

# International Law and the Regulation of Cetaceans: An Analysis of the Role of Global and Regional Instruments and Institutions in the Conservation of Marine Living Resources

John Richard Caddell

*Thesis submitted in partial fulfilment of the requirements for the degree of PhD*

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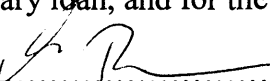
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## **SUMMARY**

This thesis examines one of the most controversial issues in the modern governance of marine living resources, namely the regulation of cetaceans (whales, dolphins and porpoises). Cetaceans face a wide range of conservation pressures, from targeted catches to incidental mortality in fisheries and the pernicious effects of habitat destruction and disturbance. The voluminous literature on cetacean issues to date has focussed predominantly on the complicated regulatory position of the International Whaling Commission, created under the International Convention for the Regulation of Whaling 1946, although supervisory institutions pertinent to cetaceans have steadily proliferated since the mid-1970s.

This thesis reviews the leading regulatory actors and institutions, with particular reference to the cohesion of the overall framework and its ability to develop effective synergies and to advance meaningful conservation measures for cetaceans. In so doing, the role of the IWC is analysed to provide a basis to identify the degree of regulatory supplementation required by alternative fora. To this end, this thesis further analyses the role of the Convention on International Trade in Endangered Species of Wild Flora and Fauna 1973, the Convention on Biological Diversity 1992 and the UN Convention on the Law of the Sea 1982, before conducting a sustained appraisal of obligations under the Convention on the Conservation of Migratory Species of Wild Animals 1979 in respect of small cetaceans. This thesis also advances a first substantive examination of pertinent policies of the European Union, and evaluates the role of EU law in the conservation of cetaceans on the international, regional and national levels.

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## GLOSSARY

ABDG	ASCOBANS Baltic Discussion Group
AC	Advisory Committee (of ASCOBANS)
ACAP	Agreement on the Conservation of Albatrosses and Petrels 2001
ACCOBAMS	Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area 1996
ADD	Acoustic Deterrent Device
AEWA	Agreement on the Conservation of African-Eurasian Migratory Waterbirds 1995
AHD	Acoustic Harassment Device
AIDCP	Agreement on the International Dolphin Conservation Programme 1998
ASCOBANS	Agreement on the Conservation of Small Cetaceans of the Baltic, North-East Atlantic, Irish and North Seas 1992
ASWSC	Aboriginal Subsistence Whaling Sub-Committee
ATOC	Acoustic Thermography of Ocean Climate
BAP	Biodiversity Action Plan
BSAP	National Biodiversity Strategy and Action Plan
BWU	Blue Whale Unit
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources 1980
CBD	Convention on Biological Diversity 1992
CERD	Cetacean Emerging and Resurging Disease
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973
CFP	Common Fisheries Policy
CLA	Catch Limit Algorithm
CMS	Convention on the Conservation of Migratory Species of Wild Animals 1979 [also known as the “Bonn Convention”]
COMNAP	Council of Managers of National Antarctic Programmes
COP	Conference of the Parties
cSAC	Candidate for a Special Area of Conservation
CSG	Cetacean Specialist Group of the IUCN Species Survival Commission
DML	Dolphin Mortality Limit
DSP	Dolphin Safety Panel
EAP	Environmental Action Programme
EC	European Community

ECBS	European Community Biodiversity Strategy 1998
ECCO	Eastern Caribbean Cetacean Commission
ECJ	European Court of Justice
EcoQO	Ecological Quality Objectives
EDG	Expert Drafting Group
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
EPO	Eastern Pacific Ocean
ESA	Endangered Species Act 1969
EU	European Union
EUROBATS	Agreement on the Conservation of Populations of European Bats 1991
FAO	United Nations Food and Agriculture Organisation
FFA	South Pacific Forum Fisheries Agency
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
GFCM	General Fisheries Council for the Mediterranean
GLOBEC	Global Ocean Ecosystem Dynamics
GROMS	Global Register of Migratory Species
HELCOM	Baltic Marine Environment Protection Commission
IATA	International Air Transport Association
IATTC	Inter-American Tropical Tuna Commission
ICES	International Council for the Exploration of the Sea
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling 1946
ICZM	Integrated Coastal Zone Management
IDCP	International Dolphin Conservation Programme 1992
ILO	International Labour Organisation
IMO	International Maritime Organisation
IOS	Indian Ocean Sanctuary
IOSEA	Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia 2001
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for the Conservation of Nature
IWC	International Whaling Commission
JARPA	Japanese Whale Research Programme under Special Permit in the Antarctic
JARPEN	Japanese Whale Research Programme under Special Permit in the Western North Pacific

JNCC	Joint Nature Conservation Committee
LOSC	UN Convention on the Law of the Sea 1982
MARPOL	International Convention for the Prevention of Pollution from Ships 1973
MEPC	Marine Environment Protection Committee
MMPA	Marine Mammal Protection Act 1972
MOP	Meeting of the Parties
MOU	Memorandum of Understanding
MPA	Marine Protected Area
MSFD	Marine Strategy Framework Directive
MSY	Maximum Sustainable Yield
NAMMCO	North Atlantic Marine Mammal Commission
NATO	North Atlantic Treaty Organisation
NATSAC	National Scientific Advisory Committee
NEPA	National Environmental Policy Act
NFFS	National Marine Fisheries Service
NGO	Non-Governmental Organisation
<i>N<sub>min</sub></i>	Minimum Estimated Abundance
NMP	New Management Procedure
NOAA	National Oceanic and Atmospheric Administration
OECS	Organisation of Eastern Caribbean States
OIE	World Organisation for Animal Health
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic 1992
PCBs	Polychlorinated biphenyls
PCSP	Permanent Commission of the South Pacific
PICES	North Pacific Marine Science Organisation
POPs	Persistent Organic Pollutants
PSSA	Particularly Sensitive Sea Area
RDA	Reserve DML Allocation
REIO	Regional Economic Integration Organisation
RFMO	Regional Fisheries Management Organisation
RMP	Revised Management Procedure
RMS	Revised Management Scheme
SAC	Special Area of Conservation
SAP	Species Action Plan
SBSTTA	Subsidiary Body of Scientific, Technical and Technological Advice
SCANS	Small Cetacean Abundance in the North Seas
SCAR	Scientific Committee on Antarctic Research
SCI	Site of Community Importance
SCMEE	Sub-Committee on the Marine Environment and Ecosystems
SCSC	Sub-Committee on Small Cetaceans
SMRU	Sea Mammal Research Unit
SOCER	State of the Cetacean Environment Report

SOS	Southern Ocean Sanctuary
SOWER	Southern Ocean Whale and Ecosystem Research Programme
SPA	Specially Protected Area
SPAMI	Specially Protected Areas of Mediterranean Importance
SPF	South Pacific Forum
SPREP	South Pacific Regional Environment Programme
SSWG	Ship Strikes Working Group
STECF	Scientific, Technical and Economic Committee for Fisheries
SWGEC	Standing Working Group on Environmental Concerns
TRAFFIC	Wildlife Trade Monitoring Network
TTS	Temporary Threshold Shift
UNCED	UN Conference on Environment and Development 1992 [also known as the “Rio Conference”]
UNCHE	UN Conference on the Human Environment 1972 [also known as the “Stockholm Conference”]
UNCLOS I	First UN Conference on the Law of the Sea (convened in 1958)
UNCLOS II	Second UN Conference on the Law of the Sea (convened in 1960)
UNCLOS III	Third UN Conference on the Law of the Sea (convened 1973-82)
UNEP	United Nations Environment Programme
UNFCCC	UN Framework Convention on Climate Change 1992
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties 1969
WAFCEET	West African Cetacean Conservation and Research Projects
WATCH	Western African Talks on Cetaceans and their Habitats
WCW	World Council of Whalers
WDCS	Whale and Dolphin Conservation Society
WHO	World Health Organisation
WTO	World Trade Organisation

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- 2001 Agreement on the Conservation of Albatrosses and Petrels
- 2001 Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia
- 2001 Convention on Persistent Organic Pollutants
- 2003 Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States and the Republic of Costa Rica
- 2006 Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region
- 2007 Agreement on the Conservation of Gorillas and their Habitats
- 2008 Memorandum of Understanding Concerning the Conservation of the Manatee and Small Cetaceans of Western Africa and Macaronesia

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\* Re-named, in 2008, the Agreement on the Conservation of Small Cetaceans of the Baltic, North-East Atlantic, Irish and North Seas.

## **European Union legislation**

Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

Council Regulation (EEC) No. 348/81 of 20 January 1981 on common rules for imports of whales or other cetacean products.

Commission Regulation (EEC) No. 3786/81 of 22 December 1981 laying down provisions for the implementation of the common rules for imports of whale or other cetacean products.

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

Council Regulation (EEC) No. 345/92 of 27 January 1992 amending for the eleventh time Regulation (EEC) No. 3094/86 laying down certain technical measures for the conservation of fishery resources.

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

Council Regulation (EEC) No. 3034/92 of 19 October 1992 amending, for the fourteenth time, Regulation (EEC) No. 3094/86 laying down certain technical measures for the conservation of fishery resources.

Council Regulation (EC) No. 1626/94 of 27 June 1994 laying down certain technical measures for the conservation of fishery resources in the Mediterranean.

Council Regulation 338/97/EC of 3 March 1997 on the protection of species of wild fauna and flora by regulating trade therein.

Council Decision 97/292/EC of 28 April 1997 on a specific measure to encourage Italian fishermen to diversify out of certain fishing activities

Council Regulation (EC) No. 894/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources.

Council Regulation (EC) No. 88/98 of 18 December 1997 laying down certain technical measures for the conservation of fishery resources in the waters of the Baltic Sea, the Belts and the Sound.

Council Regulation (EC) No. 1239/98 of 8 June 1998 amending Regulation (EC) No. 894/97 laying down certain technical measures for the conservation of fishery resources.

Council Decision 1999/27/EC of 17 December 1998 on a specific measure to encourage diversification out of certain activities and amending Decision 97/292/EC.

Council Decision 1999/337/EC of 26 April 1999 on the signature by the European Community of the Agreement on the International Dolphin Conservation Programme.

Council Decision 1999/386/EC of 7 June 1999 on the provisional application by the European Community of the Agreement on the International Dolphin Conservation Programme.

Council Decision 1999/405/EC of 10 June 1999 authorising the Kingdom of Spain to accede to the Convention establishing the Inter-American Tropical Tuna Commission on a temporary basis (IATTC).

Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable development of fisheries resources under the Common Fisheries Policy.

Decision No. 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme.

Council Regulation (EC) No. 812/2004 of 26 April 2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No. 88/98.

Council Decision 2005/26/EC of 25 October 2004 on the signing, on behalf of the European Community, of the Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica (“Antigua Convention”).

Council Regulation (EC) No. 768/2005 of 26 April 2005 establishing a Community Fisheries Control Agency and amending Regulation (EC) No. 2847/93 establishing a control system applicable to the common fisheries policy.

Council Decision 2005/938/EC of 8 December 2005 on the approval on behalf of the European Community of the Agreement on the International Dolphin Conservation Programme.

Council Regulation (EC) No. 2187/2005 of 21 December 2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound, amending Regulation (EC) No. 1434/98 and repealing Regulation (EC) No. 88/98.

Council Regulation (EC) No. 764/2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco.

Council Regulation (EC) No. 809/2007 of 28 June 2007 amending Regulations (EC) No. 894/97, (EC) No. 812/2004 and (EC) no 218/2005 as concerns drift nets.

Council Regulation (EC) No 199/2008 of 25 February 2008 concerning the establishment of a Community Framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fisheries Policy.

Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy.

## **National statutes**

### *Australia*

Whale Protection Act 1980  
Environment Protection and Biodiversity Conservation Act 1999

### *New Zealand*

Driftnet Prohibition Act 1991

### *Norway*

Norwegian Whaling Act 1929

### *United States of America*

Fishermans' Protective Act 1967  
Endangered Species Conservation Act 1969  
Marine Mammal Protection Act 1972  
Endangered Species Act 1973  
Fishery Conservation and Management Act 1976  
Driftnet Impact Monitoring, Assessment and Control Act 1987  
Dolphin Protection Consumer Information Act 1990  
Driftnet Act Amendments 1990  
High Seas Driftnet Fisheries Enforcement Act 1992  
High Seas Driftnet Fishing Moratorium Protection Act 1995

## **Statutory Instruments**

Conservation (Natural Habitats etc.) Regulations 1994.  
South-West Territorial Waters (Prohibition of Pair Trawling) Order 2004  
South-West Territorial Waters (Prohibition of Pair Trawling) (Amendment) Order 2005

# CHAPTER I

## INTRODUCTION

### **1.1. The international regulation of cetaceans: An introduction to the debate**

On 2 December 1946, the International Convention for the Regulation of Whaling<sup>1</sup> was concluded in Washington DC, USA, establishing the legal foundations for the inauguration of the International Whaling Commission (IWC) as the global regulatory body responsible for the husbandry of whale stocks. The IWC, which entered into practical effect in May 1949, was duly charged with implementing the twin objectives of the ICRW, stated as being “to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”.<sup>2</sup> It remains a matter of some considerable debate as to whether, following almost sixty years of the operation of the IWC, whale stocks may be realistically considered to have been properly conserved, or the whaling industry characterised as being remotely close to orderly.

The whaling debate, and associated concerns over the long-term survival of depleted stocks of great whales, continues to occupy a central position in the contemporary international law of marine living resources. Arguably more so than any other marine resource contested by states, the regulation of whaling remains one of the most controversial questions in modern oceans governance. This position has altered little since the earliest meetings of the IWC. Indeed, the IWC has long been characterised more by its internal divisions than clear management successes, with its often fractious and conflict-ridden meetings earning it a dubious reputation as one of the more dysfunctional multilateral organisations of the United Nations era. A series of fault-lines has been evident between the various elements of the membership of the IWC since its very first meetings, with whaling negotiations often conducted in a climate of ill-feeling and petulant threats to repudiate the Convention. Subsequently, relations have steadily deteriorated to the extent that the present-day Annual Meetings of the IWC, now convened in the full glare of the global media, are considered by one leading commentator and long-standing delegate to be less a series of debates on the

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<sup>1</sup> 161 UNTS 72 [hereinafter “ICRW”].

<sup>2</sup> Preamble to the ICRW.

regulation of whale stocks, than perpetual “altercations”<sup>3</sup> between two mutually antagonistic blocs, advancing diametrically opposing viewpoints as to the future of commercial whaling.

The polarisation of views regarding directed hunting has been thrown into sharper focus by the establishment of a global moratorium on commercial whaling, instituted in 1982 and brought into effect in 1986. This unprecedented move was designed to provide a window of sustained opportunity for whale stocks to regenerate to the point at which commercial hunting would be ecologically and economically viable. In the interim, the IWC would simultaneously elaborate a sophisticated and workable alternative to the unsatisfactory management initiatives thus far advanced to establish whaling quotas. The finalisation of this much vaunted new management system – known as the Revised Management Procedure (RMP) – encompassing a complex modelling exercise in conjunction with more holistic considerations of animal welfare, has to date proved elusive and, consequently, the moratorium on commercial hunting remains in effect.

The continued operation of the moratorium, together with the current failure to ultimately progress the RMP, has led to further controversy. A number of key whaling states argue that certain stocks of whales have recovered to the point at which a resumption in commercial harvesting is now feasible, while a slender majority of IWC members remains ideologically opposed to a resumption of commercial whaling and has consistently blocked initiatives to overturn the moratorium. This in turn has led a number of pro-whaling states to explore alternative options, such as a series of loopholes within the ICRW and the development of rival institutions to effectively bypass these restrictions, causing a further souring of relations to the extent that the continued viability of the IWC itself has been called into question.

Despite the highly divisive nature of IWC negotiations, a series of general principles may be advanced to summarise the regulation of cetaceans. Firstly, the issue of directed hunting has, over the course of the past four decades, become politicised on an unprecedented scale, with the gradual evolution of the IWC from a perceived

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<sup>3</sup> A. Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Cheltenham: Edward Elgar, 2005), at xv.

“whalers’ club” to a more overtly conservation-orientated organisation.<sup>4</sup> As global public opinion has shifted markedly in this time, so a considerable number of governments have fundamentally altered their national position on the lethal exploitation of whales, which has accordingly influenced the regulatory direction of the IWC. For reasons of space and focus, this thesis seeks not to comprehensively evaluate assertions that whales are inherently “special” and ought therefore to be protected *per se* from lethal exploitation.<sup>5</sup> It is instead merely observed that such views exist in some quarters, and are soundly rejected by other constituents.

Nevertheless, it is undoubtedly true that public perceptions of whaling in many countries have shifted from relative nonchalance to strong opposition,<sup>6</sup> a process that has accelerated since the UN Conference on the Human Environment 1972, which was subsequently reflected in the official policies of an increasing number of parties to the ICRW.<sup>7</sup> As a distinct quota-setting body, it is doubtful whether the IWC itself was designed to facilitate this debate as the central aspect of its operations that this now forms. Indeed, as one former IWC Chairman has lamented, “the public furore about whales and whaling” has jeopardised efforts “to achieve the rational management of world whaling and restoration of whale resources to full biological productivity for utilisation by man”.<sup>8</sup> Nevertheless, it is clear to both sides of the debate that, for many of the current parties to the ICRW, the objective articulated by McHugh as constituting the key function of the Convention has become politically unacceptable, while the essential terms of reference for the IWC have remained largely unchanged.

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<sup>4</sup> See S. Suhre, “Misguided Morality: The Repercussions of the International Whaling Commission’s Shift from a Policy of Regulation to One of Preservation” (1999) 12 *Georgetown International Environmental Law Review* 305; see also H. Sigvaldsson, “The International Whaling Commission: The Transition from a “Whaling Club” to a “Preservation Club” (1996) 31 *Cooperation and Conflict* 311.

<sup>5</sup> On the legal case for such a position see A. D’Amato and S. K. Chopra, “Whales: Their Emerging Right to Life” (1991) 85 *American Journal of International Law* 21. For concise appraisal of the scientific and ethical case for a prohibition on all forms of exploitation of cetaceans see M. P. Simmonds, “Into the Brains of Whales” (2006) 100 *Applied Animal Behaviour Science* 103.

<sup>6</sup> C. Epstein, *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse* (Cambridge, Massachusetts: MIT Press, 2008).

<sup>7</sup> P. W. Birnie, *The International Regulation of Whaling: From Conservation of Whaling to the Conservation of Whales and the Regulation of Whale-Watching* (New York: Oceana Publications, 1985), at 1.

<sup>8</sup> J. L. McHugh, “The Role and History of the International Whaling Commission” in W. E. Schevill (ed.), *The Whale Problem: A Status Report* (Cambridge, Massachusetts: Harvard University Press, 1974), at 311-313.

Secondly, while the ICRW remains the longest-standing international regime currently in operation to address the regulation of whaling, it is also clear that within the IWC there has been an increasing focus on *cetaceans* as opposed merely to *whales*. As will be noted in Chapter II of this thesis, the movement towards examining the needs of “small cetaceans”, including dolphins and porpoises, commenced in the early 1970s within the Scientific Committee of the IWC, before assuming an increasingly prominent role upon the agenda of the Commission itself. This remains a controversial development; as will be observed in the following Chapter, a number of pro-whaling states adopt an extremely narrow view of the parameters of regulatory competence exercised by the IWC, to the exclusion of small cetaceans, while other parties have argued strongly in favour of such a remit. Despite the lack of consensus on this issue, the IWC has nonetheless adopted a substantial number of Resolutions addressing a wider class of cetaceans.

Thirdly, and allied to this development, there has been a further movement within the IWC towards addressing threats to cetaceans beyond the general need to mitigate and deter over-consumption of whale stocks. In recent years, a more holistic view of cetacean husbandry has emerged, with the IWC now seeking to address a number of wider anthropogenic factors that may have an adverse impact upon the conservation status of these species. Particular concerns have been raised in respect of fisheries interactions and, moreover, a broad range of threats to habitats, ranging from the pernicious effects of pollution, an increased degree of anthropogenic activities in areas of key significance for cetaceans, poorly regulated ecotourism, significant ocean noise and, on a longer-term basis, the uncertain effects of global climate change. Again, the explicit recognition by the IWC of the need to exercise regulatory functions beyond the narrow confines of quota setting has proved controversial. Nevertheless, such issues have steadily occupied a significant position on the agenda of the Commission in recent years.

Fourthly, the sustained failure to advance the RMP and to develop a series of pragmatic compromises to the political – as opposed to scientific – difficulties experienced within the IWC, has led to a stagnation of the Commission’s activities. The continuing lack of a clear solution to this problem has in turn stymied progress on



other central aspects of cetacean management, which has in recent resulted in the virtual paralysis of the IWC as an effective regulatory body.

As a direct result of these evolving pressures upon the IWC, it is becoming increasingly difficult for the international management of stocks of cetaceans to be realistically and effectively discharged under the sole auspices of the ICRW as it currently stands. One ostensibly straightforward solution would be to seek to reform an ageing and unsatisfactory treaty. However, a flexible amendment procedure in the form of the ICRW Schedule has proved ineffectual to date, while the extreme division between states concerned with cetacean issues, evidenced on an annual basis at IWC Meetings, strongly suggests that such an approach would be fraught with practical difficulties and endowed with limited prospects for success.<sup>9</sup> Accordingly, since the 1972 UNCED Conference, a supplementary regulatory framework has emerged alongside the ICRW, to which certain key issues in the global debate on cetaceans have been displaced. An eclectic supervisory mosaic of international and regional bodies exercising a degree of legal competence over aspects of cetacean management may now be identified. It is this alternative framework, developed on a largely *ad hoc* basis outside the auspices of the ICRW, which constitutes the primary focus of this thesis.

## 1.2 Point of departure and key research themes

The international regulation of cetaceans remains a subject of substantial academic fascination and frustration. To date a formidable volume of commentary has been produced on this question, especially in relation to the controversial progress of the IWC, from Birnie's seminal study of the international regulation of whaling<sup>10</sup> and Tønnessen and Johnsen's classic historical review of the industry,<sup>11</sup> to more current works on the present and future of the beleaguered organisation.<sup>12</sup> The IWC has been

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<sup>9</sup> On these difficulties generally see M. C. Maffei, "The International Convention for the Regulation of Whaling" (1997) 12 *International Journal of Marine and Coastal Law* 287 and P. Birnie "Are Twentieth-Century Marine Conservation Conventions Adaptable to Twenty-First Century Goals and Principles? Part II" (1997) 12 *International Journal of Marine and Coastal Law* 488.

<sup>10</sup> Birnie, "International Regulation".

<sup>11</sup> J. N. Tønnessen and A. O. Johnsen, *The History of Modern Whaling* (London: C. Hurst & Co., 1982).

<sup>12</sup> See, for instance, W. C. G. Burns and A. Gillespie (eds.), *The Future of Cetaceans in a Changing World* (New York; Transnational Publishers, 2003) and Gillespie, "Whaling Diplomacy".

examined as a distinct ecopolitical<sup>13</sup> and international relations<sup>14</sup> conundrum, while the rich and informative experience of its Scientific Committee has been drawn upon to illustrate its contribution to management in the face of considerable scientific uncertainty.<sup>15</sup> The assortment of literature on cetacean conservation issues within scholarly periodicals devoted to various disciplines and sub-disciplines of science, law, public policy, ethics, environmental management, political science and international relations is also exceptionally voluminous.

Given that a substantial body of inter-disciplinary literature currently exists, it may be questioned to what extent a further legal analysis is necessary or, indeed, helpful. In response, the central contention of this thesis is that the current commentary remains essentially focussed on the vexed questions of whale harvesting and the future viability of the IWC. While these controversies remain of significant importance to the debate – and issues of directed hunting are considered primarily in Chapter II of this work – this thesis seeks to depart from the present literature by examining regulatory issues and actors that have, to date, been afforded rather more peripheral attention. Essentially, this thesis seeks to break new ground by evaluating the broader regulatory framework pertinent to cetaceans, and the capacity of these regional and global actors to effectively address the more pervasive and insidious threats to the survival of species of cetaceans in addition to the polemic confines of the directed hunting debate.

In so doing, this thesis seeks to answer three primary research questions:

- To what extent is the current transnational regulatory framework capable of addressing the primary anthropogenic threats to cetaceans?
- To what extent has a more regionally-based framework begun to emerge to regulate cetaceans, with particular reference to small cetaceans given the supervisory difficulties historically experienced by the IWC in this regard?

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<sup>13</sup> Epstein, “The Power of Words”.

<sup>14</sup> P. J. Stoett, *The International Politics of Whaling* (Vancouver: University of British Columbia Press, 1997).

<sup>15</sup> M. Heazle, *Scientific Uncertainty and the Politics of Whaling* (Seattle: University of Washington Press, 2006).

- Within this regional framework, what are the implications of the recent emergence of the European Union as a distinct cetacean regulator?

The key points of originality developed by such an approach may be considered to be as follows.

Firstly, issues concerning the inherent legality, or otherwise, of the resumption of commercial whaling and the various means utilised by states to avoid the IWC moratorium, continue to dominate the attention of legal writers. This thesis takes as its point of departure the sentiments of the Cetacean Specialist Group of the World Conservation Union (IUCN), which is primarily responsible for conducting independent and objective analysis of the global conservation status of cetaceans, that direct exploitation has increasingly posed a lesser threat to stocks than the cumulative range of current anthropogenic pressures upon the cetacean environment.<sup>16</sup> Nevertheless, despite this truism, a comparatively modest and *ad hoc* collection of legal literature has thus far been devoted to such issues. Therefore, in addition to considering the position in respect of the ongoing controversy surrounding commercial hunting, this thesis accordingly seeks to posit an original contribution to the current corpus of research by considering the management responses to these wider, non-consumptive, anthropogenic threats to cetaceans, with particular reference to by-catches.

Secondly, and allied to the previous point, to date the legal literature has been dominated not only by the directed hunting issue, but also by the IWC itself. In recent years legal writers have demonstrated a growing interest in alternative bodies, primarily as a result of the ambiguous wording<sup>17</sup> of the UN Convention on the Law of the Sea, 1982,<sup>18</sup> the inauguration of pro-consumptive regulatory rivals such as the

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<sup>16</sup> R. R. Reeves, B. D. Smith, E. A. Crespo and G. Notarbartolo di Sciara, *Dolphins, Whales and Porpoises: 2002-2010 Conservation Action Plan for the World's Cetaceans* (Gland: IUCN, 2003), at 2.

<sup>17</sup> T. L. McDorman, "Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention" (1998) 29 *Ocean Development and International Law* 179; see also P. W. Birnie, "Marine Mammals: Exploiting the Ambiguities of Article 65 of the Convention on the Law of the Sea and Related Provisions: Practice under the International Convention for the Regulation of Whaling" in D. Freestone, R. Barnes and D. Ong (eds.), *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006).

<sup>18</sup> 1883 UNTS 396 [hereinafter "LOSC"].

North Atlantic Marine Mammal Commission (NAMMCO)<sup>19</sup> and the tentative emergence of regulatory initiatives within other fora.<sup>20</sup> However, while the development of regulatory alternatives to the IWC has been on-going since the 1970s, a unified analysis of the current system has been somewhat conspicuous by its absence.<sup>21</sup> This thesis therefore seeks to redress this lacuna in the literature by providing a detailed assessment of the broader supervisory system in operation.

Thirdly, in addition to the modest levels of coverage historically afforded to these supervisory alternatives, since 2002 one particular regional body has emerged as a key component of the transnational regulatory framework, namely the European Union. Given that, as is argued in this thesis, conservation efforts under the current broad framework are routinely undermined by a lack of resources, legal powers, national implementation and political will, in many respects the EU seemingly operates as a microcosm of an optimal cetacean regulator. Indeed, the EU institutions can call upon substantial financial resources to underwrite conservation and research activities which, under EU law, must be effectively implemented by the Member States on pain of facing infringement proceedings, and are underpinned by a virtually unanimous political stance on the issue. The progress and prospects of the EC as a distinct cetacean regulator have not, as yet, been substantively explored in the current legal literature, nor indeed have the implications of such policies on the activities of other components of the global regulatory framework. This thesis will therefore advance the first comprehensive appraisal of the relevant EC policies and evaluate their prospects for success in relation to cetaceans in European waters and beyond.

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<sup>19</sup> D. D. Caron, "The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures" (1995) 89 *American Journal of International Law* 154.

<sup>20</sup> See, for instance, H. Nijkamp and A. Nollkaemper, "The Protection of Small Cetaceans in the Face of Uncertainty: An Analysis of the Ascobans Agreement" (1997) 9 *Georgetown International Environmental Law Review* 281; W. C. G. Burns, "The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS): A Regional Response to the Threats Facing Cetaceans" (1998) 1 *Journal of International Wildlife Law and Policy* 113; R. R. Churchill, "Sustaining Small Cetaceans: A Preliminary Evaluation of the Ascobans and Accobams Agreements" in A. E. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 2001); and R. R. Churchill, "The Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas" in Burns and Gillespie, "Future of Cetaceans", at.

<sup>21</sup> Indeed, Birnie noted the regulatory potential posed by a series of recently inaugurated biodiversity conventions, but lamented that spatial constraints within her key treatise on the whaling regime precluded substantive analysis of these alternative regimes: "International Regulation", at xxx.

### **1.3 Structure of the thesis**

This thesis comprises nine substantive chapters. Following this introductory chapter, this thesis commences by outlining the primary components of the international legal framework addressing the conservation needs and status of cetaceans. To this end, consideration is first accorded to the ICRW as the distinct management system of the greatest longevity. Chapter II highlights the development of the “whaling regime” with particular attention to the conclusion of the ICRW and the innovative structures of the IWC. Accordingly, Chapter II will provide a concise outline of the key issues in the international regulation of whaling as currently experienced within the IWC. In so doing, it is argued that two key issues arising within the IWC require supplementary regulation from further external bodies.

Firstly, it will be observed that the controversy generated over attempts within the IWC to regulate small cetaceans has necessarily displaced conservation efforts for these species to separate fora. As will be demonstrated in this Chapter, operational – if not necessarily legal – constraints upon the parameters of the IWC’s regulatory remit has left, in practice, a supervisory vacuum regarding small cetaceans and a corresponding need to regulate such species on a multilateral level outside the auspices of the ICRW. Secondly, given the traditional emphasis on quota-setting, the precise remit of the IWC to address broader environmental concerns remains somewhat uncertain. Accordingly, until a definitive agreement is reached between the parties on this issue, it is clear that a degree of regulatory supplementation will be required from alternative bodies.

Following this, Chapter III proceeds to examine the major multilateral treaties with a practical application to cetaceans and charts the impact of these regimes upon the IWC. To this end, this Chapter will consider the LOSC, the primary international instrument establishing overarching commitments in relation to the husbandry of marine resources and the protection of the marine environment. Moreover, cetaceans are specifically addressed within Articles 65 and 120 LOSC, establishing obligations on states to work through “appropriate organisations” for the conservation and management of these species. The ambiguous wording of these provisions, as will be

observed in this thesis, has raised the spectre that the IWC may be avoided as a regulatory regime for the exploitation of whale stocks.

Chapter III will also examine two key international biodiversity treaties. Firstly, the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>22</sup> emerged in the early 1970s and quickly became a forum through which certain aspects of the whaling debate were displaced, which has led to a somewhat strained relationship with the IWC on occasion. This Chapter will note the attempts within CITES to influence the regulation of whaling by certain parties and analyse the prospects for a harmonious working relationship with the IWC. Furthermore, Chapter III will also briefly examine the role of the Convention on Biological Diversity, 1992,<sup>23</sup> a framework treaty adopted at the UN Conference on Environment and Development to promote the conservation of biodiversity and a source of global commitments and aspirational targets in this regard. While to date the CBD has exercised a highly limited role in relation to cetaceans, in recent years an unprecedented degree of attention has been focussed on marine biodiversity in this forum, with corresponding implications for the regulation of cetaceans on a global level.

Chapter IV examines a particular international convention that not only straddles the international/regional divide, but has also exercised a strong supervisory remit in relation to small cetaceans in particular, namely the Convention on the Conservation of Migratory Species of Wild Animals.<sup>24</sup> In this respect it is argued that the CMS currently represents the most viable regulatory alternative for addressing the conservation needs of small cetaceans, notwithstanding the various deficiencies inherent within this regime. Chapter IV therefore presents a critical overview of the application of the Bonn Convention to these species, with particular reference to its application as a framework treaty that facilitates the elaboration of region- and even species-specific subsidiary instruments to address the conservation needs of migratory species, of which four have been concluded to date that are pertinent to cetaceans.

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<sup>22</sup> 993 UNTS 243 [Hereinafter “CITES”].

<sup>23</sup> 1790 UNTS 79 [hereinafter “CBD”].

<sup>24</sup> 1651 UNTS 333 [hereinafter the “CMS” or “Bonn Convention”].

Chapter IV argues that the CMS regime presents a number of advantages in this regard, not least given that issues of cetacean management have yet to be heavily politicised within this forum, in addition to the clear enthusiasm within the CMS to regulate such species and development of a mutually-cooperative relationship between the Bonn Convention and the IWC. However, this Chapter also observes that there are a number of significant impediments to the overall effectiveness of the CMS as a cetacean regulator, not least a chronic lack of resources, substantial commitments to the regulation of a disparate range of terrestrial, marine and avian species in addition to cetaceans, an application only to migratory cetaceans, vague treaty commitments and an alarming recent trend for subsidiary instruments to be adopted on a non-binding basis.

Chapters IV, V and VI provide a critical analysis of the progress and prospects for the various subsidiary instruments pertinent to cetaceans adopted to date under the CMS umbrella. Chapter IV examines the Agreement on the Conservation of Small Cetaceans of the Baltic Sea, North-East Atlantic, Irish and North Seas 1992,<sup>25</sup> the first and most long-standing CMS subsidiary Agreement specifically adopted to address the conservation needs of cetaceans. This Chapter details in full the development of the Agreement and the practical and legal difficulties faced by it, with particular reference to its often uncomfortable relationship with the EU and internal tensions over its regulatory remit, as well as resource limitations and a dearth of binding obligations. Chapter IV argues that ASCOBANS has made a positive contribution to cetacean conservation in these waters and remains a strong focal point for much-needed research activities and the elaboration of action plans, but it has been largely overshadowed by the emergence of the EU as a cetacean actor. Indeed, as this Chapter will demonstrate, given that its constituent parties are subject to a series of overriding – and sometimes conflicting – commitments under EC law, ASCOBANS has been largely relegated to the status of an adjunct advisory organisation, which has increasingly led to difficult questions as to its future viability as a stand-alone forum.

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<sup>25</sup> 1772 UNTS 217 [hereinafter “ASCOBANS”].

Chapter V examines the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area 1996,<sup>26</sup> the sister Agreement of ASCOBANS. ACCOBAMS has been praised by commentators as potentially the more effective of the two Europe-based CMS cetacean subsidiaries, given that it is more ostensibly conservationist in tone and operates a more sophisticated institutional structure. Chapter V will therefore trace the development of ACCOBAMS and analyse its prospects for future success, arguing that while the Agreement appears to be in a stronger position than ASCOBANS to deliver meaningful conservation measures for cetaceans within the waters under its regulatory purview, it too has been undermined by resource limitations and a generally poor level of implementation of the measures adopted by the Agreement by its constituent parties.

Following this, Chapter VI analyses developments under the CMS in relation to cetaceans, with particular reference to two Memoranda of Understanding concluded in recent years, namely the MOU for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region, concluded in 2006, and the MOU Concerning the Conservation of the West African Manatee and Small Cetaceans of Western Africa and Macaronesia, concluded in 2008. The adoption of the MOUs marks a departure to previous cetacean policies advanced under the auspices of the CMS, with both these instruments being essentially non-binding in legal character. To this end, this Chapter offers an appraisal of this approach, arguing that notwithstanding the absence of a firm commitment to the elaboration of binding obligations for cetaceans, there is merit in this policy with the Pacific Islands MOU making use of existing regional structures in an area in which there is a considerable disparity of views over cetacean conservation policy, while the West Africa MOU marks the first regional initiative to address the conservation needs of cetaceans within these waters.

Following the analysis of the regional CMS instruments, Chapter VIII considers the emergence of the European Union as a distinct regulatory forum for cetaceans. The EU retains a unique position within the global framework for the regulation of cetaceans, operating as an overarching fisheries management body as well as a source

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<sup>26</sup> 2183 UNTS 303 [hereinafter “ACCOBAMS”].



of binding environmental law in the form of the Habitats Directive.<sup>27</sup> Moreover, in recent years the EU has exercised substantial influence over the whaling debate through the application both of its external relations policies and internal trade rules. The emerging role and legislative impact of the EC will be fully analysed, tracing the development of a distinct policy towards cetaceans from its origins in a series of *ad hoc* Regulations. This thesis will argue that, from these early initiatives, the Habitats Directive has subsequently played a key role in cetacean conservation in the region, before the impact of the Sixth Environmental Action Programme<sup>28</sup> has brought an unprecedented degree of focus upon marine mammals, through the development of the EC Biodiversity Strategy, the reform of the Common Fisheries Policy and the adoption of the first clear cetacean laws, in conjunction with a greater focus on the marine application of the Habitats Directive and the elaboration of the Marine Strategy Framework Directive.<sup>29</sup> These developments have collectively fostered a distinct policy framework towards cetaceans, both within EC waters and also manifested in external policies as regards various other regional and international fora, culminating in the emerging possibility of a common whaling policy. This Chapter argues that while this is a highly positive development from the perspective of cetacean conservation, this has to an extent been counterbalanced by a tendency of the EC institutions to undermine existing fora, while certain key policies have been adopted with little reference to scientific advice, to the ultimate detriment of the measures in question.

Chapter IX of this thesis then presents a series of conclusions concerning the operation of the current international framework for the conservation, management and study of cetaceans.

In advancing this analysis, this thesis endeavours to state the pertinent legal position addressing cetaceans as it stood on 31 August 2009.

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<sup>27</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats of wild fauna and flora [1992] *Official Journal* L206/7.

<sup>28</sup> Decision No. 1600/2002/EC [2002] *Official Journal* L242/1.

<sup>29</sup> Directive No. 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) [2008] *Official Journal* L164/19.

## CHAPTER II

### THE INTERNATIONAL WHALING COMMISSION AND THE REGULATION OF CETACEANS

#### 2.1 Introduction

This first substantive Chapter considers the international regulation of whaling and the application of key institutions to the wider conservation needs of cetaceans. It is the central contention of this thesis that a definitive regime for the regulation of *cetaceans* has largely failed to emerge under the auspices of the International Convention for the Regulation of Whaling<sup>1</sup> and its constituent management organ, the International Whaling Commission (IWC). Accordingly, this Chapter seeks to establish how and why certain key conservation and management questions in respect of cetaceans have been left unanswered by the whaling convention. Thereafter, the remainder of this thesis considers the extent to which such issues may be addressed within alternative and complementary regulatory fora. The most appropriate starting point for a thesis concerned with the wider conservation of cetaceans is to accordingly review the current leading treaty regime governing (many) such species, in order to identify the areas within which it has struggled to advance regulatory initiatives and the reasons for these travails.

It is not the intention of this Chapter, nor indeed this thesis, to undertake an extensive review of the permutations of the various IWC Meetings. Definitive accounts of the IWC's long history currently exist, encompassing Tønnessen and Johnsen's exhaustive review of the history of modern whaling,<sup>2</sup> Birnie's seminal study of the Commission's practice up to the formulation of the moratorium on commercial hunting<sup>3</sup> and, more recently, Gillespie's informed appraisal of current developments.<sup>4</sup> This Chapter instead presents the whaling debate within the wider context of the international regulation of cetaceans, noting the key challenges posed by attempts to foster a wider supervisory regime for species and threats beyond those traditionally considered subject to the purview of the IWC.

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<sup>1</sup> 161 UNTS 72 [hereinafter "ICRW"].

<sup>2</sup> J. N. Tønnessen and A. O. Johnsen, *The History of Modern Whaling* (London: C. Hurst & Co., 1982).

<sup>3</sup> P. W. Birnie, *The International Regulation of Whaling: From Conservation of Whaling to the Conservation of Whales and the Regulation of Whale-Watching* (New York: Oceana Publications, 1985).

<sup>4</sup> A. Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Cheltenham: Edward Elgar, 2005).

To this end, this Chapter will first place the ICRW in its historical context, detailing the processes and pressures that led to its formation. There will then follow an examination of the practical difficulties experienced by the IWC regulating whaling, not least in establishing a clear management system and the implications of its current moratorium on commercial hunting. This Chapter will then evaluate the key inhibiting factors to the development of a more holistic conservatory regime for cetaceans, primarily the ongoing political controversies arguing that although a legal case may be made for a formal recognition of broader conservation activity, the long-standing political impasse within the IWC has undermined efforts to effectively advance the regulatory – if not necessarily the scientific – remit of the ICRW. These on-going difficulties have therefore largely displaced further consideration of wider anthropogenic threats beyond commercial hunting, as well as the management of “small” cetaceans, to other multilateral fora, for which an appraisal of the strengths and limitations of these alternative regimes is advanced in subsequent Chapters of this thesis.

## 2.2 A brief history of whaling

It is impossible to state definitively the point at which the first primitive coastal whaling activities commenced, although recent archaeological evidence suggests that the earliest known whaling communities were established on the Korean peninsula up to 6000 years BC.<sup>5</sup> Further evidence exists of whaling activities along the western coast of Canada over 3000 years ago,<sup>6</sup> and Greenlandic harvesting may be traced back to 2400 BC,<sup>7</sup> while some degree of whaling trade was conducted by Norwegian hunters before 900 AD.<sup>8</sup> Nevertheless, the establishment of a first discernible whaling “industry” is widely credited to coastal Basque communities in the Eleventh Century, with the northern right whale believed to be “probably the first large whale to be hunted on a systematic, commercial basis”.<sup>9</sup> Local stocks of the right whale, which was considered easier to harvest due to its slow movement and tendency to float when killed, accordingly became heavily depleted in the Bay of Biscay by the

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<sup>5</sup> S-M. Lee and D. Robineau, “Les Cétacés des Gravures Rupestres Néolithiques de Bangu-dae (Corée du Sud) et les Débuts de la Chasse à Baleine dans le Pacifique Nord-Ouest” (2004) 108 *L’anthropologie* 137.

<sup>6</sup> G. G. Monks, “Quit Blubbering: An Examination of Nuu’chah’nulth (Nootkan) Whale Butchery” (2001) 11 *International Journal of Osteoarchaeology* 136.

<sup>7</sup> R. A. Caulfield, *Greenlanders, Whales and Whaling: Sustainability and Self-Determination in the Arctic* (Hanover, New Hampshire, University Press of New England, 1997), at 81.

<sup>8</sup> M. Castellini, “History of Polar Whaling: Insights into the Physiology of the Great Whales” (2000) 126 *Comparative Biochemistry and Physiology Part A* 153, at 154.

<sup>9</sup> P. J. Clapham, S. B. Young and R. L. Brownell, Jr., “Baleen Whales: Conservation Issues and the Status of the Most Endangered Populations” (1999) 29 *Mammal Review* 35, at 41.

Thirteenth Century.<sup>10</sup> By the Fifteenth Century, technological advances had enabled Basque whalers to harvest whales further out to sea, eventually establishing a substantial industry expanding up to the shores of Newfoundland.<sup>11</sup>

As a distinct industry, commercial whaling has been traditionally hamstrung by poor long-term management strategies, leading to periodic cycles of over-exploitation and stock collapse. As right whales become increasingly scarce by the Seventeenth Century, Dutch whalers, which by this point dominated the industry, targeted bowhead whales, with north Atlantic stocks of this species also hunted to the point of commercial collapse.<sup>12</sup> By the mid-Seventeenth Century a small coastal whaling industry had been founded in New England, before the discovery of sperm whale hunting grounds in 1712 led to the establishment of the famous Nantucket whaling industry, which dominated world whaling throughout the Eighteenth and Nineteenth Centuries until the outbreak of the American Civil War.<sup>13</sup> Following the Civil War, a thriving whaling industry developed along the West Coast of the US which decimated stocks of grey whales to the point of near extinction,<sup>14</sup> until the discovery of oil in Pennsylvania essentially ended the sustained economic viability and attraction of the American whaling industry.<sup>15</sup>

The advent of “modern” whaling is considered to be the 1860s, with the development of the exploding harpoon, permitting for the first time the industrial pursuit of rorquals, which yielded the largest harvest of both products and profits.<sup>16</sup> This led to the development of a major pelagic whaling industry in Antarctica in the early Twentieth Century, with the establishment of the first Antarctic whaling stations in 1904.<sup>17</sup> In the years prior to the First World War the industry was dominated by the UK and Norway, with large numbers of humpback whales caught on an annual basis, in addition to a burgeoning catch of blue

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<sup>10</sup> J. E. Scarff, “The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment” (1976) 6 *Ecology Law Quarterly* 323, at 344.

<sup>11</sup> S. L. Cumbaa, “Archaeological Evidence of the Sixteenth Century Basque Right Whale Fishery in Labrador” in R. L. Brownell, Jr., P. B. Best and J. H. Prescott, *Right Whales: Past and Present Status – Reports of the International Whaling Commission; Special Issue 10* (Cambridge: International Whaling Commission, 1986), at 187.

<sup>12</sup> Clapham, Young and Brownell, Jr., “Baleen Whales”, at 44.

<sup>13</sup> On the Nantucket whaling industry see E. J. Dolin, *Leviathan: The History of Whaling in America* (New York: W. W. Norton & Company, 2007), especially 63-305; see also N. Philbrick, *In the Heart of the Sea* (London: Harper-Collins, 2001).

<sup>14</sup> Scarff, “Interdisciplinary Assessment”, at 345-46.

<sup>15</sup> Dolin, “Leviathan”, at 335-41.

<sup>16</sup> On this issue generally see Tønnessen and Johnsen, “History of Modern Whaling”, at 16-54.

<sup>17</sup> Scarff, “Interdisciplinary Assessment”, at 347.

whales. By the 1920s, following a considerable reduction in output during the First World War,<sup>18</sup> the hunting of blue whales began in earnest.<sup>19</sup> At this point, the first calls for conservatory activity were made within the newly inaugurated League of Nations, as an unprecedented degree of attention began to be paid towards the aggregation of legal norms governing marine resources.

### 2.3 The early regulation of whaling

The economic and ecological problems associated with unsustainable whaling practices were first observed in the context of the codification of the law of the sea during the League of Nations era. Prior to this, whaling activities were regulated under national law or through bilateral agreements between major whaling nations, which provided limited conservation measures.<sup>20</sup> Moreover, there was little tradition of developing multilateral conservation agreements for marine resources at this time. The *Behring Sea Fur Seals Fisheries Arbitration*<sup>21</sup> in 1893 had primarily viewed high seas stocks of marine mammals as *res nullius*. Whales therefore remained subject to the freedom of high seas fishing and thereby open to largely unrestricted exploitation in these waters, beyond individualised arrangements between interested states.

In 1924, the League of Nations established a Committee of Experts for the Progressive Codification of International Law,<sup>22</sup> with the “exploitation of the products of the sea” identified as a potential area for further activity. In 1925, Rapporteur José León Suárez submitted a series of proposals to the Committee of Experts noting particular concern for whale stocks.<sup>23</sup> Suárez advocated a “new jurisprudence” for the exploitation of marine living resources, which were considered *res communis* or “the patrimony of the whole human race”.<sup>24</sup> A series of whale conservation measures were proposed, including the establishment

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<sup>18</sup> See Tønnessen and Johnsen, “History of Modern Whaling”, at 292-305.

<sup>19</sup> Scarff observes that “[b]y 1922 the annual catch of humpbacks had fallen to nine and the blue whale catch had increased to 5,700”: “Interdisciplinary Assessment”, at 347.

<sup>20</sup> Nevertheless, a series of local whaling bans had been instituted between 1863 and 1904 in Norwegian waters: Tønnessen and Johnsen, “History of Modern Whaling”, at 61-67.

<sup>21</sup> 1 *Moore’s International Arbitration Awards* 755.

<sup>22</sup> Assembly Resolution of September 22 1924. On the contemporary difficulties of this process see H. G. Crocker, “The Codification of International Law: Some Preliminary Queries” (1924) 18 *American Journal of International Law* 38 and W. L. Rodgers, “What Parts of International Law May Be Codified?” (1926) 20 *American Journal of International Law* 44.

<sup>23</sup> Reproduced at (1926) 20 *American Journal of International Law: Special Supplement* 230, at 237; see also P. C. Jessup, “L’Exploitation des Richesses de la Mer” (1929) 4 *Recueil des Cours* 403.

<sup>24</sup> “Special Supplement”, at 236.

of reserved zones to protect habitats and migratory routes, restrictions on hunting activities and the need for a specialist international conference to further elaborate such policies.<sup>25</sup> In 1929, the International Council for the Exploration of the Sea (ICES) proposed that whaling should be regulated “as a matter of urgency” and submitted a draft convention to the League,<sup>26</sup> based on Norwegian legislation. The Convention for the Regulation of Whaling<sup>27</sup> was opened for signature on 24 September 1931 and entered into force on 16 January 1935.<sup>28</sup>

The 1931 Convention, which applied solely to baleen whales,<sup>29</sup> ultimately offered a rather negligible degree of protection to these species. The primary difficulty was a marked lack of participation by key whaling states,<sup>30</sup> while a high proportion of signatories further declined to ratify the Convention,<sup>31</sup> seemingly denoting a preference for specific bilateral arrangements over an open multilateral agreement.<sup>32</sup> Nevertheless, as noted by Birnie, the 1931 Convention was “for all its limitations, largely innovatory”.<sup>33</sup> Indeed, the Convention established for the first time a prohibition on the taking of individual species,<sup>34</sup> as well as juveniles, calves and accompanying females.<sup>35</sup> Reporting requirements were also established<sup>36</sup> and the ICES proposals for the full use of carcasses<sup>37</sup> and financial payments<sup>38</sup> were also reflected within the final text, while perhaps the most novel aspect of the Convention established an exemption for the activities of “aborigines dwelling on the coasts

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<sup>25</sup> To this end, Suárez envisaged that such a conference could examine “[g]eneral and local principles for the organisation of a more rational and uniform control of the exploitation of the aquatic fauna in all its aspects; creation of reserved zones, organisation of their exploitation in rotation, close periods and fixed ages at which killing is permitted; determination of the most effective method of supervising the execution of the measures adopted and maintaining the control”: “Special Supplement”, at 240.

<sup>26</sup> Birnie, “International Regulation”, at 108-09.

<sup>27</sup> 155 LNTS 349.

<sup>28</sup> The delay was primarily due to the stipulations of Article 17 of the Convention, which required eight ratifications, including those specifically of Norway and the UK, with legislative congestion at Westminster blamed for the UK’s tardiness in this regard: W. R. Vallance, “The International Convention for Regulation of Whaling and the Act of Congress Giving Effect to its Provisions” (1937) 31 *American Journal of International Law* 112, at 114.

<sup>29</sup> Article 2.

<sup>30</sup> Chiefly Argentina, Chile, Germany, Japan and the Soviet Union.

<sup>31</sup> Indeed, of the twenty-six states that signed the Convention, eight failed to ultimately ratify it.

<sup>32</sup> P. C. Jessup, “The International Protection of Whales” (1930) 24 *American Journal of International Law* 751, at 752.

<sup>33</sup> Birnie, “International Regulation”, at 118.

<sup>34</sup> Under Article 4, “[t]he taking or killing of right whales, which shall be deemed to include North-Cape whales, Greenland whales, southern right whales, Pacific right whales and southern pigmy right whales, is prohibited”.

<sup>35</sup> Article 5.

<sup>36</sup> Article 12 required the parties to “communicate statistical information regarding all whaling operations under their jurisdiction” to the newly established International Bureau for Whaling Statistics in Oslo.

<sup>37</sup> Article 6. Indeed, the failure to secure “the full industrial utilisation of all the parts of the captured whale” had been considered by Suárez as constituting a particularly pertinent example of the “crying need” for further international regulation: “Special Supplement”, at 235.

<sup>38</sup> Article 7.

of the territories of the High Contracting Parties”.<sup>39</sup> However, despite these innovative features, the Convention failed to incorporate the most important ICES stipulations on whaling restrictions. Likewise, key terms remained undefined, such as the concept of an “immature whale”, which did little to discourage the harvest of juvenile individuals and thereby had a marked adverse effect upon stock regeneration.<sup>40</sup>

Given the general lack of participation in the 1931 Convention, a degree of “in-house” regulation was instead advanced through inter-company agreements between the major whaling enterprises. A production agreement, signed on 9 June 1932, provided further innovation by assigning for the first time specific quotas for whales. Such quotas were based on a new, and largely artificial, unit of management called the Blue Whale Unit (BWU). The BWU, which subsequently “bedevilled the effectiveness of the conservatory regulation during the next 40 years”,<sup>41</sup> provided a numerical reference point for whaling quotas, although based on a rather arbitrary comparison with blue whales. Accordingly, one BWU was considered equivalent to the oil content of one blue whale, or two fin whales, 2.5 humpback whales, or six sei whales. Nevertheless the system was in hindsight deeply flawed and, given that a BWU did not discriminate between the size of a whale caught, merely encouraged whaling crews to seek the largest individuals – which tended to be female blue whales<sup>42</sup> – thereby facilitating the continued decline of the species. When blue whales became less abundant, a similar fate awaited progressively smaller species.

The industry arrangements remained operational until the entry into force of the 1931 Convention. Nevertheless, by 1936 the Convention had become virtually unworkable. Relations on whaling matters between the UK and Norway had deteriorated dramatically, while Germany, Japan and the Soviet Union, which had since emerged as major whaling nations, refused to participate in the Convention. In May 1937 an international conference was convened in London to foster a new accord to regulate Antarctic whaling. Despite

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<sup>39</sup> Article 3. The exemption was conditional upon native hunting techniques being used, while to ensure that this provision did not merely become a convenient avenue for commercial enterprises to procure products from protected species, the hunters were neither permitted to be employed by a non-aborigine nor to be under contract to deliver such products to third parties.

<sup>40</sup> Scarff, “Interdisciplinary Assessment”, at 349.

<sup>41</sup> Birnie, “International Regulation”, at 120.

<sup>42</sup> Tønnessen and Johnsen, “History of Modern Whaling”, at 403-04. Contemporary catch statistics reveal that the ratio of female blue whales harvested outnumbered males by over 4:1: *ibid.*

considerable negotiating tensions over disputed territory and whaling practices,<sup>43</sup> the International Agreement for the Regulation of Whaling,<sup>44</sup> was opened for signature on 8 June 1937.

The 1937 Agreement consolidated a number of the key provisions of the 1931 Convention and aimed essentially “to secure the prosperity of the whaling industry and, for that purpose, to maintain the stock of whales”.<sup>45</sup> The key innovation of the Agreement encompassed the mandatory presence of nationally-appointed and funded observers on all factory ships in order to detect and deter infractions.<sup>46</sup> Minimum catch lengths were prescribed for particular species,<sup>47</sup> alongside a series of closed areas<sup>48</sup> and a prohibition on harvesting grey whales.<sup>49</sup> A further development allowed parties to issue permits for lethal scientific research, subject solely to restrictions and conditions “as the contracting Government sees fit”.<sup>50</sup>

The Agreement was intended to expire in June 1938,<sup>51</sup> but global overharvesting prompted a series of additional conferences in 1938 and 1939 to address concerns over the long-term sustainability of the whaling industry.<sup>52</sup> An additional Protocol to the 1937 Agreement was adopted at the 1938 Meeting.<sup>53</sup> This instrument was heavily diluted from the original proposals, from which only a protected area for humpback whales<sup>54</sup> and the establishment of a two-year sanctuary for baleen whales survived in the final text.<sup>55</sup> Nevertheless, even this latter sanctuary was largely symbolic as a conservation measure, given that no hunting activities physically occurred within this area.<sup>56</sup> A further conference in 1939 gave rise to a

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<sup>43</sup> L. L. Leonard, “Recent Negotiations Toward the International Regulation of Whaling” (1941) 35 *American Journal of International Law* 90, at 102.

<sup>44</sup> 190 LNTS 79.

<sup>45</sup> Preamble.

<sup>46</sup> Article 1.

<sup>47</sup> Article 3.

<sup>48</sup> Article 9.

<sup>49</sup> Article 4.

<sup>50</sup> Article 10.

<sup>51</sup> Article 21. However, due to the vagaries of the ratification process, the Agreement did not formally enter into force until May 1938.

<sup>52</sup> Tønnessen and Johnsen, “History of Modern Whaling”, at 453.

<sup>53</sup> 1938 Protocol Amending the Agreement; reproduced on-line at [www.intfish.net](http://www.intfish.net) (last visited 31 August 2009).

<sup>54</sup> Under Article I, the taking of humpback whales was prohibited in waters south of 40 degrees between 1 October 1938 and 30 September 1939.

<sup>55</sup> Article II.

<sup>56</sup> G. Rose and S. Crane, “The Evolution of International Whaling Law” in P. Sands (ed.), *Greening International Law* (London: Earthscan, 1993), at 163.



Resolution recommending further modifications to the 1938 Agreement, including improved catch records and regular conferences on whaling issues.<sup>57</sup>

Ultimately, the initiatives developed throughout the 1930s had a very limited impact towards the protection of whale stocks and the stated aim of preserving the economic viability of the global whaling industry. These instruments were undermined primarily by a failure to secure the adherence of all the major whaling nations, in a manner that had been previously achieved by bilateral agreements. Moreover, and of equal significance, a number of promising conservationist initiatives were effectively neutered at the negotiation stage, with parties unwilling to translate concerns over excessive catches into meaningful regulatory measures.

Nevertheless, the initiatives of the 1930s may be considered highly significant, if not for the elaboration of clear and successful management policies, then for developing a rudimentary template for the modern regulation of whaling. Indeed, in addition to fostering a tradition of standardised statistical reporting, the practical mechanics of whaling negotiations established the basis for a cooperative approach, encompassing semi-regular meetings of concerned states in which consideration was afforded both to scientific and management issues, as well as debate over potential conservation measures. Such an arrangement was eventually refined within the terms of the ICRW, to which this thesis now turns.

#### **2.4 The International Convention for the Regulation of Whaling 1946**

The Second World War largely interrupted the development of further regulatory activities, although despite the hostilities a reduced degree of commercial harvesting did occur during these years.<sup>58</sup> A further Conference was convened in 1944, at which point a new Protocol was adopted but did not ultimately enter into force due to Irish opposition.<sup>59</sup> The 1944 Conference established a global quota of 16,000 BWUs for the first post-war pelagic whaling season and, most significantly, the US declared its intention to sponsor a global conference to develop a further regulatory regime for whaling in the immediate post-war years.<sup>60</sup> An additional

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<sup>57</sup> Birnie, "International Regulation", at 127-28.

<sup>58</sup> Tønnessen and Johnsen, "History of Modern Whaling", at 472-98.

<sup>59</sup> Protocol on the International Regulation of Whaling (With a Final Act of Conference); British Cmnd., 6510, Miscellaneous No. 1 (1944).

<sup>60</sup> Tønnessen and Johnsen, "History of Modern Whaling", at 493.

conference to prepare for the US-sponsored initiative was then convened in November 1945, producing a further Protocol to formalise whaling quotas in the interim.

The post-war era presented particular advantages for further whaling regulation, especially since the most recalcitrant participants in the pre-war whaling regime, Japan and Germany, had little realistic option but to accept prescriptive multilateral regulation. In November 1945, a further International Whaling Conference was convened in Washington DC to consider and refine a new draft treaty prepared by the US, following which the ICRW was opened for signature on 2 December 1946 and formally entered into force on 10 November 1948.

The ICRW is a concise document, augmented by a lengthier Schedule, and is essentially focussed on facilitating the establishment of the IWC. In this respect, the ICRW was highly innovative and ambitious at the material time, given that previous regimes governing the exploitation of marine mammals had been limited both in terms of species coverage and geographical scope.<sup>61</sup> Moreover, the establishment of a specific global management body for whaling activities was also revolutionary, and represents an evolution of cooperative practices explored in the 1930s by providing a regular and more formalised forum for debate, as well as a flexible means of policy development and treaty amendment. Indeed, Suárez had previously identified such a process as “the most effective method of supervising the execution of the measures adopted and maintaining the control”.<sup>62</sup> Suárez did not offer any explicit recommendation towards the establishment of permanent or *ad hoc* management bodies, leaving the precise regulatory arrangements of the “new jurisprudence” to be determined by a later conference of experts. Nevertheless, as Franck observes, “[t]he notion of *res communis* does not of itself determine distributional outcomes, the allocation of goods”,<sup>63</sup> which would seemingly render the establishment of a specialist quota-setting body a practical necessity for the international regulation of common resources like whale stocks.

The ICRW also broke new ground in recognising the “interest of the nations of the world in safeguarding for future generations the great natural resources represented by whale

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<sup>61</sup> Birnie, “International Regulation”, at 158; see also J. A. R. Nafziger, “Global Conservation and Management of Marine Mammals” (1980) 17 *San Diego Law Review* 591 and J. W. Kindt and C. J. Wintheiser, “The Conservation and Protection of Marine Mammals” (1985) 7 *University of Hawaii Law Review* 301.

<sup>62</sup> “Special Supplement”, at 240.

<sup>63</sup> T. M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995), at 395.

stocks”.<sup>64</sup> While similar statements are generally ubiquitous in modern natural resources treaties, the ICRW preamble represented one of the first such pronouncements in the context of marine living resources. Although likened to the modern principle of inter-generational equity,<sup>65</sup> it nonetheless appears rather more rooted in economic as opposed to inherently ecological concerns. Indeed, although the negotiating parties had viewed whales as “wards of the entire world”, such approaches were seemingly motivated more to deter claims for the national appropriation of such stocks rather than a clarion call for far-reaching global conservation.<sup>66</sup> Moreover, the Convention was explicitly stated to operate “on the basis of the principles embodied in the provisions” of the 1937 Agreement and its constituent Protocols<sup>67</sup> which had, as noted above, clearly established conservation activity as a means for largely economic ends.

The key function of the ICRW is “to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”.<sup>68</sup> Such a position appears loosely based on the preambular intentions of the 1937 Agreement, which further suggests a degree of continuity from previous regimes, although it has been argued that the underlying intentions of the US drafting team were to facilitate a less industrial interpretation of whale stocks.<sup>69</sup> Nonetheless, as noted below, early IWC practice strongly suggests that most parties viewed conservation concerns as very much the junior partner in this arrangement. In more recent years, the marriage of conservation and exploitation principles has become increasingly uneasy within the Commission and has led to increasing polarisation and conflict between the parties since the late 1960s.

#### *2.4.1 Institutional arrangements*

As noted above, a key objective of the ICRW is to facilitate the creation of a specialist management body, which is established under Article III of the Convention. Membership of

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<sup>64</sup> Preamble; second recital.

<sup>65</sup> D. French, *International Law and Policy of Sustainable Development* (Manchester: Manchester University Press, 2005), at 60.

<sup>66</sup> P. W. Birnie, “International Legal Issues in the Management and Protection of the Whale: A Review of Four Decades of Experience” (1989) 29 *Natural Resources Journal* 903, at 908.

<sup>67</sup> Preamble; seventh recital.

<sup>68</sup> Preamble; eighth recital.

<sup>69</sup> M. Bowman, “‘Normalizing’ the International Convention for the Regulation of Whaling” (2008) 29 *Michigan Journal of International Law* 293, at 397.

the IWC is open to “contracting governments”,<sup>70</sup> irrespective of the degree of national interest in whaling or, even, the ultimate possession of a coastline. At the negotiating stage, the US convenors were keen that non-whaling states should be afforded an opportunity to participate in the treaty, although none were actually represented among the nineteen participants at the 1946 Conference.<sup>71</sup> This position, which had proved somewhat controversial in the negotiations towards the earlier initiatives, was not unprecedented: indeed, the instruments of the 1930s at no stage imposed conditions upon membership and the 1931 Convention had been ratified by Switzerland.<sup>72</sup> The IWC, however, *has* remained closed to formal membership by international organisations, regional economic integration organisations such as the European Union, and other territories and entities, which may instead be granted observer status.<sup>73</sup>

The IWC presently comprises 86 parties,<sup>74</sup> which often have disparate motives for participation. Each individual party, irrespective of size, political power or whaling heritage, is entitled to one vote within the IWC and may be accompanied by as many experts and advisors as it deems appropriate. Meetings of the IWC are “convened as the Commission may determine”,<sup>75</sup> although in practice have been consistently held on an annual basis and augmented occasionally by Special Meetings where matters of particular importance have arisen. In addition to the parties, Annual Meetings may be attended by observers although, unlike a number of multilateral agreements subsequently reviewed in this thesis, there are few conditions imposed upon eligibility for attendance, raising criticisms that a number of observers have attended Meetings with little obvious expertise in cetacean issues.<sup>76</sup>

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<sup>70</sup> Article III(1). A number of landlocked states are accordingly parties to the IWC, including Austria, the Czech Republic, Hungary, Luxembourg and Slovakia.

<sup>71</sup> Birnie, “International Regulation”, at 166.

<sup>72</sup> According to Vallance, “[i]t is understood that the Swiss Government desired to show its interest in the protection of wild life wherever possible and to show the interest of a small state in a convention which does not directly concern it”: “Act of Congress”, at 113.

<sup>73</sup> The position of the EU in relation to the IWC is explored in detail in Chapter VIII of this thesis.

<sup>74</sup> As of 31 August 2009.

<sup>75</sup> Article III(8).

<sup>76</sup> On this issue generally see A. Gillespie, “Transparency in International Environmental Law: A Case Study of the International Whaling Commission” (2001) 14 *Georgetown International Environmental Law Review* 333, especially 338-42; see also K. Mulvaney, “The International Whaling Commission and the Role of Non-Governmental Organisations” (1997) 9 *Georgetown International Environmental Law Review* 347.

The IWC comprises a Chair and Vice-Chair and is supported by a Secretariat,<sup>77</sup> which has been provided by the UK since the inception of the Convention. The IWC may establish “such committees as it considers desirable to perform such functions as it may authorize”.<sup>78</sup> A number of operational committees have been established to date,<sup>79</sup> of which the Scientific Committee is by some distance the most important. The Scientific Committee is essentially responsible for discharging the obligations under Article IV(1) of the Convention to undertake substantive research into whaling practices and the status of whale stocks. Although such obligations relate specifically to “whales”, the Scientific Committee has undertaken concerted research activities upon other species of cetaceans since the 1970s and is widely considered to be a leading global forum for debate and discourse on all aspects of cetacean science.<sup>80</sup> In 2003 a Conservation Committee was controversially established by the IWC,<sup>81</sup> which has sought to bolster the work of the Scientific Committee and to explore further synergies with allied institutions.

Two key aspects of the work of the IWC are established under the Convention. In the first instance, Article VI enables the Commission to “make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention”. The wording of this provision makes clear that the IWC is not endowed with powers to adopt binding and enforceable measures and, instead, adopts Resolutions<sup>82</sup> at its annual and *ad hoc* meetings. Decisions made by the IWC require a simple majority of the parties present and voting.<sup>83</sup>

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<sup>77</sup> Article III(3). The Secretariat is based in Cambridge, and has always been provided by the UK government, although it was not established as a full-time institution until 1976. Prior to this, rudimentary administrative support was provided by the UK Ministry of Agriculture and Fisheries: S. Andresen, “The Whaling Regime: ‘Good’ Institutions but ‘Bad’ Politics?” in R. L. Freidheim (ed.) *Toward a Sustainable Whaling Regime* (Seattle: University of Washington Press, 2001), at 242.

<sup>78</sup> Article III(4).

<sup>79</sup> For a discussion of the main IWC committee structure see M. C. Maffei, “The International Convention for the Regulation of Whaling” (1997) 12 *International Journal of Marine and Coastal Law* 287, at 292.

<sup>80</sup> For a detailed discussion of the history and operation of the Scientific Committee see M. Heazle, *Scientific Uncertainty and the Politics of Whaling* (Seattle: University of Washington Press, 2006).

<sup>81</sup> Resolution 2003-1: The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission.

<sup>82</sup> In a departure from traditional practice, the two IWC Resolutions adopted at the Sixty-First Annual Meeting in June 2009 were termed “Consensus Resolutions”. This is not to suggest that all Resolutions advanced at previous IWC meetings were adopted by a unanimous vote; in fact the majority of Resolutions have been, to a greater or lesser extent, the product of broad consensus. Instead, at the Sixtieth Annual Meeting of the IWC in 2008, Chapeau E of the Rules of Procedure of the IWC was amended to ensure that “[t]he Commission shall make every effort to reach its decisions by consensus”, with this position now seemingly reflected formally in the titles of subsequent IWC Resolutions.

<sup>83</sup> Article III(2).

Rather more significantly, and in conjunction with these responsibilities, under Article V the IWC is also charged with the amendment of the ICRW Schedule, which forms “an integral part” of the Convention.<sup>84</sup> In many respects, the Schedule is the key component of the ICRW, and elaborates the operational requirements for present and future whaling activities. The amendment mechanism provided under Article V is a highly significant aspect of IWC practice. Whereas the 1937 Agreement required the adoption of periodic Protocols to address issues of conservation and management concern, the IWC, by virtue of the Schedule amendment process, allows in principle for the parties to adjust the operational parameters of the ICRW in a relatively swift and flexible manner without the need for the formal negotiation of adjunct treaty instruments. To this end, the IWC may amend the Schedule in respect of a variety of issues, especially catch and size limits, protected species, open and closed seasons, sanctuary designations and authorised whaling equipment<sup>85</sup> and methods of inspection.<sup>86</sup> Nevertheless, the amendment of the Schedule has become a problematic and controversial process in recent years. Amendments require a three-quarters majority of all parties present and voting,<sup>87</sup> a requirement that has become increasingly difficult to meet as the membership of the Commission has expanded significantly over the past twenty years. Where an amendment to the Schedule is adopted, parties have a ninety-day period to lodge an objection.<sup>88</sup> Reservation practices have proved controversial in the context of the current global moratorium on commercial whaling, as discussed below.

Despite the elaboration of what was in 1946 a largely pioneering framework for the international management and conservation of marine resources, the IWC is now widely perceived as a rather beleaguered organisation. While the Scientific Committee retains considerable global prestige, the IWC as a political and management body has been frequently described as “dysfunctional”<sup>89</sup> by commentators. It is argued that such criticism is not entirely misplaced and stems from significant stock management failures, as well as internal political problems raised largely by the evolving perception of whales, to which this thesis now turns.

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<sup>84</sup> Article I(1).

<sup>85</sup> Article VI(1)(a)-(h).

<sup>86</sup> Added by Protocol in 1956.

<sup>87</sup> Article III(2).

<sup>88</sup> Article V(3).

<sup>89</sup> Y. Iino and D. Goodman, “Japan’s Position in the International Whaling Commission” in W. C. G. Burns and A. Gillespie (eds.), *The Future of Cetaceans in a Changing World* (New York: Transnational Publishers, 2003), at 3.

## 2.5 The regulation of whaling and the IWC moratorium on commercial hunting

The seeds of the current conflict within the IWC were largely sown during its first thirty years of operation. In explaining the present state of affairs within the IWC, a number of commentators have sought to identify broad stages in the operation of the whaling regime.<sup>90</sup> Although the precise demarcation and nomenclature of these periods may be considered somewhat subjective, and sometimes debatable,<sup>91</sup> it is nonetheless clear that the aims and objectives of many of the parties have evolved, while minimal structural adjustment has occurred within the auspices of the Convention.

Since its inception the IWC has elaborated three distinct management mechanisms, which constitute useful boundaries in tracing the development of the Convention. The first period, 1949-72, involved the use of the BWU which was later considered to be wholly inappropriate for the regulation of whaling. Between 1972 and 1982 a New Management Procedure was instituted to provide a more sophisticated numerical analysis of quotas. Finally, in 1982 a global moratorium was introduced to preserve whale stocks, while a more statistical quota-setting model could be developed. These adjustments have been accompanied by a change in prevailing ideology, as the whaling question has become increasingly and acrimoniously politicised since approximately the mid-1960s, into a totem of the environmental movement.<sup>92</sup> It is impossible to understate the importance that such political considerations have played in the development of the IWC, with many parties having fundamentally adjusted their position from a pro-hunting outlook, or even ambivalent non-participation, to a protectionist ideology or “ethical” viewpoint of the whaling debate.<sup>93</sup>

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<sup>90</sup> A particularly noteworthy example is A. D’Amato and S. K. Chopra, “Whales: Their Emerging Right to Life” (1991) 85 *American Journal of International Law* 21.

<sup>91</sup> For instance, one highly influential chronological discussion, that of D’Amato and Chopra, identifies what the present author would consider to be aspects of the darkest chapter of IWC mismanagement – the first twenty years of its operation – as “conservation becomes protection”: *ibid.*, at 32. Insofar as a discernible conservation/protection period is concerned within the IWC, it might be more appropriately identified as the moratorium era.

<sup>92</sup> For an account of this process see P. Stoett, *The International Politics of Whaling* (Vancouver: University of British Columbia Press, 1997), especially 61-102.

<sup>93</sup> On this issue see A. Gillespie, “The Ethical Question in the Whaling Debate” (1997) 8 *Georgetown International Environmental Law Review* 355 and J. Baird-Callicott, “Whaling in Sand Country: A Dialectical Hunt for Land Ethical Answers to Questions about the Morality of Norwegian Minke Whale Catching” (1997) 8 *Colorado Journal of International Environmental Law and Policy* 1.

### 2.5.1 The Blue Whale Unit, 1946-74

The BWU, first introduced under the 1932 production agreements, was retained by the IWC as its operative unit of measurement for whaling quotas, a decision subsequently condemned as “[o]ne of the greatest weaknesses of the 1946 Convention”.<sup>94</sup> As outlined above, there were grave pre-existing flaws in the BWU concept, which were subsequently exacerbated by IWC practices in the immediate post-war years. In the first instance, BWU limits were issued by the IWC *en bloc* as a global quota, with the IWC exercising little control over the ultimate allocation of this allowance between the individual fleets.<sup>95</sup> This unsatisfactory position in fact pre-dated the IWC regime, with individualised quotas considered unpopular due largely due to the prevailing cartel mentality at the material time.<sup>96</sup> The IWC also failed to assign species-specific quotas, which again facilitated the unsustainable harvest of blue and fin whales. Moreover, and of equal concern, the parties seemingly regarded warnings from the Scientific Committee with impunity.<sup>97</sup> Where the IWC did effect modest reductions to the global quota – as occurred for the first time in 1953 – most of the parties promptly invoked the Article V(3) reservation process against these restrictions.<sup>98</sup>

The first management crisis faced by the IWC occurred in the late 1950s, where chronic overcapacity threatened the economic future of the Antarctic fleet. The IWC was, in effect, precluded from addressing this problem under Article V(2)(c), which forbids Schedule amendments concerning numerical restrictions on whaling vessels. Proposals by individual states, notably Norway, to downscale national whaling activities in exchange for financial contributions from other fleets were rejected, essentially forcing states to continue unsustainable hunting operations to maintain their position in future Antarctic quota negotiations.<sup>99</sup> The response of the IWC was simply to increase the global quota.<sup>100</sup>

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<sup>94</sup> J. L. McHugh, “The Role and History of the International Whaling Commission” in W. E. Schevill (ed.), *The Whale Problem: A Status Report* (Cambridge, Massachusetts: Harvard University Press, 1974), at 308.

<sup>95</sup> Indeed, McHugh observes that that was “a private matter between the nations concerned”: McHugh, “Role and History”, at 323.

<sup>96</sup> Tønnessen and Johnsen, “History of Modern Whaling” at 585.

<sup>97</sup> Heazle, “Scientific Uncertainty”, at 54.

<sup>98</sup> Gillespie, “Whaling Diplomacy”, at 5.

<sup>99</sup> Tønnessen and Johnsen, “History of Modern Whaling”, at 587-88.

<sup>100</sup> Gillespie, “Whaling Diplomacy”, at 5.



By 1959, however, it was clear that the management of Antarctic stocks of whales in particular had descended into farce. These difficulties were compounded in 1960, as the IWC effectively abdicated responsibility for stock management and suspended the Antarctic quota for two years, with the parties largely formulating their own arrangements.<sup>101</sup> Perhaps unsurprisingly, it subsequently proved difficult to induce parties accustomed to elaborating their own rules to accept sweeping multilateral reductions.<sup>102</sup> By 1964, it was noted that while the BWU concept “may have had some administrative convenience and given some apparent flexibility to the operation of the quota system in the past”,<sup>103</sup> it should be replaced with a more sophisticated model. Subsequently, it was agreed that from 1972 onwards, species-specific quotas should be introduced.<sup>104</sup> Concurrent with these developments, as noted below, the first official calls for moratoria on commercial whaling were made in 1972 at the UN Conference on the Human Environment (UNCHE). While such calls were rejected at this juncture, the IWC did nonetheless endorse an Australian proposal for New Management Procedures (NMP) to replace the BWU approach, based on a more explicit acceptance of scientific advice and providing for species-specific management measures.

### 2.5.2 *The New Management Procedures, 1974 – present*

The emergence of the NMP as the chosen management mechanism of the IWC is attributable both to grave concern over the BWU approach, as well as the evolution of legal principles within the wider codification of the law of the sea and the nascent body of international environmental law at the material time. In the late 1950s and 1960s, the prevailing management approaches towards fisheries resources<sup>105</sup> operated in terms of “Maximum Sustainable Yield” (MSY). An early and influential use of this term was made at the first UN Conference on the Law of the Sea, which resulted in the adoption of four substantive treaties codifying the contemporary law of the sea. Article 2 of the Convention on Fishing and Conservation of the Living Resources of the High Seas 1958<sup>106</sup> defined its conservationist aims as “rendering possible the optimum sustainable yield from those resources so as to ensure a maximum supply of food and other marine products”. Accordingly, the IWC

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<sup>101</sup> Heazle, “Scientific Uncertainty”, at 78.

<sup>102</sup> *Ibid.*, at 89-90.

<sup>103</sup> *Fourteenth Report of the International Whaling Commission* (Cambridge: IWC, 1964), at 37.

<sup>104</sup> *Twenty-Third Report of the International Whaling Commission* (Cambridge: IWC, 1973), at 6.

<sup>105</sup> Indeed the ICRW, remains fundamentally a fisheries-based treaty, with numerous references throughout to “whale fisheries”: for instance, preambular recitals 3 and 7, as well as Article III(6).

<sup>106</sup> 559 UNTS 225.

embraced the MSY concept as a key management policy, although by 1971 the FAO considered this approach “too simple for the increasingly complex situation of whales”.<sup>107</sup> Moreover, as noted by Rose and Crane, “[t]he concept of ecosystem management, instead of single species management, gained support in the 1970s and the NMP were intended to reflect this trend”.<sup>108</sup>

Despite concerns outside the IWC over the value of an MSY basis for whale quotas, this principle nonetheless constituted a fundamental basis for the NMP. The NMP remains nominally the current system of management for whale stocks under the ICRW, subject to the application of the present moratorium on commercial harvesting. Section 10 of the ICRW Schedule has adopted a species-specific approach to whaling quotas and allocates stocks into one of three categories, based on the advice of the Scientific Committee. The first category, Initial Management Stocks,<sup>109</sup> comprises the most abundant species and the stocks upon which the greatest degree of hunting could be supported. For these stocks, the Scientific Committee was charged with calculating a baseline MSY, for which quotas could be set at a maximum of ninety percent of this figure, leaving a ten percent shortfall to accommodate natural wastage. The second category, Sustained Management Stocks,<sup>110</sup> encompasses whales with a population at approximately the same level as the MSY, with quotas tailored to ensure that stock numbers remain at a consistent level. The final category, Protection Stocks,<sup>111</sup> constitutes the least abundant species, for which no commercial hunting would be permitted.

Initial appraisals of the NMP accorded the new arrangements a high degree of praise,<sup>112</sup> although hindsight has exposed a number of flaws within this system, not least that “MSY does not take into account long-term adverse effects, limitations of knowledge and imperfections of management”.<sup>113</sup> Limitations on exploitation of MSY levels were often rather arbitrary,<sup>114</sup> while the mechanism itself required highly specific data concerning population structures that were not feasible to attain at the time. Moreover, such calculations

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<sup>107</sup> Birnie, “Four Decades”, at 923.

<sup>108</sup> Rose and Crane, “Evolution of International Whaling Law”, at 171.

<sup>109</sup> Article 10(b) of the ICRW Schedule.

<sup>110</sup> Article 10(a) of the ICRW Schedule.

<sup>111</sup> Article 10(c) of the ICRW Schedule.

<sup>112</sup> Indeed, Scarff observes that the NMP “marked the strongest and most specific commitment to conservation that the IWC had ever undertaken”, “Interdisciplinary Assessment”, at 370, while Tønnessen and Johnsen consider this to have been a “significant step forward in the protection and conservation of the world’s whale stocks”: “History of Modern Whaling”, at 684.

<sup>113</sup> D’Amato and Chopra, “Emerging Right”, at 41.

<sup>114</sup> Heazle, “Scientific Uncertainty”, at 147.

presupposed that data provided to the IWC was accurate and legitimate; instead troubling evidence of wholesale fraud has been uncovered in recent years within certain parties.<sup>115</sup> Consequently, the NMP experienced a relatively brief operational tenure, with the subsequent introduction of a global moratorium on commercial whaling, during which considerable efforts have been made to elaborate a new quota-setting instrument, the Revised Management Procedures.

### 2.5.3 *The moratorium on commercial whaling, 1985/86 – present*

The first calls for the imposition of moratoria upon the commercial harvesting of whale stocks pre-dated the adoption of the NMP and largely reflected the internationalisation of the whaling question beyond the narrow confines of the IWC during the late 1960s and early 1970s. Although the origins and development of the IWC moratorium are multi-faceted, the emergence of a discernable anti-whaling movement exerted a substantial influence on many of the parties to the ICRW and, ultimately, the direction of the IWC itself.<sup>116</sup> These developments fundamentally and irrevocably altered the dynamic of the Commission, resulting in the oft-cited truism that the IWC metamorphosed during the late 1970s and 1980s from a “whalers’ club” into a largely protectionist institution.<sup>117</sup>

By the 1960s, the number of states actively pursuing whaling activities had declined rapidly, with the economic viability of Antarctic operations having virtually collapsed. New Zealand had abandoned whaling in 1964,<sup>118</sup> followed by the UK and the Netherlands in 1965, while the Norwegian fleet had formally ceased Antarctic operations by 1968.<sup>119</sup> Subsequently,

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<sup>115</sup> A. V. Yablokov, “Validity of Whaling Data” (1994) 367 *Nature* 108; see also D. D. Tormosov *et al.*, “Soviet Catches of Southern Right Whales *Eubalaena Australis* 1951-1971. Biological Data and Conservation Implications” (1998) 86 *Biological Conservation* 185 and P. Clapham *et al.*, “Catches of Humpback Whales, *Magaptera Novaeangliae*, by the Soviet Union and Other Nations in the Southern Ocean 1947-1973” (2009) 71 *Marine Fisheries Review* 39. On the Soviet whaling fleet and falsification practices generally see A. R. Berzin, “The Truth About Soviet Whaling” (2008) 70 *Marine Fisheries Review* 4; see also P. Clapham and Y. Ivashenko, “A Whale of a Deception” (2009) 71 *Marine Fisheries Review* 44. In 1994 the IWC formally noted its concerns over historical Soviet data and the implications for future stock management at its Forty-Sixth Annual Meeting – Resolution 1994-6: Resolution on the Unreliability of Past Whaling Data.

<sup>116</sup> On this issue generally see C. Epstein, *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse* (Cambridge, Massachusetts: MIT Press, 2008).

<sup>117</sup> See S. Suhre, “Misguided Morality: The Repercussions of the International Whaling Commission’s Shift from a Policy of Regulation to One of Preservation” (1999) 12 *Georgetown International Environmental Law Review* 305; see also H. Sigvaldsson, “The International Whaling Commission: The Transition from a ‘Whaling Club’ to a ‘Preservation Club’” (1996) 31 *Cooperation and Conflict* 311.

<sup>118</sup> S. Holt, “Whaling Mining, Whale Saving” (1985) 9 *Marine Policy* 192, at 199.

<sup>119</sup> M. J. Peterson, “Whalers, Cetologists, Environmentalists, and the International Management of Whaling” (1992) 46 *International Organization* 147, at 162.

whaling activities in the key Antarctic grounds effectively became the sole preserve of the USSR and Japan, which continued commercial operations “because, unlike their competitors they had strong economic incentives to do so”.<sup>120</sup>

Beyond these practical concerns, the abandonment of commercial hunting was more ostensibly linked to opposition from an environmental movement of considerable emerging prominence. Although there was little tradition of active opposition to whaling at the time of the conclusion of the ICRW, public opinion in many jurisdictions began to shift dramatically from a consumptive model of regulation towards a more preservationist remit for the IWC,<sup>121</sup> which began to manifest itself in national legislation. Perhaps most influentially, in December 1970 the US listed the eight largest species of whales on the Endangered Species Conservation Act 1969,<sup>122</sup> thereby prohibiting their exploitation and extinguishing the last remnants of the American whaling industry. Moreover, the Marine Mammal Protection Act 1972, enacted in response to widespread concerns over the incidental mortality of dolphins in national tuna fisheries, further enhanced the degree of legal protection afforded to cetaceans, both in US waters and indirectly in allied jurisdictions through its extra-territorial application to foreign fishing vessels. Furthermore, in Australia, a national review of national whaling policies in November 1977 in the wake of sustained public protests, recommended *inter alia* the prohibition of commercial hunting in national waters.<sup>123</sup>

Concurrent with these national processes, there was a profound sense of alarm and dissatisfaction over the stewardship by the IWC of global stocks of whales, which were becoming increasingly viewed as a common concern of humankind. In 1972, the UNCHE considered the plight of global whale stocks as part of its extensive agenda and addressed a three-pronged recommendation both to the international community and the IWC, calling for action “to strengthen the International Whaling Commission, to increase international research efforts, and as a matter of urgency to call for an international agreement under the

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<sup>120</sup> Peterson, “Whalers, Cetologists”, at 162.

<sup>121</sup> Epstein, “The Power of Words”, at 89-115; see also A. Kalland, “Whose Whale is That? Diverting the Commodity Path” in M. M. R. Freeman and U. P. Kreuter (eds.), *Elephants and Whales: Resources for Whom?* (Amsterdam: Gordon and Breach, 1994), at 159.

<sup>122</sup> Scarff, “Interdisciplinary Assessment”, at 387.

<sup>123</sup> S. Frost, *The Whaling Question: The Inquiry by Sir Sydney Frost of Australia* (San Francisco: Friends of the Earth, 1979), at 209-211. Whaling was subsequently prohibited within Australian jurisdictional waters by virtue of the Whale Protection Act 1980. On this process generally see K. D. Suter, “Australia’s New Whaling Policy: Formulation and Implementation” (1982) 6 *Marine Policy* 287.

auspices of the International Whaling Commission and involving governments concerned, for a 10-year moratorium on commercial whaling”.<sup>124</sup>

Shortly after the Stockholm Conference, the IWC convened its Twenty-Fourth Annual Meeting, which was dominated by the question of a global moratorium on commercial hunting.<sup>125</sup> Recommendation 33 was formally presented to the Commission in person by the Secretary-General of the UNCHE, with the IWC accordingly considered to have been “directly rebuked by the world community”.<sup>126</sup> A proposal for a ten-year moratorium was tabled by the US delegation. This was ultimately rejected due to the lack of a scientific foundation and the prospect of wholesale unregulated whaling.<sup>127</sup> Moreover, it was considered that a blanket ban would encounter similar deficiencies to the unlamented BWU, in that it would fail to take into account the status and condition of individual stocks, while the flow of scientific information would be interrupted and the moratorium might contravene the preambular objectives of the ICRW.<sup>128</sup>

In 1973, a near identical proposal was again tabled by the US which attracted the support of the majority of the parties, but ultimately failed to secure the requisite three-quarters of the vote.<sup>129</sup> Proposals for moratoria were subsequently tabled by the US at successive IWC Meetings, which began to attract the co-sponsorship of additional parties.<sup>130</sup> Throughout the 1970s a noticeable trend began to emerge for states to ratify the ICRW with the express intention of advancing further conservation initiatives within the IWC. In 1976, New Zealand rejoined the IWC, having repudiated the Convention in exasperation in 1969, citing

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<sup>124</sup> Recommendation 33 of the Stockholm Action Plan; reproduced at (1972) 11 *International Legal Materials* 1416.

<sup>125</sup> The question of a potential moratorium on commercial hunting had in fact been considered by the IWC Scientific Committee at the previous Annual Meeting in 1971, but was rejected in favour of the institution of a decade of cetacean research: *Twenty-First Report of the International Whaling Commission* (Cambridge: IWC, 1973), at 38.

<sup>126</sup> Scarff, “Interdisciplinary Assessment”, at 367.

<sup>127</sup> R. Gambell, “Whale Conservation: The Role of the International Whaling Commission” (1979) 1 *Marine Policy* 301, at 307.

<sup>128</sup> Gillespie, “Whaling Diplomacy”, at 10-11.

<sup>129</sup> *Twenty-Third Report of the International Whaling Commission* (Cambridge: IWC, 1975), at 26.

<sup>130</sup> For instance, Mexico seconded the US proposal at the 1974 Annual Meeting and announced at this juncture its support for pro-conservation policies, pledging to protect key breeding grounds for grey whales under national law: *Twenty-Fourth Report of the International Whaling Commission* (Cambridge: IWC, 1976), at 35. On Mexican initiatives to protect this species generally see J. Vargas, “The California Gray Whale: Its Legal Regime under Mexican Law” (2006) 12 *Ocean and Coastal Law Journal* 213; see also S. Dedina, *Saving the Gray Whale: People, Politics and Conservation in Baja California* (Tucson: University of Arizona Press, 2000), especially 40-77.

consideration for public opinion of whaling as the primary motivation for re-accession.<sup>131</sup> Likewise, in 1977 the Netherlands rejoined the IWC, partly due to the interests of national conservation groups.<sup>132</sup> Moreover, a number of existing parties explicitly clarified their stated position within the IWC; for instance in 1979, Australia announced a change in national policy towards promoting the cessation of commercial hunting and to protecting whale populations.<sup>133</sup>

This coincided with an influx of new parties of the ICRW among developing countries, whose participation was actively encouraged – and allegedly underwritten – by prominent environmental NGOs.<sup>134</sup> Perhaps the most significant of these was the Seychelles, which joined in 1979 and is credited by Birnie as having had an immediate impact upon the policy direction of the IWC.<sup>135</sup> The Seychelles successfully advocated a whale sanctuary in the Indian Ocean<sup>136</sup> and a moratorium on sperm whaling.<sup>137</sup> Most significantly, it took a lead role in advancing general moratoria proposals at a point at which the moral authority of the traditional sponsor of such motions, the US, was heavily compromised given its controversial pursuit of a bowhead whale quota for the Alaskan Inuit in the face of concerted opposition from the Scientific Committee.<sup>138</sup>

In 1982, at the historic Thirty-Fourth Meeting of the IWC, a Seychelles proposal for the graduated introduction of a moratorium on commercial whaling ultimately secured the requisite approval of three-quarters of the parties.<sup>139</sup> The Schedule was accordingly amended to freeze quotas at zero, subject to a later review, in a revised paragraph 10(e) which stated:

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<sup>131</sup> Tønnessen and Johnsen, “History of Modern Whaling”, at 675.

<sup>132</sup> Birnie, “International Regulation”, at 474.

<sup>133</sup> D’Amato and Chopra, “Emerging Right”, at 42.

<sup>134</sup> S. Andresen, “The Making and Implementation of Whaling Policies: Does Participation Make a Difference?” in D. G. Victor, K. Raustiala and E. B. Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Agreements: Theory and Practice* (Cambridge, Massachusetts: MIT Press, 1998), at 439-440.

<sup>135</sup> P. Birnie, “The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales” (1985) 12 *Ecology Law Quarterly* 937, at 959-60.

<sup>136</sup> Resolution 1979-3: Resolution in Relation to the Establishment of a Whale Sanctuary in the Indian Ocean.

<sup>137</sup> Birnie, “Developing Countries”, at 962.

<sup>138</sup> On this issue generally see S. M. Hankins, “The United States’ Abuse of the Aboriginal Whaling Exception: A Contradiction of United States Policy and a Dangerous Precedent for the Whale” (1990) 24 *U. C. Davis Law Review* 489. The US pursuit of a quota for endangered bowhead whales left it highly vulnerable to claims of double-standards in seeking to impose restrictions on commercial harvesting by other parties from stocks that were of significantly greater abundance.

<sup>139</sup> The proposal was approved by twenty-five states in favour, seven against and with five abstentions. On the events of the Meeting generally see P. Birnie, “Countdown to Zero” (1983) 7 *Marine Policy* 68.

“Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. The provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits”.

The moratorium serves a dual purpose in providing a window of opportunity both to allow stocks of particularly imperilled species to regenerate, and for the IWC to develop an improved management mechanism to allocate whale quotas for when a resumption of commercial activity is ultimately sanctioned. Accordingly, as noted below, since the inception of the moratorium, work has been ongoing on the development a two-pronged mechanism for the future management of whale stocks. This emerging system comprises the Revised Management Procedure (RMP), which constitutes the mathematical processes by which future quotas are to be calculated by the Scientific Committee, in tandem with a Revised Management Scheme (RMS), which encompasses operational aspects incumbent in any future whaling activities. While the RMP has been formally adopted by the IWC, aspects of the RMS remain a source of contention between the parties and have yet to be finalised, hence the moratorium remains in place. In the interim, a number of parties have exploited loopholes within the Convention in order to pursue a degree of directed hunting, which has created further political pressures within and beyond the IWC.

## **2.6 Directed hunting activities under the moratorium on commercial whaling**

Despite the current operation of the moratorium, considerable scope for the harvesting of whales remains through the ICRW under four broad conditions. Firstly, a party to the ICRW may enter a reservation, consistent with pertinent rules of international treaty law, to the operation of the moratorium. Secondly, and perhaps most controversially, lethal catches of whales may be sanctioned under Article VIII of the ICRW for the purposes of scientific research. Thirdly, directed hunting for aboriginal subsistence purposes is recognised by the IWC as distinct from commercial whaling, and is therefore subject to a separate and specific series of annual quotas. Finally, reflective of the essentially consensual nature of international law, non-parties are not bound by the moratorium.

### *2.6.1 Reservations to the moratorium*

As noted above, Article V(3) of the ICRW permits the parties to enter reservations to amendments to the Schedule within ninety days of the conclusion of that amendment. The reservation process was advocated by the US at the negotiation stage in order to attract the maximum number of participants to the nascent whaling regime<sup>140</sup> and was unprecedented in previous whaling instruments. The reservation process has been invoked by parties to the ICRW since the earliest meetings of the IWC, although it has assumed a wider political significance since the inception of the moratorium.

Initial attempts to enter reservations to the IWC restrictions proved highly controversial within an organisation in which a pro-conservation lobby held a clear majority. These difficulties were exacerbated by the absence of a specific dispute resolution mechanism,<sup>141</sup> a traditional limitation of the ICRW. Accordingly, when the moratorium was introduced there was, in effect, little meaningful process that the IWC could initiate to deter or postpone the application of reservations. Instead, reservations to the moratorium have been subject to considerable external unilateral activity, where appeals for restraint have failed within the IWC.

The US has traditionally been the most active exponent of unilateral fisheries sanctions, acting primarily under the 1971 Pelly Amendment to the Fishermans' Protective Act 1967<sup>142</sup> and the 1979 Packwood-Magnuson Amendment to the Fishery Conservation and Management Act 1976.<sup>143</sup> The Pelly and Packwood-Magnuson Amendments constitute a powerful dual mechanism to promote compliance with international norms. The Pelly Amendment permits the closure of US markets to imports of fish from states whose activities

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<sup>140</sup> Birnie, "International Regulation", at 194. Indeed, it is widely considered unlikely that the ICRW would have ultimately entered into effect without the incorporation of such a clause.

<sup>141</sup> No dispute resolution machinery was envisaged at the initial negotiation stage of the ICRW, with the regular forum for debate, the IWC, seemingly viewed as the key mechanism through which differences of opinion and approach could be collectively addressed. Indeed, as noted by Birnie, "[t]he IWC has in practice either settled its disputes internally, usually by achieving compromises, or by negotiation outside the Convention": "International Regulation", at 201.

<sup>142</sup> Public Law No. 92-219; codified at 22 USC § 1978.

<sup>143</sup> Public Law No. 96-61; codified at 22 USC § 1821(e)(2).



diminish the effectiveness of *inter alia* the IWC.<sup>144</sup> Likewise, the Packwood-Magnuson Amendment further mandates the denial of access to US fisheries for actions that likewise diminish *inter alia* the effectiveness of the IWC.<sup>145</sup>

The Pelly Amendment was first invoked in a whaling context in 1974, where the USSR and Japan were certified for breaching IWC minke whale quotas.<sup>146</sup> Subsequently, it seemingly exerted a strong impact upon state practices. In 1978 Chile, South Korea and Peru were all certified under this procedure and swiftly joined the IWC at its next Meeting, while in 1979 the threat of certification induced Spanish compliance with a fin whale quota to which it had previously objected.<sup>147</sup> Moreover, China instituted a complete ban on national whaling activities following certification due to a failure to observe IWC restrictions in 1980 and 1981.<sup>148</sup> In 1985 the USSR was certified, but it is somewhat debatable whether certification or domestic economic disarray led to the Soviet cessation of commercial whaling in 1987.<sup>149</sup> In 1986 Norway was certified over catches of minke whales, but sanctions were not ultimately imposed as the Norwegian government undertook to cease commercial whaling in 1987.<sup>150</sup>

Since these incidences, it appears that US enthusiasm for unilateral certification has waned and diplomatic considerations – as well as GATT/WTO concerns – have facilitated a more cautious line.<sup>151</sup> For instance, the US and Japan controversially negotiated a four-year quota of 1200 sperm whales outside the auspices of the IWC under the Baldrige-Murazumi

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<sup>144</sup> Whaling concerns were a key issue raised by Congressman Pelly in the development of this legislation: D. M. Wilkinson, “The Use of Domestic Measures to Enforce International Whaling Agreements: A Critical Perspective” (1987) 17 *Denver Journal of International Law and Policy* 271, at 280.

<sup>145</sup> See T. L. McDorman, “The GATT Consistency of US Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles” (1991) 24 *George Washington Journal of International Law and Economics* 477; see also G. S. Martin, Jr. and J. W. Brennan, “Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments” (1987) 17 *Denver Journal of International Law and Policy* 293.

<sup>146</sup> D. D. Caron, “International Sanctions, Ocean Management, and the Law of the Sea: A Study of Denial of Access to Fisheries” (1989) 16 *Ecology Law Quarterly* 311, at 318.

<sup>147</sup> Caron, “Denial of Access”, at 318.

<sup>148</sup> D. D. Caron, “The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures” (1995) 89 *American Journal of International Law* 154, at 158.

<sup>149</sup> Caron, “Denial of Access”, at 319.

<sup>150</sup> Caron, “Denial of Access”, *ibid.*

<sup>151</sup> Indeed, on a political level there has been a marked reluctance by officials to resort to the Pelly and Packwood-Magnuson Amendments, “but whenever a U.S. administration has tried to avoid or delay certification of a state, environmentalists have sued in the courts to ensure enforcement”: R. L. Freidheim, “Moderation in the Pursuit of Justice: Explaining Japan’s Failure in the International Whaling Negotiations” (1996) 27 *Ocean Development and International Law* 349, at 362.

Agreement, contingent upon an undertaking to cease commercial whaling in 1988.<sup>152</sup> A substantial body of litigation was brought at various tiers in the US, before the Supreme Court narrowly reversed an order to compel the use of the Packwood-Magnuson Amendment.<sup>153</sup> In 1993 Norway announced its intention to resume the commercial hunt of minke whales, pursuant to a reservation to the moratorium,<sup>154</sup> following which the US reluctantly commenced the certification process. Nevertheless, the Clinton administration limited the US response to stern anti-whaling rhetoric and an ambiguous undertaking towards on-going good faith negotiations with the Norwegian government,<sup>155</sup> and no sanction has thus far been imposed upon Norway under national law. Likewise, Icelandic reservations – considered to “almost certainly” incur certification<sup>156</sup> – have also received a muted response, comprising general calls for cessation and sundry anti-whaling statements.

The IWC has not encouraged reservations to the moratorium and has adopted a host of Resolutions in which it “calls upon” and “requests” Norway to cease further whaling activities,<sup>157</sup> albeit to little discernible effect upon national policies. The most intriguing incident to have arisen in the context of reservations involved an attempt by Iceland in June 2001 to rejoin the IWC subject to a reservation to moratorium, a condition that was rejected

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<sup>152</sup> On this issue generally see A. J. Siegel, “The US-Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment” (1985) 19 *George Washington Journal of International Law and Economics* 577.

<sup>153</sup> The Supreme Court ruled by 5:4 to overturn the verdict: *Japan Whaling Association v. American Cetacean Society* (1986) 106 S. Ct. 2860. For (largely critical) commentary on this decision see V. A. Curry, “*Japan Whaling Association v. American Cetacean Society*: The Great Whales become Casualties of the Trade Wars” (1986) 4 *Pace Environmental Law Review* 277; see also M. K. Blatt, “Woe for the Whales: *Japan Whaling Association v. American Cetacean Society*” (1987) 55 *University of Cincinnati Law Review* 1285, C. S. Gibson, “Narrow Grounds for a Complex Decision: The Supreme Court’s Review of an Agency’s Statutory Construction in *Japan Whaling Association v. American Cetacean Society*” (1987) 14 *Ecology Law Quarterly* 485 and Haskell, Jr., note 175 *supra*.

<sup>154</sup> Caron, “Risks of Coercion”, at 162.

<sup>155</sup> See T. Bjørndal, J. M. Conrad and A. Toft, “On the Resumption of the Norwegian Minke Whale Hunt” in G. Pétursdóttir (ed.), *Whaling in the North Atlantic* (Reykjavík: University of Iceland Press, 1997), at 38.

<sup>156</sup> T. L. McDorman, “Iceland, Whaling and the U.S. Pelly Amendment: The International Trade Law Context” (1997) 66 *Nordic Journal of International Law* 453, at 454.

<sup>157</sup> Specifically Resolution 1995-5: Resolution on Northeastern Atlantic Minke Whales (calling on Norway to reconsider its objection and halt all whaling activities under its jurisdiction); Resolution 1996-5: Resolution on Northeastern Atlantic Minke Whales (regretting the unilateral establishment of quotas for commercial whaling in the absence of a valid abundance estimate and calling on Norway to reconsider its objection and halt all whaling activities under its jurisdiction); Resolution 1997-3: Resolution on Northeastern Atlantic Minke Whales (reiterating practically verbatim the sentiments of Resolution 1996-5); Resolution 1998-1: Resolution on Norwegian Whaling (reiterating the commitment of the IWC to the moratorium on commercial whaling and calling on Norway to reconsider its objection and to immediately halt all whaling activities under its jurisdiction); Resolution 2001-5: Resolution on Commercial Whaling (calling on Norway to refrain from issuing export permits for whale products, to reconsider its less conservative “tuning level” for the establishment of quotas, to reconsider its objection and to immediately halt all whaling activities under its jurisdiction).

by the majority of the voting parties at the Annual Meeting.<sup>158</sup> Iceland had repudiated the Convention in 1991 in protest at IWC policies.<sup>159</sup> A further Icelandic application for membership on the same terms was again rejected at the 2002 Annual Meeting,<sup>160</sup> although at a Special Meeting convened in October 2002 Iceland was formally accepted as a party to the ICRW, a decision that perhaps owed more to practical considerations in admitting a key whaling nation to participate in the Convention than to a popular endorsement of the legitimacy of the reservation.<sup>161</sup>

The reservation issue again highlights the inherent ambiguity of the central purpose of the ICRW, i.e. “to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”. This has essentially served to defeat the traditional test for the legality of reservations prescribed under Article 19(c) of the Vienna Convention on the Law of Treaties.<sup>162</sup> To this end, notwithstanding the clear distaste for the Icelandic reservation demonstrated by a significant number of parties, it is difficult to definitively and objectively state that such a move defeats the object and purpose of the ICRW. Anti-whalers would base an argument on the inherent circularity of the preambular intentions of the Convention, in that the moratorium on commercial hunting is necessary to safeguard the integrity of pertinent stocks and thus facilitate future industrial activity. Likewise, pro-whalers would contend that a reservation to the moratorium remains a feasible means of securing the “orderly development of the whaling industry” when applied to abundant stocks that are currently precluded from exploitation. Ultimately, however, the decision to admit Iceland appears based more in the realms of *realpolitik* than the confines of legal argument, with Icelandic participation within the IWC serving to mitigate the prospect of further hunting activities outside ICRW auspices.

## 2.6.2 Scientific whaling

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<sup>158</sup> Nonetheless, this was a highly contentious issue, and some sixteen parties refused to vote on the motion: S. D. Murphy, “Blocking of Iceland’s Effort to Join Whaling Convention” (2002) 96 *American Journal of International Law* 712, at 713.

<sup>159</sup> J. V. Ívarsson, *Science, Sanctions and Cetaceans: Iceland and the Whaling Issue* (Reykjavik: Centre for International Studies – University of Iceland, 1994), at 135-160.

<sup>160</sup> A. Gillespie, “Iceland’s Reservation at the International Whaling Commission” (2003) 14 *European Journal of International Law* 977.

<sup>161</sup> Indeed, some nineteen parties to the ICRW subsequently entered formal objections to the Icelandic reservation.

<sup>162</sup> 1155 UNTS 331 [Hereinafter the “VCLT”]. Article 19(c) provides that a reservation may be entered provided that it is not “incompatible with the object and purpose of the treaty”.

The second possibility for continued whaling activities lies in the form of the scientific whaling exception, provided under Article VIII of the Convention. Scientific whaling quotas have long proved controversial. Although scientific considerations were ultimately absent from the 1931 Convention, some parties nonetheless unilaterally advanced a research exemption within their enabling legislation, notably the USA.<sup>163</sup> An exemption for lethal research was first instituted under Article 10 of the 1937 Agreement, which was largely reproduced within Article VIII(1) of the ICRW.<sup>164</sup> Despite the stated advisory role of the Scientific Committee, the regulation of whaling under scientific auspices largely remains the exclusive preserve of the party in question. Scientific whaling is subject to a lone obligation to report on such activities to the IWC, with the national authorities ultimately responsible for setting the conditions, scope and duration of permits, thereby constrained solely by reference to the present international law governing marine scientific research.<sup>165</sup>

The scientific whaling exception has provoked controversy since the early years of the IWC: in 1957 Norway accused the USSR of manipulating scientific activities under Article VIII to gain an enhanced harvest, prompting demand that such permits be allocated on “a limited and cogent basis”.<sup>166</sup> Thereafter, scientific research appears to have occurred on a comparatively modest scale,<sup>167</sup> and occupied a peripheral and sporadically contentious position on the IWC agenda. Nevertheless, since the inception of the moratorium, scientific whaling has expanded on an unprecedented scale.<sup>168</sup> Consequently, lethal scientific research is generally viewed with considerable cynicism as less a vital research policy and more a convenient avenue to circumvent the current commercial restrictions.<sup>169</sup>

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<sup>163</sup> Vallance, “Act of Congress”, at 118-19.

<sup>164</sup> Article VIII(1) states “[n]otwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted”.

<sup>165</sup> On this issue generally see R. R. Churchill and A. V. Lowe, *The Law of the Sea* (Manchester: Manchester University Press, 1999), at 400-16.

<sup>166</sup> Tønnessen and Johnsen, “History of Modern Whaling”, at 579. In 1962 the IWC established that proposed permits should be subject to consultation with the Scientific Committee, although a limited degree of scientific hunting occurred in the mid-1960s: Gillespie, “Whaling Diplomacy”, at 120.

<sup>167</sup> For instance, Japan issued permits for an annual scientific catch of three right whales between 1961 and 1963: Tønnessen and Johnsen, “History of Modern Whaling”, at 666.

<sup>168</sup> Gillespie observes that the rate of scientific catches in the years between 1986 and 2002 alone was almost three times higher than the entire period between 1949 and 1987: “Whaling Diplomacy”, at 120.

<sup>169</sup> See, for instance, C. S. Baker *et al.*, “Scientific Whaling: Source of Illegal Products for Market?” (2000) 290 *Science* 1695; A. Gillespie, “Whaling Under a Scientific Auspice: The Ethics of Scientific Research Whaling Operations” (2000) 3 *Journal of International Wildlife Law and Policy* 1; J. Iversen, “An Angry Rift in the Year

Whaling under scientific auspices has been primarily undertaken by Japan, coinciding with the withdrawal in 1988 of the national reservation to the moratorium. A limited degree of lethal research is also undertaken by both Norway and Iceland. In response to the rapid rise in scientific whaling in the years immediately after the introduction of the moratorium, the IWC sought to establish further conditions upon the licensing processes undertaken by the parties.<sup>170</sup> Nevertheless, it appears that these measures had little persuasive influence, with the Commission merely instructed to “inform” pertinent governments that proposed permits had failed to adhere to the criteria established by the Scientific Committee.<sup>171</sup> Subsequently, a series of Resolutions were adopted in which parties were “invited to reconsider” scientific catches<sup>172</sup> and encouraged to undertake non-lethal research,<sup>173</sup> again with little discernible deterrent effect.

To date, the most extensive lethal scientific activities have been operated by Japan, in the form of the JARPA<sup>174</sup> and JARPN<sup>175</sup> programmes. The JARPA programme is considered especially controversial, since it largely occurs within a designated IWC whale sanctuary.

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2000: Japan’s Scientific Whaling” (2000) 11 *Colorado Journal of International Environmental Law and Policy* 121; R. B. Ackerman, “Japanese Whaling in the Pacific Ocean: Defiance of International Whaling Norms in the Name of ‘Scientific Research’, Culture, and Tradition” (2002) 25 *Boston College International and Comparative Law Review* 323; E. V. C. Greenberg,, P. S. Hoff and M. I. Goulding, “Japan’s Whale Research Programme and International Law” (2002) 32 *California Western International Law Journal* 151; and T. Wansbrough, “On the Issue of Scientific Whaling: Does the Majority Rule?” (2004) 13 *Review of European Community and International Environmental Law* 333.

<sup>170</sup> Resolution 1986-2: Resolution on Special Permits for Scientific Research; Resolution 1987-1: Resolution on Scientific Research Programmes.

<sup>171</sup> At the 1987 Meeting a series of Resolutions was adopted stating that proposed special permits has failed to meet the 1986 scientific criteria: Resolution 1987-2: Resolution on Republic of South Korea’s Proposal for Scientific Permits; Resolution 1987-3: Resolution on the Icelandic Proposal for Scientific Catches; Resolution 1987-4: Resolution on the Japanese Proposal for Scientific Permits. Many such calls were reiterated at the 1988 meeting: Resolution 1988-1: Resolution on the Norwegian Proposal for Special Permits; Resolution 1988-2: Resolution on the Icelandic Proposal for Scientific Catches.

<sup>172</sup> Resolution 1989-1: Resolution on the Icelandic Proposal for Scientific Catches; Resolution 1989-2: Resolution on the Norwegian Proposal for Special Permits; Resolution 1989-3: Resolution on the Proposed Take by Japan of Whales in the Southern Hemisphere under Special Permit; Resolution 1990-1: Resolution on the Norwegian Proposal for Special Permits; Resolution 1990-2: Resolution on Special Permit Catches by Japan in the Southern Hemisphere; Resolution 1991-2: Resolution on Special Permit Catches by Japan in the Southern Hemisphere; Resolution 1991-3: Resolution on USSR Proposal for Special Permit Catches in the North Pacific; Resolution 1993-7: Resolution on Special Permit Catches by Japan in the Southern Hemisphere; Resolution 1993-8: Resolution on the Norwegian Proposal for Special Permits; Resolution 1994-9: Resolution on Special Permit Catches by Japan in the North Pacific; Resolution 1994-10: Resolution on Special Permit Catches by Japan in the Southern Hemisphere.

<sup>173</sup> Resolution 1990-5: Resolution on Redirecting Research towards Non-Lethal Means.

<sup>174</sup> The JARPA programme commenced in 1987 in the Southern Ocean and was replaced in 2005 with a second phase, JARPA II.

<sup>175</sup> The JARPN programme commenced in the western North Pacific in 1994 and was replaced in 2000 with a second phase, JARPN II.

The Japanese authorities contend that lethal research is both a valuable and necessary component of ongoing investigations into whale biology,<sup>176</sup> especially in ascertaining the level of fisheries competition between whales and humans.<sup>177</sup> The Scientific Committee, however, has consistently stated that the JARPA and JARPN programmes offer limited value to the current state of scientific knowledge<sup>178</sup> and, moreover, largely fail to provide data that could not be attained through non-lethal means.<sup>179</sup> In 2003, the IWC condemned scientific permits as “contrary to the spirit of the moratorium on commercial whaling and to the will of the Commission”, declaring that Article VIII is “not to be exploited in order to provide whale meat for commercial purposes”,<sup>180</sup> although the anti-permit rhetoric has since softened considerably. Indeed, a more effective strategy pursued by the Scientific Committee has been to consistently demonstrate the lack of scientific merit in continued lethal research.<sup>181</sup>

Beyond these viewpoints, attempts to restrict scientific whaling have been restricted by difficulties in the exercise of unilateral fisheries powers. The US initially threatened to certify Iceland over scientific whaling in 1987, which initially deterred such initiatives.<sup>182</sup> Iceland has subsequently issued further permits, but no further official action has been taken by

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<sup>176</sup> W. Aron, W. T. Burke and M. M. R. Freeman, “Science and Advocacy: A Cautionary Tale from the Whaling Debate” in Burns and Gillespie, “Future of Cetaceans”, at 87.

<sup>177</sup> On this issue generally see J. W. Young, “Do Large Whales Have an Impact on Commercial Fishing in the Southern Pacific Ocean?” (1998) 1 *Journal of International Wildlife Law and Policy* 254; see also M. Donoghue, “Whales – The New Scapegoat for Overfishing” in Burns and Gillespie, “Future of Cetaceans”, at 383.

<sup>178</sup> Notably Resolution 1997-5: Resolution on Special Permit Catches by Japan (noting that JARPA “does not address critically important research needs for the management of whaling in the Southern Ocean”); Resolution 1998-4: Resolution on Whaling under Special Permit (reiterating a failure by JARPA and JARPN to meet critically important research needs); Resolution 2000-5: Resolution on Whaling under Special Permit in the North Pacific Ocean (noting that the JARPN II programme did not justify the killing of whales); and Resolution 2007-1: Resolution on JARPA (noting that the JARPA II programme did not address critically important research needs).

<sup>179</sup> Notably Resolution 1995-9: Resolution in Whaling under Scientific Permit in Sanctuaries (noting that “with the development of modern [research] techniques it is not necessary to kill whales to obtain the information that is needed for initial implementation of the Revised Management Procedure for a particular whale stock”); Resolution 1997-6: Resolution on Special Permit Catches in the North Pacific by Japan (noting that the JARPN programme makes no advances in knowledge that could not be attained by non-lethal means); Resolution 2003-2: Resolution on Whaling under Special Permit (noting that non-lethal research “will usually provide better data at less cost to both animals and budget”); and Resolution 2007-3: Resolution on the Non-Lethal Use of Cetaceans (recognising the “valuable benefits” of non-lethal research, which constitutes “a legitimate management strategy”).

<sup>180</sup> Resolution 2003-2: Resolution on Whaling under Special Permit. Concerns had previously been raised over the potential international trade in whale meat taken for scientific purposes: Resolution 1994-7: Resolution on International Trade in Whale Meat and Products (noting that whale products acquired through lethal research activities should be sold only within domestic markets).

<sup>181</sup> Indeed, the scientists in question have consistently struggled to publish their data in peer-reviewed journals: Y. Fukui, “Difficulties in Publishing Research Results from Scientific Whaling” (2005) 21 *Marine Mammal Science* 781.

<sup>182</sup> Ívarsson, “Science, Sanctions and Cetaceans”, at 30.

successive US administrations in response. Likewise, the JARPA programme provoked swift certification by the Regan administration,<sup>183</sup> although this was largely symbolic as low fish stocks meant that Japan would not, in any event, have been allocated a quota in US waters for that particular season.<sup>184</sup> Japan was recertified in September 2000, but was again essentially banned from fishing in waters in which no such activities were scheduled.<sup>185</sup>

Japanese scientific whaling in Antarctic waters has instead become something of a *cause célèbre* in Japan-Australia relations in recent years.<sup>186</sup> The JARPA programme is considered in some quarters to constitute an abuse of right,<sup>187</sup> especially when conducted in Antarctic waters. In 1994 Australia somewhat contentiously established an EEZ within its claimed Antarctic territory, to which Japan has consistently objected.<sup>188</sup> In response, Australia has pledged to enforce a full ban on Japanese whaling in all nationally-claimed waters, supported if necessary by military assistance.

On a domestic level, environmental litigation in Australia has further strengthened the Rudd administration's resolve against scientific whaling. In 2004 a leading environmental NGO commenced litigation against a major Japanese whaling company under the Environment Protection and Biodiversity Conservation Act 1999, which allows "any interested person" to enforce its constituent provisions.<sup>189</sup> Although the Federal Court initially rejected the application on account of its potentially prejudicial effect upon international relations,<sup>190</sup> this was later overturned on appeal,<sup>191</sup> holding that diplomatic considerations were irrelevant to the application. Given that service of the orders was in practice unfeasible, the applicants

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<sup>183</sup> On this issue generally see K. Sumi, "The 'Whale War' between Japan and the United States: Problems and Prospects" (1987) 17 *Denver Journal of International Law and Policy* 317.

<sup>184</sup> S. D. Murphy, "U.S. Sanctions against Japan for Whaling" (2001) 95 *American Journal of International Law* 149, at 151.

<sup>185</sup> Murphy, "U.S. Sanctions", at 152.

<sup>186</sup> J. Mossop, "When is a Whale Sanctuary Not a Whale Sanctuary? Japanese Whaling in Australian Antarctic Maritime Zones" (2005) 36 *Victoria University of Wellington Law Review* 757.

<sup>187</sup> See especially G. Triggs, "Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?" (2000) 5 *Asia-Pacific Journal of Environmental Law* 33.

<sup>188</sup> S. Kaye and D. R. Rothwell, "Australia's Antarctic Maritime Claims and Boundaries" (1995) 26 *Ocean Development and International Law* 195.

<sup>189</sup> Section 475. On this issue generally see T. Stephens and D. R. Rothwell, "Japanese Whaling in Antarctica: *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd*" (2007) 16 *Review of European Community and International Environmental Law* 243 and R. Davies, "Enforcing Australian Law in Antarctica: The HSI Litigation" (2007) 8 *Melbourne Journal of International Law* 6.

<sup>190</sup> *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd* [2005] FCA 664. This first action concerned an application for leave to serve the requisite processes upon the defendants in Japan. For commentary see R. Davies, "Taking on the Whalers: The Humane Society International Litigation" (2005) 24 *University of Tasmania Law Review* 78.

<sup>191</sup> *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116.

sought and secured a further order for substituted service,<sup>192</sup> thereby permitting the Australian authorities to sanction whaling vessels operated by the defendant within these waters on the ultimately rather prosaic basis of contempt of court. Nevertheless, the judgment itself appears largely symbolic given that “[r]egardless of how the laws are drafted, it has been the Australian Government’s practice not to enforce Australian laws in Antarctica against non-nationals”.<sup>193</sup> Indeed, subsequent practice of the Australian navy has been to merely observe scientific whaling and, in line with IWC commitments, to ensure shipping safety against protests from militant environmental activists.<sup>194</sup>

Given that the decision in *Humane Society International* is highly unlikely to be enforced, efforts to deter scientific whaling in Antarctic waters may be more appropriately addressed elsewhere. This position raises the intriguing prospect of legal action between Australia and Japan before an international court. However, while parallels exist with the *Southern Bluefin Tuna* cases,<sup>195</sup> considerable practical difficulties have nonetheless emerged in identifying a specific forum to resolve the dispute over scientific whaling.<sup>196</sup> Furthermore, few pertinent international organisations beyond the IWC appear to offer realistic adjudicatory alternatives. The Convention on the Conservation of Antarctic Marine Living Resources 1980<sup>197</sup> provides a limited mandate to address the conservation of cetaceans beyond the regulation of activities affecting krill.<sup>198</sup> Likewise, it has been argued that a collective trade embargo under the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>199</sup> may

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<sup>192</sup> *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd* [2006] FCA 3. On this process in a Japanese context generally, see A. J. MacDonald, “Service of Australian Originating Process in Japan” (1992) 66 *Australian Law Journal* 810.

<sup>193</sup> Davies, “Enforcing Australian Law”, at 19.

<sup>194</sup> At recent IWC Meetings concerns have been raised at the increasing numbers of violent clashes between protestors and whaling crews. To this end the IWC has adopted two key Resolutions in which it “does not condone” violent protests (Resolution 2006-2: Resolution on the Safety of Vessels Engaged in Whaling and Whale Research-Related Activities) and condemns the actions of protestors to jeopardise safety at sea (Resolution 2007-2: Resolution on Safety at Sea and Protection of the Environment).

<sup>195</sup> (2000) 39 *International Legal Materials* 1359.

<sup>196</sup> See A. Hutchinson, “Baleen Out the IWC: Is International Litigation an Effective Strategy for Halting the Japanese Scientific Whaling Programme?” (2006) 3 *Macquarie Journal of International and Comparative Environmental Law* 1.

<sup>197</sup> 1329 UNTS 47.

<sup>198</sup> Indeed, Article VI of the Convention provides “[n]othing in this 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”.

<sup>199</sup> 993 UNTS 243 [Hereinafter “CITES”].



prove effective.<sup>200</sup> However, whaling in a scientific context has been virtually unexplored within CITES, which has focussed solely on the international trade in whale products.

It may be argued that the scientific whaling controversy is more likely to be resolved through the on-going negotiations towards a new direction for the IWC, than by judicial intervention or the operation of external treaty processes. Given the considerable evidence that current scientific whaling operates effectively as a substitute to industrial quotas, a resumption of commercial whaling should render scientific catches largely redundant. Any meaningful data from lethal research – insofar as it exists at all – can instead be garnered by scientific observers aboard whaling vessels. Moreover, it is likely that a universal cessation of scientific catches would be considered a fundamental pre-requisite by the anti-whaling lobby for approval of the RMS and the resumption of future commercial activities under the ICRW.

### 2.6.3 *Aboriginal subsistence whaling*

A third potential basis for limited hunting activities is provided under Section 13 of the ICRW Schedule, under which specific catch limits are established “to satisfy aboriginal subsistence need”. Modern aboriginal whaling is primarily confined to the waters of the Northern Hemisphere, conducted by the Alaskan Inuit for beluga and bowhead whales, Russian Chukotkan peoples for beluga, bowhead and grey whales, Greenlanders for narwhales, beluga, humpback, fin and minke whales, the Faeroese for pilot whales and the Canadian Inuit for bowhead, beluga and narwhals.<sup>201</sup> A smaller degree of indigenous humpback whaling also occurs in St. Vincent and the Grenadines<sup>202</sup> and Equatorial Guinea, alongside sperm whaling in isolated parts of Indonesia.<sup>203</sup>

The aboriginal subsistence exception has been a long-standing feature of multilateral whaling arrangements and, as noted above, was first incorporated in the 1931 Convention. While absent from the 1938 Agreement, it was subsequently reinstated within the ICRW Schedule

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<sup>200</sup> P. H. Sand, “Japan’s ‘Research Whaling’ in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)” (2008) 17 *Review of European Community and International Environmental Law* 56.

<sup>201</sup> For a summary of these hunts see M. M. R. Freeman *et al.*, *Inuit, Whaling and Sustainability* (Walnut Creek, CA: AltaMira Press, 1999), at 59-96. On Greenlandic activities in particular see Caulfield, “Greenlanders, Whales and Whaling”.

<sup>202</sup> N. R. R. Ward, “The Whalers of Bequia” (1988) 30 *Oceanus* 89.

<sup>203</sup> R. R. Reeves, “The Origins and Character of ‘Aboriginal Subsistence’ Whaling: A Global Review” (2002) 32 *Mammal Review* 71, at 86-88. Furthermore, a miniscule Filipino catch of Bryde’s whales was effectively ended by domestic legislation in 1996: *ibid.*

following a proposal by the USSR in respect of indigenous Siberian peoples.<sup>204</sup> Since 1950, the aboriginal subsistence provisions of the ICRW Schedule have been successively expanded and amended to establish particular tribal requirements and restrictions on certain stocks.<sup>205</sup>

The vast majority of aboriginal hunts are conducted by ICRW parties, although a small volume of tribal hunting also occurs outside the auspices of the Commission. Ultimately, aboriginal whaling is largely regulated on a national level by the parties in question, acting in conjunction with hunting standards and quotas prescribed by the IWC, with the “parent” government required to apply for a share of the aboriginal allocation on particular stocks. No guidance is provided for “aboriginal” credentials, leaving parties to champion the claims of particular communities as an aspect of national whaling policies.

It is generally accepted that aboriginal hunting is fundamentally distinct to commercial whaling. Broad endorsement is therefore accorded in principle for hunts that do not endanger the populations in question and to which precautionary monitoring and management measures are applicable.<sup>206</sup> The initial exemption in the 1931 Convention appears to be based on pre-existing marine mammal treaties that enshrined consideration for aboriginal seal-hunters.<sup>207</sup> The continuing basis for the recognition of aboriginal subsistence claims has been subsequently attributed to modern human rights norms,<sup>208</sup> such as the prohibition on deprivation of subsistence under Article 1(2) of the International Covenant on Economic, Social and Cultural Rights 1966,<sup>209</sup> although advocates of more ecocentric and preservationist approaches to whaling have expressed a degree of scepticism towards such claims.<sup>210</sup>

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<sup>204</sup> Resolution 10 of the 1946 International Whaling Conference.

<sup>205</sup> Gillespie, “Whaling Diplomacy”, at 195.

<sup>206</sup> Reeves, “Origins and Character”, at 73. Moreover, the IWC has declared that “the highest priority shall be accorded to the objective of ensuring that the risk of extinction to individual stocks is not seriously increased by aboriginal subsistence whaling”: Resolution 1994-4: Resolution on a Review of Aboriginal Subsistence Whaling.

<sup>207</sup> In this respect, Article IV of the now-defunct Convention between the United States, Great Britain, Russia and Japan for the Preservation and Protection of Fur Seals 1911 provided an exemption for aboriginal communities using traditional hunting methods, phrased in a similar manner to Article 3 of the 1931 Convention, which seems to have used the 1911 instrument as an indicative drafting guide.

<sup>208</sup> See in particular N. Doubleday, “Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law” (1989) 17 *Denver Journal of International Law and Policy* 373.

<sup>209</sup> 993 UNTS 3.

<sup>210</sup> See especially D’Amato and Chopra, “Emerging Right”, at 58-66.

The aboriginal exemption first received sustained scrutiny in the mid-1970s due to concerns over the potential impact of bowhead whaling by indigenous communities.<sup>211</sup> This resulted in the controversial decision by the IWC in 1977 to temporarily ban aboriginal hunts for grey and bowhead whales. The bowhead controversy demonstrated that the IWC possessed “a strong scientific committee but essentially no expertise within its ranks for addressing the socio-economic, cultural and nutritional dimensions of aboriginal whaling”.<sup>212</sup> Consequently, an Aboriginal Subsistence Whaling Sub-Committee (ASWSC) was established in 1983 to review quota applications and provide advice on technical management measures. The IWC has primarily focussed on reducing the numbers of whales struck but not landed,<sup>213</sup> ensuring the sustainability of specific aboriginal hunts<sup>214</sup> and improving humane killing methods.<sup>215</sup>

Two particular challenges have arisen in recent years concerning the aboriginal exemption. First, the application process for aboriginal quotas has proved susceptible to political manipulation, as demonstrated in the recent Makah controversy. Aboriginal permits are allocated to particular stocks – as opposed to named parties, communities or individuals – and distributed by consensus between pertinent IWC members. In this instance, a Native American community which held historic whaling rights under a treaty with the US government,<sup>216</sup> sought to resume whaling. The US applied to the IWC for a quota in 1996, which was subsequently rejected due to concerns that the application might subsequently

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<sup>211</sup> J. Walsh, “Moratorium for the Bowhead: Eskimo Whaling on Ice?” (1977) 197 *Science* 847.

<sup>212</sup> Reeves, “Origins and Character”, at 72.

<sup>213</sup> For instance, Resolution 1981-4: Resolution to the Government of the United States on the Behring Sea Bowhead Whale (calling on the US to ensure that aboriginal hunters acted to reduce the levels of bowhead whales struck but not landed to zero “as quickly as possible”).

<sup>214</sup> Resolution 1998-9: Resolution on Directed Takes of White Whales (noting “doubts about the sustainability of the current harvest” of beluga and narwhals by Greenlanders); Resolution 1994-4, *op. cit.*

<sup>215</sup> In this respect, particular concerns have been raised over the Faroese drive hunt – Resolution 1993-2: Resolution on Pilot Whales (noting the IWC’s “continuing concern” over the humaneness of the hunt and expressing concern over the adequacy of Faeroese legislation); Resolution 1995-1: Resolution on Killing Methods in the Pilot Whale Drive Hunt (noting improvements and encouraging the further development of alternative killing methods); see K. Sanderson, “Grind – Ambiguity and Pressure to Conform: Faeroese Whaling and the Anti-Whaling Protest” in Freeman and Kreuter, “Elephants and Whales”, at 187. More generally the IWC has sought to improve the humane killing element of all aboriginal hunts – see Resolution 1985-3: Resolution on Humane Killing in Aboriginal Subsistence Whaling (urging the prompt adoption of more efficient killing methods); Resolution 1997-1: Resolution on Improving the Humaneness of Aboriginal Subsistence Whaling (urging those engaged in aboriginal hunting “to do everything possible to reduce still any unavoidable suffering to whales”).

<sup>216</sup> The Treaty of Neah Bay 1885, considered to be the only such instrument that confers whaling rights on Native Americans, provides “[t]he right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States”: Article 4. On the Makah whaling saga see R. Sullivan, *A Whale Hunt* (London: Headline Publishing, 2000).

inspire other dormant or novel claims.<sup>217</sup> In 1997, a five-year package of aboriginal quotas was controversially negotiated based on a joint US-Russian submission, whereby Russia agreed to assign a small number of grey whales to the Makah hunt in exchange for a similar allowance from the traditional Alaskan bowhead quota.<sup>218</sup> In response, the IWC introduced a rider to the grey whale quota restricting such takings “exclusively for local consumption by the aborigines whose traditional subsistence needs *and* cultural needs have been recognised”.<sup>219</sup> Although a small number of whales were subsequently taken by the Makah, it is nonetheless doubtful whether the requirements of Section 13(2) were met on a strict construction, notwithstanding arguments that the “re-discovery” of a whaling tradition may constitute an exercise of wider rights to self-determination by traditional communities.<sup>220</sup> Although Makah whaling was later suspended<sup>221</sup> and ultimately blocked<sup>222</sup> by domestic litigation, the initial quota nonetheless set an uncomfortable precedent and raises difficult questions regarding IWC controls over the re-establishment by indigenous groups of a lapsed whaling heritage.

Secondly, certain parties have called on the IWC to establish a whaling quota as an interim relief allocation to alleviate short-term economic disruption to coastal regions most affected by the commercial moratorium. The cause of so-called “small-type coastal whaling” has been consistently advocated by Japan<sup>223</sup> – and, on a rather more transient basis, by Norway<sup>224</sup> and

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<sup>217</sup> J. Firestone and J. Lilley, “Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs” (2005) 8 *Journal of International Wildlife Law and Policy* 177, at 198.

<sup>218</sup> On this process generally see W. Walters and C. Dugger, “The Hunt for Gray Whales: The Dilemma of Native American Treaty Rights and the International Moratorium on Whaling” (1997) 22 *Columbia Journal of Environmental Law* 319; L. Jenkins and C. Romano, “Makah Whaling: Aboriginal Subsistence or a Stepping Stone to Undermining the Commercial Whaling Moratorium?” (1998) 9 *Colorado Journal of International Environmental Law and Policy* 71; R. K. Eichstaedt, “Save the Whales v. Save the Makah: The Makah and the Struggle for Native Whaling” (1998) 4 *Animal Law* 145 and W. Bradford, “Save the Whales v. Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Disputes in the New International Economic World Order” (2000) 13 *St. Thomas Law Review* 155.

<sup>219</sup> Section 13(2) of the ICRW Schedule (emphasis added). This provision has since been amended.

<sup>220</sup> See R. J. Miller, “Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling” (2000) 25 *American Indian Law Review* 165; see also Firestone and Lilley, “Right to Practice and Revitalize”.

<sup>221</sup> *Metcalf v. Daley* (2000) 214 F.3d 1135; see R. Fowles, “*Metcalf v. Daley*: Consideration of the Significant Impact on the Gray Whale Population in an Environmental Assessment” (2001) 6 *Ocean and Coastal Law Journal* 397.

<sup>222</sup> *Anderson v. Evans* (2002) 314 F.3d 1006; see Z. Tomlinson, “Abrogation or Regulation? How *Anderson v. Evans* Discards the Makah’s Treaty Whaling Right in the Name of Conservation Necessity” (2003) 78 *Washington Law Review* 1101; see also Firestone and Lilley, “Right to Practice and Revitalize”, at 202-07.

<sup>223</sup> For a review of Japanese small-type whaling claims see M. M. R. Freeman, “Culture-Based Conflict in the International Whaling Commission: The Case of Japanese Small-Type Whaling” in Burns and Gillespie, “Future of Cetaceans”, at 33. For a critical rebuttal of such claims see H. Watanabe, *Japan’s Whaling: The Politics of Culture in Historical Perspective* (Melbourne: Trans Pacific Press, 2009), especially 151-170.

most recently South Korea – as a distinct, yet analogous, form of subsistence whaling.<sup>225</sup> Thus far, such requests have been consistently rejected, while the response of the IWC has been essentially platitudinous in nature, confined to bland statements of solidarity with the communities affected and vague recommendations to “work expeditiously to alleviate distress”.<sup>226</sup> Indeed, a rather limited degree of sympathy has been exhibited towards claims for relief quotas to mitigate the socio-economic impacts of the commercial moratorium upon wealthy, industrialised and economically versatile nations, which remain infinitely better placed than isolated and itinerant indigenous communities to adapt to whaling restrictions.<sup>227</sup>

#### 2.6.4 “Pirate” and “non-affiliated” whaling

Finally, reflective of the position that “a treaty does not create either obligations or rights for a third State without its consent”,<sup>228</sup> IWC initiatives have no legal effect upon non-members. Third parties may therefore undertake whaling operations subject to national or regional constraints and the pertinent rules of the law of the sea, as outlined in Chapter III. Whaling outside IWC auspices falls into one of two broad categories. So-called “pirate whaling” involves circumventing the Convention through the reflagging of vessels and transfer of whaling equipment to third parties. On the other hand, a degree of what may be termed “non-affiliated whaling” occurs, where hunting operations are sanctioned through national law or membership of an alternative pro-consumption organisation.

Although considerable attention and alarm has been focussed on external whaling, the scale of such activities should be viewed in context. In the 1970s, generally considered the pinnacle of non-IWC whaling, approximately ninety percent of hunting operations were nonetheless

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<sup>224</sup> See B. T. Hodges, “The Cracking Façade of the International Whaling Commission as an Institution of International Law: Norwegian Small-Type Whaling and the Aboriginal Subsistence Exemption” (2000) 15 *Journal of Environmental Law and Litigation* 295.

<sup>225</sup> *Background Paper for Japan’s Small-Type Coastal Whaling*; Document IWC/60/9, submitted by Japan at the Sixtieth Annual Meeting of the IWC in 2008. Likewise, such claims have a basis in the preambular recognition by the ICRW 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”: Preamble to the ICRW, Fifth Recital.

<sup>226</sup> See Resolution 1993-3: Resolution on Japanese Community-Based Minke Whaling; Resolution 1995-4: Resolution on Japanese Community-Based Whaling; Resolution 1996-1: Resolution to Resolve the Distress of the Japanese Small-Type Coastal Whaling as Community-Based Whaling; Resolution 2000-1: Resolution on Community-Based Whaling in Japan; Resolution 2001-6: Resolution in Japanese Community-Based Whaling; and Resolution 2004-2: Resolution on Japanese Community-Based Whaling.

<sup>227</sup> H. N. Scheiber, “Historical Memory, Cultural Claims and Environmental Ethics: The Jurisprudence of Whaling Regulation” in H. N. Scheiber (ed.), *Law of the Sea: The Common Heritage and Emerging Challenges* (Dordrecht: Martinus Nijhoff, 2000), at 165.

<sup>228</sup> Vienna Convention on the Law of Treaties, Article 34.

regulated under the ICRW.<sup>229</sup> The first modern case of pirate whaling is considered the *Olympic Challenger* incident in 1954, in which Peru arrested a Honduran-registered vessel of Panamanian origin that had been reflagged to specifically avoid certain IWC restrictions.<sup>230</sup> Uncertainties over the limits of Peruvian maritime jurisdiction raised questions over the ultimate legitimacy of the arrest, although a series of local fines were later imposed for whaling infractions.<sup>231</sup>

Until the 1970s, consideration of the issue of non-IWC whaling was “superficial”.<sup>232</sup> Sustained attention was accorded to these concerns between 1976 and 1981, culminating in a series of Special Meetings in 1977 and 1978 and the establishment in 1980 of a Working Group on Non-IWC Whaling. The IWC has traditionally adopted a “carrot-and-stick” approach to external hunting activities, seeking to restrict the flow of equipment and expertise to non-members and to refrain from purchasing whale products in order to stunt the development of national industries,<sup>233</sup> while simultaneously encouraging such states to ratify the Convention.<sup>234</sup> Beyond cooperative actions with CITES to address the international trade

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<sup>229</sup> Gambell, “Whale Conservation”, at 308.

<sup>230</sup> *The Olympic Victor and Other Vessels* (1958) 22 *International Law Reports* 278.

<sup>231</sup> Birnie, “International Regulation”, at 231-33. Peru had claimed a 200-mile *mar presencial* within which the vessel had been arrested which, as noted in Chapter III, was highly contentious at the material time.

<sup>232</sup> *Thirty-First Report of the International Whaling Commission* (Cambridge: IWC, 1981), at 23.

<sup>233</sup> See Resolution 1976-5: Resolution on Transfer of Vessels, Equipment and Assistance (calling on parties to prohibit the sale of vessels and equipment and to take all practicable steps to discourage the dissemination of expertise and assistance to non-parties); 1977-8: Resolution on Prevention of Transfer of Whaling Vessels, etc (calling on parties to “take all practical steps” to avoid transfer); Resolution on Importation of Whale Products from Non-IWC Member Countries and Resolution on Transfer of Whaling Equipment and Expertise, etc, both adopted at the IWC Special Meeting in December 1978; Resolution 1979-9: Resolution on Importation of Whale Products from, Export of Equipment to, and Prohibition of Whaling by Non-Member Countries (calling on parties to “cease immediately” the import of whale products and export of vessels and equipment to non-parties and to consider prohibiting whaling by non-parties within national fishery conservation zones); Resolution 1980-6: Resolution aimed at Discouraging Whaling Operations Outside IWC Regulations (calling on parties to “take all practical steps” to avoid offering services or expertise directly relevant to whaling to non-parties).

<sup>234</sup> See Resolution 1976-4: Resolution on Adherence to the Convention (urging Spain and Portugal to join the IWC); Resolution 1977-2: Resolution on Sea of Japan Minke Whale Stock (urging China and North and South Korea to join the IWC); Resolution 1977-3: Resolution on Spain-Portugal-British Isles Fin Whale Stock (urging Spain to join the IWC); Resolution 1977-4: Resolution on North Atlantic Sperm Whales (urging Spain and Portugal to join the IWC); Resolution 1977-5: Resolution on Right Whales at Madeira (urging Portugal to join the IWC); Resolution 1977-7: Resolution on Prevention of Importation of Whale Products (renewing a general invitation for non-members to join the IWC and further requesting that current members “should seek to encourage membership by all non-member whaling nations”); Resolution on Bryde’s Whales in the South Pacific Ocean (urging Peru to join the IWC), Resolution on Sperm Whales in the South Pacific Ocean (urging Chile and Peru to join the IWC) and Resolution on Sei Whales in the South Pacific Ocean (urging Chile to join the IWC), adopted at the Special Meeting in December 1977; Resolution 1978-7: Resolution on Non-Member Whaling Countries (encouraging non parties to join the IWC); Resolution on Adherence of Peru to the International Convention on the Regulation of Whaling 1946 (welcoming Peruvian membership and observing that “this adherence will materially assist the Commission in its regulation of whaling activities”). Nevertheless, concerns have also been raised by the lack of data on the extent of non-IWC

in whale products, as detailed in Chapter III, concerns over pirate whaling have been relatively peripheral within the IWC since the early 1980s. Most recently, efforts have been centred on encouraging Canada, which oversees a miniscule bowhead hunt by its Inuit peoples, to rejoin the Commission.<sup>235</sup>

## **2.7 Revised Management Procedures and the future regulation of commercial whaling**

Efforts have been on-going since the introduction of the moratorium to establish a universally acceptable model for quota-setting that would overcome the scientific deficiencies and practical shortcomings experienced by previous systems. The post-moratorium mechanism envisaged by the IWC, the Revised Management Procedures, therefore consists of two fundamental and mutually-supportive components. In the first instance, the Revised Management Procedure (RMP) establishes the computational modelling and data-gathering mechanisms necessary to establish a conservative numerical quota for commercial whaling, based on available data from individual stocks. The Revised Management Scheme (RMS), which has proved rather more contentious within the IWC, encompasses the requisite enforcement, inspection and welfare conditions framing any future hunting activities. Although the scientific components of the new system were adopted by the IWC with little active controversy, progress on the more holistic issues of the RMS has failed to keep pace with these developments, generating further political discord within the Commission. The RMS has dominated recent IWC Meetings, with the parties having identified a clear risk of institutional implosion unless tangible progress is forthcoming in the short-term future.

The development of a more sophisticated regulatory mechanism to the NMP was first mandated by the IWC in 1981,<sup>236</sup> and was a priority activity for the Scientific Committee throughout the 1980s. Indeed, the IWC condemned the previous arrangements as “deficient in several important respects”, not least their limitations in the face of considerable uncertainty, which “often left the Commission without adequate advice on classifications and catch

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whaling: Resolution 1981-6: Resolution to Implement Recommendations of the Technical Committee Group on Non-IWC Whaling.

<sup>235</sup> See Resolution 1996-9: Resolution on Canadian Whaling; Resolution 1998-13: Resolution on Canadian Membership to the IWC; Resolution 1999-7: Resolution on Small Populations of Highly Endangered Whales; and Resolution 2000-2: Resolution on Whaling of Highly Endangered Bowhead Whales in the Eastern Canadian Arctic. Canada left the IWC in 1981 and has thus far resisted invitations by the IWC to bring its bowhead whaling policies under the auspices of the Commission’s aboriginal subsistence programme. On the Canadian position generally see T. L. McDorman, “Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention” (1998) 29 *Ocean Development and International Law* 179.

<sup>236</sup> Resolution 1981-2: Resolution on Developing Revised Management Procedures.

limits”.<sup>237</sup> The priorities for the RMP were considered to be ensuring the stability of catch limits, outlining acceptable risks and facilitating the highest possible continuing yield from stocks.

In 1992, the parties endorsed a sophisticated mathematical model, the Catch Limit Algorithm (CLA), as the statistical basis for the future calculation of whaling quotas, declaring that the CLA should not be applied “until there is agreement on all aspects of the Revised Management Scheme”.<sup>238</sup> To date, despite the exemplary progress on the development of the RMP, the conclusion of the RMS has nonetheless proved elusive and divisive. At the Forty-Fifth Meeting in 1993, a proposed Resolution on the RMS was defeated, prompting the resignation of the Chair of the Scientific Committee in protest. The subsequent observation that the remaining scientific aspects of the RMP had been “adequately addressed”<sup>239</sup> rather emphasised the ongoing difficulties in reconciling the technical and the political aspects of the process.

This position has created an impasse within the Commission which has both dominated and polarised IWC Meetings in recent years and, arguably, impeded progress on other equally pressing issues of importance to the conservation and management of whale stocks. Since 2000, progress – or the lack thereof – towards the conclusion of the RMS has been increasingly linked to the future stability and viability of the IWC itself. Indeed, at the Fifty-Second Meeting in 2000, it was considered “important for the future of the Commission” that the process to conclude the RMS proceeds expeditiously.<sup>240</sup> Despite regular meetings of a designated Working Group, a universally acceptable version of the RMS remains elusive. This has clear political implications for the Commission, with subsequent Resolutions warning that a lack of progress on this issue “may seriously jeopardise the ability of the IWC to fulfil its responsibilities”<sup>241</sup> or even provoke a “collapse”.<sup>242</sup>

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<sup>237</sup> Resolution 1991-4: Resolution on the Revised Management Procedure.

<sup>238</sup> Resolution 1992-3: Resolution on the Revised Management System (recognising that this “completes the main scientific component of the development of a Revised Management Scheme for commercial baleen whaling”).

<sup>239</sup> Resolution 1994-5: Resolution on the Revised Management Scheme.

<sup>240</sup> Resolution 2000-3: Resolution on the Revised Management Scheme. In this respect, the Resolution echoed an earlier call “towards completing work expeditiously” on the RMS – Resolution 1996-6: Resolution on Provisions for Completing the Revised Management Scheme.

<sup>241</sup> Resolution 2004-6: Resolution on Completion of the Revised Management Scheme (RMS). To this end, based on the Chair’s Proposal for A Way Forward discussed at the Meeting, the Resolution re-established a distinct Working Group on the RMS and established a full intersessional programme of work.

<sup>242</sup> Resolution 2006-1: St. Kitts and Nevis Declaration.



In 1996 the IWC officially identified three remaining issues to be finalised on the RMS<sup>243</sup>: namely, inspection and observation matters; ensuring that total catches over time remain within designated limits; and the drafting of an appropriate Schedule amendment.<sup>244</sup> Of these, inspection and compliance issues have received particular attention,<sup>245</sup> although consensus on the precise components of such a scheme has proved elusive. Key points of divergence include whether observer programmes should be mandatory or voluntary, the nationality of observers and their precise remit. While the 1937 Agreement pioneered the use of national inspectors on whaling vessels, the ICRW was essentially silent on this issue due to procedural difficulties in instituting an international inspection scheme,<sup>246</sup> while a proposal to this effect in 1955 was rejected by the parties.<sup>247</sup> Few model programmes existed at the time beyond the specialist confines of arms control treaties,<sup>248</sup> hence the voluntary adoption in 1968 of an International Observer Scheme for Factory Ships Engaged in Pelagic Whaling in the Antarctic<sup>249</sup> was considered groundbreaking. However, the observer scheme only received universal approval and participation in the mid-1970s and lapsed following the commencement of the commercial moratorium, hence current commercial hunts under reservations to the Convention deploy nationally-appointed inspectors.<sup>250</sup>

Additional complications have been raised, however, over the position of animal welfare standards within the IWC's proposed management system. A number of parties have voiced concerns over the absence of such considerations within the on-going RMS negotiations.<sup>251</sup>

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<sup>243</sup> Resolution 1996-6: Resolution on Provisions for Completing the Revised Management Scheme.

<sup>244</sup> Although in many respects this issue is likely to prove least problematic of the three given that, in addition to the Working Group on the RMS, Resolution 2004-6 further established an Expert Drafting Group (EDG) to seek to marshal broad areas of consensus into a consolidated draft text for a future amendment of the Schedule.

<sup>245</sup> On this issue generally see A. Gillespie, "The Search for a New Compliance Mechanism within the International Whaling Commission" (2003) 34 *Ocean Development and International Law* 349.

<sup>246</sup> Gillespie, "Whaling Diplomacy", at 358.

<sup>247</sup> *Seventh Report of the International Whaling Commission* (Cambridge: IWC, 1957), at 5.

<sup>248</sup> E. C. Surrency, "International Inspection in Pelagic Whaling" (1964) 18 *International and Comparative Law Quarterly* 666, at 670.

<sup>249</sup> (1968) Cmnd 2209.

<sup>250</sup> Gillespie, "Whaling Diplomacy", at 358-59. Nevertheless, this is not without potential pitfalls, as Norwegian fisheries officials discovered to their cost in the context of seal hunting, when in 1988 they were duped into appointing a rogue environmental campaigner as an observer. The resulting report by the "inspector", a fabricated tirade alleging gruesome violations of animal welfare standards, gave rise to a series of substantial libel actions that ultimately had to be resolved by the European Court of Human Rights: *Bladet Tromsø and Stensaas v. Norway* (1999) 29 EHRR 125.

<sup>251</sup> Gillespie, "Whaling Diplomacy", at 367-68. The leading advocates of this policy have been the UK and New Zealand.

While the IWC has adopted a series of Resolutions addressing humane killing,<sup>252</sup> such measures remain essentially non-binding. Certain parties therefore wish to elevate the operational status of these principals to a central aspect of any future regulatory regime governing commercial hunting.<sup>253</sup> In response, elements of the pro-whaling lobby view these concerns as a stalling tactic, designed to obstruct progress on the RMS.<sup>254</sup> Despite lying outside the traditional concerns elucidated by the IWC in the context of the RMS, it appears that some form of agreement will also have to be reached on this issue, in order to avoid further political postponement of progress towards the completion of this mechanism.

Finally, it was agreed in 1998 that “catch limits for commercial purposes for any species of whale in any region shall be calculated by deducting all human-induced mortalities that are known or can be reasonably estimated, other than commercial catches, from the total allowable removal”.<sup>255</sup> This position echoes the sentiments of a previous Resolution that had observed the need to consider wider environmental factors in quota calculations, but saw “little advantage in modifying the Catch Limit Algorithm further to account for

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<sup>252</sup> See Resolution 1978-4: Reporting Data Relative to Humane Killing (noting the dearth of available data on humane killing); Resolution 1980-11: Resolution to Ban the Use of the Cold Grenade Harpoon for Killing Minke Whales from the 1981/92 and 1982 Whaling Season (banning the use of the cold grenade harpoon); Resolution 1982-4: Resolution on the Use of the Cold Grenade Harpoon (condemning the cold grenade harpoon as a technique that is “cruel and attracts adverse criticism of the whaling industry” and requesting reservations ban to be withdrawn); Resolution 1992-1: Resolution on Humane Killing (establishing an action plan on humane killing); Resolution 1993-1: Resolution on Humane Killing (encouraging the parties to continue to progress the action plan on humane killing); Resolution 1994-1: Resolution on the Use of the Electric Lance as a Secondary Method of Killing Whales (calling on parties to “develop more satisfactory methods of killing whales”); Resolution 1995-1: Resolution on Killing Methods in the Pilot Whale Drive Hunt (calling on parties to improve the humaneness of the Faroese drive hunt); Resolution 1995-2: Resolution on Methods of Killing Whales (calling on parties to suspend the use of the electric lance pending activity towards a full ban); Resolution 1997-1: Resolution on Improving the Humaneness of Aboriginal Subsistence Whaling (calling on parties to “reduce unavoidable suffering” of whales subject to aboriginal hunts); Resolution 1999-1: Resolution arising from the Workshop on Whale Killing Methods (encouraging the development of more accurate indicators of death and to provide appropriate assistance to aboriginal hunts); Resolution 2001-1: Resolution on Whale Killing Methods (encouraging dissemination of information on technical developments); Resolution 2004-3: Resolution on Whale Killing Issues (expressing concern “in the light of its current mandate and long-standing commitment to address welfare issues, that current whaling methods do not guarantee death without pain, stress or distress” and that data is incomplete and the criteria currently used to ascertain death is inadequate). On the current limitations of the IWC regime governing humane killing generally see S. K. Knudsen, “A Review of the Criteria Used to Assess Insensibility and Death in Hunted Whales Compared to Other Species” (2005) 169 *The Veterinary Journal* 42; see also N. Gales, R. Leaper and V. Papastavrou, “Is Japan’s Whaling Humane?” (2008) 32 *Marine Policy* 408.

<sup>253</sup> Indeed, some commentators have argued that humane killing is an essential pre-requisite of any regime purporting to regulate the lethal harvest of any animal: see A. Gillespie, “Humane Killing: A Recognition of Universal Common Sense in International Law” (2003) 6 *Journal of International Wildlife Law and Policy* 1 and S. R. Harrop, “From Cartel to Conservation and on to Compassion: Animal Welfare and the International Whaling Commission” (2003) 6 *Journal of International Wildlife Law and Policy* 79.

<sup>254</sup> Friedheim, “Moderation in the Pursuit of Justice”, at 359 (describing humane killing considerations as “a perfect diversionary issue”).

<sup>255</sup> Resolution 1998-2: Resolution on Total Catches over Time.

environmental change”, with alternative aspects of the RMS considered a more appropriate avenue by which to reflect such concerns.<sup>256</sup> This approach therefore considers the adverse impact of wider anthropogenic factors on whale stocks in a manner largely unprecedented within previous IWC management schemes. However, this approach in isolation merely observes that stocks have become depleted through external environmental factors and adjusts the mathematical parameters of the RMP accordingly. Therefore, if the IWC is to truly advance “the proper conservation of whale stocks” as mandated by the Convention, it is contended that the RMS will require a supplementary programme of regulatory activity to address, as opposed to merely identifying, the impact of such threats on commercial catch quotas. Nevertheless, in recent years the IWC has consistently struggled to establish effective conservation policies, due primarily to a lack of consensus on the precise competencies of the Commission and compounded by wider institutional difficulties, to which this thesis now turns.

## **2.8 The “proper conservation of whale stocks” and future directions for the IWC**

Thus far, this Chapter has examined the deficiencies of the IWC as a distinct quota-setting body and the negative impact that such mismanagement had both on whale stocks and the global perception of the Commission as a credible institution. The remainder of this Chapter considers the extent to which the IWC is equipped to address the wider conservation needs of whales and other cetaceans in the mid- to long-term future.

In addressing future regulatory issues within the IWC, three central observations should be made at this juncture. First, as explicitly acknowledged by the IWC in 2007, “whales in the 21<sup>st</sup> Century face a wider range of threats than those envisaged when the IWC was concluded in 1946”.<sup>257</sup> The IWC will need therefore to demonstrate adaptability if it is to exercise global leadership in this regard. Second, the IWC itself may be considered to be at an operational disadvantage in respect of many of these new management challenges. Some of these limitations are essentially self-inflicted, given the lack of universal internal endorsement of the IWC’s purported remit. Conversely, certain issues may be considered broader global and environmental problems to which the ICRW may lack the mandate and practical prowess to address effectively. Third, such limitations have been compounded in recent years by

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<sup>256</sup> Resolution 1994-5.

<sup>257</sup> Resolution 2007-3: Resolution on the Non-Lethal Use of Cetaceans.

controversy and confusion over the future direction of the IWC in respect of whales and other cetaceans, as two conflicting “constitutional” Resolutions adopted since 2003 have largely failed to establish a clear, defining ethos for the Commission in the mid- to long-term future.

### *2.8.1 The evolving environmental threats to cetaceans*

Although Suárez noted habitat degradation and the variable abundance of plankton and essential prey as particularly pressing threats to whales and other marine mammals,<sup>258</sup> broader conservation considerations beyond regulating numerical catch quotas were largely absent from the 1930s instruments. This trend also characterised the early years of operation of the IWC. Nevertheless, since the early 1970s increasing concerns have been raised over the impact of alternative anthropogenic pressures upon whale stocks, the scale of which perhaps became more pronounced given that commercial whaling had been abandoned by the majority of ICRW parties by this stage. Accordingly, “[w]hile overkill from hunting was the most obvious and immediate threat to some species and populations during much of the twentieth century, the relative importance of other threats, particularly bycatch in fisheries, has increased dramatically during the last few decades”.<sup>259</sup>

Strong concerns have been raised regarding the continued unsustainable removals of individuals from stocks. Beyond the historical impact of over-hunting, recent removals have occurred through the culling of certain species, especially minke whales, due to perceived competition with fisheries.<sup>260</sup> More insidiously, and of greater alarm, interactions with fisheries pose arguably the gravest current threat to cetaceans. Fisheries interactions – especially incidental mortality and injury in fishing gear – is considered a “looming crisis” for marine mammals,<sup>261</sup> credited with the dubious distinction of being a primary cause in the recent likely extinction of one species of cetacean.<sup>262</sup> Further anthropogenic removals from stocks – with potentially significant adverse implications for diminished populations – occur through the live capture industry, discussed fully in Chapter III of this work. Beyond the substantial impact of direct and indirect removals of individuals from stocks, an increasingly

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<sup>258</sup> “Special Supplement”, at 232-37.

<sup>259</sup> R. R. Reeves, B. D. Smith, E. A. Crespo and G. Notarbartolo di Sciara, *Dolphins, Whales and Porpoises: 2002-2010 Conservation Action Plan for the World’s Cetaceans* (Gland: IUCN, 2003).

<sup>260</sup> Donoghue, “Whales – The New Scapegoat”, at 385.

<sup>261</sup> A. J. Reid, “The Looming Crisis: Interactions between Marine Mammals and Fisheries” (2008) 89 *Journal of Mammalogy* 541.

<sup>262</sup> S. T. Turvey *et al.*, “First Human-Caused Extinction of a Cetacean Species?” (2007) 3 *Biology Letters* 537.

troubling picture of habitat-related challenges is beginning to emerge.<sup>263</sup> Habitat concerns are highly subjective and both region- and species-specific, hence it is near impossible to state definitively the extent of the threat posed to all cetaceans by habitat degradation and disturbance. Although often compounded by data deficiencies, a broad range of conservation concerns are becoming increasingly apparent.

An issue of particular importance is considered to be the diminishing areas of critical habitats for a number of species of cetaceans caused by the impacts of anthropogenic disturbance within the marine environment,<sup>264</sup> given the importance of sound to cetaceans.<sup>265</sup> Increased maritime activities in recent decades have expanded considerably the range of acoustic disturbances in the oceans, which has had a displacement effect upon a number of species.<sup>266</sup> While individual species of cetaceans often react in very different ways to ocean noise,<sup>267</sup> adverse impacts have been observed in the context of icebreaking,<sup>268</sup> aircraft overflight,<sup>269</sup> and general shipping activities. Scientific research activities<sup>270</sup> and the operation of acoustic by-catch mitigation devices<sup>271</sup> have also been identified as potential adverse noise sources in the cetacean environment. Of particular concern however is the impact of low-frequency active sonar, especially devices used in military operations, which has been linked to

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<sup>263</sup> Reeves *et al.*, “Dolphins, Whales and Porpoises”, at 18-21.

<sup>264</sup> P. Tyack, “Implications for Marine Mammals of Large-Scale Changes in the Marine Acoustic Environment” (2008) 89 *Journal of Mammalogy* 549.

<sup>265</sup> Indeed, “[m]arine mammals create sounds to communicate about the presence of danger, food, a conspecific or other animal; and about their own position, identity and territorial or reproductive status. In addition, odontocete cetaceans use echolocation sounds to detect, localize and characterize objects, including obstacles, prey, and one another”: W. J. Richardson, C. R. Greene, Jr., C. I. Malme and D. H. Thomson, *Marine Mammals and Noise* (San Diego: Academic Press, 1995), at 159.

<sup>266</sup> See for instance L. Bejder *et al.*, “Decline in Relative Abundance of Bottlenose Dolphins Exposed to Long-Term Disturbance” (2006) 20 *Conservation Biology* 1791; D. P. Nowacek, L. H. Thorne, D. W. Johnson and P. L. Tyack, “Responses of Cetaceans to Anthropogenic Noise” (2007) 37 *Mammal Review* 81; and A. Frid and L. Dill, “Human-Caused Disturbance Stimuli as a Form of Predation Risk” (2006) 6 *Conservation Ecology* 11.

<sup>267</sup> S. M. Nowacek, R. S. Wells and A. R. Solow, “Short-Term Effects of Boat Traffic on Bottlenose Dolphins, *Tursiops truncatus*, in Sarasota Bay, Florida” (2001) 17 *Marine Mammal Science* 673 (noting that responses to noise vary significantly on a species-by-species basis: at 674).

<sup>268</sup> C. Erbe and D. M. Farmer, “Masked Hearing Thresholds of a Beluga Whale (*Delphinapterus leucas*) in Icebreaker Noise” (1998) 45 *Deep Sea Research Part II* 1378.

<sup>269</sup> N. J. Patenauk *et al.*, “Aircraft Sound and Disturbance to Bowhead and Beluga Whales during Spring Migration in the Alaskan Beaufort Sea” (2002) 18 *Marine Mammal Science* 309.

<sup>270</sup> For instance, the Acoustic Thermography of Ocean Climate project (ATOC – now renamed the North Pacific Acoustic Laboratory) attracted controversy when scientists planned to transmit a number of low-frequency sounds through the ocean to monitor global climate change: E. M. McCarthy, “International Regulation of Transboundary Pollutants: The Emerging Challenge of Ocean Noise” (2001) 6 *Ocean and Coastal Law Journal* 257, at 271-72.

<sup>271</sup> T.M. Cox, *et al.*, “Behavioral Responses of Bottlenose Dolphins, *Tursiops truncatus*, to Gillnets and Acoustic Alarms” (2003) 115 *Biological Conservation* 203.

increased vocalisation and manifestations of physical distress,<sup>272</sup> as well as mass fatalities through stranding<sup>273</sup> and the risk of injury and decompression sickness in performing emergency avoidance techniques.<sup>274</sup> Disturbance is also created by the growing whale-watching industries,<sup>275</sup> although “it is very challenging to assess the potential long-term effects of anthropogenic activities, such as whalewatching, which elicit subtle, short-term reactions”.<sup>276</sup>

The increasing volume of shipping in areas of critical habitat poses a risk of injury and death from ship-strikes,<sup>277</sup> with sperm,<sup>278</sup> fin<sup>279</sup> and right whales<sup>280</sup> having proven to be particularly vulnerable in this regard. More insidiously, the impact of pollution – especially by oil<sup>281</sup> – may also pose considerable risks to cetacean health,<sup>282</sup> although it appears that small cetaceans may be more susceptible in this respect,<sup>283</sup> especially from chemical pollution in the form of toxic substances such as PCBs<sup>284</sup> and heavy metals.<sup>285</sup> The accumulation of

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<sup>272</sup>P. J. O. Miller, N. Biassoni, A. Samuels and P. L. Tyack, “Whale Songs Lengthen in Response to Sonar” (2000) 405 *Nature* 903.

<sup>273</sup> See especially M. P. Simmonds and L. F. Lopez-Jurado, “Whales and the Military” (1992) 351 *Nature* 448; A. Frantzis, “Does Acoustic Testing Strand Whales?” (1998) 392 *Nature* 29 and E. C. M. Parsons *et al.*, “Naval Sonar and Cetaceans: Just How Much Does the Gun Need to Smoke Before We Act?” (2008) 56 *Marine Pollution Bulletin* 1248.

<sup>274</sup> W. M. X. Zimmer and P. L. Tyack, “Repetitive Shallow Dives Pose Decompression Risk in Deep-Diving Beaked Whales” (2007) 23 *Marine Mammal Science* 888 (noting that avoidance techniques adopted by beaked whales in particular – namely a series of shallow dives to escape the pernicious effects of sustained exposure to adverse stimuli – places them at an increased risk of serious injury or mortality due to decompression sickness; at 917-18); see also M. J. Moore and G. A. Early, “Cumulative Sperm Whale Bone Damage and the Bends” (2004) 306 *Science* 2215.

<sup>275</sup> See, for instance, R. Constantine, D. H. Brunton and T. Dennis, “Dolphin-Watching Boats Change Bottlenose Dolphin (*Tursiops truncatus*) Behaviour” (2004) 117 *Biological Conservation* 299; D. Lusseau and J. E. S. Higham, “Managing the Impacts of Dolphin-Based Tourism through the Definition of Critical Habitats: The Case of Bottlenose Dolphins (*Tursiops* spp.) in Doubtful Sound, New Zealand” (2005) 25 *Tourism Management* 657; and C. Richter, S. Dawson and E. Slooten, “Impacts of Commercial Whale Watching on Male Sperm Whales at Kaikoura, New Zealand” (2006) 21 *Marine Mammal Science* 46.

<sup>276</sup> R. Williams, D. Lusseau and P. S. Hammond, “Estimating Relative Energetic Costs of Human Disturbance to Killer Whales (*Orcinus orca*)” (2006) 133 *Biological Conservation* 301, at 302.

<sup>277</sup> On this issue generally see D. W. Laist “Collisions between Whales and Ships” (2001) 17 *Marine Mammal Science* 35; see also Clapham *et al.*, “Baleen whales” (noting that “[a]ll whales are potentially subject to collisions with ships, and incidents have been reported with most species”: *ibid.*, at 38).

<sup>278</sup> Laist, *ibid.*

<sup>279</sup> S. Panigada *et al.*, “Mediterranean Fin Whales at Risk from Fatal Ship Strikes” (2006) 52 *Marine Pollution Bulletin* 1287; see also G. Notarbartolo di Sciara, *et al.*, “The Fin Whale *Balaenoptera physalus* (L. 1758) in the Mediterranean Sea” (2003) 33 *Mammal Review* 105.

<sup>280</sup> S. D. Kraus, “Rates and Potential Causes of Mortality in North Atlantic Right Whales (*Eubalaena glacialis*)” (1990) 6 *Marine Mammal Science* 278.

<sup>281</sup> Clapham *et al.*, “Baleen Whales”, at 39.

<sup>282</sup> C. D. Harvell *et al.*, “Emerging Marine Diseases – Climate Links and Anthropogenic Factors” (1999) 285 *Science* 1505.

<sup>283</sup> Clapham *et al.*, “Baleen Whales”, at 39.

<sup>284</sup> M. P. Simmonds, “Evaluating the Threat from Public Pollution to Whales” in Burns and Gillespie, “Future of Cetaceans”, at 317.

contaminants in whales may also have adverse impacts higher up the food chain, especially in indigenous consumers<sup>286</sup> and in more commercial markets.<sup>287</sup> Likewise, the ingestion of garbage and other non-biodegradable anthropogenic debris may also pose considerable risks to cetacean health.<sup>288</sup> The effects of overfishing may also render certain areas of critical habitats less capable of supporting large predators such as cetaceans.<sup>289</sup> Finally, climate change has been identified as a further anthropogenic threat to cetaceans, with particular reference to habitat quality and abundance. Although “[e]ffects of climate change are complex and interactive, making them analytically almost intractable”,<sup>290</sup> there is already evidence of displacement of some species of cetaceans, with warm-water species such as the striped dolphin having started to regularly appear in previously colder waters,<sup>291</sup> while conversely colder-water species are likely to also be displaced and their general range restricted.<sup>292</sup> Such processes are likely to be especially pronounced in Polar Regions, with concerns having already been expressed over the projected impacts of climate change upon Arctic species.<sup>293</sup>

### 2.8.2 *The IWC and the regulation of anthropogenic threats to cetaceans*

In addressing the expanded range of anthropogenic threats to cetaceans, three key operational disadvantages may be identified as hindering current IWC initiatives. First, there is as yet no

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<sup>285</sup> T. G. Seixas *et al.*, “Total Mercury, Organic Mercury and Selenium on Liver and Kidney of a South American Coastal Dolphin” (2008) 154 *Environmental Pollution* 98.

<sup>286</sup> C. T. Charlebois, “High Mercury Levels in Indians and Inuits (Eskimos) in Canada” (1978) 7 *Ambio* 204; see also M. P. Simmonds *et al.*, “Organochlorines and Mercury in Pilot Whale Blubber Consumed by Faroe Islanders (1994) 149 *The Science of the Total Environment* 97.

<sup>287</sup> See for instance T. Endo *et al.*, “Contamination by Mercury and Cadmium in the Cetacean Products from Japanese Market” (2004) *Chemosphere* 1653; and T. Endo *et al.*, “Distribution and Toxicity of Mercury in Rats after Oral Administration of Mercury-Contaminated Whale Red Meat Marketed for Human Consumption” (2005) 61 *Chemosphere* 1069.

<sup>288</sup> See for instance M. A. Stamper, B. R. Walker and T. D. Schofield, “Morbidity in a Pygmy Sperm Whale *Kogia breviceps* due to Ocean-Bourne Plastic (2006) 22 *Marine Mammal Science* 719; see also R. J. Tarpley and S. Marwitz, “Plastic Debris Ingestion by Cetaceans along the Texas Coast. Two Case Reports” (1993) 19 *Aquatic Mammals* 93 and R. A. Kastelein and M. S. S. Lavaleije, “Foreign Bodies in the Stomach of a Female Harbour Porpoise (*Phocoena phocoena*) from the North Sea” (1992) 18 *Aquatic Mammals* 40.

<sup>289</sup> G. Bearzi *et al.*, “Prey Depletion Caused by Overfishing and the Decline of Marine Megafauna in Eastern Ionian Sea Coastal Waters (Central Mediterranean)” (2006) 127 *Biological Conservation* 373.

<sup>290</sup> Reeves *et al.*, “Dolphins, Whales and Porpoises”, at 21.

<sup>291</sup> C. D. MacLeod *et al.*, “Climate Change and the Cetacean Community of North-West Scotland” (2005) 124 *Biological Conservation* 477, at 482.

<sup>292</sup> J. Harwood, “Marine Mammals and their Environment in the Twenty-First Century” (2001) 82 *Journal of Mammalogy* 630, at 630.

<sup>293</sup> C. T. Tynan and D. P. De Master, “Observations and Predictions of Arctic Climate Change on Marine Mammals” (1997) 50 *Arctic* 308; see also K. L. Laidre and M. P. Heide-Jørgensen, “Arctic Sea Trends and Narwhal Vulnerability” (2005) 121 *Biological Conservation* 509; and H. P. Huntington, “A Preliminary Assessment of Threats to Arctic Marine Mammals and Their Conservation in the Coming Decades” (2009) 33 *Marine Policy* 77.

universal agreement over the precise range of species governed under the auspices of the ICRW, which has created a regulatory gap for a number of species of cetaceans. Second, political difficulties have hindered the development of particular conservation policies, notably the establishment of sanctuaries and the operation of a specific Conservation Committee established in 2003. Finally, many of these wider anthropogenic threats may be considered problems of global provenance. The ICRW may therefore be ill-equipped to address these fully, although the Commission may still have a key role to play in the advancement of scientific knowledge and in providing a degree of political impetus to complementary global initiatives.

#### *2.8.2.(i) Small cetaceans*

One particularly long-standing issue of contention between the various parties to the ICRW remains the definitive range of species to which it may be considered to apply. In this respect there has been a tendency in both the academic literature and, indeed, in broader treaty practice to demarcate cetaceans into two essentially artificial categories, with whales generally considered “large” cetaceans and dolphins and porpoises often deemed “small” cetaceans. This practice is rather rudimentary and arbitrary, not least given that species ostensibly classed as large cetaceans, such as minke whales, may actually be considerably smaller than species such as beaked whales, which tend to be viewed as small cetaceans.<sup>294</sup> Such designations, however artificial, have considerable practical implications and a broad consensus on the precise role of the IWC towards so-called “small” cetaceans remains elusive.

The exact species coverage of the ICRW has long been subject to debate. At the original 1946 negotiations a “Chart of Nomenclature of Whales” was annexed to the Final Act of the Washington Conference,<sup>295</sup> although the degree of precision that this document was intended to establish has remained a source of considerable dispute. This conflict has become especially pronounced since the early 1970s, as some parties have sought to translate concerns over the conservation status of dolphins into clear regulatory activity within the IWC, which has encountered a degree of opposition.

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<sup>294</sup> A. Gillespie, “Small Cetaceans, International Law and the International Whaling Commission” (2001) 2 *Melbourne Journal of International Law* 257, at 259-60.

<sup>295</sup> Reproduced in Birnie, “International Regulation”, at 695.



A number of parties, broadly aligned within the pro-whaling bloc at the IWC, contend that the Nomenclature constitutes an exhaustive list of species governed by the Convention and further regulatory initiatives addressing species beyond this list are thereby *ultra vires*. Such claims have nonetheless been rejected as an unduly narrow interpretation of the Nomenclature.<sup>296</sup> It has likewise been argued that such a strict view of the Nomenclature has elevated this document to a legal status that it was never intended to merit. Burns observes that “the predominant purpose of nomenclature lists is to establish a ‘common language’ for regulatory regimes in question, not to circumscribe the ultimate purview of that regime”.<sup>297</sup> In this respect the ICRW Chart of Nomenclature bears little resemblance to modern biodiversity treaties, which maintain detailed Annexes identifying clearly and unequivocally the precise range of species subject to the particular regulatory measures prescribed by that treaty, in conjunction with designated processes for the listing, adjustment and removal of species. Furthermore, it has been contended that the past practices of the IWC have encompassed a considerable degree of regulatory activity towards small cetaceans which, in line with Article 31(3)(b) of the VCLT, would justify an extension of the Commission’s remit to such species.<sup>298</sup>

Although there is considerable evidence that the IWC has indeed sought to address small cetaceans, especially during the past thirty years, the Commission has nonetheless avoided definitive pronouncements regarding its competencies. The early practice of the IWC demonstrates considerable flexibility, with quotas for minke whales – which were not originally listed upon the Nomenclature – having been allocated since the third meeting of the Commission<sup>299</sup> to little dissent. In the early 1960s the Commission expressed the cryptic and faintly Orwellian view that “[a]ll whales were covered by the wording of the Convention, but

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<sup>296</sup> P. W. Birnie, “Small Cetaceans and the International Whaling Commission” (1997) 10 *Georgetown International Environmental Law Review* 1, (stridently dismissing such an argument as “spurious”: at 23).

<sup>297</sup> W. C. Burns, “The International Whaling Commission and the Regulation of Consumptive and Non-Consumptive Uses of Small Cetaceans: The Critical Agenda for the 1990s” (1994) 13 *Wisconsin International Law Journal* 105. Burns further notes that in this regard, a nomenclature list is usually developed during the negotiation stage to provide a degree of uniformity in the identification of particular species which may be known by varying vernacular terms in different languages and jurisdictions: *ibid*. The IWC itself has arguably taken a similar line, noting that “the reference in the Final Act to the acceptance of the chart as a guide only means that the names therein are to be taken as a guide”: *Fortieth Report of the International Whaling Commission* (Cambridge: IWC, 1990), at 22.

<sup>298</sup> See especially P. Birnie, “Are Twentieth-Century Marine Conservation Conventions Adaptable to Twenty-First Century Goals and Principles? Part II” (1997) 12 *International Journal of Marine and Coastal Law* 488; Burns, “Critical Agenda”, Gillespie, “Small Cetaceans” and Bowman, “Normalizing the IWC”.

<sup>299</sup> Gillespie, “Small Cetaceans”, at 273.

individual species when named in the Schedule to the Convention were subject to specific conservation measures”.<sup>300</sup>

Considerable research activities on small cetaceans have been conducted under the auspices of the Scientific Committee since the 1970s. The conservation needs of smaller cetaceans were first noted by the IWC in 1972, in the context of wholesale by-catches of dolphins within the Eastern Pacific Ocean yellowfin tuna fishery.<sup>301</sup> This prompted the establishment of a Sub-Committee on Small Cetaceans (SCSC) under the auspices of the Scientific Committee. By 1975, the SCSC advocated the establishment of an international body to effectively manage stocks of all cetaceans not covered by the ICRW Schedule, which “should concern itself with all types of exploitation of cetaceans, both incidental and deliberate”.<sup>302</sup> Three intergovernmental conferences were convened between 1978 and 1981 to discuss the potential revision of the ICRW; however these proposals were ultimately rejected by parties.<sup>303</sup>

The first clear initiatives by the IWC to regulate small cetaceans were advanced in 1977 with the establishment of a series of reporting requirements for so-called “small type whaling”, under which parties were requested to collect data on catches of small cetaceans, defined as “any toothed whale other than the sperm whale”.<sup>304</sup> A Schedule amendment in 1979 formalised data collection requirements for minke, bottlenose, beaked, pilot and killer whales.<sup>305</sup> Moreover, in 1980 orcas were included in a list of species subject to a moratorium

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<sup>300</sup> *Twelfth Report of the International Whaling Commission* (Cambridge: IWC, 1962), at 21.

<sup>301</sup> Here the Scientific Committee noted its “concern over the large incidental kill of porpoises and dolphins” (emphasis added): *Twenty-Third Report of the International Whaling Commission* (Cambridge: IWC, 1973), at 37. On this issue see J. Joseph, “The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic and Political Impacts” (1994) *25 Ocean Development and International Law* 1.

<sup>302</sup> *Twenty-Seventh Report of the International Whaling Commission* (Cambridge: IWC, 1977), at 480.

<sup>303</sup> As noted by Birnie, these initiatives faltered because “[n]ot only did many states want to clearly exclude small cetaceans from the convention’s scope, but they also wanted to ensure that within their EEZs, any new convention would ensure that the coastal state would have the primary regulatory role and need only seek the advice of any commission or committees, except in relation to the great and minke whales already regulated”: “Four Decades of Experience”, at 919-20.

<sup>304</sup> Resolution 1977-6: Reporting Requirements for Small-Type Whaling. As noted in Chapter V, this definition has been incorporated within the definition of a “small cetacean” advanced by the Agreement on the Conservation of Small Cetaceans of the Baltic, North-East Atlantic, Irish and North Seas 1995. Resolution 1977-6 further observed that “existing international commissions and organisations concerned with marine resources do not, at the present time, provide a central agency for the collection of scientific information on captures of small cetaceans” and accordingly the IWC “is at the present time the sole international authority exclusively concerned with the regulation of major species of cetaceans” (emphasis added).

<sup>305</sup> Although as argued by Birnie, such a move was not intended to provide a definitive remit to address small cetaceans and instead constituted “merely a limited definition of the term ‘small-type whaling’ as used in the

on exploitation by factory ships, cited by the IWC as “an example of the execution of regulatory powers by the Commission on a species not included in the chart of nomenclature”,<sup>306</sup> although the parties “could not reach consensus on whether this constituted a precedent”.<sup>307</sup> In 1980, protection measures for beluga whales and narwhals were also introduced, although “the Convention itself does not define the species covered by the term whale and Contracting Governments are not of one view on such a definition”.<sup>308</sup>

Since 1990, a raft of Resolutions concerning small cetaceans has been adopted by the IWC. Such measures have often been qualified by statements diplomatically noting the lack of consensus on the issue<sup>309</sup> and, on occasion, the clear opposition of particular parties to an official declaration of extended competence of the Commission in this regard.<sup>310</sup> The IWC has nonetheless sought through the Scientific Committee to collate information on stock levels of small cetaceans and to address data deficiencies<sup>311</sup> as well as identifying particular anthropogenic threats to these species,<sup>312</sup> especially by-catches,<sup>313</sup> although attempts to

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ICRW, for purposes of collecting information”: P. Birnie, “Small Cetaceans” (1981) 5 *Marine Policy* 277, at 278.

<sup>306</sup> *Thirty-Fourth Report of the International Whaling Commission* (Cambridge: IWC, 1984), at 16-17.

<sup>307</sup> *Ibid.*, at 17.

<sup>308</sup> Resolution 1980-8: Resolution Concerning Extension of the Commission’s Responsibility for Small Cetaceans.

<sup>309</sup> See, for instance, Resolution 1990-3: Resolution on Small Cetaceans (noting that “there exist differences in views between member states on the regulatory competence of the IWC with regard to small cetaceans, and noting that this resolution does not seek in any way to prejudice different members’ positions”); Resolution 1991-5: Resolution on Small Cetaceans (reproducing verbatim the qualification regarding national positions on small cetaceans); Resolution 1993-10: Resolution on the Directed Take of Striped Dolphins (noting that “the Commission is aware of the differences in views among member states on the regulatory competence of the International Whaling Commission with regard to small cetaceans”).

<sup>310</sup> Resolution 1995-4: Resolution on Small Cetaceans (noting that “the governments of St Vincent and The Grenadines, St Lucia, Dominica and Grenada belong to the Organisation of Eastern Caribbean States, which administers laws regulating fisheries and related research in the territorial seas and Exclusive Economic Zones of its Member States ... these Caribbean governments do not accept the competence of the Commission in the management of small cetaceans and related research”). The Caribbean states had initially sought a formal opt-out clause in the Schedule for parties that did not recognise the IWC’s competence over small cetaceans, with this Resolution representing a compromise settlement: Birnie, “Small Cetaceans and the IWC”, at 24.

<sup>311</sup> See for instance Resolution 1990-3: Resolution on Small Cetaceans (requesting the Scientific Committee to collate all available information on the present status of stocks of small cetaceans subject to directed and incidental takes); Resolution 1991-5: Resolution on Small Cetaceans (noting data deficiencies regarding certain stocks); Resolution 1993-4: Resolution on Addressing Small Cetaceans (noting that future discussion should centre on *inter alia* mechanisms for improving the reliability of data and funding small cetacean research within the parties).

<sup>312</sup> Resolution 1994-2: Resolution on Small Cetaceans (identifying by-catches, directed takes and degradation of the marine environment as particular issues to address); Resolution 1996-4: Resolution on Small Cetaceans (noting the threats posed by incidental capture, habitat degradation and pollution to baijis in China); Resolution 2000-9: Resolution on the Conservation of Freshwater Cetaceans (noting that “habitat degradation and alteration is the primary threat to the survival of freshwater cetaceans” with fragmentation caused by damming activities as well as by-catches also identified as issues of strong concern).

<sup>313</sup> Resolution 2001-13: Resolution on Small Cetaceans (noting “the continuing and critical threat to some small cetaceans posed by directed takes and their incidental capture in fisheries operations”).

encourage parties to act in this respect have been largely restricted to vague invitations and recommendations for further action.<sup>314</sup> Moreover, specific Resolutions have been addressed to particular states, most notably Mexico, in respect of the vaquita,<sup>315</sup> China, in respect of the baiji,<sup>316</sup> and Japan, regarding the directed take of Dall's porpoises.<sup>317</sup> More promisingly, perhaps, the IWC has sought to develop synergies with pertinent organisations to address small cetaceans,<sup>318</sup> most notably the CMS<sup>319</sup> and ASCOBANS.<sup>320</sup>

Ultimately, however, there remains a considerable degree of circularity in the debate concerning small cetaceans. Despite further appeals for the development of an additional mechanism within the IWC to address small cetaceans,<sup>321</sup> the prospects for an amendment to the ICRW to provide a more explicit regulatory remit for smaller species appear remote.

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<sup>314</sup> Indeed, perhaps the most telling articulation of the limitations of the IWC's small cetacean remit may be seen in Resolution 1996-4: Resolution on Small Cetaceans, which invited the parties to "note the recommendations of the Scientific Committee".

<sup>315</sup> Resolution 1994-3: Resolution on Biosphere Reserve of the Upper Gulf of California and the Colorado River Delta (noting the elaboration by Mexico of a specific management plan for the vaquita and inviting the parties to offer technical, scientific and financial assistance); Resolution 2007-5: The Vaquita, From Critically Endangered to Facing Extinction (noting that the "best hope for the species is that the international community and non-governmental organizations will support the Government of Mexico by providing technical and financial assistance in the implementation of CIRVA's Recovery Plan and the Biosphere Reserve").

<sup>316</sup> Resolution 1996-4: Resolution on Small Cetaceans (inviting parties "to provide appropriate technical, scientific and financial assistance to the People's Republic of China, if requested, to assist in furthering its conservation programme for the Baiji").

<sup>317</sup> Resolution 1990-4: Resolution on Directed Take of Dall's Porpoises; Resolution 1993-10: Resolution on the Directed Take of Striped Dolphins; see also Resolution 1999-9: Resolution on Dall's Porpoise (inviting Japan to "reconsider the level of its domestic quota") Resolution 2001-12: Resolution on Dall's Porpoise (urging Japan to halt directed takes until a full assessment of stocks could be concluded by the Scientific Committee). As noted by Burns, between 1987 and 1990, 77% of Dall's porpoises were killed off the coast of the northern Pacific, primarily in Japanese directed hunting operations, while considerable numbers of striped dolphins have also been harvested in these waters: "Critical Agenda", at 116.

<sup>318</sup> Resolution 1993-4: Resolution on Addressing Small Cetaceans in the IWC (recognising "the need for international cooperation to address problems relating to small cetaceans and to facilitate the conservation and restoration of depleted or threatened stocks" and further requesting the SCSC to examine "the roles of the IWC and international and regional organisations which, in the opinion of many member States, have a crucial role to play with respect to small cetaceans").

<sup>319</sup> Resolution 1994-2: Resolution on Small Cetaceans (noting that "there is much benefit in maintaining a cooperative dialogue with other intergovernmental organisations with responsibility for or expertise in relation to small cetaceans, in particular UNEP and the bodies created under the Bonn Convention"); Resolution 2001-13: Resolution on Small Cetaceans (urging the IWC "under its Memorandum of Understanding with the Convention on Migratory Species (CMS) to pursue complementary and mutually supportive actions in respect of small cetaceans"). For a full discussion of the inter-relationship between the IWC and the CMS, see Chapter IV of this thesis.

<sup>320</sup> Resolution 1993-11: Resolution on Harbour Porpoise in the North Atlantic and the Baltic Sea (recognising "the relevance of the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS) for the protection of harbour porpoise"). For a discussion of the inter-relationship between the IWC and ASCOBANS, see Chapter V of this thesis.

<sup>321</sup> At its Forty-Fourth Meeting in the IWC established a Working Group to Consider a Mechanism to Address Small Cetaceans within the Commission, "with a view to considering a consensual procedure for action on small cetaceans while respecting the differing views of Contracting Governments" (Resolution 1994:2 Resolution on Small Cetaceans), although attempts to foster a workable consensus on this issue ultimately foundered.

Notwithstanding the immense political difficulties involved, it is likewise highly probable that any amendment to this effect would be unlikely to alter the *status quo* in any meaningful sense, given the spate of reservations that this would almost certainly provoke. Accordingly, beyond scientific research considerations, the regulation of small cetaceans has been largely displaced from the IWC to alternative fora. In the absence of more specialised and specific candidates, it is the contention of this thesis that the supervisory mantle in this respect has been essentially assumed by the CMS, with the merits and limitations of this regime as a default regulator considered fully in Chapters IV to VII.

### *2.8.2. (ii) Environmental concerns*

As with small cetaceans, the response of the IWC thus far to wider environmental concerns has been primarily confined to directing research activities through the Scientific Committee and encouraging the parties to participate in appropriate multilateral regimes. As noted above, two distinct limitations have undermined the IWC's pursuit of broader environmental policies. The first may be considered self-inflicted, as political difficulties have affected the operation of key policies. The second is reflective of the multi-faceted nature, causation and remediation of such threats and the limitations inherent in pursuing solutions for pressing global environmental problems through the confines of a specialist marine mammal regime. Accordingly, the approach taken under the ICRW may essentially represent the outer limits of the Commission's supervisory utility.

A clear example of cetacean policies being undermined by political considerations is the designation of sanctuary areas. Closed areas were initially established under the auspices of the 1937 Agreement, while the first official multilateral sanctuaries, however symbolic they may ultimately have proven to be,<sup>322</sup> were designated under the 1938 Protocol. Latterly, the ICRW has provided a mandate to allocate protected areas, whereby Article V(1)(c) permits the amendment of the Schedule so as to establish "open and closed waters, including the designation of sanctuary areas", although no further formal definition has been expressly provided within the Convention or the Schedule of the precise nature and function of a sanctuary, which thereby remains somewhat open to interpretation.<sup>323</sup> Like any Schedule

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<sup>322</sup> Rose and Crane, "Evolution of International Whaling Law", at 163.

<sup>323</sup> Nevertheless, a Working Group on Whale Sanctuaries established by the IWC Technical Committee in 1981 elaborated indicative Guidelines for sanctuary proposals, which were referred to the Commission in 1982: *Report of the Technical Committee Working Group on Whale Sanctuaries*; Document IWC/34/14. Although the

amendment, sanctuaries require the political endorsement of three-quarters of the parties present and voting and may accordingly be abolished, subject to specific conditions imposed upon the review process.

Having re-opened pre-existing protected areas to commercial whaling in 1955,<sup>324</sup> the first IWC whale sanctuary was established in 1979 for an initial period of ten years.<sup>325</sup> The Indian Ocean Sanctuary (IOS), which was intended to advance “a long term approach to the problem of preserving and increasing whale populations in areas sufficiently large for their needs”,<sup>326</sup> was reviewed in 1989 and subsequently established as a permanent sanctuary in 1992, which was further reaffirmed in 2002. To date, however, IOS practice has been rather mixed. The sanctuary has proved surprisingly uncontroversial, notwithstanding a commitment to the prohibition of whaling within these waters, which pre-dates the official moratorium, “irrespective of such catch limits for baleen or toothed whales as may from time to time be determined by the Commission”.<sup>327</sup> Moreover, the IOS has been generally interpreted as applying to all species of cetaceans found within these waters.<sup>328</sup> Nonetheless, despite the longevity of the sanctuary, “research and conservation could be said to be at an early stage”,<sup>329</sup> and no specific management plan has yet been developed to address the host of anthropogenic pressures faced by cetaceans in these waters.<sup>330</sup>

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Guidelines have not ultimately been adopted by the Commission, as Morgera observes they have nonetheless proved highly influential in IWC sanctuary practice and “have been referred to frequently in subsequent submissions and counterarguments”: E. Morgera, “Whale Sanctuaries: An Evolving Concept within the International Whaling Commission” (2004) 35 *Ocean Development and International Law* 319, at 322.

<sup>324</sup> Tønnessen and Johnsen, “History of Modern Whaling”, at 560-66.

<sup>325</sup> Resolution 1979-3: Resolution in Relation to the Establishment of a Whale Sanctuary in the Indian Ocean.

<sup>326</sup> Resolution 1981-3: Resolution on Communication between the IWC and the Indian Ocean Coastal States (further noting that “the success of this endeavour would require the co-operation of all states bordering Indian Ocean and beyond”).

<sup>327</sup> Section 7(a) of the ICRW Schedule. As Morgera notes, “[t]he importance of the amendment lies in the express provision that commercial whaling is banned within the sanctuary area even if whale stocks are found to be abundant at some stage”: “Whale Sanctuaries”, at 322. Nonetheless, this seemingly permanent position could in theory be reversed upon a successful motion to amend the Schedule to this effect, although there has been little indication to date that such a move has been considered desirable by the parties and, in any event, would be likely to encounter strong opposition.

<sup>328</sup> E. Hoyt, *Marine Protected Areas for Whales, Dolphins and Porpoises: A World Handbook for Cetacean Habitat Conservation* (London: Earthscan, 2005), at 15. However, for a more cautious view of the extent to which small cetaceans are addressed by the sanctuary see M. Prideaux, “Discussion of a Regional Agreement for Small Cetacean Conservation in the Indian Ocean” (2002) 32 *California Western International Law Journal* 101 (although in advocating further regional measures to categorically ensure the application of conservation measures to all species of cetaceans, the author nonetheless observes that “[t]here is a solid argument that the IWC does have competency for all cetacea but lacks the political will to exercise this competence”: at 121).

<sup>329</sup> Hoyt, “Marine Protected Areas”, at 15.

<sup>330</sup> M. N. de Boer, et al., *Cetaceans in the Indian Ocean Sanctuary: A Review. A WDCS Science Report* (Bath: Whale and Dolphin Conservation Society, 2002).

Particular controversy has arisen regarding the Southern Ocean Sanctuary (SOS), established in 1994.<sup>331</sup> Like the IOS, the SOS prohibits commercial whaling in these waters, a position that is to be reviewed every ten years.<sup>332</sup> The key difficulties have arisen over lethal scientific research conducted within the SOS, primarily by Japan. Although the terms of Section 7(b) of the Schedule, which prohibits “commercial whaling”, in conjunction with Article VIII of the ICRW would seemingly countenance such a programme, the Commission has adopted a series of Resolutions urging research activities within these waters to be strictly non-lethal in nature<sup>333</sup> and, as noted above, has repeatedly called on Japan to refrain from lethal research. In subsequent meetings, amendments have been tabled to disband the sanctuary,<sup>334</sup> raising arguments that the requisite scientific criteria had not been observed in establishing the SOS and, moreover, that the sanctuary obstructed the aims and objectives of the Convention.<sup>335</sup> The Commission has responded to such concerns by emphasising the intrinsic value of a precautionary outlook towards sanctuary proposals, advocating a broad presumption towards the establishment of protected areas, even where scientific concerns may not have been definitively established.<sup>336</sup>

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<sup>331</sup> See A. Gillespie, “The Southern Ocean Sanctuary and the Evolution of International Environmental Law” (2000) 15 *International Journal of Marine and Coastal Law* 293.

<sup>332</sup> Nevertheless, there is a subtle but significant variation in the Schedule wording regarding the SOS, which notes that despite the commitment to review the sanctuary at ten-year intervals, it “could be revised at such times by the Commission” – although as noted above, the same is technically true of the IOS. Moreover, given the location of the SOS within Antarctica, in keeping with other instruments addressing the marine resources of this region, Section 7(b) further specifies that this position is not intended to prejudice the special legal and political status of Antarctica.

<sup>333</sup> Resolution 1995-8: Resolution on Whaling under Special Permit in Sanctuaries (considering that parties “should undertake, and collaborate in, the conduct of a programme of research in the Southern Ocean Sanctuary using non-lethal methods and, in the exercise of their sovereign rights, refrain from issuing Special Permits for research involving the killing of cetaceans in such sanctuaries”); Resolution 1998-3 (noting that the objective of the SOS is to “provide the Commission with a long term framework for non-lethal research” and, moreover, that the IWC should “give priority to those proposals for non-lethal research which will address conservation and management objectives for the Sanctuary in a time frame consistent with contributing to the review in 2004 and beyond”).

<sup>334</sup> *Forty-Eighth Report of the International Whaling Commission* (Cambridge: IWC, 1998), at 36.

<sup>335</sup> The Japanese arguments, as advanced by Professor Burke, are reproduced at (1996) 27 *Ocean Development and International Law* 315, with an extended defence of these claims reproduced at (1997) 28 *Ocean Development and International Law* 313, in response to a rebuttal tabled by the UK prepared by Professor Birnie.

<sup>336</sup> Resolution 2002-1: Guidance to the Scientific Committee on the Sanctuary Review Process (noting that “sanctuaries were established and have been maintained for a number of reasons, of which scientific considerations, although important, should not be definitive in the validation process. When considering scientific arguments for sanctuary evaluation, if consensus is not possible, then a precautionary approach should prevail”. To this end, the Scientific Committee was instructed that in considering further sanctuary applications, “[t]emporary overlap of management measures, for example Para 10(e) of the Schedule and a sanctuary, cannot be used to invalidate any long-term scientific and conservation value of a given Sanctuary” and, furthermore, “[t]he application of the Precautionary Approach shall be determined in accordance to Principle 15 of the 1992 Rio Declaration”).

Since the establishment of the SOS, further sanctuary proposals within the South Atlantic, advanced by Brazil, and the South Pacific, tabled by Australia and New Zealand,<sup>337</sup> have consistently failed to secure the requisite three-quarters majority of the parties to enter into effect, a position largely indicative of the simmering controversy regarding the SOS. More recently, as a political gesture in the context of ongoing RMS negotiations, the sponsoring states have confined themselves to general pro-sanctuary statements and refraining from submitting such proposals to a formal IWC vote.<sup>338</sup> Indeed, it appears that this position within the Commission is likely to continue in the immediate short-term future. Although the IWC has remained “[c]onvinced that the establishment of Sanctuaries for conservation purposes represents an integral part of best management practices for wildlife in general”,<sup>339</sup> the parties have themselves acknowledged that political considerations are likely to stymie productive consensus towards the establishment of further protected areas.<sup>340</sup>

A second source of political controversy in addressing environmental considerations has been the establishment of a Conservation Committee, designed primarily to assist the Commission “to effectively organise its future work in the pursuit of its objective by devising an appropriate agenda that places special emphasis on its benefits to conservation”.<sup>341</sup> The Conservation Committee is primarily tasked with developing synergies with other pertinent organisations and to reviewing “appropriate scientific research items”.<sup>342</sup> Nevertheless, the highly political nature of the Resolution has ensured an uneasy tenure for the Conservation Committee to date. Some parties have viewed this body essentially as a vehicle to further advance protectionist claims within the IWC and have refused to cooperate, citing a general refusal to consider sustainable hunting as part of the Committee’s agenda as an ideological basis for non-participation.<sup>343</sup> Notwithstanding these concerns, the Conservation Committee

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<sup>337</sup> On these proposals generally see Morgera, “Whale Sanctuaries”, at 329-332.

<sup>338</sup> *Chair’s Report of the Sixtieth Annual Meeting of the International Whaling Commission* (Cambridge: IWC, 2008), at 26.

<sup>339</sup> Resolution 2002-1.

<sup>340</sup> For instance, the Brazilian delegation has “recognised that the Commission is deeply divided, ideologically more than anything, about the issue of sanctuaries and their role in cetacean management”: *Report of the Conservation Committee: Annex H to the Chair’s Report of the Fifty-Seventh Annual Meeting of the International Whaling Commission* (Cambridge: IWC, 2005), at 4.

<sup>341</sup> Resolution 2003-1: The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission. On these developments see W. C. G. Burns, “The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission: Toward a New Era for Cetaceans” (2004) 13 *Review of European Community and International Environmental Law* 72.

<sup>342</sup> Resolution 2003-1.

<sup>343</sup> For instance, Japan has yet to attend a meeting of the Conservation Committee, while Iceland has formally refused to enter into substantive discussions and Norway has taken a very cautious line towards full participation within the work of the Committee.



determined at an early stage that the divisive issue of directed hunting would be more prudently addressed within the full IWC debate.<sup>344</sup> At a preliminary stage, a number of items of “common interest” were identified, namely endangered species and populations; human impacts; habitat protection; whalewatching; reporting systems for strandings, entanglements and by-catches; and legal and regulatory arrangements for cetacean conservation.<sup>345</sup>

Particular attention has been focused on chemical pollution and ship-strikes,<sup>346</sup> with the latter issue perhaps better demonstrating the potential for supportive action raised by a fully-functional Conservation Committee. In this respect, in 2005 a Ship Strikes Working Group (SSWG) was established under the auspices of the Conservation Committee, which has advanced broad recommendations and a non-binding action plan.<sup>347</sup> Furthermore, the SSWG has developed an on-line database of ship-strikes, which has started to generate clear data concerning priority areas and species, while mitigation strategies will be explored in conjunction with ACCOBAMS in 2010, in the form of a joint workshop.<sup>348</sup> More recently, the Committee has identified whalewatching as an area of future regulatory interest, with this forum considered “ideally suited” to following-up the work of the Scientific Committee in this regard.<sup>349</sup> Thus far, and while it should be observed that the Conservation Committee remains at a preliminary stage in its operations and is seeking to develop long-term strategies for multifaceted problems, its primary contribution appears to be confined to further voluntary reporting by some of its members and in providing an additional platform for scientific and policy debate within the IWC. Nevertheless, a familiar tale of chronic underfunding and political distractions has largely characterised the brief tenure of the Conservation Committee to date. Indeed, while some encouraging projects are beginning to emerge in the context of ship-strikes, the overall initiatives thus far advanced may nonetheless represent a rather modest return on the heavy political cost of this institution.

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<sup>344</sup> *Report of the Conservation Committee*, at 2; reproduced as Annex H of the *Chair’s Report of the Fifty-Seventh Annual Meeting of the International Whaling Commission* (Cambridge: IWC, 2005).

<sup>345</sup> Indeed, at the inaugural meeting of the Conservation Committee, convened in 2004, a series of: *Report of the Conservation Committee*, at 3; reproduced as Annex H of the *Chair’s Report of the Fifty-Sixth Annual Meeting of the International Whaling Commission* (Cambridge: IWC, 2004).

<sup>346</sup> “Report of the Conservation Committee” (2005), at 3.

<sup>347</sup> *Report of the Conservation Committee*, at 2; reproduced as Annex G of the *Chair’s Report of the Fifty-Eighth Annual Meeting of the International Whaling Commission* (Cambridge: IWC, 2006).

<sup>348</sup> *Report of the Conservation Committee*; Document IWC/61/Rep5, at 5.

<sup>349</sup> *Chair’s Report of the Fifty-Ninth Annual Meeting of the International Whaling Commission* (Cambridge: IWC, 2007), at 97. This was further noted at the following meeting: *Chair’s Report of the Fifty-Eighth Annual Meeting of the International Whaling Commission* (Cambridge: IWC, 2008), at 106.

Beyond these political considerations, environmental issues have been primarily examined through the Scientific Committee, and, more specifically, a Standing Working Group on Environmental Concerns (SWGEC), established in 1996, alongside the Conservation Committee. Although the Scientific Committee has considered reports regarding habitat-related issues since 1972, concerns over wider anthropogenic pressures on cetaceans were first acknowledged by the IWC in 1980, noting that “the survival and health of whale populations is dependent upon maintenance of a healthy marine and coastal environment”, and calling for parties to “take every possible measure to ensure that degradation of the marine environment, resulting in damage to whale populations and subsequent harm to affected peoples, does not occur”.<sup>350</sup> Nevertheless, although a further Resolution in the following Meeting observed the “serious threat” to whale stocks from “increasing levels of heavy metals, PCBs and other organochlorides detected in cetaceans”,<sup>351</sup> no further substantive Resolution addressing such issues was adopted until 1992, at which point the Scientific Committee established the impact of environmental changes on whale stocks as a regular agenda item.<sup>352</sup>

In 1993 a series of Resolutions noted that “since 1982, scientific evidence has emerged regarding detrimental changes in the marine environment which may threaten whale stocks”<sup>353</sup> and observed that “the increasing evidence of degradation of the marine environment which threatens whales and other marine living resources and makes more difficult the attainment of the objectives of the International Convention for the Regulation of Whaling”.<sup>354</sup> By 1994, the Scientific Committee had identified global warming, ozone depletion, pollution, direct and indirect effects of fisheries and noise as key factors to be considered in the context of cetaceans and encouraged parties to cooperate to provide pertinent information on these issues.<sup>355</sup> In 1997, SWGEC identified eight “topics of particular importance” namely “climate/environmental change, ozone depletion and UV-B radiation, chemical pollution, impact of noise, physical and biological habitat degradation,

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<sup>350</sup> Resolution 1980-10: Resolution on the Habitat of Whales and the Marine Environment.

<sup>351</sup> Resolution 1981-7: Resolution Relating to Pollutants in Whales.

<sup>352</sup> Resolution 1992-2: Resolution on the Need for Research on the Environment and Whale Stocks in the Antarctic Region.

<sup>353</sup> Resolution 1993-12: Resolution on Research on the Environment and Whale Stocks. Here the Scientific Committee was requested to “give priority to research on the effects of environmental changes on cetaceans in order to provide the best scientific advice for the Commission to determine appropriate response strategies to these new challenges”.

<sup>354</sup> Resolution 1993-13: Resolution on the Preservation of the Marine Environment.

<sup>355</sup> Resolution 1994-13: Resolution on Research on the Environmental and Whale Stocks.

effects of fisheries, Arctic issues, disease and mortality events”.<sup>356</sup> To date, SWGEC has primarily concentrated on aspects of pollution, by-catches and habitat degradation and disturbance in discharging its operational remit.

With regard to pollution, concerns were initially raised in the context of the safety to human consumers of whale products, whereby the IWC undertook to develop closer links with the World Health Organisation to review this issue.<sup>357</sup> Since these developments, the IWC has essentially followed a dual policy in addressing pollution concerns, through research endeavours and facilitating cooperation with other pertinent bodies that may be better placed to deal with such issues. The Scientific Committee has primarily advanced its research agenda through the POLLUTION 2000+ project, which entailed an interdisciplinary programme of work to investigate the impact of pollutants upon cetaceans,<sup>358</sup> and through the Cetacean Emerging and Resurging Disease (CERD) group, established in 2007 to examine natural and pollution-induced diseases.<sup>359</sup> Particular emphasis has been placed on developing mutually supportive links with relevant bodies which is considered “essential”.<sup>360</sup> Most explicitly, the Commission has urged the parties to sign and ratify protocols on persistent organic pollutants and heavy metals adopted under the Convention on Long-Range Transboundary Air Pollution 1979,<sup>361</sup> and to “sign, ratify and adhere to” the Convention on Persistent Organic Pollutants 2001.<sup>362</sup>

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<sup>356</sup> Resolution 1997-7: Resolution on Environmental Change and Cetaceans.

<sup>357</sup> Resolution 1998-11: Resolution on IWC Concern about Human Health Effects From the Consumption of Cetaceans (noting “scientific evidence indicating that some Arctic communities are currently faced with the threat of organic contaminants and heavy metals from the consumption of certain cetacean products” and encouraging the WHO “and other appropriate agencies to put this issue on their own agenda”); Resolution 1999-4: Resolution on Health Effects from the Consumption of Cetaceans (calling on “relevant countries to take measures to reduce pollution that may cause negative health effects from the consumption of cetacean products”). While the latter Resolution established the impacts on health from the consumption of cetaceans as a permanent agenda item on environmental concerns, there has been no further substantive IWC Resolution on this issue to date.

<sup>358</sup> For a full review of the results of this research see P. J. H. Reijnders, A. Aguilar and G. P. Donovan (eds.), *Journal of Cetacean Research and Management, Special Issue 1: Chemical Pollutants and Cetaceans* (Cambridge: IWC, 1999).

<sup>359</sup> To date this group has examined pathogens, biotoxins and disease reports, with a view to establishing standardised databases to centrally collate the scattered array of national information on these issues: *Chair’s Report of the Sixtieth Annual Meeting of the International Whaling Commission, op. cit.*, at 29.

<sup>360</sup> Resolution 1995-10: Resolution on the Environment and Whale Stocks. This Resolution further directed the Scientific Committee to elaborate a list of multilateral bodies and cited ICES, IOP, UNEP and OSPARCOM as particular examples.

<sup>361</sup> Resolution 2000-6: Resolution on POPs and Heavy Metals. The Convention on Long-Range Transboundary Air Pollution is reproduced at 1302 UNTS 217.

<sup>362</sup> Resolution 2001-10: Resolution on the Stockholm Convention on Persistent Organic Pollutants (further noting that “the International Whaling Commission with its specific responsibility in the management and conservation of whale stocks may have a mutual interest in supporting the ratification of international treaties

As far as by-catches are concerned, the IWC has taken a key scientific, as opposed to regulatory, role. The Scientific Committee which, as noted above, has studied by-catches since the 1970s, has acted as a central repository for research reports. Small cetaceans are generally most susceptible to incidental capture, hence uncertainties over the IWC's competence have caused regulatory difficulties in this regard. By-catches were first considered in 1977,<sup>363</sup> where the Scientific Committee recommended that members submit an annual report on incidental and deliberate catches of all species of cetaceans.<sup>364</sup> The IWC convened a global workshop on incidental mortality in 1990 in La Jolla, USA, and subsequently considered by-catches through resolutions addressing small cetaceans.<sup>365</sup> The IWC has called for the effective monitoring of incidental catches<sup>366</sup> and promoted collaborative research activities.<sup>367</sup> By-catch information is also to be incorporated into the CLA for the future commercial quotas.<sup>368</sup>

Beyond general concerns about incidental mortality,<sup>369</sup> IWC practice has been to identify by-catch threats to particular stocks such as freshwater cetaceans,<sup>370</sup> right whales,<sup>371</sup> Dall's Porpoise,<sup>372</sup> grey whales,<sup>373</sup> and the vaquita.<sup>374</sup> However, despite this increased focus, a specific management committee on by-catches under the IWC umbrella continues to be rather conspicuous by its absence. Although a Working Group on Bycatch was established in 2001, this body is charged with examining the by-catch issue in the context of developing the RMP and does not explicitly address this problem as a threat to cetaceans *per se*.<sup>375</sup> Accordingly, unless and until a free-standing By-Catch Committee is established, the incidental mortality of cetaceans will be primarily examined by the Conservation Committee and the continuing research activities of the Scientific Committee.

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with overlapping concerns"). The Convention on Persistent Organic Pollutants is reproduced at (2001) 40 *International Legal Materials* 532.

<sup>363</sup> *Twenty-Seventh Report of the International Whaling Commission* (Cambridge: IWC, 1979) at 26.

<sup>364</sup> Resolution 1977-6 on Reporting Requirements for Small-Type Whaling.

<sup>365</sup> Resolution 1990-3 on Small Cetaceans; Resolution 1993-11 on Harbour Porpoise in the North Atlantic and Baltic Sea.

<sup>366</sup> Resolution 1997-4 on Cetacean Bycatch Reporting and Bycatch Reduction.

<sup>367</sup> Resolution 1997-8 on Small Cetaceans.

<sup>368</sup> Resolution 1998-2 on Total Catches over Time.

<sup>369</sup> Resolution 2001-4 on the Incidental Capture of Cetaceans.

<sup>370</sup> Resolution 2000-9 on the Conservation of Freshwater Cetaceans.

<sup>371</sup> Resolution 2000-8 on Western North Atlantic Right Whales.

<sup>372</sup> Resolution 2001-12 on Dall's Porpoise.

<sup>373</sup> Resolution 2005-3 on the Western North Pacific Grey Whale.

<sup>374</sup> Resolution 2007-5: the Vaquita, From Critically Endangered to Facing Extinction.

<sup>375</sup> Personal communication with Dr. Nicky Grandy, Secretary to the IWC, 6 October 2004 (on file).

Regarding habitats, aside from the broad recognition that “the destruction of coastal habitat may have a detrimental impact upon cetaceans”,<sup>376</sup> and the corresponding designation of two whale sanctuaries, such concerns have been generally accorded a relatively light treatment by the IWC. Despite the recognition of particular threats posed to identified stocks and species by ship strikes<sup>377</sup> and oil and gas exploration activities,<sup>378</sup> as with pollution concerns the broad response of the Commission has been to advocate further research and, where appropriate, to advocate participation within complementary specialised fora. This has been particularly true in the case of climate change, for which the IWC adopted its first specific Resolution in 2009, noting the “real potential for elevated risks of extinction” and appealing for “urgent action to reduce the rate and extent of climate change”.<sup>379</sup> The Resolution has further called on parties to incorporate climate change considerations into existing conservation and management plans, a departure to the previous IWC response of seeking further research activities and urging participation in international programmes to reduce greenhouse gas emissions.<sup>380</sup> Despite the vague commitment towards national action at the 2009 meeting, the Commission remains relatively poorly placed to address the threat to cetaceans from climate change, beyond the development of specific research projects and the application of political pressure upon its constituent members. Indeed, as observed by

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<sup>376</sup> Resolution 2001-11: Resolution on the Importance of Habitat Protection and Integrated Coastal Zone Management.

<sup>377</sup> Resolution 2000-8: Resolution on Western North Atlantic Right Whales, in which the IWC noted its concerns that “the two major causes of human-induced mortality for this species are ship strikes and entanglement in fishing nets and gear” and, in endorsing the results of three previous IWC workshops addressing this species, commended the development within the IMO of a mandatory ship reporting system and encouraged parties with an interest in navigation in these waters to “to pursue actively, practicable actions to reduce as far as possible ship strikes on right whales”. On the application of the IMO programme generally see J. P. Luster, “The International Maritime Organization’s New Mandatory Ship Reporting System for the Northern Right Whale’s Critical Habitat: A Legitimate Approach to Strengthening the Endangered Species Act?” (1999) 46 *Naval Law Review* 153.

<sup>378</sup> Resolution 2001-3: Resolution on Western North Pacific Gray Whale (stressing “that it is a matter of absolute urgency that every effort be made to reduce anthropogenic mortality to zero and to reduce various types of anthropogenic disturbances to the lowest possible level”); Resolution 2004-1: Resolution on Western North Pacific Gray Whale (noting the “deep concern” of the Commission that “the recovery and growth of the population appear to be hindered by a variety of biological difficulties and that the onset of oil and gas development programs is of particular concern with regard to the survival of this population” and calling on the Secretariat to act in an advisory capacity in this regard); Resolution 2005-3: Resolution on Western North Pacific Gray Whale (calling on range states “to take all practical measures to avoid all anthropogenic mortality, and in particular to develop and implement strategies to prevent accidental deaths”).

<sup>379</sup> Consensus Resolution on Climate and Other Environmental Changes and Cetaceans, Document IWC/61/16.

<sup>380</sup> *Forty-Seventh Report of the International Whaling Commission* (Cambridge: IWC, 1997), at 40. For a full discussion of the limitations of the IWC in addressing climate change issues see W. C. G. Burns, “Climate Change and the International Whaling Commission in the 21<sup>st</sup> Century” in Burns and Gillespie, “Future of Cetaceans”, at 339.

Gillespie, “this ‘urging’ is probably the only option available to the IWC”<sup>381</sup> given the limited scope of the Commission to address the root causes of global climate change, with such issues necessitating a more specialist and binding global regulatory response than the ICRW is in practice able to provide.

Likewise, as regards disturbance, the IWC has yet to adopt a substantive Resolution on ocean noise. Despite an early acknowledgment in 1981 of “the possible effects on whale stocks which may be caused by shipping and off-shore mining and drilling activities”,<sup>382</sup> to date, noise-producing activities have been evaluated primarily through SWGEC. As noted above, “noise” was expressly identified as an area of further study for the Scientific Committee, for which the clearest manifestation of collaborative research activity was the convening in 2006 of a Workshop on Seismic Surveys. More tangentially, the problems raised by whale-watching activities have been considered by the Scientific Committee, which in 1996 developed a concise series of guidelines to regulate these activities.<sup>383</sup> In practice, however, it has been observed that the Scientific Committee has been largely unable to follow up on its examination of whale-watching,<sup>384</sup> a shortcoming that is nonetheless mitigated by independent national action, given that a growing number of states have since developed localised guidelines and regulations in order to promote responsible practices.<sup>385</sup>

Overall, the IWC’s response to wider anthropogenic pressures upon cetaceans must be considered limited. Furthermore, on a practical level, concerns have also been raised over the ability of the IWC to fund such research effectively,<sup>386</sup> as well as political reticence by certain parties to accept a wider regulatory mandate in this regard.<sup>387</sup> Despite these practical and institutional difficulties, it may nonetheless be considered that the IWC could have a stronger role to play in addressing such broader concerns, both as a central “clearing house” for

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<sup>381</sup> A. Gillespie, “Environmental Threats to Cetaceans and the Limits of Existing Management Structures” (2002) 6 *New Zealand Journal of Environmental Law* 97, at 135.

<sup>382</sup> Resolution 1981-7.

<sup>383</sup> Reproduced on-line at <http://www.iwcoffice.org/conservation/wwguidelines.htm#manage> (last visited 31 August 2009).

<sup>384</sup> *Fifty-Ninth Report of the International Whaling Commission* (Cambridge: IWC, 2007), at 97; *Sixtieth Report of the International Whaling Commission* (Cambridge: IWC, 2008), at 106.

<sup>385</sup> Reproduced in C. Carlson, *A Review of Whale Watch Guidelines and Regulations around the World* (Cambridge: IWC, 2008).

<sup>386</sup> Burns, “Climate Change and the IWC”, at 366-68. Burns notes further that “[t]he IWC’s efforts to conduct critical cetacean research have been hobbled by the failure of its members to provide adequate funding” while efforts to obtain alternative finances through the trust funds characteristic of other multilateral environmental accords “have failed abjectly”: Burns, “Berlin Initiative”, at 82.

<sup>387</sup> Burns, “Berlin Initiative” at, 82.

scientific data, as well as potentially advancing a further political impetus in alternative fora. Indeed, notwithstanding the often beleaguered reputation of the IWC, the Scientific Committee remains an internationally-respected forum for debate on many of these issues. Moreover, given the role of cetaceans as potential “ecosystem sentinels”,<sup>388</sup> through which the effects of anthropogenic pressures on such species may constitute an indicative barometer of the health of the marine environment generally, the IWC accordingly retains considerable scope to contribute to the wider debate. The challenge for the Commission is therefore to galvanise its disparate members into maximising the potential of this institution in this regard, otherwise as Gillespie cautions, “the ultimate conservation of cetaceans may be decided elsewhere, not within traditional whaling debates”.<sup>389</sup> Whether the IWC will ultimately manage to achieve this depends to a considerable extent upon securing a broad consensus on the future direction of this body, an increasingly vexed issue to which this thesis now turns.

### 2.8.3 Future directions for the IWC

Finally, an enduring impediment to further IWC policies is a failure thus far to identify a defining ethos and direction for the Commission. The IWC has been considered close to implosion for a number of years,<sup>390</sup> with the Commission largely divided into two mutually antagonistic blocs, separated essentially by their views on the desirability of a long-term resumption of commercial whaling. In recent years, the membership of the IWC has become increasingly polarised as some parties have joined specifically to advance an intractably protectionist agenda within the Commission.<sup>391</sup> Moreover, parties with little historical interest in the whaling debate have also acceded to the Convention for less than orthodox reasons, as both blocs have sought to manipulate the numerical composition of the IWC via diplomatic pressure and latterly through “aid-diplomacy” or “vote-buying” in the form of structural inducements to support a particular position,<sup>392</sup> much to the chagrin of the Commission.<sup>393</sup>

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<sup>388</sup> S. E. Moore, “Marine Mammals as Ecosystem Sentinels” (2008) 89 *Journal of Mammalogy* 534.

<sup>389</sup> Gillespie, “Environmental Threats”, at 138.

<sup>390</sup> S. Holt, “Is the IWC Finished as an Instrument for the Conservation of Whales and the Regulation of Whaling?” (2003) 46 *Marine Pollution Bulletin* 924.

<sup>391</sup> For example, upon acceding to the Convention in 1985, the Indian government declared its motivation for membership of the IWC as being “to save this most fascinating and remarkable member of our planet’s living fraternity”: Letter to the IWC from Prime Minister Rajiv Gandhi, reproduced in D’Amato and Chopra, “Emerging Right” at 47. Likewise, as noted in Chapter VIII, the European Commission has urged the EU Member States to accede to the ICRW and to promote a broad pro-moratorium stance within the IWC.

<sup>392</sup> Japan has admitted to using “tools of diplomatic communication and promises of overseas development aid to influence members of the International Whaling Commission”: “Japan Accused of Whaling Bribes”, *The Times*, 18 July 2001. Likewise, Andresen observes that this tactic was seemingly pioneered by the anti-whaling lobby: “Making and Implementation of Whaling Policies”, at 439-40.

The comparatively welcome accession of self-confessed “peacemakers”, most prominently Ireland, which joined specifically to facilitate debate and consensus between the two camps,<sup>394</sup> has nonetheless exercised little discernible effect upon the long-term stability of the Commission.<sup>395</sup> These divisions are significant, as the modern regulatory direction of the IWC has ebbed and flowed according to the stated aims of its constituent members. This uncertainty also has considerable practical implications, both for the ability of the IWC to prescribe clear conservation leadership for cetaceans beyond its traditional quota-setting duties and, correspondingly, the degree of external supplementation required by alternative multilateral regimes to facilitate this broader objective. The precise operational role of the IWC in the Twenty-First Century therefore remains an issue of considerable debate and controversy.

This issue has been compounded in recent years by the adoption of two fundamentally conflicting and highly politicised Resolutions, which have each sought to readjust the regulatory direction of the Commission. In 2003 the Berlin Initiative was adopted by the parties, primarily to establish the Conservation Committee and to generate further finances to underwrite additional research, and to realign the emphasis of the IWC towards “an extensive conservation-orientated agenda”.<sup>396</sup> More significantly, the Berlin Initiative further observed that the Commission was “developing into a broad-based conservation organization whose focus now extends beyond the mere regulation of whaling, to address the multitude of threats that cetaceans face and will be facing to an increasing degree”.<sup>397</sup> It is contended that this is a desirable and logical progression for the IWC to follow in the modern era, away from the narrow quota-setting functions with which it is traditionally associated, towards a more proactive role in addressing emerging environmental threats that clearly pose a threat to whale stocks. Indeed, in principle, this could represent a desirable objective for the majority

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<sup>393</sup> Resolution 2001-1: Resolution on Transparency within the International Whaling Commission.

<sup>394</sup> Ireland commenced commercial whaling in 1940, although the industry subsequently lapsed. The *Dáil* ratified the ICRW in 1986 and, as observed by Symmons, was motivated to do so almost exclusively in anticipation of “playing a ‘balancing role’ between the conservationist and whaling states on the International Whaling Commission”: C. R. Symmons, *Ireland and the Law of the Sea* (Dublin: The Round Hall Press, 1993), at 12-13. For an overview of early Irish policies at the IWC see *ibid.*, at 151-53.

<sup>395</sup> Indeed, in 1997 an attempt to break the deadlock surrounding the further development of the RMS, the then Chair of the IWC and Irish Whaling Commissioner, Michael Canney, proposed a limited resumption of commercial harvesting, envisaged as occurring within the coastal areas of pertinent IWC parties: *Opening Statement of the Government of Ireland*, Document IWC/49/OS. The so-called “Canney Compromise” was nonetheless firmly rejected by all sides of the whaling debate: the anti-whaling bloc considered a resumption of commercial whaling to be ideologically repellent, while pro-whaling parties deemed the proposal to be an unacceptable restriction on rights of high seas fishing as established under the LOSC.

<sup>396</sup> Resolution 2003-1; *op. cit.*

<sup>397</sup> *Ibid.*, at Annex II.



of parties on both sides of the whaling debate, given that there is a vested interest in advancing improved conservatory measures for their own intrinsic value, as well as in furthering the operation of the RMS in respect of future commercial quotas. Nevertheless, considerable difficulties have ensued in seeking to establish this objective as an overall regulatory direction for the Commission.

The Berlin Initiative was highly contentious at the material time – due less to the specific establishment of a supplementary research and policy-development group than to the perceived preservationist implications of the (undefined) term “conservation” – and has remained a source of further rancour at subsequent Meetings.<sup>398</sup> Indeed, this acrimony culminated in the adoption of a controversial Resolution on “normalising” the IWC,<sup>399</sup> which was swiftly denounced by a considerable number of parties.<sup>400</sup> The so-called “normalisation” of the Commission, first advocated by Japan in 1985,<sup>401</sup> is not explicitly defined within the Resolution,<sup>402</sup> but appears to encompass a swift return to formal quota-setting, founded on the contentious and sweeping basis that “the moratorium which was clearly intended as a temporary measure is no longer necessary”, and eschewing “rule-making for emotional reasons” which is considered to set a “bad precedent”.<sup>403</sup> Likewise, the Resolution ultimately advocates the elaboration of “conservation and management measures which will allow controlled and sustainable whaling which would not mean a return to historic over-harvesting”. Some sentiments of the St. Kitts Declaration would clearly engender universal support, notably the need to prevent institutional implosion, the bolstering of the IWC’s scientific mandate and a rational and legitimate basis for decision-making. In many other

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<sup>398</sup> Indeed, Burns observes that the this endeavour might have constituted a decidedly Pyrrhic victory for the anti-whaling cohort, which “may ultimately come to view the passage of the Berlin Initiative as misguided, because it likely will not enhance the conservation status of cetaceans, while exacerbating the animus between the regime’s pro- and anti-whaling factions”: Burns, “Berlin Initiative”, at 82.

<sup>399</sup> Resolution 2006-1: St. Kitts and Nevis Declaration.

<sup>400</sup> *Chair’s Report of the Fifty-Eighth Annual Meeting of the International Whaling Commission* (Cambridge: IWC, 2006), at 65.

<sup>401</sup> Holt, “Whale Mining, Whale Saving”, at 210.

<sup>402</sup> Some debate occurred at the Meeting as to whether the term “normalisation” would have been more appropriately substituted with “modernisation”, given the considerable changes that had occurred in relation to whaling issues since the conclusion of the ICRW. This proposal was rejected on the rather circular logic that while “normalisation” was a rather inchoate concept, so too was “modernisation” and, more importantly from an administrative perspective, no such appeal for a change in terminology had been made during the earlier exchange of documents in advance of the Meeting: *Chair’s Report of the Fifty-Eighth Annual Meeting, op. cit.*, at 11. Therefore, and for quite unsatisfactory reasons, the term “normalisation” became entrenched within the final draft of this key IWC Resolution with minimal prior consideration of its meaning, scope or a potential alternative.

<sup>403</sup> Resolution 2006-1.

respects however, the Resolution, tabled by Japan,<sup>404</sup> appears to be little more than a vehicle for some of the more contentious Japanese policy claims. This is particularly true given the stated commitments towards cultural whaling and, especially, the unequivocal assertion by the Resolution that “scientific research has shown that whales consume huge quantities of fish making the issue a matter of food security”,<sup>405</sup> a polemical claim that cannot be objectively viewed as carrying universal endorsement.<sup>406</sup>

The deliberations over the adoption of the St. Kitts Declaration revealed three potential adjustments to the *status quo* within the IWC: the “normalisation” advocated by Japan and subsequently established in Resolution 2006-1, “modernisation” as advanced by Australia in response to the Japanese submission, and a further Swedish proposal for “harmonisation”. Such concepts are currently at an embryonic stage and generally lack substantive definition. Japan has remained coy as to the precise meaning of “normalisation”, which appears to encompass the allocation of sustainable quotas based upon the application of the Convention and “other relevant international law”, with particular emphasis on cultural values and the rights of coastal peoples. However, such assertions in the St. Kitts Declaration generally lack further elaboration, with little indication of precisely what is envisaged by the spectrum of rights claimed or the normative background deemed pertinent to the “normalisation” process. Some discussion of the elements of “sustainable use” has been tentatively advanced, encompassing sustainable quotas calculated by “an RMP-like or other appropriate methodology”, combined with enforcement measures, reporting requirements, trade restrictions and voluntary DNA registries.<sup>407</sup> Nevertheless, while many of these proposed components of “sustainable use” are non-controversial (beyond, of course, the principle of a resumption of commercial whaling), and are in fact advocated under the RMS, the ambiguity surrounding possible alternatives to the RMP is likely to prove contentious, while critics of “normalisation” would also note an absence of further environmental conservation measures beyond numerical caps upon quotas as a point of concern.

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<sup>404</sup> Document IWC/58/12, *Normalizing the International Whaling Commission*; Agenda Item 19 of the Fifty-Eighth Annual Meeting of the Whaling Commission, submitted by Japan.

<sup>405</sup> Interestingly, the latter claim towards scientific research fails to provide a preceding adjective such as “credible”, “extensive” or “recognised” as is common in the Resolutions of other multilateral agreements when justifying a policy based on science and, unlike the Berlin Initiative, the St. Kitts Declaration eschews an Annex within which to substantiate such claims.

<sup>406</sup> Indeed, as Donohue observes, the Scientific Committee remains sceptical towards such claims and “[w]hile this argument may appear to have some superficial logic, its scientific basis is questionable”: Donohue, “Whales – The New Scapegoat”, at 384.

<sup>407</sup> Document IWC/58/12.

The remaining two proposals, “modernisation” and “harmonisation”, may yet prove to be two sides of the same broad conservation coin. “Modernisation” is perhaps the least defined of the three and appears to be a relatively spontaneous term in response to the St. Kitts concept, subsequently embraced by a number of opponents to “normalisation”, and entails updating the ICRW in the light of pertinent international measures adopted since the conclusion of the Convention. The Swedish delegation nonetheless rejected both formulations and preferred an alternative concept to “harmonise the 1946 Convention with current thinking about conservation and the sustainable use of marine resources in today’s society as well as with a number of more recently agreed conventions”.<sup>408</sup> The distinction between the Australian proposal and the Swedish initiative – which also involves viewing the Convention in the context of (unspecified) contemporary developments – appears largely tonal, with the latter concept reflecting the need to mitigate the collective discord between the parties and to adopt a more conciliatory umbrella term for the reform process. The prolonged discussions over terminology, however, demonstrate that the semantics of the process and the precise nomenclature of the new direction of the Commission may yet prove to be of considerable political significance.

Irrespective of whichever concept the IWC ultimately chooses to embrace it is clear that the Commission will necessarily move beyond the original letter of its constituent Convention, either to introduce ecosystem-based culls as advocated by the St. Kitts Declaration, or to reinforce its regulatory mandate in line with modern international environmental law. The practice of the IWC reveals some evidence of flexibility in approach to its mandate where confronted with novel issues.<sup>409</sup> For instance in 1977, the Commission sought to impose a prohibition on certain aboriginal quotas, although the ICRW was silent on whether such a power existed. Independent legal advice received by the Commission suggested that this policy would be *intra vires*, a conclusion that was largely unchallenged by the parties.<sup>410</sup> Two years later, concerning attempts to impose an enhanced degree of IWC scrutiny over scientific permits, further legal advice considered that a treaty establishing a decision-making organ with specific regulatory functions should be treated as a “‘dynamic’ instrument, akin to a Constitution in a State, capable of adaptation to changing circumstances by a process of

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<sup>408</sup> *Chair’s Report of the Fifty-Eighth Annual Meeting*, at 63.

<sup>409</sup> P. Birnie, “Are Twentieth-Century Marine Conservation Conventions Adaptable to Twenty-First Century Goals and Principles? Part I” (1997) 12 *International Journal of Marine and Coastal Law* 307, at 331.

<sup>410</sup> Birnie, “Twentieth-Century: Part II”, at 495.

interpretation rather than as a static statement of rights and duties the content of which is fixed and unchangeable”.<sup>411</sup> Nevertheless, it is also apparent that enthusiasm within the IWC for an expansively autonomous approach is far from unanimous, and has steadily diminished as applied to some of the more controversial facets of Commission practice, not least in the context of small cetaceans, scientific catches, sanctuary arrangements and, latterly, “food security” concerns and cultural whaling.

Notwithstanding the ongoing elaboration of all three proposed concepts, it would appear that the Swedish articulation of “harmonisation” – insofar as it may be tentatively distinguished from “modernisation” – would most closely encapsulate modern principles of treaty interpretation and recent judicial moves towards viewing such instruments within their wider normative context.<sup>412</sup> In recent years, international adjudicatory bodies have noted with increasing frequency that the traditional rule of inter-temporality is subject to considerable qualification and that treaties are not hermetically sealed against the shifting landscape of international law. Such a position has been clearly – and not unpredictably – observed in the context of peremptory norms,<sup>413</sup> and, increasingly, towards other pertinent rules of international law.<sup>414</sup> Indeed, mindful that “[w]hat might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of

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<sup>411</sup> D. W. Bowett, QC, *Legal Opinion on Two Questions Concerning the Interpretation of the 1946 Convention*; reproduced in Bowman, “Normalizing the IWC”, at 350.

<sup>412</sup> Such an approach applies essentially where the instrument in question largely defies a definitive interpretation from its individual provisions, in which case the principle of “systemic integration” has been increasingly deployed. This approach entails the recognition that, while particular treaties may constitute *lex specialis*, they nonetheless remain a constituent component of an overarching system of international law. Accordingly, in the absence of contrary intention within the treaty – and presuming that any purported derogation would in fact be legally acceptable – the treaty ought to be interpreted in the light of the pertinent rules of international law. Systemic integration is most explicitly evidenced in Article 31(3)(c) of the VCLT, which provides that a treaty may be interpreted in the context of “any relevant rules of international law applicable in the relations between the parties”. For an excellent appraisal of the development of this interpretive concept see C. McLachlan, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention” (2005) 54 *International and Comparative Law Quarterly* 279; see also M. Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission* (Geneva: United Nations, 2006), especially 206-32.

<sup>413</sup> *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America) [2003] ICJ Rep 161, at 181 (noting that “[t]he Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court”).

<sup>414</sup> On this issue generally see P. Sands, “Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law” in A. Boyle and D. Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 2001), at 39.

justice if prescribed in 1997”,<sup>415</sup> it has been observed that as a matter of practice, “[l]est it produce anachronistic results that are inconsistent with current international law, a tribunal must certainly engage in *actualisation* or contemporization when construing an international instrument that was concluded in an earlier period”.<sup>416</sup>

The wider normative context is considered especially pertinent where the subject matter of the treaty is expressed in generic terms<sup>417</sup> and is broadly evolutionary in nature<sup>418</sup> in the sense that it either expressly<sup>419</sup> or by implication<sup>420</sup> requires interpretive adjustment over time. Such matters are inherently subjective, although it seems relatively clear that a concept such as the “proper conservation of whale stocks” should be treated in this manner, since the conservation needs of stocks will alter significantly over time based on the identification of emerging environmental pressures and in the light of further research. Indeed, evolutive interpretation has been consistently applied in previous disputes in which technological developments affecting the subject matter of the treaty in question could not have been envisaged at the time of its conclusion.<sup>421</sup> Such a perspective could clearly apply to the

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<sup>415</sup> *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia) [1997] ICJ Rep 7, at 76.

<sup>416</sup> *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland v. UK); reproduced on-line at [www.pca-cpa.org](http://www.pca-cpa.org) (last visited 31 August 2009), at para 103 (emphasis present within the original text of the Award).

<sup>417</sup> *Aegean Sea Continental Shelf case* (Greece v. Turkey) [1978] ICJ Rep 3, at 32 (noting that “the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time”).

<sup>418</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 (noting “[e]vents subsequent to the adoption of the instruments in question should also be considered ... Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – “the strenuous conditions of the modern world” and “the well-being and development” of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the “sacred trust”. The parties to the Covenant must consequently be deemed to have accepted them as such ... the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”: at 30-31.

<sup>419</sup> *Case Concerning the Gabčíkovo-Nagymaros Project* (noting that “[i]n order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing – and thus necessarily evolving – obligation on the parties to maintain the quality of the water of the Danube and to protect nature”: at 77-78).

<sup>420</sup> See *Report by the WTO Appellate Body in US – Import Prohibition of Certain Shrimp and Shrimp Products* (1999) 38 *International Legal Materials* 118 (noting that “[t]he words of Article XX(g), ‘exhaustible natural resources’, were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment ... we note that the generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’”: at paras. 129-30).

<sup>421</sup> *In the Arbitration Regarding the Iron Rhine (IJzeren Rijn) Railway* (Belgium v. The Netherlands); reproduced on-line at [www.pca-cpa.org](http://www.pca-cpa.org) (last visited 31 August 2009), noting that “it seems that an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and

changing anthropogenic uses of the oceans, for which the IWC and similar institutions have noted with increasing concern the adverse implications for the conservation status of cetaceans. Whether the same is true of the notion of ecosystem-based culls, which seemingly promotes neither of the ICRW's core objectives – indeed, facilitating anthropogenic removals to promote the orderly development, in essence, of undetermined *fishing* industries – remains rather questionable.

Although there appears in principle to be a strand of unanimity between the three proposed concepts of “normalisation”, “modernisation” and “harmonisation” – supported by judicial trends in treaty interpretation – that the IWC should operate “based on the terms of the ICRW and other relevant international law”, it is nonetheless difficult to identify precisely which external international laws should be applied. There is no shortage of normative candidates. Indeed, since the inception of the IWC, there have been two codifications of the law of the sea and an unprecedented degree of regulatory activity towards the elaboration of overarching environmental principles, which has heavily influenced the development and operation of subsequent resources-based treaties. Despite their general influence, however, many such principles have experienced a somewhat twilight existence, in that they are considered desirable components of national and multilateral instruments addressing marine environmental concerns, yet it remains a matter of particular uncertainty as to whether they have attained customary or peremptory status within the international legal order and can therefore be classed as “rules” in this respect.<sup>422</sup>

The distinction between rules and “mere” principles is significant, as tribunals have proved markedly reluctant to apply evolving environmental concepts in their adjudication of disputes. Indeed, while noting that new rules of international environmental law “have to be taken into consideration and such new standards given proper weight”,<sup>423</sup> they are seemingly relevant only to treaty interpretation where they have formally acquired the status of rules.<sup>424</sup>

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purpose, will be preferred to a strict application of the intertemporal rule”: at para 80). The Panel further observed that this approach had been taken in municipal law in the context of submarine cables in a previous Dutch dispute: *The Netherlands (PTT) and the Post Office (London) v. Ned Lloyd*; reproduced at (1987) 74 *International Law Reports* 212.

<sup>422</sup> For an excellent discussion of the regulatory trajectory of emergent environmental concepts see N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford: Oxford University Press, 2005).

<sup>423</sup> *Case Concerning the Gabčíkovo-Nagymaros Project*, at 78.

<sup>424</sup> *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention* (noting that “the Tribunal has not been authorized to apply ‘evolving international law and practice’ and cannot do so” and that in

Indeed, as Sands observes, “[i]t is only after the existence, relevance, and applicability of a customary norm has been recognized by an adjudicatory body that its precise impact upon the interpretation of a treaty falls to be determined”;<sup>425</sup> the implication of the converse position being that a concept deemed to carry a lesser normative weight is excluded from express consideration in treaty interpretation. This has led to a tentative process of identifying on a case-by-case basis the principles that may be considered to have evolved to the extent that they may support such interpretative status. To date, aspects of the concept of sustainable development<sup>426</sup> and the duty to mitigate harm caused by development projects<sup>427</sup> have been so regarded, but considerable reluctance has been expressed towards extending the same status to the “polluter pays” principle<sup>428</sup> and in providing definitive recognition for the precautionary principle as a rule of international law.<sup>429</sup> Thus far, the only principle to have been explicitly advocated for consideration within the particular context of the ICRW is that of ecosystem management, which the St. Kitts Declaration boldly considers “has now become an international standard”. However, it is highly questionable whether an international tribunal would endorse this sentiment, as ecosystem management rather exemplifies the type of principle that remains conceptually attractive yet legally amorphous, and thereby less suggestive of a firm rule in a manner similar to current judicial perceptions of the “polluter pays” approach. In the meantime, a degree of “principle shopping” remains

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expressing the need to consider new international rules in the *Gabčíkovo-Nagymaros* case, the ICJ “was not proposing that it – and arguably other international tribunals – had an inherent authority to apply law *in statu nascendi*”: at para. 101). Moreover, Article 31(3)(c) of the VCLT specifically uses the term “rules of international law” (emphasis added) as opposed to mere concepts or principles.

<sup>425</sup> Sands, “Cross-Fertilisation of International Law”, at 57.

<sup>426</sup> *Case Concerning the Gabčíkovo-Nagymaros Project* (stating “[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river”: at 78).

<sup>427</sup> *In the Arbitration Regarding the Iron Rhine (IJzeren Rijn) Railway*, (observing that “[t]his duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties”: at para. 59).

<sup>428</sup> *Case Concerning the Auditing of Accounts between the Kingdom of the Netherlands and the French Republic Pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976*; reproduced on-line at [www.pca-cpa.org](http://www.pca-cpa.org) (last visited 31 August 2009), stating that “[l]e Tribunal observe que ce principe figure dans certains instruments internationaux, tant bilatéraux que multilatéraux, et se situe à des niveaux d’effectivité variables. Sans nier son importance en droit conventionnel, le Tribunal ne pense pas que ce principe fasse partie du droit international général”: at para 103.

<sup>429</sup> *EC Measures Concerning Meat and Meat Products (Hormones)* decision by the Appellate Body of the WTO; WT/DS48/AB/R, at para. 123. Precaution was also absent from a brief list of emerging principles considered potentially applicable to the development of customary international law by the Panel in the *IJzeren Rijn* Arbitration: *op. cit.*, at para. 58.

rather inevitable as the parties seek to further elaborate proposals for the revision process, based predominantly upon their political positions regarding the whaling issue.

Since the St. Kitts Meeting, a tentative process of *détente* has emerged within the Commission, which continues to shape the on-going search for a new direction for the IWC. Following the 2006 Meeting a series of bloc conferences were convened, with Japan holding a Conference on Normalisation in February 2007, the Pew Foundation following suit with a symposium on whale conservation in April 2007, with a similar event staged by the Latin American parties in December 2006.<sup>430</sup> This process, whereby like-minded parties have discussed their positions and tentatively examined grounds for compromise, has been complemented by a process of “Ocean Diplomacy”, agreed at the 2007 Annual Meeting with the appointment of a neutral Special Advisor to the IWC to canvass the views of all parties towards overcoming the current impasse within the Commission.<sup>431</sup> The parties subsequently agreed to convene a Steering Group to pursue discussions further,<sup>432</sup> which led to the establishment of a Small Working Group on the Future of the IWC, charged with “developing a package or packages for review by the Commission”.<sup>433</sup> At the first meeting of the Small Working Group, some thirty-three elements of importance to the parties were identified,<sup>434</sup> and subsequently divided into issues of controversy that needed to be addressed immediately, and less controversial matters that require resolution but do not threaten the short-term stability of the Commission.<sup>435</sup>

Considerable divisions between the parties remain, and there is a palpable air of realism regarding the absence of guarantees of success, yet there is an emerging sense that some of the acrimony that has dogged IWC Meetings for the past twenty years is beginning to ease as the parties have started to adopt a more inclusive and collaborative mentality to their deliberations. Although the precise articulation of a way forward for the beleaguered Commission remains elusive, and the nature of the subject matter renders further flashpoints

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<sup>430</sup> *Chair's Report of the Fifty-Ninth Annual Meeting of the International Whaling Commission* (Cambridge: IWC, 2007), at 26.

<sup>431</sup> In 2007 Professor Calestous Juma of Harvard University, a former Executive Secretary of the UN Convention on Biological Diversity, was appointed to this position.

<sup>432</sup> *Chair's Report of the Fifty-Ninth Annual Meeting*, at 31.

<sup>433</sup> *Chair's Report of the Sixtieth Annual Meeting of the International Whaling Commission* (Cambridge: IWC, 2008), at 8.

<sup>434</sup> *An Overview of the Elements/Issues Identified as Being of Importance to One or More Contracting Governments in Relation to the Future of IWC*; Document IWC/S08/SWG3.

<sup>435</sup> *Chair's Report of the Intersessional Meeting of the Commission on the Future of IWC*; Document IWC/61/7.



and faultlines virtually inevitable, it appears that – as of August 2009 – if further progress is to be forthcoming, the future direction of the IWC is most likely to be shaped as a broad package deal of measures, negotiated by consensus and requiring difficult political compromises by both sides of the whaling debate.

## 2.9. Concluding remarks

The whaling question remains one of the most emotive and divisive issues in the modern regulation of marine living resources. As Freidheim observes, “[t]he history of whaling is a record of extraordinarily rapacious behavior”.<sup>436</sup> The damage inflicted upon stocks by the wholesale overhunting of whales, which reached its peak in the early Twentieth Century, has been compounded by considerable limitations in the international management regimes established which, while highly innovative at the material time, have nonetheless proved deeply flawed in many key respects. The earliest initiatives of the 1930s failed to attract the participation of key whaling states, while important stock protection measures also failed to garner the support of the parties. The ICRW, which has in many respects operated as a prototype for modern natural resources treaties, has also suffered from serious limitations. Not only has the Convention itself proved subject to substantial loopholes, but its operative body, the IWC, has long been mired in controversy. In the early years of its existence the Commission proved largely ineffectual in establishing sustainable quotas, while the past thirty years has seen IWC meetings routinely degenerate into acrimony as the whaling issue has become heavily politicised. As the pro- and anti-whaling blocs of the IWC have reached an operational impasse, a regulatory vacuum has perpetuated. Despite considerable soul-searching and promising recent moves towards *détente*, a number of questions remain surrounding the precise role of the IWC in the Twenty-First Century and, thereby, the future international regulation of cetaceans.

In the first instance, there is a need to define a new ethos for the IWC, a task that is likely to prove highly challenging and one that necessitates difficult compromises on both sides of the political divide. It is increasingly clear that a blanket moratorium on the commercial hunting of all species of whales – which has never been fully operational given the application of loopholes within the Convention – and the right to life famously advocated by D’Amato and

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<sup>436</sup> Freidheim, “Moderation in the Pursuit of Justice”, at 352.

Chopra is becoming ever more untenable. While the D'Amato-Chopra thesis undoubtedly captured the *zeitgeist* within many ICRW parties at the material time, it is clear that, as noted in Chapter III of this thesis, such an intractable position will simply drive the most ardent of whaling nations away from global participatory regimes and towards exploring closed bespoke regional arrangements. It seems likely that a resumption of commercial whaling is now a question of “when” rather than “if”. To this end, the precise concept of the “sustainable use” of whales as advocated by key whaling states must be explored and defined more clearly, with input from the anti-whaling lobby. Moreover, if the anti-whaling bloc is to tentatively accept sustainable hunting, it must be accompanied by clear concessions on the part of the pro-whaling cohort, especially concerning welfare standards and more rigid controls over “scientific” whaling. Given the continued political difficulties inherent in redrafting the Convention or adopting a specific amending Protocol, it is likely that such issues – if successful – will emerge through a series of package negotiations in adjunct meetings of the IWC.

Secondly, and arguably most importantly, the precise remit of the IWC in respect of anthropogenic threats facing cetaceans beyond the traditional concerns of overhunting must be determined. Although such issues do not generally carry the same degree of political attention as commercial hunting, it is nonetheless clear that the survival of whales and other cetaceans will be increasingly determined not by catch quotas and associated bargaining, but in addressing the raft of more insidious pressures upon such species. At present, the ability of the IWC to do so effectively has been heavily compromised by political considerations. “Conservation” has long been viewed – by both sides of the political divide – as virtually synonymous with “preservationism”, which has undoubtedly hindered the development of regulatory activity beyond scientific research and on-going collaboration with similar organisations. There appear to be few fundamental legal barriers to a more explicit regulatory interest in such matters by the Commission. Indeed, it is becoming increasingly apparent that – in the view of a considerable proportion of its members – the IWC will have to develop effective institutional policies towards wider environmental issues if it is to fully advance the proper conservation of whale stocks, not least given the impact that such environmental factors will inflict upon future RMP calculations and, *ergo*, the orderly development of the whaling industry. Although the ICRW faces considerable limitations in seeking to foster practical solutions to what are essentially key global environmental concerns, such as climate change and pollution, that impact far beyond the narrow confines of the whaling regime, the

current lack of consensus within the Commission not only fails to provide conservation leadership in the specific context of cetaceans but also fails to harness the considerable political power of the IWC as a participant within the wider debate on these issues.

Finally, and allied to the need to define the wider environmental remit of the IWC, a particularly pressing issue remains the legal status of so-called “small cetaceans”. The widespread disagreement over the precise species coverage of the ICRW has perpetuated a supervisory lacuna for such species, for which there has long been “an obvious need for international regulation in some form”.<sup>437</sup> In the absence of a unanimous regulatory direction within the IWC, many such species are subject to an uncertain legal status and are essentially reliant upon specific regional arrangements and alternative multilateral provisions and national laws for explicit protection. In this respect, the policy pursued by the international community, beyond abortive attempts to reform the ICRW, has been to address small cetaceans and wider environmental threats on an *ad hoc* basis by default through alternative fora, with varying degrees of success. Accordingly, this thesis now proceeds to consider the practice and prospects of these alternative regimes as surrogate regulators of cetaceans.

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<sup>437</sup> Scarff, “Interdisciplinary Assessment”, at 380.

## **CHAPTER III**

# **INTERNATIONAL REGIMES FOR THE REGULATION OF CETACEANS: THE LAW OF THE SEA AND INTERNATIONAL BIODIVERSITY LAW**

### **3.1. Introduction**

Having identified the key deficiencies and debates within the ICRW regime, this thesis now proceeds to appraise the wider regulatory framework addressing cetaceans. Given the difficulties experienced within the IWC in seeking to advance global regulatory initiatives for such species, this Chapter aims to establish the scope for pursuing additional measures and policies through alternative regimes. In this respect three key regimes will be analysed, namely the pertinent rules of the law of the sea and the role of two key biodiversity-related treaties: the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>1</sup> and the Convention on Biological Diversity.<sup>2</sup>

This Chapter commences with an appraisal of the UN Convention on the Law of the Sea,<sup>3</sup> with particular attention to Articles 65 and 120, which provide a global mandate for states to work through appropriate organisations for the conservation, management and study of cetaceans. Moreover, this Chapter examines the scope for developing potential regulatory rivals to the IWC under Article 65, with specific reference to the North Atlantic Marine Mammal Commission (NAMMCO).

The theme of alternative regulation is continued throughout the remainder of this Chapter with an analysis of CITES, which has proved to be one of the key fora to which the contemporary debate on whaling has been displaced. This Chapter presents an analysis of the operation of CITES in respect of cetaceans and its contribution to the global regulation of whaling. Finally, this Chapter will consider the role of the CBD, the leading biodiversity treaty in terms of global profile and participation, in the regulation of cetaceans.

### **3.2 Cetaceans and the law of the sea**

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<sup>1</sup> 993 UNTS 243 [Hereinafter “CITES”].

<sup>2</sup> 1790 UNTS 79 [hereinafter “CBD”].

<sup>3</sup> 1883 UNTS 396 [hereinafter “LOSC”].

As previously observed, there is currently no global treaty that is universally accepted as definitively and exclusively regulating all species of cetaceans. Accordingly, the law of the sea provides an overarching framework for the regulation of marine living resources generally and is therefore of particular relevance for the international regulation of cetaceans. Nevertheless, as noted in Chapter II, customary international law has historically offered little explicit protection for marine mammals. Moreover, little ostensible basis was provided for the regulation of cetaceans under various codifying initiatives until the conclusion of the LOSC in 1982, which contains a number of key provisions specifically addressing these species.

### 3.2.1 *Early codifications of the law of the sea*

Historical endeavours towards the codification of the law of the sea<sup>4</sup> failed to establish a clear position with regard to cetaceans. The first such initiatives were instituted by the League of Nations in 1924. Despite Suárez's call for a "new jurisprudence"<sup>5</sup> for whales, the draft articles on the law of the sea presented at the 1930 Codification Conference were neither adopted, nor indeed did they advance any specific principles of cetacean conservation. Accordingly, prior to the inception of the ICRW, whaling and associated issues were instead regulated through the hybrid system of multilateral instruments and industry arrangements detailed in Chapter II.

In 1958, the first UN Conference on the Law of the Sea (UNCLOS I)<sup>6</sup> was convened in Geneva, resulting in the adoption of four codifying treaties,<sup>7</sup> none of which explicitly addressed cetaceans. Some broad obligations towards cetaceans may be distilled from the Convention on Fishing and Conservation of the Living Resources of the High Seas, which

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<sup>4</sup> For a concise overview of the codification process see R. R. Churchill and A. V. Lowe, *The Law of the Sea* (Manchester: Manchester University Press, 1999), at 13-22.

<sup>5</sup> Reproduced at (1926) 20 *American Journal of International Law: Special Supplement* 230, at 237.

<sup>6</sup> Given the wide range of nomenclature used by commentators (as well as by international organisations and subsequent treaties) in referring to the UN Convention on the Law of the Sea, this thesis follows the model adopted by the leading journals and treatises on law of the sea issues and therefore uses the term "LOSC" to denote the Convention and "UNCLOS" to represent the international conferences from which this instrument was ultimately derived: see W. R. Edeson, "Confusion over the Use of 'UNCLOS' and References to Other Recent Agreements" (2000) 15 *International Journal of Marine and Coastal Law* 413.

<sup>7</sup> Convention on the Territorial Sea and the Contiguous Zone, 516 UNTS 205 [hereinafter the "Territorial Sea Convention"]; Convention on the High Seas, 450 UNTS 11 [hereinafter the "High Seas Convention"]; Convention on the Continental Shelf, 499 UNTS 311 [hereinafter the Continental Shelf Convention]; and the Convention on Fishing and Conservation of Living Resources of the High Seas, 559 UNTS 285 [hereinafter the "Fishing Convention"].

sought to prevent the overexploitation of stocks by virtue of “cooperation through the concerted action of all the States involved”.<sup>8</sup> While the 1958 High Seas Convention had enshrined rights of freedom of fishing in these waters,<sup>9</sup> the Fishing Convention introduced a series of conservation measures in respect of high seas living resources, albeit predicated exclusively on anthropocentric requirements. Indeed, “conservation” under the 1958 Convention was considered “the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products”, with specific programmes advanced “with a view to securing in the first place a supply of food for human consumption”.<sup>10</sup> Accordingly, parties were under a duty to adopt or cooperate to develop such measures “as may be necessary for the conservation of the marine living resources of the high seas”.<sup>11</sup> In the context of whaling, such cooperation was pursued through the IWC which, as observed in Chapter II above, embraced and applied the MSY principle to its quota calculations throughout the 1960s and 70s. As noted previously, however, the data limitations concerning stocks at the material time were considered to have heavily undermined the effectiveness of this policy in the particular case of whaling.

The proliferation of maritime claims following the Second World War also had implications for international regulation. In the wake of the 1945 Truman Proclamation, in which the US asserted jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf beneath the high seas and contiguous to the national coast, a number of other states – especially in South America and Africa – declared claims over extended areas of the sea, largely to advance national fisheries interests. A small number of claims, notably those of Chile to a 200-mile fishing/whaling zone,<sup>12</sup> were primarily motivated towards the regulation of cetacean resources within their pelagic habitats.<sup>13</sup>

Following the 1958 Geneva Conferences, a number of coastal states began to formalise claims over economic resources in waters significantly in excess of the limits recognised under customary international law at the material time. Combined with emerging concerns

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<sup>8</sup> Preamble to the Convention; second recital.

<sup>9</sup> Article 2(2).

<sup>10</sup> Article 2.

<sup>11</sup> Article 1(2).

<sup>12</sup> On this issue generally see P. S. Kibel, “Alone at Sea: Chile’s Presencial Ocean Policy” (2000) 12 *Journal of Environmental Law* 43.

<sup>13</sup> F. Orrego Vicuña, *The Changing International Nature of High Seas Fisheries* (Cambridge: Cambridge University Press, 1999), at 37 (noting that this declaration was inspired by “the need to end exploitation of whales and to make available a limited number of species for the local industry”).

over the allocation of rights over mineral resources of the deep-sea bed and pressure from newly independent countries to re-evaluate the existing regime, the UN General Assembly undertook in 1970 to convene a further conference on the law of the sea.<sup>14</sup> UNCLOS III was convened in 1973 and culminated in the adoption on 30 April 1982 of the LOSC. The LOSC, which entered into force in November 1994, contains a number of specific – and not uncontroversial – provisions addressing marine mammals, which have considerable implications for the management of cetaceans both by states and international regulatory bodies.

### 3.2.2 *Cetaceans and the LOSC framework*

In assessing the role of the LOSC in the regulation of cetaceans, two key observations may be advanced at this juncture. In the first instance, the LOSC has provided a uniform basis for previously *ad hoc* 200-mile claims in the form of the exclusive economic zone (EEZ), which brings a considerable majority of cetacean habitats under the jurisdiction of coastal states. The relevant rules concerning the EEZ are therefore of central importance to the international regulation of cetaceans. Secondly, the need to conclude a treaty with universal appeal has rendered the various cetacean provisions of the LOSC light on substantive detail. As Birnie observes, Articles 65 and 120 are afflicted by “bland phrasing and latent ambiguities”,<sup>15</sup> which has generated discord over varying national interpretations of these commitments.

As had been previously recognised in the 1958 Territorial Sea Convention states retain exclusive sovereignty over cetaceans in their coastal habitats under the LOSC. Accordingly, where such species are located in the internal waters of a state, most commonly freshwater cetaceans in major navigable rivers, such as the river dolphins of the *Platanistoidea* family, or habitually resident within port areas and bays, such as the harbour porpoise, the strength or otherwise of applicable conservation measures is determined exclusively by the coastal state,

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<sup>14</sup> Resolution 2750 (XXV) of 17 December 1970: Reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening a conference on the law of the sea.

<sup>15</sup> P. W. Birnie, “Marine Mammals: Exploiting the Ambiguities of Article 65 of the Convention on the Law of the Sea and Related Provisions: Practice under the International Convention for the Regulation of Whaling” in D. Freestone, R. Barnes and D. Ong (eds.), *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006), at 278.

in line with any pertinent international commitments.<sup>16</sup> This is no abstract issue in the case of particularly threatened freshwater species, as the Yangtze River Dolphin was declared “functionally extinct” in December 2006, with a failure to regulate by-catches of critically endangered populations deemed to have facilitated the demise of this species.<sup>17</sup> Likewise, the regulation of cetaceans and their habitats in the territorial sea is also subject to the sovereignty of the coastal state,<sup>18</sup> while certain activities affecting such species in these waters by foreign vessels are precluded under the regime of innocent passage.<sup>19</sup>

Pelagic species and habitats are addressed under the regime of the EEZ and high seas. Within the EEZ,<sup>20</sup> the coastal state exercises sovereign rights “for the purpose of exploring and exploiting, conserving and managing” marine living resources,<sup>21</sup> for which the LOSC provides a broad framework for such activities under Articles 61 and 62. Although this framework is in practice heavily qualified by the operation of Article 65 which, as noted below, operates as *lex specialis* in the context of cetaceans, a series of pertinent commitments are nonetheless established. Primarily, under Article 61(2), the coastal state must take “proper conservation and management measures” to prevent over-exploitation, using the “best scientific evidence available to it”. Such measures are intended to maintain or restore harvestable populations at MSY level, “as qualified by relevant environmental and economic factors”.<sup>22</sup> Moreover, in discharging this obligation, states must consider the effects on species associated with or dependent upon hunted species,<sup>23</sup> thereby providing an explicit mandate to address by-catches and prey depletion of cetaceans. The EEZ framework requires the state to establish the total allowable catch of living resources<sup>24</sup> and, having determined the capacity of the national fleet to harvest such resources, may control access by foreign vessels

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<sup>16</sup> The exercise of exclusive sovereignty in these areas was established under Article 5(1) TSC and Article 2(1) LOSC, and recognised as a rule of custom by the International Court of Justice in the *Nicaragua* case [1986] ICJ Rep 14, at 111.

<sup>17</sup> S. T. Turvey *et al.*, “First Human-Caused Extinction of a Cetacean Species?” (2007) 3 *Biology Letters* 537.

<sup>18</sup> Article 1(1) TSC and Article 2(1) LOSC.

<sup>19</sup> Notably “wilful and serious pollution”, any fishing activities and unauthorised scientific research: Article 19(2) LOSC.

<sup>20</sup> The EEZ is defined in Article 55 as “an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention”. An EEZ “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”: Article 57. Shortly after the conclusion of the LOSC, the ICJ declared that the passage into customary international law of the EEZ concept was “incontestable”: *Libya/Malta Continental Shelf* case [1985] ICJ Rep 13, at 33.

<sup>21</sup> Article 56(1)(a).

<sup>22</sup> Article 61(3).

<sup>23</sup> Article 61(4).

<sup>24</sup> Article 61(1).



to any surplus.<sup>25</sup> In so doing, the coastal state shall consider the significance of the living resources to its economy<sup>26</sup> and may set conditions on exploitation that include *inter alia* by-catch mitigation requirements<sup>27</sup> and the use of observers.<sup>28</sup>

Additional requirements are established in the context of highly migratory species although, again, such provisions are broadly considered *lex generalis* to the *lex specialis* of Article 65.<sup>29</sup> In this regard, under Article 64 the coastal state and any other pertinent states fishing in the region for highly migratory species listed in Annex I to the Convention – which includes virtually all species of cetaceans<sup>30</sup> – shall cooperate directly or through appropriate international organisations to ensure their conservation and promote the objective of optimal utilisation. Where no such organisation exists, states involved in the harvest<sup>31</sup> of such species shall cooperate to establish a pertinent body and participate in its work.

In addition to these general requirements, under Article 56(1) states also exercise sovereign rights in relation to economic exploitation and exploration of these areas, including energy production. This has regulatory implications for offshore wind turbines and barrages, for which some concerns have been raised – most notably within the CMS, as observed in Chapter IV – over the displacement effect upon cetaceans of such appliances through noise and vibrations. States also exercise sovereign rights to explore and exploit the natural resources of the continental shelf,<sup>32</sup> and to regulate drilling thereon,<sup>33</sup> which has also generated concerns in respect of cetaceans and their habitats.

The EEZ regime also provides for additional controls by the coastal state, which may exercise jurisdiction over *inter alia* scientific research and the protection and preservation of

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<sup>25</sup> Article 62(2).

<sup>26</sup> Article 62(3). Accordingly, this may also concern the impact of such policies on any cetacean-watching industries.

<sup>27</sup> Article 64(4)(c).

<sup>28</sup> Article 64(4)(g).

<sup>29</sup> Birnie, “Exploiting the Ambiguities”, at 274.

<sup>30</sup> Annex I applies to seven broad families of cetaceans, as well as, somewhat confusingly, two species of “dolphin”, which are in fact fish (common and pompano dolphinfish).

<sup>31</sup> The term “harvest” is not defined in the LOSC, although an ordinary construction implies an intentional anthropogenic removal of individuals from a stock. Accordingly, in the context of cetaceans, this could extend to removals for trade purposes.

<sup>32</sup> Article 76(1).

<sup>33</sup> Article 81.

the marine environment.<sup>34</sup> Occasional controversy has been generated in the regulation of research projects. Most notably, lethal scientific research in Antarctica has provoked a dispute between Australia and Japan.<sup>35</sup> Generally speaking, however, coastal states have proved relatively supportive of (non-lethal) research activities within their EEZs, although cooperation has been revoked on occasion. In 2001 the UK withdrew access for Norwegian and Faeroese vessels to its EFZ, which had been scheduled to undertake sighting surveys as part of a flagship NAMMCO research project.<sup>36</sup> This move was subsequently “deplored” by NAMMCO as “counter-productive to the conservation and sustainable management of cetaceans in the area”,<sup>37</sup> although the continuing ban on access demonstrates the powerful effect – for good or ill – that the infrequent exercise of such powers may exert in practice.

Beyond the EEZ, a series of traditional freedoms apply on the high seas, which have been enshrined in the LOSC,<sup>38</sup> including fishing<sup>39</sup> and scientific research. Moreover, states are required to cooperate in the conservation and management of marine living resources<sup>40</sup> in establishing non-discriminatory measures to maintain or restore populations at MSY levels and to take into account associated or dependent species.<sup>41</sup> Nevertheless, as is the case with the EEZ, this general framework is qualified in respect of cetaceans, given that the obligations established under Article 65 apply *mutatis mutandis* to the high seas under Article 120. Accordingly, as observed by Orrego Vicuña, “[s]ince this approach also applies to whaling on the high seas, it follows that freedom of exploitation is no longer the prevailing principle of international law in this context”.<sup>42</sup>

### 3.2.3 Article 65 and the regulation of cetaceans

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<sup>34</sup> Article 56(1)(b). In addition to the exercise of jurisdiction over the protection of the marine environment in the EEZ under Article 56(1), a general obligation to “protect and preserve the marine environment” is incumbent upon all parties to the LOSC: Article 192.

<sup>35</sup> See R. Davies, “Enforcing Australian Law in Antarctica: The *HSI* Litigation” (2007) 8 *Melbourne Journal of International Law* 6.

<sup>36</sup> The North Atlantic Sightings Surveys were inaugurated in 1995, while a second phase of the project commenced in 2001.

<sup>37</sup> *North Atlantic Marine Mammal Commission: Annual Report 2001* (Tromsø: NAMMCO, 2001), at 19-20.

<sup>38</sup> Article 87(1).

<sup>39</sup> Although this is qualified by the operations of Article 87(2), which requires “due regard for the interests of other States in their exercise of the freedom of the high seas”.

<sup>40</sup> Article 118.

<sup>41</sup> Article 119.

<sup>42</sup> F. Orrego Vicuña, “The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use” in O. S. Stokke (ed.), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001), at 27.

Article 65 constitutes the key provision addressing cetaceans under the LOSC and proved to be a controversial issue during UNCLOS III, undergoing considerable redrafting throughout the course of the negotiations.<sup>43</sup> Throughout the negotiations, however, there was near unanimous support for the multilateral regulation of marine mammals to at least some degree, although considerable difficulties remained concerning the precise parameters of external control. Some states considered compulsory universal participation in a global regulatory body the optimal solution, while others advocated a more consensual approach.<sup>44</sup> Likewise, there was a wide divergence of views surrounding the jurisdictional reach of any overarching regulatory organisation, with some states arguing that it should be confined to the high seas, while others sought a mandate in respect of individual EEZs.<sup>45</sup>

Eventually, after considerable revision, the final version of Article 65 reads:

“Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.”

The final text is ambiguous in a number of respects and has accordingly generated sustained uncertainty since the conclusion of the LOSC. In the immediate aftermath of the UNCLOS III negotiations, contemporary commentators were initially perplexed by the relationship between this provision and Article 64, addressing highly migratory species. These initial difficulties were perhaps unsurprising, given that the two clauses were initially drafted in unison as a single Article and divided at a relatively late stage in the negotiations.<sup>46</sup> Despite

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<sup>43</sup> For a useful overview of the drafting history of Article 65 see K. S. Davis, “International Management of Cetaceans under the New Law of the Sea Convention” (1985) 3 *Boston University International Law Journal* 477, at 508-13.

<sup>44</sup> Birnie, “Exploiting the Ambiguities”, at 273.

<sup>45</sup> *Ibid.*

<sup>46</sup> Davis, “International Management of Cetaceans”, at 500. Accordingly, Davis considered that “[t]his creates a strong inference that article 65 merely modifies the management regime established in article 64”: *ibid.* Nonetheless, at the material time, there were also strong suggestions that the rules governing highly migratory species should be clarified further by removing all reference to cetaceans from Annex I and addressing such species in a stand-alone regime under Article 65: J. A. R. Nafziger, “Global Conservation and Management of Marine Mammals” (1980) 17 *San Diego Law Review* 591, at 610.



Canada has articulated an official opinion on this issue, considering that the obligation may be discharged by providing scientific and technical advice to pertinent international bodies.<sup>51</sup> Beyond this individual articulation, however, which should also be read in the light of the Canadian policy of non-membership of the IWC, it appears that the “work through” clause is largely indefinable. Indeed, it is perhaps easier to exemplify aspects of practice towards discharging this obligation – such as voluntary reporting of statistics by non-parties, attendance of meetings as an observer state, the designation of national focal points, participation by national scientists at institutionally-sponsored conferences and symposia – than to elucidate a precise operative threshold in unequivocal terms.

An issue of considerably greater perplexity in the modern interpretation of Article 65 has proved to be the precise role of the IWC in discharging commitments under the LOSC. In this regard, primary difficulties stem from the subsequent proliferation of regulatory bodies exercising functional competence over cetaceans in a manner highly unlikely to have been foreseen by the drafting team at the material time. The institutional plurality facilitated by the wording of Article 65 has therefore raised the provocative theoretical possibility that a state may eschew participation within the IWC, yet still fulfil its LOSC commitments in respect of the directed hunting of cetaceans through an “appropriate” alternative forum. Accordingly, as wryly observed by one senior Icelandic whaling official, “[t]he ‘s’ at the end of the word ‘organisations’ has therefore become one of the most famous individual letters in the field of the law of the sea”.<sup>52</sup>

It is at least relatively clear that the IWC was intended to exemplify an “appropriate organisation”, given the lack of an obvious global alternative for the conservation, management and study of cetaceans. Instead, the use of the plural “organisations” was seemingly reflective of concerns raised at the material time over wholesale by-catches of small cetaceans in key fishing areas for which, as noted in Chapter II, the IWC was divided on the issue of regulation. Indeed, reporting in 1980 on the final amendments to the draft of Article 65, the US delegation observed that the provision “preserves and enhances the role of the International Whaling Commission (or a successor organization) especially, but not exclusively, with regard to whales. It recognizes the role of regional organizations in the

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<sup>51</sup> T. L. MacDorman, “Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention” (1998) 29 *Ocean Development and International Law* 179, at 182.

<sup>52</sup> S. Ásmundsson, *Legal Aspects Regarding Whaling* (Reykjavík: Foreign Ministry of Iceland, 2006), at 3 (on file).

protection of marine mammals, which are often taken incidental to fishing operations”.<sup>53</sup> Particular reference in this regard was made to the work of the Inter-American Tropical Tuna Commission in the Eastern Pacific Ocean,<sup>54</sup> which represented the first concerted efforts by a regional fisheries management body to address incidental cetacean mortality. The term “organisations” therefore seems originally intended to provide a further mandate for the development of by-catch mitigation policies by the IATTC and any other interested fisheries management body.

Initial interpretations of this provision accorded a high degree of deference to the role of the IWC, to the extent that parties to the LOSC ought to be considered bound by the terms of the whaling convention and the policies of its constituent management organisation, irrespective of individual ratification of the ICRW.<sup>55</sup> A number of states have, however, expressly rejected this view, which has seemingly declined in prominence.<sup>56</sup> As noted in Chapter II, the IWC has interpreted this issue in the context of non-affiliated whaling, noting that the ICRW offers a clear avenue to discharge Article 65 commitments.<sup>57</sup>

### 3.2.4 NAMMCO and “appropriate” organisations

The most controversial aspects of the modern application of Article 65 encompass the concept of an “appropriate” organisation for the conservation, management and study of cetaceans and the extent to which an alternative forum to the IWC may fulfil this requirement. The LOSC prescribes no explicit criteria to qualify an organisation as “appropriate”, while few clues may be uncovered within the *travaux préparatoires* of the Convention, given that the drafters seemingly – and not entirely unreasonably – failed to

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<sup>53</sup> *US Delegation Report to the Third United Nations Conference on the Law of the Sea, Ninth Session (February 27-April 4 1980)*; reproduced in Davis, “International Management of Cetaceans”, at 512.

<sup>54</sup> *Ibid.*

<sup>55</sup> See, for instance, Davis, “International Management of Cetaceans”, at 481 (noting that “Article 65 defers to the IWC to set minimum conservation measures and makes IWC regulations binding upon the parties to the Convention in ways not countenanced in the ICRW”); see also J. P. Rosati, “Enforcement Questions of the International Whaling Commission: Are Exclusive Economic Zones the Solution?” (1984) 14 *California Western International Law Journal* 114, at 116 (noting that the effect of Article 65 “requires whaling states to cooperate with the IWC”) and S. Lyster, *International Wildlife Law: An Analysis of International Treaties Concerned with the Conservation of Wildlife* (Cambridge: Grotius, 1985), at 36 (noting “[t]he implication of Article 65, although some States dispute this, is that States must abide by the regulation of the IWC, whether or not they are Parties to the Whaling Convention, except where they adopt stricter domestic measures for the conservation of whaling”).

<sup>56</sup> Freeland and Drysdale, “Baleen Out the IWC”, at 19-20.

<sup>57</sup> Resolution 2000-2: Resolution on Whaling of Highly Endangered Bowhead Whales in the Eastern Canadian Arctic.

consider such a scenario. In practice there is little meaningful dissent to the identification of the IWC as *an* “appropriate organisation”, although the wording of Article 65, by accident or design, does not preclude the operation of multiple regulators in the pursuit of such objectives.

There is little global consensus regarding indicative criteria for an “appropriate organisation”. Moreover, as Burke observes, attempts at articulating a theoretical model for the purposes of Article 65, encompassing broad aspirational factors such as a conservationist orientation, suitable membership, an effective institutional structure, necessary competences and enforcement powers, sufficient funding and access to extensive and informed scientific data and advice, are of limited utility since “[t]here are very few, if any, international fishery organizations that meet all of these criteria”.<sup>58</sup>

Objective interpretations of Article 65 on a global basis are sporadic, and often raise more questions than answers. One influential articulation – albeit in soft law – is contained in the pertinent Chapter of *Agenda 21*,<sup>59</sup> which repeats Article 65 verbatim at various points in qualifying broad commitments to MSY principles.<sup>60</sup> Moreover, Paras. 17.62 and 17.89 observe that states recognise “[t]he responsibility of the International Whaling Commission for the conservation and management of whale stocks and the regulation of whaling pursuant to the 1946 International Convention for the Regulation of Whaling”. These paragraphs further recognise the work of the IWC Scientific Committee “in carrying out studies of large whales in particular, as well as of other cetaceans”, while the IATTC and ASCOBANS are explicitly recognised for the conservation, management and study of cetaceans and other marine mammals.

Nevertheless, this is of limited value in assessing organisations that have been developed since the adoption of *Agenda 21*. While the identification of ASCOBANS – a relative leap of faith, considering that the Agreement had yet to enter into force at the material time – suggests that ACCOBAMS would be likely to receive similar recognition on this basis, no reasoning is advanced for the selection of these regimes. A case may also be made for at least

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<sup>58</sup> W. T. Burke, “Whaling and International Law” in G. Pétursdóttir (ed.), *Whaling in the North Atlantic: Economic and Political Perspectives* (Reykjavík: University of Iceland Press, 1997), at 119.

<sup>59</sup> Chapter Seventeen: Protection of the Oceans, All Kinds of Seas, Including Enclosed and Semi-Enclosed Seas and Coastal Areas and the Protection, Rational Use and Development of their Living Resources.

<sup>60</sup> UN Doc. A/Conf.151/26 (1992); at paras. 17.47 and 17.76.

some recognition of CITES<sup>61</sup> and the CMS<sup>62</sup> in this manner. Likewise, the wording of *Agenda 21* in this regard remains non-exhaustive, merely indicating bodies “such as” the IATTC and ASCOBANS as relevant. Most confusingly, perhaps, *Agenda 21* is largely silent on the regulation of small cetaceans under the ICRW, omitting any reference to such species in endorsing the IWC and noting the work of the Scientific Committee in this regard. *Agenda 21* also provides scope for its relevant provisions to be read in a manner as to designate the IWC as appropriate for whales, with other organisations deemed more pertinent for small cetaceans. A subsequent declaration by the UN Office of Legal Affairs regarding its interpretation of Article 65<sup>63</sup> has proved equally vague, recognising the Food and Agriculture Organisation and UNEP as appropriate organisations, while merely reserving judgment over the possibility of recognising the claims of other bodies.

In practice, little controversy has arisen in the case of organisations for small cetaceans – which, as noted in subsequent Chapters, have largely prohibited directed hunting, thereby rather avoiding the protracted political conflicts that tend to cloud opinion on the legitimacy of other bodies. Instead concerns are most prevalent over the development of alternative fora with potential competences to set whaling quotas. A degree of regulatory competition to the ICRW has sporadically existed since its early years of operation, most notably in the form of the Permanent Commission for the South Pacific, which raised controversy in 1960s for setting regional whaling standards that were considerably more permissive than those of the IWC.<sup>64</sup> Currently, notwithstanding the establishment in 2000 of the Eastern Caribbean Cetacean Commission as an intergovernmental forum for whaling advocacy, as well as non-binding and more community-based institutions such as the High North Alliance and World Council for Whalers,<sup>65</sup> such concerns have been almost exclusively directed in the context of NAMMCO.

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<sup>61</sup> See A. Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Cheltenham: Edward Elgar, 2005), at 334-343.

<sup>62</sup> *Agenda 21* refers only to the CMS in this context *en passant*, as the parent convention of ASCOBANS, creating something of a “chicken and egg” scenario over the means by which an appropriate body may be generated.

<sup>63</sup> Reproduced at (1996) 31 *Law of the Sea Bulletin* 79.

<sup>64</sup> P. W. Birnie, *The International Regulation of Whaling: From Conservation of Whaling to the Conservation of Whales and the Regulation of Whale-Watching* (New York: Oceana Publications, 1985), at 230; see also Gillespie, “Whaling Diplomacy”, at 324.

<sup>65</sup> For a useful overview of this issue generally see H. S. Schiffman, “The Competence of Pro-Consumptive International Organizations to Regulate Cetacean Resources” in W. C. G. Burns and A. Gillespie (eds.), *The Future of Cetaceans in a Changing World* (New York: Transnational Publishers, 2003).

The formation of NAMMCO is commonly perceived as a cautionary tale regarding the uncompromising nature of whaling negotiations in the early 1990s.<sup>66</sup> Nonetheless, while disillusionment at IWC practices provided a significant political spur to the establishment of the organisation, in truth NAMMCO currently operates rather more to regulate stocks of seals and walrus and to address fisheries interactions within the region.<sup>67</sup> NAMMCO has been operational since 1992, although an official basis for the coordination of common policies within the region was established through a series of intergovernmental conferences convened between 1988 and 1992. These initiatives led to the adoption in 1990 of a Memorandum of Understanding, which created the scope to develop a formal management body to advance this process further.<sup>68</sup> In September 1992, the Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic<sup>69</sup> was signed between Iceland, Norway, Greenland and the Faroe Islands, thereby formally bringing NAMMCO into effect.

NAMMCO has the broad objective to “contribute through regional consultation and cooperation to the conservation, rational management and study of marine mammals in the North Atlantic”.<sup>70</sup> To this end, NAMMCO has advanced an extensive institutional structure, similar to the CMS subsidiary Agreements discussed in Chapters V to VI. The operative body of NAMMCO is the Council, which provides a platform for the study, analysis and exchange of information on marine mammals in the North Atlantic,<sup>71</sup> complemented by a Scientific Committee as a forum for expert advice,<sup>72</sup> with the Agreement administered by a small Secretariat.<sup>73</sup> Despite this prosaic structure, concerns have been raised by elements within the IWC by the role of Management Committees, created by the Council to “propose to their

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<sup>66</sup> See especially D. D. Caron, “The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures” (1995) 89 *American Journal of International Law* 154.

<sup>67</sup> G. Hovelsrud-Broda, “NAMMCO, Regional Cooperation, Sustainable Use, Sustainable Communities” in Burns and Gillespie, “Future of Cetaceans”, at 145-46. Nonetheless, the perception of NAMMCO as a “renegade group” within the IWC still broadly lingers: personal communication with Dr. Christina Lockyer, General Secretary to NAMMCO (on file).

<sup>68</sup> On the development and early operation of NAMMCO see A. H. Hoel, “Regionalization of International Whale Management: The Case of the North Atlantic Marine Mammals Commission” (1993) 46 *Arctic* 116, at 118-21; see also K. Sanderson, “The North Atlantic Marine Mammal Commission – In Principle and Practice” in Pétursdóttir, “Whaling in the North Atlantic”, at 67-69.

<sup>69</sup> Reproduced on the NAMMCO institutional website at [www.nammco.no](http://www.nammco.no) (last visited 31 August 2009).

<sup>70</sup> Article 2 of the NAMMCO Agreement.

<sup>71</sup> Article 4.

<sup>72</sup> Article 6.

<sup>73</sup> Article 7. Secretariat facilities are provided by Norway, with the operational base of NAMMCO situated within the Polar Research Centre at Tromsø.



members measures for conservation and management”,<sup>74</sup> which may potentially include setting catch quotas for cetaceans. A Management Committee for Cetaceans has been created under the auspices of NAMMCO, under which any future quotas in respect of whales would be set. Nevertheless, to date, the practice of NAMMCO has been to merely recommend through its Scientific Committee desirable numbers in respect of particular stocks of cetaceans, most notably humpback limits for Greenlanders, thereby assisting pertinent national bodies responsible for administering catches as opposed to setting official quotas under the Agreement.

Shortly after its inauguration, Norway asserted within the IWC that NAMMCO should be considered an appropriate organisation for the conservation, management and study of cetaceans.<sup>75</sup> Again, however, in the absence of objective criteria for the discharge of Article 65 obligations, it is difficult to state definitively whether this is in fact the case. Advocates of this view would emphasise a number of positive and promising initiatives advanced by NAMMCO to date, not least the development of hunting regulations and the establishment of a regional monitoring programme operational since 1998,<sup>76</sup> while significant scientific and research projects have also been conducted.<sup>77</sup> Nevertheless, considerable opposition remains, with opponents of NAMMCO raising concerns over the small number of actual states involved,<sup>78</sup> a perceived lack of resources<sup>79</sup> and, perhaps most significantly, constraints on participation with the original signatories exercising a right of veto over new members.<sup>80</sup>

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<sup>74</sup> Article 5(1)(a).

<sup>75</sup> *Forty-Third Report of the International Whaling Commission* (Cambridge: IWC, 1993), at 32.

<sup>76</sup> *Joint NAMMCO Coastal Scheme for the Hunting of Marine Mammals* (Tromsø: NAMMCO, 1997); reproduced on-line at [www.nammco.no](http://www.nammco.no) (last visited 31 August 2009).

<sup>77</sup> For an overview of these developments see Hovelsrud-Broda, “NAMMCO”, at 153-57.

<sup>78</sup> Indeed, notwithstanding recent developments within Greenland towards a greater degree of autonomy from Denmark, two of the four signatories to NAMMCO remain dependent territories, an issue that may affect the global credibility of the organisation given that “the parties *may* be too few to represent a viable management alternative as Norway and Iceland are the only two independent state-members”: S. Andresen, “NAMMCO, IWC and the Nordic Countries” in Pétursdóttir, “Whaling in the North Atlantic”, at 80 (emphasis present within the original text).

<sup>79</sup> Initial concerns were voiced by some authors at the time of the inception of the Agreement that NAMMCO “is a fledgling that lacks the resources and expertise of the IWC”: G. Rose and S. Crane, “The Evolution of International Whaling Law” in P. Sands (ed.), *Greening International Law* (London: Earthscan, 1993), at 179. Nevertheless, the intervening years have seen a steady improvement in this respect.

<sup>80</sup> Article 10(2) of the Agreement requires the consent of the existing signatories for any further members of NAMMCO. In the recent past Russia and Japan have attended various meetings as observers, while Canada has been consistently represented within NAMMCO for a number of years. Given the importance of the regulation of seal stocks in these waters, NAMMCO is “very eager” for Canada to join officially, but the Canadian authorities have thus far declined to sign the Agreement: personal communication with Dr. Christina Lockyer, General Secretary to NAMMCO (on file).

aspect of IWC practice. This position is further illustrated in the context of CITES, to which this thesis now turns.

### **3.3 The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973**

The elaboration of an instrument to address the detrimental impacts of international trade in specimens and products from stocks of vulnerable species was initially mandated by the IUCN in 1963. Further impetus towards was generated at the 1972 UN Conference on the Human Environment, where the Stockholm Action Plan called for the development of a convention “on export, import and transit of certain species of wild animals and wild plants”.<sup>89</sup> CITES was opened for signature in March 1973 and entered into force on 1 July 1975. It has since become one of the most widely-ratified multilateral environmental agreements to date with 175 current parties.<sup>90</sup>

As far as cetaceans are concerned, CITES represents a rather more specialised forum within the broader mosaic of pertinent regulatory regimes. CITES maintains a highly specific focus upon international trade; it is not therefore designed to provide an holistic framework to address the myriad threats to vulnerable species, as is the case with other regimes detailed in this thesis. Moreover, although cetaceans have attracted regulatory attention since the inception of the treaty CITES has historically been rather more preoccupied with endangered land mammals.<sup>91</sup> Nevertheless, CITES is worthy of closer consideration in the specific context of cetaceans for two main reasons. Firstly, it provides a framework to regulate the increasingly significant issue of cross-border trade in live specimens – almost exclusively involving small cetaceans – for aquaria and other tourist-based industries such as therapeutic “dolphin contact” activities. Secondly, CITES has consistently demonstrated that it has an important role to play alongside the IWC in regulating the trade in whale meat and related products.

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<sup>89</sup> Recommendation 99 of the Stockholm Action Plan, reproduced at (1972) 11 *International Legal Materials* 1416.

<sup>90</sup> As of 31 August 2009.

<sup>91</sup> See, for instance, M. J. Glennon, “Has International Law Failed the Elephant?” (1990) 84 *American Journal of International Law* 1; V. Karmo, “Protection of Endangered Gorillas and Chimpanzees in International Trade: Can CITES Help?” (1991) 14 *Hastings International and Comparative Law Review* 989; P. Sand, “Whither CITES? The Evolution of a Trade Regime on the Borderland of Trade and Environment” (1997) 8 *Journal of Environmental Law* 29.

Despite these clear roles for CITES within the general framework for the protection of cetaceans, complications have nevertheless been encountered in the discharge of both functions. In the first instance, the capture and transport of live cetaceans – including endangered species – has proved problematic to regulate in practice.<sup>92</sup> Indeed, a small but significant number of parties have become “hotspots” for export trade, due to the weak and permissive regulation of the activities of operators at the local level, for which CITES has experienced considerable difficulties in addressing. Secondly, since the establishment of the IWC moratorium on commercial whaling, aspects of this debate have become increasingly displaced to CITES. Although CITES has sought to maintain a close and harmonious relationship with the IWC, a number of parties have attempted to by-pass IWC restrictions on trade by seeking to dilute CITES protection for whale species and develop it as an alternative forum to promote the trade in whale meat and associated products.<sup>93</sup>

### 3.3.1 *Fundamental principles*

As with most biodiversity-orientated treaties, CITES recognises the intrinsic value of wild flora and fauna and seeks to protect it for the benefit of present and future generations.<sup>94</sup> To this end, CITES aims to facilitate international cooperation to safeguard against the over-exploitation of “certain species” through trade.<sup>95</sup> With regard to the concept of “trade” as recognised by CITES, two central issues ought to be observed at this preliminary stage. Firstly, as stated categorically in its preamble, CITES deals solely with “international” trade. CITES therefore has no application to the internal trade in cetaceans landed, processed and sold exclusively within the jurisdictional confines of an individual party. This position thereby provides no mandate to regulate the development of markets in certain coastal areas for cetaceans that have either been directly hunted or taken as by-catches in national waters. Internal trade is accordingly a matter exclusively for domestic law or, alternatively, for a union or regional trade agreement affecting customs boundaries.<sup>96</sup>

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<sup>92</sup> On this issue generally see S. J. Fisher and R. R. Reeves, “Global Trade in Live Cetaceans: Implications for Conservation” (2005) 8 *Journal of International Wildlife Law and Policy* 340.

<sup>93</sup> A. Gillespie, “Forum Shopping in International Environmental Law: The IWC, CITES and the Management of Cetaceans” (2002) 33 *Ocean Development and International Law* 17.

<sup>94</sup> Preamble.

<sup>95</sup> *Ibid.*

<sup>96</sup> Article XIV(3). In practice, this latter position will essentially apply only to Member States of the European Union which has, as discussed in Chapter VIII of this thesis, established a distinct Regulation addressing the trade in endangered species in order to give effect to the provisions of CITES within the common market: Council Regulation 338/97/EC of 3 March 1997 on the protection of species of wild fauna and flora by regulating trade therein [1997] *Official Journal* L61/1. As noted in Chapter VIII, specific provisions have been

Secondly, four broad concepts of “trade” are recognised under CITES, namely export, re-export, import and “introduction from the sea”,<sup>97</sup> of which the latter is most ostensibly connected with the use of cetaceans and derivative products. While the first three components of trade are relatively self-explanatory,<sup>98</sup> the concept of “introduction from the sea” has been a source of on-going controversy within CITES, especially given both the increasing volume of designations of marine species in recent years and the entry into force of the LOSC.<sup>99</sup> “Introduction from the sea” is defined within the Convention as “transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State”.<sup>100</sup> This concept is interpreted by CITES with reference to the LOSC, although this remains controversial in some quarters, especially among those parties that have yet to endorse the LOSC regime.<sup>101</sup>

Under Article II, CITES operates by listing protected species upon one of three Appendices according to their individual conservation status. Under Article II(1), Appendix I includes all species threatened with extinction which are or may be threatened by trade. Trade in these species is subject to “particularly strict regulation in order not to endanger further their survival and must only be authorised in exceptional circumstances”. At present twenty-one species of cetaceans are listed on Appendix I, predominantly the larger species of whales.

Appendix II addresses all species which “although not necessarily threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in

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introduced for the importation of cetacean products into the EU: Council Regulation (EEC) No. 348/81 of 20 January 1981 on common rules for imports of whales or other cetacean products [1981] *Official Journal* L39/1. On the application of CITES generally under EU law see W. C. Burns and C. T. D. Mosedale, “European Implementation of CITES and the Proposal for a Council Regulation on the Protection of Species of Wild Flora and Fauna” (1997) 9 *Georgetown International Environmental Law Review* 389. Although the implications for the trade in cetaceans and cetacean products is likely to be minimal, some concerns have been raised by the capacity of a number of more recent EU Member States to police the import of CITES-listed species which, by virtue of the operation of the EU common market, will permit such items to be freely traded within the Community upon entry: R. Parry-Jones and A. Knapp (eds.) *Country Profiles Compiled for the EU Wildlife Trade Enforcement Co-ordination Workshop, 25–27 October 2005* (London: DEFRA, 2005).

<sup>97</sup> Article I(c).

<sup>98</sup> “Export” and “import” are not defined within CITES, while “re-export” is stated simply to constitute the “export of any specimen that has previously been imported”: Article I(d).

<sup>99</sup> E. Franckx, “The Protection of Biodiversity and Fisheries Management: Issues Raised by the Relationship between CITES and LOSC” in Freestone, Barnes and Ong, “Progress and Prospects”, at 212-14.

<sup>100</sup> Article I(e).

<sup>101</sup> For instance, the Turkish delegation has expressed dissatisfaction with this formulation as a non-party to the LOSC: *Report of the Fifty-Seventh Meeting of the Standing Committee* (Geneva: CITES, 2008), at 12. Turkey is a significant export state of small cetaceans, especially bottlenose dolphins.

order to avoid utilisation incompatible with their survival”.<sup>102</sup> Additionally, species may be listed in Appendix II if they do not fulfil this criterion, but nevertheless require protection in order to bring trade in such species under effective control. To date, West Greenland populations of minke whales, Black Sea bottlenose dolphins and “all species” of cetaceans not currently listed in Appendix I have been listed in Appendix II. Accordingly, Appendix III – which permits parties to list additional species subject to national protection and requiring the cooperation of other parties to restrict trade<sup>103</sup> – has no practical application to cetaceans.

The cornerstone principle of CITES is that parties shall not trade in species listed in the Appendices “except in accordance with the provisions of the present Convention”.<sup>104</sup> To this end, the parties are to take “appropriate measures” to enforce CITES and prohibit trade in species in violation of the Convention, including legal penalties and the confiscation and repatriation of specimens.<sup>105</sup>

### 3.3.2 Institutional structure

CITES places a strong emphasis upon the establishment of national bodies to implement the Convention. Parties are required to designate national Management Authorities, which are charged with granting permits and certificates for the import and export of listed species, and Scientific Authorities, which are responsible for providing advice and guidance on the merit or otherwise of issuing such permits.<sup>106</sup> Accordingly, the practical efficiency of CITES depends to a substantial extent upon the resources and powers allocated to such Authorities by the individual contracting parties.

On a central level CITES has developed an innovative institutional structure. The key forum established under CITES is the Conference of the Parties (COP), convened on a biennial basis<sup>107</sup> and charged with reviewing the implementation of the Convention.<sup>108</sup> Two key tasks of the COP may be considered to be of particular relevance to cetaceans. Firstly, the COP is charged with considering amendments to the CITES Appendices;<sup>109</sup> this has given rise to

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<sup>102</sup> Article II(2).

<sup>103</sup> Article II(3).

<sup>104</sup> Article II(4).

<sup>105</sup> Article VIII(1).

<sup>106</sup> Article IX.

<sup>107</sup> Article XI(2).

<sup>108</sup> Article XI(3).

<sup>109</sup> Article XI(3)(b).

considerable acrimony between the parties in the context of large whales. Secondly, the COP is to make recommendations for improving the effectiveness of the Convention,<sup>110</sup> primarily through the adoption of Resolutions and Decisions. A number of Resolutions pertinent to cetaceans have been adopted to shape CITES policies both towards stocks of whales and the IWC itself.

The COP is supported by a Standing Committee, which operates effectively as an intersessional advisory body; its functions include *inter alia* providing general policy and operational direction to the Secretariat, preparing draft Resolutions for the COP and coordinating other essential committees.<sup>111</sup> Some consideration of cetaceans has been undertaken within this forum, such as the status of dependent territories regarding the trade in whale products.<sup>112</sup> Nevertheless, in recent years a rather more limited degree of attention has been focussed on cetaceans within the Standing Committee, as proceedings have been rather dominated by consideration of land mammals. The COP has also established separate specialist Committees to provide scientific and expert technical advices on plants and animals respectively. The Animals Committee exercises an advisory role in reviewing proposed amendments to the CITES Appendices, as well as other trade-related issues, and can undertake periodic reviews of CITES-listed species.<sup>113</sup> In this capacity, the Animals Committee may issue Recommendations to the COP and to the parties themselves; for instance, most recently Denmark and Canada were subject to a Recommendation regarding trade in narwhal products.<sup>114</sup>

The institutional structure of CITES is completed by a Secretariat, primarily tasked with providing administrative support, but also endowed with the power to make recommendations for the further implementation of the Convention and to “invite the attention of the Parties to any matter pertaining to the aims of the present Convention”.<sup>115</sup> These broad powers have not proved uncontroversial, and concerns have been raised that the Secretariat has a history of acting unilaterally and may be overly reliant upon donations from

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<sup>110</sup> Article XI(3)(e).

<sup>111</sup> Resolution Conf. 11.1: Establishment of Committees; Annex 1.

<sup>112</sup> *Report of the Fiftieth Meeting of the Standing Committee* (Geneva: CITES, 2004), at 24.

<sup>113</sup> Resolution Conf. 11.1, Annex 2.

<sup>114</sup> *Report of the Fifty-First Meeting of the Standing Committee* (Geneva: CITES, 2004), at 6.

<sup>115</sup> Article XII.

hunting interests, especially in relation to the ivory trade.<sup>116</sup> In the context of cetaceans, the Secretariat has also been criticised for its apparent willingness to enter into political bargains with certain key pro-whaling parties, in which it was seemingly prepared to endorse the official downlisting of particular species of whales from Appendix I to Appendix II in exchange for “zero quota” assurances on minke whales.<sup>117</sup> The Secretariat swiftly withdrew these comments in response to criticism by a number of parties, but such institutional difficulties are somewhat indicative of the controversy generated over the listing criteria for whales.

### 3.4 CITES and the trade in live specimens of cetaceans

The trade in live specimens of cetaceans is considered to have commenced in earnest in the 1960s, driven primarily by the popularity of charismatic marine mammals in aquaria and zoos.<sup>118</sup> The anthropogenic removal of individuals from stocks of cetaceans for the purpose of international trade is considered to pose a pressing conservation threat to particular species. Indeed, the IUCN Cetacean Specialist Group deems such removals as analogous to incidental or directed killing, given that “animals brought into captivity (or killed during capture operations) are no longer available to help maintain their natural populations”.<sup>119</sup>

The trade in live specimens is almost exclusively confined to smaller species – for instance the IUCN refers solely to “dolphins” in its appraisal of the issue.<sup>120</sup> Bottlenose dolphins are by some distance the most common subject of trade within the present-day industry.<sup>121</sup> Accordingly, depending on local population levels, the trade in live specimens constitutes a varying degree of risk to different stocks. Indeed, even the removal of small numbers of animals from endangered stocks that can ill-afford individual losses may have a substantial impact upon the ability of the population in question to regenerate. Accordingly, concerns have been raised over the impact of trade on particular species, including critically

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<sup>116</sup> R. Reeve, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (London: Earthscan, 2002), at 258-66.

<sup>117</sup> *Ibid.*, at 264. The controversy was raised by a draft document issued in advance of the Eleventh COP – a meeting which ultimately resulted in the further clarification of the CITES position on cetaceans: Notification to the Parties No. 1999/97, “Provisional Assessments by the Secretariat of Amendment Proposals”.

<sup>118</sup> Fisher and Reeves, “Global Trade in Cetaceans”, at 315-16.

<sup>119</sup> R. R. Reeves, B. D. Smith, E. A. Crespo and G. Notarbartolo di Sciara, *Dolphins, Whales and Porpoises: 2002-2010 Conservation Action Plan for the World’s Cetaceans* (Gland: IUCN, 2003), at 17.

<sup>120</sup> *Ibid.*

<sup>121</sup> Fisher and Reeves, “Global Trade in Cetaceans”, at 323-4.

endangered stocks of river dolphins,<sup>122</sup> bottlenose dolphins and the “substantial, and growing, demand” for Indo-Pacific hump-backed dolphins for aquaria throughout southern Asia.<sup>123</sup>

As noted above, all species of cetaceans have been listed on either Appendix I or II of CITES, and therefore qualify for protective measures under the Convention to mitigate the potential adverse impacts of international trade. The export of Appendix I species requires the prior grant and presentation of an export permit, which should be issued only where the national Scientific Authority has advised that export will be not be detrimental to the survival of the species in question, and the Management Authority is satisfied that the specimen was not obtained in contravention of national laws, that live specimens will be prepared and shipped in a manner as to minimise the risk of injury, damage to health or cruel treatment, and that an import permit has been granted.<sup>124</sup> Importation of an Appendix I species is also conditional upon the finding that it is not detrimental to the survival of the species; that the Scientific Authority of the importing state is satisfied that the recipient of a live specimen is suitably equipped to house and care for it; and that the Management Authority is satisfied that the specimen is not to be used for “primarily commercial purposes”.<sup>125</sup>

Of particular reference to Appendix I cetaceans is the application of Article III(5), which addresses the introduction from the sea of such species. This provision perhaps relates less to orthodox “international” trade, in the sense that a particular species is bartered between two separate CITES parties – although such a position would also be covered by the Convention within the standard import-export provisions. Instead, it operates to address the capture of specimens in areas beyond national jurisdiction – and technically not owned by any state – and the subsequent landing of that specimen within a CITES party, which might not otherwise have been caught by the provisions of the Convention if based on a simple model of importation and export between the individual parties.

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<sup>122</sup> Reeves *et al.*, “Dolphins, Whales and Porpoises”, at 43.

<sup>123</sup> *Ibid.*, at 47.

<sup>124</sup> Article III(2).

<sup>125</sup> Article III(3). This concept is defined as an activity undertaken “to obtain economic benefit, including profit (whether in cash or in kind) and is directed toward resale, exchange, provision of a service or other form of economic use or benefit”: Resolution Conf. 5.10: Definition of “primarily commercial purposes”. Nevertheless, this remains a rather amorphous term and the Resolution acknowledges that it “may be interpreted by the Parties in different ways”.



The regulation of trade in Appendix II species offers a considerably lighter touch to that in relation to Appendix I species. Regarding exports, the CITES criteria is materially similar to that for Appendix I species, except a permit may be granted without the need to produce a corresponding import permit.<sup>126</sup> Perhaps more significantly, for the introduction from the sea of Appendix II species there is no requirement that such specimens are not to be used for “primarily commercial purposes”, with the state of introduction obliged only to demonstrate that receipt of the specimen is not detrimental to the survival of the species and that the necessary care and accommodation will be provided for live specimens.<sup>127</sup>

Despite the application of Appendices I and II, CITES faces challenges in respect of its ability to effectively regulate the trade in live specimens of cetaceans, with particular reference to no-detriment findings and to animal welfare standards during capture and transportation.

#### *3.4.1 No-detriment findings*

“No-detriment” findings have provided considerable practical difficulties in the discharge of CITES commitments. The no-detriment requirement, or an equivalent regime, is considered by the IUCN to constitute a vital component of any supervisory system for the trade in cetaceans, which advises against removals “unless that specific population has been assessed and it has been determined that a certain amount of culling can be allowed without reducing the population’s long-term viability or compromising its role in the ecosystem”.<sup>128</sup>

Given the widespread uncertainty that surrounds the state of scientific knowledge of population numbers and conservation status of many species of cetaceans, it is in many instances extremely difficult to provide an accurate no-detriment finding. Indeed, the most recent version of the IUCN Red List, published in 2008,<sup>129</sup> listed over forty species of cetaceans as “data deficient”, including commonly traded species such as the Indo-Pacific bottlenose dolphin. That the data concerning the global status of a particular species are considered deficient need not necessarily provide an insurmountable impediment to trade under CITES. However, it is nonetheless clear that under such circumstances, the national

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<sup>126</sup> Article IV(2).

<sup>127</sup> Article IV(6).

<sup>128</sup> Reeves *et al.*, “Dolphins, Whales and Porpoises”, at 17.

<sup>129</sup> Reproduced on-line at [www.iucnredlist.org](http://www.iucnredlist.org) (last visited 31 August 2009).

Scientific Authority should have credible and accurate information to demonstrate objectively that the prospective removals will not harm the local stock or population, from which a no-detriment finding could be legitimately granted.

While the concept of “no-detriment” itself is not explicitly defined within the Convention, the parties have established that “the findings and advice of the Scientific Authority of the country of export be based on the scientific review of available information on the population status, distribution, population trend, harvest and other biological and ecological factors, as appropriate, and trade information relating to the species concerned”.<sup>130</sup> However, it has been observed with concern that “under-resourced, understaffed and, in some cases, non-existent or marginalized Scientific Authorities have long undermined the implementation of CITES”.<sup>131</sup> The non-designation of Scientific Authorities has been identified by the COP as a substantial impediment to the correct operation of CITES, given that the granting of permits by Management Authorities without an appropriate independent scientific appraisal “constitutes a lack of compliance with the provisions of the Convention and seriously undermines species conservation”.<sup>132</sup>

Moreover, where the requisite national institutions have been established, concerns have been raised that no-detriment findings have been issued on a relatively superficial basis, with little meaningful data and minimal research, meaning that some designations may constitute little more than a “rubber-stamping” exercise. Indeed, at the most recent meeting of the Animals Committee, Israel called for the Solomon Islands population of Indo-Pacific bottlenose dolphins to be included in the CITES review of significant trade, in a bid to introduce stronger controls over the routine exportation of considerable numbers of individual animals from a population of highly uncertain numerical and conservation status.<sup>133</sup> Supporting evidence for the Israeli submission noted that “[t]here have been no published dedicated scientific surveys of the distribution and abundance of *Tursiops aduncus* in the Solomon

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<sup>130</sup> Resolution Conf. 10.3: Designation and Role of the Scientific Authorities. It is envisaged by the IUCN that such a process in relation to cetaceans is highly rigorous and should also be subject to subsequent independent peer-review: “[s]uch an assessment, including delineation of stock boundaries, abundance, reproductive potential, mortality, and status (trend) cannot be achieved quickly or inexpensively, and the results should be reviewed by an independent group of scientists before any captures are made”: Reeves *et al.*, “Dolphins, Whales and Porpoises”, at 17.

<sup>131</sup> Reeve, “Policing International Trade”, at 152.

<sup>132</sup> Resolution Conf. 10.3.

<sup>133</sup> *Selection of the Solomon Islands Population of Tursiops Aduncus for Inclusion in the Review of Significant Trade*; Document 8.5.1 presented at the Twenty-Third Meeting of the Animals Committee, April 2008 (reproduced on-line at [www.cites.org](http://www.cites.org); last visited 31 August 2009).

Islands. This means it is impossible to evaluate the overall significance of the removal of these individuals from the wild”.<sup>134</sup> Accordingly, with little overall knowledge of the local population it would appear that the national Scientific Authority would be poorly placed to make a meaningful no-detriment finding, hence the validity of such permits might be considered somewhat questionable. While the Israeli submission was ultimately withdrawn,<sup>135</sup> a subsequent review of the Solomon Islands stock of Indo-Pacific bottlenose dolphins suggested strongly that further research on population levels was necessary,<sup>136</sup> although plans nevertheless remain in force to export up to 100 individuals per year.

Some limited scope exists to address these difficulties through the activities of the importing state. For Appendix I cetaceans, there is a clear obligation for the importing authority to also render a no-detriment finding prior to the grant of an import permit.<sup>137</sup> Therefore the possibility exists for an importing state to reject a permit application and subsequently confiscate and repatriate the specimen under the powers provided by Article VIII – although the practical and welfare benefits to the individual specimen in question are somewhat less apparent. For Appendix II cetaceans the regulatory onus is placed firmly upon the exporting state, since the importing state is only required by CITES to demand the prior production of a valid export certificate.<sup>138</sup> An importing party with concerns over the ecological provenance of a particular specimen would thereby presumably be required to rely upon relevant powers under national law – if, indeed, they exist – to address this situation.<sup>139</sup>

Nevertheless, CITES prescribes little obligation for a collaborative relationship between the states of origin and destination of a particular specimen – especially if (like the majority of cetaceans) it is listed on Appendix II of the Convention. Likewise, there is neither clarity nor uniformity of practice as to how disputes over the validity of an export permit for cetaceans

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<sup>134</sup> *Ibid.*, at 4.

<sup>135</sup> *Report of the Twenty-Third Meeting of the Animals Committee* (Geneva: CITES, 2008), at 16.

<sup>136</sup> R. R. Reeves and R. L. Brownell, Jr., *Indo-Pacific Bottlenose Dolphin Assessment Workshop Report: Solomon Islands Case Study of Tursiops aduncus. Occasional Paper of the Species Survival Commission No. 40* (Gland: IUCN, 2009). The authors concluded that for export activities to continue at the level sanctioned by the national Scientific Authority, local population levels would need to be at between 5000 to 10,000 individuals, although the data currently available indicated that abundance is “well below 5000”: at 33.

<sup>137</sup> Article IV(2)(a).

<sup>138</sup> Article IV(4). The rationale behind this appears to be that the issue of a valid permit or certificate “serves as a certification scheme for assuring that trade is not detrimental to the survival of the species in question”: Resolution Conf. 13.3: Permits and Certificates.

<sup>139</sup> Article XIV(1) permits the elaboration of stricter domestic measures than are provided under CITES, thereby providing in principle a regulatory basis for the importing state to impose a high standard of diligence in this respect.

are to proceed.<sup>140</sup> The concept of no-detriment findings is the subject of on-going consideration, pending an international expert workshop to further elaborate both the capacity and practice of national Scientific Authorities in this regard.<sup>141</sup> Accordingly, it is to be hoped that effective and informative guiding principles can be developed in a timely fashion to address many of these difficulties, otherwise the CITES regulation of live trade will be heavily undermined if unsustainable capture and harvesting practices remain entrenched within the system.

### 3.4.2 Animal welfare issues

A further challenge to the effective regulation of live trade is the highly variable nature of national practices, which may have particular implications for animal welfare considerations in respect of the capture and transportation of live specimens. For instance, the monitoring of live-capture programmes ranges from strict controls exercised over US capture fisheries,<sup>142</sup> to rather more *ad hoc* and illusory supervision experienced in other jurisdictions.<sup>143</sup> Moreover, certain hotspots of activity for live-capture operations can be identified and, as with the trade in other species subject to global conservation concern, “there seems to be a close correlation between local economic desperation (often as a result of civil strife, poorly managed resource exploitation, or geographic/climatic isolation) and the level of interest in selling cetaceans for profit”.<sup>144</sup> Accordingly, under such circumstances concerns may be raised that the monitoring and regulation of these activities is likely to be even more superficial. Despite these concerns, however, there appears at present to be minimal central guidance on live-capture issues – either within CITES or under the auspices of any other pertinent expert forum – which serves to contribute further to the current variability in national standards.

CITES is silent on the issue of acquisition of specimens for export purposes, beyond a general requirement for national Management Authorities to ensure that such specimens are “not obtained in contravention of the laws of that State for the protection of fauna and

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<sup>140</sup> Fisher and Reeves, “Global Trade in Live Cetaceans”, at 335 (observing that the matter of where the burden of proof should lie in such instances is highly uncertain).

<sup>141</sup> Decision 14.49, adopted at the Fourteenth COP.

<sup>142</sup> G. P. Scott, “Management-Orientated Research of Bottlenose Dolphins by the Southeast Fisheries Center” in S. Leatherwood and R. R. Reeves, *The Bottlenose Dolphin* (San Diego: Academic Press, 1990), at 623.

<sup>143</sup> For instance, concerns have been raised over the lack of regulation in Mexican and Cuban dolphin-capture industries: Reeves *et al.*, “Dolphins, Whales and Porpoises”, at 72.

<sup>144</sup> Fisher and Reeves, “Global Trade in Live Cetaceans”, at 337. The authors identify Cuba, Russia, Ukraine, Cambodia and Thailand as particular exponents of the export trade: at 336-38.

flora”.<sup>145</sup> There is therefore little obligation beyond the enforcement of standards voluntarily developed under national law to address welfare issues during live capture, nor any Convention-based mandate to develop or improve domestic standards. Moreover, there does not appear to have been any elaboration within COP Resolutions of the role of Management Authorities in this respect. As a result, unless and until some form of guidance is provided or endorsed by the CITES institutions, the high degree of national variability in live capture regulation currently experienced would appear likely to continue.

In contrast to the position regarding live-capture, there is significantly greater scope under CITES for the regulation of the physical transportation of live specimens. Indeed, there is a clear acknowledgement within the Convention that the national Management Authority of an exporting state must verify that “any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment”.<sup>146</sup> The on-going development of standards for the transportation of live specimens has long occupied a significant position on the CITES agenda, with Guidelines for Transport and Preparation for Shipment of Live Wild Animals and Plants adopted at the Second COP in 1979. In more recent years, a Working Group on the Transport of Live Animals has been established to address the practical difficulties inherent in the transit of live specimens. In this regard, mindful of the need to avoid a costly duplication or conflict of regulatory standards, CITES has operated less as a forum through which to elaborate technical measures, opting instead to endorse indicative guidance and models of best practice advanced by specialist transportation organisations.

CITES has emphasised the value of the Live Animals Regulations of the International Air Transport Association (IATA), with the parties recommended to take “suitable measures” in order to promote the “full and effective use” by national Management Authorities of these standards.<sup>147</sup> Given that the IATA Guidelines relate solely to air transportation, the parties have been directed to the Guidelines developed by the World Organisation for Animal Health (OIE) in respect of carriage by land and sea.<sup>148</sup> Nevertheless, the pertinent CITES Resolutions are articulated in hortatory and permissive terms, with parties “recommended”

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<sup>145</sup> Article III(2)(b) in respect of Appendix I species and Article IV(2)(b) in respect of Appendix II species.

<sup>146</sup> Article III(2)(c) in respect of Appendix I species and Article IV(2)(c) in respect of Appendix II species. Nevertheless, these provisions operate *ex post facto* to any live-capture operation and are again silent on welfare issues during the acquisition of the specimen.

<sup>147</sup> Resolution Conf. 10.21: Transport of Live Specimens.

<sup>148</sup> Decision 14.58, adopted at the Fourteenth COP.

and “encouraged” to adhere to these standards.<sup>149</sup> Accordingly, national practices for the transportation of live specimens of cetaceans are often highly variable.<sup>150</sup> The further aggregation and consolidation of transportation standards therefore remains a mid- to long-term project within the Animals Committee.<sup>151</sup> In the meantime, however, it appears that the most effective method of improving transportation conditions for live specimens of cetaceans may be through unilateral action by individual parties to ban imports from certain countries with poor welfare records until such standards improve, with the recent blacklisting of Russian exporters by the Argentinean authorities a pertinent example of this practice.<sup>152</sup>

### 3.5 CITES and the trade in whale products

Notwithstanding the problems raised by live specimens, the greatest degree of controversy encountered under the auspices of CITES in relation to cetaceans concerns the trade in whale meat and associated products. CITES is the specialist global forum governing the trade in endangered and vulnerable species and, with all species of cetaceans having been listed in its Appendices, the Convention clearly has a key role to play within the wider regulation of the commercial exploitation of whale stocks. CITES policies towards whales are therefore of significant interest to the IWC and the importance of a strong cooperative relationship between the two fora has been repeatedly expressed by both regimes. To date, CITES has consistently maintained a strong degree of solidarity with pertinent IWC policies in respect of whales. Accordingly, the controversy associated with the present IWC position on commercial hunting has, to an extent, been transplanted to the various CITES institutions.

To date, the stated policy of the COP to CITES has been to guarantee Appendix I protection for species of whales subject to the IWC moratorium on commercial whaling, based on the advice of the IWC Scientific Committee, while negotiations towards the conclusion of the

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<sup>149</sup> *Ibid.*

<sup>150</sup> For instance, Fisher and Reeves observe that Russian practice – one of the key export jurisdictions for bottlenose dolphins – often differs in a number of key respects to the IATA air transportation Guidelines: “Global Trade in Live Cetaceans”, at 321.

<sup>151</sup> Decision 14.59, adopted at the Fourteenth COP.

<sup>152</sup> Notification to the Parties No. 201/029 of 18 May 2001 – Argentina: Dolphin Imports. Here, Argentina suspended imports of bottlenose dolphins from Russia until further notice, after two individuals out of a consignment of five animals were found to be dead on arrival. In addition to national bans, the impact of adverse publicity generated by poor animal welfare practices has also led some commercial carriers to refuse cargoes of live animals, with the aeronautical company Lufthansa taking this action following the Argentinean dolphins incident: Fisher and Reeves, “Global Trade in Live Cetaceans”, at 321. Nevertheless, it is unclear whether such actions by leading commercial carriers induce exporters to improve their practices or merely displaces transportation trade to less rigorous operators.

RMS remain on-going. However, political difficulties within the IWC has led a number of pro-whaling states to explore alternative regulatory avenues to by-pass the current restrictions under the ICRW, hence a series of attempts have been made to downscale CITES protection. A number of parties have questioned the continued Appendix I status of particular species, arguing that such protection may not be merited on a strict application of the CITES criteria. These contentions have raised the possibility of the downlisting of certain species, which would thereby provide an increased scope for trade in whale products under CITES. Difficult questions have arisen concerning the inter-relationship between the trade convention and the ICRW, as well as CITES policies regarding protected species of whales.

Since its inception, the need for a close and cooperative working relationship with other pertinent regimes has been clearly appreciated under CITES. To this end, a series of provisions relating to the effect of international treaties was envisaged throughout the negotiation stage.<sup>153</sup> The CITES text displays considerable deference to both pre-existing and subsequent treaties specifically dealing with “aspects of trade, taking, possession or transportation of specimens”,<sup>154</sup> to which the ICRW – as a treaty addressing the “taking” of species of cetaceans, as well as “trade” issues – is clearly relevant.

Moreover, a specific conflict clause is advanced in respect of pre-existing regimes pertaining to “marine species included in Appendix II”, for which a CITES party that is a party also to such a treaty “shall be relieved of the obligations imposed on it under the provisions of the present Convention with respect to trade in specimens of species included in Appendix II that are taken by ships registered in that State and in accordance with the provisions of such other treaty, convention or international agreement”.<sup>155</sup> This deferential position in the marine context appears primarily to be a *quid pro quo* during the CITES negotiations, in which a number of delegates expressed concerns over potential overlap and conflict with, *inter alia*, the ICRW.<sup>156</sup>

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<sup>153</sup> On this issue generally, see Franckx, “Biodiversity and Fisheries Management”, at 223-25.

<sup>154</sup> Article XIV(2). The full text of this provision states, “[t]he provisions of the present Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields”.

<sup>155</sup> Article XIV(4).

<sup>156</sup> Indeed, Franckx observes that the Japanese delegation was particularly keen to avoid conflict with ICRW obligations: “Biodiversity and Fisheries Management”, at 224. At the negotiation stage a number of delegations

The possibility of conflict between CITES and the ICRW was also considered by the IWC at the time of the conclusion of the fledgling trade convention.<sup>157</sup> Indeed, throughout the early years of the operation of CITES, the IWC was itself targeting aspects of trade within the commercial whaling industry. As part of a wider campaign to promote further adherence to the ICRW standards, the IWC in 1978 noted the desirability of using “each international opportunity to stop the taking and to ban trade in those species and stocks of whales which receive total protection” and accordingly requested CITES at its impending Second COP to “take all possible measures to support the IWC ban on commercial whaling for certain species and stocks of whales as provided in the Schedule of the ICRW”.<sup>158</sup>

In response to the IWC Resolution, cetaceans occupied a prominent position upon the agenda of the Second COP to CITES, convened in 1979. Prior to the Second COP, a series of threatened species of whales had been afforded protection under the auspices of CITES: in 1975 blue, humpback, grey, right and bowhead whales were listed on Appendix I, while in 1977 stocks of fin and sei whales were added to Appendix II.<sup>159</sup> The substantial attention focussed on cetaceans at the Second COP to CITES had two key outcomes. In the first instance, all species of cetaceans that had not been previously protected through designation upon Appendix I were listed on Appendix II to the Convention. Secondly, the CITES parties adopted three Resolutions outlining the policies of the trade convention *vis-à-vis* whales and its relationship with the IWC.

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supported the insertion of a further Appendix to CITES, listing pertinent multilateral agreements in this regard, but this proposed adjunct to the convention was ultimately omitted from the final text.

<sup>157</sup> Indeed, at the Twenty-Fifth Annual Meeting of the IWC, convened in 1973, the Technical Committee noted the possibility of “conflict between decisions taken by the Commission on the taking of certain species of whales and action taken under the provisions of this convention on the capture of whales or trading in the products of such whales”, while individual Commissioners were urged to communicate this issue to their governments in order to facilitate reservations to CITES on this basis: *Twenty-Third Report of the International Whaling Commission* (Cambridge: IWC, 1975), at 33. Nevertheless, a more conciliatory line was taken at the Twenty-Eighth Annual Meeting of the IWC in 1976, at which the IWC offered to act as the official advisor to CITES on cetaceans: *Twenty-Sixth Report of the International Whaling Commission* (Cambridge: IWC, 1978), at 23.

<sup>158</sup> Resolution to the CITES, adopted at the Special Meeting of the IWC in 1978. Nevertheless, a degree of wariness remained towards the nascent CITES regime within the IWC at this juncture, with a number of parties having “expressed their views on the difficulties of equating the IWC stock management categories with the CITES classifications and questioned what the Resolution might achieve”: *Twenty-Eighth Report of the International Whaling Commission* (Cambridge: IWC, 1980), at 5.

<sup>159</sup> Gillespie, “Whaling Diplomacy”, at 337.



The CITES parties noted that the IWC had in recent years taken “increasingly vigorous action” for the conservation of whales and that “any commercial utilisation of species and stocks protected by the IWC jeopardizes their continued existence”, thereby specifying that trade in whale products should be subject to “particularly strict regulation”.<sup>160</sup> Recognising that the trade in whale products “cannot be controlled effectively by the IWC alone”, the parties agreed not to issue any import or export permit, or certificate for the introduction from the sea, for primarily commercial purposes of any species of whale protected under the ICRW.<sup>161</sup> Moreover the desirability of providing the “maximum protection possible” for cetaceans listed in the Appendices was noted, with parties to “use their best endeavours to apply their responsibilities under the Convention in relation to cetaceans”.<sup>162</sup> The COP further called upon CITES parties “which do not currently adhere to” the ICRW to do so.<sup>163</sup>

At the Third and Fourth COPs to CITES, proposals were successfully adopted to upgrade the status of several species of whales to Appendix I.<sup>164</sup> At the Third COP, “the need for special attention to the conservation of whales and other cetaceans” was reaffirmed.<sup>165</sup> Sperm, sei and fin whales were successfully up-listed, a controversial move considering that such species now qualified for a greater degree of protection under CITES than the ICRW itself,<sup>166</sup> thereby prompting calls for further restrictions on commercial hunting within the IWC. Consequently, the pace of developments in respect of great whales within CITES meant that the IWC began to be increasingly dragged on the coat-tails of the trade convention. Indeed, as Birnie observes, “the entry into force of the CITES Convention in 1975 and the extension of its annexes began to have a considerable effect on the voting patterns and other practices of

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<sup>160</sup> Resolution Conf. 2.9: Trade in Certain Species and Stocks of Whales Protected by the International Whaling Commission from Commercial Whaling.

<sup>161</sup> *Ibid.*

<sup>162</sup> Resolution Conf. 2.8: Introduction from the Sea.

<sup>163</sup> Resolution Conf. 2.7: Relationship with the International Whaling Commission.

<sup>164</sup> Gillespie, “Forum Shopping”, at 221.

<sup>165</sup> Resolution Conf. 3.13: Trade in Whale Products. The Resolution further reiterated the call for adherence to the ICRW and to ensure that documentation requirements under Articles IV and XIV were observed. A series of trade-related Resolutions had been adopted by the IWC at Meetings convened in the intervening period between the Second and Third COP to CITES: Resolution on Adherence of Peru to the International Convention for the Regulation of Whaling (Resolution adopted at the Special Meeting of the IWC in 1979); Resolution 1979-9: Resolution on Importation of Whale Products From, Export of Equipment to, and Prohibition of Whaling by Non-Member Countries (both adopted at the Thirty-First Annual Meeting in 1979); Resolution 1980-6: Resolution Aimed at Discouraging Whaling Operations outside IWC Regulations; Resolution 1980-7: Resolution Establishing a Working Group on non-IWC Whaling. Regarding this latter initiative, it was “expected that the Working Group would cooperate fully” with CITES: *Twenty-Ninth Report of the International Whaling Commission* (Cambridge: IWC, 1981), at 24.

<sup>166</sup> Gillespie, “Whaling Diplomacy”, at 337; see also A. D’Amato and S. K. Chopra, “Whales: Their Emerging Right to Life” (1991) 85 *American Journal of International Law* 21, at 43.

certain members of the IWC that still traded in whales and whale products”.<sup>167</sup> Further amendments to the CITES Appendices were made at the Fourth COP, convened after the IWC’s decision to impose a moratorium on commercial hunting. In this respect, Bryde’s, beaked, pygmy and most stocks of minke whales were up-listed to Appendix I, with an exemption for Western Greenland stocks of minke whales in order to facilitate hunting and trade in products by aboriginal users as envisaged by the IWC,<sup>168</sup> with the up-listing formally entering into effect concurrent with the commencement of the IWC moratorium.

Following the Fourth COP and the entry into effect of the IWC moratorium on commercial whaling, cetaceans received minimal attention within CITES until the Ninth COP, convened at Fort Lauderdale, USA, in 1994. Two significant developments at the Ninth COP substantively reopened the debate over the trade in Appendix I species of whales within CITES. The first attempt to downlist particular species of whales from Appendix I to Appendix II was made at this COP. Secondly, and of enduring importance in the current debate over whale protection under CITES, the criteria for the listing of species within the Convention’s Appendices were extensively revised.

Amendments to Appendices I and II may be proposed by any party to CITES and will be adopted if it secures the votes of a two-thirds majority of the parties present and voting.<sup>169</sup> Specific considerations apply in the case of marine species, for which the Secretariat is obliged to “consult inter-governmental bodies having a function in relation to those species especially with a view to obtaining scientific data these bodies may be able to provide and to ensuring co-ordination with any conservation measures enforced by such bodies”.<sup>170</sup> In the specific context of cetaceans, this obligation is interpreted with reference to the IWC Scientific Committee.

At the Tenth COP in 1997, the new “Fort Lauderdale Criteria” adopted at the Ninth COP were applied for the first time to proposals for the amendment of the CITES Appendices. The

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<sup>167</sup> P. W. Birnie, “International Regulation”, at 405. In this respect, D’Amato and Chopra consider the IWC to have been “outflanked” by the trade convention, to which it responded “by moving ever closer to the CITES position”: “Emerging Right”, at 43.

<sup>168</sup> J. Berney, “CITES and International Trade in Whale Products” in Pétursdóttir, “Whaling in the North Atlantic”, at 105. Accordingly, the West Greenland stock of minke whales has continued to remain on Appendix II and, as noted above, under Article XIV(4) of the convention, trade in such products by the CITES parties is subject in practice to the regulatory regime prescribed under the ICRW.

<sup>169</sup> Article XV(1)(b).

<sup>170</sup> Article XV(2)(b).

initial criteria for species listings,<sup>171</sup> adopted at the First COP, had been widely criticised as inflexible<sup>172</sup> and of limited practical utility.<sup>173</sup> Particular concerns were raised the context of the ivory trade, leading to ideological clashes over whether CITES was intended to entrench preservationist principles in respect of certain species, or promote the “sustainable use” of threatened species. A number of states argued that the Berne Criteria acted as a barrier to the development of national biological resources, imposed by fellow parties far removed from the direct socio-economic consequences of such decisions.<sup>174</sup> Accordingly, at the Ninth COP the Berne Criteria was substantively revisited and replaced with the Fort Lauderdale Criteria.<sup>175</sup>

The Fort Lauderdale Criteria recognised the need to adopt “appropriate criteria” in order to secure the “proper” implementation of Article II of the Convention. Moreover, in the specific case of marine species, the new criteria acknowledged that the CITES Secretariat should consult intergovernmental bodies having a function towards such species which, in the case of cetaceans and the trade in whale products, would clearly encompass the Scientific Committee of the IWC. The parties agreed that decisions to amend the CITES Appendices ought to be subject to a precautionary approach and “founded on sound and relevant scientific information, take into account socio-economic factors, and meet agreed biological and trade criteria for such amendments”.<sup>176</sup>

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<sup>171</sup> Resolution Conf. 1.1: Criteria for the Addition of Species and Other Taxa to Appendices I and II and for the Transfer of Species and Other Taxa from Appendix II to Appendix I [hereinafter the “Berne Criteria”]. For an overview of the Berne Criteria in operation see Anonymous, “The CITES Fort Lauderdale Criteria: The Uses and Limits of Science in International Conservation Decision Making” (2000) 114 *Harvard Law Review* 1769, at 1775-79.

<sup>172</sup> P. Matthews, “Problems Related to the Convention on International Trade in Endangered Species” (1996) 45 *International and Comparative Law Quarterly* 421, at 422-24.

<sup>173</sup> K. Eldridge, “Whale for Sale? New Developments in the Convention on International Trade in Endangered Species of Wild Fauna and Flora” (1995) 24 *Georgia Journal of International and Comparative Law* 549, at 559).

<sup>174</sup> For a critical discussion of the equitability of this position see T. M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995), at 409-12. On these developments generally see R. Bonner, “Western Conservation Groups and the Ivory Ban Wagon” in M. M. R. Freeman and U. P. Kreuter, *Elephants and Whales: Resources for Whom?* (Basel: Gordon and Breach, 1994), at 59. Although the acrimony over the Berne Criteria was played out within CITES almost exclusively in the context of the ivory trade, considerable parallels exist in the arguments advanced in the modern day meetings of CITES and the IWC by pro-consumptive states in respect of whales.

<sup>175</sup> Resolution Conf. 9.24: Criteria for the Amendment of Appendices I and II. For an overview of this process see A. G. Blundell and B. D. Rodan, “Confusing Controversy with Failure: The Ft. Lauderdale Listing Criteria and CITES Appendix I and II Species Proposals” (2001) 4 *Journal of International Wildlife Law and Policy* 35.

<sup>176</sup> *Ibid.*

The change in focus at the Ninth COP did not lead to a wholesale adjustment in policy towards whales, as a Norwegian proposal to downlist minke whales to Appendix II was defeated. Furthermore, a Resolution against the trade in whale meat was adopted by the COP, noting concerns that “the international trade in meat and other products of whales is lacking adequate international monitoring or control” and further affirming that “any illegal trade in Appendix-I whale specimens undermines the effectiveness of both the IWC and CITES”.<sup>177</sup> Accordingly the COP reiterated its commitment to a close working relationship with the IWC and urged the parties to address the illegal trade in whale meat and investigate the provenance of such products.

Between the Ninth COP and to CITES and the Tenth COP, convened in 1997, trade issues returned to prominence within the IWC, with the adoption of Resolutions addressing both the relationship with the trade convention<sup>178</sup> and to improve the regulation of the trade in stockpiled products,<sup>179</sup> as well as Resolutions on specific stocks of minke whales, including aspects of trade, directed at Norway.<sup>180</sup> Meanwhile, at the Tenth COP to CITES, proposals to downlist whale species were tabled by Japan and Norway. Although both proposals were ultimately defeated, the Norwegian motion to downlist stocks of minke whales secured more votes in favour than against, although it fell short of the two-thirds majority required under Article XV(1)(b) of the Convention.

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<sup>177</sup> Resolution Conf. 9.12: Illegal Trade in Whale Meat.

<sup>178</sup> Resolution 1994-7: Resolution on International Trade in Whale Meat and Products, which reiterated the desire of the IWC to “use each international opportunity to ban trade in those species and stocks of whales that receive total protection from commercial whaling” and called on the parties to ensure the strict enforcement of obligations under both the ICRW and CITES, as well as reinforcing the need for whale meat obtained through lethal research to be restricted solely to domestic markets.

<sup>179</sup> Resolution 1995-6: Resolution on Improving Mechanisms to Prevent Illegal Trade in Whale Meat; Resolution 1996-3: Resolution on Improving Mechanisms to Restrict Trade and Prevent Illegal Trade in Whale Meat, which urged the parties “to continue to support IWC recommendations and CITES obligations through increased controls to prevent any further illegal whale meat trade activities and to take appropriate action against offenders”; Resolution 1997-2: Resolution on Improved Monitoring of Whale Product Stockpiles. At this juncture, a proposed Resolution by Japan for the IWC for the IWC Scientific Committee to review the effectiveness of the inclusion of relevant species of cetaceans upon the CITES Appendices was defeated: *Forty-Sixth Report of the International Whaling Commission* (Cambridge: IWC, 1996), at 34.

<sup>180</sup> Resolution 1996-5: Resolution on Northeast Atlantic Minke Whales; Resolution 1997-3: Resolution on Northeastern Atlantic Minke Whales. The latter Resolution noted “attempts to smuggle products of the Norwegian hunt into the markets of other countries, which highlight the need to establish a transparent supervision and control scheme so that commercial harvests can be monitored through the retail market”. While the control scheme envisaged in the Resolution was undoubtedly a helpful proposal, it may be suggested that the attempts at smuggling noted in somewhat dramatic fashion appear in fact to refer to an isolated individual misdemeanour perpetrated in 1993: C. Raymakers, *Monitoring Progress in Norway’s Development of a DNA Register as Part of its Domestic Management System for Whale Meat, Investigating Local Whale Meat Trade, and Investigating Reports of Illegal Trade in Blubber* (Cambridge: TRAFFIC, 2001), at 14.

At the Eleventh COP to CITES, convened in 2000, the trade in whale meat and associated products received substantial attention and further raised concerns within the COP that the political difficulties encountered within the IWC might become an increasing distraction within the various CITES institutions. The Eleventh COP was preceded by a Resolution adopted by the IWC in 1999, reiterating the need for a close and mutually cooperative relationship between the two organisations, while also asserting the expertise of the IWC as a forum for whale management.<sup>181</sup> Indeed, while rather strikingly accepting responsibility for “the global demise of whale stocks”, the IWC sought to reaffirm its position as “the universally recognised competent international organisation for the management of whale stocks”, with a firm reminder to ICRW parties with aspirations to downlist certain species within the CITES Appendices that the RMS had not yet been concluded and that a zero catch limit for commercial whaling remained in effect. Nevertheless, the wording of Resolution 1999-6 did little to discourage downlisting proposals from Norway and Japan, which were again defeated by a popular vote, although accompanied by words of strong concern from the Secretary-General of CITES that such proposals imperilled the working relationship between the trade convention and the ICRW.<sup>182</sup>

The CITES parties adopted a Resolution elucidating the relationship with the IWC,<sup>183</sup> which also represents the first (and only) such measure targeted at *cetaceans*, as opposed merely to aspects of the trade in whale products. In so doing, Resolution 11.4 repealed the previous Resolutions on whale issues adopted at preceding COPs, yet also entrenched a significant number of the key sentiments advanced within these instruments. To this end, and perhaps somewhat pointedly given the tone of Resolution 1999-6 adopted by the IWC, the CITES parties observed that “the meat and other products of such protected species of whales are subject to international trade which cannot be controlled effectively by the IWC alone”. Reiterating that “maximum attention” should be afforded to cetaceans under CITES, and the “need for special attention to the conservation of whales and other cetaceans”, the parties observed that commercial harvesting “circumvents and diminishes the effectiveness of the protected regime of the IWC” and that “any illegal international trade in Appendix-I whale

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<sup>181</sup> Resolution 1999-6: Resolution on Cooperation between the IWC and CITES.

<sup>182</sup> Indeed, Secretary-General Willem Wijnstekers observed that “the difficult political discussions that had created divisions in that body [the IWC] were now appearing in the CITES meetings of the Conference of the Parties and might have negative effects on the relationship between the parties”: *Summary Report of the Committee I Meeting* (Geneva: CITES, 2000), at 24.

<sup>183</sup> Resolution Conf. 11.4: Conservation of Cetaceans, Trade in Cetacean Specimens and the Relationship with the International Whaling Commission.

specimens undermines the effectiveness of both the IWC and CITES”. Accordingly, the parties resolved that no permit should be issued for primarily commercial purposes of any specimen of a species or stock protected under the IWC moratorium and that CITES parties that do not currently adhere to the ICRW should be encouraged to do so. Moreover, the parties were urged to cooperate to prevent the illegal trade in whale meat and encouraged to voluntarily establish inventories and DNA identification systems for stockpiles of whale products.

Proposals to downlist certain species of whales from Appendix I and Appendix II were again submitted by Japan at the Twelfth and Thirteenth COPs to CITES, convened in 2002 and 2004 respectively, and again failed to garner the requisite two-thirds majority in order to successfully enter into effect.<sup>184</sup> Nevertheless, at the Thirteenth COP advocates of the downlisting of whales “succeeded in making their voices heard, in gaining more votes for their proposals than in the past and in reminding CITES Parties that the current harmonious relationship between CITES and the IWC is not so stable as many assume”.<sup>185</sup> As far as this relationship is concerned, subsequent to the adoption of Resolution 11.4, trade concerns arose sporadically within the intervening IWC Meetings, resulting in Resolutions calling on parties to refrain from the commercial exchange of incidentally-captured whales,<sup>186</sup> expressing disapproval of Norwegian intentions to resume trade in minke whales under a reservation to CITES<sup>187</sup> and condemning the international trade in whales caught for scientific research purposes under Article VIII of the ICRW.<sup>188</sup>

Particular consideration was accorded to the trade in whale products at the Fourteenth, and most recent, COP to CITES, in 2007, primarily due to the somewhat uncomfortable timing of the meeting, which was convened effectively back-to-back with the IWC Annual Meeting. At the prior IWC Meeting a further Resolution was addressed to CITES,<sup>189</sup> in which the importance of continued cooperation between the two organisations was reaffirmed and mutual parties were requested to respect this relationship and “not to seek the transfer of

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<sup>184</sup> Proposals for the downlisting of whales within CITES have been raised solely by Japan since the Eleventh COP, as the Norwegian authorities have sanctioned the trade in minke whale products by virtue of a reservation to CITES, as noted below.

<sup>185</sup> C. P. Carlane, “Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of International Whaling Policies” (2005) 24 *Virginia Environmental Law Journal* 1.

<sup>186</sup> Resolution 2001-4.

<sup>187</sup> Resolution 2001-5: Resolution on Commercial Whaling.

<sup>188</sup> Resolution 2003-2: Resolution on Whaling under Special Permit.

<sup>189</sup> Resolution 2007-4: Resolution on CITES.

cetacean species from CITES Appendix I while the moratorium remains in place”.<sup>190</sup> Nevertheless, downlisting proposals were again tabled and defeated within the COP. In response, a Decision was adopted by the COP, directed at the Animals Committee, stating clearly that “[n]o periodic review of any great whale, including the fin whale, should occur while the moratorium by the International Whaling Commission is in place”.<sup>191</sup>

It appears likely that motions to downlist the status of certain species of whales from Appendix I to II will continue in subsequent COPs. Nevertheless, such proposals may be considered essentially symbolic and appear calculated primarily to maintain political pressure for future progress on the RMS. Indeed, not only are downlisting proposals largely condemned to failure given the clear position of CITES regarding Appendix I status for whales protected by the IWC moratorium, but in any event the proposing states have considerable scope to resume trade in whale products by entering a reservation pursuant to Article XXIII of the trade convention. While CITES is not subject to general reservations,<sup>192</sup> parties may nonetheless enter reservations to the listing of particular species upon the Appendices, in which case they are considered non-parties for the purpose of trade in the species in question.<sup>193</sup> Reservations have been entered against the Appendix I listing of cetaceans by Iceland,<sup>194</sup> Japan,<sup>195</sup> Norway,<sup>196</sup> Palau<sup>197</sup> and St. Vincent and the Grenadines.<sup>198</sup>

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<sup>190</sup> The use of the term “cetacean” in this paragraph of the Resolution is rather striking, given that previous IWC Resolutions of this nature had referred exclusively to “whales and “whale products”, while Resolution 2007-4 itself also refers throughout to “whale stocks” and “whales”. Given the controversy surrounding the competence of the IWC to regulate small cetaceans, it is unclear whether this Resolution was intended to apply to the full range of “cetaceans” listed in Appendix I to CITES. Nonetheless, a number of species of dolphins are designated on Appendix I, notably the vaquita, which was also the subject of a targeted IWC Resolution at the 2007 Meeting, due to concerns over the threat posed to this species by incidental catches: Resolution 2007-5: The Vaquita, from Critically Endangered to Facing Extinction.

<sup>191</sup> Decision 14.81: Great Whales.

<sup>192</sup> Article XXIII(1).

<sup>193</sup> Article XXIII(3). This position is not uncontroversial, however; for instance, Sands observes that “[t]he reservation clauses seem contradictory to the general goals of CITES, and there is little doubt that their operation has detrimental effects on listed endangered species”: P. Sands, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003), at 512.

<sup>194</sup> Iceland has entered a reservation against the listing of common minke, Antarctic minke, sei, blue, fin, humpback, sperm and northern bottlenose whales on Appendix I, as well as West Greenland minke whales, long-beaked common dolphins, common dolphins, long-finned pilot whales, Atlantic white-sided, white-beaked, Indo-Pacific bottlenose and bottlenose dolphins, killer whales and harbour porpoises on Appendix II.

<sup>195</sup> Japan has entered a reservation against the listing of common minke, Antarctic minke, Bryde’s, fin and sperm whales, Baird’s beaked whales, Irrawaddy dolphins and certain populations of sei whales on Appendix I.

<sup>196</sup> Norway has entered a reservation against the listing of common minke, Antarctic minke and sperm whales, as well as particular populations of sei and fin whales on Appendix I.

<sup>197</sup> Palau has entered a reservation against the listing of minke and sperm whales on Appendix I.

<sup>198</sup> St. Vincent and the Grenadines has entered a reservation against the listing of humpback whales on Appendix I.

Accordingly, as noted above, the Norwegian authorities may sanction the resumption of trade in minke whale products through the admission of reservations to both CITES and the ICRW.

Ultimately, it is clear that the considerable challenges inherent in regulating the trade in whale products requires the aggregation of efforts under both CITES and the ICRW, and that neither regime can realistically aspire to meaningfully address these issues in isolation to the other. The importance of a cooperative and mutually supportive relationship has been consistently reiterated by both organisations, although a degree of attempted forum shopping by certain mutual parties has raised questions concerning the precise demarcation of roles between the two regimes. Gillespie has argued that the relationship between CITES and the IWC should operate on a hierarchical basis, founded primarily on the longevity and specificity of the ICRW, to which the trade convention ought to defer to the perceived primacy of the whaling regime.<sup>199</sup> There is nonetheless an ironic degree of circularity in this approach, not least since “this view has been expressed by both proponents and by opponents of whaling, for different tactical reasons”.<sup>200</sup> Instead, CITES practice to date suggests that the partnership with the ICRW is founded on a rather more egalitarian basis than an unconditional endorsement of IWC policies.

CITES has played a proactive and innovative role in further advancing regulatory initiatives in respect of the trade in whale products, which may be considered unlikely to have been applied as widely or as forcefully under the auspices of the IWC. CITES has consistently maintained a far greater numerical and geographical cohort of parties than the ICRW, thereby increasing the possibilities for the application and enforcement of pertinent policies. Moreover, unlike the largely Resolution-based approach towards such issues taken by the IWC, CITES mandates a tangible system of controls over trade to be applied under national law. In this respect, Birnie considers that the trade convention “has had an impressive effect, making it impossible, for example, for a nascent whaling industry in Taiwan to find outlets for its whale meat”.<sup>201</sup> In addition, CITES-affiliated organisations, such as TRAFFIC, have

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<sup>199</sup> See especially Gillespie, “Forum Shopping”, at 31; Gillespie, “Whaling Diplomacy”, at 318-45.

<sup>200</sup> P. H. Sand, “Japan’s ‘Research Whaling’ in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)” (2008) 17 *Review of European Community and International Environmental Law* 56, at 61; similar sentiments are also expressed by Berney: “International Trade in Whale Products”, at 111.

<sup>201</sup> Birnie, “International Regulation”, at 577.



also played an effective role in monitoring trade and commercial practices in whale products in key jurisdictions.<sup>202</sup>

Conversely, given the vast and eclectic array of species listed on the Appendices of the trade convention, it is clear that the scientific capacity of CITES is profoundly overstretched. Since cetaceans compete for attention with a substantial range of other species within the Animals Committee, and the resources allocated to improving data deficiencies regarding the impacts of trade on whales within CITES is minimal in comparison to that of the IWC Scientific Committee, it is rather unsurprising that a strong degree of “outsourcing” of scientific advice has been pursued in relation to whales. Indeed, such an approach is explicitly mandated within the Fort Lauderdale Criteria, which provides that “the views, if any, of intergovernmental bodies with competence for the management of the species concerned should be taken into account”.<sup>203</sup> This arrangement therefore appears to be based less on deference to assumed ICRW primacy than on an application of the relevant CITES criteria, as well as a healthy degree of realism and a desire not to squander limited funds on research that is already extensively and continuously conducted within the IWC. Tellingly, perhaps, the most recent IWC Resolution on trade issues observed that “CITES recognises the IWC’s *Scientific Committee* as the universally recognised international institution with international expertise to review and evaluate the status of the world’s whale stocks”,<sup>204</sup> while CITES Resolution 11.4 correspondingly recognises the IWC as “the major source of information” on global whale stocks.

An interesting point is if and when the IWC successfully concludes the RMS, and accordingly lifts the moratorium on commercial whaling. Under such circumstances, the Fort Lauderdale Criteria would thereby permit the downlisting of certain species of whales to Appendix II, for which a commercial quota would be allocated under a fully operational RMP. Aspects of trade in such species would therefore be essentially regulated by the IWC, by virtue of Article

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<sup>202</sup> See for instance J. Mills *et al.*, *Whale Meat Trade in East Asia: A Review of the Markets in 1997* (Cambridge: TRAFFIC, 1997); A. Ishihara and J. Yoshii, *A Survey of the Commercial Trade in Whale Meat Products in Japan* (Cambridge: TRAFFIC, 2000); S. Kang and M. Phipps, *A Survey of Whale Meat Markets along South Korea’s Coast* (Cambridge: TRAFFIC, 2000); A. Ishihara and J. Yoshii, *A Survey of the Commercial Trade in Whale Meat Products in Japan* (Cambridge: TRAFFIC, 2003).

<sup>203</sup> Resolution Conf. 11.4; Criterion (k).

<sup>204</sup> Resolution 2007-4; emphasis added. Resolution 2007-4 thereby marks a subtle but significant departure to the wording of the previous IWC Resolution addressing CITES, Resolution 1999-6, which had declared that “the IWC is the universally recognised competent international organisation for the management of whale stocks”.

long as the development of the RMS remains incomplete. Consequently, the COP to CITES remains relatively closed as an avenue through which to circumvent IWC policies. Nevertheless, it is also equally apparent that once the RMS is completed, the expedited downlisting of certain species of whales will be required in any post-moratorium era if such advice is ultimately forthcoming from the IWC Scientific Committee. Indeed, any political or ideological intransigence exercised by the COP towards such a development will serve to jeopardise both the practical operation of the trade convention itself, as well as future harmony and cooperation between CITES and the ICRW.

### 3.6 The Convention on Biological Diversity, 1992

Finally, consideration ought to be afforded to the Convention on Biological Diversity, which remains among the most widely ratified and geographically expansive of all multilateral environmental agreements adopted to date. The origins of the CBD lay in the adoption of the World Conservation Strategy in 1980, developed as a joint project between UNEP, the IUCN and WWF, and subsequently endorsed by the UN General Assembly.<sup>206</sup> A series of draft texts were elaborated within the IUCN, which endorsed a proposal for the further development of a global treaty on biodiversity at its seventeenth General Assembly, convened in 1988, which point a working group was established under the auspices of UNEP to finalise the instrument.<sup>207</sup> The CBD was formally opened for signature at the UN Conference on Environment and Development in Rio de Janeiro, Brazil, in 1992 and entered into force on

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<sup>205</sup> M. Curlier and S. Andresen, "International Trade in Endangered Species: The CITES Regime" in E. L. Munnich *et al.* (eds.), *Environmental Regime Effectiveness: Confronting Theory with Evidence* (Cambridge, Massachusetts: MIT Press, 2001), at 370 (noting "their high commercial value and the fact that these animals are not attractive to humans, in contrast to the panda, the cetaceans or the elephants").

<sup>206</sup> A/Res/35/74 of 5 December 1980.

<sup>207</sup> For a full discussion of the origins of the CBD see F. Burhenne-Guilmin and S. Casey-Lefkowitz, "The Convention on Biological Diversity: A Hard Won Global Achievement" (1992) 3 *Yearbook of International Environmental Law* 43; see also C. Shine and P. T. B. Kohona, "The Convention on Biological Diversity: Bridging the Gap between Conservation and Development" (1992) 1 *Review of European Community and International Environmental Law* 307.

December 1993. The Convention currently has some 191 parties and, famously, one signatory, in the form of the USA.<sup>208</sup>

The conservation value of the CBD to cetaceans specifically is rather less ostentatious than a number of other treaty regimes examined in this thesis. The CBD contains no Annexes upon which cetaceans may be identified as meriting an advanced degree of protection. Likewise, the political compromises inherent in developing a multilateral agreement seeking near-universal appeal and approval has essentially rendered the possibility of strong and extensive conservation obligations relatively remote. Commitments towards biodiversity within the Convention are therefore largely aspirational and amorphous. Nevertheless, the CBD does advance a number of unique features of value to the overall regulatory mosaic addressing cetaceans. On a global level, the Convention may be considered to provide clear leadership towards the need to halt biodiversity losses. Indeed, while the current target set under the auspices of the CBD of halting biodiversity losses by 2010 may be considered rather unworldly, it has nonetheless been embraced by the parties, as well as other multilateral environmental agreements and entities such as the EU.

Moreover, within a broad framework of ocean policies, considerable emphasis has been placed under the CBD towards the further development of marine protected areas, both within and beyond areas of national jurisdiction, which is likely to constitute an increasingly significant aspect of the management of cetaceans in future years. In addition, a largely unheralded aspect of institutional practice under the CBD has been to promote further cooperation between a number of leading biodiversity-related conventions, thereby providing a rare forum to develop a greater degree of coordination of policies and to mitigate so-called “treaty congestion” which has dogged the implementation of commitments under key multilateral environmental agreements to date.

### *3.6.1 Fundamental obligations and institutional framework*

The CBD is a lengthy document and essentially provides a broad framework by which to attain its stated three objectives, which are articulated in Article 1 as being “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, including by

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<sup>208</sup> As of 31 August 2009.

appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding”. Nevertheless, consolidation of these three individual goals into a coherent unified purpose has to date proved rather elusive in practice. Indeed, the broad scope of the CBD’s objectives is considered by the parties themselves to pose a “fundamental challenge to the Convention”,<sup>209</sup> hence the precise ideological direction of the Convention remains somewhat unpredictable. However the pursuit of these objectives is advanced in practice, there is nonetheless a central recognition within the Convention that states are accorded the ultimate responsibility in this respect and “have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.<sup>210</sup>

Some scope – albeit rather indirect – is established for the advancement of conservation measures for cetaceans under Articles 6 and 8 respectively. Article 6 requires each party “in accordance with its particular conditions and capabilities” to develop national strategies, plans of programmes for conservation and sustainable development of biodiversity, or to adapt existing initiatives,<sup>211</sup> to “reflect, inter alia, the measures set out in this convention relevant to the Contracting Party concerned”.<sup>212</sup> Additionally, parties are to integrate “as far as possible and appropriate” the conservation and sustainable use of biodiversity into relevant sectoral or cross sectoral plans, projects and policies.<sup>213</sup> As a practical means of fulfilling national obligations under Article 6, parties to the CBD are required to develop National Biodiversity Strategies and Action Plans (BSAPs);<sup>214</sup> such instruments thereby provide a formal basis for the coordination of biodiversity conservation policies at a national level. In this respect, a number of parties have included species and habitats of cetaceans as key

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<sup>209</sup> Strategic Plan for the Convention on Biological Diversity, Decision VI/26 adopted at the Sixth Conference of the Parties in 2002, at para. 8.

<sup>210</sup> Article 3. In addition, the preamble further reflects this position, with the assertion that “States have sovereign rights over their own resources”.

<sup>211</sup> In this respect, further guidance was elaborated by the CBD at the Ninth Conference of the Parties: Decision IX/8: Review of Implementation of Goals 2 and 3 of the Strategic Plan.

<sup>212</sup> Article 6(a).

<sup>213</sup> Article 6 (b). This provision is reinforced in conjunction with Article 10(a), which requires parties “as far as possible and appropriate” to integrate “consideration of the conservation and sustainable use of biological resources into national decision-making”.

<sup>214</sup> Moreover, under Article 26, parties are required to report periodically upon the implementation of national BSAPs, with the current reporting deadline set at March 2009.

ecosystem components to be addressed under the national BSAP. For instance, the UK Biodiversity Action Plan identifies a number of species of cetaceans as “priority species” and thereby seeks to implement national CBD commitments through, *inter alia*, the coordination of management and conservation measures in respect of such species.<sup>215</sup>

Perhaps the most significant aspect of the CBD in practice has been the emphasis placed upon the *in situ* conservation of biodiversity under Article 8, which has accordingly established a global mandate for the creation of protected areas on land and at sea. Although this project has moved relatively slowly, considerable attention has been focussed within various meetings and working groups towards the development of guiding principles for these areas. General commitments are incumbent upon the parties “as far as possible and as appropriate” to elaborate a system of protected areas and develop necessary guidelines for their selection, establishment and management. Accordingly, the development of marine protected areas has constituted a significant aspect of activities undertaken through the “Jakarta Mandate”.

In implementing these commitments, in a similar manner to CITES, the CBD is subject to a broad conflict clause, under which the provisions of the biodiversity convention do not affect the rights of the parties from any existing international agreement, “except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity”.<sup>216</sup> Nevertheless, this latter qualification may be considered rather symbolic in practice, given that there is no indication provided under the auspices of the Convention as to what a “serious” damage or threat may comprise. Although the relationship between CBD commitments and obligations under Articles 65 and 120 of the LOSC is not articulated, there would appear to be relatively little scope for conflict. Indeed, the pursuit of policies such as the development of protected areas under the “Jakarta Mandate” is likely to complement rather than contravene the “conservation, management and study” of cetaceans.

The CBD has developed a strong institutional structure, which comprises a decision-making organ operating in association with administrative and scientific bodies. The Conference of the Parties, elaborated and established under Article 23 of the Convention, constitutes the operational mechanism of the CBD. To date, the COP has yet to adopt a specific Decision

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<sup>215</sup> Reproduced on-line at [www.ukbap.org.uk](http://www.ukbap.org.uk) (last visited 31 August 2009).

<sup>216</sup> Article 22(1).

addressing cetaceans, beyond its general policies constituting the on-going elaboration of the Jakarta Mandate. Indeed, as a particular concern, cetaceans have correspondingly received peripheral attention under the auspices of the CBD thus far. Nevertheless, two key policies developed within the various COPs may be considered to pose a degree of relevance in the context of cetaceans, although whether such initiatives may be objectively viewed as having inspired clear regulatory activity remains nonetheless rather questionable.

Perhaps the most visible initiative advanced by the CBD in recent years has been the establishment in 2002 of an overall commitment “to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on earth.”<sup>217</sup> Although the 2010 deadline was unaccompanied by a clear programme of action, it has nonetheless provided a degree of political impetus towards a re-evaluation of biodiversity policies at both a national and multilateral level. The 2010 target cannot be objectively considered a regulatory initiative for cetaceans in anything beyond the most indirect of terms. However, as noted for instance in Chapter VIII, the EU re-evaluation of biodiversity policies has subsequently placed a greater degree of attention on the conservation needs of marine species, for which cetaceans have been particular beneficiaries. Nonetheless, this remains a somewhat abstract link between the 2010 target and legislative activity, with EC cetacean policies having been driven rather more ostensibly by their high political visibility within the various EU institutions than pertinent CBD rhetoric. Indeed, beyond this rather peripheral application in the EU context, as well as broad statements made in support of the 2010 target within other multilateral fora with an application towards cetaceans, such as the CMS, there is little evidence that this initiative has translated into direct regulatory activity in relation to cetaceans.

Secondly, considerable attention has been paid under the auspices of the CBD to the issue of the “sustainable use” of biodiversity. At the Seventh COP a series of guiding principles were endorsed for the sustainable use of biodiversity.<sup>218</sup> However, the Addis Ababa Principles offer little indication as to how sustainable use may be applied within the specific context of cetaceans, aside from an observation that it may entail both consumptive and non-

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<sup>217</sup> Decision VI/26, at para. 11.

<sup>218</sup> Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity; Annexed to Decision VII/12: Sustainable Use.

and counselling that “not all principles were of relevance” to the trade convention.<sup>220</sup>

### 3.6.2. *The Jakarta Mandate and the conservation of cetaceans*

As noted above, the CBD does not provide clear and targeted obligations in respect of marine species; moreover, initial critiques of the Convention lamented the relatively periphrastic attention accorded to marine environmental concerns.<sup>221</sup> Accordingly, progress towards addressing the marine regulatory deficit has in practice been advanced through an on-going process of activity within working groups and the COP, termed the “Jakarta Mandate”. Policies developed under the CBD, insofar as they relate to the practical conservation needs of cetaceans, are therefore pursued under this broad umbrella.<sup>222</sup>

Initial developments under the Jakarta Mandate offered minimal consideration to conservation needs of species such as cetaceans, focussing instead on coral bleaching and sustainable development of small island states.<sup>223</sup> Some attention to issues of importance to large marine species has developed on an incremental basis under the CBD, commencing at the Fifth COP with a call to consider, *inter alia*, by-catches and the development of marine

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<sup>219</sup> Operational Guidelines to Practical Principle 5. Nevertheless, on a general basis certain aspects of these principles reflect a number of provisions advanced in the multilateral agreements pertinent to cetaceans examined in this thesis, for instance the need to develop institutional linkages (Practical Principle 1), promotion of research activities (Practical Principle 6), the needs of indigenous communities (Practical Principle 12) and the need to promote educational and public awareness programmes (Practical Principle 14).

<sup>220</sup> Resolution Conf. 13.2: Sustainable Use of Biodiversity: Addis Ababa Principles and Guidelines (at Annex 2).

<sup>221</sup> D. Freestone, “The Conservation of Marine Ecosystems under International Law” in M. Bowman and J. Redgwell (eds.), *International Law and the Conservation of Biodiversity* (The Hague: Kluwer, 1996), at 10 (noting that “the particular problems of the conservation of marine ecosystems and biodiversity have been largely overlooked by the Convention”).

<sup>222</sup> For a full discussion of the processes and meetings constituting the primary development of the Jakarta Mandate see M. M. Groote, “The Jakarta Mandate on Marine and Coastal Biodiversity” (1997) 12 *International Journal of Marine and Coastal Law* 337; see also A. C. de Fontaubert, D. R. Downes and T. S. Agar, “Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats” (1998) 10 *Georgetown International Environmental Law Review* 753.

<sup>223</sup> Decision IV/5: Conservation and Sustainable Use of Marine and Coastal Biological Diversity; including the Programme of Work; adopted at the Fourth COP.

extensive politicisation of the whaling debate and a perceived preservation bias within the IWC, has raised the possibility of the development of further quota-setting bodies for the hunting of whales and other cetaceans. To date, this has remained essentially theoretical as key states have allowed the *détente* process within the IWC a degree of time to run, although it remains a provocative option for which a number of whaling states may be prepared to exercise.<sup>227</sup> Ultimately, there remains little indication of what an “appropriate organisation” may constitute and, while an exhaustive definition may be near impossible to secure in practice, a highly positive development in this regard is the on-going progress of the Small Working Group on the Future of the IWC. As part of this process, IWC parties have been charged with articulating elements of importance for an international cetacean regulator.<sup>228</sup> This initiative, broadly reminiscent of the survey process in advance of the 1930 Hague Conference on the Law of the Sea, is likely to provide unprecedented illumination of official views of concerned states regarding many aspects of their Article 65 obligations.

Thus far, discussion of NAMMCO in this context has been equally polarised, focussing on the possibilities for conflict as opposed to collaborative activity. Nevertheless, if the political furor surrounding the establishment of NAMMCO is divorced from such an appraisal, it appears that this body could be of considerable practical value to the work of the IWC, providing that a clear demarcation of responsibilities can be agreed between both entities and, crucially, key parties to both Conventions. NAMMCO has strong scope for the development of hunting standards and, combined with its effective inspection network, offers considerable possibilities to discharge IWC whaling quotas set under the RMP if and when it is applied. Such a relationship is likely to constitute the optimal implementation of Article 65 obligations in this region, taking into account the projected plurality of regulators and the need for cooperation envisaged by the LOSC. In this way, Article 65 may be developed further as a collaborative, as opposed to divisive, provision.

In the meantime, the IWC has sought to develop clear lines of communication with pertinent bodies to clarify their working relationship. This has been achieved to relatively good effect within CITES, to which key aspects of the IWC debated had been increasingly displaced,

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<sup>227</sup> In this respect, Iceland has indicated a degree of tolerance to this process, but has reserved the right to exclusively work through NAMMCO if progress within the IWC fails in the mid-term future: personal communication with Dr. Christina Lockyer, General Secretary to NAMMCO (on file).

<sup>228</sup> *An Overview of the Elements/Issues Identified as Being of Importance to One or More Contracting Governments in Relation to the Future of IWC*; Document IWC/S08/SWG3.



much to the chagrin of the trade convention. In this respect at least, the position in respect of cetaceans appears settled,<sup>229</sup> although a number of questions remain over the ability of CITES – and, more pertinently, particular parties – to effectively regulate trade in live specimens, which is likely to represent a key challenge to the cetacean agenda in future years as controversy over whale products recedes.

Further challenges of collaboration are raised between the IWC and other key regulators, if not explicitly with the CBD, due to its limited role concerning cetaceans. In this respect, the sprawling supervisory system of the CMS represents a further challenge – and regulatory opportunity – to which this thesis now turns.

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<sup>229</sup> Given the vast range of species regulated by CITES, the central attention accorded to cetaceans within the mid-1990s appears to be declining significantly. Indeed, as observed by Carlane, “although the international debate over whaling rages stronger than ever, other species (such as elephants, rhinos and sea turtles) are increasingly taking the spotlight at CITES meetings, leaving the IWC to function as the ‘primary battleground’ for whaling”: “Saving Whales in the New Millennium”, at 28.

## **CHAPTER IV**

### **REGULATING (SM)ALL CETACEANS: THE CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS**

#### **4.1 Introduction**

Within the general framework of the various international conventions pertinent to cetaceans, one particular instrument has emerged as a mechanism through which certain key deficiencies within the ICRW may potentially be addressed, namely the Convention on the Conservation of Migratory Species of Wild Animals.<sup>1</sup> The CMS is the leading international instrument addressing the conservation needs of migratory species as a distinct class of fauna. The Convention, which was developed in the wake of the UN Conference on the Human Environment in 1972, was opened for signature in Bonn, FDR, in June 1979 and entered into force on 1 November 1983.

The CMS offers particular scope to address the conservation status of cetaceans. Firstly, a considerable number of species of cetaceans are listed under the Convention, thereby establishing a series of general obligations and commitments towards such animals. With the conclusion of the LOSC and, more pertinently, the widespread acceptance in international law of the entitlement to an extensive EEZ on the part of coastal states, the overwhelming majority of areas of cetacean habitats have been brought under the purview of national jurisdiction. Accordingly, the CMS – if widely adopted and adhered to by a significant body of coastal states – offers distinct possibilities to develop coordinated policies in respect of the cetaceans protected under its auspices.

Furthermore, the Bonn Convention provides for the development of species-specific and region-specific subsidiary Agreements, of which four such instruments concerning cetaceans have been elaborated to date. Thus far, in contrast to other international treaties, the CMS regime has demonstrated a particular focus on the smaller species of cetaceans. As noted in Chapter II, the ability of the IWC to prescribe meaningful conservation measures for smaller species of cetaceans has been hamstrung by disputes over its regulatory competence. In the

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<sup>1</sup> 1651 UNTS 333 [hereinafter the “CMS” or “Bonn Convention”]. There are currently 112 parties to the Bonn Convention, as well as a further two signatories – Central African Republic and Jamaica – that have yet to ratify the convention (as of 31 August 2009).

absence of a universally-accepted remit for the IWC to act in this manner, co-ordinated action to address the specific conservation needs of small cetaceans has instead proceeded on a predominantly regional basis, with the Bonn Convention having played a leading role in this respect. Although the CMS regime has often been forced to operate largely in the face of adversity since its inauguration, it nevertheless merits substantial consideration as a regime through which the conservation needs of cetaceans – in particular those of the smaller species – may be advanced.

This Chapter will discuss the role of the CMS in seeking to establish coordinated regulatory solutions for cetaceans – especially the smaller species – and its prospects for supplementing the regulatory lacunae raised by current IWC practices. Accordingly, this Chapter will analyse the specific provisions and institutional structure of the Bonn Convention and its application to cetaceans and the various policies pursued to date under the CMS umbrella in this regard. Finally, the inter-relationship between the Bonn Convention regime and the IWC will be explored. The following three Chapters of this thesis will examine the operation of the subsidiary Agreements adopted to date and outline the prospects for the further development of cetacean coverage under the CMS.

## **4.2 Fundamental principles and objectives**

The Bonn Convention recognises 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 mankind” and that “each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilised, is used wisely”.<sup>2</sup> As a result, in the light of the constant movement of such species and the implications of this cross-boundary travel, the parties note that successful conservation and management measures in relation to migratory animals will require “the concerted action of all States within the national jurisdictional boundaries of which such species spend any part of their life cycle”.<sup>3</sup>

In pursuing such aspirations, the parties expressly acknowledge “the importance of migratory species being conserved and of Range States agreeing to take action to this end whenever

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<sup>2</sup> Preamble to the Bonn Convention.

<sup>3</sup> *Ibid.*

possible and appropriate”.<sup>4</sup> “Migratory species” are defined expansively within the CMS as “the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries”.<sup>5</sup> Nevertheless, despite this flexibility, Burke has observed that the rather vague definitional criteria for migratory species might technically preclude the listing of certain marine species due to a lack of data concerning their migratory pathways.<sup>6</sup>

Parties to the Bonn Convention agree to take action to avoid any migratory species from becoming endangered<sup>7</sup> and to promote, cooperate in and support research relating to migratory species.<sup>8</sup> The CMS draws a distinction between species identified as “endangered” and those considered to have an “unfavourable conservation status”, with differing obligations and policies prescribed in relation to each category. To this end, following the practice of other international biodiversity treaties, such species are clearly identified and listed the Convention, with “endangered” species assigned to Appendix I and those with an “unfavourable conservation status” to Appendix II. Parties are to “endeavour to provide immediate protection” for Appendix I species,<sup>9</sup> while for those species listed in Appendix II, they are to endeavour to conclude a series of subsidiary instruments to address the long-term conservation and management needs of these animals.<sup>10</sup>

#### 4.2.1 Appendix I Species

“Endangered species” are defined as those “in danger of extinction throughout all or a significant part of its range”.<sup>11</sup> Species may be listed in Appendix I “provided that reliable evidence, including the best scientific evidence available, indicates that the species is

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<sup>4</sup> Article II(1). “Range States” are defined as any State “that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species” – Article I(1)(h).

<sup>5</sup> Article I(1)(a).

<sup>6</sup> W. T. Burke, *The New International Law of Fisheries* (Oxford: Clarendon Press, 1994), at 283.

<sup>7</sup> Article II(2).

<sup>8</sup> Article II(3)(a).

<sup>9</sup> Article II(3)(b).

<sup>10</sup> Article II(3)(c).

<sup>11</sup> Article I(1)(e).

endangered”.<sup>12</sup> To date, over 100 species have been so designated, including twelve species of cetaceans.<sup>13</sup>

Three broad objectives are prescribed for Range States of species listed in Appendix I. Parties should conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction; to prevent, remove, compensate for or minimise, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species; and “to the extent feasible and appropriate”, to prevent, reduce or control factors that are endangering or are likely to further endanger the species, including strictly controlling and regulating the presence of exotic species.<sup>14</sup> In addition to these requirements, the Conference of the Parties (COP) may recommend “further measures considered appropriate to benefit the species” which are to be taken by the relevant Range States in relation to such animals.<sup>15</sup>

Article III(5) is of particular importance to Appendix I cetaceans, which requires parties to prohibit the “taking” of such animals. The concept of “taking” – while concentrated predominantly on hunting activities – is nonetheless broadly defined,<sup>16</sup> and mirrors a growing trend in domestic fisheries law to include “harassment” of the species.<sup>17</sup> Accordingly, this provision may be interpreted as establishing stronger holistic obligations on parties to address habitat-related issues, such as the growing threats to cetaceans from ocean noise, eco-tourism and other adverse coastal activities, in addition to the more obvious matter of the directed capture and killing of cetaceans.

Limited exceptions are permitted in respect of this provision, with two such circumstances broadly reminiscent of the terms of the ICRW in their application to cetaceans. Firstly, taking is permitted for “scientific purposes” which could technically permit a state such as Norway, which is a party to both the CMS and the ICRW, to undertake a proposed scientific hunt

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<sup>12</sup> Article III(2). Under Article III(3), migratory species may be removed from Appendix I by a vote at the Conference of the Parties stating that reliable evidence – including the “best scientific evidence available” – indicates that the species is no longer endangered and the species is not likely to become endangered again because of a loss of protection due to its removal from Appendix I.

<sup>13</sup> Appendix I; reproduced at [www.cms.int/documents/appendix/cms\\_app1\\_2.htm](http://www.cms.int/documents/appendix/cms_app1_2.htm) (last visited 31 August 2009).

<sup>14</sup> Article III(4).

<sup>15</sup> Article III(6).

<sup>16</sup> “Taking” is defined in Article I(1)(i) as “Taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in such conduct”.

<sup>17</sup> For instance, for activities in US waters, the current version of the Marine Mammal Protection Act operational defines “taking” as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal”: Section 3(13).

under the auspices of either of the two Conventions. Unlike the plethora of Resolutions adopted by the IWC addressing scientific whaling, there are few specific pronouncements on this activity under the auspices of the CMS. The emotive issue of scientific whaling has been essentially marginalised within the CMS, since neither Japan nor Iceland – two leading advocates of lethal research within the IWC – have demonstrated any meaningful inclination to accede to the Convention. The CMS Scientific Council has thus largely avoided this difficult issue, unlike its IWC counterpart. Nevertheless, the scientific whaling issue has had a practical effect upon Norwegian participation in ASCOBANS, one of the key CMS subsidiary Agreements addressing cetaceans. As noted in Chapter V, Norway considers the *de facto* prohibition of lethal research under the Agreement to be fundamentally incompatible with current national policy and has accordingly declined to consider the possibility of membership on these terms.

The second key exception to the taking of Appendix I species accommodates the needs of “traditional subsistence users” of the species in question, a provision that echoes the aboriginal subsistence exception advanced under the ICRW. However, by avoiding the term “aborigine”, the CMS has avoided the awkward definitional debate that has enmeshed the IWC in on-going controversy on this issue, as detailed in Chapter II.

The right to “take” cetaceans, whether for scientific or subsistence purposes, is not unqualified under the Bonn Convention; such activities must be “precise as to content and limited in space and time” and should not operate to the disadvantage of the species.<sup>18</sup> In practice, however, directed catches of cetaceans has been a peripheral issue within the CMS. On the isolated occasions in which a party has considered particular hunting restrictions contrary to the national interest, it has simply entered a general reservation to the CMS listing or, as in the specific case of Norway, remained politely impervious to invitations to accede to the subsidiary Agreement in question.

#### 4.2.2 Appendix II Species

Appendix II lists species with an “unfavourable conservation status”. The conservation status of a migratory species is defined under the Bonn Convention as being favourable where:

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<sup>18</sup> Article III(5). Where taking is permitted pursuant to this provision, under Article III(7) the party in question must inform the Secretariat of the CMS “as soon as possible”.

“(i) population dynamics data indicate that the migratory species is maintaining itself on a long-term basis as a viable component of its ecosystems;

(ii) the range of the migratory species is neither currently being reduced, nor is likely to be reduced, on a long-term basis;

(iii) there is, and will be in the foreseeable future, sufficient habitat to maintain the population of the migratory species on a long-term basis; and

(iv) the distribution and abundance of the migratory species approach historic coverage and levels to the extent that potentially suitable ecosystems exist and to the extent consistent with wise wildlife management”.<sup>19</sup>

The conservation status of a particular species is therefore considered “unfavourable” where any of these four criteria are not met.<sup>20</sup> To date, some 39 species of cetaceans have been listed incrementally on Appendix II.<sup>21</sup>

For Appendix II species, the parties undertake to develop “international agreements for their conservation and management”.<sup>22</sup> Two types of instrument are envisaged for species listed in Appendix II, namely an AGREEMENT established under Article IV(3) of the Convention, or an agreement concluded pursuant to Article IV(4).<sup>23</sup>

#### 4.2.3 AGREEMENTS

Under Article IV(3), “[p]arties that are Range States of migratory species listed in Appendix II shall endeavour to conclude AGREEMENTS where these would benefit the species and should give priority to those species in an unfavourable conservation status”. Guidelines for the conclusion of such AGREEMENTS are advanced under Article V of the CMS, with their primary objective stated as being “to restore the migratory species concerned to a favourable

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<sup>19</sup> Article I(1)(c).

<sup>20</sup> Article I(1)(d). The “conservation status” of a migratory species is defined as “the sum of the influences acting on the migratory species that may affect its long-term distribution and abundance”: Article I(1)(b).

<sup>21</sup> Appendix I; reproduced at [www.cms.int/documents/appendix/cms\\_app1\\_2.htm](http://www.cms.int/documents/appendix/cms_app1_2.htm) (last visited 31 August 2009).

<sup>22</sup> Article IV(1). Article IV(2) permits migratory species to be listed in both Appendix I and Appendix II, “if the circumstances so warrant”. Unlike Appendix I species, once a particular species has been listed on Appendix II there is no procedure under the Bonn Convention to reverse this designation.

<sup>23</sup> The term AGREEMENT is emphasised in capital letters in order to distinguish this type of instrument from the kind provided for under Article IV(4); Resolution 2.6: Implementation of Articles IV and V of the Convention, adopted at the Second Conference of the Parties in October 1989.

conservation status or to maintain it in such a status”.<sup>24</sup> To date, four AGREEMENTS have been concluded under the CMS umbrella, relating to European bats,<sup>25</sup> African-Eurasian waterbirds,<sup>26</sup> Southern Hemisphere albatrosses and petrels<sup>27</sup> and African gorillas.<sup>28</sup>

Article IV(3) provides the clearest basis for the development of cetacean instruments under the CMS. While Article V(4) prescribes particular features common to each AGREEMENT, migratory cetaceans are specifically addressed in Article V(4)(f). To this end, “at a minimum” such instruments must prohibit “any taking that is not permitted for that migratory species under any other multilateral agreement and provide for accession to the AGREEMENT by States that are not Range States of that migratory species”. The application of this criterion could mitigate difficulties encountered within the IWC concerning its competence to regulate small cetaceans. Article V(4)(f) does not distinguish between species of cetaceans – referring simply to “migratory species of the Order Cetacea” – thereby establishing an unequivocal remit to address the various anthropogenic threats facing both large and small species of cetaceans.

Likewise, the reference in Article V(4)(f) to the “taking” of cetaceans may also be considered significant. Unlike Appendix I species, the CMS declines to prescribe conditions for the directed hunting of Appendix II species. It appears that this provision was originally intended to apply to the limitations and quotas on directed hunting imposed by the IWC, since at the material time of the conclusion of the CMS the only viable multilateral agreement addressing the taking of migratory cetaceans would have been the ICRW. Nevertheless, given the recent development of alternative regulatory bodies such as NAMMCO, the pluralistic wording of this provision may potentially raise similar problems of construction as experienced under Article 65 LOSC.

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<sup>24</sup> Article V(1).

<sup>25</sup> Originally entitled the Agreement on the Conservation of Bats in Europe (EUROBATS), the agreement was concluded in December 1991 and entered into force on 16 January 1994. In July 2000 this instrument was formally renamed the “Agreement on the Conservation of Populations of European Bats”: Resolution 3.7, adopted at the Third Session of the Meeting of the Parties. The text of the Agreement is reproduced in full (as amended) on the EUROBATS institutional website at [www.eurobats.org](http://www.eurobats.org) (last visited 31 August 2009).

<sup>26</sup> The African-Eurasian Waterbird Agreement (AEWA) opened for signature in June 1995 and entered into force on 1 November 1999. The text of the Agreement is reproduced in full on the AEWA institutional website at [www.unep-aewa.org](http://www.unep-aewa.org) (last visited 31 August 2009).

<sup>27</sup> The Agreement on the Conservation of Albatrosses and Petrels (ACAP) opened for signature in June 2001 and entered into force on 1 February 2004. The text of the Agreement is reproduced in full on the ACAP institutional website at [www.acap.aq](http://www.acap.aq) (last visited 31 August 2009).

<sup>28</sup> The Agreement on the Conservation of Gorillas opened for signature in October 2007 and entered into force on 1 June 2008. The text of the Agreement is reproduced in full on the CMS website at [www.cms.int](http://www.cms.int) (last visited 31 August 2009).



The instruments concluded to date under Article IV(4) have tended to fall into one of two categories, namely formal Agreements following a similar structure to Article IV(3) AGREEMENTS, and less formal Memoranda of Understanding (MOUs).<sup>31</sup> The more formal agreements relate to seal populations in the Wadden Sea,<sup>32</sup> small cetaceans in the Baltic and North Seas and cetaceans of the Mediterranean and Black Seas and contiguous Atlantic area. The operation of the two cetacean Agreements is outlined in Chapters V and VI respectively.

#### 4.2.5 Non-binding instruments

Thus far, seventeen MOUs have been established under the CMS, addressing the conservation needs of a variety of species ranging from birds, to marine turtles to deer and antelopes.<sup>33</sup> Of particular importance to cetaceans is the development of an MOU on the Conservation of Cetaceans and their Habitats in the Pacific Islands Region, concluded in 2006 and a MOU Concerning the Conservation of the West African Manatee and Small Cetaceans of Western Africa and Macaronesia, concluded in 2008. Both MOUs are analysed fully in Chapter VII of this thesis.

In addition, the CMS parties may also elaborate Action Plans or Initiatives for certain Appendix II species, which may be a precursor to a further multilateral instrument, commonly in the form of an MOU.<sup>34</sup> Indeed, as noted in Chapter VII, the Western African MOU commenced as a CMS Initiative in 2002 and subsequently evolved into an official CMS subsidiary instrument.

The expanding range of less formal instruments, primarily concluded over the course of the past five years, may be considered an encouraging sign that the CMS is at least moving to

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<sup>31</sup> On the role of such instruments within the CMS umbrella see C. Shine, "Selected Agreements Concluded Pursuant to the Convention on the Conservation of Migratory Species of Wild Animals" in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2003), at 196.

<sup>32</sup> The Wadden Sea Seal Agreement was the first subsidiary instrument to be concluded under the auspices of the Bonn Convention. The Agreement was signed in October 1990 and entered into force on 1 October 1991. The text of the Agreement is reproduced in full on the institutional website of the Wadden Sea Secretariat at [www.waddensea-secretariat.org](http://www.waddensea-secretariat.org) (last visited 31 August 2009).

<sup>33</sup> For a concise discussion of these developments see R. Caddell, "International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention", (2005) 16 *Colorado Journal of International Environmental Law and Policy* 113, at 137-9.

<sup>34</sup> Moreover, the CMS Gorilla Agreement started as an Action Plan, hence such initiatives may also eventually crystallise into more binding commitments.

acknowledge the conservation needs of an extended range of species.<sup>35</sup> However, as noted in Chapter VII, it also reflects a general softening of CMS measures towards non-binding instruments that, while attracting media attention and Range State interest, do not necessarily commit participants to any meaningful conservation obligations.

### 4.3 Institutional Arrangements

Like most other multilateral environmental agreements concluded to date, the Bonn Convention has developed a strong institutional structure.<sup>36</sup> In keeping with the current trend in international institutional practice, the CMS itself provided a mandate for the creation of its various component institutions, as well as the establishment of a designated forum for debate and decision-making. In this regard, a regular Conference of the Parties (COP) is convened, in which policies towards migratory species are debated and advanced. The COP receives administrative support from a Secretariat, alongside a Scientific Council and a Standing Committee which are charged with providing and disseminating expert technical advice.

#### 4.3.1 The Conference of the Parties

The COP is convened by the Secretariat of the Bonn Convention and each such meeting is to be held “at intervals of not more than three years”.<sup>37</sup> To date, nine such meetings have been convened.

The COP is charged with reviewing the implementation of the Bonn Convention,<sup>38</sup> and has particular responsibility for, *inter alia* reviewing and assessing the conservation status of migratory species, as well as making recommendations to the parties concerning the implementation of the Convention. Decisions made at a COP generally require the assent of a two-thirds majority of the parties present and voting.<sup>39</sup> Observers may attend the COP;

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<sup>35</sup> N. Matz, “Chaos or Coherence? Implementing and Enforcing the Convention on Migratory Species through various Legal Instruments” (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 197, at 202.

<sup>36</sup> On this issue generally see R. R. Churchill and G. Ulfstein, “Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law” (2000) 94 *American Journal of International Law* 623.

<sup>37</sup> Article VII(3). The period between these meetings can be altered by a vote at the COP, and an extraordinary meeting may be held “at any time” on the written request of at least one-third of the parties.

<sup>38</sup> Article VII(5).

<sup>39</sup> Article VII(7). The exceptions to this principle relate to financial matters.

however, in marked contrast to the Annual Meetings of the IWC, each prospective observer must be “technically qualified in protection, conservation or management migratory species”.<sup>40</sup>

To date cetaceans have received sustained attention on the agenda of the COP, where an increasing number of Resolutions advancing conservation policies have been advanced in recent years. Initially, particular emphasis was placed on the smaller species, for which a targeted Resolution was adopted in each of the first three COPs, reflecting concerted efforts under the CMS umbrella to establish subsidiary agreements in this regard.<sup>41</sup> Following these initial developments, however, the subsequent two COPs were primarily focussed on research initiatives, with few substantive regulatory initiatives developed in respect of cetaceans. The Fourth COP noted the paucity of scientific data on migrations of small cetaceans, recommending further studies “giving priority to species and populations of threatened or uncertain status”.<sup>42</sup> This was followed by specific attention at the next COP on climate change, whereby a further Recommendation observed the work conducted by *inter alia* the IWC, recommending an assessment of its relevance for the CMS and to strengthen existing links in this regard.<sup>43</sup> Likewise, at the Sixth COP, further consideration was accorded to the problems raised by cetacean by-catches.<sup>44</sup>

At the Seventh COP a first specific Resolution on large cetaceans was adopted.<sup>45</sup> Here, the parties were called upon to address indirect threats facing Antarctic minke, Bryde’s and pygmy right whales, noting that a lack of scientific consensus had prevented the Scientific Council from recommending the formal listing of these species on Appendix I. Accordingly, the Resolution called on parties to further clarify the nature of anthropogenic threats to these species and to enhance conservation efforts, both on a national basis and through relevant international and regional organisations.

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<sup>40</sup> Prospective observers may be refused admission if one-third of the parties present at the COP object to their attendance.

<sup>41</sup> Resolution 1.7: Small Cetaceans, adopted at the First COP in 1985; Resolution 2.3: Small Cetaceans, adopted at the Second COP in 1988; Resolution 3.3: Small Cetaceans, adopted at the Third COP in 1991.

<sup>42</sup> Recommendation 4.2: Research on Migration in Small Cetaceans, adopted at the Fourth COP in 1994.

<sup>43</sup> Recommendation 5.5: Climate Change and its Implications for the Bonn Convention, adopted at the Fifth COP in 1997. A further Resolution on climate change was adopted on this issue at the Eighth COP, which reiterated the call for general cooperation but made no specific reference to the IWC on this occasion: Resolution 8.13: Climate Change, adopted at the Eighth COP in 2005.

<sup>44</sup> Resolution 6.2: Bycatch, adopted at the Sixth COP in 1999.

<sup>45</sup> Resolution 7.15: Future Action on the Antarctic Minke, Bryde’s and Pygmy Right Whales under the Convention on Migratory Species, adopted at the Seventh COP in 2002.

Of particular significance to the present and future agenda of the CMS in respect of cetacean conservation, is the adoption at the Eighth COP of a specific Resolution on anthropogenic impacts on cetaceans,<sup>46</sup> which formally acknowledged that “human induced impacts on cetaceans are increasing”. The Resolution identified six main areas of concern, namely by-catches and entanglements, climate change, ship-strikes, pollution, habitat and feeding ground degradation and marine noise. Accordingly, the Resolution called for the development of a comprehensive programme of action – in conjunction with the IWC and other relevant organisations – to address human-induced impacts on cetaceans. Following the adoption of Resolution 8.22, the CMS Secretariat developed a formal Programme of Work for Cetaceans, which was endorsed at the Ninth COP.<sup>47</sup> This Programme reviewed existing synergies between the CMS and other pertinent organisations with a view to identifying gaps and overlaps, thereby further ascertaining the precise contribution that the Bonn Convention may provide to the current international framework.

To date, as far as the six priority actions identified in Resolution 8.22 are concerned, concerted activity has been most ostensibly developed in respect of by-catches and marine noise. With regard to by-catches, concerns over the incidental mortality of cetaceans were first addressed in a targeted Resolution adopted at the Sixth COP, and subsequently reinforced at successive COPs as a key policy of the CMS in respect of marine mammals generally.<sup>48</sup> The negative effects of ocean noise were first identified at the Seventh COP in the specific context of wind turbines,<sup>49</sup> in which the Parties expressed concerns over the possible impact of offshore wind developments on migratory species of mammals and birds, including *inter alia* the “emission of noise and vibrations into the water”. More specifically, at the Ninth COP substantial consideration was given to this issue, with “marine noise impacts” identified as one of the “multiple, cumulative and often synergistic threats” to cetaceans.<sup>50</sup> Moreover, at this juncture the parties adopted their first Resolution explicitly addressing the impact of noise on cetaceans,<sup>51</sup> commending developments within

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<sup>46</sup> Resolution 8.22: Adverse Human Induced Impacts on Cetaceans, adopted at the Eighth COP in 2005.

<sup>47</sup> Resolution 9.9: Migratory Marine Species, adopted at the Ninth COP in 2008.

<sup>48</sup> Recommendation 7.2: Implementation of Resolution 6.2 on Bycatch, adopted at the Seventh COP in 2002; Resolution 8.14: Bycatch, adopted at the Eighth COP in 2005; Resolution 9.18: Bycatch, adopted at the Ninth COP in 2008.

<sup>49</sup> Resolution 7.5: Wind Turbines and Migratory Species.

<sup>50</sup> Resolution 9.9: Migratory Marine Species.

<sup>51</sup> Resolution 9.19: Adverse Anthropogenic Marine/Ocean Noise Impacts on Cetaceans and Other Biota.

ASCOBANS and ACCOBAMS on this issue, and urging special care to control emissions of anthropogenic noise. Resolution 9.19 also called for the adoption of migration measures for high intensity active naval sonar, to consult with relevant stakeholders on issues of best practice, to undertake further research regarding sources and impacts of ocean noise and, in particular, to “endeavour to develop provisions for the effective management of anthropogenic noise in CMS daughter agreements and other relevant bodies and conventions”.

In this respect, as far as ocean noise – and the other five sources of human induced impact – are concerned, future regulatory initiatives are likely to be advanced through the flagship CMS cetacean Agreements, acting in conjunction with relevant intergovernmental bodies. Moreover, significant policy guidance will be generated as a result of the on-going Programme of Work endorsed at the Ninth COP. This project will permit the CMS to develop targeted initiatives to advance the conservation status of migratory cetaceans, while better harnessing the collaborative possibilities raised by pertinent external agencies.

#### *4.3.2 The Secretariat*

Article IX(1) of the Bonn Convention provides that a Secretariat shall be established, and this institution was duly founded when the CMS entered into force. The CMS Secretariat operates under the administrative auspices of UNEP and is based in Bonn where, having previously cohabited with a host of other UN Agencies, is now housed in its own purpose-built accommodation, together with the Secretariats of the various subsidiary Agreements. The functions of the Secretariat are elaborated in Article IX(4) of the CMS and, in addition to general administrative duties, include promoting liaison between the parties, institutions established under AGREEMENTS and other relevant international organisations concerned with migratory species. As part of this remit, in the context of cetacean conservation, the CMS Secretariat has played a key role in facilitating meetings and workshops for the development of further subsidiary agreements addressing cetaceans, most recently in relation to the Pacific Islands MOU<sup>52</sup> and Western African MOU.

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<sup>52</sup> In this regard, as noted in Chapter VII, the CMS Secretariat co-sponsored a series of workshops to promote activities to address the conservation status of cetaceans in the Pacific Islands Region, which proved highly significant in ultimately brokering the MOU inaugurated in 2006.

The CMS envisages an ambitious role for the Secretariat, which is not always matched by its funding capabilities.<sup>53</sup> Nevertheless, such difficulties aside – and the Bonn Convention is hardly the only multilateral treaty to suffer from budgetary constraints within its administrative framework – the Secretariat remains a vital component of the infrastructure of the CMS. In addition, the CMS Secretariat has, in recent years, begun to develop a significant inter-agency liaison role in conjunction with the other Secretariats of the leading wildlife treaties, and plays an active part in the Liaison Group of the Biodiversity-Related Conventions, which aims to foster closer links with these bodies as well as attempting to mitigate the potential duplication or conflict of work within these organisations.<sup>54</sup>

As noted in Chapter V, in 2007 the CMS Secretariat was formally merged with that of ASCOBANS, with the Executive Director of the CMS also appointed as the Acting Executive Director of ASCOBANS. The roots of these developments are based in discontent generated by the perceived over-spending on personnel and administrative matters within ASCOBANS. The current hybrid administration of the CMS and ASCOBANS remains subject to ongoing review and, as noted in the following Chapter, the present arrangements have received a decidedly mixed response from parties both within and outside the current ASCOBANS structure.

#### 4.3.3 *The Scientific Council*

Under Article VIII(1) a Scientific Council was established at the first COP, to provide “advice on scientific matters”. Any party may appoint a “qualified expert” as a member of the Scientific Council.<sup>55</sup> In addition to these members, experts may also be selected and appointed by the COP.<sup>56</sup> Where such experts are appointed, they are distinguished from those appointed by the parties with the title “Appointed Councillor” and the criteria for their selection and the terms of their tenure are specifically established by the COP. Eight such

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<sup>53</sup> Caddell, “Twenty-Five Years of the Bonn Convention”, at 140-1; on this issue see further P. W. Birnie and A. E. Boyle, *International Law and the Environment* (Oxford: Oxford University Press, 2002), at 622. This shortcoming has also been replicated within the subsidiary instruments of the CMS, which has led to a sometimes strained relationship between the various Agreement Secretariats and the constituent parties and Range States.

<sup>54</sup> The other members of the Liaison Group are the Secretariats of the Convention on Biological Diversity (CBD), CITES, the Ramsar Convention on Wetlands and the UNESCO World Heritage Convention. The Group was established following the Fifth COP of the CBD.

<sup>55</sup> Article VIII(2).

<sup>56</sup> At present, there are some 77 members of this body: see the Scientific Council’s webpage on the CMS institutional website at [www.cms.int/bodies/ScC\\_homepage.htm](http://www.cms.int/bodies/ScC_homepage.htm) (last visited 31 August 2009).

experts were appointed for the triennium 2006-08.<sup>57</sup> Of immediate relevance to cetaceans is the appointment in 2006 of Dr William F. Perrin as Appointed Councillor for “aquatic mammals”; a further Appointed Councillor has responsibility for “by-catch” and will accordingly have a key role to play in the formulation of conservation and management measures in respect of cetaceans under the CMS umbrella.

The COP determines the precise functions of the Scientific Council, hence the CMS cetacean agenda is largely dictated by the scientific priorities of the parties. Initial drafts of the Bonn Convention suggested that the Scientific Council was intended to be a largely autonomous body,<sup>58</sup> in a manner broadly analogous to the Scientific Committee of the IWC. However, Lyster suggests that the decision to ultimately subordinate the autonomy of the Scientific Council to the COP “indicates that some States were concerned lest it might become involved in issues that were scientifically interesting but politically undesirable”.<sup>59</sup>

Notwithstanding this position, cetaceans have occupied a significant position on the agenda of the Scientific Council since its inauguration in 1988. Indeed, at the first meeting of the Scientific Council, a distinct Working Group on Small Cetaceans was established although, somewhat portentously, it was unclear at this juncture whether the Working Group was itself intended to form a permanent part of the CMS scientific structure or whether it was to be formally disbanded after the second COP.<sup>60</sup> Nevertheless, a broad remit was envisaged for the Working Group, irrespective of the uncertainty surrounding its ultimate tenure, and it was decided that the Scientific Council should study the conservation of small cetaceans globally, including freshwater species.<sup>61</sup> In any event, the Working Group appears ultimately to have been confined to brokering interest for the elaboration of an instrument addressing small cetaceans in northern Europe – which eventually became the present-day ASCOBANS – rather than exercising a broad-ranging remit to identify and develop conservation priorities and policies for cetaceans addressed under the umbrella of the Bonn Convention.

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<sup>57</sup> Resolution 8.21, Institutional Arrangements: Standing Committee and Scientific Council, adopted at the Eighth COP. These scientific arrangements were left undisturbed at the Ninth COP.

<sup>58</sup> Lyster, “The Bonn Convention”, at 994.

<sup>59</sup> *Ibid.* at 995.

<sup>60</sup> *Report of the First Meeting of the Scientific Council* (Bonn: CMS, 1988), at 1. The Working Group was indeed disbanded at this point, having delivered a comprehensive report on the proposed development of a regional agreement for small cetaceans in the Baltic and North Seas.

<sup>61</sup> *Ibid.*

Since these developments, practical issues of cetacean conservation have been directed through the Scientific Council, as part of its remit to evaluate the impact of the CMS on the species regulated under its auspices. A significant development in this respect was the establishment in 2005 of a distinct Cetacean Liaison Group (CLG), which has become a broader incarnation of the old Working Group formed in the early years of the Bonn Convention. The CLG grew from a proposal by the Whale and Dolphin Conservation Society to establish a standing working group in support of cetacean research and conservation priorities. This body aims to prioritise funding and implementation of cetacean conservation projects submitted to the institutions of the Bonn Convention, as a means of contributing to the CMS Strategic Plan 2006-11.<sup>62</sup>

The CLG extends its consideration to all species of cetaceans. This has afforded a specialist platform under the scientific auspices of the CMS for experts to consider research reports on the specific conservation needs of cetaceans. The group is also charged with providing advice and recommendations on cetacean issues, both to the parent convention as well as its relevant subsidiary Agreements. In particular, the CLG has made a significant contribution in recent years to the elaboration of the WATCH initiative, culminating in the conclusion of the Western African MOU.

#### *4.3.4 The Standing Committee*

The final institution established under the Bonn Convention's administrative framework is the Standing Committee, established at the first COP.<sup>63</sup> The functions and purpose of the Standing Committee are to act on behalf of the COP in developing policies and providing administrative guidance between the regular meetings of the parties to the Convention.<sup>64</sup> The Standing Committee has historically exercised a limited role in relation to cetaceans. Nevertheless, at present it continues to provide a substantial input to the on-going review of the current CMS/ASCOBANS administration experiment, and the views of the Standing Committee are likely to be influential upon the evaluation of the current arrangement between the CMS Secretariat and its additional ASCOBANS responsibilities.

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<sup>62</sup> *Report of the Thirteenth Meeting of the CMS Scientific Council* (Bonn: CMS, 2005), at 17. The establishment of the Cetacean Liaison Group on these terms echoes a trend experienced within some of the subsidiary Agreements of the Bonn Convention – especially AEWA and ACCOBAMS – towards formally reviewing proposed projects on an institutional level and allocating the limited funds available upon a strict priority basis.

<sup>63</sup> Resolution 1.1.

<sup>64</sup> *Ibid.*



This arrangement was placed on a more formal footing through the conclusion of a Memorandum of Understanding between the two organisations in July 2000.<sup>71</sup> The MOU aims to “establish a framework of information and consultation between UNEP/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”.<sup>72</sup> In this regard, the respective Secretariats undertake to facilitate mutual participation as observers in relevant meetings of convened under both conventions, and to improve coordination between national focal points in their constituent parties,<sup>73</sup> while regularly exchanging data and pertinent documentation.<sup>74</sup> Furthermore, the two Secretariats undertake that they will, “to the extent possible, coordinate their programme of activities to ensure that their implementation is complementary and mutually supportive”.<sup>75</sup> The conclusion of the MOU was strongly endorsed by the IWC at its Fifty-third Meeting in 2001, with the constituent bodies of the ICRW urged “under its Memorandum of Understanding with the Convention on Migratory Species (CMS) to pursue complementary and mutually supportive actions in respect of small cetaceans”.<sup>76</sup>

The CMS views its remit in this regard as essentially to address small cetaceans and specific problems relating to cetacean migration. While the Bonn Convention technically applies to whale stocks, the pronouncements on whales are relatively infrequent in this forum. As Gillespie observes, the CMS has largely refrained from the wholesale listing of large whales in its Appendices, primarily on the basis that such species are afforded a stronger degree of protection under the ICRW.<sup>77</sup> Indeed, the CMS employs highly deferential language in addressing the whaling issue which, as noted above, largely views issues such as quota-setting and other aspects of hunting management as falling under the distinct purview of other organisations. Furthermore, vociferous protests against the listing of further species of large whales by pro-consumption parties, primarily Norway and Denmark, have ensured that such

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<sup>71</sup> Memorandum of Understanding between the Secretariat of the International Whaling Commission and the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals; reproduced as Annex 1 of Document UNEP/CMS/Conf.7.11, presented at the Seventh COP to the CMS.

<sup>72</sup> Article I.

<sup>73</sup> Article II.

<sup>74</sup> Article III.

<sup>75</sup> Article IV. Under Article V, both Secretariats undertake to report on the effectiveness of the MOU and “seek further guidance on new areas of cooperation”.

<sup>76</sup> Resolution 2001-13: On Small Cetaceans.

<sup>77</sup> A. Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Cheltenham: Edward Elgar, 2005), at 333.

a policy has remained consistent within the various CMS institutions. This avoidance of controversy with regard to whales has meant that the CMS has thereby largely played a “supporting non-conflicting role” with the IWC to date.<sup>78</sup>

Instead, the CMS institutions have long focussed on small cetaceans, noting the perpetual difficulties experienced by the IWC in this respect. Indeed, at the Fourth Meeting of the Scientific Council it was explicitly declared that “the IWC lacked the political framework – which CMS can offer – to follow through on its recommendations ... the IWC was unlikely to come to a decision in the near future on the sensitive issue of competence for small cetaceans”.<sup>79</sup> Further clarification of the prospective remit apropos small cetaceans was forthcoming a year later at the Fourth COP, with the scientific functions of the CMS seemingly confined to “migratory aspects of the species while the IWC Scientific Committee was concerned with its habitat and population”.<sup>80</sup>

Nevertheless, the comparative roles of the Bonn Convention and the IWC are perhaps not as simplistically divided as this earlier arrangement may suggest. The recent inauguration of the IWC Conservation Committee, alongside a greater consideration of the impacts of anthropogenic activities upon cetaceans under the CMS, has brought a more fluid interpretation of the regulatory frontier between the organisations in more recent years. Indeed, prior to the establishment of the Conservation Committee, interactions between the IWC and the CMS umbrella were predominantly confined to the scientific arena. The development of the Conservation Committee has provided a further platform for collaborative work, in which the IWC has been swift to embrace the Bonn Convention. Although this arrangement has been characterised largely by vague statements of support for future cooperation and undertakings towards exploring prospective collaborative work programmes, there are signs that a mutually-supportive agenda is starting to come to fruition.

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<sup>78</sup> *Ibid.* Furthermore, it is clear that if the Bonn Convention did permit future exploitation of whale stocks, especially minke whales, then “such quotas would be in accordance with the IWC Revised Management Procedure”: *Report of the Eleventh Meeting of the Scientific Council* (Bonn: CMS, 2002), at 22. It appears that this position would apply notwithstanding that the CMS Scientific Council has formally noted a “lack of confidence in the effectiveness” of the RMP, further considering that there are “considerable uncertainties about population trends and the species was subject to a range of threats owing to its aquatic habitat”: *ibid.*

<sup>79</sup> *Report of the Fourth Meeting of the Scientific Council* (Bonn: CMS, 1993), at 3.

<sup>80</sup> *Proceedings of the Fourth Meeting of the Conference of the Parties* (Bonn: CMS, 1994), at 52.

As noted above, at the Eighth COP to the CMS a broad Resolution was adopted on adverse anthropogenic activities in the cetacean environment;<sup>81</sup> this was swiftly noted by the Conservation Committee, which expressed its support for this development and to working with the CMS on this issue.<sup>82</sup> More explicitly, at the Sixtieth Meeting of the IWC in 2008, the Conservation Committee actively discussed the role of the CMS in cetacean conservation in a manner that suggests that its assistance may not be restricted to scientific aspects of migration. Indeed, building on an earlier proposal to develop a joint work programme between the IWC's Scientific and Conservation Committees and ASCOBANS, the Conservation Committee called for collaboration between the IWC and the CMS in respect of entanglements and by-catches, ship-strikes, climate change, habitat degradation and prey depletion.<sup>83</sup> The IWC has noted the development by the CMS of a Programme of Work for Cetaceans, for which a close working relationship with the IWC is envisaged.<sup>84</sup> Accordingly, it appears that the further elaboration of this programme will prove highly instructive in the development of future working practices between the CMS and the IWC.

#### 4.5 Concluding Remarks

As noted above, the CMS may be considered to offer considerable conservation possibilities for the species of cetaceans protected under its auspices. Indeed, the Bonn Convention provides a framework under which their conservation status may be advanced in a coordinated and holistic manner, addressing a broad range of anthropogenic threats to such species. Accordingly, a number of key advantages may be identified in the operation of the CMS as a regime by which to promote the conservation of cetaceans.

Firstly, cetaceans have occupied a prominent position on the CMS agenda since its inception. Notwithstanding some individual discord between parties over certain species – most notably the minke whale – the consideration of cetaceans under the Bonn Convention has largely avoided the controversy experienced within the IWC. One possible explanation is that a number of key pro-whaling states have consistently declined to participate within the CMS. Consequently, discussions of cetacean issues have not been dominated by the directed

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<sup>81</sup> Resolution 8.22: Adverse Human Induced Impacts on Cetaceans.

<sup>82</sup> *Report of the Conservation Committee* (Cambridge: IWC, 2006) at 3; adopted at the Fifty-Eighth Meeting of the IWC.

<sup>83</sup> *Report of the Conservation Committee* (Cambridge: IWC, 2008) at 7; adopted at the Sixtieth Meeting of the IWC.

<sup>84</sup> *Ibid.*

hunting debate, which has facilitated greater opportunities to develop policies addressing a host of conservation problems in a manner that has not historically been forthcoming to such an extent under the ICRW.

Secondly, and perhaps most significantly, unprecedented attention has been focussed upon small cetaceans under the CMS regime, within both the general framework of the parent convention and the individual subsidiary Agreements. A strong case can therefore be made to identify the CMS as the leading current multilateral forum in practice to address the conservation needs of small cetaceans. The ongoing debate over IWC competence presents a considerable impediment to developing meaningful conservation and management initiatives for small cetaceans under the auspices of the ICRW. The lack of equivalent political obstacles has permitted a greater volume of productive conservation initiatives to emerge for small cetaceans through the CMS, as opposed to the ICRW.

In this regard, the specific threats to cetaceans – both large and small species – have received particular attention within the CMS regime, especially in the context of ocean noise and by-catches. Furthermore, the CMS has largely avoided the generic conservation approaches taken by other multilateral fora, emphasising region-specific solutions to the anthropogenic threats to these species. This is significant since cetaceans may be exposed to very different threats in certain regions. For instance, as noted in the following Chapter, even within the relatively narrow geographical confines of ASCOBANS, the key mortality factors vary considerably between the Baltic and North Seas respectively.

Despite some initial difficulties, with the CMS initially dubbed a “sleeping treaty”,<sup>85</sup> and one that has, at times, lacked both teeth and participants,<sup>86</sup> the Convention structure demonstrates clear scope to address cetaceans effectively. Some problems remain, however, especially the acute financial pressures that have arisen as the CMS umbrella has expanded significantly in recent years. As noted in Chapter VII, such pressures have impacted upon its ability to generate further binding cetacean Agreements. Moreover, cetaceans constitute a small, but significant, aspect of the Convention’s remit. The CMS may therefore lack both the necessary resources and focus to act as a long-term default option to regulate small cetaceans globally.

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<sup>85</sup> S. Lyster, *International Wildlife Law: An Analysis of International Treaties Concerned with the Conservation of Wildlife* (Cambridge: Grotius, 1985) at 301.

<sup>86</sup> Matz, “Chaos or Coherence”, at 208-10.

In sum, the Bonn Convention has advanced a number of positive initiatives for the regulation of (sm)all cetaceans. These policies have, however, been somewhat undermined by resource pressures, competing regulatory priorities and uncertainty over the precise position of the CMS in the overall framework for cetacean conservation. The ongoing development of the COP's Programme of Work for Cetaceans should provide considerable illumination as to future working practices for the CMS in relation to other pertinent multilateral agreements, which will undoubtedly help to sharpen the focus of institutional policies accordingly. Nevertheless, many of the shortcomings currently experienced by the CMS are likely to be mirrored if – presupposing that the IWC is unable to generate the political conditions necessary to perform such duties – a global regulator could be established with specific responsibility for small cetaceans. Therefore, in the absence of a new and better-resourced global alternative, the Bonn Convention regime remains likely to remain the most viable current forum through which the specific conservation needs of small cetaceans may be advanced. Small cetaceans are regulated under the CMS framework through a growing network of Agreements and MOUs. It is to the merits of this framework that this thesis now turns, commencing with an evaluation of ASCOBANS and ACCOBAMS respectively, before analysing the possibilities generated by a more MOU-based approach and the prospects for the further expansion of the CMS cetacean umbrella.

## CHAPTER V

### THE AGREEMENT ON THE CONSERVATION OF SMALL CETACEANS OF THE BALTIC SEA, NORTH-EAST ATLANTIC, IRISH AND NORTH SEAS, 1992

#### **5.1 Introduction**

The first CMS subsidiary Agreement to address cetaceans was the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, as this instrument was originally named.<sup>1</sup> ASCOBANS represents the first multilateral instrument elaborated specifically to address the conservation needs of *small* cetaceans, in contrast to previous international initiatives that focussed primarily on large whales. Having been operational since early 1994, the experience of ASCOBANS therefore represents an insightful case-study of the operation of an Agreement pertaining to these particular species.

ASCOBANS occupies an interesting position within the regulatory framework addressing cetaceans within these waters. As the only international forum with a particular focus on small cetaceans, it cohabits – sometimes uneasily – with a number of other supervisory bodies in the region. The precise role of ASCOBANS has been a matter of considerable debate, with questions raised over the continuing utility of the Agreement. Although broad support for ASCOBANS remains, it is nonetheless clear that the regime has reached a critical point in its development, both in terms of conservation policies and its role within the CMS family. ASCOBANS has accordingly experienced an eventful tenure to date, which may be somewhat illustrative of contemporary difficulties in regulating specifically for small cetaceans.

This Chapter will analyse the operation of ASCOBANS thus far, outlining its negotiation, application and position within the current regulatory framework. This Chapter also considers the reformed institutional structure of the Agreement and key conservation policies pursued by ASCOBANS to date. Finally, a series of conclusions are advanced regarding the future operation of the Agreement.

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<sup>1</sup> 1772 UNTS 217 [hereinafter “ASCOBANS”]. The Agreement area was expanded in 2003, a development that officially entered into effect in 2008, following the requisite five ratifications of the enabling Resolution. ASCOBANS was formally renamed at this juncture, retaining its original acronym.

## 5.2 Negotiating history

The conclusion of an instrument to address the conservation needs of migratory cetaceans was envisaged at a preliminary stage under the Bonn Convention. The initial mandate for the elaboration of ASCOBANS was provided at the first COP to the CMS in 1985, which instructed the Secretariat to take “appropriate measures” to develop Agreements for numerous species, including North and Baltic Sea populations of harbour porpoises and bottlenose dolphins.<sup>2</sup> A Working Group was accordingly convened under the auspices of the CMS Scientific Council to develop a suitable instrument.<sup>3</sup>

These preliminary consultations provided little immediate optimism that an Agreement on cetaceans could be swiftly brokered between the Baltic and North Sea coastal states, with the initial negotiations producing “irreconcilable differences of opinion on the scope and content”.<sup>4</sup> A draft Agreement produced by the Working Group failed even to secure an official sponsor from among the relevant CMS parties. These inauspicious developments saw the Working Group disbanded in 1988, with the lack of a discernible consensus deemed “inappropriate for further resources to be expended by the Secretariat on this issue at this time”.<sup>5</sup>

Despite these initial difficulties, enthusiasm remained to develop an instrument for migratory cetaceans within the region. One particular impediment to the negotiations was removed at the Second and Third COPs to the CMS, where a number of species of small cetaceans – including many species commonly resident in the Baltic and North Seas – were listed on Appendix II of the parent convention. This was highly significant since, as noted in Chapter IV, Article IV(1) of the CMS requires subsidiary agreements to be concluded for Appendix II species. These designations thereby broadened the potential application of the proposed subsidiary agreement to encompass species that were previously excluded from its auspices. The negotiation process received a fresh political impetus in 1990, with the adoption of a Memorandum of Understanding on Small Cetaceans of the North Sea at the Third Ministerial

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<sup>2</sup> Resolution 1.6: Agreements.

<sup>3</sup> *Proceedings of the First Meeting of the Conference of the Parties* (Bonn: CMS, 1985), at 50.

<sup>4</sup> *Report of the First Meeting of the Scientific Council* (Bonn: CMS, 1988), at 2.

<sup>5</sup> *Ibid.*

Conference of the North Sea in 1990.<sup>6</sup> In September 1990, Sweden agreed to sponsor the agreement which prompted a further series of negotiations, culminating in the conclusion of ASCOBANS at the Third COP of the CMS in 1991. The Agreement was opened for signature in 1992 and formally entered into force on 29 March 1994.

ASCOBANS was ultimately adopted under the aegis of Article IV(4) of the parent convention, as opposed to the more explicitly cetacean-orientated Article IV(3). As noted by Nijkamp and Nollkaemper, Article IV(4) formed the basis for the first CMS cetacean Agreement for two key reasons.<sup>7</sup> Firstly, the range and migratory route of small cetaceans remained largely unknown at the time at which the Agreement was concluded, thereby failing to satisfy the precise requirements of Article V(4)(b) of the CMS for the establishment of an Article IV(3) AGREEMENT. Secondly, Article IV(4) Agreements are considered to offer a greater degree of flexibility than those concluded under Article IV(3) and are therefore more easily tailored to the specific conservation needs of the species in question.<sup>8</sup>

### 5.3 Scope

ASCOBANS applies *ratione materiae* to “all small cetaceans found within the area of the Agreement”.<sup>9</sup> As observed in Chapter II, the term “small cetacean” has given rise to considerable definitional difficulties in multilateral conventions. Gillespie notes that cetaceans are often considered “small” not as a result of their physical dimensions, but primarily “because they happen to possess certain characteristics that fall within various relevant categories”.<sup>10</sup> ASCOBANS follows the IWC in defining such animals as “any species, subspecies or population of toothed whales Odontoceti, except the sperm whale *Physeter macrocephalus*”.<sup>11</sup>

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<sup>6</sup> Reproduced in D. Freestone and T. IJlstra (eds.), *The North Sea: Basic Legal Documents on Regional Environmental Cooperation* (London: Graham & Trotman, 1991), at 277.

<sup>7</sup> H. Nijkamp and A. Nollkaemper, “The Protection of Small Cetaceans in the Face of Uncertainty: An Analysis of the ASCOBANS Agreement” (1997) 9 *Georgetown International Environmental Law Review* 281, at 288.

<sup>8</sup> *Ibid.*, at 288-9.

<sup>9</sup> Para. 1.1.

<sup>10</sup> A. Gillespie, “Small Cetaceans, International Law and the International Whaling Commission” in W. C. G. Burns and A. Gillespie, *The Future of Cetaceans in a Changing World* (New York: Transnational Publishers, 2003), at 219.

<sup>11</sup> Para 1.2(a). The IWC definition was outlined in Resolution 1977-6: Reporting Requirements for Small-Type Whaling.



This definition deliberately excludes the sperm whale, which is considered scientifically to be the sole member of the Order Odontoceti that is a large species of cetacean. It is thereby disqualified from the purview of an Agreement that seeks, in its present format, to address only small species. Likewise, the minke whale is excluded, since it is a baleen as opposed to a toothed species. The omission of minke whales unsurprising, given the controversy generated by attempts to list this species on Appendix II of the CMS at the time at which ASCOBANS was concluded. Indeed, concerns were raised within the Scientific Council at this juncture as to whether such a move “was either appropriate or meaningful”, given that this species was already governed under the ICRW.<sup>12</sup> The potential listing of the minke whale on the CMS Appendices – given that it is the most numerically abundant of all the species of commercially-exploited cetaceans – remains an emotive issue within the parent convention, and one that ASCOBANS has largely sought to avoid.

At the time of its conclusion, the state of scientific knowledge concerning the species of small cetaceans caught by the ASCOBANS definition within these waters was alarmingly deficient.<sup>13</sup> Shortly after the Agreement entered into force in 1994, the first coordinated project was initiated to map populations of cetaceans within an extended study zone broadly similar to, but not an exact template of, the ASCOBANS Area. The SCANS project (Small Cetacean Abundance in the North Seas), considered to be “the best professional judgement on the status and distribution of small cetaceans in this region”,<sup>14</sup> examined cetacean populations in the North Sea “and adjacent areas”<sup>15</sup> and ultimately concluded that nine species of small cetaceans were resident in these waters, all of which were listed on Appendix II of the CMS.<sup>16</sup>

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<sup>12</sup> *Report of the First Meeting of the Scientific Council*, (Bonn: CMS, 1988), at 5. Indeed, a motion within the Scientific Council with a view towards recommending to the COP the formal listing of listing minke whales on the CMS Appendices was comprehensively defeated by seven votes to three, while all other candidate species for potential designation at this juncture were accepted by a unanimous vote: *ibid.*

<sup>13</sup> As noted by Nijkamp and Nollkaemper, “[u]ntil 1994, the scientific record on the presence of small cetaceans in the Baltic and North Seas consisted of non-systematically compiled data based on sightings from ships and land, and from strandings”: “Small Cetaceans in the Face of Uncertainty”, at 282.

<sup>14</sup> *Ibid.*, at 282.

<sup>15</sup> In practice the SCANS project primarily examined the North Sea and the Celtic Shelf. The findings of SCANS are reproduced in P. S. Hammond *et al.*, *Distribution and Abundance of the Harbour Porpoise and Other Cetaceans in the North Sea and Adjacent Waters (SCANS)* EU-Project LIFE 92-2/UK/027, Final Report, and presented in a more concise form in P. S. Hammond *et al.*, “Abundance of Harbour Porpoise and Other Cetaceans in the North Sea and Adjacent Waters” (2002) 39 *Journal of Applied Ecology* 361.

<sup>16</sup> Namely the harbour porpoise, bottlenose dolphin, white-beaked dolphin, Atlantic white-sided dolphin, common dolphin, striped dolphin, long-finned pilot whale, Risso’s dolphin and killer whale. Additionally, the SCANS survey found four species of whale – the sperm whale, minke whale, fin whale and humpback whale – within these waters, all of which currently remain outside the purview of ASCOBANS.

In its initial form, ASCOBANS applied *ratione loci* to the “marine environment of the Baltic and North Seas”, which included the Gulfs of Bothnia and Finland, the Swedish Kattegat and Skagerrak Seas, as well as the North Sea and English Channel.<sup>17</sup> Nevertheless, it has long been acknowledged that the original Agreement Area failed to provide congruence with the known migratory pathways of the species protected under its auspices. Consequently, even as early as the first formal meeting convened under ASCOBANS, the prospect of a further expansion of the Agreement Area was mooted by the parties.<sup>18</sup> Throughout the early years of the Agreement, however, the Advisory Committee (AC) to ASCOBANS concentrated predominantly upon encouraging existing Range State participation, rather than soliciting further constituents.

In 2003, at the Fourth MOP, the Agreement was extended westwards to incorporate Ireland, Portugal and Spain as additional Range States to ASCOBANS, thereby establishing a direct geographical link with ACCOBAMS.<sup>19</sup> In redrawing the ASCOBANS frontiers, particular care was taken to avoid exceeding the limits of national jurisdiction and to prevent overlap with the existing ACCOBAMS Area, which might otherwise generate unnecessary practical difficulties.<sup>20</sup> Valid amendments to the Agreement text require ratification by five parties,<sup>21</sup> a pre-condition that initially proved somewhat elusive.<sup>22</sup> In November 2007 Finland deposited the requisite fifth ratification, and the extended Agreement Area formally entered into force on 1 February 2008. However, the extension of the ASCOBANS Area subsequently proved rather anti-climactic, since none of the new Range States have expressed any meaningful intention to accede. Indeed, such a development may have inadvertently introduced practical complications, since potential parties have advocated the inclusion of large cetaceans under ASCOBANS, to attain parity of species coverage with ACCOBAMS, as a prerequisite to accession.<sup>23</sup>

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<sup>17</sup> The original Agreement area was defined in Para 1.2(b) and, due to some ambiguity over the precise limits of the westerly waters of the UK as listed in the initial definition, was subject to further clarification at the First MOP in 1994: Resolution on the Clarification of the Definition of the Area of the Agreement.

<sup>18</sup> *Report of the First Meeting of the Parties to ASCOBANS* (Bonn: ASOBANS, 1994), at 7.

<sup>19</sup> Resolution No. 4: Extension of the ASCOBANS Agreement Area.

<sup>20</sup> *Report of the Ninth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2002), at 11.

<sup>21</sup> Para 6.5.3.

<sup>22</sup> Resolution No. 3: Extension of the ASCOBANS Agreement Area, adopted at the Fifth MOP in 2006.

<sup>23</sup> Indeed, Spain has declared that “it would not make sense to have an agreement covering all species in one part of our territory and another agreement for small cetaceans only in the other part of our waters”: Document MOP 5/Doc.29(S), submitted by the government of Spain to the Fifth MOP of ASCOBANS, 5 December 2006.

The potential expansion of species coverage under ASCOBANS has given rise to considerable debate between the parties in recent years. At the Twelfth AC Meeting, an *ad hoc* Working Group was convened to consider the legal, political and scientific implications of an expanded subject scope.<sup>24</sup> However, these investigations revealed considerable antagonism to this prospect, citing the displacement of resources away from critically endangered Baltic stocks of harbour porpoises, a likely adverse response from the IWC and substantial additional workload implications. Moreover, a crucial consideration of the parties was that, in its current format, ASCOBANS fulfils a unique niche role for the advancement of the particular conservation and management needs of small cetaceans, which should not be lightly disregarded.<sup>25</sup>

Conversely, support for expansion has been forthcoming primarily from less influential quarters, particularly non-parties and NGOs. Such constituents advocate that issues addressed under the current purview of ASCOBANS also affect large cetaceans, hence there is likely to be little diversion of resources in practice.<sup>26</sup> ACCOBAMS itself has also argued that expansion may present greater fundraising opportunities, while noting a lack of antagonism from the IWC in discharging its remit in relation to large cetaceans.<sup>27</sup> The experience of France demonstrates that ratification of both ASCOBANS and ACCOBAMS is not fundamentally irreconcilable. Moreover, all present and potential parties to ASCOBANS are EU Member States, and are tasked under the Habitats Directive<sup>28</sup> with establishing strict protection measures for “all species” of cetaceans.<sup>29</sup> However, while an expansion of the ASCOBANS remit is juridically uncomplicated, it is nonetheless clear that this proposal carries currently far from unanimous support among the current parties.

## 5.4 Participation

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<sup>24</sup> *Report of the Twelfth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2005), at 16.

<sup>25</sup> *Report of the Thirteenth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2006), at 8.

<sup>26</sup> *Ibid.*, at 9.

<sup>27</sup> *Report of the Fourteenth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2007), at 16.

<sup>28</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] *Official Journal* L206/7.

<sup>29</sup> A full appraisal of commitments under the Habitats Directive towards cetaceans is advanced in Chapter VIII of this thesis.

ASCOBANS is open to participation by all “Range States and Regional Economic Integration Organisations”.<sup>30</sup> A Range State under ASCOBANS is construed in an expansive manner,<sup>31</sup> and is considerably broader than the corresponding CMS definition. Interestingly, Spain considers itself to have been caught within this initial definition by virtue of national fishing activities,<sup>32</sup> although future Spanish participation within ASCOBANS would be explicitly grounded in the geographical expansion of the Agreement area. Likewise, the potential application to external fishing practices has also proven to be “entirely theoretical as there are no parts of the Agreement area beyond the limits of national jurisdiction”,<sup>33</sup> a position that was deliberately perpetuated within the extended Agreement area.

Accordingly, parties and participants in ASCOBANS have thus far been drawn from the fourteen coastal states located within the original Agreement area, namely Belgium, Denmark, Estonia, France, Finland, Germany, Latvia, Lithuania, the Netherlands, Norway, Poland, Russia, Sweden and the UK. To date, ten Range States have ratified the Agreement.<sup>34</sup> Estonia is an additional signatory and in 2006 stated that ratification was expected imminently,<sup>35</sup> although this has yet to occur. Latvia has prioritised participation in other CMS Agreements over involvement within ASCOBANS,<sup>36</sup> given since the marked lack of cetaceans in national waters.<sup>37</sup> Some of Latvia’s Baltic neighbours have nonetheless argued that such a position rather misses the point of the Agreement, which operates as much to restore depleted stocks of small cetaceans and extend the natural range of these species as to conserve existing populations. Latvia nonetheless participates in the ASCOBANS Jastarnia Group and receives seed funding to facilitate attendance. Beyond the NGO fraternity, there has been little official Russian engagement with ASCOBANS, with financial constraints long cited as an inhibiting factor. Meanwhile, Norway has declined to participate due to the prohibition on sustainable harvesting under the Agreement, although it has proved to be a

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<sup>30</sup> Para 8.4.

<sup>31</sup> Under Para. 1.2(f), a Range State is defined as “any State, whether or not a party to the agreement, that exercises jurisdiction over any part of the range of a species covered by this agreement, or a State whose fishing vessels, outside national jurisdictional limits but within the area of the agreement, are engaged in operations adversely affecting small cetaceans”.

<sup>32</sup> Letter from the Ministry of the Environment of the Kingdom of Spain to ASCOBANS, submitted at the Twelfth Meeting of the Advisory Committee, Document AC12/Doc.23(S).

<sup>33</sup> R. R. Churchill, “Sustaining Small Cetaceans: A Preliminary Evaluation of the Ascobans and Accobams Agreements” in A. E. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 2001), at 234.

<sup>34</sup> Belgium, Denmark, France, Finland, Germany, Lithuania, the Netherlands, Poland, Sweden and the UK.

<sup>35</sup> *Report of the Fifth Meeting of the Parties to ASCOBANS* (Bonn: ASCOBANS, 2006), at 1.

<sup>36</sup> *Report of the Fourth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 1997), at 15.

<sup>37</sup> *Report of the First Meeting of the Parties to ASCOBANS* (Bonn: ASCOBANS, 1994), at 5.

valuable scientific partner to ASCOBANS.<sup>38</sup> Ireland has demonstrated little enthusiasm for participation – somewhat surprisingly, given the designation of its national waters as a cetacean sanctuary<sup>39</sup> – while Spain and Portugal have also declined to accede, as noted above.

Beyond Range State activities, the most significant non-participant within ASCOBANS remains the European Community. Since 2004, with the accession of Poland and the Baltic States to the European Union, the Baltic Sea has been subject to closer EC regulation, while as noted in Chapter VIII, cetaceans have enjoyed high political visibility on an EU level. The ongoing reform of the Common Fisheries Policy (CFP) and the development of the Habitats Directive have raised uncomfortable questions over the future role of ASCOBANS, with all the current parties subject to a series of overriding – and potentially conflicting – measures in relation to cetaceans under EC law.

The EC has historically maintained an ambivalent relationship with ASCOBANS, consistently rejecting the possibility of formal ratification. Indeed, throughout the early years of the Agreement, relations between ASCOBANS and the EC were relatively poor.<sup>40</sup> EC officials have often cited workload considerations and time constraints as a bar to exploring mutual conservation possibilities, a position that ASCOBANS has considered “disappointing and unsatisfactory”<sup>41</sup> and “not helpful”.<sup>42</sup> Relations have softened in recent years, with EC officials noting that the Agreement could potentially have a valuable advisory role in the implementation of Habitats Directive obligations,<sup>43</sup> while ASCOBANS expertise has been acknowledged in the formation of EC by-catch policies.<sup>44</sup> Some suggestion was also made that the Agreement’s views “particularly in the field of pollution” would be sought on the marine conservation strategy advanced in the EC’s Sixth Environmental Action

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<sup>38</sup> R. R. Churchill, “The Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas” in Burns and Gillespie, “Future of Cetaceans”, at 310.

<sup>39</sup> S. D. Berrow and E. Rogan, “Ireland – A Sanctuary for Whales and Dolphins: The Implications of Ireland’s Sanctuary Declaration” (1994) 8 *European Research on Cetaceans* 12.

<sup>40</sup> R. Caddell, “Biodiversity Loss and the Prospects for International Cooperation: EU Law and the Conservation of Migratory Species of Wild Animals” (2008) 8 *Yearbook of European Environmental Law* 218, at 247-250.

<sup>41</sup> *Report of the Third Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 1996), at 6.

<sup>42</sup> *Report of the Fourth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 1997), at 15. Indeed, at this juncture it was observed that at Fifth COP to the CMS itself, the official EC representative rather patronisingly declared that the various ASCOBANS participants “should be pleased to have our research projects funded rather than be concerned about EC presence at our meetings”: *ibid.*

<sup>43</sup> *Ibid.*, at 12-13.

<sup>44</sup> *Report of the Tenth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2003), at 9.

Programme.<sup>45</sup> Nevertheless, it appears that these intimations ultimately came to very little, with the AC subsequently lamenting that “ASCOBANS had not formally been engaged by the European Commission in the preparation of the European Marine Strategy”.<sup>46</sup>

A close and co-operative relationship with the EC remains a fundamental practical consideration for the future success of ASCOBANS initiatives. This is especially true in the case of fisheries by-catches – an area of priority activity for ASCOBANS – since its constituent parties have transferred exclusive competence over fisheries to the EC. The practical implications inherent in this position are discussed further in Chapter VIII. However, at this juncture it should be observed that the transfer of fisheries competence means essentially that the parties cannot effectively implement ASCOBANS by-catch commitments and policies without explicit EC endorsement. This creates a very real danger of stagnation in the pursuit of ASCOBANS initiatives. Indeed, as noted below, the AC has repeatedly lamented the non-implementation of by-catch commitments in particular, with significant practical impediments posed by the nature of fisheries regulation in these waters.

Beyond these concerns, there are considerable practical attractions from the ASCOBANS perspective of a close association with the EC. In particular, closer Commission involvement would present opportunities to influence the EC cetacean agenda more prominently, while also creating greater scope to mitigate conflicts with Community legislation. Likewise, the experience of AEW – the only CMS subsidiary that the EC has ratified<sup>47</sup> – suggests that Community participation has also had a positive impact on the development of species action plans,<sup>48</sup> which remains a prominent commitment under ASCOBANS. With such advantages in mind, the parties have resolved to “explore ways in which ASCOBANS can better liaise and work with the EC on issues of mutual interest”.<sup>49</sup> Thus far, however, tangible cooperation has been modest and is primarily limited to official visits by the ASCOBANS Secretariat to the Commission, and sharing information on by-catch statistics.

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<sup>45</sup> *Report of the Eighth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2001), at 13. As noted in Chapter VIII of this these, this initiative that would eventually become the Marine Strategy Framework Directive.

<sup>46</sup> *Report of the Twelfth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2005), at 25.

<sup>47</sup> Council Decision 2006/871/EC [2006] *Official Journal* L345/25.

<sup>48</sup> Caddell, “Biodiversity Loss”, at 254-257.

<sup>49</sup> Resolution No. 6; Activities of the ASCOBANS Advisory Committee 2007-2010, adopted at the Fifth MOP in 2006.

Finally, participation in ASCOBANS is not limited simply to the relevant Range States. As Churchill observes, a considerable number of relevant intergovernmental organisations with a proven regulatory interest in cetaceans also operate within the Agreement Area.<sup>50</sup> This position creates a substantial risk of “treaty congestion”, which the ASCOBANS Secretariat has sought to mitigate through the establishment of institutional linkages.

While small cetaceans remain a controversial issue under the ICRW, a cooperative working relationship has nonetheless been established with the IWC. Small cetaceans have received particular attention within the IWC Scientific Committee, which has provided technical advice and assistance to ASCOBANS in establishing by-catch mitigation targets and addressing pollutants. The IWC has “recognis[ed] the relevance” of ASCOBANS for the protection of harbour porpoises and called upon mutual parties to provide full information on population distribution and abundance, stock identities, pollutant levels, and by-catch mortality and to give “high priority” to reducing by-catches of such species.<sup>51</sup> Senior IWC officials have also been regular and productive observers at the various MOPs to ASCOBANS.

The work of two key regional organisations that regulate the Baltic and North Seas – HELCOM and OSPAR – has also been of particular interest to ASCOBANS. In the Baltic Sea, the Helsinki Convention<sup>52</sup> requires the parties *inter alia* “to conserve natural habitats and biological diversity and to protect ecological processes”.<sup>53</sup> Cetaceans have traditionally occupied a relatively peripheral position on the HELCOM agenda, with one such species – the harbour porpoise – ordinarily resident in these waters. In 1996, a HELCOM Recommendation raised concerns over a dramatic decrease in population levels, with “by-catches, habitat deterioration and disturbance” identified as particular threats to this species.<sup>54</sup> Although HELCOM operates a Nature Protection and Biodiversity Group, conservation

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<sup>50</sup> Churchill observes no less than seven separate fora through which small cetacean conservation may be advanced to a greater or lesser extent, including the IWC, the Convention for the Protection of the Marine Environment of the North-East Atlantic 1992 (OSPAR), the Baltic Marine Environment Protection Commission (HELCOM), the Council of Europe and NAMMCO, as well as further political and scientific organisations such as ICES and the North Sea Ministerial Conferences: “Small Cetaceans of the Baltic and North Seas”, at 300-307.

<sup>51</sup> Resolution 1993-11: Resolution on Harbour Porpoise in the North Atlantic and the Baltic Sea.

<sup>52</sup> Convention on the Protection of the Marine Environment of the Baltic Sea Area; 1507 UNTS 167.

<sup>53</sup> Article 15.

<sup>54</sup> Recommendation 17/2: Protection of Harbour Porpoise in the Baltic Sea Area.

activities for Baltic harbour porpoises have been primarily channelled through ASCOBANS, with a close working relationship having been established between the two organisations since the inception of the Agreement. HELCOM has explicitly identified ASCOBANS as a key partner for the conservation of marine biodiversity in the Baltic Sea area, and has pledged to undertake research programmes and develop a coordinated reporting system and database on sightings, by-catches and strandings in conjunction with ASCOBANS by 2010.<sup>55</sup> HELCOM has also committed itself to supporting the implementation of key aspects of the Jastarnia Plan.<sup>56</sup>

Likewise, OSPAR has been specifically identified as a forum through which the ASCOBANS agenda against contaminants in the North Sea may be effectively advanced.<sup>57</sup> Moreover, OSPAR was centrally identified by the CMS at its Eighth COP as one of the “relevant international bodies” with which to determine work programmes and ensure a “full exchange of information and collaboration”.<sup>58</sup> Like HELCOM, the OSPAR Convention<sup>59</sup> is of particular of relevance to ASCOBANS, given its commitments towards the restoration of the ecological integrity of the North-East Atlantic and, especially, the conservation of marine ecosystems.<sup>60</sup> The OSPAR framework also offers possibilities for the development of marine protected areas within the region. Of most immediate relevance to ASCOBANS is the OSPAR programme of Ecological Quality Objectives (EcoQOs), with an EcoQO project having been established in 2005 for by-catches of North Sea populations of harbour porpoises.<sup>61</sup> As noted below, the recent conclusion by ASCOBANS of the North Sea Conservation Plan for this species is therefore likely to constitute a significant component of this wider OSPAR strategy and offer further opportunities for operational synergies.

Finally, while the consumptive use of small cetaceans is essentially prohibited under ASCOBANS, a tentative relationship has been formed with NAMMCO to facilitate and

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<sup>55</sup> Document AC15/Doc. 34 (O), *Co-operation between ASCOBANS and HELCOM in Cetacean Conservation*, submitted by HELCOM to the Fifteenth Meeting of the Advisory Committee to ASCOBANS in 2008.

<sup>56</sup> Indeed, the HELCOM Ministerial Declaration, adopted on 25 June 2003 at the HELCOM Ministerial Meeting in Bremen pledged to “give political support to the adoption and implementation of the Recovery Plan for Baltic Harbour Porpoises”: reproduced on-line at [www.helcom.fi](http://www.helcom.fi) (last visited 31 August 2009).

<sup>57</sup> *Report of the Seventh Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2000), at 10.

<sup>58</sup> Resolution 8.22: Adverse Human Induced Impacts on Cetaceans.

<sup>59</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic 1992; 2354 UNTS 67.

<sup>60</sup> Article 2(1).

<sup>61</sup> *Background Document on the Ecological Quality Objective on Bycatch of Harbour Porpoises in the North Sea* (London: OSPAR, 2005), at 3.



promote the transfer of scientific data.<sup>62</sup> Beyond this broad commitment, however, it appears that both ASCOBANS and NAMMCO operate largely in isolation to each other with little more than sporadic formal contact.<sup>63</sup>

## 5.5 Institutional arrangements

Much of the substantive text of ASCOBANS provides for the creation of operational institutions to oversee the activities of the parties, which broadly mirror those of the parent convention. Concerns have been raised over the efficiency of the original institutional structure and, in 2006, substantial reforms were introduced at the executive level of the Agreement. This has provoked a strong divergence of views, both within and beyond the confines of ASCOBANS, as to whether such developments are suitable, effective or appropriate.

The primary decision-making body of ASCOBANS is the Meeting of the Parties (MOP) which is convened on a triennial basis, of which five have been held to date. The purpose of the MOP is stated as being to review progress made and difficulties encountered in the implementation and operation of the Agreement, with particular reference to financial matters and the work of the other ASCOBANS institutions.<sup>64</sup> The MOP is the primary forum through which the key policies of the Agreement are elaborated, scrutinised and ultimately adopted. Decisions made by the MOP are adopted by a simple majority of the parties present and voting, with each party allocated one vote, aside from financial decisions and amendments to the Agreement and its Annex, which require a three-quarters majority.<sup>65</sup> Observers are entitled to attend the MOP, provided that they belong either to a lengthy catalogue of listed invitees<sup>66</sup> or are “qualified in cetacean conservation and management” and have been accepted by the ASCOBANS parties.<sup>67</sup> Interestingly, the requisite expertise of prospective observers is not confined to “small cetaceans”, although this is something of a moot point given that formal discussion of other species is generally tangential. In practice, NGO observers to ASCOBANS have played an unheralded yet highly significant role in the operation of the Agreement, frequently taking responsibility for the organisation and

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<sup>62</sup> *Report of the Twelfth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2005), at 24.

<sup>63</sup> Personal communication with Dr. Christina Lockyer (on file).

<sup>64</sup> Para. 6.1.

<sup>65</sup> Para. 6.3.

<sup>66</sup> Para. 6.2.1.

<sup>67</sup> Para. 6.2.2. Such observers are essentially NGO representatives.

management of Working Groups and research events, which is often beyond the capacity of national delegations to donate to the further activities of ASCOBANS.

The MOP receives operational support from the AC, which meets annually to review progress and to provide “expert advice ... on the conservation and management of small cetaceans”.<sup>68</sup> Nevertheless, concerns have been raised that this forum often lacks the necessary breadth of expertise and sufficient time to fully discuss key issues.<sup>69</sup> Likewise, the AC has been criticised as overly bureaucratic, often prioritising administrative and budgetary matters over the conservation and management objectives of the Agreement.<sup>70</sup> At the Fifth MOP the AC was reformed, with meetings formally demarcated into two distinct sections addressing administrative issues and scientific and policy matters respectively.<sup>71</sup> This arrangement has seemingly provided a greater degree of coherence in discharging the AC agenda, although considerable pressure remains on the time available to the delegates. However, reservations remain over the scientific capacity of ASCOBANS in comparison to other CMS Agreements. For instance, ACCOBAMS and EUROBATS have established strong scientific bodies, which have proved a fertile source of conservation policies and initiatives. Within ASCOBANS, such issues continue to compete for attention alongside a heavy administrative agenda within the AC, which may be considered a less efficient administrative structure than that encountered within other CMS bodies.

Finally ASCOBANS receives management support from its Secretariat, which is charged with undertaking essential administrative duties. Moreover, the Secretariat has in recent years assumed the important task of promoting synergies and productive working practices with other related IGOs. Despite this apparently prosaic remit, the Secretariat has in recent years experienced a somewhat fractious relationship with some of its party “shareholders”. The Secretariat has traditionally operated a rather modest office and, much of its tenure, has often struggled to keep pace with the ever-expanding workload and increasing commitments of ASCOBANS. The Secretariat has often proved to be under-funded and over-reliant upon a steady stream of interns and short-term consultants to discharge its functions.<sup>72</sup> Since 2007

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<sup>68</sup> Para 5.1.

<sup>69</sup> Churchill, “Small Cetaceans of the Baltic and North Seas”, at 293.

<sup>70</sup> See R. Caddell, *ASCOBANS – Progress and Prospects: A Report to WWF* (Doc MOP 5/ Doc.24 (O)), submitted by WWF for consideration at the Fifth MOP, September 2006, at 21-22.

<sup>71</sup> Resolution 2b: Financial, Budgetary and Administrative Matters – Operating Procedures of the Agreement 2007-2010.

<sup>72</sup> Caddell, “ASCOBANS – Progress and Prospects”, at 18-19.

the ASCOBANS Secretariat has been merged with that of the parent convention,<sup>73</sup> a position that has not always met with universal approval. Although this arrangement is considered to have reduced the Agreement's running costs, with potential advantages for the funding of conservation projects, it appears that "a significant component of the ASCOBANS constituency has regarded and to some extent is still regarding the new arrangements with suspicion, when it is not openly opposing them".<sup>74</sup> The CMS Standing Committee has also observed disquiet within the parent convention that central staff and resources have been diverted into a subsidiary Agreement with few obvious conservation benefits for the non-ASCOBANS parties.<sup>75</sup> Concerns may also be raised that these arrangements have not fully addressed the core problems of under-staffing and resource problems, which continue to affect the practical administration of the Agreement.

## **5.6 Conservation and management initiatives**

ASCOBANS cites by-catches, habitat deterioration and disturbance as the key factors that may adversely affect populations of small cetaceans within the Agreement area, with a lack of scientific data also identified as a shortcoming to effective conservation efforts.<sup>76</sup> ASCOBANS aims to facilitate co-operation to achieve and maintain a "favourable conservation status" for all cetaceans in the Agreement area.<sup>77</sup> This concept is not explicitly defined within the Agreement text; however it is widely interpreted as carrying the same meaning as that advanced under the parent convention.

### *5.6.1 General conservation measures*

In order to facilitate these objectives, a targeted Conservation and Management Plan is appended to the Agreement. The ASCOBANS Conservation and Management Plan establishes five areas of activity which each party is to apply "within the limits of its jurisdiction and in accordance with its international obligations".<sup>78</sup> Firstly, a series of habitat conservation and management objectives are explicitly identified, which have constituted a

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<sup>73</sup> Resolution 2d: Joining the Forces of ASCOBANS and CMS for Improved Management and Operation of the ASCOBANS Secretariat, adopted at the Fifth MOP in 2006.

<sup>74</sup> *Report of the Thirty-Second Meeting of the CMS Standing Committee* (Bonn: CMS, 2007), "Merger of CMS and ASCOBANS Secretariats: Progress", Doc. CMS/StC32/8.

<sup>75</sup> *Ibid.*

<sup>76</sup> Preamble.

<sup>77</sup> Para. 2.1.

<sup>78</sup> Para. 2.2.

significant proportion of the work undertaken by ASCOBANS to date. Secondly, further research activities are prescribed to assess the migratory behaviour of small cetaceans, to establish areas of importance to these species and present and potential threats to their conservation status. These activities have been pursued mainly through the on-going SCANS II project, encompassing a further survey of small cetacean populations in the Baltic and North Seas. Thirdly, the parties undertake to establish an effective system for reporting and retrieving by-catches. Fourthly, parties are to “endeavour” to establish under national law a prohibition on the intentional taking and killing of small cetaceans. This commitment falls technically short of an outright ban on directed hunting – although the spirit of ASCOBANS practice to date has been to treat this provision as a key feature of the Agreement. Finally, a strong emphasis is also made on the provision of information and education about the aims of ASCOBANS, both to the general public as well as to the fishing industry. The various requirements of the Conservation and Management Plan have been elaborated through Resolutions adopted at the various MOPs, which are then to be applied by the parties within national policies addressing small cetaceans.

As noted above, the primary emphasis of the ASCOBANS Conservation and Management Plan to date has focussed upon the conservation and management of habitats of small cetaceans. In this respect, four key areas of work are identified, namely preventing the release of harmful substances; developing modifications of fishing gear and practices to reduce by-catches and prevent the netting from being discarded; regulating activities which seriously affect food resources of small cetaceans; and prevention of other significant disturbances, especially of an acoustic nature.<sup>79</sup>

Thus far, by-catch mitigation has been generally viewed as the primary area of regulatory activity under ASCOBANS. Incidental mortality is the most significant causal factor in the depletion of stocks of small cetaceans in the Baltic and North Seas.<sup>80</sup> In the North Sea, considerable by-catch problems are raised by the widespread use of bottom-set gillnets,<sup>81</sup>

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<sup>79</sup> Para. 1 of the ASCOBANS Conservation and Management Plan.

<sup>80</sup> Churchill, “Small Cetaceans of the Baltic and North Seas”, at 285.

<sup>81</sup> T. A. Jefferson and B. E. Curry, “A Global Review of Porpoise (*Cetacea: Phocoenidae*) Mortality in Gillnets” (1994) 67 *Biological Conservation* 167, at 168. Porpoises are considered to be especially susceptible to by-catches in this equipment due to their feeding and foraging habits.

pelagic trawl fisheries and the previously widespread use of driftnets.<sup>82</sup> In the Baltic Sea, the heavily depleted numbers of harbour porpoises is attributed to historically high levels of by-catches in driftnets and bottom-set gillnets.<sup>83</sup>

To date, the ASCOBANS parties have examined the by-catch issue in considerable detail, and have adopted a number of Resolutions aimed at facilitating the development of a coordinated policy towards mitigating incidental cetacean mortality in the Agreement area. At the First MOP to the Agreement, a distinct Resolution was adopted in which a number of priority actions were established for the years 1995-97, including the “reduction of direct interactions with fisheries”.<sup>84</sup> Early mitigation strategies involved the establishment of viable by-catch limits in the Baltic and North Seas.<sup>85</sup> In conjunction with the IWC, the AC considered that the long-term aspirational goal of ASCOBANS should be to reduce by-catch to less than 1% of the best available abundance estimate, with a general (and rather unworldly) aim of ultimately eradicating all incidental catches in fisheries within the ASCOBANS area.<sup>86</sup>

However, as noted above it remains highly difficult – if not virtually impossible – in practice to translate this objective into clear by-catch limits for particular fisheries within the Agreement Area. Indeed, not only would such a policy draw vociferous objections from the EC, which exercises exclusive competence over fisheries in respect of all the current ASCOBANS parties, but furthermore, given the paucity of data concerning stock numbers of small cetaceans in these waters, the current ASCOBANS by-catch limit accordingly applies to 1% of a largely unknown figure. Consequently, the parties have repeatedly lamented that this objective has, unsurprisingly, “probably not been fulfilled”.<sup>87</sup>

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<sup>82</sup> K. Kaschner, *Review of Small Cetacean Bycatch in the ASCOBANS Agreement Area and Adjacent Waters – Current Status and Suggested Future Actions* (Bonn: ASCOBANS, 2003) at 30.

<sup>83</sup> P. Berggren, P. R. Wade, J. Carlström and A. J. Reid, “Potential Limits to Anthropogenic Mortality of Harbour Porpoises in the Baltic Region” (2002) 103 *Biological Conservation* 313, at 320.

<sup>84</sup> Resolution on the Implementation of the Conservation and Management Plan.

<sup>85</sup> On the difficulties and conservation benefits inherent in this process see P. R. Wade, “Calculating Limits to the Allowable Human-Caused Mortality of Cetaceans and Pinnipeds” (1998) 14 *Marine Mammal Science* 1.

<sup>86</sup> Resolution No. 3, Incidental Catches of Small Cetaceans, adopted at the Third MOP in 2000.

<sup>87</sup> Resolution No. 5, Incidental Take of Small Cetaceans, adopted at the Fifth MOP in 2006.

As far as the other key aspects of the ASCOBANS habitat conservation objectives are concerned, significant attention has been given to acoustic disturbances, which have long been identified as a considerable threat to marine mammals.<sup>88</sup> In this respect, the parties have endorsed a series of national guidelines advanced by the UK to mitigate the impacts of anthropogenic noise created as a result of oil and gas exploration.<sup>89</sup> Moreover, ASCOBANS was one of the first legal avenues through which the ecological implications of military sonar activities were formally recognised and evaluated. In 2008, an Intersessional Working Group on the assessment of acoustic disturbance was created to develop guidelines for certain maritime activities known to create sources of disturbance within the cetacean environment.<sup>90</sup> In 2009 a series of indicative Guidelines were developed, using those of ACCOBAMS as a foundation, with the document due to be finalised for consideration at the Sixth MOP in September 2009.<sup>91</sup>

Few substantive actions have been pursued through ASCOBANS to directly regulate the discharge of hazardous substances, primarily due to limitations on legal competence and operational resources. Instead, the response of the Agreement has been essentially two-fold. This encompasses a series of research projects and, of greater operational importance, ASCOBANS has sought to work through key regional fora to promote its objectives in this respect. Pollution reduction was first addressed at the First MOP in 1994, where the parties established pollution reduction as a “priority action” for the initial operational period of the Agreement.<sup>92</sup> An Intersessional Working Group on the effects of pollution was established in 1995,<sup>93</sup> but experienced a highly inauspicious start since all its members aside from the Chair had withdrawn within twelve months.<sup>94</sup> Particular concern was reserved for the lack of a comprehensive list of management needs for small cetaceans with respect to pollutants and considerable emphasis was placed on collaboration with relevant bodies.<sup>95</sup> At the Second MOP a Resolution noted the role of key multilateral organisations and advocated action

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<sup>88</sup> On this issue generally, see W. J. Richardson, C. R. Greene, Jr., C. I. Malme and D. H. Thomson, *Marine Mammals and Noise* (San Diego: Academic Press, 1995).

<sup>89</sup> Resolution No. 4, Disturbance, adopted at the Third MOP in 2000.

<sup>90</sup> *Report of the Fifteenth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2008), at 15. The Working Group ultimately considered vessel-source noise, seismic surveys and pile-driving as particular issues.

<sup>91</sup> *Report of the Sixteenth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2009), at 9.

<sup>92</sup> Resolution on the Implementation of the Conservation and Management Plan.

<sup>93</sup> *Report of the Second Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 1995), at 13.

<sup>94</sup> *Report of the Third Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 1996), at 2.

<sup>95</sup> *Ibid.*, at 11-12.

within OSPAR and HELCOM for a “significant reduction of pollutant emissions and sources in the ASCOBANS area”.<sup>96</sup> Subsequent activity in respect of pollution has followed the broad trend that management and regulation of hazardous substances is better pursued through the agenda of more specialist operators. ASCOBANS has sought to “support this work in an advisory capacity”,<sup>97</sup> a commitment reinforced at successive MOPs.<sup>98</sup> Most recently, ASCOBANS has resolved to support the IWC’s POLLUTION 2000+ initiative, alongside specific priority research projects advanced under OSPAR and HELCOM.<sup>99</sup>

Aside from the conservation and management of small cetacean habitats, particular significance is attached to information and educational remit exercised by ASCOBANS.<sup>100</sup> The information and education programme has become an increasingly important aspect of the work of the ASCOBANS Secretariat in recent years. In addition to maintaining a considerable volume of promotional literature in a variety of languages, one particularly significant initiative has been the elaboration of the International Day of the Baltic Harbour Porpoise. This event, held annually in May since 2003, is the flagship educational programme within the various Baltic parties to ASCOBANS. On a wider level, ASCOBANS launched the “Year of the Dolphin” programme in 2007, which was subsequently extended into 2008.<sup>101</sup> This campaign, which is the most high-profile public information project launched under the auspices of the CMS to date, comprises a series of coordinated promotional events, pooling the promotional capabilities of the parent convention and relevant subsidiaries, to raise awareness of the conservation needs of small cetaceans. Furthermore, the Agreement also seeks to engage closely with the fishing industry, to support scientific objectives and to improve compliance with by-catch initiatives.<sup>102</sup> However, it appears that this aspiration may pose substantial difficulties in practice. Indeed, representatives from the fishing industry have to date demonstrated limited enthusiasm to become involved in the operation of the Agreement, and some parties have in fact reported increasing hostility from the fisheries

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<sup>96</sup> Resolution on Management and Further Needs.  
<sup>97</sup> Resolution No. 7: Further Implementation of ASCOBANS (adopted at the Third MOP in 2000).  
<sup>98</sup> Resolution No. 8: Further Implementation of ASCOBANS (adopted at the Fourth MOP in 2003).  
<sup>99</sup> Resolution No. 7, Research on Habitat Quality, Health and Status of Small Cetaceans in the Agreement Area (adopted at the Fifth MOP in 2006).  
<sup>100</sup> Para 5 of the ASCOBANS Conservation and Management Plan.  
<sup>101</sup> See the Year of the Dolphin website at [www.YOD.com](http://www.YOD.com) (last visited 31 August 2009).  
<sup>102</sup> Resolution No. 6: Activities of the ASCOBANS Advisory Committee 2007-2010.

sector, with ASCOBANS often erroneously blamed for restrictive and unpopular fishing policies that have been ultimately imposed by the EC to mitigate cetacean by-catches.<sup>103</sup>

### 5.6.2 *Species conservation and recovery plans*

In addition to these general policies, a particularly significant development under ASCOBANS has been the elaboration of distinct conservation and recovery plans for harbour porpoises. Indeed, of the species of cetaceans governed under the regulatory purview of the Agreement, the diminished numbers of harbour porpoises in the North Sea and, especially, the Baltic region are of particular concern. As a priority action, ASCOBANS is currently developing a series of conservation and recovery plans, establishing clear coherent conservation targets for these particular stocks.

As far as Baltic populations are concerned, a distinct Recovery Plan was elaborated in 2002,<sup>104</sup> and formally adopted at the Fourth MOP.<sup>105</sup> The “Jastarnia Plan”, as this programme is popularly known, advances a series of recommendations aimed at regenerating the heavily depleted stocks of harbour porpoises in this region, and is predominantly concerned with by-catch mitigation.<sup>106</sup> The Recovery Plan is designed to be implemented by the various Parties bordering the Baltic Sea area, with progress and potential problems monitored by a designated Jastarnia Group, established in conjunction with UNEP. Five meetings have been convened since the establishment of the Group in March 2005. Regrettably, a series of considerable impediments to progress have been observed – not least chronic under-funding, which has impacted upon the ability of those charged with advancing the Recovery Plan to do so successfully, a lack of data on the use of certain types of nets (especially gillnets) and the operation of by-catch mitigation policies. The parties have noted such concerns and, at the Fifth MOP, called for swift action to step up implementation of the Jastarnia Plan.<sup>107</sup>

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<sup>103</sup> Personal communication with Dr. Krzysztof Skóra, Hel Marine Station, University of Gdańsk (on file).

<sup>104</sup> *ASCOBANS Recovery Plan for Baltic Harbour Porpoises* (Bonn: ASCOBANS, 2002). The Recovery Plan was largely elaborated at a workshop in Jastarnia, Poland, in January 2002: see R. Stempel, “The ASCOBANS Jastarnia Plan: Towards a New Lease of Life for Baltic Harbor Porpoises” (2003) 6 *Journal of International Wildlife Law and Policy* 53.

<sup>105</sup> Resolution No. 6, Incidental Take of Small Cetaceans, adopted at the Fourth MOP in 2003.

<sup>106</sup> The Jastarnia Plan itself explicitly states that its primary focus is to address by-catches, intoning that “none of the recommendations . . . should be viewed as a higher priority than the by-catch reduction initiatives”: Jastarnia Plan, at 13.

<sup>107</sup> Resolution 9, Implementation of the Jastarnia Plan.



The Jastarnia Plan acknowledges that it is intended to be neither a static nor a definitive document and establishes a formal process of re-evaluation and revision “no less than every five years”. At the Fourth Meeting of the Jastarnia Group, convened in February 2008, the Jastarnia Plan was substantially revised and updated. Particular emphasis was placed upon incorporating developments in harbour porpoise conservation across a variety of fora, especially under the EC law and the emerging HELCOM programme of marine protected areas in the Baltic Sea. The revised version of the Jastarnia Plan was subsequently advanced for adoption at the Fifteenth Meeting of the AC, where it failed to find favour among the various delegations. In particular, the revised version was considered to be “too long, intricate and academic” and unlikely to receive endorsement by the fishing industry.<sup>108</sup> Indeed, given that the draft of the revised Jastarnia Plan currently stands at over thirty pages of text, with extensive referencing and discussion of the main conservation issues, scientific developments and operative legislation, there is merit in these criticisms. Accordingly, it appears that the new model proposed for the Jastarnia Plan’s North Sea counterpart will prove instructive in the redrafting of the Baltic Sea Recovery Plan, for which a further revision was undertaken in early 2009, with a view to adoption at the Sixth MOP.

Since the adoption of the Jastarnia Plan, attention within ASCOBANS has shifted towards developing a programme of action for North Sea populations of harbour porpoises. The political impetus towards the elaboration of such a programme has been substantively assisted by forces outside the scope of the Agreement. In March 2002, at the Fifth International Conference on the Protection of the North Sea, the Bergen Declaration was issued in which the need for enhanced selectivity in fishing activities was emphasised.<sup>109</sup> In particular, the Bergen Declaration stated that the agreed aim of the Ministerial representatives was to reduce by-catches of harbour porpoises to levels below 1.7% of the best population estimate and set a “precautionary objective to reduce by-catches of marine mammals to less than 1% of the best population estimate”,<sup>110</sup> with the development and adoption of a recovery plan for North Sea harbour porpoises to be conducted “as soon as possible”.<sup>111</sup>

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<sup>108</sup> *The Finnish Point of View of the Jastarnia Plan Revision*, Document AC 15/Doc. 41 (P), submitted at the Fifteenth Meeting of the Advisory Committee to ASCOBANS. As a member of the drafting team, the present author ought to acknowledge a degree of collective responsibility in this respect!

<sup>109</sup> Ministerial Declaration of the Fifth International Conference on the Protection of the North Sea, at para. 28.

<sup>110</sup> Para. 29.

<sup>111</sup> Para. 30.

In June 2003, a declaration of the Joint Ministerial Meeting of the Helsinki and OSPAR Commissions was issued, advancing a common statement to develop and promote the implementation of a recovery plan for harbour porpoises in the North Sea.<sup>112</sup> At the same time, the European Commission was engaged in elaborating its draft of a legislative measure that would eventually become Regulation 812/2004 and was also, in the longer term, in the process of elaborating a draft European Marine Strategy. At the Fourth MOP, the Parties and Range States, together with the AC and other relevant bodies, undertook to develop a distinct instrument in respect of harbour porpoises in the North Sea.<sup>113</sup>

At this point, the parties adopted a specific Resolution, in which the development of a recovery plan for harbour porpoises of the North Sea was endorsed,<sup>114</sup> taking “a holistic and inclusive approach to the development of such a plan”. Some initial preparations for a distinct recovery plan for harbour porpoises in the North Sea had already been developed by the Advisory Committee at its Ninth and Tenth Meetings, and an outline timetable was established for this initiative, annexed to the Resolution. In 2003 a preparatory scientific group was to be convened, along with a steering group that was tasked with guiding the development of the recovery plan and providing a forum for the interests of all parties in question to be considered. The recovery plan itself was to be formulated throughout 2004, and a draft version would be considered by the Advisory Committee in 2005, with a provisional deadline for June 2005 set for finalising this instrument.

Since the Fourth MOP, some progress had been made on the recovery plan, although work was somewhat stymied by disagreement within ASCOBANS as to how the initiative should proceed, especially in relation to scope.<sup>115</sup> A small drafting group based in Germany was established to consider anthropogenic threats to harbour porpoises in the North Sea area, with the aim of producing an updated version of this instrument – since christened a “Conservation Plan” as opposed to a “Recovery Plan” – in time for the Fifth MOP. Such a document was duly produced<sup>116</sup> and evaluated, at which point a number of strong concerns were raised. Primary among these was an observation that in its current format the Conservation Plan was

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<sup>112</sup> “Towards an Ecosystem Approach to the Management of Human Activities”, at para. 13.

<sup>113</sup> Resolution No. 6: Incidental Take of Small Cetaceans.

<sup>114</sup> Resolution No.10: Recovery Plan for Harbour Porpoise in the North Sea.

<sup>115</sup> In particular, some parties were concerned that the recovery plan should have a narrower remit and focus on individual stocks of small cetaceans, instead of addressing the North Sea as a whole, while others believed that this initiative should focus on areas in which populations of harbour porpoises are in need of recovery.

<sup>116</sup> MOP5/Doc.7 (S) Rev. 1.

largely unfit for purpose, since the document did not prescribe a detailed timetable of concerted action for the various parties to strive towards. There was also some concern about a potential clash with aspects of EC law. With these issues in mind, the document was endorsed and supported as a basis for a Conservation Plan<sup>117</sup> and largely formalised in 2008.<sup>118</sup>

The objectives of the Conservation Plan have not altered since the initial mandate prescribed for this initiative in 2003, with an overarching aim to “restore and/or maintain North Sea harbour porpoises at a favourable conservation status . . . and the distribution and abundance of harbour porpoises in the North Sea are returned to historic coverage and levels wherever biologically feasible”. To this end, twelve substantive actions have been prescribed within the Conservation Plan, divided loosely into a series of categories, namely institutional implementation, management and related monitoring, mitigation measure research, scientific actions essential for providing adequate management advice and investigation of further anthropogenic threats to harbour porpoises.

Like the Jastarnia Plan, incidental capture of small cetaceans is considered to be of overriding importance to the success of the North Sea Conservation Plan, and a high priority is placed upon implementing existing (EC) provisions on by-catches, establishing observation programmes and regular evaluation of fisheries interactions, as well as reviewing mitigation measures and finalising maximum allowable by-catch limits in the region. Furthermore, the collection of relevant data on population trends and stock structures is also considered to be a high priority, on the basis that without such information it is virtually impossible to objectively assess the success of the Conservation Plan and the need for further modifications. As with the Jastarnia Plan, the North Sea Conservation Plan will also be subject to periodic review and adjustment. A distinct Steering Committee is envisaged for the North Sea Conservation Plan that appears to operate on a more formal basis to its Baltic counterpart, with the appointment of a “suitably qualified full-time coordinator” considered necessary for the effective operation of the programme.<sup>119</sup> Following minor data

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<sup>117</sup> Resolution 1.

<sup>118</sup> Document AC 15/Doc.14 (O), *ASCOBANS Conservation Plan for Harbour Porpoises (Phocoena phocoena L.) in the North Sea*.

<sup>119</sup> North Sea Conservation Plan (2008 draft), at 12.

amendments,<sup>120</sup> it appears likely that the document will be formally adopted at the forthcoming Sixth MOP.

## 5.7 Concluding remarks

Despite the initiatives undertaken to date under the auspices of the Agreement, and the progress made in terms of scientific knowledge and in advancing regulatory measures for emerging threats such as ocean noise, ASCOBANS has been subject to sustained criticism concerning its ability to elaborate meaningful and binding conservation solutions for small cetaceans on its current construction. Indeed, notwithstanding the pioneering nature of the Agreement, commentators have observed that the text of the Agreement is marked by a distinct lack of precision and undermined further by the “modest decision-making powers” exercised by its constituent institutions.<sup>121</sup> Furthermore, the operative strength of the Conservation and Management Plan is also limited, and has been considered “notable for being couched in vague, flexible and hortatory, rather than prescriptive language”,<sup>122</sup> with parties having undertaken to “work towards” and “endeavour” to fulfil such commitments.<sup>123</sup> Nijkamp and Nollkaemper, while lamenting the explicit absence of the precautionary principle and ecosystem-based management within the Agreement itself, further observe that ASCOBANS is “dominated by flexibility, long-term, non-committal objectives, faith in research and more faith in future cooperation”.<sup>124</sup>

Many of these criticisms of the Agreement text and the conservation policies accordingly envisaged by these constituent commitments are legitimate. As a result, given that ASCOBANS is primarily a generator of soft law, with its policies advanced through recommendations and guidance documents, difficult questions have been raised within ASCOBANS as to the ultimate effectiveness of this body, especially when compared to more binding commitments towards cetaceans, as advanced for instance under EU law. Likewise, the various meetings of the AC suggest that ASCOBANS itself has historically exercised a limited influence upon national policies. While further, clearly targeted, research is necessary

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<sup>120</sup> *Report of the Sixteenth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2009), at 5-6.

<sup>121</sup> Churchill, “Sustaining Small Cetaceans”, at 243.

<sup>122</sup> Churchill, “Small Cetaceans of the Baltic and North Seas”, at 296.

<sup>123</sup> Accordingly, Churchill considers that such wording has facilitated a culture whereby “there has been much said, but considerably less done in the way of effective action to address the conservation needs of small cetaceans”: *ibid.*, at 311.

<sup>124</sup> “Small Cetaceans in the Face of Uncertainty”, at 290.

to assess more precisely the impact of such conservation and management policies upon the various parties, the repeated adoption of Resolutions calling on the parties to implement agreed commitments does not suggest that such criticism is entirely misplaced.

It can be considered that ASCOBANS faces three significant – and interrelated – practical impediments to its operations. In the first instance, there has been a marked lack of support – and latterly active competition – from the EC. This issue has been considerably more pronounced in recent years as the EC has placed an unprecedented degree of emphasis upon the conservation of cetaceans as a priority component of Community marine policy, a development that was largely unanticipated during the early years of ASCOBANS. Accordingly, with the emergence of the EC as a key regulatory body for cetaceans in the Baltic and North Seas, the case for a separate and less binding framework to address the conservation needs of small cetaceans in these waters has, in the view of certain parties to ASCOBANS, been diluted.

As a result, it has been argued that ASCOBANS “will probably function best as a stimulus and forum for promoting and conducting research and the adoption of conservation measures by other organisations, rather than by attempting to adopt a comprehensive set of conservation measures of its own”.<sup>125</sup> Such a pessimistic viewpoint is indicative of the raft of regulatory bodies that pre-exist ASCOBANS. Many of these are undoubtedly better placed to address certain threats to the cetacean environment – especially in the context of marine pollution and fisheries by-catches – than the Agreement can realistically aspire to achieve. Nevertheless, at the Fifteenth AC Meeting in 2008, a suggestion that ASCOBANS should essentially operate as a specialist cetacean advisory body to the EC – justified on this exact basis – was clearly rejected by a considerable majority of the parties. This demonstrates a continuing core of support for the objectives and ideals of ASCOBANS from its parties, alongside recognition of the practical difficulties that the Agreement faces.

While there is some logic in this proposal – not least since the present and future membership of ASCOBANS is in practice likely to be drawn from the ranks of current EU Member States – the relegation of the Agreement to the status of an EC conservation adjunct must be seen as a retrograde step. The various EU institutions amply served by a host of technical committees

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<sup>125</sup> Churchill, “Sustaining Small Cetaceans”, at 244.

conservation bodies, financial constraints upon ASCOBANS have, in recent years, been particularly acute. The cost-cutting activities attempted by the parties to date have largely failed to facilitate the desired evolution of the institutional structure of the Agreement, which continues to be one the main CMS subsidiaries without a distinct scientific wing. Moreover, the projected funding for further conservation initiatives that such reforms were intended to generate has not, as yet, materialised in a manner that would dramatically impact upon the conservation record of the Agreement.

Ultimately, perhaps the most pressing impediment to the development of meaningful conservation initiatives for small cetaceans in the Baltic and North Seas is the chronic lack of data concerning the conservation status and needs of these species. Without this information it is near impossible to gauge the success or otherwise of the various policies developed by the raft of regulatory bodies operating in respect of these waters. Unless and until this position is significantly improved, it appears that present and future conservation measures, irrespective of the strength of obligation imposed upon the constituent actors by the regulator in question, are likely to be undermined by lack of benchmarks to measure their effectiveness. It appears ironic that, given the significant criticism aimed at ASCOBANS over its “further research” philosophy as a substitute for more precise commitments, the Agreement itself may appear to be better placed than many of its regulatory competitors to address the parlous state of scientific knowledge concerning the cetacean environment and, therefore, assist in creating a more productive climate for the future advancement of clear and effective conservation measures for these species.

## **CHAPTER VI**

### **THE AGREEMENT ON THE CONSERVATION OF CETACEANS OF THE BLACK SEA, MEDITERRANEAN SEA AND CONTIGUOUS ATLANTIC AREA, 1996**

#### **6.1 Introduction**

The second subsidiary Agreement adopted by the CMS relating to cetaceans was the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS).<sup>1</sup> ACCOBAMS is broader in scope to ASCOBANS and represents one of the first binding regional treaties to explicitly address both large and small species of cetaceans. Of the two main CMS cetacean Agreements, ACCOBAMS is largely considered the superior instrument, endowed with stronger conservation obligations and a unique institutional structure that provides a more formalised basis for interaction with pre-existing regulatory fora. Moreover, it has also taken a number of pioneering steps to address anthropogenic threats to cetaceans that have often been neglected in other fora, such as ship-strikes, ecotourism and the use of acoustic by-catch mitigation devices.

Despite these strengths, ACCOBAMS faces similar challenges to those experienced under ASCOBANS, particularly in the development, coordination and implementation of conservation policies. This Chapter therefore offers an appraisal of ACCOBAMS as a distinct regional actor for the regulation of both large and small cetaceans, working outside – but in cooperation with – the IWC. This Chapter commences with a review of the development of the Agreement before examining its scope and the inter-relationship with other key regulatory actors. There then follows an evaluation of the pioneering institutional framework of ACCOBAMS and its conservation measures adopted to date. Finally, a series of conclusions are advanced regarding the key challenges and opportunities facing the ASCOBANS and ACCOBAMS Agreements.

#### **6.2 Negotiating history**

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<sup>1</sup> 2183 UNTS 303.

Although ACCOBAMS was ultimately concluded under the aegis of the Bonn Convention, it was initially developed through a working group on small cetaceans convened in 1989 by the Council of Europe. These developments were especially timely given the parlous conservation status of small cetaceans in the region, with a substantial volume of striped dolphins killed in a morbillivirus epizootic in the Mediterranean region.<sup>2</sup> Although ultimately attributed to natural causes, the epizootic may have proved especially deadly due to the damage sustained to the immune systems of these animals due to exposure to extremely high levels of PCBs.<sup>3</sup>

In February 1991, the secretariats of the Bern Convention,<sup>4</sup> the CMS and the Barcelona Convention, as well as the IUCN, met to consider a draft instrument prepared by Greenpeace International to address the conservation needs of small cetaceans in the region. Of these bodies, the CMS was considered to provide the clearest prospects to develop a distinct regional instrument for cetaceans in these waters. The Third COP to the CMS subsequently adopted a Resolution on small cetaceans, identifying the draft Agreement as the basis for a future CMS subsidiary, operating closely with other regulatory fora.<sup>5</sup>

The substantive negotiations to develop ACCOBAMS were convened between 1991 and 1996. At an early stage in this process it became clear that sustained inter-Secretariat liaison would be required in order to effectively implement the nascent Agreement. Considerable attention was paid to establishing the various mechanisms by which conservation responsibilities and data-sharing were to be facilitated. Nonetheless, a number of controversial issues remained between the various negotiating parties, with matters of species coverage, operative obligations and geographical scope proving particularly problematic. These issues were largely resolved in a series of meetings between 1995 and 1996, sponsored by Monaco. By September 1995, the draft text of the Agreement had been amended from its original focus on small cetaceans to incorporate the larger species, an extension based upon

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<sup>2</sup> A. Aguilar and J. A. Raga, "The Striped Dolphin Epizootic in the Mediterranean Sea" (1993) 22 *Ambio* 524. The epizootic started in 1990 and continued through to 1992: *ibid.*

<sup>3</sup> W. C. G. Burns, "The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS): A Regional Response to the Threats Facing Cetaceans" (1998) 1 *Journal of International Wildlife Law and Policy* 113, at 114. These concerns were mirrored in respect of other stocks of Mediterranean cetaceans considered susceptible to the effects of pollution: G. Notarbartolo di Sciara *et al.*, "The Fin Whale *Balaenoptera physalus* (L. 1758) in the Mediterranean Sea" (2003) 33 *Mammal Review* 105, at 128

<sup>4</sup> 1982 UKTS 56 [hereinafter "Bern Convention"].

<sup>5</sup> Resolution 3.3, Small Cetaceans.



the recognition that both large and small cetaceans in these waters exhibited similar conservation needs, thereby rendering an explicit distinction between species somewhat superfluous.<sup>6</sup> Finally, in November 1996, a further intergovernmental meeting was convened in Monaco in order to finalise the text and to establish the precise geographical scope of the Agreement. ACCOBAMS was opened for signature at the close of this meeting and formally entered into force on 1 June 2001.

ACCOBAMS represents a challenging and ambitious project to connect two regions for which no previous instrument had been advanced on a similar scale to address the conservation needs of particular marine species. In seeking to avoid a pronounced regional disparity in membership, in order to formally enter into force ACCOBAMS required the ratification of seven eligible participants, of which at least two were to be drawn from the Black Sea region.<sup>7</sup> However, political conditions in the Black Sea at the time were not conducive to swift ratification of the Agreement. Indeed, a considerable delay was experienced in the entry into force of ACCOBAMS due to protracted boundary disputes following the dissolution of the USSR, as well as a seemingly abortive initiative to establish a common fisheries policy within the Black Sea.<sup>8</sup>

Like ASCOBANS, ACCOBAMS was ultimately concluded under Article IV(4) of the parent convention, primarily because few species of cetaceans resident in the Black and Mediterranean Seas were listed on Appendix II of the CMS at the material time.<sup>9</sup> Likewise, a lack of scientific data about the precise range of migratory cetaceans further reduced the possibilities of fulfilling the criteria for the establishment of an Article IV(3) AGREEMENT, hence Article IV(4) proved a more appropriate channel for regulatory activity on this basis.

Indeed, the deficiency of scientific knowledge concerning the conservation needs of cetaceans in these waters is considered to pose a key challenge to the future operation of the

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<sup>6</sup> A. Gillespie "Small Cetaceans, International Law and the International Whaling Commission" in W. C. G. Burns and A. Gillespie (eds.), *The Future of Cetaceans in a Changing World* (New York: Transnational Publishers, 2003), at 279. Nevertheless, these developments were not entirely uncontroversial within CMS Scientific Council as "some Councillors expressed the view that the IWC should remain the competent agency for large cetaceans": *Report of the Sixth Meeting of the Scientific Council* (Bonn: CMS, 1995), at 2.

<sup>7</sup> Article XIV(1).

<sup>8</sup> R. Churchill, "Sustaining Small Cetaceans: A Preliminary Evaluation of the Ascobans and Accobams Agreements" in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 2001), at 246-7.

<sup>9</sup> Indeed, in November 1996 only four species of cetaceans commonly found in these waters had been so listed, namely the bottlenose dolphin, common dolphin, harbour porpoise and striped dolphin.

Agreement. It is currently acknowledged that “present knowledge on the status of cetacean populations in the Agreement area, on their threats, and on how such threats affect their survival, is dramatically inadequate, and a major hindrance to appropriate conservation and management measures”.<sup>10</sup> Moreover, the paucity of accurate and meaningful data is explicitly recognised within the Agreement itself, with the parties noting in the preamble that “despite past or ongoing scientific research, knowledge of the biology, ecology, and population dynamics of cetaceans is deficient”.

While an unsatisfactory knowledge base appears to be something of a running theme within multilateral cetacean conservation bodies, the position within ACCOBAMS must be considered particularly acute. Unlike ASCOBANS, ACCOBAMS has yet to complete a SCANS-style survey of the Agreement area, although a project is currently on-going in order to collate data to form a workable baseline abundance estimate for a number of species protected under the Agreement. Following an initial proposal to conduct a sperm-whale survey in the Mediterranean basin,<sup>11</sup> this project was dramatically expanded in scope and ambition to replicate a SCANS approach to population monitoring to be pursued through a series of workshops, with a particular emphasis on establishing reliable population statistics for harbour porpoises, common dolphins, bottlenose dolphins, sperm whales, striped dolphins, fin whales and Cuvier’s beaked whales throughout the Agreement area.<sup>12</sup> Nevertheless, despite these efforts in relation to certain key species, considerable uncertainty remains over the precise numerical and conservation status of many of the species commonly or occasionally present within the ACCOBAMS area, which will ultimately continue to pose a considerable practical impediment to the conservation and management initiatives advanced under the auspices of the Agreement in future years.

### 6.3 Scope

ACCOBAMS is considerably broader in scope than ASCOBANS and applies, *ratione materiae*, to “all cetaceans that have a range which lies entirely or partly within the

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<sup>10</sup> G. Notarbartolo di Sciara (ed.), *Cetaceans of the Mediterranean and Black Seas: State of Knowledge and Conservation Strategies. A Report to the ACCOBAMS Secretariat* (Monaco: ACCOBAMS, 2002), at 1.

<sup>11</sup> *Report of the Second Meeting of the Scientific Committee of ACCOBAMS* (Monaco: ACCOBAMS, 2003), at Annex XVIII.

<sup>12</sup> *Report of the Workshop on Obtaining Baseline Cetacean Abundance Information for the ACCOBAMS Area* (Monaco: ACCOBAMS, 2005), at 3.

Agreement area or that accidentally or occasionally frequent the Agreement area”.<sup>13</sup> An “indicative list” is appended to the Agreement,<sup>14</sup> specifying the Black Sea and Mediterranean Sea populations of some eighteen different species of cetaceans. This list is not intended to be exhaustive and Annex I specifically provides that ACCOBAMS is to apply to accidental or occasional visitors to the Agreement area.<sup>15</sup> ACCOBAMS lists ten species of whale, seven dolphin species and the harbour porpoise as the most frequent inhabitants of the Agreement area. Notwithstanding the application to visiting species, the Annex I list may be considered to comprise the key species subject to regulation under ACCOBAMS.

*Ratione loci*, ACCOBAMS encompasses all the maritime waters of the Black Sea and Mediterranean Sea, their gulfs and seas and any connected or interconnecting internal waters, as well as the Atlantic area lying contiguous to the Mediterranean Sea west of the Straits of Gibraltar.<sup>16</sup> As noted above, maritime boundaries within these waters have presented an ongoing source of dispute, unlike in the Baltic and North Seas, for which the process of maritime delimitation has to a considerable extent been settled. Accordingly, the final text of ACCOBAMS notes clearly that activities under the Agreement neither affect official views over territorial claims nor “constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction”.<sup>17</sup> Article XV of the Agreement precludes general reservations to ACCOBAMS, but permits particular reservations by a party “in respect of a specifically delimited part of its internal waters”, a position apparently incorporated to accommodate the Turkish position on the Sea of Marmara.<sup>18</sup>

The convoluted nature of maritime claims in the ACCOBAMS area, particularly in the Mediterranean Sea, has created further practical difficulties in the operation of the Agreement. Indeed, the current jurisdictional arrangements in this area have created a series of enclaves of high seas within the Mediterranean Sea, which may lead to practical

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<sup>13</sup> Article I(2). Cetaceans are defined as “animals, including individuals, of those species, subspecies or populations of *Odontoceti* and *Mysticeti*”: Article I(3)(a). The “range” of a species extends to “all areas of water that a cetacean inhabits, stays in temporarily, or crosses at any time on its normal migration route within the Agreement area”: Article I(3)(f).

<sup>14</sup> Annex I. Under Article I(5), Annexes to the Agreement “form an integral part thereof, and any reference to the Agreement includes a reference to its annexes”.

<sup>15</sup> For a full appraisal of the various species of cetaceans considered to frequent the ACCOBAMS area, either as regular inhabitants or as vagrant species, see R. Reeves and G. Notarbartolo di Sciara (eds.), *The Status and Distribution of Cetaceans in the Black Sea and Mediterranean Sea* (Malaga: IUCN Centre for Mediterranean Cooperation, 2006).

<sup>16</sup> Article I(1)(a).

<sup>17</sup> Article I(1).

<sup>18</sup> Churchill, “Sustaining Small Cetaceans”, at 245.

difficulties in the enforcement of the Agreement within this area.<sup>19</sup> The existence of these jurisdictional lacunae within the Agreement area is not an abstract problem and there is some evidence to suggest that certain conservation policies have been inhibited on occasion as a result. For instance, a recent Tunisian proposal to prohibit the use of driftnets throughout the entirety of the Agreement area was defeated on the basis that such obligations “could not, therefore, be imposed on nationals of non-parties on the high seas within the ACCOBAMS area”.<sup>20</sup> Accordingly, the parties have emphasised the need to engage with third countries operating in the Mediterranean Sea to facilitate cooperation with the various ACCOBAMS policies within these high seas areas.<sup>21</sup>

#### 6.4 Participation

Like ASCOBANS, ACCOBAMS adopts a highly inclusive approach to potential participants. Under Article XIII(1), the Agreement is open to “any Range State, whether or not areas under its jurisdiction lie within the Agreement area”, a rather curious phrasing that stems from the generous approach taken to the concept of a “Range State”.<sup>22</sup> Nevertheless, as is the case under ASCOBANS, there has been little engagement by states that are geographically divorced from the ACCOBAMS area. To date, some twenty-one states have become full parties to the Agreement.<sup>23</sup> Additionally, the accession process is currently underway in both the UK<sup>24</sup> and Montenegro, the latter of which did not exist as an independent state at the time of the conclusion of ACCOBAMS.<sup>25</sup> In 2004 Egypt, Russia and Turkey were identified by

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<sup>19</sup> Churchill, “Sustaining Small Cetaceans”, at 250.

<sup>20</sup> *Report of the Third Meeting of the ACCOBAMS Contracting Parties* (Monaco: ACCOBAMS, 2007), at 12. The use of driftnets on the high seas is restricted to nets up to 2.5km: see Chapter VIII below.

<sup>21</sup> *Report of the Second Meeting of the ACCOBAMS Contracting Parties* (Monaco: ACCOBAMS, 2004), at 13.

<sup>22</sup> Under Article I(3)(g), a Range State is defined as “any State that exercises sovereignty and/or jurisdiction over any part of the range of a cetacean population covered by this Agreement, or a State, flag vessels of which are engaged in activities in the Agreement area which may affect the conservation of cetaceans”.

<sup>23</sup> Namely Albania, Algeria, Bulgaria, Croatia, Cyprus, France, Georgia, Greece, Italy, Lebanon, Libya, Malta, Monaco, Morocco, Portugal, Romania, Slovenia, Spain, Syria, Tunisia and Ukraine. In addition, both the EC and Israel signed the Final Act of the Meeting at which the Agreement was ultimately adopted, although neither has signed the actual Agreement itself.

<sup>24</sup> The UK authorities have indicated that the process of accession has commenced, but are currently unable to specify a precise date as to when this may be ultimately concluded: *Report of the Second Meeting of the ACCOBAMS Contracting Parties* (Monaco: ACCOBAMS, 2004), at 5. In the interim, the UK continues to make a voluntary donation of €10,000 to the Agreement’s funds.

<sup>25</sup> Montenegrin accession is nonetheless expected “shortly”: *Report of the Third Meeting of the ACCOBAMS Contracting Parties* (Monaco: ACCOBAMS, 2007), at 11.

the ACCOBAMS Secretariat as particular targets for recruitment efforts, albeit to seemingly little avail thus far.<sup>26</sup>

In addition to the various riparian states, like ASCOBANS the Agreement is open to participation by any “Regional Economic Integration Organisation”, provided that at least one of its constituent members is a Range State of ACCOBAMS.<sup>27</sup> In practice, as with ASCOBANS, the most viable candidate in this respect is the EC. The EC has neither signed nor ratified the Agreement, although its interest in the Agreement area has increased since the accession of Bulgaria and Romania to the EU in 2008. As with ASCOBANS, the development of a productive and harmonious working relationship with EC officials must be considered a significant strategic objective for ACCOBAMS. Nevertheless, the relationship between ACCOBAMS and the EC may be considered to be distinct to the corresponding position with ASCOBANS. Unlike ASCOBANS, a considerable number of the parties to ACCOBAMS are not current EU Member States, hence ACCOBAMS is not generally as confined to the same EC straightjacket as is often donned by its sister Agreement.

Relations between ACCOBAMS and the EU have been essentially cordial since the inception of the Agreement. Although the EC appears to demonstrate little enthusiasm towards formal accession to ACCOBAMS, the atmosphere of friction that characterised the early years of ASCOBANS has been generally avoided in practice. Like ASCOBANS, EC Member States party to ACCOBAMS face practical constraints in implementing by-catch mitigation commitments, which constitute an important aspect of the Agreements activities. Some ACCOBAMS policies in this respect have drawn a response from the EC where they have created scope for conflict. Most notably, there has been a sharp divergence of views between the two bodies regarding the mandatory use of acoustic deterrent devices, or “pingers”, introduced by EC legislation, as outlined in Chapter VIII. ACCOBAMS adopts a rather more (pre)cautious approach to such devices and has raised concerns over their potentially negative

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<sup>26</sup> *Report of the Second Meeting of the ACCOBAMS Contracting Parties* (Monaco: ACCOBAMS, 2004), at 6. Egypt and Turkey attended the First MOP to ACCOBAMS as observers, but have since failed to attend subsequent meetings, while Russia has yet to attend any MOP. Nevertheless, all three states have appointed national ACCOBAMS Focal Points, as required under Article VIII(a) of the Agreement, as indeed has Israel. The remaining riparian state, Bosnia-Herzegovina, attended the inaugural MOP, but has yet to appoint a national ACCOBAMS Focal Point and has demonstrated little official interest in the Agreement to date.

<sup>27</sup> Article XIII(1). A “Regional Economic Integration Organisation” is defined virtually verbatim to ASCOBANS as “an organisation constituted by sovereign States which has competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Agreement”: Article I(3)(h).

impacts within the cetacean environment.<sup>28</sup> The ACCOBAMS approach is to endorse pingers only “after controlled studies to ensure that they are an effective mitigation measure”.<sup>29</sup> In 2004, the European Commission formally requested – but failed to attain – an amendment to the ACCOBAMS policy on pingers,<sup>30</sup> which may present scope for a degree of future conflict on this issue. Beyond this technical mitigation policy, however, the EC has proved supportive of a number of policies developed by ACCOBAMS. This has been especially true in habitat-related initiatives like the recent Conservation Plan for Black Sea Cetaceans, for which consultations with the European Commission “had not revealed any obstacles to the adoption of the Plan by the European Union’s new Black Sea Member States”.<sup>31</sup>

Like ASCOBANS, ACCOBAMS co-exists with a series of multilateral regulatory bodies within its sphere of operation, with which clear synergies have been developed. A particularly promising relationship has been established with the Council of Europe which, given the lead role played by this body in brokering the initial negotiations for the Agreement, has retained a strong interest in the development and progress of ACCOBAMS. The Council of Europe has consistently stressed the availability of “its achievements and its institutional framework” to ACCOBAMS,<sup>32</sup> as well as the desire to further nurture biodiversity synergies in the region.<sup>33</sup> More tangibly, the Council of Europe has recently provided financial assistance for the development of the current Conservation Plan for Black Sea Cetaceans.<sup>34</sup> Likewise, despite some initial concerns over potential conflicts,<sup>35</sup> a productive working relationship has also been established with the IWC, for which the Director of Science also serves on the ACCOBAMS Scientific Committee.

Clear links have also been formed with relevant regional Agreements but, unlike its sister Agreement, the ACCOBAMS text itself provides for a more formalised collaborative relationship with the Barcelona<sup>36</sup> and Bucharest<sup>37</sup> Conventions, as detailed below. As with

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<sup>28</sup> Resolution 3.12: By-catch, Competitive Interactions and Acoustic Devices, adopted at the Third MOP to ACCOBAMS.

<sup>29</sup> Resolution 3.12, *ibid.*

<sup>30</sup> *Report of the Second Meeting of the ACCOBAMS Contracting Parties* (Monaco: ACCOBAMS, 2004), at 14.

<sup>31</sup> *Report of the Third Meeting of the ACCOBAMS Contracting Parties* (Monaco: ACCOBAMS, 2007), at 18.

<sup>32</sup> *Report of the First Meeting of the ACCOBAMS Contracting Parties* (Monaco: ACCOBAMS, 2002) at 6.

<sup>33</sup> *Report of the Second MOP*, at 18-19.

<sup>34</sup> *Ibid.*

<sup>35</sup> See, for instance, Churchill, “Sustaining Small Cetaceans”, at 245.

<sup>36</sup> Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean; 1102 UNTS 27.

<sup>37</sup> Convention on the Protection of the Black Sea against Pollution; 1764 UNTS 3.

ASCOBANS, these pre-existing regional bodies have a clear role to play in the practical operation of ACCOBAMS. In this respect, the Barcelona Convention and its allied Protocols<sup>38</sup> have established a basis for the creation of protected areas,<sup>39</sup> as well as for pollution control and mitigation. A specific Action Plan for the Conservation of Cetaceans in the Mediterranean Sea was adopted under the auspices of the Barcelona regime in 1991,<sup>40</sup> although this has largely been superseded to all practical intents by ACCOBAMS and is essentially confined to organising expert seminars and data-collection activities. The Black Sea region offers a comparatively less established system of pre-existing commitments towards cetaceans. Instead, close alignment with ACCOBAMS will serve to develop the capacity of the Bucharest regime in this regard, while drawing on its specific remit to address pollution in these waters. Future developments of this nature within the Bucharest regime are likely to mirror those of OSPAR, following the adoption of a new Strategic Action Plan for the Environmental Protection and Rehabilitation of the Black Sea,<sup>41</sup> which has established the development of EcoQOs as a central policy for fisheries management and habitat conservation.<sup>42</sup>

Within the Mediterranean region, further impetus towards the protection of cetacean habitats is provided by the designation of a protected area for marine mammals in the Ligurian Sea between Italy, France and Monaco,<sup>43</sup> known as the “Pelagos Sanctuary”. The Agreement entered into force on 14 February 2002, and is the culmination of a trilateral project to establish a sanctuary in the Western Mediterranean that began in March 1993.<sup>44</sup> Under the

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<sup>38</sup> Seven distinct Protocols have been adopted under the auspices of the Barcelona Convention, of which the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean is of clearest relevance for the conservation of cetaceans. The Protocol was adopted in June 1995 and entered into force in December 1999, replacing the earlier Protocol Concerning Mediterranean Specially Protected Areas previously adopted in April 1982 and in force since March 1986. Both Protocols are reproduced on-line at the UNEP Regional Seas institutional website at [www.unep.org/regionalseas/](http://www.unep.org/regionalseas/) (last visited 31 August 2009).

<sup>39</sup> Under Article 8 of the 1995 Protocol, parties are required to develop a list of Specially Protected Areas of Mediterranean Importance (SPAMIs). Protected areas under the Protocol may be established in respect of, *inter alia*, endangered or threatened species, of which Annex II lists a host of indicative species which specifically includes some nineteen species of cetaceans.

<sup>40</sup> Reproduced on-line at [www.rac-spa.org](http://www.rac-spa.org) (last visited 31 August 2009).

<sup>41</sup> Adopted on 17 April 2009 and reproduced on line at [www.blacksea-commission.org](http://www.blacksea-commission.org) (last visited 31 August 2001).

<sup>42</sup> *Ibid.*, at Paragraph 3.2.

<sup>43</sup> Agreement on the Creation of a Mediterranean Sanctuary for Marine Mammals between France, Italy and the Principality of Monaco on 25 November 1999; reprinted at (2001) 16 *International Journal of Marine and Coastal Law* 142.

<sup>44</sup> On 22 March 1993 the three parties issued a joint declaration seeking to establish a sanctuary to protect marine mammals in this area: see T. Scovazzi, “The Declaration of a Sanctuary for the Protection of Marine Mammals in the Mediterranean” (1993) 8 *International Journal of Marine and Coastal Law* 510. For a full discussion of the origins of the sanctuary see G. Notarbartolo di Sciara *et al.*, “The Pelagos Sanctuary for

Agreement, an area of 96,000 square kilometres has been designated a sanctuary within which “the Parties shall protect all species of marine mammals”.<sup>45</sup> The taking of marine mammals in this area is prohibited, and the parties are also required to evaluate stocks of marine mammals, prevent the discharge of toxic substances and regulate cetacean-watching activities and boating competitions.

Finally, and perhaps most significantly, unlike ASCOBANS a series of mutually-supportive synergies have been forged with the key Regional Fisheries Management Organisation operating within the Agreement area, namely the General Fisheries Commission for the Mediterranean (GFCM). Indeed, while the inter-relationship between the two organisations was “somewhat difficult initially”<sup>46</sup>, such links are now considered to be close, with the GFCM having included problems of ship-strikes and prey depletion on the agenda of its General Meeting and several joint-workshops have also been convened. A particularly important working relationship has been developed on cetacean by-catch issues with the Sub-Committee on the Marine Environment and Ecosystems (SCMEE) of the GFCM Scientific Advisory Committee. Indeed, the development of this collaborative relationship has been viewed by the Scientific Committee as a major contribution in “better linking ACCOBAMS with the fishing sector”.<sup>47</sup> To this end, the Agreement has convened a series of workshops in conjunction with SCMEE on interactions with fisheries, and the GFCM is also keen to contribute to the further implementation of ACCOBAMS by-catch initiatives.<sup>48</sup>

## 6.5 Institutional arrangements

As is the case with ASCOBANS, many of the substantive provisions of ACCOBAMS concern its institutional structure, which differs significantly to that of its sister Agreement. Under Article III, like ASCOBANS, the primary decision-making forum of ACCOBAMS is

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Mediterranean Marine Mammals” (2008) 18 *Aquatic Conservation: Marine and Freshwater Ecosystems* 367, at 371-76.

<sup>45</sup> Article 2(2). The Agreement Area is defined in Article 3, where there are eight species of cetacean ordinarily resident in these waters: T. Scovazzi, “The Mediterranean Marine Mammal Sanctuary” (2001) 16 *International Journal of Marine and Coastal Law* 132.

<sup>46</sup> *Report of the Third Meeting of the ACCOBAMS Contracting Parties* (Monaco: ACCOBAMS, 2007), at 25.

<sup>47</sup> *Report of the Fourth Meeting of the Scientific Committee to ACCOBAMS* (Monaco: ACCOBAMS, 2006), at 3.

<sup>48</sup> *Ibid.* In addition to this, in 2007 the GFCM also adopted a Recommendation in which its Secretariat undertakes to engage in a full exchange of relevant data with the Pelagos Sanctuary: Recommendation GFCM/31/2007/2; reproduced at *General Fisheries Commission for the Mediterranean: Report of the Thirty-first Session* (Rome: FAO, 2007), at 41.



the Meeting of the Parties, convened at intervals of not more than three years and of which three have been held to date.<sup>49</sup> The basic features of the MOP are established under Article III(8) and include, *inter alia*, reviewing scientific assessments of the conservation status of cetaceans, monitoring implementation of the Agreement, and making recommendations to the parties. Decisions are adopted by general consensus, with voting rights restricted to one per party.<sup>50</sup> Like ASCOBANS, ACCOBAMS provides for the attendance of observers at MOPs, with NGOs having played an equally significant role in the operation of the Agreement. ACCOBAMS, however, recognises the contribution of such actors on a more formalised footing, and may designate “ACCOBAMS Partner” status upon organisations that “have the potential to contribute to the mission of the Agreement”.<sup>51</sup> Partner status is not a token gesture. Partners make “a substantial contribution to the successful implementation of the Agreement”<sup>52</sup> and receive scientific information on a priority basis. They must also report on their activities and may officially contribute to the development of ACCOBAMS policies and other technical instruments.<sup>53</sup>

Meeting arrangements outside the MOPs differ strongly to those of ASCOBANS. Instead of an Advisory Committee, ACCOBAMS has divided these functions between a Bureau and a Scientific Committee. The Bureau is designed to operate as a policy coordinator between the MOP and the Scientific Committee and seeks essentially to ensure a clear correlation between scientific endeavour and the guiding policies of the Agreement.<sup>54</sup> Accordingly, much of the substantive research work and development of conservation priorities and policies is undertaken through the Scientific Committee.<sup>55</sup> The Scientific Committee has

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<sup>49</sup> As required under Article III(2), the First MOP was convened within a year of the formal entry into force of the Agreement.

<sup>50</sup> Article III. This is qualified by Article X, under which any amendment to the Agreement requires a two-thirds majority of the parties present and voting. Thus far the ACCOBAMS text has been substantively amended on only one occasion with an adjustment to the Conservation Plan made in 2007 to formally prohibit the use of driftnets in areas under coastal state jurisdiction within the Agreement area, having previously provided for a toleration of nets of 2.5km in length in accordance with generally accepted international standards.

<sup>51</sup> Resolution 1.3: Awarding the Status of “ACCOBAMS Partner”, adopted at the First MOP in 2002. Partners are permitted to use a unique logo to demonstrate their affinity with ACCOBAMS: Resolution 1.4: Adopting a Logo for the Agreement, and Conditions for its Use.

<sup>52</sup> Resolution 2.9: Recognising the Important Role of Non-Governmental Organisations (NGOs) in Cetacean Conservation, adopted at the Second MOP in 2004.

<sup>53</sup> Resolution 3.5: Strengthening the Status of ACCOBAMS Partners, adopted at the Third MOP in 2007.

<sup>54</sup> Nevertheless, some concerns have been raised as to the effectiveness of this body and an on-going process of review is occurring within ACCOBAMS to further develop “some kind of interface between the Scientific Committee and the Parties”, with an enlarged Bureau considered to provide the strongest prospects to attain this objective: *Report of the Second Meeting of the ACCOBAMS Contracting Parties* (Monaco: ACCOBAMS, 2004), at 10.

<sup>55</sup> Article VII(3).

convened five meetings to date and is considered to be a major strength of the Agreement, having “secured the support of high-level specialists, working in an exemplary spirit of partnership”,<sup>56</sup> although some concerns have been expressed over a perceived regional imbalance in the composition of this body,<sup>57</sup> as well as significant funding limitations.

A further innovative feature of ACCOBAMS is the establishment of sub-regional coordination units, which are charged with implementing conservation priorities and collecting relevant data within the Black Sea and Mediterranean region respectively.<sup>58</sup> ACCOBAMS encompasses an ambitious and unprecedented project to regulate the marine environment of two previously unconnected regions and has sought wherever possible to involve pre-existing regional institutions. Accordingly, the Regional Activities Centre for Specially Protected Areas of the Barcelona Convention has been appointed as the sub-regional coordination unit for the Mediterranean Sea and contiguous Atlantic area,<sup>59</sup> while the Black Sea Commission has been so designated in respect of the Black Sea.<sup>60</sup> In this way, the Agreement has been able to consistently engender a strong spirit of cooperation with relevant multilateral agreements since a preliminary stage in the operation of ACCOBAMS.

Finally, ACCOBAMS is supported by a Secretariat,<sup>61</sup> which is responsible for discharging the administrative tasks associated with the Agreement. The running costs of the Secretariat are underwritten entirely by an additional donation by Monaco, thereby largely avoiding the recent controversy generated within ASCOBANS.<sup>62</sup> Nevertheless, the perennial problems of understaffing have been observed within this forum too, raising potential adverse implications for the administrative effectiveness of ACCOBAMS as the Agreement develops further in future years.

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<sup>56</sup> *Report of the Second Meeting of the ACCOBAMS Contracting Parties*, (Monaco: ACCOBAMS, 2004), at 7.

<sup>57</sup> *Ibid.*, at 10.

<sup>58</sup> Article V(1).

<sup>59</sup> Resolution 1.4: Establishing the Subregional Co-ordination Unit for the Mediterranean Sea and the Contiguous Atlantic Area, adopted at the First MOP.

<sup>60</sup> Resolution 1.5: Establishment of the Subregional Co-ordination Unit for the Black Sea. Nevertheless, some concerns may be expressed given the comparatively low level of participation exercised by the Black Sea Commission within ACCOBAMS to date: representatives of this body attended neither the Second nor the Third MOPs due to “circumstances beyond their control”: *Report of the Third Meeting of the ACCOBAMS Contracting Parties* (Monaco: ACCOBAMS, 2007), at 9.

<sup>61</sup> Article IV.

<sup>62</sup> Indeed, it appears that a culture of institutional donation has emerged within ACCOBAMS with Italy having voluntarily funded additional administrative support where this has been required in recent years: *Report of the Second Meeting of the ACCOBAMS Contracting Parties*, (Monaco: ACCOBAMS, 2004), at 11.

## 6.6 Conservation and management initiatives

In marked contrast to ASCOBANS, the regulatory tone of ACCOBAMS is far stronger and more prescriptive, identifying clear objectives incumbent upon its constituent parties. ACCOBAMS has also advanced a number of novel features during its brief tenure to date, including the development of a series of targeted Guidelines on various anthropogenic activities affecting cetaceans, together with a pronounced application of the precautionary principle in its conservation policies.

ACCOBAMS specifically recognises cetaceans as “an integral part of the marine ecosystem” that must accordingly be conserved “for the benefit of present and future generations”.<sup>63</sup> Moreover, it is recognised that the conservation status of cetaceans may be adversely affected by habitat degradation and disturbance, pollution, reduction of food sources, the use and abandonment of non-selective fishing gear and deliberate and incidental catches. The broad purpose of ACCOBAMS is to facilitate the adoption of coordinated measures by the parties to achieve and maintain a favourable conservation status for cetaceans.<sup>64</sup> In this regard, Article II(1) prescribes two key obligations incumbent upon the parties. First, ACCOBAMS explicitly prohibits the deliberate taking of cetaceans within the Agreement area, with parties required to “take all necessary measures to eliminate” directed hunting, while lethal research is also prohibited.<sup>65</sup> Second, ACCOBAMS places a strong emphasis upon the development and operation of specially protected areas as a distinct conservation policy, with parties accordingly required to cooperate to this end.

As is the case under ASCOBANS, the primary conservation priorities to be advanced under ACCOBAMS are elaborated in a distinct Conservation Plan appended to the Agreement text. In this regard, parties are required to apply “within the limits of their sovereignty and/or jurisdiction and in accordance with their international obligations” the various conservation, research and management measures prescribed in Annex 2 to the Agreement. This addresses six broad areas of conservation policy, namely the adoption and enforcement of national legislation; assessment and management of human-cetacean interactions; habitat protection;

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<sup>63</sup> Preamble.

<sup>64</sup> Article II(1). Under Article I(3) of the Agreement the concept of a “favourable conservation status” as defined in the parent convention carries the same meaning *mutatis mutandis* for ACCOBAMS.

<sup>65</sup> Article II(2).

research and monitoring; capacity building, collaboration and dissemination of information, training and education; and responses to emergency situations.

Parties are required to adopt “the necessary legislative, regulatory or administrative measures to give full protection to cetaceans in waters under their sovereignty and/or national jurisdiction and outside these waters in respect of any vessel under their flag or registered within their territory engaged in activities which may affect the conservation of cetaceans”. Particular emphasis is placed upon the need to eradicate the use of driftnets, irrespective of length, in areas and by operatives under the jurisdiction of the contracting parties, a position that had previously been subject to a tolerance of 2.5km in accordance with the generally accepted limits prescribed under international law. Furthermore, parties are obliged to introduce or amend national policies on the discard of fishing gear, as well as requiring mandatory impact assessments for activities conducted in national waters that may adversely impact upon the conservation status of cetaceans. Additionally, parties are required to regulate the discharge at sea of harmful pollutants, with particular reference to utilising the “framework of other appropriate legal instruments”, such as the Barcelona and Bucharest Conventions, as well as endeavouring to strengthen or create national institutions to further implement the objectives and policies of ACCOBAMS.

As far as human-cetacean interactions are concerned parties are required to collect and analyse data in relation to fisheries activities, as well as industrial and tourist activities, and develop appropriate remedial measures to mitigate such impacts. By-catches are considered to be of particular significance under ACCOBAMS. The threat posed by by-catches “differs according to region and species” within the ACCOBAMS Area.<sup>66</sup> In the Mediterranean Sea, pelagic species are considered to be most susceptible to incidental capture in fishing gear, with largely due to the historically widespread use of driftnets.<sup>67</sup> In contrast, in the Black Sea area, coastal species of cetaceans face the greatest risk of incidental capture.<sup>68</sup> The collection of scientific data on by-catches was considered an initial priority for the Agreement.<sup>69</sup> This issue has occupied a significant position on the agenda of the Scientific Committee, with

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<sup>66</sup> *Report of the First Meeting of the Scientific Committee to ACCOBAMS* (Monaco: ACCOBAMS, 2002), at 5.

<sup>67</sup> G. Bearzi, “Interactions between Cetaceans and Fisheries in the Mediterranean Sea” in di Sciara, “Cetaceans of the Mediterranean and Black Seas”.

<sup>68</sup> A. Birkun, Jr., “Interactions between Cetaceans and Fisheries in the Black Sea” in di Sciara, *ibid.*

<sup>69</sup> Resolution 1.9, International Implementation Priorities for 2002-2006.

particular attention paid to data deficiencies,<sup>70</sup> as well as certain fishing gears<sup>71</sup> and potential mitigation measures. Regulatory activity through ACCOBAMS has essentially followed these broad themes.

A number of Recommendations have been adopted by the MOP to address these issues. At the Second MOP, the parties endorsed a series of research programmes for by-catches<sup>72</sup> and observed “significant cetacean mortality” caused by gillnets.<sup>73</sup> Gillnets, especially driftnets have caused particular concern within ACCOBAMS. As noted above, the Agreement was amended at the Third MOP to introduce a complete prohibition on the use and keeping on board of this equipment within the ACCOBAMS Area.<sup>74</sup> A continuing policy has been to collaborate with “relevant organisations and bodies” to further address cetacean interactions with fisheries,<sup>75</sup> notably with the GFCM. Concerns have also been raised over mitigation strategies with the use of “pingers” subject to a series of Guidelines to restrict their usage within the ACCOBAMS Area.<sup>76</sup> Ultimately, however, it appears that the ACCOBAMS by-catch initiatives have been undermined by serial non-implementation, especially in the context of driftnetting, which “greatly harms cetaceans”<sup>77</sup> and remains seemingly widespread due to “illegal operations and the exploitation of legal loopholes”.<sup>78</sup>

Habitat protection policies are advanced in conjunction with the obligation under Article II(1). Parties are required to establish and maintain a network of specially protected areas, with the existing network of the Barcelona Convention suggested as a particularly instructive model.<sup>79</sup> Research and monitoring commitments are also listed as a particular priority, especially given the parlous state of scientific knowledge on this issue, with strong emphasis

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<sup>70</sup> Recommendation SC 1.2.

<sup>71</sup> *Report of the First Meeting of the Scientific Committee to ACCOBAMS* (Monaco: ACCOBAMS, 2002), at 5 (noting the particular threats posed by bottom-set gillnets in the Black Sea and pelagic driftnets in the Mediterranean region).

<sup>72</sup> Resolution 2.7, Working Program 2005-2007.

<sup>73</sup> Resolution 2.13, Pelagic Gillnets.

<sup>74</sup> Amendment/Resolution 3.1: Amendment of the Annex 2 to the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, Related to the Use of Drift Nets. Unlike ACCOBAMS, the ASCOBANS text does not contain any corresponding statement about the use of driftnets in the Agreement area.

<sup>75</sup> Resolution 3.12: By-Catch, Competitive Interactions and Acoustic Devices.

<sup>76</sup> Resolution 2.12, Guidelines for the Use of Acoustic Deterrent Devices.

<sup>77</sup> *Report of the Third Meeting of the Scientific Committee to ACCOBAMS* (Monaco: ACCOBAMS, 2005), at 8.

<sup>78</sup> Recommendation SC 4.2: The Use of Driftnets in the Mediterranean Sea.

<sup>79</sup> Likewise, for those parties that are also EU Member States, this obligation may be discharged through the demands of the Habitats Directive, which as noted in Chapter VIII prescribes the establishment of Special Areas of Conservation for particular species, including two species of cetaceans.

placed on monitoring the status of populations as well as identifying migratory routes and predation requirements if the species subject to the Agreement.

As with ASCOBANS, the dissemination of scientific and educational information and materials is also seen as a key aspect of the work of ACCOBAMS, with parties required to coordinate to develop networks of appropriate experts across the Agreement area. ACCOBAMS has also played a key role in the broader Year of the Dolphin campaign and continues to generate publicity and information for its activities through its own regular newsletter, *FINS*, the success of which has led to the inception of a similar project under ASCOBANS. Finally, given the role of epizootics in generating political support for the formation of ACCOBAMS, parties are also required to develop contingency plans for emergency events and exceptional environmental conditions.

In addition to these general policies, in a manner similar to ASCOBANS, a series of Conservation Plans are currently under development in relation to specific species and populations of cetaceans that are considered to be particularly vulnerable to anthropogenic pressures within the ACCOBAMS area. In this respect, work has commenced on no less than six distinct Conservation Plans, with varying degrees of success to date. The elaboration of such instruments was initially mandated at the First MOP in 2002, which was primarily concerned with establishing the operative institutions of ACCOBAMS. At this juncture a Resolution was adopted,<sup>80</sup> advancing a series of overarching priority activities for the nascent Agreement, which included the development of Conservation Plans for cetaceans in the Black Sea, as well as for Mediterranean populations of short-beaked common dolphins and bottlenose dolphins.

The first of these initiatives to be successfully concluded was the Conservation Plan for Short-beaked Common Dolphins in the Mediterranean Sea, which was finalised and endorsed at the Second MOP in 2004. At this point, parties and riparian states were invited to “implement appropriate parts of the Conservation Plan for Mediterranean common dolphins without prejudice to other international obligations; introduce relevant activities into their national action plans and report on these efforts to the ACCOBAMS Permanent

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<sup>80</sup> Resolution 1.9: International Implementation Priorities for 2002-2006.

Secretariat”.<sup>81</sup> The Conservation Plan for common dolphins is a lengthy document of some ninety pages, comprising some twenty-five pages of substantive actions for the parties to implement. If the current version of the revised Jastarnia Plan is considered unwieldy by the parties, this certainly represents and even more extensive approach to conservation planning by ACCOBAMS. The Conservation Plan advances a range of actions and policies to be pursued, ranging from by-catch mitigation and the promotion of responsible dolphin-watching to increasing the legal protection afforded to this species and improving the state of public and scientific knowledge as to its population status and conservation needs.

Despite the conclusion of the Conservation Plan in 2003, it appears that little progress has been made towards implementing this initiative. The Conservation Plan has been seemingly undermined by a combination of inactivity and a chronic lack of financial resources. Given the considerable array of regulatory activities proposed under the Conservation Plan, the appointment of a formal coordinator was mandated under Resolution 2.20; nevertheless, such an operative has not been appointed due to financial constraints. Instead, a Jastarnia-style Common Dolphin Steering Committee has been established under the ACCOBAMS Scientific Committee, which is responsible for reviewing, further developing and proposing amendments to the Conservation Plan and assessing the adequacy of its provisions. The Scientific Committee recently advanced a bleak assessment of the Conservation Plan to date, noting its grave concern “that no relevant action has been taken so far that may result in common dolphin recovery in the region”, observing that by-catches and prey depletion in particular continue to jeopardise the survival of individual groups and the Mediterranean population at large.<sup>82</sup> This pessimistic appraisal was reiterated at the Third MOP in 2007, noting that “despite the strong evidence, strategic planning and multiple expressions of concern and recommendations, *inter alia* by the ACCOBAMS Scientific Committee and relevant ACCOBAMS Partners, insufficient action has been taken to ensure recovery of the common dolphin in the region”.<sup>83</sup>

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<sup>81</sup> Resolution 2.20: Conservation Plan for Short-beaked Common Dolphins (*Delphinus delphis*).

<sup>82</sup> Recommendation SC 4.1: Conservation of Mediterranean Common Dolphins, adopted by at the Fourth Meeting of the ACCOBAMS Scientific Committee in November 2006. At this juncture the Scientific Committee rather stridently observed that “failure to act to preserve common dolphins can only be interpreted as a failure of the Parties to the commitment they made when signing the agreement to ‘maintain a favourable conservation status for cetaceans in the area’”.

<sup>83</sup> Resolution 3.17: Conservation of the Mediterranean Common Dolphin *Delphinus delphis*.

Despite these difficulties, ACCOBAMS remains strongly committed to the development of individual Conservation Plans as a particular management tool. A Conservation Plan was recently endorsed by both the Scientific Committee and the MOP as “an integral component” of coordinated conservation activities for “the Black Sea environment, biodiversity, living resources, marine mammals and cetaceans”.<sup>84</sup> The Conservation Plan is a joint initiative between ACCOBAMS and the Commission on the Protection of the Black Sea against Pollution and also received substantial funding from the Council of Europe. The Conservation Plan was initially mandated at the First MOP.<sup>85</sup> An advanced draft was reviewed at the Third Meeting of the Scientific Committee in 2005, followed by an *ad hoc* Round Table on the conservation of Black Sea Cetaceans in May 2006, prior to the Fourth Meeting of the Scientific Committee in November 2006, at which point the plan was approved and commended to the MOP.<sup>86</sup>

As with the Conservation Plan for common dolphins, the Black Sea Conservation Plan is a lengthy document and prescribes some eighteen Action Points that are categorised into the six key activity areas specified within the ACCOBAMS Conservation Plan. Particular importance is placed on fisheries interactions, marine protected areas and public awareness campaigns. At the Round Table, four particular Action Points were identified as “matters of urgency”, namely the establishment of a regional by-catch network, developing the regional network of eligible protected areas, conducting a region-wide survey and assessment of cetacean abundance, distribution and hotspots, as well as developing national cetacean stranding networks. Accordingly, at the Third MOP the parties were invited to implement “appropriate parts of the conservation plan” and introduce relevant activities into their national policies. If the Conservation Plan for common dolphins is a reliable indicator, this will be largely attained through the establishment of a similar Steering Committee in due course.

Further Conservation Plans are also under development. A distinct instrument was mandated in respect of Mediterranean populations of bottlenose dolphins at the First MOP, although work was deferred due to the high priority afforded to common dolphins. A series of working

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<sup>84</sup> Resolution 3.11: Conservation Plan for Black Sea Cetaceans.

<sup>85</sup> Resolution 1.12: Conservation of the Black Sea *Tursiops truncatus*: Bottlenose dolphin.

<sup>86</sup> Recommendation SC 4.6: Conservation Plan for Black Sea Cetaceans.



groups has since been established to develop the initiative further.<sup>87</sup> Work is currently in progress to establish a Bottlenose Dolphin Steering Committee with a view towards elaborating local action plans, although as yet no fixed deadline appears to have been set for the conclusion of this project. In addition, in 2005 a workshop on fin whales was convened under the auspices of ACCOBAMS and the Pelagos sanctuary, which is intended as the preliminary work for a further Conservation Plan for this species.<sup>88</sup> Nevertheless, before any such initiative may ultimately proceed, it is clear that substantial research and monitoring activities will have to be conducted to identify both the conservation status of relevant populations as well as the key anthropogenic threats to this species.<sup>89</sup> Similarly, an equivalent research initiative must also be successfully concluded in order for a mooted sperm whale Conservation Plan to come into fruition, although the parties have, at this preliminary stage, identified driftnet fishing and ship strikes as particular conservation problems in respect of this species.<sup>90</sup> Further research activities are also required in respect of Mediterranean populations of harbour porpoises, which have also been earmarked as a candidate species for a future Conservation Plan.<sup>91</sup> Additional Conservation Plans for other species of cetaceans are also likely to be developed under the auspices of ACCOBAMS in future years, with particular reference to the status assessments adopted in relation to killer whales by the IUCN and endorsed at the Third MOP.<sup>92</sup>

A further conservation and management policy pioneered by ACCOBAMS is the development of distinct Guidelines to regulate anthropogenic activities affecting cetaceans within the Agreement area, as mandated under Article IV(3). This facilitates the preparation of Guidelines concerning, *inter alia*, the reduction or elimination as far as possible of adverse human-cetacean interactions; habitat protection and natural resource management methods; emergency measures; and rescue methods. To date, seven such Guidelines have been developed under the auspices of ACCOBAMS addressing a host of issues, including cetacean-watching activities, the establishment and management of MPAs, strandings, the

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<sup>87</sup> *Report of the Third Meeting of the Scientific Committee* (Monaco: ACCOBAMS, 2005), at 6.

<sup>88</sup> *Report of the Fourth Meeting of the Scientific Committee* (Monaco: ACCOBAMS, 2006), at 8.

<sup>89</sup> Resolution 3.16: Conservation of Fin Whales in the Mediterranean Sea.

<sup>90</sup> Resolution 3.4: Work Programme 2008-2010.

<sup>91</sup> *Ibid.*

<sup>92</sup> Resolution 3.19: IUCN Red List of Cetaceans in the Mediterranean and Black Seas. At this juncture the parties noted Mediterranean short-beaked common dolphins, Mediterranean sperm whales and Black Sea and northern Aegean populations of harbour porpoises as requiring “specific, immediate attention”. Accordingly, the experience of both ASCOBANS and ACCOBAMS suggests that these species are likely to be prioritised as candidates for further Conservation Plans in the medium-term future.

release of cetaceans into the wild, the creation of tissue banks and the mitigation of cetacean-fishery conflicts. Further Guidelines are currently in development to address the impact of anthropogenic noise upon “marine mammals” within the Agreement area, for which a Working Group was convened to advance this project further by the Fourth MOP.<sup>93</sup> This particular strategy demonstrates strong potential as a distinct conservation mechanism, that has allowed ACCOBAMS to develop – and, in some cases, pioneer – influential and informative models of best practice for a host of issues that are subject to minimal or no regulatory attention in other multilateral fora.

In addition to this, ACCOBAMS differs from ASCOBANS – and, indeed, many other long-standing CMS subsidiary instruments – due to the overt importance placed upon the application of the precautionary principle in relation to its conservation policies. Article II(4) states that, in implementing the conservation measures advanced under the Agreement, “the Parties shall apply the precautionary principle”. There is no equivalent provision within ASCOBANS, which has been considered to operate to the great detriment of the Agreement.<sup>94</sup> The central role envisaged for the precautionary principle under ACCOBAMS may be explained by the fact that the substantive negotiations for the conclusion of the Agreement were pursued subsequent to the Fourth COP to the CMS in 1994, at which point the parties undertook that any future Agreements concluded under the Bonn Convention umbrella “should incorporate the ‘precautionary principle’”.<sup>95</sup> Accordingly, a series of Guidelines on the application of the precautionary principle are currently under development within the ACCOBAMS Scientific Committee. However, due to the wide-ranging remit of the initiative, work has to date focussed upon establishing a precautionary approach to certain key conservation policies – such as the use of pingers – as opposed to finalising an overarching institutional template for precautionary activities.<sup>96</sup>

In conjunction with the broad conservation and management strategies advanced under the auspices of the Agreement in the form of Conservation Plans and specific Guidelines, at the

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<sup>93</sup> Resolution 3.10: Guidelines to Address the Impact of Anthropogenic Noise on Marine Mammals in the ACCOBAMS Area. A further Resolution adopted at the Third MOP called for a series of revisions to be made to the existing guidelines on strandings to include impacts of pollution upon cetaceans: Resolution 3.29: Guidelines for a Coordinated Stranding Response.

<sup>94</sup> H. Nijkamp and A. Nollkaemper, “The Protection of Small Cetaceans in the Face of Uncertainty: An Analysis of the ASCOBANS Agreement” (1997) 9 *Georgetown International Environmental Law Review* 281, especially 293-97.

<sup>95</sup> Resolution 4.4: Strategy for the Future Development of the Convention.

<sup>96</sup> *Report of the Third Meeting of the Scientific Committee* (Monaco: ACCOBAMS, 2005), at 11.

Third MOP the parties established a series of priority activities to be pursued within the 2008-2010 triennium.<sup>97</sup> To this end, particular emphasis has been placed upon collating comprehensive population estimates and distribution and addressing interactions with fisheries and the threats posed by anthropogenic noise, ship strikes, cetacean-watching operations, captivity, climate change and marine debris, as well as improving the legal status of key species, coordinating emergency responses and developing a coordinated network of MPAs in key areas of cetacean habitats within the Agreement area.

## 6.7 Concluding remarks

ACCOBAMS has been operational since 2002 and, with three MOPs having been successfully convened, is now at a key stage in its development. To date, ACCOBAMS has been viewed as a superior instrument to ASCOBANS, not least since it is far more prescriptive in nature and largely avoids the vague, permissive and research-orientated tone of its sister Agreement.<sup>98</sup> Furthermore, ACCOBAMS has advanced a clearly defined remit for its conservation efforts within the region in a manner that has yet to be fully realised by ASCOBANS. The institutional strengths of the Agreement are also supported by a clear Conservation Plan that is targeted and precise in terms of both obligation and strategy. In this respect, ACCOBAMS may be viewed favourably as a model for future CMS cetacean subsidiary instruments to follow.

Some initial concerns<sup>99</sup> of limited participation within ACCOBAMS have been largely assuaged by subsequent developments. The majority of the Range States have become parties to the Agreement and the remaining non-parties have exercised at least some degree of cooperation. Likewise, jurisdictional limitations have also been identified as a potential impediment to the enforcement of the Agreement, with maritime delimitation in the Mediterranean region having created enclaves of high seas.<sup>100</sup> It appears that this has also had a limited impact upon the activities of ACCOBAMS. A contributing factor may be the considerable recognition within the Agreement's institutions of the need to develop collaborative relations with third-party interests in order to advance the ACCOBAMS agenda in these waters. Additionally, as with ASCOBANS, further clearly-targeted and multi-

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<sup>97</sup> Resolution 3.4: Work Programme 2008-2010.

<sup>98</sup> Churchill, "Sustaining Small Cetaceans", at 248-50.

<sup>99</sup> *Ibid.*, at 250.

<sup>100</sup> *Ibid.*

disciplinary research will be required to gauge the impact that the Agreement has had upon the conservation practices of its constituent parties. The wide range of Guidelines developed by ACCOBAMS nonetheless offers clear models of best practice to be incorporated by domestic regulators, suggesting that the influence of the Agreement may ultimately prove rather more pervasive than ASCOBANS.

Instead, ACCOBAMS faces its primary challenges in the context of the implementation of its various conservation commitments. The implementation history of existing marine environmental commitments on the part of the various Mediterranean and Black Sea riparian states has been chequered,<sup>101</sup> a position that does not augur well for the long-term prospects of ACCOBAMS. This unsatisfactory position may be further compounded by the relative poverty of many eligible participants – as noted by Burns, “the severe financial constraints faced by many nations in the region, particularly in the Black Sea, may render the ambitious objectives of the treaty chimerical”.<sup>102</sup> Notwithstanding the individual generosity of certain parties, the CMS has officially appraised the resources of ACCOBAMS as “modest”,<sup>103</sup> which suggests that the Agreement may face similar financial pressures to ASCOBANS in future years, with similar adverse implications for the funding of key policies. The recent concerns raised by the Scientific Committee over the need to guarantee seed funding in order to attain its minimum conservation objectives represent further evidence of this alarming trend.

Although ACCOBAMS is still in a relatively early stage of its operations, a series of conservation priorities have been established under its latter MOPs. However, concerns may be raised that rhetorical support for these commitments has been slow to translate into comprehensive and coordinated activity by the parties. As with ASCOBANS, ACCOBAMS has developed a series of commendable Conservation Plans for certain key species, yet progress towards the implementation of these initiatives has been troublingly slow to date, as lamented by the various ACCOBAMS institutions. As the Scientific Committee has pointedly observed, the Conservation Plans “are only tools to guide and elicit actions (research and

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<sup>101</sup> Burns, “ACCOBAMS” at 124-25.

<sup>102</sup> *Ibid.*, at 125. Indeed, ACCOBAMS has already experienced isolated incidences of the non-payment of subscriptions – for instance, at the Third MOP it was noted that Libya had failed to pay its requisite contributions: *Report of the Third Meeting of the Parties to ACCOBAMS* (Monaco: ACCOBAMS, 2007), at 8.

<sup>103</sup> *Report of the Second Meeting of the Parties to ACCOBAMS* (Monaco: ACCOBAMS, 2005), at 2.

conservation) and should not be seen as end-products in their own right”.<sup>104</sup> In truth, however, this pertinent criticism is only part of the problem in respect of the various Conservation Plans adopted to date. As the Finnish delegation to ASCOBANS has compellingly argued,<sup>105</sup> there has been a tendency under both ASCOBANS and ACCOBAMS to develop lengthy and complex action plans that are characterised more by their scholarly evaluation of the conservation status of the species in question than by providing a clear and easily identifiable programme of activity. Indeed, many such initiatives developed under ASCOBANS and ACCOBAMS appear closer in nature to academic papers as opposed to accessible, inclusive and clearly-targeted programmes of activity that can be swiftly and easily implemented by national authorities and relevant stakeholders.

It is vitally important for the future viability of the various CMS cetacean Agreements that such bodies can demonstrate clear conservation advantages over and above those of their regulatory competitors. In this regard, the development of successful species- and region-specific conservation plans, which may be objectively demonstrated to enhance the conservation status of the species concerned, represents perhaps the best avenue by which to achieve this objective. Indeed, it is likely that ASCOBANS and ACCOBAMS are far better placed than many other regulators to develop such initiatives, given that few equivalent strategies have as yet emerged from alternative bodies, such as the various habitat groups of the relevant Regional Seas Agreements or, indeed, the European Commission.

Given that the primary criticism of the various conservation plans adopted to date concerns the format rather than the ambition of such instruments, there is a clear need to investigate alternative models. One possible solution could be for ACCOBAMS (and, indeed, ASCOBANS) to emulate the model employed by the Council of Europe, whereby a number of instruments involving complex and complicated issues are published as a concise set of Recommendations and accompanied by a more substantial (and separate) explanatory memorandum. If ACCOBAMS were to follow this model, then the lengthy discussion of the scientific basis for the instrument adopted could be explored in full in a distinct document in a manner that would not impede or intimidate the sympathetic lay reader of a targeted action plan. However ACCOBAMS opts to address this issue, it is nonetheless clear that the

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<sup>104</sup> *Report of the Third Meeting of the Scientific Committee* (Monaco: ACCOBAMS, 2005), at 6.

<sup>105</sup> *The Finnish Point of View of the Jastarnia Plan Revision*, Document AC 15/Doc. 41 (P), submitted at the Fifteenth Meeting of the Advisory Committee to ASCOBANS; reproduced on-line at [www.ascobans.org](http://www.ascobans.org) (last visited 31 August 2009).

development of an alternative approach to such instruments is required as a matter of priority. The Conservation Plans adopted thus far undoubtedly represent positive progress towards understanding, clarifying and addressing the primary threats to species of cetaceans in these waters. However, if they continue to lack focus, clear targets and comprehensibility to the key stakeholders charged with operationalising such instruments, ACCOBAMS appears to be condemned to repeating its lament against serial non-implementation for the foreseeable future.

Thus far, as free-standing institutions, ASCOBANS and ACCOBAMS have demonstrated significant political, financial and supervisory limitations that have undoubtedly impacted upon their ability to deliver tangible conservation benefits for cetaceans. These criticisms have often served to overshadow their strengths – not least in that they represent the only current regional regimes that specifically operate to regulate cetaceans and, like the CMS itself, have filled a regulatory lacuna. Accordingly, it has been argued that the optimal deployment of the ASCOBANS and ACCOBAMS regimes, given that their regulatory competitors are often considerably better placed to provide meaningful and binding conservation measures to marine fauna by addressing particular anthropogenic threats, is to play a largely facilitative role by identifying and coordinating various conservation policies through existing multilateral management structures.<sup>106</sup>

The unique institutional structure of ACCOBAMS strongly supports such a policy of facilitation while there is evidence of a strong facilitative motivation underpinning the conclusion of the Agreement.<sup>107</sup> Whether facilitation should be considered the sole function of the CMS cetacean subsidiary Agreements, to the exclusion of the pursuit of autonomous conservation measures,<sup>108</sup> is somewhat more questionable. There appears to be little practical impediment – and indeed, considerable merit – in the Agreements adopting a stance *both* as a facilitator and as an autonomous regulator. Indeed, this would appear to have been the practice of both ASCOBANS and ACCOBAMS to date, which have sought to engender collaborative programmes of activity with pre-existing regulatory institutions, while also pursuing specific policies towards a host of conservation issues facing cetaceans.

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<sup>106</sup> Churchill, “Sustaining Small Cetaceans”, at 250.

<sup>107</sup> Indeed, the CMS has formally observed that as far as ACCOBAMS is concerned, the “negotiators wished that the tools for implementation be channelled through existing regional structures”: *Proceedings of the Fifth Meeting of the Conference of the Parties* (Bonn: CMS, 1997), at 21.

<sup>108</sup> Churchill, “Sustaining Small Cetaceans”, at 250.

In this respect, the true value of the Agreements appears to be the advancement of particular measures, such as the development of Conservation Plans and specialist Guidelines that have not been pursued (and are unlikely to occupy sufficient attention) within alternative bodies, such as the EU and regional agreements. ASCOBANS and ACCOBAMS can also act as a form of regulatory cement to coordinate the conservation objectives of a disparate group of supervisory institutions in respect of cetaceans. Nonetheless, a consistent struggle to secure sufficient financial and administrative resources to effect these measures, combined with a disappointing degree of implementation by many parties, means that questions concerning the long-term effectiveness of ASCOBANS and ACCOBAMS are likely to remain.

## **CHAPTER VII**

### **NON-BINDING INSTRUMENTS AND THE CONSERVATION OF CETACEANS UNDER THE CMS**

#### **7.1 Introduction**

Having evaluated the most significant CMS Agreements adopted to date for cetaceans, this Chapter proceeds to analyse a series of relevant non-binding instruments that have emerged under the auspices of the Bonn Convention. As noted in Chapter IV, a trend has emerged within the CMS towards the development of less formal arrangements for the conservation of migratory species. This position is primarily driven by a desire to maximise the limited resources of the CMS regime, while establishing a basis for further regulatory activity and to utilise pre-existing institutional structures to advance the objectives of the Convention.<sup>1</sup> Accordingly, this Chapter examines the implications of this policy in the context of cetaceans.

Thus far, two Memoranda of Understanding (MOUs) have been concluded in respect of cetaceans. The experience of these MOUs in shaping and coordinating national and regional policies will prove instructive as to the future utility of such an approach to cetacean conservation under the CMS. This Chapter commences with an analysis of the first such instrument, applicable to the Pacific Islands region, discussing its development and analysing its prospects for success. This is followed by a preliminary evaluation of the Western African MOU, adopted in late 2008 in respect of small cetaceans and manatees. Subsequently, this Chapter evaluates the scope developing further instruments addressing cetaceans within the South Atlantic, South-East Asia and Indian Ocean regions, before advancing a series of conclusions on the prospects of success for an MOU-based approach to cetacean conservation.

#### **7.2 Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region, 2006**

The first MOU addressing cetaceans negotiated under the auspices of the Bonn Convention is the Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in

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<sup>1</sup> Resolution 9.2: Priorities for CMS Agreements, adopted at the Ninth COP in 2008.



the Pacific Islands Region, which was opened for signature on 15 September 2006. The MOU represents the culmination of a series of initiatives concerning cetaceans that have been on-going within various political and regulatory fora within the Pacific region since the early 1990s.

### *7.2.1 Species status and negotiating history*

As with ASCOBANS and ACCOBAMS, the knowledge base on cetaceans in the Pacific Islands region is considered to be largely deficient, both in terms of the precise species ordinarily and occasionally resident in these waters and the scale of the anthropogenic threats thereto.<sup>2</sup> The limited research that exists in relation to cetaceans suggests that between thirty and forty different species may frequent these waters.<sup>3</sup> While data on the precise extent of the threats posed to cetaceans is currently incomplete, they are nonetheless considered vulnerable to the main anthropogenic pressures that are generally experienced on a global basis and also replicated within other regions.<sup>4</sup>

A significant threat to cetacean stocks in the Pacific region is posed by directed hunting, hence the future agenda of the MOU may be considered likely to afford substantially greater attention to whaling issues than previously advanced under the CMS. Particular concerns have been raised by a number of the MOU signatories, not least Australia and New Zealand, over the current programme of lethal scientific research undertaken in these waters by Japan.<sup>5</sup> Furthermore, all species are considered vulnerable to by-catches, with fisheries interactions considered to pose a high threat to small and medium sized cetaceans in particular.<sup>6</sup> Additionally, further issues of concern include climate change, listed as “potentially a high threat to whales, dolphins and porpoises and their habitats in the region”,<sup>7</sup> as well as pollution and habitat degradation generally which, although potentially significant,<sup>8</sup> are considered at

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<sup>2</sup> C. Miller, *Current State of Knowledge of Cetacean Threats, Diversity and Habitats in the Pacific Islands Region* (Chippenham: WDCS, 2006), at 12.

<sup>3</sup> *Pacific Islands Regional Marine Species Programme 2008-2012* (Apia: SPREP, 2007), at 31. The Programme is reproduced in full on-line at [www.sprep.org/topic/pdf/marinespeciesweb.pdf](http://www.sprep.org/topic/pdf/marinespeciesweb.pdf) (last visited 31 August 2009).

<sup>4</sup> Miller, “Current State of Knowledge”, at 12.

<sup>5</sup> A. Gillespie, “Protecting Cetaceans in the South Pacific: The Dynamics of a Regional Agreement” (2002) 7 *Asia-Pacific Journal of Environmental Law* 71, at 72-73.

<sup>6</sup> *Pacific Islands Regional Marine Species Programme 2008-2012*, at 36.

<sup>7</sup> *Ibid.*

<sup>8</sup> Miller, “Current State of Knowledge”, at 21-22.

present to represent a “medium” threat to cetaceans.<sup>9</sup> Finally, acoustic disturbances, eco-tourism activities and the trade in live specimens are also considered potential risks.<sup>10</sup>

Regional action to address cetaceans in these waters has been primarily coordinated through the Secretariat of the Pacific Regional Environment Programme (SPREP). The first major programme of activity coordinated under SPREP was the elaboration of a Regional Marine Mammal Conservation Programme, operating between 1993 and 2003, which incorporated a conservation strategy addressing a host of marine species, including whales and dolphins. This led to the inauguration of a further Marine Species Programme Framework for 2003-07,<sup>11</sup> which comprised three distinct Action Plans addressing whales and dolphins, dugongs and marine turtles respectively.<sup>12</sup> The SPREP Framework specifically identified whales and dolphins as “flagship species for Pacific marine ecosystems”.<sup>13</sup> Moreover SPREP Framework sought to develop strategies for the “cooperative conservation management of these shared marine resources”, with the three marine mammal Action Plans forming a fundamental component of the overall vision to attain a “Pacific Ocean where populations of whales, dolphins, dugongs and marine turtles have recovered to healthy levels of abundance, have recovered their former distribution and continue to meet and sustain the cultural aspirations of the Pacific peoples”.<sup>14</sup>

In addition to these developments through SPREP – for which the Whale and Dolphin Action Plan has also formed the primary operative basis for the Pacific Islands MOU under the CMS – a parallel motivation towards the elaboration of a distinct regional instrument has proved to be closely aligned with events within the IWC. As observed in Chapter II, a matter of particular controversy in current IWC policy has been the potential designation of sanctuaries for whales, an issue that has proven especially fractious in the South Pacific region. In this respect, it is the stated policy of Australia and New Zealand to facilitate the establishment of an IWC-based sanctuary in the South Pacific to link with the existing Southern Ocean

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<sup>9</sup> *Pacific Islands Regional Marine Species Programme 2008-2012*, at 36.

<sup>10</sup> *Ibid.*

<sup>11</sup> Reproduced at: [www.sprep.org/YOST/pdfs/SPREPMarSpecActionPlans2003-07.pdf](http://www.sprep.org/YOST/pdfs/SPREPMarSpecActionPlans2003-07.pdf) (last visited 31 August 2009).

<sup>12</sup> On the potential conservation benefits of the SPREP Action Plans see A. Gillespie, “The Dugong Action Plan for the South Pacific: An Evaluation Based on the Need for International and Regional Conservation of Sirenians” (2005) 36 *Ocean Development and International Law* 135; and A. Gillespie, “The Slow Swim from Extinction: Saving Turtles in the South Pacific” (2006) 21 *International Journal of Marine and Coastal Law* 57.

<sup>13</sup> SPREP Marine Framework, at 1.

<sup>14</sup> *Ibid.*, at 4.

Sanctuary established under the ICRW in 1995,<sup>15</sup> a move that has been consistently resisted by Japan. To date, while raised as a distinct agenda item within the IWC on a virtually annual basis, the proposed sanctuary for the South Pacific has nonetheless repeatedly failed to secure the requisite three-quarters majority of the parties present and voting in order to be brought into effect under the ICRW. Consequently, the various island nations in the Pacific region have found themselves caught on the fault-line between the whaling policies of Australia and New Zealand on the one hand, and Japan on the other, all of which exert substantial influence in the region in terms of development aid and bilateral trade. Accordingly, an understandable measure of *realpolitik* has meant that a number of the island microstates in the South Pacific have sought to distance themselves from overt support for the sanctuary proposals within the IWC,<sup>16</sup> with the issue of protected areas for cetaceans thereby displaced to alternative – and rather less incendiary – fora, such as the CMS.

Initial attempts to link the activities of SPREP and the Bonn Convention regime in relation to cetaceans within occurred in March 2003, where a CMS workshop was convened at the SPREP headquarters in Apia, Samoa, with the aim of examining the scope for developing conservation programmes in relation to marine turtles and marine mammals generally.<sup>17</sup> A second workshop was held a year later, with a view towards developing a CMS subsidiary instrument for marine mammals in the region. At this juncture it became apparent that any future instrument would necessarily be confined to cetaceans, since few of the states and territories represented at the meeting were Range States for dugongs, with marine turtles considered to merit a separate regional Agreement.<sup>18</sup> “[S]ignificant progress” had been made on the instrument by the time of Sixteenth Meeting of SPREP in late 2005,<sup>19</sup> where the terms

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<sup>15</sup> A. Gillespie, “The Southern Ocean Sanctuary and the Evolution of International Environmental Law” (2000) 15 *International Journal of Marine and Coastal Law* 293.

<sup>16</sup> For a useful summary of diplomatic contortions undertaken by a number of the South Pacific island nations in this regard see Gillespie, “Protecting Cetaceans in the South Pacific”, at 75-76. Some island states, notably the Cook Islands, have formally declared their jurisdictional waters to be a sanctuary for whales and dolphins. Conversely, other Pacific Island nations have themselves voiced concerns about the sanctuary proposals tabled by Australia and New Zealand, most notably Palau. The Solomon Islands, in which a drive hunt of cetaceans is conducted on an annual basis, has also demonstrated unease at the prospect of an IWC sanctuary by abstaining from key votes on the issue: at 72.

<sup>17</sup> “Atelier SPREP sur la Conservation des Mammifères Marins Régionaux et la CMS” (2003) 17 *CMS Bulletin*, at 30.

<sup>18</sup> *Report of the Second Workshop on the Convention on Migratory Species and Marine Mammal Conservation in the South Pacific* (Bonn: CMS, 2004), at Annex 5.

<sup>19</sup> Resolution 8.5, Implementation of Existing Agreements and the Development of Future Agreements, adopted at the Eighth COP to the CMS in 2005.

of the MOU were largely finalised. The Pacific Islands MOU was opened for signature at the Seventeenth Meeting of SPREP in 2006 and has attracted eleven signatories to date.<sup>20</sup>

Like ASCOBANS and ACCOBAMS, the Pacific Islands MOU has been elaborated under Article IV(4) of the parent convention.<sup>21</sup> Again, this reflects the overall paucity of comprehensive data concerning the population status and conservation threats to cetaceans within this region. Furthermore, the MOU explicitly states that it is not considered to be legally binding.<sup>22</sup> Early negotiations revealed that a non-binding MOU would best serve the immediate need for multilateral action, but did “not preclude its subsequent development into a legally binding CMS Agreement in the future”.<sup>23</sup> Since the Whale and Dolphin Action Plan incorporated under the SPREP Framework offered a ready-made programme of activity, this instrument was further adopted as the primary source of the Action Plan requirements of MOU. Moreover, since the various Action Plans developed by SPREP thus far had applied to “whales and dolphins”, the MOU was therefore logically extended to all species of cetaceans.

### 7.2.2 Conservation policies

The Pacific Islands MOU specifically acknowledges that it faces considerable challenges in seeking to promote the conservation of cetaceans, not least that “knowledge of the biology, ecology, migrations, population abundance, and conservation status of many cetaceans is deficient”.<sup>24</sup> Furthermore, cetaceans are considered susceptible to a host of anthropogenic pressures including directed hunting, incidental capture, habitat degradation and disturbance, chemical and noise pollution, prey depletion, ship strikes and climate change.<sup>25</sup> Accordingly, the MOU recognises that cetaceans should be conserved for the benefit of present and future generations, since they form “an integral part of the marine environment that connects ecosystems and cultures”. Uniquely, given the anthropological importance of cetaceans in the region, the signatories are required to take urgent action both to achieve and maintain a

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<sup>20</sup> The eligibility criteria for participation in the MOU are significantly different to that of the parent convention, with the MOU open to signature by “the States and Territories of the Pacific Islands Region”: Para 12 of the Pacific Islands MOU. Unlike the CMS, which is only applicable to states, it was agreed at a preliminary stage in the negotiations the MOU that territories as well as states should be eligible to participate: *Report of the Second Workshop*, at 23.

<sup>21</sup> Para. 9 of the Pacific Islands MOU.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Report of the Second Workshop*, at 22.

<sup>24</sup> Preamble to the MOU.

<sup>25</sup> *Ibid.* It may be suggested that the litany of anthropogenic threats to cetaceans advanced in the preamble to the MOU may be considered to be listed in order of priority, following discussions to this effect during the drafting process.

favourable conservation status for the species and their habitats as well as to safeguard the associated cultural values for Pacific Islands peoples. Signatories are to “take steps to conserve all cetaceans and fully protect species listed in CMS Appendix I that occur in the Pacific Islands Region”.<sup>26</sup> Implementation possibilities include further participation in other relevant multilateral biodiversity-related conventions,<sup>27</sup> as well as reviewing, enacting or updating, as appropriate, national legislation to conserve cetaceans,<sup>28</sup> while implementing “subject to the availability of necessary resources” the various provisions of the SPREP Whale and Dolphin Action Plan, which is formally appended to the MOU.<sup>29</sup>

The initial Action Plan comprised some thirty-one action points of varying significance, with an over-arching vision to foster the recovery of cetaceans from past over-exploitation; improve the protection and conservation of these species and their habitats, with particular emphasis upon the establishment of sanctuaries on the national, regional and international levels; to ensure that Pacific Island peoples continue to benefit from the long-term survival of cetaceans; and to increase knowledge, awareness and understanding of these species and their role in Pacific marine ecosystems. The ultimate goal of the Action Plan was thereby stated as being “[t]o conserve whales and dolphins and their cultural values for the people of the Pacific”.

Despite the central importance of the Action Plan in framing multilateral efforts to address the conservation status of cetaceans this was, in truth, a somewhat disjointed and chaotic (if well-intentioned) document. Many of the action points advanced were assigned in a rather *ad hoc* and random order with little attempt to prioritise key activities, which in turn rendered the Action Plan a challenging instrument to seek to implement. These shortcomings were further compounded by a general dearth of clear targets. These limitations were formally acknowledged in a review of the MOU undertaken shortly after its inauguration described the Action Plan as an initiative that “lacks clear priorities/timelines, is too focussed on IWC issues and is not ‘implementation-friendly’”.<sup>30</sup>

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<sup>26</sup> Para. 1.

<sup>27</sup> Para. 2.

<sup>28</sup> Para. 3.

<sup>29</sup> Para. 4.

<sup>30</sup> *Report of the Technical Meeting on Cetaceans in the Pacific Islands Region* Doc. UNEP/CMS/PIC-1/5/Add.1 (Bonn: CMS, 2007) at 8.

Under Para 6 of the MOU, the signatories undertake to assess implementation at “regular meetings”, of which two have been convened to date. Under Para 14, the instrument – and, more pertinently, its Annex – may be amended by a consensus of the signatories. In 2008, a new Pacific Islands Regional Marine Species Programme 2008-12 was adopted under the auspices of SPREP, which superseded the 2003-07 version that initially formed the operational basis of the MOU. The 2008 version was accordingly adopted as the revised Action Plan for the MOU at the Second Meeting of the Signatories, convened in July 2009.<sup>31</sup>

In many respects, the 2008-12 Programme operates on a similar basis to its predecessor, prescribing three distinct Action Plans for marine mammals in the Pacific Islands region, while advancing an overall vision that is virtually identical to that of the 2003 version.<sup>32</sup> Indeed, the 2008-12 Programme continues a number of the broad themes advanced by its predecessor, with particular reference towards facilitating national, regional and international cooperation; reducing threats to cetaceans; promoting ecosystem and habitat protection, capacity building and education and awareness; preserving native cultural traditions in relation to cetaceans; developing national legislation; improving research and monitoring activities; and fostering the development of whale and dolphin-based tourism. Within these general themes and objectives, particular importance is placed upon threat reduction, with considerable emphasis on the need to address direct and indirect interactions with fisheries as well as the impact of anthropogenic activities in the cetacean environment.

Having observed that “substantial progress has been achieved”<sup>33</sup> in addressing the conservation needs of marine species, the 2008-12 Programme has actively sought to avoid a number of the weaknesses that characterised its forerunner and prescribed a series of priority actions and also designated lead actors to implement these objectives. Nevertheless, some concerns remain as to whether the programme of activities established under its auspices is in fact realistically attainable. Given that virtually all of the action points advanced are currently listed as a “high” priority, there remains a real risk that the parties may be overwhelmed on a number of conservation fronts to the detriment of a meaningful implementation of these

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<sup>31</sup> Document UNEP/CMS/PIC2/Doc.4-01; reproduced on-line at [www.cms.int](http://www.cms.int) (last visited 31 August 2009). At the time of writing, the formal Report of the Second Meeting of the Signatories had not been finalised and published.

<sup>32</sup> The 2008-12 Programme seeks to maintain “a healthy Pacific Ocean that sustains populations of whales, dolphins, dugongs and marine turtles, and meets the aspirations of Pacific Island peoples and protects their natural and cultural heritage”: *Pacific Islands Regional Marine Species Programme 2008-12*, at 5.

<sup>33</sup> *Ibid.*, at 6.

policies. Some attempts to mitigate this concern were made at the Second Meeting of the Signatories, which established mid-term planning objectives for the MOU with particular emphasis upon expanding the knowledge base concerning cetaceans in the region, identifying key threats and addressing fisheries interactions and tourism issues.<sup>34</sup>

Taken on its own terms, the Pacific Islands MOU is a welcome development from the perspective of the conservation of cetaceans in an area in which such species have been historically over-exploited and under-studied. While the MOU lacks binding commitments, it has nonetheless acted to entrench the current framework for conservationist activity by adding another formal tier to regional cooperation and maintaining the legislative visibility of these species. A close and cooperative working relationship has been developed with SPREP, while the considerable support for the nascent MOU has been pledged from within the CMS structure.<sup>35</sup> Furthermore, the MOU may act as a useful guide for the formulation of further instruments of this nature to address the conservation needs of additional species of marine mammals, if the requisite political will and funding is forthcoming. Such developments will thereby expand the profile of the parent convention in an area in which it has historically enjoyed limited coverage, as well as presenting opportunities to develop conservation measures for marine species that have also been somewhat neglected in other fora.

However, it appears rather unlikely that the MOU will ultimately crystallise into a binding Agreement. Indeed the general theme of multilateral marine mammal conservation initiatives within this region – both under the auspices of the CMS and beyond – has been towards the establishment of broad action plans and less formal institutional arrangements. Given the continuing political controversy generated by whaling activities undertaken in these waters, if IWC practice is a reliable barometer, the various Pacific Island states may indeed favour the development of non-binding instruments in relation to marine mammals. Such a position establishes a broad atmosphere of conservation cooperation yet avoids inflaming political tensions that would be undoubtedly generated by the elaboration of a binding Agreement advancing strong obligations against directed hunting in these waters.

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<sup>34</sup> Document UNEP/CMS/PIC2/Doc.7-01.

<sup>35</sup> Indeed, representatives of ACCOBAMS have already pledged to “collaborate and share experiences and expertise with the Pacific Islands Region”: *Report of the First Meeting of the Signatories to the Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region* (Bonn: CMS, 2007), at 3.

Irrespective of the eventual strength of its commitments, it is clear that the Pacific Islands MOU and its associated institutional sponsors face significant resource constraints that are likely to impact adversely upon the practical conservation possibilities posed by these developments.<sup>36</sup> The relative poverty of most of the Range States concerned may also act as a further inhibiting factor for the development of a more formal and binding cetacean conservation regime in this region. Incorporation within the CMS umbrella may provide some degree of additional funding, but it appears likely that a degree of reliance upon supplementary finances from signatory states, especially Australia and New Zealand, and other external sources may be necessary to fully underwrite the running costs and conservation projects associated with the MOU.

### **7.3 Memorandum of Understanding Concerning the Conservation of the Manatee and Small Cetaceans of Western Africa and Macaronesia, 2008**

Following the development of the Pacific Islands MOU, a further instrument concerning marine mammals has been elaborated for Western Africa. This particular instrument is different in scope and specifically addresses small cetaceans and sirenians. The Memorandum of Understanding Concerning the Conservation of the Manatee and Small Cetaceans of Western Africa and Macaronesia was opened for signature on 3 October 2008 and represents the first multilateral initiative to date to address small cetaceans within this region.

#### *7.3.1 Species concerns and negotiating history*

An instrument to address cetaceans in western Africa under the auspices of the Bonn Convention was first mooted in 1995, whereby this region, together with South America, was identified as a priority area for activity by the Scientific Council and a designated Working Group was duly established.<sup>37</sup> Following a series of research projects,<sup>38</sup> negotiations towards the eventual elaboration of a CMS subsidiary instrument commenced in May 2000, when a

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<sup>36</sup> Indeed, the past marine mammal initiatives operated under SPREP have been characterised by considerable austerity and the 2008-12 Programme explicitly identified the inability to fund a designated Marine Species Officer to oversee the coordination of these initiatives to be a considerable impediment to the progress of the various Action Plans to date: *Pacific Islands Regional Marine Species Programme 2008-12*, at 6. The lack of a formal coordinator for the MOU has been identified by the signatories as a key impediment to progress that must be addressed at the earliest opportunity: *Report of the First Meeting of the Signatories*, at 7-8.

<sup>37</sup> *Report of the Sixth Meeting of the Scientific Council* (Bonn: CMS, 1995), at 3.

<sup>38</sup> K. Van Waerebeek *et al.*, *A Survey of the Conservation Status of Cetaceans in Senegal, The Gambia and Guinea-Bissau* (Bonn: CMS, 2000); K. Van Waerebeek *et al.*, *Conservation of Cetaceans in The Gambia and Senegal, 1999-2001, and Status of the Atlantic Humpback Dolphin in West Africa* (Bonn: CMS, 2002).



workshop was convened in Conakry, Guinea. An Action Plan for the conservation and management of small cetaceans of western Africa was developed, although consideration of a draft Agreement was deferred due to the lack of a lead country.<sup>39</sup> Subsequently, at the Seventh COP of the CMS in 2002 a Resolution was adopted, mandating the conclusion of “an appropriate CMS instrument on small cetaceans and sirenians in West Africa” and calling for the allocation of sufficient resources for this purpose.<sup>40</sup> This Resolution was supported by a targeted Recommendation, also adopted at the Seventh COP, calling for all parties in the distribution range of these species to consider the establishment of an MOU and the implementation of collaborative actions, “notably through action plans”, in relation to small cetaceans and sirenians in this region.<sup>41</sup>

A series of key threats to these species were identified, most notably destruction and modification of habitats, both in coastal areas and inland waters, as well as pollution, agricultural activities and increasing mortality and by-catches which “could, if not properly managed, lead to further decline in their populations”.<sup>42</sup> Accordingly, the Recommendation called upon all relevant stakeholders, including NGOs, major industrial institutions and government agencies, to participate in the preparation of an MOU, appealing for multilateral and bilateral technical and financial partners to facilitate further work on this initiative. Support for this project was reiterated at the Eighth COP to the CMS in 2005,<sup>43</sup> and in October 2007 a first negotiation meeting between the various Range States convened by the CMS in Adeje, Spain. The meeting, held under the slight misnomer “Western African Talks on Cetaceans and their Habitats” (WATCH I), met to consider threats to small cetaceans and sirenians and the legal scope to develop an MOU addressing such species. A proposal to consider the extension of the WATCH meeting to all cetaceans was ultimately rejected on the basis that the original CMS mandate to develop a subsidiary instrument was confined to “small cetaceans” and “sirenians”. Although the possibility of a future expansion to larger

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<sup>39</sup> *Report of the Tenth Meeting of the Scientific Council* (Bonn: CMS, 2001), at 16-17. The initiative was eventually sponsored by Guinea.

<sup>40</sup> Resolution 7.7: Implementation of Existing Agreements and Development of Future Agreements.

<sup>41</sup> Recommendation 7.3: Regional Coordination for Small Cetaceans and Sirenians of Central and West Africa.

<sup>42</sup> *Ibid.*

<sup>43</sup> Resolution 8.5: Implementation of Existing Agreements and Development of Future Agreements.

whales at an undetermined future point was maintained,<sup>44</sup> there was a clear consensus that the exclusion of large cetaceans would also “avoid complicated relations with the IWC”.<sup>45</sup>

A preliminary draft MOU was developed at the meeting, alongside a specific Action Plan for these species. Unlike the position in the Pacific Islands Region, there was no pre-existing instrument to act as a primary base, hence the Action Plan developed *ab initio* from an early draft produced by the CMS in 2001 following the Conakry workshop, in conjunction with a document produced independently by WWF. The knowledge base on small cetaceans in the Western African region is still considered alarmingly deficient and of “varying reliability”.<sup>46</sup> The Action Plan identified the primary threats to small cetaceans as by-catches, directed takes, global environmental change, tourism and human interactions, habitat degradation, pollution and disturbance.<sup>47</sup> A second meeting of the negotiating parties was convened in October 2008 to formalise the MOU and its Action Plans. At this juncture the MOU was opened for signature and has attracted some seventeen participants to date. Like the Pacific Islands MOU, the Western African instrument is established pursuant to Article IV(4) of the CMS and is not legally binding.<sup>48</sup>

### 7.3.2 Conservation policies

As with the Pacific Islands MOU, the primary conservation policies advanced by the Western African MOU are those established within its constituent Action Plans. Particular emphasis is placed in the Action Plan on the need to minimise the impact of fisheries on small cetaceans by “using the ecosystem approach to fisheries” and improving selectivity of fishing gear, identifying critical habitats and instituting protected areas and addressing chemical pollution and acoustic disturbances. Data collection requirements are also accorded a priority status, as is capacity building, educational initiatives and the need to promote sustainable and responsible tourism in respect of small cetaceans within the Western African region. Unlike the Pacific Islands MOU, little specific activity had been previously advanced in respect of

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<sup>44</sup> Document UNEP/CMS-WATCH-Doc. 4, *Options for International Cooperation on Cetaceans and Sirenians Conservation in the African Eastern Atlantic Basins under CMS* (Bonn: CMS, 2007), at 1-2.

<sup>45</sup> “WATCH Meeting in Progress in Tenerife”, CMS Press Release, 19 October 2007; reproduced on-line at the CMS institutional website (last visited 31 August 2009).

<sup>46</sup> Document UNEP/CMS-WATCH-Inf. 6, *The Small Cetacean Fauna of the West Coast of Africa and Macaronesia: Diversity and Distribution* (Bonn: CMS, 2007), at 1.

<sup>47</sup> Document UNEP/CMS-WATCH-Doc.5, *Draft Action Plan for the Conservation of Small Cetaceans of the African Eastern Atlantic Basin* (Bonn: CMS, 2007), at 3-4. These conclusions remained undisturbed within the final version of the Action Plan.

<sup>48</sup> Para. 10 of the MOU.

cetaceans by the relevant Regional Seas Agreement, the Abidjan Convention.<sup>49</sup> Accordingly, the Action Plan identifies this forum as providing a useful framework to coordinate activities under the MOU “where practical”,<sup>50</sup> while further emphasis is placed within on a close and harmonious relationship with pertinent CMS subsidiaries within the region.<sup>51</sup>

Given that the final version of the MOU has only recently been formally concluded, any assessment of this initiative must necessarily be preliminary in nature. Despite this, the conclusion of this instrument is undoubtedly a positive development for cetaceans in these waters, with the MOU representing the first targeted multilateral initiative to address the conservation needs of small cetaceans in Western Africa. Furthermore, this extension of coverage of cetaceans under the CMS umbrella may also have positive impacts on the existing Agreements, since the extension of the geographical scope of the MOU to Moroccan waters brings this instrument into close regulatory proximity with both ASCOBANS and ACCOBAMS.

Nevertheless, the ultimate effectiveness of this initiative remains to be seen, and there are already signs that full and effective implementation of the MOU may be difficult in practice to attain without significant external financial and technical assistance. Indeed, shortly after the conclusion of the WATCH I meeting, the CMS Standing Committee reported that, while significant progress had been made towards the development of a new MOU, “funding to implement had still to be found”.<sup>52</sup> Tellingly, the WATCH I meeting was underwritten in full by donations from key European parties to the Bonn Convention,<sup>53</sup> which raises concerns for the future operation of the instrument if a wealthy “champion” party fails to emerge from within the ranks of the eventual MOU signatories. Likewise, the fragmented scientific data

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<sup>49</sup> Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region 1981; reproduced at (1981) 20 *International Legal Materials* 746. The MOU also observes the “importance of the instruments, policies and strategies specific to the region” with specific reference to the Abidjan Convention, while the Secretariat of the Convention participated at the WATCH negotiations with particular reference to pollution concerns: *Western African Talks on Cetaceans and their Habitats: Report of the Government Negotiation Session* (Bonn: CMS, 2007), at 4-5.

<sup>50</sup> *Action Plan for the Conservation of Small Cetaceans of Western Africa and Macaronesia*, at 5.

<sup>51</sup> In this respect, synergies are anticipated with the MOUs addressing Marine Turtles of the Atlantic Coast of Africa and the Eastern Atlantic Populations of the Mediterranean Monk Seal: *ibid.*

<sup>52</sup> *Report of the Thirty-Second Meeting of the Standing Committee* (Bonn: CMS, 2007), at 9. Moreover, at the WATCH I Meeting, the CMS representative observed that the parent convention’s “own resources were limited, both financially and in staff terms” although he remained hopeful that funds to implement the Action Plan would be sourced: *Report of the Government Negotiation Session*, at 15.

<sup>53</sup> *Report of the Thirty-Second Meeting*, at 3; the WATCH I meeting was ultimately funded by contributions from Monaco, the Netherlands, Italy and Spain.

also presents significant practical difficulties for the implementation of the MOU. In this respect, it appears that while the new MOU may offer conservation benefits for small cetaceans in these waters, as is the case with the Pacific Islands MOU, its success may prove to be ultimately contingent upon the ability of the existing CMS cetacean family to render meaningful and sustained assistance to this fledgling instrument.

#### **7.4 Prospects for the conclusion of further regional instruments relevant to cetaceans under the CMS umbrella**

As noted previously, one of the key historical shortcomings of the CMS regime has been a comparative difficulty in generating comprehensive and binding subsidiary instruments in regions outside its traditional European power-base.<sup>54</sup> Prior to the inauguration of the Pacific Islands MOU this position was especially true in the context of cetacean policies and projects advanced under the Bonn Convention. In the more recent past, however, a number of positive initiatives have been developed which affords some tentative optimism that further instruments pertaining to cetaceans may be ultimately elaborated and established under the aegis of the CMS. In this regard, it may be observed that there are emerging developments towards this end within South America, South-East Asia and the Indian Ocean, with varying degrees of promise.

##### *7.4.1 South America*

The elaboration of regional policies to address the conservation needs of cetaceans within South America was first mooted at the CMS Scientific Council in 1995, where a Working Group was established to explore the possibilities to address threatened marine mammals in the South-West Atlantic.<sup>55</sup> The Working Group duly recommended that an Agreement would represent a valuable contribution to conservation efforts within the region, which had been further stymied by a widespread dearth of knowledge on the conservation status and population statistics of cetaceans.<sup>56</sup> This initiative was followed by a further, more formal,

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<sup>54</sup> See R. Caddell, "International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention" (2005) 16 *Colorado Journal of International Environmental Law and Policy* 113, at 152-55.

<sup>55</sup> *Report of the Sixth Meeting of the Scientific Council* (Bonn: CMS, 1995), at 3. In this regard, particular attention was focussed on the southern waters of Chile, Argentina, Uruguay and Brazil, as well as the Falklands/Malvinas Islands.

<sup>56</sup> *Report of the Seventh Meeting of the Scientific Council* (Bonn: CMS, 1997), at 11.

review of the conservation status of cetaceans in the region,<sup>57</sup> although few meaningful conservation measures have subsequently emerged under the CMS. While “the dolphins of South America” were identified as a potential area of activity,<sup>58</sup> the most tangible declaration of intent in relation to cetaceans in this region appears to have been confined to a recommendation advanced at a regional workshop convened in 2001.<sup>59</sup> Here by-catch was identified as an acute problem and parties were recommended to pertinent international commitments and adopt appropriate technical and administrative measures to conserve such species.<sup>60</sup>

The development of regional activities regarding cetaceans has been undoubtedly impeded by an historical lack of coordination under the CMS in this region. This position was rectified to a considerable extent through the establishment of a Regional Working Group for South America in 2002.<sup>61</sup> Nevertheless the development of a CMS instrument appears unlikely, with regional activities seemingly confined to a series of workshops aimed at increasing the parlous knowledge base on cetaceans in these waters.<sup>62</sup> Tellingly, by the time of the Seventh COP to the CMS, at which point a formal list of regions with the potential to develop subsidiary Agreements for marine mammals was advanced, the South-Western Atlantic was conspicuous by its absence.<sup>63</sup>

Conservation efforts under the CMS have instead focussed predominantly upon one particular species, namely the endangered Franciscana river dolphin. The present knowledge base on the Franciscana has been deemed especially poor,<sup>64</sup> but it is considered to be confined to the waters of Brazil, Uruguay and Argentina,<sup>65</sup> where it faces particular threats

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<sup>57</sup> R. Hucke-Gaete (ed.), *Review on the Conservation Status of Small Cetaceans in Southern South America* (Bonn: CMS, 2000).

<sup>58</sup> Recommendation 6.2: Co-operative Actions for Appendix II Species, adopted at the Sixth COP in 1999.

<sup>59</sup> *Relatoria Taller Regional para America Latina de la CMS* (Bonn: CMS, 2001), at 11.

<sup>60</sup> Recommendation 2.

<sup>61</sup> *Report of the Eleventh Meeting of the Scientific Council* (Bonn: CMS, 2002), at 2.

<sup>62</sup> Most significantly a Workshop on the Conservation Status and Research Priorities of Aquatic Mammals in Latin America was convened in 2002, in the hope that further conservation proposals for dolphins and porpoises could be elaborated: *Report of the Eleventh Meeting*, at 9.

<sup>63</sup> *Review of Article IV Agreements under Development*, Document UNEP/CMS/Conf.7.9.2, presented at the Seventh COP to the CMS in 2002.

<sup>64</sup> E. A. Crespo, G. Harris and R. González, “Group Size and Distributional Range of the Franciscana, *Pontoporia Blainvilliei*” (1998) 14 *Marine Mammal Science* 845.

<sup>65</sup> *Ibid.*, at 845-6.

from by-catches<sup>66</sup> and the ingestion of harmful pollutants.<sup>67</sup> The Franciscana was formally listed on Appendix I of the Bonn Convention at the Fifth COP in 1997, following which considerable attention began to be focussed on this species within the various CMS organs. In 1998 the Scientific Council noted the “need for concerted action on the Franciscana dolphin” and recommended that the Secretariat be consulted on drafting a distinct MOU for this species.<sup>68</sup> However, the MOU proposal has since been seemingly abandoned. Instead, since 2001 regular provision has been made within the CMS budget to fund small scale research and conservation projects for the Franciscana. Nevertheless, it appears that such monies have proved rather easier to designate than disseminate, with the Scientific Council observing that conservation activities have been routinely stymied by the inability of research teams to physically access these funds.<sup>69</sup>

#### 7.4.2 South-East Asia

One of the more promising regions for future regulatory activities towards cetaceans under the CMS would appear to be South-East Asia, for which – together with the Indian Ocean – two distinct MOUs have already been established for aquatic species.<sup>70</sup> Any future MOU would appear likely to address small cetaceans and dugongs, which have attracted the attention of the CMS institutions. In 1994 the parties were called upon to conduct investigations on the migratory patterns of small cetaceans in these waters, “giving priority to species and populations of threatened or uncertain status”.<sup>71</sup> Familiar practical difficulties arose in this regard, with a working group noting that any such instrument would require a

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<sup>66</sup> M. Mendez, H. C. Rosenbaum and P. Bordino, “Conservation Genetics of the Franciscana Dolphin in Northern Argentina: Population Structure, Bycatch Impacts and Management Implications” (2008) 9 *Conservation Genetics* 419, at 420-21.

<sup>67</sup> T. G. Seixas *et al.*, “Total Mercury, Organic Mercury and Selenium on Liver and Kidney of a South American Coastal Dolphin” (2008) 154 *Environmental Pollution* 98.

<sup>68</sup> *Report of the Eighth Meeting of the Scientific Council* (Bonn: CMS, 1998), at 14. At this juncture the Scientific Council observed somewhat cryptically that, with regard to conservation efforts for the Franciscana under the CMS umbrella, “[t]here had not been much work done in the past, but one could say that at least something was moving”: at 6.

<sup>69</sup> *Report of the Tenth Meeting of the Scientific Council* (Bonn: CMS, 2001), at 7; *Report of the Eleventh Meeting of the Scientific Council* (Bonn: CMS, 2002), at 7.

<sup>70</sup> These instruments address turtles and dugongs respectively. The Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia (IOSEA) was opened for signature and entered into effect on 1 September 2001. The text of the MOU is reproduced in full on the institutional website of the IOSEA Secretariat at [www.ioseaturtles.org](http://www.ioseaturtles.org) (last visited 31 August 2009). The Memorandum of Understanding on the Conservation and Management of Dugongs (*Dugong dugon*) and their Habitats Throughout their Range was opened for signature and entered into effect on 31 October 2007. The text of the MOU is reproduced in full at [www.cms.int](http://www.cms.int) (last visited 31 August 2009).

<sup>71</sup> Recommendation 4.2: Research on Migration in Small Cetaceans, adopted at the Fourth COP to the CMS in 1994.

preceding revision of Appendix II of the parent convention to incorporate relevant populations of threatened cetaceans in these waters.<sup>72</sup> Efforts to elaborate a distinct subsidiary instrument for small cetaceans subsequently stagnated, with extreme economic and political turmoil and dislocation blamed as the primary impediment to this objective,<sup>73</sup> alongside the continued non-participation in the CMS of Indonesia, as a key Range State for small cetaceans.<sup>74</sup> Conservation efforts were thereby largely restricted to underwriting the costs of workshops and small-scale research projects on an *ad hoc* basis.

The process was tentatively revised in 2002, with discussion of a draft CMS Agreement at a workshop on small cetaceans and dugongs convened in Dumaguete, Philippines.<sup>75</sup> This was followed by a CMS Resolution at the Seventh COP, supporting the development of an appropriate instrument on small cetaceans and dugongs “if the reaction from Range States is positive”.<sup>76</sup> The Resolution was supported by a targeted Recommendation,<sup>77</sup> noting that particular threats to these marine mammals were posed by both intentional and incidental capture and mortality, pollution and habitat destruction and modification, and called upon all relevant Range States and stakeholders to facilitate efforts towards the conclusion of an appropriate instrument, for which a coordinator for the preliminary development phase should be appointed “as soon as possible”. Support for this project was reiterated at the Eighth COP in 2005,<sup>78</sup> although this endorsement was qualified by a note of alarm at the relatively slow progress demonstrated to date, with the parties requesting a lead country to sponsor the instrument’s preparatory phase “as a condition of the CMS’ continued support for the initiative”. Little progress had been made by the Ninth COP where the parties called again for a lead country and further financial and in-kind support for this initiative.<sup>79</sup>

#### 7.4.3 The Indian Ocean

Allied to the various initiatives towards the eventual formulation of an Agreement in the South-East Asia region, work has also been on-going towards the conclusion under the

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<sup>72</sup> *Report of the Sixth Meeting of the Scientific Council* (Bonn: CMS, 1995), at 8-9.

<sup>73</sup> *Report of the Ninth Meeting of the Scientific Council* (Bonn: CMS, 1999), at 17.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Report of the Eleventh Meeting of the Scientific Council* (Bonn: CMS, 2002), at 27-8.

<sup>76</sup> Resolution 7.7: Implementation of Existing Agreements and Development of Future Agreements, adopted at the Seventh COP in 2002.

<sup>77</sup> Recommendation 7.4: Regional Cooperation for Small Cetaceans and Dugongs of Southeast Asia and Adjacent Waters.

<sup>78</sup> Resolution 8.5: Implementation of Existing Agreements and Development of Future Agreements.

<sup>79</sup> Resolution 9.2: Priorities for CMS Agreements.

umbrella of the CMS of a similar instrument for the Indian Ocean.<sup>80</sup> As noted above, the initial CMS mandate at the Fourth COP to address the poor knowledge base on small cetaceans generally was inspired by the particular need to collate further data within the South-East Asia and Indo-Malay regions. Despite this, however, much of the subsequent attention in this respect has been directed at populations of small cetaceans in South-East Asia, while conservation activities within Indian Ocean have been centred on other marine mammals, evidenced by the recent progress towards the ultimate conclusion of an MOU concerning dugongs. Nevertheless, as far as small cetaceans are concerned, it has been strongly argued that the “rudiments of a mandate for an ... agreement already exist in the political context of the region”,<sup>81</sup> not least given the existence of the current IOSEA initiative pertinent to these waters under the CMS, as well as a series of other relevant fora such as the Indian Ocean Tuna Commission.<sup>82</sup> To this end, the conclusion of a CMS subsidiary Agreement, modelled upon ACCOBAMS and incorporating the establishment of a distinct management body and scientific committee, has been strongly advocated as the optimal institutional mechanism by which to address the conservation needs of small cetaceans in the region.<sup>83</sup>

Current initiatives towards this objective may be most appropriately categorised as a “work in progress”. With little formal pressure from the CMS Scientific Council, the primary impetus towards such an instrument has been forthcoming from within the NGO community and, more explicitly, the Whale and Dolphin Conservation Society, which largely initiated and has continued to sponsor the project. At the Seventh COP to the CMS the parties noted a project by the Whale and Dolphin Conservation Society to gauge the feasibility of the conclusion of a small cetacean instrument,<sup>84</sup> and invited the Secretariat to “explore further options with regard to the development of a CMS instrument”.<sup>85</sup> Nevertheless, it appears that limited institutional support for this initiative has ultimately been forthcoming. A similar Resolution adopted at the Eighth COP omitted mention of cetaceans in the context of marine mammal conservation in the Indian Ocean, referring only to dugongs and noting the developments

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<sup>80</sup> For an overview of the conservation status of cetaceans known to be located within the Indian Ocean sanctuary as established by the IWC see M. N. de Boer *et al.*, *Cetaceans in the Indian Ocean Sanctuary: A Review. A WDCS Science Report* (Bath: Whale and Dolphin Conservation Society, 2002).

<sup>81</sup> M. Prideaux, “Discussion of a Regional Agreement for Small Cetacean Conservation in the Indian Ocean” (2002) 32 *California Western International Law Journal* 101, at 127.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, at 130.

<sup>84</sup> Document UNEP/CMS/Conf.7.9.2.

<sup>85</sup> Resolution 7.7: Implementation of Existing Agreements and Development of Future Agreements.



towards the conclusion of a distinct MOU for sirenians in these waters.<sup>86</sup> Following the Ninth COP, it appears that if any such project is to ultimately come to fruition, it is likely to be directly linked to on-going efforts to generate an MOU for small cetaceans in South-East Asia,<sup>87</sup> in a manner analogous to the Dugong MOU.

Instead, as in the South American region, conservation efforts have instead been vested in individual species, especially the Gangetic susu. The Gangetic susu is a freshwater cetacean, indigenous to the various rivers and tributaries across the frontiers of India, Bangladesh and Nepal,<sup>88</sup> and is threatened mainly by directed hunting activities.<sup>89</sup> Migratory species of freshwater dolphins were “considered priorities” for the conclusion of Agreements for their conservation at a preliminary stage in the operation of the CMS;<sup>90</sup> however, no such measures have as yet come close to fruition. The conservation plight of the Gangetic susu was first formally noted by the Scientific Council in 1999, where it was advocated that this species should be listed on Appendix I.<sup>91</sup> This species was so designated at the Seventh COP and subsequently identified as a species for which concerted actions should be adopted,<sup>92</sup> as outlined in the following Section.

## 7.5 Emerging developments

The resource implications demonstrated by the Pacific Islands and the Western African MOUs illustrate that future regulatory activity for the ever-expanding list of species under the purview of the CMS may ultimately proceed upon an alternative basis to promoting regional subsidiary instruments. Indeed, the financial capacity of the CMS regime has failed to keep pace with the number both of its parties and its protected species. Consequently, the Executive Secretary has recently observed that “future MOUs would need to be more

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<sup>86</sup> Resolution 8.5: Implementation of Existing Agreements and Development of Future Agreements.

<sup>87</sup> Resolution 9.2: Priorities for CMS Agreements. Here, the parties observed that “extending the geographic scope of the [South-East Asia] instrument to cover the Indian Ocean would significantly increase the number of CMS Parties involved, thus facilitating the negotiation process for the instrument”.

<sup>88</sup> B. D. Smith, “1990 Status and Conservation of the Ganges River Dolphin *Platanista gangetica* in the Karnali River, Nepal” (1993) 66 *Biological Conservation* 159, at 159.

<sup>89</sup> R. K. Sinha, “An Alternative to Dolphin Oil as a Fish Attractant in the Ganges River System: Conservation of the Ganges River Dolphin” (2002) 107 *Biological Conservation* 253. Although the susu has been designated a protected species under national law, this is considered to be “completely ineffective”: at 253.

<sup>90</sup> *Report of the Third Meeting of the Scientific Council* (Bonn: CMS, 1991), at 6.

<sup>91</sup> *Report of the Ninth Meeting of the Scientific Council* (Bonn: CMS, 1999), at 13. India was subsequently encouraged to take the lead in this regard within the COP: *Report of the Tenth Meeting of the Scientific Council* (Bonn: CMS, 2001), at 15.

<sup>92</sup> Resolution 9.1: Concerted and Cooperative Actions.

financially independent as the parent Convention could not automatically provide secretariat services from its own resources”.<sup>93</sup> It appears that as far as future subsidiary instruments are concerned, the CMS favours an approach pioneered by the Pacific Islands MOU, in which a “champion” party is sought that is prepared to exercise the necessary political will and financial capacity to meet the majority of the relevant expenses, both during and after the conclusion of the instrument in question.<sup>94</sup> Accordingly, it appears that if the mooted cetacean instruments in respect of southern South America, South-East Asia and the Indian Ocean are to ultimately come to fruition, much will depend upon the ability of the CMS to identify and successfully court a lead partner from within these areas. Thus far, however, this has proved to be a challenging task in practice.

In addition to this emerging policy, the CMS has, in recent years, developed alternative approaches to the development of multilateral conservation initiatives for the species listed in the Appendices to the Convention. Particular species listed in Appendices I and II have been identified as requiring “concerted” and “cooperative” actions respectively. As far as Appendix I is concerned, certain individual species have been listed as candidates for “concerted actions to implement the provisions of the Convention, where possible through existing instruments of bilateral and multilateral co-operation”.<sup>95</sup> To date, nine species of cetaceans have been so designated,<sup>96</sup> with the parties encouraged to prepare reports for such species and to seek to address their conservation needs through other multilateral fora.

In relation to Appendix II species, it has been formally acknowledged that “not all such species are currently the object of an Agreement or can reasonably be expected in the short term, to become the object of an Agreement to assist with their conservation”.<sup>97</sup> Accordingly, certain Appendix II species are to be subject to cooperative actions. These arrangements are rather more obscure and appear to be confined to ensuring that a regular update of the conservation status of these species is provided to the pertinent Councillor within the Scientific Council. This is presumably intended to inform debate concerning future conservation strategies for these species. Given the recent practice of the Scientific Council,

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<sup>93</sup> *Report of the Thirty-Second Meeting of the Standing Committee* (Bonn: CMS, 2007), at 17.

<sup>94</sup> *Ibid.*

<sup>95</sup> Resolution 3.2: Appendix I Species.

<sup>96</sup> Namely the Franciscana, Ganges river dolphin, Black Sea harbour porpoise, fin whale, sei whale, sperm whale, Southern right whale, blue whale and humpback whale: Resolution 9.1: Concerted and Cooperative Actions.

<sup>97</sup> Recommendation 8.28: Cooperative Actions for Appendix II Species.

this appears to mainly concern funding of research projects and workshops, for which these species may ultimately receive priority. Some thirteen species of small cetaceans were designated for cooperative actions during the 2006-08 triennium,<sup>98</sup> and subsequently extended into the 2009-11 triennium.<sup>99</sup>

## 7.6 Concluding remarks

The general development of the CMS regime appears to be following a broad trend away from the conclusion of legally-binding Agreements, along the models advanced by ASCOBANS and ACCOBAMS, towards the elaboration of a more MOU-based approach. There is considerable merit in this policy, not least in generating multilateral synergies as well as political and public attention for such species. There has accordingly been a steady proliferation of such instruments in recent years, thereby expanding the geographical scope and species coverage of the CMS subsidiary instruments significantly. This has served to promote the profile of the Convention and secured the participation of states and institutions from areas not traditionally associated with sustained activity in the CMS regime. For cetaceans, like many other species subject to new MOUs, this has undoubtedly generated a positive platform upon which to develop further conservation measures.

In many respects, it is somewhat premature to advance clear conclusions in respect of the new MOUs, given their relatively brief tenure in comparison to ASCOBANS and ACCOBAMS. Nevertheless, a number of broad issues are worthy of comment. In the first instance, like ASCOBANS and ACCOBAMS, the MOUs have demonstrated tangible progress in unifying and formalising previously disparate conservation policies that had been advanced on a previously *ad hoc* basis. This is especially true in the case of the Pacific Islands MOU, which has essentially created a series of further operational machinery for the SPREP programmes, providing a clear institutional framework, increased political visibility and further funding opportunities for pre-existing action plans for cetaceans in the region. The Western African MOU exhibits potential in this respect, given that no such action

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<sup>98</sup> Namely the Peale's dolphin, dusky dolphin, Burmeister's porpoise, spectacled porpoise, Commerson's dolphin, Black/Chilean dolphin, finless porpoise, Chinese white dolphin, Indian Ocean bottlenose dolphin, pan-tropical spotted dolphin, Spinner dolphin, Fraser's dolphin and Irrawaddy dolphin. To date, no large cetaceans have been so designated.

<sup>99</sup> Resolution 9.1: Concerted and Cooperative Actions.

programme had been instituted previously in this area, and has provided a much-needed forum for the coordination of conservation measures in these waters.

The MOU approach is nonetheless representative of a trend in which the legal strength of CMS subsidiary instruments has begun to recede in favour of an exclusively soft-law approach. Whether the lack of legally-binding obligations will make a discernible difference to the ultimate success of these instruments is unclear, not least since the implementation of commitments under ASCOBANS and ACCOBAMS has proved rather mixed in many key respects. Nevertheless, MOUs offer little scope for the development of the institutional structure, especially on scientific and monitoring issues, that remains a considerable strength of the more binding subsidiary Agreements. While this is mitigated in the case of the Pacific Islands MOU by the important role envisaged for SPREP in this respect, the options for further institutional development for the Western African MOU – operating in a region with considerable data deficiencies for cetaceans – are rather less certain.

Finally, as with ASCOBANS and ACCOBAMS, a recurring theme within the operation of the MOUs is likely to be problems in securing the necessary financial and staffing resources to pursue the policies and objectives of these instruments effectively. Difficulties of this type have already been reported under both MOUs, while financial considerations have further impeded the development of additional initiatives in other regions. Accordingly, and perhaps more so than any of the other considerable challenges faced by the CMS in pursuing its ambitious agenda in respect of cetaceans, the need to secure adequate funding on a sustained and independent basis is central to the ultimate success of the Bonn Convention in regulating such species.

## CHAPTER VIII

### THE EUROPEAN UNION AND THE REGULATION OF CETACEANS

#### **8.1. Introduction**

In recent years there has been an unprecedented level of regulatory interest in the conservation needs of cetaceans within the various EU institutions. In many respects, the impetus behind the emergence of such policies may be traced back to the adoption in 2002 of the Sixth Environmental Action Programme (EAP),<sup>1</sup> which mandated *inter alia* the development of a stronger regulatory regime in respect of marine biodiversity. Nevertheless, it is also clear that the emergence of a distinct framework for the regulation of cetaceans is not an overnight phenomenon, with the EU institutions having expressed a supervisory interest in such species since the late 1970s. Instead, as will be demonstrated below, the EC initially lacked a clear political mandate to regulate cetaceans, while its legislative competence in this regard may also be considered to have been rather underdeveloped in comparison to the present day. Accordingly, a clear framework to promote the conservation of cetaceans under EC law may now be identified, comprising a series of guiding policy objectives, general provisions of nature conservation law and specific Regulations designed to address particular conservation threats, especially in the context of incidental catches.

It may be suggested that the emergence of such a framework is essentially the product of a loose three-stage process, which has been on-going since the late 1970s, where the first outline proposals were made within the EEC towards a greater degree of influence over the national whaling policies of its constituent Member States. A first stage can be identified as the period between 1979 and 1992, which saw abortive attempts to attain membership of the IWC, as well as the adoption of a series of *ad hoc* legislative provisions to regulate trade in whale products and to address certain fishing practices that raised concerns over cetacean welfare, such as encirclement fishing.

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<sup>1</sup> Decision No. 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme [2002] *Official Journal* L242/1.

The second stage can be identified as the period between 1992 and 2002, which witnessed three key legislative and policy developments with a strong application to cetaceans. First, in 1992 the cornerstone provision of EU nature conservation law was adopted, the Habitats Directive,<sup>2</sup> which prescribes the establishment of Special Areas of Conservation for two particular species of cetaceans and requires the strict protection of “all species” of cetaceans within EC waters. Second, throughout the 1990s there was an incremental development of a strong legislative stance against driftnet fishing, with the incidental mortality of cetaceans playing a central role in the generating the political conditions to facilitate swingeing restrictions on such equipment. Thirdly, the elaboration of a specific EC Biodiversity Strategy, in line with the EU’s commitments under the CBD, established a further basis for conservation measures in respect of marine wildlife.

The third stage encompasses the period between 2002 and 2008, which has seen the adoption of a considerable volume of cetacean-orientated legislation. This stage has been driven primarily by the demands of the Sixth EAP, which mandated a greater emphasis on marine considerations within the Habitats Directive, which has presented conservation benefits for cetaceans. This important development has dovetailed with a root-and-branch reform of the Common Fisheries Policy (CFP) which has, in turn, inspired the first clear fisheries-based Regulations on cetacean conservation. These processes have occurred in conjunction with the adoption of the Marine Strategy Framework Directive<sup>3</sup> concluded in 2008, which places a strong emphasis on the coordination of regional responses to marine environmental threats and mandates a closer working relationship with existing regional structures to address conservation concerns. Finally, this third stage has also witnessed a growing appreciation of the need to address other anthropogenic threats to marine biodiversity, such as the pervasive impacts of ocean noise, ship- and land-source pollution and the encroachment of development projects upon the coastal environment.

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<sup>2</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] *Official Journal* L206/7. The most recent consolidated version of the Directive was adopted on 1 January 2007, following the latest round of accession to the EU, incorporating Bulgaria and Romania into a further enlarged EU of twenty-seven Member States.

<sup>3</sup> Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy [2008] *Official Journal* L164/19 [Hereinafter “MSFD”].

Accordingly, this Chapter will analyse the current EC framework for cetacean regulation, first evaluating guiding principles establishing the basis for the on-going programme of legislative activity in relation to such species. There will then follow an examination of the impact of the Habitats Directive as the primary legislative mechanism for the protection of European species of cetaceans. Finally, this Chapter will offer an appraisal of the recently developed – and controversial – fisheries-based policies towards the regulation of cetacean by-catches.

## **8.2. Guiding EC policies and the regulation of cetaceans**

Before examining the role of the Habitats Directive and more specific by-catch mitigation provisions, it is first important to establish the guiding policy objectives of the EU in relation to marine biodiversity. As far as cetaceans are concerned, four key sources of EU policy may be identified. In the first instance, the European Community Biodiversity Strategy, elaborated in 1998, and latterly the Sixth EAP, adopted in 2002, established a programme of regulatory activity for the EU institutions, which includes a series of provisions with relevance to cetaceans. Nevertheless, in and of themselves, it may be observed that such documents offer little more than broad statements of legislative and policy-making intent, with the practical implementation of these objectives having been attained through the modification of existing legislative structures, as will be detailed in subsequent sections of this Chapter. In this respect, the Biodiversity Strategy and, more explicitly, the Sixth EAP have helped to develop a stronger marine focus to the Habitats Directive and to shape the reform of the CFP.

In conjunction with these developments, a further two policy sources seek to facilitate *inter alia* the future of EC cetacean regulation. The emergence of the MSFD, adopted in 2008, will place a greater emphasis on regional governance as opposed to Community-wide solutions to marine environmental questions. Furthermore, the proposed aggregation of common Community policy on whaling seeks to facilitate a clear direction on large cetaceans, as well as bolstering the presence of the EU as an actor in key multilateral fora such as the IWC.

### *8.2.1 The EC Biodiversity Strategy*

In 1998 the EC Biodiversity Strategy (ECBS) was elaborated to facilitate further management and conservation measures to address biodiversity loss throughout the Community.<sup>4</sup> The ECBS offered little specific guidance in relation to cetaceans and related species, given that it contained “no reference in its text to the marine or aquatic environment”.<sup>5</sup> Accordingly it was augmented in 2001 with the adoption of four Biodiversity Action Plans (BAPs).<sup>6</sup> Each BAP addresses a key policy area, namely natural resources, agriculture, fisheries and development and economic cooperation. In this respect, the BAPs on Natural Resources and Fisheries have identified a number of significant areas of future legislative and policy focus with practical relevance to cetaceans.<sup>7</sup>

Firstly, the BAP on Natural Resources raised three broad concerns that may be considered applicable to, *inter alia*, cetaceans: a failure to fully implement existing commitments under the Habitats Directive; a call to augment participation within pertinent international agreements; and a need to integrate environmental considerations more closely into fisheries and aquaculture policies. In this respect, the BAP targeted the full transposition of the Habitats and Wild Birds Directives by 2002,<sup>8</sup> although as noted below this has proved somewhat overambitious in practice, especially in the context of marine species and habitats.

With regard to improving participation within pertinent international organisations, the BAP noted that the EU is a party to a number of multilateral environmental agreements, emphasising the role of the Barcelona, OSPAR and HELCOM Conventions.<sup>9</sup> As noted below, these sentiments have since been translated into

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<sup>4</sup> COM (1998) 42.

<sup>5</sup> C. Lasén Díaz, “The EC Habitats Directive Approaches its Tenth Anniversary: An Overview” (2001) 10 *Review of European Community and International Environmental Law* 287, at 294.

<sup>6</sup> Communication from the Commission to the Council and the European Parliament - Biodiversity Action Plans in the areas of Conservation of Natural Resources, Agriculture, Fisheries, and Development and Economic Co-operation, COM (2001) 0162. The BAPs were introduced in conjunction with a pledge by the EU Heads of State and Government in June 2001 at the EU Spring Summit in Goteborg to “halt the decline of biodiversity by 2010”.

<sup>7</sup> In addition, the BAP on Development and Economic Cooperation noted with concern the degradation of a number of key areas of habitats, including coastal and marine regions. Accordingly, one of its main objectives was stated as supporting “sustainable use of natural resources, particularly in relation to forests, grasslands and marine/coastal ecosystems”: at Para. 10.

<sup>8</sup> Para. 1.

<sup>9</sup> Para. 132. These commitments were further noted in the BAP on Fisheries: at paras. 37 and 38.



legislative action within the MSFD. Particular significance is also accorded to the opportunities raised by this framework to create regional networks of protected areas, both within and outside EC waters, with the Mediterranean, Persian and Gulf seas identified as key candidate locations.<sup>10</sup> Furthermore, both the Council of Europe and CMS were explicitly identified as potential partners for the development of specific action plans “for the most endangered species other than birds”.<sup>11</sup>

The BAP on Natural Resources considered that “greening” fisheries provisions is best pursued through the CFP.<sup>12</sup> The BAP on Fisheries raised particular concerns over the impact of commercial fishing on non-target species and marine and coastal ecosystems, thereby establishing as a primary objective the need to facilitate the sustainable exploitation of aquatic biodiversity.<sup>13</sup> Particular concern was raised over that “[p]ersistent bio-accumulating contaminants can be a threat to the animals in the food chain, with impact on fish, sea birds, seals, cetaceans”.<sup>14</sup> While fishing activities were considered “the most important” important pressure on such species, other important factors included contamination and habitat changes or losses.<sup>15</sup> Possible mitigation strategies included the development of technical conservation measures,<sup>16</sup> for which a series of EC strategies have since been elaborated, as are outlined below. The BAP further noted the development of the Natura 2000 network under the Habitats Directive as a key conservation strategy.<sup>17</sup>

Concerns have nonetheless been raised by the slow implementation of the Natura 2000 network in marine areas. Targets have subsequently been set for the completion of the marine network by 2008, with management objectives agreed and instigated by 2010.<sup>18</sup> Furthermore, it was established by 2010 that “technical measures, including marine protected areas, [should be] effectively implemented to help ensure favourable

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<sup>10</sup> Para. 139. Likewise, commitments to marine biodiversity under OSPAR are also noted in para. 140 of the BAP.

<sup>11</sup> Para. 31.

<sup>12</sup> Para. 64.

<sup>13</sup> Para. 15.

<sup>14</sup> Para. 29.

<sup>15</sup> *Ibid.*

<sup>16</sup> Para. 39.

<sup>17</sup> Para. 44.

<sup>18</sup> “Message from Malahide”, objective 1.1: reproduced on-line at [www.ec.europa.eu/environment/nature/biodiversity/policy/pdf/malahide\\_message\\_final.pdf](http://www.ec.europa.eu/environment/nature/biodiversity/policy/pdf/malahide_message_final.pdf) (last visited 31 August 2009).

conservation status of marine habitats and species not commercially exploited”.<sup>19</sup> This was reinforced in 2006 by a Communication on the further implementation of the relevant biodiversity provisions,<sup>20</sup> with the restoration of “biodiversity and ecosystem services in the wider EU marine environment” considered a priority activity.<sup>21</sup> In December 2008, a mid-term review of these objectives was undertaken,<sup>22</sup> with considerable faith placed in the MSFD to provide the operational basis for securing a good environmental status in the EC seas and fulfilling the aspirations of the ECBS by improving the general conservation status of marine species in Community waters.<sup>23</sup>

### *8.2.2 The Sixth Community Environment Action Programme*

Allied to these developments, the Sixth EAP provided an additional impetus towards the elaboration of conservation strategies to address marine biodiversity. As with its predecessors,<sup>24</sup> the Sixth EAP advances a targeted programme of activity by establishing “priorities based on an assessment of the state of the environment and of prevailing trends including emerging issues that require a lead from the Community”.<sup>25</sup> To this end, four “key environmental priorities” are identified, including nature and biodiversity.<sup>26</sup> Accordingly, a series of primary objectives has been advanced in relation to biodiversity that will have a practical impact upon the conservation of a host of marine species, including cetaceans.

First, noting the opportunity prescribed by the review of the CFP in 2002, the Sixth EAP advocates promoting the greater integration of environmental considerations within this sectoral policy. As discussed below, the CFP has undergone significant reform to meet this objective. Second, the EAP seeks to further promote the protection of marine areas, especially under the Habitats Directive, as well as “by other feasible Community means”. The EAP has thereby provided a further impetus

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<sup>19</sup> Objective 7.3.

<sup>20</sup> COM (2006) 216.

<sup>21</sup> Objective 3.

<sup>22</sup> COM (2008) 864.

<sup>23</sup> *Ibid.*, at 5.

<sup>24</sup> The first such instrument was adopted in 1973 as a substitute for express guidance within the EEC Treaty on environmental priorities. The EAPs have since become a key aspect of EU environmental strategy-making.

<sup>25</sup> Article 1(1).

<sup>26</sup> *Ibid.* The other primary areas of focus are climate change, environment and health and quality of life and natural resources and waste.

to develop the marine application of the directive. Indeed, a mid-term review of the EAP considered that the Habitats Directive presented a strong overall framework to achieve the stated goal of halting biodiversity loss, identifying “the full and effective implementation of existing legislation” as the priority action in this respect.<sup>27</sup>

Third, and in relation to land-use planning, the EAP noted the need to promote the integrated management of coastal zones, with a series of policies having been advanced in this respect in recent years. Finally, and of overarching importance to the future regulation of the marine environment within the Community, the EAP establishes a remit for the development of a thematic strategy “taking into account, inter alia, the terms and implementation obligations of marine Conventions, and the need to reduce emissions and impacts of sea transport and other sea and land-based activities”. The development of such an initiative is of key significance for the regulation of the general cetacean environment, to which this Chapter now turns.

### *8.2.3 The Marine Strategy Framework Directive*

Community policy for the coming decades in the marine sphere will be dominated by the Marine Strategy Framework Directive (MSFD). The initial Commission proposals for a thematic marine strategy were unveiled in October 2005,<sup>28</sup> which identified a series of deficiencies within the pre-existing regulatory framework. Particular concerns were raised by institutional limitations and a deficient knowledge base, identifying a need to proceed with a dual EU-regional approach, based on ecosystem consideration and Member State interaction in framing future marine policy. Following lengthy consultations,<sup>29</sup> the MSFD was adopted in June 2008. The MSFD is intended to operate as an “environmental pillar” to a further Maritime Policy,<sup>30</sup> for which a Green Paper was adopted in June 2006.<sup>31</sup>

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<sup>27</sup> COM (2007) 225, at 7.

<sup>28</sup> COM (2005) 504.

<sup>29</sup> For a full account of the development of the Marine Strategy see L. Juda, “The European Union and Ocean Use Management: The Marine Strategy and the Maritime Policy” (2007) 38 *Ocean Development and International Law* 259.

<sup>30</sup> Preamble to the MSFD, Third Recital.

<sup>31</sup> SEC (2006) 689.

The MSFD is a lengthy document addressing a broad range of concerns. The overall objective is to provide a legal framework “to achieve or maintain good environmental status within the marine environment by the year 2020 at the latest”.<sup>32</sup> A “good environmental status” involves the provision of “ecologically diverse and dynamic oceans and seas which are clean, healthy and productive within their intrinsic conditions, and the use of the marine environment is at a level that is sustainable, this safeguarding the potential for uses and activities by current and future generations”.<sup>33</sup> This objective seeks to ensure that constituent marine ecosystems can withstand anthropogenic change and habitats and species are protected, while the anthropogenic impact of substances and energy upon the marine environment does not cause pollution effects.<sup>34</sup> In ascertaining the environmental status of Community seas, a series of indicators and qualitative descriptors are established in the Annexes to the directive.

In pursuing this objective, the MSFD largely eschews a “top-down” Community-level approach and, in keeping with the principle of subsidiarity, places responsibility for marine governance primarily at a national or regional level, subject to EU supervision. This approach constitutes an important recognition that generic responses to marine environmental problems are of limited value in addressing the four broad areas of Community seas, all of which face differing ecological pressures. Accordingly, in the first instance, each Member State is required to develop a marine strategy for its national waters, encompassing a clear assessment of their current environmental status and a targeted programme of measures to be introduced by 2016 at the latest.<sup>35</sup> Recognising that individual coastal states are components of a wider marine region or sub-region, Member States are to take “due account” of this position<sup>36</sup> and cooperate to ensure that a good environmental status is attained in respect of the region or sub-region concerned.<sup>37</sup> In implementing these commitments, national assessments should examine essential features and characteristics of these areas, the predominant pressures upon them and their primary economic and social uses.<sup>38</sup> From this

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<sup>32</sup> Article 1(1).

<sup>33</sup> Article 3(5).

<sup>34</sup> *Ibid.*

<sup>35</sup> Article 5(1).

<sup>36</sup> Article 4(1).

<sup>37</sup> Article 5(2).

<sup>38</sup> Article 8(1).

appraisal a series of environmental targets shall be identified,<sup>39</sup> as well as coordinated monitoring programmes for the ongoing assessment of these waters.<sup>40</sup> A detailed programme of measures is then to be developed,<sup>41</sup> including contributing to protected areas under the EU nature conservation directives.<sup>42</sup>

The MSFD cites its “ultimate aim” as “maintaining biodiversity and providing diverse and dynamic oceans and seas which are clean, healthy and productive”.<sup>43</sup> While it is not possible to state definitively the effect that the directive may have on cetaceans at this preliminary stage, four key conservation and management possibilities may nonetheless be identified. In the first instance, and somewhat self-evidently, presuming that the directive is swiftly and correctly implemented by the Member States, the cumulative effect of these general measures would have a considerable beneficial impact upon the quality of cetacean habitats and reduce the volume of pollutants and other anthropogenic sources faced by such species. This is, however, a considerable pre-supposition, especially given the EU criticism over previous actions to address marine environmental concerns. Moreover, a wholesale transformation of particularly degraded areas may ultimately prove to be a more long-term process than envisaged by the current MSFD targets.

Second, a particular strength of the directive is its emphasis upon the use of existing regional structures, focussing *inter alia* upon the potential application of the Regional Seas Agreements,<sup>44</sup> which have demonstrated an application to cetaceans. A degree of opportunity may also exist for ASCOBANS and ACCOBAMS to contribute to this overall framework. Some concern, however, may be raised that the CMS was rather marginalised throughout the consultation process,<sup>45</sup> while MSFD commitments are indicated only with regard to the LOSC, CBD and Regional Seas Agreements,<sup>46</sup> with no reference to the CMS and its cetacean subsidiaries. Despite this, it might be

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<sup>39</sup> Article 10.

<sup>40</sup> Article 11. Under Article 12 this information is then to be communicated to the Commission for assessment.

<sup>41</sup> Article 13(1).

<sup>42</sup> Article 13(4).

<sup>43</sup> Preamble to the MSFD, Third Recital.

<sup>44</sup> Article 6(1).

<sup>45</sup> As noted in Chapter V, the ASCOBANS Advisory Committee has criticised the lack of formal opportunities ultimately presented to it to participate in the preparation of the directive: *Report of the Twelfth Meeting of the Advisory Committee to ASCOBANS* (Bonn: ASCOBANS, 2005), at 25.

<sup>46</sup> *Ibid.*, Seventeenth, Eighteenth and Nineteenth Recitals.

considered that some introduction of appropriate policies under ASCOBANS and ACCOBAMS will be forthcoming in future marine management strategies. Indeed, there appears to be little valid reason not to consider commitments under ASCOBANS and ACCOBAMS in the development of national strategies, insofar as they do not conflict with relevant EC law.

Third, and of particular significance, the MSFD emphasises the problem of ocean noise in a manner unprecedented at Community level to date. Indeed, the MSFD may be considered the first clear translation of political concerns on this issue into binding legislation and public policy. Concerns raised by anthropogenic ocean noise have occupied a small but significant aspect of the EU political agenda, shortly after the identification of naval sonar as a potentially serious threat to cetacean welfare.<sup>47</sup> Following a series of official questions,<sup>48</sup> in June 2003 the European Parliament was petitioned for a moratorium on the use of active sonar devices and the introduction of further legal measures to prevent their unmonitored use in the ocean environment.<sup>49</sup> Simultaneously, the Commission had raised questions through the Habitats Committee which, in September 2003, requested advice from ICES. This was duly returned in February 2005 identifying gaps in the current knowledge base and suggesting possible mitigation measures to be considered.<sup>50</sup>

In October 2004, the European Parliament adopted a Resolution,<sup>51</sup> considered “probably one of the strongest statements by an international body yet on the issue of military sonar and its impact on cetaceans”.<sup>52</sup> The Resolution called for a moratorium on the deployment of high-intensity active sonars “until a global assessment of their cumulative environmental impact on marine mammals, fish and other marine life is completed”. Moreover, Member States were to “urgently adopt” geographic

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<sup>47</sup> A. Frantzis, “Does Acoustic Testing Strand Whales?” (1998) 292 *Nature* 29. Concerns had nonetheless been ongoing for a number of years prior to this: M. Simmonds and L. F. Lopez-Juado, “Whales and the Military” (1991) 337 *Nature* 448.

<sup>48</sup> Written Questions E-2442/01 and E-2797/02 and Oral Question O-0096/02.

<sup>49</sup> European Parliament, Committee on Petitions, Document CM/536432EN.doc.

<sup>50</sup> *Answer to DG Environment Request on Scientific Information concerning Impact of Sonar Activities on Cetacean Populations*; reproduced on-line at [www.ec.europa.eu/environment/nature/conservation/species/whales\\_dolphins/index\\_en.htm](http://www.ec.europa.eu/environment/nature/conservation/species/whales_dolphins/index_en.htm) (last visited 31 August 2009).

<sup>51</sup> European Parliament Resolution on the Environmental Effects of High-Intensity Active Naval Sonars [B6-0089/2004].

<sup>52</sup> E. C. M. Parsons *et al.*, “Naval Sonar and Cetaceans: Just How Much Does the Gun Need to Smoke Before We Act?” (2008) 56 *Marine Pollution Bulletin* 1248, at 1253.

restrictions on the use of such sonar in sensitive marine habitats, and to initiate in conjunction with the Commission a Multilateral Task Force to develop international agreements regulating ocean noise.

The MSFD has thereby established a clear legal basis upon which a number of these particular aspirations may be realised. In the first instance, the concept of “pollution” is broadly defined in the directive to specifically include “human-induced marine underwater noise”.<sup>53</sup> Moreover, the qualitative descriptors for demonstrating a “good environmental status” for the purposes of the directive, listed in Annex I, further includes underwater noise. The indicative list of pressures upon the marine environment, listed in Annex III, also includes this source of disturbance, citing “shipping, underwater acoustic equipment” as particular examples. There is already some evidence to suggest that such sentiments are beginning to have a trickle-down effect upon Community policies. Indeed, shortly after the adoption of the directive, in a Communication relating to the Arctic region,<sup>54</sup> the Commission identified as a key environmental policy the need to “[c]ontribute to assessing the impact on marine mammals of increased noise generated by human activities”.<sup>55</sup>

Nevertheless, considerable problems remain in relation to military uses of sonar. Indeed, in response to the original petition, the Commission observed that “it is not possible to undertake further Community action to regulate the development of new military technologies, due to the lack of EU community competences in this field”.<sup>56</sup> This position has also been reflected within the directive itself, which precludes an application to “activities the sole purpose of which is defence or national security”.<sup>57</sup> This position is tentatively softened by a commitment for Member States to “endeavour” to ensure that such activities are conducted in a manner that is compatible “so far as reasonable and practicable” with the broad objectives of the

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<sup>53</sup> Article 3(8). This definition is itself partly derived from the LOSC where, despite there being no formal mention of acoustic pollution, it has nonetheless been convincingly argued that ocean noise is indeed caught by the LOSC definition: H. M. Dotinga, and A. G. Oude Elferink, “Acoustic Pollution in the Oceans: The Search for Legal Standards” (2000) 31 *Ocean Development and International Law* 151.

<sup>54</sup> COM (2008) 763.

<sup>55</sup> *Ibid.*, at 4.

<sup>56</sup> Statement of Pedro Solbes Mira of the Commission to the Parliament, 11 March 2004; Document CM/536432EN.doc.

<sup>57</sup> Article 2(2).

MSFD.<sup>58</sup> Given that only Spain has to date introduced national restrictions on the use of military sonar,<sup>59</sup> such a position does not bode well for the swift implementation of voluntary standards among the other Member States under the directive.

Finally, and allied to the regulation of anthropogenic noise sources, the MSFD is intended to act as the environmental basis of shipping and maritime affairs within Community waters. Accordingly, the directive will ultimately advance a framework through which to regulate key aspects of shipping with the potential to cause marine environmental degradation. As far as cetaceans are concerned, this creates particular opportunities to address problems such as vessel-source pollution and shipping noise, given the emphasis accorded to these issues within the directive. Nevertheless, the emergence of such measures under the MSFD/Maritime Policy framework is also likely to constitute a longer-term project. Indeed, as Juda observes, the precise inter-relationship between these two broad ocean frameworks remains a matter of some uncertainty,<sup>60</sup> which will accordingly require substantive clarification at a relatively early stage if the MSFD is to realise its full regulatory potential in this regard.

#### 8.2.4 *Towards an EC whaling policy*

A policy of particular significance has been the ongoing development of a common EU position on whaling. Recent EU policy documents have reiterated a commitment towards “support of a continued international moratorium on commercial whaling”.<sup>61</sup> Strong criticism has also been voiced by the Commission of the resumption of commercial whaling under a reservation to the ICRW by Norway and Iceland – attacked as “a very negative step backwards”<sup>62</sup> – while lethal scientific research conducted by Japan provoked an equally strident response.<sup>63</sup> Such sentiments have been recently endorsed by the European Parliament, which has called for the maintenance of the global moratorium on commercial whaling and a cessation of

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<sup>58</sup> *Ibid.*

<sup>59</sup> Parsons *et al.*, “Naval Sonar and Cetaceans”, at 1253.

<sup>60</sup> Juda, “Marine Strategy and the Maritime Policy”, at 274.

<sup>61</sup> “Mid-Term Review of the Sixth EAP”: COM (2007) 225, at 8.

<sup>62</sup> Press release IP/92/531 of 30 June 1992.

<sup>63</sup> The Commission “emphasises that there is no need to use lethal means to obtain scientific information about whales, and that adequate data for management purposes can be obtained using non-lethal techniques”: Press release IP/07/1736 of 20 November 2007. Furthermore, Commissioner Joe Borg has declared that “[s]cientific whaling must not be used as a cover for continued whaling”: Press release IP/08/200 of 8 February 2008.



lethal research.<sup>64</sup> The EU nonetheless retains broad support for aboriginal subsistence whaling conducted through the IWC, provided that “conservation is not compromised, whaling operations are properly regulated and catches remain within the scope of documented and recognised sustainable needs”.<sup>65</sup>

Of particular significance to the EU stance on commercial whaling has been the introduction of strict measures under rules concerning the common market to restrict the import of cetacean products into the Community.<sup>66</sup> These provisions established that from 1 January 1982 the introduction of cetacean products into the Community shall be subject to an import license,<sup>67</sup> with no such license to be issued in respect of products to be used for commercial purposes.<sup>68</sup> The primary aim of Regulation 348/81 is to conserve cetaceans by restricting international trade, to truncate the market for such products and accordingly diminish the continued economic feasibility of commercial hunting. This position is further bolstered by legislation enshrining CITES commitments on the trade in protected species,<sup>69</sup> as well as relevant provisions of the Habitats Directive.

Despite these initiatives, however, internal divisions between the constituent institutions have meant that the EU has not ultimately played as forceful a role on the world stage in relation to whaling as the Commission has advocated. In 1979<sup>70</sup> and 1992<sup>71</sup> the Commission proposed the initiation of negotiations towards full membership of the IWC, within which the EU currently holds observer status. Both proposals failed to find favour within the Council, primarily due to doubts over whether the EU ultimately possessed the legal status to do so. However, given the application to cetaceans of a number of provisions of EU law, as well as participation

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<sup>64</sup> Press release IPR/46694 of 20 January 2009; the Fisheries Committee of the European Parliament endorsed a report calling for the elimination of lethal hunting for scientific and commercial purposes.

<sup>65</sup> COM (2008) 763.

<sup>66</sup> Council Regulation (EEC) No. 348/81 of 20 January 1981 on common rules for imports of whales or other cetacean products [1981] *Official Journal* L39/1.

<sup>67</sup> A series of conditions for the practical operation of import licenses was established in Commission Regulation (EEC) No. 3786/81 of 22 December 1981 laying down provisions for the implementation of the common rules for imports of whale or other cetacean products [1981] *Official Journal* L377/42. Under Article 2(1) of Regulation 348/81 a Committee on Cetacean Products was established to examine “any question relating to the application of this Regulation, including the question of control”.

<sup>68</sup> Article 1(1).

<sup>69</sup> Council Regulation 338/97/EC of 3 March 1997 on the protection of species of wild fauna and flora by regulating trade therein [1997] *Official Journal* L61/1.

<sup>70</sup> COM (79) 364.

<sup>71</sup> COM (92) 316.

within similar international fora, there would seem little obvious juridical impediment in this regard. Accordingly, as Churchill observes, “[w]hile in strict law it is difficult to argue that the Commission is wrong, in this area (as in others) questions of competence are in practice determined as much by political as legal considerations”.<sup>72</sup>

In December 2007, the Commission adopted a further proposal to the Council to advance a common EU position in respect of the various Member States party to the ICRW to pursue at IWC Meetings.<sup>73</sup> To this end, the Commission argued that “EC policy on whales will not be effective in Community waters if it is not backed by coherent worldwide action”.<sup>74</sup> Moreover, it was considered that the EU parties should advocate at the IWC the continuation of the moratorium on commercial hunting; the creation of further whale sanctuaries; the further regulation of scientific whaling and the continuation of aboriginal subsistence hunting; to support the activities of the Conservation Committee and other relevant fora such as CITES; and to encourage further transparency within the IWC by opposing the increased use of secret ballots.<sup>75</sup>

The current terms of the ICRW preclude accession to the treaty by a Regional Economic Integration Organisation,<sup>76</sup> hence formal membership of the IWC would require an amendment of the Convention as advocated by the European Commission in 1992. This is not an unprecedented arrangement, and corresponds to the position of the EU within CITES.<sup>77</sup> Thus far, and following the CITES model, the most effective substitute for official EU membership is for the Commission to secure the aggregation of a common position prior to IWC Meetings and to establish a series of common goals to be supported by the Member States party, combined with practical supervision from Commission representatives acting as Observers. To date, with the

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<sup>72</sup> R. Churchill, “Sustaining Small Cetaceans: A Preliminary Evaluation of the Ascobans and Accobams Agreements” in A. Boyle and D. Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 2001), at 234.

<sup>73</sup> COM (2007) 871.

<sup>74</sup> *Ibid.*, at 6.

<sup>75</sup> *Ibid.*, at 9.

<sup>76</sup> Article III of the Convention refers to the Membership of “Contracting Governments” within the IWC.

<sup>77</sup> In 1983 an extraordinary meeting of CITES resulted in the amendment of Article XXI, which now permits Regional Economic Integration Organisations to accede, under what is popularly referred to as the “Gabarone Amendment” to the Convention. Nevertheless, the EU currently remains outside the official umbrella of CITES, as the amendment has to date failed to meet the requirements for entry into force as prescribed under Article XVII(3), namely the acquiescence of two-thirds of the states that were parties to the Convention at the material time.

recent membership of Lithuania,<sup>78</sup> Estonia,<sup>79</sup> Poland<sup>80</sup> and Bulgaria,<sup>81</sup> some twenty-five EU Member States have become parties to the ICRW.<sup>82</sup> While the national position of most Member States corresponds broadly with that of the Commission, complications are nonetheless raised in relation to Denmark in respect of its overseas territories. The first formal example of the EU parties acting as a bloc occurred at the Sixtieth Annual Meeting in 2008, which raised strong concerns from other delegations concerning the implications of an aggregated approach to negotiations.<sup>83</sup> Nevertheless, however unpopular this tactic may ultimately transpire to be, it appears that a joint EU approach to IWC issues is likely to constitute a new and regular pattern of voting within the Commission, pursuant to the Commission's policy of environmental diplomacy in multilateral organisations.

### **8.3. The Conservation of Cetaceans under the Habitats Directive**

Ultimately, the overarching policies outlined above are largely facilitative, providing guidance for the future direction of marine environmental policies or, in the case of the MSFD, conferring a greater degree of impetus towards the development of national and regional initiatives. To date, however, the primary legislative provisions that directly impact upon the practical conservation of European species of cetaceans remain those adopted under the Habitats Directive and, latterly, pursuant to the development of the reformed CFP.

The Habitats Directive is perhaps the best-known provision of EU environmental law and certainly the most pertinent in prescribing clear obligations to advance the conservation of cetaceans. In many respects it continues to form the primary basis for regulatory action for such species, both at a Community level and within the individual Member States. The primary aims and objectives of the Habitats Directive

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<sup>78</sup> Instrument of ratification formally accepted on 25 November 2008.

<sup>79</sup> Instrument of ratification formally accepted on 7 January 2009.

<sup>80</sup> Instrument of ratification formally accepted on 17 April 2009.

<sup>81</sup> Instrument of ratification formally accepted on 10 August 2009.

<sup>82</sup> Latvia and Malta currently remain outside the ICRW umbrella, although landlocked Austria, Czech Republic, Hungary, Luxembourg and Slovakia are parties to the Convention.

<sup>83</sup> Indeed, the Republic of Korea suggested that such an approach may be illegal and considered this stance as "interfering with the legitimate process of IWC": *Chair's Report of the Sixtieth Annual Meeting of the International Whaling Commission* (Cambridge: IWC, 2008), at 21. Russia voiced similar concerns that the position of the EU had been pre-ordained and rendered debate essentially meaningless in practice: *ibid.*

are stated in Article 2(1) as being to “contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States”. Measures taken under the Directive are accordingly designed to maintain or restore natural habitats and species of “Community interest” at favourable conservation status.<sup>84</sup>

In the pursuit of these objectives, the Habitats Directive advances a two-pronged approach to the conservation of European fauna and flora. Firstly, the directive provides for the creation of a network of Special Areas of Conservation (SACs), known collectively as “Natura 2000”. The Natura 2000 network consists of sites identified by the Member States as comprising particular habitat types (listed in Annex I of the directive), as well as the habitats of particular species (listed in Annex II). To date, two species of cetaceans have been listed on Annex II, namely the harbour porpoise and the bottlenose dolphin. Secondly, Member States are required to establish a system for the strict protection, within their natural range, of animal species that are listed in Annex IV(a) of the directive. In this respect, “all species” of cetaceans have been listed in Annex IV(a), thereby all Member States are required to ensure that the distinct conservation and management requirements established for such species are observed throughout their territory.<sup>85</sup>

Despite the fundamental importance of this legislation to European biodiversity generally, the Habitats Directive itself has, until relatively recently, encountered a number of obstacles in seeking to address marine species, which has accordingly had adverse implications for the protection of cetaceans. Two primary inhibiting factors may be identified as having posed particular difficulties for the advancement of conservation efforts for cetaceans under the directive. Firstly, the tone and wording of the Habitats Directive has, since its inception, exhibited a strong emphasis on

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<sup>84</sup> Article 2(2). A favourable conservation status in respect of natural habitat is defined in Article 1(e) as being where its natural range and areas covered within that range are stable or increasing; the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future; and the conservation status of its typical species is also “favourable”. A favourable conservation status in respect of species is defined in Article 1(i) as being where population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats; that its natural range is neither being reduced nor likely to become reduced for the foreseeable future; and there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

<sup>85</sup> Article 2(1).

terrestrial species and habitats. Although a marine remit is clearly established within the directive,<sup>86</sup> there are nevertheless consistent references throughout this instrument to “land-use planning” and “landscape”<sup>87</sup> with no corresponding identification of marine spatial planning or seascapes. Likewise, the various Annexes of the directive have long been dominated by terrestrial species and habitats, while the designation of offshore areas – which comprise the main areas of critical habitat for cetaceans – as SACs remains embryonic at present. Moreover, as discussed below, the EU authorities have been relatively slow in developing clear guidelines for the marine application of the directive, which has further served to hinder the development of SACs in comparison with terrestrial protected areas.

Secondly, and perhaps most significantly, the precise jurisdictional reach of the Habitats Directive in marine terms initially lacked clarity. Under Article 2(1), the directive is merely stated to apply within the “European territory” of the Member States. Since the inception of the directive it has been somewhat questionable whether the concept of “territory” is essentially analogous to the “territorial sea”, or whether it applies to the full range of jurisdictional waters claimed by the Member States. Initial drafts of the directive originally defined “territory” as “including maritime areas under the sovereignty or jurisdiction of the Member States”, a clarification that was ultimately omitted from the final version of the text. Consequently, an interpretation that the directive applied solely to coastal waters might not be considered entirely misguided. From an ecological standpoint, however, such a narrow view of the directive is essentially self-defeating in the context of species with an extended range, including many species of cetaceans, as opposed to those exhibiting more coastal tendencies.<sup>88</sup> Accordingly, the EU institutions have broadly considered the Habitats Directive to apply to national EEZs,<sup>89</sup> even if this viewpoint may not have been consistently endorsed within the practice of the Member States.<sup>90</sup>

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<sup>86</sup> Article 1(b) of the Habitats Directive states that “natural habitats means terrestrial *or aquatic* areas” (emphasis added).

<sup>87</sup> See, for instance, the preamble to the directive, as well as Article 3(3).

<sup>88</sup> Similar sentiments have been expressed in relation to the maritime application of the Wild Birds Directive: D. Owen, “The Application of the Wild Birds Directive beyond the Territorial Sea of European Community Member States” (2001) 13 *Journal of Environmental Law* 38.

<sup>89</sup> In 2001, for instance, the Council Conclusions on the Strategy for the Integration of Environmental Concerns and Sustainable Development into the Common Fisheries Policy encouraged the Member States, in cooperation with the Commission, to “continue their work towards the full implementation of these directives in their exclusive economic zones”: Point 15; reproduced on-line at

Somewhat surprisingly, the first judicial consideration of this issue was advanced only in 2000, in response to an application for judicial review brought in the UK.<sup>91</sup> The *Greenpeace* action was raised in response to the adoption by the UK government of a series of Regulations<sup>92</sup> to license future oil and gas exploration on the continental shelf, which expressly confined the application of the Habitats Directive to the territorial sea.<sup>93</sup> The applicants considered that the restrictive approach taken by the UK authorities constituted a failure to correctly transpose obligations under the Habitats Directive into national law, given that a number of marine species (specifically including cetaceans) could be adversely affected by such activities. In granting the application, it was duly observed by the trial judge that “a Directive which includes in its aims the protection of *inter alia* ... cetaceans will only achieve those aims, on a purposive construction, if it extends beyond territorial waters”.<sup>94</sup>

The ECJ subsequently confirmed in a later case, *Commission v. UK*,<sup>95</sup> that an unduly narrow view of the jurisdictional purview of the Habitats Directive would essentially defeat the key aspirations of the legislation.<sup>96</sup> Indeed, in the Opinion of Advocate-General Kokott, “[w]hile the Habitats Directive admittedly contains no express rule concerning its territorial scope, it is consonant with its objectives to apply it beyond coastal waters ... the directive protects habitats such as reefs and species such as sea mammals which are frequently, in part even predominantly, to be found outside

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[www.ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/agricult/ACF20DE.html](http://www.ue.eu.int/ueDocs/cms_Data/docs/pressData/en/agricult/ACF20DE.html) (last visited 31 August 2009).

<sup>90</sup> For instance, the German *Bundesnaturschutzgesetz* (Federal Nature Conservation Act) initially stipulated that the Habitats Directive was to be applied solely within the territorial sea. In 2002 this provision was amended to specifically extend the application of the Natura 2000 programme to the EEZ: Article 38.

<sup>91</sup> *R v. Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [No. 2] (2000) 2 CMLR 94 (QBD).

<sup>92</sup> Conservation (Natural Habitats etc.) Regulations 1994.

<sup>93</sup> Regulation 2(1). Somewhat curiously, however, the UK government had previously officially considered that the Habitats Directive operates in a manner so as to preclude commercial whaling activities within the EEZ: P. G. G. Davies, “The Legality of Norwegian Commercial Whaling under the Whaling Convention and its Compatibility with European Community Law” (1994) 43 *International and Comparative Law Quarterly* 270, at 281. It is therefore somewhat difficult to reconcile the distinction between the operation of the directive in these waters in relation to hunting with a non-application to other potentially harmful activities.

<sup>94</sup> (2000) 2 CMLR 94, at 114 (*per* Maurice Kay J.).

<sup>95</sup> Case C-6/04; [2005] ECR I-9017.

<sup>96</sup> At para. 117.

territorial waters”.<sup>97</sup> Accordingly, it has become settled law that the Habitats Directive applies to and must be enforced within the EEZs and non-extended continental shelves claimed by the Member States.

In order to evaluate the application of the Habitats Directive to cetaceans, it is necessary to examine both aspects of the conservation regime prescribed by the directive, namely the scope and operation of Special Areas of Conservation for Annex II species and the strict protection measures applicable to “all species” of cetaceans.

### *8.3.1 Special Areas of Conservation*

As noted above, although the Habitats Directive is considered the cornerstone of EU nature conservation law, the various biodiversity Communications have consistently lamented the slow rate of progress towards advancing the Natura 2000 network. This has proved to be particularly challenging within the marine environment, where the establishment of SACs for cetaceans has, to date, been minimal. The comparative lack of protected areas for cetaceans – especially given their high political visibility within the EU institutions – is symptomatic of a general failure to designate a coordinated network of offshore SACs generally within Community waters. Accordingly, rectifying the sparse coverage of the Habitats Directive in these waters should be considered a significant area of activity for the Member States if the directive is to realise its full conservation potential in a marine context.

In the light of these concerns, and in line with the sentiments of the Sixth EAP, a series of initiatives has been launched in recent years to address the various shortcomings in the marine application of the Habitats Directive. In October 2002, at a meeting of Nature Directors of the Member States, it was agreed that further work was necessary in order to designate and manage sea-based Natura 2000 sites. In March 2003, a Marine Expert Group was established to outline a common understanding of the provisions of Natura 2000 within the marine environment, which culminated in the adoption by the Commission in May 2007 of a series of indicative,

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<sup>97</sup> At para. 132 of the Opinion of the Advocate-General.

yet non-binding, Guidelines for the designation and operation of marine SACs.<sup>98</sup> Such a development must be considered especially timely, given the Commission's observation that "to date there have been relatively few Natura 2000 sites identified for the offshore marine environment and this represents the most significant gap in the Natura network".<sup>99</sup> Nevertheless, as observed below, the Natura 2000 programme can be seen to be subject to particular difficulties in the specific context of cetaceans – both in the designation of SACs in the first instance and in the subsequent management of such areas by the Member States.

### 8.3.1.(i) *The designation of cetacean SACs*

As a preliminary point, it should be observed that the designation process for marine SACs is no different to that in relation to terrestrial sites, with the identification of the Natura 2000 network predicated solely on relevant scientific criteria.<sup>100</sup> Accordingly, it is incumbent upon the Member States to propose a list of appropriate native sites, containing the natural habitat types listed in Annex I, as well as those that host species listed in Annex II.<sup>101</sup> Criteria for the designation of SACs are provided in Annex III of the directive. For Annex II species, Annex III lays down the following considerations as site assessment criteria:

- Size and density of the population of the species present on the site in relation to the populations present within national territory.
- The degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities.
- The degree of isolation of the population present on the site in relation to the natural range of the species.
- The global assessment of the value of the site for the conservation of the species concerned.

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<sup>98</sup> *Guidelines for the Establishment of the Natura 2000 Network in the Marine Environment: Application of the Habitats and Birds Directives*; reproduced on-line at [http://ec.europa.eu/environment/nature/natura2000/marine/docs/marine\\_guidelines.pdf](http://ec.europa.eu/environment/nature/natura2000/marine/docs/marine_guidelines.pdf) (last visited 31 August 2009). [Hereinafter "Marine Guidelines"].

<sup>99</sup> *Ibid.*, at 6.

<sup>100</sup> *Commission v. France*, Case C-166/97 [1999] ECR I-1719; this point is reinforced in the Marine Guidelines: *ibid.*, at 27.

<sup>101</sup> Article 4(1).



On the basis of this information, the indicative list of such areas produced by the Member State is subsequently transmitted to the Commission, together with documentation concerning the name, location and extent of the site, a map of the area, as well as data generated in the application of the Annex III criteria.<sup>102</sup> Based on this information, the Commission is responsible for producing a draft list of Sites of Community Importance (SCIs) in consultation with the Member State, which will then be formally adopted.<sup>103</sup> The Member State is then required to officially designate any such site within its jurisdiction as a SAC “as soon as possible and within six years at most”.<sup>104</sup>

Despite the operation of an administrative system that – on the surface, at least – appears relatively uncomplicated, the establishment of the Natura 2000 network has ultimately proved a protracted process in practice, both in relation to terrestrial and marine SACs. That the demanding deadlines<sup>105</sup> for the completion of the network have not been met may be explained by the fact the relatively straightforward wording of the directive masks what is often a complex, expensive and labour-intensive series of research activities on the part of national nature conservation agencies. Moreover, the data required under Annex III to identify SCIs is often highly challenging to swiftly obtain in the distinct case of cetaceans – especially in offshore waters – given the practical and financial difficulties posed in conducting concerted studies on these species in the wild.

In conjunction with these practical limitations, a further challenge to the establishment of cetacean SACs has historically been the lack of direct guidance afforded to marine species under the directive. The only specific provision addressing the designation of marine SACs is Article 4(1), which provides that “[f]or aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factors essential to their life and

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<sup>102</sup> Article 4(2).

<sup>103</sup> Under Article 20 this will be evaluated by a specialist Committee, which will then submit its recommendations to the Commission under Article 21 for adoption.

<sup>104</sup> Article 4(4).

<sup>105</sup> The Member States that were under the EU umbrella at the time of the conclusion of the Habitats Directive were originally scheduled to have furnished the European Commission with the requisite national lists by June 1995, with a list of sites of Community importance due to have been finalised by June 1998.

reproduction”. It may be considered that the legislative intent of this provision is to prevent the designation of excessive expanses of the sea as protected areas and thereby permit the coexistence of vital economic activities with nature conservation.<sup>106</sup> Nevertheless, there is some suggestion from current practice that this formulation is rather counter-productive. Indeed, the stringency of these requirements, and concomitant difficulties in demonstrating unequivocally that areas of high species density are also in fact “essential to life and reproduction”, is cited as a primary reason for truncating the parameters of a key SAC for harbour porpoises within the German EEZ.<sup>107</sup>

Some uniform principles were tentatively developed in respect of Natura 200 sites for cetaceans by an *ad hoc* working group of the EC Habitats Committee in December 2000.<sup>108</sup> The working group considered potential designation criteria for protected areas for migratory marine species, with particular reference to harbour porpoises. Areas representing the crucial factors for the life-cycle of the species were deemed identifiable, especially where:

- There is a continuous or regular presence of the species, subject to seasonal variations.
- There is a good population density in relation to other areas.
- There is a high ratio of young to adults during certain periods of the year.

Such considerations are not considered to be exhaustive and “other biological elements are characteristic of these areas, such as very developed social and sexual life”<sup>109</sup> may also prove informative. Recent Danish practice has considered site fidelity in a reproductive context as the key aspect in ascertaining potential SACs, since “designating protected areas for harbour porpoises implies identifying areas of high porpoise density with a particular focus on distribution during the breeding

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<sup>106</sup> Article 4(1) operates in conjunction with Article 11, requiring the surveillance of such sites and allows for the national list of SCIs to be amended in the light of further data.

<sup>107</sup> S. A. Pedersen *et al.*, “Natura 2000 Sites and Fisheries in German Offshore Waters” (2009) 66 *ICES Journal of Marine Science* 155, at 160.

<sup>108</sup> EC (2001) Habitats Committee, Hab. 01/05.

<sup>109</sup> Marine Guidelines, at 47.

season”.<sup>110</sup> Although there is little definitive practice in respect of “other biological elements” that may be considered in identifying areas of importance for cetaceans, a “high proportion of sensitive behaviour, i.e. resting” was deemed to be of additional significance in establishing German SACs for harbour porpoises.<sup>111</sup>

While the guidelines were elaborated with the harbour porpoise specifically in mind, they have been also successfully applied to bottlenose dolphins in terrestrial waters.<sup>112</sup> Likewise, recent practice has seen a tentative emergence of the Natura 2000 network into offshore waters, with designations for SCIs pending in a number of Member States. The first concerted programme of activity to establish SACs within the EEZ of a Member State was undertaken by Germany in the light of the amendment of the *Bundesnaturschutzgesetz* to confer formal powers upon the pertinent authorities to do so. Accordingly, in 2004 a list of ten new SCIs – the first in offshore waters within the Community – were proposed to the Commission,<sup>113</sup> with the western area of the island of Sylt ultimately designated as a SAC for harbour porpoises.<sup>114</sup>

There is some scope for optimism that, in the mid-term future, an increasing number of critical areas of habitat for Annex II cetaceans may be identified and proposed as SCIs by the Member States, as the offshore and inshore coverage of the Natura 2000 programme continues to develop.<sup>115</sup> In this regard, an ambitious target has been set for the completion of the Natura 2000 network, both in a terrestrial and marine context, by 2012. However, notwithstanding the instructive corpus of practice that has begun to emerge in recent years on the establishment of marine SACs, the prospects of the Member States ultimately meeting this demanding deadline will depend

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<sup>110</sup> J. Teilmann *et al.*, *High Density Areas for Harbour Porpoises in Danish Waters: NERI Technical Report No. 657* (Åarhus: National Environmental Research Institute, 2008), at 9.

<sup>111</sup> J. C. Krause *et al.*, “Rationale Behind Site Selection for the NATURA 2000 Network in the German EEZ” in H. von Nordheim, D. Boedeker and J. C. Krause (eds.), *Progress in Marine Conservation in Europe: Natura 2000 Sites in German Offshore Waters* (Heidelberg: Springer Verlag, 2006), at 72.

<sup>112</sup> For instance, the UK has designated two SACs in inshore waters for bottlenose dolphins in the Moray Firth, Scotland, and Bae Ceredigion, Wales, respectively: for full details of these SACs see the website of the Joint Nature Conservation Commission at [www.jncc.gov.uk](http://www.jncc.gov.uk) (last visited 31 August 2009).

<sup>113</sup> Krause *et al.*, “Rationale Behind Site Selection”, at 66-7.

<sup>114</sup> Pedersen *et al.*, “Natura 2000 Sites and Fisheries”, at 160.

<sup>115</sup> For instance, in August 2008 the UK submitted its first five proposals for offshore SACs to the Commission, although none of these specifically addressed cetaceans. On this process generally see E. M. De Santo and P. J. S. Jones, “The Darwin Mounds – From Undiscovered Coral to the Development of an Offshore Marine Protected Area Regime” (2007) 81 *Bulletin of Marine Science* 147 and E. M. De Santo and P. J. S. Jones, “Offshore Marine Conservation Policies in the North East Atlantic: Emerging Tensions and Opportunities” (2007) 31 *Marine Policy* 336.

primarily on the ability of national authorities to allocate substantial funds to identify key areas for marine species. In the particular context of cetaceans, it may also be noted that data collection on this magnitude has been very much a long-term project, with the two SCANS initiatives – cited by the Marine Guidelines as a key example of good practice<sup>116</sup> – having been on-going since 1994. Moreover, recent Danish initiatives also utilised data gathered over a ten-year period from 1997 as an important source.<sup>117</sup> Where there is a considerable body of pre-existing historical data on cetaceans and their habitats in the waters of a particular Member States, such a task is rendered somewhat easier. However, many such areas are still considered data deficient,<sup>118</sup> which may suggest that acquiring the necessary information to develop a coherent network of marine SACs for cetaceans is likely to extend beyond the confines of the current Commission targets.

#### 8.3.1.(ii) *The management of cetacean SACs*

The designation of SACs for cetaceans under the Habitats Directive, like that of any marine protected area, is essentially meaningless unless accompanied by a clear set of management targets and enforcement provisions. Indeed, the establishment of a SAC entails a long-term commitment to the maintenance of such sites, given that protected areas in a marine context “require effective governance and well-functioning management institutions if they are to be ecologically and socially successful”.<sup>119</sup> Moreover, a leading review of best practice for protected areas for cetaceans considers that such sites, as a basic necessity, require *inter alia* an ecosystem-based and socio-economic management plan, legal recognition and a clear enforcement programme.<sup>120</sup> The Habitats Directive establishes obligations upon the Member States in relation to SACs, most notably under Article 6, which provides the broad framework of protective measures to be taken<sup>121</sup> and the coexistence of conservation

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<sup>116</sup> Marine Guidelines, at 47.

<sup>117</sup> Teilmann *et al.*, “High Density Areas”, at 10-11.

<sup>118</sup> Indeed, data availability on the distribution of Annex II species generally is considered “very sparse”: Marine Guidelines, at 47.

<sup>119</sup> A. Charles and L. Wilson, “Human Dimensions of Marine Protected Areas” (2009) 66 *ICES Journal of Marine Science* 6, at 9.

<sup>120</sup> E. Hoyt, *Marine Protected Areas for Whales, Dolphins and Porpoises* (London: Earthscan, 2005), at 75.

<sup>121</sup> Articles 6(1) and (2).

strategies and economic activities within these sites.<sup>122</sup> Nevertheless, some concerns may be raised as to how effective such commitments may be in practice for cetacean SACs.

Under Article 6(1), the national authorities “shall establish the necessary conservation measures involving, *if need be*, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements” of the habitats or species in question.<sup>123</sup> There is no express obligation to ultimately develop a targeted management plan of the type identified by Hoyt as crucial to the basic success of a protected area for cetaceans. In practice, however, national conservation agencies have developed management plans for the cetacean SACs established to date.<sup>124</sup> Likewise, the Marine Guidelines strongly recommend the establishment of conservation plans for marine SACs, citing the OSPAR model as a particular example of good practice.<sup>125</sup>

The second limb of Article 6(1), however, is clear and unequivocal: Member States must establish appropriate measures to safeguard the ecological requirements of the site. Given the extreme variability in the conservation needs of habitats and species addressed under Annexes I and II, the Commission has sought to avoid undue prescription in the discharge of this obligation. Nevertheless, it is clear that such measures must correspond to the particular needs of the species throughout its life cycle.<sup>126</sup> In the context of Annex II cetaceans, such measures might, for instance, be envisaged to take particular account of migratory behaviour and provide for enhanced protection during breeding and calving seasons.

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<sup>122</sup> Articles 6(3) and (4).

<sup>123</sup> Emphasis added.

<sup>124</sup> For instance, species action plans have been adopted by the UK for its two bottlenose dolphin SACs, while national action plans are also considered to be a key aspect of present and future Danish conservation initiatives: Teilmann, “High Density Areas”, at 8. As noted by Krause *et al.*, “sound site selection must be followed by effective management if the overall conservation intent of marine NATURA 2000 sites is to be achieved”, hence this is a key aspect of the German strategy: “Rationale Behind Site Selection” at 94.

<sup>125</sup> Marine Guidelines, at 81-2. The OSPAR Guidelines are themselves modelled upon those advanced by the IUCN.

<sup>126</sup> *Managing NATURA 2000 Sites: The Provisions of Article 6 of the “Habitats” Directive 92/43/EEC* (Brussels: European Commission, 2000), at 18.

Particular obligations apply to the habitats of Annex II cetaceans under Article 6(2), which become operational as soon as a site is designated a SCI.<sup>127</sup> This provision prescribes a two-pronged approach to habitat protection, with Member States to “take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, *in so far as such disturbance could be significant in relation to the objectives of this Directive*”.<sup>128</sup> However, while the requirements pertaining to habitat deterioration are clear, interpretive difficulties are raised by the “disturbance” of cetacean SACs. The point at which this obligation will be triggered for Annex II cetaceans is difficult to quantify objectively; the directive offers no definition of “significant” disturbance. Likewise, whether a disturbance will affect the conservation status of a protected species is dependent upon multiple factors such as the nature of the disturbing activity, the point at which it occurs within the life cycle of the species, the projected adverse impact upon individual animals, as well as stock numbers and dynamics to ascertain whether unsustainable material losses are likely to occur.

This lack of a generic “tipping point” demonstrates the practical utility of a clear management plan for Annex II cetaceans where a SAC is created. Indeed, good practice would appear to involve the development of indicative guidelines within the management plan on proposed responses to disturbing activities likely to be faced within the SAC. Although the conditions within each SAC are highly individual in nature, the Marine Guidelines have cited oil and gas exploration<sup>129</sup> and ecotourism activities<sup>130</sup> as examples of typical sources of disturbance in the cetacean environment. Accordingly, the development of localised guidelines to address such activities may be considered an increasingly important aspect of SAC management on the part of the Member States. For instance, Irish practice in relation to dolphin-

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<sup>127</sup> Article 4(5). The same is true of Articles 6(3) and (4), while the requirements of Article 6(1) do not apply until the site is formally established as a SAC.

<sup>128</sup> Emphasis added. The objectives of the directive in this regard are considered to be the maintenance of Annex II cetaceans at a favourable conservation status.

<sup>129</sup> Marine Guidelines, at 96.

<sup>130</sup> The Marine Guidelines note that whale- and dolphin-watching “needs to be carefully managed” and cites the ACCOBAMS Guidelines as an instructive model: *ibid.*, at 103.

watching operations in the Shannon Estuary SAC is to require written government consent, with permission contingent upon adherence to specific Codes of Practice.<sup>131</sup>

Despite the establishment of SACs for Annex II cetaceans under the directive, “the inclusion of a site into the network Natura 2000 does not, a priori, exclude its future use”.<sup>132</sup> Accordingly, Articles 6(3) and (4) establish the conditions under which such activities may be conducted within protected areas. These provisions are not uncontroversial, nor indeed may they be considered to be especially clear. Moreover, they are likely to be invoked with increasing frequency given the major economic and social interests at stake in a number of areas of critical habitat for cetaceans.

Article 6(3) provides that “[a]ny plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives”. However, the directive is silent on what constitutes a “plan or project” caught under the purview of this provision. A preliminary ruling by the ECJ has clarified this issue somewhat,<sup>133</sup> viewing the definition as broadly following a related directive<sup>134</sup> and suggesting that “the terms ‘plan’ or ‘project’ should be interpreted broadly, not restrictively”.<sup>135</sup> Likewise, the concept of a “significant” effect is undefined and a substantial negative impact of such activities could be experienced within the SAC, without necessarily triggering a significant impact for the purposes of the conservation status of the animals concerned. Much of the current litigation to date on this provision has concerned the necessity for an Environmental Impact Assessment (EIA) in individual circumstances,<sup>136</sup> for which there is a

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<sup>131</sup> Personal communication with Dr. Simon Berrow, Irish Whale and Dolphin Group, 7 September 2006 (on file); see also Hoyt, note 132 *supra*, at 186-7.

<sup>132</sup> Marine Guidelines, at 96.

<sup>133</sup> *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, Case C-127/02.

<sup>134</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] *Official Journal* L175/40. This provision defines a “project” (but not a “plan”) as “the execution of construction works or of other installations or schemes” and “other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources”: Article 1(2). The present case considered cockle fishing to constitute a project for the purposes of Directive 85/337/EEC and, by extension, the Habitats Directive.

<sup>135</sup> Opinion of Advocate-General Kokott, at para. 30.

<sup>136</sup> See, for instance, *Commission v. France*, Case C-256/98 [2000] ECR I-2487.

substantial array of EU legislation on this issue,<sup>137</sup> which is of considerable practical utility in identifying key implications for cetaceans in proposed marine activities.

More significantly, Article 6(4) provides that “[i]f, in spite of a negative assessment of this implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected”. Article 6(4) thereby seeks to reconcile the demands of economic and industrial activity of fundamental importance to the Member State with the practical demands of Community biodiversity commitments.

Nevertheless, Article 6(4) suffers from a marked lack of clarity concerning the threshold by which economic activities may be conducted within a SAC. Indeed, the notion of “imperative reasons of overriding public interest” is among the most contentious – and certainly one of the most opaque – clauses of the Habitats Directive, for which the Commission readily admits that the ECJ “has not given clear indications for the interpretation of this specific concept”.<sup>138</sup> De Sadeleer considers this phrase “as referring to a general interest superior to the ecological objective of the Directive”.<sup>139</sup> A further interpretation of considerable influence mandates a balance of interests approach, whereby “[a] project that is of great public interest but involves only minor adverse effects to the protected area in question should be treated differently than a project with marginal economic public interest but important detrimental effects on ecological values”.<sup>140</sup> It is accordingly evident that the concept remains highly subjective and is dependent entirely on the particular conditions present within each individual SAC.

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<sup>137</sup> For an overview of these provisions see P. G. G. Davies, *European Union Environmental Law: An Introduction to Key Selected Issues* (Basingstoke: Ashgate, 2002), at 156-185.

<sup>138</sup> *Guidance Document on Article 6(4) of the “Habitats Directive” 92/43/EEC* (Brussels: European Commission, 2007), at 7.

<sup>139</sup> N. de Sadeleer, “Habitats Conservation in EC Law – From Nature Sanctuaries to Ecological Networks” (2005) 5 *Yearbook of European Environmental Law* 215, at 249.

<sup>140</sup> A. Nollkaemper, “Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests” (1997) 9 *Journal of Environmental Law* 271, at 280.



The obligations incumbent upon the Member States under Article 6(4) are also uncertain. There is little precise indication of the “compensatory measures” required of the national authorities, aside from a vague intimation that nesting or resting sites should be moved to an appropriate safer point along migratory pathways or that so-called “habitat banking” may be considered.<sup>141</sup> While this is more feasible for certain terrestrial or avian species, such policies represent a substantial challenge in the case of cetaceans. Instead, mitigation measures in cetacean SACs are likely to involve, for instance, temporal and spatial restrictions on fishing activities and the introduction of guidelines on seismic activities in areas of critical habitat.<sup>142</sup>

A Member State may only invoke this exemption on three broad grounds, namely considerations of human health or public safety, beneficial consequences of primary importance for the environment or “further to an opinion from the Commission, to other reasons of overriding public interest”. The first two criteria are likely to be of limited relevance to cetaceans, although it should be observed that the current EU aspirations towards the further development of alternative energy sources<sup>143</sup> may involve an increasing volume of tidal barrages and offshore windfarms.<sup>144</sup> With potential adverse effects on cetaceans of such projects having been raised in certain fora,<sup>145</sup> subject to an appropriate EIA, the environment clause may be considered likely to override such concerns, while military activities may be justified under the “public safety” exemption. The clearest area of conflict, however, is likely to occur in the context of the expansively worded sweep-up clause, “other imperative reasons of overriding public interest”.

To date, some ten Opinions have been delivered by the Commission regarding Article 6(4) projects,<sup>146</sup> although they may not necessarily represent a precise template for the

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<sup>141</sup> *Guidance Document on Article 6(4)*, at 13.

<sup>142</sup> On this issue generally see R. Compton *et al.*, “A Critical Examination of Worldwide Guidelines for Minimising Disturbance to Marine Mammals During Seismic Surveys” (2008) 32 *Marine Policy* 255.

<sup>143</sup> COM (2006) 848.

<sup>144</sup> Indeed, while it is extremely difficult to study the reactions of cetaceans to such noise sources, concerns have been raised about the implications of projects within harbour porpoise SACs: A. Kellermann, K. Eskildsen and B. Frank, “The MINOS Project: Ecological Assessments of Possible Impacts of Offshore Wind Energy Projects” in von Nordheim, Boedeker and Krause, “Progress in Marine Conservation”, at 245-6.

<sup>145</sup> For instance, under the auspices of the CMS and the Bern Convention.

<sup>146</sup> Reproduced on-line at

[http://ec.europa.eu/environment/nature/natura2000/management/guidance\\_en.htm](http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm) (last visited 30

application of this provision in a marine context. Insofar as broad principles may be distilled from these Opinions, it appears that such a project will be permitted where the Member State demonstrates that it is essential to alleviate substantial unemployment or social hardship,<sup>147</sup> to secure the competitiveness of a Member State or Community industry on an international level,<sup>148</sup> to create vital infrastructure links<sup>149</sup> or to service fundamental human needs.<sup>150</sup>

Given the highly limited practice to date, the degree of toleration for development activities in cetacean SACs remains largely an exercise in conjecture. Nevertheless, certain key industrial activities have been identified within the Marine Guidelines for which supervision will be required when carried out in proximity to or within SACs. In addition to ecotourism activities,<sup>151</sup> particular concern has been reserved for oil and gas exploitation, active sonar use, vessel-based noise and acoustic by-catch mitigation devices, all of which “need to be regulated in accordance with the provisions of article 6(3) and (4) of the Habitats Directive if they are likely to have a significant effects [sic] on protected features at a Natura 2000 site”.<sup>152</sup> Likewise, fisheries activities may also require management measures within these areas, for which the Commission has recently produced concise outline guidance.<sup>153</sup> In this respect, additional complications are created by the demarcation of competence over fisheries management in particular areas, as noted below. Accordingly, with potential SACs for cetaceans encompassing locations of significant economic activity, it is likely that the parameters of Articles 6(3) and (4) in a marine context will become areas of considerable controversy and conflict in future years as the Natura 2000 network develops further in both inshore and offshore waters.

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August 2009). On this issue generally see L. Krämer, “The European Commission’s Opinions under Article 6(4) of the Habitats Directive” (2009) 21 *Journal of Environmental Law* 59.

<sup>147</sup> *Prosper Haniel Colliery Development Plan*, Opinion of 24 April 2003.

<sup>148</sup> *Project Mainport Rotterdam Development Plan*, Opinion of 23 April 2003; *Mühlenberger Loch Development Plan*, Opinion of 19 April 2000.

<sup>149</sup> *Grenadilla Port Development Plan*; *Karlsruhe/Baden-Baden Airport Development Plan*, Opinion of 6 June 2005; *TGV Est Development Plan*, Opinion of 16 September 2004; *Peene Valley Development Plan*, Opinion of 18 December 1995.

<sup>150</sup> *La Breña II Dam Development Plan*, Opinion of 14 May 2004.

<sup>151</sup> As noted above, conditions have been imposed by the Irish authorities in respect of such activities in the Shannon Estuary SAC, which may represent an attractive model for other Member States to follow.

<sup>152</sup> Marine Guidelines, at 94-5.

<sup>153</sup> *Fisheries Measures for Marine Natura 2000 Sites: A Consistent Approach to Requests for Fisheries Management Measures under the Common Fisheries Policy* (Brussels: European Commission, 2008).

### 8.3.2 Strict protection measures

The second key conservation objective pursued by the Habitats Directive mandates that Member States “shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range”.<sup>154</sup> As far as cetaceans are concerned Article 12(1) prescribes, *inter alia*, the prohibition of all forms of deliberate capture or killing of specimens<sup>155</sup> in the wild, of deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration<sup>156</sup> and the deterioration or destruction of breeding sites or resting places. Likewise, Article 12(2) prohibits the keeping, transport, sale or exchange or offering for sale or exchange of such species. Furthermore, Article 12(4) requires the Member States to establish a system to monitor the incidental capture and killing of Annex IV(a) species, a source of substantial anthropogenic pressure upon stocks of many European species of cetaceans.

Despite the protection measures mandated under Article 12, as with the provisions in respect of SACs, it is possible for a Member State to derogate from these obligations, provided that “there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations concerned at a favourable conservation status in their natural range”.<sup>157</sup> A number of grounds are specified for derogations, of which one may cause particular controversy in the case of cetaceans. Article 16(1)(e) allows for the taking or keeping of Annex IV(a) species “under strictly supervised conditions, on a selective basis and to a limited extent ... in limited numbers specified by the competent national authorities”. Accordingly, the construction of this provision suggests that the directive may in principle support some limited degree of directed hunting. Under Article 16(2), a Member State seeking to pursue whaling activities on this basis would be required to submit a reasoned report to the Commission. The

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<sup>154</sup> Article 12(1). As noted above, “all species” of cetaceans are listed in Annex IV(a).

<sup>155</sup> “Specimens” are defined in Article 1(m) as “any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants of those species”. Davies observes that this definition prevents the import of whale products into the Community, removing any potential economic benefit and “thereby diminishes a potential loophole, namely that the prohibition on the killing of animals *outside* Community waters is not provided for in the Habitats Directive”: “Legality of Norwegian Whaling”, at 281.

<sup>156</sup> By virtue of Article 12(3), these two obligations “shall apply to all stages of life of the animals”, as indeed does the obligation concerning sale and trade of the species in Article 12(2).

<sup>157</sup> Article 16(1).

Commission is then to return an Opinion on the compatibility of such activities with the Habitats Directive within twelve months of receipt. Given the clear Commission position on commercial whaling, however, it must be considered highly unlikely to acquiesce meekly to such requests.

There is some uncertainty as to whether prohibition of the lethal exploitation of cetaceans is a fundamental component of the environmental *acquis*. The limited degree of state practice to date is somewhat inconclusive. On the one hand, it is interesting to note that Portuguese accession to the EEC in 1985 was accompanied by the immediate cessation of national whaling activities;<sup>158</sup> indeed, a number of former whaling grounds have been subsequently identified as potential cetacean SACs.<sup>159</sup> Likewise, little obvious guidance is forthcoming from the position of Denmark – which acts as the primary representative within the IWC for the whaling activities of its overseas territories of Greenland and the Faeroe Islands – and is recognised by the European Commission as a unique and special case. The EU position has not been definitively tested in the context of a state with a politically and economically significant whaling industry. Commercial whaling was earmarked to receive “very careful consideration”<sup>160</sup> by the Commission during accession negotiations with Norway. However, Norwegian candidacy was ultimately rejected by a national referendum in 1994, hence there is little clear indication of the level of consideration – and, indeed, toleration – for commercial whaling within the accession process. This issue will nonetheless receive attention in the context of Iceland; the Icelandic application for membership, lodged in July 2009, is currently undergoing preliminary EU review.

Perhaps of more immediate practical concern, Article 16(1)(c) permits derogations “in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance to the environment”. As in the case of SACs, there is considerable elasticity in the wording of this provision to license important economic and industrial activities within the cetacean environment, which

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<sup>158</sup> Davies, “Legality of Norwegian Whaling”, at 292.

<sup>159</sup> Hoyt, “Marine Protected Areas”, at 194-9 and 202-5.

<sup>160</sup> COM (93) 142, at 12.

may ultimately result in a growing number of challenges to such derogations in future years. There is little decided authority in relation to these requirements specifically addressing the “strict protection” of cetaceans, with only one case seemingly brought to date. Nevertheless, insofar as this decision may be considered an instructive guide, the tone of the judgment suggests that the ECJ will not lightly tolerate a failure to facilitate such a system. In this respect, subsequent complaints are likely to involve close scrutiny of the procedural aspects of derogation practice, as well as the resources allocated to facilitating the enforcement and monitoring obligations towards Annex IV(a) cetaceans.

In *Commission v. Ireland*,<sup>161</sup> infringement proceedings were brought for a series of alleged breaches of the Habitats Directive concerning an eclectic group of species, including cetaceans. Two central complaints pertaining to cetaceans were raised by the Commission. Firstly it was alleged that the Irish authorities had failed to establish a system of strict protection due to an absence of a national action plan for cetaceans and a failure to fulfil surveillance and monitoring obligations. Secondly, concerns were raised that a project to lay a gas pipeline in Broadhaven Bay involved the use of explosives which, despite acknowledging that the sound created would have an adverse impact on cetaceans, was nonetheless authorised by the government without entering a derogation under Article 16. The Irish authorities responded that a species action plan was “underway” and that monitoring projects were being conducted by conservation volunteers with more in-depth government studies in certain areas. Moreover, a national records database had since been established together with full adherence to the by-catch monitoring obligations prescribed under relevant fisheries legislation, while permission for seismic blasting had been granted in accordance with national rules.

The ECJ found Ireland to be in breach of its commitments in relation to Annex IV(a) cetaceans on both counts. The failure to establish species action plans, considered “an effective means of meeting the strict protection requirement under Article 12(1)”,<sup>162</sup> could not be defended by demonstrating that initiatives to comply with this requirement were concluded after the expiry of the Reasoned Opinion issued by the

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<sup>161</sup> Case C-183/05.

<sup>162</sup> Opinion of Advocate-General Léger, at para. 39.

Commission.<sup>163</sup> Particular criticism was reserved for surveillance activities, considered “ad hoc and confined to certain geographical areas”,<sup>164</sup> while resources for marine conservation were “especially meagre” and wildlife rangers “focussed on terrestrial duties and do not have any meaningful seagoing capacity”.<sup>165</sup> Accordingly, the Court ruled that a system of strict protection had not been demonstrated.<sup>166</sup> Furthermore, it was held that the national authorisation process for seismic blasting was too permissive, rendering breeding and resting sites for cetaceans “subject to disturbances and threats which the Irish rules do not make it possible to prevent”.<sup>167</sup>

### 8.3.3 *Appraisal*

The Habitats Directive is clearly a vital instrument for the conservation of European species of cetaceans, both in its provisions for the establishment of protected areas and its facilitative role in ensuring the strict protection of these species throughout Community waters. Unlike many MPA-based approaches, the directive provides a strong prescriptive impetus for the creation of such areas, as well as a clear system for the review of decisions affecting the ecological integrity of SACs. While some reservations may be raised concerning the permissive nature of Article 6, the SAC regime demonstrates clear potential to transcend the “paper sanctuaries” often created for cetaceans, which are commonly starved of resources and devoid of meaningful enforcement powers. Moreover, the ECJ has demonstrated a strong approach to deficiencies in the establishment of a Community-wide system of strict protection. The high political visibility of cetaceans within the EU institutions will also ensure a proactive review of national policies that have the propensity to adversely affect the conservation status of such species.

Nevertheless, these clear strengths obscure a series of underlying structural deficiencies within the Habitats Directive that undermine its overall effectiveness as a conservatory regime for cetaceans. Firstly, the designation of SACs is restricted to harbour porpoises and bottlenose dolphins. As Hoyt observes, the reasons for this are

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<sup>163</sup> At para. 16 of the judgment. This position had been established in earlier (unrelated) litigation: *Commission v. Ireland*, Case C-282/02 ECR I-4653, at para. 40.

<sup>164</sup> Opinion of Advocate-General Léger, at para. 84.

<sup>165</sup> *Ibid.*, at 69.

<sup>166</sup> At para. 31 of the judgment.

<sup>167</sup> *Ibid.*, at 36.

contemporary to the drafting of the directive, with such species considered at the time to be the only cetaceans resident in inshore waters.<sup>168</sup> Subsequently, a case may be made to expand the range species of species listed on Annex II, as “[c]etacean distribution and habitat needs are becoming increasingly well known and certainly well enough known that species such as short-beaked, common, Atlantic white-sided and Risso’s dolphins, among others, should be able to have their habitats protected as well”.<sup>169</sup>

Secondly, the designation criteria for SACs are not presently conducive to the swift establishment of an extensive network of protected areas for cetaceans. The stringency of Article 4(1) means that while a particular site may be identifiable as being high in cetacean density, demonstrating definitively that it qualifies as representing physical and biological factors essential to life and reproduction is often rather more complicated. Allied to this, “[m]any important features of the feeding and reproduction biology of harbour porpoises are still not fully understood”,<sup>170</sup> thereby creating further challenges in identifying appropriate locations as potential SACs. Moreover, existing data deficiencies are also “understandably regarded as hindrances in the establishment of offshore NATURA 2000 sites”.<sup>171</sup> While the German experience demonstrates that such challenges are not insurmountable, practical difficulties may be experienced in other Member States. Indeed, the UK authorities consider that such sites take “several years for an area to progress from being an Area of Search to being submitted as a cSAC”,<sup>172</sup> while some of the more recent EU entrants may lack the research facilities to gather such information as swiftly and efficiently as Germany.

Finally, concerns must also be raised by the often vague and permissive nature of the obligations imposed upon the Member States concerning SACs under Article 6, which is considered “a poor piece of legislation that, unless strictly interpreted, contains big loopholes for major infrastructure projects in vulnerable areas”.<sup>173</sup> These loopholes are likely to be explored with increasing frequency given the major economic interests

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<sup>168</sup> Hoyt, “Marine Protected Areas”, at 183.

<sup>169</sup> *Ibid.*

<sup>170</sup> Kraus *et al.*, “Rationale Behind Site Selection”, at 74.

<sup>171</sup> *Ibid.*, at 93.

<sup>172</sup> Cited by the JNCC website.

<sup>173</sup> Nollkaemper, “Evolving Conceptions”, at 286.

at stake in key areas of cetacean habitats throughout the Community. Given the practical difficulties associated in developing alternative habitat sites and lingering concerns over mitigation obligations for seismic testing,<sup>174</sup> cetacean habitats will prove a considerable test to the Commission's ability to balance the interests of nature conservation and economic development in these areas.

#### **8.4. The conservation of cetaceans under the Common Fisheries Policy**

As noted above, the protection of cetaceans under EU law has been primarily guided by obligations established under the Habitats Directive. The implementation of the Natura 2000 network and securing the strict protection of particular in EC waters have been clearly identified as ongoing priorities for the Member States in addressing the conservation needs of marine biodiversity.<sup>175</sup> Such endeavours will therefore form the primary focus of initiatives to protect cetaceans in the mid- and long-term future. Despite this stated focus, an unintentional impediment to the EU framework has become increasingly pronounced in recent years, as a result of the strong emphasis upon the marine application of the Habitats Directive. Indeed, as further measures have been developed to address cetaceans, it has become apparent that implementation difficulties will arise due to the division of competences between the EU institutions and the Member States in the field of fisheries.

Competence to address biodiversity concerns has developed incrementally under the constituent EU treaties.<sup>176</sup> The original 1957 EEC Treaty was not originally endowed with competence to regulate environmental concerns. This position was altered in the aftermath of the 1972 Stockholm Conference with the establishment in 1973 of the Environment and Consumer Protection Service and the first Programme of Action of the European Communities on the Environment.<sup>177</sup> From these preliminary initiatives, certain provisions of the EEC Treaty addressing the common market were used as a

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<sup>174</sup> C. R. Weir and S. J. Dolman, "Comparative Review of the Regional Marine Mammal Mitigation Guidelines Implemented during Industrial Seismic Surveys, and Guidance towards a Worldwide Standard" (2007) 10 *Journal of International Wildlife Law and Policy* 1.

<sup>175</sup> "Mid-Term Review of the Sixth EAP", at 3.

<sup>176</sup> On the graduated emergence of competence of the EEC over biodiversity concerns see L. Krämer, "The Interdependency of Community and Member State Activity on Nature Protection within the European Community" (1993) 20 *Ecology Law Quarterly* 25.

<sup>177</sup> [1973] *Official Journal* C112/1.



basis for legislative activity.<sup>178</sup> Subsequent reforms of the EC Treaty have established clear supervisory competence over ecological concerns. A key development in this regard was the adoption of the Single European Act in 1986, designed primarily to further develop the common market. The SEA elaborated a distinct “Environmental Title”,<sup>179</sup> which prescribed competence, *inter alia*, to “protect, preserve and improve the quality of the environment”. These powers were subsequently consolidated within successive revisions of the EC Treaty.

Particular difficulties have arisen in the context of cetaceans due to conflicts between sectoral competences. This has been especially pronounced in the context of marine biodiversity, as opposed to terrestrial species, due to the need to address fisheries interactions. As noted previously, by-catches are considered to pose a severe conservation threat to cetaceans, with the risks posed by European fisheries deemed especially acute.<sup>180</sup> There is accordingly an urgent need to address this issue as part of a wider policy to ensure the strict protection of cetaceans by the Member States and to ensure the ecological integrity of SACs.

The specialist technical measures required to address cetacean by-catches would ordinarily be introduced and applied by a coastal state through its fisheries legislation. This has proved challenging in the EU context due to the nature of competences over fisheries concerns. The EC Treaty explicitly claimed competence over fisheries in 1992 by virtue of the Treaty on European Union.<sup>181</sup> Prior to this, fisheries measures were introduced as part of the Community’s remit to regulate agricultural products, which included aspects of fisheries concerns.<sup>182</sup> In 1981 the ECJ confirmed that the EC exercised exclusive competence over fisheries.<sup>183</sup> Subject to powers delegated to the Member States, the European Council is therefore charged with establishing the conditions regulating fishing activities pursued by Community fleets. This includes

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<sup>178</sup> Namely Ex-Article 100 (now Article 94) and Ex-Article 235 (now Article 308).

<sup>179</sup> See also L. Krämer, “Thirty Years of European Environmental Law: Perspectives and Prospectives” (2002) 2 *Yearbook of European Environmental Law* 155.

<sup>180</sup> R. R. Reeves, B. D. Smith, E. A. Crespo and G. Notarbartolo di Sciara, *Dolphins, Whales and Porpoises: 2002-2010 Conservation Action Plan for the World’s Cetaceans* (Gland: IUCN, 2003), at 14-15.

<sup>181</sup> Article 3.

<sup>182</sup> For a comprehensive appraisal of the early operation of the CFP, see R. R. Churchill, *EEC Fisheries Law* (Dordrecht: Martinus Nijhoff, 1987).

<sup>183</sup> Case C-804/79; *Commission v. United Kingdom* [1981] ECR 1045.

the development of technical measures in respect of fishing and the conservation and exploitation of fisheries resources. In the context of the CFP, this is addressed by the Council through a “Basic Regulation”, with the current version adopted in 2002 following a root-and-branch reform of Community fisheries objectives.<sup>184</sup> As noted below, such powers have spawned a series of protective measures to address the particular problem of cetacean by-catches in Community fisheries. However, these arrangements have also created considerable difficulties for Member States to pursue individual policies to address particular concerns over the incidental mortality of cetaceans within their jurisdictional waters.

Chronologically, the first major legislative acknowledgement by the EU of the threat posed to marine wildlife from incidental capture came in 1992 – through the Habitats Directive as opposed to specific fisheries legislation. In line with commitments towards individual protected species, incidental catches are addressed under Article 12(4) which establishes an obligation to address, *inter alia*, by-catches:

“Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant impact on the species concerned”.

This requirement is further bolstered in Article 15 of the directive, which requires Member States to prohibit “the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species”.

For terrestrial species, there is little obvious impediment to the development of policies by the individual Member States to implement this obligation. However, for marine species, discharging commitments under Article 12(4) will inevitably require the introduction of restrictions on fishing activities. So, while Article 12(4) may

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<sup>184</sup> Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable development of fisheries resources under the Common Fisheries Policy [2002] *Official Journal* L358/59.

technically mandate further by-catch mitigation measures, in practice Member States are not freely able to swiftly adopt such policies in the manner envisaged by this provision.

Instead, having transferred legislative competence over fisheries to the EC, a Member State wishing to introduce protection measures in the context of by-catches must instead rely on powers delegated by the Council. In this respect, the Basic Regulation prescribes a highly limited scope for the unilateral imposition of emergency environmental measures. Where a particularly pressing situation arises, a Member State must, in the first instance, request that the Commission introduces temporary emergency measures.<sup>185</sup> Member States retain a power under Article 8 to introduce measures for a period of up to three months in duration, but the development of mitigation strategies on a more sustained basis remains the responsibility of the EU. This position offers considerably less flexibility to Member States to mitigate individualised by-catch concerns in national waters that may not be replicated on a Community-wide basis and may be therefore less likely to command EU attention.

Indeed, this has been strikingly illustrated in the attempts by the UK to significant cetacean by-catches from pair-trawling within its territorial sea, eventually leading to a judicial review of national policies.<sup>186</sup> With the UK having previously registered concerns over cetacean by-catches in this fishery in 2003,<sup>187</sup> the Commission rejected an application under Article 7 of Regulation 2371 for emergency measures.<sup>188</sup> The UK authorities responded with temporary emergency measures under Article 8,<sup>189</sup> but have since been restricted in attempts to develop a more permanent national solution in this particular location, despite the demands of Article 12(4) of the Habitats Directive. The dichotomy between environmental and fisheries competences therefore

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<sup>185</sup> Article 7 of Regulation 2371/2002. A refusal may be overruled by the Council by a qualified majority vote.

<sup>186</sup> *Greenpeace Ltd v. Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 2144 (High Court judgment); [2005] EWCA Civ 1656 (Court of Appeal judgment).

<sup>187</sup> Written Question E-0482/03 [2003] *Official Journal* 243E/135. In response, remedial measures were “not considered a high priority”.

<sup>188</sup> [2005] EWHC 2144, at para. 22.

<sup>189</sup> South-West Territorial Waters (Prohibition of Pair Trawling) Order 2004 (SI 2004/3397), amended by South-West Territorial Waters (Prohibition of Pair Trawling) (Amendment) Order 2005 (SI 2005/49).

has clear and negative implications for the development of effective by-catch policies and the ability of individual Member States to respond swiftly to emerging threats to stocks through fisheries interactions.

Despite this position, on a Community level, cetacean by-catches have occupied significant legislative attention in recent years. In 2004, following a series of reforms of the CFP, a specific Regulation was adopted to address incidental cetacean mortality in EC fisheries. It is to this measure, which raises a number of intriguing implications for by-catch mitigation, which this thesis now turns.

#### *8.4.1 The reform of the CFP and the development of Regulation 812/2004*

The original CFP, inaugurated in 1970 was not initially well-placed to address marine environmental concerns, focussing instead on developing “equal access” to fishing grounds and in promoting harmonious relations between the Member States in this sector. Accordingly, until the CFP was comprehensively reformed in 2002, by-catches of cetaceans were addressed on a piecemeal basis, with the adoption of *ad hoc* technical measures to promote enhanced selectivity of fishing gear and techniques. In October 1992, a Regulation was adopted prohibiting the practice of encirclement fishing,<sup>190</sup> identified as a technique that “may result in the pointless catching and killing of marine mammals”.<sup>191</sup> Regulation 3034/92 is no longer in force, and the use of purse-seine nets is now governed by a subsequent measure<sup>192</sup> that prohibits the practice of encirclement fishing and the use of shore-seines (towed nets operated from the shore) from 1 January 2002, unless the Council, by a qualified majority vote, “decides otherwise in the light of scientific data proving that their use does not have a

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<sup>190</sup> Council Regulation (EEC) No. 3034/92 of 19 October 1992 amending, for the fourteenth time, Regulation (EEC) No. 3094/86 laying down certain technical measures for the conservation of fishery resources [1992] *Official Journal* L307/1. Encirclement fishing involves the setting of purse-seine nets around groups of marine mammals to catch fish, such as tuna, that are found in close association with these mammals.

<sup>191</sup> Preamble to the Regulation.

<sup>192</sup> Council Regulation (EC) No. 1626/94 of 27 June 1994 laying down certain technical measures for the conservation of fishery resources in the Mediterranean [1994] *Official Journal* L171/1.

negative impact on resources”.<sup>193</sup> Further restrictions on dolphin-associated fishing were introduced by Resolution 894/97,<sup>194</sup> which prohibits the encirclement of schools or groups of marine mammals with purse-seine nets<sup>195</sup> and restricts the use of trawl nets in specified geographical areas at certain points in the fishing season.<sup>196</sup>

In 2002, the CFP was comprehensively revised in order to mitigate the adverse effects of the Community fishing effort on the marine environment. In March 2001, the Commission issued a Green Paper on the future of the CFP,<sup>197</sup> which was highly critical of the previous environmental regulation of the EC fishing industry. The Commission considered that the CFP had failed to “sufficiently integrate the environmental problems into management considerations in a proactive manner”,<sup>198</sup> while environmental issues affecting the marine ecosystem as a whole were not addressed in a coherent and co-ordinated fashion.<sup>199</sup> Consequently, Regulation 2371/2002 was introduced to fundamentally readjust the aims and objectives of the CFP. Mindful of the need to integrate environmental management concerns into the broad areas of Community policy, the main objectives of the CFP were redefined under Article 2(1) of the Regulation, which introduced an ecosystem-based approach to the management of fisheries resources. Article 4 lists the types of measures to be taken by the Council in order to pursue these new objectives including, *inter alia*, adopting recovery plans, adopting management plans, limiting catches and limiting fishing efforts. From the perspective of by-catch mitigation, Article 4 also allows for the adoption of technical measures, including the introduction of “specific measures

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<sup>193</sup> Article 2(3). In addition to these technical restrictions, Regulation 1626/94 requires Member States to “pay attention” to the conservation of “fragile or endangered species” listed in its Annexes. This includes “all marine species of mammals” listed in the Annexes to the CMS and the Bern Convention, which in practice encompasses all species of cetaceans ordinarily and occasionally resident in Community waters.

<sup>194</sup> Council Regulation (EC) No. 894/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources [1997] *Official Journal* L132/1.

<sup>195</sup> Article 10(17).

<sup>196</sup> Article 10(15).

<sup>197</sup> COM (2001) 135. For an appraisal of these developments see R. Caddell, “By-Catch Mitigation and the Protection of Cetaceans: Recent Developments in EC Law” (2005) 8 *Journal of International Wildlife Law and Policy* 241, at 249-51.

<sup>198</sup> *Ibid.* at 9.

<sup>199</sup> *Ibid.* at 10.

to reduce the impact of fishing activities on marine ecosystems and non-target species”.<sup>200</sup>

Shortly after issuing the Green Paper, the Commission began to consider the effective integration of environmental concerns into the CFP.<sup>201</sup> Here, a number of policy objectives were listed as requiring “the highest priority”, including the improvement of fishing methods to reduce discards and incidental catches, and to mitigate adverse impacts on a variety of marine species, including cetaceans.<sup>202</sup> Work began in earnest on pursuing these priority objectives and, by mid-2002, the Commission started to address the issue of incidental catches and the protection of cetaceans. In December 2001 and June 2002, the Scientific, Technical and Economic Committee for Fisheries (STECF) examined the issue of cetacean mortality in European waters, concluding that while the precise number of by-catches was difficult to quantify, harbour porpoises were especially vulnerable to incidental capture, particularly in the Baltic Sea.<sup>203</sup> The STECF recommended that sweeping measures, including the prohibition of driftnet fishing in the Baltic Sea and the use of acoustic deterrent devices, should be introduced as a matter of priority. In 2003, the Commission published a proposal for a new Regulation to address the incidental capture of cetaceans in Community fisheries.<sup>204</sup> Three key policies were identified to mitigate cetacean by-catches:

- The restriction and eventual phase-out of driftnet fishing in the Baltic Sea.
- The mandatory use of acoustic deterrent devices in certain fisheries.
- The implementation of a co-ordinated monitoring scheme for cetacean by-catches.

These draft proposals were adopted by the Council and Regulation 812/2004 formally entered into force on 1 July 2004.

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<sup>200</sup> Article 4(g)(iv). In addition to this, Article 4(h) allows for measures to be taken to mitigate the environmental impact of fishing activities by “establishing incentives, including those of an economic nature, to promote more selective or low impact fishing”.

<sup>201</sup> COM (2002) 186.

<sup>202</sup> Other priority actions were to be taken in respect of sharks and seabirds, as well as reducing pressure on fishing grounds and eliminating public aid for modernising fishing fleets.

<sup>203</sup> Caddell, “By-Catch Mitigation”, at 250-1.

<sup>204</sup> COM (2003) 451.

#### 8.4.2 *The regulation of driftnet fishing*

Large-scale pelagic driftnets are perhaps the most controversial type of fishing gear deployed in modern fisheries, having been roundly condemned for their acute lack of selectivity.<sup>205</sup> Driftnets have been subject to particularly stringent international restrictions due to their significant adverse impacts within the marine environment. The EC has incrementally introduced a full prohibition on driftnet fishing in most Community fisheries, which forms a central aspect of Regulation 812/2004, and has generated particular controversy within a number of the individual Member States.<sup>206</sup>

Driftnetting may be broadly described as a process whereby “the surface layer of the ocean is fished with nets allowed to drift with winds and currents ... held open in a vertical position by the tension exerted between numerous floats on the floatline and a weighted deadline”.<sup>207</sup> Traditional driftnets, primarily constructed from hemp and other organic materials, were initially considered highly selective and ecologically efficient.<sup>208</sup> However, since the 1950s, such netting began to be manufactured on a vast scale using synthetic filament with smaller mesh sizes. Between the 1960s and mid-1980s few discernible restrictions were placed on the size of driftnets by international fisheries bodies, with the enormous expanses of netting routinely deployed in many fisheries eventually generating considerable disquiet over the long-term sustainability of such practices,<sup>209</sup> especially in the context of marine mammals.

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<sup>205</sup> A. Wright and D. J. Doulman, “Driftnet Fishing in the South Pacific: From Controversy to Management” (1991) 15 *Marine Policy* 303, at 313-4.

<sup>206</sup> See R. Caddell, “The Prohibition of Driftnet Fishing in European Community Waters: Problems, Progress and Prospects” (2007) 13 *Journal of International Maritime Law* 265.

<sup>207</sup> A. H. Richards, “Problems of Drift-Net Fisheries in the South Pacific” (1994) 29 *Marine Pollution Bulletin* 106, at 106.

<sup>208</sup> S. P. Northridge, *Driftnet Fisheries and their Impacts on Non-Target Species: A Worldwide Review*. *FAO Fisheries Technical Paper No. 320* (Rome: FAO, 1991), at 1.2.1.

<sup>209</sup> Indeed, by the late 1980s, commercial driftnets used in certain fisheries could extend to dimensions of up to 60km in length: M.R. Islam, “The Proposed ‘Driftnet-Free Zone’ in the South Pacific and the Law of the Sea Convention” (1991) 40 *International and Comparative Law Quarterly* 184, at 184.

Concerns were first raised in the 1960s over the incidental mortality of porpoises by Japanese salmon driftnetters in the North Pacific.<sup>210</sup> By the 1980s, wholesale by-catches of cetaceans had been observed within the South Pacific<sup>211</sup> and, especially, the Mediterranean region.<sup>212</sup> During this period, driftnetting attracted opprobrium from environmental campaigners, with such equipment condemned as “walls of death” responsible for “strip-mining the oceans”.<sup>213</sup> The emerging political visibility of the impact of driftnet fisheries led to the introduction of national restrictions by a number of coastal states. In this regard, Australia instituted a series of fisheries closures in 1986 to protect depleted stocks of dolphins,<sup>214</sup> while in 1987 the US government enacted the Driftnet Impact Monitoring, Assessment and Control Act, restricting the use of such equipment to a maximum of 1.5 nautical miles within American jurisdictional waters.<sup>215</sup>

From these individual initiatives, the ecological problems associated with driftnet fishing began to receive considerable attention within regional fora. In 1989, the first regional denunciation of driftnets as an unsustainable fishing practice was made through the Tarawa Declaration,<sup>216</sup> issued by the South Pacific Forum Fishing Agency, in response to distant-water driftnetting by Japan and Taiwan.<sup>217</sup> In November 1989 a regional convention was adopted by the South Pacific states,<sup>218</sup> instituting a ban on the use of driftnets of over 2.5 km in length within a vast expanse

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<sup>210</sup> R. R. Reeves, B. D. Smith, E. A. Crespo and G. Notarbartolo di Sciara, *Dolphins, Whales and Porpoises: 2002-2010 Conservation Action Plan for the World's Cetaceans* (Gland: IUCN, 2003), at 14.

<sup>211</sup> M. B. Harwood and D. Hembree, “Incidental Catch of Small Cetaceans in the Offshore Gillnet Fishery in Northern Australian Waters: 1981-1985” in *Thirty-Seventh Report of the International Whaling Commission* (Cambridge: IWC, 1987), at 363.

<sup>212</sup> G. Notarbartolo di Sciara, “A Note on the Cetacean Incidental Catch in the Italian Driftnet Swordfish Fishery, 1986-1988” in *Fortieth Report of the International Whaling Commission* (Cambridge: IWC, 1990), at 459.

<sup>213</sup> A. Wright and D. J. Doulman, “Driftnet Fishing in the South Pacific: From Controversy to Management” (1991) 15 *Marine Policy* 303 at 313-314.

<sup>214</sup> Richards, “Problems of Driftnet Fisheries”, at 108

<sup>215</sup> See J. Bautista Otero, “The 1987 Driftnet Act: A Step Toward Responsible Marine Resources Management” (1991) 2 *Colorado Journal of International Environmental Law and Policy* 129.

<sup>216</sup> Reprinted at (1990) 14 *Law of the Sea Bulletin* 29. On the political developments towards the adoption of the Tarawa Declaration see G. J. Hewison, “High Seas Driftnet Fishing in the South Pacific and the Law of the Sea” (1993) 5 *Georgetown International Environmental Law Review* 313.

<sup>217</sup> On Japanese driftnet fishing efforts and policies in the South Pacific Region see I. Miyaoka, *Legitimacy in International Society: Japan's Reaction to Global Wildlife Preservation* (London: Palgrave, 2004), at 50-54.

<sup>218</sup> Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific; 1899 UNTS 3.



of the region.<sup>219</sup> Following this, the concerns over driftnet fishing in the South Pacific were soon extended to the North Pacific Region,<sup>220</sup> as well as the Caribbean<sup>221</sup> and, by the early 1990s, had attained global attention within the UN General Assembly (UNGA). In 1989 and 1990 a series of Resolutions were adopted by the UNGA, calling for the increasingly stringent regulation of this equipment within areas beyond national jurisdiction.<sup>222</sup> In 1991 a further Resolution was adopted by the UNGA calling for “a moratorium on large-scale pelagic driftnet fishing ... notwithstanding that it will create adverse socio-economic effects on the communities involved”.<sup>223</sup> Resolution 46/215 thereby purported to prohibit the use of large driftnets – initially undefined, but subsequently widely interpreted in line with the 2.5km limit imposed under the Wellington Convention – upon the high seas.

Although UNGA Resolutions do not ordinarily create binding legal obligations, the driftnet moratorium prescribed under Resolution 46/215 has subsequently become a striking anomaly to this general rule. Indeed, a considerable number of coastal states have enacted domestic legislation to give effect to these international restrictions,<sup>224</sup> while a significant volume of bilateral enforcement activity (especially in conjunction with the US authorities) has also emerged.<sup>225</sup> Moreover, an array of regional fisheries management organisations (RFMOs), intergovernmental organisations and

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<sup>219</sup> For a full appraisal of the Wellington Convention see G. J. Hewison, “The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific” (1993) 25 *Case Western Reserve Journal of International Law* 449; see also B. Miller, “Combating Drift-Net Fishing in the Pacific” in J. Crawford and D. R. Rothwell (eds.), *The Law of the Sea in the Asian-Pacific Region: Developments and Prospects* (Dordrecht: Martinus Nijhoff, 1995) 161.

<sup>220</sup> L. A. Davis, “North Pacific Pelagic Driftnetting: Untangling the High Seas Controversy” (1991) 64 *Southern California Law Review* 1057.

<sup>221</sup> On the same day that the Wellington Convention was adopted, the Organisation of Eastern Caribbean States issued the Castries Declaration, calling for a similar management regime to address driftnet fishing activities in this region. Nevertheless, the strong rhetoric was never matched by clear regulatory action, as no specific regional measures were subsequently adopted by this particular body against driftnet fishing. The Castries Declaration is reproduced at (1990) 14 *Law of the Sea Bulletin* 28.

<sup>222</sup> A/Res/44/225 of 22 December 1989 and A/Res/45/197 of 21 December 1990. On this process generally see D. R. Rothwell, “The General Assembly Ban on Driftnet Fishing” in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2003) at 140.

<sup>223</sup> A/Res/46/215 of 20 December 1991. For a comprehensive (and largely critical) analysis of this measure see W. T. Burke, M. Freeberg and E. L. Miles, “United Nations Resolutions on Driftnet Fishing: An Unsustainable Precedent for High Seas and Coastal Fisheries Management” (1994) 25 *Ocean Development and International Law* 127.

<sup>224</sup> See, for instance, J. S. Davidson, “New Zealand Driftnet Prohibition Act 1991” (1991) 6 *International Journal of Estuarine and Coastal Law* 264.

<sup>225</sup> For a comprehensive appraisal of bilateral monitoring and enforcement arrangements see D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), at 117-124.

multilateral environmental treaty bodies have also endorsed and applied the ban on large-scale pelagic driftnets, thereby raising convincing claims that the UNGA moratorium may have ultimately passed from the hortatory confines of political Resolutions and into customary international law.<sup>226</sup>

The use of driftnets in European fisheries dates back over 2000 years.<sup>227</sup> However, until the mid-1980s, with the exception of the Italian swordfish fleet, few vessels routinely used driftnets in European fisheries.<sup>228</sup> This position changed in 1986, when the French expanded its albacore driftnet fleet significantly, alongside Ireland and the UK.<sup>229</sup> Such activities “grew until 1992 without the Commission and the European Fisheries Ministers passing any kind of regulation on the use of nets up to 6 or 7 kilometres long”.<sup>230</sup> However, the expansion of these activities in the Bay of Biscay soon generated strong resentment within the staunchly nationalistic coastal regions of the autonomous Basque Country in Spain, culminating in the development of an unlikely alliance between Basque nationalists and environmental NGOs to lobby for EU-wide restrictions on the use of driftnets,<sup>231</sup> which was soon officially supported within the European Parliament by Spain and Portugal.

In 1992 the first Community restrictions were introduced,<sup>232</sup> mirroring the UNGA moratorium, to control the use of driftnets in a number of key European maritime regions. Driftnets of over 2.5km in length were prohibited in Community fisheries,

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<sup>226</sup> G. J. Hewison, “The Legally Binding Nature of the Moratorium on Large-Scale High Seas Driftnet Fishing” (1994) 25 *Journal of Maritime Law and Commerce* 557.

<sup>227</sup> Rothwell, “General Assembly Ban”, at 142.

<sup>228</sup> At this time, there were approximately 3500 driftnet fishermen employed in the Italian swordfish fleet in the Mediterranean Sea: see R. J. Long and P. A. Curran, *Enforcing the Common Fisheries Policy* (Oxford: Fishing News Books, 2000), at 289.

<sup>229</sup> Fishermen from Ireland and Cornwall began to use driftnets in the Bay of Biscay in the 1990 fishing season. By 1994, 18 Irish vessels and 12 UK vessels were regularly deploying driftnets in this region: M. Findlay and A. E. Searle, “The North East Atlantic Albacore Fishery: A Cornish Crisis of Confidence” (1998) 22 *Marine Policy* 95, at 98-9.

<sup>230</sup> Lequesne, “Politics of Fisheries”, at 117.

<sup>231</sup> However, few commentators suggest that this alliance had any basis in environmental altruism, and was instead largely a marriage of convenience designed to intimidate foreign fleets into abandoning local fishing grounds that had provided a steady income for coastal communities in the Basque region for centuries. Indeed, as noted somewhat acidly by Lequesne, the Basque anti-driftnet bloc “could appreciate the tactical advantage of espousing the cause of dolphins, although in fact it had no compassion for the fate of these marine mammals”: *ibid*, at 122.

<sup>232</sup> Council Regulation (EEC) No 345/92 of 27 January 1992 amending for the eleventh time Regulation (EEC) No 3094/86 laying down certain technical measures for the conservation of fishery resources [1992] *Official Journal* L042/15.

subject to two broad exceptions in that the restrictions did not apply to the Baltic Sea, Belts and Sound,<sup>233</sup> and that France was allocated a short-term derogation in respect of the national albacore tuna fleet.<sup>234</sup> In 1997, further restrictions on driftnet fishing were introduced,<sup>235</sup> including the repeal of the French albacore exemption although leaving the Baltic Sea area exemption undisturbed. Most significantly, the Regulation recognised the problems posed to fisheries and the marine environment by the wholesale catches of non-target species, emphasising the potential scope for incidental catches involved in the use of both driftnets and purse-seine nets. Community vessels were therefore precluded from keeping on board or using for fishing one or more driftnets whose individual or total length is greater than 2.5km.<sup>236</sup>

More controversially, in June 1998, Regulation 894/97 was amended to further strengthen the Community's anti-driftnet legislation.<sup>237</sup> Article 11 was amended to prohibit the use of driftnets completely – irrespective of individual or collective length – within certain listed fisheries in EC waters from 1 January 2002 onwards. This move, which was unprecedented under the Common Fisheries Policy (CFP),<sup>238</sup> prevented the keeping on board or use for fishing of driftnets on particular species listed in Annex VIII of Regulation 894/97,<sup>239</sup> including albacore tuna and swordfish, traditional staples of the French and Italian driftnet fishing fleets respectively.

In 2004 the driftnet fishing restrictions were, for the first time, extended to the Baltic Sea areas under Community control following the accession of Poland, Estonia, Latvia and Lithuania to the EU. Regulation 812/2004 represented the first coordinated measures to restrict driftnetting in Baltic waters, which had remained exempt from the

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<sup>233</sup> Driftnet fishing in this area was at this time regulated solely by the International Baltic Sea Fisheries Commission (IBSFC). As a result of the accession of Estonia, Latvia, Lithuania and Poland to the EU in 2004, these countries were required to formally withdraw from the IBSFC, which exists nominally. Prior to the 2004 EU enlargement, the IBSFC which, in tandem with the European Council, had sanctioned the use of driftnets of up to 21km in length: Long and Curran, "Enforcing the Common Fisheries Policy", at 283.

<sup>234</sup> Article 9a.

<sup>235</sup> Council Regulation (EC) No 894/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources [1997] *Official Journal* L132/1.

<sup>236</sup> Article 11.

<sup>237</sup> Council Regulation 1239/98 of 8 June 1998 amending Regulation 894/97 laying down certain technical measures for the conservation of fishery resources [1998] *Official Journal* L171/1.

<sup>238</sup> Lequesne, "Politics of Fisheries", at 124.

<sup>239</sup> Article 11a. This provision also prohibited the landing of any Annex VIII species caught with a driftnet by Community vessels.

UNGA moratorium due to the absence of any areas of high seas within the region. The Regulation provided for the introduction of incremental restrictions on driftnets within the Baltic Sea area, culminating in a complete prohibition on the use of this equipment from 1 January 2008.<sup>240</sup> Complications with the timetable for the eradication of driftnet fishing meant that some adjustments were made to individual deadlines for certain areas within the Baltic Sea,<sup>241</sup> but the ultimate deadline for the cessation of driftnetting activities remained undisturbed.

The prohibition of driftnet fishing has proved to be highly controversial, with concerted opposition to these provisions having been raised by coastal communities in a number of Member States. Indeed, the original Regulations introducing the first operative restrictions were both subject to ultimately unsuccessful challenges on various points of EU law,<sup>242</sup> while a third challenge is currently on-going.<sup>243</sup> Moreover, in February 2006 a collective of Polish fishing interests petitioned the European Parliament seeking an exemption for national waters on the grounds that the ban would be likely to cause severe economic hardship.<sup>244</sup> Polish grievances against the restrictions have also been raised within the ASCOBANS Jastarnia Group.<sup>245</sup>

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<sup>240</sup> The incremental phase-out of this equipment commenced from the 2005 fishing season onwards. The original deadline set by the Commission in its draft version of Regulation was one year earlier than this, with a proposed moratorium to begin on 1 January 2007.

<sup>241</sup> Council Regulation (EC) No. 2187/2005 of 21 December 2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound, amending Regulation (EC) No. 1434/98 and repealing Regulation (EC) No. 88/98.

<sup>242</sup> *Établissements Armand Mondiet SA v. Armement Islais SARL*, Case C-405/92 [1993] ECR I-6133, unsuccessfully challenged Regulation 345/92 alleging that it had been adopted on an erroneous legal basis, given that the measure was essentially motivated by ecological considerations and should therefore have been elaborated under the (then) Articles 130r and 130s of the EC Treaty. An action to annul Regulation 1239/98, brought by France and Ireland on behalf of the national fishing industries, was later rejected by the Court of First Instance: *Armaments Coopératif Artesinal Vendéen v. Council*, Case T-138/98. For full commentary on these cases see Caddell, "Prohibition of Driftnet Fishing", at 274-76.

<sup>243</sup> In February 2007 a further challenge to Regulation 1239/98 was submitted to the ECJ as a preliminary reference under Article 234 of the EC Treaty from the Prud'homie de pêche de Martigues: *Jonathan Pilato v. Jean-Claude Bourgault*, Case C-109/07.

<sup>244</sup> European Parliament, Committee on Petitions, Document CM/601531EN.doc; 3 February 2006. This petition was ultimately unsuccessful, although as noted above, Regulation 2187/2005 did adjust the timescale for the eventual entry into force of these restrictions in certain areas of the Baltic region.

<sup>245</sup> At the inaugural meeting of the Jastarnia Group, it was observed that "Polish fishermen could not replace drift-nets by other gear because of the nature of the country's coastline ... The ban on drift-nets would lead to the death of the salmon fishery in Poland and to strong opposition from Polish fishermen, who feared for their future": *Report of the First Meeting of the UNEP/ASCOBANS Jastarnia Group* (ASCOBANS, 2006), at 2.

With legal challenges proving fruitless, astute operators have instead exploited significant drafting weaknesses within Regulation 812/2004, which proffered a vague and ambiguous definition of a driftnet. This loophole has been controversially utilised by French and Italian fishermen, whereby the authorities have sanctioned the use of the *thonaille* and *ferrettara* respectively – netting that is effectively the same type as that proscribed under EC law but the modification of which renders it technically distinct and thereby outside the scope of the current provisions. In France, the decision by the relevant fisheries authorities to permit the use of this equipment was successfully challenged and annulled in 2005 by the *Conseil d'État*,<sup>246</sup> and in July 2008 a similar action was initiated in Italy by WWF Italia against the use of the *ferrettara*. Additionally, the recent development of so-called “semi-driftnets” by Polish salmon fishermen has created similar problems of quasi-compliance with the relevant provisions, which has raised further concerns within ASCOBANS over cetacean mortality in the Baltic Sea.<sup>247</sup>

In the light of concerns about the potential lacunae in the EC driftnet provisions, a new Regulation was adopted in June 2007 to amend Regulations 894/97, 812/204 and 2187/2005.<sup>248</sup> At the proposal stage, the diplomatically-worded intention of this legislation was stated by the European Commission as being to “clarify certain existing provisions to avoid counterproductive misunderstandings as well as facilitate uniformity in the practice of monitoring between Member States”.<sup>249</sup> Accordingly, the new definition of a driftnet, as established in Regulation 809/2007, is stated to be:

“[A]ny gillnet held on the sea surface or at a certain distance below it by floating devices, drifting with the current, either independently or with the boat to which it may be attached. It may be equipped with devices aiming to stabilise the net or to limit its drifting”.

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<sup>246</sup> Contentieux No. 265034; 3 August 2005; see Caddell, “Prohibition of Driftnet Fishing”, at 281.

<sup>247</sup> *Report of the Second Meeting of the Jastarnia Group* (Bonn: ASCOBANS, 2006), at 8.

<sup>248</sup> Council Regulation (EC) No. 809/2007 of 28 June 2007 amending Regulations (EC) No. 894/97, (EC) No. 812/2004 and (EC) No. 218/2005 as concerns drift nets [2007] *Official Journal* L182/1.

<sup>249</sup> COM (2006) 511.

This Regulation entered into force officially in mid-July 2007 and applies in all waters under the jurisdiction of the EC. Nevertheless, it is true that a certain amount of technical creativity may be exercised with respect to virtually any official definition of a “driftnet” to create gear that will operate at the outermost parameters of the law. In this respect, monitoring activities by the recently inaugurated Community Fisheries Control Agency<sup>250</sup> – as well as by vigilant NGOs and other interested parties – will be required to reduce the current opportunities to circumvent both the letter and the spirit of the relevant provisions in EC waters.

#### 8.4.3 The use of “pingers”

Perhaps the most ambitious provisions of the new Regulation involve the mandatory use of acoustic deterrent devices by EU fishing vessels.<sup>251</sup> Given the importance of sound to cetaceans,<sup>252</sup> it has been long considered that the development of some form of acoustic emission from fishing nets may prove to be the most effective method of reducing incidental catches. This has led to the development of appliances, known as Acoustic Deterrent Devices (ADDs) or “pingers”, which may be attached to fishing gear to emit a high-frequency sound to discourage cetaceans from approaching netting. Limited trials of these devices to date have demonstrated that these appliances have the potential to be highly effective in mitigating cetacean by-catches and reducing incidental mortality to negligible levels.<sup>253</sup>

Despite these successes, the use of pingers does raise management concerns. Commentators have observed that the levels of success achieved in early experiments

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<sup>250</sup> The Community Fisheries Control Agency was established in 2005: Council Regulation (EC) No. 768/2005 of 26 April 2005 establishing a Community Fisheries Control Agency and amending Regulation (EC) No. 2847/93 establishing a control system applicable to the common fisheries policy [2005] *Official Journal* L128/1.

<sup>251</sup> Article 2.

<sup>252</sup> See W. J. Richardson, C. R. Greene, Jr., C. I. Malme and D. H. Thomson, *Marine Mammals and Noise* (San Diego: Academic Press, 1995).

<sup>253</sup> S. D. Kraus *et al.*, “Acoustic Alarms Reduce Incidental Mortality of Porpoises in Gill Nets” (1997) 388 *Nature* 525; see also E. A. Trippel, M. B. Strong, J. M. Terhune and J. D. Conway, “Mitigation of Harbour Porpoise (*Phocoena phocoena*) By-catch in the Gillnet Fishery in the Lower Bay of Fundy” (1999) 56 *Canadian Journal of Fisheries and Aquatic Science* 113; P. J. Gearin *et al.*, “Experimental Testing of Acoustic Alarms (Pingers) to Reduce Bycatch of Harbor Porpoise, *Phocoena phocoena*, in the State of Washington” (2000) 2 *Journal of Cetacean Research and Management* 1; and J. Barlow and G. A. Cameron, “Field Experiments Show That Acoustic Pingers Reduce Marine Mammal Bycatches in the California Drift Gill Net Fishery” (2003) 19 *Marine Mammal Science* 265.

have not been widely replicated, and have counselled against the viewing these devices as a panacea to eliminate by-catches of cetaceans entirely.<sup>254</sup> Furthermore, it has been advocated that “the use of acoustic alarms on gillnets should not substitute, but complement other measures, such as localized fishery closures”.<sup>255</sup> Indeed, concerns have been raised over the reaction of certain species to the use of pingers, especially since evidence suggests that bottlenose dolphins and harbour porpoises in particular may be displaced from important areas of habitat by this equipment,<sup>256</sup> and that accordingly pingers may ultimately prove detrimental to conservation efforts. Conversely, concerns have also been raised that cetaceans may ultimately become habituated to the sound of pingers in the marine environment – as has occurred in the case of certain species of pinnipeds – thereby compromising the practical efficacy of these appliances.<sup>257</sup> The response of cetaceans to such devices varies markedly from species to species – and, indeed, from pinger to pinger<sup>258</sup> – ranging from strong aversive reactions to little discernible change in behaviour.<sup>259</sup> Accordingly, as noted by Kraus, “rigorous experimental work on their effectiveness in the particular fishery and on a particular cetacean species should be done before pingers are implemented in a fishery”.<sup>260</sup>

Thus far, the development of such a regulatory framework for pinger use has been largely conspicuous by its absence. Indeed, to date the deployment of pingers has occurred on a predominantly localised basis, primarily in North America in gillnet fisheries within the Bay of Fundy, and until the adoption by the EC of Regulation

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<sup>254</sup> See S. M. Dawson, A. Reid and E. Slooten, “Pingers, Porpoises and Power: Uncertainties With Using Pingers to Reduce Bycatch of Small Cetaceans” (1998) 84 *Biological Conservation* 141, at 142-45.

<sup>255</sup> B. M. Culik, S. Koschinski, N. Treganza and G. M. Ellis, “Reactions of Harbor Porpoises *Phocoena phocoena* and Herring *Clupea Harengus* to Acoustic Alarms” (2001) 211 *Marine Ecology Progress Series* 255, at 259.

<sup>256</sup> T. M. Cox, A. J. Reid, D. Swanner, K. Urian and D. Waples, “Behavioral Responses of Bottlenose Dolphins, *Tursiops Truncatus*, to Gillnets and Acoustic Alarms” (2003) 115 *Biological Conservation* 203, at 208-9.

<sup>257</sup> Cox *et al.*, “Behavioral Responses”, at 209. Estimates suggest that harbour porpoises may habituate to pingers in as little as 10-11 days: T. M. Cox, A. J. Reid, A. Solow and N. Treganza, “Will Harbour Porpoises Habituate to Pingers?” (2001) 3 *Journal of Cetacean Research and Management* 81, at 84.

<sup>258</sup> R. A. Kastelein, D. de Haan, N. Vaughan, C. Staal and N. M. Schooneman, “The Influence of Three Acoustic Alarms on the Behaviour of Harbour Porpoises (*Phocoena phocoena*) in a Floating Pen” (2001) 52 *Marine Environmental Research* 351.

<sup>259</sup> R. A. Kastelein, N. Jennings, W. C. Verbroom, D. de Haan and N. M. Schooneman, “Differences in the Response of a Striped Dolphin (*Stenella coeruleoalba*) and a Harbour Porpoise (*Phocoena phocoena*) to an Acoustic Alarm” (2006) 61 *Marine Environmental Research* 363.

<sup>260</sup> S. D. Kraus, “The Once and Future Ping: Challenges for the Use of Acoustic Deterrents in Fisheries” (1999) 33 *Marine Technology Society Journal* 90, at 93.

812/2004 had not been sanctioned on a wider scale. Regulation 812/2004 therefore entails the first major legislative instance in which the use of pingers has been made compulsory within a series of major fisheries. However, it is accompanied by a vague and rather untested regulatory “framework” that is likely to require prompt reconsideration if the EC pinger policy is to prove successful, both as a mitigation strategy in the specific European context as well as a desirable model to be exported to similar passive gear fisheries.

The rationale behind the introduction of this policy on the part of the EC is listed in Regulation 812/2004, in which it is observed that “[s]ome acoustic devices have been developed to deter cetaceans from fishing gear, and have proven successful in reducing by-catch of cetacean species in static net fisheries”.<sup>261</sup> Article 2(1) of the Regulation requires the mandatory use of in fishing activities by all vessels of 12m or over in length in certain fisheries within EC waters at certain points within the season,<sup>262</sup> subject to a graduated phase-in period commencing from 1 June 2005. That pinger use has been made mandatory as opposed to having been incentivised in the form of grants or other material benefits is explained predominantly by the fact that to date voluntary acceptance of such devices by the fishing industry has been minimal. Pingers are “expensive, require periodic maintenance, are prone to failure, may interfere with the setting and hauling of the net, can reduce fishing performance and, in general, are unpopular with fishermen”.<sup>263</sup> It is further incumbent upon the Member States to take necessary steps to monitor and assess, by means of scientific studies or pilot projects, the effects of pinger use over time and in the fisheries and areas concerned.<sup>264</sup>

The current EC position in relation to the use of these appliances has drawn considerable unease, both within the fishing industry in a number of Member States, as well as other key multilateral bodies exercising regulatory competence over

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<sup>261</sup> Fourth recital of the Preamble to Regulation 812/2004; emphasis added.

<sup>262</sup> These are detailed in full in Annex I to the Regulation. In practice, with the exception of bottom-set gillnets under 400 metres within ICES Sub-Area IV and division IIIa, the use of pingers is required all year. Under Article 2(2), it is the responsibility of the master of the vessel to ensure that all devices are fully operational when setting the fishing gear.

<sup>263</sup> A. J. Reid, *Potential Mitigation Measures for Reducing the By-Catches of Small Cetaceans in ASCOBANS Waters: Report to ASCOBANS* (Bonn: ASCOBANS, 2000), at 14.

<sup>264</sup> Article 2(4).



cetaceans. Indeed, to this end, four key deficiencies may be identified within the EC legislation as it currently stands. Firstly, as noted above, the mandatory pinger requirements apply only to vessels of 12m or more in length; however, the majority of EC gillnet fishing activities are performed on vessels that do not fulfil this criterion, hence Article 2(1) is relatively meaningless in practice. Secondly, the monitoring and enforcement of these provisions is also likely to pose a significant challenge in practice. Due to essential safety reasons, it is neither feasible nor desirable to place observers upon vessels less than 12m in length and alternative monitoring schemes, such as the use of closed-circuit television cameras aboard such vessels are still at a very preliminary stage. Moreover, the experience of the US coastguard has proved instructive of the difficulties posed by the monitoring of pinger use, with the authorities generally lacking the facilities to haul nets for inspection, and remaining wary of tortious liability for damaging the nets and the catch even if they had this technical capacity.<sup>265</sup>

Thirdly, the use of pingers has been sanctioned on an apparently open-ended basis, with the Regulation designating specific phase-in periods, while remaining silent on the discontinuation of these devices. In this respect, it appears that this policy represents a misapplication of the scientific advice received by the STECF, which suggested that pinger use should remain a temporary policy due predominantly to concerns over the potential habituation of cetaceans to these appliances. Fourthly, and perhaps most significantly, the environmental impacts of pinger use on such a dramatic scale remain largely uncertain, notwithstanding localised information to suggest that the temporary use of such appliances may reduce cetacean by-catches. Indeed, an understanding of the precise operative basis of pingers still eludes fisheries managers, with investigations currently on-going into whether by-catch mitigation is achieved either by warning marine mammals from nets or by displacing their prey from areas in which fishing activities are occurring.

This knowledge deficiency is seemingly replicated within the relevant provisions of Regulation 812/2004 itself, with Article 2(4) acknowledging that the experimental

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<sup>265</sup> Reid, "Potential Mitigation Measures", at 16. Consequently, coastguard officers were required to formally board a shipping vessel, and the fishing crew obliged to haul nets in the presence of the authorities, which not only disrupted fishing activities but also created the safety problems noted above of an excessive number of individuals upon a small vessel: *ibid*.

nature of this mitigation technique requires considerable monitoring activities on the part of the Member States, while the preamble calls for further scientific research and for technical specifications of pingers to be updated in line with additional data.<sup>266</sup> Given the tentative support for the theoretical application of pingers in fisheries, as well as the wealth of research calling for a substantial degree of further investigation into the potential adverse effects of pinger use upon cetaceans, the widespread deployment of these appliances throughout EC waters on this basis appears to be a misapplication of the precautionary principle/approach that is so centrally mandated within the framework of the revised CFP.

#### *8.4.4 Monitoring obligations*

To ensure compliance with these provisions, Article 5 of Regulation 812/2004 requires Member States to design and implement monitoring schemes for incidental catches of cetaceans and to appoint an observer for every fishing vessel with an overall length of 15 metres or more flying the national flag. Observers must be “independent and properly qualified and experienced personnel”,<sup>267</sup> whose task is to “monitor incidental catches of cetaceans and to collect the data necessary to extrapolate the by-catch observed to the whole fishery concerned”, with a particular emphasis on the monitoring of fishery observations and by-catches of cetaceans.<sup>268</sup> Observers are required to complete a report compiling all the data collected on the fishing effort as well as observations on incidental catches of cetaceans to the competent authorities of the flag Member State, which in turn must report to the Commission.

As far as smaller vessels are concerned, considerable practical problems are raised by the possibility of an observer programme, with legitimate concerns raised as to the safety implications of such a project, although other technical possibilities exist for these vessels involving mechanical, as opposed to human, observation. The development of monitoring possibilities of smaller vessels and recreational fisheries is an on-going project under EC fisheries law, as evidenced by the recent adoption of a

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<sup>266</sup> Fifth recital of the Preamble to Regulation 812/2004.

<sup>267</sup> Article 5(1).

<sup>268</sup> Article 5(2).

new Regulation mandating both a Community-wide and nationally-based programme of data collection from fishing vessels, with no qualifications based on vessel size.<sup>269</sup>

#### 8.4.5 Appraisal

The adoption of Regulation 812/2004 has proved to be a highly controversial measure by the EC. Regulation 812/2004 remains essentially the sole legislative provision to explicitly identify the eradication of driftnets as the key mitigation strategy of a fisheries regulator against cetacean by-catches. Given the unsustainable rates of marine mammal by-catches in many European driftnet fisheries, Regulation 812/2004 has been warmly welcomed by conservationists. However, the success of these measures to date has been decidedly mixed, both in terms of providing an effective solution to cetacean by-catches in EC fisheries, as well as regulating driftnetting in these waters. Indeed, the current application of Regulation 812/2004 suggests that this provision will require substantive amendment if it is to achieve either of these twin objectives.

Firstly, there has been substantial non-compliance with the various anti-driftnet provisions introduced to date by the EC, including Regulation 812/2004.<sup>270</sup> Indeed, there have been particular compliance problems in the Mediterranean region, with some evidence to suggest that infringements were either officially sanctioned or, at the least, tacitly supported by certain governments.<sup>271</sup> This raises the ironic position that EC waters, despite being subject to the heaviest restrictions, have remained a hotspot for driftnet fishing. Moreover, as noted above, loose drafting of the definitional aspects of the EC driftnet legislation has created considerable loopholes,

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<sup>269</sup> Council Regulation (EC) No 199/2008 of 25 February 2008 concerning the establishment of a Community Framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fisheries Policy [2008] *Official Journal* L60/1.

<sup>270</sup> Due to its clandestine nature, the scale of illegal driftnet fishing by EU Member States is near impossible to quantify accurately, although there have been some *ad hoc* studies. For instance, in the Mediterranean Sea, a study of the effects of illegal driftnet fishing for swordfish by Spanish vessels in the Straits of Gibraltar estimated that some 366 dolphins were taken as by-catch in the 1993 fishing season, with 289 individuals taken in the 1994 season, concluding that the incidental mortality of dolphins in the Mediterranean was not sustainable: see L. Silvani, M. Gazo and A. Aguilar, "Spanish Driftnet Fishing and Incidental Catches in the Western Mediterranean" (1999) 90 *Biological Conservation* 79.

<sup>271</sup> T. Scovazzi, "The Enforcement in the Mediterranean of United Nations Resolutions on Large-Scale Driftnet Fishing" (1998) 2 *Max Planck Yearbook of United Nations Law* 365, at 372.

through which individual vessels have been effectively able to continue fishing with derivative gear, contravening the clear spirit of these provisions.

More insidiously, there is evidence to suggest that a number of EC driftnet fishing vessels were swiftly re-flagged in order to circumvent these restrictions.<sup>272</sup> Furthermore, despite the generous grants and subsidies paid by the EU institutions to underwrite the costs of decommissioning driftnet vessels and promoting alternative gear,<sup>273</sup> evidence suggests such vessels continued to routinely use driftnets and took considerable volumes of cetaceans and other marine mammals as by-catches.<sup>274</sup> In addition, and of overriding concern, the various infringement procedures operated under EU law have, in the context of illegal driftnet fishing, proven highly cumbersome and excessively protracted. Indeed, by an unfortunate irony, the greater the volume of evidence of non-compliance received by the European Commission, the longer a substantive judgment is effectively postponed, since such evidence must be presented to the Member State in question for an official response before the matter may proceed further, thereby facilitating a vicious circle of regulatory stagnation. Indeed, this situation raised the possibility of external enforcement through the unilateral application of US fisheries laws, which prescribes considerable scope to sanction foreign vessels using illegal driftnets.<sup>275</sup> Perhaps rather fortunately for the Italian government, as is the case with whaling sanctions, the US government

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<sup>272</sup> R. R. Churchill, "The EU as an International Fisheries Actor – Shark or Minnow?" (1999) 4 *European Foreign Affairs Review* 463, at 480-1.

<sup>273</sup> Council Decision 97/292/EC of 28 April 1997 on a specific measure to encourage Italian fishermen to diversify out of certain fishing activities [1997] *Official Journal* L121/20. The EU's contribution increases to up to seventy-five percent of the costs in the most economically deprived "Objective One" regions. Similar "bribes" of this nature to have also been conferred on Spain, France, Ireland and the UK in order to eradicate driftnet fishing in the North Atlantic: Council Decision 1999/27/EC of 17 December 1998 on a specific measure to encourage diversification out of certain activities and amending Decision 97/292/EC [1999] *Official Journal* L008/22.

<sup>274</sup> M. J. Cornax, X. Pastor and R. Aguilar, *Italian Driftnetters 2006: The Oceana Report* (Oceana, 2006), at 13-14. Indeed, in practice NGOs have proved most adept at monitoring illegal driftnet fishing in the Mediterranean Sea.

<sup>275</sup> The Driftnet Impact Monitoring, Assessment and Control Act 1987 was passed, requires the Secretary of State to enter into negotiations with foreign governments whose nationals and vessels conduct high seas driftnet fishing to assess the impact of such activities on US marine resources: Public Law 100-200; codified at 16 U.S.C. § 1822. This was followed by the Driftnet Act Amendments of 1990, which provided sweeping powers of vessel inspection and sanction: Public Law 101-627; codified at 16 U.S.C. § 1826. The High Seas Driftnet Fisheries Enforcement Act 1992 extended these powers further still: Public Law 102-582. This operates alongside the High Seas Driftnet Fishing Moratorium Protection Act 1995: Public Law 104-43; codified at 16 U.S.C. § 1826g.

ultimately managed to avoid imposing formal trade sanctions following some shrewd political manoeuvring by the Clinton administration.<sup>276</sup>

Secondly, and of significant concern to researchers and conservation actors, the alignment of EC cetacean by-catch policy so ostentatiously with its controversial stance against driftnets has created a substantial rift between the legislators and the fishing industry. This has had a significant – and, to date, largely unheralded – impact on the willingness of fishermen to cooperate with and assist in voluntary by-catch monitoring operations with independent researchers.<sup>277</sup> Likewise other conservation bodies, such as ASCOBANS and ACCOBAMS, have often been erroneously blamed for these restrictions. Indeed, a large section of the fishing industry has considered itself marginalised, with the unintended and unhelpful consequence that cooperation from this constituency has largely evaporated.<sup>278</sup> This has serious implications for the long-term effectiveness of these measures, given that the support and cooperation of the fishing industry will be instrumental in the ultimate success – or otherwise – of these provisions.

Thirdly, it appears that notwithstanding the introduction of these measures, there has been little net reduction in the volume of driftnet fishing in EC waters and, by extension, the rates of marine mammal by-catches in these fisheries. Indeed, a significant number of non-EU driftnet fishing vessels, predominantly drawn from northern Africa, have subsequently moved into the fishing grounds vacated by the various Member States.<sup>279</sup> There is very little available data on the scale of these fishing activities, but the statistics that do exist have revealed alarming rates of

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<sup>276</sup> See C. Espinosa, “*The Humane Society of the U.S. v Clinton: Executive Officers Have Broad Discretion in Determining Sanctions against Nations Conducting Illegal Driftnet Fishing in the High Seas*” (2001) 8 *University of Baltimore Journal of Environmental Law* 214.

<sup>277</sup> E. Rogan and M. Mackey, “Megafauna Bycatch in Drift Nets for Albacore Tuna (*Thunnus alalunga*) in the NE Atlantic” (2007) 86 *Fisheries Research* 6, at 7.

<sup>278</sup> Indeed, this issue has been regularly raised within ASCOBANS, especially the Jastarnia Group, with cooperation from Polish fishermen towards researchers deemed “excellent” prior to the adoption of Regulation 812/2004 but has “ceased altogether since”: *Report of the Second Meeting of the ASCOBANS Jastarnia Group* (Bonn: ASCOBANS, 2006) at 8.

<sup>279</sup> This point was not lost on opponents of the anti-driftnet legislation among the EU Member States. As noted by Long and Curran, “Italy, in common with the other Member States which border the Mediterranean, has no EEZ/EFZ. Thus there is the belief in Italy that an indiscriminate prohibition of driftnets would immediately cause Italian fishermen to be replaced by foreign fishermen, free from any obligation whatsoever”: “Enforcing the Common Fisheries Policy”, at 289.

cetacean by-catches that are widely believed to be unsustainable.<sup>280</sup> Although the provision of funding to develop alternative fishing gear has constituted a key element of fisheries relations between the EC and various north African states to date,<sup>281</sup> such a policy remains very much a long-term initiative and, given the considerable volume of areas of high seas within the Mediterranean region, the current EC rules remain jurisdictionally difficult to fully enforce.

Finally, and of overarching concern, although Regulation 812/2004 purports to provide an holistic approach to the mitigation of cetacean by-catches, the measure itself is dominated by considerations of driftnet fishing. Although driftnets have undoubtedly accounted for substantial by-catches of cetaceans in EC waters, Regulation 812/2004 seemingly views the prohibition of this equipment as a panacea against incidental mortality and is largely silent regarding other types of gillnets – as well as artesinal and recreational fisheries – that also have a considerable propensity for incidental catch. Moreover, the observer programme envisaged under the Regulation – which, in conjunction with considerable practical challenges in relation to the introduction of pingers – is also of limited value, given that it applies only to vessels of 15m in length. The majority of fishing activities in EC waters, especially in the Baltic Sea, takes place on vessels under this limit and the provisions are therefore rather meaningless in practice.<sup>282</sup> Accordingly, it is clear that Regulation 812/2004, with its emphasis on a one-gear approach and largely untried and experimental technical fixes, as opposed to a clear commitment to the long-term phase-in of alternative equipment and a collaborative approach to the fishing industry, will require significant reform in the short- to mid-term in order to develop the full potential of these measures to address cetacean by-catches in these waters.

## 8.5. Concluding remarks

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<sup>280</sup> See S. Tudela *et al.*, “Driftnet Fishing and Biodiversity Conservation: The Case Study of the Large-Scale Moroccan Driftnet Fleet Operating in the Alboran Sea (SW Mediterranean)” (2005) 121 *Biological Conservation* 65.

<sup>281</sup> Indeed, since May 2006 the EC has ring-fenced some €1.25 million to specifically underwrite programmes to abolish driftnet fishing in Morocco: Council Regulation (EC) No. 764/2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco [2006] *Official Journal* L141/1.

<sup>282</sup> Likewise, such vessels will not be caught by the relevant pinger provisions of Regulation 812/2004.

It is clear that the EU has a highly significant role to play within the current legal framework addressing the conservation of cetaceans. This is indeed true at three levels of governance. At the international level the EU has become an increasingly important figure through active participation at various international fora. More subtly, the alignment of a general Community policy is becoming an increasing feature within the various COPs, MOPs and Annual Meetings of a host of organisations, ranging from CITES to the CMS subsidiaries, with recent developments towards a similar position at the IWC. As a regional actor it is of even greater significance, exercising substantial competence over activities that have the potential to adversely impact upon cetaceans, such as fishing and, latterly, shipping and maritime affairs. Finally, at the domestic level, the transposition of EU commitments under the Habitats Directive and MSFD will frame national conservation responses in respect of marine biodiversity for the coming decades.

In many respects, the EU is especially well-placed to regulate cetaceans, with strong legislative powers, structural funding and enforcement mechanisms that are largely absent from many of the institutions reviewed in preceding Chapters. Despite the initially slow rate of progress, the Habitats Directive regime is seemingly better placed to deliver a network of MPAs with clear powers of designation, monitoring and review that are not generally replicated in other key marine regions. Likewise, the strong emphasis on cetacean conservation within the various political organs of the EU also present opportunities for the development of further regional legislation to protect such species, underpinned by a clear system of judicial enforcement. Moreover, there is considerable scope for financial assistance for research activities through schemes such as EU LIFE to contribute towards addressing the deficient knowledge base on species by funding long-term projects, such as SCANS.

Despite these clear advantages, the legal framework pertaining to cetaceans is subject to certain key shortcomings that will require further supervision by the EU institutions in order to ensure that the legislation is properly and effectively transposed. While the Habitats Directive presents strong conservation possibilities for cetaceans, the Commission must nonetheless continue to apply pressure upon the Member States to designate further SACs for marine mammals. Moreover, considerable assistance may

be required within the new Member States in order to ensure a relatively swift establishment of cetacean SACs in the Baltic and Black Sea regions. Ultimately, however, conservation efforts under the Habitats Directive are to an extent undermined by the very high scientific thresholds for the identification of potential Natura 2000 sites in the first instance and, more importantly, by the permissive nature of Article 6 that allows considerable leeway for the continuation of major industrial activities within SACs. As Verschuuren notes, “[s]o far, many of the SPAs and SACs are small islands where large-scale economic activities are dominant”.<sup>283</sup> Given the major industrial importance of key areas of cetacean habitats, it is likely that this fate will be replicated in many emerging marine mammal SACs.

In addition, while the current fisheries-based initiatives also raise strong conservation possibilities, not least in the “zero tolerance” approach to destructive fishing practices, these provisions are subject to considerable flaws and will require further modification in the short- to mid-term future in order to close substantial loopholes and improve their operational capacity. The ban on driftnet fishing has become a highly significant aspect of the EU political agenda towards the marine environment. However, while the use of driftnets in Community waters raises serious concerns for both fisheries and the wider ecosystem, the legislation has largely failed to date in its aim of eradicating such equipment in European seas. Moreover, the prospective pinger programme, which remains somewhat theoretical at present due to continuing technical limitations, has raised concerns over the adverse impacts of sanctioning such a project on this scale with limited knowledge concerning its prospective impact upon the marine environment. With the Regulations having also impacted adversely upon the goodwill of the fishing industry in many key coastal areas, it is clear that further revisions are necessary in order for the legislation to realise its full conservation potential. Most significantly, a degree of accommodation will need to be found between environmental and fisheries competences, as the transfer of fisheries powers by the Member States has created important practical difficulties in addressing by-catch concerns in national waters.

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<sup>283</sup> J. Verschuuren, “Effectiveness of Nature Protection Legislation in the EU and the US: The Birds and Habitats Directive and the Endangered Species Act” (2003) 3 *Yearbook of European Environmental Law* 303, at 328.



As far as the further development of EU cetacean policy is concerned, it may be considered that future regulatory initiatives are likely to be based around one key issue: anthropogenic ocean noise. More specifically, such policies are likely to address the impacts of seismic testing and oil exploration activities, as well as vessel-source noise. Indeed, given that the EU is currently precluded from developing binding standards in relation to the use of military sonar, consideration of this issue is likely to remain confined to the realms of *ad hoc* pronouncements and political lamentation concerning the effect of this equipment upon the marine environment. Instead, initiatives through NATO will be instrumental in developing safer standards for military sonar, which may then be incorporated into national legislation on a voluntary basis by the Member States. In the meantime, the Commission considers – somewhat optimistically, perhaps – that “Article 6(3) and (4) of the Habitats Directive provides a balanced framework to solve possible conflicts of interest between military activities and nature protection issues”.<sup>284</sup>

Indeed, as far as civilian sources of noise and disturbance are concerned, Article 6 of the Habitats Directive will continue to play a primary – and not uncontroversial – role. Some concerns may be expressed that this provision, on its current construction, will offer a less than optimal degree of protection to marine species, while the balance of interests envisaged under Article 6 may be increasingly tipped in favour of economic interests. Given the importance of industrial and resource extraction activities in areas of critical habitats for marine mammals, it is likely that the public interest exemption will be increasingly invoked in a marine context. Moreover, there are a number of examples of national legislation within the Member States that, although in conformity with Article 6, nonetheless prescribe considerable preference to mineral extraction and the development of offshore windfarms over the conservation of protected areas.<sup>285</sup> Such legislation will continue to run the gauntlet of the permissive provisions of the Habitats Directive in this respect, for which there is a pressing need for clear guidance both from the Commission on operational

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<sup>284</sup> Marine Guidelines, at 101.

<sup>285</sup> A particular example is the current *Bundesnaturschutzgesetz* in Germany, in which “[t]he preference given to mining and wind power is rather astonishing”: D. Czybulka and T. Bosecke, “Marine Protected Areas in the EEZ in Light of International and European Community Law – Legal Basis and Aspects of Implementation” in von Nordheim, Boedeker and Krause, “Progress in Marine Conservation”, at 43.

requirements within and around marine SACs, as well as the ECJ in adjudicating what is likely to be an increasing volume of litigation on these issues.

Ultimately, and despite these deficiencies within the current framework, the EU offers significant regulatory opportunities to address the conservation needs of cetaceans and, moreover, has consistently exercised a strong political and legislative will to do so. The priority activities for the coming years should therefore be focussed on increasing the Natura 2000 capacity, possibly involving the amendment of Annex II of the Habitats Directive to include a greater number of species. Attention will also need to be focussed on developing an effective balance with key economic interests, such as oil and gas exploration and extraction, in current and future SACs. Such activities should also be complemented by addressing current deficiencies within the fisheries-based legislation and in continuing to advance influential conservation policies within key international fora.



## CHAPTER IX

### CONCLUSIONS

The primary aim of this thesis has been to establish the extent to which the various global and regional instruments and actors with a regulatory interest in cetaceans constitute a coherent and effective framework for the conservation of these species. Given the extensive conservation threats to cetaceans – outlined in Chapter II of this work – the concept of the international “whaling regime” may be considered vast and open-ended.<sup>1</sup> The full range of instruments and institutions applicable to these conservation threats includes an array of pollution control bodies, fisheries management organisations and shipping regulators, alongside treaties addressing climate change, atmospheric concerns and other environmental pressures. Accordingly, this thesis has examined the practices of what may be considered the core international structure addressing cetaceans: the leading biodiversity-related treaties, as well as overarching global frameworks such as the ICRW and LOSC. At the outset, this work identified three key research questions for evaluation. These research questions have accordingly led to a series of conclusions concerning the challenges facing both the individual actors within the system, as well as the regulatory framework as the wider sum of its parts.

The first key question examined the extent to which the IWC, recognised as the leading global regulator for many species of cetaceans, may be considered to promote the effective conservation and management of such species. In this respect, it must be considered that the experience of the IWC has been extremely mixed. While the Scientific Committee has attracted near-universal admiration for its essential work on the conservation needs of cetaceans, the management of cetacean stocks by the IWC has nonetheless drawn considerable criticism.

The ICRW regime is subject to a series of deficiencies that undermine its capacity to provide clear conservation leadership for cetaceans on a global basis. A number of clear problems may be identified. Firstly, and of primary importance, the heavy politicisation of the whaling

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<sup>1</sup> P. Birnie, “The Framework for Conservation of Whales and Other Cetaceans as Components of Marine Biodiversity” in W. C. G. Burns and A. Gillespie (eds.), *The Future of Cetaceans in a Changing World* (New York: Transnational Publishers, 2003), at 111-14.

debate has created a climate in which the IWC has struggled to operate in an optimal manner. External factors have played a key role in the transformation of whales, which were viewed in largely unsentimental terms at the conclusion of the ICRW, into a primary metaphor for global environmental concerns.<sup>2</sup> Nevertheless, as the plight of whales was to a considerable extent driven by the ecologically deficient stewardship of the IWC, the roots of this politicisation lie predominantly within the Commission. Despite inheriting heavily depleted stocks of whales, the perpetuation of management failures further damaged the conservation status of great whales. This subsequently generated the conservation concerns that facilitated the totemisation of the whaling debate within wider ecological consciousness. The political problems generated by these events have had a clear practical impact within the IWC. As public opinion has developed in many jurisdictions into a strong anti-whaling position, this has heavily influenced the policies of national delegations at the Commission. This has created an impasse between pro- and anti-whaling constituents, introducing considerable circularity to the IWC debate that has often inhibited attempts to develop a more holistic approach to the “proper conservation of whale stocks and . . . the orderly development of the whaling industry”.<sup>3</sup>

Beyond these difficulties, it is argued that two central limitations work against the notion that the current IWC is appropriately placed to address the conservation of cetaceans. In the first instance, there is no clear agreement over the range of species ultimately governed under the auspices of the ICRW. Two schools of thought have arisen. One takes a narrow view, that the Nomenclature of Whales originally appended to the draft convention during the negotiations constitutes an exhaustive list of target species, mainly comprising the great whales and other commonly exploited species. Such a view considers that other species of cetaceans should be regulated via other bodies and must accordingly retain a peripheral focus within the IWC. This thesis favours a wider interpretation, based on a review of IWC practice – evidenced by a plethora of regulatory initiatives and pronouncements – alongside the stated policy of the Scientific Committee to examine the conservation status of all stocks of cetaceans. Legal argument may be made for a wider recognition of competence, based on this subsequent practice of the Commission. However, a recurring theme within the IWC remains that its regulatory direction ebbs and flows with that of its constituent parties. While the Commission

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<sup>2</sup> C. Epstein, *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse* (Cambridge, Massachusetts, MIT Press, 2008), at 248.

<sup>3</sup> Preamble to the ICRW.

has given attention to a wide range of species, it is clear that it lacks the critical mass of internal support for a wide remit in this respect. The debate on “small” cetaceans has therefore been increasingly diverted to other fora which may – or may not – be better placed to address these species.

The second particular limitation has been recognised explicitly by the IWC in that the conservation of whales (however such a species is interpreted), is more nuanced than the simple levy of catch quotas.<sup>4</sup> The pressures incumbent on the survival of whale stocks now considerably transcend the debate over directed hunting. It is clear that, in order to implement effective catch quotas for any future hunting operations, the IWC will need to consider cetaceans in more holistic terms than it has previously undertaken. However, in so doing, two key difficulties have become apparent in IWC practice. In the first instance, the Commission suffers from self-inflicted problems, with the political constraints having undermined policies of particular importance – most notably the establishment of a distinct Conservation Committee and the elaboration of whale sanctuaries. Secondly, these concerns are problems of wider consideration, with global solutions requiring clear and targeted measures to reduce by-catches, address the degraded states of many areas of the seas and mitigate the impacts of climate change. It is therefore questionable whether a treaty body primarily concerned with quota-setting is well-placed to address these issues accordingly.

The precise mandate for the IWC in the Twenty-First Century therefore remains an issue of key significance, both for the actual regime itself, as well as the wider structure of the “whaling regime”. This raises a third problem – the inherent lack of a strategic direction – given that the composition and practices of the IWC leave it vulnerable to changes of direction. This has been strikingly illustrated in recent years with the adoption of two major “constitutional” Resolutions in 2003 and 2006 respectively, which fundamentally altered the ethos of the Commission. The Berlin Initiative appeared to consolidate a general policy direction towards a more holistic view of whales and other cetaceans and the need to strongly reinforce the IWC mandate in this regard. A short while later, the St. Kitts Declaration sought to limit this approach towards an increasingly commercial objective with more limited conservation obligations. The development of a new direction for the IWC – whether it is

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<sup>4</sup> Resolution 2007-3: Resolution on the Non-Lethal Use of Cetaceans.

considered “normalisation” or “modernisation” – is likely to prove a protracted and hard-fought exercise.

This ultimately begs the question as to how the IWC should operate in the coming decades. There are a number of inter-related issues that need to be addressed within the Commission, primarily the position on directed hunting. It is clear that the moratorium on commercial whaling has largely proved illusory, given that a series of possibilities exist within the ICRW to continue harvesting on alternative bases. Of these, reservations and scientific whaling have proved the most contentious, and perceived abuses of these have led to a further souring of relations within the Commission, which further inhibits a negotiated solution. At present, a series of initiatives are underway within the IWC to develop a common strategic direction – or, at a minimum, a “least worst” option that can prove relatively acceptable to the greatest number of parties.

This is, in essence, the first major attempt to foster a negotiated direction for the IWC. These ongoing attempts to develop a package deal of reforms represent a strong opportunity for the IWC’s constituents to re-engage with each other in a positive manner and develop pragmatic solutions to the current impasse. Nevertheless, this process is fraught with political difficulties, which may ultimately prove insurmountable. For this initiative to bear fruit, it is clear that difficult compromises will need to be made on both sides of the ideological divide. Anti-whaling states are likely to be asked to tolerate a degree of commercial hunting in future years. Pro-whaling states are likely to have to accept considerable limitations on their freedom to enter reservations, alongside substantial restrictions upon – if not the complete abolition of – lethal scientific research, in conjunction with a greater emphasis on wider anthropogenic concerns. If such a political bargain can be brokered in the coming years, a unified IWC has much to offer the global regulatory system – both in terms of an improved stewardship of whale stocks, as well as influential political contributions in other important environmental fora.

However the IWC proceeds from this juncture, it is nonetheless clear that it cannot work in isolation from other multilateral bodies. Accordingly, the second key area of research posed by this thesis involved an analysis of the practices of other components of the regulatory framework, alongside a review of collaborative initiatives. Perhaps mirroring a wider trend in general international law, the multilateral regime for the regulation of cetaceans has proved

susceptible to a considerable degree of fragmentation, a process facilitated by the pertinent provisions of the LOSC. Article 65 has long raised difficult questions over the precise position of the ICRW in the regulation of cetaceans, given that it provides for a clear plurality of institutions for the conservation, management and study of such species. The spectre of a host of alternative whaling bodies has accordingly haunted IWC meetings since the conclusion of the LOSC and, especially, since the inauguration of NAMMCO.

The years immediately following the establishment of NAMMCO have proved to have been some of the most politically fraught in the history of the IWC, as developments in the High North have threatened to render the Commission largely redundant in the regulation of key stocks of harvested whales. To date, the institutional plurality provided for under Article 65 has not facilitated the break-up of the IWC and the establishment of regional whaling bodies as a realistic prospect – although this may re-emerge as a live option if the on-going negotiations within the Commission ultimately degenerate into acrimony.

Instead, this thesis argues that Article 65 has been used in a less divisive manner than may have been initially feared. Although the IWC has been keen to stress its primacy among alternative regulators,<sup>5</sup> and has often directed strongly-worded Resolutions to bodies such as CITES in the past to this effect, there appears to be a more collaborative ethos at present. This is evidenced by the growing numbers of Memoranda of Understanding concluded between the various conventions and a considerable softening of the rhetoric in IWC pronouncements. This thesis considers that a collaborative approach between the conventions is essential to the effective functioning of the overall framework, given that a number of biodiversity-related treaties have developed significant policies in respect of cetaceans, which supplement rather than supplant those of the IWC.

The CBD, as the leading biodiversity-related convention in terms of global scope and application, has exercised a very limited degree of attention to cetaceans. This is not entirely surprising given that it operates in a different manner to other leading bodies such as CITES and the CMS, which take a more individualised approach to threatened species – from which cetaceans have been particular beneficiaries. Instead, the CBD has proved to be a useful

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<sup>5</sup> A. Gillespie, "Forum Shopping in International Environmental Law: The IWC, CITES and the Management of Cetaceans" (2002) 33 *Ocean Development and International Law* 17.



forum to develop principles for the elaboration of Marine Protected Areas and other potential ocean policies that may have a residual benefit for cetaceans.

CITES has proved a somewhat reluctant component within the overall regulatory framework, with fears that the profound political disquiet generated within the IWC may be displaced to the trade convention having eventually proved to be well founded. An accommodation with the IWC has been reached, whereby CITES will retain full protection for species of whales as long as the commercial moratorium remains in place, based on a collaborative relationship with the IWC's Scientific Committee. CITES will not entirely escape the political implications of the whaling debate, however, and proposals to delist cetaceans appear likely to continue for the foreseeable future irrespective of this position, which will continue to generate a considerable degree of controversy.

Instead, the most pressing challenges faced by CITES in a cetacean context will remain the trade in live specimens of small cetaceans. To this end, this thesis has demonstrated considerable problems concerning the grant of import and export permits, especially in relation to no-detriment findings. Given the widespread uncertainty over stock numbers, in many instances a meaningful no-detriment declaration is near impossible to provide. Combined with minimal institutional consideration of these requirements on a national level, a series of hotspots for trade have emerged – largely among small island states – which CITES will need to address as a matter of some urgency.

Particular attention has been paid by this thesis to the role of the CMS, which must be considered a key component of the multilateral framework addressing cetaceans. The position of the CMS is significant in two respects – it plays a key role both as a wider framework treaty, while its subsidiary instruments further comprise important aspects of the overall cetacean regime. Taken on its own terms, there are a number of clear advantages to the CMS as a regulatory body for cetaceans. Firstly, it has unquestioned competence over a substantial array of both large and small cetaceans. Given the limitations consistently experienced by the IWC in its attempts to regulate a wide range of species, this should not be underestimated. The CMS has therefore been able to develop conservation initiatives for a host of species that have been otherwise rather neglected on an international level. Secondly, the CMS has demonstrated a proven political will to exercise these competences, with cetaceans having constituted some of the Convention's major conservation projects to date. Thirdly, and

notwithstanding the emergence of the EU as a distinct cetacean regulator, the CMS has for three decades remained the leading avenue through which to develop regional policies. This is starkly illustrated by the formation of ACCOBAMS, whereby initiatives by a variety of regional bodies to develop a distinct agreement were eventually aggregated under the CMS structure.

The CMS does face a number of problems, however, that will impact upon its future ability to effectively address cetaceans. Firstly, the Bonn Convention is not concerned specifically with the regulation of such species. It has a vast remit and cannot necessarily concentrate on cetaceans. Likewise, despite initial criticisms as a “sleeping treaty”,<sup>6</sup> the CMS regime has attracted a growing range of parties over the past decade, which has brought a changing focus to species conservation initiatives. Secondly, the strength and structure of its subsidiaries has receded significantly in recent years. The priorities of the CMS regime have shifted from the formation of substantial and binding Agreements creating autonomous regional institutions, towards a more diverse approach focussing on the development of Memoranda of Understanding.<sup>7</sup> Although there are advantages to this approach – not least in that initiatives may be developed for a wider range of species – it remains questionable as to whether effective conservation policies will be developed out of the MOU framework. Thirdly, and of greatest significance, the CMS regime faces enormous financial and resource pressures, which affect its ability to generate and maintain effective regional subsidiaries for cetaceans and, indeed, many other species under its regulatory purview.

The CMS has, however, provided a series of insights into the prospects and challenges for the regulation of small cetaceans as a specific concern, as well as regional approaches to cetacean conservation. As noted above, it appears likely that the current political situation within the IWC will continue to inhibit a clear regulatory direction for small cetaceans, beyond the endeavours of the Scientific Committee. To date, ASCOBANS represents the lone institution that seeks exclusively to regulate small cetaceans: ACCOBAMS has a broad ranging remit applicable to all cetaceans, as does the Pacific Islands MOU, while the Western African MOU applies also to sirenians. Beyond the CMS umbrella, NAMMCO applies to all marine

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<sup>6</sup> S. Lyster, *International Wildlife Law: An Analysis of International Treaties Concerned with the Conservation of Wildlife* (Cambridge: Grotius, 1985), at 297-98.

<sup>7</sup> Resolution 9.2: Priorities for CMS Agreements, adopted at the Ninth COP in 2008.

mammals and, notwithstanding ongoing political concerns from within the IWC, has largely focussed on sirenians.

Despite the unique status of ASCOBANS, it remains difficult to draw definitive conclusions from the practice of this organisation on either the value of the CMS subsidiary approach to small cetaceans, or the scope for establishing further regional bodies for the conservation of such species. ASCOBANS is instructive up to a point, but it must also be seen as a product of its distinct regulatory environment. ASCOBANS has demonstrated some promise in addressing the specific problems affecting small cetaceans in northern Europe and has developed a number of novel solutions that have been emulated in other CMS subsidiaries. Particular attention has been given to noise concerns and the generation of conservation and recovery plans, while there is some evidence that these measures have begun to inform national practices, especially in relation to licensing requirements and environmental impact assessments. Nevertheless, ASCOBANS has also suffered from a series of key problems for which few easy solutions are apparent. The dominance of EC concerns has had a negative impact on the Agreement, and its ability to address by-catch concerns – a key problem in these waters – is heavily compromised by the transfer of fisheries competence of its constituent parties to Brussels. Likewise, a number of institutional difficulties exist that recent reforms have failed to address and, arguably, in fact aggravated.

ACCOBAMS has been widely lauded as a superior instrument to ASCOBANS and it clearly enjoys a greater volume of structural funding, a lesser impact from EC concerns and a wider number of participants. A series of clear successes are also identifiable, with a number of novel approaches to by-catch concerns and ocean noise also notable. Its innovative institutional structure has also managed to unite two disparate regions in generating conservation leadership for cetaceans. However, in a number of respects, difficulties experienced in ASCOBANS are also replicated in ACCOBAMS.

Indeed, although a considerable degree of subjectivity exists in assessing the potential of the various CMS subsidiaries to regulate cetaceans, three cross-cutting deficiencies may be observed within the overall regime. Firstly, they all lack binding commitments. The two MOUs were specifically created as non-binding regimes. Moreover, ASCOBANS has been

criticised for its predominantly soft-law and research intensive approaches,<sup>8</sup> while the strength of obligations under ACCOBAMS – despite being widely considered the most powerful of the CMS cetacean bodies – are also rather uncertain. Secondly, they have each experienced practical difficulties in implementing key policies. ASCOBANS and ACCOBAMS have developed a series of potentially valuable conservation and recovery plans for particular species, but they have tended to be overlong, unduly technical and not conducive to swift implementation by stakeholders. Thirdly, and of primary concern, the CMS subsidiaries – like the parent convention – have been clearly affected by financial constraints. Of the four bodies, ACCOBAMS appears to have been the most insulated through the additional financial commitments of Monaco to underwrite its institutional structure, but has experienced resource constraints in the development of further policies. Likewise, ASCOBANS has undertaken a variety of cost-cutting measures, but these have seemingly failed to deliver considerable additional funds for conservation measures while arguably weakening its institutional framework. The Pacific Islands MOU has struggled to source funding to support the employment of key operational personnel, which will continue to impact upon its ability to coordinate conservation measures within the region. Considerable financial pressures have also been apparent within the Western African MOU since the earliest stages of the negotiation process.

The final theme explored in this work concerns the role of the European Union in the regulation of cetaceans. In recent years the EU has become an increasingly prominent component within the global framework for the conservation of marine mammals. The EU, which acts both on a global and a specifically regional context, may be considered to have exerted a broadly positive influence, albeit with some scope for controversy and conflict.

On a global level, the EU has been an increasingly influential element within the institutions established by the major treaties analysed in this thesis. This has considerable implications for the regulatory direction of these institutions, as well as for the national biodiversity policies of the Member States. A common whaling position by the Member States party to the ICRW will clearly bolster the anti-whaling constituency in the IWC, both strategically and through the recruitment of European countries that had previously demonstrated little

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<sup>8</sup> H. Nijkamp and A. Nollkaemper, “The Protection of Small Cetaceans in the Face of Uncertainty: An Analysis of the ASCOBANS Agreement” (1997) 9 *Georgetown International Environmental Law Review* 281, at 290; see also R. R. Churchill, “The Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas” in Burns and Gillespie, “Future of Cetaceans”, at 310.

interest in the whaling convention. The EU is committed to a continuation of the commercial moratorium, the cessation of lethal research and the on-going protection of cetaceans from anthropogenic pressures and is likely to exert considerable influence – both vocally and through the weight of votes – towards these broad objectives. The official bloc EU presence within the IWC is a very recent development, and it is somewhat premature to draw clear conclusions as to the precise impact that this may have within the Commission. Nevertheless, EU participation has had an intriguing effect upon the behaviour of IWC members. The advancement of a distinct EU agenda has drawn a disgruntled response from a number of parties, but it has also led to the tentative emergence of common regional positions. Indeed, during the on-going discussion on the “normalisation” of the IWC, the South American parties were keen to formulate a common position on whaling and the future direction of the Commission. It remains too early to tell whether this will constitute a definitive responsive trend, but there at least appears to be a degree of interest for bloc negotiations among like-minded states.

On a regional level, the EU must be considered to have had a mixed record as an exponent of particular policies towards cetaceans. There have been a number of positive developments under EU law, not least an emerging network of protected areas, a clear acknowledgement of the problems of fisheries by-catches – accompanied by bold and ambitious mitigation policies – and a strong impetus to address the marine environment through the MSFD. However, particular difficulties have also become apparent, both in framing and in implementing the various EU policies to date.

The Habitats Directive exhibits particular promise through its dual approach to conservation, generating the establishment of protected areas and mandating the “strict protection” of all species of cetaceans. This regime is supported by significant enforcement powers, which may in turn be considered likely to be deployed due to the high political visibility of cetaceans within the EU institutions. However, this thesis has demonstrated that the Habitats Directive has not always fully realised its regulatory potential in respect of cetaceans. This is due to problems that are both historical and contemporary in nature.

On an historical basis, implementation efforts have suffered due to the initial uncertainty over the precise jurisdictional reach of the Directive. Although its application to an extended area

of maritime territory had long been advocated,<sup>9</sup> and was subsequently judicially endorsed as self-evident,<sup>10</sup> clear policies for implementation in coastal and, especially, offshore waters have only emerged in recent years. With jurisdictional issues now clearly resolved, it is equally evident that the implementation of the Habitats Directive is subject to ongoing difficulties in the case of cetaceans and other marine species.

While the requirements of the Directive appear prosaic, they nonetheless present considerable practical difficulties to nature conservation agencies. The data required to identify potential SACs for cetaceans is often highly challenging to swiftly obtain, given the practical and financial difficulties posed in conducting concerted studies on these species in the wild. Large-scale survey projects, conducted over substantial maritime areas, are often cost- and time-intensive, given that they are generally less accessible than those on land. In addition to funding considerations, studies may also be adversely affected by survey conditions, especially in unpredictable offshore areas, which may further inhibit the ability of researchers to access such species and gather the necessary data.<sup>11</sup> Moreover, the evidential threshold within the Directive for areas of importance is deceptively high and potentially counter-productive. Indeed, the stringency of these requirements is cited as a primary reason for truncating the parameters of a key SAC for harbour porpoises within the German EEZ.<sup>12</sup> A similarly staccato approach to the identification of cetacean SACs has also been experienced in Dutch waters.<sup>13</sup>

Beyond the designation of SACs, considerable challenges arise in relation to the management of these sites. The strategic importance of many such areas – which may be sited in areas with considerable oil and gas deposits, or key fishing grounds – will undoubtedly provoke difficult questions in the balance of interests between environmental conservation and

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<sup>9</sup> D. Owen, “The Application of the Wild Birds Directive beyond the Territorial Sea of European Community Member States” (2001) 13 *Journal of Environmental Law* 38.

<sup>10</sup> *Commission v. UK*, Case C-6/04 [2005] ECR I-9017; at para. 117.

<sup>11</sup> Such considerations have impacted on the progress of studies by German researchers, for instance, given that “[g]ood survey conditions are rare for the German Exclusive Economic Zones in the Baltic and North Sea”: U. Siebert *et al.*, “A Decade of Harbour Porpoise Occurrence in German Waters – Analyses of Aerial Surveys, Incidental Sightings and Strandings” (2006) 56 *Journal of Sea Research* 65, at 78.

<sup>12</sup> S. A. Pedersen *et al.*, “Natura 2000 Sites and Fisheries in German Offshore Waters” (2009) 66 *ICES Journal of Marine Science* 155, at 160.

<sup>13</sup> H. Dotinga and A. Trouwborst, “The Netherlands and the Designation of Marine Protected Areas in the North Sea: Implementing International and European Law” (2009) 5 *Utrecht Law Review* 21, at 35-38.

economic development.<sup>14</sup> The Directive provides considerable scope for derogations to nature conservation concerns which may correspondingly erode the protection accorded for important areas of cetacean habitat. Little indicative guidance has been provided on the coexistence of important marine projects and habitat concerns. It therefore appears likely that such issues will generate considerable litigation in the mid-term future in the context of cetaceans.

A further limitation of critical concern relates to the inter-relationship between environmental and fisheries competences and the residual powers of the Member States to introduce particular conservation policies swiftly and effectively. The fault-lines between the two sectoral competences have been increasingly exposed by attempts to address by-catches, acknowledged as indisputably the most pressing threat to all species of cetaceans on a global level.<sup>15</sup> Nevertheless, the conditions of the CFP have had unexpected practical consequences in dramatically inhibiting the scope for Member States to introduce by-catch mitigation policies on an individualised basis. It is increasingly clear that a balance will have to be struck in this respect as part of the ongoing reform of the CFP, otherwise the framework for cetacean conservation in Community waters will be heavily undermined. The most likely avenue to rectify this position would appear to be through the delegation of more generous emergency powers to the Member States under the Basic Regulation to address by-catches within national waters. It is to be hoped that some accommodation between the competences can be reached swiftly to mitigate this legislative cul-de-sac.

Beyond the difficulties experienced with fisheries competences, a series of bold policies have been pursued under the CFP to address by-catches. In principle these are commendable in many respects, introducing a stronger series of controls over driftnet fishing in a region long notorious for incidental cetacean mortality in this equipment,<sup>16</sup> as well as demonstrating a clear commitment to enforcement, monitoring and mitigation. However, this thesis identifies a number of deficiencies within this legislation, which will also require reform in order to realise their conservationist potential as well as, crucially, fully engaging the cooperation of the fishing industry. Of primary concern is the fundamental lack of application of Regulation

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<sup>14</sup> A. Nollkaemper, "Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests" (1997) 9 *Journal of Environmental Law* 271.

<sup>15</sup> R. R. Reeves, B. D. Smith, E. A. Crespo and G. Notarbartolo di Sciara, *Dolphins, Whales and Porpoises: 2002-2010 Conservation Action Plan for the World's Cetaceans* (Gland: IUCN, 2003), at 14-15.

<sup>16</sup> P. Berggren, *et al.*, "Potential Limits to Anthropogenic Mortality of Harbour Porpoises in the Baltic Region" (2002) 103 *Biological Conservation* 313.

812/2004 in the areas in which it is arguably most needed. Additional reconsideration should be given to the qualification requirements for fishing vessels, with a substantial proportion of the EC fleet currently lying outside the scope of the Regulation. Some degree of consideration should also be applied to the permanent use of pingers in the cetacean environment, given the significant conservation concerns exhibited over the deployment of these appliances. Combined with concerns over competences, it is clear that these well-meaning policies will require considerable attention in the short-term future if the substantial by-catch problems in Community fisheries are to be effectively addressed.

Ultimately, two overriding problems have become apparent from this study of the international framework for the regulation of cetaceans, for which there appear to be few easy solutions. The framework is undermined primarily by funding problems. Furthermore, and in many respects related to financial constraints, additional problems have been raised in coordinating the precise remits of the various actors. Funding constraints clearly remain the key problem, and one that is experienced across virtually all multilateral bodies. There is a constant shortage of finance within the treaty bodies examined in this thesis, with particular concerns arising within the IWC and CMS. This is thrown into sharp focus by the significant costs inherent in the conservation, management and study of cetaceans. Likewise, the ability of these bodies to generate funding beyond the contribution of their constituent parties has proved highly challenging.<sup>17</sup>

Some innovative solutions are being developed under the auspices of the Bonn Convention, notably the impending recruitment of a designated Funding Officer to secure a greater volume of private sector investment in the work of the treaty. Elsewhere, the generosity of individual parties has proved highly influential, with Monaco largely underwriting the operational costs of ACCOBAMS, and the United Arab Emirates sponsoring a CMS Regional Office, which will have a strong influence over marine mammal conservation in these waters. The CMS has also sought the emergence of what may be termed “champion parties” in other locations, although the reticence of its parties does not bode well for the ongoing development of cetacean subsidiaries in the South Pacific and Western Africa.

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<sup>17</sup> W. C. G. Burns, “The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission: Toward a New Era for Cetaceans?” (2004) 13 *Review of European Community and International Environmental Law* 72, at 80-82.



Allied to these shortcomings is a lack of clear boundaries between the various regimes, with the historical dearth of coordination having led to duplication and conflict. A series of Memoranda of Understanding signed between key institutions has proved helpful to a degree. In recent years, the various Recommendations and Resolutions of major treaty bodies have helped to demarcate precise areas of activity. Again, the practice of the CMS has proved influential and its ongoing commitment to articulating institutional responsibilities in respect of cetaceans – combined with a clear programme of collaborative activity – represents an admirable model for other bodies to emulate.

In closing, it is clear that the period 2009-2012 will be of great significance to the international framework addressing cetaceans. During this period, if political developments within the IWC remain conducive to progress, the Commission's reform process may have generated a degree of compromise and treaty adjustment that could allow this body to designate a clear and unified series of future objectives. These objectives will inform the IWC's inter-relationship with the other components of the multilateral framework and therefore the precise degree of supplementation necessary from other treaty bodies to further advance the effective conservation, management and study of cetaceans in future years.

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