

# SMALL CETACEANS, INTERNATIONAL LAW AND THE INTERNATIONAL WHALING COMMISSION

ALEXANDER GILLESPIE\*

*[Small cetaceans (small whales) represent something of an anomaly in international law, as it is not clear which international or regional organisations have primary competence over their management. It is my contention that the International Whaling Commission has a broad authority in relation to small cetaceans and clear primacy over all competing organisations on this question. This primacy is given further credence when considering small cetaceans which are either migratory or endangered.]*

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\* LLB (Hons), LLM (Auckland), PhD (Nottingham); Senior Lecturer, The University of Waikato.

[I]t is essential to protect *all* species of whales from further overfishing.<sup>1</sup>

## I INTRODUCTION

Small cetaceans (small whales) are currently struggling for adequate protection in international law. This is despite being on the agenda of a number of international fora since the early 1970s. In 1992 the primacy of the International Whaling Commission ('IWC') with regard to cetaceans was clearly stated in the United Nations Environment Programme's *Agenda 21*.<sup>2</sup> However, in recent years a number of countries have argued that the IWC should not have jurisdiction over these creatures. The primary argument in support of this contention is that small cetaceans were not included in the original Nomenclature annexed to the *International Convention for the Regulation of Whaling* ('*ICRW*'),<sup>3</sup> the convention which established the IWC, and that to add them subsequently to the Nomenclature would require the consent of all the signatories to the *ICRW*.

I believe this view is mistaken for a number of reasons. The first reason relates to the actual language of the *ICRW* and the simplistic view that the nomenclature was somehow a pivotal dividing mechanism within it. Secondly, there is a general misunderstanding of the way in which treaties evolve and change, and the mechanisms that allow entrenched majorities to modify annexes within the broad framework of their original treaties (that is, it is *not* an amendment of the treaty).

Closely aligned to the argument that the IWC does not have competence over small cetaceans is the assertion that coastal states have near absolute competence. This contention is typically bolstered by the *United Nations Convention on the Law of the Sea* ('*UNCLOS*').<sup>4</sup> However, I contend that this view is also mistaken as *UNCLOS* does not accord coastal states complete sovereignty in their Exclusive Economic Zones ('EEZs'), rather it affords them limited sovereignty. It is limited in the sense that nations can waive their rights under *UNCLOS* and freely consent to the authority of overlapping international organisations such as the IWC. Under *UNCLOS*, even if a nation does not wish to join the IWC, it is still necessary to cooperate with the relevant overlapping international organisations when dealing with critically endangered species, migratory species or cetaceans in general.

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<sup>1</sup> *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72, sch I(1)(a), preamble (entered into force 10 November 1948) (emphasis added).

<sup>2</sup> United Nations Environment Programme, *Agenda 21* <<http://www.unep.org/Documents/Default.asp?DocumentID=52>> at 9 September 2001.

<sup>3</sup> *Ibid.*

<sup>4</sup> Opened for signature 10 December 1982, 1833 UNTS 3, 21 ILM 1261 (entered into force 16 November 1994).

## II DEFINING SMALL CETACEANS

Whales, dolphins, and porpoises are known collectively as whales — or to be more precise, as cetaceans. The word ‘cetacean’ is derived from both the Latin *cetus* (large sea animal) and the Greek *ketos* (sea monster). At least 79 species of cetaceans are currently recognised.<sup>5</sup> Broadly, the order cetacean can be subdivided into large and small. However, trying to define exactly which species are contained within each category is a difficult task, as there are no accepted definitions that encompass both biological and political viewpoints.

Small cetaceans are a focus of concern in a number of international conventions, although the reason they are listed is not usually because they are ‘small’. Rather, they are listed because they happen to possess certain characteristics that fall within various relevant categories: for example, they may migrate,<sup>6</sup> they may be endangered,<sup>7</sup> or they may inhabit a certain region.<sup>8</sup> However, such characteristics do not describe a small cetacean according to their physical characteristics.

The definition of a small cetacean is usually based on the false assumption that small cetaceans are limited in size. Dolphins (usually of the *Delphinidae* and *Ziphiidae* families) and porpoises (usually of the *Phocoenidae* family) are typically placed in this camp. However, this type of classification is simplistic and soon falls apart as consideration turns to the multitude of other species, which are clearly nowhere near the size of the larger whales, but which possess some of the characteristics of the smaller whales. That is, while it is true that some species of ‘small cetaceans’ are no more than 1.2–1.5 metres in length,<sup>9</sup> other ‘small’ cetaceans may reach close to 10 or 13 metres in length.<sup>10</sup> In itself, this creates problems as it is generally accepted that the IWC has the authority to regulate minke whales which are deemed ‘large’, but which are physically

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<sup>5</sup> Mark Carwardine, *Whales, Dolphins and Porpoises: The Visual Guide to All of the World's Cetaceans* (1995) 6, 10.

<sup>6</sup> They are often listed in the *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333, 19 ILM 15, art I (entered into force 1 November 1983) (‘*CMS Convention*’): ‘Migratory species means ... species [which] cross one or more jurisdictional boundaries.’ Hence, a number of small cetaceans are listed within the *CMS Convention* directly. *UNCLOS* also lists a number of migratory species, in which no distinction is made between large and small whales: *UNCLOS*, above n 4, annex 1.

<sup>7</sup> See, eg, *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243, 12 ILM 1085 (entered into force 1 July 1975) (‘*CITES Convention*’).

<sup>8</sup> See, eg, *Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area*, opened for signature 24 November 1996, 36 ILM 777 (entered into force 1 June 1997) (‘*ACCOBAMS*’) that covers all whales, including small cetaceans.

<sup>9</sup> These include the smallest cetaceans, such as the Hector’s dolphin found off New Zealand or the black dolphin found off Chile: Carwardine, above n 5, 31.

<sup>10</sup> These include the killer whale (at 5.5–9.8 metres) and Baird’s beaked whale (at 10.7–12.8 metres): Carwardine, above n 5, 34–5. In 1982 St Lucia argued that the Commission should regulate catches of Baird’s beaked whale ‘because the species is larger than the minke and killer whale whales [sic] already regulated’: IWC, *Thirty-Third Report of the International Whaling Commission* (1983) 28.

smaller (at 7–10 metres) than Baird’s beaked whales, which are deemed ‘small’.<sup>11</sup>

Due to such difficulties, marine biologists have sought more definitive biological yardsticks to establish the division between the various suborders of cetaceans — which typically correspond to the groupings of ‘large’ and ‘small’. The first suborder is the *Odontoceti*, which includes individuals that have teeth (generally of only one kind) and an asymmetrical skull. This suborder is comprised of the families *Iniidae*, *Lipotidae*, *Pontoporiidae*, *Platanistidae*, *Delphinidae*, *Phocoenidae*, *Monodontidae*, *Ziphiidae* and *Physeteridae*.<sup>12</sup> The second suborder is the *Mysticeti*, which have plates of baleen<sup>13</sup> instead of teeth, and a symmetrical skull. The families *Eschrichtidae*, *Balaenopteridae*, *Balaenidae* and *Neobalaenidae* are included in this grouping.<sup>14</sup>

The IWC did not originally base its work on such biological niceties. Indeed, the fact that there was no such dividing line between toothed and baleen whales in the original Nomenclature that was annexed to the *ICRW* has been found to be the source of much controversy.<sup>15</sup> In fact, the Nomenclature mixes toothed and baleen whales, as well as listing typically ‘small’ cetaceans such as the northern and southern bottlenose dolphins of the *Hyperoodon ampullatus* and *Hyperoodon planifrons* species.<sup>16</sup> However, the ‘Interpretation’ section of the Schedule to the *ICRW* (which is amended from time to time)<sup>17</sup> does work upon an assumption that baleen whales<sup>18</sup> and toothed whales<sup>19</sup> are different suborders.

Unfortunately, the debate over whether these categories translate into large and small cetaceans does not end there. The difficulty is that many of those species listed as having teeth are often very large in size and are typically thought of as ‘large cetaceans’. That is, species such as the sperm whale (and all genera within) possess teeth. Moreover, this species, which can mature to a length of 18 metres, has never been thought of as ‘small’ in any sense of the

<sup>11</sup> In 1986 the Netherlands, UK, India and Sweden utilised this argument in suggesting that the IWC does have competence over small cetaceans, such as Baird’s beaked whale ‘since ... it is a larger animal than the minke whale regulated by the IWC’: IWC, *Thirty-Sixth Report of the International Whaling Commission* (1986) 14.

<sup>12</sup> Carwardine, above n 5, 12.

<sup>13</sup> Baleen/Baleen Plates are ‘[c]omb-like plates hanging from the upper jaw of many large whales, used to strain small prey from sea water (also known as “whalebone”):’ ibid 250.

<sup>14</sup> See Ronald Nowak, *Walker’s Mammals of the World* (5<sup>th</sup> ed, 1991) vol II, 969–70. See also Leonard Harrison-Matthews, *The Natural History of the Whale* (1978) 23–48.

<sup>15</sup> *ICRW*, above n 1, sch I.

<sup>16</sup> *Final Act of the International Whaling Conference*, annex, reprinted in Patricia Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching* (1985) 701.

<sup>17</sup> *ICRW*, above n 1, sch I.

<sup>18</sup> ‘Baleen whale means any whale which has baleen or whale bone in the mouth, ie any whale other than a toothed whale’: ibid sch I(1)(A). See also Carwardine, above n 5, 250: Baleen whales are a ‘[s]ub-order of whales with baleen plates instead of teeth; scientific term Mysticeti, from the Greek *mystax*, meaning moustache, and *cetus*, meaning whale.’

<sup>19</sup> ‘Toothed whale means any whale which has teeth in the jaws’: *ICRW*, above n 1, sch I(1)(B).

word within the IWC.<sup>20</sup> With such considerations in mind, the *Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas* ('ASCOBANS') defines small cetaceans as: 'Any species, subspecies or population of toothed whales *Odontoceti*, except the Sperm whale *Physeter macrocephalus*.'<sup>21</sup>

In *ACCOBAMS* cetaceans are defined as animals, 'including individuals, of those species, subspecies or populations of *Odontoceti* or *Mysticeti*.'<sup>22</sup> In the 1998 *Agreement on the International Dolphin Conservation Program*, 'dolphin' was defined as meaning 'species of the family *Delphinidae* associated with the fishery for yellowfin tuna in the Agreement area.'<sup>23</sup> Elsewhere, although the word 'dolphin' appears in regional treaties, the word itself has remained undefined.<sup>24</sup>

Such types of definition have not appeared in the IWC, where, other than for administrative reasons,<sup>25</sup> the debate has moved away from biological distinctions towards political distinctions. The signatories have wrestled with jurisdictional questions as to whether the IWC has competence to manage stocks of small cetaceans. Within this broader debate, the answer to whether a species is 'small' or not, and the interlinking question of whether that grants the IWC jurisdiction over them, will often depend on which side of the jurisdictional debate the protagonist falls.<sup>26</sup>

### III THE SPECIES WITHOUT SUPERVISION

In the early 1970s, the Scientific Committee of the IWC began to examine the stocks of minke and other small whales which were essentially still

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<sup>20</sup> The sperm whale was included in the 'large baleen whale' category when fishing quotas were initially set for this species. It was given earlier attention than the physically smaller minke whale, and is recognised as a 'toothed whale': *ibid*.

<sup>21</sup> Opened for signature 17 March 1992, 1772 UNTS 217, art 1.2(a) (entered into force 29 March 1994).

<sup>22</sup> *ACCOBAMS*, above n 8, art 1(3)(a).

<sup>23</sup> *Agreement on the International Dolphin Conservation Program*, opened for signature 15 May 1998, (1998) 37 ILM 1246, art 1(2) (entered into force 15 February 1999).

<sup>24</sup> *Agreement for the Establishment of the Intergovernmental Organization for Marketing Information and Cooperation Services for Fishery Products in Africa*, opened for signature 13 December 1991, 1777 UNTS 401, art 2 (entered into force 23 December 1993) explicitly excludes marine mammals 'especially dolphins' (irrespective of whether they are endangered or not) from the provision of the services provided by the agreement.

<sup>25</sup> The 28<sup>th</sup> meeting of the IWC approved (for administrative reasons), a list of smaller cetaceans of the world: IWC, *Twenty-Eighth Report of the International Whaling Commission* (1978) 30.

<sup>26</sup> It has been suggested that within the IWC, the classification of whether a species is large or small turns on the debate of whether or not it has traditionally been exploited by the commercial whaling industry: see William Burns, 'The International Whaling Commission and the Regulation of the Consumptive and Non-Consumptive Uses of Small Cetaceans: The Critical Agenda for the 1990s' (1994) 13 *Wisconsin International Law Journal* 105, 106. See also James Scarff, 'The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment (Part One)' (1977) 6 *Ecology Law Quarterly* 323.

unexploited,<sup>27</sup> but which certain nations were beginning to exploit.<sup>28</sup> At this interim stage the Scientific Committee requested information on the ‘status and catches’ of small cetaceans by member countries. In addition, the Scientific Committee recommended that ‘[a] sub-committee on small cetaceans be set up to improve data collection on all world catches of these animals and to review species and stock identification and other problems.’<sup>29</sup>

The intention of the Scientific Committee was to keep watch over small cetaceans and provide an early warning system if required, thus avoiding the IWC’s earlier mistakes on larger species.<sup>30</sup> However, after reviewing the problem at hand, the Scientific Committee recommended that the IWC consider ‘initially the management of those small cetaceans which are taken in deliberate, direct fisheries.’<sup>31</sup> In its report, the Sub-Committee on Small Cetaceans (‘SCSC’) concluded that

there is an urgent need for an international body to effectively manage stocks of all cetaceans not covered by the present IWC Schedule. This body should concern itself with all types of exploitation of cetaceans, both incidental and deliberate. All nations involved in such exploitation of small as well as large cetaceans should be included in such a body ... The Sub-Committee therefore recommends that the present Convention for the regulation of whaling [that is, the *ICRW*] should be revised so that [it] covers all cetaceans and all forms of exploitation.<sup>32</sup>

In a resolution on small type coastal whaling the following year, it was noted that

the Commission is at the present time the sole international authority exclusively concerned with the regulation of major species of cetaceans [and] the Commission has under study proposals for the revision of the International Whaling Convention to include all species of Cetacea.<sup>33</sup>

Over the following years, the IWC urged that attention should remain focused on this issue.<sup>34</sup> However, direct involvement with the substance of the suggestion was avoided as a series of working groups examined the problem

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<sup>27</sup> International Commission on Whaling, *Twenty-Fourth Report of the International Whaling Commission* (1974) 29. Note that the International Commission on Whaling became the International Whaling Commission in 1978, and all subsequent references to the International Commission on Whaling or the IWC refer to the same body.

<sup>28</sup> International Commission on Whaling, *Twenty-Second Report of the Commission* (1972) 32, [15].

<sup>29</sup> International Commission on Whaling, *Twenty-Fourth Report of the International Whaling Commission* (1974) 33. Publication of the initial report required special funding from the United States and Norway: IWC, *Twenty-Sixth Report of the Commission* (1976) 28.

<sup>30</sup> International Commission on Whaling, *Twenty-Third Report of the Commission* (1973) 42, [20].

<sup>31</sup> IWC, *Twenty-Seventh Report of the Commission* (1977) 9.

<sup>32</sup> *Ibid* 480. See also *ibid* 49.

<sup>33</sup> IWC, ‘Reporting Requirements for Small Type Whaling’ in *Twenty-Eighth Report*, above n 25.

<sup>34</sup> *Ibid*.

both indirectly, as part of a complete reworking of the *ICRW*,<sup>35</sup> and directly, with the creation of working groups and steering committees to address the specific problem presented by small cetaceans. These groups repeatedly tried to ‘broaden the discussion’<sup>36</sup> and ‘go deeper into the problem of small cetaceans.’<sup>37</sup> In doing so, attempts were made to find common ground which did ‘not seek in any way to prejudice different members’ positions’.<sup>38</sup> Accordingly, non-controversial and cooperative solutions<sup>39</sup> to the problems surrounding small cetaceans meant that the signatories sought solutions whilst simultaneously ‘setting aside without precedent the different legal views over competence and sovereign rights.’<sup>40</sup>

Despite these attempts, controversy broke out periodically during the 1980s and more regularly during the 1990s. The controversies arose as the IWC did three things. Firstly, they invited governments with adversely impacted populations of small cetaceans ‘to seek advice from the IWC on ways in which those impacts may be assessed, and to this end to share catch statistics and data.’<sup>41</sup> Secondly, they urged

Parties to undertake relevant research and to continue to provide information on directed and incidental catches of small cetaceans to assist the Scientific Committee in assessing the status of, and threats to, small cetacean populations.<sup>42</sup>

Finally, when specific populations of small cetaceans were being pushed to the limits of sustainable catch levels, by both direct and indirect means, the IWC issued direct resolutions to specific governments, such as Chile and Argentina,<sup>43</sup> Japan,<sup>44</sup> Canada,<sup>45</sup> and Mexico,<sup>46</sup> to try to rectify the problems at hand. Other

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<sup>35</sup> Birnie, *International Regulation of Whaling*, above n 16, 494–6.

<sup>36</sup> IWC, *Forty-First Report of the International Whaling Commission* (1991) 16.

<sup>37</sup> IWC, *Forty-Second Report of the International Whaling Commission* (1992) 17.

<sup>38</sup> IWC, ‘Resolution on Small Cetaceans’, *Forty-First Report*, above n 36, 48: ‘[The IWC is] aware 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.’ See also IWC, *Forty-Third Report of the International Whaling Commission* (1993) 32, 36–7.

<sup>39</sup> IWC, ‘Resolution on Addressing Small Cetaceans in the IWC’ in *Forty-Fourth Report of the International Whaling Commission* (1994) 31–2. See also IWC, *Forty-Third Report of the International Whaling Commission* (1993) 36.

<sup>40</sup> IWC, *Forty-Third Report of the International Whaling Commission* (1993) 36.

<sup>41</sup> *Ibid* 51, [1]: ‘Resolution on Small Cetaceans’.

<sup>42</sup> IWC Resolution 1997–8, ‘Resolution on Small Cetaceans’ in *Forty-Eighth Report of the International Whaling Commission* (1998) 49.

<sup>43</sup> IWC, *Thirty-Fifth Report of the International Whaling Commission* (1985) 27. This resolution called on the governments of Chile and Argentina to ‘investigate the levels of direct takes’ and, due to the problem of Chilean black dolphins being used as bait in crab traps, to ‘initiate research to identify alternative sources of bait and provide information on such bait to fishermen.’

<sup>44</sup> IWC, ‘Resolution on the Directed Takes of Striped Dolphins in Drive Fisheries’ in *Forty-Third Report*, above n 40, 51–2. This resolution invited the Japanese Government to ‘consider the advice from the Scientific Committee on this species’ which suggested that this population was overexploited and ‘to take appropriate action as soon as possible that will allow recovery of the population.’ See also IWC Resolution 1999–9, ‘Resolution on Dall’s Porpoise’ in *Annual Report of the International Whaling Commission 1999* (1999) 55–6.

resolutions overlapping with the issue of the humane killing of small cetaceans were also issued.<sup>47</sup> This approach was reinforced in 1999 with the Resolution on Small Populations of Highly Endangered Whales.<sup>48</sup> This resolution welcomed the focus of the Scientific Committee upon the status and trends of small populations of highly endangered whales, and encouraged member and non-member governments to participate in this work. Moreover it called

upon all governments whose nationals have in recent years taken whales from any of these populations of highly endangered whales to refrain from authorising any further takes until the Scientific Committee concludes that adequate scientific advice is available to demonstrate that such takes will not cause a continued threat to the survival or recovery of these populations.<sup>49</sup>

The result of these resolutions was that the countries which had traditionally rejected the IWC's competence over small cetaceans reiterated their views with

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<sup>45</sup> IWC, 'Resolution in the Directed Takes of White Whales and Narwhals' in *Forty-Third Report*, above n 40, 52. This resolution, though it noted the differences of opinion on this issue, still requested the Canadian Government to cooperate with the IWC on this species, and to make sure that the take would be sustainable. A similar resolution directed at Canada from the 50<sup>th</sup> meeting 'expressed the Commission's concern that directed takes of white whales might not be sustainable, and invited all states having white whales in their waters to conduct further research on white whales' in accordance with 'a precautionary approach': IWC, 'Resolution on Directed Takes of White Whales' in *Annual Report of the International Whaling Commission 1998* (1998) 46. See also IWC Resolution 1999-7, 'Resolution on Small Populations of Highly Endangered Whales' in *Annual Report of the International Whaling Commission 1999* (1999) 55. Again, this resolution was specifically forwarded to Canada.

<sup>46</sup> IWC Resolution 1994-3, 'Resolution on Biosphere Reserve of the Upper Gulf of California and the Colorado River Delta' in *Forty-Fifth Report of the International Whaling Commission* (1995) 42. In fact, apart from noting the status of this species, the Resolution congratulated, commended and complimented Mexico on its decision to declare a 'Biosphere Reserve', and to take other steps to protect the vaquita. The commendation of Mexico was later repeated and was matched with congratulations to the People's Republic of China for their attempts to conserve the baiji: IWC Resolution 1996-4, 'Resolution on Small Cetaceans' in *Forty-Seventh Report of the International Whaling Commission* (1997) 49.

<sup>47</sup> In 1980 it was agreed that due to often inhumane practices, considerations of humane killing should be extended to small whales: '[E]very attempt should be made to investigate ways and means to shorten time-to-death of killing small whales such as minke whales': IWC, 'Recommendations Adopted by the International Whaling Commission at its 31<sup>st</sup> Annual Meeting Concerning the Humane Killing of Whales', *Thirtieth Report of the International Whaling Commission* (1980) 36. See also issues relating to the take of Dall's porpoise (which also had humane killing considerations): IWC, *Forty-First Report*, above n 36, 41-2. However, it was the killing of pilot whales which led to direct resolutions from the 43<sup>rd</sup> and 44<sup>th</sup> meetings: see IWC, 'Resolution on the Killing of Pilot Whales (*Globicephala melas*)' in *Forty-Third Report*, above n 40, 52; IWC, 'Resolution on Pilot Whales', *Forty-Fourth Report of the International Whaling Commission* (1994) 31. For further information on this hunt, see Environmental Investigation Agency, *Don't Buy the Faroese Pilot Whale Slaughter* (1994).

<sup>48</sup> IWC Resolution 1999-7, 'Resolution on Small Populations of Highly Endangered Whales' in *Annual Report of the International Whaling Commission 1999* (1999) 55.

<sup>49</sup> *Ibid.*

vigour.<sup>50</sup> As such, by the end of the 1990s the problem of the need for an effective international body to manage small cetaceans was as acute as it had been when the issue was first raised 25 years earlier. With this predicament, it is no surprise that the IWC has likewise continued to reiterate the pleas that it made at that time, articulating the ‘urgent need for further international cooperation to ensure the conservation of small cetaceans’.<sup>51</sup>

In essence, the question of the competency of the IWC to manage small cetaceans remains problematic. The are obvious uncertainties concerning the role of the Scientific Committee generally, and the IWC’s competence to manage small cetaceans specifically.

#### IV THE RESPONSIBILITIES OF THE SCIENTIFIC COMMITTEE

In the early 1970s the IWC decided it was necessary to monitor the catches of species of whales which had previously been largely unexploited.<sup>52</sup> To assist the achievement of this goal, member states were asked, for the first time, to provide information concerning their take (both deliberate and incidental) of small cetaceans.<sup>53</sup> The 1976 ‘Resolution on Reporting Requirements for Small Type Whaling’ noted 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 ... [T]he Commission has had brought to its attention the need for such an agency, and the need to commence the collection of such information on an urgent basis.<sup>54</sup>

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<sup>50</sup> According to Mexico, such resolutions ‘not only [exceed] the IWC mandate but especially [purport] to dictate behaviour to sovereign governments on these matters’: IWC, *Forty-Third Report*, above n 40, 37. In the following years, Mexico, Japan, Norway, Austria and Denmark all took exception to various resolutions on small cetaceans due to a belief that they did not reflect the cooperative approach of the past: IWC, *Annual Report of the International Whaling Commission 1998* (1998) 40–1, 49. See also IWC, *Annual Report 1999*, above n 48, 55.

<sup>51</sup> IWC, ‘Resolution on Small Cetaceans’ in *Forty-First Report*, above n 36, 48. The resolution from the 44<sup>th</sup> meeting noted ‘the need for international cooperation to address problems relating to small cetaceans and to facilitate the conservation and restoration of depleted or threatened stocks’: IWC, ‘Resolution on Addressing Small Cetaceans in the IWC’ in *Forty-Fourth Report of the International Whaling Commission* (1994) 31–2. The 45<sup>th</sup> meeting added the importance of ‘cooperation to conserve and restore threatened and depleted stocks’ of small cetaceans: IWC Resolution 1994–2, ‘Resolution on Small Cetaceans’ in *Forty-Fifth Report of the International Whaling Commission* (1995) 41. Finally, the 47<sup>th</sup> meeting largely repeated the call at the beginning of the decade for the ‘continuing urgent need for cooperation to conserve and restore depleted stocks of small cetaceans’: IWC Resolution 1996–4, ‘Resolution on Small Cetaceans’ in *Forty-Seventh Report of the International Whaling Commission* (1997) 49.

<sup>52</sup> International Commission on Whaling, *Twenty-Second Report*, above n 28. In this context, the term ‘unexploited’ means that these species of whales were not previously subject to IWC quotas. Further, if they were not also subject to other previous conservation measures that predated the *ICRW*, like the blue and right whales, then it was generally presupposed that they were not endangered, and therefore could be hunted.

<sup>53</sup> International Commission on Whaling, *Twenty-Third Report*, above n 30.

<sup>54</sup> IWC, ‘Reporting Requirements for Small Type Whaling’, *Twenty-Eighth*, above n 25.

To help collate and synthesise information with regard to species review, stock identification and other problems worldwide, the SCSC was established.<sup>55</sup> The SCSC later<sup>56</sup> (through the Scientific Committee) made recommendations for future action with regard to small cetaceans.<sup>57</sup> They recommended that member nations report information regarding the direct and indirect take of small cetaceans to the IWC.<sup>58</sup> By the mid-1970s, although the Scientific Committee was *not* in a position to classify stocks of small cetaceans in the same way as the classification of large whales, they were nevertheless determined not to repeat the mistakes which had plagued them with regard to larger whales. Accordingly, they began to 'provide an early warning system for signs of depletion' of small cetaceans.<sup>59</sup> Until the larger issue of the place of small cetaceans within the IWC regime was concluded, the IWC agreed (and reiterated throughout the 1980s<sup>60</sup> and 1990s<sup>61</sup>) that *all* cetaceans being taken for their own value are subject to consideration by the Scientific Committee.

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<sup>55</sup> International Commission on Whaling, *Twenty-Third Report*, above n 30, 26, [11]. For the proposal for the establishment of the SCSC, see International Commission on Whaling, *Twenty-Fourth Report of the International Whaling Commission* (1974) 33.

<sup>56</sup> Following the publication of their report on small cetaceans, the Scientific Committee recommended that the IWC should seek funds to have this report published: International Commission on Whaling, *Twenty-Sixth Report of the Commission* (1976) 28. This request was supported by the IWC. Norway, Canada and the US all made contributions to this report.

<sup>57</sup> IWC, *Twenty-Seventh Report*, above n 31, 12.

<sup>58</sup> IWC, 'Reporting Requirements for Small Type Whaling', *Twenty-Eighth Report*, above n 25.

<sup>59</sup> Birnie, *International Regulation of Whaling*, above n 16, 425.

<sup>60</sup> It was asked that 'member nations collect and submit full statistics on small cetacean catches as previously requested': IWC, *Thirty-Second Report of the International Whaling Commission* (1982) 27. At the 35<sup>th</sup> meeting, with regard to overall statistics related to direct catches, the Scientific Committee 'requested re-emphasis of the Commission's agreement in 1976 to collect and report' to it that statistics for small cetaceans directly taken as well as by live captures be included in Annual Progress Reports: IWC, *Thirty-Fifth Report*, above n 43.

<sup>61</sup> This work was commended by the IWC at the 42<sup>nd</sup> and 43<sup>rd</sup> meeting, who urged the Russian Government to continue to '[advise] on ways in which those threats [may] be eliminated or minimised': IWC Resolution 1994-2, 'Resolution on Small Cetaceans' in *Forty-Fifth Report of the International Whaling Commission* (1995) 41. See also IWC, 'Resolution on Small Cetaceans' in *Forty-Second Report*, above n 37, 48; IWC, 'Resolution on Small Cetaceans' in *Forty-Third Report*, above n 40, 51.

Despite the objections,<sup>62</sup> the IWC stipulated that the Scientific Committee should ‘provide such scientific advice as may be warranted to Contracting Governments, coastal states and other interested governments and inter-governmental organisations as appropriate.’<sup>63</sup> This aim was reiterated in the 1990s, with it being affirmed that the SCSC should direct its attention to the ‘severe reduction of certain stocks of small cetaceans through directed exploitation and incidental catches in fishing operations.’<sup>64</sup> In the pursuit of this objective, the Scientific Committee instigated a series of regional and global reviews<sup>65</sup> by which they could begin to ascertain which species of small cetaceans were severely threatened.<sup>66</sup>

## V THE IWC’S COMPETENCY TO MANAGE SMALL CETACEANS

Although member states were initially uncertain of the status of small cetaceans with regard to IWC management,<sup>67</sup> by the 32<sup>nd</sup> meeting the lines of

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<sup>62</sup> As the Scientific Committee attempted to carry out its mandate, the issue of jurisdiction arose with regard to its advice. As such, countries like Mexico, whilst recognising the general scientific value of the information requested by the Scientific Committee, expressed reservations about making this advice available to the Commission on species which were not listed in the *ICRW*: IWC, *Thirty-Fifth Report*, above n 43, 19. Likewise, it was argued that ‘no Schedule amendments [should] be made upon the recommendation of the Scientific Committee’ and that the Scientific Committee should not adopt recommendations or decisions on management issues: IWC, *Thirty-First Report of the International Whaling Commission* (1981) 24; IWC, *Forty-Seventh Report of the International Whaling Commission* (1997) 22–3. Conversely, Japan has broadly accepted the role and value of the Scientific Committee with regard to the examination of issues relating to small cetaceans: See IWC/46/SM1, ‘Japan’s View on Addressing Small Cetaceans within the IWC’ (Paper presented at the 45<sup>th</sup> meeting of the IWC, Puerto Vallarta, May 1994) [a], [c].

<sup>63</sup> IWC, ‘Resolution Concerning Extension of the Commission’s Responsibility for Small Cetaceans’ in *Thirty-First Report of the International Whaling Commission* (1981) 31. This point followed the Canadian recommendation that ‘a working process [be adopted] whereby the Scientific Committee would consider all cetaceans and be able to make scientific advice available to Contracting Parties, coastal states and other interested Governments and [inter-governmental] organisations’: at 24.

<sup>64</sup> IWC, ‘Resolution on Small Cetaceans’ in *Forty-First Report*, above n 36, 48: This resolution requested that the Scientific Committee

commence a process of drawing together all available relevant information on the present status of the stocks of small cetaceans which are subjected to significant directed and incidental takes, on the impact of those takes on those stocks, and providing an assessment of the present threats to the stocks concerned.

See also IWC, *Forty-Second Report*, above n 37, 35–6.

<sup>65</sup> These included studies of Latin America, Africa, the Indian Ocean and the Red Sea, with special reference to the Middle East: see IWC, *Forty-Fourth Report of the International Whaling Commission* (1994) 25; IWC, *Annual Report of the International Whaling Commission 1998* (1998) 33–4.

<sup>66</sup> For the SCSC, the priority areas were endangered species, species under direct or indirect threat, and global and regional reviews: IWC, *Forty-Fifth Report of the International Whaling Commission* (1995) 20. See also IWC Resolution 1999–7, ‘Resolution on Small Populations of Highly Endangered Whales’ in *Annual Report 1999*, above n 48, 55.

<sup>67</sup> A number of ‘delegations were unsure of their position on this matter, but it was thought important that the recommendations on the small cetaceans should not be ignored’: IWC, *Thirtieth Report of the International Whaling Commission* (1980) 30. This uncertainty continued for a few countries such as Norway, which initially reserved its position in this

debate were clearly established, having been triggered by attempts to list some small cetaceans as protected species.<sup>68</sup> The essence of the debate, as it unfolded at the 32<sup>nd</sup> meeting was in three parts and has remained largely the same ever since.<sup>69</sup> The issues are whether the *ICRW* confers competence upon the IWC to manage small cetaceans, the possible conflict with coastal states' rights and the role of regional organisations in small cetacean management.

#### A *Interpreting the Language of the ICRW and Related Documents*

The answer to the question of whether the IWC is the competent body to manage small cetaceans is, in part, found within the *ICRW* and its associated documents: the Schedule and the Nomenclature.<sup>70</sup> The specific issue is whether the text of these documents grants the IWC management rights over small cetaceans as well as large ones. The tool by which this can be examined is the *Vienna Convention on the Law of Treaties* ('*VCLT*')<sup>71</sup> which gives specific rules for treaty interpretation:

- 1 A Treaty shall be interpreted in good faith in accordance with *the ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose.
- 2 The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including *its preamble and annexes*:
  - (a) any agreement relating to the treaty which *was made between all the parties* in connection with the conclusion of the treaty.
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and *accepted* by the other parties as an instrument related to the treaty.
- 3 There shall also be taken into account, together with the context:
  - (a) any *subsequent agreement between the parties* regarding the interpretation of the treaty or the application of its provisions;
  - (b) any *subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation.<sup>72</sup>

#### 1 *The Language of the Convention*

The primary rule applying to the interpretation of international documents is that 'the ordinary meaning' shall be 'given to the terms of the treaty.' In

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debate: IWC, *Thirty-Second Report of the International Whaling Commission* (1982) 27. However, other states were clear in their belief that small cetaceans were not within the jurisdiction or competence of the IWC, including Argentina, Brazil, Chile, Denmark, France, Japan, Mexico, Peru and the USSR: IWC, *Thirty-Fourth Report of the International Whaling Commission* (1984) 24.

<sup>68</sup> See IWC, *Thirty-First Report*, above n 63, 23–4; IWC, *Thirty-Fourth Report of the International Whaling Commission* (1981) 16.

<sup>69</sup> IWC, *Thirty-First Report*, above n 63, 24.

<sup>70</sup> *ICRW*, above n 1, sch I.

<sup>71</sup> Opened for signature 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980).

<sup>72</sup> *Ibid* art 31 (emphases added).

scientific terms, ‘whales’ covers both large and small cetaceans. In this regard, no distinction between the two suborders of the genus ‘whale’ can be made.

This failure to make a distinction between the suborders is also furthered in the language of the *ICRW*, which talks of whales generally.<sup>73</sup> The objectives of the *ICRW* include ‘the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the *whale stocks*.’<sup>74</sup> In addition, article V explains that

[t]he Commission may amend from time to time the provisions of the Schedule by adopting regulations with respect to the conservation and utilisation of *whale resources*, fixing protected and unprotected *species*.<sup>75</sup>

Article VI adds: ‘The Commission may ... make recommendations ... on any matters *which relate to whales or whaling* and to the objectives and purposes of this Convention.’<sup>76</sup> The exception to such generic language continues in the preamble, which stipulates that ‘it is essential to protect *all* species of whales from further overfishing.’<sup>77</sup> Clearly, the word ‘all’ would give weight to the argument that the use of the generic term ‘whale’ in the *ICRW* was designed to cover *all* cetaceans, both large and small.

The ‘ordinary’ reading of such language has led several countries, including Switzerland, to suggest that

no distinction has been made between large and small whales. The ordinary meaning of the term ‘whale’ is therefore legally extended to any kind of whale without any restriction due to size or classification in the whale family.<sup>78</sup>

This approach is in accordance with the view that the focus of the *ICRW* is to afford protection to whale stocks generally.<sup>79</sup> Indeed, the *ICRW* does not deal with individual species. Rather, the question of the management of individual species is dealt with in the Schedule, which is amendable at each IWC meeting.<sup>80</sup>

The contention that the *ICRW* was designed to accommodate small as well as large cetaceans is supported by the original 1931 *Convention for the Regulation*

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<sup>73</sup> IWC, *Thirty-First Report*, above n 63: ‘[T]he Convention itself does not define the species covered by the term whale and Contracting governments are not of one view on such a definition as regards the Convention.’

<sup>74</sup> *ICRW*, above n 1, preamble (emphasis added).

<sup>75</sup> Emphasis added.

<sup>76</sup> Emphasis added.

<sup>77</sup> Emphasis added. Note, however, that the ‘history of whaling’, as noted in the preamble, was about the hunting of large cetaceans: see William Burke, *The New International Law of Fisheries* (1994) 293.

<sup>78</sup> Antoine Goetschel, ‘A Legal Analysis of IWC Competence to Manage Small Cetaceans’ (Paper presented by Switzerland at the 51<sup>st</sup> meeting of the IWC, Grenada, May 1999) [7]. The comments were later reported in IWC, *Annual Report 1999*, above n 48, 42.

<sup>79</sup> James Cameron, ‘Legal Opinion’ in Duncan Currey et al (eds), *The Global War Against Small Cetaceans* (2<sup>nd</sup> ed, 1991) 6–7.

<sup>80</sup> This argument was suggested by New Zealand: see IWC, *Forty-First Report*, above n 36.

of Whaling.<sup>81</sup> This document took a different approach to the *ICRW* in that it stipulated: ‘the present Convention applies only to baleens or whalebone whales.’<sup>82</sup> Likewise, the 1937 *International Agreement for the Regulation of Whaling*<sup>83</sup> was directly linked to baleen whales, which were clearly defined as ‘any whale other than a toothed whale.’<sup>84</sup> As such, the 1931 and 1937 conventions were clearly limited to large whales. Conversely, while the 1946 *ICRW* took a somewhat generic approach with its textual language (apart from the phrase ‘all whales’), it adopted a different approach with its annexed Nomenclature, which included *Hyperoodon ampullatus* and *Hyperoodon planifrons* (the northern and southern bottlenose). Both of these species are beaked whales and have teeth,<sup>85</sup> thus they may be classified as small cetaceans. Hence, the *ICRW* was clearly intended to be different to its predecessors because it did not limit its coverage to baleen or whalebone whales.

## 2 The Schedule and Subsequent Practice

When interpreting a treaty it is permissible to examine the ‘annexes’ of the treaty. However, the *ICRW* does not have an ‘annex’ (by label). Rather, it has a ‘schedule’ — which for all effective purposes relates to the idea and purposes of annexes. The difference between the two terms is that the term ‘annex’ means to tie or bind to, and in essence ‘expresses the idea of joining a smaller or subordinate thing with another, larger, or of higher importance.’<sup>86</sup> The Schedule is annexed to the principal instrument and ‘exhibits in detail the matters mentioned or referred to in the principal document.’<sup>87</sup> In legal terms, it often comes in the form of an appendix ‘arranged under headings prescribed by official authority.’<sup>88</sup>

Such an approach, where the text of the treaty and the annex/schedule are closely linked, was clearly recognised in the *ICRW*. Article I of the *ICRW* explains:

This Convention includes the Schedule attached thereto which forms *an integral part* thereof. All references to ‘Convention’ shall be understood as including the said Schedule either in its present form or as amended in accordance with the Provisions of Article V.<sup>89</sup>

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<sup>81</sup> Opened for signature 24 September 1931, 155 LNTS 349 (entered into force 16 January 1935).

<sup>82</sup> *Ibid* art 2. ‘Whalebone’ is another word for baleen plates — hence this refers to baleen whales, or ‘large cetaceans’.

<sup>83</sup> Opened for signature 8 June 1937, 190 LNTS 79, art 9 (entered into force 1 July 1937).

<sup>84</sup> *Ibid* art 18.

<sup>85</sup> This point was raised by Switzerland in 1999: ‘The mentioned species are of the toothed small cetacean family’: Goetschel, above n 78, [3].

<sup>86</sup> Joseph Nolan et al, *Black’s Law Dictionary* (6<sup>th</sup> ed, 1990).

<sup>87</sup> *Ibid*.

<sup>88</sup> Lesley Brown (ed), *The New Shorter Oxford English Dictionary on Historical Principles* (1993) vol 2, 2710.

<sup>89</sup> Emphasis added.

The Rules of Procedure for the *ICRW* explain that ‘a three-fourths majority of those casting an affirmative or negative vote shall be required for action in pursuance of Article V of the Convention.’<sup>90</sup>

This approach by the *ICRW* accords with many international documents dealing with environmental problems, whereby the annex forms an ‘integral’ part of the convention. This practice can be seen in areas as diverse as wildlife treaties,<sup>91</sup> conventions dealing with complete conservation areas,<sup>92</sup> and international and regional fisheries treaties,<sup>93</sup> through to treaties dealing with such diverse topics as the trade in toxic waste,<sup>94</sup> dumping of waste at sea,<sup>95</sup> ozone depletion<sup>96</sup> or climate change.<sup>97</sup>

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<sup>90</sup> IWC, ‘Rules of Procedure and Financial Regulations’, *Annual Report of the International Whaling Commission 1998* (1998) 85, r E(3).

<sup>91</sup> The *Convention Relative to the Preservation of Fauna and Flora in their Natural State*, opened for signature 8 November 1933, 172 LNTS 241, annex (entered into force 14 January 1936) listed species needing immediate protection due to ‘special urgency and importance.’ The *African Convention on the Conservation of Nature and Natural Resources*, opened for signature 15 September 1968, 1001 UNTS 3, art VIII (entered into force 16 June 1969) created a series of annexes with lists of protected species. The *Convention for the Conservation of Antarctic Seals*, opened for signature 1 June 1972, 1080 UNTS 175, 11 ILM 251, art 3 (entered into force 11 March 1978) contains annexes on all matters relating to the take of seals around the Antarctic. The *CITES Convention*, above n 7, art II, and the *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333, 19 ILM 15, art II (entered into force 1 November 1983) have annexes of ‘protected species’, as does the *Convention on the Conservation of European Wildlife and Natural Habitats*, opened for signature 19 September 1979, 1284 UNTS 209, art 4 (entered into force 1 June 1982).

<sup>92</sup> The *Convention of Wetlands of International Importance, Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245, 11 ILM 963, art 2 (entered into force 21 December 1975) created an annexed ‘list’ of wetlands. The *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 1 June 1972, 1037 UNTS 151, 11 ILM 1358, art 11 (entered into force 17 December 1975) contains a ‘list’ of property forming part of the cultural and natural heritage.

<sup>93</sup> Annexes are also an ‘integral part’ of the *Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 34 ILM 1542, art 48.1 (not yet in force) (*Agreement on Straddling and Highly Migratory Fish Stocks*); *International Convention for the High Seas Fisheries of the North Pacific Ocean*, opened for signature 9 May 1952, 205 UNTS 65, art V.1 (no longer in force); *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, opened for signature 28 October 1978, 1135 UNTS 369, art XX (entered into force 1 January 1979).

<sup>94</sup> *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, opened for signature 22 March 1989, 1673 UNTS 57, 28 ILM 657, art 18 (entered into force 5 May 1992) (*Basel Convention*) contains annexes which ‘form an integral part of this Convention.’

<sup>95</sup> *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, opened for signature 7 November 1996, 36 ILM 1, art 20 (not yet in force).

<sup>96</sup> *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 293, 26 ILM 1529, art 10.1 (entered into force 22 September 1988) created a system of annexes which were deemed ‘an integral part of this convention.’

The similarity between schedules and annexes extends to the fact that they both do the same thing; they contain the subject areas that the signatories have to focus upon. These may be anything from the specific endangered species to the gases that need to be restricted to prevent ozone layer deterioration. The essence of such lists is that they evolve to meet the needs of the signatories as time progresses. Thus all of the above examples of conventions with annexes allow amendments to the annex by the signatories provided that a majority of the signatories approve (typically three-quarters).<sup>98</sup> This practice is exactly the same

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<sup>97</sup> In the *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107, 31 ILM 849, art 16.1 (entered into force 21 March 1994), the annexes to the Convention were deemed 'an integral part thereof.' In the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 37 ILM 22, art 21 (not yet in force) ('*Kyoto Protocol*') the annexes were again deemed 'an integral part' of the Protocol.

<sup>98</sup> Eg, the *African Convention on the Conservation of Nature and Natural Resources*, above n 91, art VIII(2) provides that 'additional species shall be placed in [the annexes] by the state concerned.' This convention also allows for amendment of the annexes (art XVI(3)) and revision of the Convention by 'Meetings of the Parties' (art XXIV). The *Convention for the Conservation of Antarctic Seals*, opened for signature 1 June 1972, 1080 UNTS 175, 11 ILM 251, art 9 (entered into force 11 March 1978) contains annexes which may be amended by 'any contracting party' and a two-thirds majority of signatories who agree with it. It is, of course, not binding on those who object: art 9(4). *CITES Convention*, above n 7, art XV allows for amendments to its appendices, if these are accepted by a two-thirds majority. The *CMS Convention*, above n 6, art XI also allows for amendments to its appendices if these are accepted by a two-thirds majority. The *Convention on the Conservation of European Wildlife and Natural Habitats*, above n 91, art 14(1), 'keep[s] under review the provisions of the Convention, including its Appendices, and examine[s] any modifications necessary.' Modifications are achieved by a three-quarters majority: see art 16. The *Convention of Wetland of International Importance, Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245, 11 ILM 963, art 2 (entered into force 21 December 1975) created an annexed 'list' of wetlands. The parties who possess the wetlands in their sovereign territory may amend, delete or add to this list as they please: art 5. In a similar vein, the *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 1 June 1972, 1037 UNTS 151, 11 ILM 1358, art 11 (entered into force 17 December 1975) contains a list of 'world heritage', which is submitted by sovereign governments (to see if it qualifies for World Heritage Status). With the *Agreement on Straddling and Highly Migratory Fish Stocks*, above n 94, art 48(2) (not yet in force), 'the Annexes form an integral part of [the] Agreement.' The annexes 'may be revised from time to time by State Parties' by either consensus or majority: art 45(2). The *International Convention for the Conservation of Atlantic Tunas*, opened for signature 14 May 1966, 673 UNTS 63, art XIII (entered into force 21 March 1969) can be amended by three-quarters majority. *UNCLOS*, above n 4, art 312(2) allows amendment of its annexes by either consensus or majority. The *International Convention for the High Seas Fisheries of the North Pacific Ocean*, opened for signature 9 May 1952, 205 UNTS 65, art VII (no longer in force) contains a series of annexes, which the International North Pacific Fisheries Commission has the power to alter. Note the importance of consent in order to be bound by such alterations. Likewise, the *North-East Atlantic Fisheries Convention*, opened for signature 24 January 1959, 486 UNTS 157, art 5(4) (no longer in force) contained annexes which set out fishing boundaries which may 'be subject to alterations.' Note, however, the importance of consensus for the alteration of boundaries in this convention. The *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, opened for signature 28 October 1978, 1135 UNTS 369, art XX(2) (entered into force 1 January 1979) contained annexes that may be altered 'by a two-thirds majority vote of all Contracting Parties.' The *International Tropical Timber Agreement*, opened for signature 18 November 1983, 1393 UNTS 119, art 38 (provisionally entered into force 1 April 1985) could originally only be amended if an 85% majority was achieved. The *International Tropical*

as the *ICRW*. Moreover this approach is well established through the axiomatic principle of international law that countries have the right to object (and not be bound) by majority decisions. This right is also commonly acknowledged in the treaties themselves and is recognised in article V(3) of the *ICRW*.

Once it is recognised that the schedule/annex of an international agreement is typically what the signatories negotiate and vote upon, it then becomes possible to examine some of the other rules of interpreting international documents. These are typically based on the ideal of subsequent practice (or subsequent agreement) between the parties regarding the interpretation of the treaty or the application of its provisions.<sup>99</sup>

In terms of subsequent practice, the question that needs to be and was asked<sup>100</sup> is whether the IWC did anything subsequent to its formation to suggest that it has competence over small cetaceans? The place to look for evidence is in the Schedule, which shows direct evidence that the *ICRW* has extended its jurisdiction to cover species which were not considered to be within its original purview. This is evidenced by the Nomenclature to the agreement, which listed the multiple names of a number of whales for which the IWC regularly set quotas.

An important species missing from this original list, which nevertheless falls within the 'large' whale category, is the minke whale (contained in the general family of rorqual whales). Despite the fact that the minke is now the smallest and most abundant of all rorqual whales, it was *not* listed in the original Nomenclature. Despite this exclusion, by the third meeting of the IWC catches

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*Timber Agreement*, opened for signature 1 April 1994, 33 ILM 1014, art 42 (entered into force 1 January 1997) changed this to a two-thirds majority. The *Basel Convention*, above n 94, contains annexes that can be amended as needed by a three-quarters majority: art 17(3). The *Vienna Convention for the Protection of the Ozone Layer*, above n 96, arts 6(e)-(g), 10 created a system which could be amended as needed, by a three-quarters majority: art 9(3). The annexes of the *United Nations Framework Convention on Climate Change*, above n 97, art 15(3) can be amended by a three-quarters majority, as can those of *Kyoto Protocol*, above n 97. Of course, these are non-binding on those who disagree: art 20(5). The *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, above n 95, arts 21, 22 can be amended by a two-thirds majority. Amendments of annexes and appendices to the *Convention for the Protection of the Marine Environment of the North-East Atlantic*, opened for signature 22 September 1992, 32 ILM 1069, (entered into force 25 March 1998), require a three-quarters majority. Amendments to the *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, opened for signature 10 September 1998, 38 ILM 1, arts 21(3), 22(3)(a) (not yet in force) also require a three-quarters majority. Note, however, that amendments to annex III (the list of chemicals needing prior informed consent) require consensus: art 22(5)(b). To amend the *Agreement for the Establishment of a General Fisheries Council for the Mediterranean*, opened for signature 24 September 1949, 126 UNTS 237, art VII (entered into force 20 February 1952) a two-thirds majority is required. Finally, *ACCOBAMS*, above n 8, art X, annex, can be amended by a two-thirds majority.

<sup>99</sup> See *VCLT*, above n 71, art 31(3)(b).

<sup>100</sup> The articulation of the argument that competence can be obtained by subsequent practice appeared at the 34<sup>th</sup> meeting. The broader question of competency with regard to small cetaceans in general was deemed to be outside the Steering Committee's mandate: IWC, *Thirty-Fourth Report of the International Whaling Commission* (1984) 16.

of minke (with no minimum size restrictions) were being authorised.<sup>101</sup> Moreover this interest in taking minkes increased rapidly after the 1970s, as restrictions on the takings of other whales (from stocks which were clearly plummeting) took effect.<sup>102</sup>

A similar subsequent practice, but with regards to small cetaceans, is evinced in both the general interpretation section of the Schedule for baleen and toothed whales,<sup>103</sup> and in its general section (which defines ‘small type whaling’). Small type coastal whaling, which the IWC collects information on, but does not regulate, is defined as a ‘catching operation’ which focuses upon ‘minke, bottlenose, beaked, pilot or killer whales.’<sup>104</sup> The evidence of subsequent practice, which incorporated some small cetaceans, can be found in the fact that the killer whale was not included in the original chart of nomenclature. It was subsequently defined in schedule I at the IWC’s 29<sup>th</sup> meeting in 1977.<sup>105</sup> It was not until the 32<sup>nd</sup> meeting in 1980 that the killer whale was added to the list of species included in a provision to the moratorium.

Likewise, the Baird’s beaked whale was not listed in the original Nomenclature.<sup>106</sup> However, it was later included in the definition of ‘bottlenose whale’ in schedule I.<sup>107</sup> This inclusion took place at the IWC’s 29<sup>th</sup> meeting in 1977 and was not objected to by any government. There is also a heading ‘bottlenose’ in table 3 of s III of the Schedule, which deals with their capture. For many countries, such subsequent practices suggest that ‘the application of small cetaceans to the IWC has been concordant, common and consistent through the years.’<sup>108</sup> To many this practice by the IWC ‘shows a willingness to exercise its competence to conserve small cetaceans.’<sup>109</sup>

However, not all countries are willing to accept this view, especially with regard to the extension of competence to cover small cetaceans. That is, although the inclusion of the minke has not been challenged,, the latter examples of small cetaceans have been. Accordingly, it has been suggested that

the inclusion of Baird’s beaked whale in the definition of bottlenose whale in section I does not confer upon the Commission the competence to classify and set catch limits for it ... [S]uch action would be outside the scope of the Convention.<sup>110</sup>

Moreover with regard to the killer whale example:

<sup>101</sup> International Commission on Whaling, *Third Report of the Commission* (1952) 6, 16.

<sup>102</sup> For a discussion of the beginning of this interest in the 1970s, see International Commission on Whaling, *Twenty-Third Report of the Commission*, above n 30, 9–10.

<sup>103</sup> *ICRW*, above n 1, sch I(A), (B).

<sup>104</sup> *Ibid* sch I(C).

<sup>105</sup> See IWC, *Twenty-Eighth Report*, above n 25, 22.

<sup>106</sup> For the origins of this debate in the IWC, see IWC, *Thirty-Third Report of the International Whaling Commission* (1983) 28.

<sup>107</sup> *ICRW*, above n 1, sch I.

<sup>108</sup> Goetschel, above n 78, [8].

<sup>109</sup> Cameron, above n 79, 6–7.

<sup>110</sup> IWC/35/15, ‘Report of the Steering Committee on Regulation of Baird’s Beaked Whale’ (Paper presented at the 35<sup>th</sup> meeting of the IWC, Brighton, July 1983) [7.1.1].

the inclusion of killer whales in the factory ship moratorium was a special measure taken in response to a particular situation ... [K]iller whales in other situations [are] not regulated by the Commission.<sup>111</sup>

### 3 *Nomenclature*

At the core of the aforementioned objections is the fact that the two small cetaceans now listed in the Schedule were not listed on the original Nomenclature which was annexed to the *ICRW*.

The word '*nomen*' is Latin and in the civil law it was recognised, when referring to a particular group, as meaning 'the name showing to what gens or tribe ... they belonged ... as distinguished from ... [an] individual name.'<sup>112</sup> Thus the *nomen* became recognised as 'the name or style of a class or genus of persons or objects.'<sup>113</sup> Working from this base definition, a 'nomenclature' is

[a] set of names used, or intended to be used, to designate things, classes, places etc; a system of technical terms used in a science or other discipline ... Zoological nomenclature is the application of distinctive names to each of the groups recognized in the ... classification.<sup>114</sup>

Attempts have been made to standardise nomenclature within the disciplines of biology, ecology, botany and zoology since the end of the 19<sup>th</sup> century. To this end, international codes have been devised and continually updated as new editions are necessitated by new discoveries and refinements pertaining to the knowledge of species.<sup>115</sup>

The idea that the Nomenclature changes, and can accordingly only ever be a guide to the interpretation of the vernacular names of cetaceans (and hence, is not a tool which can circumscribe the ultimate purview of regimes), is well recognised in other wildlife treaties. Accordingly, *ACCOBAMS* clearly explains that the annex listing the cetaceans covered is only 'indicative' of species names and classifications.<sup>116</sup> Likewise, in the 1996 *Inter-American Convention for the Protection and Conservation of Sea Turtles*, the list of sea turtles that the Convention covers are listed in annex I,<sup>117</sup> but it is specifically noted that '[d]ue to the wide variety of common names, even within the same State, this list should not be considered exhaustive.'<sup>118</sup>

<sup>111</sup> Ibid [7.1.3].

<sup>112</sup> *Black's Law Dictionary*, above n 86.

<sup>113</sup> Ibid.

<sup>114</sup> Brown, above n 88, 1932.

<sup>115</sup> *The International Code of Zoological Nomenclature: Adopted by the International Union of Biological Sciences* (4<sup>th</sup> ed, 1999) has one fundamental aim, which is to provide the maximum universality and continuity in the scientific names of animals compatible with the freedom of scientists to classify all animals according to taxonomic judgment. The code is available from the International Commission on Zoological Nomenclature.

<sup>116</sup> *ACCOBAMS*, above n 8, annex 1.

<sup>117</sup> *Inter-American Convention for the Protection and Conservation of Sea Turtles*, opened for signature 1 December 1996, annex I (not yet in force) <<http://www.seaturtle.org/iac/convention.shtml>>.

<sup>118</sup> Ibid.

The 'nomenclature' guide is continually evolving. For example, in 1999 the Convention on Migratory Species ('CMS') passed a recommendation on standardised nomenclature for the *CMS Convention Appendices*.<sup>119</sup> This noted that 'biological nomenclature is dynamic',<sup>120</sup> and that 'the taxonomy used in the Appendices to the Convention will be most useful to the Parties if standardised by nomenclatural references'.<sup>121</sup> The CMS then recommended that a series of standard references 'be recognised and used as the bases on which the *CMS Convention Appendices* and amendments thereto, are prepared.'<sup>122</sup>

Likewise, following problems with the identification of species through nomenclature at CITES,<sup>123</sup> at the 10<sup>th</sup> Conference of Parties of CITES it was similarly noted that 'biological nomenclature is dynamic'.<sup>124</sup> Moreover within the realm of CITES, 'the names of the genera and species of several families are in need of standardization.'<sup>125</sup> Without such a process, and due to discrepancies between the parties with regard to nomenclature, 'the effectiveness' of the *CITES Convention* may have been damaged as the signatories would otherwise be hemmed in by dated scientific opinion.<sup>126</sup> Soon after, at the 11<sup>th</sup> Conference of Parties in 2000, the Nomenclature Committee was (re)established as the driving force to achieve a 'standardised nomenclature'.<sup>127</sup> Part of this may involve reviewing some of the species which are already listed, or about to be listed on, the *CITES Convention Appendices* to ensure consistency with 'the correct use of zoological and botanical nomenclature.'<sup>128</sup> Despite these clear

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<sup>119</sup> CMS, Recommendation 6.1, 'Standardised Nomenclature for the CMS Appendices' in *Proceedings of the Sixth Conference of the Parties* (1999) vol 1, 75. Note that the 'CMS' as an organisation should be distinguished from the *CMS Convention*. The 'CMS' is administered by the CMS Secretariat, whose responsibilities include overseeing the development of the Convention in accordance with the resolutions of its member states, collectively known as the Conference of Parties ('COP'). See United Nations Environment Programme, 'Introduction to the Convention on Migratory Species' <<http://www.wcmc.org.uk/cms/>> at 21 September 2001: 'A Secretariat under the auspices of the United Nations Environment Programme ('UNEP') provides administrative support to the Convention. The decision-making organ of the Convention is the Conference of the Parties'.

<sup>120</sup> CMS, Recommendation 6.1, above n 119.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid: '[T]he working group had been guided by the desire to keep to a minimum the number of consequential changes that would be required and the need for consistency with nomenclature of other organisations, in particular, CITES': at 114.

<sup>123</sup> See Cyrille de Klemm, *Guidelines for Legislation to Implement CITES* (1993) 14–5. Note the distinction between 'CITES' the international organisation, and the *CITES Convention*, above n 7.

<sup>124</sup> CITES, 'Standard Nomenclature' (11<sup>th</sup> Conference of Parties) Doc 11.22 <[http://www.cites.org/eng/resols/11/11\\_22.shtml](http://www.cites.org/eng/resols/11/11_22.shtml)> at 21 September 2001.

<sup>125</sup> Ibid.

<sup>126</sup> CITES, 'How to Improve the Effectiveness of the Convention' (10<sup>th</sup> Conference of Parties) Doc 10.22.

<sup>127</sup> CITES, 'Standard Nomenclature', above n 124.

<sup>128</sup> CITES, 'Establishment of Committees: Establishment of the Nomenclature Committee of the Conference of Parties' (11<sup>th</sup> Conference of Parties) Doc 11.1, annex 3 <[http://www.cites.org/eng/resols/11/11\\_1.shtml](http://www.cites.org/eng/resols/11/11_1.shtml)> at 21 September 2001. See also CITES, 'Report of the Nomenclature Committee' (11<sup>th</sup> Conference of Parties) Doc 11.11.4.1.

indications, the idea that nomenclature is something which evolves and cannot (and should not) be held back by earlier (and often scientifically flawed) assumptions, is not well received within the IWC.

The history of the Nomenclature of the *ICRW* can be found in article IV of the *Final Act of International Agreements for the Regulation of Whales*<sup>129</sup> from the 1946 International Whaling Conference. This article recommended '[t]hat the chart of Nomenclature of whales annexed to this Final Act be accepted as a guide by the Governments represented at the conference.'<sup>130</sup> The 'Nomenclature of Whales', which was then admitted as an annex, listed the scientific names for 17 different species of whales.

The Japanese Government has suggested that if a whale species was not on this original list, the ICW cannot claim jurisdiction over it unless all of the members agree. According to the wording of the *VCLT*, the justification for this assertion is that the Nomenclature was an '*agreement* relating to the treaty which was made between all the parties in connection with the conclusion of the treaty.'<sup>131</sup> Accordingly, any attempt by the IWC to exercise management over stocks that were not listed in the original Nomenclature would be *ultra vires* unless *all* members subsequently agreed to change the Nomenclature.<sup>132</sup>

[A]s the chart was adopted unanimously, the only way in which the Commission's competence to adopt regulatory measures can be extended to additional species is if there is unanimous agreement among Contracting Governments to do so.<sup>133</sup>

Therefore, as Japan argued, agreement on whether to admit other species or not was a 'matter for discussion between Contracting Governments.'<sup>134</sup> Consequently, 'since it is a matter of differing views between Contracting Governments ... [it] cannot be dealt with by the Commission.'<sup>135</sup> The implications of this view are that if there is no *agreement* between the parties on whether to regulate a species or not, it would not be regulated. This would lead to an outcome — as Denmark has suggested — of IWC jurisdiction being restricted to '*only* species named in the [original] Annex.'<sup>136</sup> Any other approach, according to the former USSR, would be 'legally unjustified'.<sup>137</sup>

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<sup>129</sup> *Final Act of the International Whaling Conference* (1946) art IV, reprinted in Birnie, *International Regulation of Whaling*, above n 16, 695.

<sup>130</sup> *Ibid.*

<sup>131</sup> *VCLT*, above n 71, art 31.2(a) (emphases added).

<sup>132</sup> IWC, *Thirty-Fourth Report*, above n 100, 16. See also IWC, *Thirty-Seventh Report of the International Whaling Commission* (1987) 15.

<sup>133</sup> IWC/35/15, 'Report of the Steering Committee on Regulation of Baird's Beaked Whale', above n 110, [7.1.3].

<sup>134</sup> Japan also stated that it would 'take no more than forty Baird's beaked whales in the next year, with catch control under its national regulations': IWC, *Thirty-Fifth Report*, above n 43, 13.

<sup>135</sup> IWC, *Thirty-Sixth Report*, above n 11.

<sup>136</sup> IWC, *Thirty-Fifth Report*, above n 43, 13 (emphasis added). This view was followed by Mexico, Brazil, Peru and Argentina and was subsequently repeated in IWC, *Fortieth Report of the International Whaling Commission* (1990) 22.

<sup>137</sup> IWC, *Thirty-First Report*, above n 63, 21.

The question that this assertion raises is: was the Nomenclature an agreement that was intended to limit the Commission in its jurisdiction? To answer this, a number of points need to be highlighted. Firstly, the *Final Act of the International Whaling Conference* expressly recommended '[t]hat the chart of nomenclature of whales ... be accepted as a guide.'<sup>138</sup> The word 'guide' does not suggest that the Nomenclature was to constitute an exhaustive list.<sup>139</sup> Secondly, it appears that the Nomenclature was designed as a 'guide' to help achieve consistency with regard to the vernacular names of the whales which were, at that time, the subject of particular attention.<sup>140</sup> This explanation is supported by the title and layout of the chart.<sup>141</sup> As such, the Nomenclature was only a guide to name usage. As New Zealand suggested, the Nomenclature was 'for information only' or 'illustrative, not exclusive'.<sup>142</sup> Finally, the question of the overall status of the Nomenclature within the *ICRW* needs to be examined. As it is set out, the Nomenclature was annexed to the *Final Act of the International Whaling Conference*.<sup>143</sup> It was not annexed to the *ICRW*. By contrast, when the drafters of the *ICRW* attached the Schedule to the *ICRW*, the Schedule was deemed 'an integral part thereof'.<sup>144</sup> Conversely, in keeping with the assumption that the Nomenclature was only to be a guide, the *ICRW* is completely silent as to its enforceability.<sup>145</sup> Hence it was never deemed an 'integral part' of the Convention.

The last point noted above is the clue to the overall mistake in this debate: those who are seeking to suggest that the *ICRW* cannot extend its mandate have confused the Nomenclature and the Schedule. The nomenclatures that are attached to treaties are typically about vernacular names. Schedules or annexes attached to conventions typically reflect the decision by the parties as to whether the focus in question should be within their purview. There is no evidence to suggest, either within the history of the *ICRW* or comparable international regimes, that nomenclatures are, or were, ever intended to be ultimately the

<sup>138</sup> *Final Act of the International Whaling Conference*, above n 129, 695.

<sup>139</sup> IWC/35/15, 'Report of the Steering Committee on Regulation of Baird's Beaked Whale', above n 110, [7.1.3].

<sup>140</sup> IWC, *Thirty-Fourth Report*, above n 100, 16.

<sup>141</sup> IWC/35/15, 'Report of the Steering Committee on Regulation of Baird's Beaked Whale', above n 110, [7.1.3].

<sup>142</sup> IWC, *Fortieth Report of the International Whaling Commission* (1990) 22. This idea has already been partly accepted. As was explained in the debate about the regulation of Baird's beaked whale,

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, whereas the list of species which the Conference regarded as whales is exhaustive and the Commission's competence to adopt regulatory measures is restricted to those species listed.

IWC/35/15, 'Report of the Steering Committee on Regulation of Baird's Beaked Whale', above n 110, [7.1.3].

<sup>143</sup> *Final Act of the International Whaling Conference*, above n 129, 695.

<sup>144</sup> *ICRW*, above n 1, art I(1). Article I goes on to explain that 'all references to the Convention shall be understood as including the said Schedule'.

<sup>145</sup> IWC, *Thirty-Fourth Report*, above n 100, 16. See also IWC, *Fortieth Report of the International Whaling Commission* (1990) 22.

defining mechanisms in international treaties. Conversely, the defining mechanisms in treaties are those which expand or restrict the mandates of the entrenched majority of the signatories. Indeed, because such decisions are so important, the principle of consensus<sup>146</sup> (but more commonly large majorities, as opposed to simple majorities) is required, along with the ability of dissenting signatories to object and not be bound by the weighted majority. Without this ability, which is clearly established in international environmental law (from climate change to toxic waste), neither the IWC nor the multiple other international organisations with similar purposes would allow the vast majority of their signatories to *evolve* (while retaining mechanisms which allow dissent to the majorities) as new situations necessitated new responses.<sup>147</sup>

With such considerations in mind, it has been repeatedly suggested by various countries that the Nomenclature cannot be used as a justification to limit the Commission's competence in this area.<sup>148</sup> Rather, the answer as to whether a species is within the competence of the Commission hinges on whether it is placed in the Schedule by a three-quarters majority of the voting members of the IWC.<sup>149</sup>

#### B *Coastal States, UNCLOS Negotiations and EEZs*

Developments in the law of the sea following the first and second Geneva conferences have been of decisive importance in the evolution of a coastal state's fishing rights and the acceptance of the EEZ concept. Although there were few claims to exclusive fishery zones before 1958 (notably made in the late 1940s

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<sup>146</sup> See, eg. the *Convention on the Protection of the Marine Environment of the Baltic Sea Area*, opened for signature 9 April 1992, 32 ILM 1101, art 19(5) (entered into force 2 January 2000) which requires decisions to be unanimous. The *Convention on the Protection of the Black Sea Against Pollution*, opened for signature 21 April 1992, 1764 UNTS 3, 32 ILM 1101, art 21 (entered into force 15 January 1994) stipulates that amendments must be on the basis of consensus. Under the *Convention for the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 47, 19 ILM 84, art XII (entered into force 7 April 1982) decisions of the Commission for the Conservation of Antarctic Marine Living Resources on matters of substance are taken by consensus. Decisions on other matters are taken by a simple majority. Amendments to annexes of the *Draft Protocol on the Convention of Long-Range Transboundary Air Pollution on Persistent Organic Pollutants*, 37 ILM 505, art 14 (entered into force 16 March 1983) require consensus. The *Agreement on the International Dolphin Conservation Program*, above n 23, arts IX, XXX requires all decisions to be made by consensus. The *Inter-American Convention for the Protection and Conservation of Sea Turtles*, above n 117, also requires all decisions to be made by consensus: art V(5). Under the *Convention on the Conservation and Management of Pollock Resources of the Bering Sea*, opened for signature 16 June 1994, 34 ILM 67, art V(2) (entered into force 8 December 1995) 'matters of substance shall be taken by consensus.' However, if consensus cannot be reached, alternative procedures for decision making exist: see annex, pts 1, 2.

<sup>147</sup> IWC, *Thirty-Fourth Report*, above n 100, 16.

<sup>148</sup> IWC, *Thirty-Fifth Report*, above n 43, 13. See also IWC, *Forty-Third Report*, above n 40, 31; Goetschel, above n 78, [4]; IWC/35/15, 'Report of the Steering Committee on Regulation of Baird's Beaked Whale', above n 110, [7.1.3].

<sup>149</sup> See IWC/35/15, 'Report of the Steering Committee on Regulation of Baird's Beaked Whale', above n 110. Competence is due 'since it is included in the Schedule definitions': IWC, *Thirty-Sixth Report*, above n 11. See also Goetschel, above n 78, [2].

and 1950s by some Latin American states), the exclusive fishery zone is actually a product of the failure of the Geneva conferences to settle the question of the territorial sea breadth, and to confer to the coastal state any special rights to exclusive access to fisheries beyond its 12 mile territorial sea. Accordingly, states decided to act unilaterally for both the purpose of conservation and economic gain.<sup>150</sup> The period of 1960–74 was characterised by a wave of unilateral claims to exclusive fishing zones and a considerable number of bilateral and regional agreements recognising these claims — despite the rulings of the ICJ to the contrary.<sup>151</sup>

By the time *UNCLOS* was concluded, the 200 mile EEZ had been codified into international law. Article 55 of *UNCLOS* defines the EEZ as ‘an area beyond and adjacent to the territorial sea ... under which the rights and jurisdiction of the coastal [s]tate and the rights and freedoms of other States are governed by the relevant provisions of this Convention.’<sup>152</sup> Within the EEZ the coastal state has ‘sovereign rights for the purpose of ... exploiting, conserving and managing natural resources.’<sup>153</sup> Moreover ‘the coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.’<sup>154</sup> The coastal state therefore has ‘full powers to determine the allowable catch of the living resources in the EEZ.’<sup>155</sup>

### 1 Coastal States, EEZs and the IWC

Given the highly coastal nature of small cetaceans, it became apparent in the debate in the mid-1970s that parallel debates in the law of the sea negotiations and the IWC regarding states rights within their 200 mile EEZ, would make the issue of IWC competence ‘even more sensitive and difficult’.<sup>156</sup> Moreover, due to states’ mixed agendas, the IWC tended to defer to the then ongoing *UNCLOS* negotiations. Thus the Resolution from the 31<sup>st</sup> meeting acknowledged the ongoing overlap with these negotiations<sup>157</sup> and that contracting governments and other interested parties might have to consider the question of possible amendments to, or the renegotiation of, the Whaling Convention in a manner which would reflect a consideration of the developments in the law of the sea.<sup>158</sup> Once the *UNCLOS* negotiations were concluded, and the sovereign rights of

<sup>150</sup> See Ramprakash Anand, ‘The Politics of a New Legal Order for Fisheries’ (1982) 11 *Ocean Development and International Law* 263, 268–70; Ann Hollick, ‘The Origins of 200-Mile Offshore Zones’ (1977) 71 *American Journal of International Law* 494, 500.

<sup>151</sup> See, eg, *Fisheries Jurisdiction (UK v Iceland) (Merits)* [1974] ICJ Rep 3.

<sup>152</sup> *UNCLOS*, above n 4.

<sup>153</sup> *Ibid* art 56(1)(a).

<sup>154</sup> *Ibid* art 61(1). See also art 62(1).

<sup>155</sup> See Jose Yturriaga, *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea* (1998) 115.

<sup>156</sup> Birnie, *International Regulation of Whaling*, above n 16, 470.

<sup>157</sup> IWC, *Thirty-First Report*, above n 63, 31: ‘[T]he rights and responsibilities of Contracting Governments with respect to the conservation, management and study of cetaceans are matters under consideration of the UN Conference on the Law of the Sea.’

<sup>158</sup> *Ibid*.

coastal states were established, the IWC continually expressed its awareness of these rights both generally<sup>159</sup> and specifically,<sup>160</sup> when dealing with individual countries.

This awareness can be juxtaposed with a growing number of countries (Mexico, Chile, Uruguay, Brazil, Argentina, Peru, Spain, Japan, the former USSR, and Costa Rica) which have all recorded their reservations on the Commission's competence in relation to small cetaceans and within coastal waters.<sup>161</sup> These countries broadly argued that 'IWC membership is small compared to the 139 coastal states and it would be wrong for this body to take such responsibility.'<sup>162</sup> To rectify this problem, the IWC attempted to promote 'a cooperative dialogue with relevant states'<sup>163</sup> who are not members of the IWC, but have small cetaceans in their waters. To assist this dialogue, a funding mechanism to facilitate the participation of coastal states on relevant small cetacean issues was established in the mid-1990s.<sup>164</sup>

Despite these initiatives, a number of coastal states have refused outright to engage the IWC on this matter. This position was exemplified at the 46<sup>th</sup> meeting by a resolution (from which the countries seeking IWC small cetacean competence abstained) introduced by St Vincent and the Grenadines to show the importance of sovereignty over coastal matters.<sup>165</sup> The Resolution noted:

The governments of St Vincent and the Grenadines, St Lucia, Dominica and Grenada ... do not accept the competence of the Commission in the management of small cetaceans and related research and ... these governments may not therefore permit IWC research on small cetaceans in their territorial seas and Exclusive Economic Zones.<sup>166</sup>

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<sup>159</sup> The Resolution from the 41<sup>st</sup> meeting noted, 'the sovereign rights of coastal states' as set out in *UNLCOS*, above n 4, art 65. Likewise, the Resolution on small cetaceans from the 43<sup>rd</sup> meeting was 'conscious of the sovereign rights of coastal states': IWC, *Forty-Third Report*, above n 40, 32, 36–7. The resolution from the 45<sup>th</sup> meeting was also '[conscious] of the sovereign rights of coastal states, as set out in the United Nations Convention on the Law of the Sea': IWC, *Forty-Fifth Report of the International Whaling Commission* (1995) 41.

<sup>160</sup> See IWC Resolution 1994–3, 'Resolution on Biosphere Reserve of the Upper Gulf of California and the Colorado River Delta' in *Forty-Fifth Report of the International Whaling Commission* (1995) 42. This resolution noted the highly endangered status of this species and was 'conscious of the sovereign rights of Mexico within its coastal waters'.

<sup>161</sup> IWC, *Thirty-Third Report*, above n 106, 26–7, 30. IWC, *Fortieth Report of the International Whaling Commission* (1990) 22.

<sup>162</sup> IWC, *Forty-Second Report*, above n 37, 16.

<sup>163</sup> IWC, *Forty-Fifth Report*, above n 160, 20. See also IWC Resolution 1994–2, 'Resolution on Small Cetaceans' in *Forty-Fifth Report*, above n 160, 41: '[The IWC] recommends that efforts be made to continue to consider the problems facing small cetacean stocks, including ... engaging ... the coastal and range States concerned ... [and] assessing the condition of stocks.'

<sup>164</sup> IWC, 'Resolution on Addressing Small Cetaceans in the IWC' in *Forty-Fourth Report of the International Whaling Commission* (1994) 31–2. IWC, *Forty-Fifth Report*, above n 160, 20, 41. See also IWC, *Forty-Sixth Report of the International Whaling Commission* (1996) 38–9; IWC, 'Voluntary Fund for Small Cetaceans', *Forty-Seventh Report of the International Whaling Commission* (1997) 54.

<sup>165</sup> IWC, *Forty-Sixth Report of the International Whaling Commission* (1996) 20–1.

<sup>166</sup> IWC Resolution 1995–4, 'Resolution on Small Cetaceans' in *ibid* 44.

## 2 *Towards a Correct Understanding of the Implications of UNCLOS for the IWC*

The thrust of these arguments seems to indicate that neither the IWC, nor any other body, has the authority to fetter the discretion of a coastal state with regards to sovereign decisions relating to the exploitation (or conservation) of their EEZ. A rider to this claim has been the implicit assertion that the IWC is somehow *ultra vires* even to be suggesting that it may have a mandate to assist in the management of small cetaceans in sovereign waters. However, these contentions are incorrect for a number of reasons. Moreover in a number of cases clear limitations upon the authority and unfettered freedom of the coastal state to act have been imposed by *UNCLOS*.<sup>167</sup> That is, *UNCLOS* does not accord to coastal states complete sovereignty in the territorial seas that abut their terra firma. Rather, it affords them limited sovereignty, comprised of rights and jurisdiction over the listed economic resources of the EEZ.

## 3 *Consenting to the IWC*

The aforementioned ‘Resolution on Small Cetaceans’ from the 46<sup>th</sup> Meeting is correct, in the sense that countries (as sovereign states) can quite legitimately object to the authority of the IWC (or any other international body for that matter) over the whales in their waters. However, the converse is also true in that parties to the *ICRW* (like any other international treaty) can agree to confer competence on the IWC regarding the exercise of their rights.<sup>168</sup> As such, *UNCLOS* and the development of the EEZ did not make the IWC redundant with regard to the coastal zone management of cetaceans (unless the signatories choose to exclude the IWC from these areas).

Moreover, throughout the history of the international management of cetaceans, whales in territorial waters have always been a direct concern. Indeed, from the outset the 1931 *Convention for the Regulation of Whaling* stated that ‘[t]he geographical limits within which the Articles of this Convention are to be applied shall include all the waters of the world, including both the high seas and territorial and national seas.’<sup>169</sup> Six years later, the 1937 *International Agreement for the Regulation of Whaling* stated the coverage slightly differently: ‘The present agreement applies to factory ships and whale catchers and to land stations ... and to all waters in which whaling is prosecuted.’<sup>170</sup> It was this later definition which was followed in the 1946 *ICRW*, where no restriction upon the geographical limits of the IWC’s competence over cetaceans were listed. Accordingly, the *ICRW* was to apply

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<sup>167</sup> See *UNCLOS*, above n 4, pts V, XI.

<sup>168</sup> Burke, above n 77, 296.

<sup>169</sup> *Convention for the Regulation of Whaling*, above n 81, art 9.

<sup>170</sup> *International Agreement for the Regulation of Whaling*, above n 83, art 2.

to factory ships, land stations, and whale catchers under the jurisdiction of Contracting Governments and all waters where whaling is prosecuted by such factory ships, land stations and whale catchers.<sup>171</sup>

In accordance with this broad coverage, the IWC has made sure that full compliance with the *ICRW* has been achieved by its signatories in all the areas in which whaling has been practised. The inspection and observation regimes of the IWC, which were originally only designed to cover pelagic whaling (in non-territorial waters), were extended to cover land stations in the 1960s,<sup>172</sup> and aboriginal whaling by the late 1970s.<sup>173</sup> In the last two examples, not only was the IWC exercising authority over territorial areas, it was also ensuring compliance of the signatories in these places, with what is in effect a very intrusive regime. Of course, the question that needs to be asked is did *UNCLOS* eclipse the possibility of such regimes? Clearly this is not the case — article 311(2) of *UNCLOS* specifically addresses the problem of prior agreements and declares that

the Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

Accordingly, two questions arise: firstly, did the signatories agree to cede their own sovereignty on such issues to the IWC (which is quite permissible);<sup>174</sup> and, secondly, is the *ICRW* compatible with *UNCLOS*?

#### 4 Article 65

It has been my contention elsewhere that article 65 of *UNCLOS*, and the supporting principles of primacy in international law,<sup>175</sup> make the IWC the central and uppermost international authority for cetaceans.<sup>176</sup> With regard to the different question of the overlap of EEZs and the management of cetaceans, it is

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<sup>171</sup> *ICRW*, above n 1, art I(2).

<sup>172</sup> International Commission on Whaling, *Seventeenth Report of the Commission* (1967) 17, 19–22. International Commission on Whaling, *Eighteenth Report of the Commission* (1968) 18, 23. International Commission on Whaling, *Nineteenth Report of the Commission* (1969) 15, 18, 21–2.

<sup>173</sup> IWC, *Twenty-Eighth Report of the International Whaling Commission* (1976) 24.

<sup>174</sup> See Burke, above n 77, 268, 291: ‘The argument that whales are not subject to the *ICRW* is difficult to follow ... [I]t stems from the belief that the *UNCLOS* over-rides the *ICRW* and reinstalls coastal state authority over whales.’ This position does not seem consistent with article 65, which indicates the clear expectation regarding cetaceans that states shall ‘work through the appropriate international organizations for their conservation, management and study.’

<sup>175</sup> The principle of primacy suggests that an international organisation, through either specific provisions in their founding treaties or through the general principles of treaty law, can gain precedence over another upon certain questions at international law.

<sup>176</sup> Alexander Gillespie, ‘Forum Shopping In International Environmental Law: Between the IWC, CITES and The Management Of Cetaceans’, *Ocean Development and International Law* (forthcoming).

important to note that article 65, in making no distinction between large and small marine mammals within EEZs, stipulates that

[s]tates 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 organisations for their conservation, management and study.

When dealing with stocks on the high seas, article 120 notes that ‘[a]rticle 65 also applies to the conservation and management of marine mammals in the high seas.’ The question of marine mammals was dealt with, once more, in chapter 17 of *Agenda 21*. Paragraph 17.47 of *Agenda 21* begins by repeating article 65 of *UNCLOS*, however it goes further than *UNCLOS* in paragraph 17.61. After expressing the hope that countries which are not members of appropriate organisations for the management of high seas fisheries should be encouraged to join these, it explains that:

States recognise:

- (a) The responsibility of the International Whaling Commission for the Conservation and management of whale stocks and the regulation of whaling pursuant to the 1946 International Convention for the Regulation of Whaling.
- (b) *The work of the International Whaling Commission Scientific Committee in carrying out studies of large whales in particular, as well as of other cetaceans.*
- (c) The work of other organizations, such as the Inter-American Tropical Tuna Commission and the Agreement on Small Cetaceans in the Baltic and North Sea under the Bonn Convention, in the conservation, management and study of cetaceans and other marine mammals.<sup>177</sup>

The same section is later repeated under the section on ‘marine living resources *under national jurisdiction*.’<sup>178</sup> Paragraph 17.63 ends with the plea that ‘[s]tates should cooperate for the conservation, management and study of cetaceans.’

Therefore *Agenda 21* is very important (with respect to small cetaceans) for three reasons. Firstly, the IWC was clearly listed as the ‘appropriate body’ for whale stocks.<sup>179</sup> Secondly, this recognition was not just limited to large cetaceans, but included ‘other cetaceans’ as well, although the exact responsibility of the IWC for ‘other cetaceans’ is far from clear.<sup>180</sup> Nevertheless this sentence was clearly linked to the importance of the Scientific Committee of the IWC.<sup>181</sup> Finally, the work of ‘other organisations’ that deal with small cetaceans was noted.<sup>182</sup>

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<sup>177</sup> *Agenda 21*, above n 2, [17.62] (emphasis added).

<sup>178</sup> See *ibid* [17.75]–[17.96] (emphasis added).

<sup>179</sup> *Ibid* [17.90](a).

<sup>180</sup> *Ibid* [17.90](b). See also Patricia Birnie, ‘Small Cetaceans and the International Whaling Commission’ (1997) 10 *Georgetown International Environmental Law Review* 1, 20.

<sup>181</sup> *Agenda 21*, above n 2, [17.90](a), (b).

<sup>182</sup> *Ibid* [17.90](c).

5 *Article 64*

In addition to article 65, there are two further areas under which outright coastal jurisdiction may be weakened under *UNCLOS*. These two areas are particularly important for states which are signatories to *UNCLOS*, but not the IWC. The first area in which there is 'a certain limitation of a coastal state's sovereign rights in its zone'<sup>183</sup> is that of highly migratory species.<sup>184</sup> Annex I of *UNCLOS* lists the highly migratory species in question. In addition to listing the large cetacean families, annex I also includes the families of *Monodontidae* (narwal and beluga); *Ziphiidae* (including 20 small to medium sized beaked whale species) and *Delphinidae* (with 26 species of dolphins).<sup>185</sup> Accordingly, article 64 also covers cetaceans, and makes no distinction between large and small whales.

However, an important distinction is made in articles 63 and 64. Article 63, which deals with stocks occurring within the EEZs of two or more coastal states and/or within the EEZ and in an area beyond and adjacent to it, specifies that

these States shall seek, either directly or through appropriate *subregional or regional* organisations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks.<sup>186</sup>

Conversely, under article 64 'highly migratory species':

The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex 1 shall cooperate directly or through *appropriate international organisations* with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region ... In regions for which *no* appropriate international organisation exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organisation and participate in its work.<sup>187</sup>

The importance of article 64 is twofold. Firstly, it makes no distinction between the listing of the two suborders in the same appendix. This would appear to legitimise the assumption that they should be dealt with together. Secondly, countries which share these species are mandated (note the operative words, as with article 65, are '*shall cooperate*' 'through appropriate international organisations').<sup>188</sup> The use of the word 'international' is crucial here, in contrast with the regional vision of article 63.

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<sup>183</sup> See Yturriaga, above n 155, 129.

<sup>184</sup> Ibid 127–30. See also Douglas Johnston, *The International Law of Fisheries: A Framework for Policy-Orientated Inquiries* (1987) LXXI.

<sup>185</sup> For a discussion of the various species involved, see Carwardine, above n 5, 99–223.

<sup>186</sup> Emphasis added.

<sup>187</sup> Emphasis added.

<sup>188</sup> Emphasis added.

6 *The Bottom Line on the High Seas and within EEZs: Extinction*

*UNCLOS* gives the coastal state considerable discretion in determining exploitation levels within its EEZ. As such, *UNCLOS* does not provide detailed management and conservation schemes. Rather, it provides a framework in which the coastal state retains an independent discretion to formulate its own management plans, within certain broad conservation constraints and standards.<sup>189</sup> This power is so wide that article 297(3)(a) specifically excludes the coastal states' discretion to determine the total allowable catch from the application of the compulsory dispute settlement procedure provided for in s 2 of part XV of *UNCLOS*. Due to coastal states' freedom in managing their own catch limits within their EEZ's, it has been contended that 'little if anything in these management and conservation requirements seems sufficiently precise and mandatory to constitute an effective restriction on the coastal state's sovereign rights to exploitation.'<sup>190</sup> The worst-case result of such freedom may be that a state chooses, either directly or through negligence, to fish a species to extinction. For example, with regard to small cetaceans and Japan, it has been contended that

with virtually no government control on the hunt of dolphins, porpoises and small whales, the increased efficiency and hunting effort [has] resulted in extensive over-catching, causing the numbers of several species or populations to plummet ... [T]he exploitation of small cetaceans in Japan's waters [has] resulted in a domino effect, overhunting one species after another.<sup>191</sup>

The question that this scenario raises is whether or not such exploitation is permissible under *UNCLOS*? It would appear that no state may drive a marine species towards extinction. This point may be inferred from the principles surrounding both the management of the high seas and EEZs.

With regard to the high seas, it has been evident since the 1958 *Convention on Fishing and Conservation of the Living Resources of the High Seas* that 'the development of modern techniques for the exploitation of the living resources of the sea ... has exposed some of these resources to the danger of being over-exploited.'<sup>192</sup> Therefore, '[a]ll States have the duty to adopt, or to cooperate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.'<sup>193</sup> This principle was later reiterated by the International Court of Justice:

It is one of the advances of maritime international law resulting from the intensification of fishing, that the former laissez-faire treatment of the living

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<sup>189</sup> *UNCLOS*, above n 4, pts V, XI. See generally Mohamed Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (1987) 42–50.

<sup>190</sup> See Johnston, above n 184, LIX, LXVII–LXIX. See also Burke, above n 77, 266.

<sup>191</sup> See Environmental Investigation Agency, *Towards Extinction: The Exploitation of Small Cetaceans in Japan* (2000) 2.

<sup>192</sup> *Convention on Fishing and Conservation of the Living Resources of the High Seas*, opened for signature 29 April 1958, 559 UNTS 285, preamble (entered into force 20 March 1966).

<sup>193</sup> *Ibid* art 1(2).

resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.<sup>194</sup>

Very similar rules were later expressed in *UNCLOS* in parts V and VII. Part V dealt primarily with species in the EEZ (which I shall come to shortly) and Part VII focused upon the ‘Conservation and Management of Marine Living Resources of the High Seas’. In this latter section, the cooperation of states in the ‘Conservation and Management of Living Resources’,<sup>195</sup> and the ‘Conservation of the Living Resources of the High Seas’,<sup>196</sup> was highlighted.

The necessity of ‘protecting and restoring marine species’ was reiterated in *Agenda 21*,<sup>197</sup> as well as in the United Nations Food and Agriculture Organisation’s *Code of Conduct for Responsible Fisheries* (‘*FAO Code of Conduct*’)<sup>198</sup> and in the 1995 *Agreement on Straddling and Highly Migratory Fish Stocks*.<sup>199</sup> Indeed, the first general principle of the *FAO Code of Conduct* is that ‘[t]he right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of marine living resources.’<sup>200</sup> The *Agreement on Straddling and Highly Migratory Fish Stocks* added to this by securing a convention which has the objective of ‘the long term conservation’ of the stocks in question.<sup>201</sup>

Finally, the rule not to drive species on the high seas towards extinction was strengthened through discussion before the International Tribunal for the Law of the Sea in the *Southern Bluefin Tuna Cases*.<sup>202</sup> Specifically, New Zealand and Australia argued that Japan had ‘breached its obligations under Articles 64 [with regard to highly migratory species] and 116 to 119 [with regard to conservation and management of the living resources of the high seas] of *UNCLOS* in relation to the conservation and management of the [southern bluefin tuna].’<sup>203</sup> They argued that Japan had failed ‘to adopt necessary conservation measures for its nationals fishing in the high seas so as to maintain the [Southern Bluefin Tuna] stock to levels which can produce the maximum sustainable yields, as required by article 119 and contrary to the obligation in article 117 to take necessary conservation measures for its nationals.’<sup>204</sup> Whilst the Tribunal found against

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<sup>194</sup> *Fisheries Jurisdiction (UK v Iceland) (Merits)* [1974] ICJ Rep 3, 31.

<sup>195</sup> *UNCLOS*, above n 4, art 118.

<sup>196</sup> *Ibid* art 119.

<sup>197</sup> *Agenda 21*, above n 2, [17.46] (b), (e), [17.74] (c), (e).

<sup>198</sup> (Adopted 31 October 1995) art 6.1.

<sup>199</sup> *Agreement on Straddling and Highly Migratory Fish Stocks*, above 93.

<sup>200</sup> *FAO Code of Conduct* art 6.1. Thereafter, the importance of making sure that ‘depleted stocks are allowed to recover or, where appropriate, are actively restored’ is emphasised (see arts 7.2.2(e), 7.6.10).

<sup>201</sup> *Agreement on Straddling and Highly Migratory Fish Stocks*, above 93, art 2. See also preamble (1), art 5(a).

<sup>202</sup> *New Zealand v Japan; Australia v Japan (Provisional Measures)* (1999) 38 ILM 1624 (Order of 27 August 1999).

<sup>203</sup> *Ibid* [28(1)].

<sup>204</sup> *Ibid* [28(1)(a)].

New Zealand and Australia at the jurisdiction stage of these cases, it effectively left open the possibility of finding Japan in breach of articles 64 and 116–119, which would further support the protection of these species from extinction.<sup>205</sup>

With regard to EEZs, states are also obliged to protect marine species from extinction.<sup>206</sup> The primary provision relating to this obligation is in article 61(2):<sup>207</sup>

The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.

Article 61(4) adds:

[T]he coastal State shall take into consideration the effects on species associated with or dependent on harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

To help achieve these goals, '[a]s appropriate, the coastal State and competent international organisations, whether sub-regional, regional, or global, shall co-operate to this end.'<sup>208</sup> Moreover,

available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent *international* organizations, whether sub-regional, regional or global.<sup>209</sup>

As these last provisions show, when dealing with the bottom line of the extinction of a species, a hook is offered to the most competent international organisations. In dealing with such questions with regard to cetaceans, that body would have to be the IWC.

### C Regional Organisations

For the countries which have objected to the universal managerial competency of the IWC, a common argument has been that the only organisations competent to manage small cetaceans (apart from the coastal states themselves) are 'regional organisations'.<sup>210</sup> As Japan explained:

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<sup>205</sup> Ibid.

<sup>206</sup> See *UNCLOS*, above n 4, art 61(2). For a discussion of this obligation, see Yturriaga, above n 155, 15, 118; Dahmani, above n 189, 43, 49.

<sup>207</sup> See also *UNCLOS*, above n 4, art 194(5), which requires parties to take measures necessary to protect the habitats of depleted, threatened or endangered species.

<sup>208</sup> Ibid art 61(2).

<sup>209</sup> Ibid art 61(5) (emphasis added).

<sup>210</sup> See IWC, *Forty-Fifth Report*, above n 160, 20; IWC, *Forty-Third Report*, above n 40, 31. See also Burke, above n 77, 264–5, 293–4.

[The] IWC should recognize that small cetacean [sic] migrating and distributing within [the] 200 nautical mile zone of coastal States [are] subject to the management [of] the regional organisation or [the] coastal States concerned.<sup>211</sup>

The emphasis on the importance of regional cooperation for such matters is well established with regard to marine pollution (and the UNEP's Regional Seas Programme)<sup>212</sup> and in international fisheries law and policy. With regard to the latter, a number of documents such as *Agenda 21*,<sup>213</sup> the *Agreement on Straddling and Highly Migratory Fish Stocks*,<sup>214</sup> the *FAO Code of Conduct*,<sup>215</sup> and the Kyoto Plan of Action,<sup>216</sup> recognise the importance of regional cooperation.

The assertion that regional organisations have a 'crucial role to play with respect to small cetaceans'<sup>217</sup> is one on which most sides of the debate agree. Some regional agreements already encompassed small cetaceans by the early 1980s.<sup>218</sup> By the late 1980s the IWC was seeking to work with related regional organisations on issues affecting small cetaceans — the Inter-American Tropical Tuna Commission<sup>219</sup> and UNEP<sup>220</sup> both received direct attention. In the 1990s the focus on organisations with an overlapping interest in small cetaceans moved indirectly to CITES,<sup>221</sup> and directly to the CMS.

With particular regard to the CMS and the question of small cetaceans, an invitation to the CMS Secretariat 'to exchange information with the Secretary of

<sup>211</sup> IWC/46/SM1, 'Japan's View on Addressing Small Cetaceans within the IWC' (Paper presented at the 45<sup>th</sup> meeting of the IWC, Puerto Vallarta, May 1994) [e].

<sup>212</sup> See Terttu Melvasalo, 'Cleaning the Seas' (1998) 9 *Our Planet* 1–5. Regional cooperation is in accordance with *UNCLOS*, above n 4, art 197.

<sup>213</sup> *Agenda 21*, above n 2, [17.10]

<sup>214</sup> Above n 199, arts 7, 9

<sup>215</sup> *FAO Code of Conduct*, above n 198, arts 6.12, 10.3.

<sup>216</sup> The 'Plan of Action' encourages States to 'enhance subregional and regional cooperation and establish, where it is considered appropriate, subregional and regional fishery conservation and management organizations': United Nations Food and Agriculture Organisation, 'Kyoto Plan of Action' (Paper presented at the International Conference on the Sustainable Contribution of Fisheries to Food Security, Kyoto, December 1995) [2] <<http://www.fao.org/fi/agreem/kyoto/kyoe.asp>> at 21 September 2001.

<sup>217</sup> IWC, 'Resolution on Addressing Small Cetaceans in the IWC', above n 39.

<sup>218</sup> See, eg. *Convention on the Conservation of European Wildlife and Natural Habitats*, above n 91, art 4. The Convention requires its parties to ensure the special protection of all species listed in appendix II, which includes all species of small cetaceans normally found in European waters. For a discussion of the limitations of this convention with regard to small cetaceans, see Robin Churchill, 'Sustaining Small Cetaceans: A Preliminary Evaluation of the ASCOBANS & ACCOBAMS Agreements' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 225, 231–3. The European Union also has regulations which deal with the protection of small cetaceans: at 240–3.

<sup>219</sup> IWC, *Thirty-Ninth Report of the International Whaling Commission* (1989) 24–5.

<sup>220</sup> *Ibid* 29.

<sup>221</sup> *CITES Convention*, above n 7. In 1993 it was noted that 'CITES had requested comments on five species of small cetaceans, which it proposed be transferred onto its appendix I: the Irrawaddy, rough-tooth and Risso's dolphins, short-finned pilot and dwarf sperm whales': IWC, *Forty-Fourth Report of the International Whaling Commission* (1994) 25.

the IWC' was made.<sup>222</sup> The engagement with the CMS was undertaken because this organisation was seen as important and largely complementary to the work of the IWC.<sup>223</sup>

The relationship between the CMS and the IWC took a further step forward in 2000, when a memorandum of understanding was signed by the two organisations, despite objections from Japan. This memorandum seeks to 'establish a framework of information and consultation between CMS and IWC.' In particular, the two bodies will 'to the extent possible, coordinate their programme of activities to ensure that their implementation is complementary and mutually supportive.'<sup>224</sup> In 2001 this approach was strengthened by the suggestion that the IWC, under this memorandum with the CMS, seek to 'pursue complementary and mutually supportive actions in respect of small cetaceans.'<sup>224</sup>

With respect to such considerations, the IWC has encouraged the cooperation between *ASCOBANS* work, the range states<sup>225</sup> of the North Atlantic harbour porpoise, and the IWC.<sup>226</sup> This cooperation was furthered in 1998 when the Scientific Committee recommended the establishment of a joint working group with *ASCOBANS* to consider scientific matters relating to the status of harbour porpoises in the eastern North Atlantic.<sup>227</sup>

Despite growing cooperation with organisations like the CMS, the IWC has been selective about which organisations it will work with in regard to small cetaceans. Accordingly, repeated suggestions by those who oppose the competence of the IWC with regard to small cetaceans, have made out that a more appropriate regional organisation to work with would be the North Atlantic Marine Mammal Commission ('NAMMCO').<sup>228</sup> In comparison with other regional bodies dealing with small cetaceans, NAMMCO has received little recognition from the IWC as it competes with the IWC for primacy in a number of areas.<sup>229</sup> Nevertheless it is useful to note that, with regard to the above quoted documents and the drift to regionalism, an equally strong current can be found with regards to international bodies (as opposed to just regional ones) when it

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<sup>222</sup> IWC, 'Resolution on Small Cetaceans' in *Forty-Third Report*, above n 40, 51.

<sup>223</sup> See Gillespie, above n 176.

<sup>224</sup> IWC, 'Resolution on Small Cetaceans' in *Annual Report of the International Whaling Commission 2001* (2001) 47.

<sup>225</sup> See *CMS Convention*, above n 6, art I(1)(h): "'Range State" in relation to a particular migratory species means 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.'

<sup>226</sup> IWC, 'Resolution on Harbour Porpoise in the North Atlantic and the Baltic Sea' in *Forty-Fourth Report of the International Whaling Commission* (1994) 34–5.

<sup>227</sup> IWC, *Annual Report 1998*, above n 90, 34.

<sup>228</sup> IWC, *Forty-First Report*, above n 36, 39–40. See also IWC, *Forty-Seventh Report of the International Whaling Commission* (1997) 22.

<sup>229</sup> I have written at length elsewhere on the primacy of the IWC in international law with regard to the management of cetaceans and thus the necessity to treat organisations such as NAMMCO as possessing limited integrity. Accordingly, I do not intend to reiterate my earlier arguments: see Gillespie, above n 176.

comes to management of the oceans. Thus *Agenda 21* stresses the importance of 'international and regional cooperation and coordination.'<sup>230</sup> With particular regard to coastal states and the high seas it was noted that '[e]ffective cooperation within existing subregional, regional or global fisheries bodies should be encouraged.'<sup>231</sup> The *FAO Code of Conduct* also took this approach by suggesting that '[s]tates should, within their respective competences and in accordance with international law, cooperate at subregional, regional and global levels through fisheries management organisations.'<sup>232</sup>

Moreover, the *FAO Code of Conduct* emphasised that the organisation in question must have 'the competence to establish conservation and management measures.'<sup>233</sup> In a similar way, the *Agreement on Straddling and Highly Migratory Fish Stocks* also highlights the point that the appropriate management organisations must have competence.<sup>234</sup> In addition, it is important to note that this Convention did not eclipse the principles espoused by *UNCLOS*. Rather, it noted the importance of taking 'into account previously agreed measures established and applied in accordance with the Convention.'<sup>235</sup> Hence parts V and VII of *UNCLOS* (with the general conservation requirements within the EEZs and the high seas) and the special status of marine mammals (articles 64, 65 and 120) remain standing.

These principles, when taken in conjunction with the rules of international organisations, should make it apparent that the IWC, as an international body, may have a strong role to play in the management of small cetaceans. Moreover although regional organisations also have an important part to play in the management of small cetaceans, it is necessary that these are complementary to the IWC and not inconsistent with it.

### 1 *The Limits of Regional Organisations and the Antarctic Killer Whale*

The case of Antarctica is a particularly useful example of such regional complementarity, as cetaceans are intricately connected with the marine environment of the South Pole.<sup>236</sup> One of the cetacean species which often resides at the South Pole (and in numerous other locations) is the killer whale, which is commonly recognised as a 'small' cetacean. The Antarctic killer whale was the subject of controversy in 1980 when the USSR objected to attempts by the IWC to set catch quotas for this species in the Antarctic area:

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<sup>230</sup> *Agenda 21*, above n 2, [17.10].

<sup>231</sup> *Ibid* [17.60]. See also [17.45].

<sup>232</sup> *FAO Code of Conduct*, above n 198, art 6.12.

<sup>233</sup> *Ibid* art 7.1.4.

<sup>234</sup> *Agreement on Straddling and Highly Migratory Fish Stocks*, above n 93, art 8(6).

<sup>235</sup> *Ibid* art 7(2)(c).

<sup>236</sup> See IWC, 'Resolution to Consider the Implications for Whales of Management Regimes for Other Marine Resources' in *Thirtieth Report of the International Whaling Commission* (1980) 34: '[Recognising] that certain marine resources in the Southern Ocean, especially krill, are food species of whales, and that exploitation of these resources may affect the demography of whale stocks to an extent that is as yet largely unknown.'

[K]iller whales belong to small cetaceans which are not regulated by the Commission within the framework of the existing Convention. Thus [the USSR believed] that the inclusion of killer whales in the number of species regulated by the Commission is legally unjustified.<sup>237</sup>

The typical rider to the above quotation is that such small cetaceans should be dealt with by appropriate regional organisations. The paradox is that such regional organisations (for example NAMMCO) are not always appropriate or they may not even exist, let alone claim authority for the species in question. The killer whale which resides in Antarctic waters cannot be claimed as a species which resides in either sovereign waters (as Antarctica is governed by the signatories to the *Antarctic Treaty* and is not subject to sovereignty claims)<sup>238</sup> or within the jurisdiction of strong regional or international organisations which have an interest in it. Rather, the governing international legislation for Antarctica has been explicit in displaying deference to the greater body — the IWC — in dealing with whaling matters.<sup>239</sup> This deference was carefully spelt out in the 1980 *Convention for the Conservation of Antarctic Marine Living Resources*:

Nothing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling.<sup>240</sup>

Moreover article XXIII (3) states:

The Commission and the Scientific Committee [of the Commission for the Conservation of Antarctic Marine Living Resources] shall seek to develop cooperative working relationships, as appropriate, with inter-governmental and non-governmental organisations which could contribute to their work, including ... the International Whaling Commission.<sup>241</sup>

From this background, the Commission for the Conservation of Antarctic Marine Living Resources ('CCAMLR') and the IWC have established a strong (but informal) coordinated working relationship<sup>242</sup> in areas of mutual interest.<sup>243</sup> This

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<sup>237</sup> IWC, *Thirty-First Report*, above n 63, 21.

<sup>238</sup> *Antarctica Treaty*, opened for signature 1 December 1959, 402 UNTS 71, art IV(2) (entered into force 23 June 1961).

<sup>239</sup> *Agreed Measures for the Conservation of Antarctic Fauna and Flora*, opened for signature 2 June 1964, UKTS 1978 No 45, art II(a) (entered into force 12 November 1982).

<sup>240</sup> *Convention for the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 47, 19 ILM 84, art VI (entered into force 7 April 1982).

<sup>241</sup> Art XXIII(3) operates together with art IX(5) to ensure that '[t]he Commission shall take full account of any relevant measures or regulations established or recommended by ... existing fisheries Commissions responsible for species which may enter the area to which this Convention applies [including the IWC] in order that there shall be no inconsistency between the rights and obligations of a Contracting Party under such regulations or measures and conservation measures which may be adopted by the Commission.'

<sup>242</sup> In 1982 the secretariats of the IWC and CITES had discussions about possible cooperative arrangements and a possible agreement: IWC, *Thirty-Third Report*, above n 106, 37. With regard to other organisations, the IWC policy was 'to welcome and extend every facility to organisations such as [the CCAMLR], and [hope] for similar treatment in return': IWC, *Thirty-Fourth Report*, above n 100, 15, 28–9. In 1984 the CCAMLR 'confirmed that it did

relationship has prospered since the mid-1980s.<sup>244</sup>

The result of these provisions is that it is unclear which organisation should manage these species if, as Russia earlier claimed, the killer whale in Antarctica cannot be governed by the IWC because it is a small cetacean. Clearly, the species needs to be managed by some international organisation and cannot under any circumstance be considered 'free for the taking'. In this instance, the appropriate organisation is probably the CCAMLR, as it is primarily concerned with managing the marine living resources of the Antarctic.<sup>245</sup> However, in accordance with the rules of primacy and the necessity to complement (and not compete against) the IWC, the CCAMLR has clearly specified that any question of management is best dealt with by the IWC.

## VI THE CONVENTION ON MIGRATORY SPECIES

The only other international instrument which has specifically addressed the protection of small cetaceans is the *CMS Convention*. As I have explained elsewhere,<sup>246</sup> the *CMS Convention* (and more specifically, the CMS Secretariat) has a close working relationship with the IWC.

The interest of the CMS in cetaceans began at the first Conference of Parties of the CMS in 1985, when a number of large cetaceans were listed in appendix I of the *CMS Convention*.<sup>247</sup> In addition, at the same meeting, it was proposed that the Indus River dolphin be listed in appendix I.<sup>248</sup> At the same time, the CMS Scientific Committee advised that since a number of small cetaceans were clearly threatened,<sup>249</sup> and although significant scientific information on many of

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not wish to formalise working relationships with other organisations, but [would] continue to communicate between Secretariats': IWC, *Thirty-Fifth Report*, above n 43, 25.

<sup>243</sup> See IWC, 'Resolution on Cooperation and Coordination between the International Whaling Commission and the Proposed Commission for the Conservation of Antarctic Marine Living Resources' in *Thirty-First Report*, above n 63, 30. Argentina and Chile reserved their positions on this resolution: at 20.

<sup>244</sup> In 1986 the Scientific Committee responded to requests for assistance by CCAMLR, in relation to questions on the suitability of whales as indicator species for krill availability: IWC, *Thirty-Seventh Report of the International Whaling Commission* (1987) 24. The Scientific Committee continued its cooperation with the Scientific Committee of the CCAMLR over this issue: see IWC, *Forty-First Report*, above n 36, 46. In 1992 joint workshops between CCAMLR and the IWC were being considered: IWC, *Forty-Third Report*, above n 40, 30. In 1998 the Commission noted formation of a small liaison group between the Scientific Committee's of the IWC and the CCAMLR. The IWC Scientific Committee noted the 'great importance it attached to cooperation with CCAMLR and ... endorsed the formation of the liaison group': IWC, *Annual Report 1998*, above n 90, 32.

<sup>245</sup> See *Convention for the Conservation of Antarctic Marine Living Resources*, above n 240.

<sup>246</sup> See Gillespie, above n 176.

<sup>247</sup> *CMS Convention*, above n 6, appendix I. These were the blue, humpback, bowhead, southern and northern right whales: CMS, *Proceedings of the First Meeting of the Parties* (1985) 10.

<sup>248</sup> CMS, *Proceedings of the First Meeting of the Conference of the Parties* (1987) vol 2, 23.

<sup>249</sup> Ibid 8-9: 'Working Group on Marine Mammals': A working group on marine migratory animals drafted a paper on the biological elements for agreement on certain small cetaceans. This paper listed the harbour porpoise (North and Baltic Sea) as well as Commerson's dolphin as examples of threatened species.

them was lacking,<sup>250</sup> many of these should be considered for inclusion in appendix II of the *CMS Convention* at the next Conference of Parties.<sup>251</sup> These suggestions helped lead to Resolution 1.7.<sup>252</sup> Although this resolution was not carried unanimously,<sup>253</sup> ‘a working group on small cetaceans’<sup>254</sup> was established. This group was required to work ‘in conjunction with ... appropriate national and international [organisations].’<sup>255</sup> The appropriate organisation in question was clearly the IWC, and the IWC Observer at the meeting responded that they would be ready to cooperate with the group to be established under the resolution.<sup>256</sup>

At the second CMS Conference of Parties in 1988, despite objections against the listing of certain species from Norway<sup>257</sup> and Denmark,<sup>258</sup> the majority of the CMS parties followed the advice of the working group<sup>259</sup> and added seven

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<sup>250</sup> CMS, Resolution 3.3, ‘Small Cetaceans’ in *Proceedings of the Third Meeting of the Conference of Parties* (1991) 20: ‘The Scientific Council’s report on the global review of the conservation of small cetaceans provides a detailed basis for the conservation measures to be included in agreements for the species and populations identified for listing in Appendix II.’ Scientific knowledge is also deficient with regard certain important behaviour like migration. In turn, this makes ‘the nature and scope of international conservation programmes difficult to determine, and making regional and international co-operation difficult to achieve’: see CMS, Recommendation 4.2, ‘Research on Migration of Small Cetaceans’ in *Proceedings of the Fourth Meeting of the Conference of the Parties* (1994). Therefore, it has been recommended that the parties to the *CMS Convention*, and the CMS itself, carry out specific studies to investigate various issues. In 1994 the Scientific Council of the CMS discussed the status of small cetaceans in other regions such as Latin America and South East Asia, where despite a common ‘paucity of data’, ‘it was clear from the limited amount of information available that there were many problems facing the small cetaceans of the area’: at 17, 121. In 1996 the Scientific Council began studies of cetacean-fishery interactions in the southwestern Sulu Sea and northeastern Malaysia: ‘Small Cetaceans / Migratory Mammals’ (1996) 5 *CMS Bulletin* 6. In 1997 studies were conducted into cetacean distribution and cetacean-fisheries interactions in coastal waters around West Africa. The results from these studies revealed that at least 24 species of whales and dolphins inhabited these waters, of which at least one (the Atlantic humpback) whose ‘long-term survival’ would be under ‘serious threat’, largely due to problems of by-catch: Koen van Waerebeek, ‘Update on Conservation Activities: A Survey on the Conservation Status of Cetaceans in Senegal, The Gambia and Guinea’ (2000) 10 *CMS Bulletin* 11. A dedicated workshop to the La Plata dolphin, which inhabits the coastal waters of Argentina, Brazil and Uruguay, was also held in 1997, discussing the risks posed to its survival through incidental catch: ‘From the Regions: Americas and the Caribbean’ (1997) 7 *CMS Bulletin* 4, 7.

<sup>251</sup> CMS, Resolution 1.7, ‘Small Cetaceans’ in *Proceedings of the First Meeting*, above n 248, 51.

<sup>252</sup> *Ibid.*

<sup>253</sup> Denmark reserved its position on this resolution, as it had not consulted either Greenland or the Faroe Islands: *ibid* 30.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid* 30.

<sup>257</sup> See CMS, *Proceedings of the Second Meeting of the Conference of the Parties* (1988) 16. Norway, while not wishing to break the consensus, noted that had these been voted on separately, they would have abstained on the white-beaked, and white-sided dolphins.

<sup>258</sup> Denmark did not believe that the pilot whale should be included in the appendices: *ibid* 36.

<sup>259</sup> After issuing its report, the working group was disbanded, and folded back into the Scientific Committee of the CMS: *Ibid* 14–15.

species of small cetaceans to appendix II of the *CMS Convention*.<sup>260</sup> This list was extended substantially in 1991 at the third Conference of Parties,<sup>261</sup> where once more Norway and Greenland spoke against the inclusion of certain species in the list.<sup>262</sup> By 1994, 27 species of small cetaceans were included in appendix II of the *CMS Convention*.<sup>263</sup>

With regard to the question of whether or not the issues raised by the CMS Conferences of Parties were overlapping with debates in other fora, such as the IWC, it was concluded that the two governing conventions were dealing with substantively different topics. Thus

[t]here was general agreement among the representatives of the Parties to the convention that coverage of any given species in another Convention was not per se, an argument against coverage in the Bonn convention. The International Whaling Convention, for example, was mainly concerned with matters such as catch levels rather than habitat protection.<sup>264</sup>

This view was reiterated in discussions in the Scientific Committee at the fourth CMS Conference of Parties in 1994,<sup>265</sup> where it was suggested that ‘there

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<sup>260</sup> Ibid 35–6. These were the bottlenose dolphin, the common dolphin, Risso’s dolphin, the pilot whale, the harbor porpoise, and the white-beaked, and the white-sided dolphins.

<sup>261</sup> CMS, *Proceedings of the Third Meeting of the Conference of the Parties* (1991) 10–11. In 1991 the Scientific Committee of the CMS recommended that a number of other small cetaceans be added to appendix II. These were the Indus and Ganges river dolphins, Franciscana, the boto river dolphin, the narwhal, the Indo-Pacific humpbacked dolphin, the harbour porpoise (Black Sea and North Atlantic populations), the finless porpoise, the Atlantic humpback dolphin, tucuxi, Peale’s dolphin, the bottlenose dolphin (Black Sea population), the long snouted spinner dolphin (eastern tropical pacific), the striped dolphin (eastern tropical Pacific and western Mediterranean), the common dolphin, Baird’s beaked whale, Commerson’s dolphin, the irrawaddy dolphin, the killer whale (North Atlantic and north-eastern Pacific), the Northern bottlenose and Heaviside’s dolphin.

<sup>262</sup> Ibid 10. Norway spoke against inclusion of the killer whale in this list, as did Greenland against the inclusion of the narwhal, which they stated was already the subject of an agreement between Greenland and Canada.

<sup>263</sup> See CMS, Recommendation 4.2, ‘Research on Migration of Small Cetaceans’, *Proceedings of the Fourth Meeting of the Conference of the Parties* (1994).

<sup>264</sup> CMS, *Proceedings of the Second Meeting*, above n 257, 35.

<sup>265</sup> See CMS, *Proceedings of the Fourth Meeting*, above n 263. This relationship between the IWC and the CMS was the subject of discussion at the fourth meeting of the Conference of Parties of the CMS in 1994. India expressed concerns that efforts should be made to avoid duplication between the CMS and the IWC where small cetaceans were concerned. In response, the Coordinator of the CMS Secretariat pointed out that closer contacts with the secretariats of other conventions were favoured, but that they were constrained in their efforts to collect and exchange data on small cetaceans due to their limited resources. However, agreement had been reached with the Secretary of the IWC on the need for closer contact and a regular exchange of information. Such contact had been strengthened by the election of the Vice-Chairman of the CMS Standing Committee as Chairman of the IWC. In addition, it was noted that at the 1994 meeting, the CMS Scientific Committee had recommended holding consultations with the IWC on the question of small cetaceans. It noted that although there were differences of opinion within the IWC on its competency to deal with the matter of small cetaceans, there had recently been some detailed studies in the area, including one done for the UN Conference on Environment and Development. As such, the Scientific Committee of the CMS was in agreement that any conflict of interest or duplication between the CMS and the IWC was unlikely, as the CMS would focus upon the migratory aspects of small cetaceans, while the IWC’s Scientific Committee would remain

[were] significant prospects for complementarity<sup>266</sup> between the CMS and the IWC. This was because ‘the [CMS] ... focus [is] on the migratory aspects of small species while the IWC Scientific Committee was concerned with its habitat and population.’<sup>267</sup> This complementarity on small cetaceans was soon recognised by the IWC, which in 1993 acknowledged the relevance of the CMS agreements with regard to work on small cetaceans.<sup>268</sup>

With such delineated functions in mind, the CMS passed a resolution on small cetaceans in 1998, which noted ‘the need to look at the conservation of migratory small cetacean species globally.’<sup>269</sup> Moreover it suggested that one of the best ways to achieve this was through regional agreements. As such, the signatories were asked to further consider the species listed in the appendices as candidates.<sup>270</sup> This suggestion was directly linked to article IV(4) of the *CMS Convention*, which provides:

Parties are encouraged to take action with a view to concluding AGREEMENTS for any population or any geographically separate part of the population of any species or lower taxon of wild animals, members of which periodically cross one or more national jurisdictional boundaries.<sup>271</sup>

With particular regard to marine species, it was suggested that additional matters to be considered in regional agreements were:

- 1 That range States should include not only those bordering on international waters, but also those whose vessels operate in those waters.
- 2 Conservation and management plans need to extend into international waters.
- 3 Hindrances to migration need to take into account boat traffic and noise pollution.
- 4 Harmful substances for marine species, including ghost nets and other non-degradable debris.<sup>272</sup>

From these considerations, two largely independent agreements which cover small cetaceans have been concluded in the Baltic and North Seas, and the Black

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concerned with their habitat and population. It further noted that there were significant prospects for the two bodies to complement each other: ‘Report of the Scientific Committee’ in CMS, *Proceedings of the Fourth Meeting*, above n 263, UNEP/CMS/Conf.4.16 (1994) ch II [42]–[43].

<sup>266</sup> CMS, ‘Report of Scientific Committee’ in *Proceedings of the Fourth Meeting*, above n 263, 52.

<sup>267</sup> *Ibid.*

<sup>268</sup> (1993) 4 *CMS Bulletin* 8–9.

<sup>269</sup> CMS, Resolution 2.3, ‘Small Cetaceans’ in *Proceedings of the Second Meeting*, above n 257, 21.

<sup>270</sup> *Ibid.* Note that there was disagreement in the CMS to whether such agreements, which would cover small cetaceans, should be restricted to just small cetaceans, and just to set geographic areas: at 37.

<sup>271</sup> See also art V, which sets out the guidelines for any such agreement.

<sup>272</sup> CMS, ‘Working Group on Marine Mammals’ in *Proceedings of the First Meeting*, above n 248.

and Mediterranean Seas.<sup>273</sup> It is hoped that such agreements will also occur in Latin America.<sup>274</sup>

#### A ASCOBANS

*ASCOBANS* had its genesis in 1985 when an ‘Agreement on Small Cetaceans in the North Sea’ was outlined at the first CMS Conference of Parties.<sup>275</sup> Nevertheless it took a further seven years until it was opened for signature in March 1992<sup>276</sup> and finally came into force in 1994. *ASCOBANS* applies to the ‘marine environment’ of the whole of the Baltic Sea (including the Gulfs of Bothnia and Finland), the Kattegat, Skagerrak, North Sea and English Channels.<sup>277</sup> *ASCOBANS* begins by recognising that ‘small cetaceans are and should remain an integral part of marine ecosystems.’<sup>278</sup> However, ‘the population of harbour porpoises of the Baltic Sea has drastically decreased’<sup>279</sup> and ‘by-catches, habitat deterioration and disturbance may adversely effect these populations.’<sup>280</sup> As such, the parties were ‘concerned about the status of small cetaceans’<sup>281</sup> in this area, and recognised ‘that their vulnerable and largely unclear status merits immediate attention in order to improve it.’<sup>282</sup> Accordingly, the parties undertook ‘to cooperate closely in order to achieve and maintain a favourable conservation status for small cetaceans’<sup>283</sup> by attempting to fulfil the objectives prescribed in the Conservation and Management Plan which was set

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<sup>273</sup> For a useful discussion on the ‘stand-alone’ aspects of *ASCOBANS*, see Hugo Nijkamp and Andre 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, 288–9.

<sup>274</sup> CMS, Recommendation 6.2, ‘Co-Operative Actions for Appendix II Species’ in *Proceedings of the Sixth Conference of the Parties* (1999) vol 1, 111. This recommendation drew special attention to ‘the dolphins of South America’ which, although already listed on appendix II, were not subject to cooperative action.

<sup>275</sup> CMS, ‘Working Group on Marine Mammals’, *Proceedings of the First Meeting*, above n 248.

<sup>276</sup> (1992) 1 *CMS Bulletin* 6: The final Act was signed in mid 1991 by Belgium, Denmark, Finland, Germany, Netherlands, Sweden, the UK and the European Economic Community. Soon after, Ireland expressed interest in extending the agreement to cover the Irish Sea: see (1993) 4 *CMS Bulletin* 6. The final impetus for this agreement came from the Memorandum of Understanding on Small Cetaceans in the North Sea, adopted at the Third Ministerial Conference on the North Sea, held in March 1990, as cited in David Freestone (ed), *The North Sea: Basic Legal Documents on Regional Environmental Co-operation* (1991) 276.

<sup>277</sup> *ASCOBANS*, above n 21, art 1(2)(b). This was clarified by *ASCOBANS* Secretariat, Resolution 6, ‘Resolution on the Clarification of the Definition of the Area of the Agreement’ adopted at the first Meeting of the Parties of *ASCOBANS* <<http://www.ascobans.org/files/1994-1.pdf>> at 21 September 2001.

<sup>278</sup> *ASCOBANS*, above n 21, preamble.

<sup>279</sup> *Ibid.*

<sup>280</sup> *Ibid.*

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid* art 2.1.

out in the annex.<sup>284</sup> The Plan, which prohibits ‘the intentional taking and killing of small cetaceans’,<sup>285</sup> also requires the signatories to work towards:

- (a) the prevention of the release of substances which are a potential threat to the health of the animals.
- (b) the development ... of modifications to fishing gear and fishing practices in order to reduce by-catches.
- (c) the effective regulation, to reduce the impact on the animals, of activities which seriously affect their food resources.
- (d) the prevention of other significant disturbance, especially of an acoustic nature.<sup>286</sup>

At the time that *ASCOBANS* was introduced to the CMS, there was some general concern that ‘the agreement just signed was a weak one, in that it lacked teeth’<sup>287</sup> and that the items in the Conservation and Management Plan ‘did not seem sufficiently focused.’<sup>288</sup> Moreover although seven parties have signed the agreement,<sup>289</sup> a number of other range states have not committed themselves (but ‘remain receptive’),<sup>290</sup> whereas some, such as Norway, will do no more than cooperate at a scientific level ‘owing to [their] desire to maintain a consistent national policy.’<sup>291</sup> Norway’s interests coincide with other regional organisations (such as NAMMCO) which, although overlapping in geographical range with *ASCOBANS*, have differing objectives.<sup>292</sup> That is, Norway believes in the sustainable use of cetaceans and also wishes to be able to kill cetaceans while carrying out research.<sup>293</sup> Accordingly, Norway would not sign *ASCOBANS*.<sup>294</sup> In addition, the five Baltic states (Estonia, Finland, Latvia, Lithuania and Russia) have said that they do not intend to ratify *ASCOBANS* for the time being for a number of reasons, ranging from financial concerns to other priorities in wildlife

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<sup>284</sup> Ibid annex.

<sup>285</sup> Ibid [4].

<sup>286</sup> Ibid [1]. These goals reflected the earlier recognition by the CMS that ‘pollution, accidental and deliberate catches, habitat changes, and depletion of food supplies’ were the primary sources of destruction to small cetaceans, see CMS, Resolution 2.3, ‘Small Cetaceans’ in *Proceedings of the Second Meeting*, above n 257, 21. See also CMS, ‘Working Group on Marine Mammals’, *Proceedings of the First Meeting*, above n 248.

<sup>287</sup> Comments from Australia and the Environmental Investigation Agency in CMS, *Proceedings of the Third Meeting*, above n 261, 14.

<sup>288</sup> Ibid.

<sup>289</sup> The 1996 Progress Report on *ASCOBANS* noted that the number of parties to the agreement was seven (Belgium, Denmark, Germany, Netherlands, Sweden, UK and France) with the EU expected to join soon after, see ‘Progress Report on the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas’ as cited in (1996) 2 *CMS Bulletin* 2–3.

<sup>290</sup> Ibid. These included Estonia, Finland, Latvia, Lithuania and Russia.

<sup>291</sup> Ibid. Norway had ‘cooperated actively with *ASCOBANS* scientific endeavours and has participated in Advisory Committee meetings with the intention to continue, independently of its signatory status.’

<sup>292</sup> Ibid. It has been noted that surveys of the geographical range of the small cetaceans covered by *ASCOBANS* included areas ‘operated under the umbrella of NAMMCO.’

<sup>293</sup> See CMS, *Proceedings of the First Meeting*, above n 248, 2. See also CMS, *Proceedings of the Second Meeting*, above n 257, 2, 25.

<sup>294</sup> ‘CMS Agreement Update: Small Cetaceans of the Baltic and North Seas (*ASCOBANS*)’ (1997) 7 *CMS Bulletin* 2.

conservation. In response to such concerns, the Netherlands, speaking on behalf of the EU, responded that although some states were dissatisfied with the provisions, '[t]hey should not overlook the fact that hitherto there had been no international agreement whatever.'<sup>295</sup> Sweden added that '[e]ven a weak text, however, could be strongly implemented where the will to do [so] existed or could be aroused.'<sup>296</sup>

*ASCOBANS* has evolved its own 'Action Plans' aimed at studying the effects of pollution on cetaceans (in conjunction with the IWC)<sup>297</sup> and reducing the offending substances;<sup>298</sup> reducing disturbances upon cetaceans (including regulating whale-watching, seismic testing and military activities); establishing protected areas for cetaceans;<sup>299</sup> and controlling the problem of by-catch.

## B ACCOBAMS

The *ASCOBANS* treaty is accompanied by *ACCOBAMS*.<sup>300</sup> *ACCOBAMS* applies to all the maritime waters of the Black Sea and the Mediterranean and their gulfs and seas.<sup>301</sup> The desirability of such an agreement was driven by the precarious situations of some of the cetacean populations, and the nature of their deaths in this region.<sup>302</sup> Accordingly, in February 1991 the secretariats of the *Barcelona*, *Bern* and *Bonn Conventions*, as well as the World Conservation Union and Greenpeace International, met to discuss the possibility of creating a new legal agreement to deal with such problems.<sup>303</sup> Soon after, the third CMS Conference of Parties adopted a resolution which urged

Parties and non-parties to the Convention that are Range States for the species and populations of small cetaceans listed by the Conference of the Parties in Appendix

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<sup>295</sup> CMS, *Proceedings of the Third Meeting*, above n 261, 14.

<sup>296</sup> *Ibid* 15.

<sup>297</sup> 'News from CMS 19<sup>th</sup> Standing Committee' (1999) 9 *CMS Bulletin* 4. In 1999, with regard to the study of the adverse effects of marine pollution on cetaceans, the Advisory Committee of *ASCOBANS* recommended continuing 'the positive cooperation' with other international organisations, such as the IWC. For a discussion of the other international organisations involved, see Churchill, 'Sustaining Small Cetaceans: A Preliminary Evaluation of the *ASCOBANS* & *ACCOBAMS* Agreements' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 225, 239–43.

<sup>298</sup> 'CMS Agreement Update: Advisory Committee' (1997) 7 *CMS Bulletin* (1997) 2.

<sup>299</sup> 'Agreement Secretariats: *ASCOBANS*' (2000) 10 *CMS Bulletin* 16. A working group on Protected Areas was formed in 2000.

<sup>300</sup> *ACCOBAMS*, above n 8.

<sup>301</sup> *Ibid* art I(1)(a). It also covers the internal waters connected to or interconnecting these maritime waters, and of the Atlantic area contiguous to the Mediterranean Sea west of the Straits of Gibraltar and bounded by the line joining Cape St Vincent (Portugal) and Casablanca (Morocco).

<sup>302</sup> (1992) 2 *CMS Bulletin* 4: The CMS Secretariat attempted to draw attention to the need for 'urgent action with respect to Black Sea dolphins.' Attention was also brought to the mass strandings of harbour porpoises and common dolphins, which were due to multiple factors of causation (from parasitic infection to loss of habitat).'

<sup>303</sup> (1992) 1 *CMS Bulletin* 7.

II of the Convention, to give priority to concluding agreements for their conservation.<sup>304</sup>

With particular regard to the Mediterranean and the Black Seas, the CMS

urges Range States to collaborate, under the sponsorship of a Party Range State, with a view to concluding under the Convention an Agreement for the conservation of small cetaceans of the Mediterranean and Black Seas.<sup>305</sup>

The negotiating phase for this treaty, which was not concluded until late 1996,<sup>306</sup> was drawn out as a result of a number of factors. Firstly, it sought to 'bind the countries of two sub-regions to work together on a subject of common concern.'<sup>307</sup> Secondly, it is also open to 'membership of non-coastal states ("third countries") whose vessels are engaged in activities which may affect cetaceans.'<sup>308</sup> The third factor was that it was extended to include all cetaceans frequenting the Mediterranean and Black Seas (small and large cetaceans) since their conservation requirements are similar.<sup>309</sup> Finally, unlike with *ASCOBANS*, a number of important range states have not signed the *ACCOBAMS*; as it stands, only 11 of the 28 range states have signed.<sup>310</sup> Although a number of the non-signatories may sign at some point in the future, four (Bulgaria, Russia, Turkey and the Ukraine) have declared that although they support the general principles of the agreement, they have reserved their position until further questions regarding the Black Sea fisheries are fully resolved.<sup>311</sup> This refusal to sign came despite the preamble of *ACCOBAMS*, which, unlike *ASCOBANS*, recognised

the importance of integrating actions to conserve cetaceans with activities related to the socio-economic development of the Parties concerned by this Agreement, including maritime activities such as fishing and the free circulation of vessels in accordance with international law.<sup>312</sup>

*ACCOBAMS*, like *ASCOBANS* before it, commences with the realisation that 'cetaceans are an integral part of the marine ecosystem which must be conserved for the benefit of present and future generations, and that their conservation is a common concern.'<sup>313</sup> Moreover the signatories are aware that

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<sup>304</sup> CMS, Resolution 3.3, 'Small Cetaceans' in *Proceedings of the Third Meeting*, above n 261, 50.

<sup>305</sup> *Ibid* 20.

<sup>306</sup> CMS, *Proceedings of the Fourth Meeting*, above n 263, 15, 122. See also (1996) 5 *CMS Bulletin* 3; (1997) 6 *CMS Bulletin* 1. Nevertheless by 1998 13 states were signatories to *ACCOBAMS*.

<sup>307</sup> CMS, *Proceedings of the Fifth Meeting of the Conference of the Parties* (1997) 21.

<sup>308</sup> *Ibid*.

<sup>309</sup> (1996) 5 *CMS Bulletin* 3.

<sup>310</sup> See 'ACCOBAMS: Agreement Summary Sheet' <[http://www.wcmc.org.uk/cms/acc\\_summ.htm](http://www.wcmc.org.uk/cms/acc_summ.htm)> at 21 September 2001.

<sup>311</sup> For a useful discussion of this refusal, see Churchill, 'Sustaining Small Cetaceans: A Preliminary Evaluation of the ASCOBANS & ACCOBAMS Agreements' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 225, 231–3, 246–7.

<sup>312</sup> *ACCOBAMS*, above n 8, preamble.

<sup>313</sup> *Ibid*.

the conservation status of cetaceans can be adversely affected by factors such as degradation and disturbance of their habitats, pollution, reduction of food resources, use and abandonment of non-selective fishing gear, and by deliberate and incidental catches.<sup>314</sup>

In an attempt to control some of these activities, the signatories agreed to

take co-ordinated measures to achieve and maintain a favourable conservation status for cetaceans. To this end, Parties shall prohibit and take all necessary measures to eliminate ... any deliberate taking of cetaceans and shall co-operate to create and maintain a network of specially protected areas to conserve cetaceans.<sup>315</sup>

This objective was assisted by the adoption of the annexed Conservation Plan<sup>316</sup> which aimed to reduce pollution, reduce by-catch, reduce indirect interactions with fisheries, reduce disturbance (for example, seismic surveys and whale-watching), establish protected areas and monitor cetacean populations in the area.

## VII CONCLUSION

A concern for small cetaceans has been evident within the IWC since the early 1970s. Since that time, the IWC has slowly brought the focus of its Scientific Committee to the status and trends of a number of these species. From the information collected, it has issued resolutions calling for restraint, often directed to specific countries, where the species are clearly at risk.

Despite this slowly evolving approach, a number of countries have continually objected to the practice of overfishing small cetaceans, suggesting that any questions of small cetaceans are not within the competence of the IWC. This is due to the fact that the power to make such moves was not conferred by the *ICRW*, since small cetaceans were not singled out for coverage, nor were they listed in the Nomenclature.

This approach is misplaced for a number of reasons. Firstly, the language of the *ICRW* would appear to be broad and encompass 'all' types of whales and whaling. This is especially so, considering that the earlier international conventions clearly excluded small types of whales from coverage, yet the later ones did not. Secondly, the idea that the Nomenclature to the *ICRW* was the 'cut-off' line for what species were to be under the purview of the *ICRW* — or the core of some form of 'agreement' which delineated authority — is simplistic. Not only was the Nomenclature specifically set out only as 'a guide' in the *ICRW*, it has subsequently been shown in other conventions to be in itself something which needs to evolve to reflect changing scientific knowledge. Thirdly, international law and the conventions within it are evolving. Thus subsequent practices exist that are reinforced through mechanisms within conventions which allow entrenched majorities to change the direction of

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<sup>314</sup> Ibid.

<sup>315</sup> Ibid art II(1).

<sup>316</sup> Ibid annex 2.

treaties. Typically, a three-quarters majority acting through a specified annex, schedule or carefully detailed provision has this power. The IWC has a clear and direct history of using subsequent practice to encompass species of whales and methods of capture and lethal utilisation which were not specifically listed or utilised in earlier times.

It is with respect to this last point that those who object to the authority of the IWC to manage small cetaceans are particularly mistaken. That is, what they are trying to argue is that the *ICRW* cannot evolve without the full and unanimous consent of all the signatories. Moreover they have attached this idea to the creation of the Nomenclature. The *ICRW* was clearly designed to evolve through subsequent practice and the operation of a three-quarters majority (but dissenting nations still have the clear right to object and not be bound). As it would not be possible to argue against this clearly established practice, these objecting states have chosen to confuse the issue with the spurious argument of nomenclature.

A related argument that the IWC does not have competence over small cetaceans is the assertion that coastal states have competence over them. This contention is typically bolstered by *UNCLOS*. However, this assertion is mistaken as *UNCLOS* does not accord coastal states complete sovereignty in territorial seas. It is limited in the sense that nations can waive their rights under *UNCLOS* and freely consent to the authority of overlapping international organisations such as the IWC. For example, signatories to the complementary *Convention for the Conservation of Antarctic Marine Living Resources* clearly deferred authority to the IWC. The need to cooperate with the relevant overlapping international organisations under *UNCLOS* is strengthened when dealing with critically endangered species, migratory species and cetaceans in general. The primacy of the IWC in these discussions was affirmed in *Agenda 21* in 1992.

This is not to suggest that decentralised approaches to the management of small cetaceans are not important. Rather, the point is that regional organisations need to be complementary to the primary international organisation, namely the IWC, in this area. The regional *ASCOBANS* and *ACCOBAMS* agreements are prime examples of this.

In conclusion, the IWC has a broad authority in relation to small cetaceans and a clear primacy over regional organisations on this question. This authority becomes stronger when the small cetaceans migrate between countries or are endangered. This authority is in accordance with the workings of the *ICRW*, the mechanism of subsequent practice and the language of the Convention.