

**Building a “safety net”**  
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**Introduction**

The IWC has been characterized by some as “dysfunctional” meaning that because of the polarized nature of members’ positions and its institutionalized mutual distrust and combative discourse the organization has been unable to carry out its function to regulate whaling as mandated by the 1946 International Convention for the Regulation of Whaling (ICRW).

The IWC as a whole has recognized the organization as dysfunctional agreeing at its 59<sup>th</sup> Annual Meeting to hold an intersessional meeting on “the future of the IWC”. Further, in his letter of October 26, 2007 to Commissioners and Contracting Governments, Dr. William Hogarth<sup>1</sup>, noted that “The Commission recognized at IWC/59 that doing nothing may lead to the demise of the organization which would serve neither the interests of whale conservation or management.”

**General approach**

The IWC’s recognition of its own dysfunctional nature and discussion aimed towards improving the situation should have come years ago but achieving positive outcomes from discussion on the future of IWC represents a significant challenge. It is of concern that while the IWC is talking about its future there is a lack of an effective conservation and management regime. Consideration of a possible new Convention and organization which will secure the dual purposes of the ICRW (management and control of whaling to achieve sustainable use of abundant species and protection and recovery of depleted and endangered species of whales) is essential in case of failure of “the future of IWC” initiative. In other words, a “safety net” is required to ensure that there is a management framework for the conservation and management of whale stocks in the absence of IWC functions.

**Main Concepts**

The 1982 UN Convention on the Law of the Sea should be the core reference for a new Convention.

The “safety net” should provide a balance of conservation and management within which stocks at low levels will be protected and abundant stocks managed sustainably under a science-based regime. The “safety net” should respect the fundamental principles that are

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<sup>1</sup> Current Chair of the International Whaling Commission.

accepted as the world standard, including the precautionary approach, ecosystem considerations, sustainable use, and transparency.

Large-scale unregulated or uncontrolled whaling should not be allowed. Whaling should be allowed only for abundant stocks with strict harvesting quotas and effective monitoring compliance and surveillance measures. An RMP-like, or similarly science-based, framework should be applied for setting or recommending sustainable quotas and, quotas should specifically take account of bycatch and sampling for scientific research.

There should be no division into commercial and aboriginal whaling categories. From a scientific point of view there is no difference.

The Convention should be unambiguously written such that membership would be attractive only to those countries that support the sustainable consumptive use of cetacean resources and promote the objectives of optimum utilization of such species both within and beyond exclusive economic zones as reflected in Article 64 of UNCLOS and who's interpretation of this Article includes the possible reduction of cetacean populations as part of ecosystem management aimed at increasing yields from other fisheries. Unlike the IWC, Governments agreeing to a new Convention should share common objectives thereby enabling proper implement the Convention.

Cetaceans should be treated like any other living resource and whaling should be managed like any fishing and hunting activity.

The new Convention should incorporate a benefit sharing scheme that would establish a research fund to be used in developing countries and for funding the participation of developing countries in its work.

Scientific whaling should be the same as for any other fisheries where the need for fishery independent scientific data on a continuing basis is recognized. The level or scale of research would be similar to or smaller than that currently being undertaken. Research results and achievements would be widely disseminated.

Discussions among experts drafting the new Convention have considered the scope and form of the new Convention as well as the species to be covered and the role and function of the organization. Such consideration has addressed these issues in terms of how management objectives can be best achieved as well as the rights and obligations of States under UNCLOS and the interests of consumers, the industry and non-whaling members.

Draft text has now been developed for a legally binding Convention that is global in scope and covers all cetaceans. The text specifies that the Commission would make regulations covering the catching of cetaceans in waters beyond national jurisdiction, provide recommendations related to cetacean use within EEZs at the request of a coastal state and administer a benefit sharing program. A number of articles in the draft text have been adapted from the ICRW including the right to file objections (ICRW Article V) and the right to issue special permits for the catching of whales for scientific purposes (ICRW Article VIII). Two Articles related to UNCLOS and an Article related to

Territories that have not attained full independence and do not have the competence to enter into treaties but which have competence over matters governed by this Convention have also been adapted from articles in the Convention on Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

A number of the draft paragraphs of the preamble and part of Article 1 of the new draft Convention have been copied below for the purpose of illustration.

HAVING REGARD to their common concerns for the rational management, conservation and optimum utilization of the living resources of the sea in accordance with generally accepted principles of international law including those reflected in the 1982 United Nations Convention on the Law of the Sea (UNCLOS);

APPRECIATING that the sustainable use of the components of biological diversity is one of the objectives of the Convention on Biological Diversity specified in Article 1 of that Convention;

NOTING that many of the world's cetacean stocks are abundant and can be sustainably utilized;

EMPHASIZING that the consumptive use of cetaceans in many parts of the world contributes to sustainable coastal communities, sustainable livelihoods, food security and poverty reduction;

INTERPRETING "optimum utilization" as reflected in Article 64 of UNCLOS to include support for sustainable consumptive use of cetacean resources as well as the possible control of cetacean populations as part of ecosystem management aimed at increasing yields from other fisheries;

BEARING IN MIND the need to develop management procedures which take into account the relationship between cetaceans and other marine living resources and DESIRING to increase research related to ecosystem management particularly related to interactions between cetaceans and fish that are utilized as food for humans;

FURTHER DESIRING to establish an effective system of regulation for the cetacean fisheries appreciating in particular the principles of the need for science based management, optimum utilization and the need to consider the interests of the consumers of cetacean products while ensuring the proper and effective conservation of stocks;

Have agreed as follows:

Article 1.

2. The purpose of this Convention to be pursued in accordance with the relevant provisions is to manage sustainable consumptive use of cetaceans while ensuring their proper and effective long-term conservation, taking into account the interests of the harvesters and the consumers of cetacean products in order to provide sustainable economic, environmental and social benefits.

Participants at the Pew Whales Commission (Lisbon, Feb. 9-10) familiar with the IWC should not be surprised at this development given the establishment of the North Atlantic Marine Mammal Commission (NAMMCO) by Iceland, Norway, the Faroe Islands and Greenland in 1992 because of their dissatisfaction with the IWC, and the statements made by Japan at the close of the 55<sup>th</sup> (2003) Annual Meeting (“Together with the lack of progress in completing the RMS, the Berlin Initiative has provoked an interest in the possible establishment of alternative management organizations”) and the 59<sup>th</sup> (2007) Annual Meeting (“We are particularly interested in holding preparatory talks to establish an alternative international organization to manage and conserve cetacean resources.”).

Clearly, the establishment of a new Convention and organization to manage the sustainable consumptive use of cetaceans must have been seen, at least by some, as one of the possible consequences of the current situation in IWC. Governments will begin consideration of the draft text of the new Convention prior to the 61<sup>st</sup> Annual Meeting of the IWC to be held in June of this year.

Articles 64 and 65 of the United Nations Convention on the Law of the Sea are copied below for reference.

## United Nations Convention on the Law of the Sea

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### ***Article 64***

#### HIGHLY MIGRATORY SPECIES

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

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

### ***Article 65***

#### MARINE MAMMALS

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