CO-OPERATION OR CHAOS? – ARTICLE 65 OF UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND THE FUTURE OF THE INTERNATIONAL WHALING COMMISSION

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I INTRODUCTION

For centuries, whales had been treated as a *res nullius* resource – considered to be freely available to anyone who could hunt and kill them.[1] Records exist of whales being hunted in the Bay of Biscay during the 12th century, and the following centuries saw significant expansion of whaling activities by many states.[2]

Over time, a familiar pattern emerged – as stocks of coastal whales were reduced by indiscriminate hunting methods, whalers would move on to other whale species and to more distant hunting areas.[3] The advent of more sophisticated technology and hunting methods eventually resulted in large scale whaling activities not only in coastal waters but also in the high seas pursuant to the doctrine of 'freedom to fish'.[4]

The development in 1925 of the first 'factory ship', which facilitated large scale processing on the high seas, gave added impetus to an international commercial

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1 Emily A Gardner, 'Swimming through a Sea of Sovereign States: A Look at the Whale's Dilemma' (1996) 12 *Ocean Yearbook* 61, 61.

2 The progress of the whaling industry has been described as 'a series of booms and slumps as the discovery of new whaling techniques and new whaling grounds has been invariably followed by the rapid depletion of one population after another'; Simon Lyster, *International Wildlife Law* (1985) 17.

3 Ray Gambell, 'International Management of Whales and Whaling: An Historical Review of the Regulation of Commercial and Aboriginal Subsistence Whaling' (1993) 46(2) *Arctic* 97, 97.

4 The principle of absolute freedom to fish on the high seas was reaffirmed in the 1893 landmark decision in *Bering Sea Fur Seals Fisheries Arbitration* (*Great Britain v United States*) (1893) 1 Moore's International Arbitration Awards 755 ('*Pacific Fur Seal Arbitration*'); see also Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003) 564-567.

whaling industry that had grown to unprecedented proportions. High seas catches of whales increased from 23,000 in 1924-1925 to 43,000 in 1930-1931.[5] Unregulated whaling led to a significant decline in the number of various whale species, with the result that states with an interest in whaling realised the need to regulate the commercial whaling industry.

Following several earlier attempts to regulate the industry,[6] a whaling conference was convened among whaling nations in Washington, at which was concluded the 1946 *International Convention for the Regulation of Whaling* (*ICRW*).[7] Whales were now to be viewed as a *res communis* resource – 'common property' – under which they would at least be subject to some form of collective management.[8]

Under the *ICRW*, the International Whaling Convention (IWC) was established as its executive body.[9] Since its establishment, the IWC has operated as the principal international organization dealing with whaling, and it currently has a membership of 58 member states.[10] It has, however, been largely ineffective in arresting the continued decline of whale numbers, to the point where eight great whale species have recently been termed 'commercially extinct', as compared with only three species before the IWC was established.[11]

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5 Cynthia Bright, 'The Future of the International Whaling Commission: Can We Save the Whales?' (1993) 5 *Georgetown International Environmental Law Review* 815, 815.

6 In 1927, the League of Nations proposed an international conference to consider the issue of whale conservation. Japan, one of the seven nations that defeated the proposal, argued that whale conservation should be accomplished through bilateral or multilateral agreements among concerned nations: see Mary S Feinstein, '*American Cetacean Society v Baldridge*: Executive Agreements and the Constitutional Limits of Executive Branch Discretion in American Foreign Policy' (1986) 12(1) *Brooklyn Journal of International Law* 209, 213 n 17. Earlier conventions relating specifically to the regulation of whaling are the *Convention for the Regulation of Whaling*, opened for signature 24 September 1931, 155 LNTS 349 (entered into force 16 January 1935); *International Agreement for the Regulation of Whaling*, opened for signature 8 June 1937, 190 LNTS 79 (entered into force 1 July 1937). In addition, further regulations were included through protocols in 1938, 196 LNTS 131; 1944-1945, 148 UNTS 1143); see Patricia W Birnie and Alan E Boyle, *Basic Documents on International Law and The Environment* (1996) 586-587.

7 *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72, art III(1) (entered into force 10 November 1948) ('*ICRW*').

8 Gardner, above n 1, 62.

9 *ICRW*, above n 7, art III(1).

10 As at 23 December 2004, the member states of the IWC are Antigua and Barbuda, Argentina, Australia, Austria, Belgium, Belize, Benin, Brazil, Chile, People's Republic of China, Costa Rica, Cote d'Ivoire, Denmark, Dominica, Finland, France, Gabon, Germany, Grenada, Guinea, Hungary, Iceland, India, Ireland, Italy, Japan, Kenya, Republic of Korea, Mali, Mauritania, Mexico, Monaco, Mongolia, Morocco, The Netherlands, New Zealand, Nicaragua, Norway, Oman, Republic of Palau, Panama, Peru, Portugal, Russian Federation, San Marino, Saint Kitts & Nevis, Saint Lucia, Saint Vincent & The Grenadines, Senegal, Solomon Islands, South Africa, Spain, Suriname, Sweden, Switzerland, Tuvalu, United Kingdom, United States: IWC, *IWC Member Countries and Commissioners* <http://www.iwcoffice.org/commission/members.htm> 23 December 2004.

11 David Day, *The Whale War* (revised ed, 1992) 43.

In its earlier years, the IWC was characterized as a 'whalers' club',[12] allocating quotas to member states at levels which led to significantly reduced whale numbers. Over the past 30 years, the nature of IWC membership has significantly altered[13] with the result that it has now adopted a much greater anti-whaling approach. This stance taken by the IWC, and the apparent intransigence of a number of its more outspoken members,[14] has been at odds with the views of whaling states and has led to considerable tensions among the IWC membership.

During this period, many multilateral agreements dealing with the environment have come into effect.[15] In 1982, the *United Nations Convention on the Law of the Sea* (*UNCLOS*) was concluded, providing a comprehensive framework for the regulation of the seas.[16] *UNCLOS* was finalised following many years of discussion and negotiation, and supersedes to a large extent the various 1958 *Geneva Conventions*[17] that dealt with matters relating to the sea.[18]

Issues of fishing and the conservation and exploitation of living marine resources are very important elements of the *UNCLOS* framework. *UNCLOS* makes specific reference to the conservation of highly migratory species[19] and marine mammals[20] and outlines mandatory obligations in relation to cetaceans.[21] Article 65 of *UNCLOS* emphasizes the role of 'the appropriate international organizations' in

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12 Ibid 41.

13 In the two-year period to 1984, 15 non-whaling states joined the IWC. Twelve of these new member states voted in favour of the 1986 Moratorium: Joseph P Rosati, 'Enforcement Questions of the International Whaling Commission: Are Exclusive Economic Zones the Solution?' (1984) 14 *California Western International Law Journal* 114, 119.

14 The Australian Government's stated policy is to seek a permanent ban on commercial whaling and a global whale sanctuary under the *ICRW*. It is also strongly opposed to 'scientific research' whaling under Article VIII of the *ICRW*: see Federal Minister for the Environment and Heritage the Hon Dr David Kemp MP, 'Whale protection, research, conservation and whaling in Australia' (Press Conference at Parliament House, 30 March 2004) <http://www.deh.gov.au/minister/env/2004/index.html> 8 June 2004.

15 See Sands, above n 4, xxxv-cii.

16 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 21 ILM 1261 (entered into force 16 November 1994) ('*UNCLOS*').

17 *Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964); *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962); *Convention on Fishing and Conservation of the Living Resources of the High Seas*, opened for signature 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966); *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964) ('1958 *Geneva Conventions*').

18 Article 311 of *UNCLOS* provides that the 1958 *Geneva Conventions* are superseded by *UNCLOS* in respect of parties to *UNCLOS*. Relations *inter se* of states who are both parties to the 1958 *Geneva Conventions*, but where only one is a party to *UNCLOS*, continue to be governed by the 1958 Geneva Conventions. They will still be bound, however, by any principles referred to in *UNCLOS* that reflect of customary international law. See Martin M A Dixon, *Textbook on International Law* (3rd ed, 1998) 188-189.

19 *UNCLOS*, above n 16, art 64.

20 Ibid art 65.

21 Ibid. Whales are part of the species of cetaceans, which also includes dolphins and porpoises. The order of cetaceans contains 78 species: Rosati, above n 13, 114 n 3.

relation to the 'conservation, management and study' of whales. During the *UNCLOS* discussions, it was generally assumed that this provision would consolidate the role of the IWC.[22] The language of Article 65, however, allows for the possibility that other organizations, with differing approaches to whaling from the IWC, might also play an important role in the regulation of whale numbers and the whaling industry.

Indeed, in April 1992 Iceland, Faroe Islands, Greenland and Norway established the North Atlantic Marine Mammal Commission (NAMMCO). The question arises as to whether NAMMCO or other whaling organizations that may be established in the future are already, or may later be, considered as 'appropriate organizations' within the terms of Article 65, thus giving rise to the possibility of a fragmented international regime for the management of whales.

This article will examine the ongoing role of the IWC in the context of Article 65 and with reference to other important general environmental principles that have evolved.

Following an outline of the major technical weaknesses of the regime established under the *ICRW* (Section II), this article will analyse the specific requirements arising under Article 65 (Section III). Sections IV and V describe the establishment and development of NAMMCO and analyse its present and potential status under the terms of Article 65. Section VI describes the nature of the widely accepted environmental principles of 'sustainable development' and the 'precautionary principle' and applies them to the terms of the *ICRW*.

This article concludes that Article 65 provides the IWC with a window of opportunity to consolidate its role among states with an interest in whales and whaling. To do so, the IWC must convince states that the management of whales is best undertaken within the regime established by the *ICRW*, together with the incorporation of acceptable and appropriate environmental principles. Having done this, various changes to the terms of the *ICRW* can be implemented to remove inherent weaknesses in its regime.

Failure by the IWC to consolidate its ongoing role may result in a future regime of fragmented regulation of whales and whaling, with differing standards operating for members of the various 'appropriate organizations'. This represents an added threat to the continued existence of whale species.

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22 In the *US Delegation Report to the Third United Nations Conference on the Law of the Sea, Ninth Session* (27 February-4 April 1980, New York), it was stated (33) that Article 65 'enhances the role of the International Whaling Commission (or a successor organization) especially, but not exclusively, with regard to whales', reproduced in Kimberly S Davis, 'International Management of Cetaceans Under the New Law of the Sea Convention' (1985) 3 *Boston University International Law Journal* 477, 512.

II 1946 INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

The *ICRW* was signed by the major whaling nations[23] on 2 December 1946 amid concerns about the effects of unregulated whaling upon the future viability of the whaling industry. It came into force on 10 November 1948, having been largely adapted from a United States draft based on fishing conventions existing at the time.[24]

Membership of the IWC is available to all states acceding to the *ICRW*, regardless of the nature of their interest in whales or the whaling industry.[25]

At the time of its conclusion, the *ICRW* was considered as an innovative model of treaty-based regulation of natural resources.[26] The preamble highlights the founding members' concern regarding the over-fishing of whales[27] and recognizes 'the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks'.[28]

By seeking to restrict whaling operations to 'those species best able to sustain exploitation',[29] the intention was to provide 'for the proper conservation of whale

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23 The original 15 signatories to the *ICRW* were Argentina, Australia, Brazil, Canada, Chile, Denmark, France, The Netherlands, New Zealand, Norway, Peru, South Africa, the Soviet Union, the United Kingdom and the United States.

24 Birnie and Boyle, above n 6, 586.

25 This has led to accusations of the 'de facto sponsorship' of a number of states' membership. This accusation has been particularly directed at Japan viz-a-viz certain of the Caribbean member states. Significant 'influence peddling' has been suggested: Peter J Stoett, *The International Politics of Whaling* (1997) 64. This claim has also been raised against Japan in the context of other international environment institutions. In June 1997, Japan called for a secret vote at the Tenth Conference of Parties to the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975) ('*CITES*'). It was met with some opposition amid 'allegations that [it] had engaged in a vote-buying exercise, providing financial support to small Caribbean states in return for their votes at international conferences': Barnabas Dickson, 'CITES in Harare: A Review of the Tenth Conference of the Parties' (1997) *Colorado Journal of International Environmental Law and Policy* 55. By way of comparison with the *ICRW*, the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 34 ILM 1542 (entered into force 11 December 2001) ('*Straddling Stocks Agreement*') looks at the rights of participation in regional organizations on the basis of a state's 'interest' in the particular activity. Article 11 provides that the nature and extent of participatory rights for new members of a subregional and regional fisheries management organization or arrangement is to be determined with reference to, inter alia: '(b) the respective interests, fishing patterns and fishing practices of new and existing members or participants'.

26 Birnie and Boyle, above n 6, 586.

27 'Considering that the history of whaling has seen over-fishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whales from further over-fishing': *ICRW*, above n 7, preamble.

28 Ibid.

29 Ibid.

stocks and thus make possible the orderly development of the whaling industry'.[30]

Anti-whaling nations argue that these twin goals of conservation of whale stocks and the development of the whaling industry are in conflict, and that the goal of conservation is to be strongly preferred. Some of these states have developed a 'conservationist' – as compared to their earlier 'protectionist' – approach,[31] justifying their fierce anti-whaling position on moral and ethical grounds[32] and on the emergence of a legally based 'right to life' of whales.[33]

Whaling nations, on the other hand, have sought to interpret the aim of developing the whaling industry as being consistent with conservation, arguing that some form of controlled commercial whaling can be conducted without threatening the conservation of whales.[34]

The *ICRW* consists of two major parts. The first comprises the substantive provisions of the Convention itself, which establishes the IWC[35] and sets out the regulatory framework for the management of whales.

The second part of the *ICRW* is the annexed Schedule, which contains the standards to be implemented in the 'conservation and utilization of whale resources'.[36] The Schedule specifies such matters as protected and unprotected species, open and closed waters including sanctuary areas, whaling seasons, whaling methods and size limits for each whale and methods of inspection.[37]

The Schedule may be amended from time to time by a three/fourths majority of members voting.[38] Under the terms of the *ICRW*, amendments to the Schedule shall inter alia:

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30 Ibid.

31 Anthony D'Amato and Sudhir K Chopra, 'Whales: Their Emerging Right to Life' (1991) 85 *American Journal of International Law* 21, 39.

32 For example, in 1996 the United Kingdom Government indicated to the IWC that it would oppose the resumption of any commercial whaling on 'moral grounds', with officials indicating that this view was 'less ambiguous' than its previous policy of opposing commercial whaling purely on technical and scientific grounds: James Buxton, 'UK Hardens Opposition to Commercial Whaling', *Financial Times* (London), 25 June 1996, 4. More recently, however, the United Kingdom has chosen not to rely on 'moral' arguments to support its anti-whaling stance: Department for Environment, Food and Rural Affairs, *Fact Sheet: Whales, Whaling and the International Whaling Commsision (IWC)* (2005) <http://www.defra.gov.uk/fish/cetaceans/factsheet.htm > 17 January 2005.

33 D'Amato and Chopra, above n 31, 28; see also Richard A Falk, 'Introduction: Preserving Whales in a World of Sovereign States' (1989) 17(2) *Denver Journal of International Law & Policy* 249; Sudhir K Chopra, 'Whales: Towards a Developing Right of Survival as Part of an Ecosystem' (1989) 17(2) *Denver Journal of International Law & Policy* 255.

34 Trond Bjorndal and Jon Conrad, 'A Report on the Norwegian Minke Whale Hunt' (1998) 22(2) *Marine Policy* 161, 165.

35 *ICRW*, above n 7, art III(1).

36 Ibid art V(1).

37 Ibid.

38 Ibid art III(2).

(a) … be such as are necessary to carry out the objectives and purposes of [the ICRW] and to provide for the conservation, development, and optimum utilization of the whale resources;
(b) … be based on scientific findings;
(c) …
(d) … take into consideration the interests of the consumers of whale products and the whaling industry.[39]

Prior to 1982, the Schedule was amended frequently to reflect revised catch limits agreed among the members at IWC Annual Meetings. More recently, the IWC has implemented a number of significant changes to the Schedule that have limited the scope of whaling. In 1982, following years of pressure from the international community[40] and environment groups, the Schedule was amended to provide for a moratorium on commercial whaling to take effect from the 1986 season (the 1986 Moratorium).[41]

Other recent amendments to the Schedule include the establishment of the Indian Ocean Sanctuary in 1979 (extended in 1992 and still in place in 2004) and the Southern Ocean Sanctuary (SOS) in 1994 (maintained in 2004),[42] although the legal

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39 Ibid art V(1).

40 The 1972 United Nations Conference on the Human Environment held in Stockholm (the Stockholm Conference), attended by 114 states, concluded that the 'natural resources of the earth including … flora and fauna and specialty representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations … Man has special responsibility to safeguard and wisely manage the heritage of wildlife', reproduced in Chopra, above n 33, 257. In the light of these principles, the Stockholm Conference called for a ten-year moratorium on commercial whaling (Recommendation 33). This resolution was adopted in plenary session of the Stockholm Conference by a vote of 53 in favour, none against and 12 abstentions. Shortly afterwards, the United States introduced a resolution at the 1972 IWC Annual Meeting calling for the adoption of a moratorium, but this was defeated (four in favour, six against and four abstentions). The United States reintroduced the resolution at the 1973 IWC Annual Meeting, but although it gained majority support among IWC members, it did not achieve the requisite three/fourths majority (eight in favour, five against and one abstention). The Stockholm Conference gave substantial impetus to increasing environmental awareness and activism, and Recommendation 33 propelled whales into the forefront of environmental concerns; see Stoett, above n 25, 64.

41 The 1986 Moratorium was adopted by a vote of 25 in favour, seven against and five abstentions. Those member states who voted against the 1986 Moratorium were Brazil, Iceland, Japan, Norway, Peru, the Republic of Korea and the Soviet Union. As a result the following provision was added as paragraph 10(e) of the Schedule: 'Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.' The 1986 Moratorium still remains in place.

42 IWC, 'Final press release from the International Whaling Commission's 56th Annual Meeting in Sorrento, Italy 2004' (Press Release, 2004) < http://www.iwcoffice.org/meetings/meeting 2004.htm> 28 July 2004.

basis for the establishment of the SOS has been questioned.[43] Further attempts by anti-whaling members to establish sanctuaries in the South Atlantic and South Pacific have so far been unsuccessful.[44]

The ineffectiveness of the IWC to control the decline of whale numbers over the past 55 years has, in large measure, been due to weaknesses inherent in the *ICRW* regime. From time to time, pro-whaling members who disagree with decisions of the IWC have been able to take advantage of these 'loopholes'[45] to pursue their own national interests, while still complying with their international law obligations and responsibilities under the *ICRW*.

To understand the current impasse among the IWC membership, it is necessary to briefly discuss the major areas of weakness in the way the *ICRW* management regime is structured.

A *The 'Opt out' or 'Objection' Provision*[46]

Under the terms of this provision, any member of the IWC is entitled to object to an amendment to the Schedule within specified timeframes. As a consequence, that member is not bound by the particular amendment unless and until it withdraws its objection.[47]

The provision was included to limit the encroachment of the *ICRW* upon the sovereignty of the member states. The IWC acknowledges criticism that the provision has rendered it 'toothless',[48] but, as former secretary of the IWC Dr Ray Gambell has explained, the objection provision was necessary since 'it is doubtful if the convention itself could have been approved without such an arrangement'.[49]

Objections have been made by pro-whaling nations from time to time, including

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43 See William T Burke, 'Legal Aspects of the IWC Decision on the Southern Ocean Sanctuary' (1997) 28(3) *Ocean Development and International Law* 313; Patricia W Birnie, *Opinion on the Legality of the Designation of the Southern Ocean Whale Sanctuary by the International Whaling Commission* (1995) High North Alliance <http://www.highnorth.no/Library/Management_Regimes/IWC/op-on-th.htm> 10 June 2004; William T Burke, 'Memorandum of Opinion on the Legality of the Designation of the Southern Ocean Sanctuary by the IWC' (1996) 27(3) *Ocean Development & International Law* 315.

44 See IWC, *Whale Sanctuaries: Establishment of the International Whaling Commission's sanctuaries* <http://www.iwcoffice.org/conservation/sanctuaries.htm> 23 December 2004.

45 Day, above n 11, 124.

46 *ICRW*, above n 7, art V(3).

47 Ibid. A party to the *ICRW* has 90 days following notification of the amendment by the IWC to lodge an objection. Following the presentation of an objection to the IWC, all other members have up to a further 120 days to also lodge an objection to the amendment. Thereafter the amendment becomes effective with respect to all members who have not lodged an objection, but is not effective with respect to all members who have lodged an objection until such date as its objection is withdrawn.

48 IWC, *IWC Information* <http://www.iwcoffice.org/commission/iwcmain.htm> 23 December 2004.

49 See Gambell, above n 3, 99.

those raised by Norway, the Soviet Union,[50] Japan and Peru in reaction to the 1986 Moratorium. Under strong diplomatic pressure from the United States, both Peru and Japan (in stages) withdrew their objections in 1983 and 1987-1988 respectively. The objections made by Norway and the Russian Federation, however, remain in place and have not been withdrawn, with the result that neither is legally bound under the terms of the *ICRW* to comply with the terms of the 1986 Moratorium.

The most recent objection to the *ICRW* was submitted by Iceland in 2001 as part of its undertaking to rejoin the IWC and adhere to the *ICRW*.[51] At issue was whether the Commission accepted Iceland's objection and also whether it was competent to make such a decision.[52] Iceland's objection to paragraph 10(e) of the Schedule[53] led to considerable debate within the IWC. As a result, Iceland was only readmitted (with its objection) at its third attempt.[54]

B *The 'Scientific Research' Exemption*[55]

The *ICRW* allows any member state to grant its nationals a special permit to 'kill, take or treat whales for purposes of scientific research', subject only to any conditions regarded as appropriate by that member state. The number of whales taken under a scientific research permit is 'exempt from the operation of' the *ICRW*[56] and such permits can be granted '[n]otwithstanding anything contained in' the *ICRW*. States are required under the *ICRW* to process 'so far as practicable' whales taken under special permits[57] and transmit scientific information gathered from research to the Commission's designated body.[58] Article VIII, however, is silent on specific criteria relating to the scientific basis or conduct of any research conducted under a special permit.

The scientific research exemption is highly controversia; particularly as a number of whaling states have created institutionalized research programs following the implementation of the 1986 Moratorium.[59] The number of whales taken under the

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50 Following the break up of the Soviet Union, the Russian Federation succeeded to membership of the IWC in its place.

51 Iceland had withdrawn from the IWC in 1992.

52 IWC, 'Final press release from the International Whaling Commission's 53rd Annual Meeting in London, UK 2001' (Press Release, 2001) <http://www.iwcoffice.org/meetings/meeting2001.htm > 10 June 2004; see also Alexander Gillespie, 'Iceland's Reservation At The International Whaling Commission' (2003) 14(5) *European Journal of International Law* 977.

53 1986 Moratorium, above n 41.

54 IWC, '53rd and 54th Annual Meetings of the IWC' (Press Releases, 2001 & 2002) and '5th Special Meeting' (Press Release, 2002) <http://www.iwcoffice.org/meetings/pressrelease.htm> 10 June 2004.

55 *ICRW*, above n 7, art VIII.

56 Ibid art VIII(1).

57 Ibid art VIII(2).

58 Ibid art VIII(3).

59 The Japanese Government created the Institute of Cetacean Research immediately after the commencement of the 1986 Moratorium: Bright above n 5, 24; for a summary of Japan's whaling programs see Eldon V C Greenberg, Paul S Hoff and Michael I Goulding, 'Japan's

scientific research exemption during the 1986 season, the first season after the 1986 Moratorium took effect, exceeded the number of whales taken in commercial whaling activities in the previous season.[60]

Despite frequent IWC resolutions calling on member states to cease special permit catches and expressing a concern over the scientific validity of such research,[61] pro-whaling states continue to asset their rights under Article VIII.[62] Even though it is provided for under the *ICRW*, scientific research whaling continues to draw criticism from the international community and environment groups,[63] with many arguing that it is merely a disguised form of commercial whaling.[64]

C *The Enforcement Provision*[65]

Under the *ICRW* regime, compliance is essentially self-regulated. A member state is responsible for enforcement of the provisions of the Convention in relation to actions 'by persons or by vessels under its jurisdiction',[66] as well as for the prosecution of violations. In addition to being dependent on the determination of member states to take appropriate action in respect to their own nationals, this does not properly address the situation where infractions are carried out in waters beyond the national jurisdiction of any other member state. Additionally, the *ICRW* makes no provision for enforcement where the violations are carried out by a state itself rather than individuals. The IWC itself has no powers of enforcement under the regime.[67]

Lack of effective enforcement powers is probably the greatest weakness of the

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Whale Research Program and International Law' (2002) 32 *California Western International Law Journal* 151.

60 Day, above n 11, 123-124.

61 IWC, '55th and 56th Annual Meeting of the IWC' (Press Releases, 2003 and 2004) <http://www.iwcoffice.org/meetings/pressrelease.htm> 28 July 2004.

62 In 2003, Iceland announced the resumption of its research whaling program, which had been suspended since 1989: Icelandic Ministry of Fisheries, 'Iceland decides to conduct a minimal implementation of its research plan for whales' (Declaration, 6 August 2003) <http://www.fisheries.is/issues/index.htm> 24 December 2004.

63 In 2004, the Australian Office of the Humane Society International (HSI) commenced an action in the Federal Court of Australia against Japanese whaling company Kyodo Senpaku Kaisha Ltd. The Society claimed the company's whaling activities in Australia's EEZ, carried out under Japan's Antarctic scientific research program, was illegal since in 2000 the EEZ was declared a whale sanctuary following the enactment of the *Environment Protection and Biodiversity/Conservation Act* 1999 (Cth): HSI, 'Humane Society International goes to Federal Court over Japanese Whaling', (Press release 19 October 2004).

64 Greenpeace has stated that 'scientific whaling is almost universally regarded as nothing more than commercial whaling under a different name', reproduced in Robert L Friedheim, 'Moderation in the Pursuit of Justice: Explaining Japan's Failure in the International Whaling Negotiations' (1996) 27(4) *Ocean Development and International Law* 349, 357.

65 *ICRW*, above n 7, art IX.

66 Ibid art IX(1).

67 John K Setear, 'Can Legalization Last?: Whaling and the Durability of National (Executive) Discretion' (2004) 44 *Virginia Journal of International Law* 711, 718.

existing *ICRW* system. To compensate for the absence of this enforcement authority, two major forms of 'external' enforcement have evolved on an ad hoc basis, although they do not offer a lasting solution for the enforcement of the *ICRW*.

The first of these ad hoc enforcement mechanisms arose from the action of the United States in introducing a series of statutory amendments designed to promote compliance with *ICRW* regulations.[68] Essentially, this has seen the United States play the role of the IWC's 'policeman',[69] even in respect of states that are not members of the IWC.

The two provisions, the 1971 Pelly Amendment to the *Fisherman's Protective Act* of 1967 (Pelly Amendment)[70] and the 1979 Packwood-Magnuson Amendment to the *Fishery Conservation and Management Act* of 1976 (Packwood-Magnuson Amendment),[71] apply where the action of a foreign national 'diminishes the effectiveness' of the *ICRW* and the IWC. Under the Pelly Amendment, once the Secretary of Commerce determines that this standard has been breached, he or she is required to certify this to the United States President who then has a discretion to impose import sanctions against the certified state.[72]

Import sanctions under the Pelly Amendment have been threatened, but not implemented, on a number of occasions, including against Japan and the USSR in 1974, and against Chile, Peru and Korea in 1978. In the latter case, the three countries were not members of the IWC at the time and therefore were not bound by the *ICRW* provisions. Diplomatic pressure associated with the United States' threats eventually resulted in those three states joining the IWC.[73]

The failure by the President to impose trade sanctions under the Pelly Amendment[74]

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68 Although the first of these amendments, the Pelly Amendment (below n 70), was designed to protect Atlantic Salmon from over-fishing, other species of marine life protected under an international fishery conservation program would also be covered by its certification procedure. Whales are protected under the *ICRW* and therefore within the Pelly Amendment's certification procedure: Melinda K Blatt, 'Woe for the Whales: *Japan Whaling Association v American Cetacean Society*' (1987) 55 *University of Cincinnati Law Review* 1285, 1290.

69 Dylan A MacLeod, 'International Consequences of Norway's Decision to Allow the Resumption of Limited Commercial Whaling' (1994) 17 *Dalhousie Law Journal* 83, 88.

70 22 USC § 1978 (2000).

71 16 USC § 1821 (2000).

72 The relevant sections of the Pelly Amendment, 22 USC § 1978(a)(1)-(2) (2000) are as follows: '(1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President. (2) When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.'

73 Rosati, above n 13, 138.

74 An example of the failure to impose sanctions is illustrated by the first certification under the Pelly Amendment in November 1974. The Secretary of Commerce certified both Japan and the

led Congress to review the operation of the provision in relation to whaling.[75] In an effort to correct what it saw as the weakness of the Pelly Amendment process, it enacted the Packwood-Magnuson Amendment, which was concerned solely with violations of the *ICRW*. Pursuant to this provision, the President, after receiving a certification under the Pelly Amendment, 'must' reduce the certified state's fishing quota in United States waters by at least 50 per cent.[76]

Threats under the Packwood-Magnuson Amendment have at times been 'highly persuasive'.[77] Threats to invoke the provision against Spain, Korea, Chile and non-IWC member Taiwan in the early 1980s effectively forced those states to comply with IWC quotas and the 1986 Moratorium. In 1985, the United States reduced the fishing allocation of the Soviet Union under the Packwood-Magnuson Amendment, though it declined to impose additional trade sanctions under the Pelly Amendment.[78]

Over time, however, the impact of these two provisions has reduced significantly and their potential for future use is limited.[79] During the 1980s, the United States was becoming increasingly reluctant to impose sanctions against Japan for fear of counter-sanctions.[80] In any event, Japan's fishery allocation in United States waters has been very low or even zero, rendering the threat of action under the Packwood-Magnuson Amendment of little worth.[81]

Soviet Union, which, under the objection procedure of the *ICRW*, continued to whale minke whales at numbers exceeding the IWC quota set in 1973. The administration declined to take action and reported to Congress that it would not impose sanctions under the Pelly Amendment since those two countries 'had taken measures to strengthen their conservation regime for whales': Ted L McDorman, 'The GATT Consistency of US Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles' (1991) 24(3) *George Washington Journal of International Law and Economics* 477, 484.

75 Ibid 485.

76 The relevant sections of the Packwood-Magnuson Amendment, 16 USC §§ 1821(e) (2)(A)(i) and 1821(e)(2)(B) (2000) are as follows: 'The term "certification" means a certification made by the Secretary [of Commerce] that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section 1978(a) of [the Pelly Amendment]', and '[i]f the Secretary issues a certification with respect to any foreign country, then each allocation [of the total allowable level of foreign fishing which is permitted with respect to each fishery subject to the exclusive fishery management authority of the United States] that is in effect for that foreign country on the date of issuance … shall be reduced by the Secretary of State, in consultation with the Secretary [of Commerce], by not less than 50 percent'.

77 Charles L Johnson, 'Environmental Law: Certification of Japanese Violations of International Whaling Agreements' (1988) 29 *Harvard International Law Journal* 541, 545.

78 McDorman, above n 74, 488.

79 Gardner, above n 1, 72.

80 Johnson, above n 77, 546.

81 Ibid 545.

Following the advent of the 1986 Moratorium,[82] the certification of Norway under the Pelly Amendment for its continued whaling was not followed by trade sanctions, with political factors playing an important part in the President's decision.[83]

In 1986, the Supreme Court in *Japan Whaling Association v American Cetacean Society*[84] overturned the decision of the district of Columbia Court of Appeals[85] that was in favour of several environment groups by a five-four majority. It held that neither the Pelly Amendment nor the Packwood-Magnuson Amendment imposed on the Secretary of Commerce a mandatory obligation to certify every violation of IWC declared quotas. The decision has been criticised[86] and has opened the way for 'behind the scenes' negotiated settlement of whaling disputes by individual IWC member states,[87] further eroding the credibility of the IWC to regulate whaling.[88]

Furthermore, in the 1991 *Tuna–Dolphin Dispute*,[89] a Dispute Settlement Panel constituted under the 1947 *General Agreement on Tariffs and Trade* (*GATT*) held that import restrictions imposed through United States national legislation[90] in relation to fishing activities by Mexico outside United States waters were inconsistent with the provisions of *GATT*.[91] In a subsequent challenge by the

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82 Norway had lodged an objection to the 1986 Moratorium under the 'opt out' clause of the *ICRW*, above n 7, art V(3) and was therefore legally entitled under the *ICRW* to continue whaling.

83 MacLeod, above n 69, 94.

84 478 US 221 (1986).

85 768 F 2d 426 (1985).

86 Ronald J Haskell, 'Abandoning Whale Conservation Initiatives in *Japan Whaling Association v American Cetacean Society*' (1987) 11(2) *Harvard Environmental Law Review* 551.

87 Feinstein, above n 6, 238.

88 In 1984, an agreement was negotiated between United States Secretary of Commerce Baldridge and Japanese Charge d'Affaires Murazami (the *Baldridge-Murazami Agreement*), under which the United States agreed that Japan could take 1200 sperm whales and an undetermined number of other species over the period 1984-1988 without being certified under the Pelly Amendment. In return, Japan agreed to withdraw its objection to the 1986 Moratorium and promised to cease commercial whaling by 1988. Immediately prior to the conclusion of the *Baldridge-Murazumi Agreement*, environment groups launched the District Court action which ultimately concluded with the Supreme Court decision in *Japan Whaling Association v American Cetacean Society* 478 US 221 (1986): Haskell, above n 86, 563. The *Baldridge-Murazumi Agreement* was described in 1987 as 'simply a substitute for the IWC's yearly Schedule, devoid of a scientific basis and the approval of interested nations': Haskell, above n 86, 588.

89 *United States Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, GATT Doc D/S2l/R, 30 ILM 1594 (1991) (GATT Dispute Settlement Panel).

90 The decision related to regulations under the 1972 *Marine Mammal Protection Act*, 16 USC § 1371 (*MMPA*). Section 101(a)(2) of the *MMPA* required the United States Secretary of State 'to ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards', reproduced in Sands, above n 4, 954.

91 Ibid 960-961. Even though Mexico was successful in its action, it was forced by subsequent diplomatic action by the United States to suspend any further action in order not to have the issue brought into the *North American Free Trade Agreement* ('*NAFTA'*) debate: Friedheim, above n 64, 367.

European Economic Community and The Netherlands, the Panel also ruled against the United States in the 1994 *Tuna-Dolphin Dispute*.[92]

In addition, Principle 12 of the *Rio Declaration on Environment and Development*[93] stated that:

> [t]rade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.[94]

This principle does not infer an absolute prohibition on the use of unilateral trade measure for environmental purposes.[95] The World Trade Organisation (WTO)[96] Panel Decisions in the *Shrimp-Turtle Dispute*,[97] however, point to a high standard by which unilateral trade measures would be evaluated by the Panel.[98] In 2000, the United States considered, but did not implement, sanctions against Japan following certification under the Pelly and Packwood-Magnuson Amendments.[99] Upon the certification of Iceland in 2004, however, the United States considered only the use of non-trade sanctions.[100]

A second ad hoc form of external enforcement of the *ICRW* has involved the actions of various environment groups, such as Greenpeace, Humane Society International[101] and the Sea Shepherd Society, designed to curb the activities of whaling nations. Non-governmental organizations and environment groups play an important role in discussions relating to whaling, and participate actively at IWC

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92 *United States – Restrictions on Imports of Tuna*, GATT Doc DS 29/R, 33 ILM 839 (1994) (GATT Dispute Settlement Panel).

93 Declaration of the United Nations Conference on Environment and Development, UN Doc A/CONF.151/26/Rev.1, 31 ILM 874 (1992) ('*Rio Declaration*') adopted by the United Nations Conference on Environment and Development (UNCED) on 13 June 1992.

94 *Rio Declaration*, principle 12, UN Doc A/CONF.151/26/Rev.1, 31 ILM 874 (1992).

95 Larissa Waters, 'The Use of Unilateral Trade Measures for Environmental Purposes: a Critique' (2002) 19(5) *Environmental and Planning Law Journal* 368, 378-379.

96 In December 1993, under the Final Act of the Trade Negotiations Committee of the Uruguay Round of GATT, agreement was reached to establish the WTO as a permanent organisation to monitor international matters relating to trade: Sands, above n 4, 946-949.

97 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/R (1998) (Report of the World Trade Organisation Dispute Panel); *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (1998) (Report of the Appellate Body).

98 Sands, above n 4, 965-973.

99 Sean D Murphy (ed), 'Contemporary Practice of the United States Relating to International Law' (2001) 95 *American Journal International Law* 132, 151-152.

100 National Oceanic and Atmospheric Administration, 'Commerce Secretary Evans certifies Iceland for its whale hunt' (Press Release, 26 June 2004) < http://www.publicaffairs.noaa.gov/relEases2004/jun04/noaa04-065.html> 25 July 2004.

101 For an example of HSI activities in relation to whaling see above, n 63.

Annual Meetings, which are also attended by observers[102] from non-member states and governmental organizations.[103] At times, however, some environment groups have been involved in actions leading to destruction of whaling ships and private property[104] – actions regarded as 'ecotage' by their supporters[105] and as 'acts of terrorism' by whaling states.[106] In 1979 and 1980 for example, the Sea Shepherd Society claimed responsibility for the sinking of five 'pirate whaling' vessels.[107]

Under the planned Revised Management Scheme (RMS),[108] it is proposed that current enforcement measures provided under the *ICRW* be maintained but that an additional Compliance Review Committee also be established to review infractions.[109] Under this proposal the imposition of penalties would remain the responsibility of member states and not the IWC. Several states claim such a proposal does not go far enough, instead calling for more stringent enforcement measures to be adopted.[110]

D *The 'Withdrawal' Provision*[111]

Upon giving the requisite notice,[112] any member of the IWC may withdraw its membership. Subsequently, a member state that withdraws from the *ICRW* is no longer bound to comply with the obligations specified in the Convention.

While withdrawal is a more drastic step than an objection under Article V, it has been invoked on a number of occasions. At various times Japan, Canada, Norway,

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102 At the 52nd IWC Meeting it was agreed that opening statements by observers would by included in official documentation: IWC, *52nd Report of the International Whaling Commission* (2002) 53.

103 The 2003 IWC Annual Meeting was attended by delegates from 49 member states, observers from seven member States, seven inter-governmental organizations and 91 non-governmental organizations: IWC, *55th Report of the International Whaling Commission* (2003) Annex A.

104 Day, above n 11, 68-89.

105 Ibid 87.

106 See Friedheim, above n 64, 358.

107 Elizabeth A Wehrmeister, 'Giving the Cat Claws: Proposed Amendments to the International Whaling Convention' (1989) 11(2) *Loyola Los Angeles International and Comparative Law Journal* 417, 432.

108 Before the 1986 Moratorium is lifted the IWC requires a Revised Management Scheme (RMS) be adopted, which encompasses inspection, observers and compliance.

109 Alexander Gillespie, 'The Search for a New Compliance Mechanism Within the International Whaling Commission' (2003) 34(3/4) *Ocean Development and International Law* 349, 359-361.

110 The RMS Working Group last met in Borgholm, Sweden on 29 November 2004. Prior to the meeting, member states were requested to respond to a questionnaire in relation to the Chair's RMS proposal. Seven out of 15 respondents rejected the Compliance Review Committee proposal. See RMS Working Group Documents, 'Responses to the Questionnaire relating to "Call for comments/positions on key issues in relation to the Chair's proposal for a way forward on the RMS"', (IWC/N04/RMSWG4) available from IWC Webmaster or the Secretariat.

111 *ICRW*, above n 7, art XI.

112 Ibid. Under the terms of Article XI, a state may withdraw from the *ICRW* by giving notice before 1 January of any year. Withdrawal takes effect on 30 June of that year.

Iceland and The Netherlands have withdrawn from the *ICRW*.[113] It had previously been argued[114] that long term withdrawal from the *ICRW* was not an appropriate option, since it deprived the withdrawing state of the benefits of the *ICRW*, mainly comprising the sharing of technology and whaling techniques. Indeed, Japan, Norway, The Netherlands and Canada subsequently returned to membership of the IWC, although Canada withdrew again in 1982 and remains outside the IWC.[115]

The establishment of 'alternate' regional international whaling organizations such as NAMMCO, however, set up at the instigation of Iceland when it withdrew from the IWC in 1992,[116] may encourage further withdrawals by member states and thus affect the future credibility of the IWC.[117] Japan has openly declared that it will 'seriously consider' leaving the IWC in 2006 if it remains dissatisfied with the progress of the RMS.[118]

Given the fundamental weaknesses in the *ICRW* and the lack of effectiveness of the IWC, amendment to these provisions of the Convention is necessary. Such amendments require the consent of all parties to the *ICRW*, including those seeking to resume commercial whaling, in order to have legal effect. Realistically, this will not be possible unless and until the IWC acts to consolidate its role within the terms of *UNCLOS* by applying and adhering to those general environmental principles which are consistent with the goals of the *ICRW*.

III 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

UNCLOS came into force in November 1994 and, at the time of writing, there are 146 parties to the Convention.[119] *UNCLOS* was drafted over the course of many

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113 Venezuela was the last state to withdraw from the *ICRW*, effective 30 June 2001.

114 Gardner, above n 1, 823 citing Wehrmeister, above n 107, 435.

115 Canada has remained an observer state at IWC Annual Meetings since its withdrawal and has been invited to rejoin the IWC. At the 1998 IWC Annual Meeting, a resolution was passed inviting the Government of Canada to 'rejoin the IWC and, in the meantime, not to issue further licenses for any whaling not conducted under the [*ICRW*]': IWC, *50th Report of the International Whaling Commission* (1998) Appendix 17.

116 In a press release issued at the time of its announcement that Iceland would be withdrawing from the IWC, the Icelandic Ministry of Fisheries stated '[i]t is, therefore, necessary and appropriate to work towards the establishment of a regional organization covering the North Atlantic, with particular emphasis on the northernmost areas, where marine mammals are plentiful and where management challenges are shared': Ministries of Fisheries, Iceland, *Questions and answers to Iceland's decision to leave the International Whaling* Commission (December 1991) High North Alliance <http://www.highnorth.no/Library/Policies/National/qu-an-an.htm> 24 December 2004. Amid considerable controversy, Iceland was readmitted to the IWC in 2002: IWC Press Releases, above n 54.

117 Bright, above n 5, 817.

118 Alex Kirby, *Japan sets 2006 whaling ultimatum* (2004) BBC News World Edition, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/science/nature/3907415.stm> 20 July 2004.

119 UNCLOS, *Chronological lists of ratification of accessions and successions to the conventions and the related Agreements as at 01 February 2005* <http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm> 17 November 2004.

years of discussion on the basis of a 'consensus' approach,[120] inevitably leading to some imprecise and vague language. Nevertheless, it provides a comprehensive framework governing the use of the sea and management of marine resources.

Articles 65 and 120 of *UNCLOS* are of particular importance to the management of whales and thus have significant implications for the IWC and *ICRW*. Article 65 is found in Part V of the Convention, which relates to the 200 nautical mile Exclusive Economic Zone (EEZ).[121] *UNCLOS* gives coastal states 'sovereign rights' in relation to the exploitation, conservation and management of its natural resources within this zone.[122] It limits the extent of the traditional concept of freedom to fish on the high seas,[123] which had previously applied beyond the outer limits of territorial waters.[124] Articles 61 and 62 set out measures for conservation and living resources within the EEZ and Articles 63 to 67 refer to specific species.[125]

Article 64 deals with highly migratory species and requires co-operation by states 'directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species' (as listed in Annex 1).[126]

This requirement of international co-operation, one of the underlying themes throughout *UNCLOS*[127] as well as in the wider spectrum of international environmental law,[128] is repeated in Article 65. It relates specifically to marine

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120 The Final Text of the Third United Nations Conference on the Law of the Sea (UNCLOS III) was adopted by a vote of 130 to four, with 17 abstentions. A vote had been requested by the United States (one of those voting against its adoption) due to its opposition to the Deep Sea Bed regime specified in Part XI. Through the offices of the United Nations, a compromise on the Deep Sea Bed provisions was reached just prior to the time that *UNCLOS* was to come into force (12 months after the 60th ratification). The resulting 1994 Agreement Relating to the Implementation of Part XI (the New York Agreement) forms an integral part of the IJNCLOS.

121 *UNCLOS*, above n 16, art 57 provides that: 'The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured'.

122 Ibid art 56(1)(a).

123 Davis, above n 22, 493.

124 In *Continental Shelf Case* (*Tunisia v Libya*) [1982] ICJ Rep 18, the International Court of Justice confirmed that the concept of the exclusive economic zone had also become a part of customary international law. This was confirmed by the Court of Arbitration in *Guinea-Guinea-Bissau Maritime Delimitation Case* (1985) 77 ILR 636: see Dixon, above n 18, 193.

125 The various species dealt with in these Articles area as follows – Article 63: 'Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it'; Article 64: 'Highly Migratory Species'; Article 65: 'Marine Mammals'; Article 66: 'Anadromous stocks'; Article 67: 'Catadromous stocks'.

126 *UNCLOS*, above n 16, art 64.

127 States are required to 'co-operate with each other in the conservation and management of living resources in the areas of the high seas'. Section 2 of Part XII of *UNCLOS*, which relates to the protection and preservation of the marine environment, specifies the obligation on states for 'Global and Regional Co-operation': Ibid art 118; see *UNCLOS*, art 197-201.

128 'The obligation to co-operate is affirmed in virtually all international environmental agreements of bilateral and regional application, and global instruments': Sands, above n 4,

mammals and provides:

> 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.

Article 120, which appears in Part VII of *UNCLOS* dealing with the high seas, provides that Article 65 'applies to the conservation and management of marine mammals in the high seas'.

During the drafting of *UNCLOS*, the matters addressed in Articles 64 and 65 were regarded as being closely associated and were initially contained in the one draft provision.[129] Only relatively late in the drafting process were they separated into two provisions. As a result, the first sentence of Article 65 is widely interpreted[130] as qualifying Article 64 by enabling coastal states, in the exercise of their sovereign rights, to impose a different (stricter) management regime than the requirement of 'optimum utilization', or to delegate to an international organization the jurisdiction to impose such a regime[131] for marine mammals in their EEZ. In this sense, the first sentence of Article 65 does not appear relevant to the high seas, although it should be noted that states retain flag state jurisdiction over their nationals in the high seas[132] and are free to impose fishing restrictions and standards over them.[133]

The second sentence of Article 65 obligates states to co-operate with respect to marine mammals and applies equally to the EEZ and high seas (under Article 120). The combined effect of Articles 65 and 120 is to create a specific management regime for marine mammals in the EEZ and high seas, and to allow for a different regime within the EEZ from that of 'optimum utilization'.[134]

The discussion below concentrates on the obligations contained in the second sentence of Article 65, the precise extent and nature of which are unclear and ambiguous.[135]

Shortly after *UNCLOS* was concluded, it was argued that Article 65 'deferred' to

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250; see also Ted L McDorman, 'Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention' (1998) 29(2) *Ocean Development and International Law* 179, 184.

129 Davis, above n 22, 500.

130 Ibid; see also Patricia W Birnie, 'Problems Concerning Conservation of Wildlife in the North Sea' (1991) 9 *Ocean Yearbook* 339, 349.

131 McDorman, above n 128, 182.

132 *UNCLOS*, above n 16, art 92(1).

133 For example, the Australian *Environment Protection and Biodiversity Conservation Act 1999* (Cth) pt 13, div 3 inter alia prohibits killing, capturing, injuring or interferences with cetaceans by any person within its 200 nautical mile EEZ, and by its citizens elsewhere.

134 Davis, above n 22, 502.

135 For an analysis of the first sentence of Article 65, see McDorman, above n 128, 182.

the IWC in matters regarding the management of whales, since the IWC was to be the only international organization under the regime established in Article 65. As a result, it was contended that all parties to *UNCLOS*, even those who were not also members of the IWC, would be bound by IWC regulations made under the *ICRW*.[136]

The United States has extended this interpretation further, asserting that the obligations set out in Article 65 constitute principles of customary international law. In December 1996, it certified Canada under the Pelly Amendment for the taking of two bowhead whales under a licence granted that year by the Canadian Government. Canada was neither a member of *UNCLOS*[137] nor the IWC (and therefore not bound by the 1986 Moratorium)[138] at the time. Nevertheless, in explaining the certification to the United States Congress, President Clinton stated that 'Canada's unilateral decision to authorize whaling *outside of the IWC* is unacceptable' (emphasis added), asserting that, under international law as reflected in Article 65, Canada was required to seek the permission of the IWC before authorising whaling by its nationals.[139]

This very broad interpretation does not accord with the views of many other states. Canada, for example, asserts both an exclusive jurisdiction over whales in its 200 nautical mile zone,[140] and that, following its withdrawal from the IWC in 1982,[141] it is not bound by regulations under the *ICRW*.[142] Other member states of the IWC, such as Mexico, have asserted their continuing right to take whales in their EEZ if

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136 Davis, above n 22, 481; Rosati, above n 13, 130.

137 The United States is also yet to ratify *UNCLOS* and is therefore not a party to it, though it does attempt to comply with its provisions. Indeed, during the 2004 American presidential election campaign, both President George W Bush and John Kerry indicated that they would move to have the United States ratify UNCLOS. It is anticipated that this may soon take place: Jonathan Power, *The US and the Law of the Sea* (2004) International Herald Tribune <http://www.iht.com/articles/2004/11/02/news/edpower.html> 7 November 2004.

138 Canada withdrew from the IWC in 1982 in the wake of domestic and international reaction over its vote in 1980 against a moratorium on the taking of sperm whales: see McDorman, above n 128, 180.

139 '[T]he whaling took place outside the IWC. *International law, as reflected in the 1982 United Nations Convention on the Law of the Sea*, obligates countries to work through the appropriate international *organization* for the conservation and management of whales' (emphasis added): William J Clinton, *To the Congress of the United States* (1997) High North Alliance <http://www.highnorth.no/Library/Trade/GATT_WTO/th-us-do.htm> 10 June 2004. Although the G W Bush Administration has confirmed its commitment to the cessation of whaling outside the *ICRW* regime, it is unclear whether the United States continues to maintain such a strong interpretation of Article 65, given that no non-members to *ICRW* have since been certified. For statements relating to whaling made by the Administration of President G W Bush: Reuben B Ackerman, 'Japanese Whaling in the Pacific Ocean: Defiance of International Whaling Norms in the Name of "Scientific Research", Culture, and Tradition' (2002) 25 *Boston College International and Comparative Law Review* 323, 328.

140 For a review of Canada's claim to a 200 nautical mile exclusive economic zone: see McDorman, above n 128, 190 n 25.

141 Ibid 180.

142 Ibid 181.

they so wish.[143]

There is nothing in Article 65 or elsewhere in the text of *UNCLOS* that specifically gives an international organization the power to infringe upon the sovereign rights of a coastal state in its EEZ.[144] This raises doubts as to the competence of the IWC within the EEZ of both member and non-member states, despite the broad scope of the *ICRW*.[145]

The United States view that the IWC is the *only* relevant organization contemplated under Article 65 is not justified by the language of the provision. Article 65 refers to the plural term 'organizations', giving rise to the possibility that there may be more than one body fulfilling the role contemplated. It has been contended that, with respect to the management of cetaceans, the terms of Article 65 only extend to the IWC and CITES at most.[146] In 1996, however, the Office of Legal Affairs of the United Nations recognized the plurality of possible organizations under Article 65 by indicating that, as well as the IWC, it regarded the Food and Agricultural Organisation (FAO) and the United Nations Environment Programme (UNEP) as 'competent or relevant international organizations' under the provision.[147] This statement was described as 'not authoritative but merely indicative'[148] and concluded that '[s]ome organizations may become "competent" in the future with respect to certain provisions of [*UNCLOS*]'.[149]

No criteria are provided in Article 65 as to what constitutes an appropriate international organization.[150] There is no doubt that the international community regards the IWC as within the terms of Article 65. The issue, however, arises as to which other bodies may also be characterized in this way, a consideration particularly relevant in relation to NAMMCO. This issue is revisited in Section IV.

Brief reference should also be made to another area of uncertainty arising in the second sentence of Article 65. The obligation to 'work through' an organization(s) has been widely discussed. At one end of the spectrum, Canada had circulated a

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143 Sands, above n 4, 595.

144 Gambell, above n 3, 105.

145 The *ICRW* applies to 'all waters in which whaling is prosecuted by factory ships, land stations and whale catchers': *ICRW*, above n 7, art I(2).

146 Alexander Gillespie, 'Forum Shopping in International Environmental Law: The IWC, CITES, and the Management of Cetaceans' (2002) 13(1) *Ocean Development and International Law* 17, 21.

147 Office for Ocean Affairs and Law of the Sea (1996) 31 *Law of the Sea Bulletin* 79.

148 Ibid.

149 Ibid.

150 For a discussion of possible criteria, see William T Burke, 'Whaling and International Law' in Gudrun Petursdottir (ed), *Whaling in the North Atlantic – Economic and Political Perspectives* (1997) High North Alliance <http://www.highnorth.no/Library/Publications/iceland/wh-an-in.htm> 23 December 2004.

written 'Statement of Interpretation' of Article 65[151] in which it regarded that this obligation could be fulfilled simply through 'consultation' with the relevant scientific body of an appropriate organization.[152] At the other extreme, various writers interpreted this obligation as requiring coastal states to defer to IWC regulation, even in their EEZ,[153] regardless of whether or not they are parties to the *ICRW*.[154]

By 1991 Iceland had formed the view that, in the absence of alternate 'appropriate international organizations' under Article 65, it was obligated to comply with IWC regulations, regardless of whether it remained a member of the IWC. Where there was another body falling within the terms of Article 65, however, Iceland believed that it could fulfil its 'work through' obligations by complying with that organization's regulations rather than those of the IWC. This view concurred with the Canadian view that Article 65 did not require a state to 'work through' more than one appropriate international organization.[155] As a result, Iceland was a driving force behind the establishment of NAMMCO in 1992.

IV THE NORTH ATLANTIC MARINE MAMMAL COMMISSION

Iceland announced in December 1991 that it would withdraw from the IWC with effect from 30 June 1992.[156] At the time it declared that the IWC 'had ceased to act in accordance with the management principles of the [*ICRW*] and with the weight of scientific evidence'.[157] As a result, the Iceland Government:

> must respond to the grim reality that the International Whaling Commission is no longer a viable forum for international cooperation on the conservation and management of the whale populations in our region.[158]

The Government declared that its first priority would be 'the establishment of a regional organization for the effective conservation and rational management of whales in the North Atlantic Ocean'.[159]

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151 Patricia W Birnie, 'Are Twentieth-Century Marine Conservation Conventions Adaptable to Twenty First Century Goals and Principles?: Part II' (1997) 12(4) *International Journal of Marine and Coastal Law* 488, 500.

152 McDorman, above n 128, 183 n 38.

153 Davis, above n 22, 481.

154 Lyster, above n 2, 36.

155 'The obligation for any particular state is to "work through" an appropriate international organization. In other words, there is no obligation on any state to "work through" more than one appropriate organization': Statement by the Delegation of Canada dated 2 April 1980, reproduced in McDorman, above n 128, 183.

156 See above n 112 for an explanation of the notice requirements under the withdrawal provision: *ICRW*, above n 7, art XI.

157 Icelandic Ministry of Fisheries, 'Government of Iceland Announces Withdrawal from the International Whaling Commission' (Press Release, 27 December 1991) High North Alliance <http://www.highnorth.no/Library/Policies/National/go-of-ic.htm> 24 December 2004.

158 Ibid.

159 Ibid.

In April 1992, NAMMCO was established pursuant to the *Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic* (*NAMMCO Agreement*), signed in Nuuk, Greenland by Iceland, Greenland, the Faroe Islands and Norway.[160] There had been previous regional whaling organizations established after the IWC,[161] but NAMMCO represented the first whaling organization established specifically with the terms of Article 65 in mind.

NAMMCO describes itself as 'an international body for cooperation on the conservation, management and study of marine mammals in the Northern Atlantic'[162] that focuses on 'all species of cetaceans (whales and dolphins) and pinnipeds (seals and walruses) in the region'.[163] It comprises a Council that meets annually, a Management Committee, a Scientific Committee and has a Secretariat based in Norway.[164] NAMMCO has reciprocal observer arrangements with the IWC, along with a number of other organizations.[165]

Unlike the voting system of the IWC, decisions by NAMMCO are made by consensus.[166] This was intended to allow the views of all members to be taken into account.[167] Participation in NAMMCO is open to other states provided all parties approve them.[168] Clearly, the founding members of NAMMCO wished to avoid a situation similar to what some have described as a 'hijacking' of the IWC by anti-whaling states.[169]

Since its establishment, NAMMCO has dealt with a number of matters related to whaling. It has primarily been concerned with scientific research and continues to support the complete implementation of its international observation scheme.[170] The

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160 *Agreement on Research, Conservation and Management of Marine Mammals in the North Atlantic*, opened for signature 9 April 1992 (entered into force 7 July 1992) ('*NAMMCO Agreement*').

161 In 1952, the Governments of Chile, Ecuador and Peru formed the Permanent Commission of the Conference on the Use and Conservation of the Marine Resources of the South Pacific. This body established catch regulations broadly similar to IWC regulations in force at the time. Each of these Governments subsequently became members of the IWC – Chile and Peru in 1979 and Ecuador in 1991: see Gambell, above n 3, 105.

162 NAMMCO, *NAMMCO – About* <http://www.nammco.no> 20 December 2004.

163 Ibid.

164 *NAMMCO Agreement*, above n 160, art 3. The functions of each are set out in arts 4-7.

165 Kate Sanderson, 'Introducing NAMMCO: A new regional approach to marine mammal conservation' (1995) 13 *The Pilot* High North Alliance <http://www.highnorth.no/Library/Management_Regimes/NAMMCO/a-ne-re.htm> 23 December 2004.

166 *NAMMCO Agreement*, above n 160, art 4(3).

167 Kate Sanderson, 'The North Atlantic Marine Mammal Commission – in principle and practice' in Gudrun Petursdottir (ed), *Whaling in the North Atlantic – Economic and Political Perspectives* (1997) High North Alliance <http://www.highnorth.no/Library/Publications/Iceland/th-no-at.htm > 23 December 2004.

168 *NAMMCO Agreement*, above n 160, art 10(2).

169 Sands, above n 4, 596.

170 Ibid.

13th Annual Meeting of the NAMMCO Council held in March 2004 was attended by delegations from the four members, together with observers from the Governments of Canada, Denmark and Japan and a number of inter-governmental and non-governmental organizations.[171]

There is already some overlap between the topics addressed by its Scientific Committee and the IWC Scientific Committee.[172] NAMMCO has not sought thus far to interfere with substantive matters that fall within the competence of the IWC. It has been suggested, however, that NAMMCO is presently considering acting 'not as a supplemental, but as a rival, organization to the IWC and [to] control the take of marine mammals in its region'.[173]

V AN 'APPROPRIATE INTERNATIONAL ORGANIZATION'?

The question arises as to whether NAMMCO should now be viewed as an 'appropriate international organization' for the purposes of Article 65 (and 120). At present it has very limited independent state membership – apart from Iceland, Norway (still a member of the IWC and conducting its commercial whaling operations through the objection procedures of the *ICRW*)[174] is the only independent member state. Denmark, which has sovereignty over the other two members[175] of NAMMCO, has chosen to remain as a member of the IWC.

In these circumstances, and notwithstanding the views of its members, there is currently insufficient international representation to support an assertion that NAMMCO offers a viable alternative to the IWC in respect of the management of whales and whaling. NAMMCO, however, may be transformed to the point where it is more widely recognized as an appropriate organization under Article 65 (and 120) if the following scenarios, or more likely a combination of them, eventuate.

A *NAMMCO Extends the Scope of its Activities*

NAMMCO has the potential to expand its activities and has stated that it intends to do so if the IWC 'fails to act as a governing body'.[176] It may decide to alter its current focus from scientific research and the exchange of information to more substantial areas relating to whaling. It could, for example, proceed to establish regulations or guidelines for controlled commercial whaling by its members, on the basis of its own scientific findings and in accordance with principles of sustainable

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171 NAMMCO, *Annual Report 2003* (2004) 11.

172 IWC, *50th Report of the International Whaling Commission* (1998) [16.1].

173 Friedheim, above n 64, 362.

174 MacLeod, above n 69, 84.

175 Greenland and the Faroe Islands retain sovereign jurisdiction over their living resources, though Denmark is the relevant state representative in the IWC: Steinar Andresen, 'NAMMCO, IWC and the Nordic Countries' in Gudrun Petursdottir (ed), *Whaling in the North Atlantic – Economic and Political Perspectives* (1997) High North Alliance <http://www.highnorth.no/Library/Publications/iceland/na-iw-an.htm> 23 December 2004.

176 Bright, above n 5, 819.

use. Such a program could incorporate an effective enforcement procedure – NAMMCO already has in place an international observer scheme.[177]

Not only might these steps encourage other states to join NAMMCO, but they would also establish a separate regime for the management of whales and whaling activities from that under the *ICRW*.

B *The Membership of NAMMCO Increases*

NAMMCO has previously invited both Canada and the Russian Federation to become full parties to the *NAMMCO Agreement*. Neither of these states has, as yet, indicated an intention to join, but continue to maintain their observer status.[178]

In addition, Japan has found itself continually frustrated by what it considers as the intransigence of the majority of IWC members. It has consistently argued its case for the resumption of controlled commercial whaling on the basis of a 'legalistic' reading of the *ICRW*.[179] Even though some of its arguments may be correct, the reality is that a strict legal interpretation of the *ICRW* has not always been undertaken in IWC determinations.[180]

Instead, Japan is faced with an IWC that has become a political forum 'resembling the UN General Assembly in its adoption of resolutions'[181] and 'a negotiating arena'.[182] It has not been successful in its attempts to convince the IWC of the merits of its position.[183] Faced with this dilemma, Japan welcomed the formation of NAMMCO[184] and remains highly supportive of NAMMCO's work.[185] Japan has again recently indicated that it is considering withdrawing from the IWC to take up membership of NAMMCO.[186]

C *Norway Withdraws from the IWC and Continues its Commercial Whaling Activities under NAMMCO Regulations or Guidelines*

Norway is the only state currently undertaking commercial whaling, though it is possible that other states, such as Japan and Iceland,[187] will follow. It has been

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177 NAMMCO, above n 171, 83.

178 NAMMCO, 'Report of the 13th Meeting of Council' (Final Press Release, 2004).

179 Friedheim, above n 64, 366.

180 For discussion as to the legality of the Southern Ocean Sanctuary, see both Burke and Birnie, above n 43.

181 Burke, above n 150.

182 Friedheim, above n 64, 366.

183 Ibid.

184 IWC, *44th Report of the International Whaling Commission* (1992) [17.1].

185 See the comments of Minoru Morimoto in Japan's opening statement at the 2004 NAMMCO Meeting, reproduced in NAMMCO, above n 171, 46-47.

186 Alex Kirby, *Japan plans pro-whaling alliance*, BBC News, 14 July 2004 <http://news.bbc.co.uk/1/hi/sci/tech/3892909.stm> 16 July 2004.

187 Iceland's objection to Schedule 10(e) states*: 'Notwithstanding this, the Government of Iceland will not authorise whaling for commercial purposes by Icelandic vessels before 2006 and,*

suggested that Norway had chosen to remain a member of the IWC after 1992 in order to maintain close links with the European Union, which is a strong supporter of the legitimacy of the IWC as the only viable international whaling organization.[188] The 1996 vote by the people of Norway rejecting entry into the European Union possibly reduces the political force of this justification for Norway to remain an IWC member.[189]

In 2001, Norway announced its plan to allow the export of Norwegian whale products[190] and it is not entirely clear whether it will continue to hold back from undertaking significant commercial whaling activities. Should it choose to move forward with these plans, it may find it easier to do so within the framework of NAMMCO.

D *Iceland Recommences Commercial Whaling Activities under a Regime Determined by NAMMCO Guidelines*

In the early 1990's, Iceland's Parliament commissioned a Working Group on Whaling which submitted its report in May 1997. It recommended that the necessary steps be taken to prepare for the 'exploitation of whale stocks off Iceland'.[191] In 1999, the Parliament resolved to resume whaling 'as soon as possible and certainly by December 31, 2000'.[192]

Having been readmitted to the IWC in 2002, Iceland has stated it will not commence commercial whaling until at least 2006 and not before the adoption of the RMS is completed.[193] As discussed below, progress on the RMS has been slow

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thereafter, will not authorise such whaling while progress is being made in negotiations within the IWC on the RMS. This does not apply, however, in case of the so-called moratorium on whaling for commercial purposes, contained in paragraph 10(e) of the Schedule not being lifted within a reasonable time after the completion of the RMS. Under no circumstances will whaling for commercial purposes be authorised without a sound scientific basis and an effective management and enforcement regime. (emphasis added), reproduced in IWC, *Chair's Report of the 5th Special Meeting* (2002) 2.

188 Stoett, above n 25, 80.

189 Norway voted in 1994 not to join the European Union: see David D Caron, 'The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures' (1995) 89 *American Journal of International Law* 154, 167.

190 William C G Burns and Geoffrey Wandesforde-Smith, 'The International Whaling Commission and the Future of Cetaceans in a Changing World' (2002) 11(2) *Review of European Community and International Environmental Law* 199, 201-202. Norway is party to *CITES*, but maintains a reservation to the listing of minke whales under Appendix I and is therefore not bound by the prohibition on trade in whales and whale products. Japan and Iceland have lodged similar reservations: High North Alliance, *Whale export resumed* (2002) High North Alliance News http://www.highnorth.no/news/nedit.asp?which=294 20 December 2004.

191 Environment Australia, *A Universal Metaphor: Australia's Opposition to Commercial Whaling - Report of the National Task Force on Whaling* (1997) ch 4.

192 CNN, *Iceland's Parliament OKs commercial whaling* (1999) CNN Nature News <http://edition.cnn.com/NATURE/9903/11/iceland.whaling/> 28 December 2004.

193 See Iceland objection to *ICRW* Schedule 10(e), above n 188.

and fundamental differences of opinion remain between the parties. It is therefore uncertain when the IWC is likely to complete its RMS agenda and how long Iceland is prepared to wait.

Should the Government of Iceland proceed with commercial whaling activities, it would further erode the ability of the IWC to control whaling and would reinforce the role to be played by organizations such as NAMMCO.

E *Additional Regional Marine Mammal Organizations are Established*

Shortly after the establishment of NAMMCO, both Norway and Japan emphasised the value of 'regional organizations' during the 1992 IWC Annual Meeting.[194] Since then, Japan has repeatedly indicated the possibility of withdrawing from the IWC to take up a greater role in NAMMCO or establish its own regional organization.[195] Japan has also previously provided scientific training to the Eastern Caribbean Cetacean Commission (ECCO), which was formed in 2000.[196]

There are earlier precedents for the establishment of regional organizations relating to the management of whaling,[197] and there are many regional fisheries organizations with mandates to manage fishing activities within a specific area.[198]

The establishment of additional regional organizations with the mandate and capability to regulate whales and whaling will further erode the credibility of the IWC and, at the same time, will legitimize the concept of regional co-operation and the 'working through' of regional organizations in respect of cetaceans under Article 65 (and 120).

F *Support by the United States for the Anti-Whaling Position taken by the Majority of IWC Members becomes Diluted*

The United States, along with the United Kingdom, Australia and New Zealand, has been an outspoken supporter of the IWC and of its adoption and subsequent extension of the 1986 Moratorium. It has on many occasions imposed diplomatic, and threatened economic, pressure on countries in an effort to enforce IWC regulations.[199]

Successive administrations, however, have shown an unwillingness to impose

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194 IWC, *42nd Report of the International Whaling Commission* (1990) [17.2].

195 Kirby, above n 186. It has been suggested that Japan may form a pro-whaling organization with the Russian Federation, China and South Korea: Anonymous, 'IWC: Differences of Commission' (1998) 28 *Environmental Policy and Law* 236.

196 International Network for Whaling Research, *INWR Digest* (2001) <http://www.ualberta.ca/~inwr/DIGEST/digest21.html> 26 December 2004.

197 See Gambell, above n 3, 105.

198 Sands, above n 4, 584-587.

199 See Ackerman, above n 139.

import sanctions under the Pelly Amendment for breaches of IWC regulations,[200] preferring to reach negotiated political solutions that have sometimes circumvented the IWC.[201]

In addition, the United States has concluded that it must take account of political expediencies and the interests of its own indigenous people in reaching these negotiated solutions. At the 1997 Annual Meeting of the IWC, the United States convinced the IWC to approve a joint Russian-United States request for a five-year quota of 620 grey whales,[202] of which 20 were allotted to the Makah Indian Tribe living in Washington State, under the 'aboriginal subsistence' exemption in the *ICRW* Schedule.[203] The 2002 Annual Meeting of the IWC defeated the United States' attempt to renew the quota. A new quota, however, was subsequently agreed upon at a Special Meeting of the IWC.[204] The Makah had not hunted whales for the previous 70 years, prompting environment groups and other anti-whaling IWC members to criticise the United States and to question its motives.[205] The Makah matter has also been the subject of proceedings in United States courts over the right of the Makah to take whales.[206] It is clear that the United States finds itself in a position of some conflict on this issue.

At the 2004 Annual Meeting of the IWC, the United States is reported to have supported the Chairman's proposal to bring forward the RMS process, a move that was widely criticised.[207] The United States has confirmed that while it remains opposed to both the lifting of the 1986 Moratorium and the adoption of the RMS, it is 'willing to negotiate in good faith and to consider mechanisms for making progress'.[208]

It is not suggested that the United States is likely, at least in the near term, to radically modify its views regarding commercial whaling or its belief that the IWC is 'the sole global authority for whales'.[209] The events mentioned above, however, do demonstrate the influence that the United States has over IWC decisions, and the potential for 'fluidity' in that country's future stance regarding whaling, and

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200 MacLeod, above n 69, 94.

201 Haskell, above n 86, 588.

202 Lesteffy Jenkins and Cara Romanzo, 'Makah Whaling: Aboriginal Subsistence or a Stepping Stone to Undermining the Commercial Whaling Moratorium?' (1998) 9 *Colorado Journal of International Environmental Law and Policy* 71, 113.

203 *ICRW*, above n 7, sch [13](b)(2).

204 IWC, above n 187.

205 Jenkins and Romanzo, above n 202**.**

206 *Metcalf v Daley*, 214 F 3d 1135 (9th Cir, 2000); see Albert Harris, 'Making the Case for Collective Rights: Indigenous Claims to Stocks of Marine Living Resources' (2003) 15 *Georgetown International Environmental Law Review* 379.

207 Xinhua China, *Berlin criticises Washington for changing position on Whaling* (2004) Xinhua China News <www.xinhua.org> 23 November 2004.

208 See RMS Working Group 2004 Questionnaire, above note 110, 48.

209 'The USA pointed to Article 65 of *UNCLOS* and Agenda 21 to identify the IWC as the sole global authority for whales': IWC, *50th Report of the International Whaling Commission* (1998) 25.

perhaps even the role of the IWC itself, depending on its political and economic interests at the time.

G *The Current Impasse among the IWC Membership is not Resolved*

The IWC adopted its Revised Management Procedures (RMP) in 1994 on the recommendation of its Scientific Committee, but is yet to implement it – primarily at the insistence of its anti-whaling members who argue for the prior completion of all inspection and observation aspects associated with the broader RMS.[210]

The RMP applies a 'catch limit algorithm'[211] to calculate the number of a particular whale species that can be taken without threatening its sustainability, taking into account existing scientific knowledge of whale stocks and their numbers. Put very simply, 'the greater the uncertainty about a given whale stock, its range and its size, the smaller the [allowable] quota' for that species.[212] Whaling states continue to call for the implementation of RMP to replace the 1986 Moratorium, but the anti-whaling states now regard the continued ban on whaling as justified on 'moral and ethical' grounds as much as on scientific bases.[213] Strong supporters of a total ban on commercial and scientific whaling such as Australia recognise that this approach leaves no room for compromise,[214] but argue that it reflects the prevailing international community attitude of 'preservationism' towards whales, which has evolved since 1982.[215]

At the 2004 Annual Meeting of the IWC, the Commission adopted the 'Chair's Proposal for a Way Forward on the RMS', agreeing that the RMS Working Group would be re-established and meet inter-sessionally to work through the issues.[216] It is evident, however, that deep divisions remain over the progress and future of RMS and it is uncertain whether the RMS will be adopted at the 2005 Annual Meeting of the IWC as planned.[217]

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210 See Gillespie, above n 109.

211 Sands, above n 4, 595.

212 John A Knauss, 'The International Whaling Commission – Its Past and Possible Future' (1997) 28(1) *Ocean Development and International Law* 79, 82.

213 'We believe the practice of killing whales is unjustifiable. It is time the international community stopped talking about a 'moratorium' on commercial whaling and instead adopted a permanent international ban on commercial whaling': Statement by the Australian Minister for the Environment quoted in Environment Australia Report, above n 191, ch 2; see also Kemp, above n 14.

214 'It [Australia] could not embrace commercial whaling and sought a definition of aboriginal whaling, with no new categories. *This was no basis for negotiating*, and so was unlikely to be successful, *but there is an evolution of attitudes'* (emphasis added): IWC, *50th Report of the International Whaling Commission* (1998) 18.

215 D'Amato and Chopra, above n 31, 45-46.

216 IWC Resolution 2004-6: IWC, *The resolutions made at the International Whaling Commission Annual Meeting in Sorrento, Italy 2004* <http://www.iwcoffice.org/meetings/resolutions/resolution2004.htm> 28 July 2004.

217 The opposing views on the RMS can be ascertained from the responses provided to the questionnaire on the Chair's Proposal: see RMS Working Group 2004 Questionnaire, above n 110.

Other IWC members, alarmed at this impasse and of a possible 'breakup of the IWC with detrimental effects on the conservation of whales',[218] have urged some form of compromise. In late 1997 Ireland introduced a proposal, subsequently known as the 'Irish Initiative', for the establishment of a 'Global Sanctuary' for whales. This involves the completion and adoption of the RMS, removal of the 1986 Moratorium and recognition of existing whaling states' rights to undertake whaling within their respective EEZ's for local consumption and aboriginal subsistence purposes. In return, the proposed scheme would abolish 'scientific research' killing under the *ICRW* and require the voluntary cessation by member states of all whaling on the high seas.[219] The Irish Initiative was supported by some IWC members,[220] but was not accepted in its suggested form by countries such as the United Kingdom and New Zealand[221] and ultimately was not adopted by the IWC.

Another cause of tension between the pro-whaling and anti-whaling members of the IWC was the adoption of the 'Berlin Initiative' at the 2003 Annual Meeting, which established a Conservation Committee.[222] While it was heralded by the anti-whaling member states, pro-whaling members such as Japan and Iceland condemned the initiative as contrary to the stated purpose of *ICRW* and to other sustainable use principles accepted under international law.[223] It is also uncertain whether the Committee will achieve its intended goals, due to under-funding and remaining divisions within the IWC.[224]

The longer that the impasse among IWC member states continues, the greater the risk to the long-term future of the IWC. If whaling states continue to believe that

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218 Opening statement of the Government of Ireland: IWC, *49th Report of the International Whaling Commission* (1997).

219 Ibid. It should be noted that Articles 87 and 116 of *UNCLOS*, above n 16, maintain a state's long standing freedom to fish on the high seas, subject to exercising 'due regard' for the interests of other states in their exercise of the freedom of the high seas (Article 86), its treaty obligations (including the *ICRW*) (Article 116) and the other provisions of *UNCLOS* including Article 65 (Article 116).

220 'Sweden urged the two sides towards the middle ground; it is not enough to talk, there must be a compromise. Switzerland agreed. The Irish proposal was courageous and it would like to see progress as patience will not go on for ever': IWC, *50th Report of the International Whaling Commission* (1998) 18.

221 Ibid.

222 IWC Resolution 2003-1, (25 in favour, 20 against and 1 abstention) '…establish[es] a Conservation committee … composed of all Contracting Parties … [entrusted with]: (1) the preparation and recommendation to the Commission of its future Conservation Agenda; (2) the implementation of those items in the Agenda that the Commission, may refer to it; and (3) making recommendations to the Commission in order to maintain and update the Conservation Agenda on a continuing basis': IWC, *55th Report of the International Whaling Commission* (2003) Annex C.

223 IWC, above n 222, 8-11.

224 William C G Burns, 'The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission: Toward a New Era for Cetaceans' (2004) 13(1) *Review of European Community and International Environmental Law* 72.

the attitude of the staunchly anti-whaling states reflects the majority view of IWC members, there is an increased danger that they may choose eventually to withdraw from the IWC and implement alternate regulatory regimes that allow whaling on the basis of sustainability.[225]

The above analysis suggests that, for the time being at least, the IWC probably remains the only viable international organization for the management of whaling under Article 65 (and 120) of *UNCLOS*. The situation, however, has clearly become more fluid and this exclusive position of the IWC will come under increasing threat by organizations such as NAMMCO.

In the short term, there remains a window of opportunity for the IWC to consolidate its position under Article 65 (and 120). To achieve this, the IWC must convince member states and the wider international community that the management of whales can only be properly conducted within a uniform regime – under the terms of the *ICRW* (with suitable amendments) – on the basis of the generally accepted international environmental principles of 'sustainable development' and 'the precautionary principle', both of which are consistent with the terms and objectives of the *ICRW*.

VI SUSTAINABLE DEVELOPMENT AND THE PRECAUTIONARY PRINCIPLE

It is important to note that, apart from the *ICRW*, the *NAMMCO Agreement* and Article 65 (and 120) of *UNCLOS*, marine mammals and whales are also protected by the network of international institutions created under other treaties.[226] These include *CITES*,[227] the 1979 *Bonn Convention*,[228] the *Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas*[229] and *Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area*.[230]

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225 Burke, above n 43, 315.

226 Stoett, above n 25, 68.

227 *CITES*, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

228 *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333, 19 ILM 15 (entered into force 1 November 1983) ('*Bonn Convention*').

229 *Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas*, opened for signature 17 March 1992, 1772 UNTS 217 (entered into force 29 March 1994) ('*ASCOBANS*').

230 *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*'). The Final Act of the 1946 Conference at which the *ICRW* was concluded, annexed a chart entitled 'Nomenclature of Whales'. Paragraph IV of the Final Act stated that 'The International Whaling Conference *recommends:* That the Chart of Nomenclature annexed to this Final Act be *accepted as a guide* by the Governments represented at the Conference' (emphasis added). The Chart mentions only large whale species (with the exception of one small cetacean – the bottlenose whale); Birnie, above n 151, 489. There still remains considerable disagreement amongst IWC members as to the extent of IWC competence to regulate other small cetaceans: see IWC, '56th Annual Meeting of IWC' (Press Release, 2004) <http://www.iwcoffice.org/meetings/pressrelease.htm> 28 July 2004;

In addition, the ongoing development of international environmental law, as reflected in numerous treaties, declarations and the practice of states and international organizations has seen various general principles and rules evolve.[231] Of particular relevance to the management of whales are two widely accepted principles – the principle of sustainable development and the precautionary principle. These two principles are consistent with the terms of the *ICRW* and can readily be applied by the IWC.

It is beyond the scope of this paper to trace the history and development of these two principles;[232] however it is necessary to define the interpretations generally accorded to them in order to apply them under the *ICRW*.

A *Sustainable Development*

The concept of 'sustainability' of species has existed since 1893, when the obligation was asserted by the United States in the *Pacific Fur Seal Arbitration*.[233] The award in that case influenced the content of subsequent treaties relating to marine mammals,[234] including the 1931 and 1937 *International Whaling Conventions*.[235]

The term 'sustainable development' was first used in the 1987 'Brundtland Report',[236] which defined it as the 'development [of natural resources] that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[237]

The broad acceptance of this principle among the international community is reflected in both the *Rio Declaration*,[238] which assumes that the principle exists in international law,[239] and in Chapter 17 of *Agenda 21*,[240] which calls for the

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Alexander Gillespie, 'Small Cetaceans, International Law and The International Whaling Commission' (2001) 2 *Melbourne Journal of International Law* 257.

231 Sands, above n 4, 231.

232 For a discussion of the development of these principles, see Sands, above n 4, 252-279; Birnie and Boyle, above n 6, 97-98 and 122-124.

233 *Pacific Fur Seal Arbitration* (1893) 1 Moore's International Arbitration Awards 755.

234 Sands, above n 4**,** 253.

235 *Convention for the Regulation of Whaling*, opened for signature 24 September 1931, 155 LNTS 349 (entered into force 16 January 1935); *International Agreement for the Regulation of Whaling*, opened for signature 8 June 1937, 190 LNTS 79 (entered into force 1 July 1937).

236 Sands, above n 4, 252.

237 Ibid.

238 *Rio Declaration*, principles 1, 4, 5, 7, 8, 9, 20, 21, 22, 24 and 27, UN Doc A/CONF.151/26/Rev.1, 31 ILM 874 (1992).

239 Ibid principle 27.

240 *Agenda 21: Programme for Action for Sustainable Development*, UN GAOR, 46th sess, UN Doc A/Conf.151/26 (1992) ('*Agenda 21*') is a non-binding blueprint and action plan for a global partnership for sustainable development adopted by UNCED. Chapter 17 of Agenda 21 addresses substantive issues with respect to the protection of oceans, seas, coast areas and protection, use and development of their living resources: see Sands, above n 4, 57-63.

'sustainable use and conservation' of marine living resources in the high seas[241] and in areas under national jurisdiction.[242] *Agenda 21* also confirms the role of the IWC pursuant to the *ICRW*.[243]

The principle of sustainability is also applied in *UNCLOS*[244] and many other treaties relating to the management of species,[245] and is regarded as an important element in the definition of 'conservation'.[246]

From time to time, pro-whaling states have sought to formally introduce the concept of 'sustainable use' into IWC resolutions. At the 1993 IWC Annual Meeting,[247] Japan introduced, on behalf of a number of states including Norway, a resolution on the sustainable use of whale resources, which it argued 'took account of UNCED[248] 'decisions' on 'sustainable use' of marine resources and 'sustainable development' as discussed in the FAO'.[249] This proposal met with opposition from the United States[250] and was subsequently withdrawn.

Pro-whaling states continue to argue their case at IWC Annual Meetings on the basis of sustainable use. A Japanese proposal at the 2003 IWC Annual Meeting to allow it to catch 150 minke whales for its coastal whaling communities was argued to have 'a serious scientific basis and complie[d] with the principle of sustainable use'.[251] The proposal was opposed, and subsequently defeated, on the basis that the proposal 'was in contravention of the [1986] [M]oratorium'.[252]

The provisions of the *ICRW* include concepts consistent with the principle of sustainable development. The preamble recognizes 'the interest of the nations of the world in safeguarding the future generations of the great natural resources represented by the whale stocks'[253] and the need for proper regulation of whales 'so as to permit increase in the number of whales which may be captured without

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241 *Agenda 21*, UN GAOR, 46th sess, ch 17 s C, UN Doc A/Conf.151/26 (1992).

242 Ibid.

243 Ibid ch 17, paras 17.61, 17.62, 17.89, 17.90.

244 *UNCLOS*, above n 16, requires conservation at 'maximum sustainable yield' to promote the objective of 'optimum utilization' of the living resources of the exclusive economic zones (Articles 61(3), 62(1), 64) and of the high seas (Article 119(1)(a)).

245 See Sands, above n 4, 260.

246 In 1986 the Legal Experts of the World Commission on Environment and Development defined 'conservation' as the 'management of human use of a natural resource or the environment in such a manner that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations. It embraces preservation, maintenance, sustainable utilization, restoration and enhancement of a natural resource or the environment', reproduced in Sands, above n 4, 260.

247 IWC, *45th Report of the International Whaling Commission* (1993) [5].

248 *Rio Declaration*, UN Doc A/CONF.151/26/Rev.1, 31 ILM 874 (1992).

249 Birnie, above n 151, 509.

250 Ibid.

251 IWC, *55th Report of the International Whaling Commission* (2003) 32-33.

252 Ibid.

253 *ICRW*, above n 7, preamble.

endangering these natural resources'.[254] This should be done by achieving 'the optimum level of whale stocks'[255] through the confining of whaling operations 'to those species best able to sustain exploitation'.[256]

Article V(1) of the *ICRW* provides that amendments to the Schedule can be made 'with respect to the conservation and utilization of whale resources',[257] on the basis of the criteria set out in Article V(2).[258]

When these provisions of the *ICRW* are considered in the context of the principle of sustainable development, the goal of the 'orderly development of the whaling industry'[259] is only to be pursued subject to the goal of 'conservation'. This is consistent with the language used in the Convention – 'proper conservation of whale stocks *and thus* make possible the orderly development of the whaling industry' (emphasis added).[260]

B *The Precautionary Principle*

The precautionary principle provides 'guidance in the development and application of international environmental law where there is scientific uncertainty'.[261] The principle has been accepted in relation to the marine environment. The 1990 *Bergen Ministerial Declaration on Sustainable Development in the ECE Region*[262] linked it to the principle of sustainable development, providing that '[i]n order to achieve sustainable development, policies must be based on the precautionary principle'.[263]

The principle was affirmed in the *Rio Declaration*[264] and has been applied to the management of straddling fish stocks and highly migratory fish stocks in the *Straddling Stocks Agreement*.[265] Article 6(2) of the *Straddling Stocks Agreement*

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254 Ibid.
255 Ibid.
256 Ibid.
257 Ibid art V(1).
258 Ibid art V(2).
259 Ibid preamble.
260 Ibid.
261 Sands, above n 4, 267.
262 *Bergen Ministerial Declaration on Sustainable Development in the ECE Region*, UN Doc A/CONF.151/PC/10 (1990) ('*Bergen Declaration*').
263 *Bergen Declaration*, para 7, UN Doc A/CONF.151/PC/10 (1990), reproduced in Sands, above n 4, 269.
264 *Rio Declaration*, principle 15, UN Doc A/CONF.151/26/Rev.1, 31 ILM 874 (1992), provides: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.
265 Article 6 of the *Straddling Stocks Agreement*, opened for signature 4 December 1995, 34 ILM 1542 (entered into force 11 December 2001) deals with '[a]pplication of the precautionary approach'. Article 6(1) provides that: 'States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment'.

provides:

> States should be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.[266]

The principle has also been carefully considered and applied in a number of international Tribunal decisions.[267] Traditionally, the onus was on those opposing an activity to show that it had deleterious environmental results.[268] While it has not been universally accepted, a number of commentators have argued that the application of the precautionary principle has, at times, had the effect of 'shifting' the burden of proof.[269] In those cases where this has happened, the result has been that, in relation to the management of natural resources, those proposing an activity must show that it does not cause environmental harm.

This approach can be applied to the management of whales under the *ICRW*, where amendments to the Schedule are to 'be based on scientific findings'.[270] Indeed, the IWC already claims to be applying the principle in this way by declaring that the ending of the 1986 Moratorium and the implementation of RMP should not occur until those 'who wish to utilize the resource … demonstrate that any resumption of whaling will not be harmful'.[271]

Pro-whaling IWC member states such as Norway,[272] however, do not believe that the IWC is genuinely applying the precautionary principle. Indeed these states claim that clear scientific evidence exists to indicate that a form of controlled commercial whaling for certain whale species would not result in any threat to the sustainability of those species.[273] They have based these conclusions on

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266 Ibid art 6(2).

267 *Southern Bluefin Tuna (Australia and New Zealand v Japan)* (2000) 39 ILM 1359; *EC – Measures concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS48/AB/R; WT/DS26/AB/R (1998) (Report of the Appellate Body) cited in Sands, above n 4, 275-279.

268 Sands, above n 4, 273.

269 See Timothy O'Riordan and James Cameron, *Interpreting the Precautionary Principle* (1994) 15; Paul L Stein, 'Are Decision-makers Too Cautious With The Precautionary Principle?' (Speech delivered at the Land of Environment Court of New South Wales Annual Conference, Blue Mountains, Australia, 14-15 October 1999); Patricia W Birnie and Alan E Boyle, *International Law and the Environment*, (2nd ed, 2002) 18; A Dan Tarlock, 'Is There a There There in Environmental Law?' (2004) 19 *Journal of Land Use & Environmental Law* 213, 252

270 *ICRW*, above n 7, art V(2).

271 Gambell, above n 3, 106.

272 MacLeod, above n 69, 84.

273 At the 41st Annual Meeting of the IWC in 1991, Norway, Iceland and Japan each presented evidence that certain stocks of minke whales were large enough to support a managed harvest under the prevailing IWC classification scheme. They each called for a resumption of controlled commercial whaling based on this evidence. The IWC rejected these proposals on the grounds that its Scientific Committee 'was developing a new stock assessment procedure and that the decision to resume commercial whaling should await additional information and reclassification': Bjorndal and Conrad, above n 34, 162. In 1993, the Chairman of the Scientific Committee resigned and asked 'What is the point of having a Scientific Committee if its unanimous recommendations … are treated with such contempt' by the IWC: High North

determinations of the Scientific Committee of the IWC.[274]

Instead, the pro-whaling states believe that the maintenance of the existing status quo by the IWC reflects the views of countries such as Australia and New Zealand, who have expressed opposition to any form of commercial whaling for whatever reason and on any grounds.[275]

The discussion above indicates that the two widely accepted environmental principles of 'sustainable development' and 'the precautionary principle' is consistent with, and applicable to, the management of whales under the *ICRW*. The universal acceptance of these principles[276] requires resource management organizations to apply them objectively and in a manner appropriate to the goals of their constitutive document. The ongoing failure of the IWC to apply these principles objectively contributes to its declining credibility among member states and the wider international community, and encourages the development of other 'appropriate international organizations'.

VII CONCLUDING REMARKS

To a certain extent the future of the IWC rests in its own hands. Time, however, is not on its side. While it is still widely regarded by the international community as the principal international organization with respect to the management of whaling, its credibility is under threat. Its membership is at an impasse, with discussions and negotiations at IWC Annual Meetings often characterized by mistrust and acrimony.[277] The IWC appears to have become a political forum as much as anything, causing a sense of frustration among pro-whaling members.[278]

Article 65 of *UNCLOS* gives the IWC the opportunity to reconsolidate its position. The IWC should make every possible effort to convince its current membership, as well as the wider international community, that the widely accepted environmental rules of sustainable development and the precautionary principle will be rigorously applied in its decisions regarding the conservation of whales and the development of the whaling industry. This will help foster a renewed confidence in the role of the

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Alliance, *C1TES and the IWC: The Fall of Conservation?* (1997) [1] <http://www.highnorth.no/Library/Trade/CITES/ci-an-iw.htm> 23 December 2004.

274 MacLeod, above n 69, 84 n 5.

275 See RMS Working Group 2004 Questionnaire, above n 110, 6, 14, 30 and 47.

276 See *Rio Declaration*, principles 1, 4, 5, 7, 8, 9, 15, 20, 21, 22, 24 and 27, UN Doc A/CONF.151/26/Rev.1, 31 ILM 874 (1992); *Straddling Stocks Agreement*, opened for signature 4 December 1995, 34 ILM 1542, art 6 (entered into force 11 December 2001).

277 Friedheim, above n 64, 365.

278 Describing the operation of the IWC, it was suggested in 1985 that 'the entry of about 25 non-whaling nations has fundamentally changed the nature of the IWC. From being a "whaler's club" where the basic problem was the distribution of a total quota among members with similar concerns, the IWC has been turned into an arena where antagonistic interests meet: whalers vs. non-whalers': Alf H Hoel, 'The International Whaling Commission 1972-1984: New Members. New Concerns' reproduced in MacLeod, above n 69, 84. This description is equally applicable to current impasse among the IWC membership.

IWC among members and non-members who have an interest in both conservation and/or controlled whaling.

In the event that this renewed sense of confidence is engendered, members could cooperate to strengthen the *ICRW* and remove the existing technical weaknesses in the Convention highlighted in this article. The future regulation of whales would remain under the one management regime, with a consistency of approach and implementation based on current and evolving international principles of environmental regulation.

The alternative scenario does not appear to be as positive for the future of whales. If the IWC is unable to restore its credibility, bodies such as NAMMCO and other regional organizations that might be established will become more influential and be increasingly recognized as alternate 'international organizations' under Article 65. Competing international agreements will result in a fragmented system of management of whales, with differing standards, rules and controls.

Worse still, some states who wish to harvest whales on a commercial basis may eventually choose to do so under no international control, further threatening the future existence of whales.[279]

In the end, a compromise based on widely accepted environmental principles is the only rational way forward for the IWC and its membership. An international management regime, based on cooperation and clear, objective environmental principles, offers a far more promising prospect for the future of the whale than the current stalemate.

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279 Knauss, above n 212, 84.