

## RESPONSE COMMENTARY

# *Size Matters, Although It Shouldn't: The ICRW and Small Cetaceans. A Reply to Stephenson, Mooers and Attaran*

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### Abstract

Written as a response to the article 'Does Size Matter? The ICRW and the Inclusion of Small Cetaceans' by Sean Stephenson, Arne Mooers and Amir Attaran, this commentary considers how important global and regional biodiversity- or conservation-related conventions have deliberately avoided the issue area of cetacean management. One of the effects of this is that so-called 'small cetaceans' – approximately 70 species – are left largely unregulated. This article differs from that of Stephenson and his co-authors, who argue that the 'only appropriate' forum for dealing with the issue is the International Court of Justice. Instead, it is argued here that the 'Future of the IWC' compromise process may yet represent the best course for bringing small cetaceans under IWC management authority. Another alternative was recently suggested in a draft resolution put forward by Monaco in 2012 – and is likely to be put forward again in 2014 – which advocated involving the United Nations General Assembly in the issue. The issue is both complicated and important, and a solution is needed.

**Keywords:** Small Cetaceans, International Whaling Commission (IWC), Future of the IWC, International Convention for the Regulation of Whaling (ICRW), Biodiversity, International Court of Justice (ICJ)

## 1. INTRODUCTION

In an age when the world's states seem to be fostering synergies between international instruments, one appears isolated – leprous, even. This is the International Convention for the Regulation of Whaling (ICRW),<sup>1</sup> which operates through its management

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The writer has attended IWC meetings as a member of the South Africa delegation, but the views expressed in this article remain personal and should in no way be ascribed to the government of South Africa. My thanks to the anonymous reviewers whose comments have improved this article.

<sup>1</sup> Washington, DC (US), 2 Dec. 1946, in force 10 Nov. 1948, available at: <http://www.iwcoffice.int/convention>.

body, the International Whaling Commission (IWC). It is not merely the body itself which is ‘untouchable’, but its very issue area.

This commentary, written as a response to the article ‘Does Size Matter? The ICRW and the Inclusion of Small Cetaceans’ by Sean Stephenson, Arne Mooers and Amir Attaran,<sup>2</sup> considers the regulatory vacuum that currently exists in respect of so-called small cetaceans. Initially, the commentary canvasses various multilateral environmental agreements (with global or regional scope) and shows how whaling as an issue area has been deliberately excluded from their authority. Stephenson and his colleagues argue that for small cetaceans to be brought under the management authority of the IWC, ‘judicial recourse’ is the ‘sole avenue that remains’; and that the only ‘suitable’ way to achieve this is by way of a decision of the International Court of Justice (ICJ) that commercial whaling of small cetaceans violates the IWC’s current moratorium on commercial whaling.

In my view, however, the idea of the ICJ being seized of the issue of small cetaceans is unlikely, given the nature of the Court and the nature of international diplomacy. I argue that Stephenson and his co-authors are too categorical in rejecting the idea of a negotiated compromise within the IWC which would see small cetaceans brought under its management authority. Despite the lack of success to date, such a compromise remains possible. Further, this commentary discusses a draft resolution, as an alternative route forward, which was put forward by Monaco at the most recent IWC meeting in 2012, and which is likely to be put forward again at the next meeting in late 2014. The draft resolution was effectively a response to the regulatory vacuum described in the first part of this commentary.

In its canvassing of the international instruments and the draft resolution, this response is complementary to, rather than a riposte to, the proposal put forward by Stephenson, Mooers and Attaran. However, it is suggested that their favoured solution is not likely to be adopted. The most realistic – and perhaps even the best – course forward is (i) for the IWC to continue with the work it is doing in respect of small cetaceans, despite not having formal management authority over them; (ii) for greater synergies to be fostered with other conventions and with the United Nations (UN); and (iii) for negotiations towards a compromise within the IWC to resume.

## 2. VARIOUS CONVENTIONS AND THE WHALING ISSUE AREA

The Convention on the Conservation of Migratory Species of Wild Animals (CMS)<sup>3</sup> provides that ‘[e]ach Agreement should ... f) at a minimum, prohibit, in relation to a migratory species of the Order Cetacea, any taking that is not permitted for that migratory species under any other multilateral Agreement’.<sup>4</sup> This implies that states party to the CMS should take direction from the IWC in respect of species for which

<sup>2</sup> S. Stephenson, A. Mooers & A. Attaran, ‘Does Size Matter? The ICRW and the Inclusion of Small Cetaceans’ (2014) 3(2) *Transnational Environmental Law*, pp. 241–63.

<sup>3</sup> Bonn (Germany), 23 Jun. 1979, in force 1 Nov. 1983, available at: <http://www.cms.int>.

<sup>4</sup> *Ibid.*, Art. V, ‘Guidelines for Agreements’, para. 4.

the latter body has a zero quota in place.<sup>5</sup> The IWC has agreed ‘that there is much benefit in maintaining a cooperative dialogue with other intergovernmental organisations with responsibility for or expertise in relation to small cetaceans, in particular [...] the bodies created under the Bonn Convention [CMS]’.<sup>6</sup>

The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)<sup>7</sup> provides that ‘[n]othing in this Convention shall derogate from the rights and obligations of Contracting Parties under the [ICRW]’.<sup>8</sup> The same wording is found in the Protocol on Environmental Protection to the Antarctic Treaty.<sup>9</sup> Considering that both CCAMLR and the Antarctic Treaty System (ATS) purport to foster a holistic, ecosystem-based approach to managing the Antarctic’s living resources, it is noteworthy that they both exclude management authority over one of the most essential elements of the area’s biodiversity – cetaceans. Australia argued at the 1982 IWC Meeting that ‘liaison and cooperation between the IWC and other organisations concerned either directly or indirectly with whales is necessary for the long term conservation of whales’, and argued that this was particularly true of the IWC’s relationship with CCAMLR.<sup>10</sup>

The 1982 UN Convention on the Law of the Sea (UNCLOS)<sup>11</sup> also treats cetaceans differently from other components of biodiversity and defers to other appropriate organizations for their management.<sup>12</sup> Although the term ‘appropriate organizations’ might suggest scope for alternative bodies to assume competence, the IWC is generally

<sup>5</sup> The CMS defers to the IWC, but also assists in filling the ‘regulatory vacuum’ in respect of certain species of ‘small cetacean’. Since 2000, the two have a Memorandum of Understanding to ‘[e]stablish a framework of information and consultation between UNEP/CMS and the IWC in the field of conserving migratory species and the world’s natural heritage, with a view to identifying synergies and ensuring effective cooperation in joint activities by the relevant international bodies established under both conventions and national institutions of their Contracting Parties’: see [http://www.iwcoffice.int/\\_documents/commission/IWC61docs/OS-IGO.pdf](http://www.iwcoffice.int/_documents/commission/IWC61docs/OS-IGO.pdf). Further, two CMS Agreements concern ‘small cetaceans’. One is the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS), New York, NY (US), 17 Mar. 1992, in force 29 Mar. 1994, extended in 2008, available at: <http://www.ascobans.org>. ASCOBANS has been ratified by Belgium, Denmark, Finland, France, Germany, Lithuania, the Netherlands, Poland, Sweden, and the United Kingdom (UK). The other is the Agreement on the Conservation of Cetaceans of the Black Sea Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS), Monaco, 24 Nov. 1996, in force 1 June 2001, available at: <http://www.accobams.org>. ACCOBAMS has been ratified by Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, France, Georgia, Greece, Italy, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Portugal, Romania, Slovenia, Spain, Syria, Tunisia, and the Ukraine.

<sup>6</sup> Resolution 1994-2, ‘Resolution on Small Cetaceans’.

<sup>7</sup> Canberra (Australia), 20 May 1980, in force 7 Apr. 1982, available at: <https://www.ccamlr.org>.

<sup>8</sup> *Ibid.*, Art. VI.

<sup>9</sup> Madrid (Spain), 4 Oct. 1991, in force 14 Jan. 1998, Annex II: ‘Conservation of Antarctic Fauna and Flora’, Art. 7, ‘Relationship with other Agreements outside the Antarctic Treaty System’, available at: <http://www.ats.aq/ep.htm>.

<sup>10</sup> Australia Commissioner, ‘IWC Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting’, *IWC Verbatim Record*, 1982, 181.

<sup>11</sup> Montego Bay (Jamaica), 10 Dec. 1982, in force 16 Nov. 1994, available at: <http://www.un.org/depts/los>.

<sup>12</sup> *Ibid.*, Art. 65, ‘Marine mammals’: ‘Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.’

considered to be the only management body with global significance for cetaceans.<sup>13</sup> What is important for the point being made here, however, is that the UNCLOS (which was an attempt to codify much of the law then relating to the use of the sea) does treat cetaceans differently from other components of biodiversity and defers to other organizations for their management.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)<sup>14</sup> does not refer to the IWC specifically, but its Conference of the Parties (CoP) has recommended that ‘the Parties agree not to issue any import or export permit, or certificate for introduction from the sea, under this Convention for primarily commercial purposes for any specimen of a species or stock protected from commercial whaling by the International Convention for the Regulation of Whaling’.<sup>15</sup> CITES thus defers to the IWC on cetaceans instead of making its own scientific, and consequently legal, determinations of status. The IWC offered in 1976 to act as CITES’ official adviser on cetaceans, and then in 1978 requested CITES to ‘take all possible measures’ to support IWC restrictions on species taken.<sup>16</sup> However, the two organizations have not always had an easy relationship. CITES has seen five CoPs (1994, 1997, 2000, 2002 and 2004) at which Japan and/or Norway proposed the downlisting of certain species of minke whale from Appendix I to Appendix II to allow regulated international trade in those species.<sup>17</sup>

The Convention on Biological Diversity (CBD)<sup>18</sup> similarly makes no specific mention of the IWC, but provides that ‘[e]ach Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity’.<sup>19</sup> It also provides that ‘[t]he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity’.<sup>20</sup> These two articles effectively defer to the IWC as authority for cetaceans.

<sup>13</sup> The North Atlantic Marine Mammal Commission Agreement (NAMMCO), Nuuk (Greenland), 9 Apr. 1992, in force 8 July 1992, available at: <http://www.nammco.no/webcronize/images/Nammco/659.pdf>, is a regional agreement between the Faroe Islands, Greenland, Iceland, and Norway, which has been promoted as a possible alternative regional model.

<sup>14</sup> Washington DC (US), 3 Mar. 1973, in force 1 Jul. 1975, available at: <http://www.cites.org>.

<sup>15</sup> Res. Conf. 11.4 (Rev. CoP12), ‘Conservation of Cetaceans, Trade in Cetacean Specimens and the Relationship with the International Whaling Commission’.

<sup>16</sup> ‘Resolution to the CITES’, IWC Special Meeting 1978, available at: [http://www.iwcoffice.int/meetings/resolutions/IWCRES\\_1978\\_SM.pdf](http://www.iwcoffice.int/meetings/resolutions/IWCRES_1978_SM.pdf).

<sup>17</sup> Whether these were genuine efforts to shift the management of certain species to a different forum, or deliberate attempts to destabilize the IWC, or both, is not considered here. For consideration of these and other issues see, e.g., A. Gillespie, ‘Forum Shopping in International Law: The IWC, CITES and the Management of Cetaceans’ (2002) 33(1) *Ocean Development & International Law*, pp. 17–56; and E. Couzens, *Whales and Elephants in International Conservation Law and Politics: A Comparative Study* (Earthscan/Routledge, 2014), at pp. 155–66.

<sup>18</sup> Rio de Janeiro (Brazil), 5 Jun. 1992, in force 29 Dec. 1993, available at: <http://www.cbd.int/convention/text>.

<sup>19</sup> *Ibid.*, Art. 5, ‘Cooperation’.

<sup>20</sup> *Ibid.*, Art. 22, ‘Relationship with Other International Conventions’.

What emerges from this quick scan of significant biodiversity-related conventions is a general and deliberate circumvention of the IWC, despite the obvious relevance of cetaceans to the subject matters of the conventions. The two most obvious reasons are, firstly, that to some states whaling is of such importance that all states can reach agreement only if the issue is excluded from consideration in negotiations towards new conventions. Secondly, states might be so concerned about importing the conflict that characterizes the IWC into new treaties that they are mutually willing to exclude the issue. Of course, this also means that any attempt to create a new convention to regulate small cetaceans on a global scale would be certain to founder on the same rock of state obduracy. They are thus left unregulated.

### 3. CONSEQUENT LACK OF REGULATION

Problems abound. One such is that the treatment of certain cetacean species is not regulated. The Schedule to the ICRW lists the cetacean species which the IWC currently has authority to manage.<sup>21</sup> This list has been amended occasionally over the years, but not significantly. By and large, the list remains as it was when it was agreed in 1946. The original Annex is somewhat difficult to read – species are not numbered, they are in haphazard order,<sup>22</sup> some of their scientific names have changed, and some species have multiple names.<sup>23</sup> The term ‘small cetacean’ does not appear and is a later informal (albeit now accepted) coinage.<sup>24</sup> The arbitrary nature of the term appears from examples such as the northern bottlenose whale not being considered a ‘small cetacean’, while the larger Baird’s beaked whale is so considered.<sup>25</sup> It has even been speculated that the latter species was omitted from the list simply because it was hunted in Japan only and was little known to the ICRW’s (mostly Western) founding parties.<sup>26</sup>

The distinction does have a significant impact upon the application of relevant instruments to individual animals. Whereas ‘small cetaceans’ have been the subject of recommendations included in various resolutions<sup>27</sup> of the IWC, only the larger species

<sup>21</sup> Available at: <http://www.iwcoffice.int/commission/schedule.htm>.

<sup>22</sup> As listed in the Annex to the Final Act of 1946, they are: bowhead, right whale, North Atlantic right whale, Southern right whale, pygmy right whale, humpback whale, blue whale, fin whale, sei whale, Bryde’s whale, minke whale, gray whale, sperm whale, Arctic bottlenose whale, and Antarctic bottlenose whale.

<sup>23</sup> The gray whale, for instance, has eight names: gray whale, gray back, California gray whale, Pacific gray whale, Devil fish, hard head, mussel digger, and rip sack.

<sup>24</sup> Consider IWC Res. 1980-App. 8, ‘Resolution concerning Extension of the Commission’s Responsibility for Small Cetaceans’, in which it is noted that ‘the Convention itself does not define the species covered by the term whale and Contracting Governments are not of one view on such a definition as regards the Convention’.

<sup>25</sup> K. Mulvaney & B. McKay, ‘Small Cetaceans: Status, Threats, and Management’, in W.C.G. Burns & A. Gillespie (eds), *The Future of Cetaceans in a Changing World* (Transnational, 2003), pp. 189–216; and A. Gillespie, ‘Small Cetaceans, International Law and the International Whaling Commission’, in Burns & Gillespie, *ibid.*, pp. 219–41. See also Stephenson, Moers & Attaran, n. 2 above, at pp. 253–4.

<sup>26</sup> M. Komatsu & S. Misaki, *Whales and the Japanese: How We Have Come to Live in Harmony with the Bounty of the Sea* (Institute of Cetacean Research, 2003), at p. 32. Japan was not one of the original signatories.

<sup>27</sup> See, e.g., IWC Res. 1980-App. 8, n. 24 above; IWC Res. 1994-2, ‘Resolution on Small Cetaceans’.

of cetacean are dealt with in the text of the Schedule to the Treaty. The list has been amended from time to time. For instance, the killer whale was initially not included, but since 1977 it expressly belongs to the list of cetaceans over which the IWC exercises jurisdiction, and the species is within the scope of the current moratorium (technically, a ‘zero quota’) on commercial whaling.<sup>28</sup> At present, however, only 15 species are listed.<sup>29</sup> Approximately 70 species of cetacean<sup>30</sup> are not regulated by the IWC, and this leaves a ‘regulatory vacuum’. The UNCLOS defers the management of ‘cetaceans’, but the most appropriate management body (the IWC) covers only 15 species, although it does recognize other species as cetaceans. Staggeringly, there is no legal instrument of global scope that effectively covers these species.

Presumably, when 15 whaling nations crafted a treaty in 1946, at the dawn of international treaties that considered environmental aspects,<sup>31</sup> they were all agreed on the essentially economic nature of the treaty and did not consider it problematic that only a few species were regulated. After all, few species of *any* animal were regulated. By the time the problem became apparent of not having included more species, parties’ attitudes had both polarized and hardened. Agreement to expand the list had become all but impossible.

It would be unfair, however, to the IWC and its contracting governments not to acknowledge that it does have many ‘cooperative arrangements’ in place with other conventions and with various international organizations, many of which have observer status. In the ‘Chair’s Report’ for IWC 63 (2011), it is noted that such cooperative arrangements ‘have continued and been strengthened with a number of other Intergovernmental Organisations’.<sup>32</sup> These moves are obviously welcome as

<sup>28</sup> At IWC 29, 1977, a definition of the species was included in the Schedule: ICRW, n. 1 above, Schedule, para. 1(B): “‘killer whale’ (*Orcinus orca*) means any whale known as killer whale or orca”.

<sup>29</sup> Under the heading ‘baleen whales’: blue whale, bowhead whale, Bryde’s whale, fin whale, gray whale, humpback whale, minke whale, pygmy right whale, right whale, sei whale. Under the heading ‘toothed whales’: beaked whale (meaning any whale belonging to the genus *Mesoplodon*, or any whale known as Cuvier’s beaked whale, or Shepherd’s beaked whale), bottlenose whale (meaning any whale known as Baird’s beaked whale, Arnoux’s whale, southern bottlenose whale, or northern bottlenose whale), killer whale, pilot whale (meaning any whale known as long-finned pilot whale or short-finned pilot whale), sperm whale: see ICRW, n. 1 above, Schedule, ‘1. Interpretation’, available at: <http://www.iwcoffice.int/commission/schedule.htm>.

<sup>30</sup> The Scientific Committee of the IWC currently recognizes 86 species of cetacean: see <http://www.iwcoffice.org/conservation/cetacea.htm>. The baiji (or Yangtze River dolphin) is probably extinct, and it has recently been suggested that there may be a new species of humpback dolphin in Australian waters: see ‘New Species of Dolphin Found in Australian Waters’, 29 Oct. 2013, *Science Daily*, available at: <http://www.sciencedaily.com/releases/2013/10/131029143000.htm>.

<sup>31</sup> Opinions differ among its contracting governments as to whether the ICRW is an ‘environmental’ treaty.

<sup>32</sup> See ‘Chair’s Report of the 63<sup>rd</sup> Annual Meeting, St Helier, Jersey, 2011’, available at: [https://www.archive.iwc.int/pages/download\\_usage.php](https://www.archive.iwc.int/pages/download_usage.php), 35. Examples include the CMS, n. 3 above; the International Council for the Exploration of the Seas (ICES), available at: <http://www.ices.dk>; the Inter-American Tropical Tuna Commission (IATC), available at: <http://www.iattc.org>; Agreement on the International Dolphin Conservation Programme (AIDCP), Washington, DC (US), 15 May 1998, in force 15 Feb. 1999, available at: <https://www.iattc.org/IDCPENG.htm>; the International Commission for the Conservation of Atlantic Tunas (ICCAT), available at: [www.iccat.int](http://www.iccat.int); the CCAMLR, n. 7 above; the NAMMCO, n. 13 above; the International Union for the Conservation of Nature (IUCN), available at: <http://www.iucn.org>; the North Pacific Marine Science Organization (PICES), available at: <https://www.pices.int>; the Protocol on Specially Protected Areas and Wildlife (SPAW) of the Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Kingston (Jamaica), 18 Jan. 1990, in force 18 Jun. 2000, available at: <http://www.cep.unep.org/content/about-cep/spaw>; and the International Maritime Organization (IMO), available at: <http://www.imo.org>.

examples of links being forged between the ICRW/IWC and other conventions, but it is probably far too early to describe them as 'synergies'. The confrontational nature of the IWC, and the level of contention within the organization, must make it difficult at the present time to conceive of formal synergistic arrangements. Rather, they probably represent initial cooperative efforts.

#### 4. THE 'FUTURE OF THE IWC'

The deadlocked nature of the IWC has been acknowledged by its own contracting governments, which have gone so far as to engage in recent years in a formal process to seek resolution of the conflict. Stephenson and his colleagues dismiss this process, writing that '[a] decision in 2011 to extend the Future of the IWC process has produced no breakthrough' and that '[a]fter four decades of sharp, unassuageable differences, it is hard to imagine a consensus on small cetaceans emerging in the near future'.<sup>33</sup>

The history of this resolution process (the 'Future of the IWC') is that at IWC 59, in 2007, it was agreed that steps should be taken towards resolving this conflict, if possible. The agreement was to create a small Steering Group which would explore ways to reconcile the different views. The Group suggested that there was an urgent need to explore ways to improve levels of trust and that 'initially' it would be 'more fruitful to take a process-oriented approach and to seek ways to improve how negotiations within the IWC are conducted'. This led, in 2008, to 25 contracting governments meeting as a Small Working Group (SWG) and considering a 'package deal' that would include elements such as a limited resumption of whaling and bringing small cetaceans under the IWC. After a number of further meetings, the initiative was given the official title 'Future of the IWC', in which process compromise was sought on issues such as Aboriginal Subsistence Whaling, Creation of Whale Sanctuaries, Japanese Small Type Coastal Whaling, Lifting of the Moratorium on Commercial Whaling, Management of Small Cetaceans, and others.

A document entitled 'A Proposed Consensus Decision to Improve the Conservation of Whales'<sup>34</sup> was put forward for adoption at IWC 62 in 2010.<sup>35</sup> While it is true that not all of these issues seem immediately to be relevant to the issue of small cetaceans, it is important to understand that for many (especially 'pro-whaling') contracting

<sup>33</sup> Stephenson, Mooers & Attaran, n. 2 above, at p. 247.

<sup>34</sup> 'Future of the IWC', available at: <http://iwc.int/future2>.

<sup>35</sup> The core components of the 'Proposed Decision' were as follows: the moratorium on commercial whaling would stay in place; whaling under unilaterally determined special permits, objections or reservations would be suspended for a decade; all whaling authorized by member governments would be brought under IWC control; whaling would be limited to those members currently taking whales; no new non-indigenous whaling would take place on whale species or populations not presently hunted; for the next decade caps lower than present catch levels would be determined, using the best available scientific advice; effective monitoring methods for non-indigenous whaling would be introduced; a South Atlantic sanctuary would be created; the non-lethal value and use of whales would be recognized as a management option; a mechanism for building capacity and encouraging enterprise for developing countries would be provided; there would be focus on recovery of depleted whale stocks and action taken on key conservation issues (such as bycatch and climate change); a decisive direction for the IWC's future work and governance would be set; and timetables and mechanisms would be set for addressing fundamental differences of view among members.

governments it is not viable to seek resolution of the impasse within the IWC unless there is ‘give and take’ and a ‘package deal’ is negotiated. However, consensus was not found in 2010, and the Chair’s suggestion that a ‘further period of reflection’ was needed was agreed to.

At IWC 63, in 2011, Argentina and Brazil put forward a proposal to establish a South Atlantic whale sanctuary. Various parties – including Japan, other ‘sustainable use’ countries and even members such as Russia which generally favour the anti-whaling arguments – objected, arguing that extracting a single issue from the proposed ‘package deal’ might lead to the ‘destruction’ of the ‘Future’ process. The matter was arguably symbolic as it was not likely that the proposal would achieve a 75% majority vote, but it led to a bitter battle of words before Argentina and Brazil drove the proposal to a vote. A group of ‘sustainable use’ countries then attempted to break the quorum before the vote, which led to an even more bitter battle over whether this was possible.<sup>36</sup> This resulted in a compromise set of paragraphs to be included in the Chair’s Report to record the events, with neither side backing down. It certainly appeared as though the ‘Future’ process was defunct. Nevertheless, in the aftermath of IWC 63 it is recorded that it was agreed that the progress achieved through the ‘Future’ process would be maintained; it was also recorded that there was general agreement to encourage continuing dialogue on the IWC’s future to continue building trust by coordinating proposals widely before submission, and to encourage continued cooperation on the work of the IWC despite different views on the conservation of whales and management of whaling.

At IWC 64, in 2012, various contracting governments gave views on the ‘Future’ process. Japan described the agreement made at IWC 63 to ‘continue dialogue to build mutual trust and collaboration’ as ‘indispensable’. Russia suggested that the process should continue, and that the SWG which had met from 2007 to 2010 be reassembled ‘so as to provide for the adoption of a package of measures which would include solutions to’ various issues, with such issues including ‘strike limits for small-type whaling’.<sup>37</sup> Australia and various other anti-whaling members, however, considered that the SWG’s ‘remit’ was over.<sup>38</sup>

Stephenson, Mooers and Attaran reject the potential usefulness of the ‘Future’ process. According to them, ‘[t]he Future of the IWC renewal effort has delivered no result at all for small cetaceans’ and, to be perfectly blunt, ‘[a] solution based on negotiation and good faith seems less likely now than at any time in the past’.<sup>39</sup> However, what is most important about the ‘Future’ process for this response commentary is that (i) although to date unsuccessful, the contracting governments to the ICRW have attempted since 2007 to reach compromise; (ii) while its future is uncertain, the process of seeking compromise may (and probably will) continue in at

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<sup>36</sup> Space precludes discussion here, but I do discuss this more deeply in Couzens, n. 17 above, at pp. 97–101.

<sup>37</sup> While small-type coastal whaling does not, in principle, include small cetaceans, the issues do become difficult to separate – the fishermen in Japan’s coastal villages who want ‘small-type’ quotas to take minke whales are also those who take unregulated dolphins and porpoises.

<sup>38</sup> ‘Chair’s Report’, IWC 64, 2012, at p. 9.

<sup>39</sup> Stephenson, Mooers & Attaran, n. 2 above, at p. 263.



least some form; and (iii) the issue of IWC authority over small cetaceans is an important element of this compromise. The ‘Future’ process may yet represent the best way in which to redress the historical anomaly of the exclusion of small cetaceans from the IWC’s management authority. At IWC 64, in 2012, a number of countries<sup>40</sup> argued that small cetaceans ‘should be considered as an integral part of the work of the IWC’.<sup>41</sup> The ‘Future’ process remains an agenda item for IWC 65, in 2014.<sup>42</sup>

## 5. A MOVE TOWARDS ALTERNATIVE MANAGEMENT

Contracting government Monaco put forward a draft resolution at IWC 64, in 2012, entitled ‘Highly Migratory Cetaceans in the High Seas’.<sup>43</sup> The draft consisted essentially of a request for cooperation from, and discussion with, the UN General Assembly (UNGA). The thrust of the draft resolution was to move the debate on so-called ‘small cetaceans’<sup>44</sup> beyond the confines of the IWC. Monaco amended the draft proposal after consultation with various other parties, and it was then considered in plenary.

Monaco noted ‘that the overwhelming majority of marine cetacean species currently recognized by the IWC are highly migratory species and thus critically dependent on international cooperation for their conservation and management’. It noted that ‘Articles 65 and 120 of [UNCLOS<sup>45</sup>] require States to cooperate with a view to the conservation of marine mammals and, in the case of cetaceans, to work through the appropriate international organizations for their conservation, management and study both within and beyond the exclusive economic zone’, and expressed concern that ‘efforts by coastal and island States to protect these migratory species depend upon effective conservation efforts on the high seas’. Monaco then recalled that ‘due to a divergence of views among IWC Parties over the taxonomic coverage of the ICRW, only 38 highly migratory species of cetacean are included in the ICRW Schedule, without addition of any further species in the last 35 years’. It regretted that ‘most countries engaged in whaling have a policy of not providing data to the IWC Scientific Committee on cetacean species which in their view are not covered by the ICRW’, and expressed deep concern ‘that current catches of cetaceans in the world’s oceans – with the single exception of those meeting aboriginal subsistence whaling quota – are taken without agreed limits’. The draft resolution then proposed that the IWC should ‘call the attention of the international community to the circumstance

<sup>40</sup> Such as Argentina, Australia, Germany, India, Monaco, and the Netherlands (which ‘expressed its concern at the lack of protection for many small cetaceans worldwide’ and ‘favoured a stronger role for the IWC on small cetacean conservation’).

<sup>41</sup> ‘Chair’s Report’, IWC 64, 2012, at p. 28.

<sup>42</sup> IWC 65/Draft Agenda, 6 June 2014, ‘7. The IWC in the Future’, available at: <http://www.iwc.int/private/downloads/9k3hji94rig4wggw44sgk0/IWC65%20Draft%20Agenda.pdf>.

<sup>43</sup> Draft Resolution for IWC 64: ‘Highly Migratory Cetaceans in the High Seas’, submitted by Monaco, IWC/64/11 Rev2 Agenda item 20; available at: <http://www.iwc.int/private/downloads/5puv0dr09mgw4w44808w0sgk8/64-11Rev2.pdf>.

<sup>44</sup> Obviously, not all small cetaceans are ‘highly migratory’, but bringing those that are under closer scrutiny would also draw attention to those that are not.

<sup>45</sup> N. 11 above; Art. 120 simply indicates that Art. 65 ‘also applies to the conservation and management of marine mammals in the high seas’.

that significant unregulated catches of highly migratory species of cetaceans continue to take place’, and invited ‘Contracting Parties to consider this issue in collaboration with the [UNGA], with a view to contributing to the conservation efforts of the IWC’.

After several postponements, Monaco’s draft resolution was discussed on the final day of the meeting. Monaco explained that the draft resolution aimed to address the fragmented legal coverage of highly migratory cetacean species, which were protected in some national waters but not elsewhere – despite this being ‘a time when the global community was calling for integrated marine governance’. The draft resolution was intended to tap into synergies and foster coordination between the IWC and the relevant [UN] processes. The idea was not to shift responsibility for whaling issues from the IWC to the UN, but rather to ‘seek synergies with UN processes by drawing the attention of a larger community of nations to the IWC’s Schedule and Resolutions which would strengthen the Commission’s work and embed it in the ongoing initiatives at UNCLOS’. According to Monaco, further, the resolution had as its key elements engagement and cooperation with the UNGA, particularly ‘in the context of the annual negotiations for the UN Resolution on Oceans and the Law of the Sea’, and examination of the gaps in the international regulation of highly migratory cetaceans.

Various countries spoke in support, particularly India and several European and Latin American countries. Many, however, were more cautious: New Zealand, for instance, said that the ‘regulation of small cetaceans was an unresolved issue between the IWC and all other relevant bodies’, but also expressed concern over ‘bringing the divisions of the IWC into the [UN] where negotiations proceeded largely by consensus’.<sup>46</sup> Support for New Zealand’s view came from countries as diverse as the United States (US)<sup>47</sup> and Norway, the latter saying that it shared New Zealand’s concerns about bringing the IWC’s divisions to the [UNGA]. China, Iceland and Japan spoke similarly, with Iceland’s view being that ‘the mandate of the IWC covered only those cetaceans listed in the Schedule to the ICRW’ and ‘that small cetaceans were protected by NAMMCO<sup>48</sup> in its region’. China declared that the IWC was the appropriate forum for the conservation and management of cetaceans;<sup>49</sup> while Japan asserted that the resolution required the IWC to ‘give up its work and ask the UN to take over – give up its mandate’.<sup>50</sup>

The proposed resolution was withdrawn before being put to a vote. Monaco seems to have realized that it had insufficient support even from sympathetic contracting governments (perhaps even from governments which had indicated that they would give support)<sup>51</sup> for the resolution to be adopted, and therefore withdrew it, despite

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<sup>46</sup> Despite this record, New Zealand was later to explain, in response to a claim by St Kitts & Nevis that the draft resolution was ‘frivolous’, that it considered the issue a very serious one and that it did support the resolution despite having had ‘initial concerns’: E. Couzens, personal notes, IWC 64, Day 5.

<sup>47</sup> The US did, however, later indicate support for Monaco’s draft resolution.

<sup>48</sup> N. 13 above.

<sup>49</sup> ‘Chair’s Report’, IWC 64, 2012, at p. 59.

<sup>50</sup> E. Couzens, personal notes, IWC 64, Day 5.

<sup>51</sup> Monaco ultimately did not receive the support it had been expecting from the European Union (EU) bloc. Denmark apparently indicated late in the day that it would block consensus within the EU bloc, which meant that all other EU countries would have abstained.

initially having been resolute in wanting to have it voted upon. Monaco finally indicated that it would continue to work on the issue through a 'non-IWC inter-sessional task force'.<sup>52</sup> Monaco's Commissioner said that he thought it was 'important to keep the spirit of building dynamics on our side', that 'there were difficulties with gaps in the management of cetaceans', and that the 'inter-sessional task force' would 'build on a platform with a view to explore the dynamics of synergies with UN processes'.<sup>53</sup>

That the draft resolution was put forward in the first place, and was discussed in plenary before being withdrawn, indicates that it was taken seriously – at least by its proponent. At the time of writing, notice of intention to submit a similar draft resolution has been put forward for the next meeting,<sup>54</sup> to take place in September 2014, and it certainly demonstrates Monaco's intention to proceed again at the IWC. If Monaco does continue to push the issue forward,<sup>55</sup> it is likely that it will do so in two different forums: the forthcoming meeting of the IWC,<sup>56</sup> and the annual UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea,<sup>57</sup> the latter having been referred to specifically in the 2012 draft resolution.

Should Monaco's proposal garner more support in 2014 than it did in 2012 (in particular, from the EU bloc of contracting governments) and the resolution be successful, an approach to the UNGA to consider the issue would carry substantial weight. Although resolutions require only simple majorities to succeed in the IWC whereas amending the Schedule<sup>58</sup> requires a 75% majority, a resolution framed in terms of a formal request from the IWC to other organizations would be difficult to ignore. The repercussions for the IWC of consideration by the UNGA would then be difficult to predict. Approximately half of the world's states are members of the IWC. If the other half were to become interested, and even involved, this could significantly affect the IWC's approach. Even if the issue were not taken to the UNGA, but taken instead to various other international organizations, expanding awareness of the 'neglect' of small cetaceans could hardly be harmful to their conservation and protection. Ultimately, it is difficult to predict whether the pro- or anti-whaling side would benefit more as a consequence of this development, but this should not be the most important consideration. What cannot be stressed enough is that

<sup>52</sup> 'Chair's Report', IWC 64, 2012, at p. 59.

<sup>53</sup> E. Couzens, personal notes, IWC 64, Day 5.

<sup>54</sup> At time of writing, the Draft Agenda for IWC 65 reflected that 'the Government of Monaco has notified the Secretariat of its intention to submit a draft Resolution on small cetaceans on the High Seas': IWC 65/Draft Agenda, 6 June 2014, '6. Resolutions', available at: <http://www.iwc.int/private/downloads/9k3hji94rig4wggww44sgk0/IWC65%20Draft%20Agenda.pdf>. The text of the intended draft Resolution was not available at the time of writing.

<sup>55</sup> It is difficult to know how the discussion at IWC 65 will proceed, especially as the meeting is likely to be dominated by the decision of the ICJ in favour of Australia that Japan's JARPA II scientific whaling programme does not represent legitimate research: ICJ, *Whaling in the Antarctic (Australia v. Japan, New Zealand intervening)*, 31 Mar. 2014, available at: <http://www.icj-cij.org/docket/files/148/18136.pdf>.

<sup>56</sup> IWC 65, 15–18 Sept. 2014, Slovenia.

<sup>57</sup> See [http://www.un.org/depts/los/consultative\\_process/consultative\\_process.htm](http://www.un.org/depts/los/consultative_process/consultative_process.htm). The UNGA decided in 1999 (Res. 54/33) to establish the Consultative Process at which it would annually review developments in respect of the law of the sea, and of general ocean affairs, considering the Secretary-General's report on these and other particular issues.

<sup>58</sup> Which is what would be required to introduce new species to the IWC's management ambit.

the overriding consideration should be whether the marine environment in general, and unregulated cetacean species in particular, would benefit from such a discussion – especially if it were to lead ultimately to regulation.

## 6. OTHER WORK

The IWC is doing much work that involves small cetaceans. Small cetaceans are included in the remit for study by the Ship Strikes Working Group<sup>59</sup> and there is a Voluntary Fund for Small Cetacean Conservation Research,<sup>60</sup> which relies on donations from contracting governments and NGOs and which offers competitive funding to particular research projects related to small cetaceans. The IWC's Scientific Committee studies and reports on small cetaceans.<sup>61</sup> Notably, many of the small cetacean species which are considered by the Scientific Committee are not those that are actively hunted, but are endangered species found in the waters of fervent anti-whaling countries – such as the franciscana in Brazil, the vaquita in Mexico, the Indus River dolphin in Pakistan, Irrawaddy dolphin in Cambodia, and the Hector's (including Maui's, a subspecies) dolphin in New Zealand. Many of these species face multiple threats, including those from fisheries bycatch, ship strikes, and environmental change. While nobody doubts the willingness of states to protect these species,<sup>62</sup> they might benefit from being brought under the direct authority of the IWC. The threats to small cetaceans are far more varied than those posed simply by direct harvesting.

## 7. CONCLUSION

The ICRW contains no mechanism for the adjudication of disputes between its contracting governments. When a difference of interpretation arises, therefore, it is not possible to have it definitively interpreted. The IWC itself, on its website, tells us that '[so]me governments take the view that the IWC has the legal competence to regulate catches only of these named "Great Whales". Others believe that all cetaceans, including the smaller dolphins and porpoises, also fall within IWC jurisdiction'.<sup>63</sup> Stephenson, Mooers and Attaran may overstate when they conclude that various legal and scientific factors 'inexorably lead to the conclusion that small cetaceans are "whales" within the IWC's competence'.<sup>64</sup> Arguably, it would be better to say that cetaceans 'ought to be' considered whales for IWC management purposes.

<sup>59</sup> See <http://www.iwc.int/ship-strikes>.

<sup>60</sup> See [http://www.iwc.int/sm\\_fund](http://www.iwc.int/sm_fund).

<sup>61</sup> 'Chair's Report', IWC 64, 2012, at pp. 51–5.

<sup>62</sup> Accusations have been made that not enough is being done. Regarding the vaquita, for instance, Austria said in 2012 that it is 'time for diplomatic niceties and step wise strategies to take a back seat to immediate concrete action, with no compromise' and for the 'Commission, the Secretariat, the range state and NGOs to bundle and boost their efforts on the vaquita to an entirely new higher level of urgency and resoluteness': 'Chair's Report', IWC 64, 2012, at p. 52.

<sup>63</sup> IWC, 'Small Cetaceans', available at: <http://iwc.int/smallcetacean>.

<sup>64</sup> Stephenson, Mooers & Attaran, n. 2 above, at p. 263.

Stephenson and his colleagues argue that the ICJ is an appropriate, indeed ‘the only appropriate’, forum for adjudication on the small cetacean question. Significantly, when discussing what form an action might take within the ICJ, they refer to ‘the political or tactical considerations of the state sticking its head above the parapet to confront the pro-whaling states’.<sup>65</sup> This is the crux. States do not often stick their heads above the parapet in the whaling issue area, as can be seen in the (at least initial) aversion to Monaco’s draft resolution in 2012. Even contracting governments that might have been expected to support the proposal were cautious about its possible consequences. There appeared to be a fairly firm view, expressed by both anti- and pro-whaling parties, that the debate should remain within the confines of the IWC. Probably this reflects a fear of the unknown.

It was surprising to many, including myself, that Australia was willing to test its views on Japan’s scientific permit whaling in the forum of the ICJ. Had the Court ruled in Japan’s favour, many of the arguments (and much of the moral high ground) of the anti-whaling side would have been damaged. Space precludes lengthy discussion here, but perhaps Australia needed to be seen to take action to satisfy a vocal domestic constituency, and did so in respect of a highly confined legal issue: the legitimacy of the research conducted in Japan’s JARPA II programme. Furthermore, the legal issues are somewhat different from those that affect the treatment of small cetaceans. The ICJ judgment concerned the genuineness or otherwise of the research encompassed by Japan’s JARPA II programme, not Japan’s legal right (as contained in the ICRW) to issue permits for scientific whaling. A suit which claimed that a state that ‘commercially catches small cetaceans today would be in breach of the IWC’s moratorium on commercial whaling’<sup>66</sup> would go to the legal issue of whether species never previously included under the IWC’s management mandate could be ‘read in’ as being included. This is not impossible, but certainly a much harder task. It is unlikely, too, that Australia’s success will ‘open the floodgates’ to more actions on other matters in the ICJ. Despite the fillip the anti-whaling side will have received from the ICJ’s recent ruling, diplomatic weight within the IWC remains quite evenly balanced and contracting governments proceed cautiously and tactically, no matter how loudly they might ‘rattle their sabres’. Finally, a resolution based on consensus is more likely to be in the long-term interests of conservation than a resolution ‘imposed’ judicially which would leave states recalcitrant.

The current ‘regulatory vacuum’ for so-called small cetaceans is unsatisfactory. The situation is even absurd, with various international bodies which could play roles deferring to the IWC, and the IWC itself, through inability on the part of some and unwillingness on the part of others, declining to exercise authority. A solution does need to be found and, even though I think that the solution proffered by Stephenson

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<sup>65</sup> *Ibid.*, at p. 262.

<sup>66</sup> *Ibid.*, at p. 242.

and his co-authors is not likely to materialize,<sup>67</sup> and may not even be the most desirable, this is a debate which needs to be had. If their article sparks further debate then that is an important contribution. Perhaps none of the current proposals for small cetaceans – whether the ‘judicial intervention’ advocated by Stephenson, Mooers and Attaran; the inclusion in a package deal under the auspices of the ‘Future of the IWC’; or Monaco’s proposal to take the debate beyond the confines of the IWC – will lead to a definitive resolution. Yet the debate is under way and hopefully each of these proposals will eventually come to be seen as a step that led towards a sustainable solution for small cetaceans.

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<sup>67</sup> Approaching the ICJ is a radical step which is not often taken by states, and only a few matters that are environmental in nature have been adjudicated by the Court. Sands suggests that states are ‘hesitant about referring international environmental disputes to international adjudication’, and ‘[t]o the extent that states want international adjudicatory mechanisms, they do not seem to want those that apply a contentious and conflictual procedure to environmental matters’: P. Sands, ‘Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law’, Proceedings of the OECD Global Forum on International Investment, 27–28 Mar. 2008, at pp. 4–5, available at: <http://www.oecd.org/investment/globalforum/40311090.pdf>. It is also worth noting that in 1993 the ICJ created a Chamber for Environmental Matters; over the next 13 years, however, no state requested that the Chamber deal with a case, and in 2006 the ICJ decided not to elect a Bench for the Chamber, effectively discontinuing it: ICJ, ‘Chambers and Committees’, available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=4>.