THE DEVELOPMENT OF THE INTERNATIONAL REGULATION OF WHALING: ITS RELATION TO THE EMERGING LAW OF CONSERVATION OF MARINE MAMMALS

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# TABLE OF CONTENTS

## TABLE OF CASES AND TREATIES

vi

## ABBREVIATIONS

viii

## FRONTISPICE

The Great Whales

xii

## INTRODUCTION

xiii

## CHAPTER I: WHALES AND OTHER MARINE MAMMALS: A DESCRIPTION OF THE RESOURCE

Introduction

1

Part I: Large Cetaceans

6

Part II: Small Cetaceans

22

Part III: Other Marine Mammals

28

Part IV: Related Species

36

Part V: Marine Mammals: Their Products and Uses

39

Conclusion

## CHAPTER II: THE HISTORY OF WHALING AND ITS REGULATION BEFORE 1930

Introduction

54

Part I: Pre International Regulation: Whaling to World War I

56

Part II: Resumption of Unregulated Whaling Between World Wars I and II

66

Part III: International Legal Basis of Whaling Before 1931

67

Conclusion

102

## CHAPTER III: THE REGULATION OF WHALING DURING THE LEAGUE OF NATIONS PERIOD 1931-1946

Introduction

103

Part I: Role of ICES

104

Part II: League of Nations Actions: Conventions and Protocols 1931-1937

107

Part III: Whaling During World War II

131

Part IV: International Regulation of Whaling During World War II

132

Part V: Substantive Provisions of Whaling Agreements in Force in 1946

137

Conclusion

141
CHAPTER IV: THE ESTABLISHMENT OF THE INTERNATIONAL WHALING COMMISSION

Part I: The Precedents
Part II: The International Whaling Conferences 1945-1946
Part III: The International Whaling Convention
Conclusion


Introduction
1. First Meeting, London, 1949
2. Second Meeting, Oslo, 1950
3. Third Meeting, Capetown, 1951
5. Fifth Meeting, London, 1953
6. Sixth Meeting, Tokyo, 1954
7. Seventh Meeting, Moscow, 1955
8. Eighth Meeting, London 1956
Conclusion


Introduction
I. The Catalysts of Legal Change
1. The Truman Proclamation 1945
2. 200 mile zones of exclusive coastal state jurisdiction
3. New Fisheries Bodies and Relevant Agreements
II. United Nations Conferences on the Law of the Sea (UNCLOS I and II)
Conclusion

1.  Introduction 312
2.  Thirteenth Meeting, London, 1961 313
5.  Sixteenth Meeting, Sandefjord, 1964 336
10. Twentieth Meeting, Tokyo, 1968 366
Conclusion 374

CHAPTER VIII:  THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW AND REGULATION OF THE LIVING RESOURCES OF THE SEA

Introduction 377
III. Relevant New Treaties of the 1970's 394
Conclusion 414


1.  Introduction 416
3.  Twenty Third Meeting, Washington, 1971 421
5.  Twenty Fifth Meeting, London, 1973 441
Conclusion 467

1. Introduction 469
2. Twenty Seventh Meeting, London, 1975 470
4. Twenty Ninth Meeting, Canberra, 1977 488
6. Special Meeting, Tokyo, 1978 514
7. Thirty First Meeting, London, 1979 516

Conclusion 518

### CHAPTER XI: CURRENT PROBLEMS AND PROPOSALS FOR A NEW CONVENTION

Introduction 520

**Part I:** Recent Developments in the International Law Concerning Conservation of Whales and Other Marine Mammals 521

1. New Treaties 521
2. Prospective Treaties 528
3. National Legislation Regulating Marine Mammals 542

**Part II:** Proposed Revision of the International Convention for the Regulation of Whaling 554

Conclusion 571

**BIBLIOGRAPHY** 582

**APPENDICES:**

**Appendix I:** International Convention for the Regulation of Whaling 1946 and states parties, 31 December 1979 595

**Appendix II:** Major Migration Routes of Whales 600

**Appendix III:** Countries which may have cetaceans off their coasts and those which have declared 50-200 mile Exclusive Fisheries or Economic Zones or Territorial Seas 601

**Appendix IV:** Catch statistics and catch quotas 1920-1979 603

**Appendix V:** UNEP's Guiding Principles on Shared Natural Resources 1978 607

**Appendix VI:** IWC's Summary of 31st Meeting of IWC, July, 1979 609
### CHRONOLOGICAL TABLE OF CASES AND TREATIES

#### Cases

#### Treaties


27. Agreement Between Japan and Korea Concerning Fisheries 1965.


34. Protection of World Cultural and Natural Heritage Convention 1972.

35. USA-USSR Agreement on Co-operation in the Field of Environmental Protection 1972.


### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
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<tbody>
<tr>
<td>ACC</td>
<td>Administrative Coordinating Committee (UN)</td>
</tr>
<tr>
<td>ACMRR/WP/MM</td>
<td>Advisory Committee on Marine Research Working Party on Marine Mammals (FAO)</td>
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<tr>
<td>AHSC</td>
<td>Ad Hoc Scientific Committee (IWC)</td>
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<tr>
<td>APW</td>
<td>Antarctic Pelagic Whaling</td>
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<tr>
<td>ATCM</td>
<td>Antarctic Treaty Consultative Meeting</td>
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<tr>
<td>ATCP:(ACP)</td>
<td>Antarctic Treaty Consultative Power</td>
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<tr>
<td>BIWS</td>
<td>Bureau of International Whaling Statistics</td>
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<tr>
<td>BWU</td>
<td>Blue Whale Unit</td>
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<tr>
<td>CCMSWA:(CCMS)</td>
<td>Convention on the Conservation of Migratory Species of Wild Animals</td>
</tr>
<tr>
<td>CEP</td>
<td>Chile, Ecuador and Peru.</td>
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<tr>
<td>CITES</td>
<td>Convention on Trade in Endangered Species</td>
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<tr>
<td>COFI</td>
<td>Committee on Fisheries (FAO)</td>
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<tr>
<td>ECOSOC</td>
<td>Economic and Social Council (UN)</td>
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<tr>
<td>EEC</td>
<td>European Economic Community</td>
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<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<tr>
<td>ESA</td>
<td>Endangered Species Act (USA)</td>
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<td>FAC</td>
<td>Finance and Administration Committee (IWC)</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organization (UN)</td>
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<tr>
<td>FCMA</td>
<td>Fishery Conservation and Management Act (USA)</td>
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<tr>
<td>FOE</td>
<td>Friends of the Earth</td>
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<td>FZ</td>
<td>Fishery Zone</td>
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<td>GCEP</td>
<td>General Council Environment Programme (UNEP)</td>
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<tr>
<td>GEMS</td>
<td>Global Environmental Monitoring Service (UNEP)</td>
</tr>
<tr>
<td>IATTC</td>
<td>Inter-American Tropical Tuna Convention or Commission</td>
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<td>Abbreviation</td>
<td>Full Name</td>
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<tr>
<td>ICCAT</td>
<td>International Convention/Commission for Conservation of Atlantic Tunas</td>
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<td>ICES</td>
<td>International Council for the Exploration of the Sea</td>
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<tr>
<td>ICNAF</td>
<td>International Convention/Commission for Northwest Atlantic Fisheries</td>
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<tr>
<td>ICRW</td>
<td>International Convention for the Regulation of Whaling</td>
</tr>
<tr>
<td>ICNT</td>
<td>Informal Composite Negotiating Text</td>
</tr>
<tr>
<td>ICSEAF</td>
<td>International Commission for the South East Atlantic Fisheries</td>
</tr>
<tr>
<td>ICSPRO</td>
<td>Inter-Secretariat Committee on Scientific Programmes Relating to Oceanography</td>
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<tr>
<td>IDCR</td>
<td>International Decade of Cetacean Research</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>IMS</td>
<td>Initial Management Stock</td>
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<td>INPC</td>
<td>International North Pacific Commission</td>
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<td>IOC</td>
<td>Inter-governmental Oceanographic Commission</td>
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<td>IPHC</td>
<td>International Pacific Halibut Convention/Commission</td>
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<td>IPSFC</td>
<td>International Pacific Salmon Fisheries Convention/Commission</td>
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<td>ISNT</td>
<td>Informal Single Negotiating Text</td>
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<tr>
<td>IUCN</td>
<td>International Union for Conservation of Nature</td>
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<tr>
<td>IWC</td>
<td>International Whaling Commission</td>
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<td>IWS</td>
<td>International Whaling Statistics</td>
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<tr>
<td>LEPOR</td>
<td>Long-term and Expanded Programme of Oceanic Research</td>
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<tr>
<td>LNTS</td>
<td>League of Nations Treaty Series</td>
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<tr>
<td>LOST</td>
<td>Law of the Sea Tribunal</td>
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<tr>
<td>MAC</td>
<td>Marine Action Centre (UK)</td>
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<td>MMC</td>
<td>Marine Mammal Commission (USA)</td>
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<td>Abbreviation</td>
<td>Full Name</td>
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<tr>
<td>MMPA</td>
<td>Marine Mammal Protection Act (USA)</td>
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<tr>
<td>MSY</td>
<td>Maximum Sustainable Yield</td>
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<tr>
<td>NAFO</td>
<td>Northwest Atlantic Fisheries Organization</td>
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<tr>
<td>NEAFC</td>
<td>North East Atlantic Fisheries Convention/Commission</td>
</tr>
<tr>
<td>NEAPC</td>
<td>North East Atlantic Permanent Commission</td>
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<tr>
<td>NGO</td>
<td>Non Governmental Organisation</td>
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<tr>
<td>NMP</td>
<td>New Management Procedures</td>
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<td>NOAA</td>
<td>National Oceanographic and Atmospheric Agency (USA)</td>
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<tr>
<td>NPPSC</td>
<td>North Pacific Fur Seal Convention/Commission</td>
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<tr>
<td>OAU</td>
<td>Organisation of African Unity</td>
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<tr>
<td>OL</td>
<td>Optimum Level</td>
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<tr>
<td>OP</td>
<td>Optimum Population</td>
</tr>
<tr>
<td>OSP</td>
<td>Optimum Sustainable Population</td>
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<td>OSY</td>
<td>Optimum Sustainable Yield</td>
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<tr>
<td>OY</td>
<td>Optimum Yield</td>
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<tr>
<td>PCSP</td>
<td>Permanent Commission for the South Pacific</td>
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<tr>
<td>PFST</td>
<td>Pacific Fur Seal Treaty</td>
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<tr>
<td>PS</td>
<td>Protection Stock</td>
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<tr>
<td>PTES</td>
<td>Peoples Trust for Endangered Species</td>
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<tr>
<td>PUSOFC</td>
<td>Peaceful Uses of the Sea-bed and Ocean Floor Committee (UN)</td>
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<tr>
<td>RAN</td>
<td>Resource Adjacent Nation</td>
</tr>
<tr>
<td>RSNT</td>
<td>Revised Single Negotiating Text (UNCLOS)</td>
</tr>
<tr>
<td>SC</td>
<td>Scientific Committee</td>
</tr>
<tr>
<td>SCAR</td>
<td>Scientific Committee on Antarctic Research</td>
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<tr>
<td>SCNEA</td>
<td>Sealing Commission for the North East Atlantic</td>
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<td>SCOR</td>
<td>Scientific Committee on Oceanic Research</td>
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<td>Abbreviation</td>
<td>Full Name</td>
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<tr>
<td>SMS</td>
<td>Sustained Management Stock</td>
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<td>SOC</td>
<td>Southern Oceans Convention</td>
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<td>SSC</td>
<td>Scientific Sub-Committee</td>
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<td>SY</td>
<td>Sustainable Yield</td>
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<tr>
<td>TC</td>
<td>Technical Committee</td>
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<tr>
<td>UFAW</td>
<td>Universities Federation for Animal Welfare</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNCHE</td>
<td>United Nations Conference on the Human Environment</td>
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<tr>
<td>UNCLOS</td>
<td>United Nations Conference on the Law of the Sea</td>
</tr>
<tr>
<td>UNEP</td>
<td>United Nations Environment Programme</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organisation</td>
</tr>
<tr>
<td>WWF</td>
<td>World Wildlife Federation</td>
</tr>
<tr>
<td>WP</td>
<td>Working Party</td>
</tr>
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</table>
RELATIVE SIZES OF THE GREAT WHALES

BLUE WHALE (Balaenoptera musculus) 9,000 to 13,000 surviving

FIN WHALE (Balaenoptera physalus)

SEI WHALE (Balaenoptera borealis)

SPERM WHALE (Physeter catodon)

HUMPBACK WHALE (Megaptera novaeangliae)

NORTH ATLANTIC RIGHT WHALE (Eubalaena glacialis)

Source: International Society for the Protection of Animals, 106 Jermyn Street, London, SW1Y 6EE.
"O lord, how manifold are thy works! in wisdom hast thou made them all: the earth is full of thy riches,
So is this great and wide sea, wherein are things creeping innumerable, both small and great beasts.
There go the ships: there is that great Leviathan, whom thou hast made to play therein."
(Psalms 104 Verses 24-26)

Although some groups of conservationists from the early twentieth century onwards have always been concerned for the conservation of whales, it was only in the 1970's, stimulated by the convening of the United Nations Conference on the Human Environment in Stockholm in 1972, that large numbers of environmental non-governmental organisations began to take a more active and demonstrative interest in the failure of international regulation to halt the decline in stocks of many species of whales. Their concern, further activated by their increased use of opportunities available to them to attend meetings of the International Whaling Commission (IWC) as observers, has led them to demand new action at the national and international level. One group, Greenpeace, has even resorted to the desperate measure of endeavouring by inserting its vessel between whales and whalers effectively to halt whaling in particular areas even where it is taking place legally and under international regulation. Many such observers, who are highly critical of the activities of the IWC, judge its performance in isolation from other fisheries commissions and without application of the constraints imposed on such bodies by international law, constraints which are deeply rooted in the economic, political, social and legal history of fisheries.
This study attempts therefore, by giving a chronological account of the development of the international law pertaining to regulation of whaling from its inception to the present day, to increase the knowledge and understanding of the problems inherent in regulating whaling, and by tracing the growing relationship of regulation of whaling to the development of other relevant laws and institutions for conservation of migratory species, to identify the ways in which international law and organizations might be developed to secure more effective conservation of whales and other marine mammals, as important components of the marine ecosystem.

The idea for this study occurred in 1967 shortly after the United Kingdom abandoned whaling because the International Whaling Commission established in 1946 had failed to arrest the decline in commercially exploited whale stocks, so that whaling ceased to be an economic activity for many of the states that had traditionally engaged in it. About this time Professor Parry drew attention to the fact that international law can be developed not only through the political organs of the United Nations but also "in a loose sense at least is the business of other ... organisations" and that a study of such organizations was now required. This present work undertakes, inter alia, the study of the IWC(which is neither the only body exclusively concerned with regulation of whales nor regulates all whales) established expressly for the purpose of arresting the pre-war decline of the large whales in the Antarctic

resulting from over-exploitation, by regulating not whales as such but whaling as its constituent treaty - the International Convention for the Regulation of Whaling (ICRW) - makes clear. Its Preamble, however, expresses the desire of the Contracting Governments "to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of the whale stocks", recognizes "the interests of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks" and that "it is essential to protect all species of whales from further overfishing." Nonetheless by 1967 whale catches had declined from 45,093 worldwide (32,396 in the Antarctic alone) in 1949 when the IWC became effective to a total quota of 15,883 by 1979/80, with no quota at all for the Antarctic. A preliminary examination of the Convention revealed that compared with previous and contemporary fishery treaties the ICRW was a considerable advance, enabling a large degree of flexible regulation by means of an annually amendable Schedule and imposing various duties on Contracting Governments concerning collection of scientific information and enforcement. Further study soon revealed that the reasons for its failure to achieve its objectives lay in the historical development of the law of the sea concerning fisheries and its failure from an early date to distinguish between marine mammals, which have many special characteristics, and fisheries generally. Chapter I of this thesis therefore first outlines these special characteristics which, it is submitted, require that whales and other marine mammals be managed on principles different from those of fin fisheries. Chapter II then briefly
outlines the early history of whaling up to 1930, i.e. the period before international regulation during which the doctrine of the freedom of fishing on the high seas was developed. By this date the decline in many species hunted had led to several inter-company private agreements which were unsuccessful in halting the economically wasteful over-exploitation. By 1931 a climate of opinion in favour of international regulation had emerged:

Chapter III describes the efforts of the League of Nations to promote the international regulation of whaling, without establishing a commission. The conservatory techniques introduced by the 1931 International Convention for Whaling and the series of Protocols adopted in the 1930's are outlined and their shortcomings examined. The Chapter concludes with a brief account of the World War II Protocols and an assessment of the state of regulation on the eve of the establishment of the IWC. The drafting history of the 1946 ICRW, the precedents on which it was based, and its strengths and weaknesses are scrutinised in Chapter IV.

The writer then faced the problem of how to describe and analyse the operations of the IWC and to relate them to the continuous development in the law of fisheries and marine mammals outside the Commission since, during the period of the writing of the thesis, a large number of major developments occurred in all the relevant sources of international law – treaties, custom and general principles. The problem was exacerbated by the fact that the thesis had to be suspended for several years following the writer's assumption of a full-time lectureship. During this period not only were there important developments in the law of the sea, following the opening of the UNCLOS III in 1973, and in
environmental law generally, following the 1972 UN Stockholm Conference on the Human Environment, but the IWC itself at this period adopted a number of revolutionary changes in its practices which have resulted in a much more complex and expanded agenda than hitherto for the annual meetings at which a whole new range of problems is now emerging so that, for example, the Antarctic quotas which used to be the hub of the IWC's regulatory role have ceased and whaling by land stations, aboriginals and non-members have become the main regulatory problems. It was therefore decided, for a number of reasons, not to attempt to make a single analytical overview of the dynamic operations and practices of the IWC as events continually progressed and altered perspectives thereon, but to follow a chronological approach in which significant periods of the operation of the Commission were described and then separately related to the significant developments in the international law of the sea and in international environmental law generally, which affected them. There were several reasons for this decision. First the pace and importance of development in the law inside and outside the IWC was such during the period of study and writing of the thesis that the scope of the thesis had constantly to be expanded to take account of these developments. A second reason was that there was not available, as far as the writer could ascertain, any concise and unbiased account of the meetings of the IWC and it was thought that it would be of considerable use to future researchers in this field, of whom there are likely, because of its multi-disciplinary nature, to be many, to have such an account on the record. Thirdly the interspersing of the factual
account of the meetings with the relevant developments in the international law gave, it was thought, a much fairer picture of the achievements of the IWC than is the case in many recent works on the subject which look only at the catch statistics and pass judgment without any appreciation of the historical development of the international law on this subject and the limitations it imposes on the IWC and similar commissions. It is hoped that this detailed account will establish that such a commission is not a simple instrument for effecting administrative conservatory laws but is a highly complex annual diplomatic conference, providing a forum for the political bargaining which must take place afresh each year to facilitate the compromises which are necessary to achieve the consensus for specific regulations that is indirectly if not directly required, because of the Convention's objection procedures. The introduction of the New Management Procedures in 1974, which require that stocks be initially maintained at their maximum sustainable yield, has exposed the Commission, many of whose members are no longer whaling states, and the meetings of which are now attended by large numbers of environmental NGO's, to quite exceptional political pressure and lobbying. Fourthly any study in depth of the IWC's operations reveals that there is a symbiotic relationship between the development of the law of conservation and the development of scientific knowledge and that though the former lags behind the latter it cannot progress at all without the enablement of a better scientific understanding of the resources and the scientific theories of conservation. As scientific knowledge has grown so have the perceived dimensions of the legal problems of conservation. The solution of the problems of conserving whales
or related species is now perceived to require a much more ecological approach to management than has hitherto been the case. Achieving the necessary changes in the law of conservation of marine mammals also requires solution of economic, social and political problems. The subject matter of the thesis is therefore, it is considered, as likely to be of interest to researchers in these disciplines as to lawyers who, apart from a few brief articles, appear to have neglected this subject. It is hoped that the account of the IWC's meetings will facilitate further research in all these disciplines. Chapter V outlines the operations of the Commission in its first 12 years, before the convening of the first two United Nations Conferences on the Law of the Sea in 1958 and 1960 respectively which stimulated the growth of other fisheries commissions, codified the freedom of the seas, and laid down the principles of conservation of fisheries described in Chapter VI. Chapter VII recounts the practices of the IWC in the light of these legal developments which, it will be seen, had little impact upon them because of the uncertainties of the scientific advice and the political difficulties of achieving unanimity in these circumstances. Chapter VIII outlines the principles laid down at the UN Conference on the Human Environment, the origins of the Third United Nations Conference on the Law of the Sea, and various new treaties of this period - some, such as the Convention on Trade in Endangered Species, engendered by these developments.

The Stockholm Conference will be seen to have been a turning point in the international regulation of whaling and for the international law of conservation generally, since its principles and resolutions have given, and are continuing to give, rise to new international treaties and national laws the gradual application
and enforcement of which is changing the policies and practices of the Commission and its Member Governments. The changes are of such consequence that events in the IWC between 1970-1979 are the subject of two chapters: Chapter IX covers the period from 1970-1974 during which the Resolution proposing a global Moratorium on whaling, which had been adopted at Stockholm, was pressed at the IWC and led to the adoption of the New Management Procedures (NMP) in 1974. Chapter X recounts the attempts to apply the NMP, to effect other reforms in the IWC's practices under the impact of developing international environmental law, and the emergence of the large variety of new problems of regulation and enforcement which have resulted, at the instance of some member states of the IWC, in the formulation of proposals for a revised Convention and the convening of meetings outside the IWC to consider this.

Finally Chapter XI, after taking account of recent national laws applied to 200 mile Fisheries Zones and developments under relevant new and prospective Conventions, summarises both the progress made by the IWC under their impact and its continuing deficiencies, before considering whether the proposals for a new convention to regulate whales and whaling are well-founded.

The ICRW at present regulates only the large whales and minke whales as its Schedule and the Convention do not provide for regulation of fisheries on marine mammals other than whales, although the class cetacea includes also dolphins species such as pinnipeds and sirenians are clearly outside its scope. The ICRW moreover is neither specifically concerned with the whales impact on and interrelationship with other marine mammals sharing their habitats and food supplies nor with the role of whales in
the general ecology of the waters they inhabit. Some cetologists and ecologists now question this limitation and the viability of any convention based upon it. They stress that ecosystems can only support a limited biomass and that their component parts, if left undisturbed, achieve a natural equilibrium.

Ecologists urge recognition also of the fact that mammals are not always top predators in the marine areas they inhabit but are often multi-level species, different species of them themselves taking one or more of the other levels - plants, benthos, zooplankton, squid, fish, birds, seals, small and even large cetaceans.\(^1\) If one trophic layer\(^2\) of an ecosystem is harvested - whether whales or krill, harp seals or capelin - the dependent layer cannot be harvested to the full extent. Some scientists urge that management of all these resources be based on the results of ecosystem case studies which should integrate available knowledge of the different species, and on an understanding of their interactions within the marine ecosystems. It is possible, though not proved, that full recovery of formerly over-exploited species now fully protected may be hampered by expansion of other populations during moratoria on whaling.\(^3\) Some scientists therefore argue that

it might now be better to use a resource (if it is to be used at all) in such a way that a balanced mixture of species from the various trophic levels is taken. This approach presents formidable difficulties for any management body since it requires the operation of a complex conservation policy without offering clearly quantified, or even (it is said by some) quantifiable criteria for its formulation. Some critics of the IWC therefore conclude that as it is neither appropriately empowered nor structured for such a task there should be a global moratorium on all whaling. Others point out that most fisheries take place without such strategies and on the basis of far less information than is now available about whales. Whatever the outcome of this debate it is clear that any management of whales and whaling cannot be confined exclusively to regulation of these species: some means must be found of taking account of the measures promulgated by other commissions and of interrelating their and the IWC’s policies within a more ecological approach.

The thesis therefore concludes with proposals for a new strategy of international law and organization to facilitate the introduction of the above approach in order to conserve marine mammals more in accordance with the newly emerging legal principles which, whilst still not clearly defining "conservation" both require and enable its further clarification and development to bring it more closely into accord with its dictionary definition - "to preserve, to retain, to keep entire" and "to keep from harm, decay or loss".¹

The five Appendices provide the background information essential to an understanding of the problems of conservation and regulation. They include the 1946 International Convention for the Regulation of Whaling and its states parties as well as details of the whales' major migration routes; catch and quota statistics; present numbers of whales; states within whose waters whales are found and those with extended maritime jurisdiction; the United Nations Environment Programme's Guiding Principles on Shared Natural Resources and the IWC's Summary of the 31st Meeting (1979).
CHAPTER I

WHALES AND OTHER MARINE MAMMALS: A DESCRIPTION OF THE RESOURCE

Introduction

At the present time, as remarked in the Introduction, under the terms of the International Whaling Convention and its Schedule, the IWC regulates only the large whales and collects statistics on 5 species of smaller whales. But not only are there many smaller cetaceans, there are also other kinds of marine mammals some of which are beginning to be so depleted that they too will need regulation if their species are to survive. There is now considerable discussion, amongst scientists and others concerned with the fate of these species, concerning the best approach to the organisation of present and future conservation of other marine mammals, many of which share the same ecosystems as the large whales. Before the question of whether the IWC or some other organisation should take on this task (should it be found necessary) the stocks of all these species must be identified and any inter-relationships between them and their habitats established. It is already being suggested, as will be revealed in the account of the more recent history of the IWC in Chapters IX and X, that at the very least the IWC should now consider the protection of any species of small cetaceans that are being depleted by direct exploitation and the IWC's Scientific Committee

1. The IWC does include the pygmy blue and right whales as well as the larger members of these 2 species, and now sets quotas for the minke whale; see Introduction n.3 for the other smaller whales covered.
established a Sub-Committee\(^2\) to collect data. The present
Chapter will therefore not only describe the large whales that
are currently regulated by the IWC but will also, more briefly,
consider the smaller cetaceans and other marine mammals and
inter-related species in areas where whaling takes place.

Cetaceans (whales and porpoises) are a small group consisting
of about 78 species. They are sui generis in the scala naturae.\(^3\)
It has been said that there are so many surprising, unique and
still unexplainable aspects of the anatomy, physiology and general
biology of cetaceans that one is hard put to select those with
which to start their description. They are the most atypical of
mammals and their derivation is ancient and obscure.\(^4\) Twelve
species of great whales proved commercially profitable to hunt
at one time or another over the centuries, mainly for their oil,
which can be made into soap and margarine, and for their meat,
used for human consumption and also for pet food and fertilisers
in some countries.\(^5\) Amongst these twelve is the blue whale which

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2. The Sub-Committee was established in 1974, IWC 25th Report,
p.10; its first report "Review of Biology and Fisheries for
Smaller Cetaceans", was published in the Journal of the
Fisheries Research Board of Canada, Vol. 32, No. 7, July 1975,
and it has met regularly since then.

J.E. Scarff "The International Management of Whales, Dolphins
and Porpoises: An Interdisciplinary Assessment", Ecology Law
Quarterly, Vol. 6 (1977) p.323-638, at p.329. This is the
best and most up to date interdisciplinary account of the whale
problem currently available.

4. Harrison and King, op. cit. supra and E. Slipjer "Whales"
(1962) Ch. 1 - "Historical Introduction" p.11. Many authors
state that the origin of the genus is difficult to assess but
it is very ancient probably emerging in the lower eocene period
as a separate cohort (cetacean).

5. Uses of whales and other marine mammals are discussed in
Part V of this Chapter.
is the largest of all animals still in existence.

The 12 species are:

<table>
<thead>
<tr>
<th>Species</th>
<th>Classification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greenland right whale or bowhead</td>
<td>Balaena mysticetus</td>
</tr>
<tr>
<td>North Atlantic right whale</td>
<td>Bubalaena glacialis</td>
</tr>
<tr>
<td>North Pacific right whale</td>
<td>Bubalaena sieboldii</td>
</tr>
<tr>
<td>Southern right whale</td>
<td>Bubalaena australis</td>
</tr>
<tr>
<td>Gray whale</td>
<td>Esrichtius robustus</td>
</tr>
<tr>
<td>Blue whale</td>
<td>Balaenoptera musculus</td>
</tr>
<tr>
<td>Fin whale</td>
<td>Balaenoptera physalus</td>
</tr>
<tr>
<td>Sei whale</td>
<td>Balaenoptera borealis</td>
</tr>
<tr>
<td>Bryde's whale</td>
<td>Balaenoptera edeni</td>
</tr>
<tr>
<td>Minke whale</td>
<td>Balaenoptera acutorostrata</td>
</tr>
<tr>
<td>Humpback whale</td>
<td>Megaptera novaeangliae</td>
</tr>
<tr>
<td>Sperm whale</td>
<td>Physeter macrocephalon</td>
</tr>
</tbody>
</table>

There are two suborders of the order Cetacea - the Mysticetes and the Odontocetes. The first eleven whales on the above list are baleen (or whalebone) whales of the suborder mysticetes; the remaining whale, the sperm, is a toothed whale of the suborder odontocetes. Ten of these cetaceans are regarded as large by the whaling industry, nine of them being mysticetes and one odontocetes. The so-called small cetaceans include one mysticetes and the remaining odontocetes - the dolphins, porpoises and smaller whales.

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7. From the Greek work "mystacocetes", mustached.

8. From the Greek word "odontos", toothed. A third sub-order, the Archae oceti, the primitive cetacean has long been extinct.

9. Gaskin op. cit. n.10 below at p.65.

10. In addition to the excellent works cited in notes 3 and 4 general descriptions of cetaceans can be found in T. Vaughan "Mammalogy" (1972); Mammals of the Sea, Biology and Medicine (S. Ridgway, ed. 1972); S. Leatherwood, D. Caldwell & H. Winn "Whales, Dolphins and Porpoises of the Western North Atlantic (1976) (NOAA Tech. Rep. NMFS CIRC-396); D.E. Gaskin "Whales, Dolphins and Seals" (1972).
The significance of these categorisations is described below. The suborders themselves can be further divided into 10 families, 39 genera and about 80 to 100 species. There is disagreement about the number of species; for example, only six species have general acceptance in the mysticeti, which is a pointer to the lack of scientific data on many aspects of cetology.

In the eighteenth and nineteenth centuries twelve states hunted five of these species, four of them to the point of extinction, since at that date there was no regulation of whale catching whatever and whalers operated on a laissez-faire basis. After this decline attention was diverted to seven other species which also in their turn became in many cases over-exploited. The eight species still hunted until 1972, when the IWC introduced the new policies described in Chapters IX and X, included the largest and therefore the most commercially attractive whales, namely the blue, finback and humpback whales, as well as some smaller whales such as the Bryde's whale and the small minke whales, which were not originally attractive to hunters. The sei and the sperm whales were increasingly exploited because of their abundance as other species declined. By 1970 the United States had put eight of the species originally hunted on its Endangered Species List, namely the bowhead, the right, blue, sperm, finback, sei, humpback and gray whales.

11. No whales have however become extinct since prehistoric times.
The dramatic decline in stocks led to an increasing awareness that if whales are to be managed for human advantage, which requires that stocks be maintained, knowledge is required not only of the identity of species but of vital aspects of whale populations, their numbers and rates of reproduction and growth, their death rates, their age at death and the effects of exploitation on these statistics. In describing the species of whales and other marine mammals, therefore, attention will be paid to their special differentiating characteristics and habits, which are as essential as management tools, as is knowledge of their distribution and abundance. Information concerning the latter is so controversial that no attempt is made here to evaluate it. Instead the detailed discussion of the status of stocks that takes place at each meeting of the IWC is recounted in the relevant Chapters.

The species of baleen whales which have been of most interest to hunters will be described first, followed by the toothed whales which have also been heavily exploited. The second section of the Chapter will be devoted to small cetaceans, the third to the other marine mammals (the sirenians, pinnipeds and marine otters) and the fourth to some of the more important species which are interrelated and share the same ecosystems, some of which already have, or may in the future have, commercial attraction, such as krill and squids. The fifth and final section describes the uses to which whales may be put.

PART I: LARGE CETACEANS

(i) General Characteristics

Whales, dolphins and porpoises are evolutionarily the highest forms of life in the seas.\(^1\) The large (or great) whales, as the name implies, are remarkable amongst these species for their size. Even the blue whale calf is 7 metres (23 feet) long at birth and weighs two and a half tons. By the time it is weaned 7 months later, it is sixteen metres (53 feet) long and weighs 23 tons.\(^17\) The longest fully grown whale recorded was 110' 2\(\frac{1}{2}\)" female blue whale\(^18\) but in the case of sperm whales males are larger than the females, growing up to eighteen metres (60 feet) and weighing 70 tons compared with 115 metres (38 feet) and seventeen tons average of the females. The blue whale, on the basis of fossil records, is the largest animal in bulk ever known.

Some whales (odontoceti) are toothed\(^19\) and, like the sperm and killer whales, eat other whales, dolphins, porpoises, seals, penguins, squid and fish (some living mainly on squid, some on fish and some on both); others (mysticeti) have whalebone or baleen plates instead of teeth with which, being filter feeders,

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15. See generally in the works cited in n.11
16. Gaskin, op. cit. n.11, p.6 says few biologists would dispute this.
18. Gaskin, op. cit. n.11, p.66; this is the largest noted since accurate records were kept after the start of Antarctic whaling; there may have been slightly larger specimens before this. See Guinness Book of Animal Facts and Feats 1970, p.9.
19. The teeth are not always evident and their number varies - the female beaked whale is virtually toothless but the porpoises have as many as 300 teeth.
they sieve vast quantities of krill,\textsuperscript{20} a shrimp-like crustacean (Euphausia superba) which is present in enormous numbers near the surface of the cold Antarctic waters. Like krill, squid\textsuperscript{21} are of great importance to the economy of the sea as the prey of whales, fish and birds and as predators on smaller animals. Because of their huge size whales need to consume vast quantities of food. In the oceans as a whole some regions are far more productive than others, the largest areas of high productivity are in the colder waters round the poles. Baleen whales feed there in the fertile summer months and eat little for the rest of the year. They are therefore particularly vulnerable to capture because of their concentration at this time and this is one of the characteristics which has to be taken account of in management policies. Some of the baleen whales are known as "rorquals".\textsuperscript{23} They are the ones that have as part of their feeding adaptation large areas of expansion in the form of pleats on their throats and stomachs, which gives them a ridged appearance.

\textsuperscript{20} "Krill" is an unfortunate loose use of a Norwegian word generally limited to euphausids, especially Antarctic Euphausia superba, but it is also now used to describe the food of whales in other seas; Schevill, Glossary, p.414; see Part IV of this Chapter.

\textsuperscript{21} Mackintosh, Ch. 3, p.61; see also Part IV of this Chapter.

\textsuperscript{22} Ibid, p.43.

\textsuperscript{23} A word of Scandinavian origin meaning "grooved whale", Schevill, Glossary, p.411. They include the balaenoptera (blue, fin, sei, Bryde's, minke) and the megoptera (humpback). As the only non-rorquals in Southern waters are the right whales, now completely protected by the IWC, the terms "rorqual" and "baleen" whale are often used interchangeably in the context of Antarctic Whaling.
Sperm whales (the only large odontoceti hunted) differ from baleen whales in several ways other than in their eating habits, as will become apparent below, but for all species, available food supply is probably the most important of the various factors limiting population size.24

Most whales, including the sperm, are highly migratory but the great whales rarely traverse the Equator and are thus generally referred to as Northern and Southern Hemisphere species. Although there are always exceptions to the patterns most whales are locked in a cycle of feeding in cold latitudes in the summer season and moving thousands of miles to warmer latitudes in the winter season to mate and calve.25 The IWC, as outlined in Chapter X, has now taken account of these facts in its new management procedures and whale stocks will therefore be discussed later in this Chapter on a Northern and Southern Hemisphere basis.

Another factor which must be considered in devising institutions to conserve whales is that they are exclusively aquatic and are found mainly in maritime areas though some forms of smaller ones are found in fresh water.26 They are stream-lined to ensure speed of passage and of diving and lack (apart from fore limbs) the external appendages of other mammals. Their auditory and reproductive organs are also recessed into their bodies, including the mammary glands with which the females suckle their young; as the milk is obvious however, this does not make identification of lactating whales as difficult as

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25. The main migratory routes are listed in Appendix II.
26. See Part II, p. 22.
some suggest. Overall they have a beautiful and impressive structure adapted to their aquatic habits.

Although information about the biology and life cycle of whales is steadily growing and in some cases the information available even exceeds that concerning most species of fish, there is still a considerable degree of uncertainty and speculation concerning some characteristics - for example on their respiratory system which is dependant on surfacing to breathe. Further information on their ability to stay submerged with only small amounts of oxygen in their lungs could be extremely useful to man. Their cardio-vascular system likewise is little identified since there are few recordings of their heart rate, most whale experiments being conducted on dead whales. More is known of their alimentary canals which are of particular interest in a world with a fast growing population to feed - and thus an urgent need for protein - since whales are the best processors of krill into protein and could supply an invaluable food resource in perpetuity if properly conserved. It was only

27. e.g. Harrison and King, Ch. 1.
28. Mr. Sinclair, Australian Minister for Primary Industry, welcoming the 29th Meeting of the IWC in Canberra, on June 20th 1977 stated that "more is known internationally of whales than of any other marine stocks". Chairman's Report of 29th Meeting, November 1977, p.1; Gaskin, op. cit. n.11 says "Our understanding of the anatomy and physiology of marine mammals has advanced so much in recent years that it becomes a daunting task to summarise the information in a few pages".
29. Harrison and King, p.65; Gaskin, p.13-14; Mackintosh, p.36-37; but see the large number of recent papers submitted to the Scientific Committee of the IWC in recent years.
30. Gaskin p.13; R. Elsner, "Cardiovascular Adjustments to Diving", in Anderson (ed) Ch. 5, p.117-145.
31. Harrison and King p.63; Gaskin, p.11.
32. Harrison and King p. 58; Gulland,Schevill (ed) op. cit. n.13, at p.44.
discovered as late as 1950 how reliant cetaceans are on their hearing to locate each other and find their food supplies; it is now said that their echolocation systems fit them "to the textures of the aquatic world just as the pulses of bats and the cries of gannets fit them to their specialized worlds". 33

This was discovered when the great variety of sounds they make was first recorded and this information created a new audience and concern for whales, although the significance of these sounds is disputed amongst scientists and others concerned with whales. 34

The whale's nervous system is also of great interest to scientists but again it was only comparatively recently that the great ability of one species of small cetaceans (the dolphins) to learn was discovered. The intelligence of the larger whales is a matter of great controversy. A wide variety of theories exist concerning the functions of the brain and much work needs to be done to verify the various assumptions and hypotheses put forward concerning this subject. 35

The main problem is that any definition of intelligence is a subjective one, as the

33. Norris op. cit. n.34 below at p.420.
34. How far these sounds involve intentional transmission of information and comprehension of the consequences is a very controversial subject. See generally W.E. Evans and J. Bertram, in Ch. 11 "Marine Mammal Communication: Social and Ecological Factors", p.425-472. Most of the collected evidence on cetacea, especially on acoustic signalling, relates to toothed whales, p.444. The authors stress the lack of information on "the content of the social life", of marine mammals, p.470. The whole topic is fraught with difficult and unanswered questions.
35. See generally the large number of works cited in Scarff op.cit. at p.338 n.41, and Jansen cited in n.36 below.
numerous disputes concerning intelligence testing of humans evidence, and that though the central nervous system of whales is known to be highly organised\textsuperscript{36} histological criteria based on facts such as brain weight, size and ratio of brain to body, type of brain tissue, and comparisons of behavioural patterns are not good guides to intelligence in terms of scientific measurement. Similarly it is difficult to draw conclusions from captive marine mammals' behaviour that can be extrapolated to free-ranging species, as the recent studies of primates in the wild have revealed in relation to observations of those based on Zoos.\textsuperscript{37} At this stage of research, judgment on these questions can only be suspended in the hope that further studies of whales in their natural environment will be encouraged and enabled, by governments, private institutions and international agencies. Whale behaviour has been little studied in the wild until recently.\textsuperscript{38}

\textsuperscript{36} Harrison & King, op. cit. p.; J. Jansen and J.K.S. Jansen, describe the whale brain without reference to measurement of intelligence and state that there are wide gaps in knowledge of the whales' central nervous system, Ch. 7 "The Nervous System of Cetacea" in "The Biology of Marine Mammals" (H.T. Anderson (ed) 1972) p.175, at p.176. They add that "a discussion of intellectual capacity is premature", but that "observations in captive cetaceans indicate a great capacity for learning". The best information concerns dolphins: Behavioural studies of the Pacific bottlenose dolphin (Turscops truneatus gilli) place them closer in many respects to chimpanzees than are dogs, p.245.

\textsuperscript{37} Op. cit. n.34, p.471.

\textsuperscript{38} e.g. R. Payne "At Home With Right Whales", 149 National Geographic p.322(1976); N. Whitehead and R. Payne "New Techniques for Assessing Right Whales Without Killing Them", ACMMR/MM/CC/79, March 1976; their work is based on analysis of aerial photographs taken by special techniques and on direct observation and is related only to Southern Right Whales off Argentina. Others are now engaged in similar studies.
There are grave dangers in taking an anthropomorphic approach to their behaviour but nonetheless such evidence as is available shows whales to be remarkable in many ways in relation to other marine mammals and fish.

The reproductive processes of the whales distinguish them from fish since they give birth to live calves and suckle their young. Knowledge of this aspect of whale biology is of particular importance to the formulation of management policies since the whale's ability to reproduce itself and the rate at which it does so is the major determinant of the level of quotas under which they can safely be exploited without dangerous depletion of stocks. Species do not usually mate with each other so whales need to be managed on a species specific basis; in addition account has to be taken of the fact that species are segregated further into discrete breeding stocks or populations often in separate areas. In this field also, however, there are, as one set of authors put it "still many mysteries" since it is not easy to determine reproductive patterns and "only when many more observations have been made on material from a much wider range of species and on animals kept in captivity will answers be found to many perplexing problems. Nothing is known at all about reproductive events in many cetacea species either because of lack of specimens or because so few have been obtained at important times in their cycles" \(^{39}\); for example their age at puberty, which is important as indicating the time at which they can reproduce themselves. Some important advances in knowledge have taken place in the fifteen years since that was written but there are still so many

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39. Harrison and King, \(q_i, q_j, q_k\).
gaps that the subject remains one of the most controversial in management and one, above all others, on which scientists, the IWC and non-governmental organisations concerned differ. Disputes continue concerning the rates at which whales reproduce themselves in each population; the rate, therefore, at which they can be harvested; and the rate at which depleted stocks recover. Many other factors enter into the calculations necessary to answer these questions but recruitment rate is the most crucial one.

The age at which whales reach puberty is known only for a few species: some scientists suggest that even in those cases it has been put too low; others doubt this. It is, however, generally higher in whales than in other animals; female sperm whales have possibly the highest age figure since they are not mature until between 7-13 years of age and the males mature only at about 20 years, and even then may not breed until they reach 30. Baleen whales follow much the same pattern but are now thought, under their reduced population conditions, to be able to reproduce when 5-6 years old. The information available for each species varies, however. Baleen whales mate in the Southern Hemisphere in June or July - the winter months there - and give birth about 11-12 months later, lactating for about 6-7 months. This information is important in management since


42. Harrison and King op. cit.

43. Ibid, and IWC Information Sheet.
if a lactating female is killed she will be unable to suckle her calf which will also die. There is an interval between successive births of about 2 years so a 30 year old female will have produced only about 12 offspring. The large whales in general bear calves only once every 2 years; although capable of bearing young more frequently the reproductive cycle taxes their energies and evens births out to this average in practice. Sperm whales mate about October to December in the Southern Hemisphere and produce a single calf about 15-16 months later which they suckle for about one to two years so the maximum number of young they can produce is probably about one every four years. All baleen whales referred to above migrate to the North to breed in winter and return South to feed in the summer by which time they have finished lactating. Information such as this is also important in planning harvesting strategy, it being better to capture whales after, rather than before they have reproduced, and after they have finished lactation, though it may be more economic to harvest them when they congregate on the breeding grounds.

The age at which whales reproduce is, as has been seen, clearly an important piece of information. There is evidence e.g. in the case of fin whales in the Antarctic, that the age has declined from 10-12 years in the 1930's when populations were first exploited commercially, to 6-7 years now. It seems that

44. Harrison and King p.91.
45. Mackintosh, p.69-80; Slipjer, p.388-90.
47. Bartholemelew, "Natural History and Management" in Schevill at p.297 and 299.
exploitation has actually accelerated the growth rate of whales, advancing the age at puberty and also increasing pregnancy rate.\textsuperscript{48}

There has long been argument among whale scientists about the average and maximum ages which whales achieve but there are now fairly reliable formulae on which to base this calculation depending on the species. Some methods of establishing age are less accurate than others. There are three possible methods\textsuperscript{49} - for toothed whales the method widely used, and generally regarded as the best, is to count the number of growth layers in the dentine of mandibular teeth though there are some problems of interpretation of data. Another method, counting the number of laminae in the bone of the lower jaw, was shown to be useless after the age of 13. The third method, used for sperm and other species, involved assessing the accumulation of corpora albicantia within ovaries and so is only useful for mature females. Moreover its value is reduced by individual variations in the rate of ovulation. The most widely used method in general use for some baleen whales remains the counting of the layers in ear plugs. A horny plug in the ear canal is found in some specimens. It has a layered structure revealed by bisection, one layer being formed each year. Thousands of these plugs have now been collected and analysed and from these it has been found that

\textsuperscript{48} Gambell op. cit. n.41.

\textsuperscript{49} Best, "Biology of the Sperm Whale" in Schevill, p.258 at p.267-270; Mitchell "N.W. Atlantic Fin and other Whales" ibid, p.108 at p.129-130; The IWC held a Symposium on the subject of age determination in 1968 which settled some of the arguments concerning the annual laminations in the ear plug method. Mackintosh in Ch. 6, Population Structure, p.98-104 gives a simple explanation and critical review of age determination by length, ovaries, baleen plate ridges and ear plugs.
fin whales for example can live to 90 years. Sperm whales, from analysis of their teeth, live for up to 60 years.  

(ii) Differences from fish

It is apparent from this necessarily brief survey of the many special characteristics of cetaceans that there are many pointers in the available scientific information to peculiar biological differences between whales, whether small or large, and fish and other marine species. This requires that in many respects they be managed on different principles from fish, principles which will take account of these unique factors including that whales:

(i) have lower reproductive, and therefore recruitment, rates;

(ii) are air breathers and thus more vulnerable to capture as they have to surface to breathe;

(iii) are visible to the eye and their bulk and spouting make them conspicuous in some circumstances;

(iv) have long life spans;

(v) mature sexually at a later age;

(vi) produce only one progeny at a time;

(vii) have a much closer relationship between breeding stock size and recruitment;

(viii) because of many of their special characteristics, can be put to a wider variety of uses than can fish.

50. IWC Information Sheet "The Lives of Whales".

51. See Part V of this Chapter; the differences 1-7 were inter alia suggested to the writer in a letter from Dr. Sidney Holt of FAO, dated 28 February 1977.
In spite of the growing volume of scientific knowledge concerning cetaceans, especially the research stimulated by the institution in 1972 by the United Nations Food and Agriculture Organisation of its Advisory Committee on Marine Resources Research, which itself established a Working Party on Marine Mammals52 (hereinafter referred to as the ACMRR and ACMRR/ WP/MM respectively), and the work of the IWC's own Scientific Committee, which includes many of the same scientists who work on the ACMRR/ WP/MM, there remain many gaps in knowledge as has been constantly stressed in this section. Books and papers on the subject abound in phrases such as "there are many mysteries", "little is known", "it is still puzzling", "it is sheer guesswork". An objective of the present work will therefore be to ascertain whether the IWC as now constituted is able to undertake the research necessary to fill these gaps and so to ensure that its management policies have a sound scientific basis.

The difficulties of obtaining reliable data are formidable, especially for some species, some areas and some aspects of the problem. This makes it difficult to determine the identity, distribution and status of stocks of marine mammals exploited by man and even more so to gather the data necessary for this purpose concerning stocks exploitable by man. Yet without this information management policies must always be imperfect. The

52. IWC 25th Report, p.6. The Committee, which can call on a wide variety of international cetologists, has produced a large number of papers on all aspects of marine mammal research. Its Report was approved at its final Session in La Jolla, USA, 21 July 1977 and is being published in "Mammals in the Seas", FAO Fisheries Series No. 5, only Vol. I (1978) of which is available at the time of writing.
ACMRR therefore gave its Working Party on Marine Mammals the following terms of reference:

"To examine and report to ACMRR on the identity, distribution and status of stocks of marine mammals which are, have been, or might soon be subject to exploitation by man, killed accidentally when fishing for other marine living resources, or which are affected by other human maritime activities.

The Working Party should examine past and existing research programmes and their results and, in the light of relevant decisions or recommendations of the IWC, COFI, the UN Conference of the Human Environment, and the UN General Assembly, identify any significant gaps and weaknesses in these. The Working Party should seek to cooperate with, and take account of the activities of the above bodies and of the IUCN, SCOR, fishery councils and commissions concerned with marine mammals, and other intergovernmental bodies. The effects of present and possible future management actions should be appraised, as well as any known or likely effects of marine pollution. Any evidence of relationships between the stock of marine mammals and other marine resources ecologically linked with them, such as the organisms on which they feed, should be appraised.

The Working Party should examine the distribution and nature of present exploitation and the products insofar as these bear on the evaluation of likely future exploitation and management regimes. The Working Party should decide itself on the priorities within its task and should take account of the ecological and behavioural and other biological investigations, as well as research on the dynamics of mammal populations.

To this end the Working Party should consult scientists, industrial operators, and other groups concerned, as widely as practicable. Its draft report will be made available to national and international mammal committees and bodies

54. FAO's Committee on Fisheries.
55. International Union for Conservation of Nature, of which governments and non-governmental organisations are members.
56. Scientific Committee on Antarctic Research.
for their consideration, will also be discussed at a technical seminar (workshop) to be convened by FAO, of which FAO will seek co-sponsorship by other interested bodies."

The work of this Working Party has highlighted both the large amount now known about whales and the large gaps in knowledge that remain concerning both whales and other marine mammals. The reports it produced have already introduced several new dimensions into the whale conservation policies pursued by the IWC, since many scientists involved in its work also participate in the Scientific Committee of the IWC as members of their national delegations. The gaps in knowledge, the need for further research and for more scientists to specialise in cetology, have become even more apparent since the IWC adopted its New Management Procedures in 1974, which call for detailed knowledge of stocks and populations.

(iii) Stock size and distribution

It is not proposed at this stage to attempt to estimate the present status of stocks of whales or their distribution. These are the most controversial aspects of the IWC's work and the views of scientists and other experts are constantly changing both as stocks decline and as more information accrues. The progressive estimates of stock size and identification of

57. This was held at Bergen on the invitation of the Norwegian Government, and was financed and supported by Norway, the United Nations Environment Programme (UNEP), the World Wildlife Fund (WWF) and by the International Union for the Conservation of Nature and Natural Resources (IUCN). The meeting was chaired by Dr. R.M. Laws, Director of the British Antarctic Survey. A summary of its proceedings is given in the Draft Report supra n.52. Many of the ACMRR/WP/MM papers cited throughout this work were presented to this meeting.
discrete populations, the developing scientific theories, the evolution of the international law and organisation pertaining to the application of the growing body of knowledge through the promulgation of IWC regulations and practices will be discussed and analysed chronologically as part of the IWC's history.

Scarff in his excellent article, the International Management of Whales etc., summarises the best estimates of whale stocks at 1975 but he draws attention to the intricacies of estimation and the unreliability of many figures, even for the species about which most is known. He points out that:

"It is estimated that before whaling began there were approximately 3.9 million whales in the oceans of the world. By 1975 whaling had reduced the number of whales to approximately 2.1 million. The mature and thus exploitable population of whales has decreased from about 2.4 million to a present level of about 1.2 million. These figures are deceptive for two reasons. First, the selectivity of the whaling industry has caused proportionally much greater reductions in the populations of certain species, especially the larger baleen species. For example, the worldwide population of whales has been reduced by about 46 per cent, some baleen species in the Antarctic have been reduced by as much as 96 per cent. Secondly, the figures on population reductions do not reflect reductions in whale biomass. The selective depletion of blue and fin whales has caused an 85 per cent reduction in the total baleen whale biomass in the Antarctic, from an estimated 43 million metric tons."

Estimates of stock size for purposes of determining the levels at which exploitation can be carried out without depleting stocks below sustainable levels are further complicated by the fact that the 78 species of whales referred to, can be further

58. Op. cit. n. 3 pp. 330-332, citing inter alia Scheffer "The Status of Whales", 29 Pacific Discovery 2, 4 (1976). See also the numerous papers now submitted annually to the IWC Scientific Committee and published in the Annual Reports; also many background papers to the Bergen Consultation on Marine Mammals, now being published by FAO in "Mammals in the Sea" op. cit. n. 52.
subdivided into several hundred discrete populations\textsuperscript{59} themselves composed, in the case of baleen whales, of mixed family units ("pods") so that taking females from them, rather than males, further reduces the reproductive possibilities, yet as it is not always possible to distinguish female baleen whales from males in the water separate quotas cannot be set. Sperm whales however herd and the males mate with harems of the smaller size females so separate quotas can be set. Finally estimates can be upset by particular populations' susceptibility to environmental change whether induced by man e.g. pollution, ice-breaking, or nature e.g. climatic change, failure of food supply.

\textsuperscript{59} A population has been defined in the ACMRR/WP/MM Report, 1977, FAO Fisheries Report No. 194, 5.3.6, as "the group of individuals of a species or subspecies which is sufficiently reproductively independent from other subsets that they are able to maintain their genetic identity" and stock. The term "management units" (now used by the IWC) is defined as "one or more populations or parts of them 'identified' on a geographical basis".
SMALL CETACEANS

One of the most controversial issues concerning present proposals for a new or revised ICRW is whether its scope should include all cetaceans. At present few small cetaceans, as we have seen, are within the IWC's management powers, although statistics are now collected on "small-type whaling" as defined in the Schedule and the IWC has established a Working Group to make preliminary studies of these species. The New Management Procedures are applied to minke and pygmy right whales but further amendment of the Schedule is required to bring more of the smaller whales, as they are exploited, within the stocks regulated by the IWC. The Preamble to the ICRW recognizes that "whaling operations should be confined to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers." In time therefore exploitation is likely increasingly to be diverted to smaller cetaceans since there is no clear scientific distinction between a "whale" and one of the smaller cetaceans and sometimes they are collectively referred to as whales though

60. As well as the general works referred to so far, in particular those noted in n. 10, "Small Cetaceans and Sirenians" are fully listed in FAO/ACMRR/MM/SC/3, Feb. 1976, the report of the Ad Hoc Group II; and in the ACMRR Draft Report for La Jolla under sec. 4.

61. For some time only the minke whale was included in the requirement for reporting statistics of "small-type whaling" but four other species have now been added. In 1972 quotas were set for the first time for the minke whale.
this word generally implies mammals larger than the 5-6 feet
dolphins and is widely used for any species over 12 feet.62

Little is known about the smaller cetaceans since few if
any have been exploited and most specimens for cetacean research
come from the companies engaged in exploiting them. There is
no agreement on the numbers or forms of the common widespread
genera, and where there are geographical variations there may be
sharply differentiated local forms.63 Small cetaceans in general
include only two of the species mysticeti, the minke whale, and
the rare pygmy right whale, but all the odontocetia, except the
larger sperm whale, i.e. dolphins, porpoises and the so-called
small whales. These odontoceti include the families Platanistidae
- river dolphins, which are all fresh water species; Ziphiidae
- the several species of beaked and bottlenose whales;
Physteteridae - which covers pygmy, as well as the large,
sperm whales; Monodontidae - the Narwhal, valued by Eskimos
for its blubber and tusks; and the White Whale; Steridae - the
long-beaked dolphins; Phocoenidae - the porpoises; and the
Delphinidae - the dolphins in a strict sense, which runs to
13 genera and 4 sub-families; Oranidae - killer, false killer
and pilot whales; Lissodelphinidae - Right Whale Dolphins;
Cephalorhynchinae - Commerson's and other rare dolphins; and
the Delphininae - Common or Bottle-nose Dolphins.64

63. ACMRR Draft Report for La Jolla, sec. 4.1.
64. Harrison and King, Ch. 2, p.23-47; Anderson (ed) Ch. 2,
p.31-63; Gaskin, Ch. 12, p.105, Ch. 13, p.115, Ch. 14,
p.123.
Even in the present state of knowledge it seems possible that the number of stocks which might require management at some date could run into hundreds. It is not therefore proposed to conduct an exhaustive survey of all small cetaceans in the context of examining the IWC's role but to describe those which might at some stage in the foreseeable future require conservation. Even in this limited context, however, much more information and study is required before stocks can be identified, though some are thought probably to be already endangered and others might be found to be so if more information were available about them.  

Species which might present conservation problems because they are either endangered or vulnerable concern mainly delphinidnae and ziphiidae and are said to be:  

Northern Bottlenose whale  Hyperoodon ampullatus  
Narwhal  Monodon monoceros  
White Whale (beluga)  Delphinapterus leucas  
Striped Dolphin (Japanese Pacific)  Stenella coeruleoalba  
Hector's Dolphin  Cephalorhynchus eutrophia  
Harbour Porpoise  Phocoena phocoena  

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65. ACMRR Draft Report for La Jolla, 4.1.  
66. Ibid. This report reclassifies the small cetaceans on the basis of the IUCN Red Data Book designations of E (Endangered), V (Vulnerable), R (Rare), O (Out of Danger), I (Indeterminate). The list given in the text is however confined to those species for which ACMRR itself thought there might be conservation problems. The ACMRR Report further classified small cetaceans into A: Those that are fished heavily now, or have been in the past, and for which there is urgent need of population assessment (12 species); B: Species which have been taken locally in only small to moderate numbers, but for which such numbers may represent a significant impact on the level of those local stocks (16 species); C: Species which have been directly or incidentally exploited at apparently low levels, but which do not now seem to be of much commercial interest or other use (21 species); D: Species not generally known to have been taken, or to be presently captured, except for scientific purposes or uniquely or accidentally (19 species).
-25-

Cochito                          Phocoena sinus
Burmeister's Porpoise           Phocoena spinippinnis
Dall's Porpoise                 (N.W. N.Pacific) Phocoenoides dalli
Ganges susu                     Platanista gangetion
Indus susu                      Platanista minor
Boutu                           Inia geoffreniis
White Flag Dolphin              Lipotes vexillifer
Franciscana                     Pontoporia blainvillei
Bottlenose dolphin              
Common dolphin                  Sea of Azov          Delphinus delphus
Harbour porpoise                
Spinner dolphin                 E. Tropical Pacific species number
Spotted dolphin                 
Common dolphin                  

Small cetaceans off Southern Africa

The toothed whales which form the above list share the same characteristics as other toothed whales being fish or squid eaters. Many of them hunt in packs (some dolphin schools number up to 1,000) and coordinate their movements by sound signals not only for purposes of meeting and mating but to echo-locate food sources, which unlike krill, are found in more tropical areas. Thus, though migratory, they migrate for smaller distances than the larger whales, and many stay closer to the coast than they do. They are thus more likely to fall within coastal state jurisdiction. They share the reproductive pattern of the larger whales to some extent since the females produce only one calf, but average rates of reproduction vary widely from one to four year intervals.68

68. [Source not provided]
It is thought that further understanding of the biology of smaller whales could be very important to understanding the biological processes of the sea, and because they are smaller it is possible to study some species live, for example in dolphinaria. This has revealed that a bottlenose dolphin consumes large amounts of fish a day, some species of which are commercially important such as capelin, cod, herring, haddock and flounder.\(^{69}\) This has led to controversial culls of dolphins, which are internationally unregulated.\(^{70}\)

Dolphins, subject to the reservations expressed earlier, have the appearance of being very intelligent, though this is controversial and it is misleading to draw any firm conclusions about this on the basis of tricks performed in dolphinaria. Following the banning of export of dolphins for this purpose by the U.S.A., South Africa appears to have taken up this trade.\(^{71}\) They also appear sometimes to guide swimmers and ships through straits\(^{72}\) and to make use of the bow waves of ships, and they also escort their new-born calves to the surface. These

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69. Gaskin Ch. 4, p.23.
70. In 1978 the slaughter of 1,000 dolphins off the island of Iki by Japanese fishermen led to such international protest that the Japanese Prime Minister instituted research into other methods of driving the dolphins away from the fishing grounds. Trials of a prototype fibre glass whale which emitted recorded sounds were successful. The Times, 30.11.78 p.1 "Dolphins Fear of Fibre Glass Whale".
71. "Hunt for Dolphins at £2,000 each" Sunday Express 7.7.74, p.13.
characteristics have led recently to controversial attempts to train them for human advantage.\textsuperscript{73} Some are of very unusual appearance such as the narwhal which has a spiral tooth up to two metres long which is said to have given rise to the legend of the unicorn. Its skin is rich in vitamin C and was once a main source of vitamins for Eskimos.\textsuperscript{74} Beaked dolphins have a strange long-jawed appearance but are known mainly from occasional strandings, there being little information available on their life cycles.\textsuperscript{75}

Small whales are in general great swimmers and divers. The pygmy sperm whale can submerge for up to an hour, dive to depths of 250 fathoms, and, in short bursts, swim at speeds of 3 knots. The killer whale, which is up to 30 feet long, is largely a scavenger (said to be the most ferocious cetacean) eating other whales, dolphins, porpoises, seals, penguins, fish and squid, hunting in a pack. The false killer whale is smaller and more gregarious. The pilot whale is valued as a source of protein in the Faroe Islands but on the whole the possible use by man of all these species has never been fully explored though it is apparent that many could provide a good source of food supplies, or be used for their other products. They will also be a fruitful field for scientific research of all aspects of their life cycles and distribution since, in general, knowledge about them is far behind that concerning the large whales and pinnipeds.\textsuperscript{76}

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\textsuperscript{73} A question was raised in the UK House of Commons about the use by the US Navy of "killer dolphins" (sic) to protect their nuclear submarines, Aberdeen Press and Journal, 6.12.77, p.5.
\textsuperscript{74} See p.13-14.
\textsuperscript{75} Angel & Harris, p.143.
\textsuperscript{76} ACMRR/WP/MM/Report, March 1977; FAO Fisheries Report No. 194, p.9, para. 3.02.
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PART III

OTHER MARINE MAMMALS

Since many scientists recommend that management of marine mammals should be related to an ecological and biomass approach, and contend that the ICRW is inappropriate for management on this basis, a brief outline of other marine mammals which share the cetaceans' habitats and food, is given below.

1. Pinnipeds

Although coming within the general category of marine mammals the pinnipeds are of a different order from cetaceans, great or small, and are thus clearly outside the scope of the IWC's present mandate though some species are subject to control - by the Fisheries Commissions, under international agreements, described in Chapters VI and VIII, as well as exclusively national laws and administrations.

Pinnipeds include seals, sea-lions, fur seals and walruses. There are three divisions in the Order - Phocidae, the earless seals; Otariidae - the eared seal; and Odobenidae - the walruses. The Phocidae are generally known as the "true" seals and there

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77. The species are listed in ACMRR La Jolla Report.

78. See Chapters VI and VIII for a description of the Commissions etc. regulating seals at relevant periods.

79. See generally in Harrison and King, Ch. 5, p.100-115; Angel & Harris, p.136-140; Gaskin, S.II, p.57-64 and S.III, p.139-162 where there are detailed descriptions of several species; ACMRR/MM/SC/4, May, 1976, Ad Hoc Group III Draft Report on Seals and Marine Otters.
are eighteen species,\textsuperscript{80} divided into Northern True seals, which include harbour, gray, and harp seals;\textsuperscript{81} the monk seals; the Antarctic seals,\textsuperscript{82} which include the crabeater, Weddel, Leopard and Ross seal, all large in size; and the two species of elephant seals.

There are about thirty million pinnipeds in the world and about fifty per cent of these are made up of the crabeater seals (Lobodon carcinophagus) of the Antarctic. Two thirds of the approximate biomass of about five million tonnes is located in the Southern Hemisphere.\textsuperscript{83} Only the monk, bearded and ring seals of the crabeater group live in tropical seas.

\textsuperscript{80} ACMRR La Jolla Report, sec. 5.1.3. There are 4 genera and 10 species in this group viz: Harbour seal, Ribbon seal, Gray seal, Bearded seal, Harp Seal, Larghe seal, Ringed seal, Backel seal, Caspian seal. It is, however difficult to consider pinnipeds on the basis of taxonomic listing as there are concentrations of species groups for the more abundant food at cooler latitudes and at the poles where ice enables access to substrata. The ACMRR Ad Hoc Group III thus found it easier to consider the southern circumpolar ice-breeding seals together; and the northern group, harp and hooded seals, though northern ice breeders, were looked at separately but together because they are both extensively hunted and managed internationally. Fur seals and sealions were considered together, though found in both hemispheres, because they were a taxonomic entity. ACMRR/MM/SC.4, p.6. This raises interesting problems for the structuring of any future international organisation of management.

\textsuperscript{81} ACMRR La Jolla Report, s.5.1.5.

\textsuperscript{82} Ibid, 5.2.1.

\textsuperscript{83} ACMRR/MM/SC.4 "Report of Ad Hoc Group III on Seals and Marine Otters", May 1976; ACMRR Draft Report for La Jolla 1977, S.5 (Pinnipeds), at 5.2.2 states that the few estimates made of net increases of biomass per annum from growth and production of young, contrary to expectations engendered by the high reproductive potential of pinnipeds than cetaceans, gives figures of less than 5% ecological efficiency.
The group as a whole is almost totally marine. It comes on land or on ice solely to breed, being especially vulnerable to capture then. This distinguishes it from cetaceans. Pinnipeds are found chiefly in Arctic and Antarctic seas and adjacent cooler waters, their elongation of range following the cold ocean currents. They are mainly carnivorous, feeding on fish, squids or crustaceans in mid-winter and animals that live on the ocean floor, though each species has its own peculiarities of diet. The crabeaters feed mostly on Antarctic krill, however, and thus compete with the baleen whales, large and small, for food. Pinnipeds' own main predators are sharks in warm waters and killer whales and leopard seals in colder higher latitude waters.

The octariids and some of the phocids appear to have a close relationship with particular breeding and resting sites and often to be segregated by age and class, either at breeding sites or elsewhere. Pinnipeds generally follow regular and related cycles of pupping and mating, and diurnal patterns which may vary with climatic conditions, but their reproductive patterns vary and in several populations of seals, pups are suckled for varying periods. Some seals, such as crabeaters, are monogamous; others such as the Weddel, are probably polygamous though the females produce only one pup a year. Bulls in rookeries of

84. They are distributed in 4 main areas, the Arctic and Antarctic, and in the colder waters of the Southern Hemisphere and of the Northern Hemisphere.
Eared seals can mate with as many as 150 females.\textsuperscript{85} Bartholemew, calling for management of whales to be related to their natural history, cites the 1957 Interim Convention on Conservation of the North Pacific Fur Seal\textsuperscript{86} (NPFSC) as a successful example of management, because it is based on the biology of this species and takes account of all their characteristics - their polygamy (one male mating with up to 40 females); the fact that the populations herded at certain seasons; that the age classes segregated in rookeries and the breeders separated from the young; that females were reproductive by their third year; that the sexes and age groups segregated themselves geographically at the non-breeding season; that as one male can service several females there is in effect a surplus of non-reproductive males. The Cape Fur Seal off South Africa is a similar example of successful biological management procedures.\textsuperscript{87} The NPFSC was one of the models for the IWC.

Eared seals include the greatest concentration (about two million) of fur seals in the world on the Pribilof Islands between Alaska and the USSR. It is estimated that those off Alaska alone eat about 700,000 tonnes of fish a year.\textsuperscript{88}

\textsuperscript{85} ACMRR/MM/SC.4, Ad Hoc Group III on Seals and Marine Otters p.16 at III.4.3.1.

\textsuperscript{86} Bartholemew, in Schevill Ch. 12, p.296-297. These seals are managed under a US-USSR Agreement. Ad Hoc Group III of the ACMRR/MM state in SC/4, May 1976, that fur seals because of their land breeding and population structures are ideally suited to management policies. See Chapter II infra for the history of this Commission.

\textsuperscript{87} Op. cit. n.85.

\textsuperscript{88} Angel & Harris p.137.
Antarctic or Keruguelen fur seal, after an initial decline in population, has now recovered, perhaps because it is a krill eater and there is a surplus of krill since the decline of the whale population. This is controversial however since fur seals on other Antarctic Islands have not increased. Nonetheless, this species may soon surpass the northern fur seal population.

Fishermen demand periodic seal culls to protect fisheries. Recent culls have provoked much opposition from conservation groups however e.g. in Canada and the U.K.  

Sealions are very few in number compared with seals and little is known of their migrations or their general biology because they have been little exploited. The walrus is the only species in the Odobenidae; it is found in the sub-Arctic pack ice, feeding in shallow water on a variety of benthic invertebrates, herding in large numbers on ice-floes.

89. Canada culled 170,000 harp seals off Newfoundland, (plus 10,000 for Eskimos etc) to maintain the population at its increased level of 1.3 million. The cull is defended as a legitimate harvest which does not threaten the population level and safeguards fisheries, Guardian 31.1.79, p.6. The UK called of a cull of 900 female gray seals and their pups and 14,000 moulted pups, the population off Scotland allegedly having increased from 35,000 in the 1960's to 60,000 by 1978; protests by conservationists who questioned the scientific basis of the cull, which aimed to protect fisheries, have led the UK government to re-examine the situation; Times, 7.7.78, p.6; the EEC subsequently undertook to investigate the scientific basis with a view to dealing with the problem within the EEC Common Fisheries Policy; Scotsman 11.10.78, p.1.


91. Ibid. III.4-6.
One species is restricted to the Arctic around the Pole; others are in the Atlantic and Pacific.

2. **Sirenians**

The sirenia, popularly known as sea-cows, grow up to 3 metres long and up to 500 kilogrammes in weight. There are three genera which include three species of manatee (Trichechus), the dugong (Dugong dugon) and the now extinct Steller's sea-cow (Hydrodamalis). Subspecies have not been fully identified. They are found in shallow coastal waters and feed exclusively on aquatic vegetation being the only large mammals to convert it into meat. All, except the extinct sea-cow, inhabit tropical and sub-tropical waters. The sea-cow inhabited the Bering Sea and was exterminated because its numbers were small and its meat and fur attractive to hunters. All the species have been intensively hunted and present populations are residual. The dugongs are found only in maritime areas mainly in the Indian Ocean from the East Coast of Africa to the Malayan Archipelago and they are still abundant off parts of South East Asia and North Australia. The Caribbean manatees on the other hand are found in both sea estuaries off the coasts from Florida to British Guiana and in rivers of Brazil and West Africa though the Amazonian variety occurs only in fresh water. Sirenians as

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93. Angel & Harris, p.136.

94. Reports of its continued survival cannot be dismissed. ACMRR La Jolla Report, s.6.1.

95. ACMRR/MM/SC/3, p.16.

96. Ibid, p.15.
a group are of striking appearance - bulky, clumsy, but fast moving. Manatees can even walk on their flippers and were mistaken for mermaids by sailors in earlier days.  

Because of their generally coastal distribution sirenians do not compete for food with the pinnipeds and cetaceans and are in any case herbivorous. Dugongs, which are distinguished from manatees by their tail shape and other features, feed only on sea grasses but manatees feed on various aquatic and non-aquatic vegetation, which is particularly susceptible to coastal disturbance of habitats from human activity. They gather by day and scatter to feed at night, but little is known of their food requirements and population dynamics, though knowledge of some stocks is better than others. It is known that sirenian reproduction rates are low, that they mature sexually between two and ten years and produce a single calf - in the case of manatees between every two to three years but at unknown intervals in the case of dugongs. Manatees may live for up to 25 years and dugongs to between 30-60. Both manatees and dugongs congregate in herds and populations within them move about but little is known of their migrations.

97. Harrison and King, p.150.
98. Ibid.
100. Angel & Harris, p.136.
102. ACMRR Draft La Jolla Report 1977, 6.3.
In general, although because of these and other characteristics sirenians are regarded as a particularly fascinating subject of study by scientists, "there is a real paucity of information about periods of gestation, rates of reproduction, rates of growth, and age composition of populations. We do not know the sizes of local populations, their biomass or the rate of food consumption." Sirenians are not currently managed or protected by any international body.

3. **Marine Otters**

There is only one true member of the group, the sea otter (*Enydra lutris*) but since the South American marine otters (*Lontra felina*) mainly inhabit coastal marine areas they are generally included therein. Both species are amongst the smallest of marine animals, share similar habitats in the shallow waters north and south of the Equator, and both were abundant before exploitation. There are no details of the reproductive patterns of marine otters available but sea otters are known to mature between 3-4 years old and to produce about 16 pups per 100 animals a year. Marine otters feed on shrimps but there are no details concerning their other feeding habits. Sea otters feed on marine invertebrates, generally preferring species such as sea urchins and congregating in large groups. It is not known whether marine otters herd.

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103. ACMRR/MM/SC/3 p.16.
PART IV

RELATED SPECIES

1. Penguins

Penguins are birds which have lost the ability to fly but are the most highly adapted of all marine birds to their environment. They use their wings as flippers in the water to move at speeds of up to 18 Km an hour and to dive. The large Emperor penguin can dive to 265 metres. Penguins are found only in the Southern Hemisphere in the colder currents off New Zealand, Australia, South Africa and South America and on the Equator.

Because of their diving ability Emperor penguins can hunt squid as well as fish but the smaller species, the Adelie, the chinstraps and gentoos, feed mainly on krill. They breed in nests and burrows close to their food supplies, feeding their chicks like other birds. They generally lay only one egg but have long life expectancies and reach puberty late, King penguins being as much as five years old at that date. They come ashore mostly to breed so there are always large numbers of non-breeders feeding at sea. It is thought by some that the increased availability of krill in the Antarctic area since the depletion of whale populations accounts for the huge explosion of populations of krill-eating Adelie penguins (Pygoscelis adeliae) there, since they need to consume huge quantities of krill in relation to their body weight. They themselves, as already mentioned, are eaten by leopard seals and killer whales. There are other birds,

105. Angel & Harris, p.133.
106. Ibid, p.141.
such as albatrosses, petrels, comorants, skuas, ducks, gulls and terns, also consuming fish, squid and krill in the areas inhabited by marine mammals, but the penguins are the most abundant and voracious in Antarctica.107

2. Krill

These are very small planktonic crustaceans (Euphausia superba) which form the main food of baleen whales as well as of other marine mammals and some penguins. There are profuse supplies in the Antarctic where it is patchily distributed on the surface of the water in dense, irregular swarms.108 These shrimp-like creatures, about 2½ inches long, themselves feed on diatoms. Whales in the Antarctic also eat other planktonic species outside the krill's habitat. It is not clear, however, whether whales account for the annual production of krill, or even of zooplankton as a whole.109

The distribution of krill is circumpolar but it is most abundant in the Weddell Sea, the East Wind Drift, the Weddell Drift and the South Georgia region, both in open water and under ice, at depths down to 100 metres. It is not known whether the circumpolar krill population is one breeding stock or whether it consists of two or more separate stocks. It is known that it spawns on the surface in the greatest quantities in February and March, and that it is comparatively long-lived

compared to other zooplankton; its actual life span and age of sexual maturity is known only in broad outline. Uncertainty thus remains concerning several important aspects of a species that might be commercially exploited on a large scale viz, concerning its physiology, breeding stocks, reproduction and recruitment, and abundance.\(^{110}\)

3. **Squid**

The giant squid (*Mesonydoteuthis hamiltoni*) and other squids (*Moroteuthis ingens*, *Conatus fabricii* and *Pareledone* sp.) provide food for sperm whales (generally feeding on the medium and small squid), seals and fish which are found in waters near the Antarctic Convergence and there may be a particular concentration of them in that region though little information is available.\(^{111}\) There are some squid in Antarctic waters as well as off New Zealand and South America.\(^{112}\) They may be krill's major predator though the larger squids feed mainly on fish and other squid. They are next to krill in importance as food for the large invertebrates and play an important role in the oceans' economy as predator and prey,\(^{113}\) though a lesser mass of Antarctic animals subsists on them than on krill. There is no indication that their populations have increased as whales declined however.\(^{114}\) It is possible that the giant species may be commercially exploitable, and there are already major squid fisheries on the smaller squid.

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110. Gulland, in Schevill, p.44; Everson op. cit. n.108.
112. Everson op. cit. n.108.
4. **Fish**

Fish must be mentioned in this survey of species which share the whales' habitats since some of the marine mammals, especially seals, and many birds, feed on fish. A few fish are found even in the stomachs of baleen whales though there is little evidence of large fish populations in the Antarctic or sub-Antarctic, such as is found in the north, so that neither whales nor seals there eat large amounts of them. It is generally concluded that the productivity of the northern waters goes into fish and of the Antarctic waters into whales, seals and birds, although this is not established.\(^{115}\) Species found in the Antarctic include the Antarctic silverfish and tooth fish, varieties of cod, and the southern blue whiting. The cod is commercially harvested and other species may be.\(^{116}\) As this work is primarily concerned with the larger cetaceans lack of space prevents a detailed elaboration of the species of fish throughout the world which provide food for the marine mammals. Attention has already been drawn to the fact that some smaller toothed whales such as dolphins, feed on capelin, cod, haddock, herring and flounders amongst other species.

**PART V: MARINE MAMMALS: PRODUCTS AND USES**

Whales, other marine mammals and the species upon which they feed or otherwise depend would never have been exploited if they were not of use to man in various ways. The species which remain unexploited stay so only because as yet a use has

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either not been found for them or because use has not become economic or urgent. It is argued, as we shall see, that almost all these uses are now substitutable by other means but this is either not necessarily everywhere either economic or convenient, or may not always remain so as other sources of oil and its products become depleted.

It has recently begun to be suggested that marine mammals, particularly the large cetaceans, have values to man that are not quantifiable in economic terms. These relate to their ethical, evolutionary and even religious significance. They are not considerations that can be taken into account generally by any body instituted for the purpose of conserving whales at a level that will sustain their exploitation; indeed they are generally advanced as reasons for non-exploitation. They remain preliminary questions which at this stage of development of international law have not been addressed by any states or government though they have been posed as preferable objectives of management by some non-governmental conservation groups. Until such time as the international community is persuaded, if ever, to adopt these values the question of the legal regime under which they might be protected solely for such purposes remains an academic one. The values on which present regimes are based are the economic value of marine mammals for oil and food and for other commodities made from their products, and the main concern is to maintain the supply of these advantages. The history of whaling has been largely based on the need for such whale products as meat and oil, but has also followed the rise and fall of fashion for particular commodities made from
these and other parts of whales. At the present time it is sperm oil, rather than whale meat, which forms the basis of the industry, and its products are used mainly in developed countries, but the whole history of whaling reveals that one must never take a static view of the industrial needs, and the present situation may only be a transient one.

If whaling eventually ceases because demand fails or the activity becomes uneconomic (except perhaps a few land stations, mainly operated for aboriginal cultural purposes), there may be a demand to dismantle the increasingly expensive structure of the IWC. On the other hand it is equally possible that in a world of expanding population with acute energy, food and other problems, particularly a shortage of protein, coupled with declining fish catches of many traditional species and possible future shortages of traditional sources of fuel oil, that the demand for whale and other marine mammal products may revive if, and as, stocks recover, especially in developing countries which border the habitats or migratory routes of marine mammals.

The increases in world population are unevenly distributed; 5/6 (836 million) of the total world rise of 1,000 million between 1960-1975 was in developing countries and only about 155 million in the developed countries which currently consume whale products

118. Op. cit. p.5; The Japanese growth rate was 1.26% from 1970-75; the USSR's .99%; the former representing a slight increase in growth rate over the previous decade, the latter a slight decline. The Latin American growth rate was 2.66% in the corresponding period, and Africa's 2.66%.
yet food production in relation to population actually declined between 1971-1975 in both Africa and South America. The Second World Food Congress in 1970 declared that "Food is ... a fundamental human right". Poor and hungry countries may become more not less able and willing to exploit marine mammals. Since there is such wide variety of uses to which cetaceans can be put, these uses are generally categorised into high- and low-consumptive uses: high-consumptive uses arise from the use of whale meat, goods manufactured from it and other parts of the whale carcases; low-consumptive uses are those which either do not require consumption of the animal or limit its use to scientific research.

1. Large Cetaceans
   (i) High-consumptive Uses

   Almost all parts of the whale carcase can be put to use as indicated below.

   (a) Blubber: is the heavy layer of fat underlying the skin of baleen whales, but it can also be obtained from the tongue and intestine, and by boiling the residue of the flesh, bones and guts. Whales have been mainly prized by hunters

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119. Ibid, p.8; In Africa by 2.1%; in Latin America by 0.1%.
120. Ibid; p.40. The Conference was held at the Hague; the phrase quoted comes from the opening words of the final declaration. Moulik op. cit.
121. ACMRR Draft Report for La Jolla Meeting 1977 s.3.4 Large Cetaceans: Values to Man; s.4.3 Small Cetaceans: Values to Man; ACMRR/MM/SC.2, Feb. 1976, Draft Report Ad Hoc Group I on Large Cetaceans, s.6, Whaling and Products; and Suppl. 2, May 1976, s.6, The Values of Whales to Man.
122. Wray Vamplew "Salvesens of Leith" (1975) p.133 (hereafter cited as Vamplew). Even in the seventeenth century when the Dutch dominated the industry off Spitzbergen, their main harbour became known as Smeerenberg, "Blubbertown". Part II, p.133-261 gives a very full account of the use of whales from the industry's point of view. (Salvesens). Vamplew, p.250, says UK companies used all products; the Norwegians generally extracted only the oil. See Table 3.4 in ACMRR La Jolla Draft Report 1977.
for the oil thus derived; not all operators have made use of the residual items. Up to the 1960's a great deal of the whale was wasted, only its oil being extracted by many operators as this gave factories a higher productivity, although Japanese and some other companies were notable exceptions. As the need for oil declined after World War II because of competition from other sources so the industry increasingly diversified its products. The oil obtained from baleen species is different from that obtained from sperm whales. Sperm oil, a mixture of oil and spermaceti, is a waxy substance, rather than a pure oil, and is inedible, being eaten only by a few remote islanders. Baleen oil, although once used as lamp fuel, is primarily used now for soap and margarine but can also be used as a lubricant, in boot polish, detergents, cattle feed, as a source of vitamin A, as a drying oil in paint, for tanning and for softening chamois leather. It also yields glycerine for

124. Slipjer, p.36-37.
125. ACMRR Draft Report for La Jolla 1977. Table 3.9 illustrates the contribution of baleen and sperm oils to the annual world production from marine sources from 1967-73.
127. When oil was first discovered underground it was thought to come from fossilised whales and whalers joined the oil rush. Draft Report on Large Cetaceans, p.30, n.1.
128. Slipjer; Vamplew, Section II passim; Harrison and King Chapter 2; Friends of the Earth "Whale Manual 78" Appendix VII, p.115-119 (hereafter FOE '78).
dynamite, lubricants, cigarette tobacco, and medicines, and can be used in some kinds of candles and crayons. Sperm oil used to be used mainly in candles but is now mainly used in cosmetics, as a lubricant in light machinery and for dressing leather. It has many by-products, too numerous to mention. As more sperm whales (by numbers and weight) are now caught than any other species, oil rather than meat has become the main whaling product, though its market value per ton of sperm whales is less than that of baleens.

There is an interdependence in product yield; thus when the meat is frozen the yield of baleen oil is less. Some companies were notably better than others at investing in the machinery necessary to obtain maximum extraction of oil. Quantities and values of products varied greatly with species, and the efforts made in relation to them by different companies and states.

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129. Ibid.
130. FOE, Table 19, p.98-99.
131. ACMRR Draft Report for La Jolla 1977, s.3.4; Vamplew passim.
132. Draft Report on Large Cetaceans Table 3.5 gives the percentages of total product weight of one whale of the fin, sei, minke whales, for baleen oil, meat and bone meal, protein meal, meat extract and frozen meat in 1972 South African catches, and the percentage of total product value for various sperm whales; Table 3.6 gives the quantities and values of products from the 1971/72 Antarctic catches of large whales; Table 3.7 gives the ratio of the prices of baleen meat and baleen oil in Japan from 1962-70. See also Mackintosh p.134-140.
(b) **Baleen**: historically this has been one of the major products though changing fashion and substitutes have rendered it unimportant at the present time. Baleen, popularly known as whalebone, is a horny substance, like a human nail, which comes from the filter plates of the baleen whale's jaw. It retains its shape when heated and cooled and is light, elastic and flexible. It has therefore been greatly used in the umbrella and corset industry, in whips and crops and the shavings can be used in brushes, mattresses and upholstery and other articles.¹³³

(c) **Whale meat**: the best cuts (of baleen meat only) are eaten in some parts of the world, especially in Japan. It supplies 9% of the Japanese meat intake though less than 1% of the total protein intake. In 1973 Japan is said to have consumed 122,700 tons of whale meat: 96,700 tons supplied by its own industry and 26,000 tons imported, though the figures are likely to have declined in size and ratio as whale catches have become further restricted. Both sperm and baleen meat is

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¹³³. FOE '78 Appendix VIII, p.120 lists and categorises alternative products and by-products. Slipjer p.44; P. Adamson, "The Great Whale to Snare", p.8 reproduces the poster of a Hull Whalebone Manufactory of the early nineteenth century advertising "sieves and riddles, nets, slays, cloth, bed, bottoms, carriage backs and sides, chair and sofa backs and bottoms, stuffings and brushes". The irrationality of consumer preferences in this respect has considerable impact on the economic objectives of states engaged in whaling and the discount rates used by them, for an economists viewpoint of the problems see Price, "Some Economic Aspects of Marine Mammal Management Policies; The Future and the Discount Rate", ACMRR/MM/SC/85, July 1976, p.2.
widely used in pet food and can also be reduced with the whale bones to whale guano and used as fodder and fertiliser. The bones can be reduced to meal for the same purposes, or made into shoe horns, toys and chess or mah jong sets. As the value of whale oil declined some companies, pressed to make maximum use of all parts, even made whale meat extract from purification of the liquor the meat had been cooked in. This can be used in dehydrated soups. Oil was also recovered from the waste cooking liquor and concentrated into solubles as a cattle food additive. The blood could be added to adhesives and also used as a fertiliser. Even the tendons need not be wasted as they can be used for surgical stitches and tennis racquet strings. Lastly the teeth of sperm whales can be used as ivory for piano keys, and for carving into intricate designs, known as "scrimshaw" work and valued as tourist souvenirs.

(d) **Ambergris** is peculiar to the sperm whale from whose intestine it is extracted. It is used as a fixative for perfume and in some soaps.


135. Vamplew p.256.

136. FOE, p.98; Slipjer, p.44; Adamson, p.30, Glossary of Whaling terms.
(e) **Value of Whale Products**

It is difficult, taking account of all the above by-products and the recent bans on imports of some whale products into countries which have themselves now ceased whaling, such as the UK, to give any reliable estimate of the current value of whale products in the world. If the higher catches of earlier years were again possible, at 1972 prices and values, and if they were fully utilized, it has been estimated that the world whale catch could have been as much as $400 million.\(^{137}\)

The demand for consumable whale products is likely to continue and even possibly to revive.\(^ {138}\) There is at present no economically marketable substitute for sperm oil and its derivatives although much research e.g. on vegetable equivalents such as the jojoba bean, is now going on.\(^ {139}\) There is no major technological problem in finding substitutes for the few products for which substitutes are not currently available, except for those which are regarded as intrinsically valuable, such as

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137. Draft Report on Large Cetaceans, p.39-40; FAO estimated in 1975 that baleen whales were worth about $190 per ton and sperm whales only $75 per ton, p.39-39, n.14.

138. The opposition of conservation groups is, as will be seen in Chapters IX and X, having some effect on the IWC's present policy but there are several non-member whaling states with whales within their maritime jurisdiction, which might become new entrants for economic reasons. It may also become technically possible so to treat sperm meat that it too will become palatable for human consumption.

ivory, or products used by the few aborigines who have little
or no contact with the outside world. There is, however, no
legal reason why present consumers who do not share the
environmentalists' view that a moratorium is required on
"humanitarian" grounds should use substitutes if they prefer
whale products for economic or aesthetic reasons so long as
the whale resources are so managed that the species are not
endangered.

(ii) Low and Non-Consumptive Uses

Live whales in the sea, and some other marine mammals,
are now thought to attract an economic value other than as
a source of potential commodities. These include such
educational and tourist attractions as "whale watching" of
migrating whales or of congregations in coastal lagoons. 141
There are also a growing number of ancillary industries such
as books, magazines, paintings, music, records, television
programmes and films, 142 T-shirts and jewellery, posters,
badges, stickers and postcards. 143

140. See generally ACMRR/MM/SC/WG.24, Sept. 1976 "Draft Report
of the Working Group on Low Consumptive Uses of Marine
Mammals", and Lopes, "Some Aspects of Evaluating Low
Consumptive Uses of Marine Mammal Stocks", ACMRR/MM/SC/139,
Sept. 1976; Draft Report for 1976 La Jolla Meeting s.10.2;
FOE Whale Manual '78, Appendix VIII, p.120-123; Draft Report
for 1976 La Jolla Meeting s.10.3.2 "Substitutes".

141. Draft Report on Large Cetaceans, Supp. 2, p.6; 300,000
visitors per year watch the gray whale migration from
lagoons in Baja, California; 35,000 visit Peninsula
Valdes in Argentina to watch right whales.

142. Ibid, p.7; see also Bibliography at end of this work;
Draft Report for La Jolla, 3.11; 8 films being made in
1976 had budgets totalling $8 million.

143. e.g. Greenpeace brochure "Save the Whales" Fund Materials
List, Autumn 1977. The IWC in 1978 received 30,000
postcards from conservationists in the U.S.A.
An estimate made of the annual value of these uses, including those of other marine mammals gave a figure of over £225 million.  

2. Small Cetaceans

(i) High Consumptive Uses

As most small cetaceans are odontocetes their oil is similar to sperm oil and can be used for the same purposes, especially as a lubricant, but the most common product is meat for animal or human consumption. There is no large scale export industry however; the meat is used for local consumption. As small cetaceans are by definition smaller they are more easily captured by local fishermen engaged in small fisheries. Some species have particular cultural or religious significance for some peoples. The Indus susu is eaten by local transient Hindus, and Moslems extract its oil for medicine. Some dolphins are being monitored for pesticide and heavy metal residue in Cape Town. The Narwhal skin was valued by Eskimos for its Vitamin C and its tusk was thought to have aphrodisiac qualities. There have from time to time been quite considerable fisheries of porpoises and dolphins.

147. Ibid, p.12.
148. Harrison & King, Ch. 2; Angel & Harris, p.142.
(ii) **Low Consumptive Uses**

Because of their small size and ease of capture the smaller cetaceans are more easily preserved in captivity and are of even greater value than the larger whales for educational, scientific and recreational purposes being often displayed in zoos and oceanaria. As they also tend to be more coastal and estuarine in their distribution they are also of even greater interest to watchers and film makers. Dolphins are sometimes said to have helped men by guiding them into harbour.

3. **Sirens**

   (i) **High Consumptive Use**

   All three genera of the modern sirenia have been hunted intensively for their meat.

   (ii) **Low Consumptive Uses**

   Sirenians are more difficult than cetaceans to observe since they have become rare but are of great interest when they can be observed. They have been used in aquatic weed control in some tropical waters. They are also kept in zoos where it is thought they may have some susceptibility to sound signals, and thus possibly to training.

4. **Seals and Marine Otters**

   (i) **High Consumptive Uses**

   Large harvests of some seals are taken for their meat and pelts, both of the fur seals (Northern, Cape and South American)

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150. Sunday Express, 11th June 1978, p.13 "Safe from the Rocks - Thanks to Dolphins".


and of harp seals (White Sea, Jan Meyen Island and Newfoundland). There are by-products such as clothes, shoes, purses and souvenirs of fur and skin. Walrus tusks, hides and some meat are used. Elephant seals are hunted for their oil and meat and their hides could be used. Otters might again be taken for their fur if they increase.

(ii) **Low Consumptive Uses**

Seal watching is a steadily growing occupation especially where there are prolific coastal populations as off California, the United Kingdom and Australia. This use is at present exploited only by the occasional local small boatman, as a minor tourist attraction but all species have potential in this respect.

Marine otters are always a local attraction where they exist and can be viewed.

5. **Related Species**

(i) **Krill**

Krill has no low consumptive uses but it can be used both for human and animal food consumption in the form of frozen and canned krill coagulates, frozen attrition-peeled tail meats, dried krill, krill protein concentrates (KPC) types A and B, and hydrolysed and enzyme digested functional protein products. It has also been established that it can be used as feed in aquaculture, a potential growth industry of the future.

153. COFI/78/7, March 1978, Twelfth Session; Agenda Item 6; Living Resources of the Southern Ocean, p.4, para. 17.
Penguins and Squid

The former have tourist attraction in some areas but have not been consumed in any commercial form. The latter might potentially be harvested on a larger scale than at present. There are squid fisheries off New Zealand and South America but not as yet in the Antarctic.

CONCLUSION

The description given in this Chapter of the cetacea, other marine mammals and related species sharing their habitats, and the uses to which they can be put, leads to several conclusions relevant to international organisation of their conservation.

(i) There is considerable interrelationship of species, their habitats and food supplies;

(ii) more is known about whales than most other species in the aquatic environment but there are still large areas of ignorance and speculation;

(iii) the variety and disparity of species and their world-wide distribution render their management and protection too great a problem for any single organisation;

(iv) nonetheless the factors above indicate the need for management to be on an international basis since so many species migrate through both national and international areas; even at the research level the ecological relationships are so close that priorities and theories need to be established internationally;

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(v) the special biological characteristics of marine mammals and their many differences from fish necessitate that any management body operates with different premises and theories from other fisheries commissions. As will become apparent as this study progresses the development of institutions and the refinement of their constitutional powers and management techniques has always lagged behind the scientific advice and scientists have always been deprived of a supply of adequate biological statistics and other information. Three problems face the international organisation of marine mammal conservation: the first is to bring the powers of existing organisations more into line with the pace of scientific knowledge of management requirements; the second is to create new bodies, as required, which will not repeat the mistakes of existing ones, for species as yet unregulated which nevertheless are beginning to be harvested - or alternatively to bring them within the scope of suitably modified existing institutions. The final problem is how to organise the interrelationship of these organisations which may be species, area or function specific, as we shall see, because of the ad hoc development of relevant institutions.
CHAPTER II

THE HISTORY OF WHALING AND ITS REGULATION BEFORE 1930

Introduction

Although man has been interested in whales, dolphins and seals for thousands of years B.C., it was not until the legal status of fisheries and, consequently, the legal distinction between high seas and territorial waters, became a politically important issue in the seventeenth century, that the legal status of cetaceans was seriously considered and even then they were not distinguished from fish. The knowledge now available, as outlined in the preceding Chapter, was, of course, not then in existence so the species specific characteristics and the potential exhaustibility of whale stocks was not taken into consideration in the framing of the international law pertaining to fisheries. This, however, was not the only reason why legal rights to take whales were not distinguished from rights to take fish. For the reasons why the international law pertaining to whaling and fishing developed in the way it did, we must look to the historical development of international law-making process.

To understand the extent to which legal problems emerging from

1. First as artists' models or the subject of fables and fantasies but later as a source of food, oil and other products. E. Slipjer, op. cit. p.11 states that the first cetacean depicted was probably about 2200 B.C. by Stone Age man in Norway.

Some writers consider that the first non-commercial whaling could have begun as early as 10,000 B.C., e.g. Ivan Sanderson, "Follow the Whale", infra n.5.
this process have contributed to the management problems of
the modern IWC - and thus to the continued decline in most
stocks of exploited cetaceans - we must examine the historical
development of whaling and the evolution of the legal rights
to exploit fisheries generally.

International law is primarily made by international
agreements, state practice based on opinio juris, and the
application of general principles of law. International
treaties and customs derive initially from the political consent
of states which in turn derives from each state's determination
of the policies which are most advantageous to its economic,
social and other perceived needs. As these are subject to
change so too must the law adapt to fulfil the new needs but
legal change can only be brought about by the legal processes
referred to above. As will be seen in the course of the following
account of the history of whaling the law regulating it contains
many examples of the variety of legal techniques for achieving
those purposes and enabling both exploitation and conservation.

2. For discussion of international law-making processes and
the "sources" in international law see inter alia
C. Parry "The Sources and Evidences of International Law";
G. Fitzmaurice "Some Problems Regarding the Formal Sources
of International Law", Symbolae Verzijl, 1958; Friedman
"The Changing Structure of International Law"; Bin Cheng
"General Principles of Law Applied by International
Courts and Tribunals"; Henkin "How Nations Behave";
See also Sources of international law listed in
Article 38 of the Statute of the International Court
of Justice.
The Origins of Whaling

Whales and dolphins have been a source of inspiration for artists from Stone Age times. The first exploitation of whales long preceded the development of the theories concerning the legal right to do so. Even as late as the sixteenth century, however, writers confused fact and fable concerning cetaceans. Such thought in early history as was devoted to their status was based on an unsophisticated level of factual information.

The first industrial hunting began with the Basques in the Bay of Biscay. So far as legal regulation is concerned, the history of commercial whaling from that date can be divided into three distinct phases.

I. Pre-International Regulation: Whaling to World War I

This falls into 3 phases:

(i) Basque Period, overlapped by early Dutch and British whaling in the Middle Ages;

3. Slipjer op. cit. n.1, p.11.
(ii) **American Period**, from the middle of the seventeenth century to the middle of the nineteenth century;

(iii) **Norwegian Antarctic Period**, from early twentieth century.

II. **International and Private Regulatory Agreements:**

The Post-World War I to World War II period of whaling 1919-1945, including introduction of League of Nations agreements.

III. **International Regulation by International Organisation:**

Post World War II Period: 1946 to the present day.

In this Chapter the development of whaling in Periods I and II will first be outlined and then the law governing this activity both at the outset of and during this period will be examined. Chapter III examines the part of Period II during which the League of Nation's Convention was adopted. Chapters IV-X are devoted to an account of Period III, the institution of the IWC and the legal developments pursuant thereto.

I. **Pre-International Regulation: Whaling to World War I**

1. **The Basque Period**

The Basques bordering the Bay of Biscay began to exploit Right whales therein for their meat as early as the eleventh century, probably acquiring the technique from the Flemings and Normans who had themselves learned it from their Norse invaders. The Basques rapidly developed an industry for lamp oil and whalebone in response to current needs and fashions and by improving their techniques were soon able to expand their hunting from the near coasts into pelagic whaling (i.e. catching and processing the whales on the high seas) in the Atlantic Ocean, to the extent that by 1578 Basque vessels were anchored off Newfoundland. This became the established pattern of most whale
fisheries thereafter — having depleted coastal stocks whalers moved further afield and engaged in pelagic whaling to meet the demands of various industries though the processing of the whales generally took place in sheltered coastal waters. Typical also was the entry of other nations. The British and Dutch were apt pupils and soon so expanded their activities that they took over from the Basques, who virtually ceased whaling by the end of the sixteenth century. Right whales had almost disappeared from the North Atlantic by the seventeenth century so the Dutch turned their attention to the so-called Greenland Right whales (now better known as the Bowhead whales), discovered as early as 1596 by Dutch explorers. These proved extremely profitable to exploit.

The Dutch industry declined for various reasons though the Bowhead whales remained quite plentiful and the British continued the hunt into and throughout the nineteenth century for both Biscayan and Greenland whales for longer seasons, with better

6. That the decline was due to over-exploitation is concluded by N. Mackintosh, in "The Stocks of Whales", 1965, p.146. Slipjer op. cit. p.17 suggests that diversion to more profitable trades is the more likely explanation of the decline.

7. Slipjer op. cit. p.19-22; by 1680 Holland sent 240 vessels employing 14,000 men in the North Atlantic area of the Arctic and 1,800 whales were caught in 1679 off Spitzbergen which became known as Smeerenberg (Blubber town), etc P. Adamson "The Great Whale to Snare", p.3.
equipment and for ever increasing numbers of whales. The German Hansa and the French also participated in the industry and by the end of the nineteenth century both the Greenland Bowhead whale and the Biscayan Right whale had become rare species, since the profits from the former subsidized the continuing unprofitable exploitation of the latter.

It may seem surprising that an industry which had produced so much in the way of profits, products and employment was allowed so swiftly to exterminate itself. The reasons were twofold: both scientific and legal. Scientists took no interest in cetacean biology until the late seventeenth century — there was no attempt by the whaling companies or countries to organise

8. The Hull Fishery boomed from 1815-1830 because of the high price of whale oil and whalebone after the French wars, Hull having a fleet of 40 ships. Hull whalers were paid a basic wage plus catch-related bonuses — "oil money" and "bone money", with harpooners paid a government bounty for every "fish" caught. Adamson p.13 and 20. After 1850 Hull whaling drastically declined — Dundee and Peterhead became the new centres when oil and bone prices again rose from 1856, following the Crimean War, and steam-powered boats were introduced in Scotland but the Greenland whales eventually declined under the onslaught. The removal of the cash subsidy in 1824, competition from American sperm oil and gas lighting contributed also to a decline in the industry. In 1910 the Dundee ships caught only 18 whales; in 1912 only 1 ship left Dundee and caught nothing. From then on only Eskimos and native inhabitants of Siberia have managed to catch a few Bowhead whales under special concessions. Adamson p.27; Slipjer p.22; Wray Vamplew "Salvesen of Leith" (hereafter Vamplew) p.134 (Scottish Academic Press 1975, Edinburgh and London); Gordon Jackson "The British Whaling Trade" (Adam and Charles Black, London 1978), Part I, pp.3-156 (1604-1914); Part II pp.157-249 (1904-1963), is especially good on the history of this and later periods until the U.K. withdrew from whaling.
scientific research into it or to provide specimens and data. Neither was there any attempt to organise the legal regulation of the activities, the legal basis for which is analysed later in this Chapter.

2. **The American Period**

Whaling was also taking place outside Europe, probably beginning with the Eskimos in Greenland and American Indians on the West coast in the early sixteenth century with methods peculiar to themselves. The latter took mainly Californian Gray whales; meanwhile Indians on the East coast may also have been catching Right whales from other stocks.

European whaling started, for the purposes described in Part V of Chapter I, off the East Coast and continued from the early settlements off New Plymouth, Connecticut and New York, originally as shore whaling from open boats, later, in the eighteenth century from sloops and schooners. Coastal stocks were depleted by the eighteenth century but discovery of sperm whales, exploited for oil alone, revived the industry in the 18th century. The Nantucket whalers, during the same period, soon depleted the stocks first of Black Right whales and later of the Humpbacks to which they turned next. They then moved

9. The first accurate rather than mythological description of cetaceans appeared in the 16th century but the first book on the Arctic Bowheads was written only in 1675 and then by a barber; Slipjer p.23. The best account of the Greenland whale appeared in 1820, William Scoresby's "Account of the Arctic Region"; 2 Vol. reprint, Newton Abbot, 1969. Even when knowledge of whale biology was better known it was used the better to exploit not to conserve whales e.g. in order to catch them on their migratory routes or feeding or breeding grounds, Vamplew p.140, 148.

10. By 1846, 729 vessels and 70,000 people were employed in the industry, Bock, p.65, citing Jenkins, op. cit. n.5, p.235; see also Slipjer p.29, who adds that 10,000 sperm whales were caught in 1842.
on to South Africa where they attacked the Southern Right whale. They proceeded next from 1712 onwards to pursue the Sperm whale off Australia, Tasmania and New Zealand. Attention was devoted to sperm whales since candles could be made from them and their oil was used as fuel. It was extracted at sea from the carcases which were then abandoned. Other states too joined the sperm whale hunt - France, Britain, and Portugal. The profitable chase led the fleets from the Indian to the Atlantic and Pacific Oceans until the industry was destroyed: mainly by the discovery of petroleum, and the diversion to gold mining, followed by the depredations on the fleets made by the Civil War, but depletion of the sperm stocks may have occurred. Thereafter whaling was limited to New England and San Francisco until it gradually petered out at the beginning of the twentieth century.

In the late nineteenth century another whaling industry emerged based on the West coast from which the vessels sailed both North to begin to catch the Bering Sea Bowheads, and South for the Californian Gray whale which were virtually exterminated in the 40 years following the discovery of their breeding ground and nursery in 1851 in what has become known as "Scammon's Lagoon". The industry died with them.

11. Slipjer p.29 reports that there "the men wreaked what can only be described as carnage". By 1770 125 ships took part; when other states later entered the fishery hundreds of boats were involved; Scoresby op. cit. n.9.
13. So-called because discovered by Charles Scammon.
14. Small op. cit. n.5, p.101, cited by Scarff. The stock is now recovering; see Ch. X.
Land Stations

From long ago, as already indicated, coastal whaling took place from land stations, but the spread of pelagic whaling carried the techniques to many more countries. Japan, which had a long-standing tradition of coastal fisheries, in particular engaged in coastal whaling from early times throughout its islands, and Russia established land stations in Korea in 1861. Land stations opened in Australia, New Zealand, Canada and South Africa as whaling spread to their shores. 15

3. The Norwegian Antarctic Period

Even the simple technology available in the seventeenth and eighteenth centuries had enabled the drastic depletion of all stocks within its reach. The right, bowhead and gray whales had been rendered commercially extinct by the beginning of the twentieth century; it is probable that even sperm whales could not sustain profitable exploitation, and the other known whales, the rorquals, were too fast swimming to enable the industries described above to divert next to them. 16 Technological breakthroughs towards the end of the nineteenth century however opened up the stocks of rorquals throughout the world but most notably in the Antarctic waters.

Whale catching up to 1868 was "as crude as it was daring"; 17 the basic technique still depended on harpoons or bomb lances hurled by hand from rowing boats which limited the catch to slow

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swimming species such as the "right" whale which derived its name from its ease of capture, and the Greenland bowhead and sperm whales, all of which floated when dead. The finner whales, blue, fin and sei sink because they have less blubber and thus pull the boat under if tied to a line. The advent of steam ships solved the speed problem and by the 1860's whaling was revolutionised by the invention and perfection by Svend Foyn, a Norwegian, of a harpoon gun to which was later added a shell harpoon the explosive head of which detonated inside the whale and was so destructive that the whale died quickly. He built the first steam whale-catcher in 1864 and added the perfected harpoon gun, thus enabling the safe and speedy capture of the fin whales. The problem of the finners 'sinking' was resolved by inflating the whales, which were then flagged and picked up later.

These new methods were so successful that a huge number of whaling companies sprang up all along the Norwegian coasts and others soon followed in Iceland, Ireland (1869), the Faroes

18. Descriptions of these developments are given in Slipjer, p.31-32; Bock, p.66; Leonard op. cit. supra p.91.
19. Initial difficulties in bringing the whales in were solved by the use of steel springs in the bottom of the vessel (accumulators) which absorbed the whale's pull; Vamplew, p.135.
20. In Finmark alone by 1885 20 companies with 34 steam-whale catchers were operating, and caught 1,287 whales; Slipjer p.32.
(1892), and the Shetland Islands (1903). Land stations were modernised to attack these new species in Newfoundland, Labrador, Russia, Canada, USA, Japan, Korea, Australia and New Zealand. South Africa established its first land station in 1908 and Chile, Brazil and Peru soon followed suit. The first floating factory ship was introduced by Norway at Spitzbergen in 1903. Local objections to the processing of whales on shore had already led to Norway's abolition of this practice in 1904. The factory ship made it possible to carry out the extraction of oil on board and enabled vessels to voyage far afield, though sheltered bays were still required to work-up the carcases alongside the ships. Soon the demand for fats, stimulated by rising populations and standards of living, led to a search for more abundant stocks of rorquals. In 1904 Norway opened the first Antarctic shore station in South Georgia.

21. As is the case in the exploitation of oil from the continental shelves which parallels the development of the whaling industry in so many ways, foreign companies had to register in the country from which they operated. For example the Norwegian company of Dansk Hvalfangst & Co registered as Danish in 1897 in order to comply with Icelandic regulations, Vamplew, p.141. This company was taken over by C.S. and Co. who soon transferred its operations to the Shetlands and then the Faroe Isles. The Shetlanders, as is now the case with the common access fisheries policy of the European Economic Community, resented the foreign origin of these whalers and complained of reduced herring catches and the danger to public health from washed up carcases and guts as a result of which a Government Inquiry was instituted. It found against them but recommended the use of the carcases. The Shetlanders continued to complain perhaps because the whaling licence fees went to the Government. p.143-5.

22. Bock, p.66.

23. The impetus and capital arose from the ship-wrecking off South America of Larsen, a Norwegian whaler. Argentina provided the capital for his company which operated from Norway, and started operations from South Georgia, in ignorance of the fact that this was a British possession and that its operations were therefore illegal. The UK Colonial Office operated a licencing scheme and charged fees. Vamplew, p.150-153.
and by 1905 seven floating factories were operating there. By 1910 2 shore factories and fourteen factory ships were operating, 10,230 whales being caught by 48 catcher boats. As all the ships operated from British Antarctic Islands and the British Government began to charge anchorage fees, the factory ships eventually turned to Antarctic pelagic whaling in 1925 when the stern slipway was invented.  

At first the bulk of the catch was made up of humpback whales, 5,755 of these being killed in 1911/12 compared to only 1,109 (82, 84 and 393 having been caught respectively in the 1910/11 season) and blue whales; but over-exploitation led to scarcity; by 1921/22 only 9 humpbacks could be caught though 5,700 blue whales were harvested; in 1922/23 however 517 of the former and 4,416 of the latter were taken.

By World War I Norwegian financed whaling intensified on the whale stocks of the Antarctic. In 1904 it took only 4,592 whales worldwide and its catch from the first land station in 1904/5 was only 195 whales; but by 1908/9 it was taking 2,139 in the Antarctic pelagic expeditions. By 1914, however, the Norwegian effort had expanded into 60 companies, 31 factory ships, 145 catcher boats and 22 shore stations and in the year 1914-1915 the catch amounted to 14,917 whales, representing 80%

of the world catch, from which 90,000 tons of oil was extracted.\(^{27}\)

The First World War, as did World War II in 1945, gave the whales
a respite and saved the stocks because many vessels were diverted
to other duties but even so it seems likely that about 18,320
whales a year were first taken during it, declining to 9,468
in 1918/19.\(^{28}\)

II. Resumption of Unregulated Whaling Between World Wars I and II

Whaling resumed after the War and in 1919/20 and 1920/21
11,369 whales were taken; by 1923/24 it was 16,839.\(^{29}\) From 1925/26
Antarctic pelagic whaling gradually developed\(^{30}\) and expanded
dramatically when the slipway was invented (a stern-ramp over
which the whales can be hauled to the cutting deck, thus
avoiding the former awkward practice of flensing beside the
mother ship). Other improvements followed. Fleets became
larger every year, operating all over the Southern Ocean. By
1927/28 there were 13 factory ships in operation. By 1931, 43,129
whales were being taken, yielding 600,000 tons of oil compared
with 68,000 tons in 1920.\(^{31}\) This represented a peak

\(^{27}\) Vamplew, p.295; BIWS, Vol. 2.

\(^{28}\) Ibid, p.25; figs. given are for 1914/15 - 18,320; 1915/16 -
17,542; 1917/18 - 10,088; 1918/19 - 9,468.

\(^{29}\) International Whaling Statistics XVI (1942) p.78.

\(^{30}\) Leonard, pp.92-93. The "Lancing" first operated that year
but the full benefits only accrued in 1927 when factory
ships lying in harbours could no longer secure adequate
catches and also moved to pelagic whaling. Size and water-
making equipment also contributed to the expansion in
effort; Vamplew, pp. 183 ff.

\(^{31}\) Ibid.
of oil production because these efforts so depleted the stocks of oil-rich blue and right whales and further diminished the already seriously reduced stocks of humpbacks that they began seriously to decline and though over half as many more whales were caught thereafter oil production diminished. The only practical way for the companies to maintain their whaling businesses was to accept some form of regulation. There were, however, now many participating countries - though the Norwegians had developed Antarctic whaling Britain, South Africa, Japan, Panama, Germany, the U.S.A. and Chile had also taken an important share. Regulation now proved difficult to achieve with the stringency necessary to maintain stocks let alone to begin to restore them. The reason for the difficulties was the same as that which had over the years led to the over-exploitation of first one then another species of whales, namely the principles of freedom and laissez faire on which the legal regime of whaling was based from its inception. The reason for the original choice of legal principles which proved so inimical to maintenance of whale stocks is historical as described below.

III. International Legal Basis of Whaling Before 1931

(i) Early Philosophy: Basic Principles

Early philosophers such as Plato, 32 made no attempt to distinguish individual animals, or to accord them rights, rather

they instantiated them. This is not surprising at a period when even human beings were subjected to slavery and devoid of most of the legal rights accorded to other individuals. Animals were thus from early times treated as continuing species, not individuals, and a species was not regarded as damaged by the taking of individual members of it. Moreover, as it was thought that animals could not owe duties the belief that they had no rights was further reinforced.

As great new areas of natural knowledge were opened up by early scientists it became clear, however, that the laws of nature must be better explained, and it was thought they could be explained in quantitative terms, by applying mathematics and measurement. Even Aristotelian concepts of nature as a system or hierarchy of natural kinds distinguished by essential qualitative differences began to be regarded as inadequate. Many philosophers then unfortunately applied the narrow syllogistic logic taught at that period to the problem of understanding and organizing natural knowledge. In the Middle Ages no distinction was drawn between philosophy and the natural sciences, so that problems of science and philosophy tended to be intertwined in the doctrine "natural philosophy". Although all great philosophers have tried to describe man's place in nature as well as the natural order itself and also to identify human purposes, goals, and duties there is little agreement about the relation of the latter to the former. Early philosophers did not segregate

natural species for special consideration of man's obligation towards them; species, especially fish, continued to be treated by them as very general concepts. Some philosophers argued, like Benjamin Franklin, that the Law of Nature in relation to fish itself revealed the basic Law of Fish to be emulated by man, namely "if you (fish) eat one another, I don't see why we may not eat you" i.e. that if fish eat each other (though not all fish and very few whales in fact do so) man has therefore the right to eat them in turn. 34

In the light of the philosophical thinking of the times preceding and prevailing at the outset of commercial whale fisheries it is not surprising that the legal concepts applied to whaling and the regime based upon them emerged in the form of the high seas freedom already referred to. Not only was its philosophical base limited by the period but also its objectives.

Law can serve a number of functions in relation to fisheries: it can be distributive: determining who is to have ownership of or access to the resources; conservatory: preserving the resource at sustainable levels for exploitation; or prohibitory: preventing the resource from being exploited at all. The origins of the law of fisheries were entirely concerned with the first objective and therefore centred round the question whether access to fisheries should be distributed on both a national and an international basis or whether fisheries should be entirely international. When states decided on the former solution for centuries thereafter the debate

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34. S. Clark, op. cit. n.32.
centred round the limits of the sea area which a coastal state
could retain under its exclusive national control. During the
entire history of whaling, up to the present day, operations
have been conducted in the international areas, which came to
be known as the high seas, under a doctrine of freedom of access
to them, although this doctrine has, at many and various times,
been severely criticised, especially when the second and third
objectives of fishery law came more into prominence in the
twentieth century. Even in the negotiations currently taking
place in the Third United Nations Conference on the Law of the
Sea (UNCLOS III), the doctrine has not been seriously challenged,
so far as it relates to the legal status of fish in high seas
areas and the right to exploit them thereon. It is the limits
of national sovereign rights to exploit fisheries that have
been called into question and concerning these the law is now
in a state of flux and uncertainty which will be examined in
later Chapters. It seems likely that even after the UNCLOS III
the high seas fisheries will for the present remain, as they
have been since international law first concerned itself with
them, a common property resource, although there is no inter-
national treaty which specifically confers this status.

It is therefore important to understand how and why this
legal concept developed and why it has continued to be applied
to marine mammals in spite of the hitherto deleterious effect
upon them.
(ii) The Common Property Resource

To describe a resource as a common property resource is to imply that "no single user has right to the resource nor can he prevent others from sharing in its exploitation". It is a doctrine that has customarily been applied to all resources that are essentially ones that can be used by more than one person or state at the same time - such as the air; or which cannot readily be confined - such as wildlife. Other factors leading to classification as common property are that the resources are so plentiful that it is to everyone's advantage to share in their use, and also that the cost of asserting and defending exclusive rights exceeds the advantages gained from such exclusivity.

It has been pointed out that the term is misleading because it incorporates two quite different concepts, one, "res communis omnium", concerning ownership and the distribution of wealth; the other, "open or free access", relating to the production of wealth. These two concepts are antipathetic and the confusion between them has led to the rejection by many states of effective conservation measures. It is argued that unless the res communis is strongly developed internationally in principle and protected internationally by appropriate laws, treaties and organisations, other states can appropriate such resources with impunity and if

36. Ibid.
37. F.T. Christy Jr., "Fisheries: Common Property, Open Access and the Common Heritage" Ch. 6, p.87; Pacem in Maribus (Royal University of Malta Press, 1971) Vol. II.
the states participating in exploitation do not see the over-exploitation which is encouraged by open access as being damaging to their wider interests, however short-term, then they accept it as a bearable cost.

The term "res communis" is founded in Roman law and has not in fact been incorporated as such into any past or present fisheries agreement. Even the 1958 Geneva Convention on the High Seas which purported to codify the freedom of the seas, including inter alia the freedom of fishing, did not refer to the term.\(^{38}\) Nor did the Geneva Convention on Fishing and the Conservation of the Living Resources of the Seas\(^ {39}\) though it does prescribe that freedom of fishing entails a duty to conserve the living resources of the seas. It has been suggested by one writer\(^ {40}\) in the context of asserting the alleged freedom to exploit the deep seabed, that the Roman law meaning of res communis is "a thing that requires the consent of the community to its use" but that such an interpretation has in fact been rejected in the historical development of international law and that this is confirmed by the language used in the former Convention to codify the high seas freedoms, i.e. that the high seas are "open to all nations", and are not therefore a res communis in this sense since no community consent is required for their use even if the international community could so organise

\(^{38}\) The High Seas Convention UN DOC.A/CONF.13/L.52-L.55; Misc. No. 15 (1958); Cmd 584. The Convention is discussed in Chapters IV, V and VI.

\(^{39}\) Ibid.

itself that such consent be given, a somewhat doubtful possibility which will be considered in later Chapters.

In practice states have avoided the question of ownership, as is shown in the historical review of fisheries law given below, but this does not mean that legal theorists from early times have not considered the question, and that states have not from time to time adumbrated whatever doctrines and concepts best suit their particular interests and policies in any given fisheries dispute. This has added to the general confusion surrounding this subject. It has been rightly said that "attempts to elaborate the res communis omnium concept of common property generally lead one quickly into a morass of ill-defined legal and social ownership concepts and terms" and that "endless etymological arguments can be - and unfortunately are - waged over definitions of private and public property, social property, public goods, title, ownership, community interest and the common heritage of mankind". The question of the legal status of marine mammals and the rights to exploit them are of such vital importance to the formulation of present and future conservation regimes, however, that an attempt must be made to find a route through this morass, so that the choices of legal principles can be identified and an understanding gained of the historical developments that have determined both the selection of the freedom of the high seas as the determinant principle and its linkage with the concept of res communis.

\[41\] op.\textsuperscript{c}it. n.37, p.88.
(iii) **Origins of the Doctrine of the Freedom of the Seas**

Although this doctrine has been written about exhaustively and is summarised in all the classic works referred to in this thesis, it merits a fairly lengthy analysis here because it has had such a disastrous effect on whaling and still makes effective conservation of whales difficult and a moratorium on whaling virtually impossible on a universal scale.

The law of the sea has evolved since early times, as now, as "a response to, and a reconciliation of, the conflicting interests of members of the international community". As these interests frequently diverge and change so too do legal doctrines. In the case of the law of the sea the processes of change can be identified by certain comparatively rare characteristics which in the view of well-known authorities "may be observed in varying phases of the process of interaction by which peoples exploit the oceans and their resources, of the process of claim by which authority is invoked for the regulation of interactions, and of the process of decision by which authority is allocated and exercised in such regulation". The most distinctive feature of the former process is "the predominantly inclusive character of the interests sought to be protected" but "the historic function of the law of the sea has long been recognised as that of protecting and balancing" both inclusive and exclusive common interests of all states in using and benefiting from the sea "while rejecting all egocentric assertions of special interests in contravention of general community interest".

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44. Ibid, p.1.
At various historical periods the international community has seen its interests in greater or lesser degrees of exclusive interest and it was just such a conflict that eventually led to the adoption of freedom of the high seas as the doctrine which for many centuries has been regarded as that best serving the community interest, although because of the heterogenous and changing character of the states making up the international community and the great variety of their national interests it is always difficult, in a decentralised system such as the international law-making process, to say what the community interest is. Even in the middle ages this presented problems and then, as now, the maritime disputes centred primarily round fisheries. Early disputes concerned the fisheries of Western Europe. Though initially it was more the sedentary fisheries that were of concern the demand for fish stimulated by religious fast days led to the growth of important fisheries in Western Europe, especially in the North Sea and English Channel in which the Dutch and other foreign fishermen took part. The great Dutch expansion of sea trade in the sixteenth century was thought by Britain to be founded on their success in this fishery and gave rise to the celebrated doctrinal argument between John Selden and Hugo Grotius in the early seventeenth century that crystallised for the next 300 years the basic concept of the freedom of the seas and freedom of access to the fisheries in them.

In the period preceding this dispute the prevailing doctrine in England had supported the Roman beliefs that the sea was common to all, that animals "ferae naturae" belonged to no person, that fish were included among them and that there was "an overwhelming body of testimony to show that fishing was free". Various treaties were concluded with foreign states on this basis. The "great fish" such as sturgeons and whales were distinguished and held to belong to the king. Regulation of fisheries in this period was not, however, specifically concerned with whales or other marine mammals but with fisheries as a whole, except for the practice of the Dutch who issued many charters concerning ownership of stranded whales, the rights and duties of the whaling industry, and whales on foreign vessels.

Whaling mostly took place beyond the territorial sea which most states bordering the North Sea limited to 3 miles at this period. Some governments developed interests in regulating fisheries beyond the territorial sea and began to look therefore for ways of changing the international law in this respect.

In 1603 James VI of Scotland also became James I of England and the new Stuart dynasty proceeded for a period to take advantage of the fact that Scotland, which retained its own distinctive legal system, had, because of the different geographical

46. Ibid, p.63, 72. Liberty of fishing was guaranteed in various treaties concluded between the fourteenth and seventeenth centuries.
47. Bock, p.71 citing Jenkins p.51. There were 252 Dutch charters between 1597-1857.
peculiarities of its coastline, also developed a different doctrine on coastal fisheries. The number of inland and sea lochs, and the proximity of abundant fisheries close to the mainland and island coasts of Scotland, and the lack there of foreign competition encouraged the Scots to think of fisheries as their exclusive preserve though apart from the ambiguous doctrine of land-kenning there was little evidence of any precise limit being claimed. Various attempts were made by the Scottish Kings to require licences for fishing by alleging that the rights to do so were vested in the Crown. In the separate treaties concluded by the Scots before the Union of the Crowns less freedom of fishing was conceded to foreigners than in the corresponding treaties concluded by the English.

The Tudor Monarchs had in the fifteenth century adopted a policy of mare liberum because it strengthened their case for refuting the exclusive fishing and trading claims to the seas made by the Spanish and Danish. James I and his successors now imported the Scots ideas into the newly formed United Kingdom, partly in an attempt to regulate the whaling then mostly taking place beyond a 3 mile limit. In 1608 Hugo Grotius published his short work on "The Freedom of the Seas", the full title of which adds "Or the Right which belongs to the Dutch to take part in the East Indian Trade", thus belying the tract's purpose. The following year the former English policy of

49. Fulton p.58, 83. Land-kenning related national waters to the distance at which land could be seen from the top of a mast. These waters, generally taken to be 14 miles from the coast (but sometimes "double-kenned") were reserved to the coastal state.

50. Ibid.
mare liberum was partially reversed and proclamations were issued defining certain bays as "King's Chambers", exclusive to the coastal state, initially for purposes of establishing neutrality.  

It was not until rivalry with the Dutch developed later in James' reign that the other Scottish ideas began to be imported and extended, which led to attempts to levy tribute from foreigners fishing in the "British seas", which would require acknowledgement of the King's sovereignty or title over the fisheries. This policy was still under consideration when Grotius published the work referred to above in which he branded as "insanely cupid" anyone who attempted to interfere with the common liberty of fishing in the sea. James I finally issued his historic Proclamation on 6th May 1609 prohibiting in general all unlicensed fishing by foreigners of all nationalities in the British or Irish Seas. The ban was aimed primarily at the Dutch, who immediately registered their diplomatic protest on the ground that the sea was free to all and that "every stranger may fish all over the seas where he pleases, without asking license or paying any toll or duty whatsoever" in spite of the fact that Grotius had developed this theory in relation to freedom of navigation to permit trade with the Indies rather than to fishing.

52. Ibid, p.152-154. It is thought the custom of the Scottish Crown of levying a tribute of "assize-herring" from Scottish fishermen inspired the assertion of similar demands against foreign fishermen and led to the further development of attempting to exclude foreign fishermen.
53. Ibid, p.148. Fulton gives a detailed account of the political developments which fostered this policy, pp. 124-128.
55. Fulton ibid.
It was during the course of the ensuing dispute that the doctrine of freedom of the high seas and the inclusion within this freedom of liberty of fishing was argued out by the legal protagonists of both states. The toing and froing of the arguments is detailed at great length by Fulton. The argument reached its height in the reign of Charles I. It is important to relate these arguments, which are discussed below, to the subject matters of the dispute giving rise to them and to understand that the immediate issue was the extent of coastal state exclusive rights. The emphasis in the original freedom of the seas debate was, in the seventeenth century, on the limitation of coastal state control of the seas adjacent to its coasts and not, directly, at all with the legal status of resources or the international management possibilities thereof in the areas beyond coastal state jurisdiction, whether for the allocation or the conservation of resources of the high seas area. In the light of the maritime technology available to them, and the number of participants at that time, these problems were not relevant and therefore not in issue.

Nonetheless, in the context of modern problems of managing marine mammals whose numbers are diminishing, it should be noted that Grotius stated at the outset of his case for high seas freedom

56 "If today the custom held of considering that everything pertaining to mankind pertained also to one's self, we should

surely live in a much more peaceable world. For the presumptuousness of many would abate, and those who now neglect justice on the pretext of expediency would unlearn the lesson of injustice at their own expense". 57 Unfortunately Grotius in the works he produced throughout the juridical battle that ensued was not entirely consistent and expediency often dictated his arguments as is apparent from the analysis below.

(iv) **Grotius Reconsidered**

Grotius' objective was to establish that the Dutch had the right to sail freely to the East Indies. He was therefore concerned with rights over the open sea, not coastal waters. His first strategy was therefore to prove that no single state could establish a title to the waters concerned. This directed him to the Roman law of title to property, 58 which he regarded as strictly analogous to maritime areas. He then argued that as discovery of land does not by itself give title over it but requires to be accompanied by an act of actual possession, the territory concerned can only be so acquired if it is a res nullius i.e. belongs to no one before this acquisition. 59 He conceded that some near coastal areas can be "occupied" and reduced to coastal state control, but contended that any revenues levied on maritime fisheries belong to the Crown, whose laws do not bind the sea itself or the fisheries, but the fishermen who are nationals of, and therefore under the jurisdiction of, the taxing state. In a later work 60 Grotius pointed out that

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57. Succinctly summarised by Fulton p.344-6.
60. e.g. H. Grotius "The Rights of War and Peace" pub. 1625.
jurisdiction (imperium) is always easier to assert than a proprietary right, especially personal jurisdiction (imperium ratione personarium), though states could exercise quasi territorial jurisdiction (imperium ratione territorii) over fleets which come close to their coasts.

Grotius insisted that such unconfinable elements as the sea, air or water cannot be classified as res nullius because "that which cannot be occupied ... cannot be the property of anyone ... all that which has been so constituted by nature that although serving some one person it still suffices for the common use of all other persons is today and ought in perpetuity to remain in the same condition as it was first created by nature". Neither custom nor prescription could support claims to individual appropriation since no one has authority to grant privileges adverse to mankind as a whole. A logical deduction from this argument in relation to present day knowledge of management problems is that such resources should not be so over-exploited that they can no longer "suffice for common use" and must be regulated to the extent necessary.

Grotius, however, arrived at different conclusions. He maintained that in the Law of Nations up to his time the sea had in fact confusingly been called by different titles including not only, mistakenly, "res nullius" (no one's property) but also "res publica" (public property) and "res communis"

61. Ibid, p.27.
62. Roman law distinguished between the legal status of the sea and of rivers; the former was "communus omnium natural e jure", the latter "publicae res, quarum proprietas est populi vel reipublicae".
(common property), but he suggested that the meaning of these terms had changed with time so that, for example, "sovereignty" now implied exclusive possession and "common" was used if "ownership or possession is held by several persons jointly according to a kind of partnership or mutual agreement from which all other persons are excluded", whereas formerly "common" merely implied the opposite of "particular", and "sovereignty" or "ownership" implied the privilege of lawfully using common property.\^63

Among things which are now to be regarded as the common property of all, said Grotius, is the sea "because it is so limitless that it cannot become a possession of anyone, because it is adapted for use by all whether we consider it from the point of view of navigation or fisheries".\^64 This Grotian argument is much quoted as illustrating the basic fallacy of his theory, viz. that the fishery resources were inexhaustible whereas recent history has proved that they are not. However this is not entirely fair to Grotius for he went on to distinguish as not marked out for common use such wild animals, fish and birds as can be reduced to possession and therefore become the objects of private ownership, whereas he thought that the air and sea could never be privately acquired. At the period at which he was writing Grotius accepted that no limitation on freedom so to acquire these resources was necessary because he distinguished

\^63. Ibid, p.22-23.

\^64. Ibid, p.28. He described the ocean as "the immense, the infinite, bounded only by the heavens, parent of all things"; it "rather possesses the earth than is by it possessed", ibid, p.37.
exploitation of maritime living resources from hunting on land or in rivers on the grounds that "Everyone admits that if a great many persons hunt on the land or fish in a river, the forest is easily exhausted of wild animals and the river of fish". Control of these activities he therefore regarded as "expedient and necessary". He even envisaged the possibility that maritime fisheries could conceivably be over exploited and that fishing might require to be banned though he made this point only indirectly to bolster his argument that navigation can never be prevented contending "if it were possible to prohibit any of these things, say for example, fishing, in a way it can be maintained that fish are exhaustible, still it would not be possible to prohibit navigation, for the sea is not exhausted by that use". Coupled with his statement that if any part of these things is by nature susceptible of occupation it may become the property of the one who occupies it only so far as such occupation does not affect its common use "otherwise" all of it would pass into private ownership and his approving reference to Cicero's view that "one of the first gifts of Justice is the use of common property for common benefit" it can scarcely be doubted that had Grotius been elaborating his doctrine now he would have placed more emphasis

67. i.e. things permitted by the law of nations.
68. Emphasis added.
69. op. cit. p.43.
70. Ibid, p.30.
71. Ibid.
on a regulation of fisheries to secure this common benefit. The whole tenor of his argument is to identify what is the best legal approach to secure this, and fisheries are regarded as common to all because they pertain to the whole human race.  

The ebb and flow of the argument concerning mare liberum and mare clausum continued throughout the seventeenth century: Grotius developed his ideas further, though not always consistently, in later works. The opposite point of view was developed by Scots lawyers: first by Welwood and then by Selden. They maintained that the seas were capable of dominion and that fishing in the sea could be appropriated. They were of course concerned with fishing in the waters adjacent to the British coasts. Fisheries there could be shared, they argued, but only under licence and on payment of a just price to the coastal state sovereign. Even free navigation, though desirable, was not to be regarded as a right in these waters. Selden in particular stressed that the sea was not inexhaustible from promiscuous use; legitimate rights over it could be diminished by other states fishing and the seas abundance likewise could be depleted by such use, in particular by fishing.

75. John Selden "Mare Clausum" pub. Stansesbeivs London 1635, begun during the reign of James I, revised and published at the request of Charles I.
The outcome of this debate eventually favoured the Grotian theory and the extensive claims made by Britain to sovereignty over her adjacent seas were abandoned in the eighteenth century when it became settled law that the high seas could not be appropriated by any one state. The history of this period and the evolution of the territorial sea doctrine and the limits thereof have been well documented. For a long period a 3 mile limit for the territorial sea was widely accepted but even by the start of the twentieth century it was beginning to be regarded as inadequate by some states and commentators.

The conceptual theories of Grotius and Selden have however remained and fishery resources began to be seriously depleted by abuse of freedom, arising from a misunderstanding of the Grotian ethic of common benefit. States disregarded the interests of others in maintaining the resources at levels enabling them to exercise their freedom to fish. Freedom of the seas has been reconsidered during the UNCLOS III negotiations and the abuses used as justification for rejection of freedom, and its replacement in coastal areas by extensions of coastal state jurisdiction in 200 mile Fisheries and Economic Zones, some of which have already been asserted. The rights and duties of states in these zones and in the high seas areas beyond are discussed in Chapter XI; at present they are so unsettled that the detailed analysis of the underlying assumptions of the "free seas" and "res communis" basis of the international law of

77. e.g. Fulton, Sec. II, Territorial Waters p.535-
fisheries undertaken in this section is still essential. The emphasis laid by Grotius, as the basis of his approach, on the common good, common benefit, and benefit to mankind or the human race as a whole has taken second place to states' assertion of their "right" to freedom whereas Grotius realised that freedom of access should not apply in cases of resources that are exhaustible and that even fisheries may become so. Viewed in this light the Grotian theory is more flexible, requiring development of laws to ensure wise use and acceptance by states to preserve shared resources in the condition they first find them, with reasonable regard to the equal rights of other uses in benefiting from the resources, rather than an immutable right to freedom of use.

(v) Regulation of Marine Mammals After Grotius

The doctrine of freedom of access was first legally challenged in relation to marine mammals in the famous case described below concerning seals.

(a) Seals

Seals, as described in Chapter I, are less aquatic than whales since they have to come ashore to pup. They are more susceptible to capture at that time and are therefore even more easily over-exploited than whales, although if properly managed their recovery rate is quicker. The value of their fur and oil early attracted hunters. The doctrine of freedom of entry into

79. Regulation of mammals was incidental to fisheries regulation rather than specifically directed to mammals until after the First World War - Good accounts are given in the works cited in n.5 and a brief but useful resume by A.P. Daggett in "The Regulation of Maritime Fisheries by Treaty" AJIL Vol. 28, (1934), p.693-717. See also J.N. Tønnessen,"Den Moderne Hvalfangsts Historie III" (Sandefjord 1969).
"fisheries" for seals soon led to devastation of seal rookeries throughout the world, accelerated by the fact that hunters did not distinguish between males and females. Fur seals were exterminated in the South Atlantic in the early nineteenth century. Antarctic fur seals were similarly almost eliminated except in the Falkland Islands where they came under the protection of British law in the same way as did early whaling in that area, as described below.

The over-exploitation of one of the remaining seal rookeries, the Bering Sea fur seals in the North East Pacific, which had resulted from unrestricted entry in the nineteenth century, gave rise to a crucial dispute which became the subject of arbitration. The eventual solution of this dispute has had a profound effect on management of marine species, especially on the management of whales, since the Treaty which was eventually concluded between the participants in this fishery became in part a model for the International Whaling Commission when it was founded in 1946. The agreements following the arbitration showed that international management of migratory resources is possible. The dispute arose because, in an attempt to prevent the over-exploitation permitted by the high sea freedom of fishing, the United States, one of the participants, purported to assert rights of ownership over the seals in the disputed area.

The North Pacific Fur Seal Dispute

The origins of the dispute were in a 1779 Russian Ukase, which made fur sealing in the Bering Straits area exclusive to a Russian-American Company. Britain considered that this law could be exclusive only as against other Russian nationals and could have no effect in international law against foreign nationals. British vessels sealed there from bases in British Colombia, a part of the Dominion of Canada. The ukase covered the North Western extremities of the North American continent, the limits of Russian jurisdiction over which were in dispute with both the United States and Great Britain. A further Russian ukase in 1821 again made hunting and trading rights in that area exclusive to Russia and specifically forbade foreign vessels either to land on the Russian coasts or "to approach them within less than (one) hundred Italian miles". Britain and the United States protested. The latter concluded a treaty with Russia agreeing a boundary line in the area in 1824. In 1825 Britain and Russia concluded an agreement in which the former recognized the Russian claim to the furthest east areas of the American continent. Russia however, in 1867 ceded the area now known

81. A succinct summary of the history of the dispute is given by Johnston at p.205-212. See also McDougal and Burke, "The Public Order of the Oceans", 942-944, 948-950, 965; Fulton "The Sovereignty of the Seas" p.581-585; 696; for the full history see Moore, International Arbitrations, Ch. XVII, p.755-917.

82. See Moore, International Arbitrations I, p.755-63; for a fuller account of the following history of the dispute; Behring Sea Arbitration, Report of Commission: British Case (1893) p.27.

83. Russian edict, Sept. 4th 1821, Article 2; Moore, p.756.

84. Moore, p.759.

85. Ibid, p.762.
as Alaska to the United States. It was to that area that the valuable fur seals migrated from the Bering Sea, and where they were being rapaciously annihilated by sealers from various countries. Seals were also taken off islands in the North Pacific belonging to Japan and Russia. Since large numbers of the seals frequented the Bering Sea islands and surrounding waters they came therein under the territorial jurisdiction of the adjacent coastal state either on its territory or within its three mile territorial waters, but not, of course, because of the high seas freedom, during their migrations beyond these limits although they could also be fished there. The United States proceeded, following its annexation of Alaska, to prohibit the killing of fur seals within American jurisdiction. 86 The question of the limits of United States jurisdiction over the fur seals then arose, since the American law did not itself define the waters to which it purported to apply.

The United States began increasingly to assert a unilateral right to regulate the fur seals 87 for conservation purposes on the grounds that she had exclusive jurisdiction over them. Foreign vessels ignored these United States assertions and continued to exploit seals beyond the American 3 mile limit. The United States precipitated the legal dispute by arresting British Columbian vessels in the area. 88 Britain protested alleging that all the vessels had been arrested outside the American three mile limit and were therefore on the high seas

86. Ibid, p.763.
87. Ibid
under international law. It was then, however, agreed between the disputants that there should be a general international agreement to conserve the seals. The United States accordingly submitted a draft instrument for this purpose to France, Germany, Britain, Japan, Russia, Sweden and Norway whose nationals were sealing in the area. Most governments supported the draft but only Britain and America signed an agreement in 1888. 89 Delay in its ratification, however, resulted in its postponement because of Canadian representations, prompted by difficulties arising in resolving the simultaneous dispute between America and Canada over the Northwest Atlantic fisheries. The United States then proceeded with its seizures of British Columbian vessels engaged in sealing on the high seas. 90 This time the British submitted a draft convention proposing a closed season for sealing in the Bering Sea. The United States rejection of the draft and further seizures by it led to the arbitration of the issue between them in 1892 91 before a specially constituted tribunal.

Bering Sea Arbitration 1893 92

The U.S. argued that the Russian ukase concerning the area had merely been declaratory of existing rights which were ceded to the U.S. on transfer of the territory, but it added that quite

89. Ibid, p.776-784.
90. Ibid, p.784.
92. Bering Sea Fur Seal Arbitration; Report of Proceedings of the Tribunal of Arbitration 1895; Award of Tribunal appended Pt. VIII.
independently of this it had "a right of protection and property in the fur seals frequenting the Pribilof Islands when found outside the ordinary three mile limit, based upon the established practice of common and civil law, upon the practice of nations, upon the laws of natural history, and upon the common interests of mankind". The U.S. referred to measures taken by other countries to protect other seal herds and other maritime resources such as oysters, pearl and herring. On the basis of these it put forward various propositions including that the seals had increased under United States conservation and that it was the pelagic sealing that was reducing the herds. It castigated pelagic sealing as an "illegitimate, improper and wasteful method of killing... barbarous and inhuman in its immense destruction of the pregnant and nursing females and young", and relatively unprofitable. It argued that foreign nationals had no legal right to engage in devastation forbidden to U.S. nationals since the U.S. had such a property in the herd as "the natural product of its own soil, made chiefly available by its protection and expenditure, highly valuable to its people and a considerable source of revenue, as entitles it to preserve the herd from destruction... by an employment of such reasonable force as may be necessary." Quite apart from this alleged property right the U.S. maintained that it had an interest in the industry derived from the herd's products which it was

94. Ibid, p.813.
95. Ibid.
entitled to protect and "that no part of the high seas is, or ought to be, open to individuals for the purpose of accomplishing the destruction of national interests of such a character and importance". They contended also that they were trustees of the herd "for the benefit of mankind" because they alone possessed "the power of preserving and cherishing it and that its destruction could only be prevented, and thus the herd preserved, by prohibition of pelagic sealing".

Great Britain rejected the American arguments. It denied that Russia had ever exercised jurisdiction over the areas in dispute, which had always been visited by trading vessels of all nations. Britain had protested the Russian ukases, and the two agreements concerning the area had recognized British and American rights to fish there, which right they freely exercised. Russian rights therefore only extended to the limits of the territorial waters permitted by international law and not to the high seas. America had in 1867 succeeded only to those rights. The claim to a right of property in the seals was, asserted Great Britain, "entirely without precedent"; indeed United States nationals had themselves engaged in pelagic sealing elsewhere without protest from their government. Furthermore the United States had not claimed, and could not claim, that the Bering Sea was a mare clausum, as this was contrary to their declared general policy. Britain considered that seals were either res communis or res nullius and not the subject of property.

96. Ibid, p.814.
97. Ibid, p.816-
The United States retorted that it did not impute to Russia a territorial claim to the waters in question but merely the intention "to preserve for the use of its citizens its interests on land by the adoption of all necessary, even though they be somewhat unusual, measures, whether on land or at sea". The United States urged that the tribunal should decide the issue on principles of right i.e. "a moral rule" dictated by "that general standard of justice on which civilized nations are agreed" which was "but another name for international law, founded on the nature of man and the environment in which he is placed". The U.S. alleged that the public opinion of the civilized world was a power to which all nations are forced to submit. It adheres to these views in the IWC today.

Ultimately the United States rested its case on the continuity of its exploitation of fur seals on the Pribilof Islands and its right to do so without interference with that right from other states, which had no right to destroy a fishery in which the United States had a defensible property and interest. The British countered the property claim by arguing that the United States could not have any property right in the herd unless it had rights in individual seals and that even if each seal could be identified and its annual return to the Pribilof Islands established, the United States "could show no title without proof that the seal was tame or reclaimed before its departure, and that it intended to return,"

98. Ibid, p.821.
not only to the islands but to some spot where it would be under the care and control of its owner". They also illustrated that none of the laws cited which protected marine resources asserted jurisdiction over foreigners.

In its written argument the United States raised another line of reasoning viz. that the Roman law terms "ferae naturae" and "domitae naturae", referred to by the U.K. as the only appropriate categorisation of animals, were too imprecise for categorisation of animals in respect of property rights in law and that the determination of the question depended more on the characteristics of the animal, there being no principle of jurisprudence which said that no wild animals were the subject of property. On the contrary Roman law had designated wild animals the subject of property where the "care and industry of man acting upon a natural disposition of the animal to return to a place of wonted resort secures their voluntary and habitual return to his custody and power so as to enable him to deal with them in a similar manner and to obtain from them similar benefits as in the case of domestic animals".100 Fur seals, alleged the United States, had an "animus revertendi" and were a typical example of this category, and as the law of property was ultimately based on necessity there should be United States property in the herd.

The United States countered the freedom of the seas argument by stating that it accepted the general rule of the freedom of the sea but contending that it was "free only for innocent and

100. Ibid, p.832-836.
inoffensive use, not injurious to the just interests of any nation which borders upon it", 101 especially if the use were for private gain. Moreover, the right of self-defence was a paramount state right and available to states in case of such abuses, to protect their rights and interests.

In their written argument Great Britain denied that the law recognized property in animals ferae naturae before their capture and relied on the freedom of the sea as complete refutation of the American arguments: "to all this shadowy claim the government of the Queen submit but one answer - the law". 102 That law was the freedom of the sea which Great Britain defined as "the right to come and go upon the high seas without let or hindrance, and to take therefrom at will and pleasure the products of the sea", whether or not this diminished another's catch. Nonetheless the British counsel did devote considerable attention to the characteristics and habits of the fur seal which were considered in detail.

In giving its award 103 the Tribunal dealt one by one with all the 5 questions put to it. It first found by a majority that Russia had admitted in the 1824 and 1825 treaty negotiations (following the 1821 ukase which had been based on a claim to an alleged mare clausum in the Bering Sea) that her jurisdiction should be restricted to cannon-shot range and that Russia had never in fact asserted any exclusive jurisdiction beyond that

103. Ibid, p.914-931.
range or in the Bering Sea up to the cession of Alaska in 1867. Nor had Britain recognized any Russian claim to the seal fisheries in the Bering Sea beyond territorial waters. The term "Pacific Ocean" in the 1825 treaty was held to have been intended to cover the Bering Sea, in which it was found that Russia neither held nor exercised exclusive rights after 1825. The tribunal unanimously agreed that all Russia's rights east of the boundary at sea set in the 1867 Alaskan cession treaty passed in toto to the United States but it held (with two arbitrators dissenting) that the United States had no right of property or protection in the fur seals beyond the 3 mile limit and could not therefore exclusively either exploit or conserve them. American laws relating to them could not be enforced on nationals of foreign states. The United States had not forbidden its own nationals to hunt the seals; its objective therefore seemed to be as much to secure exclusive American exploitation as to conserve the seals.

Neither the parties nor the arbitrators were unmindful of the urgent need for conservation. Because of the Tribunal's decision that the United States had no property rights in seals beyond a 3 mile limit the consent of Great Britain would be needed for any attempt to regulate them. The arbitral treaty provided for this eventuality and instructed the arbitrators to recommend international regulations in the event of that decision. The tribunal, therefore, in pursuit of its mandate, recommended measures for joint regulation by Great Britain and Canada of the seal fisheries in the Bering Sea. The recommendations were in the form of nine articles.\(^{104}\) As neither state had

104. Ibid, p.925-928 and Annex A p.945-950; The articles were adopted by a 4-3 majority; Johnston op. cit. p.264-265.
jurisdiction in the area the proposals aimed at limiting by agreement their exclusive rights to exploit seals in the interests of conservation. The 9 point plan included measures which have now become a familiar set of weapons in the armouries of most fisheries commissions viz. a prohibited zone; a closed season in a defined area of the high seas; a limitation on the type of vessels used; licensing by the national governments concerned; use of a special identifying flag while sealing; keeping catch records; exchange between the two governments of data collected by them; prescription of certain kinds of gear; and government responsibility for selection of suitable crews for sealing. There was even a specific exemption in favour of sealing by indigenous Indians as long as it was for traditional purposes and they used traditional methods. The provisions were reviewable after 5 years but were to continue in force until the parties agreed to abandon or qualify them.

Apart from the award itself the arbitrators recommended that these regulations for the high seas should be supplemented by apposite and uniform national legislation applicable within their jurisdiction, and that these laws should be ensured of enforcement by appropriate national measures. Two arbitrators recommended that the two governments should agree to prohibit all further killing of fur seals for one to three years, subject to some agreed exceptions, and that they might revive such a ban from time to time as necessary. As in the case of the 1972 Stockholm Conference's recommendation 80 years later, of a moratorium on whale catching, this advice was not heeded by the governments concerned.
CONCLUSION

The award pioneered the pattern of modern fisheries regulation i.e. whilst accepting the doctrine of high seas freedom and rejecting the United States claim to exclusive authority to promulgate conservation measures on the high seas beyond its territorial waters, it also supported the need for voluntary restraint by states in the exercise of freedom of fishing and laid down appropriate international measures. It presaged the limitation on high seas freedoms codified in the 1958 Geneva Convention on the High Seas i.e. that all freedoms should be exercised with "reasonable regard" for the interests of other states exercising the same rights. It also pointed the way to modern techniques of conservation regulation - closed seasons and areas; limitations on vessels and gear; licensing; responsibility for scientific information; keeping of catch records; moratoria. It was the first time an international tribunal had considered the biology and habits of marine mammals in relation to their legal status. The rejection of conservation "for the benefit of mankind" by means of recognition of national property rights in highly migratory species did not involve rejection of conservation as a desirable community objective but neither did it go so far as to acknowledge a legal interest of the international community as such in such resources which might impose a restriction on states freedom. The tribunal instead supported the freedom, but considered that it should be regulated in the interests of one state in relation to the others. The modern concept of functional zones of limited jurisdiction, which retained their status as high seas, was not considered at this date. The only alternative
to national regulation was therefore regulation by voluntary international agreement between the exploiting states.

1911 Fur Seal Convention

The tribunal's conservation proposals failed because they could of course only apply to the vessels of the United States and Canada whereas other vessels fished in the area without restriction. The result was that American and Canadian vessels re-registered under Japanese and other flags and continued to exploit seals without limitation. It was eventually realised by all participants that only a multinational agreement could save the fishery and in 1911 Russia and Japan agreed to subscribe to the system of regulations followed by the United States and Great Britain and the four states adopted the Convention for the Preservation and Protection of Fur Seals, which forbade pelagic sealing in a wide area. Enforcement was left to the United States, Russia and Japan who patrolled the area but handed vessels found to be violating the agreement to their flag states, under whose exclusive jurisdiction they remained. Compensation was to be paid to those suffering adverse economic effects as a result of these restrictions. The treaty was denounced by Japan in 1940 and ended the following year because the protected seals were attacking fisheries commercially important to Japan and endangering the stocks. The seal population of the Pribiloff Islands increased during the period of the treaty from about 124,000 to 1,500,000. The treaties which eventually replaced this agreement are described in Chapter VI.

105. 104 British State Papers (1911) 175.
Whaling did not, before World War I, give rise to a dispute or decision similar to the Fur Seal Case. However, although Grotius and Selden made no mention in the course of their debate of marine mammals as such, still less of their special characteristics, whaling did not remain entirely unregulated during and after this period, although the purpose of early regulation was to foster the industry and to levy revenue therefrom, not to conserve the resources.

The Dutch issued 252 charters between 1597-1851 concerning the ownership of stranded whales, detailing the rights and duties of the whaling industry and prohibiting whales being taken by foreign vessels, and as already mentioned states made attempts from time to time during this period to regulate whaling beyond the territorial sea without claiming any specific limits. In 1692 a Danish edict required the permission of the sovereign for whales taken within 40 miles of the Danish coast. Much later Russia attempted to regulate by Ukase (referred to in section (a) above) whale fisheries off the Northwest coast of the United States, reserving them for Russian subjects and purporting to ban all foreign vessels from approaching within 100 Italian miles of that coast. It proved unenforceable at that period. Shortly after this when American and British whalers increased their operations in this Russian/American area the Russians did use cruisers to prevent them from entering bays within a 3 mile limit. Concern to regulate in order to preserve stocks had at last been evidenced.

106. Jenkins op. cit. n. 5 p.51; cited by Bock p.71.
Near the end of the nineteenth century, in 1896, Norway, attempting to eliminate the practice of taking an excessive number of whales (leaving them and merely hoping to re-find them later) issued a Decree imposing a closed season for whaling off Finmark and Tromso for any method of whaling which "would leave it to chance alone that a whale can be traced and found".  

Canada and Britain soon followed suit, the former introducing legislation in 1902 and the latter in 1907. They and also Portugal and South Africa began to require vessels to register with them and obtain licences. Until quite recently however, there have been few attempts to regulate maritime resources other than locally in spite of the threats to many resources, especially marine mammals, arising from the unrestricted over-exploitation which has been outlined. Seals attracted more attention than whales and there was a complicated attempt to regulate the Jan Mayen seal fishery by concurrent national legislation in the eighteen seventies to establish a closed season. Russia, in the Ukase already referred to, and subsequently the United States attempted to achieve this end by unilateral national legislation. The resultant dispute led to the Fur Seal Arbitration and Agreement discussed above.

107. Ibid, p.54.
108. Vamplew p.147; the Secretary of State for Scotland introduced a closed season for whaling within 40 miles of the low water mark off the Shetland coast in 1907.
109. Bock p.73; see also n.21.
110. Germany, Great Britain, Norway, the Netherlands and Sweden co-ordinated laws for this purpose.
CONCLUSION

The Grotian doctrine of mare liberum necessitating freedom of access for fishermen of all states to the living resources of the high seas is still a basic concept of the law of the sea today, but is now subject to two reservations. First, as the Bering Fur Seal Arbitration concluded, the doctrine requires that states, having reasonable regard for the interests of other states in exercising their concomitant freedoms, should enter into agreements to conserve the fisheries; secondly, as the boundary between national jurisdiction in the territorial sea and the international areas of the high seas remained unsettled states have continually reconsidered its limit, especially the limits of coastal states' exclusive jurisdiction over fisheries. In the next Chapter we shall see the first limited international attempts both to settle these limits and to institute a conservation agreement for whales under the auspices of the League of Nations.
CHAPTER III
THE REGULATION OF WHALING DURING THE LEAGUE OF
NATIONS PERIOD 1919-1946

Introduction

Shortly before the First World War the environmental movement to conserve whales began, starting with the eighth International Zoological Congress in 1910.¹ At a meeting of the International Commission for the Protection of Wildlife 5 years later attention was drawn to the fact that this "most important source of marine wealth would mathematically be exhausted within a short time".² The decline in catches also began at this date, as has already been described, and an American-Canadian Fisheries Conference in 1918 took up the demand for measures to halt this. The Conference proposed international action but suggested that even bilateral agreements would help to arrest the decline.³

After the War, however, as related in the preceding Chapter, the hunt resumed and intensified, and the slaughter reached such a peak that all species hunted began to be threatened indiscriminately. Excessive amounts of oil were produced, for which soon there was no market so that the economics of whaling were threatened. This led for a period to the

¹. This history has been well summarised by Bock op. cit. pp.74-79, and the following account is based on this.
². P. Savazin, International Commission for Protection of Wildlife, Berne, 1913; League of Nations Committee of Experts for Progressive Codification of International Law, Report to the Council, C. 196, 1770 (Geneva, 1927) p.124; cited by Bock and Suarez (see n.5 below) at p.239.
inter-company agreements to regulate oil production which are outlined below but in the meantime the League of Nations intervened, prompted by the work of ICES (the International Council for the Exploration of the Sea) which is described below, as are the League's measures which existed simultaneously with the inter-company agreements.

I. The Role of the International Council for the Exploration of the Sea (ICES)

ICES continually drew attention to the need for better regulation of both sealing and whaling in order effectively to conserve stocks. It pressed for regulation to be based on scientific information and principles.

ICES originated from proposals for a scheme for international co-operation in marine scientific research made in 1895. There was support for a programme in which "scientific investigation would be accompanied by a practical exposé of the steps to be taken in order to bring exploitation of the sea fishery more in accord with the natural conditions regulating the growth and increase of fish" thus increasing supplies to the European markets, coupled with a scheme which would determine whether protection against overfishing was in fact needed. The economic and scientific objectives of fisheries management were thus coupled from the start. It was later resolved "that a rational exploitation of the sea should rest as far as possible on scientific enquiry and ... that international co-operation is the best way of arriving at satisfactory results in this direction".

5. Ibid, p.5, at a Conference in Sweden in 1897 to discuss the proposal.
6. At a further Conference in 1901.
The International Council for the Exploration of the Sea (ICES) was established in 1902. It was constituted by an informal "Gentleman's Agreement" effected by an exchange of letters between the governments concerned. It had none of the organs of a modern international organisation. Instead there was established a Central Bureau in Copenhagen to which a part-time General Secretary was appointed. The bureau, acting under the instructions of an annual conference was to co-ordinate and direct appropriate hydrographical and biological research of the participating states, publishing the data obtained and relevant papers in its Bulletin. The first work (on herring and cod) was conducted by 3 committees aided by the establishment of a Central Laboratory, with a modest budget based on agreed, but unequal, contributions by the expected participating states.

Seals were soon added to the species to be investigated. The report on Northern fur seals was published in 1907 and resulted in the establishment of a sub-committee to consider the likelihood of extermination of the Baltic seals. In 1912, the collection of statistics on both seals and whales was considered.

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7. For many years thereafter it was better known as the Copenhagen Council. See Inaugural Meeting, p.13-16. The General Secretary did not become full-time until 1927, Ibid, p.69, cp. the Secretary of the IWC.

8. Belgium, Denmark, Germany, Finland, the Netherlands, Norway, Sweden and the United Kingdom.


11. Ibid, p.34.

12. Ibid, p.43.
From the beginning ICES worked well. Member states soon set up national facilities for its programmes, such as laboratories, and seconded scientists to them. It became an accessory of marine science in the participating states, remarkable for its flexibility and industry in taking on emergent problems, and an important catalyst in speeding up research.

The Council's work was re-organised after the interruption of World War I. Its area was redefined, though still limited to the North Sea; its Committee structure and its publications were expanded; its membership grew and in 1927 those interested in whaling problems met specially "to lay down a programme of work aimed at providing information on the major species with a view to conserving the stocks".

The work of the whaling committee became extremely important in early collaboration, enabling co-operative international research on whales, the results of which were published and reported back annually to the Council.

13. Ibid, p. 67-68; it found, however, that it could not justify its own International Scientific Expedition because of the practical difficulties (Ibid, p. 69). A valuable innovation was the introduction in 1926 of a system of dividing the ICES area into squares and collecting statistics on that basis (Ibid, p. 59).

14. It now included Belgium, Denmark, Finland, France, Germany, Italy, Ireland, Netherlands, Norway, Poland, Portugal, Spain, Sweden, UK: Estonia was a member briefly and Latvia also considered it. Ibid, p. 69.

15. Ibid.

16. Ibid.

17. Ibid, pp. 69 and 75. Norway, in 1927, sent its Draft Bill on Whaling to the Committee for consideration.
ICES co-operated with the League of Nations in the preparations for a Conference in 1930 to promote the rational exploitation of the seas' resources, proposing in 1929, after far-reaching discussions on the state of the stocks, that those countries interested in whaling should "as a matter of urgency give serious consideration to the question of taking immediate temporary measures for dealing with the situation".  
ICES detailed the measures required and stressed the need for uniform legislation in all whaling countries to effect these regulations. It also asked the Norwegian Government to set up a central institution to collect statistics from the whaling industry throughout the world, a proposal which became of vital importance in all future efforts to conserve whale stocks.  
ICES proposals were instrumental in bringing about the League's 1931 Convention, which it also drafted.

(II) League of Nations' Action: Conventions and Protocols 1931-39

The Assembly of the League of Nations in 1924 appointed a Committee of Experts for the Progressive Codification of International Law with a mandate to prepare a list of suitable questions and to report back to the Council with a view to holding a conference for their solution. The Committee listed

18. Ibid, p.78.
19. (i) Stipulations on the use of carcases of whales killed;
   (ii) prohibition of killing some species, especially right whales;
   (iii) protection of cows with calves, and immature whales;
   (iv) restricted areas;
   (v) restriction on capture of all species in the Antarctic;
   (vi) regulation of methods of crew payment to ensure that remuneration was not related to number of whales killed.

20. Ibid, p.79.
21. Leonard(op. cit) gives a detailed account of the developments of this period. It should be noted that the League of Nations was not formally wound-up until 1946, after the establishment of the United Nations in 1945.
the question "whether it is possible to establish by way of international agreement rules regarding the exploitation of the products of the sea". Senor Jose Leon Suarez of Argentina was asked to report thereon. The Committee recommended that the problem be submitted to a conference of experts in applied maritime zoology, representatives of marine products industries, jurists, and representatives of scientific organisations such as the Copenhagen Council. Significantly the Committee of Experts also included in its list of subjects urgently requiring international agreement the question of territorial waters. The rapporteur of the Committee considering this question made many references to this related issue and the draft convention he submitted included relevant articles on this subject.

The Conference convened by the League at the Hague in 1930 failed to reach agreement on this convention. S r. Suarez did not include a draft convention in his report.

S r. Suarez can now be seen as a man ahead of his time so far as the legal principles of marine mammal management are concerned. He wanted to create a "new jurisprudence" and believed that species useful to man would become extinct if they


were not internationally regulated. He pointed the way in an impassioned plea for conservation. His views are so pertinent to the present day problems that they are worth a detailed review. He had originally proposed a technical conference to draw up uniform regulations for the exploitation of maritime resources, "whose wealth constitutes a food reserve for humanity", relating to the continental shelf to a depth of 200 metres. This he thought necessary because current international regulation was limited in scope and area, more directed to enforcement to promote trade than to the protection of species from extinction and disregarded the biological interests which were an essential component of the economic and general interests. The result, in his opinion, was merely to delay, not to prevent, extinction thus disturbing the "biological solidarity ... among the denizens of the ocean" and leading to the destruction of other species. He stressed that most aquatic animals are migratory, and that this "creates the biologico-geographical solidarity of the species, which should find its counterpart in a legal solidarity in the sphere of international law".\textsuperscript{25} concerned.

He went on to point out that existing ad hoc fisheries agreements\textsuperscript{26} were a palliative, not a cure, since species migrate from regulated to unregulated areas. This threat to resources was particularly undesirable at a time when man was beginning to experience food shortages and simultaneously to

\textsuperscript{25} \textit{op. cit.} n.22, p.232.

\textsuperscript{26} \textit{Ibid; The existing agreements were listed in an Appendix at pp.240-241.}
expect a higher standard of nourishment. His proposals therefore were designed to protect the general interests of mankind in preserving food supplies. The most urgent need was for regulation in the productive waters over the continental shelf but international cooperation would be required for this purpose. Harmonised international rules would need to be formulated by a conference of experts "for animals, happier in this than men, are ignorant of jurisdiction and national frontiers and observe not international law but internationalism; the sea for them is a single realm". 27

He drew particular attention to the inadequacy of contemporary regulation of whaling - no treaty existed at all to prevent the modern industry from exterminating the whales, in spite of the much more advanced technology now used for this purpose which nevertheless still resulted in a "barbarous" manner of killing. Urgent pleas for an international agreement "settling such important matters as the protection of young whales, the creation of reserves for adults, and the full industrial utilisation of all parts of the captured whales" had, he said, been ignored. Nothing but a fully international agreement would suffice to protect the whales since most whaling was pelagic and the British system of taxing whale oil extracted by vessels operating from the Falkland Islands merely accelerated the rate of slaughter. "The riches of the sea", urged S.r. Suarez, "and especially the immense wealth of the Antarctic region, are the patrimony of the whole human race". The obsolete rules of existing treaties should be abandoned and a "new jurisprudence

27. Ibid, p.234.
should be based on the scientific and economic considerations which alone would see justice done". S r. Suarez's proposals also extended to pinnipeds, which he thought merited a similar approach.

S r. Suarez made three basic recommendations in his report:

(i) there should be general and local principles for the organisation of more rational and uniform control of the exploitation of aquatic fauna in all its aspects;

(ii) Reserved zones should be created, the exploitation of which should be organized in rotation, and closed periods and fixed ages for killing of aquatic fauna should be prescribed;

(iii) The most effective method of supervising the execution of the measures adopted and maintaining the necessary controls should be determined.

As a contemporary commentator remarked, the proposals came "distinctly within the scope of the legislative, rather than the declarative, process of the codification of International Law", because the subject was not at that date covered by any generally accepted principles or rules of the Law of Nations.

28. Ibid, p.235. It is of interest to note that the 3 South American states promulgating the Declaration of Santiago in 1952 (referred to in Chapters V and VI) have justified the extension of national jurisdiction over 200 mile fisheries zones on the grounds that the resources therein are their "patrimonio".

control of the products of the sea was "an instance of the evil of no law" common action restraining all nations being required as much for the maintenance of the industry as for the general profit of mankind.  

In the discussion of the Report in Committee it was noted that the res communis concept had not hitherto been explored or related to the established doctrine of the freedom of the seas. The view was now put forward that "L'idée de la res communis de la mer libre représente aujourd'hui la vérité scientifique, L'idée de la res nullius était jadis en harmonie avec la conception negative de la liberté. Elle ne s'accorde plus avec la conception positive de la solidarité qui est à la base des relations internationales modernes. La nécessité d'un contrôle international sur tous les usages de la mer pénétre tous les jours davantage dans les habitudes et dans la conscience des peuples". 31 On the other hand it seemed to others that "la Comité ne puisse pas prendre sur lui de recommander aux États le principe de la res communis" but must "se borner à préconiser l'adoption du principe que l'ensemble des États civilisés peut et doit régler l'exploitation des richesses de la mer, même libre. Le Comité pourra citer à l'appui de sa thèse les accords ou conventions passés précédemment sur le traffic des esclaves en haute mer et autres conventions semblables". 32

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31. Rosenne op. cit. n.22 p.120.

32. Ibid, p.104.
Events have proved Snr. Suarez right but the comprehensive expert conference on all aspects of maritime resources for which he called was never convened in his lifetime. It was not till the Rome Technical Conference which preceded the 1958 Geneva Conference on the Law of the Sea that this demand was faced and even then the outcome did not meet his requirements.

His report, and that of M. Shucking, the Rapporteur of the Territorial Waters Sub-Committee, were circulated to governments for their comments, which were varied\textsuperscript{33} and revealed the difficulty of agreement.\textsuperscript{34} Rumania characterized the products of the sea as belonging to the whole world and favoured the adoption of a rational system of exploitation which would preserve them intact as a fully sustained source of food and other products. Most of the replies favoured the holding of a technical conference, except those of Britain, Japan and Norway; Britain, which strongly supported the doctrine of freedom of the high seas, completely rejected the proposal to conclude any international agreement on the subject.\textsuperscript{35} The United States was prepared to consider a conference on the problem of conserving the whales. Czechoslovakia proposed that the general approach should be based on the principle of "mare res communis omnium" but that the necessary restrictions on free exploitation should then be developed.

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\textsuperscript{34}\textsuperscript{35} op. cit. n.24, p.695.

\textsuperscript{35} Ibid, p.672.
The Committee presented its report recommending the convening of a conference of experts who would draft a general convention, or a series of conventions, to regulate the exploitation of the products of the sea.  

The League Council referred to its Economic Committee the question of preparing a Convention for the regulation of whaling. This Committee studied the question in consultation with the Copenhagen Permanent Council for the Exploration of the Sea (now better known as ICES). It concluded that although there was no danger of extermination of any species there was a real risk of "commercial extinction" and recommended the convening of a committee of experts to prepare a draft. This Committee was duly constituted (though even so it was short of the biological information etc. necessary for conservation) and it submitted a draft Convention and a report to the League Assembly. This draft was then circulated to governments in 1930. The Norwegian legislation which had been introduced the previous year served as a guide but not a model, the League Convention being less comprehensive.

39. Norwegian Law of June 21, 1929; it prohibited the capture of whales in tropical and sub-tropical waters, where whales had been dangerously depleted. The Copenhagen Council considered more scientific research was required before closed areas could be internationally sanctioned. Norway at that date produced half the world's whale oil. P. Jessup "The International Protection of Whales", AJIL Vol. 24 (1960) pp. 751-752. Jessup examines this law in detail.
40. Jessup, ibid, was of the opinion that "the proposed draft is unquestionably only a half-measure", but considered it to be the only practicable first step. Significantly, in the light of current proposals for revision of the 1946 International Whaling Convention and the Antarctica Treaty he also considered it "open to doubt whether a general convention such as is proposed would be as useful as a convention between the States most vitally concerned". Continuous scientific investigations would however be vital to solution of the problem. The International Bureau of Whaling Statistics was established at Oslo by the Norwegian Government in 1930 at the request of the Copenhagen Council.
Amendments were made in the light of the comments received and the Convention was adopted by the League Assembly and opened for signature in 1931. Though no more than a compromise measure and containing the many shortcomings described below it was nevertheless a landmark in international law since until this date regulation had been unilateral and not international and thus could be applied only on the flag ships of the states legislating or within their limited territorial seas.

(i) The 1931 Convention

The Convention was opened for signature on January 16, 1932, and came into effect on January 16, 1935 having achieved the necessary ratification by 8 states, which had to include Great Britain and Norway. It was signed by 26 states, 8 of which did not ratify it, and it was subsequently adhered to by 10 others. There were important non-participants viz. Japan, Germany (which signed but did not ratify), Chile, Argentina and Russia. Even


42. The Convention was ratified by Canada, Denmark, Finland, France, Italy, Mexico, Netherlands, New Zealand, Norway, Poland, Spain, Switzerland, Union of South Africa, United Kingdom, United States, Turkey and Yugoslavia, and subsequently adhered to by Brazil, Ecuador, Egypt, Eire, Great Britain (for its colonies), Latvia, Monaco, Nicaragua, Newfoundland, and Sudan. US Department of State Press Release, April 10, 1939 and op. cit. n. 41 p.114. The British ratification on October 18, 1934 brought the Convention into effect. The UK had however legislated prior to ratification, to provide for penalties and appoint whaling inspectors and endow them with the necessary powers, in the Whaling Industry (Regulations) Act, 1934, 25 and 24 Geo. V, Ch. 49, 1934 Law Reports 418.

Albania, Australia, Belgium, Colombia, Germany, Greece, India, and Rumania signed but did not ratify.
so the Convention had much wider membership than does the present 1946 IWC. The League had not followed the advice given by the United Kingdom and Japan in their replies to the League of Nations questionnaire\(^43\) that rules regarding the exploitation of the products of the sea were best established by means of bilateral and multi-lateral conventions by the nations most concerned in their exploitation. Some commentators considered that the inclusion of a number of disinterested states made the negotiating "group" too large and unwieldy and led to an ineffective convention which had to be modified for effective conservation purposes by means of Protocols negotiated by smaller groups of concerned states.\(^44\) This is in contrast to contemporary suggestions that the IWC would be more effective instrument of conservation if either its membership included more states that have never engaged, or do not now engage, in whaling, or if it became a United Nations organisation (proposals considered in Chapter XI).

Though the 1931 Convention was limited in scope it did apply for the first time under its Article 9 to "all the waters of the world" and by Article 1 all contracting parties undertook to take appropriate measures within their national jurisdictions. They also undertook under Article 8 to license vessels. Article 4 prohibited the taking of right whales and described the varieties covered. The taking or killing of calves, immature or undersized whales or females accompanied by calves was also prohibited

\(^{43}\) League of Nations Doc. C. 196 M. 70. 1927. V, p. 146 and 172 respectively.

\(^{44}\) Leonard op. cit., p. 100-101.
under Article 5. Operators were required to carry equipment to extract oil from the parts of the whale detailed in Article 6 i.e. from "blubber, flesh and bones". Gunners and crews were required by Article 7 to be paid on such terms that the sums earned would depend largely on the size and species of whales taken and the value and yield of the oil from their carcases and not on numbers of whales killed.

The Convention's Article 8 enabled the licensing by flag states of all vessels engaged in taking or treating whales but it had several defects. It did not define the terms "undersized" or "immature"; it did not specifically protect any species except Right whales; it did not prescribe enforcement measures or penalties. It did, however, introduce methods for gathering statistical information and this led to further improvements in later agreements and Protocols as the information accrued. Overall however, the comment that "it did little more than rally the support of nations in the cause of conservation" is a fair one. The Convention was, for all its limitations, largely innovatory, although the United States in introducing legislation to effect the Convention found that it could model some of the necessary provisions on its 1918 Acts (giving effect to the 1916 Treaty concluded between the U.S. and the U.K. (for Canada) for the Protection of Migratory Birds and the 1911 Convention between the U.S., U.K., Japan and Russia for the Preservation and Protection of Fur Seals and Sea Otters in the North Pacific Ocean. Similarities to the 1930 Convention for

45. Ibid, p.100.
the Protection of the Northern Pacific Halibut Fishery were also noted. 46

(ii) Inter-company Production Agreements 47

The rapidly declining stocks which followed the renewed onslaught on whales after World War I, aggravated by the new technologies employed, led Norway, then the main exploiter, to consider ways of regulating exploitation in the economic interests of their industry. All early regulation followed this industry bias; it was regulation to preserve whaling or to derive national revenues from it 48 rather than to conserve whales as "the patrimony of the whole human race" as demanded by Snr. Suarez, taking account of scientific as well as economic considerations to secure justice (to whales as well as whalers).

Norway's Whaling Association had in 1926 established a committee to consider the need for regulation which led to the pioneering national legislation limiting the taking of certain whales by Norwegian flag ships. But these regulations were inadequate for proper conservation since they did not limit

46. For further discussion of this point see Vallance op. cit. n.41, pp.116-117; Stowell "Cooperation of the United States in Conservation of Whales" also cites as similar examples the 1930 Convention on the Pacific Salmon Fisheries between the U.S. and Canada. The current N. Pacific Halibut agreement is described in Chapter VI with other fisheries agreements.

47. A good account is given by Bock op. cit.pp.84-99; see also Leonard op. cit. p.96, and Vamplew op. cit. p.198. The last clearly reveals the inter-company rivalry which undermined the effectiveness of these agreements. The Japanese rejected this requirement.

48. Vamplew op. cit.pp.193-196; Leonard op. cit. p.96 confirms that "early attempts to regulate whaling aimed to secure a high price for whale oil rather than to protect the species". Even the Committee of Experts convened by the League of Nations reported that the purpose of their draft Convention was to introduce "certain rules intended to prevent, in the interests of the whaling industry itself, the destruction of a source of wealth available to all", League of Nations Doc.A.64, 1931.II.B.
the number of whales to be killed, or factories to be operated, or oil production. In 1930–31 the economic depression of the whale oil market forced a new approach since over 150,000 tons of whale oil had remained unsold, buyers withdrew and Norway was forced to keep its fleet at home during the 1931–32 season in an endeavour to redress the balance of supply and demand. Great Britain did not follow suit. The realisation that unlimited catches and over-production would extend the slump in oil prices to the detriment of all participants now brought most whaling companies together in 1932 to negotiate a voluntary limitation of output.

Problems arose concerning the choice of methods since each company wanted the largest share and because of the nature of the structure of the industry it was difficult to achieve an equitable solution acceptable to all. Should priority be given to the older participants who considered they had established "proprietary rights" over the whales as first comers, or to the new entrants who considered themselves more efficient? This problem of allocation is a familiar one and limits the progress towards conservation of all fisheries commissions as illustrated in Chapters VI and VIII. Proposals for allocation of quotas on the basis of average tank capacity and production during the previous season were rejected, as were counter proposals of a basis of "competitive power" taking account of tank capacity, size of catcher fleets and known catches. 49

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(iii) The 1932-1936 Agreements on Production

The solution finally adopted in the agreement of June 9, 1932 allotted quotas to all expeditions, and permitted vessels which were laid up to sell their quotas to others operating. Instead of allotting quotas in terms of oil barrelage which would not encourage companies to maximise their yields of oil per whale each company was allotted a fixed quota in terms of whales but the calculation of the quota was based on assumptions concerning the amount of oil that was obtainable from each species of whale and thus was born the concept of the Blue Whale Unit which so bedevilled the efficacy of conservatory regulation during the next 40 years, after being adopted also in the 1946 International Whaling Convention.

The Blue Whale Unit

The overall quota fixed of 2.2 million barrels of oil was allocated on the basis of whale units calculated on the formula of 110 barrels per one Blue whale or 3 humpback whales or 5 sei whales. This encouraged use of the whole carcase but did not prevent whale catchers from pursuing the larger and easier to catch blue whales. It was however a beneficial measure to the extent that it reduced the waste of whales taken.

50. The calculated whale was regarded equal to 75 feet of Blue; 110 feet Sperm; 111 feet Fin; 120 feet Humpback; 200 feet Sei; Leonard op. cit. p.93-94 fn. 20, citing Dr. Kellogg. See also Scarff op. cit. p.350 citing Bock. The IBWS used 1 BWU = 1 Blue, 2 fin, 2½ humpback, 6 sei ever since 1930. There seems to be some confusion concerning the formulae cited; sei whales were rarely taken at that period when fin whales were more plentiful. Nonetheless whatever the equation the use of a BWU formula bedevilled whale conservation until it was abandoned in the 1970's; see Ch. IX.
Companies were allotted quotas on the basis of an oil ratio. The agreement also restricted the season, adopted the restriction on length of whales taken laid down in the 1929 Norwegian law, and prohibited the sale of products to companies not joining the cartel. Unilever, then the world's major whale oil consumer, owned a whaling subsidiary company and as they were not interested in limiting their own supplies, they refused to participate in the agreement. 51

The agreement was for this and other reasons only partially successful. 13,500 fewer whales were killed and less oil was produced but the price did not rise to previous levels. Nonetheless the agreement was renewed on May 1, 1933, for a further year with lower quotas and a shorter season at the end of which not only had the oil price dropped even lower but Norway was losing ground to her foreign competitors. The agreement was not renewed for 1934-35. Some companies 52 now came to believe that compulsory regulation through governments was necessary (since voluntary agreements had proved precarious and indirectly beneficial to companies staying out) provided the regulations were equitable and universal, properly enforced and not avoidable by change of vessel registration. When whaling proceeded without restriction in 1934-35 both the number of whales

51. Vamplew p.201.
52. Notably Salvesens; Vamplew op. cit. p.20. The Whaling Committee of the Copenhagen Council (ICES) also reported in 1934 that "it is unsatisfactory to leave control largely dependent on a voluntary agreement that may cease to operate" and also stressed the need for international regulation because of whales' wide-ranging migrations. Rapports et proces - Verbaux des revisions, Vol. 84, (1934) p.42.
killed and oil production therefrom rose though the average output per catcher and per floating factory declined.53

The rise in production was less than expected because of the depletion of stocks, exacerbated during this season by the entry of Japan into Antarctic whaling for the first time.54

In June 1935 the Norwegian government acted to tighten its own regulations and replaced the 1929 law by a new one restricting the South of 50° South whaling season to 1st December - 15th March; limiting Norwegian companies to an output of 1.1 million barrels and restricting the whaling area to 40° South. The law could, of course, only be enforced in Norwegian territorial waters and on Norwegian flag ships beyond these limits, but most companies voluntarily accepted the restriction.56 In 1935-36 21 companies entered into new voluntary agreements; 8 stayed out but Norway acted to impose the restrictions mandatorily on all Norwegian registered companies, all of which were given quotas.57 3 of the 4 non-

53. See Table 20; Vamplew op. cit. p.176.
54. Salvesen's efforts to prevent a Norwegian company from selling an old factory ship to the Japanese failed; as did subsequent efforts to get the Norwegian company to insert into the contract clauses requiring the purchasers to comply with the Norwegian whaling regulations. Moreover inefficient companies refused to scrap old factory ships preferring to reduce their losses by re-sale. In 1935 Salvesen also failed in their attempt to induce the UK Ministry of Agriculture and Fisheries to require all shipyards not to sell plans for factory ships to the Japanese company and plans for a modern vessel were duly sold to this company; Vamplew p.203.
56. Salvesens and all but two others of the non-Norwegian companies voluntarily adhered to this; Vamplew p.202.
57. Some Norwegian companies re-registered in the UK; Bock p.91. The 5 Norwegian and 2 other companies which voluntarily accepted agreements shared a quota of 1,475,500 barrels; those Norwegian companies which did not voluntarily adhere received only 408,000 barrels. It was estimated that foreign non-adherant companies took about 510,000 barrels making a total of 2.4 million barrels taken in 1934/35.
Norwegian companies accepted voluntarily the further restriction in the whaling season and one imposed its own quota. Only the Japanese company operated without restriction. The number of whales killed again rose in spite of the restrictions.

In 1936 discussions were initiated for a more effective quota agreement. For the first time governments joined the companies in the negotiations. Norway had ratified the 1931 League of Nations Convention in 1932 and the United Kingdom had belatedly followed suit in 1934. These two countries were thus enabled to impose the Convention's restrictions on their vessels on the high seas. Under the new 1936 agreement\textsuperscript{58} whaling for Blue and Fin whales was prohibited south of 40° south except between December 8 - March 7; the area covered by regulation was thus increased and the hunting season diminished. The number of catchers per factory ship was limited to 5-7 and the South Georgia shore stations' season was restricted to October 16 - April 15. Oil production was limited to 65,000 barrels. For the first time an international penalty was provided - the gross value of oil taken in violation of the agreement was to be paid into an international institution to be named jointly by Norway and the U.K. A sanctuary area was also introduced.

These restrictions however were not very effective. First the provisions themselves were inadequate - the shortening of the season did not in effect limit the efforts of the better equipped vessels; the sanctuary area was one in which little

\textsuperscript{58} The agreement was effected on Sept. 1st, 1936, by an exchange of letters between Norway and the UK; Int. Whaling Statistics X (1937) p.1.
catching took place in any event; and there was no international supervision of enforcement or penalties. Secondly the restrictions applied only to the two states participating in the agreement. By 1936 the Japanese company had been joined by two German ones and neither Government was prepared to join the agreement or to accept any restriction on catch though the German government intimated that it would be prepared to do so once it had established itself. As a result of the efforts of the new entrants and the high level of quota allowed under the British-Norwegian agreement the highest number of whales were killed (of decreasing length) of any other season except that of 1930/31 although there was some restriction on oil production, which was 2.5 million barrels. In spite of this some companies began to register their ships under foreign flags to avoid future restrictions but at the same time it was perceived that only a fully international convention in which all whaling states participated could effectively preserve the whaling industry. Because of the conflicting interests of old and new entrants, this proved difficult to achieve.

59. Vamplew op. cit. p.204-205; Bock op. cit. p.92; Salvesen's registration of one ship in the Irish Free State and one in Jersey, however, was only done to avoid UK law requiring that the ships Masters be British and that some other officials hold UK certificates. Salvesen needed to appoint Norwegians to these posts. The objective was not evasion of whaling regulations. The Salvesen company remained registered in the UK and subject to UK law.

60. The arguments are outlined by Bock p.92-93.
(iv) 1937 International Convention for the Regulation of Whaling

In 1937 an international convention was at last negotiated which improved upon the 1934 one though it was valid for only one season. A conference was convened by the UK in London but not all the states invited attended - Japan refused and Portugal, Canada and South Africa only sent observers. All the Antarctic whaling states, including Germany but excepting Japan, accepted the agreement which emerged from the Conference.

For the first time countries with shore based catching stations joined with those operating Antarctic fleets in an effective and comprehensive instrument of conservation signed by 9 states.

The area and the season period of the 1936 agreement were incorporated; all seas between 40° south (except for the North Pacific) and all seas above 40° north (except the Bering Straits) were prohibited to factory ships. The taking of gray whales was prohibited by Article 4 (right whales were protected by the 1931 Convention), and the taking of blue whales under 70 feet length, fin whales under 55 feet and humpback whales under 35 feet was

62. May 24 - June 7, 1937; 11 states - Argentina, Australia, Canada, Germany, Irish Free State, Japan, New Zealand, Portugal, South Africa, United Kingdom, United States were invited. It appears (Vamplew p.206-207) that the UK did not consult its industry in convening this conference and it was suggested that UK officials had succumbed to the influence of Norwegians at ICES.
63. On the grounds that her industry was too underdeveloped to be restricted, Vamplew p.205; Bock, p.99-100, citing Norsk Hvalfangst Tidende (Sandefjord) July 1937, p.225-54.
prohibited by Article 5. Article 12 prescribed the time lag between killing and loading and Article 16 required governments to collect the "most complete biological information practicable" on each whale killed and send it to the Norwegian IBWS. Enforcement was left to national states but they were required by Article 1 to appoint inspectors on each of their flag vessels and to remunerate catchers on a basis other than numbers of whales caught (Article 13), collecting the relevant information on pay (Article 14). Although Norwegian, British and German expeditions henceforth carried inspectors the 4 Japanese factory ships and their 30 catchers were not covered by the requirement. Land stations (operated by Australia, Canada, New Zealand and South Africa) were also not covered by the Convention. States attending undertook to try to persuade states absent from the conference to adhere to the Convention.

Some states realised that more stringent measures were still urgently necessary and Norway pursued further private agreements to limit the number of catcher boats but states generally were reluctant to go so far as to legislate for the most effective measures, viz. quotas, or limitation on gear used for catching.\textsuperscript{64}

In 1937/38 8,000 more whales than in the previous year were killed, and 120,000 more tonnes of oil put on the market (with a consequent drop in prices) in spite of the Agreement.

\textsuperscript{(v) The 1938 Protocol}\textsuperscript{65}

A further conference was therefore convened in London on June 1, 1938, attended by the 1937 participants and also by

\textsuperscript{64.} Langberg op. cit. p.79.
\textsuperscript{65.} LNTS CXCVI, 131.
Japan, Denmark and France. Portugal sent an observer. There was growing awareness, reinforced by a resolution of the Copenhagen Council (ICES), that unless whales were properly conserved the species might be exterminated in time. 7 methods of regulation were considered. Four of these viz. reduction of the season; a limitation on catches; the fixing of a limit for catches in the Antarctic after reaching which catching would cease; the setting of a maximum oil-production quota for Antarctic expeditions, were rejected. The catch limit proposal was supported by an insufficient majority mainly because of the difficulties of achieving a solution equitable to small inefficient factory ships and large modern ones. The previous agreement was extended by Protocol with some, but little, improvement. A new sanctuary area was provided by Article 2 in waters which were not in any event being fished; this measure did nothing therefore to reduce the Antarctic catch. More areas were closed to pelagic whaling by Article but as a concession to Japan some areas north of the North Pacific were kept open. The 1937 size limits were continued by Article 4. The taking of humpback whales below 40° south was banned under Article 1 for a season (this did not prevent the continued operation of land stations) and in other areas for 2 years. Japan agreed to accept this but only on a voluntary basis.

66. Listed by Leonard op. cit. p.103.
Following the rejection of Norwegian demands for restriction of numbers of whale catchers, more than ever before operated in the next season.\(^68\)

The Protocol was ratified by Germany, Norway, the United Kingdom and the United States but although Japan signed the Agreement and Protocol she did not ratify it. The Protocol was undoubtedly an advance, especially as Japan expressed its willingness to accede to the 1937 Agreement and the Protocol, but the rejection of important conservation measures rendered it ineffective.

(vi) The 1939 Conference

Another (but informal) conference was convened in 1939 to consider a number of issues, especially the need further to protect humpbacks. It did not adopt any formal agreement but forwarded a Resolution to participating governments\(^69\) recommending minor modifications to the previous Protocols such as further protection for humpbacks; increased whale marking; more closed areas; keeping of better catch records; uniform inspection practices; and the convening of regular conferences. Further conferences did not take place because of the outbreak of World War II in late 1939.

Shortcomings of the Agreements of the 1930's

During the period of negotiation of the first International Whaling Agreements and Protocol, the composition of the states engaged in whaling changed, new entrants arrived. Traditional

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68. 3 factories and 25 catchers more than the previous year's 34 and 281 respectively.

whaling states became reluctant to restrict their whalers when other states did not restrict theirs. Even the restrictions already agreed, however, were inadequate for conservation. Although some species and sizes of whales were protected stocks as a whole were not conserved; catch levels remained high and as species declined the whale hunters moved on to other species. There was little scientific research and therefore regulation was based on inadequate and inconclusive scientific information concerning the biology of whales. Age and maturity could not be determined, nor could stock size. It was not possible therefore either accurately or persuasively to fix the catch level which would conserve stocks and the only quotas were those limiting oil production by private agreement. Even though the original whaling states had become persuaded of the need to cut catches they were reluctant to do so in the light of the refusal of new entrants to do likewise. The new whaling states, Japan and Germany, saw no reason in view of the accepted legal doctrines of international law permitting freedom of fishing on the high seas, to abandon their legitimate right to enter the fishery and to fish without restraint. Underlying the failure to instil a more conservatory approach in the latter states was the basic attitude of the whaling states that regulation of whaling was not the business of any states except those engaged in the industry. They were therefore all resistant to international demands that the Whaling Convention should be extended to every country in the world,\textsuperscript{70} to prevent

\textsuperscript{70} per M. Braadland (Norway) in the discussion in the League Assembly of the 1931 Draft Convention, op. cit. n.24, p.172.
unregulated operations under the flags of states not party to
the agreements and not engaged in whaling. This could only be
done if all states agreed to participate; the whaling states
made no effort to encourage this.

The extent of the failure can be measured from the following
figures: 71

<table>
<thead>
<tr>
<th>Season</th>
<th>Shore stations</th>
<th>Floating Factories</th>
<th>Catchers</th>
<th>Whales killed</th>
<th>Oil (Bls)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1930-31</td>
<td>6</td>
<td>41</td>
<td>232</td>
<td>48,874</td>
<td>3,686,976</td>
</tr>
<tr>
<td>1937-38</td>
<td>2</td>
<td>31</td>
<td>256</td>
<td>54,664</td>
<td>3,635,010</td>
</tr>
</tbody>
</table>

Numbers of whales killed

<table>
<thead>
<tr>
<th></th>
<th>Blue</th>
<th>Fin</th>
<th>Humpback</th>
<th>Sei</th>
<th>Sperm</th>
</tr>
</thead>
<tbody>
<tr>
<td>1930-31</td>
<td>29,410</td>
<td>10,017</td>
<td>576</td>
<td>145</td>
<td>51</td>
</tr>
<tr>
<td>1937-38</td>
<td>14,923</td>
<td>28,009</td>
<td>2,079</td>
<td>161</td>
<td>867</td>
</tr>
</tbody>
</table>

Of blue whales killed in 1930-31 8.14% were immature; in 1937
20.83% were and the percentage rose again the following season
to 33.39%.

The weaknesses of the regulatory regime can therefore be
identified:

(i) inadequacy of the scope of the regulations themselves;
(ii) lack of an adequate scientific data base;
(iii) non-cooperation of some whaling states;
(iv) poor enforcement without international supervision;
(v) lack of international community participation or interest,

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71. Taken seriatim from the International Whaling Statistics for
the relevant periods; it should be noted that the fleet was
not substantially larger in 1937/38 than in 1930/31 but had
become much more efficient at catching since many old factory
ships were scrapped during the economic slump in the 1930's
and were replaced by vessels with a much higher processing
capacity. Tønnesen Vol. III, p.383. See also Appendix IV.
related to lack of public perception, in general, that
whales would be grossly depleted unless effectively
protected.

III. Whaling During World War II

In 1938-39 in spite of the above restrictions the number of
factory ships operating rose to 37\textsuperscript{72} and land stations to 16,
and there was a big increase in the number of catchers employed.
Though the number of whales caught declined to 45,783, 3,111,813
barrels of oil were marketed,\textsuperscript{73} i.e. more factory ships and
more catchers were now required to kill fewer whales, proof
of the inefficacy of the existing regime. When World War II
began in 1939 vessels of all the companies were involved; many
being converted for naval or merchant naval purposes.\textsuperscript{74} By
1940-41 only 14 factory ships and 4 land stations were operating,
11 of the former and 1 of the latter in the Antarctic.\textsuperscript{75} Many
fell victim to enemy attacks.\textsuperscript{76} No pelagic Antarctic expeditions
took place in 1941-42 and only one in 1943-44 and in 1944-45.
None occurred elsewhere so that the total output for the 4
wartime seasons was only 829,293 barrels of oil, and only 82,000
whales were caught. By the end of the war a large number of
whaling vessels had been sunk,\textsuperscript{77} damaged or converted. The

\textsuperscript{72} There were 13 Norwegian; 10 UK; 6 Japanese; 6 German; 1 United
States; 1 Panamanian and 1 USSR, although the last named did
not operate in the Antarctic.

\textsuperscript{73} 93.7\% of it from the Antarctic.

\textsuperscript{74} For details of this period see Karl Brandt, "Whaling and Whale
Oil During and After World War II"; Food Research Institute:
War-Peace Pamphlets No. 11; Stanford University Press, Jan.

\textsuperscript{75} 6 Japanese; 3 Norwegian and 2 British.

\textsuperscript{76} From Sept. 1940 - March 1941 5 Norwegian and 2 UK factory
ships were lost; Bock op. cit. p.112.

\textsuperscript{77} 27 were lost and damaged; 4 converted. The UK lost 10; Norway
Norwegian fleet was the least affected. Germany retained 3 vessels which at the end of the war were apportioned one to the UK (subsequently sold by government auction in South Africa), one to Norway and one to the USSR to hasten the resumption of commercial whaling.

IV. International Regulation during World War II: 1944, 1945 and 1946 Protocols

(i) 1944 Protocol

At the outbreak of war Norway invited Germany and the United Kingdom to continue the pre-war treaty regulations and to deposit their ratifications in Norway, but in the event the war proved the best conservation measure of all. States were not unmindful of the need to resume and improve regulation as soon as possible after the war, however, and in 1944 a Conference was convened to consider post-war regulation. Australia, Canada, New Zealand, Norway, South Africa, the United Kingdom and the United States adopted a new Protocol and Final Act. They noted that there would be a post-war shortage of, and therefore an urgent need for, oils and fats but considered that any relaxation of regulation should be for a limited period and subject to safeguards.

An unsuccessful attempt was made to fix a post-war catch limit by an annual quota of 16,000 Blue Whale Units (regarded as too high by some scientists) calculated on the basis that 1 Blue Whale Unit equalled 2 Fin Whales equalled 2½ Humpback

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78. Bock op. cit. p.114; Germany then undertook to ratify the 1939 Resolution.

Whales equalled 6 Sei Whales. The intention was that this would be continued on annual basis by renewed international agreement. Even this first attempt at an annual quota system was said by many scientists, in view of the declining size of whales caught and increasing efforts required to do so of pre-war ways, to be too high.

The 1944 Protocol moreover extended the open season for Antarctic whaling by 31 days i.e. from November 24th to March 24th compared to December 8th to March 7th in the earlier agreements. The Protocol was supplemented immediately after the war, pending the establishment of the International Whaling Commission, by two further Protocols in 1945 and 1946 respectively, which extended the 1944 Protocol to the subsequent two seasons with minor modifications.

(ii) 1945 Protocol

The United Kingdom convened a conference in London in 1945 mainly to extend the 1944 Protocol but also to discuss the institution after the war of a Standing Commission. The discussions concerning the latter topic are examined in Chapter IV. Discussion of proposals for the new Protocol centred round the institution of a uniform system of penalties, the provision of inspection, and the introduction of an embargo on supplying vessels to non-party states. 14 states, excluding Japan and Germany, attended the Conference.

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(a) **Penalties**

The introduction of uniform penalties was also discussed in relation to a United States suggestion that provision should be made for confiscation of oil and other whale products taken illegally, but various countries explained that there would be legal difficulties as their systems did not permit fixed penalties but only maximum ones, the actual amount being left to the discretion of the court. 82 The U.S. stated that perishable goods could not be confiscated under their legal system; others pointed to the difficulties of applying such procedures to non-parties to the agreement, 83 though some states thought it might be possible to confiscate oil brought into countries of signatory states if taken illegally by non-party states and even went so far as to suggest that import and sale of whale products produced under the flags of any non-party state should be forbidden in territories under the jurisdiction of states adhering to the agreement. 84

(b) **Inspection**

The establishment of an independent international inspectorate was not discussed. Instead the Conference considered the best methods of national inspection and whether appointment of one inspector or two inspectors should be made mandatory instead of being left optional as under present Agreements. It was stated that it had been found impossible in practice for one inspector acting alone to exercise adequate surveillance over all operations. 85

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82. IWC Paper No. 9, 1945 (revised), p.2 per Capt. Salvesen (UK).
83. Ibid, p.3, Capt. Salvesen (UK).
84. Ibid, p.4.
85. Ibid, p.4; Commander Craik (USA).
It was also suggested that a biologist should be appointed to every factory ship. 86

(c) Transfer of vessels

There was unanimous support for the proposal that provision should be made for a ban on states parties to the Agreements supplying whaling equipment to states that were not parties to it and which intended to use it in areas where preservation of whale stocks was important. 87 No such provision was included in the 1945 Protocol however because it required legislation by some states parties to the Agreement. It was left as a recommendation in the Final Act of the Conference. 88

(d) Quotas

A limit of 16,000 BWU was set on the number of whales to be taken in the 1946/47 season although the industry preferred 20,000 BWU. Although some were aware that there was no basis for relaxation of conservation efforts 89 it was proposed that the season be extended from 3 to 4 months. 90 The legal difficulties that this proposal gave rise to illustrate the shortcomings of the pragmatic approach adopted in regulation and the lesson this provided hastened the institution of a permanent commission and a more flexible approach to amendment of regulations.

86. Ibid and IWC 12 p.3. It was objected that this would be too expensive.
87. IWC Paper No. 9, p.5.
88. IWC Paper No. 10, p.2. The US announced that it would not introduce such legislation unilaterally.
89. IWC Paper No. 10 (revised) 1945. The Chairman said that there was no likelihood of the catch reaching this limit in 1946/47.
90. Ibid, p.4. The season was brought forward as whale oil production per BWU was higher later in the season. Remington-Kellogg (USA).
The length of the season had been fixed in the 1944 Protocol but Eire did not ratify this Protocol and thus prevented its coming into effect. Eire had, however, stated that she did not object to its coming into operation without her ratification and a Supplementary Protocol was devised in 1945 to bring the 1944 Protocol into effect without Eire's ratification. This latter was signed, but not ratified, by the USA which had experienced difficulty in getting it through the Senate. The USA therefore now expressed reluctance to sign a third Protocol Supplement aimed at extending the season prescribed in the 1944 Protocol before this original Protocol was in effect for it. Moreover no-one knew what Eire's reaction would be to the second Supplementary Protocol now proposed. The USA suggested this Supplementary Protocol as a way out of the difficulty to enable those states which accepted such Articles of the First Protocol which did not conflict with earlier Agreements to bind themselves to implement only those Articles without waiting for ratification of the first Protocol as a whole by all governments.

The USA proposal was opposed on the ground that the essential requirement in law and on principle was that all states should ratify it before it came into effect. The USA in an effort to overcome the difficulty created by their inability to support the new Protocol tried to make a distinction between

91. IWC Paper No. 11, 1945, Appendix.
93. Ibid, by S. Africa.
(i) Articles of the Protocol which provided for relaxation of existing restrictions; and

(ii) Articles which represented the assumption of a new fixed obligation.

The latter it was proposed would require ratification by all states. In the end a compromise recommendation that the season should be extended was included in the Final Act only. The 1945 Protocol was then signed by all the states present.

The main additions to earlier regulations introduced by this Protocol are included in the summary of regulations below.

V. Substantive Provisions of Whaling Agreements in Force by 1946

The relevant agreements and Final Acts referred to in this Chapter now controlled whale catching by a variety of techniques as follows:

1. Restrictions on Taking of Whales
   (a) by according absolute protection to some species. Gray and right whales could not be taken anywhere. Though other species might be considered threatened they were not

94. IWC/13 1945 p.3(v). The Conference resolved that every effort should be made to overcome the legal difficulties and obtain special authority for the 1945/46 season's extension for the particular factory ships which could not reach the grounds by the opening date.

95. The Protocol was to come into effect in its entirety when the 11 governments referred to in its Preamble ratified or acceded to it, but certain parts of it were to become binding when 3 governments ratified the Protocol. Ratification by governments which were not parties to the 1937 Principal Agreement and its 1938 Protocol was not to be effective until these 2 agreements were also ratified by them.


97. 1931 Convention Articles 4 and 5; Principal Agreement 1937 Article 6.
similarly protected though catching of humpbacks was limited.

(b) by size limits\(^98\) below which it was forbidden to take whales e.g. blue whales below 70 feet; fin whales below 35 feet, humpback whales below 35 feet and sperm whales below 35 feet. Exceptions were allowed if the meat was to be used entirely for local consumption.

(c) by limitations on factory ship operations,\(^99\) closing areas\(^100\) and seasons,\(^101\) banning taking of some species and

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98. Principal Agreement Article 5; 1938 Protocol Article 4; Final Act 1938 Conference para. 18.

99. Factory ships were distinguished from land stations, operations of which were often harmful to the size and type of whale taken, though their catch was an insignificant part of the total. It was pointed out at the 1946 meeting that limitation of the pelagic catch only could lead to extension of the land station catch. Studies were recommended so that "Governments should accordingly place themselves in a position to check or regulate such a development should it occur" (IWC/4 1940). The Final Act of the 1938 Conference, para. 16 also considered whether Article 9 of the Principal Agreement permitted the use of a factory ship as a temporary "land station" when it remained solely within the territorial waters of a state. The USA supported this view but the Conference as a whole did not accept it and a compromise (Article 3) was included in the Protocol, forbidding the use of factory ships as land stations but making a concession in favour of existing enterprises.

100. Principal Agreement, Article 2; 1938 Protocol Articles 2, 3 and 7; Final Act 1938 Conference para. 15; Final Act 1937 Conference para. 7.

101. Principal Agreement Article 7; Final Act 1938 Protocol para. 8; 1938 Protocol Article 5; 1944 Protocol Article 1(i); 1945 Protocol Article 1; 1946 Protocol Article 1.
limiting others e.g. calves and suckling whales, and by establishing a catch limit of 16,000 BWU.

(d) by limitations on land station operations.

(e) by providing for the maximum use of the whale carcase.

2. **Research and Reporting**

(a) Statistics were to be collected by the states parties of the numbers of whales taken and various biological details and other information relating to whales was to be recorded.

(b) Special provisions allowed governments, inter alia, to grant their nationals permits to kill, take and treat whales for the purposes of scientific research. Interchange of scientific information and scientists, and whale marking was to be encouraged.

3. **Enforcement**

(a) **General:** The states parties were to take appropriate measures within their jurisdiction, to ensure application of the provisions of the Conventions and to impose punishment

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102. 1938 Protocol Article 1; Final Act 1938 Conference para. 13.

103. 1944 Protocol.

104. Principal Agreement Article 8.

105. 1931 Convention Article 9; 1937 Agreement Articles 11 and 12; 1938 Protocol Article 8; Final Act 1937 Conference, para. 6 and 8; Final Act 1938 Conference, para. 9.

106. 1931 Convention Articles 10(i) and (ii), 11 and 12; 1937 Agreement Articles 16 and 17.

107. 1937 Agreement Article 10.


for infractions thereof.\textsuperscript{110} They were to keep at least one inspector of whaling on each factory ship under their jurisdiction, appointed and paid by them.\textsuperscript{111}

(b) **Remuneration:** pay of gunners and crews was to be related to the size and species of whales taken, not just numbers, and bonuses calculated on results could be withheld if whales were taken from categories forbidden under the Agreements.\textsuperscript{112}

(c) **Licensing:** No vessels of any of the states parties should engage in whaling unless a licence authorising it to do so has been issued by the state party whose flag the vessel flew. The states concerned could also, if they wished, require every vessel desiring to use their territory or territorial waters for whaling purposes to have a licence which may be refused or made subject to conditions by the state concerned.\textsuperscript{113} Each contracting government was to give notice to the United Kingdom (and vice versa) when factory ships registered under the laws of their territories engaged in whaling in an area defined in Article 7 of the 1937 Agreement.\textsuperscript{114}

\begin{flushleft}
\textsuperscript{110} 1931 Convention Article 1 and as in n.111 below.
\textsuperscript{111} 1937 Agreement Articles 1 and 3; Final Act of 1945 Conference, Resolution (iii).
\textsuperscript{112} 1931 Convention Article 7; 1937 Agreement Articles 13 and 14.
\textsuperscript{113} 1931 Convention Article 8.
\textsuperscript{114} 1944 Protocol, Article 1, para. (ii); 1945 Protocol Article 2.
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4. **Miscellaneous Provisions:**
   
   (a) **Transfer of vessels:** An embargo was recommended (to avoid defeating the purposes of the Agreements) on the transfer of ships registered in contracting states to any other government which was not a contracting party to the agreements. It was suggested that transfer of whaling ships should require licences.  
   
   (b) **Aborigines:** Aborigines dwelling on the coasts of contracting states and using only canoes or similar small craft and operating only for themselves, were excepted from the application of convention restrictions.
   
   (c) **Geographical Scope:** the geographical limits to which the Convention etc. was to be applied included both the high seas and territorial seas and national waters ("all the waters of the world").
   
   (d) **Definitions:** definitions were given of several terms in the agreements e.g. of "whale"; "factory ship"; "season"; "land station".

   **CONCLUSION**

   The inadequacy of many of these regulations has already been commented upon in the preceding analysis. Since many of these provisions and recommendations never came into force, and even when they did so did not bind all whaling states, pre-war catch statistics revealed the decline of species after species. As, in addition to these deficiencies, enforcement was known to be poor

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115. Final Act 1937 Conference, para. 9; Final Act 1945 Conference Resolution (iv).

116. 1931 Convention Article 3.
it was not surprising that, with the advent of the United Nations in 1945, and in the light of the discussions that led to its establishment, a demand arose for the institution of a permanent international organisation for the supervision and regulation of whaling which would accord more with the proposals made by Snr. Suarez. A preliminary question was whether or not a new Whaling Commission should be a United Nations organisation, or whether it should be established outside the U.N. framework. The pre-war regulation by ad hoc agreements which required the convening of special conferences for their negotiation and amendment, for the convening of which there was no permanent machinery, was no longer regarded as sufficient. The lack of any supervisory body to collect and collate data and to coordinate research programmes was also widely regarded as unacceptable for conservation purposes. The respite which the war had provided for whale stocks and the post-war establishment of the United Nations, encouraged a new initiative the course and outcome of which is described in the following chapters.
CHAPTER IV

THE ESTABLISHMENT OF THE INTERNATIONAL WHALING COMMISSION

PART I: THE PRECEDENTS

1. Introduction

The problems that beset the IWC from its inception are, as will be seen, similar to those confronting all international bodies attempting to manage migratory resources subject to open access. The IWC was the first commission to be established on a global scale and to some extent its difficulties must be related to the problems faced by any pioneer, to the lack of precedents and experience and to the constraints imposed by legal principles developed in a different age, before the development of twentieth century technology and advances in scientific knowledge.

It was not, however, established in isolation, or even as the only commission concerned with whales. As outlined below other commissions and treaties impinging on whales, related species and their habitats, were already in existence and many others were to follow. As the scientific knowledge enabling management of cetaceans advanced, the ad hoc establishment of fishery commissions, and negotiation of other relevant treaties has increasingly impinged on the IWC's operations to the extent that the lack of inter-relationship of these bodies and agreements seriously undermines the IWC's effectiveness and casts doubts on its future viability. Description of other relevant conventions is related, as they proliferate, to each significant stage of the IWC's history and the extent to which they have forced the IWC to modify its policies is assessed.
The draftsmen of the International Convention for the Regulation of Whaling (hereafter referred to as the ICRW), proceeded on the assumption that whaling was a form of fishing and that the Convention must, therefore, be based on the doctrine of freedom of fishing on the high seas, which in 1945 included almost all areas where whales were found since coastal states limited their territorial seas to belts of between 3 and 12 miles, with the majority adhering to 3 miles. Regulation of whaling had therefore to be based in international law on participating states' voluntary acceptance; a Convention could contain only such provisions as states were willing to accept in pursuance of their national interests as then perceived.

The League of Nations' Conference had approved, though not codified, this general doctrine but in initiating the Convention and Protocols on whaling the League had also generated the first international conservatory regulation of whaling which hitherto had been limited to national regulations enacted by some coastal states. The League's measures had resulted however not from any growing acceptance of a legal obligation to conserve fisheries, whales, or other marine mammals as such but were based on the voluntary acceptance by some participants in whaling of the need partially to restrict their activities in order to preserve the economic viability of commercial whaling. The pre-war measures were therefore regarded as a useful guide to what whaling states were prepared to accept as restrictions on their activities and therefore a good basis for a Convention's

1. See Chapter III.
2. See Chapter II.
There were, however, few pre-war models for the institutional machinery now thought to be necessary.

There were some existing treaties which minimally regulated high seas fisheries but until the period immediately preceding World War II fisheries treaties had mainly been concerned with the establishment of the limits of national jurisdiction for the purpose of allocating to coastal states exclusive access to resources, and hardly ever with conservation of such resources. These fisheries treaties have been fully described and analysed elsewhere and it is proposed only briefly to outline the relevant developments for the purpose of putting the Whaling Convention in its legal historical context.

Johnston in his work on the law of fisheries classifies it into categories that emphasise the limitations of the ICRW viz:

(i) laws regulating exploitation of resources i.e. determining which state has authority to decide who shall have access to the resources, in what area and on what terms; and

(ii) laws concerning conservation of the resources i.e. determining what authority, be it state, group of states or independent organisation shall promulgate the measures for maintaining the species at optimal levels and defining the criteria for attaining that level.

Whether the subject matter


4. Johnston op. cit. supra, Chapters 5-10, though he notes that "in a positive doctrinal sense, there is no international law of fisheries", Introduction p.xv.
of a treaty concerns exploitation or conservation the authority it establishes can be further classified into those under which the regulatory authority is (i) unshared i.e. no other states take part in its exercise, or (ii) shared i.e. with one or more participants in the fishery or with adjacent coastal states, restriction being kept to the minimum necessary to ensure the widest sharing of benefits, or (iii) modified i.e. the states concerned surrender only part of their exclusive right to control exploitation or conservation. In such an analysis the IWC as constituted falls within the category of a modified conservatory authority. Access to the resource is largely free and on equal terms but participating states voluntarily surrender some of their powers of conservation as flag states and coastal states to a commission which can uniformly restrict their activities, as we shall see, to the extent acceptable to them. In many ways, even with these limitations, the ICRW was a considerable advance on most previous fisheries regulation.

2. The Early Fisheries Agreements

(i) Fishery limits: The first fisheries agreements fell into the category of exclusive control of exploitation since they were concerned with establishing the outer limits of territorial waters and the policing of national fishing activities. In international areas inter-state agreements resulted from disputes concerning claims to exclusive limits and treaties were directed to establishing procedures, such as claims commissions, and uniform policing for settlement of such disputes.

5. Ibid, Ch. 5, p.157-252.
(a) A Mixed Claims Commission for the Northeast Atlantic led to a definition of exclusive 3 mile fishery limits off Britain and France;

(b) The North Sea Fisheries Convention 1882 used 3 mile limits to protect states against the destructive effects of trawling.

(ii) Conservation:

(a) The Bering Fur Seal Treaty 1911

The arbitration of 1893 which gave rise to this has already been described. This treaty too concerned the limits of exclusive coastal state control but in this case the award included the first proposals for managing a common fishery resource in an international area, recommending detailed modification of unfettered freedom of the participating states to exploit such resources. The tribunal, in view of the principle of freedom of fishing on the high seas, could only recommend such measures to the parties to the arbitration agreement i.e. the United States and Britain (for Canada), and they could enforce them only within their national jurisdiction. The conclusion of a convention by the USA, Japan and Russia to enforce the restrictions recommended was an important landmark, but the award itself


7. Laws and Regulations, supra, p.695. 8 states attended the initial conference in 1881 viz. Belgium, Britain, Denmark, France, Germany, Netherlands, Norway and Sweden. The two last named did not ratify the Convention. Similar limits were fixed by arbitration between Britain and Canada in 1910; North Atlantic Coast Fisheries Award, Sept. 7th 1910, Hague Court Reports (1916) J.B. Scott ed. p.1.

did not create or recognise any authority in either of the parties to prescribe or apply conservation measures on the high seas: it restricted their authority to exploit. The measures laid down in the resulting 1911 Treaty (described in Chapter III) were not conservatory in the modern sense i.e. based on scientific findings and theories of optimum population, but were confined to such regulations as prohibition of certain areas, seasons, gear and types of vessel. Though surveillance and arrest were effected by the 3 states patrolling the area, prosecution was left to the flag state of the offending vessel. After the Japanese denunciation of this treaty in 1940, however, it was replaced by the bilateral Provisional Fur Seal Treaty of 1942, described below, which became a model for the IWC.

In the period preceding and prevailing at the time of the agreements and proclamation described above, freedom of fishing and freedom of navigation continued to be identified because maritime states were anxious to refute the pretentious claims of some coastal states. They thus found it expedient still to support the doctrine of the inexhaustibility of the seas which permitted this identification which, although already in doubt for some species, had not yet been shown to be incorrect by scientific research and findings. There was very little fisheries research in the nineteenth century. It was generally assumed that overfishing was due to too many participants and that all that was necessary to correct it was to reduce

10. Johnston op. cit. passim.
coastal fisheries to exclusive state control, the considerations for this view being political and unscientific since there was no general awareness of the need for management and research, whether biological or economic. These perceptions began to change towards the end of the nineteenth century.

(b) The North Sea Overfishing Convention 1882\(^{11}\) introduced several progressive measures. Some North Sea States agreed, for the purpose of establishing good order among states exploiting fisheries in that area, to harmonise the registration and numbering of vessels, the use of certain kinds of fishing gear, the salvage of derelict gear and the superintendence of these matters by national fisheries protection cruisers. The United Kingdom followed this up by convening a further conference in 1893 to discuss fisheries problems but as there were so few scientists engaged on marine research discussion was minimal and no progress could be made.\(^{12}\) States realised that some organisation of marine scientific research was required and this led to the establishment in 1902 of a body that was to have a profound effect on fisheries conservation in general and whales and seals in particular, the International Council for the Exploration of the Sea (ICES). Its work stimulated the League of Nation's Convention and Protocol and has already been referred to in Chapter III, but it contributed also to the structure of the IWC.

\(^{11}\) See n.7 supra.

3. Agreements Concerning Fisheries 1900-1947 Relevant to the IWC

(i) Scientific Research

(a) The International Council for the Exploration of the
Sea (ICES) (1902). The structure of this body has been
described in the Introduction to the previous chapter. It
was pointed out that it was a catalyst in bringing about
improvement in regulation of whaling as was agreed before
World War II.

The ICES Whaling Committee continued thereafter to draw
attention to the increasing intensity of whale exploitation,
and to the short-comings of both it and the inter-company
agreements. In 1934 they had recommended more conservatory
measures, which they detailed, and urged whaling states not
only to take the necessary statutory powers to enforce them
but to undertake more statistical and biological investigations
of whales and the fisheries thereon. Their advice was not heeded
but as the inter-company agreements failed and stocks continued
to decline the committee "continued to act as an efficient
watchdog of a process that they thought could only lead to
disaster". Their advice led to the further Protocols described

13. See Went op. cit. supra, passim. Koers "The International
Regulation of Fisheries" p.77-79; Johnston op. cit. p.91-92;
Christy and Scott "The Commonwealth in Ocean Fisheries"
p. 198 ; UN DOC.A/CONF.62/L14 10th August 1976, Annotated
Directory of Intergovernmental Organisations Concerned
with Ocean Affairs, p.133.


15. Ibid, p.87; e.g. concerning methods of capture and working-up
of whales; vessel registration; limitation of the number
of land stations, factory ships and whale catchers; or
alternatively limitation of the catching period in any
one season. See Ch. III.

in Chapter II, but not to any reduction of effort. At their last meeting before World War II they "viewed with alarm ... the evident decline in the stocks of blue whales" and stated that "nothing less than a limitation on the total amount of whale oil which may be taken in any whaling season can be effective in preserving the stock of blue whales from being reduced to a level at which it can no longer be the object of exploitation".17

As ICES in 1946 had no constitution18 it was not put before delegates as a model and though NEAFC, as will be seen, relied on it for scientific advice, no direct links with it were written into the ICRW. It merits full consideration at this stage, however, since it prompted the IWC's founding governments to perceive the need for cooperative international research on whales and to relate regulation to scientific findings. ICES work also stimulated the IWC to institute a Scientific Committee. The ICES model has become especially relevant in the context of the current problems of the IWC19 which require it to relate to other bodies and agreements related to the protection of whales.

(ii) Regulation and Conservation

(a) **Provisional Fur Seal Treaty 1942 (PFST)**

This renewed most of the 1911 Convention provisions but between Canada and the U.S. only. It prohibited their nationals, except for aborigines, from engaging in pelagic sealing. An innovatory provision was that seals were to be caught only by

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17. Ibid, p.92.
18. It did not adopt one until 1968; see Chapter VIII.
19. See Chapters XI and XII.
the state in whose jurisdiction they were found; in compensation 20% of sealskins taken by the United States went to Canada, and vice versa. This operated as an abstention principle since seals did not migrate into Canadian jurisdiction. Scientific permits could be issued to nationals of either country. The U.S. exclusively regulated the seals within her jurisdiction but on the high seas the regulations were enforceable by officers appointed by either country with powers to seize and arrest violators, though the captured offender then had to be handed over to his national state under whose exclusive jurisdiction he remained; proceedings were instituted and penalties imposed by this state alone. This agreement was included in those placed before delegates to the Whaling Conference in 1945 as a possible model for the IWC. In the event it followed the system of specific regulation with exemptions in favour of aborigines and scientific permits. It did not adopt the abstention principle, nor the system of joint enforcement.

(b) International Pacific Halibut Convention 1924, 1930
1937, 1943\textsuperscript{20} (IPHC)

The regulations developed for the exploitation of halibut in the North Pacific had provided the first true example in the world of limitation by regulation of states' exclusive national rights to conserve stocks. They are often cited as the origin of modern fisheries regulation and were used as a model by the drafters of the ICRW.

\textsuperscript{20} Johnstone, p.373-384; Koers p.80-82; UN Annotated Directory p.113.
The United States and Canada first adopted joint measures by treaty in 1923. The measures were directed to the rebuilding of stocks in the deepsea and international areas. A uniform system of statistics was introduced on the basis of which the complex biological problems of controlling catch rates could be studied taking into account the biological relationships of the area as a whole, without artificial boundaries. The Convention introduced closed seasons and instituted the first international Fisheries Commission in the world with its own independent research staff and power to initiate recommendations, although this part of the model was not followed by the ICRW. There are 3 Commissioners from each party. It was amended in 1930 to extend the Commission's powers by allowing it to alter the date of the closed season, divide the waters subject to the Convention, limit the catch therein, license vessels, fix their departure dates, collect statistics; fix the type of gear used; close grounds populated by immature halibut and conduct scientific investigations. A third Convention in 1937 extended the Commission's role to controlling the incidental catch of halibut in other fisheries and banning the departure of vessels to areas where vessels already departed could take the Total Allowable Catch (TAC). The Commission's policy

22. One concurring vote of 2 from each state is required for the adoption of proposals.
23. (1930) LNTS CXXI, p.45.
24. (1937) LNTS CLXXXI, p.209. The ICRW, with its wider participation, could not include this provision but the IWC has had to concern itself increasingly with this problem and its relationship to other Commissions regulating fisheries which incidentally kill whales.
was to keep the TAC just below the additions made to the stocks by growth, and recruitment. This policy influenced the approach of the ICRW, but by 1946 growth in catching power was necessitating drastic reductions in the seasons and a new treaty was being called for to enable the Commission to plan fishing effort more evenly throughout the year, by dividing the season.  

(c) International Pacific Salmon Fisheries Convention, 1930 (IPSFC)

This Commission also provided a model for the IWC. It was established by Canada and the United States to investigate this declining fishery. It applied to all the Fraser River Salmon fisheries and also to those in territorial waters and on the high seas. The Commission consisted of 3 commissioners from each state and employed its own research staff to investigate the fisheries prior to regulation. An administrative committee advised on orders and regulations. Initially the Commission did not have any independent regulatory powers but in 1946 the members delegated their national regulatory authority to it and in 1957 the Convention was revised to effect this and to introduce a system of mutual enforcement. The ICRW, however, did not follow the 1946 amendments.

25. A fourth Convention was adopted in 1953: Convention between Canada and the United States of America for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, 1953, UNTS No. 3024, p.222, 77; See Ch. VI. The 1930 Convention was not ratified until 1937.

(d) **North East Atlantic Permanent Commission 1946** *(NEAPC)*

It had, however, been suggested as early as 1937 that ICES might play a role in the management of North Atlantic fisheries by being given power to modify conservation regulations to be laid down by Convention. The 1946 Overfishing Conference which established a Permanent Commission (hereafter referred to as NEAPC) limited its role to effecting conservatory regulations recommended by ICES. A Liaison Committee of ICES and the Commission was established for this purpose but the ICES recommendations required unanimous approval by the Commission to become effective. The limited measures adopted in 1946 were soon found to be inadequate; supplementary measures proved difficult to negotiate; control and enforcement were also weak in practice. The 1946 Commission's failure to effect ICES advice partly because of the limited measures provided for in its Convention and the lack of international enforcement, led to its replacement in 1959 by a new North East Atlantic Fisheries Commission (hereafter NEAFC) which did not establish its own research body but retained the link with ICES.

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30. See Ch .VI. It too had no Joint Enforcement Scheme in effect until 1972, after separate negotiation.
NEAFC was not a direct model for the IWC: as it was being negotiated simultaneously, however, its concepts were similar apart from the use of ICES which the IWC did not emulate. It is noteworthy that although NEAFC did not establish any direct link with the FAO, which was also established in 1945 (as a Specialised Agency of the simultaneously founded United Nations), ICES initiated co-operation with FAO soon after its foundation.

(e) International Commission for Northwest Atlantic Fisheries (ICNAF) 1947

This body was not a direct precedent of the IWC, but, as with the NEAPC, it reflected the prevalent concepts concerning fisheries management bodies. It did not have a direct link with ICES but stressed the need to avoid duplication with its research activities. ICNAF provided for consideration after two years of establishment of a formal link with the FAO; it then decided against this though stating that it would maintain working arrangements with public international organisations with related interests such as ICES and FAO. A similar provision was inserted into the ICRW.

31. Went op. cit. p.103.
32. UNTS 2053, p.157; Koers p.92-95; Johnston p.365-369; After the declaration of a 200 mile Fisheries Zone by Canada in 1976 the Convention was abrogated and replaced in 1978 by the new North Atlantic Fisheries Organisation (NAFO), described in Chapter XI, which takes more account of the ecological approach to fisheries management now advocated by scientists. UN Annotated Directory p.110; entered into force 1950.
ICNAF consisted of a Commission of its 18 participating states which collected and reviewed the information compiled by these states nationally through internationally coordinated programmes of scientific research the results of which it published. The Convention only applied to high seas fisheries; unlike the ICRW it did not cover fishing in territorial waters. Withdrawal was possible, after 10 years. Enforcement was originally left to flag states. ICNAF aimed at maintaining a maximum sustainable yield of all living resources in the Convention area by means of recommended conservation measures detailed in the Convention. The Convention, which established a regulatory regime similar to the IWC's, had to be amended by Protocol and revised inter alia to allocate the TAC by national quotas since stocks declined from overfishing under the original regulations.

(iii) **Sanctuaries**

(a) **Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, 1940**

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33. Each state had 3 Commissioners but only 1 vote. 9 states were also members of the IWC, viz. Canada, Denmark, France, Iceland, Japan, Norway, UK, USA, USSR. 3 attended the IWC as observers from time to time viz. Italy, Portugal, Spain; species regulated included salmon.

34. Joint Enforcement Scheme was not introduced until 1971.

35. These included fixing a total allowable catch (TAC) and regulating mesh sizes etc. to prevent overfishing.

This was the first treaty with exclusively conservatory objectives, negotiated between 21 American states. It created national sanctuaries "to protect and preserve in their natural habitat representatives of all species of the native fauna in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control".\(^{37}\) The Convention was limited to American governments but was unlimited as to area of application. An Annex listed certain species whose protection was regarded as of special urgency and importance by the listing state. These included the blue whale (Argentina and the USA); and the right, bowhead and grey whales (USA).\(^{38}\) The concept of sanctuaries was early introduced into the practice of the IWC. At its most recent meeting, the 31st in 1979, the entire Indian Ocean was declared a whale sanctuary. The system of listing protected and endangered species has also recently been adopted in the treaties on Trade in Endangered Species, and on Migratory Species described in Chapters VIII and XI, respectively. Such treaties affect greatly the operations of the IWC; their effects are discussed in the final Chapter.

4. **Extension of National Jurisdiction**

   (a) **Truman Proclamation, 1945**\(^{39}\)

The Whaling Conferences took place coincidentally with President Truman's Proclamations of (i) continental shelf rights

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37. Preamble.

38. Other species listed include various seals, manatees and sea otters; listed states include the USA, Chile, Peru, Brazil, Costa Rica, Panama, Guatemala, Venezuela.

i.e. coastal states rights to assert jurisdiction over the natural resources of the continental shelf contiguous to their coasts; (ii) fishery conservation zones. This stated that "In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States where fishing activities have been or may in the future be developed and maintained on a substantial scale". The U.S. did not attempt under this proclamation to regulate whaling in such areas but the Proclamations, as will be seen in Chapters V and VI, were instrumental in provoking the South American states in 1952 to assert jurisdiction over whales within 200 miles of their coasts and to develop their own independent Commission. The Proclamations in the long term encouraged coastal states generally to assert preferential rights in extensive areas of coastal waters, a process now accelerated by the UNCLOS III proposal of 200 mile Exclusive Economic Zones for coastal states. These and their serious consequences for the IWC are considered in Chapter XI.

CONCLUSIONS

It is important to an understanding of the provisions in the Whaling Convention to note the precedents for international regulation of fisheries at the date of the 1945 London and 1946 Washington Conference on Whaling, and their limitations.

40. The Permanent Commission for the South Pacific described in Chapter V; see also Johnston op. cit. p.334-341.
There were no global organisations comparable to that which these conferences proposed to establish and the few that existed were limited both as to parties and species regulated. NEAFC and ICNAF were only in the process of establishment; their subsequent experience of the problems of relating the fixing of the TAC to scientific advice, or introducing national and species quotas and Joint Enforcement Schemes, was not available. Only the Provisional Fur Seal Treaty, limited in area and parties, regulated taking of marine mammals; neither the International Tropical Tuna Commission nor the International Convention for the Conservation of Atlantic Tuna which now provide models for the management of large and highly migratory species was in existence, and the UN's FAO had only just begun work. Using the existing models however, the delegates to the 1945 and 1946 conferences had a number of options before them for the improvement of whale regulation:

(i) **Total Allowable Catch (TAC):** the PFST, IPHC and IPSFC provided precedents for fixing this, followed by NEAFC and ICNAF.

(ii) **Commissions** existed under the PFST, IPSFC and IPHC and were to be set up for the NEAFC and ICNAF.

(a) **Membership:** The IPHC, IPSFC and IPFSC had closed membership; ICES was open to all states of its area; ICNAF and NEAFC were to be open to all.

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41. Ch. VI, p.292.
42. Ch. VIII, p.413.
43. Koers op. cit. Ch. III, p.119-170, analyses the options open to fisheries institutions.
Specialised Committees were used by the IPHC and ICES, and planned for NEAFC and ICNAF, for administration and scientific purposes. Most were established by the Plenary Sessions of the annual meeting; and established their own specialist sub-committees, but no existing body had an Economic Committee.

Voting: the IPHC and IPSFC required 2 of the 3 Commissioners of each state party to concur; the NPSFC required unanimity; NEAFC and ICNAF were to work by simple and qualified majority voting, the former requiring a $\frac{2}{3}$ or $\frac{3}{4}$ majority for some decisions.

Regulatory powers varied, those of the IPHC providing the most comprehensive example, but none included limitation of initial entry or effort apart from the Fur Seal abstention principle, or alternatively they did provide other techniques for persuading non-members to join such as prohibition of transfer of vessels to non-members, or of trade with them in the products regulated.

Enforcement. There was limited international surveillance under the PFST, IPSFC and IPHC based on mutual enforcement i.e. the vessels of one party could inspect offending vessels of the other party or parties on the high seas and could report them to their flag state but not prosecute them. No such schemes were planned for NEAFC or ICNAF and no existing convention provided for either an international enforcement scheme, whereby the regulations could be enforced by states or bodies other than the flag state, or an international observer scheme, with fishing vessels carrying inspectors who were nationals of states other than the flag state.
(v) **Scientific Research.** Although some conventions left this to national means such as the PFSC and ICNAF, there were alternatives: the IPHC and IPSFC employed their own research staff and the NEAFC used ICES, establishing a special liaison committee for the purpose. ICES had included several scientists particularly interested and experienced in whale research and had already fulfilled an advisory role for the League of Nations. Issuing of scientific permits to take regulated species at national discretion has been introduced by the PFSC.

(vi) **Sanctuaries:** The Convention on Nature Protection drew attention to the possibility of preserving at least some species by protecting them in permanently closed areas.

The Convention adopted in 1946 to regulate whaling has not been revised but has been subjected to more intensive international criticism than any other fisheries convention. It is important, in assessing its operation today, to realise the severe limitations placed upon its negotiation, not only by the legal concepts then prevailing but also by the existing treaties which had attempted to modify the effects of these concepts, which had led to severe overfishing of some species. Only in the light of these precedents can the ICRW be understood. Also important to an understanding of how the current problems have emerged is the ad hoc institution of a variety of species, area and parties specific fishing agreements and commissions with formal or informal inter-relationship. The UN's FAO, which might have served as a liaison body to integrate the activities of commissions regulating inter-related species or areas, had only just been instituted and could play no part in the drafting conferences of the whaling convention.
PART II: THE INTERNATIONAL WHALING CONFERENCES 1945-1946


(i) Introduction

Following the respite from intensive commercial whaling which World War II provided, the proposal, considered but rejected by the League of Nations, for an international agency to control whaling was revived. The post-war draftsmen of proposals for regulation, however, never contemplated an autonomous organisation with comprehensive powers to regulate whaling independently of the authority of member states for which there was no precedent. In 1945 a Conference was convened by the United Kingdom primarily to review and renew the 1944 Protocol but also to consider the organisational question. It was attended by 14 states. Germany and Japan could not be invited because a state of war continued.

(ii) Consideration of a Standing Commission

It was proposed that a Standing Committee be established with powers to vary the earlier Agreements within certain defined limits. From the outset the most that was envisaged by any state attending was the establishment of "effective administrative machinery for modifying in specific minor respects the terms of the existing international agreements on the regulation of whaling".

44. Argentina, Australia, Canada, Denmark, Eire, France, Germany, Netherlands, New Zealand, Norway, Mexico, Union of South Africa, United Kingdom and United States.
45. IWC Paper No. 3, 1945, Agenda Item 7.
The United States "favoured in principle the eventual establishment by international agreement of a standing committee with powers to make recommendations relating to minimum lengths of whales, to become effective on approval by the governments parties to the agreement" which would be an advance on existing methods of control since the regulations could be proposed by an expert committee on the basis of scientific findings and would be effected by each government concerned, thus avoiding the present ad hoc system which needed a new treaty to enable every change or amendment, which then had to be submitted to parliaments, with all the consequent delays. The USA made it clear, however, that it was not prepared at that date to enter into any agreement for the establishment of an international commission with powers to modify the terms of agreements without the governments having an opportunity to consider and approve or reject the suggested modifications. They did, however, consider that it was undesirable that there should be established any commission which would purport to represent only the major whaling countries. They proposed that the commission should be composed of the persons best qualified to act in the interests of all countries concerned for the best utilisation and conservation of the resource. Among its duties could be the supervision of research; the analysis and interpretation of statistics; the determination of the dates on which the annual whaling quota would be deemed to have been reached and the preparation of recommendations for future international whaling.

47. Ibid.
49. op. cit. n.46.
No state revived the comprehensive approach to management of whales as a res communis advocated by Snr. Suarez, nor did this conference share his perception of the need for a "new jurisprudence" to safeguard the "patrimony of the whole human race". Instead discussion centred on means of obviating the difficulties which were likely to arise if every future amendment required a treaty. The commission was discussed in terms of a body which could make minor regulatory changes without the need for ratification. It was pointed out that some body would also be needed, if an overall oil production limit was fixed, to allocate the permitted quantity among the various countries and expeditions. Alternatively it was suggested that the Standing Commission should fix in advance a quota for each factory ship participating in the fishery.

The United States stressed the importance of any commission's role in gathering data. Its own proposal was based on the Pacific Halibut Commission: each government could establish its own machinery for transmitting the requisite available data to the International Bureau of Whaling Statistics (hereafter referred to as the IBWS). They would provide it with catch figures in Blue Whale Units (hereafter referred to as BWU) and on the basis of the information thus received the Commission would notify governments of the date on which they decided the total quota fixed would be reached; taking or processing thereafter would be illegal. In the discussion on this proposal the

50. See Ch. III, pp. 108-112.
51. IWC Paper No. 9, 1945 (revised).
52. IWC U.S. No. 2, 1945.
fear was expressed that a small minority of states might imperil the successful working of the Commission if there was not also provision for international enforcement of these decisions. The matter was then however held over until a further conference to be convened the following year.

(iii) Catch limits

The need for a speedy implementation of the US proposal was underlined by the adoption of a high catch limit of 16,000 BWU for the forthcoming season (the industry recommended 20,000 BWU and a staggered, not a fixed, season, without any other restrictions). This was said to be necessary in the light of present information on fat and oil needs and on whale stocks. The forthcoming problems of the IWC were foreshadowed by this attitude and the opposition to the suggestion that the proposed limit required an equitable allocation of the catch, perhaps on the basis of a fixed quota per ship, which might make some expeditions uneconomic. It was suggested that this possibility should be made clear to new entrants.

Conclusion

The 1945 Conference took place against a background of competing community interests. The doctrine of the freedom of the seas was accepted by all participants without challenge but the USA submitted, in a background paper, that "it was a basic principle of the US conservation programme that purchase of a licence to exploit natural resources does not grant a right to destroy that resource. A licence confers the privilege of

utilising a resource, which belongs to all of the people and not to the licensee". This principle did not appear in either the Protocol or Final Act adopted by the Conference, since the 1945 Conference took place against a background of post-war chronic shortages of food and fats, a situation that continued for some time. The UK official addressing the Opening Session of the Conference said "My Minister cannot over-emphasise the need for doing everything possible to increase the production of whale oil during the next two years ... from our point of view it would be a tragedy if any international machinery were to get in the way of that increased production." Dr. Kellogg (USA) warned, however, that former oil producing countries might rapidly resume production and reduce the demand for whale oil; over-building of factory ships ought therefore to be discouraged. The progress made in whale conservation should not be sacrificed to the world fat situation.

55. IWC Paper No. 6, 1945, p.1. Statement by Mr. Harrison (UK Ministry of Food). He added that there was a statistical world deficit of oils and facts of something like 1 million tons when consumption was increasing; see also IWC Paper No. 5 (1945) UK "Prospective World Supplies of Oils and Fats."
57. Ibid, p.3; Dr. Kellogg (USA) and Mr. Setter (Australia).
The inconclusive discussions concerning the establishment of an international commission to regulate whaling revealed many of the weaknesses in perceptions about the nature of the legal regime required for conservation. These were to lead to the early failures of the Commission as finally established. From the outset the Commission was generally viewed as one limited in scope, without independent inspection of national enforcement, and without adequate international research facilities. Scientists did not take part in the discussions but the whaling industry took a major part as adviser to most delegations. In the Protocol adopted expediency triumphed over stringency and long-term advantage, and the legal tangle of Protocols was continued for another year but the problems which had arisen from this pragmatic approach were instrumental in stimulating governments to convene a further conference in 1946 to institute more satisfactory standing arrangements. The less stringent Protocol of 1945 was understandable in the light of post-war problems but less acceptable as the basis of a long-term treaty. Crucial decisions therefore faced the 1946 Conference.


   (i) **Introduction**

   The Conference was attended by 15 states. Japan did not take part, nor did any non-whaling states, in spite of the

58. IWC/7, 1946, convened by the USA, opened Washington, November 20, 1946.

59. IWC/7, 1946. Argentina, Australia, Brazil, Canada, Chile, Denmark, France, Netherlands, New Zealand, Norway, Peru, United Kingdom, United States, USSR. Iceland, Eire, Portugal, Sweden, attended as observers.
US views on the undesirability of a commission limited to
whaling states.

The Conference's objectives were limited to the advancing
of international cooperative effort in whale conservation;
coordination and codification of existing regulations;
establishment of effective administrative machinery for the
modification from time to time of these regulations as conditions
required.

The immediate task was still regarded as "administrative
in character" but the broad objectives of whale conservation
were frequently referred to.

In his opening address to the Conference Dean Acheson
stated the interest in, and responsibility for development of,
whale stocks as "a truly international resource in that they
belong to no single nation nor to any group of nations but
rather they are the wards of the entire world," adding that
"whale conservation must be an international endeavour ...
each nation, whatever its direct or indirect interest in
whaling, will ultimately participate actively in the great
tasks of fostering and developing this common resource". 60

An analysis of the treaty adopted at the end of this Conference
reveals that terms such as "world wardship" and "common resource"
had no legal significance and were interpreted as requiring
regulation to maintain an optimum yield; the "freedom of
access" to the resource, for all states remained the basic

60. IWC/11, 1946, p.1. Mr. Acheson was then US Acting
Secretary of State. IWC/3 1946.
principle of international law and whale stocks retained the status of a common property resource.

The Conference had two main items on its agenda:

(a) the development of a code of regulations for the 1947/48 and subsequent seasons, based on codification of existing regulations, and

(b) the establishment of a new institution, the International Whaling Commission to promulgate future regulations.

The subject matter of (a) was to include inspection, uniform penalties, collection of biological data, the limit of the Antarctic season and catch limitation therein, size limits of whales, closure of specified areas and designation of others as sanctuaries, all of which measures had emerged either before or after World War II as the issues most requiring regulation if whales were effectively to be conserved.

(ii) United States Draft Convention

The US, now the leading critic of the Whaling Convention, and pressing for a revision or replacement of it, was, in 1946, a main contributor to its terms for the only draft concerning (b) placed before the delegates was a Draft United States Whaling Convention 61 which described itself as a Convention to provide for the orderly conservation of and development of whale fisheries. In producing this draft the United States had drawn on its experience with fisheries and other similar

61. IWC/8, 1946.
treaties concerned with management of shared resources, discussed in Section I. The draft's objectives recognised the need to prevent future over-exploitation; the common interest in the resource and in restoring stocks; the role of regulation as the instrument for achieving these purposes; and the need for a permanent system of management by means of a Standing Commission and a Schedule of Regulations amendable by it, enabling it, said a US delegate, "to keep a finger on the pulse of whaling".

The Convention adopted by the Conference followed the US draft closely. In the account of the Convention which follows attention will be drawn to points where the Convention diverged from this draft.

PART III: THE INTERNATIONAL WHALING CONVENTION, 1946

The International Whaling Convention 1946, which is attached as Appendix II, was adopted on the second of December and was signed initially by 15 states. The Convention has since

62. Delegates had amongst the materials before them the previous Whaling Convention and its Protocols; the Fur Seal Treaty between the US and Canada (1942 U.S.T.S. 415); the 1943 Pacific Halibut Treaty between the US and UK (U.S.T.S. 70); the 1930 Salmon Treaty between the US and Canada (U.S.T.S. 918); the Great Lakes Treaty between the US and Canada, 1946, 39th Congress. As the latter does not concern sea fisheries it has not been included in this work.

63. US Draft Article II.
64. Ibid, Article IV(i).
65. IWC/14, 1946, p.27, statement by Mr. Floy.
66. International Whaling Convention 1946, Printed by Direction of the Commission 1946, p.6. Annex I. The original signatories were Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, Union of South Africa, USSR, UK, USA.
been amended by Protocol only to enable an international observer scheme but the Schedule has been revised annually. These revisions are detailed in subsequent Chapters. Ironically, since the United States have been prime movers in recent attempts to revise or replace it, it owed a great debt to the United States Draft Convention.

1. **Principles and Objectives: The Preamble**

The Convention, based on the US draft, commences with a Preamble in general terms which is not binding though it is a useful guide to interpretation of the substantive articles. It recognized "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by whale stocks" and acknowledged the historic over-fishing and the resultant need to protect all species from further depletion. It recognized that whale stocks could increase if properly regulated and considered that regulation would enable an increase in catches without danger to the stocks. It regarded the achievement of the "optimum level" of stocks as the objective that was in the common interest and urged that this level should be achieved as far as possible "without causing widespread economic and nutritional distress". "Optimum level" was not defined. The Draft Convention's objective had been "a level which will permit a sustained capture of the maximum number of whales" and in practice, as will be seen in subsequent Chapters, the IWC

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67. The Draft Convention had referred to the resource as "The whaling fisheries".
interpreted the optimum level not as giving the maximum sustainable yield (MSY) but as that which would simply yield a quota on a sustainable basis within the context of the single Blue Whale Unit system. The latter phrase, which is in very general terms, also was not further defined. The criteria of any adverse economic effects are therefore left extremely vague. The Preamble also limited catching to "those species best able to sustain exploitation" to give other species an opportunity to recover. These species are not described in the Convention itself but are listed from time to time in the Schedule, which as in the US draft, "forms an integral part thereof". Finally the objective of the Convention is

68. During the first 20 years of the IWC, MSY, equated with the principle of maintaining populations at the size which theoretically would yield the largest harvest indefinitely i.e. at a level known as the "maximum sustainable yield"; stock level was, however, relied on, and even incorporated into, many fishery agreements because it was thought to be a simple objective standard permanently protecting stocks from over-fishing and consequent depletion. MSY was applied as a straightforward mathematical formula based on a variety of models e.g. the simple Schaefer model; the Beverton and Holt constant recruitment model; (see Gulland (ed) "The Fish Resources of the Ocean" (FAO 1974; Scarff op. cit. p.391-393; Johnston op. cit. p.50-55). Scientists pressed the MSY concept on the IWC as being, at that date, a preferable management criterion. As stocks declined and ecological considerations impinged more importantly on conservation of stocks, even MSY has been subject to severe criticism and other concepts, taking account of more ecological factors have been pressed as a more appropriate interpretation of this provision of the Preamble. The issue is still fraught with great scientific controversy as will be seen in subsequent chapters; The lack of definition in the ICRW, however, has the advantage that the terms remain open to interpretation; it can now, for example, be interpreted to apply more ecological principles and therefore represents a more flexible approach that a specific reference to MSY (the most likely alternative in 1946) would have done.

69. IWC Article 1(i).
stated as "proper and effective conservation and development of whale stocks" enabling "the orderly development of the industry" on the basis of the principles of the earlier agreements, which, of course, includes the freedom of access to high seas fisheries.

The objectives of the Convention can be seen with hindsight to be akin to the proverbial curate's egg: they are good in that they recognise the interest of the international community as a whole in preservation of whales, and recognise the need for conservation but they also contain a number of weaknesses. They take no specific account of the peculiar characteristics of whales and their difference from other fisheries; they base management on the objective of an undefined optimum level which does not take account of the importance of whales as part of the ocean ecosystem; they limit the calculation of the "optimum" level by the requirement that economic and social factors be taken into account. Although a first objective of the Commission is to promote "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by whale stocks" this imprecise language creates no legal obligation to achieve this or to do so by any specific means. It does not change the legal status of whales which therefore remain a res communis, subject to the doctrine of freedom of fishing, with unrestricted entry by all states desiring access. It does not lay down principles comparable to those laid down by the General Assembly in its Resolution relating to the exploration and exploitation of deep sea-bed
resources, which provide guidelines for the protection of these resources as the "common heritage of mankind". The Preamble's references to the "common interest", does not and under present international law, could not vest the title to the resources in either the Commission, which had a very limited membership, or the United Nations, which has no management powers. These points will be expanded upon more fully in Chapter XI.

With sound scientific advice and the willingness of member governments to adopt policies based upon it and effectively to enforce the necessary regulations, there was no reason why the Convention which followed, if it balanced these objectives in favour of conservation, should not have been made to work. In the absence of reliable scientific data, however, and without an interpretation favouring the conservative approach to exploitation that the special characteristics of marine mammals requires, the Convention enabled too much account to be taken of the need to avoid economic and social dislocation and to "develop the industry". Although its objectives are also directed to conservation, the Preamble makes it clear that the ultimate aim is to develop the industry. This in itself is not misconceived as long as stocks sustain this and as long as the policies of the Commission established under the Convention and the application of the Convention's provisions did not allow the short term interests of the industry to override "the interest

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70. GAR 2749 (XXV) 17 December, 1970
The effect on whaling of this Declaration and of the relevant articles in the Informal Texts produced by the UNCLOS III to effect it, are discussed in Chapter XI.
of the nations of the world in safeguarding for future generations" the whale stocks. Unfortunately the prescriptions of the substantive articles did not prevent this. They were directed to the interests of the industry, not to the interests of all mankind, present and future.

2. **Substantive Articles**

The Convention is quite short consisting of only eleven articles.

   (i) **Article I** provides, as in the US Draft, for

       (a) **Incorporation of the Schedule**

           Article I(i) incorporates the Schedule (as from time to time amended) into the Convention;

       (b) **The Scope of the Convention**

           The Convention did not follow the precedent of the existing conventions which reserved coastal fisheries to the adjacent state within its territorial sea. It, as proposed in the US Draft,\(^{71}\) covers factory ships, land stations, and whale catchers which are under the jurisdiction of the Contracting Governments. It thus covers all whaling vessels registered in and flying the flags of member states as well as those which enter their fisheries jurisdiction or territorial waters. It also extends to "all waters in which whaling operations take place"; the latter is more limited phrase than the "all the waters of the world" used in earlier agreements and now raises some problems in the context of the numerous unilateral declarations of 200 mile fisheries jurisdiction by coastal states.\(^{72}\)

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71. US Draft, Article X.
72. These are outlined in Chapter XI.
(ii) **Article II: Definitions**

There are 4 definitions of terms in Article II, viz. of "factory ship", which includes ships on which whales are only partially treated; "land stations" which extends the former definition to factories on land in similar terms; "whale catcher" which covers ships used for all aspects of the hunt; and "Contracting Government" which covers both those ratifying and those subsequently adhering. These definitions were included in the Convention itself, not in the Schedule only as proposed in the American draft.

(iii) **Article III: The International Whaling Commission**

(a) **Membership**

The Commission is established by Article III(i). As in the US Draft it is composed of one member from each Contracting Government, each of which has one vote. There are no categories of or limitations on membership. The Preamble refers to "the Governments whose duly authorised representatives have subscribed hereto". All that is required to become a party is to sign and ratify or adhere to the Convention; membership is not restricted to states presently or formerly engaged in whaling. The Commissioner can be accompanied by any number of experts and advisers but is not required specifically to include or exclude either industrialists or scientists in his delegation. The US Draft's proposal that there should be an Executive Committee of 5 members was not adopted in the light of the objections of some states. 73

73. e.g. the Netherlands, IWC/31, 1946, p.2.
The Commission elects its own Chairman and Vice-Chairman and determines its own Rules of Procedure. This can have important effects on substantive issues. 74

(b) Rules of Procedure

Under the present rules the Commission must hold a regular annual meeting in London but may decide that once in three years the meeting may be held elsewhere. 75 The original Rules (Rule XVII) merely allowed the meeting to be held at such place as the Commission thought fit. The seat of the Commission must be in the UK however. 76 Observers are permitted to attend but are limited to those from non-party states and international organisations. Originally "international organisation" was not defined in Rule III, but the Rules, as amended in 1977, now limit them to those organisations that have either attended previous meetings or have offices in three or more countries. 77

74. This has recently resulted in some examples of arbitrary decisions on important issues e.g. the late night addition of whales to the Alaskan Eskimo catch quota of bowhead whales at the 30th Meeting in 1978, without prior notification of the item by the United States. As no member of the Commission objected to this breach of Rule XII which requires 60 days notice, no further action could be taken. See Chapter X, p.513, n.107. The original Rules of Procedure are printed as Appendix IV at p.23 of the IWC 1st Report, 1950. The latest edition of the Commission's Rules of Procedure is January, 1979, obtainable from the IWC. They cover such questions as Representation; Meetings; Voting; Chairman; Vice-Chairman and Secretary; Order of Business; Fiscal Year; Offices; Committees; Languages; Records and Reports; and Financial Regulations.

75. Rule II.

76. Originally located in the UK Ministry of Agriculture and Fisheries it now has independent accommodation at the Red House, Station Road, Histon, Cambridgeshire.

77. Rule III. Rule III was amended at the 29th Meeting to limit observers from international organisations by defining the latter as organisations with offices in 3 or more countries to limit the growing number of observers.
Commissioners, as proposed in the US Draft, have one vote but non-voting experts and advisers, as well as the Commissioners, can address the Plenary Meetings and can even vote on committees to which they have been appointed, including the Scientific Committee, provided that only one such representative from each Contracting Government does so. 78

(c) Voting

This is provided for in Article III(2) of the Convention. At Commission meetings a simple majority vote of those voting yes or no suffices, except that a three quarters majority of those so voting is required for amendment of the Schedule under Article V of the Convention. Simple majorities of those voting yes or no are also decisive in committees but decisions taken by vote must be reported to the Commission. 79

Chairmen and Vice-Chairmen of the Commission are elected for three years but the Secretary is appointed by contract concluded by the Commission and is paid by it as provided in Article III(3) of the Convention. 80 His duties as executive officer of the Commission were defined in the original Rules (Rule XI) but have been redefined in the present Rule X, and the Chairman's in Rule VIII of the Rules of Procedure.

(d) Committees

Article III(4) enables the Commission to set up any committees it considers necessary, without limit or description although their

78. Rule IV.
79. Rule V; in October 1979 at the USSR's request the first postal vote occurred.
80. Rules VII and IX. The Secretary used to be a part-time official generally a former employee of the UK MAFF, but since 1974 has been a full-time appointee. The post is currently held by a distinguished cetologist.
composition is limited to members and advisers, apart from
the recent concession in favour of FAO, UNEP and IUCN concerning
participation in the Scientific Committee, referred to below.
Rule XVII requires the establishment of a Scientific, a Technical
and a Finance and Administration Committee. The last named is
limited to five Commissioners but the other two are open to all
Contracting Governments that want to be represented. In
practice most governments take up this option. Ad hoc committees
can be appointed from time to time as necessary by the Chairman.
The roles of these committees have become increasingly important
during the history of the IWC, as the knowledge necessary for
management has so greatly expanded and, correspondingly so has
the Commission's agenda. New Rules have now been devised for
these Committees. The work of the Scientific Committee in
particular has become crucial to the success of the new
management policies laid down and followed by the IWC since
1975. Its growing importance will be elaborated upon in
subsequent Chapters.

(i) The Scientific Committee

This committee (hereafter referred to as SC) is composed
of members designated by their national Commissioner, with the
Secretary of the IWC as a non-voting ex officio member. Members
are not required to be scientifically qualified though in practice
they generally are. Recently the practice has been adopted of
calling on the services of outside experts from relevant
scientific international organisations such as the FAO, and
UNEP, and the IUCN (International Union for Conservation of
Nature described in Chapter XI), who can be appointed as advisers
to the Committee, without voting powers. Problems arose at the
30th Meeting in 1978 concerning the status of IUCN (the membership of which is made up of both governmental and non-governmental bodies, both scientifically and non-scientifically qualified) and whether it was eligible to be appointed as an adviser to the Committee. In the event the dispute was resolved on the understanding that IUCN would always ensure that its adviser to the Committee was appropriately scientifically qualified.  

As the Scientific Committee's advice is required by Article V to be the basis of all IWC regulation, and this is crucial to the successful operation of the IWC, its original and revised mandates under the Procedural Rules are worth comparison. Its first mandate under Rule XVIII of the Rules of Procedure, based on the relevant Article of the US Draft was to "keep under review the statistical, biological and other technical information and such other matters as may be referred to it by the Commission, and to make recommendations thereon for the consideration of the Commission", publishing the results of its activities in an Annual Report.

81. IWC/30/1978; Agenda Item 4. Note taken by the writer at the 30th Meeting.

82. US Draft Article III. Beside this Article in his copy of the Draft Convention Captain Harold Salvesen (a UK delegate from a whaling company, Christian Salvesen, Edinburgh) significantly wrote "I am afraid the Commission will get into the hands of scientists and not of practical people". Many of the Commission's early failures, described in Chapters V and VII are attributable to its failure to follow the SC's advice.
The SC's role has, however, been considerably expanded by the new Rule XVII which imposes the following duties upon it:

"The Scientific Committee shall review the current scientific and statistical information with respect to whales and whaling, shall review current scientific research programmes of Governments, other international organisations or of private organisations, shall review the scientific permits and scientific programmes for which Contracting Governments plan to issue scientific permits, shall consider such additional matters as may be referred to it by the Commission, and shall submit reports and recommendations to the Commission".

The preliminary reports should be completed and available to all Commissioners by the opening date of the Annual Commission Meeting. As will be seen in the account of the history of the IWC which follows, the Rule is not always adhered to because of the infrequent meetings of the Scientific Committee, the growing expense of convening them, and the immediate proximity of its main meeting to that of the IWC's Annual Meeting. As will be seen below, neither the Convention, following the US Draft, nor the procedural rules, permit the hiring of full-time cetologists to serve on this committee or to advise it, on a permanent basis, though the Commission has, as will be seen, on occasion hired experts to report to it ad hoc. 83

(ii) The Technical Committee

The mandate of this Committee (hereafter referred to as the TC) under the original Rules of Procedure was to review regulations, consider questions involving the time, manner and intensity of whaling operations, infractions reports, the details which governments are required to transmit of their laws and regulations, and whatever else the Commission or its

83. e.g. the Committee of Three, appointed in 1960, IWC 12th Report 1961, p.7-8. See also Chs. VII and IX.
Chairman request it to do. It must then report and make recommendations.

Its role has, however, recently been changed to enable it to be used as a screening committee for the business of the Plenary Sessions (hereafter referred to as PS), in order to speed up the latter's work, which is growing in volume in direct ratio to the growing complexity of the management task, under the new management procedures and other developments.

(iii) The Finance and Administration Committee

The role of this Committee (hereafter referred to as the FAC) has also increased in importance as the budget of the IWC, though still not large in relation to the complexity of its task, has vastly increased from the first budget of £1,300, as the cost of Meetings and staff, and demands on the IWC to execute studies, acquire a computer etc. increase also.

This Committee has to advise the Commission on expenditure, budget, members' contributions and related matters. The Commission, as will be seen in Chapter X, has recently expanded its staff, increased the number of special and interim meetings, most of which it now has to pay for itself, and expanded its reports. This Committee therefore fulfils an increasingly important fund-raising role to enable the Commission's new and

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85. IWC/30/13, p.2; £116,692 in 1978, but increased to £299,250 for 1979/80.
86. IWC 1st Report 1950, Appendix VII, p.32.
87. These problems, which have greatly increased, will be discussed in their context as they arise at each Annual Meeting.
growing activities. The Commission's revenue under Financial Regulation IV is derived from four sources: annual payments from Contracting Governments; other payments from them and other sources; sale of publications; interest on capital. It is not derived from any levy on whaling states; or from the licence fees which member states collect from their flag ships or shore stations which engage in whaling; or from taxes on whales, whale oil or other whale products. The Convention does not provide for this. 88 The expenses of each member of the Commission and his experts and advisers is determined and paid for by his own Government, 89 and not from the Commission's budget, though Annual Meetings, when held at the Commission's UK Headquarters, are paid for from the budget. The growing costs of the IWC have recently occasioned the FAC to consider other bases of contribution to augment the budget. 90

(e) **Relationship with the United Nations and FAO**

(i) **The United Nations**

The United Nations had been established in 1945. 91 Amongst the aims of its Charter were "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger

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88. A levy on whales taken was once made in 1967, but was never repeated; IWC 19th Report, p.9, para. 9.

89. Art. III(5).

90. Details of these schemes are given in the account of recent meetings in Chapter X.

91. The UN Charter was established as a consequence of the United Nations Conference on International Organisation held at San Francisco in 1944, and was brought into force on 26th June 1945.
To these ends it must "employ international machinery for the promotion of the economic and social advancement of all peoples". Its General Assembly can initiate studies and make recommendations for the purpose of, inter alia, "promoting international cooperation" in the economic, social and cultural fields. Although these broad aims would seem to cover the conservation of whale resources, neither initially nor up to the present day has the UN exercised any initiative in relation to whales or other marine mammals although it has passed a number of Resolutions concerning the law of the sea in general and convened the continuing Third United Nations Conference on the Law of the Sea, the progress of which concerning the conservation of marine mammals is surveyed in Chapters VIII and XI.

A number of autonomous specialised agencies were also established before and after 1945 by separate inter-governmental agreements which define their areas of responsibility and their powers in various economic, social, cultural, educational, health and related fields. They must under the Charter be brought into relationship with the UN by special agreements concluded between them and the UN's Economic and Social Council and approved by the General Assembly. The United Nations may make recommendations for the coordination of the policies and activities of these agencies. It can do this either by direct recommendations to the agencies themselves or by recommendations to the General Assembly and to the Members of the United Nations.
The UN can at any time create new specialised agencies as long as they come within the economic, social and other fields listed in the Charter. 96 It is the General Assembly, and to the extent authorised by it, the Economic and Social Council of the UN, that is responsible for ensuring that the specialised agencies fulfil their constitutional obligations and functions.

(ii) FAO

A number of specialised agencies have interests which either directly or indirectly impinge on the conservation of marine mammals. Especially relevant is the work of the United Nation's Food and Agriculture Organisation, 97 (hereafter referred to as FAO) which was established in 1945 and whose terms of reference could be interpreted to include whale stocks. Article I(2) of its Constitution requires it to "promote and where appropriate to recommend national and international action with respect to ... the conservation of natural resources and the adoption of improved methods of agricultural production". Article XVI states that "In this Constitution the term "agriculture" and its derivatives include fisheries, marine products, forestry, and primary forest products". Article IV empowers the FAO Conference by a two-thirds majority to submit conventions on these subjects to its members. Under Article XIV "The Conference may approve arrangements placing other public international organizations dealing with questions relating to food and agriculture under the general authority of the Organisation on such terms as may be agreed with the competent authorities of the organisation concerned".

96. Ibid, Article 59.
The FAO Conference also has power under Article XII to provide for cooperation with related organisations and to enter into agreements with them for this purpose, and also to maintain common services, common arrangements in regard to recruitment, training, conditions of service and similar matters, and for interchange of staff. It has specific rules for determining the status of an organisation with which association is to be formed and for ensuring homogeneity of interests.

The Washington Conference had therefore to consider as an urgent matter the relationship of the IWC which it was creating to the United Nations, and especially to the FAO. The US Draft proposed that the Commission should be incorporated into the FAO by the adoption by the FAO Conference of an appropriate Resolution. Annexed to the Draft Convention therefore was a draft Resolution for submission to that Conference providing for the incorporation of the IWC into the FAO in order to avoid duplication of functions and promote conservation. If this proposal had been adopted and the resolution as drafted forwarded to FAO and approved by their Conference, the first meeting of the IWC would then have been convened by the Director-General of the FAO and he would, on a nomination from the IWC, have appointed an Executive Director of the IWC, and any other necessary staff, who would have become employees of the FAO, with their salaries and all other expenses of the Commission being borne on the FAO's budget. All member

98. Article II (5) and (6).
states of the FAO would therefore have been responsible for financing, supporting and guiding the activities of the IWC, although existing services and facilities offered by governments and international bodies, such as the Norwegian IBWS and ICES could continue to be made available. The IWC would have been an autonomous body within the FAO framework, however: The FAO would service it; but it would not be established as an FAO Department. It would enter into agreements with FAO and other relevant international bodies to define its responsibilities, methods of operation and relationships with them.

Several advantages were alleged to accrue from this proposal. It accorded with sound administrative practice in avoiding duplication of functions. It prevented undesirable multiplication of international organisations. FAO would be able to expand its work into new aspects related to its fisheries interests and government interest in FAO would accordingly be increased. The new Commission would make more impact on world opinion on conservation and other matters than if it stood alone, since most countries would become aware of its work and aims. It would be adequately financed without having constantly to resort to its member governments and would automatically have direct contact with a number of other concerned bodies. It was even proposed that the regional headquarters of the IWC should be located in Rome alongside the FAO, as it was

100. Membership of FAO
101. IWC/14, 1946, p.17; Mr. Hayes (USA) explained the US proposal in these terms at the second Plenary Session.
European states that then had the predominant interest in whaling. It is not certain whether FAO would have been able to improve the transmission of data from national bodies (a considerable amount was supplied to the IWC) but it might have stimulated more international research.

In view of these obvious advantages and the subsequent failure of the IWC, it is pertinent to discover why the incorporation of the IWC into the FAO framework was rejected by the Washington Conference.

At the second Plenary Session of the Conference the USA\textsuperscript{103} strongly supported their proposal although the UK thought the proposal premature and wanted to postpone any decision pending the outcome of the forthcoming International Trade Conference which was expected to establish an International Trade Organisation (hereafter ITO) with which perhaps the IWC might then be linked. The US rejected this idea and urged that they had proposed the link with FAO because the FAO Constitution made conservation a function of that organisation and also enabled it to prepare and recommend to governments conventions relating to conservation.\textsuperscript{104} The United Nations had moreover, even at this early date, negotiated agreements with the FAO which recognised its pre-eminence in the field of marine resource conservation. The UK countered\textsuperscript{105} that at the FAO Conference the main item on the agenda was not fisheries but agriculture and expressed the fear that whales would therefore be a low priority on the agenda.

\textsuperscript{103}IWC/14, 1946, Minutes of the 2nd Plenary Session p.18 et seq. 
\textsuperscript{104}FAO Constitution, Articles I, XII, XIV, XVI. 
\textsuperscript{105}IWC/14, 1946.
The Netherlands suggested that the Convention but not the Commission should be affiliated to the FAO. The USSR (which had finally joined the Conference) objected to the coordination of the IWC and FAO since some countries which were members of the former were not members of the latter.\textsuperscript{106}

The Conference rejected the proposal in the US Draft that the IWC should be incorporated into FAO, or any other organisation. Instead the Contracting Governments recognised that more than one UN specialised agency would be concerned with "conservation and development of whale fisheries and the products arising therefrom" and agreed "to consult within themselves" two years after the entry into force of the Convention to decide whether to bring the IWC into the framework of an unspecified specialised agency related to the UN. The United Kingdom was therefore given the task of convening the first meeting in 1947. The IWC then deferred the decision to the second meeting which decided, for the reasons given in Chapter V, against incorporation into FAO.

(iv) Articles IV, VI, VII and VIII: Scientific Matters
(a) Article IV: Scientific Research and Information

The Commission was permitted, but not required, to do three things to improve the scientific base of the Commission's activities:

(i) it could encourage, recommend and even organize studies and enquiries on both whales and whaling;\textsuperscript{107}

\textsuperscript{106} IWC/32, 1946, p.19.

\textsuperscript{107} The US proposed that the IWC could "plan" and "recommend" research; both terms were disputed in debate on this article, "co-ordinate" being preferred by some. Ibid. The Conference established an ad hoc Committee to consider the data required for regulation. Report of the Committee on Biological Data, IWC/36, 1946.
(ii) collect and analyse statistical information on stocks and the effect of whaling thereon;

(iii) assess and circulate information on methods of maintaining and increasing populations of whale stocks.
Reports were to be published on these and related activities, either by the IWC alone or in collaboration with other concerned bodies, but, as in the US Draft, there was no provision for the Commission to undertake its own research although other Fisheries Commissions, as is revealed in this and subsequent Chapters, do have such responsibilities. Neither money nor personnel was provided initially by the IWC for this purpose. Relevant to Article IV's aims however are the following 3 articles:

(b) Article VI: Commission Recommendations

The Commission may, but is not obliged to, make recommendations to its members "on any matters which relate to whales or whaling and to the objectives and purposes of this Convention". This, when related to the broad general aims of the Preamble and the comprehensive nature of "matters relating to whales and whaling" is an important article enabling the Commission to play a major role in guiding the whaling policies of its Contracting Governments but it cannot bind them to follow its advice under this provision.

108. US Draft Article III; its objective was to avoid duplication or conflict with existing national and international research; Floy (USA) stated that this was based on the Fur Seal Treaty for the requirement that the Commission base its findings on available biological information (though the former has its own research staff). IWC/14/1946, p.28. This draft article proposed that the IWC should also take account of "geographical" information, though relating all information to the world requirement for fats.

109. e.g. the IPHC, Chapter VI ; or the use of ICES by NEAFIC; See Chapters IV, Ch. VI and Ch. VIII generally.
In practice it has interpreted the scope of this Article increasingly broadly as is apparent in the account of the most recent meetings, passing inter alia Resolutions prohibiting trade in whale products with non-member states and transfer of vessels etc. to them.

(c) Article VII: Whaling statistics

These were required to be transmitted to the Norwegian IBWS thus continuing the requirement of the earlier Convention and Protocols without fully internationalising the Bureau or centralising it at the Headquarters of the IWC or FAO. It continues to be staffed and financed by Norway and not the IWC, though the IWC does now make some small contribution. The governments establishing the Commission did not envisage that the Commission's conservation policies would be so unsuccessful that Norway would eventually find it uneconomic to continue pelagic whaling and would no longer be a major whaling state.

At the present time the statistical demands are greater than ever before because of the modelling involved in the population dynamics on which the new management procedures are based and the Conventional arrangements for statistical collection and analysis are under considerable pressure as will be seen in Chapters IX and X.

(d) Article VIII: Scientific Permits

In pursuance of the US proposals, a concession was made exempting from the regulations of the IWC whales taken and treated

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110. Draft Article VIII. Suggestions that the Commission should be consulted, not merely informed, about such permits were rejected. IWC/20/1946 (Minutes of PS) p.10.
under scientific permits which Contracting Governments were allowed to issue for whatever numbers they thought fit. The governments concerned merely had to report the permits granted to the Commission, not to seek its prior authorization. As is revealed in Chapters IX and X, however, this practice has been modified and since 1977 the IWC has recommended that scientific permits be submitted to the Scientific Committee for prior comment,\textsuperscript{111} since there were allegations that some states abused this concession to evade the increasingly stringent regulations of the Commission.

(v) \textbf{Article V: Methods of Regulation: The Schedule}

The incorporation of a Schedule of amendable regulations into the Convention as an integral part of it was one of the major advances made by the Convention. The United States proposal,\textsuperscript{112} aimed at the provision of flexibility, continuity and permanency of regulations, was accepted, as was the use of all conservatory techniques of the earlier agreements and Protocols categorized under 7 headings, viz: (i) protected and unprotected species; (ii) open and closed seasons and (iii) areas,

\textsuperscript{111} Russia withdrew a permit it had issued in breach of the new procedure; IWC/30/1978; writer's notes; at the 31st Meeting, 1979, attended by the writer, the IWC incorporated this requirement into the Schedule, though several states e.g. Japan, Korea and Chile, protested that this infringed their national sovereignty and was in conflict with Article VIII. The permits are not, however, subject to prior approval by the SC, only to review and comment; there therefore seems to be no substance in these views; writer's notes, 31st Meeting, London July 9-14, 1979.

\textsuperscript{112} US Draft, Article I. The Schedule, listing and codifying existing regulations, was attached as an Annex.
including sanctuaries; (iv) limitation on size of species taken; (v) methods and intensity of whaling including maximum catch; (vi) types of gear and equipment used; (vii) methods for measuring whales taken; (viii) the requirement that returns be made of catch, statistical and other biological information.

(b) The Catch Quota System

A vital addition to pre-war practice which had been discussed before the War but was not imposed by any previous Protocol in force, was the fixing of an overall catch limit. Although the Commission was given the power under this Article to set a catch limit as one of the amendable items of the Schedule since the take of whales had such profound political, economic and social implications for Contracting Governments, the annual fixing of this catch quota became a highly political matter. As the IWC's early efforts to conserve whales were not, as will be seen in later Chapters, successful (the quota, to secure agreement, being invariably set too high), this single activity of the Commission has attracted more publicity in the international community outside the Commission, than any other of its measures and actions. The history at the IWC's meetings from 1949-1970 is one of almost constant failure in this respect, although there has been considerable improvement in the present decade, as subsequent chapters recounting IWC Meetings reveal.

The system adopted for setting the quota was the one proposed in the US draft, based on the Blue Whale Unit, used by the whaling companies in their pre-war oil production agreements. It was

113. These techniques are listed in Article 5(i). The detailed regulations are contained in the amendable Schedule.
114. See Chapters VII, IX and X.
not provided for in the main Convention but was included in
the Schedule. For the first year the Conference fixed the
figure at 16,000 BWU, in spite of the fact that it had been
suggested by some advisers in the Plenary discussions that
this figure, in the light of the rapidly declining stocks of
the 1930's, was too high. This high quota gave the Commission
a bad start, and was instrumental in attracting much adverse
criticism, since once the quota had been set at this level it
proved economically and politically difficult to negotiate its
reduction in a period of post-war shortages, during which the
whaling effort was excessive and over-capitalised.

The reductions in the quotas which began to be advised by
many scientists as catches and size of species began to decline
under the Commission's subsequent management were also difficult
to agree because of the four criteria which Article 5(2) lays
down as the basis of amendments to the Schedule, namely that
such amendments:

"(a) shall be such as are necessary to carry out the
objectives and purposes of this Convention and to provide
for the conservation, development and optimum utilization
of the whale resources;

(b) shall be based on scientific findings;

(c) shall not involve restrictions on the number or
nationality of factory ships or land stations, nor allocate
specific quotas to any factory ship or land stations, or to
any group of factory ships or land stations;

(d) shall take into consideration the interests of the
consumers of whale products and the whaling industry".

115. Emphasis added throughout this quotation.
The scientific basis of quotas was obliged to be offset by commercial and social considerations, and the techniques that are now generally regarded as being the most effective for conservation purposes, namely the allocation of individual quotas to each ship or fleet and the limitation of the number of vessels and their catching effort, were banned by the Convention. Such measures could therefore be introduced in future only by securing unanimous agreement to amend the Convention. Negotiating such agreement is, however, subject to the same economic, political and social difficulties as beset the reduction of the overall quota. Revision of the Convention is not provided for in the Convention itself but would, under international law, require a unanimous agreement\textsuperscript{116} to be binding on all states parties. It is now being proposed,\textsuperscript{117} but even without it these limitations have been to some extent overcome recently by broad interpretation of this Article and appropriate amendment of the Schedule.\textsuperscript{118} These developments, which include a moratorium on pelagic whaling, creation of a whale sanctuary in the Indian Ocean, and proposals for other forms of moratoria are examined in Chapter X.

\textsuperscript{116} Vienna Convention on the Law of Treaties, Article 39; Brownlie "Basic Documents in International Law" (2nd ed), p.233. The treaty is not in force but this provision codifies the customary law.

\textsuperscript{117} A preparatory Conference to consider a Revision was held in Copenhagen in July 1978.

\textsuperscript{118} The 31st Meeting, July 9-14, 1979, saw the introduction of a number of progressive proposals for amendment, following legal advice on the effect of this article; See Chapters IX and X.
Although, as already mentioned, the Commission under its Rules of Procedure can take its decisions by a simple majority, amendment of the Schedule specifically requires a three quarters majority vote. It is also subject to further qualifications in the form of an objection procedure as proposed in the US draft Convention. Amendments therefore, even when adopted by this majority, do not become effective:

(i) until 90 days after their notification by the Commission to Contracting Governments;

(ii) if any Government delivers an objection before the end of this period, such objection delays the entry into force for all governments for a further 90 days;

(iii) during this second 90 day period any Government can still object;

(iv) if any objection is received during this second 90 day period any Government can object within a period of 30 days from the date upon which the last objection of the second 90 day period was received, whichever of (iii) or (iv) is the later;

(v) at the end of this period (which could be as long as 210 days, i.e. 7 months) the amendment comes into force only for the Governments which have not objected.

Governments which have lodged objections are not bound by the amendment until they withdraw their objection.

Such a complicated procedure, designed to safeguard the interests of whaling states (as required by Article V(2)), has in the course of the Commission's history produced complex

119. Article V(3).
situations in which, as under the former Protocols, it was sometimes difficult to trace which regulations were in force for which states. Sometimes the amendments of the previous year were not in force when vessels left for the Antarctic season of the following year, since the procedure was used quite frequently in the first 20 years of the Commission's history. Increasing international pressure has recently resulted in less use of the procedure. It was last used in 1974, by Japan and the USSR, and their action provoked considerable protests from other states and conservation groups. 120

The 31st Meeting in 1979, however, adopted a number of controversial proposals, including a moratorium on pelagic whaling (apart from minke whales), and it remains to be seen whether Japan or the USSR, the only remaining states engaged in this activity, will resort to these procedures. 121

Nonetheless the Schedule in itself is an effective instrument of regulation and is adaptable to changing policies. 122

120. Japan and the USSR objected to an amendment reducing the minke whale quota, regionalising the sperm whale quota and phasing out fin whaling. IWC 24th Report, 1975, p.6-8; 27-28. Increasing public interest in the conduct by the Commission of its affairs, stimulated by conservation groups, several of whom now have observer status at the Annual Meeting of the Commission, appears recently to have inhibited member governments from lodging objections. The future admission of the Press, hitherto barred from Meetings, will no doubt reinforce this. The Commission was initially reluctant to open its proceedings to public scrutiny. A proposal to admit the Press was defeated at the First Meeting in 1949. Verbatim Record of 3rd Plenary Session, p.3.

121. See Chapter X.

122. As described in Chapter VII, even the most recently renegotiated fisheries convention establishing the Northwest Atlantic Fisheries Organization (NAFO) which in 1978 replaced ICNAF, retains a form of objections procedure, although the various periods involved are shorter than the IWC's.
first Schedule makes an interesting comparison with the present Schedule (1979). It included inter alia the following provisions, mainly based on the earlier Protocols and Agreements:

(i) 2 inspectors on factory ships; adequate inspection at land stations;
(ii) a ban on killing any gray or right whales, except "when the meat and products of such whales are to be used exclusively for local consumption by the aboriginies (humpbacks were not similarly protected);
(iii) a ban on killing calves, suckling whales or females accompanied by them;
(iv) a ban on baleen whaling in certain areas;
(v) a ban on taking humpback whales in some areas;
(vi) a limitation of the Antarctic (defined as waters south of 40° south latitude) season;
(vii) a quota of 16,000 BWU in the Antarctic, calculated as 1 blue whale equals 2 fin or 2½ humpback or 6 sei whales;
(viii) provision for the Commission or other designated body, to decide the cut-off date for Antarctic whaling in the light of information received;
(ix) a ban on taking blue, fin, sei, humpback and sperm whales below 70, 55, 40, 35 and 35 feet respectively (the estimated length at maturity) but exceptions were permitted for land stations provided the whales were used for local consumption as human or animal food. Instructions for measurement were included;
(x) requirements to ensure that all parts of the whale were used and that the minimum delay occurred between catching and processing;
(xi) engagement of gunners and crews on terms relating their pay mainly to the species, size and yield of whales taken, not the number;
(xii) a requirement that Governments forward to the Commission copies of all relevant laws and regulations; and
(xiii) that they transmit to it specified information including biological details;
(xiv) definition of the various whale species and terms referred to in the Schedule viz: baleen, blue, fin, sei, gray, humpback, right, sperm, dauhval. 123

(vi) Article IX: Enforcement

The Convention applied under Article I to member Government's factory ships, land stations and catchers and to "all waters in which whaling is prosecuted" by them. The Convention, following the US Draft, 124 made no attempt to introduce any form of international enforcement in these areas, even outside national jurisdictional limits. Enforcement precedents available to the Conference have been described in Part I (later models are described in Chapters VI and VIII). They included limited powers conceded to flag states to inspect, but not arrest or prosecute, offending foreign vessels on the high seas. 125 No

124. US Draft, Article VI.
125. e.g. under the PFST, IPSFC, IPHC, which had few states parties, and did not include the remote Antarctic Ocean. It should be remembered that the NEAFC and ICNAF Joint Enforcement Schemes were not in existence.
agreement then or now permitted such powers to be exercised by an independent international force. Nor in 1946 did any agreement provide for appointment of international inspectors or observers to the ships or shore stations of states parties, or to both. Various schemes on these lines were theoretically possible but there were no precedents for them in 1946. Negotiation of some form of international inspection had later to take place, therefore, outside the ICRW and provide one of the most difficult and contentious issues at the meetings of the 1960's.

The Convention left enforcement entirely to national means. It neither provided in the present, nor for the future, for international inspection or observation. Each Contracting Government was required to take "appropriate measures" the nature of which is not specified in the Convention except that they must ensure the application of the provisions and the punishment of infractions executed by persons or ships under their jurisdiction. Prosecution could be undertaken only by the government having jurisdiction over the offence. Sanctions were limited to withholding from gunners and crews bonuses and pay in respect of whales taken in contravention of the Convention. Transfer of vessels to non-member states was not, as suggested in the Plenary Session, banned. Infractions proved difficult to verify without international supervision;

126. Article IX(i).
127. Ibid, s.(3).
128. Ibid, s.(2).
suspicion that other parties were not enforcing the Convention contributed to the lack of political will to reduce quotas.\textsuperscript{129} No advantage accrued to states that stringently imposed the restrictions if other states did not do so. The purpose of the Convention, i.e. to ensure parity of sacrifice by equality of regulation, was thus vitiated for many years, until agreement to introduce international observers\textsuperscript{130} could be reached.

The Schedule required appointment of national inspectors only on factory ships; details of infractions, the measures taken for dealing with the infractions and of the penalties imposed, had to be sent to the Commission.\textsuperscript{131} There was no requirement that penalties be sufficient to discourage violations; no harmonisation of penalties of different states; no requirement that the penalties should be reported in a common currency; and neither instruction nor advice to the Commission concerning what action it should take on these reports.

The Commission has over the years, as will be seen in subsequent Chapters, remedied many of these defects by its practice and even sought by Resolutions\textsuperscript{132} to broaden the basis of sanctions to deal with whaling by non-member states and vessels flying

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\textsuperscript{130} International observers were not appointed until 1974. Chs. V, VII and IX outline the difficulties encountered in obtaining the necessary agreement.
\textsuperscript{131} Ibid, s.(4).
\textsuperscript{132} e.g. recommending members not to trade in whale products with such states, or to transfer whaling vessels, personnel or expertise to them; see Chapter X.
\end{flushleft}
"flags of convenience" which take species in contravention of the ICRW, but the lack of necessary measures in the Convention prevented them from being introduced for several years.

(vii) Article X: Entry into force

The Convention did not follow the US proposal on this issue. The Convention entered into force on ratification by 6 signatory Governments which had to include the Netherlands, Norway, the USSR, the UK and the USA. The first four of these were the major Antarctic whaling states; the fifth state important in that activity, Japan, was, as a former enemy power, not, in 1946, invited to take part in the Convention. The Convention provided, however, for subsequent adherence by states not signatory to it, the Convention entering into force for such states on deposit of the appropriate instrument.

(viii) Article XI: Withdrawal

As proposed in the US Draft, the Convention permitted withdrawal on fulfilment of the condition of service of notice on or before the 1st of January in any year. Withdrawal could become operative only from 30th June of any year. The Notice has to be sent to the United States, the depository Government of the Convention, which then communicates it to the other

133. The US had proposed entry into force on ratification by 3 governments, US Draft Article X; it was anxious to avoid any delay of entry into force.

134. The UK considered that preferably all states participating in the Conference should ratify the Convention, or at least all the states engaged in pelagic whaling. Letter from H. Salvesen to Dobson, 27 November 1946, in Salvesen papers.

135. Article X(2) and (4).

136. US Draft Article XI.
Contracting Governments. Any one of these then has the option of also withdrawing within one month of its receipt of this notice whereupon its withdrawal too becomes operative from the 30th June. This provision has been used several times as will be seen during the account of the IWC's operations which follows. 137

4. **Dispute Settlement**

There was no Article on this subject and no machinery was provided for this purpose. This question is discussed further in the final Chapter. The IWC has in practice either settled its disputes internally or by negotiation outside the Commission. It has occasionally sought legal advice on disputes concerning interpretation of the Convention, including its Schedule and the Rules of Procedure. 138

**CONCLUSION**

The Convention entered into force on 10th November 1948. The first Meeting was convened for 30th May 1949 in London by which date 12 Governments had ratified the Convention. Its strengths and weaknesses were already apparent. It was, and

137. This procedure was used during the 1960's when the Netherlands and Norway withdrew for a period (Japan took steps to do so) and continued whaling outside the Convention; the reasons for this are detailed in Chapter VII; recently some states have withdrawn on ceasing whaling but are returning in response to national pressures for conservation e.g. the Netherlands, New Zealand, Sweden; see Chapters X and XI.

138. These are referred to as they arise in the relevant Chapters on IWC practice; several opinions have been sought recently as the IWC, in pursuance of more conservatory policies, has endeavoured to improve its operations by broad interpretation of the Convention; see especially therefore Chs. IX and X.
remains, a great advance on previous regimes of regulation of
whales and whaling, and on most existing fishery commissions.\textsuperscript{139}

It provided for a continuing body to supervise and formulate
the issuance of regulations. Its incorporation of these
regulations, not in the Convention as such but in a flexible
amendable Schedule which continued to apply, whether amended
or not, removed many of the pre-war deficiencies. It was also
able to make use of the Rules of Procedure to broaden and
strengthen its role in the light of experience without the
necessity of convening a Conference of plenipotentiaries.

Its potential weaknesses emerged in practice (as will
be seen in the following Chapters) from:

(i) its failure to provide for international inspection or
other means of international enforcement;

(ii) its lack of adequate sanctions;

(iii) the prolonged objections procedure;

(iv) its non-comprehensive membership;

(v) its incompatible requirements that on the one hand there
be optimum utilization (not in itself objectionable) of the
whale resources, and that the interests of the whaling industry
and consumers of whale products be taken into account, whilst
on the other effect be given to scientific considerations, in
estimating the "optimum level" of stocks;

\textsuperscript{139} For further analysis of the Convention see the numerous
books and articles referred to in the attached Bibliography;
most are highly critical of its provisions. The articles
by Leonard and Scarff are good examples of the spectrum
of criticism.
(vi) its absence of restriction on effort or transfer of vessels;
(vii) the lack of dispute settlement provisions which allowed confrontations to delay introduction of effective conservation measures such as national and species quotas and an observer scheme;
(viii) its provision for whales which were otherwise protected or subject to a quota, to be taken under scientific permits, issued nationally, with the need for prior consent by the SC;
(ix) its failure to give substantive effect to several provisions of its Preamble, notably the safeguarding of whales for future generations, and the upholding of the international community interest as opposed to that of the whaling industry;
(x) its restriction on amendment of the Schedule rendering impossible limitation of the number of factory ships and land stations employed, and the allocation of quotas to them;
(xi) its non-integration into the UN system or into FAO;
(xii) its limitation to an overall quota system, set in {\em arbitrary} BWU's which did not protect individual species;
(xiii) its determination to have a minimal budget limited to small members' contributions;
(xiv) its withdrawal clauses;
(xv) its limitation of scientific advice and research to national efforts, without the addition of international independent research, or research conducted by the IWC.

Of these weaknesses (x) and (xii) perhaps in the event contributed to the undermining of the effectivity of the IWC's conservation policies, but all the provisions referred to above were only potential weaknesses. Much of the effectivity of
of the Commission was to depend on the spirit and will with
which it balanced all these interests and enforced the resultant
regulations. The provisions in themselves were not unusual or
unprecedented in the context of the international law of the
sea of the period, on which they had to be based; of the comparable
fisheries commissions then existing; or of the post-war economic
requirements. All international agreements inevitably result
from a compromise of a variety of national interests to achieve
the greater national benefit, as perceived by the states
sacrificing these interests, accruing from international
agreements restricting the interests of others as well as of
themselves. The means for effecting international agreements
establishing international "constitutional law" are diplomatic
conferences which adopt Conventions, or the promotion of
Conventions by the United Nations and its specialised agencies.
Political compromises have to be negotiated to secure inter¬
national agreement whatever the forum. The United Nations
and its specialised agencies were however given no role in the
foundation or in the subsequent development of the International
Whaling Commission. The balance of the compromises arrived
at, which favoured the industry at the expense of conservation,
might possibly have been different if these fora had been used.

At the Fourth and Final Session of the Washington Conference
the Chairman foresaw some of the problems ahead. He remarked that
all were agreed on the need for an international agreement but
added "It is to be regretted, however, that because of the
pressure of national interest, and of the whaling industry as
well, the regulations agreed on from time to time have been
subsequently relaxed by various concessions and liberal
interpretation to such an extent that, unless all countries engaged in the taking of and trading in whales exercise the utmost good faith and intelligent self-restraint to avoid excessive depletion of the whale stocks, commercial whaling may be very short-lived".

The Commission's history became for many years one of "liberal interpretation" of the Convention's requirement that the interests of the industry be taken into account and its practice evidenced its lack of "intelligent self-restraint" on the part of some members as will be seen in subsequent chapters. This, in spite of the considerable progress made in recent years towards a more effective conservation regime by amendment of the Rules and the Schedule and adoption of the Protocol establishing an Observer Scheme, has led to demands for either a revision of the 1946 Convention, or the negotiation of a new Convention on different premises and for different purposes.
CHAPTER V

PRACTICE OF THE INTERNATIONAL WHALING COMMISSION: 1949-1960

INTRODUCTION

An IWC delegate once remarked: "In the early days of such a body you always have to make up your mind again every year." 1 Certainly the annual review of the information submitted by the Contracting Parties and the ensuing annual amendment of the Schedule lent truth to this remark. Many aspects of the IWC's constitution also required rethinking in the light of experience as the following history reveals. 2 As revision of the International Convention for the Regulation of Whaling (hereafter referred to as the ICRW) is now being strongly pressed and many other fisheries commissions are reviewing their conventions in the light of developments at UNCLOS III, which has also stimulated the negotiation of new bodies, the meetings of the IWC will be described and analysed seriatim in some detail in order to reveal the nature and slow progression of state practice in interpreting and operating the Convention for conservation as well as exploitation. It is

1. IWC 7th Meeting 1955; Verbatim Record of Plenary Session, IWC Doc. XXI D, July 23rd 1955.

2. Although there is no detailed account of the IWC's meeting to the present day (at the time of writing up to the 31st Meeting in 1979) there are some accounts of its early history. The best of these (to 1965) is the political history found in Bock op. cit; Mackintosh op. cit. also resumés the history to 1965 at pp. 137-159; a brief resumé of its legal history to 1973 is given by J. McHugh "The Role and History of the International Whaling Commission" pp. 317-335 in Schevill op. cit; selective summaries are also found in the FOE Whale Manual 1978 op. cit. pp. 18-31; and Small op. cit. The most up to date account (to 1976) is given in Scarff op. cit. pp.358-372 but is necessarily very brief.
hoped that this method will signalize the political difficulties attending achievement of an interpretation which effectively conserves a resource which is currently being exploited by a majority of members. It will also, however, illustrate the remarkable progress that can be made, albeit slowly, by means only of re-interpretation and use of the extremely flexible instrument for change provided by the amendable Schedule. Finally it is hoped that this method will enable those concerned in fisheries commissions to identify the regulatory machinery required and the pitfalls of particular interpretations and applications of their constituent instruments, the disadvantages of which are not always apparent in the short-term.

Since there have been 3 major turning points in the Commission's history, it will be dealt with in 4 parts. The 12 years from 1949-1960, covering the First to the Twelth Meetings, are the subject of the present Chapter which therefore covers the period of drastic decline in catches of many species leading to a need for national quotas for which the ICRW did not provide, and for quotas for each species, rather than an overall quota based on the BWU. The difficulties encountered in arriving at a solution to this problem led by the Twelth Meeting to the withdrawal of some members, the suspension of quotas, and the institution of an independent Committee of Three Scientists to review stocks and advise on the measures necessary to restore them. The period from 1961-1970, covered in Chapter VII, was a period of gradual, but not radical, improvement. The effect of legal and political developments outside the Commission, stemming from the UN Stockholm Conference on the Human Environment 1970 (recounted in Chapter IX),
culminated in radical revision of the IWC's policies within the confines of the present Convention (as supplemented by Protocol), which are detailed in Chapter X.

The first Meeting of the Commission took place in London from May to June 1949, the Convention and its Schedule having come into force on November 10th, 1948. Eleven of the 12 Governments which had ratified the Convention by that date attended the first Meeting; only Panama was not represented. 7 observers were present, including the FAO, but neither Japan nor Germany was able to take any part.

3. As the Commission did not hold its first meeting until that date it could not produce the Report required under its first Rules of Procedure adopted at the 1949 First Meeting. Somewhat confusingly therefore, Reports thereafter relate to the year previous to their publication. Thus the First Report published in 1950 relates to the First Meeting held in 1949, IWC 1st Report, 1950, and so on thereafter. The most recent Report at the time of writing published and available from the IWC HQ, is the 29th Report of the year 1977-78, including the Report of the 30th Meeting, 1978. The Convention is at p.9-14; the Schedule p.15-19; Rules of Procedure p.23-27 of the 1st Report. Indicative of the expanding work of the Commission is the fact that the 1st Report had 32 pages, the 29th 480.

4. Namely Australia, Canada, France, Iceland, Netherlands, Norway, South Africa, Sweden, the UK, USA, USSR. Australia, Iceland, South Africa and Sweden attended without expert advisers. IWC 1st Report 1950 p.3.

5. Ibid, Appendix II, p.19. Argentina, Brazil, Chile, Denmark, New Zealand, FAO and the Supreme Commander of the Allied Powers. 5 of these states (Argentina, Brazil, Chile, Denmark, New Zealand) had signed the Convention but not ratified it at that date. In 1949 of the other Protocols in force the 1937/38 Agreement had 19 ratifications and the 1946 12, IWC Paper No. 1, 1949. Denmark informed the IWC by letter that the Faroe Islands had passed a Resolution that the Whaling Convention should be ratified only if special rights, similar to those accorded to France and Australia in the Schedule's para. 17, were accorded to Denmark, viz. that factory ships operating only in territorial waters should be subject to the same requirements as land stations, IWC Paper No. 3, 1949. The Commission agreed that whaling vessels grounded on the foreshore should be regarded as land stations and Denmark ratified the Convention thereafter, IWC 1st Report, 1950, p.6. Such concessions were to become typical.
1. First Meeting, London 1949

The first Meeting was primarily concerned with settling a number of administrative problems such as the siting of the Headquarters, election of officers, expenditure, submission of reports and appointment of committees which were dealt with by a Procedure Committee. The Scientific, Technical and the Finance and Administration Committees (hereafter referred to as the SC, TC and FAC respectively) were established and the former instituted sub-committees on Scientific Matters and Infractions and Penalties (hereafter referred to as SS-C and IPS-C respectively). It was agreed that the Norwegian BIWS (referred to in Articles IV and VII of the Convention) should continue to execute the statistical notification tasks for which it had been responsible in the past.

**Scientific Matters**

The crucial items on the agenda, however, decisions on which indicated the way in which the Commission interpreted the objectives of the Convention, related to scientific matters, and included, for the purpose of amending the Schedule, review by the SC of the 16,000 BWU quota; the length of the season; prohibition of taking of blue and humpback whales; operations of land stations; limitation on number of catchers; consideration of sperm whale catches; catch results of the previous Antarctic season; sanctuaries; organisation of research; and consideration of the information submitted on

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7. The office was to be located in the UK Ministry of Agriculture and Fisheries, London, Ibid, p.4 and 27.
8. Ibid. The Secretary was appointed part-time by the Commission; the rest of the staff was provided part-time "as and when required" by the Fisheries Department.
9. Ibid, p.22, Agenda Item XII.
infractions, penalties, regulations and legislation. These areas of interest have remained at the heart of the Commission's work throughout its subsequent history.

The Commission passed 4 important Resolutions on these matters which, as amendments of the Schedule, required a \( \frac{3}{4} \) majority vote. They unanimously amended the pelagic whaling season from 15th Dec. - 1st April to 22nd Dec. - 7th April, relaxing by a 7-2 majority the total ban on the taking of humpback whales south of 40\(^\circ\) South latitude, and thus introducing, for exploitation purposes, a form of species quota (allowing 1250 humpbacks to be taken in 1949/50 and 1950/51). It replaced, for factory ships operating in territorial waters, in order to admit them to the humpback stocks, paragraph 10 of the Schedule concerning the regulation of land station operations by a new stricter interpretation, preventing them, within a year of the relevant season's end, from being used for treating baleen whales in areas such as the Antarctic.

This relaxation of the ban on taking humpbacks provoked opposition in the SC and TC. The USSR and Norway were in favour, supported by the UK, on the ground that there were many uncertain factors, that the species was abundant and that a small catch would help to protect the declining blue and fin whales. Australia considered that as the species was easy to catch and was therefore easy to deplete, it was in danger of extermination. South Africa protested that the "object of the

11. Ibid, p.15-18, Schedule paras. 6,7,8,10 and 17 were amended; France later objected under Article V.
Convention was conservation" and that though "the number of humpbacks proposed was moderate it did mean the thin end of the wedge". Both states took humpbacks from land stations.  

The Commission on the other hand refused, on the ground that restrictions fell equally on all parties, to concede a Chilean request that the regulations relating to distances between land stations laid down in paragraph 10 of the Schedule should be relaxed. As a result Chile did not ratify the Convention, though it had signed it, since the activities permitted did not, Chile alleged, allow her "to obtain a sufficient catch to satisfy minimum domestic consumption". This action by the IWC, coupled with the United States assertion of rights over the seabed of the continental shelf in 1945, prompted Chile and Peru to remove their support from the IWC and to assert jurisdiction over 200 miles of the sea areas off their coasts in 1952.

Enforcement

The question of establishing uniformity of penalties was considered but rejected by the IPS-C which considered it impracticable. They noted that as far as could be ascertained

13. IWC 1st Report 1950, p.5; In the Plenary Session, though Australia and the Netherlands voted against, and Canada and Iceland abstained from voting, South Africa voted in favour of the relaxation.

14. IWC Paper No. 28, 1949; A Chilean paper on the special difficulties of Chile.

15. Ibid.


17. See Ch. VI, pp.274.


states' regulations in force were "reasonably uniform and adequate" and recommended that "penalties be sufficiently severe to act as a deterrent". The result was that no useful comparisons of reports could be made as penalties were in different currencies.

The Secretary to the Commission was instructed to prepare a Schedule of Penalties in force; governments were invited to submit statements to the Commission, establishing that gunners and crews were not paid bonuses for whales taken in violation of the Convention and to submit copies of their instructions to their whaling inspectors, but these measures were not added to the Schedule. It was recommended that a Committee be appointed to consider the reports of infractions submitted by Governments under Article IX(4), based on uniform log books.20

Several unfortunate patterns were thus set by the first Meeting:

(i) the quota at 16,000 BWU was set at a level not supported by adequate scientific research, which later proved too high;
(ii) the humpback protection was relaxed in spite of the scientific uncertainties surrounding this species;
(iii) whilst, on the one hand, permitting factory ships to take species harvested also from land stations, the major whaling states were not, on the other, prepared to make concessions to preserve the catch level of land stations of some developing countries, thus deterring them from joining.21

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20. Ibid.
(iv) there was no move to introduce national or species quotas apart from the humpback concession which was not for conservatory, but industrial benefit;
(v) inspection by the Commission was confined to the introduction of administrative measures.

The catch by the Antarctic pelagic fleet for the subsequent season (1949/50) was 16,069 BWU, i.e. 69 in excess of the quota. More ominous however was the fact that 2,117 humpbacks were taken, 867 in excess of the concessionary limit. Even the First Meeting, therefore, raised the crucial questions of the relation of scientific advice to regulation, the adequacy of constitutional provision for it, and the effectivity of enforcement.

2. Second Meeting, Oslo, 1950

The Meeting was attended by 15 states and 6 observers, membership having grown from 12 to 16 states. The most important decision taken at this meeting was that the IWC should not be brought into the framework of the FAO or any other international organisation for the reasons given in the previous Chapter, i.e. mainly those of economy. The IWC opted for the maintenance of "close association" with FAO but from then on, until the expansion in the late 1970's of the number and nature of observers from international organisations attending the annual meeting,

22. IWC 1st Report, p.8, para. 38.
24. Ibid, Appendix I, p.8. The observers were FAO, SCAR, ICES, IAWC and the Argentine and Chile. New Zealand did not attend.
25. Ibid, p.4 and Chairman's Report p.3.
the IWC's activities were subject to minimal international scrutiny. Its papers and proceedings remained private apart from the publication of a brief Annual Report. The Commission resolved that states which did not ratify the Convention should be warned that they could not expect indefinitely to be invited to attend as observers, but in practice they have been.

**Scientific Matters**

Dr. Mackintosh (UK) stressed the need for close liaison with existing independent research institutions and the SS-C pointed the need for more research. A programme of Whale Research was recommended by the Commission but could not, under the Convention Article IV, be made mandatory. The SS-C advised that "in spite of the deficiency of detailed biological knowledge the sub-committee consider mandatory that in accordance with general biological principles, it would be desirable to raise the minimum length and to prescribe an open season". They also considered that as stocks varied in different areas the possibility of prohibitions on catching in some areas of some species should be considered. The 1949/50 catch of blue whales was, they pointed out, the lowest on record. The opening date of the Antarctic season should therefore be put forward to January 2nd, and the humpback quota properly enforced.

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27. IWC, 2nd Report, p.4, para. 8.
28. IWC Doc. 5, Scientific Memo by Dr. Mackintosh, 1950.
29. IWC 2nd Report, 1951, Appendix V, p.15. A bibliography was attached as Appendix VI.
The Commission however, although some thought "there was much to indicate (it) was too high" despite the thought "there was much to indicate (it) was too high" again fixed the annual quota at, and as, an overall limit of 16,000 BWU and continued the quota of 1,250 humpbacks though postponing the opening date of the season for the latter to February 1st and requiring daily notification of catch. The season's closing date was left at 22nd December to 7th April. It was in the event cut-off at 9th March by which date 16,413 BWU and 1,630 humpback whales had been taken. This result bore out the reservations expressed in one report to the Commission that "the present regulations restricting whaling are to some extent arbitrary. Their results cannot be measured with much accuracy and it is not certain whether they are in fact giving sufficient protection. It may well be that a considerable measure of depletion can take place in any species before it becomes obvious, and it may then be difficult to take action which will result in restoration of the stock." Chile, stressing its lack of fats, again asked for relaxation of some regulations pertaining to land stations, especially for

30. IWC Doc. 8, 1950; 1st Plenary Session Verbatim Record; IWC Doc. 12, 2nd Plenary Session. Paulson (Norway) reported that IBWS statistics for 1949/50 revealed some disturbing trends yet the size of catching boats had increased in tonnage and engine power; IWC First Report, para. 38.
33. IWC Doc. 5B, 1950, Report on Sanctuaries.
34. IWC Doc. 13. The record actually records that Chile said it was "a country poor in facts but would make another attempt to solve harmonically with the Commission the problem of the whaling matter" (sic. emphasis added). The errors were no doubt due to the Commission's inadequate budget and services.
sperm whales which formed 85% of its catch. Chile was requested to give more information, and a decision was postponed.

**Enforcement**

The Secretary produced a summary of the laws and regulations in force within countries of the Contracting Governments. As fines were not expressed in a common currency, the Commission could not draw any conclusion concerning adequacy and relativity of penalties. Australia required that whales taken illegally be forfeited; Canada and others included in licences a term that IWC regulations be observed, but many Governments' legislation dated back to before the war.35

Some states did not report their infractions but available reports revealed that the prime cause thereof was carelessness by gunners. Most countries reporting had withheld bonuses and pay as punishment for such offences, or issued warnings. Norwegian law allowed for punishment by a maximum of a year's imprisonment, or a fine of up to £50,000 and confiscation of whales taken, but many states were either reluctant, or had no statutory powers, to prosecute gunners. Norway expressed reluctance to exercise her statutory powers unless other governments did likewise in similar cases. Many states reported that it was often impossible to avoid taking illegal whales.36

The Commission resolved that a uniform questionnaire should be sent to all Contracting Governments to obtain the fullest

35. IWC Doc. 3, 1950.
36. IWC Doc. 4, 1950 and Addendum.
information on their relevant legislation and regulations, that
infractions be recorded on a standard form, and that Contracting
Governments should act to require forfeiture of pay or bonuses
and of whale oil or products in the case of whales taken in
violation of the Convention.

The Commission thus compounded its errors of the previous
year by
(i) again setting the quota too high at 16,000 BWU;
(ii) continuing the concessionary catch of 1,250 humpbacks,
without researching these stocks;
(iii) taking only administrative measures to improve enforcement.

3. Third Meeting, Cape Town, 1951

Only 13 of the now 17 members attended this meeting but they
included for the first time Japan which had ratified the Convention
during the year. Chile however did not attend but there were
6 observers.

Scientific Matters

The Sub-committees were reconstituted as full Committees at
this session (a Scientific and a Technical Committee, hereafter
referred to as SC and TC respectively) and enlarged under a new

37. IWC Doc. XIII Verbatim Record of 2nd Plenary Session. Russia
protested at the arrival of Japan with which it had not
signed a Peace Treaty.

38. IWC 3rd Report, 1952, p.8, List of Those Attending (Brazil,
Iceland, Mexico and New Zealand, though members, did not
attend) Argentina, Italy, Panama, Peru, FAO and ICES
attended as observers.
Rule XVIII. Overcatching had continued - 16,431 BWU were taken and Dr. Mackintosh, Chairman of the SC, again drew attention to the decline in some species. He considered that there was plenty of evidence that the stocks of humpbacks could be rapidly depleted and that it was desirable on biological grounds to fix separate quotas for distinct populations of humpbacks. It was pointed out in the Plenary Session discussion that this proposal would present difficulties in areas where there were non-members such as Portugal.

The SC considered that the possibility of regional limitation of stocks should be examined since competitive whaling was a threat to them. Some members thought this too difficult but the Netherlands suggested that the stocks could at least be divided into Northern and Southern Hemisphere. It was reported that increased efficiency in capturing and processing was now evidenced by a steady increase in the catch of whales. The

39. IWC 3rd Report, 1952, p.3-4. The Rules of Procedure now required the new SC to review current scientific and statistical information with respect to whales and whaling; current programmes of Governments and of other international or private organisations; additional matters referred to it by the Commission, and to submit reports and recommendations on all these matters to the Commission, which was not, however, obliged to act upon them.

40. IWC 3rd Report, p.7, para. 26; due to administrative difficulties in closing the season at the date fixed.


44. IWC Doc. VII. Research and Progress Reports, 1951.
Chairman endorsed this finding at the Plenary Session confirming that "Every biologist who has examined the catch statistics sees very well that the total catch of 16,000 BWU is too high", and adding "the whole activity is a hazardous one resulting in hectic hunting seasons and making 100% maintenance of the Commission's decisions extremely difficult". 45

The striking increase in the average size and total number of pelagic factory ships and their catchers (20 factory ships and 270 catchers) was stated to have resulted in the shortest ever season (78 days) for baleen whales resulting in a noticeable thinning of blue whale stocks but also in an output of 1,910,000 barrels of oil worth £30 million.

The Commission nonetheless again retained the 16,000 BWU quota and a humpback quota of 1,250. In the 1951-52 season 16,000 BWU were finally taken and 1,545 humpbacks caught i.e. an excess of 295. The Schedule was amended in respect to the length of whales, and the definition of land stations.

Enforcement

Mr. Luow (South Africa) addressing the opening session drew attention to the growing awareness of states that enforcement was poor and that "to be effective measures must be reinforced by national governments and co-operation." 46 South Africa later elaborated upon this criticism in the light of information given

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45. IWC Doc. XII. Verbatim Record of Plenary Session.
46. Ibid, Mr. E. Luow, Minister of Economic Affairs; he added "The signatory nations may support regulations but firms are more interested in profit. Some governments may fail to take action against their nationals".
to the TC that "some catchers attached to 'Olympic Challenger' are sailing under the Honduras flag"47 i.e. under the flag of a non-party state and therefore not subject to IWC regulations. Panama, whose flag was flown by the Olympic Challenger's mother ship, agreed to investigate this with a view to inviting Honduras to adhere to the Convention.

Many of the Resolutions passed by the Commission at this Meeting related to the dilatoriness of some Contracting Governments in supplying the Commission with reports of their laws and regulations, and of infractions thereof. The Commission exhorted states to comply with their treaty obligations in these respects but had, under the ICRW, no way of enforcing compliance.48 The new TC, which under the new Rule XVIII had to review these reports, was unable effectively to execute its task49 and enforcement remained subject to minimal international scrutiny.

The lack of goodwill on the part of some states in enforcing the Convention and the unwillingness of many states either to reduce quotas or to allocate them on a more scientific basis were the main weaknesses emerging from this Meeting.

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47. IWC Doc. XVI. Verbatim Record.
49. Replies to the Questionnaire on Whaling Administration, Regulations etc. are contained in Appendix VII, p.29-39 of the IWC 3rd Report 1951. Australia, Canada, Denmark, Japan, Netherlands, New Zealand, Norway, South Africa, UK, USA. Parties not complying at that date were Brazil, France, Iceland, Mexico, Panama, Sweden, USSR.

16 members and 7 observers attended.\(^{50}\) The failure of the IWC's policies to conserve whale stocks was becoming increasingly apparent. The objection procedure had been used during 1951-52; Australia objected to the revised opening date for the sperm whaling season. As no other state objected the new regulation came into force after 180 days delay (on February 21st 1952) for all parties except Australia.\(^{51}\)

**Scientific Matters**

Over-fishing was continuing - 16,006 BWU were taken in 1951-52\(^{52}\) but there were no major proposals before the Commission, apart from repeated proposals by Dr. Mackintosh for the fixing of separate quotas for distinct populations of humpbacks and a Canadian proposal for the closing of the Northeast Pacific to all whaling including sperm whaling (to avoid the excuse of accidental by-catches of baleen whales) - a proposal which was resisted by the USSR as being "scientifically groundless and unsupported by pelagic data".\(^{53}\) Provision of sanctuaries was, however, discussed, South Africa pointing out that the Antarctic Sanctuary area was designated as such not on scientific criteria but because no commercial whaling took place there. The problem

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50. IWC 4th Report, 1953, p.10-11; Mexico was absent; observers included 3 international organisations and 4 states (Argentina, Italy, Portugal, Peru); Chile was not present.


52. IWC 3rd Report, para. 7, p.21.

53. Ibid; Canada considered that the Commission was deciding on the basis of catch statistics, not scientific evidence.
was deferred by establishing a sub-committee to consider this and the declining blue whale stocks.

The Commission shortened the season but retained the 16,000 BWU quota and amended the humpback quota in order to enable the BIWS to extend the humpback season by a few days if 1,250 had not been caught. In the event the BIWS cut short the Antarctic season (it stopped on 16th March instead of 7th April) because it feared that administrative problems would result in the quota being exceeded; only 14,855 BWU and 947 humpbacks were taken, by 16 factory ships with 232 catchers. Total whale oil output, including Antarctic land stations was 362,773 barrels, down on the previous year.

**Enforcement**

Three more states, France, Iceland and the USSR, submitted questionnaires concerning their laws etc. The TC spent some time deciding what to do with the replies submitted but the only action taken was to continue to publish them as an Appendix to the annual report. The replies published are in very general terms and do not give details of the relevant national Acts or of any prosecutions pursuant thereto and therefore do little to aid assessment of the adequacy of penalties at this period.

This Meeting did not decrease quotas or improve enforcement by but it took steps to improve data by resolving that whale marking

should be improved\textsuperscript{57} and data on the lactation and day of killing of all whales should be sent immediately to the Commission.\textsuperscript{58}

5. **Fifth Meeting, London, 1953**

The 1952-53 pelagic catch was only 14,853 BWU\textsuperscript{59} and this Meeting, attended by 16 of the 17 Contracting States and 6 observers,\textsuperscript{60} was faced by four clear signs of depletion of stocks:

- (i) a decline in catches per unit of effort;
- (ii) in the length of whales taken;
- (iii) in their weight and productivity;
- (iv) a decrease in the number of blue whales in the catch.

The recommendation of the special sub-committee appointed by the SC to consider these problems that more stringent measures were required,\textsuperscript{61} made this Meeting an important one.

**Scientific Matters**

The Sub-committee's findings supported all the above trends. They concluded that conditions for pelagic whaling in the Antarctic had deteriorated, blue and fin whale stocks were showing signs of depletion, and that the depletion of the former had reached a dangerous stage particularly in Area II of the Antarctic. They therefore recommended that the BWU quota be cut to 15,000, that

\textsuperscript{57} IWC 4th Report, p.7, para. 23.
\textsuperscript{58} Ibid, p.20, para. 16.
\textsuperscript{59} IWC 4th Report, p.8, para. 27.
\textsuperscript{60} IWC 5th Report, 1954, Appendix I, p.8-9. Portugal did not observe.
\textsuperscript{61} IWC Doc. II, 1953. Scientific Sub-committee's Report and Appendix.
the killing of blue whales be completely prohibited, and that some areas be banned to factory ships. They expressed concern for the possible future depletion of humpbacks but did not consider that there was enough scientific evidence available to show how to secure stocks for the future. The SC supported the sub-committee; the TC, however, did not support the blue whale proposals though it did recommend cutting the quota to 15,500 BWU. The Netherlands opposed the proposed reduction from 16,000 BWU alleging that as there were reasons, other than over-exploitation why catches were declining, there was insufficient evidence to justify it.

The SC proposals provoked much discussion in the Plenary Session. Canada opposed a suggestion that each country should have a national quota on the grounds that states would immediately increase their catching efforts in order to qualify for large quotas. A voluntary limit on the catching of humpback whales by land stations was suggested. Norway stressed that Article V of the Convention prevented restrictions on the number or nationality of factory ships or land stations, and the allocation of specific quotas to them. It was suggested that national quotas might be recommended, under Article VI, even if they could not be imposed.

62. IWC Doc. XVIII, 1953.
63. IWC Doc. XIX, 1953.
64. IWC Doc. XV E, 1953.
The Commission did not act on this suggestion, nor did it accept the extensions of the sanctuary for blue whales. Instead it merely approved a redrafting of the Schedule for reasons of clarity. It did reduce to 4 days the season for catching humpbacks and at last reduced the overall quota to 15,500 BWU. 66 In the event, because the BIWS curtailed the season too soon only 15,439 BWU and 594 humpbacks (61 less than the permitted total) were taken. 17 factory ships with 206 catchers, however, had obtained an oil production of 2,100,879 barrels which, with 184,647 from land stations, was an increase of 167,429 barrels over the previous year. 67

Enforcement

The question of prohibiting the supply of vessels and equipment to non-contracting governments for their whaling operations was raised but many states were opposed to such discrimination against non-members, though Norway and Japan said their legislation already provided for it. The issue was postponed for another year, the UK pointing out that such action would not be effective unless all Contracting states joined in the prohibition. 68 The new form of reporting infractions was found to be resulting in much fuller reports and there was a small decline in the number of infractions, except in relation to blue whales.

66. IWC 5th Report, p.1, para. 5.
68. IWC Doc. XV D, 1953, p.11.
The Commission missed its opportunity at this Meeting to protect blue whales and reduce overall quotas and thus gravely undermined its purposes, but the most serious assault on the IWC's effectiveness was the introduction in 1952 of the S. American 200 mile zone.

200 mile fishery limits

During 1952 Chile, Ecuador and Peru held their first conference on the Exploitation and Preservation of the Marine Wealth of the South Pacific as a result of which they had, in their Declaration of Santiago 69 proclaimed "sole sovereignty and jurisdiction" over a 200 mile zone adjacent to their coasts, including jurisdiction over the sea floor and the subsoil thereof. The reasons given for this step included that "Governments are bound to ensure for their peoples access to the necessary food supplies and to furnish them with the means of developing their economy", 70 that "it is the duty of each Government to ensure the conservation and protection of its natural resources and to regulate the use thereof to the greatest possible advantage to its country" 71 and to "prevent the said resources from being used outside the area of its jurisdiction so as to endanger their existence, integrity and conservation to the prejudice of peoples.


70. Ibid, Sec. (a) 1.

71. Ibid, Sec. (a) 2.
so situated geographically that their seas are irreplaceable sources of essential food and economic materials". The 3 states agreed inter alia to regulate and protect hunting and fisheries in their zones but "not to enter into any agreements, arrangements or conventions which imply a diminution of the sovereignty" over the zone, though they could conclude contracts not conflicting with the common rules laid down by them.

Unless Chile and Peru, both of which engaged in whaling, now joined the IWC, this zone would potentially be removed from the application of the IWC, which though purporting to cover all the waters in which whaling took place (Article II), was applicable to and enforceable by only the states parties to it (Article XI). Whales migrated through this area on their way to and from Antarctic waters. The possibility that even if protected and restricted by the IWC in the Antarctic they might be captured during their migration through the 200 mile zone of these 3 South American states henceforth seriously undermined the Commission's effectiveness. Many states, especially the United States, protested that the zone was illegal since international customary law required that coastal state jurisdiction be limited to territorial waters, which in the case of most states were at that date 3 or 4 miles.

72. Ibid, Sec. (a) 3.
73. Agreement supplementary to the Declaration of Sovereignty over the Maritime Zone of Two Hundred Miles, Art. 5, New Directions, Vol. I, p.234.
6. Sixth Meeting, Tokyo, 1954

16 of the 17 members and 6 observers attended. The rearranged Schedule had not come into force because Panama and Brazil had not yet assented to it, but an improvement resulting from this Meeting was that for the first time the Scientific Sub-committee's Report was published. It made several important recommendations, in the light of growing evidence of depletion of some species and the failure to catch the permitted Antarctic quota in the previous season.

Scientific Matters

The SS-C reported on humpbacks, blue and fin whales. It reported that the decline in Northern Hemisphere blue whales was severe and recommended that none should be taken in that area. There was also a decline in blue whales in the Antarctic and though the SS-C considered that further evidence was needed before a similar ban could be recommended in that area it suggested such a ban might soon be necessary. Dr. Mackintosh found that blue whales were reduced to half their population and could lose the power to recover. Meanwhile the SS-C recommended closure of some Antarctic areas to blue whale catching, and a reduction of the BWU quota to 15,000. It proposed total prohibition of catching humpback whales in the Northern Hemisphere and Antarctic,

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75. Ibid, p.9-10; Mexico attended; Iceland, was absent. Observers were Argentina, Chile, Italy, Portugal, ICES, FAO. Peru had intended to attend but was delayed.
and thought that individual species quotas may soon be necessary for better protection. Finally it advised that following the growing number of infractions since size limits were revised they should be lowered.

The SC, though endorsing the SS-C's findings from a biological view, recognised the "practical" difficulties involved whilst welcoming further protection in general. Only 152 whales had been marked so more whale marking was recommended and the Commission eventually allotted £600 for this. The Commission noted these views but did not take any new measures to protect blue whales; Japan particularly opposed a ban in the Northern Hemisphere. The IWC limited the ban to the North Atlantic and the North Pacific, for 5 years only. Humpbacks were protected except in the N. Pacific and for a 4 day catch in the Antarctic. They were also, however, being fished elsewhere by Portugal, a non-member, and Brazil which, though a member, was not an active IWC participant. The season was put back to 7th January - 7th April except for blue whales which could not be taken before 21st January.

Worries were expressed concerning declining fin whale stocks but the Netherlands, which at this period did not have good scientific advisers and resisted conservation measures, opposed raising the size limit from 55 to 60 feet; a limit of 57 feet was agreed as a compromise.

80. IWC Doc. XV, 1954; the sum was totally inadequate for the purpose but the ICRW imposes no obligation to conduct research either on the IWC or member governments. Art. IV merely enables the Commission to encourage it if it so agrees.

Enforcement

The weaknesses of the national enforcement system provided for in the Convention were beginning to be apparent and the TC drew attention to the fact that the reports on infractions may be inaccurate since so many whales that were reported to have been taken were on the borderline of the permitted lengths. As the Convention made no provision for international inspection, the Committee was limited to calling attention to the need for strict enforcement. 82 This suspected cheating by some did not encourage others to keep strictly to regulations and confidence in the Commission declined.

The 6th Meeting was a significant one - the serious warnings voiced by the SC had little practical effect, and the suspicions that some states were not properly enforcing the Schedule regulations increased. Blue and humpback whales were not completely protected and the overall quota was not reduced, as recommended by the SS-C, below 15,500. Even the protective measures adopted were subsequently weakened by the objections of Iceland and Denmark to the North Atlantic ban on blue whales, and by Canada, Japan, USA and USSR to the North Pacific ban, which thus did not come into force for these states under Article V(3). 83 The overall quota was not caught that year, 15,300 BWU and 493 humpbacks only being taken; the reasons being thought by some to be the limited season and possibly bad weather, not necessarily declining stocks.

83. IWC Doc. IV, 1954; IWC 6th Report, 1955, p.17. Iceland was not convinced the stock had so declined; IWC Doc. XXI, 1954.
7. **Seventh Meeting, Moscow, 1955**

The Meeting, attended by 16 of the 17 members gave rise to several significant developments, especially concerning enforcement.

**Scientific Matters**

The SS-C first considered separate quotas for individual species in the Antarctic including a limit of 1,250 for blue whales, but was persuaded to drop the idea. It took a grave view of the blue whale decline, and thought that the population might be too low to recover even if totally protected. Fins (now the basis of the Antarctic industry) were also declining. The SS-C favoured a drastic reduction in the number of whales taken - to about 19,000 (a balance of the 17,474 taken in 1950/51 and the 26,000 in 1954/55). As the large whales disappeared, more smaller ones were taken to keep up supplies for the industry.

The Committee, seeing the objections that followed the Tokyo meeting measures, realised that the IWC would not accept a cut of this magnitude (11,000 BWU) and suggested approaching it by stages, starting with 14,000-14,500 BWU in 1955/56. They noted

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84. IWC 7th Report, 1956, p.9, Appendix I. Brazil was absent; ICES and FAO were joined as NGO observers by the International Association of Whaling Companies; Argentina and Italy were the only observer states. It was pointed out that they were getting the privileges and papers of members without joining the IWC: IWC Doc. XIII, 1955.

85. IWC Doc. III, 1955, Report of Scientific Sub-committee. "It would appear that the stock is now only a fraction of the original population and its powers of recovery might already be found to be largely lost even if it received total protection". Doc. XIX, Report of Technical Committee; Not all agreed, e.g. Salvesen (UK) disagreed, p.5.

86. Ibid, p.2. "The whole Antarctic whaling industry is virtually dependent on healthy stocks of fin whales. Once progressive depletion has set in there is a risk that it will be accelerated and that the stock, if much reduced will begin to lose its powers of recovery".
also that pelagic whales in the North Pacific were now showing signs of depletion. Ruud (Norway) however, proposed that first a symposium on whale research problems should be held since there were differences of scientific opinion on depletion rates for all species. Slipjer (Netherlands), wrongly as events proved, thought fin whales were increasing, on the basis of calculations based on models devised by himself. As the IWC was not itself empowered by its Convention to undertake research, these proposals became the subject of dispute in the TC especially the proposed quota reduction to 14,500 BWU. South Africa and the UK protested that the industry would be too hard hit. In the subsequent Plenary Session though the blue whale season was reduced and the sanctuary in Antarctic Area II re-opened, the proposed quota reduction to 14,500 BWU (in itself a compromise) did not achieve the \( \frac{3}{4} \) majority required under Article V(3).  

89. IWC Doc. XXI C, 1955, Verbatim Record of Plenary Session; 6 voted in favour (France, New Zealand, Norway, Sweden, USA, USSR); 5 against (Japan, Netherlands, Panama, S. Africa, UK). The rest abstained or did not vote. The UK opposed the timing of the reduction though accepting the future need. Mr. Wall (UK) said "the position of the whaling industry should be fully taken into account and balanced with scientific requests as far as possible ... unless scientists are able to convince us that a most serious situation will develop". Ibid, p.32. Several other states supported this statement. The Netherlands stressed that "an expensive whaling expedition cannot be operated economically if not enough whales may be caught in a given season", Ibid, p.35.
The question of a future reduction to 11,000 BWU was left over. After much discussion and negotiation, the Commission eventually approved a first stage reduction from 15,500 to 15,000 BWU for 1955/56, and from 15,000 to 14,500 thereafter. In the event the first reduction came into force on 8th November, 1955 but 7 governments objected to the latter under the 90 day rule (UK, Panama, South Africa, Norway, Japan, USA, Canada); it did not therefore enter into force until March 1956, whereupon it did not bind the 7 objectors. In the following 1955-56 season, which was the shortest on record, only 14,887 BWU were taken, (including 1,432 humpbacks) by 19 factory ships employing 257 catchers; oil output, however, was up by 64,124 barrels.

**Enforcement**

The 7th Meeting was particularly important because of developments which further undermined the effectiveness of the IWC's enforcement of regulation on operations which occurred outside its control, first the establishment of another independent commission and secondly the further operations of the Olympic Challenger.

(i) **The South Pacific Commission (SPC)**

In 1954 Chile, Ecuador and Peru at a Second Conference on the Exploitation etc. of the South Pacific (following the Declaration of their 200 mile zones) adopted their own whaling and fishing regulations, effected by a Permanent Tripartite

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Commission concerned, inter alia, with whales. This Commission was established to manage and conserve whales and other fisheries in their zones. The protective provisions of the IWC, to which Chile had objected, were lacking from these regional arrangements which did include, however, minimum sperm whale lengths. An open season for sperm whaling was declared and no minimum distances were prescribed between land stations. Other weaknesses included permission of longer processing times and no restriction on the use of Antarctic vessels in the South Pacific area within a year of their use in the former.

The Chairman of the Santiago Conference now informed the IWC that the IWC Regulations were largely followed except where they prejudiced the just needs for national consumption and industrial supplies; the IWC regime favoured countries rich in capital and damaged poor countries. The SPC imposed some limit on sizes of whales caught, banned the catching of suckling whales and the payment of bonuses to offending gunners. Its Article 20 required that each signatory state inform the SPC of the number of whales it proposed to take; the SPC, then, under Article 21, set a quota in BWU's on the basis of the same whale equivalents as the IWC - 1 blue = 2 fins = 2½ humpbacks = 6 sei.

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93. IWC Doc. V, 1955; see further Ch. VI p.276-277.
The Olympic Challenger

The operations of this vessel, now flying the flag of Panama, a member of the IWC, had been referred to at the 3rd Meeting. It had operated outside the IWC regulations by registering its catchers under a Honduras flag. In 1954, in spite of protests, especially by the United States, that the 200 mile zone was illegal in international law, Peru had successfully arrested and fined the Olympic Challenger within its 200 mile zone for alleged breaches of these regulations.94

Japan protested that the Declaration of Santiago included "flagrant acts against international law" and requested the Commission to approach the United Nations on the question.95

The UK suggested that an immediate approach should be made to the UN before the International Law Commission drafted articles on Fisheries and Conservation for the Conventions which the UN General Assembly had instructed it to prepare for the First United Nations Conference on the Law of the Sea (hereafter referred to as UNCLOS I) which was to meet in Geneva in 1958.96

95. Article 35(i) of the UN Charter permits any member of the UN to bring any dispute situation which might lead to international friction or give rise to a dispute before the General Assembly or the Security Council. The Secretary-General under Article 99 can bring to the Security Council's attention any matter he considers may threaten the maintenance of international peace and security. It is doubtful whether the Olympic Challenger incident would qualify as a dispute situation or threat under these articles. More likely is that the matter could be put on the General Assembly's agenda under Article 11(2) so that it could discuss its implications.
96. IWC Doc. XXII, 1955, Verbatim Record of Plenary Session, p.37; for discussion of the relevant Conventions adopted at UNCLOS I see Ch. VI; on legality of limits at sea see Brown op. cit. n.74.
expressed by Canada, however, concerning whether a body which
was not a UN organisation could refer such a question to the UN;
and if it could, to which body it should refer it; 97 Japan
therefore withdrew its proposal, 98 but then submitted a report
and photographic evidence of alleged violations of the Convention
by the Olympic Challenger. Panama had not included returns for
this vessel in catch statistics submitted to the IWC. The
Panamanian delegate attested to the trustworthiness of his
countries' inspectors and undertook to investigate the matter
but later denied the charges. 99 Norway put before the Commission
documents concerning a Norwegian protest of "wholesale disregard
of the whaling regulations by a factory ship registered under a
Panamanian flag" which provoked further denials from Panama.
The matter remained under consideration, 100 but the incident
illuminated the need for an international observation scheme
since, in its absence, the IWC could not as such refute the
Panamanian denials.

(iii) International Observer Scheme

The continued decline in stocks, which, it was now apparent,
was due not only to too high quotas but also partly to poor
enforcement of the Convention by some member states, prompted
Norway to propose that international observers should be appointed

97. Ibid, p.39. Both the ILC and UNCLOS considered the question; see The Law of the Sea, Ch. VI, pp.299-311.
100. IWC 7th Report, 1956, p.5, paras 16-18.
to all factory ships, appointed by the Commission. 101

It was first objected that the proposal had been submitted out of time (it did not come within the 60 days notice required by Rule X of the Rules of Procedure) and that a legal opinion suggested it was ultra vires as the Commission had no power to pay (Schedule para. 1(a) placed the obligation to provide inspectors on the member governments). It was also objected that even if the Commission could obtain the necessary powers the cost of such a scheme, at about £10,000, would be prohibitive since the Commission's budget was based on Member State Contributions of only £150 each. Moreover, it was pointed out that if the objection procedure was used, up to 180 days would elapse before such a scheme became effective for even a few governments, by which time the next season would have begun.

The TC nonetheless approved the proposal in principle. The US proposed that the Schedule should be adapted to provide (with some amendment of the Norwegian proposal) that "to each factory ship operating in the (Antarctic) the Commission shall appoint an observer who shall not be of the same nationality of the ship which he is to serve. Each Government shall place at the disposal of the Commission as many observers as the Commission shall decide". These observers could be appointed and paid initially by the Commission but the cost could be refunded by governments on the basis of the number of their Antarctic factory ships, 102

101. Ibid, para. 14; IWC Doc. XII, 1955, Secretary's Note on Norwegian Proposal Reports the various objections.
but the proposal was not formally discussed because of the procedural difficulties.103

The 7th Meeting provided two significant landmarks in the IWC's history: (i) the first proposal for drastic quota reductions; and (ii) a proposal for an international observer scheme. It also provided evidence of the adverse effects on conservation of use of the objection procedure; the lack of linkage to the UN; and the effects of the non-membership of some whaling states, and of abuse of the international law permitting states to register ships under their flags. The continued lack of adequate research and scientific data also facilitated the diversity of scientific opinions and lack of agreement on quota reductions.


There were no significant new developments at this Meeting, which was attended by 16 of the 17 member governments,104 but the problems that had emerged during the first seven years continued to undermine the IWC's effectiveness as an instrument for conservation.

Scientific Matters

The reduction to 14,500 BWU for 1956/57 had been objected to by 7 countries.105 The SS-C106 found fin whale stocks to be

103. IWC Doc. XXI, 1955, Plenary Session.
104. Brazil was absent; Italy and Portugal observed as did ICES, FAO and the IAWC. IWC 8th Report, 1957, p.9, Appendix I; NB. This report p.3-5 includes a useful resume of the IWC history to that date.
105. IWC Doc. XIII D, 1956. The UK stated that its objection was merely to reserve its position but that it did not want to risk the industry's future by sticking to a 15,000 BWU quota until absolute proof of decline in stocks was obtained. It would be good sense to presume the decline and to take immediate minimum precautions. See p.108.
declining sharply; partly as a result of the protection of blue whales. The proposal (which had served to delay more drastic cuts in 1955) to hold a special meeting of scientists financed by the Commission was withdrawn, yet the IWC agreed to contribute only £500 to whale marking though the SC continued to complain of lack of data and the South Pacific Commission did not forward any catch data. The USSR stated that though approving the BWU cut it would not accept it if the 7 objectors were not bound by it. Norway proposed an open season for Antarctic humpbacks, which it alleged were increasing, to relieve the pressure on the fin whales. The SC recommended species quotas and a reduction of the fin whale catch and regretted the continued lack of total protection of blue whales in the N. Atlantic and N. Pacific resulting from the existing objections. Attention was drawn to the fact that states were not observing Article VIII of the Convention requiring them to send details of scientific permits to the IWC, and also that some states were issuing these outside the open season.

In the TC Norway and the Netherlands opposed both quota reductions and species quotas which they thought impractical and the Committee accepted their objections.

108. See n. 83. Doubts were now arising concerning whether the species on the east and west sides of the North Pacific were one or separate stocks.
The major weakness of the working of the Commission was openly stressed by New Zealand, namely that the SC tended to temper its views by taking into account extra-scientific considerations such as the effects of catch reductions on the industry and the possibility that governments may not accept them, instead of presenting the facts, however unpleasant. The Chairman of the SC accepted that they were influenced by such factors. New Zealand recommended a quota of 14,500 BWU for 1956/57 and 14,000 for 1957/58. It rejected arguments put forward by delegates of some non-Antarctic whaling states that these states should not vote. New Zealand considered that "the stocks of whales are ... a general trust and that no country is free to neglect this consideration, nor is the Commission free to neglect it ... in the limits which it is setting". New Zealand found that "there is great evidence that a crisis caused by over-killing faces the whaling industry ... it would lie heavily on the conscience of any nation which by its single action taken in opposition to all its partners in an international body, caused the dissipation of a mighty store of wealth". The United States agreed adding "the whales are a world resource and not the property of any one individual nation, or group of nations". The idea that whales are an international trust and the Whaling Commission should fulfil the role of an International Trustee is a recurrent one throughout the IWC history. It will be

111. IWC Doc. XIII C, Plenary Session, 1956, p.82.
114. Ibid.
considered finally in Chapter XI. At this stage, however, it must be noted that the substantive articles of the Convention do not effect a trusteeship on the lines of the only comparable international model viz. Chapter XII of the UN Charter, although the Preamble, as mentioned in Chapter IV, gives some credence to the principle.

The New Zealand amendment was defeated and the Commission fixed an overall quota of 14,500 BWU for the 1956/57 season which was, in the event, exceeded by 245, 20 factory ships with 225 catchers (the number of vessels having been at last reduced by inter company agreement outside the IWC)\textsuperscript{115} taking 14,745 BWU. The sanctuary area remained open since the catch there had been good and was thought to be relieving pressure on stocks elsewhere.

**Enforcement**

(i) **International Observer Scheme**

The Norwegian proposal for an Observer Scheme, which could not become effective without negotiation of a separate Protocol, was discussed in the TC and the SC. The latter favoured appointment on Antarctic ships of observers from nations whaling only outside the Antarctic or from non-whaling nations. The former recommended the opening of a Protocol for signature and the IWC asked the USA to draft one, proposing that the observers should report only to the IWC. Australia suggested that the cost of the scheme should be borne by the pelagic whaling states.\textsuperscript{116} This was an encouraging move but the fact that a scheme had to be negotiated outside the ICRW delayed its introduction for 18 years.

\textsuperscript{115} IWC 8th Report 1957, p.7.

\textsuperscript{116} IWC Doc. X; IWC 8th Report, 1957, p.17, para. b.
(ii) **Infractions and the Olympic Challenger**

Infractions were fewer but an ominous increase in the number of undersized whales taken was revealed.\(^{117}\) Panama had made no returns of catch statistics but Japan again produced photographs allegedly showing the Olympic Challenger taking humpback whales on prohibited days. Norway also complained about Panamanian violations\(^ {118}\) and Panama agreed to try to settle the question diplomatically,\(^ {119}\) the IWC lacking any enforcement powers.

The South African practice of fining gunners responsible for infractions, whether intentional or not, was noted but not recommended. Other states thought the loss of bonus was sufficient in accidental offences and it seems likely, therefore, that deterrence remained weak.

(iii) **Arbitration**

The TC discussed relevant sections of the Report of the 8th Session of the International Law Commission which included proposals for arbitration of disputes between states fishing the same stocks in the high seas and for coastal state rights to prescribe conservation schemes in areas adjacent to their territorial sea, to which reference has been made in earlier chapters and which will be more fully discussed in Chapter VI. The discussion was inconclusive and was thought by some members to be outside the Committee's terms of reference,\(^ {120}\) though it would seem that it is covered by a broad interpretation of Article VI.

\(^{117}\) IWC Doc. IV, 1956.
\(^{118}\) Ibid.
\(^{119}\) IWC Doc. XIII C, 1956, p.89.
\(^{120}\) IWC Doc. XI, 1956, para. 19.
Once again the IWC failed either stringently to exercise its powers or to expand them. The quota was not reduced, species quotas were rejected, blue whales remained partly unprotected because of the outstanding objections, the observer scheme was deferred by the Protocol requirements, and Panama had continued to ignore its obligations under Article IX of the Convention.


Although Brazil attended this meeting, Panama did not, probably because of the criticism of the Olympic Challenger's activities, the fact that it was Panama's failure to ratify the re-arranged Schedule that prevented it coming into force, and that its contribution was £500 in arrears.\(^{121}\) The Meeting examined further evidence of the disturbing decline in many stocks.

**Scientific Matters**

The SS-C\(^{122}\) opposed a Norwegian suggestion that the Antarctic humpback whale take might be raised to relieve the decline of blue and fin whale stocks, evidenced by the fact that much of the catch of the latter was now taken in the former sanctuary area though Dr. Slipjer (the Netherlands) contested this evidence.\(^{123}\) The Commission eventually rejected the Norwegian proposal but kept the sanctuary open for another year. The BIWS reported on the

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121. IWC 9th Report, 1958, p.8, Appendix I; 16 of the 17 members attended; Portugal, Italy and Argentina, ICES and FAO observed.
123. IWC Doc. XII, Report of Technical Committee p.1. The catch there had risen in one year from 25% to 40% of the total.
poor hunting of the 1956/57 season. In areas where before the war 20-30,000 BWU were taken, and immediately post-war 15-16,000, only 8,000 were now being caught. The size of blue whales was declining, but Iceland still refused to accept the ban on taking them in the North Atlantic, taking eight there in 1957/58. Denmark had taken one only but refused to withdraw its objection if Iceland did not do likewise, though Norway protested that it refrained from taking the same stock on its migration through Norwegian waters.

The reduced quota of 14,500 BWU was extended to the 1957/58 season but automatically raised, as agreed in 1956, to 15,000 BWU for 1958/59.

Enforcement

(i) International Observer Scheme

Brazil, Denmark, France, Mexico, the Netherlands, Panama and the USA had not yet ratified the Protocol enabling amendment of the Convention and this dilatoriness prevented decisive action being taken on the Norwegian proposal.

124. IWC Doc. XIV A, Plenary Session, p.16. The average catch per catcher day was declining.
126. IWC Doc. XIV C, 1957, Plenary Session p.81. The USA urged that the Commission's "obligation to future generations of mankind far exceeds any obligations to stockholders". It considered that the balance between scientific and moral considerations had deteriorated in this Session and that Governments were losing sight of their prime objectives in drawing up the Whaling Convention. Conservation had taken second place to national interest.
(ii) **Infractions**

That the situation was still far from satisfactory was evidenced by the TC's finding\(^\text{128}\) that infractions were still too high and that there were still too many undersized baleen whales (400) taken and too many whales lost. Norway considered that depletion of stocks in Area V was due to the continued illegal operations of the Olympic Challenger.\(^\text{129}\) Japan announced that she had now purchased this ship\(^\text{130}\) so this problem was ended. As will be seen in Chapters XI and X, at the present time, however, some companies continue to whale, albeit on a much smaller scale than did the Olympic Challenger, under the flags of both whaling and non-whaling states which are not member states of the IWC, and, as a result of the drastic decline in stocks brought about by the procrastination of the IWC in the period under review in this Chapter, this so-called "pirate whaling" poses a more serious threat to remaining stocks than would otherwise be the case.

(iii) **UNCLOS I**

The Commission decided not to send an observer to the First United Nations Conference on the Law of the Sea which was to take place in 1958 on the grounds that the observer appointed as the representative of the IWC might find his views clashed with those of his national government at the Conference. It decided to follow

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130. IWC Doc. XIV A, p.16, Plenary Session. Japan now had 5 pelagic factory ships; Norway 9; the UK 3; the Netherlands 1; and USSR 1.
the policy of ICNAF (International Council for North East Atlantic Fisheries) which was said to have declined representation for a similar reason, i.e. that the UN Conference was essentially inter-governmental. The IWC thus had no influence whatever on the relevant Articles of either the High Seas Convention or the Convention on Fishing and Conservation of the Living Resources of the Sea adopted at that Conference, although both had considerable effect upon the IWC.

The 9th Meeting followed the established pattern of previous meetings in tempering the scientific evidence of dangerously declining stocks to meet national industrial interests and refusing to exercise the powers provided in the Convention to amend the Schedule in order to reduce the overall quota or to establish more sanctuaries.

10. *Tenth Meeting, the Hague, 1958*

This meeting, which took place after UNCLOS I, was attended by only 14 Members. It was notable for the introduction of the proposal that Antarctic whaling countries should allocate the catch therein equitably between themselves by agreement outside the IWC.

**Scientific Matters**

Less whales were now being found in the sanctuary area. The blue and humpback whale catch was the lowest since the war; the

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131. Doc. XIV B, p.40, Plenary Session. It has not been represented at either UNCLOS II or III though the ICNT's adopted by the latter have included articles on Marine Mammals and on Highly Migratory Species.

132. Brazil and Mexico were absent; Italy and Portugal observed, as did FAO, ICES and IAWC. IWC 10th Report, 1959, p.8, Appendix I.
fin whales caught were young and more sei whales were now being taken. These were all signs of further depletion. The Netherlands however still considered the evidence for quota reduction insufficient, and proposed for 1959/60 a catch quota of 16,000 BWU.\textsuperscript{133} The Scientific Committee considered a figure of 10,000 BWU, the UK proposed 14,500 BWU and New Zealand suggested 14,000.\textsuperscript{134} A quota of 15,000 was finally adopted. The sanctuary was kept open even though the SC was disturbed by the speed of depletion of the stocks therein. Iceland and Denmark still objected to the North Atlantic ban on taking blue whales. In the event in 1958/59 15,301 BWU were captured (including 2,394 humpbacks) i.e. the quota was exceeded by 301, and 500 less blue whales were included in it. 20 pelagic operations with 225 catchers were used.\textsuperscript{135}

Sperm whales were now being taken in large and increasing numbers in response to rising prices for sperm oil, but as the take was said to be all male and as no evidence of depletion could be produced no protection beyond the existing size limits was considered necessary. More humpbacks appeared to have been taken in the 4 day season than were taken before in the longer one, and the Commission was urged to find a way of limiting the catch by numbers (to keep it to 1,250). The Commission was unable to do this, but protection in Area II was continued.


\textsuperscript{134} New Zealand was very critical of the higher proposals and said that it was a failure of capitalism if only by exterminating the resource could the industry continue, though whale oil was in less demand.

\textsuperscript{135} IWC 10th Report, 1959, p.3, para. 3.
National quotas for the Antarctic

The UK, as declining stocks and demands for further quota reductions meant that there was too much catching effort deployed in the Antarctic, now proposed, in order to maintain the economics of the industry, that the Antarctic countries should consult together without delay to find a solution and that a possible one might be an agreement for sharing the permitted catch equitably between them. As national quotas and effort limitation were specifically banned by Article V(2)(c) of the Convention this would have to be in the form of a diplomatic inter-governmental agreement negotiated outside the IWC, unless the Commission was unanimously prepared to recommend amendment of the Convention. The UK expressed concern for the Convention's future unless such an arrangement could be made. The UK had already sounded the USSR unofficially about an informal agreement to limit whale catchers but the USSR, which had never taken part in the earlier inter-company agreements, had initially stated that in no circumstances could it agree to this. The USSR now officially agreed to participate in discussions, however, and a conference of the 5 Antarctic pelagic whaling states was held in 1958 in London. Its recommendations were put to governments and communicated to the Commission. It was proposed that over a 7 year period the USSR should not add more than 3 new factory ships to their operating Antarctic fleet and that none of the 5 states would transfer a factory ship to a state party without also transferring part of

136. IWC Doc. XIII, Plenary Session, p.81, Wall (UK); IWC 10th Report, 1959, p.5, para. 11.
137. Letter from Harold Salvesen on file Salvesen's IWC Papers, 10th Meeting 1958.
its quota or requiring the receiving state not to use the ship in the Antarctic during the period of the agreement. The agreement would be nullified if a factory ship under any other flag entered Antarctic whaling except as a result of the purchase of a fleet from a party to the agreement.

It was also arranged that 20% of the permitted Antarctic quota would go to the USSR. Agreement could not be arrived at on the allocation of the remaining 80% to the other 4 states; they met again to try to agree in May 1959, failed again and met once more on 18th June 1959. It is important to the formulation of proposals for revision of the Convention to recall the extreme difficulty of conducting such negotiations when national interests in fisheries are at stake. The difficulties experienced by the European Economic Community (EEC) in negotiating a Common Fisheries Policy illustrate that these aspirations have not changed.\(^{138}\)

Enforcement

(i) International Observer Scheme

The Protocol providing that the Convention's definition of whale catcher should apply to helicopters and other aircraft, and also enabling the Commission to amend the Schedule in relation to methods of inspection had still not been ratified by Brazil, Mexico and Panama, countries without whaling operations and therefore without interest. As amendment of the Convention required unanimity the Protocol could not come into effect and no progress could be made with the observer scheme.\(^{139}\) These states did, however,

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subsequently ratify it during 1959 and the Protocol entered into effect on 4th May, 1959; the details of the Observer Scheme still had to be negotiated, however, thereafter.

(ii) Infractions

The general position was regarded as satisfactory but many states submitted their catch or other reports late; Brazil sent none for 5 years. New Zealand drew attention to the possible non-compliance of some states with Article IX(3) and (4) of the Convention which was ambiguous. Contracting Governments were asked to submit statements of their policy concerning its interpretation, since it could mean either that a prosecution must be taken whenever an infraction had occurred or merely that if a prosecution were instituted it must be taken by the appropriate government. New Zealand drew attention to the fact that only Australia, Japan, South Africa and the USA were actually prosecuting violations, others still relied on reprimands and withholding of bonuses.

Humane Killing

This was discussed following representations from the World Federation for the Protection of Wildlife and a Resolution of the 1958 UNCLOS I, which called on states to prescribe by all means available to them, those methods for the capture and killing of marine life, particularly whales and seals, which would spare them

140. These are summarised in Appendix IV, p.28 of the IWC 10th Report, 1958; see also Appendix VI of the IWC 8th Report 1956.

141. Article IX(3) provided that "Prosecution for infractions against or contravention of this Convention shall be instituted by the Government having jurisdiction over this offence".
suffering to the greatest extent possible. The IWC accepted the Resolution and noted that research on better methods was underway. 142

This meeting was a particularly important one as it at last initiated, if not the necessary species quotas, at least the beginning of national quotas for the Antarctic. Quotas were still, however, set too high and the observer scheme's details could still not be discussed because of the lack of ratification by disinterested states. Although the new agreement that was negotiated outside the Convention for the Antarctic did introduce some improved measures, such as non-use in the Antarctic of vessels transferred to others and some limitations on transfer of quota, as Antarctic whaling states could transfer their quotas to the purchasers, reduction of catch by elimination of catch effort did not occur.

The argument that the uneconomic nature of fishing for declining catches would in itself prevent extermination of species since states would withdraw before the decline was irreversible was undermined by this practice.

Threatened Withdrawal of the Netherlands and Norway and Japan

A particularly serious development occurred following the 10th Meeting. Because of the initial failure of the Antarctic pelagic whaling states to agree on catch allocations between themselves, Japan, the Netherlands and Norway gave notice of withdrawal from the Commission under Article XI. 143 The withdrawal was prompted by the suspected failure of Russia to observe quotas so that other Antarctic whaling state's interests were unprotected unless

143. Ibid, p.7, para. 16; see Appendix VI, p.25-26 for text of notices of withdrawal.
national quotas could be agreed. This withdrawal boded ill for the Commission's future as a conservatory body since once outside the Commission these important whaling states would not be subject to international regulation and could continue whaling under the doctrine of freedom of fishing on the high seas which, as recorded in Chapter VI, was in 1958 codified by Article 21 of the Geneva Convention on the High Seas. They would not even be subject to the less restrictive regime of the South Pacific Commission.


This was a crucial meeting, attended by 15 member governments. The IWC was now faced with the threat of withdrawal by three Antarctic whaling states the inclusion of which was vital to its success. All three had intimated in their notices of withdrawal that they would rescind them if an agreement could be reached on allocating quotas for the Antarctic catch which was satisfactory to them - a negotiation in which the Commission could play no role and over which it had no control.

The Commission was conciliatory towards its withdrawing members. Its immediate objective became to keep them within the membership rather than to conserve stocks, as the Chairman's Report of this Meeting makes plain. It states: "Conscious of the importance of maintaining the Convention, the Commission showed a willingness to consider making some increase in the Antarctic permitted catch if thereby loss of the three members...

144. IWC 11th Report, 1960, Appendix I, p.8-9; Brazil and Panama were absent; Portugal, Argentina, FAO and ICES observed.
countries which had given notice of withdrawal could be averted". On the last day of the meeting the Commission was informed that the Antarctic pelagic whaling countries had again failed to reach an agreement on national quotas and the Netherlands and Norway announced their withdrawal as from July 1st, 1959. This had disastrous consequences for conservation. The withdrawal date (set by Article XI of the Convention) fell in the middle of the 11th Meeting and the pressure it exercised forced members to seek any means, however unscientific and antipathetic to conservation, of keeping the IWC membership intact. There is again some, though not a complete parallel, with EEC negotiations.

**Scientific Matters**

The IWC Meeting took place earlier than usual and was therefore without figures for the Antarctic catch. Even so a majority of the SS-C saw no prospect of a recovery of the blue whale if the present rate of exploitation continued and it recommended total protection. It was thought that over-fishing continued and the raising of the overall catch quota to 15,000 BWU in the previous season was regretted. There had been a large increase in the number of sperm whales taken in the North Pacific and Iceland and Denmark had continued to reject the ban on catching blue whales in the North Atlantic. This year at last, however, these 2 states accepted the ban which the IWC extended to 1965. The SS-C thought drastic measures were called for in the Antarctic.

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The previous year's catch had shown a decline of 500 BWU underlining the SC's mistake in saying that the catch was stable before these figures were available.

The SC endorsed most of the above views though Slippers (Netherlands) did not consider there was sufficient evidence to support the general view that fin whales were declining. With reservations the SC recommended that the sanctuary be kept open. Lack of firm evidence prevented recommendations on fin and sei whales, and for the North Pacific.\(^{147}\)

The BIWS reported that in the 12 seasons in which it had exercised its role in terminating the catch the actual catch had exceeded the total catch permitted by the IWC by only 23 units on average. The spokesman for BIWS put forward the view that stock depletion was due not to excess over the quota but to the illegal unreported catches, the catches of non-member states and the fact that the catch quota was too high.\(^ {148}\) However, it soon appeared that the difficulties of allocating the Antarctic catch among the 5 states whaling there could only be resolved if the quota for 1959/60 was raised to at least 16,000 BWU.\(^ {149}\) Though some states considered that it was better to set a higher quota than to risk withdrawal of 3 of the 5 Antarctic whaling states,\(^ {150}\)

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147. IWC Doc. SVII, 1959.
149. IWC 2nd Plenary Session, 25th June 1959, IWC Doc. XIV p.1. John (Norway) revealed that at the Tokyo discussions between the 5 Governments a figure of 18,000 BWU was considered and in London 16,000-16,500.
150. Ibid, p.28, the USSR; Canada (IWC Doc. XV, 3rd Plenary Session, 26th June, 1959) p.45; Japan, p.49; UK, p.52; Denmark, p.54.
others remained opposed to such an approach\textsuperscript{151} since they were committed to preservation of the resource. Norway protested that the other Antarctic states wanted it to bear the brunt of the necessary cuts\textsuperscript{152} and pointed out the inconsistency of the provisions of the Whaling Convention the Preamble to which stated that its purpose was to "make possible the orderly development of the whaling industry" whereas the substantive provisions (Article 5(2)(c)) prevented any limitation on the number of expeditions. Japan, however, stressed that the efforts it had made to increase the productivity of its enterprises required that it be allotted a quota sufficient to repay these investments and take account of the fact that Japanese fleets were on an upward trend. It needed the whale meat as food and could not decrease its 6 fleets.\textsuperscript{153}

The impasse was unresolvable; the Netherlands and Norway therefore allowed their withdrawal notices to become effective though Japan, stating that "it fully recognized the exemplary and rational nature of the present Convention as a means of preserving collective operations", withdrew her notice. The UK expressed doubts about remaining in the Commission if the withdrawals took place. As no proposals were made for altering the BWU quota it stayed at 15,000 for 1959/60.\textsuperscript{154}

\textsuperscript{151} IWC Doc. XI, p.48, e.g. Norway and New Zealand; A roll call revealed 5 in favour, 2 opposed, with the rest abstaining.
\textsuperscript{152} IWC Doc. XV, (1959) p.68.
Enforcement

(i) The International Observer Scheme

The meeting continued after July 1st without Norway and the Netherlands. Their absence immediately threw the plans for an International Observer Scheme into difficulties as there was little point in proceeding with it if two major Antarctic whaling states were not in the Commission. The UK informed the IWC, however, that both countries had expressed willingness to take part in the scheme even if they were not members of the Commission and discussions took place. It was agreed in principle that there should be a scheme though it could not be applied next year in the circumstances.

Two proposals had been submitted, one by Japan and one by Norway;

(a) Japanese Proposal: The Commission should appoint one observer to each Antarctic factory ship from nationals of the Antarctic pelagic whaling states which are parties of the Convention. The observer should not be of the nationality of the vessel to which he was appointed. The Commission would choose the observers from a panel nominated by the Antarctic pelagic whaling countries in proportion to the respective number of their operational fleets. The observers would be paid by the Commission out of funds collected in advance from each Contracting Government on a basis allocated by the Commission with the Antarctic whaling countries paying more than others. The observers should be under the Commission's instructions only and they would have no disciplinary powers. They could interrogate the national inspectors but not interfere with them in any way. If infractions were seen to be
 occurring the observer would send a report by radio to the Commission. Japan proposed that the observers would have an international character similar to that of the UN Secretariat. 155

(b) **Norwegian Proposal:** Norway also proposed that the Commission should appoint one observer to each factory ship, but suggested that the observer should not only be of a different nationality to the ship but also not from any of the Antarctic pelagic whaling nations. As in the Japanese plan the Commission would pay the observers but the money would come from each government for the observers on their ships. The Norwegians agreed that the observer should not have disciplinary powers but be limited to following the operations and questioning inspectors without interfering with them. He would report to the Commission at the end of each season unless he observed infractions in which case he would report at once to the Commission by radio. 156

The only substantial differences in the 2 schemes were in the proposed method of payment and that Norway proposed that observers should be drawn from nations not engaged in Antarctic pelagic whaling whereas Japan suggested that the observers should be chosen only from the Antarctic whaling states. Australia favoured inspection by neutrals though she foresaw difficulties of payment. 157

The UK considered that an observer should at least not be of the nationality of the ship on which he was placed 158 and that the

155. IWC Doc. XIV 1959, p.112.
156. Ibid.
158. Ibid, p.113.
Antarctic powers could be asked to work out the details of a scheme and to report to the Commission, whose approval could be obtained before the next Meeting under Rule VI of the Rules of Procedure. The Commission decided to seek a legal opinion on whether an observer could be drawn from a non-member country and invited the 3 Antarctic whaling countries, which remained members of the IWC, to work out a scheme, inviting Norway and the Netherlands to attend their meeting. The Chairman emphasised that if approved the scheme would become part of the Schedule and could therefore only be amended by the procedure for amending the Schedule i.e. by a vote of the Commission, though a Special Meeting of the Commission could be summoned for this purpose under Rule XVII.

(ii) Infractions

The problem of interpretation of Article IX(3) of the Convention was resolved by the TC in favour of the less rigorous meaning i.e. that Contracting Governments were not obliged to prosecute for every infraction but that if it was decided to proceed against the violator the proceedings should be brought by the Contracting Government concerned.

159. This provides that between meetings or in the case of emergency, a vote of Commissioners might be taken by post, or other means of communication. A $\frac{3}{4}$ majority of all the Commission members would then be required for approval.


161. Special Meetings could be called at the direction of the Chairman after consultation with Contracting Governments.

The Schedule was at last amended at this Meeting to extend the provisions of para. 16(b) to helicopters and aircraft, but no progress could be agreed on the IOS amendment because of the withdrawals, though, although both Norway and the Netherlands did withdraw, both announced that they would adhere voluntarily to all the provisions of the Whaling Convention which served to preserve whale stocks. The IWC, of course, had no means of checking observance of these undertakings. Norway said that its Government would continue to make the services of the BIWS available and would grant its fleet as low a quota as possible (later announced as 5,800 BWU). The Netherlands said it would keep all the IWC rules except restrictions on the number of whales taken and the period during which they may be taken; it planned to keep within 1,200 BWU. In the event 15,301 BWU were taken by all the Antarctic countries, 4,569 BWU by Norway and 1,038 by the Netherlands which did not even reach their self-imposed limits. 20 expeditions operated using only 217catchers, a decrease due mainly to a reduction of 23 in the Norwegian fleet. Although the catch only slightly exceeded the limit it took much longer to get than before and though the oil output was much the same, there was a marked drop in the average catch per catcher day's work, which warned of further depletion.

This Meeting proved to be the most critical in the IWC's history to date. The short-sightedness of the Norwegian, Netherlands and Japanese Governments at that time now seems difficult to credit. The insistence of Japan and the Netherlands in particular in

disregarding the SC's majority view on declining stocks, their insistence that economic objectives must override the scientific advice, the withdrawal of the Netherlands and Norway\textsuperscript{165} so that no effective quota was binding on them and therefore no quota arrangements could be properly arrived at for the governments remaining in the Convention, and finally the setting by Norway and the Netherlands for themselves of quotas which they could not in the event catch even in an extended time, rendered the Whaling Commission almost completely ineffective and precipitated the final decline of Antarctic whaling as no adequate steps could be taken thereafter to halt the subsequent decline in spite of the various warning signs.


13 of the 15 members remaining attended this Meeting, including Argentina which joined this year.\textsuperscript{166} The work of the Meeting was entirely overshadowed by the problem of the absence of two of the five Antarctic pelagic whaling states (hereafter referred to as APW). Without them the work of conservation could hardly proceed effectively so the Meeting spent much time considering how to entice them back, whilst extra-Convention quota discussions continued between the 5 APW states, against a background of the increasing decline of stocks predicted by the SC. The Secretary of State for

\textsuperscript{165} The motivation of Norway and the Netherlands was very different. Norway had no illusions about the evident decline in stocks and sought to protect her interests against the USSR by securing a national quota; the Netherlands had a monopoly industry.

\textsuperscript{166} IWC 12th Report, 1961, Appendix I, p.10; Norway and the Netherlands had withdrawn, but attended as observers with Italy and Portugal, FAO and ICES; Brazil and Panama were again not represented.
Scotland, addressing the first session warned "you now meet at a critical state in your history and in the efforts to secure a rational exploitation of the whale stocks. The Convention ... is perhaps not perfect in the light of experience; it seems to me perhaps a pity that while providing for a limit on the total catch of whales it did not provide for any regulation of catching power".

**Scientific Matters**

The total catching period for all factory ships had averaged 93 days compared to 69 in the three previous seasons but the total catch had been very little more. The SC found that increased protection was needed for blue whales since there had been a further fall in the proportion of the catch of blues to the combined blue and fin whale catch, a decrease in average length and a 50% increase in the proportion of immature blue whales in the catch. The Committee therefore again called for total protection. 167 The fin whale stock was also found to be seriously declining. The Committee asked for a drastic reduction of catch by about 2,500 units, being convinced that the stock could not withstand the present catch rate without further serious depletion. 168 The size of sperm whales taken was less though the catch was not so high as before. The Committee warned that the stock was being appreciably affected by whaling and called for more whale marking, 169 to which the IWC should contribute.

168. Ibid; and IWC/12/11 p.16.
169. Ibid.
Humpback whaling had been resumed by a French company off the Congo in the expectation that the stock would have recovered after its 6 year rest there, but catches were below expectations, only 170 out of a quota of 600 being caught. The Committee deduced that humpbacks took much longer to recover than had been previously thought: 10-12 years rest might be required.

Total protection of some groups was therefore recommended, as well as drastic reductions of catching of blue, fin and humpback whales. The Committee several times expressed their deep concern about the condition of whale stocks and stressed the need for full international participation in the revaluation of pelagic whaling.

Presenting the SC's report to the Plenary Session the Chairman said "we now think the position has become more serious and we are asking for stronger protective measures than the Commission feels able to take" including the ban on blue whaling in the Antarctic and a cut in the overall BWU quota of about 2,500 BWU to bring the catch back to the level of 10 years ago.

Though the TC agreed on the urgent need to restrict the taking of humpback whales and recommended amending the Schedule to close Area IV and reduce catching in Area V to 3 days for the next 3 years, Japan opposed this amendment. The TC also opposed giving information on location of catch to the scientists because of the industrial competition for the most plentiful

170. Ibid.
171. IWC/12/11 Verbatim Record, 2nd Plenary Session, p.15, Dr. Mackintosh (UK).
172. IWC/12/12, Report of Technical Committee, p.23.
areas. The IWC, because of the withdrawal of Norway and the Netherlands, found great difficulty in heeding the SC's warnings and request for drastic measures.

**Effect of withdrawal of Norway and the Netherlands**

Talks between the 5 Antarctic pelagic whaling states held outside the Convention had failed. Though the USSR was satisfied with the 20% allocated to it, the other 4 still could not agree on division of the remainder and in the event each fixed its quota unilaterally: the Netherlands announced that it proposed to take 1,200; Norway 5,800; the UK 2,500; and Japan about 5,100: a total of 17,600 units in all i.e. 2,100 more than the previous year's quota and 1,600 more than the original IWC quota in 1949. In fact, as already seen, the catch of the 5 states for 1959/60 in the event was only 15,507.  

This situation led the USSR to oppose the introduction of an International Observer Scheme until the Netherlands and Norway returned to the Commission. The USSR pointed out that Article X(4) of the Convention had provided that it entered into force only when ratified by 6 of the signatory governments, which had to include the Netherlands and Norway; these states were therefore essential to its effectiveness. The Protocol would require the same participation. A compromise was therefore sought to induce them to return. The UK proposed that for two years the catch quota in para. 8 of the Schedule be suspended since it was now ineffective and there was no point in adopting the SC's recommendations when two states representing 40% of the Antarctic

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173. Ibid, p.27.
catch were outside the Convention. Their reasons for withdrawal had in any case been the uneconomic and wasteful effects of competition within a fixed ceiling. The 5 states should meanwhile continue to impose a voluntary limit on their catches. During the period of suspension the UK proposed, as a way out of the impasse, that a small independent committee of scientists, qualified for example in population dynamics, should undertake an assessment of the stocks.

The Committee of Three

This proposal was something of a turning point in the Commission's affairs since its adoption did indicate some willingness to bring the Commission's policies closer to the scientific findings.

The proposal, which had been considered by the SC but not included in its recommendations, met a mixed reception at first. The USA accepted the proposal with reluctance. It reiterated its view that the best way to conserve a living resource was through the operation of a Convention in which only nations directly concerned with the resources participated. Norway and the Netherlands should, therefore, return and the Commission should adopt a programme which in the shortest time practicable would evince its intention to adopt adequate conservation measures to preserve and increase the Antarctic stocks. These two actions in the US view were inseparable. They favoured the establishment of the Committee of Three on balance, but thought that the Commission should accept as binding the obligation to bring the Antarctic catch to a level consistent with its findings of the conservation measures necessary.

175. IWC/12/11 1960, p.46-49.
Suspension of quotas

The USSR accepted that protection measures were impossible unless Norway and the Netherlands returned but could not accept the suspension of the quota since it contradicted one of the main objects of the Convention. It had no objection to the Committee of Three investigation however. Pending further consideration of the UK proposal the USSR stated that it would continue to adhere to the Convention in the Antarctic taking into account the practice of the other governments. Most governments expressed approval in principle of the Committee of Three, but New Zealand doubted whether the pelagic whaling nations would pay more attention to the findings of an independent committee than of their own SC. Norway and the Netherlands were not likely to return on terms favourable to conservation but New Zealand could not agree to a proposal which would have the effect of rewarding these two countries by formal suspension of the quota by the Commission. Canada also thought quota suspension was contrary to conservation practices. Japan doubted the need for a Committee of Three since all the data were already available to the SC. Australia's reservations were based on the consideration that the Committee of Three should not usurp the quota setting role of the TC and the Commission itself, since the Commission, in order to keep the Convention alive could, and should, take a broader view of the considerations involved.

176. Ibid, p.52; p.66.
177. Ibid, p.54-55.
179. Ibid, p.78.
180. Ibid, p.58.
When the vote to suspend the quota was finally taken 7 members voted in favour, 2 against and 4 abstained. It was therefore formally adopted under Article V. 181

The establishment of the Committee of Three was approved but its financing caused some problems. FAO offered to accommodate its meetings and provide Secretariat facilities. The proposed solution of raising annual contributions to a modest £250 p.a. was criticised by Denmark 182 on the grounds that countries only marginally interested in whaling might withdraw, thus worsening the Commission's financial position at a time of decreased membership. These financial problems also led the Commission seriously to consider giving up their contribution (£500) to the whale marking programme. 183

The resolution enabling the Committee of Three to be consulted 184 required the Ad Hoc SC to undertake a thorough review of available stock data and methods of stock assessment, to study particular problems and needs for data collection and "to obtain the services of three scientists qualified in population dynamics or other appropriate science and drawn from countries not engaged in pelagic whaling in the Antarctic to examine in the light of the advice and data available to the Commission the scientific evidence" and to report to the Commission within a year "on the condition of the Antarctic whale stocks,

181. Ibid, p.87.
184. IWC 12th Report p.8, and Chairman's Report, Appendix III, Sec. 8, p.16.
on the level of sustainable yield that can be supported by these stocks and on any conservation measures that would increase this sustainable yield". The Commission announced its intention to bring the Antarctic catch limit into line with the scientific findings of this above review, under Article V(2) of the Convention, by July 21st, 1964.

The Committee of Three met at FAO for the first time in April 1961 along with representatives from Australia, Japan, New Zealand, Norway (which had rejoined), the UK, the USSR and the Netherlands (which had not rejoined but was invited to participate).

Measures to protect humpbacks caused problems for Australia and New Zealand. They could not accept the total ban proposed by the SC in areas on which whalers from remote regions of their territories were dependent for a living. Both pleaded that their own national regulations were stricter than the Convention. Australia operated a voluntary quota and licensing system, and had resisted national demands to increase the humpback catch or to enter the Antarctic whaling industry although geographically placed to do so. The Commission approved a reduction in the number of catching days in the relevant Area V from 4 to 3 and a 3 year ban in Area IV.

186. Ibid.
CONCLUSION

The Twelfth Meeting was one of the most critical in the Commission's history, blazoning the weaknesses in the Convention which states could and did exploit in pursuit of short-term national interest.

The fact that some states ruthlessly used these inadequacies to the full must cause no surprise in view of the legal and industrial history of the period preceding the IWC, as outlined in Chapters III and IV, and the practice current in co-existing fisheries commissions, which were often no more successful than the IWC in conserving stocks although fin fisheries have much greater recuperative powers than whales. The ICRW proved to have 3 particularly serious deficiencies: first the lack of provision for international inspection, which enabled some states continually to disregard quotas, so that concealed over-fishing occurred even when quotas were conservatory and scientists could not therefore accurately assess stocks; secondly the prohibition in Article V(2)(c) on limitation of number or nationality of factory ships and land stations and on specific quota allocations to them, joined with suspicions of cheating and failure to set national quotas, encouraged the "hectic hunting" referred to by the Chairman at the Third Meeting resulting in excess effort in fleets; thirdly the provision for withdrawal, now implemented.

The policies followed by the Commission's member governments compounded these failures - they did not appoint full-time staff; under-funded their activities; engaged in minimal research and as a Commission did not initiate research on stocks exploited although the Convention, if interpreted in the light of its
Preambular objectives of protection of all species from overfishing and properly conserving stocks to enable orderly industrial development certainly did not require such policies.

By 1960 the Commission had taken steps to remedy the situation by promoting a Protocol to enable introduction of an observer scheme, and member governments, by negotiations outside the Convention, were endeavouring to adopt national quotas for the Antarctic. The problem now was one of timing: member governments did not respond with sufficient sense of the urgency of the situation; they did not speedily effect these remedies and they did not apply the scientific advice which was itself sometimes inadequate; the Dutch adviser, J. Slijper, gave bad advice and the SC itself, being composed only of government advisers, was over-willing to temper its recommendations to so-called "practicalities".

Thus the Commission got off to a bad start at its first meeting when it relaxed the existing ban on taking humpback whales; at the Fourth Meeting it opened the sanctuary area. Its problems were being aggravated by developments outside its control, namely unregulated whaling under the flags of convenience of non-member or ineffective member states and whaling under the control of the independent South Pacific Commission, both of which activities taxed stocks which were also exploited by IWC members but of which the IWC took no account in setting its quotas. Most of these difficulties could be removed by adoption of policies more firmly based in conservation, by strict enforcement and by the other measures now belatedly adopted, as we shall see. Developments at the First and Second UN Conferences on the Law of the Sea in
1958 and 1960 respectively had, however, done little to motivate states towards achieving a better balance between exploitation and conservation. On the contrary the conventions adopted at the former conference codified the doctrines of freedom of fishing on the high seas without clearly defining its limits or corresponding duties. State practice in the IWC in the 1960's indicates that though there was general acceptance of an obligation to conserve there was no unanimity concerning the principles for effecting this. States were certainly not prepared to surrender to the SC the power to determine the "optimum levels" advocated in the ICRW Preamble, nor to give a broad interpretation to their duties to supply information to the SC or to undertake research.

States whaling outside the IWC accepted no international duty to join it or to conform to its regulations; whales were not regarded as an international resource requiring international management. Neither they nor IWC members differentiated whales from fisheries generally. Such modifications of high seas freedom as did occur were in the direction of more extensive national control, with the specific objective of applying less stringent regulations. As one species declined states under the laissez faire doctrine considered themselves free to direct exploitation to other whale species. Complete protection of blue and humpback whales thus resulted in eventual over-exploitation of fin and sperm whales. Even states such as the UK which were prepared to apply the best scientific advice found that the need for economic equality with competitors, in the absence of national quotas, necessitated approval of high or no catch limits; similar reasons prompted the Norwegian withdrawal. The continued participation in the Antarctic issues of disinterested states such as New Zealand, and Australia evidenced some community interest but even they opposed cuts when their interest in humpback whale quotas for land stations was affected.
CHAPTER VI


INTRODUCTION

The IWC was launched in a period when the historical assumptions still dominated the law of the sea - namely that maritime jurisdiction could be divided into only two areas, the territorial and high seas, that the former should be kept as narrow as possible to enable the largest possible area to be open to freedom of fishing, and that this freedom could be modified only to the extent that states participating in fisheries consented. The limited degree to which such states at first consented in international regulation of the high sea fishing and the institutional arrangements for this purpose in existence or contemplation in 1946 have been described in Chapter IV, in which reference was also made to the promulgation immediately after the setting up of the IWC of the Truman Proclamation. This proved to be the catalyst for major changes during the IWC's first decade, the import of which for marine mammals was not fully appreciated at the time.

I. The Catalysts of Legal Change

1. The Truman Proclamations 1945

The Truman Proclamation extended US jurisdiction horizontally throughout the contiguous continental shelf but limited to the


2. For the background to this Proclamation see D.C. Watt "First steps in the enclosure of the oceans - the origins of Truman's Proclamation on the resources of the continental shelf, 28 September 1945", Marine Policy 3(3), July 1979, p.211-224. Professor Watt concludes that the Proclamations "produced a situation in which the general policy of the USA on the question of open access to world resources ... had been compromised and would continue to be compromised by the very delicate issue of fisheries". Ibid, p.223. The UK had tried to get the Proclamation postponed pending the convening of the North West Atlantic Fisheries Conference in 1946, ibid.
sovereign right to explore and exploit the natural resources of its seabed and subsoil. It did not assert jurisdiction vertically through the superjacent waters which it was careful to insist retained the legal status of high seas. A separate proclamation asserted very limited coastal state rights in certain circumstances to establish conservation zones for fisheries, not over the shelf as such, but "in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and sustained on a substantial scale". The two proclamations and the increasingly heavy fishing by distant water fleets (inter alia from the United States) for such species as whales, tuna and anchovetta off the west coast of South America were used as partial justification for the concerted assertion by 3 states on that coast in 1952 of jurisdiction over the resources of both the seabed and the water column to which reference has been made in Ch. IV. The US attempt to "find a way

3. US Pres. Proclamation No. 2668, Sept. 28, 1945, New Directions Vol. I, p.95. It included living resources only to the extent that they could be said to be resources appertaining to the shelf; for a discussion of its effect see Johnston op. cit. p.332; McDougall & Burke, op. cit. p.630-663.

4. An excellent account of the origin of the CEP 200 mile zone is given by Ann Hollick "The Origins of 200 Mile Offshore Zones", AJIL 71 (1977) pp. 494-500. She states (at p.495) that Chile was the first to declare such a zone on June 23, 1947, for several reasons including particularly the desire of Chilean business interests to protect their new offshore whaling operations for which purpose, at that date, a 50 mile zone was sought. The 200 mile figure arose from the search for a precedent for the claim which was based on the 200 mile security zone adopted in the 1939 Declaration of Panama. Ecuador and Peru were favourably disposed to such a zone for different reasons, and initially made separate declarations in 1951 and 1947 respectively, Peru omitting the reference to whaling that figures in the Chilean assertion, but both, though aimed at protecting living resources, referred to and reflected the Truman Proclamation.
of breaking the universality of the doctrine of the freedom and commonality of the seas" without affecting freedom of access to fisheries beyond the territorial sea was therefore unsuccessful. Its repercussions even affected the 1978 Meeting to consider the revision of the ICRW.  

2. **200 mile zones of exclusive coastal state jurisdiction**

In 1952 Chile, Ecuador and Peru (hereafter referred to as the CEP) adopted the Declaration on the Maritime Zone asserting "sole sovereignty and jurisdiction" over the area of the sea, the sea floor and the subsoil thereof adjacent to the coasts of each country and extending not less than 200 nautical miles from that coast, supporting the declaration by reference to the controversial "bioma" theory which asserted a biological relationship between the sea and the adjacent land territory which appears to be unscientific.

The juridical status of the zone was also contentious. The Declaration asserted sovereignty over an area regarded by most states as high seas. It was not clear whether the zone was regarded as

6. See Ch. XII.
territorial sea or was sui generis in character since it subsequently became apparent that the extension of jurisdiction was aimed at resource control and did not purport to interfere with either freedom of navigation or overflight. Many states regarded the assertion of jurisdiction beyond a narrow territorial sea in whatever form as illegal, and, moreover, as contrary to community interests since the fisheries therein might be neither fully utilised nor effectively controlled; whales in particular migrated through the zones and could only be properly conserved by a body concerned with the species throughout their whole migratory ranges. Nonetheless, throughout the 1950's and 1960's some other states extended their jurisdiction over living resources off their coasts although the nature of the jurisdiction varied, some states purporting to extend only a functional jurisdiction over fisheries, some including all natural resources in a "patrimonial sea" and a few extending their territorial sea as such. 10

The CEP states in 1952 at Santiago had, however, as reported in the preceding chapter, also simultaneously adopted a Joint Declaration on Fishery Problems in the South Pacific and an Agreement on the Organization described below. Chile and Peru joined the IWC in 1979 11 but until then, their whaling operations were regulated solely by this Organisation. Ecuador is not engaged in whaling.

10. See Appendix IV; and Brown op. cit. supra p.135, Table III.
11. See Chapter XII. The regulations promulgated by the PCSP below will therefore in future have to conform to the IWC Schedule.
3. **New Fisheries Bodies and Relevant Agreements**

   (i) **The Permanent Commission of the Conference on the Use and Conservation of the Maritime Resources of the South Pacific (PCSP)**

   Acting as a provisional Commission the CEP states at their Conference in 1952 adopted regulations governing whaling in the South Pacific, without specifically limiting them to the national 200 mile zones. These two Declarations refer not to specific species but to "the marine fauna of the waters", a comprehensive term including all marine mammals as well as fish.

   The Permanent Commission has met regularly since 1952. Its membership is open to all signatory states but only the CEP states have signed. Its objectives are wider than most fisheries Commissions. They include the conservation and protection of the zone's resources and their rational use requiring that account be taken of the fact that the seas are an irreplaceable food and economic resource vital to the developing economies of the member states. Other states may


13. Article 1, though the regulation does particularise the maritime zone. This leaves their application to areas beyond 200 miles in some doubt. The PCSP Agreement's Article 2 provides that the Commission is established to fulfill the purposes of the Declaration on the Maritime Zone, which itself in Article 3 proclaims that each of the 3 Governments possess sole sovereignty and jurisdiction over its own 200 mile zone.

14. By 1970 it had held 11 ordinary and 1 extraordinary meeting.
be permitted to exploit the resources of the zones but only subject to the laws and regulations of the relevant coastal state. The Commission's primary role is to coordinate these laws. It has powers to initiate biological studies for conservation and use of resources and to adopt resolutions. In 1955 at its third meeting in Quito it adopted regulations as to permits for the exploitation of South Pacific resources and these were brought into effect at the next Conference in Lima in 1956. It can, under Article 3 determine open and closed seasons and areas; protected species; gear used and methods of equipment; and regulate hunting and fishing generally, ensuring that the quotas fixed annually by each party do not endanger the preservation of the South Pacific's marine resources. The whaling regulation enables the Commission to review the rules prescribed and decide upon amendments; keep a register of land stations, whaling units, ships or vessels, crews and technical staff engaged in whaling; issue permits for whaling in the maritime zones and determine the baleen whale catch for the South Pacific. At its Annual Meeting it can determine the quota of sperm whales which may be hunted by foreign vessels and determine the permit fees for foreign pelagic whaling vessels. The PCSP's main work seems to be exchange of information and personnel, improvement of statistics, regulations and other methods, and coordination of studies.

16. Article 3.
17. Article 4.
20. Article 2.
Its organs consist of a Conference of representatives of the 3 Ministers of Foreign Affairs which, meeting biennially, lays down the policies; a Secretariat, the executive organ, which is advised by two committees - a Legal Committee and a Committee for the Coordination of Scientific Investigations and Work Methods made up of the Directors of the National Fisheries Research Institutes. There are also national sections in each Foreign Ministry to ensure co-ordination. The PCSP and the Secretariat can exchange information with other international organisations, and collaborate with FAO through the national sections and scientific institutes involved with FAO.\(^{21}\) It also collaborates with the Inter-American Tropical Tuna Commission described below and with the IWC although as its history shows this cooperation has been somewhat limited. The PCSP generally sends observers to the IWC but this seems to have little effect on the policies of the former which have never conformed to the more stringent IWC regulations. However the entry of Chile and Peru into the IWC in 1979 will ensure that henceforth all measures of the PCSP concerning matters within the scope of the ICRW will have to conform to those promulgated thereunder.\(^{22}\)

Both the periodic conferences\(^{23}\) and the Commission work by unanimous vote, the former adopting agreements and the latter resolutions, the legal effect of which seems to be similar.\(^{24}\) It

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22. Correspondingly as the PCSP regulations were less restrictive than the IWC's the latter may, for a time, have to modify measures it might otherwise have taken further to restrict land stations, writer's notes of 31st meeting 1979.
23. Rule 16 of Rules of Procedure adopted by first and successive conferences and followed also by the Commission.
24. See Savini, p.29.
is unclear whether the Agreements need ratification to enter into force; the resolutions have immediate binding effect unless a state objects within 10 days in which case it does not bind that state until the objection is withdrawn. Savini notes that in practice the Commission designates its provisions by a variety of names but seems to require ratification at least for "regulations". 25

Baleen whale species regulated by the PCSP are the right, gray, blue, humpback, fin and Bryde's whales. The sperm whale can also be regulated but many of the 1952 whaling regulations have never been effected. Regulations in force have included: 26

(i) a ban on hunting of baby or nursing whales and females accompanied by their young;
(ii) a requirement that work contracts for captains, crew and gunners of whaling and factory ships must contain clauses linking their pay to the size and not the number of whales caught; a similar provision applies to land stations;
(iii) a requirement that whales be brought to processing stations within 40 hours of their death for complete processing;
(iv) a complete ban on pelagic whaling in the CEP maritime zones; (before the ban only 1 company was permitted to hunt sperm whales);
(v) provision of catch quotas for hunting baleen whales from land stations (other than for protected species) because of the lack of scientific information. The PCSP later suggested in 1970 that governments should act to ban all operation of factory ships;

(vi) permits for taking and processing whales at land stations which were required to be at least 250 miles apart;
(vii) complete protection for gray and right whales except for local consumption;
(viii) minimum size limits for all except gray whales, the limit being lower for whales taken for local consumption.

Enforcement is by national means in each national zone. There is no international or joint enforcement scheme and vessels may enter the zones of other signatories only if requested to do so. The IWC, however, since the entry of Peru and Chile, is now considering means of extending its International Observer Scheme to their land stations. A non-implemented agreement of 1954 provided for the establishment of special courts in each state to try cases involving violations of the Conference regulations, any fines imposed to be transferred to the PCSP which would distribute them equally among the signatory parties after deduction of 10% towards its own budget but this enterprising scheme was not implemented.

The PCSP is neither in theory nor in practice as stringent in its controls as the IWC - it lacks catch limits; did not for many years protect blue or humpback whales; had lower size limits; has a smaller distance between land stations; has no international or mutual enforcement scheme whether through observers or inspectors

27. Art. 2 of Regulations Governing Whaling.
29. Articles 5 and 6 of the Agreement Relating to Penalties.
30. XI Meeting, Agreement 41.
and indeed makes no specific provision for even national inspectors. It does not harmonise penalties or supervise the infractions of such regulations as are enforced. Throughout the period described in Chapters IV–XI, the CEP states were not members of the IWC (although Chile signed the Whaling Convention) and therefore conducted whaling operations under these less protective measures, taking whales otherwise within the IWC's scope as they migrated through the CEP zones.

(ii) Other Bodies and Agreements

When the IWC was established there were only 3 fisheries commissions in existence, limited to particular regions and to a few participating states. By 1960 there were at least 9 more, in addition to the PCSP, several of which had one or more species of marine mammal within their control, viz. the North West Atlantic Fisheries Commission (ICNAF); the Inter-American Tropical Tuna Commission (IATTC); the International North Pacific Fisheries

31. These were established in the sequence listed. Those dealing with molluscs and crustaceans have been omitted as insignificant for the purpose of this study.


Commission; 34 Japan-Soviet Northwest Pacific Fisheries Commission; 35 the Sealing Commission for the Northwest Atlantic (SCNEA); 36 the North East Atlantic Fisheries Commission (NEAFC); 37 the Commission for Fisheries Research in the Western Pacific; 38 the Joint Commission for the Black Sea. 39 In addition the International Pacific Halibut Convention (IPHC) 40 was revised during this period as were the


40. Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean, 1953, in force 28 October 1953; UNTS No. 3024, Vol. 222, p.78; Koers p.80-82; UN Annotated Directory p.113; Members - Canada, Japan, USSR.
International Pacific Salmon Fisheries Convention (IPSFC),\textsuperscript{41} the International Convention for the Conservation of North Pacific Fur Seals (NPFSC)\textsuperscript{42} and even the new INPFC.\textsuperscript{43} Many of these bodies have re-negotiated or are in the process of re-negotiating their constituent Conventions since the recent introduction of 200 mile fisheries or economic zones by many of their member states has subjected much of the area under their competence to national jurisdiction. The effect on the ICRW of these developments is discussed in Chapter XII, as is the constitution of the most recent fisheries body, NAFO (North Atlantic Fisheries Organisation), which replaced ICNAF in 1978.

(a) Protection of Antarctica

(i) The Antarctic Treaty 1959

Another significant development was the conclusion in 1959 of the Antarctic Treaty\textsuperscript{44} to ensure the peaceful use of that area and enable co-operation in scientific research. It had been preceded in 1957 by the establishment of the Scientific Committee on Antarctic Research (SCAR).\textsuperscript{45} The development of SCAR's role in living resources management and the implications for the IWC of recent developments

\begin{itemize}
  \item Annex to Convention amended 1959.
  \item Antarctic Treaty, signed 1st Dec. 1959; Cmd 913 (MISC, No. 21 (1959)); Whiteman ii, 232; LNTS No. 5778, 402 (1961) p.71. There are 19 states parties, 13 of them with consultative status at meetings of the Antarctic Treaty powers.
  \item See Savini p.38-40; SCAR now has 13 national committees representing the national scientific institutions of the 13 states not taking part in the Antarctic Treaty Consultative Meetings.
\end{itemize}
arising from the Antarctic Treaty will be discussed in Chapters VIII and XII in relation to the problems arising from exploitation of the living resources of Antarctica other than whales e.g. the krill. The Antarctic Treaty states have always, however, worked closely with SCAR.

(ii) Scientific Committee on Antarctic Research (SCAR)

SCAR was established by the International Council of Scientific Unions (ICSU) to coordinate national programmes of research in the area of the Antarctic convergence. It meets annually and works through Permanent Working Groups and sub-committees. One of these which specialised in seals became a SCAR Working Group of 6 Scientific Specialists on Seals working independently, and not as national representatives, to coordinate seal research, review figures of seals killed under permit and the status of seal stocks and to maintain contacts both with biologists on sealing expeditions and international organisations concerned with marine mammals such as IUCN and FAO. Their work led to the conclusion of the 1972 Convention for Conservation of Antarctic Seals. SCAR acts as scientific adviser to the Antarctic Treaty powers, but not to the IWC, and it fulfils a special role in relation to the 1972 Seals Convention which will be considered in Chapter VIII. It is also likely to perform an important role concerning any Southern Oceans Convention that may be adopted. SCAR's integration into the network of treaties and organizations now covering conservation of marine mammals is one of the organizational problems of future marine mammal management.
Of the new bodies established and the bodies revised after the formation of the IWC in the period up to 1960 only the PCSP was concerned with whales. Two, however, were concerned with other marine mammals: one, the North Pacific Fur Seal Convention, directly, the other, the Black Sea Convention indirectly, since it has considered though not regulated other marine mammals, such as dolphins, even though its terms of reference, which relate to fish, do not specifically cover these species. Another new Commission, the Inter-American Tropical Tuna Commission, is concerned with management of a highly migratory species which reflects some of the problems of whale conservation; of the others the ICNAF described in Chapter IV, and strengthened during the 1960's, and the NEAFC, which replaced the North Sea Permanent Commission of 1946, are worthy of comparison with the IWC because of their structure and powers, though the former has now been replaced by NAFO and the latter is in process of revision as the result of the impact of declarations of 200 mile fisheries jurisdiction by most of their member states.

(b) **New Commissions**

(i) **Interim Convention on the Conservation of North Pacific Fur Seals 1957**

Both Russia and Japan prohibited pelagic sealing at the end of World War II but the need for a multilateral treaty to replace the bilateral provisional agreement was apparent to all four potential exploiting states if exploitation was to continue to be

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46. Savini p.46.
47. See Chapter XII.
48. UNTS No. 4546, 314, 105.
regulated to ensure protection of the herds. Accordingly in 1957 Canada, Japan, the USA and the USSR adopted the above Convention which is limited to the 4 states parties and to one species of fur seal. The Commission can formulate, coordinate and recommend research programmes but has no staff to undertake independent research and can only recommend to the parties appropriate measures based on the findings of national programmes regarding the size, sex and age composition of the seal kill. It can decide the number of seals to be marked and those to be taken for research and make recommendations generally. The Convention bans pelagic sealing north of the 30th parallel of North Latitude which means that Japan and Canada must abstain from sealing; for this abstention they are compensated by being given 15% of the gross take in number and value of the skins taken commercially on land. Article II requires national research to establish the relationship between the seals and other living marine resources, whether the former have detrimental effects on the latter insofar as they are exploited by the parties, and if so to what extent. The Commission, which works by unanimous vote, can amend the Convention's provisions on eventual suspension of industrial seal hunting and the distribution of sealskins by the USSR, but not the ban on pelagic sealing. This can only be removed by amending the Convention itself, for which, as under the ICRW, no procedure is provided.

There is some provision for mutual enforcement. Any authorised official of a state party can board and search vessels of the others on the high seas but must have reasonable cause to believe that a
violation is occurring. If the search confirms the suspicions the vessel can then be seized but it must be delivered promptly to its flag state.

The abstention principle (the sole example in this form in fisheries bodies) and mutual enforcement are provisions that the Whaling Convention might well copy to advantage, but the NPFSC's requirement of unanimity is initially more restrictive than the IWC's voting procedure. Unlike the ICRW, the Convention has never become permanent but has been renewed every 6 years.49 It has succeeded in maintaining stocks at their MSY but mainly because there have been no new entrants, no sealing outside the Commission's jurisdiction, and the exploiters, being Government agencies, not private companies, are more easily controlled.50 Its task is therefore easier than the IWC's.

(ii) North East Atlantic Fisheries Commission (NEAFC) 195951

The NEAF Convention replaced and improved upon the 1946 Overfishing Convention referred to in Chapter III, enlarging its area, the species covered and the measures permissible and it is now again in the process of re-negotiation following the recent withdrawal of some of its member states consequent on their assertions of jurisdiction over fisheries in zones of up to 200 miles adjacent to their coasts.52 It resembled the IWC in its wide membership but

51. North East Atlantic Fisheries Convention signed at London 24th Jan. 1959; entered into force 27th June 1963; UN Legislative Series ST/LEG/SER B/15, p.853-4; UNTS Vol. 486 No. 7078; parties to the Convention - Belgium, Denmark, FRG, France, Ireland, Netherlands, Norway, Poland, Portugal, Spain, Sweden, USSR, UK.
52. See Appendix IV.
differed in being limited to a region - the Northeast Atlantic, Arctic Ocean and dependent seas - and in covering all species of living resources. Interesting features not repeated in the IWC were the use of regional committees, the use of ICES as the scientific advisory body and the establishment of a NEAFC/ICES Liaison Committee. The Commission was empowered to make recommendations on the basis of ICES advice but in practice, because of continued overfishing, found it difficult to reach agreement on the stringent measures which ICES advised to be necessary. The 1959 Convention limited the measures recommendable to the usual closed seasons and areas, gear restrictions etc., and did not provide for setting a total allowable catch (TAC) nor did it provide for any form of international enforcement although this was envisaged in Article 13(3). NEAFC soon found that it could not fulfil its Conventional objective of achieving "rational exploitation" (an objective not shared by the ICRW) without either a TAC or an international enforcement scheme, even though it interpreted this broad objective as requiring only that MSY be maintained. 53 It therefore took powers tardily in 1974 to set a TAC and to fix both national 54 and later species quotas 55 and separately negotiated a Joint Enforcement Scheme. 56

55. At first the NEAFC tried to control the decline in herring by closed seasons first introduced in 1971 which had no effect. An ad hoc group established to study the problem recommended a TAC. Great difficulties were encountered in formulating criteria for its allocation; some states favoured a relation to past catch performance, others to the size of catch for human consumption, instead of industrial purposes. To get agreement, as in the IWC, the TAC had in 1974 to be set far too high viz. at 494,000 tonnes against the 250,000-360,000 advised by the Liaison Committee; D.H. Cushing "The Atlantic Fisheries Commissions" Marine Policy 1(3) 1977,pp.230-238.
56. Article 13(3) was implemented in 1972, after adoption in 1968 NEAFC, Report of Fifth Meeting, London 1968.
These belated improvements were not sufficient to stop the decline in many stocks, especially herring. This seems to have been due to three causes similar to those accounting for the decline in stocks managed by the IWC: first the TAC and national and species quotas were always too high and too late; secondly many ICES recommendations e.g. for reductions and later for 1976 for a total ban on herring fishing, were blocked by the objection procedure (similar to the IWC's) allowed in the Convention; thirdly the Joint Enforcement Scheme (potentially less effective than the IWC's IOS) was not fully effective because some states either did not exercise stringent surveillance or did not prosecute offenders flying their flag even when evidence was presented to them that a vessel had violated NEAFC regulations. Violators could only be reported to their flag state, not apprehended and prosecuted by the inspecting state, and there was no way of ascertaining whether the flag state had prosecuted the offender. NEAFC's failure to prevent further decline in stocks decided its EEC member states to declare national jurisdiction over 200 mile zones and to withdraw from NEAFC.

57. Under Art. 8(3) any state could object within 90 days and was not then bound to implement the recommendation objected to; within another 60 days a second state could object on the basis of the first objection and thus evade being bound; finally if 30 days thereafter any other state objected all the other contracting states were released from any obligation to effect the recommendation. Denmark, Norway and Iceland objected in 1975 to the TAC set which was coupled with a ban on directed fishing.

58. McKeller and Driscoll "The Changing Regime of European Fisheries" in Mason (ed), "The Effective Management of Resources" (1979), reveal that figures in the NEAFC reports for 1963-1973 show that once mutual inspection was introduced most states had far more violations reported against them (especially France, W. Germany, the UK and USSR) than before the scheme under only flag state enforcement. The Trawling Times, July 1975, cited in op. cit., reports examples of such suspicion. See also J.C. Esteves Cardoso "Enforcement of fishery regulations: Problems in coastal and international control" Marine Policy 2(2) 1978, pp.142-150.

59. McKeller and Driscoll, op. cit. supra.
Two aspects of NEAFC, however, are of particular interest in comparison with the IWC at this period - its use of ICES, an outside but not totally independent body for scientific advice, and its Joint Enforcement Scheme which, though imperfect, was different from the Observer Scheme eventually established by the IWC. Otherwise NEAFC shared some of the IWC's limitations concerning lack of effective international enforcement and the objections procedure, and like the IWC, found that it had to introduce both national and species quotas to effect its purpose, though in the event some of its sovereign state members would not allow these quotas to be set at a level low enough to arrest the decline, and, like the IWC, it either did not heed ICES advice or did so partially or belatedly.

(iii) Inter-American Tropical Tuna Commission (IATTC) 1949

Tunas are larger and more widely migratory than other fish and their management problems are therefore more akin to those of the IWC. This Convention's scope is more restrictive than the IWC's since it is limited both by area (the Eastern Pacific Ocean) and species (yellowtail and skipjack tuna) but it does include the fish


used as bait for them and other fish taken by tuna vessels, and is therefore closer to the environmental approach now advocated for the IWC. The Commission consists of national sections appointed by governments parties with a Director appointed by the Commission. Its most interesting provision, compared to the IWC and the bodies referred to above, is that it has its own scientific research staff and also began its investigations before serious overfishing had occurred so that a scientific base for preventing overfishing could be laid. It, like the IWC, suffers from a lack of funds however which limits its research.

The Commission's task is to recommend the measures necessary to maintain the tuna population at an annual level permitting MSY. It became necessary when, as a result of expanding effort, overfishing occurred, to introduce a TAC for yellowtail tuna and recently this has been allocated on the basis of the economic need and adjacency to the resource of participating states. The IWC does not directly apply these criteria in allocating quotas but Peru, Chile and Korea, which joined the IWC in 1979, made pleas on these bases for higher catches than advised by the Scientific Committee. MSY has been fairly successfully maintained although the fishing season is much shorter but the Commission has encountered problems concerning distribution of catch among the users there being a "fundamental difference in the philosophy of those nations who have large established fisheries and those who do not but aspire to

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62. The states are now referred to in the IATTC as the RAN (Resources Adjacent Nations).
achieve them", the former favouring the classical common property approach and the latter claiming adjacency. The overcapitalization of many fisheries exacerbates this problem. Enforcement was left under this Convention to national means which, as both developed and developing states participate, has created mutual suspicion that the rules are not being effectively imposed, as was the case in the IWC.

The corresponding International Commission for the Conservation of Atlantic Tuna (ICCAT) was not established until 1969 and is therefore described more fully in Chapter VIII. Its main difference from the IATTC was that it was not given its own research staff. National research has not enabled the collection of data as speedily as is necessary for sound management advice so that regulations have not always been promulgated as needed. It too faces problems in allocating the catch between developed and developing states, some developing coastal states demanding preferential treatment in allocation before agreeing to any conservation restrictions.

(iv) International North Pacific Convention (INPC) 1952

This was limited by area but covers all fisheries resources with particular reference to halibut, herring and salmon. The Commission consisting of 12 Commissioners (4 from each state party but with only one vote for each government), studies fish stocks,

64. Joseph, op. cit. p.279; Rose op. cit. p.737-788. Special concessions in favour of the economic interests of member states have outranked the international interest in conservation. This lead observers of the IWC to speculate whether, if its new management procedures are successful and whales recover after protection, similar problems will arise within its new membership, which includes several developing states.

can require information from these governments concerning their management of the relevant stocks and can recommend conservation measures for any stock exploited by two or more parties. One of the problems considered by the Commission has been the effect of trawling on halibut stocks. In spite of this, halibut was severely overfished although parties also undertake to abstain from fishing stocks which are fished by the others if certain prescribed criteria are met; unlike the Fur Seal Convention no compensation is provided for such abstention. The administration of the abstention provision indirectly leads the Commission to allocate the catch, unusual in such Commissions. In practice some stocks have been removed from abstention but none has been added and the Commission, after its initial 10 year agreed period, encountered difficulties in continuing since Japan, because of the implication for catch allocation, wanted to abandon the abstention principle in any new treaty. The treaty has only been renewed annually since then. This illustrates the political fragility of conservation regimes and the reasons why concessions are made against scientific advice in order to secure the continuity of the agreements.

There is no provision for independent research and it is alleged that much of the national research is directed to establish national positions concerning the state of particular stocks; thus in spite of extensive research on Bering Sea King Crab stocks the Commission

66. Japan had agreed to refrain from fishing some stocks of salmon, halibut and herring, and Canada from fishing salmon originating from US rivers; Koers p.100. For discussion of the abstention principle see Oda op. cit. p.88-90; Johnston, p.275-82; 289-97; 448-49; Christy and Scott pp. 173, 187, 211. Oda takes the view that it is only the state which prescribed abstention for others which stands to gain.

found itself unable to recommend conservation measures,\textsuperscript{68} although these were known to be needed.

The remaining commissions established in the 1960's do not add anything novel to the range of powers of such bodies – the Japanese-Soviet Commission is limited to those 2 parties though covering all living resources in its area. It ran into difficulties in allocating the salmon catch. The Sealing Convention for the North East Atlantic was limited to Norway and the United States and covered only various species of seals (harp, hooded and bearded) and walruses, co-ordinating research and fixing TAC and quotas. Neither had any permanent Headquarters. Indeed a common feature of all the Commissions, including the IWC, at this date was either that they had no Headquarters or were located in a Ministry or National Research Centre of a member state and serviced by it; and also that they were limited (apart from the IATTC) to small staffs and budgets. The generally minimalist approach to fisheries management was reflected in governments' policies in the IWC, with little appreciation of the differences between fish and whales.

The revision of the IPHC in 1953 gave it a joint enforcement scheme and endowed the Commission with broader powers e.g. to regulate incidental catches; to establish closed seasons, and size limits; and maintain MSY based on scientific findings but the only novel power added to the range of powers already discussed was that vessels could be prohibited from leaving ports etc. if the Commission decided the vessels already departed were sufficient to take the TAC for the area.\textsuperscript{69}

\textsuperscript{68} Ibid, p.99.
\textsuperscript{69} Article 3(2); Johnston p.376-378.
There are also now in existence a number of regional fisheries bodies established by the Conference or Council of FAO. It created also an Advisory Committee on Marine Resources Research (ACMRR) in 1962, of not more than 13 fisheries experts appointed by FAO's Director General in their personal capacity inter alia to advise him concerning research on fishery resources, enabling a link between the general scientific community and FAO. The ACMRR has played a major role in improving the scientific input to fisheries commissions and has established a Committee on Marine Mammals which has now laid down guidelines for their management. The main work of the regional bodies is in fishery development and advice, coordination of research and assembly and dissemination of information concerning all marine fishery resources in their areas. All have their Secretariats provided by FAO which facilitates coordination.

(vi) ICES 1964

ICES continued throughout this period without a formal constitution since its "Gentlemen's Agreement" was not replaced by a formal Convention until September 12th 1974 prescribing its purposes as promotion of research for the study of the sea (particularly concerning

73. ILM (1968) p.302; UNTS No. 9344; It entered into force on July 22nd 1968; present 16 members are Belgium, Canada, Denmark, FRG, Finland, France, Iceland, Ireland, Netherlands, Norway, Poland, Portugal, Spain, Sweden, UK, USSR. Went op. cit. p.161-162; Savini p.56; UN Annotated Directory p.133; see B. Parrish "The future role of ICES in the light of changes in fisheries jurisdiction", Marine Policy 3(3) (1979) pp. 232-238.
living resources) drawing up research programmes, publishing the results. It is still limited to the Atlantic and its adjacent seas, especially the North Atlantic, but works through a much larger number of committees including a Marine Mammal Committee studying data (especially concerning whales and seals) of species in the Convention area and the status of stocks thereof, and coordinating relevant research. The Committee is mainly concerned with population assessment but has extended its studies to evaluation of mercury accumulation in seals and ICES is still concerned with collaboration with other organizations. In these wider roles it has much to offer the IWC which is now increasingly concerned about the effects of pollution on the habitats and nursery grounds of whales and its relations with other bodies concerned in whale management.

**CONCLUSION**

Compared to the other Commissions of and at this period the limitations of the IWC were not remarkable; its minimal staff and budget and lack of independent accommodation being typical; its lack of independent research staff and enforcement procedures being common; even its objections procedure being repeated in the ICNAFC and NEAFC. Only in the late 1960's and early 1970's did NEAFC and ICNAF develop their Joint Enforcement Schemes and national and species quotas, although the IPHC and NPFSC had mutual inspection from the 1950's. Independent research staff existed only in the IPHC and the IATTC. Apart from this the only attributes possessed by other Commissions which were not reflected in the IWC were the abstention procedures of the NPFSC or INPFC; the liaison arrangements for outside scientific advice from ICES made by the NEAFC; the completion of research on a stock before its exploitation of the IATTC and the direct powers to allocate the catch of the NPFSC and the IPSFC. In practice all the Commissions, except the IPHC in its
earlier days, encountered difficulties of one kind or another in formulating conservation policies that successfully arrested the decline in various species under their control, in spite of the fact that their task in many cases, being limited to one area, sometimes to only two or three parties and often to only one or two species, was much easier than the IWC's. Even the IPHC was much criticised for its failure to solve the problems of overcapitalization of fishing fleets. None dealt globally, as did the IWC, with several highly migratory species of marine mammals throughout their entire range.

II. The United Nations Conferences on the Law of the Sea (UNCLOS I and II)

The Truman Proclamations and the Declaration of Santiago provoked not only the establishment of the PCSP but also a demand for a general review of the law of the sea.

The first decade of the IWC's history had taken place in the absence of any comprehensive international treaties on the law of the sea. At its inception, as described in Chapter III, there existed only a series of ad hoc fisheries agreements, the League of Nations having failed in its attempt to produce a broad treaty on the law of the sea. The institution of the United Nations in 1945 and the requirement in its Charter that the General Assembly should encourage the progressive development of international law and its codification led to the establishment in 1947 of an International Law Commission (ILC) to fulfil these purposes, in particular to formulate more precisely and to systematise the rules of international law "in fields where there already has been extensive

74. UN Charter Article 13(1)(a).
state practice, precedent and doctrine." The law of the sea was, after World War II, ripe for such treatment and in 1948, shortly before the IWC's first meeting, the General Assembly requested the ILC to draft articles on the regime of the high seas and territorial seas, and later to add articles on the continental shelf and the conservation of fisheries and the living resources of the sea. After 6 years of study, during the IWC's first decade, it produced these articles and in 1956 recommended the convening of an international conference to examine the law of the sea taking account of its technical, biological, economic and political aspects as well as the legal, though recommending that conventions and other instruments should be produced. This advice had been prompted by the reports of an important International Technical Conference on the Conservation of the Living Resources of the Sea which had been held in Rome in 1955 under the auspices of the FAO.

The General Assembly convened the First United Nations Conference on the Law of the Sea in Geneva in 1958 to consider and vote upon the ILC's drafts. It failed to adopt a comprehensive regime of principles and procedures for the settlement of all kinds of fishery disputes, a failure attributed by Johnston to national governmental influence on the ILC members who failed to "throw off the heritage of status orientation in the law of the sea" and thus missed an imaginative opportunity to create a more comprehensive regime with

76. For a description of the ILC's role in developing the law of the sea see Johnston op. cit. p.220.
new patterns of authority over fishery conservation. The ILC should, he suggests, first have required a study by experts from all relevant fields, since lawyers alone could not succeed in providing an appropriate juridical foundation for the solution of the existing fishery problems. This is particularly true of the marine mammal management problems since the IWC was already in trouble by 1958 as was illustrated in Chapter V, partly because the law based on freedom of access took no account of the biological differences between these mammals and fin fish and their reproductive habits and patterns. The ILC did not discuss the question and therefore made no attempt to create any special protection for such species. The Conference, as in 1930, was thus more concerned with the establishment of exclusive limits of coastal state fisheries jurisdiction than with the legal regime for effective conservation and it gave no special attention to whaling since it was already regulated by a Commission. The ILC's first task was therefore to produce draft articles on the high seas and the territorial sea.

After 1955, however, the ILC did have available to it the report of the Rome Technical Conference which had devoted much attention

78. Ibid, p.221.
79. Oda op. cit. p.60; Garcia Amador op. cit. p.109-143; Christy and Scott, passim, express similar views, stressing the complexity of factors involved in conservation and especially its interrelationship with allocation of stocks.
80. Report of the International Technical Conference on the Conservation of the Living Resources of the Sea (Rome 1955), convened by the UN General Assembly (Resolution 900 (IX)) to study "the problem of the international conservation of the living resources of the sea" and to make "appropriate scientific and technical recommendations" without prejudicing the related problems (of the Law of the Sea inter alia) awaiting the General Assembly's consideration. The Conference included experts representing the main fishing regions of the world, FAO, UNESCO and 11 fisheries bodies including the IWC. Johnston op. cit. p.344 n.81 gives full details.
to conservation and which had agreed that the principal objective thereof was "to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products". The ILC was much influenced by this and incorporated it into the Convention on Fishing and the Conservation of the Living Resources of the Sea, which was finally adopted by UNCLOS I, defining conservation as the "aggregate of the measures" rendering this aim possible, though even at that date some scientists challenged the assumption that the concept of maximum sustainable yield (MSY), as a goal of conservation, could be calculated solely on biological criteria, since these required too high a fishing intensity and would be uneconomic. They preferred the objective of "eumetric fishing" (a state of optimum fishing) as one which comprehended the best balance of economic interests, regulations being based on biological, economic and social factors on equal terms, balancing the benefits to the producer with assured supplies of reasonably priced fish. Eumetric fishing would require that the optimum yield be set below the MSY. These and more recent theories have been fully considered elsewhere; they are still hotly debated

81. Ibid, para. 18.
83. See Scarff op. cit. pp. 387-400.
in the IWC's SC. At this date of UNCLOS I, however, MSY was still the preferred theory.

The progress of the ILC debates has been thoroughly examined by others and will only be summarised here. The debates in the ILC had at first centred on the limits of coastal states' exclusive fishing rights, some members favouring the concept of the patrimonial sea on which the Santiago Declaration had been based and others emphasising the continuing high seas status of the areas of sea beyond the territorial sea. In its first draft articles on the rights of coastal states the ILC limited them to the right to take part in regulatory systems in a 100 mile belt of sea on equal footing with states fishing there even if the coastal state's nationals do not fish. The Rome Technical Conference had pointed a way to compromise the conflicting views


by recognising that conservation schemes should take account of "the special interests of the coastal state in maintaining the productivity of the high seas near to its coast", but it was not able to reach a consensus on the content of these special interests.

The ILC was much affected by this suggestion and by a proposal made by Cuba and Mexico but narrowly rejected by the Rome Conference. In 1955 when revising its original draft articles, the ILC proposed that if agreement could not be arrived at for conservation and common use of fisheries between the states exploiting them, the coastal state should be able to adopt the "appropriate" conservation measures, as long as they were non-discriminatory and based on "appropriate scientific findings"; no geographical limit was imposed or used as a criterion of "special interest". The final ILC draft of 1956, which was adopted in an amended form by the Geneva Conference in 1958 followed this approach though there was still a considerable

87. A Cuban-Mexican proposal for balancing the scientific and technical requirements of the living resources against the economic and social needs of people related to the promulgation of collective conservation measures on either a regional or a species basis but, as not all concerned states might agree on the measures necessary, permitted the coastal state, because its proximity gave it a special interest in sustaining the productivity of the resources of the high seas adjacent to its territorial sea, to adopt whatever measures it saw fit. DOC. A/CONF.10/6C1; as amended in DOC. A/CONF.10/6C1/Rev. 1. The Rome Conference considered this proposal to be of a legal nature and therefore outside its terms of reference.

88. Article 5(1) of draft articles approved at ILC 7th Session (1953), Johnston p.346; Garcia Amador p.169, n.36.

89. The final draft is analysed and explained by Johnston at pp. 347-357.
body of opposition to it both in the ILC and at UNCLOS I since for
some states it went too far (in recognising any special interest
of the coastal state) and for others did not go far enough (in
not acknowledging the coastal state's exclusive right to exploit
and conserve the resources in the area).

The Convention on Fishing and the Conservation of the Living
Resources of the Sea (hereafter referred to as the Conservation
Convention) which is still in effect, did recognise that "A
coastal state has a special interest in the maintenance of the
productivity of the living resources of any area of the high seas
adjacent to its territorial sea" and that it could participate
in schemes for research and regulation whether it fished there
or not, and that any foreign state whose nationals fished there
should enter into agreements for conservation measures as necessary,
and not enforce on their fishermen conservation measures opposed
to those of the coastal state. Disputes concerning conservation
measures could be submitted (but were not obliged to be), on the
initiative of any of the parties, to dispute settlement procedures
provided in the Convention. If negotiations with other states
concerned do not lead to agreement within 6 months any coastal
state may adopt "unilateral measures of conservation appropriate
to any stock of fish or other marine resources" in that area.

90. Article 6(1).
91. Article 6(2).
92. Article 6(3).
93. Article 6(4).
94. Article 6(5). Article 9 establishes arbitration procedures
but these have never been used.
95. Article 7(1).
The measures are subject to 4 conditions however - that they be based on "appropriate scientific findings"; that there is proof of their "urgent need"; that this need be assessed in the light of existing knowledge of the fishery; and that the measures are non-discriminatory "in form or in fact" against foreign fishermen. There are obviously a number of ambiguities in these articles which it is not proposed to explore here. For the purpose of this work it is sufficient to note that this special interest of the coastal state in conservation of adjacent states was internationally, albeit not universally, recognised in 1958. Only 35 states have, however, ratified this Convention to date; they do not include either Japan or the Soviet Union and in any event this Convention has now largely been overtaken by the large number of declarations by coastal states of jurisdiction over fisheries within 200 miles of the baselines of their territorial sea.

Other Articles of the Convention stress the right of the nationals of all states to fish on the high seas though subject to their treaty obligations, the coastal state's rights under the Convention and the Convention's provisions concerning

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96. Article 7(2)(a), (b) and (c).

97. IWC member states ratifying are Australia, Denmark, France, Mexico, Netherlands, UK and USA, plus two IWC observers Spain and Portugal. IWC members who have not ratified are Canada, Argentina, Panama, Iceland, Norway, USSR, Japan. Other whaling states which have not ratified include CEP, China, Korea.

conservation. These limitations apply to non-signatory states such as the USSR and Japan only to the extent that they can be said to have become part of customary law. The attitude of the non-signatory states, as revealed in the meetings of the IWC, towards this Convention following its adoption in 1958, provide some evidence of the extent to which the provisions can be said to have done so, but both the USSR and Japan have now reluctantly asserted jurisdiction in 200 mile Fisheries Zones.

The Convention states that "All States have a duty to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas" and even when foreign nationals are not fishing in the area states must adopt conservation measures for their own nationals "when necessary." It defines "conservation" as the "aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products" (i.e. MSY) adding that "Conservation should be formulated with a view to securing in the first place a supply of food for human consumption," objectives which, whilst not in identical terms, are not incompatible with the IWC's preambular recognition that "the whale stocks represent a great natural resource" which should be "safeguarded"

99. Article 1(1).
100. It did not enter into force until March 20th 1966, the last of the 4 Geneva Conventions to do so.
102. Article 1(2).
103. Article 3.
104. Article 2.
for future generations and that "the optimum level of whale stocks should be secured as rapidly as possible without causing widespread... nutritional distress." The difference between the two Conventions is that the UN Convention states a duty to conserve stocks though it was not clear whether this provision was a codification of international custom or a progressive development of international law; the IWC Convention merely includes "proper conservation" in its purposes, for the objective of promoting orderly development of the industry. The fishery conventions existing at that date have similar terms.

As early as 1937 the Institute of International Law had stated that a "State would be failing in its international obligations if it neglected to take all proper measures to prevent practices which, in the light of scientific experience, are manifestly contrary to the conservation and the rational protection of the wealth of the sea", and as seen in Chapter III the League of Nations Committee of Experts had earlier expressed a similar view adding, however, that the question of the exploitation of the products of the sea was "ripe for regulation by international agreement to protect some of the most important species such as whales" which "deserved to be preserved for the use of mankind on an economic and a biological and not on a commercial or political basis". States' claims to regulate adjacent sea areas had however rarely been based on such obscurely purist aims

105. Emphasis added.
107. Ibid.
expressed at that date, and the acceptance of a legal obligation to preserve species for these kind of purposes must be doubted in the absence of a treaty in this period. Certainly the content and criteria of the duty, if it exists, remains obscure to this day. In Koers' view the Convention has become no more than "a moral code which fishing nations prefer not to violate". Chapter VII puts these views to the test of IWC practices. It must be borne in mind in evaluating the subsequent IWC practice that the Conservation Convention's adoption into customary law was limited not only by its terms, as examined above, and their ambiguities, but also by the fact that it was much less widely ratified than either the Continental Shelf Convention, or the Convention on the High Seas which were also adopted at UNCLOS I. The former preserved the status of the waters over the Continental Shelf (which as defined in the Convention had no fixed limit), as high seas and the latter specifically codified the freedom of fishing thereon though requiring that this freedom "be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas".

111. Convention on the High Seas, in force 30 Sept. 1962, ratified by 1970 by 56 states; IWC member states parties are Australia, Denmark, Japan, Mexico, Netherlands, USSR, UK, USA, but Argentina, Panama, Iceland, France, Norway and Canada have not ratified, nor have IWC non-members Chile and Peru, Korea and China which also whale.
112. Article 3.
113. Article 1.
114. Article 2.
The latent ambiguities of these Conventions contributed to the failure of the fisheries commissions. First the lack of clear definition of a continental shelf boundary in the Continental Shelf Convention and the imprecision of its article relating to the extent of the coastal state's right to assert jurisdiction over offshore operations and safety zones for the purpose of enabling exploration and exploitation of the shelf (Article 5) have encouraged claims to submarine areas well beyond 200 miles and to functional jurisdiction in some parts of the waters above. The Convention was careful to retain the status of the waters above the shelf as high seas, but there is obviously, in the absence of a further treaty and in the light of the failure of fisheries commissions to prevent the decline in many fisheries, an encouragement to coastal states to endeavour to control the resources of the superjacent waters and with the objective of preventing pollution damage to fisheries, to regulate uses of the marine environment over the shelf.\(^{115}\) This Convention, as mentioned at the beginning of this Chapter, was used to justify the CEP claims, in the absence of a continental shelf, to the resources of a 200 mile maritime zone and such claims have proliferated.

Secondly, the High Seas Convention's reassertion of the doctrine of freedom simpliciter, without relation to a duty to conserve high seas resources, encouraged the disastrous policies

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pursued by member governments in fisheries commissions in general and the IWC in particular, as will be seen below. Since unrestricted access was codified in the High Seas Convention's Article 2 and the obligation to have "reasonable regard to the interests of other states" made no specific reference to conserving or sustaining stocks, even if this can be argued to be implied in the concept of reasonableness, member governments of the IWC considered themselves free to continue to disregard scientific advice in furtherance of short term national interest and to threaten withdrawal when pressed to accept conservatory restrictions, as the next Chapter will establish. It is true that the requirement that states exercising their freedom to fish should do so "with reasonable regard to the interests of other states" in the exercise of their freedom of fishing implies some duty to refrain from so depleting fish stocks that others are deprived of fishing opportunities, but the duty is so obliquely and imprecisely stated that the possibility of abuse of freedom remained. Moreover this Convention also avoided the controversial question of "historic" fishing rights so that states deprived of fishing opportunities by the recklessness of others had no specific legal interest to assert, the customary law on the subject being in dispute. UNCLOS II which met in 1960 solely for the purpose of settling territorial and fisheries limits found itself unable to reach agreement on alleged historic rights. The period following these conferences witnessed "a gradual surrender of historic fishing rights" in favour of extended coastal state exclusive or preferential claims to the resources, which have undermined the effectivity of fisheries commissions in many areas, including the IWC.

118. Ibid, p.446.
CHAPTER VII

THE DEVELOPING LAW OF CONSERVATION AND THE PRACTICE OF THE

INTERNATIONAL WHALING COMMISSION 1961-1969

1. Introduction

The thirteenth Meeting of the Commission took place in 1961, the year following the failure of the Second United Nations Conference on the Law of the Sea (UNCLOS II), to agree on limits for either the territorial sea or for fisheries zones, though convened solely for that purpose. Whilst UNCLOS I had debated conservation and accepted the need for it (at least in waters "adjacent" to a territorial sea), in the Convention on Fishing and Conservation of Living Resources of the sea, neither Conference had laid down any detailed international principles for the conservation of high seas fisheries as a whole, nor had they enunciated any principles for the conservation and management of highly migratory species in general or for marine mammals in particular. The subsequent meetings of the IWC therefore proceeded, as did all earlier meetings, on the basis of high seas freedom of fishing limited for the purposes of conservation only to the extent that members of the IWC accepted specific restrictions; thus for national economic, political and social reasons it continued to fail fully to implement the scientific advice given to it. Of the 17 members of the Commission in 1962:

1. Argentina, Australia, Brazil, Canada, Denmark, France, Iceland, Japan, Mexico, New Zealand, Norway, Panama, South Africa, Sweden, USSR, UK, USA. Observers came from ICES, FAO, Chile, Italy, the Netherlands, Portugal and the Special Committee of Three Scientists, IWC 13th Report, p.15, para. 2 and Appendix I p.10-11.
(3 of whom did not attend the thirteenth meeting)\(^2\) only 8 eventually ratified the Convention on Fishing and Conservation of Living Resources.\(^3\) It was during the period covered in this Chapter that the IWC failed, in the sense that it failed to meet the main objectives of its Convention i.e. properly to conserve the whale resources at their 1946 stock levels or to restore them to their levels before over-exploitation, to enable orderly exploitation and at the same time to preserve the stocks for future generations.

2. **Thirteenth Meeting, London 1961**

The Netherlands was absent from this meeting having withdrawn from the IWC in order to exercise its freedom to fish on the high seas unfettered by the policies and regulations of the IWC.\(^4\) Norway had rejoined the Convention in 1960 but gave notice of its further withdrawal at the end of 1961,\(^5\) with the proviso that it would be prepared to retract this notice if an agreement was signed on national allocation of Antarctic quotas.

2. Ibid, Brazil, Mexico and Panama.

3. New Directions, Vol. VI, pp. 784-789, viz. Australia, Denmark, France, South Africa, UK, USA, Mexico, Netherlands. It had been ratified by 35 states by January 1, 1977. Members of the IWC in 1979 who have not ratified are Argentina, Brazil, Canada, Chile, Iceland, Japan, S. Korea, New Zealand, Norway, Panama, Peru, Seychelles, Spain, Sweden, USSR.

4. It returned to the IWC in 1962, however.

5. Ibid, p.3, para. 2 and p.15, para. 3.
Scientific Matters

The scientific advice given to the IWC at last began to be pointed in the right direction with the authority of independent scientific opinion. The Special Committee of Three Scientists, constituted at the previous meeting, now submitted its first Interim Report, stating that it had worked and would continue to work closely with the IWC's own Ad Hoc Scientific Committee (AHSC), guiding Antarctic stocks data preparation, recommending additions to the data, devising appropriate methods of analysis of optimum yield, helping to prepare the resultant estimates and supplying to the Commission an independent opinion as to the nature and reliability of the results. It stressed that if it was to make a preliminary report to the 14th Meeting, considerable tabulatory work would have to be done at a Special Meeting of the AHSC later in the year which would require extra funding. It recommended a substantial increase in the scale of marking whales to enable more accurate stock assessment, or at least the acquisition of more data on their movements and migration. The AHSC agreed that stock definition was of critical importance, that much research was required and that marking was indispensable to it. The estimated cost of special scientific investigation (£7,510) gave rise to argument. Since it was principally for the benefit of the pelagic whaling countries the non-pelagic states argued

8. Ibid, Appendix VII, Report of Ad Hoc Scientific Committee p. 38; IWC/13/14 p.45-46. Harold Salvesen minuted that this would not give the quick results wanted by the Committee of Three.
that the former should pay for it. The IWC's income for the year 1960/61 had been only £4,250, made up of contributions from the 17 member states of only £250 (3 of them unpaid). The pelagic countries agreed to meet all but £850 of the cost, which was charged to the ordinary budget.\textsuperscript{9} If the full cost had been borne by the IWC members contributions would have had to be increased to £700.

Dr. Chapman of the Special Committee of Three pointed out that the chief handicap in all fisheries investigation was the inadequacy or unavailability of long-range data. Management under the Pacific Halibut Commission was successful because the information was available. Data were, however, often not collected until the fishery was in a state of crisis by which time little could be done.\textsuperscript{10} The AHSC stressed that the validity of the regulations at present in existence may now be called into question, since they were framed without benefit of a full account of the stock, adding that "regulatory measures framed for several stocks simultaneously (whether for a single species or not) are likely to be ineffective".\textsuperscript{11}

Meanwhile the Scientific Committee (SC) reported that it continued to feel considerable anxiety about the stock condition of most important species in the Antarctic, viz. the blue, fin,  

\textsuperscript{9} Ibid, p.23, para. 22. The level of research funding was thus low bearing in mind the large incomes derived by member governments from exploitation, particularly of Antarctic stocks.

\textsuperscript{10} IWC/13/14 Verbatim Record, p.69, per Chapman.

humpback, sei and sperm whales. The protection of humpbacks agreed at the 12th Meeting had been nullified by the objections of 4 pelagic whaling states.

The SC again condemned the use of the BWU stating that "the available biological evidence indicated that the overall catch limit in recent seasons has permitted excessive catches. The overall limit itself was thought to be undesirable as it could permit the excessive exploitation of one stock while others might be under exploited. As soon as population studies allow stocks to be properly assessed each stock should be made subject to special conservation measures". But in fact even the inadequate BWU catch limit had been suspended for 2 years at the IWC's 12th Meeting with the aim of enabling agreement on allocation of Antarctic quotas. The USSR and Japan had registered objections to this suspensory amendment of the Schedule and instead had observed the previous Antarctic quota of 15,000 BWU. Norway and the UK, in the Convention, and the Netherlands, outside it, were not obliged to observe this limit but had voted for the 12th Meeting's Resolution recommending them to impose national catch

12. Ibid, p.16, para. 6. Evidence indicated a further decline in blue whales; a decreased stock of fins; the serious condition of humpbacks stocks in most areas; a fall in average length of sperm whales caught and lack of information and research on the sperms though increased catches were being made.

13. Ibid, p.21, para. 17; the UK said she would withdraw her objection if all pelagic whaling countries were within the Convention and also agreed to do so, i.e. if the parity of sacrifice to ensure which the IWC had been established, was maintained. Mackintosh (Chairman, SC) emphasised that from the scientific viewpoint protection was needed, adding "if the Commission can see its way to doing so the scientists will be pleased" IWC/13/14 p.46.

quotas on their expeditions within 1959/60 season levels. The IWC Secretary had, in the extraordinary situation thus created, proceeded normally and asked the BIWS to set a cut-off date for Antarctic whaling on the basis of a catch of 15,000 BWU (i.e. the 1959/60 limit as proposed in the 12th Meeting's Resolution). The BIWS fixed April 1st as the relevant date. Japan reached its voluntary quota of 5,980 by April 1st (the only state to do so); the USSR also stopped then, having taken about 5,000 BWU; the UK and Norway, with voluntary quotas of 1800 and 5,800 respectively, continued until April 7th. The self-fixed national quotas (including the Netherlands, outside the Commission) amounted to 17,780 BWU although the previous season's catch had been only 16,430. 21 factory ships operated (1 more than the previous season) but full catch returns had not been received by the date of the 13th Meeting. When available they revealed that only 15,253 BWU had been caught.

In spite of the evidence that stocks of all important species were declining, some member governments of the IWC still gave great weight to the economic needs of their whaling industries and to their other interests including political considerations, even seeking relaxation of some existing conservatory regulations. Canada for example sought an amendment of paras 9(a) and (b) of the Schedule enabling relaxation in the minimum size of whales taken at land stations on the North-East Pacific by removing the

15. Ibid, p.18-19, para. 11; for a full account of the reasons for this see Ch. V.
17. IWC 14th Report, p.3, para. 2.
the requirement for "local consumption" in order to preserve the economic viability of local whale fisheries. Japan considered that it was inadvisable to continue to apply existing regulations limiting the size of sperm whales caught since several states outside the IWC also took them without such limitation and also alleged that scientific evidence did not justify any limit. The Commission doubted the advisability of such a relaxation and postponed a decision pending a promised extensive biological investigation of the sperm whale by Japan.

In spite of declining stocks the Commission agreed to extend the season for the following year by bringing forward the opening date, the Technical Committee (TC) having recommended that, though the scientific evidence probably offered a case for not extending the season too far, the economic arguments in favour of an earlier opening date were so important that it was not desirable to wait until further scientific information was available before taking action. The Commission also agreed to a Danish request that 10 humpback whales be taken off the coast of Greenland, and to extend the minke whale open season from 6 to 8 months.

18. Ibid, p.20, para. 16; IWC/13/12. This was eventually accepted when limited by Canada to a 3 year period: Harold Salvesen minuted that this was "tantamount to reducing the minimum length for land stations" (generally) "If Vancouver why not South Georgia?". Sprules (Canada) argued that some stations were closing down and, their crews would be dispersed unless encouragement was given, IWC/13/14, p.25.

19. Ibid, p.20, para. 15; IWC/13/18; IWC/13/14; Plenary Session Verbatim Record, p.14. Japan (Fujita) also stressed that it was unlikely that Chile would join the Convention if this regulation continued and thought Portugal also had taken 500 sperm whales.

20. Ibid. Japan alleged that statistics showed that 256 of the sperms taken were taken by IWC non-member states; 40% of only those delivered to land stations were taken into account.

21. IWC/13/14, p.57; IWC 13th Report, p.18, para. 9. The Schedule 7(a) was amended by substituting 12th December for 28th December.

22. IWC 13th Report, p.21, para. 18.
Antarctic Quotas

As the Antarctic pelagic whaling (APW) states were precluded by the Whaling Convention from allocating quotas to individual factory ships, the number of expeditions had increased.23

Three meetings, attended by the 5 Antarctic whaling states,24 were held outside the Convention in 1961, in an attempt to divide the Antarctic quota. As the USSR had already agreed to accept a 20% share the meetings sought a formula for dividing the remaining 80%. Agreement could not be reached, but was approached on a formula of allotting a 33% share to Japan, 32% to Norway, 9% to the UK and 6% to the Netherlands, with bonus points added for the Netherlands related to her expedition's catch by a specified date. The APW states intimated that a solution might be possible if certain other proposals were acceptable to the Commission viz: (i) the principle (proposed by the Netherlands) of carrying over from one season to the next the balance of an unused quota allocation.25 The Commission endorsed the TC's view that the proposal had advantages if the quotas were lower than or equal to the optimum catch level for conservation but if such quotas were higher, as was the present situation, the proposal's effects would be undesirable and that on balance the arguments against it predominated.

23. Lardinois (Netherlands), expressing continuing support for non-restriction of numbers of vessels, pleaded that this increased the opportunity to make good losses incurred. IWC/13/14, Verbatim Record p.11.
24. Ibid, p.16-17, para. 7. The USSR attended as an observer.
(ii) the lengthening of the Antarctic season to enable expeditions to obtain their quotas economically. The scientific evidence concerning the preponderance of pregnant females in the earlier part of the season's catch being disputed, the Commission, as already stated, agreed to an extension. 26

(iii) the introduction and implementation of an International Observer Scheme (IOS). The Commission reaffirmed its support for such a scheme and asked the 5 Antarctic whaling states including the non-IWC Netherlands, to negotiate one as soon as possible, with a view to provisionally implementing it in the following (1961/62) season before the requisite submission of it for formal incorporation in the Schedule. 27

During the course of 1961 it should be noted that the UK sold one of its expeditions to Japan transferring its quota with the vessel. The UK deducted 700 units from its quota; 28 Japan added 980 to theirs, Norway having also transferred 1 factory ship to Japan. 29 Diminution of effort by the UK did not therefore have any conservatory effect.

Enforcement

Apart from the need for the speedy negotiation of an IOS referred to above, the Commission accepted that the position on infractions was satisfactory and that they were on a downward trend though members should continue a regular and adequate national

27. Ibid, para. 10; IWC/13/14 p.33-37.
28. i.e. ½ of its proposed 9% share of the quota.
29. IWC/13/14, p.19.
inspection of land stations. The Commission also accepted that the legislation of the 16 member governments which had now replied to the relevant questionnaire included appropriate measures for implementation of the Convention, following an analysis of them, but they decided to discontinue the practice of publishing the answers in the Annual Report.

The Antarctic quota remained suspended. The UNCLOS I and II and the preparatory work of the Rome Technical Conference and the ILC had clearly had no effect on the attitude of most member states to the regulatory role of the IWC. Member states economic and political interests overrode the scientific advice in most instances and the pattern of conservation in the next decade was set by this Meeting in the same mould as in the 1950s. Quotas were kept higher than advised in order to enable a solution to the impasse concerning Antarctic quota allocation.


The Fourteenth Meeting was attended by 15 of the now 18 member states (the Netherlands having rejoined the Commission). The Meeting was faced with an increasingly grave position of declining stocks but displayed no readiness to accept the consequences of

30. Ibid, p.22, para. 20; IWC/13/14; the infractions as before were attributable to errors of judgment etc.

31. Ibid, para. 21. On the grounds that governments already had the information. As an inter-governmental body the Commission was not at that period interested in making the information readily available to the international community or the general public at large. See also IWC/13/5. The Netherlands answers were included in the analysis.

32. Ibid: There were 4 observers - FAO, ICES, Chile and Italy; p.10.
its obligation to conserve whale stocks, as the resume below reveals. Although the International Observer Scheme was on the agenda, as was a detailed appropriate amendment to the Schedule, the question was once again postponed.

**Scientific Matters**

The APW states had set themselves voluntary national quotas amounting to 17,780\( \text{bwt} \) the total caught had been only 15,253 in spite of a longer season for the 21 pelagic expeditions in the 21 pelagic expeditions in the Antarctic.\(^{33}\) The Special Committee of Three Scientists was not able to submit a report analysing the underlying reasons for this since the money for its scientific investigations having not been paid, it was unable to meet.\(^{34}\) It did, however, meet later in 1962 and submitted an immediate Interim Report\(^{35}\) since "the general conclusions, both qualitative and quantitative have become clear, and point to the need for action so drastic and of such urgency" that the Committee of Three thought it essential to give the Commission ample opportunity to consider the implications, including that action would be needed before 1964 (the date set at the Twelfth Meeting for bringing the catch into line with scientific findings). Even without this report the AHSC (which was wound-up at this Meeting) and the SC found the stocks of the most important commercial species were giving cause for great concern\(^{36} \) - blue

\(^{33}\) Ibid, p.16, para. 4; p.3, paras. 2 and 3.
\(^{34}\) Ibid, p.16, para. 9; IWC/14/10 Verbatim Record p.24.
\(^{35}\) IWC 13th Report Appendix VII, p.35; First Interim Report of Special Committee of Three Scientists; p.36.
whales were in a serious condition needing complete protection; fin whales were likely to produce a further accelerated decline; humpback whales (to the protection of which Antarctic whaling states had objected) were also deteriorating in most areas. Sei whale catches were still increasing though beginning to slow down (which was evidence that the maximum sustainable yield had been reached or even surpassed). Sperm whale catches had increased as others declined but here too the decreases in average length of whales taken, the declining numbers caught in some areas, coupled with the decreasing catch per whale boat, were signs for concern. The AHSC had stressed that a single region could not be considered in isolation but only as part of a wider programme. Portugal (a non-IWC member) sent figures for the Azores which showed similar signs and asked for advice and recommendations from the IWC, but other non-members did not emulate this example.

The BIWS catch review found the figures discouraging - inclusion of pygmy whales in the blue whale catch statistics of Japan confused the true position; if the present catches continued the blue whale catch might be reduced to zero. The SC advised complete protection.\(^{37}\) The AHSC advised that, as it was clear that the 1953-62 limit of 15,000 BWU's was greater than could be sustained even by the stocks of the 1950's, a level closer to 11,000 BWU's should have been maintained. If such an amount was now removed from the present depleted stocks, however, it would be too high and to achieve the same proportional catch of total stocks the allowable quota should probably be between 5,000 to

\(^{37}\) Ibid, p.15, para. 7; p.16, para. 12; p.17, para. 14; especially Report of Ad Hoc Scientific Sub-Committee (IWC/14/3); IWC 13th Report, Appendix IV, p.24-33 at p.25.
7,000 BWU's and should be kept at this for several years to allow stocks to re-build. A higher figure would accelerate the decline and an even smaller quota, maintained for an even longer period would then be necessary for recovery. It also repeated that overall quotas for several species together were inadequate and that experience had now shown that operations were concentrated under it excessively on individual species and stocks. The need for new and additional data was urgent as also was the need to reorganise the Commission's research programme.

In spite of the critical state revealed in the above reports the IWC retained the overall catch limit set in terms of the BWU, kept it at 15,000 BWU (as agreed at the 13th Meeting) and did not totally protect either blue or humpback whales, merely passing a Resolution inviting the Antarctic pelagic whaling states to reconsider their objections. They did agree to undertake further sperm whale studies, and increased their annual contribution to £300 but with most of the cost of the special investigation being met by the 5 pelagic whaling states. The latter agreed outside the Convention to national allocations of catch for 1962. As both the UK and Norway had now sold a whale factory ship to Japan, transferring their quotas with it, the allocation agreed was Japan 41% (6,150 units); Norway 28% (4,200); the UK 5% (750);

39. Ibid, p.25. The AHSC pointed out that it was difficult to formulate views on the progress of research or make long term plans when most papers presented to them did not give results.
40. The agreed extension of the season (now national quotas were accepted) and keeping open to so-called sanctuary, were not anti-conservatory measures.
the USSR retained 20% (3,000) and the Netherlands 6% (900) i.e. a total of 15,000 BWU. In the event only 11,000 BWU were caught and only Japan reached its quota. 1,030 more sperm whales were caught than in the previous season but the blue whale catch dropped by 15.3%, the fin by 29.4% and the humpback by 12.6%. Of baleen whales only the sei catch increased by 15.9%. Including sperm oil the total output was 1,524,150 barrels, but the average catch per catcher day was 0.52 BWU compared to between 0.90-0.98 in the first decade of the IWC, and the average size of blue whales taken dropped by two feet. 42

Enforcement

(i) **Infractions**: It was concluded that these had decreased, although in the absence of international inspection the reports could not be verified. 43

(ii) **International Observer Scheme (IOS)**

It had long been evident that progress towards international supervision of Antarctic whaling would do much to engender confidence in member states that if they did accept drastic cuts in Antarctic quotas there would be parity of sacrifice that was real and effective. Discussion had been blocked at the two previous Meetings because of the absence of Norway and the Netherlands; the USSR in particular had objected that unless all were to be subject to inspection there could be no further discussion of a scheme. 44 The return of the two absent Antarctic whaling states should have enabled its speedy

42. IWC 14th Report, p.3-4.
43. IWC 13th Report, Appendix X, p.73.
44. This was a delaying tactic since Norway and the Netherlands strongly supported a scheme which was directed at observance of the USSR's activities.
introduction and a detailed amendment to the Schedule for this purpose, proposed by Norway, was on the agenda. Its details are of considerable legal interest since the IOS finally adopted by the IWC remains unique of its kind in fisheries enforcement.

(a) **Norwegian Proposals:**

The proposed amendment offered 2 alternatives:

1. Each factory ship operating in the Antarctic would be required to carry an observer of a non-Antarctic whaling state nationality, appointed, instructed and paid for by the Commission from money to be made available by the APW states related to the number of their factory ships operating in that region. The observers would not have disciplinary powers but would have all reports and records required to be kept under the Whaling Convention made available to them and could make any necessary enquiries of the vessel's master and inspectors without having any right to interfere in their activities. If the observer had reasonable grounds for believing that an infraction had taken place he must at once send a radio report to the Commission, informing the national inspector that he had done so. At the end of the season the observer would send a full report to the Commission on the extent to which operations had conformed to the Convention. The Commission would then call the attention of the Government concerned to any serious reported infraction. Any explanation given by that Government would then be conveyed to the other Governments party to the Convention.

2. Alternatively each ship operating in the Antarctic should appoint an observer of the nationality of an Antarctic pelagic whaling state party to the Convention though not of the same nationality.

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45. IWC 14th Report, p.12-14, Item 18.
nationality of the flag state of the factory ship to which he was appointed; the observers being chosen from a panel of people nominated by the Antarctic whaling states in proportion to the number of their operating fleets.

The USSR, repeating its delaying tactics, rejected the proposal that an Ad Hoc Committee be established by the Plenary Session to discuss these alternatives and insisted that a preliminary conference of the 5 Antarctic states should be held before proposals could be put to the Commission. It was agreed that an Ad Hoc Committee consisting of the 5 Antarctic pelagic whaling states and Australia would meet solely to initiate a preliminary discussion.46

(b) USSR Proposal

When this Ad Hoc Committee met,47 the USSR proposed that the observer plan should be based on mutuality, each country having the right to appoint an observer to each factory ship i.e. theoretically there might be up to 5 on one ship, but in practice each state would only send an observer to the vessels of a state reciprocating; there would be no obligation to appoint. They could be paid for either by the appointing state or the Commission from APW state contributions. The UK approved the alternative requiring each state operating in the Antarctic in addition to its own inspector to carry one from another Antarctic state, the salary and travel costs being paid by his own country and food and accommodation being provided by the ship owner. Norway preferred the Commission to appoint observers of a nationality different from that of the Antarctic pelagic whaling states, paid by the Commission from funds

46. IWC/14/10 Verbatim Record of Plenary Session p.12.
47. AHC on IOS, July 5, 1962.
made available by the APW states, information obtained being made available only to the Commission. The Netherlands preferred appointment of observers of a different nationality from the nations engaged in pelagic whaling, paid for by the APW countries except for their board and lodging, contributions being related to the number of expeditions.

The USSR proposals (which are the basis of the ones finally adopted and in force today) were criticised on several grounds - there should not, it was suggested, be more than 2 observers on any ship; national inspection was not important; mutual rights invalidated the objectives of the scheme; the observers should not be appointed by national states. As a compromise the UK proposed a two part scheme whereby the Commission would appoint one international observer who should be a national of an APW state but not of the flag state, chosen from a panel nominated by the APW states, the number of nationals nominated being related to the number of expeditions. In addition the APW states could appoint inspectors on a mutual basis. For each international observer appointed by the Commission to the ships of state A who was a national of state B, state B could appoint an observer to state A's ships. It was agreed to hold a conference to discuss these proposals.
4. **Fifteenth Meeting, London, 1963**

16 member states attended this meeting\(^{48}\) which presented the last chance to take the actions necessary to halt the over-exploitation of stocks with the opportunity, in a reasonable time, to restore them to something approaching the level at which they had been at the time of the IWC's institution - when catches of 16,000 BWU's per annum could regularly be maintained. However, as the UK Minister opening the Meeting stated "It is easier in whaling, as in war, to invent efficient means of destruction than to exercise self-discipline and devise the necessary international agreements to keep such powers in control".\(^ {49}\) The investigations of the Committee of Three Scientists had produced serious evidence of decline in all stocks exploited in the Antarctic. In the 1962/63 season 17 expeditions had taken only 11,300 BWU made up of 947 blue whales, 18,668 fins, 270 humpbacks and 5,503 sei compared to the 1,118 blue whales, 26,438 fins, 309 humpbacks and 4,749 sei of the previous season. For the first time since World War II

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\(^{48}\) IWC 15th Report, Appendix I, p.10; Brazil and Panama were unrepresented. There were 8 observers, a growing number, of interesting composition, viz. the Committee of Three Scientists (one of whom also represented FAO), Chile, Italy, Portugal, the International Society for the Protection of Animals and the Permanent Commission for the South Pacific (represented by one Peruvian and one Chilean). Mr. Aglen, a member of the UK delegation, also represented ICES and was in turn appointed by the IWC to represent them at the ICES meeting to which the UK was appointing him. This method of observation persists today; see IWC observers reports to 31st Meeting IWC/31/14; IWC/31/15A, IWC/31/15B, IWC/31/15C, IWC/31/15D, and requires review.

\(^{49}\) Press Notice of 15th Meeting 1963, per Mr. Brooman-White Under Secretary of State for Scotland.
no land station operated in South Georgia. The average catch per catcher day was again down and the overall catch was 26% less than in the early 1950s in spite of a 50% increase in the catching season.

Scientific Matters

Although more papers and reports were before the Scientific Committee than ever before, it pointed out that conclusions were based on assumptions which were not fully established and that more needed to be done to improve knowledge of basic factors such as correct sampling of the populations, defining stock units, attaining precision in age determination, etc, to secure greater accuracy and reliability in the analyses. More research was needed and a large amount of whale marking, likely to cost £12,000 in the S. Hemisphere and £50-100,000 in the N.E. Pacific. Nonetheless the SC accepted the Report of the Three Scientists as the best possible estimates at the present time and recommended that the Commission act on it giving blue whales and humpback whales total

50. Ibid.


52. Ibid, para. 36.

53. IWC/15/6; IWC 14th Report, Appendix V, Committee of Three Scientists p.32. The Committee of Three found that if the present rate of blue whale catching was continued only about 2,500-5,000 more could be taken before the species became virtually extinct; it would take 65 years to restore the stock to a level at which such catches could be maintained and another 5 years for each year that catching continued; it could take 80 years for some humpbacks to recover.
protection and abandoning the Blue Whale Unit for quotas, setting instead separate quota for fin whales. It pointed out that the rise in humpback mortality in some areas could only mean that large catches were being taken in addition to those reported. Moreover larger numbers were now being taken than in the past under scientific permits provided for by Article VIII of the Convention. The SC recommended that it should be consulted before such permits were issued. This, however, could, it thought, require amendment of the Convention.

The Committee found that all major commercial species in all areas where commercial whaling took place now needed refined population analysis. The problem was how to organise this with the limited funds and expertise available to the Commission. The practicability of organising their own Working Group on the pattern recently set by some regional fisheries commissions was considered, with experts drawn from member countries but acting independently and not as representatives of their countries. The Committee thought it impracticable for a Commission with a world wide membership to bring such experts together, and decided that it would be better to use FAO. The alternatives of continuing to use the voluntary

55. Ibid, para. 16. e.g. South Africa took 350 by this means.
56a. Ibid, para. 15. It was not until 1977 at the 29th Meeting that the IWC recommended prior review by the SC of scientific permits (by Resolution); only in 1979 (31st Meeting) did it make this mandatory by amendment of the Schedule.
57. Ibid, para. 21.
58. See Ch. VI passim.
services of the Committee of Three or of hiring experts were both considered unsatisfactory. The USSR reserved its position on this proposal as it was not a member of FAO at that time.\(^5^9\)

In spite of the dire warnings in the Report of the Committee of Three and the recommendations of the SC, the IWC as a whole found it impossible to act upon them. The Report was received and noted. The UK was prepared to support a quota of 4,000 BWU,\(^6^0\) although this would put its industry out of business, but the USSR and Japan, pleading the adverse effects on their industries, proposed a quota of 10,000.\(^6^1\) The UK then agreed for one year only to accept the 10,000 quota to prevent the USSR and Japan exercising their right to object which would result in no limit for them. Norway pointed out that this was more than the expected catch of 8,000 to 9,000 and would therefore represent no real reduction.\(^6^2\) The USA agreed with Norway remarking that the considerations put forward in favour of the higher catch did not relate to conservation but to the economic needs of the present whaling industry.\(^6^3\) The Netherlands supported a quota of 10,000 as being a substantial reduction on the previous quota of 15,000, stating that 4,000 was not practical.\(^6^4\) The quota of 10,000 was adopted by a vote of

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60. IWC/15/17 Verbatim Record Plenary Session p.66.
62. Ibid, p.68.
63. Ibid, p.69.
64. Ibid, p.70; the USSR supported this view.
7 in favour, 1 against (New Zealand) and 5 abstentions (Canada, France, Denmark, Norway and the USA). The UK voted in favour.

Although the Commission agreed to suspend catching of humpbacks in the Southern Hemisphere, it did not agree completely to protect blue whales since Japan wanted to continue catching pygmy blue whales in one area; this area was excepted from the catching ban.

Many members drew attention to the fact that in setting up the Committee of 3 the intention of the Commission was that not later than 31st July 1964 the Antarctic catch limit would be brought into line with the scientific findings. The original resolution was re-affirmed by 10 votes in favour, but no further action was taken.65

In the absence of powers in the Convention to require prior Scientific Committee approval for the issue of scientific permits the Commission merely agreed informally that the SC should be consulted whenever possible, advised on the reasons for issue and results, and that numbers approved should be the lowest possible for the purposes.66

Enforcement
(i) **Infractions:** Although reported infractions in the Antarctic had been slightly reduced those outside had slightly increased. The Commission noted this, but took no further action.67

(ii) **International Observer Scheme:**68 The method now adopted to introduce the IOS is of considerable interest, especially in view of the present proposals for revision of the ICRW which are largely

65. IWC 15th Report, p.18, para. 11.
68. Ibid, p.20-21, para. 18; IWC/15/17 Verbatim Record p.80.
based on the assumption that it is unworkable in its present form. The Special Meeting of the Commissioners of the APW countries had taken place in Moscow in May, 1963; a final agreement was arrived at on June 6th 1963; since a scheme was not provided for in the Convention, it would have to be operated outside it. Nonetheless as the scheme agreed required the Commission to appoint and supervise the observers, who would also report to it, the Schedule to the Convention would require amendment. The Commission therefore adopted a Resolution drafted by the 5 APW countries noting the agreement and resolving that the operation of the scheme would be the responsibility of a committee of the Commissioners of the APW countries. It agreed to add to paragraph 1(a) of the Schedule, concerning appointment of inspectors, the words

"and also such observers as the member countries engaged in Antarctic pelagic whaling may arrange to place on each others factory ships".

This Resolution was adopted by 11 votes in favour, and none against with one abstention, with a general undertaking that the scheme would come into force for the next season.

The scheme adopted\(^{69}\) was a modification of the USSR proposal. It provided that:

(i) the IWC would appoint the observers;
(ii) the observers would be responsible to the IWC;

The criteria for appointment were that:

(i) each state operating an Antarctic pelagic whaling expedition under its flag in any season would nominate one national observer for each foreign expedition, nominating a number equivalent to its own flag operations;

(ii) the IWC would appoint from these nominees one observer to 
every expedition in the Antarctic so that the number of each 
nationality equalled the number of that country's own expeditions;

(iii) the remaining observers would be appointed to such expeditions 
as the nominating government required, limited to only one per 
ship of any nationality;

(iv) the IWC would inform all states parties to the scheme of 
the appointments made.

The observers had no powers to do other than freely observe and 
report to the Commission whose sole authority they were under. 
Masters etc. of ships on which they served were to render them all 
necessary information. Masters etc. would have the report of 
infractions observed submitted to them as well as to the Commission, 
and could comment thereon, their remarks being forwarded to the 
Commission. Any infractions not due to excusable error would 
have to be presented to the master in writing as well as, if 
serious, being reported to the IWC Secretariat.

The observers would be appointed for one season only, paid 
by the Commission out of monies advanced by their national states. 
Such monies would also cover the Commission's administrative 
expenses; observers travel and subsistence would be refunded by 
their nominating governments, who would also pay for any necessary 
interpreters.

The Scheme, though only semi-international was a considerable 
advance on those of existing fisheries commissions, only a few of 
which had even joint enforcement schemes. Although the scheme was,

70. See Ch. VI, and esp. works listed by G. Knight, op. cit. 
p.690-691. Fishing vessels under Joint Enforcement Schemes 
were not required to carry inspectors, and could be boarded 
only in specific circumstances.
once in force, to remain in operation for the duration of the Whaling Convention, it was agreed that it would not enter into force until all 5 signatory governments notified their acceptance to the UK. In the event this requirement of unanimity of APW states delayed the entry into force of an IOS for more than a decade.

The failure of this Meeting to take any drastic measures to enable the recovery of stocks finally induced the only British company still whaling to sell its remaining factory ship to a Japanese company, transferring its 5% quota with it. This marked the end of British pelagic whaling and evidenced the UK industry's view that there was now no likelihood that the IWC would fulfil its conservatory purposes in time to allow stocks to return to a commercially viable level.

5. Sixteenth Meeting, Sandefjord, 1964

This Meeting was attended by 14 of the 18 member states. During the 1963/64 season only 8,429 BWU were caught from the quota of 10,000 BWU set, 2,877 less than in the previous season.

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71. Exchange of Notes on Jan. 6th, 1964 between Great Britain and Japan on transfer to Japan of the UK quota. Treaty Series No. 18, (1964), Cmd 2337. It should be noted that the adoption of a moratorium on pelagic whaling (other than for minke whales) at the 31st Meeting (see Ch. XII) coupled with a Resolution requiring members not to transfer whaling vessels to non-members, makes it impossible for Japan and the USSR, the only states now engaged in pelagic whaling, to reduce their losses by this means if they renounce pelagic whaling entirely.

72. IWC 16th Report, Appendix I, p.11-12; Brazil, Mexico, Panama and Sweden were not represented; observers represented the Committee of Four Scientists; ICES (again represented by Mr. Aglen); FAO; Chile; Italy; Portugal; and the International Society for the Protection of Animals. The South Pacific Commission had observer status but was not represented.
had taken 4,600 BWU, the USSR 2,001, the Netherlands 343 and Norway 1,485. Only Japan and the USSR had reached their quotas and only they had taken blue whales - 38 and 74 respectively compared to the 947 taken the previous season. The fin whale catch dropped by 25% but both sei and sperm catches rose - the latter from 4,771 in 1962/63 to 6,651. Total oil output was down to 1,298,705 barrels, and there was a sharp decline in the average catch per catcher day's work (in spite of the much more efficient ships now used) to 0.41 BWU compared to as much as 0.98 in the 1950s. It might be thought that these economic considerations would lead the remaining pelagic whaling states to desist from operations, but for the reasons given by the SC discussed below this was not so.

Scientific Matters

The Committee of Three had now been augmented into a Committee of Four. The SC noted that its earlier forecast of the 1963/64 catch had been remarkably accurate: indeed had the weather not been good the catch figures would have been worse. The position was therefore grave. The Committee again recommended a ban on taking all blue whales since blue whales could easily be taken in mistake for pygmy blue. Japan and the USSR resisted this but

73. IWC 15th Report, p.3-4, para. 2 and 3.
74. IWC 16th Report, p.16, para. 7 and p.18, para. 18; IWC/16/15 Verbatim Record p.54-61. The Committee of 3 had earlier advised of the risk that a very small stock will tend to extinction even if all catching were to cease (IWC 14th Report, p.100, para. 5). The USSR, per Mr. Solyanik, however, considered that the scientific evidence did not call for a ban on taking pygmy blue whales and a catch thereon would ease pressure on fins and seis; IWC/16/15, Verbatim Record p.58/59. Holt argued that even a catch of 400 pygmy blue whales was above a sustainable yield and that 70 of these would be blue whales since a large part of the Antarctic stock passed through the open area.
were outvoted (12-2) and total protection was agreed. The UK urged those voting against it not to use their right of objection in view of the risk of the species extinction and world opinion on this subject. A large number of conservation groups had now written to the Commission on the subject,75 protesting against the Commission's failure to conserve stocks.

A special meeting on sperm whales had recommended that regulation and research should be operated for this species on a regional basis in accordance with existing knowledge of separate stock limits. The meeting provisionally divided the world's sperm whales into 8 regions.76 There was concern that sperm whales were being taken by expeditions on their way to and from the Antarctic in areas where there was no national interest in protecting them. During discussion of this report New Zealand proposed that the Schedule be amended to forbid the use of whale catchers attached to factory ships for the purpose of killing sperm whales within a radius of 500 miles of any land station. Both Japan and the USSR opposed this, the latter categorically objecting that this was a disguised attempt to extend territorial waters and to limit the rights of others in the open seas in which the High Seas Convention provided for freedom of fishing, since only fishery zones of up to 12 miles were generally accepted. The US protested that the proposal was not prohibited by international law since states could voluntarily restrict their rights to fish on the high seas. The New Zealand proposal was defeated by a vote of

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75. IWC/16/15, Verbatim Record, p.54.
76. IWC/16/15, Verbatim Record, p.50. This can be regarded as the first step towards the New Management Procedures operated since 1974.
9 in favour, 4 against and 1 abstention. It was merely agreed that more research on stocks of sperm whales was needed.\(^77\)

The Commission accepted, with only 1 vote against, that the total protection of humpbacks should be continued but they were unable to act on either the advice that the stock of fin whales could now only sustain a yield of 4,000 whereas if whaling stopped for 24 years an MSY of 20,000 could be obtained, or that since the sustainable yield of sei whales lay between 2,400 and 8,000 the catch should be limited to about 5,000. The Commission also again failed to accept the advice that the BWU and overall quota system should be abolished and species quotas substituted. A complete ban on blue whale catches in the Antarctic was agreed but subsequently objected to by all the APW Countries.\(^78\) The SC also endorsed the 4 Scientists' view that there was a very strong supposition, since expeditions had been diverted by declining catches from the Antarctic to the North Pacific in such large numbers that there were now more expeditions in the latter than the former area, that over-exploitation was now occurring in the latter area. To delay conservation measures till better estimates were available would be to wait to collect information on a severely reduced stock and be too late for conservation.\(^79\)

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77. IWC 16th Report, p.18-19, para. 11; IWC/16/15 Verbatim Record p.48-53.
78. IWC 17th Report p.19, para. 10; as before if one objected all had to ensure equality.
79. IWC 16th Report, p.16-17, para. 7; IWC/16/15 Verbatim Record of Plenary Session p.7-25; Holt (FAO and Committee of 4) commented that "our best estimates of what is happening to a stock of animals come when the stock has virtually disappeared and we have a nice long series of data showing its decline".
The Commission concentrated on agreeing an overall quota though the Committee of Four had advised only on species quotas. The IWC received a letter from the Director General of FAO 80 pointing out that since the previous quota of 10,000 BWU had not been attained it offered no protection to stocks and members of the 12th General Conference of FAO had expressed grave concern concerning the decline thereof. He urged the IWC to limit the fin catch in the Antarctic to less than the current sustainable yield, prohibit all blue whale catches, including those of pygmy whales, and properly to study the sei and sperm stocks to which catching was now being diverted, taking the action necessary to bring the regulations into accord with the scientific findings. He warned that FAO could not collaborate in scientific work the results of which would be used merely to plan the more efficient destruction of the resource. Resolutions from other organisations concerned with conservation made similar recommendations. 81 This growing body of international protest led to the UN's Conference on the Human Environment which was to have a considerable impact on developing the International Law of Conservation. 82 The TC, ignoring this, recommended 83 that an overall quota be continued, though reduced to 4,000 BWU for 1964/65, and to 3,000 and 2,000 BWU respectively in 1965/66 and 1966/67 explaining that "There has been on all sides an endeavour

80. Letter from Dr. Sen, IWC/16/12 and IWC/16/9.
81. IWC/16/12.
82. See Ch. VIII.
83. IWC/16/15, Verbatim Record p.34, per Mr. Lienesch (Chairman of the Technical Committee); the TC Report was not published. The USA had proposed that the Schedule be amended in this way; IWC 16th Report, p.17, para. 8.
to give protection to the whale stocks in a way which will not
conflict with the interests of the industry", and that the result
of non-adoption of the above proposal would be, as the 10,000 BWU
limit had been for one season only, that there would be no limit
at all this year.

Dr. Holt made a final forceful plea in support of a more
conservatory, long-term approach arguing that "only the most drastic
action can save the industry from total collapse ... after which
it will be generations before the residual stocks recover". The
Antarctic could not now be isolated from other areas on which there
was now increasing pressure; each region should be controlled.
Referring to whale stocks in general he said "if this Commission,
which was created to ensure their proper use, condones their further
misuse, a heavy blow will have been struck against ... conservation
of high seas fishery resources" the principles on general measures
for conservation of which had been laid down in the Geneva Convention
on Conservation. He asked the Commission to set a low quota: for
ture conservation it should be less than the sustainable yield
viz. 3,000 BWU; stock extinction would be delayed by a take between
3,000-6,000; any figure above that would offer no restraint at all.
He agreed that the compromise based on phased reductions did
represent considerable restraint.84

84. Ibid, p.35; Mr. Setter (Australia) pointed out that whilst not
meeting the requirements of the 1960 Resolution (requiring the
catch to follow the scientific advice) in the first year it
would by the third year. The present conflict was not between
scientific advice and commercial interests but between long
and short-term commercial interests. Gulland & Holt in a Note
on the Effects of Various Catch Quotas, IWC 15th Report, Appendix VI
p.61 (IWC/16/20), had approved this proposal adding that a quota
of 6,000 would allow further depletion of sei and fin whales and
one of 8,500 would be more than the number taken in the previous
season. The SC in a Supplementary Report also approved the
4,000 figure, IWC/16/21.
Japan however proposed that the quota should be 8,500 BWU. Her delegates said that they "quite envied the non-pelagic whaling countries who are not engaged in the Antarctic and can discuss this problem clearly ... purely from the point of view of conservation of natural resources". The whaling industry played a very important role in the national economy of Japan. Therefore Japan could not discuss the problem only in terms of conservation of whale stocks. The USSR supported Japan and considered that conditions in the Antarctic were not as bad as presented, stating that the USSR had "made tremendous investments into the whaling industry, and we do not want them to have been in vain". These were clear admissions of the balance given by these two states to the IWC's conflicting Preambular objectives.

Canada urged that in voting on the proposal members should think of their voting "as fulfilling a moral obligation of the 1960 Resolution". Norway stated that it would have supported the 4,000 figure to save stocks and allow whaling to continue in spite of the "sacrifice" involved but nonetheless in order to provide a figure more acceptable to Japan and the USSR proposed that the overall catch quota should be 6,000 BWU. This was defeated by a vote of 12 against, 1 (Norway) for and 1 abstention (Iceland).

85. Mr. Fujita, IWC/16/15, Verbatim Record p.72.
86. Ibid, p.74, per Mr. Solyanik. He said further reduction in quota would make necessary a redistribution of national quotas to meet the reality of the numbers and owners of the vessels now operating in the Antarctic.
87. Ibid, p.75, per Mr. Sprules; emphasis added.
88. Ibid, p.76.
The Japanese proposal was also lost by 3 for (USSR, Japan, Netherlands) and 11 against. The USA proposal also did not achieve the required \( \frac{3}{4} \) majority since 4 states (Japan, Netherlands, Norway and USSR) voted against it. The Netherlands then proposed a quota of 8,000 BWU but this attracted only 3 votes (Japan, Netherlands, Norway) in favour and 10 against, with the USSR abstaining.\(^8\) The Meeting, vital to the IWC's success, thus ended disastrously with no quota at all being set. At the end of it the Commissioners for Japan, the Netherlands, Norway and the USSR agreed to recommend to their Governments a voluntary catch limit of 8,000 BWU.\(^9\)

Dr. Holt had the last word. He considered that the Commission's problems originated from two sources. "The first is perhaps some weakness in the Convention itself ... not apparent ... at the time the Convention was signed and ratified but which has turned out to be a vital point in the Convention". These weaknesses, identified in Chapter IV, will be reassessed in Chapter XI. The second source was the difference in views as to the legal status of the resources; "Do they, in effect" he asked "belong to noone or do they belong to everyone? Do they in effect belong to this generation or to future generations? Do they in effect belong to those who exploit them or to all the nations who in some way, however small or indirectly, depend on products of the sea for the nourishment of their people? These problems seem to us to be inherent in the present status of International Law and our fear is that the germs of their own

\[8\] IWC 16th Report, p.17, para. 8; IWC/16/15, p.79-93. The USSR Chairman however considered the IWC would be "rather careless" to accept such a high figure for the "remaining years in the Antarctic" as the Netherlands suggested since the Antarctic catch was likely to decrease and the quota could be reduced at future meetings. \(^{10}\)

\[9\] IWC/16/15 p.111-112.
destruction might be in other treaties that exist for conserving and managing the fisheries resources of the high seas ... We would put the question then, will the failure of this Commission to agree this year on an effective measure in the Antarctic ... nourish these germs or will it set in motion a process of reconsideration by nations of the basic principles of these Conventions?" 

The constitutions of remaining fisheries commissions will be surveyed in the next Chapter and the final Chapter will attempt to answer some of Dr. Holt's questions.

There was a growing acceptance of a duty to conserve stocks, as the voting of all but the USSR and Japan evidences, but both the opposition of these two states and the views expressed by Canada show that this was still not regarded as a legal obligation requiring the taking of immediate action to bring quotas into line with scientific advice.

Enforcement

(i) Infractions: Reported figures were slightly down but the SC drew the Commission's attention to the "regrettable fact" that "unnatural" size frequencies of many whales were reported at or only just above the minimum lengths in force, which suggested that masters were not scrupulous about size. The SC considered that the speedy implementation of the International Observer Scheme would ensure more accurate observance and reporting of size frequency. 

(ii) International Observer Scheme: The APW states had met to consider implementation of the IOS in the 1964/65 season but had

91. IWC 16th Report, p.18, para. 8.
92. Ibid, p.20, para. 20; Scientific Committee Report, IWC 15th Report, p.26 at p.28, para. 6; IWC/16/3, p.3.
not reached agreement and discussions continued on various changes now thought necessary to the rules agreed in 1963. A draft of new rules was left to be submitted to the relevant Governments,\(^{93}\) ensuring further delay.

6. **Special Meeting, London, 1965**

Since no quota had been fixed for the Antarctic for 1964/65, a unique meeting attended by 13 Contracting Governments\(^{94}\) and attended also by several observers\(^{95}\) from non-governmental organisations, was held for this sole purpose. The estimated catch for the season, although only 15 expeditions operated (the Netherlands did not operate), was 7,065 - less than the quota proposed at the 16th Meeting - compared to the 8,446 caught in the previous season. There had been a 14% decline in the CPUE\(^{96}\) (catch per unit of effort).

FAO reported\(^{97}\) that the catch of fin whales at 7,000 was less than the predicted 12,000 but well above the sustainable yield of 4,000 which they still advised. They advised a sei catch of

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\(^{93}\) IWC 16th Report, p.20, para. 19.


\(^{95}\) Ibid; There were 10 observers - Chile, Portugal, FAO, BIWS, Int. Association of Whaling Companies, Permanent Commission for the South Pacific, the International Union for Conservation of Nature (IUCN), World Wildlife Fund, Fauna Preservation Society, Universities Federation of Animal Welfare. Ibid, Appendix I.

\(^{96}\) IWC 16th Report, p.4, para. 5.

\(^{97}\) IWC/SM/3; Report on the 1964/65 season by Fisheries Division, FAO, IWC 16th Report, p.25-36.
between 3–4,000 only (500–650 BWU). Only an overall quota of less than 2,500 BWU would prevent further depletion. Various ways of achieving this over a period of time, even by deliberately permitting over-exploitation of seis to enable rationalization of the industry to a lower level, were considered but the FAO scientists advised that the only rational policy was that providing for limitation of catches of each species - a phased reduction over 3 years could still operate as a conservation policy but stocks would take correspondingly longer to recover.

The Committee of Four also reported on various alternative schemes for catch limitation including a USSR proposal for a 4,000 BWU quota coupled with reduction of effort in the Antarctic by 50%, and on alternative USSR, Japanese, Norwegian and USA suggestions for phased quotas over three years, none of which attracted agreement. It was objected to a Russian proposal for effort reduction that expeditions might, if the number of factory ships was reduced, strive to increase their catching power by adding to the number of catchers, which was already unequal. The USSR regarded

98. Japan disputes these figures, IWC/SM/9, Verbatim Record p.13-14.
100. IWC/SM/4; Appendix II to Chairman's Report of SM, Report of Committee of 4 Scientists p.43.
101. Ibid, p.43-44; IWC/SM/9 Verbatim Record p.16 per Kolenkin IWC/SM/10; USSR Proposal; IWC/SM/14 USSR 2nd proposal.
102. They ranged from the Japanese proposal of 4,500/4,000/3,500 to the USA proposal of 3,000 then 2,000; see Chairman's Report of the SM, IWC 16th Report, p.23-24, para. 8.
the Commission's task as "to find some reasonable compromise which will take into account on the one hand the scientific data and on the other the economic point of view of those countries engaged in active pelagic whaling" and proposed a Committee of 6 (3 pelagic and 3 non-pelagic whaling countries) to find a solution. Norway wanted this Committee to consider allocation of national quotas but Canada regarded these as banned by the Convention. Japan argued that though limitation by species may be desirable from a purely economic point of view it was not practicable and would be very hard to accept. The USSR and Norway concurred in this view. Japan outlined her particular problems. A Committee of 6 was constituted but could not reach agreement so the question of species quotas was not pursued as it added to the complications of finding an Antarctic quota. The final compromise was reached when in the Plenary Session Japan stated that it would withdraw its earlier proposal in favour of the USA compromise of 4,000 for 1 year coupled with a commitment to further reductions, if the USA figure was changed to 4,500, but added that they could not accept

103. IWC/SM/9 Verbatim Record, p.32.
104. Ibid.
105. Ibid. Article V(2)(c) does prohibit them but, as seen, members could negotiate them outside the ICRW.
106. Ibid, p.34. The existence of 3 companies in the Antarctic; an industry that was a large and significant domestic industry that was involved in the manufacture and export of whale oil as well as providing an important protein resource; the employment in it of over 50,000 people and Japan's late start in the industry which had not therefore yet redeemed its huge capital investment therein.
the commitment further to reduce it thereafter. This Japanese proposal was not adopted. Instead the USA proposal was adopted in full but with the figure of 4,500 substituted, the Commission recognising however that this would not reduce the catch below the sustainable yield in 1965/66 and was agreed only as a transitional limit to enable the pelagic whaling countries to adjust to the reductions necessary to rebuild the whale herds. The UK and USA stressed that they regarded members as pledged by the wording of the resolution to adopt regulations in future that were in line with the scientific findings. The Resolution, however, was not per se binding and in fact only required members of the Commission to recommend this course of conduct to their Governments. It was further agreed that the Committee of 6 would meet before the 17th annual Meeting to discuss both species and national quotas and the International Observer Scheme in the light of the above.

Following this Special Meeting, FAO informed the Commission that its future cooperation with it on stock assessment would be dependent on a definite commitment by the IWC at its 17th Meeting to reduce the combined fin and sei catches below the sustainable yield.

108. Ibid, p.52.

109. Ibid, p.55. The vote was 4 in favour (Japan, Norway, USSR, UK) with 9 abstentions.

110. Ibid, p.56; The Chairman's Report of the SM, IWC 16th Report, Appendix IV, p.24, para. 9 gives the full text of this Resolution: It included that "All Members of the Commission agree that they will recommend to their Governments that they support further reductions for the 1966/68 (sic) seasons that will assure that the quota for the 1967/68 season will be less than the combined sustainable yields of the fin and sei stocks as determined on the basis of more precise scientific evidence".

111. Ibid, p.57.
7. **Seventeenth Meeting, London, 1965**

The Meeting was attended by 15 of the 17 Contracting Governments. 4,689 BWU had been caught in the 1965/66 season (411 less than the quota) but including 4538 sperm whales taken South of 40° South Latitude, compared to 4211 in 1964/65. Only 239 whales were taken at the South Georgia land station; 1,150 had been caught by the 2 land stations operated the previous year. The total Antarctic oil output was only 678,700 barrels; the 1964/65 output had been 1,017,611 barrels; the average catch per catcher's day's work also declined.

**Land Stations**

A new problem began to emerge at this Meeting, namely the increasing importance of the land station catches (about 1,300 units) now that Antarctic stocks had declined and it was suggested that land station catches now required regulation, at least those operating on migrating pelagic stocks, as in South Georgia, the catch of which had halved. Difficulties at once arose. The UK considered "that the rights of land stations to fish whales were

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112. Brazil and Panama were unrepresented; 10 observers represented FAO, ICES, Chile, Permanent Commission for the South Pacific (Capt. Benevada represented both), Portugal, Peru, Italy, Universities Federation for Animal Welfare, World Wildlife Fund, Fauna Preservation Society, Int. Society for the Protection of Animals.

113. IWC 17th Report, p.7-8, para. 3.

114. IWC 16th Report, Scientific Committee Report p.56-57; para. 47; Technical Committee Report IWC/17/15, Item 3; land stations' fixed and limited areas had hitherto provided sufficient self-regulation to sustain stocks therein.
solely a matter for the governments having jurisdiction over them" and that they were not implicated in the entirely separate rights of the pelagic expeditions under a quota agreement. To the extent that land stations operated on stocks exclusively found in the territorial sea, or even in the UK's new 12 mile fishery zone, there was some truth in this interpretation of the law, but in the case of such a highly migratory species as whales this attitude could undermine the IWC's global conservatory policies and regulations. The UK argued that instead of fixing quotas for land stations the IWC must, in future, when fixing the Antarctic quota, allow for the fact that whales are also caught by the land stations. Since Japan regarded the setting of land station quotas as outside the Commission's competence, the TC merely urged member states voluntarily to restrict their land stations in 1966/67. No legal advice was sought on this question but since the Convention under Article 1(2) applies inter alia to all waters in which whaling is prosecuted by land stations and since Article V(i) allows the Commission to amend the Schedule by adopting a wide variety of

115. IWC/17/13 Verbatim Record p.18, 31 and 54. The UK regarded this station as under its jurisdiction but Argentina protested that it was an integral part of Argentina.

116. Following the failure of UNCLOS I and II to establish fishery limits, the UK, in conjunction with other European states had asserted fisheries jurisdiction within 12 miles of the baselines of her territorial seas; European Fisheries Agreement, 1964.

117. Ibid, p.34.

measures for the objectives set out in Article V(2) viz. inter alia for conservation - based on scientific findings, as long as they do not restrict the number or nationality of land stations or prescribe specific quotas to any land station, the opposition to overall land station quotas would been to be misplaced.\(^{119}\)

The measures taken under Article V(1) specifically can include setting the maximum catch of whales taken in any one season and this provision was not specifically limited to the Antarctic. A separate overall quota for land stations, allocated nationally by voluntary agreement, as in the case of the Antarctic, would have been legitimate.

**Scientific Matters**

Attention was now focussed on the sperm whale stocks which, following the decline of the Antarctic baleen whales, were now under pressure. The results and recommendations of the 1963 Special Meeting of a scientific sub-committee had not been followed up.\(^{120}\)

There was also strong evidence that the size limits were not being observed since 90\% of the females caught were reported to be either 38 or 39 feet. The SC therefore urged the speedy introduction of the IOS, no increase in catching effort, and research and regulation on a regional basis pending a full stock assessment. Sperm whale catches in the North Pacific should also be kept to previous levels; no blue whales should be taken in the Antarctic, the Southern Hemisphere, or the North Pacific. Humpback catches should be restricted in the North Pacific to the previous season's level.

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\(^{119}\) The IWC now sets quotas for land stations.

and banned completely in 1966 and there should be no increase in sperm catches therein pending a complete stock analysis.\textsuperscript{121} The TC could not agree on these proposals to limit effort on a broad regional basis. The USSR said that there was no evidence of the need for this and proposed further study. Limitation would be "an unwarranted interference with freedom of fishing on the high seas".\textsuperscript{122}

The SC for the first time recommended that the Commission give serious consideration to proposals that the economic problems associated with stock assessment be studied as well as the biological, by an impartial specialist committee of economists, perhaps assisted by FAO.\textsuperscript{123}

The Commission banned taking of blue whales in the Antarctic but all the APW countries objected after the Meeting so this species remained unprotected therein.\textsuperscript{124} In the North Pacific catching blue whales was to be banned after 1966; it was also agreed to ban humpback catching there for the 1966 season.\textsuperscript{125} An amendment to the Schedule to ban sperm whale catching in the area 40° South Latitude to 40° North Latitude was carried by 7 votes in favour with two against but there were 4 abstentions.\textsuperscript{126} Chile and Peru

\textsuperscript{121} Ibid.
\textsuperscript{122} Technical Committee Report IWC/17/15, Item 9, p.8.
\textsuperscript{123} Ibid, Scientific Committee Report, Appendix II, p.62, Economic Assessment; Since determination of the most practical management procedures, such as rate of effort reduction or maintainable size of surplus male sperm whale stocks in relation to effort had economic implications.
\textsuperscript{124} IWC 17th Report, p.18, para. 9; as before all objected to ensure parity.
\textsuperscript{125} Ibid, p.19, para. 11.
\textsuperscript{126} Ibid, paras. 12-14.
were urged to adhere to the 1946 Convention and observe the Commission's minimum size for sperm whales. The Commission also unanimously agreed to implement the Special Meeting's recommended quota of 4,500 BWU for 1965/66 adding that "there shall be reductions for the years 1966/67 and 1967/68 that will assure that the total catch for 1967/68 will be less than the combined sustainable yields of fin and sei stocks as determined on the basis of more precise scientific evidence", and that in discussing national quotas for these years the countries concerned take into consideration catches from Antarctic land stations as well as in other Southern Hemisphere areas. The Schedule was amended accordingly, all 12 Commissioners present voting in favour. In stating there "shall" be reductions for 1966/67 and 1967/68 to bring catches below the SY the Commission went further than required by the Resolution of the Special Meeting, which had limited the members to "recommending" such action to their governments. This Schedule revision required Member Governments to make the necessary reductions in a given period. 

Enforcement

In view of the worsening situation of stocks of all exploited species the need for effective enforcement became more urgent. Norway pointed out that "with a global quota reduced to a minimum and correspondingly limited national quotas, there is a serious risk of infractions. Experience proves that restrictive rules necessitate closer surveillance and therefore control ...".

127. Ibid, para. 15.
128. Ibid, p.20, para. 16.
129. Ibid, para. 19.
130. IWC/17/13, Verbatim Record p.51.
(i) **Infractions:** The Commission accepted reports that the minimum size limits were now being properly enforced by all member nations and urged that international observation should be extended to all pelagic and land stations as soon as possible.\(^{131}\)

(ii) **International Observer Scheme:** the IOS as agreed 5 years previously was due to expire at the end of the 1965/66 season without ever having come into force in spite of repeated support for it from all member states. Norway proposed that the countries concerned be requested to ensure that it be implemented for that season and give firm assurances to that effect.\(^{132}\) This was agreed but the USSR stated that their assurance was qualified by the reservation that both the overall quota and the IOS should be extended to factory ships and all land stations catching Antarctic whales and that there should be a just re-allocation of national quotas. No agreement could be reached on the latter at the 17th Meeting.\(^{133}\) The UK Commissioner proposed that the special meeting to consider regulation of land stations should consider the question of the IOS in relation to them, and this was agreed.\(^{134}\) There was no requirement in the Convention that national quotas (which were specified in the Convention)

131. IWC 17th Report, p.23, para. 27.
132. Ibid, p.21, para. 20.
133. Ibid, p.22, para. 21; Japan blamed the USSR for delaying implementation of the Scheme; the USSR blamed the unfair quota allocation resulting from the sale of vessels to Japan; and also increased catching from land stations which undermined Antarctic quotas. The USSR regarded sale of factory ships as illegal; the Netherlands rejected this. IWC/17/13, Verbatim Record p.48-74; Technical Committee Report IWC/17/15, Item 9, p.7.
134. Ibid, para. 22; the existing IOS did not provide for land stations which were operated by different groups of states than the APW ones; the vote was 4 for (UK, USSR, Netherlands and Norway) with 8 abstentions.
be linked to an IOS (also extra-Convention); the USSR requirement was a political not a legal measure.


This Meeting was attended by 14 of the 17 member governments. Only 4,000 BWU of the 4,500 quota had been taken in 1966/67. The fin catch had been reduced (to 2,500) but at the expense of an increase in sei whale catches which reached 17,600, 70% of it taken in the 40° to 50° South Latitude area from which, before 1961/62, almost no catch had been taken. The USSR and Japan had reached their quotas but the average size of the sperm whales therein had declined. The Commission was expected at this Meeting, in the terms of the Resolution passed at the previous Meeting, to reduce the catch below the sustainable yield. Japan, the USSR and Norway, however, which had met outside the Commission to re-allocate national quotas for 1966/67, had failed to reach agreement before the 17th Meeting though later they did agree to allocate 1,633 BWU to Japan, 800 to Norway and 1,067 to USSR.

Scientific Matters

The SC was receiving growing help from a number of special meetings and working groups reporting on specific areas and species.

135. IWC 18th Report, Appendix I, p.12; Brazil, Mexico and Panama were not represented. The 10 observers were Chile, Portugal, Peru, FAO, ICES, IUCN, Fauna Preservation Society; World Wildlife Fund, International Society for the Protection of Animals, Survival Service Commission.

136. IWC/18/15, Verbatim Record, p.6-8, Vangstein (BIWS).

137. IWC 18th Report p.9-10, para. 10. The quotas were not transferable and terminated if other member states engaged in Antarctic pelagic whaling.

138. These came from individual governments; working groups of member governments, and FAO. IWC 19th Report, pp.76-137. Many called for more information on e.g. sperm whale Sub-Committee Report Appendix E, p.120-127 at p.127. More marking, catch and effort statistics, stock assessments and social studies of entire schools (taken under scientific permits) were recommended; Ibid, p.79 paras. 19-21. It also had sent to it numerous reports of FAO; UNESCO; other Fisheries Commissions and scientific bodies (national and international) see ibid, Appendix VII, p.132-135.
but accurate stock assessment was still difficult. For example Chile and Peru had taken comparatively large numbers of blue whales in the 2 previous seasons from land stations but as seen below these countries were not prepared to work with the IWC. It was not certain whether this stock migrated to the Antarctic but as this was a possibility the SC again reaffirmed its recommendation that all Southern Hemisphere catches of this species should be banned. 139 The swing from fin to sei whale hunting led the Committee to propose sustainable yields of 4,500 for the former and between 4,500-7,500 for the latter. Marking had revealed that some fins caught at land stations in the Southern Hemisphere were from the same stocks as found in the Antarctic but much more information was needed to draw conclusions. 140 No new data were available on Antarctic sperm whales since the Committee of Three's work; it was recommended that FAO be asked to make an assessment on the basis of the data made available to them 141 and that any IOS should be applied to sperm whales. The need for economic studies of regulation of all species persisted but no progress had been made on the 1965 recommendations. 142

The Committee reaffirmed that "a rational scheme of management requires species quotas for each species". 143 Meanwhile they recommended that the sustainable yield in the Antarctic was now only 3,000-3,500 BWU but as fins were a more productive stock in terms of numbers and economic value they should be given complete

140. Ibid, para. 10-12.
141. Ibid, paras. 14-16; IWC/18/13
142. Ibid, para. 22; IWC/18/18, Verbatim Record p.28.
143. Ibid, p.80, para. 1.
protection in order to recover. Sei stocks alone would permit a quota (below the SY) of 2,000-2,300 BWU for some time.\textsuperscript{144} It was instead finally agreed by the Commission that the 1967/68 Antarctic pelagic quota should not exceed 3,500 BWU, and that the total catch should be less than the combined SY of the fin and sei stocks as determined by more precise scientific evidence.\textsuperscript{145} FAO were invited to assess the sperm whale stock on the basis of information to be made available to them by member states.\textsuperscript{146} The bans on taking blue and humpback whales in the North Pacific would be continued; but no new measures were promulgated for sperm and sei whales there; assessment should continue, and North Pacific whaling countries should "endeavour to reach agreement" on a method of reducing fin whale catches with a view to bringing them below the sustainable yield.\textsuperscript{147} FAO was again asked to investigate the economic effects of whaling operations.

Permanent Commission for the South Pacific (PCSP)\textsuperscript{148}

The IWC had grown increasingly concerned, now that stocks were so depleted, at the effect on stocks in the IWC area of catches under the control of the PCSP. The IWC had available to it this year the Report of the Ninth Ordinary Meeting of the PCSP\textsuperscript{149} which

\begin{enumerate}
\item \textsuperscript{144} Ibid, p.80-82.
\item \textsuperscript{145} IWC 18th Report, Chairman's Report, p.19, para. 17; IWC/18/18 Verbatim Record p.36-46; A USSR proposal for reducing the number of fleets in the Antarctic by half found no seconder, Ibid, p.40.
\item \textsuperscript{146} Ibid, p.18, para. 12.
\item \textsuperscript{147} Ibid, para. 13.
\item \textsuperscript{148} For PCSP Regulations see UN Legislative Series ST/LEG/SER/E/6, Dec. 1956.
\item \textsuperscript{149} IWC 17th Report Appendix VII p.133. The Report IWC/18/8 was not published in the IWC's Annual Report.
\end{enumerate}
revealed that Chile, Ecuador and Peru had established 3 Working Committees to consider relations with the IWC and whaling policy in general. The PCSP had received a note from the Secretary of the IWC inviting them to join that organisation, or at least to observe the minimum size limits set by it for sperm whales. The IWC Secretary had also forwarded to the PCSP a note drawing attention to world anxiety concerning the low Antarctic stocks and pointing out that although the IWC had reduced its catch in that region the same stocks were fished by land stations in the Southern Hemisphere under the jurisdiction of the PCSP. The PCSP members were asked to cooperate in the IWC's working groups established to study regulation and international inspection. The PCSP response was to adopt a Resolution noting that the PCSP was an international organisation which was agreed by its 3 member countries "to carry out efficiently its task of protecting the whale resources of the South Pacific and it has in operation a regulation procedure and systems of vigilance and control which are in keeping with the above aims". The PCSP members agreed that its General Secretary should promote a continual exchange of scientific information and close cooperation between it and the IWC but could not accept the IWC's invitation to take part in its studies since the "ineffectiveness of the international agreements aimed at protecting whale stocks in the Antarctic season had been clearly shown in the past two years" and the species therein were "moving towards extinction". The PCSP report claimed that "the sector of the Pacific Ocean lying between the Antarctic and the Galapagos Islands forms an indivisible whole as regards the life, conservation and development of the whales" and that uncontrolled and excessive fishing at any point in that sector inflicts damage on the whole area. The policy
pursued however by large factory ships prejudices the stocks of the species in Chilean, Peruvian and Ecuadorian waters. The PCSP agreed that it was necessary to pool the interests, research and claims of the 3 member countries with those who subsequently joined it to make a thorough review of the problems. The PCSP saw reciprocal benefit in continued exchange of scientific information and of observers at their Meetings, but considered that "the Rules of the PCSP are much more effective than those of the IWC for which reason it would be more justificable for the latter to join the Commission for the South Pacific".

The PCSP Report revealed that though Peru and Chile agreed the latter's proposal that pelagic whaling should be banned and the existing licence rules for the South Pacific revised, the former did not accept that expert outside help was needed, e.g. UN Technical Assistance or a Scientific Advisory Committee to investigate and assess the stocks. Peru preferred to rely on national research which both agreed should be coordinated by the PCSP General Secretary. Clearly there was little hope of close-cooperation between the IWC and the PCSP, a situation to which the IWC's own policies had contributed. The support of IWC members for the doctrine of freedom of fishing disbarred them from protest against the establishment of the separate Commission. Conversely the observers from Peru and Chile at IWC meetings seemed to have had little effect on their awareness of the scientific complexities of stock assessment and the need for international research.
Enforcement

(i) Infractions: It was noted that infractions reported by Canada and the UK were a much higher percentage of their total catch than those reported by other countries and it was suggested by the Infractions Sub-Committee that this was because all the whales landed in British Columbia were measured by qualified scientific technicians and those landed in South Georgia, now effectively operated by the Japanese, were checked by inspectors of different nations.\(^{150}\) The TC concluded that this evidence pointed the need for introduction of an IOS to cover all operations, including land stations\(^{151}\) and for the strengthening of domestic enforcement measures.

(ii) International Observer Scheme: The Scheme developed in 1963 expired at the end of the 1965/66 season. The Commission agreed to establish a Working Group to draw up the details of a new Scheme to cover all operations (pelagic and land stations) and asked the APW countries to implement the previous scheme as soon as possible.\(^{152}\) The USSR opposed this.

Finance

Consideration of methods of financing further stock assessment etc. generated the innovatory suggestion that instead of charging

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150. IWC/18/4, Report of Infractions Sub-Committee, Appendix

151. IWC 18th Report, p.19, para. 20.

152. Ibid, p.17, para. 11. Land station countries had, subject to equitable sharing of costs, agreed at their special meeting to cooperate but awaited more information. IWC/18/13 Report of Special Group concerned with Land Stations in the Southern Hemisphere; see also IWC/18/15 Report of the Technical Committee; IWC/18/18 Verbatim Record p.19-24. There was disagreement concerning whether the old scheme should be renewed or a new one, covering land stations, negotiated.
the extra £2,750 required as before to the extraordinary budget this sum could be financed by levying either a flat rate on all whaling countries of £200 (£2,000 in all) or on whales taken by active whaling countries: one shilling per whale would produce about £3,000. Alternatively Japan suggested dividing the cost into two parts and financing each part differently on the above basis. The Commission decided to levy one shilling per whale based on the 1965 and 1965/66 catches on blue, fin, sei and humpback whales caught in the Southern Hemisphere and on sperm whales caught throughout the world. In the event only £580 (£500 for whale marking) of the £2,750 was spent though the levy raised £2,243. It has never been repeated.


The UN General Assembly in November 1967 initiated studies of the international problems of marine science and technology and their particular application to the problems of the conservation of fishing resources. At the same time Malta raised the question of a regime to regulate the exploitation of the seabed beyond national jurisdiction.

153. IWC/18/15 Verbatim Record, p.70-78; IWC 18th Report p.20, para. 23.
155. On February 7, 1968 the UN Secretary General presented a comprehensive report for ECOSOC, Resources of the Sea; Pt. II concerned Food Resources of the Sea Beyond the Continental Shelf excluding Fish, prepared by C.P. Idyll, E/4449/Add.2, p.64-117 gave very comprehensive coverage to the problems of marine mammals, including whales.
156. See Ch. VIII for details of these developments.
the eventual convening in 1970 of a Third United Nations Conference on the Law of the Sea (hereinafter UNCLOS III) and international attention began increasingly to focus, as the community of states began, through the work of the UN’s Seabed Committee, slowly to be more aware of maritime scientific and legal problems and their interrelationships, the need to review the principles upon which living marine resources should be conserved, and the revisions of the existing laws which such principles might require.

The Meeting was attended by 15 of the now 16 members. 157

There had been 9 expeditions in the 1966/67 season with 97 catcher boats taking 3,551 BWU (578 less than 1965/66). More sperm whales (4,960) were caught than in the previous season (4,538). 575 more fins were taken but less sei (12,368 compared to 12,683). Japan and Norway took less units than in the previous season but the USSR took 151 more. The total oil output was now only just over 600,000 barrels, but the decline in catcher's day's work had been small. The South Georgia land station did not operate but outside the Antarctic 24 land stations and 7 factory ships operated taking 29,536 whales. 158 The stress at this Meeting was now on the need to introduce species quotas. 159 The Fauna Preservation Society representative urged that these should be for separate species in separate areas.

157. IWC 19th Report Appendix I, p.11-12. Brazil had withdrawn; Panama was unrepresented. The 10 observers were Chile, Italy, Portugal, FAO, Fauna Preservation Society, World Wildlife Fune, Int. Society for Protection of Animals, ICES, IUCN, Universities Federation for Animal Welfare.

158. IWC 18th Report p.7, para. 3.

159. Ibid, Report of Scientific Committee p.54, para. 2; FAO Report IWC/19/10; IWC/19/14 Verbatim Record p.32.
Scientific Matters

The SC reported many difficulties in assessing such research findings as were available and Japan questioned some of the estimates made. Dr. Holt (FAO) now pointed out\(^{160}\) that as the number of expeditions in the Antarctic decreased the traditional figures for the basis of stock assessment lost their significance - catch per catcher day must be regarded with caution as a measure of abundance since it varied greatly - each country showed different trends over the years and there had been important shifts in areas of operations, with national expeditions segregated into different areas. In spite of the need for more research the levy on whales was not continued and further research was limited to the extraordinary budget surplus accumulated from the non-expenditure of the levy in 1966-67.\(^{161}\) The Committee recommended that the best estimate for fin and sei in the Antarctic suggested that a quota of between 3,000-3,600 would be possible but that species quotas would be best.\(^{162}\) The TC advised the lower figure. FAO had suggested either banning fin whale catches, modifying the value of the fin whale in the BWU, or at least setting the quota well below the SY of both species since the sei whale surplus had now been reduced and more studies were required. The USSR and Japan opposed any change in the fin whale unit on the ground that their whalers were used to the existing one.\(^{163}\) For the North Pacific the SC advised that the fin catch be kept below the SY of 1,700 and the sei catch at or above that giving MSY. It had been pointed out that, looked at as a region, the North Pacific was overfished.

\(^{160}\) IWC/19/14, Verbatim Record p.5-6.
\(^{161}\) IWC 19th Report, p.9, para. 10.
\(^{162}\) IWC 19th Report, p.17-18, para. 19.
\(^{163}\) IWC/19/14 Verbatim Record p.33.
The Commission adopted a UK amendment setting the BWU for 1967/68 at 3,200 which FAO regarded as too high to prevent further over-exploitation. Japan however considered that the SY would increase in 5 years time. No recommendations were made to restrict catches or seasons in the North Pacific or further to reduce Antarctic quotas in subsequent seasons and the FAO reported that it had made no progress in its economic studies because of various difficulties including the lack of proper terms of reference.

Permanent Commission for the South Pacific

The attempts to calculate stocks and yield were confused as before by the lack of cooperation from the above Commission and its non-membership of the IWC. The PCSP remained uncooperative but invited the IWC to send an observer to their 1967 meeting.

The IWC's concern stemmed from the fact that though only 5 blue whales and no humpbacks were caught by IWC members in 1966/67, a Chilean and a Peruvian company took 253 blue whales and 58 humpbacks. It was, however, reported by the BIWS that operations were now being suspended.

164. IWC 19th Report, para. 19; the UK and USA proposed 3,200; USSR and Japan 3,300; see IWC/19/14 Verbatim Record p.54-64.


166. IWC/19/8 Letter and Enclosures from Permanent Commission of the South Pacific. It repeated the views expressed at the 18th Meeting.

167. IWC 19th Report p.20, para. 32. As the IWC had no funds for this purpose, no action seems to have been taken.

168. IWC/19/14, Verbatim Record p.5; IWC/19/16, Report of Technical Committee.
International Observer Scheme

No member state observed the Commission's recommendation to implement the 1963 scheme but the Working Group established to draw up an observer scheme and to consider how far the 1963 scheme could be adapted to cover all whaling now reported. The USSR, which had first objected to the implementation of the 1963 scheme because it was designed to apply to 5 APW countries and there were now only 4, thought that the most important objective of a new scheme was to control national quotas and that it would be almost impossible to introduce an IOS at land stations for which no quota was set. The other 4 members of the group, however, considered the main objective was to verify observance of the Convention and its Schedule and this was not tied to the existence of quotas. All agreed, however, that it would be preferable to have a number of separate schemes rather than one all-embracing one. It was suggested that operations in 5 areas should be covered as follows:

(i) Antarctic pelagic whaling expedition (Japan, Norway and USSR);
(ii) Pelagic whaling in the North Pacific (Japan and USSR);
(iii) Land stations in the North Pacific (Canada, Japan and USA);
(iv) Land stations in the Southern Hemisphere (Australia, S. Africa, UK);
(v) North Atlantic (Canada, Denmark, Iceland, Norway).

169. Int. Observer Scheme; Report of Working Group, IWC/19/14; IWC 19th Report p.20-22 Verbatim Record p.6-7; p.37-45. Extension of the IOS to land stations required amendment of the Schedule i.e. a 3/4 majority and was open to the objections procedure; failure to include the item in the Agenda prevented amendment of the Schedule (Rule of Procedure, Rule XII) in the event.
The USSR insisted that land stations and pelagic whaling should be under the same scheme; the others disagreed considering that each land station had its own special requirements which could be agreed between the participants. The Commission finally adopted a Resolution by 12 votes in favour with 2 abstentions (USSR and Argentina) that the countries concerned should establish regional schemes on the lines of the Working Group's Report.¹⁷⁰

The paper scheme was a considerable advance on any existing enforcement arrangement as had been its predecessor but it was not put into practice until 1974. Members expected it to be a model for existing Commissions and new ones yet to be established.¹⁷¹

The Commission had also procrastinated in taking measures towards its commitment to reduce quotas below the SY by 1968 and in initiating the research required to solve its difficulties in assessing stocks and yields.

10. **Twentieth Meeting, Tokyo, 1968**

The hope of restoring Antarctic stocks to previous levels, or at least of preventing a similar over-exploitation from taking place on North Pacific and land station stocks, faded with the Nineteenth Meeting. 14 of the remaining 16 members attended this Meeting of the Commission¹⁷² but New Zealand now announced its withdrawal.¹⁷³ As it had supported a conservationist policy and consistently voted for lower quotas this, coupled with Panama's

¹⁷¹ IWC/19/14, Verbatim Record p.69-73.
¹⁷² Panama and Mexico were not represented. IWC 20th Report, Appendix I, p.11. There were again 10 observers.
continued absence could affect future achievement of the 3/4 majority required to amend the Schedule in favour of conservation.

8 expeditions had operated (one less than in 1966/67) with 97 catchers but only 2,804 BWU were caught, 716 less than the quota. Only 2,165 fins were taken (2,893 in 1966/67) and 10,357 (11,933) sei whales. Sperm whales taken in the Antarctic totalled only 2,568 compared to 4,960 in the previous season, and oil output was only 419,046 barrels. The average catcher day's work was now down to 0.29 BWU compared to 0.90 10 years previously. Blue whales in the ocean were said to have been reduced from about 100,000 30 years ago to 1% of that number.

Scientific Matters

The SC found that the best estimate for the sustainable yield in the Antarctic was 5,000 of fin whales and 5,400 of sei whales - a total of 3,400 BWU, but recommended that as species limits could not be adopted in the present situation, the quota should be set well below this. The extension of sperm whale catching in the Southern Hemisphere, unless based on scientific evidence, was undesirable and there should be no increase at all in the North Pacific. In that area fin whale catches at land

174. IWC 19th Report, p.7-8, para. 3. In practice at this time the Schedule could be amended only with the consent of all the APW states.
175. per Norman Buchan, Joint Parliamentary Under Secretary of State for Scotland, Ibid, p.15, para. 3.
176. IWC 19th Report, Chairman's Report, Appendix III, p.154, para. 3; Statement by Mr. Buchan opening the Meeting.
178. Ibid, p.90, paras. 1 and 2.
179. Ibid, paras. 7 and 8.
stations and in pelagic operations should be kept below the sustainable yield of about 1,600.\textsuperscript{180} The MSY of sei whales in that area could be about 1–2,000 and though catches above this could safely be taken while stocks remained above that level such a high rate of catching would soon deplete the surplus.\textsuperscript{181} The Committee recommended further stock assessments by all members; the continuation of FAO assessments of Antarctic baleen whale stocks and SCAR's sighting programme and the use of a central agency for collecting, storing and distributing biological information.\textsuperscript{182} It also recommended a redefinition of sei whale in the Schedule to enable the separate definition and protection of Bryde's whale.\textsuperscript{183} It still considered that the Commission should receive studies of the economic aspects of whaling but advised that the SC lacked the necessary expertise.\textsuperscript{184}

The Commission did not follow the SC's advice. Instead it accepted the TC's advice that the Antarctic quota should again be set at 3,200 BWU despite the earlier Resolution, in mandatory terms, requiring reduction of quotas below SY in 1968/69.\textsuperscript{185} The North Pacific Commissioners had however met privately in 1967\textsuperscript{186} and agreed voluntarily to restrict fin and sei whale catches in that region during 1968. They later also agreed to do so in 1969.

\textsuperscript{180} Ibid, para. 5 (excluding the East China Sea).
\textsuperscript{181} Ibid, para. 6.
\textsuperscript{182} Ibid, paras. 10-13.
\textsuperscript{183} Ibid, para. 14.
\textsuperscript{185} IWC 20th Meeting Report, p.16, para. 16.
\textsuperscript{186} Ibid, p.17, para. 13.
Sperm whale catches were not further restricted by the Commission which advised only that it was undesirable to expand such catches unless based on scientific advice. There should be no increase at all in the North Pacific.  

Only one member, South Africa, was now catching baleen whales from land stations in the Southern Hemisphere; it used only one of its two stations, and the catch taken was reported to be below the voluntary limit imposed. Australia banned baleen whale catching from its land stations and its sperm whale catch had been reduced. Peru, a non-member, did not engage in whale catching in 1967 and Chile announced that only one land station would operate in 1968. These measures reflected the growing shortage of whales off the west coast of S. America.

**International Observer Scheme**

It was now agreed that there were no legal problems about amending the Schedule to extend any observer scheme to land stations and it was agreed to do so. The Governments of member countries were asked to put an IOS into operation as soon as possible, not having acceded to the similar request of the Nineteenth Meeting.

**11. Twenty-first Meeting, London 1969**

The Meeting was attended by only 12 of the 16 member states; Denmark, Iceland, the Netherlands and Panama were not represented. New Zealand attended as its withdrawal was not effective until after the meeting. The Netherlands now also announced its future

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187. Ibid, p.16-17, para. 11.

188. Ibid, p.16, para. 10.

189. Ibid, p.18, para. 16; the words "There shall be maintained such observers as the member countries having jurisdiction over land stations may arrange to place at each other's land stations" should be added to the appropriate paragraph.

190. IWC 21st Report; Appendix T, p.12-13; 9 observers included Chile, Italy, Portugal, FAO, ICES, IUCN, and 3 NGOs.
withdrawal. There was general dissatisfaction with the IWC. The 1968/69 catch had been only 2,469 BWU against the 3,200 quota but only 6 expeditions had operated in the Antarctic since Norway had not sent out any vessels. The fin catch was however up to 3,014 (compared to 2,165 in 1967/68) though the sei catch was down to 5,880 (compared to 10,357). Japan had almost trebled its catch of fins. The sperm whale catch in the Antarctic was also slightly up. Both the oil output (423,880 barrels) and the catch per catcher day's work (0.30) were also slightly higher than the previous season but the average size of fin and sei whales caught was somewhat less.

Scientific Matters

The SC had several different analyses of the Antarctic fin whale population before it giving different estimates of sustainable yield because of the different methods and assumptions used. Most members preferred a best estimate of 3,300 or less; Japanese scientists believed 4,900-5,600 was the figure. The Committee could only recommend further studies of this species, but agreed that the SY of sei whales was only about 5,000. Japan also suggested that there was some evidence of an increase in pygmy blue whales in the Antarctic and blue whales in the North Pacific but the Committee recommended continuation of the bans on taking blue and humpback whales. As very little new information was available

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193. IWC 20th Report, Appendix V, Report of Scientific Committee p.34-35, para. 12-17. The growing number of reports were published as appendices to the above Report at pp. 46-128.
195. Ibid, para. 19; and p.36, para. 23.
on sperm whales, except for the North Pacific, the Committee recommended a special study meeting in 1970 and no increase in catches meanwhile.\footnote{196} It found that the present catch of sei whales in the North Pacific was much above both the SY and the maximum sustainable catch. SY could be as much as 2,200 and MSY 2,700 but the catch was 5,739 in 1968, which would result in any present surplus being used up in a few years.\footnote{197} It noted with approval that Canada had set a voluntary national quota on N. Atlantic fin catches based on the best scientific evidence available on the status of the stocks.\footnote{198} Overall the Committee again urged species quotas,\footnote{199} more collection and coordination of data and better presentation thereof.\footnote{200} It had once more to report failure to make any progress in the economic studies requested of it because of lack of appropriate expertise and data.\footnote{201} It also reported that FAO now wished to withdraw from making its annual stock assessments because of its other commitments, the great reduction in catch quotas and the appointment to several national delegations of scientists qualified in stock assessment.\footnote{202} FAO would, however, continue to send observers, and occasionally contribute specific studies. The IWC made no attempt to retain the link.

\footnotetext{196}{Ibid, p.37, paras. 26 and 27.} \footnotetext{197}{Ibid, p.36, para. 22.} \footnotetext{198}{Ibid, para. 25.} \footnotetext{199}{Ibid, p.40, para. 3.} \footnotetext{200}{Ibid, p.41-42, Secs. E & F.} \footnotetext{201}{Ibid, p.39, para. 39.} \footnotetext{202}{IWC 21st Report, p.18, para. 8; and p.9, para. 7.}
In spite of the continual urging that it should do so, the Commission still did not abandon the BWU. The TC did this year however recommend it to keep a "watchful eye" on the situation. For the Antarctic quota the Commission unanimously accepted the TC's recommendation that pending more precise estimates to be made at a meeting early in 1970 the catch limit should be 2,700 BWU and the Sanctuary should remain open.203

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The North Pacific countries had agreed on catch limits for the 1970 season for the pelagic fleets of 1,332 for fin whales, 4,924 for sei whales and 11,273 for sperm whales - reductions of 10%, with interchangeability permitted, in terms of BWU, of the fin and sei quotas provided that the catch of either species did not exceed the 1969 quota therefor. For land stations Japan and the USA agreed that catches would be kept within the 1969 levels.205

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The Commission took no action on sperm whale stocks elsewhere pending a further assessment meeting in 1970.207 It also agreed, because of the lack of progress to abandon any attempt to undertake economic studies.208

203. Ibid, p.20, para. 16.
204. Ibid, p.19, para. 9.
205. Ibid, para. 12.
208. Ibid, p.20, para. 17.
The Commission extended the bans on taking blue and humpback whales in spite of limited evidence of some rebuilding of humpback stocks in one area\textsuperscript{209} and also agreed to consider at its next meeting amending the Schedule to distinguish between sei and Bryde's whales species.\textsuperscript{210} It did not increase members contributions having reduced some of its administrative costs so that expenditure for the year rose only slightly to £4,745. The only extra expenditure envisaged in 1969/70 was the usual contributions of £500 to the UK National Institute of Oceanography's whale marking programme and another £500 to the BIWS for the collection and processing of data which could be supported from the accumulated balance in the ordinary budget.\textsuperscript{211}

**Enforcement**

(i) **Infractions:** These were running at about 1.7\% of the total catch but figures for sperm whales were much higher than for baleen whales and the Commission urged reductions.\textsuperscript{212}

(ii) **International Observer Scheme:** The scheme was still not in operation but the North Pacific countries announced their intention to do their best to effect schemes and to receive observers from other areas.

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\textsuperscript{209} Ibid, para. 19.

\textsuperscript{210} Ibid, p.21, para. 20.

\textsuperscript{211} Ibid, p.21-22, para. 22.

\textsuperscript{212} Ibid, p.20, para. 18.
CONCLUSION

The 1958 Conservation Convention required that all states should adopt, and cooperate with others in adopting, the measures necessary for the conservation of the high seas living resources. IWC practice in the 1960's establishes that this duty was clearly not accepted by all IWC members; even states like Canada, which recognised the existence of the obligation, referred to it as a moral, not a legal, duty and ignored it when convenient. Russia, Japan and the Netherlands made it clear that economic interests must override the objective of conservation and resisted efforts to form an Economic Committee and cooperation with the FAO's efforts to organise economic assessments. In spite of the report of the Rome Technical Conference and both the ICRW's and Conservation Convention's requirement that conservation measures be based on scientific findings, the IWC continued during this decade either to ignore, or only partially to implement, the measures recommended by the SC, the Ad Hoc Scientific Committee and even those proposed by the Committee of Three and Four whose help they had invoked, resulting in FAO's withdrawal from its cooperation with the IWC. The Netherlands remained out of the IWC at the start of this decade; Norway, to maintain parity, was forced to threaten similar action.

The Blue Whale Unit was retained throughout the period in spite of the repeated advice of the scientists that it should be abandoned and that species, stock and area quotas should be adopted. Little effort was made to improve the data base of stock calculations
though continual serious complaints were made about its inadequacy; even when a tax on whales was introduced to finance research it was limited to 1/- per whale and retained for one year only. Although the protection of blue and humpback whales was increased it still was not complete and some states still used the Article V objection procedure to thwart introduction of total protection when it was adopted by the majority. Expeditions were sold with their quotas which, though not objected to by the IWC and its scientific advisers and regarded by the industry as a legal and integral part of the Convention and the new national quota system, prevented the conservatory effects that would otherwise ensue as uneconomic operations gradually forced companies out of business. Although national catch quotas were negotiated outside the Convention, the Convention forbade allocation of quotas to individual expeditions, the APW states never considered amending it to enable this reduction of effort and they compounded this failure by lifting some existing restraints e.g. on sperm whale catches, the better to catch their full quotas, though there was evidence that this species also was beginning to suffer from over-exploitation. As a result the TAC set for the Antarctic which was consistently set higher than scientists advised, could not even be caught, and on one occasion no quota could be agreed necessitating a special meeting. It was difficult, though the seriousness of the situation became increasingly apparent, to secure agreement even on a phased reduction of the TAC to bring catches to a level below the sustainable yield of fin and sei whales as continually advised.
The difficulty over quota reductions was to some extent caused, and to a great extent exacerbated, by the continued failure of the IWC to introduce an International Observer Scheme. States had no incentive to keep to quotas since they continually suspected other states of cheating. The first agreed scheme expired during this period without ever having been brought into effect and the new scheme adopted to replace it in 1967 also remained ineffective at the end of the decade. Meanwhile some states continued to whale outside the IWC's regulations and those in the PCSP continued to refuse to join the IWC and applied less stringent restrictions.

Non-governmental conservation organisations and the FAO, now attending the IWC meetings as observers, however, became increasingly critical of the behaviour of some member states at a time when outside the Commission there was an increasing sense of environmental crisis, and growing awareness of the need to conserve resources and of the growing complexity of the information and organizational structures required for this. The United Nations now, therefore, decided in 1970 to convene a Conference on the Human Environment and the educative effects of its preparations and discussions, the continuing impact of the standards set by its Principles and the Action Programme of Conservation measures included in its numerous Recommendations, had a radical and salutary impact on the procedures and policies of the IWC in the 1970's, as did proposals made by the UNCLOS III which the UN also decided to convene in that year.

The doctrine of freedom of fishing, the source of the IWC's difficulties in adopting policies which conserved whale stocks, was called into question, as also were the concepts of ownership of the living and non-living resources of and under the high seas and in the next decade of the IWC a number of changes in state practice began to emerge.
CHAPTER VIII

THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW AND REGULATION

Introduction

The third decade of the IWC has coincided with a period in which there has been a growing international awareness that "the protection and improvement of the human environment is a major issue which affects the well-being of peoples and development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments" and also that there is a "need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment".¹ It was also recognised that a growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive cooperation among nations and action by international organisations in the common interest.² This awareness brought increasing pressure to bear on the meetings of the IWC, both from some of its member states and from non-governmental observers, to bring its policies and even its constitution more into line with these new international perceptions.

The problems encountered by the IWC in its first 21 years were, as we have seen, not dissimilar from other fisheries bodies but because of the special characteristics of whales the resultant

² Ibid, p.4.
decline in stocks had brought the IWC to a crisis. The problems had arisen as much, if not more, from the political difficulties of allocating the catch as from the legal structure and powers of the Commission. Lack of scientific knowledge meant that the catch quotas advised by the scientists did not allow for all the environmental factors impinging on stock recruitment and were sometimes based on unreliable or insufficient data. Any errors in these advised quotas were compounded when they came before the Commission where the national economic and social interest of some member states resulted in even higher quotas being adopted.

It has been said that so far as catch allocation and conservation are concerned "acceptability can be as much a matter of education as of perception" and that therefore the education of decision makers in all nations concerning the scientific facts, available harvesting technology and economic theories might be a future objective of fisheries management, preceding promulgation of rules for allocation and conservation of catch. There have in the current decade been two major fora for this ocean education project, and the results of the proceedings thereof are slowly beginning to change the law of the sea and the measures adopted by the IWC in a more environmentally protective direction, taking account of the complexities of environmental interrelationships. These new fora are:

(i) the United Nations Conference on the Human Environment, 1972,


This Conference was convened by the General Assembly to "provide a framework for comprehensive consideration within the United Nations of the problems of the human environment in order to focus the attention of Governments and public opinion on the importance and urgency of this question and also to identify those aspects of it that can only, or best, be solved through international cooperation and agreement". Its aim was the limited one of coordination not action.

The Conference met in June, 1972, without the USSR which had however taken part in the preparation for it. Its Committee Two on "The Environmental Aspects of Natural Resources Management" considered the state of the whale stocks and recommended a 10 year moratorium on commercial whaling to permit whales' recovery. Japan opposed this in Committee, saying that their scientists had advised "that such dramatic and emotional gestures were unjustified". The Netherlands, however, stated that their scientists had advised that it was necessary. The resolution was carried in Committee by a vote of 52 in favour and 3 against; when presented to the Plenary Session it was again carried, by a vote of 53 in favour and none against, but there were 12 abstentions. Japan abstained stating this time that "while it was favourable to a moratorium on commercial whaling, it had abstained in the vote because the whole question

P.B. Stone "Did We Save the Earth at Stockholm?" (1973) p.80.
was to be considered by the International Whaling Commission on the basis of available scientific information". 6

Although the Conference had originally been intended to be little more than a consultation and coordination on environmental problems, it finally adopted, with some difficulty, both a Declaration of 26 "common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment", 7 an Action Plan for the Human Environment consisting of 109 Recommendations, 8 and also Resolutions establishing institutional and financial arrangements. 9

(i) The Stockholm Principles and Recommendations

Principles relevant to the competence of the IWC include:

"Principle 2: The natural resources of the earth, including the air, water, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning and management as appropriate".

"Principle 4: Man has special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors ...." 

"Principle 13: In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the environment for the benefit of their population".

"Principle 20: Scientific research and development in the context of environmental problems, both national and multinational, must be protected in all countries, especially developing countries ...." 

6. Report of UNCHE supra p.56, para. 190-191, Recommendation 86. The USSR being absent from the Conference was not included in these figures.

7. Ibid, p.3-5.

8. Ibid, p.6-27.

9. Ibid, p.34.
"Principle 21: States have, in accordance with the Charter of the UN and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities under their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction".

"Principle 22: States shall co-operate to develop further the international law regarding liability and compensation for ... environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction".

"Principle 25: States shall ensure that international organizations play a co-ordinated, efficient and dynamic role for the protection and improvement of the environment".

The principles are intended to be no more than guidelines and are not mandatory; they are also designed not to interfere with the development plans of developing states although they should be taken into account in their formulation. They do create standards against which all states should in future measure their environmental policies. Thus in relation to whales and other marine mammals states should aim at their preservation and rational management to prevent extinction, preserving also their habitats, and should pass on the benefits accruing from the species, promoting the necessary scientific research. They should also develop the law of state responsibility for environmental damage to areas outside their jurisdiction. But the principles remain vague in content and do not tell states what measures they should take; how to define the "benefits" of the species concerned; whether liability should be fault or strict and whether it should be dependent on proof of damage actually occurring; the principles of "rational" management.

It could be argued that taking whales in national zones to an extent that they decline in internationally managed areas, or vice versa, engenders state responsibility but in the absence of
adjudication by an international tribunal the result is uncertain. The role of the organisation concerned remains unspecific. The recognition that states have the right to follow their own choice of policy in exploiting the resources under their control made urgent the need to lay down internationally the responsibilities of states in the extended fisheries and other zones which were being asserted in increasing numbers by this date. In the light of the Stockholm Principles there was a clear need to identify and make obligatory the international environmental responsibilities of states in such zones, especially in relation to such highly migratory species as whales and other marine mammals.

The Action Plan adopted at Stockholm was made up of 109 Recommendations which it was decided should directly be commended to Governments for such action at national level as they deemed appropriate. Relevant Recommendations included: 10

"Recommendation 32: ... that Governments give attention to the need to enact international conventions and treaties to protect species inhabiting international waters or those which migrate from one territory to another;
(a) A broadly based convention should be considered which would provide a framework by which criteria for game regulations could be agreed upon and the over-exploitation of resources curtailed by signatory countries;
(b) A working group should be set up as soon as possible by the appropriate authorities to consider these problems and to advise on the need for, and possible scope of, such conventions or treaties".

"Recommendation 33: ... that Governments agree to strengthen the International Whaling Commission, to increase international research efforts, and as a matter of urgency to call for an international agreement, under the auspices of the International Whaling Commission and involving Governments concerned, for a 10-year moratorium on commercial whaling."

"Recommendation 38: ... that Governments take steps to set aside areas representing ecosystems of international significance for protection under international agreement".

10. Ibid, p.16-17.
11. These have been described throughout the present work; see Chapters IV, VI & VIII. Recommendation 46 goes on to refer specifically to the research (LEPOR), pollution investigation (GIPME) and biological programmes; data exchange; monitoring and evaluation of world fishing resources, statistics and economics, environmental conditions, and international bodies recommendations for management of fish stocks and "other aquatic animals" adding that "damage to fish stocks has often occurred because regulatory action is taken too slowly. In the past, the need for management action to be nearly unanimous has reduced action to the minimum acceptable level". Recommendation 46(e).
no international constraint on this expansion but a substantial increase in funding is needed by FAO and other international organizations concerned to meet this expanding need for data. (c) Full utilization of present and expanded data facilities is dependent on the co-operation of Governments in developing local and regional data networks, making existing data available to FAO and to the international bodies, and formalizing the links between national and international agencies responsible for monitoring and evaluating fishery resources.

"Recommendation 50: ... that Governments, and the Secretary-General of the United Nations in co-operation with the Food and Agriculture Organisation of the United Nations and other United Nations Organizations concerned, as well as development assistance agencies, take steps to ensure full co-operation among Governments by strengthening the existing international and regional machinery for development and management of fisheries and their related environmental aspects and, in those regions where they do not exist, to encourage the establishment of fishery councils and commissions as appropriate.

(a) The operational efficiency of these bodies will largely depend on the ability of the participating countries to carry out their share of the activities and programmes;
(b) Technical support and servicing from the specialised agencies, in particular from FAO, is also required;
(c) The assistance of bilateral and international funding agencies will be needed to ensure the full participation of the developing countries in these activities."

"Recommendation 99(3): ... that a plenipotentiary conference be convened as soon as possible, under appropriate governmental and inter-governmental auspices, to prepare and adopt a convention on export, import and transit of certain species of wild animals and plants".

The relevance and importance of these recommendations to the IWC can only be assessed when an examination has been made of its practice in relation to data in the years following this Conference.

(ii) United Nations Environment Programme (UNEP)

The Stockholm Conference also led to the establishment of the United Nations Environment Programme (UNEP) with machinery for continuing UNCHE's work in furthering the protection of the environment viz.
(i) **A Governing Council for Environmental Programmes (GCEP)**\(^{12}\) to promote international co-operation and lay down policy guidelines and review implementation of environmental programmes in the UN system on which the UNEP Executive Director reports annually.

(ii) **An Environment Secretariat**\(^{13}\) "to serve as a focal point for environmental action and co-ordination within the UN system in such a way as to ensure a high degree of effective management", under an Executive Director. Amongst other powers he can submit to the GCEP proposals for medium and long-term planning for UN programmes in the environmental field and reports annually to the GCEP on the environment.

(iii) **An Environment Fund**\(^{14}\) contributed on a voluntary basis only and therefore modest in relation to its objective of financing new environmental initiatives in the UN, including those in the Action Plan and programmes of general interest as decided by the GCEP.

(iv) **An Environmental Co-ordination Board**\(^{15}\) chaired by the Executive Director which was to meet periodically to ensure co-operation and co-ordination of bodies involved in UN environmental programmes, supported by other inter-governmental and non-governmental organizations which have an interest in the field of the environment. It was to report to UNEP's GCEP, within and under the framework of the UN's Administrative Co-ordinating Committee (ACC) into which it has now unfortunately been subsumed.

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12. Ibid, p.29. The GCEP consists of 58 members, elected for 3 years on the basis of equitable geographic distribution.

13. Ibid, p.30. It now employs over 100 people and has its Headquarters in Nairobi and is paid for from the UN budget.

14. Ibid.

15. Ibid, p.31; subsumed into the UN's ACC, GAR 32/197, December 1977.
UNEP has established certain priority areas for its activities one of which is "the Oceans, including the monitoring and assessment of the state of aquatic living resources". Studies of the effects of pollutants thereon are included. An International Referral System (IRS) for the exchange of data and knowledge on marine pollution and aquatic living resources is being established, as is a Global Environmental Monitoring System (GEMS).

The Executive Director has stressed that the environment problem is an "all of the earth problem", the "tragedy of the commons" being that lack of responsibility for the commons itself means that "what belongs to everyone may be the responsibility of no one". UNEP must therefore fulfil a watchful role and also be the "complexifier" i.e. draw attention to the complexities of the management problems and the inter-disciplinary relationships, emphasising the cross-sectoral and cross-functional task, including the eco-regional nature of the problems. It is this stress on cross linkage of problems and their complexity that is changing the nature of the IWC's approach to regulation in the present decade. UNEP has, though without a clear mandate to develop environmental law,

16. UNEP 3rd Session 1975, Proposed Programme, UNEP/GC/31, 11 February, 1975, p.33-38 at p.37. The GC entrusted surveys of the state of living marine resources to the FAO.
18. Ibid, p.2, para. 9; see also G. Hardin's seminal article "The Tragedy of the Commons", Science 2 (3859), 18 December 1968 pp. 1243-1248. He concludes that "the inherent logic of the commons remorselessly generates tragedy" (at p.1244) "since the laws of our society follow the pattern of ancient ethics, and are therefore poorly suited to governing a complex, crowded, changeable world".
nonetheless recognised that it must do so since "a crucial link in the environment strategy is the development of international instruments, including international environmental law".\textsuperscript{20} It therefore has been represented at the IWC, took part in the recent meeting to consider a revision of the Whaling Convention and has worked with Governments to prepare an extension of the Antarctic Treaty to ensure adequate provision for protection of its environment, especially concerning the possible exploitation of the region's natural resources.\textsuperscript{21}

(iii) \textit{UNEP Guiding Principles for Shared Natural Resources 1978}

Pursuant to the UNCHE Principles and Recommendations UNEP established an inter-governmental group of experts on harmonious utilization of natural resources shared by two or more states. Its report\textsuperscript{22} was adopted by the UNEP GC\textsuperscript{E}P and noted by the United Nations General Assembly on December 15th, 1978.\textsuperscript{23} The Assembly recognised, however, the right of states to provide specific solutions on a bilateral or regional basis and merely invited the Secretary-General to transmit it to Governments for consideration of the 15 principles,\textsuperscript{24} which are in very general terms stressing the need to establish arrangements for international cooperative research, scientific advice, information and management of such resources.

\begin{itemize}
\item \textsuperscript{20} Ibid, p.54, para. 210.
\item \textsuperscript{21} Ibid, p.58, para. 222-223. See also Ch. XI.
\item \textsuperscript{22} UNEP/GC.6/17, 10 March 1978, Draft Principles of Conduct in the Field of the Environment for the Conduct of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States.
\item \textsuperscript{23} GA Res. 33/87, 19 January 1979 (XXXIII) adopted 15 December 1978.
\item \textsuperscript{24} UN Monthly Chronicle XVI (1) 1979, p.52. See also A. Adede "Utilization of Shared Natural Resources: Towards a Code of Conduct", EPL Vol. 5(2)(1979) pp. 66-76.
\end{itemize}
The Explanatory Note to the Principles states that they are "Draft Principles of Conduct" for the guidance of states in the field of the environment with respect to the harmonious utilization of natural resources shared by two or more states "to encourage cooperation in research, scientific advice, information and management."

It adds that "the language used throughout does not seek to prejudice whether or to what extent the conduct enjoined in the principles is already prescribed in international law". Given the "soft" language used in the draft it is impossible to determine their present legal status. Some states in the working group made express declarations and reservations on this issue. India, Poland, Romania and the USSR stressed that the principles could only have the force of recommendations and the report did not commit states participating in the group to accepting the principles as binding legal obligations - rather they should be the object of bilateral and multilateral agreements between states. Others, however thought that most of the principles might already be legally binding. This view is difficult to sustain bearing in mind that the Report gives no definition of "shared natural resources". Romania further insisted that states' sovereignty over their natural resources within their frontiers and their rights to conserve and to utilize these were unprejudiced by the proposals. The General Assembly has merely endorsed the Principles in general and commended them to governments for consideration, and further action at their discretion.

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Whilst many of the UNCHE Recommendations were administrative in character, many clearly form the basis of an environmental legislative programme and part of UNEP's task has been to promote further conventions or revisions of existing conventions. As will be seen below UNCHE has had a considerable impact on development of new treaties, some of which are particularly relevant to whales and whaling and management of other marine mammals.

II. The Third United Nations Conference on the Law of the Sea (UNCLOS III)

(i) Origins

In the concluding years of the 1960's and in the 1970's all the IWC's meetings have proceeded against a background of preparations for, and negotiations at, the UNCLOS III. The immediate origins of UNCLOS III are well known, namely Malta's request that the General Assembly consider the question of reserving the exploration and exploitation of the seabed and ocean floor beyond national jurisdiction exclusively for peaceful purposes and using their resources in the interests of all mankind.\(^{25}\) From the start it should be noted, even in the original Maltese proposal, there was no suggestion that the resources of the water column above the area should be included in the treaty which Malta then contemplated would establish an international agency "to assume jurisdiction, as a trustee for all countries, over the sea-bed ... to regulate, supervise and control all activities therein" and to ensure enforcement. The

question of the location of the boundary between the national and international areas was ignored in this proposal and more states thereafter asserted extended jurisdiction of up to 200 miles from their coasts over both living and non-living resources of the sea itself.

Shortly after the Maltese proposal UNESCO's Inter-Governmental Oceanographic Commission (IOC) set up a Working Group on Legal Questions related to Scientific Investigations of the Ocean to consider inter alia those specifically related to its resources, including the legal principles guiding data collection. It was also to consider the effect of the Law of the Sea on scientific research and conversely the role of research in developing the Law of the Sea. This study followed on a UN Resolution asking the Security Council to survey and report upon the resources of the sea and the techniques for their exploitation, identifying resources capable of economic exploitation, especially for the benefit of developing countries, and pointing to the gaps in knowledge.26 The General Assembly also established an Ad Hoc Committee27 to consider the Maltese proposal and other aspects of the sea-bed problem. It produced a first draft of a declaration of principles governing the exploitation of the area proposing that it be regarded as "the common heritage of mankind",28 a concept which is considered more fully in relation to whales and other marine mammals in Chapter XI.

26. ECOSOC Res. 112 (XL), 7th March 1967.
27. GAR 2340 (XXII), 18 December 1967.
(ii) **PUSOF: The Sea-bed Committee**

The General Assembly next set up a Committee on the Peaceful Uses of the Seabed and Ocean Floor beyond national jurisdiction (PUSOF) to continue these studies, instituted an international Decade of Ocean Exploration under the UN, and invited Member States to formulate proposals for national and international scientific programmes in conjunction with UNESCO, publishing the results.\(^{29}\)

This, as we shall see, prompted the IWC to take its own research initiative.

PUSOF and its subsequent Sub-Committees met several times between 1967-1973 and generated some draft resolutions which were adopted by the General Assembly. Amongst other things they requested the Secretary-General to seek the views of Member States on the desirability of convening a Conference on the Law of the Sea "at an early date" to review the subject matter of the 1958 Geneva Conventions, including the Convention on Fishing and Conservation of the Living Resources of the High Seas and the High Seas Convention, as well as the regime for the deep sea-bed.\(^{30}\)

Some developed states opposed convening such a conference, considering that the issues were better divided into manageable packages and debated over a long period as in the past, but the majority of the General Assembly decided in 1970\(^{31}\) to convene in 1973 a Conference on the Law of the Sea to deal with the establishment of an equitable deep-sea regime and "a broad range of related issues" including fishing and the conservation of the sea's living resources.

\(^{29}\) GAR 2467 A (XXII) December 21, 1968.


\(^{31}\) GAR 2750 C (XXV) December 17, 1970; adopted by a vote of 108-7-6.
(the preferential rights of coastal states were to be included in this topic); the preservation of the marine environment and scientific research.

The General Assembly also adopted a Declaration of Principles Governing the Sea-bed Beyond National Jurisdiction (hereafter referred to as the Declaration of Principles)\(^\text{32}\) declaring that area to be "the common heritage of mankind" and requiring that all activities relating to its resources be carried out "for the benefit of mankind as a whole". As this did not relate to the resources of the super-jacent waters of the area it has no effect on the role of the IWC except in so far as activities directed at the sea-bed might at some future date interfere with the freedom of whaling either directly, or indirectly, by polluting or otherwise disturbing the whale's habitat.

The General Assembly had decided to convene UNCLOS III because it was "conscious that the problems of ocean space are closely related and need to be considered as a whole", and noted that "the political and economic realities, scientific development and rapid technological advances of the last decade have accelerated the need for early and progressive development of the Law of the Sea"\(^\text{33}\) and that many present UN members had taken no part in the UNCLOS I and II. PUSOF was enlarged to equip it for its huge task and the preparatory work got under way.

(iii) The Eight Sessions of UNCLOS III

The first organisational Session of UNCLOS III was held in New York in 1973 and the first substantive Session in Caracas in 1974, since when, at the time of writing, there have been 5 more


\(^{\text{33}}\) Res. 2750 C, n.31 supra.
sessions and an eighth is in progress during 1979. The General Assembly instructed the Conference to adopt only one convention dealing with all the matters relating to the Law of the Sea. Provisions concerning the regulation and conservation of marine mammals and other highly migratory species have thus become part of the package of law of the sea issues to be traded off in the political negotiations against other issues agreement on which is more politically and economically important to the majority of states attending the Conference, such as the definition of the continental margin's boundary, the regime for the deep sea-bed and the nature of the jurisdiction to be exercised in the proposed 200 mile Exclusive Economic Zones (EEZ).

At its Second Session in Caracas in 1974 the Conference decided that before a matter of substance was put to the vote a determination should be made that all efforts at reaching a general agreement have been exhausted and a series of delaying procedures was provided to enable a consensus to be reached. If a vote should be taken on a substantial matter, including the vote on the Convention as such, the decision must be by a two-thirds majority of the states participating in that session of the Conference. This makes final agreement difficult to achieve and


34. GAR 3067 (XXVIII) November 16, 1973; adopted by a vote of 117-0-10.
35. The legal implications of such zones, including those already established and their effect upon the Whaling Convention will be considered in Ch.XI with other current problems.
36. UNCLOS III, Rules of Procedure, UN DOC.A/CONF.62/30/Rev. 1, 16th July 1974, Rule 37. The rule does not apply to adoption of the text of the Convention as a whole; this is to be voted on 4 days after the adoption of its last Article.
37. Ibid, Rule 39.
does not allow progress to be made on the articles relating to highly migratory species and marine mammals\textsuperscript{38} independently of the adoption of the controversial Chapter XI of the present negotiating text\textsuperscript{39} (the Informal Composite Negotiating Text (ICNT/Rev.1)) relating to the deep seabed, and of the many other unresolved issues.\textsuperscript{40} As, during the present decade of the IWC's activities, many coastal states have unilaterally asserted the 200 mile fisheries zones proposed in this text,\textsuperscript{41} though not necessarily subject to either the many specific limitations provided therein or the Articles concerning highly migratory species, the continuing effectivity of conservation of whales under the present Whaling Convention has been subjected to some doubt. These developments are considered in Chapter XI. The attention of the Conference has been little directed to date to the peculiar problems of marine mammal conservation as distinct from fisheries conservation problems although at the Seventh Session there were signs that this might be changing as the result of pressure on some delegations, in response, inter alia, to demands from non-governmental conservation groups.

The Stockholm Conference Principles, as will be seen from the analysis of the Economic Zone concept in Chapter XI, undoubtedly had an influence on the proposals of some delegations at UNCLOS III and on the ICNT: although this is more apparent in relation to

\textsuperscript{38} Articles 64, 65 and 120.
\textsuperscript{39} Chapter XI of ICNT, UN DOC. A/CONF.62/WP.10/Rev.1, 28 April 1979.
\textsuperscript{40} D. Vignes, "Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?" AJIL Vol. 69 (1975) pp. 119-129.
\textsuperscript{41} Listed in Appendix V.
pollution than conservation, the EEZ proposals do reflect UNEP's view of the ecological complexity of the management problems; those concerning marine mammals and other highly migratory species are however much less reflective of this approach.  


The environmental consciousness generated by the UNCHE and the preparations therefor and the increasing pressure exerted by some private conservation groups and individual writers in part contributed to the adoption of new conventions specifically relevant to marine mammals, which established new bodies.

1. A New Commission: Agreement Between Canada and Norway on Sealing and the Conservation of the Seal Stock in the North West Atlantic, 1971

This treaty became necessary because the ICNAF Convention did not apply to territorial waters and during the 1960's Canada gradually extended both its territorial sea and national fisheries

42. Articles 56, 57 and 61 relating inter alia to states duties in the EEZ; Articles 64 and 65 concerning highly migratory species and marine mammals respectively; Articles 117-119 concerning conservation on the high seas, and Article 120 concerning marine mammals therein. These are analysed in Chapter XI.


jurisdiction necessitating an agreement with Norway whose sealers had hitherto operated in these waters. A Commission, which acts by unanimous vote, was established for all the waters in the area, including the territorial waters. It considers scientific and other research and makes proposals on sealing and conservation of seal stocks, national quotas, opening and closing dates for the season, humane methods of killing and prevention of cruelty and suffering to seals. Enforcement is left to the national states initially but the Commission is also enabled to make proposals concerning inspection and control procedures and scientific research on seals and sealing undertaken jointly or separately; if the latter the Commission can co-ordinate the programmes. Once adopted the proposals bind the parties and must be effected in two months.

The agreement is presently limited to harp seals (phoca groenlandica) and to Canada and Norway, but any other states interested in seal conservation may be invited by these two states to accede to it. This pre-UNCHE Agreement makes no reference to eco-system management and does not adopt the IWC's IOS.

45. It established in 1964 a 9 mile fisheries zone beyond its territorial sea of 3 miles; in 1969 it extended the outer limit of the territorial sea by drawing new base lines across certain bays; in 1970 it adopted a 12 mile limit for the territorial sea; in 1971 it extended more new fishing zones.

46. The Convention provided for the fact that seal herds concentrate on ice flows that at some seasons float into Canadian jurisdiction and allowed some Norwegian sealing within certain areas of the jurisdiction.

47. Established for hooded and harp seals.

48. The Commission can propose its extension to hooded seals (cystophora cristata) bearded seals (Engautus barbatus) and walruses (colobenus rosmarus). The last 2 species were included in ICNAF regulations.
(ii) **Convention on the Conservation of Antarctic Seals 1973**

(a) **Background**

The history of this Convention is of particular importance to the regulation of all marine mammals in Antarctica and of their eco-system since it indicates the intention of the Antarctic treaty states to treat preservation of this area as an exclusive right of states party to the Antarctic Treaty, and portends their approach to the present negotiations for a Southern Oceans Convention, which will have profound impact on the staple food of baleen whales and on their habitats generally. This Convention is intended to be based on eco-system management principles\(^{49}\) but the ad hoc development of an Antarctic treaty regime will create problems of relationships with the many other regimes covering species in Antarctica which are emerging under the old and new treaties.

The Antarctic Treaty of 1959\(^{50}\) aimed at cooperation in scientific research in the Antarctic area as defined in that treaty and the use of the area for peaceful purposes only (the area being defined as South of 60° South Latitude, including the ice shelves)\(^{51}\) whilst specifically preserving the rights of States under international law on the high seas within the area.\(^{52}\) It is not prima facie directed at conservation of any of the species in the area but refers to "the living resources of the area".\(^{53}\)

49. See Chapter XI.
50. See Chapter VI; Savini op. cit. p.48-57.
51. Article VI.
52. Ibid.
53. Article IX(f).
The states which have consultative status under the treaty at their third Antarctic Treaty Consultative Meeting (ATCM) agreed to recommend to their Governments measures for the conservation of Antarctic fauna and flora, including in these categories "any member, at any stage of its life cycle, of any species ... belonging to the class mammalia indigenous to the Antarctic or occurring there through natural agencies of dispersal, except whales." Whales, as has been seen in Chapter I, are a vital component of the ecosystem of that area. The purpose of these meetings is to exchange information, consult on matters of common interest concerning Antarctica and formulate and recommend measures concerning, amongst other things, the preservation and conservation of living resources in the area. Effectiveness of measures recommended is dependent on the unanimous approval of the states with consultative status under the 1959 Antarctic Treaty.

(b) Measures for the Conservation of Antarctic Flora and Fauna

The Antarctic Treaty states early agreed that conservation measures for the above species were urgently necessary to protect them from uncontrolled destruction or interference by man and recommended consultation on measures to secure this, issuing

54. Originally 12, now 13, see Ch. VI, p. 285. The ATC meetings are normally biennial and are reported in the Polar Record.
55. Agreed Measures for the Conservation of Antarctic Flora and Fauna Article II(a); emphasis added, Savini op. cit. p.51-53.
56. A chart of recommendations adopted and approved at the 7 ATCM held from 1961-1972 compiled by Savini op. cit. p.50 reveals that not all consultative states approved all the measures adopted which presents problems for effective conservation. States not approving some measures at some time include Australia, Belgium, Chile, Japan, UK, USA.
general rules of conduct based on SCAR's 1960 recommendations for
the interim, which inter alia aimed at limiting the killing of
indigenous animals, especially fur seals, and the introduction of
alien flora and fauna, and eliminating damage to wildlife by
operations in Antarctica. The third ATCM resulted in the adoption
of "Agreed Measures for the Conservation of Antarctic Flora and
Fauna"\textsuperscript{57} and the fourth in "Interim Guidelines for the Voluntary
Regulation of Antarctic Pelagic Sealing".\textsuperscript{58} The former cover the
minimization of "harmful interference" with the living resources
of native animals (Article VII); designation of specially protected
areas (Article VIII); prevention of the introduction of non-indigenous
species (Article IX); which might upset the ecosystem, and permits
for protected species (native animals)(Article VI). Permits can
only be obtained for the purpose of providing food for the men or
dogs in Antarctica or for scientific specimens and must take account
of the natural reproductive capacity of the stocks and maintenance
of the ecological balance; some species (Fur Seals and Ross Seals
have been singled out so far)\textsuperscript{59} should be regarded as specially
protected, permits being issued only for vital scientific objectives;
as long as these do not endanger the natural ecosystem and the
future of the species concerned.\textsuperscript{60} In designating special areas

\textsuperscript{57} Recommendation I-VIII of 1st ATCM, Polar Record Vol. II,
No. 70, 1962, p.73-78.

\textsuperscript{58} Polar Record Vol. 12, No. 79, 1965, p.453-472; for a summary
see Savini op. cit. p.51-53. The measures have not been
approved by all governments but have been accepted as Interim
Guidelines, Recommendation III-IX.

\textsuperscript{59} Recommendations IV-16 and IV-17.

\textsuperscript{60} Article VI.
because of their outstanding scientific interest, the ATCM has specifically stated that in some a consideration has been the presence of colonies of seals. Permits can only be obtained for these areas if there is a strong scientific case and no danger to the ecosystem. The areas have been reviewed on SCAR's advice.

The above Agreed Measures have been adopted in an unusual form in that though only Recommendations of the third ATCM they are appended as a separate text in a form more familiar to treaties, with their own separate Preamble, 14 articles and 4 annexes. They also specify conditions for their entry into force and revision.61 The intention is presumably to give them more appearance of authority than ordinary resolutions. In their ecological approach and restrictions on scientific permits these measures represent an advance on the Whaling Convention but have none of the IWC's machinery or enforcement powers, and the Antarctic Treaty Consultative status is not open to global membership as is the ICRW.

(c) Interim Guidelines for the Voluntary Regulation of Antarctic Pelagic Sealing

Problems were apparent for the conservation of seals in the Antarctic arising from the Antarctic Treaty's preservation of state's rights in international law on the high seas since these include, inter alia, the freedom of fishing thereon. Since international law makes no distinction between sealing and whaling and other forms of pelagic fishing, the special conservation measures proposed required specific agreement and participation therein by all states

whose nationals are engaged in exercising their freedom to harvest these species in the Antarctic high seas areas. We have seen that the recommendations by the third ATCM excluded whales from the living resources covered by the conservatory measures recommended and it seems likely that the conservation measures also do not apply to other species of mammals when they are not in the water but on floating ice.62 At their sixth Meeting the Antarctic Treaty states also recognised that the Treaty did not enable conservation of seals although this was needed for the stock South of 60° latitude, since although exploitation was light at present, it might be developed later.63 They had, however, at the fourth Meeting in 1966, provided guidelines which they recommended governments voluntarily to implement in their sealing operations. These were amplified and amended in 1968 in the light of the advice of SCAR64 (which had been sought by the ATCM) and recommended for voluntary implementation pending the negotiation of an international convention which was completed in 1972.65

64. Polar Record, Vol. 14, No. 92, 1969, p.670. The main measures are listed by Savini at p.54 and include a TAC for some seals, prohibition of taking seals at sea; permits for some species; protection of baby seals; rotation of closed zones annually; seal reserves; limitation of permits for provision of limited food supplies for dogs and men.
65. Recommendation III-XI.
Although the Treaty, which applies to all waters South of 60° latitude, emanated from the discussions in the ATCM and from the work of SCAR which had been solicited by these meetings, the Treaty, for the reasons given above and also because it concerned some states which were not party to the Antarctic Treaty, could only be concluded outside the Antarctic Treaty forum. A Convention was adopted at a conference convened by the UK in London but it is not in force, having not yet received the necessary seven ratifications. Only the states entitled to attend the ATCM were actually present at the Conference but, though membership of the Seal Convention is open to the states entitled to take part in the ATCM, Article 12 allows other states to be invited to accede if all the former agree.

The Convention covers 6 species of seal none of which is currently commercially exploited. If commercial sealing does begin any state party can propose the establishment of a Commission and a Scientific Committee under Article 6, but the objective is to preserve

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67. i.e. South of the rough boundary of the Antarctic Treaty area, though some species frequent the areas both inside and outside that boundary. See Repenning, Peterson and Hubbs "Contribution to the Systematics of the Southern Fur Seal" in "Antarctic Pinnepedia", Burt (ed) 1971 at p.7-8, cited by Savini p.67, n.184.

68. The 12 states with consultative status signed the Convention, viz. Argentina, Australia, Belgium, Chile, Romania, Japan, New Zealand, Norway, South Africa, UK, USSR, USA.

these seals wherever they are found before exploitation. The USA at the Conference, which took place shortly before the adoption of the 1972 US Marine Mammal Protection Act, described in Chapter XI., stressed the need to protect the Antarctic ecology generally by sound resource management under international agreement, nationally enforced but internationally observed, by a mutual exchange of observers. The regulatory measures are listed in an Annex, which, like the IWC Schedule, is an integral part of the Convention, and permits the parties to adopt other measures including an effective system of control by inspection. The question of national versus international inspection generated lively debate at the Conference, the UK having long pressed for at least a requirement that sealing vessels be inspected on return to their ports of registration. It also pressed that governments should, on request of another government, arrange for observation of enforcement measures.

Although SCAR can suggest amendments of the Annex, only states parties can make formal proposals for amendments. These are submitted to the depositary state (the UK) which then communicates them to all the Contracting Parties. The amendment procedure is similar to the IWC's in that there is an objection procedure but it is simpler - the amendments become effective 6 months after notification if no Contracting Party objects within 120 days of being notified thereof, and two-thirds of the Contracting

70. UK Conference Report, n. 66 supra.
71. Article 3(1) permits prescription of inter alia a TAC, protected and unprotected species; open and closed seasons and areas; reserves and special areas; sex, size, age limits for species; gear and methods used; time and effort limitation; catch return, statistics, biological records; means for review and assessment of scientific information; other measures.
72. Articles 3(1)(k) and 6(1).
Parties have notified their approval. Meetings of the Contracting Parties are to be held every 5 years and if a state objects this is to be considered at the next meeting. If the measure is not unanimously approved at this Meeting but attracts the support of two-thirds of the Contracting Parties it becomes effective for those parties.

The regulatory measures in the Annex include fixing catch quotas for Crabeater, Leopard and Weddell Seals, but without any national allocation thereof. The parties have, under Article 5(2) and (5), to provide to each other and to SCAR, statistics on seals killed or captured both within the Convention area and North of 60° South latitude. Once an industry has started, SCAR will notify the depositary when it estimates that the TAC for the season is likely to be exceeded, the UK then being responsible for determining the date on which the catch limit will be reached. The Annex also provides for: protected species; 73 the sealing season and the closed season; 74 sealing zones; 75 and reserves; and exchanges of information between the parties inter se and with SCAR (not only on the number, age etc. of seals taken but also of the vessels and crews involved in sealing). 76 SCAR can report and advise on humane killing.

Killing or capturing the species specified is forbidden but permits may exceptionally be granted for the purpose of providing food for men and dogs; for scientific research; and for provision

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73. Annex, para. 2.  
74. Annex, para. 4.  
75. Annex, para. 3.  
76. Annex, para. 6.
of specimens for zoos etc. IWC experience indicates that such provisions require careful international scrutiny if they are not to be abused.

This Convention, which is not in force, clearly uses the IWC as a model for its flexible annex and the measures prescribable, but in not providing for an international observer scheme or national quotas, the parties had clearly not learned from the IWC lesson; its tacit objections procedure followed but modified the IWC example. States, however, were still jealous of their high seas freedom and not willing, even in 1972, to consider surrendering any control even for conservation purposes to an independent Commission; indeed they did not establish such a body under this Convention.

(iii) USA-USSR Agreement on Co-operation in the Field of Environmental Protection 1972

Although this agreement has no immediate practical impact on the IWC it should indirectly add to the knowledge of the species regulated by the IWC and thus have indirect effect since its objective is not only to formulate measures for pollution prevention but to develop information for controlling the effect of human activities on nature e.g. concerning the preservation of nature and the organization required therefor, and the ecological systems of the Arctic and sub-Arctic regions of which too little is known.

A Joint Commission in the Field of Environmental Protection is established to approve programmes and measures for co-operation and make recommendations. Contact is maintained by 2 nominated

77. Savini, op. cit. p.74.
co-ordinators (1 US, 1 USSR) between the annual sessions; they also supervise the programmes and co-ordinate the work of the relevant national bodies. At its first meeting the Commission agreed that a joint Convention on Conservation of Rare Species Migrating between the USSR and USA and other agreements conservation of endangered wild life. A joint project on conservation of rare and endangered animal species was agreed and working groups established for the purpose; and projects were planned on research into the preservation and management of various marine and other mammals including Polar Bears and whales in the North Pacific; such as the bowhead, gray and fin whales.

(iv) **Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973**

This Convention, which is open to all states under Articles XIX-XXI, emanated from a resolution of the IUCN at its Eighth General Assembly in 1963 culminating in a UNCHE recommendation that a Conference be convened to adopt a Convention on the export, import and transit of certain species of wild animals and plants. In 1973 the USA convened such a Conference in Washington. It

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78. *ILM XII (5)(1975) pp. 1085-1104; Savini p.74; see also Ch. XI.*
79. Resolution V.
81. Attended by 88 states - 80 participants and 8 observer states; of the IWC members, Iceland did not attend, Norway attended only as an observer; of members of the SPC Peru participated but Chile and Ecuador attended as observers; of other whaling states, Korea, Portugal, Senegal and Spain participated, China did not.
adopted a Final Act with 3 annexed Resolutions and a Convention with 4 appendices, the first three listing species to which the Convention applies and the fourth setting out a model export permit. The Convention is now in force, and its Secretary-General now attends the Meetings of the IWC as an observer and the IWC in turn observes CITES Meetings.

(a) Organs

There is no Commission but it has a Secretary-General and UNEP has various designated responsibilities (which it has delegated to IUCN) under it e.g. for convening meetings, initiating studies, making recommendations for the Convention's implementation etc. There is to be at least a biennial Conference.

(b) Scope

The Convention is not limited by area or region although some provisions are specifically related to species in particular areas. Its extension to the marine environment provoked opposition from some states which pointed to the practical difficulties and the problems of relating it to coastal state rights in their territorial sea and their rights and obligations under other conservation treaties.

(c) Appendices

Two Appendices nonetheless list the marine mammals which come within the Convention's scope. Cetaceans covered by Appendix I at

82. It entered into force in 1975 having achieved the 10 ratifications required. By July 1978 it had 46 states parties.

83. The system adopted early in the IWC history of using a member of a national delegation, which is represented at both meetings, is used. Thus the IWC's observer at the 2nd Meeting of the Conference of Parties to CITES in Costa Rica, March 1979, was Ms. P. Fox, a member of the US delegation to both bodies; See IWC/31/14, Observer's Report on CITES.
first included only the gray, blue, humpback, and right whales. The dolphin Platanista gangetica, some pinnipeds (monk and Northern Elephant seals), some sirenians (dugong dugong and 2 species of manatee) are included as well as the carnivorous sea otter. Appendix II covered 3 species of pinnipedia (the fur and Elephant seals) and 2 sirenians (dugong dugong and the West African manatee). Unless a state party makes an express reservation regulations concerning the above are binding on them though if a reservation is made any other Contracting State may also register a reservation concerning the same species. At the second Conference of the states parties in 1979 all cetaceans were added to one or other of the above Appendices and this has stimulated resort to the objections procedures. These developments are outlined in Chapter XI and considered in relation to other current problems and their interactions.

(d) **Amendments:** *(i) The Convention*

It sets out all the regulatory measures and can be amended only at an extraordinary meeting of a Conference of the states parties convened by IUCN on the written request of at least one third of the CITES parties. Amendments require acceptance by two-thirds of the states parties and enter into force for accepting parties 60 days after formal acceptance by two-thirds of the parties.

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84. Statement by Secretary-General of CITES to 31st Meeting of the IWC, July 9-14, 1979, IWC/31/05.CITES. This CITES Conference also resolved that the CITES Secretariat should consult with the IWC concerning amendment of the Appendices, and that CITES parties not currently adhering to the ICRW should "be encouraged" to do so. Resolution of the Conference of the Parties, San Jose 1979, Conf 2.7.
(ii) The Appendices: these may be amended at the biennial Conference by a two-thirds majority, entering into force 90 days after the end of the Conference except for states making reservations. Between Conferences an interesting consultative and postal tacit amendment system operates— the Secretariat, viz. UNEP (IUCN), forwards to the parties any amendments received and also consults concerned inter-governmental bodies with the particular aim of gleaning relevant scientific data and co-ordinating any conservation measures applied by these bodies. The amendments enter into force, if not objected to, and for non-objecting states only, 90 days after the expiry of the objection period. If an objection is received a postal vote on the amendment is taken. If one half of the parties vote within 60 days and a two thirds majority of those approve it, the amendment enters into force 90 days later for all except— objecting states. An insufficient vote results in the amendment being referred to the next Conference under Article XV. As already mentioned, objections were made at the second Conference of the Parties to certain revisions of the Appendices.

A third Appendix lists species at the request of any state party which states that this species is regulated under its jurisdiction to prevent or limit its exploitation and that control of trade in that species requires inter-party co-operation; but other parties can reserve the inclusion of such a species and are not then bound by its inclusion in Appendix III.

85. CITES Res. (supra), requests the Secretariat to consult with the IWC "together with other sources" (unnamed) concerning amendment of the Appendices.
The Appendices were updated, following a review of the status of cetaceans undertaken by the UK, at the second CITES meeting in Costa Rica from March 19-30, 1979. Delegates approved a UK recommendation placing all species of cetaceans on Appendix II that are not already on Appendix I, and adding 3 species of small cetaceans to the latter. It was also agreed that CITES should consult with the IWC concerning proposals to amend both Appendices. States parties to CITES not currently adhering to the IWC were urged to do so. 86

Species listed in Appendix I can be traded in only exceptionally and by permits, based on export and import licences (an exporting state has to certify that the conventional criteria are complied with to prevent further danger to that species); 87 but trade in Appendix II species is under permits based only on export licences. 88 Trade in Appendix III species requires export permits from the states so listing them and import of specimens of these species from other states can take place only on production of a certificate of origin or a certificate from any state of re-export. 89

86. Sierra Club International Report (SCIR) Vol. III (8), April 30, 1979, p. cit. n.84.
87. Permits are required for re-export of specimens of these species, Article III.
88. Ibid, Article IV.
89. SCIR op. cit. n.86. A proposal to establish a minimum list of parts and derivations of endangered species banned from trade to aid customs officials was defeated on the grounds that it would become a maximum list. A US proposal enabling easier removal of species from the list was also defeated.
(e) Species "brought in from the sea"

There are special measures for species brought in from the sea, which counts as "importation" within the meaning of the Convention and requires a certificate from the importing state establishing compliance with specific criteria. If Appendix II marine species are also protected under other treaties etc., and a state is party both to CITES and the other relevant treaty, it is relieved, under Article XIV(4), of the CITES obligations in so far as the species concerned are taken by its flag ships and in conformity with the obligations of the other treaty. 90

(f) Enforcement

Enforcement is by national means but must include penalties for trading in or possession of specimens listed or both; and provision for the confiscation of specimens exported or their return to the state concerned. States have to report annually on the number and type of permits granted, the state traded with, number or quantities and type of specimens, names of species included in the three Annexes and, as appropriate the size and sex of specimens. Article VIII requires that they also report biennially on the laws, regulations and administrative measures promulgated to enforce the Convention. Rigorous enforcement will be crucial.

90. A Resolution of the Second Conference took note of the problems caused in this respect by divergent extensions of coastal state jurisdiction over marine resources and urged the parties "to use their best endeavours to apply their responsibilities under the Convention in relation to cetaceans". Conf. 2.8.
Mr. Sand, the Secretary-General of CITES, foresees several consequences flowing from the exchange of observers with the IWC and other forms of co-operation between the two:

(i) it will progressively eliminate the need for the provisional reservations expressed by some governments concerning cetaceans listed on CITES Appendices; 91

(ii) it will encourage non-ratifying states of CITES to become parties to it92 since they would no longer need to hesitate about the relationship between the two treaties;

(iii) the CITES annual reports would be useful to the IWC in future exchanges of information since they were required from some states which were not members of the IWC and, besides giving information on export and import permits, covered the granting of certificates for "introduction from the sea" interpreted as stated, as "transportation into a state of specimens of any species which were taken in the marine environment not under the jurisdiction of any state". It was planned to develop a standard procedure and lay-out for the reports.

(v) Other new Treaties

(a) General

In addition to the treaties mentioned above, concluded at the outset of the current decade, some of which can be said to herald a more broadly ecological approach to the protection of marine mammals

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91. In relation to stocks of fin and sei whales; made by Australia, Canada, South Africa and the USSR. Australia stated that this was to preserve its position at the IWC meeting at Canberra in 1977. Statement by P. Sand to 30th Meeting of TWC, July 1978.

92. As at July 1978 IWC members which had not ratified CITES included Argentina, Iceland, Japan, Mexico, the Netherlands, New Zealand, and Panama.
following the Stockholm principles, mention should be made of several relevant treaties which had been concluded before UNCHE but following the period described in Chapter VI. These included the 1965 Agreement between Japan and Korea Concerning Fisheries, a 1968 African Convention on the Conservation of Nature and Natural Resources, the Convention on the Conservation of the Living Resources of the Southeast Atlantic of 1969. The African Convention prescribes conservation measures which can only be added to by amending the Convention at a Meeting convened by the OAU but the Conventional measures can be amended by the appropriate organ of the OAU. In negotiating the Southeast Atlantic Convention some states proposed exclusion of whales from its application but this was not done and the Commission established agreed to institute

93. UN Legislative Series, ST/LEG/SER.B/15 p.912, No. 14. Savini p.57. It established a Joint Fisheries Commission to administer regulations in joint control zones, based on national research. Korea notified FAO (Note Verbale, November 6, 1973) of the whale licensing system which she operated in these zones, limited to units existing at the date of the agreement. Korea joined the IWC at the 31st Meeting 1979, and will now have to implement IWC regulations.

94. Savini p.58-60. This was a redraft by IUCN of a 1933 Convention on the same subject. It is open to all African states, including the 13 land-locked and is aimed at African territories, but adding that "the contracting states shall manage aquatic environments ... in coastal waters" (Article VII). Species covered, listed in an Annex, include the Mediterranean Monk Seal, the West African Manatee, dugong dugongs which are Class B (killing totally prohibited) and others (of subfamily lutmae,) listed as Class C, totally protected but killable under special permit. Convention published by the General Secretariat of the OAU.

95. 9 states (Belgium, Bulgaria, France, Japan, Poland, Portugal, S. Africa, Spain, USSR) established a Commission for this area for all living resources except those specifically excluded by arrangements or agreements entered into by the Commission. Text published by FAO, 1970.

96. Article XXIV (3). Amendments enter into force 3 months after approval by this OAU organ. The measures concern killing methods some of which are prohibited.
close working relations with the IWC to avoid duplication of research efforts. 97

(b) International Commission for the Conservation of Atlantic Tunas (ICCAT)

A body with problems and structure similar to the IWC's was established on FAO's initiative in 1967, viz. the International Commission for the Conservation of Atlantic Tunas (ICCAT). 98 Its objective is to maintain tuna stocks in that area at the level of their MSY by recommending regulatory measures and collecting and analysing national data, publishing the results of its scientific investigations. Unlike the otherwise comparable IATTC it does not have its own permanent research staff and started with a small budget which it is now trying to increase since this has slowed down the collection of basic information and affected the formation of management advice, 99 so that although there is much concern about the state of certain stocks, regulations cannot be promulgated for many of them. It also suffers from the problems of allocation of catch since developing states bordering the area assert rights to preferential treatment as RAN's (Resource Adjacent Nations) a concept to which increasing attention will have to be paid by other bodies. High seas freedom has as elsewhere resulted in unrestricted growth of fleets which exacerbates the distribution problems. 100

98. ILM 1967 p.293; members are Brazil, Canada, France, Ghana, Japan, Republic of Korea, Morocco, Portugal, Senegal, South Africa, Spain, USA. Koers p.113-114; UN Annotated Directory p. .
100. Ibid, p.281.
CONCLUSION

All the fisheries bodies discussed in this work so far face the same basic problems the solution to which is the key to their successful operation as conservatory bodies viz.

(i) responsibility for data collection, analysis and organisation thereof;

(ii) organization of a continual flow of high quality scientific advice based on the above;

(iii) allocation of catch and the criteria and responsibility therefor;

(iv) reduction of effort by controlling entry and reducing excess fleet capacity;

(v) effective enforcement including some form of international supervision, whether by mutual inspection by vessels of states party or by exchange of observers, as well as surveillance of stringent national measures.

All these problems can be dealt with by either national or international means, but the importance of the latter is beginning increasingly to be perceived, even in the light of extended coastal state jurisdiction. Bodies are required which will harmonise and co-ordinate measures for the same species or areas within and outside national jurisdiction. The account given illustrates that states generally start with a strong preference for retaining national control of these aspects of management, and that internationalisation is arrived at only slowly and reluctantly after unrestricted freedom

101. See also the Recommendations of the ACMRR/WP/MM, approved by the ACMRR, FAO Fish Rep. (194), 1977, s.8.
has lead to severe declines of stocks. Thus some international means are required for hastening states awareness of the need for a more ecologically comprehensive approach to marine resource management.

In the 1970's the IWC has had to reconsider its policies in relation to all these crucial matters as it became more aware of these needs. At the same time members of some fisheries commissions such as ICNAF, which had to renegotiate its convention following the declaration of 200 mile zones by Canada, and states with new national legal strategies for marine mammal management such as the USA, used their experience to rethink the objectives and machinery of the ICRW and to call for a new convention. The new style fisheries commission, NAFO (Northwest Atlantic Fisheries Organisation) which replaced ICNAF, as well as the United States Marine Mammal Protection Act (MMPA) will be examined in Chapter XI in relation to current problems affecting the proposed revision of the ICRW. Not only did the more stringent of these developments begin to exert pressure on IWC's regulatory policies but the entry into force of the CITES convention in 1975 and the extension of its annexes began to have a considerable effect on the voting patterns and other practices of certain members of the IWC which still traded in whales and whale products. This and the proposed moratorium on commercial whaling are the most significant effects for whale regulation to emerge from the Stockholm Conference.
CHAPTER IX

THE IMPACT OF DEVELOPING ENVIRONMENTAL LAW ON IWC PRACTICE: 1970-1974

1. Introduction

By 1970 Antarctic stocks were so depleted that even with a complete cessation of catching it was estimated that it would take 15 years to bring fin whales to their optimum levels and 50 years for blue, periods unfortunately outside the normal calculations of commercial entrepreneurs.\(^1\) This had stimulated the radical proposal\(^2\) that since it was the common property status of stocks, with its concomitant freedom of access thereto, which inevitably led to over-capitalization and over-fishing as entrants scrambled for the largest share of the quota under the IWC system of regulation, the nature of the system and the status of the resource should be transferred to the United Nations which could administer the stocks through an existing agency or create its own independent Whaling Authority, which could regulate and restrict catching by issue of licences, charging fees, the income from which (especially as stocks recovered, and licences became valuable, sought after and expensive) could be used, after defrayment of administrative costs, to finance scientific research into vital but little studied problems, such as inter-relationships between whales and other resources, such as krill, and whale behaviour and intelligence.

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2. Gulland, op. cit., considered that the whaling industry would not take the longer term approach unless and until they had to include the whale stocks within the balance of their capital assets in their accounts. See Appendix for stock levels before and after commercial whaling.
As the economic potential of fully recovered whale stocks is very great\(^3\) there could be sufficient monies generated for distribution among states on the basis, for example, of their populations, food needs, interest in whaling or the oceans generally. The parallels with the proposals made at UNCLOS III (which originated about the same time) for an international regime for the exploitation of the deep seabed beyond national jurisdiction as "the common heritage of mankind" are obvious. As at UNCLOS III negotiation of such a proposal is not beyond the scope of international law but is extremely difficult, even in the case of resources not already exploited, given the existing presumptions of common access and the aspirations of the increasing number of developing states.\(^4\)

Although this proposal was not formally presented to the IWC, it, coupled with the Resolutions of the UNCHE outlined in the previous chapter, resulted in the bringing to bear on the IWC of increasing pressure to change its policies and even its Convention, to enable rational management based on new scientific principles. The meetings of the IWC during the next 5 years provided the battleground for the struggle between the non- or mini whaling states and the major whaling states as the former tried to change the policies of the latter,\(^\alpha\) to induce them to accept the legal obligation to manage whales on the basis of a regime which took account of their special biological characteristics.


\(^4\) This proposal is considered further in Chapter XI. Contrast Burton op. cit. and Darman op. cit. with R.P. Arnold "The Common Heritage of Mankind as a Legal Concept", Int. Lawyer Vol. 9 (1975) pp. 153-158 and Ogley op. cit.
2. **Twenty Second Meeting, London 1970**

   This Meeting, 2 years before the UNCHC, was attended by 12 of the now 14 members. Mr. Wall of the UK Ministry of Agriculture and Fisheries, opening the Conference, stressed that the IWC had now "established the principle of the maximum sustainable yield on which depended the maintenance of stocks at their reduced levels" and their recovery to higher levels.

   The 1969-70 Antarctic quota had been 2,700 BWU but only 2,477 units were caught though the Norwegian expedition had operated. The Antarctic catches were slightly up on the previous years (by 5 BWU) due to the USSR's increase in sei whale catch though Japan still took more than the USSR of both fin and sei whales. The USSR also continued to take a large number of sperm whales in the Antarctic. The oil yield from all Antarctic catches was at 461,285 barrels, more than the previous season's, but the average

5. The format of the Annual Report was changed from this date on to accommodate the growing number of papers submitted to the Scientific Committee, since when it has been greatly enlarged.

6. Argentina, Australia, Canada, France, Iceland, Japan, Norway, Panama, South Africa, UK, USA, USSR; IWC 22nd Report p.13-14. Denmark, and Mexico were unrepresented; Chile, Italy, Peru, FAO, ICES and 5 NGO's sent observers.

7. IWC 22nd Report, p.20, para. 3, emphasis added.

8. Fin whale catches were - Japan (1,821); Norway (4); USSR (1,176); sei - Japan (3,495); Norway (22); USSR (2,139).

9. USSR (3,066), Japan (18), Norway (6).
size of the fin, sei and sperm whales caught had slightly declined. Outside the Antarctic, mostly in the North Pacific, 29,942 whales had been taken.\(^{10}\)

(i) Scientific Matters

In spite of a Special Meeting held in Honolulu there was disagreement in the SC on the estimates of fin whale stocks;\(^{11}\) It could not reach agreement on a single estimate of SY – Japan and the USSR favoured a figure of 3,520-4,350; the other members supported 2,700.\(^ {12}\) The Committee reviewed the special report on sperm whale biology and agreed that knowledge had advanced and further analyses and new population models were needed. It reaffirmed its opinion that the BWU should be replaced by species quotas for Antarctica.\(^ {13}\) It estimated the SY of male sperm whales in the North Pacific at 4,290, with little or no surplus at that level, and recommended a further decrease in the catch.\(^ {14}\) Sei whales SY was estimated at about 5,000, varying with area; in this region the SC proposed holding catches below the estimated SY of 1,300 for sei whales and 3,100 for fin whales.\(^ {15}\)

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10. IWC 21st Report, p.8, para. 4; 28,080 were taken by factory ships and land stations operating in 1969/70 and 1,862 sperm whales were taken by pelagic expeditions north of 40° S. latitude.

11. Allen's (Canada) estimate was much lower than that of Doi et al (Japan) who thought stocks had been increasing and that the catch was below SY. The USSR supported the latter view. Report of Scientific Committee IWC/22/4, IWC 21st Report, p.26, para. 15-19, Report of Special Meeting on Antarctic Fin Whale Stock Assessments, Annex C.


15. Ibid, p.27, para. 20 and p.26, para. 15-19 respectively.
The Commission agreed an Antarctic catch limit of 2,700 BWU; reduced fin whale catches in the North Pacific by 10% (to 1,308 whales) and combined sei and Bryde's whales by 15% (to 4,710 whales) but agreed that either of these TAC's could be exceeded by 10% on condition that the other was correspondingly reduced. For sperm whales, although the North Pacific Commissioners agreed to reduce the catch by 10% to 13,551 for 1971, procedural reasons prevented this being provided for in the Schedule. The IWC agreed to keep the Sanctuary open and to continue the exclusion of the Northeast Pacific from the requirement that the meat of smaller whales be used for local consumption as human or animal food. The ban on killing both blue and humpback whales in the North Pacific was continued and the Schedule was amended to treat Bryde's whales as a separate species, which would enable their better protection.

The IWC accepted a UK proposal to amend the Schedule to bring combined catcher/factory ships within its regulations since the present wording presented a loophole whereby vessels capable of catching and processing whales on board could do so, and this gap was reported to have been taken advantage of by a combined catcher/factory ship operating off the African coast. A Japanese proposal to remove the North Pacific Ocean from the ban on using in

16. IWC 22nd Report, Chairman's Report, p.21, para. 9. 3 delegations expressed doubts concerning whether this limit would preserve present stock levels.
19. Described in para. 9(a) and (b) of the Schedule.
other areas in the same season factory ships which had operated in the Antarctic was, however, accepted providing catch limits were established for the area.\(^{23}\) Norway gained approval for the exclusion of minke whales from the same requirements.

In spite of the SC's strictures on the need for data the IWC agreed to contribute only £500 to the whale marking scheme and to the BIWS,\(^{24}\) and contributions were kept at £350 per member for another year though costs were rising.\(^{25}\)

(ii) **Enforcement**

The Infractions Sub-committee reported a slight rise in violations but merely pointed the need for whaling states to enforce measures to reduce them. The International Observer Scheme remained unimplemented in spite of general agreement as to its need. The TC again proposed that it should be effected.

(iii) **Conclusion**

This Meeting, the last of its kind, was uneventful and unsatisfactory since the studies and reductions of catch to MSY levels urged by the SC were not effected and member governments still sought relaxations of existing restrictions.

3. **Twenty Third Meeting, Washington, 1971**

This Meeting, attended by 13 of the 14 members,\(^{26}\) faced a steadily deteriorating stock situation - the 1970/71 Antarctic quota

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23. Ibid, para. 17; Japan pleaded that this concession was necessary in order to allow her to rationalise her industry by using a single type of ship.


25. Ibid.

26. IWC 23rd Report, p.13-14. Members attending were Argentina, Australia, Canada, France, Iceland, Japan, Mexico, Norway, Panama, S. Africa, UK, USA, USSR: Denmark was not represented; Brazil, Italy and New Zealand; FAO, ICES, IUCN and 4 NGO's were observers.
had not been reached, the catch being only 2,470 BWU (7 less than in the previous season) in spite of an extra expedition. Though Japan exceeded her previous year's catch by 47 units, the USSR took 72 less and Norway did not operate. Japan had increased her catch of sei whales (though it was still less than her quota) and the USSR of fin. The number of Antarctic sperm whales taken was down to 3,090 (335 less than in 1969/70), and the average size of whales taken of all three species declined.27 Outside the Antarctic more whales (30,317) had been taken than in 1969 (29,942).28 The total oil output from the Antarctic catch, including sperm oil, was 470,278 barrels, little more than the previous season's.

The US Secretary of State, Mr. Johnson, opening the Conference declared that "In many respects this was the most critical meeting ever held by the Commission; the whole concept of the multilateral international Commission as an effective means of dealing with the conservation of major living marine resources was on trial". He drew attention to the fact that the US had recently placed 8 species of whales on the Endangered Species list29 and after December 31st, 1971 would issue no more licences to kill whales, and accused the Commission of not acting forcefully enough. He identified the remaining problems as the failure to implement the International Observer Scheme; the retention of the BWU catch limit in the Antarctic; the present level of catch quotas and the insufficiencies of the criteria upon which they were based.

27. IWC 22nd Report, p.8, para. 3.
28. Ibid, p.28, para. 3.
29. IWC 23rd Report, Chairman's Report, p.18-19, para. 3; see also Ch. XI.
The 23rd Meeting, therefore, was a test of the IWC's future viability, related to its ability to solve these problems, with the indication that if it did not, some states would take unilateral action.

(i) Scientific Matters

The SC had before it 14 reports by individual scientists concerning stock estimation, the problems of particular species and areas, and possible management strategies, including an important paper from FAO giving scientific advice on catch levels. There continued to be disagreement between scientists about the estimates of fin whale stocks in the Antarctic and they were again unable to reach a single estimate. All except the Japanese and USSR scientists supported a figure of 2,200 (1,100 BWU) as near the SY, but these two states proposed 4,250 (2,125 BWU). The FAO paper suggested that such discrepancies might be compounded by the fact that "a simplified description of MSY does not in fact fit precisely the actual situation in the sea", there being two main divergencies: first "the fact that the net rate of increase will depend on past events as well as present abundance; secondly, there are many sources of variation other than exploitation, in the abundance of

30. The papers are listed on pp.3-4 of the 23rd Report.
32. Ibid, p.200-209 at p.201; based on lag effects, natural fluctuations, (especially changes in year class strength) and economic considerations. The estimate of Allen (Canada) was again lower than Oshumi (Japan) who, supported by the USSR, thought stocks were increasing and the catch was below SY. Report of Scientific Committee, IWC 21st Report, p.26, para. 9-14 at p.26-27.
populations...", which are significant for whales. FAO concluded that "the simple concept of sustainable yield does not provide a completely adequate guide when the biological situation is complex" and defined 4 "quantities" corresponding more to the biological reality, one or other of which would provide a better guide for management, stressing that under nearly any circumstances it would be more desirable to fish at a rate somewhat below the level giving the MSY, and that action should be taken to rebuild the stock, which would be achieved most rapidly by cutting the catches to zero for a period, if that was acceptable as a policy, in the light of other considerations, including economic ones.

The SC continued, however, to seek to estimate MSY. It agreed that the sei whale SY was about 5,000 but that it could vary in particular areas where stocks were above or below this, and it continued to urge that the BWU be replaced by species quotas for the Antarctic, as now existed in the North Pacific.

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33. Gulland and Boerema op. cit., p.208.
34. Ibid, p.209:
   (i) the replacement yield is that catch which will leave the abundance of the stock at the end of the year the same as it was in the beginning;
   (ii) the equivalent sustainable yield for a given stock is the sustainable yield from an equilbrium stock of the same abundance;
   (iii) the maintainable yield is the yield that can be taken from the stock indefinitely over a long period. It may cause some initial changes in the stock;
   (iv) the catch for desired harvesting rate is the catch that would be obtained by exerting a particular desired fishing mortality during the season in question.

Gulland and Boerema pointed out that as in whale populations the major divergence is the lag between changes in adult stock and changes in recruitment, replacement yield or maintainable yield are the most useful criteria.

The Committee considered that a new analysis of sperm whale stocks based on population models was needed, that there should meanwhile be no increase in catches of male sperm whales in the areas for which assessments were available. It proposed a special stock assessment meeting in 1972, recommended considerable decreases in sei catches in the North Pacific and more stock studies of baleen whales in the North Atlantic to enable appropriate regulations.

(ii) Small Whales

For the first time it examined the stocks of minke and other small whales which were essentially still unexploited but which Norway in particular was beginning to exploit in the North Atlantic. The Committee estimated the present stocks at about 150,000 to 200,000 and MSY at about 5,000 though more data were needed. The Commission subsequently agreed to keep a watch on these catches. This was the first hint of a new problem. This history has shown that the dynamics of whaling result in transfer from over-exploited to unexploited stocks as economic returns decline. From now on some states and NGO's began to demand that revision of the ICRW should include its enlargement into a Commission to manage all cetaceans.

37. Ibid, paras. 10-12.
39. Ibid, p.30, paras. 29-30. Data available for catches off S. Africa, in the N. Atlantic and in Antarctica indicated a catching surplus. The USA proposed a quota of 5,000 for 3 reasons: (i) it was an opportunity to set a quota before exploitation; (ii) the quota could be set by species not BWU; (iii) past problems would be avoided because better data would enable rational management; McHugh (USA) IWC/23/12 1971, p.18.
The Commission accepted a catch limit for the Antarctic for 1970/71 of 2,300 BWU, (400 less than 1969/70), having rejected a USA proposal that it should be 2,140. Although procedural difficulties prevented the introduction of species quotas in the Antarctic for 1971/72 the APW states at last agreed to abandon the BWU and to meet before the next Meeting to establish species quotas. For the North Pacific whales the Commissioners concerned had recommended a cut of 20% in catches in the light of the above reports on stock status, with a further reduction of 20% for the sei and fin whale catches in 1973. For 1972 the Commission also agreed to keep sperm whale catches in this area to 10,841 - a reduction of 2,710.

The Commission endorsed the holding of a Special Meeting on sperm whales and suggested that it should consider not only limiting catches of males in the North Pacific, where it was agreed that methods of separating catches of males and females should be considered, but also in the Southern Hemisphere. For 1971, catch limits of 923 were imposed in one area, and of 1,824 for the 1972 coastal season.

As agreed at the 22nd Meeting the members' contribution was raised by 10% to £385. This would not meet all the rising costs in the coming year since New Zealand had withdrawn but a saving

40. IWC 23rd Report, Chairman's Report at p.20, para. 8. The vote for 2,300 was 7 for, 2 against, with 3 abstentions.
41. Ibid, para. 9.
42. Ibid, para. 11.
43. Ibid, p.21, para. 12. Japan and the USSR were the only states to vote against this; Australia abstained; IWC/23/12/1971 p.11.
was made by not providing for a contribution to the BIWS for data collection and stock assessment. The budget, at £5,950, remained grossly inadequate in relation to the income derived from the resources and in the light of the FAO's report.

(iii) **Enforcement**

(a) **IOS:** 7 states attended a prior meeting at which there was intensive private discussion concerning implementation of the IOS. The IWC recommended its introduction in the 1971/72 season on a regional basis by amending the Schedule. The Finance and Administration Committee advised that the administration costs to the Commission should be paid initially by the nations participating in the scheme pro rata on the basis of the respective national catches of whales; later small token contributions from all member states might be considered, the balance being met by the participating states on the above basis.

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44. Ibid, p.23, para. 19. Norway offered to meet the cost (p.24, para. 20); the USA had subsidised the cost of the 1971 Meeting.

45. Australia, Canada, Japan, Norway, S. Africa, USSR, USA.

46. IWC 23rd Report, p.22, para. 17. The 4 regions proposed were (i) N. Pacific; (ii) Antarctic pelagic; (iii) N. Atlantic; (iv) S. Hemisphere land stations. The amendment proposed the addition of a new paragraph(s) as follows:

"There shall be received such observers as the member countries may arrange to place on factory ships and land stations or groups of land stations of other member countries. The observers shall be appointed by the Commission and paid by the Government nominating them". The USSR stressed that the basic principle of the Convention was still that national means of enforcement was "the chief order to implement control", IWC/23/12/71, p.26.

47. Members contributions might be about £20 each (Sprules (USA) IWC/23/12/71, p.28); Meynell (UK) stressed that an IOS was necessary so that the whale stocks of the world might be "preserved to be caught" in the future. Ibid, p.40.
(b) Appointment of Inspectors on Catchers used as Factory Ships

This required a Schedule amendment to enable both inspector and observer to be accommodated thereon; some vessels flying flags of non-IWC members had operated off the coast of South Africa which had taken steps to deny harbour facilities to them; it was suggested that other countries concerned should deny transhipping facilities to them.

(iv) Conclusion

None of the objectives set at the outset by Secretary Johnson - lower quotas, abandonment of the BWU and introduction of the IOS - had been met but significant advances had at last been made at this meeting, namely the steps taken towards the introduction of the IOS and its financing by contributions related to catches; reduction in catch quotas; the steps taken to replace the "fossilized concept" of BWU with species quotas and to distinguish between catch limits of male and female sperm whales. Weaknesses remained, however: the Antarctic quota at 2,300 BWU was little below the previous year's actual catch; fin whale quotas were too high for restoration of stocks; no extra money was provided for research.

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48. Ibid, p.21, para. 15.
49. Ibid, p.21, para. 16. The UK said that with S. Africa's cooperation it had appointed an inspector to investigate one of the ships concerned, since the UK Whaling Act applied there.
50. Ruud (Norway) IWC/23/12/71, p.31.
51. Ruud (Norway) said that the actual catch would be below this figure, IWC/23/12/71 p.32. McHugh (USA) pressed a quota of 2,140 to hold the fin catch at equilibrium but when put to the vote this was first lost by 5 for, 2 against (USSR, Japan) with 5 abstentions, IWC/23/12/71, p.36. Some states asked for a chance to change their vote but on a revote the proposal was again defeated 6-3-3, Mexico having now cast an affirmative vote and Norway a negative one. IWC/23/12/71, p.38.
though the urgent need was pressed; there was no move to introduce the approach to stock estimation outlined by FAO. Not even the reductions proposed would be effective if the estimates on which they were based and the theories applied to them were wrong in the first place.

Overall, however, this was a turning point in the Commission's operations; the changes introduced were to be accelerated by the impact of the Stockholm Conference Principles, vigorously promoted within and outside the Commission by several member states and NGO's.

4. Twenty Fourth Meeting, London 1972

The growing international interest resulted in all 14 members of the Commission attending the Meeting, the first time there had been a full attendance at an IWC Meeting. It took place immediately after the Stockholm Conference (Mr. Strong, its Secretary-General attended and presented its Resolutions) and in the year the USA introduced its Marine Mammal Protection Act, can now be perceived to represent another major turning point in the Commission's affairs.


53. Argentina, Australia, Canada, Denmark, France, Iceland, Japan, Mexico, Norway, Panama, S. Africa, UK, USA, USSR; Chile, Peru, Portugal, Sweden (a newcomer), FAO, ICES, IUCN, the UNCEH, and 6 NGO's observed; IWC 24th Report 1972; p.13-14.

54. See Ch. XI for an analysis of this Act and its effect on the IWC.
Seven expeditions had operated in the 1971/72 Antarctic season (Japan had sent out an extra expedition catching exclusively minke whales).\(^{55}\) A Norwegian ship operated for only a few days catching only 3 sei whales. The total catch was 2,252 BWU, 217 less than 1970/71 and 83 less than the quota set, as predicted.\(^{56}\) Both the USSR and Japan took less BWU but more sperm whales were caught.\(^{57}\) The total oil output, however, was up to 50,011 barrels although the average catch per catcher day's work was down.\(^{58}\) Only 25,791 whales were caught outside the Antarctic, compared to 30,305 in the previous year; both the number of sperms caught by returning Antarctic expeditions and the whales caught in the North Pacific were less in 1971: the countries whaling there had agreed to reduce sperm catches to 13,551; only 10,703 were taken. Nor could the TAC's for fin (1,308) or sei (4,710) whales be caught; only 802 of the former and 3,913 of the latter were captured.\(^{59}\)

The Twenty Fourth Meeting was notable in a number of respects. The Blue Whale Unit was at last abandoned as a method of regulating Antarctic catches, and the IOS put into practice; steps were taken

55. IWC 23rd Report, 1971, p.7, para. 5. There was also 1 more catcher boat (USSR); 87 operated compared to 86 in 1970/71, 40 Japanese, 47 USSR.

56. Ibid. The catches (1970/71 figures in brackets) were Japan - Fin 1,252 (1,607), USSR 1,431 (1,283); sei - Japan 4,320 (4,137), USSR 1,135 (2,016). Catches had increased in 2 areas but decreased in 4 others. Fin size decreased. The catch of Minke whales averaged 28.0 feet in the first recorded catch.

57. Ibid; 3,366 compared with 3,055 in 1970/71, Japan taking 126 (192) and the USSR 3,240 (2,861).

58. Ibid, to 0.27 BWU compared to 0.31 in 1970/71.

59. Ibid, p.8, paras. 6 and 7; Appendix III, Statement by Mr. Vangstein p.37.
to bring management of stocks and species more into line with scientific knowledge and advice. An important event was the presentation of the moratorium on commercial whaling proposed by the Stockholm Conference. Although this has still not been accepted by the IWC, the proposal has contributed to the more vigorous efforts now made by the IWC to bring catch quotas into line with scientific advice on sustainable levels, and led in 1979 to the acceptance of a limited moratorium on pelagic whaling.

But as old problems decline new ones have arisen, regulation of whaling being a highly dynamic process — for example small type whaling, aboriginal catches and "pirate" whaling have assumed great importance in relation to grossly depleted stocks.

(i) Proposed Moratorium on Commercial Whaling

The Meeting had before it a communication from Mr. Strong concerning UNCHES's adoption of a resolution calling on all governments concerned to enter into an agreement for a ten-year moratorium on commercial whaling. This was considered by the SC, which concluded that a blanket moratorium could not be justified scientifically, since:

"A blanket moratorium is in the same category as a blue whale unit quota, in that they are both attempts to regulate several stocks as one group whereas prudent management requires regulation of the stocks individually".

60. IWC/24/13. He drew attention to the growing international interest in whales "as a world resource in a larger sense" and offered the UN's cooperation in the IWC's future activities. IWC 24th Report, p.21, Chairman's Report.

61. A Moratorium does not contravene the objectives of the Convention which though entitled "a convention for the regulation of whaling," states in its Preamble that it was concluded "to provide for proper conservation of whale stocks" to enable orderly development of the industry; a temporary standstill would meet this purpose; it is submitted that a permanent one would not.

62. IWC 23rd Report, p.28, Report of Scientific Committee: i.e. it was not, on present data, a "proper" conservation measure.
The Committee pointed out that a moratorium would also make it impossible to obtain certain kinds of information vital to continuing assessment of whale stocks and proposed as an alternative a decade of intensified research on cetaceans (establishing a sub-committee to investigate research needs), in parallel with a policy of bringing catch restrictions into line with the best available knowledge of the state of the stocks. Both these valid objectives persist.

A moratorium could be imposed without revision of the ICRW, by amending the Schedule to provide zero quotas. The USA, seconded by the UK, now proposed this in the Plenary Session. The USA first presented the proposed moratorium in the TC arguing that the state of the whale stocks was so inadequate that it was only common prudence to suspend whaling and redouble scientific research and efforts to develop new techniques therefor. The TC rejected the proposed moratorium, however, accepting the SC’s advice.

It was pointed out that the existing exceptions for small scale whaling for local consumption by the Faroe Islands, Greenland and Alaskan Eskimos, would continue under a moratorium, but several Commissioners supported the arguments against a standstill adduced in the SC and also considered that the progress now made in reducing and refining quotas and introducing the IOS would be undermined, and would lead to unregulated whaling in other parts of the world. The Commission therefore rejected the motion to amend the Schedule to enable zero quotas.

63. IWC 24th Report, p.24, para. 9 of Chairman’s Report.
64. Ibid. The moratorium was rejected by a vote of 4 in favour, 7 against, with 3 abstentions.
65. Ibid. 4 states voted in favour, 6 against, and 4 abstained.
(ii) **Scientific Matters**

The SC now acted on the Commission's decision at the 23rd Meeting that separate species quotas be established for the Antarctic. It estimated the SY of fin whales as 3,200 in 1972/73 and of sei as 5,000, the latter being at about MSY in total and the former about 35-40% below. It recommended no change in the ban on killing blue, humpback and right whales therein, but suggested that the tentative estimate of minke whales' SY of 5,000 might have been too low: further studies were needed. It noted that for sperm whales ideally regulation should be by stock units but it meanwhile put forward tentative catch limits by Divisions in the Southern Hemisphere — alternatively it recommended that the male catch therein should not exceed 8,000 and that a safe catch limit for females was 5,000. In the North Pacific the male sperm whale catch should be 6,000 but the female sperm catch could be increased to 4,000. If quotas were set for both sexes in both areas the Committee also proposed lower size limits and a ban on catching by pelagic fleets in the 40°N and 40°S area.

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68. Ibid, para. 6.
69. Ibid, para. 7.
70. Ibid, p.41, para. 8.
71. Ibid, para. 9.
72. Ibid, para. 11.
For North Pacific baleen whales the Committee found the best estimate of fin's SY to be about 900-1000 (excluding the East China Sea), the present stock level being less than 65% of the MSY level. 73

Sei whale SY was about 3,200. 74 In the North Atlantic more information on sperm whale catches was requested to enable a proper stock analysis. A reduction of fin whale quotas, the introduction of a sei whale quota, and an analysis of minke and other whale stocks were advised. 75 The SC was becoming increasingly uncertain about the basis of its advice.

(a) Small Cetaceans

Member states taking small cetaceans were asked for the first time to give information concerning their regulation of such activities and to include information on catch and incidental kills in their future progress reports. It was not suggested at this stage that these species required regulation; the intention rather was to keep watch to provide an early warning system for signs of depletion, thus avoiding the IWC's earlier difficulties and mistakes with the larger species. 76 The Commission was also asked to obtain more information of these species generally. The Whaling Convention makes no reference to small cetaceans as such; as it is directed towards regulation of species actually exploited on a commercial scale it does not clearly offer protection of small cetaceans until

73. Ibid, para. 12.
74. Ibid, para. 13.
75. Ibid, p.41-42, paras. 16 and 17.
they become the object of such catching. The IWC is not debarred by the Convention from considering stocks of small unexploited cetaceans under Article VI, but it is not required to do so.

(b) Aboriginal Whaling

The small take by aborigines began to assume increasing importance as stocks declined, just as land station catches had earlier assumed importance following depletion of Antarctic stocks. The SC proposed that Denmark, the USA and the USSR acquire information and report to the BIWS, if not already doing so, on the aboriginal kill of bowhead, gray and other whales, the USA in particular being asked to reduce the waste in its aboriginal whaling arising from the fact that so many whales were struck but not killed and were subsequently lost — a challenge to its conservationist stance.

The SC also made a number of general recommendations for improvement, including studies of catch and effort data and their use; increase in marking, especially of sperm and minke whales worldwide; more systematic and informal whale sighting effort (as the number of expeditions declined so also had the whales seen and recorded); and research on methods of defining stock units other than through mark recoveries. They also asked the Commission to obtain more data of all kinds from whaling operations, especially from states not currently relaying information to the BIWS, whose catches affected IWC estimates.

The SC recommendations at this Meeting have been reported in some detail because they represent a new firmer approach to

77. Ibid, para. 19.
78. Ibid, p.43, paras. 23-29.
management and conservation of stocks, based on more sophisticated strategies and information. Although their proposals represented a considerable move towards more accurate assessment they imposed a considerable strain on the resources of the Commission as then structured. Some states and groups now questioned the ability of the Commission, on the basis of the ICRW, to implement the new recommendations. The UK Minister, opening the Meeting, had echoed the UNCEH's anxiety about the future of whales because they occupied an important place in the ecological system. Proposals that the Whaling Convention be revised to take account of this ecological approach now began to be made. The Commission's response at this Meeting to the SC's recommendations was therefore crucial to the question of whether revision of the Convention would be pressed for.

The Commission, though rejecting the oratorium, responded by adopting a number of positive measures and other initiatives at this meeting. It took the following steps:

(i) established an ad hoc committee to consider, in collaboration with national and international groups and organizations, especially FAO, ways of implementing a Decade of Cetacean Research;

(ii) accepted in principle the need to expand its staff to improve inter alia its scientific capability and establish a committee to develop plans for this purpose.

79. Mr. Stoddart, UK Minister of State for Agriculture and Fisheries, IWC 24th Report, p.21.
81. Ibid, p.26, para. 11.
(iii) established a sub-committee on small cetaceans to improve data collection worldwide; 82

(iv) abandoned the BWU and introduced species quotas for the Antarctic, even imposing a quota of 5,000 for minke whales. 83 It should be noted, however, that quota problems persisted. The setting of Antarctic fin whale quotas led to considerable disagreement in the Commission; though the SC advice for almost all other areas and species was accepted, here it was not. The TC proposal for a quota of 2,000 was rejected as was a US proposal for 1,800. A three quarters majority was finally achieved only on a compromise proposal of 1,950 put forward by the USSR and seconded by Japan on the understanding that they were willing to accept a further reduction in 1973/74 on the basis of the SC’s recommendations. 84

(v) adopted the SC’s recommendations for all other species and areas except for the North Pacific fin whales. The TC proposal for a quota of 700 failed to secure acceptance as did a USA counter proposal that it should be 500. A limit of 650 (proposed by the USSR and seconded by Japan) finally secured the necessary three quarters majority on the understanding that the USSR would propose further reductions in the 1974 season. 85

(vi) recommended member governments, to the extent possible under their national laws, not to sell, register or charter

82. Ibid, p.33, para. 22.
83. Ibid, p.28, para. 15.
84. Ibid.
85. Ibid, p.30, para. 18; the vote on the proposal for a limit of 700 was 8-4-2; for 500 - 5-5-4; for 650 - 8-2-4.
to non-member states whaling equipment including vessels, no longer used, until such states adhered to the Whaling Convention. Meanwhile the 5 states whose whale catches were recorded by the BIWS but who were not members of the IWC, viz. Brazil (a former member), Chile, Peru, Portugal and Spain were to be invited by the Chairman of the IWC to adhere to the Convention. Members were also urged to make diplomatic efforts to induce them to do so, and the Secretary-General of the UN was also to be asked to urge all its member states to encourage all non-whaling states that were not members of the IWC to adhere to the Whaling Convention "following the spirit" of the UNCHE.

(vii) partially effected the International Observer Scheme, as described below, though not, because of practical difficulties, in the Antarctic.

(iii) Enforcement

(a) IOS: Antarctic pelagic whaling countries had signed an agreement to implement a scheme in that area in 1972/73 but found it impractical to begin in 1971. It was agreed that the Commission's responsibility for formally appointing the observers (after their nomination by bilateral agreement), would be fulfilled through its Secretary.
(b) **Infractions**

Apart from noting a slight but not significant increase in infractions in the Antarctic, no comment was made at this Meeting on infractions reported. In future however the reports of the international observers would be available to test the veracity of the explanations given in the Infractions Reports which up till now had had to be accepted uncritically by the sub-committee.

(c) **Operations outside IWC regulations**

Chile, Spain, Portugal and others continued to operate outside the IWC but information also became available this year concerning the operations of two small floating factories operating off South Africa under flags of convenience. One was an earlier catcher now converted into a combined catcher/ floating factory, the "Run", which flew the flag of the Bahamas and the other was the "Sao Nicolau" belonging to a Monrovian company. It was suggested that the former had taken about 1,139 sei and 347 sperm whales between 1968/70, but no figures were available for the latter which was thought to have operated from 1970. Whilst the figures are not significant the very existence of such operations, especially if repeated elsewhere, served to undermine the effectiveness of the IWC in view of the depleted state of these species, and the difficulties of fixing the SY accurately. There was also the

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90. Ibid, p.33, para. 23; and Appendix VI, p.234.
91. IWC 24th Report, Statement by Mr. Vangstein, Chairman's Report, Appendix III, p.37. For further details of whaling outside the IWC see FOE Whale Manual '78, Ch. V, p.42-44, which adds China and North and South Korea to the above list; and 2 publications in 1979 by the People's Trust for Endangered Species viz. Pirate Whaling and An International Register of Whaling Vessels: Preliminary Draft.
threat that if their operations were not deterred others might emulate the example. The recommended ban on transfer of vessels etc. to non-IWC member states would help to prevent such operations, which are not prima facie illegal under Articles 2, 4 and 5 of the High Seas Convention, which codify the freedom of navigation and permit all states to register vessels under their flag as long as there is a "genuine link".

**Conclusion**

This Meeting, held immediately after the UNCHE but before the opening of the UNCLOS III, witnessed a more effective achievement of the conservatory aims of the ICRW than ever before. The Stockholm principles can therefore be said immediately to have had a considerable effect on the IWC's interpretation of its Convention. The Stockholm Resolution calling for a Moratorium on Antarctic Pelagic Whaling was not implemented because the SC advised against it; rather it can be said that the Stockholm principles encouraged member states to take more account of the optimum population objectives of the Convention and less of the industrial needs. Some states and observers, however, remained concerned about the scientific basis of stock assessment and doubted the ability of the IWC, within the framework of the existing treaty, fully to achieve the more ecological approach to management now advocated, as well as other essential measures including: development of criteria to replace MSY; the obtaining of the additional data necessary to ensure the accurate assessment of safe catch levels; monitoring and possible regulation of all small cetaceans; deterrence of operations outside the IWC's control. The ICRW still referred to whales, not all cetaceans, did not require members not to transfer vessels, etc. to non-members, made no reference in its Preamble to ecological principles, and did not clearly require transmission of biological information to the Commission.
5. **Twenty Fifth Meeting, London, 1973**

14 member governments were represented at this Meeting, which took place just before the opening of the first substantive session of UNCLOS III in Caracas. For the first time for many years another fisheries body was represented, namely the International Commission for Southeast Atlantic Fisheries described in Chapter VIII.

The total Antarctic pelagic baleen whale catch, excluding the minke whales, had been reduced in 1972/73 from 8,139 in the previous season to 5,625. Norway had not taken part in the hunt, and Japan had 5 less catcher boats operating devoted to minke whales. Both Japan and the USSR had taken less fin and sei whales but more sperm whales and a big catch of minke whales—the 5,745 caught exceeded the previous year's catch by 2,725 and thus the quota set by 745. The breakdown of these figures by Area of catch showed that the fin whale catch had decreased in all but Area V and VI, and the sei whale catch in all but Areas I and VI.

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92. IWC 25th Report, Appendix I, p.13, at p.15; Brazil, Chile, Peru, Portugal, Sweden, FAO, IUCN, ICES and 9 NGO's observed. The effect of the UNCLOS negotiations on the IWC is assessed in Chapters XI and XII.

93. IWC 25th Report, Chairman's Report, Appendix A, p.34, Norway gave up large scale whaling in 1972, converting its 1 factory ship into a factory trawler and closing down its land station.

94. IWC 24th Report, p.7, para. 4. viz (1971/72 catch in brackets): Fin—Japan 1,142 (1,252), USSR 619 (1,431); Sei/Bryde's—Japan 2,919 (4,320), USSR 945 (1,133); Sperm—Japan 132 (126), USSR 4,071 (3,240).

95. Ibid, 24 and 0 respectively in 1971/72 to 128 and 308 in 1972/73.

96. Ibid, 22 and 0 respectively in 1971/72 to 460 and 77 in 1972/73.
Nonetheless, as the increases in some areas\(^97\) were offset by the decreases in others, neither the fin nor sei/Bryde's whale catches reached the quota limit set in 1972: 1,761 of the former were taken against a quota of 1,950, and 3,863 of the latter against a quota of 5,000. The average size of fin, sperm and minke whales had decreased,\(^98\) and oil production was dropping.\(^99\) There was therefore, in spite of the many improvements in management, still cause for concern about the state of Antarctic stocks especially in particular areas.

Outside the Antarctic considerably less whales, 16,393, had been caught than in the previous season, when 23,492 had been taken, itself a decrease from the 30,317 taken in 1970/71, though the same number of factory ships and land stations operated in both seasons.\(^100\) In the North Pacific only 9,609 whales were taken: The catch limits were not reached for any of the 4 species — fin, sei/Bryde's, sperm whales — taken.\(^101\)

The BIWS reported that it had not received any reports from Chile or Peru in 1972 and none from Spain in either 1971 or 1972. Catch figures for the Azores and Madeira were received only after

97. Ibid. with 1971/72 figures in brackets. The increases were Area III 1,322 (1,114); Area IV - 627 (363); Area V - 1,038 (560); Area VI - 363 (0).
98. Ibid. Fin whale size (1971/72 figure in brackets) 1972/73 66.2 feet (65.7 feet); sei whales 47,5 feet (47.1 feet); Sperm whales 44.3 feet (44.7 feet); minke whales 26.7 feet (28.0 feet).
100. Ibid, p.8, para. 5.
101. The figures (quota in parenthesis) were: Fin - 758 (1,046); Sei/Bryde's - 2,528 (3,768); Sperm - 6,323 (10,841).

N.B. Thereafter sperm whale quotas were set separately for males and females.
the statistics had been analysed, and some operations under flags of convenience still persisted, the "Run" having reputedly transferred to a Somali flag and taken 76 sei whales by the end of 1972, under the new owners, as well as 72 seis under the previous owner.

(i) Scientific Matters

The SC's work was supported by a growing number of progress reports and other specialist papers. Its attention was focussed on two issues in particular - the Ten Year Moratorium which was again proposed by the USA and referred to the SC, and the need, stressed by the UK Minister opening the 25th Meeting, for much more stringent conservation measures for fin whales if they were to recover to MSY as quickly as desired. The Committee's recommendations were marked by its growing uncertainty about methods of assessment related to the increasing detail required and by the separate assessment of species in their areas.

(a) Moratorium on Commercial Whaling

The SC repeated its view that there was no biological requirement for a blanket moratorium on all commercial whaling. The Commission's purpose as stated in the Convention was "to safeguard for future generations the great natural resources represented by...


103. Ibid. These statistics were transmitted to the BIWS by the owners. The "Sao Nicolau" caught only a few whales, transported to the "Run". The SC (IWC 24th Report, p.52) para. 8 proposed that the operators seek scientific assistance in marking and report catches to the BIWS.

the whale stocks" by a "system of international regulations for
the whale fisheries to ensure proper and effective conservation
of whale stocks". A moratorium would contradict this objective
which implied that the resources should be so managed as to keep
them in a condition which will enable them to provide the optimum
yield on a continuing basis. The concept of individual species
management and exploitation now in operation met this requirement,
a global moratorium would directly conflict with these new principles.  

The US nonetheless pressed the proposal in the TC, stressing that
knowledge was inadequate to preserve the depleted stocks, and
proposing that the moratorium should commence three years after
the adoption of the necessary resolution. The TC approved the
resolution on a majority vote but it did not attract the necessary
three quarters majority in the Plenary Session.  

The Soviet Commissioner, supported by the Japanese Commissioner, stated that
it was incompatible with the Convention and its Schedule and would
lead to the ending of the Convention and a return to unregulated
whaling since "the Soviet party will consider itself to be free
from obligations imposed by the Moratorium." Japan also regarded
it as contravening "the spirit of the Convention" and disregarding
the SC's advice; a Moratorium would endanger both the IOS and the
International Decade of Scientific Research. This vote, and the

106. IWC/25/12 - 2 Verbatim Record; 9 countries voted in favour
(Argentina, Australia, Canada, France, Mexico, Panama, USA,
UK), 5 against (Iceland, Japan, Norway, S. Africa, USSR);
Denmark abstained because of the non-commercial whaling off
Greenland and the Faroe Islands, though sympathetic to the
proposal (Mr. Lemche, Denmark), Ibid, p.10-11.
107. Ibid, Fujita (Japan, p.3-4; p.2-3 Nosov (USSR); see also
108. IWC/25/13-4, p.26, per Nosov (USSR); and p.28, per Fujita (Japan).
views expressed provoked some member states to insist that a new Convention, with different objectives, was required if whales were to be allowed to recover, or even survive.

(b) **Approach to stock by stock management**

The SC, recommending that where possible all whale stocks should be managed individually, presented a sub-committee report recommending sub-divisions for Antarctic baleen whales and percentage allocations only of the catches that may be approved for fin, sei and minke whales. The TC agreed to consider detailed proposals for such arrangements at the next meeting. The catch statistics for Areas clearly established the threat to segregated stocks of whales if stocks were not individually protected.

The SC found that the present fin whale stocks in the Antarctic were now at only one third to one half of the level providing MSY - the lower the catch now, therefore, the quicker the return to MSY.\(^{109}\) Sei stocks' SY had been estimated at either 4,000 or 5,000 and the present stock was agreed to be near MSY, but the estimates were said to be less reliable than for the fin whales.\(^{110}\) The Committee also had before it figures for minke whale MSY of between 5,000 and 12,230 with no means of determining which was the more accurate; it could only advise a conservative approach to use of the present surplus.\(^{111}\)

The Committee recommended continuation of the total protection of blue, humpback and right whales in the waters south of the

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110. Ibid, para. 3.
111. Ibid, para. 7.
Equator and of the humpback whales in the North Pacific.\textsuperscript{112} It now began to consider the SY of fin, sei and Bryde's whales in the latter area on the basis of sub-divisions into east and west.

Fins were said to be at about 760-900 SY equally divided between the 2 areas and sei about 3,000 (1,600 west of the 180 meridian and 1,400 to the east).\textsuperscript{113} For the first time it found that the Northeast Pacific gray whale had, under its complete protection (apart from an aborigine take of about 160), recovered to a stable population of about 11,000.\textsuperscript{114}

For sperm whales in the Antarctic the Scientific Committee recommended specific quotas for each sex apportioned between the 9 divisions recommended the previous year but also offered 2 alternative forms of sub-division into 3 areas only. It firmly opposed any continuation of the practice of the setting of a single quota for each sex for the whole Southern Hemisphere.\textsuperscript{115} For the North Pacific it repeated its previous year's advice of a catch of not more than 6,000, with the female element limited to 4,000.\textsuperscript{116} Lastly it approved the Icelandic view that its catch of 240 fins per year had not depleted that stock over 25 years\textsuperscript{117} but urged the USA to continue to study the problem of the loss of bowhead whales in its aboriginal fishery as well as checking the actual kill, and the population size and status of the bowhead stock in relation

\textsuperscript{112} Ibid, paras. 6 and 12.
\textsuperscript{113} Ibid, p.52, paras. 9 and 10.
\textsuperscript{114} Ibid, para. 13.
\textsuperscript{115} Ibid, p.52-53, para. 15; detailed quotas are listed.
\textsuperscript{116} Ibid, p.53, para. 16.
\textsuperscript{117} Ibid, para. 17.
to MSY. The Commission subsequently agreed to these proposals. The lack of information on the Alaskan bowhead stock was to lead to considerable difficulties from 1977-1979, calling into question the advisability of continuing the aboriginal exceptions to the Convention.

The SC was now much more concerned in detailed assessment on sub-divisions of stocks and with survival of small stocks. As usual it called for more studies and supply of data. For the first time it expressed a belief that the effects of pollution on whale stocks may be important. It asked the Commission to express its concern to member states and urge their adherence to the International Convention on Ocean Dumping. This problem is considered in relation to other current problems in Chapter XI.

The Antarctic fin whale quota had now become, in the eyes of many observers, the main test of the IWC’s ability to conserve stocks; a test which, in their view, it failed at this Meeting. The TC approved a zero quota but this was rejected in the Plenary Session where a compromise quota of 1,450 was approved, with a proviso that the catch of fin whales cease at a date no more than three years from the date of the adoption of the motion.

118. Ibid, para. 18.


120. IWC 25th Report, Chairman’s Report, p.27, para. 10. The vote in the TC for the zero quota was 7-5-2 - the necessary simple majority in that Committee. In the Plenary Session the vote was 7 in favour (Argentina, Canada, France, Mexico, Panama, USA, UK); 5 against (Australia, Japan, Norway, S. Africa, USSR); with 2 abstentions (Denmark and Iceland). There was thus not the necessary ¾ majority; the compromise proposal of a 1,450 quota was approved by a vote of 7 in favour, 2 against (Japan USSR) with 5 abstentions (Denmark, Mexico, Norway, Panama, S. Africa); IWC/25/13-3, Verbatim Record, p.4.
Difficulties also arose in setting a minke whale quota (the SC had been split), though the sei whale limit of 4,500 recommended by the SC was accepted. Japan proposed a minke quota of 8,000, supported by the USSR in the Plenary Session, but only these two states voted for this figure.121 The TC's recommendation of a quota of 5,000 was adopted by a vote of 14 to 1. The USSR, noting that Japan voted against this figure, reserved its right to study the situation within the 90 day period and if necessary to reconsider its decision.122

The SC advice concerning the 9 sub-divisions of Antarctic sperm whales was rejected. The Plenary Session adopted the alternative approved by the TC, viz. 3 divisions, in which the present quota for each sex was spread in a way which would bring together, as far as possible, those divisions in which stocks were in a similar condition, after a Japanese amendment proposing deletion of all the sub-divisions was defeated. The USSR, whilst not objecting in principle to further sub-division, supported the amendment to enable study of the practicalities.123 Both Japan and the USSR finally objected to these sub-divisions under the 90 day rule;124 they therefore did not come into effect. This, however, was the last occasion to date on which the objection procedure has been used.

121. 8 (Argentina, Canada, France, Iceland, Mexico, Norway, USA, UK) voted against; Australia, Denmark, Panama and S. Africa abstained; IWC/25/13-3, p.13.
122. Ibid. Thus threatening the first use of the objection procedure for some years.
123. Ibid. Japan and the USSR voted against the proposal; 10 members voted in favour and 2 abstained.
The Commission reduced, as promised, the North Pacific fin whale catch to 550 for 1974, 100 less than the previous year, though 5 states voted against this.\textsuperscript{125} Sperm whales in that area were kept, as advised, to 6,000 and 4,000 for males and females respectively;\textsuperscript{126} the sei quota remained at 3,000.

The introduction of the improved statistics suggested by the SC was deferred for a year's consideration by member governments who were asked meanwhile to supply statistics concerning small cetaceans to the BIWS.\textsuperscript{127}

(ii) Strengthening the Secretariat

A major significant improvement agreed at this Meeting was the strengthening of the Commission by the appointment of its own full time staff, including a scientist (with a broad reviewing, co-ordinating and representational role) as its Secretary, the provision of its own premises and a revision of the Rules of Procedure to provide for the new duties.\textsuperscript{128} Until this date the IWC had continued to operate from the UK Ministry of Agriculture and Fisheries, using part-time staff. Agreement could not however be reached on the proposal for funding the new organization.\textsuperscript{129} The Committee had adopted the proposal that this cost be met by variants of an increased flat rate contribution plus additional contributions based on member states interest in whaling

125. Ibid, p.29.
126. Ibid.
127. Ibid, p.29-30, para. 11.
128. Ibid, p.31, para. 14; Report of Committee on Proposals for strengthening the Secretariat; Appendix IV, p.39-61.
129. It was estimated that the Secretariat would cost a further £33,000 if located in London, or £39,000 if located in the USA, which also offered to house it.
activities. The Japanese and USSR Commissioners said that whilst supporting the idea of strengthening the Commission, in view of the uncertain future of whaling, especially in the light of some of the decisions taken at this Meeting, they could not agree to the increased contribution which would be required. It was agreed to study the proposals further in 1973/74. The contribution meanwhile was raised to a meagre £500 per member government.

(iii) Enforcement

(a) International Observer Scheme

The first reports from observers were now available covering the seasons 1972 and 1972/73. The observers had been appointed by the Commission on the nomination of all the whaling states under agreements concluded under paragraph 3 of the Schedule, including one for the Antarctic. The TC regarded the Scheme as successful and recommended the extension of any agreements which were due to expire. The USSR and Japan however, considered that its extension might not be possible in the Antarctic because of the new quotas and the sub-division into 3 areas. The Commission urged them to resolve these difficulties.

130. Ibid, p.47, para. 14. 3 formulae were suggested relating the extra payments to (i) a £1,000 flat rate plus payments related half to mandatory geographical areas of interest in whaling from 1953-1973 and half to payments based on a percentage of the previous year's total catch; or (ii) 50% flat rate; 50% divided as above; (iii) 50% flat rate; 50% related to previous year's catches. It was not proposed that there be a levy on whales caught.

131. IWC/25/14, International Observer Scheme.

132. IWC/25/13-3, p.27.
The existing schemes were between the following member states:

(i) **Antarctica**: Japan/USSR

(ii) **Southern Hemisphere**: Australia/South Africa

(iii) **North Pacific**: (a) **Pelagic**: Japan/USSR for factory ships  
                        (b) **Land-stations**: USA

(iv) **North Atlantic**: Canada/Iceland; Iceland/Norway

All the observers, who were suitably qualified for their tasks, were instructed to detail infractions as soon as possible, sending written reports to the Commission at the end of the season or when the expeditions returned, noting compliance or non-compliance with each regulation.

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134. Japan had nominated one whaling supervisor, 1 whaling fleet staff member, 1 Captain of a whaling boat, and 1 national inspector with 12 years whaling experience; the USSR's nominees were 1 Captain Director of an Antarctic factory ship and 1 senior national inspector of Antarctic whaling fleets.

135. Australia nominated 2 Fisheries Inspectors of the Department of Fisheries and Fauna of Western Australia; and S. Africa a Fisheries Inspector of their Sea Fisheries Division.

136. Japan nominated 1 government supervisor of factory ships in the Antarctic; the USSR 1 senior National Inspector of Soviet factory ships and 1 former Soviet factory ship master. 2 biologists with the US Marine Fisheries Service were nominated to the land stations.

137. 3 marine Arctic biologists were appointed to the Icelandic, Canadian and Norwegian stations, Canada sending observers to Iceland; Iceland to Canada; and Iceland to Norway.

138. Observers were equipped with copies of the Convention and Schedule and a Memorandum setting out the provisions applying to the respective areas to which they were appointed.
The reports of the individual inspectors were not reproduced in the IWC Report\(^{139}\) (though the IWC's unpublished documents contain full reports) but summaries were reviewed by the TC which considered that encouraging progress had been made. The inspectors suggested various administrative reforms of reporting procedures, definition of terms,\(^{140}\) minimum lengths, measuring techniques of whales, and notification of quota changes. In general where infractions were discovered satisfactory explanations were also reported, e.g. human error or foggy conditions. When such excuses were not available the state concerned took action e.g. Canada regarded the taking of inter alia 6 undersized whales as a "serious" infraction, prosecuted two offenders\(^{141}\), and planned to do so for the remaining\(^{141}\); the USSR levied fines for the taking of 2 undersized whales by one of its pelagic expeditions;\(^{142}\) South Africa imposed penalties for the taking of 23 undersized whales.\(^{143}\)

The inspectors reports are careful and detailed and the scheme can be seen to be a remarkable advance on any previous or existing enforcement system. It should provide a model for other fisheries bodies where the vessels concerned can accommodate such inspectors, e.g. where factory ships or land stations are used. Enforcement problems, however, continued concerning the states operating outside the IWC, including the members of the PCSP and

\(^{139}\) They are summarised in op. cit. n.131, at p.4-10; Full reports are available in the IWC's unpublished records.

\(^{140}\) e.g. definition of "lactating whale" or "milk-filled" whale, ibid, p.4.

\(^{141}\) Ibid, p.5.

\(^{142}\) Ibid, p.7.

\(^{143}\) Ibid, p.8.
vessels operating under other flags of non-member states, which were not attending the IWC's Meetings as observers.

(iv) Conclusion

(a) The need for changes in the IWC

This Meeting was an important one, recording considerable progress but also illustrating the growing conflict concerning the existence and interpretation of international obligations concerning conservation of species such as whales. The governments and non-governmental bodies pressing for a Moratorium based their demands on two arguments. First, the need for an ecosystem approach. The IUCN observer, for example, drew attention to the lack of scientific evidence on eco-system effects;¹⁴⁴ the USA to the "gross uncertainties and maze of complexities we are just beginning to understand about the marine eco-system".¹⁴⁵ It cited its Marine Management Protection Act as illustrative of the correct legal approach to defining objectives. Secondly the international status of the resource. The IUCN considered that "the use of a resource belonging to all nations for the marginal benefit of relatively few people seemed unjustified";¹⁴⁶ The FOE regarded whales as "a resource which should belong to all mankind and to all generations" which should be brought under the control of the United Nations Environment Programme.¹⁴⁷ The USA's view was that "whales come under no man's exclusive national jurisdiction and as such have to be an international trust in whose disposition all nations should have a voice". It did not think that "the world would any longer

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¹⁴⁴. IWC/25/13-1, Verbatim Record, p.9, Dasman (IUCN).
¹⁴⁵. Ibid, p.22, White (USA).
¹⁴⁶. Ibid, p.9, Dasman (IUCN).
¹⁴⁷. Ibid, p.11, Blythe (FOE).
tolerate the view that only the nation or the industry which is in a position to exploit a marine resource should have full and final responsibility for it". 148

(b) Proposal for a Revised Convention

As the Whaling Convention clearly does not, and, with its limited membership, could not, confer international trusteeship status on whales, and does not make ecosystem management its clearly expressed objective, the USA now proposed amendments to the Convention 149 for consideration at a future meeting. It was not only the Japanese 150 and USSR governments which did not entirely accept this proposal for revising the ICRW. Denmark pointed out that "it is not enough that we have a piece of paper with some sort of optimum, idealistic solution"; a practical solution had to be found since the USSR and Japan would not be bound by a treaty they did not accept even if it were adopted by a three quarters majority; the main catchers of whales would then be unregulated which would be more harmful to whales than any compromise. 151

148. Ibid, p.23, White (USA). He also pointed out that there may be a conflict between some of the decisions taken at this Meeting concerning the taking of some species and the action taken under the newly concluded International Convention on Trade in Endangered Species of Wild Flora and Fauna (CITES), to list some species of whales, and suggested that this should be brought to the attention of governments concerned so that they could, if they so wished, make reservations on ratifying CITES. Ibid, p.33, para. 18; CITES is described in Chapter VIII and its relationship to the IWC examined in Chapter XI.

149. IWC 25th Report, Chairman's Report, p.33, para. 19. The USA circulated a Memorandum containing its proposals.

150. IWC/25/13-1, p.24, Fujita (Japan) stressing the importance of whale meat as protein, the 50,000 jobs dependent on whaling and the lack of alternative sources of beef, appealed to "the spirit of the Convention" which requires use of whales for food and products.

151. Ibid, p.10-12, Lemche (Denmark).
South Africa went further saying that they had voted against the Stockholm Conference Moratorium resolution because they considered whales "to be similar to other marine resources that are currently exploited for human needs, representing an excellent source of protein and fats if managed sensibly on a sustainable yield basis". It pointed out that the USA view that because scientific evidence was inadequate there should be a ban on exploitation would render it unjustifiable to exploit many, if not most, marine resources. 152 In South Africa's opinion "one must use the best scientific evidence available" and if in doubt adopt a conservatory management policy since both the human population's protein needs and humans' impact on the environment forced mankind to manage natural resources in an increasingly sophisticated manner. As evidence that effective management was possible South Africa pointed to the "spectacular" recovery of the Californian gray whale and its recent removal from the IUCN Red Data list; to the signs of recovery of blue and humpback whales after 13 years of total protection; and the SC's proposal for a new and refined basis for quotas. 153

From this date the IWC's critics for a period concentrated less on pressing the UNCEH Moratorium and more on refining proposals for a new Convention and improving the scientific basis of quota

152. Most fisheries are in fact exploited in spite of inadequate knowledge; see the Commissions described in Chapters IV, VI, VIII; this does not preclude, however, taking special account of the different biological characteristics of marine mammals.

153. Ibid, p.5-7, Van de Jarger (South Africa).
fixing, aided by the work of a new important and independent review of the situation by a working party set up by FAO under its ACMRR.154

6. Twenty Sixth Meeting, London, 1974

Brazil rejoined the IWC and all 15 members attended.155 Now that the IOS was in operation and the BWU had been abolished, the main practical problems facing the Commission were the strengthening of the Secretariat, the reduction of fin whale catches and the sub-division of the baleen and sperm whale quotas to protect individual stocks. The need for a revised Convention continued to be pressed and to demand consideration. The proposal for a ten year moratorium (to begin not later than the 27th Meeting) was again presented by the USA, seconded by Mexico, but was again rejected,156 in favour of an interesting conservatory compromise proposal by Australia of new management procedures which will be outlined later.

The fin catch had declined in the 1973/74 season and the 1,450 quota was not caught (only 1,288 being taken). As the catch of sei and Bryde's whales and sperm whales was up however, the overall Antarctic pelagic baleen whale catch had increased slightly from 5,652 to 5,690, excluding minke whales of which over 7,713 had been taken, 2,713 more than the quota set at the 25th Meeting.157

154. IWC 25th Report, Chairman's Report, p.25, para. 6; see pp. 458-461 herein.

155. IWC 26th Report, Appendix I, p.16-18; observers were the Netherlands, Chile, Peru, Portugal, Sweden, FAO (per se and on behalf of its ACMRR), UNEP, ICES, ICSEAF, IUCN, and 10 NGO's, many of whom made statements expressing their environmental concerns.

156. Ibid, p.25, para. 9.

The new division of the catch into areas revealed that there were signs of a particularly sharp decline in fin whales in Areas III and IV and the SC subsequently advised especial care in setting quotas there. Japan had increased its take of sei whales, the USSR of sperm whales, and both had intensified their minke whale catch. The overall oil production had, however, declined to 334,065 barrels. More whales (22,112) were caught outside the Antarctic than the 20,272 of the previous season. The quotas set for the Southern Hemisphere sperm whales of 8,000 males and 5,000 females had not been met - only 6,989 and 4,330 respectively were caught. The sub-dividing of catches into 3 areas had not become effective for Japan and the USSR because of their objections. In the North Pacific none of the catch limits was achieved, the catches being 446 fin, 2,585 sei and Bryde's and 8,568 sperm whales compared to limits of 650, 3,000 and 10,000 respectively. The reduction of the fin quota for 1974 to 550 at the 25th Meeting was therefore unlikely to be a sufficient cut to conserve this stock.

(i) Scientific Matters

The number of papers presented to the SC had been growing every year, leading the Committee to refine the advice it gave to the Commission, and to urge upon it new approaches to quota setting. This year the Committee also had available to it the preliminary and challenging report of the FAO/ACMRR Working Party on Marine

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158. Ibid, p.8, para. 5. In 1973/74, 18,298 of these were caught by IWC members, compared to 18,148 in 1972/73.
159. Ibid, para. 6.
Mammals, which gave an important new shift to the direction of scientific research and assessment.


The WP found that the "research effort made by countries has not been adequate to the tasks and responsibilities of the Commission ... a striking feature of the available publications, documents and statistical summaries is that on the one hand assessments are based largely or even entirely on data and research from only one or a few of the countries participating in the whaling, and on the other hand there are many analyses that could be made using existing data which have not been made. ... All countries should make promptly available both operational statistics and biological data". The need for strengthened research was illuminated by considering the place of whales in the marine economy. The WP pointed out that the total values of whale products have not been calculated though this could be done; estimates of the net weights of catches served as approximate indices of value and indicated that the industry, though much reduced, was, because of the rising value of its products and full utilization of the whales, still quite valuable, especially in relation to other world fish catches. So far estimates had all been based on numbers, not weight, though there were several reasons for considering weight.

160. Ibid, p.30, para. 16; SC/26/42; IWC 25th Report, Scientific Committee Report, Annex X, p.253. The WP had established 11 groups of consultants, Group 1, which was given priority, being concerned with large whales and including some members of the IWC Scientific Committee. It was this group's preliminary findings which were reported.


162. Ibid, paras. 8 and 10.
The WP also called into question the assumption that the whales would recover if ultimately totally protected and called for this to be monitored; mathematical models used so far had assumed that the declines were reversible, though sometimes this did not occur as experience with other species showed - though they might be "replaced" by others in the marine economy. 163

In population theory non-reversible models are applied when two or more species are competing for the same limiting environmental factor, e.g. food supply. Evidence suggested that some Southern Hemisphere whale stocks were inter-dependent and the consequences of this for management should be examined also since "biomass is more important than numerical abundance in ecological relationships and therefore relevant to numerical estimates of reproductive rates". The changes in average weight of whales taken during modern whaling had been spectacular. 164 The advice given to the Commission so far had been heavily dependent on measures of catch per unit of effort and on sightings, both of which could have in-built bias. 165

The shifting distribution of effort between baleen and sperm whales in the Antarctic season could also confuse estimates if corrections were not allowed for it. 166 Other factors upsetting calculations related to time spent searching for whales, 167 the fishing power applied, 168 and the aggregation of whales. 169 Even the "best scientific estimates" hitherto relied upon by the IWC in setting

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164. Ibid, para. 10.
165. Ibid, p.257, para. 11. CUE was based on uncertain measures of effort, sightings were non-random being done by industrial not research vessels.
166. Ibid, para. 12.
its catch limits, were unreliable taking account of all the above considerations. It drew attention to the fact that the SC itself had often emphasised the tentative nature of its estimates when related to the data and theories available.  

Finally the WP pointed out that new so-called bio-economic models were being applied to whaling and these two might require the IWC to adjust its policy objectives "since it is not ... realistic from the point of view of resource survival, to presume that the enlightened self-interest of entrepreneurs, economically motivated, even if they are expertly advised, and assured both of universal compliance with regulations and that they will not later be excluded from participation, will ensure either the continued existence of a whale stock, or indefinite continuation of the industry based upon it." Defining the optimal future use of such resources requires the application of social as well as biological and economic criteria.  When Dr. Holt (ACMRR) put some of these views to the Plenary Session the Japanese Commissioner objected that it was a "personal interpretation". The SC appointed a sub-committee to consider the questions raised and to make suggestions for any necessary studies.

170. Ibid, para. 16.

171. Ibid, p.259-260, para. 17. The WP said the new theories indicated roughly that "'enlightened self-interest' can only be a sufficient condition for the survival of a healthy resource if the adopted rate of discount is less than twice the net rate of renewal of the stock near its optimal level". The renewal rates of fisheries are higher than half the current discount rates; those of whales are not.

172. IWC/26/12-3, p.41, Verbatim Record.
(b) **Participation of FAO, UNEP and IUCN in the IWC**

There was increasing concern about the lack of international scrutiny and participation in the IWC's work by other international bodies. As this is a serious current problem of the IWC, proposals for the solution of which are made in Chapter XI, the present role of UNEP and FAO is of considerable importance. The United States now proposed that the FAO and UNEP observers should be allowed to participate in the Commission's discussions. The IWC decided to leave it to the discretion of the Commission's Chairman to invite comments from them when appropriate.\(^{173}\) The FAO, inter alia, was invited to comment to the 26th Meeting and expressed concern for the world food situation which required that the seas resources be husbanded; UNCLOS could play an important role in this - the proposals for extended coastal state jurisdiction were by no means irreconcilable with the IWC's work since there could be a role for international commissions in the new zones and in the world food regime. FAO proposed that the IWC should act more promptly, abandoning its objections procedure in favour of decision-making by a qualified majority, or by resort to arbitration procedures.\(^{174}\)

UNEP (Mr. Curry-Lindahel) and IUCN (Mr. Nicholls), who also addressed the 26th Meeting, indicated that they were prepared to engage in research programmes with the IWC. The former said that UNEP were already working with FAO and its ACMRR on data and

\(^{173}\) IWC 26th Report, p.30, para. 16; see also IWC/26/12-4, pp.32-35, Mr. Fujita (Japan) opposed giving FAO and UNEP more status than other international organisations.

\(^{174}\) IWC/26/12-3, p.16-18; Mr. Boerema (FAO).
resource evaluation, the UNEP Governing Council having decided that it should promote activities to protect living resources, including protection of marine mammals, especially whale stocks.\textsuperscript{175} The latter, calling for research to be more eco-inter-related said that IUCN was publishing a review of small whale fisheries and would cooperate with the IWC, FAO and UNEP in the decade of cetacean research.\textsuperscript{176} The active involvement of UNEP and IUCN, as well as IUCN in marine mammal management, could, as will be seen in Ch. XI., be the key to future organizational strategy.

(c) \textbf{Scientific Research}

The SC established 2 sub-committees to work on research proposals for the International Decade of Cetacean Research (hereafter IDCR) and requested the Commission to forward proposals to FAO, UNEP and other agencies concerned.\textsuperscript{177} It also agreed that additional data on all whales should be provided by member governments and the Schedule was amended accordingly.\textsuperscript{178}

(d) \textbf{Catch Quotas}

The SC repeated its previous year's advice on quotas and urged particular care for the very depleted Antarctic Areas III and IV. A proposal in the TC for a zero quota was amended to 1,000 allocated,

\textsuperscript{175} IWC/26/12-3, p.13-14.
\textsuperscript{176} Ibid, p.11-12.
\textsuperscript{177} IWC 26th Report, p.30, para. 17.
\textsuperscript{178} Ibid, p.28, para. 12; p.34, Appendix lists the new requirements. Some member governments agreed to contribute to the cost of publication by Canada of the report of the important meeting held there to discuss stocks of smaller cetaceans. Ibid, p.28, para. 11; Review of Biology and Fisheries for Smaller Cetaceans, Journal of Fisheries Research Board of Canada 32(7), July 1975, p.875-1240.
as advised, by areas;\textsuperscript{179} this was approved by the Commission with a margin allowed in particular areas as long as the TAC was not exceeded.\textsuperscript{180} The SC also expressed concern for sei whales in certain areas, estimated their replacement yield at 2,500 and urged conservative catch limits. The TC recommended a TAC of 4,500 with quotas for areas but the Commission unanimously reduced this to 4,000.\textsuperscript{181} Estimates of minke whale stock size still caused disagreement in the SC and it was unable to offer any estimate of MSY, merely advising caution in setting area quotas, and that an interim safe harvest would be no more than 5\% of the exploitable population i.e. a maximum quota of 7,000. The Commission accepted this advice.\textsuperscript{182}

For the Southern Hemisphere sperm whales the Committee again advised catch limits by area and sex in 9 divisions, or alternatively by 6 Areas, or failing that 3 regions. The Commission, however, accepted the TC's advice that the catch should be 8,000 males and 5,000 females set for 3 regions.\textsuperscript{183} Argentina drew attention to its alleged exclusive catching rights in Areas I and II which came within its 200 mile zone. The SC found the North Pacific fin whales still well below their MSY level and the Commission reduced the catch from the previous year by 250 to 300, the TC having

\textsuperscript{179} The vote was 11 in favour with 4 abstentions (Argentina, Mexico, Panama, USA) IWC/26/12-3, p.1. The previous year's quota was 4,000.
\textsuperscript{180} IWC 26th Report, p.27, para. 10.
\textsuperscript{181} Ibid.
\textsuperscript{182} Ibid.
\textsuperscript{183} Ibid.
rejected a proposal for a zero quota. \(^{184}\) The SC also urged caution in setting the sei and Bryde's whales quotas. The TC majority advice that the catch should be reduced by 1,000 to 2,000, was protested by the USSR Commissioner, because of the industrial problems it would create, but his counter-proposal of a 2,400 limit was defeated. \(^{185}\) The Commission was also able unanimously to implement the SC's and TC's advice that the North Pacific Sperm whale quotas be held to last year's limit of 6,000 males and 4,000 females, although these numbers had not in fact been caught in 1973/74.

(e) The New Management Procedures

Observers of the IWC were now beginning to demand not only reductions in overall numbers caught, although they still regarded this as important, but that introduction of the eco-system approach to management was now a matter of urgency and that management in general should be more discriminating. \(^{186}\) The 26th Meeting took a major radical step towards meeting these demands by adopting the new management procedures proposed by Australia \(^{187}\) as an amendment to the Moratorium Resolution. The Australian amendment referred to the Conventional requirement that account should be taken of the

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184. Ibid, p.28. The US proposed the zero quota (IWC/26/12-3, p.7-8); Japan stated its absolute opposition; only 4 states voted for the zero quota, with 4 abstentions. The quota of 300 was approved by 10 in favour, none against with 5 abstentions.

185. Only Japan joined the USSR in voting for its proposal, 7 voted against, 6 abstained. The quota of 2,000 was finally approved by 10 in favour and none against, with 5 abstentions.

186. A number of observers made statements to the Plenary Session, see IWC/26/12-3, pp.9-40; J. McIntyre raised the new question of the effect of pollution in Japanese waters on whales, Ibid, at p.25.

interests of the whaling industry and of the consumers of whale products but it also recognised that the management of whale stocks should be based not only on MSY concepts related to numbers and species but should include assessment of factors such as total weight of whales and inter-actions between species in the marine eco-system. It therefore proposed that all stocks of whales should be classified into one of three categories following the advice of the SC, viz:

(i) **Initial Management Stocks** which may be reduced in a controlled manner to achieve MSY levels or optimum levels as these are determined. Commercial whaling would be permitted on these stocks subject to the SC advice as to the measures necessary to bring the stocks to the MSY and then optimal level in an efficient manner and without reducing them below this level;

(ii) **Sustained Management Stocks** which should be maintained at or near MSY levels and then at optimum levels as these are determined, commercial whaling being permitted on these stocks subject to the advice of the SC;

(iii) **Protection Stocks** which are below the level of the above and should be fully protected, there being no commercial whaling permitted on species or stocks so classified, including those species listed for full protection in the current Schedule.

The SC would provide advice which it would update annually on the criteria to be used for the above categorisations to be incorporated in the Schedule by the next Meeting.

The SC approved these proposals as coming within its abilities and terms of reference. The Resolution finally adopted by the Commission referred to "the need to preserve and enhance whale
stocks as a resource for present and future use" i.e. in contrast to a Moratorium on whaling it recognised that whales could continue to be exploited.

A significant step forward had thus been taken towards meeting many of the criticisms of the operation of the IWC and of its Convention, which was proving to be a remarkably flexible document in spite of its superficial limitations. The existence of the amendable Schedule was the key to these new developments. Its re-arrangement to improve its clarity and to comply with some of the International Observer's criticisms described below was also approved at this Meeting. 188

(ii) Enforcement

The reports of the international observers continued to detail many of the minor infractions which hitherto had remained unremarked and had also uncovered several more weaknesses and misunderstandings of the interpretation and import of the Schedule requirements. The Infractions Sub-committee which considered the reports in detail was thus enabled to propose more improvement in the Schedule, e.g. defining "lost whales" and "milk-filled whales". The actual number of infractions reported declined. 189 Brazil reported that it was discussing with Australia the possibility of its inclusion in the observer scheme for the Southern Hemisphere outside the Antarctic. Overall it could be said that the observer scheme continued to work

188. Ibid, p.29, para. 14; The Report of the Working Group on the Legal Revision of the Schedule IWC/31/5 was submitted to the 31st Meeting, 1979; see Chapter X.

well, but there remained concern that non-members of the IWC were
still whaling outside the scheme. The Commission again agreed to
write again to the Secretary-General of the UN and also to UNEP
to solicit all whaling states to join the IWC. 190

(iii) Strengthening the Commission

Moves were taken towards appointment of a full-time scientifically
qualified Secretary and other new staff and finding permanent
Headquarters for the IWC. The Commission now approved a novel and
equitable method of funding to enable these improvements, based
on a flat rate contribution by all member countries of 50%, with
additional contributions of 25% each based on operated areas (i.e.
areas in which each state had undertaken commercial whaling in the
20 year period 1954-1973), and on catches in the preceding year.
This would result in payments by 10 of the 15 IWC members only 191
for the above improvements.

CONCLUSION

The approval of the above financial arrangements to enable
the strengthening of the IWC, the continuation of the IOS and the
introduction of the new management procedures heralded a new era
in the work of the Commission and postponed the demand for a
Moratorium. It remained, however, to see whether the SC would be

190. Ibid, p.30, para. 15.
191. Ibid, p.30-32, para. 18; additional payments were to be made by Australia, Brazil, Canada, Iceland, Japan, Norway, South
Africa, USA, UK, USSR; with Japan, USSR and Norway bearing the largest shares. No comment was made on the absence from
the membership of the Netherlands which would otherwise have been a significant contributor. Some states, namely France,
Japan and Mexico, reserved their positions on aspects of the new formulae. The annual contribution remained at £500
for 1974/75, with £1,000 only contributed to whale marking.
provided, as a result of energetic pursuit of the IDCR, with the information necessary to operate the new procedures and the extent to which the IWC would act upon the advice given by the Committee, within the framework of the present Convention which does not make either course of action mandatory, and the objection procedures of which had recently been utilised. The USA now submitted for consideration a draft Protocol to amend the International Whaling Convention to transform it into an International Cetacean Convention. 192 These and other proposals for revision will be analysed in Chapter XI. It suffices to say here that the proposed Protocol referred to the ecological and aesthetic value of whales; the need for research on the marine ecology of cetaceans; "sound principles of scientific management"; specified appropriate qualifications for the scientific committee, and required more information and analysis by the Commission to enable establishment of "optimum population levels". From this date the Commission has operated in the shadow of these proposals.

1. Introduction

The adoption of the New Management Procedures (NMP) gave the IWC an opportunity to resist the demand for a moratorium on whaling by halting the decline in stocks and rehabilitating them though some doubted whether the IWC could effectuate the necessary innovations, in particular whether the SC would be able accurately to classify stocks under the NMP, without radical changes in its Convention, and in the law of the sea. The IWC's practices from 1975 to the present day are therefore crucial to the final evaluation of the case for a new Convention or for revision of the ICRW, and the nature of the changes required. A detailed examination of the IWC's operations in this period is essential since the minutiae of management have become important: stocks are subdivided in areas and into even smaller units as scientific information accrues and the IWC is having to adapt to this situation.

The demands for a new ICRW pressed in this period are made at a time of rapid development in the law of the sea through the UNCLOS forum, including assertion of 200 mile zones by a large number of states within whose waters whales are found; the consequent modification of existing fisheries agreements such as the replacement of ICNAF by NAFO; the entry into force of new environmental treaties concerning marine mammals, such as the CITES; and advances in knowledge in a number of related disciplines impinging on whale conservation. The period of IWC operations reviewed in this Chapter is thus one of dynamic development in the
law of the sea in general and of that relating to marine mammals and the ICRW in particular.

2. **Twenty Seventh Meeting, London, 1975**

   All 15 members attended this meeting\(^1\) which was the first faced with the task of applying the NMP to a situation of declines in stocks which had been masked by the previous methods of submitting information on them. The 25th Meeting had sub-divided the sperm whale catch in the Southern Hemisphere into areas and the 26th Meeting had extended this practice to the Antarctic baleen catches on the basis of three regions to be further sub-divided into 6 areas by 1975/76. Reports on this basis showed clearly that though in some areas catches had increased in others they had considerably declined. In 1974/75 the total Antarctic pelagic baleen catch was 4,838 compared to 5,680 in 1973/74. Against quotas of 1,000 (fin whales), 4,000 (sei and Bryde's) and 7,000 (minke), only 979, 3,859 and 7,000 had been taken respectively. The oil output was now only 140,312 barrels, and the average catch per catcher's day for fin and sei whales had considerably declined. No land stations operated.\(^2\)

   The quotas of 8,000 males and 5,000 female sperm whales set for the Southern Hemisphere by areas had not been achieved - only 6,677 and 4,497 had been taken respectively but the area returns showed that the catch of males had greatly declined in Area VI and I and risen in other regions. The female catch in Areas VI and I had also drastically declined.\(^3\) In the North Pacific the quotas of 550, 3,000 and 10,000 (6,000 males and 4,000 females) for fin, sei and

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2. IWC 26th Report, p.6, paras. 3 and 4.
3. Ibid, p.8-9, para. 5.
Bryde's, and sperm whales respectively had not been achieved - the corresponding catches being only 411, 2,643 and 8,127 (4,419 females and 3,708 males) respectively. As more detailed information on separate stocks became available the SC's advisory task became more complex and its uncertainties increased.

(i) **Scientific Matters**

The SC had been asked at the previous Meeting to develop the criteria to enable categorisation of the whale stocks according to the NMP i.e. for determining whether stocks were at, above or below MSY, adopted at that Meeting. It held a Special Meeting in 1974 (at which a large number of papers were available) in order to effect this task, and made certain proposals. The Commission now classified the stocks for the coming season on the basis of these proposals pending further consideration.

(a) **Criteria for Categorisation of Stocks under the NMP**

The formula proposed by the SC was as follows:

(i) **A Sustained Management Stock** (SMS) shall be defined as a stock which is not more than 2% of MSY stock level below MSY level, and not

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5. For an up to date and intelligible exposition and criticism of this theory in addition to other works cited see FOE Whale Manual '78, p.68-71.

6. Ibid, Report and Papers of Scientific Committee p.60-234; Report of Special Meeting, La Jolla, December 1974. The UK suggested an alternative formula for an interim period and the Commission at this Meeting asked the SC to evaluate both bases. At the 28th Meeting the IWC accepted the SC advice that it would have a higher margin of error and rejected it.

7. Subsequent meetings have revealed many inherent difficulties.

8. IWC 27th Report, pp.6-7, s.7.

9. Stock for this purpose may be defined by the SC as total, mature or exploitable as appropriate in each case.
more than 20% above that level, MSY being determined on the basis of the number of whales; provided that for stocks between MSY stock level and 2% below that level the permitted catch shall not be more than is indicated by a straight line from zero at the lower limit to 90% of MSY for stocks above MSY level and that it shall not be more than 90% of MSY for stocks above MSY level.

When a stock has remained at a stable level for a considerable period under a regime of approximately constant catches, it shall be classified as a Sustained Management Stock in the absence of any positive evidence that it should be otherwise classified under the preceding criteria.

(ii) An Initial Management Stock (IMS) shall be defined as a stock more than 20% of MSY stock level above MSY level; it is further recommended that the permitted catch for such stocks shall be no more than 90% of MSY as far as this is known, or where it will be more appropriate, fishing effort shall be limited to that which will take 90% of MSY in a stock at MSY level. In the absence of any positive evidence that a continuing higher percentage would not reduce the stock below MSY level, no more than 5% of the estimated exploitable stock size should be taken in any one year.

Exploitation should not commence until an estimate of stock has been obtained which is satisfactory in the view of the SC.

(iii) A Protection Stock (PS) shall be defined as a stock which is below 2% of MSY stock level below MSY level.

The Commission agreed that the limit below MSY level for the SMS and PS should be 10%. Thus all stock assessments had a built in 10% margin to provide a protective buffer for possible errors in calculation.
The Commission now accepted the SC's advice on the sub-division into 6 Areas for the Southern Hemisphere fin, sei and minke whales, and into 9 Divisions for the sperm whales therein, and also accepted its advice on classification of stocks in these Areas and Divisions into SMS, IMS and PS for the 1975-76 season. 4 stocks of fin whales, 2 of sei and one of male sperm whales were henceforth to be totally protected, in addition to the species already protected. The Commission also for the first time introduced quotas for fin and minke stocks in the North Atlantic. 10

The problems following from the IWC's adoption of the new system of discrete allocations of stocks, were now:

(i) making available to the SC the information necessary for them to make accurate estimates of stock status so that stocks can be correctly categorised;

(ii) monitoring the sufficiency of the 10% below MSY level limit for allocation of SMS and PS stocks;

(iii) getting the Commission's approval to implement the scientific advice.

(ii) The Revised Convention Proposals

In the absence of the above information and of reliable assessment techniques, the SC's ability correctly to categorise each stock must be subject to some doubt. The problems of obtaining information are political rather than legal, but their successful resolution has legal implications insofar as the governing Convention does or does not require the transmission of the relevant information

and the application of appropriate management principles.\textsuperscript{11} The Working Party on Amendments to the Convention had made various suggestions for amending the Convention though it had concluded that it would be inadvisable to attempt a revision of the Convention's first Article, concerning the scope of the Convention, before decisions relating to whales had been reached at UNCLOS III. Two problems arose concerning this report: first whether revision of the Convention should be postponed until after the conclusion of the possibly lengthy, or even inconclusive, UNCLOS; secondly, whether whaling states other than members of the Commission should at this stage be brought into the discussions for revision of the Convention (it was not, it should be noted, proposed that non-whaling states should be approached). The Commission at this stage rejected a Canadian proposal that the proposed revisions should be distributed to all whaling states but agreed to circulate them to all member governments for comments.\textsuperscript{12} Neither the UN nor UNEP had reported any positive response from the non-IWC whaling states approached by them at the IWC's request.\textsuperscript{13} A further problem complicating the proposed revision of the Convention concerned the question of whether it should cover all small cetaceans. The SC had now recommended, following the Report of the Sub-Committee on Small Cetaceans, that the Commission should at least consider initially the management of those small cetaceans which were being taken deliberately in directed


\textsuperscript{12}IWC 27th Report, Chairman's Report, p.12, para. 21.

\textsuperscript{13}Ibid, s.22.
fisheries and had listed such fisheries where cetacean stocks needed assessment. It had also recommended that member nations should report kills of cetaceans taken in yellowfin tuna purse seine operations and should collect statistics for other direct and indirect fisheries for small cetaceans.¹⁴

The proposals for a revised Convention persisted, in spite of the NMP, because there were still several respects in which the SC's advice was either not followed or caused controversy, and there were several stocks concerning which the SC felt it did not have sufficient information to set accurate quotas and could only advise caution. For example the SC, supported by the TC, proposed a quota of 6,170 for the Southern Hemisphere minke whales in 1975/76. The USSR proposed 7,000 and a compromise limit of 6,810 was arrived at by the Commission although the SC had expressed its doubts concerning the inter-relationship of the pelagic and land station stocks. The Commission asked the SC to re-examine the catches of earlier years and report further.¹⁵ The catch limits proposed by the SC (and supported by the TC but only by a majority vote) for sperm whales in the Southern Hemisphere were also subjected to compromise. The SC proposal for a catch of 5,870 males and 4,870 females allocated specifically into 9 divisions to protect depleted stocks in particular areas was reduced by the Commission to 6 areas by adding together Divisions 9,1 and 2 and Divisions 3 and 4. The Committee also drew attention to the lack of information on the status of stocks of Bryde's whales in both the Antarctic and the North Pacific and urged

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¹⁴. Ibid, p.9, s.11.
¹⁵. Ibid, p.8, s.8.
caution. There were no catch figures for minke whales in the latter area, though Japan promised to provide them for next year. Although the SC’s proposed catch limits of 5,200 male and 3,100 female sperm whales in the North Pacific were accepted by the Commission this was only after proposed increases to 5,600 and 3,550 respectively had been defeated.16

Dr. Holt reported that a world Consultation on Marine Mammals was to be held in Bergen in 1976 at which the status of stocks of all marine mammals, their inter-relationships and ecological significance and other related problems would be reviewed by a wide group of marine mammal biologists and others interested.17 This Consultation generated a vast number of relevant papers, the effect of which is still being considered and contended in the IWC. Meanwhile the introduction of the International Decade of Cetacean Research (IDCR) had made little progress, although it was part of the case for rejecting the moratorium. The IWC Special Meeting at La Jolla had listed various proposals but for various reasons neither IWC member states nor concerned international organizations had taken any action on them. The IWC adopted a Resolution proposed by the US Commissioner requesting the Executive Director of UNEP to support whale and small cetacean research after examining the La Jolla proposals "Remembering that the UN Conference on the Human Environment, Stockholm 1972, pointed out the necessity of increased whale research".18

17. Ibid, p.9, s.12. The Consultation on Marine Mammals was held in Bergen in 1977. The papers submitted to it have been referred to throughout this work. Only one volume has been published to date, viz. "Mammals in the Sea", FAO Fisheries Series No. 5, Vol. I, FAO, Rome, 1978.
(iii) **Enforcement**

Since the implementation of the IOS this was no longer a serious problem within the IWC; the scheme was reported to be working smoothly still. The problem of unsupervised catches by non-members continued, however.

(iv) **Conclusion**

This Meeting resulted in a major significant achievement, setting the IWC in the direction of better management, namely the preliminary implementation of the NMP by the formulation of criteria for allocation of stocks, and their provisional allocation under the new headings. Demands for revision of the Convention, however, persisted supported by the failure of the IWC fully to follow the SC's advice in spite of the many remaining uncertainties concerning the health of particular stocks, and the SC's professed lack of information concerning many stocks. The Committee again acknowledged in its Report "the deficiencies of knowledge and understanding of the facts and principles involved in applying ecological criteria" and the difficulties "deriving largely from the possibilities of error in its assessments of the state of stocks ... for the present".\(^{19}\)

It added "there will continue to be a risk for many stocks that these errors are large". It found that it was frequently "faced with an array of possible values which cannot be subjected to proper statistical analysis". Thus the best advice it could give the Commission was only "the best estimate" so that "the standard procedure for setting the catch limit for a stock at the MSY level should be to hold catches below the best estimate of MSY by a significant amount".\(^{19}\)

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Shortly before this Meeting the UNCLOS III adopted the first version of its Informal Single Negotiating Text (ISNT) which not only included articles relating to marine mammals, and to highly migratory species, but also to coastal states sovereign rights to exploit resources in Exclusive Economic Zones of 200 miles from their baselines, and to their obligations to conserve fisheries. These have considerable bearing on the development of the IWC and the international law concerning conservation of marine mammals and the relevant articles of the most recent version of the UNCLOS text (ICNT Rev. 1) are examined in Chapter XI.


15 of the 16 member states attended this Meeting, including New Zealand which rejoined. With the advent of the NMP, backed by the services of the improved Secretariat, both the Meetings and the Reports thereon became longer and more detailed as the IWC expanded its role and tasks. Attention was immediately drawn to the need to consolidate the NMP and to the fact that the UK (inter alia) had banned the import of products of baleen whales and was being pressed to prohibit the import of sperm whale products. Public interest and concern for whales had greatly increased. UNEP transmitted a Resolution of its Governing Council urging "increasing efforts for appropriate controls and re-emphasizing its concern

21. IWC 27th Report, pp. 2-3; Chile, Netherlands, Peru, Portugal, Sweden, FAO, UNEP, ICES, IUCN and 7 NGO's observed. It should be noted that the 28th Chairman's Report was included in the 27th Report of the IWC.
22. IWC 27th Report, p.22, s.3.
with the conservation of whales as a global resource". Now that stocks were everywhere depleted, small stocks were particularly at risk. UNEP stressed that their survival may depend on maintaining a critical number of individuals by very carefully defined quotas for particular stocks as far as they could be distinguished.

(i) A Conference to Consider a New Convention

The convening of a plenipotentiary conference to elaborate a new International Whaling or Cetacean Convention was now proposed with a wider scope than hitherto contemplated - the Secretary of the IWC was instructed to convey this suggestion to "non-member governments who conduct significant whaling operations or who have stocks of commercial interest off their coasts", as well as to IWC members. This would disqualify from attendance some observers, past and present, of the IWC, such as Sweden and Italy, although no criteria were given for assessing the "significance" or "commercial" nature of stocks. The objective of this restriction would seem to be to ensure that participants had some appreciation of the economic problems confronting present exploiters and the use of whales as a resource. Other members of the IWC (apart from Mexico) had all at some time exploited whales.

(ii) Catch Statistics

There had, following the recent quota reductions and increased number of protected stocks, been a drastic reduction in the number of catcher boats operating in the Antarctic in 1975/76; Japan had reduced its catchers from 30 to 23 and the USSR from 45 to 33. The quotas set for the Southern Hemisphere were not fully taken up, either

23. Ibid, s.4.
overall or in particular areas with the sole exception of that for sei and Bryde's whales in Area 1. 206 fin whales were taken (against a quota of 220); 1,820 sei and Bryde's (quota 2,200) and 6,034 minke whales (quota 6,810). Oil production was down to 63,547 barrels, less than half the previous season's. The same result occurred for the Southern Hemisphere sperm whale catch - only 7,097 males were taken against the quota set at the 26th Meeting of 8,000, and 4,737 females (quota 5,000), with individual area quotas nowhere being fulfilled (notably in Areas VI and I for which the joint quota was 1,500 and where only 510 whales were taken). The North Pacific catch limits for 1975 fared no better - 162 fin whales were caught against a quota of 3000; 1,192 sei and Bryde's whales (quota 2,000); and only 4,261 male sperm whales (quota 6,000) and 3,598 females (quota 4,000). The new management procedures introduced at the 27th Meeting went a long way to protecting these stocks in future, the fin and sei whales in the last named area being classified as Protection Stocks.

(iii) Scientific Matters

No changes were made at this Meeting in criteria for categorising stocks under the new procedures. The SC were asked in future to classify the North Pacific sperm whale stocks by sub-units to prevent excessive catches from small areas. The SC reported that it had been unable to place some stocks into any of the 3 new management categories because of the lack of information on them viz. fin, sei and minke whales in the North Atlantic. The Commission decided to classify all three as SMS. The blue, humpback, gray, fin, sei and

24. IWC 27th Report, pp. 16-17. It should be noted that there are a number of reasons, other than declining stocks, for failure to fulfil quotas.
sperm whales already classified as PS were all continued in that category.  

The Commission continued to face some problems in relating quota setting to the scientific advice. Though a quota of 1,863 was set for Southern Hemisphere sei whales the SC had not been able to take into account the effects of the substantial early catches and the preponderance of females in them and was uncertain about the recruitment rate. The Committee found the Area IV minke whale stock to be near the border of Initial, and SM stock and proposed alternative quotas depending on the final allocation, viz., of 1,830 and 1,386. The TC, by a majority, adopted the former. In the Plenary Session Mexico proposed the lower figure and eventually a compromise quota of 1,600 was agreed. Brazil noted that the Area II quota of 1,855 would be fished both during her coastal season in her 200 mile zone (from July to December 1977) and during the Antarctic pelagic season (from December 1976 to April 1977). The SC was deputed to consider the problem which, as 200 mile zones proliferated during this period, was to become a growing one.

The SC had again had a Special Meeting in La Jolla to evaluate sperm whale stocks and by applying the models used more conservatively projected lower estimates of SY, leading to lower quotas. Some were accepted without vote but the USSR and Japan proposed higher quotas for male sperm whales in 3 Areas, proposals which were rejected on a vote. Japan and the USSR both stated that they reserved their position on both the male and female quotas.

27. Ibid, p.20.
In the North Pacific the SC drew attention to the fact that a non-member state, South Korea, was also taking a significant number of minke whales from the Western stocks and that this should be taken account of; the quota was accordingly set at 541.\textsuperscript{28}

There was difficulty in setting the small North Atlantic quota since Iceland indicated that much of the sperm whale catch in that area was taken by non-member states; the SC was also undecided whether to advise a quota of 227 - 250 or 406 - 429 for the West Greenland stock of minke whales. The TC's choice of 400 was reduced to 325 by the Plenary Session.\textsuperscript{29}

For the first time the Commission adopted a Resolution\textsuperscript{30} on the bowhead whale fishery off Alaska calling for steps to be taken to limit its expansion and to reduce the rate of whales struck and lost. The US and Mexico were also asked to promulgate measures to prevent the harassment of gray whales in breeding areas.

(iv) \textbf{Small Cetaceans and the need for an organization}\textsuperscript{31}

Action was taken, on the advice of the SC (following the work of the Sub-Committee on Small Cetaceans), concerning stocks of small cetaceans. It had concentrated on species now taken for their own value: the Striped Dolphin; Dall's Porpoise, Harbour Porpoise and the Bottlenose whale. In view of the proposal that any new Convention

\begin{footnotesize}
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\item \textsuperscript{28} Ibid, p.25; Mexico's proposal for a quota of 400 being defeated.
\item \textsuperscript{29} Ibid, p.25, on an amendment proposed by Canada.
\item \textsuperscript{30} IWC 27th Report, p.28, s.25; text at p.33, Appendix 6; a growing number of papers had drawn attention to the decreasing numbers of this species against a background of increasing aboriginal exploitation, some of which was inefficient e.g. for summary of small cetaceans and fisheries therein see FOE Manual '78, Appendix VI, p.111-114; for those in need of protection see E. Mitchell, Porpoise, Dolphin and Small Whale Fisheries of the World, IUCN Monograph No. 3., 1975.
\item \textsuperscript{31} The Report of the Sub-Committee on Small Cetaceans (with 10 papers submitted to it) is at pp.474-520 of the 27th Report.
\end{itemize}
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should include all cetaceans, IWC actions in this respect are of considerable interest. The Schedule was amended to require records to be kept giving particulars of whales taken in "small-type whaling operations", small type whaling being defined as "catching operations using powered vessels with mounted harpoon guns hunting extensively for minke, bottlenose, pilot or killer whales".\(^{32}\) The Commission approved, for administrative purposes, a list of smaller cetaceans of the world,\(^{33}\) noting the SC view that, whilst it was not yet in a position to classify these stocks in the same way as the large whales, some urgent action might be needed for "vulnerable stocks". It asked the Secretariat and member states to initiate increased research in species on which there was direct fishing especially for the Northern Bottlenose Whale (hyperoodon ampullatus) and the Harbour Porpoise (phocoena phocoena) in the North Atlantic; Striped Dolphin (stenella coeruleoalba) and Dall's Porpoise (phocoeniodes dalli) in the North West Pacific. Information and statistics needed to be collected on all small cetaceans listed\(^{34}\) including captive ones, and joint workshops might be undertaken with FAO's ACMRR Small Cetacean Group.

The Commission merely noted the SC's view that an international body was needed to manage stocks of all cetaceans not covered by the present IWC Schedule. The question was referred to the working group considering the revision of the Convention and meanwhile the SC was directed to consider all cetaceans taken for their own value especially the 4 referred to above, i.e. the IWC was careful not to take on the problem of considering all small cetaceans.

\(^{32}\) Ibid, p.25, ss. 10 and 11.


\(^{34}\) The statistics required were listed in Appendix 2, ibid, p.31.
(v) The IDCR

A programme for the IDCR had been produced by the SC which now indicated its priorities, costing £175,000, within it.35 No start had been made on the IDCR since neither UNEP nor any other international research body had offered funding.

(vi) Enforcement

(a) Action to Deter Activities of Non-members Contrary to the ICRW

The catches by non-member states and the continued refusal of those states to join the IWC led the Commission at this Meeting to establish a working group to study the question of adherence of non-member states and the effects of their catches on the IWC. It recommended the adoption of a Resolution by the Commission to be circulated to non-members, drawing attention to the effects on the North Atlantic stocks as a particular example. This was done.36 Resolutions drawing non-member states attention to the effect of their operations on stocks in the IWC's Protected category, and to the possible banning of importation of whale products from non-member states which exploit whales in a manner inconsistent with the IWC's regulations were now also considered.37 Such Resolutions are not of course legally binding but being adopted unanimously by 15 concerned states, including Japan, the USA and USSR, should carry some political weight. The TC also recommended a Resolution prohibiting the

35. Ibid, Appendix 3, p.32.
36. Ibid, Appendix 4, p.32.
37. Ibid, p.26, s.15.
transfer of whaling vessels and equipment and other types of assistance from IWC member states to non-members. The IWC was thus moving towards a new form of enforcement technique, within the framework of Article IX of the ICRW.

(b) **IOS:** The IOS was reported still to be working effectively apart from minor details of reportage; observers reports were available and gave no cause for concern. Extension to minke whales and Arctic bowheads were recommended.

(c) **Penalties:** A major improvement in the IWC's sanction procedures was adopted at this Meeting, namely a recommendation that in future member nations should provide the details of monetary amounts involved in fines and bonuses and the withholding of the same in a common currency, US $, thus for the first time enabling significant comparison to be made of the relative stringency with which individual members punished violations of the Convention.

(vii) **Budget**

The establishment of the new Secretariat, the increased cost of producing the expanded Annual Reports, the growing frequency of attendance by members of the Secretariat at the meetings of other bodies, and the increased costs of Meetings now that the IWC could not meet in UK Departmental premises, resulted in a proposed budget for 1976-77 of £62,000.

38. Ibid, s.16; text at p.33, Appendix 5.
39. Ibid, p.27, s.18.
40. Ibid, p.27, s.18.
41. Ibid.
prompted some states to demand a more equitable distribution of contributions to the budget than then existed. Canada proposed that contributions should include a weighting for "areas of interest", namely areas in which members had, or could express, an interest or "sense of stewardship". The matter was left over pending the obtaining of the views of member governments.

(viii) Conclusion

Having solved many of its original problems such as the BWU, IOS and permanent Secretariat, the IWC was entering an era of new problems the solution of which required a wider use of its powers under the ICRW. The catches of non-member states assumed increased importance as stocks declined and developments resulting from UNCLOS III began to have an impact e.g. 200 mile EEZ proposals. But two new problems merit special attention.

(a) Scientific Information

The complexities of applying the NMP required identification of discrete stocks necessitating detailed information and further research on assessment formulae. Member Governments' obligations under the ICRW to supply the necessary information are, however, weak and confused. It is appropriate at this point in the IWC's history to consider them. The lack of progress on the IDCR indicates that members do not consider themselves under an obligation to undertake research. The Commission can recommend but cannot require it under Articles IV and VI of the Convention. Article VII which does require transmission of information refers

42. Ibid, at p.28.
to "statistical and other information"\textsuperscript{43} without defining the latter. It also requires that this information be passed not to the IWC but to the BIWS which is not a scientific body and this suggests that it is not expected that the other information will be of a scientific nature. This kind of information is required by Article VIII(3) but in very limited terms viz. only "scientific information available to that Government with respect to whales and whaling"\textsuperscript{44} is obliged to be conveyed, not in this instance to the BIWS, but to "such body as may be designated by the Commission", which could include the SC. The duty is further qualified by the phrase "in so far as practicable".\textsuperscript{45} These modifications enable Governments to avoid transmission of information at their discretion. Since there are no dispute settlement procedures under the Convention member governments themselves decide both what information is available and whether it is practicable to pass it on. Information is also promised under Article VIII(b) which states that Contracting Governments "will take all practicable measures to obtain biological data in connection with the operations of factory ships and land stations".\textsuperscript{46} Not only is the undertaking qualified in terms, it is not a general duty to collect information on whales but one restricted to "operations"; when operations cease so does the duty to garner the information. It is however not impossible

\textsuperscript{43} Emphasis added.

\textsuperscript{44} Ibid.

\textsuperscript{45} Ibid.

\textsuperscript{46} Ibid.
for members to interpret their obligations broadly and supply the maximum information.

(b) **Small Cetaceans:** Though the IWC was clearly reluctant to add the large and difficult problem of managing small cetaceans to its tasks, the ICRW does not clearly forbid this. Its Preambular objectives include safeguarding of "whale stocks", and refer also to "whales", "whale fisheries", "whaling operations" and the "whaling industry". The Convention's definition Article, Article II, does not define "whales" or these other terms. Whales are defined in the amendable Schedule, and species listed are added to as necessary from time to time. They now include small whales on which "small type whaling", as also now defined in the Schedule, takes place. This effects Article V, which is the basis of regulations: regulations can, however, be made thereunder both for utilization and conservation. It is arguable that protected and unprotected species can be designated for either purpose but as the relevant section (Article V(1)) uses the word "and" not "or" it is also possible to contend that conservation is required only as necessary for utilization and that small cetaceans not used in some way are outwith the scope of the ICRW. Again it would not seem to be impossible for Contracting Governments to take the broader interpretation should they agree to do so.

4. **Twenty Ninth Meeting, Canberra, 1977**

This Meeting had the fullest and most diverse aganda of any to date. It revealed the enormous complexities of the problems of living resource management for the Commission. UNEP's stated goal of making management bodies aware of the conflicting aspects
and inter-sectoral relationships of environmental problems had certainly been achieved. To add to these difficulties FAO drew attention to the IWC's importance within the UN demands for a New Economic Order. 47

There were now, since the Netherlands rejoined the Commission, 48 17 Members of the IWC, the largest number for many years, all of which attended this Meeting. 49 For the first time scientifically qualified observers were permitted to attend the meetings of the SC 50 and the Press were admitted to the opening and closing

47. IWC/29/7 Verbatim Record, p.34, Holt (FAO) considered that this required the IWC to ensure that "the peoples of the world may in future have the option to decide how these resources may best be used".

48. Its stated reasons for rejoining were interesting: not only its past interest in whaling but the interests of nature conservationists in the Netherlands. It added it was not very likely to resume whaling in the future. IWC/29/7 Verbatim Record pp. 23-24.

49. IWC 28th Report 1978, p.14-15. Observers were Chile, S. Korea, Peru, Spain, Sweden, FAO, ICES, ICSEAF, IUCN (not UNEP) and 10 NGO's.

50. Effect by adopting Rules of Procedure for the SC. and Rules of Conduct for observers at meetings. Rule 1 of the latter adopted the definition of "international organization" used by the Union of International Association (UNESCO) "An international organization is any organization with offices in more than three nations". Appendix I of Chairman's Report, Ibid, p.27-28; the IWC hoped to reduce the number of NGO observers. Rule 4 is somewhat ambiguous; it recognises that FAO and UNEP's observers attend the SC meeting "as scientists" with the status of advisers to the Committee. The representatives of other organizations "with similar scientific standing" may also be given the same status in that Committee "subject to the agreement of the Chairman of the Committee" acting according to such policy as the Commission may decide. This rule does not appear to require that the FAO or UNEP representatives be scientists but 4(b) provides "Any other international organization sending an accredited observer to a meeting of the Commission may nominate a scientifically qualified observer to be present at meetings of the Scientific Committee". The acceptability of the qualifications is determined in advance by the SC Chairman. Observers cannot take part in discussion or present papers but receive all the committee papers. A quota can be imposed but normally a minimum of 5 will be admitted.
Plenary Sessions of the Meeting. The Commission was endeavouring
to refute the criticism that its proceedings were not sufficiently
open to international scrutiny and advice although the ICRW
recognized "the interests of the nations of the world" in its
objectives.

The Australian Minister opening the Meeting (the first to
be held in Australia), pointed out that more was now known about
whales than any other marine stocks and stressed the progress
now made by the Commission. He added that the Commission's
"future role within the newly emerging Law of the Sea ... its
ability to continue its work within the extensions of maritime
jurisdiction is critical to its future effectiveness and the
maintenance of expertise built up over many years", and was
a question to which the Commission would address itself. This
Meeting was preceded by 2 other meetings of great importance to
the IWC's operations - the FAO Mammals in the Sea Consultation
held in Bergen in 1976 and a Conference on Living Resources in
the Southern Ocean held at Woods Hole in 1976. IWC representatives
had taken an active part in both, and now brought into the
Commission increased perceptions of the need to interrelate
management of all marine mammals with other species sharing
their ecosystems, and to relate the work of the IWC to other
bodies.

51. IWC 28th Report, IWC/29/79 Verbatim Record p.4, Mr. Sinclair.
52. IWC 28th Report, p.24, s.20.
Problems Raised by 200 mile Fisheries Zones

The Japanese Commissioner (with the USA's recent legislation in mind) accused some delegations of using the NMP as a means of achieving goals incompatible with it, specifically the moratorium; and warned that the international management of whale stocks would collapse if some states used their new 200 mile zones to enforce their own ideas of management. The problem is not, however, confined to the USA's actions. About 112 countries which are not members of the IWC may have stocks of cetaceans off their coasts, and by 1978 almost 70 coastal states had extended their jurisdiction over fisheries up to 200 miles.

Australia drew attention to the problems created by the growing number of 200 mile fisheries zones and the Article (Article 54) concerning marine mammals that had now been included in the Revised Single Negotiating Text (RSNT) produced at the 4th Session of UNCLOS III in 1976. This Article did not specifically exclude the IWC from playing a role within the

53. Mr. Yonezawa (Japan) IWC/29/79 Verbatim Record p.20. He was referring to the fact that in 1976 the United States had enacted a Fisheries Conservation and Management Act extending its fisheries jurisdiction to 200 miles, introducing strict enforcement measures and amending the Marine Mammal Protection Act which provided for a moratorium on whaling in United States jurisdiction, to cover this 200 mile zone. The problems raised by these Acts in relation to the IWC are discussed in Chapter XI. The USA refuted the Japanese allegation by pointing out that Congress had taken a strictly conservationist line to protect porpoise stocks, in spite of strong lobbying from the United States tuna fish industry which sought to modify the MMPA to accommodate its economic interests. Legislation now required tuna purse seiners, including foreign flag vessels fishing within US fisheries jurisdiction, to carry observers. Hon. P. McCluskey Jr. (USA), Ibid, pp. 13-14.

54. IWC/29/14 Appendix I lists these countries not all of which are independent. See also Appendix IV.


200 mile zones but gave the coastal state the right to prohibit, regulate and limit exploitation of marine mammals therein. Australia suggested that the IWC might consider whether Commissioners should take up with their governments the possibility of not exercising such coastal state control over whales managed by the IWC, and whether member states should agree to exercise the management recommended by the IWC by means of their national legislation. Australia also pointed out that though most present whaling by non-member states of the IWC took place in the prospective 200 mile zones such states were not required by Article 54 to participate in the IWC. 57 As this and other relevant Articles have now been included in revised versions of the UNCLOS negotiating texts this problem is examined further in Chapter XI.

(ii) Scientific Matters

(a) IUCN Principles: The SC had transmitted to it an IUCN Resolution (arising from an IUCN workshop on wild living resources) on "Principles replacing maximum sustainable yield as a basis for management of wildlife resources". 58 To the extent that they

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57. RSNT, Article 54 only required states to "cooperate directly or through appropriate international organizations" with a view to the protection and management of marine mammals.

58. IUCN Resolution No. 8 of 12th General Assembly of IUCN 1976 cited in Report of SC IWC 28th Report, p.43, sec. 10.1, with specific comments on each principle. The Principles include:

1. "The ecosystem should be maintained in such a state that both consumptive and non-consumptive values can be realised on a continuing basis, ensuring present and future options minimising the risk of irreversible change or long-term adverse effects;

2. Management decisions should include a safety factor to allow for limitation of knowledge and imperfections of management;

3. Measures to conserve one resource should not be wasteful of another.

4. Survey or monitoring, analysis and assessment should precede planned use, and accompany actual use, of a resource and the results should be made available promptly for critical public review".
were value judgments on the objectives of resource use the SC found them outside its competence. 59 In commenting on other aspects which did affect its work the Committee agreed "that recent literature pertaining to the economics of fishery resources management indicates that there are advantages in maintaining stocks at levels above MSY". 60 This policy could however be operated under the present Convention since its Preambular aims include bringing stocks to an "optimum level" which (being undefined in the Convention) allows economic and other criteria to be taken into account. The Committee dealt point by point with the IUCN Resolution. It recognised the existence of many of the variables referred to in the IUCN Resolution, such as environmental and ecological factors, 61 but it already had powers to take account of these 62 and it still considered that "the theoretical MSY level and a yield can provide a useful guide for management purposes"; it agreed that single species models incorporating reasonable safety factors were the only appropriate

60. Ibid, p.44.
61. It pointed out that "the Commission does not have management options over the whole ecosystem" but does have information on the system and can manage in that context. Dr. Holt drew attention to factors such as increasing catching efficiency in relation to calculations of CPUE which were perhaps not yet sufficiently taken into account in estimating stock size. Ibid, p.45, para. 10.1.4.
62. "Without prejudicing their sufficiency" the Committee listed 6 safeguards employed in its operations - population size was estimated before exploitation began; catches on IMS were restricted to 5% of estimated initial stock size; only 90% of MSY was caught of stocks at MSY level; stocks below 90% of MSY were protected; the catches of non-member states were taken into account in fixing IWC quotas; quotas were revised annually and strictly enforced under the IOS.
basis for management in the absence of other information. The models used can be amended as data accumulates, though the Committee accepted that this is only a step towards "the desirable objective of constructing realistic multi-species models for fisheries management". The Committee drew attention to the fact that the IWC Schedule already required that "Exploitation (on a stock) should not commence until an estimate of stock size has been obtained which is satisfactory in the view of the Scientific Committee", and that it already made the relevant information publicly available.

(b) The NMP: No new categories were added to the new management classifications although the SC was considering this to cover stocks for which adequate stock information did not exist. It also agreed to consider a UK proposal that the margin for safety now allowed for errors in stock calculation should also take account of the consequences of harvesting on the variability of populations coupled with the lag in implementing regulations arising from the IWC's procedures.

(c) Catch quotas: The SC's proposed catch quotas for the male and female sperm whales in the Southern Hemisphere for the 1977/78 season, set separately for males and females in each of the 9 Divisions, were accepted by the Commission. Overall quotas amounted to 4,538 for males and 1,370 for females. A Japanese proposal that catches in each division might exceed individual quotas by 10% as long as the overall quota was adhered to was accepted but Japan's suggestion that the catch limit be set at

63. IWC Schedule 1976, para. 6(b).
MSY plus 10% of the amount by which the stock of males exceeds the MSY was not, in the light of the unreliability of present information. It was agreed however that the SC should examine possible quotas for IMS of sperm whales and re-examine the new management procedures as a whole.

The SC had found itself unable to classify the Southern Hemisphere minke whale stocks because of lack of data and advised only conservative exploitation for one year pending analysis at a Special Meeting. Meanwhile the SC put forward 3 choices of catch limits; it advised adoption of the lowest - 5,690 - which was accepted by the Commission on the majority recommendation of the TC after proposals by Denmark and Japan for higher quotas had been defeated. Sei whale quotas also caused difficulty since, being uncertain of eventual stock levels, the SC produced alternative analyses on different bases. Japan and New Zealand proposed reclassification of the stock and quotas but this was defeated in the TC which, by a majority, recommended the more conservative analysis. This was adopted by the Commission which retained PS status in Areas II, III, V and VI. All other species except Bryde's whales, which were classified as IMS (but given no quota), were continued as PS, viz. right, blue, humpback and fin whales.

64. The higher Japanese calculation of a replacement yield of 7,729 was felt by most members of the SC to involve "an unwarranted number of assumptions regarding the calculation of present stock sizes; calculations done as in past seasons by the 5% rule (of estimated stock size at start of exploitation) gave a figure of 8,900. SC Report IWC 28th Report p.54, s.11.2 at pp. 56-57.

65. IWC 28th Report, Chairman's Report s.9, pp.19-20; 2 states voted against this quota and 2 abstained.

66. Ibid, p.20. One based on CPUE and one on changes in pregnancy rates.
The more discriminating policies now pursued by the IWC led to the western North Pacific stocks being divided into two discrete SMS stocks - the Okhotsk Sea (for which a quota of 400 was fixed) and the Sea of Japan stocks for which no quota could be agreed. The latter stock was fished mainly by the non-member IWC states such as Korea. The Commission had to content itself therefore with adopting a resolution directed towards Korea (which had an observer present) urging it not to increase catches. Japan agreed to do likewise. The rest of the North Pacific stocks were classed as IMS but could not be given a quota until more work was done on stock size calculation. Bryde's whale quotas in the area caused even more dispute since the SC, on the basis of different formulae, put forward 3 choices - giving quotas of 524, 870 and 1,216 respectively. The TC by a majority, overrode the Japanese preference for 870 and recommended 524. The Commission rejected the same Japanese proposal by 2 votes to 14 and approved the lower figure by 14 votes to 2.\(^{67}\) Sperm whale quotas provoked controversy also. The SC acknowledged the existence of two stocks but could not segregate them in their feeding and catching grounds because of the many uncertainties, it proposed setting interim conservative quotas pending a Special Meeting. Japan proposed that a quota be set but that it should become ineffective after the Special Meeting. Both these approaches were defeated and a Canadian compromise was adopted.\(^{68}\)

\(^{67}\) Ibid, p.20.

\(^{68}\) Canada proposed: 0 males (PS); 763 females (SMS); a Special Meeting of the SC, followed by a Special Meeting of the Commission unless the former meeting was found not to justify it; an attempt to apply quotas to both stocks. IWC 28th Report, pp. 20-21.
A Japanese request that the SC should consider step by step reductions to minimise economic dislocation resulting from analyses from the purely biological standpoint was agreed. All other North Pacific species retained PS status and zero quotas but the Commission noted that the SC was going to reconsider the gray whales' PS classification and requested Canada, USSR, USA and Mexico to make available the necessary data. It also asked the two last-named states to reduce harassment in breeding areas which was growing since whale watching became a tourist attraction. The effects on gray whales of industrial development on the continental shelves was also noted now to be causing concern.

The Commission adopted the new geographic boundaries for classifications and quotas for fin, sei and minke whale stocks in the North Atlantic as advised by the SC and accepted by the TC, and also the classification of bottlenose whales as a PS in that area pending the accumulation of sufficient information for classification. Stocks of blue, humpback and right whales remained PS and it was decided that even the exemption allowing the aboriginal catching of 10 Greenland humpbacks should be reviewed at the 30th Meeting.

69. Ibid, p.21. Iceland suggested that there might be more than minke whale stock in the E. Greenland-Iceland, Jan Mayen area. Canada agreed to help fund a Norwegian investigation of the Norwegian small whale minke fishery. A Resolution was adopted to be forwarded to Spain and Portugal (non-members) relating to their catches of the North Atlantic sperm and fin whales; and to Portugal concerning her catch of right whales. The Commission in fixing the sperm whale quota took account of catches of non-IWC members who were asked to provide data and undertake research and confirmed 2 fin stocks and one sei whale stock as PS.
(d) The Special Case of Arctic Bowhead Whales

Finally the Commission considered the plight of the bowhead whale in the Arctic which it found to be the most endangered of all species despite 40 years of protection from industrial exploitation. The growing prosperity of Eskimos had lead to increased catches from the Bering Sea stock with more use of the shoulder gun and more whales being struck and lost. This stock was giving great cause for concern, since the present kill rate of 5% was the rate allowed for commercial catches of IMS stocks. There was also increasing fear that the species' habitat might be polluted or destroyed as a result of oil developments in the region. The Commission not only continued the PS status of the stock but deleted the exemption in favour of certain aboriginal fisheries by amending para. 7 of the Schedule (as at November 1976) by deleting the reference in the exemption clause to "right whales". This created problems for the USA which was anxious to protect the cultural rights and subsistence needs of its ethnic minorities but it undertook to implement the IWC regulation when national legislation problems were removed and meanwhile promised to undertake an intensive investigation of the size of the stock.

70. Ibid, p.22.
71. The US challenged the legality of this action on the grounds that para. 6(a) referred to banning "commercial whaling" and that aboriginal whaling did not come within this definition. In a legal opinion Dr. D. Bowett Q.C. rejected this argument and advised that the proposed amendment was legal within the ICRW. Opinion of 16 November 1977 kindly made available by Dr. Bowett.
The primary task of the IWC, its setting of quotas, has, it is apparent from this account, now become a highly specialised process, involving increasing nicety of calculation. In spite of its improved new approaches, the Committee's work still has many critics because the possibility of error in its calculations is still in their view very high (the Committee itself continues to admit that it does not have enough information on many stocks to give reliable assessments and classifications and itself produced widely divergent alternatives), because the IWC's member governments do not provide the necessary information and research. It is therefore important to examine the further steps taken at this meeting to remedy these and related shortcomings.

(e) **Scientific Permits**

It had been suggested that scientific permits were being used as a way of evading the stricter quotas (Japan had taken 250 Bryde's whales by this means in 1976). Although the Convention did not provide for prior submission of permits to the SC for approval, the Committee now recommended under Article VI that it should review permits before issue, and submit reports and make recommendations thereon to the IWC. The Commission

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72. It was alleged that little information had been derived therefrom; FOE Whale Manual '78 p.36.
agreed to amend the Rules of Procedure to enable this. 73

(f) Related Bodies and Conferences

About this date numerous new developments in the international law affecting marine mammal management began to occur. The IWC is now increasingly faced with the problem of interrelating its regulations and recommendations with those of other concerned bodies.

(i) The Bergen Consultation on Marine Mammals 74

The IWC received a full report from its Secretary on the above Consultation convened by FAO and others. He drew attention to the long list of research needs concerning marine mammals that had been drawn up at the meeting, though no priorities had been allocated and commented that "the list does provide, however, convincing evidence of the incompleteness of the present account

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73. *Chairman's Report*, Appendix 10, p.32, Rule XVII, 1976. Amendments to the Commission's Rules of Procedure etc. See the views in particular of IUCN (per Menk), IWC/29/14 Verbatim Record p.40. The IWC subsequently sought an opinion on the legality of thus amending the Schedule; see IWC/31/9. D. Bowett Q.C. advised that, subject to the SC confining itself to comment (since member governments under the ICRW retained control over issue and detail of permits) the amendment was lawful. Review of permits was a proper function of that Committee, implicit in Article VIII(3) and (4). Contracting Governments are obliged under Article VIII(3), to transmit "scientific information" which can properly be construed to embrace prior notification of permits; Schedule amendment is an appropriate procedure for effecting this requirement, but the amendment must, however, be consistent with Article V. In these circumstances there would be no infringement of member government's sovereignty; the amendment would in any event be subject to the 90 days objection procedures. Opinion (undated) kindly made available by Dr. Bowett.

74. IWC/29/16, Appendix A, Dr. R. Gambell; "Observer's Report on the FAO 'Mammals in the Sea' Consultation", Bergen, September 1976; also summarises the guidelines for assessing priority of marine mammal research laid down by FAO ACMRR/WP/MM Legislation Unit with a view to maintaining a continuing inventory of national legislation sources and decisions of international organizations concerning marine mammals and their habitats, including sources specifying regulation of harvest, resource use and protection.
of marine mammal resources and the data base on which management decisions are generally made" and that the consultation emphasised the need for organization of resources on an international scale, as proposed in the IWC's proposals for an IDCR. Although the consultation had pointed the need for international monitoring of whale stocks it had not considered the means of paying for such an undertaking. In the Secretary's opinion the only work of real value to stock assessment was contributed by the active whale biologists already associated with the IWC. One criticism which was "a source of real contention", however, was the alleged secrecy of the IWC's operations compared with other fisheries bodies; it was alleged that there was insufficient time between the meeting of the SC and the submission of its advisory report to the Commission to allow public comment or review.

It had been proposed by FAO's ACMRR Working Party on Marine Mammals that UNEP and FAO and other concerned international organizations should consider instituting an International Fund for Marine Mammal Research and Conservation supported by intergovernmental organisations of global scope led by UNEP and related to other relevant programmes such as the LEPOR (Long-term and Expanded Programme of Ocean Research), established by the UN General Assembly, and to the IOC's work. Priority should be given to projects to restore endangered and threatened species of which there were several.

75. Ibid, Appendix A.
(ii) Southern Oceans Conference:

An IWC observer reported on the Conference on the Living Resources of the Southern Ocean, the interests of which were closely allied to the IWC's and for which the latter's SC had provided much of the information on whales. The observer commented that "of all the Antarctic living resources the data on whales are the most complete and form the base for examination of other eco-system components." Thus the IWC's figures for the present and initial whale stocks and biomass had allowed the conference to make estimates of the past and present consumption of krill in Antarctica on which otherwise the quality of data was poor. The relations between the major eco-system components in the area, including whales, were discussed, but it was apparent that much more work needed to be done before a conceptual model of significant management value could be devised. Although the relationship between krill harvesting and whale conservation had been discussed the general feeling of the Conference had been that there would be no conflict between the two for the next decade during which SCAR's BIOMASS project would be carried out.

(iii) CITES:

Agreement had been reached at CITES' first Meeting on categorisation of species and taxon by evaluating biological and


77. Biological Investigations of Marine Antarctic Systems and Stocks pub. SCAR and SCOR 1977; Vol. I lists research proposals prepared by the Group of Specialists on Living Resources of the Southern Oceans SCORWG 54; it includes research on krill and the ecological abundance of marine mammals, interactions and objectives.

78. IWC/29/23, Report by J. Berney, Executive Secretary CITES on First Meeting of Conference of Parties, Berne 1976: see also RG/PRP/667.
trade statistics together. They would be classed under Appendix I if on biological grounds they were threatened with extinction and if further they were or might be affected by trade in them for any purpose. Trade in Appendix I species was banned. Appendix II species were those which, on the basis of biological information, might become threatened with extinction and if subjected to trade would be likely to become so. Criteria had also been evolved for removal of species or other taxon from these Appendices. The problems caused by these listings in relation to the IWC are discussed further in the next Chapter. Clearly the IWC analyses for purpose of classification of stocks as Protected Stocks under the new management procedures are very relevant to CITES assessment and classifications on biological grounds, and there is scope for confusion if a close relationship is not maintained, especially since the membership of the two bodies is not identical. The IWC agreed to offer its services to CITES as adviser on cetaceans and also adopted a Resolution calling on its members to prevent import into their countries of whale products from non-member nations.

79. Canada explained that the IWC can supply expert evidence to CITES on the status of whales in relation to their criteria, and CITES could aid the IWC by discouraging commercial exploitation of badly depleted species of whale stocks. IWC 29th Report, p.23-24, s.18. The US pointed out that to implement IWC listings fin and sei whales should be listed under CITES Appendices I and II. The UK reviewed cetaceans for classification under CITES criteria. At CITES meeting, March 1979, it proposed that all cetaceans should be classified under one or other Appendix and will propose further that all whale products should be subject to CITES controls. Marine Action Centre Newsletter (1) 1979, p.16. "UK Proposals concerning Cetacea" produced by Nature Conservancy Council for UK Dept. of the Environment, 1979 and criticism of those relating to Great Whales by R. Gambell (note kindly made available to the writer by him).
(iv) **ICES; ICCAT:** The IWC observer at the meetings of ICES,\textsuperscript{80} reported that it was concerned at the decline of harbour porpoises in Swedish waters, possibly because of the effect of PCB's; and the one at ICCAT\textsuperscript{81} stated that it had been given authority to employ a bio-statistician - both developments are of considerable import for the IWC's future policies.

(g) **Enforcement**

(i) **IOS:** This continued to operate satisfactorily and observers made a number of recommendations which were implemented by the IWC, which now recommended that Japan and the USA should consider expanding the IOS in the North Pacific to cover minke whales, that Denmark and the USA should introduce it in Greenland and Alaska for the Arctic bowhead whale and that the possibility of a scheme should be researched for minke whale fisheries in the North Atlantic.\textsuperscript{82} Brazil and Australia had still not concluded their negotiations for a mutual IOS agreement.

(ii) **Penalties:** The Infractions Sub-Committee had found it difficult to make a direct comparison between the penalties applied by individual member states even though they were for the first time reported in a common currency, since they were reported en bloc. The smallest penalty applied for an undersized whale had been $5.5 by Australia, and for a lactating whale $14.66 by the USSR;

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81. Ibid, Appendix D, Observer's Report on Meeting of ICCAT, Madrid, Nov. 1976, by Sckagava. It had also been enabled to establish a computer data base, to speed up processing of statistics and to institute intensive research in an "International Skipjack Year".

82. IWC 29th Report, p.24-25, s.21.
the USSR had inflicted the highest penalties for both offences - $237 and $488 respectively; moreover it had imposed a total of $21,144.50 for a total of 68 offences compared to Japan's total of $4,301.00 for 25 offences out of totals of 12,762 and 9,848 whales taken respectively. The Commission decided that in future member states should provide the information on penalties for each infraction separately.

(iii) Non-members: As none of the existing non-member whaling states had joined the Commission it continued its practice of addressing Resolutions to non-members in the hope that these states would observe and enforce the policies advocated therein. Resolutions were accordingly adopted on the Sea of Japan stock of minke whales, the Spain-Portugal-British Isles fin whale stock, the North Atlantic sperm whales, and right whales at Madeira. The Chairman was also instructed to write to all non-members who took significant numbers of whales enclosing lists of stocks and inviting them to send information and join in studies thereon.

83. IWC/29/18.
84. IWC 29th Report, p.24, s.21.
85. IWC/29/15, Adherence of Non-Member Whaling Countries etc.
86. Ibid, p.29, Chairman's Report, Appendix 2, addressed to the Peoples Republic of China, the Democratic Peoples Republic of Korea and the Republic of Korea.
87. Ibid, Appendix 3, addressed to Spain.
88. Ibid, Appendix 4, addressed to Spain and Portugal.
89. Ibid, Appendix 5, addressed to Portugal.
90. The states concerned were Chile, Korea, Somalia, Spain, Portugal and Peru, IWC/29/15.
(iv) Ban on transfer of whaling vessels and importation of whale products: The IWC adopted a further resolution calling on its members "to take all practicable steps to prevent the transfer of factory ships, whale catchers, or gear, apparatus or appliances used in the conduct of whaling operations, and to discourage the dissemination by its citizens of expertise and assistance necessary to the conduct of whaling operations in any form" including training, designing ships and land stations etc., and giving financial aid to "any nation or any entity under the jurisdiction of any nation which is not a member of the IWC". Although the objective of this resolution stated that such transfer "seriously detracts from the effectiveness of the management procedures adopted by the IWC it should be noted that if the non-members concerned do join the IWC" the ban would not apply to them; although they would, of course, be subject to IWC regulations, they could not be eased out of whaling by the effect of observance of the above resolution.

Reference has already been made, in connection with the objectives of CITES, to the IWC resolution calling on members "to take all necessary steps, including such amendments to their laws and regulations as may be required, to prevent the import into their countries of whale products from the non-member nations, in the interests of ensuring effective conservation." Members were required to report to the 30th Meeting on the measures taken to


92. S. Korea, Chile, Peru and Spain joined the IWC in 1979, 31st Meeting, IWC/31/3.

implement this resolution which is open to the same possibilities as the above - if the non-members join the IWC their products can be imported by members.

(h) Revision of the Convention: 94

(i) Extension to Small Cetaceans

The Working Group on this topic had collated into a single document the proposed revised texts and the amendments thereto proposed by member states. The Commission had decided not to confine the possible meeting to discuss the revision to member states but to circulate the textual document to all countries which have commercially exploited stocks of cetaceans off their coasts, 95 as a basis for convening a plenipotentiary conference


95. Ibid, p.23, s.16. This was interpreted as applying to states with substantial or exploitable stocks and not the 112 countries listed in IWC/29/14, Appendix A. Copies were sent to

| Argentina | Mexico |
| Australia | Netherlands |
| Brazil | New Zealand |
| Canada | Norway |
| Chile | Panama |
| China | Peru |
| Cyprus | Portugal |
| Denmark | South Africa |
| France | Spain |
| Iceland | Tonga |
| Indonesia | United Kingdom |
| Japan | United States of America |
| Korea - Republic of | Union of Soviet Socialist Republics |
| Korea - Peoples Democratic Republic of |

N.B. Many more states have small unexploited populations off their coasts, especially of small cetaceans.
in 1978 to prepare for a revision of the Convention. It was left open whether the proposed revision would be restricted to a convention of the same scope as the present one i.e. limited to regulation of whaling, or whether instead it would include all cetaceans as proposed in the United States Draft. The Commission meanwhile accepted the SC's advice that "small type whaling" should be re-defined to include bottlenose, beaked, pilot and killer whales but it did not amend the Schedule to require the detailed reporting thereon proposed by the Committee, in spite of strong USA support, because of Japan's objection that the existing Convention did not cover small cetaceans. A non-binding resolution on reporting requirements was passed instead. The list of small cetaceans compiled by the Small Cetacean Sub-Committee had been accepted by the Commission at its 28th Meeting for administrative purposes only and it had then merely noted the Sub-committee's view that there was need for an international body to manage stocks of all cetaceans not covered by the present IWC Schedule, a matter to be considered also by the Working Group on a revised convention. Although the Secretary had been instructed by the Commission to ensure the collection of data, because the Schedule had not been amended to require this he had not been able to take any positive action and thus no information was in the event made available. Nor had there been

96. The Schedule Interpretation Section was amended accordingly, IWC 29th Report, p.22, s.10.
any response to the Commission's recommendation that member governments should initiate or augment research on direct fisheries for small cetaceans i.e. those taken for their own value which were now subject to consideration by the SC. The IDCR had made very little progress because of lack of funds and other support either from member states or from concerned international organizations. Voluntary contributions to the research fund had amounted to only $18,000 ($13,000 from the USA and $5,000 from Canada).

(ii) Relation to UNCLOS III

Not only was the Commission left in doubt about the scope of the proposed revision but there was also uncertainty about the relation of revision at this time to the progress of the continuing UNCLOS III, now in its 5th and 6th Sessions, which had in all three versions of its informal negotiating texts produced by this date, viz. ISNT, RSNT, ICNT (1977), included articles on highly migratory species and marine mammals. Australia repeated its view that as the latter article gave the coastal state in its proposed 200 mile EEZ, the unfettered right to prohibit, regulate and limit the exploitation of marine mammals but alternatively gave the same right to an "international organization as appropriate" it did not specifically negate the possibility of the IWC continuing to manage whaling within EEZ's. Australia again suggested that the Commission could under such a regime either propose that member governments might consider not exercising their coastal state rights

100. IWC/29/22. Australia was commenting on Article 54 of the second version of the text (RSNT) available at the date of its paper.
over whales managed by the IWC, or, alternatively, that they might, by means of their national legislation, all agree to exercise the management controls over such stocks that had been recommended by the IWC.

(i) Conclusion

These problems will be considered in detail in the next chapter in connection with other current problems impinging on global management of cetaceans. The IWC, in its attempt to apply the NMP, had entered a new era. It is apparent from the variety, complexity and inter-relationships of the matters now considered by it that this process is now a much more intricate and interdisciplinary one than was ever envisaged by those who founded the Whaling Commission on the basis of its present Convention. The movement for revision therefore continued, as did the complex agenda.


In view of the length of agendas of the 2 most recent meetings, and the fact that reports thereon were not available at the time of writing, it is not possible within the confines of this work to detail recent proceedings of the IWC to the same extent as earlier Meetings. The 30th Meeting was attended by all 17 members of the Commission, and an increased number of observers. The complex agenda arose from the detailed review required by new management procedures, the growing number of related problems and the demands for review of the legal basis of whaling in the light of the

101. The report of this meeting became available in July 1979 after this Chapter had been written. It was however attended and reported on by the writer. See P. Birnie and R. Sandbrook 30th Meeting of the International Whaling Commission, 26-30 June 1978, London, U.K.; Marine Policy 3(1) January 1979 p.69-72.

102. Observers were Belgium, Chile, S. Korea, Peru, Spain and Sweden; UNEP, FAO, IUCN, and 21 NGO's and other international organizations.
changing international law outside the convention. Discussion of many of the issues considered at the 29th Meeting continued; only significant changes in or additions to the Commission's measures will be discussed below.

(i) Scientific Matters

(a) Quotas under the NMP: The Meeting had been preceded by a Special Meeting in Tokyo on sperm whale stocks but the SC still could not complete its report on sperm whales in time for the 30th Meeting. The Commission therefore decided to hold another special meeting in November 1978 to review both Northern Pacific and Southern Hemisphere stocks and to hold a meeting of the IWC immediately thereafter to set quotas before whaling operations started. Meanwhile after much debate because there was no scientific basis for figures, the IWC agreed to accept an ad hoc proposal, that until the special meeting quotas in Areas V and VII should be reduced 25% from 1977/78. No figure was set for the N. Pacific. A special meeting had also been held to consider minke whale stocks but in spite of this the minke whale sub-committee reported that under the present management procedures it could not appropriately classify the stocks even if satisfactory calculations were available and there was some doubt that they were. A catch limit to the replacement yield (7,191) was fixed as a holding measure, and concern was expressed that the Republic of Korea had increased its catch on the Sea of Japan stocks from 447 in 1976 to 1033 in 1977.

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104. The cost of holding meetings, and other costs had necessitated a budget of £116,692 for 1978/79. The proposal to hold extra meetings therefore met with some opposition.

105. In Seattle, May 1978. The 1977 catch limits had been interim ones only, pending more detailed information and analysis.
(b) **The Bering Sea Stock of Bowhead Whales**

Controversy arose at this Meeting concerning this Protected Stock. A small catch had been permitted to the Alaskan Inuit Eskimos under the aboriginal subsistence exemptions at the Tokyo Special Meeting in December 1977 although the IWC had at the 29th Meeting accepted the SC's advice that the aboriginal exemption be withdrawn in relation to this stock because of its critically depleted state. The Special Meeting later allowed, in view of the special case made by the USA, a 1978 catch of 12 landed and 18 struck (about 1% of the stock of 1300 as then estimated). The USA undertook to review the stock and now reported to the 30th Meeting that 1758 bowheads and 29 baby whales had been sighted after an intensive sighting programme, giving an estimated population of between 1783-2865 (averaging 2064) – considerably more than the original estimate. Only 10 whales had been landed in 1978 and only another 5 had been struck and lost – a considerable improvement on previous catching efficiency. The USA, supported by intensive lobbying from Eskimo observers present at the Meeting, now sought a quota for 1978/79 of 27.29 whales for Eskimo nutritional needs or 32 (about 2% of the stock) if cultural needs were taken into account, since the very limited 1978 quota was said to have caused great hardship to Eskimos. The SC however continued to advise a zero quota for biological reasons. The Commission was more sympathetic to the American dilemma (the Eskimos had initiated legal action in the US courts alleging denial of their constitutional
and after various proposals for different quotas (based on various high and low combinations of whales landed and struck and lost) had been rejected, eventually approved a quota of 18 landed and 27 lost.  

As the USA had been one of the leading proposers of a moratorium in the Commission and had several times drawn the Commission's attention to the model of the moratorium on whaling (except for the aboriginal catch), applied in the US 200 mile fishery zone under the Marine Mammal Protection Act, it was in the interest of member states still engaged in commercial whaling that the USA should be enabled to receive this concession which undermined its efforts to press a moratorium on the IWC. Other members faced the dilemma of sympathising both with the Eskimo case and with the constitutional difficulties experienced by the USA over this issue, since some of them e.g. Denmark, also have ethnic and cultural minorities whaling within their territories.

106. Adams v. Vance, 1977, 8 Environmental Law Reporter 1978, p.20160. The U.S. C of A for the District of Columbia on 23rd October overruled an earlier order requiring the Secretary of State to object to the IWC ban, holding that there would be injury to the US if an objection was filed "in terms of prejudicing the on-going efforts of the U.S. Government to establish and administer an effective international machinery for the protection of marine mammals".

107. The Commission took the view that the small number of baby whales sighted implied a recruitment rate of 1% rather than the 4.5% suggested by the USA. At the end of the Meeting the USA sought, without the notice required under the Rules of Procedure, approval for the addition of 2 more bowheads to the quota for the 1978 fall hunt. The Commission approved on the understanding that the whole question of aboriginal whaling should be reviewed.
Eastern Pacific Gray Whale Stock

For the first time the Commission was able to remove a stock, the Eastern Pacific stock of gray whales, from the PS category and to reclassify it, on the advice of the SC, as a SMS. A catch limit of 178, to be taken by the USSR, was fixed for it. The Western Stock retained PS status; the eastern is under an intensive USA/Mexican research programme.\(^\text{108}\) There were some signs of recovery for other protected stocks.\(^\text{109}\)

6. Special Meeting, Tokyo, 1978

(i) Sperm Whale Quotas: This Meeting continued the struggle between the pelagic and non-pelagic and non-whaling states concerning quotas for sperm whales. It was eventually agreed that sperm whaling would be eliminated in the Southern Hemisphere Division\(^\text{110}\) but not in the North Pacific for which a quota of 3,800 males was agreed (a 40% reduction on 1977/78). A zero quota was set for females but an allowance was permitted for an accidental catch of 473 to be set against the overall quota.\(^\text{111}\)

108. Mexico designated Scammon's Lagoon as the first gray whale breeding sanctuary in the world, protected by Mexican law within its 200 mile zone. Note made by writer of Mexican statement at 30th Meeting. Hawaii in 1977 enacted similar protection for humpback whales. Proclamation of 8th December, 1977 done at Wailuku, Maui Hawaii by E. Cravalho, Mayor, kindly made available by him to the writer.

109. e.g. the Southern right whale. See also Text of USSR broadcast which reported recovery of the baleen whale stock in the Sea of Okhotsk, SU/W 1025/A/11, 30 March 1979.

110. MAC Newsletter (1) p. 5 and 6. Males were classified as PS; females as SMS with a zero quota after the SC, uncertain of the factual information concerning stock size, put forward alternative proposals.

111. Ibid, p.11 and 12. All catching was to stop when the female quota was reached. Japan, seconded by the USSR, had proposed higher quotas for both.
(ii) **Scientific Information:** The considerable cuts in quotas made at this and the 29th Meeting (which had made a reduction of 36%), combined with zero quotas for females, inhibition of the issue of some scientific permits following SC comments, and the announced closure of the remaining Australian land station, led some members to express anxiety concerning the future availability of the data necessary for assessment of stock recruitment under the NMP. Although the SC made various proposals for improvements in this respect the USA introduced a measure so radical that it is better considered below as an enforcement measure.

(iii) **Enforcement**

(a) **A New IOS:** The USA took several initiatives at this Meeting to endeavour to improve enforcement of IWC regulations and other obligations under the ICRW. A USA proposal that the existing observer scheme be reviewed by a Working Group and that ways of exchanging observers among all interested countries should be considered as part of a new scheme was adopted unanimously. An extension of the IOS is regarded as particularly important since the limited bye-catch of female sperm whales has been permitted.\(^{112}\)

(b) **Action Against Non-member States:** A resolution was adopted at the instance of the USA calling on members to prevent import of products from whales taken by non-member states (although members of the IWC which were also members of the EEC expressed reservations in the light of their obligations under the Rome

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112. MAC Newsletter (1) 1979, p.11 and 13.
Treaty and external trade agreements conducted thereunder). Another Resolution proposed by the USA asking member governments to prevent the transfer of whaling equipment and expertise to non-member states, was also adopted although the USSR and Japan voted against it.

Both this Meeting and the 31st Meeting referred to below marked considerable changes in the operation of the ICRW which will be considered in Chapter XI.

7. Thirty First Meeting, London 1979

This crucial meeting took place after the conclusion of this chapter; space does not permit it to be dealt with fully in the text. The IWC's summary of the Meeting (included as Appendix VI) and the many significant advances made thereat are taken into consideration in the conclusions of Chapter XI. Its agenda was even longer and more complex than before; the political difficulties arising from it made it almost impossible for the Commission to complete its business. The membership moreover had expanded to 23 (4 of the 6 new members being whaling states); 20 observer states were provisionally listed and 37 international organisations (29 of them NGO's).

Major advances included approval of a moratorium on pelagic whaling by factory ships in the Antarctic which will eliminate sperm whaling there. The original proposal introduced by the USA referred to "commercial whaling" (undefined in the ICRW) which

113. For an estimate (as at 1971) of EEC imports of whale products see FOE Manual '78, p.133. At the 31st Meeting, in 1979, Mr. Buchanan-Smith, the UK minister opening the Meeting stated that the UK could not ban sperm oil imports until it had consulted within the EEC (writer's notes of 31st Meeting). For details of UK imports see Hansard 28 July 1978Cols. 950-952.
covered land stations (but not aborigine catches); it also applied to a wider area than finally approved; the area was reduced in order to permit the continued take of minke whales by Japan and the USSR. The USA's need to seek a bowhead quota for the Alaskan Eskimos in spite of the SC's advice that there should be zero quotas led to such political bargains and enabled the US to secure a small Eskimo take. On the initiative of the Seychelles (the only non-whaling new member) the Indian Ocean was declared a whale sanctuary, But perhaps the most interesting development was Australia's proposal (following its acceptance of the Frost Report and closure of its last land station) that with a view to a global moratorium (including aboriginal whaling) the IWC should institute studies of the means of implementing it and of the economic and social implications, in particular the hardship it might cause, e.g. to aboriginals. Meanwhile an overall quota of 15,835 (3,884 less than in 1978) was set.

The IWC, because of the legal limitations imposed by high seas freedoms, found itself unable to take any action in relation to "pirate" whaling in spite of an extensive dossier on the subject presented to it by an NGO,¹¹⁴ but did agree, following the same body's initiative, to compile a register of whaling vessels and also to extend the existing observer scheme by further bilateral agreements. A proposal for a Schedule amendment to make compulsory, not recommendatory, the prior submission of scientific permits to the SC for comment, failed since the new whaling members now supported Japan and the USSR in opposition to this proposal, alleging that

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¹¹⁴. See Chapter XI, p.558, n.79.
it undermined sovereign rights in 200 mile zones. A proposal to add the beluga and the narwhal to the Schedule was rejected. It seems possible that the number of PS species of large whales and the low quotas for them will now put pressure on smaller cetaceans; the increase in the whaling membership may make it difficult to regulate such catches by adding them to the Schedule unless more non-whaling members join, but this in turn could create difficulties since the expanding membership and agenda is making meetings long and costly and leading to pressurised bargaining rather than thoughtful consideration and evaluation of the scientific evidence.

CONCLUSION

The period covered in this Chapter was one of fundamental change in the IWC's operation of its Convention, the introduction of the NMP, which theoretically enables it to fulfil its Preambular objective of conservation at optimal levels. The continued failure of members to give a broad interpretation to the Article VIII requirement to transmit scientific information, however, has undermined the full effectiveness of the NMP, since the more sophisticated categorisation requires more detailed information. The SC was therefore unable to classify some stocks and more special meetings are having to be held; however, the occurrence of such meetings evidences some flexibility. Though the signs of recovery of the Californian gray whale stock does witness a modest success for the IWC's recent policies other PS stocks appear to be showing little such improvement and the sei and sperm whales seem still to be declining. This has led critical observers to suggest that the NMP are unworkable since it is alleged that they do not take
sufficient account of the ecological aspects of stock recruitment and assessment, including a variety of ecological factors, and the interrelationship with catches permitted on other related species by other bodies, which not only affect the ecological balance of whale stocks but lead to by-catches of whales. The IUCN principles presented to the 29th Meeting challenged the efficacy of the ICRW for pursuit of more ecological management principles. The large number of unilateral declarations of 200 mile zones of exclusive fisheries jurisdiction exacerbated the problems, since they enable both more stringent (as in the USA) and less stringent (as in Chile and Peru) regulations. Though the latter have now joined the IWC their votes as whaling states may lead the IWC to modify some of its quota reductions in their interest, because of the ICRW's application to whaling in all waters. The problem of whaling outside the Convention is reduced by the new membership but remains; the Commission can have no effect upon it but the actions of NGO's and of the national laws of some member governments are doing so. The IWC's IOS undoubtedly worked well during this period but the cessation of pelagic whaling brings that part of the scheme to an end and the new whaling members have yet to subject themselves to it since it depends on conclusion of voluntary agreements.

State practice in the IWC confirms that freedom of fishing on the high seas has remained the law during this period but both the UNCLOS texts and a series of new conventions and principles are, as will be seen from the next Chapter, gradually introducing conservatory limitations upon its exercise in relation to marine mammals.
CHAPTER XI
CURRENT PROBLEMS AND PROPOSALS FOR A NEW CONVENTION

Introduction

It is apparent from the foregoing account of the international regulation of whaling that a revolution is occurring in the objectives of the wider international community concerning the management of whales which is leading to major changes of policy by most member governments of the IWC and gradually therefore to changes in the IWC's operations. What is not clear is the extent to which the events recounted have developed the international law concerning conservation of whales and other marine mammals. The 1958 Geneva Conventions described in Chapter VI have not been denounced or superseded by a new Law of the Sea Convention. The Stockholm Declarations, outlined in Chapter VIII, are not binding per se; the fisheries commissions referred to throughout continue mainly to be based on the premise of freedom of fishing on the high seas though that area has been eroded by unilateral extensions of fisheries jurisdiction by coastal states to 200 miles from their baselines.

However, the principles applied both by the existing commissions and within the new 200 mile fisheries zones are changing under the impact of the Stockholm principles and a variety of new declarations, treaties and draft conventions and texts is evidencing considerable development in the international law concerning conservation of living resources in general and whales and other migratory species in particular. It is submitted that such new instruments as the 1973 CITES, the 1979 Convention on Migratory Species, the UNCLOS ICNT's, the new Northwest Atlantic Fisheries Convention evidence
major advances in the conservatory laws relating to whales, as also does some state practice: within 200 mile fisheries zones such as the USA's, UNEP's new Guiding Principles for shared natural resources and the draft convention for the protection of the environment of the Southern Oceans. Such national and international acts are, it will be argued, slowly giving a new meaning to "conservation" in international law and also improving the opportunities for enforcement of the regulations of the IWC. This chapter will first therefore consider these developments and endeavour to assess the extent to which they have effected changes in the law pertaining to whales and whaling and will then, after examining the present effectivity of the ICRW for its objective of conserving whale stocks, evaluate the proposals for a new convention to replace the ICRW, before reaching final conclusions on the future organisation of the international management of whales and other marine mammals.

PART I: RECENT DEVELOPMENTS IN THE INTERNATIONAL LAW CONCERNING CONSERVATION OF WHALES AND OTHER MARINE MAMMALS

A. New Treaties

Space does not permit a lengthy examination of the very vague and general provisions of recent treaties but points of particular relevance will be considered.

1. The Convention on Trade in Endangered Species (CITES) 1973

CITES, described in Chapter VIII, now has 57 states parties. Attention has been drawn elsewhere to its loopholes;\(^1\) nonetheless

action is now taking place under it. At the second meeting of the parties in 1979 all species of cetaceans not already on Appendix I under which trade is banned, were placed on Appendix II, under which trade is regulated, and further species of small cetaceans were added to the former. The CITES Secretariat was instructed to consult with the IWC concerning further amendments; this would appear to be essential if conflict of regulation is to be avoided, the IWC being the body most affected by CITES listings as well as being the repository for the best available information on whales. The new listings have already been challenged.

Enforcement of the present listings presents considerable practical problems for national customs officials exacerbated by current reductions in personnel; nonetheless CITES system provides

2. See Sierra Club International Report Vol. VII (8), April 30, 1979; Animal Welfare Institute Information Report Vol. 28 (2), April-June 1979. The 57 states party and 16 observer states attended the meeting in Costa Rica. These listings were recommended by the UK (following Recommendation VII of a Special Working Session of CITES in 1977), based on the UK Nature Conservancy Council's "Proposals Concerning Cetacea", San Jose (Costa Rica) 1979 which added the Indus River dolphin (Phatanisti minor) and the humpback dolphins (soosa and Sotolia) to App. I and the chacito (P. sinus); Bayi (lipotex vexillifer) and finless porpoises (N. Phocaeoides) to App. II. But note some criticisms of the scientific information made by Dr. Gambell, Secretary of the IWC (kindly made available by him to the writer).

3. Sierra Club Int. Report, op. cit. n.2. Canada and South Africa have lodged objections to the listing of humpback dolphins in Appendix I and of all cetaceans in Appendix II. Canada has also entered reservations to the listing of finless porpoises in Appendix I and continued its objection to inclusion of gray, sei and fin whales therein.

4. Ibid. A UK proposal for establishment of a minimum list of Endangered Species because of the difficulties experienced by customs officers in identifying banned products was defeated because of the danger that such a list would become the only list.
considerable addition to the limited enforcement procedures of the IWC and if the new measures are widely enforced, should considerably limit further exploitation of cetaceans. States parties to CITES have resisted moves to weaken the application of the Convention. Its potential for changing the operations of the IWC will depend on the extent to which it achieves ratification by all potential customers of whale products and the willingness and ability of its states parties stringently to enforce it.

2. **Convention on the Conservation of Migratory Species of Wild Animals (CCMS) 1979**

This Convention covers all migratory species throughout the world including "marine mammals, fish, crustacea and molluscs". It is based on the concept that resources which cross national boundaries are shared resources, not national property, and thus require international protection. It derives from and elaborates the Stockholm Principles and UNEP's Guiding Principles for Shared Natural Resources. Like CITES it lists species under 2 Appendices:

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5. A USA proposal that the requirement of prior scientific data for deletion of a species from an Appendix be abolished was also defeated, and see also supra.

6. Final Act done at Bonn, 23 June 1979, following a diplomatic conference convened by the Federal Republic of Germany (the depository); open for signature until 22 June, 1980. 62 states participated; 15 attended as observers as did numerous international organisations (including EEC, FAO, IUCN, UNEP) and NGO's. IUCN Bulletin N.S. Vol. 10(6), June 1979, p.1; see also Convention (Final I), 22 June 1979, Working Draft No. 2; Vols I and II, which was signed by 22 states. It will enter into force on ratification by 15 states. Participation by the EEC and similar regional economic organisations is provided for in Article 1 if they have competence in its subject matter.

7. In contrast to Article 65 of the UNCLOS ICNT (Rev.1) which is limited to "marine" species which are "highly" migratory and provides no specific protective measures.

8. Recom. 32 of the UNCHE Action Plan, approved by the UN General Assembly at its 27th Session, called for conclusion of treaties to protect species inhabiting international waters.
Appendix I for endangered species requiring immediate national protection and Appendix II for species with "an unfavourable conservation status" requiring conclusion of international agreements. Its Preamble recognizes wild animals as an irreplaceable part of the earth's natural system, to be conserved for mankind's good; man holds them for future generations and "has an obligation to ensure that this legacy is conserved and, if used, used 'wisely'". States must be the protectors of species passing through national boundaries, which requires "concerted action of all states" within such boundaries. States parties to the ICRW which become parties to the CCMS will have to pursue the latter's objectives in the former, but as this new convention was not arrived at without difficulty, especially concerning its application to marine animals, some important states voting against such extension may not ratify the CCMS. Although 41 states voted for their inclusion, 9 voted against, including 7 IWC members. Western European States and many developing states, however, give it strong support.

The Convention is, however, in very general terms, with numerous ambiguities which can only be removed by state practice. Definitions of terms in Article 1 such as "migratory species", "conservation status" and "favourable status" beg as many questions as they

9. The 9 were Australia, Canada, Japan, New Zealand, Poland, South Africa, Uruguay, USA, USSR. IUCN Bull. op. cit. 6 of these (excluding Canada and Uruguay) are parties to the Antarctic Treaty, and therefore involved in the negotiations under that convention for a new convention to protect the Southern Oceans' environment. They and also Argentina (another Antarctic Treaty party) did not vote in favour of the adoption of the Final Act of this Conference since all 10 are already engaged in catching krill in the Southern Oceans.

10. Ibid. 30 African states issued a Declaration insisting that the convention include all migratory species throughout the world.
A species becomes "endangered" if it is in danger of extinction through all or a "significant proportion" of its "range" which includes all areas covered during "normal" migration. A new term "range state" is introduced into international law defined by two criteria, viz. "a state exercising jurisdiction over any part of the range of that migratory species" and "a state, ships flying the flag of which are engaged outside their national jurisdictional limits in taking particular migratory species". (Article 1(f) and (h) respectively). The uncertainties presently surrounding jurisdictional limits at sea will make interpretation difficult; the CCMS Secretariat (UNEP) may not find it easy to fulfil the task imposed by Article VI of maintaining a register of range states.

The Principles merely require parties to "acknowledge the importance of migratory species being conserved and of Range States agreeing to take action to this end whenever possible and appropriate" and to avoid endangering migratory species. Research

11. "Migratory species" are defined as "the entire population or any geographically separate part of the population of any species or lower taxon of wild animals a significant proportion of whose members cyclically and predictably cross "one or more" national jurisdictional boundaries". Terms such as "significant", "cyclically", "predictably" and even "national boundaries" in the present uncertain state of the law of the sea will all be open to dispute in practice. "Conservation status" leading to listing under Appendix II is "the sum of influences acting on the migratory species that affect its long-term distribution and abundance" and "favourable status" includes inter alia estimating abundance related to "historic coverage". "Habitat" is defined as "any area in the range of a migratory species which contains suitable living conditions for that species"; the choice of criteria for "suitability" is likely to occasion considerable controversy.

12. Article II(1)-(3). A draft principle recognizing that "migratory species constitute natural resources which should be conserved in accordance with ecological principles by the actions of the Range States" was not adopted. Parties need only take "appropriate necessary steps" to protect species with "unfavourable conservation status".
should be promoted and parties must **endeavour** to protect species with "unfavourable conservation status, concluding Agreements to conserve and manage them." The Convention lists species under two Appendices: Appendix I will list Endangered Migratory Species on the basis of "reliable scientific evidence"; Range states must conserve and restore important habitats (as far as possible), remove impediments to migration and any factors endangering these species. Appendix II lists Migratory Species which are to be the subject of Agreements; though species can be listed in both appendices those with "unfavourable conservation status" must be listed in Appendix II.

The criteria for listing are as open to dispute and interpretation as the Convention's other terms; parties are, however, encouraged, tentatively, to take action ("with a view to concluding agreements" to be filed with the Secretariat) on populations which cross boundaries. Article V provides Guidelines and dispute settlement procedures for such agreements, and proposes prevention "at a minimum" of taking cetaceans in contravention of other agreements (such as the IWC). Accession of non-range states to agreements under this Convention is provided for in Article V.

The Convention establishes (Article VII) various organs: a Conference of the Parties as the decision making and supervisory organ; a Scientific Council of qualified experts appointed by the Parties and the Conference to advise it, the Secretariat, and any

13. Article III. But exceptions are listed. The Conference of the parties can recommend measures to Range States.
14. i.e. those requiring international agreements for their conservation and those which would "significantly" benefit from the cooperation that could be achieved by international agreement (Article IV).
other bodies established (it thus has a wider role than the IWC's SC) and to make recommendations to the Conference; a Secretariat provided by UNEP the Executive Director of which can, at his discretion, call on any other bodies whatever for advice (and so has wider specific powers than the IWC's Secretary). He is also specifically empowered to liaise with all relevant bodies, including all those concerned with the species listed.

The Convention and its appendices are amendable under the procedures of Articles X and XI respectively, but specific reservations are permitted by Article XIV. The impact and effectiveness of this Convention in improving conservation of whales and other marine mammals thus remains to be seen and will depend on the number and nature of ratifying states, their willingness to list species, to provide the scientific information necessary for this purpose and to enter into strong regulatory agreements. Insofar as it eventually imposes greater obligations than the ICRW states parties to both will have to adopt the higher standards of protection facilitated by the CCMS. It may also attract whaling states which are not members of the IWC and thus at least enable some protection of whales within the national jurisdiction and crossing the boundaries of such states. It must be admitted that the hesitant and imperspicuous terminology of this Convention indicates that whilst its aims and principles are an improvement on the IWC its interpretation and execution may give rise to the political bargaining and evasion which occurs under the latter. The deletion of a proposed principle that migratory species should be conserved in accordance with ecological principles is a considerable setback to the translation of this principle into a rule of customary international law.
B. Prospective Treaties

1. The Draft Convention on the Southern Oceans (SOC) 1978

(i) Introduction

The species inhabiting Antarctic waters have been described in Chapter I. Hake, whales and krill are those mainly exploited. However, in 1977 the 13 states party to the Antarctic Treaty agreed that a conservation regime should be negotiated by them for the living marine resources of the area based on protection of the ecosystem of the region as a whole, extending North of the 60°S boundary of the Antarctic Treaty as necessary and including species not commercially exploited. Krill forms the basis of most Southern Ocean food chains including that of the severely depleted baleen whales. Increasing exploitation of krill could thus have serious ecological consequences; it may so deplete krill stocks as to modify krill's little researched behaviour (e.g. swarming) and thus reduce dependent populations and in particular further delay the recovery of the blue, fin, humpback and sei whales which now all have PS status under the IWC's NMP. Environmentalists are concerned that the ecological balance of the area could be disturbed; other populations might explode and consume the food which should be available for the whales. However, there remains considerable difference of opinion concerning the abundance of krill; some

15. At the 9th Consultative Meeting. See Ch. VI p.285 for a description of the Antarctic Treaty and subsequent developments thereunder.

16. Following the 31st Meeting of the IWC in July 1979, only the minke whale will be exploited in these waters by Japan. A quota of 5,330 females and 5,215 males was approved. ECO(5) July 13, 1979, p.3. Although the whole Indian Ocean was declared a whale sanctuary its boundary was defined south of 60°S to enable continued exploitation of minke whales.


18. cp. op. cit. supra suggesting that about 50,000 tonnes are taken from large resources with J. Barnes view that predators already crop the krill to a desirable level related to biomass, op. cit. Ch. I, pp.7-8.
commentators consider that it is possible that the ecosystem may now be in equilibrium with whale stocks at their present level. Any krill harvesting should therefore be subject to very conservative quotas, carefully monitored and regulated, and close liaison maintained with IWC policies and scientific information on whale stocks. A regime should, in the light of IWC history, be established before harvesting.

(ii) The Draft Convention

After several special sessions of the ACP a draft convention was refined but political difficulties deriving from the claims of some states party to the Antarctic Treaty to jurisdiction over areas of Antarctic territory from the baselines of which they purport to extend 200 mile exclusive economic zones, have prevented the holding of a diplomatic conference for the adoption of a convention. It is not yet known therefore which states will be invited to participate. The draft convention proposes that it would be open for signature by states attending the conference and others engaged in harvesting resources or in scientific research


in the area. It would not be open, unlike the ICRW, to the international community at large. The IWC moreover has taken no part in the negotiations although its interests are closely affected.

The draft SOC consists of a Preamble and 31 articles and is a radical legal development being not so much a fisheries convention as "a broad Convention for conservation of the Antarctic environment and ecosystem". It takes a broad ecological approach which could provide a model for a revised ICRW. This, however, is objectionable to some states which see ecological criteria for conservation as a potential threat to resource exploitation.

The draft Preamble recognises the need to protect "the integrity of the ecosystem" of the seas surrounding Antarctica (although it does not fully define this term) and also the need to increase knowledge of the Antarctic ecosystem and its components but it clearly states the "prime responsibility" of the Antarctic Consultative Powers (not the community) for protection of the Antarctic environment and its living resources, though acknowledging that it is in the interest of all mankind to preserve these.

22. Barnes op. cit. p.5, considers that East Germany, actively interested in the krill fishery will be invited to attend, but probably not S. Korea and Taiwan which also take krill. IWC, FAO, SCAR, SCOR are likely to be invited to observe but not the EEC because of the USSR's objection.


24. The legal status of these waters is evaded; some states will continue to regard them as high seas; others to claim that parts are within their national EEZ.

25. There is no legal basis for this responsibility, apart from the 200 mile EEZ claims and the sector claims "frozen" by the Antarctic Treaty itself. At the 11th Session of COFI (Verbatim Record op. cit) Senegal considered that the area was of particular interest to and should be "shared" by the whole international community; Norway considered that its high seas resources should have the character of "common heritage" (p.35) as did Sri Lanka (p.37).
Draft Article 1 extends the scope of the SOC to all marine living resources (including fish, molluscs, crustaceans and all living organisms) in an area comprising the whole Antarctic ecosystem, defined as "the complex of relationships of Antarctic marine living resources with each other and with their physical environment". Conservation can, however, include "rational use" (Article II) though harvesting must be based on ecological principles with the aim of avoiding reduction of a population to "levels below those which ensure its stable recruitment", the level to be maintained "close to that which ensures the greatest net annual recruitment". This avoids reference to the criticised criteria of OY, MSY, or OP used, for example, in the 1958 Geneva Convention on Conservation or the ICRW, and is more in accord with the Airlie House and IUCN principles referred to in Chapter X, but it does not, of course, facilitate determination of that level. The linking of conservation to "rational use" is likely to make agreement on catch levels as difficult to arrive at in any SOC as in the IWC.

Membership, as already indicated, would be open to two categories - permanent membership of the SO Commission would be accorded to states participating in the conference adopting the Convention (Draft Article XXIV) - any state "interested in research or harvesting activities" on the resources could adhere during the period of such activities as long as it accepts Antarctic Treaty obligations.27

26. Article 1(1) "those in the areas "South of 60° South latitude and ... between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem".

27. Specifically Antarctic Treaty Articles I, IV, V and VI.
Membership is thus more restricted than under the ICRW which is open to all states. The SOC clearly negates the concept of Antarctic resources as "the common heritage of mankind" in the sense that they must essentially be managed by an international authority comparable to that being negotiated at UNCLOS for the deep seabed resources (i.e. as in ICNT Chapter XI). The SO Commission is enabled by draft Article VII to designate a wide range of conservation measures but the jurisdictional problems already referred to have resulted in the commission of the power to allocate national quotas. This could lead to the cycle of over-exploitation, over-capitalization and excess effort that has undermined conservation and aggravated the depletion of whale stocks under the IWC's regulation. The SOC draft merely proposes in general terms that there should be regulation of effort and of harvesting methods, adding that "full account" should be taken of scientific advice and of the effect of harvesting krill etc. on other components of the ecosystem. The draft proposes, however, that the Commission proceeds by consensus (as at UNCLOS, not as in the IWC) on matters of substance (substantiality being itself determined by consensus), and an objection procedure is moreover provided (draft Article VIII(e)). If a review of the objectionable measure by the Commission fails to allay doubts any member may, 30 days after the review, reject the measure, even if it had previously accepted it. Despite the modification in these procedures (compared to the IWC's) agreement on conservation measures is thus likely to be difficult to achieve once exploitation expands, and consensual measures may represent the lowest common denominator between the proposals of scientists and rational users. The scientific research which would
enable effective conservation is left to member states. A Scientific Committee of suitably qualified people from member states would merely promote research albeit *including* the whole ecosystem. It is not proposed to employ independent scientists, as does the IPHC or the IATTC, though other experts could be called in to advise, nor is a direct link to the IWC's SC established though the SOC's SC is to "have regard" (draft Article XVIII) to other relevant bodies. There is no proposal for the use of SCAR or SCOR in the kind of advisory role successfully fulfilled by ICES for NEAFC and the EEC though this might enable better integration of information and advice between the IWC, SOC and other concerned bodies, including the Secretariats of CITES, CCMS and the IWC.

Enforcement is left to national means under Articles XIX and XX coupled with an undertaking that parties *shall* "consistent with the UN Charter" try to prevent non-members contravening the Convention's objectives. A detailed system of observers and inspectors is proposed, but designated and appointed by the states party, not (as in the ICRW protocol) by the SOC. In this respect it will be less advanced than the ICRW. On the other hand the SOC, unlike the ICRW, provides for settlement of disputes by either the use of the means outlined in Article 33 of the UN Charter, or, by agreement, the ICJ or an Arbitral Tribunal, the machinery for the latter being detailed in an Annex. Failure to agree on use of these means specifically does not absolve parties from the continued responsibility to seek peaceful settlement. This compromise is likely to be the best that can be hoped for in a treaty to which both eastern and western, European, developed and developing states may be parties.
Cooperation with other bodies involved in Antarctica is provided for only in very general terms. Draft Article VI preserves the obligations of parties under the ICRW; and Draft Article XXI requires cooperation "as appropriate" with FAO and other Specialised Agencies. UNEP is thus excluded from specific mention though it would be included in the requirement that the SOC develop "working cooperative relationships with inter-governmental and non-governmental organisations which could contribute to their work". The only other bodies mentioned are SCAR, SCOR and the IWC but the machinery for cooperation and the choice of other bodies is left vague. IUCN, concerned at this gap, has proposed 4 procedures for ensuring cooperation. It will be particularly important that any SOC receives the best scientific advice and that politicization of advice is avoided. An institutionalised liaison with SCAR and SCOR on the lines of ICES cooperation with NEAFC and the EEC would seem to be a possible solution, with close links established with the IWC, availability of the best and most consistent advice being crucial to the success of both bodies. At its 31st Meeting in July 1979 the IWC passed a resolution to this effect.

28. See Barnes op. cit. p.27 and Appendix IV; IWC Resolution on Antarctica 14th General Assembly, 5 October 1978, Environmental Policy and Law Vol. 5(1) p.58.

It might be thought that the continuing UNCLOS III would institute the necessary mechanisms for coordinating the proliferation of treaties and bodies concerned in the management of marine species and would establish integrated principles and guidelines for their conservation in all the waters of the world. The texts so far produced by UNCLOS reveal that this is not the case. Though informal many proposals have attracted wide consensus and some have been introduced into state practice e.g. by 1978 68 coastal states had asserted national jurisdiction over living resources in zones 200 miles adjacent to their coasts. UNCLOS is still endeavouring at the time of writing to formalize its latest text, ICNT (Rev. 1). The main articles directly related to whales—Articles 64 (Highly Migratory Species) and 65 (Marine Mammals)—which have so far been subject only to drafting changes, are only a small part of the provisions relevant to conservation of living resources. Article 64 is specifically subjected to Part V concerning the Exclusive Economic Zone (EEZ), beyond which the waters remain high seas on which freedom of fishing is preserved by Articles 86 and 87, though subject to the duty imposed by Article 117 to conserve the living resources.


(i) Conservation of living resources in the EEZ: problems of common stocks

In spite of the ecological approach of the SOC and the CCMS, which is also being pressed in the IWC, these ICNT articles make little provision for protection of the marine ecosystem, endangered species, habitats or for sanctuaries. Articles 55-57 establish the EEZ as an area beyond the territorial sea, not exceeding 200 miles from its baselines. Although some states still contend that this area remains high seas the extensive jurisdiction conceded to the coastal state in it, including the sovereign right to explore and exploit the living and non-living resources of the seabed and water column and the right to protect its marine environment, appear to render the zone sui generis in international law. Although Article 61 allows the coastal state to determine the total allowable catch (TAC) it is subject to various obligations. Article 62 requires it to adopt proper conservation and management measures, taking account of "the best scientific advice", to prevent over-exploitation and to co-operate with unnamed global, regional and sub-regional organisations. These duties are offset, however, by the obligation to promote "optimum utilization" and to direct conservation measures to maintenance and restoration of exploited populations at MSY, a concept now discounted by many scientists, rejected in the draft SOC and modified even by the IWC in its NMP. The ICNT qualifies MSY


but by a general reference to consideration of both "relevant environmental and economic factors", thus opening up the possibility that the short term national interests of some states will lead to more weight being accorded the latter than the former, and that, regarding the zone as a form of national property they will resist application of international regulations in it. Article 61(2) specifically allows the economic needs of coastal fishing communities, developing country interests, and fishing patterns to be weighed against such factors as inter-dependence of stocks, effects on species "associated" with or dependent on harvested species, and the need to restore populations above levels at which their reproductive capacity may be threatened, taking account only of the "generally recommended" minimum standards of relevant international organisations.

No specific or harmonised standards are laid down in the ICNT. These provisions potentially endanger highly migratory species crossing zonal boundaries or traversing the zonal/high seas boundary whose effective conservation requires international cooperation between the various coastal and harvesting states to ensure that conservation measures apply throughout a species' entire range (as in the CCMS) and are based on the best harmonised scientific findings.

Article 63 makes some weak provision for this requiring that where the same stock or stocks of associated species occur within several EEZ's coastal states must seek to agree on coordinated measures to ensure conservation. But they can do this bilaterally; they are not required to act through any appropriate international body or to

34. See for example the views expressed by Tanzania, Kenya and Peru in the Second Committee at its 2nd Session, 23rd Meeting, 1 August 1974, p.182-184 and at the 30th Meeting, 7 August, 1974 at p.230 respectively; UNCLOS OR Vol. II.
conserve the ecosystem or habitats. Moreover though it is unclear whether Article 63 applies to the migratory species covered by Article 64, it is clear that it does not cover them in the territorial sea, the relevant articles on which (3-17) impose no duty to conserve. Stocks could thus migrate from conservation to non-conservation areas. If a stock occurs both in the EEZ and the high seas, Article 63(2) requires the coastal and harvesting states to try to agree on the necessary conservation measures but they can choose to act bilaterally. Considerable discrepancies in management could arise if a stock migrates between all 3 areas, especially as a coastal state's duties under this section could conflict with its specific duty to prevent over-exploitation in its EEZ. The possibility that exploitation of a stock on the high seas might not endanger it there but could affect it in the EEZ is not provided for.

(ii) Highly Migratory Species

Article 64, devoted to these species is unsatisfactory. It states that:

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

It applies "in addition to the other provisions of this Part" but its provision for "cooperation" on the high seas and in the EEZ for fisheries on such species, without requiring conclusion of agreements, conflicts with Article 63(2) which proposes conservation agreements, but for the high seas only. If articles 61 and 62 giving the coastal state wider discretion in its EEZ are regarded as a modification of Article 64, cooperation could be undermined, and if a species enters the territorial sea further modification of Article 64 could arise from Article 61(1).

Other problems arise from the Article's lack of definition of such species since the related Annex is neither comprehensive nor amendable. It includes all cetaceans but not krill or squid. The alternative of direct cooperation means that some species may not be conserved throughout their range. The failure to nominate one coordinating organisation, or to require states to participate in a single organisation could undermine conservation. There is, moreover, no clear requirement to establish an organisation where one does not exist; harvesting states could shelter behind the failure of others to "cooperate" in its establishment. Promotion of "optimum utilization" allows economic factors to be considered, conflicts with scientists demands for more ecological management and is now regarded as an objective more appropriate to fin fisheries than marine mammals. Finally the Article also ignores the increasing problems of by-catches.

(iii) Marine Mammals

Article 65 (extended by Article 20 to the high seas) weakly provides:

"Nothing in this Convention restricts the right of a coastal state or international organization, as appropriate, to prohibit, regulate and limit the exploitation of marine mammals. States shall co-operate either directly or through appropriate international organizations with a view to the protection and management of marine mammals".
This Article, though much criticised,\textsuperscript{36} has remained substantially unchanged in all texts, and undiscussed in any formal UNCLOS sessions, though "clarification" proposals by the USA received "sympathetic attention" at the 7th and 8th Sessions of UNCLOS.\textsuperscript{37} Article 65 at least implies modification of Article 64's requirement of 'optimum utilization', and of Article 62(2)'s requirement that coastal states make the TAC surplus to their harvesting capacity available to others. But the article does not require states to join a single, or any, international organization: 'cooperation' can again be bilateral. Even states parties could thus continue legally to whale outside the IWC.

The draft does have the advantage of requiring states to "cooperate in all areas" (neither the EEZ nor territorial sea is mentioned), and of leaving states free to impose higher standards than those of international organizations within their own jurisdiction, as some now do. Failure to ensure harmonisation of conservation measures throughout a species range is increasingly perceived, however, to undermine conservation. The draft is a compromise: securing some Latin American and other states interests in avoiding application of IWC regulations in their EEZ's and US interests in imposing their higher MMPA standards within their FZ. Several NGO groups have therefore proposed the substitution for this Article of the following:

\begin{quote}
\end{quote}
"Nothing in the present Convention restricts the right of a coastal state or international organisation, as appropriate, to prohibit or limit exploitation of marine mammals and to establish an international organisation for the protection, conservation and study of cetaceans on a global basis."  

It should be noted that neither this nor other articles of ICNT make any change in the juridical status of whales or other migratory species which thus remain common property resources. The concept of "common heritage of mankind", itself ambiguous and contentious, but in pursuance of which UNCLOS is endeavouring to establish a single international management authority with powers and organs greatly exceeding the IWC's (Chapter XI, Articles 133-191), is reserved for the seabed areas beyond national jurisdiction and does not apply to the resources of the waters above. Whales, however, being listed in Article 64's Annex do "seem to be in a particular situation among marine mammals" in ICNT - being also exempt from optimum utilization and to be preserved and managed under Article 65; there is no requirement (as in Ch. XI) that their marine environment and its ecological balance be preserved.

38. Marine Action Centre (MAC) Newsletter 4 May/June 1979 p.6. See also "Whales and the Law of the Sea: A Proposal to Clarify Articles 64 and 65 of ICNT", American Cetacean Society, January 1978 which inter alia proposes that protection should take account of "the unique scientific, ecological, cultural and aesthetic value of marine mammals", and requires establishment of a global cetacean commission. See Senator Weicker's proposal in a letter to H. Kissinger, 8 December 1976, for a redraft of the corresponding RSNT Article (54) to establish "a new international organization to conserve whales on a global basis", limited to coastal and harvesting states.

The ICNT has many other weaknesses in relation to marine mammals: enforcement is left to flag and coastal states in Parts II, V and VIII; scientific research might be restricted by coastal states in their EEZ under Article 56, even when read in relation to Articles 238-257. Article 246(4) requires a coastal state, whose consent is required for research in the EEZ, to grant it in "normal" (undefined) circumstances, but can withhold it if a project "is of direct significance for the exploration and exploitation of natural resources, whether living or non-living". The implications for whales etc. are obvious; "the best scientific advice available" which the coastal state is by Article 61(2) required to take into account in conserving living resources may not always be "the best".

C. National Legislation Regulating Marine Mammals in 200 Mile Fisheries Zones

Widespread support at UNCLOS at least for the proposal that coastal states should have sovereign rights to explore and exploit fisheries in 200 mile zones adjacent to the baselines (if not for the EEZ as such), and its inclusion in the series of INT's, by 1978 had encouraged 68 states unilaterally to assert such jurisdiction. The terms and jurisdictional content of the relevant acts has varied but nonetheless they enable coastal states to promulgate and enforce more stringent regulations than is possible under the compromising fisheries commissions, including the IWC, though non-members can still apply weaker regulations. This has necessitated the revision of the constituent treaties of several commissions, the whole (or a major part) of whose areas has now fallen under national jurisdiction.

1. Trends in National Legislation Concerning Management in 200 mile FZ's

A number of trends is emerging from the new national legislation. There is not space to detail them here but it should be noted that the need for integrated management throughout the cited range of migratory stocks is being recognised and adequate information on stocks is required. Some demand participation in regional conservation agreements. Strict application of specific enforcement measures is imposed, including boarding, inspection, arrest and prosecution of offending vessels, hot pursuit onto the high seas or even into other states' EEZ's, and heavy penalties. Such measures exert pressure on foreign states to comply with international standards. Foreign nationals may be refused licences if they operate elsewhere outside international regulations e.g. taking species classified by the IWC as FS. Some, such as the USA, are introducing, on the lines of CITES, selective trade embargoes against states which violate internationally established standards of conservation. Since US legislation requires it to promote national laws as international norms its provisions are of great relevance to the future regulation of whales and related species, as illustrated below.

41. The FAO Report op. cit. supra does this noting licensing schemes to control entry, effort, areas, and species taken, and exacting fees for fishing opportunities which erode the old former freedom and introduce payment of rent for fishing opportunities which offsets administrative, research and enforcement costs.

2. United States Legislation affecting Marine Mammals

The strong environmental lobby in the USA following the UNCHE led to demands for cetaceans in particular to be protected as a valuable part of the ecosystem rather than a resource. The resultant policy changes in the USA required it to press at the 24th and 25th IWC Meetings the Moratorium on Whaling resolved at Stockholm. It withdrew this demand on the introduction of the NMP at the 26th Meeting but re-introduced at the most recent (31st) Meeting in 1979 alleging that the NMP were unworkable because of lack of scientific knowledge and data. 43 Meanwhile in 1974 it had introduced in the IWC a draft Protocol to the ICRW proposing its revision to cover all cetaceans and to bring its provisions into accord with principles of scientific management of the whales' ecosystem. In pressing these policies in the IWC the USA was fulfilling the requirement in its new national legislation that it ensure that international agreements in which the US participates are brought into line with the relevant US national laws. In the last decade the USA has developed a unique series of integrated environmental laws to protect endangered living resources. Space does not permit a detailed critique of these important developments; they have been examined elsewhere. 44

43. See IWC/31/20 and 21: "The Moratorium Issue", U.S. Dept. of Commerce (NOAA). The US proposed a global moratorium on whaling except for aboriginal catches. This did not achieve the required 2/3 majority in the 31st Plenary Session. It was amended to apply only to pelagic (not land station) whaling and to permit a continued take of minke whales and was then adopted by a vote of 18 in favour, 2 against (Japan, USSR) with 3 abstentions (Brazil, S. Korea, Spain), ECO Vol. XIV (6) July 14, 1979 pp.2-3.

It will suffice here to state that though these laws are riddled with ambiguities and do not in practice fully achieve their objectives they are of major importance to international legal developments. Especially relevant to conservation of marine mammals are the Endangered Species Act (ESA) 1973\textsuperscript{45} which gives the Secretary of State for the Interior (or of Commerce for marine mammals) authority to compile a list of endangered species (based on the best scientific and commercial advice), to prohibit their harming and harassment, and trading in them, except for species taken by Alaskan aboriginals or for scientific purposes. The great whales were listed in 1970.\textsuperscript{46}

The 1972 Marine Mammal Protection Act (MMPA)\textsuperscript{47} has been signalled as the world's first legislation recognising that maintenance of habitats is a prerequisite of survival of a species, aimed at international as well as national protection. It recognised marine mammals as a resource of great international significance, aesthetic and recreational as well as economic, and lays down for these species management principles based on scientific information and advice unrelated to the needs of the industry (then extinct in the USA).\textsuperscript{48} Takes by Alaskan aboriginals and for scientific


\textsuperscript{46} As the last permit for a US whaling company was then rescinded (in 1971) this ban affects only foreign nationals. That the ban on imports of listed species is effective is evidenced by its effect on sporran production in Scotland following the listing of seals and consequent ban on import of sealskin products into the USA. Scotsman, 12 April 1979, p.11.

\textsuperscript{47} 16 USC ss. 1361-62, 137-84, 1401-07 (Supp. III, 1974); Coggins op. cit.; Friedman op. cit.

\textsuperscript{48} The US fisheries limit was then 12 n.m. and it was thus assumed that the only species affected were the North Pacific Fur Seals. The extension to 200 miles in 1976 which applied the principles to cetaceans was then unforeseen.
research (subject to permit) were excepted. The former derogation has created the difficulties for the US in the IWC described in Chapter X.

The Act established a Marine Mammal Commission (MMC). US policy in the IWC is now largely based on its reports which thus have international effects. No marine mammals can be taken until a permit or waiver has been granted on the MMC's advice. The MMPA's principles are more ecologically based than the ICRW's. S.1361(2) of the Act states that endangered species and stocks should not be allowed to diminish, "beyond the point at which they cease to be a significant functioning element of the ecosystem of which they are a part"; S.1361(6) adds that they "should not be permitted to diminish below the optimum sustainable population". The concepts of "optimum level" (OL) and "optimum sustainable population" (OSP) thus introduced differ from the ICRW's and 1958 Geneva Conservation Convention's "optimum yield" (treated as MSY) but, in the light of present deficiencies in scientific knowledge are very difficult to apply. Scientific criticism led to revision of the Act's original definition of OSP; it is now defined in s.136(2):

"a population size which falls within a range from the population level of a given species or stocks which is the largest supportable within the ecosystem to the population level that results in maximum net productivity. Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and/or growth less losses due to natural mortality".

This begs many unanswerable questions concerning the supportive properties of particular ecosystems.

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49. E.g. see Annual Report of Marine Mammal Commission, Calendar Year 1977, pub. 31 January 1978, MMC, US Dept. of Commerce, NTIS P.B.; Ibid 1978, pub. 31 January 1979. They comprehend all issues affecting these species and make recommendations; these have led to bans on specific imports from named states violating IWC regulations.
The MMPA has several international aspects. It recognises that the interdependence of marine mammals and their ecosystems and its relation to OSP necessitates research at the international level. S.1378 requires the USA to initiate international programmes, by agreements, to protect all species within the Act. The US must further initiate amendment of any international treaty protecting marine mammals to which it is a party (including the ICRW) in order to make it 'consistent with the purposes of this Act'. It must also, under S.1378(a)(3)-(5), encourage agreements promoting the Acts objectives concerning ocean and land habitats, and try to secure the convening of an international conference to promote a treaty for the general protection of all marine mammals. These provisions have instigated recent US policy in the IWC and its initiatives towards a new whaling convention.

The U.S. Fisheries Conservation and Management Act (FCMA), 1976, extended US jurisdiction over fisheries (including whales) to 200 miles and made the MMPA enforceable within that limit, including its S.1372(a)(2) which, furthering the ESA listings, instituted a moratorium on taking and import of marine mammals and their products, except for scientific research and public display subject to permit, or as expressly provided for by a treaty to which the US is party. Stringent enforcement is provided for by the

50. S.1378(a)(4).
51. 13 April, 1976, 16 USC 1801 et seq (Supp. 1977)
   It requires states seeking fishing opportunities in the US zone to enter into "governing agreements" recognising US exclusive authority therein and acceptance of the terms etc. of the FCMA).
52. This confusing provision arises from the original objectives of protecting Fur Seals and was not intended to prevent the US introducing a national moratorium on whaling even if not approved by the IWC. Application of the MMPA to the IWC was not forseen.
MMPA for a wide range of offences; vessels can be seized and fined (including (S.1376(a)) those of any offending vessel within US jurisdiction or using US harbours). Import of or trade in species whose taking was prohibited in their country of origin or of fish taken by methods disapproved by the US (whether these methods affect marine mammals or not) is prohibited by S.1372.

The Secretary of State is required when promulgating regulations under the MMPA, to give full consideration to international regulations under S.1373 which ambiguously adds that the Act's provisions are "in addition to" and "not in contravention of the provisions of any existing international treaty ... which might otherwise apply to the taking of marine mammals". As this can hardly prejudge the facts of particular cases the assumption must be that where national legislation imposes higher standards than the international ones the former will supplement the latter and thus there is no conflict. If the international standards are higher than the national ones the MMPA will not affect them. 53 The US did not foresee the difficulties created for it either by the recommendations of the IWC's SC to the 30th and 31st Meetings that Alaskan aboriginal bowhead whaling should cease, or the IWC's refusal to adopt a global oratorium. The US efforts to promote a oratorium in the IWC have been considerably undermined by the bowhead dispute and the US governments need, in the light of cases filed against it

53. For further discussion of potential conflicts between the ICRW (Art. I of which applies it to all waters where whaling takes place) and the MMPA see Scarff op. cit. pp. 615-617.
by Eskimos pursuing their cultural and subsistence rights, to seek a quota.54

The MMPA also prohibits (S.1371(a)(3)(A)) import of marine mammals and their products (not clearly limited to marine mammal products) unless the Secretary certifies that the programme of the harvesting country of origin is consistent with the MMPA, neither consistency nor certification being defined. Even these wide powers to limit trade, however, have not been regarded in the US as sufficient to deter whaling by non-members of the IWC or under flags of convenience and even more stringent restrictions have been introduced by amendment of various Acts.55 The Pelly Amendment to the Fisherman's Protection Act 1967 authorises the President (on certification by the US Secretary of Commerce) to ban the import into the US of fish products from any country whose nationals fish in a manner which diminishes the effectiveness of any international conservation programme (e.g. the IWC's) regardless of whether stocks are endangered or treaties violated. This thus affects even states which do not take marine mammals in the US zone or trade in the products thereof in the US such as Japan and the USSR. The MMC reviewed the whaling activities of the non-members of the IWC and in 1978 advised that Peru, Chile and the Republic of Korea


infringed the Pelly Amendment and advised the Secretary to ban their fish products thereunder. 56 Significantly the Republic of Korea then ratified the ICRW on 29th December 1978 and Chile and Peru joined the IWC at the 31st Meeting, July 1979. The MMC now plans evaluation of the activities of Japan and other non-members. 57

An amendment to S.917 of the FCMA proposed by Senator Packwood, which passed the Senate in July 1979, 58 provides that no licence to fish in the US zone will be issued to any state which acts "to diminish the effectiveness" of an international fisheries conservation programme (such as the IWC's) or of an international programme to protect endangered species (such as CITES or the CCMS). States objecting to any moratoria adopted by the IWC would contravene this amendment. Some US Departments, whilst supporting the amendment in principle are seeking modification of, for example, its lack of criteria for allocation, and inflexibility of application. They prefer that support for conservation programmes be used only as one factor to take into account.

56. See MMC Reports 1977 (p.58) and 1978 (p.79-81) op. cit.
57. Including import of whale products from whales taken by nationals of non-IWC members in violation of IWC regulations; funding and other participation in operations violating IWC measures; export of whaling equipment used to conduct offending activities.
58. Marine Mammal News, July 1979, pp.5-6; MAC Newsletter No. 3, May 1979. States importing whale products from IWC non-member states would be denied licences to fish. This is of great concern to Japan.
Although not as advanced as the USA's legislation, the laws of other states are moving in this direction. Australia, for example, reversed its policy on whaling, closed its last land station in 1979, and is now proposing new legislation to implement a policy of opposition to whaling coupled with an initiative in the IWC of a global moratorium on all whaling, including aboriginal whaling.

3. Effects on Regional and other Fisheries Commissions

The reduction to national control of large areas formerly high seas, and the promulgation of stricter legislation, has had a major impact on fisheries commissions, including the IWC and has caused many commissions to reconsider their constituent treaties in the light of the new principles advocated. A recent example of the form likely to be taken is the treaty which replaces ICNAF by NAFO.


Canada has advocated that the IWC be replaced by a new body on the lines of NAFO, the principles of which are less innovatory than


61. COFI National Legislation etc. op. cit.; COFI/77/10, March, 1977, Progress and Problems of Regional Fishery Bodies esp. pp. 3-4 for Canadian legislation. Constitutional changes have occurred or are imminent in CCFCM, ICNAF, IPFC, NPFSC and NEAF. See also COFI/78/Inf. 6, May 1978, 12th Session "Activities of Regional Fishery Bodies" and COFI/78/5, April 1978 "Future of FAO Regional Fishery Bodies".

those in the USA's MMPA. It retains the objective of "optimum utilization" (Article I) but its "Regulatory Area" includes both the Canadian 200 mile FZ and the area beyond; cetaceans are, inter alia, exempted from its provisions, being left to management by the IWC "or any successor body" (Article I(4)). Membership is open to all states fishing in the area. NAFO consists of 4 main bodies: a Commission; a Secretariat; a General Council (GC) of all Contracting Parties, deciding by simple majority; and a Scientific Council (SC) proceeding by consensus, advising both the Commission and coastal states on request and collecting statistics. Statistics and records must include "environmental and ecological factors affecting them" (Article VI(a)) and consultations etc. must (Article VI(b)) include:

"Study, appraisal and exchange of scientific information and views relating to the fisheries of the Convention Area including environmental and ecological factors affecting these fisheries and to encourage and promote co-operation among Contracting Parties in scientific research designed to fill gaps in knowledge pertaining to these matters".

This does not oblige management to be based on ecological principles; the GC does not have to accept the SC's advice. These provisions seem merely to make explicit trends introduced in the IWC towards taking account of environmental factors in determining "optimum yield". The GC can adopt proposals for joint action by the parties to achieve "optimum utilization", "taking account" only of the SC's information and "seeking" to ensure consistency between proposals and measures for stocks inside and outwith the Regulatory Area (Article XI), including effects through species inter-relationships. Traditional fishing interests and the needs of coastal communities can be considered but the latter must try
to conserve stocks by international action and under international enforcement schemes - a possible model for solution of the IWC's aboriginal problem.

NAFO's Article XII retains objections procedures similar to the ICRW's but based on shorter periods. National enforcement is supplemented by provision for joint enforcement limited to reciprocal rights of inspection with prosecution and penalties left to the flag state. There is no observer scheme, or port state enforcement. In contrast to the IWC's original flat rate contributions NAFO's budget is contributed in 3 categories.63

Canada proposed64 that an organization for all cetaceans should be established on similar lines, with a Commission, and Scientific and General Councils. The SC would advise coastal state members on management in their FZ's; the GC would determine membership of the Commission: present whaling members of the IWC would be obliged to be members of the Commission; non-members whaling would not - they could join the SC (contributing their scientific expertise) without being subject to the Commission's regulations, at a lower rate of financial contribution. This proposal would, however, defeat the objective pressed by scientists of harmonised effective management of cetaceans and related species throughout their entire range.

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63. 10% related to coastal state catches in the Convention area 2 years before the budget year; 30% divided equally between all parties, 60% in proportion to their catches in the area 2 years before the budget year. NAFO has only a developing state in its membership.

64. Discussion Paper for Draft Revision of the ICRW, circulated privately at 30th Meeting of the IWC.
It is submitted that other ways of reforming the present structure of marine mammals management must be sought which will take account of the developments described in this Chapter as well as the deficiencies of the IWC in its operations as described throughout this work, including the difficulties encountered in applying and enforcing the NMP. The strands of development - national legislation in 200 mile zones; the numerous ad hoc fisheries commissions; the ad hoc treaties and the IWC itself clearly need to be brought together. We must now consider whether this necessitates a new whaling treaty or institution of other new machinery or both.

**PART II: THE PROPOSED REVISION OF THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING**

1. **Background**

The proposal put forward by the USA at the IWC's 26th Meeting in 1974 for renegotiation of the ICRW emanated from the USA's obligations under its MMPA to ensure that the former conforms to the latter. The Working Group set up by the IWC to consider the proposal concluded that any necessary changes would be better effected by a new Convention than a Protocol. A Preparatory Meeting on the Revision of the International Convention for the Regulation of Whaling was held in July 1978 to consider a composite text which had been prepared.

65. See Chapter IX. Revision of the Schedule's framework has been effected within the IWC however by another Working Group; Its Report, IWC/31/5, has now been adopted.

66. The Meeting was convened by Denmark, outside the IWC, which is not taking part in the negotiation, to consider a Draft Revision of the Text of the International Convention for the Regulation of Whaling 1946 as accepted as an agreed negotiating text by the Commission at its 29th Meeting, June 1977 (dated January 1978); see Chapter IX. It was based largely on a Canadian draft, with alternatives added by South Africa and Brazil. Denmark invited to attend only the TWC members, the observer states engaged in whaling, and UNEP, FAO, IUCN and the EEC.
meeting but a new composite text incorporating points agreed and disagreed was produced, revealing great disparity of views. At the time of writing a further meeting was taking place to discuss this text; it has not succeeded in producing a draft treaty.

The difficulties of revision were exacerbated by the impact of the numerous unilateral declarations of 200 mile FZ's. Canada, as we have just seen, proposed the new NAFO as a model, suggesting that coastal states should manage cetaceans found "primarily within their jurisdiction"; the difficulties of defining such stocks would appear to be formidable and the proposal could negate a major purpose of revision, viz. management of stocks throughout their range and as part of their ecosystem on the basis of comprehensive scientific information and advice. Canada proposed that, as in NAFO, the new Cetacean Organisation should have a Scientific Council which could advise coastal states on management of cetaceans in their 200 mile zones, but that only members of the old IWC would be obliged to be full members of a new Commission. A General Council of participating states could determine other membership. States participating only in the SC would pay smaller contributions and would not be bound by the Commission's regulations.

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67. Rapporteur's Report of the Preparatory Meeting on the Revision of the International Convention for the Regulation of Whaling (hereafter Rap. Rep); see also Report by P. Forkan, member of the US delegation (Forkan Rep); both Reports are unpublished.

68. Convened by Portugal, a new member of the IWC, in November 1979. Reports suggested that there was no agreement on the need for revision.

69. Tabulation of changes to W.G's Revised Convention suggested by Canada (unpublished document) see Article 1, new ss.3 and 5. S.3 reserves the coastal states right to regulate "whales/cetaceans" within its fisheries jurisdiction subject only to the proviso that "the Contracting Governments shall exercise this right in a manner consistent with the objectives of this Convention".

This proposal was much criticised since objection procedures would not be available to member states if coastal states set quotas inconsistent with the Commissions, or permitted harvesting of PS stocks; Canada subsequently modified it to relate only to cetaceans not managed by the IWC but the objections remained.  

Before considering the proposals for revision in detail it is necessary at this stage to take stock of the present position under the ICRW since there is disagreement not only concerning the extent of the revision required but whether any revision at all is necessary.

2. Progress and Remaining Problems under the ICRW

(i) Progress

(a) Instruments of change: The potential defects of the ICRW were listed at the end of Chapter IV. Many have been removed by the IWC's practices within the present Convention, by amendment of the Convention by Protocol (once only, introducing the IOS), by constant amendment of the Schedule, which has proved a flexible instrument for legal change, and by amendment of the Rules of Procedure. Non-binding Resolutions have increasingly been used as a method of promoting changes in practice, not covered by the ICRW.

(b) Scientific aspects: Many more species than in 1946 are now completely protected, apart from the aboriginal takes and even these are now being restricted. The NMP have enabled classification

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71. Canada was anxious to protect the interests of coastal communities in culling certain cetacean species to permit the growth of fisheries more socially and economically advantageous to them. Portugal, then a non-member of the IWC supported the proposal (Forkan Rep. p. 3) which would permit coastal ecosystem management in the interests of coastal communities by the coastal state.

72. See Chapters V, VIII, IX and X passim. The Rules of Procedure have inter alia changed the place of meeting; qualifications of observers; financial arrangements, including establishment of a Research Fund; participation of observers in the SC; and enabled review of scientific permits by the SC.
of whales, on the basis of scientific advice, into 3 categories related to areas, species and stocks, enabling protection of endangered stocks, which may be all that is necessary if segregated stocks are sufficiently researched to be accurately identified and assessed within the safety margins now provided. Data are also collected on several species of smaller whales subjected to directed fisheries or taken incidentally in fisheries regulated by other bodies.\(^74\) To meet the problem of the increased awareness of the gaps in scientific knowledge, paradoxically illuminated by recent refinements of research on individual stocks and populations, the IWC instituted by Resolution in 1974 an International Decade of Cetacean Research; although this has not been vigorously pursued, some programmes are underway.\(^75\) Another Resolution requires prior submission to the SC of scientific permits for review and comment.\(^76\)

(c) **Enforcement:** An IOS has been in force since 1972 for pelagic factory ships and for most, not all, land stations with observers appointed by and reporting to the Commission,\(^77\) though

73. The blue, humpback and bowhead whales are all PS; the NMP now totally protects a large number of individual stocks e.g. the fin and sei stocks apart from the N. Atlantic; pelagic sperm stocks (following the 31st Meeting).

74. Article I, 1979 Schedule defines "small-type whaling" including minke, bottlenose, beaked, pilot and killer whales; a proposal at the 31st Meeting to add the Deluga and the narwhal was defeated.


76. IWC 31st Meeting.

77. See IWC Technical Committee WG Report on New Observer Schemes IWC/31/5 WG, 5-6 July 1979; IWC/31/11, International Observer Scheme, Summary of Reports. The moratorium on whaling by factory ships in the Antarctic adopted at the 31st Meeting effectively ends the IOS in that area as neither the USSR nor Japan will now be able to take sperm whales there. It remains to be seen whether a scheme will be negotiated for the Japanese pelagic minke whale fishery, and the USSR's.
based on bilateral agreements. It appears to be working satisfactorily although it will have to be extended by further negotiations to cover the operations of the 6 new members of the Commission. A series of Resolutions has been adopted requiring members not to import whales or whale products from non-member states nor to transfer vessels, equipment, personnel or know-how to them. These are not mandatory but the active support and monitoring by a variety of NGO’s are having some effect on "pirate" whaling by states using flags of convenience and whaling by non-members and the Commission at its 31st Meeting agreed to compile a register of whaling vessels; notable new techniques of enforcement.

(d) Organisational developments: The IWC now has an independent Secretariat, a cetologist as full-time Secretary; its own headquarters; and a greatly increased budget in 1979 to fund its expanded tasks. Its membership has expanded from 14 in 1946 to 23 in 1979.

(e) Moratorium proposals: Declining stocks and uncertain science led the IWC at its 31st Meeting in 1979 to introduce three important new measures; the first, based on a US initiative, was a moratorium on all pelagic whaling except for minke whales and

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78. Chile, Peru, Republic of Korea, Seychelles, Spain, Sweden (only the Seychelles is not whaling).


80. Following the initiative of N. Carter, in compiling for the People's Trust for Endangered Species a preliminary register of such vessels.

81. The technique of Greenpeace, an NGO, of preventing whaling operations taking place by sailing their vessel between whaling ships and the whales hunted appears to be of doubtful legality; Greenpeace Fact Sheets. On the high seas the freedom to navigate is required by the High Seas Convention Article 2 to be exercised with reasonable regard for the interests of other states legitimately exercising their freedom of fishing; subject to the IWC regulation only if they are members thereof. Coastal states will no doubt now legislate to protect their EEZ's or FZ's from such activities.
aboriginal catches.\textsuperscript{82} This, if the objections procedures are not resorted to by either the USSR or Japan or both, will effectively end sperm whaling in the Antarctic. As the USSR took only this species therein, this will terminate its Antarctic whaling activities. Secondly, following a Seychelles proposal, the Indian Ocean was declared a Sanctuary Area within which no whaling for any species can now take place, although the boundary of the area was re-drawn to exclude minke whales.\textsuperscript{83} Thirdly, as a preparatory move towards a complete global moratorium (excluding even aboriginal whaling), an Australian proposal that an economic study should be undertaken was accepted.\textsuperscript{84} The study will, inter alia, indicate any hardships that might ensue, such as for aboriginals.

In spite of these advances, however, because some of the measures taken are not binding, are incomplete, or deficient in application, whale stocks have in many instances continued to decline and a number of problems and gaps remain in the regime for conservation of whales.\textsuperscript{85}

\textsuperscript{82} A complete Moratorium on pelagic whaling (apart from aboriginal catches) proposed by the US, "The Moratorium Issue", US Dept. of Commerce, NOAA, US Proposal IWC/31/20; IWC/31/21 (1979), was rejected, as was a moratorium on land station catches. The area covered was so defined as to permit the taking of minke whales. The moratorium is effected by setting zero quotas for the species concerned in that area. It may also end the Antarctic observer scheme which is based on a bilateral agreement for exchange of observers between the USSR and Japan, although as observers are appointed by the Commission it may be possible for it to continue by modifying the agreement.

\textsuperscript{83} See "The Seychelles Initiative", IWC/31/6 (1979).

\textsuperscript{84} Australian Proposal "World Wide Ban on Whaling", IWC/31/21a (1979). This will be the first time the IWC has undertaken an economic study. A similar proposal in the 1960's lapsed from lack of data.

(ii) Outstanding Problems

(a) **Scope:** IWC regulations relate only to whales listed in its Schedule, and affect only whales taken within IWC members' jurisdiction or by vessels flying their flag. The Convention relates to whales only, not cetaceans, and regulates only those taken directly or incidentally.

(b) **Enforcement:** The IOS does not cover all whale fisheries and is not fully international, since the IWC does not select the observers, who are drawn from member states only some of which are still whaling. The IWC membership still does not comprehend all whaling states which limits the effectivity of enforcement.

(c) **Objectives:** These are outdated, directed to the old not the new perceptions of whale management, still aimed at achieving "optimum levels" - not optimum population or ecosystem equilibrium - as quickly as possible. They still require avoidance of economic and nutritional distress and development of the industry. They assume that increase in stock size necessarily permits increase in take, a proposition now contested by some scientists. Although Article V(2) requires Schedule amendments to be based on "scientific findings" the Convention's objectives do not require management to be based on scientific principles and these are not therefore

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86. The 1979 Schedule, Article I refers to 15 species or types.
87. The 1979 IWC Schedule, Article V s.20(e) provides: "There shall be received such observers as the member countries may arrange to place on factory ships and land stations or groups of land stations of other member countries ... paid by the Governments nominating them" (emphasis added).
88. The FAO ACMMRR/MM/Rep. op. cit. sets out new management principles.
89. The reclassification of gray whale stocks from PS to IMS under the NMP and the fixing of a quota for it provoked criticism on these grounds.
identified. Preservation of whales for aesthetic, cultural or biological research purposes is not an objective. The Convention protects the industry as much as whales, but as several member states are still legitimately whaling under international law this is not a criticism supported by them; on the contrary they prefer the conventional status quo. Five of the six new members whale.

(d) **Scientific Research:** The Commission itself is not empowered to conduct research. The pace of research (even though more is known of whales than other living resources) is considered by many to be too slow for an ecological approach to management. The ICRW does not impose a clear obligation to transmit adequate data to the Commission. Some scientists consider the available data so incomplete that the NMP are unworkable and catch quotas cannot safely be continued. At the 31st Meeting a Resolution was proposed requiring members to submit data, the adequacy of which would then be determined by the Commission which would decide whether any deficiency therein was beyond the control of the state concerned, failure to submit or indefensible deficiency resulting in loss of quota for the year. The Resolution was defeated.

(e) **Catch quotas:** The ICRW does not enable limitation of effort by national states, or allocation of national catch quotas. Members have reduced their fleets in response to quota cuts but not as quickly or sensitively as required for conservation. The quota limits are still sometimes higher than the SC advises because of the

90. Article VI allows it only to recommend that its members conduct research.

91. Article VIII(4) requires only that Contracting Governments "take all practicable steps to obtain such data" (emphasis added).

92. ECO XIV (6) July 14, 1979, pp.2-3. The vote was 11 in favour 7 against, with 5 abstentions.
political and economic problems created by excess of effort over yield. The effects are mitigated by the voluntary agreements on national quotas concluded outside the IWC forum. The IWC can play no role in expediting or influencing them.

(f) Effect of developments outside the IWC: The Convention takes no account of events since its conclusion such as the 200 mile extensions of coastal state jurisdiction; other fisheries commissions affecting whales; the Stockholm Resolutions and UNEP Principles; CITES and the CCMS. No machinery for interrelating with such bodies is provided. The same problem will arise in relation to a future SOC, the proposed Convention on the Conservation of Wildlife and Natural Habitats of the Council of Europe, and any UNCLOS Treaty. There is a clear need to harmonise research, to minimise conflicts and avoid duplication of measures under all these bodies. A new body of international law for the conservation of marine mammals is likely to emerge as states ratify and apply these new treaties and principles. Conflicts concerning interpretations of the ICRW are increasing as states parties to CITES or enacting higher national standards than the IWC's seek to bring its policies more into line with these principles. As the IWC lacks dispute settlement procedures no authoritative interpretation can be given.

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93. The most relevant are the IATTC, INPFC, NAFO, GRCM, PCSP: Rap. Rep. p.3.

without consensus.  
These defects have led several member states to support the US initiative towards revision of the ICRW in spite of the progress made. Some states, such as Japan and the USSR, however, perceive no need for revision; others disagree on details of the proposals.  

3. Proposals for Revision of the ICRW

As the ICRW does not specifically provide for amendment of the substantive Convention revision can be achieved only be unanimity. The Draft Revisions however, contain many provisos and alternative articles and remain unofficial; few articles were agreed at the Copenhagen Meeting as a brief analysis of the main points reveals.

95. The IWC has increasingly resorted to seeking outside legal opinions on interpretation of the Convention e.g. on the proposal for prior review of scientific permits by the SC; that vessels failing to submit information should not receive a quota; that aboriginal catches should be prohibited: (see Ch. X). The problem is common to all organisations without dispute settlement machinery: see F. Morgenstern "Legality in International Organisations", BYIL XLVIII (1976-77) pp.241-258; E. Osieke "Ultra Vires Acts in International Organisations - the Experience of the International Labour Organisation", ibid pp.259-280; and E. Osieke "Unconstitutional Acts in International Organisations: The Law and Practice of ICAO" ICLQ (28) 1979, pp.1-26.

96. The USSR stated at Copenhagen Meeting that it was not even interested in joining the Working Group established there to consider revision: Forkan Rep. p.5.

97. Vienna Convention on Treaties, Article 40; the Draft Revision of the ICRW includes an article providing amendment procedures.

98. Draft Revision of the Text of the ICRW 1946 as accepted as an agreed negotiating text by the Commission at its 29th Meeting, June 1977 (IWC, January 1978); Revision of the Text of the ICRW 1946 as developed at the Preparatory Meeting, Copenhagen 4-7 July 1978 (January 1979); Tabulation of changes suggested by Canada to the IWC WG's proposed revisions (undated).
(i) **Title:** Even the title of the proposed Convention is contentious because of the implications for its scope: the choice of the present title of "International Convention for the Conservation of Cetaceans" is given. No distinction between direct and indirect taking of cetaceans - to ensure the inclusion of the former in an ICRW - is made. All reference to "whales" or "whale stocks" throughout the draft thus also apply in the alternative to "cetaceans" and "cetacean stocks".

(ii) **Preamble:** Restating the Preambular objectives to accord with new perspectives is one of the most controversial areas of negotiation. Proposals include recognition of the interests of present and future generations in whale stocks, which should be "rationally utilized on the basis of their nutritional, economic, social and aesthetic values", but Portugal wanted to delete this paragraph; Japan preferred deletion of "aesthetic". Portugal also favoured deletion of paragraph 6 stating the need to use methods "minimising pain and suffering"; others wanted to insert "humane methods". Other proposed aims are the need to increase efforts to protect all species of whales; to undertake research on the ecology of whales and their population dynamics but to confine "utilisation" (Canada preferred "exploitation") to species and stocks best able to sustain it in order to permit recovery. The avoidance of "widespread economic and nutritional distress" remains as an alternative objective, offset by that of establishing a "system of conservation" (or "management") based on scientific principles (or merely "data") and proper conservation (or "rational utilization") of the ecological value of whale stocks. Some states, such as Japan, Portugal and the Republic of Korea, reserved their position on the Preamble and its greater length as a whole.e. The widening of the conservatory objectives of the Convention.
(iii) **Scope:** It was agreed, however, that membership, as under the ICRW, should be open to all states but defined as "contracting parties" not governments. Some thought that the Vienna Convention on Treaties' Article 2(1) covered the point but as it refers to treaties between "states" and the EEC may wish to adhere to the new ICRW it does not necessarily do so. 99

The revised treaty's application to factory ships (since debarred from whaling at the 31st Meeting in 1979) is agreed; its full application to land stations and vessels whaling in 200 mile zones is not. The present universal scope of the ICRW could thus be undermined by revision.

(iv) **Definitions:** New definitions which it is proposed to add to Article II e.g. of "Protected Stocks" (presently defined only in the Schedule), "cetaceans", "conservation", 100 and "optimum levels" 101

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99. The USA expressed doubts on the proposed substitution; the USSR said it could not accept organisations as parties. The EEC attended the Copenhagen Meeting as an observer as it is not party to the ICRW. It is likely to seek to ensure that a new ICRW provides for its adherence; E. Brown Sea-Use Planning in the North Sea" in Gamble (ed) "Law of the Sea:Neglected Issues" pp.157-192

100. Some favoured no definition, or leaving it to other articles. The USA defined it as "the collection and application of scientific information for the purposes of increasing and maintaining the numbers of animals within species at optimum levels. Conservation includes research, census, enforcement and observation and also includes, when and where appropriate, the periodic total protection of whale stocks as well as regulating taking." The ambiguity of terms such as "appropriate" make the Netherlands simple definition more attractive viz. "measures for restoration or maintenance of the number of animals within stocks and species", including "scientific studies, protection and rational use of [whales][cetaceans]" but rationality of use is also open to wide interpretation.

101. The USA's proposed definition viz "the number of animals within a cetacean stock that falls within a range between the largest number of animals that is supportable within the ecosystem and the number of animals that is necessary to result in the maximum net productivity on the basis of scientific information, to maintain or restore the functional role of the stocks in the marine ecosystem" is based loosely on its MMPA but remains as difficult to apply as does that Act; see MMC Reports op. cit.
even though expressed in highly equivocal terms are objectionable to some states and likely to remain so as long as some participants view whales as a commercial resource. Tighter definition proportionately reduces the chances of participation by exploiting states, 5 of which joined the IWC after this Meeting.

(v) The Commission: The Commission remains in its present form with \( \frac{3}{4} \) majority voting for amendment of the Schedule, \( \bar{A} \) proposal that its objectives should be specified is contentious.\(^{102}\) Wider powers, to accord with the new Preambluar aims, are proposed such as giving advice to regional fishery bodies on stock status, making recommendations to parties on protecting habitats from "harassment, disturbance, or any activity which might directly affect" them. Parties would be required to notify and advise the Commission of planned actions which might have "a significant adverse impact on whales". ("significance" is not defined).

(vi) Scientific Committee: The Commission would still establish the Scientific Committee but while Australia favoured invitation of outside scientists or experts to advise it, Brazil wanted to limit participation to scientists of states parties. Revision of Article VI to allow the Commission, if necessary, itself to conduct studies on whales, and to extend these to conservation and utilization, provoked disagreement, as also did proposals specifying the information to be collected by the Commission and its encouragement of investigations "to develop knowledge of the role

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102. The USSR prefers a simple aim "to regulate whaling and to protect whale stocks on the basis of contemporary scientific evidence". The alternative of "application of conservation measures to restore stocks to optimum levels on the basis of the best available scientific measures" is retained.
of the whale in the marine environment". Although a broad interpretation of the present Article IV(a) could cover this the new draft (Article IV(a-d) details current scientific views on the information required on whales and their conservation.

(vii) **The Schedule**: Additions are proposed to the subject matter of regulations under the Schedule including limitation of effort; methods of inspection and enforcement and an international observation scheme (now instituted by Protocol). Proposals for addition of a catch-call phrase e.g. "such other measures as may be necessary to accomplish the objectives of this Convention" (Article VI(j)) were regarded as superfluous by some delegations. Radical revision of Article V, laying down the criteria for amendments is proposed; some states even controversially proposed that the Convention itself should be amendable by 3/4 majority. Some propose that Schedule amendments should be based on scientific "investigations" (e.g. of the ecosystem, economic and social relationships) not just "findings" (as in ICRW Article V(2)(c)) and that national quotas be fixed, by species, sex, area and period. There are three versions of this provocative proposal. Finally it is suggested that the interests to be taken into account should now include those of aboriginals (currently recognised only by exemption clauses in the Schedule) and of coastal communities (not presently included).

(viii) **Objections Procedures**: There significantly appears to be no dispute concerning the continued inclusion of objections procedures as in NAFO, CITES, the CCMS. No government is prepared to accept the surrender of its sovereignty to a Scientific Committee of member states, still less of outside advisers, which abolition of
objections procedures implies. States wish to retain their option of protecting short term national interests by rejecting or modifying scientific advice on occasion. They might however be prepared to accept proposed reductions of the time limits for the procedure (30/60/30 days is proposed to replace the 90/90/30 period of Article V(3)(a-c), with a written explanation of the reasons for objection).

(ix) Scientific Permits: There is a variety of proposals concerning restriction of scientific permits ranging from requirement of prior consultation with the Commission to deduction of whales so taken from the quota for that stock (no quota resulting in no permit). The nature of the information acquired which has to be transmitted to the Commission is the subject of other suggestions.

(x) Enforcement: New enforcement provisions are particularly sensitive in view of the large extensions of coastal state jurisdiction. One alternative substitutes for ICRW Article IX(3) that "each party within its jurisdiction should take measures to prevent and repress conduct in contravention of the present Convention". Rewording of the provisions on the IOS provoked much debate and the final draft was subject to reservations by Chile and Japan amongst others, since one variant proposes that observers be assigned by the Commission not only to factory ships and land stations but also to whale catchers and aboriginal operations. Some, but not all, (e.g. USSR, Portugal, S. Korea, Spain, the EEC, which reserved their positions because of legal difficulties) delegations approved in principle a proposed ban on transfer of whaling vessels to states whaling in a manner inconsistent with the Convention. An original improvement in enforcement would
ensue from the proposal (Draft Article IX(8)) that entry to their ports should be denied by member states to vessels whaling under the flags of non-members which have permitted whaling in a manner inconsistent with the ICRW. This differs from the port state jurisdiction provided in Articles 218-220 of the UNCLOS ICNT (Rev.1) or in IMCO's 1973 Convention for the Prevention of Marine Oil Pollution, for prevention of vessel source pollution. Such powers could greatly reduce the incidence of pirate whaling but though some states approved, others opposed it in principle.

(xi) Dispute Settlement: A new Article is proposed requiring that disputes on quota allocation not settled by negotiation shall be submitted, at the request of a party, to arbitration for which procedures (establishing an Arbitration Commission of 3) are proposed. Only a few delegations supported this; many reserved their positions pending the outcome of UNCLOS III, Articles 279-298 of the ICNT (Rev.1) provide for a Law of the Sea Tribunal (LOST), but neither these nor Annexes IV-VI setting out other peaceful procedures have yet attracted consensus. Annex V, Article 15 would permit the LOST to form chambers for dealing with particular categories of disputes, on the request of parties to a dispute. The applicability of its scope to disputes concerning marine mammals thus remains uncertain, both for disputes arising in and beyond national jurisdiction.

103. For a clear exposition of this form of port state jurisdiction see "The Concept of Port State Jurisdiction" Report of British Branch Committee in "Report of 56th Conference of ILA, New Delhi (1976) pp.400-408. States party could not generally deny port entry but could detain and even prosecute offending vessels if the flag state does not do so.

(xii) **Relationship to Other Treaties and Bodies:** Consideration was given by the Copenhagen Meeting to the need for a disclaimer clause in a new ICRW if concluded before the end of UNCLOS III. Potential problems arising from the effect of ICNT articles on marine mammals have already been discussed. The Meeting was aware also of the growing problem of interrelating the IWC with other new bodies affecting whales. It was suggested that Article IV of the ICRW be expanded to require the Commission to try to establish working arrangements, and possibly agreements, with such bodies (as listed in a draft Annex they include the SOC, IATTC, INFPC, PCSP, UN and Specialized Agencies especially FAO, CITES, UNEP, to which should now be added the CCMS and the Council of Europe) but no form for such agreements, or the machinery to be established, was proposed. Alternatives to Article VI proposed further that the Commission may occasionally advise (by recommendation) appropriate regional fisheries organizations on the status of stocks taken incidentally to their commercial fisheries. A CITES proposal for a disclaimer of the exception of parties from the obligations under other agreements concerning whales was accepted (since IWC members retain the option of not adhering to such agreements).

A further Meeting was at the time of writing taking place in Portugal; it was unable to draft a Convention. Participation was contentious; some states at Copenhagen favoured invitation of all coastal states; some only coastal states with whales within their jurisdiction (about 108); others proposed limitation to the 27 states at Copenhagen, viz. IWC members and whaling states. It is to be hoped that as the current unfinished negotiations both on the ICRW and the ICNT seriously undermine confidence in the IWC some attention will be devoted, pending the entry into force of any new treaties adopted, to other arrangements, as proposed below.
PART III: CONCLUSION

1. No need for a new Convention

Present proposals are limited to a revision of the existing ICRW text: the few new articles are a glossary upon it. No radical reform of the existing structure of regulation of whales or whaling is contemplated e.g. on the lines, once advocated, of an international licensing scheme, involving fees (as payment of rent for rights to exploit) which would subsidise research. There appears to be no international interest in this. The degree of disagreement concerning the proposed revision raises serious doubts concerning the short term prospects of this approach. The proposal originates (though it has attracted considerable support from other states and organisations) from the self-imposed obligations of the USA under its MMPA and it is submitted that the whole project is misconceived at the present time. It may undermine confidence in the IWC at a critical phase in its development, when considerable advances have been achieved and more are under way. If whaling ceases, as now seems possible in view of the drastic cuts in quotas, which have made pelagic whaling uneconomic, and the progress made towards a global moratorium on whaling, retention of a commission will be essential to monitor the protection and recovery of stocks, to regulate whaling should it resume when stocks recover, and to deter "pirate whaling". Revision

requires unanimity among the 23 member states and this, particularly as 5 of the 6 new members are engaged in whaling, seems unlikely to be achieved in the light of the IWC's practice to date.

In the opinion of the writer the present convention already provides sufficient mechanisms for the changes required if the political will so to use them exists or can be stimulated. The history of the IWC proves that major changes of policy can be brought about by amendments of the Schedule and the Rules of Procedure, and by Resolutions if subsequently monitored by IWC members and NGOs. The Convention itself can be amended by Protocol if necessary e.g. to enable national quotas or dispute settlement machinery. What is really required are further changes in the policies of whaling states. If such changes occur they can be implemented by the above means. Without such changes of policy (e.g. to introduce a moratorium if necessary; to secure production of data; to stimulate and fund research; to improve coordination with other bodies; to increase the number of species regulated) the proposed revision will not in any case be acceptable to all participating governments. With such changes of policy the ICRW could be an effective instrument of conservation as it stands. If states are not prepared to comply with present Resolutions they are not likely to accept their formalization in a new treaty. An ecological approach to management, based on optimum levels fixed on a scientific basis, is possible under the ICRW given the above conditions, which are the prerequisite of a stricter interpretation of the existing widely accepted international legal obligation to "conserve" whales.
2. Need for a New Organization Strategy

The ambiguous language of recent conventions (CITES, NAFO, the CCMS and the draft SOC) and even of the MMPA, suggest that the international community is still neither able nor willing clearly to define "conservation". The content of the customary duty to conserve thus remains uncertain, open to argument and interpretation. It is suggested therefore that the efforts now devoted to revision of the ICRW should be redirected to the re-organizing of the interrelationship of the ad hoc commissions, organizations and treaties concerned with whales, related species and their ecosystems to enable the requisite scientific information to be made available on a global basis and for an integrated global management system for these species to be developed. This requires:

(a) Coordination and stimulation of scientific research, pooling resources and avoiding the duplication and wasted effort of the present system. This requires institution of a Scientific Council for Marine Mammals which would convene regular meetings of the several Secretariats and of representatives of the Scientific Committees of all concerned fisheries bodies, including such appropriate international organizations as FAO, UNEP, IUCN. Its members would meet outside the political pressures of their own Annual Meetings and could develop more interrelated solutions to management problems, institute integrated research etc. Possibly the FAO's ACMRR/MM/WG could be institutionalized, on the lines of ICES, perhaps with regional or species specific committees.

(b) Coordination of measures under existing agreements; Many species are already within the scope of different conventions and commissions, and are thus subject to different systems; others
soon will be. Regulation of krill under the general systems approach of the SOC could conflict with IWC's policy of restoring the MSY of the baleen whales to which krill is of vital importance.\textsuperscript{105} Discrepancies may occur from the differences in membership; from the same states adopting different policies in the different fora;\textsuperscript{106} from differences in organs and procedures and in composition of scientific advisory bodies. These could lead to accordance of different conservation priorities for different species in different fora. Some areas might be sanctuaries under one body but not another. Indicators of over-fishing or sources of pollution might be remarked only in one body though affecting another body; the source of pollution could be outside the jurisdiction of the state whose fisheries are affected. Availability of dispute settlement machinery under some bodies only could lead to dissimilar judgments. Enforcement could be strong in one body in relation to a species, weak in another which takes the same species incidentally.

The establishment of a mechanism to coordinate existing bodies and agreements impinging on whale management is required; a new comprehensive global body for such purposes, in view of the plethora of existing commissions etc. concerned, is a political impossibility


\textsuperscript{106} e.g. at the 31st Meeting the UK announced that it could not ban sperm oil imports because of the need to coordinate such action within the EEC; while resisting proposals for a Common Fisheries Policy and itself initiating a controversial seal cull in UK waters, and pressing for listing of all cetaceans on CITES annexes. The policy differences arise from the fact that fish are still exploited by the UK; whales are not.
and could be a bureaucratic disaster, given the political and economic issues which divide the international community. 107

Since the UNEP's coordinating machinery has been disbanded, and the UN's ACC and other coordinating bodies are unsuited for such specialised tasks, 108 either a new coordinating council (with a Secretariat) is needed, or an existing organization such as FAO, UNEP or IUCN could be designated as the lead organization for this purpose with its Secretariat providing good offices for settlement of disputes pending any procedures established by UNCLOS. Use of an existing Secretariat would enable a start to be made now and would cover the possibly long interim period before any UNCLOS treaty enters into force.

(c) Improved Enforcement: Enforcement is likely to be left mainly to national means. Improvement is most likely to be achieved by strengthening this and by extension of the IWC's existing IOS scheme, subject to the improvements agreed at the 31st meeting, within the IWC, and its use as a model for related Commissions. The new Council could promote this, advising states concerned in


108. Existing UN bodies concerned with the oceans are the ACC (Sub-Committee on Marine Affairs of the Administrative Committee on Coordination); ICSPRO (Inter-Secretariat Committee on Scientific Programmes related to Oceanography). UNEP's ECB (Environment Coordinating Board) was subsumed into the ACC by General Assembly Resolution in December 1977. There is an ECG (Ecosystem Conservation Group) consisting of specialists in that subject from UNEP, UNESCO, FAO, IUCN and GESAMP, but it is informal. See unpublished Plan of Action for Marine Mammals (First Draft, October 1978-March 1979) pp.175-177, submitted to UNEP by S.J. Holt.
whale management which existing conventions it is necessary to ratify; how to correlate their enforcement obligations thereunder, and what national action is required, cooperating with CITES in implementing further trade bans to enforce internationally agreed measures. Working groups on available enforcement techniques, such as port state enforcement, denial of other facilities by coastal states to states contravening international regulations, compilation of registers of offending vessels and their operations, could be established.

(d) **International supervision of marine mammal management:**
No existing body fulfils this task. UNCLOS is not proposing that such a body be established. Though the ICNT frequently refers throughout to use of an or the "appropriate" international organization (as in Articles 64 and 65) none, including UNEP or FAO, is named. In a recent review of the organizational requirements deriving from the ICNT\(^9\) the authors concluded that "No case can be made for the creation of a new international organization within the UN system to deal with the oceans" since existing bodies, supplemented by further regional and species specified ones, could meet the new demands. They found, however, that a need remained for an organization to take stock of existing programmes and to assess their direction and emphasis in the light of the trends established by UNCLOS and other global developments (which would include advances

in scientific knowledge). Such action is particularly necessary for overview of plans for marine mammals throughout their range. The role is too complex and specialized for the UN's General Assembly yet further growth of organizations will perpetuate existing problems of disorganisation.

As governments, especially at a time of economic recession, will be anxious neither to establish new bureaucracies nor to surrender sovereignty to them, it is suggested that a supervisory role could appropriately be allocated to and developed by UNEP, as custodian of the Stockholm Principles and promoter of the principles governing exploitation of shared natural resources. UNEP has a Secretariat, support of developed and developing countries; a Governing Council of IWC members and non-members, whaling and non-whaling states, and has made a particular study of the role of regional bodies, which it is successfully promoting for the prevention of marine pollution. It has observer status with the IWC and close links with FAO and its ACMRR. It could convene joint meetings of representatives of concerned commissions, as FAO has done for staffs of regional fishery bodies, which could inter alia

110. The Plan of Action, n.108 supra, recommends that UNEP initiate an inquiry into marine mammal management as a preparation for structuring a long term plan; see p.50 and pp.100-101, taking either direct action or joint action e.g. with FAO as co-sponsor, or UNEP as lead organization; ibid, p.99.

111. FAO Fisheries Report No. 194 FIR/R194(En.)

112. COFI/20/1977; successful meetings took place in Lisbon, 1976, stressing the role of regional bodies in facilitating dispute settlement, coordination of data collection, standardisation of concepts etc.
lead to formulation of more ecological definitions of "conservation" (which might become as widely accepted in treaties as GESAMP's definition of "pollution") and to establishment of a global marine mammal "ICES", and an International Marine Mammal Research Fund on the lines of the World Heritage Fund. State practice in the IWC and its operation of the NMP suggests that whilst an obligation to "conserve" is accepted, no clear definition of the term and content of the obligation has emerged (though the pre-ICRW option of exploiting whales to extinction is now clearly illegal); the CCMS avoids an ecological definition; the MMPA binds only the USA; the SOC remains in draft.

(e) United Nations Action

It is impossible, given the highly migratory nature of marine mammals, to change their customary legal status as common property resources which has been the basis of all regulations described in this work. Nor does state practice in the IWC and as evidenced in recent agreements and proposals, challenge the doctrine of freedom of fishing on the high seas, continuing to regard whales as a species of fish in spite of the advances in scientific knowledge. The continued singling out in the UNCLOS ICNT, however, for the first time in a comprehensive text on the law of the sea, of marine mammals and highly migratory species, for the purposes of imposing a duty to protect them, indicates a growing awareness on the part


of the international community of the need to differentiate the principles of their management from those of fish. The new conventions, drafts and principles described in this Chapter and in Chapter VIII, coupled with the Conventions on the World Cultural and Natural Heritage and on Wetlands of International Importance, moreover, evidence the emergence of new international norms for the management of migratory and endangered species and shared natural resources which, it is submitted, indicate an advance towards the acceptance by the international community of responsibilities for such species akin to those of public trusteeship now being developed in many national legal systems for certain limited purposes. It is evident from the events described in this thesis that if such species are to recover or survive new concepts such as these need to be further developed not only by states ratifying these conventions and clarifying their provisions by their practices but also by further international action. The failure of some fishery commissions can be partly overcome by better regulation and enforcement within extended national jurisdiction but this option is not open as a solution to the problems of conserving migratory mammals.

It is recommended that the UN General Assembly should now formulate global principles for the management at least of marine mammals and institute new machinery to monitor the execution of these principles. It is not advised that the UN should establish a

new Marine Mammal Authority on the lines of the International Seabed Authority as postulated in Chapter XI of the ICNT (Rev.1). This is not considered to be either feasible or desirable for the taking of the speedy and sensitive decisions required to conserve such species. A more realistic approach would be for the General Assembly to institute a Marine Mammal Commission, comparable to the Human Rights Commission, the complaints procedures of which, in spite of its limitations, provides a focal point for international criticism and case studies. It could investigate the alleged failures of states to observe the international standards both in international areas and in national jurisdictions without infringing sovereignty in the EEZ's and FZ's. Not only could non-whaling states make use of such procedures at a global level but the NGO's, which have increasingly assumed the tasks of monitoring the effective application and enforcement of conservatory principles under the IWC and CITES, and no doubt will increasingly do so for CITES, the CCMS and the SOC etc., could bring before the new Commission their evidence of alleged violations.

The international standards guarded by this Commission should now, it is proposed, unless UNCLOS in its final sessions itself adopts such a declaration, be promoted by UNEP, FAO or other appropriate bodies, in the form of a General Assembly Resolution embodying a Declaration of Principles Governing the Conservation of Marine Mammals Within and Beyond the Limits of National Jurisdiction, similar to that Governing the Sea-bed and Ocean Floor, but appropriately adapted, protecting these species as

119. For a description of these procedures see N. Rodley "Monitoring Human Rights Violations by the UN and the Role of NGO's" in D. Kommers and G. Loescher "Human Rights and US Foreign Policy" 1979.

the "common heritage of mankind",\textsuperscript{121} to be utilized and conserved only under a regime of international cooperation and coordination, under the guidance of appropriate international organisations, which shall promote international cooperation in scientific research and measures to prevent pollution and other disturbance of habitats and ecosystems.

The difficulty in such situations it has been pointed out, lies not in developing the new idea but in escaping from the old ones.\textsuperscript{122} It is suggested that the above strategy bridges this gulf since it would not require abandonment of the long-established doctrines but would enable the new concepts to be grafted on to them, requiring states to exercise their sovereign rights responsibly on the basis of internationally established and monitored principles to the benefit of all, thus fulfilling an essential condition of "common heritage" for living resources namely that resources transmitted by a previous generation should be preserved to hand on in much the same state to the next. This has clearly not been achieved under past and present systems of regulation: before intensive whaling began it has been estimated that there were over 3,035,000 whales in

\textsuperscript{121}. There are many differences of opinion concerning the legal status of this concept e.g. see Burton op. cit., Ogley op. cit. and Darman op. cit., but the interpretation adopted by R.P. Arnold in "The Common Heritage of Mankind as a Legal Concept", Int. Lawyer Vol. (1975) pp. 153-158 favours this approach although the writer does not go so far as he suggests i.e. requiring consent of all "co-owners" for any disposal.

\textsuperscript{122}. Arnold supra, p.158.
the oceans, today the estimated total is 1,953,000.\textsuperscript{123}

Only by establishing the framework proposed above will, it is submitted, the international community evidence the "sense of stewardship" proposed by Canada and secure the conservation of whales and other marine mammals as, in the words of Dean Acheson at the birth of the IWC, "wards of the World".

\textsuperscript{123} See the figures given by R. Gambell, "Whale Conservation" op. cit. at p.301 as at 1977:

\begin{table}
\centering
\caption{Estimated total numbers of whales in the world: comparison of 'original' (i.e. before whales were hunted intensively from the beginning of this century) and present figures}
\begin{tabular}{lcc}
\hline
Species & Original & Present \\
\hline
Blue & 200,000 & 16,000 P (1967) \\
Fin & 500,000 & 155,000 \\
Sei & 250,000 & 170,000 \\
Sperm & 1,670,000 & 1,345,000 \\
Bryde & 50,000? & 45,000? \\
Minke & 250,000+ & 200,000+ \\
Humpback & 100,000 & 6,000 P (1966) \\
Right & ? & 5,000 P (1935) \\
Gray & 15,000 & 11,000 P (1947) \\
\hline
\end{tabular}
\end{table}
Selective Bibliography

UN Bibliographies

The three United Nations Conferences on the Law of the Sea have stimulated such an extensive literature on the subject in general and on fisheries in particular that it is not possible to include all the works referred to. The UN Dag Hammarskjold Library has however produced a series of bibliographies on the sea of which extensive use has been made viz:


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United States:


INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING (1)

WASHINGTON, 2ND DECEMBER, 1946

The Governments whose duly authorised representatives have subscribed hereto,

Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks;

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;

Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources;

Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress;

Recognizing that in the course of achieving these objectives, whaling operations should be confined to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers;

Desiring to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks on the basis of the principles embodied in the provisions of the International Agreement for the Regulation of Whaling, signed in London on 8th June, 1937, and the protocols to that Agreement signed in London on 24th June, 1938, and 26th November, 1945; and

Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry;

Have agreed as follows:—

ARTICLE I

1. This Convention includes the Schedule attached thereto which forms an integral part thereof. All references to "Convention" shall be understood as including the said Schedule either in its present terms or as amended in accordance with the provisions of Article V.

2. This Convention applies to factory ships, land stations, and whale catchers under the jurisdiction of the Contracting Governments and to all waters in which whaling is prosecuted by such factory ships, land stations, and whale catchers.

ARTICLE II

As used in this Convention:—

1. "Factory ship" means a ship in which or on which whales are treated whether wholly or in part;

2. "Land station" means a factory on the land at which whales are treated whether wholly or in part;

3. "Whale catcher" means a ship used for the purpose of hunting, taking, towing, holding on to, or scouting for whales;

4. "Contracting Government" means any Government which has deposited an instrument of ratification or has given notice of adherence to this Convention.

areas; (d) size limits for each species; (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records.

2. These amendments of the Schedule (a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources; (b) shall be based on scientific findings; (c) shall not involve restrictions on the number or nationality of factory ships or land stations, nor allocate specific quotas to any factory or ship or land station or to any group of factory ships or land stations; and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry.

3. Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if any Government presents to the Commission objection to any amendment prior to the expiration of this ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be the later; and (e) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn. The Commission shall notify each Contracting Government immediately upon receipt of each objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals.


ARTICLE VI

The Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention.

ARTICLE VII

The Contracting Governments shall ensure prompt transmission to the International Bureau for Whaling Statistics at Sandefjord in Norway, or to such other body as the Commission may designate, of notifications and statistical and other information required by this Convention in such form and manner as may be prescribed by the Commission.

ARTICLE VIII

1. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.
ARTICLE III

1. The Contracting Governments agree to establish an International Whaling Commission, hereinafter referred to as the Commission, to be composed of one member from each Contracting Government. Each member shall have one vote and may be accompanied by one or more experts and advisers.

2. The Commission shall elect from its own members a Chairman and Vice-Chairman and shall determine its own Rules of Procedure. Decisions of the Commission shall be taken by a simple majority of those members voting except that a three-fourths majority of those members voting shall be required for action in pursuance of Article V. The Rules of Procedure may provide for decisions otherwise than at meetings of the Commission.

3. The Commission may appoint its own Secretary and staff.

4. The Commission may set up, from among its own members and experts or advisers, such committees as it considers desirable to perform such functions as it may authorize.

5. The expenses of each member of the Commission and of his experts and advisers shall be determined by his own Government.

6. Recognizing that specialized agencies related to the United Nations will be concerned with the conservation and development of whale fisheries and the products arising therefrom and desiring to avoid duplication of functions, the Contracting Governments will consult among themselves within two years after the coming into force of this Convention to decide whether the Commission shall be brought within the framework of a specialized agency related to the United Nations.

7. In the meantime the Government of the United Kingdom of Great Britain and Northern Ireland shall arrange, in consultation with the other Contracting Governments, to convene the first meeting of the Commission, and shall initiate the consultation referred to in paragraph 6 above.

8. Subsequent meetings of the Commission shall be convened as the Commission may determine.

ARTICLE IV

1. The Commission may either in collaboration with or through independent agencies of the Contracting Governments or other public or private agencies, establishments, or organizations, or independently

(a) encourage, recommend, or if necessary, organize studies and investigations relating to whales and whaling;

(b) collect and analyze statistical information concerning the current condition and trend of the whale stocks and the effects of whaling activities thereon;

(c) study, appraise, and disseminate information concerning methods of maintaining and increasing the populations of whale stocks.

2. The Commission shall arrange for the publication of reports of its activities, and it may publish independently or in collaboration with the International Bureau for Whaling Statistics at Sandefjord in Norway and other organizations and agencies such reports as it deems appropriate, as well as statistical, scientific, and other pertinent information relating to whales and whaling.

ARTICLE V

1. The Commission may amend from time to time the provisions of the Schedule by adopting regulations with respect to the conservation and utilization of whale resources, fixing (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary
2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.

3. Each Contracting Government shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph I of this Article and to Article IV.

4. Recognizing that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data.

ARTICLE IX

1. Each Contracting Government shall take appropriate measures to ensure the application of the provisions of this Convention and the punishment of infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction.

2. No bonus or other remuneration calculated with relation to the results of their work shall be paid to the gunners and crews of whale catchers in respect of any whales the taking of which is forbidden by this Convention.

3. Prosecution for infractions against or contraventions of this Convention shall be instituted by the Government having jurisdiction over the offence.

4. Each Contracting Government shall transmit to the Commission full details of each infraction of the provisions of this Convention by persons or vessels under the jurisdiction of that Government as reported by its inspectors. This information shall include a statement of measures taken for dealing with the infraction and of penalties imposed.

ARTICLE X

1. This Convention shall be ratified and the instruments of ratification shall be deposited with the Government of the United States of America.

2. Any Government which has not signed this Convention may adhere thereto after it enters into force by a notification in writing to the Government of the United States of America.

3. The Government of the United States of America shall inform all other signatory Governments and all adhering Governments of all ratifications deposited and adherences received.

4. This Convention shall, when instruments of ratification have been deposited by at least six signatory Governments, which shall include the Governments of the Netherlands, Norway, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, enter into force with respect to those Governments and shall enter into force with respect to each Government which subsequently ratifies or adheres on the date of the deposit of its instrument of ratification or the receipt of its notification of adherence.

5. The provisions of the Schedule shall not apply prior to 1st July, 1948. Amendments to the Schedule adopted pursuant to Article V shall not apply prior to 1st July, 1949.

ARTICLE XI

Any Contracting Government may withdraw from this Convention on 30th June, of any year by giving notice on or before 1st January, of the same year to the depository Government, which upon receipt of such a notice shall at once communicate it to the other Contracting Governments. Any other
Contracting Government may, in like manner, within one month of the receipt of a copy of such a notice from the depository Government give notice of withdrawal, so that the Convention shall cease to be in force on 30th June, of the same year with respect to the Government giving such notice of withdrawal.

This Convention shall bear the date on which it is opened for signature and shall remain open for signature for a period of fourteen days thereafter.

In witness whereof the undersigned, being duly authorized, have signed this Convention.

Done in Washington this second day of December, 1946, in the English language, the original of which shall be deposited in the archives of the Government of the United States of America. The Government of the United States of America shall transmit certified copies thereof to all the other signatory and adhering Governments.

For Argentina:
O. Ivaniševič.
J. M. Moneta.
Pedro H. Bruno Videla.

For Australia:
F. F. Anderson.

For Brazil:
Paulo Froés da Cruz.

For Canada:
H. H. Wrong.
Harry A. Scott.

For Chile:
Agustín R. Edwards.

For Denmark:
P. F. Erichsen.

For France:
Francis Lacoste.

For the Netherlands:
D. J. Van Dijk.

For New Zealand:
G. R. Powles.

For Norway:
Birger Bergersen.

For Peru:
C. Rotalde.

For the Union of South Africa:
H. T. Andrews.

For the Union of Soviet Socialist Republics:
Bogdanov.
E. I. Nikishin.

For the United Kingdom of Great Britain and Northern Ireland:
A. T. A. Dobson.
John Thomson.

For the United States of America:
Remington Kellogg.
Ira N. Gabrielson.
William E. S. Flory.

Present Membership: Argentina, Australia, Brazil, Canada, Chile, Denmark, France, Iceland, Japan, Republic of Korea, Mexico, Netherlands, New Zealand, Norway, Panama, Peru, Seychelles, South Africa, Spain, Sweden, UK, USA, USSR.
# APPENDIX III

COUNTRIES WHICH MAY HAVE CETACEANS OFF THEIR COASTS AND THOSE WHICH HAVE DECLARED 50-200 MILE EXCLUSIVE FISHERIES OR ECONOMIC ZONES OR TERRITORIAL SEAS.

<table>
<thead>
<tr>
<th>Country</th>
<th>Jurisdiction</th>
<th>Country</th>
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1. EEZ (Exclusive Economic Zone); FZ (Fisheries Zone only); TS (Territorial Sea).

* denotes membership of the IWC;
** denotes whaling states not members of the IWC (including "flags of convenience").

Sources: (i) Countries which are not members of the IWC and which may have stocks of cetaceans off their coasts, IWC/29/14, Appendix A.

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*a 1920 means 1919/20 season in the Antarctic, calendar year 1920 elsewhere.*
Blue-whale-unit catch limits established for the Antarctic since the 1945/46 season compared with actual catches.

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* Including land-station catches.

* Japan, Netherlands, Norway, and the United Kingdom announced voluntary limits which totaled 14,500 b.w.u. The USSR announced no limits.

* The five Antarctic whaling nations announced voluntary limits which totaled 17,780 b.w.u.

* The three remaining Antarctic whaling nations (Japan, Norway, and the USSR) announced voluntary limits which totaled 8,000 b.w.u.
### IWC catch limits and catches by member nations

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<th>Southern Hemisphere</th>
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<td>(t)</td>
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</tr>
</tbody>
</table>

**Source:** IWC 1979
An attempt has been made to avoid language which might create the impression of intending to refer to, as the case may be, either a specific legal obligation under international law, or to the absence of such obligation.

The language used throughout does not seek to prejudice whether or to what extent the conduct envisaged in the principles is already preserved by existing rules of general international law. Neither does the formulation intend to express an opinion as to whether or to what extent and in what manner the principles—as far as they do not reflect already existing rules of general international law—should be incorporated in the body of general international law.

Principle 1

It is necessary for States to co-operate in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States. Accordingly, it is necessary that consistent with the concept of equitable utilization of shared natural resources, States co-operate with a view to controlling, preventing, reducing or eliminating adverse environmental effects which may result from the utilization of such resources. Such co-operation is to take place on an equal footing and taking into account the sovereignty, rights and interests of the States concerned.

Principle 2

In order to ensure effective international co-operation in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States, States sharing such natural resources should endeavor to conclude bilateral or multilateral agreements between or among themselves in order to secure specific regulation of their conduct in this respect, applying as necessary the present principles in a legally binding manner or engaged or to enter into other arrangements, as appropriate, for this purpose. In entering into such agreements or arrangements, States should consider the establishment of institutional structures, such as joint international commissions, for consultations on environmental problems relating to the protection and use of shared natural resources.

Principle 3

1. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

2. The principles set forth in paragraph 1, as well as the other principles contained in this document, apply to shared natural resources.

3. Accordingly, it is necessary for each State to avoid the maximum extent possible and to reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the utilization of a shared natural resource so as to protect the environment, in particular when such utilization might:
   (a) cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State;
   (b) threaten the conservation of a shared renewable resource;
   (c) endanger the health of the population of another State.

Without prejudice to the generality of the above principle, it should be interpreted, taking into account, where appropriate, the practical capabilities of States sharing the natural resource.

Principle 4

States should make environmental assessments before engaging in any activity with respect to a shared natural resource which may create a risk of significantly affecting the environment of another State or States sharing that resource.

Principle 5

States sharing a natural resource should, to the extent practicable, exchange information and engage in consultations on a regular basis on its environmental aspects.

Principle 6

1. It is necessary for every State sharing a natural resource with one or more other States:
   (a) to notify in advance the other State or States of the pertinent details of plans to initiate, or make a change in, the conservation or utilization of the resource which can reasonably be expected to affect significantly the environment in the territory of the other State or States; and
   (b) upon request of the other State or States, to enter into consultations concerning the above-mentioned plans; and
   (c) to provide, upon request to that effect by the other State or States, specific additional pertinent information concerning such plans; and
   (d) if there has been no advance notification as envisaged in sub-paragraph (a) above, to enter into consultations about such plans upon request of the other State or States.

2. In cases where the transmission of certain information is prevented by national legislation or international conventions, the State or States withholding...
such information shall nevertheless, on the basis, in particular, of the principle of good faith, and in the spirit of good neighbourliness, cooperate with the other interested State or States with the aim of finding a satisfactory solution.

**Principle 7**

Exchange of information, notification, consultations and other forms of co-operation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to avoid any unreasonable delays either in the forms of co-operation or in carrying out development or conservation projects.

**Principle 8**

When it would be useful to clarify environmental problems relating to a shared natural resource, States should engage in joint scientific studies and assessments, with a view to facilitating the finding of appropriate and satisfactory solutions to such problems on the basis of agreed data.

**Principal 9**

1. States have a duty urgently to inform other States which may be affected:
   (a) Of any emergency situation arising from the utilization of a shared natural resource which might cause sudden harmful effects on their environment;
   (b) Of any sudden grave natural events related to a shared natural resource which may affect the environment of such States.

2. States should also, when appropriate, inform the competent international organizations of any such situation or event.

3. States concerned should co-operate, in particular by means of agreed contingency plans, when appropriate, and mutual assistance, in order to avert grave situations, and to eliminate, reduce or correct, as far as possible, the effects of such situations or events.

**Principle 10**

States sharing a natural resource should, when appropriate, consider the possibility of jointly seeking the services of any competent international organization in clarifying the environmental problems relating to the conservation or utilization of such natural resource.

**Principle 11**

1. The relevant provisions of the Charter of the United Nations and of the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations apply to the settlement of environmental disputes arising out of the conservation or utilization of shared natural resources.

2. In case negotiations or other non-binding means have failed to settle a dispute within a reasonable time, it is necessary for States to submit the dispute to an appropriate settlement procedure which is mutually agreed by them, preferably in advance. The procedure should be speedy, effective and binding.

3. It is necessary for the States parties to such a dispute to refrain from any action which may aggravate the situation with respect to the environment to the extent of creating an obstacle to the amicable settlement of the dispute.

**Principle 12**

1. States are responsible for the fulfillment of their international obligations in respect of the environment concerning the conservation and utilization of shared natural resources. They are subject to liability in accordance with applicable international law for environmental damage resulting from violations of these obligations caused to areas beyond their jurisdiction.

2. States should co-operate to develop further international law regarding liability and compensation for the victims of environmental damage arising out of the utilization of a shared natural resource and caused to areas beyond their jurisdiction.

**Principle 13**

It is necessary for States, when considering, under their domestic environmental policy, the permissibility of domestic activities, to take into account the potential adverse environmental effects arising out of the utilization of shared natural resources, without discrimination as to whether the effects would occur within their jurisdiction or outside it.

**Principle 14**

States should endeavour, in accordance with their legal systems and, where appropriate, on a basis agreed by them, to provide persons in other States who have been or may be adversely affected by environmental damage resulting from the utilization of shared natural resources with equivalent access to and treatment in the same administrative and judicial proceedings, and make available to them the same remedies as are available to persons within their own jurisdiction who have been or may be similarly affected.

**Principle 15**

The present principles should be interpreted and applied in such a way as to enhance and not to affect adversely development and the interests of all countries, and in particular of the developing countries.

**DEFINITION**

In the present text, the expression "significantly affect" refers to any appreciable effects on a shared natural resource and excludes "de minimis" effects.

SUMMARY OF 31st ANNUAL MEETING OF THE INTERNATIONAL WHALING COMMISSION

(9-13 July 1979)

Member Nations

Six new countries (underlined) have joined the Commission which now has a membership of 23 countries. These are Argentina, Australia, Brazil, Canada, Chile, Denmark, France, Iceland, Japan, Republic of Korea, Mexico, Netherlands, New Zealand, Norway, Panama, Peru, Seychelles, South Africa, Spain, Sweden, United Kingdom, USA, USSR.

World-Wide Ban/Moratorium on Whaling

Two main proposals were put forward: Australia seeking an end to all whaling and the USA proposing a moratorium on commercial whaling until various deficiencies in the present management procedure had been remedied. The Scientific Committee identified advantages and disadvantages in these from the viewpoint of scientific knowledge and research but there was no agreement on the overall effect of a moratorium.

There was extensive discussion on the proposal in which some countries expressed strong support whilst others drew attention to legal problems and to economic hardship which might result from a moratorium. Questions were raised about enforcement and whether a moratorium would in fact weaken the IWC. Panama moved an amendment which had the effect of splitting the US proposal into two parts: one dealing with a moratorium on factory-ship whaling, further amended by a Danish proposal to exclude minke whales; and a second suggesting a moratorium on whaling from land stations. The amended first proposal was adopted.

The Commission also agreed that the Technical Committee would report to the 32nd Annual Meeting on procedures to implement a world-wide ban on whaling bearing in mind the interests of aboriginal whaling, the period over which it would be implemented, and steps that might be necessary to avoid undue hardship resulting from a ban.

It was also instructed to review and report on economic aspects of current commercial whaling including employment, capital investment, production costs, productivity and returns, direct and indirect government subsidies and any instances in which a ban would cause undue hardship.
Whale Sanctuaries

The Scientific Committee discussed the general concept of sanctuaries as well as the specific proposal for the Indian Ocean. It reached no firm conclusions but noted that while on the one hand sanctuaries could provide freedom from disturbance (e.g., for breeding) they might also produce a reduction in the acquisition of biological data unless catches were permitted for research purposes.

The Commission agreed to a ten-year prohibition on all whaling within an area designated as the Indian Ocean Sanctuary, with a provision for a general review after five years.

It also noted that within the next few years the Seychelles would like to host a special meeting of scientists interested in carrying out research in the sanctuary.

Bowhead Whales in the Bering Sea

The Commission received the Report of a Technical Committee Working Group on aboriginal/subsistence whaling which proposed a management regime involving research to be undertaken by the USA in conjunction with a Commission regulation setting a ceiling for any catches taken and provision for interim measures in the absence of complete information. The Scientific Committee stated for the fourth successive meeting that the only safe course of action from a biological point of view was to allow no catch of bowhead whales from the Bering Sea stock. After long discussion in which the USA argued that a limited take was essential for the eskimos and that a zero quota could result in non-compliance with the Commission's decision, a proposal that in 1980 the catch of bowhead whales from the Bering Sea stock would be limited to 26 whales struck or 18 landed, gained the required majority. The Commission also adopted a resolution agreeing to institute a management regime when sufficient information is available and charging the USA to adopt a National Management Plan for bowhead whales involving management and research commitments similar to those proposed by the Technical Committee Working Group.

Catch Limits

The Commission set the following catch limits for the 1979/80 Antarctic season and for the 1980 season elsewhere.

A. COMMERCIAL WHALING

(Last year's figures in brackets)

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<th>S. Hemisphere</th>
<th>N. Pacific</th>
<th>N. Atlantic</th>
<th>N. Indian Ocean</th>
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<tr>
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</tr>
<tr>
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<td>479 (454)</td>
<td>0 (0)</td>
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<td>8,102 (6,221)</td>
<td>1,361 (400)</td>
<td>2,543 (2,552)</td>
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</table>

The blue, right (including bowhead), humpback, and gray whales remain totally protected from commercial whaling in all areas. The bottlenose whale is protected in the North Atlantic Ocean.
B. ABORIGINAL WHALING

Bowhead whales in the Bering Sea: limited to 26 struck or 18 landed.
Gray whales (Eastern stock) in the North Pacific: 179.
Humpback whales in Greenland waters: 10.

Humane Killing and Ethics of Killing Cetaceans

The Commission received the report of a Technical Committee Working Group on this subject including the results of field research commissioned last year and noted its comment that "at present the best available method for killing large whales is the explosive harpoon but ... from a humane point of view ... it leaves much to be desired." The Commission accepted the Working Group's recommendations for further studies to be carried out and to consider next year the prohibiting of the use of cold grenades for killing minke whales.

The Scientific Committee repeated its view that a meeting on behavioural studies would be valuable in the context of management procedures and would also assist in the discussions on the ethics of whaling. Offers of funding had been received from two accredited observer groups and the Commission approved the allocation of funds in its budget towards the costs of such a meeting. The USA indicated that it would like to consider the possibility of hosting the meeting within the next year.

Development of Computer Facility

The Commission, acting on the strongest recommendation of the Scientific Committee, approved funding to allow the establishment in the next year of a permanent computer capability within the Commission.

Pirate Whaling

South Africa reported on steps taken to restrict the activities of the Sierra which will probably result in the closure of the Sierra Fishing Agency - Cape Town. Other countries including Japan and the Netherlands reported on steps taken to prohibit the importation of whale products from non-member countries.

The Commission noted with approval the various methods that members had taken in this matter and adopted a resolution whereby member nations undertook immediately:

(a) to cease importing whale products from non-member countries and exporting whaling vessels and equipment to non-members;
(b) to consider national legislation prohibiting whaling by non-member nations within their fishery conservation zones;
(c) to support a textual prohibition on the above in any new international convention dealing with whales and whaling.

The Commission also agreed to draw up a register of whaling vessels of member countries to make it easier for Contracting Governments to monitor and, if appropriate, take action against the operations of vessels flying flags of convenience.
Review of Present Management Procedure and Implications of Krill Harvesting

The Commission agreed that the special Scientific Working Group on Management, augmented by additional experts on whale biology and population dynamics, should meet again well before the next Annual Meeting to finalise their work and allow their report to be adequately considered at the meeting.

The UK pointed out that eventually krill catches may be limited by the proposed Convention for the Conservation of Antarctic Marine Living Resources. As krill is a basic food species of whales and there will be no control until the Convention enters into force, the Commission agreed that:

1. Member nations should be encouraged to supply data on krill harvesting to FAO;
2. Since ecosystem management may conflict with the Commission's policy for whales, the matter be referred to the Scientific Working Group on Management;
3. A Technical Committee Working Group will meet in the week before the 32nd Annual Meeting to consider how the IWC's activities can best be co-ordinated with other interested organisations including the exchange of relevant data and the conduct of scientific studies of mutual interest.

Infractions and New International Observer Schemes

No violation of commercial quotas had taken place and no whales from protected stocks were taken by commercial operations.

There was a small drop in the total percentage of infractions from last year. The level has remained stable at about 0.6% for the last few years. Observers had received full co-operation from host Governments.

The Commission received the report of a Technical Committee Working Group on New International Observer Schemes and endorsed its recommendations which were aimed at securing the participation of as many member governments as possible (Brazil, Chile and Peru indicated their willingness to accept observers under the Scheme) and at expanding the extent of observation by bringing small-type whaling operations and aboriginal whaling within the Scheme.

Press

No changes were made to existing arrangements whereby the Press are able to report plenary sessions but it was agreed that in future either the Chairman or Vice-Chairman would attempt to make themselves available to the Press at least once a day.