

Note from the Government of Portugal

'With no prejudice to our position in Rome and in Madeira, Portugal is submitting as an information document the Chair's Report of this Pew meeting.' A translation into French is also available.

The Pew Whales Commission

Lisbon, 9-10 February 2009

Chair's Report

Dr Peter Bridgewater, Chairman

Introduction and Background

I was asked by the Pew Environment Group to chair a Commission of 13 eminent individuals with wide and considerable experience in international law, policy and environmental governance to discuss and make recommendations on the future of whale conservation, whaling and the International Whaling Commission (IWC). The Commission met in Lisbon 9-10 February 2009, at the headquarters of the Luso-American Foundation, and was aided by the presence of 25 observers from governments, academia and civil society. Members of the Commission came from all over the world (see Annex 1 below), although we would have preferred to have members from all countries currently active in whaling at the table with us.

The Commission meeting was the third such event organized by the Pew Environment Group. Previous meetings in New York¹ and Tokyo² were more exploratory in nature. Some of those present in Lisbon expressed concern with the notion of referring to the members of this group as "Commissioners," which implies a formality and negotiating authority that could be construed as duplicative of the International Whaling Commission (IWC). Nonetheless, the term "Commission" was meant to convey a desire to move beyond exploratory discussions to making concrete recommendations and proposals for the way forward. As Judge Neroni Slade said in his report of the Tokyo symposium:

There are moments in history when solutions are seen to be within reach. From this symposium I believe there is just cause for me to suggest that we may be at that point now for whales. Certainly, a door may be opening.

The purpose of the Pew Whales Commission was to take some steps through that door.

The Lisbon meeting took place four weeks before the intersessional meeting of the IWC to be held in Rome on 9-11 March 2009 to discuss the future of the IWC. The Rome meeting will discuss options prepared by a Small Working Group (SWG) under the leadership of Ambassador Alvaro de Soto, whose report was published on 2 February 2009. The Pew

¹ <http://www.pewwhales.org/whalesymposium/index.php>

² <http://www.pewwhales.org/tokyosymposium/index.html>

Whales Commission welcomed the spirit of change reflected in this process, and expressed its hope that the deliberations in Lisbon could build on this momentum and serve as a useful addition to others' contributions in Rome. That said, there was an emphasis on the importance of openness in the SWG process. While understanding the need to negotiate in an atmosphere of trust and confidence, the Commission urged that more consideration be given to transparency, including the improved involvement of civil society and the need for solutions to take full account of the findings, views and opinions of the IWC Scientific Committee. As NGOs from all sides of the whaling issue inform and influence the debate on whaling, it is hard to envisage a credible and lasting resolution being achieved without their involvement and, ultimately, their support. Failure to involve NGOs invites their opposition and continued campaigning, with the potential that, ultimately, the outcome will be undermined and of no lasting effect.

This report presents my summary as Chairman of the discussions and of the resulting areas of agreement. The *Earth Negotiations Bulletin*, whose reporting team was present in Lisbon, has also published an independent account of the meeting, which can be found at the following URL: <http://www.iisd.ca/ymb/whales/pew3/>.³

The list of participants and observers, the agenda and background materials available in Lisbon can also be found at the following URL:
<http://www.pewwhales.org/tokyosymposium/index.html>

The list of expert presentations made to the Lisbon meeting, and links to each one, can be found in Annex 2 of this report.

As a group, the Pew Whales Commission properly reflected a broad spectrum of views. There was widespread agreement on most issues and perspectives, as well as on the means of reaching a workable agreement in the future. It was only in a few cases that full consensus on a single way forward addressing all participants' concerns could not be reached. The meeting proceeded in excellent spirit and with a very positive ambiance and approach from both Pew Commissioners and observers.

Summary of the Discussions

The Commission's meeting was opened by the Honourable Humberto Rosa, Secretary of State for the Environment of the Government of Portugal. As host of the next IWC Annual Meeting in Madeira in June, 2009, his clear commitment to helping resolve this matter was greatly appreciated. I draw particular attention to his statement:

I believe that the way ahead for the IWC will need the increased involvement of politicians - politicians at ministerial level. To tell you of my own experience on climate change negotiations, when I acted as leading EU's negotiator in the Bali Conference in December 2007, when Portugal was holding EU's Presidency, I have seen how those countries represented at senior negotiator level, after a point could not bring any further contribution to the way forward. Senior negotiators are well

³ The ENB report will also be available shortly in French, Japanese and Spanish at the same URL.

trained to defend their position and counteract the positions of others. In doing so, they tend to act as 'spoilers' of whatever approach can emerge that does not match their mandate. In contrast, countries represented at ministerial level could more easily, at a point, grasp the political way-in-between and contribute to success. I anticipate that the same is likely to happen in the IWC. Thus, we encourage our ministerial colleagues of IWC countries to give it a try by coming to Funchal next June, to open up chances for consensus and success.

My observations of the key points arising from the ensuing discussion are set out here:

The whaling issue, like other complex issues, may well have reached the point at which senior negotiators have difficulty making further progress without political involvement. The **involvement of high-level policy-makers** was identified by many participants as necessary for moving the IWC negotiations forward to successful conclusion. It was proposed, in keeping with State Secretary Rosa's statement at the opening of the meeting, that there be full ministerial involvement at the IWC Annual Meeting in June 2009. Ideally ministers might meet before the IWC meeting, and/or convene in parallel session to it during that week.

With reference to facilitating the success of a ministerial process, various participants in the meeting offered suggestions. One proposed that "emissaries" be sent to IWC member states in advance of the March and June 2009 IWC meetings to engage in direct dialogue with the political directorate of those countries to ensure their full and informed involvement since final decision-making would fall to them. Another participant noted that States will collaborate to solve a problem collectively only when they cannot solve it unilaterally. It would appear that at the present time many IWC Member States, both whaling and non-whaling, are seeking unilateral solutions to whaling-related problems rather than cooperative, multilateral ones because the incentives for their actions are political in nature and relate to domestic constituencies; in many cases, the *status quo*, while not beneficial for conservation, is comfortable domestically. It could be a task for the members of the Pew Whales Commission instead to work to help change State perceptions of the incentives for a collaborative, international solution to the current impasse, for example by putting whaling in the broader context of international ocean governance and environmental protection. Without incentives for States to cooperate internationally to find solutions a Ministerial-level initiative is likely to fail. It was also suggested that more progress may be made with the engagement of Foreign Ministers, as well as Ministers of the Environment rather than Ministers of Fisheries, as is the case for many IWC member states.

In a similar vein, it was argued that a Ministerial-level engagement could also be used in parallel to try to place the IWC reform within the broader context of readjustment of institutions dealing with **ocean governance**. A number of participants stressed that the IWC, which dates to 1949, has been living in a world of its own and that it needs to be exposed more fully to modern ocean conservation institutions and policies. The U.N. Convention on the Law of the Sea (UNCLOS) now provides the agreed legal framework for regulating the conservation and management of all forms of marine life, including whales and other cetaceans. Other international organizations have recently reviewed their operations in the light of the principles laid down in the Convention, as implemented in the Fish Stocks Agreement of 1995.

The IWC faces many problems that are of an institutional nature, some of which are rooted in the 1946 Convention (and its limitations) and others of which are a product of its polarized debates. Paradoxically, though, given the high public interest in the question of whales and whaling, successful resolution of those problems can lead the IWC to become a model for the development of responsible ocean governance, with an emphasis on ensuring greater transparency and public participation. It was also stressed that the science of conservation did not exist in 1946, and that it is highly appropriate to move the IWC from a focus exclusively on whaling, to that of whale conservation in the 21st century.

Socio-economic, cultural and ethical considerations must be a part of any discussions seeking to find solutions to the whaling issue, in addition to conservation issues. Pew Commission members asked questions about the economics of whaling, such as: who benefits and how much? How relevant is whaling to a nation's economy? How does this compare to the economics and benefits of non-lethal utilization, such as whale-watching? To what extent is the whaling industry in the three countries that are currently whaling subsidized by the governments of those countries (other than those conducting aboriginal subsistence operations)? There was a widely supported recommendation to remove direct and indirect **subsidies** to the whaling industry. In the course of discussions on **whale-watching**, it was noted that the IWC has made good progress with this issue. This is helpful especially for developing countries where whale-watching is a growing industry, making a valuable contribution to sustainable development efforts. However, Latin American countries and other stakeholders still seek to have the IWC officially recognise non-lethal use of cetaceans as a valid management option, with the subsequent allocation of time and resources to the issue that such recognition would entail. This was described as an issue on which there should be no irreconcilable legal difficulty for the IWC to reach consensus and it was recommended that those countries that until now have opposed the full treatment of whale-watching in the IWC work to an effective resolution of this issue .

During the discussion of conservation tools, **whale-watching** was furthermore identified as an important incentive for conservation. As an activity worth an estimated USD 1 billion worldwide, existing in both hemispheres, and providing in many coastal communities significant "livelihood benefits" in the spirit of the UN Millennium Development Goals, it was acknowledged that if managed properly whale-watching can provide significant income for coastal communities as well as conservation benefits for whales.

In the same discussion, national, regional and international **policy and legislation** were identified as important **tools for species conservation**, aimed at facilitating species recovery and reducing conservation threats. There was widespread support for the need to remove the threat to whale conservation posed by **international trade** in whale meat and other products, with the main focus being on decisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Pew Commission members raised the questions: **Does the Scientific Committee have all of the tools and information** it needs to do its work, and **is its work understood by policy-makers?** Some participants identified a lack of trust in the workings of the Scientific Committee, and noted that present arrangements did not always permit full access to data that would otherwise facilitate the

Committee's work. The current practice whereby the Scientific Committee's report is made available to IWC Commissioners a day or two before the Plenary for review and assimilation of its often complicated contents was identified as an obstacle to decision-makers taking fully informed policy decisions. It was also seen in particular as an obstacle for developing countries that may not be able to send a full scientific delegation, and as contributing to the polarized climate. It was argued that if the two sessions could be decoupled in time (by at least several months), decision-makers back in the capitals would be better able to fully analyse the Scientific Committee's report and develop more nuanced and fully informed policies.

Pew Commission members received presentations on the Revised Management Procedure (RMP) and its Catch Limit Algorithm (CLA), developed within the Scientific Committee after years of extensive computer simulation testing. The CLA is a complex mathematical procedure that establishes how many whales can be taken from a "stock". It is based on a minimum amount of information that can be reliably available, e.g. stock surveys and catch data, and was developed in response to the failures of previous IWC management regimes that were unable to protect exploited whale stocks from depletion. The RMP as specified in a 1994 IWC resolution has not been formally adopted into the IWC's Schedule, which allows some countries to opt-out of its safeguards. Norway, for example, is presently whaling under a unilaterally modified version of the RMP that is less conservative than that agreed by the IWC.

The Pew Commission considered several options related to management and the RMP:

- 1) Adopt the 1994 specification of the RMP into the Schedule as part of a larger process that includes resolving the problem of possible "opt-outs" to the procedure and to the catch limits it generates;
- 2) Establish catch limits for coastal whaling using the agreed RMP;
- 3) Develop a new management approach for coastal whaling which may require acceptance of a less precautionary approach and higher level of risk than the agreed RMP.

The meeting agreed that Option 3 was not acceptable. It was largely acknowledged that the RMP as specified in 1994 would provide a robust way of managing whaling IF ever the IWC takes the decision that commercial whaling should be authorized under some circumstances, and wide support was expressed for Option 1. With regard to Option 2, one participant argued that acceptance of Option 2 could not be an immediate consequence of Option 1, but would have to be preceded by the IWC taking formal policy decisions to adopt a regime for regulating any such activity (i.e. a Revised Management Scheme) and to agree to an exemption to, or the lifting of, the current moratorium on commercial whaling, at least in respect of coastal whaling.

Pew Commissioners identified **bycatch** as an important issue, acknowledging a pressing need to know, with greater accuracy the numbers and species of cetaceans being affected, and to make recommendations for actions to mitigate cetacean bycatch. One speaker explained the importance of domestic regulations being designed so as to remove the incentive for bycatch to occur. Where such regulations instead provide an incentive for bycatch, such as by allowing bycaught whales to be sold on the market, the Pew Commission heard that there has been a marked increase in the numbers of animals killed in this way.

From the scientific point of view, there is a need to take a **precautionary approach to the distribution of whaling and of survey areas in relation to our knowledge of stock identity and mixing**. An example was given concerning the stocks of minke whales in the Western North Pacific, including the depleted “J” stock. These stocks would be likely to be affected by the Small Type Coastal Whaling (STCW) operations contemplated in the SWG proposals, and it is clear that any adoption of such proposals should seek the best science-based solution. One suggested approach was presented to the meeting.⁴

Pew Commissioners were informed about the importance of **compliance and enforcement measures**, and concluded that it would be wise to consider adopting in the IWC the best practices and precedents currently followed in other organizations. This could entail costs-sharing mechanisms among all members of the IWC to help promote their adoption and implementation.

Pew Commissioners were made aware of a paper (“Building a Safety Net”) from Japan's Institute for Cetacean Research, describing an alternative convention now under development in Japan to regulate whaling in the event that IWC negotiations break down.⁵ Pew Commissioners conveyed a general consensus that collective efforts should be devoted to making the **IWC more effective, for which the group underlined its support of the SWG process, and that the IWC remains the appropriate international organization for the conservation of whales and the management of whaling**.

There was agreement from all participants that the “old days” of whaling were destructive, irresponsible and never to be repeated. Various options regarding **changes to the International Convention on the Regulation of Whaling (ICRW)** were reviewed. They ranged from proposals to re-write the Convention to updating it through adoption of one or more protocols when changes could not be achieved through Schedule amendments. Examples were given of other conventions that had been developed around the same time as the ICRW and had subsequently been updated in this way, such as the Northwest Atlantic Fisheries Organization (NAFO) agreement.

A list of possible IWC reforms was discussed during a round robin session on the second day:

- Finalizing and implementing the RMP
- Rewriting the rules on objections and reservations
- Explicitly recognizing non-lethal use

⁴ The proposal was to survey the “J” stock and determine a catch limit under the CLA, survey the “O” stock and determine a CLA catch limit in the overlap area, conduct DNA testing of each whale at the moment of landing in order to determine stock origin, and close the whaling season when the first of the two catch limits has been reached. Bycatch would be included in the allowable catch limit. If the catch limit for “J” stock is already zero, whaling would have to be relocated or conducted at another time to avoid “J” stock.

⁵ The ICR “Safety Net” paper is available at:
<http://www.pewwhales.org/pewwhalescommission/submissions/ICT%20submission%20to%20Pew%20Whales%20Commission%20-%20Jan,%202009.pdf>.

- Regulating by-catch, with penalties for infractions ⁶
- Introducing a dispute resolution mechanism
- Engaging non-state actors in the process
- Decoupling the scientific and political processes
- Changing the name of the IWC to reflect “new priorities” (e.g., the International Whale Commission)
- Addressing Article VIII (“scientific” or special permit whaling)

Pew Commissioners were asked to rank these areas, listing their top three priorities for reform. The three that resulted from this exercise were: 1) **rewriting the rules on objections and reservations**; 2) **regulating by-catch, with penalties for infractions**; and 3) **introducing a dispute resolution mechanism**.

Regarding any amendment to **Article VIII** (Whaling under Special permit), the Pew Commission heard that existing treaty rights could not be removed without changing the Convention. Pew Commissioners considered alternative suggestions that included: (1) individual States maintaining their rights but declaring for a particular period that they will not exercise them, (2) requiring Scientific Committee approval at the request of the Commission before whaling under Article VIII could go ahead or (3) addressing Article VIII as part of a wider review of the Convention.

The issue of most contention among some Pew Commissioners was the question of whether a trade-off could or should be made between phasing-out whaling in the Southern Ocean Sanctuary in return for a limited quota for Small Type Coastal Whaling (STCW), as noted in the SWG report. While there was support for a solution in this vein it was not unanimous and remains a key issue of contention that emphasizes the need for ministerial consideration. There was some support for pursuing such an approach, but serious reservations regarding the regulation of coastal whaling, as well as the concept of a “phase out,” were expressed.

Several participants also addressed various aspects of the **5-year period for resolution of issues** proposed in some elements of the SWG paper. Pew Commissioners expressed acceptance that the IWC might be able to achieve significant accomplishments over a five-year period. However, it was argued that utmost care should be taken to ensuring that decisions were not taken in the short-term, especially under interim arrangements, with possible negative long-term consequences for whale conservation. It was stressed by several participants that five years could be too long to wait, and several issues required more immediate resolution. Another participant pointed out that the IWC had not successfully concluded any of its current or recent long-term negotiations (e.g. the now suspended 12-year negotiation for a Revised Management Scheme) and therefore expressed some caution about specifying a five-year period for resolving any outstanding issues. It was argued that a significant change in the IWC’s present negotiation dynamic would be required if that is to be successful.

⁶ Although the IWC cannot address all issues related to bycatch, measures available to IWC related to bycatch might include removing marketing incentives or requesting the Scientific Committee for advice on ways to reduce bycatch, particularly for stocks which may also be subject to direct takes

Pew Commissioners noted, too, that this time period coincides with opportunities to improve **ocean governance**. Participants were informed that the UN Commission on Sustainable Development (CSD) would be dedicating its 2014-2015 cycle to an examination of ocean affairs. This convergence could provide a further incentive for the IWC to re-examine its role in improved ocean governance, including more transparency in its procedures and more involvement of non-State actors by that deadline.

Areas of agreement

The following conclusions reflect the views of a significant majority of the group. Where noted, some individuals held different views on matters that could not be comfortably reconciled in a framework of full consensus.

Aware that **all international negotiations require a spirit of give and take** on all sides, we look forward to the June 2009 IWC Annual Meeting in Madeira as a long-awaited opportunity to address these topics, noting that it could serve as a test case for the international community to address and improve international ocean governance.

Critically, we urge that the **capacity of delegations to make decisions in Madeira be enhanced by Ministerial-level participation**, in order to address outstanding issues at the highest political level. To this end, we support actions that engage high-level actors in the discussions. We encourage Portugal's Secretary of State Humberto Rosa to use his good offices to encourage Ministers of the IWC Contracting Governments to attend.

We note the suggestion of the SWG to limit whale products from Japanese small type coastal whaling to local consumption as this could contribute to the prevention of international trade in whale products. Most participants expressed the need to **prevent all international trade in whale products**, and to ensure and maintain linkage with CITES, including by a removal of all reservations by contracting Parties to CITES Appendix 1 listings for whales. One participant expressed a different view, arguing that there is no need to prevent trade in whale products for conservation reasons, citing his belief that all whaling currently taking place is legal and sustainable and arguing that those countries that have reservations on such CITES Appendix I listings maintain national DNA registers that can detect illegal trade.

The Pew Whales Commission identified a number of steps that could **improve the functionality of the ICRW** and harmonise it with current international standards and other global and regional conventions concerning the conservation and management of living resources. There are some institutional gaps in the IWC that need to be filled, including by the incorporation of a dispute resolution mechanism and by improvement of the objection procedure. We welcomed the SWG suggestion of considering whether the Convention requires amendment to reflect the changes in priorities, dispute mechanisms and approaches to whale conservation and ocean governance that have occurred since the

Convention came into force. Some of these proposals would require the negotiation at a diplomatic conference of a Protocol to the ICRW.

It would be beneficial to make **improvements in the provision of scientific advice** to policy-makers. Possible solutions would be the decoupling of the back-to-back meetings of the Scientific Committee and the Commission ensuring that Scientific Committee findings are available to the Commissioners in a timely and coherent manner.

There is a need to **increase transparency and clarity of the Scientific Committee process** and to review current confidentiality provisions.

Decisions must be based on the best scientific information, taking into account the precautionary approach and socio-economic, cultural and ethical considerations.

The IWC should **continue to address whale-watching *inter alia*** to give greater emphasis to non-lethal uses of whales as a valid whale management option and to identify relevant best international practices.

We noted the importance of whale sanctuaries worldwide and welcomed the proposal to establish a **South Atlantic Whale Sanctuary** as part of the SWG approach towards reaching broad agreement in the IWC, although some questions were raised regarding the 5-year time limit proposed in the SWG paper.

Almost all of the members of the Pew Commission recommended seeking if and how the **elimination of whaling under special permit in the Southern Ocean** can be realized as rapidly as possible. One option could be that, while retaining treaty rights, at least in the short term, Contracting Governments could choose not to exercise their special permit rights for research purposes, or could choose not to do so in the absence of the IWC's approval. Treaty rights might be separately addressed in a Protocol arising from any diplomatic conference. One delegate did not support this recommendation, arguing that whaling under special permit is providing valuable scientific findings necessary for the management of whale resources and that the right of the Parties to issue special permits is a fundamental right under Article VIII of the ICRW. While these points need to be taken into account, the participant proposed that negotiations on the matter of research whaling in the Southern Ocean could consider voluntary measures and a possible reduction in the number of whales taken.

Likewise, there was some support for the consideration by the IWC of proposals for **Small-Type Coastal Whaling in Japan** provided that such activity is in keeping with advice from the IWC Scientific Committee that the risks to whale populations would not be greater than under the RMP—and indeed were fully in accordance with the RMP, protects threatened and endangered

whale populations, allows the recovery of depleted populations, and is managed so as to reduce by-catch and infractions with a view to their elimination and to ensure that the products of the catch do not enter international trade.

We emphasised the need to **strengthen substantially monitoring, control, surveillance, compliance and enforcement mechanisms**. There was widespread support that these mechanisms could be supplemented by wildlife management tools including adequately controlled DNA testing and monitoring.

Conclusion

The meeting concluded convinced that with goodwill, full understanding of all positions, and the *give-and-take* necessary in international discussions, a solution to the vexed nature of whaling and whale conservation matters can be developed in Rome on the way to Madeira. The Pew Commission again gives full support to the initiative being undertaken by Portugal as the next host of the IWC.

Annex 1: Members of the Pew Whales Commission (in alphabetic order)

Ambassador **Nobutoshi Akao** (Japan)
 Judge **David Anderson** (United Kingdom)
 Dr. **Peter Bridgewater** (Chair, UK/Australia)
 Hon. **Barry Cohen** (Australia)
 Mr. **Modou Diagne Fada** (Senegal)
 Governor **Parris Glendening** (USA)
 Ms. **Madeleine de Grandmaison** (France/Martinique)
 Dr. **Yolanda Kakabadse** (Ecuador)
 Mr. **Juan Mayr** (Colombia)
 Hon. **Jim McLay** (New Zealand)
 Senator **Ngoné Ndoeye** (Senegal)
 Professor **Mario Ruivo** (Portugal)
 Mr. **Kaliopate Tavola** (Fiji)
 Senator **Elizabeth Thompson** (Barbados)

Annex 2: Expert presentations made to the Pew Whales Commission.

Science and Precautionary Management, presented by Dr William de la Mare.

<http://www.pewwhales.org/documents/CLUSTER%201%20-%20Bill%20de%20la%20Mare.pdf>

Special Permit and Coastal Whaling, presented by Dr Russell Leaper.

<http://www.pewwhales.org/documents/CLUSTER%202%20-%20Russell%20Leaper.pdf>

Compliance and Enforcement, Compliance and Monitoring, Objections and Reservations, Bycatch and Infractions, presented by Prof. Al Gillespie.

<http://www.pewwhales.org/documents/CLUSTER%203%20-%20Al%20Gillespie.pdf>

Conservation Tools: Whales and the IWC, presented by Dr Susan Lieberman.

<http://www.pewwhales.org/documents/CLUSTER%204%20-%20Sue%20Lieberman.pdf>

Developments in Ocean Governance, presented by Mr Duncan Currie, Esq.

<http://www.pewwhales.org/documents/CLUSTER%205%20-%20Duncan%20Currie.pdf>