

# Chair's Report of the RMS Working Group Meeting

University Arms Hotel, Cambridge, 28 February to 2 March 2006

## 1. INTRODUCTORY ITEMS

The meeting was held at the DeVere University Arms Hotel, Cambridge UK, from 28 February to 2 March 2006. A list of participants is given as Annex A.

### 1.1 Appointment of Chair

Doug DeMaster (USA) was appointed Chair.

### 1.2 Introductory remarks and meeting objectives

Before making his own introductory remarks, the Chair invited Henrik Fischer, Chair of the Commission, to address the meeting. Henrik Fischer noted that the process to develop an RMS started in 1995 with a meeting in Reine, Norway. He referred to the various meetings held since then and to the various technical groups established during this period. He noted in particular a change in the approach to discussions that took place after IWC/53 in London, 2001 when the RMS Expert Drafting Group was established and when he was appointed as RMS Working Group Chair. Until this time, the Commission had tried to make progress with an RMS through revisions to draft Schedule text (a 'square-bracket exercise') rather than looking at the RMS discussions as a 'whole'. The EDG agreed a framework that established RMS objectives and a way to develop and evaluate proposals, with Schedule text only being drafted once some level of agreement was reached on a particular issue. Henrik Fischer reminded the meeting that at IWC/55 in Berlin in 2003, the Commission had agreed to allow him to convene a small group of his choosing to explore ways and possibilities to take the RMS process forward. His consultations produced his 'Chair's Proposals for a Way Forward on the RMS' (IWC/56/26) which were reviewed by the Commission at IWC/56. Since then there had been a further three meetings of the RMS Working Group, i.e. in Borgholm, Sweden in November/December 2004, in Copenhagen in March/April 2005 and in Ulsan in association with IWC/57 last year. He had resigned as RMS Working Group Chair after Ulsan. Henrik Fischer welcomed Doug DeMaster as the new RMS Working Group Chair and hoped that the group would give him its support. Finally he noted his view that reaching agreement on an RMS in some form was important not only for whale conservation and management but also for the future of the organisation.

Doug DeMaster recalled that via Resolution 2005-4 agreed at IWC/57 to 'advance the RMS process', the Commission had agreed to: (1) hold an intersessional meeting to advance the work of the RMS Working Group and that of the Small Drafting Group (as established by Resolution 2004-6), with particular emphasis on any outstanding issues and taking as a starting point the Group's report to the Commission (i.e. IWC/57/RMS 3); (2) hold a meeting of the RMS Working Group in connection with IWC/58 to discuss the remaining issues that must be resolved before adoption of the RMS can be considered; and (3) consider, if appropriate, Ministerial, diplomatic, or other high-level possibilities to resolve these issues among the Contracting Governments to the Convention.

The Chair noted that over the years, and particularly recently, a huge amount of effort has been spent by Contracting Governments, the Chair of the Commission and the Secretariat on attempts to develop an RMS. Although significant progress has been made on a range of technical matters and draft Schedule language has been prepared, he noted that major policy issues remain and reaching agreement on what an RMS 'package' should comprise continues to be elusive.

The Chair further noted that although some technical matters remain, these are driven in large part by which elements are to be included in any RMS, and the nature of those elements. Given the many options on the table at present, he believed it sensible at this meeting to focus on ways to break the current deadlock so as to be able to consolidate diverging views on the composition of an RMS 'package', which may require identification of the most important obstacles.

Finally the Chair recognised that it may not be possible to develop an RMS that could be adopted by consensus, but that it should be possible to reduce the options currently on the table. He hoped that this could be achieved at this meeting, but if this is not possible, then he hoped that a mechanism could be developed that would lead to this.

### 1.3 Reporting

In the interest of making the best use of the time available, the Working Group agreed that a Chair's report summarising the main discussions and outcomes of the meeting should be prepared and circulated after the meeting.

Nicky Grandy and Greg Donovan of the Secretariat were appointed as rapporteurs.

### 1.3 Review of documents

The list of documents available to the meeting is given as Annex B.

## 2. ADOPTION OF AGENDA

The agenda adopted is given as Annex C.

The Chair noted that Contracting Governments wishing to make general statements on their position with respect to the RMS would have an opportunity to do so under agenda item 5.

## 3. BACKGROUND: HOW WE GOT WHERE WE ARE TODAY

The Secretariat gave an overview of RMS discussions over the years, focusing in particular on activities since IWC/53 in 2001 onwards, i.e.:

- IWC/53, London to IWC55, Berlin
  - Two meetings Expert Drafting Group (Cambridge late 2001& Auckland early 2002)
  - Private Commissioners' meeting, Cambridge Oct 2002
  - Working Group on catch verification, Antigua, April 2003
  - Working Group on costs, Antigua, May 2003
  - Working Group on compliance, IWC55 Berlin, June 2003
  - Private Commissioners' meeting, IWC55 2003
- IWC/55 allowed Chair to form small group
  - Two meetings, Cambridge, December 2003 & March 2004
- IWC/56, Sorrento
  - Chair's proposals for an RMS 'package'
  - Resolution 2004-6 reviving RMS Working Group & establishing RMS Small Drafting Group (SDG)
- IWC/56 to IWC/57
  - Two meetings of RMS Working Group and SDG (Borgholm & Copenhagen)
  - Technical groups established: VMS, DNA, animal welfare, Code of Conduct for special permit whaling

These activities had involved four RMS Working Group meetings, three private Commissioners' meetings, two meetings of the Chair's Small Group and five meetings of various drafting/technical groups. With the exception of the Chair's Small Group, all groups had been open to any interested Contracting Government. A total of 17 Contracting Governments had been involved, some in many groups, others in only one or two. The Secretariat reported briefly on the outcome of these activities and on the status of discussions with respect to the possible elements to be included in an RMS. A copy of the presentation is available on request.

## 4. OVERVIEW OF THE CURRENT STATUS OF DISCUSSIONS

The Chair indicated briefly the status of discussions on the possible RMS elements/issues as of IWC/57 using Table 1 (revised) from the Working Group's Report to the Commission (i.e. IWC/57/Rep 6) as a basis and asked whether Contracting Governments had anything to report on work since IWC/57, or anything they particularly wished to raise. Regarding the latter, he stressed that the intention of this agenda item was not to re-open discussions on the various options developed previously and listed in Table 1. For ease of reference, Table 1 (revised) is included in Annex D.

There were contributions/discussion on the following items only: (1) RMP; (2) deterring IUU whaling; (3) animal welfare considerations; (4) compliance monitoring; and (5) whaling under special permit. These are reported in the sections below.

#### 4.1 RMP

Norway informed the meeting that it intended to propose a generic revision of the *Catch Limit Algorithm (CLA)* for the RMP to the Scientific Committee at IWC/58. Previously it had given notification of its intention to develop and propose a change to the *CLA* of the RMP for minke whales in the North Atlantic (see *Ann. Rep. Int. Whaling Comm. 2004:21*). There was no discussion.

#### 4.2 Deterring IUU whaling

Australia submitted Document IWC/F06/RMSWG 8 on Illegal, Unreported and Unregulated (IUU) fishing for toothfish: a case study to the Working Group for information. This document is included as Annex E. Australia reiterated its well-known position that it will oppose adoption of an RMS because of its opposition to the resumption of commercial whaling, but noted that nevertheless, it has an interest that any discussions on the RMS reflect best practice elsewhere. Australia believed that the experience of other fisheries management bodies can help discussions at a practical level within IWC.

Australia recalled that on previous occasions, some Contracting Governments have expressed the view that IUU activities would not be a problem should commercial whaling resume. It noted that a similar view had been taken initially within CCAMLR regarding their fisheries but that this had turned out to have been a misjudgement. Australia noted that the toothfish case-study summarises how CCAMLR has struggled to contain IUU fishing. It drew attention to the following lessons learned by CCAMLR that it believed the IWC should not ignore:

- Having a strong compliance regime in place before IUU whaling begins is essential as it may deter potential IUU fishers. Once investments have been made and fishing has commenced, IUU fishers have substantial incentives to maintain operations and regulatory responses are correspondingly more difficult.
- A compliance regime should be as comprehensive and robust as it can be from the beginning in order to avoid gaps that IUU operators can, and will, exploit.
- A compliance regime must apply to all whaling operations where whale meat products enter the commercial market to avoid creating gaps and markets for illegally caught products.
- Transparency through the use of internationally recognised, independent systems, is the only way of ensuring compliance and building widespread trust in any compliance regime.
- The RMS package that the IWC is currently discussing is far from complete. Elements in CCAMLR's compliance regime such as lists of IUU vessels still need to be incorporated into the RMS arrangements.

There was no discussion.

#### 4.3 Animal welfare considerations

The UK noted its view that there should be specific requirements in the Schedule for the collection of animal welfare data. It believes that if the Commission as a body is to sanction the killing of whales, then it has an ethical duty and moral responsibility to ensure that this is done in a way so as to minimise suffering. There were no further comments.

#### 4.3 Compliance monitoring

The Chair recalled that a Compliance Working Group had been established by the Commission at IWC/57 in response to a proposal from Argentina, Germany and the UK<sup>1</sup>. The agreed Terms of Reference were to: '(1) *explore ways to strengthen compliance by analysing the range of possible legal, technical and administrative measures available to the Commission which are consistent with the ICRW; and (2) to explore possible mechanisms to monitor and possibly address non-compliance of Contracting Governments consistent with the ICRW and international law*'.

The Chair invited Working Group members to report on any activity since the Annual Meeting. Noting that it was not the convenor of the Group, the UK reported that the Working Group had not actually materialised but that it had itself given some thought to this matter. Argentina reported that it had tried to advance the issue, but had not been able to involve other members of the group.

The meeting agreed to return to this matter under item 7, 'Next Steps'.

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<sup>1</sup> After IWC/57, the following Governments indicated their interest in joining the group: Argentina, Australia, Benin, Brazil, France, Germany, Republic of Guinea, Italy, Japan, the Netherlands, New Zealand, Norway, Sweden, UK and USA.

#### 4.4 Whaling under special permit

Greg Donovan, Head of Science at the Secretariat presented Document IWC/F06/RMSWG 6: 'Further Thoughts for a Code of Conduct for Whaling under Special Permit' on behalf of the other co-authors (Arne Bjørge – Chair of the Scientific Committee; Debbie Palka – Vice Chair of the Scientific Committee; and Doug DeMaster – immediate past Scientific Committee Chair). This document is included as Annex F.

In presenting the document, the Head of Science stressed that it was an *outline* of what might be included in a Code of Conduct, not an actual *proposal* for such a code, and that there are a number of areas (e.g. further details on responsibilities of Contracting Governments, the relationship between the proposed Review Group and the Scientific Committee, definitions of certain terms and levels of confidentiality at the various stages in the process) that would require clarification and elaboration should the RMS Working Group believe the approach is worth pursuing.

He also stressed that the authors had tried to restrict their consideration to scientific aspects of a code, to the extent possible. In particular they made no comment as to whether lethal research is philosophically desirable or not. However, although noting that developing mechanisms for the implementation of any code was outside their area of expertise, they understood that because of the provisions in existing Article VIII of the Convention, any code that may be developed would be in some sense voluntary. Despite this they took the premise that a Code of Conduct would only be of value if Contracting Governments agree to follow it. As one approach, they suggested that if a code could be agreed by consensus, this might be achieved by all Governments making a formal declaration that they will abide by it in addition to the passing of a Resolution.

The paper put forward a sequence of events that would lead to a thorough Scientific Review, from initial submission of a proposal via a workshop of experts nominated by the IWC Scientific Committee Convenors to presentation to the Scientific Committee and the Commission. It also suggested some potential responsibilities of Contracting Governments and a proposal for regular review.

The Chair invited comments on the document and questions for clarification.

A number of delegations thanked the authors of Document IWC/F06/RMSWG 6 and Greg Donovan for his presentation.

Japan drew attention to the sentence in paragraph 3 of the introductory section of the paper that says '*Any evaluation of the take of whales under scientific permits must account for all potential human induced mortality, including direct catches, bycatches,.....*' It considered the phrase '*all potential human induced mortality*' to be too open-ended and noted that in the past, the phrase '*all known human induced mortality*' has been used. The Head of Science agreed with this view. Japan also believed that the role in the Review Workshop of the scientists involved in the development of the original permit proposal should be clarified (see section 2.3.1 of the paper). The Head of Science explained that the primary role of these scientists would be to provide clarification on the proposal to the Review Group as required and discuss any suggested changes.

The UK expressed concern that the presentation had referred to the review of permit proposals not specifically related to the management of whales. It noted that there is no mechanism under the Convention to deal, for example, with the culling of whales in relation to the management of other marine resources and therefore questioned whether such permit proposals could be justified. Australia shared the UK's concerns. The Head of Science responded that the authors had not developed any new categories of objectives but had followed the guidelines previously developed by the Commission, in particular with respect to 'critically important research needs' which may cover a broad range of headings from ecosystem research to medicine. Japan recalled that management of whaling under the Convention had developed as single species management regimes but that now many resource management organisations, particularly fisheries management bodies are moving towards an ecosystem approach. It therefore saw no problem with research proposals taking such an approach.

Germany asked whether the authors of IWC/F06/RMSWG 6 had considered a binding Code of Conduct. Referring to his presentation, the Head of Science noted that the mechanism for the implementation of any code was outside the area of expertise of the authors, but that they had assumed that a voluntary code would be made binding in some way, otherwise there would be no point in having a code. New Zealand considered that a voluntary Code of Conduct would be a derogation of Contracting Governments' rights under Article VIII. It further noted that if consensus could be reached on a voluntary code then it should be possible to amend the Convention accordingly. This would be the only way to make the code binding on Contracting Governments. Brazil questioned whether the authors had given themselves the right to interpret the Convention and stressed that this was a matter for Contracting Governments only. Argentina associated itself with the remarks of Germany, New Zealand and Brazil. Italy saw the resolution of many governments' concerns regarding whaling under special permit to be fundamental to the development of an RMS and that a binding agreement is necessary.

St. Kitts and Nevis believed that discussions on the development of a voluntary Code of Conduct were a reaction to an abnormal situation within IWC. It considered that such a code would not be necessary in a normal situation given the provisions of Article VIII of the Convention, and suggested that further discussions on this issue be put on hold pending the outcome of work on other possible RMS elements. Furthermore, St. Kitts and Nevis considered

whaling under special permit to be peripheral to the main purpose of the Commission (i.e. sustainable use of whale resources) and that IWC needed to take a responsible view on the issue of food security.

Sweden viewed Document IWC/F06/RMSWG 6 as a valuable contribution to RMS discussions that provided good ideas on how permit proposals could be subject to the necessary review and scrutiny before being issued. However, key point for Sweden was whether a code would be voluntary or binding.

Australia recognised the rigour of the review process outlined in the paper and questioned whether any whaling under special permit would ever be conducted.

Belgium indicated that it would submit written comments after the meeting.

## 5. EXPLORATION OF HOW TO PROCEED WITH THE DEVELOPMENT OF AN RMS

The Chair recalled that when circulating the draft agenda for the RMS intersessional meeting, Contracting Governments were invited to send written responses to the following two questions:

- (1) whether it is likely that progress on an RMS package can be made, and if so how this might be done, including consideration of some form of 'high level' meeting (as suggested in Resolution 2005-4); or
- (2) whether the impasse is such that further collective work should be postponed for the time-being but with individual governments or groups of governments free to work together if they so choose.

Given that there was little time at IWC/57 in Ulsan to discuss the intentions of Resolution 2005-4 in detail, views of Contracting Governments on their understanding of what is meant by a 'high level' meeting and how such a meeting would help resolve issues were particularly encouraged.

Responses were received from Belgium, Germany, Japan, Norway and the USA and were made available as Document IWC/F06/RMSWG 5 (see Annex G).

### 5.1 General remarks

The Chair opened discussions on this item by first inviting those countries that had submitted written responses to introduce their comments or make additional comments if they wished. Belgium and Germany declined to do so.

Japan noted that it is committed to the resumption of sustainable commercial whaling under international control, based on science and in accordance with international law. It believed that over the years it has made compromises in its position with respect to an RMS and has taken part in discussions in good faith. Japan considered the RMS proposal from the Chair of the Commission – the 'Chair's proposal' – to be a good basis for discussions on an RMS and indicated that it could find the proposal acceptable if it received three-quarters majority support from Commission members. It reminded the meeting that its proposal at IWC/57 for the incorporation of an RMS into the Schedule (i.e. IWC/57/19) involved a combination of national and international control and in its view represents a fair balance of the required elements to ensure that IWC rules are obeyed and are seen to be obeyed. However, from the reactions it received in Ulsan, Japan considered that perhaps its proposal had not been well understood and sought permission of the Chair to re-introduce this to the Working Group. The Chair agreed to come back to this later. Japan then went on to caution that failure to agree an RMS will ultimately lead to the demise of the organisation and that this meeting may be the last chance to complete an effective RMS. It did not believe that discussions could continue in the way they had over the last 14 years during which time there had been some 45 RMS meetings. This accumulation of meetings had led to an accumulation of points of disagreement rather than to compromises. Japan believed that the point had been reached where some major political issues, such as whaling under special permit, needed to be resolved. It saw no merit in addressing technical details or discussing what might be included in a Code of Conduct for special permit whaling if some Contracting Governments took the view that this activity should be phased out. It noted that currently there is no common agreement among Contracting Governments as to the purpose of the Convention and that distrust among members adds to the difficulties in reaching agreement. Japan therefore considered that the RMS Working Group should discuss how to normalise the IWC rather than having Governments spending time repeating their well-known positions. It did not believe that a high level meeting would help in reaching agreement and that such a meeting may serve to only further polarise positions. It viewed as unacceptable proposals to amend the Convention, believing that it is unreasonable to be forced to abandon certain rights under the existing Convention to restore the right of sustainable whaling which is the purpose of the Convention.

Norway did not wish to add anything further to its written response, but stressed that its position is that the lifting of the moratorium is a pre-requisite to adoption of an RMS.

The USA reported that it remains committed to working towards the completion of a robust, yet practical RMS, but believed that a successful resolution to the issue of whaling under special permit is the fundamental building block of any RMS. It believed that a high level meeting may not achieve much, but considered that there may be merit in trying to resolve some issues, like permit whaling, in smaller groups.

Iceland noted that it had not supported Resolution 2005-4, but was not against it if others thought that progress could be made in this way. However, it was pessimistic that progress would be forthcoming and indicated that it would therefore not take an active part in Working Group discussions. It stressed that its silence represented its unwillingness to be dragged into a process unlikely to reach agreement rather than its tacit agreement. Iceland believed that the only realistic proposal on the table is the 'Chair's Proposal'. It noted that there are elements of the 'Chair's Proposal' that it dislikes strongly and considered that this would be the case for all Contracting Governments. However, it stressed that all parties should recognise that there can be no compromise solution on any other basis – it is preferable to have a compromise that no-one likes than have nothing at all. Iceland believed that if the Chair's Proposal is allowed to die, then the RMS development process will die along with it.

Argentina drew attention to the Buenos Aires Declaration that the Secretariat had distributed to all Contracting Governments via Circular Communication IWC.CCG.522 of 9 December 2005. It explained that Commissioners to IWC from Argentina, Brazil, Chile and Mexico met on 7 and 8 November 2005 in Buenos Aires. Representatives from Costa Rica and Peru as well as the Embassy of Panama were present and diplomatic observers from the Embassies of Colombia, Ecuador and Uruguay also participated from the Latin-American region. IWC Commissioners from Australia and New Zealand and a representative from the South African Embassy were invited and attended reflecting common concern on issues regarding Southern Hemisphere whale conservation. The Spanish Commissioner was also present. Argentina requested that the views expressed in the Buenos Aires Declaration be taken into account by the RMS Working Group.

Referring to Table 1 (revised) of IWC/57/Rep 6, Brazil considered that the RMS discussions has yielded results and that it is principally policy issues that now remain to be resolved. It believed that discussions should now focus on whaling under special permit (which it considered to be unregulated), compliance and the recognition of regions free of whaling rather than debating a link with the lifting of the moratorium.

New Zealand associated itself with the remarks of Argentina and Brazil. It viewed the Buenos Aires Declaration as a significant and important Southern Hemisphere initiative that had arisen from a belief that within IWC, there is a lack of sensitivity to this region's concerns. For New Zealand, a necessary condition of progressing negotiations on an RMS is that whaling under special permit has to be dealt with. It noted that Japan began its JARPA programme shortly after the commercial whaling moratorium was established and that whaling under special permit has been controversial during this whole period.

Australia agreed with others that it is difficult to finalise details of an RMS until more fundamental issues, like whaling under special permit, have been resolved. It recognised that calling for a high level meeting has its risks, but believed that some form of political process is needed. Australia wanted to ensure that deliberations on the RMS reflect best practice elsewhere and considered that this view should be argued most strongly by those who wish to resume commercial whaling.

The UK believed that it has tried to make constructive proposals on the RMS and agreed with others that some progress has been made. However, also like others it believed that a point has been reached where the fundamental issues are political, not technical. It believed that Commissioners were now too close to the issues to be able to resolve them and that consequently a high level meeting may be more effective. While the UK considered special permit whaling to be fairly central to RMS development, it is not the only important issue, others being, for example, compliance and animal welfare considerations. Spain also believed that there are a number of important issues, but that its first priority was to make progress on special permit whaling. For Germany, reaching a resolution of special permit whaling is a pre-requisite to progress. It shared the sentiments of the UK regarding the importance of other components. Special permit whaling was also the most important issue for Italy, who believed that the amendment of Article VIII is necessary.

The Netherlands considered that Table 1 (revised) of IWC/57/Rep 6 identifies all of the outstanding issues and believed that it is important for the Working Group to attempt to bridge gaps to the extent possible prior to IWC/58. It believed that if the three issues of special permit whaling, compliance and the link with the moratorium could be solved, resolution of the other issue would follow. It suggested that the Working Group should prepare different alternatives on these three issues. It was not yet sure whether a high level meeting is necessary.

Belgium was prepared to follow two parallel processes, i.e. revision of the Convention in relation to critical elements and discussion within the Working Group of less critical issues.

Nicaragua noted that the Buenos Aires Declaration does not represent the views of all Latin American countries. It believed that some Contracting Governments were not demonstrating sufficient flexibility in RMS discussions and associated itself with the remarks of Japan, Norway and Iceland.

The Republic of Guinea expressed disappointment that the 'Chair's Proposal' had been rejected and that the Commission was as far as ever from reaching agreement. It did not consider that Article VIII of the Convention needed to be amended and could therefore not support a high level meeting. The Republic of Guinea stressed its keen interest in research, particularly in relation to the consumption of fish by whales and the direct competition

between whales and fishermen for fishery resources. It called on Contracting Governments to show more good will in discussions.

The Republic of Korea also noted its support of the 'Chair's Proposal'. It thought it inappropriate to link whaling under special permit with the RMS and did not believe that a high level meeting would be successful.

Antigua and Barbuda was opposed to attempts to change the purpose of the Convention and saw failure to make progress on an RMS as a failure to meet governments' obligations under the Convention. It called on the Working Group to be guided by the fundamentals of science and sustainable use, to support research and to promote the continuation of cultures using their natural resources.

St. Kitts and Nevis noted its commitment to completion of the RMS. It considered that the negotiations down-play the importance of whale meat as a source of animal protein, again stressed the importance of food security and noted the increase in consumption of whales by non-IWC countries. It disagreed with the view that special permit whaling must be resolved first, believing that this would simply lead to deadlock, noting that the issue of lifting the moratorium had been on the table long before the concern regarding special permit whaling. St. Lucia associated itself with the remarks of Antigua and Barbuda and St. Kitts and Nevis and stressed that reaching agreement on an RMS is critical to the organisation.

With respect to Brazil's comment that whaling under special permit is unregulated, Japan recalled that the RMP would limit the number of whales that could be taken, with any whales taken under special permit being subtracted from any commercial whaling quota. The UK noted that this would only be the case for those stocks on which an RMP had been completed and that if the Southern Ocean Sanctuary remains, catch limits would not be set and special permit whaling would not be affected.

Based on the above remarks, the meeting agreed to structure further discussions under agenda item 5 as follows:

- an exchange of reviews regarding procedures to amend the Convention;
- re-introduction by Japan of its Schedule amendment proposal from IWC/57;
- discussion of three key issues, i.e. (1) special permit whaling; (2) the link between adoption of an RMS and lifting of the moratorium; and (3) compliance monitoring.

## 5.2 Procedures to amend the Convention

### 5.2.1 Views provided by the USA

In preparation for discussions at the RMS Working Group on high level meetings and procedures to amend the Convention, the USA had had some informal consultations within the USA Government. The Chair invited the USA to report to the Working Group. The USA introduced the following viewpoints, but stressed that they do not reflect final US policy and are offered as one means to guide discussion on the issue.

#### Amendments to the ICRW (Convention)

- With respect to amendments to the Convention: the Convention itself is silent on amendment to it (although there is a clear amendment process for the Schedule), which means that customary international law regarding amendments, as reflected in Article 40 of the Vienna Convention on the Law of Treaties, would generally be considered applicable. Article 40 is not as detailed as an amendment article tailored to a specific treaty would ordinarily be, and so some questions are left to be resolved by the Parties to the specific treaty. But it seems fairly clear that:
- Any Party can propose an amendment to all of the other Parties (presumably directly or through the Secretariat) and all existing Parties could participate in the deliberation on the amendment. (Non-Parties to the treaty would not participate.)
- An amendment to the text of the treaty would need to be: 1) adopted by the Parties (see below) at a meeting or conference (this could be an ordinary IWC meeting or a specially held one) **AND SUBSEQUENTLY** 2) ratified or accepted by a certain number of Parties before it could enter into force.
- In the case of the ICRW, a decision would need to be made by the Parties regarding how to proceed on potential adoption of the amendment. An amendment needs to be "adopted" by some specified number or majority of Parties, and normally treaties specify what this majority should be. The ICRW does not. The Rules of Procedure provide that all decisions except those that amend the Schedule are to be decided by majority. But this does not necessarily need to be interpreted to mean that *adoption of amendment to the treaty* could be decided by majority. If anything, it would be very strange if it took three-quarters to amend the Schedule and less than that to amend the treaty itself. In summary, where, as here, the treaty is silent on adoption of amendments to it the Parties need to decide on the formula (presumably some super majority or all Parties) required for adoption of amendments. (Note that while many treaties specify super-majorities like two-thirds or three-quarters, many

require adoption by all Parties). Given the ICRW's decision making rules, presumably a majority or consensus agreement *would* decide what number or super-majority would be necessary to adopt the amendment, e.g., the majority or consensus of members present and voting would decide that the amendment is considered adopted if it receives three-quarters support from those present and voting, or if it receives consensus support, or whatever the majority decided upon as the formula for adoption.

- The majority would also need to decide what number of ratifications or acceptances are needed before the amendment would enter into force. There is precedent to examine in the 1956 protocol on aircraft, which required that "all the Contracting Governments to the 1946 Whaling Convention" ratify or adhere to the protocol in order for it to enter into force.
- After entry into force of the amendment, only those Parties who ratified it or accepted it are legally bound to it. (At this point whether or not a Party supported the initial "adoption" is legally irrelevant—only subsequent ratifications and acceptances matter.)
- A government that becomes Party to the treaty after the amendment enters into force would become Party to the treaty as amended *unless they specify otherwise when joining*. Also, even if they become Party to the treaty as amended, they are not Party to the amendment *vis-à-vis* other Parties to the treaty who are not Party to the amendment.
- Amendments are often written up in a document called "Protocol of amendment," which is typically just the amendment and any preamble to it the Parties want to preface the actual amendment text with. But "Protocol" does not necessarily have any particular meaning, and other words can be used.

#### 5.2.2 Working Group discussion

The Working Group members thanked the USA for sharing these points which generally confirmed their own views regarding what would be involved in amending the Convention. It was accepted that negotiation of amendments could, if the Commission decided, be done by Commissioners, i.e. a 'high-level' Ministerial or Diplomatic meeting would not necessarily be required.

Several delegations commented that it is clear that if there was a decision to amend the Convention, then it would be important to require that all Contracting Governments had to ratify the amendment before it could enter into force. It was noted by some that such a requirement would make it difficult if not impossible to amend the Convention along the lines proposed by some Contracting Governments, and caution was expressed about embarking on such a process. It was also noted that the internal national processes involved in ratification can further complicate the process and lead to delays. However, although some believed that the time might not yet be right to consider a high level meeting, it should be kept in mind as an option for the future. Others believed that entering into discussions to amend the Convention would change the RMS process fundamentally and risk dividing the organisation into two.

The Chair of the Commission expressed the view that changing the Convention by Protocol and changing the Convention itself require two different procedures. This was disputed by others who believed that there is no difference in a legal sense.

### 5.3 Japan's proposed Schedule amendment at IWC/57

Japan believed that its proposed Schedule amendment put forward at IWC/57 (i.e. IWC/57/19) could be one of the RMS 'packages' that might be considered in an effort to make progress. It noted that in developing this proposal, which was still open to comment, it had made a sincere effort to include as many elements as possible from the 'Chair's Proposal' and considered that its proposal meets most of the requirements of Table 1 (revised) of IWC/57/Rep 6. It had included the RMP and text such that catch limits calculated by the RMP would be adjusted downwards to account for human-induced mortalities. It noted: (1) that RMP implementation would lead naturally to a phased-in approach to commercial whaling; (2) that the RMP would put a cap on commercial whaling and whaling under special permit; and (3) that the RMP protects whale stocks on their breeding grounds. It had also included a national inspection and international observation scheme as proposed by the RMS Expert Drafting Group and text referring to the fact that infractions shall be considered by the Infractions Sub-committee. It believed that costs of the international observer scheme should be borne by the Commission and recovered through membership contributions assessed from Contracting Governments under the financial contributions scheme, while costs of national inspections would be born by the Contracting Government. Paragraph 10(e) had been deleted. Japan noted that it already had a national DNA register and market sampling and tracking scheme in place and had closed its market to non-IWC countries and IWC-countries not whaling. These were therefore not included in the proposed Schedule amendment. Finally with reference to special permit whaling, Japan noted that if the 'Chair's Proposal' received sufficient majority support, it would be willing to discuss the details of a possible voluntary Code of Conduct.



The Chair asked for clarification from Japan regarding what its proposal would dictate with respect to stocks subject to special permit whaling but for which there is no RMP implementation. Japan responded that this was not addressed in its proposal, but that it would be open to discussion, perhaps as part of a Code of Conduct.

With respect to Japan's comments that the RMP would limit the number of animals taken under commercial and special permit whaling, New Zealand recalled the UK's earlier remarks on this matter (see item 5.1) and stressed that there are no IWC-agreed abundance estimates for the stocks targeted by Japan's special permit whaling research programmes (JARPAII and JARPNII). With respect to Japan's proposed Schedule amendment, New Zealand made the following points: there is insufficient provision for observer training and no provision for assisting international observers in their duties; there is no requirement to have international observers and VMS on all boats; international observers can be vetoed and boats can leave without observers if none are available; the user-pays principle is not applied; there is no provision for vessel licensing, for a Catch Document Scheme, for DNA registers/market sampling scheme with IWC oversight; there is no reference to the compliance measures proposed by the EDG; and no considerations with respect to animal welfare. New Zealand therefore found the proposal to be too weak, minimal compared with the best practice of fishery organisations and would de-regulate whaling.

Japan responded that its intention is exactly the opposite, i.e. to regulate whaling. It recalled that the issue of 100% coverage by international observers and rights of veto had already been addressed by the EDG, and it was the EDG recommendations that Japan had included. It reported that vessel licensing is already in place, as is a national DNA register/market sampling scheme. Japan believed that IWC could either continue the current situation in which IWC is not controlling whaling, other than aboriginal subsistence whaling, or it could introduce some controls. It noted that whaling countries have so far remained within IWC as they are committed to international control, but that if no RMS is agreed they may need to seek a mechanism for such control elsewhere. Japan recognised that there is no compromise that everyone is completely happy with (that is the nature of a compromise), but that reaching a compromise would be better than a continuous conflict.

#### **5.4 Discussion of three key issues**

While special permit whaling, the link between RMS adoption and lifting of the moratorium, and compliance monitoring were not the only important issues identified, delegations broadly agreed that resolution of these issues was key to making progress. There was reluctance by some to try to move forward by viewing these issues as a 'package' and so the Chair proposed to take each issue in turn, to discuss the options listed in Table 1 (revised) of IWC/57/Rep 6 and then from achieving a better understanding of these to try to move forward to a single option.

##### *5.4.1 Whaling under special permit*

The Chair reminded the group that there are currently four options under consideration:

- (1) voluntary Code of Conduct;
- (2) binding Code of Conduct;
- (3) phasing out of whaling under special permit via amendment to the Convention;
- (4) no reference to whaling under special permit as part of an RMS.

A number of suggestions and comments were made with respect to the possibility to reduce options. St. Kitts and Nevis questioned whether options (2) and (3) could be removed given the discussions on procedures involved in amending the Convention and the obvious difficulties involved in taking such a route, or whether option (2) could be linked with lifting of the moratorium (deletion of Schedule paragraph 10(e)). The Netherlands suggested that focus be given to options (1) and (2). New Zealand could not agree to eliminate option (3) until it was demonstrated that (1) or (2) could work. It did not believe that any option, with the exception perhaps of (4) could be eliminated at this stage. Australia and the UK agreed. The USA could not agree to option (4), found (1) insufficient, but considered that option (2) and possibly (3) - recognising that amendment of the Convention may take some time - might provide a way forward. Mexico supported the USA, believing that a voluntary Code of Conduct would not be useful. Spain and Italy also believed that any Code of Conduct should be binding. Sweden believed that options (2) and (3) should be retained. France and Argentina associated themselves with New Zealand, Australia, Mexico and others. Germany believed that all options should remain for the time being. Italy identified two elements to scientific permit whaling, i.e. the research itself, and the subsequent 'utilisation' of the whales taken. It noted that a Code of Conduct would deal only with the former and suggested that concerns expressed by some regarding the commercial nature of permit whaling might be allayed to some degree if the commercial aspect was removed. Its own domestic law does not permit the sale of products from scientific research.

Japan indicated that it could not support the removal of option (4) and that it would only discuss the development of a voluntary Code of Conduct if there was a three-quarter majority support to delete paragraph 10(e). As it could not support amendment to Article VIII, it believed that any Code of Conduct would have to be voluntary.

The Chair asked for clarification as to how a Code of Conduct could be made binding without amendment to the Convention (i.e. option 2). The USA suggested that this could perhaps be done by either (1) developing side/bilateral agreements between Contracting Governments, or (2) by including the Code of Conduct in the Schedule. Several delegations expressed concern with both approaches, noting that with respect to side agreements, enforcement of a Code of Conduct would be the responsibility of the parties to the agreement rather than the Commission.

With respect to a voluntary Code of Conduct, the Netherlands questioned what would be the implications if such a code was not followed. The UK took the view that a voluntary code would be essentially unenforceable and without a legal basis, as infringements of the code could not be dealt with by the Compliance Review Committee/Commission. Australia noted that a Code of Conduct is a set of standards and that the purpose of having a code is to make sure that something happens. If a code is voluntary there may be no recourse to legal sanctions but failure to abide by it could lead to public exposure and damage to reputation.

Given the discussions, the Chair suggested that options (1) or (2) would move discussions in the direction of greater consensus, but acknowledged that special permit whaling should not be looked at in isolation but rather in the context of the other possible RMS elements. There was some support for setting aside, for the moment, the question of whether a Code of Conduct should be voluntary or binding and instead to further develop the outline in Document IWC/06/RMSWG 6. Such an exercise would help to clarify whether a Code of Conduct could be useful. Once this had been done, discussions could return to whether a code should be voluntary or binding. Others thought this would be a fruitless exercise.

Finally, the Head of Science stressed that implicit in the development of a Code of Conduct for whaling under special permit is that this does not rule out the possibility of such research programmes taking place under specific conditions.

#### 5.4.2 The link between adoption of an RMS and lifting of the moratorium

The Chair reminded the group that there are currently five options under consideration:

- (1) Direct link, i.e. simultaneous deletion of paragraph 10(e) with adoption of an RMS;
- (2) Link to ensure that commercial whaling is only carried out under an RMS (i.e. to avoid objections being lodged);
- (3) A two-stage approach in which an RMS is adopted first followed by a vote to delete Schedule paragraph 10(e) if no objections have been lodged to the RMS within the 90-day period;
- (4) Adopt an RMS but retain paragraph 10(e), then allow a gradual introduction of exemptions for certain stocks under certain conditions by adding further sub-paragraphs, e.g. *10(f) Notwithstanding the provisions of paragraph 10(e), commercial whaling shall be permitted for [species/stock/area] ....*;
- (5) No link.

#### Background

Aside from the view of some member governments that commercial whaling is always unacceptable, the primary concern expressed with respect to making adoption of the RMS simultaneous with the lifting of paragraph 10(e), is the possibility that a whaling nation might exercise its right to object to one or more of the RMS provisions and thus be able to whale legally but outside the RMS. At the October 2002 private Commissioners' meeting on the RMS, it was noted that practical ways to address this concern may be developed, e.g. the addition of a clause to paragraph 10(e) such that it becomes invalid on a specific day, provided that no objections to the RMS provisions have been received.

In his proposal for an RMS reviewed by the Commission at IWC/56 in 2004, the Chair of the Commission made the following statement and proposal: *'I do not believe that trying to finalise an RMS in isolation of discussions on paragraph 10(e) is appropriate, and consider that a way of linking agreement on an RMS with the lifting of paragraph 10(e) needs to be found. My preferred approach is to modify paragraph 10(e) such that it becomes invalid on a specific day whilst ensuring that any whaling operations are undertaken under the full RMS package as adopted by the Commission'*. The aim of any mechanism developed under the Chair's proposal was to enable a lifting of paragraph 10(e) whilst ensuring that (a) whaling only occurs under a full RMS and (b) that the objection of a non-whaling country could not prevent the possibility of whaling under an RMS. It was recognised that developing appropriate text to achieve this is not a simple task and at the request of the Commission at IWC/56, the Secretariat explored ways in which this might be done and presented them to the RMS Working Group meeting in Borgholm in November 2004 (IWC/N04/RMSWG 12). From the Secretariat's paper and subsequent discussions, it has become clear that the 'Chair's Proposal' cannot be achieved without essentially requiring Contracting Governments to give up their right under Article V.3 of the Convention to object to Schedule amendments.

### Working Group discussions

The UK believed that given the current Convention, there is no legal mechanism to avoid the possibility of Contracting Governments lodging an objection to the RMS in the scenario where there is a link between adoption of the RMS and lifting of paragraph 10(e). Since for the UK, the adoption of an RMS without objections is a prerequisite for the lifting of paragraph 10(e), it could not support anything other than a sequential approach. New Zealand referred to the need to amend the Convention with respect to the objection procedure. Brazil saw the need for two votes as inescapable, i.e. the first being a technical decision regarding the adoption of an appropriate RMS, while the lifting of paragraph 10(e) is a political decision. With respect to option (4) above, Brazil suggested that this could include the possibility of geographic exceptions. Japan saw the absence of mutual trust as a major obstacle to reaching agreement and believed that the fundamental differences among Contracting Governments as to the purpose of the Convention needed to be resolved and the IWC 'normalised' (it noted that it would submit a working paper on this matter for consideration under item 7, next steps). Given the difficulties of getting around the problem of the objection procedure without amending the Convention, the Secretariat asked whether it could be considered satisfactory for Contracting Governments to make a formal declaration at the meeting that they would not use their right to object. Different views were expressed as to the validity of such a declaration.

The USA suggested that the approach taken in option (4) might provide a way forward. In response to a question from the UK, the Head of Science noted that, if asked at the 2006 Annual Meeting, the only stocks for which the Scientific Committee would be in a position to run the RMP and provide advice would be for North Atlantic and western North Pacific common minke whales. He noted that running the RMP did not necessarily mean that catches would be recommended for all *Small Areas*. The nature of the RMP process thus means that the introduction of catch limits after an RMS had been adopted would necessarily involve a gradual introduction. He also reminded the meeting that even if an RMS has been adopted and Paragraph 10e removed, a three-quarter majority is needed to set catch limits other than zero. France favoured option (5) but could consider a 2-stage approach. However, like others it could not support a procedure in which the RMS could be open to objection. It therefore noted that it may be necessary to modify the Convention, although a political statement might be acceptable.

#### *5.4.3 Compliance monitoring*

The Chair reminded the group that there are currently three options under consideration:

- (1) Establishment of a Compliance Review Committee (CRC) as agreed by the EDG;
- (2) Retention of the existing Infractions Sub-committee;
- (3) Change to the Convention to (a) establish a dispute settlement mechanism and (b) to give power to the Commission as a body to set penalties.

The UK noted that together with others, it has argued that the credibility of an RMS depends on it having real teeth. It was not convinced that this could only be achieved through an amendment to the Convention and referred to the paper that it had presented to the RMS Working Group at IWC/57 along these lines (IWC/57/RMS 6). However, while the UK did not dispute the fact that the CRC would not have any enforcement authority (that would be for the Commission), it expressed concern regarding the extent to which the CRC could recommend the form of penalty to be taken against infractions.

Henrik Fischer, Chair of the Commission, recalled that in past discussions, the UK had proposed that catch limits automatically revert to zero in the event of an infraction. He noted that at least one difficulty with such a proposal is that catch limits are set for whale stocks and not Contracting Governments. Consequently in the case of a stock where the catch limit is shared, the UK approach would penalise all those sharing the quota. The Working Group Chair noted that it is possible to partially address this by appropriate delineation of the *Small Areas* used in the RMP to encapsulate areas where only one nation was catching (e.g. in its 200 mile EEZ).

New Zealand noted that the draft Protocol that it had distributed some time ago to all Contracting Governments included new provisions with respect to compliance.

#### 5.4.4 Combinations and interactions of the three 'key' elements

##### Introduction by the Chair

Following the discussions on each of the three 'key' elements, the Chair again referred to the need, in his view, to look at possible interactions and combinations between these elements and to ascertain whether the number of options could be reduced.

Options from Table 1 (revised) in IWC/57/Rep 6		
Special permit whaling	Compliance	Link between RMS and Para 10(e) (see note)
1. Voluntary Code of Conduct	1. CRC as proposed by EDG	1. Simultaneous lifting
2. Binding Code of Conduct	2. Change to Convention	2. Link to ensure whaling only under RMS
3. Phasing out via Convention	3. Infractions Sub-Committee	3. Two-stage approach (RMS → 10(e))
4. No reference as part of RMS		4. Retain 10(e) with exemptions
		5. No link

The Chair noted that from the above summary, the number of permutations is clearly high, but that one possible way to structure the discussions and limit the number of options to be discussed *at the first stage* would be to see if there are general links between some options whereby the overall principle or idea is the same but the details of the ways those are implemented differ. He stressed that this approach would still mean that the detailed options remain.

He suggested that from the discussions of the individual elements, some grouping might be possible, as shown below.

Special permit whaling	Compliance	Link between RMS and 10(e)
Limited by Code of Conduct (1)-(2) above	CRC (1)	Whaling only under RMS limited to completed <i>Implementations</i> . (1)-(4)
Phase-out via Convention (3)	Change to Convention (2)	No link (5)
No change (4)	No change (3)	

The Chair explained the rationale for these links and this is given in the paragraphs below. He stressed that grouping them in this way was not intended to suggest that the differences between the grouped options are not important and will not require important subsequent discussion.

*Special permit whaling:* The two Code of Conduct options were grouped together since *at this stage* (a) they both require a Code to be developed; (b) in the Voluntary Code option it is implicit that Contracting Governments would follow it, once agreed, otherwise it would become meaningless – in the 'Binding option' this *implicit* assumption is made *explicit*. Thus although the options are different in implementation mechanism (a very important difference and with some implications for Compliance), they have some similarities, and neither completely rules out the possibility of some whaling under Special Permits, provided the agreed Code is followed. This is not the case with the phase-out approach.

*Compliance:* The options are quite different, but given the convergence of views towards the CRC during earlier discussions, the Chair considered that it might be possible to not consider the 'no change' option at this stage.

*Link between the adoption of the RMS and the lifting of Paragraph 10(e):* The Chair recognised that it may seem rather radical to link options (1)-(4). However, he explained that by doing this, it is not intended to imply that the differences are not important but for the purposes of *first stage discussions* they are effectively differences in a mechanism to ensure that any future commercial whaling is only carried out on species/stocks for which the Scientific Committee has completed *Implementations* (noting that this necessarily entails a limited and phased introduction given the time constraints of the *Implementation* process) under the RMP **and** that it is undertaken in accord with the agreed **full** RMS and any associated provisions (i.e. no objections are made).

The Chair suggested that if the above links are not considered unreasonable for the purposes of *first stage discussions*, then the following matrix summarises the various combinations, assuming all provisions are acted upon (more-or-less) simultaneously:

	Special permit whaling	Compliance	Link between RMS and 10(e)
1	Limited - Code of Conduct	CRC	Limited whaling under RMS 'soon'
2	Limited - Code of Conduct	CRC	No link
3	Limited - Code of Conduct	Change to Convention	Limited whaling under RMS 'soon'
4	Limited - Code of Conduct	Change to Convention	No link
5	Phase-out via Convention	CRC	Limited whaling under RMS 'soon'
6	Phase-out via Convention	CRC	No link
7	Phase-out via Convention	Change to Convention	Limited whaling under RMS 'soon'
8	Phase-out via Convention	Change to Convention	No link
9	No change	CRC	Limited whaling under RMS 'soon'
10	No change	CRC	No link
11	No change	Change to Convention	Limited whaling under RMS 'soon'
12	No change	Change to Convention	No link

### Working Group discussions

Germany, the UK and Argentina questioned the merit of taking this approach to structure discussions since it deals only with three of the 15 elements that have been addressed. New Zealand noted that the Chair's approach was trying to refine options but believed that it did not reflect the complexity of the choices on offer. Brazil agreed. In a similar way, Australia believed that this exercise only gives the appearance of reducing the number of options, but that it did not address the key choices and therefore risks moving forward in a way that could be misleading.

Spain suggested that the number of combinations could be reduced by taking out those that were internally inconsistent and would not be supported by anyone. For example, Spain could not envisage any government supporting no change in approach to special permit whaling would support amending the Convention in relation to compliance. On this basis, the Chair suggested that combinations 10, 11 and 12 could be eliminated.

Japan noted that combinations 8 and 9 demonstrate the extremes of views, while combination 1 takes a more middle approach. Sweden agreed to try to limit the number of combinations and believed that it should be possible for Contracting Governments to support, at this stage, either 1, 8 or 9. The USA believed that combination 2 should be included and the UK that combination 4 should be included.

The Chair noted that the following combinations 1, 2, 4, 6, 8 and 9 had been identified by one or more delegations. He suggested that ways to take these forward be addressed under item 7 on next steps.

## **6. OTHER MATTERS**

There were no other matters.

## **7. NEXT STEPS**

The Chair proposed that the following items be addressed:

- A working paper on 'Toward normalization of the International Whaling Commission, submitted by Antigua and Barbuda, Dominica, Gabon, Republic of Guinea, Iceland, Japan, St. Kitts and Nevis and St. Lucia. Japan had referred to this under item 5 (see 5.4.2 above);
- Further intersessional work on (1) the outline for a Code of Conduct for whaling under special permit; and (2) compliance monitoring;
- A suggestion from the Chair on future work.

### **7.1 'Toward normalization of the IWC'**

Japan introduced the paper included here as Annex H on behalf of the other co-authors.

In essence, the authors regretted that in their view, the Working Group had again failed to make progress towards completion of an RMS, and that discussions since IWC/56 at which the 'Chair's Proposal' was reviewed have moved the process backwards, expanding the number of options under consideration. The authors believed that it is time to start more productive discussions that will bring about the normalization of the IWC by refocusing the organization back to its fundamental purpose as mandated by the ICRW. They believed that the resumption of commercial whaling under a regulated, controlled, transparent and science-based management regime will not mean a return to

historic over-harvesting. Past poorly regulated whaling was for oil whereas current and future whaling is for food for a limited market.

Japan informed the Working Group that IWC members supporting the sustainable use of whale resources will present to IWC/58 in St. Kitts, a clear statement of conditions and factors for the normalization of the functions of the IWC by implementing the ICRW in a responsible manner consistent with international law. The intention of the statement would be to identify specific activities (a strategy) that will achieve normalization of the current situation such that whales are treated as any other marine living resources available for harvesting subject to the needs of conservation and science-based management. Japan noted that the strategy will address the fact that sustainable whaling is possible and that use of cetaceans contributes to sustainable coastal communities, sustainable livelihoods, food security and poverty reduction. The strategy will also be based on respect for cultural diversity and traditions of coastal peoples as well as coastal state rights, relevant national and international law, the need for science-based management, policy and rule-making and consideration of ecosystem approaches all of which are the accepted global standard.

Japan noted that it would welcome constructive comments before, during or after IWC/58.

Norway indicated that it could support the general content of the paper. It noted that it is not listed as one of the authors mainly because Norway has already 'normalised' whaling to a great extent. It sets quotas using the RMP, it has a system of national inspection, international observation via NAMMCO, and it has a national DNA register of whales taken. Norway expressed disappointment that from the 12 combinations identified under item 5.4.4 above, six had been selected. Norway favoured combination 9, but noted that believing that reaching agreement on this would be unrealistic. It therefore considered that combination 1 is the only viable alternative. Nicaragua, St. Lucia and the Republic of Guinea also spoke in support of the paper. St. Lucia noted that the last paragraph (see Annex H) is in line with its own Government's policy. The Republic of Guinea remained concerned at the lack of will to finalise an RMS and believed that the status quo is a serious threat to food security.

Australia noted that the authors believe that sustainable whaling is possible and that there would be no return to the overexploitation of the past. It was therefore puzzled why these same countries do not wish to implement measures that are used for sustainable fishing elsewhere. Brazil did not agree that no progress had been made, and with respect to rights of coast communities and cultural diversity, noted that this may preclude whaling, allowing such communities to benefit from the non-lethal use of whale stocks.

## **7.2 Further intersessional work**

### *7.2.1 Code of Conduct for whaling under special permit*

Japan believed that Document IWC/F06/RMSWG 6 (Annex F) provides a good basis for further discussion and development. If further work was to be undertaken and recognising that the code would operate in the real world, Japan asked the authors to consider what would happen if, at the various steps involved in the process, consensus could not be reached. France believed that permit proposals should be reviewed in terms of their justification as well as their feasibility.

The Working Group agreed that the authors of IWC/F06/RMSWG 6 should develop it further to include more detail and to have a revised version available to the Group at its meeting at IWC/58.

### *7.2.2 Compliance*

To address the Terms of Reference agreed for the Compliance Working Group at IWC/57 (see section 4.3), the UK proposed to work with the Netherlands, Germany, USA, Sweden, Australia, New Zealand and Republic of Korea to develop a document that identifies the specific responses/measures to non-compliance that have so far been mentioned by some Contracting Governments as being desirable and indicates how each of these may or may not be compatible with the provisions of the existing Convention and with the draft Schedule text for the Compliance Review Committee. The UK indicated that it would act as convenor of the group and that the group would make a document available well before the meeting in St. Kitts. The work would be done by email correspondence.

The Working Group agreed to this proposal.

### 7.3 Chair's suggestion for future work

#### 7.3.1 Introduction by the Chair

The Chair noted that at the end of discussions under item 5.4.4, the Working Group had agreed that the options in the table below were sufficient to encapsulate the views of the members of the working group with respect to the combinations and interactions among three key elements of any RMS packages. In doing so, the group recognised that work is needed within these broad groupings and that any final package options must include discussion of the other elements listed in Table 1 (revised) of IWC/57/Rep 6.

	Special Permit	Compliance	Link between RMS and 10(e)
1	Limited - Code of Conduct	CRC	Limited whaling under RMS 'soon'
2	Limited - Code of Conduct	CRC	No link
4	Limited - Code of Conduct	Change to Convention	No link
6	Phase-out via Convention	CRC	No link
8	Phase-out via Convention	Change to Convention	No link
9	No change	CRC	Limited whaling under RMS 'soon'

The Chair suggested that it is clear, both from the discussions at this meeting and the range of options encapsulated in the table above, that it is not possible for the RMS Working Group to develop one single RMS package that could be adopted by consensus at this time. Noting that the Commission has passed several Resolutions urging a timely solution of the RMS issue, the Chair indicated that if progress is to be, the Working Group will have to consider developing more than one RMS package for consideration by the Commission. Given that any Schedule amendment requires a three-quarters majority, the Chair thought it sensible (in a Working Group context) to develop a limited number of packages that stand a reasonable chance of receiving a broad level of support for the Commission to consider.

The Chair noted that lack of consensus, although regrettable, is not unusual in working groups of the Commission or its sub-committees, including the Scientific Committee, and that under such circumstances, it is common to put forward a number of options, representing the common views of groups within the working groups. He believed that from the discussions at this meeting, a process could be begun that would allow progress within this Working Group to be made.

The Chair proposed that consideration be given to establishing up to six intersessional sub-groups based on the Table above. Membership of the sub-groups should be based on governments' own 'preferred' and 'minimum' requirements for a package. They could then join one or more negotiating sub-groups whose tasks would be to work on packages that they could support broadly. In terms of limiting the number of negotiating sub-groups a Government might join, the Chair noted that at least some delegations have referred to 'pre-requisites' during this meeting. He therefore believed that it would not be productive for them to spend time participating in a group that did not include those pre-requisites as a negotiating option. Following this logic, and allowing for the fact that there is no point, from a Working Group perspective, in having negotiating sub-groups that involve very few delegations as they are unlikely to obtain broad support within the Commission, the Chair suggested that it may be possible to limit the number of negotiating sub-groups to less than six. This would not, of course, prevent individual Governments developing their own packages outside the Working Group.

The Chair noted that these negotiating sub-groups should also consider the other options/elements given within Table 1 (revised) of IWC/57/Rep 6 with a view to presenting at least a progress report on work towards developing a package for consideration at IWC/58. The Chair suggested that the sub-groups be established at this present meeting and that it would be useful for them to spend some time during the rest of the day to develop a work plan. While some work can be achieved by email correspondence, the Chair suggested that time also be allowed for them to meet on the first day of the RMS Working Group meeting in St. Kitts.

#### 7.3.2 Working Group discussions

New Zealand thanked the Chair for his strenuous efforts to bring countries together. However, it believed that there was an attempt being made to apply methods used in the Scientific Committee to solve deep political problems. New Zealand believed that this approach would lead to confusion rather than clarity and was not the way to deal with fundamental differences which could only be solved through negotiation. New Zealand drew attention to the two questions asked in item 5, i.e. (1) whether it is likely that progress on an RMS package can be made, and if so how this might be done, including consideration of some form of 'high level' meeting (as suggested in Resolution 2005-4); or (2) whether the impasse is such that further collective work should be postponed for the time-being but with individual governments or groups of governments free to work together if they so choose. New Zealand thought that at this point, taking the approach in (2) would be likely to produce a better result. It was concerned that the approach proposed by the Chair would require a lot of work, much of which would be wasted, and that majority voting on which 'package' to take further may result in a package that represents the lowest common denominator. It hoped that what the Chair proposed would not go forward, but indicated that would participate if the Working Group agreed to this approach. Brazil associated itself with these remarks. It believed that unless the whole Commission engaged

in negotiations, then the suggested approach would be little more than a drafting exercise. Argentina associated itself with New Zealand and Brazil. It believed that the proposal would discriminate against countries that would find it difficult to join many groups and it felt that the views of Southern Hemisphere countries were being ignored.

The Chair thought there may have been some misunderstanding of his proposal, which was not intended to lead to a single RMS, but rather to make progress by developing a number of packages that would have a reasonable degree of support. He believed that it was clear that making progress on a single RMS package would be unlikely. He considered that if Contracting Governments wish to continue to work collectively on RMS development, then what he was proposing would be a reasonable approach. He recognised that participation in all six groups would be daunting, but had assumed that most governments would choose to participate in only 2 or 3 depending on their views.

Iceland did not believe that any of the 6 options in 7.3.1 above would have a three-quarter majority support. It regretted the outcome of the meeting. It considered that no progress had been made or would be made in the foreseeable future.

The UK considered that progress had been made during the meeting as the discussions had served to outline more sharply the nature of the fundamental differences among Contracting Governments. It did however share the concerns expressed by New Zealand.

The USA pointed out that the approach proposed by the Chair does allow countries to continue to work together if they so choose, but does not prevent government-to-government talks. It drew attention to the current reality in IWC, i.e. that whaling is continuing but without IWC control.

Japan thanked the Chair for his proposed next steps. It considered that as its own proposed Schedule amendment (IWC/57/19) represented option 9, there was no need for a group on this and that option 1 was essentially the 'Chair's Proposal'. The Chair acknowledged that while IWC/57/19 would be consistent with option 9 and the 'Chair's Proposal' would be consistent with option 1, neither were necessarily the logical outcome of discussions of these options, given that there are 15 elements to consider, not just three.

St. Kitts and Nevis thanked the Chair for his proposed framework but was concerned that it would lead to pigeon-holing countries. It was also concerned about moving to bilateral negotiations as mentioned by the USA as this approach tends to neglect small developing countries and is not in their best interests. It believed that the approach outlined in item 7.1 was the way to achieve the goal of the Convention and that it was important to find a middle ground.

Sweden agreed with New Zealand that talking in like-minded groups may not lead to progress. It agreed with Japan that option 9 is essentially complete. It agreed with Norway that option 1 is the only realistic proposal – which it would like to see further developed – and it agreed with the USA in believing that something needed to be done to regulate whaling.

Netherlands also believed that it is necessary to negotiate with people with different views. It noted that it is common practice to take, as a starting point, the extreme views and a view representing the middle ground, which in this case would be options 1, 8 and 9. It considered that it would be useful to have some text for discussions at IWC/58 in St. Kitts. If delegations did not like such an approach, it was unsure as to what the alternative would be but hoped that there would still be time at this meeting to discuss the possibility of a high level meeting.

Italy indicated that it would be ready to participate in the approach proposed by the Chair if there was consensus. However, it noted that consensus appeared to be elusive, that establishing groups as proposed by the Chair would further polarise positions and that in any case there was insufficient time before IWC/58 to make much progress. Furthermore, Italy did not believe that this was the type of work that could be done satisfactorily by email and considered that a more transparent approach is needed.

France supported the remarks made by New Zealand, Brazil, Italy and others. Although it would participate in the approach proposed by the Chair if the meeting agreed to this, it believed that a high level meeting would be needed to make progress.

Norway considered that option 1 was the only possible option to take forward and found the others unacceptable. It not participate if the meeting agreed to work on multiple options.

Given the above discussions, the Chair suggested that an impasse in discussions had actually been reached and that further collective work should be postponed for the time-being (with the exception of the two activities agreed under 7.2) but with individual governments or groups of governments free to work together if they so choose. The meeting agreed and asked the Secretariat to issue a press statement to this effect (see Annex I). With respect to a high level meeting, the Chair did not believe that there was consensus among the group for such an approach at the present time. The Chair of the Commission suggested that bilateral/trilateral type discussions would be less risky and would be a better way forward at present than a high level meeting.



**ANNEX A**  
**List of Participants**

**Chair of the Commission**

Henrik Fischer

**Antigua & Barbuda**

Anthony Liverpool

**Argentina**

Eduardo Iglesias

Miguel Iniguez

**Australia**

Howard Bamsey

Gillian Slocum

Virginia Mudie

Pam Eiser

**Belgium**

Alexandre de Lichtervelde

**Brazil**

Maria Teresa Mesquita Pessôa

José Truda Palazzo

**Chile**

Mariano Fernandez

Veronica Rocha

**Czech Republic**

Pavla Hycova

**DOMINICA**

Lloyd Pascal

**FINLAND**

Esko Jaakkola

**FRANCE**

Stephane Louhaur

Martine Bigan

Vincent Ridoux

**GABON**

Guy Anicet Rerambyath

**GERMANY**

Marlies Reimann

Cristina Zametzer

**Guinea, Republic of**

Diallo Anadou Telivel

Abdellah Regragui (I)

**ICELAND**

Asta Einarsdottir

Kristjan Loftsson

**Italy**

Riccardo Rigillo

Caterina Fortuna

**Japan**

Joji Morishita

Jiro Hyugaji

Dan Goodman

Yasuo Iino

**REPUBLIC OF KOREA**

Zang Geun Kim

**Luxembourg**

Pierre Gallego

**Mexico**

Lorenzo Rojas Bracho

**Netherlands**

Giuseppe Raaphorst

Martyn Lucassen

Stefan Verbunt

**New Zealand**

Geoffrey Palmer

Gerard Van Bohemen

Michael Donoghue

**Nicaragua**

Miguel Marengo

**Norway**

Halvard Johansen

Turid Eusébio

Lars Walløe

**Saint Kitts & Nevis**

Daven Joseph

**Saint Lucia**

Vaughn Charles

**Spain**

Carmen Acensio

**Sweden**

Bo Fernholm

Stellan Hamrin

**UK**

Richard Cowan

Trevor Perfect

Ruth Thirkettle

Jim Gray

Chanaka Wickremasinghe

Sue Fisher

Paul Dolder

**USA**

William Hogarth  
Doug DeMaster  
Cheri McCarty  
Roger Eckert  
John Field  
Emily Lindow  
Kitty Block

**IWC SECRETARIAT**

Nicky Grandy  
Greg Donovan

**INTERGOVERNMENTAL ORGANISATION  
OBSERVERS****IUCN**

Justin Cooke

**NON-GOVERNMENTAL ORGANISATION  
OBSERVERS****Animal Care International**

Philippa Brakes

**Animal Welfare Institute**

Susan Millward

**Campaign Whale**

Andy Ottaway

**David Shepherd Wildlife Foundation**

Alice Stroud

**Ecodetectives**

Clare Perry

**Environmental Investigation Agency**

Jennifer Lonsdale

**Eurogroup for Animal Welfare**

Leah Garcés

**European Bureau for Conservation &  
Development**

Despina Symonds

**ExxonMobil**

Bruce Tackett  
John Young

**Florida Caribbean Conservation Coalition**

Dan Morast

**Greenpeace**

John Frizell

**International Marine Mammal Association**

Vassili Papastavrou  
C:\IWC58\RMS\RMS-3

**Pro Wildlife e.V.**

Sandra Altherr

**Society for the Conservation of Marine  
Mammals, GSM**

Birgith Sloth

**Werkgroep Zeehond**

Geert Drieman

**Whale and Dolphin Conservation Society**

Nicolas Entrup

**World Society for the Protection of Animals**

Virág Kaufer  
Poonam Doshi (I)

**WWF**

Sabri Zain

(Alt) Alternate Observer

(I) Interpreter

## ANNEX B

### List of Documents

- IWC/F06/RMSWG**
- 1 Draft Agenda
  - 2 List of documents
  - 3 List of Participants
  - 4 [Extract from the ] Chair's Report of the 57<sup>th</sup> Annual Meeting (i.e. RMS discussions)
  - 5 Comments from Contracting Governments regarding approaches to further RMS discussions
  - 6 Further thoughts for a Code of Conduct for whaling under special permit (*prepared by Arne Bjørge, Doug DeMaster, Greg Donovan and Debi Palka*)
  - 7 *Not issued*
  - 8 Illegal, unreported and unregulated (IUU) fishing for toothfish: a case study (*submitted by Australia*)

#### Documents from IWC/57

- IWC/57/RMS**
- 3 Chairs' Reports of the RMS Working Group Meetings (Borgholm, Sweden, 29 November to 1 December 2004 and Copenhagen, Denmark, 30 March to 1 April 2005)
  - 4 Chair's Report of the meetings of the RMS Small Drafting Group (Borgholm, Sweden, 1 - 3 December 2004 and Copenhagen, Denmark, 2 -3 April 2005)
- IWC/57/** Rep 6 Report of the RMS Working Group

#### Documents from IWC/56

- IWC/56/**
- 26 [Extract from the] Chair's Proposals for a Way Forward on the RMS (Preface: Why and RMS is needed)

#### Document from RMS Working Group intersessional meeting in Borgholm

- IWC/N04/RMSWG**
- 7 (Draft )Overview of the Monitoring, Control and Surveillance Regimes of Other International Fisheries Management Bodies (*Secretariat note: As this document was prepared for the Borgholm meeting it may now be slightly out of date, but should still provide useful background information*).
  - 12 Discussion document: The RMS and lifting of Schedule Paragraph 10(e)

## ANNEX C

### Agenda

1. INTRODUCTORY ITEMS
  - 1.1 Appointment of Chair
  - 1.2 Introductory remarks and objectives of the meeting
  - 1.3 Reporting
  - 1.4 Review of documents
2. ADOPTION OF THE AGENDA
3. BACKGROUND: HOW WE GOT WHERE WE ARE TODAY
4. OVERVIEW OF THE CURRENT STATUS OF DISCUSSIONS
  - 4.1 Summary of IWC/57/Rep 6 and IWC/57
  - 4.2 Report of the Compliance Working Group
5. EXPLORATION OF HOW TO PROCEED WITH THE DEVELOPMENT OF AN RMS
6. OTHER MATTERS
7. NEXT STEPS

## ANNEX D

**Table 1 (revised)<sup>2</sup> of IWC/57/Rep 6 – The Report of the Revised Management Scheme Working Group**

Summary of status of present discussions and outstanding issues presented in response to Resolution 2004-6. Note: readers are referred to the extensive discussions of these items in IWC/57/RMS 3 (RMS Working Group) and 4 (Small Drafting Group) for a full consideration of the issues.			
		Outstanding issues remaining	
Issue/element	Brief summary	Policy	Technical
RMS 'Package' IWC/57/RMS3	There is still no agreement on what elements should comprise an RMS package.	Yes	No
RMS adoption procedure IWC/57/RMS3, p. 5	Should any prospective RMS be voted upon as a complete package or packages, or should a paragraph by paragraph approach be adopted. There are also practical implications as to how the voting should take place.	Yes	Yes (voting mechanism)
Statement of principle IWC/57/RMS3, pp. 5-6; 37 (IWC/57/RMS4, Annex 4)	Options: (1) no statement; (2) short statement; (3) and (4) one of two longer statements.	Yes	No
RMP IWC/57/RMS3, pp. 6-7; 37-8 (RMS 4, Annex 5)	Options: (1) RMP as currently agreed; (2) RMP with different tuning level. Possible addition: text regarding periodic review of RMP.	Yes	No (although yes if Norway proposes a case-specific CLA)
Phased in approach to whaling once RMP implemented IWC/57/RMS3, pp.7-8; 38-9 (RMS 4, Annex 5)	Options: (1) No phase-in; (2) No 'high seas whaling'; (3) Limited to national waters for initial period. Possible addition: compensation mechanism	Yes	Yes to specify compensation mechanism
Sanctuaries IWC/57/RMS3, pp. 25; 48-9 (RMS 4, Annex 5)	Options: (1) Not necessary as part of RMS, existing provisions clear; (2) Proposed text on sanctuaries.	Yes	No
National Inspection and International Observers IWC/57/RMS3, pp. 8-11; 39-41 IWC/57/RMS3, Annex IID (RMS 4, Annex 6) This report Item 4.1 and Annex D	Options: (1) As proposed by EDG with some later updates (takes into account issues relating to very small vessels); (2) All vessels must have an international observer irrespective of vessel size; (3) VMS only on very small vessels; (4) VMS on all vessels even where observer present; (5) No specification of nature of national inspection QQ of priority between national inspector and international observer; QQ on national or international VMS system; QQ on real-time or periodic reporting.	Yes	Yes: further work on technical specifications for VMS
DNA registers/market sampling IWC/57/RMS3, pp. 11-16; 41-3 IWC/57/RMS3, Annex IIE RMS4 Annex 7 This report Item 4.2	Options: (1) national schemes with international audit; (2) centralised IWC system; (3) not included.	Yes	Most work done irrespective of options chosen, but some further specification needed linked to policy decisions
Legal deterrence of IUU whaling IWC/57/RMS3, pp. 16; 43 (RMS4 Annex 8, 1)	Options: (1) Resolution, with commitment; (2) Incorporation into Schedule.	Yes	No

<sup>2</sup> The version of Table 1 in the original Working Group Report (IWC/57/Rep 6) had an error in the options listed for scientific permits. Also, in the original Table, certain options (i.e. those relating to amendment of the Convention/development of a Protocol to the Convention) had been marked with an asterisk as being outside the Terms of Reference of the RMS Working Group. At its latest meeting, the Working Group agreed that Resolution 2005-4 had given the Working Group the mandate to discuss these items also. The asterisk has therefore been deleted.

Issue/element	Brief summary	Outstanding issues remaining	
		Policy	Technical
Catch documentation scheme IWC/57/RMS3, pp. 16-17; 43-44 IWC/57/RMS3, Annexes IIF and G (RMS4 Annex 8, 2) This report Item 4.3/Annex E	Options: (1) National scheme; (2) IWC scheme (see RMS7); (3) No scheme; QQ To which point in process doe scheme apply (point of entry/landing/wholesale/retail).	Yes	Further work needed depending on policy choice
Compliance monitoring IWC/57/RMS3, pp. 16-17; 44-5 (RMS4 Annex 9) This report Item 4.4 and Annex F	Options: (1) Compliance review committee as agreed by EDG; (2) Infractions Committee; (3) Change to Convention QQ Level of IWC involvement in setting penalties; QQ Implications of RMS 5.	Yes	Yes (legal issues with respect to penalties and sanctions)
Costs IWC/57/RMS3, pp. 19-20; 45-46  (RMS 4, Annex 10)	Options: (1) Chair's proposal for cost sharing; (2) All by whaling countries; (3) Factor in membership contributions; (4) Core (IWC) plus rest to whaling countries	Yes	Yes in terms of identifying actual costs (depends on several policy decisions) and nature of contributions scheme, etc.
Link between RMS and 10(e) IWC/57/RMS3, pp. 20-23; 46 (RMS 4, Annex 11)	Options: (1) Link to ensure whaling only carried out under RMS (i.e. to avoid objections) (2) Two-stage approach – first adopt RMS, then soon after 10(e); (3) Retain 10(e) but gradual exemptions; (4) No link (5) Direct link	Yes	Yes in terms of options seeking to avoid problems associated with trust and objections
Animal welfare considerations IWC/57/RMS3, pp. 24-25; 47-48 IWC/57/RMS3, Annexes II I & J (RMS 4, Annex 12)	Options: (1) General <i>Schedule</i> paragraph plus voluntary data submission and regular workshops/co-operative research programme; (2) Specific <i>Schedule</i> text on data collection and conditions for hunting; (3) Not included	Yes	Yes if a co-operative research programme is to be developed or if final <i>Schedule</i> specifications are to be developed
Scientific permits IWC/57/RMS3, pp. 23-4; 46-7 IWC/57/RMS3, Annex II.H	Options (1) Voluntary code of conduct (2) Binding code of conduct (3) Phasing out via protocol (4) No reference to scientific whaling as part of an RMS.	Yes	Yes if final codes are to be developed

## ANNEX E

### Illegal, unreported and unregulated (IUU) fishing for toothfish: a case study

(Submitted by Australia)

#### Introduction

In fin-fish fisheries throughout the world, highly organised international trade in fish caught by illegal, unreported and unregulated (IUU) fishing operations is a major management and conservation problem. In many cases these operations are conducted by companies in defiance of the will of the countries that have jurisdiction over them.

Marine resource management organisations and individual States have for many years sought to address this issue and prevent, deter and eliminate IUU fishing. As we discuss the Revised Management Scheme (RMS) the lessons learnt from finfish fisheries for addressing IUU fishing should be considered and, furthermore applied directly to any RMS model proposed.

In particular, the trade of toothfish caught through IUU fishing operations highlights that without a robust, effective and watertight compliance regime, loopholes will exist in any RMS that can be exploited. Especially without a robust RMS, the best intentions of members to sustainably manage whaling will not prevent whale populations from quickly becoming depleted again.

This paper outlines the experience of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) in addressing IUU fishing for toothfish and highlights the lessons which the International Whaling Commission (IWC) should not ignore.

#### IUU fishing for toothfish (*Dissostichus spp.*)

##### The development of the CCAMLR compliance regime

IUU fishing for toothfish began in earnest in the mid-1990s. This coincided with:

- 1) the rapid expansion of CCAMLR-sanctioned fishery activity;
- 2) a reduction in toothfish catches around South America, which forced many vessels to seek new fishing grounds; and
- 3) increased interest from Northern Hemisphere fishing operators in toothfish (Agnew 2000).

By the mid-late 1990s about 90 vessels were involved in IUU fishing for toothfish, with most operating independently of each other (Agnew 2000).

The 16<sup>th</sup> annual CCAMLR meeting in 1997 (CCAMLR XVI) was the first to take a serious look at the issue of IUU fishing. They noted with concern that IUU fishing had the potential to undermine the work of the Commission and to seriously threaten toothfish and seabird populations (CCAMLR 1997).

At this time only one relevant compliance measure was in place; this was the System of Inspection, adopted in 1989, which allows inspectors from one member country to board and inspect fishing vessels of another member country within the CCAMLR Area of competence (Agnew 2000). The reason for the lack of a compliance regime was that the Commission simply had not considered that IUU fishing would be a problem.

At CCAMLR XVI the Commission commenced building a compliance regime (Agnew 2000). Since this time CCAMLR has adopted many compliance-related conservation measures aimed at addressing IUU fishing. These include conservation measures which:

- prohibit landings of toothfish from Non-Contracting Party vessels which have been sighted in the CCAMLR Area;
- require all finfish fishing vessels to carry an automatic vessel monitoring system and for vessel position data to be provided to the CCAMLR Secretariat and made available to Contracting Parties under certain conditions (ie a centralised Vessel Monitoring System);
- require toothfish catches to be accompanied by a catch document; and
- require vessels which contravene CCAMLR conservation measures to be included on IUU vessel lists (CCAMLR 2005).

(Attachment A provides further detail on the primary compliance-related conservation measures currently in force in CCAMLR finfish fisheries.)

## **Exploitation of gaps in CCAMLR's compliance regime**

The conservation measures outlined above have built CCAMLR's compliance regime and, together with coastal State surveillance and enforcement activities, have contributed to a decline in the amount of toothfish taken by IUU fishing (see Attachment B). Building a compliance regime over a period of almost 10 years has however meant that gaps in the compliance regime have existed that IUU operators have been able to exploit. IUU operators have demonstrated their ability to adapt in order to take advantage of these gaps. Indeed, the speed with which they have been able to adapt has far surpassed the speed with which CCAMLR has been able to respond by tightening the compliance regime.

Some examples of the gaps in compliance that IUU operators have been able to exploit over time, together with examples of how the IWC can ensure that they do not face the same issues follow.

### IUU toothfish catches being freely traded

Prior to 1999 there were no trade-related measures to combat IUU fishing for toothfish. IUU toothfish catches had free access to markets as there was no mechanism for market States to differentiate between legal toothfish catches and IUU toothfish catches. In order to try and control IUU fishing, CCAMLR adopted trade-related measures in the form of a Catch Documentation Scheme (CDS), to track landings and trade flows of toothfish caught in the CCAMLR Area and, where possible, adjacent waters.

#### *Action required of the IWC*

A RMS adopted by the IWC must include a global catch verification scheme, coordinated by the IWC Secretariat, in order that only legally caught whale products can enter the market. It is essential that all whaling activities (including scientific whaling should it continue under an RMS) be subject to this scheme.

### Misreporting of catches

When CCAMLR's catch documentation scheme was introduced vessels were required to start reporting where they had caught their toothfish catches so that port and market States could determine whether the catch was caught in accordance with CCAMLR conservation measures.

To avoid being denied access to ports or markets IUU operators catching toothfish in the CCAMLR Area falsely claimed on catch documents that they were fishing outside the CCAMLR Area. To further mask their deceit, IUU operators also began to tamper with their VMS so that they gave false position reports to indicate that their vessels were outside the CCAMLR Area, when in fact they were operating illegally inside the area.

To address this issue CCAMLR bolstered its vessel monitoring system so that VMS reports must now be sent to the CCAMLR Secretariat as well as to the flag State (ie a centralised VMS) and VMS units must have a seal to detect tampering. Recognising however that a centralised VMS alone cannot resolve this issue, CCAMLR is currently looking at complementary measures.

#### *Action required of the IWC*

The IWC should ensure that a real-time centralised VMS system is in place and that standardised tamper-proofing of VMS units on board all vessels is compulsory.

### IUU vessel lists

Until 2002 there was no CCAMLR obligation for Contracting Parties to take action against fishing vessels identified as having been involved in IUU fishing. This meant that a Contracting Party, if it wished, could flag a known IUU fishing vessel and issue it with a licence to fish in the CCAMLR Area. Such vessels could obtain verified catch documents from their flag State enabling them to land their catch wherever they wished. To make it more difficult for IUU vessels to operate in the CCAMLR Area, CCAMLR established two IUU fishing vessel lists- one for Contracting Party vessels and one for non-Contracting Party vessels. The conservation measures associated with these lists oblige Contracting Parties to, amongst other things, prohibit the licensing of such vessels or authorise a landing.

#### *Action required of the IWC*

The IWC needs to ensure that any RMS adopted includes IUU whaling vessel lists for both Contracting and non-Contracting Party vessels, applicable to whaling vessels and all support vessels.

## **Lessons learnt from the IUU fishing for toothfish experience that the IWC should not ignore**

CCAMLR has actively tackled IUU fishing for toothfish over the past decade and the lessons learnt should not be ignored by the IWC. To do so would be to risk IUU whaling activity.

- Having a strong compliance regime in place before IUU whaling begins is essential as it may deter potential IUU fishers. Once investments have been made and fishing has commenced however, IUU fishers have substantial incentives to maintain operations and regulatory responses are correspondingly more difficult.
- A compliance regime should be as comprehensive and robust as it can be from the beginning in order to avoid gaps that IUU operators can, and will, exploit.
- A compliance regime must apply to all whaling operations where whale meat products enter the commercial market to avoid creating gaps and markets for illegally caught products.
- Transparency, through the use of internationally recognised, independent systems, is the only way of ensuring compliance and building widespread trust in any compliance regime.
- The RMS package that the IWC is currently discussing is far from complete. Elements in CCAMLR's compliance regime such as lists of IUU vessels still need to be incorporated into the RMS arrangements.

### **References**

Agnew DJ (2000) The illegal and unregulated fishery for toothfish in the Southern Ocean, and the CCAMLR catch documentation scheme. *Marine Policy* 24: 361-374

CCAMLR (1997) Report of the Sixteenth Meeting of the Commission for the Conservation of Antarctic Marine Living Resources.

CCAMLR (2005) Commission for the Conservation of Antarctic Marine Living Resources web site. [www.ccamlr.org](http://www.ccamlr.org)



## **A summary of CCAMLR compliance-related conservation measures in force in 2005/06**

*(The conservation measures in full can be found at: [http://www.ccamlr.org/pu/e/e\\_pubs/cm/05-06/toc.htm](http://www.ccamlr.org/pu/e/e_pubs/cm/05-06/toc.htm))*

### **CONSERVATION MEASURE 10-01 (1998)**

#### **Marking of fishing vessels and fishing gear**

Vessels licensed by Contracting Parties to fish in the CCAMLR Area shall be marked so as to be readily identified. Marker buoys and other markers indicating the location of fishing gear shall be marked at all times with the details of the vessels to which they belong.

### **CONSERVATION MEASURE 10-02 (2004)**

#### **Licensing and inspection obligations of Contracting Parties with regard to their flag vessels operating in the Convention Area**

Contracting Parties must have the ability to meet their responsibilities (ie enforce CCAMLR conservation measures and international obligations). Contracting Parties must also verify compliance with license conditions by conducting inspections. Details of licenses and details of the vessels must be provided to the CCAMLR Secretariat, including, *inter alia*, vessel name, previous names, previous flags, photographs, and information about owners and beneficial owners.

### **CONSERVATION MEASURE 10-03 (2005)**

#### **Port inspections of vessels carrying toothfish**

Contracting Parties must undertake inspections of all fishing vessels carrying *Dissostichus* spp. which enter their ports. Inspections are to determine whether harvesting occurred in the CCAMLR Area and if so, whether conservation measures were complied with. Inspections also check whether appropriate toothfish catch documentation is provided to match the catch on board. If evidence suggests applicable conservation measures have not been complied with the Contracting Party shall, *inter alia*, refuse landing or transshipping of the catch.

### **CONSERVATION MEASURE 10-04 (2005)**

#### **Automated satellite-linked Vessel Monitoring Systems (VMS)**

Contracting Parties must ensure their vessels licensed to fish for finfish in the CCAMLR Area use a satellite linked vessel monitoring system to report positions to the flag State. These positions must be provided to the CCAMLR Secretariat and are stored in a centralised data base, and made available (under certain conditions) for verification of toothfish catch documents, and for patrol and surveillance activity.

### **CONSERVATION MEASURE 10-05 (2005)**

#### **Catch Documentation Scheme for *Dissostichus* spp.**

Toothfish catches are accompanied by a catch document through all stages of movement and trade (taking, landing, transshipping, import, export and re-export) to allow Contracting Parties and other States to determine if the fish were caught and traded in compliance with CCAMLR conservation measures. The movement and trade in toothfish shipments is also prohibited unless accompanied by a valid catch document.

### **CONSERVATION MEASURE 10-06 (2005)**

#### **Scheme to promote compliance by Contracting Party vessels with CCAMLR conservation measures**

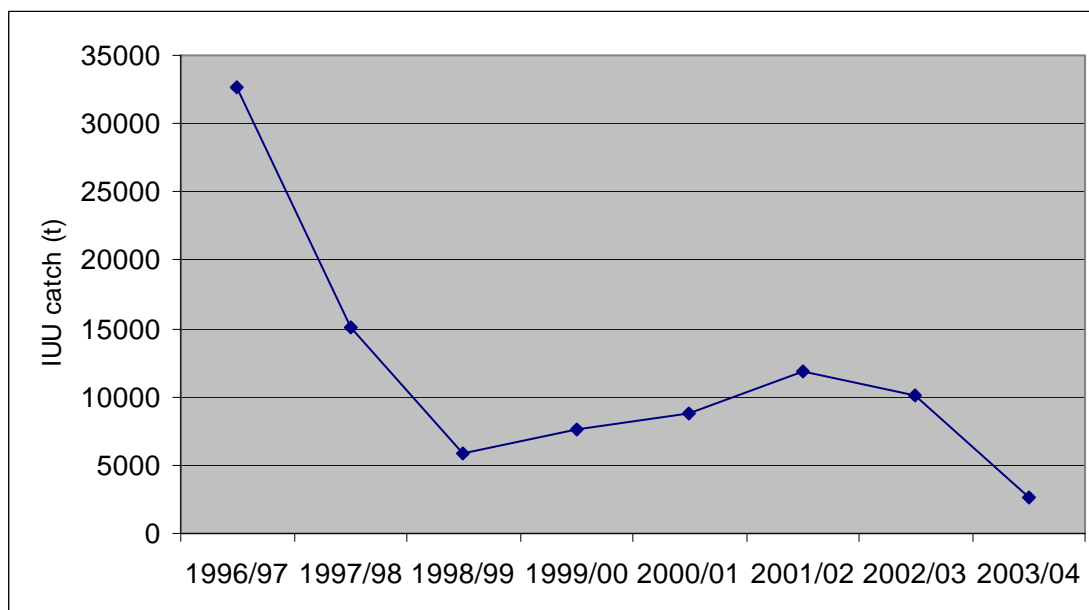
Procedures are set out for maintaining a list of vessels flagged to CCAMLR Contracting Parties that have contravened CCAMLR conservation measures (the CP-IUU vessel list). Contracting Parties flagging the vessels are required to address the issues leading to listing. A range of actions are specified for Contracting Parties to take regarding vessels on the list. The list is publicly available on the CCAMLR website.

### **CONSERVATION MEASURE 10-07 (2005)**

#### **Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures**

Procedures are established for maintaining a list of vessels flagged to countries that are not party to CCAMLR that have contravened CCAMLR conservation measures (the NCP-IUU vessel list). A range of actions are specified for Contracting Parties and the Secretariat to take regarding vessels on the list, including communication with the flag States of vessels regarding the activities leading to listing, and actions to encourage flag States to prevent such activities. Contracting Parties may cooperate to adopt trade related measures to prevent, deter and eliminate the IUU activities carried out by listed vessels. The list is publicly available on the CCAMLR website.

**IUU catches of toothfish from within the CCAMLR Area  
1996/97- 2003/04**



## ANNEX F

### Further thoughts for a Code of Conduct for whaling under special permit

#### 1. INTRODUCTION

The Chair's proposal for an RMS (IWC/56/26) had suggested that a code of conduct be developed for whaling under scientific permit as part of an RMS package. We were asked to produce an initial draft of what elements might comprise such a code of conduct and we presented our first thoughts towards the development of such a code in IWC/M05/RMSWG 10 (later appended as IWC/57/RMS3 Annex IIH). At least one Contracting Government suggested that it might be valuable to update and develop that document and this is the result. We have not had chance to share this draft with our colleagues, but we hope that this revision may prove of some value for your discussions. As before, we have attempted to minimise any consideration of non-scientific aspects. Specifically, we do not comment on the issue as to whether lethal research is philosophically desirable or not and nor, by developing such a code, is it our intention to suggest that scientific permit catches should be the norm.

Although, developing precise mechanisms for implementation is outside our area of expertise, it is our understanding that present Article VIII of the Convention means that whatever code may finally be developed will be voluntary. However, it is our premise that it is only of value if Contracting Governments agree to follow it. If the code can be agreed by consensus, this could perhaps be achieved by all Governments making a formal declaration that they will abide by it in addition to the passing of a Resolution.

In developing the draft code, we recognise that the Scientific Committee has developed the management procedure approach (RMP and AWMP) that is regarded as a milestone in modern wildlife management. These approaches explicitly incorporate scientific uncertainty in order to ensure no unwanted depletion of any population. The draft code therefore follows a similar philosophical approach. Any evaluation of the take of whales under scientific permits must account for all known human induced mortality, including direct catches, bycatches, ship strikes etc., to ensure no unwanted depletion of the stocks.

The following outline is suggested as one possible example. There are a number of areas (for example with respect to detailing: the responsibilities of Contracting Governments; the relationship between the proposed Review Group and the full Scientific Committee; definition of terms such as 'acceptable'; targets; deadlines; and levels of confidentiality at various stages in the process) that will require clarification and elaboration should the RMS Working Group believe the approach is worth following up.

#### 2. DEVELOPMENT OF PERMIT PROPOSALS

##### 2.1 Objectives

The first stage of any permit proposal (or indeed any research proposal) should be the development of precise, and to the extent possible, quantified objectives and sub-objectives expressed as testable hypotheses. This is clearly the responsibility of the Contracting Government and their scientists. The reason the proposers consider the proposal to be important must be captured as part of the objectives. As a minimum, the Contracting Government should include a statement as to how the proposed research is intended to provide information that will be used to:

- (1) improve the conservation and management of whale stocks;
- (2) improve the conservation and management of other living marine resources or the ecosystem of which the whale stocks are an integral part and/or;
- (3) test hypotheses not directly related to the management of living marine resources.

##### 2.2 Submission to the Scientific Committee

###### 2.2.1 Abundance estimates

No proposal for a permit should be submitted to the Committee unless an abundance estimate is available for the species/regions involved. Without an acceptable estimate it will not be possible to be able to satisfactorily assess the possible conservation implications of any catches. The quality required of that estimate may depend on the scale of the permit proposal (e.g. a one-off take of one animal versus a multi-year proposed take of hundreds of animals).

Normally (and certainly for large, multi-year takes) estimates should have been obtained following the guidelines developed for abundance estimates for use in the RMP or AWMP, although in certain circumstances alternative methods (e.g. mark-recapture estimates) may be acceptable. If the estimate has not already been accepted by the Scientific Committee, the data upon which the abundance estimates are based should be made available under the Scientific Committee's Data Availability Agreement Procedure A (with its associated protection for data holders and its timeframe). New estimates should be reviewed and either agreed or revised by the IWC Scientific Committee at an Annual Meeting.

### 2.2.2 Initial proposal (submission at least 6 months before an Annual Meeting)

Once an abundance estimate(s) is (are) available, the Contracting Government should send an initial proposal to the Chair of the Scientific Committee. This must be submitted to the Chair of the Scientific Committee at least 180 days (i.e. about 6 months) before an Annual Meeting. This must contain details on:

(1) *Objectives of the study*: – rationale and to the extent possible, quantified objectives and sub-objectives expressed in terms of testable hypotheses

(2) *Background information*:

- (a) Summary of what is known about the abundance and population structure of the species/area under consideration;
- (b) List of all relevant available data (c.f. that required during the RMP/AWMP *Implementation process*).

(2) *Methods to address objectives*:

(a) Field methods, including:

- species, number and sampling protocol for both lethal and non-lethal aspects of the proposal;
- an assessment of why non-lethal methods (including analysis of existing data as well as collection of new data), or methods associated with any ongoing whaling operations have been considered to be insufficient;

(b) Laboratory methods;

(c) Analytical methods, including estimates of statistical power where appropriate;

(d) Time frame for project must be specified at the outset and intermediate targets ('milestones') set.

(3) *Assessment of potential effects of catches on the stocks involved*:

Where appropriate (e.g. for multiple-year proposals involving many animals), the potential effects of the catch shall be evaluated using a simulation approach similar to that used in the RMP/AWMP, including consideration of uncertainty

- for the proposed time-frame of the proposal
- for a situation where the proposal is continued (a) for twice the envisaged time at the same level, (b) three times the envisaged time at the same level and (c) 100 years at the same level.

The computer code (and full description) used in any simulations will be lodged with the IWC Secretariat. The proposal will provide information on the risk of e.g. the targeted population(s) declining to below an agreed level (e.g. 0.54K) or slowing the time taken for the recovery of population(s) to an agreed level (e.g. 0.54K) by more than *x* years.

## 2.3 The review process

Once a proposal is received, the Chair, in consultation with the Convenors, will draw up a Review Group of appropriate specialists (the number shall be no more than 15, depending on the complexity of the proposal) to take part in the review process, primarily via a Workshop (see below). In addition, at least one of the Chair, Vice-Chair and Head of Science shall participate. The Secretariat's computing department will assist the Review Group if necessary.

### 2.3.1 Review workshop (at least three months before an Annual Meeting)

The initial proposal shall be circulated to the Review Group. Data used to justify the proposal should be made available to the Review Group under the Committee's Data Availability Agreement Procedure A. The Contracting Government may request that the proposal remains confidential at this stage.

The relevant Contracting Government shall organise and host a Review Workshop at least 90 days (i.e. about three months) before the start of the Annual Meeting. Adequate time must be allowed to enable the Review Group of scientists to read the proposal and dates must be chosen to allow all of the nominated scientists to participate (or, if necessary, replacements nominated by the Chair and Convenors). Travel and subsistence costs shall be met by the requesting Government via the IWC Secretariat.

Up to 10 scientists involved in the development of the original proposal may participate in the Workshop in an advisory role.

The primary objective of the Workshop will be to review the proposal *in the light of the stated objectives*. However, it may comment *briefly* on its view of the importance of those objectives *only* from a scientific and management perspective. In particular, the Workshop should focus on:

- (1) whether the proposed field, laboratory and analytical methods are likely to achieve the stated quantified objectives within the proposed time-frame (including, where appropriate, additional power analyses, comments on sample size and time-frame considerations);

(2) the provision of advice and suggestions on components of the programme that might be achieved using non-lethal methods, including, where possible, power analyses, approximate logistics and costs, and time-frames;

(3) the provision of advice on the likely effects on the stock or stocks involved under various scenarios of the length of the programme – this may involve a different analysis to that provided in the original proposal.

Given (1) – (3) above, the Workshop may choose to develop a revised proposal or alternative proposals to meet the stated objectives of the original proposal. This may or may not include lethal methods and may include changes to the sample size and methods of the original proposal or its time frame. It will also include a specified time-table with ‘milestones’. It may also include comments on the feasibility of *any* approach to achieve the stated objectives.

The Workshop report is the responsibility of the Review Group. The scientists involved in the development of the original proposal may include an appendix of their views if they feel it to be necessary.

#### **Following Annual Scientific Committee meeting (circulation at least 45 days before)**

The Contracting Government shall submit a revised (if necessary) proposal of the original scientific permit proposal, explaining how the recommendations from the Workshop have been taken into account and specifying milestones. This, along with the report of the review workshop shall be submitted to Scientific Committee members no later than 45 days (i.e. about one and a half months) before the annual meeting. The Review Group may submit written comments on how they feel the revised proposal has accommodated their recommendations, at least two weeks before the Annual Meeting.

The report of the Review Workshop can be discussed and commented upon, but not amended by the Scientific Committee.

The Review Workshop report, any revised proposal and the comments from the Scientific Committee will then be submitted to the Commission and become publicly available at the opening of the Commission meeting in the usual manner.

#### **Responsibility of Contracting Governments**

We would suggest that Contracting Governments should at least:

- (1) refrain from issuing a permit for lethal aspects of any proposal until the above process has been completed;
- (2) refrain from issuing a permit if the Review Group agrees that it does not have a ‘reasonable’ likelihood of achieving the stated objectives within the time frame proposed; and
- (3) only issue a permit if the Review Group agrees that there is an acceptably low risk of e.g. the targeted population(s) declining to below an agreed level (e.g. 0.54K) or slowing the time taken for the recovery of population(s) to an agreed level (e.g. 0.54K) by more than  $x$  years.

#### **Periodic independent review and data availability**

Once a programme has been undertaken, periodic review of the actual progress against expected progress is important at regular intervals. The period between reviews will depend on the nature of the research and milestones set. Therefore, following as part of the final research proposal, the [Contracting Government/Review Group/Scientific Committee] should develop a specified time-table for subsequent independent reviews by a Review Group nominated by the Chair and Convenors. The data obtained under scientific permits shall be made available for such periodic reviews under the IWC’s Data Availability Agreement Procedure A. One function of such reviews will be to comment on whether the research remains likely to meet its objectives and, if appropriate, to suggest changes (including suspension) to methods, sample sizes etc.

#### **Consideration of subsequent permit proposals**

Contracting Governments should agree to implement extensions to or follow-up research programmes (that are based on the results of existing permits) only after the results of the initial research programme have been subject to review by the Review Group and the Scientific Committee.

## **ANNEX G**

### **Comments from Contracting Governments regarding approaches to further RMS discussions**

#### **Introduction**

When circulating the draft agenda for the RMS intersessional meeting (Circular Communication IWC.CCG.521 of 7 December 2005), it was noted that it was expected that the majority of time during the meeting would be spent on item 5, i.e. an exploration of how to proceed with the development of an RMS. It was also noted that although significant progress has been made on a range of technical matters and that draft Schedule language has been prepared, major policy issues remain and reaching agreement on what an RMS 'package' should comprise continues to be elusive. Given this, it was suggested that before entering into discussions on any of the potential RMS elements it would be useful for the RMS Working Group to give consideration to:

- (1) whether it is likely that progress on an RMS package can be made, and if so how this might be done, including consideration of some form of 'high level' meeting (as suggested in Resolution 2005-4); or
- (2) whether the impasse is such that further collective work should be postponed for the time-being but with individual governments or groups of governments free to work together if they so choose.

Written views on (1) and (2) were sought since it was considered that these would help the Chair to structure discussions. Given that there was little time at IWC/57 in Ulsan to discuss the intentions of Resolution 2005-4 in detail, submissions from Contracting Governments on their understanding of what is meant by a 'high level' meeting and how such a meeting would help resolve issues were particularly encouraged.

Written views were requested to be submitted to the Secretariat by 1 February 2006 so that they could be circulated to Contracting Governments prior to the intersessional meeting. Further views can of course be made known at the meeting.

While it is clearly the responsibility of the Commission to decide on the direction of any further work, the RMS Working Group may wish to develop guidance/recommendations for review by the Commission at IWC/58.

#### **Responses received from Contracting Governments**

Responses were received from Belgium, Germany, Japan, Norway and the USA (see Appendix).

## **Appendix**

### **Comments received from Contracting Governments**

#### **BELGIUM**

Belgium chooses to go on constructively with the RMS work.

Alexandre De Lichtervelde, Commissioner for Belgium

#### **GERMANY**

Thank you for the draft agenda of the RMS Working Group meeting, 28.02. – 02.03.2006, in Cambridge. I fully agree with you that the main time will be spent on item 5 where we have to discuss how to proceed. I must confess that I have no answer, but we have discussed this question internally during the previous months. We think that we might consider two aspects which are interlinked:

- the main priorities in the RMS-process;
- the consideration, if appropriate, of a ministerial, diplomatic, or other high-level conference.

If we focus in the RMS-process on Schedule amendments a 3/4 majority is required. But it seems to me that any further progress is unlikely. In a high-level conference, where all fundamental issues in IWC would and could be raised, an unanimous decision is necessary which is also very unlikely. On the other hand we would be stepping onto new ground and would have a lot of new issues for discussion. New ideas might arise.

To go further on, it might be helpful to define the views and priorities of Contracting Governments for the RMS process itself and for a possible high-level conference.

From Germany's point of view, it would be advisable that the two groups (pro whaling and anti whaling) try to focus on those aspects which they consider to be essential and where common ground for a solution or a compromise must be found. In doing so, it might be helpful to make an analysis taking into account the legal situation in the framework of IWC regulations. For Germany and other Contracting Governments especially three issues are of paramount importance:

- Whaling under Special Permits,
- Paragraph 10 e of the Schedule,
- Compliance.

##### Whaling under Special Permits

For Germany together with other Contracting Governments it is essential that whaling under special permits should be phased out or at least be incorporated into the RMP as it stands now. I wonder which legal options exist to achieve this goal. The obvious option might be the deletion of Article VIII. But this can be done only in the frame of a ministerial, diplomatic or other high-level conference. As long as we have no such conference or no concrete expectations for results of it one could think of a preliminary option in modifying the schedule in order to restrict and minimize whaling under special permits to which all Contracting Governments have to agree to in a self binding procedure without any objections.

##### Paragraph 10 e of the Schedule

The second essential for Germany and other Contracting Governments is the fact that the moratorium is part of the fundamental legal basis set out in the Schedule. So, we think that it should remain in the Schedule without any modification. A possible compromise might be that on a regional basis and on scientific advice catch limits could be set for identified individual areas as a test for a limited time (e.g. 3 years). This could be reflected in additional sub-paragraphs of Par. 10 e.

As an essential it must be guaranteed that the full rigour of the RMS (e.g. all relevant and appropriate management, control, inspection and supervision measures) should apply to all authorised operations, such that it can be seen to be properly tested. It has to be guaranteed that during this period no scientific whaling operations will be conducted in addition to any quotas generated under the RMP (and outside the control of the RMS). If there are objections against the adopted measures (and especially against the adopted catch quotas) and if there are additional scientific whaling operations Par. 10 e remains intact without any changes and amendments, and the RMS becomes invalid.

##### Compliance

On compliance, there might be an option to modify the Convention (Art. IX) with the aim to implement a new regime including a dispute settlement mechanism, and penalties procedures. This can also only be discussed and done in the frame of a ministerial, diplomatic or other high-level conference. Therefore an alternative could and should be discussed, namely to find an agreement for the establishment of preliminary mechanisms in which a compliance review committee will be set up with the aim to recommend sanctions (e.g. quota reduction or withdrawal, license withdrawal) which have to be accepted by all Contracting Governments.

Concerning your two questions whether it is likely that progress on a single RMS package can be made or whether further collective work should be postponed for the time-being and individual governments or groups of governments should try to work together I would suggest that we first should try to evaluate the situation:

1. Looking where we are.
2. What essentials in the two main groups (pro and anti whaling) do exist?
3. Where might solutions and compromises be possible and to what extent and content?
4. Is there is a chance to make any further progress on the RMS process?
5. Evaluation of the possibility, the chances and the pros and cons of a ministerial, diplomatic or other high-level conference.

And only if the responses and the reactions to all questions are negative we should use the second alternative and postpone the process for the time-being.

I hope that my thoughts might be a little bit helpful for the preparation of the meeting in Cambridge.

Peter Bradhering, Commissioner for Germany

## **JAPAN**

Japan is committed to the implementation of a reasonable RMS and resumption of sustainable whaling in accordance with scientific advice and international law. Japan has been and is willing to accept a practical, effective and cost efficient monitoring and inspection scheme including national inspectors and international observers to verify catches, a conservative harvesting quota, and a fair sharing of the costs. On this basis Japan has actively participated in this process to develop a framework for the resumption of commercial whaling on a sustainable basis. We have made substantial compromises, supported reasonable draft texts and participated in good faith. The resumption of commercial whaling under a regulated, controlled, transparent and science-based management regime will not mean a return to historic over-harvesting. We believe that the RMS proposal submitted by Japan to IWC 57 represents a fair balance of the required elements to ensure IWC rules are obeyed and that they are seen to be obeyed.

It should be noted that in 1982 the IWC adopted a moratorium on commercial whaling (paragraph 10 e of the Schedule to the International Convention for the Regulation of Whaling) without advice from the Commission's Scientific Committee that such measure was required for conservation purposes. The moratorium was clearly intended as a temporary measure, and the Scientific Committee has developed a robust and risk-averse procedure (RMP) for calculating quotas for abundant stocks of baleen whales which was adopted by the Commission in 1982. Further, the Scientific Committee has advised that some stocks could sustain a harvest. For these reasons, we believe that the continued prevention of the resumption of commercial whaling is contrary to the fundamental purpose of the ICRW and the obligation under international law to implement treaties in good faith.

However, there have been 45 meetings over 14 years (1992 – 2005) to negotiate the “Revised Management Scheme” (RMS) without resolution.

We are deeply concerned that failure of the Commission to come to agreement on an RMS will ultimately cause the demise of the organization and that the current meeting is the last chance to complete an effective RMS.

It is not the time to continue the insistence on an always-increasing list of unnecessary, duplicative and excessively costly measures for controlling whaling operations.

It is not the time to discuss the proposal to amend the Convention or the demand that completion of any RMS must be linked to a legally binding phase out of Article VIII research. These proposals are simply unacceptable for many members of the IWC and the IWC does not have the mandate to amend the Convention or to insist that the rights of Parties to the Convention be abolished. It is unreasonable to be forced to abandon these rights in order to restore the right of sustainable whaling which is the purpose of the Convention.

The RMS WG should discuss how to normalize the IWC instead of spending more time for repeating the same positions. Negotiation and normalization will be achieved only when we agree to discuss specific and reasonable plans



to manage whaling. Extreme anti-whaling positions which do not accept any whaling under any situation remove any basis for negotiations.

Finally, Japan does not see any merit in having a high level meeting. We don't see any possibilities that the IWC members will change their well-known positions even if a high level meeting is held. In fact, it is quite possible that such a meeting will hear only the same positions made by "high level" participants and that the current polarization will be strengthened at a higher level.

Submitted by Joji Morishita, Alternate Commissioner for Japan

## **NORWAY**

With reference to Circular Communication IWC.CCG.521, please allow me to give you some comments on the questions you raise concerning the RMS process:

As Norway repeatedly has stated, the lifting of the moratorium must be an integrated part of the RMS. The RMS must respect the Convention and cannot limit or redefine the Parties rights and duties. The RMS must also reflect the sovereign rights and duties of the coastal states as these are defined in international law and reflected in the 1982 UN Law of the Sea Convention.

The implementation of the best available RMP must be an integrated part of the RMS, and the RMP should be modernised in line with the best available scientific knowledge of whale stocks and in line with recent international principles for management of living marine resources, e.g. the WSSD-declaration.

From Norway's point of view, we are far from reaching an agreement on the above mentioned matters. We do not believe that a "high level meeting" would facilitate any solution as long as the Parties' views on the matters are as far from each other as they are today and we do not favour a "high level meeting" in this situation.

Karsten Klepsvik, Commissioner for Norway

## **USA**

- (1) Whether it is likely that progress on a single RMS package can be made, and if so how this might be done, including consideration of some form of 'high level' meeting

The United States remains committed to working towards the completion of a robust, yet practical RMS. The United States views the successful resolution of the issue of scientific research whaling as the fundamental building block of any RMS. It is our view that progress on a single RMS package will not be made until scientific research whaling is addressed. We believe that the Working Group and the full Commission are the best fora to resolve differences, and that Members' points of view are unlikely to change in a high-level meeting. Nevertheless, the United States remains committed to supporting any process that the Commissioners believe will serve to make progress on completing the RMS.

- (2) Whether the impasse is such that further collective work should be postponed for the time-being but with individual governments or groups of governments free to work together if they so choose.

The United States would reluctantly consider a suspension of the RMS Working Group, for an agreed-upon period of time, to allow member countries to work together towards the completion of an RMS. If the stalemate in negotiations cannot be resolved at the current Working Group meeting, then a defined postponement in these negotiations may be the best means to address contentious issues in smaller, more focused discussions among members.

Bill Hogarth, Commissioner for the USA

## **ANNEX H**

### **Toward normalization of the International Whaling Commission**

#### **Antigua & Barbuda, Dominica, Gabon, Guinea, Iceland, Japan, Saint Kitts & Nevis and Saint Lucia**

It is regrettable that the RMS Working Group again failed to make a progress toward the completion of the RMS. As Mr. Fischer stated in his Chair's Proposals for a Way Forward on the RMS (IWC/56/COMMS 2), "failure to put an RMS in place will jeopardise the future of the IWC and serves neither the interests of whale conservation nor management."

Bearing this in mind, we have participated in the process to develop a framework for the resumption of commercial whaling on a sustainable basis for more than 14 years. We have made substantial compromises, supported the Chair's Proposal and participated in consultations in good faith.

However, the Chairman's proposed RMS package at the 2004 Annual Meeting was rejected, and at two intersessional meetings between the 2004 and 2005 annual meetings of the Commission the process moved backwards with an increased number of options.

Given that the moratorium was clearly intended as a temporary measure and the fact that the Commission adopted a robust and risk-averse procedure (RMP) for calculating quotas for abundant stocks of baleen whales in 1994 the IWC can be normalized and saved from collapse only by accepting conservation and management measures which will allow controlled and sustainable whaling. This is supported by advice of the Scientific Committee that some stocks could sustain a harvest. We reiterate our view that paragraph 10(e) is no longer valid.

However, rather than agreeing on regulations to implement an RMS, a significant number of anti-whaling members are demanding that the ICRW itself be amended in ways that would fundamentally and unacceptably change the rights of Parties as a prerequisite to any RMS. IWC members opposed to the resumption of sustainable and regulated commercial whaling have stalled negotiations for too long and have now made it impossible. These extreme positions of the anti-whaling members of IWC have now forced the IWC to give up the process of negotiating an RMS.

It must be remembered that the 1946 International Convention for the Regulation of Whaling is about properly managing the whaling industry, that is, regulating catch quotas at levels so that whale stocks will not be threatened. The Convention is not about protecting all whales irrespective of their abundance. A number of countries which were whaling countries when they agreed to and signed the Convention have subsequently changed their position to anti-whaling following the closure of their whaling industry but this does not change the Convention or its purpose. If these countries can no longer agree to the Convention, they should withdraw from it rather than subvert its purpose.

We believe that it is time to start more productive discussions that will bring about the normalization of the IWC by refocusing the organization back to its fundamental purpose as mandated by the ICRW. The resumption of commercial whaling under a regulated, controlled, transparent and science-based management regime will not mean a return to historic over-harvesting. Past poorly regulated whaling was for oil whereas current and future whaling is for food for a limited market.

Therefore, IWC members which support the sustainable use of whale resources will present at the 58<sup>th</sup> Annual meeting in St. Kitts, a clear statement of conditions and factors for the normalization of the functions of the IWC by implementing the ICRW in a responsible manner consistent with international law.

This will not produce an RMS proposal or include a proposal for an amendment to the Schedule of the ICRW. Nor will this be a tool for another set of inconclusive negotiations, although we will welcome constructive comments from any IWC member which will support sustainable whaling. Rather, this will be a demonstration of the commitment of IWC members supporting the sustainable use of whales to responsible management.

This intends to visualize specific activities that will achieve normalization of the current situation such that whales are treated as any other marine living resources available for harvesting subject to the needs of conservation and science-based management.

The strategy will address the fact that sustainable whaling is possible and that use of cetaceans contributes to sustainable coastal communities, sustainable livelihoods, food security and poverty reduction. The strategy will also be based on respect for cultural diversity and traditions of coastal peoples as well as coastal state rights, relevant national and international law, the need for science-based management, policy and rule-making and consideration of ecosystem approaches all of which are the accepted global standard.

## **ANNEX I**

### **Press Statement**

At its 57<sup>th</sup> Annual Meeting in Ulsan last year, the International Whaling Commission agreed to hold an intersessional meeting of the Revised Management Scheme (RMS) Working Group to advance work on development of an RMS. Particular emphasis was to be given to any outstanding issues, taking as a starting point the Group's report to the Commission in Ulsan and to consider, if appropriate, Ministerial, diplomatic or other high level possibilities to resolve differences among Contracting Governments to the Convention.

The RMS Working Group met in Cambridge, UK, from 28 February to 2 March 2006 under the chairmanship of Dr Doug DeMaster (USA). The meeting comprised 66 representatives from 29 Contracting Governments and the Commission's Chair (Henrik Fischer).

There was a valuable exchange of views and ideas on a number of difficult issues surrounding the completion of an RMS. Some progress was made in some areas (two small working groups on specific topics were established) and a better understanding of different governments' perspectives was achieved. However, the RMS Working Group agreed that discussions on further collective work should be postponed for the time being but with individual governments or groups of governments free to work together if they so choose.

The next meeting of the RMS Working Group will take place prior to the next Annual Meeting of the Commission in St. Kitts and Nevis, June 2006.

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