

Discussion document: The RMS and lifting of Schedule Paragraph 10(e)

(prepared by the Secretariat)

1. Introduction

In his 'proposals for a way forward on the RMS' (IWC/56/26), Henrik Fischer, 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.'

He recognised that developing appropriate text to achieve this is not a simple task, and asked the Secretariat to develop some possible scenarios and text for consideration. This request was incorporated into the Annual Meeting document IWC/56/36 'Discussion document: further work required on the RMS based on IWC/56/26' prepared by the Secretariat.

While acknowledging that some Contracting Governments believe strongly that there should be no link between adoption of an RMS and the lifting of paragraph 10(e) and that others just as strongly believe that they should be linked, the Commission nevertheless did instruct the Secretariat to develop a discussion document on this issue for the forthcoming RMS Working Group meeting. This document therefore considers some possible options and issues regarding ways that reaching agreement on an RMS might be linked to the lifting of paragraph 10(e), and takes into consideration to the extent possible, views expressed on the Chair's proposal both at IWC/56 (see Document IWC/N04/RMSWG 5) and in responses to the questionnaire on the Chair's proposal circulated by the Secretariat in August 2004 (see Document IWC/N04/RMSWG 4; and see Annex A).

This document is thus the Secretariat's response to an instruction from the Commission and should not be taken to represent a comment on whether or not there should or should not be a link between paragraph 10(e) and the adoption of an RMS.

2. Background

Given the range of views that have been expressed, the relationship between the RMS and Schedule paragraph 10(e) represents one of the most important obstacles to agreeing an RMS. Views expressed have ranged from: (1) agreement on the RMS should result in simultaneous deletion of paragraph 10(e) from the Schedule and catch limits other than zero should be established for those stocks for which the Scientific Committee provides advice that this is safe to do; to (2) even if an RMS is agreed, paragraph 10(e) should remain until such time as the Commission takes action to remove it. The rationales for these opinions vary from the view that an RMS is meaningless if no whaling is allowed on stocks for which the RMP would set a catch limit other than zero, through a lack of trust that countries may object to one or more provisions of an RMS and thus not be bound by them, to the view that whaling should not be allowed but that an RMS should be in place in case a three-quarter majority is in favour of lifting the moratorium at some point in the future.

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. However, as noted at the October 2002 private Commissioners' meeting on the RMS, 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. The aim of any mechanism developed under the Chair's proposal will be to enable a lifting of paragraph 10(e) whilst ensuring that (1) whaling only occurs under a full RMS and (2) that the objection of a non-whaling country could not prevent the possibility of whaling under an RMS.

3. Some implications of lifting paragraph 10(e)

Before laying out some possible options of how adoption of an RMS and the lifting of paragraph 10(e) might be linked, it is perhaps worthwhile to consider what the practical consequences of lifting paragraph 10(e) would be.

The inclusion of paragraph 10(e) into the Schedule created what is popularly termed the 'moratorium' on commercial whaling, setting commercial whaling catch limits on all species in all areas to zero. While fully

recognising the symbolic nature of paragraph 10(e) for some Contracting Governments, should it be removed, the practical consequences are that commercial whaling catch limits would remain at zero until the Commission decides otherwise. The 'moratorium' would therefore effectively remain in place, and a three-quarter majority would still be needed for catch limits to be set at anything other than zero. Moreover, if paragraph 10(e) is removed, catch limits will be zero until the Scientific Committee has completed an *RMP Implementation* for a particular species and area, and the Committee cannot begin an *Implementation* without instructions from the Commission. While recognising some Contracting Governments' criticisms of the RMP (see IWC/N04/RMSWG 4), if implemented today, the RMP would only allow catches from some stocks of minke whale and there would be a natural phase-in of commercial whaling. Bryde's whales in the North Pacific and fin whales in the North Atlantic are at the *pre-Implementation Assessment* stage. In addition, the lifting of paragraph 10(e) would not affect paragraph 10(d), which would remain in place unless the Commission decides otherwise. Paragraph 10(d) forbids the taking, killing or treating of sperm whales, killer whales and baleen whales (except minke whales) by factory ships or whale catchers attached to factory ships¹.

4. Possible options for linking the adoption of the RMS and lifting paragraph 10(e)

The Chair's preferred approach is to modify paragraph 10(e) such that it becomes invalid on a specific day whilst ensuring that any commercial whaling operations are undertaken under the full RMS package as adopted by the Commission. The following two options have been considered thus far but both have disadvantages.

- (1) Modifying paragraph 10(e) such that it is lifted on a certain date provided no objections to the RMS package have been lodged. This approach would certainly ensure that future commercial whaling was undertaken under the full RMS package. The primary disadvantage is that an otherwise broad agreement would collapse if a single country (of whatever view on whaling) lodged an objection to the RMS.
- (2) Modifying paragraph 10(e) such that it is lifted only if there are no objections to the RMS package from 'key players' – in a similar way to when a Convention only goes into force once certain named countries have ratified it (as was the case with the ICRW). The drawback to this approach is that it may be very difficult to reach agreement on who the 'key players' should be (ideally they should at least include all countries with an interest now or in the future in commercial whaling). In addition, this approach would allow a country not included as a 'key player' at the time the RMS is adopted to lodge an objection and then whale outside the RMS at some point in the future.

Other approaches that might be considered include:

- (3) Lift paragraph 10(e) simultaneously with adoption of the RMS, but include a clause/provision in the Schedule such that the Commission will not instruct/authorise the Scientific Committee to determine catch limits for a particular stock if the request for such a determination comes from a Contracting Government that has an objection or reservation to any part of the RMS. This has three possible disadvantages: (a) it may be considered to conflict with that part of Article V.2(c) that notes that 'amendments shall not involve restrictions on the.....nationality of factory ships or land stations.....'; (b) a country with no objection to the RMS may request the Commission to determine a catch limit for a particular stock on behalf of a country that has an objection/reservation; (c) it penalises a country with no objections who may wish to catch whales from the same stock as one that does have an objection.
- (4) Lift Paragraph 10(e) simultaneously with the adoption of the RMS and include a note to the Table of catches that states that catches may be taken only by operations under the jurisdiction of Contracting Governments that do not have objections or reservations to the RMS. This does not preclude Governments lodging objections but the implications if they do are clear. Although, it too may be regarded by some as conflicting with Article V.2 (c) it is perhaps one of the more promising approaches, given good will to find a solution.

The above options do not fully address the concern that Contracting Governments are essentially being required to give up their right under Article V.3 of the Convention to object to Schedule amendments – option (4) is perhaps the closest to this.

Options (3) and (4) address the concern expressed over the possibility of Contracting Governments leaving the Commission and rejoining with a reservation to the RMS or a new government joining with a reservation to the RMS. They also avoid the situation that could occur in Options 1 or 2 whereby if there are objections to the RMS, 10(e) remains in place and the RMS remains in the Schedule with objections lodged against it – in such a situation, the RMS would not be binding on the countries that lodged objections should the moratorium ever be lifted in the future.

¹ Japan has previously expressed the view that paragraph 10(d) should also be deleted (see for example IWC/53/9)

Finally, in their responses to the questionnaire (and see Annex A), several governments suggested that there is no need to remove paragraph 10(e) in a single step and that a phased-out approach would be more appropriate, helping to build public confidence. In this approach, exemptions from the moratorium would be gradually introduced for certain stocks under certain conditions, for example by adding a sub-paragraph 10(f) specifically stating '*notwithstanding the provision in 10(e), catch limits are allowed for.....*'. The symbolism of 10(e) would be retained, although commercial whaling would be phased in (as mentioned above, there would be a natural phasing-in of commercial whaling even if 10(e) were to be lifted). This approach might address the view expressed by some governments that the RMS should be thoroughly tested before paragraph 10(e) is lifted, since presumably some commercial whaling will need to be allowed to enable such testing to be done. However, removal of paragraph 10(e) is equally symbolic to those countries supporting a resumption of sustainable commercial whaling and such an approach does not meet their wish for a direct link between adoption of the RMS and the lifting of the moratorium.

5. Conclusions

This issue remains one of the most difficult the Commission must overcome. Differences of opinion are particularly strong on this matter even among those Governments who are not necessarily opposed to commercial whaling.

Annex A

Views expressed by Contracting Governments on the Chair's proposal

The range of views expressed on the Chair's proposed link between finalising an RMS and the lifting of paragraph 10(e) at IWC/56 and in responses to the questionnaire could be broadly summarised as follows:

1. There should be no link between reaching agreement on the RMS and lifting paragraph 10(e). Decisions on lifting or otherwise modifying the zero catch limits should be kept separate from considerations of the elements that in principle comprise a best-practice management scheme for whaling. Agreement on an RMS must be reached prior to any discussions on lifting the moratorium. (Any eventual process that might result in the lifting of the moratorium should not only be time-sensitive but also geographically sensitive to take account of the rights of coastal States that have opted for the non-lethal management of whale stocks.) (Another reason for objecting to an automatic lifting of the moratorium once the RMS is lifted is that were whaling to be resumed, disputes are bound to arise that the Convention is not equipped to deal with as it contains no mechanism for settling disputes.)
2. There should be no link between reaching agreement on the RMS and lifting paragraph 10(e). The RMS should be rigorously tested first to make sure that it works and it would be prudent to formally retain paragraph 10(e) through that testing/trial period (with any catch limits set for particular stocks being regarded as exceptions to the general rule).
3. There is no need to remove paragraph 10(e) in a single step – rather a phased-out approach would be more appropriate, i.e. exemptions from the moratorium would gradually be introduced for certain stocks under certain conditions.
4. A link between the RMS and lifting of 10(e) could only be considered if a proposal is presented that ensures that 10(e) remains in force until the adopted RMS has entered into force without objections.
5. Finalising the RMS must be linked to the lifting of 10(e). At least one Contracting Government takes the position that 10(e) is no longer in force due to its wording, i.e. '....and by 1990 at the latest.....'.

The following specific concerns were expressed regarding the Chair's proposal to add a 'sunset clause' to paragraph 10(e):

- Germany: The Chair's proposal to add a clause to 10(e) which states that 10(e) becomes invalid on a specific day provided that no objections to the RMS provision have been received within 90 days would not prevent a Contracting Government from leaving the Commission after 90 days and rejoining with a reservation to the RMS, or a new government joining with a reservation to the RMS..... This loophole has to be closed.
- Germany, UK: The Sunset Clause proposed by the Chair provides that if a Contracting Government objects to the RMS as it is entered into the Schedule, 10(e) will remain in place. However, in this situation, the RMS will remain in the Schedule with objections lodged against it. It will not be binding on the countries that lodged objections should the moratorium ever be lifted in the future. Such an outcome is entirely unsatisfactory; to avoid its arising, any sunset clause added to 10(e) must have additional language stating that if any objections are made to the RMS then not only will 10(e) remain in place, but the RMS in the Schedule will also be rendered invalid. In other words, if there are any objections lodged against the RMS, 10(e) remains intact and the RMS added to the Schedule is deemed invalid.
- Japan: can agree, for the present time, and with some reservation, with the Chair's preferred approach, i.e. "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" provided that "any whaling operations" means any commercial whaling operations (*Secretariat note: Republic of Korea also noted that reference should be to commercial whaling operations specifically*). Our reservation on this matter is that the approach of the Chair is essentially analogous to giving up our right under Article V of the Convention to file an objection. Clearly the Convention was drafted specifically to allow Parties to object to regulations so the insistence that any commercial whaling operations are undertaken under the full RMS package sets a perhaps problematic precedent of diminishing the rights of Parties. As a matter of principle, we find this objectionable although we fully understand the rationale for the proposal. We believe that this matter requires further consideration and discussion and hope that the Secretariat's document to be developed will consider alternate approaches to linking agreement on an RMS with the lifting of paragraph 10(e) taking account of our concern.