

## Annex D

# Chair's Report of the Intersessional Meeting on the Future of IWC

6-8 March 2008, Renaissance London Heathrow Hotel, UK

### 1. INTRODUCTORY ITEMS

The meeting was held at the Renaissance London Heathrow Hotel, UK from 6-8 March 2008. A list of participants is given as Appendix A. It was chaired by Bill Hogarth (USA), Chair of the Commission.

#### 1.1 Introductory remarks

The Chair welcomed participants to the meeting which he considered to be very important in terms of the future of the IWC. He re-iterated his concerns about the organisation's future and again stressed that one of his aims as Chair of the Commission is to try to find a solution to its problems. He noted that during last year's Annual Meeting in Anchorage he had sensed a different attitude to discussions emerging and believed that this was a good sign for finding a way forward. He was therefore heartened to see so many member countries in attendance at the intersessional meeting.

Noting that in Anchorage the Commission agreed to establish a Steering Group, comprising representatives of the Governments of Chile, Japan, New Zealand, Palau, and the United States to plan the intersessional meeting, the Chair thanked the members for their valuable contributions and work over the last several months. He recalled that when the Steering Group met in October 2007, it had decided that at this intersessional meeting, it would not be fruitful to launch immediately into negotiations on the substantive issues that have polarised the membership but rather, at least initially, to focus discussions on process and to seek ways to improve how negotiations are conducted within the IWC. The Chair suggested that if this could be done, subsequent discussions on matters of substance may have more chance of producing a successful outcome. He noted that the format and agenda for the meeting reflected the Steering Group's desire to find a way forward and added that he hoped that the involvement of outside individuals with experience in handling other difficult international issues (see Item 1.2) would be beneficial to the process being embarked upon.

The Chair expressed his optimism that by working together, viable solutions to IWC's current difficulties could be found and encouraged delegates to approach the ensuing discussions with an open mind and positive attitude.

Finally the Chair thanked the UK for hosting the reception the previous evening noting that this had provided an excellent opportunity for participants to interact more informally prior to the beginning of the meeting.

#### 1.2 Management of the meeting

The Chair recalled that when planning the meeting, the Steering Group had believed it useful to devote the first day to gaining an understanding of the mechanisms used to resolve other difficult international issues via presentations

by outside specialists and that to assist in this approach it had agreed to engage the services of an acknowledged expert in this field, i.e. Calestous Juma, Professor of the Practice of International Development and Director of the Science, Technology, and Globalization Project at Harvard University's Kennedy School. The Chair introduced Professor Juma and proposed that since he was participating in the meeting in an advisory capacity he be given speaking rights in a similar manner to those given to the Chair of the Scientific Committee. He noted that together with the Steering Group, Professor Juma had identified two other outside experts to be involved in the meeting (i.e. Ambassador Raúl Estrada-Oyuela and Ambassador Alvaro de Soto) and introduced them to the meeting also. Brief information on the background of the speakers is provided in Appendix B.

The Chair informed the meeting that since discussions on later agenda items would inevitably be somewhat dependent on those on earlier items, he intended to have a meeting of the Steering Group at the end of each day to plan how to proceed on the following day. He further reported his intention to invite Professor Juma and Ambassadors Estrada-Oyuela and de Soto to these meetings.

Given that one of the objectives of the intersessional meeting was to create positive dialogue among participants and that discussions conducted in the margins of the meeting are often as useful as those in session, the Chair encouraged delegates to make the most of the refreshment breaks for which more time than usual had been allowed. He noted that longer breaks would also give Professor Juma time to conduct private interviews with individual Commissioners<sup>1</sup>.

The Chair stressed the importance of all Contracting Governments represented at the meeting having the opportunity to express their points of view and hoped this could be done without interruption.

Finally, the Chair re-confirmed previous arrangements for the speaking rights of intergovernmental organisations (IGOs), i.e. that he would allow IGOs to make one intervention. He noted that for this meeting, such interventions would be most appropriate in relation to agenda Items 4 or 5. He requested IGOs to let him know in advance if they wish to speak and under which item.

#### 1.3 Reporting

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

<sup>1</sup>Professor Juma conducted private interviews with Commissioners/Alternate Commissioners to gain an understanding of individual IWC Contracting Government views regarding *inter alia* how the conflict in the organisation arose and how they believe it might be resolved. (See also Appendix B).

prepared and circulated to all Contracting Governments after the meeting.

Drawing attention to the Commission's Rules of Procedure (Q.1), the Chair noted that discussions at the meeting should be treated as confidential by both delegates and observers until the report of the meeting has been sent to all members of the Commission. He explained that while this rule would allow delegates and observers to make comments about the objectives of the meeting, they should refrain from reporting on the discussions themselves until the report had been issued. Noting that the meeting report would not be available immediately at the end of the meeting, the Chair indicated that reference could be made to the press release to be agreed under Item 6.

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

#### 1.4 Review of documents

The list of documents available to the meeting is given as Appendix C.

### 2. ADOPTION OF AGENDA

In response to comments received on the draft agenda prior to the meeting, the Chair proposed to allow limited time towards the end of the meeting (under Item 5) for Contracting Governments to identify substantive issues that they believed should be addressed by the Commission.

Japan noted its intention to co-operate with the Chair to rebuild the IWC and that it looked forward to constructive discussions during the intersessional meeting. However, Japan also drew the meeting's attention to the protest activities of the Sea Shepherd Conservation Society against its vessels involved in its research programme in the Antarctic. While recognising the different views held on whaling and respecting the right for peaceful demonstration, Japan considered the recent attack on one of its vessels in which bottles containing butyric acid were thrown on board to be an act of terrorism which should be denounced, particularly given the two Commission Resolutions adopted by consensus at the 2006 and 2007 Annual Meetings<sup>2</sup>. It therefore considered it important that the meeting adopt a statement on safety at sea and indicated its intention to work with others in the margin of the meeting to develop a statement that could be adopted by consensus. The Chair suggested that this matter be dealt with at the end of the meeting under Item 6.

The agenda adopted is given as Appendix D.

### 3. DRAWING ON OUTSIDE EXPERIENCE

#### 3.1 Professor Calestous Juma

Professor Juma expressed his thanks for the opportunity to become involved in discussions on the future of IWC which he saw as an important organisation. He noted that prior to working at Harvard University he had been Secretary-General of the Convention on Biodiversity (CBD) and had been responsible for not only building a new Secretariat from scratch but also building a new programme of work for the Convention itself. He had therefore had considerable interactions not only with Parties to the Convention, but also with NGOs and other

stakeholders. He believed that his experience from CBD is relevant to discussions on the future of IWC.

Professor Juma noted that in this part of the agenda he wanted to address the following three areas: (1) why it is important that IWC succeeds and evolves; (2) issues surrounding how this could be made to happen; and (3) how IWC could learn from other institutions, regimes and experiences with the benefit of input from the other external speakers.

He stressed that the 1946 International Convention for the Regulation of Whaling (ICRW) is a treaty of the Contracting Governments themselves and while individuals from outside the organisation could be used as a sounding board for ideas, they could not solve the problems faced by the IWC. This could only be done by the parties to the Convention. Professor Juma therefore stressed that a sense of ownership of the Convention by Contracting Governments is very important, together with an interest and willingness to find a way out of the current difficulties. He was therefore encouraged that during the interviews conducted so far with Commissioners/Alternate Commissioners, he had received a wealth of ideas and had sensed optimism about the future of IWC. He was also encouraged by the thoughtful written contributions received from Contracting Governments in response to the 'call for input' provided to participants in meeting document IWC/M08/4<sup>3</sup> (the 'call for comment' was developed by the Steering Group as a way to engage Contracting Governments prior to the intersessional meeting itself – see Appendix E) and from IWC-accredited NGOs whom he had approached independently.

Professor Juma noted that the ICRW is one of the oldest of around 260 environmentally-related treaties, many being regional in nature, of which he believed only some 20-30 were fulfilling properly their mandates. During his period at the CBD, he had spent some time examining many treaties and had found that effectiveness appears to be the exception, and not only in the environmental area. He commented that it is therefore not unique for treaties to run into difficulties. Professor Juma therefore believed the work of IWC had implications to other fields and that finding solutions to its problems could be inspirational for other bodies.

Professor Juma considered that the ICRW was very visionary when negotiated back in the 1940s, introducing the concepts of conservation and sustainable use and for decisions to be based on scientific findings. These are now principles reflected in more modern treaties. He noted that environmentally-related treaties are looking for role models and reported that in its early days, the CBD had looked to IWC as a source of ideas regarding mechanisms for obtaining scientific advice to input into a decision-making process. He hoped that IWC as it moved forward would continue to develop interesting ideas that might be applicable to other bodies. However, he expressed real concern over the escalation of debates within IWC that impact adversely on diplomatic relations between nations (not just related to whaling), and stressed the importance of finding ways to stop such escalation. In this regard he

<sup>2</sup>Resolution 2006-2 on the safety of vessels engaged in whaling and whale research-related activities and Resolution 2007-2 on safety at sea and protection of the environment.

<sup>3</sup>Contracting Governments were invited to respond to the following two questions: (1) Why do you think that discussions to date within the IWC have not led to a more consensus-based resolution of IWC's problems? Is the negotiating process itself a factor? (2) What are your initial thoughts on how future discussions and negotiations should be organised and conducted, taking into account the need to rebuild trust?

noted the keen interest of many involved in UN negotiations for IWC to resolve its problems internally so as to avoid them being brought to the attention of the UN General Assembly which is often the case when treaties fail to find solutions themselves.

Professor Juma believed that IWC has a unique opportunity to evolve into a modern treaty that could serve as flagship for other environmentally-related agreements, particularly those dealing with complex matters of resource management. In this context he noted that whales are not seen simply as a natural resource but also as a metaphor reflecting larger concerns including the way that individuals think about the world and also such issues as equity, differences in power and historical linkages in how neighbouring countries relate to each other. He believed that an increasing number of countries adhering to the Convention are doing so not only because of their interest in the conservation and management of whales but also because the principles being applied in IWC can be applied elsewhere. Professor Juma cautioned that this evolution into a modern-day treaty will require considerable political commitment given the deeply held and differing views of member countries regarding whaling. While he realised the risks involved, he believed that they needed to be taken because of the uncertainty over whether the *status quo* still provided something for everyone, i.e. doing nothing would not necessarily guarantee continuation of the current *status quo*.

Professor Juma believed that Contracting Governments need to have the courage to work together and to take steps to resolve IWC's difficulties. He therefore considered that at this meeting it would be helpful to IWC to receive input on how others have dealt with seemingly intractable problems, for which Ambassador de Soto with his work connected with the UN Law of the Sea and subsequently with a range of peace initiatives is well placed. He also thought it useful to gather ideas on how to connect with the environmental process, for which Ambassador Estrada is well placed given his experience with the negotiations on the Kyoto Protocol and how to approach this if there is a real wish to proceed.

Professor Juma believed that the basis for advancing the ICRW exists and that Commissioners have the ideas necessary to make this happen while recognising the need to accommodate the different sensitivities held among member countries. He noted that in the course of his own work he had found that it is not change that people resist, but potential loss. He stressed the need to open-up the possibility for collective learning at IWC/60 in Chile and beyond.

Finally Professor Juma reported that he would be developing a short document laying out his view on how IWC could move forward based on his interviews with Commissioners/Alternate Commissioners, the call for input and discussions at the intersessional meeting.

### 3.2 Alvaro de Soto

Ambassador de Soto noted that he felt honoured to be given an opportunity to address the Commission. While he admitted to knowing little about whales and whaling he hoped that his experience over 40 years in conflict negotiation and deadlock resolution would be useful for discussions at the meeting. In this regard he thought it would be useful to highlight three areas in which he had been involved that might be germane to the challenges

faced by IWC (i.e. (1) the 3<sup>rd</sup> UN Conference on the Law of the Sea (UNCLOS); (2) the workings and practices of the UN Security Council; and (3) various peace negotiations) and then to draw out lessons learned that might be germane to IWC.

#### UNCLOS

Ambassador de Soto noted that many interests had to be reconciled during the negotiations on UNCLOS. He noted that reconciliation had to combine a substantial body of existing law, areas where no law existed because of new uses of the oceans, where it was necessary to innovate from scratch, and areas where existing law needed to be adjusted. Those involved in negotiations recognised that the only way to address these issues was via a gargantuan package deal. In developing this, Ambassador de Soto explained that three devices had been used: (1) a consensus-seeking mechanism to avoid the precipitous triggering of the use of Rules of Procedure and voting procedures that would threaten collapse of the entire package; (2) use of a single negotiating text; and (3) use of contact (smaller) groups and the concept of miniaturisation in general.

With respect to the consensus-seeking mechanism and to preserve the idea of the development of an overall package, Ambassador de Soto noted that the Conference adopted a gentleman's agreement, based on the strong desirability of the outcome commanding the broadest possible consensus, that '*nothing is agreed until every thing is agreed*,' and that if efforts at consensus failed, the Conference would observe a cooling-off period before resorting to voting. As a result, most of the Convention was adopted by consensus and most of the provisions are accepted today as customary law.

With respect to use of a single negotiating text, Ambassador de Soto explained that in large gatherings, as was the case for UNCLOS, negotiations in terms of straightforward give and take are extremely difficult, if not impossible. Consequently informal gatherings were convened to promote discussion rather than formal negotiations. At the end of a day of discussions, the convenor together with a carefully-selected drafting team, would draft text for review by the informal group the next day. There would be re-iterations of this procedure (as many as 20) until an outcome was achieved that everyone could live with, it being important that there should be no clear winners or losers.

With respect to the use of smaller negotiating groups, Ambassador de Soto reported that these were used to address a regime for the seabed beyond national jurisdiction – the last chapter to be negotiated at UNCLOS. He noted that these discussions had embodied straightforward north versus south negotiations/confrontations in which some industrialised countries wanted as broad a freedom as possible to exploit the resources of this vast area on which there was no existing law governing their exploitation and developing countries who saw this area as a common heritage of mankind and who wanted to see it governed by a regime controlled by an international seabed authority that would ensure that all would benefit and no-one be unduly harmed. Following very slow progress with negotiations conducted in a large group, a decision was taken to establish a smaller group comprising 21 countries divided equally between developed and developing. While only these countries were

allowed to speak, all delegations were allowed access to the meeting room. Ambassador de Soto reported that this format was not successful in promoting give and take but provided a framework through which to channel progress that was achieved in a considerably smaller but still representative group miniaturised so as to allow for its work to be conducted in private. While the smaller group included countries representing all ends of the spectrum, all delegations shared the view that there was a need to reach agreement and to merge this area with the overall Law of the Sea package.

#### *UN Security Council*

Ambassador de Soto noted that the UN Security Council has been much maligned in part because of the way it is constituted which many see as unrepresentative of the realities of today. However, he reported that in the last few years, partly because of complaints over the composition but also perhaps to fend off pressure to make significant structural reforms, it has amended its practices. While the Security Council now works in a less secretive manner than before, the work on the most difficult issues is still conducted away from the public eye with nothing being put on record and with only decision-makers present. What occurs in the on-the-record meetings in the formal Council chamber is heavily stage managed and prepared in informal consultations beforehand.

#### *Peace negotiations*

Ambassador de Soto recalled his experiences in two sets of peace negotiations, i.e. El Salvador and Cyprus. He noted that in both cases, difficulties had been created by all parties leaking to the public the positions being taken by the differing sides. This had the effect of raising the stakes and undermining the ability of the negotiators involved to engage in give and take lest they be accused of yielding too much. The UN negotiators involved had no alternative but to develop draft texts that were submitted to separate consultations with each side, resulting in a lengthy shuttle-diplomacy process. This provided a framework in which negotiators did not appear to be conceding to each other but rather agreeing to an overall package where an honourable balance was preserved.

#### *Lessons learned germane to IWC*

- (1) Negotiate away from the public eye. Ambassador de Soto reported that he has found that negotiations work best if held away from the public eye and that this is particularly important for those issues on which public opinion is inflamed. He suggested that if discussions on such matters are held in public, even the most reasonable compromises can be seen as humiliating sell-outs. He further suggested that open discussions serve to entrench hard positions, prevent underlying issues rather than positions from being addressed, exacerbate conflict and ensure that negotiators leave aside any spirit of compromise. While he was aware that conducting negotiations in private may not be popular with some, he considered this extremely important if a successful outcome is to be achieved.
- (2) Use small negotiating groups (miniaturisation). Ambassador de Soto had found that the greatest possible miniaturisation is needed, noting that the size of participation is inversely proportional to the chance of a successful outcome. Stressing that full powers of decision-making cannot be delegated to such groups,

he noted the importance that participants in the small groups, who should be well plugged in to those whose broad interests they reflect, agree to make good faith efforts to 'sell' the outcome/compromise that emerges to parties not involved.

- (3) Sometimes the language or terms used can hinder negotiations. Ambassador de Soto noted that the language or terms used can create difficulties during negotiations, particularly when dealing with 'high octane' words. In this respect he recommended that it is frequently better to try to leave such loaded language aside and leave it to a later stage and to either find substitutes or break up the underlying concepts into smaller practical components.

In summary, Ambassador de Soto made the following points:

- The question should be asked as to whether IWC is in deadlock or is dysfunctional.
- If the Commission does decide that major repair work is necessary, then if it is in earnest it should:
  - negotiate among decision-makers so as not to have the inhibiting factor of the presence of other players – while non-decision makers have a very important role in society, it is ultimately governments that are accountable to their electorates;
  - try to miniaturise;
  - avoid inflammatory language/terms; and
  - break negotiations into manageable components.

Finally Ambassador de Soto drew attention to the recent emergence of the notion of 'ripeness', i.e. whether an issue is ripe/ready for negotiating. 'Ripeness' has been defined by the existence of a mutually-hurting stalemate, i.e. a situation in which the hurt which parties are enduring is greater than the hurt of solving it. Settlement then becomes a matter of 'how' and not 'whether'. He further noted that while 'ripeness' is not a pre-requisite, the likelihood of success is higher if it is present.

#### *Discussions on clarification*

In response to a question regarding involvement of civil society, Ambassador de Soto stressed that it is essential that civil society is involved in policy formulation. He believed that governments failing to do so take serious risks since the outcome of any negotiations may ultimately not be acceptable to their publics. However, it was his view that civil society should not become directly or indirectly the actual negotiator. With respect to their involvement in intergovernmental organisations, he pointed to the UN as having considerable experience in this matter from which IWC could perhaps learn.

Regarding how to take account of the interests of all stakeholders, Ambassador de Soto suggested that this has to be done on a case-by-case basis depending on the various interests involved. He noted that this is a heavy responsibility on whoever is the Chair or 'stage manager' of the negotiations since the identification of basic interests is difficult and can be risky from a political viewpoint. With respect to miniaturisation of negotiations he indicated that it is necessary to balance the need for as small a negotiating group as possible with as large as necessary to be representative.

Responding to a question on whether it is possible to sit at a table where agreements are sought if there is no prior

commitment that whatever is agreed is binding, Ambassador de Soto noted that what is essential in any negotiations is that all participants know what the outcome is going to be, i.e. there has to be transparency. Each person needs to know what the next stage is going to be. He stressed however that in international organisations, discussions have to be done at an executive level.

With respect to how miniaturisation should be done (i.e. how to select who is involved), Ambassador de Soto noted that this is a decision for the Chair or whoever is organising the discussions. He noted that frequently, small groups are created at the initiative of the Chair. He noted the need frequently felt to have geographic areas included but that it is also wise to include representatives of the prevailing interests. Given the need to balance these two aspects, the capacity to miniaturise negotiations is reduced.

It was noted that IWC has tried to miniaturise negotiations in various ways but that while the dynamics of small groups have led to constructive discussions, there has been a tendency for such groups to delude themselves into thinking that their outcomes will be acceptable to a wider majority. Rather the case has been that such outcomes were not acceptable to a wider audience. Ambassador de Soto suggested that perhaps this reflects that the issues were not ripe for negotiation.

### 3.3 Raúl Estrada-Oyuela

Ambassador Estrada thanked the Commission for its invitation to contribute to the intersessional meeting. He indicated that drawing on his own experiences, particularly in relation to climate change discussions, he would make similar points to those made already by Ambassador de Soto, but concentrate more on the role of the Chair or 'stage manager' in negotiations. At the outset he stressed that there is no single formula that will apply to all situations and no magic formula to resolve all difficulties. In particular he noted that the success of the programmes of intergovernmental organisations depends on the willingness of parties to engage in these programmes. He also noted that because the international legal system is decentralised, regulatory powers exist only when and up to the limit the parties are willing to establish and with the caveats and protections they set, and that these are valid only for those limited areas on which parties are prepared to co-operate. While compliance and/or settlement dispute procedures may be agreed, this is not always the case.

Ambassador Estrada noted that factors that can affect negotiations and decision-making include the interest and emotional involvement of those involved, formalities or lack of formalities of the procedure and/or setting, and the background and tenure of the negotiators themselves. Observing that many IWC Commissioners have known each other for many years, he suggested that while in some situations this familiarity can be of benefit, in others it can complicate the dialogue, particularly when opposite positions are being taken and emotional factors are involved. Ambassador Estrada also noted that the interests of parties can correspond to particular regional situations. Using climate change negotiations as an example, he noted that small island states have different views to large continental states and that uneven levels of development are usually related to energy consumption and therefore very different levels of emissions of greenhouse gases *per capita*. He suggested that disparity in life-styles, culture and traditions are elements that can be found in both

climate change and whaling discussions and that in some sense, the history of industrialisation and the history of whaling could be a similar cause of disagreement.

With respect to the conduct of negotiations, Ambassador Estrada noted that while increasingly, international negotiations require significant scientific input, his view is that negotiating is a task for politicians or diplomats, not for scientists. He recalled that while decision-making by voting was a frequent occurrence in the UN General Assembly 40 years ago, experience has shown that members abstaining in a vote or voting against a motion deem themselves not bound by decisions that they have not supported. Consequently there is now a clear tendency to prefer milder decisions that are adopted by consensus but which carry the commitment of all the parties involved, over more precise and concrete resolutions that may generate refusal or rejection by some. Like Ambassador de Soto, Ambassador Estrada pointed out that consensus does not necessarily mean unanimity but rather that all participants can live with the decision adopted. He noted that consensus texts adopted in climate and other environmental negotiations usually do not fully satisfy the views of all participants but reflect the best possible level of common ground all participants can reach together. Referring to a number of climate change negotiations in which he had been involved, Ambassador Estrada stressed the important role of the Chair/stage manager in assessing the existence of consensus. He explained that this individual must know well the different positions of the parties involved, be able to assess the 'bottom line' and to know how far an assembly will go in search of a common position. Referring to the tendency within IWC to take decisions by voting, Ambassador Estrada indicated that he could not see the purpose of submitting to a vote any proposal that it is known in advance will be rejected. He considered that such behaviour serves only to deepen differences and provoke confrontation and stressed that decision-making in the international arena should not be a zero sum game, i.e. everyone must gain something.

Regarding mechanisms that could be used to create a basis for understanding, Ambassador Estrada suggested that negotiating packages can be a way to facilitate trade-offs and that small informal groups can be useful in seeking compromises. He noted that leading a complex negotiation is not a single man job, but requires team work, with the Chair delegating responsibilities, including a commitment to success, to team members. Recognising that defining the composition and mandates of small groups can have difficulties, Ambassador Estrada noted that on many occasions, to avoid public debates on such matters, he had resorted to unorthodox techniques such as: (1) the creation of 'non groups', not to negotiate, but to advise him on certain issues; and (2) appointment of co-ordinators or facilitators rather than Chairs since the selection of the latter always has implications. He also noted that the selection of participants of a small group is a sensitive matter and requires good knowledge of the various interests and positions. Ambassador Estrada reported that on occasion he had also called together a group of delegates or 'friends of the Chair' to exchange views and seek advice, while stressing to all parties that no negotiations were to take place in such gatherings. He noted that meetings and deliberations of 'like-minded' groups, interest groups or regional groups may help to clarify their positions and aspirations, but warned that they

can delay negotiations. While he believed it necessary to allow like-minded countries the time to adopt a common position that will be conducive to consensus, he also believed that this time should not be unduly long.

Ambassador Estrada noted that while decision-making by consensus is a political option to which governments are inclined, civil society groups often prefer the adoption of texts that support strongly the principles involved in any matter over a compromise among differing views. However, he stressed that while governments should pay attention to the opinion of civil society groups and understand their views, governments are accountable to their electorates. He was of the opinion that while such groups must be given an opportunity to present their views and offer their assessments and proposals, the process of negotiation should be restricted to government delegates only. He supported this restriction since government delegates will be more candid when among colleagues, may explain positions and ask questions that they would never make in public and be more prepared to reconcile different interests. He expressed surprise that IWC levies a fee on NGO observers.

Ambassador Estrada stressed the need for fair behaviour in the use of legal instruments and the implementation of rules of procedure. He noted that in climate change negotiations, like in many other fora, there is a permanent constituency, with parties attending all meetings and following the life of conventions with continuity for many years. He considered this to be a basic condition for rational evolution and progress in decision-making. By contrast, he wondered whether this is the case in IWC and questioned whether the instant membership of any government provided for in Article X.2 of the Convention is helpful. He recalled that other very specialised international instruments such as the Antarctic Treaty require some preconditions for full membership.

Finally, Ambassador Estrada emphasised that a friendly environment aids the decision-making process.

#### *Discussions on clarification*

In response to a question on what are some of the key pointers that the Chair or stage manager of negotiations should take on board, Ambassador Estrada noted that such a person requires instinct, experience, dedication to the matter in question and to keep in contact with the countries and/or groups involved, including via visits between sessions.

Regarding suggestions on how to deal with the current situation in IWC of instant membership and voting rights, Ambassador Estrada again drew attention to the requirements of the Antarctic Treaty<sup>4</sup>. He also noted the suggestion made in the call for input (see Appendix E)

regarding instituting a period of time between adherence to the Convention and effective membership which is employed in many conventions. He believed that the current situation in IWC can help to create lack of stability in negotiations. Professor Juma also supported the implementation of a 'waiting period' before full membership since this is important in helping to avoid undue surprises, allowing bilateral consultations between existing and new parties prior to meetings. He stressed that such a period had been important in the CBD and had helped to stabilise relationships between players.

An observation was made that Contracting Governments to IWC are often represented by different ministries (e.g. Environment, Fisheries and Foreign Affairs) but that in other conventions running into difficulties, there tends to be greater participation by diplomats. Ambassador Estrada suggested that 19<sup>th</sup> century diplomacy involving only diplomats no longer exists and that diplomats now need some technical understanding to carry out their missions. However, he noted that while technical/scientific support will be necessary, it is also necessary to have diplomats who can be sufficiently flexible to achieve a compromise. Consequently, the main actors in an agreement will be the diplomats. Professor Juma stressed the need for effective national co-ordination by drawing attention to his experience in the CBD. He noted that the main focal point in CBD negotiations had been predominantly Environment Ministries. They had agreed to negotiate a Treaty on genetically modified organisms (the Biosafety Protocol) that would be primarily the mandate of Agriculture Ministers. By the time the Agriculture Ministers had realised what was happening, it was too late for them to participate in the negotiations. They therefore tried to defeat the outcome by opposing ratification by their governments. In this way, Professor Juma reported that such action impacted on the rate of ratification and subsequent implementation of the Protocol. He suggested that when diplomatic difficulties are encountered, negotiations should include representatives from Ministries of Foreign Affairs.

In response to a request for clarification on what is meant by consensus, Ambassador Estrada noted that 'consensus' could allow for not everyone involved to be in total agreement. He noted however that if there is formal opposition, then there is no consensus. Together with Professor Juma he stressed the importance of the role of the Chair in managing the development of consensus. Ambassador de Soto noted that while UNCLOS had no formal definition of consensus, a definition that has been referred to is one where 'a consensus exists when a decision has been taken without opposition strong enough to demand a vote'.

In response to the remark that currently the only official and working language of the Commission is English, it was noted that the use of language is an administrative decision internal to IWC, although a preference was expressed to allow participants to speak in their own language.

In response to a comment about the current restrictions within IWC for the use of secret ballots, it was noted that it would be unusual for decisions on substantive matters to be taken in this manner.

### **3.4 General discussions**

It was noted that the fundamental issue for IWC is to solve a problem concerning a common resource over which there

<sup>4</sup>The original Signatories to the Treaty are the twelve countries that were active in Antarctica during the International Geophysical Year of 1957-58 and then accepted the invitation of the Government of the United States of America to participate in the diplomatic conference at which the Treaty was negotiated in Washington in 1959. These Parties have the right to participate in the meetings provided for in Article IX of the Treaty.

Since 1959, thirty-four other countries have acceded to the Treaty. According to Art. IX.2, they are entitled to participate in the Consultative Meetings during such times as they demonstrate their interest in Antarctica by 'conducting substantial research activity there'. Sixteen of the acceding countries have had their activities in Antarctica recognised according to this provision, and consequently there are now twenty-eight Consultative Parties in all. The other eighteen Non-Consultative Parties are invited to attend the Consultative Meetings but do not participate in the decision-making.

are different schools of thought on how it should be used, i.e. an environmental versus a sustainable use perspective. The speakers were invited to provide advice on how such divergent views could be resolved. Ambassador de Soto noted that there are some categories of problems that can be solved by constructive ambiguity where it is not that important if there is not full clarity about what is agreed. However, he noted that there are others where the divergence is so fundamental that the use of constructive ambiguity merely postpones the needed solution. He believed that the situation in IWC falls into the second category. Ambassador Estrada however noted that postponing resolution of an issue can be useful on occasion. Professor Juma noted that the CBD had conservation objectives, sustainable use objectives and benefit sharing objectives. Consequently, a large part of the negotiations had revolved around reaching a common understanding/accommodation of different parties' views.

The observation was made that the presenters had focused more on developing/agreeing new conventions, while IWC faces the problem of operating an existing agreement which may be somewhat different. It was noted that IWC has developed a practice of taking decisions via voting rather than by consensus such that it is operating more like a legislator. It was further suggested that the remorseless use of voting hinders the search for deeper and wider agreements and produces resentment among parties. The presenters were asked to comment on whether reaching agreement via consensus is likely to produce more enduring results. The presenters believed this to be the case. Professor Juma suggested that taking decisions by voting not only alienates parties and creates anxieties but also does not take uncertainty into account, i.e. agreements may not be implemented at the national level. Ambassador de Soto believed that 'hair trigger' voting tends to discourage the possibility of broadening agreement, effective implementation and durability. Ambassador Estrada noted that since the ICRW allows governments to object to decisions of the Commission and to therefore not be bound by them, it is better to reach decisions by consensus.

#### **4. REBUILDING TRUST AND IMPROVING APPROACHES TO DISCUSSIONS AND NEGOTIATIONS WITHIN IWC**

Drawing on the presentations by the outside speakers, discussions on these presentations and responses to the call for input (Appendix E), discussions under this agenda Item fell into the following seven broad areas:

- the role/purpose/future of the organisation and ripeness to discuss;
- improving practice and procedures;
- improving the negotiation process;
- the role of science;
- improving participation;
- the role of the media; and
- improving relationships with other intergovernmental organisations.

##### **4.1 The role/purpose/future of the organisation and 'ripeness' to discuss**

As mentioned by Professor Juma in his presentation, some noted that the *status quo* within IWC is no longer

acceptable and that if no steps are taken to resolve IWC's difficulties, some Contracting Governments may no longer be able to justify continuation of their membership. The *status quo* would therefore no longer exist. However, it was also noted that in agreeing to address what some saw as an impasse, the Commission may be deluded into believing that a solution will be found and that what is really needed is to first address what the role of IWC should be, given the fundamental differences existing among members regarding the appropriate use of whale resources. With respect to differences, it was noted that member governments do not disagree on the need to protect endangered whale stocks. Rather the underlying problem is what to do with abundant stocks. Furthermore, while the existence of fundamental disagreements was recognised, it was suggested that this does not make it less important to find a way to acknowledge differences and by looking at the underlying positions and principles involved, to see where doing so may lead. It was suggested that if the fundamental principles are so opposite, this will have to be acknowledged if consensus is to be achieved but if such steps fail, the Commission should be brave enough to recognise its failings and perhaps be prepared to work through a different forum.

Differing views were expressed as to whether the future of the IWC is 'ripe' for discussion. It was noted that for this to be the case there must be recognition that the current stalemate is mutually hurting. Some doubt was expressed as to whether this is in fact the case. Some expressed the view that IWC should not be characterised as being dysfunctional or that a lack of trust among parties exists. It was noted that there needs to be a political will to resolve IWC's problems and that solutions will have to come from within IWC. There was however the suggestion that it would be useful if the forthcoming G8 summit could urge IWC to resolve its problems in the near future.

A view was expressed that the only way forward for the organisation is for each 'group' to sacrifice its fundamental positions. For example, the 'anti-whaling' group should drop their stance that there can be no commercial whaling at all and the 'pro-whaling' group should drop the position that scientific permit whaling is beyond a compromise. This would require a commitment or symbolic gesture from governments that they are prepared to make sacrifices and to explore possibilities without pre-set conditions. In this regard, Ambassador de Soto noted that in UNCLOS, there had been a gentleman's agreement under which all parties committed themselves to make every effort possible to reach consensus. He suggested that IWC could make similar vow, indicating that a simple statement would send quite a strong message and would involve a moral commitment.

Another view was expressed that for IWC to move forward, Contracting Governments should not be requested to compromise on their principles at the start of negotiations, but that discussions should first concentrate on areas of mutual interest. It was also stressed that compromises do not necessarily mean selection of the lowest common denominator.

##### **4.2 Improving practice and procedures**

There was broad agreement of the need to change the culture and behaviour of IWC to avoid the often acrimonious discussions of the past few years and to strive

to reach decisions by consensus wherever possible rather than resorting to a vote prematurely. A comment was made that consensus is the only adequate way to treat globally important management issues and to define universal principles. Noting the presentations by the outside experts, there was recognition that consensus does not necessarily always mean total agreement but rather that there is sufficient support to move forward on a particular issue or issues.

There was also agreement on the need to adopt measures to ensure adequate notice is given of matters to be considered by the Commission so as to reduce surprises and allow time for proper consultation. It was recognised that such measures would also improve the possibility of reaching decisions by consensus. A number of recommendations were made in this regard including that:

- Full details of any proposed Schedule amendments and amendments to Rules of Procedure should be circulated well in advance of meetings. At present, while notice of proposed amendments must be made 60 days in advance as required by Rule of Procedure R.1, the full text is not always provided until the meeting itself.
- All documents to be considered by the Commission and its sub-groups should be made available by a set deadline, preferably well before the meeting and in the languages used by the Commission. Currently an informal deadline of five weeks prior to a meeting is set via a Circular Communication from the Secretariat.
- A period should be established between the adherence of a new Government to the Convention and its participation as a full member of the Commission as is the case in many conventions<sup>5</sup>. In IWC, currently as soon as a Government adheres and pays the financial contributions due, it has full voting rights. Comments were made that this can create uncertainty at the beginning of Annual Meetings when governments are trying to assess which group has a simple majority.

Noting that currently little meaningful dialogue/exchange occurs between Commission meetings, the promotion of real dialogue among Contracting Governments during intersessional periods was also supported. Suggestions for how this could be done included arranging: a series of bilateral meetings; meetings in the margins of non-IWC meetings at which IWC delegates may be present (i.e. take advantage of other meetings); and meetings in a more informal setting.

There was a call for mutual respect and equal treatment of all Contracting Governments and a recommendation that the Commission should recognise the diversity of interests within the Commission via a written statement. Remarks were made that more attention should be given to the terminology used and the way it is used, for example avoiding contrasting conservation and whaling to suggest that the two are mutually exclusive.

### 4.3 Improving the negotiation process

It was recognised that the way negotiations are conducted in IWC needs to be improved and a variety of mechanisms were suggested. These included the following.

- Giving an undertaking that 'nothing is agreed until everything is agreed'.
- Using a mixture of open and closed sessions.

It was noted that allowing for the possibility to hold some discussions in private, particularly in relation to addressing difficult matters, would be helpful in making progress. It was recognised that other stakeholders should not be excluded from the process and that they should be kept regularly informed via briefings, including bilateral briefings. A comment was made that the possibility of governments engaging in private, quiet diplomacy should not be confused with exclusiveness or lack of representivity.

- Using smaller groups (miniaturisation).

The notion of using smaller groups to discuss issues as part of the negotiating process was particularly attractive given the increasing number of Contracting Governments. Some concern was expressed that using smaller groups may reduce transparency and affect the ability of developing countries to participate. It was therefore recognised that the composition of small groups would need to be decided with care. A comment was made that there will be an appropriate time to use smaller groups but perhaps not at the outset of negotiations.

On the creation of smaller groups, Ambassador Estrada noted that the Chair has authority to seek advice and could establish one or more groups, none of which have to be permanent. He suggested that the important issue is for parties to have confidence in the Chair and to allow him/her the latitude to seek the best possible advice. He also stressed that small groups are not supposed to decide anything but rather to advise the Chair. Ambassador de Soto noted that miniaturisation is a tool that can be used either by the entire body or the Chair. He underscored his earlier remarks that use of small groups does not deprive any member of participating in any decision. He noted that the Chair could establish a group that is entirely stakeholder free, i.e. comprised of those who have no stake in the outcome but who could help broker a deal.

Reference was made to the fact that IWC had used small groups in the past, but without success. Some suggested that they failed because they did not have sufficient flexibility. Others that it was because the outcome from smaller groups had not been supported by all group members when the outcome was presented to the whole Commission.

- Employing cooling-off periods.

It was recognised that when difficulties arrived during negotiations, it can be useful to employ a cooling-off period so as to avoid, for example, precipitating a vote. This would allow time for more informal discussions to take place outside of the negotiating context. On occasion it may also be useful for the Chair to establish a parallel working group outside of plenary to work on difficult issues.

- Using outside experts/mediators.
- Involving ministers.

It was recognised that there should be commitment at a political level to any negotiations. Such a commitment

<sup>5</sup>For example, for CITES and CBD, the Conventions enter into force for a government 90 days after the deposit of its instrument of ratification, acceptance or accession. For CCAMLR, the waiting period is 30 days.



would help governments explain the outcome of negotiations and any compromises made to their constituencies.

- Involving civil society.

The need to better integrate elements of civil society into the Commission's work was recognised. It was suggested that it would be useful to investigate how this was done by other intergovernmental organisations.

#### 4.4 The role of science

There was agreement that science is key to the IWC, that a positive feature of the organisation is its strong scientific element and that the Scientific Committee is recognised as providing the best available knowledge on cetaceans. It was suggested that the Commission should follow the Scientific Committee and broaden its scope of work to include all cetacean conservation issues and thus complete its transition to a modern cetacean conservation organisation.

It was noted that the Scientific Committee has recently achieved consensus on nearly all of its recommendations, the exception being reviews of scientific permit whaling programmes, but that progress towards consensus is now being made in this area also. A comment was made that while recognising the political pressure the Commission is under to achieve a solution to its problems, the Commission should not resort to bypassing scientific input and retreating to the bad practice and horse trading of the past.

Some believed that the current workload of the Scientific Committee is too high, difficult to prioritise and not adequately integrated into the policy work of the Commission mainly because of its timing, i.e. holding the Scientific Committee meeting in conjunction with the Commission. It was noted that this does not allow sufficient time for proper consideration of the Scientific Committee's work by member governments. The suggestion was therefore made that consideration should be given to separating the Scientific Committee meeting from the Commission meeting so as to provide more time for consideration of the Committee's work.

The need to review the composition and function of the Scientific Committee was also suggested (e.g. improving the involvement of scientists from developing countries and the procedures for inviting scientists to the Committee).

#### 4.5 Improving participation

Currently English is the only official and working language of the Commission, although for the last few years the Commission has been exploring ways to introduce other working languages (French and Spanish). The Commission now provides simultaneous interpretation for French and Spanish and some documentation translation in these languages. However, some delegations stressed the importance of continuing further with such work to enhance the participation of French and Spanish speakers.

Some believed that attention needed to be given to the role of developing countries in IWC. It was noted that the Convention had been developed when whales were hunted primarily for oil. However, in view of UNCLOS it was

stressed that developing countries have a stake in how marine living resources are used and that special consideration should be given to their involvement. The current level of financial contributions for Contracting Governments was identified as an obstacle to the participation of developing countries in IWC. The view was expressed that these should more closely reflect the formula used within the UN.

#### 4.6 The role of the media

It was noted that while the presence of the media at Commission meetings contributes to transparency and the provision of information to the public, there is a tendency for their presence to be used as a mechanism for delegations to speak to their home audiences rather than to other delegations at the meeting. It was further noted that the media tends to focus on issues that divide IWC rather than reporting discussions in a more balanced manner. It was suggested that the role of the media at Annual Meetings should be reviewed.

The need for improved reporting of accurate information on whales and whaling to the public was identified.

#### 4.7 Improving relationships with other inter-governmental organisations (IGOs)

There was a view that IWC should improve co-ordination and co-operation with relevant inter-governmental organisations/agreements such as IMO, UNCLOS, CITES, CMS and CBD and to find a way to take better account of relevant work being done by such bodies. There was a suggestion that this could help to normalise and modernise intergovernmental policy making for the great whales.

### 5. PLANNING FURTHER DISCUSSIONS ON THE FUTURE OF IWC

#### 5.1 Schedule of meetings at IWC/60

It was agreed to revise the schedule of meetings for IWC/60 agreed in Anchorage last year to allow for open discussions on follow-up to the intersessional meeting over 1½ days during the week of sub-group meetings and to extend the half-day session of the Commissioner's meeting planned for Sunday 22 June to a full day to allow for private discussions. Meetings of the Conservation Committee (CC), the Infractions Sub-committee (INF), the Budgetary Sub-committee (BSC) and the Finance and Administration Committee (F&A) would be unaffected (except for minor re-scheduling), but the planned one-day workshop on welfare issues associated with entangled/entrapped cetaceans would be replaced by a scoping meeting – the workshop itself to be held either prior to or in association with IWC/61. It was understood that if discussions on the follow-up to the intersessional meeting have budgetary implications, these will need to be addressed before the Commission's budget is agreed in plenary. The revised schedule for this part of IWC/60 is therefore as follows:

**Revised schedule for IWC/60**

Day	Date	Morning	Afternoon	
Tuesday	17 June	CC	INF	BSC Scoping meeting for workshop on welfare issues associated with entangled/entrapped cetaceans
Wednesday	18 June	ASW	F&A	
Thursday	19 June	Follow-up to intersessional meeting on future of IWC		
Friday	20 June	Follow-up to intersessional (cont.)	Report preparation & review	
Saturday	21 June	Report preparation/review/translation		
Sunday	22 June	Private meeting of Commissioners		
Monday to Friday	23-27 June	60 <sup>th</sup> Annual Commission Meeting		

**5.2 Development of a draft agenda for the Commission plenary at IWC/60**

It was noted that revising the schedule of meetings as described above would still allow time during the plenary for the Commission to deal with standard agenda items and its on-going work programme. It was therefore understood that the draft agenda for the Commission plenary would be similar to those in previous years (i.e. dealing with the regular functioning of the Commission) but that it would also include an item on follow-up to the intersessional meeting. Japan noted that as long as it considered discussions on the future of the organisation were progressing and as an expression of its interest in making progress, it would not submit its usual request for an allocation for its small-type coastal whaling communities. It asked others to take a similar approach so as to allow sufficient time during the plenary for follow-up discussions to the intersessional meeting.

Australia welcomed the discussions and co-operation that had been evident during the intersessional meeting. While it had been happy with the focus of the intersessional meeting being on a process (i.e. how to improve negotiations within IWC), it wished to take advantage of the Chair's proposal to allow limited time under this item for Contracting Governments to identify substantive issues that they believed should be addressed by the Commission in Chile. Australia therefore drew attention to the paper it had submitted on 'Whale Conservation and Management: A Future for the IWC' (Document IWC/M08/Info 11). Australia explained that it is proposing a strategy that focuses on future work that can be done in a collaborative manner without fundamentally challenging the key principles of Contracting Governments regarding the conservation and management of whales. It noted that underpinning this is recognition of the need for IWC to move toward a contemporary international conservation and management function focused on the conservation of whale populations and embracing the non-consumptive use of whales. Australia identified three key areas on which it believed IWC should focus: (1) developing internationally-agreed, co-operative conservation management plans that take into account all whale-related issues and threats; (2) launching regional, non-lethal collaborative research programmes to improve management and conservation outcomes for cetaceans; and (3) reforming the management of science conducted under the ICRW and IWC auspices, including agreed priorities and criteria for research, and an end to unilateral 'special permit' scientific whaling. It believed conservation plans need to address threats other than whaling, focus on recovery of depleted stocks and be linked to the actions of other international bodies and arrangements in place such

as those under CMS. Regarding non-lethal collaborative research programmes, Australia noted that it looked forward to continuing to work with other parties. It recognised that there needs to be a concrete scientific framework underpinning work in these areas. While recalling the success of the Scientific Committee in areas such as comprehensive assessments, it suggested that the Committee could be improved in a number of ways. It believed that the Committee currently lacks a co-ordination mechanism to prioritise and address knowledge gaps linking population studies with threats and that the absence of such a mechanism has hampered the efficient advancement of reliable science with too much effort having been spent in relation to scientific whaling programmes. Australia reported that it wanted to work with others to improve the science within IWC and proposed that a collaborative research partnership be established to strengthen performance of IWC and improve whale conservation and management. It gave notice that it would submit a proposal for consideration at IWC/60 for a Southern Ocean research programme.

The UK thanked Australia for developing its document which it noted was in much alignment with the views of the UK. Given the content of Australia's paper, the UK suggested that there are areas that IWC can and should tackle with respect to conservation that it has been prevented from doing because of a focus on a different set of issues. The UK believed that if IWC could focus on matters on which all parties agreed are important and do this successfully, it may subsequently be able to make progress on more controversial matters.

A number of countries sought clarification from the Chair regarding the process being entered into given the intervention of Australia. The Chair noted that it had been his intention to allow Contracting Governments to identify substantive issues that they believed should be included in the context of discussions on the future of the organisation. Japan therefore indicated that it wished to include small-type whaling in this context. Brazil noted that there are many issues that should be included in this context including non-lethal consumptive use, sanctuaries, whalewatching, scientific whaling and also procedural issues related to the functioning of both the Commission and the Scientific Committee. It stressed the need to be creative on how discussions on the future of IWC are handled in Santiago, but stressed that these discussions should not detract at IWC/60 from the regular functioning of the Commission and its regular agenda items. Iceland did not believe it necessary to develop a list of items since these were already well-known, although it noted the importance it gives to the inclusion of sustainable use of whale resources. It encouraged the Chair to take advice

from others as necessary prior to IWC/60 and come to the Annual Meeting with recommendations on how to take forward the process initiated at this intersessional meeting. Others agreed with this remark.

### 5.3 Activities prior to IWC/60

St. Kitts and Nevis thanked the Chair and the outside speakers for their excellent work and contributions to the meeting. It considered that the important process started at the intersessional meeting should be continued since it believed an overwhelming majority of parties consider that it is possible to converge on a negotiated solution to IWC's difficulties. In this context and recognising the existence of a number of 'key' issues to be resolved, St. Kitts and Nevis thought it would be fruitful for the Chair, perhaps together with the outside experts, to try to visit capitals of member countries prior to IWC/60 to gain a better understanding of what is underpinning the various positions currently being held.

The Chair responded that Professor Juma would continue to be involved in this issue up and including IWC/60 and that he had already put some thought into how he might arrange some regional meetings which he recognised as being very beneficial.

No further specific activities were identified.

## 6. CONCLUSIONS AND PRESS RELEASES

### 6.1 Statement on the outcome of the intersessional meeting

The meeting agreed that a statement from the Chair of the Commission on the outcome of the meeting should be released to the media and made available on IWC's website. The statement is provided in Appendix F.

### 6.2 Statement on safety at sea

Recognising the dangerous actions recently taken by the Sea Shepherd Conservation Society against vessels involved in Japan's research whaling programme in the Antarctic,

the meeting agreed by consensus a statement on safety at sea. This is provided in Appendix G. It was released to the media and also made available on IWC's website.

### 6.3 Concluding remarks by the Chair

The Chair re-iterated that when taking on the role of Commission Chair, he gave an undertaking to improve the functioning of IWC so as to be more effective in conserving whale stocks and addressing cultural needs. He expressed his appreciation to delegates for their interest and attention throughout the meeting. The Chair thanked Professor Juma and Ambassadors de Soto and Estrada for their contributions and hard work and believed that their involvement in the process had been very worthwhile. Noting that while Professor Juma will be involved up to and including IWC/60, the Chair indicated that he would consider how continued involvement of the two Ambassadors could be achieved. He noted that would present a report of the meeting to the Commission (which would be circulated well in advance) and in consultation with others, develop a series of recommendations for improved procedures and ideas to take the Commission forward for discussion at IWC/60.

The Chair again thanked the UK government for hosting the reception on Wednesday 5 March. He also thanked the Secretariat for its assistance in preparing the meeting and the interpreters for whom he provides a significant challenge given his southern-Virginian drawl! He encouraged governments and observers to send him any comments they may have on the process being entered into via the Secretariat. He wished everyone a safe journey home.

Chile noted its pleasure that IWC/60 would be held in Santiago and that it was looking forward to welcoming participants in June. While Santiago would be in winter, Chile noted that there would be plenty of wine and pisco sour to provide some warmth. It encouraged the Chair to consider inviting all three experts to the Annual Meeting.

## Appendix A

### LIST OF PARTICIPANTS

**Antigua and Barbuda**  
Anthony Liverpool (C)

**Argentina**  
Eduardo Iglesias (C)  
Javier Figueroa (AC)  
Miguel Iñiguez (AC)

**Australia**  
Donna Petrachenko (C)  
Andrew McNee (AC)  
Nick Gales (AC)  
David Dutton (AC)  
Pam Eiser  
Joe Mitton

**Austria**  
Andrea Nouak (C)

**Belgium**  
Alexandre de Lichtervelde (C)

**Benin**  
Joseph Ouake (C)

**Brazil**  
Bernardo Paranhos Velloso (C)  
José Truda Palazzo Jr. (AC)  
Maria Angélica Ikeda

**Cambodia**  
Nao Thuok (AC)

**Cameroon**  
Baba Malloum Ousman (C)

**Chile**  
Cristian Maquieira (C)  
Francisco Berguño (AC)

**Costa Rica**  
Pilar Saborio de Rocafort

**Czech Republic**  
Pavla Hýčková (C)

**Denmark**  
Ole Samsing (C)  
Karsten Ankaer Jensen

Amalie Jessen  
Sigmundur Isfeld  
Christen Krogh  
Ata Bærentsen

#### **Dominica**

Lloyd Pascal (C)

#### **Ecuador**

Deborah Salgado Campana (C)  
Alisva Coronel Vazquez

#### **Finland**

Esko Jaakkola (C)

#### **France**

Stéphane Louhaur (C)  
Martine Bigan (AC)

#### **Germany**

Walter Dübner (AC)  
Andreas Von Gadow (AC)  
Sabrina Führlich (AC)

#### **Greece**

Alexandros Rallis

#### **Grenada**

Justin Rennie (AC)

#### **Guinea, Republic of**

Mohamed Youla  
Amadou Telivel Diallo

#### **Iceland**

Stefan Ásmundsson (C)  
Hafsteinn Hafsteinsson (AC)  
Kristjan Loftsson

#### **India**

Ravindra Bihari Lal (C)

#### **Ireland**

John Fitzgerald (C)

#### **Israel**

Amir Frayman

#### **Italy**

Patrizia de Angelis (C)  
Plinio Conte (AC)  
Caterina Fortuna (AC)  
Michele Alessi  
Angelo Ciasca

#### **Japan**

Akira Nakamae (AC)  
Joji Morishita (AC)  
Ryotaro Suzuki (AC)  
Tsuyoshi Iwata  
Daisuke Kiryu  
Hiroshi Aimoto  
Yasuo Iino  
Dan Goodman

Yoshihiro Takagi  
Midori Ohta (I)  
Emiko Kodama (I)

#### **Korea, Republic of**

An Yong-Rock

#### **Luxembourg**

Pierre Gallego (AC)

#### **Mexico**

Lorenzo Rojas-Bracho (C)  
Victor Koyoc

#### **Monaco**

Frederic Briand (C)

#### **Morocco**

M. Bourhim Aomar  
M. Mohammed Said Oualid

#### **Netherlands**

Giuseppe Raaphorst (C)  
Maaïke Moolhuijsen (AC)  
Martijn Lucassen (AC)

#### **New Zealand**

Geoffrey Palmer (C)  
Jan Henderson (AC)  
Mike Donoghue  
Nigel Fyfe

#### **Norway**

Karsten Klepsvik (C)  
Halvard Johansen (AC)

#### **Republic of Palau**

Kuniwo Nakamura (C)

#### **Panama**

Deborah Siraze (C)  
Anna Nunez

#### **Peru**

Doris Sotomayor Yalán (C)  
Angelica Calderon

#### **Portugal**

Marina Sequeira  
Branca Martins Da Cruz

#### **Russian Federation**

Valentin Ilyashenko (C)  
Rudolf Borodin  
Valery Fedorov  
John Tichotsky (I)

#### **Saint Kitts and Nevis**

Cedric Liburd (C)  
Roberto Hector  
Daven Joseph

#### **Saint Lucia**

Vaughn Charles (AC)

#### **Saint Vincent and The Grenadines**

Edwin Snagg (C)

#### **Slovak Republic**

Katarina Slabeyova (C)

#### **Slovenia**

Janez Kastelic  
Andrej Bibič

#### **South Africa**

Herman Oosthuizen (C)  
Les Manley (AC)

#### **Spain**

Carmen Asencio (C)

#### **Sweden**

Bo Fernholm (C)  
Stellan Hamrin

#### **UK**

Richard Cowan (C)  
Trevor Perfect (AC)  
James Gray (AC)  
Luke Warwick  
Panayiota Apostolaki  
Clare Hamilton

#### **USA**

William Hogarth (C)  
Doug DeMaster (AC)  
Roger Eckert (AC)  
John Field (AC)  
Robert Brownell  
Shannon Dionne  
Cheri McCarty  
Rollie Schmitten  
Michael Tillman  
Heather Rockwell

#### **Uruguay**

Ricardo Varela

#### **SPEAKERS**

Calestous Juma  
Raúl Estrada-Oyuela  
Alvaro de Soto

#### **INTERPRETERS**

Schéhérazade Matallah-Salah  
Mohammed Bennis  
Gabriela Retana  
Letitia Saenz

#### **IWC SECRETARIAT**

Nicky Grandy  
Greg Donovan

## **INTERGOVERNMENTAL ORGANISATION OBSERVERS**

**CCAMLR**  
Scott Parnell

**European Community**  
Irene Plank  
Hugo-Maria Schally

**IUCN**  
Justin Cooke

**NAMMCO**  
Amalie Jessen

**UNEP/CMS**  
Robert Hepworth

## **NON-GOVERNMENTAL ORGANISATION OBSERVERS**

**All Japan's Seamen's Union**  
Hideo Kon

**Animal Welfare Institute**  
D.J. Schubert  
Susan Millward

**Beneficiaries of the Sea**  
Glenn Inwood

**Biodiversity Action Network East  
Asia (BANEA)**  
Atsushi Ishii  
Ayako Okubo (I)

**Campaign Whale**  
Andy Ottaway

**Canadian Marine Environment  
Protection Society**  
Ericka Ceballos

**Center for Respect of Life and  
Environment**  
Kitty Block

**Cetacean Society International**  
Barbara Kilpatrick

**Concepasca**  
Miguel Marengo

**David Shepherd Wildlife  
Foundation**  
Mark Simmonds

**Environmental Investigation  
Agency**  
Clare Perry  
Jennifer Lonsdale  
Fionnuala Walravens

**European Bureau for  
Conservation & Development**  
Despina Symons

**Exxon Mobil Corporation**  
Bruce Tackett  
John Young

**Gesellschaft zum Schutz der  
Meeressäugetiere e.V. GSM**  
Birgith Sloth

**Greenpeace International**  
Sara Holden  
Thilo Maack  
John Frizell  
Karen Sack  
Junichi Sato

**High North Alliance**  
Rune Frovik

**Humane Society International**  
Patricia Forkan

**International Association of Oil  
and Gas Producers**  
John Campbell

**International Fund for Animal  
Welfare**  
Vassili Papastavrou  
Patrick Ramage

**International League for the  
Protection of Cetaceans**  
Sidney Holt  
Paul Gouin

**IWMC World Conservation Trust**  
Janice Henke

**Japan Whale Conservation  
Network**  
Naoko Funahashi

**LegaSeas**  
Michael Iliff

**Natural Resources Defense Council**  
Susan Alter

**Norwegian Society for the  
Protection of Animals**  
Tanya Schumacher

**Pew Environment Group**  
Monica Medina  
Tuiloma Neroni Slade  
Leslie Busby

**Shell International**  
Mark Downes

**Te Ohu Kaimoana**  
Peter Douglas  
Ngahiwi Tomoana (I)

**The Varda Group**  
Rémi Parmentier  
Duncan Currie

**Werkgroep Zeehond**  
Geert Drieman

**Whale and Dolphin Conservation  
Society**  
Sue Fisher

**World Society for the Protection of  
Animals**  
Claire Bass  
Joanna Toole  
Lasse Bruun

**WWF International**  
Susan Lieberman  
Heather Sohl  
Mamadou Diallo

(C) Commissioner  
(AC) Alternate Commissioner  
(I) Interpreter

## Appendix B

### INFORMATION ON THE OUTSIDE EXPERTS INVITED TO THE MEETING

#### Calestous Juma

Calestous Juma, a Kenyan national, is Professor of the Practice of International Development and Director of the Science, Technology, and Globalization Project at Harvard University's Kennedy School. He is a former Executive Secretary of the United Nations Convention on Biological Diversity, Founding Director of the African Centre for Technology Studies in Nairobi, and served as Chancellor of the University of Guyana. Prof. Juma is co-chair of the African High-Level Panel on Modern Biotechnology of the African Union and the New Partnership for Africa's Development (NEPAD). He has been elected to several scientific academies including the Royal Society of London, the US National Academy of Sciences, the Academy of Sciences for the Developing World (TWAS), the Royal Academy of Engineering and the African Academy of Sciences. He holds a DPhil in science and technology policy studies and has won several international awards and honorary degrees for his work on sustainable development.

Professor Juma was engaged by the Commission to help with the planning and execution of the March 2008 Intersessional Meeting of the Future of IWC and to help identify other outside experts. Part of his preparation involved private interviews with Commissioners/Alternate Commissioners conducted by telephone or in person at the meeting to gain an understanding of individual IWC Contracting Government views regarding *inter alia* how the conflict in IWC arose and how they believe it might be

resolved. He undertook to develop a document pulling together the views expressed, but without attribution. The intention is that this document, together with the outcome of discussions at the intersessional meeting, would form the basis upon which Contracting Governments could continue to engage with each other.

#### Raúl Estrada-Oyuela

Ambassador Estrada-Oyuela has been a major player, in particular, with climate change discussions and the Kyoto Protocol and its implementation, chairing sessions to finalise the negotiations on the Kyoto Protocol. He has also been involved with other environmental and sustainable development issues, was on the Board of Governors of the UN Atomic Energy Agency and has a background in international environmental law and policy. He is a national of Argentina.

#### Alvaro de Soto

Ambassador de Soto recently concluded 25 years service at the United Nations where he was deeply involved in a range of peace negotiations, his last role being the UN Special Co-ordinator for the Middle East Peace Process. He has a long experience in the UN Security Council, both as a national representative and on behalf of three Secretaries-General and he was also involved in discussions leading up to the adoption of the Law of the Sea Convention. He is a Peruvian national. Both Ambassadors have held senior positions in their national diplomatic services. Both took part in the intersessional meeting in their personal capacities.

## Appendix C

### LIST OF DOCUMENTS

#### IWC/M08/

1. Draft agenda
2. List of participants
3. List of documents
4. Responses to the 'call for input'

#### IWC/M08/Info

1. Extract from the Draft Chair's Report of the 59<sup>th</sup> Annual Meeting, i.e. the section dealing with discussions under item 7 of the IWC/59 agenda, 'The IWC in the Future'
2. Summary Report of the Conference for the Normalization of the International Whaling Commission, February 13-15, 2007, Tokyo, Japan (submitted by the Republic of Palau) [originally available at IWC/59 as IWC/59/7]
3. Chair's Summary Report of the Symposium on the State of Conservation of Whales in the 21<sup>st</sup> Century, 12-13 April 2007, New York (submitted by New

Zealand) [originally available at IWC/59 as IWC/59/11]

4. Declaration submitted by Argentina [originally available at IWC/59 as IWC/59/28]
5. Provisional Schedule for IWC/60, Santiago, Chile, 2008 [originally available at IWC/59 as IWC/59/6]
6. Latin American Meeting for the Conservation of Cetaceans, Buenos Aires, 4-5 December 2007 [originally made available at the request of Argentina via Circular Communication IWC.CCG.658 of 21 December 2007]
7. Latin American Co-operation Strategy for the Conservation of Cetaceans [originally made available at the request of Argentina via Circular Communication IWC.CCG.669 of 12 February 2007 – replacing that provided via Circular Communication of IWC.CCG.658]
8. Déclaration du Groupe de Pays Africains Membres de la Commission Baleinière Internationale (CBI). Symposium sur l'Utilisation Durable des Ressources

Marines Vivantes de la Region Africaine, Rabat, 11-12 Février 2008 [Originally made available at the request of the Republic of Guinea via Circular Communication IWC.CCG.672 of 26 February 2008] [English translation available]

9. The Second Pew Whale Symposium, Tokyo, 30-31 January, 2008. Chairman's Summary: Judge Tuiloma

Neroni Slade, Symposium Chairman (submitted by the Netherlands and Argentina) [Also available in French]

10. Letter from Republic of Croatia
11. Whale Conservation and Management: A Future for the IWC (submitted by Australia) [Also available in French and Spanish]

## Appendix D

### AGENDA

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Introductory items               <ol style="list-style-type: none"> <li>1.1 Introductory remarks/objectives of the meeting</li> <li>1.2 Management of the meeting</li> <li>1.3 Reporting</li> <li>1.4 Review of documents</li> </ol> </li> <li>2. Adoption of the Agenda</li> <li>3. Drawing on outside experience</li> </ol> | <ol style="list-style-type: none"> <li>4. Rebuilding trust and improving approaches to discussions and negotiations within IWC</li> <li>5. Planning further discussions on the future of IWC               <ol style="list-style-type: none"> <li>5.1 Schedule of meetings at IWC/60</li> <li>5.2 Development of a draft agenda for the Commission plenary at IWC/60</li> <li>5.3 Activities prior to IWC/60</li> </ol> </li> <li>6. Conclusions and press release</li> </ol> |
|---|---|

## Appendix E

### RESPONSES TO THE 'CALL FOR INPUT'

#### Introduction

The primary aim of the Intersessional Meeting on the Future of IWC being held from 6-8 March 2008 is to consider a process to determine a way forward for IWC rather than to consider matters of substance.

The Steering Group<sup>6</sup> established to plan and develop a draft agenda for the intersessional meeting, believed that it would be important for individual Contracting Governments to have the opportunity to provide input in advance of the March meeting on their initial thoughts on the negotiating process within the IWC and how it might be improved, and ways in which trust might be rebuilt.

To that end, Contracting Governments, via Circular Communication IWC.CCG.661 of 11 January, were invited to provide written responses to the following two questions:

- (1) Why do you think that discussions to date within the IWC have not led to a more consensus-based resolution of IWC's problems? Is the negotiating process itself a factor?
- (2) What are your initial thoughts on how future discussions and negotiations should be organised and conducted, taking into account the need to rebuild trust?

Contracting Governments were also encouraged to provide any additional information or ideas they had in relation to how the functioning of IWC can be improved.

Responses were to be compiled, without attributing comments to specific Contracting Governments, and made available prior to the meeting. Please note that when the responses are compiled this will be done without attributing comments to specific Contracting Governments.

#### Responses received

Responses to the call for input were requested to be submitted by 15 February. As of 26 February, responses had been received from 10 Contracting Governments. If further responses are received, these will be added and this document will be revised accordingly.

The responses are provided verbatim in the following pages.

<sup>6</sup>The Steering Group comprises the Commission Chair, Vice Chair and representatives (from Chile, New Zealand and Palau) of three non-IWC meetings held between the 2006 and 2007 Annual Meetings to discuss the future of IWC. The three meetings were: (1) the Conference for the Normalisation of the International Whaling Commission, Tokyo, February 2007, hosted by the Government of Japan; (2) the Symposium on the State of the Conservation of Whales in the 21<sup>st</sup> Century, New York, April 2007; and (3) a meeting of Latin American countries held in Buenos Aires in December 2006.

**RESPONSE 1**

- (1) *Why do you think that discussions to date within the IWC have not led to a more consensus-based resolution of IWC's problems? Is the negotiating process itself a factor?*

In discussions and negotiations on many IWC resolutions political arguments substitute scientific data. Besides, the emotional nature of discussions prevents decision-making by consensus.

- (2) *What are your initial thoughts on how future discussions and negotiations should be organised and conducted, taking into account the need to rebuild trust?*

It is not necessary to rebuild trust between Parties as it exists. The problem is that conservation policy of some countries is based on 'passive protection': unspecified ban for commercial and scientific-purpose whaling in any part of the World's oceans. Others consider that there is a need for active conservation measures, e.g. management of whale populations and sustainable use whaling of wealthy whale stocks on scientific basis.

The problems in question are very delicate and complicated. The main step should be made towards consensus establishment among leader countries of two sides. To reach this goal it will be possibly useful to organise a small group (SG) (not more than 10-12 countries). For example - Japan, Norway, Iceland, Antigua and Barbuda, Grenada, St. Vincent and The Grenadines, from one side, and UK, USA, Australia, NZ, Germany, Brazil, from another. It will be also good to include the Secretariat and Scientific Committee representatives and Professor Jumo (as facilitator) in this SG. It goes without saying that each side may need time and place to conduct consultations with other countries and NGO observers. Mandate of the SG could be as follows to:

- (1) elaborate a strategy on how to reach consensus on harmonisation of different government positions concerning whaling;
- (2) identify discussions format and level; and
- (3) determine the procedure of the whole process.

**RESPONSE 2**

- (1) *Why do you think that discussions to date within the IWC have not led to a more consensus-based resolution of IWC's problems? Is the negotiating process itself a factor?*

We have observed that some procedures block the negotiation process. For example, when the voting started during the 59<sup>th</sup> Meeting in Anchorage, it was allowed a new vote category 'not participating'. This category is not consistent with the transparency that should be the norm during the voting process. A country that attends a session shall express a valid vote and not excuse its participation during voting.

Also, as a means to avoid the last minute entry of new states that can bias the results, it must be considered that a country that attends a commission meeting for the first time shall be as an observer, without voting rights and without paying membership. In this way, said country would get used to the issues and procedures of the commission and will get the right to vote at the next meeting.

This measure will block the entry of new states, which are promoted by other members of the commission that want to obtain votes for their own issues. This will also demonstrate the real motivation of these new states in participating at the IWC.

On the other hand, we considered it would be advisable to assert the importance of the Scientific Committee and elevate its influence in the decision making process. It would also be desirable that this Committee would act with more independence and produce more objective results on its research, without any political bias.

Another recommendation that we find important is that the meetings should take place in accessible locations for all countries. It should be taken into account that costs in said locations are high for developing countries.

- (2) *What are your initial thoughts on how future discussions and negotiations should be organised and conducted, taking into account the need to rebuild trust?*

A mandatory practice, which is now being adopted, should be the celebration of intersessional meetings before plenary meetings, in order to solve conflicts. We also consider appropriate to hire facilitators like experts in conflict resolution and promote the participation of international organisations, like FAO, that could act as mediators when conflicts arise.

We also understand that there are economic restraints to the participation of large delegations, which prevents the developing countries from having an adequate representation and puts them in a difficult position.

Moreover, we think that the application of penalties and interests to the contracting parties that do not pay their contributions on time should be reasonable and by no means be a punishment to developing countries.

**RESPONSE 3**

- (1) *Why do you think that discussions to date within the IWC have not led to a more consensus-based resolution of IWC's problems? Is the negotiating process itself a factor?*

Whales and the IWC have been chosen as the battleground between two opposing cultural forces. The one ('the anti-harvest' movement) is generally of the view that meat originating from wildlife in general, or from wild mammals, or in some cases restricted to wild aquatic mammals, should be avoided primarily due to concern for the biodiversity of the world, but also from a number of other concerns, or just reflecting different dietary habits. The supporters of this view represent a broad coalition of divergent views, ranging from vegetarians to those who accept the consumption of meat, but only from land mammals or even only from farmed land mammals. The other force maintain that meat originating from wild mammals, whether they be terrestrial or aquatic, is a legitimate source of food supply or of monetary income.

With the dual objective of the IWC – conservation and management – the organisation has been chosen as a convenient place to fight out the confrontation between the opposing views. Originally the fight against commercial whaling was based on widespread, and in some cases also objectively well founded, concerns over stock levels of whale populations as they were known in the 1970s, reflecting inadequate management policies and methods



employed by the IWC at the time. The introduction of an interim moratorium on all commercial whaling, followed by scientific effort and the formulation of more adequate management methods, seemed a reasonable option at the time.

The real problem for the IWC has arisen out of the inability to act politically and administratively after the scientists have re-evaluated the stock levels, and constructed an adequate management method (RMP). The inability has been cemented by the present voting rules which require 75% of the votes to be cast for changes – a requirement almost impossible to meet in an organisation split nearly in two equally great parts.

The general public, notably in non-whaling nations, and the popular media, have a very limited understanding of today's real state of the various whale stocks. The idea that 'The Whale' is threatened with extinction is an easily understood and an energetically communicated slogan, but it is evidently far from true. This notion is upheld by some NGOs which want to maintain a cause, and a fund-raising issue, and it is also readily used for politically cost-free political profiling on environmental issues. On the other side the nations wanting to reintroduce whaling seem to have underestimated the strength and in some respects also the legitimacy of scepticism against whaling. They may have been too reluctant to admit that the former ways of conducting whaling did have some problems associated, notably regarding the animal welfare side of whaling. These combined factors have turned debate in the IWC into highly publicised trench warfare, and have made it almost impossible to create the conditions necessary to formulate a new understanding of the IWC's twin purpose – conservation and management. A compromise seems far away, as the present stalemate in the IWC allows:

- those nations who oppose whaling to maintain the moratorium on commercial whaling and to exploit this visible 'green' platform vis-à-vis their public;
- those nations who insist upon continued whaling to do so, either as scientific whaling or under the objection procedure, without the bureaucratic hassle that might become part and parcel of a future RMS compromise;
- the aboriginal societies to get (some) modest quotas for food purposes.

As a consequence any acute need to change the situation is not felt. Almost all – of the traditional concessionaires – seem to get at least some of what they want.

The present situation has been unchanged for more than 20 years. It does not take account of changing circumstances relating to the availability of whales, of the fact that new and efficient management methods have been invented, or to the fact that a number of coastal societies feel that their needs are being overlooked without reason. Neither does the present situation take account of the interesting fact that the number of whales taken in the various whaling operations actually has increased more than 100% during the last 10 years without being subject to international decision making.

With the present voting rules (75% for substantive changes) there is no hope for a change in the basic situation based on the present way of discussing matters. Only a clear and present danger of dissolution of the organisation – as the one we have seen looming on the horizon – might create sufficient interest on both sides to start listening to the other side.

- (2) *What are your initial thoughts on how future discussions and negotiations should be organised and conducted, taking into account the need to rebuild trust?*

It might be noted that apparently the contracting states with the strongest views or interests in the matter are under pressure from strong parts of their constituencies. This makes it extremely difficult for them to be seen to open up a discussion of alternatives. These difficulties are increased by the extreme publicity connected with IWC meetings. In normal international negotiations many different solutions may be discussed and reviewed before coming to a solution which might be acceptable to all. This has for many years not appeared to be feasible in the IWC.

Confidential talks in – or on the margin of – such fora as the upcoming intersessional meeting in London – seem to be the only way forward for the time being.

In addition it might be considered useful to establish a code of conduct on public dealings with whaling matters, not only covering the IWC meetings themselves but also the periods in between.

#### RESPONSE 4

- (1) *Why do you think that discussions to date within the IWC have not led to a more consensus-based resolution of IWC's problems? Is the negotiating process itself a factor?*

I think that the key problem is that almost every one is more or less 'comfortable' with the current situation: whaling countries actually get what they want (Japan under article VIII of the Conventions and Norway under its objection to the moratorium), while the anti-whaling countries remain opposed to the resumption of the whaling activities, as their public opinion demand from them.

- (2) *What are your initial thoughts on how future discussions and negotiations should be organised and conducted, taking into account the need to rebuild trust?*

I think that a new and different approach is necessary since negotiations have not been successful up to now, despite the good faith efforts taken by many countries during a number of years.

#### RESPONSE 5

- (1) *Why do you think that discussions to date within the IWC have not led to a more consensus-based resolution of IWC's problems? Is the negotiating process itself a factor?*

(A) Because many of country whale commissioners:

- are unwilling to recognise or accept the fundamental role of IWC is a management organisation for regulation of whaling as provided in the 1946 ICRW;
- do not honour proper implementation of provisions of ICRW, i.e. national licensing permit procedures for scientific whaling;
- do not give due respect to, accept or support the science-based findings, recommendations or reports of IWC's Scientific Committee, i.e. RMP, RMS;
- fail to acknowledge nor honour original understanding and their commitments to the temporary nature of the 1986 moratorium on commercial whaling;

- come to IWC meetings with inflexible national positions, mindset, or preconditions leaving no room for negotiations, accommodations or compromises; and
- are more interested in pushing their national or regional agendas forward than concentrating their time and efforts in narrowing gaps on given issues.

(B) IWC meetings over these many years have been conducted in:

- a confrontational/adversarial manner rather than reconciliatory/accommodating;
- harsh, derogatory and disrespectful languages and remarks have been the rule instead of exception;
- debaters from both sides have been talking at instead of to each other; and
- double standards have been employed in the treatment of similarly situated indigenous people subsisting on annual quotas for whale hunts.

(2) *What are your initial thoughts on how future discussions and negotiations should be organised and conducted, taking into account the need to rebuild trust?*

- Agreement be reached on the conduct of debates, i.e. the chair be empowered to stop the debates if discussions/negotiations are confrontational or adversarial and therefore counterproductive;
- harsh, derogatory, and disrespectful languages not be tolerated;
- debates be minimised so as to encourage plenary to accept findings and reports of the Scientific Committee especially with regards to RMP and RMS;
- representatives not be allowed to set pre-conditions to issues they make concessions to;
- mutual respects for differences be encouraged to prevail instead of putting each other down simply because of the disagreement;
- representatives be advised in advance of the IWC meetings to have open mind and be flexible on issues being resolved; and
- commissioners be authorised by their governments to make decisions on the spot and not bound by instructions from their countries.

You have also asked for additional ideas in relation to how the forthcoming IWC can be improved and what follows are some of such thoughts. Since becoming an IWC member in [], we have observed the detrimental if not divisive role the various environmental organisations, Sea Shepherd and Greenpeace to name a few, have had in the decision-making process of IWC. It seems that their aims, objectives and goals, not to mention their *modus operandi*, have so permeated into policy formulation and have become integral parts of national environmental policies. And as such they unfortunately have given impression to sustainable use group of countries that their colleagues on the other aisles serve as spokesmen for these NGOs in the IWC arena. Ways and means to minimise if not eliminate altogether their role and influence in IWC decision-making process should be developed and implemented.

Finally, we agree with Secretariat's recommendation that comments received not be attributed to sending governments. This approach will remove the traditional bias or prejudice that the polarised camps have become characterised with over the years. The *modus operandi* over these many years has been for each camp to reject

whatever the other side is saying, offering or suggesting irrespective of whether their arguments are science-based, sound or reasonable.

## RESPONSE 6

(1) *Why do you think that discussions to date within the IWC have not led to a more consensus-based resolution of IWC's problems? Is the negotiating process itself a factor?*

The very nature of 'conservation and management' of whales in the IWC does not lend itself well to consensus. Especially given the polarised views of parties on conservation and management, there are few issues where a middle-ground, negotiated position currently can be formed. To control the outcome of IWC issues, the parties have spent an inordinate amount of time and capital recruiting new members to their persuasion. This has further confounded the lack of trust among parties. Polarised camps have developed and members have come to view these as inflexible voting blocs (although this is not always accurate); the two groups rarely talk except in formal debate on the issues.

Although disputes over the substance of issues are the primary reason for a lack of consensus, the negotiating process may also be a contributing factor. Member nations with opposing views do not make sufficient efforts for bilateral dialog on IWC matters outside of annual meetings. In the interim between annual meetings, many parties keep up their aggressive positions in other diplomatic arenas and meetings. The short time available for the annual IWC meeting discourages consensus building; therefore parties seek to succeed by simply controlling the outcome of the vote. Moreover, the Commission's practice often allows debates to become unconstructively aggressive, and insufficient attention is given to traditional modes of dispute resolution – particularly when achieving a middle-ground might be possible. Even in opening statements, delegations tend to adopt hard-line postures that set a polarised tone for the balance of the meeting. Finally, this distrust among parties has led to parliamentary maneuvers deliberately designed to confuse or simply buy time.

(2) *What are your initial thoughts on how future discussions and negotiations should be organised and conducted, taking into account the need to rebuild trust?*

Here are a few ideas that might help reduce the conflict and move to negotiated agreements.

- (a) Rule of Procedure E states that members should seek to make decisions by consensus, although this rule is rarely followed. A new rule of procedure should be implemented on 'no surprises'. A member wishing to put forward a new initiative (resolution, Schedule amendment, discussion paper, etc.) would be required to circulate the document in question to the Secretariat no later than 60 days or some other reasonable period before the IWC meeting at which it is to be discussed. This will allow proponents to inform and consult with all parties before tabling the initiative, and seek consensus before it is voted upon. This is aimed at preventing the introduction of controversial actions without timely notification and/or consultation prior to Commission

consideration. Any such rule of procedure could make allowances for late/emergency circulation of resolutions and documents on late-breaking issues that would not unduly inhibit the proceedings.

- (b) IWC members and outside observers have commented on the lack of diplomacy and escalating rhetoric in the Commission as serious barriers to progress. Initially civil debates in plenary sessions too often devolve into unproductive, heated, and repetitive statements. The body should encourage the chair, through acclamation or resolution, to curtail this behaviour by:
- increased reliance on Rules of Debate D(1) and D(2), relating to time limits for speakers and truncated speakers lists;
  - enforcing the policy of allowing oral opening statements only for new members. This is designed to avoid political figures setting a confrontational tone for the meeting; and
  - reminding delegates about the proper use of the parliamentary procedure for a 'point of order', through an education process on this issue.
- (c) In most multilateral environmental institutions, when it becomes apparent that an issue cannot be resolved in plenary or that detailed edits to a text might address a country's concerns, the issue is referred to a working group for continued discussion in a smaller, less formal environment. Such smaller groups are often able to arrive at solutions that the full plenary cannot. References to working groups should become the IWC's standard mode for attempting to resolve disputes during plenary in the first instance. Difficulties of smaller delegations participating in small working groups needs to be addressed, with careful scheduling and close coordination *inter alia*. The IWC should also formalise other tools to act as 'dispute resolution mechanisms.' One possibility might be the enhanced use of 'friends of the chair' groups. Another possibility might be to provide cooling-off periods while informal consultations take place. Yet another possibility would be to rely more heavily on the Chair's Advisory body to propose consensus recommendations to the Commissioners for their consideration and possible adoption.
- (d) A new resolution should be considered soon that would acknowledge the broad spectrum of issues in the IWC such as cultural diversity, food and economic security, conservation goals, and different uses of whale resources. This is aimed at acknowledging the variety of perspectives in the IWC, without judging which are superior, and calming the somewhat inflammatory nature of debate during Commission deliberations. Many delegations may have difficulties accepting these goals, but just formally acknowledging them should help IWC overcome perceived insensitivities amongst parties and establish a useful foundation for resolving the current impasse.

## RESPONSE 7

- (1) *Why do you think that discussions to date within the IWC have not led to a more consensus-based resolution of IWC's problems? Is the negotiating process itself a factor?*

I think there are two main reasons - one being an objective large difference in interests between the countries that oppose all commercial whaling at all times and those countries that want to start whaling now - the other being a lack of interest in keeping the process alive. The latter is of course to a large extent a result of the first one but there is also a basic lack of keeping the negotiating process alive that could be dealt with. New commissioners with experiences from other fora would facilitate the process.

- (2) *What are your initial thoughts on how future discussions and negotiations should be organised and conducted, taking into account the need to rebuild trust?*

One way is to involve more outside experts both in marine ecology and in social science as was done in the PEW meeting in New York. Experienced national negotiators from adjacent fields would also help the process.

Some of the present problems are possible to solve which would create a stronger pressure on those few countries involved in the basic problem concerning whether there should be any commercial whaling at all.

## RESPONSE 8

- (1) *Why do you think that discussions to date within the IWC have not led to a more consensus-based resolution of IWC's problems? Is the negotiating process itself a factor?*

The whaling dispute has undergone transition over its history. In the early stage, the issue had been mainly that of economic interests and resource management. IWC members were striving to establish an effective resource management system to conserve and sustainably utilise whale resources. However, at least since the early 1970s, the whaling issue has become a conflict over the different views about whales. Countries supporting the sustainable utilisation of whales regard them as resources valuable as food, while anti-whaling countries grant a special status to whales different from other animals and consider whales as an icon of environmental consciousness. As anti-whaling countries tend to ignore the current status of whale stocks, the nature of the dispute has changed from a conservation and management issue to an issue of conflicting values. Discourse at the IWC reflects this misunderstanding or a confusion of the resource management issues with 'ethical' issues.

Anti-whaling NGOs and some politicians take advantage of this situation and make resolution of whaling issues more difficult. Many anti-whaling countries bear no domestic political cost in opposing whaling, since they no longer have a domestic whaling constituency. By opposing whaling in anti-whaling countries, such politicians and governments obtain political points on environmental issues without losing anything.

Under this political climate, the anti-whaling movement has been able to achieve tremendous success in many countries and further spread to other countries, as the result, the general public of these countries accepted and

became fixated on the view that whales are special animals and that they should not be harvested even if they are abundant.

As scientific data on the whale stocks has been accumulated, it is widely accepted by experts that sustainable whaling is possible for some abundant species. However, because of the intensive lobbying from anti-whaling NGOs, the public are led to believe that all whales are endangered, politicians and anti-whaling IWC member countries maintain their anti-whaling policy. This has rendered the IWC dysfunctional as an international resource management organisation.

Since 1982, the normal rules of debate and treaty interpretation, as well as the globally accepted principles of science-based conservation and management and mutual respect for cultural diversity, have often been put aside in the IWC.

To sum up this, the following eight situations contribute to the current 'impasse' or 'dysfunctional nature' of the IWC.

- Disrespect for international law (the ICRW and treaty interpretation). (Particularly meaning that the current discussion in the IWC tends to disrespect the core principle of the ICRW which is 'orderly development of the whaling industry' as referred in the preamble of the ICRW).
- Disrespect for the principle of science-based policy.
- Excluding whales from the principle of sustainable use of resources.
- Disrespect of cultural diversity related to food and ethics.
- Fuelling emotionalism concerning whales.
- Institutionalised combative/confrontational discourse that discourages cooperation.
- Lack of good faith negotiations.
- Pressure on scientists which results in a lack of consensus scientific advice from the Scientific Committee.

With these situations mentioned above, it is the negotiating environment rather than the process that is the primary factor which has rendered the current impasse in the IWC. This environment has failed to offer a common ground on which its contracting parties can discuss and negotiate the issues.

*(2) What are your initial thoughts on how future discussions and negotiations should be organised and conducted, taking into account the need to rebuild trust?*

As the first step, mutual respect for differences, not political coercion, is the solution to facilitate constructive discussion and negotiation in the IWC. It is most important to carefully consider if the IWC can function with two fundamentally different views between pro- and anti-whaling interests as to the value of whales - whether whales can be regarded as food or not. From a pragmatic perspective, whaling is existing and will continue to exist in many regions of the world. The question then is whether or not anti-whaling countries want some roles in the management of this whaling.

Next step will be the establishment of common rules applicable to discussion and negotiations of the IWC which will change the negotiating environment. These rules might include; respect of international law, science-based policy,

sustainable use of marine living resources, respect of cultural diversity related to food and ethics, and spirit of good faith.

As Dr. Hogarth stated in his letter of 20 December 2007 (IWC.CCG.657), it is very important to 'include discussion of many issues, including small type coastal whaling and non-lethal use of cetaceans' to the process he initiated in Anchorage. We contracting parties have to find solutions for these substantial issues as soon as possible to restore credibility of the IWC as an international organisation responsible for conservation and management of whales.

## RESPONSE 9

*(1) Why do you think that discussions to date within the IWC have not led to a more consensus-based resolution of IWC's problems? Is the negotiating process itself a factor?*

The management and conservation of large, long lived, highly migratory marine mammals such as cetaceans is a complex issue. The IWC was established for both the proper conservation of whale stocks and the orderly development of a whaling industry. However to date, the majority of its management tools have objectives and controls that are entirely limited to adjustments in the number of whales killed in whaling operations. The limitations of this approach have seen the IWC preside over the systematic over-exploitation of one cetacean species after another.

The modern era has brought successes in whale management that include the declaration of the moratorium on commercial whaling; the establishment of sanctuaries; consensus-based management of aboriginal subsistence whaling quotas; and consideration of emerging environmental issues. These measures have brought about the partial recovery of the world's whale populations but they are only the first steps to successful long-term management.

No one who participates in the IWC would deny that the Commission is currently split between states that fundamentally support non-consumptive use of cetaceans and seek their full protection, and states that could support a resumption of some form of commercial whaling. With such fundamental differences on key positions held by parties to a multilateral organisation, consensus will be difficult to achieve. But that is not the same as instability or an inability to make and hold to decisions. The characterisation that the IWC is at an 'impasse' appears in itself to be accepting the view of those countries that would measure progress solely in terms of steps the Commission is making towards lifting its current ban on commercial whaling. The moratorium on commercial whaling has not been lifted and a Revised Management Scheme has not been agreed because three quarters of the members have not voted to do so. This reflects the legitimate decision-making procedures of the Commission.

It is appropriate for the Commission to reflect the views of its Parties. As the number of adherents to the Convention increases, the Parties become more closely representative of the international community. The polarisation currently experienced in the Commission would be reflected by any Conference of the Parties, UN conference or debate, or similar representative forum. It would be unrealistic to expect any representative international gathering to arrive at consensus, for instance,

on the maintenance of the moratorium, or the resumption of commercial whaling.

The primary issues preventing the Commission moving forward relate more to a lack of recognition of contemporary oceans management principles and Parties' ability to 'opt-out' of Commission decisions. For the IWC to move into the future the key challenges that need to be addressed are: the capacity for countries to 'opt-out' of collective management decisions; the dramatic expansion of special permit scientific whaling; and disagreement over the competency of the IWC on issues such as animal welfare and the management of small cetaceans.

(2) *What are your initial thoughts on how future discussions and negotiations should be organised and conducted, taking into account the need to rebuild trust?*

As some of the heavily exploited populations of whales have started to recover under complete protection from IWC-endorsed commercial whaling, and our knowledge of the abundance of less exploited whale populations has increased, it is not surprising that tensions between conservation and whaling interests have risen. The polarised debate about the future of the IWC and its management options is a natural consequence. However, to characterise this divergence of views as a potentially fatal failure of trust or a fundamental shortcoming of the Convention would be an over-simplification, which fails to acknowledge three critical issues.

1. The ICRW operates legitimately through a set of rules that ensures that substantive changes in its operation are only achieved when three-quarters of its voting members agree to this. Through this near-consensus approach, substantial change is likely to occur at a conservative pace and will reflect the wishes of most members.
2. During the moratorium on commercial whaling the IWC has been successful in arriving at consensus decisions on the management of the one form of whaling that all Parties can accept: Aboriginal and Subsistence Whaling.
3. Learning from the lessons of historical failures in management, the IWC's Scientific Committee has developed and continues to refine a new management procedure for the hypothetical reintroduction of commercial whaling (the Revised Management Procedure: RMP). This procedure, developed in the early 1990s is arguably among the world's most thorough and detailed processes for resource management.

This is not to say that the IWC lacks substantial problems. Among the most critical failures are a dramatic expansion of unregulated whaling, in the form of whaling under special permit and under objection to the moratorium; an ongoing disagreement over inclusion of robust compliance and enforcement requirements into any Revised Management Scheme under which commercial whaling might operate if sufficient members agreed to it; and a lack of agreement over the competency of the IWC on core issues such as the management of small cetaceans (many of which are in urgent need of international management) and animal welfare.

While acknowledging the progress achieved in the past few decades, any effective discussion of the future of the IWC must include a dialogue on how to resolve these

issues. Perhaps most importantly, any future direction for the IWC should include management objectives and priorities beyond the current single fishery paradigm, and accommodate global environmental threats associated with climate change and the overall ecological health of the oceans.

## RESPONSE 10

(1) *Why do you think that discussions to date within the IWC have not led to a more consensus-based resolution of IWC's problems? Is the negotiating process itself a factor?*

At this stage it does not make much sense trying to assign responsibilities for the current impasse. Particularly, because the reasons must be sought in structural causes which go beyond the willingness of certain players.

Among such reasons, we can mention, on the one hand, the Convention's institutional deficiencies. That is to say, the ambiguities with regard to its purpose, the possibility for the Parties to be exempted from complying with certain key provisions related to the Convention's Regulation (such is the case of the commercial whaling moratorium) the lack of compliance and dispute settlement regimes, as well as the complicated procedure to amend the Convention which has led it to become an old-fashioned instrument compared to other conventions that address the conservation/use of living marine resources.

On the other hand, the IWC decision-making process and the way in which plenary debates are conducted do not meet the sought objective. If each controversial item on the agenda is discussed in plenary meetings where on many occasions interventions are meant to reflect maximalist positions politically profitable at the domestic level - we cannot expect great progress.

(2) *What are your initial thoughts on how future discussions and negotiations should be organised and conducted, taking into account the need to rebuild trust?*

There is a consensus about IWC abandoning the culture of confrontation, which prevails within the Commission where the primary objective of the delegates discourse seems to be, in some cases, a tactical, political defeat although merely rhetorical over the opposite bloc since no victory can alter the current situation. Although most speeches are not framed within that rationale, it is the most unyielding positions, which have regretfully ended up by splitting the organisation into two irreconcilable blocks.

Within this context and if we would really like to exit the current status of IWC, it would be necessary to:

1. hold closed diplomatic negotiations (either multilateral or bilateral);
2. ensure intersessional contact between the Commissioners of the opposite blocs to foster the confidence that is missing nowadays;
3. establish open working groups in IWC to elaborate on options for the agenda's controversial items, either by correspondence during intersessional periods or in plenary meetings;
4. recognise the need to urgently debate in the Commission all options recently proposed to unlock the current situation (from convening a diplomatic meetings under the auspices of the United Nations through to studying the possibility of amending the

- Convention, or relaunching negotiations on RMS, among other options);
5. foster IWC bonds with other international agencies such as CBD, CMS, CITES, the Antarctic Treaty and the CCAMLR to share experiences and learn from others, particularly on how those organisations handle their internal disputes;
  6. promote a greater participation of the international community in IWC. In this regard, issues such as fostering international cooperation activities in the Commission (e.g. training new Commission members), encouraging the participation of scientists from developing countries on the Scientific Committee and developing an equitable contribution scheme, are all issues which favour the Commission's universal nature;
  7. bearing in mind the importance of the work of the organisations and institutions devoted to cetacean conservation and research, it is important for them to support a potential negotiation process through their responsible participation within IWC;
  8. in plenary, avoid condemnatory resolutions (e.g. JARPA II) and/or political appeals (St. Kitts Declaration) agreed upon on the basis of fluctuating simple majorities to foster an environment of mutual confidence; and
  9. completely leave aside derogatory language, inside and outside IWC meetings.
- With a view to implementing such measures to open up a dialogue, although they guarantee no specific outcome, it is necessary to achieve a basic political agreement that will allow progress in that direction.
- Such a framework agreement should state the negotiating will of all Parties to negotiate a package including all contentious issues, while agreeing on a roadmap to establish negotiating mechanisms and realistic intermediate goals.
- Furthermore, it should include an express acknowledgement of the non-lethal use of cetaceans on equal grounds to other uses of the resource, reflecting existent international consensus with regard to the need of striking a balance between conservation and the rational use of live marine resources.

## Appendix F

### MEDIA RELEASE:

#### INTERSESSIONAL MEETING ON THE FUTURE OF THE INTERNATIONAL WHALING COMMISSION RENAISSANCE LONDON HEATHROW HOTEL, 6-8 MARCH 2008

'The intersessional meeting has spent three days discussing positive ways forward for the IWC,' Dr. Hogarth, the Commission's Chair, said today releasing a statement summing up the meeting.

'The IWC has in recent years shown increasing signs of polarisation and has reached something of an impasse. That is why the Annual Meeting in Anchorage last year decided to hold this London meeting,' he said.

'To assist in this process, the Commission obtained the assistance of Prof. Calestous Juma, from Harvard Kennedy School, Ambassador Raúl Estrada-Oyuela and Ambassador Alvaro de Soto, all of whom have extensive and high-level experience with a range of challenging international issues.'

'Intensive discussions following the presentations of the outside experts isolated a number of issues that the Commission will consider in order to improve its practice and procedures,' Dr. Hogarth said.

Among these suggestions were:

- make better efforts to reach decisions by consensus;
- reduce the use of voting;

- adopt measures to ensure adequate notice of matters to be considered to reduce surprises;
- employ cooling off periods when difficulties arise;
- consider using small negotiating groups;
- improve the co-ordination between the IWC and other relevant international conventions;
- discuss how to assist the Chair in the running of meetings;
- discuss how to better integrate elements of civil society into the Commission's work; and
- consider whether to change the time of meetings of the Scientific Committee in order to provide more time for consideration of its work and to undertake a review of its composition and function.

'I will present a report of the meeting to the Commission and in consultation with others develop a series of recommendations for improved procedures to take the Commission forward, at the forthcoming Annual Meeting in Chile in June 2008.'

**Appendix G****MEDIA RELEASE:  
STATEMENT ON SAFETY AT SEA MADE AT THE INTERNATIONAL WHALING COMMISSION'S  
INTERSESSIONAL MEETING**

The Meeting recalled Commission resolution 2007-2 entitled 'Resolution on Safety at Sea and Protection of the Environment' as well as resolution 2006-2 entitled 'Resolution on the Safety of Vessels engaged in Whaling and Whale Research-related Activities', both of which had been adopted by consensus by the Commission. It noted reports of dangerous actions by the Sea Shepherd Conservation Society in the Southern Ocean in recent months directed against Japanese vessels.

It called upon the Sea Shepherd Conservation Society to refrain from dangerous actions that jeopardise safety at sea, and on vessels and crews concerned to exercise restraint. The meeting reiterated that the Commission and its

Contracting Governments do not condone and in fact condemn any actions that are a risk to human life and property in relation to the activities of vessels at sea. It urged Contracting Governments to take actions, in accordance with relevant rules of international law and respective national laws and regulations, to cooperate to prevent and suppress actions that risk human life and property at sea and with respect to alleged offenders.

The Meeting recalled that accreditation for the Sea Shepherd Conservation Society as an observer to the Commission had been denied since 1987 because of unacceptable behaviour and tactics.

---