

Legal Opinion

on the Competence of the IWC to Include Humane Treatment and Human and Cetacean Health Concerns in the RMS

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June 21, 2000

I. Introduction

The International Convention for the Regulation of Whaling (ICRW) grants the International Whaling Commission (IWC) competence to make binding regulations provided that the regulations are "necessary to carry out the objectives and purposes of the Convention" and based on scientific findings. This mandate has been the subject of much dispute, particularly regarding controversial issues such as the moratorium, aboriginal whaling, sanctuaries, and small cetaceans. Some argue that the IWC does not have competence to address these issues, because the ICRW's objectives require any conservation measure to support current or future whaling. They also contend that "necessary" means "imperative" or that no other measures are effective.

A close look at the ordinary meaning of the ICRW in light of its context reveals the broad competence of the IWC to issue regulations on these and other issues. In fact, the IWC has competence to issue regulations to conserve whales even if that specific regulation is not linked to the development of the whaling industry. The whaling nations that drafted the treaty apparently had a conservation vision, because the ICRW creates a conservation-oriented regime through which the whaling industry can develop. Consistent with this vision and the text of the ICRW, the IWC has interpreted its authority expansively for conservation purposes. For example, the IWC has addressed environmental threats to whales and humane treatment of whales through recommendations, as well as the need for inspection and monitoring within the Revised Management Scheme (RMS). The IWC's interpretations help confirm that the objectives of the ICRW allow the conservation of whales in the absence of whaling objectives.

Although the IWC has not always implemented its authority fully, it has grown into its mandate as new information becomes available and circumstances change concerning the conservation of whales and the regulation of whaling. What some have called "creeping competence" or an evolving mandate¹ is merely the IWC exercising its existing competence to address new issues relating to whales and the development of the whaling industry.

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¹See Patricia Birnie, *Are Twentieth-Century Marine Conservation Conventions Adaptable to Twenty First Century Goals and Principles?: Part II*, 12 INT'L J. MARINE & COASTAL LAW 488, 502 (reporting that the United Kingdom "did not see a problem of creeping jurisdiction" with regard to IWC regulation of small cetaceans) [hereinafter *Part II*]; See also James Cameron, *Opinion of Law 2* (May 1995) (stating that the IWC may consider many factors in its comprehensive review of the moratorium, because "[a]greements are living documents, they evolve and so does their interpretation").

This legal opinion concludes that the IWC has authority to issue purely conservation and welfare regulations, provided that the development of the whaling industry remains a legitimate goal. Further, it concludes that the terms "necessary" and "based on scientific findings" do not create rigid tests that demand scientific certainty that a regulation will, on its own, achieve a specific purpose. Instead, the IWC may issue regulations appropriate for meeting one of the ICRW's objectives, provided that the regulation is rationally related to scientific evidence. As such, the IWC has competence to address a variety of issues, including humane treatment of whales and whale and human health concerns, such as contamination of whale meat. The IWC may, if it chooses, address these issues in the RMS.

II. The IWC's Express Mandate to Adopt Regulations

Article V(1) of the ICRW grants the IWC authority to adopt binding regulations, also called amendments to the Schedule, if several requirements are met. First, Article V(1) permits the IWC to adopt regulations "with respect to the conservation and utilization of whale resources," fixing: (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits; (e) time, methods, and intensity of whaling; (f) gear specifications; (g) methods of measurement; and (h) catch returns and other statistical and biological records.

Second, Article V(2) requires that amendments to the Schedule "shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources." In addition, Article V(2) requires that a regulation "shall be based on scientific findings." It must also "take into consideration the interests of the consumers of whale products and the whaling industry."

Much of the IWC's competence to issue regulations is contested. The majority of the debate concerning the IWC's competence centers on the meaning of the ICRW's objectives and purposes. Member States and scholars also differ on the meaning of "necessary," and "based on scientific findings."² As contamination of whale meat becomes better understood and the commercial importance of whalewatching better known, so too the meanings of "whale industry," "interests of consumers," and "optimum utilization" have been debated.

A. The Objectives and Purposes of the ICRW

The ICRW very clearly includes two objectives: the conservation of whales and the orderly development of a whaling industry. The persisting question, however, is whether conservation measures may be adopted in their own right or whether all conservation measures

²A further question, which is not addressed here, asks whether the IWC *applied* its competence appropriately by finding that the regulations were in fact necessary and based on scientific findings. *See, e.g.*, William T. Burke, *The Legal Invalidity of the IWC Designation of the Southern Ocean Sanctuary*, IWC/50/27, Item 13 (arguing that the IWC illegally designated the Southern Ocean Sanctuary because it was not necessary and not based on scientific findings) [hereinafter *1998 Opinion*].

must link directly to the development of the whaling industry.³ The differences in opinion have crystalized in the colloquy between Professors Birnie and Burke. Professor Birnie maintains that the IWC has authority to interpret its mandate and as such can separate conservation and whaling goals; the IWC's actions are presumed *intra vires*.⁴ In contrast, Professor Burke, finds that this division of treaty objectives "distorts the fundamental mission and goal of the ICRW which links conservation directly and immediately with the continuation of safe harvests of whales."⁵

Yet, a third position, which permits the IWC to adopt a conservation regulation without expressly linking it to the development of the whaling industry, but which also requires the IWC to develop the whaling industry within the overall regime, provides a more faithful interpretation of the ICRW's objectives. Under the fundamental rules of treaty interpretation, as provided by the Vienna Convention on the Law of Treaties (Vienna Convention), a treaty must be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in light of its object and purpose.⁶ The context includes the treaty, its preamble and annexes, as well as any agreement or instrument relating to the treaty. According to Article 32 of the Vienna Convention, a good faith interpretation of the treaty must also take into account any subsequent agreement and subsequent practice of the parties. Any intent of the drafters must be

³Prof. Birnie writes:

The Convention thus had two main aims: conservation *and* development of the whaling industry. This raises the question, in the context of its present membership, whether both aims must always be pursued or whether the IWC can decide to give precedence to conservation, particularly since developments in scientific and public awareness or the ecological complexities now involved in determining both the conservation status and the measures required to restore and maintain stocks in equilibrium with their environment has increased the difficulties of interpreting such terms as "conservation" and the "optimum level" of whale stocks.

Birnie, *Part II*, *supra* note 1, at 491 (emphasis in original).

⁴*Id.*; see also Patricia Birnie, *Opinion on the Legality of the Designation of the Southern Ocean Whale Sanctuary by the International Whaling Commission*, IWC/47/41, Agenda Item 13.

⁵Burke, *1998 Opinion*, *supra* note 2, at 4.

⁶Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27. 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). The Vienna Convention does not apply retroactively. *Id.* at art. 4. Nonetheless, its rules apply to interpretation of the ICRW, because the Vienna Convention codifies customary international law regarding interpretation of treaties. IAN M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 6-23 (1973); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 608 (5th ed. 1998)(stating that "a good number" although not all, of the provisions of the Vienna Convention express general international law, and those that do not "constitute presumptive evidence of emergent rules of general international law."). This textual approach to interpretation has attained the status of customary international law. See, e.g., *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, 1994 I.C.J. Reports 6; OPPENHEIM'S *INTERNATIONAL LAW*, 1271-1275 (Jennings & Watts eds., 9th ed. 1992).

gleaned from the text of a convention,⁷ but when interpreting treaties, it is necessary "to look ahead" and "have regard to new conditions" and "the exigencies of contemporary life, rather than the intentions of those who framed" the treaty, because a treaty "acquires a life of its own."⁸

The ordinary meaning of the preamble, which establishes the objectives and purposes of the ICRW,⁹ reveals the authority of the IWC to undertake conservation measures. The ICRW's inclusion of a broad mandate no doubt reflects the concern of the drafters that whaling activities had depleted and endangered several whale species. The drafters clearly knew of the detrimental impacts of whaling on whales, and thus wrote in the preamble:

the history of whaling has seen over-fishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whales from further over-fishing.

This paragraph evinces an intent to protect whales *from* whaling, not to promote whaling or develop the whaling industry. The preamble also recognizes the interest of all nations in "safeguarding for future generations the great natural resources represented by whale stocks." In both of these two paragraphs, conservation is not linked to the development of the whaling industry. As such, the preamble does not appear to require the IWC to "directly and immediately" link each conservation measure to whaling.

At the same time, the preamble recognizes that conservation measures will increase the number of whales that may be captured. It also states that the participating governments want a regulatory system for whale fisheries to ensure proper conservation and development of whale stocks. Even where the preamble states that "whaling operations should be confined to those best able to sustain exploitation," it does not require exploitation, but rather seeks "an interval of

⁷See BROWNLIE, *supra* note 6, at 632. The International Law Commission, which drafted the Vienna Convention, proposed rules which are now reflected in Articles 31 and 32 of the Vienna Convention that presume that the text of the treaty represents the authentic expression of the intentions of the parties and that the starting point for interpreting a treaty is the text of the treaty, "not an investigation *ab initio* into the intentions of the parties." SINCLAIR, *supra* note 6, at 71, citing 1966 I.L.C. REPORTS 51.

⁸Second Admissions Case, 1950 ICJ 4, 18 (Advisory Opinion on the Competence of the U.N. General Assembly). Although this language from Judge Alvarez comes from his dissent, his views did not conflict with the majority opinion. See also C.F. AMERASINGHE, PRINCIPLES OF INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 57-58 (1996)(stating, "There is no better statement of the reasons for the reduced importance of the preparatory work in the interpretation of constitutions of international organizations" than the language of Judge Alvarez referenced in this note). See also Grain Pool of Western Australia v. Commonwealth [2000] HCA [High Court of Australia] 14, paras. 136 (23 March 2000)(reaching interpretations of terms "not on the basis of the meaning of s 51(xviii) of the Constitution according, or even by reference, to the accepted understandings of the terms used in 1900. I reach my conclusion in accordance with what I take to be the meaning of the phrase "patents of inventions", in its 'really essential characteristics' as understood in a constitutional context in Australia today.").

⁹For purposes of determining the objectives of a treaty, the context of a treaty includes its preamble. BROWNLIE, *supra* note 6, at 634. In addition, paragraph 5 of the preamble of the ICRW specifically refers to "these objectives," indicating that the preambular paragraphs above it state the ICRW's goals.

recovery" for depleted populations. These provisions do not suggest that conservation measures can be adopted only to promote the lethal killing of whales.

Instead, the final preambular paragraph states the drafters' intent to "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry." Here, too, the ICRW does not directly link conservation to the development of the whaling industry. In fact, it indicates that conservation measures are the priority, because they are needed to "make possible" the orderly development of the whaling industry. In contrast to Burke's assertion that this paragraph requires a conservation measure to relate directly to whaling, this paragraph suggests just the opposite — that the development of the whaling industry cannot proceed in the absence of conservation measures.

Moreover, it is not clear that the development of the "whaling industry" means the lethal killing of whales. While the 1946 meaning of "whaling industry" likely meant the lethal killing of whales, the contemporary meaning of "whaling industry" may or may not include lethal killing given the popularity and economic value of whalewatching.

Lastly, the preamble recognizes the "common interest" in achieving the "optimum level of whale stocks without causing widespread economic and nutritional distress." Significantly, the term "optimum level" does not refer to optimum utilization of whales; it relates to the prevention of widespread economic and nutritional distress. Conservation measures that promote economically valuable activities such as whalewatching may be the best way to avoid economic and nutritional distress. Further, it is important to remove optimum utilization from the goal of developing the whaling industry, because Article V(2) requires IWC regulations to be necessary to fulfill the objectives of the ICRW *and* to provide for conservation, development, and optimum utilization. The only way to avoid making Article V(2) completely redundant is to interpret the development of the whaling industry as distinct from optimum utilization.¹⁰

Nonetheless, the ordinary meaning of the preamble does not suggest that the IWC can ignore the development of the whaling industry, as that is clearly an objective of the ICRW. But, the preamble as a whole does not preclude the IWC from adopting solely conservation-oriented measures. So long as the IWC retains the development of the whaling industry as a general objective, the IWC can reasonably interpret the ICRW to allow the adoption of conservation regulations solely for conservation purposes.

The practice of the member States shows that they interpret the objectives and purposes and competence in this way. For example, Paragraph 10(e) of the Schedule bans commercial

¹⁰A treaty should be interpreted to avoid redundancies. *See e.g.*, Corfu Channel Case, 1949 I.C.J. 24; Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad), 1994 I.C.J. 23; 1966 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. II, at 209; *United States — Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, AB-1996-1, at 23, *reprinted in*, 35 INTERNATIONAL LEGAL MATERIALS 603, 627 (1996). This opinion recognizes that the preamble and Article V still includes redundancies as Article V plainly refers to conservation and utilization in both paragraph V(1) and V(2)(a).

whaling, but also requires the IWC to review the ban, undertake a comprehensive review to determine its effects, and consider modifications and the establishment of other catch limits. Similarly, the prohibition against whaling in the Southern Ocean Sanctuary is not intended to be permanent. The Schedule requires that the IWC review the sanctuary at ten year intervals. Moreover, the IWC has been developing the Revised Management Plan and the Revised Management Scheme to ensure the orderly development of the whaling industry. According to Article 32 of the Vienna Convention, the IWC's long history of consistently interpreting the ICRW's objectives to permit the adoption of conservation measures while maintaining a long-range goal to promote the orderly development of the whaling industry must be taken into account when determining the context of a treaty.

Moreover, according to the International Court of Justice, deference must be given to actions taken by an organization to fulfill a stated objective of the organization — these actions are presumed not *ultra vires*.¹¹ Although that decision has proven controversial,¹² it represents the prevailing rule.¹³ One scholar notes, "If the parties to a treaty agree on a common interpretation either by a formal treaty or otherwise, this interpretation acquires an authentic character and prevails over any other."¹⁴ Nonetheless, respect for the rule of law and the text that establishes the international organization preclude an organization from interpreting a treaty inconsistently with the treaty's express terms.¹⁵ However, as shown above, the IWC's interpretation is reasonable and certainly not clearly inconsistent with the text of the ICRW.

In sum, the ordinary meaning of the ICRW and the subsequent practice and agreement by the member States, through the IWC, reveal two objectives of the ICRW: conservation and the orderly development of the whaling industry. But, the IWC may adopt conservation measures without a direct link to the whaling industry, provided that the orderly development of the whaling industry remains a true objective; neither conservation nor the development of the whaling industry can become the sole objective of the ICRW.

¹¹Certain Expenses of the United Nations, 1962 I.C.J. Reports 151, 168.

¹²See BROWNIE, *supra* note 6, at 700 (summarizing the main criticisms of the opinion); L. Gross, *Expenses of the United Nations for Peace-keeping Operations: The Advisory Opinion of the ICJ*, 17 INTERNATIONAL ORGANIZATION 1 (1963).

¹³Namibia (South West Africa) Case, 1971 I.C.J. Reports 16, 22 (stating, "A Resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted."); Patricia Birnie, *Are Twentieth-Century Marine Conservation Conventions Adaptable to Twenty-First Century Goals and Principles?: Part I*, 12 INT'L J. MARINE & COASTAL LAW 307, 327 (1997) [hereinafter Birnie, *Part I*].

¹⁴PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES, para. 138 (José Mico & Pater Haggemacher trans. 1991).

¹⁵See AMERASINGHE, *supra* note 8, at 166.

B. The Regulation Shall Be "Necessary" for Conservation and Optimum Utilization

Even though the IWC has competence to adopt regulations for solely conservation purposes, it must still *apply* its competence appropriately. To do so, Article V(2) requires that a regulation "shall be necessary to carry out the objectives and purposes and to provide for the conservation, development, and optimum utilization of whale resources." While a regulation need not relate to both objectives, it must be necessary for both conservation and optimum utilization. What this requires, however, is disputed, because disagreement persists over the meaning of "necessary" and "optimum utilization." As this legal opinion relates to inclusion of humane treatment and human and whale health concerns in the RMS, which concerns commercial harvesting of whales, this opinion only explores the meaning of "necessary" here.¹⁶

Professor Burke maintains that "necessary" means "imperative" for achieving a goal.¹⁷ As such, a regulation is not necessary "if other actions have been unable to achieve the conservation and development objectives set out in the ICRW preamble."¹⁸ For example, a Southern Ocean Sanctuary might be an effective way to conserve whales only "[i]f the commercial moratorium is terminated in the near future, *and no other restrictions on harvesting whales were adopted*."¹⁹ Further, his approach requires previous failures to determine if it is "'necessary' to use another approach" because we must obtain some "gradient of success of previous measures."²⁰ By seeking a "gradient of success" and requiring previous failures, a regulation must fully achieve the ICRW's goals by itself.

While this definition of "imperative" accords with a dictionary definition of "necessary," Burke's formulation must be rejected. First, his interpretation of "necessary," requires far more than any ordinary meaning of "necessary" suggests. The dictionary meaning of "necessary" — something "needed to achieve a certain result or effect"²¹ or "essential, indispensable"²² — does not require a regulation to accomplish an objective on its own. A regulation could be

¹⁶See Alexander Gillespie, *The Southern Ocean Sanctuary and the Evolution of International Environmental Law*, Section §§5, 6 (forthcoming August, J. MARINE & COASTAL LAW)(noting that scientific consensus is a rare achievement, especially within the IWC)(discussing the meaning of "optimum utilization").

¹⁷William T. Burke, *Legal Aspects of the IWC Decision on the Southern Ocean Sanctuary*, IWC/48/33, Agenda Item 13, at 7 (1996)[hereinafter *1996 Opinion*].

¹⁸William T. Burke, *Memorandum of Opinion on the Legality of the Designation of the Southern Ocean Sanctuary by the International Whaling Commission*, IWC/47/38, Agenda Item 13 [hereinafter *1995 Opinion*].

¹⁹*Id.* at 2 (emphasis added).

²⁰Burke, *1996 Opinion*, *supra* note 17, at 7.

²¹THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 877 (William Morris ed., 1979).

²²WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1511 (1986).

indispensable, for example, as one element of a larger regulatory scheme. Burke's interpretation, however, precludes regulations from mutually supporting each other. As one international legal scholar notes, "there should be a difference between what is necessary and what is essential (what is necessary may not always be also essential)."²³

Second, the ordinary meaning of "necessary" in the legal context differs from its dictionary meaning. In a legal context, the term is better defined as "being appropriate and well adapted to fulfilling an objective"²⁴ and courts in the United States and Australia have consistently interpreted "necessary" in that way.

In fact, courts in the United States have rejected arguments similar to Burke's to rule that "necessary" means "appropriate." For example, the U.S. Endangered Species Act (ESA) instructs the Secretary of the Interior to issue regulations "necessary and advisable to provide for the conservation" of threatened species.²⁵ When shrimpers challenged regulations that required the use of turtle excluder devices to protect threatened sea turtles, they claimed regulations could be necessary "only if found actually to save an endangered species from extinction" or to halt the depletion of the species.²⁶ The court found that this argument, which is strikingly similar to Burke's, "finds no support" in the ESA.²⁷ In response to plaintiffs' argument that the regulations failed to address other serious causes of sea turtle mortality, the court ruled that "regulations need not remedy all evils."²⁸ Instead, the ESA's "necessary and advisable" language permits regulations that "promote" conservation of threatened species.²⁹ Courts have also rejected interpretations of "necessary" that allow an agency to adopt only the least restrictive

²³AMERASINGHE, *supra* note 8, at 97.

²⁴See BLACK'S LAW DICTIONARY 1052 (Bryan A. Garner ed.-in-chief, 7th ed. 1999)(defining "necessary and proper").

²⁵16 United States Code ("U.S.C.") §§1531-1544, §1533(d).

²⁶State of Louisiana v. Verity, 853 F.2d 322, 332 (5th Circuit 1988).

²⁷*Id.* See also, Cayman Turtle Farm, Ltd. v. Andrus, 478 F.Supp 125 (D.D.C. 1979), *aff'd without opinion* (D.C. Cir. Dec. 12, 1980)(rejecting plaintiff's claim that the regulations to protect threatened green sea turtles were too restrictive and that the evidentiary record did not support the Secretary's determination that the regulations were necessary).

²⁸State of Louisiana v. Verity, 853 F.2d at 332, citing two U.S. Supreme Court cases for this "well-established rule," Railway Express Agency, Inc. v. New York, 336 U.S. 106, 69 S.Ct. 463, 465-66, 93 L.Ed. 533 (1949); Central Lumber Co. v. South Dakota, 226 U.S. 157, 160, 33 S.Ct. 66, 67, 57 L.Ed.2d. 164 (1912). Speaking directly to the issue of agency discretion, the court stated that "the agency's decision need not be ideal, so long as it is not arbitrary or capricious, and so long as the agency gave at least minimal consideration to relevant facts contained in the record. *Id.* at 327.

²⁹Christy v. Hodel, 857 F.2d 1324, 1336 (9th Circuit 1988)(stating, "By limiting the Secretary's legislative authority to the promulgation of regulations that promote the 'conservation' of threatened species, Congress has established a standard sufficiently definite and precise to permit the courts to determine whether the Secretary's enactments comport with Congressional will").

regulations.³⁰

These opinions accord with the intent of the U.S. Congress to provide agencies with flexibility. A legislative report concerning the "necessary" language in the ESA context states that the "Secretary is authorized to issue *appropriate* regulations to protect endangered or threatened species ... Once an animal is on the threatened list, the Secretary has almost an infinite number of options available to him with regard to permitted activities for those species."³¹ Clearly, Congress did not intend "necessary" to mean indispensable or least restrictive. Instead, this legislative history mirrors the legal definition of "necessary and proper" — something "appropriate and well adapted to fulfilling an objective."³²

Similarly, the Australian High Court has interpreted constitutional grants of legislative power to extend to all matters "necessary for the reasonable fulfilment of the legislative power" or "necessary to effectuate its main purpose." To bring a law within the reach of the incidental scope of a power, "it is enough that the provision is *appropriate* to effectuate the exercise of the power; one is not confined to what is necessary for the effective exercise of the power."³³

While these opinions of U.S. and Australian courts do not bind international tribunals and organizations, they provide persuasive authority that the term "necessary," in its proper legal context, means "appropriate." Because "appropriate" constitutes the ordinary legal meaning of "necessary," it represents the most legitimate way to interpret the term "necessary" in Article V of the ICRW. Further, just as agencies and legislatures have discretion to determine which

³⁰National Rifle Association v. Brady, 914 F.2d 475, 478-481 (4th Circuit 1990). The court expressly rejected the argument that an agency could issue only regulations that were "strictly necessary and the least restrictive means of accomplishing the purposes of the [Gun Control] Act." *Id.* at 478-79. *See also*, Harris v. James, 896 F.Supp. 1120 (M.D. Alabama 1995); Smith v. Vowell, 379 F.Supp. 139 (W.D. Texas), *aff'd*, 504 F.2d 759 (5th Circuit 1974)(not requiring the Secretary of Health and Human Services to show that other methods of transporting beneficiaries of a federal medical program were more effective than state funded transportation.).

³¹H.R.REP. NO. 93-412, 93d Cong., 1st Sess. 12 (1973)(emphasis added). Committee reports are not necessarily conclusive, but "represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Zuber v. Allen, 396 U.S. 168, 186, 90 S.Ct. 314, 324, 24 L.Ed.2d 345 (1969).

³²BLACK'S LAW DICTIONARY, *supra* note 24, at 1052. One court ruled that a regulation promulgated pursuant to a "necessary" delegation of power should be upheld if the regulations "conform to the purposes and policies of the Act and if they do not contravene any of its terms." Rex Chainbelt, Inc. v. Volpe, 486 F.2d 757, 761 (7th Circuit 1973). Similarly, the High Court of Australia has said that interpretations of legislative power must be "Unless there is something in the context of the rest of the Constitution to indicate that a narrower interpretation will 'best carry out its object and purpose', ambiguities must be resolved in favour of a broad interpretation, given that the words appear in a Constitution. Grain Pool of Western Australia v. Commonwealth [2000] HCA [High Court of Australia] 14, para. 119 (23 March 2000).

³³Airservices Australia v Canadian Airlines International Ltd, [1999] HCA 62, C22/1998, at 234-235 (citations omitted)(emphasis added).

measures are "necessary" to implement their obligations,³⁴ so too international organizations and their member States have discretion to interpret the language of treaties that they administer.³⁵

C. The Regulation Shall Be Based on Scientific Findings

Article V(2) also requires a regulation to be "based on scientific findings." A thing is "based on" another thing if the thing "serves as a base for"³⁶ or "is supported by" or "built" upon the other.³⁷ It does not mean "conform to," which means "compliance with" or correspondence in form or manner.³⁸ Understood this way, "based on" does not require scientific consensus.³⁹ Further, it does not require scientific certainty that a measure will produce a certain outcome or that new scientific research be developed.

Instead, the phrase "based on scientific findings" is best understood to require some rational relationship between the regulation and the scientific findings. Such a rational relationship would require an assessment of available scientific information and prohibit the disregarding of any scientific evidence that is better in some way than the information relied upon.⁴⁰ A rational relationship would not require an exhaustive study but would require some observable link between the regulation and the scientific findings.⁴¹

³⁴*See, e.g.,* *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

³⁵*See supra* notes 11-15 and accompanying text, describing the authority of international organizations and member States to interpret the language of treaties that they administer.

³⁶WEBSTER'S DICTIONARY, *supra* note 22, at 180.

³⁷THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES, VOL. I, 187 (Lesley Brown ed. 1993).

³⁸*Id.* at 477. The World Trade Organization decision in *EC Hormones* contrasts the terms "based on" with "conform to." *See EC Measures Concerning Meat and Meat Products (Hormones)*, World Trade Organization, Report of the Appellate Body, AB-1997-4, WT/DS26/AB/R, WTDS48/AB/R, para. 160-168 (January 16, 1998). Although this decision superficially resembles the question of whether a decision is "based on scientific principles," it specifically relates to the Agreement on Sanitary and Phytosanitary Standards, risk assessment and international standards. As the ICRW clearly does not involve these issues, the WTO decision is instructive for its comparison of "based on" with "conform to", but its overall analysis cannot be used to inform this discussion of the ICRW.

³⁹*See* Gillespie, *supra* note 16, at §4(A)(noting that scientific consensus is a rare achievement, especially within the IWC).

⁴⁰*See* *City of Las Vegas v. Lujan*, 891 F.2d 927, 933 (D.C. Cir. 1989)(interpreting the requirement under the Endangered Species Act to use "the best available scientific and commercial data available," 16 U.S.C. §1536(a)(2)).

⁴¹*See EC Hormones*, *supra* note 38, at para. 189 (stating, "We believe that "based on" is appropriately taken to refer to a certain *objective relationship* between two elements, that is to say, an *objective situation* that persists and is observable....")(emphasis in original).

In the ESA context, the U.S. Supreme Court has stated that the "obvious purpose" of the requirement to "use the best scientific and commercial data available" is "to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise."⁴² Under the Magnuson Fisheries Conservation and Management Act, a court ruled that a requirement to use the "best scientific information available"⁴³ did not require the Department of Commerce to set an "optimum yield" quota based on perfect or ironclad science. It also ruled that the Department could use a lower estimate of fish recruitment, rather than the mean estimate, to set lower catch quotas. The court was satisfied that the decision to use the conservative recruitment estimate was linked to a scientifically supportable reason — the recruitment estimate contained the most uncertainty.⁴⁴ These courts are asking agencies to ensure that their decisions are rational. The ICRW requirement to base regulations on scientific findings is best interpreted in this way.

D. Consumer Interests

Article V(2) also requires the IWC to "take into account" the interests of the consumers of whale products and the whale industry. This requirement means that the IWC cannot ignore the interests of consumers and the whale industry, which now includes whalewatching.⁴⁵ However, these interests may conflict. Consumer interests and the broad meaning of whale industry allows the IWC to consider a wide range of interests, including non-lethal utilization, the quality of the meat, the level of pollutants in the meat, and the manner in which the whale was caught. It also includes impacts of whaling on the whalewatching industry as well as the impacts of a moratorium on whaling.

III. The RMS, Consumer Protection, and Humane Treatment

These conclusions concerning the meanings of the ICRW's objectives, "necessary," and "based on scientific findings" provide the IWC with broad competence to address a wide range of issues, and the IWC has shown a willingness to use its broad competence to address new issues falling within this competence as they arise. For example, the IWC asserted authority to regulate aboriginal whaling at its very first meeting although no language specifically provides that authority. An IWC-commissioned independent legal opinion later found that the IWC had such authority under Articles V(1) and V(2).⁴⁶ As the IWC has gained a better understanding of the range of activities affecting whales and the whaling industry, it has expanded its range of

⁴²Bennett v. Spear, 520 U.S. 154, 176-77, 117 S.Ct. 1154, 1168, 137 L.Ed.2d 281, 304 (1997). The Supreme Court also said that another purpose was to prevent uneconomic decisions. *Id.*

⁴³Magnuson Fisheries Conservation and Management Act, 16 U.S.C. §1801 *et seq.*, at §1851(a)(2).

⁴⁴Fishermen's Dock Co-op., Inc. v. Brown, 75 F.3d 164, 171-172 (4th Circuit 1996).

⁴⁵See Burke, 1996 Opinion, *supra* note 17, at 7, note 8.

⁴⁶Birnie, *Part II*, *supra* note 1, at 494, citing Derek Bowett, "Opinion on the Amendment to Paragraph 7 of the Schedule dated November 1976 under the 1946 International Whaling Convention" (Nov. 16, 1977).

issues to include small cetaceans, whalewatching, and whale bycatch in other fisheries. This does not mean, however, that the IWC is expanding its competence. Rather, the IWC is exercising its existing competence as new issues become relevant to conserving whales and regulating whaling.

Similarly, humane treatment and consumer interests fall within the broad range of ICRW objectives. The IWC would also have little difficulty finding them necessary to implement the objectives of the ICRW and it probably already has enough information to base its decisions on scientific findings. The IWC also has competence to address humane treatment and consumer interest issues in the RMS. While the RMP runs historical catch data and population estimates through a mathematical model to produce catch limits, it will not be incorporated into the Schedule until the RMS is completed. The RMS requires consideration of additional mechanisms and information, including a supervision and control scheme and a means of calculating total catches over time. A consideration of humane treatment and contamination of whales and whale products fits within these categories of information required in the RMS.

A. Inclusion of Whale Contamination Issues in the RMS

The objectives of the ICRW to conserve whales and to develop the whaling industry provide a clear mandate for regulations relating to environmental change, including marine pollution, the effects of marine pollution on whales and humans, and contaminant levels in whales and whale meat. To accurately gauge the health and status of whale populations and individual whales for setting quotas and area restrictions, the IWC must comprehensively collect and analyze data concerning the levels of contaminants in whales. In addition, whale populations may decline if seriously affected by contamination, which would directly impact the optimum level of whale stocks for harvest. In addition, contamination of whales may have serious, harmful effects on human health when whale products are ingested. In this case, the conservation goal of healthy whales relates directly to the development of the whaling industry and the protection of the interests of consumers, because the whaling industry would certainly suffer from sick and dying whales and a market of contaminated whales.

The IWC has competence to address these issues under Article V(1) as a statistical or biological record. Levels of contaminants in whales and whale meat constitute a biological record reflecting the health of the whale. It also indicates the suitability of the meat for human consumption and its entry into commerce. The IWC has been cognizant of this link as early as 1979, when it directed member governments to take "all practicable measures to remove existing threats to the marine environment," because degradation of the marine environment negatively affects whales and subsequently harms people.⁴⁷

It seems self-evident that such regulations are "necessary" to fulfill the conservation and

⁴⁷Chairman's Report of the Forty-Fifth Annual Meeting (1992-1993), "Resolution on the Preservation of the Marine Environment," Appendix 13, at 36 (1994); Annual Report of the 31st Meeting (1979-1980), "Resolution on Preservation of the Habitat of Whales and the Marine Environment, Appendix 10, para. 7, at 32 (1981).

whaling objectives of the ICRW and to provide for optimum utilization. The comprehensive collection and assessment of contaminant levels in whales and the marine environment will provide essential data concerning whale health and important trends in marine pollution. If this information suggests that whales are sick and dying due to marine pollution, the IWC may need to reduce the number of whales that may be harvested. By tracking the levels of contaminants in whale meat from particular species harvested at particular times of year from particular areas, the IWC may identify when and where to open and close whale fisheries and whether other conservation measures are necessary.

Moreover, the scientific basis for regulations relating to contaminant levels in whales and whale meat may already exist. Reports indicate serious whale meat contamination from heavy metals and organic compounds. For example, Japanese scientists recently tested whale meat sold in Japan and detected mercury levels more than 1,600 times the government permitted levels of 0.4ppm for mercury and 0.3ppm for dimethylmercury, which could cause acute mercury poisoning.⁴⁸

In this regard, earlier IWC action relating to marine pollution and tracking of whale meat is entirely consistent with the objectives of the ICRW and the competence of the IWC. In particular, the IWC has begun to connect marine contamination and whale meat consumption by encouraging member States to submit information to the IWC relating to possible human health effects resulting from the consumption of whale meat⁴⁹ and to take measures to reduce pollution that may cause negative health effects from the consumption of cetacean products.⁵⁰

These efforts, as well as the work of the Scientific Committee relating to the relevance of non-natural mortalities to future RMP catch limit calculations,⁵¹ dovetail nicely with annual reports on stockpiles and sale of whale meat, and DNA testing procedures for identification of whale meat.⁵² The member States now agree on the inclusion of DNA testing for monitoring and

⁴⁸*New Whale Meat Health Scare in Japan*, Mainichi Shimbun (May 4, 2000). The scientists recorded mercury levels of 645 ppm in a boiled whale liver product. The study was based on a survey of ready-to-eat boiled whale liver and kidney dishes that were sold in Tokyo and Wakayama Prefecture in July 1999.

⁴⁹Chairman's Report of the Fiftieth Annual Meeting (1997-1998), "Resolution on IWC Concern about Human Health Effects from the Consumption of Cetaceans," Appendix 12, IWC Resolution 1998-11, at 47 (1999).

⁵⁰Chairman's Report of the Fifty-First Annual Meeting (1998-1999), "Resolution on Health Effects from the Consumption of Cetaceans," Appendix 5, IWC Resolution 1999-4, at 62 (2000).

⁵¹Chairman's Report of the Forty-Ninth Annual Meeting (1996-1997), "Resolution on Environmental Change and Cetaceans," Appendix 7, IWC Resolution 1997-7 (1998).

⁵²Chairman's Report of the Forty-Seventh Annual Meeting (1994-1995), "Resolution on Improving Mechanisms to Prevent Illegal Trade in Whale Meat," Appendix 7, IWC Resolution 1995-6, at 45 (1996). *See also* Chairman's Report of the Forty-Ninth Annual Meeting (1996-1997), "Resolution on Improved Monitoring of Whale Product Stockpiles," Appendix 2, IWC Resolution 1997-2 (1998).

inspection of commercial whaling operations in the RMS and RMP.⁵³

Similarly, testing of whale meat for contamination could provide essential information concerning threats to whales and for verifying the legitimacy of quotas established under the RMS/RMP. Without the information that testing would provide, the RMS probably cannot ensure that total catches over time are within the limits set under the RMS, as required by Resolution 1994-5.

B. Inclusion of Humane Treatment Issues in the RMS

The humane treatment of whales also falls within the ICRW's objectives, because the manner in which a whale is killed relates to the "proper conservation of whale stocks" and the "orderly development of the whaling industry." The manner in which a whale is killed also has clear links to the "utilization of whale resources." Article V(1) confirms this point. It grants the IWC an express mandate to consider "time, methods, and intensity of whaling." All three words, "time, methods, and intensity," relate to restrictions on the manner in which whales are killed.⁵⁴ They indicate that the IWC may establish regulations relating to the length of time a ship may hunt whales, the type of ship that can be used, the methods to pursue whales, and the methods to kill whales.

The member States appear to interpret "methods" in this way. The ban on the use of the cold grenade harpoon in 1980 noted the opportunity to develop "alternative killing methods."⁵⁵ In 1958, the IWC adopted an amendment calling on States to regulate the "methods" for capturing and killing whales and other marine life.⁵⁶ The IWC has also urged the "prompt adoption" of more efficient methods of killing whales to reduce "cruelty and inhumanity" in

⁵³Chairman's Report of the Fifty-First Annual Meeting (1998-1999), "Resolution on DNA Testing," Appendix 9, IWC Resolution 1999-8, at 65 (2000). This resolution specifically requests that the Scientific Committee give advice to the IWC on "the development and implementation of a transparent and verifiable system of identification and tracking of products derived from whales taken under the RMP, and to provide a means to differentiate such products from those taken outside the RMP."

⁵⁴Under the basic rule of interpretation, *noscitur a sociis*, "words are to be read in context with the neighboring words in the same document." REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 233 (1975). This rule finds expression in international law as the maxim, *ejusdem generis* (also called *generalia specialibus non derogant*), which means "of the same kind, class, or nature," and assesses other words and clauses for restrictions on general, ambiguous phrases. See MYRES S. MCDUGAL ET AL., THE INTERPRETATION OF INTERNATIONAL AGREEMENTS 200-206 (1994). See also 2A JABEZ G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §47.17, at 166 (Norman J. Singer ed., 4th ed. 1984).

⁵⁵Chairman's Report of the 34th Meeting (1981-1982), "Resolution on the Use of the Cold Grenade Harpoon," Appendix 4, at 38 (1983).

⁵⁶Birnie, INTERNATIONAL REGULATION OF WHALING 246 (1985), citing IWC 10th Report, p. 7, para. 15, 1959.

aboriginal whaling.⁵⁷

Even if the term "methods" does not extend to the "concept" of humane treatment, the IWC has competence under Article V(1) to regulate the "types and specifications of gear and apparatus which may be used." This authority permits the IWC to regulate the type of killing devices used in whaling as a gear type or specification, because the degree of humaneness of the kill will turn on the type of gear used.

Moreover, other humane treatment issues, such as data requirements for time to death, constitute "statistical and biological records," which the IWC has authority to regulate under Article V(1). The member States, apparently using these provisions of Article V(1), agreed to keep records regarding "catching operations using powered vessels with mount harpoon guns hunting extensively for minke, bottlenose, pilot and killer whales."⁵⁸

Humane treatment regulations are also "necessary", that is, appropriate, for carrying out the ICRW's conservation and whaling objectives and to provide for optimum utilization. The inhumane treatment of whales has generated serious negative publicity for the whaling industry. In fact, the IWC banned the use of the cold grenade harpoon for killing minke, because of "the broadly held view" that its use "is cruel and attracts adverse criticism of the whaling industry."⁵⁹ Assuming that the whaling industry includes whalewatching, the simple fact that commercial whaling is cruel detracts from optimum utilization of whales. The IWC could also adopt humane measures to deflect criticism of commercial whaling. As current public opinion appears largely against the lethal utilization of whales, measures to enhance the image of whalers may ensure or provide for the continued lethal use for whales.

The IWC has taken other measures to ensure that the most appropriate killing methods are based on scientific findings. It has devised an action plan to advise member States concerning humane killing, which includes recommendations for equipment and methods, indications of insensibility and death, assessment of cause of death, collection and provision of information on time of death, and assessment of physiological status of hunted animals.⁶⁰ It has

⁵⁷Chairman's Report of the Thirty-Seventh Annual Meeting (1984-1985), "Resolution on Humane Killing in Aboriginal Subsistence Whaling," Appendix 3, at 26 (1986). The IWC later welcomed the steps taken by aboriginal groups to improve the humaneness of their hunts but urged them to reduce further "any unavoidable suffering caused to whales in such hunts." Chairman's Report of the Forty-Ninth Annual Meeting (1996-1997), "Resolution on Improving the Humaneness of Aboriginal Subsistence Whaling," Appendix 1, IWC Resolution 1997-1 (1998).

⁵⁸Twenty-Seventh Report of the Commission (1975-76), "Review of Reporting Requirements," Item 10, p. 25 (year).

⁵⁹Chairman's Report of the 34th Meeting (1981-1982), "Resolution on the Use of the Cold Grenade Harpoon," Appendix 4, at 38 (1983).

⁶⁰*Id.* See also Chairman's Report of the Forty-Fifth Annual Meeting (1992-1993), "Resolution on Humane Killing," Appendix 1, at 30-31 (1994)(encouraging member States to continue progress on the action plan). The IWC revised the action plan at its Forty-Seventh Meeting. Chairman's Report of the Forty-Seventh Annual Meeting

also adopted resolutions that encourage member States to direct their scientific research on whales to non-lethal research methods⁶¹ and to promote the development of humane killing methods.⁶²

IV. Conclusion

As evidenced by the ordinary meaning of the ICRW and the practice of the IWC, the IWC has broad competence to address a wide range of issues consistent with the ICRW's objectives to conserve whales and to develop the whaling industry. While the IWC need not link each conservation measure to the goal of promoting the orderly development of the whaling industry, it cannot ignore that whaling goal altogether. The IWC must maintain both the conservation and whaling industry objectives of the ICRW; it cannot completely separate the two.

In addition, the requirement of Article V to adopt regulations that are "necessary" to fulfill these objectives and to provide for optimum utilization means that the regulation must be appropriate for these purposes. Consistent with this legal meaning, the word "necessary" does not require a finding that other less restrictive measures are available or that the measure will attain the objectives of the convention on its own.

These legal conclusions show that the IWC has competence to address issues relating to human and cetacean health deriving from marine pollution, including testing for contamination in whale meat. The IWC also has competence to address humane treatment issues. Given the importance of these issues for ascertaining the health of whale populations and the potential collapse of the whaling industry due to serious whale meat contamination, these issues could appropriately be considered within the context of the RMS.

(1994-1995), "Revised Action Plan on Whale Killing Methods," Appendix 1, at 42 (1996).

⁶¹Chairman's Report of the Forty-Second Meeting (1989-1990), "Resolution on Redirecting Research Towards Non-Lethal Methods," Appendix 5, at 49 (1991).

⁶²Chairman's Report of the Forty-Fourth Meeting (1991-1992), "Resolution on Humane Killing," Appendix 1, at 38 (1993).