UNIVERSITÉ DU QUÉBEC À MONTRÉAL

LE RÉGIME INTERNATIONAL BALEINIER: ÉVOLUTIONS À TRAVERS LE DÉVELOPPEMENT DURABLE

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CECILIA THOMPSON

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LIST OF ABREVIATIONS

CITES Convention on International Trade in Endangered Species of Wild Fauna and Flora

DJILP Denver Journal of International Law and Policy

ELQ Ecology Law Quarterly

GIELR The Georgetown International Environmental Law Review

GLEP Global Environmental Politics

ICRW International Convention for the Regulation of Whaling

IWC International Whaling Commission

JARPA Japanese scientific whaling Program in the Antarctic

JARPN Japanese scientific whaling program in the North Pacific

JDI Journal du Droit International

LNTS League of Nations Treaty Series

MqJICEL Macquarie Journal of International and Comparative Law

RECIEL Review of European Community and International Environmental Law

RMP Revised Management Procedure

RMS	Revised Management Scheme
SOS	Southern Ocean Whale Sanctuary
UNCLOS	United Nations Convention on the Law of the Sea
UNTS	United Nations Treaty Series

RÉSUMÉ

La réalisation effective du développement durable est actuellement un thème à la fois populaire et controversé. Il répond à l'échec de politiques de développement, à la pression des modes actuels de croissance économique et à la prise de conscience que les ressources de la planète sont limitées. Le concept de développement durable a été construit pour contribuer à changer la répartition de la richesse mondiale et à restreindre l'exploitation des ressources naturelles en faveur des générations futures. Ceci s'est fait notamment au travers d'une série de conférences, de documents de réflexion et d'instruments de droit international.

Le développement durable appelle un équilibre délicat entre des intérêts concurrents : la protection de l'environnement, l'équité sociale et le développement économique. Il ne peut être réalisé que si un équilibre est trouvé entre ces trois domaines, en éliminant la dominance de l'un au détriment des autres. L'identification des tensions entre ces intérêts ouvre la voie à l'adoption de compromis permettant la réalisation de cet équilibre.

Ces conflits d'intérêts sont liés à l'évolution globale de l'exploitation des ressources naturelles, à la quête de gains économiques et à la distribution inéquitable des ressources. Les préoccupations environnementales sont souvent subordonnées aux prérogatives du développement économique et du gain financier, et les politiques environnementales ne prennent pas en compte les questions sociales. Pour réaliser le développement durable, il y a besoin d'intégrer ces approches et de redresser les déséquilibres causés dans le passé.

Ce mémoire utilise le régime international baleinier comme étude de cas pour examiner ces tensions et la mesure dans laquelle ces trois domaines ont été intégrés au sein d'une approche axée sur le développement durable. La première partie illustre comment, dans la phase initiale des règlements de chasse à la baleine suite à l'adoption de la Convention internationale pour la réglementation de la chasse à la baleine de 1946, la chasse n'a pu être limitée car les États poursuivirent allègrement cette activité lucrative. Ceci mena à la dominance de l'exploitation sur la conservation, et des intérêts nationaux sur l'intérêt commun. L'adoption du moratoire sur la chasse commerciale en 1982 représenta un retournement de politique avec une dominance de la préservation et de l'intérêt commun. La deuxième partie illustre comment la Commission baleinière internationale, ayant pour mandat la supervision de la mise en œuvre de la Convention, a échoué à rééquilibrer ces préoccupations dans ses trois politiques principales, soit la mise sur pied de sanctuaires (l'écologie), le contrôle de la chasse aborigène (l'équité), et l'octroi de permis de chasse à des fins de recherche scientifique (l'économie). La conclusion montre que l'évolution du développement durable au sein du régime baleinier suit celle observée généralement au niveau international, met en lumière les conflits d'intérêts entre ces trois domaines, et suggère de faire du développement durable un axe central du régime baleinier.

Mots-clés : whaling, International Whaling Commission, sustainable development, ecology, equity, economy.

"Like it or not, the whale is now the symbol of mankind's failure to manage the world's resources responsibly"

Tønnessen and Johnson[1]

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[1]*The history of modern whaling* (London: C. Hurst and Company. Canberra: Australian National University Press, 1982) at 675.

INTRODUCTION

The achievement of sustainable development is one of the most current topics of today. It has been suggested as a response to the failure of development policies, the pressure of present patterns of economic development and the realization that the resources of the earth are finite. Its concept has evolved in international law through a variety of conferences, documents and conventions.

The standard definition of sustainable development has been coined in the *Brundtland Report* of 1987[2], which is the final document prepared by the United Nations World Commission on Environment and Development, as ("...") development which meets the needs of the present without compromising the ability of future generations to meet their own needs"[3]. It contains two essential messages – the need to change the present distribution of global wealth and to set a limit to the exploitation of the world's natural resources for future generations. As such it calls for the delicate balance of competing interests represented by three areas – environmental protection, social equity and economic development. The effective achievement of sustainable development can only be guaranteed when these complementary areas can be simultaneously balanced and integrated through the elimination of a bias towards one or the other, in other words, once the competing interests between them have been addressed and solved.

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[2] World Commission on Environment and Development. *Our Common Future* (Oxford: Oxford University Press, 1987).
[3] *Ibid.* at ix

Conflicts of interests have arisen as a result of demands between environmental protection, social equity and economic development. These are linked to the global patterns of natural resource depletion, the quest for rapid economic gains and the inequitable distribution of resources. This is essentially due to an imbalance and a lack of integration between the three areas of sustainable development. Environmental concerns are often subordinate to prerogatives of economic development and financial gain, and environmental policies may fail to adequately take into account social issues. For sustainable development there is a need to integrate these approaches and redress the imbalance that has occurred in the past.

This present thesis uses the international whaling regime as a case study for examining the competing interests between these three areas of development. It focuses in particular on the attempts of the International Whaling Commission to redress some of the imbalances through the adoption of guidelines for whaling and policies for the management of whales as a natural resource. It illustrates how a shift has occurred from overexploitation to conservation, that is from state to common interests, and the type of measures which have been introduced to preserve whales and regulate continued whaling, beyond the moratorium on commercial whaling adopted in 1982. While it is beyond the scope of this thesis to resolve the conflicts of interests identified or to provide a blueprint for a sustainable development framework to be applied to the international whaling regime, it does provide a helpful starting point for the consideration of some of the major issues which would need to be addressed.

This introduction sets out the nature of the problem with a view to highlighting some of the issues underlying the competing areas for the achievement of sustainable development with respect to the international whaling regime. In addition, it provides an overview of the analytical framework and methodology used, and describes the plan which sets out the structure of the thesis.

0.1 Presentation of the problem

The concept of sustainable development has increasingly become the main subject of international debates, and has been referred to in many areas and sectors including government, academia, and civil society as a catch-all phrase in the attempt to conciliate development and respect for nature, the imperatives of the present with the preoccupations of the future, and the environmental policies of the developed and the developing countries[4]. Sustainable development has evolved in response to the pressing need to address the inequalities which have arisen as a result of the impact of human activity and interference in the environment. In particular, the concept has developed in response to a quest by the international community to establish a new world order, to address the limits imposed by finite resources and the need to share these equitably among all people in the North and South. The aim was thereby to avoid the dilemma of the 'tragedy of the commons'[5].

The "sustainable development" concept has been criticized as being a contradiction per se, as development cannot, by definition, be infinite and therefore sustainable[6]. Some authors have gone as far as questioned whether it is even possible to promote development in the long term while, simultaneously, providing present and future generations with a more equitable distribution of wealth[7]. Furthermore, it has been noted that sustainable development goes beyond mere economic

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[4] Marie-Claude Smouts, dir., Le développement durable : les termes du débat Paris, Armand Colin, 2005 à la p. 1.

[5] The 'tragedy of the commons' is an influential article written by Garrett Hardin which appeared in the journal *Science* in 1968. It describes a dilemma in which multiple individuals acting independently in their own self interest can destroy a shared limited resource even when it is clear that it is not in anyone's long term interest for this to happen.

[6] Regroupement national des conseils régionaux de l'environnement du Québec, « Évolution conceptuelle et historique du développement durable » (Rapport de recherche, deuxième édition, 1998) à la p. 5.

[7] Claude Offredi, dir., *La dynamique de l'évaluation face au développement durable*, Paris, Budapest, Torino, l'Harmattan, 2004 à la p. 16.

development. It provides the links between the economy, the environment and society, which requires a shift in paradigm[8].

The lack of clarity of the concept has resulted in inherent tensions in the discourse on sustainable development, and in particular in the application of its core three pillars identified in the *Brundtland Report*[9] as ecology, equity and the economy. These tensions have, in turn, been reflected in the various international environmental treaties, the management of natural and living resources, and the declarations and action plans adopted by, *inter alia*, the world summits held in Stockholm, Rio and Johannesburg in 1972, 1992 and 2002 respectively. It is clear from the literature that sustainable development can best be achieved by attaining a balance between its three pillars – ecology, equity and the economy - which often involves compromises to address inherent tensions and conflicts of interests between and among them. In situations where an imbalance exists between these three pillars, or one or more pillars may dominate, sustainable development cannot be achieved.

The international whaling regime provides an interesting case for analysing the tensions between the three pillars of sustainable development. Although extensive research has been undertaken on both sustainable development and the international whaling regime, very little research has been done on the impact of the one upon the other.

The regulation of whaling became a dire necessity in the early 20th Century in response to the overexploitation of whales as a result of the advent of the modern whaling industry and the intent by whaling states to secure rapid economic gains. A

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[8] Philippe Crabbé, « Le développement durable : concepts, mesures et déficiences des marchés et des politiques aux niveau de l'économie ouverte, de l'industrie et de l'entreprise » (Document hors-série no. 16 Ottawa : Industrie Canada, 1997) à la p. 8.

number of countries thus recognised the need to regulate commercial whaling and to promote international cooperation in this regard, if whale stocks were to be preserved, with a view to maintaining the whaling industry. This led to the adoption of a series of international conventions and agreements regulating commercial whaling between 1918 and 1939, which were, however, largely unsuccessful, until the adoption in 1946 of the *International Convention for the Regulation of Whaling* (ICRW)[10].

During the initial period of the international whaling regime from 1949 to 1972, the conflicts of interests between member states and other actors in the areas of environmental protection, social equity and economic development have become increasingly apparent. Despite attempts to regulate whaling through the imposition of quotas, state interests to continue whaling for economic gain continued to dominate over common interests to preserve whales as a natural resource, leading to social inequity for present and future generations, with a clear bias towards economic development at the expense of environmental protection and social equity. This situation can be described as amounting to the 'tragedy of the commons'[11] or as characterized by one author, in a more nuanced manner, as the orderly gold rush[12].

As of 1972, with the adoption of the *Stockholm Declaration*[13], and other documents and treaties in the field of international environmental law, as well as the rise of the environmental movement, increasing pressure was exercised on the

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[9] ***Supra*** note 2.
[10] International Convention for the Regulation of Whaling, 2 December 1946, 62 Stat. 1716, 161 U.N.T.S.
[11] ***Supra*** note 5.
[12] P. B. Payoyo, Cries of the Sea, world inequality, sustainable development and the common heritage of humanity (the Hague, London, Boston: Martinus Nijhoff Publishers, 1997) at 366.
[13] *Stockholm Declaration on the Human Environment*, 16 June 1972, U.N. Doc. A/CONF.48/14, 11 I.L.M. 1461 (1972).

members of the IWC to shift their focus towards greater conservation of whales, marking a move away from the 'tragedy of the commons' towards common interests. This trend culminated in the decision by the IWC to introduce a moratorium on commercial whaling in 1982 which is still in force today.

The evolution of three major policies of the IWC, namely, the establishment of whale sanctuaries, aboriginal subsistence whaling and the scientific research exemption, bring to light some of the inherent tensions within the international whaling regime which mirror the conflicts of interests which have emerged from the attempts by the international community to establish a balance between environmental protection, social equity and economic development.

The establishment of whale sanctuaries provides a preventive measure to address the serious depletion of whales, and ensure their recovery in the long-term. The tensions within the IWC regarding the establishment of sanctuaries centre on whether they strengthen its conservation agenda, conform to the twin objectives of the ICRW to preserve whales for future use, or whether they are even necessary in the light of the moratorium on commercial whaling or the adoption, by the IWC, of a system for the effective management of whales.

Aboriginal subsistence whaling has been subjected to special regulation and has been exempted from the moratorium. Conflicts of interests have arisen around the allocation of subsistence whaling quotas to states on the basis of a number of disputed criteria. These include the definition of the term 'aborigine', the requirements that aboriginal communities must demonstrate both a cultural and nutritional subsistence need for whaling, as well as that the whale products will be consumed locally by the aboriginal communities themselves.

Scientific research whaling provides for the taking of whales for purposes of scientific research exempting states from IWC regulations. Tensions have arisen as it has been argued that some states continue whaling for economic gain under the guise of scientific research, in pursuit of illegitimate ends, in defiance of the moratorium and whale sanctuaries. This is threatening the co-existence of both environmental protection and economic development.

On the basis of the issues identified, this research attempts to demonstrate that:

a) The international whaling regime has largely followed the evolution of the sustainable development agenda at international level, in the following two distinct phases: the dominance of exploitation of whales and the 'tragedy of the commons', and the shift from state interests to common interests and the dominance of conservation over exploitation.

b) There exist competing interests among the areas of environmental protection, social equity and economic development, resulting in the failure to effectively achieve sustainable development within the international whaling regime.

A number of steps need to be taken in order for the international whaling regime to be compatible with sustainable development.

0.2 Analytical framework

The main conceptual tool used for the analysis of the problem of competing interests in the areas of environmental protection, social equity and economic development identified in the previous section is that of sustainable development. The reason for

this choice is that sustainable development "aims to promote harmony among human beings and between humanity and nature"[14], and proposes a potential framework for the management of living resources and ecosystems in an integrated manner. The analytical framework of sustainable development will be used as a lens to analyse how the international whaling regime has evolved and developed. This will be done through the perspective of the three pillars of sustainable development – ecology, equity and the economy – in order to demonstrate the conflicts of interests and the common interests, and thereby expose the challenges inherent in the search for a balance between the said three pillars.

For the purposes of the analysis, the timeframe will cover the period from 1946 to 2003, but will focus on three distinct periods: the overexploitation of whales as a natural resource; the trend towards common interests culminating in the moratorium on commercial whaling; and the overall failure to balance the three pillars and thus achieve sustainable development.

0.2.1 Sustainable development, ecology, equity and the economy, what imbalances?

Prior to 1972, protection of the ecology was sporadic and partial. This has changed dramatically, with the advent of problems resulting from economic development after the Second World War[15]. Some research shows how development seemed incompatible with the requirements of ecological protection, as it creates obstacles to the equitable development of peoples. This was due to: European expansion and colonialism which conquered nature and destroyed it through over-exploitation in order to meet the needs of an ever increasing population growth; a desire to control

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[14] World Commission on Environment and Development, ***Supra*** note 2 at 73.

the means of production, and; scientific progress and the quest of the capitalist and western world for power. In this case, the management of development is considered subordinate to the logic of international economic relations[16].

Other research clearly demonstrates how economic development, again predominantly spurred by western countries through exploitation and colonialism, has led to the impoverishment of the planet both in terms of resource exploitation and of increased poverty of those populations who have failed to reap the benefits from this development. This has led to an imbalance in the ecosystem which has been exacerbated by the increase in the world's population and the needs for technology which has exceeded the capacity of the environment to produce the needed resources to sustain development[17]. Furthermore, it has been claimed that there cannot be any coherence between healthy development and ecological preservation, when applying the logic of economics. It is, therefore, development that predominates, not the ecology[18]. On the issue of sustainable development and trade, debates have centred on the compatibility between free trade and sustainable development, and whether there is a need to regulate certain areas of trade in order to take into account the needs of communities as well as the ecological and social costs involved. Doubt has been

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[15] Jean-Maurice Arbour et Sophie Lavallée, *Droit International de l'Environnement*, Cowansville (Qc), Bruxelles, Yvon Blais, Bruylant, 2006 à la p. 32.
[16] Jean-Claude Fritz, « Le développement comme système de domination de la nature et des hommes » dans C. Apostolidis, G. Fritz et J-C. Fritz, dir.,*L'humanité face à la mondialisation : droit des peuples et environnement*, Paris, L'Harmattan, 1997 à la p. 95.
[17] Wolfgang Sachs et Gustavo Esteva, *Des ruines du développement*, Montréal, Écosociété, 1996 à la p. 49.
[18] Serge Latouche, « Développement durable : un concept alibi, main invisible et mainmise sur la nature » (1994) *Revue Tiers Monde*, 35/137 à la p. 79.

cast, therefore, at the suggestion that free trade leads to increased revenue, which in turn leads to ecological protection and sustainable development[19].

In the early 1970's the links and balance between population growth, ecological protection, the pursuit of equity, and economic development have also been discussed at length in the research, although in a disparate manner instead of within the framework of a comprehensive approach. The majority of this research has centred on the theory that resources of the planet are finite, and unless checked, could lead to disaster. The influential 1972 Club of Rome report entitled *The Limits to Growth*[20] modeled the consequences of a rapidly growing world population and finite resources. It concluded that the cumulative effects of, among others, overpopulation, pollution and the disappearance of natural resources could destroy the very foundations of society[21], and lead to exponential growth. Critics of this study argue that it is missing an essential requirement for sustainable development, namely, the integration of cultural and social norms which value the environment and reduce the gap between rich and poor, thereby limiting the consequences of such growth. Sustainable development in this sense is a paradigm which challenges approaches exclusively centred on the economy or the ecology by integrating a human dimension and emphasizing the need to address the ecology, equity and the economy

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[19] M. Damian, B. Chaudhuri et P. Berthaud, « La libéralisation des échanges est-elle une chance pour le développement durable? » (1997) *Revue Tiers Monde*, 38/150 à la p. 428 et la p. 431.
[20] Donella Meadows et al., *Limits to Growth.* A Report for the Club of Rome's Project on the Predicament of Mankind (New York: Universe Books, 1972)
[21] Ved Nanda & Georges Pring, *International Environmental Law and Policy in the 21st Century* (Irvington-on-Hudson, New York: Transnational Publishers, Inc., 1994) at 83.

simultaneously[22]. A balance between these three areas should thus transcend disciplines and traditional sectors of analysis[23].

Reference has been made to the fact that, in addition to ecological interdependency, there are various economic, social and political interdependencies between states which are integral to ecological concerns[24]. Increasingly, research has focused on the need to address the inequalities which have arisen from the focus of one area to the detriment of others, and the necessary integration of these elements in a sustainable development framework which may provide the means necessary to achieve this balance between ecology, equity and the economy.

0.2.2 Sustainable development – what core principles?

Since the early 1980's, the concept of sustainable development rapidly gained ground, and has, over the past 25 years, been reflected in various Conventions, declarations and other documents which act as benchmarks of its evolution by further clarifying the concept[25].

The core principles of sustainable development are unclear, and the majority of these have as yet not crystallized into positive international law. Some authors have identified underlying themes such as development of principles of general application, institutional arrangements to implement sustainable development,

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[22] Nicole Huybens et Claude Villeneuve « La professionalisation du développement durable : au-delà du clivage ou de la réconciliation écologie-économie » (2004) 5 VertigO 2 à la p. 4.
[23] Alexandre Kiss, « Environnement et développement ou environnement et survie? » (1991) 2 J.D.I. à la p. 264.
[24] K. Bosselman, "Governing the Global Commons : the Ecocentric Approach to International Environmental Law", in M. Prieur et S. Doumbé-Billé (dir), *Droit de l'environnement et développement durable* (1994) Limoges, PULIM à la p. 94.
[25] Regroupement national des conseils régionaux de l'environnement du Québec, ***supra*** note 6 à la p. 4.

principles to inform the role of various actors, compliance mechanisms and financial resources. One author has identified the core principles of sustainable development as integration of environment and development, application of equity between States, consideration of the needs of present and future generations and non-exhaustion of renewable natural resources[26]. Another has suggested that the cornerstone of sustainable development is equity which is to be addressed through the application of three basic principles: the 'conservation of options' for future generations; the 'conservation of quality' of the resource base, and the 'conservation of access' as the legacy from past generations[27].

The international community has yet to arrive at a consensus regarding an agreed core set of principles making up the concept of sustainable development. It can be said, however, that there are three themes which are recurrent, and which were brought together at the Rio Conference, namely, those of the sustainable use of natural resources, the integration of environmental protection and economic development, the right to development[28], and the pursuit of equity of allocation of resources both within the present generation and for future generations[29]. Although brought together in a systematic manner at Rio, these terms are not new and go back to the core elements detailed in the *Brundtland Report*[30]. These include the ecology, equity and the economy and for the purposes of this thesis will be referred to throughout this paper.

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[26] Peter Sand, "International Law in the Field of Sustainable Development" in *British Year Book of International Law*, No. 65 (Oxford: Oxford University Press (1995) at 335-381.
[27] Edith Brown Weiss, In fairness to future generations : international law, common patrimony, and intergenerational equity (The United Nations University: Hotei Publishing (1989) at 38.
[28] Kiss, ***supra*** note 23 at 267.
[29] M.A. Fitzmaurice, *International Protection of the Environment* (The Hague: The Hague Academy of International Law, Tome 293, Martinus Nijhoff Publishers, 2002) at 170.
[30] ***Supra*** note 2 at 57 to 74.

With regard to its potential normative value, it has been argued that sustainable development cannot be considered a norm of international law of the traditional kind, as reflected in Article 38(1) of the Statute of the International Court of Justice. Although sustainable development was considered merely a concept in the Judgement of the ICJ in the *Gabcikovo-Nagymaros* case, dissenting Judge Weeramantry considers it "a principle with normative value"[31]. Despite frequent use of the term, it has been argued that it can neither be employed as a principle of law and applied to establish rights and duties of states, nor can it be considered as a norm-constraining behaviour[32].

0.2.3 Ecology, equity and the economy – what integration?

The extent of the integration of the three pillars of sustainable development – ecology, equity and the economy - and the balance between these has varied over the past decades as illustrated in the following sections.

It was at the 1972 Conference on the Human Environment in Stockholm that increased recognition was granted to the need to integrate the environment and development in a sustainable manner over the long term, in response to the large number of ecological crises which were threatening the planet[33]. The resulting *Stockholm Declaration*[34] which contained twenty-six guiding principles, represented the first global consensus on the nature and scope of the environmental challenge that confronted the world. The principles and recommendations adopted at Stockholm

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[31] Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgement, I.C.J. Reports 1997, p. 7 (Separate opinion of Vice-President Weeramantry).
[32] Vaughan Lowe, "Sustainable development and unsustainable arguments" in Boyle & Freestone, eds., *International Law and Sustainable Development, part achievements and future challenges* (Oxford: Oxford University Press, 1999) at 23.
[33] Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law, Principles, Practices and Prospects*" (Oxford: Oxford University Press, 2004) at 17.

were to serve as international and national guidelines for the future conduct of states on environment and development issues. Although the term "sustainable development" had not yet been coined, the Preamble to the *Stockholm Declaration* captures its essence when it refers to the need "To defend and improve the human environment for present and future generations ("...") which is to be pursued ("...") together, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development"[35]. Stockholm introduced the inherent link between the environment and economic development, which was later to be the main theme of the Rio Conference, and stressed the importance of their integration requiring "an integrated and coordinated approach to ("...") development planning so as to ensure that ("...") development is compatible with the need to protect and improve the human environment"[36]. Furthermore, the *Stockholm Declaration* made the link between environmental protection and human rights[37].

The concept of "sustainable development" was the subject of the 1987 *Brundtland Report*[38] which marked a turning point in the popularization of the concept. The Report expressed particular concern with the achievement of socio-economic goals such as access to resources and redistribution of the world's wealth, and focused primarily on the issue of equity. It noted the widespread damage that humankind was inflicting on the environment with serious repercussions for future generations. It stated that critical global environmental problems were primarily the result of the enormous poverty of the South and the non-sustainable patterns of consumption and production in the North. While sustainable development takes into

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[34] ***Supra*** note 13.
[35] ***Ibid***. at Preamble, Paragraph 6.
[36] *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/6/Rev.1, (1992), 31 ILM 874 (1992) at Principle 13.
[37] ***Supra*** note 13 at Principle 1.
[38] ***Supra*** note 2.

account economic development, this must respect the ecological limitations of the planet and the natural environment which is source of life[39]. The Report called for a strategy that united development and the environment – described as "sustainable development" and defined it as that which "meets the needs of the present without compromising the ability of future generations to meet their own needs"[40]. Furthermore, it called on international organisations to focus on the link between trade and the environment[41]. It has been widely viewed that the adoption of the *Brundtland Report* was the moment at which sustainable development became a broad global policy objective[42].

The 1992 *Rio Declaration on Environment and Development*[43] reaffirms the contents of the *Stockholm Declaration*[44] on which it seeks to build, but with a new approach and philosophy. Although it failed to provide a definition of sustainable development, its central concept, as compared to Stockholm, is sustainable development with a shift from nature to that of the human being as the centre of the "concerns of sustainable development"[45]. It set the goal of establishing an equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people[46]. It highlighted the notion that economic development was essential in addressing problems of environmental degradation. This was considered by some authors as a serious step back, contrary to the interests

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[39] ***Ibid***. at 66.
[40] ***Ibid***. at ix.
[41] ***Ibid***. at 430.
[42] Marie-Claire Cordonier-Segger et al., "Weaving the rules of our common future : principles, practices and prospects for international sustainable development" (Policy Paper, Centre for International Sustainable Development Law, Faculty of Law, McGill University, Montreal, Canada, 2002) at 15.
[43] ***Supra*** note 36.
[44] ***Supra*** note 13.
[45] ***Supra*** note 36 at Principle 1.
[46] ***Ibid***. at Preamble.

of environmental protection[47] and the spirit of the *Brundtland Report*[48]. Nevertheless, the Declaration affirms that in order to achieve sustainable development, environmental protection must "constitute an integral part of the development process ("...")[49]. Furthermore, it advances certain principles which are key elements of sustainable development such as the common but differentiated responsibilities of states[50], the precautionary approach[51] which underlies the principle of equity, the polluter-payer principle[52], and environmental impact assessment[53] which is essential for a balance between the protection of the ecology and equity, and management and development[54].

The Rio Conference adopted *Agenda 21*[55] which is a comprehensive plan of action proposing to ensure economic efficiency, social balance and the preservation of resources in a series of initiatives to be taken in the service of sustainable development.

The objectives of the 2002 World Summit for Sustainable Development held in Johannesburg were to review the achievements of the Rio Conference and, in particular, the status of the implementation of *Agenda 21*. The proposed aim of the Summit was to ensure a balance among economic, social and environmental concerns and reinforce the global commitment to sustainable development. The resulting

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[47] M. Pallemaerts. "International Environmental Law from Stockholm to Rio : back to the future?" (1992) 11 RECIEL 3 at 262.
[48] According to the Brundtland Report, the protection of ecology is considered a pre-condition of sustainable development, neither a result thereof nor of economic development.
[49] ***Supra*** note 36 at Principle 4
[50] ***Ibid.*** at Principle 7
[51] ***Ibid.*** at Principle 15.
[52] ***Ibid.*** at Principle 16.
[53] ***Ibid.*** at Principle 17.
[54] ***Ibid.*** at Principle 20.
[55] *Agenda 21*, A/Conf.151/26 (Vols. I, II and III).

Johannesburg Declaration on Sustainable Development[56] and the *Johannesburg plan of Implementation*[57] focused on practical and action-oriented steps to address the world's problems, however, failed to advance the debate on sustainable development. Instead of seeking means to impose an equilibrium between the three pillars and integrate these into a sustainable development approach, economic development was pushed to the fore, at the expense of environmental protection and social equity. In addition, the World Summit introduced few innovations regarding sustainable development as compared to the status of debates at Stockholm and Rio, and failed to propose concrete tools for the implementation of sustainable development in practice.

0.3 Methodology

The methodology adopted for the purpose of this research will essentially consist of:

a) An analysis of the concept of sustainable development which will draw on international law as reflected in Article 38 of the Statute of the International Court of Justice (ICJ), in particular international conventions and doctrine[58]. To this end, a number of Conventions will be reviewed in order to examine how these have included references, and are relevant to sustainable development. This will allow highlighting the common elements as well as the general trends regarding the conceptualisation and application of sustainable development to the management of whales and the protection of their ecosystem. With regard to doctrine, reference will be made to articles and books written on the definitions, terms and interpretations of

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[56] Johannesburg Declaration on Sustainable Development, Report of the World Summit on Sustainable Development, 4 September 2002, UN Doc. A/CONF.199/20.
[57] Johannesburg Plan of Implementation, Report of the World Summit on Sustainable Development, 4 September 2002, UN Doc. A/CONF.199/20.

sustainable development and comments made on the balance of the three pillars in various circumstances.

b) Reference will also be made to documents of 'soft law', which although not legally binding can have enormous impact, especially in the field of sustainable development. Soft law can provide interpretation and fill the gaps of treaty law, and can provide guidance to states as well as other actors on how best to implement necessary action. Such sources include documents resulting from the world summits - such as the Stockholm and Rio Declarations, the Rio Principles and Agenda 21 - as well as resolutions of the UN General Assembly and other declarations adopted by *inter alia*, inter-governmental and non-governmental organisations, in the field of environmental law.

c) The analysis of the international whaling regime, from the perspective of the evolution of sustainable development will be made through a review of the *International Convention on the Regulation of Whaling*[59] and the work of the International Whaling Commission (IWC), covering the decisions and resolutions adopted by the IWC, as well as its practice.

0.4 Plan

This thesis will be divided into two major chapters. The first chapter will provide an analysis of the shift undertaken by the IWC from the 'tragedy of the commons' characterized by the overexploitation of whales to common interests represented by the moratorium on commercial whaling adopted by the IWC in 1982. The first

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[58] *Statute of the International Court of Justice*, 26 June 1945, T.S. No. 933, 59 Stat. 1055, 3 Bevans 1179 at Article 38.
[59] ***Supra*** note 10.

section provides an overview of international whaling regulation and how this has failed to restrict whaling practices by states. The second section analyse the external and internal influences on the International Whaling Commission to shift towards conservation, from state to common interests, during the period from 1972 to 1987.

The second chapter will determine whether the IWC has managed to establish a balance between the conflicting demands of exploitation and conservation between the three pillars of sustainable development. The chapter is divided into three sections and sets out to analyse the three major policies of the IWC from the perspective of the three pillars as follows: the establishment of whale sanctuaries (ecology); aboriginal subsistence whaling (equity), and; scientific research whaling (economy).

The conclusions provide the input to the three issues identified for the purpose of this research, namely: a) the extent to which the international whaling regime has followed the evolution of the sustainable development agenda at the international level, b) the identification of competing interests among the three pillars of sustainable development within the international whaling regime, and c) the suggested measures which could be taken for the international whaling regime to be compatible with the concept of sustainable development.

CHAPITRE I

WHALING : FROM THE 'TRAGEDY OF THE COMMONS TO COMMON INTERESTS

This chapter provides an analysis of the shift undertaken by the International Whaling Commission (IWC) from the 'tragedy of the commons', characterized by the overexploitation of whales through excessive hunting by states, to common interests, represented by the moratorium on commercial whaling decreed by the IWC in 1982. The first section describes the development of whaling regulation in response to the over-exploitation of whales and points to some of the inherent tensions between exploitation and conservation in the text of the 1946 *International Convention for the Regulation of Whaling*[60], and exemplified by the debates within the IWC. The second section analyses both the external and internal influences on the IWC by developments in international environmental treaties and documents and pressure by states, as well as inter- and non-governmental organisations to ban the practice of whaling. This led to a distinct shift from the predominance of the economic pillar over that of the ecology in disregard to equity, failing to reach a balance between the three pillars.

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[60] ***Supra*** note 10.

1.1 Whaling regulations: the predominance of the tragedy of the commons (1949 -1972)

This section provides an overview of whaling regulations through the adoption of a series of Conventions aimed at prescribing measures to conserve whale stocks and contribute to halting the trend towards overexploitation. These proved largely ineffective in imposing restrictions on the freedom to whale by the major whaling nations as economic and political interests continued to guide decisions within the IWC. Scientific data was weak and that which was available was all too often disregarded. It describes in greater detail the 1946 *International Convention for the Regulation of Whaling*[61], which sets the tone for future tensions within the IWC between exploitation and conservation and the quest by the IWC to achieve a balance between enforcing regulations and bending to the will of states to continue whaling.

Evidence exists that whaling dates back as early as the year 1500 BC, however, it was the Basques of Biscay who were credited with initiating organised whaling activities some time between 800 and 1000 AD. By the sixteenth century, their activities had spread to the North Atlantic where they were joined by the British and the Dutch, and later the French and Germans. In the eighteenth century, Americans started to hunt whales and became "one of the world's leading whaling fleets" by the nineteenth century[62].

The watershed in the history of whaling came about with the development of modern methods of whaling in the 1860's, with respect to techniques and species

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[61] ***Supra*** note 10.
[62] Sarah Suhre, "Misguided Morality: the Repercussions of the International Whaling Commission's Shift from a Policy of Regulation to One of Preservation" (1999-2000) 302 GIELR at 307.

caught[63]. Previously, whaling had been conducted by catcher boats from the coast (coastal whaling), the catch being processed in land stations. As a result of scientific and technological advancements, however, these methods were replaced by the use of steam engines and exploding harpoon guns. Factory ships were introduced as the primary method for processing the whale harvest. Modern whaling was conducted by expeditions undertaken by whaling companies, enabling whalers to exploit the whale resources and benefit from whale products, in particular whale oil and meat. This led to the rapid development of the whaling industry, around the 1870's, and was fuelled by the increasing market for whale oil which was used for lighting, lubrication, soap, and later as an important raw material in the production of margarine[64].

The introduction of commercial whaling resulted in many more whales being hunted than was possible using traditional means. As a result, "more whales were killed in the first forty years of the twentieth century than in the previous four hundred years"[65]. This led to rapidly dwindling levels of whale stocks by the turn of the century, threatening the extinction of a variety of species of whales especially right, bowhead, and gray whales[66]. Furthermore, by the early 1930's, the killing of blue whales hit such levels that it depressed whale oil prices[67]. It thus became increasingly clear that if states wanted to continue whaling in pursuit of their interest to maintain profits, there was a need to regulate commercial whaling, and international cooperation was crucial in this regard.

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[63] Modern whaling was based on the catching of rorquals, as stocks of right whales had already been decimated in the latter half of the nineteenth century. As rorquals swim very fast and sink once killed, new modern methods of whaling had to be developed.
[64] Tønessen & Johnsen, ***supra*** note 1 at 7.
[65] Suhre, ***supra*** note 62 at 308.
[66] Alexander Gillespie, *Whaling Diplomacy* (Cheltenham: Edward Elgar Publishing, 2005) at 18-23.
[67] *International Whaling Statistics 1935* (Oslo : Oslo: the Committee for Whaling Statistics 1935) at 4.

1.1.1 Inherent tensions pave the way to failure

Early attempts at regulation were motivated primarily by the whaling industry's desire to maintain populations of whales at levels that would sustain continued harvesting. Some attempts were made to regulate whaling as early as 1918, and were continued throughout the 1930's. The real risk of the extinction of whale stocks coupled with the need to seek an arrangement for the "rational exploitation of the seas' resources"68 led to the adoption of the "Convention for the Regulation of Whaling" in 193169, the "International Convention for the Regulation of Whaling" in 193770, and its Protocol in 1938.71

Despite these early regulations, exploitation of whales during this period of the 1930's continued almost completely unchecked. Reasons included the "inadequacy of the scope of regulations; inadequate and inconclusive scientific information; poor enforcement of agreements without supervision; and lack of international community participation or interest"72. Overall, the failure of the agreements of the 1930's reflected the unwillingness of states to abide by restrictions on whaling, especially if these were not applied and enforced in a coherent and uniform manner, and implemented by all whaling nations. In addition, the main whaling states at the time, including Germany, Japan and the USSR refused to be bound by their provisions since the economic incentives of continuing whaling far outweighed any benefits accrued from whaling regulations. The Conventions thus failed to be implemented in such a manner as to address the increasingly dwindling number of whales. In the

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[68] Patricia Birnie, International Regulation of Whaling: from conservation of whaling to conservation of whales and regulation of whale watching (New York: Oceana Publications, 1985) at 108.
[69] *Convention for the Regulation of Whaling*, 24 September 1931, 155 L.N.T.S. 349.
[70] International Convention for the Regulation of Whaling, 8 June 1937, 190 L.N.T.S. 79.
[71] Protocol to the International Agreement for the Regulation of Whaling, 24 June, 1938. 196 L.N.T.S. 131.5.
[72] Birnie, ***supra*** note 68 at 129-130.

1937-38 whaling season for example, 8,000 more whales were killed than in the previous year and 120,000 more tons of oil put on the market despite the existing whaling regulations73. The event which prevented the extinction of the major species of whales was World War II as most floating factories were confined to port while others were destroyed or utilized in the war effort.

After the Second World War, edible fat was in short supply leading to interest in securing this resource by states that were not traditionally involved in whaling. Whaling regulation after the Second World War was aimed primarily at limiting competition among whaling companies and protecting whales for future harvesting as there was a clear threat to the survival of the species74. It was at the initiative of the United States that an international conference was convened to lay down the ground rules for future regulation of whaling, revision of previous agreements, and codification of these agreements as confusion had arisen as to which country had ratified which agreement75. The International Whaling Conference was held in Washington in 1946, and had two main items on its agenda: the development of a code of regulations for subsequent whaling seasons, and the establishment of a new institution, the IWC, to promulgate future regulations. The result of the conference was the adoption, by 15 states76, of the International Convention for the Regulation

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[73] Tønessen & Johnsen, ***supra*** note 1 at 126.
[74] Sebastian Oberthür, "The International Convention for the Regulation of Whaling: from over-exploitation to total prohibition", in *Yearbook of International Cooperation on Environment and Development 1998/99* (Oslo: Fridtjof Nansen Institute) at 29.
[75] Tønessen & Johnsen, ***supra*** note 1 at 499.
[76] The initial signatories to the Convention were: Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, USSR, UK, USA, and South Africa. See: *The International Convention for the Regulation of Whaling, **supra*** note 10.

of Whaling77(ICRW), which superseded all previous agreements, the original text of which is still in force today.

The objective of the ICRW is to ensure that all harvesting and research activities are conducted in accordance with its text: to formulate, adopt and revise conservation measures78; to compile, analyse and disseminate information on the status of resources; and to facilitate research activities. The primary purpose of the ICRW is thus to ensure the sustainable exploitation of whale stocks with the assistance of modern methods of management. This is reflected in the preamble of the ICRW, which sets out the spirit, object and purposes of the Convention, and covers the two major motives for whaling regulation, namely, to conserve whale resources while at the same time providing for an orderly development of the whaling industry. Conservation is recognized in the preamble of the ICRW as "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by whale stocks79". The Convention thus provides for the recovery of whale stocks, and ("...") will permit increases in the number of whales which may be captured without endangering these natural resources"80, thereby allowing for the resumption of commercial whaling in a regulated manner.

With regard to specific action that can be taken to regulate the conduct of whaling, a Schedule which is annexed to the Convention provides flexibility regarding the management of whale stocks. The Schedule allows the setting of specific restrictions on commercial whaling by designating protected and unprotected species of whales, open and closed whaling seasons, open and closed waters,

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[77] **Supra** note 10.
[78] ***Supra*** note 10 at Articles V; IV and VII; and IV, VII and VIII respectively.
[79] ***Ibid***. at Preamble, at Paragraph 1.
[80] ***Ibid***. at Preamble, at Pararagraph 3.

including the designation of sanctuary areas, the size limits for each species, time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season), types of gear to be used, methods of measurement and catch returns and other statistical and biological records81.

Amendments may be made to the Schedule by a three-quarters majority vote by member states82. These are limited by three conditions, namely, that "they 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", that they shall be "based on scientific findings", and that they "shall take into consideration the interests of the consumers of whale products and the whaling industry"83. As a means to safeguard the sovereignty of states, and thereby also encourage states to ratify the Convention, the text ensures that amendments to the Schedule not be binding. The text thus contains an opt-out clause which allows states to object within a period of 90 days to an amendment to the Schedule84.

In order to comply with the requirement that Schedule amendments be based on 'scientific findings', the ICRW established a Scientific Committee85 which is composed of the world's leading biologists86. According to the text of the ICRW, this Committee is to encourage, recommend or organise studies on whaling; collect and analyse statistical information regarding whale stocks, and; disseminate information on methods of maintaining and increasing the populations of whale

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[81] ***Ibid.*** at Article V (1).
[82] ***Ibid.*** at Article III.
[83] ***Ibid.*** at Article V (2)
[84] ***Ibid.*** at Article V (3).
[85] This Committee is provided for at article VII of the ICRW. It meets two weeks prior to the annual ICW sessions and may hold special meetings at other periods during the year to consider particular subjects.

stocks87. With regard to the collection of scientific data, this is to be gathered and transmitted by the member states themselves and submitted to the International Bureau of Whaling Statistics in Norway88, staffed by Norway. In addition, a particular concession was made to allow governments the right to ("...") grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research ("...")89, exempting them from regulations under the ICRW.

With regard to infractions to the Convention, this responsibility is left to the governments themselves which ("...") shall take appropriate measures to ensure the application of the provisions of this Convention and the punishment of infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction"90.

As for its implementation, the Convention provides for the establishment of the IWC91 which has the authority to act under the ICRW and to implement the provisions of the Convention. The IWC has also been entrusted with making recommendations to member states on ("...") any matters which relate to whales or whaling and to the objectives and purposes of the Convention"92. Participation in its annual sessions is open to all countries, irrespective of whether they are active in whaling or not, or have access to the sea. In addition, meetings may be attended by

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[86] The membership of the Committee expanded rapidly from 11 scientists in 1954 to over 170 in 2003. See: online <http: www.iwcoffice.org/commission/iwcmain.htm>
[87] ***Supra*** note 10 at Article IV
[88] ***Ibid.*** at Article VII.
[89] ***Ibid.*** at Article VIII.
[90] ***Ibid.*** at Article IX.
[91] ***Ibid.*** at Article III.
[92] ***Ibid.*** at Article VI.

observers from non-member states, intergovernmental and non-governmental organisations.

In 1948, when the ICRW entered into force, there were a number of elements and issues which were already reflected in the nature of the instrument, which set the tone for tensions within the IWC regarding the contentious issues of exploitation of whales on the one hand and conservation thereof on the other. As stated above, the Convention has been concluded ("...") to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry", while reflecting "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks". This contradiction is further articulated in the preamble of the ICRW which recognizes the need ("...") to protect all species from further overfishing", and ("...") that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress"93. The IWC thus faced the challenge of reconciling the two aspects: conservation of whale stocks and the economic interests of the whaling states.

The following section will demonstrate that the IWC has failed to ensure the necessary balance between exploitation and conservation, with predominance of the former over the latter.

1.1.2 The IWC fails to maintain the balance between exploitation and conservation

Whaling, after the Second World War and the adoption of the ICRW, resumed rapidly due essentially to the effectiveness of the remaining floating factories, the distribution of German and Japanese whaling materiel, and the contracting of new

floating factories[94]. During this period, pelagic whaling (open water whaling) was dominated by Norway, the Netherlands, the USSR, the UK and Japan. Whaling was regulated by the IWC by setting catch limits for stocks of the great whales hunted in the Antarctic, as well as catch limits of other species, on the basis of the Blue Whale Unit (BWU). This was fixed according to the amount of oil that was obtainable from each specie of whale, and equalled one blue whale, two fin whales, two and a half humpback whales, or six sei whales[95]. A quota of 16,000 BWUs for pelagic catching in the Antarctic, included in the Schedule, was already set at the International Whaling Conference in 1946[96]. Whalers were free to catch any of the species covered by the BWU, irrespective of the state of whale stocks of any single species.

The initial years of the IWC from 1946 to the early 1950s saw many nations involved in free-for-all whaling for the 16,000 BWUs, the allocation of which was negotiated between whaling companies, not levied on individual countries. This implied that whaling states competed amongst themselves for the quota. The setting of the 16,000 BWUs was established for a number of consecutive years without the support of adequate scientific research as this was difficult to obtain and states were often unwilling to collect adequate and accurate data. At its third annual meeting in 1951, it was clear that there was a lack of goodwill on the part of some states to enforce the Convention and an unwillingness of many to reduce quotas or allocate them on a more scientific basis[97].

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[93] ***Ibid.*** at Preamble.
[94] Birnie, ***supra*** note 68 at 508.
[95] Quotas had already been fixed as early as 1932 among whaling companies.
[96] Tønessen & Johnsen, ***supra*** note 1 at 506.
[97] Birnie, ***supra*** note 68 at 219.

At its meeting in 1954, the Scientific Committee published its first report which made a series of recommendations in the light of growing evidence of depletion of some species of whales. In disregard for this scientific data, plans were being made by member states to expand pelagic Antarctic whaling supported by economic and political interests. During this period, the IWC's activities were subject to minimal international scrutiny and the IWC could do little to regulate whaling, on a multilateral basis, as the parties involved managed whaling independently, rather than through the Commission[98].

The meeting in 1955[99] produced two new developments: that of a strengthened enforcement mechanism, and the proposal for a reduction of the quotas. By this time it was clear that the national enforcement system provided for by the Convention was not being implemented and reporting on infractions were possibly inaccurate. This led to suspected cheating which undermined confidence among states that regulations were respected, and, therefore, to a subsequent decline in the confidence, by states, in the IWC. In light of the findings of the Scientific Committee, a reduction of the BWU to 15,000 for the 1955-56 whaling season was approved, leading to seven governments objecting under the 90 day rule, thus not binding these seven states[100] to the decision to reduce the whaling quota. It was also at this meeting that poor enforcement of the Convention led to the proposal, by Norway, for an International Observer Scheme, involving the appointment, by the IWC, of international observers to all factory ships operating in Antarctic pelagic whaling with a view to conserving whale stocks for purposes of continued whaling. It was suggested that the scheme be implemented by the drafting of an additional protocol to the Convention as the text of

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[98] ***Ibid***. at 572.

[99] This meeting was attended by sixteen of the seventeen member states which represented the majority of the initial whaling nations.

[100] These seven governments were the UK, Panama, South Africa, Norway, Japan, USA, and Canada.

the Convention itself did not provide for it. The fact that this scheme had to be negotiated outside the Convention delayed its introduction for many years.

At the end of the 1950's and in the early 1960's, as some whaling nations, in particular the USSR, took the majority of the share of the quota, the system of quotas shifted from a global quota to the allocation of separate national quotas. These had to be allocated between the parties themselves by agreement outside the IWC, as the Convention did not provide for the setting of quotas to individual states and were specifically banned by Article V(2)(c) of the Convention[101]. In order to set overall quotas, the Scientific Committee had to collect data on the status of whale stocks. Soon, however, the IWC was unable to agree on a quota. The major reason for this was the tension which arose between the findings of the Scientific Committee which revealed that whale stocks were increasingly declining and that therefore the quotas had to be lowered, and the will of the whaling states to be subjected to the restrictions imposed by the Scientific Committee.

The tensions between science and whaling increasingly dominated negotiations within the IWC, with priority given to whaling over science. This led to a deadlock within the Commission and a complete breakdown of the Convention which was based on the free competition for a common quota, and struck a serious blow to whale stocks, in particular to fin and blue whales[102]. By its 1959 meeting, it was clear that some states such as Japan, the Netherlands and Norway consistently disregarded the warning signs of dwindling whale stocks, characterized by their insistence that economic objectives override scientific advice. This resulted in the

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[101] This states that ("...") amendments to the Schedule ("...")(c) shall ("...") allocate specific quotas to any factory ship or land station or to any group of factory ships or land stations ("..."), not to individual states.

[102] Birnie, ***supra*** note 68 at 587.

withdrawal of the Netherlands and Norway from the Convention, implying that no quota arrangements could be properly arrived at for the remaining members, rendering the IWC ineffective[103].

The tensions between the will of the whaling nations to continue whaling, and the dictates of science to restrict whaling to preserve whale stocks led to a stalemate within the IWC. Conciliation among the pelagic whaling nations only took place when they realised that whale stocks would not be saved without drastic quota reductions. States therefore began to voluntarily accept quotas, which were gradually reduced at the beginning of the 1960's. Quota negotiations between 1958 and 1962 accounted for eleven international conferences, in addition to taking up most of the IWC's four annual meetings[104]. Finally, member countries arrived at a Quota Agreement establishing quotas for the major five pelagic whaling nations, Japan, Norway[105], the USSR, the Netherlands[106] and the UK which was first applied in 1962. An important turning point came at its 1963 meeting at which the quota was drastically lowered on the basis of the recommendations of the Scientific Committee which had presented a provisional report, containing a mass of scientific data, painting a very gloomy picture of whale stocks[107]. It was argued that this meeting presented the last chance to take action necessary to halt the overexploitation of whale stocks and to restore them to the level which existed before the establishment of the IWC[108].

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[103] ***Ibid***. at 248.
[104] ***Ibid***. at 602.
[105] Norway rejoined the Convention in 1960.
[106] The Netherlands rejoined the Convention in 1962.
[107] Birnie, ***supra*** note 68, at 609.
[108] ***Ibid***. at 317.

In order to attempt to enforce restrictions on whaling, the IWC adopted at this same meeting in 1963, the International Observer Scheme, which, however, did not come into effect for many more years. In 1963 and 1964, several prohibitions were declared by the IWC, notably the harvesting of the humpback whale and blue whale respectively, both of them endangered species. Furthermore, at its 1964 meeting, the Commission again failed to accept the position that the BWU and overall quota system should be abolished and substituted for specific species of whales. In light of the fact that member states were reluctant to considerably reduce the quota, and that there was disagreement over an acceptable quota, no quota was set at this meeting for the forthcoming whaling season.

By 1968, whale stocks were plummeting and blue whales in particular "had been reduced to only one percent of their level thirty years earlier"[109]. By its 1971 meeting, it was clear that the numerous attempts by the IWC to set quotas, on the basis of the findings of the Scientific Committee, and to provide for the prohibition of whaling of certain endangered species proved ineffective. The early system of quotas failed to protect whales from extinction, primarily because member states did not heed the warnings of the Scientific Committee, and were unwilling to take the necessary action to conserve whales. This led the IWC to activate the International Observer Scheme, which had lain dormant for almost a decade since its adoption in 1963, beginning in the 1971-1972 whaling season[110].

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[109] Suhre, ***supra*** note 62 at 309.
[110] International Whaling Commission, *Seventeenth Annual Report*, Chairman's Report (London: International Whaling Commission 1967) at 22.

1.1.3 Conclusion

Due in part to the fact that the IWC was, during this period, dominated by the pro-whaling nations - in particular Japan, the Netherlands, Norway, the UK, and the USSR - it was unable to regulate commercial whaling through a system of quotas aimed at the recovery of the depleted whale stocks. At the time, the risk was that some species of whales would be threatened with extinction if the rate of commercial whaling, in defiance of the quotas, based on the advice of the Scientific Committee, was maintained. The difficulty over quota reductions was caused, on the one hand by the continued failure of the IWC to introduce an acceptable International Observer Scheme and, on the other, by the unwillingness of states to keep to quotas, despite scientific evidence which clearly demonstrated that whale stocks were being overexploited.

During the early period of the existence of the IWC from 1949 to 1972, scientific advice provided by the Scientific Committee was largely ignored. In the early 1970's, however, when the need was greatest to restrict whaling and impose quotas, scientific advice overrode the interests of the whaling industry, and was generally taken into account by states.

With regard to the balance between exploitation and conservation, the IWC had failed to motivate states towards achieving this. Despite the fact that there existed a tacit acceptance to conserve whales among the members of the IWC, there was no agreement on the principles which would achieve this. States were reluctant to accept any limits to their freedom of fishing on the high seas, to allow the IWC to determine quotas or require states to supply information to the Scientific Committee on catches. This implied that the IWC leaned towards excessive regard for industrial considerations rather than towards methods of ensuring recovery and maintenance of whale stocks for present and future generations. One can thus conclude that the two

fundamental aims as stated in the preamble of the ICRW - the proper conservation of whale stocks and the orderly development of the whaling industry - were not reconciled during this period, and were neither pursued simultaneously nor on an equal footing. Indeed, this period has clearly been characterized by exploitation of the whale resource, rather than conservation.

1.2 Influences on the International Whaling Commission to shift from state to common interests (1972-1987)

This section reviews the influences of a number of developments which marked the period from 1972 to 1987, and which were characterized by a growing awareness, by the international community, of the need to preserve and enhance the world's natural resources, including whales. This section brings to light how the shaping of whale management policies within the IWC, resulted in a shift towards conservation from state to common interests, culminating in the adoption of the moratorium on commercial whaling in 1982. This was due primarily to the following external and internal influences: firstly, the impact of a number of international environmental treaties and documents which were elaborated and adopted in the 70's and early 80's; and secondly, the increase in the number of member states as well as enhanced participation by inter- and non-governmental organisations which advocated for a ban on whaling.

1.2.1 External influences: the impact of international environmental treaties and documents

1.2.1.1 The role of the 1972 Stockholm Declaration

It was the Action Plan[111] adopted at the *Conference on the Human Environment* (UNCHE) in Stockholm in 1972 which first suggested that the IWC impose a complete ban on whaling though the adoption of a 10 year moratorium.

The *Stockholm Declaration*[112] marks the beginning of the global effort to address environmental problems, and in particular makes the link between quality of life and quality of the environment. It specifies that natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning and management[113], and allows for the sustainable use by sovereign states of their own natural resources while ensuring that these not be depleted[114]. Accordingly, states should aim at the preservation of whales through rational management to prevent extinction, preserve their habitats, ensure that their ecosystems are safeguarded for the benefit of present and future generations, and promote the necessary scientific research.

The Action Plan consisted of 109 recommendations which were to be directly commended to governments for such action at national level, as appropriate. The most significant recommendation adopted was that the IWC institute a 10-year moratorium on commercial whaling, stating:

> ("...") that Governments agree to strengthen the International Whaling Commission, to increase international research efforts, and as a matter of urgency to call for an international agreement, under the auspices of the

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[111] Action Plan for the Human Environment. A/Conf.48/14/Rev. 1
[112] ***Supra*** note 13.
[113] ***Ibid***. at Principle 2.
[114] ***Ibid***. at Principle 4.

> International Whaling Commission and involving governments concerned, for a 10-year moratorium on commercial whaling[115].

The call for a moratorium increased the pressure on the IWC to adopt a ban on commercial whaling, the details of which will be described in the following section of this chapter.

1.2.1.2 Restricting trade in endangered whale species: the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

In 1977, the first report of CITES[116] was adopted, which stated that certain whales already protected by the IWC were also considered "endangered species". CITES is a convention which aims to ensure that international trade in specimens of wild animals and plants does not threaten their survival. Although the Convention covers trade in live animals it is prevention or control of the trade in products that is its main objective. The species which are covered by CITES are listed in three appendices[117] in accordance to the degree of protection required. Each Party to the Convention may amend the appendices in conformity with certain set criteria. By 1976, CITES had listed only gray, blue, humpback and right whales in Appendix I as endangered species, in 1979, all cetaceans were added to one or the other appendices and at its third meeting, in 1981, in response to data submitted by the IWC's Scientific Committee, all IWC protected species of whales were included in Appendix I, including gray, blue, humpback, right, sei, fin and sperm whales.

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[115] ***Supra*** note 111 at Recommendation 33.

[116] Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 U.N.T.S. 243.

[117] Appendix I includes species threatened with extinction, and trade in specimens of these species is permitted only in exceptional circumstances. Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival, and Appendix III contains species that are protected in at least one country, which has asked other CITES Parties for assistance in controlling the trade.

CITES had considerable impact on the shaping of IWC policies. At its meeting in 1977, CITES offered observer status to the IWC[118]. It also adopted a resolution calling on IWC members to prevent import into their countries of whale products from non-member nations[119]. By 1981, CITES had identified a greater number of whale species than the IWC, which incited the IWC to move "even closer to the CITES position"[120]. Furthermore, CITES considerably strengthens the limited enforcement procedures of the IWC, and, as more and more states become parties to this Convention, contributes to the limitation of further exploitation of whales. In addition, CITES diminishes the economic benefit of whaling for some states, through the prohibition of the international trade in whale meat and whale products and provides a useful framework for preventing whale meat or whale products from being traded between parties.

1.2.1.3 The sustainable use of whales: three Conventions at the turn of the 1980's

Over the three-year period, before the decision by the IWC to impose a moratorium on commercial whaling in 1982, three Conventions were adopted calling for the sustainable use of whales while ensuring that the stocks would not be over-exploited and depleted. These were the 1979 *Convention on the Conservation of Migratory Species of Wild Animals*[121], the 1980 *Convention on the Conservation of Antarctic Marine Living Resources*[122], and the 1982 *United Nations Convention on the Law of*

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[118] International Whaling Commission, *Twenty-ninth Annual Report* (Cambridge: International Whaling Commission 1979), Chairman's Report at the Special Meeting, Tokyo, December 1977 at 3.
[119] Patricia Birnie. "The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to encouraging Non-consumptive Uses of Whales" (1984) 12 ELQ 937 at 491.
[120] Anthony D'Amato & Sudhir K. Chopra, "Whales: their emerging right to life" (1991) 85 American Journal of International Law 21 at 13.
[121] Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 U.N.T.S.
[122] Convention on the Conservation of Antarctic Marine Living Resources, 20 May 1980, 1329 U.N.T.S.

the Sea[123]. These conventions specifically allow for the harvesting of marine living resources (including whales), while limiting their exploitation through the provision of scientific data to ensure that these would be conserved over the long term. Their overall objective is to oversee the international protection of species and thereby prevent their over-exploitation.

The 1979 *Convention on the Conservation of Migratory Species of Wild Animals*[124] elaborates on the Stockholm Principles, and covers all migratory species of the world including "marine mammals, fish, crustaceans and molluscs". It is based on the notion that living resources, such as whales, that cross national boundaries are shared resources and not national property, and therefore require international protection. The preamble of the Convention recognizes that, among others, whales are an irreplaceable part of the earth's ecosystem, to be conserved and that man holds them for future generations and thus "has an obligation to ensure that this legacy is conserved and if used, used wisely"[125].

The 1980 *Convention on the Conservation of Antarctic Marine Living Resources*[126] aims to conserve marine life but does not exclude harvesting carried out in a rational manner. It reflects developing views on conservation, which is defined as 'rational use'[127], as well as the more ecological approach to management and is based on developing a conservation regime for marine resources in the Antarctic region, focused on the protection of the ecosystem and the maintenance of the resource base. The Convention consists of a preamble and thirty three articles and it is not so much a

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[123] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3.
[124] **Supra** note 121.
[125] Convention on the Conservation of Migratory Species of Wild Animals, **supra** note 121 at Preamble, Paragraph 2.
[126] ***Supra*** note 122.

fisheries convention as "a broad Convention for conservation of the Antarctic environment and ecosystem"[128]. It applies to all marine living resources in the Antarctic, and aims at avoiding reduction of a population to "levels below those which ensure its stable recruitment"[129]. This Convention added new techniques for an ecological approach to conservation[130] and highlighted the need for collaboration between states and organisations to manage whale stocks[131]. At its meeting in 1979, the IWC passed a resolution to this effect and has continued to address the issue of information on stocks and management arrangements under both this Convention and the ICRW on an annual basis[132].

The third *United Nations Convention on the Law of the Sea*[133] (UNCLOS III), was concluded in 1982, and provides a comprehensive framework for use of the seas by states within their Exclusive Economic Zone (EEZ) extending 200 nautical miles from their shore. It is accompanied by responsibilities and obligations of the states concerned regarding the management of marine resources and thus limits the traditional concept of freedom to fish on the high seas. States thus have two major duties which are particularly relevant to the work of the IWC: firstly, they have a duty to conserve and manage marine mammals, and secondly they have a duty to work within international regimes in this respect.

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[127] Convention on the Conservation of Migratory Species of Wild Animals, **supra** note 121 at Article II (2).
[128] Birnie, ***supra*** note 68 at 525.
[129] Convention on the Conservation of Antarctic Marine Living Resources, **supra** note 122 at article II.
[130] These include: the prevention of decrease in the size of harvested populations below those which ensure its stable recruitment; the maintenance of the ecological relationships between harvested, dependent and related populations and the restoration of depleted populations; and the prevention of changes or minimisation of the risk of changes in the marine ecosystem.
[131] ***Supra*** note 122 at Article XXIII.
[132] Birnie, ***supra*** note 68 at 531.
[133] ***Supra*** note 123.

According to the Convention, coastal states are to adopt conservation and management measures to ensure that living resources are not threatened by over-exploitation in their EEZ[134]. In particular, they are to conserve living resources at "maximum sustainable yield ("...") with a view to maintaining or restoring populations ("...") above levels at which their reproduction may become seriously threatened"[135]. The Convention has thus been interpreted as imposing a duty of preservation on states[136].

With regard to cooperation by states, this is to be ensured "directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilization of marine living resources"[137]. Although it was thought that the organisation it refers to is the IWC, the language of the article leaves interpretation open for other organisations to take on this role, with different mandates and objectives, thereby giving rise to the possibility of a fragmented international regime for the management of whales[138]. However, after the conclusion of UNCLOS, it was agreed that the IWC was to be entrusted with matters regarding the management of whales which implied that all parties to UNCLOS, even those that were not members of the IWC, would be bound by its regulations according to the ICRW[139].

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[134] ***Ibid.*** at Article 61.
[135] ***Ibid.*** at Article 119 (1)(a).
[136] Angela Lang, "Detailed Discussion: The Global Protection of Whales" (Michigan State University, Detroit College of Law 2002) at 11.
[137] United Nations Convention on the Law of the Sea, **supra** note 123 at article 65.
[138] Steven Freeland & Julie Drysdale, "Cooperation or chaos? – article 65 of United Nations Convention on the Law of the Sea and the future of the International Whaling Commission" (2005) 2 MqJICEL at 4.
[139] ***Ibid.*** at 19.

1.2.2 Internal influences: adoption of a total ban on whaling by the IWC in 1982

By 1982, an additional sixteen members had joined the IWC, amounting to a total of thirty nine members[140], the majority of whom were non-whaling or anti-whaling states. They generally considered the oceans and their resources as the common heritage of mankind, and whaling as immoral. In addition, over fifty NGOs[141] were represented at the IWC by the early 1980's which, since 1979, attended the IWC meetings officially as observers, and in some cases as delegation members[142]. NGOs intensified their activities to promote the ban through active lobbying of commissioners and delegations, the circulation of papers and studies at IWC meetings, and the dissemination of information necessary to publicise the shortcomings of the IWC policies in their own countries[143]. The combination of a change in the domestic policy of anti-whaling member states and the plea to the global public to save whales exercised considerable influence on the decisions on the IWC[144]. At its session in 1982, the IWC adopted a moratorium on commercial whaling.

Earlier appeals for such a moratorium proved unsuccessful. At the IWC meeting in 1972, the moratorium on commercial whaling, recommended by the *Action Plan* adopted at Stockholm[145], was presented by the USA. The proposal for a moratorium

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[140] Birnie, ***supra*** note 68 at 613.
[141] These included NGOs such as the Fauna Preservation Society, the International Society for the Protection of Animals, the International Union for the Conservation of Nature, the World Wildlife Fund, Greenpeace and the International Fund for Animal Welfare.
[142] International Whaling Commission, *twenty-ninth Annual Report* (Cambridge: International Whaling Commission 1979), Chairman's Report, Appendix 1 at 31.
[143] Peter Stoett. *The International Politics of Whaling* (Vancouver: University of British Columbia Press, 1997) at 95.
[144] Tora Skodvin & Steinar Andresen, "Non-state influence in the International Whaling Commission, 1970 – 1990" (2003) 3 GLEP 4 at 74.
[145] ***Supra*** note 111.

was supported by a number of governments and non-governmental organisations on the basis of the ecosystem approach. Despite this, it was rejected by the Scientific Committee which concluded that a moratorium could not be justified scientifically since priority was given to careful management of whales requiring the regulation of stocks individually rather than of several stocks as a group. The reticence of the IWC to impose a moratorium at the time was thus linked to the fact that in order to conserve whales in an ecologically sound manner, there was a need to ensure the recovery of some species of whales which were severely depleted while allowing for the sustainable use of others. In addition, it was highlighted that instituting a moratorium would prove counter to the nature and spirit of the ICRW by going against the sustainable use of whales, without taking into account the needs of the whaling industry, as reflected in the text of the Convention. Although not implemented at this point, the call to impose a moratorium on whaling marked the beginning of continual re-presentation of this proposal in the following years.

Further appeals for a moratorium were made at the 1973 and 1974 sessions, however these were withdrawn at the IWC meeting in 1974 on the introduction of the New Management Procedure (NMP) which required classification, on the basis of the advice of the Scientific Committee, of all whale stocks into one of three categories regarding that stock's status in relation to the Minimum Sustainable Yield (MSY) or optimum levels[146]. It was thus considered among the majority of the IWC members that the NMP would sufficiently protect whale stocks from extinction in order to continue sustainable whaling in conformity with the ICRW, without having to go so far as to decree a moratorium to allow whale stocks to recover.

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[146] These covered initial "Management Stocks" which can be reduced in a controlled manner to achieve MSY; "Sustained Management Stocks" allowing for whaling only on the advice of the Scientific Committee; and "Protection Stocks" which are below the MSY and requiring full protection, with no whaling of these stocks permitted.

By its 1979 session, the IWC counted twenty four member states, including non-whaling states such as Oman and Switzerland, which had recently joined[147]. At that session, three proposals for a moratorium were put forward: a worldwide ban, a moratorium on commercial whaling, and a moratorium on the taking of sperm whales. At that time, the Working Group of the IWC that was considering the moratoria rejected the proposals by drawing attention to the lack of scientific support and the resulting economic hardships which would result in the direct and indirect losses of jobs in the whaling industry, including work on factory ships, and with respect to the processing and distribution of whale products[148].

By its 1981 session, the meeting of the IWC was attended by 30 members[149]. A further proposal for a global ban on whaling was proposed by the UK on the basis of concerns such as past management failures and uncertainties in assessments of whale stocks[150], but failed to be adopted by the required three-quarters majority vote. Also unsuccessful at this session were proposals for a ban on whaling in the North Atlantic, a ban on minke whaling and a global phase-out of commercial whaling over the next five years. The only proposal that was adopted was that calling for a whaling ban of sperm whales which had been hunted in such large numbers that they were by then virtually extinct.

In 1982, the IWC received five moratorium proposals from Australia, France, the Seychelles, the UK and the USA respectively. The proposal by the Seychelles called for a phase-out of commercial whaling so as to facilitate the adjustment that

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[147] D'Amato & Chopra, ***supra*** note 120 at 37.
[148] International Whaling Commission, *Thirty-first Annual Report* (Cambridge: International Whaling Commission 1981), Chairman's Report at 18-19.
[149] International Whaling Commission, *Thirty-second Annual Report* (Cambridge: International Whaling Commission 1982), Chairman's Report at 17.
[150] ***Ibid***. at 18.

whaling nations would have to make to save whales from extinction[151]. This would give them time to cope with the economic impact of the moratorium. It proposed a ban on all commercial whaling, namely a zero quota by the 1986 coastal and 1985-1986 pelagic seasons, subject to a review thereafter. Australia argued in favour of the moratorium as this measure would best balance the competing interests of the whaling industry and the conservation of whales. Latin American countries such as Argentina, Brazil, Chile, Costa Rica, Mexico, Peru and Uruguay supported the call for a moratorium but expressed concern over the issue of the sovereign rights of coastal states to access their resources within their 200 mile EEZ as provided for under UNCLOS III. The Republic of Korea, Iceland, Japan and Norway all opposed the ban as there was no scientific evidence requiring a blanket moratorium on commercial whaling as some whale stocks had by then recovered.

After much discussion, the moratorium was finally adopted by a vote of twenty-five in favour, seven against and five abstentions. The major reason for the moratorium - which was not justified on the basis of scientific data and was initially intended to be temporary - was to allow whale stocks to recover over time so that the 'orderly development of the whaling industry' could be pursued sometime in the future. The resolution referred:

> ("...") to the concern that all the species of great whales were at present depleted considerably below their original population levels, due not only to excessive exploitation but also because of knowledge that was inadequate to protect the species and in order to provide time that the nations could use to enhance knowledge of the ecology and population dynamics of whales, and

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[151] International Whaling Commission, *Thirty-third Annual Report* (Cambridge: International Whaling Commission 1983), Chairman's Report at 20.

> permit the most rapid recovery of whale populations, proposed that commercial whaling for all species of cetaceans should cease ("...")[152].

The provision for review after entry into force acknowledged the requirement of Article V(2) (b) of the ICRW as well as its objectives by keeping open the possibility that whaling might be resumed if reassessment of stocks indicated that they could then sustain catches. To this end, it was agreed that the effects of the moratorium on whale stocks would be monitored and assessed five years later to determine whether it was possible to re-introduce quotas.

By the early 1980's whaling had become a marginalized economic activity with a declining global demand for whale products for many states. Voting in favour of the moratorium thus cost states little strategically and appeased voters who perceived whaling as an immoral activity. However, Norway, Japan, Peru and the USSR filed formal objections to the moratorium[153] in the time limit provided for under the Convention, on the basis that zero quotas were neither fully justified by scientific findings nor biological needs. This implied that these countries were consequently not bound by the ban on commercial whaling and could legally continue whaling. Canada, an ardent whaling nation, went one step further and decided to pull out of the ICRW and leave the IWC entirely[154].

In order to appease the whaling nations, and in particular to address the need expressed by indigenous peoples to preserve their whaling culture and for states to take some whales for the purpose of effective scientific data collection, the

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[152] ***Ibid.***

[153] Peru however withdrew its objections because the United States threatened to implement unilateral economic sanctions provided by the Pelly amendments to the US Fisherman's Protective Act and the Packwood Magnuson amendments to the Magnuson Fishery Conservation and Management Act.

[154] Adrienne Ruffle, "Resurrecting the International Whaling Commission: suggestions to strengthen the conservation effort" (2002) XXVII Brooklyn Journal of International Law 2 at 4.

moratorium went into effect with two compromise clauses: aboriginal subsistence whaling and scientific whaling.

1.2.3 Conclusion

At the end of this period, there has been a distinct shift in the policies of the IWC in favour of greater conservation rather than exploitation of whales. This has been influenced by increasing pressure on the IWC through the adoption of environmental treaties and documents. Many of these texts give new meaning to 'conservation' in international law, and have introduced new perspectives to the management of whales, such as the ecosystem approach. Furthermore, the treaties create an obligation for states to preserve the marine environment in general and conserve whales in particular, and through legislative reforms at home, have enhanced the enforcement opportunities of the ICRW.

Furthermore, the increased pressure from non-whaling states and lobbying from NGOs and conservationist organisations has led to a shift in the balance between exploitation and conservation, clearly in favour of the latter with the adoption of the moratorium on commercial whaling in 1982, as well as measures aimed at the recovery and maintenance of whale stocks. The moratorium was adopted irrespective of the data provided by the Scientific Committee which demonstrated the abundance of certain species of whales and pointed to the fact that a blanket moratorium of commercial whaling regarding all species of whales was an extreme unnecessary measure of conservation.

The pendulum has thus swung completely in the opposite direction with a general ban on whaling, the only exception being the taking of whales for scientific research and in pursuit of aboriginal subsistence whaling. With regard to the dual purposes of the ICRW, namely, the conservation of whale stocks and the orderly

development of the whaling industry, one can conclude from the practice of the ICW during this period that it has once again failed to simultaneously pursue the aims and objectives set by the Convention, and establish the necessary balance between exploitation and conservation.

CHAPITRE II

BALANCING THE THREE PILLARS OF SUSTAINABLE DEVELOPMENT

By 1982, the IWC had adopted the moratorium on commercial whaling amidst uncertainty regarding the status of whale stocks and inadequacy of scientific data to manage whale stocks effectively, as was the case at the time of its adoption. At the time, the Scientific Committee found it therefore almost impossible to agree on recommendations for restricting catches of stocks subjected to commercial whaling. The role of the Scientific Committee had already begun to decrease by the 1970's and in the years leading up to the moratorium decision, scientific advice was gradually being overridden by the environmental movement to save whales. The shift from the 'tragedy of the commons' to common interests had taken place within the IWC, with the dominance of conservation over exploitation. During this initial period, the IWC had thus failed to achieve the necessary balance between exploitation and conservation so critical for sustainable development, with an initial bias towards economic development and a subsequent dominance of the ecology, to the detriment of the other two pillars, respectively.

This chapter will determine whether the IWC has managed to re-establish a balance between the conflicting demands of exploitation and conservation and among the three pillars, in favour of sustainable development. As the latter is best served in situations which allow for a balance of competing interests, this chapter will bring to light the conflicts of interests among and between the three pillars of sustainable

development - ecology, equity, and the economy - and how the IWC has attempted to redress these imbalances. For purposes of illustration, these pillars are represented, respectively, by three major policies of the IWC – the establishment of whale sanctuaries (ecology), aboriginal subsistence whaling (equity) and scientific research whaling (economy). These will be examined in turn in the following three sections of this chapter.

2.1 Protection of the ecology: the establishment of whale sanctuaries

This section uses the establishment of whale sanctuaries by the IWC to determine to what extent its policy conforms to the protection of the ecology as set out in international instruments and sustainable development debates, in favour of a balance between the conflicting demands of exploitation and conservation.

The first sub-section will point to the preventive and precautionary approaches necessary for the protection of the ecology which act as the basis for the establishment of whale sanctuaries. The second provides a review of the objectives and characteristics of sanctuaries adopted by the IWC in order to determine whether these conform to the ecological pillar of sustainable development. The third examines the practical application of the criteria, and the reasoning behind its decisions to adopt or reject whale sanctuaries. The final sub-section determines whether the whale sanctuaries contribute to redressing the balance between the overexploitation of the past, the ban on commercial whaling and the requirement to protect the ecology for the achievement of sustainable development.

2.1.1 Protection of the ecology underlies sanctuaries

Whale sanctuaries represent a measure of preservation and in the case of the IWC can act as an acceptable balance between the two extreme forms of whale management of

the past - the unsustainable commercial hunting practiced in the 1950's and 1960's, and the prohibition of commercial hunting under the 1982 moratorium. Sanctuaries provide marine areas devoted to the protection of whales on the high seas, free from the threat of commercial whaling.

Sanctuaries are in line with the pillar for the protection of the ecology as they act as an effective measure of preservation between the exploitation of natural resources and the need to avoid their depletion[155]. As reflected in the *Stockholm Declaration*[156] "The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind"[157]. To this end, the *Brundtland Report*[158], proposes a new approach to conservation of species that can be characterized as "anticipate and prevent"[159]. This preventive approach addresses the problems of species depletion in development policies, anticipates the impact of destructive policies and aims to prevent damage now[160]. The *Rio Declaration*[161] in turn specifies that this involves the reduction and elimination of unsustainable patterns of production and consumption[162], and therefore, calls on limiting the exploitation of natural resources.

The 1982 *United Nations Convention on the Law of the Sea*[163] (UNCLOS) refers specifically to the protection of the marine environment. In this regard, it recognises that states have the sovereign right to exploit their natural resources

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[155] World Commission on Environment and Development, **supra** note 2 at 46.
[156] ***Supra*** note 13.
[157] ***Ibid***. at Principle 5.
[158] ***Supra*** note 2.
[159] ***Ibid***. at 157.
[160] Ibid.
[161] ***Supra*** note 36.
[162] ***Ibid***. at Principle 8.

pursuant to their environmental policies, but notes that they also have a duty to protect and preserve the marine environment[164]. *Agenda 21*[165] complements UNCLOS by providing a program of action with regard to the prevention of degradation of the marine environment and the sustainable use and conservation of marine living resources[166].

In the face of scientific uncertainty, in addition to being established on the principle of prevention, whale sanctuaries are set up on the basis of the *principle of precaution.* This principle represents an important element of the concept of sustainable utilisation, as it addresses the key question of uncertainty in the prediction of environmental effects[167]. It calls on the need for positive action, rather than reaction, to restrict activities likely to lead to natural resource depletion before scientific proof of harm has been made available.

The principle of precaution was endorsed by Principle 15 of the *Rio Declaration*[168], which specifies that: ("...") where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation"[169]. This was further strengthened by *Agenda 21*[170] which requires: "new approaches to marine

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[163] ***Supra*** note 123.
[164] ***Ibid.*** at Article 193.
[165] ***Supra*** note 55.
[166] Alexander Yankov, "The Law of the Sea Convention and Agenda 21: Marine Environmental Implications" in Alan Boyle and David Freestone, eds., *International Law and Sustainable Development* (Oxford University Press, 1999) at 271.
[167] Alan Boyle & David Freestone., *International Law and Sustainable Development* (Oxford University Press, 1999) at 9.
[168] ***Supra*** note 36.
[169] ***Ibid.*** at Principle 15.
[170] ***Supra*** note 55.

and coastal area management and development ("...") that are integrated in content and are precautionary and anticipatory in ambit ("...")[171].

Whale sanctuaries can act as an effective measure to ensure that species are safeguarded from depletion and have an opportunity to recover from overexploitation. Sanctuaries benefit long-term whale preservation by facilitating the recovery of seriously depleted whale populations through the protection of the species throughout their life cycle, including their feeding and breeding grounds and migratory routes. The protection of the ecology through the establishment of whale sanctuaries can thus be viewed as a rational response to the tension between the overexploitation of whales and their sustainable use, in order to meet the international duty to preserve them for present and future generations. In this regard, sanctuaries represent the intersection between the first and second pillars of sustainable development - that of the protection of the ecology and the principle of equity, which will be discussed in greater detail in the next section of this chapter.

2.1.2 Do the IWC criteria for whale sanctuaries conform to the protection of the ecology?

The provision for sanctuaries was already included in the ICRW. The IWC subsequently adopted a series of criteria and guidelines for the establishment and management of sanctuaries. This process was undertaken in an *ad hoc* manner, through a reactive approach over a period of more than 50 years.

The option of establishing whale sanctuaries was carried over from the Protocol to the 1937 Convention for the Regulation of Whaling[172], and included in the

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[171] ***Ibid***. at chapter 17.01.
[172] This provided for the establishment of the first whale sanctuary in the Antarctic region.

Schedule of the ICRW which may be amended by the Commission with a view to the conservation and utilisation of whale resources by fixing "open and closed waters, including the designation of sanctuary areas"[173]. Although at the time, no definition was provided of the "sanctuary areas" in question, the designation of such areas was to be subject to the same conditions as the other amendments to be made to the schedule, *inter alia*, that they must be:

> ("...") necessary to carry out the objectives and the purposes of the ICRW and to provide for the conservation, development and optimum utilisation of the whale resources"; they must be based on ("...") scientific findings"[174]; and must ("...") take into account the interests of the consumers of whale products and the whaling industry"[175].

It was only in 1981, after the establishment of its first sanctuary in the Indian Ocean region (which is described in greater detail hereafter), that the IWC set up a Technical Committee Working Group to examine the general concept of a whale sanctuary and its desirable characteristics. This Working Group defined a whale sanctuary as "an area closed to whaling for a specific period of time, in which whales were to be afforded protection in order to provide for long-term conservation"[176]. It further specified that the objective of a sanctuary was to ensure the conservation and utilisation of whale resources, consistent with the Preamble and Article V of the ICRW. The 1982 report of this Working Group added that whale sanctuaries should be based on ecological considerations; that they may apply only to certain or all

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[173] ***Supra*** note 10 at Article V, Paragraph 1.
[174] ***Ibid***. at Article (V) (2) (c).
[175] ***Ibid***. at Article (V) (2) (d).
[176] International Whaling Commission, *Fiftieth Annual Report* (London: International Whaling Commission 2000), Annex S, Proposed Rules of Procedure of the Scientific Committee at 4.

species of whales; and that research within the sanctuary be based on non-lethal techniques[177].

Much later, in 1999, a set of guidelines adopted by the IWC complemented the criteria set out in the above Working Group report by specifying that there is a need to: provide protective measures to conserve whales which are not otherwise available under the regulatory measures of the IWC; identify the species to be protected; provide information on current and past population or stock levels; provide information on the protection offered to the species identified; submit information on the contribution of the sanctuary to the IWC's management of whale stocks, and on the research undertaken to conserve and manage these[178].

As a backdrop to the discussions of criteria for sanctuaries, lengthy debates took place within the IWC on appropriate responses to scientific uncertainty regarding the status of whale stocks. Of particular concern was how to assess acceptable levels of risk of depletion of whale stocks and the extent to which scientific data is to inform the decision of the IWC to establish whale sanctuaries.

These focused on the one hand on the Revised Management Procedure (RMP) adopted by the IWC in 1994, which has to date yet to be implemented, and the desire to establish whale sanctuaries, on the other[179]. The objective of the RMP was to set up a system of stock assessment which should guarantee the protection of whale stocks on a sustainable basis[180]. It provides conservative quotas for baleen whales

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[177]International Whaling Commission, ***supra*** note 151 (Cambridge: International Whaling Commission 1983), Report of the Technical Committee Working Group on Whale Sanctuaries at 34.
[178] International Whaling Commission, ***supra*** note 176.
[179] Michael Heazle, "Lessons in precaution: the International Whaling Commission experience with precautionary management" (2006) 30 Marine Policy at 496.
[180] Alexander Gillespie, "The Southern Ocean Sanctuary and the Evolution of International Environmental Law" (2000) 15 The International Journal of Marine and Coastal Law 3 at 303.

which are set lower than necessary in order to include an effective safeguard against scientific uncertainty by allowing up to 50% of error in abundance estimates[181]. The RMP, which is considered a very precautionary measure, has been described as representing ("...") the culmination of several years of extensive development and had been tested against uncertainty with a rigor unparalleled of any biological resource"[182]. The question related to whether both the RMP and whale sanctuaries represented necessary and complementary measures to address the risk of stock depletion, or whether only the RMP should be applied, in which case there would be no need for an additional measure to ensure the preservation of whale stocks in the form of sanctuaries. In addition, the RMP has been completed by the Revised Management Scheme (RMS) which would ensure compliance of the RMP.

Despite the fact that the divisions within the IWC over acceptable levels of risk has continued to dominate debates at its annual sessions, the IWC finally adopted, in 2001, the instructions from the Commission to the Scientific Committee for Reviews of Sanctuaries and Sanctuary Proposals[183]. These focus essentially on the review of proposed sanctuaries and that of existing sanctuaries with a view to amending the objectives of the sanctuary, as and when necessary. The instructions require the Scientific Committee to provide advice on the status and trends of whale stocks in the proposed sanctuary, if known, and to verify whether the proposal differentiates between stocks that are depleted and slow to recover, those that reproduce rapidly, and those that are abundant. The Committee is also to assess whether the sanctuary boundaries are ecologically appropriate, whether it is consistent with the

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[181] Joji Morishita, "Multiple analysis of the whaling issue: understanding the dispute by matrix" (2006) 30 Marine Policy at 804.
[182] International Whaling Commission, *Forty-third Annual Report* (London: International Whaling Commission 1993) at 72.

precautionary approach and what its anticipated effects could be on whale breeding areas and feeding grounds as well as migratory routes. Finally, the Committee is to evaluate how the proposed sanctuary may contribute to, or impede, the conduct of scientific research to inform the IWC.

The instructions do not, however, refer to the need for an analysis of the implications of a proposed sanctuary in respect of the RMP or the need to base its reviews and decisions on the findings of the Scientific Committee[184]. In order to reinforce this position, the IWC adopted a resolution, in 2002, which states that scientific considerations, although important, should not be definitive in the justification for the establishment of a whale sanctuary. The Resolution noted that "..." there was no consensus on specific issues within sanctuaries. The precautionary approach should limit the negative impacts of environmental uncertainty" [185] in accordance with Principle 15 of the *Rio Declaration*[186]. The instructions and the related resolution adopted implied that the Scientific Committee was sidelined and relegated to a merely supportive role, as its scientific findings were not taken into account on the occasion of the review of proposals for sanctuaries submitted.

It can be argued that the criteria for the establishment of sanctuaries as set out by the IWC indeed conform to the principles underlying the protection of the ecology as reflected in international instruments. Sanctuaries are to be established according to the preventive and precautionary approaches. To this end, they act as an effective

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[183] International Whaling Commission, *Fifty-second Annual Report* (London: International Whaling Commission 2002) Instructions from the Commission to the Scientific Committee for Reviews of Sanctuaries at 63.
[184] Elisa Morgera, "Whale sanctuaries: an evolving concept within the International Whaling Commission" (2004) 35 Ocean Development and International Law at 333.
[185] International Whaling Commission, *Fifty-third Annual Report* (London: International Whaling Commission 2003) Resolution 2002/1 Guidance to the Scientific Committee on the Sanctuary Review Process.

measure against the future exhaustion of whales, avoid their depletion, address the issue of unsustainable patterns of consumption, and can be set up in the absence of scientific data. In this way, they go even further in scope as they articulate and expand on the content of the protection of the ecology, as reflected in international instruments.

2.1.3 The establishment of whale sanctuaries in practice

This sub-section examines how far the IWC has applied the criteria and guidelines for sanctuaries that it has adopted and how it conforms to the ecological pillar of sustainable development.

During the period under study, four sanctuary proposals were submitted to the IWC for review and adoption. Two proposals - for the establishment of an Indian Ocean Sanctuary and a Southern Ocean Sanctuary - were accepted by majority vote, and the proposals for a South Pacific and South Atlantic Sanctuary were rejected. These proposals will be considered in greater detail in this sub-section.

The first proposal for a whale sanctuary was submitted to the IWC by the Seychelles in 1979 requesting the creation of the Indian Ocean sanctuary. The proposal covers an area of approximately 28 million square kilometres around Antarctica and the feeding grounds for 90% of the world's great whales[187]. This initiative was influenced by the 1972 *Stockholm Declaration*[188] which called for international recognition of the need to safeguard natural ecosystems[189]. Furthermore,

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[186] ***Supra*** note 36.
[187] William Burns & Geoffrey Wandesforde-Smith, "The International Whaling Commission and the future of cetaceans in a changing world" (2002) 11 RECIEL at 207.
[188] ***Supra*** note 13.
[189] ***Ibid.*** at Principle 2.

pressure on the IWC to set up this sanctuary was increased by the International Union for the Conservation of Nature (IUCN) proposal for a whale sanctuary in the Eastern Indian Ocean expressed during a 1979 United Nations Environment Program (UNEP) workshop on cetacean sanctuaries[190]. The suggestion for this sanctuary was made on the assumption that any policy of the IWC based on stock assessment was ineffective and it was, therefore, necessary to provide specific areas where whales would be protected from hunting. The objective of the sanctuary was to provide freedom from disturbance for ecosystems and for species of whales in general and, breeding activities in particular.

The proposal for the Indian Ocean Sanctuary was adopted by the ICW in 1979 by 16 votes for, 3 against[191] and 3 abstentions[192]. The Schedule under the ICRW was amended accordingly and stated that this prohibition applies irrespective of the classification of baleen or toothed whale stocks in the sanctuary, for a period of ten years, with a provision for a general review after five years. The sanctuary was renewed for a further three years in 1989 and established as a permanent sanctuary at the 1992 session of the IWC[193]. At this session, the Schedule was further amended to reiterate that commercial whaling is banned within the sanctuary even if whale stocks are sufficiently abundant at some stage to warrant the resumption of whaling[194]. The status of the sanctuary was reviewed in 2002 and its maintenance reaffirmed[195].

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[190] Morgera, ***supra*** note 184 at 321.
[191] The countries which voted against the establishment of the sanctuary were the USSR, Japan and Korea.
[192] International Whaling Commission, *Thirtieth Annual Report* (Cambridge: International Whaling Commission 1980) Chairman's Report at 27.
[193] International Whaling Commission, ***supra*** note 193 (London: International Whaling Commission 1991) Chairman's report at 21.
[194] International Whaling Commission, *Forty-fourth Annual Report* (London: International Whaling Commission 1994) Chairman's report at 18.
[195] Ibid.

At the 1990 annual session of the IUCN, a resolution was passed which not only called upon the IWC to continue to support the Indian Ocean Sanctuary but also to ("...") consider the creation of other sanctuaries within a comprehensive system for the conservation of whales"[196]. This suggestion was taken up by France at the 1992 meeting of the IWC, when it proposed the establishment of a sanctuary in the Southern Hemisphere, known as the Southern Ocean Sanctuary. The objective of this sanctuary was to respond to the need to contribute to the rehabilitation of the Antarctic marine ecosystem and the protection of all Southern Hemisphere species and populations of baleen and sperm whales on their feeding grounds. Here again, this would provide an area where the whales would be free from commercial whaling, and thereby allow for the recovery of a large number of species and populations. The proposal also included a long-term program for research and monitoring of the whale populations in the specified area based on non-lethal techniques[197]. Furthermore, the IWC Intersessional Working Group that was established to consider the Southern Ocean Sanctuary[198] suggested that the sanctuary be created in conformity with the precautionary principle in a risk-averse manner[199].

Two years later, after much debate, the decision to establish a Southern Ocean Sanctuary was adopted by the IWC at its 1994 meeting by 23 votes in favour, one against and six abstentions[200]. The majority of states supported this sanctuary, due largely to increasing acceptance of the principle of precaution enshrined in principle 15 of the *Rio Declaration*[201]. In order to avoid reopening the debate, it was decided

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[196] International Union for the Conservation of Nature, 18th General Assembly, Resolution 18.34.
[197] International Whaling Commission, *Forty-sixth Annual Report* (London: International Whaling Commission 1996) Chairman's Report at 20.
[198] This Intersessional Working Group on a Sanctuary in the Southern Ocean held a meeting on the Norfolk Island in 1994.
[199] Morgera, ***supra*** note 184 at 325.
[200] International Whaling Commission, **supra** note 197 at 19.
[201] ***Supra*** note 36.

that the status of the sanctuary would be reviewed ten years after its initial adoption and at succeeding ten year intervals thereafter. It has now been declared for an indefinite period.

Japan and Norway objected to the amendment to the Schedule which implies that they are not bound to respect the regulations concerning the Southern Ocean Sanctuary. The reasons given were that it did not comply with either Article V.2 (b) or Article V.2 (d) of the ICRW, namely, that consideration shall be given to the interests of consumers of whale products and that of the whaling industry. Therefore, it was argued, the existence of the sanctuaries would deny sustainable use.

The two whale sanctuaries established by the IWC represent the main example of marine protected areas on the high seas and combined cover a surface area of approximately 100 million square kilometers, which corresponds to about 30% of the world's oceans[202].

Two additional sanctuary proposals were rejected by the IWC.

The South Pacific Sanctuary was proposed for four consecutive years by Australia and New Zealand at the IWC sessions from 2001 to 2003. Again, it was decided to establish this sanctuary "irrespective of the conservation status of baleen or toothed whale[203] stocks in this Sanctuary"[204]. The purpose of this sanctuary was to ensure the conservation of whales, especially further to depletion, due to past overexploitation of most of the eleven great whale species found in the area. Such a

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[202] Morgera, ***supra*** note 184 at 333.
[203] Toothed whales include different species of dolphins, sperm whales, orca, pilot whales, beluga and porpoises.
[204] International Whaling Commission, *Fifty-fourth Annual Report* (London: International Whaling Commission 2004), Chairman's Report at 28.

measure would complement the protection of all the great whale species that breed in tropical and sub-tropical latitudes and migrate each summer to feeding grounds within the Southern Ocean Sanctuary. Support for this initiative was further strengthened by the fact that there were already a number of domestic whale sanctuaries which had been so declared by countries within their Exclusive Economic Zone[205]. The sanctuary would be reviewed ten years after its initial adoption and at succeeding ten year intervals thereafter.

Some countries felt that the establishment of this sanctuary would represent an additional tool in strengthening the conservation agenda of the IWC while others noted that, in the light of the moratorium on commercial whaling and the restrictions of the use of factory ships, there was no urgent need for a sanctuary[206]. Iceland recognised the sovereign rights of individual states to establish protected areas for whales in waters under their jurisdiction but "believed that it goes against the general principles of international law and the ICRW specifically to close vast areas to whaling without regard to the abundance of different whale stocks in those areas", and that the proposal is thus not in conformity with Article (V) (2) of the Convention regarding the interests of consumers of whale products and the whaling industry. In view of this, "Iceland urges Contracting Governments not to go against the Convention or the principles of sustainable development and use"[207]. The Republic of Palau added that it felt that there was insufficient evidence that all whales in the proposed sanctuary area require protection. When put to a vote, the proposed amendment to the Schedule did not attract the three-quarters majority of the IWC members, and the sanctuary proposal failed to be adopted.

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[205] For example 12 pacific states and territories established a whale sanctuary by adopting whale protection legislation.
[206] ***Supra*** note 204 at 29.
[207] ***Ibid***.

The proposal for a South Atlantic Sanctuary was submitted to the IWC by Brazil for three consecutive years from 2001 to 2003. The purpose of this proposal was to mark the importance Brazil gives to the environmental and social dimensions of sustainability. In this regard, Brazil reiterated that not only did whaling cause damage to stocks shared by many coastal nations, but the profit generated was concentrated in a few developed countries to the great disadvantage of most of the global community. The proposal also asserts that the whale sanctuary would be consistent with current international approaches to marine conservation, and that it would promote the economic interest of local communities, through the development of the whale watching industry.

As for those states which opposed the sanctuary, Iceland once again referred to the text of the ICRW and asked why the sanctuary was necessary for the optimum utilisation of whale resources and how it would take into consideration the interests of consumers of whale products and the whaling industry. Japan further raised the issue of the scientific justification for the whale sanctuary, as data about the specific species to be protected was unavailable. Guinea was concerned that the sanctuaries would not cater to food requirements of the consumers of whale products, which was especially regrettable in the light of the lack of scientific evidence justifying the establishment of the sanctuaries. The lack of consensus on the proposal or on the interpretation of the Convention led to its rejection by the IWC[208].

2.1.4 Conclusion

In the light of the historical overexploitation of whales and amidst scientific uncertainty, it can be argued that the two sanctuaries that have been established

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[208] Of the 77 member states of the IWC at the time, 39 voted in favour and 29 against. The others abstained or were not present.

represent an effective measure to preserve whales. They correspond to the protection of the ecology as set out in international instruments, and meet the general objectives of whale sanctuaries by targeting the protection of whale breeding and feeding grounds, their habitat, migratory routes, and their ecosystems over very large areas of ocean. This allows for the recovery of those whale species which were particularly depleted. In addition, they provide for non-lethal research on stock status and recovery, enabling the IWC to make informed decisions concerning the effective preservation of whale stocks, for potential future sustainable use. Finally, they may serve the 'interests' of consumers of whale products and the whaling industry, in particular in the southern hemisphere, in terms of non-consumptive use, by generating profit through activities such as whale watching.

With regard to the overall status of the international whaling regime, it can be argued that the sanctuaries provide protection to whales, as a precautionary approach, in addition to the moratorium on commercial whaling which can be lifted at any of the annual sessions of the IWC, in complement to and on the basis of, the RMP, which although conservative may still fail to be fully implemented by states which are unwilling to abide by restrictions on whaling. With respect to whale sanctuaries, the role of the Scientific Committee remains weak as the IWC decided to establish these irrespective of information of individual stock status. This is compounded by the fact that scientific data justifying the establishment of sanctuaries is transmitted by the relevant states within the framework of proposals they submit, rather than on the basis of the scientific findings of the Committee.

It can be concluded that sanctuaries comply with the elements of sustainable development to limit exploitation and provide for the recovery of whale species for future sustainable use. They respond to the principle of prevention by addressing resource depletion and the principle of precaution in the face of scientific uncertainty. In this way, they can contribute in the long-term to ensuring the co-existence of

limited resource exploitation and the protection of the ecology. In terms of providing for a profit-making industry through the developing of whale watching activities, sanctuaries can contribute to social equity, especially in developing countries. In this way sanctuaries contribute to both the pillars of the ecology and equity of sustainable development.

Despite these positive conclusions, three major issues regarding whale sanctuaries continue to be debated by the IWC, which underlie continuing tensions and create obstacles to the establishment of additional sanctuaries. These relate to the fact that: they have been set up irrespective of data provided for by the Scientific Committee itself, including information concerning the status of individual whale stocks; they fail to meet the need to simultaneously carry out the objectives and the purposes of the ICRW by providing for the conservation, development and optimum utilisation of whale resources, and thus sustainable use, in the short term; and they represent an unnecessary measure in addition to the moratorium on whaling and the RMP both of which should provide for adequate protection and sustainable use of whales, respectively.

2.2 The principle of equity: Aboriginal subsistence whaling

This section uses aboriginal subsistence whaling to examine the contribution which the IWC has made to the principle of equity[209] as a key element of sustainable development. The first sub-section details what is understood by equity in both its intra- and inter-generational perspectives by drawing on the provisions of international documents and instruments, and the role of indigenous peoples[210] in

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[209] For ease of reference, the term 'equity' encompasses both intra- and inter-generational equity.
[210] The term "indigenous peoples" used is based on that used in the United Nations Declaration on the Rights of Indigenous Peoples. See: *United Nations Declaration on the Rights of Indigenous Peoples* A/Res/61/295.

contributing to the respect of this principle. The second sub-section points to the fact that a number of key elements of equity are included in the guidelines for aboriginal subsistence whaling the IWC has elaborated. The third focuses on how the IWC has dealt, in practice, with requests for aboriginal subsistence whaling and whether these criteria have been taken into account when considering requests. The conclusion will provide an analysis as to whether the policies and decisions of the IWC regarding aboriginal subsistence whaling have contributed to the respect of the principle of equity and thus to the wider issue of sustainable development.

2.2.1 Equity: what provisions in international instruments?

The principle of equity, as it applies to the conservation of resources, is central to the achievement of sustainable development. It contains two distinct components: the first calls for fairness in the utilisation of resources of present and future generations, known as inter-generational equity; the second refers to the rights of all peoples within the current generation of fair access and use of the earth's resources, both domestically and globally, known as intra-generational equity. In both intra- and inter-generational dimensions, equity constitutes a bridge for recognized mutual interests between environmental protection, socio-economic development and human rights law.

A framework for addressing equity has been suggested by one prominent author on this subject through the application of three basic principles: firstly, that each generation be required to conserve the diversity of the natural and cultural resource base so that future generations may benefit, known as the principle of 'conservation of options'; secondly, that each generation maintain the quality of the resource base, referred to as the 'conservation of quality' and; thirdly, that each generation provide

its members with equitable rights of access to the legacy from past generations, known as the principle of 'conservation of access'[211].

More specifically, inter-generational equity concerns the ordering of the community of mankind so that every generation, by virtue of its own effort and responsibility, can secure a proportionate share in the common good[212]. This implies that the present generation has a right to use and enjoy the natural resources of the earth, but has an obligation to consider the long-term impact of its activities, and to sustain the resource base and the global environment for the benefit of future generations. There is thus a duty to meet the development and environmental needs of present and future generations in a sustainable and equitable manner.

Intra-generational equity, which is distinct from inter-generational equity, concerns an obligation "to ensure a just allocation of the utilisation of resources among human members of the present generation, both at the domestic and global levels"[213]. It is directed at the serious socio-economic asymmetry in resource access and use within and between societies and nations that has exacerbated environmental degradation and the inability of a large part of humanity to adequately meet its most basic needs. Reference is made to ensuring that the sharing of resources within generations is carried out in a non-discriminatory manner and that they "may not infringe upon the rights of other members to use and benefit from planetary resources"[214]. The duty within generations also concerns that of avoiding adverse impact upon the natural and cultural environment, in order to transmit to future generations the same quality of natural resources as they enjoy in the present.

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[211] Brown Weiss, ***supra*** note 27 at 38.
[212] Segger & Khalfan, ***supra*** note 33 at 124.
[213] ***Ibid***. at 125.
[214] Brown Weiss, ***supra*** note 27 at 55.

The fulfillment of either the intra- or inter- generational component can either help or hinder the achievement of the other's objectives. Current intra-generational inequity can thus lead to future or inter-generational inequity. Problems of equity among and between generations arise from the depletion or elimination of renewable resources and from loss of cultural resources[215]. This implies that the exhaustion of natural resources, which may possibly lead to an irreversible situation, results in the narrowing of the range of options for future but also present generations. A number of international instruments have referred to equity.

The 1972, *Stockholm Declaration*[216] set the scene by stating that "Man ("...") bears a solemn responsibility to protect and improve the environment for present and future generations"[217]. The *Brundtland Report*[218] defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[219]. The *Draft Declaration on Principles on Human Rights and the Environment*[220] uses very similar language in that "All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs"[221]. A similar reference was included in the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES)[222],

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[215] ***Ibid***. at 5.
[216] ***Supra*** note 13.
[217] ***Ibid.*** at Principle 1.
[218] ***Supra*** note 2.
[219] **Ibid.** at 43
[220] *Draft Declaration on Principles on Human Rights and the Environment* in Report presented to the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its 46th session (UN Doc, E/CN.4/Sub.2/1994/9).
[221] ***Ibid***. at Principle 4.
[222] ***Supra*** note 116.

which, in its preamble recognizes that ("...") wild fauna ("...") must be protected for this and the future generations to come"[223].

The 1992 *Rio Declaration*[224] framed equity within a rights-based approach by stating that "the right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations"[225]. Similarly, the *draft International Covenant on Environment and Development*[226] provides that the "Right to development must be fulfilled in order to meet the developmental and environmental needs of present and future generations in a sustainable and equitable manner"[227].

The *Convention on Biological Diversity*[228] notes that the concept of intra-generational equity and linked it to indigenous peoples in that it recognizes that the knowledge and methods of indigenous peoples play a key role in the conservation of natural resources and biodiversity, and that the benefits extracted from this biodiversity must be equitably shared[229]. The *United Nations Declaration on the Rights of Indigenous Peoples*[230] highlights the responsibility of indigenous peoples to ensure that future generations may benefit from the natural resources of the planet. To this end, it has recognised the "spiritual relationship with their traditionally owned or

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[223] ***Ibid***. at Preamble.
[224] ***Supra*** note 36.
[225] ***Ibid.*** at Principle 3.
[226] International Union for the Conservation of Nature, Draft International Covenant on Environment and Development.
[227] ***Ibid***. at Preamble.
[228] *Convention on Biological Diversity*, 1760 U.N.T.S 79; 31 ILM 818 (1992).
[229] ***Ibid.*** at article 8 (j).
[230] United Nations Declaration on the Rights of Indigenous Peoples A/Res/61/295.

otherwise occupied ("...") waters and coastal seas and other resources and ("...") their responsibilities for future generations in this regard"[231].

The interdependent relationship between equity and sustainable development of natural resources is particularly prominent in situations involving the protection of fragile ecosystems inhabited by indigenous peoples. Aboriginal subsistence whaling[232] provides a good case study of the potential intersection and interrelationship between cultural values, environmental protection and the respect, in particular for intra-generational equity.

2.2.2 IWC guidelines for aboriginal subsistence whaling include elements of equity

The IWC has recognised the importance of whaling for some indigenous peoples who rely on whaling for food and economic and cultural survival. In many instances, whaling represents a long-standing cultural tradition which has been maintained for thousands of years, going back to at least 9,000 years[233]. It has met subsistence, religious, spiritual and ritual needs of indigenous peoples. For the Inuits, sharing the harvest of the whale hunt is important for food throughout their regions, and hunting is essential to the Inuit way of life[234]. The Alaskan Eskimos have a long history of hunting bowhead whales to meet their subsistence needs which is an integral element of their culture. The native people of Chukotka in Russia have relied on the hunting of gray and bowhead whales for their nutritional requirements as well as maintaining the survival and vitality of their culture. For the Makah in the USA, whaling is

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[231] ***Ibid.*** at Article 25.
[232] This term is the one used by the IWC.
[233] Jeremy Firestone & Jonathan Lilley, "Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs" (2005) 8 Journal of International Wildlife Law and Policy at 181.
[234] Nancy Doubleday, "Aboriginal subsistence whaling: the right of Inuit to hunt whales and implications for international environmental law" (Winter 1989) DJILP at 373.

important for cultural sustenance and for societal rebuilding and strengthening[235]. The Maori people of New Zealand associate whales with spirituality and include whales in their myths and legends, emphasizing the spiritual connection many native Pacific Islanders have with the environment[236].

Already in 1946, the ICRW has provided for the consumers of whale products, including indigenous peoples, the text of which has been framed in terms of equity for present and future generations. It states, in its preamble, that it is in the "interest of the nations of the world in safeguarding for future generations the great natural resources represented by whale stocks"[237]. The ICRW reflects intra-generational equity in that it is in ("...") the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress"[238]. The concept of intra-generational equity was strengthened in the section on the amendment to the Schedule which states that it "shall take into consideration the interests of the consumers of whale products ("...")[239], referring here to indigenous peoples. The first Schedule of the ICRW carried this concept forward in order to meet the request of the USSR on behalf of the Chukotka people to hunt gray whales, for local consumption[240]. To this end it included a specific exception of aboriginal subsistence whaling in that "It is forbidden to take or kill gray or right whales, except when the meat and products of such whales are to be used

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[235] Travis Reaveley, "Nuu Chah Nulth Whaling and its significance for social and economic reproduction" reprinted with author permission from the (1998) 28 Chicago Anthropology Exchange Graduate Journal of Anthropology at 2 .
[236] Comments, "Culture Clash: the influence of indigenous cultures on the international whaling regime" (2004-2005) 35 California International Law Journal 83 at 119.
[237] ***Ibid***. at Preamble, Paragraph 2.
[238] ***Ibid***. at Paragraph 5.
[239] ***Ibid***. at Article V 2 (d).
[240] Resolution 10 of the International Whaling Conference, paragraph IX, Washington, 1946. Reprinted in Birnie, ***supra*** note 68 at 697

exclusively for local consumption by the aborigines"[241]. A similar amendment to the Schedule was adopted in 1964 and extended to cover the American Eskimo, the Soviet Aleut and the Canadian Inuit catches[242], even though both the whales which they traditionally caught such as the gray and bowhead whales were already seriously depleted.

At its 1977 meeting, the IWC revised its policy of allowing, among others, the Inuit to hunt the otherwise protected gray and bowhead whales and decided that these hunts would no longer be legal[243]. This led the IWC to address the needs of aboriginals for whaling while ensuring preservation of particular species threatened with extinction, and to establish a management regime for aboriginal subsistence whaling, separate from that of commercial whaling[244]. Some members of the IWC argued that as both types of whaling involved the same interaction between man and whales as a resource, the same principles and management objectives should apply. Others considered that there was a much greater dependence on whale products to ensure the subsistence and cultural needs of aboriginal whaling, as opposed to commercial whaling, whose primary goal is to obtain the maximum yield from individual stocks[245].

After extensive discussions, the majority of members of the IWC clearly favoured a separate system of management for aboriginal subsistence whaling. This

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[241] ***Supra*** note 10 at Schedule, Paragraph 2.
[242] Gillespie, ***supra*** note 66 at 231.
[243] This decision was partly reversed however when the pressure by Alaskan whalers led the IWC to accept a hunt of 18 bowheads for the 1978 whaling season.
[244] Randall Reeves, "The origins and character of 'aboriginal subsistence' whaling: a global review" (2002) 32 Mammal Review at 72.
[245] International Whaling Commission and Aboriginal/Subsistence Whaling : April 1979 to July 1981, Special Issue 4 in: *International Whaling Commission, Aboriginal/Subsistence Whaling: (with special reference to the Alaska and Greenland Fisheries* (Cambridge: International Whaling Commission 1982) at 84.

separate management regime, adopted at the 1979 session of the IWC, was to be achieved by ensuring that: subsistence whaling not increase the risks of extinction to individual stocks; aboriginal people continue to harvest whales in perpetuity at levels appropriate to their cultural and nutritional requirements; and whale stocks be maintained at or above conservation level[246].

In 1981, this separate management regime was reinforced by the adoption of a working definition of aboriginal subsistence whaling as "whaling for the purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous or native peoples who share strong community, familial, social and cultural ties related to a continuing traditional dependence on whaling and the use of whales", and "local aboriginal consumption means the traditional uses of whale products by local aboriginal, indigenous or native communities in meeting their nutritional, subsistence and cultural requirements. The term includes trade in items which are by-products of subsistence catches"[247].

The IWC thus defined aboriginal subsistence whaling as meeting subsistence and cultural needs of 'aborigines' who have solid family, community and cultural ties, the products of which are to be consumed locally and not traded on a commercial scale.

With regard to specific groups to which aboriginal subsistence whaling applies, further debates within the IWC centred on the issue of aboriginal subsistence whaling as opposed to small-type coastal whaling. It was argued by some member states, such

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[246] ***Ibid***.

[247] International Whaling Commission, *Thirty-second Annual Report* (Cambridge: International Whaling Commission 1982) Report of the Steering Committee of the ad hoc technical committee working group on development of management principles and guidelines for subsistence catches of cetaceans by indigenous peoples at 24.

as Japan and Norway, that small coastal communities who have a long history of whaling which also meets their subsistence and cultural needs should have the same rights as those undertaking aboriginal subsistence whaling[248]. Alternatively, it was suggested that the IWC set up a separate category to cater to the whaling needs of small-type coastal communities. Despite the arguments put forth, the majority of members of the IWC concluded that small coastal communities did not share the same characteristics as those of indigenous peoples and that it would not be possible to establish an additional category of small type coastal whaling, in addition to the already existing categories of aboriginal subsistence and commercial whaling[249].

2.2.3 Requests for aboriginal subsistence whaling: an erratic response by the IWC

The following sub-section will examine the responses by the IWC to requests for aboriginal subsistence whaling by member states.

For the determination of aboriginal subsistence quotas, the IWC allocates these not to specific indigenous peoples but rather to governments requesting an aboriginal subsistence quota on the basis of a "needs statement" for one or more groups living on their territory. The allocation itself then proceeds on the basis of stock assessment by the Scientific Committee from which indigenous peoples, whose cultural and subsistence needs have been recognised by the IWC, can take whales. The IWC must then decide by a three-quarters majority whether to se the catch limit requested. The IWC thus allocates quotas for aboriginal subsistence whaling on the basis of individual stocks of whale species.

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[248] International Whaling Commission, *Thirty-ninth Annual Report* (Cambridge: International Whaling Commission 1988) Chairman's Report at 20.
[249] International Whaling Commission, *Forty-seventh Annual Report* (Cambridge: International Whaling Commission 1998) Chairman's Report at 27.

During the period under review, the IWC has dealt with five separate requests by states to hunt whales under the special provision of the aboriginal subsistence whaling category. These have included requests made by Denmark (for the peoples of Greenland for humpback whales), Japan, Norway, and the Russian Federation (for the Chukotka people for gray whales), Saint Vincent and the Grenadines (for humpback whales), and the United States (for the Makah and indigenous peoples of Alaska for humpback and gray whales). For the purposes of this section, only the requests for aboriginal subsistence whaling quotas by the Russian Federation, the USA, Japan and Norway will be examined in greater detail below, as these best exemplify the tensions regarding aboriginal subsistence whaling within the IWC. Other examples will be mentioned only briefly[250].

2.2.3.1 Russian Federation (Chukotka) and USA (Makah): subsistence needs called into question

At the 1996 session of the IWC, the Russian Federation presented a request for an annual catch of 5 bowhead whales to meet the needs of the indigenous peoples of the Chukotski autonomous region, the Chukotka, as they relied on whale hunting for both nutritional and ceremonial purposes, and have done so for thousands of years. This was to be granted in addition to the existing quota on bowheads all of which had been previously allocated to Alaskan Eskimos[251]. The Russian Federation argued that such an exemption would increase their food security in times of economic hardship within the Russian Federation and would restore old traditions and customs to preserve the culture of the Chukotkan people. Some delegations felt that the Chukotka had the right to continue whaling as a means of preserving their cultural traditions, others sought greater clarification as to the justification that aboriginal subsistence whaling

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[250] For a detailed table of aboriginal subsistence whaling sites, annual catches and status of hunted whale populations see: Reeves, ***supra*** note 244 at 74–75.

would meet the subsistence needs of the Chukotkan people, while yet others expressed concern about granting an exemption for bowhead whaling to the Chukotka when the limited stock would also need to be made available to indigenous peoples in other countries. No consensus was arrived at and the request was denied.

The other request at this session was that of the USA on behalf of the Makah Tribe which lives on the Pacific Coast of Washington State. Members of the Makah have traditionally hunted gray whales, an activity that involved the whole community, and once provided up to eighty percent of their subsistence needs[252]. Makah whaling then subsided in 1915 as the large scale commercial practices brought it to the point of extinction, with the suspension of whaling by the Makah by 1926 in order to allow the whale population to recover. The Makah thus suspended whaling for over seventy years resulting in dwindling economic prospects, and a rise in unemployment, juvenile crime, and drug and alcohol use. Makah leaders believed that "a return to whaling will not only contribute to the Tribe's subsistence and economic needs, but it will also help to revive a sense of community, self-worth and spirituality[253]". At the 1996 session of the IWC, the USA therefore presented a request for a catch of 5 gray whales for the Makah, placing particular emphasis on the resumption of whaling for subsistence and cultural purposes. Some delegations were fully supportive of the proposal, while others suggested that the subsistence element of the whaling exception was not justified as the Makah had not hunted whales for over seventy years, and yet their culture had survived. This lack of consensus led the USA to withdraw its proposal, with the intention of re-submitting it the following year.

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[251] Reeves, ***supra*** note 244 at 92.

In 1997, a joint proposal was submitted by the Russian Federation and the USA requesting a subsistence whaling exemption for the Chukotka and the Makah respectively. Some delegates again expressed doubts regarding the qualification of the Makah under the aboriginal subsistence exception. In order to obtain the necessary majority within the IWC, the delegates suggested that the joint proposal be amended to allow the quota to be used only by aboriginal groups "whose traditional subsistence and cultural needs have been recognized by the International Whaling Commission". This wording was then amended by the USA to allow the quota to be used by aboriginal groups whose traditional and cultural needs have been recognized. The USA further amended the text to allow whaling based on "cultural and/or subsistence" need thus eliminating the subsistence requirement of the exemption[254]. At the 1997 session of the IWC, no quota was officially awarded to the Makah. Consequently, both countries exchanged their already acquired quotas, with the Russian Federation giving the Makah four gray whales per year over the next five years out of their pre-existing aboriginal exception quota[255], and in turn receiving part of the bowhead quota that had been awarded to the USA[256].

2.2.3.2 Japan and Norway (Small coastal communities): coastal communities fail to qualify for aboriginal subsistence whaling

Since 1987, Japan has requested, from the IWC, a quota of fifty minke whales for the coastal whaling communities of Taiji, Wadaura, Ayukawa and Abashiri. Japan argued that these towns have been hard hit by the moratorium as their communities relied

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[252] Lawrence Watters & Connie Dugger, "The Hunt for Gray Whales: The Dilemma of Native American Treaty Rights and the International Moratorium on Whaling" (1997) 22 Columbia Journal of Environmental Law 319 at 321.
[253] ***Ibid***. at 324.
[254] ***Ibid***. at 11.
[255] The Chukotka have been granted an annual take of 140 gray whales for the years 1995 to 1997.
[256] Anthony Matera, "Whale quotas: a market-based solution to the whaling controversy" (Fall 2000) GIELR at 7.

heavily on small-type whaling and on the promotion of the social and cultural activities associated with the whaling operations and the distribution and consumption of whale products[257]. Japan thus considered that they have a similar status to that of aboriginal peoples who rely on whaling for their cultural and subsistence needs, and that exceptions to the moratorium should therefore also be granted to these small coastal communities. Furthermore, the request specified the hunting of minke whales, as available scientific data indicated that this species of whale had recovered to a level sufficiently sustainable to allow for whaling[258].

The claims made by Norway were similar to those of Japan as there exist, along their coasts, communities who have whaled for millennia and for whom whaling, especially of minke whales, has been a key element of their traditions and way of life. By 1993, the IWC scientific Committee unanimously concluded that the minke whale population had recovered to the point that Norway could resume traditional coastal whaling. Despite the existence of this scientific data, these requests have to date not been granted by the IWC to Japan or to Norway.

2.2.3.3 Additional requests for aboriginal subsistence whaling: meeting subsistence and cultural needs of communities

During the period under review, additional requests for aboriginal subsistence whaling were granted to the USA on behalf of the Alaskan Inuits, to Saint Vincent and the Grenadines for the people of Bequia, and to Greenland (represented by Denmark) on behalf of Inuit communities.

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[257] ***Ibid***. at 5.

[258] Minke whales are one of the species which, at the time of the adoption of the moratorium on commercial whaling in 1982, was considered sufficiently abundant as to allow for continued hunting.

Additional requests for aboriginal subsistence whaling during the period under review were granted by the IWC to the Alaskan Inuits living in 10 villages, on the basis of subsistence needs. In 1979, the IWC granted an aboriginal subsistence whaling quota of 41 bowheads per year to the Alaskan Eskimos who claimed that the bowhead whales represented great importance to their traditional diet. In addition, they were granted a quota of 204 bowhead whales for four years from 1995-1998. Saint Vincent and the Grenadines were granted a quota of 3 humpback whales for the years 1988 to 1993 to meet their nutritional needs with the stipulation that the meat and other products be used only for local consumption[259]. In addition, the quota would continue to serve a cultural need for the whole community[260]. The peoples of Greenland were granted an annual catch limit of 19 fin whales and 165 minke whales from 1995 to 1997 to meet the nutritional needs of the community where whale meat forms a substantial part of the household diet.

2.2.4 Guidelines for aboriginal subsistence whaling include three key elements of equity

The specific criteria for aboriginal subsistence whaling contained both in the Schedule of the ICRW and the guidelines developed by the IWC contain three key elements of equity. These include: the recognition of the special status of indigenous peoples; the requirement to meet their cultural and nutritional needs and; the need for conservation of those species of whales which are threatened with depletion.

By adopting a separate management regime for aboriginal subsistence whaling, the IWC has singled out indigenous peoples as deserving specific rights which other

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[259] Reeves, ***supra*** note 244 at 84.
[260] International Whaling Commission, ***supra*** note 193 (Cambridge: International Whaling Commission 1991) Chairman's Report at 31.

members of communities with similar needs for whaling do not possess. The IWC has thus recognised that the way of life of indigenous peoples has been threatened by modernization and social change and their traditional whale hunting has been curtailed or denied, in the past, due to the overexploitation of some species of whales through commercial whaling. A distinction has thus been made with other small-type coastal whaling communities who, as opposed to indigenous peoples, are indistinguishable from the dominant society's population, are fully integrated into the national economy, and have benefited from commercial whaling undertaken by the state to which they belong. The IWC has addressed the concept of intra-generational equity by redressing past discriminatory practices for present generations.

Furthermore, the IWC has recognised the relationship indigenous peoples have with their environment, in particular, the use of whales as a natural resource. By granting whaling quotas on the basis of a cultural and a nutritional subsistence need, and the local consumption and use of whale products by indigenous peoples who share strong community ties, the IWC has emphasized the central role played by whaling in the maintenance and perpetuation of their identity and culture. This approach has thus contributed to the principle of intra- and inter-generational equity, in that it has allowed for the maintenance and development of indigenous whaling culture within the present generation, and consequently the transmission of whaling as an intrinsic element of culture for future generations.

In addition, the IWC has provided that aboriginal subsistence whaling can be granted when the subsistence and cultural needs are also "consistent with effective conservation of whale stocks". Since the IWC has "enabled aboriginal people to harvest whales in perpetuity", it has been necessary "to ensure that the risks of extinction to individual stocks are not seriously increased by aboriginal whaling". The IWC has thereby attempted to limit the overexploitation of whales by indigenous peoples. Through this approach, the IWC not only contributes to meeting the

consumptive demands of the present generation but also ensures that adequate whale stocks are available for future generations. This in turn allows aboriginal communities to continue hunting whales "in perpetuity", and provides for the survival of their culture of which whaling is a crucial element. With respect to inter-generational equity, the IWC has also been concerned with the requirement that the present generation has a right to benefit from natural resources but has to restrain the use thereof for future generations in a sustainable and equitable manner.

2.2.5 Practical application of guidelines for aboriginal subsistence whaling is discriminatory

Despite the existence of guidelines for aboriginal subsistence whaling, the allocation of quotas can be considered discriminatory. Although states submit a "needs statement" on behalf of indigenous peoples living on their territory, it is up to the IWC to determine whether they belong or not to the aboriginal subsistence whaling category. Discriminatory practices have arisen as a result of the fact that the elements of equity as contained in the guidelines for aboriginal whaling are not applied in practice.

This concerns on the one hand the fact that governments are submitting proposals on behalf of indigenous peoples in disregard of the international practice for indigenous peoples themselves to determine whether they do or do not belong to an indigenous population group[261], and can address United Nations mechanisms directly without having to go through the state to which they belong[262]. In order to better contribute to equity, the IWC could adopt the practice for indigenous peoples to self-define and submit proposals for aboriginal whaling quotas directly to the IWC.

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[261] See: United Nations Declaration on the Rights of Indigenous Peoples, **supra** note 210.

This would eliminate the discussions around who belongs or not to certain population groups.

On the other hand, there exists confusion among the members of the IWC around the requirements to meet both a subsistence and cultural need, the issue of local aboriginal consumption and the criteria that whale products not be traded.

In respect of the requirement to meet both a subsistence and cultural need, discrimination seems to be apparent concerning the aboriginal whaling quota requests for both the Makah and the Chukotka. With regard to the Makah, not only do their whaling traditions go back over 1500 years, but they also describe themselves as a whaling people and use the products of whales for their own consumption and for maintaining their culture alive. The IWC refused to grant the Makah a whaling quota because they had not whaled for over seventy years and therefore could not demonstrate an ongoing nutritional need, despite the fact that their cultural need for whaling had been recognised by the IWC. Furthermore, their whaling practice was cut short in large part because commercial whaling had devastated the population of gray whales almost to the point of extinction and that they stopped whaling to allow them to recover. By refusing them a quota, the IWC is denying the Makah the right to revive their own culture and whaling tradition. In addition, it fails to recognise the practice of the Makah to sustain the use of whales for present and future generations.

The same goes for the Chukotka people who are considered by the Russian Federation as indigenous peoples and have a very long whaling tradition. They claimed that the taking of whales would increase their food security as well as maintain and perpetuate their culture – facts recognised by many delegations of the

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[262] See: United Nations Forum on Indigenous Peoples and former United Nations Working Group on

IWC. Nevertheless, the IWC denied them a quota as member states failed to reach a consensus regarding the justification of the Chukotka to continue whaling, with the purpose, in particular, to meet their subsistence needs.

As for the criteria regarding 'local consumption' and 'products not be traded', there are two arguments: firstly that it is not possible to supply all the communities with whale meat without making use of the distribution network, and that aboriginal subsistence whaling must therefore also include aspects of trade. This is all the more controversial as for most indigenous peoples, there is a need to combine both subsistence and trade in order to sustain their culture[263], and they have developed mixed economies for this purpose. Secondly, there is the risk that trade may become commerce on a larger scale in pursuit of short-term rapid economic and pecuniary gains, which would again fail to respect the criteria established by the IWC.

Discrimination seems to be apparent in the granting of the quota to the communities of Greenland. With regard to the hunt of minke and fin whales by these communities, there is evidence that the whale meat is distributed through normal commercial channels such as private profit-making companies, including in supermarkets[264], rather than used merely for purposes of 'local aboriginal consumption' as required for by the IWC. As far as St Vincent and the Grenadines is concerned, there exists evidence that its local quota of humpback whales could have been traded throughout the island[265]. In addition, with a whaling history going back to only 150 years, it cannot be argued that the communities of St Vincent and the

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Indigenous Populations.

[263] Sean Kerins, "The sustainable use of renewable resources: New Zealand and the International Whaling Commission" Paper presented at a whaling seminar held by the Ministry of Foreign Affairs and Trades, Wellington, New Zealand, 18 December 1996.

[264] See: *Aboriginal subsistence whalers under attack: new front in the war against whaling* <www.highnorth.no/library/culture/ne-fr-in.htm>, High North News, No. 11, Nov. 1996.

Grenadines are indigenous. It can thus be concluded that their whaling practice was not indigenous, especially as this derived from whaling techniques learned by local seamen who enlisted on US whaling ships[266], and that they are not indigenous as they are descendants of slaves who were introduced into the Caribbean during the early period of colonisation.

2.2.6 Conclusion

It can be concluded that the IWC has, in its guidelines for aboriginal subsistence whaling, recognised a number of elements of equity which contribute to the achievement of sustainable development. These include the recognition of the special status of indigenous peoples; the requirement to meet their cultural and nutritional needs and; the need for conservation of those species of whales which are threatened with depletion. The IWC thereby allows for the maintenance and development of indigenous whaling culture within the present generations, and consequently the transmission of whaling as an intrinsic element of culture for future generations.

Despite this, the achievement of sustainable development is undermined by the loopholes regarding the application of the guidelines in practice. These relate to the apparent discriminatory manner by which aboriginal subsistence whaling quotas are granted and the confusion and wide interpretation which has arisen within the IWC concerning the various terms used, including 'aborigine", 'cultural and subsistence need', 'local consumption' and the prohibition of trade for commercial purposes. This also implies that the lines between commercial and aboriginal subsistence whaling are blurred.

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[265] *Gillespie,* ***supra*** note 66 at 214.
[266] ***Ibid.*** at 229

2.3 The principle of the economy: the use of scientific research permits.

This section demonstrates how the provision for scientific research whaling provided for in the ICRW has been abused by some states for purposes of continued whaling for economic gain, in defiance of the moratorium on commercial whaling adopted. The first sub-section highlights the relationship between environmental protection and economic development, and the need to ensure a balance between these two pillars in order to achieve sustainable development. Of particular relevance here is the role which research can play per se as a development objective, as a means to an end in preserving the environment, and how it may be abused in pursuit of illegitimate objectives. The second sub-section provides an example of the latter, drawn from the practice of some whaling states to continue whaling under the guise of scientific research and how the IWC has attempted, unsuccessfully, to impose restrictions on such whaling. The third sub-section points to a number of reasons for the belief, by the IWC, that states are abusing the use of scientific research permits and how this has threatened the co-existence between the two pillars of economic development and environmental protection.

2.3.1 The balance between economic development and environmental protection: the role of scientific research

The link between the economy and the environment and the balance between these two pillars are crucial to the overall achievement of sustainable development. All too often this delicate equilibrium fails, since the majority of states give precedence to the economy, to the detriment of environmental considerations. It has been widely recognised that economic development is both necessary and legitimate, but that limits need to be placed on such development to take into account the capacity for renewal of natural resources. In practice, there is a need to integrate economic considerations into environmental policies in order to achieve the necessary balance between the economy and the environment, in turn promoting both intra-and inter-

generational equity. Indeed, the present generation may require the exercise of restraint on economic development in the immediate, which will in the long-term provide the necessary economic and environmental sustainability for future generations.

The link between the economy and the environment has been emphasized in a number of documents. The *Stockholm Declaration*[267] stated that economic development of all countries was necessary but that this had to be balanced with the protection of the environment. It made the link between resource depletion and the need to ensure that natural resources be available for the benefit of present and future generations, and suggested that: "The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind"[268]. The *Brundtland Report*[269] reiterated the fact that economic development does not imply that resources should not be used but that measures are taken to ensure that depletion of the resource does not occur[270]. It noted that preventing depletion of natural resources would thus increase the options for future generations. The *Rio Declaration*[271] goes one step further by stressing that environmental protection should not be considered in isolation but should be fully integrated into the process of economic development. For the achievement of sustainable development states should reduce and eliminate unsustainable patterns of production and consumption[272].

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[267] ***Supra*** note 13.
[268] ***Ibid***. at Principle 5.
[269] ***Supra*** note 2.
[270] ***Ibid*** at 46.
[271] ***Supra*** note 36.
[272] ***Ibid***. at Principle 8.

Scientific research plays a key role in achieving the balance between economic development and environmental protection. It serves to promote a better understanding of the issues at stake, enabling the identification and selection of sound economic and environmental policies, and their respective integration. *Agenda 21*[273] summed up that "the sciences are increasingly being understood as an essential component in the search for feasible pathways towards sustainable development"[274].

There are three particular functions which scientific research can exercise, as follows:

Firstly, scientific research can represent a key component of sustainable development and thus serves as an end in itself to enhance economic and developmental opportunities. In this respect, scientific research is an economic and profit-driven activity, per se, which attracts funding, promotes employment, guides policy and enhances capacity to generate income through the implementation of activities and projects.

Secondly, scientific research can act as a means to an end, to promote the preservation of the environment. It can thus contribute to a better understanding of ecological processes, through, *inter alia*, the collection of scientific data on the capacity for renewal of natural resources, the rates of depletion, and the impacts of human activities, such as patterns of consumption and pollution. Scientific research for preservation of the environment thereby assists in determining the limits to unsustainable use of a resource and guiding policies for preservation for present and future generations. Impact assessment and monitoring techniques rely on the objectivity and credibility of data which are essential to sustainable development.

Thirdly, scientific research can impact negatively on sustainable development if the ends pursued are unjustified or illegitimate. This section provides a case study of how scientific research has been undertaken for purposes of furthering economic gains of some whaling states, under the guise of scientific research whaling as provided for by the ICRW.

2.3.2 Scientific research whaling: IWC unsuccessful in restricting abuse

Since its inception, the IWC has been supported by scientific research in order to better understand the population dynamics of whale species and guide its policy in effectively managing stocks. This involves the collection of data on abundance of whales, their trends and characteristics, as well as numbers of specific stocks hunted, so that calculations can be made to ensure their rate of survival in the short-term and preservation in the long-term. The ICRW has recognized the need for scientific research to be carried out on whales which would otherwise be protected under the IWC whaling restrictions governing commercial whaling.

For this purpose, the ICRW has provided for the collection of data by member states, to be considered by the Scientific Committee as a basis for sound decision-making regarding the evaluation of stocks in the light of management objectives. Research includes tracking of whales, genetic analysis of populations, feeding and breeding habits and reproductive patterns. As at the time of the adoption of the ICRW, elements of this data could only be obtained by killing whales, provisions were enshrined in the text of the Convention to allow for the taking of whales for scientific research purposes.

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[273] ***Supra*** note 55 at Chapter 35.
[274] ***Ibid.*** at Recommendation 35.2.

The ICRW has thus allowed countries to take samples of whales caught under special permits to invoke the scientific research provision at Article VIII as follows:

> ("...") any Contracting Government may grant to any of its nationals a special permit authorizing that nation to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention[275].

This provision allows any member state to grant to its nationals special permits to hunt whales for purposes of scientific research, irrespective of any regulations of the IWC, as they are 'exempt' from the operation of the Convention. In this regard, the IWC is not required to give prior approval for permits, thereby leaving it up to the state concerned to decide: when; how many; and what species of whales to take for scientific research purposes. This right overrides any other regulations adopted by the IWC, including those relating to the moratorium and to sanctuaries.

Allowing for the killing of whales for scientific purposes opened the door to continued whaling, with little or no control by the IWC over scientific whaling activities by states. This led the IWC to take a series of initiatives to attempt to restrict whaling under such permits. This was all the more crucial during the first decade of the establishment of the IWC, at a time when the IWC struggled to restrict whaling through the imposition of quotas, and thereby protect some species that were close to depletion such as the bryde, gray and right whales.

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[275] ***Supra*** note 10 at Article VIII, Paragraph 1.

The IWC first attempted to close this loophole in 1957 when it declared that states should not issue permits for the taking of whales for scientific purposes outside of the whaling season, unless there was an urgent reason for doing so[276]. It further attempted to impose some control by requesting that the results obtained from the scientific research undertaken by states be submitted to the IWC in accordance with article VIII (3)[277] of the ICRW on the submission of scientific information.

As the problem continued to grow[278], the IWC declared that the Scientific Committee was to be consulted before the granting of such permits, that it should review these before issue under article VI of the ICRW[279], and make recommendations on the proposed permits to the IWC. The IWC agreed to amend the Scientific Committee's Rules of Procedure to allow for this, although some members argued that such conditions represent an infringement of their sovereignty[280]. In their applications for scientific research permits, they should set out the reasons for the research, and keep the numbers of whales taken to a strict minimum. Although proposed permits are thus to be submitted to the Scientific Committee for review, states maintain the prerogative to issue permits as they see fit. Despite these new IWC directives, Japan, Norway, Australia, the USA, Canada and the Russian Federation[281] continued to hunt whales under the cover of scientific permits.

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[276] Gillespie, ***supra*** note 66 at 120.
[277] Contracting governments are obliged to transmit "scientific information" under Article VIII (3).
[278] Special permits had been granted by governments for the taking of much larger number of whales under Article VIII, than before. See: International Whaling Commission, *Fifteenth Annual Report* (London: International Whaling Commission 1965) Chairman's Report at 20.
[279] This provides that the IWC may from time to time make recommendations to states on any matters related to whales or whaling and to the objectives of the Convention.
[280] This is not really an issue, as states can still use the 90 day escape clause included in the ICRW.
[281] Australia issued a permit for the taking of up to 120 undersized sperm whales; Canada for up to 20 undersized whales; and New Zealand for the taking of up to 100 sperm whales. See: International Whaling Commission, ***supra*** note 278 at 8.

Before the imposition of the moratorium in 1982, few countries had used the procedure for scientific research exceptions. Prior to that date, only 100 permits had been issued by governments, including Canada, USA, USSR, South Africa and Japan. Since then, some whaling states, in particular Iceland, Norway and Japan, which opposed the moratorium, have been hunting extensively under the guise of scientific research permits. This rise in the number of scientific permits issued is reflected in the number of whales killed under the guise of scientific research permits between 1986 and 2002, amounting to approximately 6000 whales as the official figure, representing 2.8 times the number of catches under special permits between 1949 and 1987[282]. All three countries have established large scientific research programs to which the IWC has generally reacted strongly by adopting resolutions calling for their withdrawal or reconsideration by a three-quarters majority vote[283].

In 1986, Iceland decided to initiate a 4-year program in which up to 80 fin whales and 40 sei whales may be caught every year as a long-term research effort[284]. The objectives of the Program were to study the feeding ecology of whale species, and the possible impact on the yield of commercially important fish species. However, the program did not contain any specific information about how the data would be used for the management or conservation purposes of the IWC. In addition, Iceland's intended research targeted sei whales with respect to uncertainty of stock abundance, which could be ascertained by non-lethal methods.[285] The IWC consequently adopted a number of resolutions recommending that "the government of

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[282] Gillespie, ***supra*** note 66 at 120.

[283] Although such resolutions are generally adopted by majority vote, there are some elements of the research which provide useful data to the IWC, and members of the Scientific Committee or the Commission are not always unanimous in respect of the value of this research.

[284] Ray Gambell, "The International Whaling Commission – quo vadis?" (1990) 20 Mammal Review 1 at 36.

[285] International Whaling Commission, *Fifty-fourth Annual Report* (Cambridge: International Whaling Commission 2004) Report of the Scientific Committee at 48-53.

Iceland revoke and refrain from issuing special permits to its nationals ("...") until the uncertainties identified by the Scientific Committee ("...") have been resolved"[286]. Although Iceland brought slight modifications to its proposal, these were not satisfactory to the IWC[287].

The IWC reacted strongly to the Icelandic scientific research proposal, especially as some member states feared that this provision was increasingly used as a loophole to evade the setting of zero catch limits for commercial whaling subsequent to the imposition of the moratorium. Generally, and as a means to pre-empt further unjustified research proposals, the IWC called upon "contracting governments proposing the issue of scientific permits ("...") to take account of the serious concerns expressed in the Commission at the possibility of whaling for scientific purposes"[288].

Furthermore, the IWC decided on additional measures they deemed necessary to further restrict the taking of whales for scientific purposes. In 1987, the Scientific Committee developed strict criteria which were to be taken into account when reviewing proposals for scientific research permits with the aim of legitimizing the research to be undertaken. These required that states submit information on: whether the permit adequately specifies the aims, methodology and samples taken; whether the research is essential for the management of whales or the work of the Scientific Committee; whether the methodology and sample size are likely to provide reliable answers to the questions asked; whether the questions can be answered using non-lethal research methods; whether the catches will have an adverse effect on the stock;

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[286] International Whaling Commission, *Thirty-eighth Annual Report* (Cambridge: International Whaling Commission 1988) Resolution on Icelandic Proposal for Scientific Catches at 28.
[287] Iceland decided to withdraw from the ICRW in 1992 and rejoined the IWC in 2002.
[288] International Whaling Commission, *Thirty-sixth Annual Report* (Cambridge: International Whaling Commission 1986) Chairman's Report, Appendix 2 at 26.

and, whether there is the potential for scientists from other nations to join the research program[289].

This was followed by a research proposal from Norway which consisted of a similar approach to that of Iceland, in which the prime focus was the collection of data for use in developing mathematical modes of the Barents Sea ecosystem. To this end, Norway instituted a five-year study in 1988, to monitor minke whales in the North Atlantic, including investigations on food selection and intake, food digestion and body composition. Again, the IWC noted that the research being undertaken by Norway was not directly relevant to the scientific information required, and that it did not satisfy all the criteria for scientific permits as developed[290], especially with regard to the assessment of whale stocks and critically important research needs. This led the IWC to adopt a series of resolutions requesting Norway to reconsider its special permit program[291]. In 1995, the Norwegian government stopped issuing special permits for scientific whaling and resumed commercial whaling, thus ignoring the moratorium.

The country that has most actively practised and expanded scientific whaling is Japan. In 1987, Japan announced a long-term research program in the Antarctic which included an annual research catch of 825 minke whales and 50 sperm whales. Known as the JARPA program[292], its aim was to obtain estimates of age-specific natural mortality, information on stock identity, and feeding ecology. The purpose of the study of sperm whales was to investigate the role played by cetaceans in the

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[289] International Whaling Commission, *Thirty-seventh Annual Report* (London: International Whaling Commission 1987) Chairman's Report, Appendix 2 at 25.
[290] International Whaling Commission, *Forty-second Annual Report* (London: International Whaling Commission 1992) Comments on the Norwegian Proposal for a Scientific Permit at 208-214.
[291] Gillespie, ***supra*** note 66 at 123.

ecosystem with a focus on the sperm whale and its food[293]. This was followed by the announcement by Japan of a similar scientific whaling proposal under the JARPN program in the western North Pacific[294]. Again, the main objective of the program was to study the feeding habits of whales and the type of prey consumed.

At the session of the IWC in 2000, Japan submitted a further extensive research proposal concerning the taking of 100 minke whales, 50 bryde's whales and 10 sperm whales every year, known as JARPN II. Japan argued that this was necessary to determine accurate population levels of certain whale stocks which it believed to be at harvestable levels, especially sperm and bryde's whales, which would as a consequence justify an increase in quotas, according to the text of the ICRW. The stated goal of the program, described as "a long-term research program of undetermined duration"[295] was to obtain information, in addition to feeding habits, on the conservation and sustainable use of whales. The elucidation of the effect of environmental change upon cetaceans was added to the program, which, according to Japan, fell broadly into the category of the ecosystem approach for managing marine resources. This was followed by the submission of a more comprehensive program in 2002 which included sei whales, a species which was considered as endangered at the time[296].

Once again, as with Iceland and Norway, the IWC reacted strongly to the scientific research proposals. The major criticisms of the proposals, which were

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[292] Under this program, almost 6'800 whales were killed between 1987 and 2005, "Environment News Service", 31 May 2007.
[293] Gambell, ***supra*** note 284 at 36.
[294] Gillespie, ***supra*** note 66 at 124.
[295] Clapham et al, "The JARPN II Program: a critique" SC/54/026 at 1.

debated at length within the IWC, centred on the fact that lethal sampling is not required for such research, the IWC does not employ an ecosystem approach for the purposes of the collection of scientific information, and existing data on the prey of these whales already exists[297]. As of 1988, the IWC recommended that Japan refrain from granting special permits for scientific whaling until the Scientific Committee is able to resolve the serious uncertainties surrounding the capacity of the proposed research to contribute to reliable results required for the assessment of whale stocks and crucially important research needs[298]. Further directives were issued by the IWC in response to the practice of Japan of hunting whales in the Southern Ocean Sanctuary, as this is unnecessary to improve the management of whales in sanctuary areas by taking whales by lethal means. In 1996, the IWC therefore resolved that: "contracting governments should undertake ("...") the conduct of a program of research in the Southern Ocean Sanctuary using non-lethal methods ("...") and refrain from issuing special permits for research involving the killing of cetaceans in such sanctuaries"[299].

Between 2000 and 2002, the IWC Scientific Committee strongly urged Japan to reconsider issuing permits for scientific research. It specifically requested ("...") that permits be conducted strictly in accordance with scientific requirements and in particular to take account of the advice and guidelines of the Scientific

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[296] World Wildlife Fund. See: online <http://assets.panda.org/downloads/wwfscientificwhaling2007_pdf.pdf> at 1.
[297] Clapham et al., ***supra*** note 295 at 2.
[298] International Whaling Commission, ***supra*** note 286 (London: International Whaling Commission 1988) Resolution on Japanese Proposal for Special Permits at 27.
[299] International Whaling Commission, ***supra*** note 197 at 46.

Committee"[300]. In 2002, two further resolutions were adopted. These concerned the JARPN and JARPN II programs and used particularly strong language expressing:

> ("...") major concerns ("...") that the proposal did not address questions of high priority relevant to management, did not make use of existing data, and revealed many methodological problems ("...") the IWC strongly urges the Government of Japan to refrain from issuing special permits for whaling under JARPN[301].

The overall response by the IWC to these proposals was to try again to reason with those states issuing special permits, calling upon them to stop extensive whaling under the guise of science. The issue discussed within the meetings of the IWC concerned whether the taking of whales for scientific purposes is necessary for accurate whaling management, or an essential requirement under the ICRW. Generally, it was felt that not enough is known about depleted species to justify scientific whaling in general[302], and that the information obtained from biological factors, such as trends in mortality rates, age-specific information and feeding habits did not contribute to reliable stock assessment or respond to critically important research needs[303]. In this regard, the IWC noted that the majority of proposals failed to fulfill the criteria developed by the IWC for scientific whaling, and were, therefore, unjustified.

In addition, the IWC argued that there was no need to kill whales in order to undertake scientific research and that the use of lethal means should only be

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[300] International Whaling Commission, *Thirty-sixth Annual Report* (Cambridge: International Whaling Commission 1986) Resolution on Scientific Permits at 26.
[301] International Whaling Commission, ***supra*** note 196 (London: International Whaling Commission 2001) Resolution 2000/5 at 66.
[302] Calvin Sims, "Japan, Feasting on Whale, Sniffs at 'Culinary Imperialism' of US" New York Times, August 10, 2000.

permitted in exceptional circumstances, when the questions addressed cannot be answered by any other means. The IWC suggested that a voluntary code of practice for whaling under scientific permits be adopted, with a focus on the fact that whaling should occur only when non-lethal alternatives are unavailable and the research has the support of the Scientific Committee and the IWC. The suggestion for the code, however, was not immediately adopted by the IWC and it only reappeared in discussions in 2002 with the decision to incorporate the code as part of the Revised Management Scheme (RMS) package[304].

A number of factors increasingly led the IWC to believe that those states undertaking scientific research continued the practice of commercial whaling under the guise of scientific whaling permits. These factors included the following: the fact that the countries concerned expanded their scientific research programs despite the imposition of the moratorium on commercial whaling and the establishment of whale sanctuaries which prohibited whaling within designated areas; none of these proposals provided for critically important research needs; the research often called for the killing of whales that were subject to uncertain stock status; the research did not make use of existing data; there was evidence of repeated failure to seriously engage in non-lethal techniques, and; there prevailed a general overall perception of failure to act in good faith[305].

These factors are compounded by the fact that the decisions and recommendations of the IWC to restrict the taking of whales under the guise of scientific research permits are essentially disregarded. The large number of whales taken between 1986 and 2002 since the imposition of the moratorium, has further

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[303] Gillespie, ***supra*** note 66 at 133.
[304] This resolution was withdrawn.
[305] Gillespie, ***supra*** note 66 at 125.

fuelled the argument that scientific permits have been granted by states to cover for illicit commercial whaling activities, the major purpose of which is to subvert the moratorium for economic gains. Indeed, the financial benefits derived from scientific whaling have been substantial. In 2000 for example, the value of products derived from Japanese scientific whaling, was around USD 35 million per year, with approximately 3,000 tons of edible products being produced from scientific whaling[306]. Furthermore, whale meat is consumed by Japanese and has become the major whale product by volume produced[307].

2.3.3 Conclusion

Scientific research as provided for by the ICRW is essential for the effective management of whales, as a means to an end, to preserve stocks for continued limited whaling. It thus serves a dual purpose which is both environmental and economic in nature. In the event that the scientific data is accurate and neutral, its role and purpose can be considered legitimate. This is in conformity with both the spirit of the Convention as well as with sustainable development.

In practice, the tensions which have arisen within the IWC around the granting of scientific research permits by states such as Iceland, Norway and Japan generally concerns: the credibility of data collected; the taking of whales by lethal means when unnecessary for the objectives of the research; the irrelevance of the data as required by the IWC, and; the killing of whales whose stocks are already depleted. This has led the IWC to believe that those states taking whales under the guise of scientific research permits are doing so to continue commercial whaling, in defiance of both the

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[306] Gillespie, ***supra*** note 66 at 126
[307] C.W. Clark & R. Lamberson, "An economic history and analysis of pelagic whaling" (1982) 6 Marine Policy 2 at 110.

moratorium and the establishment of whale sanctuaries. In this perspective, the provision for scientific research permits has been abused by a small number of states and scientific research has been used for illegitimate ends. This has in turn resulted in an imbalance between the economic and environmental pillars of sustainable development.

CHAPITRE III

GENERAL CONCLUSIONS

Overall it can be concluded that the IWC has adopted a number of key elements of sustainable development throughout its work, through the application of the three pillars of sustainable development. However, for its effective achievement, the IWC needs to close the loopholes and tighten its procedures. The conclusions address three issues identified for the purpose of this research, namely: 1) the extent to which the international whaling regime has followed the evolution of the sustainable development agenda at the international level, 2) identification of competing interests among the three pillars of sustainable development within the international whaling regime, and 3) suggested measures which could be undertaken in order for the international whaling regime to be compatible with the concept of sustainable development.

3.1 The whaling regime mirrors the evolution of sustainable development at international level

The initial period of international whaling regulation since the adoption of the International Convention on the Regulation of Whaling in 1946 and the evident failure, by 1972, of states to abide by restrictions on their freedom to whale, was dominated by the tensions between exploitation and conservation within the IWC. During the same period, similar tensions between environmental protection, equity

and economic development at the international level, characterized the relationship of power between richer and poorer nations.

In the early years of the IWC, decisions regarding whaling were essentially guided by state interests to further their economic gains, which led to the overexploitation of whales. During this period, states negotiated collective quotas but only complied with them if they served their short-term economic objectives. IWC decisions which threatened state interests led those same states to opt out of regulations, as provided for by the ICRW, or of withdrawing their membership.

During this period, scientific data exercised little influence in IWC debates, and environmental arguments were absent. From the early 1960's to the early 1970's, it was clear that whale stocks could not be maintained without drastic quota reductions. Despite the introduction of stricter quotas whaling regulation failed to bring about the corresponding restraint in the behaviour of whaling states. The tensions between exploitation and conservation were not reconciled by the IWC, with a clear predominance of the former over the latter.

The pattern of intensive exploitation of whales was similar to that resulting in the depletion of natural resources in general, particularly in the northern hemisphere. As reflected within the international whaling regime, ecological protection seemed to be incompatible with the requirements of development, leading to the over-exploitation of natural resources. In parallel, the use of technology, and in particular the introduction of modern methods of whaling, exceeded the capacity of the environment to produce the necessary resources to sustain development. The resulting imbalance between economic gains and ecological preservation, led to a clear preponderance of exploitation over conservation, with the tragedy of the commons remaining unchanged.

In the face of serious resource depletion by the early 1970's, the international community realized that unless the interdependent economic, social and political concerns of states were not integrated into ecological policies, over-exploitation of the world's natural resources could not be effectively addressed. This represented a distinct trend from state interests towards common interests, thereby contributing to bridging the three pillars of sustainable development. The expression of the common interests within the international whaling regime reached its apogee with the adoption of the moratorium in 1982 and the consequent prohibition of commercial whaling.

During the period from 1972 to 1982 this shift towards common interests unfolded in parallel to the evolution of key elements of sustainable development (which term had not yet been coined). It was largely fuelled by two major developments: firstly, the influence of the Stockholm Conference in 1972 and environmental law treaties adopted in the early 1980's, and, secondly, the increasing role of NGOs and inter-governmental organisations within the IWC.

Firstly, the Stockholm Principles and Recommendations adopted in 1972 referred to the sustainable use of natural resources while ensuring their conservation for future generations. This led NGOs and some member states to actively lobby the IWC to consider the recommendations adopted at Stockholm, in particular with regard to the preservation of whales through rational management to prevent their extinction, ensuring the safeguard of their habitat and promoting scientific research. By adopting a specific recommendation requesting the IWC to adopt a 10 year moratorium on commercial whaling, the *Stockholm Declaration* was particularly influential.

Environmental law treaties have also had considerable impact on the decision-making process of the IWC. They have influenced the development of new

perspectives on the management of whales as a natural resource, the introduction of the ecosystem approach, new systems of management of whale stocks, and the creation of an obligation for states to preserve the marine environment in general and conserve whales in particular. The treaties have also called for increased cooperation between states and between states and international organisations, as an additional element of sustainable development.

Secondly, NGOs and inter-governmental organisations made their mark when the demand for a ten-year moratorium on commercial whaling was successfully adopted as early as 1972 by the Stockholm Conference, in the form of a recommendation to that effect. In 1982, the environmental movement achieved its goal when the IWC adopted a moratorium on commercial whaling. Moreover, the environmental movement played a particularly important role in increasing the participation of states, by encouraging non-whaling states to ratify the ICRW and become a member of the IWC. The concern of overexploitation had spread beyond the IWC to the general public, which was one of the most determining factors in explaining the increased influence of non-state actors. During this period, science was overridden by the environmental movement, and was relegated to a secondary role.

This period marks a clear shift away from the tragedy of the commons which had been the dominant norm in the past, to safeguarding community interests to conserve whales for present and future generations. Unfortunately it was short-lived as the period between 1982 and 2003 was dominated by competing interests which undermined the progress made towards sustainable development.

3.2 The identification of competing interests among the three pillars of sustainable development within the international whaling regime

Sustainable development is best served in situations which allow for a balance of interests. The research undertaken has highlighted that decision making within the IWC has often involved intense negotiations and compromises. Nevertheless, where a bias has existed toward any of the three pillars of sustainable development – the ecology, equity and the economy – sustainable development cannot be achieved. Identifying the competing interests among the three pillars allows for compromises that create the necessary balance between them.

This paper has demonstrated that an imbalance exists within the international whaling regime between and among the three pillars of sustainable development which are represented by the establishment of whale sanctuaries (ecology), aboriginal subsistence whaling (equity) and the scientific research exemption (economy).

The establishment of whale sanctuaries by the IWC can be viewed as a rational response to the tension between the overexploitation of whales and their sustainable use, in order to meet the international duty to preserve them for present and future generations. Whale sanctuaries thus represent the intersection between the first and second pillars of sustainable development, namely, that of the protection of the ecology and intra- and inter-generational equity. One can conclude that the concept of sanctuaries as developed by the IWC through the adoption of guidelines for their creation and review, is indeed in line with the ecological pillar of sustainable development as they target the protection of the breeding and feeding grounds of whales as well as their ecosystems.

The weakness in this pillar, however, concerns the establishment of sanctuaries in practice through the *ad hoc* and often irrational manner in which decisions by the

IWC have been made, either in favour of or against their creation. This largely politically-motivated decision-making process has meant that the IWC sanctuaries may or may not provide the necessary protection of the most endangered species and ensure stock recovery, in line with the aims of sanctuaries and ecological protection. The incoherent and inconsistent approach to whale sanctuaries by the IWC, including the lack of effective management over time, has led to the failure of long-term strategic planning for sustainable development.

The pillar of equity in both its intra- and inter-generational dimensions constitutes a bridge for recognized mutual interests among all three pillars of sustainable development. It can be concluded that the IWC, through its approach and management of aboriginal subsistence whaling over the years, has somewhat contributed to the respect of intra-and inter-generational equity. This is exemplified by: the recognition of the key role played by whaling in the maintenance of the cultural identity of indigenous peoples; the establishment of a separate management regime for aboriginal subsistence whaling; the provision of redress for past discrimination resulting from commercial whaling; and, ensuring that the granting of quotas be consistent with the conservation of whale stocks. In this way, the IWC has allowed for the maintenance and development of an indigenous whaling culture within the present generation, and for the transmission of a whaling culture for future generations.

Here again, however, as with the ecological pillar of sustainable development, the arbitrary and inconsistent manner in which the IWC has allocated quotas for purposes of aboriginal subsistence whaling is caused by the tensions between whaling nations and non-whaling nations and the dominating politics of member states. This has led to the discriminatory allocation of quotas to some groups rather than others, irrespective of the definition of 'aborigines' by the IWC or the relevant criteria and guidelines developed on aboriginal whaling. This in turn seriously undermines the

pillar of equity and weakens the links between all pillars, thus failing to contribute to sustainable development in the long-term.

The research on the taking of whales under the guise of scientific research permits has highlighted an inherent weakness in the economic pillar and an imbalance between that and the ecological pillar of sustainable development. This is largely due to the fact that these scientific research permits have been granted by states to their citizens, without adhering to the criteria developed by the IWC to provide sound scientific data in response to research needs, and in disregard of the recommendations of the IWC to reconsider research programs and calls for limiting the lethal taking of whales. Although the scientific research permits were initially intended to provide crucial information regarding the status of whale stocks, in line with the needs for the collection of scientific data for sustainable development, whaling states have abused this provision in order to continue whaling and circumvent the moratorium. Overall, the IWC has failed to balance competing interests.

Despite this assessment, it should be recognized that the IWC has contributed to elements of the three pillars of sustainable development, especially in respect of the criteria and guidelines developed with regard to: sanctuaries with a view to allowing stocks to recover in protection of the ecology; aboriginal subsistence whaling by recognizing the right of indigenous peoples to continue their whaling tradition and use whaling products to maintain and develop their culture, and; allowing for research permits with a view to gathering valuable scientific information on the status of whale stocks for management purposes.

Nevertheless, it is the failure of effective short-term management and long-term strategic planning for sustainable development which has led to weaknesses in each of the three pillars as well as an imbalance between them. This is compounded by the fact that in light of the politically motivated decision-making process within the IWC,

it has been unable and/or unwilling to impose, in practice, the sound management of whales as a natural resource, in line with a sustainable development agenda. The IWC has clearly failed to identify a shared vision allowing for an integrated approach to the whaling regime, which has remained fragmented.

3.3 Achieving sustainable development within the whaling regime

In order to stimulate the achievement of sustainable development within the international whaling regime, there is a need to diminish and/or eliminate the trade-offs with a bias against any of the ecology, equity and economic pillars. To this end, the IWC should use sustainable development as a framework for its policies and decisions. This would re-establish a balance between the three pillars and ensure that the IWC take decisions in the common interest thereby transcending the national interests of individual states. In this regard, sustainable development can be achieved by reinforcing the institutional implementation of whaling regulations, in particular, the criteria and guidelines it has developed to preserve whales and the management system it is establishing for purposes of limited hunting of species that have recovered from overexploitation.

As quoted by Tønessen and Johnson that ("...") the whale is now the symbol of mankind's failure to manage the world's resources responsibly", so sustainable development now represents mankind's capacity to manage the world's resources responsibly

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