

# ARTICLES

## THE JAPANESE DOLPHIN HUNTS: IN QUEST OF INTERNATIONAL LEGAL PROTECTION FOR SMALL CETACEANS

By  
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*This article sets out to explore the international legal status of those dolphins targeted by the Japanese drive hunts. It is estimated that over 2,500 small cetaceans—dolphins, porpoises, and small whales—will be killed as a result of the drive hunt, out of a total of over twenty thousand killed annually in Japan by direct catch. Since humans have literally pushed dolphins to the brink of extinction, humans have an ethical duty to stop the cruelty perpetrated against them and to ensure the survival of their species. This ethical duty should be turned into an international legal duty, with a correlated legal right for dolphins to international protection. Inseparable from and interwoven with the absolute and devastating cruelty of the drive hunts and the excruciating suffering of the dolphins, are the implications from a conservationist perspective on the targeted dolphin populations. For cetacean diversity, like biodiversity worldwide, is declining at a rapid and increasing rate. Action must finally be taken by international environmental institutions to bring an end to these inhumane practices.*

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## I. INTRODUCTION

If dolphins could speak human languages, and one of them kept in an aquarium was interviewed, she might say,

My family lived in the ocean, freely swimming around. One day, all of a sudden, we were chased by fishing boats, threatened by noises from the banging of the metal pipes, driven to a shallow inlet and confined there. My father died from suffocation after becoming entangled in fishing nets. My mother was slaughtered with a knife for human consumption. My sister died of shock when she was lifted out of the water and my brother drowned during the capture procedure. Both of them were processed for meat and eaten by humans and their pets. I myself survived, was brought into this aquarium, taught tricks, and am working to entertain you.<sup>1</sup>

<sup>1</sup> Sakae Hemmi, *Foreword*, in Courtney S. Vail & Denise Risch, *Driven by Demand, Dolphin Drive Hunts in Japan and the Involvement of the Aquarium Industry* 4 (Apr. 2006) (available at [http://www.wdcs.org/submissions\\_bin/drivenbydemand.pdf](http://www.wdcs.org/submissions_bin/drivenbydemand.pdf)). Sakae Hemmi is a writer and environmentalist associated with the Elsa Nature Conservancy, a Japanese non-governmental organization working to raise public awareness about the dolphin hunts in Japan. Whale and Dolphin Conservation Society (WDCS), *Trade*, <http://www.wdcs.org/dan/publishing.nsf/allweb/45BAE79B3EC785BC80256F19005486>

More than twenty thousand small cetaceans (dolphins, porpoises, and small whales) are estimated killed in Japan each year<sup>2</sup>—at least 2,500 of whom<sup>3</sup> are killed by direct catch.<sup>4</sup> This article is being written at the height of the 2007–2008 dolphin drive hunt season in Japan,<sup>5</sup> and thus, the article is suffused with both a sense of futility and a great sense of urgency—if it will be too late this year to stop the carnage and the irreplaceable loss of sentient, intelligent beings who make up an irreplaceable component of Earth's global biodiversity, then at least the appropriate international environmental institutions should take action, based on the recommendations of Part V of this article, to finally bring an end to these inhumane practices.

The dolphin drive hunts have become the focus of intense public protest around the world. They are monitored and documented by observers, including representatives of international environmental and humane organizations, who videotape and photograph the hunting practices and their results and then publish their findings on their websites.<sup>6</sup> The terror the dolphins undergo is described by two scientists who have investigated the humane implications of these hunts:

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B1 (accessed Apr. 13, 2008). WDCS is a member of the Species Survival Network (SSN), an international coalition of more than sixty organizations and individuals committed to the promotion, enhancement, and strict enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). *Id.*

<sup>2</sup> David McNeil, *Taiji: Japan's Dolphin Cull and the Clash of Cultures*, <http://www.japanfocus.org/products/topdf/2306> (Jan. 2, 2007) (stating that 26,000 cetaceans will be killed in "what is probably the largest annual cull of cetaceans").

<sup>3</sup> See Boyd Harnell, *Tokyo Sanctions an Extended Cull of Taiji Dolphins*, <http://search.japantimes.co.jp/cgi-bin/fe20070919a1.html> (Sept. 19, 2007) (explaining that the quota for the 2007–2008 Taiji drive hunt alone is 2,468 dolphins).

<sup>4</sup> See Bluevoice.org, *Bluevoice.org Documents Brutal Slaughter of Dolphins in Japan and the Tie to the Dolphin Captivity Industry*, <http://www.bluevoice.org/sections/dolphins/incite.shtml> (accessed Apr. 13, 2008) ("More than twenty thousand dolphins are killed each year in Japan—a process sanctioned by the Japanese government. Dolphins are killed for meat and to provide dolphins for aquariums and swim-with programs. Fishermen drive the dolphins into a bay, separate the number contracted by dolphin buyers, then butcher the rest in a manner brutal beyond description."); Jonathan Owen, *£25,000: What Brutal Hunters in Japan Charge for Catching a Dolphin*, <http://news.independent.co.uk/world/asia/article2152441.ece> (Jan. 14, 2007) ("More than 20,000 whales and dolphins are killed along Japan's coastline every year but the most notorious of the hunts is the 'drive fishery' near the village of Taiji. Fewer than 30 fishermen are behind an annual hunt in which dolphins are chased into shallow waters and then stabbed to death. The few that are spared are then sold on to the highest bidder."); WDCS, *Japan Dolphin Day Demonstration*, <http://www.whales.org/news/driveHuntDemo9-07.asp> (accessed Apr. 13, 2008) ("Up to 20,000 small whales and dolphins are taken in other hunts along the coastline of Japan. . . ."); Toshio Kasuya, *Japanese Whaling and Other Cetacean Fisheries*, 14 *Envtl. Sci. & Pollution Research* 39, 44 (2007) (listing catch numbers according to species for the years 1995–2004).

<sup>5</sup> See e.g. WDCS, *Celebrities and Surfers Attempt to Save Dolphins*, <http://www.wdcs.org/dan/publishing.nsf/allnews/7BD797E16A6A1A88802573870032747A> (Nov. 2, 2007) (stating that dolphin drive hunts occur annually from September through April) (site no longer available) (on file with *Animal L.*).

<sup>6</sup> E.g. BlueVoice.org, *BlueVoice Executive Director Hardy Jones*, [www.bluevoice.org/about.shtml](http://www.bluevoice.org/about.shtml) (accessed Apr. 13, 2008) (working to save dolphins and whales by present-

The dolphin drive hunts are conducted with a complete and utter disregard for animal welfare and humanness. There are no restrictions on capture or killing methods, including time to death, in the drives. Video tapes documenting the deplorable treatment and killing methods employed confirm how dolphins are corralled into the shallows and then either suffer a slow, painful death by a knife-cut to the throat or the spinal cord or, if not killed, are hoisted by their tail flukes and dragged aboard trucks for further 'processing.' Many of these animals are left to writhe on the hard ground while awaiting slaughter. The dolphins are forced to swim in water red with their own blood and that of others in their social group. Beyond the annual number of animals killed, there is no effort to minimize the impact of physiological and mental stress on animals that escape back into their natural habitat or that have been procured for Asian aquariums.<sup>7</sup>

Inseparable from and interwoven with the absolute and devastating cruelty of these practices and the excruciating suffering of the dolphins are the implications from a conservationist perspective on the targeted dolphin populations.

Cetacean diversity, like all biodiversity worldwide, is crumbling; we are losing it at a rapid and increasing rate. So we must redouble our efforts . . . . If we don't speak up, if we don't go out of our way to prod and assist the managers, there will be no hope for continued abundance and diversity of whales, dolphins, and porpoises.<sup>8</sup>

This article is intended to do exactly that—to *prod and assist the managers* of these species to take a firm position against deliberate

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ing streaming video, audio, text, images, and animated contents); Earth Island Institute, *International Marine Mammal Project*, <http://www.earthisland.org/immmp/immmp/home.htm> (accessed Apr. 13, 2008) (working to make oceans safe for marine mammals worldwide by posting articles, newsletters, and videos); Earth Island Institute, *International Dolphin Sage Monitoring Program*, <http://www.earthisland.org/dolphinSafeTuna/> (accessed Apr. 13, 2008) (private environmental monitoring program that ensures tuna processing is "dolphin safe"); Animal Welfare Institute, <http://www.awionline.org> (accessed Apr. 13, 2008) (seeking to reduce pain inflicted on animals by people); In Defense of Animals, <http://www.idausa.org> (accessed Apr. 13, 2008) (seeking to "end animal exploitation, cruelty, and abuse by protecting and advocating for the rights, welfare, and habitats of animals, as well as to raise their status beyond mere property, commodities, or things"); Elsa Nature Conservancy, [http://www.elsaenc.net/index\\_e.htm](http://www.elsaenc.net/index_e.htm) (accessed Apr. 13, 2008).

<sup>7</sup> Diana Reiss & Lori Marino, *Japan's Dolphin Hunts from a Scientific and Animal Welfare Perspective*, <http://www.theoceanproject.org/actfordolphins/scivi.html> (accessed Apr. 13, 2008).

<sup>8</sup> William F. Perrin, *Foreword*, in Cetacean Specialist Group (CSG), *Dolphins, Whales and Porpoises: 2002–2010 Conservation Action Plan for the World's Cetaceans* vii, (Randall R. Reeves et al. eds., IUCN 2003); see also CSG, *Dolphin, Whales and Porpoises: 2002–2010 Conservation Action Plan for the World's Cetaceans* 30–31 (Randall R. Reeves et al. eds., IUCN 2003) ("[The CSG's] guiding premise is that conservation ultimately depends upon good science, and the group's credibility and value are based on maintaining high standards of scientific rigor. . . . We recognize that these areas of knowledge are always marked by uncertainty, and that the usefulness of science in guiding conservation action depends upon open channels of communication with non-specialists and on the ability to create and maintain the political will to effect change.").

taking of dolphins in Japan and elsewhere.<sup>9</sup> Hopefully, the article will complement the work done by those exposing the dolphin hunts to the world and by the scientists gathering data and reporting on the implications of these hunting practices on targeted populations. The objective is to persuade the relevant decision makers, who have in their hands the authority and the power to halt the dolphin hunts, to promote such policy in the framework of existing international legal structures and, if necessary, to create new structures.

Dolphins, together with small whales and porpoises, are known as *small cetaceans* to differentiate them from the *large cetaceans* more commonly known as whales.<sup>10</sup> Many species belonging to the Order of Cetacea migrate between their breeding, feeding, and wintering areas and in doing so, cross international borders amidst a wide range of threats derived from human behavior: maritime traffic; bycatch; marine pollution; hazardous substances, such as heavy metals and organic compounds that accumulate in the body tissue of cetaceans through the food chain; acoustic disturbances; and the deliberate taking by means of the notorious drive hunts, as well as by harpoon hunting from boats, by small-type whaling, and even by the use of crossbows.<sup>11</sup>

This article explores the international legal status of those dolphins targeted by the Japanese hunts. The article does not deal with the status of *all* dolphin species, nor does it ignore the fact that dolphins are being killed in *other* national jurisdictions by similar practices<sup>12</sup> and that small cetaceans in general are threatened by the

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<sup>9</sup> In this article, the term "dolphin" connotes species of small cetaceans and will be used interchangeably with the term "small cetaceans."

<sup>10</sup> Kasuya, *supra* n. 4, at 42 ("Biologically speaking there is no distinction between 'dolphins/porpoises' and 'whales' . . ."); William C. Burns, *The International Whaling Commission and the Regulation of the Consumptive and Non-Consumptive Uses of Small Cetaceans: The Critical Agenda for the 1990s*, 13 Wis. Intl. L.J. 105, 105 n. 1 (1994) ("All whales, dolphins, and porpoises making up the order of cetaceans are divided into two suborders, the Odontoceti, or toothed whales, and the Mysticetes, or baleen whales."); Patricia Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale Watching* vol. 1, 11–17 (Oceana Publ., Inc. 1985); CSG, *supra* n. 8, at 30 (there are eighty-six species of whales); Boris M. Culik, *Review of Small Cetaceans: Distribution, Behavior, Migration and Threats 2* (UNEP, Conv. on Migratory Species 2004) (seventy-one species are small cetaceans, meaning dolphins, porpoises, and small whales).

<sup>11</sup> Clare Perry & Allan Thornton, *Towards Extinction: The Exploitation of Small Cetaceans in Japan* 4, <http://www.eia-international.org/files/reports18-1.pdf> (accessed Apr. 13, 2008); Burns, *supra* n. 10, at 111–23; Culik, *supra* n. 10, at 4–5; Kasuya, *supra* n. 4, at 40.

<sup>12</sup> E.g. Wikipedia, *Dolphin Drive Hunting*, [http://en.wikipedia.org/wiki/Dolphin\\_drive\\_hunt](http://en.wikipedia.org/wiki/Dolphin_drive_hunt) (accessed Apr. 13, 2008) (dolphin drive hunting also occurs in the Faroe Islands of Denmark, the Solomon Islands, and Peru); Bonnie Gretz, Policy Letter: Opposition for Faroese Drive Hunting, <http://www.acsonline.org/issues/whaling/Ltr0202FaroeIslandsWhaleSlaughter.html> (Feb. 1, 2002) (entire families of pilot whales are killed in the Faroe Islands); The Intl. Whaling Commn. (IWC), *Resolutions from Annual Meetings of the International Whaling Commission*, <http://www.iwcoffice.org/meetings/search.asp>; *select 1990, search "1990-Appendix 3"* (last updated Oct. 30, 2007);

human behaviors described above.<sup>13</sup> However, the largest numbers of killings of small cetaceans occur in Japanese waters and coastal towns.<sup>14</sup> Throughout the past twenty years, it is estimated that more than four hundred thousand dolphins have been slaughtered by Japanese fishermen.<sup>15</sup>

Because of the large numbers killed, together with the fact that the drive hunts take place in coastal areas open to public view,<sup>16</sup> there has been considerable media coverage of these events, creating a substantial amount of information and evidence. However, despite the scientific and investigative reports and reviews that indicate the precarious status of the targeted dolphin populations, Japan has legalized the dolphin hunts, allowing its nationals to hunt, capture, and slaughter thousands of dolphins a year without any national legal obstacles and, as will be discussed, without any international legal obstacles either.

An international legal structure for the protection of small cetaceans is essential for two reasons. First, the global community has chosen international environmental law as the principal framework for solving environmental problems and protecting biodiversity. The interaction of states on these issues takes place under international regimes administered by multiple institutions that work to achieve the specific objectives of that particular regime, and despite arguments regarding the effectiveness of such regimes, they cannot be ignored. Second, as migratory species, small cetaceans are acutely in need of protective international regimes and are dependant on the cooperation and coordinated actions of their range states. Though political and economic factors might prove successful in halting the Japanese hunt (for example, other states could refuse to import dolphins for the entertainment industry,<sup>17</sup> consumers could quash the dolphin market by simply refusing to buy dolphin meat, or public disgust with the hunt or with

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*id. select 1991, search "1991-Appendix 5"; id. select 1993, search "1993-Appendix 4"; id. select 1994, search "1994-2"; id. select 1995, search "1995-Appendix 4"; id. select 1996, search "1996-Appendix 4"; id. select 1997, search "1997-Appendix 8"; id. select 2001, search "2001-Appendix 13" (expressing concern about the disappearance of certain stocks of small cetaceans caused by direct exploitation and incidental catches).*

<sup>13</sup> Culik, *supra* n. 10, at 5.

<sup>14</sup> Kasuya, *supra* n. 4, at 39 ("... Japan today retains the world[s] top position in the annual harvest of cetaceans for human consumption."); Richard O'Barry, *Help Stop the Largest and Cruellest Slaughter of Dolphins in the World*, <http://www.savejapandolphins.org/index/html> (accessed Apr. 13, 2008) ("This brutal massacre [of the dolphins]—the largest scale dolphin kill in the world—goes on for six months of every year. . . . Japanese fishermen kill the largest number of dolphins anywhere in the world . . . ."); see also Perry & Thornton, *supra* n. 11, at 16 ("With a national quota of 17,700 Dall's porpoises, this is the largest kill of cetaceans in the world.").

<sup>15</sup> Perry & Thornton, *supra* n. 11, at 1, 27.

<sup>16</sup> See WDCS, *supra* n. 4 (stating that "Japan's Fisheries Agency directs fishermen to hide evidence of the hunts from the public eye, erecting tarpaulins and tents behind which the dolphins are slaughtered").

<sup>17</sup> See e-mail from Mark J. Palmer, Assoc. Dir., Intl. Marine Mammal Project, to Rachelle Adam, *The Japanese Whale Hunt* (Nov. 15, 2007) (copy on file with *Animal L.*)

the toxic content of dolphin meat<sup>18</sup> could drive political change in Japan), small cetaceans, as important components of *global* biodiversity, should be protected under the umbrella of an international protective legal structure.

Part II of this article describes the background of the dolphin hunts in Japan and the legal-regulatory structure under which they take place. Part III reviews the status of the populations targeted by the hunts, based on scientific reviews and investigative reports. Part IV reviews the global environmental governance structure regarding the protection of small cetaceans and discusses individual Multilateral Environmental Agreements (MEAs) as possible candidates for protecting and conserving small cetaceans.<sup>19</sup> Part V concludes with recommendations for the use of existing legal structures, or for the creation of new legal tools, to grant small cetaceans international legal protection. The major recommendation calls for an immediate moratorium (imposed globally by a joint decision of the Conference of the Parties (COPs) of the relevant MEAs,) on all dolphin hunts and all trade in live dolphins.

## II. BACKGROUND

### A. *Hunting Methods*

Small cetaceans have been hunted along Japan's coasts for hundreds of years. As technology progressed in the form of faster boats, deadlier harpoons, and improved communication systems, the number

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(concerning the decision of the Dominican Republic to stop the import of twelve dolphins from Japan).

<sup>18</sup> See e.g. Perry & Thornton, *supra* n. 11, at 1 (stating that the "Japanese public and press are generally unaware . . . and are often shocked to discover that many small cetaceans are killed" and that the "[g]overnment of Japan has never acted to counter this widespread fraudulent trade . . ."); see Tetsuya Endo et al., *Total Mercury, Methyl Mercury and Selenium Levels in the Red Meat of Small Cetaceans Sold for Human Consumption in Japan*, 39 *Envtl. Sci. & Tech.* 5703 (2005) (concluding that the consumption of red meat from small cetaceans could pose a health problem for not only pregnant women but also for the general population of Japan); see also Clare Perry et al., *Mercury Rising, The Sale of Polluted Whale, Dolphin and Porpoise Meat in Japan* 6-8, <http://www.eia-international.org/files/reports55-1.pdf> (June 2003) (stating that "[m]ost Japanese people are unaware that dolphins and porpoises are killed in large numbers" and outlining the high levels of mercury to which the Japanese are exposed); Hannah Beech, *Postcard: Taiji*, <http://www.time.com/time/magazine/article/0,9171,1668448,00.html> (Oct. 4, 2007) (stating that "new mercury studies have divided the tight-knit community of Taiji [Japan]" and that there was "a lot of pressure from fishermen not to publicize the mercury results").

<sup>19</sup> See *International Convention for the Regulation of Whaling* (ICRW) (Dec. 2, 1947), 62 Stat. 1716, 161 U.N.T.S. 74 (giving an example of an MEA); *United Nations Convention on the Law of the Sea* (UNCLOS) (opened for signature Dec. 10, 1982, entered into force Nov. 16, 1994), 1833 U.N.T.S. 397 (giving an example of an MEA); *Convention on Migratory Species of Wild Animals* (CMS) (June 23, 1979), 19 I.L.M. 11 (1980); CITES, 27 U.S.T. 1087, 993 U.N.T.S. (Mar. 3 1973); *Convention on Biological Diversity* (CBD) (June 5, 1992), 31 I.L.M. 818.

of dolphins killed each year climbed into the thousands.<sup>20</sup> As mentioned above, Japanese fishermen hunt and kill more than twenty thousand small cetaceans annually, the national quota being over 22,000.<sup>21</sup> According to many sources, the motivating force behind the Japanese drive hunts is the growing demand from marine parks, aquariums and dolphinariums, as confirmed by the lucrative payments offered for live dolphins.<sup>22</sup>

The massive slaughter is carried out by several methods, the most notorious being the drive hunts, which account for about two thousand killings per year.<sup>23</sup> Because of its visibility, its grisly details are recorded by protestors and posted on Web sites, where they have outraged a public revolted by the mass carnage and waters turned blood red.<sup>24</sup>

The hunts are notoriously brutal and blue tarpaulin sheets block the main viewing spots overlooking the cove where the killings take place to prevent picture-taking. Beyond the cove, a small fleet of boats surround a pod of migrating dolphins, lower metal poles into the sea and bang them to frighten the animals and disrupt their sonar. Once the panicking, thrashing dolphins are herded into the narrow cove, the fishermen attack them with knives, turning the sea red before dragging them to a [harbor]-side warehouse for slaughter.<sup>25</sup>

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<sup>20</sup> Courtney S. Vail & Denise Risch, *Driven by Demand, Dolphin Drive Hunts in Japan and the Involvement of the Aquarium Industry* 10, [http://www.wdes.org/submissions\\_bin/drivenbydemand.pdf](http://www.wdes.org/submissions_bin/drivenbydemand.pdf) (Apr. 2006).

<sup>21</sup> Perry & Thornton, *supra* n. 11, at 1.

<sup>22</sup> Vail & Risch, *supra* n. 20, at 7; see also Save Japan Dolphins Campaign, *The Ugly Secret Behind the Slaughter: Dolphin Captivity Industry Subsidies Keeps Hunt Alive*, <http://www.savejapandolphins.org/captiveIndustry.html> (accessed Apr. 13, 2008) ("The dolphins and other small whales that are selected and purchased by members of the dolphin captivity industry represent a much higher commercial value to the Japanese fishermen than the ones that are slaughtered for meat. The multibillion dollar dolphin captivity industry is not 'saving' the dolphins from the drives. The industry is helping to maintain the drives by making the practice profitable for the fishermen."); see McNeil, *supra* n. 2, at 7 (quoting Richard O'Barry as estimating that each dolphin captured and sold alive to the captivity industry is worth one hundred thousand dollars, whereas the ones killed for meat are worth six hundred dollars each); Bluevoice.org, *supra* n. 4 ("Killing dolphins for meat is not only an outrageous act, the high level of toxins in dolphin meat makes it dangerous for human consumption. And, from a monetary standpoint, the profits on the sale of dolphin meat are often marginal. But the increase in demand for live dolphins, captured and shipped to aquariums and swim-with programs, has created a huge incentive for fishermen to step-up the dolphin drives which result in so [many] brutal deaths."); *infra* n. 42 (explaining that the discrepancies in estimates are due to the data having been taken from a variety of sources).

<sup>23</sup> O'Barry, *supra* n. 14 (Figures for the drive hunts in Taiji alone for the 2003–2004 hunting season were 1,165 dolphins killed with the following division among species: 444 striped dolphins, 197 bottlenose dolphins, 102 Pantropical spotted dolphins, 293 Risso's dolphins, 117 pilot whales, and 12 false killer whales. Seventy-eight dolphins consisting of sixty-seven bottlenose dolphins, six Risso's dolphins, and five pseudo orcas were captured for sale to the entertainment industry); see Harnell, *supra* n. 3 (for the 2007–2008 quota for the Taiji drive hunt).

<sup>24</sup> Perry & Thornton, *supra* n. 11, at 11–12.

<sup>25</sup> McNeil, *supra* n. 2, at 3.



Corralled and prevented by nets from escaping, the dolphins are slaughtered under extremely cruel and inhumane conditions by the fishermen who stab them to death with knives and spears.<sup>26</sup>

Though the drive hunt is the most notorious, the majority of small cetaceans are hunted and slaughtered by hand harpooning, where fishermen chase dolphin pods by boat until the animals, weak from exhaustion, make easy targets for the harpoons.<sup>27</sup> The most targeted species for hand harpooning is the Dall's porpoise: The yearly quota for this group alone is set at 17,700.<sup>28</sup> Hand harpooning is "carried out in the prefectures of Hokkaido, Miyagi and Iwate in the north [of Japan] and Wakayama, Chiba and Okinawa in the south."<sup>29</sup> Other hunting methods are small-type coastal whaling<sup>30</sup> and crossbow hunts.<sup>31</sup>

The traditionally targeted species in the hunts are striped dolphins, Dall's porpoises, Pantropical spotted dolphins, bottlenose dolphins, Risso's dolphins, false killer whales, short-finned pilot whales, and Baird's beaked whales, while a newly targeted species is the Pacific white-sided dolphin.<sup>32</sup> The Japanese government assigns catch quotas for each species, divided regionally among Japan's prefectures, which in turn are divided among the fishing cooperatives of each prefecture. Quotas for drive hunts are divided between the Wakayama Prefecture, where the town of Taiji is located, and the Shizuoka Prefecture, the location of the town of Futo on the Izu peninsula.<sup>33</sup> The drive hunt season is September through March; the other hunting practices are not limited except for hand harpooning of the Dall's porpoise, which is prohibited during the month of July.<sup>34</sup>

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<sup>26</sup> Perry & Thornton, *supra* n. 11, at 11–12.

<sup>27</sup> See *id.* at 6 ("Around 18,500 dolphins, porpoises and small whales are caught in such hunts each year. . . . The hunt of Dall's porpoises is still the largest hand harpoon hunt in Japan. . . . [With] a national quota of 17,700 Dall's porpoises, this is the largest direct kill of cetaceans in the world."); Kasuya, *supra*, n. 4, at 40 (describing the history of hand harpooning in Japan).

<sup>28</sup> Perry & Thornton, *supra* n. 11, at 19.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> ICRW, *supra* n. 19 ("Small-type whaling" is defined in the Schedule to the ICRW as ". . . catching operations using powered vessels with mounted harpoon guns hunting exclusively for minke, bottlenose, beaked, pilot or killer whales"). Birnie, *supra* n. 10, vol. 2, at 708; Perry & Thornton, *supra* n. 11, at 4.

<sup>31</sup> Perry & Thornton, *supra* n. 11, at 4, 6.

<sup>32</sup> Stefan Anitei, *Japanese Government is Protecting the Cruel Dolphin Hunt*, <http://news.softpedia.com/news/Japanese-Government-is-Protecting-the-Cruel-Dolphin-Hunt-36510.shtml> (accessed Apr. 13, 2008); e-mail from Mark J. Palmer, Assoc. Dir., Intl. Marine Mammal Project, to Rachele Adam, *CITES and the Japanese Whale Hunt* (Sept. 20, 2007) (on file with *Animal L.*).

<sup>33</sup> Perry & Thornton, *supra* n. 11, at 5–6.

<sup>34</sup> See Save Japan Dolphins Campaign, *Taiji Update, September 2006: Taiji Dolphin Hunts Begin Early!*, <http://www.savejapandolphins.org/weblog2006.html> (accessed Apr. 13, 2008) (explaining that this year the drive hunt started in September, apparently to allow the fishermen more time to fill their quota, which has been difficult because of the decimation of stocks from previous years' hunts); Perry & Thornton, *supra* n. 11, at 7 (although July is traditionally considered the breeding season, it turns out, however,

The intensive hunting has resulted in a "domino effect."<sup>35</sup> Hunters hunt a species until its population is decimated, then the hunters move on to the next species until that species, too, becomes harder to hunt as a result of decreasing numbers. The vicious cycle continues, leaving depleted populations of dolphins in its wake. When the exploitive drive hunts of the striped dolphin led to a serious depletion of its population, the hunters switched their target to killer whales, bottlenose, Pantropical spotted, and Risso's dolphins.<sup>36</sup> The cycle of hunting a larger species until its decimation and then hunting other smaller species has its roots in whale hunting.

[T]he history of whaling is one of 'boom-bust' cycles in which the largest species of whales have been hunted to the point of exhaustion, followed by a shift to progressively smaller species. In recent years, the devastation of the stocks of the eleven largest species of whales has increasingly led commercial whalers to turn to exploitation of small cetaceans with the total reported catch of these species increasing by an astounding seventy percent between 1983 and 1986.<sup>37</sup>

Faced with the decimation and near extinction of the targeted whale species, in 1982 the International Convention for the Regulation of Whaling (ICRW) issued its moratorium on commercial whale hunting,<sup>38</sup> which was entered into force in 1986, leading to the exploitive hunting of small cetaceans as an alternative to whale meat.<sup>39</sup> Dall's porpoise, in particular, became a heavily targeted species following the depletion of striped dolphin populations by the 1970s.<sup>40</sup> Consequently, the species has become seriously depleted, with more than 250,000 slaughtered between 1986 and 1998.<sup>41</sup>

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that May and June are the real breeding months, as attested to by the large number of lactating females killed in the hunts).

<sup>35</sup> Perry & Thornton, *supra* n. 11, at 2.

<sup>36</sup> CSG, *supra* n. 8, at 13.

<sup>37</sup> Burns, *supra* n. 10, at 115-16.

<sup>38</sup> *Id.* at 109; *see infra* n. 184 (discussing how the moratorium did not end all whale hunting).

<sup>39</sup> Burns, *supra* n. 10, at 116; Environmental Investigation Agency (EIA), *Stop the Dall's Disaster!*, <http://www.eia-international.org/files/reports119-1.pdf> (accessed Apr. 13, 2008).

<sup>40</sup> Perry & Thornton, *supra* n. 11, at 2; *see also* EIA, *supra* n. 39 ("Around 800 tons of Dall's porpoise meat enters the Japanese markets for human consumption every year.").

<sup>41</sup> Perry & Thornton, *supra* n. 11, at 2.

B. *The Legal-Regulatory Framework of the Dolphin Hunts*<sup>42</sup>

In Japan, cetacean hunts are regulated by the Fisheries Agency.<sup>43</sup> Following the International Whaling Commission (IWC) resolutions from the early 1990s that called on Japan to suspend catches of striped dolphins and Dall's porpoises,<sup>44</sup> and due to the resulting international criticism,<sup>45</sup> in 1993 the Fisheries Agency set catch quotas for eight (now nine) targeted species of dolphins.<sup>46</sup> The quotas have changed little over the years and were imposed on commercial fisheries only.<sup>47</sup> Thus, the taking of dolphins by means other than "commercial" methods continued unhindered.<sup>48</sup> In 2001, the Japanese government revised Japan's fishing law and prohibited toothed whale fisheries, ostensibly banning dolphin hunts.<sup>49</sup> However, by using the conditional clause mechanism of the revised law, the government issued an ordinance that exempted commercial fisheries from the prohibition on dolphin catch.<sup>50</sup> Through this ordinance, management of the dolphin hunts was formally transferred from the mandate of the central government to that of the prefectures, which historically allocates the permits among the fishing cooperatives by means of a regulatory licensing system.<sup>51</sup> However, the objective of the licensing system is to fill the

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<sup>42</sup> Several e-mails from the author to Japanese ministries asking for information on the regulatory structure of dolphin hunting received no reply. As with data on targeted species, there is a dearth of accurate and updated information on the Japanese regulatory framework for small cetacean hunts. Additionally, the Japanese legislation appears not to have been translated into English. Thus, the data for this section were gleaned from a variety of secondary sources.

<sup>43</sup> Vail & Risch, *supra* n. 20, at 31.

<sup>44</sup> IWC, *supra* n. 12, at 1993-Appendix 10, 1990-Appendix 4.

<sup>45</sup> See Perry & Thornton, *supra* n. 11, at 10 ("It is possible to interpret the setting of catch quotas as a desperate attempt by the government to make it look to other countries as though Japan is controlling cetacean catches. In future it will be necessary to change the catch quota into a rational system for legal control, instead of a diplomatic smoke and mirrors in contrivance by the government.")

<sup>46</sup> Kasuya, *supra* n. 4, at 42; see also Vail & Risch, *supra* n. 20, at 31 ("In 1993, the Fisheries Agency established quotas for eight species of small [cetaceans] in each prefecture involved in hunting them. Although these quotas were reportedly based on science, they appeared heavily influenced by political factors, with emphasis on past yields. Japanese government research on small cetaceans in coastal waters remains data deficient. Urgently-needed catch quota reviews for most of the dolphin species targeted by the drive hunts have been postponed by the Fisheries Agency, at least partly due to the lack of information about the status of the animals targeted by them.")

<sup>47</sup> E-mail from Nanami Kurasawa, Iruka & Kujira (Dolphin and Whale) Action Network, to Cathy Williamson, Captivity Program Manager, WDCS, *Dolphin Hunt Legal-Regulatory* (Dec. 21, 2007) (copy on file with *Animal L.*).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*; e-mail from Cathy Williamson, Captivity Program Manager, WDCS, to Rachelle Adam, *Japanese Drive Hunts* (Nov. 12, 2007) (copy on file with *Animal L.*).

<sup>51</sup> E-mail from Nanami Kurasawa, *supra* n. 47; Perry & Thornton, *supra* n. 11, at 7; Kasuya, *supra* n. 4, at 40.

catch quotas, not to impose legal restrictions to protect the dolphins.<sup>52</sup> The permit system has no compliance or enforcement mechanism, but is self-regulated, with catch reports submitted on a volunteer basis by the fishing cooperatives.<sup>53</sup> The prefectures introduced monitoring systems, consisting of an observer from either local government or the National Research Institute of Far Seas Fisheries, a research agency.<sup>54</sup>

Japan's law addressing wildlife conservation and hunting management was revised in 2001. Species of marine mammals that had until then been regulated by the Fisheries Agency—the dugong, five species of seals, and the Japanese sea lion—were included under the mandate of the revised law. However, despite the efforts of Japan's Nongovernmental Organizations to include cetaceans as well, the Fisheries Agency refused to do so.<sup>55</sup>

### III. REVIEW OF TARGETED SPECIES OF SMALL CETACEANS

Since the question of whether dolphins are deserving of international legal status is linked to the findings of status assessments, the following section will review those small cetaceans specifically targeted by the Japanese hunts. For the most part, the section below is based on surveys and reports prepared by the Environmental Investigation Agency,<sup>56</sup> the International Union for the Conservation of Nature's Cetacean Specialist Group (CSG),<sup>57</sup> the Convention on Migratory Species (CMS),<sup>58</sup> and the Whale and Dolphin Conservation Society (WDCS).<sup>59</sup> Additional information is also available through the resolutions of the IWC on small cetaceans, as detailed below.

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<sup>52</sup> Perry & Thornton, *supra* n. 11, at 10.

<sup>53</sup> *Id.* (“The Government of Japan is extremely evasive regarding small cetacean catches to avoid criticism of the many abuses. The Fisheries Agency only reports catch quotas at the national level to the IWC. EIA investigators were told by authorities in Iwate, Miyagi and Shizuoka that they were strictly instructed by the Fisheries Agency not to [publicize] regional catches or catch limits.”); *see also* Kasuya, *supra* n. 4, at 42 (explaining that “the Fisheries Agency . . . requires a special permit to take [the blue whales, bowhead whales, and finless porpoises] species, and it demands the reporting of individuals killed incidentally. The basis for selecting the three species is unclear, and the significance of the listing for conservation is dubious”).

<sup>54</sup> E-mail from Nanami Kurasawa, *supra* n. 47; *see also* Vail & Risch, *supra* n. 20, at 10 (“In 2002, a monitoring and penalty system was officially introduced to drive fishermen in Futo but it does not involve independent observers.”).

<sup>55</sup> E-mail from Nanami Kurasawa, Iruka & Kujira (Dolphin and Whale) Action Network, to Rachele Adam, *Dolphin Hunt Legal-Regulatory* (Dec. 25, 2007) (copy on file with *Animal L.*).

<sup>56</sup> Perry & Thornton, *supra* n. 11, at 1–28.

<sup>57</sup> CSG, *supra* n. 8, at xi (“[M]ost of the group’s attention has been devoted to the small and medium-sized cetaceans, as they are not officially recognized as falling within the aegis of the [IWC].”).

<sup>58</sup> Culik, *supra* n. 10, at 2 (the review dealt with seventy-one small cetacean species).

<sup>59</sup> Vail & Risch, *supra* n. 20, at 1–39 (the review focused on small cetaceans drive hunts).

A. *Striped Dolphin (Stenella Coeruleoalba)*

Historically the most targeted species in Japanese drive hunts,<sup>60</sup> the striped dolphin has become seriously threatened.<sup>61</sup> In Shizuoka Prefecture alone, the catch for 1959 totaled more than 21,000, but plummeted to less than one thousand by the early 1980s.<sup>62</sup> In the town of Taiji in the Wayakama Prefecture, by 1990 the annual catch had fallen below one thousand.<sup>63</sup>

Perhaps because it has been intensively exploited for an extended period of time, in contrast to other species, there is a substantial amount of data on the status of the striped dolphin.<sup>64</sup> The Scientific Committee of the IWC has been monitoring striped dolphin populations since the 1960s. Following assessments that indicated sharp declines in populations,<sup>65</sup> the Scientific Committee called on Japan in 1992, and again in 1993, to halt all catches of the striped dolphin until the completion of full population assessments.<sup>66</sup> In line with these decisions of its Scientific Committee, the IWC issued a resolution in 1993 entitled, *Resolution on the Directed Take of Striped Dolphins*, in which the IWC unambiguously blames the Japanese drive fisheries for the exploitation of the species:

WHEREAS the Scientific Committee noted the lack of firm information on stock structure of striped dolphins in Japanese waters and encouraged age determination and genetic analysis to be carried out;

WHEREAS the mean annual catches of striped dolphins in the drive fisheries have declined from 7,558 in the 1960s, to 6,295 in the 1970s, to 4,070 in the 1980s, to about 835 in the early 1990s;

WHEREAS the Scientific Committee has expressed concern since the mid 1970s that takes of striped dolphins in the drive fishery have sharply de-

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<sup>60</sup> Perry & Thornton, *supra* n. 11, at 18; Kasuya, *supra* n. 4, at 40.

<sup>61</sup> Perry & Thornton, *supra* n. 11, at 18; Culik, *supra* n. 10, at 291; CSG, *supra* n. 8, at 46; Burns, *supra* n. 10, at 116; Kasuya, *supra* n. 4, at 44.

<sup>62</sup> Perry & Thornton, *supra* n. 11, at 18-19.

<sup>63</sup> *Id.* at 19 (the decline accrued "despite an almost doubling in daily searching efforts by the drive team during this period?").

<sup>64</sup> *Id.* at 18 ("In 1992, the Scientific Committee of the IWC attempted to review the status of dolphin species taken in Japanese drive fisheries. New population estimates were provided, based on sightings surveys carried out by Japanese government scientists between 1983 and 1991, but the data was inadequate to conduct a meaningful review. . . . With little biological data to go on and no clear abundance estimates of the exploited stocks, the Scientific Committee was only able to assess the status of the striped dolphin, as concern for this species dated back several decades with a wealth of biological and catch information confirming a catastrophic decline in the coastal populations.").

<sup>65</sup> *Id.* at 21; Kasuya, *supra* n. 4, at 44.

<sup>66</sup> Perry & Thornton, *supra* n. 11, at 18.

clined over the years and concluded in 1981 that this has been caused by the over-exploitation of the coastal population of striped dolphins;

WHEREAS the Scientific Committee reiterated its concern of last year that the population cannot support continued exploitation at the current level and its longstanding concern regarding the status of the striped dolphin taken in the coastal waters of Japan;

WHEREAS the Scientific Committee repeated last year's recommendation regarding an interim halt;

WHEREAS the Commission is aware of the differences in views among member states on the regulatory competence of the International Whaling Commission with regard to small cetaceans, and noting that this resolution does not does [sic] in any way to [sic] prejudice different member positions;

Now, THEREFORE, the Commission INVITES the Japanese Government:

1. to consider the advice from the Scientific Committee including research needs as a matter of urgency;
2. to take appropriate action as soon as possible that will allow recovery of the population;
3. to consider appropriate action regarding other species of small cetaceans taken in the drive fishery individually and on a scientific basis;
4. to report on progress made to the 46th meeting of the IWC.<sup>67</sup>

In 1993, apparently as a result of the above resolution, the Japanese government started setting national quotas for targeted species.<sup>68</sup> Ignoring the advice of the IWC Scientific Committee to stop the striped dolphin hunts,<sup>69</sup> the Japanese government instead set a catch quota of 725, allocated between the prefectures of Wakayama, Shizuoka, and Chiba.<sup>70</sup> However, "catches in recent years have averaged around [five hundred]. The hand harpoon hunts rarely reach their allowable catch levels."<sup>71</sup>

Because Japan neither stopped the striped dolphin hunts nor issued new assessments of the striped dolphins' status, as requested by the IWC Scientific Committee both in 1992 and 1993,<sup>72</sup> in 1996 the IWC issued a further resolution urging Japan to follow the recommendations of the Scientific Committee.<sup>73</sup> The Japanese government ignored this resolution, as well.<sup>74</sup> In 1997, the Scientific Committee

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<sup>67</sup> IWC, *supra* n. 12, at 1993-Appendix 10.

<sup>68</sup> Perry & Thornton, *supra* n. 11, at 3.

<sup>69</sup> *Id.*; IWC, *supra* n. 12, at 1993-Appendix 10 ("WHEREAS the Scientific Committee repeated last year's recommendation regarding an interim halt.").

<sup>70</sup> Perry & Thornton, *supra* n. 11, at 19 ("However, the basis of these quotas is uncertain, as scientific information on species population status is sorely lacking.").

<sup>71</sup> *Id.*; Burns, *supra* n. 10, at 11 ("Japanese scientists and other researchers have concluded that the species could be quickly driven to extinction if harvesting continues unabated.").

<sup>72</sup> Perry & Thornton, *supra* n. 11, at 18.

<sup>73</sup> IWC, *supra* n. 12, at 1996-4.

<sup>74</sup> Perry & Thornton, *supra* n. 11, at 21 (concluding that "[n]o full assessment of abundance or stock structure was forthcoming, and in 1996 the IWC passed a resolution

again reviewed the status of the striped dolphin and issued a decision expressing concern regarding the sharp decline in striped dolphin populations.<sup>75</sup> Today, despite these repeated warnings by the IWC and its Scientific Committee, the Japanese government continues to allow hunting of striped dolphins. "The striped dolphin is gravely threatened by the continued drive and hand harpoon hunts in Wakayama, Shizuoka and Chiba. Nothing less than a complete suspension of the hunts will ensure the long-term survival of other coastal striped dolphin populations."<sup>76</sup>

The CSG, an advisory group to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), also reported detrimental findings regarding the decrease in striped dolphin populations resulting from the drive hunts: "Catches of striped dolphin in Japan have declined dramatically since the 1950s, and there is clear evidence that this decline is the result of stock depletion by over-hunting . . . [Striped] dolphins have been completely or nearly eliminated from some areas of past occurrence."<sup>77</sup>

In addition, Japanese scientists themselves reported on drastic declines in stocks of striped dolphins, which resulted in the targeting of other species.<sup>78</sup> As a migratory species to the range states of Japan, North and South Korea, China, and Taiwan, CMS<sup>79</sup> has recommended extending the Appendix II listing of the striped dolphin to the West Pacific region.<sup>80</sup>

### B. *Dall's Porpoise (Phocoenoides Dalli)*

The only known deliberate take of the Dall's porpoise occurs in Japan, where the take is very high and remains "a matter of concern" to CMS.<sup>81</sup> The exploitive hunting of this species dates from 1986, as an alternative to whale meat following the IWC moratorium on whale hunting that took effect that same year.<sup>82</sup> Starting from a catch of ap-

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urging Japan to take 'appropriate action' to follow the recommendation of the Scientific Committee. The following season (1996-97), the striped dolphin catch in Wakayama numbered 472, actually exceeding that prefecture's quota by 22 animals").

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> CSG, *supra* n. 8, at 45-46.

<sup>78</sup> Vail & Risch, *supra* n. 20, at 30.

<sup>79</sup> Culik, *supra* n. 10, at 4; see CMS, *Introduction to the Convention on Migratory Species*, <http://www.cms.int/about/intro.htm> (accessed Apr. 13, 2008) (CMS is an inter-governmental treaty seeking to conserve terrestrial, marine, and avian wildlife. Migratory species threatened with extinction are listed on Appendix I and the species that need or would significantly benefit from international cooperation are listed in Appendix II.).

<sup>80</sup> Culik, *supra* n. 10, at 4, 291.

<sup>81</sup> *Id.* at 237.

<sup>82</sup> EIA, *supra* n. 39 (reportedly, the meat of the Dall's porpoises was sold fraudulently as whale meat in Japanese markets); see also Kasuya, *supra* n. 4, at 41 (linking the significant 1987 catch of 45,600 Dall's porpoises to "the cessation of commercial whaling"); Burns, *supra* n. 10, at 1.

proximately ten thousand in 1985, by 1988 the catch had gone up to forty thousand porpoises a year.<sup>83</sup> Between 1986 and 1998, over 250,000 Dall's porpoises were killed.<sup>84</sup> The large numbers killed were due, in addition to the IWC moratorium, to the decimation of the striped dolphin populations.<sup>85</sup> In light of the exploitive numbers taken by the Japanese hunts, the IWC issued its "Resolution on the Directed Take of Dall's Porpoises" in 1990, calling upon Japan to reduce its annual catches:

WHEREAS the Scientific Committee is greatly concerned that the takes in the Japanese hand harpoon fishery for Dall's porpoises have increased sharply in recent years and concluded, both in 1989 and 1990, that the current takes in the harpoon fishery are not sustainable and that the catch should be reduced urgently at least to the pre-1986 levels, approximately 10,000 animals per year;

WHEREAS the Commission [recognizes] that the Japanese Government's regulations for 1989 reduced the takes of Dall's porpoises to about 29,000 animals, a reduction of 28% compared with the 1988 takes and notes its intention to take further measures to reduce the takes in 1990;

WHEREAS the Scientific Committee stated that the planned rate of reduction of the takes in 1990 by 15% of the 1989 catch is inadequate to prevent population decline if the population estimates are even roughly correct;

Now, THEREFORE the Commission requests the Japanese Government to consider the advice from the Scientific Committee as a matter of urgency, and as soon as possible to reduce the takes to at least the levels before 1986 and that even further reductions be considered when planned new stock assessments are completed.<sup>86</sup>

The advice offered was not taken, and the Japanese government refused to cooperate with the IWC, arguing that species of small cetaceans are not covered by the ICRW.<sup>87</sup> In 1999, the IWC issued a further resolution on the Dall's porpoise:

RECALLING that in 1990 the Commission requested the Japanese Government to urgently consider the advice from the Scientific Committee concerning the Dall's porpoise stocks exploited in the Japanese hand harpoon fishery, to reduce catches to pre-1986 levels, and to consider further reductions in take when new stock assessments became available;

NOTING that 8 years have elapsed since the Scientific Committee's last review in 1991, during which time:

(i) over 115,000 Dall's porpoises have been taken in the fishery, with catches tending to increase in recent years;

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<sup>83</sup> Perry & Thornton, *supra* n. 11, at 2.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 3; IWC, *supra* n. 12, at 1990-Appendix 4.

<sup>87</sup> Culik, *supra* n. 10, at 237.



(ii) concerns have been raised in the Scientific Committee about the unpublished 1990 abundance estimate, on which the Government of Japan has based its domestic quota;

(iii) the potential for significant bycatch has been identified;

COINSIDERING that the Scientific Committee has in 1999 reiterated its concerns over the status of the exploited stocks;

NOTING that the Scientific Committee has offered advice to the Government of Japan on Dall's porpoise in the past, and that such advice has led to very positive responses from the Government;

NOW THEREFORE THE COMMISSION:

DIRECTS the Scientific Committee to review the status of the impacted stocks in the 53rd Annual Meeting;

ENCOURAGES the Government of Japan to make available the data identified by the Scientific Committee as relevant for such a review, in sufficient time to allow analysis before the 53rd Annual Meeting;

INVITES the Government of Japan meanwhile to reconsider the level of its domestic quota, in the light of the concerns identified above.<sup>88</sup>

In 2001, the IWC issued yet another "Resolution on Dall's Porpoise":

[RECOGNIZING] that for more than a decade there has been concern about the status of Dall's porpoise stocks impacted by the Japanese hand-harpoon fishery . . .

WHEREAS in 1999 the Commission directed the Scientific Committee to review the status of Dall's porpoise stocks exploited in the Japanese hand-harpoon hunt and that this review was carried out . . .

NOTING however, that this year data for the Dall's porpoise status review was not made available by the government of Japan, and that the work of the Scientific Committee was hampered because of this;

CONCERNED that the most recent abundance estimate for the exploited stocks was made in 1991, and that since this time more than 130,000 Dall's porpoises have been reported taken;

NOTING that there has been a recent increase in the proportion of lactating females in some catches which may reflect a change in hunting techniques whereby hunters target females with dependent calves;

FURTHER NOTING that reported catch statistics are also limited by the absence of data on number of individuals struck and lost, inaccurate reporting on a stock-by-stock basis and the absence of data on age, sex and reproductive condition;

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<sup>88</sup> IWC, *supra* n. 12, at 1999-9.

NOTING that in 1990 the Scientific Committee recommended that catches of Dall's porpoises should be reduced to levels below 10,000 each year, and that, subsequently, catches have exceeded these levels;

CONCERNED that reported levels of directed takes alone exceed levels considered by the Scientific Committee to be sustainable;

NOTING that the Scientific Committee reiterated its extreme concern for these stocks and repeated its previous recommendations that catches be reduced as soon as possible to sustainable levels;

NOW THEREFORE THE COMMISSION:

DIRECTS the Scientific Committee to carry out a full assessment of the status of exploited Dall's porpoise stocks as soon as sufficient additional information becomes available;

CALLS ON the Government of Japan to provide information necessary to carry out such an assessment;

URGES the Government of Japan to halt the directed takes of Dall's porpoises until a full assessment by the Scientific Committee has been carried out.<sup>89</sup>

Japan continues to hunt Dall's porpoises. With the number killed reaching up to eighteen thousand per year, Japan's Dall's porpoise hunt is "the largest direct kill of cetaceans worldwide."<sup>90</sup> The status of this species continues to be a matter of scientific concern.<sup>91</sup>

### C. *Pantropical Spotted Dolphins (Stenella Attenuata)*

Japanese fishermen started hunting the Pantropical spotted dolphins in 1959, probably as a result of the decimation of striped dolphin populations.<sup>92</sup> Although this species is hunted in other countries,

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<sup>89</sup> IWC, *supra* n. 12, at 2001-12.

<sup>90</sup> Wendy Elliott & Ezra Clark, *The Facts Behind Japan's Whale, Dolphin and Porpoise Hunting* 1, <http://www.eia-international.org/files/reports19-1.pdf> (accessed Apr. 13, 2008).

<sup>91</sup> Culik, *supra* n. 10, at 237-38. The author notes that

[c]oncern has been expressed in the past regarding the direct catch of Dall's porpoises in Japanese waters. By 1987 the level of annual catches reached about 10% of the estimated 105,000 Dall's porpoises known to migrate to the fishing grounds. The number of Dall's porpoises taken by Japan in 1988 in the harpoon fishery was nearly 39,000, apparently in compensation for the shortage of whale meat attributed to the IWC moratorium on whaling. Further depletion of the stocks may have occurred if the hunting pressure continued at the high levels reported. Studies on stock identity, biological parameters and abundance are urgently needed. The assessment of various fisheries in the North Pacific needs to be completed, in order to understand the actual impact of these fishing operations on the Dall's porpoise populations.

*Id.*; see also CSG, *supra* n. 8, at 49-50 (describing pressure on the Dall's porpoise population in the western Pacific).

<sup>92</sup> Perry & Thornton, *supra* n. 11, at 22.

"[o]nly Japan takes large numbers of spotted dolphins for human consumption in drive and harpoon fisheries."<sup>93</sup>

According to the CSG,

[a]lthough mortality rates [from tuna seiners] have been greatly reduced, a recent assessment of this population indicated that it was not recovering at the expected rate and that the stress of being chased and captured repeatedly in the tuna nets, separation of mothers from young, and under-reporting of fishery kills could account for the depressed growth rate . . . . Pantropical spotted dolphins are subject to high mortality in some other parts of the world, notably Japan, where they are killed by harpooning and driving . . . . Although the species is not considered threatened, there is a need for improved understanding of regional stock differences, abundance, and take levels.<sup>94</sup>

The IWC Scientific Committee determined in 1992 "that there had been a decline in catch per unit effort for spotted dolphins."<sup>95</sup> The Red List of Threatened Species<sup>96</sup> lists the status of the spotted dolphins in Japanese waters as unknown.<sup>97</sup>

#### D. Common Bottlenose Dolphin (*Tursiops Truncatus*)

In tandem with the increased catch of the spotted dolphin, increased catch of the common bottlenose dolphin by Japanese fishermen was also a result of the plummet in stocks of striped dolphins.<sup>98</sup> Direct catch of this species occurs in a number of regions globally. However, "[t]he most significant take probably occurs off Japan, where bottlenose dolphins are killed for human consumption, bait and because of perceived competition with fisheries."<sup>99</sup> In addition, "[u]nregulated live-capture fisheries can contribute to the depletion of wild populations."<sup>100</sup> The demand for bottlenose dolphins in the entertainment industry is behind the increase in their take in the drive hunts at Taiji; thus, hundreds of dolphins are caught and slaughtered for meat mainly to choose a few for captivity.<sup>101</sup> Large numbers are also taken by hand-harpooning and, in Okinawa, by crossbows.<sup>102</sup>

Regarding their status in Japan, as well as in other countries in which they are hunted:

Acute conservation problems are known or suspected . . . where large numbers (e.g., nearly 3400 in 1980) have been taken in some years in the drive

<sup>93</sup> Culik, *supra* n. 10, at 279.

<sup>94</sup> CSG, *supra* n. 8, at 45.

<sup>95</sup> Perry & Thornton, *supra* n. 11, at 22.

<sup>96</sup> See generally Intl. Union for the Conservation of Nature, *The IUCN Red List of Threatened Species*, <http://www.iucnredlist.org/info/introduction> (accessed Apr. 13, 2008) (explaining the structure and comprehensiveness of the list).

<sup>97</sup> Perry & Thornton, *supra* n. 11, at 22.

<sup>98</sup> Vail & Risch, *supra* n. 20, at 10.

<sup>99</sup> Culik, *supra* n. 10, at 319.

<sup>100</sup> CSG, *supra* n. 8, at 47.

<sup>101</sup> Perry & Thornton, *supra* n. 11, at 23.

<sup>102</sup> *Id.* at 22.

and harpoon fisheries and where more than 4,000 were culled for fishery protection at Iki Island from 1977 to 1982. The culling off northern Kyushu has declined in recent years, but the take in drive and hand-harpoon fisheries along the Pacific coast has increased since the early 1980s.<sup>103</sup>

In 1992, the Scientific Committee of the IWC was unable to assess the status of the bottlenose dolphins due to lack of data.<sup>104</sup> In 1997, the Red List of Japanese Mammals listed the populations migrating in Japanese waters as "threatened."<sup>105</sup> CMS has recommended amending its Appendix II listing by including all populations of the species.<sup>106</sup>

#### E. Indo-Pacific Bottlenosed Dolphin (*Tursiops Aduncus*)

Known from southern Japan to Australia, "[a]lthough not considered to be endangered as a species, its very near-shore distribution makes this dolphin vulnerable to environmental degradation, direct exploitation and fishery conflicts."<sup>107</sup>

#### F. Risso's Dolphin (*Grampus Griseus*)

These dolphins are also regularly hunted in Japanese waters,<sup>108</sup> particularly after the decimation of the striped dolphins.<sup>109</sup> They are also culled by Japanese fishermen, who claim the dolphins compete with them over fisheries.<sup>110</sup> The Scientific Committee of the IWC was not able to assess their status due to lack of information.<sup>111</sup> The Red List of Japanese Mammals has listed them as "status unknown."<sup>112</sup> Currently, only the North and Baltic Seas populations of the Risso's Dolphin are included in Appendix II of CMS.<sup>113</sup> However, CMS has recommended listing the Risso's Dolphin in Appendix II as a species because of evidence that other populations also migrate along coasts.<sup>114</sup>

#### G. Short-finned Pilot Whale (*Gloiecephala Macrorhynchus*)

"The short-finned pilot whale has been exploited for centuries in the western North Pacific. The largest catches have recently occurred off Japan, where small coastal whaling stations and drive fisheries took a few hundred annually."<sup>115</sup> There are two recognized populations

<sup>103</sup> CSG, *supra* n. 8, at 47.

<sup>104</sup> Perry & Thornton, *supra* n. 11, at 23.

<sup>105</sup> *Id.*

<sup>106</sup> Culik, *supra* n. 10, at 3.

<sup>107</sup> CSG, *supra* n. 8, at 47.

<sup>108</sup> *Id.* at 40.

<sup>109</sup> Vail & Risch, *supra* n. 20, at 10.

<sup>110</sup> Culik, *supra* n. 10, at 82.

<sup>111</sup> Perry & Thornton, *supra* n. 11, at 24.

<sup>112</sup> *Id.*

<sup>113</sup> Culik, *supra* n. 10, at 83.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 70.

of short-finned pilot whales off the coast of Japan, "but at least one of the two forms hunted off Japan is depleted."<sup>116</sup>

The southern population is targeted by drive hunts and harpooning in the prefectures of Wakayama and Okinawa.<sup>117</sup> Today, the greatest hunting pressure on the short-finned pilot whale is the drive hunts in Taiji.<sup>118</sup>

In 1986, the Scientific Committee of the IWC reviewed the status of the southern population of the short-finned pilot whale and advised against intensifying its catch due to its low reproductive rate.<sup>119</sup> Despite the recommendation, the catch increased following the reintroduction of small-type whaling.<sup>120</sup> In 1991, the Scientific Committee repeated its advice and in 1992 concluded that it could not assess the southern form of the species in Japan's coastal waters due to lack of information.<sup>121</sup> Since then, catch statistics from Taiji indicate a decrease in the population.<sup>122</sup> The Red List of Japanese Mammals lists the two populations of the short-finned whale as "rare."<sup>123</sup> CMS has recommended listing the species under Appendix II to CMS.<sup>124</sup>

#### H. False Killer Whale (*Pseudorca Crassidens*)

Because they have been observed removing bait from fishing gear, false killer whales are viewed as competition for fisheries and are consequently culled.<sup>125</sup> They are also targeted in the harpoon and drive fisheries, and some of them are kept alive and sold to the marine entertainment industry.<sup>126</sup>

Abundance estimates, even for large tracts of habitat such as the eastern tropical Pacific, are only in the low tens of thousands. This species, while not considered threatened on a global scale, could easily be over-exploited regionally because of its low potential for population increase (possibly less than 2%), relatively low abundance, and economic value.<sup>127</sup>

The species is widely found, but nowhere is it found in great numbers. The population estimates off the coast of Japan are sixteen thousand, while the largest numbers taken were documented around Iki Island, Japan.<sup>128</sup> In 1992, the Scientific Committee of the IWC was

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<sup>116</sup> CSG, *supra* n. 8, at 39.

<sup>117</sup> Perry & Thornton, *supra* n. 11, at 24.

<sup>118</sup> *Id.* at 25.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Perry & Thornton, *supra* n. 11, at 25.

<sup>124</sup> Culik, *supra* n. 10, at 71.

<sup>125</sup> CSG, *supra* n. 8, at 44.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Culik, *supra* n. 10, at 254-55; see also Perry & Thornton, *supra* n. 11, at 26 (explaining catches of false killer whales were high in 1979, 1980, and 1983 in Japan).

unable to assess the status of the species due to lack of information.<sup>129</sup> In 1997, false killer whales were listed as “threatened” on the Red List of Japanese Mammals.<sup>130</sup> Japanese scientists determined a maximum sustainable yield of 1.6%, while the current catch limit is nearly 2.5% and the abundance estimate is not updated.<sup>131</sup> Because of the small population, Japanese scientists from the National Research Institute of Far Seas Fisheries noted in 1993 that “management of this species requires great caution, because of the small population size, low reproductive rate and large body size which may attract new operations.”<sup>132</sup>

### I. Baird's Beaked Whale (*Berardius Bairdii*)

“The Japanese Baird’s beaked whale hunt has been ignored by the IWC since 1992 as a result of Japan’s incessant arguments that the Baird’s beaked whale is a small cetacean despite being up to 12.8m (42 feet) long.”<sup>133</sup> Consequently, Japan interprets the 1982 moratorium to exclude Baird’s beaked whales and the Japanese have been hunting them without any legal restriction.<sup>134</sup> Despite the urgings of the IWC Scientific Committee calling for assessments of populations, at the 2000 meeting of the Scientific Committee the Japanese announced their refusal to cooperate on the scientific review of the species’ status.<sup>135</sup> The species is listed on Appendix I to CITES and Appendix II to CMS.<sup>136</sup> The Red List of Japanese Mammals lists the species as “rare” for the three populations found off the coast of Japan.<sup>137</sup> The CSG concluded, “[a] more frequent and rigorous assessment of stock status is needed to ensure that the [Japanese] hunt does not deplete any of the affected whale populations.”<sup>138</sup> The species is hunted by small-type whaling. The present annual quota set by the Japanese government is sixty-two whales<sup>139</sup>—a quota that cannot be evaluated since the status of the species remains unknown.<sup>140</sup> “The Baird’s beaked whale hunt is a commercial hunt that is cruel, unregulated and carried out with no

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<sup>129</sup> Perry & Thornton, *supra* n. 11, at 26.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Jennifer Lonsdale, *The Forgotten Whales, Hunting Baird's Beaked Whales in Japan's Coastal Waters* 1, <http://www.eia-international.org/files/reports56-1.pdf> (June 5, 2003); see also Alexander Gillespie, *Whaling Diplomacy, Defining Issues in International Environmental Law* 285–86 (Edward Elgar 2005) (explaining that Baird’s beaked whales were included in the definition of bottlenose whales in 1977).

<sup>134</sup> Lonsdale, *supra* n. 133, at 1.

<sup>135</sup> CSG, *supra* n. 8, at 53.

<sup>136</sup> Lonsdale, *supra* n. 133, at 2.

<sup>137</sup> *Id.*

<sup>138</sup> CSG, *supra* n. 8, at 53.

<sup>139</sup> *Id.*

<sup>140</sup> Lonsdale, *supra* n. 133, at 1.

understanding of its impact on the targeted populations of this whale in Japan's coastal waters."<sup>141</sup>

### J. *Pacific White-sided Dolphin*

This species has only recently been targeted by the hunts.<sup>142</sup> "Moderate numbers of white-sided dolphins are sometimes killed deliberately in the harpoon and drive fisheries in Japan and accidentally in gillnets and other fishing gear throughout the species' range."<sup>143</sup> There is not much data on its status, but CMS has recommended listing this species under Appendix II.<sup>144</sup>

### K. *Summary*

Are these cetaceans in trouble? Based on existing information and scientific reviews, and taking scientific uncertainty into consideration, the answer is yes. While the lack of data for most species makes it difficult to estimate the overall impact upon small cetaceans from the drive hunts, harpoon hunting, and other means of capture and slaughter along Japan's coasts,<sup>145</sup> there is sufficient evidence to determine that these hunting practices are detrimental to the targeted populations. The striped dolphin and the Dall's porpoise are both of threatened status.<sup>146</sup> According to assessments of the IWC Scientific Committee, the striped dolphin population that migrates off Japan's coast has been in serious decline for years.<sup>147</sup> These assessments are corroborated by Japanese scientists who also reported population declines.<sup>148</sup> In addition, assessments indicate declines in populations of the spotted dolphin and the short-finned pilot whale,<sup>149</sup> and determined that the take of the Dall's porpoise is unsustainable.<sup>150</sup> The Scientific Committee was unable to assess the status of Risso's dolphin and the false killer whale due to lack of information.<sup>151</sup>

Beyond the actual killing of dolphins and the subsequent decline in their populations, their live capture and transfer to captivity also take a toll:

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<sup>141</sup> *Id.* at 4.

<sup>142</sup> E-mail from Mark Palmer, Assoc. Dir., Intl. Marine Mammal Project, Earth Island Inst., to Rachele Adam, *CITES and the Japanese Whale Hunt* (Sept. 20, 2007) (on file with *Animal L.*).

<sup>143</sup> CSG, *supra* n. 8, at 41.

<sup>144</sup> Culik, *supra* n. 10, at 133.

<sup>145</sup> *E.g.* Culik, *supra* n. 10 (disussing Japan's harpoon fishery); *see also* Vail & Risch, *supra* n. 1, at 30 (stating the lack of biological data available for most species).

<sup>146</sup> Perry & Thornton, *supra* n. 11, at 17-19.

<sup>147</sup> *Id.* at 18.

<sup>148</sup> Vail & Risch, *supra* n. 20, at 30-31.

<sup>149</sup> *See* Perry & Thornton, *supra* n. 11, at 22, 25 (reporting a decline in catches of spotted dolphins and short-finned pilot whales).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 24, 26.

The demand for captive dolphins does far more than harm the individual captured—it can threaten dolphin populations and the marine ecosystem. The capture of even a few animals can result in the death or injury of many more dolphins, since the capture activities involve intensive harassment of a group or groups. In addition, it negatively impacts on already depleted dolphin populations by removing breeding (or otherwise important) members from the group. The capture and removal of dolphins for interactive [programs] is especially problematic . . . because female dolphins are preferred. . . . Many studies of wildlife populations have demonstrated that the removal of females can result in seriously harmful consequences to animal populations over the long term.<sup>152</sup>

Japan's position that these practices are sustainable is not supported by scientific findings; either the necessary scientific assessments of population statuses have not been performed or existing data indicate population declines.<sup>153</sup> Furthermore,

[r]emoval of live cetaceans from the wild, for captive display and/or research, is equivalent to incidental or deliberate killing, as the animals brought into captivity (or killed during capture operations) are no longer available to help maintain their populations. . . . As a general principle, dolphins should not be captured or removed from a wild population unless that specific population has been assessed . . . .” The continued removal of animals in the drive hunts, . . . in the face of evidence demonstrating their detrimental impact, shows a complete lack of precaution by those involved and may be severely damaging the sustainability of the populations targeted.<sup>154</sup>

As evident from the IWC resolutions, the obstacle before the IWC Scientific Committee in assessing populations of small cetaceans is lack of information.<sup>155</sup> But beyond that, cetaceans are generally difficult species to monitor, the most obvious reason being that they are

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<sup>152</sup> Vail & Risch, *supra* n. 20, at 30; see also Ltr. from Karen Sausman, Pres., World Assn. of Zoos and Aquariums (WAZA), to Colleagues, *Support for WAZA's Condemnation of Inhumane Practices and Urge to Halt Dolphin Drives* (June 1, 2006) (available at <http://www.savejapandolphins.org/assets/ColleaguesDolphinsJune1.pdf>) (discussing “the inhumane practice of collecting dolphins through drive fisheries”).

<sup>153</sup> Perry & Thorton, *supra* n. 11, at 18; see also Kasuya, *supra* n. 4, at 47 (“The quota was calculated in 1993 based on then available abundance estimates and arbitrarily selected population growth rates of 2–4%, and the sustainability has not been demonstrated.”).

<sup>154</sup> Vail & Risch, *supra* n. 20, at 30 (quoting the CSG).

<sup>155</sup> E.g. IWC, *Resolution 2001-13: Resolution on Small Cetaceans*, [http://www.iwcoffice.org/meetings/resolutions/IWCRES53\\_2001.pdf](http://www.iwcoffice.org/meetings/resolutions/IWCRES53_2001.pdf) (Sept. 20, 2004) (“REGRETTING that, despite repeated requests for information and action on certain species and populations, the requested information and action have not always been forthcoming.”); see also IWC, *Resolution 2001-12: Resolution on Dall's Porpoise* (discussing Japan's refusal to cooperate with the subcommittee on cetaceans); Kasuya, *supra* n. 4, at 47 (“[the current] attitude of Japan to refuse cooperation with [the Scientific Committee] on management of these small cetaceans is of extreme concern.”); see also Kasuya, *supra* n. 4, at 39, Abstract (“[S]tudies are urgent on the population structure, abundance and validity of catch statistics. The results should be open to scientific communities.”).



simply not visible most of the time.<sup>156</sup> Their “small population size, great mobility, individual longevity [and] late age of breeding” make all cetaceans poor candidates for monitoring, and are responsible for the difficulties in compiling population assessments.<sup>157</sup> “As a result, it is impossible to ascertain the implications of present levels of exploitation, or to make predictions as to the future viability of certain species. Thus, we may be driving some species of small cetaceans to the brink of extinction without even knowing it.”<sup>158</sup>

The scientific uncertainty regarding the effects of the Japanese capture and slaughter industries on populations of small cetaceans requires the use of the precautionary principle.<sup>159</sup> “All too often, the residue of uncertainty that surrounds any scientific effort provides an excuse for inaction.”<sup>160</sup> We must be wary not to use scientific uncertainty as an excuse for not acting to halt these detrimental and inhumane practices. As an alternate, more sustainable strategy, and in accordance with the precautionary principle, the burden of proof must be switched.<sup>161</sup> In light of the scientific uncertainty, and considering that the consequences of uninvestigated action might be irreversible damage to the species, these practices must be stopped rather than allowed to continue until they are proven detrimental to the species.

In conclusion, existing data and information indicate that the drive hunts, hand-harpooning, and other hunting methods are either detrimental to targeted populations or liable to be detrimental, while the lack of scientific assessment requires the use of the precautionary principle. In line with this conclusion, it is now necessary to explore the existing international environmental regimes as to the legal protection they accord small cetaceans against these hunts and the tools they provide decision-makers to bring them to a halt. The spirit hovering over this discussion, to remind us of its existence, is the declaration of the year 2007 as “the Year of the Dolphin” as discussed below,<sup>162</sup> together with the ongoing mantra of the global community to reduce biodiversity loss by 2010.<sup>163</sup>

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<sup>156</sup> In contrast, bird species are relatively easy to monitor because of their high visibility. Rachele Adam, *Waterbirds, the 2010 Biodiversity Target, and Beyond: AEWAs' Contribution to Global Biodiversity Governance*, 38 *Envtl. L.* 87, 127 (2008).

<sup>157</sup> Burns, *supra* n. 10, at 124.

<sup>158</sup> *Id.* at 125.

<sup>159</sup> Vail & Risch, *supra* n. 20, at 30 (“The overall impact of Japan’s drive hunts on the species and populations of cetaceans they target is difficult to determine, due to the lack of biological data available for most species.”); *id.* at 31 (lack of information casts doubts on Japan’s position that the quotas set by the Fisheries Agency starting in 1993 are sustainable and scientifically based, but rather, since they are based on past yields are apparently influenced by political factors).

<sup>160</sup> CSG, *supra* n. 8, at 3.

<sup>161</sup> See David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy* 360–64 (West 1998) (discussing the precautionary principle and its use as a prevention device in most environmental issues).

<sup>162</sup> World of TUI, *infra* n. 202.

<sup>163</sup> *Id.*; Conv. on Biodiversity (CBD), *2010 Biodiversity Target*, <http://www.cbd.int/2010-target/> (last updated June 1, 2007).

#### IV. INTERNATIONAL LEGAL STATUS OF SMALL CETACEANS: REVIEW OF MULTILATERAL ENVIRONMENTAL AGREEMENTS

##### A. *The International Convention for the Regulation of Whaling (ICRW)*

In the quest for a multilateral environmental agreement (MEA) that protects small cetaceans, the International Convention for the Regulation of Whaling, or the ICRW, is the most likely candidate. Adopted in 1946 against the background of the near extinction of species of the great whales as a result of centuries of exploitive whaling, the ICRW is a legal framework for the regulation of the whaling industry.<sup>164</sup> Although the ICRW had been designated as the legal regime for the regulation of whale harvests, it has since evolved into a conservation-orientated MEA for cetacean protection.<sup>165</sup>

The ICRW consists of the agreement text and the "Schedule,"<sup>166</sup> which contains the regulations for "the conservation and utilization of whale resources."<sup>167</sup> Article III establishes the IWC, the body that implements the ICRW, made up of one member of each contracting party.<sup>168</sup> Article V authorizes the IWC to pass binding regulations, included in its schedule, on a range of topics: protected and unprotected species, open and closed seasons and waters (including whale sanctuaries), size limits for each species, whaling methods (including seasonal catch size), gear specifications, methods of measurements, and statistical and biological data.<sup>169</sup> Article VIII allows parties to grant permits

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.<sup>170</sup>

The IWC is the only international institution that has spoken up on behalf of those small cetaceans targeted by the Japanese hunts. It has issued formal resolutions against these practices, reiterated the recommendations of its Scientific Committee to halt the take of the striped dolphin,<sup>171</sup> and called on the government of Japan to stop the

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<sup>164</sup> ICRW, *supra* n. 19.

<sup>165</sup> See Burns, *supra* n. 10, at 109 ("During the 1970s and early 1980s, the membership of the IWC changed dramatically, as many non-whaling nations, concerned about the conservation of cetaceans, ratified the ICRW.")

<sup>166</sup> ICRW, *supra* n. 19, at art. I.1 ("This Convention includes the Schedule attached thereto which forms an integral part thereof.")

<sup>167</sup> *Id.* at art. V.1.

<sup>168</sup> *Id.* at art. III.1.

<sup>169</sup> *Id.* at art. V.1.

<sup>170</sup> *Id.* at art. VIII.1.

<sup>171</sup> IWC, *supra* n. 12, at 1993-Appendix 10.

hunts of the Dall's porpoise.<sup>172</sup> The IWC has repeatedly called for international cooperation for conservation of small cetaceans and restoration of depleted stocks,<sup>173</sup> to the ire of those countries exploiting small cetacean populations—Japan in particular.<sup>174</sup>

The IWC has been persistent in expressing its concern over the status of small cetaceans in an attempt to protect them from the kind of exploitive harvesting that brought some species of large cetaceans to the brink of extinction.<sup>175</sup> Recognizing the precarious condition of small cetaceans and the need for monitoring and research, the IWC's Scientific Committee established a subcommittee on small cetaceans in 1973.<sup>176</sup> In 1976, the subcommittee reported that there was an "urgent need" for an international body to effectively manage those cetacean species not covered by the ICRW and suggested that the convention be revised in order to formally include small cetaceans.<sup>177</sup> In this same report, the subcommittee identified the striped dolphin and the Dall's porpoise as threatened and in need of immediate action.<sup>178</sup> Although its initiative to include small cetaceans under the authority of the ICRW has not succeeded due to the vehement opposition of the pro-whaling parties,<sup>179</sup> the Scientific Committee has researched small cetaceans extensively.<sup>180</sup>

A major milestone in IWC's history was the 1982 decision on a zero-catch quota in commercial whaling for all whale species, commonly referred to as the moratorium, which came into effect in 1986.<sup>181</sup> However, again, due to the objections of the pro-whaling members of the IWC, the moratorium does not apply to small cetaceans. Despite a substantial number of legal opinions finding no

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<sup>172</sup> *Id.* at 2001-12.

<sup>173</sup> *Id.* at 1990-Appendix 3.

<sup>174</sup> Gillespie, *supra* n. 133, at 278-80; Burns, *supra* n. 10, at 126-31; Pat W. Birnie, *International Legal Issues in the Management and Protection of the Whale: A Review of Four Decades of Experience*, 29 *Nat. Resources J.* 903, 919-23 (1989).

<sup>175</sup> Gillespie, *supra* n. 133, at 279; Birnie, *supra* n. 10, at 425.

<sup>176</sup> Burns, *supra* n. 10, at 126; *see also* Kasuya, *supra* n. 4, at 44 (discussing the management of small cetaceans and IWC competence).

<sup>177</sup> Burns, *supra* n. 10, at 126.

<sup>178</sup> *Id.* at 127.

<sup>179</sup> *Id.* at 127-28.

<sup>180</sup> *Id.* at 126-28; IWC, *infra* n. 182.

<sup>181</sup> CSG, *supra* n. 8, at 1, 2. However, this does not mean the end of whaling. Japan continues to hunt under the scientific research exemption, Norway exempted itself from the moratorium following its notification, and Iceland withdrew from the ICRW following the IWC's refusal to approve its request for a limited hunt. Burns, *supra* n. 10, at 110-11. This topic has been the subject of a large amount of research. *See generally* Mark Detsky, *Developments in Conservation and Living Resources: The Murky Sea over the Magnificent Whale*, 14 *Colo. J. Intl. Env'tl. L. & Policy* 35 (2003) (presenting research on current whaling practices); Jonathan Iversen, *An Angry Rift in the Year 2000: Japan's Scientific Whaling*, 12 *Colo. J. Intl. Env'tl. L. & Policy* 121 (2001) (presenting research on current whaling practices); Lisa Kobayashi, *Lifting the International Whaling Commission's Moratorium on Commercial Whaling as the Most Effective Global Regulation of Whaling*, 29 *Environ* 177 (2005-2006) (discussing the state of the moratorium).

legal barrier to the inclusion of small cetaceans under the ICRW, the IWC's pro-whaling parties objected to including them in the moratorium and insisted that the convention had authority only over the great whales.<sup>182</sup> Thus, though whale hunting has been halted since 1986 by means of this international moratorium, small cetaceans remain unprotected.

The position of the IWC is that even though the issue concerning the ICRW's legal competency to regulate catches of small cetaceans remains controversial, there is no constraint to the Scientific Committee advising on the issue.<sup>183</sup> As discussed above, the result is a long line of resolutions issued by the IWC on small cetaceans that call on the Scientific Committee to continue its work on assessing status of the species and for cooperation of the parties in submitting relevant information.<sup>184</sup> The IWC passed resolutions concerning the hunting of

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<sup>182</sup> See IWC, *Small Cetaceans*, <http://www.iwcoffice.org/conservation/smallcetacean.htm> (last updated May 5, 2004) ("The 1946 Convention does not define a 'whale', although a list of names in a number of languages of a dozen whales was annexed to the Final Act of the Convention. Some governments take the view that the IWC has the legal competence to regulate catches only of these named great whales. Others believe that all cetaceans, including the smaller dolphins and porpoises, also fall within IWC jurisdiction. It is agreed that the Scientific Committee can study and provide advice on the small cetaceans.").

<sup>183</sup> See *id.* ("Despite the different views of the member countries over the question of legal competence, the IWC does recognise the need for further international co-operation to conserve and rebuild depleted stocks of small cetaceans. It has encouraged countries to seek scientific advice on small cetaceans from the IWC and also invited IWC member nations to provide technical or financial assistance to countries with threatened small cetaceans stocks."); *id.* at *IWC Information*, "Dolphins and Porpoises" <http://www.iwcoffice.org/commission/iwcmain.htm> (last updated September 28, 2007) ("The Commission has since its inception regulated the catches of the large whale species, but the smaller species of whales, dolphins and porpoises (commonly known as 'small cetaceans') are also members of the same zoological order of Cetacea. Member governments hold different views over the legal competence of the IWC to regulate direct and incidental catches of small cetaceans. However, they are working to promote cooperation between the coastal and range states to conserve and manage these species also. Although the Commission does not set regulations for small cetacean management, the IWC Scientific Committee addresses matters of the conservation of small cetacean species at its annual meetings. Papers addressing small cetaceans are published in the *Journal of Cetacean Research and Management* and in special volumes."); see also *id.* at *Small Cetaceans* ("Each year the Scientific Committee, through its sub-committee on small cetaceans, identifies priority species/regions for consideration by a review. Topics considered include distribution, stock structure, abundance, seasonal movements, life history, ecology and directed and incidental takes. Reviews conducted in recent years have considered the status of monodontid whales (white whales and narwhals), freshwater cetaceans (Irrawaddy dolphin, tucuxi, boto, Indus river dolphin, Ganges river dolphin, finless porpoise and baiji), Dall's porpoise, humpback dolphins and small cetaceans of the Baltic Sea.").

<sup>184</sup> See IWC, *International Convention for the Regulation of Whaling*, <http://www.iwcoffice.org/commission/convention.htm#convention> (last updated Mar. 26, 2008) (The authority of the IWC to issue resolutions is pursuant to Article VI of the agreement: "The Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention").

striped dolphins in 1992 and 1993, and of Dall's porpoise in 1990, 1999, and 2001, as well as general resolutions that call on the parties, and on Japan in particular, to submit the data and information needed to carry out full status assessments. However, since 2001, Japan has refused to cooperate with the subcommittee on cetaceans.<sup>185</sup>

*B. The Convention on the Conservation of Migratory  
Species of Wild Animals*

Does CMS<sup>186</sup> fill the void in global environmental governance regarding dolphins? As the MEA was purposefully created to protect migratory species, CMS is seemingly the most appropriate legal instrument to protect small cetaceans. By joining CMS, parties signal their agreement to forego part of their sovereignty in order to protect species dependent on all of them for their well-being.<sup>187</sup> Under CMS, endangered migratory species listed in Appendix I are accorded strict protection.<sup>188</sup> For species that are not listed in Appendix I, CMS functions as a framework convention for the adoption of regional agreements. Appendix II lists thirty-three species of small cetaceans,<sup>189</sup> including

migratory species which have an unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international co-operation that could be achieved by an international agreement.<sup>190</sup>

Regarding these species, “[p]arties that are Range States of migratory species listed in Appendix II shall endeavor to conclude Agreements where these would benefit the species and should give priority

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<sup>185</sup> IWC, *Journal of Cetacean Research and Management*, “Small Cetaceans,” <http://www.iwcoffice.org/publications/editorialnew.htm#small> (last updated Dec. 3, 2007) (“In 2001, the Government of Japan had indicated that it would no longer co-operate with the Committee on small cetacean related matters. In 2002, the Committee referred to the great value of the information provided by the Government of Japan on the status of small cetaceans in previous years and respectfully requested that the Government of Japan reconsider its position on this matter and resume the valuable contribution of Japanese scientists to its work on small cetaceans. Unfortunately, this has still not yet happened.”); see also Kasuya, *supra* n. 10, at 6 (“Japan started to boycott all the activities of the [Scientific Committee] in 2001. . . . This is probably the easiest way to avoid criticism on Japanese management policy of small cetaceans, but escaping from criticism increases the risk of management failing.”).

<sup>186</sup> CMS, *supra* n. 19.

<sup>187</sup> *Id.* at arts. III.4–7. Japan is presently not a party to the CMS. This, however, would not prevent it from becoming a party to an agreement adopted under its aegis. See *id.* at art. V.2 (“Each Agreement should cover the whole of the range of the migratory species concerned and should be open to accession by all Range states of that species, whether or not they are parties to this Convention.”).

<sup>188</sup> Except for the exceptions listed in art. III.5. CMS, *supra* n. 19, at art. III.5.

<sup>189</sup> Culik, *supra* n. 10, at 2.

<sup>190</sup> CMS, *supra* n. 19, at art. IV.1.

to those species in an unfavourable conservation status,"<sup>191</sup> and in accordance with the "Guidelines for Agreements" under Article V.<sup>192</sup>

As to species that are not listed in Appendix II, Article IV Section 4 provides for the adoption of "agreements for any population or any geographically separate part of the population of any species or lower taxon of wild animals, members of which periodically cross one or more national jurisdictional boundaries."<sup>193</sup> Thus, small cetaceans that are not listed in Appendix II, perhaps because of a lack of scientific data as to their "unfavourable status," or because of a lack of political will of the parties to CMS, can still be protected by agreements among range states under Article IV Section 4.

Two cetacean agreements have been adopted under Article IV Section 4 of CMS. The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea, and Contiguous Atlantic Area (ACCOBAMS)<sup>194</sup> covers all species of cetaceans (both large and small) in the geographical regions of the Black Sea, the Mediterranean Sea, and the Atlantic coasts of North Morocco and South Portugal—areas suffering from the pressures of extremely large human populations and intense development. The agreement area includes twenty-eight range states.<sup>195</sup>

The Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS)<sup>196</sup> covers all species, subspecies or populations of small cetaceans in the Baltic Sea and North Sea. In August 2003, the Meeting of the Parties agreed to extend the agreement area further west to the Northeast Atlantic along the coasts of Ireland, Portugal, and Spain and thus to form a geographical link with ASCOBANS.<sup>197</sup> In their migrations in this region, dolphins are threatened by catch, maritime traffic, acoustic disturbances, and competition with fisheries. The agreement area includes fifteen range states along the shores of the Baltic and North Seas.<sup>198</sup>

Another agreement that was adopted in the framework of CMS for the protection of cetaceans is the Memorandum of Understanding (MOU) for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region, signed on September 15, 2006. The first meet-

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<sup>191</sup> *Id.* at art. IV.3 (emphasis omitted).

<sup>192</sup> *Id.* at art. V.

<sup>193</sup> *Id.* at art. IV.4.

<sup>194</sup> The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea, and Contiguous Atlantic Area, 36 I.L.M. 777 (1997) [hereinafter ACCOBAMS].

<sup>195</sup> UNEP, CMS, ACCOBAMS, [http://www.cms.int/species/accobams/acc\\_bkrd.htm](http://www.cms.int/species/accobams/acc_bkrd.htm) (accessed Apr. 13, 2008).

<sup>196</sup> The Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, 1772 UNTS 217 (1994) [hereinafter ASCOBANS].

<sup>197</sup> UNEP, CMS, ASCOBANS, [http://www.cms.int/species/ascobans/asc\\_bkrd.htm](http://www.cms.int/species/ascobans/asc_bkrd.htm) (accessed Apr. 13, 2008).

<sup>198</sup> *Id.*; but see UNEP, ASCOBANS, *Threats to Small Cetaceans in the ASCOBANS Area*, <http://www.ascobans.org/index0202.html> (accessed Apr. 13, 2008) ("Small cetaceans are no longer deliberately hunted in the ASCOBANS area.")

ing of the signatories to the MOU was held in March 2007.<sup>199</sup> In the framework of the Year of the Dolphin, as discussed below, CMS announced the preparation of an agreement for the protection of dolphins and small whales in the geographical area from Morocco to South Africa, including the whales around the Macronesia Islands in the Eastern Atlantic.<sup>200</sup> The new agreement was announced in October 2007, and plans are being made to conclude the agreement at an additional meeting in 2008.<sup>201</sup>

Together with its “daughter agreements” ACCOBAMS and ASCOBANS, CMS and the Whale and Dolphin Conservation Society, have declared 2007 the Year of the Dolphin—a declaration which has been extended to 2008.

The Year of the Dolphin campaign focuses on raising awareness of dolphins in the wild, the threats they face to their survival and actions that could help with their conservation and the protection of their habitats and ecosystems. As the campaign was developed under the aegis of the UNEP Convention on Migratory Species of Wild Animals, whose mandate is the conservation of migratory wildlife, the campaign does not address or deal with captivity issues.<sup>202</sup>

Two questions arise regarding the Year of the Dolphin. First, despite the CMS declaration that the Year of the Dolphin is intended to raise awareness of dolphins and the threats to their survival, why is there no mention on the CMS website of the ongoing dolphin hunts in Japan, the consequent slaughter of thousands of them, or the capture and trade of others as show animals? To confuse the issue even more, the CMS partner in the Year of the Dolphin is the Whale and Dolphin Conservation Society (WDCS), one of the leading opponents of the drive hunts in Japan.<sup>203</sup> Its investigative report on the dolphin drive hunts in Japan and the involvement of the aquarium industry, *Driven by Demand*, concludes that “[it] is time for Japan’s drive hunts to end. WDCS calls upon the international zoo and aquarium associations to

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<sup>199</sup> Press Release, Found. UNEP, CMS, *Pacific Island Countries Celebrate the Year of the Dolphin* (Mar. 5, 2007) (available at [http://www.cms.int/news/PRESS/nwPR2007/03\\_Mar/pressRel\\_050307\\_yod.pdf](http://www.cms.int/news/PRESS/nwPR2007/03_Mar/pressRel_050307_yod.pdf)).

<sup>200</sup> World of TUI, *Year of the Dolphin, Year of the Dolphin: Foundation Laid for One of the Largest Agreements on Small Whales under CMS*, [http://www.yod2007.org/en/NewsEvents/WATCH\\_meeting\\_Tenerife.html](http://www.yod2007.org/en/NewsEvents/WATCH_meeting_Tenerife.html) (accessed Apr. 13, 2008).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at [http://www.yod2007.org/en/Start\\_page/index.html](http://www.yod2007.org/en/Start_page/index.html) (“The United Nations, Governments, intergovernmental organizations, NGOs and the private sector, namely TUI, are building a strong alliance to achieve a common objective: to protect wild dolphins and create an ocean home that is safe from harm. Crucial elements in achieving this are educating to create awareness of dolphin species and their situation, alerting and informing decision makers and involving local communities in grassroots action. Therefore, the Year of the Dolphin will be part of the UN Decade on Education for Sustainable Development. The campaign is also a tangible contribution towards meeting the goal of curbing the loss of wildlife by 2010, which all Governments have agreed on through the UN.”).

<sup>203</sup> Vail & Risch, *supra* n. 20, at 4.

prohibit any members or member institutions from sourcing live dolphins from these hunts and to sanction any that do."<sup>204</sup> It is thus incongruous that in the Year of the Dolphin, which focuses on raising public awareness to the threats to dolphins' survival, CMS fails to mention that intensive dolphin hunts are underway at the cost of over twenty thousand killings of small cetaceans per year.

The second question requires clarification of the caveat that the Year of the Dolphin campaign will not "address or deal with captivity issues."<sup>205</sup> In light of the scientific findings that the taking of small cetaceans into captivity is, from the perspective of its effect on population size, an act equal to killing a dolphin,<sup>206</sup> this caveat deprives the Year of the Dolphin of significance. The fact that no mention of the ongoing destruction of dolphins is made on the CMS Web site raises questions as to the CMS' contracting parties' possession of the necessary political will to use CMS as a legal tool for dolphin protection.

As a means of overcoming this apparent lack of will to address the ongoing dolphin hunts, a two stage approach is suggested. First, Appendix II to CMS should be amended to include all targeted populations, taking into consideration the recommendations of the Small Cetacean Review (sponsored by CMS) to add the Pacific white-sided dolphin and the pilot whale, extending the present listing for bottlenose dolphins for all populations, and adding the West Pacific stock of striped dolphins.<sup>207</sup> Second, a regional agreement<sup>208</sup> for the protection of these targeted populations should be initiated and negotiated between the range states, addressing threats to their survival and prohibiting, in particular, their deliberate catch.

### C. *The Convention on International Trade in Endangered Species of Wild Fauna and Flora*

As an MEA whose sole objective is the regulation of international trade in endangered or threatened species, CITES<sup>209</sup> has the potential to provide dolphins protection. CITES is extremely relevant concerning the drive hunts because, instead of being slaughtered and marketed for their meat, some of the dolphins that are caught are exported live for trade in the small cetacean entertainment industry.<sup>210</sup>

The main CITES structure consists of three appendices. Appendix I lists those species threatened with extinction and regarding which international trade is strictly regulated and allowed only under special

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<sup>204</sup> *Id.* at 32.

<sup>205</sup> World of TUI, *supra* n. 200.

<sup>206</sup> Vail & Risch, *supra* n. 20, at 18, 30.

<sup>207</sup> Culik, *supra* n. 10, at 3-4.

<sup>208</sup> See also Perry & Thornton, *supra* n. 11, at 3 (discussing Japan's apparent assent to a regional agreement in lieu of a global one).

<sup>209</sup> CITES, *supra* n. 19.

<sup>210</sup> See Vail & Risch, *supra* n. 20, at 30.



circumstances, subject to both an export permit and an import permit.<sup>211</sup> Appendix II lists

(a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and<sup>212</sup> (b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control.<sup>213</sup>

All cetaceans not listed in Appendix I are listed in Appendix II.<sup>214</sup> Trade in Appendix II species is subject to an export permit that can be issued subject to certain conditions, including the confirmation by a scientific authority of the state of export that the export will not be detrimental to the survival of that species.<sup>215</sup>

Because of its potential as a legal tool to stop the export of live small cetaceans captured in drive hunts for the entertainment industry, the CITES Secretariat has become a target for queries and complaints from the public.<sup>216</sup> Apparently, the Secretariat is bombarded with e-mails on this issue, much to the Secretariat and Secretary-General's consternation (as evidenced by the Secretariat's answers).<sup>217</sup> In

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<sup>211</sup> CITES, *supra*, n. 19, at art. II. These permits are granted only in accordance with conditions as prescribed in CITES. *Id.* at art. III.

<sup>212</sup> CITES, *supra* n. 19, at art. II.2(a).

<sup>213</sup> *Id.* at art. II.2(b); *see also id.* at art. II.3 ("Appendix III shall include all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other Parties in the control of trade.").

<sup>214</sup> CITES, *supra* n. 19, at app. II.

<sup>215</sup> *Id.* at art. IV.2(a).

<sup>216</sup> *See* Earth Island Inst., *Take Action for Dolphins*, <https://www.earthisland.org/saveJapanDolphins/action.cfm?aaID=362> (accessed Apr. 13, 2008) (urging supporters to send an e-mail to the CITES secretary).

<sup>217</sup> Press Release, Found. CITES, *Statement, Trade in Live Dolphins* (Mar. 5, 2004) (available at [http://www.cites.org/eng/news/press/2004/040305\\_dolphin.shtml](http://www.cites.org/eng/news/press/2004/040305_dolphin.shtml)). Secretary-General Willem Wijnstekers stated:

I recognize that many people are against trade in live animals and particularly against trade in live marine mammals for a variety of reasons. That is one reason why we are particularly alert to possible cases of illegal trade and (also for Appendix II species) follow up allegations. One should realize, however, that when trade is legal, the decision on whether it takes place is not taken by the CITES Secretariat. It is therefore not very useful to lobby the Secretariat or to inundate my staff or myself with standard-type emails. In fact this is counter-productive. I only have a small team of people and email or other campaigns hamper our efforts to investigate information on alleged illegal trade in wildlife seriously. It is sufficient to be informed once about each case. Equally counter-productive is the time we are required to spend on correcting misinformation and wrong statements about what is or not permitted under CITES. We have a very informative website which also provides us with a means to disseminate information quickly and widely. We will of course be as responsive as we can to queries from the public and the media, but our communication on issues that generate significant interest is managed through the website rather than through separate replies to individuals. I am sure people will understand this.

response to the barrage, on March 5, 2004, the Secretariat issued a laconic statement addressing the “serious concerns regarding a number of recent cases of trade in live dolphins” and noted that “[t]he Convention contains no specification with regard to the use and housing of the animals in the importing country, which is—unlike for Appendix I species—not required to issue an import permit.”<sup>218</sup> In any case, the Secretary-General stated, the Secretariat is investigating and reviewing documentation on the cases at issue.<sup>219</sup> A further statement was issued on October 15, 2007:

The trade in live dolphins continues to attract considerable attention and much negative comment from NGOs, the general public and a number of Parties to CITES. The CITES Secretariat is currently receiving many requests to intervene to stop such trade. . . .

My earlier comments regarding the provisions of the Convention remain valid, but I should like to make the following additional observations today.

Many of the people and organizations who have contacted the Secretariat, to express their concerns regarding the trade in live dolphins, have referred to the fact that no export can be allowed without a non-detriment finding. This is indeed a basic principle of CITES, which is to ensure that the export of specimens of a species will not be detrimental to the survival of wild populations.

The Conference of the Parties to CITES has noted that there are various ways in which a non-detriment finding can be made and it agreed, at its 14th meeting, in June this year, that this subject should be studied further. For the moment, however, it has not recommended any particular method for the making of a non-detriment finding. It is a matter for each State to satisfy itself that any exports will not negatively impact upon wild populations and to decide how best to reach such a decision.

In relation to trade in live dolphins, the Secretariat has not been presented with any evidence which demonstrates that non-detriment findings are not being adequately made before exports are authorized. Similarly, it has received no evidence to demonstrate that trade which is now taking place, or is intended to take place, will have a detrimental impact upon wild dolphin populations. There is therefore, at present, no justification for the CITES Secretariat to take steps to halt the trade. If the Secretariat receives any information to show that there is such a justification, we will certainly act.<sup>220</sup>

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*Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> Press Release, Found. CITES Sec. Gen. Wijnstekers, *Trade in Live Dolphins* (Oct. 15, 2007) (available at <http://www.cites.org/eng/news/sundry/2007/dolphin.shtml>). In his statement, the Secretary-General does not refer to the species of dolphins concerned. If, however, it would be argued that the particular species traded is not threatened, the answer would be that several species of dolphins are caught in drive hunts and, thus, even if the trade is in a less threatened species, the hunt itself impacts a number of threatened species, as well. See also Perry & Thornton, *supra* n. 11, at 2 (the pattern of hunting over the years demonstrates that a species is hunted until its numbers are

As reflected in this statement, CITES' position is that because there is no evidence that the trade is detrimental to the survival of the populations, CITES has no legal authority to intervene. This statement is contradicted by existing evidence of the detrimental impact of the trade in live dolphins on those populations from which they were captured, as detailed above in Part II.<sup>221</sup> These reviews and reports indicate that stocks of some of the populations that are being hunted, captured, slaughtered, or sold into captivity, have become seriously depleted. Because the primary goal of the drive hunts is the capture of live dolphins for trade,<sup>222</sup> the slaughter of thousands of dolphins caught together with them is also a detrimental result of the trade in live dolphins. In light of the evidence as to the dangers of live capture on populations<sup>223</sup> and the detrimental effect on small cetacean populations from hunting—including the report of the Cetaceans Specialist Group<sup>224</sup>—it is not clear why CITES has adopted a policy of non-interference in the trade in these dolphins and is not calling into question the non-detrimental findings submitted by the Japanese government.<sup>225</sup>

CITES should be playing a proactive role concerning the non-detrimental findings submitted by the Japanese government on the trade in dolphins. The Secretariat's mandate is to ensure implementation of the convention.<sup>226</sup> To this end, Article XII of the Convention authorized the Secretariat "to undertake scientific and technical studies . . . as will contribute to the implementation of the present Convention . . ."<sup>227</sup> and to study the reports of Parties and to request from

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decimated, the hunters then target another population until it, too, is decimated, and the pattern repeats).

<sup>221</sup> Vail & Risch, *supra* n. 20 at 4, 30 (discussing the negative effect on captured dolphins).

<sup>222</sup> *Supra* n. 22.

<sup>223</sup> See also Earth Island Inst., *supra* n. 216 ("And many of the local dolphin populations are depleted by the captures, resulting in local decline and even extinction of dolphin populations."); Sue J. Fisher & Randall R. Reeves, *The Global Trade in Live Cetaceans: Implications for Conservation*, 8 J. Intl. Wildlife L. & Policy 315, 315 (2005) ("Rigorous assessment of source populations is often lacking, and in some instances live capture is adding to the pressure on stocks already at risk from hunting, fishery by-catch, habitat degradation, and other factors. All too often, entrepreneurs appear to be taking advantage of lax (or non-existent) regulations in small island states or less developed or politically unstable countries to supply the growing global demand for dolphins and small whales. The regulation of trade in live cetaceans under CITES is fraught with problems, not least the poor quality of reporting and the lack of a rigorous mechanism for preparation, review, and evaluation of non-detriment findings.").

<sup>224</sup> CSG, *supra* n. 8, at 46.

<sup>225</sup> Ltr. from Rachele Adam to Willem Wijnstekers, Sec. Gen., CITES, *International Legal Protection of Dolphins* (Nov. 16, 2007) (copy on file with *Animal L.*) (letter sent to CITES Secretary-General addressing this issue, to which no reply was received).

<sup>226</sup> CITES, *supra* n. 19, at art. XII.2(c); see also Alice Stroud, *A Review of the Role of the CITES Secretariat in the Implementation of the Detriment Finding Requirement*, 30 Wm. & Mary Env'tl. L. & Policy Rev., 661, 662 (2005–2006) (discussing the Secretariat's role).

<sup>227</sup> CITES, *supra* n. 19, at art. XII.2(c).

Parties such further information . . . as it deems necessary to ensure implementation."<sup>228</sup> Article XIII further mandates the Secretariat to act upon becoming aware that any species in Appendix I or II is adversely affected by trade, and to communicate such knowledge to the party concerned.<sup>229</sup>

The issuance of non-detrimental findings is the primary means for the Secretariat to ensure that international trade is not detrimental to the species traded, that CITES is being implemented, and that it is effective in protecting endangered or threatened species. Non-detrimental findings issued in contradiction to scientific findings violate the convention. This would trigger the non-compliance procedure under CITES against the exporting party, which could ultimately lead to the cessation of the exporting party's trading rights. Non-detrimental findings are addressed by Article IV:<sup>230</sup>

2. The export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met: (a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species; (b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora; and (c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.

3. A Scientific Authority in each Party shall monitor both the export permits granted by that State for specimens of species included in Appendix II and the actual exports of such specimens. Whenever a Scientific Authority determines that the export of specimens of any such species should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I, the Scientific Authority shall advise the appropriate Management Authority of suitable measures to be taken to limit the grant of export permits for specimens of that species.<sup>231</sup>

To further the purpose of Article IV, Resolution Conf. 10.3 of the CITES Conference of the Parties, which is titled "Designation and Role of the Scientific Authorities," noted that "issuance of permits by a

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<sup>228</sup> *Id.* at art. XII.2(d).

<sup>229</sup> *Id.* at art. XIII.1.

<sup>230</sup> Though it is beyond the scope of this discussion, an inherent problem with Article IV to CITES is that it imposes the responsibility for determining whether trade is detrimental on the exporting party. This dilemma is exemplified by the issue raised here, i.e., that the Japanese government's support for its small cetacean hunting industry effectively neutralizes any chance of objective non-detrimental findings. In common with other MEA's, CITES guards the national sovereignty of its parties—to the detriment of the species which, by ratifying the agreement, the parties supposedly undertook to protect. CITES' dilemma is particularly acute where the species in question are migratory, as are small cetaceans.

<sup>231</sup> CITES, *supra* n. 19, at art. IV.2-3.

Management Authority without appropriate Scientific Authority findings constitutes a lack of compliance with the provisions of the Convention and seriously undermines species conservation.” It recommended that:

the findings and advice of the Scientific Authority of the country of export be based on the scientific review of available information on the population status, distribution, population trend, harvest, and other biological and ecological factors, as appropriate, and trade information relating to the species concerned.<sup>232</sup>

Hopefully, after becoming aware of the existing evidence of the detrimental effects of the trade in live dolphins on the targeted populations, the CITES Secretariat will act to halt the illegal trade. This will entail bringing the relevant information to the attention of Japan,<sup>233</sup> which will be obligated to “inform the [S]ecretariat of any relevant facts.”<sup>234</sup> The next stage calls for the Secretariat to bring the information before the Conference of the Parties (COP) for its review and recommendations.<sup>235</sup>

#### D. *The United Nations Convention on the Law of the Sea*

The United Nations Convention on the Law of the Sea (UNCLOS)<sup>236</sup> is the umbrella convention on the marine environment. It is a comprehensive codification defining the rights and duties of coastal, port and flag states on the vast array of issues concerning the use of

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<sup>232</sup> CITES, *Conference 10.3 Designation and Role of the Scientific Authorities*, <http://www.cites.org/eng/res/10/10-03.shtml> (accessed Apr. 13, 2008); see also CITES, *Conference 12.8 Review of Significant Trade in Specimens of Appendix-II Species*, <http://www.cites.org/eng/res/12/12-08R13.shtml> (accessed Apr. 13, 2008) (“Recalling that Article IV, paragraph 2 (a), of the Convention requires, as a condition for granting an export permit, that a Scientific Authority of the State of export has advised that the export will not be detrimental to the survival of the species concerned; Recalling that Article IV, paragraph 3, requires a Scientific Authority of each Party to monitor exports of Appendix-II species and to advise the Management Authority of suitable measures to be taken to limit such exports in order to maintain such species throughout their range at a level consistent with their role in the ecosystem; . . . Concerned that some States permitting export of Appendix-II species are not effectively implementing Article IV, paragraphs 2 (a), 3 and 6 (a), and that, in such cases, measures necessary to ensure that the export of an Appendix-II species takes place at a level that will not be detrimental to the survival of that species, such as population assessments and monitoring programmes, are not being undertaken, and that information on the biological status of many species is frequently not available; Recalling that the proper implementation of Article IV is essential for the conservation and sustainable use of Appendix-II species. . . .” The COP went on to direct the Animals and Plants Committees “to review the biological, trade and other relevant information on Appendix-II species subject to significant levels of trade, to identify problems and solutions concerning the implementation of Article IV, paragraphs 2 (a), 3 and 6 (a),” in accordance with the procedure as detailed in the resolution.) (emphasis omitted).

<sup>233</sup> CITES, *supra* n. 19, at art. XIII.1.

<sup>234</sup> *Id.* at art. XIII.2.

<sup>235</sup> *Id.* at art. XIII.3.

<sup>236</sup> UNCLOS, *supra* n. 19.

the planet's oceans. In line with the previously discussed conventions, the scope of this discussion is limited to UNCLOS' relevance as an international legal tool for the protection of small cetaceans.

Since small cetaceans tend to live in coastal waters, part V of UNCLOS on the rights and duties of parties in an Exclusive Economic Zones (EEZ),<sup>237</sup> is particularly pertinent. Article 61, "Conservation of the Living Resources," obligates coastal state parties to avoid overexploitation of their marine resources in the EEZ. Of particular interest are subsections 2 and 4:

The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.<sup>238</sup>

In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.<sup>239</sup>

Subsection 2 imposes a "hard-law," unqualified obligation on coastal states to ensure that "the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation," taking into account "the best scientific evidence."<sup>240</sup> Subsection 4 obligates coastal states to act to prevent species from becoming seriously threatened.<sup>241</sup> In addition, Subsection 5 of Article 61 obligates parties to contribute and exchange "available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks . . . on a regular basis through competent international organizations."<sup>242</sup> In applying these binding commitments to the dolphin hunts taking place in Japan, it appears Japan is in violation of its commitments under Article 61 of UNCLOS. The government of Japan supports the exploitation of threatened species of small cetaceans without the necessary scientific research, while ignoring decisions of the ICRW calling both for a halt to the hunts and for submission of information and data on those targeted populations.

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<sup>237</sup> *Id.* at art. 55 ("The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."); *id.* at art. 57 ("The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.")

<sup>238</sup> UNCLOS, *supra* n. 19, at art. 61.2; Gillespie, *supra* n. 133, at 296.

<sup>239</sup> UNCLOS, *supra* n. 19, at art. 61.4.

<sup>240</sup> *Id.* at art. 61.2.

<sup>241</sup> *Id.* at art. 61.4.

<sup>242</sup> *Id.* at art. 61.5.

Article 64 Section 1, "Highly Migratory Species," imposes additional binding obligations on coastal state parties, requiring them to cooperate to ensure the conservation of highly migratory species listed in Annex 1:

The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.<sup>243</sup>

Item 17 of Annex 1<sup>244</sup> lists seven families of cetaceans, including those species targeted by the Japanese hunts.<sup>245</sup> Additionally, in 1992, Agenda 21 recognized the ICRW as an "appropriate international organization" for cetaceans, as designated by Article 64.<sup>246</sup> Based on these two components of Article 64 Section 1—that coastal states are obligated to cooperate in conserving highly migratory species that include cetaceans, and the "appropriate international organizations" with which they are obligated to cooperate has been defined as the ICRW—it could be argued that Japan is also in non-compliance with this article. Japan supports dolphin hunts which are detrimental to the targeted populations and refuses to cooperate with the ICRW on small cetacean issues.<sup>247</sup>

Article 65, "Marine Mammals," together with Article 120, which applies Article 65's provisions to the high seas, clarifies that coastal states are entitled to take stricter measures than those provided by UNCLOS to prevent the exploitation of marine mammals.<sup>248</sup> In addition, and similarly to Article 64.1 but in relation to marine mammals only, Article 65 requires parties to cooperate in protecting marine mammals. Regarding cetaceans in particular, the articles require parties to work through the "appropriate international organizations,"<sup>249</sup> which as mentioned above, has been recognized as the ICRW.<sup>250</sup>

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<sup>243</sup> *Id.* at art. 64.1.

<sup>244</sup> *Id.* at Annex I (describing the classes of cetaceans as, "Family *Physeteridae*; Family *Balaenopteridae*; Family *Balaenidae*; Family *Eschrichtiidae*; Family *Monodontidae*; Family *Ziphiidae*; Family *Delphinidae*").

<sup>245</sup> The short-finned dolphin, Risso's dolphin, the Pacific white-sided dolphin, the false killer whale, the striped dolphin, the Pantropical spotted dolphin, the common bottlenose dolphin, and the Indo-Pacific dolphin are in the Family *Delphinidae*. The Dall's porpoise belongs to the Family *Phocoenidae*, which is not listed in Annex 1.

<sup>246</sup> Gillespie, *supra* n. 133, at 293.

<sup>247</sup> See IWC, *supra* n. 185 (referencing a report from the IWC describing Japan's refusal to cooperate with the Commission regarding small cetaceans).

<sup>248</sup> UNCLOS, *supra* n. 19, at art. 65.

<sup>249</sup> *Id.*

<sup>250</sup> See Gillespie, *supra* n. 133, at 293 (describing Article 64's designation of ICRW as an appropriate international organization).

Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.<sup>251</sup>

Is Japan's exploitive hunting of small cetaceans—its refusal to prepare scientific assessments of populations prior to the hunts and to take into consideration existing data and information—a violation of Article 61? Is Japan's refusal to cooperate with the IWC in general, and with the small cetaceans subcommittee under the IWC in particular, a violation of Articles 64 and 65? If so, what is the redress? These are questions in need of further study, particularly in the framework of UNCLOS' elaborate dispute settlement system.

#### *E. The Convention on Biodiversity*

The Convention on Biodiversity (CBD)<sup>252</sup> is the framework MEA for the protection of biodiversity. The CBD has an extremely wide scope, as defined by its three objectives: "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources."<sup>253</sup> As a framework agreement, implementation of the CBD is problematic because it contains mostly soft-law, general provisions instead of the necessary unambiguous, focused, hard-law obligations. The CBD imposes only one binding commitment on its parties—the submission of national reports<sup>254</sup>—and makes liberal use of the term "as far as possible and as appropriate" in qualifying obligations imposed on parties.<sup>255</sup> In other words, the CBD is arguably still waiting for the adoption of specific protocols containing binding provisions, pursuant to Article 28, to be implemented. As of today, the CBD's only protocol is the Cartagena Protocol on Biosafety,<sup>256</sup> a process-oriented agreement regarding the safe handling in trade of living modified or-

<sup>251</sup> UNCLOS, *supra* n. 19, at art. 65.

<sup>252</sup> CBD, *supra* n. 19.

<sup>253</sup> *Id.* at art. 1.

<sup>254</sup> CBD, *Draft Reporting Mechanisms Under the Convention and other Conventions: Executive Summary* 1, <https://www.cbd.int/doc/reviews/wgri/WGRI-10.doc> (July 27, 2005) ("The submission of national reports on measures taken to implement the provisions of the Convention and their effectiveness is the only unqualified obligation of Parties to the Convention."); see also Desiree M. McGraw, *The Story of the Biodiversity Convention; from Negotiation to Implementation in Governing Global Biodiversity: The Evolution and Implementation of the Convention on Biological Diversity* at 21 (Phillipe G. Le Prestre ed., Ashgate 2003) (discussing the CBD as "a framework of general, flexible obligations").

<sup>255</sup> CBD, *supra* n. 19, at arts. 5, 7–11, 14.

<sup>256</sup> *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (Jan. 29, 2000), 39 I.L.M. 1027.



ganisms. It addresses one of the threats to biodiversity<sup>257</sup> but does not directly further the CBD's objective of biodiversity conservation.

Article 6 of the CBD, which requires each party to "[develop] national strategies, plans or [programs] for the conservation and sustainable use of biological diversity,"<sup>258</sup> provides a potential avenue for using the CBD as a legal tool for protecting small cetaceans. Under this Article, Japan would have to justify the sustainable basis for its dolphin hunts. Article 7, "Identification and Monitoring," may also be useful for protecting small cetaceans because it requires each party to identify and monitor components of biodiversity and—most important for the issue discussed here—to "[identify] processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques."<sup>259</sup> The significance of these obligations is that they require documentation and, consequently, Japan would in principal be obligated to submit information that is not available today. Other potential obligations under the CBD exist under Article 8, "In-situ Conservation," which lists a large number of requirements that parties must undertake to conserve biodiversity, including establishing a system of protected areas for biodiversity,<sup>260</sup> regulating or managing biological resources important for the conservation of biodiversity,<sup>261</sup> protecting ecosystems, habitats and "the maintenance of viable populations of species in natural surroundings,"<sup>262</sup> and "[promoting] the recovery of threatened species."<sup>263</sup> Article 10, "Sustainable Use of Components of Biological Diversity," requires parties to "[i]ntegrate consideration of the conservation and sustainable use of biological resources into national decision-making,"<sup>264</sup> and "adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity."<sup>265</sup>

However, as mentioned above, a major problem with these obligations is that they are not binding, but are rather qualified commit-

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<sup>257</sup> See CBD, *Cartagena Protocol, About, Background*, <http://www.cbd.int/biosafety/background.shtml> (last updated Dec. 17, 2007) (explaining that the "[p]rotocol seeks to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology . . . [and] establishes an advance informed agreement (AIA) procedure for ensuring that countries are provided with the information necessary to make informed decisions before agreeing to the import of such organisms into their territory").

<sup>258</sup> CBD, *supra* n. 19, at art. 6(a). *But see* Kurasawa, *supra* n. 55 (noting that despite attempts by Japanese NGOS, Japan's National Biodiversity Strategy does not refer to cetacean conservation and ignores cetaceans as a component of coastal biodiversity).

<sup>259</sup> CBD, *supra* n. 19, at art. 7(c).

<sup>260</sup> *Id.* at art. 8(a).

<sup>261</sup> *Id.* at art. 8(c).

<sup>262</sup> *Id.* at art. 8(d).

<sup>263</sup> *Id.* at art. 8(f).

<sup>264</sup> *Id.* at art. 10(a).

<sup>265</sup> CBD, *supra* n. 19, at art. 10(b).

ments. Articles 7, 8, and 10 obligate parties only "as far as possible and as appropriate."<sup>266</sup> Concerning the obligation to prepare a national strategy for biodiversity, the nature of this obligation is more binding than the others, but it contains no specific provision requiring a party to refer to a specific component of biodiversity. Thus, the CBD does not currently offer protection to *any* species, including small cetaceans.

Despite this, the CBD provides two mechanisms that could promote the protection of small cetaceans. One is the annex mechanism pursuant to Article 30, which states: "[A]nnexes to this Convention or to any protocol shall form an integral part of the Convention or of such protocol. . . . Such annexes shall be restricted to procedural, scientific, technical and administrative matters."<sup>267</sup> Small cetaceans could be protected by listing them in an annex to Article 8, "In-situ Conservation," as species that the parties are required to protect under this Article. Adoption of annexes is less complicated than adoption of amendments. The annex will enter into force for all parties one year from the notification on the adoption of the annex by the Conference of the parties, except for those who have submitted a notification as to their objections.<sup>268</sup>

The other potential mechanism is the adoption of a protocol on the conservation of small cetaceans pursuant to Article 28 of the CBD, which states that "the Contracting Parties shall cooperate in the formulation and adoption of protocols to this Convention."<sup>269</sup> However, promoting a protocol to the CBD follows the same format as preparing a new MEA, which means years of work in drafting, negotiating and finally adopting the protocol, together with the necessary ratification by each party for the protocol to come into force. In the existing reality of a proliferation of MEAs, the challenge in creating an additional one—whether as a protocol to the CBD or otherwise—will be in overcoming the existing lack of political will.<sup>270</sup>

## V. CONCLUSION AND RECOMMENDATIONS

"They're not their dolphins, they don't carry Japanese passports; they belong to the planet."<sup>271</sup> In these few words, Richard O'Barry put his finger on the major problem facing the existing structure of global environmental governance available for the protection of migratory species. States are not willing to forgo national sovereignty to undertake the actions necessary for their protection and conservation.<sup>272</sup>

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<sup>266</sup> *Id.* at arts. 7, 8, 10.

<sup>267</sup> *Id.* at art. 30.1.

<sup>268</sup> *Id.* at art. 30.2(b).

<sup>269</sup> *Id.* at art. 28.

<sup>270</sup> Adam, *supra* n. 156, at 134–35.

<sup>271</sup> McNeil, *supra* n. 2.

<sup>272</sup> Maria Ivanova & Jennifer Roy, *The Architecture of Global Environmental Governance: Pros and Cons of Multiplicity*, in Lydia Swart & Estelle Perry, *Global Environmental Governance: Perspectives on the Current Debate* 48, 63 (Ctr. for UN Reform 2007) ("National sovereignty in the face of global environmental problems has also

The principle of national sovereignty permeates the existing agreements: the preamble to the CBD reaffirms "that States have sovereign rights over their own biological resources";<sup>273</sup> the preamble to CITES recognizes "that peoples and States are and should be the best protectors of their own wild fauna and flora";<sup>274</sup> UNCLOS recognizes national sovereignty as a basic tenet for the rights of coastal states under that agreement; and sovereignty has been a major issue in the ICRW, as evident from the opposition to extending the convention's authority to small cetaceans.<sup>275</sup> Nation-states jealously guard their sovereignty.

However, as migratory species, small cetaceans are not the biological resource of any one country, and their protection depends upon the coordinated action of all range states along migratory routes.<sup>276</sup> This concept must be inherent in any scheme for their protection and, in fact, is what gives meaning to the phrase "global biodiversity." The challenge is to persuade nation-states to relinquish part of their sovereignty in order to ensure the welfare and survival of the threatened dolphins.

Beyond the conventional conservationist concerns regarding the dolphin hunts, "[t]he scientific research about dolphins raises enough *reasonable doubt* about the ethical defensibility of these practices that we are morally obliged to stop them."<sup>277</sup> Humans compete with dolphins for marine food and coastal habitat. Because we are technologically advanced and they are not, humans easily prevail over them, as exemplified by the drive hunts. Humans have literally pushed small cetaceans to the brink of extinction—hunting, slaughtering, and en-

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proven a difficult obstacle to effective solutions as governments have been driven to act on the basis of narrowly defined self-interest rather than the common good.").

<sup>273</sup> CBD, *supra* n. 19, at Preamble; see also *United Nation Report on Environment and Development Policies in Rio*, annex 1, principle 2, (Aug. 12, 1992) A/CONF.151/26 Vol. 1 (available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>) (accessed Apr. 13, 2008) ("States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies."); Rosie Cooney, *Cites & the CBD: Tensions and Synergies*, 7 (June 2001) (on file with *Animal L.*) ("[A]n emphasis on asserting rights over natural resources is apparent throughout the text of the CBD, which represents in fact the first statement of the principle of state sovereignty over natural resources in a binding international agreement.").

<sup>274</sup> CITES, *supra* n. 19, at Preamble.

<sup>275</sup> IWC, *supra* n. 182. The CMS, however, created specifically to protect migratory species, with its emphasis on international cooperation to conserve and protect migratory species, is, potentially at least, an exception. See generally Richard Caddell, *International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention*, 16 *Colo. J. Intl. Envtl. L. & Policy* 113, 115–20 (Winter 2005) (discussing the protection of migratory wildlife under the Bonn Convention); Cyril De Klemm, *Migratory Species in International Law*, 29 *Nat. Resources J.* 935, 951–54 (Fall 1989) (discussing international conventions on various migratory species).

<sup>276</sup> Peter J. Stoett, *The International Politics of Whaling* 8 (UBC Press 1997) ("The international politics of whaling suggests that, ultimately, sovereignty remains a vital concern for decision makers, even when dealing with non-sovereign mammals.").

<sup>277</sup> Thomas I. White, *In Defense of Dolphins: The New Moral Frontier* 221 (Blackwell 2007) (emphasis in original).

slaving them in order to satisfy a voracious appetite and enable ferocious development. Therefore, humans now have an ethical duty toward dolphins to stop the cruelty perpetrated against them and to ensure the survival of their species. This ethical duty should be turned into a legal duty with a correlated legal right for dolphins' protection.

From the above review of relevant MEAs and other international agreements, it can be concluded that existing international legal regimes have failed in protecting dolphins. Nation-states have no legal duty to protect dolphins, and conversely, dolphins have no legal right to be protected. Tens of thousands of dolphins are hunted, slaughtered, or traded every year in Japan and elsewhere, despite their importance to global biodiversity, the 2010 target to reduce biodiversity loss, and 2008's status as the Year of the Dolphin. Dolphins continue to be vulnerable, defenseless, ignored, and lacking in any legal status.

In the quest for an MEA that will speak up in the name of those dolphins targeted by the Japanese fishing industry as they are being captured, slaughtered, or sold into captivity, the only entity that has spoken in defense of dolphins is the ICRW. In an attempt to prevent the earlier mistakes that had led to the near extinction of species of large whales,<sup>278</sup> the IWC undertook to monitor the status of small cetaceans by means of its Scientific Committee, whose work has been handicapped by lack of data and the non-cooperation of the dolphin-hunting parties.<sup>279</sup> However, in spite of the political will of many state parties of the IWC to place small cetaceans under its wing,<sup>280</sup> at present, the role of the ICRW is limited to scientific research. The opposition of its pro-whaling parties has prevented recognition of the IWC's authority over small cetaceans, and therefore the committee cannot extend small cetaceans legal protection.<sup>281</sup>

Of the MEAs reviewed, CITES would be able to extend the most immediate assistance by declaring that non-detrimental findings issued by Japan do not meet the requirements of Article IV because existing evidence demonstrates that the trade in dolphins captured in drive hunts is detrimental to the species. Even though the convention itself imposes the authority for the non-detrimental findings on the exporting country, by means of Article IV (together with Resolution Conf. 10.3), CITES would be able to challenge the export permits on the basis of existing evidence on the status of the species. However, as discussed above, CITES addresses only one aspect of the dolphin hunts, i.e., international trade, and thus, in any case, the assistance of additional MEAs will be needed.

Along with several of its subsidiary agreements, CMS is another MEA. CMS has the legal authority to address the Japanese dolphin

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<sup>278</sup> Gillespie, *supra* n. 133.

<sup>279</sup> See IWC, *supra* n. 185 (discussing Japan's lack of cooperation).

<sup>280</sup> See IWC, *supra* n. 182, at IWC Information (discussing IWC's push for cooperation among the member governments to regulate the catches of small cetaceans).

<sup>281</sup> Burns, *supra* n. 10, at 127-28.

hunts by initiating an agreement for their protection, similar to its existing agreements.<sup>282</sup>

Regarding the CBD and as discussed above, the COP of the CBD could adopt the dolphin species targeted by the hunts (or, preferably, all species of small cetaceans) as an annex to the convention. This would afford them status as species to be protected under Article 8 "In-situ Conservation" and could promote a new, comprehensive protocol specifically geared to the protection of small cetaceans.

As to UNCLOS, Japan's dolphin hunting practices are apparent violations of several articles in Part V. Enforcement of these provisions in the framework of UNCLOS' dispute settlement process, and the global community's redress in the name of the dolphins, is in need of further discussion and research.

Despite the ostensible agreement as to the need for global environmental protection for small cetaceans,<sup>283</sup> consensus on how to protect them—and cetaceans in general—is starkly lacking.<sup>284</sup> The UN organizations, United Nations Environment Programme (UNEP) and all of the MEAs (except for the ICRW), prefer to ignore the plight of the dolphins. Therefore, immediate promotion of a new initiative for a comprehensive international agreement for small cetaceans is recommended. And to promote synergetic implementation amongst biodiversity MEAs, the agreement could be pursuant both to Article 28 of the CBD<sup>285</sup> and Article IV Sections 3 and 4 of the CMS.<sup>286</sup>

In addition, an immediate moratorium should be imposed on all catch and trade of small cetaceans. The moratorium would be a joint decision of each COP within the CBD, the CMS, CITES, UNCLOS and the IWC, pursuant to the authorities granted to each one by its respective agreement, spearheaded by UNEP. In 1994, William Burns proposed that the ICRW impose a moratorium on take of small cetaceans.<sup>287</sup> Since it can be assumed that populations have been further decimated since that time, the call for a moratorium is even more urgent today than it was then. The decision to impose a moratorium will not be the sole responsibility of one regime, as was the moratorium declared by the IWC on great whales; it will be a decision of the global community, represented by those international legal regimes created for the purpose of saving biodiversity, and will constitute synergetic implementation of them all.<sup>288</sup> This step will also contribute to the

<sup>282</sup> See e.g. ACCOBAMS, *supra* n. 194 (an example of an agreement over certain regions); ASCOBANS, *supra* n. 196 (examples of agreements over certain regions).

<sup>283</sup> Gillespie, *supra* n. 133, at 279.

<sup>284</sup> See Burns, *supra* n. 10, at 127 (quoting the sub-committee on cetaceans of the IWC Scientific Committee, on the urgent need for an international body to effectively manage stocks of all cetaceans not covered by the present IWC schedule, and its recommendations that the IWC should be revised to include all cetaceans).

<sup>285</sup> See CBD, *supra* n. 19 at art. 28.1 (establishing the protocol mechanism).

<sup>286</sup> See CMS, *supra* n. 19 at arts. IV.3-4 (stating that parties of migratory species are to take action to benefit species in unfavorable conservation status).

<sup>287</sup> Burns, *supra* n. 10, at 137.

<sup>288</sup> Adam, *supra* n. 156, at 129.

2010 biodiversity loss reduction target set by the United Nations, UNEP, and the international biodiversity regimes.

In the Year of the Dolphin, it is incumbent on the nations of the world to unite to end the intolerable, human-caused suffering of dolphins and to prevent irreversible damage to the dolphin populations targeted by the reprehensible dolphin hunts.