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„THE COMPETENCE OF IWC TO CONSERVE SMALL CETACEANS“ (DRAFT)

A Report by the Foundation for the Animal in the Law, CH-Berne/Zurich,
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with supports by ASMS, CH-Wädenswil

I **International Convention for the Regulation of Whaling, 1946**

1. The International Convention for the Regulation of Whaling, dated December 2, 1946 („ICRW“), creates the International Whaling Commission („IWC“) and grants it certain competencies over whales and whaling. The Commission can regulate the whaling activities and make recommendations on matters which relate to whales or whaling (ICRW Ar. VI).
2. Due to Ar. V.1. a ICRW, changed on November 19, 1956, the Commission is entitled to define the protected and the not protected species of whales. Based on a systematic interpretation it is clear that all species of whales are object of the Convention. The Commission however has the right to restrict the scope of application of the ICRW. In other words the ICRW itself does not indicate any restriction of the Convention's application to small cetaceans.

II **Annex of Nomenclature**

3. As an appendix of ICRW an Annex of Nomenclature was meant to define different terms as the various species of whales, explicitly e.g. the *Orcinus orca* and the *Ziphius cavirostris* and the *Tasmacetus sheperdi*. The two species of toothed whales are small cetaceans. The term of „whale“ itself has not been determined, neither in the first appendix dated 1946 nor in the later amendments e.g. of October 2, 1996.
4. The Annex of Nomenclature contents a list of translations of the common names used for the species regulated because they were the most threatened by over-exploitation at the time. It does not neither exclude small nor other cetaceans not listed in

the Annex from the application of the IWC, based e.g. on Ar. V.1.a of the Convention.

III Vienna Convention on Treaties

5. The Vienna Convention on Treaties Between States and International Organizations or Between International Organizations 1986 gives the rules how to interpret Treaties and also the IWC. The terms are to be interpreted on the basis of their traditional sense concentrated on context and the goal of the treaty. Ar 31 enlists the instruments and documents that are to be respected as being connected with the treaty, such as preambles and annexes.
6. As showed under 2., 4. and 5 both the ICRW and the Annex of Nomenclature include small cetaceans. The intention of ICRW was the regulation of the whaling as a whole and not of certain species.

IV United Nations Convention on the Law of the Sea

7. The UN Convention on the Law of the Sea (UNCLOS III) dates of December 10, 1982 and has been signed by over 130 states. It has come into effect on November 16, 1994. This treaty intends to protect the marine environment and does not give the possibility to make any reservation to it (Article 309). This Convention regulates the conservation and the utilization of the living resources (Articles 61 and 62) such as fish. Article 65 treats marine mammals and prohibits further restrictions as described in this Part V of UNCLOS III concerning the exclusive economic zone.

8. The UN Convention on the Law of the Sea does not make any difference between large and small cetaceans and treats and protects them both the same.

V „Resolution concerning the extension of the International Whaling Commission’s responsibilities for small cetaceans“

9. At its 32nd Annual Meeting the International Whaling Commission adopted the „Resolution concerning the extension of the International Whaling Commission’s responsibilities for small cetaceans“. Therewith is shown how the Commission for years never had a serious doubt on the fact that legally also small cetaceans are part of the „International Convention for the Regulation of Whaling“.

VI „Resolution on Small Cetaceans“

10. At its 42nd Annual Meeting the same Commission adopted the „Resolution on Small Cetaceans“ being concerned that certain stocks of small cetaceans are being severely reduced and recognising that there exists an urgent need for further international cooperation to ensure the conservation of small cetaceans. Differences are *not* expressed on any *doubts* if the Commission is entitled to treat *small cetaceans at all*. Differences only seem to exist in views between member states on the *regulatory competence* of the IWC with regard so small cetaceans.
11. Therefore in the resolution adopted the Commission requests the Scientific Committee for commence a process of drawing together all available information on the *present status* of the stocks of small cetaceans (...), on *incidental takes*, on the *impact*

of those takes on the stocks and providing an *assessment* of the present threats to the stocks concerned.

12. In the last years remarkable information on all these items have been researched. From our *legal* view no obstacle has been found against the implementation of serious measures to better conserve stocks of various small cetaceans.

CH-Zurich, April 8, 1998

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