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Iceland and European Union Accession - the Whaling Issue *

On July 17, 2009, Iceland, a country that for some time has enjoyed close links with the European Union (“EU” or “Union”),¹ made a formal application to join the EU; the response of the Council of the EU (“Council”) was to ask the European Commission (“Commission”) to deliver an opinion on the application. This opinion was duly submitted to the Council and the European Parliament (“Parliament”) on February 24, 2010. Taking into account *inter alia* Iceland’s democratic traditions, its application of the rule of law and regard for human rights, and its involvement in the single market since joining the European Economic Area (EEA),² the Commission’s opinion noted:

Iceland’s accession would have a limited overall impact on the European Union and would not affect the Union’s capacity to maintain and deepen its own development. In the light of these considerations, the Commission recommends that negotiations for access to the European Union should be opened with Iceland.³

Consequently, the EU member states’ heads of state or government decided on June 17, 2010 to open accession negotiations. These negotiations subsequently began on July 27, 2010 in an intergovernmental conference held in Brussels.

An essential focus of the Commission’s opinion on Iceland’s application was the ability of Iceland to take on the “obligations of membership, i.e. the total body of EU legislation as expressed in the Treaty, the secondary legislation, as well as the policies of the Union (*acquis* of the European Union).”⁴ Specifically in relation to EU environmental law, in February 2010, the Commission took the view that the “[environmental] legislative framework in Iceland is to a large extent aligned with the *acquis* and should be able to take on the obligations of membership.”⁵ However, in a word of warning as to Icelandic whaling operations, the Commission stipulated that “further efforts will be

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¹ Iceland has “a high degree of integration with the EU through its membership of the European Economic Area (EEA) since 1994, as well as the Schengen area, which allows its citizens to travel and work freely throughout the EU.” *Iceland - EU-Iceland Relations*, EUROPEAN COMM’N, http://ec.europa.eu/enlargement/potential-candidates/iceland/relation/index_en.htm (last updated Oct. 31, 2010).

² *Commission Staff Working Document—Analytical Report Accompanying the Commission Opinion on Iceland’s Application for Membership of the European Union*, at 7, 9, 16, SEC (2010) 153 (Feb. 24, 2010) [hereinafter *Commission Analytical Report*]. The EU is a key trading partner for Iceland. “[M]ore than 54% of Iceland’s imports came from the EU and 76% of its exports went to the EU” in the year 2008. *Id.* at 8.

³ *Commission Staff Working Document—Commission Opinion on Iceland’s Application for Membership of the European Union*, at 8, COM (2010) 62 (Feb. 24, 2010) [hereinafter *Commission Opinion on Iceland’s Application*].

⁴ *Commission Analytical Report*, *supra* note 2, at 8.

⁵ *Id.* at 62.

needed to achieve compliance with the nature protection *acquis* in particular as regards the protection of whales.”⁶

This article seeks to assess one of the important questions regarding Iceland’s potential accession to the EU, namely, whether Iceland could legitimately continue its whaling operations under current EU environmental law if it becomes a member of the regional economic integration organization. Although it will be very *politically* difficult for Iceland to continue whaling as an EU member state, this article suggests it may be *legally* possible to whale in EU waters under current EU environmental law should Iceland make an appropriate derogation under the EU’s Habitats Directive. However, the appropriateness of such derogation will be for the Commission, and perhaps ultimately the European Court of Justice (ECJ), to decide.

Before analyzing relevant EU environmental law, this article will provide an overview of key international developments in the last thirty years under the 1946 International Convention for the Regulation of Whaling (“Whaling Convention”)⁷ and their application to Iceland, as well as an indication of the EU’s stance in recent negotiations on the future of the IWC.⁸

The Whaling Convention and Iceland

Since World War II, the Whaling Convention has been the key international instrument regulating the harvesting of whales and the whaling industry. It aims to “provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.”⁹ The Whaling Convention established the International Whaling Commission (IWC),¹⁰ a body that meets annually to adopt regulations that are noted in the Schedule to the Treaty.¹¹ There are presently eighty-nine parties to the Whaling Convention, each of whom is represented on the IWC by one commissioner. Although the EU is party to an increasing number of international environmental conventions¹² and twenty-five of its twenty-seven member states have

⁶ *Id.*

⁷ International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 [hereinafter ICRW]. The Whaling Convention was signed on December 2, 1946 in Washington, D.C. and entered into force on November 10, 1948. Two earlier attempts had proved unsuccessful in establishing an effective system of regulation. The Convention for the Regulation of Whaling, Sept. 24, 1931, 155 L.N.T.S. 349, came into force on January 16, 1935, but failed to attract key whaling nations such as Argentina, Chile, Germany, Japan, and the Soviet Union as parties. The International Agreement for the Regulation of Whaling, June 8, 1937, 190 L.N.T.S. 79, as amended by the 1938 Protocol, June 24, 1938, 196 L.N.T.S. 131 and 1945 Protocol, Nov. 26, 1945, 148 U.N.T.S. 114, was not ratified by Japan and did little to curb the over-exploitation of the resource. See PATRICIA BIRNIE, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING 125-26 (1985). See generally MICHAEL BOWMAN ET AL., LYSTER’S INTERNATIONAL WILDLIFE LAW, 150-198 (2d ed. 2010) (overview of the Whaling Convention).

⁸ For more information on these negotiations, see *Future of the IWC*, INT’L WHALING COMM’N, <http://iwcoffice.org/commission/future.htm> (last updated June 15, 2010).

⁹ ICRW, *supra* note 7, pmb1.

¹⁰ *Id.* art. III, para. 1.

¹¹ See *id.* art. V.

¹² See, e.g., United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38 (1992), 1771 U.N.T.S. 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148; Vienna Convention for the Protection of the Ozone

ratified the Whaling Convention,¹³ the EU is not a party to the Treaty. As will be discussed later, Iceland left the Whaling Convention in 1992 but rejoined in 2002 and remains a party to the Treaty.

The IWC may amend the Schedule either by consensus or, in its absence, by a three-quarters majority of those Commissioners voting¹⁴ in order to fix:

- (a) protected and unprotected species;
- (b) open and closed seasons;
- (c) open and closed waters, including the designation of sanctuary areas;
- (d) size limits for each species;
- (e) time, methods and intensity of whaling (including the maximum catch of whales to be taken in any one season);
- (f) types and specifications of gear and apparatus and appliances which may be used;
- (g) methods of measurement; and
- (h) catch returns and other statistical and biological records.¹⁵

After years of ineffective management of the resource,¹⁶ in 1982, the IWC voted to amend the Schedule in the following terms:

[C]atch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.¹⁷

Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 293; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 3; Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

¹³ See ICRW, *supra* note 7, pmbl. (only two EU member states are not party to the Whaling Convention: Latvia and Malta).

¹⁴ *Id.* art. III, para. 2.

¹⁵ *Id.* art. V, para. 1.

¹⁶ Originally the IWC utilized the blue whale unit to regulate the industry. Catch limits were established for a season by taking into account the volume of oil a given species was thought to produce—a blue whale unit represented a single blue whale or, for example, two fin whales or six sei whales. This led to the decimation of stocks of the larger whales in particular—blue whales were, for instance, highly prized by whalers as a rich source of oil. The massive over-exploitation of the whale resource led to calls at the United Nations Conference on the Human Environment in 1972 for a ten-year whaling moratorium to allow stocks to recover. Although this suggestion was not acted upon by the IWC at that time, the decision was made that same year to discard the blue whale unit and to adopt the new management procedure (NMP). The NMP was a more sophisticated system that enabled species to be divided into geographical stocks and rated as an initial management stock, sustained management stock, or protection stock. If rated as a protection stock, no commercial whaling of such stock was allowed. The NMP attempted to facilitate the exploitation of whales, but only on a sustainable basis. A key weakness of the new system was that it was dependent on accurate whale population data, which was largely not forthcoming.

¹⁷ ICRW, *supra* note 7, sched., sec. III, para. 10(e).

As such, a moratorium on commercial whaling became effective with the 1986 coastal and 1985/86 pelagic whaling seasons, and commercial catch quotas in the Schedule have remained set at zero to the present day.¹⁸ The 1982 amendment to the Schedule introducing the moratorium indicated that a “comprehensive assessment of the effects of this decision on whale stocks”¹⁹ was to be made. The IWC’s Scientific Committee has been actively involved in this assessment. The need for such a study underlined the poor quality of data on cetacean populations at that time.

In recent decades, much of the debate within the IWC has been deeply polarized between those states that have generally adopted a protectionist stance seeking to conserve cetaceans (for example, Australia, New Zealand, the United Kingdom, and the United States), and, on the other hand, those pro-whaling countries that argue that the time has come to lift the commercial whaling moratorium by allowing quotas to be set for those whale stocks that, in their view, can now be sustainably harvested (Iceland, Japan, and Norway).

Importantly, any amendment to the Schedule can lead to the lodging of an objection by a party within ninety days of notification of adoption by the IWC.²⁰ An objection has a similar impact as a legal reservation; the objected measure is avoided by the objecting state, and the state will therefore not be bound by the measure under international law. Four states lodged objections to the moratorium: Japan, Norway, Peru, and the USSR. Japan, under particular political pressure from the United States,²¹ and Peru have subsequently withdrawn their objections and must therefore now respect the moratorium. However, neither Norway nor Russia have withdrawn their objections and, in essence, may engage in commercial whaling. Russia has opted not to do so, but Norway recommenced commercial whaling in 1993, taking the view that the northeastern Atlantic minke whale stock is not threatened with extinction and can be sustainably harvested.²² Iceland has shared this view. Norway has continued to whale commercially since 1993, ignoring several calls by the IWC to bring its operations to a close.²³

Iceland chose not to lodge an objection to the moratorium and, in late 1991, indicated that it was withdrawing from the IWC with effect from June 30, 1992. Iceland had become frustrated with what it perceived as a lack of progress within the IWC on the re-introduction of commercial whaling, particularly bearing in mind that the amendment

¹⁸ Catch quotas have continued to be established for aboriginal whaling. Traditionally, small takes of whales have been allowed for subsistence purposes, including local consumption in meeting nutritional, subsistence, and cultural needs. In recent years, the IWC has endorsed proposals for such catches in Greenland (generally fin and minke whales), the Russian Federation (gray and bowhead whales), St. Vincent and the Grenadines (humpback), and the United States (bowhead and gray whales). *See generally* Jeremy Firestone & Jonathan Lilley, *Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs*, 8 J. INT’L WILDLIFE L. & POL’Y 177 (2005).

¹⁹ ICRW, *supra* note 7, sched., sec. III, para. 10(e).

²⁰ *Id.* art. V, para. 3.

²¹ *See* Charles L. Johnson, *Environmental Law: Certification of Japanese Violations of International Whaling Agreements*, 29 HARV. INT’L. L.J. 541 (1988).

²² Int’l Whaling Comm’n [IWC], *Chairman’s Report of the Forty-Eighth Annual Meeting*, 47 REP. INT’L WHALING COMMISSION 17, 30 (1996) (Endorsed by the IWC’s Scientific Committee in 1996, abundance approximations estimated that the northeastern Atlantic minke whale population in 1989 was more than 67,000 and increased to over 118,000 in 1995).

²³ *See, e.g.*, IWC, *Resolution on Commercial Whaling*, Resolution 2001-5 (2001), available at <http://iwcoffice.org/meetings/resolutions/resolution2001.htm>.

to the Schedule introducing the moratorium had stipulated that by “1990 at the latest”²⁴ the IWC was to have undertaken an assessment of the impact of the ban and “consider[ed] modification of this provision and the establishment of other catch limits.”²⁵ Icelandic proposals for what it considered to be sustainable catch quotas in 1990 and 1991 having been rejected by the IWC, the Icelandic Fisheries Minister, commenting on Iceland’s decision to withdraw from the Whaling Convention, indicated as follows:

The economic and social fabric of this island nation [is] overwhelmingly dependent on the health and productivity of the surrounding marine environment. Whales have an important ecological role in the Icelandic Exclusive Economic Zone; they consume more than the amount of seafood that our fishermen harvest. Whales must, therefore, be treated in the same manner as other resources, subject to the same management principles. . . . It should not be difficult to understand why this Government must respond to the grim reality that the International Whaling Commission is no longer a viable forum for international cooperation on the conservation and management of the whale populations in our region. It is clear that Iceland has no choice but to seek cooperation in this field through the establishment of a new organization for the North Atlantic.²⁶

Iceland subsequently became a founding member of the North Atlantic Marine Mammal Commission (NAMMCO), which was established by the 1992 Agreement on Cooperation on Research, Conservation and Management of Marine Mammals in the North Atlantic.²⁷ Signed by those ministers responsible for fisheries management in the Faroe Islands, Greenland, Iceland, and Norway, this Treaty aims to “contribute through regional consultation and cooperation to the conservation, rational management, and study of marine mammals in the North Atlantic”²⁸ and, in particular, endorses the sustainable utilization of cetaceans in the North Atlantic.

While its fellow pro-whaling nations, Japan and Norway, remained in the IWC arguing their case for the introduction of sustainable whaling, Iceland took the dramatic step to disengage completely from the Whaling Convention and instead to cooperate with other like-minded parties within NAMMCO. However, such withdrawal diminished Iceland’s international voice and, in doing so, reduced the potential impact of the pro-

²⁴ ICRW, *supra* note 7, sched., para. 10(e).

²⁵ *Id.*

²⁶ Press Release, Ministry of Fisheries, Iceland, Government of Iceland Announces Withdrawal from the International Whaling Commission (Dec. 27, 1991), *available at* <http://www.highnorth.no/Library/Policies/National/go-of-ic.htm>.

²⁷ Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, Apr. 9, 1992, 1945 U.N.T.S. 3; *see* N. ATL. MARINE MAMMAL COMM’N, www.nammco.no (last visited Sept. 13, 2011); *see also* David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 AM. J. INT’L L. 154, 163 (1995).

²⁸ Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, art. 2, Apr. 9, 1992, 1945 U.N.T.S. 3.

whaling lobby at the international level. As a consequence, in June 2001, Iceland attempted to rejoin the IWC. Contentiously, Iceland's 2001 re-adherence instrument included a reservation to the amendment of the Schedule that introduced the commercial whaling moratorium. Iceland had not objected to the modification to the Schedule introducing the moratorium in 1982 and could no longer do so because any objection had to be made within ninety days of the modification's notification. Instead, Iceland opted to register a reservation that it hoped would avoid the impact of the moratorium and protect it should it decide at any point in the future to resurrect its commercial whaling operations.

At its fifty-third meeting held in London in July 2001, the IWC refused to accept Iceland's reservation. Nineteen commissioners voted for such a refusal and three abstained. No votes were cast against the motion, but sixteen Commissioners refused to participate at all, taking the view that the IWC did not enjoy competence to rule on the legitimacy of Iceland's reservation. In a subsequent vote, the IWC deemed that Iceland would only enjoy observer status at the meeting. However, the issue of Iceland's membership and reservation reappeared again at the fifty-fourth IWC meeting held in Shimonoseki, Japan following Iceland's registration of another adherence instrument together with an identical reservation in May 2002. At Shimonoseki, the IWC voted in favor of a proposal to uphold the IWC chair's decision taken earlier at the meeting that the chair was obligated to uphold the July 2001 IWC decision not to accept Iceland's reservation (by a vote of twenty-five to twenty).

Iceland nevertheless persisted in its ambition to re-adhere to the IWC; it registered another adherence instrument together with a similarly worded reservation on October 10, 2002. This attempt to rejoin the IWC was the subject of a special IWC meeting held four days later in Cambridge, United Kingdom, at which the IWC voted in favor of a proposal that the Chairman was, in fact, not bound by the previous 2001 IWC decisions (by a vote of nineteen for to eighteen against).²⁹ Iceland had in effect succeeded in re-establishing itself as a member of the IWC with a reservation against the moratorium and, as such, has since asserted that the commercial whaling moratorium is inapplicable as far as it is concerned.³⁰

²⁹ Controversially, Iceland was allowed to vote in favor of this motion.

³⁰ Nineteen states, however, have subsequently lodged objections to Iceland's reservation; some of these states have expressly stated that the reservation is contrary to the object and purpose of the Whaling Commission and therefore unacceptable. The Whaling Convention is silent on the power of parties to enter reservations. However, the 1969 Vienna Convention on the Law of Treaties stipulates that a state may do so unless "the reservation is incompatible with the object and purpose of the treaty." Vienna Convention on the Law of Treaties, art. 19, subpara. c, May 23, 1969, 1155 U.N.T.S. 331. The Vienna Convention indicates that its provisions apply only "to treaties which are concluded by States after the entry into force of the present convention with regard to such States." *Id.* art. 4. However, the Treaty's provisions on reservations arguably represent custom and, therefore, apply to the Whaling Convention. See Alexander Gillespie, *Iceland's Reservation at the International Whaling Commission*, 14 EUR. J. INT'L L. 977, 987 (2003). A detailed assessment of the reserving states' arguments and the appropriateness of Iceland's reservation lie outside the realm of this article, but such an assessment has been the focus of earlier learned academic discussion. See generally *id.* See also IWC, *Status of International Convention for the Regulation of Whaling*, at 10-14 (2011), available at http://iwcoffice.org/_documents/commission/convention_status.pdf [hereinafter *ICRW Status*] (status of the Whaling Convention and those states that have objected to the reservation).

The reservation stipulated that Iceland would not recommence its commercial whaling operations before 2006. Additionally, commercial whaling would not be authorized after such time “while progress is being made in negotiations within the International Whaling Commission on the [r]evised [m]anagement [s]cheme.”³¹ Part of the revised management scheme (RMS)—the revised management procedure (RMP)—has been agreed upon by the IWC. Rightly described as “the most conservatory of any system currently existing for setting quotas,”³² the RMP will replace the ineffective new management procedure (NMP) and, importantly, takes account of existing uncertainties in our knowledge of stock populations and the impact of environmental change on cetaceans. However, before the RMP is implemented for commercial whaling, the IWC must not only lift the commercial moratorium, but must also reach agreement on the entire RMS, of which the RMP forms just one part.³³ Issues that remain unresolved as to the RMS include agreement on an international observer scheme, the funding of an international inspector and observer scheme, DNA catch verification, and certain animal welfare issues.³⁴ In 2006, the IWC acknowledged that an impasse had been reached in RMS discussions. Bearing in mind this stalemate, Iceland indicated in late 2006 that it would recommence its commercial whaling operations.

It is important to note that, although Icelandic commercial whaling under its reservation began in 2006, Iceland was in fact taking minke whales (*Balaenoptera acutorostrata*) between 2003 and 2007 under special permit.³⁵ By virtue of Article VIII, paragraph 1 of the Whaling Convention, a party may:

grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research.... 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.³⁶

Although parties must report to the IWC on takes under special permit,³⁷ it is within the remit of the party concerned—and not the IWC—to determine whether to issue such permits. However, the Schedule provides that “proposed permits shall be reviewed and commented on by the Scientific Committee at Annual Meetings when possible.”³⁸ The

³¹ *ICRW Status*, *supra* note 30, at 10. The reservation additionally indicates that it “does not apply, however, in case of the so-called moratorium on whaling for commercial purposes, contained in paragraph 10 (e) of the Schedule, not being lifted within reasonable time after the completion of the Revised Management Scheme. Under no circumstances will whaling for commercial purposes be authorized in Iceland without a sound scientific basis and an effective management and enforcement scheme.” *Id.*

³² PATRICIA BIRNIE ET AL., *INTERNATIONAL LAW AND THE ENVIRONMENT* 726 (3d ed. 2009).

³³ IWC, *Resolution on the Revised Management Scheme*, Resolution 1994-5 (1994), available at http://iwcoffice.org/meetings/resolutions/IWCRES46_1994.pdf

³⁴ See Stuart R. Harrop, *From Cartel to Conservation and on to Compassion: Animal Welfare and the International Whaling Commission*, 6 *J. INT’L WILDLIFE L. & POL’Y* 79 (2003) (regarding welfare issues).

³⁵ *Scientific Permit Whaling*, IWC, <http://iwcoffice.org/conservation/permits.htm> (last updated June 22, 2010). See generally Alexander Gillespie, *Whaling Under a Scientific Auspice: The Ethics of Scientific Research Whaling Operations*, 3 *J. INT’L WILDLIFE L. & POL’Y* 1 (2000) (discussing ethical issues of using animals for scientific research).

³⁶ *ICRW*, *supra* note 7, art. VIII, para. 1.

³⁷ *Id.*

³⁸ *Id.*, sched., sec. VI, para. 30.

IWC has adopted guidelines for its Scientific Committee to enable it to carry out such reviews.³⁹ Since the adoption of the commercial whaling moratorium, Iceland, Japan, and Norway have established research programs at various times utilizing special permits. In the last few years, just Iceland and Japan have done so.⁴⁰

Whaling by special permit has been seen by some anti-whaling nations as simply the continuation of commercial whaling operations under a separate guise. In 2003, the IWC adopted a resolution on Japan's and Iceland's research operations that expressed "deep concern that the provision permitting special permit whaling enables countries to conduct whaling for commercial purposes despite the moratorium on commercial whaling."⁴¹ The resolution went on to reaffirm that "non-lethal techniques available today will usually provide better data at less cost to both animals and budget"⁴² and urged "any country conducting or considering the conduct of [s]pecial [p]ermit whaling to terminate or not commence such activities and to limit scientific research to non-lethal methods only."⁴³ In the years between 2003 and 2007, the Icelandic whale research program nevertheless involved the taking of some 200 minke whales. The original Icelandic special permit proposal had also envisaged the taking of fin (*Balaenoptera physalus*) and sei (*Balaenoptera borealis*) whales, but Iceland has yet to make a formal decision to commence this element of its research. In 2010, the total whales Iceland caught commercially amounted to 59 minke whales and 142 fin whales.⁴⁴ All Icelandic whaling since 2003 has taken place within Iceland's territorial sea or exclusive economic zone.⁴⁵

The EU and Recent Developments within the IWC

Intended to resolve issues that have polarized much of the debate within the IWC in recent years, discussions began on the future of the IWC⁴⁶ after the 2007 IWC

³⁹ See IWC, *Resolution on Whaling under Special Permit*, Resolution 1995-9 (1995), available at http://iwcoffice.org/meetings/resolutions/IWCRES47_1995.pdf. In 2009, the IWC adopted a new procedure for reviewing new permit proposals that includes the establishment of a specialist workshop to review and comment upon proposals.

⁴⁰ *Scientific Permit Whaling*, *supra* note 35; see Keiko Hirata, *Why Japan Supports Whaling*, 8 J. INT'L WILDLIFE L. & POL'Y 129 (2005) (discussing the Japanese standpoint on whaling).

⁴¹ IWC, *Resolution on Whaling under Special Permit*, Resolution 2003-2 (2003), available at <http://iwcoffice.org/meetings/resolutions/resolution2003.htm>. The vote in favor was twenty-four, as opposed to twenty-one against and one abstention.

⁴² *Id.*

⁴³ *Id.* Australian displeasure at Japan's continued special permit program in Antarctica led it to commence proceedings in May 2010 before the International Court of Justice (ICJ) in the *Whaling in the Antarctic (Austl. v. Japan)* case. Australia alleges that "Japan's continued pursuit of a large scale programme of whaling under the Second Phase of its Japanese Whale Research Programme under Special Permit in the Antarctic ("JARPA II") [is] in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling ("ICRW"), as well as its other international obligations for the preservation of marine mammals and marine environment." See Press Release, ICJ, Australia Institutes Proceedings Against Japan for Alleged Breach of International Obligations Concerning Whaling (June 1, 2010), available at <http://www.icj-cij.org/docket/files/148/15953.pdf>.

⁴⁴ GISLI VIKINGSSON, ICELAND. PROGRESS REPORT ON CETACEAN RESEARCH, MAY 2010 TO APRIL 2011, WITH STATISTICAL DATA FOR THE CALENDAR YEAR 2010 sec. 6.2 (2011), available at http://iwcoffice.org/_documents/sci_com/2011progreports/SC-63-ProgRepIceland.pdf.

⁴⁵ E-mail from Gisli Vikingsson, Marine Research Institute, Reykjavik, Iceland, to Author (Sept. 29, 2011, 09:59 GMT) (on file with author).

⁴⁶ See *Future of the IWC*, *supra* note 8.

meeting. The Small Working Group on the Future of the IWC⁴⁷ was set up in 2008 with a view to reaching a consensus on a range of matters including divisive issues such as whaling under special permit, the continuing moratorium, and the ability to make objections and reservations. Following these discussions, the *Proposed Consensus Decision to Improve the Conservation of Whales*⁴⁸ was circulated by the IWC's chair and vice-chair in April 2010 for discussion at the June 2010 sixty-second IWC meeting. Key components of the draft decision would have kept the commercial whaling moratorium in place, suspended for ten years all "unilaterally-determined whaling under special permit, objections, and reservations," and brought "all whaling authorized by member governments under the control of the IWC."⁴⁹ Additionally, whaling would have been limited to only those countries that "currently take whales" and "establish caps for the next ten years that are significantly less than current catches and within sustainable levels, determined using the best available scientific advice."⁵⁰ Consensus on this draft decision could not, however, be reached at the 2010 IWC meeting, and it was agreed that further work should be paused to allow time for reflection before the next IWC meeting in 2011.

At the time of the 2010 IWC meeting, Spain held the presidency of the EU and therefore spoke on behalf of the EU and its member states in its opening statement.⁵¹ Although agreeing with some of the draft decision, Spain highlighted twelve points that needed to be addressed as far as the EU was concerned. Of particular interest to this article, the draft decision would have allowed IWC-endorsed quotas to be set for those states currently whaling, and the EU was unhappy with the catch limits envisaged for the Northern Hemisphere. The EU's position advocated "reduced catch limits that would guarantee a significant improvement in the conservation of whales in the long term, moving towards the final goal to ban the whaling activities which are not in line with the moratorium on commercial whaling within an agreed time frame."⁵²

The EU's political negotiating stance at the international level is that commercial whaling should cease in a given period of time. Against this backdrop, this article will now provide an analysis of the applicable EU legal measures currently in place and the extent to which, if at all, continued Icelandic whaling could legitimately continue under EU environmental law should Iceland accede to the EU.

Icelandic Whaling and EU Environmental Law

This section will first consider the legitimacy of whaling operations by an EU member state in light of the terms of the EU's Habitats Directive. It will then turn to the

⁴⁷ *Id.*

⁴⁸ IWC, *Proposed Consensus Decision to Improve the Conservation of Whales from the Chair and Vice-Chair of the Commission*, IWC Doc. 62/7rev (Apr. 28, 2010), available at http://iwcoffice.org/_documents/commission/IWC62docs/62-7rev.pdf.

⁴⁹ *Id.* at 5.

⁵⁰ *Id.*

⁵¹ IWC, *Opening Statement by Spain on Behalf of the EU and its Member States, 62nd Annual Meeting of the IWC*, IWC Doc. 62/OS (June 21-25, 2010), available at http://iwcoffice.org/_documents/commission/IWC62docs/62-OS%20GO.pdf.

⁵² *Id.* at 2-3.

application of relevant EU trade-related measures protecting endangered species as they relate to whaling.

*Application of the Habitats Directive*⁵³

The Habitats Directive aims to protect biodiversity “through the conservation of natural habitats and of wild fauna and flora,”⁵⁴ and its measures are designed to “maintain or restore, at favorable conservation status, natural habitats and species of wild fauna and flora of community interest.”⁵⁵ By affording protection in this way, the Habitats Directive seeks—at least in part—to implement the EU’s obligations not only under the 1992 Convention on Biological Diversity,⁵⁶ but also under both the 1979 Convention on the Conservation of European Wildlife and Natural Habitats⁵⁷ and the 1979 Convention on the Conservation of Migratory Species of Wild Animals.⁵⁸

While the Habitats Directive has primarily conservation objectives, these objectives are not to be pursued to the total exclusion of all other interests as “measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.”⁵⁹ These other interests are reflected in the Directive’s allowance for member states to derogate from its conservationist provisions in certain specified circumstances, which will be addressed later in this article in so far as such derogations potentially relate to whaling. As will also be later discussed, the Habitats Directive seeks to protect habitats and wild fauna and flora by establishing a Europe-wide interrelated network of protected habitat sites imposing obligations of maintenance and restoration of habitat (the Natura 2000 network), as well as introducing a system of strict protection of fauna and flora that applies to a given member state’s entire territory.

What is the precise geographical application of the Habitats Directive? The directive is designed to “contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the *European territory of*

⁵³ Council Directive 92/43, Conservation of Natural Habitats and of Wild Fauna and Flora, 1992 O.J. (L 206) 7 (EEC) [hereinafter Habitats Directive]. The Directive has been amended several times. For consolidated text, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1992L0043:20070101:EN:PDF>.

⁵⁴ *Id.* art. 2, para. 1.

⁵⁵ *Id.* art. 2, para. 2.

⁵⁶ Convention on Biological Diversity, *supra* note 12; see Council Decision 93/626, Conclusion of the Convention on Biological Diversity, art. 1, 1993 O.J. (L 309) 1 (EEC) (regarding EU adherence). Article 8, subparagraphs (a) and (d) of the Convention on Biological Diversity note that “as far as possible and as appropriate” parties are obliged to “establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity” and to “promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.” Convention on Biological Diversity, *supra* note 12, art. 8, subparas. (a), (d).

⁵⁷ Convention on the Conservation of European Wildlife and Natural Habitats, Sept. 19, 1979, E.T.S. No. 104; see Council Decision 82/72, Conclusion of the Convention on the Conservation of European Wildlife and Natural Habitats, art. 1, 1982 O.J. (L 38) 1 (EEC) (regarding EU adherence).

⁵⁸ Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 356; see Council Decision 82/461, Conclusion of the Convention on the Conservation of Migratory Species of Wild Animals, art. 1, 1982 O.J. (L 210) 10 (EEC) (regarding EU adherence).

⁵⁹ Habitats Directive, *supra* note 53, art. 2, para. 3.

the [m]ember [s]tates to which the Treaty applies.”⁶⁰ In the early days of the Habitats Directive’s application,⁶¹ it would have been easy to assume that its geographical scope only applied to a member state’s internal waters, land territory, and its adjacent territorial seas up to a limit of twelve nautical miles, as only these areas can rightly be regarded as a country’s “territory” under international law.⁶² Extending the Directive’s application beyond the territorial sea to, for example, the adjacent exclusive economic zone (EEZ)⁶³ would have been met with skepticism given that, although states may enjoy certain sovereign rights therein, such maritime zones could never be regarded as national territory under international law.⁶⁴ However, the ruling of the English High Court in *R. v. Secretary of State for Trade & Industry ex parte Greenpeace Ltd.*⁶⁵ on November 5, 1999 has been highly influential in denoting a wider geographical scope of the measure. The United Kingdom (U.K.) government had argued that it could legally carry out its licensing functions for oil exploration without reference to the Habitats Directive because the measure was only applicable within its sovereign territory, which included its twelve-mile territorial sea. Greenpeace, however, disagreed with this view and sought judicial review of the Secretary of State’s decision that licenses would be granted to oil companies to search and bore for oil in the northeast Atlantic, specifically in an area that forms part of the U.K.’s continental shelf and its declared economic fishing zone.

UNCLOS defines the continental shelf in the following terms:

The continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.⁶⁶

⁶⁰ *Id.* art. 2, para. 1 (emphasis added).

⁶¹ Member states were duty bound to have implemented the directive into national law by June 5, 1994. *See generally* Case C-329/96, *Comm’n v. Hellenic Republic*, 1997 E.C.R. I-3749 (involving infringement actions taken by the Commission against Greece for late implementation); Case C-83/97 *Comm’n v. Germany*, 1997 E.C.R. I-07191 (involving infringement actions taken by the Commission for late implementation).

⁶² “Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding [twelve] nautical miles, measured from baselines determined in accordance with this Convention.” United Nations Convention on the Law of the Sea art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁶³ From 12 nautical miles to 200 nautical miles.

⁶⁴ *See* UNCLOS, *supra* note 62, art. 56 (describing rights and jurisdiction of coastal states in a declared EEZ). In particular, Article 56, paragraph (1)(a) notes that the coastal state enjoys “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed . . .” *Id.*

⁶⁵ *R. v. Sec’y of State for Trade & Indus. ex parte Greenpeace Ltd.*, [2000] Env. L.R. 221 (U.K.). *See* J.H. Jans, *The Habitats Directive*, 12 J. ENVTL. L. 385, 385-390 (2000) (analyzing the case).

⁶⁶ UNCLOS, *supra* note 62, art. 76, para. 1.

The continental shelf therefore extends beyond the U.K.'s territorial sea. In the continental shelf area, the coastal state exercises "sovereign rights for the purpose of exploring it and exploiting its natural resources."⁶⁷

Concerned about the potential impact of the oil companies' activities on cetaceans and coral forming reefs, Greenpeace claimed that the U.K. government would act illegally if it failed to consider the provisions of the Habitats Directive in the licensing process. Adopting a purposive approach to the issue of geographical scope, the English High Court agreed with Greenpeace in deciding that the Directive did apply to the U.K.'s continental shelf and to the superjacent waters up to 200 nautical miles from the baseline from which the territorial sea is measured. In coming to this conclusion, the High Court in particular took into account Greenpeace's argument that the aims of the Directive were "more likely to be achieved if the geographical scope extends to the continental shelf and its superjacent waters."⁶⁸ Subsequent discussion will highlight that all cetaceans are afforded protection by the Habitats Directive as they are listed in its Annex IV(a) and are known to spend much of their time in waters beyond the confines of territorial seas. Furthermore, the coral forming reef, *Lophelia pertusa* (not specifically noted in the Directive, although "reefs" are mentioned in Annex I), is also more likely to be found outside the twelve-mile territorial sea limits. The High Court therefore concluded that:

[A] directive which includes in its aims the protection of...*Lophelia pertusa* and cetaceans will only achieve those aims, on a purposive construction, if it extends beyond territorial waters. Although much of the concern of the Directive and some of its language can properly be described as "land-based", it also deals specifically with some habitats and species which are sea-based and, to a large extent, flourish beyond territorial waters.⁶⁹

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As such, the U.K. government was unable to legally exercise its offshore licensing function without taking into account and applying the provisions of the Habitats Directive. In short, the Habitats Directive applied beyond territorial waters to include all marine waters within national jurisdiction.

Importantly, this approach by a national court has subsequently been upheld by the European Court of Justice (ECJ). By virtue of Article 258 of the Consolidated Version of the Treaty on the Functioning of the European Union, the Commission performs an enforcement role that gives it sole discretion as to whether to bring infringement proceedings before the ECJ against a member state for failure to apply EU legislation.⁷⁰ In *Commission v. United Kingdom*,⁷¹ the Commission brought such an

⁶⁷ *Id.* art. 77, para. 1.

⁶⁸ *R. v. Sec'y of State for Trade & Indus. ex parte Greenpeace Ltd.*, [2000] Env. L.R. 221, 231.

⁶⁹ *Id.* at 242.

⁷⁰ Consolidated Version of the Treaty on the Functioning of the European Union, art. 258, Dec. 13, 2007, 2010 O.J. (C 83) 47, 160 [hereinafter TFEU] ("If the Commission considers that a [m]ember [s]tate has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the [s]tate concerned the opportunity to submit its observations. If the [s]tate concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union").

action alleging that the U.K. had failed to properly implement the Habitats Directive. Among various other issues in contention, the Commission argued that the U.K. had improperly limited the scope of its national implementing provisions to national territory and U.K. territorial waters, and alleged that “within their exclusive economic zones the [m]ember [s]tates have an obligation to comply with Community law in the fields where they exercise sovereign powers and that the directive therefore applies beyond territorial waters.”⁷²

By the time the issue came to the ECJ, the U.K. and the Commission had in fact reached “common ground . . . that the United Kingdom exercises sovereign rights in its exclusive economic zone and on the continental shelf and that the Habitats Directive is to that extent applicable beyond the [m]ember [s]tates’ territorial waters.”⁷³ The ECJ also adopted this approach in its ruling that “the directive must be implemented in that exclusive economic zone.”⁷⁴

Having underlined its geographical application, the article will now analyze the Habitats Directive to assess the level of protection it affords to cetaceans. Whilst the establishment of the Natura 2000 network has been described as the first pillar of protection under the Habitats Directive, the species protection system has been referred to as the second pillar.⁷⁵ Each of these pillars will now be duly addressed in the context of whaling operations.

A. First Pillar - Natura 2000

An important feature of the Habitats Directive is the establishment of the network of special areas of conservation known as Natura 2000, which the Commission has referred to as “the cornerstone of Community nature conservation policy.”⁷⁶ This interlinked coherent ecological network seeks to ensure that the distribution and profusion of certain types of natural habitats and species’ habitats—both marine and terrestrial—are either maintained or, if need be, restored at a “favourable conservation status.”⁷⁷ Each member state contributes to the Natura 2000 network “in proportion to the representation within its territory of the natural habitat types and the habitats of species”⁷⁸ noted in Annex I and II respectively. Special areas of conservation (SACs) are established as particularly important sites that either host natural habitat types noted in Annex I or habitats of rare, vulnerable, or endangered species noted in Annex II. The

⁷¹ Case C-6/04, *Comm’n v. United Kingdom*, 2005 E.C.R. I-9017. See generally Colin T. Reid & Michael Woods, *Implementing EC Conservation Law*, 18 J. ENVTL. LAW 135 (2006).

⁷² 2005 E.C.R. I-9017, para. 115.

⁷³ *Id.* para. 117.

⁷⁴ *Id.* para. 117.

⁷⁵ See Environment Directorate-General of the European Commission, *Guidance Document on the Strict Protection of Animal Species of Community Interest under the Habitats Directive 92/43/EEC*, at 12 (Feb. 2007), available at http://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm [hereinafter *Strict Protection of Animal Species Guidance*]. This document reflects “only the views of the Commission services and is not of a binding nature.” *Id.* at 4.

⁷⁶ European Commission, DGXI–Environment, Nuclear Safety and Civil Protection, *Natura 2000: Managing Our Heritage*, at 10 (1997), available at http://ec.europa.eu/environment/nature/info/pubs/docs/nat2000/managing_heritage_en.pdf.

⁷⁷ Habitats Directive, *supra* note 53, art. 3, para. 1.

⁷⁸ *Id.* art. 3, para. 2.

third type of site comprising Natura 2000 is the special protection area (SPA) classified under the Wild Birds Directive.⁷⁹

Annex II of the Habitats Directive is therefore potentially important in the context of this article if it includes whales caught by Icelandic operations as the establishment of SACs would be envisaged to form part of Natura 2000. Although over eight hundred animal and plant species are listed in Annex II and are therefore deemed in need of protection because they are endangered, vulnerable, or rare, only two cetaceans are included in this annex: *Phocoena phocoena* (harbor porpoise) and *Tursiops truncatus* (common bottlenose dolphin).⁸⁰ These cetaceans are not the subject of Icelandic whaling operations. Instead, we must turn attention to the second pillar—the species system of protection—to assess the manner in which cetaceans harvested by Icelandic whalers are afforded protection.

B. Second Pillar - Species Protection

Member states must establish a system of protection under the Habitats Directive for animal species listed in Annex IV(a) and plant species in Annex IV(b). There are currently more than nine hundred animal and plant species in Annex IV. In the whaling context, it is important to stress that *all species* of cetaceans are noted in Annex IV(a). By virtue of Article 12(1),⁸¹ the following actions are prohibited in relation to Annex IV(a) animal species:

- (a) all forms of deliberate capture or killing of specimens of these species in the wild;
- (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation, and migration;
- (c) deliberate destruction or taking of eggs from the wild;
- (d) deterioration or destruction of breeding sites or resting places.⁸²

The case of *Commission v. Hellenic Republic* provides an example of an infringement action brought against a member state by the Commission alleging a failure to establish and implement an effective system of protection for a species noted in Annex IV(a).⁸³ The loggerhead sea turtle (*Caretta caretta*) produces offspring only every two or three years, at which time each turtle crawls onto the beach and lays approximately 120 eggs. Two months later, the baby turtles are born and are at their most vulnerable. Tipped off by environmental nongovernmental organizations, Commission officials visiting the Greek island of Zakynthos identified the presence of mopeds on beaches used as breeding sites, as well as the presence of small boats near breeding beaches. In finding against Greece, the ECJ declared that the use of these modes of transport in this sensitive area

⁷⁹ Council Directive 79/409, Conservation of Wild Birds, 1979 O.J. (L 103) 1 (EEC), now consolidated and repealed by Council Directive 2009/147, Conservation of Wild Birds, 2010 O.J. (L 20) 7 (EC).

⁸⁰ Habitats Directive, *supra* note 53, annex II. Species noted in this Annex include the lynx, as well as certain bats and dragonflies.

⁸¹ Article 13 notes that a protection system must also be introduced for plant species listed in Annex IV(b). *Id.*, art. 13, para. 1.

⁸² *Id.*, art. 12, para. 1.

⁸³ Case C-103/00, *Comm'n v. Hellenic Republic*, 2002 E.C.R. I-1147.

constituted “deliberate disturbance” during the turtles’ breeding period. Moreover, the erection of illegal buildings on the breeding beaches was deemed liable to lead to the deterioration or destruction of the turtles’ breeding sites. Greece had failed in its obligations to ensure a system of strict protection for the loggerhead turtle in accordance with Article 12.⁸⁴

As noted earlier, it has been established by case law that the terms of the Habitats Directive apply to a member state’s declared EEZ. As all Icelandic whaling since 2003 has been located within its territorial sea or EEZ, such operations would fall within the remit of the Habitats Directive should Iceland accede to the EU. The particular provisions of Article 12(1) that would seemingly prohibit Icelandic whaling within its territorial waters *and* its declared EEZ are the prohibitions on “all forms of deliberate capture or killing of specimens of these species in the wild” and any “deliberate disturbance of these species.”⁸⁵ In the absence of national Icelandic laws capable of affording such protection, Iceland would be in breach of its legal obligations if it became an EU member state. Furthermore, even if such an Icelandic national protective legal framework existed, an Icelandic omission to enforce these protective laws would constitute a separate breach of its obligations.⁸⁶

In addition to the prohibitions under Article 12(1), member states are obliged to take measures to ban the “keeping, transport, and sale or exchange, and offering for sale or exchange, of specimens taken from the wild” of Annex IV(a) species by virtue of Article 12(2). A “specimen” is defined as “any animal or plant, whether alive or dead, of the species listed in Annex IV” and “any part or derivative thereof.”⁸⁷ In effect, if Iceland were an EU member state, the offer, sale, and transportation of whale meat would be banned. This point is important considering that whale meat has been sold in Iceland in recent years and that Iceland has sold and transported whale meat to Japan since recommencing commercial whaling.⁸⁸

In accession negotiations, Iceland may request that an amendment be made to the Habitats Directive removing cetaceans from Annex IV(a). Transitional measures may also be requested in these negotiations, as the applicable accession negotiating framework notes: “The Union may agree to requests from Iceland for transitional measures provided

⁸⁴ See also Case C-518/04, *Comm’n v. Hellenic Republic*, 2006 E.C.R. I-42 (discussing the lack of protection Greece provides for vipers on the island of Milos).

⁸⁵ In *Commission v. Spain*, the ECJ indicated that “[f]or the condition as to ‘deliberate’ action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing.” Case C-221/04, *Comm’n v. Spain*, 2006 E.C.R. I-4536, para. 71. Evidently, Icelandic whaling operations would be regarded as a form of “deliberate” killing.

⁸⁶ See, e.g., Case C-183/05, *Comm’n v. Ireland*, 2007 E.C.R. I-162, paras. 28-30 (ECJ stipulated that “it should be recalled that Article 12(1) of Directive 92/43 requires the [m]ember [s]tates to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to that directive in their natural range. . . . [T]he transposition of Article 12(1) of the Directive requires the [m]ember [s]tates not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures . . . Similarly, the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature.”); see also *Strict Protection of Animal Species Guidance*, *supra* note 75, at 39.

⁸⁷ Habitats Directive, *supra* note 53, art. 1, para. (m).

⁸⁸ See Richard Black, *Japan Sells Icelandic Whale Meat*, BBC NEWS (Dec. 5, 2008), <http://news.bbc.co.uk/2/hi/science/nature/7767716.stm>.

they are limited in time and scope, and accompanied by a plan with clearly defined stages for application of the *acquis*.⁸⁹ Nonetheless, it is highly unlikely that the twenty-seven existing EU member states would grant a request either to amend the Habitats Directive or to apply transitional measures delaying the application of the Habitats Directive in relation to whaling. Indeed, Norway applied to join the European Community (now the EU) in 1992 and subsequently held accession negotiations with the European Community. By 1993, Norway had recommenced commercial whaling by utilizing its objection under the Whaling Convention. Even so, no amendments to the Habitats Directive were made in the draft Accession Treaty nor were transitional measures agreed to despite Norway's wish to continue its commercial whaling operations. In late 1994, the Norwegian public voted on the Accession Treaty and decided not to join the European Community.

It is, however, very important to stress that the Habitats Directive itself allows member states to derogate from the provisions of Article 12(1) and (2). Indeed, 4718 derogations were issued by member states in 2005-2006.⁹⁰ This ability to derogate is intended to provide some balance to the Directive's environmental objectives by allowing other interests to be taken into account in carefully defined circumstances. Before assessing the ability to derogate in the context of Icelandic whaling, a few general points need to be made about derogations under the Habitats Directive. Member states are allowed to derogate without consulting with the Commission beforehand,⁹¹ but must report to the Commission on these derogations every two years.⁹² The Commission is then tasked with assessing the appropriateness of derogations and can ultimately commence an infringement action before the ECJ should it feel that a member state has made an unwarranted derogation.

Provided that there is “*no satisfactory alternative* and the derogation is not *detrimental to the maintenance* of the populations of species concerned *at a favourable conservation status*,” member states can derogate, but only if one or more additional conditions apply.⁹³ Of those conditions, the following might arguably cover whaling operations:⁹⁴

- “in the interests of public health and public safety, or *for other imperative reasons of overriding public interest, including those of a*

⁸⁹ European Union, *Negotiating Framework*, para. 25 (July 26, 2010), available at http://ec.europa.eu/enlargement/pdf/iceland/st1222810_en.pdf.

⁹⁰ THE N2K GROUP, COMPOSITE EUROPEAN COMMISSION REPORT ON DEROGATIONS IN 2005-2006 ACCORDING TO ARTICLE 16 OF DIRECTIVE 92/43/EEC ON THE CONSERVATION OF NATURAL HABITATS AND OF WILD FAUNA AND FLORA 6 (2008), available at http://circa.europa.eu/Public/irc/env/monnat/library?l=/reporting_derogations/habitats_2005-2006/_EN_1.0_&a=d (a report prepared for the European Commission).

⁹¹ *Strict Protection of Animal Species Guidance*, *supra* note 75, at 65.

⁹² Habitats Directive, *supra* note 53, art. 16, para. 2.

⁹³ *Id.* art. 16, para. 1 (emphasis added).

⁹⁴ See Peter G. G. Davies, *Legality of Norwegian Commercial Whaling under the Whaling Convention and its Compatibility with European Community Law*, 43 INT'L & COMP. L.Q. 270, 282-83 (1994) (applying these potential derogations under the Habitats Directive in the context of Norwegian whaling operations in the 1990s); see also Gregory Rose & Oliver Wood, Research Advice to Greenpeace U.K. on the Legality of Whaling in the European Community (1993) (on file with author) (applying the Habitats Directive in a whaling context).

*social or economic nature and beneficial consequences of primary importance for the environment;*⁹⁵

- “*for the purposes of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;*”⁹⁶ and
- “*to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property.*”⁹⁷

Each of these potential derogations will now be assessed with specific reference to Icelandic whaling operations.⁹⁸ In doing so, it is important to stress that the ECJ has ruled that “Article 16 of the Habitats Directive defines in a precise manner the circumstances in which [m]ember [s]tates may derogate from Article[] 12 . . . so that Article 16 must *be interpreted restrictively.*”⁹⁹ Furthermore, any killing of an Annex IV(a) animal under derogation would necessitate the relevant competent authority in the member state in question “proving that the necessary conditions are present for each derogation.”¹⁰⁰

1. *For other imperative reasons of overriding public interest, including those of a social or economic nature*

The world financial crisis was a key reason behind Iceland’s 2009 application to join the EU as it is envisaged that membership in the organization would have a potentially stabilizing impact upon Iceland’s economy. The Commission, in February 2010, indicated that “the last two years have been challenging for Iceland. In the context of global financial crisis, its banking system collapsed in October 2008 with severe economic impact and social consequences.”¹⁰¹ Indeed, the country’s gross domestic

⁹⁵ Habitats Directive, *supra* note 53, art 16, para. 1(c) (emphasis added).

⁹⁶ *Id.* art. 16, para. 1(d) (emphasis added).

⁹⁷ *Id.* art. 16, para. 1(b) (emphasis added).

⁹⁸ Derogations under the Habitats Directive are also allowed “in the interests of protecting wild fauna and flora and conserving natural habitats,” *id.* art. 16, para. 1(a), and “to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.” *Id.* art. 16, para. 1(e). In relation to the latter derogation, the Commission has endorsed the limited hunting of Latvian lynx on these grounds. See *Strict Protection of Animal Species Guidance*, *supra* note 75, at 57-58. The Commission took into account that “[l]imited and strictly controlled taking by hunters is considered to have a positive impact on the population as well as on public perception.” *Id.* at 57. The Latvian lynx is not as threatened as the lynx population in other European countries, and studies have shown that a total ban on lynx hunting in Latvia may in fact lead to increased and unrestricted levels of poaching. See JĀNIS OZOLINS, ET AL., ACTION PLAN FOR THE CONSERVATION OF EURASIAN LYNX (LYNX LYNX) IN LATVIA 32 (2007(2002)), available at http://www.daba.gov.lv/upload/File/DOC/SAP_Lusis-07_EN.pdf. This finding may have influenced the Commission in allowing the derogation. Of course, concern over poaching is hardly likely to apply in the whaling context. Furthermore, hunting of the lynx is regarded not primarily as a commercial enterprise, as with whaling, but as a sport. For these reasons, the application of this derogation in the context of the lynx can be distinguished from its potential application in the whaling context.

⁹⁹ See Case C-6/04, *Comm’n v. United Kingdom*, 2005 E.C.R. I-9017, para. 111 (emphasis added).

¹⁰⁰ Case C-342/05, *Comm’n v. Finland* 2006 E.C.R. I-4716, para. 25 (Opinion of Advocate General).

¹⁰¹ *Commission Opinion on Iceland’s Application*, *supra* note 3, at 3.

product dramatically fell from 47,700 euros per capita in 2007 to 32,100 euros in 2008.¹⁰² With a population of over 300,000,¹⁰³ Iceland experienced an average unemployment rate of 3.2% between 1993 and 2002, but this rate rose to 8.0% in 2009 and 8.1% in 2010.¹⁰⁴ Whilst International Monetary Fund (IMF) projections place the 2012 rate at 6.5%,¹⁰⁵ Iceland is presently in economic difficulties and may wish to apply this derogation by highlighting the raised levels of unemployment and economic distress since 2008. In March 2010, the Institute of Economic Studies at the University of Iceland produced a report analyzing the effects of whaling around Iceland.¹⁰⁶ The report indicates that in 1973-1985, when the Icelandic company Hvalur Ltd. commercially whaled, the value of whale processing amounted to 0.7% of gross domestic product on average.¹⁰⁷ Furthermore, it estimates that if 150 fin and 150 minke whales were caught each year, they could provide around 80-90 jobs.¹⁰⁸

However, if Iceland attempted to derogate for social or economic reasons, it would also have to be sure that there were no “satisfactory alternatives.” Expanding the whale watching industry would arguably provide such an alternative.¹⁰⁹ Ten whale watching companies operated in Iceland in 2010, and the largest four companies employed approximately 120 people at the height of the season.¹¹⁰ It is estimated that the numbers of tourists participating in whale watching trips in Iceland has risen from 61,000 in 2000 to 125,000 in 2009.¹¹¹ The burgeoning Icelandic whale watching industry has allowed fisherman forced to leave the fisheries industry due to pressures on fish stocks to gain new employment.¹¹² The reintroduction of the whaling industry in Iceland has at times led to conflict with the newly established whale watching industry; for example, in May 2011, it was reported that whalers had processed a minke whale within a no-hunt zone established by the Icelandic government to exclude whaling operations near areas reserved for whale watching.¹¹³ A cessation of whaling may provide a boost to the whale watching industry with more tourists prepared to visit Iceland for whale watching opportunities.

It will be recalled that a member state would also have to provide evidence that any derogation is not detrimental to the maintenance of the species at a favorable conservation status. In essence, favorable conservation status is a “necessary

¹⁰² *Commission Analytical Report*, *supra* note 2, at 92.

¹⁰³ *Id.* (315,000 in 2008).

¹⁰⁴ Int’l Monetary Fund, *World Economic Outlook*, tbl. B.1 (April 2011), available at <http://www.imf.org/external/pubs/ft/weo/2011/01/pdf/tblpartb.pdf>.

¹⁰⁵ *Id.*

¹⁰⁶ INST. OF ECON. STUDIES AT THE UNIV. OF ICE., ÞJÓÐHAGSLEG ÁHRIF HVALVEIÐA [MACRO-ECONOMIC ANALYSIS ON THE EFFECTS OF WHALING] (2010), available at <http://www.ioes.hi.is/rammi31.html> (Ice.).

¹⁰⁷ *Id.* at 3.

¹⁰⁸ *Id.*

¹⁰⁹ *See infra* note 160.

¹¹⁰ INST. OF ECON. STUDIES AT THE UNIV. OF ICE., *supra* note 106, at 4.

¹¹¹ *Id.* at 5.

¹¹² Niels Einarsson, *From Good to Eat to Good to Watch: Whale Watching, Adaptation and Changes in Icelandic Fishing Communities*, 28 POLAR RES. 129, 132-33 (2009).

¹¹³ *Iceland’s Whaling Season Begins, with Alleged Violations*, WHALE & DOLPHIN CONSERVATION SOCIETY (May 02, 2011), <http://www.wdcs.org/news.php?select=939>.

precondition” for a valid derogation.¹¹⁴ “Conservation status” and “favourable conservation status” are defined in Article 1(i) of the Habitats Directive as follows:

[C]onservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2; The *conservation status* will be taken as “favourable” when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.¹¹⁵

The Commission has subsequently noted that a favorable conservation status is, “roughly speaking, . . . a situation where species populations are doing well with good prospects for the future.”¹¹⁶ In this respect, it is noteworthy that the fin whale currently has “endangered” status on the International Union for Conservation of Nature’s (IUCN) red list.¹¹⁷ This listing is, however, a global rather than a regional one,¹¹⁸ and “when the area west and southwest of Iceland was singled out, a significant increasing trend was found.”¹¹⁹ A 2001 estimate placed the population around Iceland at 25,800, a figure agreed to by the IWC’s Scientific Committee in 2006.¹²⁰ Iceland’s Marine Research Institute takes the view that a catch of 154 fin whales per year is “sustainable and precautionary for the calendar years 2011-2012.”¹²¹ Globally, the status of common minke whales is rated as a species of “least concern” on the IUCN red list.¹²² A 2001 estimate placed the population around Iceland at around 43,600, an estimate agreed to by the IWC’s Scientific Committee in 2003.¹²³ Iceland’s Marine Research Institute has indicated that “the minke whale stock around Iceland is considered to be

¹¹⁴ Case C-342/05, *Comm’n. v. Finland*, 2007 E.C.R. I-4730, para. 28 (Judgment of the Court).

¹¹⁵ Habitats Directive, *supra* note 53, art. 1, para. (i).

¹¹⁶ *Strict Protection of Animal Species Guidance*, *supra* note 75, at 11.

¹¹⁷ *IUCN Red List of Threatened Species: Balaenoptera physalus (Fin Whale)*, INT’L UNION FOR CONSERVATION OF NATURE (IUCN), <http://www.iucnredlist.org/apps/redlist/search/link/4e70e841-5446dad> (last visited June 18, 2011).

¹¹⁸ See *IUCN Red List of Threatened Species: Assessment Process*, IUCN, <http://www.iucnredlist.org/technical-documents/assessment-process> (last visited Sept. 14, 2011).

¹¹⁹ *IUCN Red List of Threatened Species: Balaenoptera physalus*, IUCN, <http://www.iucnredlist.org/apps/redlist/details/2478/0> (last visited June 18, 2011).

¹²⁰ *Iceland and Commercial Whaling*, IWC, <http://iwcoffice.org/conservation/iceland.htm> (last visited Sept. 14, 2011).

¹²¹ MARINE RESEARCH INST., ENGLISH SUMMARY OF THE STATE OF MARINE STOCKS IN ICELANDIC WATERS 2009/10 – PROSPECTS FOR THE QUOTA YEAR 2010/2011 171 (2010), *available at* <http://www.hafro.is/Astand/2010/35-engl-sum.pdf>.

¹²² *IUCN Red List of Threatened Species: Little Piked Whale*, IUCN, <http://www.iucnredlist.org/apps/redlist/search/link/4e70eb58-128aaa85> (last visited June 18, 2011).

¹²³ See *Iceland and Commercial Whaling*, *supra* note 120.

close to pre-exploitation abundance,” but that annual catch should not be more than 216 in 2011 and 2012.¹²⁴

There is perhaps an arguable case that a derogation is needed for “imperative reasons of overriding public interest, including those of a social or economic nature,” and that the killing of a limited number of minke and fin whales would not be detrimental to the maintenance of the species at a favorable conservation status. However, this argument is likely to be supportable only in the medium term as the Icelandic economy recovers over the next few years.¹²⁵ Moreover, all of the necessary conditions in Article 16 must be proven, and the Commission and the ECJ may well conclude that, for example, there are satisfactory alternatives to this derogation, especially when one takes into account that the grounds for derogation are to be interpreted restrictively. Should this be the case, any attempt to derogate under Article 16(1)(c) would be invalid.

2. *To prevent serious damage, in particular to . . . fisheries*

Iceland may wish to argue that whales consume too many fish and thereby reduce the catch for the fishing industry.¹²⁶ The Institute of Economic Studies at the University of Iceland has estimated that fishing for capelin, cod, and haddock could be significantly expanded if Iceland was to hunt 150 fin and 150 minke whales every year.¹²⁷ It is estimated that the capelin catch would increase by 13,800 tons, cod by 2200 tons, and haddock by 4900 tons.¹²⁸

However, a member state utilizing this derogation must clearly establish that hunting would prevent “serious damage” to fisheries. In the absence of clear and accepted evidence confirming that hunting would prevent such damage, the ECJ is likely to rule against the derogation. For example, in *Commission v. Finland*, the Commission alleged that Finland infringed the Habitats Directive by incorrectly issuing permits for the hunting of wolf (*Canis lupus*), a protected Annex IV(a) species, in order to prevent “serious damage.”¹²⁹ In its deliberations, the court noted as follows:

Although it cannot be automatically ruled out that authorizing the killing of one or several wolves in a pack certain of whose members cause or are likely to cause such damage may prevent, eliminate or reduce that damage, it must be stated that the information on the file is not capable of confirming that hypothesis. In that regard . . . certain parties are of the

¹²⁴ MARINE RESEARCH INST., *supra* note 121, at 171.

¹²⁵ The International Monetary Fund has recently noted that the “impressive progress in implementing program policies has underpinned the economic stabilization and nascent recovery” and that “the annual growth is still set to turn positive in 2011.” Int'l Monetary Fund, *Iceland: Fifth Review Under the Stand-By Arrangement, and Request for Modification of Performance Criteria and Rephasing of Access*, at 31, IMF Country Report No. 11/125 (June 2011), available at <http://www.imf.org/external/pubs/ft/scr/2011/cr11125.pdf>.

¹²⁶ See generally Jock W. Young, *Do Large Whales Have an Impact on Commercial Fishing in the South Pacific Ocean*, 3 J. INT'L WILDLIFE L. & POL'Y 253 (2000) available at <http://www.jiwlpl.com/contents/Young.pdf>.

¹²⁷ INST. OF ECON. STUDIES AT THE UNIV. OF ICE., *supra* note 106, at 4.

¹²⁸ *Id.*

¹²⁹ Case C-342/05 *Comm'n v. Finland*, 2007 E.C.R. I-4730 (Judgment of the Court).

opinion that continued hunting keeps wolves wary of humans and thus helps to reduce damage, while others consider that hunting of wolves which belong to packs only increases damage. Furthermore, it is stated that little biological research on this topic is available. In those circumstances, the Commission's complaint relating to the fact that hunting permits are issued on a preventive basis must be upheld.¹³⁰

The findings by the Institute of Economic Studies at the University of Iceland referred to above, which indicate that whales have a negative impact on the status of commercial fish stocks, have been criticized on the grounds that the model utilized in the analysis is too simplistic and fails to take into account so-called "beneficial predation" that occurs when cetaceans consume those fish species that would otherwise feed on cod and other commercially exploitable stocks.¹³¹ For these reasons, it would be difficult to prove conclusively the need for the derogation before the ECJ regardless of the other conditions that would need to be satisfied as to whether there is a satisfactory alternative to the derogation or whether the derogation is not detrimental to the maintenance of the fin and minke whale populations around Iceland at a favorable conservation status.

3. *For the purposes of research and education*

Although Iceland at the moment has ceased to whale for scientific purposes, from 2003 to 2007 a scientific research program was operational in relation to the minke. Additionally, Iceland had intended to conduct research into the status of fin and sei whales and, although this element of its research proposal to the IWC has not yet commenced, it is possible that it or a similar program will begin at some point in the future. If so, Iceland may wish to utilize this derogation should it by then have joined the EU. In this context, it is interesting to note the reaction within the IWC's Scientific Committee in 2003 when asked to review the Icelandic proposal in relation to minke, fin, and sei whales. The proposal's aim was to provide information on the "biology and feeding ecology of important cetacean species in Icelandic waters for improved management of living resources based on an ecosystem approach."¹³² In this regard, Iceland has indicated that, although it carries out research using non-lethal methods, "there are some questions that cannot be sufficiently addressed without taking whales" such as cetacean interaction with the marine ecosystem, as well as age and reproduction rates of whale stocks.¹³³ In relation to the latter, for example, Iceland's Ministry of Fisheries and Agriculture has indicated that "we need to sample earplugs and eye lenses for age determination and reproductive organs to determine reproductive status and vital

¹³⁰ *Id.* paras. 43-44.

¹³¹ See Lowana Veal, *Whaling Profitable but Bad for Iceland's Image*, IPS-INTER PRESS SERVICE (Apr. 16, 2010), <http://ipsnews.net/news.asp?idnews=51067>; see also *Questions and Answers on Whale and Whaling*, DEPT. FOR ENV'T FOOD & RURAL AFFAIRS (Feb. 12, 2009), <http://archive.defra.gov.uk/wildlife-pets/wildlife/protect/whales/whalingqa.htm#Q10>. A recent article by a marine biologist notes that whales "play a critical role in maintaining and enhancing productivity of the seas" and that "[i]t might well be that allowing whales and other large animals to recover to something like their previous levels would boost fish numbers rather than reduce them." Steve Nicol, *Givers of Life*, NEWSIDENTIST, 36, 37, 39 (Jul. 9, 2011).

¹³² IWC, *Report of the Scientific Committee*, 6 (SUPP.) J. CETACEAN RES. & MGMT. 1, 40 (2004).

¹³³ *Iceland and Whaling for Scientific Purposes*, MINISTRY FISHERIES & AGRIC. (July 10, 2006), <http://eng.sjavarutvegsraduneyti.is/news-and-articles/nr/1229>.

rates. Both of these are impossible to obtain by non-lethal means.”¹³⁴ This view was met with a mixed reaction within the Scientific Committee in 2003. For example, some on the Committee took the view that “the most reliable” source of data required for the purposes of the RMP “could be obtained from genetic analysis, and from genotype-based mark-recapture data on the movements of individual whales. These analyses are routinely conducted using skin tissue derived from biopsy samples and lethal sampling was not required.”¹³⁵

Bearing in mind that Article 16 of the Habitats Directive is interpreted restrictively and that any derogation requires a member state to prove that the necessary conditions are present, it could be argued that, even if the need for some sort of research is proven, the lethal manner of such research is not justified when a satisfactory alternative, namely non-lethal research, is available.

Application of EU Trade-related Measures Protecting Endangered Species

Attention now turns to the application of relevant EU trade-related measures protecting endangered species in the context of whaling.

A. The Protection of Species of Wild Fauna and Flora by Regulating Trade Therein (“CITES Regulation”)¹³⁶ and Commercial Whaling

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”)¹³⁷ entered into force on July 1, 1975. CITES operates by virtue of a permit system. All parties to CITES must designate at least one management authority with the ability to grant CITES permits and must establish at least one CITES scientific authority.¹³⁸ All current EU member states are CITES parties. As the EU is a regional organization rather than a state, it cannot become a party to the Treaty. However, the EU would be allowed to do so should the Gaborone amendment to CITES come into force.¹³⁹ Despite not being a party, the EU fully implemented CITES as long ago as January

¹³⁴ *Id.*

¹³⁵ *Report of the Scientific Committee, supra* note 132, at 41.

¹³⁶ Council Regulation 338/97, Protection of Species of Wild Fauna and Flora by Regulating Trade Therein, 1997 O.J. (L 61) 1 (EC) [hereinafter CITES Regulation]. Note that Commission Regulation 865/2006, 2006 O.J. (L 166) 1 (EC) establishes rules for the implementation of the Council Regulation.

¹³⁷ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243

¹³⁸ *Id.* art. IX, para. 1; *see also* CITES Regulation, *supra* note 136, art. 13.

¹³⁹ The Gaborone amendment was adopted in 1983 and would introduce an amended Article XXI to CITES allowing “regional economic integration organizations constituted by sovereign States which have competence in respect of the negotiation, conclusion and implementation of international agreements in matters transferred to them by their [m]ember [s]tates and covered by this Convention” to accede to the treaty. CITES, *supra* note 137, Gaborone Amendment, art. XXI, para. 2. To enter into force, the amendment would need fifty-four of the eighty states that were party to the Convention on April 30, 1983 to deposit their instruments of acceptance. *Gaborone Amendment to the Text of the Convention*, CITES, <http://www.cites.org/eng/disc/gaborone.php> (last visited Oct. 24, 2011). To date, forty-nine states that were party to CITES at that time have accepted this amendment. *Id.*

1984¹⁴⁰ and currently applies it by reason of the CITES Regulation, which came into force in 1997.

CITES utilizes appendices to differentiate the degree of threat a given species faces.¹⁴¹ Only CITES Appendix I species are granted the maximum protection under the Treaty in that the commercial trade in such species or specimens of such species is, with very limited exceptions, prohibited.¹⁴² However, Article XIV(1)(a) of CITES allows parties to adopt “stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species” included in Appendices I, II, and III, and the EU’s CITES Regulation imposes a number of stricter measures on its member states.¹⁴³ Annex A of the EU’s CITES Regulation, for example, currently includes all CITES Appendix I species *and* some CITES Appendix II and III species. Annex A species are afforded the strictest protection under the EU’s CITES Regulation.

Whilst only some cetaceans are included in CITES Appendix I,¹⁴⁴ *all* cetaceans are currently included in the EU’s CITES Regulation Annex A. Regardless of a species’ status under CITES, any species in Annex A of the CITES Regulation cannot be introduced into the EU unless a number of requirements are met.¹⁴⁵ Crucially, these conditions include a management authority of the EU “[m]ember [s]tate of destination” issuing an import permit that will not be forthcoming unless it is “satisfied that the specimen is not to be used for primarily commercial purposes.”¹⁴⁶ This prohibition extends not just to the importation of whales or whale products from a third country, but

¹⁴⁰ See Council Regulation 3626/82, O.J. 1982 (L 384) 1 (EEC) (repealed by current CITES Regulation, which was designed to overcome difficulties in implementing CITES in the EU); see also ELIZABETH H. FLEMING, *THE IMPLEMENTATION AND ENFORCEMENT OF CITES IN THE EUROPEAN UNION* 3-4 (1994) (discussing CITES implementation difficulties).

¹⁴¹ CITES Appendix I includes “all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.” CITES, *supra* note 137, art. II, para. 1. CITES Appendix II includes “(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 (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.” *Id.* art. II, para. 2. Appendix III of CITES includes “all species which any [p]arty identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other [p]arties in the control of trade.” *Id.* art. II, para. 3.

¹⁴² *Id.* art. III, para. 3.

¹⁴³ *Id.* art. XIV, para. 1(a); see also *The Differences between EU and CITES Provisions in a Nutshell*, EUROPEAN COMM’N - ENV’T, http://ec.europa.eu/environment/cites/pdf/differences_b_eu_and_cites.pdf (last visited Sep. 11, 2011).

¹⁴⁴ All cetacean populations subject to the IWC moratorium on commercial whaling are listed in CITES Appendix I with just one exception; the West Greenland population of minke is listed in Appendix II. Icelandic whalers do not harvest the West Greenland minke population, but instead concentrate their minke whaling operations on the central North Atlantic minke whale stock.

¹⁴⁵ See CITES Regulation, *supra* note 136, art. 4, para. 1. This requirement is subject to an exception which is inapplicable to any future Icelandic whaling: specimens listed under CITES Appendix II “including products and derivatives other than meat products for commercial purposes, taken by the people of Greenland under licence granted by the competent authority concerned, shall be treated as belong to Annex B.” *Id.* annex 12, x703. This exception relates to aboriginal whaling by Greenlanders only. *Id.*

¹⁴⁶ *Id.* art. 4, para. 1(d).

also to any cetacean brought into EU waters by an EU member state's whaling fleet. "Introduction from the sea" is defined in the CITES Regulation in the following terms:

the introduction into the [EU] of any specimen which was taken in, and is being introduced directly from, the marine environment not under the jurisdiction of any state. . . .¹⁴⁷

Although this definition fails to cover whaling within an EU member states' territorial waters or EEZ, it does govern the taking of any whales on the high seas that are then brought into a member state. As noted earlier, all recent Icelandic whaling operations take place within its territorial seas or EEZ, and the CITES Regulation would therefore not apply to such activities. But should Iceland ever expand its whaling operations to the high seas, such operations would come within the remit of the EU's CITES Regulation and therefore it deserves consideration.

It will be recalled that a management authority of the EU "[m]ember [s]tate of destination" must issue an import permit that will not be forthcoming unless it is "satisfied that the specimen is not to be used for primarily commercial purposes." The EU's CITES Regulation defines a "[m]ember [s]tate of destination" in the context of "introduction from the sea" as "a [m]ember [s]tate within whose jurisdiction the place of destination of a specimen lies."¹⁴⁸ Iceland would therefore be the "[m]ember [s]tate of destination" in this context since a "place of destination" is defined as "the place at which at the time of introduction into the [EU], it is intended that specimens will normally be kept."¹⁴⁹ In effect, Iceland's CITES management authority would need to issue an import permit for a harvested whale caught on the high seas (but not within its territorial seas or EEZ) and could not do so when the specimen would be used for primarily commercial purposes. Any future commercial harvesting of whales by the Icelandic whaling fleet on the high seas would fall within this prohibition.

In addition, the export of any whale meat from an EU member state to a state that is party to CITES would require the management authority of the EU state of export to be satisfied that a CITES import permit has been issued by the importing state.¹⁵⁰ No exceptions are allowed under the EU's CITES Regulation in this respect even if the importing non-EU state has a reservation to a CITES listing of a given cetacean. CITES stipulates that a required import permit could not be granted unless a management authority of the importing country "is satisfied that the specimen is not to be used for primarily commercial purposes."¹⁵¹ The export of whale meat from Iceland to Japan would therefore be effectively ruled out as such exports are for primarily commercial purposes. The domestic purchase and sale of whale products would also be prohibited in Iceland regardless of whether the product was obtained from whaling operations that took place on the high seas or within waters under national jurisdiction.¹⁵² However, the prohibition on trade in whale products in Iceland (but not the export ban to third countries) is likely to be set aside in relation to whale meat from cetaceans caught in

¹⁴⁷ *Id.* art. 2, para. (e).

¹⁴⁸ *Id.* art. 2, para. (h).

¹⁴⁹ *Id.* art. 2, para. (k).

¹⁵⁰ *See id.* art. 5, paras. 2(c)(ii), 3.

¹⁵¹ CITES, *supra* note 137, art. III sec. 3.

¹⁵² *See* CITES Regulation, *supra* note 136, art. 8, para. 1.

Icelandic territorial seas or its EEZ if Iceland makes a legitimate derogation for reasons of “overriding public interest, including those of a social or economic nature” under the Habitats Directive.¹⁵³

These conclusions, however, assume that minke, fin, and sei whales will remain on the EU’s CITES Regulation Annex A. In this regard, future Icelandic membership in the EU raises an interesting issue. Iceland became a party to CITES with effect from April 2, 2000 and currently has reservations to the listing on CITES Appendix I of minke, sei, and fin whales as well as blue, humpback, sperm, and Northern bottlenose whales. The EU’s CITES Regulation stipulates that its Annex A shall *inter alia* contain “species listed in Appendix I to [CITES] for which the [m]ember [s]tates *have not entered a reservation*.”¹⁵⁴ The measure further stipulates that Annex B is to contain “the species listed in Appendix I to [CITES] for which a reservation has been entered.”¹⁵⁵

Let us assume that following its accession negotiations with EU member states Iceland still retains its reservations. Presumably the minke, fin, and sei whales would then be regarded as Annex B species due to the reservations. While an import permit to introduce a given whale from the high seas into Iceland would still be required from the Icelandic CITES management authority, under the CITES Regulation, the issuing of such a permit would not be subject to the management authority in question being satisfied that the specimen is not to be used for primarily commercial purposes.¹⁵⁶ An import permit would not be forthcoming, however, if Iceland’s CITES scientific authority took the view that introduction into the EU would have a “harmful effect on the conservation status of the species . . . taking account of the current or anticipated level of trade.”¹⁵⁷ This requirement may well be satisfied as far as Iceland’s CITES scientific authority is concerned bearing in mind the Icelandic view that the minke and fin whale populations can be sustainably harvested in and around its waters. Furthermore, the export of an Annex B specimen from Iceland to a CITES party such as Japan would likely proceed as it would not be subject to the requirement that the specimen being exported is not to be used for primarily commercial purposes.¹⁵⁸

¹⁵³ Habitats Directive, *supra* note 53, art 16, para. 1(c). Assuming that Iceland makes such a derogation to the Habitats Directive, it would be derogating not only from the obligation to protect whales under Article 12(1) of the Habitats Directive, but also the obligation not to sell whales under Article 12(2). *Id.* art. 12, paras. 1-2. However, any derogation in respect of Article 12(2) would not apply to its obligations under the CITES Regulation, *supra* note 136, art. 8(1), which states that: “*the purchase, offer to purchase, acquisition for commercial purposes . . . sale, offering for sale or transportation for sale of specimens of the species listed in Annex A shall be prohibited.*” These prohibitions would seem to undermine the purpose of any derogation under the Habitats Directive made for reasons of “overriding public interest, including those of a social or economic nature.” Habitats Directive, *supra* note 53, art 16, para. 1(c). However, the CITES Regulation notes that an exemption to the prohibition in Article 8(1) can be granted by the management authority in question if the specimen originates “in a [m]ember [s]tate” and is “taken from the wild in accordance with the legislation in force in that [m]ember [s]tate.” CITES Regulation, *supra* note 136, art. 8, para. 3(h). Iceland would argue that any whales caught under a Habitats Directive derogation are taken in its own waters and therefore originate in its territory, and that the taking of the specimens complies with the applicable law in force as it has satisfied the derogation requirements under the Habitats Directive.

¹⁵⁴ *Id.* art. 3, para. 1(a) (emphasis added).

¹⁵⁵ *Id.* art. 3, para. 2(b).

¹⁵⁶ *See id.* art. 4, para. 2 (listing requirements for the import of Annex B species).

¹⁵⁷ *See id.* art. 4, para. 2(a) (condition most relevant to any Icelandic commercial whaling operation).

¹⁵⁸ *See id.* art. 5, para. 4.

Presently, no EU member state has a reservation to the listing of a species on CITES Appendix I or II.¹⁵⁹ The EU has established its own CITES' Management Committee, Scientific Review Group, and Enforcement Group. These committees comprise relevant EU member state representatives and are chaired by the Commission. Action is tightly coordinated to ensure uniformity of approach throughout the EU's single market and would include the making of reservations by member states to the listing of specimens on Appendix I or II. Any such reservation would in practice require the approval of all EU member states. The issue of Iceland's reservations will therefore need to be discussed in accession negotiations between Iceland and all twenty-seven EU member states. In this regard, it should be borne in mind that, even before these accession negotiations began, thirteen EU member states were among an international group that called for the withdrawal of Iceland's reservations to the listing of whales on CITES Appendix I in October 2009.¹⁶⁰ It therefore appears highly unlikely that Iceland would be

¹⁵⁹ Some—but not all—EU member states have entered reservations to the listing of species in Appendix III. As a consequence, instead of such species being listed in the CITES Regulation Annex C, these species are listed in Annex D. *See id.* art. 3, paras. 3-4. Annex D contains “the species listed in Appendix III to [CITES] for which a reservation has been entered.” *Id.* art. 3, para. 4(b).

¹⁶⁰ The October 2, 2009 joint demarche, available at http://www.hsi.org/assets/pdfs/joint_demarche_iceland_2009.pdf, notes as follows:

We, the Governments of Argentina, Australia, Austria, Belgium, Chile, Costa Rica, The Czech Republic, Ecuador, Finland, France, Germany, Ireland, Israel, Luxembourg, Mexico, Monaco, The Netherlands, New Zealand, Panama, Peru, Portugal, Spain, Sweden, The United Kingdom, The United States of America and Uruguay, wish to express our support for the Government of Iceland's decision to review and reassess its position on the hunting of whales.

We were deeply disappointed with the former Icelandic Government's decision to authorise the hunting of fin and minke whales over the next five years on 27 January 2009. The authorisation was put in place without presentation to the International Whaling Commission (IWC) and without regard for the long term interests of cetacean conservation. We further note that the Icelandic Marine Research Institute recommended in June an increased quota of up to 200 fin and 200 minke whales for the 2009/2010 season and that almost 200 whales have been killed.

We encourage the Government of Iceland to adhere to the internationally agreed moratorium on commercial whaling and to re-examine the decision to increase its fin and minke whale quota.

Both species are listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Appendix I and we remain extremely concerned with Iceland's reservation, entered in 2000, for these and other cetacean species. We urge Iceland to withdraw this reservation and safeguard these species from international trade.

We recognise the conservation efforts made by Iceland in other international agreements and hope the Icelandic Government will be able to extend this stance to fully support global efforts for cetacean conservation. Furthermore, we would like to draw attention to the considerable economic, social and educational benefits of Iceland's growing whale watching industry and share our strong endorsement of the Icelandic Government's plans to designate specific ocean areas for whale watching. We hope this action will reinforce

allowed to retain its reservations in the negotiations. To allow it to do so would in effect place the fin, minke, and sei whales on CITES Regulation Annex B and allow commercial trade in such species from an EU standpoint.

B. The Import of Whales or Other Cetacean Products Regulation and Commercial Whaling

Council Regulation 348/81, Common Rules for Imports of Whales or Other Cetacean Products (“Imports of Whales or Other Cetacean Products Regulation”),¹⁶¹ was adopted in January 1981 and prohibits, from January 1982, the introduction into the EU of a list of whale products listed in its annex if the products are to be used for commercial purposes. The products listed in the annex, *inter alia*, include fresh, chilled, or frozen meat, and whalebone.

A whaling operation that harvests whales in a member state’s territorial sea would not be subject to this measure as the whale would not have been imported into the EU since it was caught within the territory of an EU member state. Similarly, any whale caught in an EU member state’s EEZ would likely not be subject to the measure for the same reason, although there is no ECJ case law clarifying this particular point. However, any whales caught on the high seas and then brought into the jurisdiction (terrestrial or marine) of a member state would fall within this measure’s remit; the dead whale comprises meat and whalebone, and they are whale products being imported into the EU. As a consequence, the Import of Whales or Other Cetacean Products Regulation would prohibit the import of whales from any Icelandic high seas whaling operation into the EU and into Iceland should it become a part of the EU. This absolute prohibition would apply to such activities notwithstanding any, albeit highly unlikely, listing of whales in Annex B under the EU’s CITES Regulation.

C. The CITES Regulation and Whaling under Special Scientific Permit

It is important to reiterate that the CITES Regulation does not apply to current and recent whaling as these operations have been restricted to Iceland’s territorial sea and EEZ. However, what if, in the future, Iceland issues special permits to its nationals to

Iceland’s commitment, as a member of the Support Group, to the future of the IWC discussions on the management and conservation of all whale species.

In summary, we support the Icelandic Government’s decision to reassess its position on commercial whaling and once again call upon Iceland to respect the IWC’s global moratorium and end its commercial whaling.

See generally John Vidal, *US and EU Countries Officially Condemn Iceland’s Decision on Whale Hunting*, GUARDIAN (Oct. 2, 2009), <http://www.guardian.co.uk/environment/2009/oct/02/iceland-whaling>.

¹⁶¹ Council Regulation 348/81, Common Rules for Imports of Whales or Other Cetacean Products, 1981 O.J. (L 39) 1 (EEC) [hereinafter *Import of Whales or Other Cetacean Products Regulation*]. This measure was adopted prior to the adoption of the first measure implementing CITES in the EU; the preamble notes the common rules adopted are appropriate “pending the adoption at Community level of more general measures concerning the supervision of trade in species of wild fauna and flora.” *Id.* pmbl. Regulation 3626/82, *supra* note 140, came into force implementing CITES (now repealed), but the *Import of Whales or Other Cetacean Products Regulation* was not repealed at that time and still remains applicable law.

take whales from the high seas for research purposes? Assuming, as is likely, that all cetaceans remain on CITES Regulation Annex A, Iceland's management authority would still need to issue an import permit and be satisfied that the specimen is not to be used for primarily commercial purposes. "Primarily commercial purposes" is defined by the EU's CITES Regulation as "all purposes the non-commercial aspects of which do not clearly predominate."¹⁶² From 2003-2005 Iceland did not sell whale meat from whales caught by special permit and indicated that it had no plans to do so in 2006.¹⁶³ If this trend was to continue in the context of a future scientific program involving Icelandic whaling on the high seas, there would be no doubt that the introduction of whales from the high seas under special permit would not be considered to be for purposes of a primarily commercial nature.

However, an import permit still could not be issued unless Iceland's scientific authority has determined that the introduction into the EU of a specimen "would not have a harmful effect on the conservation status of the species"¹⁶⁴ and is taking place for one of a number of stated reasons, which include research "aimed at the preservation or conservation of the species."¹⁶⁵ Presumably Iceland would be satisfied that any whaling under scientific permit of minke or fin whales would meet these conditions and therefore whaling under special permit on the high seas could proceed. In making the determination that the take of whales in this way satisfies these conditions, Iceland's scientific authority would need to take note of any opinion of the EU's CITES Scientific Review Group. However, its obligation is simply to consider rather than to follow any such opinion.¹⁶⁶

The sale of whale meat inside Iceland (but not the export ban to third countries) is arguably also allowed as the CITES Regulation provides an exemption from the prohibition of the sale of Annex A specimens if they are "intended for research or education aimed at the preservation or conservation of the species."¹⁶⁷ Care would have to be taken that economic gain from such a sale is not the predominant feature of the whaling operation as this would render it subject to the prohibition on trade for commercial reasons. However, the potential domestic sale of whale meat in this way would be deemed illegal under the Import of Whales or Other Cetacean Products Regulation as will now be discussed.

D. The Import of Whales or Other Cetacean Products Regulation and Whaling under Special Scientific Permit

It will be recalled that the Import of Whales or Other Cetacean Products Regulation prohibits the introduction from the high seas into a member state of a list of whale products (including fresh, chilled or frozen meat) if the products are to be used for commercial purposes. However, whales caught on the high seas purely for reasons of scientific research would be allowed into a member state subject to the production of an

¹⁶² CITES Regulation, *supra* note 136, art. 2, para. m.

¹⁶³ *Iceland and Whaling for Scientific Purposes: Questions & Answers*, MINISTRY OF FISHERIES & AGRIC. (Oct. 7, 2006), <http://eng.sjavarutvegsraduneyti.is/news-and-articles/nr/1229>.

¹⁶⁴ CITES Regulation, *supra* note 136, art. 4, para. 1(a)(i).

¹⁶⁵ *Id.* art. 4, para. 1(a)(ii), art. 8, para. 3(g).

¹⁶⁶ *See id.* art. 4, para. 1(a).

¹⁶⁷ *Id.* art. 8, para. 3(g).

import license by the relevant competent, national authority.¹⁶⁸ Such an import license would only be granted when the competent national authority is satisfied that “the products in question are not to be used for commercial purposes.”¹⁶⁹ Any move to sell whale meat from cetaceans killed for reasons of scientific research would bring such whaling activity within the remit of the prohibition stipulated in the Import of Whales or Other Cetacean Products Regulation and therefore render such takes illegal. In the absence of such a sale, the Import of Whales or Other Cetacean Products Regulation would not prohibit the importation into Iceland of whales caught under special permit on the high seas.

Concluding Remarks

Accession negotiations with Iceland are ongoing at the time of writing. In time, a draft Treaty of Accession will be drawn up, and the Icelandic people will be given an opportunity to vote in a referendum on EU membership.¹⁷⁰ It is important, however, to note that Iceland will only be allowed to join the EU if all twenty-seven EU member states agree to its membership. The outcome of any negotiation is difficult to forecast, but a formal change to applicable EU environmental law or the adoption of a transitional period facilitating the continuance of current Icelandic whaling operations is a remote possibility. The provisions of the Habitats Directive will therefore apply to the taking of whales by Iceland in its territorial seas and EEZ. This measure provides for the protection of all cetaceans in these waters and would appear to rule out current Icelandic whaling operations. However, Iceland could derogate from the species protection requirements of the Habitats Directive, but only in clearly defined and limited circumstances. If it successfully derogates, Iceland would be able to continue its current whaling operations in its territorial seas and EEZ and to sell whale meat at home (but not abroad due to an effective ban on export of whale meat under the CITES Regulation). However, if the Commission takes the view that the conditions for derogation have not been satisfied, it has the discretion to bring infringement proceedings against Iceland before the ECJ. It will then be for the parties to put forward their viewpoints and for the ECJ to make a determination. If the ECJ rules against Iceland and Iceland fails to comply with the ruling, the matter can be brought back before the ECJ by the Commission whereupon the Court can impose a lump sum or penalty payment.¹⁷¹

In relation to the EU’s CITES Regulation, Iceland will continue to come under pressure from EU member states to withdraw its reservations under CITES to the listing of certain whales (including the fin, sei, and minke), and all cetaceans will remain on the EU’s CITES Regulation Annex A after the conclusion of accession negotiations. If this

¹⁶⁸ Import of Whales or Other Cetacean Products Regulation, *supra* note 161, art. 1.

¹⁶⁹ *Id.* p.mbl.

¹⁷⁰ In July 2010, the Icelandic government acknowledged that there are “different opinions in Iceland on EU membership, as has been the case in many member states and every enlargement round. The Icelandic government remains fully committed to the process we now embark on. However, the final word will rest with the Icelandic people who will make an informed and final decision in a national referendum.” *General Position of the Government of Iceland: Ministerial Meeting Opening the Intergovernmental Conference on the Accession of Iceland to the EU*, para. 11 (July 27, 2010), available at <http://eu.mfa.is/media/esb/27072010-iceland-statement.pdf>.

¹⁷¹ TFEU, *supra* note 70, art. 260, para. 2.

submission is correct, Iceland would be unable to carry out a future program to harvest whales commercially on the high seas and to land such whales at an Icelandic port under the CITES Regulation. The Import of Whales or Other Cetacean Products Regulation would also prohibit the importation of whales into the EU from the high seas for commercial reasons. Furthermore, Iceland would be unable to export any whale meat to a third country such as Japan under the CITES Regulation. However, if it successfully derogates under the Habitats Directive in relation to whales caught within its territorial seas or EEZ, the prohibition on the sale of whale meat from cetaceans caught in such waters under the CITES Regulation would not apply to sales in Iceland. Whaling under special permit on the high seas for reasons of scientific research would likely be permitted under both the CITES Regulation and the Import of Whales or Other Cetacean Products Regulation, but the latter ensures that the sale of whale meat from such a high seas research program must remain unsold.

The EU favors an end to whaling and seeks to afford a high level of protection to all cetaceans primarily under its environmental legislation, but also to an extent under its Common Fisheries Policy (CFP).¹⁷² The incidental catches regulation, for example, was adopted in 2004 under the CFP and introduces an independent observer scheme on board EU fishing vessels over fifteen meters long to monitor cetacean by-catch.¹⁷³ Any attempt by Iceland to continue its whaling operations as an EU member state will be closely scrutinized not only by the Commission but also by civil society, particularly environmental nongovernmental organizations. The level of scrutiny will make it politically very difficult for Iceland to continue whaling. Legally, as this article has sought to address, it may not be impossible to whale in EU waters under EU environmental law, but significant pressure will be placed on Iceland to justify any derogation under the Habitats Directive. The final arbiter may well be the ECJ, which will undoubtedly take the view that Article 16 of the Habitats Directive allowing derogations must be restrictively interpreted.¹⁷⁴

¹⁷² The question whether cetaceans can be included within the remit of the CFP lies outside the scope of this article. *See* ROBIN CHURCHILL & DANIEL OWEN, *THE EC COMMON FISHERIES POLICY* 34-36 (2010); *see also* Reid & Woods, *supra* note 71, at 159 (discussing the relationship between the CFP and the Habitats Directive, noting the “thorny legal question of whether the Common Fisheries Policy (CFP) trumps the requirements of the Habitats Directive or vice versa”).

¹⁷³ Council Regulation 2004/812, Laying Down Measures Concerning Incidental Catches of Cetaceans in Fisheries, 2004 O.J. (L 150) 12, 15 (EC).

¹⁷⁴ Case C-6/04, *Comm’n v. United Kingdom*, 2005 E.C.R. I-9017, para. 111.