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**IWC PROCEDURAL PRECEDENTS SUPPORTIVE OF THE
NEWLY-FORMED CONSERVATION COMMITTEE**

INTRODUCTION

At the 2003 Annual Meeting of the International Whaling Commission (“the Commission”), the Commission approved a landmark Resolution (Resolution 2003-1) for “Strengthening the Conservation Agenda of the International Whaling Commission,” which in part created a permanent Conservation Committee within the Commission. The mission of the Conservation Committee includes drafting an official conservation agenda for the Commission and subsequently implementing that agenda.

Prior to passage of Resolution 2003-1, there were concerns raised and extensive debate regarding Mexico’s inclusion of a procedural provision to amend the Rules of Procedure to reflect the Committee’s establishment. These concerns centered on Rule of Procedure R.1, which states that a 60-day prior notice is required to propose and vote on an amendment to the Rules of Procedure in an Annual Meeting.¹ Mexico and its co-sponsors agreed to proceed with the vote on the amended draft Resolution, with the understanding that Mexico would propose the

¹ R.1 Amendment of Rules: These Rules of Procedure may be amended from time to time by a simple majority of the Commissioners voting, but notice of any proposed amendment shall be dispatched by the most expeditious means available to the Commissioners by the Secretary to the Commission not less than 60 days in advance of the meeting at which the matter is to be discussed.

appropriate amendment to the Rules of Procedure prior to the next Annual Meeting in accordance with the 60-day prior notice rule.

The Chairman then ruled that a vote could proceed since there had already been exhaustive debate on the draft Resolution. The draft amended Resolution was adopted on a vote of 25 votes in favor and 20 against, thereby establishing the Conservation Committee. As requested in the language of the Resolution, the Commission then directed the Conservation Committee to meet prior to the 2004 Annual Meeting to organize its work and develop a Conservation Agenda for consideration at the Annual Meeting. The Chairman's Report from the 2003 meeting confirms the establishment of the Committee and the Commission's directions to its members to meet prior to this year's Annual Meeting. The Secretariat has scheduled time for the Committee to meet prior to, and then report to, the full Commission in the plenary session at this year's Annual Meeting.

While there is no question that the Commission views the vote on Resolution 2003-1 as conclusory, HSI anticipates that some countries might seek to reopen discussion on the issue at the upcoming Annual Meeting. Specifically, they may assert that the Resolution was procedurally flawed and should be revisited. This paper identifies some of the legal or procedural issues that may be raised and provides a summary of past practice and precedents within the IWC that make clear that the Conservation Committee was properly established.

In an effort to counter a potential argument in this year's Annual Meeting that the Conservation Committee was not properly established, HSI has researched the records of the Commission to determine whether there is a precedent for the creation of a permanent committee, and if so, to identify the procedure used. HSI was particularly interested in identifying any instances in which the Commission created a committee and then later took

action on the related administrative details regarding corresponding changes to the Rules of Procedure at a subsequent meeting. HSI has found that the process used to establish the Conservation Committee is consistent with the past practice of the IWC. Indeed, HSI has identified one recent positive precedent -- the creation of the Advisory Committee -- that in particular supports the position that the adoption of Resolution 2003-1 was procedurally sound.

I. Possible Challenges to the Newly Formed Conservation Committee

The controversy surrounding Resolution 2003-1 at the last Annual Meeting centered in part on the procedural steps that memorialized the creation of the Committee. Some may argue that Resolution 2003-1 has the following defects:

1. The provision of the Rules of Procedure addressing committees only expressly provides for “a Scientific Committee, a Technical Committee and a Finance and Administration Committee.” *See* Rule of Procedure M.1. There is no mention of a Conservation Committee, so some may argue that it cannot be created or convened without amending this Rule of Procedure.
2. In proposing Resolution 2003-1, Mexico did not provide the required 60-day prior notice to other Contracting Governments prior to the 2003 Annual Meeting, as required by Rule of Procedure R.1 for proposed amendments to the Rules of Procedure.

At the upcoming Annual Meeting scheduled for July 19 - 22, 2004 in Sorrento, Italy; some countries might argue that the Commission failed to properly establish the Conservation

Committee since Mexico failed to amend the Rules of Procedure to reflect the formation of the new committee.

Despite the prospect of such challenges, precedent shows that the Commission has in the past created new committees without first amending the Rules of Procedure. While there are several positive examples of the Commission allowing less than strict adherence to the Rules of Procedure, the strongest argument in support of Resolution 2003-1 is based on the procedural history of the Commission's recent creation of the Advisory Committee. The procedural steps taken, which are described below, demonstrate that the course of dealing in the Commission's plenary sessions and committee meetings allows for deviations from strict adherence to the Rules. The analysis below is based on a review of Chairman's Reports, Verbatim Records, Resolutions and committee reports (e.g., Finance and Administration Committee) over the last 20 years.

II. Past IWC Precedent: Creation of the Advisory Committee

As the process followed by the Commission in the recent creation of the Advisory Committee demonstrates, there have been instances in the past where the Commission has formed a committee in a plenary session without concurrently adopting an amendment to the Rules of Procedure to formally recognize the committee as an administrative matter. Indeed, one need only go back five to seven years to find this precedent. A review of the procedural steps taken to create the Advisory Committee over the four year period from 1997 to 2000 demonstrates that the Committee was not only formed, but also staffed and operational, prior to the formal adoption of an amendment to the Rules of Procedure that would memorialize its creation and purpose.

A. 1997 Creation of the Advisory Committee by Resolution

At the 49th Annual Meeting held in Monaco in 1997, New Zealand introduced a draft Resolution to establish a new Advisory Committee. The Resolution provided for the creation of the Advisory Committee and enabled it to provide advice to the Commission on various administrative matters that were not to overlap with the substantive areas considered by the Commission or other Committees. The Resolution did not provide for a formal amendment of the Rules of Procedure. After some discussion, the Resolution was adopted by consensus. Following the establishment of the Advisory Committee, the Committee convened and began work in advance of the next Annual Meeting. Only later were the Rules of Procedure amended to reflect the creation of the new Committee.

In the plenary session on October 23, 1997, the Commission discussed the creation of a committee that would oversee a review of the Secretariat's administrative operations and offer recommendations for increased efficiency and effectiveness. After some discussion about the administrative review (an idea that was initially proposed at a Commissioners' Meeting in Granada in early 1997) and the creation of the Committee, the Chairman requested that New Zealand draft two Resolutions; one to define a terms of reference for the administrative review, and another to create the Advisory Committee, which was among other things to oversee the administrative review. In suggesting a procedure by which to do this, the Chairman was relatively informal, saying nothing about a need for an amendment to the Rules of Procedure:

Clearly, we would want to adopt this very quickly and we wouldn't want to be voting on this sort of thing but a Resolution gives us a very clear direction and it certainly provides the Secretariat with clear direction.... It may be that the issue of the Advisory Committee might form the subject of a separate and second Resolution and again we can agree on that hopefully quite quickly. If we are going to establish an Advisory Committee, however the way in which we do that really depends on us agreeing that we are going to do it and as I had already established a time tomorrow morning for an informal Commissioners' Meeting at

9:30, I think that is one of the items that we will discuss at that point including possible membership of course.

See Intl. Whal. Commn 49th Ann. Meeting Verbatim Record, June 1998: 96. New Zealand then agreed to draft the two Resolutions and present them later in the meeting.

On the final day of the Annual Meeting, New Zealand presented the draft Resolutions for approval by the Commission. The language of Resolution 1997-9, “Resolution on the Need for an Administrative Review,” states that the Commission “[r]equests that the ‘Advisory Committee’ consider the following Terms of Reference as a basis for this [IWC administrative] review...[and] that the Advisory Committee select and appoint an external consultant to undertake such a review.” *See Ann. Rep. Intl. Whal. Commn 49, 1997: 50.* Here, the Commission directed the Advisory Committee to undertake tasks on its behalf; however it was not until the *subsequent* Resolution, Resolution 1997-10, “Resolution for the Establishment of an Advisory Committee to the Secretariat and Commission,” that the Commission actually formalized and established the Committee.² Significantly, the Commission voted to adopt the Resolution establishing the Committee and directed it to undertake tasks on behalf of the Commission without any corresponding revision to the Rules of Procedure. The only comment on this procedural issue came from the UK delegate, who stated, “I fully support the recommendation to establish the Advisory Committee but if we do agree to do that can I suggest

² *See id.* Recognizing this, the Chairman continued with the vote. He recognizes an implicit agreement among Commission members to proceed with the vote based on a general discussion of the issue, saying,

I realise that I have actually fallen into a hole here because despite the numerical sequence of these Resolutions we really can't consider this one [directing the Advisory Committee to oversee the administrative review] until we have decided whether we are going to have an Advisory Committee so I wonder if you would simply carry on. My hope being that we have already had enough discussion on this to this [sic] to be able to consider the package together to briefly introduce [the subsequent draft Resolution on the establishment of the Advisory Committee].

See Intl. Whal. Commn 49th Ann. Meeting Verbatim Record, June 1998: 168.

that we ask the Secretariat to produce proposals to incorporate this in our Rules of Procedure for discussion in Oman.” *Id.* The reference to Oman concerned the location of the subsequent 50th meeting of the IWC Plenary, scheduled for May 16 - 20, 1998 in Oman. He then reiterated that the decision to establish the new committee should be codified in the Rules of Procedure “at some stage.” *Id.* at 170. There were no objections from the Commission to the sequence of actions proposed at the meeting, and the Resolutions were approved. The Advisory Committee convened and conducted business relating to the administrative review of the Commission prior to the next Annual Meeting.

At the 50th Annual Meeting in Oman the following year, the Commission took action to amend the Rules of Procedure, thereby fully reflecting the creation of the Advisory Committee at the 49th Annual Meeting. The remarks of the British Chairman of the Finance and Administration Committee in the May 18, 1998 Plenary session verbatim record reflect that the Commission had agreed at the previous meeting to create the Advisory Committee and then address related procedural details, including defining the role of the Committee, in Oman:

UK: We agreed last year to establish an Advisory Committee and we also agreed that this year we would adopt Rules of Procedure formalising that decision. A proposed text was circulated by the Secretary, it’s recorded in the Report. There was discussion at the meeting, particularly about the last line, and New Zealand and Norway agreed to try and reformulate the sentence so that it would define the role of the Advisory Committee rather better, or in fact I think they are reformulating the whole paragraph and I understand they have reached some conclusions on that and there may even be a text but I haven’t seen it.

Norway: ...Yes, Norway and New Zealand has [sic] produced a text which is a revision of the one that was presented by the Secretariat.

See Intl. Whal. Commn 50th Ann. Meeting Verbatim Record, September 1998: 46. Norway said that the revised draft had not been circulated, and the Chairman then requested that it be circulated as a document, after which time the Chairman would come back to the issue. *Id.* Later that same day in the context of another, unrelated agenda item, the Chairman stated that he

had “consulted the Advisory Committee” earlier in the year on the matter under discussion. *Id.* at 55. This is further evidence that the Advisory Committee was not only established, but had also convened and considered substantive matters presented to it by the Chairman, prior to the adoption of a Rule of Procedure that would formalize its establishment.

Two days later, after circulation of the draft text of the Rule of Procedure to all the delegates, the Commission returned to the topic of the Advisory Committee to gain final approval. Again, the British chairman of the Finance and Administration Committee addressed the Commission:

This was discussed at the meeting of our Committee. As you will recall, we established the Advisory Committee by Resolution last year but agreed that we would regularise it this year by adopting a change to the Rules of Procedure. A proposal for a change was circulated by the Secretary and is set out I think in the Finance and Administration Committee’s Report. At our meeting it was agreed that New Zealand and Norway would reformulate the Rule. Those two countries have now done so and I have it in a reformulated version in front of me.

Id. at 177. He proceeded to read the language of the proposed Rule into the record:

The Commission shall establish an Advisory Committee. This Committee shall comprise the Chairman, Vice-Chairman, Secretary and two Commissioners to broadly represent the interests within the IWC forum. [...] The role of the Committee shall be to assist and advise the Secretariat on administrative matters upon request by the Secretariat or agreement in the Commission. The Committee is not a decision making forum and shall not deal with policy matters or administrative matters that are within the scope of the Finance and Administration Committee other than making recommendations to this Committee.

Id.

Despite the fact that the text of the Rule establishing the Advisory Committee was read into the record at the 1998 meeting, the Secretariat did not publish the final Rule of Procedure until 2000 -- two years after the Rule had been approved and three after the initial substantive creation of the Advisory Committee. At that point, it showed up in the record as Rule of Procedure M.9, Advisory Committee. This delay is further evidence that the Commission has in

the past properly established and operationalized committees prior to the adoption of and promulgation of corresponding administrative changes to the Rules of Procedure.

This recent precedent demonstrates that the Commission has allowed the establishment of a permanent committee without concurrently amending the Rules of Procedure to provide a role for the new committee.

III. Sixty-Day Notice Provision

As noted above, some members may also charge that the Resolution creating the Conservation Committee is procedurally flawed due to the fact that the Resolution called for an amendment to the Rules of Procedure and was not circulated to governments 60 days before the Annual Meeting. Past attempts to bypass Rule R.1 have been met with mixed results and there have not been enough examples to establish a definitive pattern of acceptable past practice within the IWC. It is important, however, to note that the 60-day prior notice is required for an amendment to the Rules of Procedure that will memorialize the establishment of a committee. Accordingly, the amended Resolution, which did not include language that would concurrently amend the Rules of Procedure, did not require 60-day prior notice to governments. Resolution 2003-1 was on the provisional annotated agenda for the 55th Annual Meeting, so discussion of the Resolution and its subsequent adoption were procedurally proper.³

³ It should be noted that the Commission has on rare occasions waived Rules of Procedure for an Annual Meeting. For example, at the 35th Annual Meeting, the Commission expressly waived Rule of Procedure C.1(b), which addresses the suspension of voting rights when a particular country's annual dues are in arrears (unless the Commission decides otherwise), for the duration of the meeting in order to expedite its work. *See Rep. Intl. Whal. Commn 34, 1984*: 13. This action was put forward for a vote and was approved. In the context of the vote on Resolution 2003-1, one could argue that by allowing a vote on the Conservation Committee to proceed, members were implicitly waiving Rule R.1, which requires proposed amendments to the Rules of Procedure to be circulated not less than 60 days in advance of the meeting at which the matter is to be discussed.

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CONCLUSION

The procedure that members followed at the last meeting in establishing the Conservation Committee is consistent with past IWC practice and precedent. The actions taken by governments to establish the Advisory Committee provide an analogous, recent example of the Commission's ability to affirmatively establish a committee and address corresponding amendments to the Rules of Procedure at a later meeting. Furthermore, the fact that the process followed in establishing the Advisory Committee went unchallenged in the plenary sessions of two Annual Meetings demonstrates that member countries have endorsed substantive actions -- even the creation of permanent committees -- and subsequently completed the "clean-up" procedural details. Therefore, there is precedent to support a two-step process -- the creation of a committee at one meeting, followed by a procedural amendment to authorize its existence at the subsequent Annual Meeting.

Lastly, we found no case where a committee had been created, then later disbanded due to procedural issues or a new majority.

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