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**JOINT STANDING COMMITTEE ON
TREATIES**

Monday, 27 November 2006

Members: Dr Southcott (*Chair*), Mr Wilkie (*Deputy Chair*), Senators Bartlett, Carol Brown, Mason, McGauran, Sterle, Trood and Wortley and Mr Adams, Mr Johnson, Mr Keenan, Mrs May, Mrs Mirabella, Mr Ripoll and Mr Bruce Scott

Members in attendance: Senators Carol Brown, McGauran, Trood and Wortley and Mr Keenan, Dr Southcott and Mr Wilkie

Terms of reference for the inquiry:

To inquire into and report on:

Treaty tabled on 17 October 2006.

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Committee met at 10.05 am

Amendments to the Schedule to the International Convention for the Regulation of Whaling, 1946

JENNINGS, Mr Mark Brandon, Senior Counsel, Office of International Law, Attorney-General's Department

McCULLOCH, Ms Robyn Eleanor, Acting Director, Cetacean Policy and Recovery Section, Marine Environment Branch, Marine Division, Department of the Environment and Heritage

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MASON, Mr David, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade

CHAIR (Dr Southcott)—I declare open this meeting of the Joint Standing Committee on Treaties. As part of the committee's ongoing review of Australia's international treaty obligations, the committee will hear evidence on one treaty action tabled in parliament on 17 October 2006.

I thank witnesses from various departments and agencies for being available for discussion on this treaty today. I remind witnesses that these proceedings are being televised and broadcast by the Department of Parliamentary Services. Should this present any problems for witnesses, it would be helpful if any issues could be raised at this time. Although the committee does not require you to give evidence under oath, I advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House of Representatives and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded a contempt of parliament. If you nominate to take any questions on notice, could you please ensure that your written response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings.

We will now take evidence on the Amendments, done at St Kitts and Nevis, in the Caribbean on 20 June 2006, to the Schedule to the International Convention for the Regulation of Whaling, done at Washington on 2 December 1946. Do you wish to make some introductory remarks before we proceed to questions?

Ms Petrachenko—Yes, thank you. We are pleased to be here today and, at the committee's request, are prepared to give a presentation. My colleague Mr Paull will do that in a few minutes. We will outline the new members of the International Whaling Commission, the outcome from the past meeting of the Whaling Commission, recent developments concerning Iceland, and the overall question of scientific whaling. We also have some documentation that has been provided—some background information—for committee members.

Ms McCulloch—For the committee's consideration is an amendment to the Schedule to the International Convention for the Regulation of Whaling. I understand that the Minister for the Environment and Heritage has written to the committee explaining that the parliamentary schedule did not allow these amendments to be presented before their entry into force. The amendments to the schedule extend the international moratorium on commercial whaling for another year. In 1982 the IWC voted by a three-quarters majority to set the commercial catch numbers to zero, commencing the moratorium in 1985. These amendments are automatic every year when the IWC does not vote by a three-quarters majority to lift the moratorium. There was no such vote or motion at this year's IWC. These changes do not add an additional burden to Australia's treaty obligations or have financial impacts upon Australia.

The committee secretariat suggested that the committee would appreciate a brief presentation from the department on recent developments relating to the international convention. The presentation will be given by Mr Martin Paull.

Mr Paull—As Donna outlined, there are four topics in the presentation. These include new members of the IWC since you last heard from us and outcomes from this year's IWC. We saw your press release and note that you are interested in what is happening with Iceland. The fourth topic is scientific whaling in the Southern Ocean.

Since you last heard from us, three pro-whaling nations—Cambodia, the Marshall Islands and Guatemala—have joined the IWC. Israel and Slovenia have joined on the nominally pro-conservation side. It is important to note that Slovenia have only just joined and they were not present at this year's meeting of the IWC. They will be there next year. The total membership at IWC 58 was 70 member countries, with approximately 36 on the pro-whaling side and 34 on the pro-conservation side. It is important to note that binding resolutions of the IWC are carried by a three-quarters majority. That would actually mean that there are 53 votes required on either side of a motion for there to be a binding resolution.

At this year's meeting, there was a resolution passed by a simple majority, known as the St Kitts and Nevis declaration. It is a non-binding resolution. Basically, the St Kitts and Nevis declaration is a pro-whaling position paper. It outlines what they call the 'normalisation' of the IWC. It states that countries opposed to commercial whaling are acting contrary to the object and purpose of the international convention. They claim that the IWC will collapse unless whaling resumes. It is important to note that the declaration includes no operative paragraphs and does not call on the IWC to take any action. As I said, it is basically a position paper.

What is Australia's view on the declaration? Australia considers that pro-whaling countries are working to return the IWC to the days when poor management almost led to the extinction of whales. Australia's view is that, rather than normalisation, we should be seeking to modernise the IWC. The objective of modernisation can only mean that we embrace the non-consumptive

use of whales through activities such as tourism, just like Australia's highly successful whale-watching industry.

What is Iceland up to? In October this year, Iceland announced that they were about to resume commercial whaling. The stated reason was: 'The Icelandic economy is overwhelmingly dependent on the utilisation of living marine resources.' The moratorium on commercial whaling was agreed by the IWC in 1982. At the time, Iceland did not object to the moratorium and were therefore bound by it. Iceland could have put in a reservation against the moratorium—they can do so within 90 days—but they chose not to. In 1992 Iceland left the IWC, only to rejoin in 2002 with a reservation against the moratorium. The reservation they brought with them when they rejoined basically meant that they did not want to be bound by the international moratorium on whaling. When Iceland rejoined, Australia, together with 18 other members of the IWC, registered a formal objection to Iceland rejoining with a reservation. The objection remains to this day. In essence, Australia's objection was that they should be bound by the moratorium, that they cannot leave an organisation where they were present for that vote and then rejoin with a reservation.

Until this year, Iceland have been conducting scientific whaling, which is possible under article VIII of the international convention. Upon Iceland's announcement that they were resuming commercial whaling, on 1 November Australia joined 25 other countries in a demarche to formally protest to Iceland about their decision to resume commercial whaling. What does the IWC think? They have not expressed a formal view on the issue. The commission only expresses its view as a body through meetings of the commission. The next meeting of the IWC is in May 2007 in Anchorage.

Slides were then shown—

Mr Paull—With respect to scientific whaling in the Southern Ocean, any day now the Japanese whaling fleet will reach the Southern Ocean. The picture here shows a minke whale on the deck of a whaling factory ship. I will show you a picture of what one looks like with its skin on. That is a minke whale there. You can see they are about seven to 10 metres long and can weigh between five and 15 tonnes. This map here indicates their distribution. You can see down in the bottom left-hand corner a bit of a scale, with a human being at the very bottom. The scientific whaling program is known as JARPA2. JARPA stands for Japanese Research Program Antarctic.

In 2005 Japan commenced a new scientific whaling program in the Southern Ocean. Japan reported to the IWC that, under the program, they took 853 minke whales and 10 fin whales in the Southern Ocean last summer. Japanese whaling fleets set sail for the Southern Ocean on 15 November this year. This season, Japan intends to take up to 935 minke whales and 10 fin whales. Next year, they propose to take the same number of minkes, to increase the take of fin whales to 50 and, for the first time, take 50 humpback whales. What do these whales look like? Here is the minke we saw before. The humpback whale you can see on the scale is the one just above it. I should point out that this is a Northern Hemisphere humpback whale. Southern Hemisphere humpback whales have a white underbelly. The distinguishing features of the humpback whale are not so much their humpback but their large fins, their pectoral fins, which you can see here. You can see they are quite large. Even on this representation here, they are larger in relationship to the other whales.

The humpback whale is the whale that most Australians are likely to see when they go whale watching. They migrate from the Southern Ocean up the west and east coasts of Australia each year. They feed down in the Southern Ocean during summer and migrate to tropical waters during winter months. That is when we see them—as they migrate up and down the coast.

The last whale is the fin whale. You can see that the fin whale has a white underbelly, as I mentioned before with the Southern Hemisphere humpback whale. Ten of those were taken last year in Antarctic waters. You can see that it is the second-largest one. The blue whale is the largest whale—in fact, it is the largest animal to have ever lived, including the dinosaurs. That concludes my presentation. As Robyn said, we have handed out some information on what Australia is doing with regard to non-lethal scientific research, the protection of whales and production of whale-watching guidelines that ensure the safety of the whales and also give people the opportunity to view these animals safely. My colleagues and I will be happy to answer any questions you may have.

CHAIR—Thank you very much for your presentation. As you are aware, the committee is very interested in the issues surrounding whales. Was a vote taken on extending the moratorium on commercial whaling at the International Convention for the Regulation of Whaling?

Mr Paull—The vote was taken in 1982. It was at that time that the moratorium was enacted. The way they did that was to set the commercial catch amounts to zero. Every year that the IWC meets and does not vote by a three-quarters majority to set those catch rates to a different level—that is, above zero—the commission crosses out the relevant year that the catch of zero applies to. So, last year, it was 2005-06. This year it will be 2006-07. So it was the decision in 1982 that set the moratorium.

CHAIR—So it would require a 75 per cent majority to see commercial whaling reopened amongst the member states?

Ms McCulloch—That is correct, yes.

CHAIR—What is Iceland's status? Are they still a member of the IWC?

Ms McCulloch—Australia and 18 other countries do not recognise Iceland's readmission, but they are treated as a member.

CHAIR—How does it work if you have a moratorium on commercial whaling but a member state announces that they are going to resume commercial whaling?

Ms McCulloch—I will defer to Mr Dengate.

Mr Dengate—I am not sure that I would 100 per cent agree with my colleague that Australia does not recognise Iceland as a member of the IWC. Iceland did lodge a reservation when it rejoined the convention in 2002. From that, Australia lodged an instrument saying that we did not consider that their reservation was compatible with the object and purpose of the convention. While Iceland's actions for commercial whaling may not strictly be contrary to their international obligations, the Australian government has consistently maintained that the reservation is contrary to the object and purpose of the International Convention for the

Regulation of Whaling. There was a vote in 2002 by the IWC to readmit them as a member, but Australia did lodge that note saying that we did not believe that the reservation was compatible with the object and purpose of the convention.

CHAIR—What is the next step for Iceland? Is it okay to be a member and resume commercial whaling, even though the organisation has a moratorium on commercial whaling?

Mr Dengate—The question revolves around the issue of their reservation and whether member states of the IWC believe that their reservation is consistent with the object and purpose. We note that, with Iceland's reservation, they stated that under no circumstances will whaling for commercial purposes be authorised in Iceland without a sound scientific basis and an effective management and enforcement regime. We note that Iceland does not appear to have carried out the necessary steps that it set itself with its reservation, so it is most appropriately taken up with the IWC.

CHAIR—In terms of the scale of what we are talking about, is it true that the size of Iceland's announced commercial whaling is much smaller than Japan's scientific whaling?

Ms McCulloch—That is correct, yes.

CHAIR—By a factor of 10?

Ms McCulloch—Probably 20.

CHAIR—So Japan's scientific whaling is 20 times bigger than what Iceland has announced in their resumption of commercial whaling?

Ms McCulloch—At least.

CHAIR—How do we resolve this distinction between commercial whaling and scientific whaling?

Mr Paull—Under the IWC, countries can issue themselves scientific permits and it is completely within the rules and the charter of the IWC. They can issue themselves with permits to conduct scientific whaling. That is the treaty. I think I am correct in saying that it is really a matter to be worked out within the IWC.

CHAIR—This is my last question, and then I will open up to other members. Iceland has been conducting scientific whaling since 2002, so why have they made this decision to go to commercial whaling but with very low numbers?

Mr Paull—I guess it is the Iceland government's decision. We do not really know why they have decided to do that.

Senator TROOD—Mr Dengate, on this issue of Iceland's position within the commission: notwithstanding our reservation, it is permitted to vote on all resolutions of the commission, so, for all intents and purposes, it is a fully functioning member of the commission. Is that right?

Mr Dengate—Correct.

Senator TROOD—What would it take for a country to be removed from the commission if the commission chose to force one of its members out?

Mr Dengate—That is a very unlikely event, considering that you would need a mechanism within the convention itself.

Senator TROOD—That is what I am asking. Is there a mechanism within the convention whereby other members can force a non-complying member to retire from the commission or be forced out of it?

Mr Dengate—Not that I am aware of.

Senator TROOD—Mr Paull, you do not seem to be able to explain why it is that Iceland resumed or decided to take on commercial whaling. Can you explain to us why they resigned from the commission in 1992? Does anybody have an explanation for that?

Mr Paull—No, I do not have that information here—unless one of my colleagues can answer that. Perhaps we can undertake to get back to you on that.

Mr Mason—I was involved with the IWC some years back. I am aware that Iceland took that decision in 1992 as a protest against what was happening in the International Whaling Commission, which was, in their view, moving from being a convention to regulate the amount of commercial whaling to something different—something that was heading towards conservation. So they took it as a protest. It was a political act, and they did it on principle. I think it is likely that their newest decision is also very much a tactical political act to challenge, as the IWC increasingly moves in the direction that Japan and the whalers would want, the conservationist countries. Iceland sees an opportunity to, if you like, mischief-make—to take a position that will create the questions and quandaries that we have just been talking about this morning.

Senator TROOD—When it sought to resume its membership in 2002, you suppose that it was part of a strategic move to press the commission on these issues of commercial whaling and scientific whaling. Is that right?

Mr Mason—That would be my best estimate as to why they did it. As other speakers have said, we do not have the capacity to look into the mind of Iceland but, given their record in the IWC and given their statements about their positions over many years—at least from 1992 onwards—I would assess that that is the most likely reason as to why they are doing it.

Ms Petrachenko—When Iceland came back to the IWC in 2002—if I can just quote from its terms of adherence it might shed some light on its thinking—it said:

Notwithstanding this, the Government of Iceland will not authorise whaling for commercial purposes by Icelandic vessels before 2006 and, thereafter, will not authorise such whaling while progress is being made in negotiations within the IWC on the RMS. This 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 a reasonable time after the completion of the RMS.

What that means is that, within the IWC, there have been ongoing negotiations for years about this revised management scheme. That is where you take the scientific information on populations, and the scientists look at what that means and the numbers. There has been no agreement. This year in St Kitts and Nevis it was the same thing—there was no agreement. So Iceland said very clearly when it came in in 2002 that, if it did not feel there was enough progress by 2006 on the revised management scheme, it would look at resuming commercial whaling.

Senator TROOD—Are negotiations or discussions continuing on the revised management scheme?

Ms Petrachenko—Yes. We anticipate this at the next meeting in Anchorage in May. The scientific committee usually meets for about a week. That is where the scientists try to reach agreement. My understanding is that we have some basic disagreements in approach—even on a scientific basis.

Senator TROOD—You do not sound terribly optimistic.

Ms Petrachenko—It has been a number of years in the making. We can always be hopeful that progress will be made this year.

Senator TROOD—I am always hopeful and very optimistic, but sometimes one confronts brick walls on these things. Mr Mason, we do not have any diplomatic representation in Iceland, do we?

Mr Mason—No.

Senator TROOD—Who represents our interests there—anybody?

Mr Mason—Our ambassador in Copenhagen would be accredited. We do have non-resident accreditation.

Senator TROOD—I am just wondering whether there has been a change of government or a change in the political circumstances in Iceland which might provide us with some kind of insight as to why they have suddenly changed their position on this issue.

Ms Armstrong—I think it is very much as Ms Petrachenko has outlined—that is, that this has been something they have had in mind for quite some years. It was very much dependent upon the sort of movement that they saw towards the development and the acceptance of the revised management scheme. Last year and early this year there was quite a lot of discussion that negotiations on that scheme were not going as well or as quickly as the pro-whalers had hoped for. I think Iceland decided that, because of this perceived lack of progress in the development and the implementation of this scheme, they would go ahead and do what was flagged back at the time of rejoining the IWC.

Senator TROOD—Has the mission in Copenhagen sent us any kind of analysis of the politics of this from Reykjavik?

Ms Armstrong—We have not had a detailed analysis from discussions with Iceland. We do talk to the Iceland government about whaling issues, but the positions in the IWC are extremely polarised at the moment and it is often not as easy an exchange as we might like or hope for. The post in Copenhagen took part in a demarche that was led by the United Kingdom quite recently to put our concerns about the resumption of commercial whaling on the record. We have asked the post to continue to monitor developments there. We talk very frequently with our like-minded colleagues in the UK and other European countries that have a pro-conservation position and also with the Americans. It is something that we will be keeping a very close monitoring eye on as we move forward to the next meeting of the IWC at Anchorage next year.

Senator TROOD—Can we expect any change in the membership of the commission between now and then? Has there been any notice given of countries that are likely to join that might affect the balance of numbers either pro or con conservation?

Ms Armstrong—Of course, both sides of this whaling issue are engaged in this sort of activity—the Japanese on one side and the like-minded countries on the other. We have a very active diplomatic effort underway that we have been working on now for some years, where we actively try to identify countries that we believe may be helpful in a pro-conservationist sense. Quite a lot of the newly acceded European Union countries of course have very strong credentials in this regard—and we have made approaches to them—which is why a country like Slovenia is considering coming on board. Israel are a strongly pro-conservationist country. They came on board last year and were very helpful during the IWC meeting with regard to pursuing pro-conservation objectives. There is of course a danger, as we do not really want to see small countries caught up in a battle between us and Japan on this issue, and I think we have to be quite targeted in who we perhaps choose to approach or who we think might be willing to support a strongly pro-conservationist line.

Senator TROOD—I do not want you to reveal your battle plan—we do not want to give advantage to the opposition—but are there still countries that you have targeted and are still working on who might be prepared to support the position that Australia takes?

Ms Armstrong—There are a number of countries that do have a great deal of concern about the conservation of whaling stocks globally. So, yes, I think there are countries that are still ‘possibles’.

Senator CAROL BROWN—When Iceland left the IWC between 1992 and 2002, did they engage in any whaling?

Ms McCulloch—I am not aware of it, but I would have to check on that for you.

Senator CAROL BROWN—Thank you. Mr Dengate, you talked about Iceland having given assurances about taking certain steps before they commenced whaling, and you indicated that those steps had not been taken and that would be discussed in Anchorage next year.

Mr Dengate—That is something that the Australian delegation would take up.

Senator CAROL BROWN—What can we expect to see from those discussions?

Mr Dengate—That would depend on whether there was support within the IWC. We would basically be drawing to the attention of the commission Iceland's not fulfilling the steps it set out in its own reservation.

Senator CAROL BROWN—To put it bluntly, if we had the numbers for our position, basically all we could do is to draw their attention to their undertakings.

Mr Dengate—Yes.

Senator CAROL BROWN—What was the vote on the St Kitts and Nevis amendment?

CHAIR—I had noted 36 to 34 when someone raised it earlier.

Mr Paull—It was 33 to 32, with one abstention; a simple majority.

Senator CAROL BROWN—What is the process to overturn an amendment that has been accepted—if we get to Anchorage and the numbers are reversed?

Ms Armstrong—This was a declaration.

Senator CAROL BROWN—Yes, I understand that. But is there a process where that can be overturned in any way?

Ms Armstrong—Countries can put up resolutions that might seek to re-establish pro-conservation positions, and you can put those resolutions to the vote. The key to any lasting change in the IWC is a three-quarters majority.

Senator CAROL BROWN—I understand that. How many member states put forward an objection to the St Kitts and Nevis amendment?

Ms Armstrong—Could you put the question again?

Senator CAROL BROWN—I understand that you can lodge a formal objection to a declaration like this. I wonder how many members of the IWC have done so.

Ms Armstrong—We would have to take that on notice to see whether any members might have done so after the St Kitts meeting concluded.

Senator CAROL BROWN—I would appreciate that. If they have, can you name the countries?

Ms Armstrong—Yes.

Senator CAROL BROWN—I have one other question. You talked about the commercial whaling being set at zero. What about whaling done under the scientific premise? I want to know whether there is a limit to the permits they can set themselves.

Ms Armstrong—As I understand it, there are no limits. Individual countries can decide to issue whatever quota they wish under article 8, mentioned earlier.

Senator CAROL BROWN—Did we receive reports on the scientific research? Do Japan present any of their findings?

Ms Armstrong—They have presented findings from time to time, but they are not prolific, in terms of the reports that they prepare, pursuant to their scientific research.

Senator WORTLEY—Just going back to the moratorium, I understand that it is a year-by-year proposition at the moment. Is there any reason for that? Are there plans to extend it to perhaps a more indefinite period of time?

Ms McCulloch—It is dependent on the assessment of the whale stocks. It is a very tricky thing for scientists to come up with an agreed figure of stocks of any whale population in any particular area, so this is a continuing assessment. The IWC has agreed numbers for a few species in certain areas. It is for a very few. The Antarctic minke whale stocks have been assessed for at least 10 years. I think they are hoping—but they say this each year—to come up with a figure this year, at this coming meeting. But there is no guarantee that the scientists will agree to that one. There are always problems.

Senator WORTLEY—Have there been discussions about making it a two-year or three-year moratorium rather than a year-by-year proposition?

Ms McCulloch—Not that I am aware of.

Senator WORTLEY—What were the benefits of it being just for 12 months? I would have thought that, if it were based on research and the research is ongoing, there would be some benefit in making it a longer period of time.

Ms McCulloch—I think the pro-whalers would like to get back to whaling, so they are hopeful that the scientists will reach an agreement on a yearly program. I do not think anybody has suggested yet that they go to a longer one.

Senator WORTLEY—How does Australia enforce the prohibition on killing whales in the Australian Whale Sanctuary and, in particular, in the Australian Antarctic Territory?

Mr Dengate—Thank you for your question. Australia's claim to the Australian Antarctic Territory is recognised by only a very small number of states—New Zealand, Norway, France and the United Kingdom. Japan does not recognise any claims to Antarctic territory and therefore does not recognise the waters off the Australian Antarctic Territory as being Australia's national jurisdiction. Japan, together with a vast number of countries, regards this as high seas.

Under the Antarctic Treaty system, it is longstanding practice for each party to regulate the activities of their own nationals on the Antarctic continent and in these surrounding waters. This practice allows all parties to work together to protect the environment and manage pressures on the Antarctic continent regardless of the recognition of sovereign claims to the territory. Both Australia and Japan are parties to the Antarctic Treaty. Action to apprehend whaling vessels—

Japanese or otherwise—engaged in whaling in what we regard as the Australian Antarctic waters would have implications for the Antarctic Treaty system, which serves Australia's long-term interests in Antarctica.

Senator WORTLEY—Does Japan in any way breach the treaty?

Mr Dengate—The issue of whaling does not come under the Antarctic Treaty.

Senator WORTLEY—So there is no way that it can be seen that Japan is in breach of the Antarctic Treaty?

Mr Dengate—My understanding is no.

CHAIR—Could I ask a little about the science. Iceland have said that the numbers of minke whales in Icelandic waters are 43,000. The numbers of fin whales in Iceland are 25,000. I understand that that has been agreed by the IWC's scientific committee but that the fin whale is endangered based on the definition that its numbers have halved worldwide over the last three generations. Is it true that there are those sorts of numbers of whales in Icelandic coastal waters but also that the fin whale is considered endangered based on that definition?

Ms McCulloch—The agreed figure from the IWC for the North Atlantic, which is central and north-eastern, up until 2001 was 30,000 fin whales. To give you an idea of the fin whale population worldwide, we estimate that 750,000 animals were taken in the commercial whaling period last century. So that is the scale of what we are talking about.

CHAIR—Do you have anything to add to that information that we have from the IWC?

Ms McCulloch—No. Fin whales are an offshore species, certainly in the Southern Hemisphere, so we have no indication of their numbers at all. Nobody has been able to survey them. In the Northern Hemisphere they are seen more often, and Iceland seem to think they have enough whales to withstand a small take.

CHAIR—There being no further questions, I would like to thank you very much for coming today.

Resolved (on motion by **Mr Wilkie**):

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 10.47 am