
Iceland's Reservation at the International Whaling Commission

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Abstract

Reservations to international treaties represent one of the most difficult areas to negotiate through in international law. The difficulties with reservations lie in their legal applicability and the political implications that reservations create for the subsequent utilization of the treaty and its members. The full extent of these difficulties has recently been displayed in the International Whaling Commission. In this instance, although the reservation was ultimately successful, a certain amount of integrity was retained by the Commission as it ultimately controlled the process and the overall decision was not dictated to the Commission on a bilateral basis.

1 Introduction

In late 2002, Iceland was readmitted as a member of the International Whaling Commission (IWC) as a signatory to the International Convention on the Regulation of Whaling (ICRW).¹ This readmission followed an acrimonious process in two earlier meetings when their attempt to rejoin the IWC was rejected. Its initial attempts were refused by a majority vote by the IWC because of the 'conditional' reservation to the Schedule which is attached to the ICRW. The second time Iceland was refused membership (the majority of the IWC agreed that the issue had effectively been dealt with at the meeting in the previous year as the reservation was substantially the same as their first attempt) they left the meeting, refusing to even participate as an observer nation² and indicated their intention to resume their international trade in whale meat (following a 14-year hiatus) regardless.³

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¹ International Convention for the Regulation of Whaling, 161 UNTS 143.

² Anon., 'Bluster over Blubber', *New Scientist*, 25 May 2002, at 9.

³ Anon., 'Iceland', *New Scientist*, 29 June 2002, at 11.

Iceland did not get to carry this threat out, as they were victorious in joining the IWC with their third attempt. This success for Iceland occurred because the Chair chose not to follow his earlier decision (i.e. that the matter had been dealt with earlier because the reservation was the same). Accordingly, with the third attempt, the Chair implicitly suggested that the Reservation this time was different, and as such, the issue had to be dealt with afresh. Although this was challenged, a series of votes were undertaken, trying to force the Chair to lead one way or another (on whether it was a different reservation or not). After an exhausting and confusing process (including Iceland being able to vote on their own admission), Sweden decided that this was a new Reservation (and effectively swung the balance of power against those who wanted to keep Iceland out of the IWC with its reservation). This subtle change allowed a sequence to follow, in which after a 19/18 vote that it was a new reservation, a number of other reticent countries (such as Ireland) decided to no longer contest the Icelandic membership bid, and welcomed Iceland (although they, and many others, made it clear that their objections to Iceland's reservation stood, irrespective of their being seated as a member government of the ICRW). Despite Iceland's eventual success in gaining membership to the IWC with a reservation, this controversy raised many questions of international law, which this article seeks to answer.

2 Iceland at the IWC

Iceland, although not an original signatory to the ICRW in 1946, deposited a receipt of notification of adherence with the depository the following year. For the majority of its time within the IWC, it was broadly in the 'pro-whaling' camp. This stance became pronounced when the moratorium on commercial whaling was finally agreed (see below) and Iceland vowed to keep whaling. However, Iceland elected not to continue whaling which, in accordance with the ICRW, it could have done by entering an objection to the moratorium as embodied in Paragraph 10(e) of the Schedule. Instead, to avoid confrontation with strong opposing countries including the United States, it began conducting whaling under the scientific loophole found in Article VIII of the ICRW. The utilization of this loophole became controversial as the scientific merits of the research were solidly criticized, as was the practice of exporting the resulting whale meat to Japan.⁴ In the face of mounting external criticism of this practice Iceland threatened 'severe repercussions in the attitude of Iceland towards the Commission'⁵ before stopping the practice of scientific whaling in 1989.⁶ The following year, after applying for quotas which were refused by the IWC, Iceland threatened to leave the IWC and to set up a rival body of its own to regulate whaling in the North Atlantic. It was suggested that this would be an 'alternative framework for

⁴ Anon., 'Iceland Fights on in War of Whales', *New Scientist*, 7 August 1987, at 21.

⁵ Cherfas, 'Whaling Continues as Commission Wrings Its Hand', *New Scientist*, 19 June 1986, at 27.

⁶ Anon., 'Whale Reprieve', *New Scientist*, 12 August 1989, at 7.

discussing the . . . rational management' of marine resources in the North Atlantic.⁷ This organization was to eventually become the North Atlantic Marine Mammal Commission (NAMMCO)⁸ (which, unlike the IWC, is a controlled membership organization⁹ and actively desires to lethally take whales and other marine mammals on a sustainable basis). However, before Iceland came to actively promote NAMMCO it had to leave the IWC. They promised to do this in 1991 as the then proposed scientific basis for whaling did 'not allow whaling soon enough or on a large enough scale to satisfy Iceland'. Iceland believed that it was safe (in conservation terms) to set its own quotas in its own waters 'regardless of any limit that might be set down by the new management procedure'.¹⁰ The following year Iceland left the IWC (and threatened to renew its commercial whaling outside of the ambit of the IWC)¹¹ after complaining that the change of emphasis (i.e. the moratorium on commercial whaling) within the IWC gave 'Iceland the right to leave'.¹² In doing so, they suggested that the IWC 'is no longer a viable forum for international co-operation on the conservation and management of the whale population in our region'.¹³

3 Iceland's Reservation

Despite these earlier actions, in the late 1990s, Iceland began suggesting that it may rejoin the IWC before attempting to do so in 2001 and 2002. However, their application to rejoin the IWC was not straightforward, as they attempted to do so with a 'reservation',¹⁴ which they deemed conditional on their readherence. Specifically, their notification to the United States (the depository under the ICRW) with its instrument of adherence contained the following reservation:

. . . we hereby declare that Iceland through this instrument adheres to the . . . Convention and [1956] Protocol with a reservation with respect to paragraph 10(e) of the Schedule attached to the Convention. The reservation forms an integral part of this instrument of adherence.¹⁵

As soon as this attempt was known, considerable diplomatic and academic discussion was generated before the 53rd IWC meeting in London in anticipation of

⁷ MacKenzie, 'Whaling Nations Threaten Unilateral Action', *New Scientist*, 14 July 1990, at 14.6.

⁸ See Sanderson, 'The North Atlantic Marine Mammal Commission — In Principle and Practice', in G. Petursdottir (ed.), *Whaling in the North Atlantic* (1997) 67, at 68.

⁹ Article 10(2), Agreement on Co-Operation in Research, Conservation and Management of Marine Mammals in the North Atlantic.

¹⁰ MacKenzie, 'Whalers Spurn Plans for Scientific Quotas', *New Scientist*, 8 June 1991, at 15; Editorial, 'Whaling Leads the Way', *New Scientist*, 8 June 1991, at 11.

¹¹ Anon., 'More Whale Hunts', *New Scientist*, 25 June 1995, at 11.

¹² MacKenzie, 'Iceland Goes It Alone on Whaling', *New Scientist*, 15 February 1992, at 17.

¹³ Cherfas, 'Key Nations Defy Whaling Commission', *New Scientist*, 4 July 1992, at 7.

¹⁴ See Article 19 of the Vienna Convention of the Law of Treaties. This is reprinted in D. Evans, *International Law Documents* (1999). See also International Law Commission, Chapter VI: Reservations to Treaties. Text of Reservations to Treaties: Guides to Practice (1999). Section 1, at 10-12, available at <www.un.org/law/ilc/reports/1999/english/chap6.htm>.

¹⁵ This is noted in a document by the Department of State, 'Status of the Whaling Convention' (2001), at 7.

the attempted reservation. When the meeting finally convened, on the first morning of the first day of Plenary, Australia and the United States moved a formal motion that: ‘The Commission does not accept Iceland’s reservation regarding paragraph 10(e) (i.e. that Iceland is not bound by paragraph 10(e) of the Schedule), as reflected in its instrument of adherence.’¹⁶

This motion led to two separate questions. Firstly, did the Commission have the competence to decide this matter? On this question, ‘the Commission voted by 19 votes to 18 (1 country was absent for the vote) that it had the competence to determine the legal status of Iceland’s reservation’.¹⁷ After that vote, the Commission voted on the original motion that: ‘The Commission does not accept Iceland’s reservation regarding paragraph 10(e) of the Schedule, as reflected in its instrument of adherence.’¹⁸ This motion was then carried with 19 votes in favour. Sixteen member nations refused to vote, believing it was illegal and three abstained. After consultation with Commissioners, the Chairman then ruled that Iceland should ‘assist in the meeting as an observer’.¹⁹ This ruling was then challenged, but upheld by 18 votes to 16, with three abstentions. A statement was then recorded by the dissenting nations which suggested that: ‘In denying Iceland membership, the IWC clearly was in contravention of customary international law’ and that this was ‘an illegal act’.²⁰ Iceland later added:

The practice with respect to other reservations regarding the Whaling Convention supports the above conclusion. The reservations made by Argentina in 1960, by Chile and Peru in 1979, and by Ecuador in 1991, were not addressed by the IWC but were subject to acceptance by individual Parties. Thus, for example, the United Kingdom formally objected to Argentina and Peru’s reservations and the Federal Republic of Germany formally objected to Peru’s and Ecuador’s reservations. There was no legal basis to treat Iceland’s reservation any differently.²¹

The general principle of international law is that a reservation with respect to an international agreement is subject to the explicit or implicit acceptance by individual parties to such agreement. This general principle applies in the case of Iceland’s reservation as the exceptions from that principle are not applicable. At the Annual Meeting some States maintained that the IWC had the competence to make a decision with respect to the reservation on the basis of the exemption rule that a reservation with respect to a constituent instrument of an international organization is subject to acceptance by the relevant body of that organization. Iceland’s reservation, however, does not relate to the original Whaling Convention, but to paragraph 10(e) of the Schedule attached to the Convention. The rationale behind the exemption rule is that it is important to preserve the integrity of a constituent instrument which includes provisions of an organizational nature. Reservations with respect to such [an] instrument are only valid if accepted by the relevant body of the international organization.²²

¹⁶ Motion Regarding Iceland’s Reservation. IWC/53/25. Agenda Item 1.3.

¹⁷ IWC, Final Press Release from the IWC 53rd Annual Meeting (2001), at 1.

¹⁸ *Ibid.*, at 2.

¹⁹ *Ibid.*

²⁰ Statement Concerning Iceland’s Adherence to the International Convention for the Regulation of Whaling, IWC/53/50.

²¹ Diplomatic Note from Iceland to Objecting Countries, 2 August 2001.

²² Diplomatic Note, *ibid.* Very similar information on this incident can be found in IWC 53rd Report (2002), at 5–9.

Needless to say, with such a close vote and such weighty accusations, 'the row over Reykjavik's application almost split the organization in two'.²³ Accordingly, the question on which so much hangs must be answered: Was it legal to refuse Iceland's admission to the IWC with a conditional reservation?

4 The IWC Tradition of Reservations

Iceland suggested that an inconsistent practice had arisen within the IWC with regard to dealing with reservations when previous and present practices were examined. To prove this, it offered the examples of 'Argentina in 1960, by Chile and Peru in 1979, and by Ecuador in 1991'.²⁴ This choice of precedents was very selective. In fact, counting the possibility of China, there have been five (not three) attempted reservations to the ICRW in the past. It is the first of these — the case of Denmark in 1948 — (which Iceland omitted) which is the most interesting. This attempt concerned Danish registered ships working within Danish waters, which Denmark wished to be not subject to the provisions of the Schedule governing such vessels. In doing so, it requested the United States, acting as depository, to 'inform [Denmark] at the earliest practicable date whether the reservation proposed by the Government of Denmark with respect to the Convention is acceptable to each of the governments concerned'.²⁵

On circulation, Norway replied: 'it is the view of the Norwegian Government that the proposal put forward by the government of Denmark raises a question of such a nature that it should be submitted for the consideration of the International Whaling Commission'.²⁶

The British agreed that the matter should go to the IWC (when established) as it 'raises a question of principle'.²⁷ The former Soviet Union also concurred that such a 'question of principle' should be discussed by the IWC.²⁸ The USA also agreed that 'as this reservation would constitute an amendment to the Schedule annexed to the Convention [it] is therefore a matter which should be submitted to the International Whaling Commission for consideration when it is established'.²⁹

After collating all of these views, the United States, as depository, finally replied to Denmark:

It will be noted that certain of the signatory and adhering governments to the International Convention on the Regulation of Whaling have stated that they cannot agree to the ratification of the Convention with the reservation proposed by Denmark as this reservation would

²³ Browne, 'Global Ban on Whaling Faces Its Toughest Test Yet,' *Guardian International*, 26 July 2001.

²⁴ Diplomatic Note, Iceland, *supra* note 21.

²⁵ Diplomatic Note, 8 December 1948. This note circulated the Diplomatic Note from the Government of Denmark proposing a reservation to the Convention.

²⁶ Diplomatic Note from the Government of Norway, 9 March 1949.

²⁷ Diplomatic Note from the Government of the United Kingdom, 17 February 1949.

²⁸ Diplomatic Note from the Government of the Union of the Soviet Socialist Republics, 4 May 1949.

²⁹ Diplomatic Note from the Government of the United States, 29 May 1949.

constitute an amendment to the Schedule annexed to the Convention and is therefore a matter which should be subjected to the International Whaling Commission when it is established. In view of the fact that, in accordance with the general principles of international law and procedure, the assent of all signatories and adhering governments to the Convention would be required before a reservation of the nature of that proposed by Denmark could become effective, this Government, as depository of the Convention, considers that it could not accept for deposit an instrument of ratification with the reservation proposed by Denmark.³⁰

As a result of these objections, and consistent with the unanimity rule of the time, Denmark did not make its proposed reservations when it deposited its instrument of ratification. Nevertheless, the incident did raise three important questions. Firstly, to quote Norway, it was concluded that this 'raise[d] a question of such a nature that it should be submitted for the consideration of the International Whaling Commission'.³¹ The USA, UK and former USSR also all agreed that the IWC was the correct forum to determine this question. Secondly, that the issue had to be determined in accordance with the unanimity rule (to be discussed shortly), and finally that 'the reservation would constitute an amendment to the Schedule'.

In the following years, Peru (in 1979),³² Chile (also in 1979) and Ecuador (in 1991)³³ also attached reservations to their instruments of adherence and these did not lead to any action by the IWC. These reservations related to matters being dealt with in other forums, and were only of indirect relevance to the IWC. That is, their reservations related to claims of exclusive economic sovereignty of up to 200 miles off their coasts. These reservations were objected to by the USA,³⁴ the United Kingdom,³⁵ Russia³⁶ and Germany³⁷ on the grounds that they were inconsistent with international law (i.e., UNCLOS) but the matter was not referred to the IWC for discussion. A similar approach followed Argentina's reservation in 1960, pertaining to the sovereignty of the Falklands³⁸ (which prompted a strong reply from Britain), and a Declaration³⁹ by China in 1980 that any attempt by Taiwan to join the IWC was 'illegal, null and void'.⁴⁰

It is important to note that none of these later reservations were dealt with by the IWC. The reason they were only dealt with on a bilateral basis was twofold. Firstly, the matter was not put to the IWC for formal discussion (unlike the incidents with

³⁰ Diplomatic Note from the Government of the United States, 22 June 1950.

³¹ Diplomatic Note from the Government of Norway, 9 March 1949.

³² This is noted in a document by the Department of State, 'Status of the Whaling Convention', (2001), at 5.

³³ *Ibid.*, at 7.

³⁴ Diplomatic Note from the Government of the United States, 27 May 1983.

³⁵ Diplomatic Note from the Government of the United Kingdom, 1 and 12 March 1984. A similar note was recorded for Ecuador on 1 May 1992.

³⁶ Diplomatic Note from the Government of Russia, 24 March 1992.

³⁷ Diplomatic Note from the Government of the Federal Republic of Germany, 27 May 1983. A similar note was recorded for Ecuador in 29 May 1992.

³⁸ This is noted in a document by the Department of State, 'Status of the Whaling Convention' (2001), at 4.

³⁹ ILC Report (1998). Chapter IX: Reservations to Treaties, paras 517 and 518. This is available at <www.un.org/law/ilc/reports/1998?chp9.htm>; McRae, 'The Legal Effects of Interpretative Declarations', 52 *BYbIL* (1978), at 160–161; Whiteman, 14 *Digest of International Law* (1970), at 137–138.

⁴⁰ Department of State, 'Status of the Whaling Convention', (2001), at 6.

Denmark and Iceland). The probable reason that this did not occur was because the matters raised by these other reservations did not directly relate to the business of the IWC and were better suited for discussion in other forums. Conversely, the attempted reservations by both Denmark and Iceland *did* go to the core of the IWC's business. It should be noted that this percentage of non-relevant reservations is also in accordance with general practice. Indeed, findings suggest that the vast majority (70 per cent) of reservations are 'insignificant' and only a small percentage (6 per cent) could be deemed 'significant'.⁴¹

5 Reservations in International Law

Reservations to multilateral⁴² treaties began with the Enlightenment early in the nineteenth century. Nevertheless, despite over two centuries of utilization, an advisory opinion from the International Court of Justice, three examinations of the issue by the International Law Commission, the conclusion of an international treaty, and extensive literature on the topic, the issue remains 'inevitably complex'.⁴³ This is especially so with 'ongoing and perhaps insoluble doctrinal quarrels'⁴⁴ between theorists, over multiple questions,⁴⁵ in this which deal with political,⁴⁶ technical and good faith concerns.⁴⁷ Of late, this topic has become a particular problem in the area of human rights.⁴⁸

⁴¹ Redgewell, 'Universality or Integrity: Some Reflections on Reservations', 67 *BYbIL* (1993) 245.

⁴² Kennedy, 'Conditional Approval of Treaties by the US Senate', 98 *Loyola of Los Angeles International and Comparative Journal* (1996); V. Degan, *Sources of International Law* (1997) 484; ILC Report (1997), Chapter V, Reservations to Treaties, Paragraph 55. This is available at <http://www.un.org/law/ilc/reports/1997/chap06.htm>, paras 111–113.

⁴³ I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., 1984), at 51.

⁴⁴ ILC, *supra* note 42, at para. 55.

⁴⁵ ILC Report (1996), Chapter VI, Reservations to Treaties, Paragraphs 111 and 119. This is available at <http://www.un.org/law/ilc/reports/1996/chap06.htm>.

⁴⁶ Koh, 'Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision', 23 *Harvard International Law Journal* (1980) 71, at 75–76.

⁴⁷ The good faith concern relates to where a state withdraws from a treaty and immediately re-accedes just in order to make a reservation which it had not made before. This is known as the Trinidad and Tobago strategem. This arose in 1999 when Trinidad and Tobago withdrew from the Optional Protocol on the International Covenant on Civil and Political Rights. It then simultaneously deposited an instrument of re-accession with a reservation attached. See 'Unacceptably Limiting Human Rights Protection', available at <http://www.amnesty.org/library/Index/ENGAMR05001/999?open&of=ENG-GUY>. In the present case, the circumstances are very different. Iceland withdrew from the Convention nine years ago. Nevertheless, on the broad basis of principle, concern may be justified in allowing situations where countries which once had an opportunity to object, missed the opportunity, and later leave the convention only to subsequently try to re-adhere and set down a reservation to something they had not previously objected to. As such, they effectively have two bites at the cherry.

⁴⁸ Cook, 'Reservations on the Elimination of All Forms of Discrimination Against Women', 30 *Virginia Journal of International Law* (1990) 643. M. Shaw, *International Law* (1997), at 648–649.

A *The Traditional Rule*

The traditional rule governing reservations to multilateral conventions was that in order to be admitted, any reservation must be consented to by *all* the contracting parties to the treaty in question.⁴⁹ It was believed that this approach helped maintain the integrity of treaties, tied all parties to the same uniform obligations, and was in broad congruence with the view that a treaty is a contract.⁵⁰ These views were so widely held that the League of Nations stipulated: ‘a reservation can only be made at the moment of ratification if all the other signatory States agree or if such a reservation has been provided for in the text of the Convention’.⁵¹

Although the unanimity rule was clearly articulated by the League, it was not followed by all countries or regions who opted for a more ‘flexible’ approach. Specifically, the Latin American approach (later adopted by the former Soviet Union) as defined by the Pan American Union in 1932 suggested that the unanimous agreement of all the parties to a treaty was not necessary to enable a state entering a reservation to successfully join. Accordingly,

1. As between States which ratify a treaty with reservations and States which accept those reservations, the treaty applies in the form in which it may be modified by the reservations, and,
2. As between States which ratify a treaty with reservations and States which, having already ratified, do not accept those reservations, the treaty will not be in force.⁵²

The second rule marked a significant departure from the unanimity rule in the sense that it permitted a reserving state to become ‘a party to the treaty in relation to those contracting states which were prepared, expressly or tacitly, to accept the reservation. In other words, a reserving state might become a party to an inter-American convention in spite of the objections of one or more states to its reservations. However, the Convention would not be in force as between the reserving and the objecting states. As such, the dependence of the reserving states’ acceptance by other parties was substantially weakened. Nevertheless, maximum participation was achieved within a treaty. However, in the quest to protect state sovereignty over the ideals of integrated and uniform international integration, the Pan American system aimed to ensure that all the states would be equally bound by any legal norms and thus stripped the multilateral treaty of its element of community.

B *The International Court of Justice and the International Law Commission*

It was not until 28 years later that a serious international attempt was made to resolve the question of which view should predominate. The catalyst for the attempt arose in 1950 when a number of states sought to attach reservations to the Convention on the

⁴⁹ Ruda, ‘Reservations to Treaties’. 146 *RdC* (1975) 105, at 112.

⁵⁰ ILC, *Yearbook of International Law* Vol. II (1950) 239; R. Jennings, *Oppenheim’s International Law* (9th ed., 1992), at 1244.

⁵¹ League of Nations. OJ, Special Supplement (1931) 93, at 139.

⁵² These three rules are quoted by the ICJ in the *Genocide* Opinion. See ICJ Reports (1951) 5, at 17.

Prevention and Punishment of the Crime of Genocide.⁵³ A number of countries opposed this attempt, and because the Genocide Convention contains no provisions governing reservations, the matter went (on the request of the General Assembly)⁵⁴ to the International Court of Justice (ICJ) for an Advisory Opinion.

The Court addressed the principle of unanimity, finding it rested 'essentially on a contractual conception of the absolute integrity of the Convention adopted'.⁵⁵ It did not regard this conception as having been 'transformed into a rule of international law'.⁵⁶ Nevertheless, it did recognize that it was of 'undisputed value as a principle'⁵⁷ and attempted to find a middle ground by laying down a threshold which effectively meant a state could not make any reservation it wished. To allow any reservations at all would be 'so extreme an application of the idea of state sovereignty [that] it could lead to a complete disregard of the object and purpose of the Convention'.⁵⁸ With such considerations in mind, in seeking a more flexible approach to reservations,⁵⁹ the ICJ ruled (by seven votes to five):

That a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is *compatible with the object and purpose of the Convention*; otherwise, that State cannot be regarded as being a party to the Convention.⁶⁰

Accordingly, despite the strong dissenting opinions of three judges in defence of the unanimity rule,⁶¹ the ICJ broke the rule of absolute integrity of treaties when the reservation concerned *unessential* provisions. As such, it largely followed the two Latin American approaches. Nevertheless, the test still places a clear 'threshold' for the permissibility of reservations.⁶²

Despite the ICJ's ideal of a threshold (compatibility) test for reservations, the ICJ's movement towards a more flexible approach created more uncertainty than unity on the issue.⁶³ This uncertainty was furthered greatly by the fact that, shortly after the ICJ opinion was offered, the UN General Assembly asked the International Law Commission (ILC) to also examine the problem of reservations. The ILC, then led by James Brierly, took the view that the 'object and purpose' test, as formulated by the Court, was too subjective and was accordingly not suitable (due to the way that this test could end up turning a multilateral treaty into an unwieldy collection of bilateral

⁵³ Convention on the Prevention and Punishment of the Crime of Genocide. UNTS, No. 1021, vol.78 (1951) 277.

⁵⁴ GA Res. 478 (V). General Assembly Records. Fifth Session, Agenda Item 56, A/1372, at 8, para. 46.

⁵⁵ ICJ Reports (1951). IIR (1951), at 364.

⁵⁶ *Ibid.*, at 372.

⁵⁷ *Ibid.*, at 368.

⁵⁸ *Ibid.*, at 361.

⁵⁹ Kearney and Dalton, 'The Treaty of Treaties', 64 *AJIL* (1970) 495, at 510.

⁶⁰ ICJ Reports (1951), at 29–30 (emphasis added).

⁶¹ *Ibid.*, at 31.

⁶² *Ibid.*, at 29–30.

⁶³ M. Bedjaoui, *International Law: Achievements and Prospects* (1991), at 141–142.

interpretations)⁶⁴ for application to multilateral treaties in general.⁶⁵ Not surprisingly, given the fact that the ICJ and the ILC had come to different conclusions, no settled practice emerged and countries (such as the United States) continued to follow both the traditional unanimity approach, while others adopted the flexible approach advocated by the ICJ. Some countries followed variations of both.⁶⁶

This situation began to change in the 1960s when, with a new Special Rapporteur, Sir Humphrey Waldock at the helm, the ILC swung against its earlier recommendations, and came to support the ICJ approach. The ILC did this because it believed that the international world was rapidly expanding to the point where ‘the number of potential participants in multilateral treaties’ seemed to ‘make the unanimity principle less appropriate and less practicable’.⁶⁷ As such, the traditional unanimity principle was deemed no longer applicable. Moreover, ‘the essential interests of each individual state were to a very great extent safeguarded by the two fundamental rules that . . . [the objecting state could] regard the treaty as not being in force between it and the receiving State’.⁶⁸ Accordingly, the ILC went back to the ‘compatibility test’. It did however note:

The difficulty lies in the process by which that [compatibility] principle is to be applied, and especially where there is no other organ vested with standing competence to interpret the treaty. Where the treaty is the constituent instrument of an international organization, the Commission was agreed that the question is one for determination by its competent organ. It was also agreed that where a treaty is concluded between a small group of States, unanimous agreement to the acceptance of a reservation must be presumed to be necessary in the absence of any contrary indication. Accordingly, the problem essentially concerns multilateral treaties which are *not* constituent instruments of international organizations and which contain no provisions in regard to reservations.⁶⁹

C The 1969 Vienna Convention on the Law of Treaties

Following the reconciliation of the ILC with the ICJ and the general agreement that a more flexible approach (which retained key parts of the traditional ideals, the Latin American ideals and the ICJ compromise was needed with regard to reservations) the Vienna Convention on the Law of Treaties (VCLT) was finally able to be agreed. Article 19 (Formulation of Reservations) stipulated:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
(a) the reservation is prohibited by the treaty.

⁶⁴ *YbILC* Vol. II (1951), at 130–131.

⁶⁵ ILC Report, A/1858 (A/6/9) (1951), Chapter II. Paragraphs 12–34. J. Brierly, *The Law of Nations* (5th ed., 1955), at 249–250.

⁶⁶ GA Res. 598 (VI) 12 January 1952; Schachter, ‘The Question of Treaty Reservations’, 54 *American Journal of International Law* (1960) 372, at 374; Mendelson, ‘Reservations to the Constitutions of International Organisations’ 45 *BYbIL* (1971) 137, at 158–160.

⁶⁷ *YbILC*, Vol. II (1966) 204.

⁶⁸ *YbILC*, Vol. II (1962) 207.

⁶⁹ *Ibid.*, at 178–179 (emphasis added).

- (b) The treaty provides that only specified reservations . . . may be made.
 (c) In cases not falling under sub-paragraphs (a) or (b) *the reservation is incompatible with the object and purpose of the treaty* (emphasis added).

Article 20 (Acceptance of and Objection to Reservations) added:

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the *limited number of negotiating States* and the object and purpose of a treaty that the application of the treaty in its entirety between all parties is an essential condition of the *consent of each one* to be bound by the treaty, a reservation requires acceptance by *all* the parties.
3. When a treaty is a *constituent instrument of an international organization and unless it otherwise provides*, a reservation *requires the acceptance of the competent organ of that organization*.
4. In cases *not falling* under the preceding paragraphs . . . (emphasis added).

D The VCLT as Customary International Law

When the ILC re-examined the question of reservations between 1993 and 1999, there was a 'consensus in the Commission that there should be no change' in the relevant provisions of the VCLT. This consensus reflected the view that the VCLT regime on reservations 'achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty.'⁷⁰ Moreover, it was suggested that the VCLT, especially the sections on reservations, now represents customary international law.⁷¹ The importance of the VCLT now representing customary international law, especially in the debate about the IWC, should not be overlooked. This is because Article 4 of the VCLT explained that 'the Convention applies only to treaties which are conducted by States after the entry into force of the present Convention with regard to such States'. Given the fact that the ICRW was concluded 23 years before the VCLT, a certain difficulty appears to arise. However, this is subverted by the first sentence of Article 4 which states: 'Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention.' The 'without prejudice' sentence would appear to make clear that principles of customary international law codified in the VCLT continue to apply to treaties such as the ICRW. This is especially so when the actions of the IWC in the 2001 debate over Iceland (and the move from unanimous to majority opposition) are examined below. These demonstrate how the IWC adopted some of the VCLT principles and moved partly away from its old precedents.

⁷⁰ ILC, *supra* note 42, at para. 98.

⁷¹ A. Pellet, First Report on the Law and Practice Relating to Reservations to Treaties. A/CN.4/470. 30 May 1995, at para. 157.

6 Applying the VCLT to Iceland's Reservation at the IWC

Working upon the assumption that the VCLT represents the customary international law on reservations, it is now appropriate to work through the VCLT, with regard to Iceland's attempted reservation.

A The Reservation is Prohibited by the Treaty

The first provision of the VCLT on dealing with reservations is that reservations are not allowed if 'the reservation is prohibited by the treaty'.⁷² Although there is nothing in the ICRW which prohibits reservations, it is useful to note the way that international environmental law has largely evolved on this question. Indeed, as the uncertainties on reservations began to emerge in the late 1950s, the UN General Assembly recommended that future conventions should directly address the possibilities of reservations, so as to avoid this labyrinth in the future.⁷³ Accordingly, in the formation of treaties, the deliberating parties have been asked to consider whether they wish to admit reservations or not. From these deliberations it has become apparent that a number of instruments expressly prohibit reservations.⁷⁴ This has become a very common (but not exclusive) approach with international regimes concerned with international law. For example, no reservations may be taken on the international regimes which protect the ozone layer (the Vienna Convention⁷⁵ and the Montreal Protocol)⁷⁶ the regimes which protect the climate (the Framework Convention on Climate Change⁷⁷ and the Kyoto Protocol),⁷⁸ and multiple regimes which deal with (terrestrial) biodiversity, such as the Convention on Biodiversity,⁷⁹ the Biosafety Protocol,⁸⁰ the Convention on Migratory Species,⁸¹ and the Convention on Trade in Endangered Species.⁸² Important conservation agreements such as the Madrid Protocol for Environmental Protection in the Antarctic,⁸³ the Basel Convention on the Trade in Toxic Waste,⁸⁴ the Convention on Desertification,⁸⁵ also all

⁷² Article 19(A).

⁷³ See GA Res. 598 (VI). 12 Jan. 1952.

⁷⁴ Nevertheless, in some extreme historical instances states have still tried to register their reservations. This happened when Switzerland joined the League of Nations, but wanted a reservation to express their neutrality. See Hudson, 'Membership in the League of Nations', 17 *AJIL* (1924) 439.

⁷⁵ Vienna Convention for the Protection of the Ozone Layer (1985). TIAS11097.txt. See Article 18.

⁷⁶ Montreal Protocol on Substances that Deplete the Ozone Layer. 26 ILM (1987) 1529. Article 18.

⁷⁷ United Nations Framework Convention on Climate Change. UNCED. A/AC.237/18 (Part II)/Add.1. 15 May 1992. Article 24.

⁷⁸ Adoption of the Kyoto Protocol. FCCC/CP/L.7. Article 26.

⁷⁹ The Convention on Biological Diversity. UNEP/Bio.Div/CONF. 12 ILM (1992) 954. Article 37.

⁸⁰ Biosafety Protocol. This is available at <http://www.biodiv.org/biosafety/protocol.asp>. Article 38.

⁸¹ The Convention on Migratory Species of Wild Animals. BH752.txt. Article XIV.

⁸² Convention on International Trade in Endangered Species of Wild Flora and Fauna. 12 ILM (1973) 1055. Article XXIII.

⁸³ Protocol on Environmental Protection to the Antarctic Treaty (1991). BH992.txt. See Article 24.

⁸⁴ Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal. 21 ILM (1989) 657. Article 26.

⁸⁵ Convention on Desertification. A/AC.241/27. 12 September 1994. See Article 37.

prohibit reservations. The same practice is followed by many contemporary regimes designed to improve the international governance of the oceans. The United Nations Convention on the Law of the Sea,⁸⁶ the Straddling Stocks Agreement,⁸⁷ the Convention Prohibiting Driftnets in the South Pacific⁸⁸ and recent regional fishery agreements such as those relating to the Western and Central Pacific⁸⁹ and the South Pacific.⁹⁰ Although this list is by no means exhaustive of international environmental law (and a few earlier examples to the contrary do exist) it is possible to assert that the majority of important international environmental law documents are moving towards a situation of not allowing reservations. Even within treaties which do allow such reservations, it is possible to argue that within the more normative international environmental treaties, reservations are increasingly viewed with unease.⁹¹ This refusal to tolerate reservations is probably implicitly due to the above concerns about fragmenting conventions, and especially those where international cooperation of the highest, not lowest common order is desired.⁹² Indeed, by refusing to even tolerate the consideration of reservations, those thinking of joining a convention know exactly what the contents of the contract are that they are contemplating.

B The Object and Purpose of a Treaty

The second possibility (for our purposes) under the VCLT for prohibiting reservations is that the reservation is incompatible with the object and purpose of a treaty. Despite the compatibility hurdle being very clearly set out, the test is not significantly explained or reinforced elsewhere in the VCLT's articles on reservations. Nevertheless, some guidance may be taken from the ICJ's *Genocide* Opinion, which suggested that the compatibility of a reservation with the object and purpose of a treaty must be measured on a case-by-case basis, based upon the treaty's 'character, . . . purpose, [and] provisions'.⁹³

⁸⁶ United Nations Convention on the Law of the Sea (1982). BH825.txt. Article 309.

⁸⁷ United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 34 ILM (1995) 1542. See Article 42.

⁸⁸ Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (and Protocols) (24 November 1989) BH954.txt (29 ILM (1990) 1454). Article 11.

⁸⁹ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (2000) Article 37, available at <http://www.oceanlaw.net/texts/htm>.

⁹⁰ Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the South Pacific, Article 18, available at <http://www.oceanlaw.net/texts/htm>.

⁹¹ See Hafner, 'Environmental Issues within the Work of the International Law Commission', 11 *YBIEL* (2001) 3, at 30–32.

⁹² See A. Gillespie, *The Illusion of Progress: Unsustainable Development in International Law* (2001), at Ch. 10.

⁹³ ICJ, *supra* note 62, at 22, 26.

1 *The Purpose and Provisions of the ICRW*

With regard to the ICRW, the purpose of the Convention, is well reflected in the provisions of its preamble.⁹⁴ This explains that the parties to the ICRW, have subscribed to, *inter alia*:

safeguard[ing] for future generations the great natural resources represented by the whale stocks;
 protect[ing] all species of whales from further over-fishing;
 [seeking] the optimum level of whale stocks;
 [provide] an interval for recovery to certain species of whales now depleted in numbers;
 [and] establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks.

Interestingly, Iceland also concurred that in determining the object and purpose of an agreement such as the ICRW, the preamble has a high value.⁹⁵ Its Commissioner highlighted the preambular paragraphs 3 and 7 which state:

Recognising that the whale stocks are susceptible of natural increases if whaling is properly regulated, and the increases in the size of whales stocks will permit increases in the number of whales which may be captured without endangering these natural resources;

Having decided to conclude a convention for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.

Obviously, these preambular paragraphs take a somewhat larger conservation focus than those offered by Iceland. However, although I believe that the ones I offered are just as legitimate in interpreting the treaty, by way of reducing difficulties, I shall just utilize the preambular paragraphs that Iceland offered to show how their reservation is inconsistent with the preambular paragraphs they suggest are the most illustrative for interpreting the object and purpose of the treaty. The two points I wish to highlight from the Icelandic preambular paragraphs are firstly, that ‘whaling [should be] properly regulated’ and the ‘whaling industry’ should be subject to ‘orderly development’. Secondly, that whales should only be captured without endangering these natural resources’.

In order to examine these objectives, it is necessary to fully examine the subject of the Icelandic reservation. Paragraph 10(e) of the Schedule states:

Notwithstanding the other provisions of paragraph 10, catch 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.⁹⁶

Paragraph 10(e) is commonly regarded as the paragraph that established the so-called ‘moratorium’ on commercial whaling (although 21,416 whales have been

⁹⁴ Article 31 of the VCLT recognizes that preambles may be used ‘for the purpose of interpretation of a treaty’. See Article 31(2).

⁹⁵ Diplomatic Note from Iceland to New Zealand, 2 August 2001. Iceland quotes from preambular paragraphs 3 and 7.

⁹⁶ Paragraph 10(e). Schedule of the International Convention for the Regulation of Whaling (2001), at 13.

killed between 1986 and 2000).⁹⁷ A large part of the justification of the moratorium was to realign the overall management regime of the IWC. Against a background of calls for a global moratorium, and recurring uncertainties in stock numbers and catch quotas, the earlier management regimes were replaced in 1981⁹⁸ at the same time that a comprehensive stock assessment was undertaken.⁹⁹ Within ten years, the objectives of the new management regime were established.¹⁰⁰ These were/are:

- Stability of catch limits which would be desirable for the orderly development of the whaling industry.
- Acceptable risk that a stock not be depleted (at a certain level of probability) below some chosen level so that the risk of extinction is not seriously increased by exploitation.
- Making possible the highest possible continuing yield from the stock.

The remarkable similarity between the preambular paragraphs which Iceland has highlighted and the objectives for the Revised Management Procedure (RMP) cannot be lightly overlooked. However, the overt irony (and hence a background reason why many countries objected to Iceland's attempted reservation) is that Iceland, by objecting to paragraph 10(e), was objecting to the very process which aims to facilitate these goals. These goals are intricately connected to the RMP which, although being agreed in the early 1990s,¹⁰¹ has been forced to take a number of 'additional steps' to complete the Procedure.¹⁰² These included consideration of how much factors such as environmental change, 'human induced mortalities' (by-catch) and the falsification of earlier Soviet Whaling data should be taken into account within the catch limit algorithms. Additional non-scientific aspects which make up the Revised Management Scheme (RMS) which have to be concluded before the Scheme can become operative include a fully suitable inspection and observation regime.¹⁰³ In many regards, it has been this last consideration that has been the primary sticking point to concluding the RMS since the late 1990s and the signatories to the ICRW have had numerous special meetings in an attempt to solve the problem and establish an overall compliance procedure which all sides are happy with.¹⁰⁴

In sum, since the imposition of the moratorium, the IWC has been struggling to work out the best estimates of whale stocks to prevent endangerment of species, a suitable procedure by which to facilitate so-called 'sustainable catch limits' and to

⁹⁷ Statement by Germany at the 53rd IWC meeting in London, 2003.

⁹⁸ See Appendix 2. Resolution on Developing Revised Management Procedures. IWC, 32nd Report (1982) 35.

⁹⁹ IWC, 33rd Report (1983), at 21; IWC, 34th Report (1984), at 30; IWC, 36th Report (1986), at 12–13; IWC, 37th Report (1987), at 12–14; IWC, 39th Report (1989), at 13–15; IWC, 40th Report. (1990), at 17–21; IWC, 41st Report (1991), at 16–19.

¹⁰⁰ Appendix 4. Resolution on the Revised Management Procedure. IWC, 42nd Report (1992), at 47–48.

¹⁰¹ IWC, 42nd Report (1994), at 47–48.

¹⁰² Appendix 5. IWC Resolution 1994–5. Resolution on the Revised Management Scheme. IWC, 45th Report (1995), at 43–44.

¹⁰³ See Appendix 3. Resolution on the Revised Management Scheme. IWC, 43rd Report (1993), at 40.

¹⁰⁴ See Gillespie, 'The Search for an Effective Compliance Regime at the International Whaling Commission', *Journal of Ocean Development and International Law* (forthcoming).

develop essential mechanisms — such as an inspection and observation regime — by which the traditional whaling industry may be updated. The moratorium has been/is the breathing space in which these key objectives have been pursued. Moreover, many of these objectives have not yet been completed. As such, a central justification for the moratorium remains. By objecting to the moratorium, Iceland would in essence be pursuing whaling upon species which have not only not been approved by the IWC, but nor has the inspection and observation mechanisms by which the whaling is supposed to be controlled. Exactly how avoiding these developments and processes within the IWC would further the development of the traditional whaling industry is a mystery.

2 *The Character of the ICRW, and the Importance of Section 10(e)*

The second suggestion put forward by the ICJ for ascertaining the object and purpose of a treaty pertains to its ‘character’.¹⁰⁵ The importance of section 10(e) to the character of the ICRW and the workings of the IWC cannot be underestimated. Indeed, it is possible to assert that the moratorium is arguably the core of the IWC’s current character. This assertion can be made when the history of the moratorium is examined.

The movement towards the moratorium, which began in the early 1970s, was intricately connected with the repeated failure of the IWC to come to grips with its overt mismanagement problems in the first three decades of its existence. This failure led to calls from international forums (such as the 1972 Stockholm Conference)¹⁰⁶ for an immediate international moratorium on all commercial whaling. Thereafter, for the following 10 years acrimonious debate flowed back and forth at the IWC between those who argued for the moratorium, and those who objected to it. Finally, in 1982, at the 34th meeting of the IWC, the proposals to end all commercial whaling gained the requisite three-quarters majority. This was despite objections from Norway, the Soviet Union, Japan and Iceland.¹⁰⁷

After this long journey to obtain the moratorium, and the subsequent journey to complete all of the necessary components of the RMS, it is possible to assert that paragraph 10(e) is now a core part of the ICRW’s character. Moreover, attempting to set a reservation against paragraph 10(e) is also contrary to the object and purposes of the ICRW as displayed in its preamble, and acted out in the process since the moratorium to achieve the RMS.

C ‘A Limited Number of Negotiating States’

Working through the VCLT, the third section which deserves attention is Article 20(2) which stipulates:

¹⁰⁵ ICJ, *supra* note 62, at 22, 26.

¹⁰⁶ Recommendation 33. Report of the United Nations Conference on the Human Environment, Stockholm, 5–15 June 1972. UN Doc. A/CONF.48/14/Rev/1, at 56. Paragraphs 190–191.

¹⁰⁷ IWC, 33rd Report (1983), at 21.

When it appears from the *limited number of negotiating States* and the object and purpose of a treaty that the application of the treaty in its entirety between all parties is an essential condition of the *consent of each one* to be bound by the treaty, a reservation requires acceptance by *all* the parties. (emphasis added)

This paragraph represents the concession within the VCLT to the traditional rule of reservations in international law. However, although the traditional principle still has a clear applicability in some cases, the first part of the sentence ('a limited number of negotiating states') clearly restricts where it may have an application. A limited number of states has been interpreted as meaning a grouping whose relations are 'so closely interwoven that any alteration in the legal relations between two parties has inevitable repercussions' for other parties.¹⁰⁸ Although efforts to establish numerical criteria for defining a 'restricted' treaty are not to be found, the emphasis is clearly upon a small number, working in 'very close co-operation'.¹⁰⁹

Interestingly, with regard to the ICRW it would appear that this was the practice that was initially adopted. Indeed, when the Convention was concluded, there were only 12 signatories and, in accordance with the practice of the time, the unanimity rule — as displayed in the Denmark example above — was followed. However, in a clear situation of evolution, when the Iceland example appeared in 2001, the membership of the IWC had grown to over 40 countries and the matter was dealt with by majority vote, as opposed to unanimity. It may be arguable to suggest that the IWC could have followed its earlier precedent, as nothing in substance had challenged this approach. However, this was not the case in 2001, and as such, it would appear that the IWC broke from its traditional path on this unanimity issue.

D The Decision by the Competent Organ, as Created through Its Constituent Instrument

The third and final section to consider in deciding the legitimacy of a reservation ultimately relates to how the decision on the admissibility of a proposed reservation is determined and applied. The applicable section is Article 20(3) which stipulates:

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

This short sentence raises five detailed issues. The first two issues relate to whether international organizations or individual states should decide collectively or on an ad-hoc basis on reservations, and if an international organization suitable for examining the reservation exists, whether the ICRW is the constituent instrument of an international organization. The final three issues are concerned with the acceptance by the competent organ of that organization, how that acceptance is to be recorded and, finally, if there is any difference between a reservation to the constituent instrument itself or its associated protocols, annexes, and so on.

¹⁰⁸ F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (1986), at 123.

¹⁰⁹ Sinclair, *supra* note 43, at 34.

1 *Individual or Collective Responses to Reservations*

Where a reservation has been entered, the question arises as to who is to determine its effect: Is it the individual state parties or the institution within its collective identity? Prior to the 1969 VCLT this remained an open and sometimes controversial question, and practice was mixed.¹¹⁰ Sometimes the organization decided the question,¹¹¹ and sometimes it was decided individually by the members on the principles of unanimity¹¹² after either the depository or the constituent organ¹¹³ distributed the reservations to the members. The practice of the governing body of the organization deciding the issue was not eclipsed by Article 20(3), which clearly opted for a ‘collegiate system’ of reservations (if a suitable organ exists for this purpose). The important clue of why the collegiate, as opposed to the unilateral approach, is given preference is from the sentence following ‘acceptance of the competent organ’. The key words are: ‘In cases *not* falling under the preceding paragraphs...’ (emphasis added). As such, *if* a reservation cannot be satisfactorily dealt with by the constituent organization, then the VCLT then sets out a secondary sequence of possible alternatives for individual countries in Article 20(4)(a)–(d). This secondary sequence of possible alternatives clearly favours the reserving state. Conversely, if the reservation can be dealt with inside sections 20(1)–(3) then it becomes much harder for a state with a reservation to achieve success. However, before the secondary sequence can be activated, it is first necessary to see if the reservation can be dealt with within Article 20(3).

2 *Is There a ‘Competent Organ’ Available to Examine the Reservation?*

It is the availability of a competent organ which is the primary difficulty in this area. Indeed, as noted above, the International Law Commission recognized nearly 40 years ago¹¹⁴ that the difficulty lies in the process by which that compatibility principle is to be applied, and especially where there is no other organ vested with standing competence to interpret the treaty. Accordingly, the question arises, did the constituent instrument establish a ‘competent organ’ to deal with this question? Philippe Sands gave a pointer in the way that this question may be answered. He suggested:

As most constituent instruments do not address this question, it will therefore be the organ which is charged with deciding on the candidacy of a state wishing to join the organization which will adjudge the reservation. Ultimately this may go to a plenary organ or, if one has been provided for, a judicial or other body charged with authoritative interpretation.¹¹⁵

The alternative situation — where there is no single authoritative body which might decide if a reservation is contrary to the object and purposes of a treaty — is ultimately a scenario of ‘great confusion’ as each state is forced to individually decide

¹¹⁰ P. Sands, *Bowett’s Law of International Institutions* (5th ed., 2001), at 445.

¹¹¹ See Hudson, *supra* note 74, at 439–440.

¹¹² See N. Schermers, *International Institutional Law* (1995), at 716.

¹¹³ See *YbILC*, Vol. II (1966), at 207.

¹¹⁴ *Supra* note 69.

¹¹⁵ Sands, *supra* note 110, at 445.

upon the admissibility of the reservation in accordance with Article 20(4)(a)–(d), whereby ‘the unity of the treaty’ may be ‘destroyed as a result of the establishment of a complex network of bilateral agreements’.¹¹⁶

3 *The Constituent Instrument of an International Organization*

The constituent instrument of an international organization is almost always a treaty. The constituent instrument will provide for the functions and objects of the organization, and indicate how they will be achieved.¹¹⁷ The unique feature of a constituent instrument is that it creates an organ with an identity distinct from that of the individual member states. As such, the organization has its own legal personality. Personality is shorthand for the proposition that an entity is endowed by international law with legal capacity. Personality may be expressly granted by the founding document¹¹⁸ or implied by the actions of the international organization.¹¹⁹ The ICRW is clearly the constituent instrument of the International Whaling Commission, because as Article III of the ICRW stipulates: ‘The Contracting Governments agree to establish an International Whaling Commission’ and then proceeds to elaborate on the make-up of the Commission. The Commission is further strengthened by fulfilling additional requirements to enhance its independence and identity.¹²⁰ Accordingly, on the first question, it may be suggested that the ICRW is the constituent instrument of the IWC, which is a valid international organization in itself.

4 *The Acceptance of the Competent Organ of that Organization*

When a competent organization has the authority to decide upon the admissibility of a reservation, a question arises over how that should be done. That is, what procedural method should be utilized in ascertaining what is a suitable majority of states necessary to accept the reservation? Since the decision does not arise under Article 20(2), the only certainty is that it need not be done by a unanimous process. As such, within most conventions, depending upon what the reservation is in respect of, it will depend upon the applicable Rules of Procedure and whether weighted majority voting is necessary. Within the IWC, when this matter was dealt with in 2001, it was decided by a simple majority voting in accordance with the IWC’s Rules of Procedure.¹²¹ This was despite the fact that the United States had earlier suggested that the matter should

¹¹⁶ ILC, *supra* note 42, at para. 105.

¹¹⁷ Sands, *supra* note 110, at 422.

¹¹⁸ See the preamble of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. B.H.883.txt. A/CONF.129/15, 25 ILM (1986) 543.

¹¹⁹ N. D. White, *The Law of International Organisations* (1994), at 24. *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 11.

¹²⁰ Statutory Instrument pertaining to the Diplomatic and International Immunities: The International Whaling Commission, 23 July 1975, No. 1210.

¹²¹ Article III(2) of the ICRW provides that with the exception of Article V decisions, decisions of the ICRW shall be taken by a majority of members voting. See also Rule E.3 of the Rules of Procedure.

be seen as being related to a specific instance that necessitated a three-quarters approval for the reservation.¹²²

5 *Reservations to the Instrument and/or Its Supporting Schedules or Annexes*

The final consideration which deserves attention under this section pertains to Iceland's suggestion that as its attempted reservation only applied to the Schedule and not to the actual constituent instrument of the ICRW, then it was not possible for the IWC to object to that reservation. In its own words:

At the Annual Meeting some States maintained that the IWC had the competence to make a decision with respect to the reservation on the basis of the exemption rule that a reservation with respect to a constituent instrument of an international organization is subject to acceptance by the relevant body of that organization. Iceland's reservation, however, does not relate to the original Whaling Convention, but to paragraph 10(e) of the Schedule attached to the Convention. The rationale behind the exemption rule is that it is important to preserve the integrity of a constituent instrument which includes provisions of an organizational nature. Reservations with respect to such [an] instrument are only valid if accepted by the relevant body of the international organization.¹²³

This suggestion is mistaken for three reasons. Firstly, the VCLT makes no distinction between where the reservation is attached. As such, the competent organ has the ability to examine reservations attached to the constituent instrument, or its connected Schedules/Annexes. Secondly, this ability for the competent organ suggests a reading whereby connected Schedules/Annexes, etc. are considered to be 'integral' to the constituent instruments and cannot be lightly severed, which Iceland appears to be implying. Finally, the precedent which Iceland seems to be seeking comes from the CITES and CMS treaties where clear distinctions are drawn within their constituent documents for this kind of split. However, such splits do not occur within the ICRW, and the precedent of the IWC on the early Denmark reservation shows that the matter of a reservation to the Schedule was clearly within the IWC.

7 The Aftermath

Once the question of permissibility of a reservation is decided by the constituent body, the issue becomes what happens next? At this point, two options occur. The first is that the reservation is deemed unacceptable, in terms of relations between those who objected to the reservation and the country whose attempt failed, and the options they face. The second is the exact opposite of the first, when the reservation is successful.

With regard to the first question, in terms of the options faced by the refused country, it is possible for the refused country to consider severing its reservation from their application. Whether this is possible or not will depend on how closely attached the reservation is to the application. Clearly, with the Icelandic case, given that the

¹²² This was originally in the Diplomatic Note from the Government of the United States, 29 May 1949. The United States reiterated this belief with the Icelandic reservation.

¹²³ Diplomatic Note, *supra* note 10.

'[t]he reservation form[ed] an integral part of this instrument of adherence'¹²⁴ this was not possible. From the Icelandic perspective, this was a correct choice, as with their third attempt they were successful — and they did not need to sever their reservation from their application. The fact that Iceland was successful leads on to the second part of the consideration for the first question: What becomes of treaty relations between the state whose reservation was refused by the competent organ and the dissenting states within the competent organ who disagreed with the majority (and argued that the reservation should be admissible)? On this question, in terms of international practice, there is no definitive answer as state practice on this specific question is inconclusive.¹²⁵ Unfortunately, the Icelandic instance did not progress this lacuna, as the space of time between the failed and successful attempts was so short, very little consideration, let alone precedents were offered.

Conversely, when dealing with the aftermath of a successful reservation, which has ultimately been accepted by the constituent organization as with the Icelandic example, a series of interesting precedents are developing. The question is, how do the dissenting countries, which attempted to block the entry with the reservation and lost the vote, deal with the country which was successful? As of 2003, as the fallout of Iceland's success was being examined, two approaches were developing. The commonality with both approaches is their notification to the Depository of their individual objections to Iceland's reservation, noting its inconsistency with the objectives and purposes of the Convention. However, thereafter, the approaches diverge. On the one hand, a number of countries, despite noting their objection, note that their objection does not preclude entry into force of the Convention between their country and Iceland. On the other hand, some countries maintain that because of both the substance of the reservation, and the manner in which they ultimately gained acceptance, Iceland would not be considered by them a member of the IWC. Exactly how these divergences will work out on the floor is very uncertain.

8 Conclusion

The IWC's initial rejection of Iceland's assertion for membership of the IWC, which was conditional on acceptance of their reservation to the moratorium on commercial whaling, was in accordance with the international law on reservations. Indeed, in accordance with the VCLT, the IWC initially prohibited the reservation as it was originally deemed incompatible with the object and purpose of a treaty. This incompatibility was evident through the text and character of the ICRW. The original decision on the question of whether Iceland's reservation was incompatible was correctly decided by the IWC, which is the competent organ of that organization (as empowered through the ICRW), which is the constituent instrument of that organization. When Iceland finally gained membership in 2002, the majority (implicitly) held that the reservation was not incompatible with the ICRW. At this

¹²⁴ This is noted in a document by the Department of State, 'Status of the Whaling Convention' (2001) 7.

¹²⁵ Redgewell, *supra* note 47, at 245; Shaw, *supra* note 76, at 647.

point, a divergence of views by the countries dissenting to Iceland's admission opened up (over whether to ultimately accept them or not). In this regard, it is possible that those who have continued to accept that Iceland has membership have in part missed the substance of what the reservations debate was about in 2001 and 2002 — whether the governing body acting democratically through the constituent instrument of an international organization has the power to decide that question. As such, whether the decision is ultimately yea or nay is not necessarily the most important concern. Rather, it is the fact that members within international organizations have the ability to make such decisions, and ultimately control the integrity of their own conventions. Thus, objections should be made, and limited treaty rights on the reservation question between parties should be acknowledged, but so too should Iceland's ultimate membership — this time.