Comment on the Compliance Control Mechanism within the Framework of the International Whaling Convention

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I. Introduction: The Historic Practice of Unregulated Whaling

It is important to realise at the outset first how prolonged resistance to establishment of any international body to supervise whaling activities has been and then, once an International Whaling Commission (IWC) was established in 1946 by conclusion of the International Convention for Regulation of Whaling, how prolonged the resistance to equipping it with powers or other techniques to ensure conformity with any regulations negotiated within that body. As it was negotiated outside the newly established United Nations, following the failure of the League of Nations' efforts in the 1930's to develop effective conservatory approaches to the conservation of the sea's living resources, it nonetheless drew on the few precedents provided by the nineteenth and early twentieth centuries concerning establishment of a Sealing and Fisheries Commission, which left enforcement of the regulations adopted to the varying capabilities of the States Parties whose flag the sealers and fishermen concerned flew, albeit under the auspices of an international supervisory body composed of all parties to the new convention. The fact that the new convention was a product of this period and not of the UN means that, when the UN and its specialised agencies convened the series of environmental and developmental conferences which adopted a variety of declarations and action plans on these aspects of living resource exploitation, the new precepts were not automatically promoted within the ICRW framework. Similarly, the softer “compliance” approach, rather than the adversarial “enforcement” technique for ensuring conformity to conservatory regula-

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tions was alien to the language and techniques of the ICRW itself. Attempts to amend it to provide more clearly for modern concepts and use of new technologies have, therefore, long been resisted by those of its States Parties which are still whaling despite continuous pressure from other States Parties, some observer states and large numbers of NGO observers, as the following analysis of attempts to “modernise” the ICRW and the IWC’s policies by infusion of modern measures for promoting marine environmental protection, sustainable development and “compliance” techniques reveals.

Whales have thus been exploited for their meat from very early times as part of the res communis, initially without supervision or regulation of any kind. The first industrial hunting began in the Middle Ages conducted by the Basques, Dutch and English, followed by Americans and Norwegians, all using sailing vessels and hand-held harpoons. Over time whales came to be valued not only for their meat but also for their oil and other products. Activities began with unregulated coastal whaling from land stations but as stocks declined, whilst technology of vessels and killing methods improved, pelagic whaling began worldwide under the Grotian doctrine of freedom of the seas, though even Grotius had advised that freedom should not be applied to exhaustible resources which should be protected as part of the common good. As targeted stocks declined vessels merely moved on to other whale species and more distant grounds. The subsequent invention of the harpoon gun and engine powered vessels, used as factory ships in the early twentieth century, enabled vast numbers of targeted species to be taken even further afield, including in Antarctica, to such an extent that some whale species were virtually extinct by that date. However, the Bering Fur Seal Tribunal Award in 1895, which ruled that even seals protected under United States law within its territory and territorial sea where they pupped could not be protected from capture by vessels of other states on the high seas, suppressed any thoughts that whales regulated within their territorial seas by coastal states could, similarly, when they migrated beyond coastal waters, be protected from over-exploitation by other states on the high seas without their agreement. Other means of protecting whales from over-exploitation had to be sought, since the US and Canadian vessels concerned in high seas sealing simply re-registered under Japanese flags and exploited the seals freely, proving the mere national protection of species, even from nationals of the protecting state, to be ineffectual.

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