

# **NON-COMPLIANCE WITHIN THE IWC**

**Requirements for an Effective  
IWC Compliance Review Committee**



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## Glossary

AIDCP	Agreement on the International Dolphin Conservation Program
CCAMLR	Convention for the Conservation of Antarctic Marine living Resources
CCSBT	Convention for the Conservation of Southern Bluefin Tuna
CFP	Common Fisheries Policy (EC)
CITES	Convention on the International Trade of Endangered Species of Wild Fauna & Flora
CoP	Conference of the Parties
CRC	Compliance Review Committee
EC	European Community
FAO-CA	Compliance Agreement of the Food and Agricultural Organization of the United Nations
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICRW	International Convention for the Regulation of Whaling
IMO	International Maritime Organisation
IWC	International Whaling Commission
MEA	Multilateral Environmental Agreements
NAFO	Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries
RFMO	Regional Fisheries Management Organisations
RMP	Revised Management Procedure
RMS	Revised Management Scheme
SCIC	Standing Committee on Implementation and Compliance
UNCLOS	United Nations Convention on the Law of the Sea
UNFA	Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, or UN Fish Stocks Agreement
VMS	Vessel Monitoring System
WCPFC	Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

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## 1. Introduction

Compared with many other Multilateral Environmental Agreements (MEAs) the IWC is often regarded as a “toothless tiger” suffering from ineffective and weak non-compliance procedures. Since the creation of the IWC in 1946, illegal whaling has often remained unpunished, even though Parties did not meet their obligations under the treaty. Although violations are regularly discussed before the IWC’s Infractions Sub-Committee, these discussions mostly remain without consequence. The moratorium on commercial whaling, which came into effect in 1986, became necessary to stop the imminent extinction of many whale species. In 1993, the IWC agreed on a *Revised Management Procedure* (RMP) for baleen whales and started formal negotiations for a *Revised Management Scheme* (RMS) to allow “controlled and limited” commercial whaling. The RMS process is under continuous development. Among many of the measures proposed, the RMS provides for the establishment of a *Compliance Review Committee* (CRC). At its annual meeting in 2005, the IWC adopted Resolution IWC/57/31 “to advance the RMS process” and agreed on the creation of a *Compliance Working Group* (Terms of Reference: see box 1). The present report argues that it is essential for the CRC to have enough powers to ensure compliance with IWC provisions and to be more than just a remodelled Infractions Sub-Committee. In view of the fact that the IWC has lost a lot of time discussing, what constitutes an infraction, this report summarises the most important duties of IWC Contracting Parties and recommends a list of possible infractions to the provisions of the IWC. Finally, it analyses options and practices in place in other MEAs with regard to non-compliance and proposes a catalogue of measures, which have proven to be efficient and which could be adopted by the IWC.

- Box 1 -

### WC/57/27: Terms of Reference for the Compliance Working Group\*

- (1) to explore ways to strengthen compliance by analysing the range of possible legal, technical, and administrative measures available to the Commission which are consistent within the ICRW;
- (2) to explore possible mechanisms to monitor and possibly sanction non-compliance of contracting governments consistent with the ICRW and international law.

\* adopted by consensus

## 2. Compliance in Multilateral Environmental Agreements

The effectiveness of an international agreement is limited by the extent, to which the Contracting Parties meet their obligations. Article 2(2) of the United Nations Charter calls on all member countries to “*fulfil in good faith their obligations*”, Article 300 of the United Nations Convention on the Law of the Seas (UNCLOS) requires that “*states shall fulfil in good faith their obligations assumed under this convention*”; and Article 26 of the Vienna Convention on the Law of the Treaties provides that “*agreements are to be kept*”.

- Box 2 -

### UNEP Definition of Compliance\*

In relation to MEAs: “*Compliance means the fulfilment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement.*”

In relation to national enforcement and international cooperation: “*Compliance means the state of conformity with obligations, imposed by a State, its competent authorities and agencies on the regulated community, whether directly or through conditions and requirements in permits, licences and authorizations, in implementing multilateral environmental agreements.*”

\* UNEP (2002): *Compliance with and enforcement of multilateral environmental agreements*. UNEP Governing Council Decision, adopted October 2002 in Nairobi.

Compliance has many aspects and compliance measures can range from taking action against individual offenders and imposing appropriate penalties to requesting provision of information required by Parties or certain Committees. In most cases violations are committed by individuals, who are under the jurisdiction of Parties or Non-Parties, and not by the Government itself. However, it has been shown that the frequency of violations by individuals is negatively correlated with their risk of getting caught and being sentenced to severe fines<sup>1</sup>. Therefore, Parties must ensure compliance not only by implementing decisions of Conventions into national law but also by adopting appropriate deterrent enforcement measures (see box 2). For instance, enforcement frequently stops with seizure, but thorough investigations and juridical proceedings are essential consequences. Additionally, Contracting Parties have the duty to cooperate and to submit in-

<sup>1</sup> Conclusion of the EU’s project N° 96/090: *Compliance with fishery regulations*. Hatcher et al. 1996.

formation that contributes to the conservation measures of a Convention.

In many MEAs non-compliance measures were not included in the original treaty, but evolved over time through resolutions and practice, e.g. CITES, CCAMLR or ICCAT<sup>2</sup>. This example could be followed by the IWC.

## 2.1. IWC Infractions Sub-Committee

Presently, the IWC has 66 member states<sup>3</sup>, which are bound by Art. IX (1) of the IWC Convention: “*Each Contracting Government shall take appropriate measures to ensure the application of the provisions of this Convention and the punishment of infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction*”. However, from its creation in 1946, the IWC has been confronted with non-compliance and unwillingness to cooperate. The establishment of an Infractions Sub-Committee in the 1950s<sup>4,5</sup> did nothing to change this. Since then, this forum has considered “*matters and documents relating to the International Observer Scheme and Infractions insofar as they involve monitoring of compliance with the Schedule and penalties for infractions thereof*”<sup>6</sup>. Cases of illegal whale catches, illegal sale or mislabelling of whale products, and obviously intentional “by-catches” are regularly on its agenda, but most fail to incur serious consequences. The forum has discussed 24 cases of reported illegal whaling, and six of illegal trade since 1990. On average the discussions lasted 1.5 years before being dropped, despite no resolution of the case being reported<sup>7</sup>.

Non-compliance at the IWC is facilitated by several factors:

- To this day, the IWC has failed to define, what exactly constitutes an infraction;
- IWC Parties often interpret resolutions as “non-binding” whenever these resolutions conflict with their own interests.

<sup>2</sup> Brack, D. (2001): *International environmental disputes: International forums for non-compliance and dispute settlement in environmental-related cases*. Royal Institute of International Affairs.

<sup>3</sup> as of October 2005.

<sup>4</sup> The Infractions Sub-Committee was first mentioned in the Chair’s report of the 5th meeting in 1953 (IWC secretary in lit. to S. Altherr, 16<sup>th</sup> November 2005).

<sup>5</sup> Gillespie, A. (2005): *Whaling Diplomacy: Defining issues in international environmental law*. E. Elgar Pub. (ed.), Northampton.

<sup>6</sup> Rep.Int.Whal.Comm’n 29:22.

<sup>7</sup> WDCS (2005): *Analysis of the reports of the IWC’s Infraction Sub-Committee from 1991 to 2004: Review of Compliance at the IWC. Briefing to the IWC parties, June*

- The Infractions Sub-Committee has *de facto* no competence to impose sanctions or to make recommendations to IWC Parties that are accused of violations. Instead, the Party itself has the liberty to decide whether the accusations are (or are not) an infraction. Accordingly, accused Parties regularly undermine the discussions by contesting the occurrence of infractions or by denying the submission of relevant information. An analysis of the Infractions Sub-Committee’s reports from 1991 to 2004<sup>8</sup> showed that in only 10 out of 46 cases the Parties concerned recognised the incidents as infractions. In 19 cases Parties denied that the incidents were infractions, in 26 cases they failed to give additional information when requested to do so by the Sub-Committee. Japan was confronted with 14 cases, followed by Denmark (10), St. Vincent and Iceland (6 each), Norway (4), Russia (2), the UK and Peru (1 each). Over time, Parties increasingly showed an unwillingness to cooperate and infractions mostly remained unpunished.

So far, the IWC has failed to find a way to deal effectively with non-compliance. Meanwhile, several Parties continuously neglect their duty to conform to the provisions of the IWC, e.g. to Art. 24 (b) of the Schedule that requests “*a full explanation of each infraction.*”

## 2.2. Compliance in CITES

The *Convention of International Trade in Endangered Species of Wild Fauna and Flora* (CITES) came into force in 1975. Today, CITES has 169 contracting Parties<sup>9</sup> and with 90% of all countries worldwide is now close to universal. This broad participation, combined with the ability of CITES to recommend effective sanctions, including trade suspensions, make it one of the most effective MEAs. All IWC member countries (as of December 2005) – except Kiribati, Nauru, Oman, Solomon Islands and Tuvalu – are Parties to CITES.

**Compliance duties:** Article VIII (1) of CITES states: “*The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures: (a) to penalize trade in, or possession of, such specimens, or both; and (b) to provide for the confiscation or return to the State of export of such specimens*”

<sup>8</sup> WDCS (2005): *Analysis of the reports of the IWC’s Infraction Sub-Committee from 1991 to 2004: Review of Compliance at the IWC. Briefing to the IWC parties, June* [www.cites.org/eng/disc/parties/index.shtml](http://www.cites.org/eng/disc/parties/index.shtml) (as of Dec.05)

**Compliance forum:** Contrary to the situation in many other MEAs, it is not the Conference of the Parties that decides on individual non-compliance measures, but in most cases is the *Standing Committee*. The CoP may review a particular case, though this is rare; as a rule, its role is to direct and oversee the general handling of compliance. Article XII, Paragraph 2 of the Convention enables the Secretariat “to request from Parties such information as it deems necessary to ensure implementation of the Convention” and, unusually, “to make recommendations for the implementation of the aims and provisions of the present Convention”. After cases of non-compliance have been identified, usually by the Secretariat, assistance is offered to facilitate a Party’s return to compliance. Frequently, deadlines are set for enforcement to be improved, legislation enacted or reports delivered. Trade suspensions have often been decided as a “last resort” measure to entice compliance (see below).

**What represents an infraction?** The Convention text does not include a definition. However, CITES deals with two different types of “infraction”: “illegal trade” and “non-compliance by Parties with the provisions of the Convention either directly or as interpreted by Resolution”<sup>10</sup>, emphasising the duties arising from resolutions. Indeed, contrary to the IWC within CITES the realisation of resolutions and decisions is not controversial<sup>11</sup>. Doc. 10.28 (Rev.) lists in detail infractions, e.g. insufficient communication with the Secretariat, failure to submit reports and to enact national legislation.

**Reporting duties:** Article VIII (7) requires each party to prepare periodic reports. Two types of reports are required: annual trade reports detailing permits issued and species traded and biennial implementation reports “on legislative, regulatory and administrative measures taken to enforce the provisions of the present Convention.” Import and export records are cross-matched and discrepancies are reported by the CITES Secretariat.

**Quota reduction:** In cases, where trade volumes for a species are considered to be unsustainable, the Animals or Plants Committee may decide to set maximum export quotas.

**Trade restrictive measures:** In cases of persistent non-compliance and no will of a Party to

<sup>10</sup> CITES Doc. 10.28 (Rev.): *Review of alleged infractions and other problems of implementation of the Convention*.

<sup>11</sup> Reeve, R. (2002): *Policing international trade in endangered species – The CITES treaty and compliance*. The Royal Institute of International Affairs & Earthscan Publications Ltd. (eds.), London.

cooperate towards compliance<sup>12</sup> (e.g. lack of annual reports over three consecutive years<sup>13</sup>, insufficient national legislation, failure to provide non detriment finding) the Standing Committee may recommend to all Parties to suspend trade in certain or all CITES listed species with the non-compliant Party. Since 1985, trade suspensions have been used in at least 40 cases<sup>14</sup> and are currently valid for 31 countries posted on the CITES website. Trade suspensions often result in Parties restoring compliance, and trade suspensions being lifted.

**Other measures:** At present, “guidelines on compliance with the Convention” are under discussion in the CITES Standing Committee<sup>15</sup>. In this context, the CITES Secretariat suggested several measures that could be used in cases of non-compliance, e.g. the restriction of the right to vote at CoP meetings, the ineligibility for membership in the Standing Committee, loss of right to participate in other permanent committees and working groups<sup>16</sup>.

### 2.3. Compliance in CCAMLR

*Contracting Parties*<sup>17</sup> (IWC Parties in bold): **Argentina, Australia, Belgium, Brazil, Chile, EC, France, Germany, India, Italy, Japan, Republic of Korea, Namibia, New Zealand, Norway, Poland, Russia, Spain, Sweden, South Africa, Ukraine, UK, Uruguay, USA.** Party to the Convention, but not member of the Commission: *Bulgaria, Canada, Finland, Greece, Mauritius, Netherlands, Peru, Vanuatu.*

The *Convention for the Conservation of Antarctic Marine Living Resources* (CCAMLR) came into force in 1982. CCAMLR has earned broad appreciation for its several effective and innovative measures promoting compliance<sup>18</sup>.

<sup>12</sup> SC53 Doc. 30 (2005) *Annex: draft guidelines on compliance with the Convention. Paragraph 38 i*.

<sup>13</sup> *Sanctioned by trade suspension since 2002.*

<sup>14</sup> Sand, P. (2005): *Sanctions in case of non-compliance and state responsibility: pacta sunt servandae – or else? In: Making law work: Environmental compliance and sustainable development. Zaelke et al. (eds.): 259-271.*

<sup>15</sup> CITES SC53 Doc. 30 (2005): *Guidelines for Compliance with the Convention. Draft to be finished and to be discussed at SC54 in October 2006. See also Reeve, R. (2004): The CITES treaty and compliance: progress or jeopardy? Chatham House BP 04/01 and Addendum.*

<sup>16</sup> CITES (2002) SC46 Doc. 11.3: *Possible measures for non-compliance. CITES Secretariat.*

<sup>17</sup> As of December 2005: 24 Parties.

<sup>18</sup> Cordonnery, L. (1998): *Environmental Protection in Antarctica: Drawing Lessons from the CCAMLR Model for the Implementation of the Madrid Protocol. Ocean Development & International Law, 29: 125-146.*

**Compliance duties:** According to Article X (2) “the commission shall draw the attention of all Contracting Parties to any activity which, in the opinion of the Commission, affects the implementation by a contracting party of the objective of this Convention or the compliance by that Contracting Party with its obligations under this Convention.” Article XXI states that “1. each Contracting Party shall take appropriate measures within its competence to ensure compliance with the provisions of this Convention and with conservation measures adopted by the Commission... and 2. each Contracting Party shall transmit to the Commission information on measures taken pursuant to Paragraph 1 above, including the imposition of sanctions for any violation.”

**Compliance Forum:** Since 2001, CCAMLR has a *Standing Committee on Implementation and Compliance* (SCIC), which shall “review and analyse information pertaining to activities of Contracting Parties and non-Contracting Parties which undermine the provisions of the Convention, including in particular IUU fishing, and recommend actions to be taken”<sup>19</sup>.

**What constitutes an infraction?** Conservation Measure 10-06 describes non-compliance as fishing operations that diminish the effectiveness of CCAMLR Conservation Measures or are not consistent with the objective of the Convention.

**Reporting duties:** According to Article XX Parties “shall provide, in the manner and at such intervals as may be prescribed, information about their harvesting activities, including fishing areas and vessels, so as to enable reliable catch and effort statistics to be compiled.” Article XXI urges for the submission of reports on responses to violations. Reports are submitted annually and comprise information on fishery-related activities, compliance and enforcement, and other activities related to CCAMLR’s provisions.

**Vessel register:** CCAMLR requires that all Parties submit detailed information on all licences issued and the corresponding vessels, including name and type of vessel, registration and IMO<sup>20</sup> number, external markings and port of registry, where and when built, length, previous flags, international radio call signs, ves-

sel communication types and numbers, name and address of owner, normal crew complement, licensed fishing areas and periods, gear, power of engines, and photos of both starboard and port side of vessel and stern<sup>21</sup>.

**Blacklisting IUU vessels:** Before each annual meeting, the Executive Secretary of CCAMLR creates a draft list of Party vessels that are obviously involved in a fishing activity, “which has diminished the effectiveness of CCAMLR conservation measures in force”<sup>22</sup>. Contracting Parties, under whose flag the suspect vessels are registered, are notified of this draft list and have the opportunity to report or comment on the incidents<sup>23</sup>. If their responses do not satisfy the Commission, the SCIC at the Annual Meeting adopts the **IUU Vessel List**<sup>24</sup>, including all vessels, for which the concerns are not cleaned out. Parties are requested, if necessary, to **withdraw the registration or the fishing licenses** of those vessels<sup>25</sup> – for waters within the Convention Area as well as waters under their national fisheries jurisdiction<sup>26</sup>. The current list, which is accessible on the CCAMLR homepage, includes two vessels from Parties and 11 vessels from non-Parties<sup>27</sup>. In 2000, CCAMLR also decided to keep a **list of flags of convenience**<sup>28</sup>.

**Trade restrictive measures:** In 2001, the option of trade sanctions was introduced through Resolution 19/XXI, which urges both Parties and non-Parties to prohibit landing and transshipment of fish and fish products from boats with flags of non-compliance” (FONC)<sup>29</sup>. In 2004 Conservation Measure 10-06 prohibited chartering of “black-list” vessels (see above) and importing their catches.

**Other measures:** Article XXIV requires that the Commission elaborates a system of observation and inspection “to promote the objective and ensure observance of the provisions of the Convention”. This allowed an independent insight in fishing activities through inspectors nominated by the Commission. Parties are also obligated to permit landing or tranship-

<sup>19</sup> CCAMLR (2001): *SCIC Terms of Reference and organization of work*.

<sup>20</sup> In 1987, the International Maritime Organisation introduced through adoption A.600(15) a permanent number to each ship for identification purposes. This number keeps unchanged upon transfer of the ship to other flags and is inserted in the ship’s certificates. IMO Circular letter No. 1886/Rev.2, 27<sup>th</sup> June 2002.

<sup>21</sup> Conservation Measure 10-02 (2004): *Licensing and inspection obligations of Contracting Parties with regard to their flag vessels. Article 3 to 5*

<sup>22</sup> Conservation Measure 10-06 (2004): *Scheme to promote compliance by Contracting Party vessels. Article 1.*

<sup>23</sup> See Article 8, *ibidem*

<sup>24</sup> See Article 13, *ibidem*

<sup>25</sup> See Article 17, *ibidem*

<sup>26</sup> See Article 18, *ibidem*

<sup>27</sup> CCAMLR (2005): *Lists of contracting parties vessels and non-contracting parties vessels, updated 17<sup>th</sup> March.*

[www.ccamlr.org/pu/E/sc/fish-monit/iuu-vess-list.htm](http://www.ccamlr.org/pu/E/sc/fish-monit/iuu-vess-list.htm)

<sup>28</sup> CCAMLR (2001): *Report of the 20<sup>th</sup> Meeting of the Commission, section IUU fishing in the Convention Area.*

<sup>29</sup> CCAMLR (2001): *Resolution 19/XXI - Flags of non-Compliance.*

ment of toothfish only if a detailed catch document (DCD) provides details on the vessel and the toothfish product<sup>30</sup>.

## 2.4. Compliance in ICCAT

*Contracting Parties (IWC Parties in bold):* Algeria, Angola, Barbados, **Belize, Brazil, Canada, Cap Verde, China, Croatia, Equatorial Guinea, EC, France, Gabon, Ghana, Guatemala, Guinea, Honduras, Iceland, Ivory Coast, Japan, Libya, Mexico, Morocco, Namibia, Nicaragua, Norway, Panama, Philippines, Republic of Korea, Russia, Sao Tomé and Principe, Senegal, South Africa, Trinidad & Tobago, Tunisia, Turkey, Uruguay, UK, USA, Vanuatu, and Venezuela.**

The *International Convention for the Conservation of Atlantic Tunas* (ICCAT) was founded in 1969 to conserve about 30 species of tuna and tuna-like fishes.

**Compliance duties:** Through Article IX Parties “(1) agree to take all action necessary to ensure the enforcement of this Convention. Each Contracting Party shall transmit to the Commission, biennially or at such other times as may be required by the Commission, a statement of the action taken by it for these purposes” and “(3) to collaborate with each other with a view to the adoption of suitable effective measures to ensure the application of the provisions of this Convention and in particular to set up a system of international enforcement to be applied to the Convention Area...”.

**Compliance Forum:** In 1995, ICCAT established a (*Conservation and Management Measures*) *Compliance Committee*, which reviews the status of Parties’ compliance with ICCAT and specifically reviews domestic measures for the implementation of the Commission’s recommendations<sup>31</sup>. Resolution 03-15 passed in 2003 determines that the Compliance Committee identifies both contracting and non-contracting Parties that did not take measures or exercised effective control to prevent their vessels from undermining the effectiveness of ICCAT<sup>32</sup>.

**What constitutes an Infraction?** Resolution 02-23 lists illegal activities as a) harvesting tuna, when not being registered on the ICCAT list of authorised vessels; b) harvesting tuna, if flag state is without quotas, catch limit or effort allocation; c) no or false recording / reporting of

catches; d) taking or landing undersized fish; e) fishing during closed seasons or in closed areas; f) using prohibited fishing gear; and g) trans-shipment with vessels in the IUU list.

**Reporting duties:** Article IX 2(a) obliges Parties to “furnish, on the request of the Commission any available statistical, biological, and other scientific information the Commission may need for the purposes of this Convention”, which means there is no duty to regularly report, e.g. on violations and arising action.

**Black-listing:** In accordance with Recommendation 02-23<sup>33</sup>, ICCAT maintains a “**black list**” of fishing vessels involved in illegal operations, currently including 10 vessels, with the latest addition in November 2005<sup>34</sup>.

**Quota reduction:** ICCAT has established country-specific quotas. If these limits are exceeded ( e.g., Atlantic blue-fin tuna and swordfish<sup>35,36</sup>) the quota for the following management period will be reduced by the previous quota overage. In case of repetition, the catch limit will be even further reduced and trade restrictive measures may be taken.

**Trade restrictive measures:** In cases of IUU fishing activities ICCAT recommends to suspend **trade in certain ICCAT species** with the nations accused, which led to import bans from Belize (2000-2002), Bolivia (since 2002), Cambodia (2000-2004), Equatorial Guinea (2000-2004), Georgia (since 2003), Honduras (2000-2001), Sierra Leone (2002-2004), and St. Vincent & the Grenadines (2000-2001)<sup>37</sup>.

**Other measures:** Catching undersized fish may lead to time or area closures, assignment of reduced fish quotas or gear restrictions<sup>38</sup>. In 1998, port state measures were introduced that require members to carry out inspections of all tuna fishing vessels in their ports<sup>39</sup>.

<sup>33</sup> ICCAT (2002) Rec. 02-23 to establish a list of vessels presumed to have carried out IUU Fishing Activities in the ICCAT Convention Area.

<sup>34</sup> ICCAT (2006): List of vessels presumed to have carried out IUU fishing activities in the ICCAT Convention Area. <http://www.iccat.es/IUU.htm>, viewed 20<sup>th</sup> March.

<sup>35</sup> ICCAT (1996) Rec. 96-14 regarding compliance in the bluefin tuna and North Atlantic swordfish fisheries.

<sup>36</sup> ICCAT (1997) Rec. 97-08 regarding compliance in the South Atlantic swordfish fishery.

<sup>37</sup> See ICCAT Rec. 00-15, 00-16, 01-14, 01-15, 02-16, 02-17, 02-19, 03-18, 04-13, 04-14, 04-15.

<sup>38</sup> ICCAT (1997) Rec. 97-01 to improve compliance with minimum size regulations.

<sup>39</sup> FAO (2002): *Port state measures: In: Implementation of the international plan of action to deter, prevent and eliminate IUU fishing.* Rome.

<sup>30</sup> Conservation Measure 10-05 (2004): *Catch Documentation Scheme for Dissostichus spp.*, Article 6

<sup>31</sup> ICCAT (1995): *Mandate and terms of reference adopted by the Commission for the ICCAT Conservation and Management Measures Compliance Committee.*

<sup>32</sup> ICCAT (2003): *Resolution by ICCAT concerning trade measures.* Res. 03-05.

## 2.5. Compliance in AIDCP

*Contracting Parties (IWC Parties in bold): Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, USA, Vanuatu, and Venezuela. Bolivia, Columbia and the EC are applying the Agreement provisionally.*

The *Agreement on the International Dolphin Conservation Program* (AIDCP) is a legally binding instrument in the eastern tropical Pacific which entered into force in 1999. Its Annex IV establishes a Dolphin Mortality Limit (DML), which is the maximum by-catch quota assigned to each authorised vessel<sup>40</sup>. In order to receive a DML, a vessel must list its captain in the AIDCP List of Qualified Captains<sup>41</sup>.

**Compliance duties:** Article XVI of the Agreement states: “*In respect of violations, each party ... shall apply, consistent with its national laws, sanctions of sufficient gravity as to be effective in securing compliance with the provisions of this Agreement and of measures adopted pursuant thereto and to deprive offenders of the benefits accruing from their illegal activities. Such sanctions shall, for serious offences, include refusal, suspension or withdrawal of the authorization to fish.*”

**Compliance forum:** The AIDCP body charged to identify infractions and to ensure compliance is the *International Review Panel*, which holds at least three meetings a year.

**What constitutes an infraction?** AIDCP distinguishes between “major” and “other” infractions<sup>42</sup>. Major infractions include

- “fishing without an observer;
- fishing on dolphins without a DML;
- fishing on banned stocks of dolphins;
- failing to avoid injuring/killing dolphins captured in the course of fishing operations;
- fishing after reaching their DML;
- departing to fish with a DML without a dolphin safety panel in the net;
- assigning fishing captains not on a AIDCP List of Qualified Captains to a DML vessel;
- using explosives when fishing on dolphins;
- not conducting backdown after dolphins are captured;

<sup>40</sup> Annex IV, section I, Paragraph 2.

<sup>41</sup> AIDCP (2004): *Procedures for maintaining the AIDCP list of qualified captains. Based on Resolution A-04-04.*

<sup>42</sup> AIDCP (2003): *Report of the International Review Panel IRP-34-14: Effect of Resolution A-02-03. La Jolla, 9.-10. October.*

- sacking up or brailing live dolphins;
- harassing an observer, or interfering with his duties.”

“Other” infractions include “*night set, not deploying rescuers during backdown, item of rescued equipment missing, not continuing rescue efforts after backdown with live dolphins in the net, and fishing on dolphins prior to notification of allocation of DMLs*”<sup>43</sup>.

Resolution A-02-03<sup>44</sup> defines a so-called “**Pattern of Infractions**”, i.e. repeated or combined major infractions, which results in the loss of the DML for the vessel concerned, in accordance with Paragraph I(7), Annex IV of the Agreement, and with this a loss of fishing authorisation.

**Reporting duties:** Resolution A-01-04<sup>45</sup> calls on Parties to provide information on infractions and corresponding sanctions. Resolution A-01-02<sup>46</sup> introduced procedures for a tuna certification, and Parties are asked to submit copies of all certified tuna products.

**Black-listing:** In Resolution A-04-07<sup>47</sup> the AIDCP agreed to establish a **IUU fishing list**. Vessels on the IUU List are not authorised to land or tranship at ports of AIDCP Parties. According to Paragraph 8 of Resolution A-04-07 the inclusion into the IUU-list may lead to “the withdrawal of the registration or the fishing licenses of these vessels”.

## 2.6. Compliance in the UNFA

*Contracting Parties (IWC Parties in bold): Argentina, Australia, Austria, Bangladesh, Belgium, Belize, Brazil, Burkina Faso, Canada, China, Cote d'Ivoire, Denmark, Egypt, EC, Fiji, Finland, France, Gabon, Germany, Greece, Guinea-Bissau, Iceland, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Luxembourg, Maldives, Marshall Islands, Mauritania, Micronesia, Morocco, Namibia, Netherlands, New Zealand, Niue, Norway, Pakistan, Papua New Guinea, Philippines, Portugal, Republic of Korea, Russia, St. Lucia, Samoa, Senegal, Seychelles, Spain, Sri Lanka, Sweden, Tonga, Uganda, Ukraine, UK, USA, Uruguay, Vanuatu.*

The *UN Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*

<sup>43</sup> AIDCP (2004): *Executive report on the functioning of the AIDCP in 2004, page 3.*

<sup>44</sup> AIDCP (2002): *Resolution on the definition of a pattern of infractions, 10<sup>th</sup> October.*

<sup>45</sup> AIDCP (2001): *Resolution to promote compliance with AIDCP. 20th June.*

<sup>46</sup> AIDCP (2001): *Resolution to establish procedures for Dolphin Safe Tuna Certification, San Salvador, 20<sup>th</sup> June.*

<sup>47</sup> AIDCP (2004): *Resolution to establish a list of vessels presumed to have carried out IUU fishing activities in the Agreement Area. La Jolla 20<sup>th</sup> October.*

(UNFA) was adopted in August 1995 to implement the provisions of the United Nations Convention on the Law of the Sea (UNCLOS) relating to straddling and migratory fish.

**Compliance duties:** Article 19 of UNFA Paragraph 1 urges Parties to “(e) ensure that, where it has been established, in accordance with its laws, a vessel has been involved in the commission of a serious violation of such measures, the vessel does not engage in fishing operations on the high seas until such time as all outstanding sanctions imposed by the flag state in respect of the violation have been compiled with.” Paragraph 2 states: “All investigations and judicial proceedings shall be carried out expeditiously. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities. Measures applicable in respect of masters and other officers of fishing vessels shall include provisions which may permit, *inter alia*, refusal, withdrawal or suspension of authorizations to serve as masters or officers on such vessels.” States are obliged to closely cooperate during investigations of infractions. Article 34 claims that states shall “fulfil in good faith the obligations assumed...” and “exercise the rights recognised in this agreement in a manner which would not constitute an abuse of right.”

**What constitutes an infraction?** Article 21 (11) provides a list of serious violations:

- “fishing without a license, authorization or permit issued by the flag state in accordance with Article 18, Paragraph 3(a);
- failing to maintain accurate records of catch and catch-related data, as required by the relevant sub-regional or regional fisheries management organization or arrangement, or seriously misreporting catches, contrary to the catch reporting requirements of such organization or arrangement;
- fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established by the relevant sub-regional or regional fisheries management organisation or arrangement;
- directed fishing for a stock subject to a moratorium or for which fishing is prohibited;
- using prohibited fishing gear;
- falsifying or concealing the markings, identity or registration of a fishing vessel;
- concealing, tampering with or disposing of evidence relating to an investigation;

- *multiplying violations which together constitute a serious disregard of conservation and management measures; or*
- *such other violations as may be specified in procedures established by the relevant sub-regional or regional fisheries management organization or arrangement.”*

**Non-compliance measures:** According to Article 18 Parties may refuse the authorisation of fishing vessels. This article also lays out reporting duties on fishing data. Article 42 states: “No reservations or exceptions may be made to this Agreement” preventing the loopholes which seriously undermine other international accords<sup>48</sup>. Probably the most innovative aspect of UNFA is its Article 21, which allows a State Party to “through its duly authorised inspectors, board and inspect ... fishing vessels flying the flag of another state party to this agreement ... for the purpose of ensuring compliance with conservation and management measures”. This right to inspect foreign vessels also covers regional fisheries organizations.

## 2.7. Compliance in WCPFC

*Contracting Parties (IWC Parties in bold): Australia, Canada, China, Cook Islands, Federated States of Micronesia, Fiji Islands, France, Indonesia, Japan, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Republic of Korea, Samoa, Solomon Islands, Tonga, Tuvalu, UK for Pitcairn, Henderson, Ducie and Oeno Islands, USA and Vanuatu.*

The Western and Central Pacific Fisheries Commission (WCPFC) was only established in 2001 by a Convention which entered into force on 19<sup>th</sup> June 2004. The mandate for sanctions is directly embedded in the Convention text.

**Compliance duties:** Articles 23 and 25 of the Convention lists in detail the duties of Parties to enforce the provisions of the WCPFC.

**Compliance body:** Article 14 of the Convention defines the mandate of a **Technical and Compliance Committee** which is obligated to “(g) report to the Commission its findings or conclusions on the extent of compliance with conservation and management measures and (h) make recommendations to the Commission on matters relating to monitoring, control, surveillance and enforcement”. Details on a time-frame for all reporting duties of member and flag states and the Commission’s secretariat

<sup>48</sup> E.g. in CCAMLR, Article IX (6)(c).

have been decided at the first meeting of the Commission in December 2005<sup>49</sup>.

**What constitutes an infraction?** In accordance with Article 25, §2 Parties are obliged to investigate “*any alleged violation by fishing vessels flying its flag of the provisions of this Convention or any conservation and management measure adopted by the Commission*”.

**Reporting duties:** Articles 14 Paragraph 2(b) and 23 Paragraph 5 oblige Parties to submit reports “*relating to measures taken to monitor, investigate and penalize violations and reports*” on the progress of investigations and resulting action. Article 24 Paragraph 5 urges Parties to provide data on their records of authorised fishing vessels and on any changes to these records. It is suggested they submit reports on violations within two months<sup>50</sup>.

**Trade restrictive measures:** Article 25 Paragraph 12 states that “*the Commission, when necessary, shall develop procedures which allow for non-discriminatory trade measures to be taken, consistent with the international obligations of the members of the Commission, on any species regulated by the Commission, against any state or entity whose fishing vessels fish in a manner which undermines the effectiveness of the conservation and management measures adopted by the Commission*”.

**Withdrawal of fishing authorization:** Article 25 Paragraph 7 urges Parties to impose sanctions that “*shall be adequate in severity to be effective in securing compliance and to discourage violations... Measures applicable ... shall include provisions which may permit, inter alia, refusal, withdrawal or suspension of authorizations to serve as masters or officers on such vessels.*”

## 2.8. Compliance in FAO-CA

*Contracting Parties (IWC Parties in bold):* Albania, Argentina, Australia, Barbados, Belize, Benin, Canada, Chile, Cyprus, Egypt, EC<sup>51</sup>, Georgia, Ghana, Japan, Madagascar, Mauritius, Mexico, Morocco, Myanmar, Namibia, New Zealand, Norway, Peru, Republic of Korea, St. Kitts & Nevis, St. Lucia, Seychelles, Sweden, Syrian Arab Republic, Tanzania, USA, Uruguay.

The FAO’s Compliance Agreement (FAO-CA) was approved in 1993, but only came into

force in April 2003. Facing IUU fishing activities that are continuously growing in both intensity and scope<sup>52</sup>, the FAO developed a series of measures. Contrary to other FAO initiatives – such as the FAO Code of Conduct<sup>53</sup>, the International Plan of Action to prevent, deter and eliminate IUU fishing<sup>54</sup>, and the Rome Declaration on IUU fishing 2005<sup>55</sup> – which are all voluntary, FAO-CA is binding for Parties that have ratified.

**Compliance duties:** Article III of the Compliance Agreement lays out the responsibility of flag states to ensure compliance, including in Paragraph “*1(a) such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.*”

**What constitutes an infraction?** The FAO-CA so far has not precisely defined infractions, but only vaguely mentions activities “*that undermine the effectiveness of the international conservation and management measures*”.

**Reporting duties:** In accordance with Article VI Parties are obliged to provide information on all authorised vessels, operators, fishing methods and any changes to these records. Paragraph 8 explicitly calls for reports on any fishing that undermines international conservation and management measures, not only of vessels under a Party’s jurisdiction but also from other nations.

**Vessel register / black listing:** The FAO runs the *High Seas Vessels Authorization Record* database which contains, for example, data on registration and authorization status infringements. This register is not publicly accessible; access is limited to authorised countries. This lack of transparency diminishes public accountability of countries that are not complying.

**Withdrawal of fishing authorization:** FAO-CA in its Article III Paragraph 8 explicitly states that “*each Party shall take enforcement measures in respect of fishing vessels entitled to fly its flag which act in contravention of the provisions of this Agreement, including, where appropriate, making the contravention of such*

<sup>49</sup> WCPFC/TCC1/11 (2005): Structure for monitoring and reviewing compliance with conservation and management measures, 5<sup>th</sup> November.

<sup>50</sup> Table 1, *ibidem*.

<sup>51</sup> Of the EU’s 25 member states the following are IWC parties: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, UK.

<sup>52</sup> FAO (2004): Countries debate strategies for managing fleet capacities and combating illegal fishing. News release 1<sup>st</sup> July, Rome.

<sup>53</sup> FAO (1995): Code of Conduct for Responsible Fisheries, as adopted on 31<sup>st</sup> October, Rome.

<sup>54</sup> adopted at the FAO session in June 2001.

<sup>55</sup> FAO (2005): The 2005 Rome Declaration on IUU Fishing, adopted by the FAO Ministerial Meeting on Fisheries, 12<sup>th</sup> March.

provisions an offence under national legislation. Sanctions applicable in respect of such contraventions shall be of sufficient gravity as to be effective in securing compliance with the requirements of this Agreement and to deprive offenders of the benefits accruing from their illegal activities. Such sanctions shall, for serious offences, include refusal, suspension or withdrawal of the authorization to fish on the high seas.<sup>56</sup> Paragraphs 4 and 5 aim to prevent the undermining of the Agreement by vessels under flag of convenience.

## 2.9. Compliance in NAFO

*Contracting Parties (IWC Parties in bold): Bulgaria, Canada, Cuba, Denmark (in respect of Faroe Islands and Greenland), EC, France (in respect of St. Pierre & Miquelon), Iceland, Japan, Republic of Korea, Norway, Russia, Ukraine, USA.*

NAFO, the *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, was founded in 1979. NAFO obliges Parties to stick to quotas (TACs, total allowable catches) for certain fish stocks and to stop any fishing as soon as the accumulated reported catch, the estimated unreported catch, the estimated quantity to be taken before the closure of the fishery and the likely by-catch reach the total quota<sup>57</sup>. Sustainable fishing quotas are to be respected through minimum gear, by-catch and fish size requirements as well as area and time restrictions<sup>58</sup>. However, **NAFO** is criticised as weak in compliance, poor in enforcement and less transparent than many other RFMOs<sup>59</sup>.

**Compliance duties:** Article XVII of the Convention states that *“the Contracting Parties agree to take such action, including the imposition of adequate sanctions for violations, as may be necessary to make effective the provisions of the Convention and to implement any measures which become binding under Paragraph 7 of Article XI and any measures which are in force under Article XXIII.”* Further, Contracting Parties are obliged to *“take prompt action to conduct the investigations”* on alleged infractions and *“take immediate judicial or administrative action in the same manner”* as

when *“dealing with infringements of fisheries regulations in national waters”*<sup>60</sup>.

**Compliance body:** The *Standing Committee on International Control (STACTIC)* evaluates the effectiveness of NAFO (including reporting on inspection, surveillance activities, infringements and follow-ups thereof), makes recommendations to the Commission and produces an annual compliance review. Its Executive Secretary supervises relevant information, e.g. on whether Parties respect their quota.

**What constitutes an infraction?** NAFO classifies certain infringements as serious, including *“fishing on an others quota, directed fishing for a stock which is subject to a moratorium, directed fishing after the date on which the Party for the vessel has notified the Executive Secretary that vessels of that party will cease a directed fishery for those stocks or species, fishing in a closed area or with gear prohibited, mis-recording of catches, fishing without a valid authorisation issued by the flag Contracting Party, interference with the satellite monitoring system, catch communication violations, or preventing inspectors or observers from carrying out their duties”*<sup>61</sup>.

**Reporting duties:** Article XVII obliges Parties to *“transmit to the Commission an annual statement of the actions taken by it.”* Furthermore, the NAFO Conservation and Enforcement Measures demand a variety of reports from Parties, e.g. action taken concerning infringements, inspection and surveillance activities, authorised vessels for the register, catch and fishing effort, VMS, inspectors etc.<sup>62</sup>.

**Black-listing:** In 2005, NAFO started to black-list non-NAFO-members involved in IUU fishing and automatically shares such data with other regional fishery bodies and the FAO<sup>63</sup>.

**Quota reduction:** When a Party has obviously exceeded its own quota or fished on a quota for other Parties, the Commission may adjust the quota for this Contracting Party in a successive period<sup>64</sup>, resulting in a reduced quota.

<sup>56</sup> FAO (1995): *Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas*. Rome.

<sup>57</sup> Article 3 of the NAFO conservation and enforcement measures, NAFO/FC Doc. 05/1, revised 19<sup>th</sup> July 2005.

<sup>58</sup> Articles 9, 10, 11, and 12 *ibidem*.

<sup>59</sup> McDiarmid, et al. (2005): *The Northwest Atlantic Fisheries Organisation: A case study in how RFMOs regularly fail to manage our oceans*. Greenpeace, June.

<sup>60</sup> Article 33 of the NAFO conservation and enforcement measures, NAFO/FC Doc. 05/1, revised 19<sup>th</sup> July 2005.

<sup>61</sup> Article 32 *ibidem*.

<sup>62</sup> Articles 15, 20, 21, 25, 35, 36, *ibidem*.

<sup>63</sup> NAFO (2005): *NAFO starts a reform process*. Press release 23<sup>rd</sup> September.

<sup>64</sup> Article 8 of the NAFO conservation and enforcement measures, NAFO/FC Doc. 05/1, revised 19<sup>th</sup> July 2005.

**Trade restrictive measures:** Landing and transshipments of all fish from non-contracting Party vessels may be prohibited if on board inspections find distinct fish species that fall under NAFO regulations<sup>65</sup>.

## 2.10. Compliance in the EC' Common Fisheries Policy

Council Regulation (EC) No. 2371/2002 regulates conservation and exploitation of fisheries resources within the EC under the Common Fisheries Policy (CFP).

**Compliance duties:** Under Article 25 of the Regulation Member States are obliged to initiate proceedings which will be capable of effectively depriving those responsible for committing infringements of any economic benefit thus gained and also acting as a deterrent in the future. However, since poor implementation was undermining the effectiveness of its conservation measures, the EC set out an Action Plan for Co-operation in Enforcement<sup>66</sup>, including a Compliance Work Plan.

**Compliance body:** Cases of non-compliance are reviewed by the EC Commission. Further, the Commission announced, it would develop a catalogue of sanctions relating to serious infringements<sup>67</sup>.

**What constitutes an infraction?** Council Regulation (EC) No. 1447/1999 lists infringements to the CFP, i.e. the failure to

- cooperate with the authorities responsible for monitoring;
- cooperate with observers;
- observe conditions to be met when fishing;
- comply during fishing operations;
- comply in connection with resources for monitoring;
- comply in connection with landing and marketing of fishery products.

**Black listing of Parties:** The Compliance Work Plan is accompanied by a scoreboard, which "provides an indication of the level of

*compliance of different regulatory provisions by the Member States' control and enforcement activities and their level of compliance with the rules of the CFP.*<sup>68</sup> The scoreboard contributes to transparency regarding compliance within the EC. The most recent edition lists the failures of individual Member States concerning e.g. reporting of catches, quota overruns, submission of information on fleet register and fishing effort declarations<sup>69</sup>.

**Other measures:** Sanctions arising from non-compliance of a Member State may include fines<sup>70</sup>, seizures of prohibited fishing gear and catches, sequestration or temporary immobilisation of the vessel, suspension or withdrawal of the licence, (see Article 24, Paragraph 3 of EC No. 2371/2002. In the context of the Compliance Work Plan, the EC Commission may

- initiate infringement procedures against Member States that have failed to comply with Community legislation; (Presently 69 procedures are pending and eight before the European Court of Justice<sup>71</sup>.)
- arrange for suspension of financial assistance and/or;
- arrange for reduced quotas and increased powers for the Commission's inspectors<sup>72</sup>.

In late 2005, the EC asked the European Court of Justice to impose a periodic penalty payment and a lump sum on non-compliant member states<sup>73</sup>. The fixing of the sanction shall be based on both seriousness and duration of infringement, and shall have a deterrent effect<sup>74</sup>. In March 2006, a penalty of €57 million was imposed to France due to its continued landing and marketing of undersized fish<sup>75</sup>.

<sup>68</sup> page 2, *ibidem*.

<sup>69</sup> EC (2006): *Third edition of the Common Fisheries Policy Compliance Scoreboard*. [http://europa.eu.int/comm/fisheries/scoreboard/index\\_en.htm](http://europa.eu.int/comm/fisheries/scoreboard/index_en.htm), 16<sup>th</sup> January.

<sup>70</sup> In accordance with Art. 104 c, § 11 and Art. 108a § 3 of the Maastricht Treaty the EU Council may impose fines of an appropriate size as long as a member state fails to comply with a decision or a regulation of the EU.

<sup>71</sup> EC (2006): *Third edition of the Common Fisheries Policy Compliance Scoreboard*. [http://europa.eu.int/comm/fisheries/scoreboard/index\\_en.htm](http://europa.eu.int/comm/fisheries/scoreboard/index_en.htm), 16<sup>th</sup> January.

<sup>72</sup> EU COM(2003)344: *Communication from the Commission: Compliance with the rules of the common fisheries policy „Compliance work plan and scoreboard“*.

<sup>73</sup> EC Fisheries and Maritime Affairs (2005): *Financial penalties for Member States who fail to comply with judgments of the European Court of Justice: European Commission clarifies rules*. Press release 14<sup>th</sup> December.

<sup>74</sup> SEC(2005)1658: *Application of Article 228 of the EC Treaty*. Commission Communication.

<sup>75</sup> EC Fisheries and Maritime Affairs (2006): *France to pay €57 million penalty for failing to meet Court obligations in fisheries*. Press release 1<sup>st</sup> March.

<sup>65</sup> NAFO (2003): *Scheme to promote compliance by non-contracting party vessels with the conservation and enforcement measures established by NAFO*. GC Doc. 03/2.

<sup>66</sup> EU COM(2003)130: *Communication to the Council and the European Parliament „towards uniform and effective implementation of the common fisheries policy“*.

<sup>67</sup> EU COM(2003)782: *Reports from member states on behaviours which seriously infringed the rules of common fisheries policy in 2002“*, page 14.

### 3. Composition of the CRC

When the *International Convention for the Regulation of Whaling* (ICRW) was signed in 1946, it was done so by whaling nations that had caused the dramatic collapse of their targeted prey and wished to manage whale populations for future use. However, in the following decades all regulatory measures by the IWC failed and could not prevent further collapse of whale populations. It was not until 1982 that the IWC switched from a primarily consumption-oriented forum to a conservation-oriented one by agreeing a moratorium for commercial whaling. The conservation-priority of the IWC finally resulted in the establishment of a Conservation Committee in 2003<sup>76</sup>. However, many Parties, which have joined the IWC in recent times, are not themselves interested in whaling but have close relationships with whaling nations and receive considerable financial support from them.

Within MEAs, those nominated to serve on a compliance committee are expected to be “*independent, impartial, and objective, and to serve in their independent capacity*”<sup>77</sup> and are usually nominated by Parties. To achieve and maintain integrity and acceptance of the CRC it is essential to ensure that its composition is well-balanced and that its considerations and decisions are both transparent and consistent. Additionally, it must be determined, who can file complaints to the CRC. Naturally, all Parties should be allowed to do so, and in some conventions the Secretariat has this competence as well. Some MEAs allow members of the public to submit complaints on non-compliance as well, in accordance with Rio Principle 10<sup>78</sup>.

Occasionally, members of the CRC might face a conflict of interest in cases, where the country they represent is accused of infractions or failures. The IWC Parties and the CRC itself must find a way to deal with such situations – e.g. by excluding affected CRC members from any decision process concerning the State they represent. The inclusion of independent experts with recognised competence should also be considered. This is of proven benefit, e.g. in the Aarhus compliance mechanism<sup>79</sup>.

<sup>76</sup> IWC Resolution 2003-1: *The Berlin Initiative on strengthening the conservation agenda of the IWC.*

<sup>77</sup> UNEP/DEPI (2004): *Draft manual on compliance with and enforcement of multilateral environmental agreements.* Nairobi, p. 84.

<sup>78</sup> UNEP/DEPI (2004): *Draft manual on compliance with and enforcement of MEAs.* Nairobi, p. 84.

<sup>79</sup> Paragraph 2 of the Annex: *Structure and function of the Compliance Committee and procedures for the review of compliance.* UN Economic and Social Council (2004): *De-*

### 4. Competence of the CRC

International conventions often suffer from vague language allowing scope for different interpretations and fail to precisely describe the duties of a Party<sup>80</sup>. The impact of such practice could be observed in the activity of the Infractions Sub-Committee, which, for decades, has been toothless and reduced to a farce. It is essential to ensure that this is not repeated under the RMS. The role of the CRC is one of the key issues within the RMS<sup>81</sup>. Therefore it is essential to precisely define the mandate and competences of the CRC<sup>82</sup>. The draft RMS text<sup>83</sup> already contains important aspects for the mandate of the CRC (especially regarding the collection and review of information on alleged infractions and actions by the Parties affected). A paper presented by the United Kingdom before the RMS Working Group<sup>84</sup> further proposes that the CRC should have the capacity to recommend the revocation of vessel licences or the reduction of quotas. This is a step in the right direction, but not yet sufficient. The draft should be further strengthened and Paragraph 31 of the RMS draft should:

1. **propose a definition of infractions** by developing a list of activities that undermine the ICRW (chapter 6 may serve as a basis);
2. Compile a **catalogue of penalties** (see box 3) based on the nature, the cause, the degree and the frequency of non-compliance (Single or systematic failures? Inadvertent or intentional? Minor or serious infringements?) and on whether the affected Party has taken any steps to restore compliance.
3. **Define deadlines** for the submission of national reports, DNA samples etc.. Reports on compliance should be produced on an annual basis, whereas the submission of DNA samples to a central register must occur in due course to achieve an

*cision 1/7: Review of Compliance.* ECE/MP.PP/2/Add.8, 2<sup>nd</sup> April.

<sup>80</sup> Jacobson & Brown Weiss (1997): *Compliance with international environmental accords: Achievements and strategies.* In: *International governance on environmental issues.* Rolan et al. (eds.) Kluwer Academic Publishers: 78-110.

<sup>81</sup> Gillespie, A. (2005): *Whaling Diplomacy: Defining issues in international environmental law.* E. Elgar Pub. (ed.), Northampton.

<sup>82</sup> The UNEP guidelines on compliance with and enforcement of MEA, adopted in 2002, stress that clarity of the obligations of parties to MEAs assist in the assessment and ascertainment of compliance.

<sup>83</sup> IWC/57/RMS 4 (2005), page 34, Annex 9: *Incorporation into the Schedule of text regarding compliance monitoring.*

<sup>84</sup> IWC/57/Rep 6 (2005): *Report of the Revised Management Scheme Working Group.* Page 5, item 4.4.

up-to-date DNA register (according to the present draft samples must be submitted at the end of the whaling season). The failure to report must be defined as a punishable infraction, resulting to deterrent penalties. Paragraph 31 should also extend the mandate of the CRC to allow it to:

4. Analyse incidents and identify actions, which negatively affect the effectiveness of IWC measures of contracting and non-contracting Parties. The CRC must have the mandate to make a “**Declaration on Non-Compliance**”, with precise recommendations to the Commission (see chapter 5), corresponding to Paragraph 31 (c) of the draft text;
5. **Determine – on a case by case basis - deadlines for a Party to restore compliance** with regards to concrete infringements and establish follow-up mechanisms in case the deadline expires without satisfying results.
6. Request Parties under whose jurisdiction violations have been identified, to develop a **compliance action plan** and to **report on progress**;
7. Publish a blacklist of vessels found to be involved in illegal activities (**IUU vessel list**), which has proven effective at CCAMLR and ICCAT.
8. Publish a **black list of Contracting Parties** that refuse to cooperate or fail to fulfil their duties. The public identification and dissemination of specific acts of non-compliance or questionable compliance is a common step to put pressure on the Parties concerned (e.g. the Common Fisheries Policy Compliance Scoreboard of the EU<sup>85</sup>). Both IWC black lists should be published on the IWC’s website.
9. **Arrange for appropriate sanctions by the IWC** against Parties that fail to comply (see chapter 5).
10. Be authorised in cases of emergency to **trigger an emergency mechanism** (see chapter 5).

<sup>85</sup> The EU Scoreboard on compliance in fisheries is annually updated. This measure is part of the EU's Compliance Work Plan, COM(2003)344.

- Box 3 -

### Sanctions for Non-Compliance

Penalties that have proven a success in other fora (see chapter 2) and that the IWC is encouraged to consider include

- **Monetary penalties** (i.e. fines to be paid to the IWC to contribute to the costs for supervision and control) as being practiced in many MEAs\* and in the EU;
- **Revocation of vessel registration or whaling licence**, analogous to the practice in AIDCP, WCPFC, FAO-CA, NAFO and EU;
- **Reduction or cessation of catch quota**, analogous to CITES and ICCAT;
- **Publication of vessels in IUU black lists**, analogues to CITES, CCAMLR, ICCAT, AIDCP, FAO-CA and NAFO;
- **Publication of Parties in a Non-Compliance list** to motivate Contracting Governments to return to compliance (as e.g. being practice in the EU through its scoreboard).
- **Confiscation of whaling equipment** (see also Guideline 40 (c) of the UNEP Guidelines on Compliance with and Enforcement of MEAs, Cartagena 2002)
- **Trade suspensions**, as practiced in CITES, CCAMLR, ICCAT, WCPFC and NAFO
- **Appeal to the International Tribunal for Law of the Sea\*\***;
- **Withdrawal of a Party’s right to vote** (presently being discussed at CITES and already in place at the IWC for failure to pay contributions on time),
- **Suspension of a Parties membership** as a last resort\*\*\*.
- **Notification of illegal whaling activities** to other relevant conventions and institutions, such as CITES. NAFO e.g. shares information on IUU with the FAO and regional fisheries bodies.

\* see Oullet (2005): *Enforcement mechanisms*. [www2.beyondintractability.org/m/enforcement\\_mechanism\\_sms.jsp](http://www2.beyondintractability.org/m/enforcement_mechanism_sms.jsp)

\*\* The Tribunal was established in 1996 and to date has dealt with 11 cases of disputes in marine issues, including illegal fishing. For details see: [www.worldii.org/int/cases/ITLOS](http://www.worldii.org/int/cases/ITLOS)

\*\*\* as recommended by experts on environmental law, such as Prof. Peter Sand, pers. comm. to S. Altherr, 7<sup>th</sup> December 2005.

## 5. Procedural questions

Clearly defined procedures, such as those outlined below, would enable the CRC to act transparently, appropriately and effectively against non-compliance:

### Cases of emergency:

An emergency mechanism should be established. This mechanism should be independent from the Annual Meetings and should immediately come into effect in defined cases of serious infractions (such as exceeding a quota, directed catches of protected stocks or in closed areas or during closed seasons). In such cases

- all IWC Parties should be immediately informed through the IWC Secretariat.
- In parallel, the IWC Secretariat should call on the non-compliant Party to immediately halt whaling activities on a distinct (sub)-species or in a distinct area as well as all processing and all commercialisation of whale products, to prevent economic benefits arising from the violation.
- If necessary, e.g. in cases of exceeding RMP quotas, all Parties should be informed that any further whaling or trade in whale products of the whale stock affected by the infraction, should be immediately halted until the next Annual Meeting of the IWC, where further measures must be decided.

### Transparency:

The CRC shall be committed to act in a transparent way to make its decisions understandable (e.g. by clearly defining a catalogue of penalties; by publishing a list of Parties that do not comply and a black list of vessels and enterprises involved in illegal whaling activities).

### Review of infringements:

The CRC should not only review reported infractions, but also enforcement efforts by the non-compliant Party. The extent of compliance in fisheries is related to several factors, including the strength of the enforcement system (controls), awareness of penalties, the time between the offence and conviction, the lack of criminalisation, the ability of the industry to operate their own control system, and the extent

to which pressures are placed on the enforcement agencies for increased efficiency<sup>86</sup>.

### Compensation:

In several environmental agreements a breach of an obligation triggers a second obligation to make reparation, frequently in form of monetary payment<sup>87</sup>. Such fines could contribute to finance measures to be undertaken under the RMS, e.g. missions of international observers or running of an international DNA register.

### Rehabilitation procedure:

As soon as the CRC decides, that a Party has fulfilled its obligations to take action against illegal activities sanctions imposed by the IWC should be lifted. At the next CRC meeting the rehabilitated Party must be erased from the IWC black list within the regular review procedure.

### Frequency of CRC meetings:

As long as the IWC has annual meetings, it seems to be sufficient for the CRC to operate during these meetings. However, Resolution 2004-7 opens a discussion on less frequent IWC meetings. In any case, the CRC should meet at least once a year, as it is practice in other MEAs, such as the CITES Standing Committee.

<sup>86</sup> Conclusion of EU project N° 96/090: *The costs and benefits of compliance with regulations in northern EU Fisheries*. Banks et al.

<sup>87</sup> Hajost & Shea (undated): *An overview of enforcement and compliance mechanisms in international environmental agreements*. [www.inece.org/1stvoll/hajost.htm](http://www.inece.org/1stvoll/hajost.htm).

## 6. What represents an Infraction to the ICRW provisions?

Paragraph 31(b)(i) of the RMS draft text directs the CRC to „develop and maintain a list of matters that will constitute serious infractions.“<sup>88</sup> Infraction in general means a violation of a rule or local ordinance, regulation, promise, obligation, or contract. Within the IWC, however, the present handling of infractions is lax and has, so far, has barely had a deterrent effect. Accordingly, regular and systematic violations of IWC provisions by Parties have been ongoing throughout the last decades<sup>89</sup>. Part of the problem is that some Parties within the IWC interpreted Resolutions to be non-binding, which is contrary to their interpretation and behaviour in other MEAs like CITES.

**Who is responsible for infractions?** ICRW Article IX binds Contracting Parties to “take appropriate measures to ensure the application of the provisions of the Convention and the punishment of infractions against the said provisions...” and to institute “prosecution against contraventions of this Convention.” This leaves the prosecution of infractions as the responsibility of the Party, under whose jurisdiction individuals, enterprises or vessels committed the infraction. Compliance within the IWC therefore also means that the Party is meeting its obligations to enforce IWC provisions. Since international law vests exclusive jurisdiction in the flag state, it is vital for the IWC to handle any infraction, conducted by flagged whaling vessels, as an infraction of the flag state<sup>90</sup>. But the IWC should also ensure that a Party acts against any crew member/wholesaler/retailer within its jurisdiction found to be involved in illegal whaling and trade in illegally obtained whale products. Failure to do this should be defined as an infraction by the Party itself. For instance, the pirate whaling vessel *Sierra*, active from 1968 to 1979, was owned by a Norwegian business man and was managed and crewed by South Africans. It sold its catches exclusively to a Japanese company<sup>91</sup>. Despite clear evidence that the *Sierra* had killed thousands of whales

<sup>88</sup> IWC/57/RMS 4 (2005), Annex 9, p. 34.

<sup>89</sup> An overview is given in „The RMS – A question of Confidence? Manipulations and Falsifications in Whaling“ by Dr. Sandra Altherr, Kitty Block & Sue Fisher, PRO WILDLIFE, HSUS & WDCC (eds.), 2005.

<sup>90</sup> So long as a vessel is flagged, states other than the flag state generally cannot take any action for violations outside of their EEZs. Accordingly, a nation has the full responsibility to take action against any infraction conducted by vessels under its national jurisdiction. See Ferrel (2005): Controlling flags of convenience: One measure to stop over-fishing of collapsing fish stocks. *Environm. Law* 35: 323-390.

<sup>91</sup> Carter & Thornton (1985): „Pirate whaling 1985“, Environmental Investigation Agency (ed.), London.

illegally, none of the three Governments concerned prosecuted the violations. Such failures must not be tolerated in the future.

**Reporting duties:** ICRW Article VII urges the Parties to promptly submit “statistical and other information required by this Convention...”. Nevertheless, whaling nations consistently fail to submit information requested by the Commission in resolutions, e.g. on by-catch, national laws concerning whaling, stockpiles of whale products or infractions. This clearly undermines the work of the IWC and constitutes a violation of the Contracting Party’s obligation.

We do not claim that the following list is complete, but it can be used as a summary of potential infractions of the ICRW, its Schedule, its decisions, or of provisions, which only appear in the RMS draft and which are essential to the proper functioning of the RMS

### 6.1. Whaling quota and licenses

- **Catch of protected species, subspecies, stocks, or local populations:** Throughout its past, the IWC has been confronted with many cases of illegal killing of protected species, subspecies or stocks and the commercial sale of their products<sup>92</sup>. Therefore it is important to consider the killing of any whale outside a quota as an infraction.
- **Whales as “by-catch”, exceeding the RMP quota:** As a matter of course whales entangled alive in fishing nets should be released, as is reflected, e.g., in Resolutions 1997-4 and 2001-4. Instead, it is common practice in some Parties to tolerate or even support the killing of incidentally caught animals, e.g. by allowing the commercialisation of whale products obtained through “by-catch”. For instance, in South Korea, the number of mainly minke whales obtained as by-catch has almost reached the level of Korea’s commercial whaling activities before the moratorium<sup>93</sup>. Under any future RMS it would be vital to include whales, which have been obtained through “by-catch”, in the RMP quota, and to regard every additional animal which exceeds the quota as an infraction.
- **Exceeding catch limits:** The IWC has a long history of whaling activities that exceed

<sup>92</sup> Altherr et al. (2005): The RMS – A question of confidence? Manipulations and falsifications in whaling. *Pro Wildlife, WDCC and HSUS* (eds.), May. Chapter 3.

<sup>93</sup> Baker et al. (2000): Predicted decline of protected whales based on genetic monitoring of Japanese and Korean markets, *Proc.ER.Soc.Lond.* 267, 1191-1199.

given quotas<sup>94</sup>. Such illegal activities have been systematically hidden by falsifying the official whaling statistics of e.g. the former Soviet Union, Japan, and South Korea<sup>95</sup>. Additionally, in the recent past Norway increasingly ignored the conservative tuning level of 0.72 agreed by the IWC in 1992, and increased its self-allocated quota on the basis of a much lower tuning level of 0.62. This was criticized in IWC Resolution 2001-5. In the future, any whale caught outside any quota established by the IWC under the RMP must be handled as a case of infraction, as must quotas that are arbitrarily defined by individual Parties.

- **Whaling out of season or in closed areas:** In the past, whaling operations repeatedly ignored Paragraphs 2 and 3 of the Schedule. Seasonal protection is of extreme importance to secure the mating, breeding, rearing, and migration behaviour of cetaceans. Any infractions of closed seasons or areas can have a disastrous impact on population dynamics.
- **Ignoring a temporary cessation:** The RMS draft in Paragraph 5 (c) authorises the Commission to order a temporary cessation of whaling activities in the event of a massive die-off (natural or human-induced) of small and threatened stocks. The continuation of whaling on the distinct stock would be a serious infraction.
- **Capture of undersized specimens:** Paragraph 15 and 17 of the Schedule prohibit the killing of baleen and sperm whales under a defined body size. Nevertheless, in practice whalers over decades ignored these rules and killed undersized animals. Often, these captures were hidden in the statistics by either counting two small specimens as one or by just withholding the catch in the reports. However, killing of such animals has a serious impact on population structures and their dynamics.
- **Capture of calves and/or accompanying females:** Paragraph 14 of the Schedule states that “*It is forbidden to take or kill suckling calves or females accompanied by calves*”. Neither the ICRW text nor the IWC Schedule contains a definition of the term “calf” which leads to controversial debates regarding which specimens fall under this provision. The Scientific Committee uses the body size as a criterion<sup>96</sup>. Nevertheless,

some Parties accused of infractions repeatedly limited the definition of “calf” to a “suckling animal”, concluding that animals with no milk in their stomach were not calves<sup>97,98</sup>. These incriminated Parties denied that incidents were infractions<sup>99</sup>. To avoid similar unacceptable discussions within a future CRC, it is therefore vital to clearly define what constitutes a “calf”. Considering only the body size in the definition of this term would ignore other biological criteria. A cetacean should be defined as “calf” until it is physically and behaviourally independent from its mother.

- **Manipulation of catch statistics and biological data of hunted whales:** Infractions have been systematically hidden by manipulating log books, protocols and catch statistics. Therefore it is not sufficient to only treat the action itself as an infraction. Any data manipulation must count as an infraction (see also Resolution 1994-6).
- **Continuation of whaling under special permit contrary to decisions of the IWC:** During recent decades dozens of Resolutions have criticised so-called “scientific whaling” operations and unmasked their economic background. Nevertheless, since the moratorium came into effect, Parties, above all Japan and Iceland, abused Article VIII of the Convention, and thousands of whales have been killed under this pretence. If the RMS is to be effective, such activities must be halted by treating them as an infraction.
- **Unjustified licences for / authorisation of vessels or primary processing sites:** The RMS draft defines a series of conditions for effective control of whaling operations: For example, vessels must be equipped with VMS (if possible with continuous real-time reporting of the vessel position), inspectors and observers must be present, vessels must not carry or use weapons that are banned etc.. In accordance with Paragraph 19 of the RMS draft as it stands “*whales may only be taken by vessels authorised by Contracting Governments*” and “*primary processing may only be undertaken on vessels or at landing points authorised by Contracting Governments*.”<sup>100</sup>. Accordingly, failing to revoke registrations/licences of the whaling vessels violating the IWC provisions or any

<sup>94</sup> see Resolutions 1997-2, 1977-3, 1977-4.

<sup>95</sup> Altherr et al. (2005): *The RMS – A question of confidence? Manipulations and falsifications in whaling. Pro Wildlife, WDCS and HSUS (eds.), May. Chapter 3.*

<sup>96</sup> IWC/51/4 (1999): *Report of the Scientific Committee.*

<sup>97</sup> IWC/51/7 (1999): *Report of the Sub-Committee on Infractions. Item 6.*

<sup>98</sup> IWC (2001): *Annual Report of the International Whaling Commission 2000. Chapter 9.1., pp. 18-19.*

<sup>99</sup> WDCS (2005): *Analysis of the reports of the IWC's Infraction Sub-Committee from 1991 to 2004: Review of Compliance at the IWC. Briefing to the IWC parties, June.*

<sup>100</sup> IWC/57/RMS 4 (2005), Annex 6, p. 18, Paragraph 19.

other form of unjustified authorisation must be considered as an infraction.

## 6.2. Implementation of IWC provisions

- **Whaling under the valid moratorium:** As long as the moratorium stands, all whaling activity for which the IWC has not allocated a quota, must be regarded as a serious infraction.
- **Reservation/objection against the RMS:** The options of reservation or objection are dangerous loopholes of the IWC. Some Parties have broadly abused these loopholes despite IWC criticism<sup>101</sup> which obviates the necessity to bring this practice to an end. All components of the RMS enabling control of commercial whaling are vital to prevent illegal activities. If Contracting Parties can enter an objection or reservation against single components of the RMS or against the RMS as a whole, this would clearly document the Party's unwillingness to comply with its obligation under the IWC. The IWC Parties should therefore consider removing the possibility of entering reservations against the RMS and including whaling under reservation/objection in the list of infractions.
- **Insufficient or absent reports on national laws concerning whaling and sale of whale products:** The IWC has had to repeatedly deal with Parties' failure to submit details of their current national legislation on whales. Accordingly, the IWC passed Resolutions 1994-7, 1995-6, 1996-3, 1998-8, and 2001-2. However, so far 50% of the Parties still have not submitted any information on national legislation and implementation of the IWC<sup>102</sup>. Paragraph 23 of the RMS draft text urges Parties to transmit "*copies of the relevant laws and regulations to the Commission*"<sup>103</sup>. Failure to do this should be treated as a violation.
- **Lack of implementation of IWC regulations through national law:** Article IX of the Convention obliges Parties to ensure enforcement of the ICRW and the IWC Schedule, e.g. by implementing the regulations through national law. Furthermore, Paragraph 23 of the RMS draft text requires that "*each Contracting Government, under whose jurisdiction whaling operations for commercial purposes are carried out, shall have in*

*place appropriate enforcement legislation and effective administrative frameworks to ensure that the requirements of the RMS are fully met.*"<sup>104</sup> Therefore, the absence or the inadequacy of corresponding national laws should be treated as an infraction. The same should apply to laws that contradict IWC regulations. In Japan, new legislation came into force in July 2001, authorising the deliberate killing of whales caught incidentally in fishing operations as well as their commercialisation. This immediately resulted in a fivefold increase of whales allegedly caught incidentally<sup>105</sup>. Since it indirectly supports directed catches and undermines the conservation efforts of the IWC, adoption of this type of legislations should be considered as an infraction<sup>106</sup>.

- **Inadequate enforcement:** Parties are bound by Article IX (1) and (3) of the Convention and must punish infractions. As set out above the list of infractions should be interpreted to include inter alia illegal catches, missing catch data<sup>107</sup> and illegal trade in whale products, whether caught domestically or imported<sup>108</sup>. However, whaling nations have repeatedly failed to penalize corresponding violations or, if at all, only imposed minor sanctions, without deterrent effect.
- **Involvement in whaling operations within non-contracting Parties:** Several resolutions prevent the cooperation of Parties with non-member states by e.g. designing, producing or selling vessels, land stations or whaling equipment, training of personnel, financial aid for whaling operations, and import of whale products from non-contracting Parties<sup>109</sup>. Accordingly, any such cooperation must be regarded as an infraction.
- **Permitting whaling by non-member countries within the EEZ of a Contracting Party,** in accordance with Resolution 1979-9. When IWC Parties grant non-Parties permission to whale in their EEZ, including through the use of a flag of convenience, this should be interpreted as an infraction. Various IWC Parties (e.g., Belize, Panama, St.

<sup>104</sup> IWC/57/RMS 4 (2005), Annex 6, p. 20.

<sup>105</sup> Kyodo News (2002): 52 whales trapped in nets sold over 6 months. Japan Today, dated 14<sup>th</sup> January.

<sup>106</sup> e.g., IWC (2003): Annual Report of the International Whaling Commission 2002. Chapter 16.1.5., p. 45.

<sup>107</sup> Incomplete whaling data resulted in Resolution 1980-12, urging to „prohibit the use of any factory ship, whale catcher or land station under their jurisdiction, for any whaling operations in each year following the year in which any such factory ship, whale catcher or land station, fails to provide all of the information required pursuant to section VI of the present Convention“.

<sup>108</sup> Repeated import of whale products in violation of the IWC resulted in Resolutions 1979-9, 1994-7 and 1996-3.

<sup>109</sup> Resolutions 1976-5, 1977-7, 1977-8, 1979-9, 1980-6.

<sup>101</sup> Resolutions 1995-5, 1996-5, 1997-3, 1998-1, 2001-5.

<sup>102</sup> IWC/57/Rep. 4 (2005): Report of the Infractions Subcommittee, pp.3-4.

<sup>103</sup> IWC/57/RMS 4 (2005), Annex 6, p. 20.

Vincent & The Grenadines) have open registers and provide flags of convenience<sup>110</sup>.

- **Use of inadmissible killing methods:** For many years, the IWC Parties have had controversial debates on killing methods and animal welfare aspects of the hunt. Various whaling nations refuse to cooperate in this matter and withhold information on time to death during whaling<sup>111</sup>. Nevertheless, several killing methods have been banned by the IWC, e.g. the cold harpoon in 1983 (Paragraph 6 of the Schedule, Resolution 1980-11, also RMS draft Paragraph 15), the use of so-called “gaffs” in the Faroese pilot whale hunt<sup>112</sup> or the electric lance<sup>113</sup> in 1995. Accordingly, contracting Parties have the obligation to take measures against the use of such outlawed weapons. They are also obliged to optimise their hunting techniques to reduce cruelty in whaling<sup>114</sup> and the numbers of animals struck and lost<sup>115</sup>.

### 6.3. Supervision and control

- **Insufficient coverage with national inspectors:** Past incidences have proven that the presence of inspectors is essential to prevent or reduce illegal catches. The necessity of inspectors is included in Paragraph 21 of the Schedule and in the RMS draft text, which obliges Parties to ensure “appropriate inspection ... on each whaling vessel and at each point of landing/primary processing site”<sup>116</sup>. Paragraph 24<sup>117</sup>, if adopted as is, requires 100% inspection coverage, meaning the fulltime presence of inspectors, during the whole season, on all vessels and at each point of landing/primary processing site. Accordingly, the failure of a Party to provide enough qualified and empowered inspectors for the control of all whaling activities falling under its jurisdiction must constitute an infraction.
- **Hampering of inspectors and observers:** Paragraph 5.1. of the RMS draft<sup>118</sup> provides

that “Contracting Governments under whose jurisdiction the observer is to carry out his/her activities shall take all necessary measures to assist the observer in obtaining the required visas and immigration documents”. It also urges Parties to “at all times fully cooperate with the observer so that he/she can fulfil his/her duties properly and efficiently”<sup>119</sup> but does not detail the obligations of the Party towards the national inspector. The history of whaling operations substantiates the need to protect inspectors and observers from any obstruction. Whalers have been enormously creative in hindering independent controllers, e.g. by keeping them away from landing stations, from the hunt itself or from the documentation procedure afterwards<sup>120,121</sup>. Accordingly, any such attempt to prevent inspectors or observers from properly conducting their job, as well as the failure of the Party itself to ensure inspection or observation must be treated as an infraction.

- **Incomplete submission of DNA samples to a DNA register:** The RMS draft text provides for the inclusion of DNA samples from all whale products in a register. However, there is controversy over whether this register should be held by the whaling nation itself or whether there should be a central register under the IWC<sup>122</sup>. Apart from the fact, that only a central register under the IWC can provide security, transparency, central availability and objectivity of information, it is vital that every Party ensures the submission of DNA samples of all whale products on its domestic market to the IWC for inclusion in the register, including samples from whale products resulting from by-catch<sup>123</sup>. For example, Resolution 2001-4 states that “there shall be no commercial exchange of incidentally-captured whales for which no catch limits have been set by the Commission”. Some countries however still allow such transactions, e.g. Iceland, and Korea allow the commercialisation of whales caught incidentally, despite the absence of DNA-registers and despite the collection of DNA-samples. Under a future RMS, only a central register and full cooperation of whaling nations (including the submission of DNA samples of all whale products) should be accepted. Any

<sup>110</sup> Gianni & Simpson (2005): *The changing nature of high seas fishing – How flags of convenience provide cover for IUU fishing*. Australian Government, ITWF & WWF (eds.).

<sup>111</sup> e.g. Iceland refused to provide time-to-death data of its 2003 and 2004 hunts of minke whales; Japan did not present any such data related to its sperm whale hunts which were resumed in 2000.

<sup>112</sup> IWC Resolution 1995-1: *Resolution on killing methods in the pilot whale drive hunt*.

<sup>113</sup> IWC Resolution 1995-2: *Resolution on methods of killing whales*.

<sup>114</sup> See Resolutions 1997-1, 1992-1, 2001-2.

<sup>115</sup> see Resolutions 1976-6, 1979-4, 1981-4, 1992-.

<sup>116</sup> IWC/57/RMS 4 (2005), Annex 6, page 20, § 24.

<sup>117</sup> IWC/57/RMS 4 (2005), Annex 6, p. 20.

<sup>118</sup> IWC/57/RMS 4 (2005), Annex 6, p. 22, item 5.1.

<sup>119</sup> IWC/57/RMS 4 (2005), Annex 6, page 22, item 5.2.

<sup>120</sup> Kasuya (1998): „Evidence of statistical manipulations in Japanese coastal sperm whale fishery“, SC/50/CAWS10.

<sup>121</sup> Kasuya & Brownell (2001): „Illegal Japanese coastal whaling and other manipulations of catch records“, SC/53/RMP/24.

<sup>122</sup> Both options are given in the RMS draft text Paragraph 22 (a), IWC/57/RMS 4 (2005), Annex 7, p. 24.

<sup>123</sup> in accordance with Resolutions 1995-6, 1997-2, 1997-3, and 2001-4

lack of cooperation must be regarded as an infraction.

- **Submission of manipulated, inadequately prepared, preserved or unlabelled DNA samples:** The RMS draft text gives clear instructions on how DNA samples must be retained, preserved and stored<sup>124</sup>. It is necessary to ensure a high quality of the DNA samples as a condition for a successful analysis. Therefore, it would be unacceptable, if Parties provide false DNA samples or samples failing to meet the quality required.
- **Insufficient market sampling:** In Paragraph 22 (b), the RMS draft obliges Contracting Parties to carry out market sampling schemes, following a given procedure<sup>125</sup>. Failure of Parties to do so should also be treated as an infraction.
- **Manipulation of VMS components or log books:** Although there is still discussion on the detailed wording of the section on VMS (Paragraph 21 of the RMS draft) there is agreement that a VMS shall be part of the RMS. Any manipulation of a VMS (e.g. in order to hide whaling in closed areas) must be treated as a criminal act.
- **Use of defective equipment:** The full functioning of equipment (e.g. VMS, harpoons, guns) must be a condition for continuing whaling operations. In cases of malfunction whaling operations must be immediately halted and if not, this should be treated as a violation of the IWC.
- **Possession or sale of illegal whale products** (e.g. unregistered stockpiles): Whereas CITES only covers trade on an international level, for the IWC both domestic and international trade in whale products is relevant to ensure a safe RMS and to exclude illegal activities.

#### 6.4. Cooperation and report duties

Insufficient quality and quantity of reports from Parties on several issues are both central problems at the IWC. Reporting requirements are a vital measure to ensure compliance and are a standard feature in many MEAs<sup>126</sup>. Con-

<sup>124</sup> IWC/57/RMS 4 (2005), Annex 7, p. 25, Appendix {DNA}: Specifications and requirements for diagnostic DNA Registers and Market Sampling Schemes.

<sup>125</sup> There are two different options in the present draft, but both include a market sampling scheme: IWC/57/RMS 4, Annex 7, p. 24.

<sup>126</sup> Jacobson & Brown Weiss (1997): Compliance with international environmental accords: Achievements and strategies. In: International governance on environmental issues. Rolen et al. (eds.), Kluwer Acad. Publ.: 78-110.

tracting Parties should include the following in the list of infractions:

- **Missing reports on violations of the ICRW provisions and on measures / penalties imposed:** In accordance with Article IX (4) of the ICRW Contracting Parties are obliged “to transmit to the Commission full details of each infraction under the jurisdiction of that Government ... This information shall include a statement of measures taken for dealing with the infraction and of penalties imposed.”
- **Insufficient reports on relevant biological data of killed whales**, such as body length, reproduction status, lactation etc., as requested in Article 24 (b) of the Schedule;
- **Lack of cooperation and transparency with regards to the vessel register:** Based on Paragraph 28 of the Schedule, the IWC held a register of factory ships, catch vessels and landing stations until 1987, when Norway, Iceland and Japan stopped providing data. Finally, the register became officially dormant in 1994. However, the RMS draft intends to re-establish a register<sup>127</sup> and any future refusal to cooperate should be considered as an infraction. In this context Parties are also obliged to provide information on landing sites and primary and secondary processing sites. Data on vessels under flags of convenience will also be required.
- **Unjustified and/or repeated refusal to admit international observers:** The RMS draft text provides that “any contracting Government may veto any candidate”<sup>128</sup> – without requiring the government to justify its veto. Furthermore, the draft states: “if, through no fault of the Contracting Government or relevant whaling operation, an observer is not available, the Secretariat [shall/may], on behalf of the Commission, waive the requirement for an observer to be present”<sup>129</sup>. If whaling nations are free to refuse as many candidates as they would like, they can easily thwart the presence of any observer. This loophole must be closed in the final RMS text and unjustified or repeated refusal of observers should be handled as an attempt by a Party to evade the RMS provisions. The refusal of an observer must be limited to extraordinary circumstances, which must be strictly defined
- **Insufficient reporting on by-catch and other cases of human-induced mortality in whales:** The IWC has faced many discus-

<sup>127</sup> IWC/57/RMS 4 (2005), Annex 6, page 19, § 20.

<sup>128</sup> IWC/57/RMS 4 (2005), Annex 6, Appendix on the International Observer Scheme, page 21, item 2.1. (3).

<sup>129</sup> IWC/57/RMS 4 (2005): Annex 6, page 20, § 27.

sions, in which whaling nations doubted the necessity to report incidents of by-catch and other human-induced mortality of whales. This clearly undermines Resolutions 1994-7, 1997-4, 1998-2, and 2001-4 and any future quota calculation under the RMP. With Resolution 1998-2 Parties agreed “*that catch limits for commercial purposes ... shall be calculated by deducting all human-induced mortalities that are known or can be reasonably estimated ... from the total allowable removal.*”

- **Insufficient reporting on availability, sources and trade in whale products:** Whaling nations regularly re-iterate the view that trade-related issues are outside the competence of the IWC and only relevant under CITES. However, the integration of trade-related issues in the RMS and the handling of breaches of the IWC’s provisions as infractions are essential. Firstly, the IWC has underlined its competence in several Resolutions, urging Parties to report on the availability, sources and trade in whale products<sup>130</sup>. [For instance, Resolution 1997-2 urges Contracting Parties to “*provide information to the IWC about the size of remaining stockpiles and the species of origin remaining in stockpiles.*”] Secondly, CITES only regulates international trade, but not domestic trade. Thirdly, CITES trade documents do not contain the information required for a CDS under the RMS. And finally, several IWC Parties, namely Japan<sup>131</sup>, Norway<sup>132</sup>, Iceland<sup>133</sup>, Palau<sup>134</sup> and St. Vincent & the Grenadines<sup>135</sup> hold reservations concerning the CITES Appendix I listing of various cetaceans. Therefore, these countries are not bound by the CITES ban on commercial trade, which makes documentation/control of both international and domestic trade under the IWC particularly vital.
- **Insufficient or absent catch documentation (including stockpiles and by-catch):** In several nations, which are contracting Parties to the IWC, whale products from so-called “by-catch” enter domestic commercial markets without these catches being sufficiently documented or registered (including DNA samples). For instance, in Iceland the

reporting in fisheries logbooks of whales caught incidentally has been mandatory for several years. Nevertheless, no official by-catch statistics appear to exist in Iceland<sup>136</sup>. The situation is similar in Korea.

- **Insufficient or absent reports on killing methods:** Many resolutions urge Parties to submit data on killing methods, numbers struck and lost, time to death etc. and to reduce cruelty in whaling operations<sup>137</sup>. However, both quality and quantity of such reports are poor<sup>138</sup>, a situation which should no longer be tolerated.
- **Lack of cooperation regarding small cetaceans:** The IWC needs to clarify its scope regarding small cetaceans, for which several Parties refuse to acknowledge the competence of the IWC in this regard, although Paragraph 1 of its Schedule explicitly includes beaked whales, bottlenose whales, killer whales, and pilot whales. Legal studies also confirm the IWC’s competence on this issue<sup>139</sup>. Through several Resolutions the IWC has urged Parties to cooperate on conservation measures for small cetaceans<sup>140</sup> (e.g. narwhal, beluga, striped dolphin, Dall’s porpoise), to reconsider catch levels<sup>141</sup> or hunting methods<sup>142</sup> for small cetaceans and to reduce their bycatch<sup>143</sup>. Nevertheless, discussions on reported infractions<sup>144</sup> or whale killing methods<sup>145</sup> in the context of small cetaceans have repeatedly been rejected by expelling them from the scope of the IWC.

<sup>130</sup> see Resolutions 1994-7, 1995-6, 1996-3, 1997-2 and 1998-8.

<sup>131</sup> Japan holds reservations on fin, sei, minke, sperm, Bryde’s whale, Baird’s beaked whale, bottle-nosed whale, Irrawaddy dolphin. CITES reservation list valid from 7<sup>th</sup> June 2005. [www.cites.org/eng/app/reserve\\_latest.shtml](http://www.cites.org/eng/app/reserve_latest.shtml).

<sup>132</sup> Norway’s reservations: fin, sei, minke and southern minke, sperm whale, *ibidem*.

<sup>133</sup> Iceland’s reservations: blue, fin, sei, humpback, sperm, Baird’s beaked whale, bottle-nosed whale, *ibidem*.

<sup>134</sup> Palau’s reservations: sperm and minke whale, *ibidem*.

<sup>135</sup> St. Vincent & the Grenadines: humpback whale, *ibidem*.

<sup>136</sup> Altherr (2003): „Iceland’s Whaling Comeback“, *Pro Wildlife, WDCS, HSUS (eds.)*.

<sup>137</sup> see Resolutions 1978-4, 1992-1, 1993-1, 1993-2, 1995-2, 1999-1, 2001-2.

<sup>138</sup> as reflected by Resolution 2004-3

<sup>139</sup> IWC/51/20 (1999): *IWC’s competence to manage small cetaceans. Document submitted by Switzerland.*

<sup>140</sup> Resolutions 1977-6, 1980-8, 1990-3, 1991-5, 1993-4, 1993-10, 1993-11, 1994-2, 1994-3, 1995-1, 1995-4, 1996-4, 1997-8, 1998-9, 2000-9, and 2001-13.

<sup>141</sup> Resolution 1990-4, 1993-10, 1998-9, 1999-9, 2001-12+13.

<sup>142</sup> Resolutions 1992-1, 1993-2, 1995-1.

<sup>143</sup> Resolutions 1993-11, 1997-8, and 2000-9

<sup>144</sup> e.g. IWC (2003): *Annual Report of the International Whaling Commission 2002. Chapter 16.1.5., p. 45.*

<sup>145</sup> IWC (2001): *Annual Report of the International Whaling Commission 2000. Chapter 8.1., p. 17.*

## 7. Conclusions

Compared to other MEAs the IWC's handling of violations is weak and ineffective. Over decades the IWC Infractions Sub-Committee has failed to ensure compliance due to its limited mandate and lack of competence to arrange for sanctions. Accordingly, whaling nations continuously fail to take this forum seriously, refuse to submit relevant information and the classification of an incident as an infraction. Other conventions provide successful examples for achieving compliance, ranging from warnings and deadlines to black listing violators and trade suspensions.

At present, the IWC is still in transition about whether it will finally bring commercial whaling successfully under its control or whether it will continue to be doomed to failure. The RMS presently under discussion will include elements to prevent illegal whaling activities and is considering replacement of the toothless Infractions Sub-Committee with a Compliance Review Committee (CRC).

To prevent future non-compliance at the IWC, it is absolutely vital to authorize the CRC to identify infractions and to trigger appropriate sanctions. Of the 66 IWC Parties, all but Oman are also Parties to one or more MEAs, which have stricter compliance response mechanisms than the IWC<sup>146</sup> (see chapter 2.2. to 2.10). It is not acceptable that Parties accept stronger measures within other MEAs, but refuse comparable compliance mechanisms within the IWC.

MEA non-compliance regimes have proven to be more effective if they offer clear language on the duties under their provisions and if they possess a non-compliance body and a range of instruments, including strong responses and penalties<sup>147</sup>. So far, the IWC has failed to clearly define, which incidents are to be treated as infractions and what consequences arise from non-compliance. Therefore, the most important tasks will be for Contracting Governments to define infractions and to ensure that the CRC has sufficient authority to propose penalties for non-compliance. A list of defined

<sup>146</sup> Including the whaling nations: Japan and Korea (Parties to CITES, CCAMLR, ICCAT, UNFA, WCPFC, NAFO, FAO-CA), Norway (CITES, CCAMLR, ICCAT, UNFA, NAFO and FAO-CA), Iceland (CITES, ICCAT, UNFA, NAFO), Russia (CITES, CCAMLR, ICCAT, UNFA, NAFO) and the USA (CITES, CCAMLR, ICCAT, AIDCP, UNFA, WCPFC, NAFO, FAO-CA)

<sup>147</sup> Brack (2001): *International environmental disputes: International forums for non-compliance and dispute settlement in environmental-related cases*. Royal Institute of International Affairs.

- Box 4 -

### Infractions of IWC provisions

**The Compliance Review Committee must unambiguously identify violations of IWC provisions as infractions, such as:**

- **Any whaling without or exceeding the RMS quota** (e.g. killing specimens of protected stocks or undersized specimens including calves and/or accompanying females, whaling in closed areas or seasons, by-catch over quota, whaling under the current moratorium; scientific whaling, whaling under a self-allocated quota exceeding those under the RMS)
- **Any manipulation of catch statistics**, including biological (e.g. body size, sex) or geographical data (e.g. catch area) and the use of defective or manipulated VMS.
- **Insufficient supervision and control**, e.g. incomplete submission of DNA-samples, incomplete coverage of whaling vessels, land stations and processing sites with inspectors and observers, hampering of inspectors and observers; insufficient catch documentation and market sampling.
- **Whaling with banned weapons** (e.g. use of electric lance, cold harpoon, inadequate calibres or defect weapons).
- **Lack of cooperation**, including omission of a Party's reporting duties (e.g. on national legislation; infractions and corresponding measures; bycatch; vessel register; availability; sources of and trade in whale products), unjustified refusal of observers; killing methods; small cetaceans.

See also chapter 6 for more details.

and agreed infractions has to be included in the Schedule.

### 7.1. Definition of Infraction

Keeping in mind that so far the discussions on whether or not an incident should be considered an infraction have frequently remained without result, it is important for the IWC to clearly define what constitutes an infraction. Chapter 6 lists activities and failures that violate the Convention text, the Schedule, the RMS draft and Resolutions passed by the Par-

ties<sup>148</sup>. This list is not intended to be complete, and in developing a list of infractions Contracting Parties may want to consider compliance mechanisms of other MEAs that have proven a success (for examples see box 3). Box 4 gives an overview of the most frequent and relevant failures of Parties over the history of the IWC.

To assure compliance it would be essential to close the IWC's loopholes of "scientific whaling", reservations and objections. UNFA, AIDCP, CCSBT and the Forum Fisheries Agency all prevent the option of exemptions.

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## 7.2. Penalties for non-compliance

Within the last century many MEAs were established to reduce or even end the overexploitation of wild species. However, the original treaty of several of the older MEAs does not include a non-compliance mechanism. Instead, it has developed over time through resolutions, decisions and practice. For example, as a reaction to serious non-compliance by several Parties during the first decade of CITES, trade suspensions were successfully put in place to sanction cases of ongoing illegal trade in internationally protected species. Their use was later extended to address failures to adopt national implementing legislation and, most recently, to submit annual reports.

In CCAMLR, trade suspensions as a non-compliance response measure were introduced almost 20 years after the Convention came into force, and since then Parties have agreed on further measures such as blacklisting of IUU vessels. These measures have already made a noticeable difference.

ICCAT started to use trade suspensions as a non-compliance response only in 2000 – more than 30 years after its foundation. Only two years later it further agreed on black-listing of IUU fishing vessels to enhance compliance.

Similarly, the IWC – often criticised as a "toothless tiger" – must take the opportunity offered now to develop a clear and strong non-compliance response mechanism within the RMS, including sanctions. A catalogue of penalties, with sequential and graduated measures based on the seriousness of the infraction, must be developed. The most modest reaction would be advice and appropriate assistance by the IWC to restore compliance of a Party. Warnings, including deadlines for distinct

measures, should be the next step to motivate a Party to return to compliance<sup>149</sup>. In cases of persistent lack of cooperation or after serious infractions (which need to be clearly defined), the CRC should arrange for the IWC to impose one or more of the following penalties:

- Financial penalties;
- Revocation of vessel registration and/or whaling licences;
- Inclusion of a Party in a non-compliance list published by the IWC;
- Inclusion of a vessel in a publicly available IUU vessel list to unmask those responsible;
- Reduction or cessation of whaling quota;
- Trade suspensions;
- Notification of illegal whaling activities to other conventions and institutions.

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## 7.3. Emergency mechanism

So far, the IWC holds annual meetings but recently a discussion has started on whether less frequent meetings would be sufficient (see chapter 5). Meetings of a future CRC will be necessary at least on an annual basis. Additionally, IWC Parties should establish an emergency mechanism. The present RMS draft only contains a passage stating that "*In the event of a massive die-off... larger than 1% of a stock or 500 animals... the Commission shall order a temporary cessation of catch limits on that stock.*"<sup>150</sup> This option only relates to large-scale losses, but whaling nations could take considerable numbers of even protected stocks without any possibility for the IWC to intervene before its next meeting. Therefore, an emergency mechanism is needed which would enable CRC members, in cooperation with the IWC Secretariat, to respond to fatal infractions and to immediately halt whaling activities of either a single Party or all Parties hunting – depending on the scope of the impact of the illegal hunt.

Fitted out with a clear mandate for sanctions, a list of infractions and consequent sanctions, the IWC would not only conform to international practice in other MEAs, which have developed successful compliance mechanisms, it might finally stand a chance of controlling the activities of whaling nations that persistently violate IWC provisions.

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<sup>148</sup> The Convention text, the Schedule, the RMS draft and IWC Resolutions have been used to collect the infraction items in chapter 6.

<sup>149</sup> See also Recommendations of measures to restore compliance in CITES, SC53 Doc. 30, Paragraph 38.

<sup>150</sup> IWC/57/RMS 4: Paragraph 5 (c) in Annex 5, page 12.

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