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(Complimentary Greeting referring to the Ministry of Foreign Affairs of Iceland's dip note dated August 2, 2001)

On June 8, 2001, the Government of the United States of America, as depositary for the International Convention for the Regulation of Whaling (the Convention), received Iceland's instrument of adherence to the Convention. That instrument was expressly conditioned on a reservation to the commercial whaling moratorium found in Paragraph 10 (e) of the Convention's Schedule. The United States received the instrument without prejudice to its own views of the reservation as a Party to the Convention.

As noted in the Ministry of Foreign Affairs, diplomatic note dated August 2, 2001, the International Whaling Commission (IWC) at its 53rd Annual Meeting decided that it had the legal competence to decide whether to accept Iceland's reservation and it voted not to do so.

During those discussions, both Iceland and Commission members had an opportunity to air their views on the matter. For the reasons outlined below, the United States is of the view that the Commission acted legally in all respects regarding this matter during the 53rd Annual Meeting. Given the Commission's decisions, the United States recognizes Iceland as an observer to the IWC Commission, but not as a Party to the Convention.

The Ministry of Foreign Affairs note takes the position that a general principle of international law governs the question of the acceptability of Iceland's reservation, i.e., that Iceland's reservation is only subject to explicit or implicit acceptance by individual parties to the Convention. The note rejects the availability of an exception to that rule where the constituent instrument of an international organization is subject to acceptance by the relevant body of that organization. Specifically, Iceland argues that reservations to the Schedule should not be subject to acceptance by the IWC because the Schedule does not incorporate provisions of an organizational nature, which are the sort of provisions for which the exception was developed.

Both the general principle and the exception cited by Iceland appear to be based on the terms of Article 20 of

the 1969 Vienna Convention on the Law of Treaties (VCLT). Article 20(3) of the VCLT provides that "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization." Article 20(4) of the VCLT provides for acceptance and rejection of a reservation by individual parties to other sorts of treaties under the principle that "an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation."

Even though it is not a party to the VCLT, the United States considers it to be the authoritative guide to current treaty law and practice. By its terms, the VCLT does not apply directly to treaties concluded prior to its entry into force. Accordingly, the VCLT's January 27, 1980 entry into force date precludes it from applying directly to the 1946 IWC Convention. However, VCLT Article 4, in providing for its non-retroactivity, also provides that this condition is "(w)ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention." Accordingly, to the extent the provisions of the VCLT reflect customary international law, they may be invoked to address Iceland's reservation to the Convention.

Looking at the VCLT as a whole, however, the United States is of the view that there is no need to reach the question of Article 20's applicability to Iceland's reservation (although it is worth noting that the Schedule to which Iceland attached a reservation forms an "integral part" of the Convention and that article 20(3) by its terms applies to the "constituent instrument" of an international organization like the IWC without any distinction as to its "organizational" provisions). Another VCLT article applies - Article 5.

VCLT Article 5 provides in part that the VCLT's norms apply to any treaty which is the constituent instrument of an international organization "without prejudice" to any relevant rules of the organization. In this instance, there are relevant rules that are applicable to Iceland's reservation, so it is unnecessary to address the application of Article 20. These relevant rules are the

provisions of the Convention that deal with amending the Schedule.

As noted in the U.S. Opening Statement to the IWC, the United States, views are based on the fact that Iceland's reservation constitutes, in effect, a proposed amendment to the Schedule. The reservation by its terms would amend paragraph 10 (e) of the Schedule to modify its legal effect. Currently, zero catch limits for commercial whaling apply to all parties to the Convention under paragraph 10 (e) except for those states that filed objections in accordance with Article V(3) of the Convention. Article V(3) of the Convention allows states to object to amendments adopted by the IWC within a 90-day time frame. If a government does object, the amendment does not become effective for any states for an additional 90 days, thereby allowing governments which did not originally object to review the situation created by the non-participation of one or more other governments. In the case of the moratorium, its adoption was originally notified on 6 August 1982. Four states (Peru (on 26 October 1982), Norway (on 2 November 1982), U.S.S.R. (on 3 November 1982), and Japan (on 4 November 1982) objected within the requisite 90 days, and therefore the amendment did not become effective until 3 February 1983, 180 days after states were notified of its adoption. Iceland, which was a party to the Convention at the time, did not take advantage of its right to object to the amendment during either the original or additional 90-day periods.

Iceland's reservation, therefore, would amend the Schedule by modifying the current scope of application of Paragraph 10 (e) with respect to all parties. Instead of all IWC Contracting Parties being bound to the commercial moratorium except for those states that objected in accordance with Article V(3) of the Convention, the commercial moratorium would apply to all states except those that objected and Iceland. Moreover, Iceland's reservation would amend paragraph 10 (e) by permanently exempting Iceland from such zero catch limits without affording other governments the opportunity to review their own positions with respect to such an exemption in accordance with Article V(3).

Furthermore, the practice of parties to the Convention supports extending the Convention's rule on amendments to the Schedule to apply to reservations to the Schedule as

well. The only previous proposed reservation to the Schedule was treated as an amendment to the Schedule. In 1948, Denmark requested the views of governments concerning its proposal to ratify the IWC Convention with a reservation to a portion of the Schedule. Specifically, Denmark sought to exclude the application to factory ships of Schedule provisions on regulations governing the operation of land stations if those factory ships were operating under the jurisdiction of the Danish government, and moving entirely within Danish territorial waters, including the territorial waters of the Faroe Islands and Greenland.

Four founding Parties of the Convention - Norway, the U.S.S.R., the United Kingdom and the United States - objected to the proposed reservation, each indicating that the matter should be referred to the IWC when it was established, the IWC Convention not yet having entered into force (the other 10 states indicated that they were prepared to accept the Danish reservation).

In a May 12, 1949 note to Denmark, the United States, acting as depositary, informed Denmark that "certain of the signatory and adhering governments to the International Convention for the Regulation of Whaling have stated that they cannot agree to the ratification of the Convention with the reservation proposed by Denmark as this reservation would constitute an amendment to the schedule annexed to the Convention and is therefore a matter which should be submitted to the International Whaling Commission for consideration when it is established."

As a result of these objections, Denmark did not make its proposed reservation when it deposited its instrument of ratification to the IWC Convention on May 23, 1950. The United States takes the view that the Danish case provides precedent within the IWC for considering these types of reservations as amendments to the Schedule.

Since Iceland's reservation would constitute an amendment to the Schedule, it required IWC acceptance. Articles III and V of the Convention invest the IWC with the authority to amend the provisions of the Schedule by a three-fourths majority of those members voting. Absent three-fourths of the IWC members accepting Iceland's reservation, Iceland's reservation does not accord with the Convention's rules. In such circumstances, the United States views the IWC

decision to continue to treat Iceland as an observer to be legally valid.

Iceland's reservation (and the reservation proposed by Denmark) are materially different from the statements made by Argentina, Chile, Peru, and Ecuador when those states became parties to the Convention. None of the statements related to the Convention's Schedule. Moreover, although styled as reservations, these statements did not modify the legal effect of the Convention's provisions with respect to other IWC parties. Argentina's statement, to which the United Kingdom objected, related to reaffirming its claim over the Falkland/Malvinas islands and other territories in the Antarctic region, without modifying the rights and obligations it assumed under the Convention. Similarly, the statements of Chile, Peru and Ecuador related to their views regarding certain provisions of the Law of the Sea Convention. They did not have any direct bearing on the rights and obligations among the parties since the Convention applies to all waters of parties to the Convention. In contrast, as noted above, the Icelandic reservation would modify directly and substantially the legal rights and obligations of the IWC Parties.

Finally, the Ministry of Foreign Affairs, note takes the position that the validity of a reservation with respect to a provision of an international agreement must be judged on the basis of whether it is compatible with the object and purpose of the agreement in question (a principle codified in VCLT Art. 19(c)). Since in Iceland's view, the reservation is consistent with the object and purpose of the Convention, the reservation cannot be rejected. Aside from ignoring the applicable rules of the Convention for accepting amendments to the Schedule, such an approach fails to fully reflect the distinction in the VCLT between the admissibility and acceptability of reservations. All reservations must be "admissible" - i.e., compatible with a treaty's object and purpose. However, simply because a reservation is compatible with a treaty's object and purpose does not render it legally valid. It must also be "accepted" by other states parties to the treaty, which, as detailed above, in the case of the Convention is done through a vote before the IWC.

The United States regrets that Iceland has chosen to condition its adherence to the Convention with a reservation to the Convention Schedule that was

unacceptable to the IWC but believes that IWC members acted in accordance with the provisions of the Convention and consequently with applicable international law during the 53rd annual meeting. The United States is aware that other IWC members have additional legal views that support the Commission's decisions. Regrettably, Iceland chose to deposit its instrument of adherence only a few weeks before the IWC meeting. As a result, there was little opportunity for consultations before the meeting and for a discussion of the relevant precedent. Notwithstanding this, the 53rd IWC annual meeting provided ample opportunity for all to express their views on this matter.

The United States wishes to reiterate its views that consideration of Iceland's reservation is, first and foremost, a question of fidelity to the Convention's provisions. As the Convention contains specific applicable provisions (and there is actual precedent that is relevant), the United States believes that it is not appropriate in this case to consider arguments based solely on general principles of international law. Consistency with the Convention's provisions forms the basis for the United States' views. Despite some differences in views on whaling policy, it has been the longstanding position of the United States to welcome the participation of Iceland in the IWC Convention as a Party, subject to the rules that are applicable to all other parties to the Convention. The United States urges Iceland to accept the Commission's decisions and adhere to the Convention without a reservation to Paragraph 10 (e) of the Schedule.

(Complimentary closing)