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# Vote-Buying in International Fora.

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## 1. Introduction.

Allegations of vote buying have arisen with increasing frequency and severity at the International Whaling Commission (IWC). Whilst this practice is a problem evident since the birth of democracy it is also something which is universally condemned in all countries which take democracy seriously. Nevertheless, in the international arena, vote-buying may actually be facilitated by Overseas Development Assistance (ODA or 'aid'). The current attempts to confront this practice have come via two avenues. Firstly, through the donor community moving to untie conditionality attached to aid to low income countries for commercial reasons. Secondly, through fora which have been plagued with such accusations, such as the IWC, which have recently established principles rejecting the use of ODA to secure votes. Although these two developments are welcome, it is necessary for the international community to go further. As such, I suggest that international attention should be focused on prohibiting the use of ODA to buy votes. Moreover, those countries, against which allegations of vote-buying are proven should be expelled from the international organizations they are trying to manipulate.

## 2. The Corruption of Democracy.

Democracy is one of the strongest western traditions. Democracy is defined as: "Government by the people, that form of government in which the sovereign power resides in the people as a whole and is exercised either directly by them or by officers elected by them."<sup>1</sup> The mechanism by which this goal is typically achieved is whereby autonomous individuals, who are all deemed equal, vote to declare and register "one's opinion"<sup>2</sup> which is then duly weighted within the relevant democratic institutions. This simple political goal forms a critical linch-pin of the present and future view of the global order, both within countries and within the institutions that they deal with each other in international fora.<sup>3</sup>

Although this ideal has a strong appeal, it has been recognised since the debates about the merits of democracy began 2,500 years ago, that the process could be corrupted by unscrupulous players.<sup>4</sup> Corruption, as in the sense of: "To spoil or destroy... to turn from a sound into an unsound impure condition; to cause to go bad; to make rotten"<sup>5</sup> is clearly possible in democracy when fraud or unfair practices by unscrupulous individuals attempt

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<sup>1</sup> Oxford University Press. (1988). *The Compact Oxford English Dictionary*. (Oxford). 410.

<sup>2</sup> Oxford. *Ibid.* 2251.

<sup>3</sup> See Article 21 of the Universal Declaration of Human Rights. UNGA Res. 217 A (III). 10 December, 1948. See also Article 25 of the International Covenant on Civil and Political Rights. UNGA Res. 2200 A (XXI). 16 December, 1966. The importance of democracy has been reinforced by the United Nations following the end of the Cold War. through its Support of the Efforts of Governments to Promote and Consolidate New or Restored Democracies. See documents, UNGA. Doc A/49/713. 23 November, 1994. & UNGA. Doc A/52/334. 11 September, 1997.

<sup>4</sup> See Roberts, J. (1994). *Athens on Trial: The Antidemocratic Tradition in Western Thought*. (Princeton University Press, New Jersey). 56, 64, 88.

<sup>5</sup> Oxford, *supra* n1. 341.

to distort the outcomes of free and democratic processes.<sup>6</sup> These corrupt practices may have a very detrimental impact upon democracy itself, as it is essential that all of those involved in the process, whether they benefit or lose from the decisions, have faith in the integrity of the process. Electoral corruption, bribery of voters, illegal promises, payoffs and a multitude of other fraudulent, corrupt and unfair practices are all issues that can destroy the integrity of democracy. The direct manipulation of voter choices is particularly problematic in this context, as voters lose the ability to express their own free and self-determined opinions.<sup>7</sup> Unfortunately, this is not just a philosophical discussion,<sup>8</sup> a quick scan over the internet quickly reveals the extent of this problem<sup>9</sup> and the universal condemnation within democratic countries of such practices. For example, in New Zealand, the 1996 Electoral Act lists bribery, treating (the giving of gifts) or other forms of ‘undue influence’ (such as the use of force) as “corrupt and illegal practices” if the intention of the act is to make a voter behave in any way which does not reflect the true will of the person voting.<sup>10</sup>

The international arena is also predicated on principles that are very similar to those in democratic domestic systems. As such, individual states are seen and recognised as autonomous individuals in both international law,<sup>11</sup> and jurisprudence. This vision was clearly articulated by Christian Wolff in 1759:

“By nature all nations are equal the one to the other. For nations are considered as individual free persons.... Therefore, since by nature all men are equal, all nations too are by nature equal the one to the other.”<sup>12</sup>

Although clear exceptions exist within some of the fora of international law (such as the Security Council and some of the Bretton Woods Institutions)<sup>13</sup> the general principle is that each country, no matter what its size and influence in the world, has one vote to

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<sup>6</sup> As Hannah Arendt recognised, this reflects a corruption not on part of the process, but those at the top who are able and willing to manipulate their position. Arendt, H. (1963). *On Revolution*. (Viking, New York). 238-42.

<sup>7</sup> See Berelson, B. et al. (1954). *Voting*. (University of Chicago Press, Chicago). 306-307.

<sup>8</sup> See Hyland, J. (1995). *Democratic Theory: The Philosophical Foundations*. (Manchester University Press, Manchester). 240.

<sup>9</sup> See for example, Leigh, A. (2000). ‘Vote Buying in America.’ <http://www.onlineopinion.com.au/2000/nov00/Leigh.htm> ‘Vote Buying in the Philippines.’ <http://www.almaz.com/nobel/wwwboard/messages/3091.html> Winter, J. (2001). ‘Zimbabwe Vote Buying Row.’ [http://news.bbc.co.uk/1/hi/english/world/africa/newsid\\_1107000/1107974.stm](http://news.bbc.co.uk/1/hi/english/world/africa/newsid_1107000/1107974.stm) Dickson, P. (1999). ‘Vote Buying Row Over Pay Hike.’ <http://www.mg.co.za/mg/news/99apr2/21apr-transkei.html> ‘Premier Chang Vows to Eradicate Vote Buying.’ <http://www.taipei.org/teco/cicc/news/english/e-08-28-01/e-08-28-01-4.htm> ‘Mexico Election - Vote Buying.’ (2000). <http://www.wola.org/mexbulletin4.html> ‘Opposition Claims Carr is Vote Buying.’ (2001).

<[http://www.abc.net.au/public/news/2001/09/item20010905163524\\_1.htm](http://www.abc.net.au/public/news/2001/09/item20010905163524_1.htm)>

<sup>10</sup> See Electoral Act. 1996. Reprinted Statutes of New Zealand. Volume 35. 39-279. Section 218-230.

<sup>11</sup> See Articles 1 & 2 of the United Nations Charter, which speak of “respect for the principle of equal rights” and “the principle of sovereign equality of all its members.”

<sup>12</sup> Wolff, C. (1749). *Jus Gentium Methodo Scientifica Pertractatum*. Prolegomena, paragraph 16. This volume is available from the Carnegie Series on International Law.

<sup>13</sup> See Gillespie, A. (2001). *The Illusion of Progress: Unsustainable Development in International Law*. (Earthscan, London). Chapter 10.

exercise in the democratic process. As such, equality of voting, despite often unequal interests in manner is the general rule (although certain exceptions exist with weighted voting).<sup>14</sup>

### 3. The Possibility of Persuasion: The Manipulation of Overseas Development Assistance.

Vote-buying is central to the current allegations of corruption in international democratic fora. Manipulation of bilateral (as opposed to multilateral) overseas development assistance (ODA) or aid makes vote-buying possible. At the end of the twentieth century, (US\$) 51,521 million was distributed from the wealthy countries. Over one quarter of this (26.5%) was given as tied aid – or aid which was *conditional* on the fulfilment of various terms.<sup>15</sup> A condition attached to a loan or grant sets out a requirement for action of some sort by the recipient government, without which assistance will not be granted or continued.

In general, enforced conditionality is involuntary and as such may be viewed as a simple expression of *force majeure*, summed up in the popular saying, that he who pays the piper, calls the tune. One view is that donors who insist on conditionality are merely flexing financial muscles in order to achieve their own objectives without necessarily paying much heed to the interests of recipients.<sup>16</sup> These donors have the resources which some developing country governments are desperate to obtain and this gives the donors the economic power to impose their wills. This idea of conditional ODA (or its implementation) is not new. During the Cold War, according to Milton Freeman, “Foreign economic aid [wa]s widely regarded as a weapon in the ideological war.”<sup>17</sup>

The use of conditionality has not changed since the end of the Cold War, although the purposes for which it is applied has. Multilateral institutions which work in areas of international economic concern such as the World Bank and International Monetary Fund,<sup>18</sup> through the debt crisis and the quest for development have gained an

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<sup>14</sup> See Schermers, N. (1995). *International Institutional Law*. (Nijhoff, London). 518-527. White, N. (1996). *The Law of International Organisations*. (Manchester University Press, Manchester). 72-76.

<sup>15</sup> Independent Review of Poverty Reduction and Development Assistance. (2000). *The Reality of Aid: 2000*. (Earthscan, London). 3. A condition, according to the Oxford English Dictionary, is ‘something demanded or required as a prerequisite to the granting or performance of something else, a stipulation.’

<sup>16</sup> For example, although tied aid may marginally benefit the countries that insist on the purchases of their products, it may be detrimental to the interests of the recipients. For example, one survey in Kenya found more than 16 different types of water pumps, each from a different donor. This not only makes a co-ordinated programme of replacements and spares difficult, it has also resulted in Kenya being locked long-term into a number of programmes which are neither the cheapest, nor in the best interests of specific Kenyan requirements. Baird, N. (1996). ‘Tied to the Hand that Feeds.’ *New Scientist*. October 12. 12-13. Moreover, tied aid typically costs 20-25% more for goods or services than if they were subject to international competition. See OECD. (2001). ‘DAC Reaches Agreement on Untying Aid.’ <<http://webnet1.oecd.org/oecd/page.../0,3380,EN-document-notheme-2-no-20-5559-0,00.htm>>

<sup>17</sup> Freeman, M. (1995). *Foreign Economic Aid: Means and Objectives*. (Hoover Institute, Stanford University). 1.

<sup>18</sup> Gillespie. *Supra* n10. Chapters 1 & 3.

unprecedented ability to influence the countries to which they lend money.<sup>19</sup> As the leverage has become more entrenched, the conditions attached for the obtainment of finance (with an average of 56 conditions per loan)<sup>20</sup> have moved away from the traditional objectives of commercial self interest and the pursuit of economic orthodoxy towards broader 'good governance' objectives such as human rights, democracy and protection of the environment.<sup>21</sup> Typically, the multilateral institutions and the bilateral loans are piggy-backed, with mutually reinforcing conditionality. Moreover, the conditionality is often overlaid with other persuasion techniques, both complex and subtle, to achieve the desired goals of the donors.<sup>22</sup> The success of conditionality is determined from the relationship between the donor and the recipient. The most important consideration in this relationship is "the internal characteristics of the targeted country."<sup>23</sup> The characteristics of democracy and transparency are important in this equation, although possibly not as much as the inverse relationship between the use of conditionality and recipient governments access to alternative sources of finance.<sup>24</sup>

Although recipient nations may sometimes resent conditional aid on the grounds that it is an invasion of their sovereignty,<sup>25</sup> philosophically such conditionality may be justified if the overall outcome is worthwhile, and the expectations of the international community are observed when it is being applied. As such, the giving of aid which is conditional on the promotion of human rights etc, is not necessarily a bad thing, as it promotes a type of world order worth aspiring too.<sup>26</sup> Furthermore, such conditionality is transparent and the direct self-interest of the donor in the outcome is minimal. This is the anti-thesis of a situation where a country may use its ODA to secure advantages for itself in various international fora, by manipulating vulnerable countries to vote in accordance with its wishes, or lose its ODA.

#### 4. Vote-Buying in International Fora.

Vote-buying is an extreme example of conditionality and ODA. This issue first became apparent in the late 1970s and early 1980s when a number of Arabic countries introduced a new type of conditionality to their aid. Although they could not demand that aid recipients purchase their technology or utilise their consultants, they could (and did) insist that their aid recipients support Arab issues in general, and Palestinian issues in particular at international fora.<sup>27</sup> Unfortunately, this practice did not end there, as by the 1990s it was appearing in a number of very diverse international fora such as the International

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<sup>19</sup> Killick, T. (1998). *Aid and the Political Economy of Policy Change*. (Routledge, London). 5

<sup>20</sup> Killick, *ibid.* 2.

<sup>21</sup> See Hewitt, A. & Killick, T. (1996). 'Bilateral Aid Conditionality: A First View.' In Stokke, O. (ed). *Foreign Aid Toward the Year 2000*. (Cass, London). 21-36.

<sup>22</sup> Nelson, J. *Global Goals, Contentious Means: Issues of Multiple Aid Conditionality*. (Overseas Development Council, Washington). 30-34.

<sup>23</sup> Nelson, *ibid.* 65.

<sup>24</sup> Killick. *Supra* n19. 12.

<sup>25</sup> Nelson. *Supra* n22. 24-25.

<sup>26</sup> According to Killick, the justification of conditionality "stands or falls on its ability to improve policies within recipient countries." Killick. *Supra* n19. 17.

<sup>27</sup> Sardar, Z. (1981). 'How Good Is Arab Aid for the Third World ?' *New Scientist*. October 22. 233.

Olympic Committee (with regard to vote buying to secure Olympic Salt Lake City venue)<sup>28</sup> UNESCO (with regard to a Japanese official obtaining the top post)<sup>29</sup> the World Health Organisation (again, with regard to a Japanese official obtaining the top job).<sup>30</sup>

The last two examples provide a link with the country which has become repeatedly involved in such allegations – Japan. At this point it is important to note that Japan has consistently rejected these claims, and have suggested that those who make them are either lying or have been manipulated by NGO's who oppose Japanese interests. Despite these denials, the merits of the accusations still deserve serious consideration.

This link becomes increasingly apparent in the management of international environmental resources and has been evident for over twenty years. The first evidence of the overt manipulation of ODA appeared in 1982 in the South Pacific Forum when Japan was trying to reorganise its fishing arrangements in light of the new UNCLOS arrangements which gave vast swathes of the ocean to coastal states.<sup>31</sup> Although Pacific Island leaders noted in their Communique,:

“the importance of aid for the development of their economies, [they nevertheless] Deplore[d] the increasing tendency of distant water fishing nations to link the grant of aid with the receipt of fisheries access; and  
Declare[d] that distant water fishing nations should not link that aid to fisheries access agreements.”<sup>32</sup>

These difficulties have been ongoing for Pacific Island countries as they have continually experienced “the negative effects of political intervention in Japan's aid decision-making.”<sup>33</sup> These pressures continued in the South Pacific region, where although aid discussions have always been welcome, overlaying difficulties have always clouded issues. This has been particularly so with Japan over the driftnet controversy, and Japan's reluctance to negotiate at the multilateral level (with the South Pacific Fisheries Forum Agency) with regard to access to regional fisheries. Rather, the Japanese

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<sup>28</sup> See Sportserver. (2001). ‘IOC Looking Into Vote-Buying Case.’  
[Http://www.sportserver.com/olympics/story/6843p-219339c.html](http://www.sportserver.com/olympics/story/6843p-219339c.html)

<sup>29</sup> See Deen, T. (2000). ‘Japan Battles for Big Power Status at the UN.’ Asia Times. July 18. Also available from <http://www.globalpolicy.org/security/reform/japan.htm> Also, Giudice, B. (1999). ‘New UNESCO Chief Pledges Radical Steps to Reform.’  
<[http://www1.worldbank.org/education/tertiary/news\\_archive/1203b9.html](http://www1.worldbank.org/education/tertiary/news_archive/1203b9.html)>

<sup>30</sup> See Centre for UN Management Accountability. (1998). ‘50 Years of the WHO: Successes and Failure.’ September 7. <[http://www.cunma.com/press\\_articles/who\\_successes.htm](http://www.cunma.com/press_articles/who_successes.htm)>

<sup>31</sup> The main concern of the leaders was that linking aid with access denied countries a fair return to their EEZs. But the weak position of the Pacific Island states, most of which could not a loss of aid or access fees, meant that the practice of linking aid and access continued. See Tarte, S. (1998). Japan's Aid Diplomacy and the Pacific Islands. (Australian National University, Canberra). Chapter 4, & p96.

<sup>32</sup> South Pacific Forum Communique, 1982. Available from the Ministry of Foreign Affairs, New Zealand.

<sup>33</sup> Tarte, supra n31. 15. Tarte goes on: “On one level this refers to the use of aid to threaten, punish or cajole states. All countries in the region, from the largest (Papua New Guinea) to the smallest (Tuvalu) have at times experienced these pressures.”

preference has been for negotiations with individual countries.<sup>34</sup> Moreover, it became increasingly apparent in the 1980s that recipients of Japanese aid were also meant to be supportive of Japan in international fora. This was made clear in 1987 at an Overseas Fisheries Cooperation Foundation symposium, when a Fisheries Agency representative told Pacific Island states that there were at least two criteria for providing fisheries grants:

“When the Japanese government selects the countries to which it provides fisheries grants, criteria include that the recipient country must have a fisheries agreement with Japan and it must take a supportive position to Japan in various international organizations.”<sup>35</sup>

A different gloss on this process was offered by the Japanese Ministry of Foreign Affairs in 1998 with their assertion:

“Japan's ODA has demonstrated a substantial measure of success, and many recipient countries and their citizens have expressed sincere gratitude for that assistance. Such sentiments have earned Japan broad support from countries in Latin America, Africa, the Asia-Pacific, and other regions, notably within the context of UN elections and other international forums.”<sup>36</sup>

At this point, the lines between appreciation, coincidence and coercion inevitably begin to blur to everyone except those who were in the direct negotiations. Moreover, it is important to note that Japan has continually explained that its overseas aid programme “was not linked to voting policy.”<sup>37</sup> Nevertheless, it is increasingly possible to assert that coercion, via manipulation of ODA, may be becoming an increasingly recognised tactic by Japan. This linkage first became apparent with the (successful) attempt to prohibit driftnets in international law<sup>38</sup> which Japan tried to prevent.<sup>39</sup> It then manifested itself at the Commission for the Convention on International Trade in Endangered Species in 1994,<sup>40</sup> 1997<sup>41</sup> and 2000<sup>42</sup> where Japan has allegedly repeatedly tried to manipulate the

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<sup>34</sup> See South Pacific Forum Communiqué. 1990. Vanuatu. July 31-August 1. 64-65. South Pacific Forum Communiqué. 1988. Tonga. September 20-21. 50, 56. South Pacific Forum Communiqué. (1987). Samoa. May 29-30.

<sup>35</sup> Overseas Fisheries Cooperation Foundation. (1987). Conference Report: Symposium on South Pacific Fisheries Development. (Tokyo). 93.

<sup>36</sup> Japanese Ministry of Foreign Affairs. ODA Summary: 1998. This is available from: <http://www.mofa.go.jp/policy/oda/summary/1998/1.html>.

<sup>37</sup> IWC. 50<sup>th</sup> Report (1999). 40.

<sup>38</sup> See Gillespie, A. (forthcoming) ‘Bycatch in International Law.’ *Journal of Ocean Development and International Law*.

<sup>39</sup> See *The Fiji Times*, 1989, July 31. 11. This example is cited by Wright, A. (1991). ‘Driftnet Fishing in the South Pacific.’ *Marine Policy*. September. 303-37.

<sup>40</sup> In the lead-up to the tenth CITES meeting in Florida in 1994 an attempt was made to include the Atlantic Bluefin Tuna in Appendix Two of CITES. This would have severely restricted the trade in this species, which Japan has a strong commercial interest in. The proposal came from Kenya. However, Kenya later agreed to withdraw its proposal before the meeting, after representations from the Japan Fisheries Agency “through diplomatic channels.” See FFA News Digest. No5/94, September/October 1994. At 2. This is noted in Tarte, *supra* n31. 148.

<sup>41</sup> Brown, P. ‘Japanese Bribes Threaten Wildlife.’ *International News*. June 17.

placement of endangered species on various protection lists, which restricts international trade in them. Although these allegations have been prominent in the above instances, it is within the IWC where Japanese vote-buying tactics have been most apparent.

The IWC is a particularly interesting example for three reasons. Firstly, Japan has been at the forefront of the whaling debate for the last thirty years and it has invested a large amount of time and effort in achieving an outcome which is desirable for an aspiring international super-power.<sup>43</sup> Secondly, the countries which are typically linked to having their votes bought (Antigua & Barbuda, St Vincent and the Grenadines, St Lucia, Dominica, St Kitts & Nevis and Grenada) are unlikely members of the IWC, given the limited number of other international organizations in which these countries participate. Ironically, the Caribbean countries are not signatories to some other very important international wildlife related conventions, such as the Convention on Migratory Species (which has 76 contracting parties)<sup>44</sup> or the Wetlands Convention (128 contracting parties).<sup>45</sup> Both of these Conventions are considerably cheaper to join than the IWC (as unlike the other two organizations the IWC is not based on the UN scales of assessments for membership contributions). Furthermore, these international organizations may be of at least equal interest to these Caribbean states, as whales are, in the much smaller (40 member) IWC, where they have played a continually provocative role.<sup>46</sup>

Allegations of Japanese vote-manipulation first surfaced during the IWC's 1993 meeting.<sup>47</sup> Although concern with vote-buying remained prominent throughout the 1990s, it was not until the end of the decade that the issue once again became front page news. In 1999, Japan announced it was giving aid to countries that had been reluctant to join the

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<sup>42</sup> Earth Negotiations Bulletin. <http://www.iisd.ca/linkages/download/asc/enb2102e.txt> **Volume 21 Number 2. CITES-11**. 11 Apr 2000. Nairobi, Kenya. Unfortunately, the ENB commentary did not record the depth of some of the comments about the undue influence of some countries upon the voting intentions of others. Although Japan was not named, the inference was clear. This is a personal observation, from where I was sitting, as the lawyer on the New Zealand delegation.

<sup>43</sup> See Gillespie, A. (forthcoming). Whaling Diplomacy.

<sup>44</sup> CMS. Parties to the CMS. <[http://www.wcmc.org.uk/cms/part\\_lst.htm](http://www.wcmc.org.uk/cms/part_lst.htm)>

<sup>45</sup> RAMSAR. Contracting Parties to the RAMSAR. <[http://www.ramsar.org/key\\_cp\\_e.htm](http://www.ramsar.org/key_cp_e.htm)>

<sup>46</sup> For example, in 1982, in the Aboriginal Subsistence Whaling Committee Saint Vincent reported that three whales were taken at Bequia. IWC. 33<sup>rd</sup> Report. (1983). 29. In 1983, the IWC requested more detailed co-operation from St Vincent due to a number of "outstanding infractions." IWC. 34<sup>th</sup> Report. (1984). 15. Since this time, there have been 13 infractions since 1983. In response to these, there have been six excuses. These are:

1. "any infractions that did occur took place outside territorial waters." IWC. 36<sup>th</sup> Report. (1986). 13.
  2. "by establishing the existence of an aboriginal subsistence hunt, and by obtaining a very modest quota, the Government will be able to cure these infractions in the future." IWC. 37<sup>th</sup> Report. (1987). 19.
  3. "no attempt is being made to improve the methods used in the hunt because the Government does not wish to encourage its continuation." IWC. 40<sup>th</sup> Report. (1990). 30-31.
  4. "the phasing out of whaling would take place naturally as the single harpooner was 67 years of age." IWC. 39<sup>th</sup> Report. (1989) 22.
  5. The infractions happened because it was a very small fishery in a remote location. IWC. 44<sup>th</sup> Report. (1994). 15.
  6. "the relationship between the cow and calf... are not clearly defined in the schedule." IWC. 50<sup>th</sup> Report. (1999)
- <sup>14</sup> Nevertheless, the seventh infraction included yet another humpback cow and calf. IWC. 52<sup>nd</sup> Report. (2001). 14.

<sup>47</sup> See The Japan Times. 1993, May 14. 1,2. Noted in Tarte, supra note 31. 140.

IWC for fear of damaging ties to ‘anti-whaling’ countries, in the hope of changing the balance of votes at the Commission.<sup>48</sup> Later in the year, the Japanese Vice-Minister for Fisheries added:

“We would like to utilise overseas development aid as a practical means to promote nations to join [the IWC] expanding grant aid towards non-member countries which support Japan’s claim.”<sup>49</sup>

In its attempt to change the balance of power at the IWC Japan pushed so hard that in 2000 the (former) Environment Minister of Dominica, Atherton Martin, resigned in protest at the “outright extortion”<sup>50</sup> of Japan and its conditionality on its foreign aid. He explained that he was doing this because:

“I am alarmed that the Japanese seem to be using the promise of aid... to manipulate [Dominica’s] voting at the IWC.”<sup>51</sup>

He went on:

“They [Japan] make it clear, that if you don’t vote for them, they will reconsider the aid. They use money crudely to buy influence. Small islands are enormously vulnerable to offers of aid. Through extortion with aid, Japan has been able to get many island nations to join the International Whaling Commission and vote its way.”<sup>52</sup>

The following year, a senior Japanese official partly explained this situation. Mr Masayuki Komatsu stated:

“Japan does not have a military power like the United States or Australia. Unlike the United States or Australia, you may dispatch your military power to East Timor, that is not the case of Japan. Japanese means is simply diplomatic communication and ODA. So, in order to get appreciation of Japan’s position, of course it is natural that [what] we must do results on these two major truths. So I think there is nothing wrong.”<sup>53</sup>

Later in the year, the Tongan Representative at the IWC explained their situation as:

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<sup>48</sup> The Editors. (1999). ‘Japan Urges Support for Whaling.’ *The Observer*. May 13.

<sup>49</sup> See Brown, P. (1999). ‘Japan Admits Using Aid to Build Pro-Whaling Vote.’ *Guardian International*. November 11.

<sup>50</sup> Whymant, R. (2000). ‘Whaling Extortion Denounced.’ *The Times (UK)*. August 14. This is also available from <<http://www.transparency.org/sourcebook/17.sidebards.html>>

<sup>51</sup> Noted in Parry, R. (2001). ‘Japan Admits Aid Deals Buy Support for Whaling.’ *Independent*. July 19.

<sup>52</sup> Martin, noted in Browne, A. (2001). ‘Dirty Deals: Whales Lose Out in Japan’s Fight For Votes.’ *Observer*. May 13. See also “Buying Votes for Dominica.” [http://news.bbc.co.uk/1/hi/english/events/newsnight/newsid\\_994000/994511.stm](http://news.bbc.co.uk/1/hi/english/events/newsnight/newsid_994000/994511.stm)

<sup>53</sup> This was originally reported in a radio interview of July 18, 2001. It was later reported in the *Independent*. 2001, July 19. See also Browne, A. (2001). ‘Global Ban on Whaling Faces Its Severest Test.’ *Guardian Weekly*. July 26. And Editorial. ‘Bloody Whaling.’ In the same edition.

“When we came to the meeting, on the agenda it had whaling and Japanese grants as one item. Mixing it like that, I don’t think is the proper way of doing it. They are two separate issues.”<sup>54</sup>

Such comments sparked a furore at the 2001 meeting of the IWC<sup>55</sup> and in a number of countries. New Zealand accused Japan of conducting “chequebook diplomacy” in the South Pacific by exploiting small and vulnerable Island states into supporting the Japanese position.<sup>56</sup> In the British House of Commons debate, the situation was described by Mr Tony Banks. He suggested:

“One of the most contemptible practices employed by the Japanese is the buying of votes in the IWC – providing development and fisheries aid to a number of countries on condition that they will vote with Japan at the IWC. I have a list here: Antigua and Barbuda, Dominica, Morocco, St Lucia, St Vincent and the Grenadines, St Kitts and Nevis, Grenada and Guinea. Two more countries – Panama and Peru – are likely to join the IWC this year as part of the Japanese vote-buying strategy. Namibia and Togo are rumored to be potential IWC members, having signed fisheries agreements with the Japanese. The Government must challenge Japan and that vote buying, because if it is allowed to succeed at the IWC, it will, buy a return to whaling.”<sup>57</sup>

## 5. Japanese ODA.

Japan’s aid program<sup>58</sup> grew out of an approach to economic co-operation with developing countries that Japan initiated in the 1950s. The first step towards becoming an aid donor was taken in 1952 when Japan contributed \$80,000 to the forerunner of the United Nations Development Program. This process continued throughout the 1950s as Japan made contributions towards Asian countries, especially those to which Japan had not paid reparations with regard to their wartime involvement. Japan joined the international community of donors through the forerunner of the Development Assistance Committee (which tries to effectively co-ordinate donor activities to developing countries) of the OECD in 1960.

In order to promote Japanese exports in the 1960s aid was tied to the purchases of Japanese goods and services by creating markets for Japanese goods and introducing

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<sup>54</sup> Mr Samiu Vaipulu. As reported in ‘War of the Whales.’ 60 Minutes. September 24, 2001.

<sup>55</sup> See McCarthy, M. (2001). Battle Over Vast Whale Sanctuary In Pacific; Conservation Anti-Whaling Nations Need The Support Of Caribbean States In A Crucial Vote On A Proposal To Protect Nine Species From Hunters. *Independent*. May 8. Pg. 7 Browne, A. (2001). Aid Harpoons Votes For Slaughter.’ *Observer/ NZ Herald*. May 22. B2

<sup>56</sup> See ‘PM Slates Japan’s ‘Deplorable’ Stand on Whaling.’ NZPA. (Jan, 19). From Mike....

<sup>57</sup> Banks, T. (2001). House of Commons Hansards Debates. Column 306WH. July 11. Available from <<http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmhansrd/.../1071h05.ht>>

<sup>58</sup> Japan has three types of aid. Grant aid (no obligation to repay), technical assistance and yen loans (loans at soft interest rates). Aid for fisheries is typically within the grant aid section. Orr, R. (1990). Japan’s Foreign Aid Power. (Columbia University Press, Columbia). 30.

Japanese banks and trading companies into developing countries. Starting in the 1970s, Japanese funds began to be used to build large-scale facilities for exploiting and processing raw materials in resource rich countries, such as Indonesia and Brazil, and to relocate hazardous and energy-intensive industries to offshore facilities, usually in South East Asia.<sup>59</sup> Additional projects soon came to concentrate on supplies of materials crucial to Japanese industry, such as oil, aluminium and pulp. In terms of Pacific Island nations they have largely been used as a tool to secure access ground for Japanese fleets.<sup>60</sup>

In 1989 it emerged that Japan's foreign aid budget emerged as the largest in the world. By 1998, Japan was giving US\$ 10,683 million annually. This was the equivalent of 0.28% of GNP (the global average is 0.23) or US\$ 85 on a per-capita basis (the global average is US\$63). In terms of volume, this makes Japan the largest contributor.<sup>61</sup> In 2000, due to the prolonged recession, the outlook for Japan's aid programme was deemed 'pessimistic.'<sup>62</sup> Although the aid budget was cut by 10% in 1998 the anticipated cut in the 1999 aid budget was avoided. Overall, the net disbursement of aid has been in decline since 1996.<sup>63</sup>

Japan gives 46.8% of its aid to low income countries (an average income per-capita of less than US\$2 per day). This is a lower percentage than 16 other donors, which reflect a global average of 50.7%. This percentage is a reflection of the strong focus by Japanese aid in Asia (48.6% to the Far East, and 20.1% to South Asia). As such, places like Oceania only receive 2.0%).<sup>64</sup> Despite this small percentage going to Oceania, it still remains very influential in this area. This influence began in 1987 with the Kuranari Doctrine, when ODA was doubled to the region.<sup>65</sup> This sudden increase in Japanese interest in the region coincided with the sudden growth in power of small island states following the conclusion of the UNCLOS Convention (see above). In addition, a 'security burden' which accompanied the Cold War (making sure that Soviet aid to the region was minimised) Japan quickly became the largest or second-largest donor to the region. This position became more pronounced with the end of the Cold war, and the United States and the United Kingdom scaled down their ODA in the region. A common characteristic of most Pacific island states is the important role of aid in their economies. The ratio of aid to GDP is more than 20% for many countries and a few (Tuvalu for example) it is as high as 70-80%. This reflects the small export base of many of these countries and low levels of domestic savings. Fiji, with a relatively large export base and higher savings rate, has an aid to GDP ratio of only 5%.<sup>66</sup>

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<sup>59</sup> See Brooks, W. (1985). 'Japan's Foreign Economic Assistance.' *Asian Survey*. 25(3): 324.

<sup>60</sup> Orr, R. (1987). 'The Rising Sun: Japan's Foreign Aid to ASEAN, the Pacific Basin and Korea.' *Journal of International Affairs*. 41 (1): 45.

<sup>61</sup> That is in terms of volume, not in terms of percentage of GDP). *Independent Review*. Supra n15. 3, 57. The highpoint of the GDP ratio was 0.35 in 1984.

<sup>62</sup> *Independent Review*, supra n15. 54-55.

<sup>63</sup> *Independent Review*. Supra n15. 54.

<sup>64</sup> *Independent Review*. Supra n15. 3, 56.

<sup>65</sup> In 1987 the Foreign Minister of Japan, Tadashi Kuranari, visited the Fiji capital of Suva and announced a new beginning in the relationship between Japan and the Pacific Island countries. The centerpiece of the Kuranari speech was a declaration that Japan would double its official development assistance to the region. For a discussion of this, see Tarte, supra n31. 1.

<sup>66</sup> Tarte, supra n31. 2, 96.

In tandem with the vast amount of ODA that Japan provides, is the Japanese vision of their foreign assistance. The essence of this vision has been tied to moving away from the idea of traditional forms of 'strategic' aid (due to their historical legacy in World War II) and moving towards one which provides a 'positive' international profile for Japan or as the Ministry of Foreign Affairs suggests: "an honoured place in international society."<sup>67</sup> As such: "ODA is a vehicle through which Japan strives to cultivate a sound international environment and promote ties of good will."<sup>68</sup> Historically, Japan has largely lived up to this objective, as its ODA has been, as a rule, less ideologically driven<sup>69</sup> compared to that of many comparable donors.<sup>70</sup> The emphasis on good will, and the expansion into an apparently very admirable ODA policy increased in the late 1980s and early 1990s when Japan was at the forefront of the primary international donors who issued a wave of public statements indicating that their aid programs would reflect a broadened concept of development.<sup>71</sup> The core of the Japanese vision is clearly articulated in Japan's 1992 Official Development Assistance Charter<sup>72</sup> which includes the promotion of environmental conservation, the pursuit of democracy and human rights.<sup>73</sup> Japan has fulfilled many of these objectives, and deserves special merit for its policy of not allowing their ODA to be applied toward military use or the promotion of international conflict.<sup>74</sup> However, it is important to note that the Charter also promises that:

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<sup>67</sup> Ministry of Foreign Affairs of Japan. (1998). Council on ODA Reforms for the 21<sup>st</sup> Century, Final Report. <http://www.mofa.go.jp/policy/oda/reform/report21.html> At 2. At 26, they add: "ODA in spirit and practice is an expression of Japan's will, ability, and character as a member of th[e] international community."

<sup>68</sup> Ministry of Foreign Affairs of Japan. (1998). Council on ODA Reforms for the 21<sup>st</sup> Century, Final Report. *ibid.*

<sup>69</sup> Although Japan has a long, continuing history of using its ODA to secure its necessary resources)Resource security (such as food supply) remains a predominant objective for Japan's ODA. In many ways, Japan's aid diplomacy has been "extremely successful" in achieving this and other goals. Nester, W. (1990). 'The Third World In Japanese Foreign Policy.' In Newland, K. (ed). The International Relations of Japan. (Macmillan, London). 71, 97. Japan appears to have first used aid strategically in the early 1970s in the wake of the OPEC oil crisis. At this point Japan used aid as a 'diplomatic weapon' to placate Arab anger over Japanese compliance with US policy in the Middle Eastern region. The mission brought \$3 billion in aid pledges to oil producing nations and a 'distancing' policy toward Israel. See Yoshitsu, M. (1984) Caught In the Middle East: Japan's Diplomacy in Transition. (Lexington Books, Massachusetts) 7.

<sup>70</sup> For discussion, see Orr, *supra* n58. 57-59.

<sup>71</sup> "Japan has traditionally been guided by a set of ODA policies that placed primary emphasis on economic development while maintaining a cautious stance about the attachment of political strings. However, in the aftermath of the Cold War... this particular feature of ODA policy has been changing." Ministry of Foreign Affairs of Japan. (1998). *Supra* n67. 6.

<sup>72</sup> Official Development Assistance Charter, 1992. Cabinet Decision June 30. This is available from <<http://www.mofa.go.jp/policy/oda/summary/1999/ref1.html>>

<sup>73</sup> Charter, *ibid.* Section 2, Principles.

<sup>74</sup> See Inada, J (1990), 'Japan's Aid Diplomacy.' In Newland, *supra* n69. 100-20. Japan has utilized its aid to pressure both India and Pakistan to sign the Non-Proliferation Treaty, and in 1991, Japan announced it was suspending all its aid to North Korea until it dismantled a plutonium processing plant. See Nelson, *supra* n22. 110-111.

“Japan’s ODA will be provided in accordance with the principles of the United Nations Charter (especially those of sovereign equality and non-intervention in domestic matters).”<sup>75</sup>

Despite the admirable vision of Japan’s ODA, it has been, according to the Japanese Ministry of Foreign Affairs:

“a target of serious criticism. In particular, Japanese ODA principles have been described as ambiguous, and the projects in some instances have been rated as ineffective, lacking in technical assistance or other ‘soft’ expertise-orientated aspects, or insufficient in terms of attention to local environmental factors or the needs of local residents.... Though some of the criticisms aimed at Japanese ODA happen to be erroneous, others nonetheless contain a truth and should be heeded if Japan is to improve the quality of its ODA programs.”<sup>76</sup>

Overt corruption scandals aside,<sup>77</sup> a good example of the difficulties of Japanese ODA can be found in Japan’s (substantial)<sup>78</sup> ODA which is utilized for environmental purposes. Within this broad portfolio, which began within Japan’s various aid related ministries in the mid 1980s, some notable results have been achieved, such as withdrawing their funding from the Sardar Sarovar dam on India’s Narmada river.<sup>79</sup> Nevertheless, in spite of a large degree of rhetoric to the contrary, parts of Japan’s record with environmental aid has been problematic. The problems have arisen from within the auspice of aid, sending debatable pesticides to third world countries,<sup>80</sup> creating a detrimental impact within tropical forests,<sup>81</sup> and funding heavy polluting industries in the Third World.<sup>82</sup> With such a record it has been suggested that the only sustainability that Japan thinks of when allocating aid, is sustaining its own interests.<sup>83</sup>

The question that these issues, in addition to the vote-buying allegations, is how this could happen with Japan’s ODA when they have such strong background principles ?

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<sup>75</sup> Charter, supra n72. Section 2, Principles.

<sup>76</sup> Ministry of Foreign Affairs of Japan. (1998). Supra n67. 7.

<sup>77</sup> In 1986, a JICA (Japanese International Cooperation Agency) official was arrested for being involved in a 700,000 yen bribe in relation to an agricultural project in Morocco. The bribe came from a private firm official with a distinctly overlapping interest in the delivery of Japanese aid in this sector. It has been suggested that the fault in this instance was more in being indiscrete about the incident, and getting caught. In the same year, allegations were raised that Japanese aid funds were misused by the Marcos Administration in the Philippines. When questioned about this, the Director General of the Economic Planning Agency said that Japanese funding is: “like money a husband gives to a wife for shopping – the husband can’t know where the wife spends it.” This story is told in Forrest, R.A. (1991). ‘Japanese Aid and the Environment.’ *Ecologist*. 21(1). 24, .28. See also Orr, supra n58. 42.

<sup>78</sup> At the 1992 Earth Summit, Japan announced it would increase its environmental aid to between 900-1000 billion yen for the period of 1992-1996. In 1998, with regard to the Kyoto Protocol alone, Japan funded ODA projects amounting to 243.3 billion yen. See Annual Report of Japan’s ODA: 1999.

Available from [http://www.mofa.go.jp/policy/oda/summary/1999/ref2\\_02.html](http://www.mofa.go.jp/policy/oda/summary/1999/ref2_02.html) Footnotes 14 & 15.

<sup>79</sup> See Forrest, R. & Harago, Y. (1990). ‘Japan’s ODA and Tropical Forests.’ (WWF, London).

<sup>80</sup> See Hadfield, P. (1993). ‘Japanese Aid May Upset Cambodia’s Harvests.’ *New Scientist*. March 13. 5.

<sup>81</sup> See Forrest. Supra n77. 30-32.

<sup>82</sup> Anon. (1990). ‘Japanese Business Counts the Cost of Aid Projects.’ *New Scientist*. August 11. 9.

<sup>83</sup> See Cross, M. (1989). ‘Tokyo Nods Its Head Toward the Environment.’ *New Scientist*. September 16. 6.

The answer to this may be two fold, and both answers relate to the same concern – the ability for rogue actors to act independently if they so desire. That is, if we take the Charter and repeated pronouncements by Japan on ODA seriously, vote-buying is clearly something they would not tolerate. Nevertheless, it may be that unscrupulous actors within the Japanese bureaucracy have alternative views of this matter. However, until two problems are addressed within Japan on this question, it may be impossible to confront this issue.

The first problem relates to the possibility that ODA may be distributed via multilateral or bilateral means. If it goes through multilateral institutions, such as the World Bank, then that forum (not Japan) controls the distribution. If it is done bilaterally, then the donor retains the control. Japan clearly prefers the bilateral option, as opposed to multilateral ones or those based upon common and like treatment<sup>84</sup> or multilateral ODA management schemes.<sup>85</sup> Despite this preference, Japan is only slightly above the global average for bilateral as opposed to multilateral aid (70% of Japan's aid is bilateral, whereas the global average is 66.9%)<sup>86</sup> Moreover, Japan has reported that (unlike much of the recent history of its contemporaries) none of its bilateral aid commitments is tied to the purchase of goods and services from Japan.<sup>87</sup> As such, any analysis of the bilateral pressure applied with ODA needs to be more sophisticated than seeking simple linear relationships with Japanese ODA, and rather see it as part of the 'totality of relations'<sup>88</sup> with recipient nations.

The second part of the problem is that is the somewhat unique position within Japan's overall ODA schema, that there is no strong common or co-ordinating structure. As such, Japan's aid administration lacks unified or coherent authority over programmes. It also lacks forceful laws governing it. Japanese citizens groups and opposition parties in the Diet have tried for more than three decades to enact a 'basic ODA law' to create a centralized ministry and bring strong co-ordination to the system. As such, unlike other developed countries that are part of the DAC, Japan "has no defined political structure for aid but relies on a dispersed administrative pattern to delineate political relationships."<sup>89</sup>

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<sup>84</sup> Tarte, supra n31. 2, 105.

<sup>85</sup> For example, at the Earth Summit in 1992, as the Global Environmental Facility agreement was being concluded, with the objective of channeling environmental aid on issues of international concern through more balanced intermediaries (initially the World Bank, but later a balanced board with an equal split of developed and developing countries) who would effectively control the aid for clear and transparent purposes, Japan warned that it preferred the bilateral approach, and may try to bypass any overseeing multilateral institutions. Pearce, F. (1992). 'Japan's Billions May Bypass World Bank.' *New Scientist*. June 13. 4.

<sup>86</sup> Independent Review. Supra n15. 3, 56.

<sup>87</sup> This is unlike many other countries. Indeed, just over a quarter of DAC bilateral aid (26.5%) is given on the condition that it is used only to purchase goods and services from the donor country. This excludes technical co-operation which is mostly tied to services from the donor and which amounted to 40% of bilateral aid in 1997. Independent Review. Supra n15. 4, 56.

<sup>88</sup> Rix, A. (1993). *Japan's Foreign Aid Challenge* Policy Reform and Aid Leadership. (Routledge, London). 176.

<sup>89</sup> Rix, *ibid.* 84.

Efforts to create such a law (such as the U.S Foreign Assistance Act)<sup>90</sup> have repeatedly failed, apparently because of opposition from the bureaucracy. The lack of a unified development assistance structure creates a lack of coordination and, allegedly, even breeds unproductive competition between different branches of the bureaucracy.<sup>91</sup> As it stands, it appears that the four primary ministries (Foreign Affairs, Finance, International Trade and Industry, and the Economic Planning Agency), complimented by the implementing arms of the Overseas Economic Cooperation Fund (OECF) and the Japan International Cooperation Agency represent a labyrinth of interests and objectives which are not always in consensus. Indeed, it has been contended that conflict within government bureaucracy can skew the good overall intentions.<sup>92</sup>

The possible conflict of interests becomes even more pronounced when the close relationship between private sector, governmental bureaucracy and government actors becomes apparent in their attempts to advance strategic economic interests through ODA. These “gray areas” often compliment other aspects of Japanese political and economic development.<sup>93</sup> As such, although there have been formal attempts to untie aid from the commercial sector, questions have been asked over how successful this objective has been.<sup>94</sup> These questions remain pertinent as Japan’s ODA is far below the DAC average in most sectors possibly relating to basic human needs, while retaining a somewhat ‘commercial’ flavor,<sup>95</sup> the impetus “from the business community to retie aid”<sup>96</sup> is increasing.<sup>97</sup>

## 6. Confronting Conditionality: The Current State of Play.

### (a) Commercial Conditionality.

Of late, the international community has acted admirably in beginning to control the influence of commercial conditionality within ODA. This process began in 1998 when the G8 promised to begin “work within the OECD on a recommendation on untying aid to the least developed countries.”<sup>98</sup> Two years later at the Okinawa G8 summit, they pledged:

“To achieve increased effectiveness of ODA, we resolve to untie our aid to Least Developed Countries on the basis of progress made in the Organisations for

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<sup>90</sup> For a copy of the 1961 US Foreign Assistance Act, and discussions of its implementation, see <<http://www.usaid.gov/about/usaidhist.html#foreign>>

<sup>91</sup> Forrest. Supra n77. 28.

<sup>92</sup> Orr, supra n58. 3, 19-52, 138-141. Rix, A. (1980). Japan’s Economic Aid. (St Martins, London). 12-15.

<sup>93</sup> Orr. Supra n58. 64. Forrest. Supra n77. 26-28.

<sup>94</sup> Orr. Supra n58. 65-68.

<sup>95</sup>For Japan, building economic infrastructure, rather than poverty alleviation is the mainstream of its aid allocation. This emphasis is achieved in an ever increasing call to achieve a ‘balance’ between poverty elimination and economic growth. Independent Review. Supra n15. 55.

<sup>96</sup> Independent Review. Supra n15. 54.

<sup>97</sup> Independent Review. Supra n15. 55.

<sup>98</sup> G8 (1988) Communique, Birmingham. Available from <<http://www.g7.utoronto.ca/g7/summit/1998birmingham/finalcom.htm>>

Economic Co-operation and Development (OECD) to date and a fair burden sharing mechanism that we will agree with our OECD partners. We believe that this agreement should come into effect on 1 January 2002. In the meantime, we urge those countries which maintain low levels of untying of ODA to improve their performance.”<sup>99</sup>

This promise to untie bilateral ODA “to the greatest extent possible”<sup>100</sup> to the Least Developed Countries was largely delivered on by the 2001 OECD DAC recommendation.

### (b). Political Conditionality.

International law is based on the principle of equal sovereign countries acting independently. Independence is at the core of this principle. Key examples of independence include the power of a state to exclusively control domestic affairs and make its own choices (within the limits of international law) on both domestic and foreign policy.<sup>101</sup> As such, as Article 2(4) of the United Nations Charter stipulates that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...” This principle was clearly recognised in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, in Accordance with the United Nations Charter.<sup>102</sup> Although this Charter strongly emphasises refraining from the use or threat of force against other countries, it nevertheless stipulates:

“No state may use or encourage the use of economic, political, or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.”

This principle was also recognised in the International Court of Justice case between Nicaragua and the United States which recognised a general prohibition of wrongful intervention in the domestic policies of foreign countries. Specifically, an intervention is prohibited by international law if it impinges on matters as to which each state is permitted to make decisions by itself freely, (eg. choice of its own political or economic system or adoption of its own foreign policy.)<sup>103</sup>

However, it is important to note that the Nicaragua case added that the intervention must also involve an element of subversive coercion (ie the use of force). This view is largely

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<sup>99</sup> G8 (2000) Communique, Okinawa. Available from <<http://www.g7.utoronto.ca/g7/summit/2000okinawa/finalcom.htm>>

<sup>100</sup> 2001 OECD DAC recommendation on Untying ODA to the Least Developed Countries. This is available from <<http://webnet1.oecd.org/oecd/page.../0,3380,EN-document-notheme-2-no-20-5559-0,00.htm>> See principle 2. Note, as well as only being targeted at the Least Developed Countries, it also excludes food aid and ‘investment related technical co-operation.’

<sup>101</sup> See Shearer, I. (1999). *Starke’s International Law*. (11<sup>th</sup> Edn, Butterworths, London). 91. Shaw, M. (1999). *International Law*. (Grotius, Cambridge). 152-153.

<sup>102</sup> GA Res. 2625 (XXV). October 24, 1970. Adopted by consensus.

<sup>103</sup> *Nicaragua v. the United States*. ICJ. (1986). 14.

reflected in the 1969 Vienna Convention on the Law of Treaties (VCLT) which declares treaties void, if coercion of a state by the threat or use of force was involved.<sup>104</sup> However, the VCLT says nothing about economic types of coercion, although if the attempts involved getting another state to *conclude* a treaty through either corrupting or coercing one of the representatives of that State, the treaty could be considered invalid for the joining State.<sup>105</sup> Despite this principle, overall, the VCLT offers little guidance, as the vote buying appears to be more of an ongoing matter, than pertaining to the initial conclusion of a treaty. In addition, it would only invalidate the obligation for the joining party, not sanction those conducting the *fraud*. Fraud is the pertinent word.<sup>106</sup> Although in international law, it is clear that it is illegal for trans-national corporations to act fraudulently,<sup>107</sup> and fraudulent acts by an international organization can nullify that entity,<sup>108</sup> it is not so clear when it comes to sovereign countries acting in unscrupulous ways such as vote-buying.

The general area that this question falls in relates to the ideal of ‘good faith.’ It is a clear principle of international law that all members of the international community should act in “good faith” towards one another.<sup>109</sup> Although good faith is very difficult to define,<sup>110</sup> it is possible to assert that an essential part of the *pacta sunt servanda*<sup>111</sup> rule involve the three moral elements of honesty, fairness and reasonableness.<sup>112</sup> Bribing countries to vote in certain ways at international fora cannot be seen as honest, fair or reasonable, and as such may be classified as the anti-thesis of good faith in international relations.

These principles were clearly reflected at the 2001 meeting of the IWC. At this meeting, the Commission passed by consensus a specific resolution on Transparency within the IWC. This resolution noted the importance of good faith, the 1970 Declaration and affirmed the application of these principles to the IWC. As such, it endorsed and affirmed:

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<sup>104</sup> See article 52 of the Vienna Convention of the Law of Treaties. Reprinted in Evans, supra n24. 168

<sup>105</sup> See article 50 & 51 of the Vienna Convention of the Law of Treaties. Reprinted in Evans, supra n24. 168.

<sup>106</sup> The word pertains to the usage of a dishonest act or trick to gain an unjust advantage. It is also used in connection with a person or thing not fulfilling what is expected of it. The Oxford Concise Dictionary. (Oxford University Press, Oxford). 466.

<sup>107</sup> See World Bank., World Bank Debars Five Firms. Press Release No.2000/081/S. The movement to stop corruption in international society is one of the more promising areas in this arena. In 1997, the Combating Bribery of Foreign Public Officials in International Business Transactions was agreed by the OECD. For some general discussions of corruption, see the special edition of *Third World Quarterly*. 20 (1999): 485-645.

<sup>108</sup> See Cheng, B. (1987). *General Principles of Law As Applied by International Courts and Tribunals*. (Grotius, Cambridge). 358-360.

<sup>109</sup> Article 2(2) of the UN Charter.

<sup>110</sup> See the *Nuclear Tests Case*. ICJ. (1974) 253.

<sup>111</sup> The rule that agreements and stipulations, especially those in treaties, must be observed. See Garner, R. (1994). *Black's Law Dictionary: Seventh Edition*. (Liber, New York). 1133.

<sup>112</sup> See O'Connor, J. (1991). *Good Faith in International Law*. (Dartmore, London). 117-125.

“the complete independence of sovereign countries to decide their own policies and freely participate in the IWC (and other forums) without undue interference or coercion from other sovereign countries.”<sup>113</sup>

## 7. The Future of the Conditionality Debate.

It is now possible to assert that the international community is, in some areas, trying to move away from undesirable forms of conditionality attached to ODA. This realisation is most prominent with the removal of commercial conditionality from low-income countries, and vote-buying in international fora. With regard to the second area, the discussions at the International Whaling Commission over vote-buying clearly acknowledged that any such practice is not good faith, good neighbourliness, or any form of reasonable diplomatic practice. With such background progress in mind, the question now becomes: where to go from here? The answer to this question is in two parts. Firstly, the problem of vote-buying must be identified as being squarely rejected by the international community. Secondly, to invoke further mechanisms to deter and condemn this practice.

With regard to the first issue, it is necessary to move the rejection of vote-buying further onto the international stage for greater recognition. There are three possible avenues where it may be possible to advance this, by a simple affirmation, similar to that provided by the IWC in 2001. Firstly, it could come from the DAC, as has the recommendation against Tied Aid for Low-Income countries. Secondly, it could come from the 2002 Earth Summit Review in South Africa (akin to the earlier statements on ODA in Agenda 21 from 1992).<sup>114</sup> Finally, it could come from the forthcoming high-level international inter-governmental event on financing and development<sup>115</sup> which would be designed to consider “national, international and systemic issues relating to financing for development in a holistic manner in the context of globalisation and interdependence.”<sup>116</sup> Each of these options is desirable, although clearly the last one represents the strongest option (as it reflects not just the OECD within the DAC acting through soft recommendations, and would not just be environmentally focused within the Rio+10 dialogue).

With regard to deterring the practice of vote-buying, two options present themselves. Firstly, the international community should commit itself further to running aid through appropriate multilateral institutions. Although there are serious questions to be asked about organizations such as the World Bank and associated Bretton Woods institutions,<sup>117</sup> the more UN orientated multilateral bodies, or compromise international organisations such as the Global Environmental Facility represent an attractive alternative to possible uncontrolled bilateral initiatives. This is especially so when the donor countries do not

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<sup>113</sup> Resolution on Transparency Within the IWC. IWC/53/23 Rev. Agenda Item 3.2.

<sup>114</sup> Agenda 21. A/CONF 187/26 (Volume III). 1992. 14 August.

<sup>115</sup> UNGA Res. 54/196.

<sup>116</sup> See ECOSOC. (2001). Commission on Sustainable Development Acting as a Preparatory Committee for the World Summit on Sustainable Development. E/CN.17/2001/PC/10.

<sup>117</sup> See Gillespie, *supra* n10. Chapter 1.

have tight controls upon their own, possibly conflicting objectives and parties within their bureaucracies.

Secondly, the international community should consider also installing an appropriate deterrent to nations that persist with vote buying. If allegations of vote-buying are shown to be correct (via appropriate judicial processes), then that act, in accordance with established democratic procedures at domestic levels, should be considered illegal. In the instance of the international community, the penalty should be expulsion from the democratic organization it is wrongfully trying to manipulate. Although this may seem a harsh penalty, it should be realised that the offence is much wider than disrupting the will of opposing countries, it is an offence against the international community itself, and any meaningful global order where democratic mechanisms are values to be desired and protected. As such, the legitimate question should be raised – should those who try to actively subvert the democratic process, be allowed to continue to participate in it? I think the answer, for a short period at least, should be no.

# The Future of the Vote-Buying Debate

## Executive Summary

Vote-Buying in international forums, when one country obtains the vote of another country via manipulation of its Overseas Development Aid (ODA) is one of the worst forms of conditionality that can be forced upon a sovereign country. This problem, which has become particularly apparent at the International Whaling Commission is a clear breach of good faith, good neighbourliness, and any form of reasonable diplomatic practice. With such background progress in mind, the question now becomes: where to from here ? The answer to this question is in two parts. Firstly, the problem of vote-buying must be identified as being squarely rejected by the international community. Secondly, to invoke mechanisms to deter this practice.

With regard to the first issue, it is necessary to move the rejection of vote-buying further onto the international stage for greater recognition. There are three possible avenues where it may be possible to advance this, by a simple affirmation, similar to that provided by the IWC in 2001. Firstly, it could come from the Development Assistance Committee of the OECD, akin to their other recommendation against Tied Aid for Low-Income countries. Secondly, it could come from the 2002 Earth Summit Review in South Africa (akin to the earlier statements on ODA in Agenda 21 from 1992). Finally, it could come from forthcoming high-level international inter-governmental events on financing and development.

With regard to deterring the practice of vote-buying, two options present themselves. Firstly, the international community should commit itself further to running aid through appropriate multilateral institutions. Although there are serious questions to be asked about organizations such as the World Bank and associated Bretton Woods institutions, the more UN orientated multilateral bodies, or compromise international organisations such as the Global Environmental Facility represent an attractive alternative to possibly uncontrolled bilateral initiatives. This is especially so when the donor countries do not have tight controls upon their own, possibly conflicting objectives and parties within their bureaucracies.

Secondly, the international community should consider also installing an appropriate deterrent to nations that persist with vote buying. If allegations of vote-buying are shown to be correct (via appropriate judicial processes), then that act, in accordance with established democratic procedures at domestic levels, should be considered illegal. In the instance of the international community, the penalty should be suspension from the democratic organization it is wrongfully trying to manipulate. Although this may seem a harsh penalty, it should be realised that the offence is much wider than disrupting the will of opposing countries, it is an offence against the international community itself, and any meaningful global order where democratic mechanisms are values to be desired and protected.