

## MEMORANDUM

TO: -----

FROM: Harris & Moure, pllc

DATED: May 5, 2010

RE: Japanese Whaling

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### Question Presented

Is Japanese whaling in the Antarctic Southern Ocean illegal under international law?

### Short Answer

Yes. First, Japan has been justifying its whaling to the International Whaling Commission (IWC) and to the world as “scientific research” since 1956. However, the value of this research is highly controversial, calling into question whether it can be properly classified as “scientific.” Twice in the last five years, the IWC passed resolutions strongly urging Japan to cease its whale research. Second, Japan conducts its Antarctic whaling in a marine sanctuary—the IWC Southern Ocean Sanctuary—in opposition to all other IWC member nations. Third, Article VIII of the International Convention for the Regulation of Whaling (ICRW) requires that whales taken under scientific permit be “processed” as far as practicable. Since much of the whale caught by Japan is wasted, we can argue that Japan is failing to comply with the processing requirement as well. Lastly, Japan is arguably also violating the United Nations World Charter for Nature, the Law of the Sea Convention, and the Biodiversity Convention for failing to conserve and protect nature.

### Discussion

*A. Japan is not Producing Scientific Results, as Required under the ICRW Scientific Permits.*

In 1946, the ICRW established the terms for regulating whaling on an international level and created the IWC as the administrative body to implement these terms.<sup>1</sup> In an effort to strengthen the protection of whales, the IWC issued a moratorium on all commercial whaling in 1986.<sup>2</sup> This moratorium remains in effect and is binding on Japan, as Japan withdrew all of its objections to it by 1988.<sup>3</sup>

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<sup>1</sup> International Convention for the Regulation of Whaling (1946) ([www.iwcoffice.org/commission/convention.htm](http://www.iwcoffice.org/commission/convention.htm)).

<sup>2</sup> International Whaling Commission Schedule, Article III para. 10(e) (1982) ([www.iwcoffice.org/commission/schedule.htm](http://www.iwcoffice.org/commission/schedule.htm)).

Nevertheless, Japan has taken whales every year since the 1987/1988 season under an annual Special Scientific Permit.<sup>4</sup> This is because the ICRW allows Japan to unilaterally issue itself such a permit, subject to ICW number limits and conditions, including a scientific reporting requirement.<sup>5</sup> Japan has established two extensive research programs based on whaling in the Antarctic. These programs are organized by the Institute on Cetacean Research (ICR) and include the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA), an 18-year program that ended with the 2004/2005 season (annual lethal take of 400±10% minke whales), and JARPA II, which succeeded JARPA and is currently in force (annual lethal take of 850±10% Antarctic minke whales, 50 humpback whales, and 50 fin whales).<sup>6</sup>

Despite having conducted “scientific research” under special permits for more than 22 years, it is not clear whether the ICR has produced results of scientific substance. As early as 1977, the IWC Scientific Committee (Committee) criticized Japan’s whale “research” for catching 120 Bryde’s whales.<sup>7</sup> At the 1997 mid-point review and at the 2007 final review of JARPA, the Committee agreed that JARPA was providing information on stock structure, but disagreed over the necessity of lethal research to address stock identity questions.<sup>8</sup> The Committee lacked confidence in JARPA’s estimates regarding natural mortality (JARPA’s main initial objective), and it noted that JARPA’s results were not required for management under the Revised Management Procedure (RMP).<sup>9</sup> In 2007, the Committee questioned the research coming from JARPA II:

...there was considerable disagreement over the value of this research both within the Scientific Committee and the Commission. As in previous years, there was severe disagreement within the Committee regarding advice that should be provided on a number of issues, including: the relevance of the

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<sup>3</sup> *Id.* at footnotes.

<sup>4</sup> International Whaling Commission, List of Special Permit Catches Since 1985 ([www.iwcoffice.org/conservation/table\\_permit.htm](http://www.iwcoffice.org/conservation/table_permit.htm)).

<sup>5</sup> International Convention for the Regulation of Whaling, *supra* n. 1, at Article VIII.

<sup>6</sup> International Whaling Commission, Scientific Permit Whaling (<http://www.iwcoffice.org/conservation/permits.htm#jarpa>); *see also* The Institute of Cetacean Research, Japan’s Whale Research Programs ([www.icrwhale.org/generalinfo.htm](http://www.icrwhale.org/generalinfo.htm)).

<sup>7</sup> Peter H. Sand, *Japan’s ‘Research Whaling’ in the Antarctic Souther Ocean and the North Pacific Ocean in the Fact of the Endangered Species Conventions (CITES)*, 17 *Reciel* 56, 57 (2008).

<sup>8</sup> Scientific Permit Whaling, *supra* n. 6.

<sup>9</sup> *Id.*

proposed research to management, appropriate sample sizes and applicability of alternate (non-lethal) research methods.<sup>10</sup>

Most importantly, the IWC has passed two recent resolutions urging Japan to discontinue its JARPA II program. In 2005, the IWC voted (30-27) in favor of Japan either discontinuing the JARPA II program entirely or revising it to use non-lethal methods. The IWC was “concerned that more than 6,800 Antarctic minke whales (*Balaenoptera bonaerensis*) have been killed in Antarctic waters under the 18 years of JARPA, compared with a total of 840 whales killed globally by Japan for scientific research in the 31 year period prior to the moratorium.”<sup>11</sup> In 2007, the IWC voted 40-2 to urge Japan to cease the lethal aspects of its JARPA II program indefinitely.<sup>12</sup> The 2007 resolution noted again that Japan had yet to respond, to the Committee’s satisfaction, to over 30 recommendations that had accumulated on Japan’s whaling under scientific permit since the moratorium.<sup>13</sup> The resolution further criticized the JARPA programs because:

- JARPA I had not achieved any of its goals;
- JARPA I was not required for management under the RMP;
- Japan’s minke whale take had more than doubled, and it had added fin whales (which are endangered) and humpback whales (from depleted breeding populations) to its hunts;
- JAPRA II would involve taking whales from an IWC Sanctuary;
- The aims of JARPA II did not address critically important research needs.<sup>14</sup>

Notably, the ICR lies exclusively within the jurisdiction of the Ministry of Agriculture, Forestry and Fisheries, without the participation of the Ministry of Environment, and outside the scope of Japan’s National Institute of Polar Research (under the Ministry of Education, Culture, Sports, Science and Technology).<sup>15</sup> As discussed below, the clear intent of the JARPA programs is not to produce viable scientific results, but to attempt to profit commercially—less than 1% of the biomass of the catch is used for scientific sampling, and almost 60% is packaged for sale.<sup>16</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> International Whaling Commission, Resolution 2005-1: Resolution on JARPA II (2005) ([www.iwcoffice.org/meetings/resolutions/resolution2005.htm#1](http://www.iwcoffice.org/meetings/resolutions/resolution2005.htm#1)).

<sup>12</sup> Scientific Permit Whaling, *supra* n. 6.

<sup>13</sup> International Whaling Commission, Resolution 2007-1: Resolution on JARPA (2007) ([www.iwcoffice.org/meetings/resolutions/Resolution2007-1.pdf](http://www.iwcoffice.org/meetings/resolutions/Resolution2007-1.pdf)); *see also* Scientific Permit Whaling, *supra* n. 6.

<sup>14</sup> *Id.*

<sup>15</sup> Sand, *supra* n. 7, at 56-7.

<sup>16</sup> *Id.* at 62.

Our position should be to go on the offensive against Japanese whaling by asking that Japan explain what useful scientific research it has conducted as part of its whaling in the last five years. Have any legitimate scientific journals published research gathered from the whale hunts? Most importantly, is killing over 1,000 whales annually necessary for this research?

*B. Japan is Illegally Taking Whales from within the Southern Ocean Sanctuary.*

In 1994, the IWC established the Southern Ocean Sanctuary, over Japan's sole objection.<sup>17</sup> At the 1997 JARPA review, the Committee noted that if a sanctuary is in place, it can be argued that information on improving the management of whaling in that region is unnecessary.<sup>18</sup> The IWC stated in its 2007 resolution that the aims of JARPA II did not address critically important research needs and expressed "deep concern" at "lethal research" within the Sanctuary:

**WHEREAS** paragraph 7(b) of the Schedule establishes a sanctuary in the Southern Ocean;

**RECALLING** that the Commission has repeatedly requested Contracting Parties to refrain from issuing special permits for research involving the killing of whales within the Southern Ocean Sanctuary, has expressed deep concern at continuing lethal research within the Southern Ocean Sanctuary, and has also recommended that scientific research involving the killing of cetaceans should only be permitted where critically important research needs are addressed;<sup>19</sup>

In essence, the IWC has made a resounding statement that Japan's whaling is not justified as scientific research in the Southern Ocean Sanctuary. Our position should be to challenge Japan regarding this global consensus, and to emphasize the necessity of establishing and respecting areas to protect ecosystems and the endangered wildlife they contain. We can reference not only the Southern Ocean Sanctuary, but other marine sanctuaries that have served to protect whale populations.

*C. Japan's Inability to Process its Whale Violates the ICRW.*

Article VIII paragraph 2 of the ICRW, requires the whales be "processed":

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<sup>17</sup> International Whaling Commission Schedule, *supra* n. 2, Article III para. 7(b) and footnotes (1994). Russia originally objected but then withdrew its objection later that year.

<sup>18</sup> Scientific Permit Whaling, *supra* n. 6.

<sup>19</sup> Resolution 2007-1, *supra* n. 13.

Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.<sup>20</sup>

In direct violation of this language, about 40% of the biomass of the catch—the commercially unusable parts—are thrown overboard as waste.<sup>21</sup> The ICR attempts to sell the other 60% of the whale meat domestically in order to “process” it.<sup>22</sup> Japan’s demand for whale meat, however, has fallen sharply.<sup>23</sup> In 2004, twenty percent of the ICR’s 4,000-ton haul went into frozen surplus.<sup>24</sup> According to the ICR, 5,334 tons from research whaling was put into storage in 2006—approximately four times as much as in 1990.<sup>25</sup> The wholesale prices of whale meat per kg in Japan have been falling since 1994, starting at just over \$30/kg in 1994, and declining to \$16.40 in 2006.<sup>26</sup> A Japanese newspaper study in 2002 showed that 86% of respondents had never eaten whale meat or had stopped eating it in childhood.<sup>27</sup> The government has been forced to start serving whale meat in school lunches.<sup>28</sup> This practice continues despite alarming reports since 2001 of toxic mercury levels in whale meat sampled from vendors and processors in Japan,<sup>29</sup> which can cause birth defects, brain damage, and death.<sup>30</sup> Professor Endo from Health Sciences University of Hokkaido, Japan, who has published multiple articles on this topic, says, as do other biologists, that the health and agriculture ministries have done little to inform the Japanese people about high mercury levels in whale meat.<sup>31</sup>

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<sup>20</sup> Convention, *supra* n. 1.

<sup>21</sup> Sand, *supra* n. 7, at 62.

<sup>22</sup> *Id.*

<sup>23</sup> Anthony Faiola, *Reviving a Taste for Whale: Japan introduces meat to children as it fights moratorium*, Washington Post Foreign Service, June 19, 2005, at 1 ([www.washingtonpost.com/wp-dyn/content/article/2005/06/18/AR2005061800890.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/06/18/AR2005061800890.html)); Ko Sasaki, *Mercury Taint Divides a Japanese Whaling Town*, New York Times, Feb. 21, 2008, at 1 ([www.nytimes.com/2008/02/21/world/asia/21dolphin.html?ex=1361250000&en=ae6816f9af9d9f96&ei=5088&partner=rssnyt&emc=rss&pagewanted=all](http://www.nytimes.com/2008/02/21/world/asia/21dolphin.html?ex=1361250000&en=ae6816f9af9d9f96&ei=5088&partner=rssnyt&emc=rss&pagewanted=all)).

<sup>24</sup> Faiola, *supra*, at 1.

<sup>25</sup> Sand, *supra* n. 7, at 63-4, citing the ICR website ([www.icrwhale.org/02-A-52.htm](http://www.icrwhale.org/02-A-52.htm)).

<sup>26</sup> World Wildlife Fund, *Norway, Japan Prop Up Whaling Industry with Taxpayer Money*, June 19, 2009 ([wwf.panda.org/?167621/Norway-Japan-prop-up-whaling-industry-with-taxpayer-money](http://wwf.panda.org/?167621/Norway-Japan-prop-up-whaling-industry-with-taxpayer-money)).

<sup>27</sup> Joseph E. Roeschke, *Eco-terrorism and Piracy on the High Seas: Japanese whaling and the rights of private groups to enforce international conservation law in neutral waters*, 20 Villanova Environ. L.J. 99, 105-6 (2009), citing Justin McCurry, *Big Sushi: the world’s most politically sensitive lunch*, The Monthly, Aug. 2006.

<sup>28</sup> Faiola, *supra*, at 1.

<sup>29</sup> M.P. Simmonds et al, *Human Health Significance of Organochlorine and Mercury Contaminants in Japanese Whale Meat*, 65 Journal of Toxicology and Environmental Health 1211 (2002); Sasaki, *supra* n. 22, at 1; Roeschke, *supra* n. 26, at 105-6.

<sup>30</sup> Sasaki, *supra*.

<sup>31</sup> *Id.*

Even though the sale of whale meat produces income for the ICR, during the 2008-09 season, the Japanese whaling industry needed a US \$12 million government subsidy to break even.<sup>32</sup> Since 1988, Japan has provided US \$164 million in subsidies to its whaling industry,<sup>33</sup> but the ICR has had difficulty repaying even interest-free public loans.<sup>34</sup>

In other words, instead of responding to the decline in demand for whale meat in a way that might meet the ICRW “process” requirements, and despite strong criticism from the ICW, Japan has more than doubled its intended catch in JARPA II—at its own taxpayers’ expense, and to the danger of its schoolchildren. Our position should be that Japan is obligated to abandon its attempts to make whale fishing a commercially viable industry under the guise of scientific research, both to comply with the ICRW and for the sake of its own citizens.

*D. Japan is Violating the World Charter For Nature and Other International Agreements by Failing to Protect Nature.*

In 1982, the United Nations adopted the World Charter for Nature,<sup>35</sup> which provides in relevant part:

All areas of the earth, both land and sea, shall be subject to these principles of conservation; special protection shall be given to unique areas, to representative samples of all the different types of ecosystems and to the habitats of rare or endangered species.<sup>36</sup>

...

States...shall: [s]afeguard and conserve nature in areas beyond national jurisdiction.<sup>37</sup>

Though the World Charter for Nature does not have an enforcement mechanism, it is still international law. Japan is endangering the ecosystem of rare and/or endangered species and is thereby failing to “safeguard and conserve” the whales of the Antarctic Southern Ocean (outside its national jurisdiction).

Paul Watson has often cited the World Charter for Nature to justify Sea Shepherd’s actions.<sup>38</sup> He is right in doing so, as that Charter explicitly calls upon “international

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<sup>32</sup> World Wildlife Fund, *supra* n. 25.

<sup>33</sup> *Id.*

<sup>34</sup> Sand, *supra* n. 7, at 64, n. 75.

<sup>35</sup> United Nations World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/RES/37/7 (Oct. 28, 1982) ([www.un.org/documents/ga/res/37/a37r007.htm](http://www.un.org/documents/ga/res/37/a37r007.htm)).

<sup>36</sup> *Id.* at Article III para 21(e).

<sup>37</sup> *Id.* at Article III para 21(e).

organizations” and individuals to “safeguard and conserve nature . . . beyond national jurisdiction”:

...international organizations, individuals, groups and corporations shall: [s]afeguard and conserve nature in areas beyond national jurisdiction.<sup>39</sup>

Each person has a duty to act in accordance with the provisions of the present Charter; acting individually, in association with others or through participation in the political process, each person shall strive to ensure that the objectives and requirements of the present Charter are met.<sup>40</sup>

Further research will likely indicate that Japan may be violating two other international agreements for endangering nature through its whaling. The United Nations Convention on the Law of the Sea (UNCLOS)—a codification of international customary law—requires conservation cooperation for highly migratory species on the high seas and compliance with environmental regulations on marine scientific research.<sup>41</sup> The Convention on Biological Diversity (CBD) requires avoidance of environmental harm and cooperation for conservation of biological diversity beyond areas of national jurisdiction.<sup>42</sup>

Our position should be that Japan is violating its obligations to protect species and ecosystems and to conduct environmentally sustainable research under international customary law and the above international agreements. We should persuade Japan’s government to finally come into compliance with these obligations.

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<sup>38</sup> Raffi Khatchadourian, *Neptune’s Navy*, *The New Yorker*, Nov. 5, 2007, at 1 ([www.newyorker.com/reporting/2007/11/05/071105fa\\_fact\\_khatchadourian?currentPage=all](http://www.newyorker.com/reporting/2007/11/05/071105fa_fact_khatchadourian?currentPage=all)).

<sup>39</sup> World Charter for Nature, *supra* n. 34, at Article III para 21(e).

<sup>40</sup> *Id.* at Article III para 24.

<sup>41</sup> United Nations Convention on the Law of the Sea, Arts. 64, 65, 120, 240, 241, *opened for signature* Dec. 10, 1982, *in force* Nov. 16, 1994, 1833 U.N.T.S. 396 ([www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm)).

<sup>42</sup> Convention on Biological Diversity, Arts. 3, 5, 14, *opened for signature* June 5, 1992, *in force* Dec. 29, 1993 ([www.cbd.int/convention/convention.shtml](http://www.cbd.int/convention/convention.shtml)).