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Whaling Issues: International Law and Japan

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Introduction

This paper introduces the position taken by the Government of Japan regarding whaling issues from the viewpoint of public international law. This paper consists of three parts. Section I provides an overview of the regulation of whaling in international law. This provides a basis or background for a discussion on whaling issues. Section II and III introduce the position taken by the Japanese government on key points concerning these issues.

The position of the Japanese government introduced in this paper are those interpreted, presumed or understood by the author, based on comments, information or statements that are found in official documents or on websites of the Japanese government or inter-governmental institutions, mostly the International Whaling Commission (IWC), or have been given by governmental officials, who are in charge of the issues, in discussions with the author.² Therefore, this paper does not present any official view or position of

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the Japanese government. Nor is it intended, in any way, to defend or criticize the position of the Japanese government. My intention is to contribute to the discussion of this sensitive and difficult issue³ by describing in as neutral a manner as possible some key legal issues that have sometimes been obscured. The paper will not consider various political actions taken by the Japanese government in advancement of its position, such as the contentious issue of alleged aid-for-votes within the IWC.

I. International regulatory regimes

1. Treaty regulations of whaling that are applicable to Japan

There are five conventions that are applicable to Japan concerning whaling.⁴

Agency of Japan, the secretariat of the International Whaling Commission (IWC), the Institute of Cetacean Research and the Japan Overseas Fishing Association. The comments, information or statements were those obtained by the author by the end of September 2011.

³ Australia instituted proceedings before the International Court of Justice (ICJ) against Japan for alleged breach of international obligations concerning whaling in May 2010. The case is before the court at the time of writing of this paper. As to the case, see the website of the ICJ, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=aj&case=148&k=64> (as of 30 September 2012).

⁴ There are some other international agreements, to which Japan is not a contracting party, that are relevant to whales or whaling. They include: Convention of Migratory Species of Wild Animals (CMS), adopted in 1979; Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS), 1994; Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS), 1996; and Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic (NAMMCO Agreement), 1992. The ASCOBANS and the ACCOBAMS are regional agreements to implement the CMS. For an overview of the agreements, see R. Churchill, 'Sustaining Small Cetaceans,' in A. Boyle & D. Freestone (eds.), *International Law and Sustainable Development*, Oxford University Press, 1999; M. Koyano, 'Hogei-mondai: Kaiyoseibutsushigen no Kokusaikanri nikansuru Ichikosatsu' (Whaling issues: a study on the international legal regime for

They include: United Nations Convention on the Law of the Sea (UNCLOS), International Convention for the Regulation of Whaling (ICRW), Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and Convention on Biodiversity (CBD). The UNCLOS, CITES and ICRW are particularly important in the context of whaling issues.

Article 62 of the UNCLOS, which regulates the catching of marine mammals in the EEZ, reads as follows:

'Article 65: Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.'

The provision admits the possibility of introducing stricter regulation on catching marine mammals in the EEZ than the general rules applicable to fisheries in the EEZ prescribed in Part V of the UNCLOS. It also requires contracting parties to implement activities for conservation, management and scientific study through international organizations. Under the provision, however, each contracting party determines how to fulfill their obligations.⁵ It should be noted that Article 65 applies to mammals in the high seas in

conservation of marine living resources), in H. Shiroyama & R. Yamamoto (eds.), *Tokeru Sakai Koeru Ho 5: Kankyo to Seimei*, (Boundaries loosened and interconnected law), Vol. 5: the environment and life), University of Tokyo Press, 2005, pp.282-286;

⁵ This provision does not specify a particular international organization. It does not articulate how and to what extent states shall cooperate nor formulates how to ensure such cooperation.

accordance with Article 120 of the UNCLOS.

The ICRW, adopted in 1946, regulates the catching of large cetaceans in any maritime area. Its adoption was to respond to the increasing concern on the drastic depletion of the stocks of large cetaceans, such as blue whales, particularly in the Antarctic Ocean. The depletion was caused by over-catching by whaling industries of some advanced countries, such as the Netherlands, the UK and the US, *etc.*, as well as Japan. The ICRW has been a key international legal instrument in regulating whaling. The IWC, established in 1948 by the Convention, has taken a principal role in its enforcement.

The CITES, adopted in 1973, aims at the conservation of endangered species by regulating international trade. The United Nations Conference for the Human and Environment (UNCHE) provided a momentum for its adoption. Under the Convention trade includes 'introduction from the sea,' as well as export, re-export and import (Article I (c)). 'Introduction from the sea' is defined as 'transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State' (Article I (e)).

Under the CITES, species in which trade is regulated are divided into three categories, Appendix I, II and III, depending on the risk of their extinction. Different regulatory rules apply to each trade between the species listed in the three Appendixes. Appendix I includes 'all species threatened with extinction which are or may be affected by trade' (Article II (1)). Appendix II contains 'all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization with their survival' (Article II (2) (a)) and 'other species which must be subject to regulation in order that trade in specimens of certain species referred to Article II (2) (a) may be brought under effective control' (Article II (2) (b)). Appendix III lists all species which 'any Party identifies as being subject to

regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other Parties in the control of trade.' (Article II (2) (c)). Nonetheless, a contracting party may enter a specific reservation with regard to any species included in Appendix I, II or III (Article XXIII (2) (a)).

'Introduction from the sea' of a specimen of a species included in Appendix I or II is allowed if requirements formulated in Article III (5) or Article IV (6) are fulfilled. Under Article III (5) it 'shall require the prior grant of a certificate from a Management Authority of the State of introduction.' Conditions of granting a certificate are formulated in Article III (5) or Article IV (6). As to species listed in Appendix I the conditions include: '(a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved, (b) a Management Authority of the State of introduction is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and (c) a Management Authority of the State of introduction is satisfied that the specimen is not to be used for primarily commercial purposes.' Under Article IV (6) the first two of the three conditions aforementioned, (a) and (b), shall be met concerning species included in Appendix II.

At this stage trade of any specimen of all species of cetaceans is regulated by the CITES. Twenty-one species are included by Appendix I, and all other species of cetaceans, by Appendix II.⁶ Those numbers have increased since

⁶ They are: *Balaena mysticetus*, *i.e.* bowhead whale; *Eubalaena* spp., *i.e.* right whale; *Balaenoptera acutorostrata*, *i.e.* minke whale; *Balaenoptera bonaerensis*, *i.e.* Antarctic minke whale; *Balaenoptera borealis*, *i.e.* sei whale; *Balaenoptera edeni*, *i.e.* Bryde's whale; *Balaenoptera musculus*, *i.e.* blue whale; *Balaenoptera omurai*, *i.e.* Omura's whale; *Balaenoptera physalus*, *i.e.* Common Rorqual, fin whale; *Megaptera novaeangliae*, *i.e.* humpback whale; *Orcaella brevirostris*, *i.e.* Irrawaddy dolphin; *Orcaella heinsohne*; *Sotalia* spp., *i.e.* river dolphins; *Sousa* spp., *i.e.* humpback dolphins; *Eschrichtius robustus*, *i.e.* gray whale; *Lipotes vexillifer*, *i.e.* Chinese lake dolphin, Yangtze River Dolphin; *Caperea marginata*,

the adoption of the Convention.⁷ Some contracting parties, such as Japan, have entered a reservation regarding certain species of cetaceans listed in Appendix I, to be mentioned later.

2. Regulatory framework of the ICRW

The purpose of the ICRW is 'to provide for the proper conservation of whales stocks and thus make possible the orderly development of the whaling industry' (Preamble). Any country can accede to this Convention. Its scope covers at least thirteen large cetaceans, including ten of the baleen whales, *i.e.* blue whale, bowhead whale, Bryde's whale, fin whale, gray whale, humpback whale, minke whale, pygmy right whale, right whale and sei whale, and three of toothed whales, *i.e.* beaked whale, bottlenose whale and sperm whale. Their definitions are given in the Schedule (Paragraph 1.). The ICRW 'applies to factory ships, land stations, and whale catchers under the jurisdiction of the Contracting Governments and to all waters in which whaling is prosecuted by such factory ships, land stations, and whale catchers' (Article I (2)).

Specific rules regulating whaling, such as seasons, catch limits and the like, are contained in the Schedule. The current Schedule consists of thirty-one paragraphs in six chapters, namely, I interpretation, II seasons, III capture, IV treatment, V supervision and control, and VI information required. The IWC may amend from time to time the provisions of the Schedule on certain conditions (Article V) by a three-fourths majority of those members voting (Article III (2)). Such conditions include: the amendment is necessary 'to carry out the objectives and purposes of the Convention and to provide for the

i.e. pygmy right whale; *Neophocaena phocaenoides*, *i.e.* black finless porpoise, finless porpoise; *Phocoena sinus*, *i.e.* Cochito, Gulf of California Harbour porpoise; *Physeter macrocephalus*, *i.e.* sperm whale; *Platanista spp.*, *i.e.* Susus; *Berardius spp.*, *i.e.* beaked whale; and *Hyperoodon spp.*, *i.e.* bottlenose whale.

⁷ In the early year after adoption seven species were included in Appendix I, and, two, in Appendix II. In 1979 all whale species, except for the seven listed in Appendix I, were added to a list of Appendix II.

conservation, development, and optimum utilization of the whale resources'; it is 'based on scientific findings'; it does 'not involve restrictions on the number or nationality of factory ships or land stations, nor allocate specific quotas to any factory ships or land station or to any group of factory ships or land stations'; and it takes 'into consideration the interests of the consumers of whale products and the whaling industry' (Article V (2)). Nonetheless, the amendment is not applicable for any members that presented to the IWC an objection to the amendment within ninety days from its adoption (Article III (3)).

The ICRW grants a right to any contracting government to issue 'a special permit authorizing that national to kill, take and threat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Governments thinks fit' (Article VIII (1)). It requires a contracting governments to report to the IWC all authorizations it has granted (Article VIII (1)), to proceed any whales taken under the special permits (Article VIII (2)); and transmit to the Scientific Committee of the IWC, in so far as practicable and at intervals not more than one year, scientific information available on whales and whaling (Article VIII (3)).

Under the ICRW, the Scientific Committee (SC) has been established as a subsidiary body (Article III (4)). The SC consists of the world's leading whale biologists. Many are nominated by member governments.⁸ Decisions and recommendations adopted by the Committee are to facilitate activities of the IWC and to become a basis of its decision (Article IV (1)).

Eighty-nine countries ratified or acceded to the ICRW by the end of August 2011. The number is relatively small, compared with the number of member states of the UN, *i.e.* 193. In the IWC there are only a few member

⁸ As to the outline of the SC, see, 'The Scientific Committee,' in IWC, 'IWC information: A general introduction to the IWC with links to more detailed information,' *available at* <<http://www.iwcoffice.org/commission/iwcmain.htm>>(as of 10 September 2011).

states under whose jurisdiction whaling, except for aboriginal subsistence whaling, has currently been undertaken. Japan is one of them.⁹

3. History of conservation and management by the IWC

The IWC has a seventy-year-long history. The history is not simple affected by various kinds of factors.

Particularly in the 1950s, regulation by the IWC almost concentrated on the catching of baleen whales in the Antarctic Ocean mainly to adjust price of whale oil. Catch limits were calculated based on the blue whale unit (BWU). The method accelerated catching of large cetaceans for economical efficiency. This resulted in their appreciable depletion. The IWC was a 'salon' of whalers, and properly scientific advice was scarcely provided by the SC.¹⁰

By the mid-1960s, whaling industries of many advanced countries, such as Australia, France, the Netherlands, UK and US, stopped their operations, mainly due to the stagnation in the price of whale oil. This contributed to a gradual change in the IWC's attitude that used to have priority over interests of whaling industry. In the 1960s the IWC started to take measures to assess whale stocks and to conserve whales to prevent large cetaceans from becoming extinct. The SC prompted this direction, recommending abolition of the BWU. However, the IWC kept the BWU through to the 1960s, while it prohibited catching blue whale and humpback whale.¹¹

In the beginning of the 1970s the IWC started to move towards a scientific-based management of whaling, which the SC had tried to pursue. It rejected a proposal on a moratorium of commercial whaling based on the SC's view that there was no scientific justification for introducing a total ban under the circumstances where not all whale species were presumably in endangered.

⁹ Japan ratified the ICRW in 1951. The other such members include: Iceland and Norway.

¹⁰ W. Aron, 'The Science and the IWC,' in R.L. Friedheim (ed.), *Towards a Sustainable Whaling Regime*, University of Washington Press, 2001, pp.106-108.

¹¹ E.g. IWC, *Chairman's Report of the Twenty-Second Meeting* (1971), pp.4-13.

Thus, the IWC did not follow the resolution adopted by the UNCHE on a moratorium of commercial whaling. At the same time the IWC abolished the BWU and adopted quotas for each whale stock. Moreover, it successfully introduced mechanisms of mutual dispatch of monitoring persons based on bilateral agreements between members of the IWC.¹² Furthermore, in 1975 the IWC adopted a new management policy for whales, introducing the new management procedure (NMP). This was a method of calculating catch limits based on some biological characteristics of whales.¹³

Towards the end of the 1970s, the anti-whaling¹⁴ movement became more vocal both within and outside the IWC. This was rooted in the rising prominence of eco-activities in the international community. In the IWC it was discovered that the RMP could not be implemented properly due to difficulties with obtaining the complex data required.¹⁵ It complicated arguments on uncertainties in the scientific analyses in the SC whose members were increasing.¹⁶ Under the circumstances, the anti-whaling trends clearly appeared in the IWC. It was accelerated by the increased accession to the ICRW by non-whaling states that opposed commercial whaling. By the end of the 1970s members opposing commercial whaling became the majority within the IWC.¹⁷ It led to the amendment of the Schedule that introduced the Indian Ocean Sanctuary by the IWC in 1979.¹⁸

In the 1980s, this anti-whaling trend became much stronger in the IWC due

¹² *Report of the International Whaling Commission* (hereinafter called IWC Report) (1972-73), 24 IWC Report (1974), p. 6; Chairman's Report of Twenty-Fourth Meeting, *Ibid.* pp. 7-17.

¹³ 27 IWC Report (1977), pp. 6-8.

¹⁴ In this paper, 'anti-whaling' refers to those opposed to any form of commercial whaling.

¹⁵ 'Conservation and management,' IWC, *supra* note 8.

¹⁶ *E.g.* 29 IWC Report (1979), p. 41-42.

¹⁷ Such member states increased from 7 to 13 within the period between 1973 and 1979.

¹⁸ 30 IWC Report (1980), p. 27 & 39 (Appendix 10).

to the remarkable increase of accession to the ICRW by countries that opposed commercial whaling. In 1982 the IWC adopted a moratorium of commercial whaling as Paragraph 10 (e) of the Schedule. It was supported by the members who opposed commercial whaling. They insisted that an interim prohibition was needed to achieve conservation of whale resources under the circumstances where there was incomplete scientific data on the stocks. However, there was no scientific advice of the SC as a basis for such a decision.¹⁹ Some members of the IWC, such as Japan, Norway, Peru, the former USSR, presented objections against the decision. However, Japan and Peru withdrew their objection mainly as a result of external pressure.²⁰ However, whaling by indigenous people like the Inuit in the US was exceptionally allowed as 'aboriginal subsistence whaling.'²¹ Moreover, the IWC decided to prolong the Indian Ocean Sanctuary for ten more years in 1992 and adopted a new Sanctuary of the Southern Ocean in 1994. Neither decision on the Sanctuaries was based on an agreement in the SC.²² Japan presented an objection against the Southern Ocean Sanctuary in terms of minke whales.

By the mid-1990s such an anti-whaling direction became decisive in the IWC, while the SC undertook a comprehensive assessment and succeeded in developing scientific methods for managing whaling. Paragraph 10 (e) remained untouched in spite of the productive work done by the SC in reviewing a moratorium of commercial whaling in accordance with the second sentence of Paragraph 10 (e).

The SC undertook a comprehensive assessment as required in the Paragraph.²³ Moreover, it successfully adopted a new scientific method of

¹⁹ 32 IWC Report (1982), p. 48.

²⁰ The US made protests against Japan and suggested sanctions under the Packwood—Magnuson Amendment and the Pelly Amendment. K. Sumi, 'The "Whale War" Between Japan and the United States: Problems and Protests,' 17-2 *Denver Journal of International Law and Policy* (1989), pp.356-362.

²¹ 33 IWC Report (1983), pp. 20-21 & p. 39 (Appendix 6).

²² 45 IWC Report (1995), pp. 27-29.

²³ As to a comprehensive assessment undertaken by the SC and its results,

setting catch limits, namely, a revised management procedure (RMP), by unanimous decision in 1992.²⁴ The RMP is a simple method but highly appreciated by scientists as being sufficiently precautionary. This balances the somewhat conflicting requirements to ensure that the risk to individual stocks is not seriously increased, while allowing the highest continuing yield. The RMP requires knowledge of two essential parameters: estimates of current abundance taken at regular intervals; and knowledge of past and present catches. It takes into account scientific uncertainties on the stocks and is therefore highly precautionary.²⁵ In 1994 the RMP was finally adopted and endorsed by the IWC after protracted discussion.²⁶ However, there was no substantial progress in discussion in the IWC for implementing the RMP. No agreement was reached on monitoring measures of its compliance. Thus, a series of discussions on a revised management scheme (RMS) ended without any tangible results in 2006.²⁷

see IWC, 'Whale population estimates,' *available at* <<http://www.iwcoffice.org/conservation/estimate.htm>> (as of 24 July 2011). The term 'comprehensive assessment' in Paragraph 10 (e) had not been defined by the IWC and eventually the SC defined it to be: "an in-depth evaluation of the status of all whale stocks in the light of management objectives and procedure... that ... would include the examination of current stock size, recent population trends, carrying capacity and productivity." *Ibid.*

²⁴ 44 IWC Report (1994), pp. 43-51 & 74-92.

²⁵ As to the outline of RMP, see IWC, 'Revised management procedure,' *available at* <<http://www.iwcoffice.org/conservation/rmp.htm>> (as of 24 July 2011).

²⁶ 45 IWC Report (1995), pp. 23-27 & 43 (Appendix 5). In the 1992 and 1993 annual meetings the IWC did not adopt the RMP in spite of recommendations of the SC on its adoption. The Chairman of the SC, Mr. Butterworth, protested the attitudes of the IWC and resigned the position, criticizing the ignorance of the science by the IWC. As to his criticism against the IWC, see D.S. Butterworth, 'Science and sentimentality,' 357 *Nature* (1992), pp. 532-534.

²⁷ IWC, *Chair's Report of the 58th Annual Meeting, 16-20 June 2006*, St. Kitts and Nevis, January 2007, *Annual Report of the International Whaling*

Under the circumstances the IWC members supporting sustainable commercial whaling pursued their own policies. For example, Japan suspended commercial whaling in 1988 and started research whale programs for scientific purposes. It also repeatedly proposed a special quota for small-type coastal whaling of minke whales whose stocks were agreed abundant in the SC. In addition to whaling for scientific research, Norway resumed commercial whaling in 1993. Iceland withdrew the IWC and took an initiative on establishing the NAMMCO in 1992.²⁸ Russia stopped whaling except for aboriginal subsistence whaling.

Towards the end of the 1990s the IWC became deadlocked. Both sides were unable to constitute a three-fourth majority of the IWC members necessary for an amendment of the Schedule. This was due to the gradual increase of member states supporting sustainable commercial whaling.²⁹ Scientific-based management of whaling was not achieved, neither.

It should, however, be noted that from the mid-2000s there were several attempts among members to make a political compromise to normalize the IWC. It was the process, 'Future of the IWC', that should particularly be focused on as the most recent and intensified dialogue. It started in 2008 based on the outcome of intersessional meetings. A small working group (SWG) was established in 2008 to facilitate further discussion or negotiations

Commission (hereinafter called IWC Annual Report of 2007, pp. 31-34. As to the summary of work on the RMS in the IWC, see IWC, 'Revised management scheme,' *available at* <<http://www.iwcoffice.org/conservation/rmp.htm>> (as of 24 July 2011).

²⁸ However, Iceland rejoined the IWC with reservation on Paragraph 10 (e) in 2002 and resumed commercial whaling in 2006. There were a series of controversies regarding the admissibility of the adherence to the ICRW with the reservation. As to the issues, see 'Iceland', in http://www.iwcoffice.org/_documents/iceland.htm (as of 13 September 2011).

²⁹ This was caused by the increase both of withdrawal from the IWC by non-Euro-American states that are non-whaling and of accession to it by developing countries that rely on fisheries.

on the Future of the IWC. The process continued intensively for two years.³⁰ In March 2010 the Chair and Vice Chair of the IWC, assisted by a support group established in 2009, submitted a report to the SWG that contained a set of ideas as to how the IWC could function in the future.³¹ In April 2010 the Chair and Vice-Chair released a draft package. It was expectedly to be discussed at the 2010 annual meeting of the IWC.³²

The proposed decision in the package would establish a 10-year interim period of stability within which intensive dialogue will occur on the major long-term issues at the IWC with the objective of resolving those issues during that period. Main components of the decision are: to retain the moratorium on commercial whaling; to suspend immediately for the 10-year period unilaterally-determined whaling under special permit, objections, and reservations; to bring all whaling authorized by member governments under the control of the IWC; establish caps for the next ten years that are significantly less than current catches and within sustainable levels, determined using the best available scientific advice,³³ to limit whaling to

³⁰ As to the process, see IWC, 'Future of the IWC: Meeting of the Small Working Group on the Future of the IWC and associated documents,' *available at* <<http://iwcoffice.org/commission/future.htm>> (as of 19 June 2011).

³¹ IWC/62/6rev: Report of the fourth meeting of the Small Working Group on the Future of the IWC.

³² IWC/62/7rev: Proposed Consensus Decision to Improve the Conservation of Whales from the Chair and Vice Chair of the Commission.

³³ Catch limits of non-aboriginal subsistence whaling set by the proposed decision include: 1) in Southern Hemisphere, 400 Antarctic minke whales per year in the first 5 years, and, 200, in the last 5 years, 10 fin whales per year in the first 3 years, 5, in the rest of 7 years; 2) in Northern Hemisphere, in the North Pacific, 120 minke whales per year on the coastal waters near Japan, excluding the Okhotsk Sea, and 40, on the offshore, 50 sei whales per year, 12 Bryde's whales; and in the North Atlantic, particularly in the Eastern Atlantic, 600 minke whales per year and 80 fin whales per year, and especially in the Central Atlantic, 80 minke whales per year. *Supra* note 32, p. 15 & 16 (Table 4). Considering the proposition of the proposed decision to limit whaling to those

those members who currently take whales; to introduce modern, effective IWC monitoring, control and surveillance measures for non-indigenous whaling operations; to create a South Atlantic Sanctuary; etc.

However, the process has not been successful. Despite the enormous amount of effort and resources used, no political compromise was reached. In the 2010 annual meeting the IWC completed its discussions on the Future of the IWC without reaching a consensus resolution over its main differences. Even the discussions on the proposed consensus decision did not take place in the plenary but continued as a series of small, private 'one to one' meetings between groups of member states. After all, it agreed to a pause in its work on this topic to allow time for reflection until the 2011 annual meeting.³⁴ Nonetheless, there was no substantial discussion on the matters in the meeting. The IWC agreed to encourage continued dialogue among its members regarding the future of the IWC, continue to build their mutual trust and to encourage them to continue to cooperate in taking forward the work of the Commission.³⁵ The Japanese government expressed an intention "to carry out the discussion cool-headedly and constructively for the diplomatic solution of the issues concerning the process".³⁶ At the 2012 annual meeting there was no action arising on the matter, neither.³⁷ Moreover, it was agreed in the meeting that the Commission should move to biennial meetings.³⁸ Thus, the process has unfortunately collapsed, and the future of

members who currently take whales, the catch limits in Southern Hemisphere and in the North Pacific are presumably allocation for Japan, those in the Eastern Atlantic, for Norway, and those in the Central Atlantic, for Iceland.

³⁴ IWC Annual Report of 2010, p.1 & pp.6-10.

³⁵ IWC Annual Report of 2011, p.1 & pp.6-7.

³⁶ IWC/63/OS JAPAN: Fisheries Agency, Japan's opening statement to the 63rd annual meeting of the International Whaling Commission.

³⁷ IWC, *PRESS RELEASE: DAY 1*, available at <<http://iwcoffice.org/cache/downloads/d3lm0kofrkoc0g40kgk0swwcg/PRESS%20RELEASE%20day1.pdf>> (as of 28 September 2012).

³⁸ IWC, *PRESS RELEASE: DAY 5*, available at <<http://iwcoffice.org/cache/>>

the IWC remains uncertain.

Why did it fail?³⁹ One of the main factors is presumed to be that some states, notably Australia and Latin American countries, insisted on the phase-down of all whaling except for aboriginal subsistence whaling and did not accept the proposed decision.⁴⁰ The Japanese government appreciated the proposed decision and regarded the Australian as being unacceptable.⁴¹

II. Understandings of general matters on whaling by the Japanese government

1. Whaling as sustainable utilization of marine living resources

Within the framework of the ICRW, the Japanese government is pursuing the resumption of sustainable commercial whaling under international control including science-based harvest quota and effective enforcement measures. At the same time, it strongly supports conservation and protection of endangered species. Such a position is fully compatible with objects and purposes of the ICRW.⁴²

downloads/6ltw9i6m15wk4gsg8o4w4gock/PRESS%20RELEASE%20day5.pdf>
(as of 28 September 2012).

³⁹ cf. D. Goodman, 'The "Future of the IWC": Why the Initiative to Save the International Whaling Commission Failed,' 14 *Journal of International Wildlife Law & Policy* (2011), pp. 63-74.

⁴⁰ *Supra* note 34. As to Australia's argument, see IWC/A10/SG1: Comments received on the Draft Consensus Decision to Improve the Conservation of Whales (IWC/M10/SWG 4) (Comments of Australian Government); IWC/M10/SWG 5, The Future of the International Whaling Commission: An Australian Proposal.

⁴¹ *Supra* note 34.; 'Japan's comments on the draft Consensus Decision to Improve the Conservation of Whales' in IWC/A10/SG1, *supra* note 36; IWC/62/OS Japan: Fisheries Agency, Japan's opening statement to the 2011 annual meeting of the International Whaling Commission; IWC/M10/SWG7: Government of Japan, Statement on the Future of the IWC: Small Working Group on the Future of the IWC, 2-4 March 10, St. Pete Beach, Florida, USA.

⁴² Suisancho (Fisheries Agency, Japan), 'Hoge wo Torimaku Jokyo' Current

Sustainable whaling can be achieved by scientifically sound management. For example, the SC has developed an appropriate scientific method for the purpose, RMP, based on precautionary consideration. The IWC adopted and endorsed it. Together with a monitoring and inspection scheme it is to provide a regime to ensure sustainable commercial whaling.⁴³

2. Whale population estimates

There are more than eighty species of cetaceans in the world. Some are abundant, increasing and recovering from past over-harvesting, while others are endangered. As to cetaceans under the jurisdiction of the IWC, the SC agreed this by undertaking a comprehensive assessment of the whale stocks in accordance with Paragraph 10 (e) of the Schedule. The Japanese government fully supports the SC's conclusion.⁴⁴

Antarctic minke whales are typical examples of abundant stocks.⁴⁵ The population estimates, 761,000, is currently being reconsidered.⁴⁶ Nonetheless,

ituations concerning whaling) (in Japanese), *available at* <http://www.jfa.maff.go.jp/j/whale/w_thinking/index.html> (as of 18 June 2011); J. Morishita, Alternate Commissioner, Delegate of Japan 'IWC 63, *Briefing Note:*' Introduction.

⁴³ Morishita, *supra* note 42, para.1

⁴⁴ IWC, *supra* note 23; Suisancho (Fisheries Agency, Japan), *supra* note 42.

⁴⁵ E.g. IWC, *Chair's Report of the 56th Annual Meeting*, April 2005, p.47.

⁴⁶ In the SC there have been discussions on appreciable decline in circumpolar (CP) Antarctic minke whale abundance estimates between the second (II) and third (III) circumpolar. IWC, *Report of the Scientific Committee 2011*, IWC/63/Rep1, pp.24-26. Also, see *supra* note 42, 49S & 49, 1-4 ('Antarctic Minke Whale' (in Japanese), *available at* <http://kokukshi.job.affrc.go.jp/H20/H20_49.html>) (as of 24 July 2011)). In 2012 the SC agreed the best available abundance estimates of Antarctic minke whales in the surveyed areas during the years of CPII and CPIII. They are 720,000 for CPII and 515,000 for CPIII. The Committee understands the differences seen between CPII and CPIII probably reflect real changes in abundance in the open-water areas surveyed. It is exploring possible reasons for this. IWC, *Report of the Scientific Committee 2012*, IWC/64/

there are still a large number of minke whales that can be utilized in a sustainable manner even if a new estimate shows a lower abundance. This seems clear from figures currently being discussed in the SC.⁴⁷ The Committee also agreed that humpback whales in the Antarctic, as well as finback whales in the area, are increasing at a rate of about 10% per year. Moreover, according to the Japanese government, data collected by the Japanese non-lethal research suggests that there is an increasing number of minke whales, Bryde's whales and sei whales in the Western North Pacific.⁴⁸

However, blue whales are still endangered according to analyses by the SC. This means that their stock has not sufficiently been recovering yet. Supporting this finding, the Japanese government believes that catching them cannot be justified as sustainable whaling.⁴⁹

III. Position taken by the Japanese government on legal issues

Replrev1, pp.35-39.

⁴⁷ *Ibid*; *supra* note 23.

⁴⁸ Population estimates of the stocks are the following. During the period of 1998 and 2001, minke whales in the Sea of Okhotsk and North West Pacific are 25,049; Bryde's whales in the North West Pacific, 20,501. The estimates were agreed by the SC. During the period of 2002 and 2003, sei whales in the North West Pacific are 68,000. There needs more detailed analyses regarding the estimates of sei whales, for there are objections on the method adopted. Suisan Sogo Kenkyusenta (Fisheries Research Agency, Japan), 'Heisei 22 Nendo Kokusai Gyogyoshigen no Genkyo' (Current status of marine living resources and their management) (in Japanese), 2011, p. 48S & 48, 2 ('Common Minke Whale' (in Japanese), *available at* <http://kokukshi.job.affrc.go.jp/H20/H20_48.html> (as of 24 July 2011)); 50S & 50, 1-3 ('Bryde's Whale' (in Japanese) *available at* <http://kokukshi.job.affrc.go.jp/H20/H20_50.html> (as of 24 July 2011)); 52S & 52, 1-2 ('Sei Whale' (in Japanese) *available at* <http://kokukshi.job.affrc.go.jp/H20/H20_52.html> (as of 24 July 2011)).

⁴⁹ Consulate-General of Japan, Sydney, 'Japanese Government's position on whaling,' *available at* <http://www.sydney.au.emb-japan.go.jp/english/top/important_info/japanese_governments_position.htm> (as of 24 July 2011).

1. Object and purpose of the ICRW⁵⁰

It is the opinion of the Japanese government that the purpose of the ICRW is 'to provide for the proper conservation of whales stocks and thus make possible the orderly development of the whaling industry' (Preamble). The ICRW requires that regulation of whaling adopted by the IWC be based on scientific findings to ensure that whaling is sustainable. This is clearly reflected in Article V (2). In other words, the ICRW aims at science-based sustainable whaling that is compatible with conservation of whales stocks and the protection of endangered species.

Some argue that the object and purpose of the ICRW have been fundamentally changed into the conservation of cetaceans. According to this point of view, such a change has been brought about by practice of the IWC, such as the amendment of the Schedules for adopting the moratorium of commercial whaling, of sanctuaries, *etc.* Considering their position that seems to preclude any form of commercial whaling irrespective of the science and status of the stocks, this presumably means that the 'conservation' required by the ICRW would consist of a total ban of whaling. The Japanese government considers this as a fundamental change of its purpose - or even a rejection of the purpose - which is explicitly referred to in the Preamble of the Convention.

However, it is the position of the Japanese government that such an argument cannot be justified as an interpretation of the ICRW. First, the object and purpose of a convention cannot be fundamentally changed in an adverse direction of that which is explicitly found in the text of a convention. This cannot be done without amendment of provisions of the main text of the Convention. The main text of the ICRW clearly requires that regulation shall

⁵⁰ Discussions in this section are based on the materials, such as J. Morishita, Alternate Commissioner, Delegate of Japan, 'IWC 59, Buriifing-shiryo,' (IWC 59, Briefing Note) (in Japanese), para.16; Morishita, *supra* note 42, para.4; IWC, Chair's Report of the 55th Annual Meeting, 16-19 June 2003, January 2004, IWC Annual Report of 2003, p.10; *supra* note 49.

be adopted based on scientific findings. It is to achieve the object and purpose that are explicit in the Preamble. Second, such practice as the amendments of the Schedule on the moratorium or on sanctuaries cannot be regarded as evidence of a fundamental shift in the object and purpose of the ICRW. The moratorium on commercial whaling is not a permanent prohibition of whaling regardless of status of the stocks but pursuing sustainable whaling that is compatible with appropriate conservation of cetaceans. This is particularly clear from the second sentence of the Paragraph 10 (e) of the Schedule on the moratorium, to be mentioned later. This is the reason why Japan has accepted the moratorium. Moreover, both the amendments of Paragraph 7 (a) and (b) on sanctuaries, proposed without support of the SC, were adopted by a narrow margin in the IWC. Japan and other IWC member states presented objections against the amendments. Thus, the amendments have not been supported by the vast majority of the IWC members. Therefore, the objects and purposes of the ICRW cannot be regarded as being fundamentally changed as argued in the view of the Japanese government.

In any event, according to the Japanese government, the ICRW aims at achieving appropriate and orderly management of the whaling industry with science-based conservation of cetaceans. Its purpose is not 'conservation' of whales regardless of the status of the stocks and without taking into consideration of the current state of the scientific knowledge.

2. The moratorium of commercial whaling in Paragraph 10 (e), the Schedule, ICRW

The moratorium of commercial whaling is indicated in Paragraph 10 (e) of the Schedule. It reads as follows:

'10 (e) Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a

comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.'

Notwithstanding the Paragraph whaling traditionally conducted by indigenous people, such as the Inuit in the US, can be retained as 'aboriginal subsistence whaling.' However, there is no definition of 'aboriginal whaling' adopted by the IWC.

Japan presented an objection against the amendment of the Schedule at the beginning due to the lack of scientific grounds for a total ban of commercial whaling. Not all species were in danger, as aforementioned. Nonetheless, Japan withdrew its objection mainly as a result of external pressure and suspended commercial whaling in 1988.

The Japanese government believes that whale research programs permitted by Japan are legitimate under Article VIII of the ICRW. It does not fall into commercial whaling currently prohibited by Paragraph 10 (e), to be explained later.

The Japanese government deeply regrets that the moratorium has not been appropriately been reconsidered by the IWC in accordance with Paragraph 10 (e). The Paragraph does not intend to prohibit commercial whaling permanently. It is designed to prohibit commercial whaling provisionally. In the second sentence it explicitly requires the IWC to undertake a comprehensive assessment and to establish appropriate catch limits within a period of ten years. Thus, Paragraph 10 (e) provides for a measure to achieve scientifically sound and appropriate utilization of resources. Faced with some uncertainties of status of the stocks, it required the provisional suspension of their utilization. Upon collecting relevant scientific information and examining appropriate catch limits based on its analysis, it was envisaged that the suspension would be lifted.

Moreover, the SC has done successful work for reviewing the moratorium, namely, undertaking a comprehensive assessment and adopting a scientifically-sound method for setting catch limits, *i.e.* the RMP. First, results

of the assessment demonstrate that some stocks are abundant and increasing while others are not.⁵¹ Second, the SC adopted the RMP to overcome difficulties with implementing the NMP. The RMP has been appreciated by all the scientists in the SC as a simple but fully reliable method. It can respond to substantial depletion of stocks in a short period by the prompt change of the environment.⁵²

For more than ten years the IWC continued discussions with a view to completion of the RMS. It is to be a comprehensive scheme to implement the RMP together with monitoring measures of its compliance. However, they did not produce any fruitful outcome. Since the collapse of the discussion in 2006, no work has been done in the IWC with a view to adopting the RMS, while the SC has been engaged in the implementation simulation test of the RMP regarding certain stocks to set a catch limits. The Japanese government appears willing to accept a practical, effective and cost efficient monitoring and inspection scheme. In the view of the Japanese government, such a scheme would necessarily include national inspectors and international observers to verify catches, a conservative harvesting quota, and a fair sharing of the costs. Japan has tried to make substantial compromise to reach an agreement on a reasonable RMS and made proposals for the purposes.⁵³

3. Whale research programs under special permit under Article VIII

(1) Overview of whale research programs permitted by Japan

Article VIII (1) of the ICRW reads as follows:

'Article VIII 1. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of

⁵¹ IWC, *Chair's Report of the 56th Annual Meeting, 19-22 July 2004, Sorrento, Italy*, April 2005, p.47.

⁵² Morishita, *supra* note 42, para.3.

⁵³ *Ibid.*

scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.'

The Japanese government issued a special permit of whale research programs in the Antarctic Ocean or the Western North Pacific in accordance with the provision. The programs permitted by the Japanese government involve both lethal and non-lethal research techniques, such as sighting surveys and biopsy sampling. They have two objectives. One is to collect biological information on whales to promote their sustainable utilization. Such biological information includes: distribution of stocks, trends in increase or decrease of the stocks, resource composition regarding sex, age, and impacts of changes of the environment in their habitat on whales. Another objective is to collect relevant information on interactions between whales and other part of marine ecosystem. It has been presumed that increased number of whales prey a large number of marine resources and that there is competition between their predation and fisheries. Such competition may presumably cause a change of balance in the marine ecosystem.⁵⁴

The programs are summarized as follows.

(a) Whale research programs in the Antarctic Ocean: JARPA & JARPA II

⁵⁴ Suisancho (Fisheries Agency, Japan), 'Geirui-Hokakuchosa ni Tsuite' (Whale research programs under Special Permit) (in Japanese), presented in the first meeting of Geirui Hokakuchosa nikansuru Kento-iinkai (Review Committee for the Whale Research Program under Special Permit) organized by the Fisheries Agency of Japan, 22 April 2011, p. 4; Suisan Sogo Kenkyusenta (Fisheries Research Agency, Japan),

A series of research programs have been undertaken in the Antarctic Ocean. They are: JARPA, conducted during the austral summer seasons from 1987/1988 to 2004/2005) and JARPA II,⁵⁵ started with two feasibility surveys in the austral summer seasons of 2005/2006. Their conductor is the Institute of Cetacean Research (ICR). The ICR, the National Research Institute of Far Seas Fisheries, Fisheries Research Agency (NRIFSA/FRA) and universities jointly the programs and analyze their results.⁵⁶

The JARPA continued for eighteen years. It was launched to overcome the insufficiency of scientific evidence on whale stocks, which triggered the introduction of a moratorium of commercial whaling.⁵⁷ The program had four main objectives: a) estimation of biological parameters to improve the stock management of the Southern Hemisphere minke whale; b) elucidation of the role of whales in the Antarctic marine ecosystem; c) elucidation of the effect of environmental change on cetaceans; and d) elucidation of the stock structure of Southern Hemisphere minke whales to improve management.⁵⁸ Up to 440 minke whales were caught per year. Considering the estimates agreed in the SC, the catch was not likely to affect the status of the stocks.⁵⁹

The analysis of the results of JARPA clarified biological parameters, such as age at sexual maturity, age at physical maturity, growth curve, natural mortality rate, blubber thickness, and stomach content change over the years.

⁵⁵ IWC Document, SC/57/O1: Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) – Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources (Government of Japan).

⁵⁶ Suisan Sogo Kenkyusenta (Fisheries Research Agency, Japan), *supra* note 44, 44- 3 ('Oogata Geirui,' (Large cetaceans) (in Japanese) *available at* <http://kokusai.job.affrc.go.jp/H20/H20_44.html> (as of 24 July 2011)).

⁵⁷ Suisan Sogo Kenkyusenta (Fisheries Research Agency, Japan) note 48.

⁵⁸ ICR, 'JARPA/JARPA II research results,' *available at* <<http://www.iwcwhale.org/JARPAResults.htm>> (as of 10 September 2011). The ICR is not a governmental organ but a conductor of the programs.

⁵⁹ Suisan Sogo Kenkyusenta (Fisheries Research Agency, Japan), *supra* note 48.

It was also found out that the abundance of some of the large whale species, including humpback and fin whales, are showing a rapid recovery of late. Furthermore, it was demonstrated that the composition of the Antarctic marine ecosystem continues to change today.⁶⁰

Following a mid-term review in 1997, the most recent JARPA review by the SC in December 2006 concluded that “the dataset provides a valuable resource to allow investigation of some aspects of the role of whales within the marine ecosystem and that this has the potential to make an important contribution to the SC’s work in this regard as well as the work of other relevant bodies such as the Convention for the Conservation of Antarctic Marine Living Resources,”⁶¹ and “the results from the research program, while not required for management under the RMP, have the potential to improve management of minke whales in the Southern Hemisphere”.⁶²

Based on the results of JARPA, JARPA II was launched in 2005 as a new and expanded program. It is a long-term research program with the following objectives: 1) monitoring of the Antarctic ecosystem (whale abundance trends and biological parameters; drill abundance and the feeding ecology of whales; effects of contaminants on cetaceans; cetacean habitat); 2) modeling competition among whale species and future management objectives (constructing a model of restoration of the cetacean ecosystem); 3) elucidation of temporal and spatial changes in stock structure; and 4) improving the management procedure for the Antarctic minke whale stocks.⁶³ In particular, JARPA II places emphasis on collecting data that is necessary to establish a multi-species management model of whaling based on an ecosystem approach. The RMP is a method for a single-species management of whaling. However,

⁶⁰ Suisancho (Fisheries Agency, Japan), *supra* note 42; *supra* note 54, pp. 9-10.

⁶¹ ICR, *supra* note 58; IWC document, SC/59/REP. 1, Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic, Tokyo 4-8 December 2006, p. 28.

⁶² IWC document, *supra* note 55, p. 31.

⁶³ ICR, *supra* note 58, pp. 10-12.

considering the interaction of predation between different species, a multi-species management is a better approach for sustainable whaling. The Japanese government has been pursuing this possibility. For this purpose, more than 100 variables, such as the age and the stomach contents of whales, are collected to obtain scientific data in the program.⁶⁴

The program has covered the waters south of 60° and that from 35° E eastwards as far as 145° W. Whales caught include 850 Antarctic minke whales, $\pm 10\%$, per year, 50 fin whales per year, though 10, in the first two years, and 50 humpback whales per year. No humpback whales were caught under the process of the Future of the IWC and that there has been no report of their catching.⁶⁵

Such catching numbers were computed as statistical minimum sample numbers that are needed for establishing maturity age and ratio of pregnancy and so on. It should be noted that both Humpback whales and Fin whales in the Antarctic Ocean are not on the brink of becoming endangered. Stocks are recovering rapidly, especially Humpback whales, as aforementioned.⁶⁶

The results of JARPN II have not yet been reviewed, since it has still been undertaken for the moment.

(b) Whale research programs in the Western North Pacific, JARPN and JARPN II

Whale research programs have been undertaken on whales in the Western North Pacific under a special permit granted by the Japanese government. They are: JARPN, conducted from 1994 and 1999, and JARPN II,⁶⁷ started in 2000.

As a first phase, JARPN continued for six years from 1994. It had two

⁶⁴ Suisan Sogo Kenkyusenta (Fisheries Research Agency, Japan), *supra* note 48.

⁶⁵ Suisancho (Fisheries Agency, Japan), *supra* note 54, p. 5; *supra* note 55, pp. 12-14.

⁶⁶ Suisan Sogo Kenkyusenta (Fisheries Research Agency, Japan), *supra* note 48; *supra* note 54, pp. 17-19; ICR, *supra* note 58.

⁶⁷ IWC Document, SC/54/O2: Research Plan for Cetacean Studies in the Western North Pacific under Special Permit (JARPN II) (Government of Japan).

main objectives: a) determine the stock structure of common minke whales, and in particular to investigate whether or not the “W” stock exists and if so to estimate mixing rates between “O” and “W” stocks, and b) determine the feeding ecology of the common minke whale in the North Pacific.⁶⁸

In the program up to 100 minke whales were caught per year. Research by JARPN revealed that whales eat huge amounts of fisheries resources. It was estimated that whales consume approximately three to five times as much marine resources as the world's yearly marine fisheries production volume. Besides eating Krill, which is also food for fish, whales eat a large amount of Anchovies, Mackerel, Saury, Salmon, Squid and Walleye Pollack. Furthermore, it became clear that whales feast on certain types of fish during their most prolific season. Japan as a fishing nation is concerned with this issues.⁶⁹

Based on the results of JARPN, JARPN II began in 2000 as a new and expanded program. The ongoing JARPN II started with two feasibility surveys in 2000 and 2001.⁷⁰ The first full survey started in 2002. The program involves both coastal and offshore research. The coastal research includes offshore operation along Kushiro or the Sendai Bay. The ICR conducted it up to March 2010, and since April 2010, it has been undertaken by Ippanshada-hojin Chiikihogeiisuishin-kyokai (Local Association of Whaling). The NRIFSA/FRA participates in research on the feed environment in both programs. The ICR, NRIFSA/FRA and universities jointly made both programs. The results of the research have also been analyzed by them.⁷¹

The objectives of the JARPN II are as follows: a) feeding ecology and ecosystem studies (prey consumption by cetaceans, prey preference of

⁶⁸ ‘JARPN/JARPN II research results,’ *available at* <<http://www.iwcwhale.org/JARPNResults.htm>> (as of 10 September 2011).

⁶⁹ Suisan Sogo Kenkyusenta (Fisheries Research Agency, Japan), *supra* note 48.

⁷⁰ IWC Document, SC/54O17: Report of 2000 and 2001 feasibility study of the Japanese Whale Research Program under Special Permit in the western North Pacific-Phase II (JARPN II) (Government of Japan).

⁷¹ Suisan Sogo Kenkyusenta (Fisheries Research Agency, Japan), *supra* note 48; *supra* note 71, p.22, 24 & 30.

cetaceans, ecosystem modeling); b) monitoring environmental pollutant in cetaceans and the marine ecosystem (pattern of accumulation of pollutants in cetaceans, bioaccumulation process of pollutants through the food chain, relationships between chemical pollutants and cetacean health); and c) stock structure of large whales (common minke whale, Bryde's whale, sei whale and sperm whale).⁷² It is a comprehensive research on the marine ecosystem with a view to obtaining scientific data that is indispensable for establishing a multi-species management-model of whaling based on an ecosystem approach.⁷³

Catch limits are set as follows: 1) 100 minke whales per year for the first two years, 150, for the next two years, 160, for the next one year, and 220, from 2005; 2) 50 Bryde's whales; 3) 50 sei whales per year in the first two years from 2002, and 100, after 2005; and 4) 10 sperm whales per year.⁷⁴ It should be noted that none of the whale stocks are in danger and that the catch is unlikely to endanger them.⁷⁵

In January 2009 the SC carried out a review of the data and results collected by JARPN II in its six first years (2002-2007). On the main objective of JARPN II, the report approved that the program was making good progress to achieve its purposes.⁷⁶ It stated that "The Panel appreciates the notable amount of effort undertaken and the generally high quality of the sampling programme, resultant data and information from JARPN II studies on whale food habitats and prey preferences. The sampling programme was

⁷² IWC Document, *supra* note 71, pp. 12-22; *supra* note 68.

⁷³ Suisan Sogo Kenkyusenta (Fisheries Research Agency, Japan), *supra* note 48.

⁷⁴ Suisancho (Fisheries Agency, Japan), 'Geirui-Hokakuchosa no Genjo ni Tsuite' (Current situations of whale research programs under Special Permit) (in Japanese), presented in the Second meeting of Geirui Hokakuchosa nikansuru Kento-iinkai (Review Committee for the Whale Research Program under Special Permit) organized by the Fisheries Agency of Japan, 17 May 2011, p. 5; IWC Document, *supra* note 71, pp.26-29.

⁷⁵ IWC Document, *supra* note 71 pp.35-36.

⁷⁶ *Supra* note 68.

generally well-coordinated across a wide range of vessels and platforms, and the degree of concurrently collected multi-disciplinary data was laudable. These efforts have resulted in valuable datasets that have great potential for concerted analytical work on a broad range of topics, not all directly related to the JARPN II programme objectives.”⁷⁷

(2) Treatment of whale meat as research by-products

Article VIII (2) reads as follows:

‘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.’

Under the provision, by-products of whaling for scientific purposes shall be processed and utilized as far as possible. In Japan income from sales of whale meat has been allotted to expenses of whale research programs under the supervision of the Government in the following manner. It is fulfillment of a duty imposed by Article VIII (2). Thus, the sales of whale meat are legitimate under the ICRW.⁷⁸

In Japan whale meat as research by-products has been dealt with in the following way. Upon the completion of each research, whale meat is to be sold by the ICR in accordance with Tokubetuchosa Jigyogyomu Hohosho (Manual of executing special projects) that was approved by directions issued by the Minister of Agriculture, Forestry and Fisheries. Under Tokubetuchosa Jigyogyomu Hohosho (Manual of executing special projects), the ICR gets a permission from the Secretary of the Fisheries Agency for sales of meat

⁷⁷ *Ibid*; IWC Document, SC/61/Rep.1: Report of the Expert Workshop to Review the Ongoing JARPN II Programme, reprinted in *Journal of Cetacean Research Management* 11(Supplement 2) (2010), p. 408.

⁷⁸ Morishita, *supra* note 42, para. 8.

obtained in each research. Meat is sold either on the market or for the public use. As to the former, some are dealt with by retailers, while others, by cooperative associations of fisheries or restaurants. In terms of the latter, meat is sold to the local people, schools or hospitals. The price of whale meat is determined not in the market but based on expenses of whale research programs. Such a procedure was introduced when the whale research programs started. It aims at ensuring appropriate treatment of whale meat as their by-product in accordance with Article VIII (2) of the ICRW and to guarantee sufficient financial resources for the programs, as well as preventing a jump in whale meat price. However, price determined in this manner does not meet needs of consumers these days. It is a factor of less sales performance of whale meat. Consequently, there are increasing stocks of whale meat remaining, as shown by statistics of 2009.⁷⁹

(3) Legitimacy of Japanese permits for the whale research programs⁸⁰

The Japanese government argues that granting a special permit of whaling for scientific research is a right of all member states of the IWC under Article VIII (1) of the ICRW. According to the provision the state granting a special issue primarily determines appropriate restrictions on numbers and other conditions concerning the permit in question. Programs permitted by it are genuinely for scientific purposes, to be explained later. Therefore, it is the view of the Japanese government that this is an exercise of a right conferred under the Convention to issue a special permit to the programs. Moreover, the Japanese government has fully undertaken all of the procedures required by Article VIII (1), (3) and (4), as well as Paragraph 30 of the Schedule, concerning its granting of a special permit.

⁷⁹ Suisancho (Fisheries Agency, Japan), *supra* note 42, pp.5-7.

⁸⁰ Discussions in this section are based on the materials, such as J. Morishita, Alternate Commissioner, Delegate of Japan, 'IWC 59, Buriifing-shiryo,' (IWC 59, Briefing Note) (in Japanese), para.16; Morishita, *supra* note 42, para.4; *supra* note 49.

In the view of the Japanese government, the programs cannot be regarded as being incompatible with the object and purpose of the ICRW in terms of the number and species of whales caught and of other conditions. They do not endanger the stocks, for the SC has agreed their abundance or sufficient increase, as aforementioned. It is highly unlikely that they have an adverse impact on the status of the stocks even if scientific uncertainties are taken into account based on a precautionary approach.

The Japanese programs have the purpose of advancing scientific knowledge according to the Japanese government. In its understanding the Scientific Committee has commended that results of their research are scientifically useful for sustainable whaling. The Japanese government argues that the programs contribute to enhancing the accuracy of the RMP. They also make it possible to collect relevant scientific data even for developing a method of multi-species management-model of marine resources. In fact the IWC showed their interest in the work on the interaction between cetaceans and fisheries.⁸¹ Moreover, the SC has recently initiated discussions on the issue, assisted by the Ecosystem Modeling Working Group first convened in 2007.⁸² The results of the Japanese programs are to contribute to this work.

In the view of the Japanese government, scientific data for these purposes cannot be obtained by non-lethal research techniques. Certain information requires sampling of internal organs, such as ovaries, ear plugs and stomach content, while some other information can be obtained through non-lethal means, such as sighting surveys and biopsy sampling. Whale research programs permitted by the Japanese government involve both lethal and non-lethal research techniques.⁸³

⁸¹ *E.g.* discussions in the 2001 IWC meeting & Resolutions 2001-9, IWC Annual report of 2001, Cambridge 2002, pp.31-32; those in the 2002 IWC meeting, IWC Annual Report of 2002, pp.38-39.

⁸² IWC/63/Rep1, *supra* note 46, pp. 42-45.

⁸³ Morishita, *supra* note 42, para.10; Suisancho (Fisheries Agency, Japan), 'Kujira

The Japanese government understands that in the case of land mammals the population age structure and reproductive rates can be determined by observation over a period of time. However, this is not the case for whales, for they spend most of their time underwater. We here need ear plugs for age determination and ovaries to establish reproductive rates. Similarly, for studying the interactions of whales and other parts of the marine ecosystem we need to know what, how much, where and when they are eaten, at most not when, where and how much. Another example is that for pollution studies, tissue samples from various internal organs are required.⁸⁴

More than 100 data items and samples are taken from each whale including ear plugs for age determination studies, reproductive organs for examination of maturation, reproductive cycles and reproductive rates, stomachs for analysis of food consumption and blubber thickness as a measure of condition. These data and the analysis of the data provide us with valuable scientific information on whales and the ecosystem of which they are a part.⁸⁵

In the view of the Japanese government the whale research programs are part of Japan's commitment to scientific work for promoting scientific-based sustainable whaling. Japan has been engaged in three other kinds of non-lethal research programs.

First, Japan has actively joined several international research programs of sighting surveys organized by the IWC. They are programs on minke whales in the Antarctic Ocean and those on whales in the North Pacific. The former includes ICDR/SOWER. They are: the International Decade of Cetacean Research (IDCR), commenced in 1978, and the Southern Ocean Whale and Ecosystem Research program (SOWER) conducted between 1996 and 2010

mondai ni kansuru Yokuarushitumon to Kotae,' (Questions and answers on whaling issues), *available at* <http://www.jfa.maff.go.jp/j/whale/w_fa/faq/faq.html> (as of 11 September 2011).

⁸⁴ Morishita, *supra* note 42, para.10.

⁸⁵ *Ibid.* para.8.

following the IDCR. The latter is a joint program between the IWC and Japan started in 2010.

Second, Japan has launched a program of sighting surveys on cetaceans in the North Pacific. It has two objectives. One is to collect useful information on large cetaceans for a comprehensive assessment of the stocks and for implementation simulation tests of the RMP (IST), both of which have been undertaken by the SC. Estimates of the stocks based on the research have been officially adopted as reliable data for the IST. The other objective is to obtain information that could be used for assessing the current status of the stocks of small cetaceans and dolphins that are outside the jurisdiction of the IWC. They are being hunted by Japanese fishermen, and their hunting has been under the control of Japan. The program of sighting surveys has been reviewed prior to its undertaking. Moreover, monitoring crew nominated by the IWC has got on board.

Finally, Japan has been engaged in joint research programs of sighting surveys respectively with Russia in the northern part of the Japan Sea, Sea of Okhotsk and near the Kamchatka Peninsula and with South Korea in the East China Sea and the southern part of the Japan Sea.⁸⁶

According to the Japanese government, the expansion of the research in JARPA II is based on genuine scientific needs, as explained. The Japanese government argues that it will contribute to the conservation, management and sustainable utilization of whales in the Antarctic Ocean. In JARPA II, the research area has been expanded, and fin and humpback whales have been added. This was because they are presumably in rapid increase in the area and have a significant role in the ecosystem. It is impossible to test hypotheses concerning changes in the Antarctic ecosystem unless data on these species is collected. Such data is also necessary for developing an

⁸⁶ Suisan Sogo Kenkyusenta (Fisheries Research Agency, Japan), *supra* note 48, 44- 2 & 3 ('Oogata Geirui,' (Large cetaceans) (in Japanese) *available at* <http://kokusai.job.affrc.go.jp/H20/H20_44.html> (as of 24 July 2011)).

ecosystem-based management scheme for whale resources. Moreover, sample sizes have been calculated as the minimum number required for obtaining statistically significant data. The number you need to ask increases when the size of the population is large and the degree of accuracy required is high. This is similar to doing public opinion polls – you do not ask everyone in the entire population for their view but you need to ask more than one person. In any case the number of the catch is highly unlikely to have any detrimental effect on the stocks.⁸⁷ It is obvious from the estimates of the stocks agreed in the SC.

The Japanese government has been providing the Secretary of the IWC with the proposed permits. The proposed permits have been reviewed and commented on by the SC at its annual meetings. Preliminary results of research resulting from the permits, as well as other scientific information available to Japan with respect to whales and whaling, have been made available at the next annual meeting of the SC concerned. All these actions are in accordance both with Article VIII (1) and (3), Paragraph 30 of the Schedule as well. The Japanese government understands that the SC has recognized scientific values of the whaling research programs in its review of the programs, as aforementioned.⁸⁸

Moreover, The Japanese government believes that it has fulfilled its obligation under Article VIII (2) of the ICRW by selling whale meat as a by-product of the research in the afore-mentioned manner. Therefore, the whale research programs cannot be regarded as ‘suspected commercial whaling’ under the ICRW.⁸⁹

The IWC has frequently adopted a resolution recommending Japan to stop

⁸⁷ Morishita, *supra* note 42, para. 14.

⁸⁸ *Ibid.* para. 6.

⁸⁹ *Ibid.* para. 8.

the whale research programs. Nonetheless, a resolution, to be adopted by a single majority vote, is not legally binding on member states of the IWC. It is different in legal character from the Schedule that provides for 'measures of management' that are legally binding.

In the view of the Japanese government, fundamentally, such a resolution is against the relevant provisions of the ICRW, for it does not respect a right conferred to all contracting governments under the Convention. It should also be noted that such a resolution was always adopted by a small majority of the IWC. They were not supported by the vast majority of the member states but opposed by a half of them. Moreover, Japan explained reasons for opposing such a draft resolution whenever it was proposed in the IWC. It cannot be regarded that Japan has not acted in a good faith in disregarding the resolutions. Thus, repeated adoption of such a resolution by the IWC does not affect the legitimacy of granting a special permit to the research programs by the Japanese government⁹⁰

The Japanese government believes that it is not in breach of Paragraph 7 (b) of the Schedule that establishes the Southern Ocean Sanctuary by issuing a special permit for JARPA and JARPA II. The Paragraph only prohibits commercial whaling in the area. It does not prohibit whaling for scientific purposes permitted under Article VIII.⁹¹ Moreover, presented an objection against an amendment of the Schedule, which added the Paragraph, in terms of minke whales. Therefore, Japan does not have a legal obligation to follow the restriction prescribed by Paragraph 7 (b). In any case Japan thinks such measures are irrelevant under the ICRW, to be explained later.

In 15 January 2008, the Federal Court of Australia declared the illegality of conducting the whale research programs in the Antarctic Ocean and ordered

⁹⁰ *Ibid.* para. 9.

⁹¹ *Ibid.* para.13.

the ship owner to stop it.⁹² The Japanese government recognizes that the judgment is based on the premise that Australian domestic law is applied within a 200 nautical mile Exclusive Economic Zone (EEZ) which Australia had established on the coast of the Antarctic Continent based on its claim to territorial sovereignty in Antarctica. However, Japan as well as a considerable number of sovereign states has taken the position regarding the issue of sovereignty in Antarctica that any state's territorial sovereignty shall not be recognized. Recalling Article IV of the Antarctic Treaty, Japan does not recognize any state's rights over or claims to the water, sea-bed, and subsoil of the submarine areas adjacent to the continent of Antarctica, including the establishment of EEZ. Since the judgment is not in concordance with the principle of the exclusiveness of the Flag State, the Japanese government cannot accept the judgment. The Japanese government reaffirms that its research whaling conducted on the high seas is legal under international law including the ICRW.⁹³

4. Sanctuary established by the Schedule of the ICRW

The Schedule of the ICRW prescribes two sanctuaries from commercial whaling. One is the Indian Ocean Sanctuary under Paragraph 7 (a). The other is the Southern Ocean Sanctuary under Paragraph 7 (b).

The Japanese government considers both sanctuaries as irrelevant, redundant and unnecessary. They were established without a recommendation of the SC. On this ground Japan presented an objection against Paragraph 7 (b), in terms of Antarctic minke whales that is estimated as being abundant by the SC. With the moratorium, they are also simply

⁹² *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, NSD 1519 of 2004, 15 January 2008.

⁹³ Consulate-General of Japan, Sydney, 'Comments on the Judgment by the Federal Court on the case of HIS vs Kyodo Senpaku Kaisya', available at <http://www.sydney.au.emb-japan.go.jp/english/top/important_info/comments_on_the_judgement.htm> (as of 24 July 2011).

redundant. Moreover, the RMP protects whales in the breeding areas and addresses uncertainties related to abundance estimates and environmental changes. Therefore, Japan has proposed their abolishment several times although Japan's proposals were not adopted by a narrow margin by the IWC.⁹⁴

In particular, Paragraph 7 (b) prohibits commercial whaling, 'irrespective of the conservation status of baleen and toothed whale stocks in this Sanctuary.' Such conservation measures as totally prohibiting the use of abundant resources over large areas is against the principles of sustainable utilization. A review of the Southern Ocean Sanctuary by the external experts of the SC, held in 2004, concluded that the Sanctuary and IWC sanctuaries in general are not ecologically justified; that there is little rationale for boundary selection and management prescriptions within the sanctuary; and that they are more prohibitive than precautionary. The conclusions mean that establishment of the Sanctuary and its continuation is contrary to Article V of the ICRW.⁹⁵

5. Small-type coastal whaling under the ICRW

The Japanese government considers it highly rational that a quota regarding abundant stocks for Japan's coastal communities be admitted by the IWC. Japan has repeatedly requested an interim relief allocation of minke whales since the moratorium on commercial whaling was adopted. It aims at alleviating the hardship of STCW communities; Abashiri, Ayukawa, Wada and Taiji. However, it is a source of deep regret to the Japanese government that such requests have been continuously rejected by the IWC.⁹⁶ Since 2008,

⁹⁴ As to the Indian Ocean Sanctuary, *e.g.*, see IWC Annual Report of 2002, pp.31-33. Concerning to the Southern Ocean Sanctuary, *e.g.*, IWC, *Chair's Report of the 57th Annual Meeting, 20-24 June 2005, Ulsan, Republic of Korea*, March 2006, IWC Annual Report of 2005, p.45.

⁹⁵ IWC Annual Report of 2005, p.45.

⁹⁶ IWC Document: IWC/60/9: Background Paper for Japan's small-type coastal whaling (Submitted by Japan). The most recent proposal was that for an

Japan has refrained from submitting such a proposal so as not to impede the process of the Future of the IWC.⁹⁷

Japan's draft proposal in 2008, intended to be submitted but not done so,⁹⁸ included that the following sub-paragraph 10 (f) be added as an amendment of the Schedule. It reads as: '(f) Notwithstanding the other provisions of paragraph 10, the taking of up to () minke whales from the Okhotsk Sea-West Pacific stock in the coastal waters east of Japan north of 35N and west of 150E (excluding the Okhotsk Sea) shall be permitted for each of the years 2008, 2009, 2010, 2011 and 2012 and the meat and products are to be used exclusively for local consumption'. The draft proposal indicated that the STCW would be conducted under conditions on several matters: (a) catch quota; (b) monitoring, compliance and surveillance (MCS), such as acceptance of international observers at landing stations, deployment of VMS (vessel monitoring system) which will allow real time monitoring of whaling vessels, and DNA registration of whale products which can identify individual whales; (c) local-consumption; (d) oversight committee and (e) moratorium. It explicitly intended to leave the moratorium on commercial whaling in place although the Japanese government maintains its position against the moratorium.⁹⁹

In the view of the Japanese government, the argument of "commerciality" of the STCW is arbitrary and in a sense irrelevant because neither the Convention nor the Schedule uses or defines the term "commercial". Under the current aboriginal subsistence whaling regime, sales of whale products, including meat and crafts made from whale parts, are considered as

amendment of the Schedule, namely adding a new Paragraph 10 (f) submitted to the IWC in 2007. However, the proposal was finally withdrawn as faced with oppositions by anti-whaling members in the IWC. IWC, Chair's Report of the 59th Annual Meeting, 28-31 May 2007, Anchorage, Alaska, March 2008, in IWC Annual Report of 2007, pp.33-37.

⁹⁷ IWC, Revised Chair's Report of the 60th Annual Meeting, in IWC Annual Report of 2008, p. 26; IWC Document, *supra* note 96.

⁹⁸ IWC Annual Report of 2008, p. 26

⁹⁹ IWC Document, *supra* note 96.

acceptable by the IWC. Local consumption and some domestic transaction of whale meat in Japan, which is expected to take place in conjunction with the proposed resumption of the STCW, should be treated as the same.¹⁰⁰

There is a long history of whaling in some coastal communities in Japan according to the Japanese government. In such communities whale meat has traditionally been not only a protein source as ordinary food but also treated as a special food with regional and social significance. Local ceremonies or festivities include the serving of some Whale meat dishes. Whaling still plays an important role as the basis of solidarity of community there. In particular, four coastal communities, Abashiri; Ayukawa; Wadaura and Taiji that were involved in the taking of minke whales prior to the imposition of the moratorium are highly dependent on whaling. They still have socio-economic, cultural and dietary needs similar to aboriginal communities in the US, Russia and Greenland. These STCW communities in Japan now take Byrd's beaked whales, pilot whales and Risso's dolphins under the management of the Japanese government and at a much reduced scale. The impact of the moratorium on commercial whaling in these communities has been enormous. Many countries expressed sympathy for the social, economic and cultural difficulties of the STCW communities caused by the introduction of the moratorium.¹⁰¹

The IWC has notably adopted a number of resolutions concerning STCW. They included that i) recognize the socio-economic and cultural needs of the four small-type coastal whaling communities; ii) recognize the severe impacts of the moratorium on the four communities; iii) agreed (and reaffirmed) its commitment to work expeditiously to alleviate their distress and; iv) noted the importance for communities to continue customary resource use practices on a sustainable basis.¹⁰²

It is the position of the Japanese government that the STCW, targeting

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *E.g.* IWC Resolutions, 45-51 (1993), 1995-3, 1996-1, 2000-1, 2001-6, and 2004-2.

minke whales of the Okhotsk Sea-West Pacific Stock, is compatible with object and purpose of the ICRW. The SC agreed that the stocks were abundant. Therefore, the Commission should permit such whaling as being community-based in order to reinstate traditional and local practices associated with catching, processing, distribution and consumption of whale meat, and revitalize traditional festivals and rituals of the regions.

6. Interpretation of the CITES

Japan entered a specific reservation on eight species of cetaceans out of the twenty-one included by Appendix I of the CITES. Such eight species are: fin whale, sei whale (except for the stocks in North Pacific and those habitats in the area from 0° of East (east longitude) to 70° of East (east longitude) and from the equator line to the Antarctica), sperm whale, minke whale, Antarctic minke whale, Bryde's whale, bottlenose whale and Irrawaddy dolphin.¹⁰³ Thus, restriction under the CITES do not apply to measures taken by Japan concerning the species. The Japanese government regards the listing of the species in Appendix I as irrelevant based on scientific findings. There are no scientific grounds in their inclusion. They are currently not in danger according to the estimates of the stocks agreed by the SC. Therefore, Japan will not abolish the reservation unless the current estimates become irrelevant.¹⁰⁴

Japan has not made reservation on humpback whale and sei whale of the stocks in North Pacific, which are included in Appendix I. It is obvious for the Japanese government that catching specimens for the purposes of scientific research in the whale research programs is acceptable under the CITES. It

¹⁰³ Ministry of Economic, Trade and Industry, Japan, 'Boeki-Kanri' (Trade regulation), http://www.meti.go.jp/policy/external_economy/trade_control/boekikanri/cites/cites_a... (as of 22 August 2011).

¹⁰⁴ Foreign Ministry of Affairs, Japan, '*CITES : Convention on International Trade in Endangered Species of Wild Fauna and Flora*', available at <<http://www.mofa.go.jp/mofaj/gaiko/kankyoyoyaku/wasntn.html>> (as of 22 August 2011).

is regarded as a legitimate introduction from the sea of any specimen of a species included in Appendix I under Article III (5) of the CITES. It fulfilled conditions prescribed in the provision. The Japanese Fisheries Agency gives an advice that the measures do not make the species endangered, approves that the measures are not for commercial purposes and issues a permit prior to undertaking the measures in accordance with the provision. Therefore, Japan is not in breach of legal obligations under the CITES by granting a special permit to the programs that cover the species.¹⁰⁵ The number of whales caught in the programs is highly unlikely to affect the status of the stocks, as aforementioned.

7. Obstruction of the Sea Shepherd Conservation Society (SSCS) against the whale research programs permitted by the Japanese government

Whale research programs permitted by the Japanese government have been mistrusted by anti-whaling NGOs, such as Greenpeace and Sea Shepherd Conservation Society (SSCS). In particular, SSCS has disturbed Japanese research vessels operating in the Antarctic Ocean. Its continued obstruction started in 2005 and has subsequently escalated. The safety of Japanese vessels and the life and property of the crew have seriously been disturbed. The Japanese government repeatedly requested other relevant states to take appropriate measures to stop them by diplomatic channels.¹⁰⁶

The Japanese government is clearly unhappy that such obstruction has been taken by SSCS every year and that it has escalated. Moreover, it is regrettable for the Japanese government that the research programs in the Antarctic Ocean, JARPA II, were suspended to ensure the safety of the research vessels and life and property of the crew in the whaling season of

¹⁰⁵ Suisancho (Fisheries Agency, Japan), *supra* note 74; comment of the staff of the MOF, International Legal Affairs Division, in the interview held by the author on 25th July 2011.

¹⁰⁶ Suisancho (Fisheries Agency, Japan), *supra* note 74, p. 9.

2010/2011.¹⁰⁷

The obstruction by SSCS has been criticized by IWC members regardless of their position on commercial whaling. Resolutions condemning the activities have repeatedly been adopted by consensus in the IWC. In the 2011 annual meeting of the IWC, for example, Japan made a presentation with video about the obstruction by SSCS and requested other relevant states, such as a flag state and a port state, to take appropriate measures to prevent its recurrence. Many states presented statements that condemned such violent activities of SSCS. Upon a proposal by Japan the IWC agreed by consensus a resolution on this issue. The Resolution noted statements from the Japanese government that it decided to withdraw its vessels from the Southern Ocean much earlier than originally scheduled in the 2010/11 season in order to secure the safety of the vessels and lives of the crew members in response to dangerous actions by SSCS. It, *inter alia*, reiterated that the Commission condemns any actions that are a risk to human life and property and that this is not the most appropriate way to pursue the resolution of different view regarding whales and whaling. The Resolution also recognized the importance of the International Maritime Organization (IMO) with respect to safety at sea; and encouraged all governments to fulfill their obligations under the IMO and UNCLOS.¹⁰⁸

The Japanese government considers that Japan is not in the position to take coercive measures to regulate the activities of SSCS in international law. In international law vessels are under the jurisdiction of the flag state in the high sea. Japan is not the flag state of the vessels of the SSCS. Therefore, it is doubtful that Japan may legitimately take coercive actions against them in

¹⁰⁷ Suisancho (Fisheries Agency, Japan), 'Puresu Ririsu, Dai 24-ji Nankyokukai Geirui Hokakuchosa Kiriage nitsuite,' (Press release, Cease of the 24th cruise of whale research in the Antarctic) (in Japanese), February 2011.

¹⁰⁸ IWC/63/17 : 'Resolution on Safety at Sea, submitted by Japan'; IWC, 'Press Release - Day 4 - 14 July 2011', *available at* <<http://www.iwcoffice.org/meetings/meeting2011.htm>> (as of 22 August 2011).

international law. This derives from an interpretation of the relevant provisions of the UNCLOS. The activities taken by SSCS does not fall into acts of piracy as defined by Article 2 of the Law on Punishment of and Measures against Acts of Piracy¹⁰⁹ Thus, the Japanese government has requested that the relevant states take appropriate actions to regulate them.

Conclusion

Whaling is an issue of the management and conservation of marine living resources based on science. Therefore, the Japanese government takes the view there is no reason to prohibit all commercial whaling comprehensively if the following two conditions are fulfilled. First, the SC affirms the abundance of some stocks and adopts a scientifically sound method to calculate catch limits adopting precautionary considerations, like the RMP. Second, a management scheme for implementing the RMP is introduced in a practical, effective and cost-efficient manner. This position is justified by reference to the contemporary state of international law on the management and conservation of marine living resources, including the ICRW.

¹⁰⁹ 'Shugiin-giin Hase Hiroshi kun Teishutu Shii Shepado niyoru Nihon no Chosahogeisen eno Bogaikoui ni kansuru Shitzumon nitaishuru Tobensho (bassui),' (Answers to questions regarding obstruction by SSCS against Japanese vessels of research whaling, selected version) (in Japanese), Kakugi Kettei (Cabinet decision), 15 March 2011, in Suisancho (Fisheries Agency, Japan), *supra* note 74, p. 10