

# SCIENTIFIC RESEARCH WHALING IN INTERNATIONAL LAW: OBJECTIVES AND OBJECTIONS

*Howard S. Schiffman\**

|      |  |     |
|------|--|-----|
| I.   | INTRODUCTION .....   | 473 |
| II.  | THE INTERNATIONAL WHALING COMMISSION<br>AND SCIENTIFIC WHALING .....                   | 474 |
| III. | OBJECTIONS TO JAPANESE SCIENTIFIC RESEARCH<br>WHALING .....                            | 476 |
|      | A. <i>The Research is Lethal</i> .....   | 477 |
|      | B. <i>A Large Unilateral Research Catch is not<br/>Justifiable</i> .....               | 480 |
|      | C. <i>The Whale Meat from Scientific Research<br/>Catches is Sold for Profit</i> ..... | 482 |
| IV.  | CONCLUSIONS.....   | 484 |

## I. INTRODUCTION

Scientific research whaling is one of the most hotly debated points of contention between anti-whaling forces and those few remaining states that seek to resume commercial whaling. While the justification for scientific whaling in international law needs to be carefully considered, so, too, must one understand the political and economic motivations underlying the practice. This paper is a brief overview of the legal, political and economic context of scientific research of whaling in the world today.

Research whaling programs do not exist in a vacuum. On the contrary, scientific whaling is intimately bound up with the status of commercial whaling. The legacy of commercial whaling is one of the saddest examples of resource overexploitation in human history. Whales (cetaceans) were hunted for centuries without regard for the maintenance of healthy stocks.<sup>1</sup> With many important commercially valuable species

---

\* LL.M., J.D. Adjunct Assistant Professor, New York University School of Continuing and Professional Studies. An earlier version of this article was presented at the 2001 annual International Law Weekend of the American Branch of the International Law Association, October 2001, New York, New York, United States.

1. For a review of the history of commercial whaling, see Howard Scott Schiffman, *The Protection of Whales in International Law: A Perspective for the Next Century*, 22 BROOK. J.

depleted, the whaling states sought to create an international legal framework for whale harvesting. The product was the 1946 International Convention for the Regulation of Whaling (ICRW).<sup>2</sup> The primary achievement of the ICRW was the establishment of the International Whaling Commission (IWC) as an organization responsible for the stewardship of whale stocks and the whaling industry.<sup>3</sup> The IWC is comprised of representatives of each member state of the ICRW<sup>4</sup> and it remains the most significant international organization devoted to whale conservation and management.

The most salient responsibility of the IWC is that it may amend the provisions of the ICRW's Schedule (of catch-limits) by adopting regulations with respect to the conservation and utilization of whale resources.<sup>5</sup> The amendments of the Schedule "shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development and optimum utilization of whale resources."<sup>6</sup> The amendments of the Schedule also "shall be based on scientific findings."<sup>7</sup>

## II. THE INTERNATIONAL WHALING COMMISSION AND SCIENTIFIC WHALING

In addition to the powers of the IWC to regulate commercial whaling, the ICRW conferred upon member states the power to grant their nationals special permits to harvest whales for scientific purposes. Article VIII of the ICRW provides as follows:

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 scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government

---

INT'L L. 303 (1996); Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21 (1991); DAVID DAY, *THE WHALE WAR* (1987).

2. International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948) [hereinafter ICRW].

3. See *id.* at art. III. The International Whaling Commission (hereinafter IWC) remains the most significant intergovernmental organization devoted to cetacean conservation and management.

4. *Id.* at art. III(1).

5. *Id.* at art. V(1).

6. *Id.* at art. V(2)(a).

7. *Id.*

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.<sup>8</sup>

2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance to directions issued by the Government by which the permit was granted.<sup>9</sup>

In 1982, faced with the catastrophic results of its inability to provide for the recovery of whale stocks the IWC voted to phase in a moratorium, or zero catch-limit, on commercial whaling subject to annual review.<sup>10</sup> The moratorium was largely predicated on the scientific uncertainty and inability to accurately assess stock populations.<sup>11</sup>

Despite the moratorium on commercial whaling, scientific research whaling, along with aboriginal subsistence whaling,<sup>12</sup> continued to be permitted. Without question, the state at the forefront of the practice of scientific whaling is Japan. Not surprisingly, Japan is also a stalwart whaling state; one of the few seeking to overturn the moratorium and resume commercial whaling. Japan's vigorous research whaling program has raised questions about whether these activities are merely a way to circumnavigate the present commercial moratorium.<sup>13</sup> Japan has countered this with the argument that these specially designated scientific catches are

---

8. *Id.* at art. VIII(1).

9. *Id.* at art. VIII(2).

10. See INTERNATIONAL WHALING COMMISSION, THIRTY-THIRD REPORT OF THE INTERNATIONAL WHALING COMMISSION 20-21 (1983) [hereinafter THIRTY-THIRD REPORT OF THE INTERNATIONAL WHALING COMMISSION].

11. *Id.* One of the factors that weighed in favor of the moratorium was a letter by then-President Ronald Reagan expressing concern over the insufficient data on whale stocks. See President's Message to the International Whaling Commission, 1981 PUB. PAPERS 634 (JULY 1981).

12. ICRW, *supra* note 2, Schedule at para. 13. Aboriginal subsistence whaling, along with scientific research whaling are two of most contentious issues in international marine mammal policy.

13. See International Whaling Commission, *The IWC, Scientific Permits and Japan*, at <http://www.iwcoffice.org/sciperms.htm> (last visited Nov. 10, 2001) [hereinafter *The IWC, Scientific Permits and Japan*].

essential to obtain information necessary for rational management and other important research needs.<sup>14</sup>

### III. OBJECTIONS TO JAPANESE SCIENTIFIC RESEARCH WHALING

The controversy over Japan's research catches largely stems from three key points: 1) the lethal nature of the research program; 2) the size and unilateral nature of its research catch; and, 3) the ultimate commercial sale of whale products derived from the scientific hunts.

The ultimate decision on whether or not a scientific permit shall be issued is up to the individual member state and not the IWC.<sup>15</sup> This unilateral decision includes the manner in which the research is conducted, however, the Scientific Committee of the IWC reviews proposals for permits in each case.<sup>16</sup> The Scientific Committee's review focuses upon:

- (1) whether the permit adequately specifies its aims, methodology and the samples to be taken;
- (2) whether the research is essential for rational management; the work of the Scientific Committee or other critically important research needs;
- (3) whether the methodology and sample size are likely to provide reliable answers to the questions being asked;
- (4) whether the questions can be answered using non-lethal research methods;
- (5) whether the catches will have an adverse effect on the stock;
- (6) whether there is the potential for scientists from other nations to join the research programme.<sup>17</sup>

Applying these criteria to Japan's programs, some of the key objections are apparent. Japan currently maintains three (3) main research

---

14. *Id.*

15. ICRW, *supra* note 2, at art. VIII(1). For the full text of Article VIII(1), see *supra* text in Section II at note 8.

16. See *The IWC, Scientific Permits and Japan*, *supra* note 13.

17. *Id.* The Scientific Committee is comprised of over 120 scientists, some nominated by member governments and others invited especially by the Committee itself. The Committee inevitably includes the scientists proposing the scientific permit. *Id.*

whaling programs, one in Antarctica and two (2) in the North Pacific (one North Pacific program focuses specifically on the western North Pacific).<sup>18</sup> Their scientific catch in each of these programs involves the death of a significant number of whales.

### A. *The Research is Lethal*

In the year 2000, Japan's scientific catch included approximately 400 minke whales in the Antarctic region, approximately 100 minke whales, 50 Bryde's whales and 10 sperm whales in the western North Pacific.<sup>19</sup> Whenever the whales die for the purpose of the scientific research it is referred to as lethal, or consumptive research. Japan's fisheries industry maintains the objectives of these lethal catches are to study the population, structure, feeding ecology and pollutant levels in these chosen whale species.<sup>20</sup>

Despite Japan's assertions about the necessity of the research and their vehement arguments for the ability of the minke stocks to sustain the research catch, the IWC has expressed strong reservations on these very grounds. At the 2001 meeting of the IWC, two salient resolutions were adopted strenuously urging Japan to refrain from the lethal taking of whales in the Southern Ocean Sanctuary (Antarctica) and the Northern Pacific. In Resolution 2001-7 the IWC strongly urged Japan to halt the lethal take of minke whales conducted under the Antarctic program until the Scientific Committee reports on the impact of the research on the minke stocks.<sup>21</sup>

In Resolution 2001-8 the IWC strongly urged Japan to reconsider its lethal scientific catch in the North Pacific as it was unconvinced that Japan's objectives could not be achieved by non-lethal means and the

---

18. *Id.* The research whaling program in the Antarctic waters is particularly troublesome to anti-whaling advocates because the IWC has designated the Antarctic as a Southern Ocean Sanctuary which theoretically offers whales protection distinct from, and above and beyond, the present moratorium. Although Japan maintains an objection to the Southern Ocean Sanctuary, if a Sanctuary is in place, are further data needed on stock populations in those protected waters? *Id.*

19. *The IWC, Scientific Permits and Japan*, *supra* note 13.

20. See Press Release, Japan Whaling Association Website, *Media Release by Japan's Fisheries Agency: Japan Responds to Criticism of its Whale Research Program*, (Aug. 3, 2000), available at <http://www.jp-whaling-assn.com/banner1.htm>. [hereinafter *Japan Responds to Criticism*].

21. See International Whaling Commission, *Resolution 2001-7 of the IWC, Resolution on Southern Hemisphere Minke Whales and Scientific Permit Whaling*, available at <http://www.iwcoffice.org/Resolutions2001.htm> (last visited November 11, 2001).

objectives themselves did not rise to the level of justifying lethal research.<sup>22</sup> These resolutions from the IWC's 2001 meeting follow-up on key resolutions adopted in 1999 and 2000 requesting the Scientific Committee to advise the IWC on proposed research programs as to whether the information sought in the research program under each special permit is: required for the purposes of management of the species or stock being researched; and, whether the information sought could be obtained by non-lethal means.<sup>23</sup>

Understanding the feeding patterns and diet of whales is often raised as a research objective that can be realized through non-lethal research. Even if this was not the case, however, the use of such information by pro-whaling states is suspect. With greater frequency, Japan and other pro-whaling states have argued that the recovery of some species, coupled with their voracious appetites for commercially valuable fish stocks is positive proof of the need to resume whaling operations. In other words, some species of whale are now so plentiful and rapacious that they threaten other valuable ocean resources, such as some commercial fish stocks, and it is therefore necessary to cull the herd.<sup>24</sup> This argument is understandably

---

22. See *id.* Resolution 2001-8 of the IWC, *Resolution on JARPN II Whaling in the North Pacific*. The JARPN II is Japan's research whaling program in the western North Pacific. Resolution 2001-8 is similar to others from previous years expressing the identical concern for the necessity of lethal research. Most particularly, in Resolution 1995-9 the IWC recommended that scientific research involving the killing of cetaceans should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of non-lethal research techniques. For a reference to Resolution 1995-5 see *The IWC, Scientific Permits and Japan*, *supra* note 13. For a discussion of the overall ethics of lethal research whaling, see Alexander Gillespie, *Whaling under a Scientific Auspice: The Ethics of Scientific Research Whaling Operations*, 3 J. INT'L WILDLIFE L. & POL'Y 1 (2000).

23. *Resolution 1999-2 of the IWC, Resolution on Special Permits for Scientific Research* (IWC/51/48 Rev.). The full text of Resolution 1999-2 is reproduced on the Journal of International Wildlife Law & Policy Website at <http://www.eelink.net/~asilwildlife/cet2.html>. In fact, the IWC has repeatedly passed resolutions expressing concern and recommending caution in the practice of scientific whaling. In particular, at the 47th meeting, the IWC adopted Resolution 1995-9, which "recommended that scientific research involving the killing of cetaceans should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and or/use of non-lethal techniques . . ." IWC Resolution 1995-9. In 2000, Resolution 2000-4 and 2000-5 condemned Japan's Antarctic and Pacific programs on that basis. See generally the IWC's website at <http://www.iwcoffice.org/>.

24. See The Whale and Dolphin Conservation Society Website [hereinafter WDCCS Website], *Why We Do Not Need to Cull Whales to Protect Fish* (visited November 13, 2001), <http://www.wdcs.org/dan/publishing.nsf/allweb/B1B776DDB9DB8D2680256A370033A60B>. The Japan Whaling Association suggests that the amount of fish consumed by whales is problematic. See *Japan Responds to Criticism*, *supra* note 20. "It is becoming clear that whales are eating 3 to 5 times of marine living resources than fisheries catch by humans [sic]."

controversial and will continue to be the subject of scientific and policy debate.<sup>25</sup>

Environmentalists have argued that at least part of Japan's research objectives could be achieved through non-lethal means such as biopsy techniques to assess stock identity.<sup>26</sup> They maintain that Japan has not seriously investigated non-lethal substitutes because the costs of non-lethal research cannot be recouped by the sale of whale products.<sup>27</sup> As a result of these objections, the United States, has seriously criticized Japan's ongoing lethal scientific program. Former-President Bill Clinton, for example, sent a letter to Congress in January 2001, where he expressed concern that Japan was expanding its research program to include sperm and Bryde's whales.<sup>28</sup> Clinton also noted that Japan's "research whaling activities diminish the effectiveness of the (IWC) conservation program."<sup>29</sup> President George W. Bush continued the U.S. objection. In May 2001, the State Department openly criticized Japan's continuing lethal research operations in the North Pacific.<sup>30</sup>

While observers of research whaling may honestly debate the scientific value of the data generated by Japan's programs, any scientific utility must be balanced with both the environmental and legal impact of

---

Research with the objective of discovering the diet and feeding patterns of certain species is often referred to as prey consumption or prey preference research.

25. See Jock W. Young, *Do Large Whales Have an Impact on Commercial Fishing in the South Pacific Ocean*, 3 J. INT'L WILDLIFE L. & POL'Y 253 (2000) (concluding that despite high consumption, dietary overlap with commercial fish species appears to be relatively low, although direct data on the matter is limited).

26. See, WDCS Website, *Japan's Scientific Whaling* (visited November 12, 2001) <http://www.wdcs.org/dan/publishing.nsf/allweb/84A8B79F42BEB580802569070055CB80> [hereinafter *Japan's Scientific Whaling*]. On the other hand, it is clear that some data such as the age of an animal and the reproductive status of females can only be obtained through lethal means. See *The IWC, Scientific Permits and Japan*, *supra* note 13.

27. WDCS Website, *Japan's Scientific Whaling*, *supra* note 26. For a discussion of the sale of whale products derived from Japan's scientific programs see *infra* text accompanying notes 44-51.

28. See *Washington File, U.S. Dept. of State, January 2, 2001, Text: Clinton Letter to Congress on Japan's Whaling Practices*, 3 J. INT'L WILDLIFE L. & POL'Y 311 (2000).

29. *Id.* The particular wording invoked by President Clinton is significant in that it tracks the language of the Pelly and Packwood-Magnuson Amendments which provide for sanctions against states that "diminish the effectiveness of" international fishery and whale conservation programs. See Pelly Amendment to the Fisherman's Protective Act of 1976, 22 U.S.C. § 1978 (1994); Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1821 (1994).

30. See Press Statement of Richard Boucher, United States Department of State, *U.S. Opposes Renewed Japanese Whaling in the North Pacific* (May 14, 2001), available at <http://www.state.gov/g/oes/rls/prsr/2001/index.cfm?docid=2870>.

the lethal research. The next section considers the legal consequences that flow from the substantial size of the Japanese scientific catch.

### *B. A Large Unilateral Research Catch is not Justifiable*

Assuming the species targeted by the Japanese programs—minkes, sperm and Bryde's—are robust enough to sustain a lethal research catch (a matter of some debate among IWC members), we are still left with other genuine questions as to whether the scale of the Japanese research programs runs afoul of other meaningful legal limitations. The large scale<sup>31</sup> and unilateral nature of the research raises one such objection. While both the size of the research catch and its unilateral character could easily be considered independently, combined they form a compelling synergy. Therefore, it is instructive to consider them together.

Where a single state removes hundreds of whales from ocean space in furtherance of research objectives promulgated only by that state, such action might constitute a violation of the law of the sea governing marine scientific research. The 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>32</sup> is not only the framework agreement governing virtually all aspects of ocean usage, it is also one of the most significant achievements in international law in the twentieth century. One of the many innovations of UNCLOS is Part XIII governing marine scientific research.<sup>33</sup> In particular, Article 241 of UNCLOS provides that: “[m]arine scientific research shall not constitute the legal basis for any claim to any part of the marine environment or its resources.”<sup>34</sup> Since the Japanese scientific whaling programs are not only lethal, but also unilateral and consumptive of a significant number of cetaceans, one can easily see the basis for a violation of Article 241. Simply put, Japan is laying claim to hundreds of whales every year in the name of scientific research while it is doing so to the exclusion of other states' enjoyment of those same cetacean resources.

---

31. *Id.* For information on the size of the year 2000 Japanese research catch and the species affected *see supra* text accompanying note 19.

32. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

33. *Id.* at Part XIII. Part XIII is entitled, “Marine Scientific Research” and is comprised of 28 articles addressing numerous aspects of marine scientific research including international cooperation, conduct and promotion, installations and equipment and responsibility and liability. *Id.*

34. *Id.* at art. 241.



Although it is true that Japan has called upon other states to conduct similar studies,<sup>35</sup> the Japanese programs are nevertheless unilateral undertakings. Most significantly, the ultimate sale of whale meat from the scientific catch in the Japanese markets<sup>36</sup> highlights the particular Japanese interest in the large number of whales killed for research purposes. While the key question of whether Japan's research objectives could be achieved through a smaller catch is ultimately one for scientists and statisticians, Japan can partially respond to objections to the size of its research programs with the counter-argument that a larger sample of whale specimens will likely yield more accurate data and more reliable scientific conclusions. This counter-argument, of course, assumes in the first instance the ability of minke, Bryde's and sperm stocks to absorb the number of whales taken for research purposes.

More compellingly, as previously noted, the essence of Article VIII of the ICRW is to allow individual states to unilaterally issue special permits to their nationals for the purpose of conducting scientific research.<sup>37</sup> In addition, the ICRW also clearly contemplates the use of whale resources that are not directly related to scientific purposes under the direction of the state issuing the permit.<sup>38</sup> As with all treaty rights, however, the rights conferred by Article VIII must be exercised in good faith and in a manner not prejudicial to the interests of other IWC members.<sup>39</sup> Furthermore, the provisions of UNCLOS, a later treaty, specifically addressing marine scientific research would suggest that the interests of other states should temper research upon a common marine resource.

In addition, any discussion of cetaceans in the context of UNCLOS must include the special status which the drafters of UNCLOS saw fit to confer upon them. The treatment of marine mammals, cetaceans in particular, under UNCLOS unquestionably set them apart as a resource deserving special attention and consideration. Article 65 states:

---

35. See Japan Whaling Association Website, *Japan Responds to Criticism*, *supra* note 20.

36. *Id.* For a more detailed analysis of this particular objection see *infra* section III(C).

37. See *supra* text in section II at note 8.

38. See *supra* text accompanying note 9. For a more complete discussion of the right to dispose of whale meat generated by research catches see *infra* text accompanying notes 46-48.

39. For a thought-provoking article on whether the Japanese practices under the scientific whaling exception rises to the level of an "abuse of right" see Gillian Triggs, *Japanese Scientific Whaling: An Abuse of Right or Optimum Utilization?* 5 ASIA PAC. J. ENVTL L. 33 (2000). Triggs concludes that the question of whether Japan's activities constitute "an abuse of right to conduct scientific whaling will depend upon the evidence regarding the primary purposes of the right, the significance of the research and the scale of any commercial activities." *Id.*

[n]othing 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.<sup>40</sup>

Article 65 appears in Part V of UNCLOS entitled, "Exclusive Economic Zone."<sup>41</sup> Article 120 extends the provisions of Article 65 to the High Seas (international waters).<sup>42</sup> An interpretation of these key UNCLOS provisions would strongly suggest that conservation, not consumption or utilization, is the weightier objective in the case of cetaceans. This contrasts with clearer provisions for utilization of other marine resources. Most significantly, Article 65 highlights the necessity of cooperation with international organizations to further the goals of conservation, management and study. Such a requirement would certainly seem to limit a large-scale scientific operation where the appropriate organization has condemned the scientific programs in the first instance and established guidelines disfavoring lethal research.

As previously noted, the UNCLOS provisions specifically pertaining to marine scientific research directly inform any marine research activities.<sup>43</sup> The UNCLOS marine scientific research regime, coupled with Articles 65 and 120 would seem to set a high bar for any ongoing, large-scale, lethal scientific whaling activities conducted by a single state.

### *C. The Whale Meat from Scientific Research Catches is Sold for Profit*

Of all the criticisms of the Japanese scientific program, the ultimate commercial sale of whale products derived from the scientific catches has perhaps generated the loudest objection by anti-whaling advocates. In their view, this fact exposes the scientific program as a subterfuge; that is, commercial whaling is simply being repackaged and sold in the name of

---

40. UNCLOS, *supra* note 32, at art. 65.

41. *Id.* at Part V. The Exclusive Economic Zone (hereinafter EEZ) is an area beyond and adjacent to a state's territorial waters where it may exercise its rights and jurisdiction for the purpose of exploring and exploiting, conserving and managing, the natural resources found there.

42. *Id.* at art. 120.

43. *See supra* notes 33 and 34 and accompanying text.

science. Cynicism aside, the practice of scientific whaling raises some genuine questions about motivations and whether an unstated goal of the research is to hold the place of the commercial whaling industry until such time as the present moratorium can be overturned.

It is no secret that whaling states maintain that the IWC has failed in its mandate to provide for the proper stewardship of the whaling industry as provided for in the ICRW.<sup>44</sup> Similarly, it should be no surprise that an objective of scientific whaling is the establishment of parameters for an ultimate resumption of commercial whaling. Such resumption, in the view of whaling states, would be perfectly consistent with a consumptive application of sustainable utilization of cetacean resources.<sup>45</sup>

On the other hand, anti-whaling advocates point to the fact that whale products derived from scientific catches, whale meat in particular, is regularly sold in commercial markets.<sup>46</sup> For example, the Whale and Dolphin Conservation Society protested the commencement of Japan's 2001 scientific whaling season in the Antarctic by highlighting the ultimate sale of the whale meat from the catch.<sup>47</sup>

Japan's response to this criticism can be found in the text of the ICRW itself. Article VIII(2) indeed indicates that whale products taken under special permits shall be processed and the proceeds shall be dealt with in accordance with directions issued by the government who granted the permit. A plain reading of this provision demonstrates the wide discretion accorded the issuing government in the disposition of whale

---

44. See WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND* 288-289 (1994). The preamble to the ICRW clearly designates the interests of the whaling industry as an objective of the treaty. "Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry[.]" ICRW, *supra* note 2, at Preamble.

45. For arguments on how the Japanese whaling industry hopes to proceed in the future from a model of sustainable utilization see INSTITUTE OF CETACEAN RESEARCH, *WHALING FOR THE TWENTY-FIRST CENTURY* (1996). The Institute of Cetacean Research is a nonprofit research organization whose legal status is authorized by the Japanese Ministry of Agriculture, Forestry and Fisheries. For a particular criticism of the role of the Institute of Cetacean Research see *infra* text accompanying note 48.

46. See WDCS Website, *Action Alert—Protest at Japan's New Whaling Season*, at <http://www.wdcs.org/dan/publishing.nsf/allweb/3B8B075EDF0DCB6E80256AFE0037B558> (visited November 29, 2001) [hereinafter *Action Alert*]. The WDCS is a global non-governmental organization dedicated to the conservation of whales and dolphins and their habitats.

47. *Id.* The WDCS criticism is supported by scholarly skepticism of Japan's motivations. Professor Gillian Triggs raises the question of whether "[t]he JARPA programme appears to camouflage the harvesting of whales for the Japanese commercial market so that the issue of special permits is a sham and in bad faith." Triggs, *supra* note 39, at 37 (citing Sara L. Ellis, *Japanese Whaling in the Antarctic: Science or Subterfuge?* 31 *OCEANUS* 68-69 (1988)).

products not used directly for research. The Japanese government has indicated that the commercial distribution of the whale meat from the scientific catch, required by the ICRW, ensures that whale resources are not wasted.

Anti-whaling advocates, on the other hand, expand their case against scientific whaling beyond the textual language of the ICRW. In an effort to demonstrate an unbroken link between scientific whaling and commercial whaling, conservation forces point to the source of funding for the research program. In particular, they cite the central role of the Institute of Cetacean Research: a private institute established with a grant from the whaling industry and subsidized by the Japanese government.<sup>48</sup>

Questions of motivations and funding aside, robust and active scientific whaling by a single government certainly seems to hold the economic and political space of the commercial whaler during the time of the moratorium, even if it is not a direct circumnavigation of the moratorium.

#### IV. CONCLUSIONS

Until anti-whaling advocates are successful in securing a permanent ban on commercial whaling or whaling states are successful in repealing the present moratorium, the matter of scientific research whaling will continue to be contentious in law and policy. Although Japan is currently the only state actively pursuing scientific whaling, its exercise of the scientific whaling exception provided for in the ICRW is a bellwether for the status of the whalers during a time of strong anti-whaling sentiment within the IWC. Japan lawfully asserts its treaty right to conduct scientific whaling operations. Such operations, however, must be viewed in the context of a number of obligations in international law that may limit an extensive exercise of that right.

Japan's heavy emphasis on lethal research is strongly criticized by the IWC and does not comply with guidelines set forth by that body. While these guidelines may not themselves establish binding obligations, the resolutions of the IWC, as a competent international organization, deserve consideration. Importantly, the lethal nature of the research, the large size of the experimental catch and the fact that the research is conducted unilaterally may rise to the level of a claim that Japan is not fully cooperating with the work of the IWC. In addition, these facts support arguments that Japan has unlawfully and unfairly laid claim to these cetacean resources to the exclusion of other states. Such contentions arise

---

48. See WDCS Website, *Action Alert*, *supra* note 46.

from specific obligations in UNCLOS relating to cetaceans and marine scientific research.

Finally, the commercial sale of whale meat derived from scientific catches, although provided for in the ICRW, raise questions of motive. Is the purpose behind large-scale lethal scientific research the generation of useful data to be shared openly and in good faith in international discourse? Or, on the other hand, is it simply a way to circumnavigate the current moratorium on commercial whaling and preserve the status of the Japanese whaling industry? The answer may lie somewhere in between. Even if convinced of the legal justification of its actions, at a minimum, Japan should respond to these objections with an understanding that the legal and political landscape now favors conservation over utilization of cetacean resources.