

# Legality of Japan’s Issuance of Introduction from the Sea (IFS) Certificates for Sei Whale Meat Products

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## I. Summary of Argument

**Japan is violating CITES by issuing introduction from the sea certificates under purpose code “S” (scientific purposes) for pre-packaged sei whale meat because the meat is sold for primarily commercial purposes.**

Sei whales (*Balaenoptera borealis*) are listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES or Convention).<sup>1</sup> Since 2002, Japan has hunted sei whales in areas beyond the jurisdiction of any State on the high seas as part of its special permit whaling program (formerly known as JARPN (Japanese Whale Research Program under Special Permit in the North Pacific) and JARPN II and since 2017 as NEWREP-NP: the “New Scientific Whale Research Program in the Western North Pacific”), conducted under Article VIII of the International Convention for the Regulation of Whaling (ICRW).<sup>2</sup> Because sei whales are taken in the marine environment beyond the jurisdiction of any State, Japan must issue “introduction from the sea” (IFS) certificates pursuant to Article III of CITES, which prohibits introductions from the sea of specimens that are intended to be used for “primarily commercial purposes.”<sup>3</sup>

The Convention does not define the term “primarily commercial purposes,” but Resolution Conf. 5.10 (Rev. CoP15), *Definition of ‘primarily commercial purposes,’* provides that an activity is commercial if “its purpose is to obtain economic benefit (whether in cash or otherwise), and is directed toward resale, exchange, provision of a service or any other form of economic use or benefit.” Sei whale meat and other edible products, including the blubber, skin, and some organs (collectively referred to in this document as “whale meat”)<sup>4</sup> is offloaded from a factory ship in 15 kilogram (kg) frozen blocks or smaller vacuum-sealed packages and distributed to consignees, wholesalers, and retailers for sale. As such, it is introduced from the sea for primarily commercial purposes in violation of CITES.

Several considerations are dispositive in this regard, including that (1) no scientific research is conducted on the products that enter the marketplace, (2) the majority of each sei whale is processed for sale, (3) commercial sale of whale products is predetermined by law in Japan, (4) the sale of whale meat is both income and profit generating, (5) even whale meat used for so-called “public interest” purposes is sold by ICR, (6) ICR and others actively develop commercial marketplaces, and (7) the whale products are processed onboard the factory ship (*Nisshin Maru*) for sale.

## II. Factual Background

From 2002-2017, Japan has hunted sei whales as part of its special whaling permit program in the North Pacific (i.e., JARPN, JARPN II, or NEWREP-NP). From 2002 through 2017, Japan took 1453 sei whales (see Table 1). Japan’s sei whale hunt has been conducted in three

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<sup>1</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), signed Mar. 3, 1973, entered into force July 1, 1975, 27 UST 1087; 993 UNTS 243, available at: <http://www.cites.org/eng/disc/text.php> [hereinafter CITES]. For a complete list of all species listed on Appendix I, see *id.* at Appendices I, II, and III, valid from 4 April 2017, at <https://cites.org/eng/app/appendices.php>.

<sup>2</sup> International Convention for the Regulation of Whaling, signed Dec. 2, 1946, entered into force Nov. 10, 1948, 161 UNTS 72, available at <https://archive.iwc.int/pages/view.php?ref=3607&k=->.

<sup>3</sup> CITES, *supra* note 1, at art. III(3)(a).

<sup>4</sup> By “whale meat,” we mean all consumable products, including meat, skin, blubber, and offal.

International Whaling Commission (IWC) designated management area—sub-areas 7, 8 and 9. Most of sub-areas 8 and 9 lay outside the jurisdiction of any State (see map), except that a portion of sub-areas 8 and 9 includes the EEZ of Russia. Japan does not take whales in Russia's EEZ.<sup>5</sup> As part of NEWREP-NP, Japan intends to take 134 sei whales annually in sub-area 8 until 2022.<sup>6</sup>

**Table 1: IWC data of landed catches of sei whales under JARPN, JARPN II and NEWREP-NP in sub-areas 8 and 9: 2002-2017**

|               | 2002-2007 <sup>7</sup> | 2008 <sup>8</sup> | 2009 <sup>9</sup> | 2010 <sup>10</sup> | 2011 <sup>11</sup> | 2012 <sup>12</sup> | 2013 <sup>13</sup> | 2014 <sup>14</sup> | 2015 <sup>15</sup> | 2016 <sup>16</sup> | 2017 <sup>17</sup> | Total |
|---------------|------------------------|-------------------|-------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|-------|
| sub-area 8    | 135                    | 44                | 31                | 15                 | 29                 | 36                 | 10                 | 22                 | 17                 | 26                 | 31                 | 396   |
| Sub-area 9    | 338                    | 56                | 69                | 75                 | 65                 | 64                 | 90                 | 68                 | 73                 | 60                 | 99                 | 1057  |
| Total catches | 473                    | 100               | 100               | 90                 | 94                 | 100                | 100                | 90                 | 90                 | 86                 | 130                | 1453  |

<sup>5</sup> See Figure 1.

<sup>6</sup> Government of Japan, Research Plan for New Scientific Whale Research Program in the western North Pacific (NEWREP-NP), SC/67A/SCSP/10, at Annex 12, Table 2, p. 151, *available at* <http://www.icrwhale.org/pdf/170606newrep-np.pdf>.

<sup>7</sup> T. Tamura et al., Cruise Report of the Japanese Whale Research Program under Special Permit in the western North Pacific -Phase II (JARPN II) in 2004 (part I) - Offshore component, SC/57/O3 (2005), at Table 5, *available at* <http://www.icrwhale.org/pdf/SC-57-O3.pdf>; T. Tamura et al., Cruise report of the second phase of the Japanese Whale Research Program under Special Permit in the Western North Pacific (JARPN II) in 2005 - Offshore component, SC/58/O8 (2006), at Table 5, *available at* <http://www.icrwhale.org/pdf/SC-58-O8.pdf>; T. Tamura et al., Cruise report of the second phase of the Japanese Whale Research Program under Special Permit in the Western North Pacific (JARPN II) in 2006 (part I) - Offshore component, SC/59/O5 (2007), at Table 5, *available at* <http://www.icrwhale.org/pdf/SC59O5.pdf>; K. Matsuoka et al., Cruise report of the second phase of the Japanese Whale Research Program under Special Permit in the Western North Pacific (JARPN II) in 2007 - Offshore component, SC/60/O5 (2008), at Table 4, *available at* <http://www.icrwhale.org/pdf/SC60O5.pdf>.

<sup>8</sup> T. Tamura et al., Cruise report of the second phase of the Japanese Whale Research Program under Special Permit in the Western North Pacific (JARPN II) in 2008 (part I) - Offshore component, SC/61/O4 (2009), at Table 3, *available at* <http://www.icrwhale.org/pdf/SC61O4.pdf>.

<sup>9</sup> T. Bando et al., Cruise report of the second phase of the Japanese Whale Research Program under Special Permit in the Western North Pacific (JARPN II) in 2009 (part I) - Offshore component, SC/62/O4 (2010), at Table 5, *available at* <http://www.icrwhale.org/pdf/SC62O4.pdf>.

<sup>10</sup> G. Yasunaga et al., Cruise report of the second phase of the Japanese Whale Research Program under Special Permit in the Western North Pacific (JARPN II) in 2010 (part I) - Offshore component, SC/63/O2 (2011), at Table 3, *available at* <http://www.icrwhale.org/pdf/SC63O2.pdf>.

<sup>11</sup> T. Tamura et al., Cruise Report of the Second Phase of the Japanese Whale Research Program under Special Permit in the Western North Pacific (JARPN II) in 2011 (part I) - Offshore component, SC/64/O3 (2012), at Table 3, *available at* <http://www.icrwhale.org/pdf/SC64O3.pdf>.

<sup>12</sup> T. Bando et al., Cruise report of the second phase of the Japanese Whale Research Program under Special Permit in the Western North Pacific (JARPN II) in 2012 (part I) - Offshore component, SC/65a/O03 (2013), at Table 3, *available at* <http://www.icrwhale.org/pdf/SC-65a-O03.pdf>.

<sup>13</sup> T. Bando et al., Cruise report of the second phase of the Japanese Whale Research Program under Special Permit in the Western North Pacific (JARPN II) in 2013 (part I) - Offshore component, SC/65b/SP02 (2014), at Table 3, *available at* <http://www.icrwhale.org/pdf/SC65bSP02.pdf>.

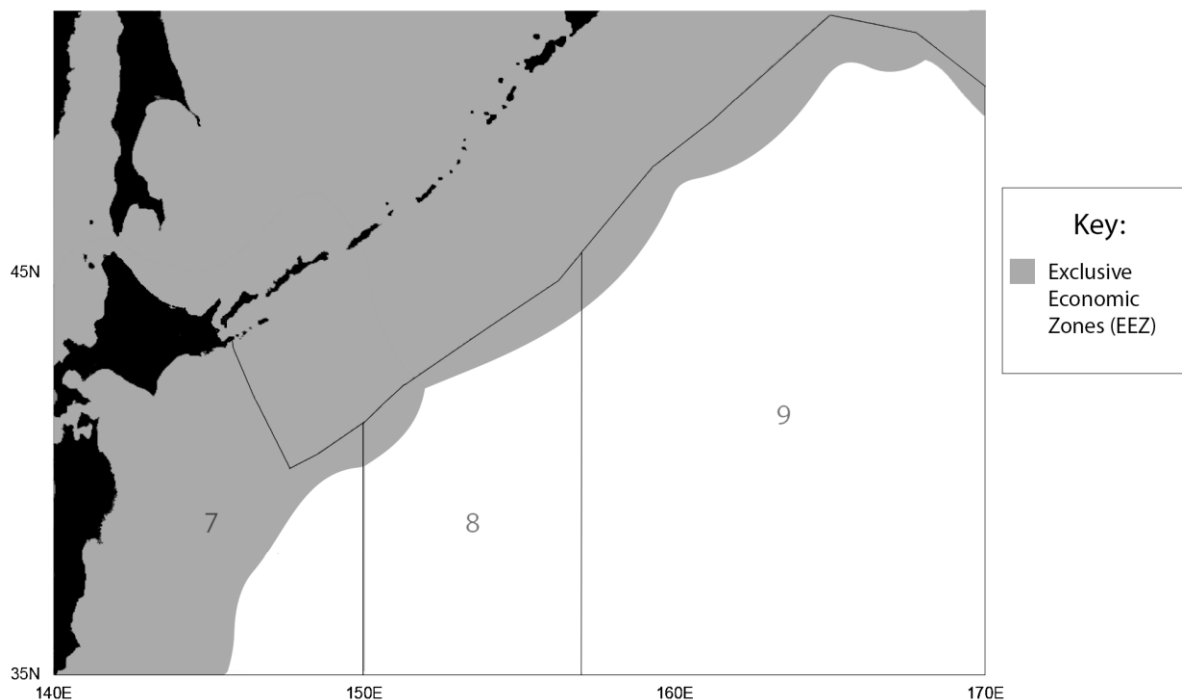
<sup>14</sup> T. Tamura et al., Cruise Report of the Second Phase of the Japanese Whale Research Program under Special Permit in the Western North Pacific (JARPN II) in 2014 (part I) Offshore component, SC/66a/SP06 (2015), at Table 3, *available at* <http://www.icrwhale.org/pdf/SC66aSP06.pdf>.

<sup>15</sup> T. Bando et al., Cruise report of the second phase of the Japanese Whale Research Program under Special Permit in the Western North Pacific (JARPN II) in 2015 (part I) Offshore component, SC/66b/SP02 (2016), at Table 3, *available at* <http://www.icrwhale.org/pdf/SC66bSP02.pdf>.

<sup>16</sup> T. Bando et al., Cruise report of the second phase of the Japanese Whale Research Program under Special Permit in the Western North Pacific (JARPN II) in 2016 (part I) Offshore component, SC/67A/SCSP/04 (2017), at Table 3.

<sup>17</sup> Press release. Institute of Cetacean Research, 26 September, 2017. *Available at* <http://icrwhale.org/170926ReleaseJp.html>

Figure 1: IWC sub-areas



Japan's whaling program involves at least three key actors. The Fisheries Agency of Japan (JFA), is an agency within the Ministry of Agriculture, Forestry and Fisheries (MAFF). JFA is tasked with oversight of the special permit whaling program through its Whaling Affairs Office. The Institute of Cetacean Research (ICR), a public interest corporation subsidized by the Japanese government,<sup>18</sup> implements the whaling program by organizing all relevant contracts and sub-contracts for the operation of the whaling program and is tasked with conducting much of the scientific research that occurs, facilitating sale of the whale meat, setting prices for the whale meat, and pre-determining whale product allotments to different supply chains. Kyodo Senpaku Kaisha Ltd. (Kyodo Senpaku) owns the fleet responsible for the capture of whales and employs the crewmembers.

The ICR, Kyodo Senpaku, and the government of Japan are closely aligned and work together to advance and promote special permit whaling and the sale of whale products. In 1987, when Japan commenced special permit whaling following the adoption of a global ban on commercial whaling by the IWC, MAFF issued the Cetacean Research Capture Project Implementation Guidelines. JFA issued a Directive with additional guidelines, providing the

<sup>18</sup> The ICR was established in 1987 when Japan commenced special permit whaling. Start-up costs were paid by Kyodo Senpaku and a grant from JFA. An annual subsidy is paid by the government of Japan. *See* Institute of Cetacean Research, Overview and Purpose, <http://icrwhale.org/abouticr.html>; NEWREP-NP, *supra* note 6, at 43. The ICR presents its mission, as applied to sei whales, as examining "consumption of fish by cetaceans and competition between whales and fisheries and [providing] data for ecosystem models to improve management of all living marine resources in the area." ICR, *About us*, <http://www.icrwhale.org/abouticr-2.html>. Another goal seems to relate to "research to elucidate stock structure, examine the effects of environmental contaminants and sighting surveys for estimation of the cetacean populations in the North Pacific." *Id.*

basic contours of the government-endorsed program to sell whale meat.<sup>19</sup> Under the Directive, the ICR must apply to JFA in advance for permission to sell the whale meat.<sup>20</sup> The Directive also provides that ICR must submit a report providing the details of the sale of whale meat to JFA, and any profits earned must be shared with JFA.<sup>21</sup>

Similarly, ICR and Kyodo Senpaku have a close relationship. In fact, these organizations are intertwined in terms of ownership. In 2006, shares of Kyodo Senpaku were transferred to the ICR and it currently holds a large share in the company.<sup>22</sup> ICR annually consigns to Kyodo Senpaku whale meat to sell to wholesalers and others through “sales consignment agreements.”<sup>23</sup> These agreements provide Kyodo Senpaku with a set commission on the earnings from the sale of whale meat.<sup>24</sup>

Each of these actors is involved in the introduction of sei whale meat into Japan, although only JFA’s International Affairs Division issues the introduction from the sea certificates.<sup>25</sup> According to the CITES Trade Database, managed by UNEP-WCMC, Japan has reported that it has “introduced from the sea”—as indicated by code “ZZ”<sup>26</sup>—1,174 sei whale bodies since at least 2002 through 2015 (see Table 2).<sup>27</sup> According to the Trade Database, Japan used the source code “S,” indicating that the purpose for these introductions from the sea is “scientific.”<sup>28</sup> Presumably, the skin pieces are biopsy samples from the live whale sampling program component of JARPEN and JARPEN II that continues under NEWREP-NP. Japan lands specimens from its special permit whaling program in North Pacific at the ports of Tokyo or Sendai.

**Table 2: UNEP-WCMC data regarding Introduction from the Sea certificates issued by Japan for Sei whale: 2010-2015**

| Term                      | Source Code | Country | 2002-2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | Total |
|---------------------------|-------------|---------|-----------|------|------|------|------|------|------|-------|
| bodies                    | S           | ZZ      | 674       | 98   | 95   | 100  |      | 90   | 90   | 1,174 |
| skin pieces <sup>29</sup> | S           | ZZ      | .068 kg   | 100g | 155g | 205g |      |      | 80g  | 608 g |

<sup>19</sup> Government of Japan, *Re: Implementation of the Cetacean Research Capture Project*, Directive of the Director-General of the Japan Fisheries Agency, 1987 Sea Fisheries No. 3777 (as amended Mar. 28, 2007), available at Annex 101 of the Memorial of Australia, Whaling in the Antarctic (Australia v. Japan) (May 9, 2011).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Kyodo Senpaku Kaisha, Ltd., *Subject: Changes in Shareholder Composition*, Press Release (Mar. 24, 2006).

<sup>23</sup> For further detail, see *infra* notes 115-119 and accompanying text.

<sup>24</sup> For further detail, see *infra* notes 117-122 and accompanying text.

<sup>25</sup> CITES, National Authorities, Japan, <https://cites.org/eng/cms/index.php/component/cp/country/JP>.

<sup>26</sup> CITES Trade Database, available at

[https://trade.cites.org/en/cites\\_trade/download/view\\_results?filters%5Btime\\_range\\_start%5D=2002&filters%5Btime\\_range\\_end%5D=2016&filters%5Bexporters\\_ids%5D%5B%5D=all\\_exp&filters%5Bimporters\\_ids%5D%5B%5D=244&filters%5Bsources\\_ids%5D%5B%5D=all\\_sou&filters%5Bpurposes\\_ids%5D%5B%5D=122&filters%5Bterms\\_ids%5D%5B%5D=all\\_ter&filters%5Bselection\\_taxon%5D=taxon&filters%5Btaxon\\_concepts\\_ids%5D%5B%5D=&filters%5Breset%5D=&web\\_d\\_isabled=&filters\[report\\_type\]=comptab](https://trade.cites.org/en/cites_trade/download/view_results?filters%5Btime_range_start%5D=2002&filters%5Btime_range_end%5D=2016&filters%5Bexporters_ids%5D%5B%5D=all_exp&filters%5Bimporters_ids%5D%5B%5D=244&filters%5Bsources_ids%5D%5B%5D=all_sou&filters%5Bpurposes_ids%5D%5B%5D=122&filters%5Bterms_ids%5D%5B%5D=all_ter&filters%5Bselection_taxon%5D=taxon&filters%5Btaxon_concepts_ids%5D%5B%5D=&filters%5Breset%5D=&web_d_isabled=&filters[report_type]=comptab).

<sup>27</sup> See UNEP-WCMC, *A Guide to Using the CITES Trade Database* (version 8, 2013), Annex 3,

[https://trade.cites.org/cites\\_trade\\_guidelines/en-CITES\\_Trade\\_Database\\_Guide.pdf](https://trade.cites.org/cites_trade_guidelines/en-CITES_Trade_Database_Guide.pdf).

<sup>28</sup> See CITES Trade Database, *supra* note 26.

<sup>29</sup> We assume that these “skin pieces” are the biopsies taken from live whales during non-lethal sampling.

Japan uses a factory ship, the *Nisshin Maru*, as its research vessel along with two sampling and sighting vessels, the *Yushin Maru* No.1 and 3.<sup>30</sup> The two sampling vessels survey a designated research area from one hour after sunrise to one hour before sunset, and all sei whales sighted as primary and secondary sightings, excluding cow and calf pairs, are targeted for lethal sampling, using a harpoon.<sup>31</sup>

Once the whales are harpooned, they are hauled aboard the *Nisshin Maru*. After measurements, such as body length, weight, and blubber thickness, are taken, the whales are butchered and divided according to type of product.<sup>32</sup> Body parts intended for research are separated from the rest of each individual whale. Under its JARPEN and JARPEN II programs, Japan took sei whales in order to study the stomach contents, testes, ovaries, and blubber.<sup>33</sup> Under NEWREP-NP, earplugs, eye lenses, baleen plates, plasma, and some organs are subject to study.<sup>34</sup> In addition skin/blubber biopsy samples (>1 gram) are taken from live sei whales, to test fatty acids and stable isotopes and the hormone and plasma content of blubber. Some biological research is conducted onboard (stomach content analysis) and the rest of the parts intended for scientific research are packaged separately for landing and transport to ICR. Although ICR is the main laboratory for the scientific research, the NEWREP-NP Research Plan provides a list of “collaborating research institutions.”<sup>35</sup>

Other than the research undertaken on these small samples and body parts, ICR does not conduct scientific research on the remainder of the whale. Instead, the vast majority of each whale is butchered and packaged according to the type of commercially valuable product, such as red meat, white meat, skin, blubber and *unesu*,<sup>36</sup> as well as various internal organs, including the small intestine, tongue, kidney, and heart<sup>37</sup> onboard the *Nisshin Maru*. For ease of off-loading and distribution, the meat and the vast majority of the blubber is frozen onboard the *Nisshin Maru*. For many years, the whale meat was frozen in 15 kg blocks. Smaller scraps may be packaged and frozen in bags<sup>38</sup> to be processed for canning once landed.

Based on ICR data, a sei whale yields about 12 tons of edible products.<sup>39</sup> Thus, by the time the *Nisshin Maru* reaches port, each sei whale caught on the high seas is divided into hundreds of 15 kg packages or perhaps many more small packages.<sup>40</sup> Under NEWREP-NP, the initial sampling size is 134 sei whales, which would result in approximately 1,680 tons of commercial products, and the introduction from the sea of over 100,000 15 kg packages.<sup>41</sup> As described above, the portions of the whales used for scientific research are already separated from the parts of the whales packaged for sale and consumption when landed.

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<sup>30</sup> See NEWREP-NP, *supra* note 6, at 36.

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

<sup>32</sup> Email correspondence on file with author (June 29, 2017).

<sup>33</sup> The blubber is not retained for scientific study upon landing the sei whales specimens; a small sample is retained to test the lipid content. The blubber is a commercially valuable product that is consumed in Japan. See Institute of Cetacean Research, *Whales as food and Japanese culture* (2007), available at <http://www.icrwhale.org/pdf/59FoodCulture.pdf>.

<sup>34</sup> NEWREP-NP, *supra* note 6, at 117, 121, 126–27, 133. For a full list of “research items” subject to scientific study, see ICR, Media Release, <http://icrwhale.org/News.html>. The documents entitled “JARPEN II Offshore Cruise research vessels return to port” for each year contains a full description of the “scientific” samples.

<sup>35</sup> NEWREP-NP, *supra* note 6, Annex 20, at 137.

<sup>36</sup> *Unesu* is an accordion-like layer of fat that runs from the throat to the abdomen and is marketed as “bacon.” See *id.*

<sup>37</sup> *Id.*

<sup>38</sup> Email correspondence on file with author (June 5, 2017).

<sup>39</sup> Junko Sakuma, *Report on Sei Whale Prices*, 5 (July 2, 2017).

<sup>40</sup> See email correspondence on file with author (June 23, 2017), translating from Planning Document of KKP: Kujira Kaizen Project 2–3 (2012), available at [http://www.fpo.jf-net.ne.jp/gyoumu/hojyogijyo/01kozo/nintei\\_file/H241002\\_kujira.pdf](http://www.fpo.jf-net.ne.jp/gyoumu/hojyogijyo/01kozo/nintei_file/H241002_kujira.pdf).

<sup>41</sup> *Id.*

Japan earmarks the consumable products of its research program for distribution through two different supply chains. Under JARPN/JARPN II between 2003 and 2011, about twenty percent of sei whale meat and other consumable products was reserved for so-called public interest purposes, such as school lunch programs and marketing.<sup>42</sup> For these programs, whale meat is sold at a discount and distributed, in part, to establish a consumer base for whale meat.<sup>43</sup> Around 80 percent of the whale meat was sold to wholesalers for distribution to fisheries cooperatives, grocery stores, restaurants, and other retailers.<sup>44</sup>

The distribution and supply chain for the consumable products is overseen by ICR. According to publically available information, prices for whale meat and blubber are set annually by the ICR.<sup>45</sup> The meat is consigned to Kyodo Senpaku as ICR's sales agent in order to facilitate the sale of the whale meat to wholesalers at a fixed price set by the ICR, or more recently to municipalities, school boards, hospitals, fishery cooperatives, and large-scale retailers. From 2006 through at least 2011, it appears that consumable whale meat was also consigned to Geishoku Rabo (a company established with the support of JFA, ICR, and Kyodo Senpaku to develop new sales channels).<sup>46</sup> The wholesalers who purchase whale meat from Kyodo Senpaku sell to various distributors and retailers. Beginning in 2017, sale of sei whale meat will be managed by Kyodo Hanbai, a subsidiary of Kyodo Senpaku. This new company was established in order to "improve business, including development of new products and sales channels" for whale meat.<sup>47</sup>

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<sup>42</sup> See ICR, Media Releases (2003-2011), <http://www.icrwhale.org/News.html>; see also Junko Sakuma, *Sluggish Sales of Whale Meat*, Iruka & Kujira (Dolphin and Whale) Action Network (May 22, 2012), <http://ika-net.jp/ja/ikan-activities/whaling/250-sluggish-sales-of-whale-meat>.

<sup>43</sup> K. Nakano, *To Protect Whale Eating Culture, The Japan Fisheries Agency Supports A Meat Wholesaler to Develop Sales Channels Targeting School Lunches*, Nikkei Sangyo Shimbun, May 29, 2006, available at Annex 130 of the Memorial of Australia, Whaling in the Antarctic (Australia v. Japan) (May 9, 2011).

<sup>44</sup> See ICR, Media Releases (2003-2011), <http://www.icrwhale.org/News.html>.

<sup>45</sup> See ICR, *Rules for the Processing and Sale of By-Products of the Cetacean Capture Research Program*, ICR No. 570, (Jan. 12, 2001, as amended through May 31, 2006), available at Annex 114 of the Memorial of Australia, Whaling in the Antarctic (Australia v. Japan) (May 9, 2011) [hereinafter "ICR Rules for the Processing of By-products"].

<sup>46</sup> See Institute of Cetacean Research and Geishoku Rabo, *New organisation for whale meat sales promotion*, Press Release, March 2006, [http://whaling.jp/press/press06\\_05.html](http://whaling.jp/press/press06_05.html).

<sup>47</sup> See <http://www.kyodo-senpaku.co.jp/news/#35>.

### III. Legal Analysis

Because of the sensitivity of issues relating to whales and whaling, Section A begins by describing the relevant provisions of CITES and their applicability to the introduction from the sea of Appendix I specimens, such as sei whales. Section B applies the provisions of CITES to Japan's introduction of sei whale products. It concludes that, although Japan appears to issue IFS certificates, it does so in violation of CITES because it issues IFS certificates when the introduction is clearly for primarily commercial purposes.

#### A. The Applicable Provisions of CITES

##### 1. Japan must issue IFS certificates for introductions of Appendix I sei whale specimens.

The sei whale is listed in Appendix I of CITES and Japan does not have a reservation for the population of sei whale in the North Pacific.<sup>48</sup> Article III, paragraph 5, of the Convention sets out the conditions for trade in specimens of Appendix I species, such as the sei whale, caught in marine areas not under the jurisdiction of any State. It requires the State of introduction to issue an "introduction from the sea" certificate.

Japanese registered vessels take sei whales in marine areas not under the jurisdiction of any State. Japan stated in reports relating to its JARPN and JARPN II programs that it killed sei whales exclusively in the parts of IWC sub-areas 7, 8, and 9 that are outside foreign exclusive economic zones (EEZs) and has indicated the same for takes of sei whales under NEWREP-NP.<sup>49</sup> In fact, according to data Japan submits to the IWC all sei whales hunted by Japan are killed outside the jurisdiction of any State (see Table 1 and Figure 1). According to the same data, the sei whales are all taken by catcher vessels.<sup>50</sup> The *Nisshin Maru* is owned by Kyodo Senpaku and registered by Japan.<sup>51</sup> Since sei whale products are introduced into Japan, Japan is the State of introduction.<sup>52</sup> As a result, Japan must issue IFS certificates for specimens of sei whale introduced into Japan consistent with the provisions of Article III, paragraph 5.

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<sup>48</sup> Japan's reservation for sei whale is as follows: *Balaenoptera borealis*: reservation not applicable to populations: a) in North Pacific; and b) in areas from 0 to 70 degrees east longitude and from the equator to the Antarctic Continent. See CITES, "Reservations," <https://www.cites.org/eng/app/reserve.php>.

<sup>49</sup> See NEWREP-NP, *supra* note 6, at 101 ("In JARPN II, dedicated sighting surveys were conducted in sub-areas 7, 8 and 9 excluding foreign EEZ in early and late seasons."); see also *id.* at 113 ("In JARPN II surveys, dedicated sighting surveys were conducted in sub-areas 7, 8 and 9 excluding foreign EEZ in early and late seasons.").

<sup>50</sup> *Id.* at 140-142 (listing the *Nisshin Maru* as the primary vessel engaged in the biological and ecological surveys of whales sampled, and the *Yushin Maru No. 1* and *Yushin Maru No. 3* as additional sampling vessels, and the *Yushin Maru No. 2* for "sighting and experiments"). These ships are all flagged in Japan. See MarineTraffic, *Nisshin Maru*,

<http://www.marinetraffic.com/en/ais/details/ships/shipid:664599/imo:8705292/mmsi:431683000/vessel:NISSHIN%20MARU>;

MarineTraffic, *Yushin Maru No. 1*, <http://www.marinetraffic.com/en/ais/details/ships/shipid:663737/mmsi:431439000/vessel:YUSHIN%20MARU>;

MarineTraffic, *Yushin Maru No. 3*, <http://www.marinetraffic.com/en/ais/details/ships/shipid:665259/mmsi:432621000/vessel:YUSHIN%20MARU%20NO.3>;

MarineTraffic, *Yushin Maru No. 2*, <http://www.marinetraffic.com/en/ais/details/ships/shipid:665133/mmsi:432364000/vessel:YUSHIN%20MARU%20NO.2>.

<sup>51</sup> See MarineTraffic, *Nisshin Maru*, <http://www.marinetraffic.com/en/ais/details/ships/shipid:664599/imo:8705292/mmsi:431683000/vessel:NISSHIN%20MARU>.

<sup>52</sup> "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." CITES, *supra* note 1, art. I(e). Resolution 14.6 (Rev. CoP16) defines "marine environment not under the jurisdiction of any State" as "those marine areas beyond the areas subject to the sovereignty or sovereign rights of a State consistent with international law, as reflected in the United Nations Convention on the Law of the Sea." CITES, *Introduction from the Sea*, Resolution Conf. 14.6 (Rev. Cop16) (parentheticals added).

According to the CITES Trade Database and other information collected in Japan, Japan issues IFS certificates for introductions of specimens of sei whale. According to the CITES Trade Database, managed by UNEP-WCMC, Japan has reported that it has “introduced from the sea”—as indicated by code “ZZ”—sei whale bodies and small skin pieces since at least 2002.

IFS certificates are provided prior to initiation of special permit whaling in the North Pacific with only the upper limit of the catch and some other information included on the certificate. Prior to landing, once the total number of sei whales taken is known, the captain fills out the exact number that will be landed and, therefore, covered by the IFS certificate.<sup>53</sup> In other words, the Management Authority in Japan issues one permit annually for all of the sei whales that are introduced from the sea.

**2. IFS certificates are required for trade in *specimens* of sei whale, and data from Japan suggests that it considers the “body” of each sei whale to be the relevant specimen.**

Article III, paragraph 5, provides that IFS certificates are required for “[t]he introduction from the sea of any *specimen* of a species included in Appendix I.”<sup>54</sup> “Specimen” is defined by the treaty, in relevant part, as “any animal . . . whether alive or dead; [and] . . . any readily recognizable part or derivative thereof.”<sup>55</sup> With this definition, the treaty text provides some flexibility as to how a Party applies the term “specimen.” In this case, although Japan could consider the relevant “specimen” to be each package of meat or each part of the sei whale on which the ICR conducts scientific research, it appears to identify the relevant specimen as the body of each sei whale.

According to the CITES Trade Database, Japan reports most of its sei whale introductions in quantities of “bodies.”<sup>56</sup> The use of this term indicates that the specimen in trade is the entire body of each sei whale. Both documents relevant to understanding and interpreting the data contained in the CITES Trade Database confirm this. The *Guidelines for the preparation and submission of CITES annual reports (Guidelines)* provides that Parties include in their annual reports a description of the specimens that it has imported, exported, introduced from the sea, or re-exported.<sup>57</sup> In *A Guide to Using the CITES Trade Database*, UNEP-WCMC confirms that the “term” in the CITES Trade Database outputs is the “description of the specimen traded by the importing [or reporting] country.”<sup>58</sup>

Japan mischaracterizes the “specimen” that it introduces from the sea. As described in Section II, Japanese whalers butcher the sei whales on board the *Nisshin Maru* and package different

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The phrase “transportation into a State” is not defined by the Convention, but Resolution 14.6 (Rev. CoP16) clarifies the situations in which the Parties expect that an introduction from the sea certificate is necessary. According to paragraph 2(a) of Resolution Conf. 14.6 (Rev. CoP16), when specimens are “taken in the marine environment not under the jurisdiction of any State by a vessel registered in one State (Japan) and transported into that same State (Japan), the provisions of Article III, paragraph 5 . . . should be applied; with that State (Japan) being the State of introduction.” *Id.* at para. 2(a).

<sup>53</sup> See email correspondence, July 13, 2017 (on file with author).

<sup>54</sup> CITES, *supra* note 1, art. III(5) (emphasis added).

<sup>55</sup> *Id.*, art. I(b).

<sup>56</sup> Japan also reports “specimens,” as kilograms prior to 2010 and as grams after 2010, but we assume that these are biopsies taken from live sei whales. See NEWREP-NP, *supra* note 6, at Annex 19.

<sup>57</sup> CITES, *Guidelines for the preparation and submission of CITES annual reports*, 3, <https://cites.org/eng/notif/2011/E019A.pdf>.

<sup>58</sup> UNEP-WCMC, *supra* note 27, at 7,10.

types of products (meat, blubber, organs) separately according to commercial value and market demand. According to the *Guidelines*, the term “body” is described as “substantially whole dead animals, including fresh or processed fish.”<sup>59</sup> Thus, Japan is not introducing from the sea a “body” as defined in the *Guidelines* because it is not introducing “substantially whole” sei whales.

The *Guidelines* identify different types of “specimens,” including “meat,” which is defined as “meat, including flesh of fish if not whole, fresh, or unprocessed meat as well as processed meat (e.g. smoked, raw, dried, frozen, or tinned).”<sup>60</sup> Other types of specimens, as described in the *Guidelines*, may also be appropriate, such as “oil,” “eyes,” “bone,” “skin,” or the general term of “derivative” for anything not included in the table provided. Japan should use the appropriate terms from the *Guidelines* to describe the specimens it is actually introducing from the sea. Nonetheless, the analysis that follows is based on Japan’s designation of “bodies” as the relevant specimens in trade.

**3. Prior to issuing IFS certificates, Japan must determine that the “specimen” is “not to be used for primarily commercial purposes” based on the intended end use of the specimen, not the reason for taking the specimen.**

Article III, paragraph 5, of the Convention requires Japan, as the State of introduction, to determine prior to issuing an IFS certificate that the specimens it is introducing are “not to be used for primarily commercial purposes.”<sup>61</sup> Importantly, the “primarily commercial purposes” finding asks how the specimen will be used once it has been introduced. It does not relate to the reasons for taking the specimen, or, in CITES terms, the reasons for removing the specimen from the wild. The plain language of the Convention’s text focuses on the intended *use* of the specimen.

Discussions at meetings of the Parties confirm that a “primarily commercial purposes” finding relates to the use *after* import or introduction. At COP10, Namibia proposed to redefine “primarily commercial purposes” to allow any conservation benefits in the country of origin resulting from trade to be considered in the determination of “primarily commercial purposes.”<sup>62</sup> Before the proposal was withdrawn due to a lack of support, a large number of Parties objected to the proposal, emphasizing that the primarily commercial purposes finding clearly asks whether the purpose of the import or introduction is commercial, not whether the transaction in the exporting country is commercial or non-commercial.<sup>63</sup>

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<sup>59</sup> *Id.* at 7.

<sup>60</sup> *Guidelines for the Preparation and Submission of CITES Annual Reports*, *supra* note 56, at 8. Other options exist for describing whale parts, such as “skin,” “skin pieces,” “oil,” “baleen,” and other descriptions for different organs.

<sup>61</sup> The requirements for issuing an IFS certificate are as follows:

- a) a Scientific Authority of the State of introduction [must] advise 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 be used for primarily commercial purposes.

CITES, *supra* note 1, art. III(5)(c).

<sup>62</sup> CITES, *Revision of the Definition of “Primarily Commercial Purposes,”* Doc. 10.38 (Rev.) (1997).

<sup>63</sup> See CITES, *Summary Report of the Committee II Meeting, Fifth Session: 13 June 1997*, at para. 12, 216-217 (1997) (concern voiced by the delegations of the Netherlands, on behalf of the European Union, and the United States).

Resolution Conf. 5.10 (Rev. CoP15) further clarifies that the nature of the transaction between the owner of the specimen in the exporting country and the recipient in the importing country is irrelevant.<sup>64</sup> Paragraph (d) under “General Principles” provides that “[i]t can be assumed that a commercial transaction underlies many of the transfers of specimens of Appendix-I species from the country of export to the country of import. This does not automatically mean, however, that the specimen is to be used for primarily commercial purposes.”<sup>65</sup> This language clarifies that what takes place in the exporting country is separate and distinct from the use of the specimen in the country of import. In the case of introduction from the sea, this language clarifies that the nature of the take on the high seas should not be confused with the reason for the introduction. Indeed, the reason for the take may be scientific, but that does not mean that the introduction will automatically be for scientific purposes.

The interpretation presented in Resolution Conf. 5.10 (Rev. CoP15) is consistent with the intent of the drafters of the Convention. As the drafters crafted language to provide some flexibility to the total trade prohibition contained in an early working draft of the Convention while retaining the underlying assumption that commercial trade is inherently detrimental to Appendix I species, Australia proposed an amendment that became the basis for the Convention’s current language.<sup>66</sup> Specifically, Australia proposed that the importing country must find that the “recipient does not engage in commercial transactions involving Appendix I and II species.”<sup>67</sup> The focus on the recipient’s activities makes clear that from early drafts of the “primarily commercial purposes” provision, the drafters intended the provision to apply to the end use of the specimen in the importing country.

With Japan’s introduction of sei whales, the issue is not whether its whaling program is commercial or scientific. Instead, the issue is the purpose for which the specimens are used upon introduction. Japan conflates these issues. For example, in a press conference on Japan’s new whaling legislation the Director of Whaling Affairs in the Fisheries Agency asserted that the sei whale meat is the by-product of whaling program and that it is not provided from a commercial whaling program.<sup>68</sup> Japan suggests that it makes its primarily commercial purposes finding based on the reason for killing whales rather than the reason for the introduction.

#### **4. The meaning of “primarily commercial purposes” as defined by the Parties in Resolution Conf. 5.10 (Rev. CoP15), comports with its ordinary meaning.**

The treaty does not define “primarily commercial purposes,” but the Parties have interpreted the phrase in Resolution Conf. 5.10 (Rev. CoP15). Resolution Conf. 5.10 (Rev. CoP15) breaks down the phrase “primarily commercial purposes” into two operative components: First, it provides an understanding of what is meant by “commercial” and second, it clarifies how to calculate what might be a “primarily commercial purpose.”

With respect to the first component, Parties are asked to determine whether any of the intended uses of the specimen are “commercial.” Resolution Conf. 5.10 (Rev. CoP15) defines an activity

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<sup>64</sup> See CITES, *Definition of “Primarily Commercial Purposes,”* Resolution Conf. 5.10 (Rev. CoP15), at para. 4 (1985).

<sup>65</sup> *Id.* at para. (d).

<sup>66</sup> See International Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, Washington, at Proposed Amendments to Article III, PA/III/10 (proposed by Australia) (Feb. 15, 1973).

<sup>67</sup> *Id.*

<sup>68</sup> Foreign Correspondents’ Club of Japan, Press Conference: Kiyoshi Ejima, Nanami Kurasawa, & Shigeki Takaya, July 6, 2017 (paraphrased statement by Mr. Shigeki Takaya begins at minute 58:00), <https://www.youtube.com/watch?v=zT2AOtknc34>.

as “commercial” if its purpose is to “gain economic benefit, including profit (whether in cash or in kind) . . . [when it] is directed towards resale, exchange, provision of a service or other form of economic benefit.”<sup>69</sup> Importing countries are to interpret the term “commercial purposes” as “broadly as possible so that any transaction which is not wholly ‘non-commercial’ will be regarded as ‘commercial.’”<sup>70</sup>

The resolution then provides advice to Parties regarding the determination of whether the import or introduction from the sea of a specimen will be used for “*primarily* commercial purposes.” The resolution addresses the intended scope of “primarily” when it says that any use of imported specimens whose non-commercial aspects “do not clearly predominate shall be considered to be primarily commercial in nature.”<sup>71</sup> Moreover, according to Resolution Conf. 5.10 (Rev. CoP15), the burden of proving that the intended use is “clearly non-commercial” lies with the entity seeking to import the specimen.

Although CITES Resolutions evince the common understanding of the Parties and agreed CITES policies, they are not legally binding as international law. As such, Japan’s understanding of the meaning of “primarily commercial purposes” could deviate from Resolution Conf. 5.10 (Rev. CoP15); however, any such definition applied by Japan may not contravene the ordinary meaning of the phrase “primarily commercial purposes” as used in the text of the Convention because the Vienna Convention on the Law of Treaties requires treaties to be interpreted consistently with their ordinary meaning.<sup>72</sup>

As a start, the term “commercial,” according to the *Oxford English Dictionary*, means “engaged in commerce” or “of or pertaining to commerce or trade.”<sup>73</sup> “Commerce,” in turn, is defined as “buying and selling together; trading; exchange of merchandise...”<sup>74</sup> Like Resolution Conf. 5.10 (Rev. CoP15), these definitions make clear that “commercial” is fundamentally about obtaining economic benefit. “Primarily” is defined by the *Oxford English Dictionary* as “to a great or the greatest degree; for the most part, mainly.” Again, this plain language meaning is similar to the Parties understanding captured in Resolution Conf. 5.10 (Rev. CoP15), which provides that if noncommercial aspects do not clearly predominate, the use is primarily commercial. Any definition of “primarily commercial purposes” that Japan has adopted in any of its CITES-related domestic measures<sup>75</sup> must comport with this plain language understanding in order to be in compliance with CITES.

ICR and others involved in the Japanese whaling industry often produce materials that specifically assert that whaling is not a profitable enterprise because the money generated from the sale of whale meat is used to fund whaling operations.<sup>76</sup> For example, ICR explains that

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<sup>69</sup> Resolution Conf. 5.10 (Rev. CoP15), *supra* note 64, at para. 2

<sup>70</sup> *Id.* at para. 3.

<sup>71</sup> *Id.*

<sup>72</sup> Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331, art. 31 (entered into force Jan. 27, 1980).

<sup>73</sup> OXFORD ENGLISH DICTIONARY, *Commercial*, <http://www.oed.com/view/Entry/37081?redirectedFrom=commercial#eid>.

<sup>74</sup> OXFORD ENGLISH DICTIONARY, *Commerce*, <http://www.oed.com/view/Entry/37073?rskey=b5O3km&result=1&isAdvanced=false#eid>.

<sup>75</sup> Japan’s CITES legislation does not contain a definition of either “primarily commercial purposes” or “commercial.” However, we are unsure as to whether a definition exists in some other domestic measure. *See* The Law for the Conservation of Endangered Species of Wild Fauna and Flora, Law No. 75 (June 5, 1992) (Preliminary Translation).

<sup>76</sup> *See* ICR Rules for the Processing of By-products, *supra* note 44 (“Cetacean capture surveys are not a profit-making enterprise”); Tania Rabesandratana, *Japan Ordered to Stop Scientific Whaling*, ScienceMag, Mar. 31, 2014, <http://www.sciencemag.org/news/2014/03/japan-ordered-stop-scientific-whaling> (“Japan counters that its whale meat sale is not profitable and that it needs to take and kill whales to study the animals and their potential as a food source.”).

“income from the sale of by-products (meat) is used to partially offset the cost of the research.”<sup>77</sup> By these statements, ICR suggests that its whaling is not commercial and, given the use of purpose code “S,” that its imports of whale meat are, therefore, non-commercial. However, this misconstrues the term “commercial”—the making of profit is not necessary for an activity to be considered commercial. In fact, many commercial enterprises are not profitable, yet still “commercial.” For example, Amazon, the giant online retail business, did not generate profits for years,<sup>78</sup> yet it is clearly a commercial enterprise.

## **B. Japan violates CITES by introducing from the sea sei whale meat for scientific purposes when it is clearly used for primarily commercial purposes**

Japan issues IFS certifications for sei whale specimens, claiming that these introductions are for non-commercial, scientific purposes. According to the data in the CITES Trade Database, Japan uses “S” as the purpose code on its IFS certificates. Resolution Conf. 12.3 (Rev. CoP17) designates certain codes so that Parties can easily identify the “purpose of the transaction” on each permit or certificate.<sup>79</sup> The purpose code “S” signifies that the purpose of the import or introduction from the sea is “scientific.”<sup>80</sup> Because Japan has identified the specimen as the “body” of the sei whale, Japan is indicating with the use of “S” that each sei whale “body” is imported for scientific purposes, not primarily commercial purposes.

The intent of Resolution Conf. 5.10 (Rev. CoP15) and the plain language meaning of “primarily commercial purposes,” when taken together with Japan’s intended and actual use of the majority of the introduced sei whale products, make it unequivocally clear that Japan is introducing from the sea sei whale specimens for primarily commercial purposes in violation of Article III of CITES. Quite simply, the non-commercial scientific uses of the sei whale do not clearly predominate as Resolution Conf. 5.10 (Rev. CoP15) requires. To the contrary, commercial use is the primary motivation for introducing the sei whale meat and sale is the predominant intended use.

Several considerations, described more fully below, are dispositive in this regard, including the following:

- no scientific research is conducted on the meat that enters the marketplace;
- the majority of each sei whale is processed for sale;
- the sale of whale meat is predetermined by law in Japan;
- the sale of whale meat is structured to generate revenue;
- whale meat designated for “public interest” purposes is sold, albeit at a discount;
- ICR and other actors involved in whaling actively develop commercial markets; and
- the *Nisshin Maru* has been retrofitted in order to package whale meat to increase profitability.

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<sup>77</sup> Institute of Cetacean Research, Q&A, Japan’s whale research programs (JARPN and JARPN II), <http://www.icrwhale.org/QandA3.html>.

<sup>78</sup> *Amazon Reports Annual Net Profit for the First Time*, Wall Street Journal (Jan. 28, 2004), available at <https://www.wsj.com/articles/SB107523879334513159>.

<sup>79</sup> See Resolution Conf. 12.3 (Rev. CoP17), *Permits and Certificates*, para. I(3)(g).

<sup>80</sup> *Id.*

**1. No science is conducted on the whale meat that is introduced from the sea for distribution; instead, the overwhelming majority of each sei whale is processed for sale**

Under JARPN and JARPN II, Japan lethally sampled sei whales in order to study the stomach contents, testes, ovaries, and the lipid content of samples of blubber.<sup>81</sup> Under NEWREP-NP, earplugs, eye lenses, baleen plates, plasma, and some organs will also be studied.<sup>82</sup> Research plans for JARPN, JARPN II, and NEWREP-NP make it clear that this is the only science conducted on any parts of the whales killed under the programs.<sup>83</sup> Once whales are killed, they are brought onboard the *Nisshin Maru*, where data such as body length and body parts for further research are collected. For example, ICR measures age by ear plug reading and via aspartic acid racemization technique using the eye lens and sexual maturity by analysis of the ovaries or testes.<sup>84</sup> The whale parts to be used for “scientific purposes” are separated from the rest of the whale. “Scientific parts” such as blubber samples, plasma, other tissues and stomach contents are frozen for further analysis at facilities, such as ICR.<sup>85</sup>

While Japan may argue that the introduction is for a scientific purpose, not a single intended use of sei whale meat introduced from the sea is scientific in nature. Japan also does not conduct scientific research on the remainder of the whale, including on any of the muscle (whale meat), skin, other internal organs (such as the heart, kidney, and intestine), or most of the blubber.<sup>86</sup> Instead, the overwhelming majority of the whale body is frozen in 15 kg blocks or smaller vacuum-sealed packages<sup>87</sup> in order to be sold after introduction.

As explained above, in the case of introduction from the sea, the nature of the take in the high seas should not be confused with the reason for the introduction. Indeed, the reason for the take may be scientific, but that does not mean that the introduction will automatically be for scientific purposes.<sup>88</sup> Similarly, the take of a specimen on the high seas for commercial purposes does not mean that the introduction from the sea is automatically commercial.

Indeed, conflating the reason for the take of a specimen with the reason for the introduction or import of that specimen could lead to absurd and undesirable consequences under CITES. If the introduction or import of an Appendix I specimen for commercial purposes is permissible so long as some “science” is also conducted—for example, measuring the length of a single component of the specimen or sampling stomach contents—then the very purposes of CITES

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<sup>81</sup> The blubber is not retained for scientific study upon landing the specimens of sei whale; a small sample is retained to test the lipid content. The blubber is a commercially valuable product that is consumed in Japan. See Institute of Cetacean Research, *Whales as Food and Japanese Culture* (2007), available at <http://www.icrwhale.org/pdf/59FoodCulture.pdf>.

<sup>82</sup> See *supra* note 34 and accompanying text. For a full list of “research items” subject to scientific study, see ICR, Media Release, <http://icrwhale.org/News.html>. The documents entitled “JARPN II Offshore Cruise research vessels return to port” for each year contains a full description of the “scientific” samples.

<sup>83</sup> See Government of Japan, Research Program for Clarification of Minke Whale Stock Structure in the Northwestern Part of the North Pacific (JARPN) 5–6; Government of Japan, Research Plan for Cetacean Studies in the Western North Pacific under Special Permit (JARPN II) 31–34; NEWREP-NP, *supra* note 6, at 117, 126.

<sup>84</sup> See NEWREP-NP, *supra* note 6, at 117.

<sup>85</sup> *Id.* at 137–38. Other institutions and facilities also undertake scientific research once the scientific products are introduced. *Id.*

<sup>86</sup> See *supra* note 37 and accompanying text.

<sup>87</sup> According to reports of the *Nisshin Maru*’s upgrades, approved in 2012 as part of the “Kujira Kaizen Project,” in order to process smaller packages of whale meat to meet consumer demand, the production facilities were to be upgraded. See Suisan Keizai Shimbun, *The Central Council Approves “KKP” - The Kujira Kaizen Project (Whaling Reform Project)* (Oct. 1, 2012) (on file with author).

<sup>88</sup> See *supra* notes 64–68 and accompanying text.

to prevent over-utilization due to trade would be undermined. Science is not intended to be a cover for commercial introduction from the sea or import.

**2. The sale of whale meat is predetermined prior to issuance of IFS certificates, and Japan is aware that the intended use of sei whale meat is sale.**

Bringing whale meat to the marketplace in Japan is a sophisticated process that is predetermined and organized under the law through a joint effort of JFA, ICR, and Kyodo Senpaku. As such, at the point at which the IFS certificate is procured, all relevant actors, including the CITES Management Authority in Japan, which for the specific purpose of issuing IFS certificates for whales is JFA,<sup>89</sup> knows that the *intended use* of any introduced sei whale meat is commercial.

The predetermined nature of the process for selling whale meat and the overall legal basis for such sales in Japan is evidence that the intended use of the whale meat is commercial and that Japan is aware of the use of sei whale meat at the time it issues IFS certificates. Regulations issued by JFA as well as rules prescribed by ICR in order to implement JFA regulations specifically provide for the commercial use of whale meat, provide a process for selling the whale meat, direct how prices for whale meat are set, and pre-determine allotments to different uses and supply chains.

The 1987 Cetacean Research Capture Project Implementation Guidelines issued by the government of Japan, and supplemental guidelines issued as a Directive by JFA, provide the basic contours of the government-endorsed program to sell whale meat.<sup>90</sup> The Directive, as amended in 2007, makes clear that when ICR has whale meat to sell, it must apply in advance of the sale to JFA for permission to sell the whale meat; appended to the Directive is the specific form that JFA must complete in order to receive such permission.<sup>91</sup> The Directive also provides that ICR must submit a report providing details of the whale meat sales to JFA.<sup>92</sup> Finally, the Directive elaborates how any profits earned must be shared with JFA.<sup>93</sup> That this legal architecture exists clearly demonstrates that at the time of issuing the IFS certificates for sei whale meat products, the CITES Management Authority in Japan is aware that the whale meat is not going to be used for scientific purposes but rather that it is being introduced solely for sale in Japan.

The *Rules for the Processing and Sale of By-Products of the Cetacean Capture Research Program (Cetacean Byproduct Sale Rules)* produced by ICR with input from JFA provide a more detailed framework for the sale of whale meat.<sup>94</sup> In fact, these *Rules* make clear that “by-products” will be sold after all capture surveys, assuming whales are actually taken, making it clear that sei whale meat is not introduced from the sea for scientific purposes.<sup>95</sup> The rules define “by-products” as the “frozen products derived from whale carcasses in the course of cetacean capture surveys . . . and offered for sale,” again leaving no question as to the purpose of introducing the whale meat.<sup>96</sup>

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<sup>89</sup> See *supra* notes 18–24 and accompanying text.

<sup>90</sup> Government of Japan, *Re: Implementation of the Cetacean Research Capture Project*, *supra* note 18.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See ICR Rules for the Processing of By-products, *supra* note 45.

<sup>95</sup> “The by-products of these surveys . . . are sold within Japan.” *Id.*

<sup>96</sup> *Id.*

Moreover, the *Rules* predetermine the various distribution routes for whale meat, the method of sale by “sale agents,” and the authority of ICR and JFA to set the price of whale meat in advance of sales, including discounted rates for so-called “public interest” sales. The sale of whale meat is neither incidental to scientific whaling, nor is it an *ad hoc* event that occurs only when a surplus of scientific specimens exists. Instead, because the sales are predetermined by laws, regulations, and directives, Japan’s CITES Management Authority is fully aware of the intended commercial use of the sei whale specimens long before any IFS certificate is issued.

**3. The nature of the sales distribution chain for whale meat is highly structured with opportunities for economic benefit occurring at multiple stages.**

As with the legal architecture providing for and regulating the sale of whale meat, the distribution and supply chain for whale meat in Japan is highly structured, highly regulated, and well-known. The structure of the distribution and supply chain presents a number of opportunities for earnings on the sale of whale meat, providing an indication of the intended commercial nature of the whale meat market. That the Japanese market for whale meat is in decline and the business model is failing is not evidence of a lack of commerciality; as noted above, commercial enterprises fail to generate profit all the time.

**a. The goal of generating income is commercial in nature.**

For purposes of this analysis, the distinction between “profit” and “income” is important. “Profit” may be defined as “[a] financial gain, *esp.* the difference between the amount earned and the amount spent in buying, operating, or producing something.”<sup>97</sup> “Income,” however, is used to describe total earnings or the “annual or periodical receipts accruing to a person or corporation; revenue.”<sup>98</sup>

Japan makes much of the lack of “profit” when it comes to the sale of whale meat, suggesting that this indicates that such transactions are non-commercial.<sup>99</sup> Under CITES Resolution Conf. 5.10 (Rev. CoP15), however, the determination of an activity’s commercial or non-commercial purpose focuses on whether the purpose is to obtain “economic benefit,” which may, but does not necessarily include, profit.<sup>100</sup>

In the case of Japan’s whaling program, the whale meat undeniably generates economic benefit through the revenue earned from sales. The fact that sales are not enough to make the activity “profitable” for ICR is irrelevant to its commercial nature. In fact, ICR and JFA documents and regulations routinely describe the motivation for the sale of whale meat as capturing economic value for the purpose of funding scientific whaling.<sup>101</sup> In other words, ICR and JFA specifically plan sales for the purpose of generating economic benefits—the very definition of

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<sup>97</sup> OXFORD ENGLISH DICTIONARY, *Profit*, <http://www.oed.com/view/Entry/152097?rskey=yilBuq&result=1&isAdvanced=false#eid>.

<sup>98</sup> OXFORD ENGLISH DICTIONARY, *Income*, <http://www.oed.com/view/Entry/93645?rskey=NXcRI5&result=1&isAdvanced=false#eid>. The term “revenue” is sometimes used interchangeably with both “profit” and “income,” as a result, we are using the word “income” throughout to distinguish between gross earnings on the sale of whale meat any net profit that might result once expenses are deducted from gross earnings.

<sup>99</sup> Counter-Memorial of Japan, Whaling in the Antarctic (Australia v. Japan) (Mar. 9, 2012), at 293–95.

<sup>100</sup> Resolution Conf. 5.10 (Rev. CoP15), *supra* note 64, at para. 3.

<sup>101</sup> See ICR Rules for the Processing of By-products, *supra* note 45.

“commercial” under Resolution Conf. 5.10 (Rev. CoP15). Additionally, while ICR may not make a profit, Kyodo Senpaku earns a commission and has regularly turned a profit.<sup>102</sup>

Similarly, ICR’s status as a “non-profit” or “public interest corporation” does not mean that its introduction of sei whale meat is automatically non-commercial. While ICR may not generate profits, it does sell whale meat specifically for the purpose of generating income. In fact, ICR arranges “consignment sales agreements” with for-profit corporations for the purpose of selling whale meat. These corporations—mainly, Kyodo Senpaku—are required to remit payment to ICR of all income less expenses and Kyodo Senpaku’s commission.<sup>103</sup> Furthermore, ICR sets a fixed price for whale meat prior to distribution, highlighting that, even as a public interest corporation it has a vested commercial interest in the conduct and value of the whale meat sales.<sup>104</sup>

**b. All actors in the distribution and supply chain gain economic benefit by generating income and possibly profit from the sale of whale meat.**

The distribution and supply chain for whale meat begins with ICR. JFA issues the introduction from the sea certificate and subsequently introduces the sei whale meat.<sup>105</sup> ICR then contracts with “sales agents” that take the whale meat on consignment in order to facilitate the sale of the whale meat to wholesalers that purchase whale meat at a fixed price set by ICR, or to other approved buyers, such as municipalities, school boards, hospitals, fishery cooperatives, and large-scale retailers that purchase whale meat at a price set by ICR.<sup>106</sup> The wholesalers then broker sales with retailers or other distributors, which in turn sell whale meat to the public.<sup>107</sup>

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<sup>102</sup> See *infra* notes 116–19 and accompanying text.

<sup>103</sup> See further description of the consignment sales agreement at *infra* notes 114–118 and accompanying text.

<sup>104</sup> See ICR Rules for the Processing of By-products, *supra* note 45.

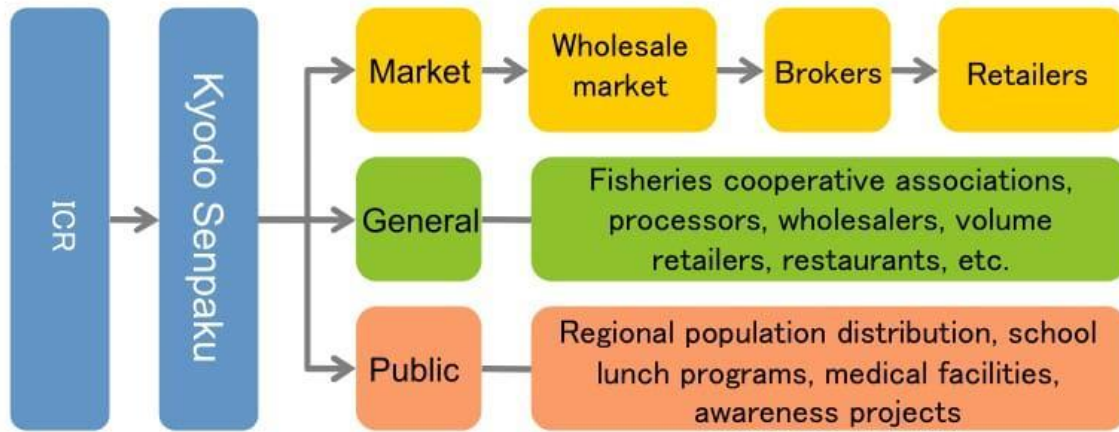
<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

**Figure 2: Distribution channels for whale meat as provided by ICR in 2012 as part of the “KKP”.<sup>108</sup>**

■ Research By-product Distribution Routes



Japanese and ICR officials suggest that as a “public interest corporation,” ICR is inherently a non-commercial enterprise.<sup>109</sup> However, as Japanese and ICR officials routinely acknowledge, the very purpose of the sale of whale meat is to obtain economic benefits, which can then be used to support the operational costs of Japan’s special permit whaling program. For example, a recent initiative to improve whale meat sales, the Kujira Improvement Project (KKP), is based on the idea that ICR needs to boost sales in order to secure stable implementation of its special permit whaling program.<sup>110</sup> Furthermore, the basis of ICR’s *Cetacean Byproduct Sale Rules* is that “[t]he by-products of . . . [Japan’s whaling programs] are sold within Japan for the purpose of . . . procuring funds necessary for the conduct of capture surveys, etc.”<sup>111</sup> In these statements, Japan and the ICR make clear that the goal of selling whale meat is to obtain economic benefit.

In addition, official documents suggest that ICR has the ability to earn income and profits. In fact, The *Special Survey Projects Business and Service Document (Business and Service Document)*,<sup>112</sup> produced in 1988 for the provision of ICR’s implementation of “special surveys,” contemplates specifically that “the income . . . shall be spent on the expenses associated with the implementation of cetacean capture surveys. However, there may be exceptions as resolved by the Board of Directors and approved by the Director-General of Japan Fisheries Agency.”<sup>113</sup> This language suggests not only that ICR is an income-generating operation but that any profits earned do not necessarily need to be reinvested in special permit whaling. While whale meat sales may not be profitable now, the earning of profit is one outcome contemplated by ICR and JFA.

<sup>108</sup> ICR, Scientific Whaling Reform, Promotion, and Concentration Project Plan (Kujira Kaizen Project) (2012) [hereinafter KKP].

<sup>109</sup> See ICR Rules for the Processing of By-products, *supra* note 45.

<sup>110</sup> KKP, *supra* note 108.

<sup>111</sup> ICR Rules for the Processing of By-products, *supra* note 45.

<sup>112</sup> See Special Survey Projects Business and Service Document (Nov. 24, 1988), available at Annex 111 of the Memorial of Australia.

<sup>113</sup> *Id.* at Art. 15.

The role of “sales agents” in the distribution of whale meat is clearly commercial. ICR commissions “sales agents” to facilitate and handle the sale of whale meat to wholesalers and other direct purchasers.<sup>114</sup> Since its incorporation in 1987, Kyodo Senpaku has been granted a “consignment sales agreement” each year that sets out the terms of the relationship between Kyodo Senpaku and ICR.<sup>115</sup> The consignment sales agreement from 2007 makes abundantly clear that Kyodo Senpaku is earning a profit from the sale of whale meat.<sup>116</sup>

According to Article 8 of the sales agreement, Kyodo Senpaku is to subtract the expenses plus a 5.58 percent commission from the sales proceeds from the sale of whale meat before remitting payment of the remainder to ICR.<sup>117</sup> The expenses of the sale of the whale meat are borne by ICR; these expenses are enumerated in the sales agreement and include warehouse charges, storage charges, freight, bookkeeping, loading and unloading, market commission charges, “miscellaneous charges,” and “expenses associated with sales promotion.”<sup>118</sup> Because ICR explicitly agrees to bear the cost of all expenses associated with the sale of the whale meat, the commission that Kyodo Senpaku is allowed to take is profit earned on the sale of the whale meat.

Kyodo Senpaku continued to earn this profit, even as ICR defaulted on interest-free loans provided by the government.<sup>119</sup> According to an article published in the *Asahi Shimbun* on February 2, 2008, Kyodo Senpaku earned a “net profit of about 5 million yen for its accounts period ending October 2007.”<sup>120</sup> The article also states that “[t]he company says that it secures a profit every year.”<sup>121</sup>

By the time whale meat reaches consumers, the price has been marked up significantly relative to the price originally set by ICR, providing yet further evidence that the distribution chain for whale meat is inherently and primarily commercial. In 2002, for example, whale meat sold for about 3,000 Japanese yen (about 22 USD) per kilogram to wholesalers but was sold to consumers for approximately 9,000 Japanese yen (about 68 USD) per kilogram.<sup>122</sup> Fatty, desirable cuts, such as “whale bacon” retailed for around 49,000 Japanese yen (about 368 USD) per kilogram.<sup>123</sup> Based on these numbers, retail prices reflect a 300 to over a 1,000 percent mark-up from wholesale costs, suggesting that significant revenue is generated on the sale of whale meat throughout the supply chain.

#### **4. Whale meat designated for “public interest” purposes is still sold, albeit at a discount, in order to generate income.**

ICR designates a specific allotment of whale meat for distribution for “public interest” uses. However, the “public interest” distribution chain is also commercial in nature because the

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<sup>114</sup> See Institute of Cetacean Research and Kyodo Senpaku Kaisha Ltd., *By-product Consignment Sales Agreement* (June 5, 2007), available at Annex 118 of the Memorial of Australia, Whaling in the Antarctic (Australia v. Japan) (May 9, 2011).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at Art. 6.

<sup>119</sup> K. Oyamada, *Scientific Whaling: Financial Pressure. ICR misses ¥1 Billion Financing Repayment in 2006/07 Account Settlement*, *Asahi Shimbun*, Feb. 2, 2008, available at Annex 136 of the Memorial of Australia, Whaling in the Antarctic (Australia v. Japan) (May 9, 2011).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Stephen Lunn, *‘Scientific’ whale on sale in Japan*, *The Australian* (Mar. 27, 2002).

<sup>123</sup> *Id.* The calculations of the cost are based on information reported in Australian dollars and converted using the exchange rate for March 27, 2002.

whale meat is sold for the purpose of “public interest” use. According to ICR’s *Cetacean Byproduct Sale Rules*, public interest uses are those “with a public character.”<sup>124</sup> These uses include “distribution to local residents, school meals allocations, medical services allocation, and public education initiatives.”<sup>125</sup>

Approximately 16.6 percent of the whale meat obtained from sei whales each year since 2007 is allocated for “public interest” sale (see Table 3). For example, in 2009, 216 tons of sei whale meat was dedicated for public interest sale, while 1,079.2 tons was reserved for “commercial” sale.<sup>126</sup> The whale meat reserved for “commercial” sales are the highest value, most desirable products.<sup>127</sup>

**Table 3: ICR data on the allocation of sei whale meat between “public interest” sales and “commercial” sales.**<sup>128</sup>

|  | 2007 <sup>129</sup> | 2008 <sup>130</sup> | 2009 <sup>131</sup> | 2010 <sup>132</sup> | 2011 <sup>133</sup> |
|--|---------------------|---------------------|---------------------|---------------------|---------------------|
| “Public interest” sales<br>(in tons)     | 204                 | 215.1               | 216                 | 198.9               | 177.3               |
| “Commercial” sales<br>(in tons)          | 1,016.3             | 1,079.6             | 1,079.2             | 973                 | 896.8               |
| Percentage of “public<br>interest” sales | 16.7                | 16.6                | 16.7                | 17                  | 16.5                |

ICR provides that “prices for the sale of by-products shall be lower than prices for commercial sale. In principle, a discount of 10% . . . shall be applied to public interest sales.”<sup>134</sup> ICR appears to discount whale meat for school meals and for medical services at a greater rate.<sup>135</sup> In other words, ICR is offering discounts for the less desirable whale meat products—an action any savvy commercial marketplace actor might take. Importantly for determination of whether this whale meat is imported for primarily commercial purposes, whale meat for these purposes is not donated by ICR, nor is it donated by the government of Japan. In fact, it is sold for the purpose of income generation and the gain of economic benefit, even if it is sold at a discount. Despite the discount on price, in 2013 the Shimonoseki School Board, although wanting to

<sup>124</sup> ICR Rules for the Processing of By-products, *supra* note 45.

<sup>125</sup> *Id.*

<sup>126</sup> Institute of Cetacean Research, 2009 JARPEN II Offshore Cruise whale research byproducts on sale, *available at* <http://www.icrwhale.org/091102ReleaseJp.html>.

<sup>127</sup> Economics for the Environment Consultancy (eftec), *Economics of Subsidies to Whaling*, 11 (June 10, 2009).

<sup>128</sup> ICR stopped releasing this data after 2011.

<sup>129</sup> Institute of Cetacean Research, 2007 JARPEN II Offshore Cruise whale research byproducts on sale, *available at* <http://www.icrwhale.org/02-A-67.html>.

<sup>130</sup> Institute of Cetacean Research, 2008 JARPEN II Offshore Cruise whale research byproducts on sale, *available at* <http://www.icrwhale.org/081028ReleaseJp.html>.

<sup>131</sup> Institute of Cetacean Research, 2009 JARPEN II Offshore Cruise whale research byproducts on sale, *available at* <http://www.icrwhale.org/091102ReleaseJp.html>.

<sup>132</sup> Institute of Cetacean Research, 2010 JARPEN II Offshore Cruise whale research byproducts on sale, *available at* <http://www.icrwhale.org/101007ReleaseJp.html>.

<sup>133</sup> Institute of Cetacean Research, 2011 JARPEN II Offshore Cruise whale research byproducts on sale, *available at* <http://www.icrwhale.org/111027ReleaseJp.html>.

<sup>134</sup> ICR Rules for the Processing of By-products, *supra* note 45.

<sup>135</sup> The school meals allocation is discounted at a 33 percent rate, while the whale meat sold for medical services is discounted at a 50 percent rate. *Id.*

provide more whale meat to its students, could not afford to buy the amount it needed from ICR.<sup>136</sup>

## **5. JFA and ICR are actively engaged in creating new commercial market for whale meat.**

JFA and ICR are actively engaged in a campaign to increase whale meat consumption, underscoring the commercial purposes of the introduction of sei whale meat and significantly undermining the very purpose of the “primarily commercial purposes” finding. Since the commercial whaling moratorium took effect, Japan’s whaling industry has actively looked to preserve pre-existing markets for whale meat and develop and promote new markets for whale meat. In fact, those involved in the whaling industry in Japan, especially ICR and Kyodo Senpaku, hope to increase whale meat consumption and build a commercial enterprise around whaling and the sale of whale meat. ICR introduces from the sea sei whale meat specifically for this purpose.

The Japanese whaling industry that existed prior to the IWC’s commercial whaling moratorium taking effect in 1986 morphed into the current organizations that now run special permit whaling in Japan. In fact, the companies that had engaged in commercial whaling banded together to form Kyodo Senpaku in order to sustain a whale hunt and the infrastructure necessary to take whales on the high seas.<sup>137</sup> Market demand for whale meat at the time was strong, and the continuation of whaling was intended to generate enough supply to meet market demand, amongst other goals. However, demand began declining not long after the commercial moratorium took effect.<sup>138</sup> By 2005, the frozen stockpiles of whale meat amounted to 5,560 tons,<sup>139</sup> and ICR, along with others involved in Japan’s whaling industry, began looking to boost sales, lest its whaling efforts go unfunded.<sup>140</sup>

While ICR and Japanese officials have long promoted whale meat consumption, the official campaign to expand the consumption and viable markets for whale meat seems to have begun at the same time ICR began stockpiling significant quantities of whale meat that went unsold as part of annual consignments and sales. Early attempts to promote whale meat seemed limited to one-off local events or showcases around special events, such as the IWC’s meeting in Shimonoseki, Japan.<sup>141</sup> However, by 2005, when the amount of stockpiled whale products increased substantially as sales dropped significantly, ICR, Kyodo Senpaku, and the Japanese

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<sup>136</sup> According to the article, “Due to the cost, the [Shimonoseki] school board can only afford to pay for whale meat to be featured in school lunches three times a year.” As a result, the Shimonoseki Municipal Fisheries Division subsidizes the purchase of enough whale meat to serve it at least once a month. *Shimonoseki to Include Whale Meat in School Lunches Once a Month*, Asahi Newspaper (Sept. 15, 2013), [http://digital.asahi.com/articles/SEV201309150007.html?ref=comkiji\\_txt\\_end](http://digital.asahi.com/articles/SEV201309150007.html?ref=comkiji_txt_end).

<sup>137</sup> See Counter-Memorial of Japan, *supra* note 99, at 285.

<sup>138</sup> Economics for the Environment Consultancy *supra* note 127, at 12.

<sup>139</sup> K. Oyamada, *Whale Meat Goes Unsold. Supplies Increasing, But Distribution Channels Not Expanding. Government-Backed Distributor Operating at Loss*, Asahi Shimbun Feb. 19, 2008, available at Annex 137 of the Memorial of Australia, Whaling in the Antarctic (Australia v. Japan) (May 9, 2011).

<sup>140</sup> According to an article in the Yomiuri Shimbun newspaper in 2006, “Sales of whale meat are an important source of income for whaling research so it is imperative to stimulate demand as poor sales may hinder future research.” Takeo Miyazaki, *Whale meat plentiful; demand sluggish*, Yomiuri Shimbun (Sept. 8, 2006), <http://www.yomiuri.co.jp/dy/national/20060908TDY04002.htm>.

<sup>141</sup> See e.g., *Japan Serves Whale Meat, Urges Hunt* (Apr. 9, 2002)(story filed by Associated Press reporter in Tokyo)(describing whale meat sampling and other promotions in advance of the IWC meeting in May of 2002 in Shimonoseki); *The Core of Whaling Culture: Whale Meat Diet Faced Straight-on: Still Far from a Staple Japanese Diet*, Suisan Keizai Shimbun (Jan. 1, 2005) (noting that ICR and the Japan Whaling Association have hosted events such as “Summit of Japanese Traditional Whaling Communities” and “Whale and Food Culture Citizen’s Circle”).

government orchestrated a large-scale campaign to increase the existing commercial market for whale meat and create new commercial markets to increase public consumption of whale meat.

One of the widest reaching campaigns involves introducing children to whale meat at a young age. This campaign aims to cultivate a taste for whale meat that would endure over a lifetime, essentially “locking in” market demand over an individual’s lifespan. To accomplish this, JFA, ICR, and Kyodo Senpaku are involved in coordinated efforts to promote the purchase of whale meat for school lunch programs.<sup>142</sup> In Wakayama prefecture, whale meat from JARPN and JARPN II were introduced to children at 270 public schools beginning in 2005, incorporating whale meat into dishes designed for children’s food preferences, such as meatballs, hamburgers, and spaghetti.<sup>143</sup> By 2009-2010, 18 percent of schools had served whale meat lunches at least once during the school year.<sup>144</sup> In Oshika and Ishinomaki, whale meat is breaded, fried, and coated in sweet sauce and served at day care centers in order to create a desire for the product and promote life-long consumption.<sup>145</sup>

ICR, JFA, and Kyodo Senpaku were involved in additional strategies to stimulate demand and develop new markets for whale products as well. Such strategies range from celebrity chef promotions, cooking classes, government-endorsed nutrition recommendations,<sup>146</sup> sampling at various fairs and expos, and recipe development.<sup>147</sup> A 2006 article published in Japan reported that Kyodo Senpaku “has been promoting its whale meat, resulting in increased sales to food companies and restaurants.”<sup>148</sup> As recently as 2012, JFA and ICR attempted to stimulate demand amongst “middle-aged and elderly people” by selling high quality cuts through mail order catalogues.<sup>149</sup> ICR has also promoted internet sales in order reach a broader audience of consumers.<sup>150</sup> In 2012, ICR also refigured its distribution methodologies and began using commercial delivery companies to distribute whale meat to small restaurants and taverns.<sup>151</sup> In 2014, the *Nisshin Maru* was awarded Halal certification to further extend the consumer base to Muslims in Japan.

By proactively seeking growth in the consumer marketplace, ICR, JFA, and Kyodo Senpaku have demonstrated an unmistakable commercial motivation for whale meat sales. The KKP, a comprehensive reevaluation of ICR’s whaling operations, including the production and

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<sup>142</sup> K. Nakano, *supra* note 43.

<sup>143</sup> Hiroko Tabuchi, *Japan’s Whale Hunts Produce Glut of Meat*, Washington Post, Feb. 26, 2006, [https://www.washingtonpost.com/archive/politics/2006/02/26/japans-whale-hunts-produce-glut-of-meat/d7fe0bff-922b-4ea8-a1c6-be1349392a72/?utm\\_term=.618f79e05d1c](https://www.washingtonpost.com/archive/politics/2006/02/26/japans-whale-hunts-produce-glut-of-meat/d7fe0bff-922b-4ea8-a1c6-be1349392a72/?utm_term=.618f79e05d1c).

<sup>144</sup> *Whale meat back on school lunch menus*, The Japan Times (Sept. 4, 2010), <https://www.japantimes.co.jp/news/2010/09/05/national/whale-meat-back-on-school-lunch-menus/>.

<sup>145</sup> *Ishinomaki children get introduced to whale meat* (Jan. 24, 2001), [http://www.sanriku-kahoku.com/news/2007\\_01/i/070124i-kujira.html](http://www.sanriku-kahoku.com/news/2007_01/i/070124i-kujira.html).

<sup>146</sup> See e.g. [http://www.jfa.maff.go.jp/j/kikaku/wpaper/h25\\_h/trend/1/zoom\\_p021.html](http://www.jfa.maff.go.jp/j/kikaku/wpaper/h25_h/trend/1/zoom_p021.html) (MAFF promoting halal meat); <http://www.maff.go.jp/chushi/chisanchisyo/dentou/ryouri/35yamaguti/obaik.html> (MAFF promoting a recipe for “obaik,” which it recommends brings good luck); [http://www.maff.go.jp/pr/aff/1607/spe1\\_03.html](http://www.maff.go.jp/pr/aff/1607/spe1_03.html) (MAFF promoting recipes for taste and health).

<sup>147</sup> See generally IFAW, *The Economics of Japanese Whaling*, 8 (2013); Economics for the Environment Consultancy *supra* note 127, at 16.

<sup>148</sup> *Whale meat plentiful; demand sluggish*, Yomiuri Shimbun (Sept. 8, 2006), <http://www.yomiuri.co.jp/dy/national/20060908TDY04002.htm>.

<sup>149</sup> See KKP, *supra* note 108; Government to sell meat from whales caught for research purposes more widely to raise funds (Nov. 7, 2012), <http://mainichi.jp/english/english/newsselect/news/20121107p2a00m0na008000c.html>.

<sup>150</sup> See KKP, *supra* note 108; Institute of Cetacean Research, 2009–10 Southern Ocean Research Whaling By-Product Sales, Press Release, Apr. 14, 2010, available at Annex 122 of the Memorial of Australia, Whaling in the Antarctic (Australia v. Japan) (May 9, 2011).

<sup>151</sup> See KKP, *supra* note 108.

marketing of whale meat, underscores this in absolutely clear terms. According to the KKP, a refinement of whale products and a detailed marketing strategy for “demand expansion measures” that focuses on targeted and “aggressive” media initiatives to reach different potential audiences is necessary.<sup>152</sup>

As part of the KKP, ICR published the results of extensive studies aiming at understanding the “cause of poor sales of whale meat.”<sup>153</sup> The results of the study suggest that the price, quality, and aspect of whale meat, as well as the lack of advertisement were all factors contributing to the decline in whale meat consumption in Japanese culture.<sup>154</sup> In response, the KKP identified as priority the creation of a product that “anyone can enjoy,” by providing whale meat in smaller packages and by improving the taste and the color to make it more attractive to consumers. The Project identified various initiatives aimed at boosting whale meat sales, including the expansion of existing markets through cooperative sales, direct sales of products to individuals, and to small and medium-sized bars.<sup>155</sup> These initiatives constitute abundant evidence of Japan’s efforts to promote sales of whale meat and of the commercial purpose of Japan’s whaling activities.

The KKP explicitly seeks to “*increase sales income (gross profit)*” (specifically by boosting “sales revenue by 160 million yen”). To achieve this, it identifies new whale products to be manufactured and potential target markets to be cultivated. These include young people in their 20s and 30s who do not recognize whales as food ingredients, consumers concerned about health (to whom the properties of the amino acid balenine could be marketed as an antidote to fatigue), men in their 50s, and school officials responsible for lunch programs.<sup>156</sup> It also proposes more direct sales to customers, including to small restaurant businesses that provide take-out or delivery services and seeks the sale of value-added products for the luxury goods market via mail- and TV-order. KKP documentation includes a glossy 15-page brochure produced by the Japanese Whaling Association promoting the health benefits of whale meat and other products, including specific commercially available whale-based health supplements.<sup>157</sup>

Perhaps the most notable effort to stimulate demand is the coordinated effort by JFA, Kyodo Senpaku, and ICR to establish a new company specifically to cultivate new commercial markets for whale meat. The company, Geishoku Rabo, was established in 2006 following concerns about the surplus of whale meat resulting from the expansion in scientific whaling and related revenue loss.<sup>158</sup> The company was established with an initial mandate of five years.<sup>159</sup> The president of Geishoku Rabo, Mr. Hiroshi Tanaka, a former consultant, invested ¥1 million of his own funds, while Kyodo Senpaku provided a loan of ¥20 million for operating capital.<sup>160</sup> The Geishoku Rabo office is located in the same building as Kyodo Senpaku, the Japanese Whaling Association,<sup>161</sup> and ICR.

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> K. Nakano, *supra* note 43.

<sup>159</sup> See Institute of Cetacean Research and Geishoku Rabo, *supra* note 46.

<sup>160</sup> K. Nakano, *supra* note 43.

<sup>161</sup> The Japanese Whaling Association is a pro-whaling lobbying non-governmental organization.

The goal of the new company was to develop and establish new sales channels that were not in competition with those of Kyodo Senpaku. Geishoku-Rabo indicated it would sell 1,000 tonnes in the first year and up to 3,000 tonnes after five years.<sup>162</sup> For example, in 2006, Geishoku Rabo began selling whale meat to livestock producers and started processing whale meat into pet food.<sup>163</sup> The new company also aimed to approach new industries not previously targeted for retail sales such as school lunch providers, prepared-meal providers, hospitals, universities, and the chain restaurant sector.<sup>164</sup> The rules governing the sales of whale meat were amended to relax conditions on the distribution of the by-products in order to facilitate Geishoku-Rabo's efforts.<sup>165</sup>

Not only are the overt attempts at stimulating demand by multiple actors involved in the whale meat distribution chain clearly commercial, campaigns to *promote* demand for Appendix I species like sei whales significantly undermines CITES conservation objectives. Paragraph 4 of the preamble provides that the goal of the Convention is to prevent “over-exploitation of species through international trade.”<sup>166</sup> To give effect to this goal, the Parties regulate international trade to varying degrees, depending on the biological status of the species.<sup>167</sup> Species that are threatened with extinction—Appendix I species—are subject to “particularly strict regulation,” and all international trade in those species for primarily commercial purposes is prohibited.<sup>168</sup> By prohibiting trade in Appendix I specimens for primarily commercial purposes, CITES expresses a clear intent to prevent growth in demand for Appendix I, wild-caught specimens. In fact, the U.S. Secretary of the Interior, Rogers C.B. Morton, acting as Temporary Chairman of the Washington Conference at the commencement of the first plenary session, drew the connection explicitly for delegates, stating that “[w]hile many individual nations are diligently striving to protect their wildlife, the temptation of rich markets abroad continues to invite evasion of this protection.”<sup>169</sup>

Furthermore, at the most recent meeting of the CITES Conference of the Parties, the Parties took a number of decisions aimed at demand *reduction*. In fact, the Parties adopted by consensus Resolution 17.4 on demand reduction strategies in order to curb illegal trade in specimens.<sup>170</sup> While the circumstances of sei whale meat trade is different from the illegal poaching of other Appendix I species, such as elephants and rhinoceros, the underlying goals of the resolution are relevant here. The introduction from the sea of sei whale for the purpose of growing a domestic market directly contradicts the motivations of this resolution, which acknowledges that public awareness campaigns to reduce supply and demand are critical to implementation of CITES objectives.

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<sup>162</sup> K. Nakano, *supra* note 43.

<sup>163</sup> *Whale Meat Sales to Livestock Producers: Targeting Non-fisheries Sales Channels*, Nikkan Minato Shimbun, Nov. 27, 2006, <http://www.whaling.jp/news/061127m.html>.

<sup>164</sup> *Japan Fisheries Agency and ICR Establish Whale Meat Retail Company, Develop New Sales Channels* ISANA 26 (Japan Whaling Association, June 2006), available at Annex 117 of the Memorial of Australia, *Whaling in the Antarctic* (Australia v. Japan) (May 9, 2011).

<sup>165</sup> Institute of Cetacean Research and Geishoku Rabo, *supra* note 46.

<sup>166</sup> CITES, *supra* note 1, preamble.

<sup>167</sup> WILLEM WIJNSTEKERS, *THE EVOLUTION OF CITES* 15, CITES Secretariat (7th ed. 2003).

<sup>168</sup> CITES, *supra* note 1, at art. II(2)(a).

<sup>169</sup> International Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, Washington, Summary Record – First Plenary Session, Feb. 12, 1973, SR/1 (Final), 1 para 2.

<sup>170</sup> CITES, *Demand Reduction Strategies to Combat Illegal Trade in CITES-listed Species*, Resolution Conf. 17.4.

**6. Retrofitting of the *Nisshin Maru* was planned, in part, for the purpose of increasing “profitability” of whale meat sales.**

The recent retrofitting of the *Nisshin Maru* reflects both ICR and Kyodo Senpaku’s commercial motivations regarding the sale of whale meat. Although a 2007 fire onboard the vessel and the need for hull redesign necessitated some reconstruction, certain aspects of the redesign were motivated by the desire to improve the quality and marketability of whale meat. ICR and Kyodo Senpaku had complained in the press that they were limited in how they were able to process the whale meat aboard the *Nisshin Maru* and had stated that they believed they could raise the price of whale meat as well as consumer demand for whale meat if processing facilities aboard the *Nisshin Maru* were more sophisticated.<sup>171</sup>

Consumers and, most notably young people, had complained that whale meat was bloody and difficult to work with, as well as smelly and “not so tasty.”<sup>172</sup> In response to these complaints and declining sales, a panel of experts convened as part of the effort to improve special permit whaling, considered upgrades to the *Nisshin Maru*.<sup>173</sup> According to an article on the new plans,

[t]he plan is also looking at increasing the profit by improving the production facilities for value-added products, for example by accommodating smaller lot sizes and refining meat maturity, as it recognizes that the byproduct (whale meat) is not meeting the customer demands as before.<sup>174</sup>

The new plans are detailed as part of the KKP, which outlines the response ICR, Kyodo-Senpaku, and JFA formulated in reaction to sluggish whale meat sales and was approved in 2012.<sup>175</sup>

The fundamental purpose of the KKP is to overhaul the onboard processing of whale meat and improve the distribution and marketing of whale meat so that they become “a delicious food” that “everyone can easily eat.”<sup>176</sup> The changes allow a portion of the red meat to be “subjected to an aging process to improve its quality and allow meat to be packaged into 1 kg and 6 kg vacuum-sealed blocks.”<sup>177</sup> According to the document, packaging the whale meat into smaller packages is more likely to “satisfy customer demand” and respond to wholesalers’ complaints that the existing 15 kg frozen blocks are too large to handle easily.<sup>178</sup> Additional improvements would facilitate more sophisticated on-board freezing and vacuum-sealing processes that would eliminate consumer complaints about the smell, the bloodiness, and the drippiness of the whale meat.<sup>179</sup>

The Director of JFA recognized the commercial value of the whale meat and the revamping of the *Nisshin Maru*’s processing facilities in a meeting of the House of Representative Committee

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<sup>171</sup> *The Central Council Approves “KKP,”* *supra* note 87.

<sup>172</sup> *The Core of Whaling Culture: Whale Meat Diet Faced Straight-on: Still Far from a Staple Japanese Diet*, Suisan Keizai Shimbun (Jan. 1, 2005).

<sup>173</sup> The Kujira Kaizen Project (The Research Whaling Reform Promotion Project) received approval on September 28, 2012 from JFA’s Central Council. The proposal provided a framework for reconsideration of the sale of whale meat and the financial troubles of the special permit whaling program. *The Core of Whaling Culture: Whale Meat Diet Faced Straight-on: Still Far from a Staple Japanese Diet*, Suisan Keizai Shimbun (Jan. 1, 2005); *see also* Junko Sakuma, *Research Whaling: Heading Toward Nationalization* (on file with author).

<sup>174</sup> *The Core of Whaling Culture*, *supra* note 172.

<sup>175</sup> *See KKP*, *supra* note 108.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

on Audit and Oversight of Administration regarding the subsidies provided to ICR when he noted that “[w]e are planning on streamlining our operation . . . [including] improving value added production of the research byproducts.” He expressed hope that these activities would “steer the management back to the point where we do not have to depend on [subsidies] to cover the deficits.”<sup>180</sup>

**7. Japan’s introductions from the sea of sei whale meat is not consistent with the criteria for “scientific purposes” under Resolution Conf. 5.10 (Rev. CoP15).**

Resolution Conf. 5.10 (Rev. CoP15) recognizes that Appendix I specimens may be introduced from the sea or imported for scientific purposes and that, in these circumstances, the non-commercial aspects may be predominant. Resolution Conf. 5.10 (Rev. CoP15) establishes a three-part test for determining whether introductions from the sea or imports are for primarily commercial purposes or whether the non-commercial aspects predominant. The importation of an Appendix I specimen may be permissible when the following three criteria are met:

- (1) “the scientific purpose for such importation is clearly predominant,”
- (2) “the importer is a scientist or a scientific institution registered or otherwise acknowledged by the Management Authority of the country of import,” and
- (3) “the resale or commercial exchange of the specimens, or their exhibit for economic benefit is not the primary intended use.”<sup>181</sup>

The introduction from the sea of sei whale meat does not meet either the first or the third criteria for all of the reasons discussed above. Most notably, neither ICR nor any other scientific institution in Japan conducts any amount of “science” on the sei whale *meat* after introduction. Instead, the purpose of the introduction from the sea is explicitly for the purpose of selling the meat. In this case, the activity is not “resale” upon the completion of some scientific endeavor. It is simply “sale” because ICR conducts no amount of science after introduction.

**8. Japan’s introductions of sei whale meat do not meet the criteria for use of the scientific exemption in Article VII.**

Article VII, paragraph 6, of CITES provides an exemption from the provisions of Article III when an Appendix I specimen is imported, exported, or introduced from the sea for the purpose of “non-commercial loan, donation or exchange between scientists or scientific institutions registered by the Management Authority of their State.”<sup>182</sup> While ICR may be recognized as a scientific institution and registered with the government of Japan as such, this exemption does not apply to the introduction from the sea of sei whale meat. None of the sei whale meat is loaned, donated, or exchanged among scientists. No interpretation of this exemption would render it applicable, and Japan does not appear to apply it.

**C. If Japan wants to introduce the parts of the sei whales that are used for scientific purposes, then Japan must issue appropriate IFS certificates for those sei whale parts only.**

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<sup>180</sup> Junko Sakuma, *Research Whaling: Heading Toward Nationalization* (on file with author).

<sup>181</sup> Resolution Conf. 5.10 (Rev. CoP15), *supra* note 64.

<sup>182</sup> CITES, *supra* note 1, at art. VII, para. 6.

As established in this analysis, Japan's introduction from the sea of sei whale meat is for primarily commercial purposes and thus unlawful under CITES. However, if Japan wishes to introduce from the sea the parts that it actually uses for scientific purposes after landing, then it must separate those parts from the rest of the sei whale prior to introduction and issue an IFS certificate that applies to those parts only. The sei whale meat simply may not be introduced, and any IFS certificate that is issued for a specimen that includes any sei whale meat that is introduced for primarily commercial purposes is unlawful under CITES.

Article VI, paragraph 5, supports this understanding. It provides that "[a] separate permit or certificate shall be required for each consignment of specimens."<sup>183</sup> According to the *Oxford English Dictionary*, the term "consignment" means "delivering over; delivery, committal, allotment" or "the consigning of goods or a cargo, especially to an agent for sale or disposal."<sup>184</sup> ICR consigns the sei whale meat to Kyodo Senpaku to act as a sales agent per a "sales consignment agreement."<sup>185</sup> While ICR does not appear sign a "sales consignment agreement" with Kyodo Senpaku until after the sei whale meat is introduced, it has done so every year that it has caught and landed sei whales. In fact, Kyodo Senpaku's corporate registry documents state that one of its purposes is to "process and trade" cetacean capture research byproducts.<sup>186</sup>

#### **D. Relationship between the ICRW and CITES**

##### **1. Japan must implement both ICRW and CITES, which are two distinct treaties.**

Consistent with the principle of *pacta sunt servanda*, Parties to treaties must implement all treaty obligations because "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>187</sup> Because the ICRW and CITES are distinct treaties with distinct rules and Japan is a party to both of them, it must comply with all the obligations of both treaties.

##### **2. No conflict exists between the provisions of ICRW and CITES.**

No conflict exists between the rules of the ICRW and CITES. The ICRW and CITES regulate different activities and have different purposes. The ICRW manages and conserves whale stocks to make possible the orderly development of the whaling industry,<sup>188</sup> while CITES regulates the international *trade* in specimens of listed whale species.<sup>189</sup> Japan, however, implicitly argues that Article VIII(2) of the ICRW creates a conflict, despite the different purposes of the two treaties. Article VIII(2) calls for, "to the extent practicable," whales to be processed and the proceeds distributed according to the rule established by the relevant ICRW

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<sup>183</sup> *Id.* at art. VI, para 5.

<sup>184</sup> OXFORD ENGLISH DICTIONARY, *Consignment*, <http://www.oed.com/view/Entry/39628?redirectedFrom=consignment#eid>.

<sup>185</sup> See *supra* notes 114–18 and accompanying text for further description of the consignment relationship between ICR and Kyodo Senpaku.

<sup>186</sup> Government of Japan, Tokyo Legal Affairs Bureau Nakana Branch, *Certified Record of All Historical Register Particulars: Kyodo Senpaku Kaisha Ltd, Corporate Registration No. 0100-01-041436* (Dec. 22, 2010), available at Annex 109 of the Memorial of Australia, Whaling in the Antarctic (Australia v. Japan) (May 9, 2011).

<sup>187</sup> Vienna Convention, *supra* note 72, at art. 27 (entered into force Jan. 27, 1980) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith").

<sup>188</sup> ICRW, *supra* note 2, at preamble, para. 7 ("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.").

<sup>189</sup> CITES, *supra* note 1, at arts. III–V.

contracting government.<sup>190</sup> Japan and ICR claim that this provision “requires that the by-products of the research be processed.”<sup>191</sup>

However, no conflict exists. As stated above, the principle of *pacta sunt servanda* requires States to comply with all of their treaty obligations.<sup>192</sup> In addition, the International Court of Justice (ICJ) has stated that treaties should “be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it.”<sup>193</sup> As a result, international law recognizes a presumption against conflicts.<sup>194</sup> For a conflict to exist, it must deal with the same subject matter and the provisions must be mutually exclusive.<sup>195</sup> According to the international scholar C. Wilfred Jenks, the presumption does not apply only when there are “clearly unreconcilable [sic] provisions.”<sup>196</sup> Thus, if the treaty obligations can be performed simultaneously, then a conflict does not exist.<sup>197</sup>

In the case of Japan’s introduction of sei whales and subsequent sale of whale meat, the provisions of the ICRW and CITES do not conflict; they are easily reconciled. First, special permit whaling under Article VIII is an exception to the Convention’s other provisions,<sup>198</sup> including the moratorium on commercial whaling.<sup>199</sup> IWC Members, including Japan, are not

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<sup>190</sup> ICRW, *supra* note 2, at art. VIII(2) (“Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.”).

<sup>191</sup> ICR, Questions & Answers: Japan’s whale research programs (JARPN and JARPNII), at <http://www.icrwhale.org/QandA3.html>.

<sup>192</sup> Vienna Convention *supra* note 72, at 27.

<sup>193</sup> Rights of Passage over Indian Territory (Preliminary Objections) (Portugal v. India), 1957 I.C.J. 125, 142.

<sup>194</sup> OPPENHEIM’S INTERNATIONAL LAW 1275 (eds. Sir Robert Jennings and Sir Arthur Watts, 9th. ed. 1992); JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW, 240–44 (2003); C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BR. YB. INT’L L. 401, 427 (1953) (“It seems reasonable to start from a general presumption against conflict.”), International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc A/CN.4/L.682, ¶ 37 (Apr. 13, 2006) (finalized by Martti Koskenniemi) (“In international law, there is a strong presumption against normative conflict. Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict.”) [hereinafter ILC, *Fragmentation*].

<sup>195</sup> Indonesia - Certain Measures Affecting the Automobile Industry, Panel Report, WT/DS54/, WT/DS55/R, WT/DS59/R, WT/DS64/R, ¶ 14.28 (July 2, 1998).

<sup>196</sup> Jenks, *supra* note 194, at 429.

<sup>197</sup> Jenks, *supra* note 194, at 426.

<sup>198</sup> Article VIII(1) begins with the phrase “notwithstanding anything contained in this Convention,” words frequently used to denote an exception to a rule. The WTO’s Appellate Body had the following to say about the use of the word “notwithstanding”:

The ordinary meaning of the term “notwithstanding” is, as the Panel noted, “[i]n spite of, without regard to or prevention by”. By using the word “notwithstanding”, paragraph 1 of the Enabling Clause permits Members to provide “differential and more favourable treatment” to developing countries “in spite of” the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO “immediately and unconditionally”. Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an “exception” to Article I:1.

European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, Appellate Body Report, WT/DS246/AB/R (Apr. 7, 2004). See also IWC Resolution 1995-9, recommending that the killing of whales “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.”

<sup>199</sup> Although the moratorium is found in the Schedule to the ICRW, the ICRW explicitly provides that the Schedule is an “integral” part of the ICRW. ICRW, *supra* note 2, at art. I(1) (“This Convention includes the Schedule attached thereto which forms an integral part thereof. All references to “Convention” shall be understood as including the said Schedule either in its present terms or as amended in accordance with the provisions of Article V.”). As the ICJ noted, “Article VIII is an integral part of the Convention. It therefore has to be interpreted in light of the object and purpose of the Convention and

required to avail themselves of this exception. Thus, it does not conflict with the requirement of CITES to prohibit the introduction from the sea of Appendix I specimens for primarily commercial purposes.

Second, even if Article VIII establishes a requirement to sell the whale meat for commercial purposes, the plain language of Article VIII(2) is clear as to the parameters of the obligation: Japan is required to process and distribute proceeds only “so far as practicable.” The *Oxford English Dictionary* defines “practicable” to mean “[a]ble to be done or put into practice successfully; feasible; able to be used; useful, practical, effective.” It is not practicable for Japan to introduce whale meat for commercial purposes because it is not allowed to do so: it is not “able to be done” because CITES prohibits introductions from the sea for primarily commercial purposes. By interpreting Article VIII(2) consistent with its plain meaning, as directed by the Vienna Convention,<sup>200</sup> no conflict exists between the ICRW and CITES.

The IWC itself has essentially made this point. The IWC noted as early as 1994 that “any commercial international trade in whale products obtained from research whaling undermines the effectiveness of the IWC’s conservation programme.”<sup>201</sup> In 2003, the IWC acknowledged that Article VIII “is not intended to be exploited in order to provide whale meat for commercial purposes and shall not be so used.”<sup>202</sup>

Third, both the ICRW and CITES include provisions to help Parties avoid conflicts. For example, the ICRW allows IWC members to object to regulations included in the Schedule.<sup>203</sup> Similarly, CITES Parties may enter a reservation to the listing of a species in the Appendices.<sup>204</sup> Japan understands that reservations are a valid way to ensure activities do not violate the terms of a treaty; it has entered reservations to the inclusion of most cetaceans in the CITES Appendices, but it did not do so with respect to the North Pacific population of sei whales.<sup>205</sup> Japan also entered an objection to the moratorium on commercial whaling so that it may undertake commercial whaling but then withdrew that objection.<sup>206</sup> Thus, the two treaties are completely reconcilable and even include provisions that allow Parties to easily avoid conflicts.

Lastly, some scholars support a looser definition of conflict where one treaty may frustrate the goals of another<sup>207</sup> or when two rules “suggest different ways of dealing with a problem.”<sup>208</sup> Even using these definitions of conflict, no conflict exists. The primary goal of CITES is to

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taking into account other provisions of the Convention, including the Schedule.” Whaling in the Antarctic (Australia v. Japan; New Zealand intervening) 2014 I.C.J. Rep. \_\_, ¶ 55 (Mar. 31, 2014).

<sup>200</sup> Vienna Convention, *supra* note 72 at art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

<sup>201</sup> IWC, *Resolution on International Trade in Whale Meat and Products*, Resolution 1994–7, ¶ 3 (1994).

<sup>202</sup> IWC, *Resolution on Whaling under Special Permit*, Resolution 2003–2, para. 3 (2003). Resolution 2003–2 also restated some of the conclusions of earlier resolutions that whaling under Article VIII only be permitted in exceptional circumstances (1995-8 and 9); meet critically important research needs (1987); satisfy criteria established by the Scientific Committee; be consistent with the Commission’s conservation policy (1987/1); be conducted using non-lethal research techniques (1995-9); and ensure the conservation of whales in sanctuaries (1995-8).

<sup>203</sup> ICRW, *supra* note 2, at art. V(3).

<sup>204</sup> CITES, *supra* note 1, at art. XV(1)(c).

<sup>205</sup> CITES, Reservations entered by Parties (in effect from 5 July 2017), at <https://cites.org/eng/app/reserve.php>.

<sup>206</sup> ICRW, *supra* note 2, at Schedule, ¶10(e), fn. \*.

<sup>207</sup> ILC, *Fragmentation*, *supra* note 194, at ¶ 24.

<sup>208</sup> *Id.* at ¶ 25.

prevent the over-utilization of species due to trade.<sup>209</sup> The primary goal of the ICRW is the management of whaling,<sup>210</sup> with scientific research whaling a minor element of that scheme.<sup>211</sup>

### 3. Even if a conflict exists, CITES prevails.

To the extent that Japan believes a conflict exists, the provisions of CITES prevail by virtue of the rules of treaty interpretation, specifically the principles of *lex specialis* and *lex posterior*. *Lex specialis* (also known as *generalia specialibus non derogant*)—the principle that special law derogates from and thus prevails over general law “is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts.”<sup>212</sup> *Lex specialis* is widely accepted because a special rule is more to the point than a general one and it regulates the matter more effectively than general rules.<sup>213</sup> In other words, “special rules are better able to take account of particular circumstances. . . . They have greater clarity and definiteness and are thus often felt ‘harder’ or more ‘binding’ than general rules.”<sup>214</sup>

Distinguishing the special from the general rule has challenges.<sup>215</sup> However, “[a] rule is never ‘general’ or ‘special’ in the abstract but in relation to some other rule.”<sup>216</sup> In comparing CITES Article III, paragraph 5, with Article VIII, paragraph 2, of the ICRW, the CITES provision is clearly the “special” rule. The primarily commercial purposes finding of CITES is critical to the execution of CITES’ goals, whereas Article VIII, paragraph 2, is not critical to the goals of ICRW.

With regard to the introduction from the sea of sei whale products, Article III, paragraph 5 of CITES constitutes the *lex specialis* because it is a specific, concrete rule that address a single problem: the overutilization of species due to trade.<sup>217</sup> To achieve this goal, CITES establishes a permit regime and specifically prohibits introductions from the sea in Appendix I specimens for primarily commercial purposes.

The ICRW, in contrast, addresses the conservation of whale stocks and the development of the whaling industry. While the ICRW regulates three types of whaling—commercial, aboriginal, and scientific—its primary focus is on commercial whaling.<sup>218</sup> Whaling for scientific research purposes is an exception to the ICRW’s rules<sup>219</sup> that was intended to have a very small role in

<sup>209</sup> CITES, *supra* note 1, at preamble, para. 4 (“Recognizing, in addition, that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade.”).

<sup>210</sup> ICRW, *supra* note 2, at preamble, para. (“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.”).

<sup>211</sup> See *supra* note 198 (describing Article VIII as an “exception” to the core obligations of the ICRW).

<sup>212</sup> ILC, *Fragmentation*, *supra* note 194, at ¶ 56.

<sup>213</sup> See Hugo Grotius, *De Jure belli ac pacis. Libri Tres*, in THE CLASSICS OF INTERNATIONAL LAW, Book II, Chap. XVI, Sect. XXIX, p. 428, (ed. James Brown Scott, 1925) (“Among agreements which are equal . . . that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.”).

<sup>214</sup> ILC, *Fragmentation*, *supra* note 194, at ¶ 60.

<sup>215</sup> *Id.* at ¶ 111 (“one of the difficulties in the *lex specialis* rule follows from the absence of clarity about the distinction between “general” and “special.” For every general rule is particular, too, in the sense that it deals with some particular substance, that is, includes a certain fact-description as a *general* condition of its application.”). Moreover, courts have applied the *lex specialis* rule in different contexts. For example, the ICJ has used it both to set aside entire areas of law, as in *Gabčíkovo-Nagymaros Project*, (Hungary v. Slovakia) 1997 I.C.J. 7, 76, ¶ 132 and to use the general law to provide meaning to the special rule, as in *Oil Platforms*, (Iran v. United States of America), 2003 I.C.J. 161, ¶¶ 40-41.

<sup>216</sup> See ILC, *Fragmentation*, *supra* note 194 at ¶ 112.

<sup>217</sup> CITES, *supra* note 1, at preamble, para. 4.

<sup>218</sup> ICRW, *supra* note 2, at preamble, para. (“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.”).

<sup>219</sup> See *supra* note 198 and accompanying text.

the implementation of the ICRW. The rules relating to scientific research whaling were included to address the killing of perhaps 10 whales annually to identify and describe new species.<sup>220</sup> As such, the ICRW's rules on processing whales subject to whaling under Article VIII are not central to achieving the ICRW's purposes. Article VIII(2) on the processing of whales is not even central to implementing the exception for special permit whaling. As such, under the *lex specialis* principle, CITES prevails and Japan must issue IFS certificates consistent with CITES.

Reaching the conclusion that CITES prevails over the ICRW with respect to introductions for primarily commercial purposes does not suggest that ICRW Article VIII vanishes. The ICJ, in *Legality of the Threat or Use of Nuclear Weapons*,<sup>221</sup> concluded that humanitarian law was *lex specialis* in relation to human rights law for one narrow purpose,<sup>222</sup> but that human rights were not abolished in times of war.<sup>223</sup> Similarly, ICRW special permit whaling under Article VIII remains permissible and the application of Article VIII(2) relating to processing and use of proceeds can be applied when Japan has a reservation to the inclusion of a whale species in CITES Appendix I or if the relevant species is included in Appendix II.

In addition, CITES prevails over the ICRW in case of a conflict by virtue of the principle *lex posterior derogat legi priori* (later law overrides prior law). Rules adopted later in time prevail over older rules because negotiators are presumed to know of the old rules.<sup>224</sup> As with *lex specialis*, *lex posterior* is widely accepted rule of treaty interpretation, finding expression in judicial opinions,<sup>225</sup> the Vienna Convention on the Law of Treaties,<sup>226</sup> and the writings of international scholars.<sup>227</sup> CITES, which entered into force in 1975, is later in time than the ICRW, which entered into force in 1946 and, therefore CITES rules prevail.<sup>228</sup>

Despite the separate purposes of the ICRW and CITES, nothing prevents these treaties from creating synergies between them. For example, CITES Resolution 11.4 (CoP12) recommends that the Parties not to issue CITES permits for trade for primarily commercial purposes for any specimen of a species or stock protected by the IWC's moratorium on commercial whaling.<sup>229</sup>

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<sup>220</sup> Article VIII was drafted by Mr. Birger Bergersen, who became the IWC's first chair. Dr. Lars Walløe, who has written about Bergersen, has said that "It's clear that in his mind he was thinking that the number of whales a country could take for science was less than 10; he didn't intend for hundreds to be killed for this purpose," and that "He had in mind, for instance, the possibility of finding a new animal and thus needing to take some in order to describe them scientifically." Virginia Morell, *Killing Whales for Science?*, 27 SCIENCE 532, 533 (2007), available at <http://science.sciencemag.org/content/316/5824/532.full>.

<sup>221</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240, para. 25.

<sup>222</sup> *Id.* at ¶¶ 24–25 (to determine what constituted the "arbitrary deprivation of life").

<sup>223</sup> *Id.* at ¶ 25.

<sup>224</sup> Alexander Boer, *LEGAL THEORY, SOURCES OF LAW AND THE SEMANTIC WEB* 229 (2009).

<sup>225</sup> European Court of Human Rights, *Slivenko and others v. Latvia* (Decision as to the admissibility of 23 January 2002) ECHR 2002-II, pp. 482-483, ¶¶ 60-61.

<sup>226</sup> Vienna Convention, *supra* note 72, at art. 30.

<sup>227</sup> See, e.g., Grotius, *supra* note 213, at Book II, Ch. XVI, Sect. XXIX, p. 428; Sir Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 98 (2d. ed. 1984).

<sup>228</sup> Questions remain as to whether *lex specialis* or *lex posterior* should be applied first to resolve a conflict. Mavrommatis Palestine Concessions case, P.C.I.J. Series A, No. 2 (1924) p. 31 (applying both rules without establishing a hierarchy). The International Law Commission has stated that whether *lex specialis* or *lex posterior* should be applied decisive "depend[s] on such aspects as the will of the parties, the nature of the instruments and their object and purpose as well as what would be a reasonable way to apply them with minimal disturbance to the operation of the legal system." ILC, *Fragmentation*, *supra* note 194, at ¶ 411. Since CITES is both *lex specialis* with respect to introductions of sei whale products and *lex posterior*, this issue is irrelevant.

<sup>229</sup> CITES, *Conservation of Cetaceans, Trade in Cetacean Specimens and the Relationship with the International Whaling Commission*, Resolution 11.4 (Rev. CoP12), ¶ 3, available at <https://cites.org/sites/default/files/document/E-Res-11-04-R12.pdf>.

Such a provision does not conflict with the rules of the ICRW but rather supports the ICRW's efforts. If the institution and treaty charged with managing whales has decided to prohibit commercial whaling, then other treaties should not undermine the ICRW by allowing trade in those same whales.

#### IV. Remedies

Japan must immediately halt all introductions from the sea of sei whale meat intended to be used for primarily commercial purposes and retract any IFS certificates already issued for sei whale meat. If Japan continues to issue IFS certificates for sei whale meat products, then the Standing Committee has the authority to recommend a suspension of commercial trade with Japan. Resolution Conf. 11.3 (Rev. CoP17), *Compliance and Enforcement*, directs the Standing Committee to play a critical role in any compliance issues raised as Article XIII compliance matters. When the Secretariat is unable to reach a solution with the relevant Party, the Secretariat must bring the matter to the attention of the Standing Committee, "which may pursue the matter in direct contact with the Party concerned with a view to helping to find a solution."<sup>230</sup> In this case, the solution is for Japan to discontinue issuing IFS certificates for sei whale meat that will be sold by ICR. If Japan refuses to take such action, then further action by the Standing Committee is necessary.

CITES Resolution Conf. 14.3, which includes the CITES *Guide to Compliance Procedures*,<sup>231</sup> allows the Standing Committee to take compliance measures against non-complying Parties.<sup>232</sup> The Standing Committee has the authority to "recommend the suspension of commercial or all trade in specimens of one or more CITES-listed species."<sup>233</sup> The *Guide* specifies that a recommendation to suspend trade "may be made in cases where a Party's compliance matter is unresolved and persistent and the Party is showing no intention to achieve compliance."<sup>234</sup> Given the number of years of non-compliance—dating at least to 2002<sup>235</sup>—Japan's non-compliance is "persistent." In addition, Japan's developed country status obviates the need for technical and other assistance to bring it into compliance. Consequently, the Standing Committee should take action to suspend trade with Japan as soon as possible and urge Japan to confiscate and destroy all sei whale meat either offered for sale or in storage awaiting commercial sale.

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<sup>230</sup> CITES, *Compliance and Enforcement*, Resolution Conf. 11.3 (Rev. CoP17), ¶ 4(d), available at <https://cites.org/sites/default/files/document/E-Res-11-03-R17A.pdf>.

<sup>231</sup> CITES, *CITES Compliance Procedures*, Resolution 14.3, at Annex, available at <https://cites.org/sites/default/files/document/E-Res-14-03.pdf>.

<sup>232</sup> *Id.* at ¶ 12.

<sup>233</sup> *Id.* at ¶ 30.

<sup>234</sup> *Id.*

<sup>235</sup> See *supra* Section II.