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LIVE CAPTURE OF CETACEANS FROM THE WILD FOR COMMERCIAL PURPOSES

(Prepared by the Secretariat)

Summary:

In order to aid the implementation of Resolution 11.22, the Secretariat has developed draft best practice guidelines to assist CMS Parties interested in improving existing national legislation or developing new laws relating to the live capture of cetaceans from the wild for commercial purposes.

Implementation of the guidelines will contribute towards meeting target 6 of the Strategic Plan for Migratory Species 2015-2023.

Rev.2 includes a reference to a related Information document and adds draft Decisions (Annex 3).



The [Government of the Principality of Monaco](#) were recognized as Champion for their generous support and commitment towards marine species conservation for the period 2015 – 2017. The development of these guidelines has been funded with the contribution granted by Monaco under the Migratory Species Champion Programme.

 **Gouvernement Princier**
PRINCIPAUTÉ DE MONACO

LIVE CAPTURE OF CETACEANS FROM THE WILD FOR COMMERCIAL PURPOSES

1. At CMS COP11 in 2014, Resolution 11.22 was adopted which amongst other things called upon Parties to develop and/or implement national legislation prohibiting the live capture of cetaceans from the wild for commercial purposes, and also urged Parties to consider taking stricter domestic measures in line with CITES Article XIV with regard to the import and international transit of live cetaceans.
2. In order to assist Parties to implement this Resolution, the Secretariat has developed¹ draft Best Practice Guidelines, which include two sets of recommendations:
 - a. Recommendations for Developing National Legislation for Prohibiting the Live Capture of Cetaceans for Commercial Purposes
 - b. Recommendations for Implementing Stricter Domestic Measures Relating to Import and Transit of Live Cetaceans for Commercial Purposes.

Consultations

3. In April 2015, the Secretariat requested from Parties information on any existing national legislation to prohibit the live capture of cetaceans from the wild for commercial purposes, or any plans of the government to develop such legislation. Furthermore, information was requested on any national legislation that amounts to stricter measures in line with CITES Article XIV² with regard to the import and international transit of live cetaceans, or on any plans to develop such legislation.
4. Forty-five Parties provided information in response to the Secretariat's request. The information was collated and analysed and made available to the 1st Meeting of the Sessional Committee of the Scientific Council (ScC-SC1) as [UNEP/CMS/ScC-SC1/Inf.4](#).
5. This information was then used in developing the attached report and the resulting guidelines. A draft of the guidelines was shared with all Parties for their review in December 2016 and comments received were incorporated as appropriate.
6. ScC-SC1 requested that further analysis of survey responses be performed, including on possible legal inconsistencies, and that the situation in non-Parties be considered. This work was undertaken under the leadership of the CMS partner organization Whale and Dolphin Conservation (WDC), and the result is contained in [UNEP/CMS/COP12/Inf.24](#).

Resolution 11.22

7. In order to adopt the Best Practice Guidelines, new text has been inserted in Resolution 11.22. A draft revised version, incorporating proposed amendments, is attached as Annex 2 of the present document.

¹ making use of funds provided for this purpose by the Principality of Monaco

² CITES *Article XIV*

Effect on Domestic Legislation and International Conventions

1. The provisions of the present Convention shall in no way affect the right of Parties to adopt:

(a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or

(b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appendix I, II or III.

Recommended actions

8. The Conference of the Parties is recommended to:

- a) note the Report contained in Annex 1 of this document (pages 4-30);
- b) adopt the proposed amendments to Resolution 11.22 contained in Annex 2 (pages 31-33), including the annexed Best Practice Guidelines (pages 34-38);
- c) adopt the draft Decisions contained in Annex 3.

BEST PRACTICE GUIDELINES TO AID THE IMPLEMENTATION OF CMS RESOLUTION 11.22 ON THE LIVE CAPTURE OF CETACEANS FROM THE WILD FOR COMMERCIAL PURPOSES

Table of Contents

I.	Scope and Purpose of this Report	5
II.	Prohibitions against Taking, including Live Capture	6
A.	The International Context	6
B.	Implementation by CMS Parties of Provisions Relating to Live Capture	9
C.	Recommendations for Developing National Legislation for Prohibiting the Live Capture of Cetaceans for Commercial Purposes	18
III.	Rules Relating to Import and Transit of Live Cetaceans for Commercial Purposes	22
A.	The International Context	22
B.	Implementation by CMS Parties of Provisions Relating to Imports and Transit of Live Cetaceans for Commercial Purposes	24
C.	Recommendations for Implementing Stricter Domestic Measures Relating to Import and Transit of Live Cetaceans for Commercial Purposes	30

I. Scope and Purpose of this Report

1. Due to a number of conservation concerns relating to live captures of cetaceans, the Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals (CMS)³ adopted [Resolution 11.22, *Live Captures of Cetaceans from the Wild for Commercial Purposes*](#) at the Eleventh Meeting of the Conference of the Parties. Resolution 11.22:
 1. *Invites* Parties that have not already done so to develop and implement national legislation, as appropriate, prohibiting the live capture of cetaceans from the wild for commercial purposes;
 2. *Urges* Parties to consider taking stricter measures in line with CITES Article XIV with regard to the import and international transit of live cetaceans for commercial purposes that have been captured in the wild;
 3. *Requests* the Secretariat and the Scientific Council to seek to enhance cooperation and collaboration with CITES and the IWC on small cetacean species targeted by live captures from the wild;
 4. *Calls* on Parties to support and, where appropriate and possible, contribute to cooperation and collaboration with CITES and IWC on small cetacean species targeted by live captures from the wild;
 5. *Urges* Parties and *encourages* Parties or Signatories to relevant CMS instruments and non-Party States to actively discourage new live captures from the wild for commercial purposes; and
 6. *Encourages* Parties to share data and information on live captures with the IWC and other appropriate fora.
2. Resolution 11.22 asks Parties to take measures stricter than CMS by inviting them to prohibit the live capture of all cetacean species, regardless of whether they are included in CMS Appendix I. The resolution also urges Parties to consider adopting measures stricter than those provided by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁴ with respect to imports and transit under customs control of live cetaceans captured in the wild for commercial purposes.
3. To support the Parties in the implementation of Resolution 11.22, the CMS Secretariat sought assistance in the preparation of best practice guidelines. The guidelines are intended to assist CMS Parties interested in improving existing national legislation or developing new laws that (1) prohibit the live capture of cetaceans from the wild for commercial purposes and (2) regulate the import and international transit of wild-caught live cetaceans for commercial purposes more strictly than CITES. In preparing these guidelines, the consultant was asked to research and evaluate existing national legislation, existing toolkits, guidelines or similar measures available in relevant regional and international fora.
4. To prepare best practice guidelines, this report places Resolution 11.22 in its international context by reviewing the provisions of CMS, CITES, and two CMS “daughter” agreements, the Agreement on the Conservation of Small Cetaceans in the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS)⁵ and the Agreement on the Conservation of Cetaceans

³ Convention on the Conservation of Migratory Species of Wild Animals, signed June 23, 1979, entered into force Nov. 1, 1983, 1651 UNTS 331, available at: <http://www.cms.int/en/convention-text> [hereinafter CMS].

⁴ Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed March 3, 1973, entered into force July 1, 1975, 27 UST 1087; 993 U.N.T.S. 243, available at <https://www.cites.org/eng/disc/text.php>. [hereinafter CITES].

⁵ Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, § 2.1, signed Mar. 17, 1992, entered into force March 29, 1994, 1772 UNTS 30865, available at http://www.ascobans.org/sites/default/files/basic_page_documents/Ch_XXVII_09_CertifiedTrueCopiesAgreement.pdf

of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS).⁶ Because Resolution 11.22 also requests cooperation between CMS and the International Whaling Commission (IWC)⁷, this report briefly introduces the IWC.

5. The report also reviews existing legislation of several CMS Parties with respect to live capture, importation, and transit of cetaceans, in particular those that responded to a questionnaire developed by the Secretariat.⁸ This report does not attempt to comprehensively survey the legislation of all CMS Parties. Instead, it has selected legislation from Parties in different geographic regions. Legislation has also been chosen based on its online accessibility.
6. Lastly, for live capture, importation, and transit, this report provides recommendations that would allow CMS Parties to implement Resolution 11.22. These recommendations are found at paragraphs 61 to 85 for live capture and paragraphs 132 to 138 for import and transit.

II. Prohibitions against Taking, including Live Capture, of Cetaceans

A. The International Context

7. Paragraph 1 of Resolution 11.22 specifically refers to the adoption of measures relating to prohibiting the live capture of cetaceans from the wild for commercial purposes. Consequently, this paragraph addresses CMS, which prohibits the “taking” of specimens of Appendix I species, ACCOBAMS and ASCOBANS, which include provisions for the conservation of cetaceans within their respective convention areas, and the Schedule of the IWC, which prohibits commercial whaling of certain species of whale.

CMS

8. CMS imposes different obligations on its Parties depending on whether a migratory species is included in Appendix I or Appendix II. Whereas Article III establishes explicit obligations for Parties that are Range States⁹ of species listed in Appendix I,¹⁰ Article IV establishes a framework under which Range States of species listed in Appendix II may conclude agreements for the protection of such species.¹¹ A species may be listed in both Appendices when circumstances so require.¹²
9. In addition to several habitat-related obligations,¹³ Parties must prohibit the taking of Appendix I species.¹⁴ CMS defines “taking” broadly to include “taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct.” The only permissible exceptions to the prohibition against taking are for scientific purposes,¹⁵

[hereinafter ASCOBANS].

6 Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Sea, Art. II(1), signed Nov. 24, 1996, entered into force June 1, 2001; 2183 UNTS 38466, available at http://www.accobams.org/images/stories/Accord/anglais_text%20of%20the%20agreement%20english.pdf [hereinafter ACCOBAMS].

7 International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, (entered into force Nov. 10, 1948) [hereinafter ICRW].

8 See Update on Resolution 11.22 on Live Capture of Cetaceans from the Wild for Commercial Purposes, UNEP/CMS/ScC-SC1/Inf.4 (Mar. 24, 2016), available at <http://www.cms.int/en/document/update-resolution-1122-live-capture-cetaceans-wild-commercial-purposes>.

9 CMS, art. I(1)(h) (defining Range States as those States exercising “jurisdiction over any part of the range of [a] migratory species,” including States with flag vessels engaged in taking of migratory species).

10 See, e.g., CMS, art. III(5) (providing in part that “Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species.”).

11 CMS, art. IV(3).

12 CMS, art. IV(2).

13 CMS, art. III(4).

14 CMS, art. III(5); see also CMS, art. I(1)(i) (defining “taking” as “taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct.”).

15 CMS, art. III(5)(a).

for enhancing propagation or survival of the species,¹⁶ to accommodate traditional subsistence uses,¹⁷ and under extraordinary circumstances.¹⁸ Any exception must be “precise as to content,” “limited in space and time,” and “not operate to the disadvantage of the species.”¹⁹

10. Significantly, a CMS Party must ensure that any vessel it flags does not engage in activities that “take” specimens of Appendix I species. CMS defines “Range State” to include any State that exercises jurisdiction over any part of the range of a covered species, including when vessels it flags operate in areas beyond national jurisdiction.²⁰
11. Thus, CMS Parties have an existing duty to prohibit the taking of live cetaceans listed in Appendix I for commercial purposes unless an exception exists. They have included 16 cetacean species or populations of a cetacean species in Appendix I.²¹
12. The Parties have also included 44 cetacean species or populations of cetacean species in Appendix II,²² nine of which are also included in Appendix I.²³ The most well-known cetaceans commonly found in live transport include the orca (*Orcinus orca*) and bottlenose dolphin (*Tursiops* spp.),²⁴ but species such as the Irrawaddy dolphin (*Orcaella brevirostris*) and the beluga (*Delphinapterus leucas*) are also of concern.²⁵
13. For Appendix II cetaceans,²⁶ the Parties do not have an obligation to prohibit taking. Instead, the Range State Parties must endeavour to conclude conservation agreements for the species.²⁷ Yet, Resolution 11.22 invites Parties to prohibit the live capture of these Appendix II cetacean species, as well as those that are not listed at all.
14. Four agreements for Appendix II species have been concluded. Two of these agreements – the Memorandum of Understanding for the Conservation of Cetaceans and Their Habitats in the Pacific Islands Region²⁸ and the Memorandum of Understanding concerning the Conservation of the Manatee and Small Cetaceans of Western Africa and Macaronesia²⁹ – do not prohibit the take of cetaceans. Instead, the action plans developed under each MOU direct the signatories to limit the direct take of cetaceans.³⁰ In contrast, ACCOBAMS prohibits the take of species within its geographic scope and ASCOBANS seeks to limit anthropogenic removals of specified cetaceans to zero.

16 CMS, art. III(5)(b).

17 CMS, art. III(5)(c).

18 CMS, art. III(5)(d). The COP has not yet defined “extraordinary circumstances” and the term is not defined in the text of CMS. See CMS, art. I.

19 CMS, art. III(5)(d).

20 CMS, art. I(1)(h).

21 The species currently listed on Appendix I are *Balaena mysticetus* (bowhead whale), *Balaenoptera borealis* (sei whale), *B. musculus* (blue whale), *B. physalus* (fin whale), *Delphinus delphis* (common dolphin), *Eubalaena australis* (Southern right whale), *E. glacialis* (Northern right whale), *E. japonica* (North Pacific right whale), *Megaptera novaeangliae* (humpback whale), *Orcaella brevirostris* (Irrawaddy dolphin), *Physeter macrocephalus* (sperm whale), *Pontoporia blainvillei* (La Plata dolphin), *Sousa teuszii* (Atlantic humpback dolphin), *Tursiops truncatus ponticus* (Black Sea common bottlenose dolphin), and *Ziphius cavirostris* (Cuvier’s beaked whale). Species | CMS, <http://www.cms.int/en/species>.

22 *Id.*

23 *Id.*

24 Sue J. Fisher & Randall R. Reeves, *The Global Trade in Live Cetaceans: Implications for Conservation*, 8 J. OF INT’L WILDLIFE & POLICY L. 315, 315–16 (2005).

25 *Id.* at 326.

26 Appendix II comprises migratory species with an unfavourable conservation status or which would benefit from international cooperation in their maintenance. CMS, art. IV(1).

27 CMS, art. IV(3). As the Government of Ecuador notes, work should be done regionally, with the guidance of the Scientific Council, to draft agreements, memoranda of understanding, or other legal instruments with the goal of restoring populations of Appendix II and unlisted cetacean species to a favourable conservation status. Government of Ecuador, Note No. 4-3-22/RFA/17.

28 Memorandum of Understanding for the Conservation of Cetaceans and Their Habitats in the Pacific Islands Region, ¶ 4, <http://www.cms.int/pacific-cetaceans/en/documents/agreement-text> [hereinafter Pacific Islands MOU].

29 Memorandum of Understanding concerning the Conservation of the Manatee and Small Cetaceans of Western Africa and Macaronesia, available at <http://www.cms.int/aquatic-mammals>.

30 Pacific Islands MOU, supra note 25, at Annex 2 to the Memorandum of Understanding for the Conservation of Cetaceans and Their Habitats in the Pacific Islands Region, Objective 3; Western African Aquatic Mammals MOU, Action Plan for the Conservation of Small Cetaceans of Western Africa and Macaronesia, Objective 4.2.

ACCOBAMS

15. The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Sea (ACCOBAMS) requires its Parties to “take co-ordinated measures to achieve and maintain a favourable conservation status for cetaceans.”³¹ To accomplish this goal, the Parties “shall prohibit and take all necessary measures to eliminate . . . any deliberate taking of cetaceans.”³²
16. ACCOBAMS itself does not define “taking,” but Resolution 4.19, which sets out model provisions for domestic legislation, defines “taking” as “to hunt, capture or harass a cetacean.”³³ Article 7 of Resolution 4.19 further clarifies that implementing legislation should make it “unlawful to take a cetacean or attempting to engage in such activity.”³⁴
17. Parties must also “require the immediate release of cetaceans caught incidentally in fishing gear in conditions that assure their survival.”³⁵
18. ACCOBAMS allows only narrow exceptions to the prohibition against taking a cetacean. It specifies that a Party may grant an exception only in “emergency situations” or after receiving advice from the ACCOBAMS Scientific Committee.³⁶ In either case, the exception may be granted only for “non-lethal *in situ* research aimed at maintaining a favourable conservation status for cetaceans.”³⁷
19. ACCOBAMS applies specifically to three species of cetaceans in the Black Sea and 18 in the Mediterranean Sea and the contiguous Atlantic Ocean Area. Many of these species, such as the harbour porpoise (*Phocoena phocoena*), Risso’s dolphin (*Grampus griseus*), bottlenose dolphin (*Tursiops truncatus*) and orca (*Orcinus orca*), are included in CMS Appendix II. Others, such as the rough-toothed dolphin (*Steno bredanensis*) and Blainville’s beaked whale (*Mesoplodon densirostris*), are not included in either CMS Appendix. Consequently, ACCOBAMS extends the CMS prohibition against take, including live capture, to additional cetacean species, at least in the ACCOBAMS agreement area for the 23 Parties to ACCOBAMS.³⁸

31 ACCOBAMS, *supra* note 4, at art. II(1).

32 ACCOBAMS, art. II(1).

33 ACCOBAMS, Resolution 4.19, Model Measures on Conservation of Cetaceans, art. 1(5).

34 *Id.* at art. 7.

35 ACCOBAMS, *supra* note 4, at Annex 2, art. 1(b).

36 *Id.* at art. 2(2).

37 *Id.* Resolution 4.19 indicates the intent of the Parties to ensure that these exceptions are very narrowly applied. It states that exceptions should be granted only:

- a) for the purpose of non-lethal *in situ* research aimed at maintaining a favourable conservation status for cetaceans, after having obtained the advice of the ACCOBAMS Scientific Committee and a permit by the [competent national authority] issued under Art. 13;
- b) in emergency situations for cetaceans, when exceptionally unfavourable or endangering conditions occur;
- c) to an action that is taken in a humane manner and is reasonably necessary to relieve or prevent suffering of a cetacean;
- d) to an action that is reasonably necessary to prevent a risk to human life or health;
- e) to an action that occurs as a result of an unavoidable accident, other than an accident caused by negligent or reckless behaviour;
- f) an unintentional action or omission which would be a contrary to Arts. from 5 to 11 above, provided that the author, within seven days after becoming aware of it, notifies the [competent national authority] in writing, by telephone or by use of any other electronic equipment that the action or omission occurred and provides other relevant particulars, including time and place.

ACCOBAMS Resolution 4.19, *supra* note 30, at art. 12.

38 The Parties are: Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, France, Georgia, Greece, Italy, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Portugal, Romania, Slovenia, Spain, the Syrian Arab Republic, Tunisia, and Ukraine.

ASCOBANS

20. Through the Agreement on the Conservation of Small Cetaceans in the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS), the 10 Parties “cooperate closely in order to achieve and maintain a favourable conservation status for small cetaceans.”³⁹ ASCOBANS defines small cetaceans to mean any species, subspecies, or population of toothed whale (*Odontoceti*) except *Physeter macrocephalus*. ASCOBANS does not prohibit the taking of cetaceans, but the Parties have adopted a resolution with the aim of minimizing anthropogenic removals (i.e., mortality), with an ultimate objective to reduce mortality to zero.⁴⁰ In addition, the Agreement’s Conservation and Management Plan provides that the Parties “shall endeavour” to establish legislation to prohibit the intentional taking and killing of small cetaceans and impose an obligation to release immediately small cetaceans caught alive and in good health.⁴¹
21. ASCOBANS is limited in scope to its “Area of the Agreement,” which is defined as “the marine environment of the Baltic and North Seas and contiguous area of the North East Atlantic,” as delimited by specific coordinates and landmarks.⁴² While the area is relatively small, the Parties have agreed to establish legislation to prohibit takes of all small cetaceans in that area, regardless of whether the species are included in Appendix I or II of CMS.

IWC

22. The International Whaling Commission (IWC) regulates whaling pursuant to the ICRW. The IWC has maintained a moratorium on commercial whaling of “great whales” since the 1985-1986 whaling season.⁴³ IWC members have not agreed on which cetaceans the IWC has competence to manage. IWC members have agreed that the IWC has competence to manage “great whales,” such as humpback whales and sperm whales, but have not agreed a position on small cetaceans, such as bottlenose dolphins and other dolphins subject to incidental and directed take, such as live capture for aquaria.⁴⁴ Nonetheless, the IWC has agreed that the IWC Scientific Committee may evaluate research relating to small cetaceans and make recommendations for their conservation and management.⁴⁵ The IWC has adopted resolutions recommending that members take actions relating to small cetaceans. For example, IWC resolutions have invited Greenland to take steps to ensure the sustainability of its catches of belugas and narwhals⁴⁶ and urged Mexico to do more to protect the endangered vaquita.⁴⁷

B. Implementation by CMS Parties of Provisions Relating to Live Capture

23. CMS Resolution 11.22 invites Parties that have not already done so to develop and implement national legislation, as appropriate, prohibiting the live capture of cetaceans from the wild for commercial purposes. As described above, this provision reinforces the prohibition against “take” of Appendix I specimens found in Article III of CMS and, for Parties to ACCOBAMS, the extension of the take prohibition to those CMS Appendix II cetaceans covered by ACCOBAMS. However, it also invites CMS Parties to prohibit the

39 ASCOBANS, *supra* note 3, at art. 2.1.

40 ASCOBANS Resolution 8.5, *Monitoring and Mitigation of Small Cetacean Bycatch*.

41 ASCOBANS, Conservation and Management Plan, at Annex, art. 4.

42 ASCOBANS, *supra* note 3, art. 1.2(b).

43 International Convention for the Regulation of Whaling, Schedule, ¶ 10(e). The Schedule is an integral part of the ICRW. ICRW, *supra* note 39, at art. I(1).

44 See, e.g., IWC, *Resolution on Small Cetaceans*, in *41st Report of the International Whaling Commission* 48 (1991) (recognizing the “differences in views between member states on the regulatory competence of the IWC with regard to small cetaceans”).

45 *Id.* (requesting the IWC Scientific Committee to “draw [] together all available relevant information on the present status of stocks of small cetaceans which are subjected to significant directed and incidental takes, on the impact of those takes on the stocks, and providing an assessment of the present threats to the stocks concerned.”).

46 IWC, IWC Resolution 1998-9, *Resolution on Directed Takes of White Whales*, available at <https://archive.iwc.int/pages/download.php?ref=2073&size=&ext=pdf&k=&alternative=-1&usage=-1&usagecomment=>.

47 IWC, *Resolution on the Critically Endangered Vaquita*, IWC/66/20 Rev (2016), available at <https://archive.iwc.int/pages/download.php?ref=6315&size=&ext=pdf&k=&alternative=-1&usage=-1&usagecomment=>.

live capture of all cetaceans regardless of whether they are included in Appendix I or II of the CMS appendices.

24. CMS Parties have adopted a variety of approaches to implementing the take prohibition for cetaceans included in CMS Appendix I. These approaches differ based on the species subject to the take prohibition, the exceptions that apply to the take prohibition, and the geographic area in which the take prohibition applies.

Argentina

25. Argentina, in Law No. 25577,⁴⁸ prohibits the hunting and capture of listed cetacean species⁴⁹ throughout the territory, interior waters, territorial waters, and exclusive economic zone of Argentina.⁵⁰ The law applies this prohibition to the use of nets, forced beaching, and other fishing gear.⁵¹ Thus, it is unclear if this provision constitutes an absolute prohibition on the taking of listed species or only a prohibition against the capture of cetaceans by certain methods.
26. Although orcas are not expressly covered by Law No. 25577,⁵² Argentina's Law No. 25052 prohibits the hunting or capture of specimens of *Orcinus orca* by means of nets or forced beaching.⁵³ Because Law No. 25052 omits reference to "other fishing gear," as in Law No. 25577, it appears that Law No. 25577 prohibits the use of specific fishing gear to catch listed cetaceans rather than completely banning their capture. Although not defined in either Law No. 25577 or Law No. 25052, it is possible that the term "nets" in Law No. 25577 includes all types of fishing gear.⁵⁴
27. A regulation promulgated by the Ministry of the Environment and Sustainable Development⁵⁵ also prohibits throughout the national jurisdiction of the Argentine Republic the hunting, capture, trade, and transit of specimens of species listed in Annex I of the resolution.⁵⁶ Annex I lists all of the species of cetacean listed in Law No. 25577, with the exception of Hector's beaked whale.⁵⁷

Australia

28. Australia's Environment Protection and Biodiversity Conservation Act (EPBC Act),⁵⁸ among many other things, establishes the Australian Whale Sanctuary.⁵⁹ The Australian Whale Sanctuary includes "all Commonwealth waters from the three-mile state waters limit out to the boundary of the Exclusive Economic Zone."⁶⁰ It also includes the territorial waters and exclusive economic zones (EEZs) of Australia's island territories, such as Christmas, Cocos, Norfolk, Heard, and Macdonald Islands.⁶¹ Inside three nautical miles

48 Law No. 25577, May 6, 2002, B.O. 29893 (Arg.) available at <http://servicios.infoleg.gov.ar/infolegInternet/anexos/70000-74999/74097/norma.htm> [hereinafter Law No. 25577].

49 Law No. 25577, at Annex I (listing the southern right whale, pygmy right whale, minke whale, sei whale, blue whale, fin whale, humpback whale, La Plata dolphin, Burmeister's porpoise, spectacled porpoise, dusky dolphin, hourglass dolphin, Peale's dolphin, Risso's dolphin, common bottlenose dolphin, pantropical spotted dolphin, striped dolphin, short-beaked common dolphin, southern right whale dolphin, Commerson's dolphin, pygmy killer whale, false killer whale, long-finned pilot whale, Shepherd's beaked whale, giant beaked whale, strap-toothed whale, Hector's beaked whale, Gray's beaked whale, Cuvier's beaked whale, southern bottlenose whale, sperm whale, and the pygmy sperm whale as protected species).

50 Law No. 25577, at ¶ 1.

51 Law No. 25577, at ¶ 1.

52 Law No. 25577, at ¶ 2 (noting that orcas fall under Law No. 25052, Dec. 14, 1998, B.O. 29042 [hereinafter Law No. 25052]).

53 Law No. 25052, *supra* note 50, at ¶ 1.

54 Personal communication with Vanesa Tossenberger (Nov. 21, 2016). Ms. Tossenberger has represented Argentina in various international fora, including CITES meetings.

55 Resolution No. 351/95, Sep. 18, 1995, B.O. 16117 (Arg.) available at http://www2.medioambiente.gov.ar/mlegal/icticolos/res351_95.htm [hereinafter Resolution No. 351/95].

56 Resolution No. 351/95, at art. 1, annex I.

57 Resolution No. 351/95, at annex I. Oddly, though, annex I identifies the common name of *Mesoplodon grayi* (Gray's beaked whale) as Hector's Beaked Whale.

58 Environment Protection and Biodiversity Conservation Act 1999 (Aus.), § 3(1) [hereinafter EPBC Act]. <https://www.legislation.gov.au/Details/C2016C00777>.

59 EPBC Act, § 224.

60 EPBC Act, § 225.

61 *Id.* See also Australian Whale Sanctuary, <https://www.environment.gov.au/marine/marine-species/cetaceans/australian->

from the coastline, which are considered state or territory waters, the Government of that State or territory is responsible for providing protections for cetaceans similar to those required in the Australian Whale Sanctuary.⁶²

29. In addition, the EPBC Act applies, with respect to whales and other cetaceans, beyond Australia's borders and jurisdictional waters. The EPBC Act extends to "acts, omissions, matters and things" that occur outside of Australian jurisdiction, including in foreign countries, if the violation was performed by an Australian citizen, anyone with an Australian visa who is domiciled in Australia, Australian corporations, Commonwealth agencies, or Australian aircraft and vessels or their crew.⁶³ For the purposes of this part of the EPBC Act, a vessel is regulated if the vessel is declared to be an Australian boat⁶⁴ under the *Fisheries Management Act 1991*, including vessels registered (flagged) in Australia.⁶⁵ Thus, the provisions of the EPBC Act, as they apply to cetaceans, apply on the high seas and elsewhere.
30. Within and beyond the Whale Sanctuary, Australia prohibits any action that results in the death or injury of a cetacean.⁶⁶ A person also commits an offense if he possesses⁶⁷ or "takes, trades, keeps, moves or interferes with a cetacean."⁶⁸ The EPBC Act defines "interfere" to mean harass, chase, herd, tag, mark or brand cetaceans.⁶⁹ In other words, these provisions of the EPBC Act clearly prohibit the live capture of cetaceans.
31. The EPBC Act allows the Minister to issue permits for certain activities otherwise prohibited,⁷⁰ provided that certain conditions are met.⁷¹ Those conditions include a requirement that the action not adversely affect the conservation status of a species, the taking is not inconsistent with a recovery plan, and the holder of the permit will take all reasonable steps to minimize the interference with cetaceans.⁷² These conditions make it very difficult for the Minister to approve the live capture of a cetacean for a commercial purpose. In addition, the Minister "must not grant a permit authorizing its holder to kill a cetacean or to take a cetacean for live display."⁷³ Thus, Australia prohibits the primary reason for live captures of cetaceans.

Costa Rica

32. Costa Rica's Fishing and Aquaculture Law prohibits the hunting or capture of cetaceans, with exceptions allowed if provided in international treaties and agreements with Costa Rica.⁷⁴ The language of the exceptions clause leaves unclear the precise scope of the prohibition on capture of cetaceans under the Fishing and Aquaculture Law.
33. An Executive Decree—Decree No. 32495 on "Regulations for the Operation of Activities relating to Cetaceans in Costa Rica"—clarifies the situation. The Decree prohibits catching and killing, keeping captive, touching or trapping, or feeding or attempting to feed, any

[whale-sanctuary](#).

62 EPBC Act, *supra* note 56, at §§ 225-227.

63 EPBC Act, § 224(1).

64 EPBC Act, § 224(3).

65 Fisheries Management Act 1991 (Aus.), § 4(2).

66 EPBC Act, *supra* note 56, at § 229.

67 EPBC Act, § 230.

68 EPBC Act, § 229B(1).

69 EPBC Act, § 229B(4). Treating whales—to "divide or cut up, or extract any product from, the cetacean."—is also unlawful and punishable by imprisonment for up to 2 years, a fine up to 1,000 penalty units, or both. EPBC Act, § 229D.

70 EPBC Act, § 238.

71 EPBC Act, § 238(3).

72 EPBC Act, § 238(3).

73 EPBC Act, § 238(4) (emphasis added).

74 "The maritime hunting, the capture of cetaceans, pinnipeds and chelonians is forbidden, as well as the utilization of their spawning grounds, save for what is established on duly ratified international treaties and agreements by Costa Rica." Fishing and Aquaculture Law 8436, at art. 39, English translation available at <http://www.visitcostarica.com/ict/paginas/LEYES/pdf/Ley8436eng.pdf>.

marine mammal,⁷⁵ with exceptions provided for euthanasia or rehabilitation.⁷⁶ The Decree does not describe the geographical scope of the prohibitions. The Decree is based, in part, on the Fishing and Aquaculture Law, which defines its jurisdictional scope as the continental waters, the territorial waters, and the Exclusive Economic Zone (EEZ) and adjacent areas to the EEZ where Costa Rica may have national jurisdiction.⁷⁷ Thus, Decree No. 32495 most likely applies throughout Costa Rica's jurisdictional waters. This author was not able to determine whether the Decree applies to Costa Rican citizens or Costa Rican flagged vessels in areas beyond Costa Rica's jurisdictional waters.

European Union

34. The Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (the "Habitats Directive")⁷⁸ forms the cornerstone of European Union (EU) conservation policy. It places species and habitats "of Community interest" into different Annexes and imposes obligations on Member States regarding the conservation of these species and habitats. All species of cetacea are included in Annex IV of the Habitats Directive because they are "animal and plant species of community interest in need of strict protection."⁷⁹
35. Article 12(1) of the Habitats Directive requires EU Member States to take "the requisite measures" to protect species included in Annex IV. These measures include prohibiting:
 - (a) all forms of deliberate capture or killing of specimens of these species in the wild;
 - (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
 - (c) deliberate destruction or taking of eggs from the wild;
 - (d) deterioration or destruction of breeding sites or resting places.⁸⁰
36. The Court of Justice of the European Union has interpreted these obligations broadly, stating that "[a] failure to fulfil obligations may arise due to the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law."⁸¹ Thus, administrative and institutional practices, in addition to national law, must be consistent with the Habitats Directive.
37. Article 16 of the Habitats Directive allows exceptions—derogations in the language of the Habitats Directive—from the requirements of Article 12. The EU Member State seeking to

75 [I]t is strictly forbidden to:

1. Catch and kill marine mammals.
2. Keep cetaceans and other marine mammals captive.
3. Touch or trap any cetacean or other marine mammal.
4. Feed or attempt to feed any marine mammal that is in the water or on land.

Decree No. 32495, art. 14 (2005), available at <http://www.mag.go.cr/legislacion/2005/de-32495.pdf>. English translation available at Whale and Dolphin Conservation Society, *Marine Mammals: Guidelines and Criteria Associated with Captivity*, 6 (Sept. 2006), available at http://www.car-spaw-rac.org/IMG/pdf/OVERVIEW_CAPTIVITY_MARINE_MAMMALS_WCR.pdf.

76 [C]etaceans may be killed, caught, kept captive, touched, trapped or fed, and attempts may be made to feed them, in the following cases:

1. Euthanasia due to irreversible illness, injury or infection causing the animal great suffering and death, verified by a qualified vet in the presence of the relevant authority . . .
2. Animals that have been stranded, entangled or hurt by human or natural causes and that require rehabilitation so that they can be released subsequently. A diagnosis must be sought from specialist biologists and vets and a permit must be obtained . . . , provided that the period of captivity does not exceed one year.

Decree No. 32495, art. 15; English translation available at *Marine Mammals: Guidelines and Criteria Associated with Captivity*, *supra* note 73, at 6.

77 "The Costa Rican State will exert dominion and exclusive jurisdiction over the marine resources and natural richness existing in the continental waters, the territorial waters, the exclusive economic zone and adjacent areas to the latter, where there exist or may exist national jurisdiction, according to the national laws and international treaties." Fishing and Aquaculture Law 8436, *supra* note 72, at art. 6.

78 European Union, Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (1992), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31992L0043> [hereinafter Habitats Directive].

79 Habitats Directive, at Annex IV.

80 Habitats Directive, at art. 12.

81 Case C-342/05, *Commission v. Finland*, 2007 E.C.R. I-04713, ¶ 22, available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-342/05>.

justify its derogation must prove that the following three specific conditions are met for each derogation *before* a derogation may be granted:⁸² (1) the reason for the derogation falls within the scope of one of the reasons listed in Article 16(1), (2) no satisfactory alternative to the derogation exists, and (3) the derogation is not detrimental to the maintenance of populations at a favourable conservation status.⁸³

38. The live capture of cetaceans for commercial purposes could be possible under certain circumstances. In particular, Article 16(1) allows derogations for the following purposes:

- (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- (d) for the purpose of research and education, of repopulating and reintroducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;
- (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.⁸⁴

39. These exceptions have typically been interpreted narrowly. For example, with respect to the “public health and safety derogation,” the European Commission has stated that “the ‘overriding’ character of this public interest must be underlined” and that consequently a “careful balancing of interests is needed.”⁸⁵ In this context, the Commission stated that “it . . . seems reasonable to assume that a public interest is in most cases likely to be overriding only if it is a long-term interest: short-term interests that would only yield short-term benefits would not be sufficient to outweigh the long-term interest of species conservation.”⁸⁶

40. Concerning the “limited numbers” derogation of subparagraph (e), the Commission, relying on the conclusions of the Court of Justice of the European Union in cases interpreting a similar provision of the Birds Directive,⁸⁷ has stated that the derogation “should not be granted where there is a risk that the derogation might have a significant negative impact on the population” or fails to maintain the population at a satisfactory level.⁸⁸ In other words, the derogation must be “compared to the population level of a species and is directly linked with its conservation status.”⁸⁹

41. Questions remain about the geographic scope of the Habitats Directive. The Habitats Directive itself does not expressly limit its geographic scope of application. However, Article 2 states that the aim of the Habitats Directive is to conserve habitats and species “in the European territory of the Member States.” If the Habitats Directive is so limited, then Europeans or European-flagged vessels, absent other legislation, could capture cetaceans on the high seas.

82 Commission v. Finland, *supra* note 79, at ¶¶ 25, 28.

83 Habitats Directive, *supra* note 76, at art. 16(1). See also EUROPEAN COMMISSION, GUIDANCE DOCUMENT ON THE STRICT PROTECTION OF ANIMAL SPECIES OF COMMUNITY INTEREST UNDER THE HABITATS DIRECTIVE 92/43/EEC, at 54, available at http://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance_en.pdf.

84 Habitats Directive, *supra* note 76, at art. 16(1)(a)–(e).

85 GUIDANCE DOCUMENT, *supra* note 81, at 56.

86 GUIDANCE DOCUMENT, *supra* note 81, at 56; see also EUROPEAN COMMISSION, GUIDANCE DOCUMENT ON ARTICLE 6(4) OF THE ‘HABITATS DIRECTIVE’ 92/43/EEC, at 8 (2007), available at

http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf. The Commission has noted that only *public* interests can be balanced against the conservation aims of the Habitats Directive; activities that are entirely in the interest of companies and individuals are not covered. GUIDANCE DOCUMENT, *supra* note 81, at 56. However, purely private interests do not appear to be involved in the Faroese grinds.

87 Directive 79/409/EEC of the European Parliament and of the Council of 30 November 2009 on the Conservation of Wild Birds, OJ L 20, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0147>.

88 Case C-182/02, Ligue pour la Protection des Oiseaux and Others v Premier Ministre and Ministre de l’Aménagement du Territoire et de l’Environnement, 2003 E.C.R. I-12105, ¶ 17, available at

<http://curia.europa.eu/juris/liste.jsf?language=en&num=c-182/02>; Commission v. Finland, *supra* note 78, at ¶¶ 47–59.

89 GUIDANCE DOCUMENT, *supra* note 81, at 56 (relying on Case C-252/85, Commission v. France, 1988 E.C.R. I-2243).

42. However, since not all cetaceans are found in European waters but all cetaceans are included in Annex IV, an argument can be made that the obligations of the Habitats Directive, including the prohibitions applicable to Annex IV-listed species, extend to the high seas.⁹⁰ An argument can also be made that the prohibitions of the Habitats Directive should apply to citizens of EU Member States on the high seas in order to give effect to the purposes of the directive.⁹¹

Israel

43. Israel's Wildlife Protection Law prohibits, without a permit, "hunting" of "protected wildlife," defined as "wildlife that is neither game, pest nor domesticated wildlife."⁹² That definition "protected wildlife" apparently includes CITES and CMS-listed cetaceans, regardless of whether they are included in Appendix I or II of CMS. The Minister of Agriculture may issue a permit for hunting done for "scientific purposes, for reproduction, to maintain the balance in nature."⁹³ Israel's CMS national report indicates that no exceptions have been issued for specimens of CMS Appendix I species.⁹⁴
44. The Nature Reserves, National Parks, and National Monuments Law of 1998⁹⁵ also prohibits "harming" of "protected natural assets,"⁹⁶ which include all cetaceans. "Harm" is defined to include removal, destruction, and injury.⁹⁷
45. These two laws give the Israel Nature and Parks Authority (INPA) full powers to prohibit any harm to cetaceans, including disturbance, harming, live capture or trade, without a permit. INPA trade policy determines under what circumstances permits may be issued, and no live capture of cetaceans is permitted or has ever been permitted in Israel.

Kenya

46. Kenya's Wildlife and Conservation Management Act (WCMA)⁹⁸ establishes a broad prohibition against the taking of wildlife. The WCMA specifically provides that "no person shall . . . take any such species" within Kenya, in its territorial waters and upon the high seas.⁹⁹ The reference to "any such species" refers to "wildlife species,"¹⁰⁰ a phrase that is broad enough to include cetacean species, regardless of whether they are included in the CMS Appendices.

90 See Cornelis Kramer and Others, Joined Cases 3/76, 4/76, and 6/76, 1976 E.C.R. 1279, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CJ0003> (concluding that the EU could take measures to conserve biological resources of the high seas. The Court stated that it follows "from the very nature of things that the rule-making authority of the Community *ratione materiae* also extends—in so far as the Member States have similar authority under public international law—to fishing on the high seas." *Id.* at 1309.

91 See Case C-424/13, Zuchtvieh-Export GmbH v. Stadt Kempten, not yet published, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=163872&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=96412> (concluding that the structure of Regulation No. 1/2005 indicated that the provisions of the regulation required compliance with the transport rules for animal welfare to those parts of the journey taking place outside the territories of EU Member States.).

92 Wildlife Protection Law, 5715-1955, §1 (as amended) (Isr.). An unofficial English translation is available at <http://www.sviva.gov.il/English/Legislation/Documents/Wildlife%20Protection%20Laws%20and%20Regulations/WildlifeProtectionLaw1955.pdf>.

93 *Id.* at §3.

94 Israel, National Report, UNEP/CMS/COP11/Inf.20.3.IL, § 2.1, available at http://www.cms.int/sites/default/files/document/14-06-01_Israel_UNEP-CMS-COP11-Inf.20.3.IL_.pdf.

95 National Parks, Nature Reserves, National Sites and Memorial Sites Law, 5758-1998, §1 (Isr.), unofficial English translation available at <http://www.sviva.gov.il/English/Legislation/Documents/National%20Parks,%20Nature%20Reserves,%20National%20Sites,%20Memorial%20Sites%20Laws%20and%20Regulations/NationalParksNatureReservesNationalSitesAndMemorialSitesLaw1998.pdf>.

96 *Id.* at § 33(c). The unofficial English translation refers to "damage," but the CMS focal point, Simon Nemptov, interprets the prohibition as referring to "harm." Personal communication with Simon Nemptov, Wildlife Ecologist and Coordinator for International Treaties, Israel Nature and Parks Authority (Nov. 22, 2016).

97 National Parks, Nature Reserves, National Sites and Memorial Sites Law, *supra* note 93, at § 33(e).

98 The Wildlife Conservation and Management Act, No. 47 (2013) KENYA GAZETTE SUPPLEMENT NO. 181 [*hereinafter* WCMA] at <http://faolex.fao.org/docs/pdf/ken134375.pdf>.

99 WCMA, art. 99(2)(b)-(d).

100 WCMA, art. 99(1).

47. “Take,” however, is not defined. Thus, it is not clear whether “take” includes live capture or attempts to capture a live cetacean.
48. In addition, the prohibition applies to “territorial waters” and the “high seas.” The WCMA does not define “territorial waters,” but Kenya’s Maritime Zones Act defines that term as extending 12 nautical miles from Kenya’s baseline.¹⁰¹ The Maritime Zones Act defines the term “maritime zones” to include Kenya’s exclusive economic zone,¹⁰² but that term is not used in the WCMA. While it is not clear that the definitions in the Maritime Zones Act are controlling on any interpretation of the WCMA, it would appear that Kenya’s prohibition on “take” excludes take within Kenya’s exclusive economic zone.
49. In addition, although the WCMA embodies CMS by extending its prohibitions to the high seas, the WCMA does not define “person.” Consequently, the WCMA does not make clear whether the prohibition against takes refers to individuals only or to vessels flagged by Kenya.
50. The WCMA does allow exceptions to the “take” prohibition,¹⁰³ including for live capture.¹⁰⁴ The conditions for allowing the take of an animal for live capture must be consistent with the provisions of Schedule Eight,¹⁰⁵ and those provisions do not appear to relate to marine species; an exception may be granted, for example, for live animals in game farming operations.¹⁰⁶ Thus, it could be argued that live capture of cetaceans is prohibited because they would not derive from a game farming operation.
51. The WCMA, in paragraph 48, also prohibits any person from “carry[ing] out any activity involving a specimen of a listed species” without a permit.¹⁰⁷ Again, the WCMA creates some problems of interpretation. The phrase “listed species” is not defined, but paragraph 47 refers to wildlife set out in the Sixth Schedule that is declared to be “critically endangered, vulnerable, nearly threatened and protected.”¹⁰⁸ The Sixth Schedule also includes species that are “endangered” and “threatened.”¹⁰⁹ The WCMA defines “endangered” and “threatened” species as those included in the Fourth Schedule (not the Sixth) as well as any species included in the CITES Appendices.¹¹⁰ The Fourth Schedule, however, refers to provisions for public consultation. Presumably, the definitions of “endangered” and “threatened” should refer to the Sixth Schedule. Even if that is true, it is not clear whether “endangered” and “threatened” species are to be considered “listed species” under paragraphs 47 and 48.
52. Assuming that all CITES-listed species are included in the Sixth Schedule, then Kenya may issue permits for activities relating to these species. The WCMA does not specify what the criteria are; presumably they are the same ones as referred to above with respect to live capture.¹¹¹
53. If all CITES-listed species are not included in the Sixth Schedule, then the prohibitions relating to species included in that schedule will be of little use for most cetaceans covered by CMS because only four species are included in the Sixth Schedule (the blue whale and sei whale are listed as “endangered”¹¹² and the humpback whale and sperm whale are listed as “vulnerable.”¹¹³).

101 Maritime Zones Act, No.6 of 1989, § 3(1).

102 Maritime Zones Act, § 2.

103 WCMA, *supra* note 96, at art. 79.

104 WCMA, art. 80(3)(c).

105 WCMA, art. 80(3)(c).

106 WCMA, Eighth Schedule, ¶ 4.

107 WCMA, art. 48(1).

108 WCMA, art. 47(1).

109 WCMA, Sixth Schedule, ¶ 4.

110 WCMA, art. 3.

111 See notes 101–104, and accompanying text.

112 WCMA, Sixth Schedule (listing *Balaenoptera musculus* and *Balaenoptera borealis* as endangered).

113 WCMA, Sixth Schedule (listing *Megaptera novaeangliae* and *Physeter macrocephalus* as vulnerable). Additionally, Kenya’s 2014 National Report to the CMS Secretariat noted that taking of all species of aquatic mammal listed in Appendix I of CMS has been prohibited by Kenya’s national implementing legislation, which that report identifies as the WCMA.

Mauritius

54. Mauritius prohibits the live capture of cetaceans, at least within its jurisdictional waters, although exceptions could permit live capture. The Mauritius Fisheries and Marine Resources Act 2007 prohibits, among other things, any person from fishing for any marine mammal.¹¹⁴ The Act defines “fishing” broadly to include catching, collecting, killing, or destroying.¹¹⁵ The Act allows the Permanent Secretary to authorize, in writing, and subject to such terms and conditions as he may impose, the catching of any “fish . . . for scientific, reproductive, or any other purpose beneficial to the community.”¹¹⁶ Because “fish” is defined as “any aquatic organism, other than a bird,”¹¹⁷ the exception applies to marine mammals.¹¹⁸ The Permanent Secretary could, in theory, determine that the live capture of a cetacean for an aquarium is beneficial to the public.
55. Whether this prohibition applies to Mauritians and Mauritian-flagged vessels beyond the jurisdictional waters of Mauritius is unclear. The prohibition does not include any geographical limitation. Because other prohibitions of this Act are limited to the waters of Mauritius (see next paragraph), one could argue that this prohibition applies beyond the national jurisdiction of Mauritius. The prohibition applies to any “person,” but the Act does not define “person.”
56. The Act further provides that no person may “land or cause any person to land, sell or have in his possession in Mauritius or in the maritime zones . . . any marine mammal.”¹¹⁹ The Permanent Secretary may authorize an exception to this prohibition for scientific and conservation purposes.¹²⁰ The Act does not define the term “maritime zones,” but this term is defined in detail in the Maritime Zones Act 2005 and consists of all marine waters within the jurisdiction of Mauritius.¹²¹

Philippines

57. Philippines Fisheries Administrative Order No. 185, as amended by Administrative Order 185-1, makes it “unlawful to take or catch dolphins, whales and porpoises in Philippine waters or to sell, purchase, possess, transport or export the same whether dead or alive, in any state or form whether raw or processed.”¹²² “Take” is broadly defined to mean “taking or catching” where “take or catch” includes “the killing, capturing, trapping, snaring and netting” of cetaceans.¹²³ In addition, wounding or killing cetaceans during the course of fishing is unlawful, and any cetacean caught in fishing gear must be immediately

114 “Subject to subsection (2), no person shall fish or cause any person to fish . . . any marine turtle, marine turtle egg or any marine mammal;” “[s]ubject to subsection (3), no person shall land or cause any person to land, sell or have in his possession in Mauritius or in the maritime zones . . . any marine mammal.” Mauritius Fisheries and Marine Resources Act 2007, §§ 17(1)(d), 22(2)(a) (Dec. 26, 2007); available at

https://www.ofdc.org.tw/components/Editor/webs/files/Mauritius_Fisheries_and_Marine_Resources_Act_2007.pdf [hereinafter Fisheries and Marine Resources Act]. Many of the provisions use the term “fish,” which means “any aquatic organism, other than a bird, and includes any shell or coral.” Fisheries and Marine Resources Act, § 2.

115 Fisheries and Marine Resources Act, § 16(1).

116 Fisheries and Marine Resources Act, § 16(2).

117 Fisheries and Marine Resources Act, § 2.

118 Regulations that implement the Fisheries and Marine Resources Act exclude marine mammals from the definition of “fish.” See Fisheries and Marine Resources (Import of Fish and Fish Products) Regulations 2012, available at

[http://fisheries.govmu.org/English/Documents/fisheries/Legislations/The%20Fisheries%20and%20Marine%20Resources%20\(Import%20of%20Fish%20and%20Fish%20Products\)%20Regulations%202012.pdf](http://fisheries.govmu.org/English/Documents/fisheries/Legislations/The%20Fisheries%20and%20Marine%20Resources%20(Import%20of%20Fish%20and%20Fish%20Products)%20Regulations%202012.pdf). However, these regulations appear limited to imports of fish products and not other aspects of the Fisheries and Marine Resources Act. See Fisheries and Marine Resources (Import of Fish and Fish Products) Regulations 2012, § 3(1) (stating “These regulations shall apply to the import of any fish or fish product into Mauritius.”).

119 Fisheries and Marine Resources Act, *supra* note 112, at § 17(1)(d).

120 Fisheries and Marine Resources Act, § 17(3).

121 “‘Maritime zones’ means the archipelagic waters; contiguous zone; continental shelf; EEZ; historic waters; internal waters; maritime cultural zone; and territorial sea.” The Maritime Zones Act 2005, § 1 (Feb. 28, 2005); available at <http://www.lexadin.nl/wlg/legis/nofr/oeur/arch/mut/MARITIMEZONESACT2005.doc>.

122 Philippines Bureau of Fisheries, Administrative Order No. 185, Series of 1992, § 2, available at <http://extwprlegs1.fao.org/docs/texts/phi67907.doc> [hereinafter Administrative Order 185]; Philippines Bureau of Fisheries, Administrative Order No. 185-1, Series of 1997, § 2, available at

<http://savephilippineseas.com/lexmfrfy/pages/Legislation/FAO/fao185-1.pdf> [hereinafter Administrative Order 185-1].

123 Administrative Order 185, § 1. It should be noted that the definition of “take or catch” in Section 1 does not mention whales or porpoises. Administrative Order 185-1 does not amend this, but rather includes whales and porpoises in Section 2.

released unharmed.¹²⁴ Dead, beached cetaceans must be surrendered to the Department of Agriculture.¹²⁵ Administrative Order 185 further specifies that “dolphin” includes a “small toothed cetacean of the family *Delphinidae*”, “whale” includes “a medium or large toothed or baleen cetacean of the family *Physeteridae*, *Kogiidae*, *Ziphiidae*, *Delphinidae*, and *Balaenopteridae*,” and “porpoise” means “a small toothed cetacean of the family *Phocoenidae*.”¹²⁶ In other words, live capture of all cetaceans, whether or not in the CMS Appendices, is prohibited.¹²⁷

58. This Administrative Order applies to “Philippine waters.”¹²⁸ Although the administrative order does not define that phrase, the Philippines Fisheries Code defines “Philippine waters” to include bodies of water within the Philippines and any waters the Philippines has jurisdiction over, including the exclusive economic zone.¹²⁹ The Philippines Administrative Order does not specify whether this definition is controlling for purposes of “take and catch” of cetaceans. If it is, then the scope of Administrative Order 185-1 does not implement Resolution 11.22 to its fullest extent because it does not apply to vessels flagged by the Philippines when operating on the high seas.
59. The Philippines allows only a small number of exceptions to the prohibition against “taking and catching” whales, dolphins, and porpoises. The Secretary of Agriculture, upon the recommendation of the Director of the Bureau of Fisheries and Aquatic Resources (BFAR), may issue a special permit to any government or private agency “engaged in purely scientific research on dolphins, whales, and porpoises, *including those to be used for exhibition and show purposes* subject such terms and conditions as the said Secretary may deem wise to impose.”¹³⁰ This exception would appear to be inconsistent with the main thrust of Resolution 11.22, which has an implicit, if not explicit, goal to prevent the live capture of cetaceans for aquaria.

Sri Lanka

60. Sri Lanka’s Flora and Fauna Protection Ordinance (FFPO)¹³¹ prohibits any person from killing, wounding, injuring, or taking any mammal, using any boat, snare, net, spear, trap, gun, rod, line or hook with any accessory or bait, or explosives of any description or other instrument for the purpose of killing, wounding, injuring or taking any such mammal.¹³² Moreover, the FFPO prohibits any person from possessing, “expos[ing] for sale,” or purchasing any mammal killed or taken, including its parts.¹³³ These broad prohibitions clearly prohibit the live capture of any cetacean, regardless of its placement in the CMS Appendices.

124 “It shall likewise, be unlawful to wound or kill dolphins, whales and porpoises in the course of fishing. Dolphins, whales, and porpoises, which are accidentally included in the catch by any gear or washed ashore alive, shall be immediately released unharmed into the sea.” Administrative Order 185 § 2; Administrative Order 185-1 § 2.

125 “Dead whales, dolphins or porpoises that are washed ashore shall be reported and/or surrendered to the nearest Department of Agriculture (DA) office for proper disposition and documentation.” Administrative Order 185 § 2; Administrative Order 185-1 § 2.

126 Administrative Order 185-1, at § 1.

127 See also Fisheries Order No. 208 (2001), Conservation of Rare, Threatened and Endangered Fisheries Species, available at <http://www.bfar.da.gov.ph/bfar/download/fao/FAO208.pdf> (listing several species of Cetacea as endangered and prohibiting any person from taking, catching or causing to be taken or caught any such species).

128 Administrative Order 185, § 2; Administrative Order 185-1 § 2 (“It shall be [unlawful] to take or catch dolphins, whales and porpoises in Philippine waters or to sell, purchase, possess, transport or export the same whether dead or alive, in any state or form whether raw or processed.”).

129 “Philippine waters - include all bodies of water within the Philippine territory such as lakes, rivers, streams, creeks, brooks, ponds, swamps, lagoons, gulfs, bays and seas and other bodies of water now existing or which may hereafter exist in the provinces, cities, municipalities, and barangays and the waters around, between and connecting the islands of the archipelago regardless of their breadth and dimensions, the territorial sea, the sea beds, the insular shelves, and all other waters over which the Philippines has sovereignty and jurisdiction including the 200-nautical miles Exclusive Economic Zone and the continental shelf.” An Act Providing for the Development, Management and Conservation of the Fisheries and Aquatic Resources, Integrating All Laws Pertinent Thereto, and for Other Purposes, Republic Act No. 8550, Feb. 25, 1998, available at http://www.lawphil.net/statutes/repacts/ra1998/ra_8550_1998.html.

130 Administrative Order 185 § 2; Administrative Order 185-1 § 2 (emphasis added).

131 Fauna and Flora Protection Ordinance, § 2(1), available at: <http://faolex.fao.org/docs/pdf/srl22041.pdf> [hereinafter FFPO].

132 FFPO, § 30(1)(a), (c), as amended by Act No. 12 of 2005, available at <http://citizenslanka.org/wp-content/uploads/2016/02/Fauna-and-Flora-Protection-Ordinance-No-02-of-1937-E.pdf>.

133 FFPO, § 30(1)(d)-(g).

C. Recommendations for Developing National Legislation for Prohibiting the Live Capture of Cetaceans for Commercial Purposes

61. This review of international agreements and domestic legislation shows significant international and State practice to prohibit the live capture for commercial purposes of cetaceans included in Appendix I of CMS as well as those included in Appendix II and those not included in either Appendix I or II. In addition, the exceptions to these prohibitions are frequently narrowly tailored.
62. Nonetheless, the national prohibitions against live capture of cetaceans from the wild for commercial purposes sometimes fail to implement Resolution 11.22 to its fullest extent or lack clarity in several ways.
63. It is important to bear in mind that resolutions are not binding in international law. As a consequence, CMS Parties are not required to prohibit the live capture of cetaceans not included in Appendix I or beyond the jurisdictional scope provided by CMS. In any event, Resolution 11.22 “invites” Parties to prohibit the live capture of cetaceans from the wild for commercial purposes.
64. However, the International Court of Justice has stated that Parties must give resolutions “due regard.”¹³⁴ Thus, with respect to Resolution 11.22, a CMS Party may choose to assert jurisdiction and control over its citizens on the high seas and in the territories of other States. In other words, it may choose to prohibit its citizens from capturing live cetaceans on the high seas and in the territories of other States, but it is not required to do so.
65. It is against these principles that the following recommendations are premised. The recommendations identify some problem areas found in national law and suggest ways to implement Resolution 11.22 fully and with clarity.

Recommendation 1: Application to “Cetaceans”

66. Resolution 11.22 applies to all cetaceans, but the laws reviewed did not always extend to all cetaceans. Some CMS Parties limit the scope of the prohibition against live capture or “take” to cetaceans (and other animals) included in a list while others apply the prohibition to all cetaceans or all marine mammals. The use of a list is consistent with the approach of CMS, which limits its prohibition against “taking” to those migratory species included in Appendix I. The list approach, however, is inconsistent with the approach of Resolution 11.22 (as well as ASCOBANS), unless the list includes each cetacean species.
67. To implement Resolution 11.22 fully, Parties should consider adopting legislation to “prohibit the take, including live capture, of all cetaceans.” In the alternative, legislation should be drafted to “prohibit the take, including live capture, of all cetaceans included in Annex [X].” Annex X would then list “all cetaceans” or the “Order Cetacea.” The term “marine mammals,” as used by Sri Lanka, covers a broader range of animals that could also be used to implement Resolution 11.22 fully.

Recommendation 2: Clearly Define the Geographical Scope

68. Resolution 11.22 applies without geographic scope. Thus, any laws to implement Resolution 11.22 fully should make clear that any prohibition against live capture applies to (1) all jurisdictional waters of that State and (2) the high seas with respect to its citizens and vessels it flags.
69. Some of the national laws reviewed are unclear as to the geographical scope of the prohibition. Some, for example, apply in the “waters of State X” without defining what those waters include. If the geographic scope of a law relies on a definition of “waters of State

¹³⁴ Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening) 2014 I.C.J. Rep. ___, at ¶ 137 (Mar. 31, 2014).

X” found in a different law, that should be made clear. For example, if the State’s Fisheries Law prohibits live capture of cetaceans in the “waters of State X,” but that phrase is defined in the State’s Maritime Zones Act, then the Fisheries Law should state

“waters of State X,” as used in the Fisheries Law, has the same meaning as used in Article Z of the Maritime Zones Act.

70. Other laws omitted from the scope of application a key jurisdictional zone, sometimes internal waters or the exclusive economic zone, but most frequently the high seas (also known as areas beyond national jurisdiction). To implement Resolution 11.22 fully for all cetaceans and Article III(5) of CMS for Appendix I cetaceans, laws should apply to

“internal waters, territorial seas, exclusive economic zone, and areas beyond national jurisdiction.”

71. As described in the following paragraphs, a State does not have jurisdiction over vessels flagged by other States or non-citizens in areas beyond national jurisdiction. Thus, a law implementing Resolution 11.22 fully needs to specify to whom the law applies in areas beyond national jurisdiction separately from those provisions that apply to areas under national jurisdiction.

Recommendation 3: Clearly Define the Range of “Persons” to Whom the Prohibition Applies

72. Some of the national laws reviewed make it unlawful to capture or otherwise take cetaceans, but they do not specify to whom the prohibition applies. Other laws prohibit “a person” or “any person” from capturing or otherwise “taking” a cetacean, but do not define “person.” Consequently, it is not clear whether the prohibition applies to, for example, governmental agencies or vessels flagged by that State. This is a weakness in the laws for at least two reasons. First, CMS specifically extends its prohibitions to vessels flagged by a CMS Party with respect to Appendix I species. Second, the crews of a vessel flagged by one State are frequently nationals of another State.
73. Under international law, States may assert jurisdiction and control over individuals and entities through a variety of principles. For purposes of Resolution 11.22, the two relevant principles are the nationality and territoriality principles.
74. The nationality principle allows a State to exercise jurisdiction and control over its nationals, regardless of where they are.¹³⁵ Companies, ships, and aircraft are considered as having the nationality of the State in whose territory they are registered (i.e., flagged). Thus, a flag State has a duty to exercise jurisdiction and control over vessels that it flags. In the case of the conduct of individuals, a State often cedes jurisdiction over its nationals when they are abroad so that the State in which the conduct occurred can exercise jurisdiction pursuant to the territoriality principle.
75. The territoriality principle gives a State authority to regulate persons, regardless of nationality, within its borders.¹³⁶ The exercise of this type of jurisdiction depends on the location of the conduct. So long as the conduct occurs within the territory of the State, it has jurisdiction. Thus a State may apply its laws to foreign commercial ships while they are within its ports and internal waters, which are considered part of its territory.
76. For the purposes of Resolution 11.22, CMS Parties are invited to prohibit the live capture of all cetaceans from the wild. Article III(5) of CMS already requires the Parties that are Range States to prohibit the live capture of Appendix I cetaceans within their waters and,

¹³⁵ See, e.g., Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 306 (5th ed. 1998).

¹³⁶ *Id.* at 303–06.

with respect to vessels they flag, on the high seas.¹³⁷ Thus, Resolution 11.22 extends the prohibition against live capture to non-Appendix I species. It also invites Parties to prohibit the live capture of cetaceans in the wild for commercial purposes by (1) vessels flagged by a CMS Party in all waters and (2) all “persons” under the jurisdiction of that CMS Party wherever they may be.

77. Based on the legislation reviewed, most CMS Parties are not prohibiting the live capture of cetaceans to the fullest extent contemplated by Resolution 11.22. Of the legislation reviewed, only Australia clearly applied Resolution 11.22 to areas outside its jurisdiction. Its legislation could be a model for other CMS Parties.
78. Australia combines the geographic scope of its prohibitions on live capture (as described in Recommendation 2) with the application to various entities and persons. Sections 5 and 224 of the EPBC Act provide as follows:

Section 5

Extension to external Territories

(1) This Act extends to each external Territory.

Limited extraterritorial application

(2) This Act applies to acts, omissions, matters and things in the Australian jurisdiction, and does not apply to acts, omissions, matters and things outside the Australian jurisdiction except so far as the contrary intention appears.

Application limited to Australians outside exclusive economic zone

(3) A provision of this Act that has effect in relation to a place that is outside the outer limits of the exclusive economic zone and is not on or in the continental shelf applies only in relation to:

- (a) Australian citizens; and
- (b) persons who:
 - (i) are not Australian citizens; and
 - (ii) hold permanent visas under the *Migration Act 1958*; and
 - (iii) are domiciled in Australia or an external Territory; and
- (c) corporations incorporated in Australia or an external Territory; and
- (d) the Commonwealth; and
- (e) Commonwealth agencies; and
- (f) Australian aircraft; and
- (g) Australian vessels; and
- (h) members of crews of Australian aircraft and Australian vessels (including persons in charge of aircraft or vessels).

Application to everyone in Australia and exclusive economic zone

(4) A provision of this Act that has effect in relation to a place that is within the outer limits of the exclusive economic zone (whether the place is in the zone or in Australia or an external Territory) or that is on or in the continental shelf applies in relation to:

- (a) all persons (including persons who are not Australian citizens); and
- (b) all aircraft (including aircraft that are not Australian aircraft); and
- (c) all vessels (including vessels that are not Australian vessels).

224 Application of Division

(1) This Division extends to acts, omissions, matters and things outside Australia (whether in a foreign country or not), except so far as the contrary intention appears.

¹³⁷ Article III(5) requires “Parties that are Range States” to prohibit the take of Appendix I animals. CMS defines “Range State” to mean any State or regional economic integration organization “that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species.” CMS, *supra* note 1, at art. I(1)(h). By implication, the take prohibition thus includes a Range State’s jurisdictional waters as well as the high seas as it relates to vessels it flags.

- (2) A provision of this Division that has effect in relation to a place outside the outer limits of the Australian Whale Sanctuary applies only in relation to:
- (a) Australian citizens; and
 - (b) persons who:
 - (i) are not Australian citizens; and
 - (ii) hold permanent visas under the *Migration Act 1958*; and
 - (iii) are domiciled in Australia or an external Territory; and
 - (c) corporations incorporated in Australia or an external Territory; and
 - (d) the Commonwealth; and
 - (e) Commonwealth agencies; and
 - (f) Australian aircraft; and
 - (g) Australian vessels; and
 - (h) members of crews of Australian aircraft and Australian vessels (including persons in charge of aircraft or vessels).
- (3) This Division applies to a vessel as if it were an Australian vessel if:
- (a) the vessel is a boat within the meaning of the *Fisheries Management Act 1991*; and
 - (b) a declaration, under subsection 4(2) of that Act, that the vessel is taken to be an Australian boat is in force.

79. A separate provision applies the provisions relating to the Whale Sanctuary to a different list of entities.¹³⁸ To eliminate ambiguity, the EPBC Act specifically defines phrases used in Section 5, including “Australian jurisdiction,” “Australian aircraft,” and Australian vessel.”¹³⁹
80. The definition of “person” may not need to be as extensive as the one provided by Australia, depending on the laws of a State. For example, the U.S. Marine Mammal Protection Act defines “person” to include
- (a) any private person or entity, and
 - (b) any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government¹⁴⁰
81. Paragraph (A) of this definition, by referring to a “private entity,” ensures that any individual, corporation, or vessel is covered by the definition of “person.” Paragraph (B) ensures that any person working with or on behalf of the government (“agent”), as well as any agency or the government itself is covered by the definition.

Recommendation 4: Clearly Define “Take”

82. Most of the laws reviewed adequately define “take” or otherwise use words that prohibit live captures of cetaceans. The European Union, for example, prohibits “all forms of deliberate capture or killing of specimens [of Annex A species].” The use of the phrase “all forms” ensures that every method of capturing a cetacean is prohibited. At least one law reviewed, however, did not include any definition of “take” and did not use other words that would prohibit the live capture of cetaceans.
83. For consistency with Article III(5) of CMS if not Resolution 11.22, legislation should also prohibit “attempts” to capture cetaceans. This is an omission from most of the laws reviewed.

¹³⁸ EPBC Act, *supra* note 56, §224.

¹³⁹ EPBC Act, at § 5.

¹⁴⁰ Marine Mammal Protection Act, 16 United States Code § 1362(1), available at <http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa.pdf>.

Recommendation 5: Clearly Define the Criteria for Exceptions

84. Many of the laws reviewed include only vague criteria relating to the use of exceptions to the prohibition against live captures of cetaceans. Some explicitly included an exception for exhibition/display. Other legislation allows the competent authority discretion to issue a permit under vaguely defined exceptions. Whether implemented strictly or not, the lack of clearly defined criteria leaves uncertainty as to the scope of the exceptions.
85. Australia affirmatively prohibits exceptions for exhibitions/display, while Costa Rica's exceptions to its prohibition against capture are limited to euthanasia or rehabilitation.¹⁴¹ These laws can perhaps be models for other CMS Parties, at least with respect to barring an exception for live capture of cetaceans for display.¹⁴²

III. Rules Relating to Import and Transit of Live Cetaceans for Commercial Purposes

A. The International Context

86. Paragraph 2 of Resolution 11.22 urges CMS Parties to consider taking stricter measures than CITES with regard to the imports for commercial purposes of live cetaceans that have been captured in the wild. This paragraph thus goes to the heart of the CITES permit regime for trade in specimens of species included in the CITES Appendices. Paragraph 2 also urges Parties to take stricter measures concerning transit of live cetaceans for commercial purposes that have been captured in the wild. CITES exempts specimens in transit from its permit requirements, provided that the specimens remain under customs control.
87. CITES requires the issuance of permits for international trade in species included in CITES Appendices I, II, and III. The Convention defines "trade" as "export, re-export, import, and introduction for the sea."¹⁴³ While export, re-export, and import carry their common meanings (e.g., re-export means the "export of any specimen that has previously been imported"¹⁴⁴), "introduction from the sea" is a term unique to CITES.
88. The Convention defines "introduction from the sea" to mean "transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State."¹⁴⁵ The CITES Parties later clarified that "introduction from the sea" applies when a specimen of a CITES-listed species is caught on the high seas.¹⁴⁶
89. The CITES Parties also clarified that "introduction from the sea" occurs only when a vessel flagged by a specific country catches its CITES specimens on the high seas and lands those specimens in the State in which it is flagged.¹⁴⁷ In these circumstances, the flag State must issue an introduction from the sea certificate. In contrast, the CITES Parties agreed that if a vessel flagged by one State catches CITES specimens on the high seas

141 [C]etaceans may be killed, caught, kept captive, touched, trapped or fed, and attempts may be made to feed them, in the following cases:

1. Euthanasia due to irreversible illness, injury or infection causing the animal great suffering and death, verified by a qualified vet in the presence of the relevant authority . . .
2. Animals that have been stranded, entangled or hurt by human or natural causes and that require rehabilitation so that they can be released subsequently. A diagnosis must be sought from specialist biologists and vets and a permit must be obtained . . . provided that the period of captivity does not exceed one year.

Decree No. 32495, *supra* note 73, at art. 15.

142 While the concerns motivating Resolution 11.22 are not limited to public display of cetaceans, concerns over live capture for public display was an important motivation for the resolution. CMS, UNEP/CMS/COP11/Doc.23.2.3/Rev. 1 (23 October 2014).

143 CITES, *supra* note 2, at art. I(c).

144 CITES, art. I(d).

145 CITES, art. I(e).

146 By resolution, the Parties defined "the marine environment not under the jurisdiction of any State" to mean "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, Resolution Conf. 14.6 (Rev. CoP16), *Introduction from the Sea*, available at <https://www.cites.org/eng/res/14/14-06R16.php>.

147 *Id.*

and lands those specimens in another State, then the flag State must issue an export permit and the port State, for an Appendix I specimen, must issue an import permit.¹⁴⁸

90. It is unclear whether the CMS Parties had this distinction in mind when they adopted Resolution 11.22, with its request for stricter domestic measures relating to “import” and not also “introduction from the sea.” This report assumes that Resolution 11.22 used the word “import” to refer more broadly to import of live captures of cetaceans taken anywhere in the marine environment because this interpretation is consistent with the scope of CMS with respect to Appendix I species.¹⁴⁹
91. All species of cetaceans are included in CITES Appendix II unless they are included in Appendix I.¹⁵⁰ As a consequence, the CITES permit rules apply to any trade in specimens of cetacean species included in the Appendices wherever they are caught, provided that the specimens are in “trade.”
92. Trade in specimens of CITES Appendix I species is more heavily regulated than trade in specimens of Appendix II species. Prior to trade in a specimen of an Appendix I species, the State of import must determine that the import (1) is not for primarily commercial purposes,¹⁵¹ (2) will be for purposes that are not detrimental to the survival of the species, and (3) for a living specimen, that the recipient can suitably house and care for the specimen.¹⁵² The State of export must determine that (1) the export will not be detrimental to the survival of the species, (2) the specimen was legally obtained, (3) a living specimen will be prepared and shipped so as to minimize the risk of injury, damage to health or cruel treatment, and (4) an import permit has already been granted.¹⁵³
93. For introduction from the sea of an Appendix I specimen, the flag State must determine that the introduction (1) is not for primarily commercial purposes, (2) will be not detrimental to the survival of the species, and (3) for a living specimen, that the recipient can suitably house and care for the specimen.¹⁵⁴
94. Trade in specimens of CITES Appendix II species requires only an export permit. Prior to export of such a specimen, the State of export must determine that (1) the export will not be detrimental to the survival of the species, (2) the specimen was legally obtained, and (3) a living specimen will be prepared and shipped so as to minimize the risk of injury, damage to health or cruel treatment.
95. For introduction from the sea of an Appendix II specimen, the flag State must determine that the introduction (1) is not for primarily commercial purposes and (2) a living specimen will be handled so as to minimize the risk of injury, damage to health or cruel treatment.¹⁵⁵
96. Article VII of CITES includes a number of exceptions to these permit rules, including specimens obtained prior to the application of the convention to a species (“pre-convention specimens”) and specimens bred in captivity.¹⁵⁶ The exception relevant to CMS Resolution 11.22 relates to transit. Under CITES, the permit requirements “do not apply to the transit or transshipment of specimens through or in the territory of a CITES Party while the specimens remain in Customs control.”¹⁵⁷ As a consequence of this exception, even if a

148 *Id.*

149 See *supra* paragraph 10 of this report.

150 CITES, Appendices, <https://cites.org/eng/app/appendices.php>.

151 In a Resolution, the Parties defined “primarily commercial purposes” as “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,” and went further to state that if a use of the species in trade is not clearly predominated by non-commercial aspects, than it is to be considered as “primarily commercial in nature.” CITES, Resolution Conf. 5.10 (Rev. CoP 15), *Definition of ‘Primarily Commercial Purposes’*, available at <https://www.cites.org/eng/res/05/05-10R15.php>.

152 CITES, *supra* note 2, at art. III(3).

153 CITES, art. III(2).

154 CITES, art. III(5).

155 CITES, art. IV(6).

156 CITES, art. VII(2), (4), (5).

157 CITES, art. VII(1).

CITES Party would prohibit a specimen of an Appendix I specimen from being imported into its country, it could allow the transit of that specimen through its jurisdiction to another State.

97. CITES also recognizes the right of Parties to adopt rules for trade that are stricter than those provided by the convention.¹⁵⁸ These are typically known as “stricter domestic measures.” In other words, CITES establishes minimum standards for trade in specimens of species included in the CITES Appendices.
98. Resolution 11.22 urges CMS Parties to consider taking stricter domestic measures with regard to import and transit of live cetaceans for commercial purposes. In the context of Resolution 11.22, legislation could be stricter than those required by CITES by, for example, (1) including permit requirements for imports of specimens of CITES Appendix I cetacean species that are additional to those found in CITES, (2) prohibiting imports of specimens of CITES Appendix II species for primarily commercial purposes, or (3) eliminating or restricting the application of the Article VII exceptions to imports of specimens of any CITES-listed species.
99. While Resolution 11.22 specifically calls on CMS Parties to take measures stricter than CITES with respect to import, ACCOBAMS also refers to import and trade restrictions in Resolution 4.19 on Model Measures on Conservation of Cetaceans. Article 9 of the model measures indicates that Parties should make it unlawful to import any cetacean or part of any cetacean that was taken or killed in violation of the law of any State.¹⁵⁹ It further states that legislation should make it unlawful to “purchase, sell, barter, export or offer to purchase, sell or export any cetacean, any part of a cetacean or any product derived from a cetacean in violation of this Law.”¹⁶⁰ Thus, Resolution 11.22 is not the first time an international body has called for restrictions stricter than those provided by CITES.

B. Implementation by CMS Parties of Provisions Relating to Imports and Transit of Live Cetaceans for Commercial Trade

100. As with the provisions for live capture of cetaceans, the provisions relating to import of live cetaceans for commercial purposes vary from Party to Party.

Argentina

101. In Argentina, the import of live animals is governed by National Decree 666/97.¹⁶¹ The Decree provides that the import and export of live wild animals and products derived from wild animals requires authorization from the national enforcement authority.¹⁶² Articles 22 and 27 provide the circumstances in which the authorization will be denied, including for all species listed in Appendix I of CITES¹⁶³ and in the case of species protected throughout the range of their natural habitat.¹⁶⁴
102. A regulation promulgated by the Ministry of the Environment and Sustainable Development prohibits the hunting, capture, trade, and transit of specimens of species listed in the resolution’s annex I throughout the national jurisdiction of the Argentine Republic.¹⁶⁵ Annex I lists all of the cetacean species included in Law No. 25577 with the

158 CITES, art. XIV(1).

159 ACCOBAMS Resolution 4.19, *supra* note 30, at art. 9.

160 ACCOBAMS Resolution 4.19, at art. 11.

161 Decreto No. 666/97, July 18, 1997, B.O. 28695 (Arg.) [hereinafter Decreto no. 666/97], available at http://www2.medioambiente.gov.ar/mlegal/fauna_flora/dec666_97.htm.

162 Decreto No. 666/97, at arts. 21, 26 (governing import and export, respectively, of wild animals and products derived therefrom); *See also* Decreto no. 691/81, July 27, 1981, B.O. 24644, art. 1 (designating the Secretary of State for Agriculture and Livestock as the National Enforcement Authority).

163 Decreto No. 666/97, arts. 22(a), 27(a).

164 Decreto No. 666/97, arts. 22(b), 27(b).

165 Resolution No. 351/95, *supra* note 53, at art. 1, annex I (“Prohibir la caza, captura o apropiación y tránsito en jurisdicción nacional de todas las especies de cetáceos y pinnípedos que figuran en el listado que obra en el **Anexo I**.”).

exception of Hector's beaked whale.¹⁶⁶ However, "transit" is not defined. Thus, it is not clear whether this term refers to movement under customs control in the sense of Article VII(1) of CITES or whether it refers to any movement of a specimen by some form of transport (e.g., ship, truck, or car).

Australia

103. Australia implements CITES and its provisions relating to import through the EPBC Act. Australia treats all cetaceans as if they are included in Appendix I of CITES, even if CITES itself includes them in Appendix II.¹⁶⁷ Additionally, Australia prohibits the import of all live specimens of cetaceans for any purpose.¹⁶⁸ Thus, Australia prohibits all imports for primarily commercial purposes of specimens of cetaceans, regardless of whether they are included in the CITES Appendices.
104. Under Australia's EPBC Act, transit of a cetacean through Australia may be possible under limited circumstances. For example, a non-Australian vessel may transit through Australian waters with a cetacean without a permit.¹⁶⁹
105. In addition, for cetaceans brought into Australia from another country, "transshipment" without a permit is possible under Section 303GW.¹⁷⁰ The exception specifically does not apply to cetaceans caught in Australian waters or on the high seas. In addition, Section 231(k) allows "transit" of a cetacean through Australia (or other parts of Australia's "commonwealth area"), provided that the cetacean was obtained outside the commonwealth area or inside it under certain specified circumstances.¹⁷¹ These two provisions thus appear to allow the capture of a live cetacean in, for example, Indonesian waters and the transit of that live cetacean from Sydney to Perth without needing a permit.
106. However, other provisions further limit the scope of these exemptions. First, Australian vessels are prohibited from capturing and moving a cetacean in Australian waters, on the high seas, and in the waters under the jurisdiction of other States,¹⁷² unless the Minister issues a permit.¹⁷³ However, the Minister may not issue a permit for live display.¹⁷⁴ Thus, the exceptions for transshipment and transit of live cetaceans apply to Australians and Australian vessels only in very narrow circumstances.
107. Foreign vessels carrying cetaceans may not enter an Australian port without written permission from the Minister.¹⁷⁵ The EPBC does not specify conditions for authorizing such a foreign vessel carrying a cetacean to enter an Australian port. Consequently, it may be possible for foreign vessels carrying live cetaceans to transit that specimen across Australia, provided it has authorization from the Minister.

166 Resolution No. 351/95, at annex I. Oddly, though, annex I identifies the common name of *Mesoplodon grayi* (Gray's beaked whale) as Hector's beaked whale.

167 Australia, Environment Protection and Biodiversity Conservation Act 1999, Listing of CITES Species, Declaration of Stricter Domestic Measure (Jan. 25 2007), available at: <https://www.legislation.gov.au/ComLaw/legislation/LegislativeInstrument1.nsf/0/3A16A312D915BB16CA25728100040BD2/%24file/LegislativeInstrument.pdf>.

168 Australia, List of Specimens Taken to be Suitable for Live Import (29/11/2001) (not including any species of Cetacea), available at: <https://www.legislation.gov.au/Details/F2015C00959>.

169 See E-mail from Rachel Sanderson, Assistant Director, Wildlife Trade Regulation, Department of the Environment and Energy to Chris Wold, Professor of Law, Lewis & Clark Law School (February 6, 2017).

170 EPBC Act, *supra* note 56, at § 303GW.

171 EPBC Act, § 231(k).

172 EPBC Act, §§ 229B, 229(C).

173 EPBC Act, § 238.

174 EPBC Act, § 238(4)

175 EPBC Act, § 236.

European Union

108. Council Regulation 338/97¹⁷⁶ implements CITES in the EU. However, the Regulation divides the species covered into four Annexes,¹⁷⁷ rather than the three Appendices of CITES. Annex A includes those species that require the highest levels of control;¹⁷⁸ all species of cetacean are included in Annex A.¹⁷⁹
109. The Regulation requires that several conditions be met prior to import of a specimen of an Annex A species.¹⁸⁰ Consistent with the rules for trade in Appendix I specimens under CITES, trade in Annex A specimens is prohibited for primarily commercial purposes.¹⁸¹ The regulation also adopts other elements of CITES relating to trade in Appendix I specimens, including the requirement to determine that the import will not be for purposes that are detrimental to the survival of the species.¹⁸²
110. In addition to including all CITES-listed cetacean species in Annex A, regardless of whether they are included in the CITES Appendix I or II, the EU Regulation is also stricter than CITES in other ways. In particular, the management authority must be satisfied, after consultation with the scientific authority, that no other factors relating to the conservation of the species mitigates against issuance of an import permit.¹⁸³ Moreover, the EU Regulations also prohibit the commercial use, including display to the public, offering or transporting for sale, of Annex A specimens within the European Union unless specific exemptions are met.¹⁸⁴
111. Nonetheless, non-commercial imports may be possible in limited circumstances. These include imports for “exceptional circumstances” for the advancement of science or for essential biomedical purposes, breeding purposes, or for research and education aimed at the preservation or conservation of the species.¹⁸⁵
112. The European Union implements the exception for transit found in Article VII(1) of CITES. Article 7(2) of Council Regulation 338/97 specifically exempts from the prohibitions relating to the importation of Annex A specimens those specimens in transit through the EU. The Regulation defines transit as the transport of specimens through the EU between two points outside the EU.¹⁸⁶ With respect to Annex A specimens, the shipment must be accompanied by a valid export or re-export permit that specifies the destination of the specimens.¹⁸⁷ If such documentation does not accompany the shipment, then the specimen must be seized and may be confiscated if the document is not submitted retrospectively.¹⁸⁸

Israel

113. Israel’s Wildlife Protection Law prohibits “trade”—defined as “purchase, sale, export, re-export, import and introduction from the sea”—in wildlife that is not a pest and is not domesticated wildlife, unless a permit is granted.¹⁸⁹ The Wildlife Protection Law defines “wildlife” as any “mammal, bird, reptile or amphibian, or any part thereof, or its offspring, originated within the area of Israel or outside of it, which by its nature does not live among

176 Council Regulation No. 338/97, 1997 O.J. (L 61) 1 (EC).

177 Council Regulation No. 338/97, art. 3.

178 Council Regulation No. 338/97, art. 3(1)(b)(i) (noting that Annex A contains, *inter alia*, any species in demand for trade and “which is either threatened with extinction or so rare that any level of trade would imperil the species”).

179 Council Regulation No. 338/97, Annex A.

180 Council Regulation No. 338/97, art. 4(1).

181 Council Regulation No. 338/97, art. 4(1)(d).

182 Council Regulation No. 338/97, art. 4(1)(a)(i)-(ii).

183 Council Regulation No. 338/97, art. 4(1)(e).

184 Council Regulation No. 338/97, art. 8(1).

185 Council Regulation No. 338/97, art. 8(3)(e)-(g).

186 Council Regulation No. 338/97, art. 2(v).

187 Council Regulation No. 338/97, art. 7(2)(b).

188 Council Regulation No. 338/97, art. 7(2)(b).

189 Wildlife Protection Law, 5715-1955, *supra* note 90, at § 8.

humans.”¹⁹⁰ Regulations based on the Wildlife Protection Law require all permits to be in accordance with CITES.¹⁹¹ The regulations do not specifically mention CMS, but since all CMS-listed species are also protected wildlife, permits must be issued prior to trade.¹⁹²

114. In addition, the National Parks, Nature Reserves, National Sites and Memorial Sites Law prohibits trade in “protected natural assets,”¹⁹³ which include cetaceans. Trade is defined as “purchase, sale, exchange, export, re-export, introduction from the sea and also an offer of trade.”¹⁹⁴

115. Israel also prohibits the import for commercial purposes of wild-caught specimens of species included in CITES Appendix II.¹⁹⁵ Exceptions may be made, *inter alia*, when appropriate documentation shows that such an import is not detrimental to the survival of the wild population in the exporting country.¹⁹⁶

116. Israel interprets import and export as including transit; consequently, transit requires a permit.¹⁹⁷

Kenya

117. Kenya’s WCMA expressly prohibits trade, import, export, or re-export of any wildlife species into or from Kenya without a permit.¹⁹⁸ Such permits may only be issued when the purpose for which the application is made is not detrimental to the survival of the species, any required compensation has been paid, and, in the case of import permits, the relevant export permits have been obtained.¹⁹⁹ The Kenya Wildlife Service may issue a permit with such conditions and terms “as may be appropriate and necessary to enhance conservation and management of listed species.”²⁰⁰ Significantly, the WCMA does not require a finding, prior to import of a CITES Appendix I specimen, that the specimen will not be used for primarily commercial purposes and regulations to implement CITES and other aspects of the WCMA have not been promulgated.²⁰¹

118. Kenya’s WCMA does not appear to have any provisions relating to transit. Its provisions relating to import, export, and trade refer to transactions into or from Kenya. Shipments that remain in customs control may or may not be considered to be imported into a country. Without additional information, it cannot be determined whether specimens require permits for transit through Kenya.

Mauritius

119. Mauritius prohibits the import of any marine mammal, “dead or alive or stuffed,”²⁰² regardless of whether the species is included in the CITES Appendices. However, an exception to this prohibition is possible with the written approval of the Permanent

190 Wildlife Protection Law, 5715-1955, § 1.

191 Personal communication with Simon Nemtzov, *supra* note 94.

192 Personal Communication with Simon Nemtzov, *supra* note 94. The violation of any part of this law is punishable by prison or a fine, depending on which section was violated. Wildlife Protection Law 5715-1955, *supra* note 90, § 1 (as amended). For example, a violation of section 8, which prohibits the trade, transfer, and holding of protected wildlife, is punishable by one year in prison or a fine. Wildlife Protection Law, 5715-1955, § 14(a) (as amended).

193 National Parks, Nature Reserves, National Sites and Memorial Sites Law, *supra* note 93, at § 33(d).

194 *Id.* § 33(e).

195 CITES, Notification 2004/025, Israel: Stricter Domestic Measures concerning Import and Export of Wild Fauna and Flora (Apr., 30, 2004).

196 *Id.*

197 Personal Communication with Simon Nemtzov, *supra* note 94.

198 WCMA, *supra* note 96, at arts. 85(1), 99(1). Article 99(1) provides that no person shall introduce wildlife into Kenya but the use of introduce in this paragraph refers to the introduction of invasive species, not introductions from the sea. See WCMA, art. 93 (stating, “Any person who knowingly introduces an invasive species into a wildlife conservation area” commits an offence.).

199 WCMA, art. 85(2).

200 WCMA, art. 85(2).

201 See Kenya Wildlife Service, at <http://www.kws.go.ke/Downloads> (showing a series of draft regulations to support the WCMA).

202 Fisheries and Marine Resources Act, *supra* note 112, at § 22(2)(a).

Secretary.²⁰³ This approval is subject to terms and conditions that the Permanent Secretary deems fit to impose on such permits.²⁰⁴ Neither the Act nor subsequent regulations define the terms and conditions for issuing a permit to import a marine mammal.

120. Nonetheless, by applying the prohibition to all marine mammals, not only those included in the CITES Appendices, Mauritius appears to have adopted measures stricter than CITES. Whether that is true or not depends on whether the Permanent Secretary is using his or her discretion to allow exceptions to the import prohibition.

121. Even if a person is allowed to import a cetacean into Mauritius, the possible uses of that specimen are very limited. Mauritius prohibits the landing, sale, and possession of marine mammals, subject only to an exception for scientific and conservation purposes.²⁰⁵

122. Mauritius expressly adopts the exception for transit found in Article VII(1) of CITES.²⁰⁶

123. However, Mauritius does require a “Mauritian fishing boat or Mauritian fishing vessel” to have a licence for fishing or any related activity.²⁰⁷ At least with respect to these vessels, it would seem that the licence must specify that they have the authority to transit with a live cetacean on board.

Philippines

124. Under Administrative Order No. 185, the Philippines prohibits the “sale, possession, or export of a cetacean, dead or alive.”²⁰⁸ Thus, this administrative order does not appear to prohibit import of cetaceans. The exclusion of the word “import” coupled with the inclusion of the word “export” indicates that the drafters intended to omit “import” from the list of prohibitions. Nonetheless, the Secretary of Agriculture has the authority to issue a “special permit.”²⁰⁹

125. Although the Philippines’ cetacean-specific administrative order does not appear to regulate the import of cetaceans, its CITES implementing legislation—the Wildlife Resources Conservation and Protection Act—specifically prohibits “trade,” including importation of wildlife, unless otherwise allowed.²¹⁰ The implementing regulations designate the Bureau of Fisheries and Aquatic Resources as the management authority charged with issuing CITES permits for marine species.²¹¹ However, these regulations and additional guidelines²¹² do not include any requirements for issuing permits pursuant to CITES.

126. Administrative Order 221 prohibits the importation of live “fish”,²¹³ a term that includes marine mammals, without a licence.²¹⁴ A request for importation is reviewed by a panel to

203 Fisheries and Marine Resources Act, § 22(2)(a).

204 Fisheries and Marine Resources Act, § 22(2)(b) (“An approval under paragraph (a) shall be subject to such terms and conditions as the Permanent Secretary may think fit to impose.”).

205 Fisheries and Marine Resources Act, §§ 17(1)(d), 17(3) (“The Permanent Secretary may issue an authorization, in writing, and subject to such terms and conditions as he may impose, for the capture, landing or possession of any fish specified in subsection (1)(a) to (f) for scientific or conservation purposes.”).

206 The Native and Terrestrial Biodiversity and National Parks Act (No. XVI of 2015), § 3(1), available at <http://mauritiusassembly.govmu.org/English/bills/Documents/intro/2015/bill1615.pdf>.

207 Fisheries and Marine Resources Act, *supra* note 112, at § 36(1).

208 Administrative Order 185, *supra* note 120, at § 2; Administrative Order 185-1, *supra* note 120, at § 2.

209 Administrative Order 185, § 2; Administrative Order 185-1 § 2.

210 Act Providing for the Conservation and Protection of Wildlife Resources and Their Habitats, Republic Act No. 9147, § 27(e) (2001), available at http://www.lawphil.net/statutes/repacts/ra2001/ra_9147_2001.html [hereinafter Republic Act No. 9147];

Administrative Order No. 1, Joint Implementing Rules and Regulations Pursuant to Republic Act No. 9147 (May 18, 2004), available at <http://faolex.fao.org/docs/pdf/phi157501.pdf> [hereinafter Joint IRR].

211 Joint IRR, § 19.

212 DENR Administrative Order No. 2004-85, available at <http://faolex.fao.org/docs/pdf/phi93376.pdf>.

213 Philippines Bureau of Fisheries and Aquatic Resources, Administrative Order 221, Series of 2003, § 4, available at http://sps_issuances.da.gov.ph/attachments/article/654/fao221.pdf.

214 *Id.* § 1(d).

determine the level of risk posed by the introduction of that species.²¹⁵ Administrative Order 233 includes requirements for use of aquatic wildlife, a term that includes “wildlife living in aquatic environment . . . its by products and derivatives.”²¹⁶ Administrative Order 233 requires the importer to submit a fishery/veterinary health certificate issued by the competent authority of the country of origin.²¹⁷ It also establishes rules for the use of aquatic wildlife for exhibition, educational, or documentation for commercial purposes.²¹⁸

127. The requirement to submit a fishery/veterinary health certificate is stricter than required by CITES. In addition, importation of an “exotic wildlife species,” that is, a species not native to the Philippines,²¹⁹ requires the Secretary of the Department of Agriculture, in the case of cetaceans,²²⁰ to determine that the import is “based on sound ecological, biological and environmental justification resulting from scientific studies, subject to biosafety standards and import risk analysis and/or other sanitary and phytosanitary measures.”²²¹ While these requirements will not prohibit the importation of cetaceans for commercial purposes, they are stricter than the permit requirements of CITES.

128. The Philippines also allows breeding or propagation of wildlife for commercial purposes.²²² The breeding operation must not be detrimental to the survival of the species involved²²³ and only progenies and unproductive parent stock may be traded.²²⁴

129. In the Philippines, the “transport” of cetaceans, dead or alive, is prohibited.²²⁵ The administrative orders do not mention “transit,” but define “transport” as “to carry or move or cause to be carried or moved.”²²⁶ Whether this includes “transit” as that phrase is used in Article VII(1) of CITES is unknown. If it does, the Secretary of Agriculture may issue a “special permit” to allow transport.²²⁷

Sri Lanka

130. The FFPO prohibits the import or export of any mammal, whether dead or alive, or any part of any such mammal, unless a permit has been issued.²²⁸ Sri Lanka reports that import and export permits may be issued for marine mammals only to zoos for scientific purposes.²²⁹

131. The FFPO prohibits the “transport” of any protected mammal.²³⁰ The FFPO does not define “transport.” The context in which it is used—as a prohibition similar to possession or take—suggests that it is a prohibition against the movement or transportation of mammals (e.g., by ship, truck, or car) and not intended as a measure stricter than the exception from CITES permit rules under Article VII(1) of CITES for specimens in transit.

²¹⁵ *Id.* §§ 6, 7.

²¹⁶ Philippines Bureau of Fisheries and Aquatic Resources, Administrative Order 233, Series of 2010, § 1(a).

²¹⁷ *Id.* § 33(3).

²¹⁸ *Id.* § 26.

²¹⁹ Joint IRR, *supra* note 208, at § 5(j).

²²⁰ Joint IRR, § 4.

²²¹ Joint IRR, § 11.3.

²²² Republic Act No. 9147, *supra* note 208, § 17; Joint IRR, *supra* note 208, at § 17.

²²³ Republic Act No. 9147, § 6.

²²⁴ Joint IRR, *supra* note 208, at § 17.

²²⁵ Administrative Order 185, *supra* note 120, at § 2; Administrative Order 185-1, *supra* note 120, at § 2.

²²⁶ Administrative Order 185, *supra* note 120, at § 1.

²²⁷ Administrative Order 185, *supra* note 120, at § 2; Administrative Order 185-1, *supra* note 120, at § 2.

²²⁸ FFPO, §§ 37, 40.

²²⁹ Update on Resolution 11.22 on Live Capture of Cetaceans from the Wild for Commercial Purposes, *supra* note 5, at Annex B, Catalogue of Responses to CMS Live Captures Questionnaire

<http://www.cms.int/en/document/annex-b-inf-doc-4-catalogue-responses-cms-live-captures-questionnaire> (Sri Lanka entry).

²³⁰ FFPO, *supra* note 129, at § 30(1)(f), as amended by No. 22 of 2009, available at

http://www.documents.gov.lk/files/act/2009/4/22-2009_E.pdf.

C. Recommendations for Implementing Stricter Domestic Measures relating to Import and Transit of Live Cetaceans for Commercial Purposes

Recommendation 6: Apply Import Requirements to All Cetaceans

132. Several of the laws reviewed expressly prohibit the import of all cetaceans (e.g., Australia and Mauritius), regardless of whether they are included in the CITES Appendices and regardless of the purpose of the import. Some, such as Mauritius and Sri Lanka, simply prohibit the import of any marine mammal, “dead or alive.”
133. The European Union uses a different approach. It includes protected species in one of four Annexes and then establishes rules for trade in species included in that Annex. It included all cetaceans in Annex A of Council Regulation 338/97, regardless of whether they are included in the CITES Appendices, and then applied the permit requirement applicable to CITES Appendix I species to all species in Annex A. As a consequence, the EU Member States prohibit all trade in any cetacean species for primarily commercial purposes.
134. Both approaches clearly prohibit imports of live cetaceans captured in the wild for commercial purposes. Both approaches implement Resolution 11.22 fully.

Recommendation 7: Define “Transport” or “Transit”

135. The provisions relating to transit were challenging to identify because States do not always refer directly or indirectly to “transit.” They may, however, establish rules relating to “transport.” Whether “transport” is intended as a synonym for “transit” or is meant to cover domestic movement of specimens is not always clear because the laws do not define the word or distinguish it from “transit.”
136. The Native Terrestrial Biodiversity and National Parks Act of Mauritius includes a provision that provides a precise meaning of transit, although it does so as part of an exception to the permit requirements. It states that the permit requirements of the Act “shall not apply to – (a) the transit through, or the transshipment in, Mauritius of any species while it is and remains under the control of the customs authorities.”²³¹
137. To eliminate ambiguity as to whether CITES permit requirements apply to specimens in transit that remain under customs control and to implement Resolution 11.22 fully, CMS Parties may want to include a provision in their legislation that specifically requires permits in those situations. The provision could read as follows:

the permit requirements of the Act apply to the transit through, or the transshipment in, [name of country] of any live specimen of a cetacean species captured in the wild while it is and remains under the control of the customs authorities.

138. To remove any ambiguity as to the meaning of “transit,” CMS Parties could define that term. The definition provided in EU Council Regulation 338/97 provides a useful model:

“transit” shall mean the transport of specimens between two points outside [name of country] through the territory of [name of country] which are shipped to a named consignee and during which any interruption in the movement arises only from the arrangements necessitated by this form of traffic.

²³¹ Native Terrestrial Biodiversity and National Parks Act, *supra* note 204, at §3(1).

ANNEX 2

PROPOSED AMENDMENTS TO RESOLUTION 11.22

**LIVE CAPTURES OF CETACEANS FROM THE WILD
FOR COMMERCIAL PURPOSES**

NB: Proposed new text is underlined. Text to be deleted is ~~crossed-out~~.

Noting with concern the continuing activities targeting wild small cetacean populations for live capture, including several species listed on CMS Appendices I and II, for public display in commercial aquaria and travelling shows;

Noting that the IUCN (through the work of the Species Survival Commission's Cetacean Specialist Group) recognizes that live capture can be a serious threat to local cetacean populations when unmanaged and undertaken without a rigorous programme of research and monitoring, because the removal of live cetaceans from the wild, for captive display and/or research, is equivalent to incidental or deliberate killing, since the animals brought into captivity or killed during capture operations are no longer available to help maintain their natural populations;

Noting the regularly repeated advice from the International Whaling Commission (IWC) that populations of small cetaceans should not be subject to removals where such removals have not been shown to be sustainable;

Recalling that Article III (5) of CMS requires that Parties that are Range States of a migratory species listed in Appendix I shall in principle prohibit the taking of animals belonging to such species;

Also recalling that CMS Resolution 10.15 on a Global Programme of Work for Cetaceans requests the CMS Secretariat and Scientific Council to continue and increase efforts to collaborate with other relevant international fora with a view to avoiding duplication, increasing synergies and raising the profile of the CMS and CMS cetacean-related agreements in these fora;

Further recalling that Resolution 9.9 on Migratory Marine Species expresses concern that migratory marine species face multiple, cumulative and often synergistic threats with possible effects over vast areas, such as by-catch, over-fishing, pollution, habitat destruction or degradation, marine noise impacts and deliberate hunts as well as climate change;

Noting that Resolution 8.22 on human-induced impacts on cetaceans does not sufficiently address the issue of live capture for commercial purposes;

Reiterating its urgent call in Resolution 10.15 on Parties to promote the integration of cetacean conservation into all relevant sectors by coordinating their national positions among various conventions, agreements and other international fora;

Aware that all regional cetacean-related instruments concluded under CMS contain provisions, or have in place plans, relevant to the issue of live captures, namely that:

- the Whale and Dolphin Action Plan (2013-2017) of the CMS Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region includes "direct take" as one of five major hazards to whale and dolphin populations in the Pacific Islands region and includes minimizing its impact as an objective of the Plan;

- the Small Cetacean Action Plan of the CMS Memorandum of Understanding Concerning the Conservation of the Manatee and Small Cetaceans of Western Africa and Macaronesia calls on Signatories to ensure that any live capture activities in the region do not affect the viability of local populations and comply with international regulations and agreements;
- Paragraph 4 of the Annex to the ASCOBANS Agreement requires Parties to “endeavour to establish (a) the prohibition under national law, of the intentional taking and killing of small cetaceans where such regulations are not already in force” pursuant to the Article 2.1 aim to achieve and maintain a favourable conservation status for small cetaceans; and
- Article II of the ACCOBAMS Agreement requires Parties to “prohibit and take all necessary measures to eliminate, where this is not already done, any deliberate taking of Cetaceans”, subject to limited exceptions “only in emergency situations” and “for the purpose of non-lethal in situ research aimed at maintaining a favourable conservation status for cetaceans”;

Also aware that:

- The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) includes all cetacean species in its Appendices I or II, where imports of specimens of CITES Appendix I species to be used for primarily commercial purposes are prohibited;
- the Bern Convention on the Conservation of European Wildlife and Natural Habitats prohibits “all forms of deliberate capture and keeping” of species included in its Appendix II, including the bottlenose dolphin (*Tursiops truncatus*) and the killer whale (*Orcinus orca*);
- European Union Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora lists all cetaceans in its Annex IV and subject to exceptions, requires EU Member States to take requisite measures to establish a system of strict protection for these species in their natural range, prohibiting all forms of deliberate capture or killing of wild specimens, and to prohibit the sale or exchange of cetaceans;
- Article 11 (1) (b) of the Specially Protected Areas and Wildlife Protocol of the Wider Caribbean Region requires each Party to ensure protection and recovery of fauna species on its Annex 2 (including cetaceans) by prohibiting “the taking, possession or killing (including, to the extent possible, the incidental taking, possession or killing) or commercial trade” in such species or their parts or products; and
- The so-called Buenos Aires Group, comprised of the majority of Latin American IWC member states, adopted in 2007 the Latin American Strategy for Cooperation on Cetacean Conservation, which assumes among its main commitments non-lethal use of cetaceans;

Acknowledging increasing global concern for animal welfare in relation to the live capture, transport and keeping of cetaceans; and

Acknowledging that a number of countries including Argentina, Australia, Brazil, Chile, China, Costa Rica, India, Israel, Lao People’s Democratic Republic, Malaysia, Mauritius, Member States of the EU, Mexico, Monaco, Nicaragua, Peru, Philippines, Singapore, Sri Lanka, Thailand and Uruguay, have already established total or partial prohibitions of live captures of wild cetaceans in their national waters.

*The Conference of the Parties to the
Convention on the Conservation of Migratory Species of Wild Animals*

1. *Invites* Parties that have not already done so to develop and implement national legislation, as appropriate, prohibiting the live capture of cetaceans from the wild for commercial purposes;
2. *Urges* Parties to consider taking stricter measures in line with CITES Article XIV with regard to the import and international transit of live cetaceans for commercial purposes that have been captured in the wild;
3. *Adopts the Best Practice Guidelines contained in the Annex to this Resolution, designed to aid CMS Parties interested in improving existing national legislation or developing new laws relating to the capture, transit or import of live cetaceans;*
4. *Requests* the Secretariat and the Scientific Council to seek to enhance cooperation and collaboration with CITES and the IWC on small cetacean species targeted by live captures from the wild;
5. *Calls* on Parties to support and, where appropriate and possible, contribute to cooperation and collaboration with CITES and IWC on small cetacean species targeted by live captures from the wild;
6. *Urges* Parties and *encourages* Parties or Signatories to relevant CMS instruments and non-Party States to actively discourage new live captures from the wild for commercial purposes; and
7. *Encourages* Parties to share data and information on live captures with the IWC and other appropriate fora.

ANNEX TO THE RESOLUTION

**BEST PRACTICE GUIDELINES
RELATING TO THE LIVE CAPTURE OF CETACEANS FROM THE WILD FOR
COMMERCIAL PURPOSES**

1. These Best Practice Guidelines are based on the review contained in Annex 1 of UNEP/CMS/COP12/Doc.22.2.4*. They contain two sections:
 - a) Recommendations for Developing National Legislation for Prohibiting the Live Capture of Cetaceans for Commercial Purposes
 - b) Recommendations for Implementing Stricter Domestic Measures Relating to Import and Transit of Live Cetaceans for Commercial Purposes

A. Recommendations for Developing National Legislation for Prohibiting the Live Capture of Cetaceans for Commercial Purposes

Recommendation 1: Application to “Cetaceans”

2. Resolution 11.22 (Rev. COP12) applies to all cetaceans, but the laws reviewed did not always extend to all cetaceans. Some CMS Parties limit the scope of the prohibition against live capture or “take” to cetaceans (and other animals) included in a list while others apply the prohibition to all cetaceans or all marine mammals. The use of a list is consistent with the approach of CMS, which limits its prohibition against “taking” to those migratory species included in Appendix I. The list approach, however, is inconsistent with the approach of Resolution 11.22 (Rev. COP12) (as well as ASCOBANS), unless the list includes each cetacean species.
3. To implement Resolution 11.22 (Rev. COP12) fully, Parties should consider adopting legislation to “prohibit the take, including live capture, of all cetaceans.” In the alternative, legislation should be drafted to “prohibit the take, including live capture, of all cetaceans included in Annex [X].” Annex X would then list “all cetaceans” or the “Order Cetacea.” The term “marine mammals,” as used by Sri Lanka, covers a broader range of animals that could also be used to implement Resolution 11.22 (Rev. COP12) fully.

Recommendation 2: Clearly Define the Geographical Scope

4. Resolution 11.22 (Rev. COP12) applies without geographic scope. Thus, any laws to implement Resolution 11.22 (Rev. COP12) fully should make clear that any prohibition against live capture applies to (1) all jurisdictional waters of that State and (2) the high seas with respect to its citizens and vessels it flags.
5. Some of the national laws reviewed are unclear as to the geographical scope of the prohibition. Some, for example, apply in the “waters of State X” without defining what those waters include. If the geographic scope of a law relies on a definition of “waters of State X” found in a different law, that should be made clear. For example, if the State’s Fisheries Law prohibits live capture of cetaceans in the “waters of State X,” but that phrase is defined in the State’s Maritime Zones Act, then the Fisheries Law should state

“waters of State X,” as used in the Fisheries Law, has the same meaning as used in Article Z of the Maritime Zones Act.

* The principles against which the recommendations are premised are discussed in Annex 1 of the document, which also contains the related references.

6. Other laws omitted from the scope of application a key jurisdictional zone, sometimes internal waters or the exclusive economic zone, but most frequently the high seas (also known as areas beyond national jurisdiction). To implement Resolution 11.22 (Rev. COP12) fully for all cetaceans and Article III(5) of CMS for Appendix I cetaceans, laws should apply to

“internal waters, territorial seas, exclusive economic zone, and areas beyond national jurisdiction.”

7. As described in the following paragraphs, a State does not have jurisdiction over vessels flagged by other States or non-citizens in areas beyond national jurisdiction. Thus, a law implementing Resolution 11.22 fully needs to specify to whom the law applies in areas beyond national jurisdiction separately from those provisions that apply to areas under national jurisdiction.

Recommendation 3: Clearly Define the Range of “Persons” to Whom the Prohibition Applies

8. Some of the national laws reviewed make it unlawful to capture or otherwise take cetaceans, but they do not specify to whom the prohibition applies. Other laws prohibit “a person” or “any person” from capturing or otherwise “taking” a cetacean, but do not define “person.” Consequently, it is not clear whether the prohibition applies to, for example, governmental agencies or vessels flagged by that State. This is a weakness in the laws for at least two reasons. First, CMS specifically extends its prohibitions to vessels flagged by a CMS Party with respect to Appendix I species. Second, the crews of a vessel flagged by one State are frequently nationals of another State.
9. Under international law, States may assert jurisdiction and control over individuals and entities through a variety of principles. For purposes of Resolution 11.22 (Rev. COP12), the two relevant principles are the nationality and territoriality principles.
10. The nationality principle allows a State to exercise jurisdiction and control over its nationals, regardless of where they are. Companies, ships, and aircraft are considered as having the nationality of the State in whose territory they are registered (i.e., flagged). Thus, a flag State has a duty to exercise jurisdiction and control over vessels that it flags. In the case of the conduct of individuals, a State often cedes jurisdiction over its nationals when they are abroad so that the State in which the conduct occurred can exercise jurisdiction pursuant to the territoriality principle.
11. The territoriality principle gives a State authority to regulate persons, regardless of nationality, within its borders. The exercise of this type of jurisdiction depends on the location of the conduct. So long as the conduct occurs within the territory of the State, it has jurisdiction. Thus a State may apply its laws to foreign commercial ships while they are within its ports and internal waters, which are considered part of its territory.
12. For the purposes of Resolution 11.22 (Rev. COP12), CMS Parties are invited to prohibit the live capture of all cetaceans from the wild. Article III(5) of CMS already requires the Parties that are Range States to prohibit the live capture of Appendix I cetaceans within their waters and, with respect to vessels they flag, on the high seas. Thus, Resolution 11.22 (Rev. COP12) extends the prohibition against live capture to non-Appendix I species. It also invites Parties to prohibit the live capture of cetaceans in the wild for commercial purposes by (1) vessels flagged by a CMS Party in all waters and (2) all “persons” under the jurisdiction of that CMS Party wherever they may be.
13. Based on the legislation reviewed, most CMS Parties are not prohibiting the live capture of cetaceans to the fullest extent contemplated by Resolution 11.22 (Rev. COP12). Of the legislation reviewed, only Australia clearly applied Resolution 11.22 (Rev. COP12) to areas outside its jurisdiction. Its legislation could be a model for other CMS Parties.

14. Australia combines the geographic scope of its prohibitions on live capture (as described in Recommendation 2) with the application to various entities and persons. Sections 5 and 224 of the EPBC Act provide as follows:

Section 5

Extension to external Territories

(1) This Act extends to each external Territory.

Limited extraterritorial application

(2) This Act applies to acts, omissions, matters and things in the Australian jurisdiction, and does not apply to acts, omissions, matters and things outside the Australian jurisdiction except so far as the contrary intention appears.

Application limited to Australians outside exclusive economic zone

(3) A provision of this Act that has effect in relation to a place that is outside the outer limits of the exclusive economic zone and is not on or in the continental shelf applies only in relation to:

- (a) Australian citizens; and
- (b) persons who:
 - (i) are not Australian citizens; and
 - (ii) hold permanent visas under the *Migration Act 1958*; and
 - (iii) are domiciled in Australia or an external Territory; and
- (c) corporations incorporated in Australia or an external Territory; and
- (d) the Commonwealth; and
- (e) Commonwealth agencies; and
- (f) Australian aircraft; and
- (g) Australian vessels; and
- (h) members of crews of Australian aircraft and Australian vessels (including persons in charge of aircraft or vessels).

Application to everyone in Australia and exclusive economic zone

(4) A provision of this Act that has effect in relation to a place that is within the outer limits of the exclusive economic zone (whether the place is in the zone or in Australia or an external Territory) or that is on or in the continental shelf applies in relation to:

- (a) all persons (including persons who are not Australian citizens); and
- (b) all aircraft (including aircraft that are not Australian aircraft); and
- (c) all vessels (including vessels that are not Australian vessels).

224 Application of Division

(1) This Division extends to acts, omissions, matters and things outside Australia (whether in a foreign country or not), except so far as the contrary intention appears.

(2) A provision of this Division that has effect in relation to a place outside the outer limits of the Australian Whale Sanctuary applies only in relation to:

- (a) Australian citizens; and
- (b) persons who:
 - (i) are not Australian citizens; and
 - (ii) hold permanent visas under the *Migration Act 1958*; and
 - (iii) are domiciled in Australia or an external Territory; and
- (c) corporations incorporated in Australia or an external Territory; and
- (d) the Commonwealth; and
- (e) Commonwealth agencies; and
- (f) Australian aircraft; and
- (g) Australian vessels; and
- (h) members of crews of Australian aircraft and Australian vessels (including persons in charge of aircraft or vessels).

(3) This Division applies to a vessel as if it were an Australian vessel if:

- (a) the vessel is a boat within the meaning of the *Fisheries Management Act 1991*; and

(b) a declaration, under subsection 4(2) of that Act, that the vessel is taken to be an Australian boat is in force.

15. A separate provision applies the provisions relating to the Whale Sanctuary to a different list of entities. To eliminate ambiguity, the EPBC Act specifically defines phrases used in Section 5, including “Australian jurisdiction,” “Australian aircraft,” and “Australian vessel.”
16. The definition of “person” may not need to be as extensive as the one provided by Australia, depending on the laws of a State. For example, the U.S. Marine Mammal Protection Act defines “person” to include
 - (A) any private person or entity, and
 - (B) any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government
17. Paragraph (A) of this definition, by referring to a “private entity,” ensures that any individual, corporation, or vessel is covered by the definition of “person.” Paragraph (B) ensures that any person working with or on behalf of the government (“agent”), as well as any agency or the government itself is covered by the definition.

Recommendation 4: Clearly Define “Take”

18. Most of the laws reviewed adequately define “take” or otherwise use words that prohibit live captures of cetaceans. The European Union, for example, prohibits “all forms of deliberate capture or killing of specimens [of Annex A species].” The use of the phrase “all forms” ensures that every method of capturing a cetacean is prohibited. At least one law reviewed, however, did not include any definition of “take” and did not use other words that would prohibit the live capture of cetaceans.
19. For consistency with Article III(5) of CMS if not Resolution 11.22 (Rev. COP12), legislation should also prohibit “attempts” to capture cetaceans. This is an omission from most of the laws reviewed.

Recommendation 5: Clearly Define the Criteria for Exceptions

20. Many of the laws reviewed include only vague criteria relating to the use of exceptions to the prohibition against live captures of cetaceans. Some explicitly included an exception for exhibition/display. Other legislation allows the competent authority discretion to issue a permit under vaguely defined exceptions. Whether implemented strictly or not, the lack of clearly defined criteria leaves uncertainty as to the scope of the exceptions.
21. Australia affirmatively prohibits exceptions for exhibitions/display, while Costa Rica’s exceptions to its prohibition against capture are limited to euthanasia or rehabilitation. These laws can perhaps be models for other CMS Parties, at least with respect to barring an exception for live capture of cetaceans for display.

B. Recommendations for Implementing Stricter Domestic Measures Relating to Import and Transit of Live Cetaceans for Commercial Purposes

Recommendation 6: Apply Import Requirements to All Cetaceans

22. Several of the laws reviewed expressly prohibit the import of all cetaceans (e.g., Australia and Mauritius), regardless of whether they are included in the CITES Appendices and regardless of the purpose of the import. Some, such as Mauritius and Sri Lanka, simply prohibit the import of any marine mammal, “dead or alive.”
23. The European Union uses a different approach. It includes protected species in one of four Annexes and then establishes rules for trade in species included in that Annex. It included all cetaceans in Annex A of Council Regulation 338/97, regardless of whether they are included in the CITES Appendices, and then applied the permit requirement applicable to CITES Appendix I species to all species in Annex A. As a consequence, the EU Member States prohibit all trade in any cetacean species for primarily commercial purposes.
24. Both approaches clearly prohibit imports of live cetaceans captured in the wild for commercial purposes. Both approaches implement Resolution 11.22 (Rev. COP12) fully.

Recommendation 7: Define “Transport” or “Transit”

25. The provisions relating to transit were challenging to identify because States do not always refer directly or indirectly to “transit.” They may, however, establish rules relating to “transport.” Whether “transport” is intended as a synonym for “transit” or is meant to cover domestic movement of specimens is not always clear because the laws do not define the word or distinguish it from “transit.”
26. The Native Terrestrial Biodiversity and National Parks Act of Mauritius includes a provision that provides a precise meaning of transit, although it does so as part of an exception to the permit requirements. It states that the permit requirements of the Act “shall not apply to – (a) the transit through, or the transshipment in, Mauritius of any species while it is and remains under the control of the customs authorities.”
27. To eliminate ambiguity as to whether CITES permit requirements apply to specimens in transit that remain under customs control and to implement Resolution 11.22 (Rev. COP12) fully, CMS Parties may want to include a provision in their legislation that specifically requires permits in those situations. The provision could read as follows:

the permit requirements of the Act apply to the transit through, or the transshipment in, [name of country] of any live specimen of a cetacean species captured in the wild while it is and remains under the control of the customs authorities.

28. To remove any ambiguity as to the meaning of “transit,” CMS Parties could define that term. The definition provided in EU Council Regulation 338/97 provides a useful model:

38

ANNEX 3**DRAFT DECISIONS*****Directed to the Secretariat***

12.AA The Secretariat shall:

- a) Request Parties to submit information on the implementation of the Best Practice Guidelines relating to the Live Capture of Cetaceans from the Wild for Commercial Purposes;
- b) Report to the Standing Committee at its 49th meeting on the Parties' progress in implementing the Resolution.

Directed to Parties

12.BB Parties are requested to:

- a) cooperate with the Secretariat in the implementation of Decisions 12.AA, by providing information in response to the request mentioned in paragraph a).

Directed to the Standing Committee

12.CC The Standing Committee shall:

- a) Consider at its 49th meeting the report submitted by the Secretariat and as appropriate recommend further actions to be taken.