



# CONVENTION ON MIGRATORY SPECIES

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## **TAKING OF CETACEANS AND DOLPHINARIA: A LEGAL ANALYSIS WITHIN THE FRAMEWORK OF ACCOBAMS**





Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and contiguous Atlantic area, concluded under the auspices of the Convention on the Conservation of Migratory Species of Wild Animals (CMS)

Accord sur la Conservation des Cétacés de la Mer Noire, de la Méditerranée et de la zone Atlantique adjacente, conclu sous l'égide de la Convention sur la Conservation des Espèces Migratrices appartenant à la Faune Sauvage (CMS)



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## Fifth Meeting of the Parties to ACCOBAMS

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# TAKING OF CETACEANS AND DOLPHINARIA: A LEGAL ANALYSIS WITHIN THE FRAMEWORK OF ACCOBAMS



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**TAKING OF CETACEANS AND DOLPHINARIA:  
A LEGAL ANALYSIS WITHIN THE FRAMEWORK OF ACCOBAMS\*\***

*Document prepared by Professor Tullio Scovazzi \**

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\*\* This study has been completed on 30 May 2013. It solely reflects the findings and personal opinions of the author.

## 1. Terms of Reference

In the frame of the Fifth Meeting of the Parties to the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area<sup>1</sup> and following the Bureau recommendation, the consultant has been requested to provide the ACCOBAMS Secretariat with a legal analysis on how the questions of taking of cetaceans and dolphinarium are addressed in ACCOBAMS.

The concerns that exist as regards the questions of taking of cetaceans and dolphinarium have recently been expressed by the ACCOBAMS Scientific Committee that recalled “the illegality of live removals of cetaceans from the Black Sea” and called for “an inventory and thorough assessment of individual identity of all bottlenose dolphins kept in captivity by means of genetic, morphological and photo-ID methods”, as well as for the provision of “appropriate administrative measures in order to prevent substitution of dolphins that die in captivity by animals taken from the wild” (Recommendation 8.2, adopted in November 2012). Following the recommendations by the Scientific Committee, in May 2013 the ACCOBAMS Bureau approved, for submission to the Fifth Meeting of the Parties, to be held in November 2013, Draft Resolution 5.14 (Live Removals of Bottlenose Dolphins in the Black Sea).

The analysis developed hereunder outlines the obligations relevant to the issues of taking and dolphinarium arising from the Agreement and related instruments adopted by the Parties<sup>2</sup>, as well as from five other relevant international legal instruments to which all or some of the Parties to ACCOBAMS are also bound. As half of the current Parties to ACCOBAMS are members of the European Union<sup>3</sup>, the relevant legislation of this regional economic integration organization is also considered in the analysis as an important element of the current legal regime.

## 2. The Obligations Arising from ACCOBAMS and the Related Instruments:

### 2.A. Cetaceans as an Integral Part of the Marine Ecosystem

ACCOBAMS was concluded within the framework of the Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 1979)<sup>4</sup>. The recognition that cetaceans are “migratory” animals is an important element to be taken into account when interpreting the text of this agreement and the obligations binding on its Parties.

Since its preamble, ACCOBAMS recognizes that cetaceans<sup>5</sup> are migratory species of wild animals which form “an integral part of the marine ecosystem”. This fundamental recognition already implies

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<sup>1</sup> Hereinafter: ACCOBAMS.

<sup>2</sup> The Parties to ACCOBAMS presently are twenty-three (Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, France, Georgia, Greece, Italy, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Portugal, Romania, Slovenia, Spain, Syria, Tunisia, Ukraine). Six States bordering the ACCOBAMS area are not parties to ACCOBAMS (Bosnia and Herzegovina, Israel, Palestine, Russian Federation, Turkey, and United Kingdom). According to Art. XIII, the ACCOBAMS is open for signature and ratification “by any range State, whether or not areas under its jurisdiction lie within the Agreement area”.

<sup>3</sup> See *infra*, para. 3.F.

<sup>4</sup> Hereinafter: CMS.

<sup>5</sup> “Cetaceans”, for the purpose of ACCOBAMS, “means animals, including individuals, of those species, subspecies or populations of *Odontoceti* or *Mysticeti*” (Art. I, para. 3). The provisions of the Agreement apply to “all cetaceans that have a

that cetaceans are to be conserved in the marine ecosystem of which they form an integral part, and not elsewhere.

Dolphinaria, commonly understood as “aquaria in which dolphins are kept and trained for public entertainment”<sup>6</sup>, do not represent nor can substitute in any way the marine ecosystem. They can never constitute the appropriate habitat for a migratory species. Even the so-called “local populations” of bottlenose dolphins, for example, have home ranges which are measured in kilometers, being always in motion, also when resting<sup>7</sup>. Dolphinaria are in principle incompatible with one of the fundamental considerations expressed in the preamble of ACCOBAMS, on which the interpretation of the entire legal instrument is necessarily based<sup>8</sup>.

## 2.B. The Prohibition of Taking

Consistently with the statements contained in the preamble, ACCOBAMS explicitly places an obligation on its Parties to, *inter alia*, “prohibit and take all necessary measures to eliminate, where it is not already done, any deliberate taking of cetaceans” (Art. II, para. 1).

The definition of “taking” is not contained in ACCOBAMS itself. In this regard, Art. I, para. 3, provides that “the terms defined in Article I, subparagraphs 1 a) to e), and i) of the Convention shall have the same meaning, *mutatis mutandis*, in this Agreement” The “Convention” referred to is CMS. In Art. I, para. i, CMS defines the term “taking” as “taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct”.

As seen, “taking” is defined in very broad and clear terms which apply not only to cetaceans taken from the wild, but also to those born in captivity. Not only the killing of cetaceans in various forms or for various purposes, but also all activities which are intended to hunt, capture or harass cetaceans are banned from the ACCOBAMS area<sup>9</sup>. The terms “taking” and “capturing” are to be understood as referring to a continuing conduct, that is in the meaning of depriving the animals of their natural freedom and keeping them in captivity. To keep a dolphin in a dolphinarium necessarily presupposes its hunting, capturing and harassing, as the animal is deprived of its natural characteristics of belonging to a migratory species<sup>10</sup>. It is a breach of ACCOBAMS, as from the time when a State becomes a party to it.

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range which lies entirely or partly within the Agreement area or that accidentally or occasionally frequent the Agreement area” (Art. I, para. 2). An indicative list of these cetaceans is contained in Annex I to ACCOBAMS.

<sup>6</sup> *Oxford English Dictionary*, online edition, 2013.

<sup>7</sup> Moreover, cetaceans spend a minimal percentage of their time at the water’s surface, contrary to what they are trained to do in dolphinaria.

<sup>8</sup> According to the general rule of interpretation contained in Art. 31 of the Convention on the Law of Treaties (Vienna, 1969), a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context for the purpose of the interpretation of a treaty comprises, first of all, the text of the treaty, “including its preamble and annexes”.

<sup>9</sup> The ACCOBAMS area is currently constituted by “all the maritime waters of the Black Sea and the Mediterranean and their gulfs and seas, and the internal waters connected to or interconnecting these maritime waters, and of the Atlantic area contiguous to the Mediterranean Sea west of the Straits of Gibraltar”. Art. I, para. 1 a, defines the precise boundaries of the Agreement area. The Fourth Meeting of the Parties (2010) adopted Resolution A/4.1, which amended ACCOBAMS in order to extend the Agreement area, following a proposal put forward by Portugal and Spain. These amendments are not yet in force.

<sup>10</sup> In Appendix 1 to ACCOBAMS Resolution 4.18 (Guidelines on the Granting of Exceptions to Article II, Paragraph 1, for the Purpose of Non-lethal In Situ Research in the Agreement Area), “harassment” is defined as “disruption of cetacean’s normal

Exceptions to the prohibition of taking are allowed only “in emergency situations”<sup>11</sup> or “after having obtained the advice of the Scientific Committee, for the purpose of non-lethal *in situ* research aimed at maintaining a favourable conservation status for cetaceans” (Art. II, para. 2). These exceptional situations, defined in very strict terms, are far from occurring in the specific case of taking cetaceans for dolphinarium.

The negative attitude of ACCOBAMS towards the taking of cetaceans and dolphinarium is confirmed by a number of Resolutions adopted by the Meeting of the Parties.

For instance, Resolution 3.13 (Dolphin Interaction Programmes) endorsed the Action Plan of the Cetacean Specialist Group of the International Union for the Conservation of Nature, stressing that “removal of live cetaceans from the wild, for captive display and/or research, is equivalent to incidental or deliberate killing, as the animals brought into captivity (or killed during captive operations) are no longer available to maintain their populations. When unmanaged and undertaken without a rigorous programme of research and monitoring, live-capture can become a serious threat to local cetacean populations”.

By Resolution 4.18 (Guidelines on the Granting of Exceptions to Article II, Paragraph 1, for the Purpose of Non-lethal In Situ Research in the Agreement Area) ACCOBAMS Parties were recommended “to limit exception permits to ‘taking’ that only has the potential to disturb a cetacean population by causing disruption of behavioural patterns, and excluding those takings which have the potential to injure a cetacean or cetacean population”, and “to consider that harassment risk begins when a vessel is voluntarily closer than the minimum distance identified in common rules of commercial cetaceans watching”<sup>12</sup>.

Consistently, Draft Resolution 5.14 (Live Removals of Bottlenose Dolphins in the Black Sea), approved in May 2013 by the ACCOBAMS Bureau for submission to the Fifth Meeting of the Parties, states that “the practice of taking live Black Sea bottlenose dolphins from the wild to trade them or to keep them in captivity constitutes a breach of the Agreement” and that “this kind of activities constitute a breach of obligations arising from [...] other treaties and are contrary to the objectives set forth by the Conservation Plan for Black Sea Cetaceans”<sup>13</sup>.

The ban on the taking of cetaceans in this broad meaning is in full conformity with the United Nations Convention on the Law of the Sea (Montego Bay, 1982)<sup>14</sup>.

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behaviour or prior activity by deliberate or negligent acts of pursuit, dispersal, herding, interference, torment, tagging, marking, branding or other acts that annoy or trouble cetaceans, as well as attempts and repeated approaches for such purposes”.

<sup>11</sup> Responses to emergency situations are regulated in Annex 2, para. 6, to ACCOBAMS.

<sup>12</sup> The same resolution adopted the Guidelines on the Granting of Exceptions to Article II, Paragraph 1, for the Purpose of Non-lethal In Situ Research in the Agreement Area (Annex of Resolution 4.18), to be applied for research activities in waters under the jurisdiction of the Parties and to their nationals conducting research activities wherever in the Agreement area.

<sup>13</sup> See ACCOBAMS and Commission for the Protection of the Black Sea against Pollution, *Conservation Plan for Black Sea Cetaceans*, 2006.

<sup>14</sup> Hereinafter: UNCLOS.

According to Art. 65 of UNCLOS, nothing in Part V (that is the UNCLOS part dealing with the exclusive economic zone) “restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for” in Part V itself. Moreover, States parties are under the general obligation to co-operate with a view to the conservation of marine mammals. They shall in particular work through the appropriate international organizations for the conservation, management and study of cetaceans. Art. 120 of UNCLOS extends the application of Art. 65 to the conservation and management of marine mammals on the high seas. It follows that, under Arts. 65 and 120, the normal scheme of exploitation of marine living resources provided for by the UNCLOS, that is the scheme based on the objective of optimum utilization of the living resources and the determination of the total allowable catch, does not apply to marine mammals. Unlike other marine living resources of the sea, the exploitation of these animals can be prohibited, limited or regulated, irrespective of the fact that they are in danger of extinction or their stocks are being depleted.

### 2.C. The Prohibition of Trading

The rules upon which treaties must be interpreted and performed in good faith by the parties thereto (*pacta sunt servanda*)<sup>15</sup> prevent the parties to ACCOBAMS also from trading in cetaceans deliberately taken in the Agreement area or elsewhere by third entities and offered to the Parties on sale or other contractual basis. Even though the word “trading” is not explicitly listed in Art. I, para. i, CMS<sup>16</sup>, it is evident that any kind of trade in cetaceans presupposes their previous deliberate taking, hunting, capturing, harassing or killing<sup>17</sup>.

Accordingly, Resolution 3.13, mentioned above<sup>18</sup>, urges ACCOBAMS Parties “not to allow imports of dolphins that have been captured from the wild, and to screen very carefully all information submitted for the importation of captive-bred dolphins”.

Since their First Meeting (2002), the Parties to ACCOBAMS have committed themselves to make every effort not only to strictly enforce the prohibition of deliberate taking and keeping of Black Sea bottlenose dolphins, but also to ban importation, exportation and re-exportation of these animals to and from ACCOBAMS range States and, particularly, Black Sea coastal States<sup>19</sup>. The already mentioned Resolution 3.13<sup>20</sup> expresses concern over “the continued trade in cetaceans, some of which are known to be originating from the Agreement area”, for the purpose of their placement in captive facilities.

The same concern is repeated in Draft Resolution 5.14, which also asks the Black Sea ACCOBAMS Parties, in coordination with the Permanent Secretariat of the Commission on the Protection of the Black Sea Against Pollution, “to carry out an assessment and an inventory of all specimens of bottlenose dolphins kept in captivity by means of genetic, morphological and photographic

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<sup>15</sup> See Arts. 26 and 31 of the Convention on the Law of Treaties (Vienna, 1969).

<sup>16</sup> See *supra*, para. 2.B.

<sup>17</sup> Specific rules on the prohibition of trading are to be found in the Convention on the International Trade in Endangered Species of Wild Fauna and Flora, as well as in some European legal instruments (*infra*, paras. 3.C and 3.F).

<sup>18</sup> See *supra*, para. 2.B.

<sup>19</sup> ACCOBAMS Resolution 1.12 (Conservation of the Black Sea *Tursiops truncatus*: Bottlenose Dolphin).

<sup>20</sup> *Supra*, para. 2.B.



identification methods, to adopt appropriate measures to prevent the substitution of Black Sea bottlenose dolphins that die in captivity by others taken from the wild, and to present a report on this matter at the next Meeting of the ACCOBAMS Parties”.

The idea of setting up an inventory is not new in the field of marine mammal protection and is to be welcomed in the context of ACCOBAMS, with a view to effectively addressing the problem of illegal takings of live animals. In particular, an inventory could provide a manageable means against the illegal practice of substituting those cetaceans which die in dolphinariums with new animals taken from the wild and traded, thus frustrating the objectives of ACCOBAMS and other international treaties.

Such a provision is included in the legislation of the United States. According to the Marine Mammal Protection Act of 1972, as amended in 2007<sup>21</sup>, “no marine mammal may be exported for the purpose of public display, scientific research, or enhancing the survival or recovery of a species or stock unless the receiving facility meets standards that are comparable to the requirements that a person must meet to receive a permit” under the MMPA itself (para. 9). The MMPA also provides that “the Secretary shall establish and maintain an inventory of all marine mammals possessed pursuant to permits [...], and all progeny of such marine mammals”. The inventory must contain, for each marine mammal, the following information: “(a) the name of the marine mammal or other identification; (b) the sex of the marine mammal; (c) the estimated or actual birth date of the marine mammal; (d) the date of acquisition or disposition of the marine mammal by the permit holder; (e) the source from whom the marine mammal was acquired, including the location of the take from the wild, if applicable; (f) if the marine mammal is transferred, the name of the recipient; (g) a notation if the animal was acquired as a result of stranding; (h) the date of death of the marine mammal and the cause of death when determined” (para. 10).

Currently, there is no regulated or centralized inventory of captive cetaceans for the ACCOBAMS area. If such an inventory were set up, with the support of the ACCOBAMS Secretariat and the Scientific Committee, all cetaceans held in captivity could be found by name, State and facility in a searchable archive and monitored, without illegal substitutions of wild animals taking place. This would dramatically increase the effectiveness of trade controls and contribute to a strengthened compliance with the Agreement.

## **2.D. Threats Posed to Cetaceans by Human Interactions**

The main purpose of dolphinariums is to exhibit dolphins to humans and entertain the public also through interaction with the animals kept in captivity. The provisions contained in the ACCOBAMS Conservation Plan (Annex 2 to the Agreement), however, demonstrate the contrariness of such facilities and of the activities undertaken therein with the purposes of the Agreement not only by emphasizing the migratory nature of cetaceans<sup>22</sup>, but also by placing “interactions with human activities” in the context of “potential threats”<sup>23</sup>.

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<sup>21</sup> Hereinafter: MMPA.

<sup>22</sup> For instance, para. 4 of the Conservation Plan requires the Parties to “co-operate to determine the migration routes and the breeding and feeding areas of the species covered by the Agreement in order to define areas where human activities may need to be regulated as a consequence”.

<sup>23</sup> Para. 4 requires the Parties to “develop systematic research programmes on dead, stranded, wounded or sick animals to determine the main interactions with human activities and to identify present and potential threats”.

Also the importance recognized in the Conservation Plan to the “collection and dissemination of information about cetaceans” and to “training courses and education programmes” (para. 5) appears in contrast with the completely different purposes of dolphinaria, as most facilities lack any educational programme, indicate no more than the common and scientific name of the animals held in captivity and do not provide any information to visitors concerning the provenance, biological and ecological aspects, conservation status of cetaceans nor the threats to which they are exposed.

So-called “swimming with dolphins” programmes, offered in some dolphinaria, far from being educational, may encourage people to undertake similar activities with animals in the wild, putting both humans and animals at risk of injury. By the same token, feeding animals during shows held in dolphinaria may encourage people to approach and try to feed cetaceans in the wild, again putting both animals and humans at significant risk. Dolphins are often presented as playful animals without visitors being reminded that cetaceans can also be dangerous if approached by inexperienced people in the wild. Moreover, dolphinaria do not contribute in any way to the development of “information, awareness and identification guides for distribution to users of the sea” (para. 5, g) nor of any other tool that could contribute to the common educational purposes stated in the Conservation Plan.

At their Third Meeting (2007), on the recommendation of the ACCOBAMS Scientific Committee, the Parties adopted the already mentioned Resolution 3.13<sup>24</sup>. This instrument points out, *inter alia*, the “risks associated with direct contact between humans and marine mammals, especially cetaceans, which relate to the harassment of wild animals and present risks to the safety of swimmers”, and underlines that “activities that promote or enable direct interactions between humans and marine mammals dramatically increase the potential for harassment”. For these reasons, Resolution 3.13 requests the ACCOBAMS Parties “to prohibit any cetacean interaction programme that involves closely approaching, interacting with, or attempting to interact with wild cetaceans, with the exception of authorized research activities granted according to Resolution 2.8<sup>25</sup> and cetacean-watching activities carried out in accordance with the Guidelines for commercial cetacean-watching activities in the Black Sea, the Mediterranean Sea and contiguous Atlantic area, adopted within the framework of ACCOBAMS. This includes attempting to swim with, touch, feed or otherwise elicit a reaction from the animals”. The resolution also urges the ACCOBAMS Parties to provide the Secretariat with “information on dolphin-assisted therapy and other interaction programmes or activities existing or planned in the areas under their jurisdiction”.

## 2.E. Dolphinaria and Scientific Research on Cetaceans

The preamble of ACCOBAMS also acknowledges that, “despite past or ongoing scientific research, knowledge of the biology, ecology, and populations dynamics of cetaceans is deficient, and that it is necessary to develop co-operation for research and monitoring of these species in order to fully implement conservation measures”. These terms are relevant for interpretation of ACCOBAMS as regards the question of dolphinaria.

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<sup>24</sup> See *supra*, paras. 2.B and 2.C.

<sup>25</sup> Resolution 4.18 (Guidelines on the Granting of Exceptions to Article II, Paragraph I, for the Purpose of Non-lethal *In Situ* Research in the Agreement Area).

The lack of knowledge that the Parties aim at remedying through improved co-operation refers to three specific aspects, namely biology, ecology and population dynamics of cetaceans. “Biology” is understood as “the study of living organisms, divided into many specialized fields that cover their morphology, physiology, anatomy, behavior, origin, and distribution”<sup>26</sup>. It seems evident that, at least with regard to behavior – meant as behavior of a wild species in its natural environment – and distribution of cetaceans, the objective of an improved knowledge cannot be pursued by the Parties through studies undertaken in dolphinarium. In particular, cetaceans held in dolphinarium are forced to unnatural and anthropomorphic behaviors that bear no resemblance to the types of behaviors seen in wild cetaceans<sup>27</sup>. Also the so-called dolphin-assisted therapy often performed in dolphinarium, forces dolphins to direct contacts with a species that they would avoid in the wild. Moreover, although being predators, cetaceans held in captivity totally depend on humans for food and lack any hunt-related natural behavior. Dolphins in captivity also lose skills important to survival as well as essential nursing skills, as calves born in captivity are often separated from their mothers at young age.

The contrariness of dolphinarium to the purposes stated in the preamble of ACCOBAMS is even more evident when considering the term “ecology”, understood as “the branch of biology that deals with the relations of organisms to one another and to their physical surroundings”<sup>28</sup>. Dolphinarium, which hinder in fact any relations between cetaceans and other organisms belonging to the same natural environment, cannot replace in any way their natural physical surroundings. Often dolphinarium do not even simulate the natural environment of cetaceans. Water is chemically treated with chlorine, which prevents the placing of other live species (fish and marine plants) into the pools where the animals are kept. Most of the tanks holding dolphins are small, smooth-sided or even made by glass and devoid of stimuli, to facilitate cleaning and allow the audience a better view of the animals held in captivity. Some dolphinarium even lack any natural light, providing only indoor facilities.

Dolphinarium do not even contribute in any way to an improved knowledge of cetacean population dynamics, also called for in the preamble of ACCOBAMS. On the one hand, cetaceans held in captivity are often unrelated and belong to different groups or even to different species coming from widely different locations<sup>29</sup>; on the other hand, when targeting smaller and more distinct populations, repeated captures in a single area to obtain animals for dolphinarium may have an impact on the survival of the population itself.

From all these elements it seems evident that research, if any, conducted in dolphinarium on animals kept in unnatural surroundings and forced to unnatural behaviors is likely to provide information that is misleading or even detrimental when applied to the conservation of wild populations of cetaceans, thus frustrating the purposes of improved knowledge and conservation of wild populations of cetaceans stated in the preamble of ACCOBAMS.

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<sup>26</sup> *Oxford English Dictionary*, online edition, 2013.

<sup>27</sup> For example, dolphins used in shows performed in dolphinarium are trained to shooting basketballs through nets, jumping through hoops and dancing, pushing trainers into the air or through the water, or even painting on canvas.

<sup>28</sup> *Oxford English Dictionary*, online edition, 2013.

<sup>29</sup> This circumstance may also hinder the ability of cetaceans held in captivity to exchange information and create social bonding, because individuals belonging to different groups or species may not be able to recognize the sounds or signals made by one to another.

### 3. The Obligations Arising from Other Legal Instruments:

#### 3.A. The Convention on the Conservation of Migratory Species of Wild Animals

All the twenty-two Parties to ACCOBAMS are also Parties to CMS and, as such, are bound by its relevant provisions<sup>30</sup>. ACCOBAMS itself is an agreement within the meaning of Art. IV, para. 4, of CMS, i.e. an agreement concluded by CMS Parties “for any population or any geographically separate part of the population of any species or lower taxon of wild animals, members of which periodically cross one or more national jurisdiction boundaries”<sup>31</sup>.

In the CMS preamble the Parties recognize that species of wild animals, in their innumerable forms, are “an irreplaceable part of the earth’s natural system”, as well as their ever-growing value, *inter alia*, “from an ecological point of view”<sup>32</sup>. This implies that wild species are to be conserved in the wild, and not in other places (laboratories, dolphinarium, etc.).

According to CMS, “the Parties acknowledge the importance of migratory species being conserved and of Range States agreeing to take action to this end whenever possible and appropriate, paying special attention to migratory species the conservation status of which is unfavourable, and taking individually or in co-operation appropriate and necessary steps to conserve such species and their habitat” (Art. II, para. 1)<sup>33</sup>. Appendix I to CMS lists migratory species which are endangered (Art. III, para. 1). Appendix II lists migratory species “which have an unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international cooperation that could be achieved by an international agreement” (Art. IV, para. 1). Cetacean species are listed Appendix I<sup>34</sup> or in Appendix II<sup>35</sup> or in both of them. In particular, the species *Delphinus delphis* and *Tursiops truncatus ponticus* are listed in both appendices.

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<sup>30</sup> As of 24 May 2013, CMS has 119 States Parties. The CMS currently binds also two States (Israel and the United Kingdom), which are not parties to the Agreement although their coastlines border the ACCOBAMS area. The CMS does not apply to five States bordering the ACCOBAMS area, namely, Bosnia-Herzegovina, Lebanon, Palestine, the Russian Federation and Turkey.

<sup>31</sup> As recalled above (*supra*, para. 2.B), a number of terms used in the Agreement, namely, “migratory species”, “conservation status of a migratory species”, “favourable conservation status”, “unfavourable conservation status”, “endangered migratory species”, “habitat”, “range”, and “taking” have, *mutatis mutandis*, the same meaning established in CMS.

<sup>32</sup> On the implications of the use of the term “ecology”, see *supra*, para. 2.E.

<sup>33</sup> “‘Habitat’ means any area in the range of a migratory species which contains suitable living conditions for that species” (Art. I, para. 1 g).

<sup>34</sup> The following cetaceans are listed in Appendix I: Physeteridae: *Physeter macrocephalus*\*; Platanistidae: *Platanista gangetica gangetica*\*; Pontoporiidae: *Pontoporia blainvillei*\*; Delphinidae: *Delphinus delphis*\* (only Mediterranean population), *Tursiops truncatus ponticus*\*, *Orcaella brevirostris*\*, *Sousa teuszii*\*; Balaenopteridae: *Balaenoptera borealis*\*; *Balaenoptera physalus*\*; *Balaenoptera musculus*, *Megaptera novaeangliae*; Balaenidae: *Balaena mysticetus*; *Eubalaena glacialis* (North Atlantic); *Eubalaena japonica* (North Pacific); *Eubalaena australis*. The asterisk indicates that the species, or a separate population of that species, or a higher taxon which includes that species is included also in Appendix II.

<sup>35</sup> The following cetaceans are listed in Appendix II: Physeteridae: *Physeter macrocephalus*\*; Platanistidae: *Platanista gangetica gangetica*\*; Pontoporiidae: *Pontoporia blainvillei*\*; Iniidae: *Inia geoffrensis*; Monodontidae: *Delphinapterus leucas*, *Monodon monoceros*; Phocoenidae: *Phocoena phocoena* (North and Baltic Sea, western North Atlantic, Black Sea and North West African populations), *Phocoena spinipinnis*, *Phocoena dioptrica*, *Neophocaena phocaenoides*, *Neophocaena asiaeorientalis*, *Phocoenoides dalli*; Delphinidae: *Sousa chinensis*, *Sousa teuszii*\*, *Sotalia fluviatilis*, *Sotalia guianensis*, *Lagenorhynchus albirostris* (only North and Baltic Sea populations), *Lagenorhynchus acutus* (only North and Baltic Sea populations), *Lagenorhynchus obscurus*, *Lagenorhynchus australis*, *Grampus griseus* (only North Sea, Baltic Sea and

The taking of migratory species listed in Appendix I is prohibited under Art. III, para. 5, of CMS:

“Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species. Exceptions may be made to this prohibition only if:

- a) the taking is for scientific purposes;
- b) the taking is for the purpose of enhancing the propagation or survival of the affected species;
- c) the taking is to accommodate the needs of traditional subsistence users of such species; or
- d) extraordinary circumstances so require;

Provided that such exceptions are precise as to content and limited in space and time. Such taking should not operate to the disadvantage of the species”.

As it can be seen, dolphinarium do not fall in any of the exceptions mentioned above.

More generally and recalling, *mutatis mutandis*, what has already been said for ACCOBAMS<sup>36</sup>, dolphinarium are basically in contrast with the meaning itself of “migration” and the purpose of conserving “migratory species”, defined in CMS as populations of wild animals that “cross one or more national jurisdiction boundaries” (Art. 1, para. 1, a). For this reason, Art. I, para. 1, c, of CMS states that the conservation status is “favourable” when “there is, and will be in the foreseeable future, sufficient habitat to maintain the population of the migratory species on a long-term basis”. Cetaceans, wherever they are located, are migratory species to which CMS parties have committed to ensure a “sufficient habitat” – a commitment which is basically and legally in contrast with the keeping of cetaceans in dolphinarium.

The references in CMS to the fundamental characteristic of migratory species are numerous, beginning from the title of the treaty itself. All of them stand as a confirmation of the paramount role played by such characteristic in the entire logic of the treaty. In particular, concepts developed in CMS that should be taken into account in addressing the question of dolphinarium include the “research into the ecology and population dynamics of the migratory species concerned, with special regard to migration”; the “maintenance of a network of suitable habitats appropriately disposed in relation to the migration routes”; the “provision of new habitats favourable to the migratory species or re-introduction of the migratory species into favourable habitats”; and the “elimination of, to the maximum extent possible, or compensation for activities and obstacles which hinder or impede migration” (Art. V of CMS).

Dolphinarium are in evident conflict with all these provisions and related legal obligations, as they hinder or impede the fundamental activity around which the entire treaty is based – migration.

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Mediterranean populations), *Tursiops aduncus* (Arafura/Timor Sea populations), *Tursiops truncatus*\* (North Sea, Baltic Sea, Mediterranean and Black Sea populations)\*, *Stenella attenuata* (eastern tropical Pacific population, Southeast Asian populations), *Stenella longirostris* (eastern tropical Pacific populations, Southeast Asian populations), *Stenella coeruleoalba* (eastern tropical Pacific population, Mediterranean population), *Stenella clymene* (West African population), *Delphinus delphis*\* (North and Baltic Sea, Mediterranean, Black Sea and eastern tropical Pacific populations), *Lagenodelphis hosei* (Southeast Asian populations), *Orcaella brevirostris*\*, *Orcaella heinsohni*, *Cephalorhynchus commersonii* (South American population), *Cephalorhynchus eutropia*, *Cephalorhynchus heavisidii*, *Orcinus orca*, *Globicephala melas* (only North and Baltic Sea populations); Ziphiidae: *Berardius bairdii*, *Hyperoodon ampullatus*; Balaenopteridae: *Balaenoptera bonaerensis*, *Balaenoptera edeni*, *Balaenoptera borealis*\*, *Balaenoptera omurai*, *Balaenoptera physalus*\*; Neobalaenidae: *Caperea marginata*. The asterisk indicates that the species, or a separate population of that species, or a higher taxon which includes that species is included also in Appendix I.

<sup>36</sup> *Supra*, para. 2.A.

Moreover, as recalled above<sup>37</sup>, dolphinarium may threaten the conservation of wild populations of migratory species, which is the paramount objective of both ACCOBAMS and its framework treaty.

### 3.B. The Convention on the Conservation of European Wildlife and Natural Habitats

Eighteen among the ACCOBAMS parties<sup>38</sup> are also bound by the Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 1979)<sup>39</sup>, concluded within the framework of the Council of Europe. Under the Bern Convention, the Parties shall take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of the wild flora and fauna species, especially those specified in Appendices I (Strictly Protected Flora Species) and II (Strictly Protected Fauna Species), as well as the conservation of endangered natural habitats (Art. 4, para. 1). They also undertake to give special attention to the protection of areas that are of importance for the migratory species listed in Appendices II and III (Protected Fauna Species) and which are appropriately situated in relation to migration routes, as wintering, staging, feeding, breeding or moulting areas (Art. 4, para. 3).

The Bern Convention lists cetaceans in its Appendix II and explicitly prohibits, *inter alia*, “all forms of deliberate capture and keeping and deliberate killing”, as well as “the possession of and internal trade in these animals, alive or dead” (Art. 6). Dolphinarium are evidently prohibited under the Bern Convention, as they involve the “capture”, “keeping” and “possession” of animals, and often “internal trade” therein. Although international trade in cetaceans is not specifically prohibited by the Bern Convention, the explicit prohibition of capture, keeping and possession in Art. 6 obviously implies that the parties to this convention cannot even engage in international trade in these animals, as this kind of activity involves capture, keeping and possession of specimens.

In the framework of the Bern Convention, Recommendation No. 43 (1995) on the conservation of threatened mammals in Europe, adopted by the Standing Committee, recommended States parties and invited other States to consider (or, if appropriate, reinforce) recovery plans for certain species of cetaceans listed in an appendix to the recommendation<sup>40</sup>.

Recommendation No. 86 (2001) on the conservation of the Black Sea bottle-nosed dolphin *Tursiops truncatus ponticus*, adopted by the Standing Committee, noted that this Black Sea subspecies was critically endangered. Conscious that the trade of *Tursiops truncatus ponticus* is an important threat factor for this subspecies, the Standing Committee recommended States parties to the Bern Convention, and invited other States, as appropriate, to “strictly enforce the prohibition of capture and keeping of *Tursiops truncatus ponticus* and avoid as far as possible the use of exceptions in Art. 9 of the Bern Convention on this subspecies, unless for conservation reasons; support efforts of other

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<sup>37</sup> *Supra*, para. 2.A.

<sup>38</sup> Namely, Albania, Bulgaria, Croatia, Cyprus, France, Georgia, Greece, Italy, Malta, Monaco, Montenegro, Morocco, Portugal, Romania, Slovenia, Spain, Tunisia, Ukraine. Among the States which border the ACCOBAMS area, but are not parties to ACCOBAMS, Bosnia and Herzegovina, Turkey and the United Kingdom are parties to the Bern Convention. The European Union is also a party to the Bern Convention.

<sup>39</sup> Hereinafter: Bern Convention. It currently has 51 parties.

<sup>40</sup> The appendix to Recommendation No. 43 (1995) listed *Tursiops truncatus*, *Delphinus delphis* (Mediterranean and Black Seas), *Physeter catodon* (Mediterranean), *Grampus griseus* (Mediterranean), *Globicephala melas* (Mediterranean), *Phocoena phocoena* (Black and Baltic Seas), *Ziphius cavirostris* (Mediterranean), and *Balaenoptera physalus* (Mediterranean) among the taxa needing conservation or recovery plans. The appendix also listed *Stenella coeruleoalba* (Mediterranean) among the taxa to be evaluated as candidates for conservation or recovery plans.

States to provide an improved protection of this subspecies from international trade in the framework of CITES and other relevant treaties and agreements; and support regional coordination of efforts on the conservation of this subspecies”.

### **3.C. The Convention on International Trade in Endangered Species of Wild Fauna and Flora**

All the ACCOBAMS Parties are also bound by the Convention on international trade in endangered species of wild fauna and flora (Washington, 1973)<sup>41</sup>. CITES recognizes that “wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth” (preamble). As such, they must be preserved in the natural systems of which they form part, and not elsewhere.

CITES subjects international trade in specimens of selected species to certain controls. “Trade” is defined as “export, re-export, import and introduction from the sea”<sup>42</sup> (Art. I, para. c). When concerning species covered by the treaty, international trade has to be authorized through a licensing system. The species covered by CITES are listed in three Appendices, according to the degree of protection that they need.

Appendix I includes species which are threatened with extinction and are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be permitted in exceptional circumstances. Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival. Appendix III contains species that are protected in at least one State, which has asked other CITES Parties for assistance in controlling the trade<sup>43</sup>. CITES provides that “the Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions” of CITES itself (Art. II, para. 4)<sup>44</sup>.

Amendments to Appendices I and II are subject to a specific procedure which is regulated in Art. XV of CITES. In particular, it provides that “for marine species, the Secretariat shall, upon receiving the text of the proposed amendment, immediately communicate it to the Parties. It shall also consult intergovernmental bodies having a function in relation to those species especially with a view to obtaining scientific data these bodies may be able to provide and to ensuring co-ordination with any conservation measures enforced by such bodies. The Secretariat shall communicate the views expressed and data provided by these bodies and its own findings and recommendations to the Parties as soon as possible”.

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<sup>41</sup> Hereinafter: CITES. It currently has 178 parties which include five among the six States bordering the Agreement area that have not yet become parties to the Agreement (the only exception being Palestine).

<sup>42</sup> According to Art. I, para. e, of CITES, “introduction from the sea” means “transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State”.

<sup>43</sup> Changes to Appendix III follow a different procedure than changes to Appendices I and II, as each party is entitled to make unilateral amendments to it.

<sup>44</sup> As regards the relationship of CITES with domestic legislation of States parties, the provisions of CITES “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” (Art. XIV, para 1).

CITES requires that “the Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures: (a) to penalize trade in, or possession of, such specimens, or both; and (b) to provide for the confiscation or return to the State or export of such specimens” (Art. VIII, para. 1). Parties are also under the obligation to “maintain records of trade in specimens of species included in Appendices I, II and III” (Art. VIII, para. 6)<sup>45</sup>. Periodic reports by the Parties on the implementation of the convention have to be transmitted to the CITES Secretariat (Art. VIII, para. 7).

Certain cetacean species are included in Appendix I<sup>46</sup>. All other cetacean species are included in Appendix II. There are no cetaceans listed in Appendix III.

In 2000, Georgia and the United States submitted a proposal to the Conference of the Parties to CITES to transfer the Black Sea bottlenose dolphin (*Tursiops truncatus ponticus*) from Appendix II to Appendix I to CITES<sup>47</sup>. The proposal, which was withdrawn failing consensus on it, was reiterated only by Georgia in 2002<sup>48</sup>. That year, the proposal was accepted as amended, i.e. the Black Sea population of bottlenose dolphin was retained in to retain in Appendix II, but with a zero export quota for live specimens removed from the wild and traded for primarily commercial purposes.

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<sup>45</sup> These records shall cover: “(a) the names and addresses of exporters and importers; and (b) the number and type of permits and certificates granted; the States with which such trade occurred; the numbers or quantities and types of specimens, names of species as included in Appendices I, II and III and, where applicable, the size and sex of the specimens in question” (Art. VIII, para. 6).

<sup>46</sup> *Balaena mysticetus*, *Eubalaena* spp., *Balaenoptera acutorostrata* (except the population of West Greenland, which is included in Appendix II), *Balaenoptera bonaerensis*, *Balaenoptera borealis*, *Balaenoptera edeni*, *Balaenoptera musculus*, *Balaenoptera omurai*, *Balaenoptera physalus*, *Megaptera novaeangliae*, *Orcaella brevirostris*, *Orcaella heinsohni*, *Sotalia* spp., *Sousa* spp., *Eschrichtius robustus*, *Lipotes vexillifer*, *Caperea marginata*, *Neophocaena phocaenoides*, *Phocoena sinus*, *Physeter macrocephalus*, *Platanista* spp., *Berardius* spp., *Hyperoodon* spp.

<sup>47</sup> See Prop. 11.14 circulated at the Eleventh Meeting of the Conference of the Parties to CITES (Nairobi, 2000).

<sup>48</sup> See Prop. 12.3 circulated at the Twelfth Meeting of the Conference of the Parties to CITES (Santiago, 2002).



### 3.D. The Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean

Sixteen among the ACCOBAMS Parties<sup>49</sup> are also bound by the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 1995)<sup>50</sup>, concluded within the framework of the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona, 1976; amended in 1995).

According to Art. 11, para. 3, of the Protocol, the Parties are required to “control and, where appropriate, prohibit” the taking, possession or killing, the commercial trade, the transport and the exhibition for commercial purposes of the endangered or threatened species listed in Annex II to the Protocol, as well as, to the extent possible, the disturbance of wild fauna, particularly during the period of breeding, incubation, hibernation or migration, as well as other periods of biological stress. The Parties are also bound to ensure the maximum possible protection and recovery of the above mentioned species, by adopting at the national level the measures provided for in the Protocol. (Art. 12, para. 2). Exceptions are allowed, but in cases that do not regard dolphinarium<sup>51</sup>.

Nineteen species of marine mammals are listed in Annex II<sup>52</sup>.

### 3.E. The Black Sea Biodiversity and Landscape Conservation Protocol

Three among the ACCOBAMS parties<sup>53</sup> are also bound by the Black Sea Biodiversity and Landscape Conservation Protocol (Sofia, 2002)<sup>54</sup>, concluded within the framework of the Convention on the Protection of the Black Sea against Pollution (Bucharest, 1992).

Under Annex 3 (Conservation of species and management of their habitats), Art. 1, para. 3, the Parties are required to compile lists of threatened species of flora and fauna and species critical to ecosystem functioning and accord protected status to such species within three years of the coming into force of this Protocol. Under the subsequent para. 4, with respect to protected species of fauna, the Parties are bound to control and, where appropriate, prohibit “the taking, possession or killing, the commercial trade, the transport and the exhibition for commercial purposes of these species, their eggs, parts or products”, as well as “the disturbance of wild fauna, particularly during breeding, hibernation or migration, as well as other periods of biological stress”.

Five species of marine mammals appear in Annex 2 (Provisional List of Species of the Black Sea Importance) to the Protocol<sup>55</sup>. They are subject to the special measures, as described in Annex 3.

<sup>49</sup> Namely, Albania, Algeria, Croatia, Cyprus, Egypt, France, Italy, Lebanon, Malta, Monaco, Montenegro, Morocco, Slovenia, Spain, Syria, Tunisia,. Among the States which border the ACCOBAMS area, but are not parties to the ACCOBAMS, Turkey is a party to the Protocol. The European Union is also a party to the Protocol.

<sup>50</sup> In this paragraph: Protocol. It currently has eighteen parties.

<sup>51</sup> “Provided that no other satisfactory solutions are available and that the exemption does not harm the survival of the population or of any other species, the Parties may grant exemptions to the prohibitions prescribed for the protection of the species listed in the annexes to this Protocol for scientific, educational or management purposes necessary to ensure the survival of the species or to prevent significant damage. Such exemptions shall be notified to the Contracting Parties” (Art. 12, para. 6).

<sup>52</sup> *Balaenoptera acutorostrata*, *Balaenoptera borealis*, *Balaenoptera physalus*, *Delphinus delphis*, *Eubalaena glacialis*, *Globicephala melas*, *Grampus griseus*, *Kogia simus*, *Megaptera novaeangliae*, *Mesoplodon densirostris*, *Monachus monachus*, *Orcinus orca*, *Phocoena phocoena*, *Physeter macrocephalus*, *Pseudorca crassidens*, *Stenella coeruleoalba*, *Steno bredanensis*, *Tursiops truncatus*, *Ziphius cavirostris*.

<sup>53</sup> Bulgaria, Georgia, Ukraine. Among the States which border the ACCOBAMS area, but are not parties to the ACCOBAMS, Turkey is a party to the Protocol.

<sup>54</sup> In this paragraph: Protocol. It currently has four parties.

### 3.F. The European Union Legislation

ACCOBAMS is open to participation not only by States, but also by any regional economic integration organization at least one member of which is a range State (Art. XIII), such as the European Union. Although it has not yet decided to become a party to the ACCOBAMS, the European Union is a party to CMS and did participate in the negotiations for ACCOBAMS<sup>56</sup>. Currently, eleven ACCOBAMS Parties are members of the European Union and are bound by the relevant legislation<sup>57</sup>.

The running of dolphinaria and the activities that they involve are in contrast with the relevant European Union legislation, and in particular with the three directives examined below.

The Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora (so-called “Habitats Directive”) applies up to the outer limit of the exclusive economic zone of those European coastal States that have declared one<sup>58</sup>. Its objective is to contribute towards ensuring biodiversity through the conservation of natural habitats as well as wild fauna and flora in the European territory of the European Union member States (Art. 2, para. 1). The Habitats Directive lists “all species” of cetaceans in its Annex IV (Species of Community Interest in Need of Strict Protection). *Tursiops truncatus* and *Phocoena phocoena* figure also in Annex II (Species of Community Interest Whose Conservation Requires the Designation of Special Areas of Conservation).

As regards trade in cetaceans, Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (so-called “CITES Regulation”) also comes into consideration. This instrument is intended to be applied in compliance with the objectives, principles and provisions of CITES (Art. 1).

The CITES Regulation defines “trade” in very broad terms, as “the introduction into the Community, including introduction from the sea<sup>59</sup> and the export and re-export therefore, as well as the use, movement and transfer of possession within the Community, including within a Member State, of specimens subject to the provisions” of the regulation itself (Art. 2, *u*). Annex A to the CITES Regulation contains, *inter alia*, the species listed in Appendix I to CITES (Art. 3, para. 1), therefore

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<sup>55</sup> *Delphinus delphis*\*\* , *Lutra lutra*\* , *Monachus monachus*\*\* , *Phocoena phocoena*\*\* , *Tursiops truncatus*\*\* (\* = Rare species; \*\* = Endangered species).

<sup>56</sup> In the opening statement made in 1996 at the intergovernmental meeting convened for the purpose of negotiating and adopting ACCOBAMS, the European Union declared itself “fully committed to the conservation of [cetaceans]. As a matter of fact, all cetaceans are fully protected under the EU Directive for the conservation of natural habitats, and of wild flora and fauna”.

<sup>57</sup> The Parties to ACCOBAMS which are also members of the European Union are Bulgaria, Cyprus, France, Greece, Italy, Malta, Portugal, Romania, Slovenia and Spain. Croatia will accede to the European Union as from 1<sup>st</sup> July 2013. Among the seven States bordering the ACCOBAMS area which have not become parties to ACCOBAMS, one (the United Kingdom) is a member of the European Union.

<sup>58</sup> All Black Sea coastal States have declared an exclusive economic zone and no waters having the legal condition of the high seas do exist in this sea. The situation is more complex in the Mediterranean Sea, where extents of high seas still exist, although it can be considered as a sea in transition towards an exclusive economic zone regime.

<sup>59</sup> According to Art. 2 of the CITES Regulation, “introduction from the sea shall mean the introduction into the Community of any specimen which was taken in, and is being introduced directly from, the marine environment not under the jurisdiction of any State, including the air-space above the sea and the sea-bed and subsoil beneath the sea”. This definition elaborates on the definition contained in Art. 1, para. *e*, of CITES (see *supra*, note 42).

including several species of cetaceans<sup>60</sup>. Annex B to the CITES Regulation contains, *inter alia*, all species listed in Appendix II to CITES (Art. 3, para. 2), including all remaining species of cetaceans.

According to Art. 4, the introduction into the European Union of specimens of the species listed in Annex A “shall be subject to completion of the necessary checks and the prior presentation, at the border customs office at the point of introduction, of an import permit issued by a management authority of the Member State of destination”<sup>61</sup>. Import permits, however, may be issued only in accordance with certain restrictions and when certain conditions are met, including, but not limited to: when “the competent scientific authority is satisfied that the intended accommodation for a live specimen at the place of destination is adequately equipped to conserve and care for it properly”<sup>62</sup>; when “the management authority is satisfied that the specimen is not to be used for primarily commercial purposes”; and, “in the case of introduction from the sea, the management authority is satisfied that any live specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment”.

The introduction into the European Union of specimens of the species listed in Annex B to the CITES Regulation, i.e. all cetaceans not already listed under Annex A, follows a similar procedure. However, in this case there is no requirement for the competent scientific authority to be satisfied of the adequacy of the accommodation provided at the place of destination, being it is sufficient that “the applicant provides documentary evidence” to this purpose.

The CITES Regulation also provides in similar terms for the export and re-export from the European Union, specifying that permits can be issued only if the management authority is satisfied that the specimens of species listed under Annexes A and B “will not be used for primarily commercial purposes” (Art. 5).

Under Art. 8 of the CITES Regulation, which is an important provision as regards the question of dolphinarium, “the purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale of specimens of the species listed in Annex A shall be prohibited” (Art. 8, para. 1). It is also provided that “Member States may prohibit the holding of specimens, in particular live animals of the species listed in Annex A” (Art. 8, para. 2).

An exemption from the prohibitions referred to above may only be granted on a case-by-case basis and when strict conditions are met, for instance when the specimens “are intended for research or education aimed at the preservation or conservation of the species” (Art. 8, para. 3). As already remarked above<sup>63</sup>, dolphinarium do not contribute in any way to research and education aimed at the preservation or conservation of species, but rather fall under the description of the activities prohibited by Art. 8 of the CITES Regulation. In fact, dolphinarium are primarily commercial enterprises.

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<sup>60</sup> For the species of cetaceans listed in CITES Appendix I, see *supra*, note 46.

<sup>61</sup> “Management authority shall mean a national administrative authority designated, in the case of a Member State, in accordance with Article 13(1)(a) or, in the case of a third country party to [CITES], in accordance with Article IX of [CITES]” (Art. 2, *g*).

<sup>62</sup> “Scientific authority shall mean a scientific authority designated, in the case of a Member State, in accordance with Article 13(1)(b) or, in the case of a third country party to [CITES], in accordance with Article IX of CITES” (Art. 2, *q*).

<sup>63</sup> *Supra*, para. 2.E.

Visitors of this kinds of facilities are charged a fee to enter. To recall the terms of the CITES Regulation, the animals kept therein have been purchased, offered to purchase, acquired for commercial purposes, displayed to the public for commercial purposes, used for commercial gain, transported for sale, and often kept for sale and offered for sale.

The CITES Regulation defines “commercial purposes” as “all purposes the non-commercial aspects of which do not clearly predominate” (Art. 1, *m*). This is a very strict definition. It means that, even where a dolphinarium offered free scientific research and education programmes and, therefore, there were a proven non-commercial purpose, this should “clearly predominate” over any commercial purpose of the facility in order for the latter to be lawful.

Also the movement of live specimens is regulated by the CITES Regulation. In particular, any movement within the European Union of a live specimen of a species listed in Annex A from the location indicated in the import permit requires “prior authorization” from a management authority of the Member State in which the specimen is located (Art. 9, para. 1). Where a live specimen of a species listed in Annex B is moved within the European Union, “the holder of the specimen may relinquish it only after ensuring that the intended recipient is adequately informed of the accommodation, equipment and practices required to ensure the specimen will be properly cared for” (Art. 9, para. 4). It is equally provided that, when any live specimens are transported into, from or within the European Union or are held during any period of transit or transshipment, “they shall be prepared, moved and cared for in a manner such as to minimize the risk of injury, damage to health or cruel treatment and, in the case of animals, in conformity with Community legislation on the protection of animals during transport” (Art. 9, para. 5).

Animal welfare is probably the topic on which European Union law adds the most to the legal picture examined so far relating to conservation of cetaceans in the ACCOBAMS area.

Since longtime, a Protocol on Protection and Welfare of Animals attached to the Treaty amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts (Amsterdam, 1997) officially recognized that animals are sentient beings and obliged the European institutions “to pay full regard to the welfare requirements of animals” when formulating and implementing common policies. For cetaceans this means that full account should be taken of their biological requirements as highly migratory species, whose behavior in the wild includes traveling long distances and living in social groups. Dolphinaria do not comply with these welfare requirements.

Council Directive 1999/22/EC of 29 March 1999 relating to the keeping of wild animals in zoos (so-called “Zoo Directive”) is another European instrument relevant to the issue of dolphinaria. The Zoo Directive defines “zoos” as “all permanent establishments where animals of wild species are kept for exhibition to the public for seven or more days a year, with the exception of circuses, pet shops and establishments which Member States exempt from the requirements of this Directive on the grounds that they do not exhibit a significant number of animals or species to the public and that the exemption will not jeopardize the objectives of this Directive” (Art. 2).

Dolphinaria meet the definition of zoo under and must consequently comply with the requirements set forth in Art. 3 of the Zoo Directive. This provision obliges European Union member States to

ensure that all zoos implement certain conservation measures, including, but not limited to: participating in research and exchange of information relating to, *inter alia*, “repopulation or reintroduction of species into the wild”; “promoting public education and awareness in relation to the conservation of biodiversity, particularly by providing information about the species exhibited and their natural habitats”; “accommodating their animals under conditions which aim to satisfy the biological and conservation requirements of the individual species, *inter alia*, by providing species specific enrichment of the enclosures; and maintaining a high standard of animal husbandry with a developed programme of preventive and curative veterinary care and nutrition”<sup>64</sup>.

However, dolphinariums do not aim at repopulating nor reintroducing species into the wild; do not promote public education nor awareness in relation to the conservation of biodiversity; are not likely to provide any “enrichment of the enclosures” to cetaceans; and do not accommodate these animals under conditions which satisfy their biological and conservation requirements. Rather, observations on dolphins conducted in some European facilities<sup>65</sup> have identified a number of stress-related types of behavior in dolphins kept in captivity, including stereotypic behaviors such as pacing, swaying from side-to-side, incessantly circling the pool, slapping the water’s surface, chuffing (producing sharp and repetitive exhalation of breath), as a result of restricted movement or restricted expression of natural behavior. Symptoms of stress include weight loss, aggressive behavior, reduced breeding success, arteriosclerosis, stomach ulcers, blood cell count changes and an overall increased susceptibility to diseases and death.

As dolphins live in social groups which are formed freely in the wild in accordance with each population’s dynamics, adding new animals to a captive group or forcing incompatible animals to live together in a constricted environment may have severe impacts on the weakest individuals of the group, which are more exposed to aggression, illness and even death, as they cannot disperse during conflict. Curative veterinary care includes vitamins (mainly to cope with the impossibility to feed the animals with live fish), but also antibiotics and other medications which gradually weaken the immune system of the animals.

All these findings demonstrate that dolphinariums, although meeting the definition of “zoo” under the Zoo Directive, do not meet the necessary requirements for being in compliance with the same directive.

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<sup>64</sup> Art. 8 of the Zoo Directive provides that “Member States shall determine the penalties applicable to breaches of the national provisions adopted pursuant to this Directive. The penalties shall be effective, proportionate and dissuasive”.

<sup>65</sup> See *EU Zoo Inquiry 2011*, written by the Whale and Dolphin Conservation Society of the European coalition ENDCAP in association with the Born Free Foundation.

#### 4. The Consequences of the Breach of the Relevant International Obligations

Following a deliberate taking by an ACCOBAMS party, which constitutes a violation of the obligations arising from ACCOBAMS and the other relevant treaties, all other parties would be entitled to invoke the consequences of the wrongful act vis-à-vis the responsible party, as provided for under the customary international rules on responsibility<sup>66</sup>. In particular, the responsible State is bound to cease the wrongful conduct and to re-establish the situation that would have existed if the breach had not occurred (*restitutio in integrum*). For instance, if the taking of cetaceans is still ongoing, the State concerned must stop such activity.

In principle, cetaceans illegally held in captivity should be released into the wild. But this should be done whenever possible and with all relative precautions for the animals' safety. It should be recalled that Article 9 of the Convention on Biological Diversity (Rio de Janeiro, 1992) requires parties to adopt measures for the recovery and rehabilitation of threatened species and for their reintroduction into their natural habitats, provided that appropriate conditions occur, and that a set of Guidelines for the release of captive cetaceans into the wild is annexed to ACCOBAMS Resolution 3.20. This Resolution is based on the assumptions that the extent of commercial operations involving dolphins is likely to be an increasing threat to wild cetacean populations due to illegal takes and reintroductions, that the chances of survival of released dolphins, especially if born in captivity, are very low and that the welfare of released animals must be of utmost concern.

If circumstances so require, the responsible State must offer appropriate assurances and guarantees of non-repetition of the wrongful conduct (for instance, by adopting effective national legislation to ensure compliance with its international obligations). It is also bound to make full compensation for the damage caused (for instance, by financially contributing to programmes for the conservation of cetaceans in the wild and the protection of natural habitats in the ACCOBAMS area).

If the responsible State refuses to make reparation or to enter into negotiations, conciliation or arbitration or manifestly does not act *bona fide* in responding to the offer for negotiations or dispute settlement<sup>67</sup>, the other ACCOBAMS parties are entitled to resort to countermeasures, which may include, for instance, trade sanctions against the responsible party.

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<sup>66</sup> See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted in 2001 by the International Law Commission, as annexed to United Nations General Assembly resolution 56/83 of 12 December 2001.

<sup>67</sup> On the settlement of disputes, see Art. XII of ACCOBAMS.

## 5. Conclusions

ACCOBAMS and other legal instruments applicable to most or some of the parties to it are based on the assumption that cetaceans are an irreplaceable and integral part of the marine ecosystem. This implies that cetaceans are to be preserved in the marine ecosystem of which they form an integral part, and not elsewhere. Dolphinarium are basically contrary to this assumption as they are not part of the marine ecosystem nor they can replace it in any way.

ACCOBAMS and other legal instruments binding on the parties emphasize the nature of cetaceans as “migratory” species, defined as populations of wild animals that cross one or more national jurisdiction boundaries. Taking of cetaceans (in all its forms, including harassing, capturing, keeping and possessing) and dolphinarium hinder and impede migration. This kind of conduct is contrary to the purposes of legal instruments aiming at protecting wild species, precisely in light of their biological characteristic as “migratory” animals.

ACCOBAMS and other legal instruments binding on the parties put a general ban on the taking of cetaceans, in full conformity with the relevant provisions of the UNCLOS. Taking is defined in very broad terms and includes harassing, capturing, keeping and possessing cetaceans. Trading is also strictly regulated by legal instruments binding on the parties. Exemptions to the prohibition of trading do not include trading in cetaceans for their placing in dolphinarium. Such facilities constitute a multiple breach of international obligations binding on the Parties, as their functioning includes both taking of and trading in cetaceans.

ACCOBAMS and other international legal instruments binding on most or some of the Parties prohibit taking because their primary purpose is to conserve wild populations of migratory species. Dolphinarium not only do not make any contribution to this purpose, but they even weaken wild populations by keeping animals in captivity, therefore hindering conservation.

The same legal instruments emphasize the importance of an improved scientific knowledge of the ecological and biological aspects of wild cetacean populations, as well as a corresponding improved education of the public on these matters. Dolphinarium are mostly commercial enterprises that do not contribute to an increased knowledge of wild populations of cetaceans nor educate the public to, *inter alia*, respect for fauna species, their behaviors in the wild, their ecological and biological characteristics and the threats to which they are exposed, including human pressures. Education of the public on cetaceans can only take place in the natural environment where they live through regulated cetacean-watching activities.

Dolphinarium do not even comply with the legal obligations binding on some of the parties to pay full regard to the welfare requirements of the animals, as the facilities in question do not take account of the biological requirements of cetaceans as highly migratory species, whose behavior in the wild includes travelling long distances and living in social groups.

All these considerations lead in the direction of the drawing of effective plans to phase out dolphinariums. From a legal point of view, this seems to be the only logical solution. If the number of dolphinariums remained the same as it is now, this would require imports of wild-caught dolphins to replace the captive dolphins that die and it would constitute a violation of ACCOBAMS and other legal instruments binding on some or most of the parties. Even where some of the animals concerned reproduced in captivity, the overall contrariness of dolphinariums with the purposes of the legal obligations binding on the ACCOBAMS parties leaves no room to justify the existence of commercial facilities aiming at entertaining the public with naturally migratory species.

As an interim measure, pending the complete phasing out of dolphinariums, dolphins currently kept in dolphinariums within the territory of the parties could be registered in a centralized inventory with the support of the ACCOBAMS Secretariat, with a view to avoid illegal substitutions of dead animals with new live specimens. The relevant national authorities could ensure compliance with all the requirements relating to animal welfare through periodic reports to the ACCOBAMS Secretariat.



## ANNEX

## Table of Participation to the Relevant Treaties

Member States of the European Union (shown in bold): 27

Parties to the Bern Convention: 51

Parties to CMS: 119

Parties to ACCOBAMS: 23

Parties to CITES: 178

*States bordering the ACCOBAMS area that have not ratified the ACCOBAMS (in italics): 7*

States/REIOs	EU Members	Bern Convention	CMS	ACCOBAMS	CITES
Afghanistan					x
Albania		X	x	x	x
Algeria			x	x	x
Andorra		X			
Angola			x		
Antigua and Barbuda			x		x
Argentina			x		x
Armenia		X	x		x
Australia			x		x
<b>Austria</b>	x	X	x		x
Azerbaijan		X			x
Bahamas					x
Bahrain					x
Bangladesh			x		x
Barbados					x
Belarus		X	x		x
<b>Belgium</b>	x	X	x		x
Belize					x
Benin			x		x
Bhutan					x
Bolivia			x		x
<i>Bosnia and Herzegovina</i>		X			x
Botswana					x
Brazil					x
Brunei					x
<b>Bulgaria</b>	x	X	x	x	x
Burkina Faso		X	x		x
Burma (Myanmar)					x
Burundi			x		x
Cambodia					x
Cameroon			x		x
Canada					x
Cape Verde			x		x
Central African Republic					x
Chad			x		x
Chile			x		x
China					x
Colombia					x
Comoros					x
Congo			x		x
Cook Islands			x		
Costa Rica			x		x

Côte d'Ivoire			x		x
<b>Croatia</b> <sup>68</sup>		X	x	x	x
Cuba			x		x
<b>Cyprus</b>	x	X	x	x	x
<b>Czech Republic</b>	x	X	x		x
Dem. Rep. of Congo			x		x
<b>Denmark</b>	x	X	x		x
Djibouti			x		x
Dominica					x
Dominican Republic					x
Ecuador			x		x
<b>Egypt</b>			x	x	x
El Salvador					x
Equatorial Guinea			x		x
Eritrea			x		x
<b>Estonia</b>	x	X	x		x
Ethiopia			x		x
European Union		X	x		
Fiji			x		x
<b>Finland</b>	x	X	x		x
<b>France</b>	x	X	x	x	x
Gabon			x		x
Gambia			x		x
<b>Georgia</b>		X	x	x	x
<b>Germany</b>	x	X	x		x
Ghana			x		x
<b>Greece</b>	x	X	x	x	x
Grenada					x
Guatemala					x
Guinea			x		x
Guinea-Bissau			x		x
Guyana					x
Haiti					
Honduras			x		x
<b>Hungary</b>	x	X	x		x
Iceland		X			x
India			x		x
Indonesia					x
Iran			x		x
Iraq					
<b>Ireland</b>	x	X	x		x
<i>Israel</i>			x		x
<b>Italy</b>	x	X	x	x	x
Jamaica					x
Japan					x
Jordan			x		x
Kazakhstan			x		x
Kenya			x		x
Kiribati					
Korea, North					
Korea, South					x
Kuwait					x
Kyrgyzstan					x

<sup>68</sup> Croatia will accede to the European Union as from 1<sup>st</sup> July 2013.

Laos					x
<b>Latvia</b>	x	X	x		x
<i>Lebanon</i>				X	x
Lesotho					x
Liberia			x		x
<b>Libya</b>			x	x	x
Liechtenstein		X	x		x
<b>Lithuania</b>	x	X	x		x
<b>Luxembourg</b>	x	X	x		x
Madagascar			x		x
Malawi					x
Malaysia					x
Maldives					x
Mali			x		x
<b>Malta</b>	x	X	x	x	x
Marshall Islands					
Mauritania			x		x
Mauritius			x		x
Mexico					x
Micronesia					
Moldova		X	x		x
<b>Monaco</b>		X	x	x	x
Mongolia			x		x
<b>Montenegro</b>		X	x	x	x
<b>Morocco</b>		X	x	x	x
Mozambique			x		x
Namibia					x
Nauru					
Nepal					x
<b>Netherlands</b>	x	X	x		x
New Zealand			x		x
Nicaragua					x
Niger			x		x
Nigeria			x		x
Norway		X	x		x
Oman					x
Pakistan			x		x
Palau			x		x
<i>Palestine</i>					
Panama			x		x
Papua New Guinea					x
Paraguay			x		x
Peru			x		x
Philippines			x		x
<b>Poland</b>	x	X	x		x
<b>Portugal</b>	x	X	x	x	x
Qatar					x
<b>Romania</b>	x	X	x	x	x
<i>Russia Federation</i>					x
Rwanda			x		x
St. Kitts and Nevis					x
St. Lucia					x
St. Vincent and the Grenadines					x
Samoa			x		x

San Marino					x
São Tomé and Príncipe			x		x
Saudi Arabia			x		x
Senegal		X	x		x
Serbia		X	x		x
Seychelles			x		x
Sierra Leone					x
Singapore					x
<b>Slovakia</b>	x	X	x		x
<b>Slovenia</b>	x	X	x	x	x
Solomon Islands					x
Somalia			x		x
South Africa			x		x
South Sudan					
<b>Spain</b>	x	X	x	x	x
Sri Lanka			x		x
Sudan					x
Suriname					x
Swaziland			x		x
<b>Sweden</b>	x	X	x		x
Switzerland		X	x		x
<b>Syria</b>			x	x	x
Tajikistan			x		
Tanzania			x		x
Thailand					x
The former Yugoslav Republic of Macedonia		X	x		x
Timor-Leste					
Togo			x		x
Tonga					
Trinidad and Tobago					x
<b>Tunisia</b>		X	x	x	x
<i>Turkey</i>		X			x
Turkmenistan					
Tuvalu					
Uganda			x		x
<b>Ukraine</b>		X	x	x	x
United Arab Emirates					x
<b>United Kingdom</b>	x	X	x		x
United States					x
Uruguay			x		x
Uzbekistan			x		x
Vanuatu					x
Venezuela					x
Viet Nam					x
Yemen			x		x
Zambia					x
Zimbabwe			x		x