

THE TAKING OF SEI AND HUMPBACK WHALES BY JAPAN:

**LEGAL ISSUES ARISING UNDER THE CONVENTION
ON INTERNATIONAL TRADE IN ENDANGERED SPECIES
OF WILD FAUNA AND FLORA (CITES)**



LONDON, 1 NOVEMBER 2007

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INTRODUCTION

1. In the light of the taking by Japan of a number of whale species under special permit, including sei whales from the North Pacific, and (from December 2007) humpback whales from the Southern Ocean, we have been asked to advise the International Fund for Animal Welfare (IFAW) on the following issues, which relate to Japan's legal obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES):
 - A:** the *legal status* of Japan's catches and landings of those whale species listed on Appendix I of CITES for which Japan does not hold a reservation (which include sei whales and humpback whales), taking account, inter alia, of:
 - (i) the ongoing discussion between the CITES Parties with regard to the interpretation and application of the "introduction from the sea" provisions of CITES;
 - (ii) the extent to which such catches and landings are for "primarily commercial purposes" as defined in the CITES context;
 - B:** the *remedies available* to other States Parties to CITES in the event that Japan's catches and/or landings of these whales species are found to be illegal, taking into account the provisions and practice of CITES, the draft Guidelines for Compliance with the Convention (currently under negotiation), and other relevant principles and practices of international law.
2. We have noted the International Panel of Independent Legal Experts' Report¹ commissioned by IFAW (Paris 2006) which primarily addresses

¹ Report of the International Panel of Independent Legal Experts on Special Permit ("scientific") Whaling under International Law, Paris, June 2006. The members of the panel were Professor Philippe Sands, Ambassador Alberto Szekely, Ambassador William Taft IV, Professor Laurence Boisson De Chazournes, Professor Pierre-Marie Dupuy and Professor Donald Rothwell. The Rapporteur to the Panel was Kate Cook.

issues arising under the *International Convention for the Regulation of Whaling* (ICRW). Two members of the present Panel were involved in the preparation of the Paris Report.² We refer in this Opinion to some of the conclusions drawn in that report. For the purposes of this Opinion, we accept the conclusions reached in the Paris Report as to the legal status of Japan's special-permit whaling under the ICRW. Among the conclusions reached in the Paris Report were the following: “the 'scientific whaling' conducted by some members of the IWC does not meet the requirements of paragraph 30 of the Schedule to the ICRW and does not therefore fall within the exemption laid down in Article VIII of the ICRW, as interpreted in the light of the object and purpose of the Convention and its context..”; “there is strong evidence that the 'scientific whaling' conducted by some members of the IWC is in violation of the moratorium on commercial whaling laid down in paragraph 10(e) of the Schedule to the ICRW”; and the “scientific whaling” conducted by some members of the IWC “will raise questions of compliance under CITES”.

3. The issues we have been asked to address in this Opinion turn largely on the facts. Where the relevant facts are not yet fully established our conclusions are necessarily tentative, as we have indicated. On many of the issues addressed, however, we consider that there is a sufficient factual basis on which to draw firm conclusions based on those facts.
4. The purpose of this Opinion is not to re-examine the issues addressed by the Paris Report but to examine (A) the legal status of Japan's taking of sei and humpback whales under the CITES Convention; and (B) the remedies available to Parties concerned about illegal catches/landings of whales by Japan.

² Professor Sands was a member of the Panel and Kate Cook was the Rapporteur to the Panel.

SUMMARY

5. In summary our views are as follows:

A: As to the legal status of Japan's catches and landings of those whale species listed on Appendix I of CITES for which Japan does not hold a reservation:

- We consider that the taking of sei whales in the North Pacific and the proposed taking of humpback whales *plainly constitute international trade in the form of "introduction from the sea"* under Article III.5 of the CITES Convention. Article III.5 applies to the transportation into a State of any whales listed on Appendix I to CITES which were taken in the marine environment not under the jurisdiction of any State. This would include those areas from which these whales have been or will be taken by Japan;
- Under Article III.5 of CITES, an introduction from the sea of an Appendix I whale species for which no reservation has been entered by Japan requires the prior grant of a *certificate*. This may *only be granted under the conditions laid down in that provision and in related Resolutions of the Conference of the Parties*.³ The relevant conditions in this case are that: (1) a Scientific Authority of the State of introduction has advised that *the introduction will not be detrimental to the survival of the species involved* (pursuant to Article III.5(a) of CITES), and (2) the Management Authority of the State of introduction is satisfied that the specimen is *not to be used for primarily commercial purposes* (pursuant to Article III.5(c));

³ Consolidated in 2004 in CITES Resolution Conf. 12.3 (Rev.CoP13), "Permits and Certificates"; see also footnote 39 below.

- In this case, based on the facts presented in the materials to which we have been referred and having regard to *Conference Resolution 5.10*, and in particular *paragraph 2*, it is clear that there is or, is likely to be, a *material commercial element* to the trade in specimens or products of sei and humpback taken under the *jarpn II* and *jarpa II* programmes;
- Furthermore, for the reasons set out in our Opinion and in the light of the material to which we have been referred, it appears that the current and proposed takings of humpback and sei whales, as well as other whale species (minke and fin whales), are for *primarily commercial purposes*, having regard to the provisions of the *cites Convention* and the terms of *Conference Resolution 5.10*;
- Any certificate granted by the Japanese Management Authority in circumstances where the specimens are to be used for primarily commercial purposes would be invalid and the issue of a certificate in these circumstances would constitute a breach of *Article III.5(c)* of the *Convention* by Japan;
- While a breach of *Article III.5(c)* is a sufficient basis to invalidate all certificates issued by Japan for the introduction from the sea of any specimens of sei or humpback whales, there is also evidence of a risk that the taking of both sei whales and humpback whales could be detrimental to the survival of the species in each case. This raises the separate issue as to Japan's compliance with *its obligations under Article III.5(a) of cites*. In our view, on the basis of the material to which we have been referred, *there are also serious questions as to Japan's compliance with that provision*. The issue of a certificate of introduction in circumstances where the introduction will be detrimental to the survival of either humpback or sei whales would constitute a further breach of the *Convention* by Japan and any such certificate would be invalid. Considering the remaining major scientific uncertainties as to the status of those two species, *the precautionary principle*—which was endorsed by the *Conference of the Parties* in its “*Strategic Vision*” in 2004⁴—is relevant to making a determination as to (non) detriment in relation to trade in *Appendix I* species.

B: As to the remedies available to other States Parties to *CITES*, in the event that Japan's catches and/or landings of these whales species are found to be illegal:

- Under the compliance regime which has evolved in *cites* practice under *Article XIII* of the *Convention*, a Party may call upon the *Standing Committee* to investigate an alleged breach by

⁴ *CITES Conference Decision 13.1*, Annex 1, stating as follows: “Where uncertainty remains as to whether trade is sustainable, the precautionary principle will prevail as the ultimate safeguard.”

Japan. Considering that infractions of Article III – i.e., illegal imports of Appendix I species, and especially of endangered species taken from the global commons – constitute a breach of collective treaty obligations owed to all member countries, any Party to CITES is entitled to initiate the established non-compliance procedure. Even if the narrower view were taken that only “directly affected” Parties may complain, there is no question in our mind that in the case of humpback and sei whales, such a definition would necessarily include all Parties which are also party to the ICRW, or to the 1979 *Convention on Migratory Species of Wild Animals* (CMS) (which lists humpback and sei whales on its appendices); and/or any other Party with a legitimate interest in these species – for example, any State with an interest in whale-watching along their migration routes;

- The Standing Committee, provided it does not reject the complaint as trivial or ill-founded, may then determine what measures should be taken in response. In accordance with established practice, these measures could, after appropriate procedural steps and a finding of persistent non-compliance, include *a recommendation to suspend commercial or all trade with Japan in CITES-listed species*;
- Alternatively, any of the Parties mentioned above would also be entitled to request negotiations and arbitration (by mutual consent) under Article XVIII of CITES, which provides for the resolution of disputes with respect to the interpretation or application of the Convention.
- Further dispute settlement options may also be available before the International Court of Justice and/or under Part XV of the United Nations Convention on the Law of the Sea (UNCLOS).

FACTUAL BACKGROUND

6. Japan is one of a small number of countries which currently engage in so-called “scientific whaling”; i.e. the grant of special permits “to kill, take and treat whales for purposes of scientific research” purportedly under Article VIII of the ICRW. Japan has recently expanded its special-permit whaling programme. We are asked to address the legal issues relating to the taking of humpback whales (*Megaptera novaeangliae*) from the Antarctic and sei whales (*Balaenoptera borealis*) from the North Pacific under that programme. Other whale species taken by Japan in this way include, from the Antarctic, Antarctic minke whales and fin whales, and from the Western North Pacific, common minke whales, Bryde's whales and sperm whales.
7. The profits derived from Japan's special-permit whaling (through the commercial sale of whale products) are used to support the work programme of the non-governmental Institute for Cetacean Research (ICR) in Tokyo,⁵ which carries out, or in turn provides funding for, seasonal whaling expeditions by commercial vessels in the Antarctic and the Pacific. According to the ICR's Annual Reports, more than 85% of the institutional ICR budget for this programme (i.e., approximately US\$ 55 million annually) is derived from the commercial sale of whale products of species listed on Appendix I of CITES.⁶

⁵ See <http://www.icrwhale.org/abouticr.htm>. Two basic conditions are reported to have been specified by the Japanese Government for the original programme: (a) that it should be (economically) self-sustainable; and (b) that it should be long-term, possibly “until the re-opening of commercial whaling”; T. Kasuya, “Japanese Whaling and Other Cetacean Fisheries”, *Environmental Science and Pollution Research* 14 (2007) 39-48, at page 46.

⁶ See the table setting out research whaling related income and expenses of the ICR (based on the ICR annual reports 1989-2004), reproduced in A. Ishii & A. Okubo, “An Alternative Explanation of Japan's Whaling Diplomacy in the Post-Moratorium Era”, *Journal of International Wildlife Law and Policy* 10 (2007) pp. 55-87, at page 73, which shows that proceeds from “by-products” of special-permit whaling quadrupled in the period between 1988-2003. The remainder of the ICR budget is covered by government subsidies (Ministry of Agriculture, Forestry and Fisheries) and from other sources; see T. Kasuya (Professor at Teikiyo University of Science and Technology), as quoted in *Mainichi Shimbun* (Tokyo) of 3 October 2005; and *id.*, footnote 5 above.

8. In 1982, the Parties to the ICRW decided to set zero catch limits for commercial whaling until further decision. This multilateral agreement, included as paragraph 10(e) in the Schedule to the ICRW,⁷ and sometimes (inaccurately) referred to as “moratorium”,⁸ has been in effect since the 1985/1986 whaling season. Japan lodged an objection to the decision which it has since withdrawn.⁹
9. The IWC has also established two sanctuaries in the Southern Ocean and the Indian Ocean. In the case of the Southern Ocean Sanctuary, provision is made for review at 10-yearly intervals. The “Japanese Whale Research Programme under Special Permit in the Antarctic”, known as JARPA II,¹⁰ is conducted within the waters of the Southern Ocean Sanctuary. Japan was the only country to vote against the establishment of the Southern Ocean Sanctuary in 1994. Subsequently, Japan entered a reservation to paragraph 7(b) of the Schedule. The footnote to paragraph 7(b) states that the Government of Japan lodged an objection within the prescribed period to paragraph 7(b), to the extent that it applies to the Antarctic minke whale stocks.¹¹ At the 2006 IWC meeting, Japan introduced a proposal to delete the provision for the Southern Ocean Sanctuary, on the ground that it lacks a scientific basis, but this proposal was not adopted.¹²
10. *Humpback whales*: Humpback whales were already fully protected under the ICRW –by a zero catch limit– long before the so-called moratorium for commercial whaling; and they were among the first species listed on Appendix I of the 1979 *Convention on the Conservation of Migratory Species of Wild Animals* (CMS).¹³ The species is listed on Appendix I to the CITES Convention (discussed below) which includes “all species threatened with extinction which are or may be affected by trade.” Humpback whales are also listed as vulnerable on the 2006 IUCN Red List of Threatened Species.¹⁴

⁷ Paragraph 10(e) provides: “Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/1986 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.”

⁸ A formal IWC moratorium is in place, e.g., for all killing of sperm whales (effective since 1981).

⁹ The footnote to paragraph 10(e) states: The Governments of Japan, Norway, Peru and the Union of Soviet Socialist Republics lodged objection to paragraph 10(e) within the prescribed period. For all other Contracting Governments this paragraph came into force on 3 February 1983. Peru withdrew its objection on 22 July 1983. The Government of Japan withdrew its objections with effect from 1 May 1987 with respect to commercial pelagic whaling; from 1 October 1987 with respect to commercial coastal whaling for minke and Bryde’s whales; and from 1 April 1988 with respect to commercial coastal sperm whaling.

¹⁰ The JARPA II programme follows on from the earlier JARPA programme which ran for 16 years until the 2004/2005 Antarctic season. The stated objectives of that programme were “the estimation of biological parameters (especially the natural mortality rate) to improve management; elucidation of stock structure to improve management; examination of the role of whales in the Antarctic ecosystem; examination of the effect of environmental changes on cetaceans”.

¹¹ The Government of the Russian Federation also lodged an objection to paragraph 7(b) within the prescribed period but withdrew it on 26 October 1994. For all Contracting Governments except Japan, paragraph 7(b) came into force on 6 December 1994.

¹² See the Chair’s Report of the 58th Annual Meeting at paragraph 9.3.

¹³ Convention on the Conservation of Migratory Species of Wild Animals, adopted at Bonn on 23 June 1979, in force since 1 November 1983; *International Legal Materials* 19 (1980) p. 15; ratified by 101 States and the EU.

¹⁴ See listing at www.iucnredlist.org/info/categories.

11. The humpback whale is one of the target species of the JARPA II. From the start of the full JARPA II in 2007/08, an annual catch of 50 animals is planned. Catches will be made in each austral summer season, alternatively in Areas IV and V. In 2006, the IWC Scientific Committee noted that: “the available information on Southern Hemisphere humpback whales was sufficient to generate a reasonable hypothesis regarding Breeding Stock D (Western Australia) and its general connection to the feeding grounds of Area IV – however, there remains the question of how much mixing exists with Area V to the east and Area III to the west. The situation for Breeding Stocks E and F (Eastern Australia and the South Pacific Islands) is complex and currently unresolved, and therefore it was not possible to construct stock structure hypotheses for assessment modelling”.¹⁵
12. Japan has included humpback whales among the species which will be taken under JARPA II. The Government of Japan announced JARPA II in 2005 and the programme commenced in the 2005/2006 season.¹⁶ The first two years of JARPA II involve a feasibility study commencing with the sampling each year of a maximum of 850 (+/- 10% allowance) minke whales and 10 fin whales. No humpback whales are scheduled to be taken during the period of the feasibility study. The full whaling programme involves the taking of up to 935 minke whales, 50 fin whales¹⁷ and 50 humpback whales annually from the Antarctic. This represents a significant increase in the number of whales taken under earlier scientific whaling programmes operated by Japan, or indeed any other Contracting Government.
13. The objectives of the JARPA II and a description of the methods to be used are set out in the document entitled “Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) – Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources” (SC/57/01) published by ICR and presented to the Scientific Committee of the IWC.¹⁸ The stated objectives of the programme include: monitoring of the Antarctic ecosystem; modeling competition among whale species and developing future management objectives; elucidation of temporal and spatial changes in stock structure and improving the management procedure for the Antarctic minke whale stocks. At the 2006 IWC meeting, Japan reiterated the goal of JARPA II as being “to develop an ecosystem model leading to sustainable use through multi-species management.”¹⁹
14. There has been extensive criticism within the IWC of Japan's decision to issue special permits for lethal research within the Southern Ocean

¹⁵ Report of the IWC Scientific Committee, 2006. *Journal of Cetacean Research and Management, Supplement 9* (2007), p. 29.

¹⁶ Feasibility studies will be conducted in the first two years and the full-scale programme will start in the 2007/2008. On 28 February 2007, the ICR announced that the Antarctic whale research program for the 2006/2007 austral summer season would be cut short as a result of a fire aboard the research mother vessel, the *Nisshin Maru*.

¹⁷ Fin whales (*Balaenoptera physalus*) are listed on CITES Appendix I (with a reservation by Japan), on CMS Appendices I and II, and are classified as “endangered” on the IUCN Red List of Threatened Species.

¹⁸ The document is available at www.icrwhale.org/JARPAII.

¹⁹ Chair's Report of the 58th Annual Meeting, 16-20 June 2006 St Kitts, paragraph 11.2.1.

Sanctuary and these were reiterated at the 2006 IWC meeting.²⁰ There has also been strong criticism of Japan's decision to take whale species for which there is no agreed IWC Scientific Committee abundance estimate.²¹

15. The Chair's report of the 2006 IWC meeting states that the Scientific Committee reviewed results from the first year of JARPA II, and different views on the value of this and other research programmes being conducted by Japan and Iceland were expressed in the Scientific Committee and the Commission.²² Australia and New Zealand expressed concern that there was insufficient data to identify and differentiate where in the Southern Ocean the small and vulnerable Pacific Island populations of humpbacks feed and that JARPA II might take whales from very small populations. Australia criticised the original JARPA programme on a number of grounds including: the fact that 6,800 minke whales had been killed, few peer-review papers had been published, there had been a lack of any formal review by the Scientific Committee and the fact that the data derived from the programme were not used for management purposes.
16. In relation to humpback whales, Australia noted that (1) they are listed as vulnerable by IUCN; (2) the Southern Hemisphere Humpback Whale Comprehensive Assessment Workshop in April 2006 concluded that the stock structure of Southern Hemisphere whale populations is more complex than previously thought and that knowledge gaps could be filled with non-lethal techniques; (3) a small take of humpback whales that migrate between the Southern Ocean and the South Pacific could have severe conservation implications and (4) humpback whales are the basis for whale-watching in Australia and the South Pacific.²³
17. Japan claimed that there was a bias against papers based on lethal studies of whales in foreign scientific journals and claimed that many scientists considered IUCN's criteria inappropriate to marine species. Japan also indicated that it was considering asking CITES to change its listings of humpback and fin whales.
18. Japan subsequently submitted to the 14th meeting of the Conference of the Parties to CITES (to be held at The Hague in June 2007) a proposal to review the listing of all cetaceans listed in Appendix I that are managed under the ICRW (CoP14 Doc.51). In its comments on the proposal, the CITES Secretariat questions whether such a review would serve any useful purpose, as Resolution Conf. 11.4 (Rev.CoP12) is still in effect.²⁴
19. *Sei whales*: Sei whales have been listed on Appendix I to the CITES Convention since 1977 for populations/stocks in the North Pacific and in parts of the Southern Hemisphere (from 0° to 70° East longitude, and from the equator to the Antarctic continent), and since 1981 for the

²⁰ See Chair's Report of the 58th Annual Meeting, 16-20 June 2006 St Kitts, paragraph 9.3.

²¹ Chair's Report of the 58th Annual Meeting, 16-20 June 2006 St Kitts, paragraph 11.2.1.

²² See Chair's Report of the 58th Annual Meeting, 16-20 June 2006 St Kitts, page 6.

²³ See Chair's Report of the 58th Annual Meeting, 16-20 June 2006 St Kitts, paragraph 11.2.3. page 43.

²⁴ See paragraph 62 below for discussion of that resolution.

entire species,²⁵ and on both Appendices I and II of the CMS Convention since 2002. Sei whales are also listed as endangered on the 2006 IUCN Red List of Threatened Species.²⁶ At the 2006 IWC meeting, it was agreed that priority for in-depth assessment should be given to those stocks taken under special permit which have not been assessed for many years and that consideration should be given to beginning an assessment of North Pacific sei whales.²⁷

20. Japan takes sei whales under the “JARPN II” programme,²⁸ announced in 2000, which operates in the Western North Pacific. The stated goal of the programme is to obtain information to contribute to the conservation and sustainable use of marine living resources (including whales) in the western North Pacific. In 2002, a full JARPN II programme was proposed involving the take of 150 common minke whales, 50 Bryde's whales, 50 sei whales and 10 sperm whales. The current permit (2004) is for 220 common minke whales, 50 Bryde's whales, 100 sei and 10 sperm whales. We understand that, since 2002, the whaling factory ship *Nisshin Maru*, operated by Kyodo Senpaku,²⁹ has been catching sei whales in the North Pacific. This whaling is conducted under a special permit issued by the Japanese Fisheries Agency in purported reliance on Article VIII of the ICRW.³⁰
21. At the 2006 IWC meeting, Japan showed data from JARPN II indicating increased abundance of sei whales among other species in the period 1985–2001.³¹ Japan's approach to ecosystem modelling was criticised by a number of other States, as was its use of lethal research techniques.
22. Both these programmes have been scrutinised under the procedures in place under the ICRW, as discussed in the Paris Report.³² We note that the value of the research under the JARPA II programme in particular has been questioned within the Scientific Committee of the IWC and that the matter was referred to the Commission which adopted a Resolution, *Resolution 2005-1*, that strongly urged the Government of Japan to withdraw its JARPA II proposal, or to revise it so that any information needed to meet the stated objectives of the proposal is obtained using non-lethal means.³³

²⁵ Japan did not enter a reservation under Article XXIII to the 1977 listing of sei whales (which was the result of an amendment of Appendix I adopted by the 1st Conference of the Parties at Bern in November 1976, and hence was already in effect at the time of Japan's acceptance of CITES in 1980), but lodged a reservation under Article XV(3) to the 1981 listing (which was the result of a further amendment of Appendix I adopted by the 3rd Conference of the Parties at New Delhi in March 1981, effective from 6 June 1981). Accordingly, Japan's reservation to the listing of sei whales on CITES Appendix I is limited to populations *other* than those already listed since 1977; see the CITES website http://www.cites.org/eng/app/reserve_index.shtml.

²⁶ See www.iucnredlist.org/info/categories.

²⁷ See the Chair's Report of the 58th Annual Meeting, 16–20 June 2006 St Kitts, paragraph 11.1.3.

²⁸ This programme replaces an earlier programme known as JARPN which ran from 1994–1999. JARPN stands for “Japanese Whale Research Programme under Special Permit in the Western North Pacific”

²⁹ See <http://www.maff.go.jp/mud/479.html>, *Kyodo Senpaku* is a company converted from the former Kyodo Whaling Company to conduct special permit whaling; see Ishii & Okubo, (footnote 6 above), at page 59.

³⁰ Japan Progress Reports submitted to the International Whaling Commission 2003–2007 (Papers SC/55–59/ProgRep Japan): http://www.iwcoffice.org/sci_com/scprogress.htm. See also paragraph 36 and footnote 39 below.

³¹ Chair's Report of the 58th Annual Meeting, 16–20 June 2006 St Kitts, paragraph 11.2.2.

³² See paragraphs 10–20 of the Paris Report.

³³ See paragraph 19 of the Paris Report.

THE CITES CONVENTION

23. The CITES Convention is based on the recognition by states that:

“international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade.” (fourth pre-ambular recital).

24. The CITES Convention entered into force on 1 July 1975 and has been ratified by 171 States.³⁴ Japan accepted the Convention on 6 August 1980 and the Convention entered into force for Japan on 4 November 1980.

25. The Convention establishes a system of regulation for international trade in the species to which it applies, which are those listed in its three Appendices.³⁵ “Trade”, for the purposes of the Convention, means “export, re-export, import and introduction from the sea” (Article I(c)).

26. “Introduction from the sea” means the transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State (Article I(e)).

27. Article II.4 of 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 the present Convention.”

28. Article II sets out the core criteria by which species are to be listed under the Convention and provides:

“Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particu-

³⁴ As at 24 May 2005. Convention on International Trade in Endangered Species of Wild Fauna and Flora, adopted at Washington/DC on 3 March 1973, *United Nations Treaty Series* 993:243; as amended at Bonn on 22 June 1979 (amendment in force since 13 April 1987). Members of CITES are listed on the Convention website, <http://www.cites.org/eng/disc/parties/chronolo.shtml>.

³⁵ Current Appendices I, II and III, valid as from 3 May 2007, are contained in the annex to the CITES Secretariat's *Notification to the Parties* No.2007/007 of 2 February 2007, with a correction in No.2007/012 of 28 March 2007; see also the CITES website <<http://www.cites.org/eng/app/index.shtml>>.

larly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.” (Article II.1).³⁶

29. *Appendix II* includes species “which, although not currently threatened with extinction, may become so unless trade in them is strictly regulated” (Article II.2) and *Appendix III* includes species “which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other Parties in the control of trade” (Article II.3).
30. Humpback whales worldwide have been listed on Appendix I since 1975, and all sei whales in the North Pacific have been listed on Appendix I since 1977. All other species of “great whales” are also currently listed in Appendix I, while only one population of Northern minke whales (West Greenland) is currently listed in Appendix II.
31. The rules on trade in species listed in Appendix I are set out in Article III.³⁷ Article III.1 provides that all trade in specimens of Appendix I species “shall be in accordance with the provisions of this Article.” Article III then sets out the rules for export (paragraph 2), import (paragraph 3), re-export (paragraph 4) and introduction from the sea (paragraph 5).
32. In relation to the introduction from the sea of Appendix I species, Article III.5 provides:

“The introduction from the sea of any specimen of a species included in Appendix I shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate only shall be granted when the following conditions have been met:

 - (a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved;
 - (b) a Management Authority of the State of introduction is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
 - (c) a Management Authority of the State of introduction is satisfied that the specimen is *not to be used for primarily commercial purposes.*” (emphasis added).
33. *Exemptions:* Article VII of the Convention makes provision for exemptions and other special provisions relating to trade. These relate to transit and transshipment (paragraph 1); specimens acquired before the Convention applied to them (paragraph 2); personal or household items (paragraph 3); animals bred in captivity and plants which have been artificially propagated (paragraphs 4 and 5); non-commercial loans, donations or exchanges between scientists or scientific institutions (paragraph 6) and specimens forming part of a travelling zoo or circus (paragraph 7). It is for the Management Authority of the Party granting an exemption to satisfy itself that these exceptional conditions are met, and thereby to ensure the Party's compliance with the Convention. The burden of proof for any exception from the Convention's general restriction of trade in Appendix I species thus rests on the Party claiming such an exception.

³⁶ CITES Conference Resolution 9.24 (Rev.CoP13) sets out in detail the biological and trade criteria for amending Appendices I and II.

³⁷ The rules governing trade in Appendix II species are set out in Article IV and those governing trade in Appendix III species in Article V.

34. *Enforcement*: Article VIII of the Convention requires Parties to take appropriate measures to enforce the provisions of the Convention and to prohibit trade in specimens in violation of its provisions. These shall include measures to penalise trade in, or possession of such specimens or both, and measures to provide for the confiscation or return to the State of export of such specimens.
35. At their 11th meeting in April 2000, the Parties to the Convention adopted Conference Resolution 11.3 on *Compliance and Enforcement*. This Resolution, revised in 2004, emphasises the important role of the CITES Secretariat in promoting effective enforcement of the Convention.³⁸ The Resolution goes on to make a series of detailed recommendations to the Parties including that requests for information on alleged infractions from the Secretariat should be responded to within one month and that Parties provide the Secretariat with detailed information about significant cases of illegal trade.
36. Article IX requires each Party to designate one or more Management Authority competent to grant permits or certificates on behalf of that Party and one or more Scientific Authorities. At the time of its acceptance of CITES in 1980, the Japanese Government designated as its national “Management Authority” the International Trade Policy Bureau (now the Trade and Economic Cooperation Bureau) of the Ministry of International Trade and Industry (now Ministry of Economy, Trade and Industry, METI); and as “Scientific Authority”, the national Environment Agency. However, for all purposes of “introduction from the sea”, the designated “Management Authority” was/is the Fisheries Agency of the Ministry of Agriculture, Forestry and Fisheries; and the designated “Scientific Authority” for all fish and cetacean species also was/is the Fisheries Agency (Resources and Environmental Research Division).³⁹ That designation now appears to be in conflict with CITES Conference Resolution 10.3 (1997) which expressly recommends that “all Parties designate Scientific Authorities independent from Management Authorities”.⁴⁰
37. Article XV governs amendments to Appendices I and II. There is provision for the Secretariat to consult other interested bodies and in relation to marine species, to consult intergovernmental bodies having a

³⁸ Based on Article XIII (“international measures”), as elaborated in CITES Conference Resolution 11.3 (Rev.CoP13) and in Conference Resolution 14.3 (2007), discussed in paragraphs 100-112 below.

³⁹ See the CITES website, <http://www.cites.org/common/directy/e_directy.html>. For example, therefore, a “certification of vessel research” issued on 10 May 2005 by the Director-General of the Fisheries Agency (Mr. Fumio Tahara) for the vessels participating in JAPN states that this certificate purports to serve concurrently as a “certificate under Articles III(5) and IV(6) of [CITES] as appropriate when samples and the parts thereof obtained are subject to the provisions of these articles.” Apparently, no further documentation was issued in this case. On the standard requirements for CITES permits and certificates under Articles III and IV, see Article VI (which provides, *inter alia*, that “a separate permit or certificate shall be required for each consignment of specimens”) and Conference Resolution 12.3 (Rev.CoP13) of 15 November 2002, referred to in footnote 3 above.

⁴⁰ Note, however, that while in past CITES practice, a Party's *failure* to designate a national Scientific Authority was considered sufficient ground in at least two cases in 1999 (Afghanistan and Rwanda) for initiating non-compliance proceedings –as described in paragraphs 100-112 below–, mere lack of administrative independence does not appear to have been so sanctioned; see R. Reeve, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (Royal Institute of International Affairs 2002), at pages 152-154.

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.” Accordingly, with regard to cetaceans in particular, the CITES Secretariat regularly consults the IWC, under guidance from the CITES Conference of the Parties.⁴¹

38. *Reporting.* According to Articles VIII(6) and VIII(7), each Party is obliged to submit to the CITES Secretariat annual reports containing a summary of the number of permits and certificates issued, including “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.” In view of the crucial importance of these reports for monitoring compliance with the Convention, the Conference of the Parties has since 1994 elaborated *Guidelines for the Preparation and Submission of CITES Annual Reports*,⁴² which specify that the reports “*must contain information on imports, exports, re-exports and introduction from the sea of specimens of all species included in Appendices I, II and III*”.⁴³
39. At its 11th meeting in 2000, the Conference of the Parties decided that “failure to submit an annual report by 31 October of the year following the year for which the report was due constitutes a major problem with the implementation of the Convention, which the Secretariat shall refer to the Standing Committee for a solution in accordance with resolution in accordance with Resolution Conf. 11.3 [Rev.CoP13]” (i.e., subjecting the delinquent Party to the non-compliance procedure described in paragraphs 100-112 below). The Conference further recommended “that Parties not authorize trade in specimens of CITES-listed species with any Party that the Standing Committee has determined has failed, for three consecutive years and without having provided adequate justification, to provide the annual reports required under Article VIII, paragraph 7(a), of the Convention within the deadline (or any extended deadline) provided in the present Resolution”.⁴⁴ As a result, trade embargoes for persistent failure to submit adequate annual reports were imposed on 11 CITES member countries since 2003 (Afghanistan, Algeria, Central African Republic, Djibouti, Dominica, Guinea-Bissau, Liberia, Mauritania, Rwanda, Somalia, and Vanuatu), and are still in force for all trade in CITES-listed species with two of those countries today.⁴⁵
40. Japan regularly submitted annual reports pursuant to Article VIII(7) of CITES, most recently in January 2007 for the year 2005. However, the very last annual report regarding Japan's *introductions from the sea* was

⁴¹ See Conference Resolution 11.4 (Rev.CoP12), discussed in paragraph 62 below.

⁴² Most recent version in *Notification to the Parties* No. 2002/022 of 9 April 2002.

⁴³ Guidelines section 2(a), emphasis added; section 2(d) specifies that “any introductions from the sea should be included in the section on imports”.

⁴⁴ Conference Decision 11.17 (Rev.CoP13); emphasis added.

⁴⁵ Mauritania and Somalia. Countries subject to trade suspensions are listed on the CITES website, <http://www.cites.org/eng/news/sundry/trade_suspension.shtml>; see also Table I in R. Reeve, “Wild-life Trade, Sanctions and Compliance: Lessons From the CITES Regime”, *International Affairs* 82 (2006) 881-897, at page 890.

submitted by the Fisheries Agency for the year 2000 (showing a number of Appendix I whale products introduced “for scientific purposes”, including a total of 158 kg of “skin pieces” of humpback whales, and 2 kg “skin pieces” of sei whales.⁴⁶) For all subsequent years, –i.e., over five consecutive years now– Japan has failed to submit to CITES any data on specimens or products introduced from the sea, and hence will risk incurring trade sanctions.

⁴⁶ Report submitted by the Fisheries Agency, on file with the UNEP *World Conservation Monitoring Centre* (WCMC) in Cambridge, and publicly available in accordance with CITES Article VIII(8).

ISSUES

A: What is the *legal status* of Japan's catches and landings of those whale species listed on Appendix I of CITES for which Japan does not hold a reservation, taking account, inter alia, of: (i) the ongoing discussion between the CITES Parties with regard to the interpretation and application of the “introduction from the sea” provisions of CITES; (ii) the extent to which such catches and landings are for “primarily commercial purposes” as defined in the CITES context?

41. While Japan has entered a number of reservations on whale species, it has not entered a reservation to the Appendix I listing of either the North Pacific population of sei whales or any humpback whales.⁴⁷ It follows that the legal status of any taking of specimens of those two species (and any other Appendix I whales species for which no reservation has been entered) falls to be determined under the rules governing trade in Appendix I species.
42. In our view, the taking of sei whales and humpback whales by Japanese-registered whaling ships to be landed in Japan plainly constitutes the “introduction from the sea” by Japan of those whale specimens. Such trade is therefore regulated by the rules of the Convention.

Introduction from the sea

43. “Introduction from the sea” means the transportation into a State of specimens of any species which were “taken in the marine environment not under the jurisdiction of any State.” We understand that the sei and humpback whales are all to be taken from areas not under the jurisdiction of any State (the North Pacific and the Antarctic Ocean).

⁴⁷ CITES reservations are listed at www.cites.org/eng/app/reserve_index.shtml. The species are listed by their latin names. Sei whales are *Balaenoptera borealis*, humpback whales are *Megaptera novaeangliae*.

44. The humpback whales are to be taken from December 2007 onwards in the Pacific sector of the Southern Ocean south of 60°S in what the IWC defines as Areas IV (70°E to 130°E) and Area V (130°E to 170°W).⁴⁸
45. The sei whales have been taken each year since 2002 in the Western North Pacific.⁴⁹ Based on the maps of catch positions provided in those documents, we are instructed that almost all of the 389 sei whales reported caught during 2002-06 were taken well outside the EEZ of any State. The remaining few may have been taken within the Japanese EEZ, but we are instructed that the maps are not sufficiently precise to be certain which side of the EEZ boundary those few catches fall.⁵⁰
46. We have had regard to the discussions currently taking place between the Parties to CITES on the scope of “introduction from the sea” and in particular to a paper, CoP14 Doc.33, produced by the CITES Secretariat at the request of the Standing Committee, in preparation for the next Conference of the Parties in June 2007. That paper contains a draft Resolution recommended to the Parties by the Standing Committee and the Secretariat. We do not consider that these discussions call into question our conclusion that Japan's takings of sei and humpback whales fall within the scope of Article III.5 of the Convention, for the reasons set out below.
47. “*The marine environment not under the jurisdiction of any State*”: It appears from the report of the 2005 workshop attached to the Secretariat's paper that particular areas of concern in relation to the meaning of the phrase “the marine environment not under the jurisdiction of any State” relate to its application to: the continental shelf; exclusive fishing zones (EFZs); exclusive economic zones (EEZs); and those marine areas where States have a right to declare EFZs/EEZs. It appears that Parties were agreed that the CITES definition should be consistent with the rules of international law on sovereignty over these areas, as reflected in the United Nations Convention on the Law of the Sea (UNCLOS).
48. So far as we are aware, however, none of Japan's takings of sei and humpback whales have or will have occurred in these areas of concern: the sei whales taken in the North Pacific have been taken on the high

⁴⁸ “Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources” Document SC/57/O1 submitted by the Government of Japan to the IWC Scientific Committee, June 2005

⁴⁹ Documents SC/55/O7 (2003), SC/56/O13 (2004), SC/57/O3 (2005), SC/58/O8 (2006) and SC/59/O5 (2007) submitted by the Institute of Cetacean Research, Tokyo, to the IWC Scientific Committee each year since 2002, detail the catches in the previous season

⁵⁰ Sei whales are taken in the North Pacific in what the IWC defines as sub-areas 7, 8 and 9. These areas extend from the east coast of Japan, north of 35°N, to 170°E. Sub-area 7 includes waters in the EEZ of Japan whereas the whales taken in sub-areas 8 and 9 were exclusively international waters. Thus of 350 whales taken between 2003 and 2006, at least 340 originated from international waters.

Catches of sei whales under JARPNII from 2002 -2006 from annual progress reports submitted to IWC.

Year	7	8	9	Total
2002				39
2003	5	19	26	50
2004	0	2	98	100
2005	0	31	69	100
2006	5	48	47	100

seas⁵¹ and the humpback whales will be taken in the Antarctic in waters considered by Japan as high seas. Accordingly, and on this basis, we do not see any grounds, on a geographical basis, for arguing that these takings by Japan do not constitute an introduction from the sea falling within the scope of Article III.5.

49. *Transportation into a State*: Parties have discussed whether introduction only occurs upon transportation into a Port State (which would mean the Flag State does not have to issue a certificate of introduction prior to transportation into a Port State) or whether it occurs at the earlier stage, when the specimen is taken aboard a vessel (in other words, the introduction is into the Flag State of the vessel). This issue remains unresolved and the draft decision attached to the Secretariat paper proposes the establishment of a working group to look further at the matter.
50. It is our understanding that Japan is *both* the Flag State for most of the ships involved in the taking and transporting of sei and humpback whales *and* the Port State into which the specimens are transported. We are aware of the fact that some of the whale specimens and products, after transference at sea, are transported to Japan by vessels operating under foreign flag (flags of convenience). For CITES purposes, however, it is irrelevant under which flag such transportation may occur. Whenever an Appendix I specimen or product enters Japanese territory, it is the Japanese Management Authority which must satisfy itself that the substantive conditions of CITES Article III are met, either under the requirements for an import permit (Article III.3) or under the identical requirements for a certificate of introduction from the sea (Article III.5).
51. Consequently, in order for an introduction from the sea (or, as the case may be, an importation) of either sei or humpback whale specimens to be lawful, a certificate of introduction (or an import permit) must have been issued by the Management Authority of the State of introduction or importation. It must meet all the conditions set out in Articles III.3 or III.5, including that the Management Authority of the State of introduction/importation is satisfied that the specimen is not to be used for primarily commercial purposes.

“Not to be used for primarily commercial purposes”

52. Article III.5 of the Convention clearly states that a CITES certificate may only be granted by the Management Authority of the State of introduction where the Management Authority is satisfied that the specimen is not to be used for primarily commercial purposes. This condition (which is identical to the condition in Article III.3) is consistent with the fundamental principle laid down in Article II of the Convention that trade in Appendix I specimens: “must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.”

⁵¹ See the reports submitted to the IWC Scientific Committee by Japan, 2004-2006.

53. The phrase “primarily commercial purposes” is not defined in the text of the Convention. The phrase has been considered and interpreted by the Parties in *Conference Resolution 5.10*, adopted in 1985.⁵²

54. The need for the Resolution is explained in the preamble which provides in part:

“...RECOGNIZING that because the Convention does not define the terms 'primarily commercial purposes', 'commercial purposes' in paragraph 4 of Article VII, or 'non-commercial' in paragraph 6 of Article VII, the term 'primarily commercial purposes' (as well as the other terms mentioned above) may be interpreted by the Parties in different ways;

ACKNOWLEDGING that the Parties' differing internal legislation and legal traditions will make it difficult to reach agreement on a simple 'objective' interpretation of the term and that the facts concerning each importation will determine whether a proposed use would be for 'primarily commercial purposes';

RECOGNIZING that lack of specific definitions for terms involving 'commercial' and the importance of the facts concerning each proposed transaction create a need for consensus by the Parties regarding general principles and examples to guide the Parties in assessing the commerciality of the intended use of those specimens of Appendix-I species to be imported;

AWARE that agreement on interpreting the term 'primarily commercial purposes' is important because of the fundamental principle in Article II, paragraph 1, of the Convention that trade in specimens of Appendix-I species must be subject to particularly strict regulation and only authorized in exceptional circumstances;”

We note that the object of Conference Resolution 5.10 is to minimise the possibility of different interpretations. The Resolution then sets out the recommendation of the Parties:

“...that for the purposes of Article III, paragraphs 3 (c) and 5 (c), of the

Convention, the following general principles and the examples in the Annex attached to the present Resolution be used by the Parties in assessing whether the importation of a specimen of an Appendix-I species would result in its use for 'primarily commercial purposes':

General principles

1. Trade in Appendix-I species must be subject to particularly strict regulation and *authorized only in exceptional circumstances*. (emphasis added)
2. An activity can generally be described as 'commercial' if its purpose is to obtain economic benefit, including profit (whether in cash or in kind) and is directed toward resale, exchange, provision of a service or other form of economic use or benefit.
3. The term 'commercial purposes' should be *defined by the country of import as broadly as possible so that any transaction which is not wholly 'non-commercial' will be regarded as 'commercial'*. In transposing this principle to the term 'primarily commercial purposes', it is agreed that all uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature with the result that the importation of specimens of Appendix-I species should not be permitted. The burden of proof for showing that the intended use of specimens of Appendix-I species is clearly non-commercial shall rest with the person or entity seeking to import such specimens. (emphasis added)...

⁵² There have been a number of more recent proposals to revise Conference Resolution 5.10, but these have been rejected by the Conference of the Parties. We note for example the proposal by South Africa at COP 11 (subsequently withdrawn) which would have shifted the emphasis to an analysis of whether a proposed export would be for the benefit of the species (as opposed to the current analysis of whether the transaction would be for primarily commercial purposes).

The *Annex* to Conference Resolution 5.10 then sets out a number of examples of categories of transactions in which the non-commercial aspects may or may not be predominant, depending upon the facts of each situation. The Resolution states that: “the discussions that follow each example provide further guidance in, and criteria for, assessing the actual degree of commerciality on a case by case basis. The list is not intended to be exhaustive of situations where an importation of specimens of Appendix I species could be found to be not 'for primarily commercial purposes':

...b) *Scientific purposes*: Article VII, paragraph 6, of the Convention uses the term 'noncommercial loan, donation or exchange between scientists or scientific institutions'. Thus, the Convention acknowledges that scientific purposes may justify a special departure from the Convention's general procedure. The import of specimens of an Appendix-I species may be permitted in those situations where the scientific purpose for such importation is clearly predominant, the importer is a scientist or a scientific institution registered or otherwise acknowledged by the Management Authority of the country of import, and the resale, commercial exchange or exhibit for economic benefit of the specimens is not the primary intended use....”

At the end of the *Annex* are set out some further general comments including the following:

“Moreover, in keeping with the provisions of Article II, paragraph 1, the importation of specimens of Appendix-I species removed from the wild for one of the purposes set forth above should, as a general rule, not be allowed unless the importer has first demonstrated that:

- a) he has been unable to obtain suitable captive-bred specimens of the same species;
- b) another species not listed in Appendix I could not be utilized for the proposed purpose; and
- c) the proposed purpose could *not be achieved through alternative means.*” (emphasis added)

55. Accordingly, by Conference Resolution 5.10, which was supported by Japan, the Parties recommend that, for the purposes of Article III, paragraphs 3 (c) (import) and 5 (c) (introduction from the sea), of the Convention, the general principles and the examples in the *Annex* to the Resolution be used by the Parties in assessing whether the importation of a specimen of an Appendix-I species would result in its use for “primarily commercial purposes”. The Resolution makes clear the Parties' concern that in the absence of guidance the Parties may adopt differing interpretations of this important aspect of the Convention.
56. We note in particular that Conference Resolution 5.10 states that an activity is “commercial” if its purpose is to obtain economic benefit, including profit (in cash or in kind) and is directed towards resale, exchange, provision of a service or other form of economic use or benefit (paragraph 2). The Resolution goes on to recommend that the term “commercial purposes” should be defined “as broadly as possible” so that any transaction which is not wholly “non-commercial” will be regarded as commercial (paragraph 3).
57. As to whether the purposes are *primarily* commercial, the Parties have agreed that “all uses whose non-commercial aspects *do not clearly pre-dominate* shall be considered to be primarily commercial in nature with

the result that the importation of Appendix I species should not be permitted.” (emphasis added). The burden of proof for showing that the intended use is clearly non-commercial shall rest with the person or entity seeking to import such specimens (paragraph 3).

58. The Annex to the Resolution refers to the exemption provided for non-commercial loans between scientific institutions in Article VII.6 as an indication that the Convention recognises that scientific purposes “may justify a special departure from the Convention's special procedure”. It goes on to state that import of Appendix I specimens may be permitted in those situations “where the scientific purpose for such importation is *clearly predominant*, the importer is a scientist or scientific institution registered or otherwise acknowledged by the Management Authority of the country of [introduction], and the resale, commercial exchange or exhibit for economic benefit of the specimens is *not the primary intended use*.” (emphasis added).
59. *Use of lethal research methods*: We also note that the Annex to Conference Resolution 5.10 recommends that importation of Appendix I specimens removed from the wild including for scientific purposes should “as a general rule, not be allowed unless the importer has first demonstrated that...(c) the proposed purpose *could not be achieved through alternative means*.” (emphasis added) This is clearly applicable to both introduction and importation of whale specimens and raises the issue of Japan's use of lethal research methods in circumstances where the IWC has repeatedly called on Japan to avoid such methods.
60. We note that in a series of resolutions, the IWC has criticised recourse to lethal methods of research: *Resolution 2005-1* strongly urges Japan to withdraw its JARPA-II proposal or revise it so that any information needed to meet its objectives is obtained by non-lethal methods; *Resolution 2003-2*, notes that “Article VIII of the ICRW was drafted and accepted by State Parties in 1946, at a time when few alternatives to lethal investigations existed, a situation *drastically different from today*” (emphasis added); by *Resolution 1997-5*, the IWC expressed its “deep concern” at Japan's continuing lethal research within the Southern Ocean Sanctuary and recommended that research involving the killing of cetaceans should only be permitted where “critically important research needs” are addressed which cannot be answered by analysing existing data or using non-lethal methods.⁵³
61. The Government of Australia has also criticised the continuing use of lethal methods where non-lethal methods are available. Following the completion of the “Baseline Research Oceanography Krill and the Environment (Broke-West) Antarctic marine science survey, January–March 2006,⁵⁴ the Australian Minister for the Environment and Heritage, Senator Ian Campbell, stated in a press release that the research

⁵³ See also IWC Resolution 1990-Appendix 5, and the discussion in the Paris Report (footnote 1 above) at paragraphs 145-149 in particular.

⁵⁴ See the Press Release “New Australian research shows Japan's scientific whaling is a sham”, dated 28 March 2006 at www.deh.gov.au/minister/env/2006/mr28mar206.html.

- showed that there was no justification for Japan's so-called “scientific whaling” and went on to state that the information, obtained solely through non-lethal means “now represents the most powerful approach seen yet to understanding the role of whales in their Southern Ocean ecosystem”. It concluded that: “It is clear that countries like Japan cannot credibly argue the information gained from killing whales is even remotely relevant to the stated objectives of their scientific whaling programme”.
62. *Conference Resolution 11.4 (Rev.CoP12)*: Prompted in part by concerns about the lack of monitoring or control of the international trade in whale meat and products, the Parties to CITES have also adopted *Conference Resolution 11.4 (Rev.CoP12)* on conservation of cetaceans, trade in cetacean specimens and the relationship with the IWC. This recommends that Parties to CITES agree not to issue any certificate for introduction from the sea (or import or export permit) under the Convention for primarily commercial purposes for any specimen of a species or stock protected from commercial whaling by the ICRW. The Resolution also recommends a series of further steps to address the illegal trade in whale meat including a voluntary inventory of all frozen whale parts and derivatives possessed in commercial quantities.
63. *Interpretation of Article III*: Article 31(1) of the *Vienna Convention on the Law of Treaties* (the Vienna Convention) requires that a treaty 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. Article 31(3) then provides that:
- “There shall be taken into account, together with the context:
- a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - c) any relevant rules of international law applicable in the relations between the parties.”
64. We consider that *Conference Resolution 5.10* and *Conference Resolution 11.4* provide authentic guidance on the agreement of the Parties as to the interpretation of the meaning of the phrase “primarily commercial purposes” in Article III.3(c) and III.5(c). In our view, those two Resolutions may be treated as subsequent agreements between the Parties to CITES, regarding the interpretation of the treaty within the meaning of Article 31(3)(a) of the Vienna Convention, or alternatively as “subsequent practice” within the meaning of Article 31(3)(b) of the Vienna Convention.
65. In order to decide whether the takings are for primarily commercial purposes it is necessary to determine: (1) whether the use of the specimens, once introduced into Japan, is (or is intended to be) commercial; and (2) whether such use is *primarily* commercial. It must be remembered that *Conference Resolution 5.10* expressly states that the burden of proof for showing that the intended use of the specimen is clearly non-commercial lies with the applicant for the certificate. It should also be

noted that *Conference Resolution 11.4* recommends that no certificate be issued for primarily commercial purposes for any specimen of a species or stock protected from commercial whaling by the ICRW whale stocks. This reinforces the requirement for caution and rigour, in our view, in determining whether an introduction or importation is for primarily commercial purposes. Both sei whales and humpback whales are protected from commercial whaling under the ICRW.

66. **(1) Is the use of the specimens commercial?** We have been referred to a number of factors which indicate that the specimens are, or are intended to be, for commercial use. These factors include: the significant increase in the number and species of whales to be taken under special permit; the commercial use of the whale specimens obtained from these takings; and the efforts of the Japanese Government to support the market in whale meat and promote the commercial use of whale meat and whale products.⁵⁵
67. In our view, based on the facts presented in the materials we have considered (from both official sources and academic literature), and having regard to Conference Resolution 5.10, and in particular paragraph 2, it is clear that there is or, is likely to be, a material commercial element to the trade in specimens of sei and humpback taken under the JARPN II and JARPA II programmes. We so conclude because the special-permit whaling conducted by Japan is used to obtain economic benefit from the sale of whale meat and other products, in the sum of 5.89 billion yen in fiscal year 2003-2004.⁵⁶ This is a very significant amount of money generated not predominantly by government subsidies but by commercial sales. Having regard to the scale of commercial activity and sales, and the extent of Government support for the commercial market, it is difficult to see how the activity could not be said to be “directed toward” the resale or exchange of the 'by-products' of such whaling.
68. *The market for whale meat in Japan:* We note from the 2000 TRAFFIC Report that, at that time, Japanese special-permit whaling was supplying about 1000-2000 tonnes of whale products from captured minke whales annually “as a by-product”.⁵⁷ The report goes on to analyse trends in consumption (volumes and prices).⁵⁸ It noted that there were five legal sources of supply within Japan including so-called “scientific research whaling”.⁵⁹ The supply from this source rose from 1384 tonnes in 1990 to 1989 tonnes in 1998 according to the report.⁶⁰ The report notes that

⁵⁵ By way of background, we have been referred, among other material cited in this Opinion, to: Akiko Ishihara & Junichi Yoshii, “A Survey of the Commercial Trade in Whale Meat Products in Japan” (TRAFFIC East Asia-Japan, Tokyo, June 2000, hereafter TRAFFIC Report); Atsushi Ishii & Ayako Okubo, “An Alternative Explanation of Japan's Whaling Diplomacy in the Post-Moratorium Era”, *Journal of International Wildlife Law and Policy* 10 (2007) pp. 55-87; Toshio Kasuya, “Japanese Whaling and Other Cetacean Fisheries”, *Environmental Science and Pollution Research* 14 (2007) pp. 39-48.

⁵⁶ See paragraph 85 and footnote 74 below.

⁵⁷ See page iv of the TRAFFIC Report, footnote 55 above.

⁵⁸ See page 1 of the TRAFFIC Report. The TRAFFIC investigators visited the major fisheries product retailers in the Tokyo area and the Hanshin area of Japan and also visited major brokers, wholesalers and retailers.

⁵⁹ See page 15 of the TRAFFIC Report.

⁶⁰ See table on page 2 of the TRAFFIC Report.

this source subsidises in part the special-permit whaling operation. While the report notes that frozen stockpiles of whale meat had declined in the 1990's, more recent reports refer to significant total stockpiles of whale meat in 2006: JARPN - 1,897.8 tonnes, and JARPA - 3,435.8 tonnes.⁶¹

69. The TRAFFIC Report notes that, in 2000, 76 whale meat products were found in 69 retail shops (from all the sources considered). The Report states that “it is very difficult to tell what proportion of the whale products sold at the retailer level are from scientific whaling”.⁶² The report does not suggest that none (or only a small percentage) of whale meat was from that source. The report goes on to state that whale meat prices rose significantly between 1976 and 1997 as the supply dwindled.⁶³ It notes that Japan ceased commercial whaling in March 1988 and Japan's last import from Iceland arrived in 1991 and then states: “Since that time, scientific whaling has been *the main source* where new whale products from species covered by the IWC moratorium could be added to the commercial market in Japan.”⁶⁴ (emphasis added).
70. The TRAFFIC Report is primarily concerned with the levels, management and continuing use of frozen stock piles of whale meat, an issue which is not directly relevant to the issue on which we are asked to advise here, but it does provide useful background on the operation of the market for whale meat in Japan at that time. The general picture of the commercial market for whale meat in Japan at that time, drawn from the TRAFFIC Report,⁶⁵ is that there was an active commercial market and that meat from whales taken under special permit was a very important, indeed the most important, source of supply into that market. We note that of the 11 wholesalers interviewed for the report, all said that they had bought whale products from “scientific whaling” each year.⁶⁶ The report notes that importation of most whale products is regulated under Japan's Decree of Import Trade Control and refers to its implementation of CITES.
71. Whether or not certain whale products are being used for commercial purposes is essentially a question of fact. On the basis of these materials, our conclusion is that whale products obtained from special-permit whaling appear to be used for commercial purposes in Japan, having regard to the clear agreement of the Parties to CITES in *Conference Resolution 5.10* as to the standard to be applied in determining whether an introduction is for “primarily commercial purposes”.
72. **(2) Is the use of the specimens for primarily commercial purposes?** Japan has stated in the IWC that the takings are for scientific purposes. It has submitted its special permits to the IWC's Scientific Committee for scru-

⁶¹ See the press releases on the ICR website: <http://www.icrwhale.org/02-A-55.htm> <http://www.icrwhale.org/02-A-52.htm>. According to Japanese authorities, deep-frozen whale products can be stored for up to 10 years; see IWC 47/Inf.3, Minutes of the First Informal Meeting Relating to the Control of Trade in Whale Products (1995).

⁶² See page 5 of the TRAFFIC Report.

⁶³ See page 7 of the TRAFFIC Report.

⁶⁴ See page 8 of the TRAFFIC Report.

⁶⁵ See also ICR material, <http://www.icrwhale.org/FAQ.htm>.

⁶⁶ See page 9 of the TRAFFIC Report.

tiny. The Paris Report outlines the scrutiny process under the ICRW for the special permits issued by Japan for the taking of sei and humpback whales (as well as other species) under the JARPN and JARPA II programmes.⁶⁷

73. Even if the takings are in part for scientific research, the conditions for the issue of a certificate of introduction will not be met unless “the scientific purpose ...is clearly predominant” and “the re-sale, commercial exchange or exhibit for economic benefit of the specimens is not the primary intended use.” (*Conference Resolution 5.10, paragraph (b) of the Annex*).
74. Thus the issue of whether the takings of sei and humpback whales are for primarily commercial purposes under CITES is not solely determined by the validity or otherwise of the scientific research in which Japan claims to be engaged, although this is in our view a relevant factor to take into account in determining, on objective grounds, whether the real motivation for the takings is commercial. The central issue is whether the commercial aspects of the trade (which we consider to be clearly present) predominate or not. This is a matter for objective determination.
75. As relevant background, we take note of Japan's consistent efforts to maintain the possibility of conducting commercial whaling, in particular by maintaining an objection to the Southern Ocean Sanctuary as regards commercial whaling of minke whales and by seeking, most recently in 2005, to lift the so-called moratorium. We note that at the 2006 meeting of the IWC Japan tabled a paper on “normalisation” of the ICRW in which it called for sustainable utilisation of abundant species of whales with no commercial whaling allowed for depleted and endangered stocks. This would entail the removal of the general “moratorium” on commercial whaling which in Japan's view had been intended as a temporary measure only.⁶⁸ Japan announced that it was organising a workshop, outside the auspices of the IWC, on the normalisation of the IWC. We note that Japan refrained from answering a question from the Netherlands as to whether its statement that commercial whaling would not be allowed for depleted species, also applied to special-permit whaling.⁶⁹
76. We note also the adoption of the St Kitts and Nevis Declaration at the 2006 IWC by 33 votes to 32 with 1 abstention. The Report of the meeting records that a number of the Governments opposing the Declaration formally distanced themselves from it following the vote. The Declaration, which was supported by Japan, declares a: “commitment to normalize the functions of the IWC based on the terms of the ICRW and other relevant international law...” The Parties to the Declaration understand that the ICRW is: “about managing whaling to ensure whale stocks are not over-harvested rather than protecting all whales irrespective of their abundance”. The Declaration then notes: “that that the

⁶⁷ See paragraphs 10–20 of the Paris Report.

⁶⁸ See Chair's Report of the 58th Annual Meeting, 16–20 June 2006 St Kitts, paragraph 19.1.1.

⁶⁹ See the Chair's Report of the 58th Annual Meeting of the IWC, paragraph 19.1.2 at page 62.

moratorium which was clearly intended as a temporary measure is no longer necessary”, and goes on to express concern that “after 14 years of discussion and negotiation, the IWC has failed to complete and implement a management regime to regulate commercial whaling”. The Declaration also states that the IWC “can be saved from collapse only by implementing conservation and management measures which will allow controlled and sustainable whaling which would not mean a return to historic over-harvesting and that continuing failure to do so serves neither the interests of whale conservation nor management”.

77. In our view, Japan's conduct at the IWC indicates a continued interest in and support for commercial whaling in general.⁷⁰ We recognise of course that Japan is entitled, in common with any other member of the IWC, to seek changes to the ICRW regime under the procedures permitted by that treaty and to object, within the terms of the treaty, to provisions which it does not support. However, whilst not determinative of the issue which we are asked to address here, we consider that Japan's consistent and vocal support for commercial whaling in the face of widespread international concern as to the impact of such activity on depleted whale stocks, suggests that the burden will be on Japan and on any Japanese importer to establish that any introduction with a commercial element is *not* for commercial purposes within the meaning of the CITES Convention. The language of *Conference Resolution 5.10* does not explicitly specify a burden of proof in relation to the issue of whether an introduction is for “primarily” commercial purposes, but the burden of showing that the intended use is “clearly non-commercial” is explicitly placed with the person seeking to import (or introduce) the specimen (paragraph 3 of *Conference Resolution 5.10*). Therefore, in the light of the clear prohibition of such trade in Article III.3 and III.5, and considering that the burden is normally on the party seeking an exemption from a general prohibition, we consider that the object and purpose of regulatory framework places the burden on the applicant for a certificate of introduction to show that the introduction is not for primarily commercial purposes. It is the duty of the Management Authority granting the certificate to satisfy itself that this substantive condition for an exemption is met. We have considered the factors set out below in that light.
78. We have considered the following factors to be relevant to a consideration of whether Japan's takings of whales under special permit are for primarily commercial purposes within the meaning of the CITES Convention: (1) the scale of the takings; (2) the commercial value of the trade in whale products/meat obtained from Japanese special-permit whaling; (3) the efforts of the Japanese Government in seeking to maintain the commercial market for whale products; (4) the substantial doubts raised in the international scientific community as to the scientific validity of the research programmes and the necessity for recourse to lethal research techniques.

⁷⁰ See S.J. Holt, “Whaling: Will the Phoenix Rise Again?”, *Marine Pollution Bulletin* 54:8 (2007) 1081-1086.

79. For the reasons set out below, we are persuaded that the current and proposed takings of humpback and sei whales, as well as other whale species (minke and fin whales), are for primarily commercial purposes, having regard to the provisions of the CITES Convention and the terms of Conference Resolution 5.10: (1) the criticism of the scale of the takings and the absence of any convincing explanation for the increase indicates in our view that the motive for the increased scale of takings is commercial rather than scientific; (2) the significant commercial value of trade in whale “by-products” and the extent of the subsidy this provides for the research programme of the Japanese Government also indicates in our view a commercial motive for the takings; (3) the efforts of the Japanese Government to promote the commercial trade in whale products including by reference to the economic and cultural importance of the trade suggest in our view that the purpose of the programme is commercial rather than scientific; and (4) the serious criticism of the scientific basis underlying the Japanese research programme and the condemnation of the use of lethal techniques indicates that the purpose of the programme is not genuinely or predominantly scientific in our view.⁷¹

80. (1) *The scale of the takings*: In the light of the criticisms made by Australia, New Zealand, Brazil and other States, as to the scale of the takings contemplated (and already undertaken) under the JARPA II and JARPN II research programmes, at the 2006 IWC and elsewhere, we consider that there are good grounds for taking the view that the scale of taking is prompted by commercial rather than scientific considerations. In our view, no convincing justification has been put forward by Japan as to why it is necessary to take the numbers of sei and humpback whales envisaged in the programmes.⁷² The special-permit catches proposed under the JARPA II and JARPN II programmes and their predecessors (JARPA and JARPN) have been an extremely controversial issue in the IWC Scientific Committee at every Annual Meeting since these programmes were first proposed by the Government of Japan. The Committee has not endorsed any of the proposed special permits for the catches of whales.⁷³

81. Applying the guidelines set out in *Conference Resolution 5.10*, all uses whose non-commercial aspects do not clearly predominate should be considered to be primarily commercial with the result that the importation/introduction should not be permitted (paragraph 3). It follows from this that, if takings on this scale cannot clearly be shown to be for scientific purposes, the Japanese Government is obliged to proceed on the basis that they are for primarily commercial purposes.

⁷¹ See the recent discussion of the issue in “Japan’s ‘Research Whaling’ in the Face of the Endangered Species Convention (CITES)” by Peter Sand, forthcoming in 16:3 *Review of European Community and International Environmental Law* (forthcoming, November 2007, which concludes, inter alia, that the purposes for which 391 sei whales were taken by the Japanese *Institute for Cetacean Research (ICR)* in the context of the JARPN-II programme from 2001 to 2006, as well as the purposes for which 50 humpback whales are to be taken in the context of the JARPA-II programme in 2007/08, were and are primarily commercial within the agreed meaning of CITES Art. 3(5)(c), *interim finding C*.

⁷² See also the statement of the former IWC chairman, Birger Bergersen (quoted in paragraph 92 below), on the original scope of ICRW Article VIII.

⁷³ Reports of the IWC Scientific Committee, *Journal of Cetacean Research and Management*, Supplements 3, 4, 5, 6, 7, 8, 9 (2001-2007).

82. We note the conclusion of the Paris Report that there is “strong evidence that the 'scientific whaling' conducted by some members of the IWC is in violation of the moratorium on commercial whaling laid down in paragraph 10(e) of the Schedule to the ICRW”.⁷⁴
83. We note that the revenue from the sale of whale products from special-permit takings now finances the bulk of Japan's whaling operations. According to the ICR Annual Report for fiscal year 2003-2004, the total expenses of special-permit whaling operations (5.34 billion yen; i.e., approximately US\$ 50 million) were covered by income from “proceeds of by-products” (5.89 billion yen), while the remainder plus additional income from government subsidies (less than 1 billion yen) was spent on Southern Ocean and coastal whaling research programmes.⁷⁵ In our view, a commercial interest in maintaining or increasing the level of funding for those operations by increasing the scale of takings of whales would constitute trade “for primarily commercial purposes” under CITES since the scale of takings is not related to the research needs of the programme but to the economic cost of conducting the operations. If the underlying objective of such a programme is to rationalise and maximise the generation of economic profit, rather than the generation of biological/ecological knowledge, the programme itself has become (or was always intended to be) part of an overriding commercial purpose.⁷⁶
84. (2) *The commercial value of the trade in whale meat:* We note the comment by New Zealand at the 2006 IWC meeting that through JARPA II, Japan had generated so much whale meat that it was necessary for a vessel to go down to the Southern Ocean half-way through the season to transfer meat back to Japan.⁷⁷
85. According to a report in the *Mainichi Shimbun* newspaper of 3 October 2005, Professor Toshio Kasuya, of Teikyo University of Science and Technology in Tokyo, gave the following analysis:
- “The annual expenses of the research program amount to around 6 billion yen, or more than US\$50 million, of which 5 billion yen is covered by the sales of whale meat produced from the catch by the scientific whaling. Government subsidy and other funding make up the remaining 1 billion yen. *Without the earnings from the meat sales, the whaling organization that undertakes the government-commissioned research program would be unable to continue operation, and the shipping company that provides the fleet for the program would not be able to recover costs for whaling vessel construction.* (emphasis added). This is nothing other than an economic activity. It leaves no room for researchers to carry out research based on their own ideas. It certainly does not conform to the scientific purpose authorized by the Convention”.⁷⁸
86. (3) *The efforts of the Japanese Government to maintain the market in whale meat:* Faced with the declining appetite for whale meat in Japan,

⁷⁴ See paragraph 2A(1) of the Paris Report.

⁷⁵ Institute for Cetacean Research (ICR) Annual Report for 2003 (*Zaidan-Hōjin Nihon-Geirui-Kenkyūjo Nenpō*, Tokyo 2004), containing the most recent figures publicly available; see Table 1 in Ishii & Okubo (footnote 6 above), at page 73. See also Kasuya, quoted in footnote 5 above; and the TRAFFIC Report (footnote 55 above), at page 3.

⁷⁶ On long-term strategic objectives of the programme see Holt, footnote 70 above.

⁷⁷ See Chair's Report of the 58th Annual Meeting, 16-20 June 2006 St Kitts, paragraph 11.2.4, page 44.

⁷⁸ See also T. Kasuya in footnote 5 above.

the Japanese Government has initiated a public relations campaign in order to maintain the commercial market for whale products by convincing the public that whaling is culturally and economically important for the country.⁷⁹ An article in the magazine *ISANA*, published jointly by the Fisheries Agency and the Japan Whaling Association, quotes Dr. Hiroshi Hatanaka, Director of the ICR, as stating that:

“The fact that the price of whale meat is well regulated by the Government means it is also affordable for some schools to reintroduce it as a protein-rich lunch option for pupils”.⁸⁰

The Government (through Mr. Tsutomu Takebe, Minister of Agriculture, Forestry and Fisheries, and Secretary-General of Japan's ruling Liberal Democratic Party) also claims⁸¹ that whales feed on fish and threaten the conservation of global fish stocks, thus competing with human food needs. This assertion, reiterated in the 2006 St. Kitts and Nevis Declaration of the IWC,⁸² has been shown to be without scientific basis, even in the light of Japan's own whale research.⁸³

87. (4) *Doubts about the validity of the research programmes*: We note the conclusions of the Paris Report that the so-called “scientific whaling” conducted by some members of the IWC does not meet the requirements of paragraph 30 of the Schedule to the ICRW and does not therefore fall within the exemption laid down in Article VIII of the ICRW, as interpreted in the light of the object and purpose of the Convention and its context, according to principles applied under the law of treaties.⁸⁴ We also note the views expressed at the most recent meeting of the IWC by Australia and other States that lethal research was not justified in this case; and by a prominent Japanese marine biologist, commenting as follows: “The Institute of Cetacean Research argues that lethal research is the only appropriate method to collect the needed data. But examination of biopsy samples reveals the amount of blubber or reproductive rate, and analysis of faeces provides information on what whales are eating”.⁸⁵ There have been major advances in non-lethal and non-consumptive whale research over recent years, which put

⁷⁹ See Ishii & Okubo (footnote 6 above), at pages 76-79, on cultural justifications for special-permit whaling, as presented by the Japanese Government and the Fisheries Agency. The *Geishoku Labo* company, established in 2006 with active support from ICR and the Government Fisheries Agency, has as its sole objective the promotion of sales of whale meat in private company and hospital canteens. Located in the Fisheries Association Hall in Tokyo, next to the ICR building, it was initially established for a period of five years. Source: Dolphin and Whale Action Network (IKA Net), Tokyo 2007.

⁸⁰ See www.whaling.jp/english/isana.html, JWA News No 13, March 2006, “Whale meat is for human consumption almost in its entirety”.

⁸¹ As quoted, e.g., in *The Sunday Times*, London (18 June 2006). For earlier arguments by ICR scientists along the same lines see S. Ohsumi & T. Tamura, “Regional Assessments of Prey Consumption by Cetaceans in the World”, Doc. IWC/sc/52/E6 (2000).

⁸² Doc. IWC/58/16/Rev., referring to the issue as “a matter of food security for coastal nations”.

⁸³ S.J. Holt, “Whales Competing with Humans?” background document for the *Symposium on the State of the Conservation of Whales in the 21st Century* (New York: Varda Group, 12-13 April 2007); summarised by the symposium chairman in para.19 of Doc. IWC/59/11 (2007).

⁸⁴ See paragraph 2A(1) of the Paris Report.

⁸⁵ Professor Toshio Kasuya, former head of the Department of Animal Sciences at Teikyo University of Science and Technology in Tokyo, as quoted on the Greenpeace website.

the rationale for the JARPA II programme with its massive seasonal special-permit killings into serious doubt.⁸⁶

88. In our view, it is important to have regard to the following criteria in determining whether the research programmes are scientifically justifiable: evidence that the use of lethal research techniques was unavoidable; evidence that the scientific purpose of the research is clearly articulated and enjoys broad consensus; evidence that research within the Antarctic sanctuary was unavoidable and evidence that the taking of vulnerable or endangered species of whales was unavoidable. We have borne in mind the conservation status of these two species and the level of uncertainty about the composition of the humpback population which will be affected.
89. There is a significant body of reputable scientific opinion that calls into question whether these criteria have been met. The Annex to Conference Resolution 5.10 makes it clear that a permit or certificate for Appendix I species taken from the wild should not be allowed unless the importer has first demonstrated that the proposed purpose could not be achieved through alternative means. Taken together with the commercial importance of the trade in whale products obtained in this way, it will be very difficult in our view for the importer to establish, and for the Management Authority to satisfy itself, that the introduction is not for primarily commercial purposes such that the scientific purposes of the research clearly predominate.
90. ***The relationship between the ICRW/IWC and CITES:*** We are aware that Japan has previously defended its sales of special-permit whale meat on the grounds that this is sanctioned under Article VIII.2 of the ICRW. In our view: (1) Japan's interpretation of Article VIII.2 is flawed for the reasons given below; (2) in any event, the general prohibition of trade in Appendix I specimens for primarily commercial purposes under CITES does not appear to be undercut by any provision of the ICRW. We address these issues in turn below.
91. (1) *Interpretation of Article VIII ICRW:* Article VIII.2 of the ICRW provides:

“Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.”
92. In our view the wording of this provision does not indicate that whale products obtained from special-permit whaling must be traded for primarily commercial purposes. The language simply refers to “processing” which could simply mean that the resulting products are utilised rather than disposed of as waste where possible. Historical comparison shows that Article VIII.2 was taken directly from Article 11 of the 1937 *International Agreement for the Regulation of Whaling*, which had copied

⁸⁶ E.g., under the *Years of the North Atlantic Humpback* project (YONAH) in the 1990s, the ongoing *Structure of Populations Levels of Abundance and Status of Humpback Whales* project (SPLASH) in the entire North Pacific (with more than 300 participating scientists much broader than the JARPA programmes), and other ongoing collaborative non-lethal research; see T.D. Smith *et al.*, “An Ocean-Basin-Wide Mark-Receptive Study of the North Atlantic Humpback Whale (*Megaptera novaeangliae*)”, *Marine Mammal Science* 15 (1999) pp. 1-32.

it in turn from Article 6 of the 1931 *Convention for the Regulation of Whaling*.⁸⁷ Article VIII of the 1946 Convention was drafted by Birger Bergersen (1891-1977, Norwegian diplomat and first chair of the IWC until 1953). According to Norwegian marine biologist and physiologist Lars Walløe, Bergersen's thinking was that “the number of whales a country could take for science was less than 10; he didn't intend for hundreds to be killed for this purpose”.⁸⁸

93. We note that the members of the IWC have expressed their concern that any commercial international trade in whale products obtained from special-permit whaling undermines the effectiveness of the IWC's conservation programme, see *Resolution 2003-2 (fifth recital)*. In *Resolution 2003-2* the members of the IWC stated that Article VIII of the Convention “is not intended to be exploited in order to provide whale meat for commercial purposes and shall not be so used.”
94. (2) *The relationship between CITES and the ICRW*: The Parties to CITES have addressed the issue of the relationship between CITES and the IWC/ICRW on a number of occasions.⁸⁹ The provisions of the CITES Convention indicate that there is to be a close working relationship between the two agreements: Article XIV.4 has the effect of exempting parties to the ICRW from their CITES obligations in respect of Appendix II specimens taken from the sea by ships registered in their State in accordance with the ICRW; and Article XV of CITES provides for consultation with inter-governmental bodies having a function in relation to marine species in relation to listing proposals for marine species.⁹⁰
95. Conference Resolution 11.4 (Rev.CoP12), which supersedes the earlier Resolutions on this issue, notes that the IWC has asked for the support of CITES Parties in protecting certain stocks and species of whales (9th recital). It goes on to refer to the fact that commercial utilization has caused the rapid depletion of many species and stocks of large whales once they become a focus of exploitation and has resulted in a threat to their survival and that continued commercial utilization jeopardises the continued existence of species and stocks protected by the IWC (11-12th recitals). The Resolution then notes that although they are protected from commercial exploitation, some “unknown level of exploitation of whales” may be occurring outside the control of the IWC (14th recital). The Resolution then refers to the lack of control over the international trade in whale meat and other products and to the fact that any illegal international trade in Appendix I whale specimens undermines the effectiveness of both the IWC and CITES (19th-24th recitals).

⁸⁷ *League of Nations Treaty Series* 155:351, and 190:80.

⁸⁸ As quoted by V. Morell, “Killing Whales for Science?” *Science* 316:5824 (27 April 2007), pp. 532-534. Professor Lars Walløe of Oslo University-chair of the Scientific Committee of the North Atlantic Marine Mammal Commission (NAMMCO) until 2006-is the head of Norway's delegation to the IWC Scientific Committee.

⁸⁹ See Conference Resolutions 2.7, 2.9, 3.13 and 9.12, all superseded by Conference Resolution 11.4 (Rev.CoP12).

⁹⁰ The CITES Secretariat has observer status at IWC meetings and the IWC has observer status at CITES meetings.

96. In our view, *Resolution 11.4 (Rev.CoP12)* indicates that the Parties to CITES have agreed that the CITES regime plays a critically important role in monitoring illegal trade in protected whale species. In our view, this role is supportive of the protection afforded to whales under the ICRW, but the regulation of trade in endangered species and the interpretation of the CITES provisions governing such trade remain the primary responsibility of the Conference of Parties to CITES.
97. We consider that this is particularly the case in relation to Appendix I species, in which commercial trade is generally prohibited under CITES. We note, in this regard, that in relation to Appendix I species, there are *no* exemptions for species regulated under the ICRW, as in the case of Appendix II species (Article XIV.4-5).⁹¹ Nor does the CITES Convention require the Parties to follow the recommendations of other intergovernmental bodies such as the IWC, which it is merely obliged to “consult” on listing proposals under Article XV.2(b).

B: What are the remedies available to other States Parties to CITES in the event that Japan's catches and/or landings of these whale species are found to be illegal, taking into account the provisions and practice of CITES, the *Guidelines for Compliance with the Convention* currently under negotiation, and other relevant principles and practices of international law.

98. *Remedies under CITES*: Article XIII of the Convention is entitled “international measures” and provides:
1. When the Secretariat in the light of information received is satisfied that any species included in Appendix I or II is being affected adversely by trade in specimens of that species or that the provisions of the present Convention are not being effectively implemented, it shall communicate such information to the authorized Management Authority of the Party or Parties concerned.
 2. When any Party receives a communication as indicated in paragraph 1 of this Article, it shall, as soon as possible, inform the Secretariat of any relevant facts insofar as its laws permit and, where appropriate, propose remedial action. Where the Party considers that an inquiry is desirable, such inquiry may be carried out by one or more persons expressly authorized by the Party.
 3. The information provided by the Party or resulting from any inquiry as specified in paragraph 2 of this Article shall be reviewed by the next Conference of the Parties which may make whatever recommendations it deems appropriate.”
99. The Parties have elaborated on the operation of Article XIII in a number of successive resolutions and decisions, including in particular *Conference Resolution 11.3 (Rev.CoP13)* which lays down time limits within which states must respond to a request for information from the Secretariat under Article XIII (in general one month, with provision for longer periods if required). The Resolution also states that if “major problems” concerning the implementation of the Convention by a particular Party are brought to the attention of the Secretariat, the Secretariat will work together with the Party concerned to try and solve the problem and offer advice or technical assistance as required. Conference Resolution 11.3

⁹¹ Article XIV.5 does refer to Article III, but this has been acknowledged to have been a mistake in the drafting of the Convention which should be rectified by amendment at the next extraordinary meeting, see Decision 9.26 of the Parties (re-numbered 10.94 in 1997).

then states that “if it does not appear that a resolution can readily be achieved, the Secretariat will bring the matter to the attention of the Standing Committee”, which “may pursue the matter in direct contact with the Party concerned with a view to helping to find a solution”.

100. Conference Resolution 11.3 reflects long-standing existing practice of the Parties to CITES, which has recently been restated and consolidated in a comprehensive set of “CITES Compliance Procedures” (Conference Resolution 14.3) finalised by the Conference of the Parties at its 14th meeting at The Hague in June 2007.
101. Considering that infractions of Article III –i.e., illegal imports of Appendix I species, and especially of endangered species taken from the global commons– constitute a breach of collective treaty obligations owed to all member countries, any Party to CITES is, in our view, entitled to initiate the non-compliance procedure so established. Even if the narrower view were taken that only “directly affected” Parties may complain, there is no question in our mind that in the case of humpback and sei whales, such a definition would necessarily include all States which are also party to the ICRW; all States which are also party to the Convention on Migratory Species; and/or any other Party with a legitimate interest in these species –for example, any State with an interest in whale-watching along their migration routes.
102. Conference Resolution 14.3 (2007) states that, when compliance matters are brought to the attention of the Standing Committee, this is generally done in writing and includes “details as to which specific obligations are concerned and an assessment of the reasons why the Party concerned may be unable to meet those obligations” (paragraph 23). The Secretariat immediately informs the Party concerned and the Standing Committee (if it does not reject the complaint) decides whether to gather or request further information and whether to seek an invitation from the Party concerned to undertake gathering and verification of information in the territory of the Party concerned “or wherever such information may be found” (paragraph 26).
103. The Party concerned has the right to participate in discussions with respect to its own compliance, in accordance with the rules of procedure of the relevant CITES body (paragraph 27).
104. If, following these procedures, a compliance matter has not been resolved, the Standing Committee may decide to take one or more of the procedural steps listed in the Resolution which include, among others: the provision of advice; request of special reporting; issuance of a written caution and “public notification of a compliance matter sent through the Secretariat to all Parties advising that compliance matters have been brought to the attention of a Party and that, up to that time, there has been no satisfactory response or action” (paragraph 29).⁹²

⁹² Some members of the drafting group had also proposed to add the option of a formal “declaration of non-compliance” by the Standing Committee where appropriate (see the Draft Guidelines, CITES CoP 14 Doc.23).

105. In accordance with past practice, the Resolution then states that, in certain cases, the Standing Committee can decide to recommend the suspension of “commercial or all trade” in specimens of one or more CITES-listed species, consistent with the Convention. The Resolution specifies that such a recommendation may be made “in cases where a Party's compliance matter is unresolved and persistent and the Party is showing no intention to achieve compliance” (paragraph 30).
106. Enforcement of the recommendation is a matter for the national CITES Management Authorities in each member country, in exercise of their power, under Article XIV.1 of the Convention, to take “stricter domestic” (though multilaterally authorised) measures. In existing practice, this means administrative refusal (embargo) to allow imports, exports or re-exports of CITES-listed specimens and products from/to the targeted Party.
107. The Standing Committee monitors the actions taken by the targeted Party with a view to returning to compliance and may request the Party to submit progress reports and/or arrange upon the invitation of the Party concerned for an in-country technical assessment and for a verification mission (paragraph 33).
108. Existing recommendations to suspend trade are generally reviewed at each Standing Committee meeting and monitored intersessionally by the Secretariat. The Resolution states that a recommendation to suspend trade “is generally withdrawn as soon as the compliance matter has been resolved or sufficient progress has been made” (paragraph 34). The Secretariat notifies such withdrawal as soon as possible. The Standing Committee reports to the Conference of the Parties on compliance matters (paragraph 36).
109. A review of past practice indicates that this procedure for addressing non-compliance with CITES, including trade suspensions enforced in at least 40 cases since 1985,⁹³ has proved to be remarkably effective. As a result of the procedural safeguards that were gradually developed and built into the regime to ensure due process for all Parties concerned (as codified in the 2007 CITES Compliance Procedures), the procedures would also appear to be compatible with conditions for the lawful exercise of collective “countermeasures” for the breach of treaty obligations under the general rules of state responsibility (as codified in 2001 by the UN International Law Commission).⁹⁴

⁹³ See the table of countries and territories subjected to recommended CITES trade suspensions in R. Reeve, “Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime”, *International Affairs* 82 (2006) 881-897, at pages 891-892. Trade suspensions have been applied both to Parties and non-Parties (the latter for failure to issue Article X documentation). Countries (Parties and non-Parties) currently subject to a recommendation to suspend trade are listed on the CITES website under http://www.cites.org/eng/news/sundry/trade_suspension.shtml.

⁹⁴ See Articles 48-54, Report of the International Law Commission on its 53rd Session, UN-Doc. A/56/10 (2001); J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press 2002); and P.H. Sand, “Sanctions in Case of Non-Compliance and State Responsibility: pacta sunt servanda – Or Else?”, in: D. Zaelke, D. Kaniaru & E. Kruzikova, *Making Law Work: Environmental Compliance and Sustainable Development*, vol. 1 (London: Cameron May 2005) pp. 259-271.

110. In the light of past practice by the Parties to CITES, as restated in Conference Resolution 14.3 (2007), we consider that a Party which disputes the legality, under CITES, of Japan's trade in humpback and sei whales introduced from the sea and the products derived from those whales, would be entitled to raise the matter with the CITES Secretariat and/or Standing Committee under Article XIII of the Convention.
111. The Secretariat would then be obliged to consult with Japan and refer the matter to the Standing Committee. The Standing Committee, provided it does not reject the complaint as trivial or ill-founded, may then determine what measures should be taken in response and these could, after appropriate procedural steps and a finding of persistent non-compliance, include a recommendation to suspend commercial or all trade with Japan in CITES-listed species.
112. This well-established non-compliance procedure would appear to offer one possible way of initiating effective remedial action to address Japan's conduct in contravention of the CITES Convention.⁹⁵
113. *Article XVIII*: Another option provided by CITES is *dispute settlement under Article XVIII*: Article XVIII of the Convention provides for any dispute between two or more Parties to the Convention with respect to the interpretation or application of the provisions of the Convention to be subject to negotiation between the Parties involved. If the dispute cannot be resolved by negotiation, paragraph 2 of Article VIII provides that the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at the Hague and the Parties submitting the dispute shall be bound by the arbitral decision. We are not aware, however, of any case where the provisions of Article XVIII have been used, and given the requirement for a further agreement to arbitrate it is unlikely that they would be practicable in the present matter.⁹⁶
114. The possibility also exists of recourse to dispute settlement proceedings available under other international legal instruments. Options that may exist include (1) proceedings before the International Court of Justice (ICJ), and (2) proceedings under Part XV of the 1982 UN Convention on the Law of the Sea (UNCLOS). Other options may also be available, for example conciliation proceedings under the 1992 *Convention on Biological Diversity*, although it is not apparent how this would bring any advantages beyond those available under CITES. The ICJ and UNCLOS options would require further careful consideration, including in respect of their availability for a cause of action that arises under a treaty (CITES) that has its own dispute settlement mechanism. The question of whether Article XVIII was intended to be exhaustive, and to exclude recourse to other dispute settlement mechanisms, would need to be addressed. For the purposes of this Opinion we lim-

⁹⁵ We note that Resolution 14.3 states (in paragraph 3) that these procedures are without prejudice to any rights and obligations and to any dispute settlement procedure under the Convention, discussed below.

⁹⁶ See W. Wijnstekers, *The Evolution of CITES*, 8th edn. (Geneva: CITES 2005), ch.25 (final articles).

it ourselves to identify the institutional options that may be available. We do not here express a view as to the issues of admissibility or jurisdiction in respect of such options.

115. *A case before the International Court of Justice:* We note that Japan has accepted as compulsory the jurisdiction of the ICJ under the “optional clause” of the Statute of the Court (Article 36(2)). Japan's Declaration was lodged on 15 September 1958 and provides for compulsory acceptance of the Court's jurisdiction, with respect to disputes arising on or after the date of the Declaration not settled by other peaceful means of peaceful settlement. The possibility therefore exists that another Party to CITES that has also accepted the jurisdiction of the ICJ might be able to bring a case to that Court concerning a violation of CITES. We note, however, that Japan's Declaration under Article 36(2) states that its acceptance of the jurisdiction of the Court “does not apply to disputes which the parties thereto have agreed or shall agree to refer for final and binding decision to arbitration or judicial settlement”. The scope of this limitation, and in particular whether it would be sufficient to cover the limited undertaking given by Japan under Article XVIII of CITES, is a matter that would require careful consideration.
116. *A claim under UNCLOS:* Part XV of UNCLOS (to which Japan is a party) contains detailed provisions relating to compulsory dispute settlement. Compulsory procedures for dispute settlement are provided for with States parties able to utilise the ICJ, the International Tribunal for the Law of the Sea (ITLOS) and either a general arbitral tribunal or a special arbitral tribunal (Article 287 UNCLOS). Dispute resolution under Part XV is limited to disputes concerning the interpretation and application of UNCLOS (Article 279), so there can be no question of bringing any claim under Part XV for a violation of CITES as such.
117. However, the possibility cannot be excluded that another party to UNCLOS might bring proceedings for a violation of an UNCLOS provision. For example, Article 65 of UNCLOS (marine mammals) provides:
- “Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.”
- Article 120 states that Article 65 also applies to the conservation and management of marine mammals in the high seas.
118. These provisions might give rise to a cause of action under UNCLOS. A Party to CITES and UNCLOS which objects to trade in sei and humpback whales by Japan may seek to argue that Japan, as a Party to CITES, is not cooperating with other States to ensure the appropriate management, conservation and study of whales, contrary to the requirements of Articles 65 and/or 120 of UNCLOS.
119. UNCLOS provides that States Parties may lodge declarations indicating their acceptance of the various procedures established to facilitate dis-

pute resolution. Japan has not made a declaration under Article 287 of UNCLOS. Accordingly Japan is deemed to have accepted arbitration under Annex VII of UNCLOS. Should a Party wish to bring a claim which has not accepted the same dispute settlement procedure as Japan, Article 287(5) provides that unless they agree, the matter will be determined by arbitration consistent with Annex VII of UNCLOS. Once an application for arbitration has been made, an application for provisional measures may be made under Article 290 of UNCLOS. The principal requirements for issuing provisional measures include the need to *show prima facie* jurisdiction and the urgency of the need for such measures. *In the Southern Bluefin Tuna Cases* (Australia v Japan, New Zealand v Japan), ITLOS ordered provisional measures against Japan, having concluded that it had *prima facie* jurisdiction and that such jurisdiction was not excluded by the dispute settlement mechanisms available under the 1993 *Convention for the Conservation of Southern Bluefin Tuna* (Order of 27 August 1999). The following year, however, the Arbitral Tribunal dealing with the merits of the case ruled that it did not have jurisdiction, on the grounds that the dispute settlement provisions of the 1993 Convention excluded other dispute settlement procedures, within the meaning of Article 281 of UNCLOS (Award of 4 August 2000). These precedents, which are authoritative but not legally binding on any future cases, indicate the issues that would have to be considered further if proceedings under UNCLOS in relation to the matters addressed in this Opinion were to be contemplated.



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