



LIVE CAPTURE OF CETACEANS FROM THE WILD FOR COMMERCIAL PURPOSES

(UNEP/CMS/COP12/Doc.24.2.4)

(Prepared by the Aquatic Working Group)

PROPOSED AMENDMENTS TO RESOLUTION 11.22

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

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

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

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

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

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

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

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

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

- the Whale and Dolphin Action Plan (2013-2017) of the CMS Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region includes “direct take” as one of five major hazards to whale and dolphin populations in the Pacific Islands region and includes minimizing its impact as an objective of the Plan;
- the Small Cetacean Action Plan of the CMS Memorandum of Understanding Concerning the Conservation of the Manatee and Small Cetaceans of Western Africa and Macaronesia calls on Signatories to ensure that any live capture activities in the region do not affect the viability of local populations and comply with international regulations and agreements;
- Paragraph 4 of the Annex to the ASCOBANS Agreement requires Parties to “endeavour to establish (a) the prohibition under national law, of the intentional taking and killing of small cetaceans where such regulations are not already in force” pursuant to the Article 2.1 aim to achieve and maintain a favourable conservation status for small cetaceans; and
- Article II of the ACCOBAMS Agreement requires Parties to “prohibit and take all necessary measures to eliminate, where this is not already done, any deliberate taking of Cetaceans”, subject to limited exceptions “only in emergency situations” and “for the purpose of non-lethal in situ research aimed at maintaining a favourable conservation status for cetaceans”;

Also aware that:

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

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

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

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

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

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

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

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

Recommendation 1: Application to “Cetaceans”

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

Recommendation 2: Clearly Define the Geographical Scope

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

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

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

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

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

7. As described in the following paragraphs, a State does not have jurisdiction over vessels flagged by other States or non-citizens in areas beyond national jurisdiction. Thus, a law implementing Resolution 11.22 (Rev. COP12) fully needs to specify to whom the law applies in areas beyond national jurisdiction separately from those provisions that apply to areas under national jurisdiction.

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

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

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

Section 5

Extension to external Territories

(1) This Act extends to each external Territory.

Limited extraterritorial application

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

Application limited to Australians outside exclusive economic zone

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

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

Application to everyone in Australia and exclusive economic zone

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

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

224 Application of Division

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

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

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

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

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

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

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

Recommendation 4: Clearly Define “Take”

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

Recommendation 5: Clearly Define the Criteria for Exceptions

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

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

Recommendation 6: Apply Import Requirements to All Cetaceans

22. Several of the laws reviewed expressly prohibit the import of all cetaceans (e.g., Australia and Mauritius), regardless of whether they are included in the CITES Appendices and regardless of the purpose of the import. Some, such as Mauritius and Sri Lanka, simply prohibit the import of any marine mammal, “dead or alive.”

23. The European Union uses a different approach. It includes protected species in one of four Annexes and then establishes rules for trade in species included in that Annex. It included all cetaceans in Annex A of Council Regulation 338/97, regardless of whether they are included in the CITES Appendices, and then applied the permit requirement applicable to CITES Appendix I species to all species in Annex A. As a consequence, the EU Member States prohibit all trade in any cetacean species for primarily commercial purposes.
24. Both approaches clearly prohibit imports of live cetaceans captured in the wild for commercial purposes. Both approaches implement Resolution 11.22 (Rev. COP12) fully.

Recommendation 7: Define “Transport” or “Transit”

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

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

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

8

DRAFT DECISIONS

Directed to the Secretariat

12.AA The Secretariat shall:

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

Directed to Parties

12.BB Parties are requested to:

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

Directed to the Standing Committee

12.CC The Standing Committee shall:

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