Japan’s ‘Research Whaling’ in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)

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Over the past 20 years, Japanese whalers have taken more than 10,000 whales from the Antarctic Southern Ocean and the north Pacific Ocean for ‘scientific purposes’, under a controversial exemption clause in the International Convention for the Regulation of Whaling (ICRW). After analyzing the relationship of the ICRW regime with other applicable multilateral agreements, this article concludes that Japan’s current pelagic ‘research whaling’ programmes are not only a growing embarrassment for the country’s meritorious ongoing research in both polar regions; they are also in open breach of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). In light of different options for international legal action, the author recommends the initiation of ‘compliance procedures’ – potentially leading to a collective trade embargo – in accordance with CITES Conference Resolution 14.3 (2007).

PRELIMINARY REMARKS

Simultaneously with the entry into force of the so-called ‘moratorium’ on commercial whaling,1 the Japanese Government in 1987/1988 began to issue, on a large scale, special whaling permits for ‘scientific purposes’ under Article VIII of the International Convention for the Regulation of Whaling (1946) (ICRW),2 in the context of a ‘Japanese Whale Research Program under Special Permit in the Antarctic’ (JARPA), and since 1994 in the context of a corresponding programme for the north-west Pacific (JARPN), extended in 2002 as JARPN-II. The Antarctic programme was further extended in 2005 via a second phase (JARPA-II). These programmes operate under the exclusive jurisdiction of the Ministry of Agriculture, Forestry and Fisheries (without participation by the Ministry of Environment), and outside the scope of activities of Japan’s National Institute of Polar Research (under the Ministry of Education, Culture, Sports, Science and Technology). From 2008 on, catch quota from both programmes will yield up to 1,415 whales annually (as compared to 273 in 1988), most of them from the so-called ‘Southern Ocean Sanctuary’ of the International Whaling Commission.3 Over the past 20 years (1988–2007), the number of whales taken by Japanese ‘research whaling’ has thus amounted to a total of 10,857, including 9,941 from the JARPA/JARPN programmes.4 By comparison, during the 40 years before

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1 While the ‘zero catch quota’ (suspension of commercial whaling) adopted on 24 July 1982 by a three-quarters majority decision of the International Whaling Commission (IWC) – as an amendment to the ICRW Schedule, para. 10(e), with effect from the 1986–1987 whaling season – really is not a ‘moratorium’ according to IWC terminology, the term is now commonly used in the media. The text of the amendment can be found in J.G. Lammers et al. (eds), International Environmental Law: Documents (TMC Asser Instituut, 1997), at 179.


4 The remaining 916 specimens are mainly from ‘research whaling’ in Japanese coastal waters (see n. 61 below). See IWC, Special Permit Catches Since 1985 (IWC, 20 September 2007), available at <http://www.iwcoffice.org/_documents/table_permit.htm>, supplemented by data for 2007 (for a detailed list by species, see text at n. 65–66 below). Like Japan, Iceland has also used the exception clause of ICRW, Article VIII to grant special permits for ‘scientific whaling’ since 2003, albeit with considerably lower catch quota (during the period from 2003 to 2007, a total of 194 specimens to date); see ‘News: Iceland Stops Commercial Whale Hunt’, 54:10 Marine Pollution Bulletin (2007), 1565; see also n. 68 below.
(1948–1987), the total number of whales reported to have been taken ‘under Article VIII’ by all countries worldwide (including Japan) was about 2,100.

The present study will analyze – after a brief historical overview – the tensions between a formal–juridical interpretation of the 1946 Whaling Convention and other international legal instruments applicable to Japan’s pelagic whaling in the Antarctic and north Pacific oceans, in particular the impact of the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973) (CITES).

SO-CALLED ‘SCIENTIFIC WHALING’ IN THE CONTEXT OF THE ICRW

The 1946 Whaling Convention had borrowed its exceptional rule on whaling for ‘scientific purposes’ from a precursor text: ICRW, Article VIII was derived from Article 10 of the 1937 International Agreement for the Regulation of Whaling. The 1946 Convention actually goes back to a draft by Norwegian diplomat Birger Bergersen (1891–1977, the first chairman of the International Whaling Commission (IWC)), who had already participated in the drafting of the 1937 Agreement. Yet, according to the clear recollection of Professor Lars Walløe (currently head of Norway’s delegation in the IWC Scientific Committee), in Bergersen’s mind ‘the number of whales a country could take for science was less than 10; he didn’t intend for hundreds [let alone thousands] to be killed for this purpose’.

In 1956, Japan first issued a permit for scientific catch of two north Pacific right whales – a moderate quota, which however steadily increased from there on. When the IWC Scientific Committee in 1977 criticised a Japanese ‘research programme’ for a catch of 120 Bryde’s whales, the Japanese Government agreed to reduce the quota. Alas, that measure of diplomatic moderation came to an end by 1987, at the latest – after the entry into force of the IWC’s moratorium. Japan had initially entered a valid objection/reservation against the moratorium, but later withdrew it under massive US threats of unilateral fishery sanc-

9 See nn. 102–118 below.
12 After an intervention by Prime Minister Y. Nakasone in 1987, however (taking into account US reactions), the Fisheries Agency reduced its ‘scientific’ catch quota from 875 to 300; see n. 112 below, and A. Wong, The Roots of Japan’s International Environmental Politics (East Asia Publishers, 2001), at 118. On current administrative permit practice, see nn. 85–92 below.
repeatedly noted – at virtually each annual meeting since 1987 – that neither the research programmes submitted by Japan in support of its special permits nor the programme results subsequently submitted met the requirements of Article VIII and the Guidelines;15 whereupon the Japanese Government each time dismissed the criticism of the Committee as unfounded, and consistently ignored all IWC recommendations to stop the JARPA/JARPN programmes, treating them as non-binding and without ‘any restrictive effect on the right of research whaling’.16

International evaluations of this single-State interpretation of the treaty have been mostly negative. Not only the critical resolutions of the IWC (annually and almost ritually reiterated), but also numerous commentaries and opinions among the literature affirm that Japan’s current special permit practice is not compatible with the purpose and spirit of ICRW, Article VIII.17 For its part, however, the Japanese Government insists on the formal legality of its permitting policy and the underlying textual interpretation of the Convention,18 relying in part on dissenting views in international legal publications.19

Rather than perpetuating what has turned into an interminable and virtually fruitless internal debate within the ICRW regime, the remarks that follow here are intended to explore legal alternatives available outside the politically gridlocked IWC, with a view to closing at least part of this pathological (and obviously chronic) ‘governance gap’ jeopardizing the management of living marine resources in the Antarctic and north Pacific oceans.20

THE INTERFACE OF THE ICRW AND OTHER MULTILATERAL AGREEMENTS

Whales as natural resources protected by the international community21 have been the subject of a

15 The most recent resolution, ‘JARPA-II’ (Resolution 2007-1, 30 May 2007), referring to a total of 31 earlier recommendations and the critical conclusions of an expert meeting in December 2006 evaluating the results of JARPA-I, was adopted in the Commission by 40 votes against 2 (with one abstention), while Japan and 26 other Member States refused to participate in the decision.


multitude of global and regional agreements besides the 1946 whaling regime, including:

- the Washington Convention on Endangered Species (1973) (CITES),
- the Bonn Convention on Migratory Species (1979) (CMS), with its regional agreements for Baltic/ North Sea and Mediterranean/Black Sea whales (ASCOBANS 1991 and ACCOBAMS 1996);
- the Canberra Convention Antarctic Marine Living Resources (1980) (CCAMLR), and the Madrid Environmental Protocol (1991) (PEPAT) to the Antarctic Treaty;
- the UN Convention on the Law of the Sea (1982) (UNCLOS);
- the Biodiversity Convention (1992) (CBD);
- and a range of regional nature conservation agreements and protocols that specifically list whales on their annexes.

The coexistence of these autonomous international environmental regimes has resulted in multiple overlaps and interlinkages; i.e. both synergies and conflicts, generally referred to as ‘interplay’ in political science terminology. There also are parallel or overriding inter-governmental commitments, such as those arising from agreed rules of interpretation in the event of treaty conflicts (lex posterior/lex specialis) under the Vienna Convention on the Law of Treaties (1969), or from governmental declarations accepting the jurisdiction of the International Court of Justice for dispute resolution.

In the case at hand, several of the multilateral regimes listed can be discarded simply because Japan is not part of them, and their restricted membership does not provide enough of a basis for customary norms erga omnes: such as the Bonn Convention on Migratory Species, and regional conservation agreements outside the Antarctic relating to whales.

The Law of the Sea Convention (UNCLOS) has some specific provisions on whales and other marine mammals – e.g. Articles 64 (‘highly migratory species’ in Annex I), 65 and 120 – obligating all Member States to cooperate in the conservation of those species, both on the high seas and within the exclusive economic zones (EEZs) of coastal States. Furthermore, marine scientific research according to Article 240 et seq. must comply with environmental regulations and ‘shall not constitute the legal basis for any claim to any part of the marine environment or its resources’ (Article 241).

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23 Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979). It currently has 103 Member States.
24 The Agreement on the Conservation of Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (New York, 13 September 1991) currently has 10 Member States; and the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (Monaco, 24 November 1996) currently has 21 Member States.
26 Protocol to the Antarctic Treaty on Environmental Protection (Madrid, 4 October 1991). It currently has 32 Member States.
28 Convention on Biological Diversity (Rio de Janeiro, 5 June 1992). It currently has 189 Member States.

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33 Such as the Japanese declaration of acceptance of 15 September 1958, in accordance with Article 36/2 of the ICJ Statute, which is stated in subsidiary form; i.e. ‘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’. While that would exclude ICJ jurisdiction for UNCLOS, CBD, CITES or the Antarctic agreements, it does not rule out ICJ proceedings for interpretation of the Whaling Convention, which has no dispute settlement clause of its own; see n. 18 above, and generally D.M. Konisky, ‘The United Nations Dispute Settlement System and International Environmental Law’, 9:1 Journal of Public and International Affairs (1998), 1.
34 Japan was part of the ‘Pacific Alliance’ of coastal States (also including Canada, Russia, and the USA) which in 1979 were categorically opposed to the listing of marine species in the CMS appendices, and which have continued to boycott the Convention since; see S. Lyster, n. 8 above, at 282, and S. Lyster, ‘The Convention on the Conservation of Migratory Species of Wild Animals (the ‘Bonn Convention’), 29:4 Natural Resources Journal (1989), 979.
35 See n. 29 above. As to the rather limited suitability of the Antarctic agreements, see nn. 43–44 below.
Non-compliance with these provisions (as well as the abuse of rights, according to UNCLOS, Article 300) by individual States entitles other Member States to initiate dispute settlement proceedings pursuant to Article 279 et seq., and hence also opens the option of a request for provisional measures prima facie under Article 290. According to the 2000 Tuna Arbitration, however, that recourse may only be available subsidiarily (Article 281); i.e. where no other settlement procedure has been agreed between the parties to the dispute.

The Biodiversity Convention (CBD) also contains provisions binding all Member States to take measures for the conservation of biological resources, including under Article 3 to avoid environmental harm, and under Article 5 to cooperate for the conservation of biological diversity also in areas beyond the limits of national jurisdiction, as well as under Article 14 to assess the environmental impacts of projects posing significant risks for biodiversity. There is no doubt that massive killings of protected marine mammals in the Antarctic and the north-west Pacific would fall under these provisions. In case of non-compliance by a CBD member, however, the only recourse for other Member States would be conciliation proceedings (Article 27).

Within the framework of the Antarctic Treaty, there are relevant provisions in the Canberra Convention (CCAMLR), the scope of which (conservation of living marine resources) in accordance with Article I(2) encompasses all species of living organisms and the entire Antarctic marine ecosystem – inter alia, with regard to harvesting activities, maintenance of ecological relationships and prevention of irreversible changes in the ecosystem (Article II) – and therefore would indeed seem to cover the JARPA programme. Yet, Article VI of the Convention expressly reserves (and hence would give priority to) treaty rights and obligations of Member States under the IWC. Moreover, considering that the dispute settlement clause of CCAMLR, Article XXV is practically restricted to consensual proceedings (paragraph 2: ‘with the consent in each case of all parties to the dispute’), the Convention hardly qualifies as an instrument for whale conservation. The Madrid Protocol (PEPAT), as regards the taking of protected Antarctic species on Schedule II, similarly ‘does not affect the rights and obligations of Contracting Parties under the ICRW’ (II/7); hence the only remaining remedy there would be an environmental impact assessment of JARPA-II (pursuant to Article 8 and Annex I), presumably to be initiated through arbitration proceedings under Article 19 – not a very promising option, given the notorious political handicaps of contemporary Antarctic diplomacy.

That leaves the Endangered Species Convention (CITES), in the interpretation and application of which Japan’s whaling and whale product trading played a non-negligible role from the beginning. Most great whales (Cetacea) have been listed on CITES, Appendix I since 1973 as ‘threatened with extinction’ and excluded from international trade, since 1979, all whale and dolphin species have been subject to the Convention’s trade controls (Appendix II), which in accordance with Article 15(2)(b) are regularly coordinated with the IWC. That has led

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39 As Japan has not accepted the jurisdiction of the International Tribunal for the Law of the Sea (ITLOS), the arbitration procedure of UNCLOS, Annex VII would apply pursuant to Article 287(3).
37 In this event, a Member State also cannot invoke the ‘primacy’ of ICRW provisions, as CBD, Article 32(1) does not apply in cases of ‘serious damage or threat to biological diversity’.
36 As Japan has not accepted any of the means of dispute settlement listed in Article 27(3), the conciliation procedure of Annex II/Part 2 would apply pursuant to Article 27(4).

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some authors to postulate a hierarchic superiority for the ICRW vis-à-vis CITES. Closer analysis shows, however, that there is no evidence of any ‘primacy’ of the whaling regime.

CITES, Article 15(2)(b) requires ‘consultation’ with the IWC – as one of the ‘inter-governmental bodies having a function in relation to [marine] species’ – prior to all amendments of the Convention’s appendices, which in practice is carried out through inter-secretariat cooperation and mutual accreditation (with observer status), and by way of corresponding conference resolutions. However, rather than ‘subordinating’ the 172 CITES Member States to decisions by the 78 ICRW Member States, the consultation requirement merely illustrates the fact that the two autonomous global regimes supplement and ‘complement’ each other, – a variety of ‘interplay’ not untypical in modern international environmental law.

The most significant ‘conflict clause’ in this context is Article 14(4) of CITES, which exempts all ICRW Member States from CITES provisions (especially Article 4) concerning trade in whale products on Appendix II, provided that the specimens concerned were ‘taken’ and certified in conformity with the Whaling Convention. The exception is, however, restricted to Appendix II species, hence it does not legalize international trade or the ‘introduction from the sea’ for any of the whale species on Appendix I, which thus continue to be strictly protected. Given that there is currently – apart from national reservations – only a single, geographically limited (Arctic) minke whale population remaining on Appendix II, this ‘exoneration’ of ICRW States from certain CITES norms has lost much of its significance, even though it remains relevant for the north Atlantic region.

In the case at hand, the net result is that simultaneous membership in the international whaling regime exempts Japan from the rules for Appendix II species (CITES, Article 4) but not from the country’s other obligations under the Endangered Species Convention – nor from the rules of general international law, for that matter.

JAPAN’S ‘RESEARCH WHALING’ AS AN INFRACTION OF CITES

Legal analysis of Japan’s so-called research whaling programmes, and of their compatibility with CITES –
which Japan co-signed in 1973 and ratified in 1980—
must address four questions in particular:

(1) Is this a case of ‘trade’ within the meaning of CITES, Article 1?
(2) Which of the CITES appendices apply to the whale specimens taken?
(3) Are the specimens used for ‘primarily commercial purposes’ according to Article 3?
(4) Does the Japanese permitting and reporting system for these whale specimens meet the mandatory requirements for CITES implementation?

‘TRADE’ WITHIN THE MEANING OF CITES, ARTICLE 1

International trade under Article 1(c) of CITES includes, in addition to border-crossing imports and exports, ‘introduction from the sea’; i.e. transportation into a Member State after ‘taking’ from ‘marine areas beyond the areas subject to the sovereignty or sovereign rights of a State consistent with international law, as reflected in the United Nations Convention on the Law of the Sea’. That is how the definition in CITES, Article 1(e) has been specified by the Conference of the Parties at its fourteenth meeting at The Hague in 2007, by way of an agreed ‘common understanding of the provisions of the Convention’.

The whales introduced in the course of the pelagic ‘research whaling programmes’, JARPA (I/II) and JARPN (I/II), do not primarily originate from Japanese coastal waters, but from high sea areas outside national sovereignty in the Antarctic and north-west Pacific Oceans. The animals taken there are processed on the spot in factory ships; scientific samples are extracted (biopsy and stomach content samples, which together amount to less than 1% of biomass); commercially unusable parts are discarded (i.e., thrown overboard as waste, amounting to about 40% of biomass); and the remaining parts destined for sale are separated, packaged and carried to Japan on refrigeration transport vessels.

Finding 1: The introduction into Japanese territory of whale specimens taken in the course of the JARPA/JARPN ‘research whaling programmes’ in the Antarctic and North Pacific Oceans is ‘trade’ as defined in CITES, Article 1(c) and (e).

APPLICABLE CITES APPENDICES

The taxonomic classification of the whale specimens taken under the JARPA/JARPN programmes as species listed on the CITES appendices is clearly documented in the IWC reports and tables. Sampling of whale products from ‘research whaling’ on sale at Japanese fish markets has confirmed the fact that they belong to protected whale species.

Of the total of 10,857 whales reported by Japan as having been taken from 1988 to 2007 ‘under special permit pursuant to ICRW Article VIII’, 10,055 were minke whales (Balaenoptera acutorostrata and B. bonaerensis; up to 1,000 annually since 2005), 345 were Bryde’s whales (B. edeni; one specimen in 1998, and about 50 annually since 2000), 391 were sei whales (B. borealis; one specimen in 2001, and up to

60 CITES Resolution 14.6 (‘Introduction from the Sea’, 15 June 2007). Clarification of various Convention terms (authentic interpretation) is among the routine functions of the Conference of the Parties, under a regular agenda item entitled ‘Interpretation and Implementation of the Convention’. Whenever the need for clarification of a term arises – i.e. when two or more parties disagree on its interpretation – the Conference convenes an expert group which in the course of one or more workshops prepares an agreed text proposal, which is then re-discussed in plenary and adopted by consensus or a two-thirds majority of the Conference. See the Rules of Procedure of the Conference, referred to in n. 129 below, and generally J. Werksman, ‘The Conferences of Parties to Environmental Treaties’, in J. Werksman (ed.), Greening International Institutions (Earthscan, 1996), 55, at 60; and G. Ulfstein, ‘Treaty Bodies’, in D. Bodansky et al. (eds), Oxford Handbook of International Environmental Law (Oxford University Press, 2007), 877, at 884.

61 There have been separate ‘research whaling’ programmes for coastal whaling since 1994, see n. 4 above. On the organization and cultural tradition of small-scale coastal whaling, see K. Hirae, ‘Why Japan Supports Whaling’, 8:2/3 Journal of International Wildlife Law and Policy (2005), 129, at 139.
62 Including the IWC Southern Ocean Sanctuary (partly not recognized by Japan), see n. 3 above.
63 See n. 4 above; e.g. see the most recent expedition report by the Institute for Cetacean Research (ICR, n. 72 below) to the ICW Scientific Committee (Doc. SC/59/05, 2007). CITES Resolution 11.4 (n. 50 above) recommends, in cooperation with IWC, that countries ‘inventory all frozen whale parts and derivatives possessed in commercial quantities’, and collect and inventory whale skin or meat samples for genetic (DNA) identification, in order to monitor illegal trade.
100 annually since 2002), 46 were sperm whales (Physeter macrocephalus; about 5–10 annually since 2000), and 20 were fin whales (Balaenoptera physalus; about 10 annually since 2006). The Japanese special permits granted for the taking of up to 1,400 whales for ‘scientific purposes’ during the 2007–2008 whaling season also included, for the first time, 50 humpback whales (Megaptera novaeangliae). 65

All of these whale species are listed in CITES, Appendix I, and hence are subject to the rigid international trade restrictions of CITES, Article 3. It is true that Japan has entered legally valid reservations against the listing of some of these species in accordance with Article 23(2) or 15(3) of the Convention. To that extent, therefore, the Japanese authorities are exonerated from Article 3, and with regard to such whale specimens and products merely have to comply with the provisions regarding Appendix II species. 67 With regard to north Pacific sei whales and all humpback whales, however – for which Japan has no valid reservations – Article 3 remains fully applicable. 68

65 In 2006, according to ICR, there were 3,436 tonnes of whale meat from JARPA II and 1,898 tonnes from JARPN in storage; see the tables available at the ICR website, found at <http://www.icrwhale.org/02-A-52.htm> and <http://www.icrwhale.org/02-A-55.htm> (in Japanese). Frozen whale meat can be stored for up to ten years; it may therefore be assumed that a large portion of that meat is still in refrigerated storage, and – given its exclusively ‘scientific’ origins – is all taxonomically inventoried there; cf. n. 63 above, and IWC Resolution 1997-2 (‘Improved Monitoring of Whale Products’, 24 October 1997), which urges contracting parties to ‘provide information to the IWC about the size of remaining stockpiles and the species of origin remaining in the stockpiles’. Japanese DNA inventories of frozen stockpiles have been criticized, however, as incomplete and unreliable; see S. Altherr et al., Der RMS: eine Frage des Vertrauens? Manipulationen und Faelschungen im Walfang (Pro Wildlife, 2005), at 10.

66 See IWC, nn. 3 and 4 above; T. Kasuya, n. 7 above, at 46, Table 4; and the critical assessment by N.J. Gales et al., ‘A Case for Killing Humpback Whales?’, Nature Precedings Doc. 1313 (13 November 2007), available online at <http://precedings.nature.com/documents/1313/version1>. On 21 December 2007, after massive international protests, the Japanese Government declared that it had temporarily suspended the taking of humpback whales, pending further negotiations in the IWC.

67 See the authentic interpretation (n. 60 above) of Articles 23 and Article 15(3) by the Conference of the Parties, in CITES Resolution 4.25 (‘Effects of Reservations’, 30 April 1983, as revised 15 June 2007); on certification and reporting duties see nn. 85–95 below.


Finding 2: The 391 sei whales taken from 2001 to 2007 in the context of Japanese ‘research whaling programmes’ in the north Pacific, as well as all humpback whales, are Appendix I species subject to the trade ban of CITES, Article 3. Furthermore, all other whales and whale products taken under these programmes are subject to the provisions for Appendix II species.

‘PRIMARILY COMMERCIAL PURPOSES’ WITHIN THE MEANING OF CITES, ARTICLE 3

‘Introduction from the sea’ of whale parts or whale products listed on Appendix I according to CITES, Article 3(5) is permissible only under the dual condition that ‘the introduction will not be detrimental to the survival of the species involved’ (to be certified by the competent national ‘Scientific Authority’; i.e. in this instance, the Japanese Fisheries Agency (JFA)), and that the whale parts or products are ‘not to be used for primarily commercial purposes’ (to be certified by the competent CITES ‘Management Authority’, i.e. in this instance also the JFA). 69 While the first of these conditions is a matter for purely scientific assessment, which for some whale species at least is controversial and likely to remain so, 70 the second condition requires a finding of facts, with the burden of proof at any rate resting on the importer, in accordance with CITES Conference Resolution 5.10; 71 i.e. in this instance the so-called ‘Institute for Cetacean Research’.

All Japanese whaling has since 1987 been organized under the direction of the non-governmental Institute for Cetacean Research (ICR, Nihon Geirui-Kenkyujyo), which during each annual whaling season in the Antarctic and the North Pacific equips and finances whaling expeditions with ‘whalewatching’ conservancy boats, factory vessels and transport vessels – in collaboration with the Kyodo Senpaku Kaisha Ltd shipping agency (created

69 See nn. 85–87 below. Conditions for import permits pursuant to Article 3(3) are verbatim the same.


71 CITES Resolution 5.10 (‘Definition of “Primarily Commercial Purposes”’, 3 May 1985), general principle 3, third sentence: ‘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’.

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in 1987 out of the former commercial whaling fleet of the Nihon Kyōdō Hagei Ltd, part of whose staff members were taken over by the ICR). These operations are carried out mainly by vessels under Japanese flag, but also in part by chartered vessels under flags of convenience. According to the ICR annual reports, expenditures for ‘special permit whaling’ (i.e. under ICRW, Article VIII) during fiscal year 2003 amounted to 5.34 billion yen (about US$50 million), as compared to expenditures totalling 582 million yen (about US$5.4 million) for scientific research projects in the Antarctic and in Japanese coastal waters; among the latter projects, the component reported as Japan’s contribution to Antarctic research under IWC auspices (431 million yen, about US$4 million, for the Southern Ocean Whales and Ecosystem Research programme (SOWER)) is equivalent to approximately 6% of the annual costs of Antarctic research expeditions undertaken by Japan’s National Institute of Polar Research (NIPR).73

In turn, ICR earns more than 85% of its income from the sale of whale meat and whale oil from the Antarctic and north Pacific, via Kyōdō Senpaku Ltd.74 During fiscal year 2003, the Institute thus reported revenues from ‘sales of by-products’ of 5.89 billion yen altogether (about US$55 million; i.e. roughly four times as much as at the beginning of ‘scientific whaling’ in 1988), plus another 943 million yen (about US$8.8 million) from government subsidies, mainly from the Fisheries Agency.75 As a result, so-called research whaling currently yields about 5,000 tonnes of whale meat annually,76 which can be stored deep-frozen for up to ten years,77 and for the country-wide marketing of which (inter alia, in the cafeterias of hospitals, schools, universities and private companies) a new business firm named Geishoku Labo (‘whale meat nutrition laboratory’) was established in 2006 with active support from ICR and the Fisheries Agency, and with headquarters in the building of the Japanese Fisheries Association in Tokyo, directly adjoining the ICR.78

According to CITES Conference Resolution 5.10 (definition of ‘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.’79 Under these terms, ICR should not under any circumstances – and quite regardless of any scientific assessment of the survival status of the species (‘non-detriment finding’) pursuant to CITES, Article 3(5)(a) – have been granted special permits for sei whales from the north-west Pacific in the context of the JARP-N-II programme since 2001,80 the same is true for the special permit concerning introduction from the sea of humpback whales in the context of the JARPA-II programme for the current (2007–2008) Antarctic whaling season (which has since been suspended), and for the permit soon to be issued for sei whales in the forthcoming (2008) north Pacific whaling season.

Finding 3: The purposes for which 391 north-west Pacific sei whales were taken by the ICR in the context of the JARP-N-II programme from 2001 to 2007, as well as the purposes for which another 100 sei whales will be taken in 2008, were and are primarily commercial within the agreed meaning of CITES, Article 3(5)(c). Hence, the special permits so granted by the Japanese Fisheries Agency were contrary to international law, and should be revoked without delay. The parts and products of sei whales already introduced and stored in Japan should be considered as illegal imports, and should therefore be confiscated pursuant to CITES, Article 8(1)(b) and the corresponding Japanese regulations for implementation.81

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74 See A. Ishii and A. Okubo, n. 18 above, at 73, Table 1; and n. 142 below.
76 The ICR annual reports for the years from 1988 to 2003 (Tokyo, 2004) quoted by A. Ishii and A. Okubo, n. 18 above, contain the most recent published budget figures of the Institute. Since 2001, the ICR has also received – from Japan’s Overseas Fishery Cooperation Foundation (chaired by the former Director-General of the JFA) – interest-free public loans of up to 3.6 billion yen annually (about US$34 million), which it now has difficulty repaying: see K. Oyamada, ‘Japan’s Research Whaling Now Facing Problems at Home’, Asahi Shimbun (English edition) of 9 February 2008, at 3.
77 According to ICR statistics (as published in the Japanese Journal for Fisheries Economics, Suisan Keizai Shimbun), that quantity about doubled within intervals of ten years (1987, 1,137 tonnes; 1997, 2,294 tonnes); see IFAW, n. 64 above, at 8, Table 1.
78 The ICR reports that in 2006, a total of 5,334 tonnes from the JARPA und JARPN ‘research whaling programmes’ were stored in refrigeration facilities; i.e. about four times as much as in 1990; see n. 65 above, and cf. A. Ishihara and J. Yoshi, n. 64 above, at 2.
79 Initially registered for a period of five years; see notice in the Asahi Shimbun (11 May 2006), at 11.
80 See Resolution 5.10, n. 71 above, general principle 3, second sentence.
81 On the IWC Scientific Committee’s massive criticism regarding the scientific rationale of the entire programme – especially in light of available non-lethal alternatives for part of the research objectives indicated – see P.J. Clapham et al., n. 17 above, and N.J. Gales et al., n. 66 above; see also n. 92 below.
82 CITES, Article 8(1)(b) obligates Member States to take appropriate measures for the confiscation of specimens traded/introduced in violation of the Convention; see C. de Klemm, Guidelines for Legislation to Implement CITES, IUCN Environmental Policy and Law Paper No. 26 (IUCN, 1993), at 62. On the identification of illegal whale meat stockpiles remaining in refrigerated storage in Japan, see n. 65 above.
Mandatory Permitting and Reporting Requirements for CITES Implementation

The permits illegally granted for sei and humpback whales also illustrate structural defects of CITES enforcement practice in Japan, which are incompatible with the Convention’s binding international standards, especially as regards the procedures for certification and reporting concerning marine species. Even though Japan’s implementing laws of 1987/1992 are currently ranked in category I – i.e. legislation believed generally to meet the requirements for CITES implementation – actual enforcement practice reveals serious deficiencies.

The ‘management authority’ competent to issue all certificates for ‘introduction from the sea’ according to CITES, Article 9(1)(a) in Japan is the Resources and Environment Research Division of the Japan Fisheries Agency, which, however, simultaneously also serves as the ‘scientific authority’ competent to issue so-called ‘non-detriment findings’ for all endangered species of whales, seals, marine turtles, fish and crustaceans according to Article 3(5)(a). Such a dual function contravenes Resolution 10.3 of the Conference of the Parties, according to which the Scientific Authorities are to be ‘independent of Management Authorities’.

The problem is exemplified by the 100 sei whales which in breach of international law were taken for ‘scientific purposes’ during the 2005 north Pacific whaling season (in the context of the JARPN-II programme) – even though they are listed in CITES, Appendix I, without a valid Japanese reservation: the special permit in that case was issued on 10 May 2005, by way of a so-called ‘certificate of vessel research’, which according to its wording also was to serve as a ‘certificate under [CITES] Article 3(5) and 4(6), as appropriate, when samples and the parts thereof obtained are subject to the provisions of these Articles’, signed by the Director General of the JFA. The permit does not indicate whether he had obtained the requisite prior ‘non-detriment finding’ for endangered north Pacific sei whales pursuant to CITES, Article 3(5)(a) from the competent scientific authority. It can hardly be assumed, though, that the JFA’s Resources and Environment Research Division would have denied a permit to its own head of administration. It is precisely this conflict of interest which Principle (a) of Resolution 10.3 was intended to avoid, and which the internal Japanese administrative system manifestly fails to address.

Another serious infringement of CITES provisions concerns the obligation to submit compliance reports in accordance with Article 8(7)(a) of the Convention. These comprise annual reports to the CITES Secretariat in Geneva on the numbers and types of permits and certificates issued for all specimens on Appendices I, II and III – including those species for which a contracting party has entered reservations. For the reporting procedure (contents, format, deadlines), the Conference of the Parties has laid down uniform 


87 CITES Resolution 10.3 (‘Designation and Role of the Scientific Authorities’, 20 June 1997), recommending (a) that ‘all Parties designate Scientific Authorities independent from Management Authorities’; see also n. 128 below.

88 The intention of this terminology obviously was to bring the permit under the exemption clause of CITES, Article 14(5), which however applies exclusively to Appendix II species, hence not to north Pacific sei whales; see nn. 54–55 and 68 above.

89 See Resolution 10.3, n. 87 above, recommending (c) that: ‘Management Authorities not issue any export or import permit, or certificate of introduction from the sea, for species listed in the appendices without first obtaining the appropriate Scientific Authority findings or advice.’ The important function of the scientific authority in this regard has been described as a ‘right of veto’ by C. de Klemm, n. 81 above, at 23.

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guidelines consolidated in Resolution 11.17.\textsuperscript{91} The duty to ensure compliance with these guidelines falls on the designated management authority; so in Japan on the JFA for all marine species, and on the Environment Ministry for all other species.

Comparative analysis of the CITES compliance reports submitted to the JFA with its corresponding reports to the IWC shows that the data reported are essentially consistent. For the year 2000, the JFA thus reported to CITES the following specimens as having been ‘introduced for scientific purposes’: 439 southern minke whales (to IWC: 439), 16 northern minke whales (IWC: 40), 39 Bryde’s whales (IWC: 43), 3 sperm whales (IWC: 5), plus 19 ‘skin pieces’ (i.e. biopsy samples) of various whale species.\textsuperscript{92} These comparative data are crucially important for the enforcement of the Endangered Species Convention – especially for tracking and combating illegal trade – and therefore are regularly processed and publicized, on behalf of the CITES Secretariat, by the World Conservation Monitoring Centre (UNEP– WCMC).\textsuperscript{93} In order to control international trade in whale products in particular, the Conference of the Parties by Resolution 11.4 of 20 April 2000 called for increased compliance monitoring measures in collaboration with the IWC, and in this connection recommended not to issue any CITES certificates for primarily commercial ‘introduction from the sea’ of any specimens of whale species or stocks protected from commercial whaling by the ICRW.\textsuperscript{94}

One unexpected result of that resolution was that the JFA, from 2001 onwards, simply ceased to submit any further reports to the CITES Secretariat, without giving any reasons and in patent breach of the Convention. While the Japanese Environment Ministry continues to comply regularly with its reporting duties for other animal species,\textsuperscript{95} the Secretariat and UNEP–WCMC have for over five years running now not received any comparable JFA data for marine species (on all CITES appendices) imported, exported or introduced from the sea by Japan.

Finding 4: The hybrid administrative function or hierarchic subordination of the Japanese ‘scientific authority’ for marine species under the Japanese Fisheries Agency, as the national ‘management authority’, patently contravenes the authentic interpretation of CITES, Article 9(1)(b) by Resolution 10.3 of the Conference of the Parties. Furthermore, the continuous non-compliance of the JFA with its international reporting duties since 2001 constitutes a serious infraction of Article 8(7)(a) of the Convention.

REMEDIES AND PROCEDURES

In case of breach of the Convention, there are essentially three options for redress:

(1) arbitration pursuant to CITES, Article 18;
(2) unilateral sanctions as ‘stricter domestic measures’ pursuant to CITES, Article 14; and
(3) collective countermeasures pursuant to CITES, Article 13, under the compliance procedures agreed by the Conference of the Parties in Resolution 14.3.

\textit{ARB蒂TATION PURSUANT TO ARTICLE 18}

CITES Article 18(2) opens the traditional international legal option to initiate third party arbitration proceedings for disputes over the interpretation or application of the Convention that cannot be resolved by negotiation, and specifically refers to the Permanent Court of Arbitration at The Hague, which has since adopted its own rules for this type of case.\textsuperscript{96} There is no doubt that alleged infractions of CITES obligations by a Member State qualify as disputes over interpretation or application, and hence entitle other Member States – being collectively ‘injured’ by the infractions\textsuperscript{97} – to request


\textsuperscript{92} This amounted to 0.216 kg in total; including Southern minke whales (\textit{Balaenoptera bonaerensis}), blue whales (\textit{Balaenoptera musculus}), humpback whales (\textit{Megaptera novaeangliae}), Southern right whales (\textit{Eubalaena australis}), sei whales (\textit{Balaenoptera borealis}), killer whales (\textit{Orcinus orca}), sperm whales (\textit{Physeter macrocephalus}) and Bryde’s whales (\textit{Balaenoptera edeni}). Biopsy extraction for genetic identification is also possible without killing the specimens examined. See P.J. Palsbøll et al., ‘Genetic Tagging of Humpback Whales’, 388:6644 \textit{Nature} (1997), 767; T.D. Smith et al., ‘An Ocean-Basin-Wide Mark-Recapture Study of the North Atlantic Humpback Whale (\textit{Megaptera novaeangliae})’, 15:1 \textit{Marine Mammal Science} (1999), 1; and N.J. Gales et al., ‘Japan’s Whaling Plan Under Scrutiny’, 435:7044 \textit{Nature} (2005), 883.


\textsuperscript{94} See Resolution 11.4, n. 50 above, third recommendation.

\textsuperscript{95} The most recent Japanese compliance report (for the year 2005 – although without JFA data) was received by the CITES Secretariat in January 2007.

\textsuperscript{96} Permanent Court of Arbitration (PCA), Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (PCA, 2001).

authoritative and binding arbitration proceedings under Article 18. Considering, however, that initiation of this procedure requires ‘mutual consent’ by the parties to the dispute – i.e. a prior compromis, with Japan’s concurrence – that approach will in most cases offer little chance of proceeding. It is therefore hardly surprising that Article 18 has never been used in the more than 30 years since the entry into force of the Convention;98 incidentally, the same is true for similar traditional ‘paper clauses’ in other multilateral environmental agreements.99

**UNILATERAL SANCTIONS AS ‘STRicter DOMESTIC MEASURES’ PURSUANT TO ARTICLE 14**

CITES, Article 14(1) expressly authorizes Member States to take ‘stricter domestic measures’ by way of trade restrictions and trade bans, hence including legitimate unilateral sanctions (retorsion) against other States.100 There are numerous illustrations of CITES practice to this effect, including the EU Member States’ strict ban on imports of all Appendix II species from Indonesia in 1991–1995.101 A prominent example in this field has long been the unilateral trade sanctions of the USA: starting with the Lacey Act of 25 May 1900, which in 1935 was supplemented by an import ban for endangered wildlife species;102 and, in particular, the so-called ‘Pelly Amendment’ of 1971 to the 1954 Fishermen’s Protective Act,103 as well as the 1979 ‘Packwood–Magnuson Amendment’ to the 1976 Fishery Conservation and Management Act.104 Those laws empower the US President to sanction other States’ infringements of international environmental agreements such as ICRW or CITES, by way of countermeasures in the form of foreign trade restrictions or denial of fishing rights in American coastal waters, upon prior ‘certification’ of such infringements through the US Secretary of Commerce.105

In actual US practice, unilateral sanctions have repeatedly been invoked for CITES infringements,106 including once in 1991 against Japan (for trade in endangered marine turtles).107 ‘Certifications’ for

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98 See W. Wijnstekers, n. 55 above, annotation to Article 18.
107 See the certification issued under the Pelly Amendment in March 1991 for permits to import marine mammals from the sea (even though Japan had entered a valid reservation under CITES Article 23). As a result, the Japanese Government withdrew its reservation and prohibited the importation of Appendix I olive ridley turtles (*Lepidochelys olivacea*) in April 1991, and in 1994 withdrew its
infringements of the Whaling Convention (1946) were issued in at least six cases: in 1974 for the first time against Japan and the Soviet Union;108 in 1978 against Chile, South Korea and Peru;109 in 1979/1980 against Spain and South Korea,110 in 1981 against Taiwan;111 and against Japan again in 1988, 1995 and 2000.112 In most of those cases, certification by the Secretary of Commerce was sufficient as a diplomatic warning of impending sanctions to achieve compliance;113 only two of the proceedings against Japan reached the stage of partial fishery bans in the US exclusive economic zone (EEZ).114 Even so, the effectiveness of unilateral US sanctions, or the mere threat of sanctions (in Japanese, gaïatsu, which translates as ‘foreign pressure’),115 has suffered considerable erosion over the years,116 in part because Japan is no longer critically dependent on fishing rights in the American coastal zone, and can in turn threaten countermeasures by way of restrictions on US imports. Moreover, the compatibility of such national sanctions with GATT/WTO non-discrimination rules is controversial at least since the 1991 Tuna-Dolphin case.117

Yet, the main problem with unilateral sanctions for multilateral environmental law is the fact that those sanctions primarily serve the self-interest and power politics of nation States. To wit, the US Supreme Court decided in 1987 that the invocation of trade sanctions lies within the exclusive foreign policy discretion of the US Government, and therefore cannot be mandated on the basis of community concerns (Japan Whaling Association v. American Cetacean Society).118 That would condition the enforcement of international environmental law on an assessment as to whether or not it is politically opportune for individual States—hardly a robust basis for the conservation of common natural resources.


109 They were the remaining IWC members at the time (certification for ‘whaling without ICRW quota’).

110 These were for objections/reservations against IWC decisions; both objections were withdrawn after US certification.

111 After Taiwan enacted a ban on whaling, the US certification was withdrawn.


115 See A. Ishii and A. Okubo, n. 18 above, at 55.

COLLECTIVE COUNTERMEASURES PURSUANT TO ARTICLE 13 AND THE CITES COMPLIANCE PROCEDURES (CONFERENCE RESOLUTION 14.3)

In the meantime, the CITES Conference of the Parties has developed a procedure of its own for collective countermeasures against infractions of the Convention, consolidated and codified – on the basis of Article 13 (‘International Measures’) – in Resolution 14.3 of 2007 (‘CITES Compliance Procedures’). Accordingly, the CITES Standing Committee may as a last resort recommend, in the event of continuous non-compliance (‘where a Party’s compliance matter is unresolved and persistent and the Party is showing no intention to achieve compliance’), an embargo (‘trade suspension’)

against the targeted/delinquent State – not only with regard to trade in the specific species concerned, but eventually also for the entire trade with that State in all species listed on CITES, Appendices I, II and III (i.e. more than 30,000 animal and plant species, and their parts or products).

A prerequisite for initiating such ‘collective retorsion proceedings’ – which were actually applied in at least 30 cases since 1985, and hence have been part of continuing treaty practice for more than 20 years now – is a formal finding of treaty infraction by the CITES Standing Committee. Among the relevant treaty obligations (infraction of which may ‘trigger’ the procedure) singled out in Resolution 14.3 is the duty not to allow trade in strictly protected species, in accordance with Article 8; and the duty to designate national management and scientific authorities in accordance with Article 9. Resolution 14.3 lays down the entire compliance procedure – *inter alia*, consultation with the targeted/delinquent State (‘affected party’); observance of an adequate timetable for compliance action; and eventual withdrawal of the embargo by the Standing Committee (after remediation, and return to compliance) – as well as the distribution of functions for this purpose between different CITES bodies in accordance with Article 13. Recommendations on compliance matters require consensus or a simple majority vote in the 33-member Standing Committee, or a two-thirds majority in the Conference of the Parties.

CITES embargoes are primarily enforced via Article 14(1); i.e. implemented by national restrictions on foreign trade, as ‘stricter domestic measures’ concerted/harmonized on the basis of recommendations by the Conference of the Parties or the Standing Committee. In terms of administrative practice, that means collective non-recognition of all CITES permits and certificates issued by the targeted State, and hence the termination of legal trade with that State in wildlife products, mentioned in n. 101 above. See R. Reeve, n. 93 above, at 159; for example, the EU import ban on whale products, mentioned in n. 101 above.


In 1999–2002, CITES embargoes for infraction of this treaty obligation were enforced against Afghanistan and Rwanda. See R. Reeve, n. 93 above, at 153.

species/products. Given the substantial economic losses involved, the use or mere threat of trade suspensions has proven a remarkably effective instrument for expeditious redress of infractions.

The basic conformity of the CITES embargo procedure with the rules of general international law may be demonstrated by comparison with the criteria for legitimate ‘countermeasures’ in the UN International Law Commission (ILC)’s ‘Draft Articles on State Responsibility’: The catalogue of requirements to legitimize countermeasures, available to all Member States of a treaty in the event of infringement of collective treaty obligations (ILC, Articles 48–54), largely corresponds to the procedural and substantive rules laid down in CITES Resolution 14.3 (2007). Another question frequently raised in the literature concerns the compatibility of CITES trade sanctions with GATT/WTO free trade rules; in view of the fact, however, that almost all WTO Member States are now also parties to CITES, the hypothesis of a regulatory conflict here is virtually academic, and has never arisen in practice.

Considering that the CITES provisions infringed by Japan are collective treaty obligations owed to all members of the Convention (erga omnes), any other Member State is entitled to request the initiation of compliance procedures. That obviates the question raised by the Japanese delegation during the preparatory negotiation of Resolution 14.3 as to a ‘directly affected’ (i.e. injured) party, at the very least, all those States who concurrently are also members of other multilateral agreements relating to whale conservation would have to be considered as affected/injured – and therefore may even be under a duty now, on the basis of their external international legal obligations, to request CITES compliance procedures for the protection of sei and humpback whales.

CONCLUSIONS

From 2008 on, thanks to the activities of the Japanese ‘Institute for Cetacean Research’ and its ‘Whale Meat Nutrition Laboratory’ (Geishoku Labo), Tokyo’s gourmet restaurants will again be able to offer ‘scientifically introduced’ whale delicacies from the Antarctic and north Pacific oceans. While humpback steak (Megaptera novaeangliae) is now temporarily off the menu, there still is some rare north-west Pacific sei whale (Balaenoptera borealis) – albeit at certain health risks to consumers.
The so-called ‘scientific whaling’ of the ICR casts an embarrassing shadow upon the respectable and meritorious work of other Japanese scientists, such as the National Institute of Polar Research (NIPR) in particular. More importantly, in terms of international law, Japan’s current ‘research whaling programmes’ in the Antarctic and north-west Pacific Oceans qualify as manifest and persistent infractions of CITES; in particular, of Article 3(5)(c) (‘introduction from the sea’ of strictly protected whale species for primarily commercial purposes as defined by the Conference of CITES Parties in Resolution 5.10); Article 8(7)(a) (non-compliance with reporting duties for marine species, as defined in CITES Resolutions 11.4 and 11.17); and Article 9(1)(b) (failure to designate a ‘scientific authority’ independent from the management authority for marine species, as required by CITES Resolution 10.3).

The Conference of the Parties to the Convention, through its Standing Committee delegated for this purpose, should without delay initiate compliance procedures pursuant to CITES Resolution 14.3, and – in conformity with the agreed procedural steps and deadlines – recommend a collective embargo (trade suspension) for all trade with Japan in CITES species, in accordance with Articles 13(3) and 8(1). In view of the imminent risk of further serious infractions of the Convention during the forthcoming north Pacific whaling season (May–July 2008), the initiation of such collective countermeasures appears justified and proportionate, not only in the interest of equal treatment of all treaty members (at least 30 of which were subject – with Japanese consent – to similar CITES sanctions over the past two decades after all) but also in the interest of the fundamental integrity and credibility of the Convention.

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