

November 14, 2000

The Honorable Bruce Babbitt
Office of the Secretary
U.S. Department of Interior
1849 C Street NW
Washington, DC 20230

**Re: Petition to Certify Japan Pursuant to 22 U.S.C. §1978 for Trading in the
Meat of Minke, Bryde's, and Sperm Whales from the North Pacific and the
Southern Hemisphere**

Dear Secretary Babbitt:

Perhaps no other group of animals evokes as much mystery, awe, and poetry as cetaceans (whales, dolphins, and porpoises). Nonetheless, thousands of cetaceans are killed or captured each year for food, sport, science, and entertainment. Japan's killing of minke whales (*Balaenoptera acutorostrata*), Bryde's whales (*B. edeni*), and sperm whales (*Physeter macrocephalus*) in its so-called scientific whaling program is particularly troubling, because it is both unnecessary and unscientific. Japan's arguments for killing these whales are, in the words of the Secretary of Commerce, "preposterous." Japan's whaling is also inconsistent with the efforts of the International Whaling Commission (IWC), the decisionmaking body of the International Convention for the Regulation of Whaling¹ (ICRW), to conserve and rebuild whale populations. In fact, Japan's whaling may be contributing to declines of populations of all three species. Japan's whaling and subsequent commercial trade in whale meat also contravene the Convention on International Trade in Endangered Species of Flora and Fauna (CITES), which regulates trade in species of conservation concern.²

As such, the undersigned organizations respectfully petition you, as the head of the agency responsible for implementation of CITES, to certify that nationals of Japan are diminishing the effectiveness of an international endangered species program, CITES, pursuant to the Pelly Amendment of the Fishermen's Protective Act.³ Because Japan openly flouts the will of the international community, we also request that you recommend to the President that he

¹International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat., 1716, T.I.A.S. No. 1849 (entered into force Nov. 10, 1948)[hereinafter ICRW].

²Convention on International Trade in Endangered Species of Flora and Fauna, March 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975)[hereinafter CITES].

³22 U.S.C. §1978, *as amended* Pub. L. No. 95-376, 92 Stat. 714 (Sept. 18, 1978).

direct the Secretary of the Treasury to impose significant trade sanctions against Japan until such time as it ceases its so-called scientific whaling and withdraws its reservations to minke, Bryde's and sperm whales under CITES.

The international community has spoken with great clarity regarding the conservation of minke, Bryde's, and sperm whales. The IWC imposed a moratorium against killing all whales in 1982. That decision became effective in 1986 and remains in effect. In July 2000, the IWC adopted its nineteenth resolution since 1987 requesting that Japan rescind its scientific whaling program, because Japan's program fails to meet the criteria established by the IWC for scientific whaling. The failure of Japan to bring its scientific whaling program into compliance with IWC criteria diminishes the effectiveness of the ICRW and IWC. Moreover, no accepted population estimates exist for minke, Bryde's, and sperm whales, and very significant taxonomic and identification concerns prevail for Bryde's and minke whales. As a result, any killing of minke, Bryde's, and sperm whales places these species at additional risk and also diminishes the effectiveness of the ICRW and the IWC.

Similarly, the parties to CITES have given minke, Bryde's, and sperm whales that convention's highest level of protection by including them in Appendix I, and the parties rejected proposals in 1994, 1997, and 2000 to permit commercial trade in minke whales. Article III(5) of CITES requires parties to issue introduction from the sea certificates when taking an Appendix I species from the marine environment beyond the jurisdiction of any country. It also prohibits introductions from the sea of Appendix I species if the introduction is detrimental to the survival of the species or the purpose of the introduction is for primarily commercial purposes. The CITES parties also agreed not to issue introduction from the sea certificates for Appendix I cetaceans. As Japan openly sells whale meat in markets and restaurants, the introductions from the sea of these animals is for commercial purposes. The fact that Japan channels funds from the sale of whale meat back into scientific research is irrelevant, because it is the purpose of the introduction, not the use of the funds, that is determinative. Further, the IWC's call to use whale meat taken in the course of scientific whaling is irrelevant, because Japan retains a distinct legal obligation to comply with CITES. Japan's reservation concerning these whale species may exempt it from the requirements of CITES, but commercial sales of whale still diminish the effectiveness of CITES. The sale of whale meat erroneously suggests that commercial whaling and whale meat trade is viable, thus making restoration of depleted populations more difficult. It also undermines the cooperative efforts between the IWC and CITES. Japan has issued introduction from the sea certificates in the past, but those certificates would contravene Article III(5) and CITES Resolution 2.9, in which the parties agreed not to issue any introduction from the sea permits for cetaceans for primarily commercial purposes.

As explained in Section II, recent high-level diplomatic efforts have failed to bring Japan into compliance with ICRW and CITES. The time has come for significant trade sanctions to encourage Japan to comply with the ICRW and CITES — two of the most significant multilateral environmental agreements. As explained in Section III, the Pelly Amendment, as a

measure to protect whales by encouraging compliance with international agreements, is consistent with the General Agreement on Tariffs and Trade (GATT), one of the primary agreements of the World Trade Organization (WTO).⁴ More specifically, the general structure and design of the Pelly Amendment, as well as its application in this specific context, meet the criteria established under GATT Articles XX(b), XX(d), and XX(g) and Article XX's chapeau. For these and other reasons, you, in your capacity as Secretary of Interior, must certify Japan pursuant to the Pelly Amendment and recommend to the President significant trade restrictions that target whale-related products and products produced by those companies engaged in whaling or whale meat trade.

I. The Secretary of Interior Must Certify Japan pursuant to the Pelly Amendment because Nationals of Japan are Diminishing the Effectiveness of CITES

The Pelly Amendment establishes a two part test for determining whether or not the Secretary of Interior or Secretary of Commerce must certify a country. The Secretary of Interior or Secretary of Commerce must determine that

1. nationals of a foreign country,
2. directly or indirectly, are
 - a. conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, or
 - b. engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species.⁵

If the Secretary of Interior or Secretary of Commerce makes this determination, the Secretary "shall certify such fact to the President."⁶ Upon receipt of such certification, the President may direct the Secretary of the Treasury to prohibit the importation into the United States of any product from the offending country for any duration, provided that the restrictions

⁴General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 187 [hereinafter GATT]. Prior to the Final Act, the original GATT was applied through the Protocol of Provisional Application. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A2051, 55 U.N.T.S. 308. The GATT is now incorporated into the World Trade Organization (WTO). Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 108 Stat 4809, 19 U.S.C. 3501 *et. seq.*, reprinted in 33 I.L.M. 1145 (1994).

⁵22 U.S.C. §1978(a)(1)-(2).

⁶*Id.*

are consistent with the GATT.⁷ The President must also notify Congress of any action taken within 60 days of certification.⁸

Quite clearly, nationals of Japan are involved in the killing of whales and commercial trade of whale meat. The Government of Japan annually issues 540 permits to its nationals specifically to kill whales. It admits that it recently sent its whale fleet to kill minke, Bryde's and sperm whales,⁹ and it has notified the United States that its nationals killed its first whales.¹⁰ Further, the ICRW is an "international fisheries program" and both CITES and the ICRW are an "international program for endangered and threatened species." The legislative history of the Pelly Amendment makes this clear by identifying the early successes of the Pelly Amendment for improving compliance with the ICRW and IWC.¹¹ In addition, Congress amended the Pelly Amendment in 1978 specifically to extend those early IWC successes to CITES.¹²

Sections A and B below complete the analysis for Pelly certification, establishing that Japanese nationals are directly or indirectly conducting fishing operations that diminish the effectiveness of the ICRW and are directly or indirectly engaging in trade that diminishes the effectiveness of CITES. While petitioners do not ask you to certify Japan as diminishing the effectiveness of the ICRW and IWC, Section A provides species specific data relevant for understanding the conservation status of minke, Bryde's, and sperm whales. Quite obviously, the whale meat trade cannot exist without killing whales. Thus, if Japan's trade includes species that the IWC seeks to protect, then that information is relevant for determining whether Japan is diminishing the effectiveness of CITES trade restrictions that support the IWC moratorium. Section A also documents the long history of unsuccessful attempts within the IWC to control Japan's so-called scientific whaling. This data and history provide the underpinnings for CITES'

⁷*Id.* at §1978(a)(4).

⁸*Id.* at §1978(b).

⁹Media Release, Japan Fisheries Agency, *Japan Responds to Criticism of Its Whale Research Program* (Aug. 3, 2000), available at http://www.jp-whaling-assn.com/media_releases/jfa000803.htm.

¹⁰*See, e.g.*, Press Release, "U.S. Objects to Japan's Lethal Whaling Research Program," statement of Philip T. Reeker, Deputy Spokesman, U.S. Department of State (Aug. 16, 2000)(stating, [T]he Government of Japan has confirmed that it has taken one sperm whale, four Bryde's whales and six minke whales. . . .").

¹¹H.R. REP. NO. 95-1029, 95 Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 1768, 1773 (stating that the Secretary of Commerce certified different nations five times as engaging in fishing operations that diminish the effectiveness of IWC quotas and that the Pelly Amendment "has been one of our most effective tools in the effort to conserve the greatest whales.").

¹²*Id.* at 1773-1775, 1780 (The definition of "international program for endangered or threatened species . . . would have the effect of including the Convention on International Trade in Endangered Species of Wild Fauna and Flora . . . and other qualifying multilateral agreements.").

efforts to control trade in whale meat from whales protected by the IWC. Section B describes the specific reasons for finding that nationals of Japan are diminishing the effectiveness of CITES.

A. ICRW

The Contracting Governments of the ICRW, acting as the IWC, regulate whaling and provide for the effective conservation of whales. As the devastating impacts on whale populations due to killing of whales became obvious, the IWC took several dramatic steps to recover and protect whales populations. In 1979, the IWC adopted a moratorium on the taking, killing, and treating of whales, excluding minke whales, by factory ships or whale catchers attached to factory ships. In 1981, it established catch limits for sperm whales at zero in the Southern Hemisphere for the 1981/1982 season, and at zero in the Northern Hemisphere for the 1982 season (except the western division of the North Pacific).¹³ In 1982, the IWC recognized that stricter measures were required to rebuild seriously depleted whale populations and it established a moratorium on killing *all* whales for commercial purposes starting with the 1986 coastal season and the 1985/1986 pelagic season.¹⁴ It has also established the Southern Ocean Sanctuary and the Indian Ocean Sanctuary.¹⁵

As the IWC's continuing moratorium demonstrates, significant reasons exist for maintaining a complete ban on the commercial hunting of all species of whales. Population figures are uncertain, serious identification problems persist, and taxonomic confusion prevails. For these reasons, any killing of these three species in the North Pacific and the Southern Hemisphere diminishes the effectiveness of the ICRW and the work of the IWC. Moreover, the parties have expressly imposed conditions for scientific whaling which Japan has not met, and the IWC has adopted resolutions asking Japan to refrain from scientific whaling because Japan's programs fail to meet these criteria. Yet, Japan flouts international will by continuing and expanding its so-called scientific whaling program. This, too, provides a separate reason why Japan's whaling activities diminish the effectiveness of the ICRW and the work of the IWC.

1. Killing Sperm Whales Diminishes the Effectiveness of the ICRW and the IWC

The biology of sperm whales is complex. Male and female sperm whales have distinctly different life histories and ranges and this has significant implications for conservation and

¹³See Schedule to the ICRW, para. 10(d), *reprinted in*, ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 1999, at 32 (2000); ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, 32 (1982)

¹⁴See Schedule to the ICRW, para. 10(e).

¹⁵Schedule to the ICRW, para. 7.

whaling activities. Experts have commented that there is an absence of appropriate data from which to construct reasonably realistic population models and that in the absence of such data "knowledge of stock structure in sperm whales [worldwide] is constrained to be little better than anecdotal."¹⁶ As such, no accepted population figures exist for sperm whales in the North Pacific¹⁷ and no clear stock structure exists for sperm whales in the North Pacific.¹⁸ This is one reason why any attempt to harvest sperm whales sustainably is inappropriate.

What is clear, however, is that lethal takes of sperm whales from the North Pacific were extraordinarily high in the 20th Century, with estimates of 290,000.¹⁹ Lethal takes of sperm whales were greatest in the 1960s and 1970s, peaking at more than 16,000 in 1968.²⁰ The catch consisted almost exclusively of large males in the 1950s but changed to medium-sized males and females in the 1970s, presumably after the larger males became too rare to catch.²¹

This killing strategy will have greatly affected sperm whale populations. According to the IUCN Red Data Book, about 100,000 sperm whales, predominately males, were killed in the area north of 40° north latitude between 1965-1970 and 1975-80. During this time, surveys suggest that sperm whale abundance in this area declined about four-fold.²²

Significantly, the IUCN published the Red Data book in 1991, before the full impact of under-reporting of sperm (and other) whale catches became apparent. As such, the Red Data Book likely substantially under-estimates the number of sperm whales killed. For example, Soviet whalers alone took 180,000 sperm whales between 1949 and 1979 – about 60% more than officially reported.²³ Even absent this under-reporting, the number of animals killed over the last four decades is huge and recent, suggesting that sperm whale populations are far from recovered.

¹⁶S. Dufault, H. Whitehead, & M. Dillon, *An Examination of the Current Knowledge on the Stock Structure of Sperm Whales (Physeter macrocephalus) Worldwide*, J. CETACEAN RES. MANAGEMENT, 1(1):1-10, at 4 (1999).

¹⁷R.R. Reeves & H. Whitehead, *Status of the Sperm Whale (Physeter macrocephalus) in Canada*, CAN. FIELD NAT. 111:293-307 (1997).

¹⁸Dufault, *supra* note 16, at 4.

¹⁹A. M. KLINOWSKI, DOLPHINS, PORPOISES AND WHALES OF THE WORLD: THE IUCN RED DATA BOOK 330 (1991).

²⁰*Id.* at 330.

²¹*Id.* at 330-331.

²²*Id.* at 331.

²³R.L. Brownell, A.V. Yablokov, V.A. Zemsky, *USSR Pelagic Catches of North Pacific Sperm Whales, 1949 – 1979: Conservation Implications*, SC/50/CA WS27, at 1.

The biological nature of sperm whales makes them particularly vulnerable to whaling. They are long-lived and slow breeding and have poorly defined stock structures. Their social structure also makes them especially vulnerable. A mature female sperm whale is likely to have a calf only about once every five years.²⁴ Males live separately from females once except when breeding, when they travel towards the equator to their breeding grounds, and they therefore generally have larger ranges than females.²⁵

Data also suggest that, because of the unusual and intricate social system of sperm whales, that whaling may negatively affect the individuals not actually killed. Some of these effects may persist well past the end of whaling and over a much larger area than covered by the whaling operations.²⁶ When large factory whaling became more prevalent, whalers focused their harpoons on the larger, more profitable males. Male sperm whales became so depleted that some fear that too few males exist for effective breeding in some areas.²⁷ This form of modern whaling activity is thus believed to have left an imbalance in sperm whale populations with a deficit of mature males. Further, the early whalers focused their efforts on females and juvenile whales in temperate and tropical waters, possibly also disrupting their social organization.²⁸ This strategy of exhausting sperm whales in one area before moving on to the next, very likely caused the depletion of an entire population of sperm whales of one sex. The implications of this for such a slow maturing and slow breeding species are likely to be significant still.

Whitehead and Weilgart have commented:

Modern whaling reduced populations substantially, but to an extent that is not well known because of technical difficulties with the data available....The modern whalers' preferential selection of the larger males radically changed the adult sex ratio on the breeding grounds, which in turn, in some areas, seems to have decreased the pregnancy rate of the females . . . or the rate of observing calves. . . These reduced pregnancy rates are likely persisting well beyond the end

²⁴P.B. Best, P.A.S. Canham, & N. Macleod, *Patterns of reproduction in sperm whales*, *Physeter macrocephalus*, in REPORT OF THE INTERNATIONAL WHALING COMMISSION (special issue) 6:51-79 (1984).

²⁵P.B. Best, *Social Organization in Sperm Whales*, *Physeter macrocephalus*, in 3 BEHAVIOR OF MARINE ANIMALS (H.E. Winn & B.L. Olla, eds. 1979).

²⁶H. Whitehead, J. Christal & S. Dufault, *Past and Distant Whaling and the Rapid Decline of Sperm Whales off the Galápagos Islands*, CONSERVATION BIOLOGY 11:1387-1396 (1997).

²⁷R. Clarke, A. Aguayo & O. Paliza, *Pregnancy rates of sperm whales in the southeast Pacific between 1959 and 1962 and a comparison with those from Paita, Peru between 1975 and 1977*, in REPORT OF THE INTERNATIONAL WHALING COMMISSION (special issue) 2:151-158 (1980).

²⁸J. GORDON, SPERM WHALES 65 (1998).

of whaling on account of the long delay before most males begin to enter the breeding grounds. . . .²⁹

Whaling for females can also have population effects beyond the removal of the animals killed. For these reasons, Whitehead and Weilgart have concluded, "for this species, the effects of whaling, which can often be unexpected and unusual, linger years after its cessation."³⁰

Whitehead and Weilgart also review the potential significance of a range of threats other than whaling for sperm whales and conclude:

The actual or potential effects of these threats to sperm whale populations are largely unknown, and we need to research into them. However, in the case of whaling, in which the level of the threat (numbers of animals targeted) and its effect on individuals (death) were both well known, results at the population level have been either unclear or unexpected. This unpredictability is partly the result of difficulties inherent in studying any wide-ranging pelagic animal, but special attributes of sperm whales, and perhaps especially their social structure, makes predictions of population dynamics particularly uncertain. No research can assure us what are "safe levels" of the new, and compared with whaling, much less quantifiable threats. Therefore the principle priority for conserving this species should be action to reduce by-catch, chemical pollutants, noise and other anthropogenic effects on the ocean and to prevent the resumption of large-scale commercial whaling.³¹

Because stock structures and population estimates are unclear, and because the impact of killing sperm whales on their social and population structure is not known, any additional killing of sperm whales diminishes the effectiveness of the ICRW and the work of the IWC.

2. Killing Bryde's Whales Diminishes the Effectiveness of the ICRW and the IWC

No accepted population estimates exist for Bryde's whales. Further, the similarity in appearance of most rorqual whale species, including Bryde's whales, make them difficult to

²⁹H. Whitehead & L. Weilgart, *The Sperm Whale: Social Females and Roving Males*, in *CETACEAN SOCIETIES - FIELD STUDIES OF DOLPHINS AND WHALES* 172 (J. Mann et al., eds. 2000).

³⁰*Id.*

³¹*Id.*

distinguish on the high seas.³² This confusion, particularly between Bryde's and sei whales, is "widespread," leading to confusion in distributions and historical catch data.³³ Indeed, the Japanese Fisheries Agency reported that Japanese whalers killed a Bryde's whales in the "JARPN" program,³⁴ presumably because they misidentified it as a minke whale.

Further, the taxonomy of Bryde's whales is in flux. Like many other baleen whales, what is currently called a Bryde's whale is likely several different species with significant population divisions. For example, the "pygmy" form reported from the Java Sea and Solomon Islands is likely to be defined as a new species shortly.³⁵

As a result of this confused and poorly understood taxonomy, Japan could be removing animals from depleted populations and not necessarily taking the species that they intend to take and for which permits have been issued.

The IWC's Scientific Committee also recognizes this confused and poorly understood taxonomy and the lack of accepted population figures. At the 48th Meeting of the IWC (IWC48), the Scientific Committee noted that the estimate of the North Pacific stock required further evaluation, and concern was expressed about the reliability of the catch statistics.³⁶ At IWC50, the Scientific Committee discussed the different forms of Bryde's whales³⁷ and at IWC51, it discussed whether separate local stocks of inshore Bryde's whales existed around all major island groups.³⁸ Finally, at IWC52, the Nomenclature Sub-committee recognized that more than one species of Bryde's whale "is involved."³⁹

Because no accepted population estimates exist for Bryde's whales, and because very

³²Personal communication with Mark Simmonds, Director of Science, Whale and Dolphin Conservation Society, August 31, 2000.

³³M. Klinowska, *supra* note 18.

³⁴Kyodo News Service, July 16, 1998.

³⁵Correspondence between Andy Dizon, whale geneticist, and Mark Simmonds, Director of Science, Whale and Dolphin Conservation Society, Sept. 2000.

³⁶REPORT OF THE FORTY-SEVENTH MEETING OF THE INTERNATIONAL WHALING COMMISSION 32, 84 (1997).

³⁷CHAIRMAN'S REPORT OF THE FIFTIETH MEETING, ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, 20-21 (1998).

³⁸CHAIRMAN'S REPORT OF THE FIFTY-FIRST MEETING, ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, 18-19 (1999).

³⁹IWC Scientific Committee, Report of the Scientific Committee, IWC/52/4, at 46-47.

significant taxonomic and identification concerns prevail for Bryde's whales, any killing of Bryde's whales diminishes the effectiveness of the ICRW and the work of the IWC.

3. Killing Minke Whales Diminishes the Effectiveness of the ICRW and the IWC

As with sperm and Bryde's whales, minke whales also are the subject of taxonomic confusion and identification problems. Scientists and the parties to CITES now recognize two distinct species of minke whales, one in the Northern Hemisphere and one in the Southern Hemisphere.⁴⁰ What was once thought to be one global population is now recognized as at least two distinct species. In the Southern Hemisphere, perhaps a third distinct species of minke whale exists, as the rare dwarf minke whale may be a distinct species.

In addition, the IWC recognizes a J-stock and an O-stock of minke whales in the North Pacific, and it considers the J-stock to be "critically endangered."⁴¹ Norway, too, has acknowledged that the J-stock is not in a healthy condition.⁴² However, the J-stock mingles with the O-stock during times of the year when Japan conducts its scientific whaling, and individuals from the two stocks can only be identified genetically; they are visually indistinguishable. As a result, Japan kills minke whales from the critically endangered J-stock during its scientific whaling operations as evidenced by the identification of J-stock samples of whale meat on the Japanese market. In fact, market surveys have provided enough samples from J-stock whales for better discrimination between J- and O-stock whales than was possible in JARPN analyses. Because of the high level of incidental catches of J-stock individuals, the IWC's Scientific Committee has recently stated that the J-stock is "likely to further decline markedly."⁴³

Further, population estimates for Southern Hemisphere minke whales have recently been thrown into considerable doubt. An approximate point estimate of 761,000 minke whales in the Southern Hemisphere has been used for several years, although the IWC's website confirms that this is "under review" and notes that "[t]he Commission is unable to provide reliable estimates at

⁴⁰CITES, Inf. 11.9, at 1.

⁴¹The IWC classified this stock as a "Protection Stock" in 1985 to reflect its depleted status and remove it from commercial exploitation, although Japan continues to catch them.

⁴²The Norwegian proposal to transfer minke whales from Appendix I to Appendix II of CITES states that "all known minke whales except one specific stock in the Sea of Japan are in a healthy state." CITES Prop. 11.18, at 5.

⁴³IWC Scientific Committee, Report of the Sub-Committee on the Revised Management Procedure. Report of the Scientific Committee of the International Whaling Commission, Annex D, at 7 (1999).

the present time. A major review is underway by the Scientific Committee."⁴⁴ The Chair of the Scientific Committee reported at IWC52 that the Scientific Committee now has no estimate for Southern Hemisphere minke whales. Any whaling of minke whales in the Southern Hemisphere could thus have devastating consequences for these populations and Japan's scientific whaling in the Southern Hemisphere may be causing the decline (although the original estimates may have been too high). The fact is, no one knows.

In summary, scientists disagree on the number of species of minke whale that exist, a fact that affects minke whales in both the North Pacific and the Southern Hemisphere. The Scientific Committee has no estimate for minke whales in the Southern Hemisphere. Japan's so-called scientific whaling in the North Pacific kills minke whales from the critically endangered J-Stock, placing this stock at considerable risk. As such, Japan's scientific whaling in the Southern Hemisphere and the North Pacific prevents the IWC from rebuilding and conserving populations of minke whales for any purpose and prevents any research being conducted in the absence of the confusing variable of directed takes. Clearly, such activity diminishes the effectiveness of the ICRW.

4. Japan's Continuing and Expanding Scientific Whaling Program Diminishes the Effectiveness of the ICRW and IWC by Ignoring IWC Resolutions Establishing Criteria for Scientific Whaling

Article VIII of the ICRW allows Contracting Governments to issue special permits authorizing the killing, taking, and treating of whales for scientific research purposes, subject to conditions imposed by that Contracting Government. Scientific whaling programs are not completely unregulated by the IWC, however. Paragraph 30 of the Schedule requires a Contracting Government to provide the IWC with proposed scientific permits for review and comment before they are issued. Further, the proposed permits should specify the objectives of the research; the number, sex, size and stock of animals to be taken; opportunities for participation in the research by scientists from other countries; and possible effects on conservation of the stocks.

The IWC has also adopted resolutions establishing additional criteria for issuing special permits for scientific whaling. The Scientific Committee must advise the IWC whether the objectives and methodology of the research: are intended to assist the Comprehensive Assessment or other "critically important" issues for which answers cannot be obtained by non-lethal means; will produce reliable answers to the questions being addressed; and will not have an adverse effect on the stock.⁴⁵ Despite these criteria, at each IWC meeting from 1987 to 2000

⁴⁴IWC Website, *available at* <http://ourworld.compuserve.com/homepages/iwcoffice/Estimate.htm>.

⁴⁵IWC Resolution 1995-9.

(except 1988 and 1995), the IWC has passed one and sometimes two resolutions determining that Japan's proposals for special permits fail to meet the established criteria.⁴⁶

The recent history in many ways provides the entire history of Japan's complete failure to listen to, much less implement, the concerns of the IWC. In 1996, the IWC found that Japan's proposals to whale for scientific purposes in both the Southern Hemisphere under the "JARPA" program and in the North Pacific under the "JARPN" program failed to meet the criteria for such permits under IWC Resolution 1995-9.⁴⁷ More significantly, the Scientific Committee noted that the results of the JARPA program are not required for management purposes.⁴⁸ Based on the Scientific Committee's report, the IWC affirmed in IWC Resolution 1997-5 that the JARPA program does not meet critically important research needs in the Southern Ocean and again asked Japan to refrain from issuing special permits. The IWC repeated these concerns and made similar requests to Japan to refrain from issuing special permits in 1998 (IWC Resolution 1998-5), 1999 (IWC Resolution 1999-3) and 2000 (IWC/52/36, IWC/52/37) for the Southern Ocean and the North Pacific. Most recently at IWC52 in July 2000, the Scientific Committee did not endorse Japan's expanded "JARPN II" scientific whaling program for sperm, Bryde's and minke whales in the North Pacific. The IWC specifically found that gathering information on interactions between whales and prey species is not a critically important issue which justifies killing of whales for research purposes (IWC/52/36).

Some of the criteria that Japan fails to meet strike at the heart of the IWC's efforts to control whaling. For example, IWC Resolution 1995-8 asks Contracting Governments to refrain from issuing special permits for killing cetaceans in sanctuaries. IWC Resolution 1995-9, which establishes the baseline criteria for issuing special permits, recommends that special permits be issued consistent with Section III of the Schedule, which prohibits killing whales in the Southern Ocean Sanctuary.⁴⁹ Yet, Japan continues to kill up to 440 minke whales in the Southern Ocean

⁴⁶IWC Resolutions 1987-4 (Southern Hemisphere); 1989-3 (Southern Hemisphere); 1990-2 (Southern Hemisphere); 1991-2 (Southern Hemisphere); 1992-5 (Southern Hemisphere); 1993-7; 1994-10 (North Pacific); 1994-11 (Southern Hemisphere); 1996-7 (Southern Hemisphere and North Pacific); 1997-5 (Southern Hemisphere); 1997-6 (North Pacific); 1998-4 (Southern Hemisphere and North Pacific); IWC52/36 (North Pacific); IWC/52/37 (Southern Hemisphere).

⁴⁷IWC Resolution 1996-7.

⁴⁸Scientific Committee, SC/49/Rep.1; Report of the Scientific Committee, IWC/49/4.

⁴⁹IWC Resolution 1995-9 replaced IWC Resolution 1986-1 on the same subject. The IWC criticized Japan in IWC Resolution 1987-4 for failing to meet those earlier criteria for issuing special permits for its scientific whaling in the Southern Ocean and that the proposed research

does not appear, on present information, to be structured so as to contribute information essential for rational management of the stock and that the proposed take will not, at least at this stage, materially facilitate the Comprehensive Assessment.

Sanctuary each year.

IWC Resolution 1995-9 recommends that any scientific research involving the killing of cetaceans only be permitted in "exceptional circumstances." Japan has never contemplated an entirely non-lethal research program. The reason appears obvious. Japan is not so much interested in scientific whaling as obtaining a luxury food item – whale meat sells for \$20-40 per pound in Japan, with total sales of about \$27-36 million annually.⁵⁰

Japan's current explanation for its need to kill sperm and Bryde's whales exposes this charade, offends common sense, and cannot be scientifically justified. Japan argues that it needs to kill sperm and Bryde's whales to study their impact on fish populations, because those whales are eating so much that they are negatively affecting the livelihoods of Japanese fisherman.⁵¹ Such arguments are not worth a considered response. As the Secretary of Commerce Norman Mineta has said, this argument "is preposterous."⁵²

Japan's rejection of high-level diplomatic efforts demonstrates its unwillingness to bring its so-called scientific whaling program into compliance with IWC resolutions without significant and real economic or political consequences. Just prior to IWC52, President Clinton sent a personal letter to Japanese Prime Minister Yoshiro Mori asking Japan to refrain from issuing special permits. Just after IWC52, United Kingdom Prime Minister Tony Blair sent a letter on behalf of President Clinton and New Zealand Prime Minister Helen Clark asking Japan to refrain from issuing special permits. Fifteen nations presented Japan's Ministry of Foreign Affairs with a *démarche* again pleading for Japan to refrain from engaging in scientific whaling.⁵³

Despite numerous efforts of the IWC and despite high-level pleadings from heads of state and ambassadors, Japan continues to kill whales in defiance of a global moratorium. Japan continues to kill whales without complying with the IWC's criteria for scientific whaling. In fact, Japanese whalers eventually killed five sperm whales, 43 Bryde's whales, and 40 minke whales in its JARPN II program.⁵⁴

Japan, by continuing and expanding its scientific whaling program in both the Southern

⁵⁰*Japan's Whalers Bring Home the Blubber*, Associated Press, Sept. 5, 2000.

⁵¹*Id.* (quoting Joji Morishita, Japan Fisheries Agency).

⁵²*U.S. Considers Sanctions over Expanded Whaling*, JAPAN TIMES, Aug. 29, 2000.

⁵³Embassy of Ireland, Press Release, *Japanese Scientific Whaling Programme: Fifteen Countries Make a Démarche to the Government of Japan* (Aug. 21, 2000).

⁵⁴*Japan Unmoved by Whale Kill Critics*, Associated Press, Sept. 21, 2000.

Ocean Sanctuary and the North Pacific, defies the opinions of the majority of the IWC members who each year criticize Japan's program as failing to meet the provisions of the ICRW and the IWC's resolutions. Nonetheless, Japan not only continues its scientific whaling programs, it has increased the numbers of whales to be taken and has now increased the numbers of species to be taken. This petition does not complain of isolated incidents. Rather, Japan is engaged in a long-term, persistent pattern of violating the resolutions of the IWC and the interests of IWC members in conserving minke, Bryde's and sperm whales. These actions clearly diminish the effectiveness of the ICRW and the efforts of the IWC to conserve populations of minke, Bryde's, and sperm whales in both the Southern Hemisphere and the North Pacific. In fact, Japan so-called scientific whaling program deviates so widely and consistently from the IWC criteria that Japan's continued scientific whaling likely constitutes an abuse of rights under international law.⁵⁵

B. The "Introduction from the Sea" of Any Whales Diminishes the Effectiveness of CITES

The parties to CITES regulate international trade in species included in one of three Appendices, which determines the extent to which trade is regulated in the species. The only relevant Appendix for purposes of this petition is Appendix I, which includes species "threatened with extinction which are or may be affected by trade,"⁵⁶ because it includes minke, Bryde's and sperm whales. The parties to CITES included sperm whales in Appendix I on February 4, 1977, with Bryde's whales following in June 1979. In June 1979, all populations of minke whales received Appendix I protection, except the West Greenland population which is included in Appendix II. The parties have expressed their wish to keep minke whales (as well as gray whales) in Appendix I by rejecting proposals from Japan and Norway to transfer minke whales

⁵⁵The doctrine of abuse of rights provides that a country may not exercise a right in a way that injures the rights of others. See *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, AB-1998-4, para. 158 (Oct. 12, 1998)[hereinafter *Shrimp/Turtle*]. The doctrine of abuse of rights has found support in dicta of two cases of the Permanent Court of International Justice. *Certain German Interests in Polish Upper Silesia*, 1926 P.C.I.J., (ser. A) No. 7, at 30 (stating that such abuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove its statement"); *Free Zones Case*, 1930 P.C.I.J. (ser. A) No. 24, at 12.

⁵⁶CITES, *supra* note 2, at art. II(1).

from Appendix I to Appendix II in 1994,⁵⁷ 1997,⁵⁸ and 2000.⁵⁹

Because Japan maintains reservations for minke, Bryde's and sperm whales, it is technically not a party to CITES for these species. Nonetheless, Japan has issued introduction from the sea certificates in some years.⁶⁰ Neither the reservation nor the issuance of introduction from the sea certificates prevents a finding that Japan is diminishing the effectiveness of CITES.

First, the reservation itself is cause for certification. In 1991, the Departments of Interior and Commerce certified Japan under the Pelly Amendment for diminishing the effectiveness of CITES, by its continued trade in endangered hawksbill sea turtles (*Eretmochelys imbricata*) pursuant to a reservation. Even when Japan announced that it would sharply limit hawksbill sea turtle imports and ultimately end trade by a specific date (December 1992) and eliminate its reservation by 1994, the Department of Interior announced that the Pelly certification would remain in effect until Japan removed its CITES reservations and ceased trade in sea turtles.⁶¹

The case for Pelly certification regarding whales is more compelling, because Japan has never said that it would withdraw its reservations and it continues to trade in tons of whale meat. Officials from the Japanese Fisheries Agency estimate that the volume of cetacean meat on the market, including species protected by CITES, is between 4,000 and 5,000 tons and that 70% of that meat is unidentified by type.⁶² Japan's reservation is thus leading to a huge commercial market for whale meat. Merely by maintaining the reservation, Japan diminishes the effectiveness of CITES because huge volumes of protected cetacean meat is sold commercially.

Further, Japan's failure to label and identify specific types of whale meat ensures that it will be unable to determine whether meat derives from whales for which valid CITES permits

⁵⁷CITES, Com.I 9.10, Summary Report of the Committee I Meeting, Tenth Session, Ninth Meeting of the Conference of the Parties, Nov. 15, 1994.

⁵⁸CITES, Com.I 10.8, Summary Report of the Committee I Meeting, Eighth Session, Tenth Meeting of the Conference of the Parties, June 16, 1997; CITES, Com.I 10.9, Summary Report of the Committee I Meeting, Ninth Session, Tenth Meeting of the Conference of the Parties, June 17, 1997.

⁵⁹CITES, Com.I 11.7, Summary Report of the Committee I Meeting, Seventh Session, Eleventh Meeting of the Conference of the Parties, April 15, 2000; CITES, Com.I 11.8, Summary Report of the Committee I Meeting, Eighth Session, Eleventh Meeting of the Conference of the Parties, April 15, 2000.

⁶⁰Japan issued introduction from the sea certificates for minke at least for the years 1994 (351 certificates), 1995 (540), 1996 (456), and 1997 (533). Personal communication with Robert Brownell, National Oceanic and Atmospheric Administration (Sept. 12, 2000).

⁶¹See 57 Fed. Reg. 7774 (Mar. 4, 1992).

⁶²See *Research Whale DNA to Be Logged*, JAPAN TIMES, Nov. 10, 2000.

have been issued. As a result, Japan will be unable to report accurately to CITES concerning the volume of trade in whale meat. Accurate reporting is essential to the CITES regime. The CITES Secretary General has written that annual reports provide an "invaluable element for the assessment of the conservation status of the species concerned."⁶³ CITES Resolution Conf. 11.17 states that the annual reports provide the "only means of monitoring the implementation of the Convention and the level of international trade in species of species include in the appendices."⁶⁴ Thus, the reporting problems that flow from the reservation and failure to identify whale meat products diminishes the effectiveness of CITES.

Article III(5) also prohibits introductions from the sea — taking a species in the marine environment not under the jurisdiction of any State and introducing that species into the jurisdiction of a country — of Appendix I species, if that introduction will be detrimental to the survival of the species. As described in Section I(B), the lack of accepted population estimates makes any killing and introduction from the sea of minke, Bryde's and sperm whales potentially detrimental to the survival of these species. The serious taxonomic and identification problems that exist for minke, Bryde's and sperm whales make those killings and introductions far more likely to be detrimental to whale species. Given these problems, Japan's "non-detriment" findings are unlikely to accurately gauge the impact of such removals. Thus, any introductions from the sea diminish the effectiveness of CITES, even though Japan remains with its legal right to take a reservation.

Moreover, Article III(5) prohibits introductions from the sea of Appendix I species, including minke, Bryde's and sperm whales, for primarily commercial purposes. The parties have interpreted "primarily commercial purposes," in CITES Resolution 5.10, to mean "all uses whose non-commercial aspects do not clearly predominate." The parties reinforced this prohibition against commercial trade in cetaceans in CITES Resolution 2.9 by "agree[ing] not to issue any import or export permit, or certificate for introduction from the sea, under this Convention for primarily commercial purposes for any specimen of a species or stock protected from commercial whaling by the International Convention for the Regulation of Whaling."⁶⁵

⁶³WILLEM WIJNSTEKERS, THE EVOLUTION OF CITES 191 (4th ed. 1995).

⁶⁴CITES, Resolution Conf. 11.17.

⁶⁵CITES Resolution Conf. 2.9 recalls that the great whales have not recovered from the depletion brought on by commercial exploitation and observes that "any commercial utilization of species and stocks protected by the IWC jeopardizes their continued existence, and that trade in specimens of these species and stocks must be subject to particularly strict regulation in order not to endanger further their survival." CITES Resolution Conf. 2.9 also recognizes that commercial harvesting by nationals of non-IWC member nations "diminishes the effectiveness of the protective regime of the IWC and threatens to prevent the recovery of those protected species and stocks." Although a moratorium on commercial harvesting was not yet in effect, presumably the CITES parties limited this provision to non-parties of the ICRW because they believed that parties would abide by the moratorium. Certainly, a harvest amounting to a commercial harvest by a party would also diminish the effectiveness of the ICRW and the protective

If Japan issues introduction from the sea certificates, it must be issuing those certificates inconsistently with Article III(5) and Resolution 2.9, because whale meat is sold openly in markets and restaurants — a "primarily commercial purpose." Although these sales derive from so-called scientific research, the sales are still primarily commercial, because the non-commercial aspects do not clearly predominate. CITES Resolution 5.10 recognizes that scientific research may not be a primarily commercial purpose, but only where "the scientific purpose is clearly predominant . . . and the resale, commercial exchange or exhibit for economic benefit of the specimens is not the primary intended use." It is unlikely that scientific purposes "clearly predominate." The findings of the IWC Scientific Committee that Japan's research program is not required for management purposes suggests that the primary purpose of the introductions is commercial. With 4,000 to 5,000 tons of whale meat on the market and with total sales of about \$27-36 million annually,⁶⁶ the enterprise is clearly very large and very commercial. As such, the issuance of those certificates would be inconsistent with Article III(5) and CITES Resolution 5.10, which prohibit the issuance of introduction from the sea certificates for commercial purposes.

In addition, Japan's claim that the trade is not primarily commercial, because funds generated from the sale of whale meat are used for further research, is untenable. Article III(5) specifically refers to the *purpose* for which the specimen will be used, not the destination of the proceeds, for determining whether a transaction is commercial. The parties have rejected several resolutions in recent years that attempt to change this basic premise of Article III. Most recently, South Africa proposed to redefine "primarily commercial purposes" at COP11 by defining imports that have benefits for conservation as non-commercial. The Secretariat, as well as several parties and observers, stated that this proposal was not in accordance with Article III, because the relevant inquiry was "whether the purpose of an import is primarily commercial."⁶⁷ If this were not true, a country could export Appendix I specimens, such as ivory souvenirs, and claim that the sale was for scientific, non-commercial purposes provided that the funds from the sale were used for scientific purposes. Thus, the huge market created by the Japanese introductions of minke, Bryde's, and sperm whales, coupled with the IWC findings that the Japanese do not have valid management reasons for doing so, ensure that these introductions from the sea are for primarily commercial purposes.

The fact that the IWC Resolution 1986-2 asks countries to utilize whale meat from a scientific research program for primarily local consumption is not a defense; Japan still diminishes CITES by engaging in trade inconsistent with CITES rules. The ICRW and CITES

regime of the IWC. CITES Resolution 2.9, "Trade in Certain Species and Stocks of Whales Protected by the International Whaling Commission from Commercial Whaling" (1979).

⁶⁶*Japan's Whalers Bring Home the Blubber*, Associated Press, Sept. 5, 2000.

⁶⁷CITES Doc. 11.43, at 1-2.

are legally distinct international agreements of equal effect and Japan has responsibilities to both agreements. Further, IWC Resolution 1986-2 does not require that Japan consume the meat; rather, its purpose is to ensure that meat taken pursuant to a special permit is not exported.⁶⁸

Moreover, the IWC has stated repeatedly that Japan's scientific program fails to meet the criteria for scientific whaling. Japan cannot benefit from IWC resolutions when it is in Japan's self-interest and simultaneously ignore and contravene other resolutions relating to scientific whaling that it chooses not to comply with.

In sum, by maintaining a reservation, Japan diminishes the effectiveness of CITES. Japan fails to properly identify whale meat in the market and will be unable to report accurately on its trade in whale meat. This too diminishes the effectiveness of CITES. Further, Japan's actions are inconsistent with the rules of CITES relating to the issuance of introduction from the sea permits. Japan apparently is also ignoring the recommendation in CITES Resolution Conf. 2.8 that the parties "use their best endeavours to apply their responsibilities under the Convention in relation to cetaceans." Instead, nationals of Japan are killing whales and engaging in commercial trade. The Secretary of Interior must certify Japan as diminishing the effectiveness of CITES.

II. Japan's Actions Warrant Trade Restrictions that Target Products Relating to Whales or to Those Companies Involved in Whaling or Whale Meat Trade

Polite pleadings and high level diplomatic channels have been insufficient to bring Japan into compliance with the rules of the IWC and CITES. Japan apparently pays scant attention, if any, to the opinions of the majority of IWC members. As Prime Minister Helen Clark of New Zealand stated, "Japan's action defies a resolution condemning its whaling programme . . . and it defies top-level representations from President Clinton, Tony Blair, and others."⁶⁹

Moreover, the United States has certified Japan in 1974 for exceeding quotas established by the IWC and in 1995 for continued whaling in the Southern Ocean Sanctuary. The 1974 certification is generally regarded as convincing Japan (as well as the Soviet Union) to comply

⁶⁸See CHAIRMAN'S REPORT OF THE 39TH MEETING OF THE INTERNATIONAL WHALING COMMISSION 11-12 (1987) ("The [Working] Group was unable to reach consensus in the discussions, and presented a new draft resolution, including a paragraph recommending that the products from special permit catches should not enter international trade, over which divergent opinions were expressed . . . Oman then introduced a new draft resolution, in which the trade paragraph was replaced by one recommending that products from whales taken under scientific permit should not be used for purposes other than scientific research or local consumption as food.. . .").

⁶⁹Media Statement, "NZ Deplores New Japanese Whaling Plans in North Pacific" (July 29, 2000).

with the IWC quotas.⁷⁰ Without the prospect of other whaling options, however, the 1995 certification, in the absence of trade sanctions, failed to convince Japan to alter its scientific whaling activities.

The time has come for the Department of Interior to certify Japan as diminishing the effectiveness of CITES and to recommend to the President that significant trade restrictions be imposed against Japan.

The petitioners believe that trade restrictions should target products that may contain whale products derived from Japan's scientific whaling. In addition, trade restrictions should focus on those companies that engage in whaling, support the whaling operation, or engage in trade in whale meat. Petitioners have identified the following companies and products as falling within these categories.

Kyodo Senpaku. Kyodo Senpaku owns the vessels used for scientific whaling.⁷¹ Its shareholders include Nippon Suisan and Kyokuyo.

Nippon Suisan (also **Nippon Suisan Kaisha**) is the second largest marine/fish products company in Japan. It processes products such as "surimi," fish paste flavored with crab meat (which is made in the United States), and EPA (an unsaturated fatty acid used in pharmaceuticals).⁷² It also produces frozen sushi and builds ships. Fresh and frozen fish accounted for 53% of its revenues in 1999.⁷³ It has about 45 subsidiaries. It is a major shareholder in Anzco, one of the world's biggest natural sausage casing companies.

Kyokuyo is Japan's fourth largest marine/fish products company. It catches, processes, and cans fish and sells fresh, frozen, and salted seafood.⁷⁴ Its sales of fresh, frozen and salted marine product accounted for 60% of its 1999 revenues.⁷⁵

⁷⁰H.R. REP. NO. 95-1029, 95 Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 1768, 1773.

⁷¹*See* Tim Large, *Japan, Norway want to Harpoon IWC Ban on Gray, Minke Whales*, DAILY YOMIURI SHIMBUN, Mar. 21, 2000.

⁷²Hoover's Company Capsule Database, Hoover No. 56071.

⁷³Wright Analysis, *available at* <http://profiles/wisi.com/profiles/script...pinfo.asp?cusip=C39292000&B1=Get+Profile>.

⁷⁴Hoover's Company Capsule Database, Hoover No. 56816.

⁷⁵Wright Analysis, *available at* <http://profiles/wisi.com/profiles/script...pinfo.asp?cusip=C39283640&B1=Get+Profile>.

III. The Pelly Amendment Is Consistent with the GATT

The Pelly Amendment, as a measure to ensure the protection of species and the environment when nationals of a country diminish the effectiveness of international fishery and endangered and threatened species programs, is consistent with the Article XX environmental exceptions to the GATT. Article XX reads in relevant part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .

- (b) necessary to protect human, animal or plant life or health;
- (d) necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of [the GATT]. . . ;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

An analysis of the application of Article XX begins with a determination that the measure is justified under sub-paragraph (b), (d), or (g). If provisionally justified under a specific exception, then further analysis of the same measure is required under the introductory clause, or chapeau, of Article XX.⁷⁶

At the outset, it should be noted that the structure of the Pelly Amendment, *Tuna/Dolphin I* ruled that the Pelly Amendment was consistent with the GATT to the extent that it authorizes, but does not require, measures inconsistent with the GATT.⁷⁷ The application of trade restrictions under the Pelly Amendment, as well as the timing of the petition in the course of WTO jurisprudence, raise several issues of first impression. For example, the trade restrictions imposed pursuant to the Pelly Amendment, while certainly designed to protect species, are also linked to the enforcement of international agreements. This dual purpose of the Pelly Amendment makes more difficult the precise identification of the "measure" that must be analyzed and which must "relate to" the conservation of exhaustible natural resources under Article XX(b). Nonetheless, Section A(2) below concludes that *Reformulated Gasoline* and

⁷⁶*United States — Standards for Reformulated and Conventional Gasoline*, AB-1996-1, Doc. No. 96-1597, at 22, April 29, 1996, *reprinted in* 35 I.L.M. 603 (May 1996)[hereinafter *Reformulated Gasoline*]; *Shrimp/Turtle*, *supra* note 55, at 118-119.

⁷⁷*United States — Restrictions on Imports of Tuna*, GATT Doc. No. DS21/R, paras. 5.21 (Sept. 3 1991)(unadopted), *reprinted in* 1993 BDIEL AD LEXIS 1; 30 I.L.M. 1594 (1991)[hereinafter *Tuna/Dolphin I*].

Shrimp/Turtle require an analysis of the "general structure and design" of the Pelly Amendment, of which sanctions are but one part.

In addition, recent decisions of the WTO have significantly modified interpretations of Article XX. *Reformulated Gasoline* and *Shrimp/Turtle* have moved several requirements previously found within the enumerated exceptions of Article XX to the chapeau. In doing so, these two Appellate Body decisions also transformed the meaning of Article XX(g). In addition to transforming Article XX(g), these decisions also illuminate the meaning of Article XX(b) remains unclear, and Section B discusses Article XX(b) in light of these decisions.

A. Article XX(g): Trade-related Measures of the Pelly Amendment Relate to the Conservation of Exhaustible Natural Resources

WTO members may impose measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. The Pelly Amendment meets the three part test established by GATT and WTO panels under Article XX(g). First, the Pelly Amendment establishes a policy of conserving exhaustible natural resources. Second, the Pelly Amendment relates to the conservation of that exhaustible natural resource. Third, the measures of the Pelly Amendment are made effective in conjunction with restrictions on domestic production or consumption.

1. Whales are Exhaustible Natural Resources

The Pelly Amendment seeks to protect the environment and species through the enforcement of international fisheries programs and international endangered and threatened species programs. While the Pelly Amendment may be used to protect a variety of species, this petition relates to whales, which clearly represent an "exhaustible natural resource." Similarly, previous panels have found clean air,⁷⁸ tuna,⁷⁹ herring and salmon,⁸⁰ and sea turtles⁸¹ to be exhaustible natural resources. As the *Shrimp/Turtle* Appellate Body said:

One lesson that modern biological sciences teach us is that living species, though

⁷⁸*Reformulated Gasoline*, *supra* note 76, at 19.

⁷⁹*United States — Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted February 22, 1982, BISD 29S/91, para. 4.9; *United States — Restrictions on Imports of Tuna*, Panel Report DS29/R, June 1994, para. 5.15, *reprinted in* 33 I.L.M. 839 (1994); 1994 BDIEL AD LEXIS 54 [hereinafter *Tuna/Dolphin II*]; *Tuna/Dolphin I*, *supra* note 73, at paras. 5.30–5.34.

⁸⁰*Canada — Measures Affecting the Exports of Unprocessed Herring and Salmon*, 35S/98, para. 4.4 (adopted March, 22, 1988).

⁸¹*Shrimp/Turtle*, *supra* note 55, at paras. 128-131.

in principle capable of reproduction and, in that case "renewable", are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as "finite" as petroleum, iron ore and other non-living resources.⁸²

The population crashes over the last century for most species of whales demonstrate the reality of that quotation and just how vulnerable whale populations are to depletion, exhaustion, and extinction. For example, perhaps only 400-1,400 blue whales remain globally after intense whaling radically depleted those populations.⁸³ The United States recognizes the precarious nature of minke, Bryde's and sperm whale populations by listing sperm whales as endangered under the Endangered Species Act⁸⁴ and prohibiting the taking of all three species under the Marine Mammal Protection Act.⁸⁵ Moreover, *Tuna/Dolphin II* found,⁸⁶ and *Shrimp/Turtle* suggested,⁸⁷ that Article XX(g) does not impose jurisdictional limitation on the application of Article XX(g) for resources having an international scope, such as whales which migrate through the waters of many countries, sometimes including waters of the United States.

2. The Pelly Amendment Relates to the Conservation of Exhaustible Natural Resources

To determine whether a measure relates to the conservation of exhaustible natural resources, WTO Appellate Body decisions make clear that the relevant relationship to analyze is not solely the relationship of the trade sanction itself to conservation, but rather the general structure and design of the measure as it relates to conservation. The *Reformulated Gasoline* Appellate Body expressly refused to review the Article III-inconsistent baseline establishment provisions "totally divorced from other sections of the Gasoline Rule which certainly constitute part of the context of these provisions."⁸⁸ Affirming that analysis, the *Shrimp/Turtle* Appellate Body iterated that it must examine the "relationship between the general structure and design of

⁸²*Id.* at para. 128.

⁸³IWC website, available at <http://ourworld.compuserve.com/homepages/iwcoffice/Estimate.htm>

⁸⁴16 U.S.C. §§1531-1544; 50 C.F.R. §17.11.

⁸⁵16 U.S.C. §1361 *et seq.*, §§1371, 1372.

⁸⁶*Tuna/Dolphin II*, *supra* note 79, at 5.20.

⁸⁷*Shrimp/Turtle*, *supra* note 55, at para. 133.

⁸⁸*Reformulated Gasoline*, *supra* note 76, at 19.

the measure" and the policy goal it purports to serve.⁸⁹

The impact of this interpretation of Article XX is substantial. In *Reformulated Gasoline*, for example, the Appellate Body reversed the panel's ruling that the "less favourable treatment" accorded by the baseline establishment rules were not related to conservation.⁹⁰ Instead, the Appellate Body analyzed the relationship between the rules for establishing baseline pollutant levels in gasoline and the conservation of clean air; it did not analyze the discriminatory part of the baseline rules and conservation of exhaustible resources.⁹¹ By changing the focus of the analysis to the general structure and design of the measure, the Appellate Body determined that the baseline pollutant levels provided the basis upon which to measure air quality and that the "baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air. . . ."⁹² As such, the baseline establishment rules related to the conservation of exhaustible natural resources.

Similarly, while Section 609 included the use of import bans on shrimp, the *Shrimp/Turtle* Appellate Body looked beyond the import bans, finding that the "general structure and design of Section 609 *cum* implementing guidelines," were "fairly narrowly focused."⁹³ The Appellate Body found particularly instructive Section 609's exemptions from the ban, not the ban itself. It stated that the exemption from the ban for a country that required the use of turtle excluder devices on shrimp nets, which greatly reduces turtle mortality, directly connected to the conservation of sea turtles.⁹⁴ As such, it found that Section 609 was "not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality for shrimp."⁹⁵ It concluded that Section 609 relates to the conservation of sea turtles because:

Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation

⁸⁹*Shrimp/Turtle*, *supra* note 55, at para. 137.

⁹⁰*Reformulated Gasoline*, *supra* note 76, at 14-19.

⁹¹*Id.* at 16.

⁹²*Id.* at 19.

⁹³*Shrimp/Turtle*, *supra* note 55, at para. 139.

⁹⁴*Id.* at para. 140.

⁹⁵*Id.* at para. 141.

of sea turtle species. The means are, in principle *reasonably related* to the ends.⁹⁶

Importantly, neither *Reformulated Gasoline* nor *Shrimp/Turtle* require a direct nexus between the import restrictions and the protected resource for a measure to relate to the conservation of exhaustible natural resources. For sure, *Shrimp/Turtle* noted that Section 609's shrimp import restrictions took account of the impact of the harvesting method on sea turtles.⁹⁷ It held, however, that the totality of Section 609 *together with* the implementing guidelines constituted the means that were reasonably related to the ends.⁹⁸ Thus, *Shrimp/Turtle* does not require a direct nexus between the specific products subject to import restrictions and the resource being protected. While the actual sanctions cannot be ignored, they constitute only one element of the total context of the measure — its *general structure and design*.⁹⁹

Viewed in this light, the Pelly Amendment relates to the conservation of exhaustible natural resources. The legislative history confirms that the Pelly Amendment is intended to "reduc[e] the alarming international trade in endangered and threatened species"¹⁰⁰ by providing the President "with authority to encourage other nations to comply with [CITES]"¹⁰¹ as well as the ICRW.

To accomplish this goal, the Pelly Amendment (22 U.S.C. §1978) establishes a two-step general structure and design to conserve exhaustible natural resources at risk due to fishing and trade that diminish the effectiveness of international fisheries or endangered or threatened species programs. First, it requires the Secretary of Commerce or Interior to determine that nationals of a country are in fact diminishing the effectiveness of such a program. Only after this finding is made may the relevant Secretary recommend trade sanctions to the President. Second, the President may then employ sanctions because nationals are diminishing the effectiveness of an applicable program and those sanctions are needed to protect species and encourage compliance with the program.

⁹⁶*Id.* (emphasis added).

⁹⁷*Id.* 141 (stating that Section 609 was "not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality for shrimp.").

⁹⁸*Id.*

⁹⁹In addition, the *application* of the measure, including its trade sanctions, is evaluated later under the chapeau. *Id.* at para. 141, note 128.

¹⁰⁰H.R. No. 95-1029, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 1768, 1773.

¹⁰¹*Id.* at 1775.

In the present case, Japan's program to kill 40 minke whales in the Southern Hemisphere and 100 minke whales, 50 Bryde's whales, and 10 sperm whales in the North Pacific clearly diminishes the effectiveness of the ICRW's moratorium on the killing of all whales as well as its efforts to control scientific whaling. Because of the problems identified in Section I, Japan's killing places these species at substantial risk. The commercial trade in whale meat keeps markets open for these at risk species, which diminishes CITES efforts to protect species at risk due to trade.

Thus, both steps in the Pelly process relate to the conservation of whales. The finding that a country is diminishing the effectiveness of the ICRW and IWC is directly related to the conservation of exhaustible natural resources. If nationals are diminishing the effectiveness of the ICRW, IWC, and CITES, they jeopardize exhaustible natural resources – whales – because the regimes of these international agreements are designed expressly to conserve and protect the species from the detrimental effects of whaling (ICRW/IWC) and trade (CITES). In many cases, certification alone encourages countries to implement their international obligations.

The sanctions themselves become just one element of this process to encourage a country to comply with its international obligations. A unique aspect of the Pelly Amendment is that it cannot target its sanctions in the same way that the Shrimp/Turtle regulations linked the conservation of sea turtles to the product that causes sea turtle mortality. In the case of whales, no member of the IWC may kill any whale for commercial purposes. CITES prohibits all trade in whale products. Thus, import restrictions on whale products would be totally ineffectual, because U.S. and Japanese obligations under CITES already prohibit trade in whale products. In fact, these are the very international obligations that the Pelly Amendment seeks to enforce.

So long as sanctions under the Pelly Amendment target products bear some relationship to the activity that diminishes the effectiveness of an international fisheries or endangered or threatened species program, the Pelly Amendment as a whole – the "measure" – constitutes a "means . . . reasonably related to the ends."¹⁰²

Petitioners recognize that the United States may wish to tailor trade restrictions to products relating to whaling and products from those companies engaged in whaling or the whale meat trade, as this may tend to encourage compliance with international agreements more effectively. For that reason, we proposed in Section II that sanctions target those products that may include whale parts and those products produced by those companies involved in the scientific whaling program and the trade in whale meat. By closely linking the sanctions to the industry and companies involved in the activity that diminishes the effectiveness of the ICRW/IWC and CITES, the Pelly Amendment ensure that it is a measure relating to the conservation of exhaustible natural resources. This would be true even under a more restrictive

¹⁰²*Shrimp/Turtle*, *supra* note 55, at 141.

reading of *Shrimp/Turtle*.

3. Such Measures Are Made Effective in Conjunction with Restrictions on Domestic Production and Consumption

The requirement of Article XX(g) to ensure that such measures are made effective in conjunction with restrictions on domestic production or consumption "is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."¹⁰³ The requirement allows a broad review of the laws of a country. For example, *Shrimp/Turtle* analyzed whether the Endangered Species Act (ESA) as a whole imposed restrictions similar to Section 609 and made clear that the entire statutory scheme is relevant for determining whether an even-handed approach is taken.¹⁰⁴

While the Pelly Amendment itself does not prohibit U.S. citizens from killing and trading minke, Bryde's, and sperm whales, the Marine Mammal Protection Act (MMPA) does. The MMPA prohibits any person, vessel, or other conveyance subject to the jurisdiction of the United States from taking any marine mammal on the high seas.¹⁰⁵ The MMPA also prohibits the taking of marine mammal in waters under the jurisdiction of the United States unless expressly authorized by an international treaty that pre-dates the MMPA's prohibitions.¹⁰⁶ The MMPA further prohibits any transport, purchase, sale, export, or offer to purchase, sell, or export any marine mammal or marine mammal product, except under limited circumstances.¹⁰⁷ Thus, through the Pelly Amendment, the U.S. would simply ask Japan to implement the moratorium in place under the ICRW in the same way that the MMPA prohibits the taking of marine mammals, including minke, Bryde's and sperm whales. The ESA also prohibits the taking – any killing, harming, and harassing of, and trade in, sperm whales,¹⁰⁸ except under extremely limited circumstances.¹⁰⁹

¹⁰³*Reformulated Gasoline*, *supra* note 76, at 20-21 (emphasis in original).

¹⁰⁴*Shrimp/Turtle*, *supra* note 55, at para. 144 (analyzing the civil and criminal penalties of the Endangered Species Act as well as the regulations requiring U.S. shrimp trawlers to use approved turtle excluder devices and restrict the duration of tow-times in areas where significant shrimp mortality occurs due to shrimping).

¹⁰⁵16 U.S.C. §1372(a)(1).

¹⁰⁶*Id.* at §1372(a)(2).

¹⁰⁷*Id.* at §1372(a)(4).

¹⁰⁸16 U.S.C. §1538(a).

¹⁰⁹*Id.* at §1539.

Further, the scientific research exceptions of the ICRW mirror those of the MMPA. IWC Resolution 1995-9 recommends that scientific research using lethal means should "only be permitted in exceptional circumstances where the questions address critically important issues" that cannot be addressed through non-lethal means. Similarly, the MMPA permits lethal scientific research on any marine mammal only if the applicant demonstrates that a nonlethal method of conducting the research is not feasible, and only if the Secretary of Commerce determines that the research fulfills a "critically important research need."¹¹⁰

With regard to encouraging implementation of the ICRW, the Pelly Amendment asks no more, perhaps even less, than required by the MMPA and the ESA. The Pelly Amendment is thus an even-handed measure.

B. Article XX(b): Trade-related Measures under the Pelly Amendment Are Necessary for the Protection of Animal Life

Article XX(b) exempts measures inconsistent with the core obligations of the GATT if they are "necessary for the protection of human, animal, or plant life or health." Interpretation of Article XX(b) is presently in a state of severe flux. First, a recent, although unpublished, decision has found that a complete ban on imports of asbestos products meets the Article XX(b) test¹¹¹ — the first time any measure has been found to meet an Article XX environmental exception. Moreover, the WTO Appellate Body decisions in *Shrimp/Turtle* and *Reformulated Gasoline* have placed many elements previously considered in the "necessary" analysis instead within an analysis of the chapeau. For example, whereas previous panels required a country to engage in "international negotiation" as a demonstration of necessity,¹¹² *Shrimp/Turtle* and *Reformulated Gasoline* place that finding within the chapeau.¹¹³

A general rule of treaty interpretation, previously adopted by the *Reformulated Gasoline* Appellate Body,¹¹⁴ prohibits an interpreter from reducing whole clauses or paragraphs of a treaty to redundancy or inutility.¹¹⁵ Given the radically different language of Article XX(b) and the

¹¹⁰16 U.S.C. §1374(c)(3).

¹¹¹See Frances Williams, *WTO Backs French Ban*, FINANCIAL TIMES, at 11, July 26, 2000.

¹¹²See, e.g., *Tuna/Dolphin I*, *supra* note 77, at para. 5.28.

¹¹³*Shrimp/Turtle*, *supra* note 55, at para. 166-172; *Reformulated Gasoline*, *supra* note 72, at 27.

¹¹⁴*Reformulated Gasoline*, *supra* note 76, at 23.

¹¹⁵See, e.g., *Corfu Channel Case*, 1949 I.C.J. Reports 24; *Territorial Dispute Case (Libyan Arab Jamahiriya v Chad)*, 1994 I.C.J. Reports 23; OPPENHEIM'S INTERNATIONAL LAW, 1280-1281 (Jennings & Watts eds., 9th ed. 1992).

chapeau, as well as the recent decisions interpreting the chapeau, one *must* interpret "necessary" differently from the chapeau in order to give it effect and purpose.

The evolution — really a transformation — of Article XX(g) provides WTO precedent for such a reexamination and reinterpretation. A long line of decisions previously held that the phrase "relating to" in Article XX(g) meant "primarily aimed at."¹¹⁶ Further, those same cases interpreted the phrase "in conjunction with" to mean "primarily aimed at rendering effective" the restrictions on domestic productions and consumption.¹¹⁷

Reformulated Gasoline began the process of making interpretations of Article XX(g) consistent with the meaning of the terms actually used. It more accurately interpreted "relating to" as requiring a "substantial relationship" between the measures at issue and the conservation of exhaustible natural resources.¹¹⁸ It also found that the phrase "made effective in conjunction with" domestic restrictions required even-handedness in the imposition of restrictions; it did not require that the international restrictions *make effective* the domestic restrictions.¹¹⁹ *Shrimp/Turtle* affirmed these interpretations and furthered the transformation of Article XX(g) by rejecting implicitly an interpretation of "in conjunction with" that means "primarily aimed at."¹²⁰ It also found that the "substantial relationship" referred to by *Reformulated Gasoline* included a "close and genuine relationship of ends and means" as well as means that are "reasonably related to the ends."¹²¹

An examination of the plain language of Article XX(b) can also yield a more rational interpretation than those provided by previous panels. A rationalized interpretation of Article XX(b) begins, as it did with Article XX(g), by using the fundamental rules of treaty interpretation, as provided by the Vienna Convention on the Law of Treaties (Vienna Convention).¹²² Perhaps the Vienna Convention's most fundamental rule requires a treaty to be

¹¹⁶See, e.g., *Tuna/Dolphin I*, *supra* note 77, at paras. 5.30-5.34; *Tuna/Dolphin II*, *supra* note 79, at para. 5.22.

¹¹⁷See, e.g., *Tuna/Dolphin I*, *supra* note 77, at paras. 5.31; *Tuna/Dolphin II*, *supra* note 79, at para. 5.22.

¹¹⁸*Reformulated Gasoline*, *supra* note 76, at 19.

¹¹⁹*Id.* at 20-21.

¹²⁰*Shrimp/Turtle*, *supra* note 55, at paras. 143-145 (failing to even mention the phrase "primarily aimed at" in relation to "in conjunction with").

¹²¹*Id.* at paras. 136, 141.

¹²²Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27. 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980)[hereinafter Vienna Convention]. Vienna Convention codifies customary international law regarding interpretation of treaties. IAN M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF

interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in light of its object and purpose.¹²³

The term "necessary", when used in the legal and statutory sense, differs from the dictionary meaning of the term. Just as courts around the world have interpreted "necessary" in its legal sense, so too should WTO dispute resolution bodies. Whereas the dictionary defines "necessary" as something "needed to achieve a certain result or effect"¹²⁴ or "essential, indispensable,"¹²⁵ the legal definition carries a more flexible meaning. As one international legal scholar notes, "there should be a difference between what is necessary and what is essential (what is necessary may not always be also essential)."¹²⁶

In the legal context, "necessary" means "being appropriate and well adapted to fulfilling an objective."¹²⁷ In fact, courts in the United States and Australia, as well as the European Court of Human Rights,¹²⁸ have rejected arguments that "necessary" means "essential or

TREATIES 6-23 (1973); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 608 (5th ed. 1998)(stating that "a good number," although not all, of the provisions of the Vienna Convention express general international law, and those that do not "constitute presumptive evidence of emergent rules of general international law."). This textual approach to interpretation has attained the status of customary international law. *See, e.g.*, *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, 1994 I.C.J. Reports 6; OPPENHEIM'S *INTERNATIONAL LAW*, 1271-1275 (Jennings & Watts eds., 9th ed. 1992).

¹²³Vienna Convention, *supra* note 122, at art. 31.

¹²⁴THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 877 (William Morris ed., 1979).

¹²⁵WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1511 (1986).

¹²⁶C.F. AMERASINGHE, *PRINCIPLES OF INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* 97 (1996).

¹²⁷*See* BLACK'S LAW DICTIONARY 1052 (Bryan A. Garner ed.-in-chief, 7th ed. 1999)(defining "necessary and proper").

¹²⁸In interpreting the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human rights ruled:

The Court notes at this juncture that, whilst the adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), is not synonymous with "indispensable" (cf., in Articles 2 para. 2 (art. 2-2) and 6 para. 1 (art. 6-1), the words "absolutely necessary" and "strictly necessary" and, in Article 15 para. 1 (art. 15-1), the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" (cf. Article 4 para. 3) (art. 4-3), "useful" (cf. the French text of the first paragraph of Article 1 of Protocol No. 1) (P1-1), "reasonable" (cf. Articles 5 para. 3 and 6 para. 1) (art. 5-3, art. 6-1) or "desirable". Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.

"indispensable" in the legal context and have ruled that "necessary" means "appropriate." For example, the U.S. Endangered Species Act (ESA) instructs the Secretary to issue regulations "necessary and advisable to provide for the conservation" of threatened species.¹²⁹ When shrimpers challenged regulations that required the use of turtle excluder devices to protect threatened sea turtles, they claimed regulations could be necessary "only if found actually to save an endangered species from extinction" or to halt the depletion of the species.¹³⁰ The court found that this argument "finds no support" in the ESA.¹³¹ In response to plaintiffs' argument that the regulations were not necessary because they failed to address other serious causes of sea turtle mortality, the court ruled that "regulations need not remedy all evils."¹³² Instead, the ESA's "necessary and advisable" language permits regulations that "promote" conservation of threatened species.¹³³ Of great importance to trade discussion, courts have expressly rejected interpretations of "necessary" that allow an agency to adopt only the least restrictive regulations.¹³⁴

These opinions accord with the intent of the U.S. Congress to provide agencies with

Handyside Case, 1/1976/17/30, para. 48 (Dec. 7, 1976) <<http://www.dhcour.coe.fr/hudoc/ViewRoot.asp?Item=0&Action=Html&X=730010925&Notice=0&Noticemode=&RelatedMode=0>>.

¹²⁹16 U.S.C. §1533(d).

¹³⁰State of Louisiana v. Verity, 853 F.2d 322, 332 (5th Circuit 1988).

¹³¹*Id. See also*, Cayman Turtle Farm, Ltd. v. Andrus, 478 F.Supp 125 (D.D.C. 1979), *aff'd without opinion* (D.C. Cir. Dec. 12, 1980)(rejecting plaintiff's claim that the regulations to protect threatened green sea turtles were too restrictive and that the evidentiary record did not support the Secretary's determination that the regulations were necessary).

¹³²State of Louisiana v. Verity, 853 F.2d at 332, citing two U.S. Supreme Court cases for this "well-established rule," Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110, 69 S.Ct. 463, 465-66, 93 L.Ed. 533 (1949); Central Lumber Co. v. South Dakota, 226 U.S. 157, 160, 33 S.Ct. 66, 67, 57 L.Ed.2d. 164 (1912). Speaking directly to the issue of agency discretion, the court stated that "the agency's decision need not be ideal, so long as it is not arbitrary or capricious, and so long as the agency gave at least minimal consideration to relevant facts contained in the record." *Id.* at 327.

¹³³Christy v. Hodel, 857 F.2d 1324, 1336 (9th Circuit 1988)(stating, "By limiting the Secretary's legislative authority to the promulgation of regulations that promote the 'conservation' of threatened species, Congress has established a standard sufficiently definite and precise to permit the courts to determine whether the Secretary's enactments comport with Congressional will.").

¹³⁴National Rifle Association v. Brady, 914 F.2d 475, 478-481 (4th Circuit 1990). The court expressly rejected the argument that an agency could issue only regulations that were "strictly necessary and the least restrictive means of accomplishing the purposes of the [Gun Control] Act." *Id.* at 478-79. *See also*, Harris v. James, 896 F.Supp. 1120 (M.D. Alabama 1995); Smith v. Vowell, 379 F.Supp. 139 (W.D. Texas), *aff'd*, 504 F.2d 759 (5th Circuit 1974)(not requiring the Secretary of Health and Human Services to show that other methods of transporting beneficiaries of a federal medical program were more effective than state funded transportation.).

flexibility. A legislative report concerning the ESA's "necessary" language states that the "Secretary is authorized to issue *appropriate* regulations to protect endangered or threatened species ... Once an animal is on the threatened list, the Secretary has almost an infinite number of options available to him with regard to permitted activities for those species."¹³⁵ Clearly, Congress did not intend "necessary" to mean indispensable or least restrictive. Instead, this legislative history mirrors the legal definition of "necessary and proper" — something "appropriate and well adapted to fulfilling an objective."¹³⁶

Similarly, the Australian High Court has interpreted constitutional grants of legislative power to extend to all matters "necessary for the reasonable fulfilment of the legislative power" or "necessary to effectuate its main purpose." To bring a law within the reach of the incidental scope of a power, "it is enough that the provision is *appropriate* to effectuate the exercise of the power; one is not confined to what is necessary for the effective exercise of the power."¹³⁷

U.S. courts have also interpreted "necessary" similarly where it appears within an exception to a rule, as it does in Article XX(b) of the GATT. For example, several Indian tribes in the United States have treaty rights to fish at all usual and accustomed places. The Supreme Court has ruled that this right "may, of course, not be qualified by the State," although the state may impose restrictions on the manner of fishing and the size of the take provided they are "necessary for conservation."¹³⁸ Within this context, the State's ability to impose regulations

¹³⁵H.R.REP. NO. 93-412, 93d Cong., 1st Sess. 12 (1973)(emphasis added). A committee report is not necessarily conclusive, but "represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen*, 396 U.S. 168, 186, 90 S.Ct. 314, 324, 24 L.Ed.2d 345 (1969).

¹³⁶BLACK'S LAW DICTIONARY, *supra* note 127, at 1052. One court ruled that a regulation promulgated pursuant to a "necessary" delegation of power should be upheld if the regulations "conform to the purposes and policies of the Act and if they do not contravene any of its terms." *Rex Chainbelt, Inc. v. Volpe*, 486 F.2d 757, 761 (7th Circuit 1973). Concerning interpretations of legislative power, the High Court of Australia has said that "unless there is something in the context of the rest of the Constitution to indicate that a narrower interpretation will 'best carry out its object and purpose', ambiguities must be resolved in favour of a broad interpretation, given that the words appear in a Constitution." *Grain Pool of Western Australia v. Commonwealth* [2000] HCA [High Court of Australia] 14, para. 119 (23 March 2000).

¹³⁷*Airservices Australia v. Canadian Airlines International Ltd.*, [1999] HCA 62, C22/1998, at 234-235 (citations omitted)(emphasis added).

¹³⁸*See, e.g., Puyallup Tribe v. Washington Game Dept.*, 391 U.S. 392 (Puyallup I)(in which Justice Douglas says: "As to a regulation concerning the time and manner of fishing . . . , the power of the State [is] measured by whether [the regulation is] necessary for the conservation of fish."). *See also Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979)(reciting the history of the Puyallup and other cases).

necessary for conservation acts as an exemption to the tribe's otherwise unfettered right to fish.¹³⁹ Courts, however, have never interpreted "necessary" in this context to mean "indispensable," but rather more like "appropriate."¹⁴⁰

An analysis of the WTO agreements also supports this interpretation. First, the drafters of the Uruguay Round agreements knew the difference between the word "necessary" and the phrase "absolutely necessary." For example, they used the phrase "absolutely necessary" in the Agreement on Import Licensing Procedures, one of the many agreements signed as a part of the Uruguay Round in 1994.¹⁴¹ In a context very similar to Article XX(b), the Licensing Agreement states that certain licensing procedures "shall be no more administratively burdensome than absolutely necessary to administer the measure." In treaty interpretation, different words must be given different meanings. *Reformulated Gasoline* recognized this rule when it interpreted distinctions between the phrases "necessary," "relating to" and "in pursuance of" in the enumerated exceptions of Article XX. It stated:

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.¹⁴²

Similarly, if the WTO members intended "necessary" to mean "absolutely necessary", they would have no need to use two different phrases. Thus, "necessary" must mean something different from "absolutely necessary." Whatever "necessary" means, it means something less than "absolutely necessary." Because "appropriate" is the accepted legal definition of "necessary", it is the definition that should apply to the Article XX(b). "Appropriate" certainly creates a lower threshold between the means and the ends than previous panels have held.

¹³⁹Although nontreaty fishermen might be subjected to reasonable state fishing regulation serving any legitimate purpose, "treaty fishermen are immune from all regulation save that required for conservation." *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. at 682.

¹⁴⁰*Puyallup Tribe v. Washington Game Dept.*, 391 U.S. at 398.

¹⁴¹Article 3(2) of the Agreement on Import Licensing provides:

Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure.

¹⁴²*Reformulated Gasoline*, *supra* note 76, at 17-18.

Cast in this light, the Pelly Amendment and trade restrictions imposed pursuant to it are appropriate to protect animal life. Following the instructions of *Reformulated Gasoline* and *Shrimp/Turtle* to review the general structure and design of the measure, the general structure and design of the Pelly Amendment appropriately ties trade restrictions to a country's failure to comply with international fisheries or endangered or threatened species programs. Compliance with international fisheries and endangered species programs is "necessary" for protecting the life of animals. This is especially true when the noncompliance that Pelly seeks to remedy results in the deaths of more than 500 protected animals annually, as with Japan's noncompliance with the rules of the ICRW and IWC. It is also especially true when those deaths are not balanced by management benefits and research that meet critical needs. As described fully in Section I, the IWC's Scientific Committee annual reminders that Japan's whaling fails these basic tests for scientific research whaling demonstrates that killing of these whales has little, if any, scientific or management purpose, and that continued killing of them further endangers minke, Bryde's, and sperm whales.

C. Article XX(d): Trade-Related Measures under the Pelly Amendment are Necessary to Secure Compliance with Laws and Regulations

By implementing the Pelly Amendment and applying trade sanctions against Japan, the United States is acting consistently with Article XX(d) of the General Agreement on Tariffs and Trade which provides an exception for "measures necessary to secure compliance with laws and regulations which are not inconsistent with [the GATT]. . . ." In the United States, as in many other countries, ratified treaties are considered the "supreme Law of the Land."¹⁴³ The ICRW and CITES both certainly qualify as international agreements ratified by the United States. Further, the self-executing or non-self-executing nature of the treaty appears irrelevant for determining whether the treaty is the "law of the land." Not only is customary international law treated as the law of the land,¹⁴⁴ but also, a State has a legal obligation not to defeat the object and purpose of the treaty from the time the treaty is signed.¹⁴⁵ As such, the United States may rely on the treaties themselves for purposes of defining "law" under Article XX(d); it is not limited to the ICRW's implementing legislation (the Whaling Convention Act) and CITES' implementing legislation (the ESA). Because the Pelly Amendment encourages compliance with international agreements and the conservation of exhaustible natural resources, it constitutes a measure

¹⁴³U.S. CONST. art. VI.

¹⁴⁴See THIRD RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §111, note 3 (Based on the implications of *Sabbatino*, the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts). The self-executing or non-self-executing nature of a treaty will, however, determine whether the treaty is enforceable in U.S. courts. *Id.* at §111 and accompanying comments and notes.

¹⁴⁵Vienna Convention, *supra* note 122, at art. 18.

necessary to secure compliance with the laws. In addition, the term "laws" as used in Article XX(d) may simply include "international laws" as Article XX(d) does not expressly qualify laws as "domestic."

The general structure and design of the Pelly Amendment, including its "diminishment" finding and trade restrictions, constitute necessary — that is, appropriate — means for the United States to enforce compliance with the ICRW and CITES. The Pelly Amendment first requires certification that a country is diminishing the effectiveness of an international fisheries or endangered or threatened species program. Only after that determination is made may the President impose discretionary trade restrictions. In this case, the United States has exhausted all avenues of diplomatic persuasion and has participated in broad-based multilateral agreements establishing clear and unequivocal rules for the protection of minke, Bryde's and sperm whales. Japan, while also a signatory to these agreements, blatantly acts in contravention of the letter and spirit of its international obligations. This jeopardizes whales and the future effectiveness of multilateral wildlife agreements. For these reasons, trade sanctions against Japan are necessary — appropriate — to secure compliance with established law.

Japan, by failing to implement its internationally agreed obligations under the ICRW and CITES, also fails to implement the binding international principle of cooperation. The duty to cooperate to solve international problems of "an economic, social, cultural, or humanitarian character" is reflected in Article 1.3 of the U.N. Charter. Article 24 of the Stockholm Declaration extends the duty of cooperation as a means to "control, prevent, reduce, and eliminate adverse environmental effects," and Principle 27 of the Rio Declaration echoes this theme.¹⁴⁶ Article 65 of the U.N. Convention on the Law of the Sea requires parties to cooperate directly or indirectly through appropriate international organizations to conserve and use marine mammals. In the case of whales, it is indisputable that any U.S. action will be taken in accordance with a widely recognized international consensus, reflected by the major multilateral treaties for the protection of wildlife. It is equally indisputable that Japan's actions contravene the will of the international community and that it is failing to cooperate to protect whales. As customary international law is the "law of the land,"¹⁴⁷ the Pelly Amendment is justified under Article XX(d) as a law necessary to secure compliance with the binding international law norm of cooperation.

¹⁴⁶Principle 27 states:

States and people shall cooperate in good faith and in the spirit of partnership in the fulfillment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26, *reprinted* in 31 I.L.M. 874 (1992).

¹⁴⁷*See supra* note 151.

D. Chapeau: Trade-related Measures under the Pelly Amendment Are Not a Means of Arbitrary or Unjustifiable Discrimination or a Disguised Restriction on International Trade

Once provisionally justified under one of the enumerated exceptions, the measure must be analyzed for consistency with the chapeau of Article XX. The chapeau includes three standards:

1. the measure is not applied in a manner which would constitute a means of arbitrary discrimination between countries where the same conditions prevail;
2. the measure is not applied in a manner which would constitute a means of unjustifiable discrimination between countries where the same conditions prevail; and
3. the measure is not a disguised restriction on international trade.

Shrimp/Turtle explained that the preamble to the WTO Agreement provided useful insight into interpreting whether or not these conditions of the chapeau are met. The first paragraph of the preamble states the desire to "protect and preserve the environment and to enhance the means for doing so in a manner consistent with [the Member's] respective needs and concerns at different levels of economic development." That language "must add colour, texture and shading" in the interpretation of the WTO Agreements, including the chapeau.¹⁴⁸ While the preambular language and *Shrimp/Turtle* do not grant environmental measures a presumption of validity, they perhaps establish a "benefit of the doubt" which should be applied when determining the consistency of environmental measures with the chapeau. Of course, this "benefit of the doubt" cannot be abused; while Members have the right to invoke an exception, they also have a duty to respect the rights of other members.¹⁴⁹ Nonetheless, this benefit of the doubt may be applied when balancing the rights of a Member state to use the exceptions of Article XX and the obligation to respect the rights of other Member states.¹⁵⁰

1. Not Applied Arbitrarily or Unjustifiably¹⁵¹

¹⁴⁸*Shrimp/Turtle*, *supra* note 55, at para. 153.

¹⁴⁹*Id.* at para. 156.

¹⁵⁰*See id.* at para. 159 (stating that the "task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of other Members under varying substantive provisions . . .").

¹⁵¹The WTO decisions that interpret the chapeau, have either conflated the discussion and analysis of unjustifiable discrimination and arbitrary discrimination, as in *Reformulated Gasoline*, or failed to explain why certain factors are considered as unjustifiable discrimination whereas other factors are considered as arbitrary

Previous GATT and WTO dispute resolution bodies have focused on several factors in determining whether a measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination. They have assessed whether the party invoking the exception intended some coercive ploy to make the laws of other countries essentially the same as its own. They have also assessed whether the Member invoking the exception had other options available to it and whether it applied the measure in a transparent and fair way. The Pelly Amendment and the trade restrictions suggested in Part II meet these tests for consistency with the chapeau.

a. The Pelly Amendment Is Not Coercive

The *Shrimp/Turtle* Appellate Body emphasized the coercive effect of certain import restrictions. In particular, it found Section 609 to be applied unjustifiably because its coercive effect required countries to adopt essentially the same policy as the United States.¹⁵² That is not the case with the Pelly Amendment. The Pelly Amendment does not ask Japan to meet U.S. standards; it asks Japan to comply with Japan's own international obligations under the ICRW and CITES.

b. The United States Has Exhausted Other Options

GATT and WTO dispute resolution bodies have required, in some way, for the party invoking the exception to demonstrate that it has reviewed other possibilities for accomplishing its conservation or environmental goals. In environmental disputes under the GATT, this requirement was found under Article XX(b).¹⁵³ *Shrimp/Turtle* and *Reformulated Gasoline*, however, elevate that test to the chapeau (as it also did with the "coercion" test discussed in section (a) above).¹⁵⁴ This exhaustion test is sometimes referred to as the "least-trade restrictive test, because dispute resolution bodies often ask if the trade measures chosen were the least trade restrictive measure available.

discrimination, as in *Shrimp/Turtle*. For this reason, this petition addresses all the various issues considered as unjustifiable discrimination and arbitrary discrimination in this section.

¹⁵²*Shrimp/Turtle*, *supra* note 55, at paras. 161, 164.

¹⁵³See *Tuna/Dolphin I*, *supra* note 77, at para. 35; *Thailand—Restrictions on Importation of and International Taxes on Cigarettes*, DS/10 37/200, para. 74 (adopted Nov. 7, 1990).

¹⁵⁴The *Tuna/Dolphin II* GATT panel also rejected the contention of the United States that the tuna import restrictions of the MMPA were consistent with Article XX because the MMPA coerced other Members to adopt essentially the same policies as the United States. Unlike *Shrimp/Turtle*, however, *Tuna/Dolphin II* based this analysis in Article XX(b), not the chapeau. *Tuna/Dolphin II*, *supra* note 79, at para. 5.23.

A common theme of this requirement is whether the party invoking the exception has attempted international negotiations or cooperation to achieve its goals. In fact, both *Shrimp/Turtle* and *Reformulated Gasoline* found unjustifiable and arbitrary discrimination in the failure of the United States to engage disputants in bilateral or multilateral negotiations.¹⁵⁵ The application of the Pelly Amendment to Japanese scientific whaling and whale meat trade, however, relates to existing, multilateral agreements to which Japan is a party. The United States does not seek compliance with unilaterally devised standards. Quite to the contrary, the IWC has spoken vigorously and frequently in condemnation of Japan's scientific whaling. In 12 of the last 14 years, the IWC has condemned Japan's so-called scientific whaling for failing to meet the criteria for scientific whaling and the IWC's Scientific Committee has stated that Japan's scientific whaling does not provide data relevant to any critically important management purpose.¹⁵⁶ The large numbers of whales taken by Japan in its scientific whaling programs also shows that the lethal kills are not authorized only in "exceptional circumstances," as recommended by IWC Resolution 1995-9.

The parties to CITES have adopted special resolutions to ensure cooperation and synergy with those IWC measures. Even though Article III(5) of CITES specifically prohibits introductions from the sea for commercial purposes, the parties agreed in CITES Resolution 2.9 not to issue any CITES permits for any specimen, species, or stock protected from commercial whaling by the IWC. The parties also adopted CITES Resolution 2.8, recommending that the parties use "their best endeavours to apply their responsibilities under [CITES] in relation to cetaceans." Yet, Japan continues to trade in whale meat.

The IWC and CITES have also cooperated to maintain the highest level of protection for cetaceans. A request from the IWC for CITES support in protecting certain species of whales led the CITES parties to adopt CITES Resolution 2.8. The CITES parties have repeatedly reaffirmed their commitment to support and complement the IWC moratorium despite several efforts by Japan to have CITES Resolution 2.8 repealed. The IWC more recently recognized in IWC Resolution 1998-8 the important role of CITES in supporting the IWC's conservation efforts, in particular, by cooperating on issues related to trade in whale meat.

Further, high-level diplomatic efforts have failed. President Clinton has written to Prime Minister Mori asking Japan to refrain from scientific whaling. Prime Minister Tony Blair, on behalf of others, has made the same request. Ambassadors from 15 countries presented Japan with a *démarche*. All this to no avail. Japan is clearly unwilling to cooperate and unwilling to adhere to its international obligations.

¹⁵⁵*Shrimp/Turtle*, *supra* note 55, at para. 166-172; *Reformulated Gasoline*, *supra* note 76, at 27.

¹⁵⁶*See supra* notes 47-49 and accompanying text.

Whereas the *Shrimp/Turtle* Appellate Body noted that the conservation of sea turtles requires cooperative efforts,¹⁵⁷ here the IWC and CITES have made significant multilateral efforts and have even sought cooperation between the two conventions to protect whales – another group of species that require international cooperation for conservation purposes. Japan diminishes the effectiveness of that cooperation first by killing minke, Bryde's and sperm whales at all – due to their poorly understood populations and confusing taxonomy – and by killing 440 minke whales per year in the Southern Hemisphere, 100 minke whales per year in the North Pacific, and now sperm and Bryde's whales in the North Pacific through a research program that fails to meet IWC criteria. At this point, no other options are reasonably available to the United States.

c. Transparency and Fairness

Shrimp/Turtle also appears to require transparency and an opportunity for the certified country to challenge the allegations prior to the imposition of trade restrictions.¹⁵⁸ While these suggestions are quite sensible, the Appellate Body erred in its analysis by returning to the plain language of the statute rather than the application to the case at bar. In *Shrimp/Turtle*, the Appellate Body failed to ask, as it did earlier in its opinion, whether the United States *applied* Section 609 arbitrarily. Instead it looked only at the language of Section 609 to determine that a Section 609 "*could* result in the negation of rights or Members."¹⁵⁹ The chapeau, however, expressly asks whether or not measures are *applied* in a manner that constitutes arbitrary or unjustifiable discrimination. As the *Reformulated Gasoline* Appellate Body said, the "chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied."¹⁶⁰

Provided that WTO dispute resolution bodies adhere to the language of the chapeau and assess the application of the measure, the Secretary of Interior can easily ensure that the requirements for transparency and opportunity for a country to be heard by publishing the proposed sanctions in the *Federal Register*. The Department of the Interior has used strategy recently under the Pelly Amendment — certification was announced in the *Federal Register* and comments sought prior to the issuance of trade restrictions.¹⁶¹

¹⁵⁷*Shrimp/Turtle*, *supra* note 55, at para. 168.

¹⁵⁸*Id.* at paras. 180-183.

¹⁵⁹*Id.* at 181 (emphasis added).

¹⁶⁰*Reformulated Gasoline*, *supra* note 76, at 22.

¹⁶¹*See, e.g.*, 59 *Fed. Reg.* 22043 (Apr. 28, 1994)(proposed trade restrictions against Taiwan pursuant to the Pelly Amendment and providing more than 30 days for public comment). An even better course of action for the future would be to announce a proposal for certification in the *Federal Register* and allow comments on the

d. Countries Where the Same Conditions Prevail

While no panel has ever provided any interpretation of the phrase "countries where the same conditions prevail,"¹⁶² in the present case Japan's conditions are unique. First, no other country kills sperm or Bryde's whales. Second, no other country has a scientific research program that actively promotes large-scale lethal killing of whales. Third, no other country continues to whale after years of findings that its scientific whaling program fails to meet IWC criteria for scientific whaling. Fourth, no other country kills whales in the Southern Ocean Sanctuary. Fifth, no other country issues (or fails to issue) CITES introduction from the sea certificates for minke, Bryde's and sperm whales inconsistently with CITES rules.¹⁶³ Japan stands alone. Thus, there is no discrimination in countries where the same conditions prevail.

2. Not a Disguised Restriction on International Trade

The trade restrictions requested in this petition are not a disguised restriction on international trade. While no dispute resolution body has satisfactorily interpreted "disguised restrictions on international trade,"¹⁶⁴ it apparently means, at a minimum, more than a "concealed or unannounced restriction."¹⁶⁵

proposal. After considering the comments, then announce the decision regarding certification in the *Federal Register* with a proposal for trade restrictions and other possible action. See, e.g., 57 *Fed. Reg.* 59122 (Dec. 14, 1992). This two stage process could also be accomplished in one step; the Secretary could propose both certification and possible trade sanctions in the same *Federal Register* notice.

¹⁶²The *Shrimp/Turtle* Appellate Body noted that the United States, by requiring all nations to adopt essentially the same fishing methods, failed to inquire into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries. *Shrimp/Turtle*, *supra* note 55, at para. 165. However, it did not elaborate on what the phrase might mean.

¹⁶³While Norway kills minke whales, it kills them in jurisdictional waters and no CITES permits are required.

¹⁶⁴The *Reformulated Gasoline* Appellate Body said:

We consider that "disguised restriction":, whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX..

Reformulated Gasoline *supra* note 76, at 25. Defined in this way, however, it is unclear how to distinguish a "disguised restriction" from an "arbitrary" or "unjustifiable" one.

¹⁶⁵*Reformulated Gasoline*, *supra* note 76, at 25 (implicitly disagreeing with the adopted GATT Panel decision in *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT Doc. L/5198, B.I.S.D. (29th Supp.) 91, at para. 4.8 (adopted Feb. 22, 1982) and *United States—Imports of Certain Automotive Spring Assemblies*, B.I.S.D. 30S/107, para. 56 (adopted May 26, 1983)).

The application of the Pelly Amendment to Japan's scientific whaling and trade in whale meat does not constitute a disguised restriction on international trade. First, the Pelly Amendment itself establishes a test directly related to a country's diminishment of an international fisheries or endangered or threatened species program. The intent of the restrictions is clear — to encourage compliance with international agreements in order to protect species covered by those agreements. In this case, the restrictions are intended to encourage compliance with the ICRW and CITES to conserve minke, Bryde's and sperm whales. Second, the United States, after a period of whaling, has become an ardent proponent of whale conservation. Its positions at IWC and CITES meetings are well known certainly to Japan and all other IWC and CITES members. As such, the Pelly Amendment does not hide some protectionist motive. Third, the measures proposed in this petition, strategically targeted at whale related products and the products of those companies engaged in whaling, do not cloak some protectionist motive.

IV. Conclusion

Although this petition asks you to certify Japan because its nationals are diminishing the effectiveness of CITES, we summarize our conclusions relating to the need for strict conservation measures under the ICRW/IWC, because these conclusions underpin the conclusion that Japan is diminishing the effectiveness of CITES. Nationals of Japan diminish the effectiveness of the **International Convention for the Regulation of Whaling and the International Whaling Commission**, an international fisheries program and an international endangered or threatened species program, as defined by the Pelly Amendment, in the following ways:

In the Southern Hemisphere:

- A. Japan kills minke whales even though their stock structure is poorly understood. No populations estimates exist for minke whales in the Southern Hemisphere. So much taxonomic confusion exists that scientists believe minke whales in the Southern Hemisphere may actually be two species. Only recently did scientists identify Southern Hemisphere minke whales as a distinct species from Northern Hemisphere minke whales.
- B. Japan kills whales in the Southern Ocean Sanctuary. Although Japan has a valid objection to the creation of the Southern Ocean Sanctuary to the extent that it applies to minke whales, the IWC has sent a clear message that the Sanctuary is intended to protect all whale species, including minke whales, regulated by the IWC.
- C. Japan kills whales in the Southern Hemisphere pursuant to a so-called scientific whaling program that fails to meet the IWC's basic criteria for scientific whaling.

In the North Pacific:

1. Japan kills minke whales even though the stock structure of those populations of whales is poorly understood. Stocks are, however, understood well enough to know that Japan kills minke whales from the "critically endangered" J-stock, which mingles with the more abundant O-stock during times of the year when Japan conducts its so-called scientific whaling.
2. Japan kills sperm whales even though those populations are poorly understood and no population estimates exist. Whaling has greatly affected sperm whale populations due to significant removals in recent times and due to their unique biological characteristics.
3. Japan kills Bryde's whales when no accepted population estimates exist for the species. The taxonomy of Bryde's whales is in flux; more than one species may exist. Further, similarities in appearance between Bryde's and other rorqual whales has led to "widespread" confusion in distributions and historical catch data. Thus, Japanese whalers may be taking species from depleted populations. It is already known that Japanese whalers kill other species of whales which they presumably identify as Bryde's whales.
4. Japan kills whales in the North Pacific pursuant to a so-called scientific whaling program that fails to meet the IWC's basic criteria for scientific whaling.

Nationals of Japan also diminish the effectiveness of the **Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)**, an endangered or threatened species program, as defined by the Pelly Amendment, by maintaining reservations to minke, Bryde's and sperm whales and by introducing these species from the sea for commercial purposes. Because Japan fails to properly identify whale meat in the market, it will be unable to report accurately on its trade in whale meat, which also diminishes the effectiveness of CITES. Further, Japan's actions are inconsistent with the rules of CITES relating to the issuance of introduction from the sea permits under Article III(5) of CITES and Resolution 2.9 of CITES. Japan apparently is also ignoring the recommendation in CITES Resolution Conf. 2.8 that parties "use their best endeavours to apply their responsibilities under the Convention in relation to cetaceans." Instead, nationals of Japan are killing whales and engaging in commercial trade. The Secretary of Interior must certify Japan as diminishing the effectiveness of CITES.

Based on the conclusions in this petition, we respectfully request that you certify Japan because its nationals diminish the effectiveness of CITES, and that you recommend trade sanctions to the President. As described in Section III, the Pelly Amendment and its trade restrictions are consistent with the GATT. Given the total breakdown in international diplomacy

and cooperation, no other course of action will compel Japan to comply with these two major multilateral agreement to protect minke, Bryde's and sperm whales.

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We look forward to your prompt investigation and determination consistent with the conclusions made in this petition. If you have any questions, please feel free to contact me.

Respectfully submitted by,

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