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Mission creep in the application of wildlife law: The progressive dilution of legal requirements regarding a wild-born orca kept for 'research' purposes

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Environmental law contributes to biodiversity conservation insofar as it is properly drafted and implemented. This article explores one way in which its effectiveness can be impaired: progressive dilution. This occurs when consecutive steps are taken in the law's application which in isolation may not appear much out of line and are presented as legal, but eventually render a result contrary to the law's intentions – like a military mission creeping beyond its mandate. This phenomenon is explored using the case of an orca found emaciated in the Netherlands' waters in 2010. Captured for rehabilitation purposes and subsequently retained for strictly circumscribed scientific research, the animal somehow ended up in a commercial Spanish entertainment park, used for public performances and breeding purposes – all with express approval of various governmental authorities, including courts. The entire chain of events is analysed in light of requirements imposed by diverse (inter)national legal instruments, including the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS), the Convention on International Trade in Endangered Species (CITES) and European Union regulations.

1 | INTRODUCTION

To ensure the protection and sustainable use of wildlife, law is a crucial, albeit not sufficient, means. Legally binding instruments at international, national and subnational levels can make important contributions to biodiversity conservation – that is, when properly drafted and implemented.[1] In fact, wildlife conservation legislation around the globe is frequently the focus of subtle or not so subtle attempts to weaken its impact, for a variety of reasons usually involving competing human ambitions.[2] A review published in 2017 documents 39 different tactics that have been used, by governmental stakeholders, to reduce the effectiveness of wildlife laws, each tactic coming with an example from the preceding decade.[3] Some of these tactics conjure evocative names like 'race to the bottom' (reducing the protection offered by national legislation to the absolute minimum requirements of international legislation) and 'sleeping beauty' (silently neglecting the enforcement of otherwise very good legislation).

The present article offers a 40th tactic: the progressive dilution of legal requirements – 'mission creep' for short. This stands for a series of steps in the application of wildlife legislation which in isolation may not seem very much out of the ordinary, are presented by the authorities involved as being in conformity with the applicable legislation, perhaps even condoned by courts, but at the end of the line somehow renders a result that is far removed from what the law originally envisaged – like a military mission gradually expanding beyond its original

[1]See, e.g., G Chapron et al, 'Bolster Legal Boundaries to Stay within Planetary Boundaries' (2017) 1 Nature Ecology & Evolution 0086; A Trouwborst et al, 'International Wildlife Law: Understanding and Enhancing its Role in Conservation' (2017) 67 BioScience 784.

[2]Chapron et al (n 1).

[3]ibid.

mandate, typically entailing trouble. Cases of wildlife law mission creep typically unfold subtly and, conspicuous red flags being absent, their detection will often require careful reading, attention to details and comparison of relevant documents.

This article focuses on an especially striking case, involving an orca (*Orcinus orca*, also known as killer whale) encountered in apparent distress in the Netherlands Wadden Sea in 2010, taken to a commercial Netherlands aquarium to recover and ultimately transported to a larger commercial aquarium in Spain, where the animal remains to date. In particular, it reviews the role of research as a justification for the orca's permanent captivity, documenting and analysing each step in a long and complex cascade of events between 2010 and the present.

2 | THE TALE OF AN ORCA NAMED MORGAN

First sighted swimming alone and emaciated in the Wadden Sea on 22 June 2010, the female orca in question – soon thereafter named Morgan – was captured on the 23rd and transported to the commercial entertainment park Dolfinarium Harderwijk that same day. It was later reported by the Dolfinarium that she weighed 450 kg and measured 343 cm at the time of capture.[4] Plotting the whale's length against known-age lengths of other young orcas, it was possible to estimate that she was between three and five years of age.[5] Regardless, the Dolfinarium duplicitously maintained that Morgan was only 18 months of age and (despite only feeding her fish) 'dependent on milk'.[6]

The orca was maintained at Dolfinarium Harderwijk and put on display to the paying public.[7] She was kept in a small tank[8] until 29 November 2011. On that day, weighing over 1,350 kg and measuring over 4 m,[9] Morgan was transported to another commercial entertainment park, Loro Parque in Spain, on the basis of a certificate (permit) issued by the Netherlands authorities (and discussed below in further detail). At some point prior to transportation, the orca was microchipped[10] and her ownership transferred to SeaWorld, a US-based company which already owned all the other orcas at Loro Parque.[11]

As of the date of publication, Morgan remains at Loro Parque. There, she has faced a range of issues, including: (i) pathogens, for example, *Candidiasis*, a fungal infection usually associated in captive cetaceans with overuse of antibiotics and/or overtreatment of water, which flourishes in cetaceans that are immunosuppressed,[12] and which has been implicated in the death of captive orcas;[13] (ii) unprecedented numbers of attacks by other orcas (over 90 attacks were recorded in approximately 70 hours[14]), including ramming, biting (over 350 bite marks have been photographed[15]) and severe harassment to the point where Morgan attempts to avoid altercations by hauling herself out of the water onto the concrete ledges surrounding the tanks;[16] (iii) abnormal repetitive behaviours (termed stereotypies) resulting in self-harming wounds and self-mutilations such as extreme permanent damage to Morgan's teeth (more than 75 percent damage including completely split teeth);[17] (iv) claims that she is deaf (despite being given a completely clean bill of health prior to transportation to Loro Parque); and (v) being subjected to breeding attempts orchestrated by Loro Parque, using one of the SeaWorld male orcas (who were, at the time of impregnation, under a company-wide policy of no breeding),[18] with a calf born in September 2018.[19] Incidentally, both potential fathers have been involved in severe attacks on their trainers.[20]

3 | MAKING LEGAL WAVES

A curious legal tale has been unfolding in the orca's wake, involving a plethora of international, European Union (EU) and national legal instruments and a series of decisions under various successive Netherlands administrations, with several of these decisions challenged before the Netherlands courts and EU institutions.

Pertinent legal instruments include the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS),[21] which is a subsidiary instrument to

[4]N van Elk, 'Expert Advice on the Releasability of the Rescued Killer Whale (*Orcinus orca*) Morgan' (Dolfinarium Harderwijk – SOS Dolfijn 2010) <http://www.freemorgan.org/wp-content/uploads/2015/10/van-Elk-2010-seven-experts-on-Morgan.pdf>.

[5]Different populations (termed ecotypes) are known to have different maximum sizes, however, this age range accounts for that variation; see <http://www.freemorgan.org/morgan-facts/>.

[6]Application for EU CITES certificate submitted by Dolfinarium Harderwijk BV (11 July 2011) <http://www.freemorgan.org/pdfs/Dolfinarium-Harderwijk-Application-for-EG-Certificate-11-07-2011.pdf>.

[7]IN Visser and TM Hardie, '"Morgan" the Orca Can and Should be Rehabilitated – With Additional Notes on Why a Transfer to Another "Captive Orca Facility" is Inappropriate and Release is Preferred' (2011) 68.

[8]20.42 m long, 7.72 m wide and less than 3 m deep; ibid.

[9]ibid.

[10]Chip nr. #528210002335926, EU certificate #11NL114808/20 (issued 27 July 2011).

[11]SeaWorld Entertainment, 'Prospectus Filed with United States Securities and Exchange Commission' (2013) <https://www.sec.gov/Archives/edgar/data/1564902/000119312513447594/d600440ds1.htm> 76.

[12]W Medway, 'Some Bacterial and Mycotic Diseases of Marine Mammals' (1980) 177 Journal of American Veterinary Medical Association 831.

[13]SH Ridgway, 'Reported Causes of Death of Captive Killer Whales (*Orcinus orca*)' (1979) 15 Journal of Wildlife Diseases 99.

[14]A similar study, looking at aggression in captive orcas and observing them for 1,872 hours (i.e. 78 days) recorded only eight aggressive episodes. See IN Visser, 'Report on the Physical and Behavioural Status of Morgan, the Wild-born Orca Held in Captivity, at Loro Parque, Tenerife, Spain' (2012) <http://www.freemorgan.org/wp-content/uploads/2012/11/Visser-2012-Report-on-the-Phyisical-Status-of-Morgan-V1.2.pdf> 35.

[15]ibid.

[16]See, e.g., this video of 22 February 2016: <https://www.youtube.com/watch?v=hHLFiZm7g20>.

[17]IN Visser and RB Lisker, 'Ongoing Concerns Regarding the SeaWorld Orca Held at Loro Parque, Tenerife, Spain' (Free Morgan Foundation 2016) <http://www.freemorgan.org/visser-lisker-2016-ongoing-welfare-concerns/> 67.

[18]See <https://web.archive.org/web/20180713214014/http://seaworldcares.com/en/Future/Last-Generation/>.

[19]See <https://web.archive.org/web/20180716173855/http://blog.loroparque.com/loro-parque-anticipates-that-the-orca-morgan-will-give-birth-by-the-end-of-summer/?lang=en>; and <https://web.archive.org/web/20181201053531/http://blog.loroparque.com/loro-parque-da-la-bienvenida-a-la-cria-de-la-orca-morgan/?la%20ng=en>.

[20]See <http://www.outsideonline.com/1886916/blood-water>.

[21]Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (adopted 17 March 1992, entered into force 29 March 1994) 1772 UNTS 217 (ASCOBANS).

the Convention on the Conservation of Migratory Species (CMS);[22] the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention);[23] the EU's Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive);[24] the Convention on International Trade in Endangered Species (CITES)[25] and its EU implementing legislation, including Regulation 338/97 on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein (CITES Basic Regulation)[26] and Commission Regulation 865/2006 (CITES Implementing Regulation);[27] EU Directive 1999/22 on the Keeping of Wild Animals in Zoos (Zoos Directive);[28] and domestic Netherlands legislation implementing several of the aforementioned instruments. Also relevant (albeit indirectly) is the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS)[29] – another CMS subsidiary instrument – and so is Spanish legislation, although the primary focus in this article is on the Netherlands, which had operational control over the orca when the most significant decisions were made.

Some of the (inter)national legal aspects of the Morgan saga have already been considered at the macro level in the legal literature between 2011 and 2015.[30] The intersection of law and its real-world application to Morgan has also been examined at the micro level.[31] The present article builds on this literature. In particular, it focuses on the role that 'research' has played as a justification for keeping this orca in captivity, her use in a commercial environment and most recently breeding her, by documenting and analysing the use of this research justification throughout the entire sequence of events between the orca's extraction from the Wadden Sea to the present.

4 | ASCOBANS: RESEARCH HARDLY A BASIS FOR PERMANENT CAPTIVITY

Certain provisions of ASCOBANS, to which the Netherlands has been a party since 1992, provide the starting point of, and a key overarching reference framework for, the chain of events in the Morgan saga. ASCOBANS aims at conserving a range of 'small cetaceans', including orcas,[32] in the contiguous marine areas it covers. Each of its parties 'shall apply' the 'conservation, research and management measures prescribed in the Annex' to the Agreement.[33] Regarding research, paragraphs 2 and 3 of the 'Conservation and Management Plan' contained in this Annex require the following from parties:

> *2. Surveys and research*
>
> *Investigations, to be coordinated and shared in an efficient manner between the Parties and competent international organizations, shall be conducted in order to (a) assess the status and seasonal movements of the populations and stocks concerned, (b) locate areas of special importance to their survival, and (c) identify present and potential threats to the different species.*
>
> *Studies under (a) should particularly include improvement of existing and development of new methods to establish stock identity and to estimate abundance, trends, population structure and dynamics, and migrations. Studies under (b) should focus on locating areas of special importance to breeding and feeding. Studies under (c) should include research on habitat requirements, feeding ecology, trophic relationships, dispersal, and sensory biology with special regard to effects of pollution, disturbance and interactions with fisheries, including work on methods to reduce such interactions. The studies should exclude the killing of animals and include the release in good health of animals captured for research.*[34]
>
> *3. Use of by-catches and strandings*
>
> *Each Party shall endeavour to establish an efficient system for reporting and retrieving by-catches and stranded specimens and to carry out, in the framework of the studies mentioned above, full autopsies in order to collect tissues for further studies and to reveal possible causes of death and to document food composition. The information collected shall be made available in an international database.*

[22]Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333 (CMS).

[23]Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 September 1979, entered into force 1 June 1982) 1284 UNTS 209 (Bern Convention).

[24]Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L206/7 (Habitats Directive).

[25]Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 992 UNTS 243 (CITES).

[26]Regulation (EC) No. 338/97 on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein [1997] OJ L61/1 (CITES Basic Regulation).

[27]Commission Regulation (EC) No. 865/2006 Laying Down Detailed Rules Concerning the Implementation of Council Regulation (EC) No. 338/97 [2006] OJ L166/1 (CITES Implementing Regulation).

[28]Council Directive 1999/22/EC on the Keeping of Wild Animals in Zoos [1992] OJ L94/24 (Zoos Directive).

[29]Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean and Contiguous Atlantic Area (adopted 24 November 1996, entered into force 1 June 2001) 2183 UNTS 303 (ACCOBAMS).

[30]A Trouwborst, 'De Troebele Regels rond de Opvang van Zeezoogdieren: Een Analyse aan de Hand van de Casus van Orka "Morgan"' (2011) 38 Milieu en Recht 653; A Trouwborst, R Caddell and E Couzens, 'To Free or Not to Free? State Obligations and the Rescue and Release of Marine Mammals: A Case Study of "Morgan the Orca"' (2013) 2 Transnational Environmental Law 117; A Trouwborst, R Caddell and E Couzens, 'Habeas Porpoise: The Strange Case of Morgan the Orca' (Cambridge Core Blog, 30 April 2013) <http://blog.journals.cambridge.org/2013/04/habeas-porpoise-the-strange-case-of-morgan-the-orca/>; A Trouwborst, 'Caught Napping by (Sea) Wolves: International Wildlife Law and Unforeseen Circumstances involving the Killer Whale (*Orcinus orca*) and the Gray Wolf (*Canis lupus*)' in C Ryngaert, EJ Molenaar and SMH Nouwen (eds), *What's Wrong with International Law? Liber Amicorum A.H.A. Soons* (Martinus Nijhoff 2015) 200.

[31]MV Spiegl and IN Visser, 'CITES and the Marine Mammal Protection Act: Comity and Conflict at Loro Parque – White Paper on Whale Laundering' (Free Morgan Foundation 2015) <http://www.freemorgan.org/pdfs/Spiegl-Visser-2015-CITES-and-the-MMPA-Comity-and-Conflict-at-Loro-Parque.pdf> 124.

[32]ASCOBANS (n 21) art 1(2)(a).

[33]ibid art 2(2).

[34]ibid Annex para 2.

Other obligations of relevance for present purposes are stated in paragraph 4 of the same Annex:

> *4. Legislation*
>
> *Without prejudice to the provisions of paragraph 2 above, the Parties shall endeavour to establish (a) the prohibition under national law, of the intentional taking and killing of small cetaceans where such regulations are not already in force, and (b) the obligation to release immediately any animals caught alive and in good health. Measures to enforce these regulations shall be worked out at the national level.*[35]

As discussed in more detail elsewhere, the intentional capture of animals that are *not* [alive and] *in good health*, with a view to their rehabilitation, is not expressly addressed in these (or other) provisions, and indeed appears to run counter to the obligations of ASCOBANS parties – unless, for some convincing reasons, the serious 'endeavours' of a party to establish the prohibition required by paragraph 4 have somehow repeatedly been thwarted.[36] After all, the *only* exception to this prohibition is the taking of cetaceans for research purposes as specified in paragraph 2.

A resolution on cetacean strandings adopted by the ASCOBANS Meeting of the Parties (MOP) in 2016 has done nothing to change this, even if the Morgan affair played a role in its adoption.[37] It recalls the obligation of parties to 'endeavour to establish the obligation to release immediately any animals caught alive and in good health', while 'noting that the principle should apply to live stranded animals as well'.[38] The resolution furthermore commends the efforts of stranding networks, 'which have resulted in large numbers of animals having been rescued and returned to the sea throughout the ASCOBANS Area'; and observes that 'effective responses to live strandings not only contribute to achieving and maintaining a favourable conservation status of small cetaceans, but also have significant animal welfare implications'.[39]

Be that as it may, the key conclusion for present purposes is that it follows from the ASCOBANS provisions, including those cited above, that *research* can apparently not be invoked to justify the *permanent captivity* of a cetacean taken from the wild in the area covered by the treaty.[40] The research exemption is conditional upon the 'release in good health' of any captured animals involved.[41] Even if one allows for the possibility that ignoring this requirement might somehow be possible in exceptional cases, particularly with a view to the use of the word 'should' rather than 'shall', then still the only research that could justify a cetacean's permanent captivity is research undertaken for the three ends specified in paragraph 2. Given the formulation of these ends and the specifications of the types of studies required, the scope for usefully conducting such research on permanently captive animals is extremely narrow.[42]

It hardly comes as a surprise, then, that the Netherlands did *not* rely on research as a basis for permitting the capture and subsequent keeping in captivity of orca Morgan when the issue was tabled at an ASCOBANS meeting. In a letter to the ASCOBANS Advisory Committee, the Netherlands authorities explained their motivations as initially having been the orca's rescue, rehabilitation and release, and subsequently, in light of the alleged impossibility of a return to the wild, contributing to raising 'awareness of the beauty of wildlife' by allocating the orca to a facility involved in public education.[43] While asserting in general terms that 'all legal procedures have been followed', the letter curiously fails to relate the actions taken by the Netherlands authorities in any way to the provisions of ASCOBANS.[44] The letter states that the 'conditions under which orca Morgan may remain in captivity' are that the animal be kept 'with other orcas; at a location with good facilities suitable for such large predatory animals; at a location which places emphasis on education'.[45] No mention of research.

Before moving to the domestic level, it is instructive to make a brief comparison with ASCOBANS' Mediterranean sister agreement ACCOBAMS. Research is not an apparent justification for permanent captivity under ACCOBAMS either. The latter's 'taking' prohibition is subject to two exceptions, namely *in situ* research – that is, research carried out at sea – and 'emergency situations' including 'rescue operations for wounded or sick cetaceans'.[46] It is unclear to what extent precisely ACCOBAMS allows for the permanent captivity of rescued cetaceans, although a set of 'Guidelines for the Release of Captive Cetaceans in the Wild' adopted by ACCOBAMS parties in 2007 appears to presume that a rescued captive cetacean should be released unless it is insufficiently healthy, carries a transmissible disease or has become unduly habituated to humans.[47] The Guidelines cover captive cetaceans broadly, regardless of the reason of initial capture, and including offspring born in captivity. They aim to ensure that 'special consideration is given to proposals for the release into the wild of captive cetaceans that originate from, or are a result of breeding between cetaceans originating from, the Agreement area'.[48] Any

[35]ibid Annex para 4.

[36]See Trouwborst et al, 'To Free or Not to Free?' (n 30) 129–133.

[37]ASCOBANS MOP Resolution 8.10 (1 September 2016) preamble.

[38]ibid.

[39]ibid.

[40]See also Trouwborst et al, 'To Free or Not to Free?' (n 30) 132.

[41]ASCOBANS (n 21) Annex para 2.

[42]ibid.

[43]AC18/Doc.8-01, 'Why Orca Morgan Cannot Be Set Free' <https://www.ascobans.org/sites/default/files/document/AC18_8-02_NLMinistry_ReleaseMorgan_1.pdf>.

[44]ibid.

[45]ibid.

[46]ACCOBAMS (n 29) art II(1) and Annex 2 para 2.6.

[47]Guidelines for the Release of Captive Cetaceans in the Wild, ACCOBAMS MOP Resolution 3.20 (25 October 2007); see also Trouwborst et al, 'To Free or Not to Free?' (n 30) 133–134.

[48]Guidelines (n 47) para 1.1.

such release should be 'guided by the principles of preservation and/or conservation of the species and/or population concerned' and be 'aimed at improving the health and welfare of the individual animal(s) proposed for release'.[49] The document sets out a range of aspects to consider when planning a reintroduction, including the choice of release sites, post-release monitoring, the rehabilitation process, screening for pathogens and the threshold for release criteria. Although not expressly outlined in the Guidelines, it is evidently vital that procedures for the latter are not governed by the very facility conducting the rehabilitation.[50] In any event, the Guidelines do not inform Spain's obligations under ACCOBAMS, as they do not apply to cetaceans captured outside the geographic area covered by the Agreement.

5 | THE NETHERLANDS DOLFINARIUM PERMIT: *CONTRADICTIO IN TERMINIS*?

At home, the Netherlands authorities took a very different approach from what they indicated in their statement to ASCOBANS – an approach indeed that appears to clash with the conclusions just reached regarding the (in)validity, under ASCOBANS, of research as a justification for a wild-born cetacean's permanent captivity.

Under Netherlands domestic legislation – at the time this involved the 1998 Flora and Fauna Act[51] – the capture of orcas is prohibited, subject to limited exemptions. The exemption held by Dolfinarium Harderwijk under the Act permitted it to transport and keep cetaceans for 'research and the protection of flora and fauna, that is, rescue, rehabilitation, and release into the wild'.[52] This permission is restricted by *inter alia* the following conditions:

> *Captured specimens of cetaceans (*Cetacea*) may be retained temporarily to enable recovery, with the purpose of subsequent release. If release is not possible, such animals may be retained permanently for the purpose of conducting research which is relevant within the framework of obligations imposed by the EU Habitats Directive, the Bern Convention and ASCOBANS.*
>
> *Stranded and captured animals must, as soon as possible after their rehabilitation (and, as the case may be, research), be released in a suitable habitat as close as possible to the place where they were found.*[53]

According to the Netherlands authorities, this national exemption authorized both the capture of orca Morgan and the subsequent decision to keep the animal in permanent captivity, despite the mandatory language of 'must … be released' in the conditions.[54]

Various issues stand out for present purposes regarding this exemption under Netherlands law. First, the permanent captivity of rescued cetaceans which cannot be returned to the wild is allowed by it for *one purpose only*, *namely research* – and not even all kinds of research. The above analysis of ASCOBANS would seem to indicate, however, that retaining a wild-caught orca '*permanently* for the purpose of conducting research which is relevant within the framework of obligations imposed by … *ASCOBANS*'[55] is a contradiction in terms. Even when assuming the position under ASCOBANS to be less rigid, then still the research involved must clearly be of the kind indicated in the ASCOBANS Annex in order to fit the Flora and Fauna Act exemption.

The Habitats Directive and Bern Convention also require the Netherlands to prohibit the capture of orcas, but unlike ASCOBANS they do in principle empower the Netherlands to authorize derogations for a range of purposes, including 'research and education' – without circumscribing these further – provided that certain general conditions are met regarding alternatives and conservation status.[56] Whereas derogations for research purposes are primarily associated with minor interventions – for instance, briefly capturing animals to fit them with transmitters, followed by release – justifying permanent captivity under this heading cannot be completely ruled out, in particular when this is the only way to pursue some vital research objective.[57] Orca Morgan's scenario is, of course, a different one. Indeed, the fact that research was not initially the motivation for capturing her, but instead features in the Dolfinarium Harderwijk's exemption as a blanket backup option, raises legal questions of its own, as discussed in more detail elsewhere.[58] Regarding the text of the Flora and Fauna Act exemption, for present purposes it is important to note that for research to be 'relevant within the framework of obligations imposed by the EU Habitats Directive [and] the Bern Convention', it must be *designed* to benefit the conservation status of orcas in the wild.[59]

[49]ibid; it should be noted that the preamble to MOP Resolution 3.20, through which the Guidelines were adopted, rigidly indicates that 'the only reason for any release should be conservation', while noting at the same time that 'the welfare of released animals must be of utmost concern'.

[50]A case of the 'fox guarding the hen-house' can easily arise should there be a desire to keep an animal post-rescue, as has been documented herein and for at least 12 other species of cetaceans; see <http://www.orcaresearch.org/wp-content/uploads/2011/08/VISSER-2015-RESCUED-CETACEANS-POSTER-Compassionate-Conservation-FINAL.pdf>.

[51]Wet Houdende Regels ter Bescherming van in het Wild Levende Planten- en Diersoorten (25 May 1998) Staatsblad [1998] 402 (Flora and Fauna Act). The Act was repealed in 2017, although the new legislation replacing it is broadly similar.

[52]Exemption FF/75A/2008/064 (3 February 2009) (as translated from Dutch by the authors).

[53]ibid paras 8 and 9 (as translated by present authors).

[54]See, e.g., a letter by the competent State Secretary to Parliament of 25 March 2011, Kamerstukken II [2010–2011] 28 286 nr 496.

[55]Exemption FF/75A/2008/064 (n 52) (emphasis added).

[56]Bern Convention (n 23) arts 6 and 9; Habitats Directive (n 24) arts 12 and 16.

[57]Trouwborst et al, 'To Free or Not to Free?' (n 30) 140.

[58]ibid.

[59]This follows from the objectives and obligations of the Directive and the Convention; see, e.g., Habitats Directive (n 24) art 2(2).

6 | THE EU CITES CERTIFICATE AND THE MIRACULOUS DISAPPEARANCE OF THE RESEARCH CONDITION

When the Netherlands CITES Management Authority issued the EU certificate[60] authorizing the orca's transfer from Dolfinarium Harderwijk in the Netherlands to Loro Parque in Spain, it stated in the accompanying governing letter that the certificate was issued 'on the condition that the animal will be kept for research'.[61]

The corresponding provision in the CITES Basic Regulation is Article 8(3)(g), which refers to 'research or education aimed at the preservation or conservation of the species'.[62] On the form used to issue the actual certificate, however, *one* of the various boxes which may be ticked (at line 18.8) has the following text: '[the specimens described above] are to be used for the advancement of science/breeding or propagation/research or education or other non-detrimental purposes'.[63] This text thus combines Article 8(3)(g) with various other grounds mentioned in Article 8(3) of the CITES Basic Regulation, and is prone to generate confusion, and allow mischief, when taken at face value. On orca Morgan's certificate, the Netherlands Management Authority ticked this box without crossing out those parts of the corresponding text that were not applicable – that is, everything except the words 'are to be used for … research'.[64] Consequently, *when viewed in isolation*, the certificate could cause the (erroneous) impression that the orca's use is authorized not only for research but also for education and even breeding, and in fact any use that is not deemed 'detrimental', including invasive biomedical experimentation. This opens the door to a misrepresentation of what the certificate actually authorizes.

This is all the more noteworthy in light of doubts that have existed from the beginning regarding the likelihood and ability of Loro Parque to meet the requirement that the orca be used only for research, in particular research 'aimed at the preservation or conservation of the species' (CITES Basic Regulation), let alone 'research which is relevant within the framework of obligations imposed by the EU Habitats Directive, the Bern Convention and ASCOBANS' (Flora and Fauna Act exemption). For instance, in October 2011 a Member of the European Parliament highlighted concerns that:

> *if transported to Loro Parque, this orca will be exploited primarily for commercial purposes, being forced to perform in shows and participate in a captive-breeding programme that does not have as a goal release to the wild to augment depleted populations. The available evidence also suggests that little, if any, scientific research with the aim of conserving orcas is actually taking place at Loro Parque.*[65]

In response to a request for annulment of the orca's EU certificate filed by a nongovernmental organization (NGO) (the Free Morgan Foundation, FMF), the Netherlands Management Authority stated in June 2017 that 'administrative bodies must make their assessments based on the application', noting that 'at the time, a single application was filed requesting a single transfer in the interests of scientific research'.[66] It then stated that 'at that time [in 2011], at least, there was absolutely no question of breeding', but also observed in an apparent contradiction that 'breeding was never prohibited in the EU certificate'.[67]

The Netherlands and Spanish Management Authorities' contention that 'breeding is not prohibited insofar as it occurs in the context of breeding or propagation for research or education or other non-detrimental purposes' seems predicated on the erroneous transposition of Article 8(3)(e), (f) and (g) of the CITES Basic Regulation onto line 18.8 of the actual form prescribed for certificates in the CITES Implementing Regulation, which reads: 'are to be used for the advancement of science/breeding *or* propagation/research *or* education *or* other non-detrimental purposes'.[68]

This aspect of the Commission's transposition of the CITES Basic Regulation has been challenged in the Petitions Committee of the European Parliament, in June 2018.[69] Using orca Morgan as a case study, the Petitioner (FMF) highlighted the failings of the European Commission to accurately transpose the Basic Regulation into an easily intelligible, unequivocal and enforceable certificate format. The Petition requests the European Commission to establish a new intra-EU 'exemption certificate' template clearly defining the parameters of the exemption authorization in a manner consistent with the provisions of Articles 8(1) and 8(3) of the Basic Regulation by, in particular: (i) listing subparagraphs 8(3)(e), (f) and (g) as separate line items; and (ii) incorporating clear,

[60]EU certificate 11NL114808/20 (27 July 2011), also sometimes referenced as 'EC certificate' or 'CITES certificate'. This involves a certificate issued for intra-EU movement of Annex A (wild-born) specimens pursuant to the CITES Basic Regulation, and consistent with the certificate template provided in Annex V of the CITES Implementing Regulation. The forms listed in Annexes I–IV and VI of the latter Regulation are all identified on their face as CITES forms. The form used for Morgan's transfer, however, is based on Annex V, which is not an official CITES form because it is only used within the EU. The CITES Secretariat has also noted that the EU certificate issued for Morgan was not a CITES certificate. 'The certificate in question is for the purposes of: Exempting Annex A specimens from the prohibitions relating to commercial activities listed in Article 8(1) of Regulation (EC) No 338/97; and Authorising the movement within the EU of a live Annex A specimen from the location indicated in the import permit or in any certificate. Neither of these activities are requirements of CITES and therefore there are no CITES criteria to be met' (email correspondence from David Morgan, Chief, CITES Governing Bodies and Meeting Services, 27 August 2016).

[61]Governing letter accompanying EU certificate 11NL114808/20 (27 July 2011) (authors' translation).

[62]CITES Basic Regulation (n 26) art 8(3)(g).

[63]EU certificate 11NL114808/20 (27 July 2011), under 18 <http://www.freemorgan.org/pdfs/EC-certificate-11NL114808-20_with_Governing_Letter.pdf>.

[64]ibid.

[65]European Parliament, written question P-009807/2011 (25 October 2011).

[66]Decision of 12 June 2017 by State Secretary of Economic Affairs, now the Minister of Agriculture, Nature and Food Quality (authors' translation).

[67]ibid.

[68]CITES Implementing Regulation (n 27) Annex V (emphasis added); see also Annex V of Commission Implementing Regulation (EU) No. 792/2012 Laying Down Rules for the Design of Permits, Certificates and Other Documents Provided for in Council Regulation (EC) No. 338.97 [2012] OJ L242/13.

[69]European Parliament Committee on Petitions Notice to Members, Petition No. 0853/2017 <http://www.europarl.europa.eu/RegData/commissions/peti/communication/2018/625247/PETI_CM(2018)625247_EN.pdf>.

unambiguous identification of the exemptions actually authorized for the particular specimen(s).[70] Such clarification would help ensure that the protections to be afforded to Annex A (i.e. wild-born) specimens[71] can, and will be, uniformly implemented and enforced by Member States. The Commission responded to this Petition as follows:

> *The Commission has not been made aware of any major problems with the implementation of these provisions during the last seventeen years. Also, no relevant issues were raised in the very extensive study on the effectiveness of the EC wildlife trade regulations carried out for the Commission by Traffic, the wildlife trade monitoring network, in 2007.*[72]

However, the Commission was notified by the FMF of this fundamental flaw as early as 2015, through a comprehensive report on the laundering of Morgan.[73] Furthermore, the study cited by the Commission actually supports the position of the Petitioner by observing that Box 18 on the EU certificate template 'does not correspond directly with the range of exemptions set out in Article 8(3)' and that the 'situation could be clarified through amendment of the design of the certificate (including alignment of Box 18 to Article 8(3))'.[74]

7 | THE SPANISH ACQUIESCENCE

The absence of trade borders within the EU differentiates intra-EU movement of wildlife specimens, using a single EU certificate,[75] from wildlife transactions outside the EU involving dual (and often duelling) CITES import/export permits.[76] The EU CITES Basic Regulation reflects an expectation that all competent authorities in the EU will give deference to, and faithfully enforce, an EU certificate in a manner that is consistent with the decisions made by the principal competent authority that considered the application and issued the certificate.[77] Furthermore, when potential violations are brought to their attention, competent authorities are expected to act accordingly.[78]

In the case of orca Morgan, a single EU certificate under a governing letter, was issued by the Netherlands, the principal competent authority, pursuant to both Articles 8 and 9 of the CITES Basic Regulation. As such, the Netherlands would appear to remain competent to address questions arising with regard to the EU certificate and the compliance with its authorizations and conditions, even after the specimen's transfer to the territory of another Member State.

From the outset, the competent Spanish authorities have chosen not to play a role in any challenges or disputes concerning orca Morgan's EU certificate, even though discrepancies and violations have been formally brought to their attention. The Spanish authorities have not attempted to assert dominion over orca Morgan and have acquiesced to the interests of the Government of the Netherlands, its courts and the principal competent authority represented by the Netherlands Minister of Agriculture, Nature and Food Quality.[79] The Spanish authorities have also refrained from intervening directly, or through the European Commission, in any of the administrative or legal proceedings in the Netherlands involving Morgan's EU certificate.

The European Commission, for its part, has consulted with the competent authorities of both Spain and the Netherlands, but there is no indication of the Spanish authorities claiming sole or even joint jurisdiction to determine the nature and scope of the Article 8(3)(g) exemption authorized by the principal competent authority of the Netherlands.[80] Like the Spanish authorities, the Commission itself has failed to act, which resulted in the aforementioned Petition being considered in the European Parliament. The Petitions Committee has asked the Spanish authorities to respond to the allegations

[70]Full text of Petition No. 0853/2017 <http://www.freemorgan.org/pdfs/EU_Petition_No_0853-2017.pdf>.

[71]Annex A is an EU-wide restrictive category, including wild-born specimens of protected species included in Appendices I, II and III of CITES. As such, Annex A specimens are afforded a higher level of protection than Annex B (captive-born) specimens.

[72]ibid.

[73]Spiegl and Visser (n 31).

[74]C Ó Críodáin, 'Study on the Effectiveness of the EC Wildlife Trade Regulations' (TRAFFIC Europe report for the European Commission 2007) <http://ec.europa.eu/environment/cites/pdf/studies/effectiveness_study.pdf> 62. At any rate, the state of knowledge in 2007 is of limited value as an evidence base regarding issues that have arisen subsequently.

[75]Issued pursuant to arts 8 and 9 of the EU CITES Basic Regulation.

[76]There is a long-running discussion among the parties to CITES concerning reform of the purpose-of-transaction codes on CITES import and export permits. There is presently no consensus regarding the need for, or even the desirability of, requiring uniformity in the exporting and importing purpose codes for the same specimen involving the same transaction. This can lead to, and in Morgan's case has led or at least contributed to, two competent CITES authorities with conflicting interpretations and intentions concerning the same specimen.

[77]Article 11(2) of the Basic Regulation (n 26) specifically recognizes that a competent authority can void an EU certificate if it was issued on the false premise that the conditions for its issuance were met. Article 14(1)(b) states that if, at any time, the competent authorities have reason to believe that these provisions are being infringed, they shall take the appropriate steps to ensure compliance or to instigate legal action. As written, Article 14 is not limited to the competent authorities of the Member State of location (arrival) or destination of any particular specimen. Rather, Article 14 evokes an EU obligation for all competent authorities of Member States to act in light of significant acts of infringement which may come to their attention.

[78]See ibid arts 11 (validity of and special conditions for permits and certificates), 14 (monitoring of compliance and investigation of infringements), 15 (communication of information) and 16 (sanctions).

[79]In a letter dated 7 February 2014, the Spanish CITES Management Authority (Alicia Sanchez Munoz) erroneously stated that Morgan comes from a stranding on the coast of the Netherlands, not from a wild capture, therefore the Spanish administrative authority has claimed no competence in disposing of Morgan. In a letter of 14 December 2014, the same Spanish CITES Authority stated that the only binding document for the Spanish authorities is the EU CITES certificate accompanying Morgan, as issued by the Netherlands – and therefore, by default arguably also the governing letter under which the certificate was issued. In a letter of 6 April 2018, the same Spanish Management Authority stated that since Morgan is not owned by the Spanish State, it is not possible to take measures regarding Morgan's destination.

[80]In the context of the aforementioned European Parliament Petition (Notice to Members, Petition No. 0853/2017, 29 June 2018), the European Commission noted that it has been in consultation with the Netherlands and Spanish authorities on several occasions regarding this case during the past seven years, in reference to compliance with the EU wildlife trade regulations.

raised and also asked the Commission for further investigation, following the Commission's unsatisfactory initial response.[81]

The extent of the Spanish authorities' involvement with the transfer of Morgan to Loro Parque is limited to its obligation under Article 9 of the CITES Basic Regulation. Under this provision, the Spanish Management Authority's task was to confirm, in consultation with the competent authority in the Netherlands, whether Loro Parque engages in research and education associated with the publicly displayed orcas. The responsibility of the Spanish Scientific Authority was limited to confirmation that the facilities at Loro Parque are physically adequate to hold orca Morgan. Regardless of the Spanish authorities' error regarding the provenance of Morgan,[82] by acknowledging that the only binding document is the EU certificate – and by implication the governing letter under which it was issued – they are required to ensure that Morgan's welfare and housing conditions are met. However, they have failed to recognize the existence of any problems in this regard, despite abundant evidence.

8 | FAIR PLAY AND 'MORGAN'S LAW'

On the surface then, Morgan's movement from the Netherlands to Spain may have seemed reconcilable with EU CITES rules, but under the magnifying glass a different picture appeared. Morgan's case is unlikely to be unique in this regard, given the loopholes resulting from the ambiguous template discussed above.[83]

The interaction between an applicant or holder of an EU certificate and the authority responsible for issuing and enforcing the certificate may be likened to a chess match. Clearly, players are not always evenly matched. A Member State Management Authority tasked with issuing thousands of certificates for thousands of different species and specimens but with no expertise in any particular aspect of the marine mammal industry would seem to be at a distinct disadvantage when sitting across the board from a corporate entity specializing in the captive display of orcas. Tracking the moves of a single piece – orca Morgan – on the captivity chessboard would seem to confirm this impression. Despite EU certificates being issued for individual animals, Member State Management Authorities and the European Commission alike appear to face a lack of resources, and sometimes perhaps motivation, to ensure that the rules are adequately implemented in all cases, and to intercede when doubts arise. This leads to situations like that of Morgan, where the regular checks and balances fail to offer the purported safeguards. The victim's advocates are then faced with a long, slow administrative challenge and judicial process, while commercial exploitation is allowed to continue.

One possible way to increase compliance and facilitate enforcement of trade regulations is through reform of the purpose-of-transaction codes on CITES permits. This continues to be a recurring item at CITES Conferences of the Parties (COPs), but the debate remains largely detached from real-world consequences for the animals involved and meaningful resolution appears years away.[84] This has prompted the concept of 'Morgan's Law', consisting of four policy proposals to help clarify existing regulations whilst strongly promoting ethically robust and transparent legislation.[85] Morgan's Law would purportedly close inequitable loopholes by requiring:

1. Consistent and conforming CITES purpose-of-transaction codes for both import and export of a single transaction;
2. Full disclosure of the legal 'owner' in addition to identifying the 'holder' and 'facility' on all applications, permits and certificates;
3. Enforceable policies regarding the non-breeding of rescued, wild cetaceans with their captive-born counterparts, to ensure rescued cetaceans do not become breeding stock for commercial purposes or used to propagate hybrid (wild/captive) specimens with no conservation benefit to wild populations; and
4. Clear guidelines as to what constitutes (*bona fide*) scientific research as this has been improperly used in an attempt to justify holding rescued and wild cetaceans in captivity.[86]

Within this context, the role of the EU Zoos Directive should be noted too, as this has become a source of confusion, and might even be considered a 'get out of jail free' card by stakeholders who view compliance with the Zoos Directive as somehow exhausting or even trumping requirements flowing from the EU Regulations on wildlife trade.[87] Two things should be highlighted in this connection. First, the label 'zoo' does *not* classify an entity as predominantly non-commercial. As the aforementioned effectiveness study of 2007 observes:

> *it is unclear whether zoos, museums and botanical gardens fall within the definition of scientific institutions for the purpose of this [CITES Implementing] Regulation, due to the ambiguity of their status as 'commercial' or 'non-commercial' operations. The Commission has confirmed*

[81]Letter from Petitions Committee Chair (Wikstrom) (16 August 2018).

[82]See the aforementioned (n 79) letter of 7 February 2014, in which it was stated that Morgan originated from a stranding rather than a wild capture.

[83]Ó Críodáin (n 74) 62.

[84]See, e.g., CITES COP Decision 14.54 (Rev CoP17) on Purpose Codes on CITES Permits and Certificates.

[85]MV Spiegl and IN Visser, 'Morgan's Law: A Legal Prophylactic to Compassionately Protect Rescued Cetaceans', 3rd International Compassionate Conservation Conference (Sydney, 22–24 November 2017) <http://www.freemorgan.org/wp-content/uploads/2017/11/Spiegl-Visser-2017-Morgans-Law-Poster-Compassionate-Conservation-Conference.pdf>. The framework for Morgan's Law was originally submitted to the United States CITES Management Authority (Fish & Wildlife Service) for consideration as an agenda item proposal for CITES COP17 and also informally distributed to CITES delegates and observing NGOs before the start of the COP; see <https://www.regulations.gov/document?D=FWS-HQ-IA-2014-0018-0139>, <https://www.regulations.gov/document?D=FWS-HQ-IA-2014-0018-1456> and <http://www.freemorgan.org/morgans-law/>.

[86]ibid.

[87]See, e.g., the records of a stakeholder meeting on the EU Wildlife Trade Regulations held on 29 September 2008 <http://ec.europa.eu/environment/cites/pdf/summary_record.pdf>, where discussion focused *inter alia* on the degree to which zoos and aquaria might be equated with 'scientific institutions'; the commercial versus non-commercial status of zoos; and the captive breeding of Annex A specimens, with orca noted as a species of special concern.

> *that the name 'zoo' is not grounds for assuming primary non-commercial use.*[88]

Unfortunately, various Netherlands court decisions concerning orca Morgan have rather muddied the waters in this regard, thus enabling further mission creep.[89] Second, it would be erroneous to construe compliance with the broad goals and general provisions of the Zoos Directive as negating or pre-empting any of the strict prohibitions and explicit standards regarding breeding and public display exemptions for wild Annex A specimens as set forth in the CITES Basic Regulation.[90]

9 | GOING TO COURT – AND FROM BAD TO WORSE

The first of three court rulings issued by the Amsterdam District Court regarding orca Morgan, issued in August 2011, observed that 'the question whether scientific research in Loro Parque is secondary to other activities has not been answered sufficiently', describing the facility as 'an animal amusement park with commercial interests'.[91] It also expressed doubt – quite sensibly, considering the above – as to 'whether this scientific research is sufficiently relevant, in light of what is prescribed by international rules in this regard'.[92] After questioning the lawfulness of the Netherlands authorities' decisions to endorse the orca's indefinite captivity, and observing that the ultimate decision on the orca's fate should turn on 'the questions of international law which have arisen',[93] the Court provisionally blocked the transfer to Loro Parque.

In its second ruling, three months later, the Court (albeit in the person of a different judge) actually established that scientific research in Loro Parque is subordinate to other interests.[94] Remarkably, however, the Court no longer attached much significance to this finding, and contented itself with the finding that 'sufficient education and research' was taking place in Loro Parque to justify the transfer.[95] The Court's earlier decision was reversed and the transfer authorized.

The third judgment, of December 2012, shows that the aforementioned format of the EU certificate and the way the form was completed by the Netherlands Management Authority were enough to throw at least the Amsterdam District Court off the legal scent (and, as indicated below, the Council of State as well). Despite the unequivocal statement in the governing letter that the certificate was given for research *only*, the Court holds that:

> *the EC certificate has been issued both for the performance of research as well as for education. After all, it is declared on the EC certificate under point 18 that Morgan is destined to: 'be used for the advancement of science … research or education'.*[96]

Rather than verifying whether orca Morgan is in fact used for research *only*, the Court contents itself with the finding that it has encountered 'no reason to assume that no research at all takes place in Loro Parque',[97] as if that somehow were the benchmark. 'That it is possible to question the scientific value of (some of) this research', the judgment continues, 'does nothing to affect this.'[98] It may be noted in passing that the same judgment contains the utterly perplexing contention that the extraction of the orca from the Wadden Sea during its rescue operation did not constitute 'intentional taking' in the sense of paragraph 4 of the ASCOBANS Annex, cited previously.[99]

Remarkably, the latter contention was endorsed in appeal before the highest Netherlands administrative court, the Council of State, in April 2014.[100] Moreover, the Council of State also endorsed the District Court's conclusion that the EU certificate authorizes use of orca Morgan for research *and* education.[101] The Council expressly submits that the governing letter does not change this position.[102] In a similar vein as the District Court, the Council furthermore does not consider that the orca should be used for research only, or even research and education only. 'That Loro Parque also develops commercial activities does not alter the fact that Loro Parque is involved in research and education.'[103]

The fifth Netherlands court ruling in the Morgan saga, by the Utrecht District Court in April 2018,[104] is far from an improvement over the prior three when it comes to the role of research. The last sentence in the following excerpt indicates how far the benchmark has drifted away from the strict requirements under ASCOBANS and the Flora and Fauna Act:

[88]Ó Críodáin (n 74) 52.

[89]E.g., the Council of State (Afdeling Bestuursrechtspraak van de Raad van State, ECLI:NL:RVS:2014:1423 (23 April 2014)) has held that 'Loro Parque is not an amusement park but a zoo in accordance with the Zoos Directive, and that zoos as such are not classified as predominantly commercial institutions but have primarily an educational role' (para 7; authors' translation) and that 'Loro Parque's educational function was a given fact, since Loro Parque is indisputably a zoo within the meaning of the Zoos Directive' (para 8.6; authors' translation).

[90]CITES Basic Regulation (n 26) art 8(1) and (3).

[91]Rechtbank Amsterdam, ECLI:NL:RBAMS:2011:BR4578 (3 August 2011) (authors' translation).

[92]ibid.

[93]ibid.

[94]Rechtbank Amsterdam, ECLI:NL:RBAMS:2011:BU5150 (21 November 2011).

[95]ibid para 5.8 (authors' translation).

[96]Rechtbank Amsterdam, ECLI:NL:RBAMS:2012:BY6129 (13 December 2012) para 3.5.3 (authors' translation).

[97]ibid para 3.5.5 (authors' translation).

[98]ibid.

[99]ibid para 3.4.3; see on this issue Trouwborst et al, 'To Free or Not to Free?' (n 30) 130–131.

[100]Afdeling Bestuursrechtspraak van de Raad van State (n 89) para 8.1.

[101]ibid para 8.6.

[102]ibid.

[103]ibid (authors' translation).

[104]Rechtbank Midden-Nederland, ECLI:NL:RBMNE:2018:1767 (26 April 2018).

> *The mere circumstance that Loro Parque has indicated its hope that the orca would get pregnant is insufficient to be able to conclude that it has from the beginning been the intention to use the orca for breeding purposes. Similar considerations apply to the fact that the orca is currently pregnant. In this regard, the court takes into account that the purpose of research and education is not as such incompatible with the orca becoming pregnant. The court does not detect … sufficient indications to enable the conclusion that the orca was destined exclusively for breeding purposes. In addition*, it has not been established that the orca has not been used for research and education at all.[105]

Time will tell whether the Council of State will seize the opportunity of the pending appeal to recall and apply the much more rigid requirements that follow from the international and European legal framework.

10 | MISSION CREEP

The point of departure in the preceding analysis was ASCOBANS and an orca lifted out of the Wadden Sea in 2010. To recall, if the permanent captivity of this orca can be justified under ASCOBANS at all, which is open to serious legal doubt, it must be through its crucial role in research to 'assess the status and seasonal movements' of orca populations, to 'locate areas of special importance to their survival' or to 'identify present and potential threats' to the species.[106] In the scheme of ASCOBANS, all other justifications – including education, breeding, commercial use, animal welfare and research for *other* purposes – appear to be out of the question. Still, in 2018 a Netherlands court declared that all is well because 'it has not been established that the orca has not been used for research and education at all'[107] – as in a classic game of Chinese whispers.[108]

To enable a better grasp of the striking dilution of legal requirements that has taken place along the chain of events concerning orca Morgan, Table 1 portrays the different shades of grey that appear in the principal legal instruments and documents which have passed in review above.

Of course, as the authorities involved must operate within the limits of all applicable legal instruments, the bounds of their discretion regarding orca Morgan is ultimately determined by (the combination of) the strictest legal requirements. ASCOBANS evidently provides a particularly tight bottleneck in this regard, although not the only one.[109]

TABLE 1 Different legal instruments and documents and the extent to which they allow for permanent captivity

Source	Permanent captivity allowed:
ASCOBANS, Annex, paragraph 2	If at all – which is highly doubtful, *inter alia* given that ASCOBANS calls for 'the release in good health of animals captured for research' – then only for 'research' to '(a) assess the status and seasonal movements of the populations and stocks concerned', to '(b) locate areas of special importance to their survival' or to '(c) identify present and potential threats to the different species'
Bern Convention, Article 9	*Inter alia* for 'research and education'
Habitats Directive, Article 16	*Inter alia* for 'research and education'
EU CITES Basic Regulation, Article 8(3)(g)	For 'research or education aimed at the preservation or conservation of the species'
Flora and Fauna Act, exemption Dolfinarium Harderwijk	Only for 'research which is relevant within the framework of obligations imposed by the EU Habitats Directive, the Bern Convention and ASCOBANS'; '[s]tranded and captured animals must, as soon as possible after their rehabilitation (and, as the case may be, research), be released'
EU certificate's governing letter	Only for 'research'
EU certificate	Only for 'research or education', or possibly also for 'other non-detrimental purposes' and even 'breeding or propagation'

By applying much more liberal benchmarks – merely requiring that the orca be used for *some* research *and/or* education, alongside other uses including commercial ones and breeding – various Netherlands court decisions discussed above clearly err.

11 | CONCLUDING OBSERVATIONS

A study published in 2013 already highlighted some of the legal problems associated with the 'shifting justification provided by the Netherlands authorities' for the treatment of orca Morgan, noting that these 'evolved from conservation considerations to research initiatives, with the latter basis omitted from the official explanation to ASCOBANS'.[110] The present analysis conjures up similar images of shifting sands and smokescreens – in addition to miraculous disappearances, uneven chess matches and Chinese whispers. As shown above, the use of research as a justification for the orca's permanent captivity has gone hand in hand with a progressive

[105]Ibid para 14 (authors' translation; emphasis added).

[106]ASCOBANS (n 21) Annex para 2.

[107]Rechtbank Midden-Nederland (n 104) para 14.

[108]This children's game is known as telephone in the United States and under a variety of different names in other countries.

[109]Another noteworthy bottleneck is the use of the wording 'must … be released' in the Flora and Fauna Act.

[110]Trouwborst et al, 'To Free or Not to Free?' (n 30) 143.

watering down of the applicable requirements under international and national legal instruments.

It is difficult to ascertain the degree to which this dilution has been the result of intent. It is, likewise, difficult to establish to what degree events have been influenced by the commercial nature of Dolfinarium Harderwijk and Loro Parque – both of which have petitioned to become parties in the court cases against the Netherlands authorities – and the considerable economic value of an orca like Morgan, although it is easy to imagine such factors having played a role of sorts.[111]

Morgan's saga appears far from over, including from a legal perspective. It remains to be seen, in particular, how events will unfold in the pending appeal before the Netherlands Council of State and at the EU level.[112] Scope remains for the Council of State and the European Commission to remedy the mission creep that has taken place and revert to the original mandate.

Until now, however, Morgan's case has been a striking example of domestic legislative, executive and judiciary powers all failing to uphold the standards imposed by international and national nature conservation law.[113]

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[111]Industry experts have indicated that the value of a captive orca starts at over US$1 million. However, given the extreme inbreeding throughout the world's captive orca population (particularly at the time Morgan was captured), estimates for her value alone have ranged up to US$20 million, making Morgan one of the most valuable animals of any species, worldwide.

[112]On 11 July 2018, the Petitions Committee Coordinators voted to keep the Free Morgan Foundation Petition No. 0853/2017 'open'. The Committee announced it would send a letter to the Spanish authorities to further assess Morgan's situation. The Committee would also ask the European Commission for further information on the specific transposition questions raised by the petition, including compliance with the EU CITES Basic Regulation.

[113]Whereas this article focuses on the legal propriety of keeping Morgan in permanent captivity for research purposes, there remain a host of other legal and administrative issues with Morgan's capture and captivity not addressed here, including regarding the rescue and rehabilitation, the process under which it was determined that the orca not be released and the current conditions under which Morgan is kept.