

A supplemental response to a question raised by the EFRA Committee Marine Mammals session 11.10.22

Whale meat passing through European ports, including Southampton (Information based on CITES data obtained by Animal Welfare Institute, AWI, USA)

February – April 2013: In February 2013, 4,250 metric tonnes of whale products were loaded on to a small, refrigerated container vessel, the *ECL Commander* which sailed from Ålesund, Norway, to **Rotterdam**. The shipment was then loaded on board the *NYK Olympus*, where in early March, it transited the ports of **Le Havre, Hamburg, and Southampton**, en route to Japan via the Suez Canal, arriving in April (information from AWI).

December 2013- February 2014: In December 2013, a combined Icelandic/Norwegian shipment of 3.1 metric tons of whale products left Ålesund, Norway and arrived in **Rotterdam** where it was then loaded on to the *NYK Olympus*. The *NYK Olympus* sailed in early January 2014, subsequently docking in **Southampton and Le Havre**, en route to Asia. The shipment arrived in Tokyo, Japan on 18 February (information from AWI).

September 2014: A shipment of 50,549 metric tonnes of minke whale products (blubber, meat and tail) left Ålesund on board *the ECL Commander*, arriving in **Rotterdam**. The shipment was then transferred to the *NYK Venus* which transited the ports of **Hamburg, Southampton and Le Havre**, en route to Japan (information from AWI).

2015: A 2016 Times article quoted Minister George Eustice commenting that whale meat also transited **Southampton** in 2015¹.

October 2016: A shipment of 2948 kg of whale meat departed Ålesund on board the vessel *Berta*, and arrived in **Hamburg** on the 10th of October. The shipment was transferred on to the *MOL Beacon*, which departed **Hamburg** on the 14th of October en route to Kobe, Japan. According to Marine Traffic vessel tracing, and the sailing schedule for the *MOL Beacon*, the ship passed through **Southampton, Le Havre and Malta** (information from AWI).

Further examples of similar movements through EU ports in 2018 and 2019 are included at page 6.

WDC briefing: UK ports and transit of whale products

What are we asking the UK Government to do?

1. Prevent the use of UK ports or UK waters for the transport, transshipment

¹ <https://www.thetimes.co.uk/article/eu-forces-britain-into-whalemeat-trade-says-minister-99ts2vrpf>

- or movement of whale meat and the products of whaling.
2. Interpret, or where needed revise, existing UK laws to implement the prohibition and grant enforcement powers to UK Customs and Excise and other such bodies that are deemed relevant to these actions.
 3. Send a clear signal to nations that currently allow commercial whaling that the UK will not tolerate the growth of commercial whaling

How can the UK make the changes proposed?²

1. Create new specific legislation to enact such a ban, or use secondary legislation, bylaws and amendments to existing law to effect the changes we wish to see. E.g., Amend the **Harbour, Docks, and Piers Clauses Act 1847**³ through Secondary Legislation as required, that empowers ports to affect a ban, and/or,
2. Use such bylaws as harbours are empowered to enact, and, if necessary,
3. Interpret, and or amend the **CHSR, COHSR** and **WCA** as necessary, and,
4. Create an offence for British citizens, or any other person, to knowingly, or negligently, assist the transport of whale products by permitting such vessels to refuel, to transship whale meat or products, or otherwise assist in, or benefit in any way from, such transportation.

Recommendations

The following comments are offered as a starting point on how to approach the legal changes that would be required. There may also be other ways to achieve the same aims and WDC is ready to work with HMG to further identify specifics and applicable language to ensure our shared objectives are achieved.

Existing Legislation

It has been argued that Article 33 of The **Harbour, Docks, and Piers Clauses Act 1847** prevents the Government from prohibiting the movement of whale meat through UK ports.

Article 33 states:

*“Upon Payment of the Rates made payable by this and the Special Act, and subject to the other Provisions thereof, the Harbour, Dock, and Pier **shall be open to all Persons for the shipping and unshipping of Goods and the embarking and landing on Payment of Passengers.**”*

Unlike more recent legislation, Article 114 appears to imply that the Act can only be amended during the original session of Parliament,

*“And be it enacted, That this Act may be amended or repealed by any Act to be passed **in this Session of Parliament.**” [Emphasis added]*

However, Article 103 states;

² We note that the UK will continue to implement the *Convention on a Common Transit Procedure*, OJ L 226 13.8.87, p.2

³ http://www.legislation.gov.uk/ukpga/1847/27/pdfs/ukpga_18470027_en.pdf

‘And be it enacted, That nothing herein or in the Special Act contained shall be deemed to exempt the Undertakers from the Provisions, Regulations, and Conditions which may be contained in any General Act relating to Harbours, Docks, or tiers, or to Ports, Harbours, or tidal Waters, which may be passed in the same Session -in which the ‘Special Act is passed, or any future Session of Parliament.’

Thus, the Act is subject to subsequent legislation that may be applicable, *inter alia*, the provisions of CHSR, COHSR and WCA.

The Defra website notes that,

‘Offences under regulations 45 and 47 of the Conservation of Offshore Marine Habitats and Species Regulations 2017 (COHSR) are from 12 to 200 nautical miles.⁴

Offences under regulations 43 and 45 of the Conservation of Habitats and Species Regulations 2017 (CHSR) and sections 9(4)(a) – protects whales and dolphins – and 9(5) – protects whales, dolphins and porpoises – of the Wildlife and Countryside Act 1981 (as amended) (WCA) are from 0 to 12 nautical miles.’

Thus, it can be argued that the Conservation of Habitats and Species Regulations 2017 (CHSR), and the Conservation of Offshore Marine Habitats and Species Regulations 2017 (COHSR) effectively prohibit the ‘possession or keeping’ of cetacean products from 0 to 200 miles of the UK coast.

The CHSR states at **42(1)** “Schedule 2 lists those species of animals listed in Annex IV(a) to the Habitats Directive which have a natural range which includes any area in Great Britain”

Defra also note that it is an offence to ‘**Transport, expose, sell, exchange, advertise for sale**’ under the CHSR, COHSR and the Wildlife and Countryside Act 1981 (WCA).

The CHSR at Article 43(3) states
“it is an offence for any person—

- (a) *to be in possession of, or to control,*
 - (b) **to transport,**
 - (c) *to sell or exchange, or*
 - (d) *to offer for sale*
- or exchange, anything to*

⁴ <https://www.gov.uk/government/publications/protected-marine-species/cetaceans-dolphins-porpoises-and-whales>

which this paragraph applies.

43(4) Paragraph (3) applies to—

- (a) any live or dead animal or part of an animal—*
 - (i) which has been taken from the wild, and*
 - (ii) which is of a species or subspecies listed in Annex IV(a) to the Habitats Directive; and*
- (b) anything derived from such an animal or any part of such an animal”*

UK officials already have the right to inspect vessels suspected of carrying prohibited products such as whale meat. Indeed, the Conservation of Habitats and Species Regulations 2017, allocates powers of entry and inspection to Wildlife Officers at:

116.—(1) *A wildlife inspector may, at all reasonable hours, enter and inspect any premises other than a dwelling - (a) for the purpose of ascertaining whether a species offence is being or has been committed; or:*

(2) The power in paragraph (1) to enter and inspect premises includes power to board and inspect a ship within the marine area, subject to paragraphs (3) to (6).

We would suggest that we need to consider, noting the restrictions in the original Act, if Ministers or the competent authorities can make use of Statutory Instruments to amend the Act or these other pieces of legislation to achieve our aims.

Potential use of Bylaws

Article 83 of the 1847 Act allows:

‘The Undertaker⁵ may from Time to Time make such Byelaws as they shall think fit for all or any of the following Purposes; (that is to say,) For regulating the Use of the Harbour, Dock, or Pier’...
For regulating the Exercise of the several Powers vested in the Harbour-master:

For regulating the Admission of Vessels into or near the Harbour, Dock, or Pier and their removal out of and from the same’.

The UK has regularly used bylaws to control access to ports, e.g. ***The Hinkley Point Empowerment Order 2012***⁶

At Section 3, 22(1), the Order states, *The Company may from time to time make byelaws for the efficient management and regulation of the harbour.*

⁵ Undertakers "shall mean the Persons by the Special Act authorized takers:" to construct the Harbour, Dock, or Pier, or otherwise carry into effect the Purposes of the Special Act with reference thereto.

⁶ <http://www.legislation.gov.uk/uksi/2012/1914/contents/made>

(2) Without prejudice to the generality of paragraph (1), byelaws made under this article may provide for...

b. regulating the admission to, the movement within, and the departure from, the harbour of vessels, or the removal of vessels;

c. regulating the shipping and unshipping, landing, warehousing, stowing, depositing and removing of goods within the harbour

Defences to any challenges under the WTO

The UK should be ready to present a counter argument to any complaints raised by whaling interests.

The briefing provided by Client Earth notes that a unilateral ban on transits of whale meat through EU ports (and as such, UK ports) appears to be *prima facie* inconsistent with Article V, paragraph 2, of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") which provides that: "*there shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of the other contracting parties.*"

However, the WTO legal system contains exceptions under Article XX of the GATT 1994, which may be used to justify an EU ban on whale meat transits as a last resort measure (after *bona fide* efforts to reach an international agreement) to improve the conservation of whales.

Client Earth⁷ noted that the EU has historically argued against such unilateral measures, as evidenced in the position it has taken in at least three cases but this does not mean that an independent UK would have interpreted the issues in the same way, then or in the future.

However, as established in WTO jurisprudence, the assessment of a claim of justification under Article XX involves a two-tiered analysis: first, the challenged measure must be 'provisionally justified' under one of the subparagraphs of Article XX; and second, the measure must be appraised under the introductory paragraph ("the Chapeau"). The justification under Article XX, subparagraphs (a), (b), and (g), have been considered in WTO cases as follows;

- **Article XX (a) necessary to protect public morals, requiring a 'necessity analysis'**, thus, provided it is justified as "necessary", the UK may adopt trade restrictive measures to protect its public morals on the transit of whale meat
- **Article XX (b) necessary to protect human, animal or plant life or health** - Prior to adopting a unilateral ban on whale meat transits (which would be even more restrictive than an import ban), the UK must make *bona fide* efforts to reach an international agreement on an improved conservation status of whales.
- **Article XX (g) relating to the conservation of exhaustible natural**

⁷ <https://bit.ly/3Fb8hMB>

resources if such measures are made effective in conjunction with restrictions on domestic production or consumption - Species listed in Appendix I of CITES (which are threatened with extinction) are “exhaustible natural resources” that qualify for conservation measures under Article XX (g)³⁷ and a WTO Member may adopt conservation measures to protect species known to occur in its territory – without showing that all populations of the species at stake migrate to, or traverse, that territory.

The UK would be required to make an argument that Iceland, Norway and Japan are effectively refusing to engage in *bona fide* efforts to reach an agreement (for example, in the context of the IWC or CITES) on an improved conservation status of whales.

Therefore, the following ideas are not exhaustive, but are submitted as a way of starting a discussion on the potential arguments that could be used.

- The UK’s increasing recognition of the global public good that live cetaceans play in the mitigation of climate change and the contribution they make through whale watching means that a defence can be made under the ‘*necessity analysis*’ of Article XX (a),
- Looking to UNCLoS⁸, Articles 65 and 120 of UNCLOS require States to “*cooperate with a view to the conservation of marine mammals and in the case of cetaceans [to] in particular work through the appropriate international organizations for their conservation, management and study*”, both within and beyond their exclusive economic zones and in the areas of the high seas. Therefore, that the UK could argue a defence under Article XX (b),
 - Iceland, Norway and Japan’s continued objections to CITES provisions with regard to trade in whale products,
 - Iceland’s use of a ‘reservation’⁹ and Norway’s use of an objection to the moratoria adopted by the IWC in 1982, and,
 - Japan’s withdrawal from the jurisdiction of the ICRW and the International Court of Justice (ICJ) with respect to marine species is a *prima facie* demonstration of a continuing rejection of efforts to improve the conservation of whales.

Supporting Background

The campaign to end the transit of whale products

WDC has been campaigning to end the transit of whale products for over twenty years. During that time, both supply and demand have fluctuated. However, since 2000, we have seen concerted efforts by Icelandic and Norwegian whalers to increase their profits by exporting to Japan and other countries. Prominent individuals in the whaling industry have made much of the role of enhanced trade as being a signal that whaling can be made profitable.

⁸ A copy of UNCLOS is available on http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm

⁹ To the best of our knowledge the UK has never recognised the use of a reservation by Iceland.

Such transit has often involved whale products moving through ports in countries opposed to commercial whaling and the trade in whale products. Whilst multiple international and EU laws prohibit the disturbance, killing and commercial trade in whales and products, European countries, including the UK, have effectively facilitated the whaling industry by allowing whale meat to pass through their ports. WDC has, thus, identified the ending the import and export of whale meat and products as a strategically important goal. We have sought to isolate these individuals seeking to benefit from this trade and reduce their credibility with the wider public whilst increasing the costs of transporting whale products.

Known whale meat transits through UK and EU ports since 2013

Working with other organisations, in particular US-based Animal Welfare Institute (AWI), we have monitored and tracked movement of both Icelandic fin and minke whale products, as well as Norwegian minke whale products, through European ports, with especial interest in any movement through UK ports, primarily Southampton.

At least four shipments of whale products have passed through Southampton: in March 2013, January 2014, September 2014 and October 2016 as detailed on page 1

These shipments also stopped off at various other EU ports, with Rotterdam, Hamburg and Le Havre the ports most used. Additional shipments did not transit Southampton but did pass through one or more of those ports.

We would note the difference between a shipment *transiting* a port (passing through without being unloaded or moved to another vessel) and being *transferred or transshipped* (unloaded and moved to another vessel or conveyance).

More Recent incidents:

- In October 2018, 148.3 metric tonnes of Norwegian minke whale meat was shipped to **Rotterdam** aboard the *Samskip Endurance*, where it was then transferred to another container vessel, the *Sino Bridge*, which sailed on to **Hamburg** and from there to Busan, Korea. The shipment was transferred to *the Star Express* before sailing on to its final destination, Sendai, Japan on 27th November (information from AWI).
- In October 2019, a shipment of 201.2 metric tonnes of Norwegian minke whale meat left Ålesund, Norway, again aboard the *Samskip Endurance*. Arriving in **Rotterdam**, the shipment was transferred to the container vessel *Al Dahna*, which then sailed to Busan, Korea where it was offloaded and moved by truck to another vessel, the *New Camellia*, which took it on to Hakata, Japan, arriving on November 22nd (information from AWI).

We would note that **Samskip** is the Icelandic shipping company that had previously promised in 2013 that it would not transport whale meat again (after the Hamburg incident).¹⁰

Pre-Brexit campaign to end the transit of whale products through EU ports

The EU strictly protects all species of whale, dolphin and porpoise and any incidental capture, killing or sale by EU Members is prohibited. The EU specifically prohibits international trade in whale products under Council Regulation No. 338/97 which implements CITES in the EU Member States and which lists all cetacean products under Annex A, thus being stricter than CITES itself.

WDC's stance pre-Brexit had been to challenge the EU Commission's assertion that the issue of transit of whale products fell solely under Trade and therefore, challenged the claim that the EU Commission had exclusive competency on this issue. We asserted, rather, that whaling and the transit of whale products should fall under environmental policy and therefore be treated as a shared competency issue. This would have allowed the UK and other MSs to enact stricter national provisions. However, we campaigned with the goal that an EU-wide policy to prevent future transit of whale product should be achieved.

In August 2014, WDC commissioned a report by Client Earth '**Transit of whale meat through EU ports**'¹¹.

In January 2016, we approached Doerthe Ohm (Env) with a request to see the Commission's legal analysis on the issue of whale meat transiting EU ports. After obtaining the non-paper, we supplied DEFRA at their request with an overview of the issue and a summary of the barriers to taking unilateral or EU action¹²

Vote Leave campaign

During the 2016 Brexit campaign, those arguing for the Leave side used the issue of whaling and whale meat movements as part of a social media campaign appealing to voters to allow the UK to address this issue independently of EU law.



WDC was contacted by supporters during this period who believed that voting Leave would indeed result in the UK being able to take progressive action to end the use of UK ports by whaling interests. In 2020 it was stated by ministers that post transition period, the transition of whale meat through British ports would be outlawed.

2017 WDC petition

In 2017, WDC presented a petition, signed by over 100,000 people, to the UK Government and the EU, calling for action to prohibit transit of whale meat through UK and EU ports.

Post Brexit challenges

i) Open Port Duty

In a 2016 article in *The Times*¹³, George Eustice MP blamed EU legislation for our current Open Ports policy, e.g., "...EU legislation creates an obligation on members to have "open" ports and permit the transport of any product."

Whilst WDC acknowledges the fact that the EU was not helpful in addressing this issue, we would note that the open port duty is primarily based on British legislation extant before joining the EU.

Under Clause 33 of the ***Harbour, Docks, and Piers Clauses Act 1847***, Harbour Boards are subject to open port duty. This means that the harbour must be open to anyone ***"for the shipping and unshipping of goods and the embarking and landing of passengers"*** on payment of the rates and other conditions set by the Board. This suggests that, even after the UK has left the EU, we will still be bound by existing UK law unless it is amended.

ii) Free Ports

In 2016, the then Chancellor of the Exchequer, Rishi Sunak authored a report on the subject: *The Free Ports Opportunity*.¹⁴

Free Ports are areas that, although inside the geographic boundary of a country, are considered outside the country for customs purposes. Goods can enter and exit a Free Port without incurring the usual import procedures or tariffs – with the purpose of incentivizing domestic manufacturing.

In his report, Sunak argued that Britain's membership of the EU has long held back the potential of British ports and stymied growth. He postulated that the creation of Free Ports across Britain would increase manufacturing output, reinvigorate the North and represent a huge opportunity for trade. Sunak noted that ports are already a vital strategic asset for the UK economy, accounting for 96% of all trade

¹³ <http://www.thetimes.co.uk/article/eu-forces-britain-into-whalemeat-trade-says-minister-99ts2vrpf>

¹⁴ <https://www.cps.org.uk/files/reports/original/161109144209-TheFreePortsOpportunity.pdf>

by volume and 75% trade value, further noting that the UK ports sector is already the second largest in Europe.

Whilst we recognise that the concept of Free Ports may be attractive from an economic stimulus perspective, we are concerned to ensure those wishing to move their whale meat products around the world are not permitted to exploit UK Free Ports as they are developed.

The Freeports consultation was published in February 2020; this set out the government's vision to establish up to 10 Freeports across the UK¹⁵

WDC, via Wildlife and Countryside Link, responded to this consultation, raising concerns over the potential transit of whale meat through freeports¹⁶. The Government published its response to the Freeports consultation¹⁷.

We are troubled that there was no substantive response to our concerns raised the potential transit of whale meat through freeports, and the lack of detail as to how environmental protections will be upheld, let alone strengthened".

About WDC

WDC, Whale and Dolphin Conservation is a leading charity dedicated to the protection of whales, dolphins and porpoises. Headquartered in the UK, we have offices around the world. WDC has considerable expertise in addressing the issue of international whaling, international ocean policy, marine litter, international environment, climate, biodiversity and marine conservation issues.

Glossary

"English inshore region" means the area of sea within the seaward limits of the territorial sea adjacent to England;

"sea" includes—

- (a) any area submerged at mean high water spring tide, and
- (b) the waters of every estuary, river or channel, so far as the tide flows at mean high water spring tide, and any reference to an area of sea includes the bed and subsoil of the sea within that area;

"ship" means any vessel (including hovercraft, submersible craft and other floating craft) other than one which permanently rests on, or is permanently attached to, the seabed.

¹⁵ <https://www.gov.uk/government/consultations/freeports-consultation>

¹⁶ <https://committees.parliament.uk/writtenevidence/5465/pdf/>

¹⁷

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/924644/FINAL_-_200923_-_OFF_SEN_-_Freeports_Con_Res_-_FINAL.pdf

