

Agenda Item 20

Possible Amendment of the Agreement to include all Cetacean Species in the Agreement Area  
(Political, institutional and legal aspects)

Document 37

**The Interaction between the ASCOBANS MOP and the IWC, NAMMCO and EC**

**Action Requested**

- Take note of the document
- Evaluate implications for the Agreement
- Make recommendations to the MOP

Submitted by

WDSCS



**NOTE:**  
**IN THE INTERESTS OF ECONOMY, DELEGATES ARE KINDLY REMINDED TO BRING THEIR OWN COPIES OF DOCUMENTS TO THE MEETING**

## **Secretariat's Note**

1. MOP5 Resolution 6 (2006) on the Activities of the Advisory Committee 2007-2009 instructs the AC to “consider, in 2009, the possible amendment of the ASCOBANS Agreement to include all cetacean species”.
2. Upon request of the 12th Meeting of the Advisory Committee (2005), ECS and WDCCS agreed to draft reviews on the implications of such an extension.
3. This attached document was first tabled for the 13<sup>th</sup> Meeting of the ASCOBANS Advisory Committee (2006) and is now being brought to the Meeting's attention again to facilitate the deliberations called for by the MOP.

The interaction between the  
ASCOBANS MOP  
and the  
IWC, NAMMCO and EC

A report for WDCS

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April 2006

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## Disclaimer

The material provided in this report is general in nature and should not be regarded as an attempt to comprehensively cover every possible aspect of the particular issues being addressed. It should not be relied upon or treated as a substitute for legal advice in relation to individual situations. Except in respect of WDCCS, the author shall have no responsibility for any loss which may arise from reliance on any part of the material contained in this report.

## Abbreviations

Many abbreviations are used in this report. Some are explained in the course of the report, while others are set out here:

Abbreviation	Full name
ACCOBAMS	Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area
ACCOBAMS MOP	Meeting of the Parties to the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area
ACCOBAMS SC	Scientific Committee established pursuant to Article VII of ACCOBAMS
ASCOBANS	Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas
ASCOBANS MOP	Meeting of the Parties to the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas
ASCOBANS AC	Advisory Committee established pursuant to Article 5 of ASCOBANS
CFP	EC's common fisheries policy
CITES COP	Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on the Conservation of Migratory Species of Wild Animals
CMS COP	Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals
EEZ	Exclusive economic zone
EC	European Community
Habitats Directive	Council Directive 92/43/EEC of 21 May 1992 on the conservation of

	natural habitats and of wild fauna and flora
IBSFC	International Baltic Sea Fishery Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICES	International Council for the Exploration of the Sea
ICRW	International Convention for the Regulation of Whaling
IMO	International Maritime Organization
IWC	International Whaling Commission
IWC-SC	Scientific Committee established by the IWC
LOSC	United Nations Convention on the Law of the Sea
NASCO	North Atlantic Salmon Conservation Organization
NAMMCO	North Atlantic Marine Mammal Commission
NAMMCO Agreement	Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic
NAMMCO Council	Council of the NAMMCO
NAMMCO MC	Management Committee of the NAMMCO
NAMMCO SC	Scientific Committee of the NAMMCO
NEAFC	North East Atlantic Fisheries Commission
nm	nautical miles
RFMO	regional fisheries management organisation
SAC	special area of conservation (pursuant to the Habitats Directive)
STECF	Scientific, Technical and Economic Committee for Fisheries (pursuant to EC Council Regulation 2371/2002)

## 1. Scope of report

This report addresses the interaction between, on the one hand, the ASCOBANS MOP and, on the other hand, the IWC, the NAMMCO and the EC.

The specific purpose of the report is to consider the nature of that interaction in the light of: (a) the agreed extension of the “Area of the agreement” under Article 1(2)(b) of ASCOBANS (referred to in this report as “the Agreement Area”); and (b) the possible extension of the subject matter of ASCOBANS from small cetaceans to all cetaceans.

The IWC, NAMMCO and EC are all international organisations. For the purposes of this report, the ASCOBANS MOP will likewise be regarded as an international organisation (as will, *inter alia*, the ACCOBAMS MOP and each Conference of the Parties (“COP”) and Consultative Meeting of the Parties referred to in the list at the end of this section).<sup>1</sup>

The choice of the IWC, NAMMCO and EC as the focus for this report is not intended to convey the impression that only those organisations are relevant regarding the extended geographical scope and extended subject matter of ASCOBANS. Other international organisations that are potentially relevant in that regard include, *inter alia*, the following:

#### Global

- COP to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal
- COP to the Convention on Biological Diversity
- COP to the Convention on International Trade in Endangered Species of Wild Fauna and Flora
- COP to the Convention on the Conservation of Migratory Species of Wild Animals
- COP to the Stockholm Convention on Persistent Organic Pollutants
- Consultative Meeting of the Parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter
- Food and Agriculture Organization of the United Nations (FAO)
- Intergovernmental Oceanographic Commission (IOC)
- International Hydrographic Organization (IHO)
- International Maritime Organization (IMO)
- International Seabed Authority (ISA)
- United Nations (UN)

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<sup>1</sup> For a fuller discussion on the status of institutional arrangements established by multilateral environmental agreements, see: R.R.Churchill & G.Ulfstein, Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law, *The American Journal of International Law*, Vol.94, No.4, October 2000, pp 623-659.

- World Heritage Committee of the Convention Concerning the Protection of the World Cultural and Natural Heritage

## Regional

- ACCOBAMS MOP
- Baltic Marine Environment Protection Commission (Helsinki Commission)
- Council of Europe (and the Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats)
- International Baltic Sea Fishery Commission (IBSFC)
- International Commission for the Conservation of Atlantic Tunas (ICCAT)
- International Council for the Exploration of the Sea (ICES)
- North Atlantic Salmon Conservation Organization (NASCO)
- North Atlantic Treaty Organisation (NATO)
- North East Atlantic Fisheries Commission (NEAFC)
- OSPAR Commission

## 2. ASCOBANS

### 2.1 *Introduction*

ASCOBANS was concluded under the CMS. The Final Act of ASCOBANS was signed on 13 September 1991; ASCOBANS was opened for signature on 17 March 1992 and entered into force on 29 March 1994.<sup>2</sup> It currently has 10 contracting parties: Belgium; Denmark; Finland; France; Germany; Lithuania; the Netherlands; Poland; Sweden; and the United Kingdom.<sup>3</sup> Those parties are all EC Member States.

The existing Agreement Area includes maritime zones under the sovereignty or jurisdiction of the parties to ASCOBANS as well as maritime zones under the sovereignty or jurisdiction of four non-parties (i.e. Estonia, Latvia, Norway and Russia). The term “maritime zones” has been used in this report, instead of

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<sup>2</sup> <[www.cms.int/pdf/en/summary\\_sheets/Ascobans\\_Agr\\_Sum\\_Sheet.pdf](http://www.cms.int/pdf/en/summary_sheets/Ascobans_Agr_Sum_Sheet.pdf)>.

<sup>3</sup> <[www.ascobans.org/index0101.html](http://www.ascobans.org/index0101.html)>.

“waters”, to reflect the fact that one of the types of maritime zone under coastal State jurisdiction, i.e. the continental shelf, has no water column element. In some cases, the maritime zones of a particular coastal State are not covered in their entirety by the Agreement Area (e.g. UK, France).

ASCOBANS provides for three institutions: the ASCOBANS MOP;<sup>4</sup> the ASCOBANS AC;<sup>5</sup> and the ASCOBANS Secretariat.<sup>6</sup>

## 2.2 *Extensions of geographical scope and subject matter*

### Extension of geographical scope

The extension of the geographical scope of ASCOBANS is provided for by Resolution No. 4 of ASCOBANS MOP 4. By that Resolution, the MOP agreed to extend the Agreement Area to include specified areas to the west and south of the existing Agreement Area. That extension is to be effected by an amendment to Article 1(2)(b) of ASCOBANS and two associated changes. The Resolution requests parties to ASCOBANS to ratify the amendment as soon as possible. In practice, the amendment has not yet entered into force. The extension of the Agreement Area provided for by the Resolution will be referred to in this report as “the agreed extension”.

The agreed extension includes maritime zones under the sovereignty or jurisdiction of, *inter alia*, France, Ireland, Portugal, Spain and the United Kingdom (including the Isle of Man). Of those, only France and the United Kingdom are currently parties to ASCOBANS.

There are two maps accompanying Resolution No. 4 of MOP 4. Though both show the agreed extension of the Agreement Area, neither indicates which parts of the agreed extension constitute areas beyond national jurisdiction. Based on a cursory

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<sup>4</sup> ASCOBANS, Article 6.

<sup>5</sup> ASCOBANS, Articles 2(4) and 5.

<sup>6</sup> ASCOBANS, Articles 2(4) and 4.

analysis of the agreed extension, it is possible that it may include one or more such areas.

It may be of interest to the ASCOBANS MOP to have a formal assessment made of the extent to which the agreed extension includes areas beyond national jurisdiction, though any assessment of that kind would need to take into account the current uncertainty about the outer limits of the continental shelf where it extends beyond 200 nm from the baseline.

One reason for establishing which parts of the agreed extension constitute areas beyond national jurisdiction is that it would enable the ASCOBANS MOP to better understand how it was likely to interact with other international organisations that have functions in relation to such areas. In that respect, the report of ASCOBANS AC 9 states that the Chairman of the ASCOBANS AC noted that “extending the Agreement area beyond 200 nm might cause problems and this would not be beneficial to ASCOBANS”.<sup>7</sup>

#### Extension of subject matter

The extension of the subject matter of ASCOBANS would involve an extension in scope from small cetaceans to all cetaceans. That development is less progressed than the extension of geographical scope, in that no specific amendments to ASCOBANS have yet been agreed by means of a Resolution.

Most recently, the issue was on the agenda of ASCOBANS AC 12. Yet the report of that meeting states that: “The meeting decided that it was premature to discuss this matter in detail because it was not yet clear what the implications of an extension of the agreement area might be”.<sup>8</sup> Nevertheless, Spain “expressed interest” in the extending the scope and France suggested that the extended scope “would be a logical

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<sup>7</sup> Report of ASCOBANS AC 9, page 11.

<sup>8</sup> Report of ASCOBANS AC 12, page 16.

extension of ASCOBANS work ...”.<sup>9</sup>

### 2.3 *Status of ASCOBANS in relation to Article IV of CMS*

CMS provides for so-called “Agreements” under Article IV(3) and other “agreements” under Article IV(4). Technically, there is a distinction between those two categories of instrument.

So-called “Agreements” under Article IV(3) of CMS are intended to apply to “migratory species [as defined] listed in Appendix II” of CMS. Parties to CMS that are Range States of such species “shall endeavour to conclude Agreements where these would benefit the species ...”. Article V of CMS establishes guidelines for Agreements.

In contrast, so-called “agreements” under Article IV(4) of CMS are intended to apply to “any population or any geographically separate part of the population of any species or lower taxon of wild animals, members of which periodically cross one or more national jurisdictional boundaries”. Parties to CMS “are encouraged to take action with a view to concluding agreements” for such populations or sub-populations.

ASCOBANS states that it “is an agreement within the meaning of the Bonn Convention, Article IV (4)”.<sup>10</sup> Thus, ASCOBANS is an “agreement” rather than an “Agreement” (emphasis added). This in turn gives the parties to ASCOBANS more freedom over the content of, and practice under, ASCOBANS. Notably, an agreement may apply to a broader array of species than just those listed in Appendix II of CMS and the guidelines for Agreements set out in Article V of CMS do not necessarily apply.

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<sup>9</sup> Report of ASCOBANS AC 12, pages 15 and 16. See also: Letter from Spanish Ministry of Environment to ASCOBANS Secretariat, dated 31 March 2005, Document AC12/Doc.23(S), unofficial translation by ASCOBANS Secretariat.

<sup>10</sup> ASCOBANS, Article 8(1).

## 2.4 *Potential parties to ASCOBANS*

### Introduction

The duty in Article IV(4) of CMS to endeavour to establish “agreements” is a duty aimed at parties to CMS in general, rather than Range States specifically. In practice, ASCOBANS defines the term “Party [to ASCOBANS]” as meaning “a range State or any Regional Economic Integration Organization for which this agreement is in force”<sup>11</sup> and clearly implies that “all Range States and Regional Economic Integration Organizations” may become parties.<sup>12</sup>

The term “Range State” is in turn defined in Article 1(2)(f) of ASCOBANS as follows:

“Range State” means any State, whether or not a Party to the agreement, that exercises jurisdiction over any part of the range of a species covered by this agreement, or a State whose flag vessels, outside national jurisdictional limits but within the area of the agreement, are engaged in operations adversely affecting small cetaceans;

Thus the definition of the term “Range State” has two components: (a) a State “that exercises jurisdiction over any part of the range of a species covered by this agreement”; and (b) a State “whose flag vessels, outside national jurisdictional limits but within the area of the agreement, are engaged in operations adversely affecting small cetaceans”.

### The coastal State component of “Range State”

The first component of the definition of the term “Range State” in Article 1(2)(f) of ASCOBANS relates to States in their capacity as coastal States. In that regard, it is first necessary to establish what is meant by the term “a species covered by this agreement”.

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<sup>11</sup> ASCOBANS, Article 1(2)(e).

<sup>12</sup> ASCOBANS, Article 8(4).

Article 1(1) of ASCOBANS states that “[t]his agreement shall apply to all small cetaceans found within the area of the agreement”, and the term “small cetaceans” is in turn defined as “any species, subspecies or population ...”.<sup>13</sup> For the purposes of this report, it will therefore be assumed that the term “a species covered by this agreement” means a small cetacean species, subspecies or population, individuals of which are found within the Agreement Area.

Next, it is necessary to understand what is meant by the term “any part of the range”. For a coastal State to be a “Range State” for the purposes of ASCOBANS, is it sufficient for that State to exercise jurisdiction over any part of the range of a species covered by ASCOBANS – even a part of the range that is outside the Agreement Area? Or is it necessary for that State to exercise jurisdiction over a part of the range that falls inside the Agreement Area? The answer is not clear from the wording of ASCOBANS itself.

An argument for the broader interpretation is that the flag State component of the term “Range State” (see below) is qualified by a reference to “within the area of the agreement”, whereas the coastal State component is not. A counter-argument is that if coastal States beyond the Agreement Area were intended to be included as Range States, it would have been logical to also include flag States whose vessels adversely affect species covered by ASCOBANS even when such vessels are engaged in operations outside the Agreement Area; yet such flag States are not included.

Some help is provided by practice under the Agreement. Thus the report of ASCOBANS AC 9 states that: “In order to enable Spain and Ireland to join ASCOBANS without the delay caused by a formal extension of the [Agreement] area, the attention of the States in question had been drawn to the fact that under [Articles 1(2)(f) and 8(4) of ASCOBANS], the Agreement was open to accession by any states that exercised jurisdiction over any part of the range of a species covered by the Agreement”.<sup>14</sup>

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<sup>13</sup> ASCOBANS, Article 1(2)(a).

<sup>14</sup> Report of ASCOBANS AC 9, page 11.

The implication of that statement is that, for a coastal State to be a “Range State” for the purposes of ASCOBANS, it is sufficient for that State to exercise jurisdiction over any part of the range of a species covered by ASCOBANS, even if that part of the range is outside the Agreement Area. If that is right, then an extension of the scope of ASCOBANS to all cetaceans species found within the Agreement Area is likely to broaden significantly the number of coastal States that may be “Range States” for the purposes of the Agreement (assuming that large cetaceans range significantly more widely than small cetaceans).

However, the statement in the report of ASCOBANS AC 9 is somewhat at odds with an earlier statement in the report of ASCOBANS AC 8. The latter states that: “Countries beyond the existing Agreement area could be accommodated either through establishing that they had fishing vessels operating in the Agreement area or by extending the Agreement area”.<sup>15</sup> That statement therefore neglects the possibility of a State beyond the existing Agreement Area being a Range State by virtue of exercising jurisdiction over a part of the range of a species covered by the Agreement, even if that part of the range is outside the Agreement Area.

The statement in the report of ASCOBANS AC 9 also contrasts with the view of the Spanish Minister of Environment expressed in a letter dated 16 June 2003 to the ASCOBANS Secretariat.<sup>16</sup> In that letter, the Minister states that “given the current version of the Agreement, our country could accede only if Spanish vessels were fishing in waters covered by the Agreement”. Again, that statement neglects the possibility of a State beyond the existing Agreement Area (e.g. Spain) being a Range State by virtue of exercising jurisdiction over a part of the range of a species covered by the Agreement, even if that part of the range is outside the Agreement Area.

It is beyond the scope of this report to advise on the correct interpretation of the coastal State component of the term “Range State” as used in ASCOBANS. But any amendments in due course to ASCOBANS to extend its subject matter may be a suitable opportunity for the ASCOBANS MOP to also propose an amendment that

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<sup>15</sup> Report of ASCOBANS AC 8, page 10.

<sup>16</sup> Letter from Spanish Minister of Environment to ASCOBANS Secretariat, dated 16 June 2003, Document MOP4/Doc. 27(S), unofficial translation by ASCOBANS Secretariat.

clarifies the scope of the coastal State component in line with whatever the ASCOBANS MOP considers to be the correct interpretation. Failing that, the ASCOBANS MOP may feel able to adopt an interpretive Resolution.

### The flag State component of “Range State”

The second component of the definition of the term “Range State” in Article 1(2)(f) of ASCOBANS relates to States in their capacity as flag States. Thus a flag State is a Range State if its “flag vessels, outside national jurisdictional limits but within the area of the agreement, are engaged in operations adversely affecting small cetaceans”. The flag State in question may potentially be one of the States whose maritime zones occur within the Agreement Area, or another State altogether.

The reference to “outside national jurisdictional limits” in Article 1(2)(f) of ASCOBANS is a little confusing. On a narrow construction, it would mean outside the maritime zones of any coastal State. On a broader construction, it would mean outside the maritime zones of just the flag State in question. The broader construction would allow, *inter alia*, a flag State with no maritime zones inside the Agreement Area to be a “Range State” if its vessels were anywhere inside the Agreement Area (and were “engaged in operations adversely affecting small cetaceans”).

It is relevant to consider what is meant by the phrase “flag vessels ... engaged in operations adversely affecting small cetaceans”. A statement in the report of AC 8 indicates that the parties include fishing vessels within the scope of that phrase. Thus the report states that: “Countries beyond the existing Agreement area could be accommodated either through establishing that they had fishing vessels operating in the Agreement area or by extending the Agreement area” (emphasis added).

Two statements by Spain, currently a non-party to ASCOBANS, also relate to fishing vessels. First, a letter dated 31 March 2005 from the Spanish Ministry of Environment to the ASCOBANS Secretariat concludes that Spain is a Range State by virtue of it being “a country whose fishing fleet is operating in Agreement waters”

(emphasis added; though, oddly, Spain quotes only that part of Article 1(2)(f) of ASCOBANS relating to coastal States).<sup>17</sup>

Secondly, a letter dated 16 June 2003 from the Spanish Minister of Environment to the ASCOBANS Secretariat states that “given the current version of the Agreement, our country could accede only if Spanish vessels were fishing in waters covered by the Agreement” (emphasis added).<sup>18</sup> The wording of that letter, at least in the unofficial translation, implies that Spain considers that the phrase “flag vessels ... engaged in operations adversely affecting small cetaceans” only encompasses fishing vessels.

It is noteworthy that none of the three statements quoted above refer to the requirement in Article 1(2)(f) of ASCOBANS that the vessels must be “engaged in operations adversely affecting small cetaceans”. It is not necessarily the case that all fishing vessels will be “engaged in operations adversely affecting small cetaceans”.

Whether the phrase “flag vessels ... engaged in operations adversely affecting small cetaceans” only encompasses fishing vessels or also encompasses other categories of vessel is a matter of interpretation. It is beyond the scope of this report to advise on the correct interpretation of the phrase. However, an interpretation that does include other categories of vessel will tend to increase the number of flag States that are “Range States”.

Assuming a broader construction of the term “outside national jurisdictional limits” (see above), the extension of the Agreement Area has the potential to increase the number of flag States that are “Range States” for the purposes of ASCOBANS if: (a) vessels are engaged in operations adversely affecting small cetaceans in the new parts of the Agreement Area but not in the original parts; and (b) the flag States of those vessels are not already Range States by virtue of any of their flag vessels being engaged in operations adversely affecting small cetaceans in the original parts of the Agreement Area.

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<sup>17</sup> Letter from Spanish Ministry of Environment to ASCOBANS Secretariat, dated 31 March 2005, Document AC12/Doc.23(S), unofficial translation by ASCOBANS Secretariat.

<sup>18</sup> Letter from Spanish Minister of Environment to ASCOBANS Secretariat, dated 16 June 2003, Document MOP4/Doc. 27(S), unofficial translation by ASCOBANS Secretariat.

An extension of the scope of ASCOBANS to all cetacean species has the potential to increase the number of flag States that are “Range States” for the purposes of ASCOBANS if: (a) vessels are engaged in operations in the Agreement Area that are adversely affecting large cetaceans but not adversely affecting small cetaceans; and (b) the flag States of those vessels are not already Range States by virtue of any of their flag vessels being engaged in operations adversely affecting small cetaceans.

## *2.5 Interaction between ASCOBANS MOP and other international organisations*

Specific aspects of the interaction between the ASCOBANS MOP and each of the IWC, NAMMCO and EC will be reviewed in sections 3, 4 and 5 below. However, some general points about interactions will be made here.

The question of the interaction between the ASCOBANS MOP and other international organisations can be approached from two points of view: (a) by focusing on any conflict of obligations faced by a State that is a party to both ASCOBANS and the particular treaty underlying the other international organisation in question; or (b) by focusing on the scope for conflict or complementarity between international organisations themselves.

The issue of conflict of obligations is important. For example, ASCOBANS contains a provision (known as a “conflict clause”) stating that: “The provisions of this agreement shall in no way affect the rights and obligations of a Party deriving from any other existing treaty, convention, or agreement”.<sup>19</sup> That is a very deferential conflict clause, and ideally it would be appropriate to analyse its impact. However, for reasons of time, such an analysis is outside the scope of this report.

Instead, the focus in this report will be on the scope for conflict or complementarity between international organisations themselves. In that regard, there is no general

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<sup>19</sup> ASCOBANS, Article 8(2).

proposition in international law that two international organisations with competence in the same sector may not co-exist and operate simultaneously. Furthermore, ASCOBANS itself does not contain any provision setting out how conflicts of competence between the ASCOBANS MOP and other international organisations are to be resolved.

Some general points about cooperation can be made based on the wording of ASCOBANS itself. Under Article 4(2) of ASCOBANS, the ASCOBANS Secretariat is required to, *inter alia*, “facilitate the exchange of information and assist with the coordination of monitoring and research ... between the Parties and international organizations engaged in similar activities”. Under Article 5(1) of ASCOBANS, the ASCOBANS AC is to have regard to “the need not to duplicate the work of other international bodies and the desirability of drawing on their expertise”. Article 6(2)(1) of ASCOBANS identifies, *inter alia*, a number of bodies which are entitled to send observers to meetings of the ASCOBANS MOP.

The Annex to ASCOBANS, in its first paragraph, states that its measures are to be applied “in conjunction with other competent international bodies”. Under paragraph 2 of the Annex, investigations regarding species and threats are to be “coordinated and shared in an efficient manner between the Parties and competent international organizations”.

Several Resolutions of the ASCOBANS MOP recognise both “the commitments by Parties in other international bodies and fora to cetacean conservation and other commitments that will aid cetaceans” and, reflecting Article 5(1) of ASCOBANS, “the importance of the need of Parties to co-operate and not to duplicate the work of other international bodies and the desirability of drawing on their expertise”.<sup>20</sup> (The precise wording varies from Resolution to Resolution.)

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<sup>20</sup> The wording cited is from: ASCOBANS MOP 1 - Resolution on the implementation of the conservation and management plan (2<sup>nd</sup> and 3<sup>rd</sup> recitals). But see also: MOP 2 – Resolution on activities of the ASCOBANS Advisory Committee 1997-2000 (1<sup>st</sup> recital); MOP 2 – Resolution on further implementation of ASCOBANS (2<sup>nd</sup> and 3<sup>rd</sup> recitals); MOP 3 – Resolution No.8 (1<sup>st</sup> recital); MOP 3 – Resolution No.7 (2<sup>nd</sup> and 3<sup>rd</sup> recitals); MOP 4 – Resolution No.8 (3<sup>rd</sup> and 4<sup>th</sup> recitals); and MOP 4 – Resolution No.9 (1<sup>st</sup> recital).

### 3. ASCOBANS MOP and IWC

IMPORTANT NOTE: This section of the report takes no account of how a significant change in the voting pattern within the IWC might affect the interaction between the IWC and other international organisations, including the ASCOBANS MOP. If a significant change in the voting pattern within the IWC were to occur, the relevance of this section of the report, and the relevance of section 3.4 in particular, would potentially be reduced.

#### 3.1 Introduction to IWC

The IWC was established by the ICRW. The ICRW was adopted on 2 December 1946 and entered into force on 10 November 1948. It includes a Schedule which forms an integral part of the treaty<sup>21</sup> and which is amended periodically. The treaty currently has 66 parties<sup>22</sup> and each of those is entitled to provide one member for the IWC.<sup>23</sup> The situation of the parties to ASCOBANS, as well as some potential parties to ASCOBANS, in relation to the IWC can be summarised as follows:

	IWC member?
Parties to ASCOBANS	
Belgium	Yes
Denmark	Yes
Finland	Yes
France	Yes
Germany	Yes
Lithuania	No
Netherlands	Yes
Poland	No
Sweden	Yes
United Kingdom	Yes
Some potential parties to ASCOBANS	
Estonia	No

<sup>21</sup> ICRW, Article I(1).

<sup>22</sup> <[www.iwcoffice.org/](http://www.iwcoffice.org/)>.

<sup>23</sup> ICRW, Article III(1).

Ireland	Yes
Latvia	No
Norway	Yes
Portugal	Yes
Russia	Yes
Spain	Yes

### 3.2 Interaction between IWC and other international organisations

#### Introduction

The IWC regards itself as “the universally recognised competent international organisation for the management of whale stocks”.<sup>24</sup> The report of ASCOBANS MOP 4 states that, during the deliberations on draft Resolution No. 9 in Working Group II, “[t]he representative of the IWC noted that the IWC is the global body responsible for the conservation and management of large whales”.<sup>25</sup>

The IWC does indeed have functions regarding the management (and conservation) of whale species. That is reflected in the ICRW – see in particular Articles IV, V and VI and the Schedule. But that does not mean that the IWC alone has the power to adopt restrictions at the international level on human activities that may negatively affect whales.

As noted above, there is no general proposition in international law that two international organisations with competence in the same sector may not co-exist and operate simultaneously. There may be specific instances in international law where a widely-ratified treaty does point to a single organisation as having an exclusive role. But it is strongly arguable that that is not the case with the IWC.

For example, Article 65 (and, by reference, Article 120) of the LOSC (a treaty with 149 parties as at 15 March 2006)<sup>26</sup> states, *inter alia*, that: “States shall cooperate with

<sup>24</sup> See, for example, IWC Resolution 1999-6, preamble, 2<sup>nd</sup> recital.

<sup>25</sup> Report of ASCOBANS MOP 4, page 52.

<sup>26</sup> <[www.un.org/Depts/los/index.htm](http://www.un.org/Depts/los/index.htm)>.

a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study” (emphasis added).

The IWC existed at the time that the LOSC was being negotiated and at the time of LOSC’s adoption (1982), and yet Article 65 LOSC refers to organisations in the plural. When the LOSC intends to refer to just one international organisation, it does so. For example, the IMO is referred to as “the competent international organization” (emphasis added).<sup>27</sup> Those observations indicate that the IWC is not regarded by the LOSC as the only international organisation for the conservation, management and study of cetaceans.

In seeking to construe a term in a treaty, it is necessary to apply the rules of treaty interpretation. Those rules are set out in the 1969 Vienna Convention on the Law of Treaties. Article 31(1) of that treaty states the basic rule that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

Time does not allow application in this report of the Vienna Convention rules to Article 65 LOSC. Instead, for the purposes of this report, it will be assumed that: (a) Article 65 LOSC does not provide an exclusive role to the IWC to adopt restrictions at the international level on human activities that may negatively affect whales; and (b) the ASCOBANS MOP is potentially one of the international organisations covered by the term “appropriate international organizations” in Article 65 LOSC.

The role of the IWC can be viewed by looking at the terms of the ICRW itself, as well as the practice of the IWC and its subsidiary bodies. Others have written at length on these issues, and the debate will not be repeated here. However, it is important to point out that though the reports of the IWC-SC and the provisions of IWC Resolutions cover a wide array of cetacean-related issues, those reports and Resolutions are not binding on the parties to the ICRW.

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<sup>27</sup> See Articles 22, 41, 60, 211, 217, 218, 220 and 223 of the LOSC.

The ICRW itself (including its Schedule) is the only source of binding rights and obligations for parties to that treaty, and the ICRW's Schedule currently establishes regulations relating only to the hunting of whales and their subsequent treatment. Thus, under the Schedule, the parties have no binding rights or obligations in relation to threats other than hunting, such as chemical pollution, habitat loss and degradation, interactions with fisheries, noise and disturbance or ship strikes.

The absence to date, within the ICRW's Schedule, of binding rights and obligations in relation to threats other than hunting indicates that: (a) international organisations other than just the IWC are needed to help protect cetaceans; and (b) it was entirely appropriate for the LOSC (in Articles 65 and 120) to envisage that conservation, management and study of cetaceans would be effected by more than just one international organisation.

In 2003, the IWC adopted a Resolution (2003-1) that impliedly recognised the role of other international organisations in addressing threats to cetaceans. The preamble to the Resolution notes that the IWC “has evolved into an organisation internationally recognised, among other things, for its meaningful contributions to the conservation of great whales” (emphasis added).<sup>28</sup> It also notes that since the ICRW came into force, “several key conventions have been adopted which may affect great whales, including, *inter alia*, UNCLOS, CITES, IOC, ICSU, the CBD, CMS, ACCOBAMS and ASCOBANS”.<sup>29</sup>

This suggests that the IWC may be prepared to accept a less exclusive role regarding the conservation of whales in relation to threats other than hunting. However, it should be added that the purpose of Resolution 2003-1 was to establish a Conservation Committee that would potentially address a variety of threats to whales and hence might lead to increasing overlap with existing treaties and organisations. Despite two meetings of the Conservation Committee to date (in 2004 and 2005), it is still unclear as to how that Committee will function in relation to other organisations with potentially overlapping roles.<sup>30</sup>

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<sup>28</sup> IWC Resolution 2003-1, preamble, 3<sup>rd</sup> recital.

<sup>29</sup> IWC Resolution 2003-1, preamble, 4<sup>th</sup> recital.

<sup>30</sup> IWC/57/Rep 5 (Report of the Conservation Committee), sections 3 and 4.

The willingness of the IWC to accept and work with other international organisations involved with cetacean conservation and management is further evidence of a non-exclusive role for the IWC. This report will take a brief look at the IWC's relationship with the CITES COP, the CMS COP and the ACCOBAMS MOP, before moving on to its relationship with the ASCOBANS MOP. At the outset, it should be noted that there are differences of opinion about the competence of the IWC to deal with small cetaceans.

### IWC and CITES COP

The relationship between the IWC and the CITES COP is characterised by: (a) the IWC regarding itself as “the universally recognised competent international organisation for the management of whale stocks”;<sup>31</sup> and (b) support flowing predominantly in one direction, namely from the CITES COP to the IWC. The support provided by the CITES COP relates to trade restrictions. The amount of trade regulation undertaken by the IWC is relatively small compared with that undertaken by the CITES COP in respect of cetaceans. Thus the relationship is further characterised by one organisation (the CITES COP) providing support in an area not already significantly occupied by the other organisation (the IWC).

### IWC and CMS COP

The CMS COP is of interest because CMS itself provides for protection of several cetacean species, including large cetaceans. In particular, the placing of a cetacean species on Appendix I of CMS subjects it to the binding protection regime provided for in Article III of CMS (subject to any reservations). That regime includes a (qualified) prohibition on hunting.<sup>32</sup> Appendix I of CMS includes several large cetacean species or subspecies. There is therefore an overlap in competence between the IWC and the CMS COP in relation to large cetaceans and, more specifically, in relation to hunting of such cetaceans.

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<sup>31</sup> See IWC Resolution 1999-6, preamble, 2<sup>nd</sup> recital.

<sup>32</sup> CMS, Article III(5) in conjunction with CMS, Article I(1)(i).

It is relevant to consider briefly how that overlap is affected by the conflict clause in CMS which states that: “The provisions of this Convention shall in no way affect the rights and obligations of any Party deriving from any existing treaty, convention or agreement”.<sup>33</sup> It is possible that the conflict clause might, for example, be invoked by a State that had failed to enter the appropriate reservations under CMS and that wished to undertake “objection” whaling by virtue of Article V(3) of ICRW. However, despite that, the effect of the (qualified) prohibition on hunting in Article III of CMS would still remain for those parties to CMS that did not wish to invoke whaling rights under any applicable existing treaty, convention or agreement or for which such rights did not apply.

The activities of the IWC and IWC-SC do not only relate to the issue of hunting. As a result there are several issues, other than hunting, where the activities of the IWC/IWC-SC and the activities of the CMS COP overlap. One response to that general overlap has been the adoption of a *Memorandum of Understanding between the Secretariat of the International Whaling Commission and the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals* (“the MOU”).<sup>34</sup>

The preamble of the MOU refers to the wish of the two secretariats “to achieve synergies in the conservation and management, including research and monitoring of cetaceans” (emphasis added).<sup>35</sup> Article I, entitled “Objective”, then states that:

The purpose of this Memorandum is to establish a framework of information and consultation between UNEP/CMS and the IWC in the field of conserving migratory species and the world’s natural heritage, with a view to identifying synergies and ensuring effective cooperation in joint activities by the relevant international bodies established under both conventions and national institutions of their Contracting Parties. [Emphasis added.]

Thus Article I of the MOU foresees “identifying synergies and ensuring effective cooperation in joint activities ...”. Several articles follow, to implement the objective.

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<sup>33</sup> CMS, Article XII(2).

<sup>34</sup> See document UNEP/CMS/Conf.7.11, paragraph 22 and Annex 1. In September 2002, the CMS COP subsequently welcomed and endorsed the MOU (see CMS COP Resolution 7.9, paragraph 3). However, there appears to be no resolution of the IWC similarly endorsing the MOU.

<sup>35</sup> MOU, preamble, 6<sup>th</sup> recital.

But, in short, the MOU is interesting because the IWC acknowledges the scope for synergy and cooperation in cetacean conservation with another organisation (the CMS COP) that is also involved in conservation and management of cetaceans, including regulation of hunting. The relationship is therefore distinct from that between the IWC and the CITES COP where the roles of the two organisations are more complementary than overlapping. The MOU will be considered further in section 3.3 below.

## IWC and ACCOBAMS MOP

In principle, the relationship between the IWC and the ACCOBAMS MOP should be a useful indicator of how the relationship between the IWC and the ASCOBANS MOP would progress assuming an extension in the subject matter of ASCOBANS to all cetaceans. That is because ACCOBAMS covers all cetaceans, both large and small, and provides for protection measures for cetaceans in response to a variety of threats.

It is outside the scope of this report to research the reaction of the IWC, or its members, to the original notion of a regional agreement that would cover all cetaceans. Furthermore, with two exceptions (see below), this report does not analyse the reports and papers from meetings of the various ICRW bodies, or the IWC Resolutions, for evidence on the nature of the relationship between the IWC and the ACCOBAMS MOP.

However, a brief analysis of the reports of ACCOBAMS MOP 1 and 2 and ACCOBAMS SC 1, 2 and 3 indicates an absence of any particular conflicts between those bodies and the IWC or the IWC-SC; indeed the general theme is one of cooperation. That cooperation seems to be mainly at the level of workshops, assessments, research and monitoring.

A short paper prepared by the IWC Secretariat in 2004 summarises the relationship between the IWC and other organisations.<sup>36</sup> In the section on the relationship with

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<sup>36</sup> Document IWC/56/CC 2, prepared for the first meeting of the IWC Conservation Committee.

CMS, the paper states, *inter alia*, that: “In practice, the most effective co-operation is with the relevant CMS Agreements [*sic*], notably ASCOBANS and ACCOBAMS”.

Regarding the ACCOBAMS MOP and SC, the paper notes that: “IWC is a member of the ACCOBAMS Scientific Committee ...”. That point is discussed further below. The paper also notes that the IWC is an observer at the ASCOBANS MOP meetings and that “ACCOBAMS nominates an observer to IWC’s Scientific Committee and Commission meetings”.

It adds that: “The IWC plays an active role in the working of the [ACCOBAMS] Scientific Committee both at meetings and intersessionally. For example [Greg] Donovan is a member of a small group working towards a project to estimate the abundance and distribution of cetaceans in the ACCOBAMS area. Scientific Committee reports often form the basis of discussions and recommendations”.

In a further short paper, the IWC Secretariat summarises the outcome of the 2<sup>nd</sup> meeting of the ACCOBAMS SC (held in December 2003).<sup>37</sup> The paper summarises “[t]he main topics for discussion that are of interest to the IWC Scientific Committee”, including at least two topics of particular relevance to large cetaceans (ship strikes and fin whale conservation) and concludes that: “As can be seen above, there are a number of areas of common interest where cooperation is and can be valuable”.

### *3.3 Interaction to date between IWC and ASCOBANS MOP*

There is already a relationship between the ASCOBANS MOP/AC and the IWC/IWC-SC. On the ASCOBANS side, that is evidenced by many references to the IWC and IWC-SC in the reports of the ASCOBANS MOP and AC and in the Resolutions adopted by the ASCOBANS MOP. Those references indicate a collaborative relationship with the IWC and the IWC-SC.

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<sup>37</sup> Document IWC/56/11, Appendix J.

The relationship can be illustrated by reference to two examples: by-catch and chemical pollution. In the case of by-catch, ASCOBANS MOP Resolutions support by-catch thresholds established by the IWC-SC and also make use of advice on by-catch thresholds provided by the IWC/ASCOBANS Working Group on Harbour Porpoises.<sup>38</sup> In turn, the ASCOBANS recovery plan for harbour porpoises in the Baltic has been endorsed by the IWC Subcommittee on Small Cetaceans.<sup>39</sup>

In the case of chemical pollution, Resolutions of the ASCOBANS MOP contain frequent cross-references to IWC initiatives such as: the IWC intersessional meeting on the effects of chemical pollution on cetaceans;<sup>40</sup> the IWC Workshop on Chemical Pollution and Cetaceans;<sup>41</sup> and the IWC's Pollution 2000+ programme.<sup>42</sup> Those references are supportive and generally point to a role for ASCOBANS in research and advisory work to facilitate the initiatives in question.

For reasons of time, this report does not systematically analyse reports and papers from meetings of the various ICRW bodies or Resolutions of the IWC for evidence of how the IWC and the IWC-SC view ASCOBANS. However, it does consider: (a) a short paper prepared by the IWC Secretariat summarising the outcome of ASCOBANS MOP 4;<sup>43</sup> (b) a short paper prepared by the IWC Secretariat in 2004 summarising the relationship between the IWC and other organisations;<sup>44</sup> and (c) the report of the 2<sup>nd</sup> meeting of the IWC's Conservation Committee (held in 2005).<sup>45</sup>

The IWC Secretariat's paper on the outcome of ASCOBANS MOP 4 states that: "Observers [from the IWC] are allowed to play an active role in both the meetings of the [ASCOBANS] Meeting of the Parties and the Advisory Committee and the contribution and advice provided by the IWC Scientific Committee appears to be

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<sup>38</sup> ASCOBANS MOP 2 – Resolution on incidental take of small cetaceans (7<sup>th</sup> recital and paragraphs 5 and 7); MOP 3 – Resolution No. 3.

<sup>39</sup> Report of ASCOBANS MOP 4, page 4 and Annex 6.

<sup>40</sup> ASCOBANS MOP 1 – Resolution on the implementation of the conservation and management plan (action I).

<sup>41</sup> ASCOBANS MOP 2 – Resolution on management and further research needs to address effects of pollutants on cetacean health (1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> recitals and paragraphs 1-3).

<sup>42</sup> ASCOBANS MOP 3 – Resolution No. 8 (paragraphs 6 and 13); MOP 3 – Resolution No. 7 (6<sup>th</sup> recital); MOP 4 – Resolution No. 8 (paragraph 3).

<sup>43</sup> Document IWC/56/11, Appendix I.

<sup>44</sup> Document IWC/56/CC 2, prepared for the first meeting of the IWC Conservation Committee.

<sup>45</sup> IWC/57/Rep 5 (Report of the Conservation Committee).

appreciated by the ASCOBANS Parties and Secretariat, as reflected in its standing invitation to the IWC to attend”.

The IWC Secretariat’s paper on the relationship between the IWC and other organisations, when dealing with CMS, states, *inter alia*, that: “In practice, the most effective co-operation is with the relevant CMS Agreements [*sic*], notably ASCOBANS and ACCOBAMS” (emphasis added). More specifically, the paper notes that the IWC nominates an observer to the ASCOBANS MOP and AC and that “ASCOBANS nominates an observer to IWC’s Scientific Committee and sometimes its Commission meetings”.

The paper adds that: “The Scientific Committee provides considerable advice to ASCOBANS both through its reports and through direct input from members ... both at meetings and intersessionally. Scientific Committee reports often form the basis of discussions and recommendations, in particular with respect to abundance and by-catch related issues”. It will be assumed that the references to the “Scientific Committee” quoted above are references to the IWC-SC (some confusion having been created earlier in the paper when it refers to the “ASCOBANS Scientific Committee”, which is presumably intended to be a reference to the ASCOBANS AC).

The paper also makes specific reference to SCANS I and II. It notes that:

... the IWC collaborates with a number of organisations on particular research programmes of common interest. This is particularly true at present with respect to work in Southern Ocean via CCAMLR and SO GLOBEC, as well as various international survey efforts including SCANS (I and II) in the eastern North Atlantic and Baltic Seas and the NASS (North Atlantic Sightings) Surveys. [Emphasis added.]

The report of the 2<sup>nd</sup> meeting of the IWC’s Conservation Committee contains the report of the Working Group on Ship Strikes (a working group, convened in 2005, of the Conservation Committee). The report of the Working Group makes two references to ASCOBANS.<sup>46</sup> First, in a proposed work plan for an intersessional e-mail discussion group, one task is to “[i]dentify and liaise with organisations that already have (eg. ASCOBANS, ACCOBAMS) ... programmes of data collection

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<sup>46</sup> IWC/57/Rep 5 (Report of the Conservation Committee), Appendix 3.

and/or mitigation of ship collisions”. Secondly, the report notes that: “Denmark and Italy stated that ASCOBANS and ACCOBAMS have for years compiled information on ship strikes in European waters, and should be contacted”.

### 3.4 Future interaction between IWC and ASCOBANS MOP

The relationship to date between the ASCOBANS MOP and the IWC has to be seen in the light of the existing scope of ASCOBANS: a scope that is limited to small cetaceans. However, a continuing relationship between the ASCOBANS MOP/AC and the IWC/IWC-SC seems likely, notwithstanding an extension of the subject matter of ASCOBANS to all cetaceans. Three reasons for that forecast are set out below.

#### Reason 1: existing relationship between ACCOBAMS MOP and IWC

The existing relationship between the ACCOBAMS MOP and the IWC suggests that there is no reason in principle why the IWC should not also cooperate with another regional organisation involved with both small and large cetaceans.

It is notable that the IWC-SC is a member of the ACCOBAMS SC, rather than merely being an observer at meetings of that Committee. That is possible because ACCOBAMS states broadly that the ACCOBAMS SC may comprise “persons qualified as experts in cetacean conservation science”.<sup>47</sup> The Rules of Procedure of the ACCOBAMS SC<sup>48</sup> in turn state that the Committee shall consist of 12 members including, *inter alia*, one representative from the IWC-SC.<sup>49</sup> Each member of the ACCOBAMS SC has one vote.<sup>50</sup>

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<sup>47</sup> ACCOBAMS, Article VII(1).

<sup>48</sup> For the latest version of the Rules of Procedure of the ACCOBAMS SC, see: Report of the Third Meeting of the Scientific Committee, Annex 3.

<sup>49</sup> ACCOBAMS SC, Rules of Procedure, Rule 3.

<sup>50</sup> ACCOBAMS SC, Rules of Procedure, Rule 9.

In contrast to ACCOBAMS, ASCOBANS states more narrowly that: “Each Party shall be entitled to appoint one member of the Advisory Committee”.<sup>51</sup> The Rules of Procedure of the ASCOBANS AC<sup>52</sup> in turn state that: (a) each party may appoint one Committee Member to the ASCOBANS AC;<sup>53</sup> and (b) voting rights may be exercised by those Committee Members (or nominated substitutes).<sup>54</sup> The Rules of Procedure provide for (non-voting) observers, including any “body or individual qualified in cetacean conservation and management”.<sup>55</sup> The IWC is one such observer.

Thus, under ACCOBAMS, the IWC-SC is a voting member of the ACCOBAMS SC. In contrast, under ASCOBANS, the IWC is a non-voting observer at the ASCOBANS AC. Thus there is a legal difference in the relationship between the IWC and each of ASCOBANS and ACCOBAMS. It is beyond the scope of this report to assess whether that difference has made any difference to the degree of cooperation that exists in the two cases or will make any difference in due course.

## Reason 2: MOU between IWC and CMS Secretariats

The MOU was finalised in 2000,<sup>56</sup> well after ASCOBANS had entered into force (March 1994). Though the MOU does not make express reference to ASCOBANS, Article I refers to “identifying synergies and ensuring effective cooperation in joint activities by the relevant international bodies established under both conventions and national institutions of their Contracting Parties” (emphasis added).

It is arguable that the ASCOBANS MOP is an international body established under CMS since it arises from ASCOBANS, which was itself concluded under CMS. However, it is counter-arguable that the reference to “international bodies” in Article I of the MOU is a reference exclusively to bodies established directly under CMS or ICRW (notably the CMS COP and the IWC, respectively).

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<sup>51</sup> ASCOBANS, Article 5(2).

<sup>52</sup> For the latest version of the AC’s Rules of Procedure, see: Document AC12/Doc. 5(S).

<sup>53</sup> ASCOBANS AC, Rules of Procedure, Rule 1.

<sup>54</sup> ASCOBANS AC, Rules of Procedure, Rule 1.

<sup>55</sup> ASCOBANS AC, Rules of Procedure, Rule 2.

<sup>56</sup> Document UNEP/CMS/Conf.7.11, paragraph 22.

Article III of the MOU, entitled “Information – Access and Dissemination”, states, *inter alia*, that: “The Secretariats will institute procedures for regular exchange of information in their respective fields. In the case of the UNEP/CMS Secretariat this extends to the Secretariats of the Agreements concluded under its auspices if the decision-making bodies of those Agreements agree” (emphasis added).

The reference to “Agreements concluded under its auspices” is confusing, because it implies that the “Agreements” in question must have been concluded under the auspices of the CMS Secretariat. Technically, Agreements under Article IV of CMS are not concluded under the auspices of the CMS Secretariat, but rather under CMS itself. It will be assumed that the latter meaning is intended.

As noted in section 2.3 above, ASCOBANS was adopted under Article IV(4) of CMS rather than under Article IV(3). Technically, it is therefore an “agreement” rather than an “Agreement” (emphasis added). Nonetheless it would be odd if the MOU, by referring to “Agreements” had intended to exclude ASCOBANS (and also ACCOBAMS) from the scope of Article III.

Assuming that Article III of the MOU does indeed apply to, *inter alia*, ASCOBANS, its effect is to encourage the secretariats to facilitate information exchange between, say, the ASCOBANS Secretariat and the IWC Secretariat. The evidence from the reports of the ASCOBANS MOP and AC and from the ASCOBANS MOP’s Resolutions suggests that such exchange is indeed occurring.

There is scope for either party to the MOU to terminate it; there is also scope for the parties to mutually agree to amend the MOU.<sup>57</sup> However, a sign that neither of those things will be necessary in the face of an extended scope for ASCOBANS is provided by the fact the MOU was finalised after ACCOBAMS had been concluded (November 1996).

Thus the MOU was finalised at a time when it known that one of the instruments adopted under CMS would apply to small and large cetaceans alike. Assuming that

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<sup>57</sup> MOU, Article VI.

Article III of the MOU applies to ACCOBAMS, it is reasonable to assume that it would also apply to ASCOBANS even if the scope of ASCOBANS were extended to cover both small and large cetaceans.

One issue that may be relevant is the advent of the IWC's Conservation Committee. That Committee was established in 2003, i.e. after the MOU was finalised. A question therefore arises about the continuing role of the MOU. At least three points can be made: (a) the IWC Secretariat has not terminated the MOU, despite the advent of the Conservation Committee; (b) the continued existence of the Conservation Committee remains uncertain; and (c) the report of the 2<sup>nd</sup> meeting of the Conservation Committee acknowledges the MOU (albeit when recording a comment from Australia that it may be premature to consider more memorandums like the one with the CMS Secretariat).<sup>58</sup>

### Reason 3: IWC Resolution 2003-1

In 2003, the IWC adopted Resolution 2003-1. That Resolution established the IWC's Conservation Committee. The 4<sup>th</sup> recital of the preamble to the Resolution states that:

Noting that since the Convention came into force in 1948 several key conventions have been adopted which may affect great whales, including, *inter alia*, UNCLOS, CITES, IOC, ICSU, the CBD, CMS, ACCOBAMS and ASCOBANS;" [emphasis added]

Thus the IWC acknowledges ASCOBANS as one of "several key conventions ... which may affect great whales". That in turn raises the possibility that, in 2003, the IWC was aware of discussions about extending the subject matter of ASCOBANS to all cetaceans and was prepared to accept such an extension. However, that possibility would need to be tested by further research and may anyway be reading too much into the 4<sup>th</sup> recital.

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<sup>58</sup> IWC/57/Rep 5 (Report of the Conservation Committee), section 4.2.

## 4. ASCOBANS MOP and NAMMCO

### 4.1 *Introduction to NAMMCO*

The NAMMCO was established by the Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic (“the NAMMCO Agreement”). That treaty was concluded on 9 April 1992 and entered into force on 8 July 1992.<sup>59</sup> The treaty currently has four parties: the Faroe Islands, Greenland, Iceland and Norway.<sup>60</sup>

Each of those parties is a member of the Council of the NAMMCO (“NAMMCO Council”).<sup>61</sup> There is also a Management Committee (“NAMMCO MC”), a Scientific Committee (“NAMMCO SC”) and a Secretariat.<sup>62</sup> None of the parties to the NAMMCO Agreement is a party to ASCOBANS (though the Faroe Islands and Greenland are territories of Denmark, which is a party to ASCOBANS). The NAMMCO website carries reports from meetings of the NAMMCO Council, NAMMCO MC and NAMMCO SC in 1995, 1996 and 2001 – 2004. Those reports will be referred to below.

### 4.2 *Interaction to date between NAMMCO and ASCOBANS MOP*

#### Introduction

The NAMMCO Agreement applies to the north Atlantic.<sup>63</sup> The limits to the north Atlantic for the purposes of the treaty are not defined, but it can reasonably be assumed that the area covered by the treaty overlaps with the extended Agreement Area under ASCOBANS. It may also overlap with the original Agreement Area.

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<sup>59</sup> Entry into force date obtained from <[www.oceanlaw.net](http://www.oceanlaw.net)>.

<sup>60</sup> <[www.nammco.no/](http://www.nammco.no/)>.

<sup>61</sup> NAMMCO Agreement, Article 4(1).

<sup>62</sup> NAMMCO Agreement, Article 3.

<sup>63</sup> NAMMCO Agreement, Article 2.

The NAMMCO Agreement applies to marine mammals.<sup>64</sup> Thus, with regard to cetaceans, it applies to both large and small cetaceans. Therefore, in principle, there is overlap with the species to which ASCOBANS applies. In practice, the harbour porpoise is one such species: both the ASCOBANS MOP and the NAMMCO are concerned about the threat to that species posed by by-catch.<sup>65</sup>

The purpose of the NAMMCO Agreement is clearly related to the hunting of marine mammals, including cetaceans. In contrast, ASCOBANS contains an obligation on parties "... to endeavour to establish ... the prohibition under national law, of the intentional taking and killing of small cetaceans where such regulations are not already in force ...",<sup>66</sup> and it will be assumed for the purposes of this report that that obligation would be extended to all cetaceans.

There is scope under ASCOBANS for "a Range State or Regional Economic Integration Organization ..., on becoming a Party ..., [to] enter a specific reservation with regard to any particular species, subspecies or population of small cetaceans".<sup>67</sup> However, that does not detract from the fact that the preferred approach, as stated on the face of ASCOBANS, is to prohibit intentional taking and killing. Indeed it is noteworthy that one of the two principal reasons given by Norway for its decision "not to become a signatory to ASCOBANS" was that "the obligation of Parties to prohibit all directed takes of small cetaceans, regardless of their conservation status, was in opposition to the principle of the sustainable use of resources".<sup>68</sup>

The NAMMCO and the ASCOBANS MOP are therefore operating under agreements that have some conflicting objectives. However, both organisations also have a common interest in some degree of cetacean conservation. Therefore, in principle, there are reasons why the two organisations may benefit from cooperation.

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<sup>64</sup> NAMMCO Agreement, Article 2.

<sup>65</sup> See, for example, NAMMCO Annual Report 2004, pages 19-20 and 27.

<sup>66</sup> ASCOBANS, Annex, paragraph 4.

<sup>67</sup> ASCOBANS, Article 8(6).

<sup>68</sup> The other principal reason was that ASCOBANS' "prohibitions against lethal research methods were not acceptable to Norway". See: NAMMCO Annual Report 1996, Report of the 6<sup>th</sup> Meeting of the Council, page 34.

## Observers

On the ASCOBANS side, Article 6(2)(1) of ASCOBANS identifies various bodies that are entitled to send observers to ASCOBANS MOP meetings. The NAMMCO is not listed in that provision, presumably because ASCOBANS existed before the NAMMCO Agreement was concluded.

However, a NAMMCO report regarding ASCOBANS MOP 1 states that the NAMMCO had received “a standing invitation ... to attend future meetings of the organisation”.<sup>69</sup> In practice, the NAMMCO has been represented as an observer at, *inter alia*, the meetings of ASCOBANS AC 8 and AC 12 (but not, *inter alia*, the meetings of ASCOBANS AC 9-11 and MOP 3-4).

On the NAMMCO side, Article 8 of the NAMMCO Agreement states that: “The Council may agree to admit observers to meetings of the Commission when such admission is consistent with the objective set out in Article 2”. Article 2 in turn states that: “The objective of the Commission shall be to contribute through regional consultation and cooperation to the conservation, rational management and study of marine mammals in the North Atlantic”.

A brief review of the NAMMCO Annual Reports for 2001-2004 (encompassing the reports of the 11<sup>th</sup> – 14<sup>th</sup> NAMMCO Council meetings and the 9<sup>th</sup> – 12<sup>th</sup> NAMMCO SC meetings) reveals that neither the ASCOBANS MOP nor the ASCOBANS AC has been represented as an observer at any of the meetings covered by those reports. However, the Annual Reports show that ASCOBANS bodies have been invited at least to NAMMCO Council meetings 11 and 13 (see below).

A further brief review of the reports of the NAMMCO Council, NAMMCO MC and NAMMCO SC for 1995 and 1996 shows that ASCOBANS was represented by an observer at the 5<sup>th</sup> and 6<sup>th</sup> Council meetings and at the 5<sup>th</sup> MC meeting. Thus ASCOBANS bodies seem to have been more active as observers at the earlier meetings of the NAMMCO than at its more recent meetings.

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<sup>69</sup> NAMMCO Annual Report 1995, Report of the 5<sup>th</sup> Meeting of the Council, page 26.

## References in reports and Resolutions

On the ASCOBANS side, a search for the term “NAMMCO” in the reports of ASCOBANS MOP 3-4 and AC 8-12 (using the search facility in Adobe Acrobat) yielded the following results:

ASCOBANS meeting	Date	Reference to NAMMCO in report
MOP 3	July 2000	None
MOP 4	August 2003	None
AC 8	April 2001	- contact details for NAMMCO observer
AC 9	June 2002	None
AC 10	April 2003	None
AC 11	April 2004	None
AC 12	April 2005	[Several references – see below]

As noted in the table above, the report of ASCOBANS AC 12 contains several references to NAMMCO. The report shows that: (a) NAMMCO made an opening statement;<sup>70</sup> and (b) NAMMCO informed the meeting of its “tentative plans for a joint international cetacean survey, to take place in 2007” and suggested “co-ordination of methods and survey areas with SCANS-II”.<sup>71</sup>

There was also a dialogue between the NAMMCO observer and the Chairman of ASCOBANS AC 12 about interaction between the NAMMCO and the ASCOBANS AC. It was reported as follows:<sup>72</sup>

The NAMMCO observer expressed his concern at the lack of interaction and co-operation between ASCOBANS and NAMMCO. He noted that both ASCOBANS and NAMMCO were working on research, conservation and the management of marine mammals in their respective areas and, in many cases, on the same species. He expressed the view that there were many areas where increased

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<sup>70</sup> ASCOBANS AC 12 report, page 3. The opening statement is not reproduced in the report of ASCOBANS AC 12.

<sup>71</sup> ASCOBANS AC 12 report, page 4.

<sup>72</sup> ASCOBANS AC 12 report, page 24.

communication and co-operation would be beneficial, and encouraged the exchange of information and observers.

The Chairman of the Advisory Committee noted that the objectives of ASCOBANS and NAMMCO differed, but acknowledged there were overlapping interests. He noted that the abundance surveys which would be coordinated by the NAMMCO Scientific Committee in 2007 would be of value to the work of ASCOBANS. [...]

A brief search of the Resolutions arising from ASCOBANS MOP 1-4 revealed no express references to the NAMMCO. That contrasts with several other bodies to which there are specific references, including: the ACCOBAMS MOP; the Committee of North Sea Senior Officials; the Common Wadden Sea Secretariat; the European Commission; the Helsinki Commission; the IBSFC; the ICES; the IWC; and the OSPAR Commission.

However, there are several generic references that could, in principle, be applied to NAMMCO. For example, in several Resolutions the ASCOBANS MOP recognises “the importance of the need of Parties to co-operate and not to duplicate the work of other international bodies and the desirability of drawing on their expertise”.<sup>73</sup> That reflects the text of Article 5(1) of ASCOBANS.

Furthermore, a Resolution of ASCOBANS MOP 1 to establish the ASCOBANS AC includes the following as one of the AC’s terms of reference: “The Committee shall ensure, as far as possible, exchange of information with other international bodies, and encourage and promote joint international research and collaboration”.<sup>74</sup> A Resolution of MOP 4 recommends that the ASCOBANS Secretariat continue and step up its activities to promote ASCOBANS to non-party Range States.<sup>75</sup>

Regarding SCANS-II, a Resolution of ASCOBANS MOP 4 agrees that “survey activities be extended from the original ASCOBANS area ...” and recommends that

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<sup>73</sup> ASCOBANS MOP 1 – Resolution on the implementation of the Conservation and Management Plan (3<sup>rd</sup> recital). See also: MOP 2 – Resolution on Activities of the ASCOBANS Advisory Committee (1<sup>st</sup> recital); MOP 2 – Resolution on Further Implementation of ASCOBANS (3<sup>rd</sup> recital); MOP 3 – Resolution No. 8 (1<sup>st</sup> recital); MOP 3 – Resolution No. 7 (3<sup>rd</sup> recital); MOP 4 – Resolution No. 8 (4<sup>th</sup> recital); MOP 4 – Resolution No. 9 (1<sup>st</sup> recital).

<sup>74</sup> ASCOBANS MOP 1 – Resolution to Establish the Advisory Committee (paragraph 3).

<sup>75</sup> ASCOBANS MOP 4 – Resolution No. 2 (paragraph 1).

“Parties, Range States, international organisations and others, provide funds and other resources to support the proposed new abundance survey”.<sup>76</sup>

On the NAMMCO side, a search for the term “ASCOBANS” in the NAMMCO Annual Reports for 2001-2004 and in the reports of the NAMMCO Council, NAMMCO MC and NAMMCO SC for 1995 and 1996 (using the search facility in Adobe Acrobat) yielded the following results:

Year	NAMMCO document	Reference to ASCOBANS in document
1995	Report of 5 <sup>th</sup> Council mtg	<ul style="list-style-type: none"> <li>- ASCOBANS represented by observer</li> <li>- report on ASCOBANS MOP 1</li> <li>- standing invitation to NAMMCO to observe at future MOPs</li> <li>- invitation from NAMMCO to participate in NASS-95</li> <li>- name of ASCOBANS observer</li> </ul>
	Report of 4 <sup>th</sup> MC mtg	- name of ASCOBANS observer
	Report of 3 <sup>rd</sup> SC mtg	- report on ASCOBANS MOP 1
1996	Report of 6 <sup>th</sup> Council mtg	<ul style="list-style-type: none"> <li>- presentation by ASCOBANS Secretary on recent developments</li> <li>- ASCOBANS seeking cooperation and information exchange with, <i>inter alia</i>, NAMMCO on, <i>inter alia</i>, distribution and abundance of small cetaceans, pollution, population structure and by-catches</li> <li>- NAMMCO Council Chairman “welcomed the continuation of an active exchange of information which had already been established between ASCOBANS and NAMMCO”</li> <li>- Norway explained why it had chosen not to sign ASCOBANS but it also “underlined ... Norway would continue to participate as an observer, and encouraged future cooperation between NAMMCO and ASCOBANS”</li> <li>- name of ASCOBANS observer</li> </ul>
	Report of MC mtg	None
	Report of SC mtg	<ul style="list-style-type: none"> <li>- letter received from ASCOBANS Secretary:</li> <li>- requesting cooperation with NAMMCO on exchange of survey data</li> <li>- requesting future cooperation on survey planning</li> <li>- requesting scientific collaboration on project to determine</li> </ul>

<sup>76</sup> ASCOBANS MOP 4 – Resolution No. 7 (paragraphs 1 and 3).

		<ul style="list-style-type: none"> <li>population structure of harbour porpoise in north Atlantic</li> <li>- suggesting that pooling of information on by-catch reporting would be useful</li> <li>- NAMMCO SC agreed that “such collaboration with ASCOBANS would be a positive development”</li> <li>- NAMMCO SC agreed to recommend work on the harbour porpoise under NAMMCO</li> <li>- name of ASCOBANS observer</li> </ul>
2001	NAMMCO Annual Report	<ul style="list-style-type: none"> <li>- ASCOBANS unable to attend 11<sup>th</sup> NAMMCO Council mtg</li> <li>- written report by Norwegian delegate on ASCOBANS AC 8</li> <li>- reference to PBR method adopted by ASCOBANS re by-catch</li> </ul>
2002	NAMMCO Annual Report	<ul style="list-style-type: none"> <li>- plans for Nordic Co-ordination mtg prior to ASCOBANS mtg</li> </ul>
2003	NAMMCO Annual Report	<ul style="list-style-type: none"> <li>- ASCOBANS had been invited to attend 13<sup>th</sup> NAMMCO Council mtg</li> </ul>
2004	NAMMCO Annual Report	None

The results presented in the table above indicate that there was closer cooperation between the NAMMCO and the ASCOBANS bodies in 1995 and 1996 than in the period 2001 – 2004. That is compatible with the results on observers (see above). Overall, it puts into context the request by the NAMMCO observer at ASCOBANS AC 12 for improved interaction and cooperation between the NAMMCO and the ASCOBANS bodies.

#### *4.3 Future interaction between NAMMCO and ASCOBANS MOP*

As things currently stand, there is already some overlap in the species covered by the NAMMCO and the ASCOBANS MOP. A good example is the harbour porpoise. Simultaneous with that overlap, the NAMMCO is currently keen on improving cooperation with the ASCOBANS MOP. That indicates that an overlap in species is not, in itself, a reason why the two organisations should not cooperate.

An extension in the scope of ASCOBANS to all cetacean species and an extension in its geographical scope into the north Atlantic is likely to increase the extent to which

the species covered by the NAMMCO and the ASCOBANS MOP overlap. It is not clear how that increased species overlap will affect the relationship.

On the one hand, it may tend to put the two organisations into conflict. After all, the NAMMCO Agreement and ASCOBANS have somewhat conflicting aims (see above). An incident several years ago involving the United Kingdom (a party to ASCOBANS) and research vessels of Norway and the Faroe Islands (both parties to the NAMMCO Agreement) illustrates the type of problem that might arise. The incident is reported in the NAMMCO Annual Report for 2001.

The research vessels in question wished to conduct sighting surveys for cetaceans in United Kingdom waters, as part of the NASS-2001 survey. The Annual Report states that: “Priority species for the NASS-2001 survey were to be minke whales and fin whales ...”.<sup>77</sup> The Annual Report goes on to state that:<sup>78</sup>

The Norwegian and Faroese research vessels which had planned to conduct sighting surveys including waters around Great Britain were denied access to the Exclusive Economic Zone of the United Kingdom. This required survey plans to be changed at short notice and distorted the planned survey design. It also precluded the possibility of getting information on abundance and distribution of cetacean species within these waters. The Scientific Committee deplored this decision of the British authorities and emphasised its hope that in the future all nations in the region will give access to their waters for conducting surveys to enable complete coverage of the species’ ranges.

[...]

The Council noted parts of the survey had been compromised by the sudden revocation of permission to access British waters by the government of the United Kingdom, and that this means the resulting abundance estimates will not be as accurate as they could or should have been. This action of the government of the United Kingdom was therefore counterproductive to the conservation and sustainable management of cetaceans in the area. The Council deplored this decision of the United Kingdom, and expressed the hope that the government of the United Kingdom would reconsider its negative and inconsistent attitude towards marine science and conservation.

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<sup>77</sup> NAMMCO Annual Report 2001, page 19.

<sup>78</sup> NAMMCO Annual Report 2001, pages 19-20.

It would be interesting to know if research vessels participating in the NASS-2001 survey also sought to undertake sighting surveys in the waters of other parties to ASCOBANS, and if so what reaction they received from those parties. In the absence of that information, it is hard to extrapolate from the position taken by the United Kingdom. The NAMMCO Annual Reports 2002, 2003 and 2004 do not report a similar problem.

On the other hand, an increased species overlap between the NAMMCO and the ASCOBANS MOP may serve to promote cooperation between the two organisations. If the ASCOBANS MOP is to implement ASCOBANS for a wider array of cetacean species in a larger area of sea, it may need to pool some of its resources with other organisations. Potential synergy between survey vessels for the SCANS surveys under ASCOBANS and the NASS surveys under the NAMMCO Agreement may be a case in point. Overall, it will be interesting to see where the balance comes to lie between the potential benefits of cooperation and ideological standpoints of particular States.

## 5. ASCOBANS MOP and EC

### 5.1 *Introduction to EC*

All of the parties to ASCOBANS are EC Member States. ASCOBANS also provides for the EC (in its capacity as a “Regional Economic Integration Organization”) to become a party.<sup>79</sup> However, the EC has so far not become a party.<sup>80</sup>

Two ASCOBANS documents shed some light on the EC’s reasons for not becoming a party. The report of ASCOBANS AC 8 contains a summary of a meeting held in February 2001 between, on the one hand, the Chairman of the ASCOBANS AC and the Executive Secretary of the ASCOBANS Secretariat and, on the other hand, two representatives of DG Environment and one representative of DG Fisheries. That summary states, *inter alia*, that: “Regarding accession of the European Community to

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<sup>79</sup> ASCOBANS, Article 8(4).

<sup>80</sup> <[www.ascobans.org/index0101.html](http://www.ascobans.org/index0101.html)>.

the Agreement, the Commission had limited funding and staff resources to dedicate to ASCOBANS, although it was clearly interested in partnership and cooperation”.<sup>81</sup> A report on the same meeting states that: “[A representative of DG Environment] explained that the legal and budgetary implications of ratification were currently being examined by the European Commission”.<sup>82</sup>

The reports of meetings of the ASCOBANS MOP report on progress regarding the accession by the EC to ASCOBANS. In an evaluation of the implementation of the ASCOBANS Work Plan 1997-2000, in the report of MOP 3, the evaluation by the Chair and Vice-Chair of the AC of progress under the item “accession of Range States and the EC” is recorded as “partly sufficient”.<sup>83</sup> The equivalent evaluation for the ASCOBANS Work Plan 2001-2003, in the report of MOP 4, is recorded as “partly, but not sufficiently”.<sup>84</sup>

## 5.2 *Interaction to date between EC and ASCOBANS MOP*

### Introduction

The implementation of ASCOBANS touches on several issues which are relevant to the EC. One principal issue is fisheries conservation. The EC Member States have transferred the power to make rules for fisheries conservation to the EC. Yet the Annex to ASCOBANS requires parties to work towards, *inter alia*, “the development ... of modifications of fishing gear and fishing practices in order to reduce by-catches ...” and “the effective regulation ... of activities which seriously affect [cetaceans’] food resources”.<sup>85</sup>

How can those two factors be reconciled? The traditional response is that measures to address by-catch and prey competition are a matter for the EC by virtue of its exclusive power to make rules for fisheries conservation. If one accepts that, then the

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<sup>81</sup> Report of ASCOBANS AC 8, page 13.

<sup>82</sup> Document AC8/Doc. 11(S), page 4.

<sup>83</sup> Report of ASCOBANS MOP 3, page 41.

<sup>84</sup> Report of ASCOBANS MOP 4, page 45.

<sup>85</sup> ASCOBANS, Annex, paragraph 1.

parties to ASCOBANS must turn to the EC for implementation of their duties under ASCOBANS regarding by-catch and prey competition. In practice, the EC has delegated some rule-making powers back to the Member States, but those delegated powers are very limited in scope and may not be suited to the problem in question. Therefore, action by the EC itself may be the only option in many cases.

An alternative response is that that measures to address, say, by-catch of cetaceans are not a fisheries conservation issue (and hence not a matter for the EC's exclusive power) but a matter of nature conservation (and hence, potentially, a matter for the EC Member States instead). That idea has been discussed at length in a report published by the IEEP,<sup>86</sup> and so will not be repeated here.

Another principal issue is environmental protection. The EC and the EC Member States share the power to make rules regarding environmental protection. However, over the years, the EC has adopted several Directives which place environmental protection duties on the Member States. Several of those Directives are relevant to cetacean conservation, and the Habitats Directive is particularly relevant in that regard. Implementation of the Habitats Directive is one means by which the parties of ASCOBANS can seek to implement some of their duties under ASCOBANS.

A search for the terms "European Community", "EC", "European Union", "EU", "European Commission", "common fisheries policy" and "CFP" in the reports of ASCOBANS MOP 3-4 and AC 8-12 was carried out using the search facility in Adobe Acrobat.

The principal themes arising in relation to the EC were: (a) the question of the EC's accession to ASCOBANS, or other forms of involvement by the EC in the workings of the ASCOBANS bodies; (b) cetacean by-catch issues (by reference to the CFP and Article 12 of the Habitats Directive); (c) protected areas (by reference to SACs under the Habitats Directive); and (d) funding by the EC of SCANS II. Other themes included, *inter alia*, the EC chemicals strategy, the EC marine strategy and access to EC sources of funding for a variety of purposes (other than SCANS II).

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<sup>86</sup> See: D.Owen, *Interaction between the EU common fisheries policy and the Habitats and Birds Directives*, IEEP Policy Briefing, Institute for European Environmental Policy, 2004.

In the absence of the EC being a party to ASCOBANS, interaction between the EC and the ASCOBANS bodies occurs by virtue of, *inter alia*: (a) the European Commission attending some meetings of the ASCOBANS MOP and AC as an observer; (b) the European Commission involving ASCOBANS bodies in some EC processes; and (c) the parties to ASCOBANS wishing to act compatibly with EC law.

### The EC as an observer at meetings of ASCOBANS bodies

Article 6(2)(1) of ASCOBANS identifies various bodies that are entitled to send observers to ASCOBANS MOP meetings. Those bodies include “all ... Regional Economic Integration Organizations bordering on the waters concerned”. That therefore includes the EC. In practice, the EC has been represented by the European Commission as an observer at, *inter alia*, the meetings of ASCOBANS AC 9-12 (but not AC 8) and MOP 4 (but not MOP 3).

In February 2001, a meeting was held between ASCOBANS and the European Commission (see above). The matter of the European Commission’s representation at meetings of ASCOBANS MOP and AC was discussed. According to a report on the meeting: “[A representative of DG Environment at the meeting] reiterated that the Commission was interested in participating. However, budgetary constraints and limited staff resources prohibited the Commission from attending all meetings. Therefore, the decision to participate would continue to be taken on a case by case basis, depending on the agenda of the meeting in question”.<sup>87</sup>

One agenda item that has tended to attract the interest of the EC is measures to address by-catch. For example, the report of ASCOBANS AC 10 states that: “The representative of the European Commission explained that he was attending the Advisory Committee meeting in order to obtain information for input into the EC policy on bycatch”.<sup>88</sup>

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<sup>87</sup> Document AC8/Doc. 11(S), page 2.

<sup>88</sup> Report of ASCOBANS AC 10, page 9.

However, there is ongoing concern within ASCOBANS that there should be fuller involvement by the EC in the activities of the ASCOBANS bodies. For example, the report of ASCOBANS MOP 4 states that: “The Parties ... emphasised ... the need to involve the European Commission in the work of the Advisory Committee at an early stage. This could include encouraging the Commission to take up its entitlement to send observers to the Committee meetings, and to participate actively in its business, wherever possible”.<sup>89</sup>

### Invitations by the EC to the ASCOBANS bodies

The reports of meetings of the ASCOBANS MOP and AC identify various occasions on which those bodies have been invited by the European Commission to get involved with EC initiatives. Perhaps the context can be set by a statement in the report of ASCOBANS AC 8 by the Chairman of the AC that: “The [European] Commission recognised ASCOBANS as a discussion partner in the development and execution of [EC] policy but indicated that ICES was the official body to provide scientific advice including advice on marine mammals”.<sup>90</sup>

The report of ASCOBANS MOP 4 states that: “The European Commission had invited ASCOBANS to send representatives to work in advisory groups” over the period 2001-2003.<sup>91</sup> In that regard, the report of ASCOBANS AC 10 notes that “[s]everal of the members of the Advisory Committee had worked in the sub-group of STECF on bycatch issues” and that “[t]he Chairman of the AC had represented ASCOBANS in a scientific sub-group of the [STECF]”.<sup>92</sup> Furthermore, the report of ASCOBANS AC 8 notes that two ASCOBANS representatives were invited to participate at a STECF meeting in 2001 reviewing advice by the ICES on marine mammal by-catch.<sup>93</sup>

A summary in the report of ASCOBANS AC 8 of a meeting in February 2001 between ASCOBANS and the European Commission (see above) states that: “Both

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<sup>89</sup> Report of ASCOBANS MOP 4, page 14.

<sup>90</sup> Report of ASCOBANS AC 8, page 35.

<sup>91</sup> Report of ASCOBANS MOP 4, page 4.

<sup>92</sup> Report of ASCOBANS AC 10, pages 9 and 4.

<sup>93</sup> Report of ASCOBANS AC 8, page 35.

DG Environment and DG Fisheries were interested in developing a strategic research programme in which ASCOBANS interests should be flagged up”.<sup>94</sup> The summary also states that: “... ASCOBANS’ views on [the forthcoming European Marine Strategy], particularly in the field of pollution, would be sought”.<sup>95</sup> However, the subsequent report of ASCOBANS AC 12 states that: “The Advisory Committee regretted that ASCOBANS had not formally been engaged by the European Commission in its preparation of the European Marine Strategy”.<sup>96</sup>

### Parties to ASCOBANS wishing to act compatibly with EC law

Because of the relevance of some activities under ASCOBANS to EC law, and because all parties to ASCOBANS are EC Member States, it is necessary for those parties to meet during meetings of the ASCOBANS MOP for so-called “EU coordination meetings”. The need for the parties to ASCOBANS to pay attention to the compatibility of their actions under ASCOBANS with EC law is illustrated by the following extract from the report of ASCOBANS MOP 4:<sup>97</sup>

The Meeting [of the Parties] acknowledged certain difficulties arising in its discussions in relation to the requirement applying to Parties that are members of the European Union to respect [EU] treaty obligations. The Parties recognised the requirements on them in this respect. ... As an EU member and as Chair of the EU coordination meetings during this Meeting of the Parties, the Netherlands pointed out that while it was not always easy for non-EU Member States to understand procedures under the EU Treaty, it was the responsibility of all EU members to follow the right procedure under the EU Treaty and to work cooperatively with the European Commission. ...

By-catch and prey competition are two issues where parties to ASCOBANS are likely to pay particular attention to the compatibility of their actions under ASCOBANS with EC law (see above). Sensitivities in that regard are illustrated in several ways. For example, the report of ASCOBANS AC 11 states that, in the context of a discussion of a proposed recovery plan for harbour porpoises in the North Sea: “The representative of the European Commission commented on the competence of

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<sup>94</sup> Report of ASCOBANS AC 8, page 13.

<sup>95</sup> Report of ASCOBANS AC 8, page 13.

<sup>96</sup> Report of ASCOBANS AC 12, page 25.

<sup>97</sup> Report of ASCOBANS MOP 4, page 14.

Member States and noted that under EC law, fisheries issues were an area of exclusive Community competence”.<sup>98</sup>

Furthermore, a Resolution adopted at ASCOBANS MOP 4 on the incidental take of small cetaceans states that its operative paragraphs are “[w]ithout prejudice to the exclusive competence of the European Community for the conservation, management and exploitation of living aquatic resources”.<sup>99</sup> (The term “conservation, management and exploitation of living aquatic resources” is also used in Council Regulation 2371/2002 - the so-called “Basic Regulation” of the CFP.)

### *5.3 Future interaction between EC and ASCOBANS MOP*

#### Introduction

The types of issue that shape the existing relationship between the EC and the ASCOBANS MOP/AC, and the means for maintaining it, have been summarised in section 5.2 above. Two principal factors currently shaping the relationship are: (a) the exclusive power of the EC to make rules for fisheries conservation; and (b) the implementation of the Habitats Directive in respect of cetaceans. This section will address how the extension of the Agreement Area and the extension of the subject matter of ASCOBANS may affect the relationship between the EC and the ASCOBANS MOP in the light of those factors.

#### Impact of extension of Agreement Area

The extension of the Agreement Area, simply by adding new cetacean habitat to the scope of ASCOBANS, may increase the number of instances in which the EC, by virtue of its exclusive power to make rules for fisheries conservation, is called upon by the parties to ASCOBANS to facilitate implementation of their duties under ASCOBANS regarding by-catch and prey competition.

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<sup>98</sup> Report of ASCOBANS AC 11, page 5.

<sup>99</sup> Resolution No. 6 – ASCOBANS MOP 4.

However, some special issues may arise to the extent that the extended Agreement Area contains any areas beyond national jurisdiction. Fisheries in such areas will potentially fall to be regulated by the ICCAT, the NASCO or the NEAFC. The EC is a member of all three of those RFMOs. As such: (a) it has the exclusive power to make fisheries conservation rules for fishing vessels flagged to EC Member States that are operating within the framework of those RFMOs in the areas in question (subject to the relevant international law); and (b) it is in a position to seek to influence the outcome of any particular set of negotiations between the members of those RFMOs.

In the event of an interaction arising between cetaceans and fisheries in any areas within the Agreement Area that are beyond national jurisdiction, the ASCOBANS MOP could seek to persuade the EC to take appropriate action. If the interaction was caused by vessels flagged to non-EC Member States, the ASCOBANS MOP could seek to persuade the EC to use its influence within the RFMO in question to address the particular problem. If the interaction was caused by vessels flagged to EC Member States, the ASCOBANS MOP could seek to persuade the EC to regulate to address the problem.

Of course, there is scope for the EC to fail to respond adequately to one or more requests for action made by the parties to ASCOBANS or by the ASCOBANS MOP. Any significant or persistent failures in that regard might lead to disappointment or frustration by those requesting the action.

The extension of the Agreement Area will also bring within the geographical scope of ASCOBANS further areas to which the Habitats Directive applies. It is EC law that the Habitats Directive applies not just to internal waters and the territorial sea, but also to the EEZ.<sup>100</sup> The agreed extension of the Agreement Area will include areas of internal waters, territorial sea and EEZ. As such it may include new sites qualifying as SACs for *Tursiops truncatus* and *Phocoena phocoena* and new areas where the duty in Article 12 of the Habitats Directive applies.

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<sup>100</sup> C-6/04 *European Commission v United Kingdom*, judgment, paragraph 117.

The ASCOBANS MOP and AC may therefore become increasingly important as forums for discussion and agreement regarding the implementation of the Habitats Directive in respect of cetaceans. If so, the European Commission is likely to be interested in the debate in those forums (just as it is currently interested in the debate within the ASCOBANS MOP and AC regarding by-catch). The Commission would presumably be interested in ensuring consistency between that debate and debate on similar issues within the Habitats Committee (including the Marine Experts Group).

The extension of the Agreement Area will also include areas of continental shelf. The application of the Habitats Directive to the continental shelf is not entirely clear, particularly in respect of that part of the shelf lying beyond 200 nm. Yet activities in relation to the shelf are potentially harmful to cetaceans (e.g. use of seismic for oil and gas exploration and use of both sonar and seismic to investigate the geology and geomorphology of the shelf beyond 200 nm). The application of the Habitats Directive to the shelf is currently under discussion in the Habitats Committee (including the Marine Experts Group). It will be interesting to see whether the extension of the Agreement Area will in any way influence that discussion and the subsequent implementation of the Habitats Directive.

### Impact of extension of subject matter of ASCOBANS

The extension of the subject matter of ASCOBANS from small cetaceans to all cetaceans may increase the number of instances in which the EC, by virtue of its exclusive power to make rules for fisheries conservation, is called upon by the parties to ASCOBANS to facilitate implementation of their duties under ASCOBANS regarding by-catch and prey competition. As noted above, there is scope for the EC to fail to respond adequately to one or more requests for action made by the parties to ASCOBANS, and any significant or persistent failures in that regard might lead to disappointment or frustration by those requesting the action.

The extension of coverage to all cetaceans will also bring within the subject matter of ASCOBANS further species to which the Habitats Directive applies. That is because Article 12 of the Habitats Directive applies to all cetaceans. As with the extension of the Agreement Area, the ASCOBANS MOP and AC may therefore become

increasingly important as forums for discussion and agreement regarding the implementation of Article 12 of the Habitats Directive in respect of cetaceans. An additional factor on the horizon is the Marine Strategy Directive. That is still in draft form,<sup>101</sup> but in its finalised form it may contain duties that are relevant to cetacean conservation.

## Conclusion

It is hard to see how extension of the Agreement Area or extension of the subject matter of ASCOBANS would, of necessity, imperil the relationship between the EC and the ASCOBANS MOP/AC.

However, those two extensions may increase the number of instances in which action by the EC will be sought by the parties to ASCOBANS or by the ASCOBANS MOP. There is scope for the EC to fail to respond adequately to one or more requests for action made by the parties to ASCOBANS or by the ASCOBANS MOP, and any significant or persistent failures in that regard might lead to disappointment or frustration by those requesting the action. Some such difficulties, but not necessarily all, may potentially be avoidable through timely and meaningful communication between those involved.

Some comfort can potentially be drawn from ACCOBAMS. Like ASCOBANS, ACCOBAMS allows for accession by regional economic integration organisations<sup>102</sup> and the EC has not yet become a party.<sup>103</sup> The subject matter of ACCOBAMS includes all cetaceans and its geographical scope includes areas beyond national jurisdiction.

A brief analysis of the reports of ACCOBAMS MOP 1 and 2 and ACCOBAMS SC 1, 2 and 3 does not indicate any particular conflicts between the ACCOBAMS MOP/SC and the EC. However, the same analysis does suggest that the degree of interaction

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<sup>101</sup> COM(2005) 505 final, 24 October 2005.

<sup>102</sup> ACCOBAMS, Article XIII.

<sup>103</sup> <[www.accobams.org/accobams\\_parties\\_list.htm](http://www.accobams.org/accobams_parties_list.htm)>.

between the ACCOBAMS MOP/SC and the EC is less than the degree of interaction between the ASCOBANS MOP/AC and the EC.

## 6. Summary

This section summarises only those parts of the report addressing the future interaction between the ASCOBANS MOP and each of the IWC, NAMMCO and EC, i.e. sections 3.4, 4.3 and 5.3 respectively.

Section 3.4 addresses the future interaction between the ASCOBANS MOP and the IWC. That section takes no account of how a significant change in the voting pattern within the IWC might affect the interaction between the two organisations. If a significant change in the voting pattern within the IWC were to occur, the relevance of section 3.4 would potentially be reduced.

Section 3.4 concludes that a continuing relationship between the ASCOBANS MOP/AC and the IWC/IWC-SC seems likely, notwithstanding an extension of the subject matter of ASCOBANS to all cetaceans, in view of: (a) the precedent set by the existing relationship between the IWC and the ACCOBAMS MOP; (b) the Memorandum of Understanding between the IWC Secretariat and the CMS Secretariat; and (c) subject to further research, the text of IWC Resolution 2003-1.

Section 4.3 addresses the future interaction between the NAMMCO and the ASCOBANS MOP. It is not clear how an extension of the geographical scope and subject matter of ASCOBANS will affect that interaction. On the one hand, it may tend to put the two organisations into conflict in view of the fact that they are operating under agreements that have some conflicting objectives. On the other hand, it may serve to promote cooperation between the two organisations (e.g. in relation to cetacean survey work).

Section 5.3 addresses the future interaction between the EC and the ASCOBANS MOP. It is hard to see how an extension of the geographical scope or subject matter

of ASOCBANS would, of necessity, imperil the relationship between the EC and the ASCOBANS MOP/AC. However, those two extensions may increase the number of instances in which action by the EC to address fisheries by-catch or prey competition issues will be sought by the parties to ASCOBANS or by the ASCOBANS MOP.

Any significant or persistent failures by the EC to act might lead to disappointment or frustration by those requesting the action. Some such difficulties, but not necessarily all, may potentially be avoidable through timely and meaningful communication between those involved.