Agenda Item 20	Possible Amendment of the Agreement to include all Cetacean Species in the Agreement Area (Political, institutional and legal aspects)
Document 38	**The Implications of Extending the Scope of ASCOBANS to all Cetaceans – Legal Aspects**
Action Requested	• Take note of the document • Evaluate implications for the Agreement • Make recommendations to the MOP
Submitted by	ACCOBAMS

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. In order to provide the Parties with additional elements of consideration concerning the implications of a possible amendment of ASCOBANS to cover all cetacean species occurring in the Agreement Area, the Secretariat requested ACCOBAMS, who are already in this situation, to provide an opinion. The ACCOBAMS Secretariat kindly agreed and provided the attached document, prepared by legal experts.

3. This attached document was first tabled for the 15th 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 IMPLICATIONS OF EXTENDING THE SCOPE OF ASCOBANS TO ALL CETACEANS

LEGAL ASPECTS

Note: *The designations employed and the presentation of the material in this document do not imply the expression of any opinion whatsoever on the part of the ACCOBAMS Permanent Secretariat concerning the legal status of any State, Territory, city or area, or of its authorities, or concerning the delimitation of their frontiers or boundaries.*

This document was prepared in the frame of the collaboration between ASCOBANS and ACCOBAMS, for the 15th Meeting of the Advisory Committee, and on the request of ASCOBANS Secretariat.

THE IMPLICATIONS OF EXTENDING THE SCOPE OF ASCOBANS TO ALL CETACEANS LEGAL ASPECTS

Concise Opinion by Irini Papanicolopulu* and Tullio Scovazzi*

This opinion addresses the following question: what are the legal implications of a future extension of the scope of the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas ("ASCOBANS". adopted in New York on 17 March 1992, in force from 29 March 1994) in order to cover all cetaceans, in particular as far as the International Convention for the Regulation of Whaling ("IWC", adopted in Washington on 2 December 1946, in force from 10 November 1948) is concerned?

1. The Right to Amend ASCOBANS

ASCOBANS applies only "to all small cetaceans found within the area of the agreement" (Art. 1, par. 1). ASCOBANS was concluded as an agreement within the meaning of Art. IV, para. 4, of the Convention on the Conservation of Migratory Species of Wild Animals ("Bonn Conv.", adopted on 23 June 1979, in force from 1 November 1983), which encourages the conclusion of "agreements for 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".

Under the Vienna Convention on the Law of Treaties ("Vienna Conv.", adopted on 23 May 1969, in force from 27 January 1980), "a treaty may be amended by agreement between the parties". It follows that the ASCOBANS Parties may, if they so wish, amend ASCOBANS in order to extend its application to all cetaceans, including the big ones. In particular, an amendment which would extend the scope of ASCOBANS to cover all cetaceans would be fully consistent with the above mentioned Art. IV, para. 4, Bonn Conv., as all cetaceans periodically cross one or more national boundaries.

The possibility of, and the procedure for, amendments is envisaged by Art. 6 of ASCOBANS itself. The amendments must be adopted by the Meeting of the Parties (Art. 6.5) by a three-quarters majority among Parties present and voting (Art. 6.3). Under Art. 6.5.3, amendments to ASCOBANS enter into force for those parties which have accepted them 90 days after the deposit of the fifth instrument of acceptance of them. The number of ASCOBANS Parties being presently ten, it is probable that, for a certain period of time after the entry into force of the amended text, the original text of ASCOBANS will still apply in the relationship between the parties which have not accepted the amendments, as well as in the relationship between the parties which have not accepted the amendments and those which have accepted them.

2. International Rules on Treaty Relationship

Complex legal questions arise where successive treaties relating to the same subject-matter are in principle applicable. Art. 30 Vienna Conv. provides for the following regime:

"1. (...) the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

a) as between States parties to both treaties the same rule applies as in paragraph 3;

b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both

States are parties governs their mutual rights and obligations"[1].

From the logical point of view, the questions to be addressed in order to determine the rights and obligations of States in cases of successive treaties are thus the following:

a) Whether the States concerned are parties to both the earlier and the later treaty (a *ratione personae* question).

b) If they are parties to both treaties, whether a provision of the earlier treaty and a provision of the later one relate to the same subject-matter and have the same scope of territorial application (a *ratione materiae* or *ratione loci* question).

c) If so, whether one of the two treaties specifies that it is subject to the other.

d) If not, whether and to what extent the two provisions in question are incompatible. In this respect and whenever possible, the provisions should be interpreted according to a meaning that leads to their reconciliation. For instance, a special provision contained in a treaty may be compatible with a more general provision contained in another treaty (*lex specialis derogat legi generali*).

e) Finally, if reconciliation between the two provisions is not possible, it must be determined which one is the later treaty[2] and, consequently, which is the prevailing provision according to Art. 30, para. 3, Vienna Conv.[3].

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[1] Art. 59 Vienna Conv., referred to in Art. 30, para. 3, deals with the termination or suspension of the operation of a treaty implied by the conclusion of a later treaty.

[2] Incidentally, this is a very problematic question. It may be asked whether the concepts of "earlier" and "later" are to be determined according to the dates of signature of the two treaties or to the dates of their entries into force on the international level or to the dates on which the treaties have become binding in the relationship between the States concerned. The answer is far from being clear.

3. The Relationship between ASCOBANS and IWC

If ASCOBANS were amended to cover all cetaceans, its subject matter would partially overlap with IWC, which applies in general to "whaling".

Among the ten ASCOBANS Parties, only two (Lithuania and Poland) are not parties to the IWC. They are consequently not concerned by the question of the relationship between ASCOBANS and the IWC. But the other eight ASCOBANS Parties are.

ASCOBANS provides 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" (Art. 8.2). It follows that any treaty concluded before the adoption of ASCOBANS prevails over ASCOBANS.

The IWC does not contain any clause as to its relationship with other treaties. It follows that, for States which are parties to both ASCOBANS and IWC, the IWC prevails.

No substantive contradictions may be noticed between the IWC and ASCOBANS. The IWC allows whaling. It is only as a consequence of the moratorium adopted by the International Whaling Commission in 1982 (and still applicable today) that commercial whaling has been prohibited. Surprisingly enough, the text of ASCOBANS does not prohibit either whaling or the taking of whales[4]. This does not detract from the longstanding practice of ASCOBANS Parties which, through the resolutions adopted during their meetings, have in practice shown their commitment to the preservation of small cetaceans. But, in principle, if ASCOBANS were amended only to cover all cetacean species, this would not determine any conflict with IWC, as both treaties do not prohibit the taking of whales. Only as a consequence of the IWC moratorium would eight ASCOBANS parties be bound to refrain from commercial whaling for any kind of cetaceans.

Of no relevance is the fact that the "taking"[5] of a number of cetacean species listed in Appendix I to the Bonn Conv. is prohibited by Art. 3, para. 5, Bonn Conv. The Bonn Conv. itself is subject to treaties existing before its adoption, as stated in Art. 12, para. 2. It follows that the IWC prevails over the Bonn Conv.

4. The Relationship between ASCOBANS and the Bern Conv.

It would however be too reductive to conclude that an extension of the scope of ASCOBANS to cover all cetacean species would create no conflict with the IWC, as both treaties allow for whaling. If seen in a broader context, in the light of other relevant treaties, it is more precise to remark that ASCOBANS Parties are already bound not to engage in whaling as a result of the application of the

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[3] Under Art. 44, para. 3, Vienna Conv., the provisions of a treaty are separable, as far as termination is concerned.

[4] In the conservation and management plan annexed to ASCOBANS, the Parties "endeavour to establish the prohibition under national law of the intentional taking and killing of small cetaceans". But an "endeavour to establish" falls short of a legal obligation.

[5] Under Art. 1, para. 1, *i*, Bonn Conv., "taking" means "taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct".

Convention on the Conservation of European Wildlife and Natural Habitats ("Bern Conv."; adopted in Bern on 19 September 1979; in force from 1st June 1982).

All ASCOBANS Parties are also parties to the Bern Conv. As a result of the above mentioned Art. 8.2 ASCOBANS, the Bern Conv., which existed before the conclusion of ASCOBANS, prevails over ASCOBANS.

Under Art. 6 Bern Conv., the Parties are bound to prohibit "all forms of deliberate capture and keeping and deliberate killing" of wild fauna species listed in Appendix II, which includes a large number of cetacean species, both small and big. It follows that ASCOBANS has to be interpreted in the light of the Bern Conv.: when it provides for "a favourable conservation status for small cetaceans" (Art. 2.1), ASCOBANS really means that the Parties are bound to avoid "all forms of deliberate capture and keeping and deliberate killing" of the animals listed in Appendix II to the Bern Conv.

5. Broader ASCOBANS Amendments

Considering that, irrespective of the wording of ASCOBANS provisions, all ASCOBANS Parties are already bound not to engage in any forms of deliberate capture, keeping and deliberate killing of cetaceans, ASCOBANS Parties may wish to consider amendments of a broader scope than merely delete the word "small" before the word "cetaceans".

In this regard, the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area ("ACCOBAMS"; adopted in Monaco on 24 November 1996, in force from 1st June 2001) is a treaty which clearly prohibits any deliberate "taking"[6] of any cetacean (Art. 2, para. 1) and provides for several specific measures aiming at their conservation[7]. Perhaps a combination of the "good" provisions of both ACCOBAMS and ASCOBANS could be the desirable result of a broader ASCOBANS amendment endeavour.

A prohibition to kill and take whales would be in full conformity with Arts. 65 and 120 of the United Nations Convention on the Law of the Sea ("UNCLOS", adopted in Montego Bay on 12 December 1982, in force from 16 November 1994):

"Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with 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".

"Article 65 also applies to the conservation and management of marine mammals in the high seas".

[6] Under Art. 1, para. 3, ACCOBAMS, the term "taking" has the same broad meaning as in Art. 1, para. 1 *i*, Bonn Conv. (see *supra*, note 5).

According to Arts. 65 and 120, the normal scheme of exploitation of marine living resources provided for by the UNCLOS, that is the scheme based on the objective of optimum utilization of the living resources and the determination of the total allowable catch, does not apply to marine mammals. Unlike other marine living resources of the sea, the exploitation of these animals can be prohibited, limited or regulated, irrespective of the fact that they are in danger of extinction or their stocks are being depleted. No-taking treaties, such as ACCOBAMS, are in full conformity with the UNCLOS[8].

All ASCOBANS Parties are also parties to the UNCLOS. According to the international rules on treaty relationship[9], UNCLOS provisions prevail over provisions of other earlier treaties, such as the IWC, being the UNCLOS the later treaty.

6. Conclusions

The responses to the question are the following:

- ASCOBANS may be amended to cover all cetaceans without violating the IWC;

- considering the obligations already existing under the Bern Convention, ASCOBANS Parties may wish to consider also other amendments aimed at prohibiting all forms of deliberate capture, keeping and deliberate killing of cetaceans.

[7] The Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic ("NAMMCO", adopted 9 April 1992, in force 1 January 1999) would be a less recommendable model.
[8] If ASCOBANS were to become a no-taking treaty, a provision corresponding to Art. 11, para. 1, ACCOBAMS should replace present Art. 8.2 ASCOBANS.
[9] *Supra*, para. 2.