

Agenda Item 7.2

Relations with other Bodies
Proposal to Extend the ACCOBAMS
Agreement Area

Document 7-07

**Proposal for Extension of
ACCOBAMS Agreement Area
– Some Legal Implications**

Action Requested

- Take note of the assessment
- Consider the implications for ASCOBANS
- Provide guidance to the Secretariat

Submitted by

Secretariat



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

Secretariat's Note

This document was produced by the IUCN Environmental Law Centre on commission by the joint CMS/ASCOBANS Secretariat. The amendment proposals have been made available as AC17/Doc.7-05.

Proposal for extension of ACCOBAMS Agreement area

Some legal implications

I- Background

The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS) was negotiated under the Article IV-4 of the Convention on Migratory Species (CMS) and signed in 1996 in Monaco. It entered into force on the 1st of June, 2001. ACCOBAMS applies to all cetaceans, including both small and large cetaceans, with 'cetaceans' defines as "species, subspecies or populations of Odontoceti and Mysticeti" (art 1.3, a). The ACCOBAMS 'Agreement area' includes the Black Sea, Mediterranean Sea and the Atlantic coasts of North Morocco and South Portugal. Twenty-three (23) Range States are Parties to ACCOBAMS and 5 Range States and one regional economic integration organization are not yet Parties to the Agreement. ACCOBAMS' Secretariat is hosted by the Government of the Principality of Monaco.

Another agreement that deals with cetaceans, also concluded under CMS, is the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS). ASCOBANS was concluded in 1991 and entered into force in 1994, originally covering only the North and Baltic Seas (art.1.2, b). However in February 2008, an extension of the Agreement area came into force and as a result of this extension, the current geographical scope of ASCOBANS includes the Baltic, North East Atlantic, Irish and North Seas. Ten countries are Parties to this Agreement, which concerns only small cetaceans, meaning any species, sub-species or population of toothed whales *Odontoceti*, except the sperm whale *Physeter macrocephalus*.

II- Proposal for extension of the ACCOBAMS Agreement area

On the 9th of June 2010, Spain and Portugal, both Parties to ACCOBAMS, presented two proposals in accordance with Article X of the Agreement, for an extension of the ACCOBAMS Agreement area into the Atlantic and the Bay of Biscay. A draft resolution for the amendment of the Agreement was also submitted to the ACCOBAMS Secretariat.

The proposals put forth by Spain and Portugal seek to extend the ACCOBAMS Agreement to the marine areas under their national jurisdiction. The proposed extension would cover the Atlantic waters under the jurisdiction of Spain and Portugal.

The area subject to the proposed ACCOBAMS extension has been covered by the extended ASCOBANS Agreement area since February 2008. This 2008 extension area was made in order to close the gap for some species of small cetaceans between the areas covered by ASCOBANS and its sister agreement ACCOBAMS. As ASCOBANS deals with small cetaceans only, large cetaceans remain uncovered in the 2008 extension area.

The ASCOBANS Advisory Committee has repeatedly concerned itself with the question whether the Agreement's scope should be extended to include large cetaceans as well. At the 6th Meeting of Parties (2009), advantages and disadvantages of a possible species extension were considered (MOP6/Doc.5-04). No consensus between Parties could be reached, but it was decided that an informal working group of the Advisory Committee would be formed to provide advice to Parties how best to address their conservation needs alongside those of small cetaceans. (MOP6 Report, Agenda Item 5.5)

Spain and Portugal outline, as a reason for the proposed extension of the ACCOBAMS Agreement area, that the scopes of ACCOBAMS and ASCOBANS are different, as the latter focuses only on small cetaceans and the former includes both small and large cetaceans. In order for them to implement the conservation and management measures for all cetaceans, Spain and Portugal reason that they would benefit from the inclusion of all species and populations within one single agreement.

Furthermore, Spain and Portugal invoke a geographical and conservation aspect for the extension of the ACCOBAMS Agreement area into the Bay of Biscay and Iberian Coast. They raise the fact that cetacean populations present in the north of Portugal, Galician and Cantabrian Seas are connected, whereas they differ in terms of species composition from the ones inhabiting the Northern seas.

Finally, Spain and Portugal highlight the fact that the implementation of obligations related to the European Directive 2008/56/EC on marine environmental policy (the Marine Strategy Framework Directive) and the OSPAR Convention would be consistent with the implementation of ACCOBAMS, since these former instruments create the sub-region of Bay of Biscay and the Iberian Coast. Here it should be noted, however, that France, whose waters comprise the northern part of the Bay of Biscay, is already a Party to ASCOBANS and manages its small cetacean populations occurring in the Bay under ASCOBANS.

III- Analysis of the Proposal to extend the ACCOBAMS Agreement area

The proposal of Portugal and Spain to extend the ACCOBAMS Agreement area raises a number of issues that can be preliminarily classified in the following manner:

a) Overlap affecting small cetaceans: can it be avoided?

Since Spain and Portugal are Parties to ACCOBAMS, they wish to expand the Agreement area in order to cover both small and large cetaceans in their jurisdictional waters.

The Spanish proposal indicates 6 species of small cetaceans and 3 species of large cetaceans that would be covered by the proposed extended ACCOBAMS area. Portugal's proposal mentions three species of small cetaceans present in the Atlantic waters and which are the most common in the Portuguese waters. Small cetaceans being also covered by ASCOBANS, the extension of the ACCOBAMS Agreement area would

obviously create a geographical overlap between both agreements areas, and thus also an overlap of competences with regard to the small cetaceans populations concerned.

Spain and Portugal are not Parties to ASCOBANS, although they are Range States. Thus the overlap relating to small cetaceans could be avoided if Spain and Portugal decide to become Parties to the Agreement. According to article 8.4 of ASCOBANS, “after the date of its entry into force, the agreement shall be open for accession by Range States and Regional Economic Integration Organizations”. This accession would allow Spain and Portugal to benefit from the extended Agreement area and take part in ASCOBANS with regard to all small cetaceans migrating in the marine areas under their jurisdiction (art.6.5.4 according the 2008 amended text).

This being said, it must be pointed out that the large cetaceans are not covered in the specific North East Atlantic region.

b) Legal and other consequences of the proposal to extend ACCOBAMS

This means, from a legal point of view, and according to Article X of ACCOBAMS, Spain and Portugal as Parties to ACCOBAMS are entitled to propose an amendment to extend the geographical area of the Agreement. If the solution indicated under a) is unacceptable, and the proposed amendment to ACCOBAMS by Spain and Portugal is implemented, the following consequences can be foreseen:

First, an overlap of Agreement areas for the same species seems legally and practically a difficult proposition. The consequences of an enlargement of the ACCOBAMS area would thus logically require a corresponding adjustment in the ASCOBANS area, so as to avoid this overlap. This would raise the issue whether or not the ASCOBANS Parties would be ready to consider that and/or why they should do so, as they had reasons for extending their Agreement’s geographical coverage?

Second, even if the proposal was carried out, the result would be the application of two different management regimes for the same species in the same area.

The expansion of ACCOBAMS means that Spain and Portugal should “take the measures to achieve and maintain a favorable conservation status for cetaceans” (Article II.1). Paragraph 3 of the same article further states that “Parties shall apply, within the limits of their sovereignty and/or jurisdiction and in accordance with their international obligations, the conservation research and management measures prescribed in Annex 2”.

Considering article 2.2 of ASCOBANS, the same obligation does exist for the Parties to apply conservation, research and management measures to small cetaceans.

Therefore the Range States face the risk of having a two-level conservation and management mechanism for the same species: in the north of the Atlantic waters, the small cetaceans would be protected under ASCOBANS rules, whereas in part of the Bay of Biscay and along the Iberian Coast, meaning the waters under the jurisdiction of Spain

and Portugal, the ACCOBAMS criteria for management and conservation plans will be applied for the same species. It would be inefficient to establish the same conservation and management plans for the same species under differing Agreements.

c) Relationships/Impacts with other regional instruments

Regarding the relationships with other instruments such as the Marine Strategy Framework and the OSPAR Convention that both Portugal and Spain raised, the implementation of these obligations would be more coherent if they continued to apply in the context of the present ASCOBANS Agreement area.

Pursuant to article 4 of the Marine Strategy Framework, one of the regions covered by the Directive is the North East Atlantic Ocean including four sub-regions which are: the North East Atlantic; the Greater North Seas (including the Kattegat and English Channel); the Celtic Seas; the Bay of Biscay and Iberian Coast and in the Atlantic ocean, the Macaronesian biogeographic region. Taking into account the geographical aspects, the ASCOBANS agreement area fits better to the delimitations of the Directive rather than that of ACCOBAMS. ASCOBANS covers the Baltic and North Seas and contiguous area of the North East Atlantic, including the Bay of Biscay. By contrast, the proposed extension of ACCOBAMS will only cover the sub-region of the Bay of Biscay and the Iberian Coast. The same applies for the OSPAR Convention.

Thus, although the proposed ACCOBAMS Agreement area would correspond partly to the geographical scope of the Directive and also the OSPAR Convention, it appears that it would be more coherent to implement them together with ASCOBANS since it covers a broader area from the North to the South Atlantic.

d) Linkage/impact of the proposals on the Process regarding the Future Shape of CMS

Resolution 9.2 on “Priorities for CMS Agreements” states that the development of additional Agreements in the future should be linked to the outcome of the work initiated by Resolution 9.13 on the Future Shape of CMS. Even if these two proposals do not relate to the elaboration of new instruments, they do entail potentially wide-ranging institutional changes of existing Agreements.

As the Future Shape process is looking into possibilities for developing strategies that would best support the effective conservation and management of more migratory species, any proposals implying institutional amendments in the CMS Family should await the results of this process or at a minimum be reviewed by the Working Group on the Future Shape of CMS.

IV- Conclusion and Recommendations

Aside from the findings and recommendations deriving from the analysis in Section III above, this section contains some further recommendations for the consideration of the CMS Secretariat when analyzing the Spanish and Portuguese submission in a broader context:

- Explore the feasibility of negotiating a single agreement that merges ASCOBANS and ACCOBAMS and covers the North East Atlantic region.
- Strengthen the role of CMS Secretariat in any decision-making process related to the geographical extension of the daughter's Agreements area.