

Agenda Item 10

“Future of the ASCOBANS Agreement”

Document 28

**Options for future arrangements for
ASCOBANS**

Action Requested

- Take note of the information submitted
- Identify options to be further developed in preparation of MOP6

Submitted by

AC Chair



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

Options for future arrangements for ASCOBANS

by Stefan BRÄGER, Chair of the Advisory Committee

1. Introduction

The 5th Meeting of the Parties to ASCOBANS (MOP-5) decided that for the triennium 2007-2009 the UNEP/CMS Secretariat would serve as the ASCOBANS secretariat pursuant to provision No. 4 of the ASCOBANS Agreement, and the Executive Secretary of UNEP/CMS would be the acting Executive Secretary for ASCOBANS. In addition it was decided that the Executive Director of UNEP would undertake an independent evaluation of the new Secretariat arrangements in mid 2008; and that the results of this evaluation were to be considered by MOP-6 of ASCOBANS in 2009, with the aim of identifying the best organizational solutions for ASCOBANS (Resolution 2d of MOP-5).

The Administrative Session to the 15th Meeting of the ASCOBANS Advisory Committee (AC15) accepted Terms of Reference for the evaluation of the new arrangements for the ASCOBANS Secretariat. In addition, the AC decided to create a Working Group to assist UNEP to select an appropriate consultant and to review whether the draft report fulfilled the objectives of the evaluation. In November of 2008, the Working Group invited Stefan BRÄGER (as AC-Chair) and Paulus TAK (as Chair of the Administrative Sub-Group of the AC) to prepare discussion documents on possible future arrangements for ASCOBANS and its Secretariat for further discussion at AC-16, and subsequently at MOP-6.

This document identifies possible future activities of the Agreement. Starting from the original objectives in the Conservation and Management Plan of the Agreement and taking into account relevant developments, an analysis is made of how the Agreement can contribute to the conservation of (small) cetacean in the ASCOBANS area. This analysis also provides some insights into current and potential staffing arrangements of the Secretariat as well as into organization possibilities of the Agreement within and outside of the institutional frameworks of UNEP and/or CMS. Rather than recommending one approach or another, this document aims to provide an overview of available options as basis for an open-minded discussion to allow Parties to take the best-possible decision for effective cetacean conservation in the ASCOBANS area in the future.

2. Background and Evaluation:

2.1 Background: What was the intention behind establishing ASCOBANS?

The objectives ASCOBANS was created to achieve are best described in the Annex to the Agreement text (New York, 1992):

“Conservation and management plan

The following conservation, research, and management measures shall be applied, in conjunction with other competent international bodies, to the populations defined in Article 1.1 [“1.1. This agreement shall apply to all small cetaceans found within the area of the agreement.”]:

1. Habitat conservation and management

Work towards (a) the prevention of the release of substances which are a potential threat to the health of the animals, (b) the development, in the light of available data indicating unacceptable interaction of modifications of fishing gear and fishing practices in order to reduce by-catches and to prevent fishing gear from getting adrift or being discarded at sea, (c) the effective regulation, to reduce the impact on the animals, of activities which seriously affect their food resources, and (d) the prevention of other significant disturbance, especially of an acoustic nature.

2. Surveys and research

Investigations, to be coordinated and shared in an efficient manner between the Parties and competent international organizations, shall be conducted in order to (a) assess the status and seasonal movements of the populations and stocks concerned, (b) locate areas of special importance to their survival, and (c) identify present and potential threats to the different species.

Studies under (a) should particularly include improvement of existing and development of new methods to establish stock identity and to estimate abundance, trends, population structure and dynamics, and migrations. Studies under (b) should focus on locating areas of special importance to breeding and feeding. Studies under (c) should include research on habitat requirements, feeding ecology, trophic relationships, dispersal, and sensory biology with special regard to effects of pollution, disturbance and interactions with fisheries, including work on methods to reduce such interactions. The studies should exclude the killing of animals and include the release in good health of animals captured for research.

3. Use of by-catches and strandings

Each Party shall endeavour to establish an efficient system for reporting and retrieving by-catches and stranded specimens and to carry out, in the framework of the studies

mentioned above, full autopsies in order to collect tissues for further studies and to reveal possible causes of death and to document food composition. The information collected shall be made available in an international database.

4. Legislation

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

5. Information and education

Information shall be provided to the general public in order to ensure support for the aims of the agreement in general and to facilitate the reporting of sightings and strandings in particular; and to fishermen in order to facilitate and promote the reporting of by-catches and the delivery of dead specimens to the extent required for research under the agreement.”

2.2 Evaluation: Has ASCOBANS delivered, is it delivering now? Is it providing added value?

“*While much has already been achieved, much remains yet to be done.*” (ASCOBANS web site under “Aims and Activities”). This statement correctly and concisely sums up the agreement’s record of achievements to date. However, an evaluation of its performance requires an answer to the question of how many of its goals ASCOBANS has actually been able to achieve during the past 15 years of its existence.

To try to answer this question, it appears useful to concentrate on part 1 of the Conservation and Management Plan (“Habitat conservation and management”) that outlines the four most fundamental goals for the conservation of small cetaceans:

- Prevention of chemical pollution,
- Modifications of fishing gear and fishing practices to prevent bycatch,
- Creation of an effective regulation to reduce prey depletion, and
- Prevention of other significant disturbance, especially of noise pollution.

Incidentally, the implementation of part 1 of the ASCOBANS Conservation and Management Plan was, also evaluated in 2006 by Richard CADDELL in a WWF report to MOP 5 entitled “The Agreement on the Conservation of Small Cetaceans in the Baltic, North East Atlantic, Irish and North Seas: Progress and Prospects” (MOP 5 Doc. 24, referred to below as “Caddell Report”).

To date, these goals have been filled with more detail in a number of resolutions adopted by the Parties to ASCOBANS. A comprehensive overview of the implementation of the work plan in each triennium can be obtained from the implementation reports which the Chairs of the Advisory Committee have delivered to every MOP since MOP 2 (cf. MOP 2 Doc. 5, MOP 3 Doc. 18, MOP 4 Doc 18, MOP 5 Doc 8). Therefore, the present paper will restrict itself to outlining only the major, concrete steps taken by the Parties and the Secretariat to promote the implementation of the Conservation and Management Plan as well as the Resolutions:

To address goal no.1 (“**Prevention of chemical pollution**”), AC-5 (Hel, Poland, April 1998) established a working group on pollution that for the past years has been reviewing the scientific literature on the possible impact of (chemical) pollution on small cetaceans.

ASCOBANS has taken a series of steps to further the achievement of goal no.2 (“**Prevention of bycatch**”). Thus, the Working Group on Bycatch Issues established by AC 3 (Copenhagen, Denmark, November 1996) submitted a report to MOP 2 (MOP 2 Doc. 1). The Secretariat also commissioned a number of scientific papers on bycatch and bycatch mitigation in the ASCOBANS area, such as the “Read Report” (Andrew J. READ: “Potential Mitigation Measures for Reducing the Bycatches of Small Cetaceans in ASCOBANS Waters”, December 2000, available for download from the ASCOBANS website), the study by CLARKE *et al.* (CLARKE, E.D., BUCKLAND, S.T: & HIBY, L.: “The Estimation of the Bycatch Mortality of Harbour Porpoises in the Baltic Sea”, MOP 2 Doc 3), and the 2003 report by Kristin KASCHNER (“Review of Small Cetacean Bycatch in the ASCOBANS area and Adjacent Waters – Current Status and Suggested Future Actions”, MOP 4 Doc. 21). ASCOBANS has devoted considerable attention to the especially endangered Baltic harbour porpoise population. The ASCOBANS Baltic Discussion Group established in 1998 and delivered a final report in 2001 which helped lay the groundwork for the Recovery Plan for the Baltic harbour porpoise (“Jastarnia Plan”) developed in 2002. This plan calls for modifications of fishing gear and fishing practices to prevent bycatch.

Its strong fisheries-related component and the resultant problems in connection with the exclusive competency of the EU for fisheries issues prevented the actual adoption of the Jastarnia Plan by the 4th Meeting of the Parties (Esbjerg, Denmark, August 2003). However, the Parties welcomed the Plan and they have taken some steps to implement it. The steering group for the Recovery Plan (the so-called Jastarnia Group) took up its work in 2005 and has continuously reviewing the Plan’s implementation and provided advice on future implementation needs and priorities to the Advisory Committee. The Plan is currently undergoing a periodic review. A Conservation Plan for harbour porpoises in the North Sea is currently under preparation.

ASCOBANS has not yet attempted to realize goal no.3 (“**Regulation to reduce prey depletion**”).

To address goal no.4 (“**Prevention of noise pollution**”), AC-15 (Bonn, Germany, 2008) established a working group on noise pollution that is due to deliver its first report at AC-16.

Although the problems ASCOBANS was established to address have not been solved and the Agreement’s achievements may not yet meet everybody’s expectations, the overview above bears witness to the fact that ASCOBANS has not been inactive. ASCOBANS does in fact have tremendous potential for the conservation of small cetaceans and thus the marine environment in general. The strength of the Agreement is based on a number of factors, not the least of which is the fact that ASCOBANS is the only regional international instrument exclusively dedicated to the conservation of small cetaceans in the area concerned. Perhaps its greatest strength is its ability to bring together managers, scientists and various stakeholders with a diversity of interests to work towards mitigating anthropogenic impacts on these species and their habitats and to pool expertise in a way no other regional body is able to. Or, in the assessment of WWF, “ASCOBANS ... is considered by international lawyers to be a particularly sophisticated example of a subsidiary agreement under the auspices of the Bonn Convention on Migratory Species.” (CADDELL Report). It is therefore worth examining how ASCOBANS can more fully realize its potential.

3. What needs to be done to ensure that ASCOBANS objectives are achieved /continue to be achieved in the future?

3.1 Policy-related Issues:

As ASCOBANS embarks on its seventh triennium, the Agreement and its Parties will need to examine means of better ensuring that its objectives are met. These objectives themselves may also need to be partly redefined, e.g. by extension or limitation.

The limited success of ASCOBANS in some cases is undoubtedly –at least in part– due to the difficult political environment in which ASCOBANS operates. The Advisory Committee and its various working groups have provided a wealth of advice concerning conservation threats and their mitigation, and this in turn has led to numerous resolutions by the Meetings of the Parties. However, as a result of attempts to balance conservation and fisheries interests, and of the problems related to the exclusive competency of the European Community for fisheries issues (cf. below), decisions taken by the Parties are frequently based on the lowest common denominator. Moreover, to realize their full conservation potential the resolutions adopted by the Parties need to be implemented fully. At times, however, Parties appear somewhat reluctant to implement their own resolutions. The success of the Agreement in

meeting its objectives depends to a considerable extent on the willingness of Parties to assume ownership, to be consistent, and to follow through on their decisions.

However, in light of the rather mixed picture that ASCOBANS presents with respect to the achievements of its goals, the fundamental question as to whether ASCOBANS itself is in fact the most suitable forum for the achievement of its own goals might theoretically be asked. An alternative solution could lie in abolishing the Agreement and transferring certain of its tasks to various other competent regional bodies. Thus, the work of the Jastarnia Group might be carried on by HELCOM, while the work related to the future North Sea Harbour Porpoise Conservation Plan could presumably be carried out within the framework of OSPAR. Alternatively, a merger with the sister agreement ACCOBAMS into a European agreement for the conservation of cetaceans might be considered. While these options do have advantages (reduction in number of regional bodies working in parallel, avoidance of duplication of effort, reduced costs), they do not do justice to the (potential) added value offered by ASCOBANS and therefore will not be further discussed in this paper.

This leads to the question of what the objectives of the Agreement should be in the coming triennium. Much of ASCOBANS' lack of progress in its attempts to reduce bycatch of small cetaceans has been attributed to the potential for conflict between ASCOBANS and European Union legislation. By its very nature, ASCOBANS must address fisheries-related issues. Yet, ASCOBANS is an agreement consisting solely of EU Member States and in the EU the exclusive competency for the conservation, management and exploitation of marine resources rests with the European Community. Therefore, ASCOBANS cannot take binding decisions which go beyond, let alone contradict relevant European legislation. Or in other words: "...despite having considered this issue [bycatch] in depth and adopting a series of Resolutions, ASCOBANS is unable to enforce specific measures to mitigate bycatches since it lacks the legal capacity to implement fisheries restrictions and gear modifications. In this regard it is reliant upon the EC to formally accept such proposals and to enshrine them in European Law, which is binding upon all of the current parties to ASCOBANS ... The EC exercises exclusive competence over fisheries in the Agreement area and can undermine and overrule ASCOBANS at any time." (CADELL Report).

Again, there are two potential ways of dealing with this dilemma. On the one hand, it has been suggested unofficially to **limit the work of ASCOBANS for practical purposes to the requirement of the European Union**, changing its nature effectively into an EU specialist group.

On the other hand, while it is true that the European Community holds the exclusive competency to adopt binding legislation on fisheries issues, there is no legal obstacle that

prevents ASCOBANS from making relevant recommendations based on its extraordinary expertise and the Parties from jointly seeking to feed these recommendations into the relevant processes at the EU level.

Similarly, if somewhat less radically, the unofficial suggestion has been made to limit ASCOBANS to a **purely scientific role** solely providing scientific advice to its Parties.

Despite the EU-ASCOBANS dilemma, there is, therefore, a continued role for an independent ASCOBANS in the framework of regional marine conservation and environmental policy. The considerations below, both regarding policy issues and institutional questions, are based on the assumption that Parties will choose to pursue this option.

At the policy level the following issues will presumably determine the agenda of MOP 6 and the work of ASCOBANS in the next triennium:

- The **revision of the Jastarnia Plan** will be concluded in time for the 6th Meeting of the Parties. The weight and relevance of the Plan could be considerably increased by its formal adoption at MOP 6. The continued implementation of the Plan will remain high on the ASCOBANS agenda.
- The **North Sea Harbour Porpoise Conservation Plan**, a long-standing ASCOBANS project, is nearing completion and will also be available for adoption by MOP 6. The new triennium will therefore also require efforts to implement this document in practice.
- The **south-westward extension of the Agreement** agreed at MOP 4 (Esbjerg, Denmark, 2003) has meanwhile entered into force. However, this extension needs yet to be filled with life.
- In recent years, the **inclusion of large whales** under the Agreement has been discussed intensively. In order to establish the future direction of the Agreement, a consensus needs to be made on whether to remain focused specifically on small cetaceans, or whether to include larger species within the remit of ASCOBANS. It could be argued that the inclusion of large whales is a logical progression from the point of view of implementing practical conservation measures, since baleen and sperm whales face broadly the same threats as small cetaceans in European waters. Moreover, all current ASCOBANS Parties are obliged already by the EU Habitats Directive to ensure the “strict protection” of “all species” of cetaceans within their territories. This extension of the Agreement’s scope might also make ASCOBANS more appealing for further Range States and incite them to accede to the Agreement.

In this context it should not be overlooked that any new Party that is not a member of the European Union would certainly alter the legal status and the international standing of ASCOBANS, which is, currently an Agreement composed solely of EU Member States. For a number of reasons, however, the inclusion of great whales does not appeal to all current Parties and their concerns should not be taken lightly. At least from a legal and institutional standpoint, however, an extension of the scope of ASCOBANS to include all cetaceans seems to be unproblematic. In particular, there appears to be no conflict of interest between ASCOBANS, the IWC and other relevant international bodies, as documented in two recent studies (cf. The Interaction between the ASCOBANS MOP and the IWC, NAMMCO and EC, MOP 5 Doc 21 a); Extending the Scope of ASCOBANS to all Cetaceans, AC 15 Doc. 29) and also confirmed by information received from the IWC itself.

- ASCOBANS and its objectives would also benefit from **strengthened cooperation with other intergovernmental organizations** representing other stakeholders such as the International Maritime Organisation (IMO). The creation and enhancement of synergies between ASCOBANS and other relevant regional players such as OSPAR and HELCOM and, very importantly, the EU will also need to be addressed. *Inter alia* this involves defining the future role of ASCOBANS in the framework of the European Marine Strategy.

3.2 Institutional Issues:

As stated above, ASCOBANS can only be successful if Parties assume ownership of the Agreement and consistently implement their decisions. In addition to policy-related actions, this requires endowing the Agreement with a sufficient budget and ensuring that the Agreement benefits from functional and efficient institutional arrangements.

In the budgetary context, the unfavourable ratio between staffing and administrative costs on the one hand and budget lines related to actually implementing the Agreement's objectives on the other gives rise to concern and needs to be examined.

Furthermore, well-functioning Agreement bodies, in particular a well-functioning Secretariat are also essential to a well-functioning Agreement and, therefore, to meeting the objectives of ASCOBANS.

This means, however, that Parties will need to choose the most appropriate structure for the Agreement Secretariat of the future. In principle, there are three possible options: A merged secretariat, a stand-alone secretariat under UNEP, and an independent secretariat outside the UNEP system. Each of these options can be sub-divided into sub-scenarios:

3.2.1 *ASCOBANS Secretariat merged with CMS Secretariat.*

There are several possible scenarios for such a merger:

3.2.1.1 This scenario [also mentioned in the Final UNEP Evaluation Report by Priyalal KURUKULASURIYA & Jessica KITAKULE-MUKUNGU under paragraph 124 on page 47 as well as “Scenario A” in document 17 [restricted] provided by Paulus TAK] would retain the *status quo*. It was agreed upon by the Parties at their last Meeting for the current triennium (2007-2009) to reduce costs. During MOP-5, the Acting Executive Secretary assured the Parties that the merged secretariat would be more efficient at reduced cost due to synergies with the CMS Secretariat.

3.2.1.2 There are further variations on the merger theme described in the UNEP Evaluation Report (Scenarios 2 and 5 of the UNEP evaluation).

3.2.1.3 Merged Secretariat with one full-time ASCOBANS staff (P3 plus 50% G5) and guidance by the Executive Secretary of CMS (3%) resulting in higher contributions from Parties (Scenario 4 of the UNEP evaluation and scenario C in document 17, respectively).

3.2.1.4 Integration of ASCOBANS Secretariat into an Agreements Unit within CMS similar to that envisioned by Parties at CMS MOP 5 (Geneva, Switzerland, 1997) but subsequently discarded by CMS MOP 6 (Cape Town, South Africa, 1999). This would entail the creation of an Agreements Unit comprising individual Executive Officers for the individual CMS Agreements and pooling of further (administrative, secretarial, scientific, information-related) staff (cf. Proceedings of CMS MOP 5, item 15 (a), paragraph 166, p. 29). The various agreements would then no longer have their own Secretariats but would be serviced by their own individual executive officers within the Agreements Unit. It should be noted that in 1999 Parties rejected such an arrangement and opted for the arrangement subsequently followed (i.e. separate, independent Secretariats for AEWA, ASCOBANS and Eurobats), “To ensure that the identities of the Agreements were maintained ... and to avoid giving the mistaken impression that they were subsumed under the CMS Secretariat.” (cf. explanatory statement by the Executive Secretary of Eurobats, Mr. Andreas Streit, Proceedings of CMS COP 6, item XIII.B., paragraph 208, p. 28).

3.2.2 *Independent secretariat under UNEP (status as before 2007)*

This scenario effectively returns to the state of affairs before the Fifth Meeting of Parties with staffing arrangements as at 31 December 2006 and a minimal raise of contributions by Parties (scenario 3 of the UNEP evaluation and scenario F of document 17, respectively). This scenario provides for two full-time staff (P4 and G5).

3.2.3 *Independent secretariat outside UNEP (status as before 2001)*

The report of the merger evaluation states: "It may also be noted that there could be other scenarios which the Parties may wish to consider in the broader context of the synergies and interlinkages within the wider CMS family of Agreements..." [Final UNEP Evaluation Report by Priyalal KURUKULASURIYA & Jessica KITAKULE-MUKUNGU under paragraph 124 on page 47].

One such option would be an independent Secretariat outside the UNEP system. This is the arrangement successfully followed by ACAP, ACCOBAMS, and CWSS (see also scenario I of document 17). It would offer considerable savings among other things because 13% UNEP overhead would not be charged. Furthermore, potential economies of scale (depending on salaries) could be used to increase the staff to three full-time staff to make the secretariat more effective without raising the annual costs. Two possible sub-scenarios might be considered.

3.2.3.1 Permanently hosted by one Party with contributions from all Parties in future triennium not exceeding the current ones according to UN plan.

3.2.3.2 Hosting of secretariat rotates among Parties according to a schedule.

3.2.4 *Changes in the structure of other Agreement bodies*

It has also been suggested by the Secretariat to subject other Agreement bodies, in particular the Advisory Committee, to close scrutiny and possibly effect changes in the structure of these bodies. All of the above scenarios are possible with or without an Advisory Committee, or with a Scientific Committee and/or Standing Committee instead. Meetings of Parties could take place at a three-year or four-year interval. It should not be overlooked, however, that the ASCOBANS Agreement expressly provides for the current Advisory Committee and does not make any provisions for alternative arrangements such as a Standing Committee and a Scientific Committee. A switch to such a scenario would therefore presumably require an amendment to the Agreement. Any amendments of the Agreement, however, would require a qualified majority of the MOP (rule 14 of the Rules of Procedure). Moreover, a draft resolution to this effect would have to be submitted by a Party (c.f. article 6.5.1 of the Agreement), keeping the deadline of 90 days before the opening of the meeting (c.f. article 6.5.2), i.e. likely sometime between May and July 2009, depending on the date of MOP-6, which is yet to be determined.