

**AMENDMENTS, DONE AT NAIROBI, KENYA ON 25 NOVEMBER 2005,
TO APPENDICES I AND II OF THE CONVENTION ON THE
CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS,
DONE AT BONN ON 23 JUNE 1979
[1991] ATS 32**

Documents tabled on 7 February 2006:

National Interest Analysis [2006] ATNIA 2

With attachment on consultation

Text of the proposed treaty action

Background information: Current status list

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. The treaty action concerns amendments to Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals (the CMS, also referred to as the Bonn Convention). The amendments were adopted by the 8th Meeting of the Conference of the Parties (CoP8) to the CMS, held in Nairobi from 20-25 November 2005. The amendments to the Appendices include the listing, on Australia's joint proposal with the United Kingdom, of the basking shark on both Appendices.
2. The Assistant Secretary of the Marine Environment Branch, Australian Government Department of the Environment and Heritage, sent a letter to the Committee Secretary of the Joint Standing Committee on Treaties (JSCOT) on 4 November 2005 advising of the Government's joint nomination of the basking shark to the Appendices of the CMS.
3. Article XI(5) of the CMS, provides that amendments to the Appendices will automatically enter into force for all Parties ninety days after adoption, with the exception of those Parties having made a reservation in accordance with Article XI(6). As Australia does not propose to lodge a reservation to the amendments to the Appendices, entry into force for Australia will automatically occur on 23 February 2006 and no further treaty action is required.
4. The Commonwealth Minister for the Environment and Heritage has written to the Chairman of the JSCOT providing details of the amendments, together with advice that, due to the automatic entry into force mechanism governing amendments to the CMS Appendices, entry into force for Australia will occur on this occasion before the usual treaty tabling requirements are met.

Overview and national interest summary

5. The treaty action is the addition of eleven species to Appendix I and sixteen species to Appendix II of the CMS. The basking shark was jointly nominated by Australia and the United Kingdom for inclusion in both Appendices. Of the additions, Australia is only a range state for the basking shark. This means Australia has special obligations in relation to the basking shark. The proposed treaty action is in the national interest as Australia is committed to international shark protection and conservation, and to protecting globally endangered shark species occurring in Australian waters.
6. The listing of the basking shark continues Australia's efforts to conserve sharks, following the successful Australian proposal for the listing of the great white shark under Appendices I and II at CoP7 in 2002. The listing of the basking shark under the CMS complements Australia's efforts under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which include the listing of the Great White Shark in Appendix II of CITES at the 13th Conference of Parties in 2004. The amendment to the CMS reinforces Australia's broader campaign to protect migratory sharks.

Reasons for Australia to take the proposed treaty action

7. The CMS is a multilateral convention which came into force generally in 1983 and for Australia on 1 September 1991. It focuses upon terrestrial, avian and marine species that migrate across or outside national jurisdictional boundaries. The CMS obliges its parties to protect migratory species of wild animals that live within, or pass through, their jurisdictional boundaries.

8. Article I of the CMS establishes two categories that define the conservation status of a migratory species - 'endangered' for a migratory species that is in danger of extinction throughout all or a significant proportion of the area of land or water that it inhabits (its range), and 'unfavourable conservation status' where the conditions for a favourable conservation status are not being met. The conservation status of a species will be taken as favourable when, as provided in Article I(1)(c):

(1) population dynamics data indicate that the migratory species is maintaining itself on a long-term basis as a viable component of its ecosystems;

(2) the range of the migratory species is neither currently being reduced, nor is likely to be reduced, on a long-term basis;

(3) there is, and will be in the foreseeable future, sufficient habitat to maintain the population of the migratory species on a long-term basis; and

(4) the distribution and abundance of the migratory species approach historic coverage and level to the extent that potentially suitable ecosystems exist and to the extent consistent with wise wildlife management.

9. Appendix I lists migratory species that are endangered and for which Parties are obliged to provide immediate protection. Appendix II lists migratory species with an unfavourable conservation status and which require, or would significantly benefit from, international cooperation for their conservation and management which could be achieved by an international agreement.

10. The amendments to the Appendices to the CMS add eleven species to the list of endangered species described in Appendix I and sixteen species to the list of animals with an 'unfavourable conservation status' described in Appendix II. The CMS provides the most accessible mechanism to facilitate international action for conservation of these migratory species. The amendments to Appendices I and II of the CMS will facilitate such action in relation to the species listed and will complement actions already taken.

11. Australia, with the United Kingdom, submitted a joint proposal to list the basking shark in Appendices I and II of the CMS. Australia is a range state for the basking shark.

12. A range state is defined in the CMS under Article I as any State that exercises jurisdiction over any part of the range of that migratory species, or a State, the flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species. As a range state, Australia has special obligations with regard to the basking shark. However, such obligations will not extend beyond the protection already afforded to the species under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

13. The basking shark is listed under the World Conservation Union's Red List of Threatened Species as Vulnerable globally, with the North Pacific and Northeast Atlantic stocks listed as Endangered. The basking shark was listed on Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 2002. Threats to the migration, and hence the long term survival, of basking shark populations include targeted fisheries, incidental catch of the species, boat strikes, global warming and habitat degradation.

14. The attached list of the additions to the Appendices of the CMS was prepared by the Migratory and Marine Species Section, Department of the Environment and Heritage, on the basis of its records of CoP8 in November 2005. The CMS Secretariat has not yet published formal records of the Conference or the revised Appendices.

15. Australia has a strong interest in maintaining biodiversity generally and in protecting specific species such as the basking shark. Accepting these amendments will signify Australia's commitment to conservation and maintain our position as a leader in the field of conservation.

Obligations

16. All Parties to the CMS acknowledge the importance of conserving migratory species in Article II(1) and the need to take action to avoid any migratory species becoming endangered in Article II(2). The Parties also agree to promote, cooperate and support research relating to migratory species pursuant to Article II(3)(a) and endeavour to provide immediate protection for migratory species included in Appendix I pursuant to Article II(3)(b). Australia's primary obligations arising from the amendments to the Appendices to the CMS stem from the fact that it is a range state for the listed basking shark.

17. Under Article II of the CMS, range states for species listed in either Appendix I or Appendix II accept special obligations to conserve those species. Parties that are range states for migratory species listed in Appendix I must, pursuant to Article III(4), endeavour:

- a) to conserve and, where feasible and appropriate, restore those habitats which are of importance in removing the listed species from danger of extinction;
- b) to prevent, remove, compensate for, or minimise the adverse effects of activities or obstacles that impede or prevent the migration of the listed species; and
- c) to the extent feasible and appropriate, prevent, reduce or control factors that are endangering or likely to further endanger the listed species.

18. Additionally, Parties that are range states for species listed in Appendix I shall, pursuant to Article III(5), prohibit the taking of animals belonging to such species. Exceptions may be made to this prohibition only if:

- a) the taking is for scientific purposes;
- b) the taking is for the purpose of enhancing the propagation or survival of the affected species;
- c) the taking is to accommodate the needs of traditional subsistence users of such species; or

d) extraordinary circumstances so require;

provided that such exceptions are precise as to content and limited in space and time. Such taking should not operate to the disadvantage of the species.

19. Parties that are a range state for migratory species listed in Appendix II have further obligations. Australia, as a range state for the basking shark, must endeavour to conclude Agreements with other range states where these would benefit the species and give priority to those species in an unfavourable conservation status pursuant to Article IV(3).

20. Each agreement must accord with the guidelines established by Article V of the CMS. Article V(5) provides that where appropriate and feasible, each agreement should provide for (although need not be limited by) certain requirements. While CMS agreements are not strictly bound to include these requirements, they do form the template for agreements contemplated under the Convention. The specified requirements broadly encompass areas such as habitat conservation, research, information exchange and public education.

21. In addition to the basking shark, a number of other species were added to the Appendices of the CMS on the proposal of other Parties. However, Australia is not a range state for those other species and therefore does not need to take any further action.

22. The CMS Secretariat, established under Article IX, keeps a list of range states of migratory species listed in Appendix I and II and updates the list using information it has received from the Parties pursuant to Article VI(1). Australia is obliged to keep the Secretariat informed of the migratory species listed in Appendices I and II for which they consider themselves to be range states. This includes keeping the Secretariat informed with regard to information on flag vessels engaged outside national jurisdictional limits in taking the migratory species concerned, and where possible, future plans for such taking pursuant to Article VI(2). No new obligations arise under this paragraph as Australian flagged vessels are not engaged in taking the basking shark. Australia is now, pursuant to Article VI(3), obliged to inform the Conference of Parties through the Secretariat at least six months prior to each ordinary meeting of the Conference of measures taken to implement the provisions of the CMS for these species.

23. In order to meet the international obligations that arise for Australia as a range state for migratory species listed in Appendix II under the CMS, Australia must cooperate in the development of multilateral conservation agreements where these will benefit the species listed.

24. Article XII(2) provides that the provisions of the CMS do not affect the rights or obligations of any Party deriving from any existing treaty or convention. Article XII(3) also allows Parties to adopt stricter domestic measures concerning the conservation of any listed migratory species.

Implementation

25. The EPBC Act enables Australia to give domestic effect to its obligations arising out of amendments to the Appendices. The obligations imposed by the listings of species for which Australia is a range state will not extend beyond the protection already afforded to those species under the EPBC Act.

26. The EPBC Act provides for protection of migratory species. Division 2 of Part 13 of the EPBC Act provides for the preservation, conservation and protection of migratory species in Australian waters, including to the outer limits of the Exclusive Economic Zone. As a result of

the listing of the basking shark in Appendices I and II of the CMS, Australia will be required to update the list of migratory species pursuant to Division 2 of Part 13 of the EPBC Act. Section 209(3)(a) specifies that the list of migratory species must include all species that are 'from time to time included in appendices to the CMS and for which Australia is a Range State under the Convention.'

Costs

27. The amendments to the Appendices of the CMS are not expected to impose any additional costs on Australia in terms of meeting its obligations under the CMS. The basking shark is rarely encountered in Australian waters and is not a commercially targeted species. Australia already has a strong protection and conservation management regime in place for other migratory shark species, such as the great white shark and whale shark. The amendments will not require any domestic agencies or management arrangements to be put in place and therefore no additional costs in this regard are anticipated.

Regulation Impact Statement

28. The Office of Regulation Review (Productivity Commission) has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

29. The CMS works on the assumption that Appendices I and II will be expanded or amended as required to meet the conservation needs of migratory species which are endangered, become endangered or have an unfavourable conservation status. Moreover, it is also envisaged that migratory species may be removed from the Appendices once their conservation needs have been met. Any future amendments or additions, of this or any other kind, to the Appendices will constitute a separate treaty action and be subject to the usual domestic treaty making process including the tabling of a National Interest Analysis.

30. In accordance with Article XI(5) of the CMS, amendments to the Appendices will automatically enter into force for all Parties ninety days after adoption, with the exception of those Parties having made a reservation in accordance with Article XI(6). Any Party that by notification in writing to the Depositary makes a reservation within the ninety days provided will not be bound by the CMS in regard to that species.

Withdrawal or denunciation

31. Once amendments have entered into force for a Party, the only way to withdraw from them would be by denouncing the CMS. Article XIX provides that a Party to the CMS may denounce it by written notification to the Depositary (the Government of Germany) at any time. Such denunciation would take place twelve months after the depositary has received the notification and would be subject to the usual domestic treaty process including the tabling of a National Interest Analysis.

Contact details

Migratory and Marine Species Section
Marine Division
Department of the Environment and Heritage

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CONSULTATION

1. The following Federal and State agencies were consulted regarding the proposed listing of the basking shark to Appendices I and II of the CMS:

- Australian Antarctic Division, Australian Government Department of the Environment and Heritage
- Australian Fisheries Management Authority
- Australian Government Department of Agriculture, Fisheries and Forestry
- Department of Primary Industries (New South Wales)
- Department for Environment and Heritage (South Australia)
- Department of Primary Industries Water and Environment (Tasmania)
- Department of Primary Industries (Victoria)
- Department of Conservation and Land Management (Western Australia)
- Department of Fisheries (Western Australia)

Agencies in Queensland and the Northern Territory were not consulted as the basking shark does not occur in their waters.

2. Written consultation occurred in May 2005 following a request from the United Kingdom for an indication of support for their proposed nomination of the basking shark to Appendices I and II of the CMS. The Department of Agriculture, Fisheries and Forestry and the Australian Antarctic Division supported the proposal, while no objections were raised by the other consulted agencies.

3. Consultation with relevant organisations was undertaken in 2002, during the development of the Australian Government position on the proposed listing of the basking shark to Appendix II of CITES at CITES CoP12. Consultation prior to CoP12 included Federal and State Agencies, fishing groups and non-government organisations. Given the extensive nature of the consultation in 2002, the rare incidence of basking sharks in Australian waters, and hence the lack of new information regarding the species, it was not deemed necessary to repeat the extensive consultation process for this nomination.

Liberia	1.12.04												
Libyan Arab Jamahiriya	1.09.02	X			X								
Liechtenstein	1.11.97												
Lithuania	1.02.02	X	X										S
Luxembourg	1.11.83	X	X										
Mali	1.10.87	X											
Malta	1.06.01		X		X								
Mauritania	1.07.98									S			
Mauritius	1.06.04	X									S		
Monaco	1.06.93	X	X		X								
Mongolia	1.11.99												
Morocco	1.11.93	(x)			X			S		S			
Netherlands	1.11.83	X	X	X		X							
New Zealand	1.10.00					X							
Niger	1.11.83	X											
Nigeria	1.01.87	X								S			
Norway	1.08.85		X										
Pakistan	1.12.87							S					
Panama	1.05.89												
Paraguay	1.01.99												
Peru	1.06.97					(x)							
Philippines	1.02.94									S			
Poland	1.05.96		X	X									
Portugal	1.11.83	X	X		X								
Rep. of Moldova	1.04.01	X	X							S			
Romania	1.07.98	X	X		X			S	S				
Rwanda	1.01.05												
Sao Tome and Principe	1.12.01									S			
Saudi Arabia	1.03.91									S			
Senegal	1.06.88	X								S		S	
Seychelles	1.08.05										S		
Slovakia	1.03.95	X	X						S				
Slovenia	1.02.99	X	X										S
Somalia	1.02.86												
South Africa	1.12.91	X				X							
Spain	1.05.85	X			X	X		S					S
Sri Lanka	1.09.90										S		
Sweden	1.11.83	X	X	X									
Switzerland	1.07.95	X											
Syrian Arab Rep.	1.06.03	X			X								
Tajikistan	1.02.01												S
The former Yugoslav Republic of Macedonia	1.11.99	X	X						S				
Togo	1.02.96	X								S			
Tunisia	1.06.87				X			S					
Uganda	1.08.00	X											
Ukraine	1.11.99	X	X		X			S	S				S
United Kingdom	1.10.85	X	X	X		(x)					S		S
United Rep. of Tanzania	1.07.99	X									S		
Uruguay	1.05.90												
Uzbekistan	1.09.98	X						S	S				S

There are also three signatories to the Convention: Central African Republic, Jamaica, Madagascar

Legend:

AEWA = Agreement on the Conservation of African-Eurasian Migratory Waterbirds (01.11.1999)

ACCO = Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (01.06.2001)

ASCO = Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (29.03.1994)

BAT = Agreement on the Conservation of Populations of European Bats (16.01.1994)

ACAP = Agreement on the Conservation of Albatrosses and Petrels

GBUS = Memorandum of Understanding on the Conservation and Management of the Middle-European Population of the Great Bustard (01.06.2001)

MT-AFR = Memorandum of Understanding concerning Conservation Measures for Marine Turtles of the Atlantic Coast of Africa (01.07.1999)

MT-IOSEA = Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia (01.09.2001)

CURL = Memorandum of Understanding concerning Conservation Measures for the Slender-billed Curlew (10.09.1994)

SEAL = Agreement on the Conservation of Seals in the Wadden Sea (01.10.1991)

SIBE = Memorandum of Understanding concerning Conservation Measures for the Siberian Crane (01.07.1993)

BUKH = Memorandum of Understanding concerning Conservation and Restoration of the Bukhara Deer (16.05.2002)

AQW = Memorandum of Understanding concerning Conservation Measures for the Aquatic warbler (30.04.03)

1) Agreements which a given CMS Party has ratified or signed. Refer to the legend for Agreement titles and dates of entry into effect (in parentheses)