The Convention on Migratory Species Agrees on Measures to Protect Cetacean Culture

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Matter commented on: CMS Resolution on the Conservation Implications of Cetacean Culture, UNEP/CMS/COP11/Doc.23.2.4

1. Introduction

The Conference of the Parties to the 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS), in its 11th session held in Quito, Ecuador on November 4-9 has adopted a landmark resolution that aims to protect the culture of socially complex animals, and more specifically cetaceans. Parties to the CMS will henceforth have to consider relevant “units of culture” when deciding upon conservation measures, so as to protect behaviours that are passed on within particular groups of dolphins and whales, not through genetic information encoded in the animals’ DNA, but through social learning. This resolution has possibly far reaching implications. Some of these implications (but only some) will be raised in this post.

2. The Convention on the Conservation of Migratory Species of Wild Animals

The CMS is a framework agreement that has as its objective the conservation and sustainable use of migratory species, including their migration routes and their habitats. In this respect, the Convention fosters transboundary cooperation between “Range States”. A Range State is a State that a) exercises jurisdiction over any part of the migration routes of particular migratory species, and/or b) a State, whose flag vessels are engaged in any form of taking (such as hunting, fishing, capturing, harassing, killing or attempts thereof) in relation to any of the migratory species protected under the Convention in areas beyond national jurisdiction (art. 1(h)). Parties have two main obligations. First, they shall “endeavour to provide immediate protection” to any of the species included in Appendix I. Appendix I lists species which are threatened with extinction. Secondly, Parties shall “endeavour to conclude” international agreements in relation to species included in Appendix II, that is species whose conservation status is “unfavourable” and/or would “significantly benefit” from global or regional agreements or other informal instruments, as the case may be.

There are two such agreements for cetaceans (of which there are 86 recognized species): the Agreement for the Conservation of Small Cetaceans of the Baltic and North Sea (ASCOBANS) and the Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea and the Contiguous Atlantic area (ACCOBAMS). Other marine areas can benefit from Action Plans or Memoranda of Understanding, and there are several ongoing discussions in relation to the adoption of additional regional agreements.

The general threats endangering (especially marine) cetaceans are well-known but it is important here to highlight global fisheries and bycatch (a particular focus of both ASCOBANS and ACCOBAMS), ship strikes, hearing disturbances such as underwater noise (as it interferes with cetaceans’ ability to navigate, find food and interact socially), and habitat loss or degradation.
3. The Resolution Protecting Cetacean Culture

As mentioned, the 11th Conference of the Parties to the CMS has adopted a resolution whose objective is to “consider the role and dynamics of culturally transmitted behaviours” (Conservation Implications of Cetacean Culture, UNEP/CMS/COP11/Doc.23.2.4, Annex: Draft Resolution) in relation to any conservation measures Parties intend to adopt.

The resolution was based on the recommendations of a workshop held by CMS’ Scientific Council’s Aquatic Mammals Working Group (a typical procedure within the context of multilateral environmental treaties). The Working Group had been “instructed” by Resolution 10.15 of the Global Programme of Work for Cetaceans to “review and provide advice on the impact of the emergent science of cetacean social complexity and culture, as it relates to regional populations and to inform forward decision about CMS conservation priorities” (Global Programme of Work For Cetaceans Adopted by the Conference of the Parties at its Tenth Meeting, Bergen, 20–25 November 2011, UN Doc. UNEP/CMS/Resolution 10.15, at 4). More specifically, the task was to provide a science-based definition of the “unit to conserve” in relation to socially complex species.

The workshop used the following definition of culture: “information or behaviours that are shared by a community and acquired through social learning from conspecifics” (ibid. at 4), and the efforts were aimed at understanding the implications of such behaviours for conservation efforts. The workshop participants agreed that lack of data would make it difficult (“rare cases”) to base management decisions on “cultural aspects” of cetaceans; however, it was also agreed that, where such data are available, such information “could provide important insights relating to the delineation of units to conserve and should be taken into account” (ibid. at 4). The workshop also called for the use of precaution, on the assumption that various populations of cetaceans “may contain discrete social elements which have conservation significance warranting further investigation” (ibid. at 4). The workshop recognized that a sense of culture is “widespread” in a number of socially complex mammals, and particularly cetaceans, primates and elephants.

The adopted resolution recognizes how socially complex mammals show evidence of (non-human) culture and requires Parties to act on four substantive points, and lays out a set of requests and/or invitations related to scientific knowledge and data collection.

The Parties are “strongly encouraged” to consider “the role and dynamics of culturally transmitted behaviours when determining conservation measures”. This is the central provision. While the language is hortatory, its weight should not be underestimated. The Parties are further “strongly encouraged” to consider the interaction of particular anthropogenic threats with the species’ “social structure and culture”. The Parties are also “urged” to apply a precautionary approach, in line with the findings of the workshop mentioned above, and are finally “encouraged” to “prioritize the acquisition of pertinent data”.

The requests related to scientific knowledge and data gathering are particularly aimed at developing priority lists on which to base “comprehensive investigation of culture and social structure”, as well as at the development of guidelines for the application of the precautionary approach called for in the resolution.
4. The Significance of the Resolution

There are two immediate reflections prompted by this resolution. One is practical, and relates to the difficulty that may arise in relation to a whole series of human activities (“threats”) which may have significant effects on the ability of cetaceans to carry on their complex cultural practices; cultural practices which, in the future, will have to be considered when considering conservation measures. If it is already difficult to gauge with a good level of precision the material effects of human activities on biodiversity, in light of the complex ecosystem interactions of a large ensemble of factors operating at different temporal and spatial scales. The inclusion of cultural impacts will certainly make it significantly more complex, especially in light of the novel set of uncertainties involved.

On a more conceptual or philosophical plane, this resolution, and the underlying epistemological standpoint from which it emerges, may be understood as a (further) challenge to the pervasive modern binary nature/culture. If one of the effects of the ecosystem approach was to re-insert humans within their natural contexts (conceptually, as materially they were never outside), this resolution operates in a parallel but opposite direction, situating cetaceans within a cultural context. Thus, this resolution can be read as a (further) step on the road to the legal subjectification of natural entities to the extent that it recognizes their cultural agency, a cultural agency traditionally reserved to the rational human agent.

In this respect, it was perhaps a serendipitous coincidence that this Conference of the Parties was held in Ecuador, the first country in the world to recognize the rights of nature in its Constitution. Article 71 establishes that Nature “has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes”. But the right to life, some doctrine maintains, is increasingly finding its way into international law, at least for some symbolic species (for an early analysis in this direction see e.g. See A D’Amato and S Chopra ‘Whales: Their Emerging Right to Life’ (1991) 85 American Journal of International Law 21). Yet the adoption of cultural agency as a relevant element to consider in relation to conservation opens further possibilities in this direction, such as, perhaps, that of using the language of cultural rights. However, we cannot yet assess the full implications of this landmark decision.

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