



**CONVENTION ON  
MIGRATORY  
SPECIES**

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Agenda Item 22

**REVIEW MECHANISM AND NATIONAL LEGISLATION PROGRAMME**

*(Prepared by the Secretariat)*

Summary:

The document reports on the progress to implement Resolution 12.9 *Establishment of a Review Mechanism and a National Legislation Programme*, and Decisions 12.6 – 12.9 on the *Establishment of a Review Mechanism and a National Legislation Programme*, adopted by the Conference of the Parties at its 12<sup>th</sup> meeting (COP12, Manila, 2017) and proposes the amendment and adoption of new decisions.

## REVIEW MECHANISM AND NATIONAL LEGISLATION PROGRAMME

### Background

1. The Conference of the Parties at its 12<sup>th</sup> meeting (COP12, Manila, 2017) adopted Resolution 12.9 and Decisions 12.6 – 12.9 on the *Establishment of a Review Mechanism and a National Legislation Programme*.
2. Section I of Resolution 12.9 establishes a Review Mechanism for Specific Implementation Matters, with the aim of ensuring long-term compliance with Articles III.4, III.5, III.7, and VI.2.” (Res.12.9 (I) (A(1))). Section II of Resolution 12.9 establishes a National Legislation Programme to support implementation, specifically aimed at the long-term compliance with Article III, paragraphs 4(a) and (b) and 5.
3. Decisions 12.6 – 12.9 on the Establishment of a Review Mechanism and a National Legislation Programme provide:

#### **12.6 Directed to the Secretariat**

*The Secretariat shall:*

- a) *Develop a template for communicating initial information to the Secretariat based on the admissibility criteria in Section I.C of UNEP/CMS/Resolution 12.9 on the Establishment of a Review Mechanism and a National Legislation Programme;*
- b) *Subject to the availability of resources, undertake an inventory of the Secretariat’s present information on Parties’ current legislation in relation to Article III paragraph 5 of the Convention;*
- c) *Subject to the availability of resources, develop a questionnaire pre-filled with existing information to complement the inventory to identify Parties as provided in paragraph II.2 of UNEP/CMS/Resolution 12.9 on the Establishment of a Review Mechanism and a National Legislation Programme;*
- d) *Submit the draft template and the draft questionnaire for review and Decision by the Standing Committee at its 48th meeting;*
- e) *Subject to the availability of resources:*
  - i. *Prepare legislative guidance materials and model laws as well as conduct capacity building workshops;*
  - ii. *Provide technical support to assist Parties in drafting adequate national legislation to implement the provisions of Article III, paragraph 5 of the Convention;*
  - iii. *As appropriate, prepare technical guidance on best practices relating to the implementation of Article III, paragraphs 4(a) and (b) of the Convention.*

#### **12.7 Directed to the Standing Committee**

*The Standing Committee shall:*

- a) *At its 48th meeting, review and decide on the template for communicating initial information and draft questionnaire referred to in Decision 12.6 a) and c);*
- b) *Consider the implementation of the review mechanism and report to the 13th meeting of the Conference of the Parties, including any recommendations for modifications of the procedure or criteria.*

**12.8 Directed to the Parties**

*Parties are requested to review the implementation of the review mechanism at the 13th meeting of the Conference of the Parties*

**12.9 Directed to Parties**

*Parties are strongly encouraged to complete the information in the pre-filled questionnaire, updating any information provided through the national report.*

## Activities to implement Decisions related to the Review Mechanism

4. As requested by Decision 12.6 a), the Secretariat developed a draft template for communicating initial information on implementation matters to the Secretariat. It presented the draft to the Standing Committee for their consideration at its 48<sup>th</sup> meeting. The draft template was based entirely on the admissibility criteria of Section I.C of UNEP/CMS/Resolution 12.9.
5. Decision 12.7 directed the Standing Committee at its 48th meeting to “review and decide on the template for communicating initial information and draft questionnaire referred to in Decision 12.6 a) and c); consider the implementation of the review mechanism and report to the 13<sup>th</sup> meeting of the Conference of the Parties, including any recommendations for modifications of the procedure or criteria”. Consistent with that mandate, the Standing Committee reviewed and agreed on a final template for communicating initial information to start the review process at its 48<sup>th</sup> meeting (Bonn, October, 2018).
6. The Secretariat made the template publicly available on the CMS website at [“Template for communication on a possible implementation matter”](#).
7. Since the template for communication of a possible implementation matter was made available, the Secretariat has not received any communication that has triggered the procedure of the Review Mechanism set out in Resolution 12.9. This is not surprising, given that it has been only one year since the template was finalized and published. The Secretariat will continue its efforts to promote the availability and use of the Review Mechanism.

## Activities to implement Decisions related to the National Legislation Programme

8. Decision 12.6 directed the Secretariat, subject to availability of resources, to prepare an inventory of information concerning each Party’s implementation of Article III, paragraph 5 and to prepare a questionnaire pre-filled with existing information to complement the inventory. Decision 12.6 also directs the Secretariat to prepare technical guidance on best practices relating to Articles III, paragraph 4(a) and (b) of the Convention.
9. With a generous voluntary contribution from Switzerland, the Secretariat hired a consultant to prepare the inventories and the questionnaire based solely in the information accessible through the national reports and instruments of ratification and accession. However, these sources were inadequate to ascertain compliance with Article III, paragraph 5 of the Convention. Additional information on this process can be found in the document that the Secretariat submitted to the Standing Committee, UNEP/CMS/St48/Doc.15/Rev.1, Review Mechanism and National Legislation Programme.
10. Consequently, the Secretariat undertook additional steps to full the request from the COP. First, it completed the inventories as directed. The inventory for each Party can be found on a dedicated page of the CMS website created by the Secretariat to facilitate implementation of the Review Mechanism and the National Legislation Programme.

11. Second, the Secretariat developed a questionnaire for Parties to complete in order to fill in knowledge gaps concerning implementation of Article III, paragraph 5 of the Convention. The draft questionnaire is found in Annex 2 of UNEP/CMS/St48/Doc.15/Rev.1.
12. The Standing Committee at its 48th meeting reviewed the draft questionnaire and approved it after making some modifications. The Standing Committee decided that the questionnaire would focus on national legislation in relation to Article III, paragraph 5 and that the information on Article III, paragraphs 4(a) and (b) would be gathered from the National Reports. The Secretariat made the changes recommended by the Standing Committee and issued the questionnaire to Parties.
13. 39 Parties submitted the completed questionnaire to the Secretariat. The responses, as well as information from the inventories, were used to prepare an initial set of legislative guidance materials and a model law for the implementation of Article III, paragraph 5 and to start preparing national legislation profiles, including findings and recommended actions.
14. 7 countries have reported through their National Reports that the taking of Appendix I species is not prohibited by national or territorial legislation in accordance with Article III, paragraph 5. Out of those 7 countries only 2 had submitted the questionnaire on legislation to the Secretariat.

#### Discussion and analysis

15. Most of the work called for under Decisions 12.6 – 12.9 has been carried out. As noted above, the Secretariat will continue to promote the Review Mechanism. With respect to the National Legislation Programme, the work continues to provide recommendations to Parties, when necessary, as stated in Resolution 12.9.
16. The on-going analysis of the 39 questionnaires is a complex process; it shows different levels of implementation and different interpretations of key concepts, such as definition and obligations of Range States, scope and definition of the taking prohibition, or the exceptions. It has also revealed a variety of approaches and legal instruments to be assessed in their own languages.
17. The Secretariat proposes to continue this process. It will result in the drafting of National Legislation Profiles that will provide the findings and the recommended actions in a harmonized and coherent manner. It will also facilitate the identification of capacity building needs and inconsistencies in the interpretation of the convention that lead to legislative gaps and regulatory challenges at the national level. Finally, this process will complement the legislative guidance materials prepared by the Secretariat and support the drafting model laws. The Secretariat is also aware that the development of legislation is a continuous process as new gaps, needs and inconsistencies are identified.
18. Regarding the lack of information regarding the implementation of Article III, paragraphs 4(a) and (b), the Secretariat carries on this aspect of the Decision 12.6 and proposes to collect legislation from Parties that have submitted the questionnaire and to prepare technical guidance on best practices relating to Articles III, paragraphs 4(a) and (b). It can also explore the possibility of accessing and sharing legislation through incentives such as inforMEA.

Recommended actions

19. The Conference of the Parties is recommended to:
- a). take note of the Template for communication on a possible implementation matter contained in Annex 1 of this document;
  - b). take note of the Legislative Guidance Material relating to Implementation of Article III, paragraph 5 contained in Annex 2;
  - c). take note of the Model Law for implementation of Article III, paragraph 5 contained in Annex 3;
  - d). delete Decisions 12.6 to 12.9
  - e). adopt the draft Decisions contained in Annex 4 of this document.

**CMS REVIEW MECHANISM**  
**TEMPLATE FOR THE COMMUNICATION OF A POSSIBLE IMPLEMENTATION MATTER**

(Available online [here](#))

**I. Submitted by:**

**Title \***

**First name \***

**Family name \***

**On behalf of: \***

a Party Please specify

the Standing Committee  the Secretariat  an Organization

Please specify

Any body or agency technically qualified in the protection, conservation and management of migratory species, which is either:

- 1).an international non-governmental agency or body; or 2) an accredited national non-governmental agency or body (Res.12.9, Section I. B. 2. e))

Please select one of the options

**Position**

**Address**

**City/Town**

**Postcode**

**County/State/Province**

**Country \***

**Telephone**

**Email \***

**Website**

**II. The possible implementation matter concerns**

**Party**

Please provide the name of the CMS Party involved

**Species/Population(s)**

Please name the CMS-listed species or population(s) potentially affected) See CMS Appendix I and II

**Site(s)**

Please name the relevant site(s) potentially affected

**III. Specific implementation matters:** Please describe how the case concerns the non-implementation of Articles III.4, III.5, III.7 and/or VI.2 of the Convention

**Non-implementation of Article III, paragraph 4**

Please describe

**Non-implementation of Article III, paragraph 5**

Please describe

**Non-implementation of Article III, paragraph 7**

Please describe

**Non-implementation of Article VI, paragraph 2**

Please describe

**Summary of facts \***

Please briefly detail the evidence you have found of non-implementation describing the possible negative effects for the species/population(s)/sites(s) involved. Please do not exceed 1500 words

**IV. Efforts taken to address the matter with the Party concerned**

**Efforts taken to address the matter with the Party concerned**

Please indicate which measures or procedures you have invoked to address the matter of non-implementation with the Party concerned. Specify which measures you used, when they were used, and what the results were.

**V. Compliance with other Multilateral Environmental Agreements**

**Have the potentially affected species or their habitats been the subject of decisions on compliance and/or implementation by other Multilateral Environmental Agreements?**

In particular, CMS Family Agreements and Instruments, the Bern Convention, Ramsar Convention, CITES and the World Heritage Convention. If yes, please describe.

**VI. Supporting documentation and other information** Please attach sufficient evidence substantiating the submission. The supporting materials should consist of any documentation substantiating the information provided above, including material evidence such as photos; relevant national legislation - highlighting the most relevant provisions; decisions/results of other procedures; relevant correspondence with the authorities.

**Image 1**

**Image 2**

**Image 3**

**Document 1**

Choose File

**Document 2**

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**Document 3**

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**Video link 1**

**Video link 2**

**Video link 3**

Submit

**LEGISLATIVE GUIDANCE MATERIALS RELATING TO IMPLEMENTATION OF ARTICLE III.5**

Introduction

1. The CMS Conference of the Parties at its 12th meeting (COP12, Manila, 2017) adopted agreed Resolution 12.9 and Decisions 12.6 – 12.9 on *the Establishment of a Review Mechanism and a National Legislation Programme*. The National Legislation Programme is a process that encourages Parties to submit information to the Secretariat regarding their legislation and other domestic measures relating to implementation of Article III, paragraphs 4(a) and (b) and 5 and supports the development of national capacities to strength domestic legislation.
2. In response to Decision 12.6 and to assist the Parties in the development national legislation for prohibiting the taking of Appendix I migratory animals, this document provides the following recommendations:

<i>Recommendation 1</i>	Identify the competent authority for implementing and enforcing the CMS prohibiting against taking
<i>Recommendation 2</i>	Implement CMS through a single law
<i>Recommendation 3</i>	Ensure relevant legislation applies to “all species included in CMS Appendix I”
<i>Recommendation 4</i>	Clearly define the geographical scope
<i>Recommendation 5</i>	Clearly define the range of “persons” to whom the take prohibition applies
<i>Recommendation 6</i>	Clearly define “take”
<i>Recommendation 7</i>	Clearly define “take” to include the destruction and removal of eggs and nests
<i>Recommendation 8</i>	Clearly identify the exceptions, if any, to the take prohibition
<i>Recommendation 9</i>	Clearly describe the means by which exceptions will be “precise as to content and limited in space and time.”
<i>Recommendation 10</i>	Establish a threshold for determining when the taking does “not operate to the disadvantage of the species.”
<i>Recommendation 11</i>	Establish a process for obtaining a permit to take an animal
<i>Recommendation 12</i>	Establish a process for communicating exceptions to the Secretariat
<i>Recommendation 13</i>	Establish civil and criminal penalties that are sufficient to deter future violations
<i>Recommendation 14</i>	Include provisions for seizure and forfeiture of property used to facilitate or to commit a crime
<i>Recommendation 15</i>	Establish obligations to affected resources, if possible, or require the economic compensation for the damage caused
<i>Recommendation 16</i>	Include provisions for the suspension or withdrawal of licenses and authorizations, or for the limitation, restriction or suspension of activities, or for the shutdown of premises and establishments
<i>Recommendation 17</i>	Extend liability for the commission of the offence to any person who contributes in its commission, with increased penalties for public officials

**Recommendation 18**

Create incentives for enforcement of the take prohibition

3. It also provides a Model Law for implementation of Article III, paragraph 5, for Parties that need support in drafting or amending domestic laws (see Annex)

Analysis

4. Article III.5 of CMS provides that “Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species.” Article I.1(i) of CMS defines “taking” to mean “taking, hunting, fishing capturing, harassing, deliberate killing, or attempting to engage in any such conduct.” This is known as the “take prohibition” or the “prohibition against taking.”
5. CMS establishes a broad take prohibition that also includes attempts to engage in activities defined as a “taking.” Legislation must account for the different types of activities that constitute “taking” and ensure that attempts to engage in such activities are prohibited.
6. In addition, Article I.1(h) of CMS defines “Range State” to mean  
any State . . . that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species;
7. Consequently, legislation must extend the take prohibition of Article III.5 throughout a State’s territory, territorial seas, exclusive economic zone (if applicable), and, with respect to the vessels it flags (and citizens on those vessels), to areas beyond national jurisdiction (that is, the high seas).
8. The take prohibition of Article III.5 applies throughout the entire span of migration of a species included in Appendix I unless the listing of that species explicitly indicates that it only applies to specific populations.
9. Article III.5 of CMS allows exceptions 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.
10. CMS Parties have not further elaborated rules for implementation of these exceptions. However, the requirement that exceptions be “precise as to content and limited in space and time” indicates that the exceptions must be clearly drafted, geographically limited, and timebound. If a Party makes an exception to the take prohibition, Article III.7 requires it to inform the Secretariat “as soon as possible.”
11. Appendix I already includes species of mammals, birds, reptiles, and fish. These species can be found in terrestrial, freshwater, and marine habitat. In addition, Article XI allows any CMS Party to propose amendments to Appendix I at any ordinary or extraordinary meeting of the Conference of the Parties. The Parties have, in fact, adopted proposals to include additional species in

Appendix I at each ordinary meeting of the Conference of the Parties. Consequently, legislation must include a provision for prohibiting the taking of new Appendix I animals.

12. To assist the Parties implement the take prohibition of Article III.5, the remainder of this document provides recommendations for implementing legislation.

### **Recommendations for Developing and Strengthening National Legislation for Prohibiting the taking of Appendix I Migratory Animals**

*Recommendation 1: Identify the competent authority for implementing and enforcing the CMS prohibiting against taking*

13. CMS implementing legislation should clearly identify which agency, minister, or other official is the competent authority or authorities for implementing and enforcing CMS. Implementation of the take prohibition not only requires the implementation of regulations to clarify the scope of the definition of “taking” and the exceptions to the take prohibition, but it also requires someone to issue permits consistent with the exceptions. Moreover, someone must be responsible for investigating alleged violations of the take prohibition.
14. The designation of the competent authority or authorities is especially important in those jurisdictions where CMS is implemented through different laws relating to specific taxa or geographical areas. As described in Recommendation 2, many jurisdictions implement CMS for marine species through fisheries legislation and through other legislation for other species. Consequently, more than one agency or ministry might have jurisdiction over certain species for certain activities or in certain areas. For these reasons, where CMS is not implemented through a single competent authority, laws must clearly identify which competent authority has jurisdiction for which species and in which areas.

*Recommendation 2: Implement CMS through a single law*

15. Article III.5 applies to all species included in Appendix I, but relevant laws do not always extend to all Appendix I species. A review of national reports and information submitted as part of the National Legislation Programme suggests that challenges may arise from implementing the take prohibition for all Appendix I species through complex legal frameworks. Some Parties, for example, protect birds, fish, marine mammals, and terrestrial mammals through different laws. This differs from implementation of some international agreements, such as the Convention on International Trade in Endangered Species of Fauna and Flora (CITES), which many CITES Parties implement through a single law.
16. Some Parties have constitutional structures that require sub-national governments to implement a State’s treaty obligations. For many Parties, however, this piecemeal approach described in paragraph 12 likely evolved over time as governments addressed conservation problems as they arose.
17. By implementing CMS through more than one law, several problems arise. First, the definition of “taking” may differ from law to law, which means that the prohibition of Article III.5 is implemented differently for different CMS Appendix I species. Similarly, the exceptions to the take prohibition may differ from species to species.
18. Second, implementing amendments to Appendix I made at meetings of the Conference of the Parties may be more difficult to enact at the national level because changes to more than one law are required.

19. Third, different laws may apply across different geographic areas. Thus, the take prohibition may apply to cetaceans, as an example, throughout the marine environment, including the high seas, but a law relating to birds, including albatrosses and petrels, may not.
20. To simplify implementation and ensure that the take prohibition is applied consistently to all taxa in all habitats, Parties should consider implementation of the take prohibition in a single law. By implementing CMS through a single law, Parties could ensure that the take prohibition of Article III.5 applies equally to all Appendix I species, simplify implementation of Article III.5, and improve coordination among competent authorities responsible for implementing Article III.5 specifically and CMS more generally.

*Recommendation 3: Ensure relevant legislation applies to “all species included in CMS Appendix I”*

21. Regardless of whether a Party implements CMS through a single law or through more than one law, all relevant legislation should prohibit the taking of “all species included in CMS Appendix I.” Some Parties (e.g., Netherlands) use this approach. This approach has two benefits. First, a Party does not need to determine whether it is a Range State for the species because all species are covered. This is especially important if a Party flags vessels that fish beyond national jurisdiction. Second, agencies or legislatures do not need to amend relevant laws each time changes are made to Appendix I.
22. In their responses to the questionnaire, many Parties (e.g., Australia) indicated that their legislation only applies to species for which they are Range States. A Party that flags fishing vessels must ensure that it includes all marine species, including species outside their own exclusive economic zones if those vessels fish beyond the State’s national jurisdiction. A Party can avoid this problem by applying legislation to “all species included in CMS Appendix I”.
23. Some Parties do not use the approach described above. Instead, they include specific species in a list of protected species. When species are added to Appendix I, these Parties ensure that the new species are added to relevant domestic legislation by convening a parliamentary or inter-agency committee. For example, one Party (Czech Republic), in 2018 after the Twelfth Meeting of the Conference of the Parties, made reservations with respect to 34 CMS Appendix I and II species to be able to comply with their internal requirements for the amendment of national laws.<sup>1</sup>
24. These committees determine which legislation must be amended to include the new Appendix I species in the list of protected species to which the Article III.5 take prohibition applies. If a Party uses this approach, it should establish legislation that requires the process to be triggered within a certain number of days after completion of the meeting of the Conference of the Parties.

*Recommendation 4: Clearly define the geographical scope*

25. As noted above, CMS and the prohibition against taking of Article III.5 applies throughout the range of a species, including in areas beyond national jurisdiction. Thus, any laws to implement Article III.5 must make clear that the take prohibition applies in (1) terrestrial habitats, (2) freshwater, (3) all jurisdictional waters of that State (that is, territorial seas and exclusive economic zones), and (4) with respect to vessels it flags (and citizens on those vessels), areas beyond national jurisdiction.<sup>2</sup>
26. Some of the national laws reviewed are unclear as to the geographical scope of the take prohibition. Some, for example, apply in the “waters of State X” without defining what those waters include. If the geographic scope of a law relies on a definition of “waters of State X” found in a different law, that should be made clear. For example, if the State’s CMS implementing law

<sup>1</sup> See “Parties’ species reservations and territories to which the convention does not apply”, updated 5 May 2019, available at: [https://www.cms.int/sites/default/files/uploads/species/cms\\_reservations-and-territories\\_may\\_2019\\_web\\_version.pdf](https://www.cms.int/sites/default/files/uploads/species/cms_reservations-and-territories_may_2019_web_version.pdf).

<sup>2</sup> Pursuant to Article VI, paragraph 2 of CMS Convention, Parties shall inform the Secretariat not only about the Appendices I and II migratory species they consider themselves to be Range States of, but also about their flag vessels engaged outside national jurisdictional limits in taking the migratory species concerned and, where possible, future plans in respect of such taking.

prohibits the taking of Appendix I animals in the “waters of State X,” but that phrase is defined in the State’s Maritime Zones Act, then the CMS implementing law should include the following definition:

“waters of State X,” as used in this Law, has the same meaning as used in Article Z of the Maritime Zones Act.

27. Other laws omit from the scope of application a key jurisdictional zone—sometimes the exclusive economic zone, but most frequently areas beyond national jurisdiction.
28. To implement Article III.5 of CMS for all Appendix I species in all geographic areas, Parties have several options. First, Parties could identify the various habitats or areas to which the prohibition against taking applies. For example, the law could prohibit the taking of Appendix I species  
  
in terrestrial habitats, internal waters, territorial seas, and exclusive economic zones under the jurisdiction of [this State], and areas beyond national jurisdiction.
29. A second option is to focus on jurisdiction. Using this approach, the law could prohibit the taking of species  
  
included in Appendix I to CMS in any area under the jurisdiction of [this State], including vessels flagged or registered by [this State] when operating in areas beyond national jurisdiction.
30. A third option is to define the geographic scope in relation to the definition of “habitat” included in Article I.1(g) of CMS. Using this approach, the law could prohibit the taking of Appendix I species  
  
in any area under the jurisdiction of [this State] that is in the range of an Appendix I migratory species which contains suitable living conditions for that species.
31. Article III.5 also applies irrespective of whether the animal is taken on public or private land. Most laws implicitly reflect this by not expressly excluding any types of land.

*Recommendation 5: Clearly define the range of “persons” to whom the take prohibition applies*

32. Even if laws clearly define the geographic scope of the take prohibition, they still must define the persons to whom the prohibition applies. Because CMS requires a Party to prohibit take of Appendix I species by vessels it flags in areas beyond national jurisdiction, laws must specify to whom the law applies in areas beyond national jurisdiction. Unlike in terrestrial habitats and marine waters under the jurisdiction of a State, in which the take prohibition applies to any person regardless of nationality, the take prohibition will only apply in areas beyond national jurisdiction to those vessels flagged by the Party. Thus, relevant laws must make this distinction clearly.
33. Some of the national laws reviewed indicate a number of problems associated with defining the range of persons to whom the prohibition against taking applies. For example, some laws make it unlawful to take certain Appendix I animals, but they do not specify to whom the prohibition applies. Other laws prohibit “a person” or “any person” from “taking” certain Appendix I animals, but do not define “person.” Consequently, it is not clear whether the prohibition applies to, for example, governmental agencies or vessels flagged by that State. This is a weakness in the laws for at least two reasons. First, as noted above, CMS specifically extends its take prohibition to vessels flagged by a CMS Party that operate in areas beyond national jurisdiction. Second, because the crews of a vessel flagged by one State are frequently nationals of another State, it may not be clear who is responsible for taking an Appendix I animal. A definition of “person” would eliminate both of these problems.

34. Under international law, States may assert jurisdiction and control over individuals and entities through a variety of principles. For purposes of Article III.5, the two relevant principles are the nationality and territoriality principles.
35. The nationality principle allows a State to exercise jurisdiction and control over its nationals, regardless of where they are.<sup>3</sup> Companies, ships, and aircraft are considered as having the nationality of the State in whose territory they are registered (e.g., flagged). Thus, a flag State has a duty to exercise jurisdiction and control over vessels that it flags.<sup>4</sup> In the case of the conduct of individuals, a State often cedes jurisdiction over its nationals when they are abroad so that the State in which the conduct occurs can exercise jurisdiction pursuant to the territoriality principle.
36. The territoriality principle gives a State authority to regulate persons, regardless of nationality, within its borders.<sup>5</sup> The exercise of this type of jurisdiction depends on the location of the conduct. So long as the conduct occurs within the territory of the State, that State has jurisdiction. Thus, a State may apply its laws to foreign-flagged ships while they are within its ports and internal waters, which are considered part of its territory, as well as within its territorial sea and exclusive economic zone.<sup>6</sup>
37. For the purposes of Article III.5, CMS requires Parties that are Range States to prohibit the taking of Appendix I species within their waters and, with respect to vessels they flag, in areas beyond national jurisdiction.<sup>7</sup> Based on the legislation reviewed, many CMS Parties are not prohibiting the taking of Appendix I species in areas beyond national jurisdiction by not defining person in a way that includes vessels it flags while in areas beyond national jurisdiction or by excluding such areas from the geographic scope of the relevant law's application.
38. Parties have several options for ensuring that the take prohibition is applied consistently with the scope of CMS. One option is to clearly define "person" as follows (the text in brackets taking into account the different forms of government within individual States):
- The term "person" means
- (a) an individual, corporation, partnership, trust, association, or any other private entity, including a vessel subject to the jurisdiction of the [State];
  - (b) any officer, employee, agent, department, or instrumentality of the [State] [Federal Government], of any [provincial] [state], municipality, or political subdivision of a State, or of any foreign government; or
  - (c) any [province] [state], municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the [State].
39. Defined in this way, it is clear that the take prohibition applies to any individual within the jurisdiction of the state, whether they are citizens or foreign visitors. It is also clear that the prohibition applies to governments as well as individuals working within the government. It is also clear that it applies to vessels flagged by the State (any other entity subject to the jurisdiction of the State).

<sup>3</sup> See, e.g., Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 306 (5th ed. 1998).

<sup>4</sup> The United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, art. 94(1), 1833 U.N.T.S 3, U.N. Doc. A/CONF.62/122 (entered into force Nov. 16, 1994), available at: [http://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm) ("Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.").

<sup>5</sup> Brownlie, *supra* note 3, at 303–06.

<sup>6</sup> UNCLOS, *supra* note 4, at art. 73 (describing the enforcement authority of coastal states for fisheries within an exclusive economic zone).

<sup>7</sup> Article III(5) requires "Parties that are Range States" to prohibit the take of Appendix I animals. CMS defines "Range State" to mean any State or regional economic integration organization "that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species." CMS, *supra* note 1, at art. I(1)(h). By implication, the take prohibition thus includes a Range State's jurisdictional waters as well as the high seas as it relates to vessels it flags.

40. The U.S. Marine Mammal Protection Act similarly defines “person” to include the following:
- (a) any private person or entity, and
  - (b) any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.<sup>8</sup>
41. Paragraph (a) of this definition, by referring to a “private entity,” ensures that any individual, corporation, or vessel is covered by the definition of “person.” Paragraph (b) ensures that any person working with or on behalf of the government (“agent”), as well as any agency or the government itself, is covered by the definition.
42. Other options also exist. At least one Party (Germany) ensures that CMS applies on the high seas by specifically prohibiting vessels it flags from taking Appendix I species:
- It is prohibited for animals of the species listed in Annex I of the Convention to be taken by a ship entitled to fly the national flag outside the national territorial limits.<sup>9</sup>
43. Another Party (Australia) has adopted a different approach that is more specific than the definitions included in paragraphs 35 and 37. This Party combines the geographic scope of its take prohibition (as described in Recommendation 4) with the application to various entities and persons. Sections 5 and 224 of Australia’s Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act)<sup>10</sup> provide as follows:

## **Section 5**

### *Extension to external Territories*

- (1) This Act extends to each external Territory.

### *Limited extraterritorial application*

- (2) This Act applies to acts, omissions, matters and things in the Australian jurisdiction, and does not apply to acts, omissions, matters and things outside the Australian jurisdiction except so far as the contrary intention appears.

### *Application limited to Australians outside exclusive economic zone*

- (3) A provision of this Act that has effect in relation to a place that is outside the outer limits of the exclusive economic zone and is not on or in the continental shelf applies only in relation to:
- (a) Australian citizens; and

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<sup>8</sup> Marine Mammal Protection Act (United States), 16 United States Code § 1362(1), available at <http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa.pdf>.

<sup>9</sup> Law on the Convention of 23 June 1979 on the Conservation of Migratory Species of Wild Animals (Germany), art. 3 (Gesetz zu dem Übereinkommen vom 23. Juni 1979 zur Erhaltung der wandernden wildlebenden Tierarten), [https://www.gesetze-im-internet.de/wildtart\\_bkg/BJNR205690984.html](https://www.gesetze-im-internet.de/wildtart_bkg/BJNR205690984.html).

<sup>10</sup> Environment Protection and Biodiversity Conservation Act 1999 (Australia), § 3(1) [hereinafter EPBC Act]. <https://www.legislation.gov.au/Details/C2016C00777>.

- (b) persons who:
  - (i) are not Australian citizens; and
  - (ii) hold permanent visas under the *Migration Act 1958*; and
  - (iii) are domiciled in Australia or an external Territory; and
- (c) corporations incorporated in Australia or an external Territory; and
- (d) the Commonwealth; and
- (e) Commonwealth agencies; and
- (f) Australian aircraft; and
- (g) Australian vessels; and
- (h) members of crews of Australian aircraft and Australian vessels (including persons in charge of aircraft or vessels).

*Application to everyone in Australia and exclusive economic zone*

- (4) A provision of this Act that has effect in relation to a place that is within the outer limits of the exclusive economic zone (whether the place is in the zone or in Australia or an external Territory) or that is on or in the continental shelf applies in relation to:
  - (a) all persons (including persons who are not Australian citizens); and
  - (b) all aircraft (including aircraft that are not Australian aircraft); and
  - (c) all vessels (including vessels that are not Australian vessels).

**224 Application of Division**

- (1) This Division extends to acts, omissions, matters and things outside Australia (whether in a foreign country or not), except so far as the contrary intention appears.
- (2) A provision of this Division that has effect in relation to a place outside the outer limits of the Australian Whale Sanctuary applies only in relation to:
  - (a) Australian citizens; and
  - (b) persons who:
    - (i) are not Australian citizens; and
    - (ii) hold permanent visas under the *Migration Act 1958*; and
    - (iii) are domiciled in Australia or an external Territory; and
  - (c) corporations incorporated in Australia or an external Territory; and
  - (d) the Commonwealth; and
  - (e) Commonwealth agencies; and
  - (f) Australian aircraft; and
  - (g) Australian vessels; and

(h) members of crews of Australian aircraft and Australian vessels (including persons in charge of aircraft or vessels).

(3) This Division applies to a vessel as if it were an Australian vessel if:

(a) the vessel is a boat within the meaning of the *Fisheries Management Act 1991*; and

(b) a declaration, under subsection 4(2) of that Act, that the vessel is taken to be an Australian boat is in force.

44. A separate provision applies the rules relating to the Australian Whale Sanctuary to a different list of entities.<sup>11</sup> To eliminate ambiguity, the EPBC Act specifically defines phrases used in Section 5, including “Australian jurisdiction,” “Australian aircraft,” and “Australian vessel.”<sup>12</sup>

*Recommendation 6: Clearly define “take”*

45. Some of the laws reviewed (e.g., Austria, Australia, Brazil, the Dominican Republic, Germany, Liechtenstein among others) adequately define “take” or otherwise use words that prohibit the range of actions falling under the “taking”, as defined by Article I of CMS, of Appendix I species. At least one law reviewed, however, did not include any definition of “take” and did not use other words that would prohibit the full range of activities that constitute “taking” under CMS.

46. Many laws do, however, implement most of the full range of actions that are included in the definition of “taking” in Article I(1)(i) of CMS. For example, the Member States of the European Union, in implementing the Habitats Directive<sup>13</sup> and Birds Directive,<sup>14</sup> prohibit “all forms of deliberate capture or killing of specimens [of Annex A species].”<sup>15</sup> The use of the phrase “all forms” ensures that every method of taking an Appendix I species that reduces an animal to possession is prohibited. However, harassment is not expressly covered, and this is true for many Parties. Likewise, Angola’s Basic Law on the Environment<sup>16</sup> expressly prohibits “all activities”, without detailing the actions falling under the category “activities”.

47. The laws of some Parties (e.g., Trinidad and Tobago) prohibit “disturbance” and “feeding” of Appendix I animals. At least one Party (New Zealand) prohibits “pursuing” Appendix I animals. Each of these terms could be interpreted as a form of “harassment.” Injuring an Appendix I animal would also seem to be a form of harassment not otherwise covered by the other words included in the definition of “taking.” However, harassment can take many forms and these terms appear to cover only some forms of harassment.

48. “Harassing” is subject to different meanings and neither CMS nor Resolutions of the Conference of the Parties define it. Whalewatching and shark tourism could result in harassment of Appendix I species if not conducted appropriately. Whether those activities are covered by Article III.5 as harassment is debateable. The definition of “taking” in Article I(1)(i) suggests that harassment must be intentional. Each of the words included in the definition of “taking” requires intent: one does not unintentionally hunt, fish, or capture an animal. The negotiators specifically inserted the word “deliberately” before kill, presumably to ensure that unintentional kills (e.g., hitting an Appendix I bird with a car) were not prohibited takes. If this interpretation is correct, then harassment would seem to exclude harassment from tourism and noise derived from sonar or

<sup>11</sup> EPBC Act, *supra* note 10, §224.

<sup>12</sup> EPBC Act, *supra* note 10, at § 5.

<sup>13</sup> European Union, Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (1992), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31992L0043>.

<sup>14</sup> European Union, Council Directive 2009/147/EC on the conservation of wild birds (2009), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0147>.

<sup>15</sup> Habitats Directive, *supra* note 13, at art. 12. See also Birds Directive, *supra* note 14, at art. 5 prohibiting “deliberate killing or capture by any method.”

<sup>16</sup> Basic Law on the Environment (Angola), art 13.

seismic testing. Of course, Parties can define harassment to prohibit or regulate such activities and, in any event, these actions could be prohibited by Article III.4 if they are endangering or likely to further endanger the species or impede a species' migration.

49. In addition, a major omission for many Parties is the failure to prohibit "attempts" to take Appendix I species. Some Parties (e.g., Germany, Hungary) allow criminal punishment of attempts to take Appendix I animals but, of course, civil penalties could also be applied. Civil penalties typically require a lower degree of certainty (e.g., preponderance of the evidence) to find a defendant guilty compared to criminal prosecutions (e.g., beyond reasonable doubt). Parties may wish to consider the enactment of civil penalty provisions in addition to criminal penalties for violations of the take prohibition.
50. The laws of at least two Parties (Eswatini, Georgia) allow inferences to be made when determining whether a person attempted to take an Appendix I animal. If inspectors find a person carrying fishing gear during a closed fishing period or weapons or traps in a protected area, then the person is presumed to be attempting to fish or hunt illegally.<sup>17</sup> In contrast, the laws of another Party (Hungary) ask whether the person had the intent to commit a premeditated crime without finishing the crime. In such circumstances, prosecutors must present evidence to establish intent.

*Recommendation 7: Clearly define "take" to include the destruction and removal of eggs and nests*

51. In addition, the take prohibition should make clear whether it applies to eggs, nests, and natural breeding grounds. The laws of several Parties (e.g., Eswatini, France, and many others) specifically apply the take prohibition to "the destruction or removal of eggs or nests."
52. Sea turtles, crocodiles, and other species create nests, although they are holes in the sand or ground as opposed to the physical structures that many birds build. Some species have very specific sites, such as leks, where animals gather during the breeding season for community courtship displays to attract mates. The destruction of these nests and sites could also be considered a "taking." Even if not considered a taking, these actions could be prohibited by Article III.4 if they are endangering or likely to further endanger the species or impede a species' migration.
53. Article III.5 applies the take prohibition to "animals" but applying the take prohibition to eggs and nests, and arguably breeding and nesting sites, is consistent with the CMS definition of "take." Destruction or removal of an egg constitutes the capturing or deliberate killing of an animal. The destruction or removal of a nest could constitute a form of harassment, particularly if done during the nesting or breeding season for the species.
54. Consistent with this approach, Parties should consider defining "animal" in their CMS implementing legislation to include eggs and nests and, potentially, breeding and nesting sites.
55. One Party (Serbia) makes "look alike" species—those species that are not endangered but due to appearance can be easily confused with an endangered wild species—to be "strictly protected."<sup>18</sup> Serbia does not necessarily prohibit the take of such species. Nonetheless, CMS Parties may wish to consider extending the take prohibition to such species in order to avoid mislabelling of species or claims of misidentification of species. This is an approach that CITES uses to avoid fraudulent trade in species protected by that convention.

*Recommendation 8: Clearly identify the exceptions, if any, to the take prohibition*

Article III.5 allows only four exceptions to the take prohibition:

- (a) the taking is for scientific purposes;

<sup>17</sup> The National Trust Commission Act, 1972 (Amended K.O-I-C 22/1973) (Eswatini) § 23, <http://www.sntc.org.sz/documents/SNTCAct.doc>.

<sup>18</sup> Law on Nature Protection 2016 (Serbia), art. 36(6), [http://www.pregovarackagrupa27.gov.rs/?wpfb\\_dl=107](http://www.pregovarackagrupa27.gov.rs/?wpfb_dl=107).

- (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;
56. The first three exceptions have identifiable purposes and should be specified in the law(s) that implement CMS. They may also require further elaboration. For example, it may be useful to identify what constitutes scientific purposes or the conditions that make a purpose scientific. The display of an animal in a zoo or aquarium may or may not be for scientific purposes. If the purpose is merely to generate revenue for the zoo or aquarium, then the purpose likely is not scientific. If an animal is displayed but also used in a captive breeding program for reintroduction in the wild, then perhaps the purpose is scientific or to enhance the survival of the species. Regulations could clarify when a purpose is scientific or to enhance the survival of the species.
57. The fourth exception — when “extraordinary circumstances so require” — is more ambiguous than the other three exceptions. It is not a “catchall” exception; the words “extraordinary circumstances” are clearly intended to limit the scope of this exception.
58. The challenge with clarifying the scope of the “extraordinary circumstances” exception is ensuring that its scope is not too broad while also not foreclosing situations that may require the need for an exception. Without necessarily defining “exceptional circumstances,” the laws of some Parties provide examples of what could be included within the scope of this exception:
- a. Prevention of serious damage to crops, livestock, forests, fisheries, waters, and other forms of property;
  - b. Self-defence;
  - c. Disease outbreak;
  - d. In the interest of public health and safety or for other imperative reasons of overriding public interest.
59. These examples are rather specific and perhaps also relatively common. The first example for serious damage ensures that the exception is not used too frequently by establishing a threshold of “serious” damage.
60. Example (d) is more open-ended and capable of accounting for unforeseen situations, but it is also perhaps overly broad. The first part of the second example — “in the interest” of public health and safety — could be considered a lower threshold than “if extraordinary circumstances so required” and thus inconsistent with Article III.5. The second clause, which is limited to “imperative reasons” of “overriding” public interest, appears to be consistent with the exception’s requirement of “extraordinary circumstances.”
61. Other exceptions identified by some Parties appear to fall outside the scope of these four exceptions. They include exceptions for:
- a. Domestication;
  - b. Selling, exchanging, exporting, or importing;
  - c. Education.

*Recommendation 9: Clearly describe the means by which exceptions will be “precise as to content and limited in space and time.”*

62. The plain language of Article III.5 makes clear that any exception to the take prohibition is not to be open-ended. It must be “precise as to content and limited in space and time.”
63. Many Parties appear to grant the permitting authority the discretion to determine that an exception is “precise as to content and limited in space and time” without imposing any criteria for making that determination.
64. Other Parties provide criteria for allowing exceptions to ensure that the exception is, in fact, “precise as to content and limited in space and time.” One Party (Cabo Verde) provides a good example:<sup>19</sup>

The collection of specimens and their parts of designated species or endemic species requires the issuance of a license by the Environmental Authority, which shall specify:

- a. The species covered;
  - b. The duration of the license;
  - c. The area covered;
  - d. The number of individuals of each species that will be allowed to be collected under the Authorization granted where such indication is possible;
  - e. The method and equipment which can be used for catching and collecting; and
  - f. other indications or limits deemed necessary.
65. Consistent with an approach that strictly regulates exceptions to the take prohibition, Parties may also wish to prohibit the transfer of any license to take an Appendix I animal that has been granted. At least one Party (Somalia) specifically prohibits such transfers.<sup>20</sup>
  66. Similarly, any permit issued pursuant to an exception should be revocable if the permittee fails to comply with the conditions of the permit or if evidence indicates that the taking will disadvantage the species.

*Recommendation 10: Establish a threshold for determining when the taking does “not operate to the disadvantage of the species.”*

67. The laws of many Parties incorporate the requirement to ensure that any take does not disadvantage the species. One Party (Germany) allows exceptions only if no reasonable alternatives exist and the conservation status of a species’ population will not be worsened. Parties should include similar thresholds (e.g., does not undermine the species’ conservation status; is not detrimental to the survival of the species) in their laws to implement the CMS take prohibition.
68. In addition, Parties should establish a reporting or monitoring procedure to ensure that the taking of Appendix I animals does not, in fact, operate to the disadvantage of the species.

<sup>19</sup> Decree No. 7/2002 establishing conservation and protection measures for fauna and flora species (Cabo Verde), art. 14(1), <https://www.ecolex.org/details/legislation/decreo-no-72002-establishing-conservation-and-protection-measures-for-fauna-and-flora-species-lex-faoc051798/> (in Portuguese).

<sup>20</sup> Law on Fauna (Hunting) and Forest Conservation, Law No. 15 of 25 January, 1969 (Somalia), art. 19(1), [http://www.somalilandlaw.com/Law\\_on\\_Fauna\\_Hunting\\_and\\_Forest\\_Conservation\\_1969.pdf](http://www.somalilandlaw.com/Law_on_Fauna_Hunting_and_Forest_Conservation_1969.pdf).

*Recommendation 11: Establish a process for obtaining a permit to take an animal*

69. The relevant agency may not have the information on which to determine whether a proposed take of an Appendix I animal constitutes one of the purposes for which take is allowed, will be limited in space and time, and will not disadvantage the species. An agency should not issue a permit to allow the taking of an animal unless it makes affirmative findings with regard to all of the requirements of Article III.5.
70. Further, it should not be the agency's duty to obtain that information. It should require the applicant to provide that information. This information should include the following:
- a. The species to be taken;
  - b. The purpose for taking the animal(s);
  - c. Information to demonstrate that the animal(s) will be used for the intended purpose;
  - d. The number of animals to be taken;
  - e. The method for taking the animal(s);
  - f. Evidence to demonstrate that the taking will not disadvantage the species.
71. An exception for self-defence raises the issue of retrospective justification or issuance of a permit to take an animal. To accommodate such circumstances, Parties should require any person who takes an Appendix I animal for purposes of self-defence to inform the relevant authority within a specific period of time, such as 7 days.

*Recommendation 12: Establish a process for communicating exceptions to the Secretariat*

72. Article III.7 requires Parties to inform the Secretariat "as soon as possible" that they have implemented an exception to the take prohibition of Article III.5. The responses to the questionnaire, however, show that many Parties are not informing the Secretariat of their exceptions.
73. It is not clear that Parties should include a procedure in their legislation to require notification to the Secretariat, and the Secretariat is unaware of any law that does so. It may be more appropriate to address this matter through a Resolution of the Conference of the Parties. Regardless, Parties should establish domestic processes that require the CMS focal point to inform the Secretariat when an exception to the take prohibition of Article III.5 is granted; the responses to the questionnaire indicate that Parties are granting exceptions and not notifying the Secretariat.

*Recommendation 13: Establish civil and criminal penalties that are sufficient to deter future violations*

74. While not solely related to implementation of Article III.5, laws to implement it and CMS as a whole should include both civil and criminal penalties for violations. As noted above, civil proceedings carry a lower burden of proof to show a violation. Civil penalties are more appropriate for less significant violations. However, criminal penalties (larger financial penalties and imprisonment) should be available for more serious violations.
75. Criteria that could be taken into consideration in order to determine the amount of the fine include the financial capacity of the person that violated the take prohibition and the magnitude of the damage caused by the violation (Dominican Republic). Other criteria include the economic benefits obtained and costs avoided by the offender, the administrative costs for the imposition of a sanction, the degree of damage caused to protected species and their threat category, whether the violator has previously violated CMS implementing legislation, the possibility of a repeat

offence, whether the violator voluntarily remedied the damage caused by the violation (Peru), and any other criteria that the Party considers appropriate.

76. In addition, laws should ensure that each violation constitutes a separate offence. For example, killing one Appendix I animal is one violation but killing three Appendix I animals during the same trip would be three violations. In this way, the penalties have a greater deterrent effect.
77. Further, any “attempt” to take an Appendix I animal should be punished as if the offence had been committed. National courts may, in specific circumstances, decide to mitigate or renounce penalties for attempts.
78. Increased penalties should be established for subsequent violations under the same Act. Upon a second or subsequent offence, the convicted person can be sentenced to the maximum penalty prescribed for the charged offence, or to a fine and period of imprisonment of double the time prescribed for the first offence.
79. At least one Party (Switzerland) establish a reduced penalty for cases of negligence. Article 17 of the Federal Law on Hunting and the Protection of Wild Mammals and Birds<sup>21</sup> provides as follows:
  1. Shall be punished by deprivation of liberty for a maximum of one year or by a pecuniary penalty anyone who intentionally and without authorization:
    - a. hunts or kills game and animals of protected species, or captures, or keeps or appropriates protected animals in captivity;
    - b. finds eggs or young birds of protected species or disturbs birds during breeding;
  2. If the offender acted negligently, he will be punished with a fine.

*Recommendation 14: Include provisions for seizure and forfeiture of property used to facilitate or to commit a crime*

80. In addition to establishing financial penalties that are sufficient to deter future violations, CMS Parties should establish provisions that allow enforcement officers to seize—the temporary taking of property pending resolution of a criminal or civil proceeding—any animal(s) alleged to have been taken illegally, including their parts and products. Officers should also be authorized to seize any documents and other property, such as weapons, traps, net, cages, gears, poisons, vehicles, devices and any other items or means of transport, believed to have been used in preparation of, or to commit the violation, or even to obstruct investigations into the violation. Also, objects obtained entirely or largely by means of, or from the proceeds of the criminal offence, should be seized. The seizure of such property is essential for procuring evidence of the crime as well as to deter additional violations. For this reason, the United Nations Office on Drugs and Crime (UNODC) has stated that “[a]sset freezing, seizing, and confiscation measures should be used in wildlife crime cases whenever possible.”<sup>22</sup>
81. One Party (Norway), for cases when legal and illegal catches are mixed, allows the seizure of the entire catch.
82. Parties should also require forfeiture—the permanent taking of property after the government successfully prosecutes a case—of any property used to commit the crime. The United Nations Office on Drugs and Crime has stated that “[a]sset forfeiture is underutilized in wildlife crime cases.”<sup>23</sup> In this way, violators are deprived of the property needed to commit future violations. The permanent taking of the property also acts as a punishment for the crime. As UNODC said,

<sup>21</sup> Federal Law on Hunting and the Protection of Wild Mammals and Birds of June 20, 1986 (Switzerland), art. 17, <https://www.admin.ch/opc/fr/classified-compilation/19860156/index.html> (in French).

<sup>22</sup> U.N. Office on Drugs and Crime & Asia/Pacific Group on Money Laundering, *Enhancing the Detection, Investigation and Disruption of Illicit Financial Flows from Wildlife Crime*, 35 [https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/FINAL\\_-\\_UNODC\\_APG\\_Wildlife\\_Crime\\_report.pdf](https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/FINAL_-_UNODC_APG_Wildlife_Crime_report.pdf).

<sup>23</sup> *Id.* at 6.

“Asset forfeiture is a powerful tool to adjust the risk/reward equation of wildlife crime, by taking away the expected rewards of crime, and sending a message to criminals that this is not a high-profit activity. It also reduces the risk of criminal proceeds being re-invested in further criminal activities.”<sup>24</sup> Asset forfeiture is also a way to recoup the costs of enforcement; vehicles, traps, and other equipment can be sold and the proceeds used for enforcement activities.

*Recommendation 15: Establish obligations to affected resources, if possible, or require the economic compensation for the damage caused*

83. Laws should ensure that anyone who commits a violation pays to repair any damage, if possible. If that is not possible, the violator should compensate the state for the damage. The reparation shall consist in the establishment of the previous situation or in the replacement of the animal. At least one country (Eswatini) increases the period of imprisonment if neither of these options is possible.
84. In assessing the amount payable for restoration costs, Parties could direct courts to take into account salaries and wages of government employees who investigated the violation or who will perform the restoration work, as well as all relevant factors and incidental expenses incurred in the investigation of the act constituting the offence or in remedying the loss and damage caused by the act.

*Recommendation 16: Include provisions for the suspension or withdrawal of licenses and authorizations, or for the limitation, restriction or suspension of activities, or for the shutdown of premises and establishments*

85. Several Parties (e.g., Mozambique, Uruguay and Pakistan) include provisions to punish the offenders with suspension or withdrawal of licenses, permits and authorizations issued in their names, or of their registration, with consequent inability to carry out the activities for a certain period. Also, offenders should not be eligible to obtain such licenses, permits and authorizations for a certain period of time. This can also mean that Parties should also establish the temporary or permanent limitation, restriction or suspension of activities or businesses that caused the violation, and in extreme cases, the partial or total shutdown of premises or establishments where the activities are carried out. In the case of non-compliance, at least one Party (Dominican Republic) sets out the withdrawal of authorizations to exercise or carry out the activities that caused the violation.
86. Parties may also establish additional penalties, such as: punitive fines (Norway, Spain), community work (The Netherlands, New Zealand), the deprivation of certain rights (The Netherlands), the forfeiture of profits (Uganda), and the publication of judgements (The Netherlands). Moreover, the laws of some Parties (Ecuador, Peru) empower competent authorities to adopt precautionary measures, in order to prevent further threats to species.

*Recommendation 17: Extend liability for the commission of the offence to any person who contributes in its commission, with increased penalties for public officials*

87. In several countries (e.g., Algeria, Eswatini, New Zealand and Switzerland), persons who permit, facilitate, assist, instigate or in any other way contribute to the commission of the offence shall be liable on conviction to the same penalty imposed on the offender.
88. When the offence is committed by or with the assistance of public officials—who authorize or allow the commission of the offence in the exercise of their office, or, having knowledge of such conducts, do not take appropriate actions, or wilfully interfere with the investigation of a case—Parties should consider increasing the maximum penalties for the corresponding offences by a specified percentage. In addition, national courts could also disqualify the offenders from

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<sup>24</sup> Id. at 32.

exercising their office for a period of years. One Party (Costa Rica) provides a good example in this sense:<sup>25</sup>

When public officials participate in the commission of the offences and misdemeanours established in this Law in the exercise or on occasion of their office, the extremes of the penalties provided for each case shall be increased by up to one third.

In addition, the judge may impose on the offenders, as an accessory penalty and in a reasoned sentence, the penalty of disqualification from the exercise of office, from four (4) to twelve (12) years; the foregoing, without prejudice to other administrative, civil and criminal penalties as appropriate.

Public officials who, in spite of having knowledge of conduct that constitutes violations of this Law and its Regulations, do not take the pertinent actions, within their competencies, to arrest them and seek the punishment of those responsible, shall incur in the crime of breach of duties and shall be sanctioned with the penalty determined in Article 332 of the Criminal Code; regardless of the liability that may arise from their participation in the unlawful acts that they allowed.

89. Many Parties (e.g., Eritrea, Liechtenstein, Mozambique, Norway and Uruguay) have enacted provisions that extend the offender's liability to legal entities, the master of vessels or management persons. This is consistent with the application of the take prohibition to "persons", as discussed in Recommendation 5.
90. Some Parties (Bolivia and France), furthermore, specifically set out penalties for cases in which the offence is committed by criminal organizations.

*Recommendation 18: Create incentives for enforcement of the take prohibition*

91. Parties should also consider establishing incentives for enforcement of the take prohibition. Two important types of incentives are rewards and citizen suits.
92. With rewards, citizens can receive financial remuneration for providing information to officials when that information contributes to a successful criminal prosecution or civil penalty assessment. The rewards are paid from fines paid by those found to violate legislation to implement CMS. By providing such rewards, government incentivizes citizens to help enforce the law rather than turn a blind eye to violations.
93. Similarly, citizen suits in which citizens can challenge the actions of private individuals or the government for violations of the law can help make citizens part of the solution. Many governments lack the financial or human resources to sue all violators of a law, such as the CMS take provision. Citizen suits thus allow environmental organizations and others to augment governmental enforcement efforts, thereby contributing to improved conservation of CMS Appendix I species.
94. Citizen suits harness the energy and commitment of citizens to effectuate public environmental protection goals. Significantly, they do so to protect public goods—the environment, wildlife—and not private goods. For instance, Ecuador's Organic Code of the Environment allows every individual or community to request precautionary measures to stop the threats or damages to nature. Moreover, the liable party has to pay a sum to the plaintiff:

Any natural or legal person, commune, community, people or nationality, individually or collectively, may apply to the Competent Environmental Authority for compliance with and protection of the rights of nature. Likewise, they may denounce violations of the provisions established in the Constitution, this Code and environmental regulations.

<sup>25</sup> Law no. 7317 of 1992, the Wildlife Conservation Law, art. 118

<https://www.conagebio.go.cr/Conagebio/public/documentos/legislacion/Leyes/Ley%20de%20Conservaci%C3%B3n%20de%20la%20Vida%20Silvestre.%20N%C2%B0%207317.pdf> (in Spanish).

Any natural or juridical person may adopt legal actions before the corresponding judicial and administrative bodies and request precautionary measures that allow the threat or environmental damage to cease.

In addition, the judge shall sentence the liable party to pay 10 to 50 unified basic salaries, in accordance with the gravity of the damage repaired, in favor of the plaintiff.<sup>26</sup>

In Brazil and other Latin American countries, citizens have the right to challenge violations of environmental and other laws. The legal actions have different names in different countries by common legal actions include *ação populares*, *actio popularis*, *acciones populares*, *acciones difusas*, or *intereses difusas*.

95. When citizens use citizen suits to challenge governmental action or inaction, they also help improve transparency and accountability.
96. Citizen suits typically allow citizens to bring only civil proceedings. However, some CMS Parties allow citizens to bring criminal proceedings against violators of law. In South Africa, for example, the National Society for the Prevention of Cruelty to Animals (NSPCA) has the statutory power to institute private prosecutions.<sup>27</sup>

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<sup>26</sup> Organic Environmental Code. R.O. 983 of 12 April 2017 (Ecuador), art. 304, *available at*: <http://extwprlegs1.fao.org/docs/pdf/ecu167116.pdf>.

<sup>27</sup> National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another, Constitutional Court of South Africa, [2016] ZACC 46 ("It is declared that the National Society for the Prevention of Cruelty to Animals has the statutory power of private prosecution conferred upon it by section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 read with section 8 of the Criminal Procedure Act 51 of 1977."), <http://www.saflii.org/za/cases/ZACC/2016/46.html>.

## MODEL LAW FOR THE IMPLEMENTATION OF ARTICLE III.5

Based on the issues raised in the preceding section of this paper, the following model provisions are provided for implementation of the prohibition against taking included in Article III.5 of CMS.

### Section 1: Definitions

1. "Animal" means any individual, egg, or nest of an Appendix I migratory species;
2. "Appendix I migratory species" means any species included in Appendix I of the Convention on the Conservation of Migratory Species of Wild Animals, commonly referred to as CMS;
3. "Competent Authority" means the [agency] [ministry] [minister] responsible for implementing and enforcing this Act;
4. "CMS" means the Convention for the Conservation of Migratory Species, concluded in Bonn on 23 June 1979;
5. "Harassing" means to disturb, pursue, injure, feed, or otherwise intentionally disrupt an animal of an Appendix I migratory species;
6. "Take" or "taking" means taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct;
7. "Person" means
  - a) an individual, corporation, partnership, trust, association, or any other private entity, including a vessel subject to the jurisdiction of the [State];
  - b) any officer, employee, agent, department, or instrumentality of the [State] [Federal Government], of any [provincial] [state], municipality, or political subdivision of a State, or of any foreign government; or
  - c) any [province] [state], municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the [State].

### Section 2: Scope

#### *Option 1: For countries that do not list the species*

1. This Act applies to all species included in Appendix I to CMS in any area under the jurisdiction of [this State], including vessels flagged or registered by [this State] when operating in areas beyond national jurisdiction.
2. The official website of CMS is the official reference for Appendix I listed species.

#### *Option 2: For countries that list the species and the domestic list of CMS Appendix I species are automatically amended after an amendment to the CMS Appendix I enters into force:*

1. This Act applies to all species included in Appendix I to CMS in any area under the jurisdiction of [this State], including vessels flagged or registered by [this State] when operating in areas beyond national jurisdiction.
2. Schedule 1, which lists all species included in Appendix I of CMS, is attached to this Act.

3. Schedule 1 of this Act is automatically amended to include newly listed species, when amendments to Appendix I of CMS enter into force. The official website of CMS is the official reference for Appendix I. [These amendments shall be published in the Gazette as soon as possible after their adoption by the CMS Conference of the Parties.]

**Note:** The laws of many States require publication in the Government Gazette (or similar publication) to become legally binding. In other States, this may not be true. For this reason, the language concerning publication in the Gazette is placed in brackets.

*Option 3: For countries that list the species and the domestic lists of CMS Appendix I species cannot or are not automatically amended after an amendment to the CMS Appendix I enters into force:*

1. This Act applies to all species included in Appendix I to CMS in any area under the jurisdiction of [this State], including vessels flagged or registered by [this State] when operating in areas beyond national jurisdiction.
2. Schedule 1, which lists all species included in Appendix I of CMS, is attached to this Act.
3. Within 30 days of the completion of a meeting of the Conference of the Parties to CMS, the competent authority shall propose regulations to amend Schedule 1 to include additions to CMS Appendix I.

### **Section 3: Prohibitions**

It is illegal for any person to take an animal of an Appendix I migratory species, except as permitted by Section 4 of this Act.

### **Section 4: Exceptions**

1. The competent authority may permit, under such terms and conditions as the competent authority shall prescribe, an act otherwise prohibited by Section 3 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.

2. The competent authority shall, prior to issuing any permit consistent with Section 4(1), explain in writing why the issuance of the permit is
  - a) precise as to content;
  - b) limited in space;
  - c) limited in time; and
  - d) does not operate to the disadvantage of the species.
3. No permit may be issued by the competent authority authorizing any taking referred to in Section 4(1) unless the applicant submits to the competent authority an application that specifies

- a) the species to be taken;
  - b) the purpose for which the animal will be taken;
  - c) the number of animals to be taken;
  - d) the method for taking the animal;
  - e) the impact that will likely result from such taking;
  - f) the actions that the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement those actions;
  - g) alternative actions to such taking that the applicant considered and the reasons why such alternatives are not being undertaken; and
  - h) any other measures that the competent authority may require as being necessary or appropriate for determining whether to issue a permit under Section 4(1).
4. When a person, as a result of extraordinary circumstances such as self-defence, takes an animal prior to the issuance of a permit under this Section, the person shall notify the competent authority within 7 days of the taking and apply for the retrospective issuance of a permit. The person shall, in applying for retrospective issuance of a permit,
- a) explain the circumstances that the person believes justifies the taking of the animal; and
  - b) provide the information in Section 4, paragraphs 3(a)–(d) and 3(h).
5. The permit shall contain such terms and conditions as the competent authority deems necessary or appropriate to carry out the purposes of this Section, including, but not limited to,
- a) the species to be taken;
  - b) the purpose for which the animal will be taken;
  - c) the number of animals to be taken;
  - d) the method for taking the animal;
  - e) any other provisions, including monitoring requirements, the competent authority deems necessary to ensure that the taking is consistent with Section 4(1);
  - f) such reporting requirements as the competent authority deems necessary for determining whether such terms and conditions are being complied with.
6. The competent authority shall revoke a permit issued under this Section if the competent authority finds that
- a) the permittee is not complying with the terms and conditions of the permit; or
  - b) the taking is disadvantaging the species.
7. Any permit issued under this Section is not transferable.
8. Any permit issued under this Section shall be communicated within 30 days to the CMS Secretariat in a manner that describes how the permit meets the conditions of Section 4(1).

## Section 5: Penalties

1. Any person who violates or attempts to violate any provision of this Act or any provision of any permit issued under this Act shall be assessed a civil penalty by the competent authority of not less than [some amount intended to deter other violations] for each violation.<sup>28</sup>
2. Any person who knowingly violates or attempts to violate any provision of this Act or any provision of any permit issued under this Act shall, upon conviction, be fined not less than [some amount intended to deter other violations] for each violation or imprisoned for not less than [X], or both.

<sup>28</sup> Each violation is a separate offense. That is, the taking of one Appendix I animal is a single violation; the taking of two Appendix I animals is two violations.

3. Any person who permits, facilitates, assists, instigates or in any other way contributes to the commission of the offence shall be liable on conviction to the same penalty.
4. When public officials in the exercise of their office participate in the commission of the offences established in this Act, the penalties provided for the corresponding offences shall be increased by [X (a fraction)]. Without prejudice to other administrative, civil and criminal penalties, the court may disqualify the offenders from the exercise of their office for a period of [X] to [X] years.
5. Without prejudice to other penalties that may be imposed by the competent court, the competent authority is empowered to order the following additional measures:
  - a) the seizure and/or forfeiture of any animal(s) alleged to have been taken illegally, including their parts and products, in addition to any documents and other property, including weapons, traps, net, cages, gears, poisons, vehicles, devices and any other items or means of transport, believed to have been used in preparation or in the commission of the offence, or to obstruct investigations into the violation;
  - b) the seizure and/or forfeiture of any objects obtained entirely or largely by means of, or from the proceeds of the criminal offence;
  - c) the temporary or permanent limitation or restriction of activities or businesses carried out by the person or the legal entity, and that cause or threaten to cause the violation under this Act, and, in extreme cases, the partial or total closure of the premises or establishments where such activities are carried out;
  - d) the suspension or withdrawal of licenses, permits or authorizations issued to the offender for a period of [X];
  - e) the disqualification from being eligible to new licenses, permits or authorizations for a period of [X];
  - f) the reparation of the damage, the restoration of the affected resources and, if not possible, the compensation of the state for the damage or prejudice resulting from the violation, or, failing this, a further period of imprisonment to be determined by the court.
6. In assessing the amounts payable, national courts may take into account salaries and wages of governmental employees involved in investigating the offence and related restoration activities and all relevant factors and incidental expenses incurred in the investigation of the act constituting offence or in remedying the loss and damage caused by the act.
7. Any person who alters, defaces, erases, or in any way changes any permit or license issued under this Act shall be assessed a civil penalty by the competent authority of not less than [some amount intended to deter other violations] for each violation.
8. Any person who knowingly provides false information in connection with an application for a permit or license under this Act shall be assessed a civil penalty by the competent authority of not less than [some amount intended to deter other violations] for each violation.
9. The maximum fine and duration of imprisonment shall be doubled for subsequent violations of this Act and any regulation issued hereunder.

## Section 6: Rewards

1. The competent authority shall pay, from sums received as penalties, fines, or forfeitures of property for any violation of this Act or regulation issued hereunder,
  - a) a reward to any person who furnishes information that leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this Act or any regulation issued hereunder; and

- b) the reasonable and necessary costs incurred by any person in providing temporary care for any Appendix I animal pending the disposition of any civil or criminal proceeding alleging a violation of this Act or any regulation issued hereunder.
2. The competent authority shall designate the amount of the reward, if any, to be provided in any case.

### **Section 7: Enforcement Powers**

1. Any person authorized to enforce this Act may detain for inspection and inspect any animal, vehicle, package, crate, or other property, including its contents, and all accompanying documents.
2. Such person may make arrests without a warrant for any violation of this Act if he has reasonable grounds to believe that the person to be arrested is committing the violation in his presence or view, and may execute and serve any arrest warrant, search warrant, or other warrant or civil or criminal process issued by any officer or court of competent jurisdiction for enforcement of this Act.
3. Such person so authorized may also search and seize,<sup>29</sup> with or without a warrant, as authorized by law, any animal taken, any property used in the commission of the suspected violation, and any other evidence of the suspected violation. Any animal or property or item so seized shall be held by a person authorized by the competent authority identified in paragraph 1 of this Section pending disposition of the civil or criminal proceedings.
4. Any animal taken in violation of the provisions of this Act and any regulations issued hereunder shall be subject to forfeiture.<sup>30</sup>
5. All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking of any animal in violation of this Act or any regulations issued hereunder shall be subject to forfeiture to the Government upon criminal violation pursuant to Section 5 of this Act. Such forfeiture may be in addition to any other penalty given for the violation of this Act or regulation issued hereunder.

### **Section 8: General**

1. The is authorized to promulgate regulations as may be appropriate to implement and enforce this Act.
2. The Minister is authorized to charge reasonable fees for expenses to the Government connected with permits or licenses requested or authorized under this Act. All such fees collected pursuant to this Section shall be deposited in the Treasury.

### **Section 9: Citizen Suits**

1. Any person may commence a civil suit on his own behalf to enjoin any person, including the government or government official, alleged to be in violation of any provision of this Act or regulation issued hereunder;
2. A court shall award to a prevailing party other than the Government fees and other expenses incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the Government in any court having jurisdiction of that action, unless the court finds that the position of the Government was substantially justified or that special circumstances make an award unjust.

<sup>29</sup> The terms "seize," "seizure," and "confiscation" refer to the temporary taking of property by a law enforcement officer pending disposition of a civil or criminal matter.

<sup>30</sup> The term "forfeiture" refers to the permanent taking of property by the Government as punishment for a crime or misdemeanor.

3. A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.
4. For the purposes of this subsection—
  - a) “fees and other expenses” includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party’s case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the Government; and (ii) attorney fees shall not be awarded in excess of [some amount consistent with the hourly rate of an attorney] unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);
  - b) “prevailing party”, in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

**DRAFT DECISION(S)****REVIEW MECHANISM AND NATIONAL LEGISLATION PROGRAMME****Directed to the Secretariat**

13. AA The Secretariat is requested to:

- a) In relation to Parties that have completed and submitted the National Legislation Programme questionnaire, and subject to the availability of external resources:
  - i. Analyse the information submitted through the questionnaires regarding legislation and other domestic measures in place relating to implementation of Article III, paragraph 5 of the Convention;
  - ii. Continue the preparation of national legislation profiles and identify the Parties that have not implemented Article III, paragraph 5 of the Convention;
  - iii. Inform all Parties about the findings and recommended actions and provide technical support to assist Parties in drafting adequate national legislation to implement the provisions of Article III, paragraph 5 of the Convention;
  - iv. As appropriate, liaise with National Focal Points regarding the information submitted through the questionnaires and further actions to be taken;
  - v. As appropriate, prepare training materials and conduct capacity building workshops;
- b) In relation to Parties that have not completed and submitted the National Legislation Programme questionnaire, and subject to the availability of external resources:
  - a. Revise the questionnaire template, if necessary, and promote its completion and submission to the Secretariat;
  - b. Upon request, assist Parties that have reported in their National Reports that there is no legislation that prohibits taking of species listed in Appendix I in place
- c) In relation to the implementation of Article III, paragraphs 4(a) and (b), subject to the availability of external resources:
  - i. Collect information on the implementation of Article III, paragraphs 4(a) and (b);
  - ii. As appropriate, prepare technical guidance on best practices relating to the implementation of Article III, paragraphs 4(a) and (b) of the Convention;
- d) report to the Conference of Parties at its 14<sup>th</sup> meeting on the progress in implementing this decision;
- e) collaborate closely with the UNEP and CITES National Legislation Programme, taking into account the specificity of CMS.

**Directed to the Standing Committee**

13. BB The Standing Committee is requested to:

- a) consider the implementation of the Review Mechanism and report to the 14<sup>th</sup> meeting of the Conference of the Parties, including any recommendations for modifications of the procedure or criteria;
- b) review and adopt the revised National Legislation Programme questionnaire, if necessary.

**Directed to the Parties**

13. DD (12.8) Parties are requested to review the implementation of the review mechanism at the 14<sup>th</sup> meeting of the Conference of the Parties

**Directed to Parties**

13.EE

- a) Parties that have completed and submitted the National Legislation questionnaire are requested to:
  - i. as appropriate, liaise with the Secretariat and provide clarifications or further information on the legislation and domestic measures in place;
  - ii. within six months of having received the findings and recommended actions from the Secretariat, indicate the procedures, action and reasonable time frames that are envisaged in response;
  - iii. take appropriate measures to implement Article III, paragraph 5 in accordance with the indicated procedures and time frames;
- b) Parties that have not completed and submitted the questionnaire are strongly encouraged to do so.
- c) Parties are invited to provide financial or technical support to further strengthen the legal development and institutional capacity through the implementation of the National Legislation Programme and the Review Mechanism.