

48th Meeting of the Standing Committee

Bonn, Germany, 23 – 24 October 2018

UNEP/CMS/StC48/Doc.15/Rev.1

REVIEW MECHANISM AND NATIONAL LEGISLATION PROGRAMME

(Prepared by the Secretariat)

Summary:

This document implements the work directed to the Secretariat in Decision 12.6. It describes the process for developing the inventories and questionnaire in furtherance of Resolution 12.9, on the Establishment of a Review Mechanism and a National Legislation Programme.

The document includes two annexes. Annex 1 includes a draft template for communicating initial information on an implementation matter to the Secretariat, to ensure compliance with Articles III.4, III.5, III.7 and VI.2 of the Convention. Annex 2 includes a draft questionnaire to submit to Parties in order to obtain additional information on implementation of Article III, paragraphs 4 and 5, of the Convention.

The Standing Committee is requested to review and decide on whether to adopt the drafts set out in Annex 1 and Annex 2.

REVIEW MECHANISM AND NATIONAL LEGISLATION PROGRAMME

Background

1. At the Twelfth Meeting of the Conference of the Parties (COP12), the Secretariat submitted two documents for the consideration of the Parties relating to implementation of national legislation and compliance with the Convention:
 - a) UNEP/CMS/COP12/Doc.20/Rev.1, [National Legislation to Implement CMS Provisions](#); and
 - b) UNEP/CMS/COP12/Doc.22/Rev.1, [Options for a Review Process for the Convention on Migratory Species](#).
2. The Parties decided to consider these two documents together. After considerable discussion, the Parties agreed to consolidate them into a single resolution, Resolution 12.9, [Establishment of a Review Mechanism and a National Legislation Programme](#).
3. Resolution 12.9 establishes two processes. It establishes a “supportive, non-adversarial and facilitative approach” towards implementation of the Convention, with the aim of ensuring long-term compliance with Articles III.4, III.5, III.7, and VI.2. This process is called the Review Mechanism. Resolution 12.9 also 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. This process is called the National Legislation Programme.
4. Decision 12.7 directs 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); and report to the 13th meeting of the Conference of the Parties, including any recommendations for modifications of the procedure or criteria.
5. Decision 12.9 strongly encourages the Parties to complete the information in the pre-filled questionnaire, updating any information provided through the national report. To this end, although the draft questionnaire provided is blank, the information given by the Secretariat through the inventories can be used to pre-fill the questionnaires.
6. In order to facilitate the implementation of the Review Mechanism and the National Legislation Programme, the Secretariat has created [a dedicated page](#) on its website.

REVIEW MECHANISM

7. As requested by Decision 12.6 a), the Secretariat has developed a draft template for communicating initial information on an implementation matter to the Secretariat. The submission of the information through the use of the template, when an implementation matters arises, is a basis for initiating the review process. The draft template has been entirely based on the admissibility criteria of Section I.C of Resolution 12.9.
8. The draft template proposed is called “Case-information Template” and is attached in Annex 1. The Standing Committee is requested to review and decide whether to adopt the draft template.

NATIONAL LEGISLATION PROGRAMME

9. With a generous voluntary contribution from Switzerland, the Secretariat was able to hire a consultant to undertake an inventory of the Secretariat’s present information relating to Parties’ current legislation, and prepare a questionnaire. The questionnaire is attached as Annex 2.
10. The consultant has also been tasked with drafting model legislation for implementation of Article III, paragraph 5, and for preparing technical guidance on best practices relating to implementation of Article III, paragraphs 4(a) and (b). Originally, the Secretariat envisaged those two documents being available to the Standing Committee at its 48th meeting. Due to the issues discussed in the remaining paragraphs of this document, it became clear that the consultant and Secretariat would be able to prepare those documents only after receiving responses to the questionnaire from Parties.

The Inventory

11. In preparing the inventory, the Secretariat was mindful of Decision 12.6, which calls on the Secretariat to review “the Secretariat’s present information on Parties’ current legislation.” Consequently, the Secretariat reviewed national reports and accession documents. With respect to national reports, the Secretariat reviewed national reports submitted between COP9 (2008) and COP12 (2017). To the extent that information in the national reports was inconsistent, the Secretariat used information from the more recent national report on the assumption that it was more current and accurate.
12. The Secretariat is also mindful that Decision 12.6 directs the Secretariat to undertake an inventory of Parties’ current legislation in relation to Article III, paragraph 5, only. However, the Secretariat is also tasked with preparing technical guidance with respect to Article III, paragraphs 4(a) and (b). To facilitate that work, the Secretariat included information concerning Article III, paragraphs 4(a) and (b), in the inventory.

13. In addition, the Secretariat is mindful that Resolution 12.9 asks Parties to submit information concerning implementation of Article III, paragraphs 4(a) and (b). Decision 12.6 directs the Secretariat to prepare technical guidance relating to those two sub-paragraphs. However, the national reports specifically ask the Parties to provide information relating to Article III, paragraph 4(c). For each taxonomic group, the national reports ask the Parties to answer the following question: “What actions have been taken to prevent, reduce or control factors that are endangering or are likely to further endanger [bird/mammal/reptile/fish] species beyond actions to prevent disruption to migrating behaviour.” Accordingly, the Secretariat thought it would be worthwhile to include that information in the inventory.
14. The Secretariat further notes that, due to the manner in which questions are asked in the national reports, the inventories do not necessarily provide an accurate picture of the status of legislation in a country. Thus, while the national reports provide much needed information on distribution of relevant species and provide an overall summary of activities that the Parties are undertaking with respect to migratory species, they do not provide an accurate picture of whether Parties are implementing Article III, paragraphs 4(a) and (b) and 5. That can lead to misleading entries in the inventory, as explained below. The Standing Committee may want to take this information into account when considering whether to adopt a new format for national reports under Agenda Item 12, Document UNEP/CMS/StC48/Doc12.

Article III, paragraph 5

15. At least four issues arose from using national reports to determine the extent to which Parties are implementing Article III, paragraph 5. First, the national reports ask the Parties to include relevant implementing legislation in Table 1(a). Most Parties have several pieces of legislation that implement the Convention. Later, the national reports ask if legislation included in Table 1(a) prohibits the take of specific taxonomic groups. If a number of laws are included in Section 1(a), then the Secretariat was unable to identify which law might be responsible for the take prohibition. In these circumstances, the entry in the inventory reads “yes, but no law expressly identified.”
16. Secondly, and more significantly, Section II of the national reports includes questions that may lead to misleading answers. For example, Section II asks the following: “Is the taking of all Appendix I fish species prohibited by the national implementing legislation cited in Table 1(a)?” Article I(1)(i) of the Convention defines “taking” to mean “taking, hunting, fishing capturing, harassing, deliberate killing, or attempting to engage in any such conduct.” Most Parties answered “yes” to this question but the Secretariat is aware from its review of national laws of some Parties that certain types of “taking” are not prohibited. Most commonly, for example, “harassing” is not prohibited. Nonetheless, a Party that implements only some aspects of the “taking” prohibition would rightfully be reluctant to answer “no” to this question because that answer might indicate that the Party does not implement any aspect of the take prohibition.
17. Similarly, Article III, paragraph 5, of the Convention prohibits “attempts” to take an animal of an Appendix I species. The Secretariat is aware that some Parties do not prohibit “attempts” to take an animal of an Appendix I species. Only one Party has reported that it prohibits “attempts” to take an Appendix I species.

18. Thirdly, Section II asks whether “any exceptions have been granted”. If an exception has been granted, Parties are asked to provide details. What is not asked, however, is what the permissible scope of exceptions might be under the Party’s legislation. Article III, paragraph 5, includes a narrow list of permissible exceptions and also requires exceptions to be “precise as to content and limited in space and time”. For determining compliance with Article III, paragraph 5, it is important to know whether any exceptions have been granted as well as the scope of permissible exceptions.
19. Fourthly, Section II of the national reports is divided into questions relating to different taxonomic groups. Because some Parties may not be Range States for those species, they did not complete those sections. The Secretariat did not want to be in a position to describe whether or not a Party is a Range State. Thus, unless a Party specifically reported that it is not a Range State, the inventory records “unknown” for any section of the national report that was not completed.
20. A related question concerns landlocked countries. At first glance, landlocked countries would not appear to be Range States for cetaceans, marine turtles, or sharks. However, Article I, paragraph I(h), of the Convention defines “Range State” to include “a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species”. Under international law, landlocked countries are allowed to—and do—flag fishing and other vessels. The Secretariat does not possess information regarding which landlocked CMS Parties flag vessels. Thus, unless a Party specifically noted that it does not flag vessels, the inventory records “unknown” for those Sections of the national report in which taking by a vessel could occur.
21. By raising these issues, the Secretariat is not suggesting that Parties have submitted inadequate national reports or that they are inadequately implementing Article III, paragraph 5. The Secretariat is merely pointing out issues associated with using the national reports as currently structured to complete the inventories accurately. The questions included in the questionnaire will allow Parties to provide more specific information in relation to the issues arising with respect to Article III, paragraph 5.

Article III, Paragraph 4

22. Additional issues arose with respect to Article III, paragraph 4. For example, the Secretariat needed to make an initial decision as to whether specific “obstacles that seriously impede or prevent the migration of the species” should be included in the inventory. Certain obstacles to migration (dams, wind turbines, fishing gear, roads) affect a wide variety of CMS-listed species or are significant obstacles to migration. Understanding the strategies that Parties are implementing to prevent or minimize these specific obstacles will benefit all Parties. Thus, the Secretariat decided to include specific obstacles as part of the inventory.
23. In addition, laws or activities that implement one obligation (e.g., habitat conservation) might also implement a second obligation (minimize barriers to migration). To avoid repetition and overly long inventories, a law or activity was included in only one part of the inventory.

24. Also, Section IV of the national reports asks Parties to describe whether “policies/plans” include measures relating to dams, fences, and other obstacles to migration. Parties are asked to tick boxes to indicate whether the policies and plans do or do not include such measures. However, Section IV does not ask whether these policies and plans led to concrete action. Thus, if a Party did not include comments about specific laws or activities, the information was not used in the inventories.
25. Other sections of the national reports are too general to provide useful information for the inventories. For example, Section IV asks questions relating to migratory species in general. The questions do not relate to Appendix I species specifically or even to CMS-listed species. Thus, unless a Party made reference to a particular law or policy that applied to Appendix I species or a specific Appendix I species, it was not included in the inventory.
26. Similarly, Section V of the national reports asks whether migratory species are taken into account in the selection and establishment of protected areas. Because of the way in which this question is asked, Parties rarely provided information as to whether Appendix I species were, in fact, taken into account in selecting and establishing a protected area. Thus, the inventories acknowledge the range of protected areas established by Parties but also acknowledge that insufficient information was provided in most situations to determine 1) whether Appendix I species inhabit those areas and 2) the nature of any obligations that arise from various protected area designations.
27. In addition, the Secretariat notes that most, if not all, Parties reported that they are engaged in monitoring of and scientific research concerning Appendix I species. Inclusion of this information, especially when species-specific, would have made the inventories excessively long. In addition, while monitoring and research are important precursors to conserving habitat, minimizing obstacles to migration, and otherwise fulfilling the obligations of Article III, paragraph 4, those activities do not directly implement those obligations. For all of these reasons, monitoring and research activities were not included in the inventories.
28. Lastly, the Secretariat acknowledges the vast array of laws enacted and activities undertaken in fulfillment of Article III, paragraph 4. Clearly, a great amount of significant conservation work is being undertaken. As a consequence, however, the Secretariat found it challenging to identify when to include a particular law or activity in the inventory. For example, does guidance for the siting of renewable energy projects constitute an activity significant enough to include in the inventory? Guidelines are expressly non-binding and, given the structure of the national reports, information was rarely provided to know whether Parties or relevant economic entities use the guidelines. The Secretariat used its judgment to determine whether a particular law or activity should be included in the inventory based on the information provided in a specific national report.

Territorial Application of the Convention

29. Whether, and to what extent, a Party is implementing Articles III, paragraphs 4 and 5, of the Convention depends on two issues relating to the scope of application of the Convention: the territorial scope of application of the Convention and the application of the Convention to the marine environment.

30. With respect to the territorial scope, Article 29 of the Vienna Convention on the Law of Treaties (Vienna Convention)¹ states that, “unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party.” Thus, Article 29 establishes a presumption: a State that ratifies a treaty will apply the treaty throughout its entire territory, which includes any overseas territories and its territorial sea. This presumption, however, is qualified by a broad exception; States have the flexibility to adopt the opposite rule and apply a treaty only to those territories that they expressly include in its instrument of ratification.
31. The Secretariat is aware that at least one State Party has adopted the practice of applying a treaty only to specified territories. The Secretariat is unaware, however, of a list of such States. In addition, only one or two States specifically included the territorial scope of the Convention’s application in their instrument of ratification. Thus, aside from these one or two cases, the inventories include the exact language used in a Party’s national report to record the territorial scope of the Convention’s application to that Party. Because of the ambiguity created by the presumption, the inventories use the word “presume” to indicate the territorial scope of the Convention to a specific Party. The questionnaire seeks additional information from Parties to clarify this issue.
32. Under the United Nations Convention on the Law of the Sea and customary international law, coastal States have the right to assert jurisdiction for the conservation and management of natural resources in their exclusive economic zone—an area beyond their territorial seas up to 200 nautical miles from their coastline. Only a handful of Parties reported that they applied the Convention in their EEZ but the Secretariat is aware that a much larger number of Parties do so. The questionnaire seeks additional information from Parties to clarify this issue.
33. In addition, the Convention directs Range State Parties to implement Article III, paragraph 5, to vessels that they flag and which are engaged outside national jurisdictional limits in taking a migratory species. Fishing and other vessels could take an animal through vessel strikes, fishing activity, and other means. However, only one Party expressly reported that it applies the Convention to its vessels in outside national jurisdictional limits (i.e., on the high seas). The questionnaire seeks additional information from Parties to clarify this issue.

Recommended Actions:

The Standing Committee is invited to:

- a) review and decide on the draft template for communicating initial information to start the review process, included in Annex 1;
- b) review and decide on the questionnaire included in Annex 2; and
- c) take note of progress on the implementation of Decision 12.6.

¹ Vienna Convention on the Law of Treaties, *signed* May 23, 1969, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331.

CMS REVIEW MECHANISM

TEMPLATE FOR THE COMMUNICATION OF A POSSIBLE IMPLEMENTATION MATTER

The CMS Review Mechanism was established by the Conference of the Parties at its 12th meeting (COP12, October 2017, Manila) through [Resolution 12.9](#) in order to support the implementation of the Convention. Information on possible implementation matters can be submitted by Parties, the Secretariat, the Standing Committee and any body or agency technically qualified in the protection, conservation and management of migratory species (Res.12.9, Section I. B. 2.). The Secretariat shall determine whether the information submitted is admissible (Res.12.9, Section I. C.).

Please fill in this sheet and send it to the attention of:

UNEP/CMS Secretariat,
 UN Campus Platz der Vereinten Nationen 1
 53113 Bonn, Germany
 E-mail: cms.secretariat@cms.int Fax. (+49 228) 815 2449

Submitted by:

First Name and Surname(s): _____

On behalf of (Please select one of the following options):

- a Party, please specify: _____
- the Secretariat
- the Standing Committee
- an Organization², please specify: _____

Position: _____

Address: _____

City/Town: _____ Postcode: _____

County/State/Province: _____ Country: _____

Telephone: _____

Email: _____

Website

² 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))

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)*

Site(s) *(Please name the relevant site(s) potentially affected)*

Specific implementation matters

Please describe how the case concerns the non-implementation of Articles III.4, III.5, III.7 and 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)/habitat(s) involved. Please do not exceed 1500 words)*

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:

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.)*

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.

ANNEX 2

CMS NATIONAL LEGISLATION PROGRAMME

DRAFT QUESTIONNAIRE

Party _____

Section I - General

1. What legislation does your country have in place to implement the CMS? Please give the following details:

1.1 Is there one law designed specifically to implement CMS?

Yes

No

1.2 Indicate the name of the name of the law(s).

1.3 Does the law(s) require regulations, ordinances or decrees to implement the law?

1.4 Please attached the law(s) and regulations or if the law and regulations are available online, please provide the links to the relevant law and regulations.

1.5 If no legislation is in place, please explain what the obstacles are to enact such a law.

2. Do the laws above include a list of all CMS species currently included in Appendix I?

Yes

No

2.1 If yes, what process is required to apply those laws and regulations to additions to Appendix I made at Conferences of the Parties?

2.2 If no, what process is required to apply those laws and regulations to additions to Appendix I made at Conferences of the Parties?

2.3 Do these laws of your country distinguish between CMS-listed species for which you are a Range State and those for which you are not?

Yes

No

3. Are any of the laws included in your most recent national report no longer in force?

Yes

No

3.1 If yes, please identify those laws.

Section II - Article III.5: “Take” Prohibition

Article III.5 prohibits the “taking” of Appendix I-listed species. “Taking” is defined to include “taking, hunting, fishing capturing, harassing, deliberate killing, or attempting to engage in any such conduct.”

4. Do the laws you have in place prohibit taking (as defined by the Convention) of all CMS Appendix I species?

Yes
No

- 4.1 If no, which species are not covered by the prohibition against taking (as defined by the Convention)?

Drop down menu of all Appendix I species

- 4.2. If no, explain why your country does not prohibit the taking (as defined by the Convention) of all CMS Appendix I species.

If the laws you have in place, do prohibit taking of all CMS Appendix I species in regard to all aspects of the definition of taking by the Convention, please move on to Section III.

If there is no legislation at all prohibiting the taking of Annex I species, you may stop here.

5. Do the laws you have in place prohibit hunting or fishing of all CMS Appendix I species?

Yes
No

- 5.1 If no, which species are not covered by the prohibition against hunting?

Drop down menu of all Appendix I species

- 5.2 If no, explain why your country does not prohibit the hunting of all CMS Appendix I species.

6. Do the laws you have in place prohibit capturing of CMS Appendix I species?

Yes
No

- 6.1 If no, which species are not covered by the prohibition against capturing?

Drop down menu of all Appendix I species

- 6.2 If no, explain why your country does not prohibit the capturing of all CMS Appendix I species.

7. Do the laws you have in place prohibit harassing of CMS Appendix I species?

Yes

No

7.1 If no, which species are not covered by the prohibition against harassing?

Drop down menu of all Appendix I species

7.2 If no, explain why your country does not prohibit the harassing of all CMS Appendix I species.

8. Do the laws you have in place prohibit deliberate killing of CMS Appendix I species?

Yes

No

8.1 If no, which species are not covered by the prohibition against deliberate killing?

Drop down menu of all Appendix I species

8.2 If no, explain why your country does not prohibit the deliberate killing of all CMS Appendix I species.

9. Do the laws you have in place prohibit “attempting” to engage in hunting, fishing, capturing, harassing, deliberate killing of CMS Appendix I species?

Yes

No

9.1 If no, which species are not covered by the prohibition against “attempting” to engage in hunting, fishing, capturing, harassing, deliberate killing of CMS Appendix I species?

Drop down menu of all Appendix I species

9.2 If no, explain why your country does not prohibit “attempting” to engage in hunting, fishing, capturing, harassing, deliberate killing of CMS Appendix I species.

9.3 Please explain how your country would enforce against individuals you suspected of attempting to take Appendix I species.

10. If you have no legislation in place, do you have any plans to ensure that the taking, as defined by CMS, of all Appendix I species is prohibited?

Yes

No

10.1 If no, please explain what the barriers are to achieving this.

Section III - Article III.5: Exceptions to the “Take” Prohibition

Article III.5 allows exemptions to the prohibition against taking only if the taking is for scientific purposes, enhancing the propagation or survival of the species, accommodating the needs of traditional subsistence users, and in extraordinary circumstances.

11. Do the laws you have in place allow taking of Appendix I species for scientific purposes?

Yes
No

11.1 If yes, for which species?

All Appendix I species
Drop down menu of all Appendix I species

12. Do the laws you have in place allow taking for the purpose of enhancing the propagation or survival of the affected species?

Yes
No

12.1 If yes, for which species?

All Appendix I species
Drop down menu of all Appendix I species

13. Do the laws you have in place allow taking to accommodate the needs of traditional subsistence users of such species?

Yes
No

13.1 If yes, for which species?

All Appendix I species
Drop down menu of all Appendix I species

14. Do the laws you have in place allow taking when extraordinary circumstances so require?

Yes
No

14.1 If yes, what are the extraordinary circumstances under which an exception may be granted?

14.2 If yes, for which species?

All Appendix I species
Drop down menu of all Appendix I species

15. Do the laws you have in place allow taking for any other purpose (for example, public display)?

Yes
No

15.1 If yes, what are those other purposes?

15.2 If yes, for which species?

All Appendix I species
Drop down menu of all Appendix I species

16. Article III.5 allows the exceptions described in above 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.*” Do the laws of your country allow exceptions consistent with these limitations?

Yes
No

16.1 If yes, please describe the language in the laws you have in place that limits the use of these exceptions to the prohibition against the taking of Appendix I species.

16.2 If no, please explain what the barriers are to limit the use of these exceptions to the prohibition against the taking of Appendix I species.

Section IV - Reservations, territorial inclusions, and territorial exclusions

Under international law, treaties are presumed to apply to the entirety of a State’s territory, including that State’s overseas territories. A State has the right to exclude overseas territories from application of a treaty in its instruments of ratification. A State also has the right to adopt the opposite presumption through State practice. Consequently, the Secretariat is not certain in all circumstances whether a CMS Party has agreed to apply CMS to all of its territory.

In addition, Article I.1(h) defines a Range State as 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* (emphasis added). Thus, a Party must extend the prohibitions of Article III.5 to vessels that it flags and which operate on the high seas.

17. Do the prohibitions of Article III.5 of CMS apply to all of your land-based territory, including all overseas territories and semi-autonomous zones within your country?

Yes
No

17.1 If no, please list the overseas territories and semi-autonomous ones to which CMS does not apply.

18. Do the prohibitions of Article III.5 of CMS apply in your territorial seas?

Yes
No

19. Do the prohibitions of Article III.5 of CMS apply in your exclusive economic zone?

Yes
No

20. Do the prohibitions of Article III.5 of CMS apply to any vessels flagged by your country and which operate outside national jurisdiction?

Yes
No

20.1 If yes, which vessels?

All vessels
Fishing vessels only
Other (please explain).

20.2 If no, does your country flag vessels (fishing, cargo, cruise, other) that operate in areas beyond national jurisdiction?

Section V – Final comments

If relevant, please add any further information regarding the laws you have in place to implement Art. III.5, such as success stories or challenges you may be facing in the development and/or enforcement of legislation.