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GUIDELINES FOR THE HARMONISATION OF FUTURE AGREEMENTS

On the instruction of the Conference of the Parties in its Resolution 5.2 (Geneva, 10-16 April 1997), the Secretariat:

- distributed copies of the 'Guidelines' together with Resolution 5.2 to Parties for their further consideration;
- examined, with the assistance of a consultant, all comments received; and
- produced a comprehensive revision of the draft 'Guidelines', which is attached to this document.

Owing to circumstances beyond the control of the Secretariat, the revision of the draft 'Guidelines' has been delayed. Consequently, it has not been possible to consult the draft, as requested by the Conference of the Parties, by correspondence in an open working group of the Parties.

The only substantial issue of the former draft which has been addressed in comments received from a number of Parties has been the question of the legally non-binding character of the Memoranda of Understanding (MOU) under the Convention and the 'Guidelines' themselves. This has been revised accordingly. The Secretariat is of the opinion that the draft would now qualify to be used, on a preliminary basis, as a helpful tool for the further elaboration of Agreements and MOU presently under development.

Action requested by the Parties:

The Secretariat suggests that the Conference of the Parties:

1. Takes note of the revised draft;
2. Instructs the Secretariat to proceed as requested in Resolution 5.2;
3. Advises the Standing Committee to supervise the further process of finalising the 'Guidelines' and recommends, if the Standing Committee is satisfied with the result, that they be applied to Agreements and Memoranda of Understanding (MOU) under development.

GUIDELINES ON THE HARMONIZATION OF AGREEMENTS

(30 October 1999)

CONTENTS

I. INTRODUCTION

1. Preliminary remarks

These Guidelines are based on a detailed study entitled *Elements for the Formulation of Guidelines for the Harmonization of Future Agreements* by Cyrille de Klemm (UNEP/CMS/Conf.4.9 of 20 May 1994), submitted to the Fourth Meeting of the Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals. They also include an evaluation of the Agreements and Memoranda of Understanding (MOU) concluded since mid-1994. In addition, the Guidelines draw on resolutions and recommendations of the Conference of the Parties which, although generally[1] not legally binding, provide useful guidance on certain issues.

There is wide variation in the form and content of instruments concluded to date under the parent Convention, which may work against public awareness and understanding of CMS's objectives and mechanisms. These Guidelines are therefore designed to assist States to pursue a harmonised approach to the elaboration and negotiation of new Agreements which should, where possible and appropriate, be consistent with the provisions and terminology of the parent Convention and existing Agreements.

These Guidelines are not definitive and should be regularly updated to take account of experience gained from the implementation of existing Agreements and the conclusion of new Agreements. They do not establish binding rules to be observed in all circumstances. For instance, an Agreement negotiated by only a small number of Parties, or one that is bilateral rather than multilateral, might well contain swifter amendment procedures or stronger dispute resolution mechanisms.

Although this document provides guidance on the terminology to be used in new Agreements, there are discrepancies in the use of certain terms in different provisions of the Convention or in existing Agreements. Interpretation is obviously more difficult where terms are used inconsistently, as shown in the following example:

- **Conservation** and **management**. Determining the exact meaning of both terms and their relationship to one another is a complex matter. The Convention is using the term “conservation and management” e.g. in Articles II.3.c), V.1, V.1, VI.5.b), VII.9, VIII.5.d), IX.2. However, its title and its definition of AGREEMENT (Article I.1.j)) refer only to "conservation" but the latter cross-refers to Articles IV and V which use the term "conservation and management" (Articles IV.1 and V.5.b)). Also, Article V.5.e refers to “conservation of habitats only. This may be interpreted in a way that the term “conservation” includes the term “management.” Existing Agreements vary in their use of these terms. AEWA departs from the Convention by referring to "conservation, including management", whereas management is not defined in the Seals Agreement and ACCOBAMS (which incorporate the relevant definitions from the Convention) or in ASCOBANS (where neither term is defined).

[1] The question of the binding character of resolutions of the Conference of the Parties (COP) would have to be examined separately; namely the decisions of the COP on the budget and listing of species in the CMS Appendices appear to be binding, subject to the provisions of the Convention

The term "management" in the Convention text has never been interpreted. It should logically be understood as including both the sustainable use of species covered by Agreements and, where necessary, the control of numbers of a species which have become harmful to other wild species and/or human living requirements[2]. The relationship of this term to similar terms used in other treaties (eg."sustainable use" in the Convention on Biological Diversity, "wise use" in the Ramsar Convention) needs to be clarified.

It is beyond the scope of the first edition of these Guidelines to examine such discrepancies in further detail, but the preceding remarks should remind the negotiators of future Agreements of the need for caution and precision in the use of key terms. For the same reasons, it is essential that official language versions of future Agreements are harmonized by their translators with these Guidelines and any relevant interpretative resolutions adopted by the Conference of the Parties. Discrepancies in translation obviously breed confusion and could undermine the credibility and effectiveness of new Agreements.

[2] Possibly as the result of long-term strict protection measures or other circumstances.

2. Terms and abbreviations used in these Guidelines

AEWA	AGREEMENT on the Conservation of African-Eurasian Migratory Waterbirds (The Hague, June 1995)
ACCOBAMS	Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (Monaco, November 1996)
Agreement	Covers all types of instrument which may be concluded in accordance with the Convention, namely AGREEMENTS, agreements and Memoranda of Understanding
AGREEMENT	An AGREEMENT concluded in accordance with Article IV, paragraph 3 and Article V of the Convention
agreement	An agreement in the form of a treaty concluded under Article IV, paragraph 4 of the Convention
ASCOBANS	Agreement on the Conservation of Small Cetaceans of the Baltic and North Sea (Geneva, September 1991)
Bats AGREEMENT	AGREEMENT on the Conservation of Bats in Europe (Geneva, September 1991)
CBD	Convention on Biological Diversity (Rio de Janeiro, June 1992)
CMS Scientific Council	The body established under Article VIII of the Convention
Convention/CMS/Bonn Convention/parent convention	Convention on the Conservation of Migratory Species of Wild Animals (Bonn, September 1979)
COP	Conference of the Parties to the Convention
MOP	Meeting of the Parties to an Agreement
MOU	Memorandum/Memoranda of Understanding (the term is used in these Guidelines to cover any form of administrative agreement adopted in accordance with Article IV, paragraph 4 of the Convention and Resolution 2.6 of the COP)
REIO	Regional economic integration organization
Seals Agreement	Agreement on the Conservation of Seals in the Wadden Sea (Bonn, October 1990)

All article references are to the Bonn Convention unless otherwise specified. Suggested model provisions are set in italics.

3. The different types of Agreement under the Convention

There are three categories of regional Agreement which may be concluded under the Convention. The special characteristics of each type of instrument are summarized below.

3.1 Legally binding Agreements

3.1.1 AGREEMENTS adopted under Article IV.3[3]

- Restricted to species listed in Appendix II[4].
- Substantive content largely governed by Article V (Guidelines for AGREEMENTS).
- The object must be to restore the migratory species concerned to a favorable conservation status or maintain it in such a status (Art.V.1).
- Should cover the whole of the range of the migratory species concerned and be open to accession by all Range States of that species, whether or not they are Parties to the Convention (Art.V.2).
- The other Article V guidelines are non-binding. It is arguable, however, that an instrument should be reasonably consistent with these provisions in order to constitute an AGREEMENT under the Convention.
- Take the form of treaties as they provide *inter alia* for the creation of institutions and contain financial provisions and must therefore be ratified.
- Certain procedural rules are laid down by Article V, others may be inferred from the list of powers conferred on the COP (Article VII)[5].

3.1.2 agreements in the form of treaties adopted under Article IV.4[6]

- May be concluded for any population or any geographically separate part of the population of any species or lower taxon of wild animals, members of which periodically cross one or more national jurisdictional boundaries.

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[3] The only examples to date are the Bats AGREEMENT and AEWA.

[4] It is the listing of a species in Appendix II which constitutes the legal basis for the conclusion of an AGREEMENT.

[5] To "receive and consider any reports presented by any standing body established pursuant to an AGREEMENT" and to review the progress being made under AGREEMENTS (Article VII.5.d) and e).

[6] Although the negotiating documents for the Convention referred to agreements (lower case), the Bonn Conference that adopted the Convention in 1979 mistakenly referred in Article IV.4. to AGREEMENTS. The Depositary for the Convention therefore circulated a note verbale on 28 January 1982 expressing the intention to bring the wording of Art.IV.4 into conformity with the negotiating documents by writing the word "agreements" in lower case letters. This proposal received the formal concurrence of the COP (Resolution 2.6).

- Preferably restricted to species or populations which are not listed in Appendix II to avoid overlap with AGREEMENTS under Article IV.3[7].

- Particularly suitable for species or populations which cannot be listed in Appendix II because they do not fulfil the criteria in Article IV.1 or come within the definition in Article I.1.a.

- May have a territorial scope narrower than the range of the species concerned and be closed to certain Range States and international marine areas.

- No substantive rules laid down by the Convention, but the Article V guidelines have been applied to certain agreements[8] and should be applied to future agreements where appropriate to promote consistency.

- No procedural rules laid down by the Convention. Two Resolutions of the COP contain recommendations in favour of removing most procedural differences between AGREEMENTS and agreements: Resolution 2.7 of 1988 (common rules for "efficient administrative arrangements") and COP Resolution 3.5 of 1991 (extends certain procedural rules for AGREEMENTS to agreements).

- No institutional links between the Convention and bodies established under these agreements. Such bodies may not be represented as of right at meetings of the COP, which has no express power to review progress made under agreements. The CMS Scientific Council has no express power to advise bodies set up under agreements[9].

- Institutional provisions of future agreements should preferably be harmonized with those applicable to AGREEMENTS, corresponding to the requirements of the Convention and recommendations contained in resolutions of the COP[10].

3.2 Memoranda of Understanding adopted under Article IV.

It is clear from the Convention that the conclusion and application of species-specific regional Agreements are essential for its implementation. However, progress in concluding legally binding instruments was initially very slow[11]. Certain Parties expressed concern about the complex

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7 The COP has stressed the desirability of concluding AGREEMENTS in cases where the conservation status of specific migratory species would benefit therefrom (Preamble, Resolution 2.6 of 1988), and more specifically "whenever such AGREEMENTS are needed because of the nature of the obligations to be undertaken by the Parties" (Para.1, same Resolution). Although not mandatory under the Convention, it would therefore seem advisable, and consistent with the spirit of the Convention, that Agreements relating to species or populations listed in Appendix II should be AGREEMENTS unless there are specific reasons against this.

8 ASCOBANS, the Seals Agreement.

9 cf. above 3.1.1, last indent, and footnote 5.

10 MOPs should, for example, be required to submit reports to the COP (as is the case under AEWA and ACCOBAMS).

11 The first Agreement, the 1990 Wadden Sea Seals Agreement, was concluded more than seven years after the Convention's entry into force.; for the AEWA it took more than 14 years from the respective recommendation of the

arrangements required for AGREEMENTS and support grew for developing a simplified formula in order to facilitate implementation of Agreements by as many Range States as possible[12].

The Conference of the Parties, recognizing the importance of implementing "the full scope of conservation measures envisaged by the Convention"[13], sought to open up the range of instruments that could be developed for this purpose. Resolution 2.6 suggests mechanisms that may be used to implement Art.IV.4 within the spirit of the Convention. Such instruments may, whenever appropriate and feasible, "take the shape of, for example, resolutions adopted by the Conference of the Parties on proposals submitted by the Party Range States, administrative agreements or memoranda of understanding"[14].

The instruments mentioned in this non-exhaustive list are clearly different in kind from conventional treaties elaborated through diplomatic negotiations. Resolutions of the Conference of the Parties are not legally binding although they have strong persuasive value[15]. Administrative agreements, as their name suggests, are not conditional on the exercise of political power and are generally concerned with operational matters. In the context of this list, memoranda of understanding should also be understood as being intended to have a non-binding character[16]. Such instruments have been collectively classified as "less formal"[17] or even as "informal"[18].

In international law, however, it is not the designation of an instrument but rather its content and the intention of its signatories that determine whether it is considered to be legally binding. With regard to the two existing MOU[19], different views have been put forward as to their legal character. One view holds that these MOU create obligations, are therefore as legally binding as any other international agreement and must be ratified[20]. Another considers that MOU are intended to be agreements at

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Scientific Council (1985) through its conclusion (1995), opening for signature (1996) until its entry into force (1 Nov. 1999). However, such long procedures are immanent for international negotiations and procedural requirements of multilateral treaties (cf. already Simon Lyster, International Wildlife Law, 1985, p.290).

12 e.g. Proceedings of the second meeting of the COP (Geneva, 11-14 October 1988), UNEP/CMS. Conf.2.16, pp.8-13. France, for example, emphasized that regional Agreements should be flexible in form and should not require ratification, otherwise it would be confronted with procedural problems.

13 Preamble to Resolution 2.6.

14 Both instruments in this category concluded to date have been Memoranda of Understanding: the 1993 MOU concerning Conservation Measures for the Siberian Crane and the 1994 MOU concerning Conservation Measures for the Slender-billed Curlew, *Numenius tenuirostris*.

15 Interestingly, as such resolutions are not signed by the Parties, there would no proof as evidenced by signature that the Parties concerned wish to commit themselves.

16 This view is supported by Resolution 4.4 (Adoption in principle of the *Strategy for the Future Development of the Convention*) which provides that Agreements "should continue to be developed as legally binding instruments. Recommendations and memoranda of understanding should be used where necessary to conserve species through non-binding instruments linked to the Convention" (Priority 15).

17 This terminology is regularly used by the UNEP/CMS Secretariat in official publications.

18 Birnie, P.W. and Boyle, A.E., *International Law and the Environment*, OUP 1992, p.472.

19 The new MOU concerning Conservation Measures for the Sea Turtles of the Atlantic Coast of Africa (Abijan, 29 May 1999) has not been incorporated in these Guidelines.

20 Letter from the European Commission to the UNEP/CMS Secretariat dated 1.12.1997. It should be noted that different States or REIOs operate different rules with regard to ratification of instruments developed under the Convention. The procedure is particularly restrictive within the European Union, as the Commission has no power to conclude an instrument which amounts to an agreement binding under international law, even if the obligations

implementation level that may be signed by any level of Government, possibly without formal Government authorization, and may be terminated by any signatory without legal consequences[21].

It is true that the existing MOU contain some substantive provisions phrased in mandatory language as well as procedural provisions reminiscent of treaties (an area of confusion which should preferably be avoided in future MOU in accordance with these Guidelines[22]). As both MOU cover species listed in Appendix I of the Convention, however, Party Range States were already bound by the Convention's strict obligations to conserve those species and their habitats (Article III.3-5 in connexion with Appendix I). The MOU are designed not to formulate new commitments but to provide a mechanism for coordinating more detailed and country-specific actions. Consistently with this practical objective, the MOU have also been signed by non-governmental and intergovernmental "co-operating organisations" which respectively commit themselves to carry out defined actions.

The COP's proceedings and resolutions to date[23] have repeatedly emphasized the need for a range of instruments under the Convention which cater for different conservation needs and regional circumstances. As mentioned above, the very concept of memoranda of understanding developed in reaction to the delays and complexities involved in negotiating legally binding Agreements. MOU were intended from the start to provide an alternative approach where appropriate, which could offer greater simplicity and speed and would avoid the need for protracted ratification procedures[24].

In order to facilitate the effective use of MOU in accordance with the Convention, it is essential that the purpose and character of such instruments should be clearly understood and that future MOU be harmonised with these Guidelines. The following list therefore summarises the main characteristics of Memoranda of Understanding:

- MOU constitute official undertakings signed by competent government representatives which should be considered as morally and politically binding by the signatory Range State. They are not legally binding but should be regarded as measures specifying existing legal commitments deriving from Article III.3-5 of the Convention.

- The MOU concluded to date are intended to initiate and co-ordinate short-term administrative and scientific measures to be taken by Range States in collaboration with specialised international NGOs[25].

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thereunder can be fully implemented by the Commission and executed within the limits of an existing budgetary line. The EC has not yet ratified or signed any Agreement developed under CMS. At the other extreme, the Swiss federal law ratifying the Convention provides that *any* Agreement concluded under the Convention and signed by Switzerland will enter into domestic law automatically without the need for ratification (emphasis added).

[21] Letter from the Landbouw, Natuurbeheer en Visserij Ministry, The Netherlands to the UNEP/CMS Secretariat dated 16.9.1997.

[22] See Part III below.

[23] Resolution 5.2 (Geneva, 1997) recognizes that treaty practice is subject to some variance between Parties and that some flexibility is desirable. The range and type of possible Agreements, the best and most achievable means of conservation and management under the framework of CMS, and other circumstances may not render a single form of Agreement optimal for all cases.

[24] To hold memoranda of understanding to be legally binding would defeat the COP's logic in supporting this separate open-ended category of instruments.

[25] The 1993 Memorandum of Understanding on the Siberian crane was originally drafted as a binding Agreement but consensus was reached that "a less formal Memorandum of Understanding among the Range States …would be a

- Although desirable, it is not mandatory for a MOU to cover the whole range of the migratory species concerned in accordance with Article V.2 of the Convention or to be open to accession by all Range States[26].
- The procedural rules listed by Resolutions 2.7 and 3.5 are also applicable to MOU.

- MOU have a simpler structure than Agreements in the form of treaties which is summarised in Part III of these Guidelines.

more practical way of promoting short term actions" (reported in CMS Bulletin 4, p.5, 21 July 1993).

[26] Resolutions 2.6, paragraph 3, and 3.5, paragraph 3. Article IV.4, as interpreted by these Resolutions, is highly flexible as to the migration behaviour and size of the species or populations which may be covered by Agreements concluded thereunder.

4. Relationship between Memoranda of Understanding and legally binding Agreements

In accordance with Resolution 2.6 (Geneva, 1988), a memorandum of understanding may be developed in any case where this is an appropriate tool to implement the Convention in respect of certain species or geographically limited parts thereof. (*e.g.* Appendix I species which urgently need concerted and cooperative conservation measures by Range States in addition to the national protection measures undertaken by the Party Range States to the Convention).

Resolution 2.6 also envisages other ways in which MOU may contribute *inter alia* to the effective implementation of Agreements. Paragraph 2 provides that instruments developed under Article IV.4 may be established as a first step towards the conclusion of an AGREEMENT[27]. Whilst it seems unlikely that Parties to a binding IV.4 agreement would go through the time-consuming process of amendment and ratification to convert it into an AGREEMENT, this two-step procedure could be particularly appropriate where the first instrument is an informal agreement such as a MOU.

MOU provide the simplest solution as they can be adopted rapidly under the auspices of the MOP to the relevant Agreement. The conclusion of a MOU between the relevant Ministries of the Range States concerned avoids the need for lengthy ratification procedures and enables immediate protection measures to be adopted for seriously endangered species and/or populations until a more elaborate conservation strategy can be prepared and adopted. In addition, a MOU allows for the participation of Range States which are not party to the Agreement concerned. Therefore, it could be used, *inter alia*, to cover the whole range of a species or population where this is split between two neighbouring Agreements.

At present MOU under the Convention have been developed and concluded for single (Siberian Crane, Slender-billed Curlew) or groups of species (Sea Turtles of the African Atlantic Coast) which are listed on Appendix I of CMS which urgently need internationally co-ordinated and concerted action for their survival. Such MOU can at a later stage be incorporated in larger Article IV.3 or IV.4 Agreements as international single-species action or conservation plans.

E.g. in respect of AEWA the two existing MOU for Siberian Cranes and Slender-billed Curlew will be converted into single-species conservation plans (SSCPs) under the binding Action Plan annexed to AEWA. This, however, can only take place if all countries which are signatories to these MOU are Parties to AEWA.

MOU could also serve as a first step towards the development and conclusion of a full-fledged Agreement where it is clear that an Agreement is, for political, scientific or other reasons, impossible to reach and where only certain preliminary international measures for the species' conservation may be agreeable, e.g. coordinated research and monitoring, exchange of data etc.

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[27] Although this may not necessarily be appropriate in all cases (Resolution 3.5).

II. GUIDELINES FOR LEGALLY BINDING AGREEMENTS[28]

The following Guidelines should be used for all legally binding Agreements concluded in accordance with Article IV.3 or IV.4. Whilst the legal basis and scope of these Agreements differ because of the distinctions made between them by the Convention and subsequent Resolutions of the Conference of the Parties, they have the same binding character in international law. The legal basis on which each future Agreement is concluded should be stated in the Agreement concerned (see section 2.d below).

The order suggested below follows that used in most international conservation treaties, including the parent Convention. It is a logical arrangement which is used by most of the existing formal Agreements, subject to certain variations which are indicated where relevant.

1. PREAMBLE

The elements of the Preamble to each new Agreement should be standardised as far as possible to ensure consistency with the Convention, existing Agreements and, as appropriate, other conservation treaties. It is recommended that the Preambles to AEWA and to ACCOBAMS be used as the general model for the formulation of Preambles to future Agreements.

The main purpose of the Preamble is to set out the basic motives for the conclusion of the Agreement and to refer to the Convention and other relevant treaties to emphasize areas of substantive complementarity. In order to avoid repetition or unnecessary detail, there is no need to define the legal character of the Agreement (*i.e.* whether it is concluded under Article IV.3 or IV.4) as this must be stated in the text of each new Agreement. It is also unnecessary to mention technical matters such as the conservation status of the species concerned, particularly if different categories of threat apply to the various species concerned, their coverage under other treaties or fundamental principles such as the precautionary principle which should be incorporated into the text of the Agreement.

The Parties

RECALLING that the Convention on the Conservation of Migratory Species of Wild Animals, 1979, encourages international co-operative action to conserve migratory species;

[.] [Relevant background to conclusion of this Agreement, such as specific Resolutions of the Conference of the Parties];

[.] [Elements stating the ecological importance of the species covered[29]; that their conservation is a matter of common concern; the need to integrate conservation actions with other activities of socio-economic importance; the types of threat which face the species concerned; and the consequent need for the relevant States to implement specific conservation measures in respect of the species in question];

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[28] AGREEMENTS (IV.3) and agreements (IV.4).

[29] ASCOBANS, ACCOBAMS and the Seals Agreement affirm that the species they cover are and must remain an integral part of the marine ecosystems concerned.

[.] [Elements relating to the need for international cooperation between all actors (States, regional economic integration organizations, intergovernmental organizations and the non-governmental sector)[30]; for cooperation in research; and (where appropriate) acknowledgement that effective implementation of the Agreement will require provision of assistance, in a spirit of solidarity, to certain Range States for research, training and establishment or improvement of scientific and administrative institutions];

[.] [RECOGNIZING the importance of other global and regional instruments of relevance to the conservation of the species concerned (give list, including dates and relevant Protocols)[31] and initiatives of (list the appropriate intergovernmental bodies).

Have agreed as follows:

2. SCOPE, DEFINITIONS AND INTERPRETATION

These introductory provisions focus the substantive obligations at the heart of each Agreement. The suggested title and order, which is used in AEWA and ACCOBAMS, encompasses the geographic scope of the Agreement, the species covered and any necessary definitions and defines the legal character of the Agreement and any annexes thereto.

(a) *The geographic scope of the Agreement is..., hereinafter referred to as the "Agreement Area".*

All Agreements concluded to date are of restricted geographic coverage, which may be defined in one of two ways:

- by reference to the **area** to which the Agreement applies. This may be constituted by specific regions or seas[32] or be delimited by means of geographical coordinates;

- by reference to the **range of the species/populations** covered by the Agreement[33]. This is probably the most satisfactory solution in respect of

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30 eg. *CONVINCED that these species would significantly benefit from the international cooperation that could be achieved by an agreement for their conservation and management.*

31 These should include the CBD, as every Agreement may be viewed as an instrument for the implementation of that Convention in its particular field, and, as appropriate, relevant regional conventions, e.g. the Bern Convention (mentioned in ASCOBANS and ACCOBAMS but not the Bats AGREEMENT), the Ramsar Convention (mentioned in AEWA), regional seas instruments (ACCOBAMS) and relevant non-binding instruments (eg. ASCOBANS refers to the World Conservation Strategy).

32 As in the Seals Agreement, ASCOBANS and ACCOBAMS.

33 This is the approach used in the Bats AGREEMENT. The formulation of this AGREEMENT is open to confusion because its title, *AGREEMENT on the Conservation of Bats in Europe*, wrongly implies that the geographic scope of Europe is its Agreement Area; Article I(f) defines "in Europe" as meaning "the continent of Europe" which is fairly unclear and the definition of the Agreement Area is almost hidden in the identification of the range of species in Article I(b). The AGREEMENT actually covers the whole range of European populations of Rhinolophidae and Vespertilionidae, even outside Europe. Its Agreement Area therefore encompasses all non-European States liable to be visited by European bats during their migration. The advantage of this approach is that if bats originating in Europe are found to winter in a non-European State in which they were not known to exist, the AGREEMENT will

terrestrial species, although it can also be applied to other species, because if the range of the species is larger than originally thought or is naturally expanding, it would automatically be covered by the Agreement. However, if the distribution and migration range of the respective species are not well known, it will be impossible to define the Agreement Area with sufficient precision.

In complex cases, it may be necessary to use geographical coordinates to delimit the extent of the range[34].

(b) *The Agreement applies to all* [names of species or populations, if necessary by reference to a list annexed to the Agreement].

Every Agreement should be as precise as possible when it comes to identifying the species covered, so as to clarify the scope of the Parties' obligations[35]. This may present difficulties if many species or populations are involved, as it is neither possible nor desirable to list them exhaustively in the Agreement itself. In addition, scientific knowledge about certain species may not be sufficiently advanced to state whether or not they are migratory as defined by the Convention.

As a general rule, every Agreement should specify that it applies only to the species concerned when they are present in the Agreement Area[36].

Broadly speaking, there are two approaches open to negotiators:

- to define the species in the text of the Agreement by an exhaustive list of the taxa to which the Agreement applies[37]. This is appropriate where the species covered are not too numerous and their status (migratory or non-migratory) is known; or

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automatically be open to accession by that State. In order to solve the unclear situation, the MOP2 (Bonn, 1998) has interpreted the geographical scope of the Agreement in its Resolution 5.

[34] The AEWA Agreement Area covers "the area of the migration systems of African-Eurasian waterbirds, as defined by Annex 1 to this Agreement" (which defines geographic coordinates). All migratory waterbirds listed in Annex 2, whose range lies entirely or partly within the Agreement Area are covered, wherever they breed.

[35] Because taxonomic changes are frequent and result in changes in the names of species or the species composition of genera, families or higher taxa, it is essential to be precise about the species which are actually covered by an Agreement, so that the original intent of any listing be retained. In order to dispel any doubts that could otherwise arise in the future on the taxonomic status of species listed in an Agreement, mention should be made of the standard references or nomenclature used as a basis for such listing. Also, the Agreement should include a provision for the inclusion of new species by the MOP in order to avoid that such inclusion requires a new ratification act of the Parties (the case of the Bats Agreement refers)

[36] In exceptional cases, for bio-geographic or political reasons, the Agreement may be open to Range States which do not have territory under their jurisdiction within in the Agreement Area. A precedent for this is found at Article XIII.1 of AEWA (Signature, Ratification, Acceptance, Approval or Accession), which provides that the Agreement shall be open for signature by any Range State, *whether or not areas under its jurisdiction lie within the Agreement Area*.

[37] ASCOBANS defines "small cetaceans" as any species, subspecies or population of toothed whales Odontoceti, except the sperm whale Physeter macrocephalus": this covers species found only rarely within the Agreement Area.

- to define species covered by the Agreement by cross-referring to a list of species annexed to the Agreement[38], where the number of species concerned is very high or there is uncertainty about their migratory status. Such a list may be easily amended by means of a simplified amendment procedure applicable to annexes, provided that this is permitted under the Agreement.

(c) *For the purposes of this Agreement:*

As mentioned in the Introduction, it is important to harmonise certain definitions in future Agreements to promote consistency with the parent Convention, existing Agreements and relevant treaties and to facilitate the implementation of future Agreements.

() *"Convention" means the Convention on the Conservation of Migratory Species of Wild Animals, signed at Bonn on 23 June 1979;*

() *"Convention Secretariat" means the body established under Article IX of the Convention[39];*

() *"Party" means a Range State or a regional economic integration organisation for which this Agreement is in force[40];*

() *"Parties present and voting" means the Parties present and casting an affirmative or negative vote: those abstaining from voting shall not be counted among the Parties present and voting[41];*

() *"Range State" means any State[42] that exercises jurisdiction[43] in the Agreement Area over any part of the range of any one of the species to which this Agreement applies. [*With regard to marine species: *Range State also means any State, flag vessels of which are engaged, whether deliberately or incidentally to other activities, outside national jurisdictional limits in taking any one of such species within the Agreement*

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[38] Article I.2.(c) of AEWA provides one model: "Waterbirds" means those species of birds that are ecologically dependent on wetlands for at least part of their annual cycle, have a range which lies entirely or partly within the Agreement Area and are listed in Annex 2 to this Agreement".

[39] Depending on the Agreement concerned, it may be necessary to define other institutions created by the Convention, such as the COP or the CMS Scientific Council.

[40] This is a shortened form of the definition at Article I.1.k) of the Convention and is used in ASCOBANS and Article I.3.i) of ACCOBAMS. It is preferred, for reasons of clarity and consistency with the Convention, to the formulation used in the Bats AGREEMENT and AEWA: ""Parties" means, unless the context otherwise indicates, Parties to this Agreement" (Article I.2.f)). If "Party" is used in any other context in an Agreement, it should be appropriately qualified (eg "Parties to the Convention").

[41] Taken from Article I.2.g) of AEWA.

[42] ASCOBANS, ACCOBAMS and the Bats AGREEMENT exclude REIOs from the definition of "Range States" and separately define these organisations. cf Article 1.1.h)) of the Convention, incorporated into AEWA, which provides for their inclusion in the definition of "Range States" (REIOs are not separately defined in the Convention).

[43] Also based on Article I.1.h) of the Convention. Article I.3.g) of ACCOBAMS, which deals exclusively with marine species, uses the formulation, "sovereignty and/or jurisdiction", possibly echoing the use of the terms "sovereign rights" and "jurisdiction" in Article 56 of the United Nations Law of the Sea Convention, 1982.

Area];

() *"Regional economic integration organisation"*[44] *means an organisation constituted by sovereign States, at least one of which is a Range State*[45]*, which has competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Agreement*[46]*;*

() *"Agreement Secretariat" means the body established under Article --, paragraph --, of this Agreement*[47]*;*

Negotiators must obviously ensure that future Agreements define or cross-refer to definitions for all terms which they employ. Where appropriate, terms may be defined by cross-reference to the corresponding definitions in Article I of the parent Convention: this approach is used in the Seals Agreement, AEWA and ACCOBAMS.

() *In addition, the terms defined in Article I, subparagraphs 1 [(a) to (i)*[48]*] of the Convention shall have the same meaning, mutatis mutandis, in this Agreement.*

Where the definition supplied by the Convention is not sufficiently precise, negotiators should endeavour to ensure that any definition used in future Agreements should be consistent not only with the Convention but also with any interpretative resolutions adopted by the COP[49]. These Resolutions are obviously not legally binding on the Parties nor, *a fortiori*, on non-Parties participating in the negotiation of an Agreement.

() *The interpretation of any term or provision of this Agreement shall be made in accordance with the Convention and/or relevant Resolutions adopted by its Conference of the Parties, unless those terms or provisions are defined or interpreted differently in the Agreement or by the Meeting of the Parties. [Any matter arising under this Agreement which is not covered by a provision thereof shall be subject*

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[44] Although the Convention includes REIOs in the definitions of "Party" at Article I.1.k) and "Range State" (Article I.1.h)), it is recommended that REIOs be separately defined as is done in the Bats AGREEMENT, ASCOBANS, ACCOBAMS and recent treaties such as the Framework Convention on Climate Change, New York 1992.

[45] It is recommended that such a clause, which forms part of the provision on Accessions in AEWA and ACCOBAMS, be included in the actual definition of REIO in future Agreements. The corresponding clause in the Bats AGREEMENT, " constituted of sovereign States to which this AGREEMENT applies", is not sufficiently clear. It could be interpreted to mean that all Member States of the organisation must be Range States or Parties to the AGREEMENT before that organisation may accede to it.

[46] This is the formulation used in Article I.1.k) of the Convention, ASCOBANS and ACCOBAMS.

[47] Similar definitions should be given *mutatis mutandis* for other institutions created under the Agreement, notably the Meeting of the Parties, the Scientific [Technical] Committee etc.;

[48] It will obviously vary from one Agreement to another which definitions should be incorporated. In particular, depending on the species covered by the Agreement, concerned, it may be preferable to give a separate definition of "range" and "habitat".

[49] Such as *Guidelines for the application of certain terms of the Convention* (Resolution 2.2, 1988), particularly "cyclically and predictably" and "endangered".

mutatis mutandis to the relevant provision of the Convention.] [50]

(d) *This Agreement is an AGREEMENT [agreement] within the meaning of Article IV, paragraph 3 [4], of the Convention*[51].

This provision is essential as each Agreement is of course an instrument for the implementation of the Convention and has its legal basis in the provision cited.

(e) *The annexes] to this Agreement form[s] an integral part thereof. Any reference to the Agreement includes a references to its annexes]*[52].

3. FUNDAMENTAL PRINCIPLES

Fundamental principles and substantive obligations may be set out in a single Article (ACCOBAMS) or in separate Articles (AEWA). There is no legal difference between these alternatives but the second option has the advantage of greater clarity. It is the Article or paragraph dealing with conservation measures which should make provision for the adoption of some form of conservation plan (where this is envisaged under the future Agreement).

(a) *Parties shall take co-ordinated measures to maintain [species names] in a favourable conservation status or to restore them to such a status*[53]*. To this end, they shall apply, within the limits of their jurisdiction and in accordance with their international obligations, the [measures prescribed in Article III] [together with the specific actions determined in the [Action/Conservation] Plan contained in Annex - to this Agreement]*[54].

(b) *In implementing the measures prescribed above, the Parties shall apply the*

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[50] A paragraph of this kind would strengthen the linkage between the Convention and the Agreements and it would further the harmonisation of Agreements which can reached only to a limited extent by these Guidelines. However, the second sentence (in square brackets) would need deeper discussion as it might jeopardize in limited cases the contents of the Agreement as concluded by its Range States.

[51] The placing of this provision varies widely between existing Agreements. It comes before the definitions in the Seals Agreement; immediately after the definitions in Articles I of AEWA and ACCOBAMS (the preferred placing); in Article 2, after the definitions, in the Bats AGREEMENT; and almost at the end, at the beginning of the final clauses, in ASCOBANS.

[52] The effect of this important provision is that species lists and Action Plans annexed to an Agreement are legally binding in their own right.

[53] This objective is mandatory for AGREEMENTS under Article V.1 (eg. Article II.1, AEWA). The object of Article IV.4 agreements may be freely decided but in keeping with the spirit of the Convention, they should have the same object (eg. Article II.1, ACCOBAMS): indeed, this is essential where such agreements cover species listed in Appendix II. It may be appropriate to vary or amplify the defined objective in accordance with the conservation status of the species concerned: where this is unfavourable, Parties could commit themselves to attack the causes of this situation or, where unknown, to attempt to determine the conservation status of the species and, in the interim, to refrain from actions which might adversely affect the species.

[54] This is broadly the formulation used in Article II of AEWA. In contrast, Article II.1 of ACCOBAMS lists strict prohibitions with which Parties must comply immediately after the purpose of the Agreement and then deals with conservation and management measures prescribed by the annexed Conservation Plan (Article II.3).

precautionary principle.

It is recommended that negotiators give consideration to incorporating the precautionary principle into the operational part of future Agreements, as has been done in the AEWA and in ACCOBAMS. This will echo one of the pre-dominant objectives of the convention (cf. Article II.2) Failing this, the principle should at the very least be included in the Preambles to future Agreements.

4. SUBSTANTIVE OBLIGATIONS

4.1 Conservation Measures and Action/Conservation Plan

These obligations form the heart of each Agreement. Provision for the adoption of an Action/Conservation Plan may usually be made in the Article dealing with conservation measures, although in the very comprehensive AEWA, separate articles deal with General Conservation Measures, the Action Plan and Conservation Guidelines. Essentially, a choice must be made between two approaches:

- including a detailed list of such obligations. This is most appropriate for an Agreement where the MOP has consultative status only and needs an adequate legal basis to make recommendations[55]; or

- outlining substantive obligations in the text and cross-referring to an action/conservation plan annexed to the Agreement[56]. This approach should generally be considered preferable. The objectives and content of such a plan should be clearly stated at this part of the Agreement with procedural matters (adoption, monitoring and amendment of plans) being covered in the institutional and final clauses.

The following points should be noted about Action/Conservation Plans:

- There is no harmonised terminology for such Plans. The Convention refers to "co-ordinated conservation and management plans" (Article V.5.b)) and ASCOBANS and the Seals Agreement provide for the adoption of Conservation and Management Plans. An Action Plan is annexed to AEWA, a Conservation Plan to ACCOBAMS.

- It is beyond the scope of these Guidelines definitively to recommend one term in view of difficulties over the use of the terms "conservation" and "management" (see Introduction) and the absence of any standard term in other international instruments. An advantage of the term "Action Plan" is that it conveys the need for practical conservation initiatives in contrast to the longer-term policy/legislative measures taken under the relevant Agreement.

- Action/Conservation Plans should be flexible instruments which can be regularly

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[55] Exceptionally, the Bats AGREEMENT does not confer this power on its MOP.

[56] This is the system used in AEWA and ACCOBAMS.

updated and strengthened to clarify the actions which Range States should take to implement the Agreement concerned.

- For this purpose, it is recommended that Plans adopted under future Agreements should be made legally binding[57]. They may either be incorporated into the main body of an Agreement or, preferably, placed in an annex[58] in order to emphasize their special character and make them legally distinguishable from provisions of the Agreement which are subject to the ordinary amendment procedure.

- The MOP must be given express powers to adopt legally binding annexes to the Agreement and to keep them under review.

- Such annexes should be subject to a simplified amendment procedure, but Parties must have the right to enter reservations to amendments made to annexes so that they cannot be bound against their will[59] (see II.8.1 (Amendment of the Agreement) below).

Moving from form to content, a non-exhaustive list of substantive issues that should be addressed in the Agreement or Action/Conservation Plan includes:

(a) Species conservation measures, including measures related to taking and national trade

"Sustainable use" is a fundamental principle of international conservation law since the conclusion of the CBD in 1992[60]. The concept is already implicit in the definition of "conservation status" in the Convention: a favourable conservation status is only possible if species are used sustainably and conversely, species used in an unsustainable manner will become endangered in the short or longer term.

It is therefore recommended that measures and criteria to ensure the "sustainable use" of species covered by the Agreement should be included in all future Agreements, unless the Agreement prohibits any taking or other utilisation of such species.

AGREEMENTS on cetaceans "should" at a minimum prohibit any taking of a migratory species of the Order Cetacea that is not permitted under any other multilateral agreement[61]. It

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[57] Non-binding Plans should preferably be used only to provide a long-term framework and basic guidelines for implementing the Agreement.

[58] The proposed paragraph (see above Section II.2.e)) in these Guidelines ensures that annexes to an Agreement are legally binding because they are an integral part of the Agreement.

[59] eg. Articles III.8.d and X.4 of ACCOBAMS and Articles VI.9.c and X.4.5 of AEWA. The same system is used in a large number of environmental protection treaties. In contrast, the ASCOBANS Conservation and Management Plan can only be amended by the ordinary amendment procedure and it is not possible to enter reservations to provisions of the annex or amendments thereto.

[60] See Article 10 of CBD.

[61] Article V.4.f), parent Convention: this was designed to prevent the conclusion of AGREEMENTS which authorised taking in breach of the International Convention for the Regulation of Whaling, but other multilateral treaties prohibiting the taking of cetaceans have been concluded since that date (eg.the Bern Convention with

is recommended that a similar requirement should be applied to Article IV.4 agreements. The simplest route would be to incorporate the prohibitions laid down by other multilateral treaties in respect of the same species. Careful reflection should be made as to whether or not the MOP should be entrusted to modify these prohibitions in order to harmonise the provisions of the Agreement with (potentially) conflicting decisions of other relevant conventions. International trade matters should, as a rule, be left to CITES. Exceptions may be necessary in particular cases if a species is threatened by international trade and is not covered or likely to be covered by the provisions of CITES.

Where appropriate, the relevant elements of previous Agreements or MOU may be incorporated into this part of the Agreement or Action/Conservation Plan[62].

(b) Habitat protection, management, rehabilitation and restoration[63]

(c) Identification of processes and categories of activities, including pollution, which contribute to the unfavourable conservation status of any species to which the Agreement applies; monitoring of their effects by appropriate techniques; regulation or management of such processes and categories of activities[64].

(d) The introduction of non-indigenous species

(e) Research and monitoring

(f) Education and public information

(g) Implementation including monitoring, follow-up and evaluation of implementation measures and enforcement

5. IMPLEMENTATION AND REPORTING

The Convention does not refer to national authorities or reporting and the placing of such provisions in existing Agreements is variable. These Guidelines adopt the placing used in AEWA, whereby implementation and reporting requirements follow on logically from the conservation obligations accepted by each Party[65].

This Article should therefore contain two elements:

(a) The designation of competent national authorities for the implementation of the Agreement and a contact point for other Parties and the Agreement Secretariat.

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regard to Europe).

62 See Part I.4 above.

63 The heading used in Articles III.2.c and IV.1.b of AEWA.

64 Modelled on Articles 7(c) and 8(l) of the CBD.

65 Financing is also placed in Article V of AEWA, but these Guidelines propose that financial arrangements be dealt with under institutional mechanisms.

(b) Provision on the content and procedure for the submission of reports for each ordinary session of the MOP[66].

6. INSTITUTIONAL AND FINANCIAL MECHANISMS[67]

6.1 Meeting of the Parties[68]

While circumstances obviously vary from one Agreement to another, many provisions could be harmonised to simplify the negotiating process.

(a) The Meeting of the Parties shall be the decision-making body of this Agreement[69].

(b) Procedure for convening the first and subsequent ordinary sessions of the Meeting of the Parties [in consultation with the Convention Secretariat where the Secretariat functions for the Agreement are not provided by that Secretariat].

(c) On the written request of at least two thirds[70] of the Parties, the Agreement Secretariat shall convene an extraordinary session of the Meeting of the Parties.

(d) Admission of observers to Meetings of the Parties[71]. The Convention creates two categories of observers at meetings of the COP (observers as of right[72] and observers which may be admitted unless at least one-third of the Parties present object)[73] but existing Agreements vary considerably on this point.

It is important to harmonise the observer clauses in new Agreements to prevent the unequal treatment of observers, particularly those representing non-governmental organisations whose presence is necessary for open debate and democracy. The Convention's criteria should

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66 All Agreements other than the Seals Agreement require such reports.

67 Each institution established under the Agreement should be covered by a separate article. The Article establishing the MOP should always come first. The Article establishing the Secretariat should normally come last but this is not a rigid rule: in ACCOBAMS, the Article on the Secretariat precedes those dealing with the Co-ordination Units, the Bureau and the Scientific Committee.

68 Existing Agreements use the term "Meeting of the Parties" for the mechanism established to facilitate the implementation of the Agreement and monitor its effectiveness, in order to avoid confusion with the COP to the Convention. It is strongly recommended that this term should be used in all future Agreements.

69 Formula used in Article VI, AEWA and Article III, ACCOBAMS.

70 Article VII.3 of the Convention, Article VI.3, AEWA cf Article III.3, ACCOBAMS which requires a written request from at least two thirds of the Parties.

71 The observer clauses come at the end of this Article in the Convention but recent Agreements (AEWA, ACCOBAMS) place them above the provisions on the right to vote and the powers of the MOP.

72 The United Nations, its Specialized Agencies, the International Atomic Energy Agency, any State not Party to the Convention and the bodies designated by the Parties to AGREEMENTS. There is no reference to bodies designated under other agreements under the Convention or to secretariats of other treaties dealing with the conservation of wild fauna and natural habitats (Art.VII.8).

73 "Organisations which are technically qualified in protection, conservation and management of migratory species" (Article VII.9).

preferably be broadened to include among observers as of right bodies designated by the Parties to other Agreements and to other international conventions dealing with nature conservation as well as certain qualified international organisations outside the United Nations family.

(1) The United Nations, its Specialized Agencies, the International Atomic Energy Agency[74]; any State not a Party to the Agreement; the Secretariat of the Convention; for each Agreement concluded under the Convention, the body designated by the Parties to that Agreement; the body designated by the Parties to other Conventions or agreements concerned inter alia with [the conservation of wild flora and fauna and natural habitats][75]; and ~~[~~IUCN-the World Conservation Union[76]~~]~~ may be represented by observers in sessions of the Meeting of the Parties[77].

(2) Any other agency or body technically qualified in the [protection, conservation and management of migratory species] may also be represented at sessions of the Meeting of the Parties by observers, unless at least one-third of the Parties present object[78].

Procedures for admitting these observers should be determined by rules of procedure rather than the Agreement itself[79].

The admission of observers to meetings of the subsidiary bodies established under Agreements is not covered by the Convention or any existing Agreements[80], and practice varies too widely for standardised rules to be useful in this respect. This matter should be decided by the Parties to the Agreement concerned under the rules of procedure of its MOP or of the relevant subsidiary body.

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[74] It is understood that this Agency is now considered to be a Specialized Agency of the UN, in which case no specific reference will be necessary in future Agreements.

[75] The list is open, so that bodies designated by the Parties to treaties concluded at a later date may be represented without further formalities. It may be appropriate to refer expressly to sectoral bodies (ACCOBAMS refers to fisheries management organisations with competence over activities in the Agreement Area).

[76] The organisations will vary depending on the nature of the Agreement and might include, for example, semi-official NGOs such as Wetlands International.

[77] This model (except for the reference to IUCN) is based on AEWA and ACCOBAMS. The Bats AGREEMENT does not mention the United Nations and its specialized agencies and excludes non-Range States. ASCOBANS does not name the United Nations or its Specialized Agencies as observers as of right and only lists secretariats to treaties applicable in the Agreement area: on the other hand, the International Council for the Exploration of the Sea and IUCN are both named as observers as of right.

[78] The requirement in Article VII.9 of the Convention for national non-governmental agencies or bodies to be approved for this purpose by the State in which they are located has been excluded as this does not feature in any existing Agreement.

[79] Under the Bats AGREEMENT, AEWA and ACCOBAMS, the decision is taken by the Parties present at the session of the MOP and no time limit applies to the presentation of requests for admission cf. ASCOBANS which requires putative observers to file a request for admission at least 90 days before the session for communication to Parties at least 60 days in advance thereof. Objections to their admission must be made at least 30 days before the session.

[80] Except for Article VI.1, ACCOBAMS: the Chairperson of the Scientific Committee may be invited to participate as an observer in the meetings of the Bureau.

It is recommended that the rules of procedure of existing and future Agreements should be harmonised as far as possible.

(e) The right to vote of Parties, including regional economic integration organisations, should be harmonized between Agreements. These guidelines propose a slight modification of the formulation used in the Convention (Article I.2, Interpretation) to ensure legal clarity[81].

Only Parties have the right to vote. Each Party shall have one vote. Regional economic integration organisations which are Parties to this Agreement shall, in matters within their competence, exercise their right to vote with a number of votes equal to the number of their Member States which are Parties to this Agreement. A regional economic integration organisation shall not exercise its right to vote if its Member States exercise theirs, and vice versa[82].

Decisions of the Meeting of the Parties shall be adopted by consensus or, if consensus cannot be achieved, by a two-thirds majority of the Parties present and voting[83].

(f) *At its first session, the Meeting of the Parties shall:*

This list should typically include the adoption of flexible rules of procedure, the establishment of the Agreement Secretariat, the establishment of any other subsidiary bodies and a decision as to the format and content of national reports.

(g) *At each of its ordinary sessions, the Meeting of the Parties shall:*

This list should cover the actions necessary for the effective implementation of the Agreement, such as: review of conservation status of species concerned; progress made in implementing the Agreement; adoption of the budget; consideration of matters related to the Secretariat or any other subsidiary bodies established under the Agreement; adoption of report for communication to the Parties to the Agreement and to the Conference of the Parties to the Convention[84]; and decision on the provisional time and venue of the next session.

(h) At any of its sessions, the Meeting of the Parties may:

These discretionary powers, drawn from the AEWA, should cover the making of recommendations to the Parties; the adoption of specific actions (including emergency measures, if necessary) to improve the effectiveness of the Agreement; the amendment of

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81 For a fuller discussion of this point, see Part XII, *Elements for the Formulation of Guidelines for the Harmonization of Future Agreements* (UNEP/CMS/Conf.4.9 of 20 May 1994: p.35).

82 Modelled on the Bats AGREEMENT, AEWA and ACCOBAMS.

83 AEWA, Article VI.6; Article VII.7 of the Convention requests a two-thirds majority and ASCOBANS, Article 6.3 a single majority of the Parties present and voting.

84 The COP may "receive and consider any reports presented by any standing body established pursuant to an AGREEMENT" (Art.VII.5.d) and review progress being made under AGREEMENTS (Article VII.5.e)). The Bats AGREEMENT does not require the submission of such a report cf Article VI.8, AEWA. Resolution 3.5 of 1991 confers similar powers on the COP in respect of agreements concluded under Article IV.4.

annexes, including Action/Conservation Plans in accordance with the relevant provision of the Agreement concerned; the establishment of subsidiary bodies as necessary to assist in the implementation of the Agreement[85]; and decisions on any other matter relating to the implementation of the Agreement.

6.2 [Scientific][Technical][Advisory] Committee[86]

Appropriate provisions (composition, duties, meetings etc.) will obviously vary from one Agreement to another, depending on the scope of the Agreement.

The Technical Committee established under Article VII of AEWA includes not only experts from the different regions of the Agreement Area but also representatives of the IUCN, the International Waterfowl and Wetlands Research Bureau and the International Council for Game and Wildlife Conservation as well as experts in the fields of rural economics, game management and environmental law. This Committee may *inter alia*, in the event of an emergency which requires immediate measures to avoid deterioration of the conservation status of one or more species covered by the AEWA, request the Agreement Secretariat to convene urgently a meeting of the Parties concerned in order to establish a protection mechanism rapidly.

The CMS Scientific Council may, subject to approval from the COP, provide scientific advice to any body set up under an AGREEMENT (Art.VIII.5.a)).

6.3 [Bureau][Executive Committee]

In the development of future Agreements, consideration should be given to including a provision for the establishment of a body to represent the MOP intersessionally[87]. Such provision should make it clear that a body of this kind acts only as an agent of the MOP and has no decision-making powers of its own.

A body of this kind may be unnecessary under Agreements where the number of Parties is small, as focal points of the governments of the Parties can easily communicate and decisions can be taken without a meeting. The position is quite different under Agreements which have a large number of

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[85] AEWA includes a specific provision on co-ordination: *...in particular for coordination with other bodies established under other international treaties, conventions and agreements with overlapping geographic and taxonomic coverage* (Article VI.9.(e)). ACCOBAMS provides for the designation of a co-ordination unit in each sub-region within existing institutions (Article III.7.c). For a detailed discussion of coordination mechanisms, including the necessary institutional and financial provisions to be included in Agreements, see *Elements for the Formulation of Guidelines for the Harmonization of Future Agreements* (UNEP/CMS/Conf.4.9 of 20 May 1994), part V, pp.23-5.

[86] Use of the term "Scientific Council" should be avoided to prevent confusion with the Scientific Council established under the parent Convention. The term Advisory Committee is used in the Bats Agreement and ASCOBANS, Scientific Committee in ACCOBAMS and Technical Committee in AEWA.

[87] cf. the Advisory Committees established under ASCOBANS and EUROBATS which function purely as bodies dealing with the scientific and technical matters relating to the implementation of the Agreements concerned.

Parties. Neither the Bats AGREEMENT (over 40 potential Parties) nor AEWA[88] (117 Range States) provides for such a body, which means that the matter will require further discussion and decision by the MOP at a later stage.

A comprehensive precedent for the establishment of such a body may be found in Article VI of ACCOBAMS. This provision deals *inter alia* with the membership of the Bureau and sets out its general functions:

- to provide general policy guidance and operational and financial direction to the Agreement Secretariat and the Co-ordination Units for the implementation of the Agreement;

- to carry out intersessionally such interim activities as may be assigned to it by the MOP; and

- to represent the Parties *vis-à-vis* the Government(s) of the host country (or countries) of the Agreement secretariat and the MOP, the Depositary and other international organizations on matters relating to the Agreement and its secretariat.

The Bureau will normally meet once per year and is required to provide a report on its activities for each session of the MOP.

6.4 Agreement Secretariat

Under COP Resolution 2.7 of 1988, Parties may agree that the administration of any Agreement may be undertaken by a Party thereto, a national or international organisation or, subject to the prior agreement of the Standing Committee of the Convention[89], the Secretariat to the Convention. In the latter case, the Agreement should expressly provide for the eventuality of such consent being withheld or subsequently revoked and empower the MOP to make alternative arrangements for an Agreement Secretariat[90].

The Agreement must confer authority on the secretariat to that Agreement to perform such tasks as may be necessary for the implementation of the Agreement or which may be entrusted to it by the Parties. Each Agreement should specify that actions of the Convention Secretariat for its implementation should be financed by the Agreement budget or other means, as it would be inequitable to finance such actions from the Convention budget unless the COP were to decide otherwise.

The body responsible for administering the Agreement must keep the Convention Secretariat fully

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[88] The respective proposal in the draft AEWA was dropped on request of one of the negotiating Range States which agreed that the convention itself does not provide for the establishment of a Convention body which replaces the authority of the COP intersessionally, and that the MOP at any time can establish such a body for its Agreement.

[89] An Agreement cannot impose obligations on a body established by another international instrument without the prior consent of the Parties to that instrument.

[90] There is a precedent for this at Article IX.3. of the Convention.

informed of the operation of the Agreement and present regular reports to the COP[91]. The body designated by the Parties to an AGREEMENT may be represented as of right by observers at meetings of the Conference of the Parties (Art.VII.8).

6.5 Financial arrangements

The financial provisions of existing Agreements are unreasonably diverse[92], although all include the principle of financial contribution[93]. Financial provisions in future Agreements should be harmonized wherever possible. This would be appropriate, for example, for provisions dealing with the contribution of a regional economic integration organisation to the budget of an Agreement, which can be done by specifying the maximum percentage of the administrative costs that such an organization shall be required to contribute[94].

Existing Agreements vary as to the amount of detail contained in their financial provisions. Some specify a particular voting system applicable to financial regulations[95], including the scale of contributions and the budget of the Agreement: this may constitute an important guarantee for contributing States. Others flexibly permit these questions to be regulated by the MOP's rules of procedure, which may be changed when circumstances so require.

In general terms, it is desirable to avoid rigid budgetary constraints in the text of Agreements and to leave the MOP free to adopt a different scale of contributions or to finance actions which are not listed in the Agreement without the need for formal amendments. Each Agreement should therefore confer a general power on its MOP to adopt and amend financial regulations.

The possibility of creating a conservation fund to finance particular conservation projects should preferably be mentioned in the Agreement (Article V.3, AEWA). The MOP would have discretion whether to establish such a fund and develop the necessary regulations for its management, but an express reference in the Agreement to such a fund should make it easier to hold discussions between the Parties on this subject after the Agreement enters into force.

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91 The Convention Secretariat must liaise with the standing bodies set up under AGREEMENTS (Article IX.4.b)) and agreements (Resolution 3.5, 1991) and provide information on AGREEMENTS if so required by the CoP (Art.IX.4.h)).

92 In both their content and placing: they are dealt with in the article on implementation and reporting in AEWA, in two separate articles of the Bats AGREEMENT and after the main institutional provisions in ACCOBAMS.

93 All Range States that are Parties to an Agreement should be prepared to contribute a share of the costs of its administration. Contributions may be paid through the Trust Fund for the Convention (Resolution 2.7, 1988).

94 Article V.2(a), AEWA and Article IX.1, ACCOBAMS both state that no REIO shall be required to contribute more than 2.5% of the administrative costs cf. ASCOBANS which requires a contribution amounting to 2.5% of the administrative costs to be met by such organizations (this appears to establish a global contribution of 2.5% for all organizations concerned).

95 Budgetary decisions and changes to the scale of assessment must be adopted by consensus (AEWA, ACCOBAMS) or by a three-quarters majority of those present and voting (ASCOBANS). The Bats AGREEMENT requires a three-quarter majority for decisions taken "under" the financial rules which, if read literally, actually excludes decisions concerning the financial regulation, the scale of contributions and the budget.

A specific provision may be included to encourage Parties to provide technical and financial support on a bilateral or multilateral basis to other Parties to assist them in implementing the provisions of the Agreement[96].

7. RELATIONS WITH RELEVANT INTERNATIONAL ORGANISATIONS

The following provision is modelled on Article IX of the AEWA, which makes comprehensive provision for consultation and coordination with a range of appropriate international bodies.

The Agreement Secretariat shall consult:

(a) *on a regular basis, the Convention Secretariat and, where appropriate, the bodies responsible for the secretariat functions under Agreements concluded pursuant to Article IV, paragraphs 3 and 4, of the Convention which are relevant to [species covered by this Agreement], [relevant conservation conventions] and the Convention on Biological Diversity, 1992, with a view to the Meeting of the Parties cooperating with the Parties to these conventions on all matters of common interest [reference to specific topics as appropriate];*

(b) *the secretariats of other pertinent conventions and international instruments in respect of matters of common interest;*

(c) [reference to other competent organisations].

8. FINAL CLAUSES

The final clauses of existing Agreements are broadly similar in content and arrangement except in ASCOBANS where they are grouped in one final article. The final clauses of future Agreements should be harmonised *mutatis mutandis* with those of the most recent Agreements, AEWA and ACCOBAMS, which correspond to the drafting practice of other international environmental treaties.

8.1 Amendment of the Agreement[97]

(a) *This Agreement may be amended at any ordinary or extraordinary session of the Meeting of the Parties.*

The remaining paragraphs of the Article should cover the following:

(b) *Proposals for amendment may be made by any Party.*

(c) Procedure for communication of proposed amendments to the Secretariat and to the Parties to the Agreement, with precise timetable.

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[96] AEWA and ACCOBAMS include such a provision, the latter focusing on Range States which are developing countries or countries with economies in transition.

[97] Articles X of AEWA and ACCOBAMS

(d) Procedure for amendments to the Agreement other than amendments to its annexes that are subject to a simplified procedure: a two-thirds majority should generally be required. The provision should specify the date on which the amendment will enter into force for the Parties that have accepted it.

(e) Simplified procedure for the adoption of new annexes[98] and amendments to annexes: the provision should specify the majority required and the date of entry into force for all Parties that have not entered a reservation.

A suitable model for this clause is provided by Article X.5 of AEWA:

[Any additional annexes and] any amendment to an annex shall be adopted by a two-thirds majority of the Parties present and voting and shall enter into force for all Parties on the ninetieth day after the date of its adoption by the Meeting of the Parties, except for Parties which have entered a reservation in accordance with [paragraph 6] of this Article.

(f) Procedure for entry (during the period of [ninety] days), and withdrawal (at any time) of reservations to new annexes/amendments to annexes.

8.2 Effect of Agreements on international conventions and legislation[99]

In accordance with the parent Convention and international nature conservation instruments, every future Agreement should specify the effect of that Agreement on other international instruments and the right of Parties to adopt stricter national measures than those laid down by the Agreement.

A suitable model for this clause is taken from Article XI, AEWA:

(a) *The provisions of this Agreement do not affect the rights and obligations of any Party deriving from existing international treaties, conventions or agreements to which it is a Party[, except where the exercise of those rights and obligations would threaten the conservation of [name of species]]*[100].

(b) The provisions of this Agreement shall in no way affect the right of any Party to maintain or adopt stricter measures for the conservation of [species to which the Agreement applies and their habitats].

Where the Agreement applies to marine species, it may be necessary to include a provision dealing expressly with the relationship between the Agreement and the law of the sea:

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[98] New annexes are adopted by a simplified procedure under Article X.5 AEWA, but by the traditional procedure under Article X.3 ACCOBAMS. It is recommended that the AEWA model be followed in future Agreements to facilitate their adaptation to changing conditions or new scientific data.

[99] Article XII of the Convention, Articles XI of AEWA and ACCOBAMS.

[100] This clause is included in Article XI.1, ACCOBAMS in respect of cetaceans.

[.] Parties shall implement this Agreement consistently with their rights and obligations arising under the law of the sea[101] *as reflected in the United Nations Convention on the Law of the Sea of 1982.*

8.3 Settlement of disputes[102]

The formulation used in the Convention is reproduced in full in the AEWA. The equivalent provision in ACCOBAMS is broader than this precedent as it also provides for the possibility of judicial settlements rather than just arbitration: this may be relevant to negotiating Range States for political or other reasons. It is therefore recommended that the ACCOBAMS formulation be used *mutatis mutandis* as the model for future Agreements.

(a) Any dispute which may arise between two or more Parties with respect to the interpretation or application of the provisions of this Agreement shall be subject to negotiation between the Parties involved in the dispute [or to mediation or conciliation by a third party if this is acceptable to the Parties concerned][103].

(b) If the dispute cannot be resolved in accordance with paragraph 1 of this Article, the Parties may by mutual consent submit the dispute to arbitration or judicial settlement. The Parties submitting the dispute shall be bound by the arbitral or judicial decision[104].

8.4 Signature, Ratification, Acceptance, Approval or Accession[105]

The corresponding provisions in the Convention are dealt with in three separate Articles, XV to XVII. It is recommended instead that the formulation in AEWA and ACCOBAMS, contained in a single article, be followed in future Agreements.

(a) The Agreement shall be open for signature by any Range State, [whether or not areas under its jurisdiction lie within the Agreement Area][106]*, or regional economic integration organization, at least one member of which is a Range State, either by:*

(1) signature without reservation in respect of ratification, acceptance or approval[107]*; or*

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101 Article XI.2, ACCOBAMS.

102 Article XIII of the Convention, Articles XII of AEWA and ACCOBAMS.

103 The last clause is only found in Article XII.1, ACCOBAMS.

104 Article XII.2, ACCOBAMS. cf. Article XII.2, AEWA: "... by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at the Hague, and the Parties submitting the dispute shall be bound by the arbitral decision".

105 Articles XIII of AEWA and ACCOBAMS.

106 See above II.2.a., and footnote 33.

107 The terms “acceptance” and “approval” are being explained by Article 14 paragraph 2, of the Vienna Convention of the Law of Treaties, 1969: “The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification”.

(2) signature with reservation in respect of ratification, acceptance or approval, followed by ratification, acceptance or approval.

(b) The Agreement shall remain open for signature at [name of Depositary] until the date of its entry into force.

(c) The Agreement shall be open for accession by any Range State or regional economic integration organization mentioned in paragraph 1 above on and after the date of entry into force of the Agreement.

(d) Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

8.5 Entry into force

It is recommended that the model provided by Article XIV of both AEWA and ACCOBAMS be followed in future Agreements, subject to the insertion of the minimum number of Parties necessary for the Agreement to enter into force. This will be a matter for negotiators in each case but it is obviously desirable that future Agreements should enter into force as quickly as possible and that the number selected should be realistic.

Where the Agreement Area covers more than one region or sub-region, it is recommended that the Agreement should specify the minimum number of Parties from each region or sub-region necessary for its entry into force in order to ensure geographic representation of all parts of the Agreement Area. By way of example, AEWA requires seven Range States from Africa and seven from Eurasia; ACCOBAMS requires two from the subregion of the Black Sea and five from the subregion of the Mediterranean Sea.

8.6 Reservations

The formulation used in Articles XV of AEWA and ACCOBAMS provides an appropriate model for future Agreements but certain points should be emphasized:

- Agreements should not be subject to general reservations. This means that no reservation may be entered on any provisions of the Agreement other than on those that are specifically named for this purpose in the Reservations clause and, where appropriate, on the Annexes. This is the approach used in the Convention;

- The right to enter specific reservations should be as limited as possible in order to prevent the Agreement from being undermined[108];

- Reservations may not be entered after signature without reservation as to ratification,

[108] Specific reservations under AEWA may be made "in respect of any species covered by the Agreement or any specific provision of the Action Plan" cf. the tightly-drawn clause in ACCOBAMS which restricts reservations to "a specifically delimited part of [a State's] internal waters".

acceptance, approval or accession or after the deposit of the instrument of ratification, acceptance, approval or accession;

- Reservations may be withdrawn at any time.

8.7 Denunciation

Articles XVI of AEWA and ACCOBAMS should be used as an appropriate model

8.8 Depositary[109]

The authentic languages of a treaty are traditionally mentioned in the Article dealing with the Depositary. These may include all the languages of the signatories or of potential Parties, or some of these languages, as the negotiators think fit. It should be remembered, however, that the existence of authentic texts in English [and French] may be a necessary precondition to the accession of certain countries and will in any event contribute to the linking of the Agreement to the world-wide network of international conservation treaties.

The working languages of the Agreement, that is to say the languages of the proceedings at meetings and of Agreement documents, need not of course be all the authentic languages. The working languages are normally determined by the Rules of Procedure. It should be remembered that the more working languages there are, the higher the administrative costs will be.

An appropriate model for this provision[110] is as follows:

(a) *The original of this Agreement, in the .... languages, each version being equally authentic, shall be deposited with the ... which shall be the Depositary. The Depositary shall transmit certified copies of each of these versions to all States and all regional economic integration organizations referred to in Article [-], paragraph [-], of this Agreement, to the Agreement Secretariat after it has been established[111] and to the Convention Secretariat[112].*

(b) *As soon as this Agreement enters into force, a certified copy thereof shall be transmitted by the Depositary to the General Secretary of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations*[113].

The remaining paragraphs should cover communication by Depositary to States, REIOs and the

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109 Articles XVII of AEWA and ACCOBAMS.

110 Preferred to the method used in ASCOBANS which consists of listing the languages in which the authentic versions are written in a final phrase: *DONE at ... this ....., the texts ... (name of the languages) being equally authentic.*

111 Modelled on the Bats AGREEMENT, the Seals Agreement, AEWA and ACCOBAMS.

112 All future Agreements should provide for the Convention Secretariat to be supplied with a copy of each AGREEMENT (Article IV.5 of the Convention) and each Article IV.4 agreement (Resolution 3.5, 1991). This requirement features in the Seals Agreement, but not in AEWA or ACCOBAMS.

113 In accordance with custom.

Agreement Secretariat of signatures; deposits of instruments of ratification, approval etc; entry into force of the Agreement, additional annexes, amendments thereto etc.; reservations; withdrawals of reservations; denunciations; and the texts of any reservation, additional annex and any amendment to the Agreement or to its annexes][114].

[114] It is recommended that Article XVII, paragraph 3 of AEWA be used as a model.

III. GUIDELINES FOR MEMORANDA OF UNDERSTANDING

Two Memoranda of Understanding have so far been concluded under the parent Convention[115]. Using simple language, they list common substantive measures, followed by an Action Plan which sets out specific conservation actions required from each signatory.

As mentioned above[116], MOU are administrative instruments which should be considered morally and politically binding as they contain solemn undertakings by authorised government representatives. They should only include substantive measures which can be implemented by administrative decision. This means that:

- MOU may not contain provisions requiring signatories to take actions which are conditional on the exercise of political power, such as undertakings to ratify specified treaties or to adopt legislation[117]. However, there is nothing to prevent MOU from stating that signatories should use their best endeavours to this end.

- MOU may not contain provisions requiring signatory States to make binding financial commitments. There is of course nothing to prevent any State from providing technical and financial assistance on a voluntary basis to some signatory States. In some cases, the development of future MOU may depend on the provision of such assistance to potential signatories.

These Guidelines for the content and structure of MOU are based partly on the Guidelines for formal Agreements proposed above and partly on the two MOU already in force. It should be borne in mind, however, that more experience needs to be gained in respect of the aims and mechanisms of MOU.

1. INTRODUCTORY PROVISIONS

The undersigned, acting on behalf of the respective authorities named above[118],

(a) RECALLING that the Convention on the Conservation of Migratory Species of Wild Animals, 1979, encourages international co-operative action to conserve migratory species;

(b) NOTING that [name of species] is a migratory species [in imminent danger of extinction][is

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[115] MOU concerning Conservation Measures for the Siberian Crane (Kushiro, 16 June 1993); MOU concerning Conservation Measures for the Slender-billed Curlew, *Numenius tenuirostris* (1994: no place or date of adoption mentioned).

[116] See Parts I.3.2 and I.4 above on the legal character of Memoranda of Understanding adopted under Article IV.4 of the Convention.

[117] It is in this respect that difficulties have arisen over the legal character of the MOU on the Slender-billed Curlew.

[118] The appropriate representatives of the Range States named in the heading of the MOU should either be the government institution responsible for wildlife conservation or another institution designated by the respective government for this purpose. It is the practice of the Convention Secretariat to request MOU to be signed by senior staff-members of the responsible ministries, duly authorised by their ministers, or by the ambassadors to Germany of the countries concerned.

in an unfavourable conservation status] because of ... [119];

(c) CONSCIOUS of the need to take immediate concerted action to prevent the extinction of this species;

[.] Any other considerations pertinent to the species concerned, including reference to relevant international conservation instruments and where appropriate, the Agreement under which the MOU is concluded[120].

AGREE to work closely together to [state objective of MOU]

To that end they will, in a spirit of mutual understanding and co-operation, endeavour to: (the list of undertakings then follows)

– SUBSTANTIVE PROVISIONS

(a) Definitions[121]

(b) This Memorandum of Understanding is an administrative agreement under Article IV, paragraph 4, of the Convention[122].

(c) The next section should define the main substantive measures in terms of actions which can be implemented by administrative decision. These include the protection of the species concerned where conservation legislation authorises the relevant Government department to make regulations for this purpose, but rarely extend to the creation of protected areas.

Parties shall work closely together to improve the conservation status of [name of species] [throughout its potential[123] breeding, migrating and wintering range][124] and to that end, in a spirit of mutual understanding and cooperation, shall endeavour to:

(1) Provide strict legal protection for [name of species] and identify and conserve [habitat types] essential for their survival[125].

(2) Identify and monitor processes and categories of activities which contribute to the

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119 The two MOU concluded so far are each limited to one species listed in Appendix I of the Convention.

120 It should be made clear where the MOU is an instrument for the implementation of an Agreement as well as the parent Convention.

121 If necessary: neither of the existing MOU has a definitions clause.

122 This provision is included in the Basic Principles at the end of the MOU on the Siberian crane. There is no equivalent provision in the MOU on the Slender-billed Curlew.

123 "Potential" is only mentioned in the MOU on the Slender-billed Curlew.

124 This clause on the object and geographic scope of the MOU comes after the preamble in both existing MOU, but should preferably come just before the list of substantive obligations, following the structure of legally binding Agreements.

125 This measure features in both MOU. Paragraph 1, MOU on the Slender-billed Curlew expressly cross-refers to the conservation obligations laid down in the parent Convention.

unfavourable conservation status of [name of species] and recommend appropriate steps for the regulation or management of such processes and categories of activities[126].

(3) Implement in their respective countries the provisions of the Action Plan[127] *annexed to this Memorandum as a basis for the conservation of the [relevant population] of the species.*

(4) Procedure for implementation and assessment of the Action Plan(s).

(d) Designation of national contact points.

(e) Submission of national reports to the Convention Secretariat or any organisation providing secretariat functions for the MOU.

(f) Exchange of scientific, technical and legal information; cooperation mechanisms; research and monitoring.

(g) Where appropriate, the preparation of a longer-term Conservation Plan.

(h) Meetings of signatories, the functions of these meetings and the procedure required to call meetings.

(i) Each administrative agreement should make basic provisions for its relationship to the Convention, its links with the Convention Secretariat and, *inter alia*, invite the CMS Scientific Council to provide scientific advice.

3. PROCEDURAL PROVISIONS

These procedural provisions should be limited to what is strictly necessary for the operation of the MOU.

(a) Duration of MOU[128]

(b) Amendments

(c) Signature

(d) Date on which the MOU will come into effect

(e) Denunciation

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[126] Based on Articles 7(c) and 8(l) of the CBD: see also Part II.4 of these Guidelines.

[127] Measures contained in Action Plans should be limited to the species or species covered by the document: undertakings dealing generally with hunting go well beyond the purpose of these texts.

[128] The existing MOU have been concluded for a renewable period of three years.

(f) Administrative aspects, including the question of languages[129]

(g) Place and date of signature[130]

[129] The existing MOU do not designate a Depositary. The official text of each MOU is held by the UNEP/CMS Secretariat which *de facto* carries out related administrative functions.

[130] These are not mentioned in the MOU concerning Conservation Measures for the Slender-billed Curlew, *Numenius tenuirostris.*