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A History of "AGREEMENTS" under Article IV.3 and "agreements" under Article IV.4 in the Convention on Migratory Species

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A History of "AGREEMENTS" under Article IV.3 and "agreements" under Article IV.4 in the Convention on Migratory Species

Prepared by Professor Chris Wold*

Introduction

1. The issue of the scope of "AGREEMENTS" under Article IV.3 and "agreements" under Article IV.4 has arisen in the context of *Developing, Resourcing and Servicing CMS Agreements–A Policy Approach* (UNEP/CMS/COP11/Doc. 22.2). To gain an understanding of the distinction between AGREEMENTS and agreements, this informational document reviews the negotiating history to shed some light on what the drafters of the Convention on the Conservation of Migratory Species of Wild Animals (Convention or CMS) intended. It also reviews the early years of the Convention to determine, regardless of the negotiating history, how the Parties have distinguished AGREEMENTS from agreements.

2. This informational document uses "Agreements," with an upper case "A," to refer collectively to these two types of instruments and to the period during the negotiations before the negotiators distinguished AGREEMENTS from agreements. This document uses "AGREEMENTS" only when referring to AGREEMENTS under Article IV.3 and "agreements" only when referring to agreements under Article IV.4.

3. This informational document is divided into five parts.

3.1 Part I traces the negotiating history to describe the emphasis on concluding Agreements for all migratory species.

3.2 Part II describes the development of Article IV.3 and Article IV.4. Unfortunately, the available English-language documents do not provide any detail as to the distinction between of Article IV.3 and Article IV.4. However, nothing in the negotiating history indicates that one provision or the other should be used for legally binding

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instruments (as opposed to legally non-binding Memoranda of Understanding (MOUs)) or that the Secretariat should administer Agreements.

3.3 Part III reviews the early implementation and interpretation of Agreements by the Parties. In contrast to the intent of the negotiators, the Parties began to rely on the Secretariat to administer Agreements. The Parties also realized that concluding legally-binding Agreements posed challenges. Consequently, they developed the concept of the MOU.

3.4 Part IV briefly describes how the Parties have used Agreements, concluding that the Parties have made few practical distinctions between AGREEMENTS and agreements.

3.5 Part V briefly summarizes some steps that the Parties could take to clarify the distinction between AGREEMENTS and agreements.

I. The Convention's Emphasis on Concluding Agreements

4. The negotiating history makes clear that Agreements were intended to be the defining characteristic of CMS. In fact, the second draft of the Convention from August 1974, prepared by the Environmental Law Centre of the International Union for the Conservation of Nature (IUCN), provides that the Parties "shall take action to bring into being Agreements covering *all* migratory species."[1] Similarly, the Explanatory Notes to a 1975 draft state that the goal of the Convention is to ensure that all migratory species are covered by an Agreement.[2] As the draft Convention did not include appendices at this point, it is clear that the IUCN meant all migratory species, provided they met the broad definition of "migratory species"; at this point, the definition of "migratory species" included all migratory species except those that migrated wholly within the borders of a single State or wholly within the high seas.[3]

5. In July 1976, the IUCN and the Federal Republic of Germany convened a group of governmental and non-governmental experts to discuss the draft convention. Many concluded that the goal of preparing Agreements for all migratory species was too ambitious and not politically realistic.[4] As a consequence, the drafters abandoned the goal of completing Agreements for all migratory species. By 1977, the draft Convention included appendices for listed species, which clearly indicated that only those species meeting certain criteria would be covered by the Convention and potentially subject to an Agreement. Nonetheless, the emphasis on concluding Agreements did not wane. The Explanatory Notes from 1977 state:

[1] Preliminary Draft of Proposed Convention on the Conservation of Migratory Species of Wild Fauna, art. III.1 (Draft P.4, Aug. 1974) (emphasis added) [hereinafter August 1974 Draft].
[2] IUCN, Explanatory Notes on Draft (February 1975) of Proposed Convention on the Conservation of Migratory Species of Wild Fauna, 4 (Feb. 1975).
[3] August 1974 Draft, *supra* note 1, at art. 1(a) (defining "migratory species" as "a species of wild vertebrate, crustacean or mollusk all or some members of which may at some season cross any border between the territory of one State and either that of another State or the high seas during their migration cycle …").
[4] *See* Summary Report of the Meeting of Experts 6–9 July 1976, 44 (1976) (stating that "[s]everal comments maintained that the present draft is over-ambitious and that it will be difficult to negotiate and operate the numerous general and specific Agreements envisaged.").

> Although the main purpose of the Convention is to promote the conclusion of agreements for the conservation and management of migratory species, it is recognized in Article III that certain species require stringent conservation measures which should be implemented immediately. . . .
>
> It is anticipated that in many cases, measures provided for in Article III will not be sufficient to improve the conservation status of a species listed in Appendix I. Accordingly, a species listed in that Appendix may eventually be listed in Appendix II with a view to the negotiation of an Agreement to provide for common conservation action by listed Range States.[5]

The text quoted states clearly that the main purpose of the Convention is to promote the conclusion of Agreements. It also indicates that the drafters believed that the obligatory measures of Article III may not be sufficient to protect a species and that an Agreement could offer a species more protection than provided by Article III for Appendix I species.

6. In fact, in 1977 the drafters explained that they envisaged the deletion of a species from Appendix I after Range States negotiated an Agreement for that species.[6] The IUCN, which worked on the early drafts of the Convention with governmental officials from the Federal Republic of Germany, argued that a species should automatically be removed from Appendix I after the conclusion of an Agreement.[7] IUCN argued that this would create an incentive to conclude an Agreement and that the Agreement "could not function properly if the Appendix I provisions were still in force."[8] Other negotiators apparently disagreed, however; subsequent drafts never incorporated the IUCN's recommendation.

7. Nonetheless, the drafters' focus remained on Agreements. The negotiators anticipated that "only a limited number of species in special need of immediate protection will be included in [Appendix I],"[9] perhaps as few as ten to fifteen species.[10] The drafters intended Article III to "rapidly improve"[11] the situation for Appendix I species and to "freeze" the situation for these species by obliging all Range States "to take strong national conservation measures, from which exemptions may might [*sic*] only be made in exceptional circumstances."[12] Just as the IUCN appears to have underestimated the difficulties of negotiating Agreements for all migratory species, it may have also underestimated the number of species that would need "immediate

[5] Explanatory Notes on Revised Draft of the Convention on the Conservation of Migratory Species of Wild Animals, 39 (Aug. 5, 1977) [hereinafter August 1977 Explanatory Notes]; Explanatory Notes on Revised Draft of the Convention on the Conservation of Migratory Species of Wild Animals, 3 (July 15, 1977) [hereinafter July 1977 Explanatory Notes].
[6] August 1977 Explanatory Notes, *supra* note 5, at 39–40; July 1977 Explanatory Notes, *supra* note 5, at 4.
[7] Notes on Revision of Draft R.1, 1 (Dec. 1976).
[8] *Id.*
[9] July 1977 Explanatory Notes, *supra* note 5, at 2.
[10] Letter from Daniel B. Navid, Assistant Legal Officer, IUCN Environmental Law Centre, to Tony Mence, IUCN, 5 July 1977 (noting that the IUCN Environmental law Centre was "alarmed by the magnitude and composition" of the proposed list of species for inclusion in Appendix I" and that "[w]e were told by scientific authorities in the Ministry that they could only envisage 10–15 species that it would be desirable to list on this Appendix.").
[11] August 1977 Explanatory Notes, *supra* note 5, at 39.
[12] August 1977 Explanatory Notes, *supra* note 5, at 39; July 1977 Explanatory Notes, *supra* note 5, at 4.

protection" due to habitat loss and other factors threatening the survival of species. In any event, the Federal Republic of Germany had a different view of Appendix I, recommending about 70 species for potential inclusion in Appendix I to a 1978 meeting to discuss an initial list of species for inclusion in Appendix I.[13]

II. The Distinction between AGREEMENTS under Article IV.3 and agreements Article IV.4

8. As noted above, the concept of the Agreement has been fundamental to CMS since the first draft of the Convention. Nonetheless, the negotiating history does not clarify the difference between the two types of Agreements. Nor does the negotiating history indicate whether the binding nature of an Agreement was a distinguishing factor. However, it makes clear that the Secretariat was never intended to administer the Agreements.

9. As early as the second draft of the Convention in August 1974, negotiators envisaged two types of Agreements: general and specific. A specific Agreement would cover one species only and a general Agreement would cover a group of species.[14] For both specific and general Agreements, the Convention identified a number of measures that should be included, such as the establishment of a network of reserves and the elimination of disturbances to migration.[15] Agreements that included endangered, rare, vulnerable, or exploited species would require additional provisions.[16]

10. The concept of general and specific Agreements persisted into 1975.[17] However, the 1975 draft began to distinguish the types of provisions that would be included in general and specific Agreements. While both general and specific Agreements were required to include identified provisions for endangered, rare, vulnerable, and exploited species,[18] only specific agreements were required to include provisions to establish a network of reserves and eliminate disturbances to migration.[19] While the draft Convention does not indicate a preference for multi-species (general) or single-species (specific) Agreements, the Explanatory Notes state that "usually one [Agreement] per species" should be established but for "practical purposes such Agreements may cover a group of related species, or those which share a migratory route or all of the species of a region."[20]

11. By late 1976, the draft Convention began to resemble structurally the Convention as finally adopted. For example, the 1976 draft introduces the concept of Appendix I and II species, with Appendix I species covered by specific obligations and Appendix II species requiring the

[13] IUCN, Summary Record of Meeting of Experts to Advise on Species to Be Included in Appendices to the Convention (18–21 July 1978) (1978).
[14] August 1974 Draft, *supra* note 1, at art. II.2
[15] *Id.* at art. IV.
[16] *Id.* at arts. V, VI, & VII.
[17] Preliminary Draft of Proposed Convention on the Conservation of Migratory Species of Wild Fauna, arts. II.2, IV.1 (Feb. 1975).
[18] *Id.* at arts. V, VI, & VII.
[19] *Id.* at art. IV.2.
[20] IUCN, Explanatory Notes on Draft P.5 (February 1975) of Proposed Convention on the Conservation of Migratory Species of Wild Fauna, 4 (Feb. 1975).

creation of a separate Agreement.[21] The idea to limit the Convention to listed species appears to have been motivated by the United Kingdom, which believed that covering all migratory species was "over-ambitious" and that it would be "extremely difficult to negotiate the kind of elaborate and specific agreements over a wide range of species."[22]

12. However, also by late 1976, the draft Convention eliminated the distinction between general and specific Agreements.[23] As the delegation of Kenya stated, "[t]he words 'specific and 'general' should be eliminated. These should simply read 'Agreement covering one or more species.'"[24]

13. This basic structure persisted through several drafts in 1977 until the end of 1978.[25] To this point, neither the drafts nor the explanatory notes indicated whether the Agreements would be legally binding or not. The negotiators did engage in some discussion of this issue, but the discussion is inconclusive. On the one hand, some thought that Agreements should have the same legal status as the Convention itself.[26] The word "international" was then added to the definition of "Agreement"[27] but subsequent Explanatory Notes do not describe what that adjective added to the definition.[28] On the other hand, some thought that the Convention should be an "umbrella" agreement that would provide basic commitments and that governments could negotiate within this framework "the form of agreement most appropriate to the particular problems posed by that species."[29]

14. The drafts did include a provision, however, stating that each Agreement required a Commission and Scientific Council that would be entrusted with implementation of an Agreement.[30] At a 1976 Experts Meeting, several participants voiced concern about the "possible

[21] Revised Draft of Proposed Convention on the Conservation of Migratory Species of Wild Animals, arts. III, IV. (Draft R.1, Dec. 1976) [hereinafter December 1976 Draft].
[22] Letter from M. I. Rothwell, UK Science and Technology Department, to Dr. W. Dünwal (Mar. 11, 1976).
[23] *See generally* December 1976 Draft, *supra* note 21, at art. V (establishing provisions for all Agreements).
[24] W.J. Lusingi, Summary Views of the Kenya Delegation on the Draft Convention on the Conservation of Migratory Wild Animals, prepared for the Meeting of Experts on the Draft Convention on the Conservation of Migratory Wild Animals, July 6-10, 1976, 1 (1976). *See also* Summary Report of the Meeting of Experts, *supra* note 4, at 63 (noting that "[a] number of participated queried the need to maintain the distinction between 'general' and 'specific' Agreements …").
[25] *See* Second Revised Draft of the Convention on the Conservation of Migratory Species of Wild Animals (Dec. 1978).
[26] *See* Summary Report of the Meeting of Experts, *supra* note 4, at 63 (noting that "[s]everal comments propose that it be made clear that the Agreements are International Agreements having the same status as the Convention itself. To this end, one suggestion is that the word 'international' be inserted before 'Agreement.'").
[27] *Compare* Draft of the Convention on the Conservation of Migratory Species of Wild Animals, art. I.1(j) (Feb 1975) [hereinafter February 1975 Draft], *with* December 1976 Draft, *supra* note 21, at art. I.1(f) (changing the definition of "Agreement" to mean "an *international* agreement relating to the conservation and management of one or more migratory species …") (emphasis added).
[28] *See*, *e.g.*, Explanatory Notes to the Draft of the Convention on the Conservation of Migratory Species of Wild Animals (June 8, 1977), (providing no explanation for the change in the definitions or agreements sections of the Explanatory Notes).
[29] Summary Report of the Meeting of Experts, *supra* note 4, at 44.
[30] *See*, *e.g.*, February 1975 Draft, *supra* note 27, at art. VIII.

proliferation of Commissions and Committees."[31] Nonetheless, several drafts later, provisions requiring a commission and scientific body for each agreement remained.[32]

15. By the time the delegations arrived in Bonn for the final negotiating session in June 1979, the draft Convention included the following provisions for Agreements:

> 3. Parties that are Range States of migratory species listed in Appendix II shall endeavour to conclude Agreements that would benefit the species and should give priority to those species in an unfavourable conservation status.
>
> 4. Parties shall endeavour to take action with a view to concluding agreements for any population or any geographically separate part of the population of any species or lower taxon of wildlife animals, members of which periodically cross one of more boundaries [defining national conservation and management jurisdiction, as established in accordance with international law.].[33]

16. The negotiating documents do not indicate the origin of or the reason for distinguishing Agreements in Article IV.3 from agreements in Article IV.4. Presumably, bilateral and other discussions in the months just prior to the conference to conclude the Convention resulted in these changes.[34] The split into two separate provisions and the capitalization of Agreement in Article IV.3 and the use of all lower case letters in Article IV.4, however, indicate that some distinction was intended.

17. In any event, the text of Article IV.3 did not change appreciably during the negotiating conference except to substitute the phrase "shall endeavour to conclude Agreements that would benefit the species" with the phrase "shall endeavour to conclude Agreements where these should benefit the species." In other words, the negotiators weakened the obligation to conclude Article IV.3 Agreements.

18. Similarly, the negotiators made only minor revisions to Article IV.4. The final text differs from the text quoted in paragraph 14 only by agreeing to the language referring to the boundaries that a migratory species must periodically cross: "one or more national jurisdictional boundaries."

19. Interestingly, the negotiators never considered the Secretariat to be the entity to house or otherwise administer Agreements. As noted above, the early drafts contemplated a Commission for each Agreement. During the conference to conclude the Convention, the text never changed with respect to the Secretariat's role with Agreements. According to the draft that opened the meeting, the Secretariat was

[31] *See* Summary Report of the Meeting of Experts, *supra* note 4, at 81.
[32] *See*, *e.g.*, Revised Draft of Proposed Convention on the Conservation of Migratory Species of Wild Animals, art. V.4 (June 8, 1977).
[33] Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, RT 5, art. IV (June 17, 1979).
[34] The IUCN Environmental Law Centre maintains an extensive collection of documents relating to the negotiation of the Convention. However, it does not have any documents from January 1979 to the beginning of the negotiating conference in June 1979.

> To promote, under the direction of the Conference of the Parties, the conclusion of Agreements; [and]
>
> To maintain and make available to the Parties a list of Agreements and, if so required by the Conference of the Parties, to provide any information on such Agreements.[35]

That is the same text as found in Article IX.4 of the Convention, as adopted.

20. Presumably, the negotiators had some understanding of the difference between AGREEMENTS negotiated under Articles IV.3 and agreements negotiated under Article IV.4. That understanding, however, is not discernible from the negotiating history.

21. To summarize, a review of the negotiating history permits only the following conclusions to be made concerning the difference between AGREEMENTS and agreements:

a. The Secretariat was not intended to have a role in administering Agreements;
b. It was not clear whether Agreements needed to be legally binding (i.e., required ratification by States); and
c. It was not clear what distinction the negotiators were making between Agreements negotiated under Articles IV.3 and IV.4.

III. Interpretation of Agreements in the Convention's Early Years

22. The Convention entered into force on 1 November 1983, and the Parties held their first Meeting of the Conference of the Parties (COP1) in 1985. At COP1, COP2 in 1988, and COP3 in 1991, the Parties began to develop particular views on how to implement Articles IV.3 and IV.4.

23. For example, at COP1, many Parties and scientific experts believed that the Secretariat should provide administrative support for AGREEMENTS.[36] The Secretariat noted that the Convention gives no role to the Secretariat regarding the provision of administrative support for AGREEMENTS.[37] According to the Secretariat, if the Secretariat were to administer AGREEMENTS, then the Parties to the AGREEMENTS needed to provide financial support to the Secretariat;[38] funds from the core CMS budget would be inadequate, because at the time many potential Parties to an AGREEMENT were not Party to the Convention.[39]

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[35] Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, RT 9, at 2 (June 17, 1979).

[36] *See* CMS Secretariat, *Administrative Support for AGREEMENTS*, CMS/Conf.2.15.4, ¶ 1 (July 12, 1988) (stating that "[d]uring consultations on the development of the AGREEMENTS specified in resolution 1.6 adopted at the first meeting of the Conference of the Parties, many government officials and scientific experts have expressed the view that administrative support for these AGREEMENTS should be provided by the Conference Secretariat, rather than by independent administrative and advisory support machinery established for the purpose.").

[37] *Id.*

[38] *Id.* (stating that "it is not appropriate that [the Secretariat] should simply take on responsibility for providing administrative support for AGREEMENTS without supplementary contributions from parties to these AGREEMENTS, at least in the longer term.").

[39] The Secretariat's paper notes that for the proposed AGREEMENT for *Ciconia c. ciconia*, only 23 of the 77 Range States were Parties to the Convention. *Id.* at 5.

24. In addition, the Convention's definition of AGREEMENT started creating confusion. Article I.1(j) of the Convention defines an "AGREEMENT" to mean "an international agreement relating to the conservation of one or more migratory species as provided for in Articles IV and V of this Convention." This definition is confusing because it defines AGREEMENT as an international agreement under Article IV and V. The reference to Article IV as a whole could indicate that the definition applies to both AGREEMENTS and agreements.

25. The definition's use of the word "international" without further description raises two additional issues. First, it is not clear whether "international" refers to a multilateral agreement (an agreement with two or more Parties) or a treaty having a broad geographic scope. Second, it is not clear whether the term "international agreement" refers to a legally-binding agreement. France commented at COP1 that AGREEMENTS "should be flexible and they should not require ratification,"[40] suggesting that AGREEMENTS should not be legally binding. Others disagreed, believing that AGREEMENTS and agreements must be legally binding.[41] As a consequence, the Secretariat recommended that "interim conservation measures," such as the memorandum of understanding on small cetaceans signed in 1990, provided a possible way forward.[42]

26. At COP2, the Parties started addressing these issues. First, they indicated that an international agreement did not need to have a wide-ranging geographic scope. By reporting that "[t]he conclusion of *regional* agreements has proved to be more difficult than expected"[43], they signaled that the word "international" did not require such a broad geographic scope. The difference between "international" and "regional" did not go unnoticed. At COP3, an observer asked what the legal basis was for institutionalization of regional agreements. The Chair replied that for Article IV.3 AGREEMENTS, the basis was Article II.3(c) of the Convention, which states that the Parties "shall endeavour to conclude AGREEMENTs," and for Article IV.4 agreements, the basis was Article IV.4 itself, which provides that Parties "are encouraged to take action with a view to concluding agreements."[44]

27. In light of these issues, the Parties adopted Resolution 2.6. Resolution 2.6 includes three elements.

[40] CMS, Proceedings of the Second Meeting of the Conference of the Parties, UNEP/CMS/Conf.2.16, ¶ 26 (1989).
[41] For example, Barbara Lausche, an attorney, states in her history of the Convention that "legally-binding agreements would be needed to trigger actions required for specific species" included in Appendix II. BARBARA L. LAUSCHE, WEAVING A WEB OF ENVIRONMENTAL LAW, 173 (2008). She calls the MoU approach adopted in Resolution 2.6 "a legal technique not provided for by the Convention text." *Id.* at 175. Writing during the early years of the Convention, one author stated that "[o]ne obstacle has been the *apparent* need for AGREEMENTS to go through a formal ratification process, and a number of countries have expressed reservations about the prospect of asking their Parliaments to go through the full treaty ratification exercise for an AGREEMENT on European bats or white storks." Simon Lyster, *The Convention on the Conservation of Migratory Species of Wild Animals (The "Bonn Convention")*, 29 NATURAL RESOURCES JOURNAL 979, 992 (1989) (emphasis added).
[42] Measures under Article IV of the Convention, UNEP/CMS/Conf.3.14.3, ¶ 2 (June 11, 1991).
[43] Report on the Work of the Standing Committee, CMS/Conf.2.12.1, ¶ 24 (1988) (emphasis added).
[44] CMS, Report of the Third Meeting of the Conference of the Parties, Report of Committee II, UNEP/CMS/Conf.3.21, ¶ 7 (13 Sept. 1991).

26.1 First, paragraph 1 stresses the desirability of concluding AGREEMENTS in accordance with Article V of the Convention "whenever such AGREEMENTS are needed because of the nature of the obligations to be undertaken by the Parties." The intent of this paragraph is not entirely clear. However, at COP2, the Acting Assistant Executive Director of UNEP commented in his opening address that "progress towards conclusion of AGREEMENTS had been disappointing,"[45] and Norway noted "with regret" that no AGREEMENTs had yet been adopted.[46] In light of these comments about the slow pace of adopting AGREEMENTS, this paragraph may simply be urging Parties to complete those AGREEMENTS under development and to initiate new ones.

26.2 Second, paragraph 2 notes that agreements under Article IV.4 could be established as a first step towards the conclusion of an AGREEMENT under Article V.

26.3 Third, paragraph 3 provides that agreements under Article IV.4 "may take the shape of, for example, … administrative agreements or memoranda of understanding" and that Article V.2 of the Convention "should apply also to such instruments." In other words, Article IV.4 could include agreements that are not legally binding, but in any event, such non-binding agreements should cover the whole range of the species concerned and be open to all Range States, whether or not they are Parties to the Convention. This third element of Resolution 2.6 addresses the issue over whether AGREEMENTS and agreements were required to be legally binding instruments.

28. Another question related to whether both AGREEMENTS and agreements should cover the entire range of the species. Article V.2 provides that "[e]ach AGREEMENT should cover the whole of the range of the migratory species concerned." Neither Article IV nor Article V directly states what the geographic scope of an agreement under Article IV.4 should be.

29. At COP3, the Secretariat also reported on problems arising from the implementation of Resolution 2.6. It noted that the recent Article IV.4 agreement for the common seal (*Phoca vitulina*) in the Wadden Sea did not cover the full range of the species despite the call of Resolution 2.6 for such agreements to do so.[47] The Secretariat also recommended that the Parties clarify the definition of "AGREEMENTS" in Article I.1(j).[48] The Secretariat noted that the definition's lack of clarity "gave rise to a problem in the drafting of the Wadden Sea seals agreement."[49] The Secretariat does not explain exactly what the problem was, but the problem could have been one of two things (or both). First, the Secretariat could have been referring to

[45] UNEP/CMS/Conf.2.16, *supra* note 40, at ¶ 9 (statement of Mr. A.T. Bough, Acting Assistant Executive Director of UNEP).
[46] *Id.* at ¶ 24. Three years later at COP3, the Secretariat reported that progress towards completion of AGREEMENTS and agreements "has been disappointing." UNEP/CMS/Conf.3.14.3, *supra* note 42, at ¶ 2.
[47] *Id.* at ¶ 19.
[48] *Id.* at ¶ 24.
[49] *Id.*

whether the agreement needed to cover the entire range of the common seal.[50] Second, and more likely, is the definition itself. Article I.1(j) defines AGREEMENT, presumably meaning an Article IV.3 AGREEMENT. However, the definition refers to "an international agreement … as provided for in Articles IV and V." The definition does not define an AGREEMENT as "an international agreement … as provided for in Articles IV.3 and V." Thus, the definition left open the possibility that an AGREEMENT could be either an Article IV.3 or IV.4 Agreement.

30. On the geographic scope of Article IV.4 agreements, the Secretariat noted that Resolution 2.6 applies the same requirements of Article V.2 to AGREEMENTs and agreements "but such equal treatment may not be appropriate." To support this position, the Secretariat made a number of conclusions about the distinction between AGREEMENTS under Article IV.3 and agreements under Article IV.4.

30.1 First, the Secretariat noted that Article IV.3 urges Parties as "'Range States' of migratory species to conclude AGREEMENTS" (emphasis in original). In contrast, Article IV.4 does *not* refer to "Range States" or migratory species. Instead, it refers to "species." Similarly, it refers to species, "members which *periodically* cross one of more national jurisdictional boundaries." The definition of a "migratory species" in Article I.1(a) of the Convention uses the phrase "species … , a significant proportion of whose members *cyclically and predictably* cross one or more national jurisdictional boundaries (emphasis added). Because Article IV.4 omits the phrases "significant proportion" and "cyclically and predictably," the Secretariat suggested that Article IV.4 allows for the development of agreements for species that are not migratory within the meaning of the Convention. The Secretariat concluded that "[t]herefore, certain populations of a species could be deliberately excluded from an agreement for various reasons, or an agreement could even apply to a species which is shared but not truly migratory as defined by the Convention."[51]

30.2 In light of its interpretation of Article IV.4, the Secretariat also concluded that agreements that cover species not meeting the definition of "migratory" under the Convention may not be appropriate as a "first step" towards an AGREEMENT, as suggested by Resolution Conf. 2.6.[52] Similarly, biological or political reasons may indicate that an Article IV.4 agreement cover only a subgroup of Range States.[53]

30.3 In addition, agreements that do not cover the whole range of a species, such as the Agreement on the Conservation of Seals in the Wadden Sea, would not be in compliance with Resolution 2.6, which calls for agreements to include the entire range of a species and be open to all Range States. As such, the Secretariat

[50] *See id.*, at ¶ 19 (stating that ("[a]lthough technically [the agreement] does not meet the criteria adopted by the Conference of the Parties in Resolution 2.6, with respect to full coverage of the species range, it has been identified by the three Governments concerned as being an agreement under Article IV(4) of the Convention.").
[51] *Id.* at ¶ 25.
[52] *Id.*
[53] CMS, Proceedings of the Third Meeting of the Conference of the Parties (Geneva, Switzerland, 9–13 Sept. 1991), Report of the Third Meeting of the Scientific Council, UNEP/CMS/Conf.3.21, Annex I, ¶ 44 (June 1993).

suggested that Resolution 2.6 "is unnecessarily restrictive and indeed not conducive to flexibility in implementing article IV of the Convention."[54]

31. The Parties did not adopt the Secretariat's interpretation of Article IV.3 and Article IV.4. However, they did adopt Resolution 3.5, which clarifies the scope of the definition of "AGREEMENT" in Article I.1(j). Resolution 3.5 specifically provides that this definition only applies to AGREEMENTS "concluded in accordance with the basic principles governing such instruments as included in Article IV, paragraph 3, and Article V."[55] In addition, agreements concluded under Article IV.4 should generally be open to all Range States and cover the entire range of a species, but "this is not necessary if this would adversely affect the conclusion or implementation of such an agreement under the Convention."[56]

32. Resolution 3.5 also states that, while agreements under Article IV.4 "may be established as a first step towards conclusion of AGREEMENTS under Article IV, paragraph 3, in other cases this may not be appropriate."[57]

IV. The Current State of AGREEMENTs and agreements

33. While a complete understanding of what the negotiators intended is not possible, some conclusions can be made about how the Parties have interpreted Article IV.3 and Article IV.4.

34. First, nothing precludes AGREEMENTS and agreements from being legally binding or non-legally binding. Of the 22 Article IV.4 agreements, all 19 Memoranda of Understanding are non-legally binding, while 3 other agreements are legally binding.[58] All four Article IV.3 AGREEMENTS are legally binding.[59]

35. While the Parties have not developed or adopted a non-legally binding AGREEMENT, nothing prevents them from doing so. However, the Parties appear to have taken the view that AGREEMENTs under Article IV.3 should be legally binding. In the *Guidelines for Harmonisation of Future Agreements*,[60] only legally binding AGREEMENTs are contemplated.[61] Although these *Guidelines* were never finalized,[62] they do provide some insight into the thinking of the Parties at the time.

[54] UNEP/CMS/Conf.3.14.3, *supra* note 42, at ¶ 25.
[55] Resolution 3.5, ¶ 1.
[56] Resolution 3.5, ¶ 3.
[57] Resolution 3.5, ¶ 4.
[58] The three legally-binding agreements are the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS), the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS), and the Agreement on the Conservation of Seals in the Wadden Sea.
[59] The four legally-binding AGREEMENTS are the Agreement on the Conservation of Albatrosses and Petrels (ACAP), the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA), the Agreement on the Conservation of Populations of European Bats (EUROBATS), and the Agreement on the Conservation of Gorillas and their Habitats.
[60] UNEP/CMS/Conf. 6.10 (1 Nov. 1999).
[61] *See id*, at § 3.1.1.
[62] The Secretariat submitted the draft to the 6th Meeting of the Conference of the Parties. Because of the legal aspects associated with the document, several Parties indicated that they could not adopt the document but they did "take

36. Second, AGREEMENTS and agreements do not always cover the entire range of a species. For example, the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA), an Article IV.3 AGREEMENT, does not cover the entire range of all waterbirds covered by AEWA.[63] Similarly, the Wadden Sea Seals Agreement, an Article IV.4 agreement, does not cover the entire range of the common seal.

37. Third, AGREEMENTS and agreements do not always include all Range States that are Parties to CMS, including AEWA[64] and the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic area (ACCOBAMS),[65] an Article IV.4 agreement.

38. Fourth, AGREEMENTS and agreements include non-Parties to CMS. For example, non-Parties to CMS participate in the Agreement on the Conservation of Albatrosses and Petrels, an Article IV.3 AGREEMENT,[66] and the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia (IOSEA Marine Turtle MOU),[67] an Article IV.4 agreement.

39. Fifth, AGREEMENTS and agreements may include non-Range States. To date, however, non-Range States have become signatories only to the non-legally-binding MOUs. For example, the IOSEA Marine Turtle MOU includes the United States, a non-Range State.[68]

40. Sixth, AGREEMENTS and agreements are administered by the Secretariat. As noted above, this reliance on the Secretariat to administer agreements was not envisaged by the drafters of the Convention. Nonetheless, reliance on the Secretariat to administer Agreements quickly became standard practice and early on led to resource constraints within the Secretariat. As reflected in *Developing, Resourcing and Servicing CMS Agreements–A Policy Approach*[69] and *An Assessment of MOUs and their Viability*,[70] this continues to be a problem.

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note" of it. CMS, Proceedings of the Sixth Meeting of the Conference of the Parties (Cape Town, South Africa (10–16 Nov. 1999), Report of the Sixth Meeting of the Conference of the Parties ¶ 146–47 (2000). Due to a lack of capacity, the Secretariat was unable to hire a consultant and complete the work. The Parties decided to discontinue the project. CMS, Proceedings of the Seventh Meeting of the Conference of the Parties (Bonn, Germany (18–24 Sept. 2002) ¶ 174–75 (2000).

[63] AEWA defines "waterbirds" to mean "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." AEWA, art. I.2(c) (emphasis added).

[64] Austria and Saudi Arabia, for example, are Parties to CMS but not to AEWA. *See* AEWA, Parties and Range States, http://www.unep-aewa.org/en/parties-range-states.

[65] The United Kingdom and Israel, for example, are Parties to CMS but not to ACCOBAMS. *See* ACCOBAMS, ACCOBAMS, http://www.cms.int/en/legalinstrument/accobams.

[66] Brazil, for example, is a Party to ACAP but not to CMS. ACAP, Parties to ACAP, http://acap.aq/resources/parties-to-acap.

[67] The United States, for example, has signed the Memorandum of Understanding (MOU) on the Conservation of Migratory Sharks but is not a Party to CMS. CMS, Sharks, http://www.cms.int/en/legalinstrument/sharks.

[68] CMS, IOSEA Marine Turtles, http://www.cms.int/en/legalinstrument/iosea-marine-turtles.

[69] UNEP/CMS/COP11/Doc. 22.2.

[70] UNEP/CMS/COP11/Doc. 22.3.

V. Recommendations

41. In light of the discussion of criteria for the development of future agreements in UNEP/CMS/COP11/Doc. 22, the Parties may also want to consider guidelines for distinguishing AGREEMENTS under Article IV.3 from agreements under Article IV.4. Article V of the Convention, as well as Resolution 2.6, Resolution 2.7, and Resolution 3.5 provide some guidance. As noted above, however, Resolution 2.6 and Resolution 3.5 conflict with respect to whether Article IV.4 agreements should be a "first step" towards an Article IV.3 AGREEMENT. As a consequence, the Parties may benefit from clarifying and consolidating these resolutions.

42. Any guidelines should not be overly prescriptive, and they should remain flexible.[71] To avoid future discussion of the distinction between AGREEMENTS and agreements, the guidelines could merely restate the six points made in Section IV. They could, of course, be elaborated upon. For example, the Parties could clarify that any instrument carrying the title "Agreement" must be legally binding but that an MOU will not be legally binding. The Parties could also state that the Parties will strive to include the entire range of a species in any AGREEMENT, although that is not necessary.

43. The Parties could also state that Article IV.4 agreements may include non-migratory species as well as species not included in the Appendices. Such an interpretation is consistent with the plain language of Article IV.4, but the plain meaning does require very careful reading of Article IV.4.[72] Of course, the Parties may want to prioritize the development of AGREEMENTS and agreements for the more than 200 species included in the Appendices.

[71] At COP3, some participants of the Legal Committee that "flexibility was a key factor in reaching agreement" and the Committee as a whole agreed that any guidelines "should be flexible and neither mandatory nor too detailed." CMS, Proceedings of the Third Meeting of the Conference of the Parties (Geneva, Switzerland, 9–13 Sept. 1991), Report of Committee II, UNEP/CMS/Conf.3.21, Chapter IV, ¶¶ 8–9 (June 1993).

[72] Simon Lyster, formerly of the World Wildlife Fund, writes:

> At first sight, article IV(4) is rather confusing because its provisions appear so similar to those relating to AGREEMENTS, but there are some differences. "Agreements" under article IV(4) cover a wider variety of species than AGREEMENTS since they encompass any population of any species whose members periodically cross one or more national boundaries. This might include species not listed in appendix II or even species that are not considered "migratory" as defined by the convention. The purpose of article IV(4) is to encourage parties to conclude agreements to protect species which would benefit from international cooperation in situations where for some reason the species has not yet been listed in appendix II or does not technically qualify for appendix.

Lyster, *supra* note 41, at 992.