



## Third Meeting of Range States for the European Eel

Malmö, Sweden, 25-26 June 2019

UNEP/CMS/Eels3/Doc.2

### DRAFT ANNOTATED LEGAL AGREEMENT FOR THE CONSERVATION AND MANAGEMENT OF THE EUROPEAN EEL (*ANGUILLA ANGUILLA*)

(Prepared by Chris Wold\*, 18 February 2019)

#### I. Background

International concern has been growing for many eel species in the family Anguillidae due to the status of their stocks,<sup>1</sup> but regional and international efforts have primarily focused on the European eel (*Anguilla anguilla*). In 2007, the European Union (“EU”) adopted a regulation that requires EU Member Range States to prepare Eel Management Plans (“EMPs”) with a goal of 40% escapement of adult eels into the marine environment.<sup>2</sup> Later in 2007, the Convention on International Trade in Endangered Species of Fauna and Flora (“CITES”)<sup>3</sup> included the species in Appendix II.<sup>4</sup> In 2008, the European eel was first listed as “Critically Endangered” on the International Union for Conservation of Nature (“IUCN”) Red List of Threatened Species.<sup>5</sup>

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<sup>1</sup> *Anguillid Eel Specialist Group (AESG): About AESG*, IUCN FRESHWATER SPECIALIST GRP., <https://perma.cc/23DD-7B5S> (“For 30 years or more there has been growing concern amongst stakeholders in relation to the decline in recruitment and/or populations of a number of species within the family Anguillidae.”).

<sup>2</sup> The provision provides as follows:

The objective of each Eel Management Plan shall be to reduce anthropogenic mortalities so as to permit with high probability the escapement to the sea of at least 40% of the silver eel biomass relative to the best estimate of escapement that would have existed if no anthropogenic influences had impacted the stock. The Eel Management Plan shall be prepared with the purpose of achieving this objective in the long term.

Council Regulation 1100/2007, Establishing Measures for the Recovery of the Stock of European Eel, art. 2, 2007 O.J. (L 248) 1, 3, 4 (EC), <https://perma.cc/7FCN-TXCG> [hereinafter EU Eel Regulation].

<sup>3</sup> Convention on International Trade in Endangered Species of Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975), <https://perma.cc/A6UP-M6V9> [hereinafter CITES].

<sup>4</sup> CITES Appendices II, III (valid from Apr. 4, 2017), <https://perma.cc/XV8Z-YUW6>.

<sup>5</sup> DAVID JACOBY & MATT GOLLOCK, IUCN, THE IUCN RED LIST OF THREATENED SPECIES – ANGUILLA ANGUILLA, EUROPEAN EEL 1, 3 (2014), <https://perma.cc/J8QZ-KVAA>. The European eel was again classified as “Critically Endangered” in 2010 and 2014. *Id.*

This listing remains at the time of writing. That same year, the European eel was added to the List of Threatened and/or Declining Species in the Northeast Atlantic under the Convention for the Protection of the Marine Environment of the North-East Atlantic (“OSPAR”).<sup>6</sup> In 2014, the Convention on Migratory Species (“CMS”)<sup>7</sup> included the European eel in Appendix II due to its unfavorable conservation status.<sup>8</sup> Despite these actions, the European eel’s conservation status may not be improving.<sup>9</sup> The status of the stock “remains critical.”<sup>10</sup>

Consequently, the CMS Secretariat and the Sargasso Sea Commission<sup>11</sup> sponsored the First Range States Workshop on the European Eel to review the conservation status of and existing management measures for the species.<sup>12</sup> That meeting concluded that a second workshop that includes additional Range States, particularly from North Africa, would be valuable.<sup>13</sup> The first workshop also concluded that the second workshop should review different options for conservation and management of eels and the nature of a CMS legal instrument for the European eel, including whether it should be a legally binding CMS “AGREEMENT” or a non-legally binding “agreement”<sup>14</sup> (collectively referred to as “Agreement” with a capital “A”).<sup>15</sup> It also concluded that the second workshop should explore the feasibility of including the American eel in any such Agreement at a later time.<sup>16</sup>

<sup>6</sup> OSPAR List of Threatened and/or Declining Species and Habitats (Ref. No. 2008-6), pt. II, 2008, <https://perma.cc/WV8U-VAJH>. OSPAR is the treaty and commission through which fifteen States and “the EU cooperate to protect the marine environment of the North-East Atlantic” Ocean. *About OSPAR*, OSPAR COMM’N, <https://perma.cc/A5B2-F4AL>.

<sup>7</sup> Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333 (entered into force 1983), <http://perma.cc/XP9Q-GBWZ> [hereinafter CMS].

<sup>8</sup> CMS Appendix II, at 14, <https://perma.cc/GXL2-YMS5>. The CMS Parties include species in Appendix II “which have an unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international cooperation that could be achieved by an international agreement.” CMS, *supra* note 7, at art. IV(1).

<sup>9</sup> Willem Dekker, *Management of the Eel Is Slipping through Our Hands!: Distribute Control and Orchestrate National Protection*, 73 ICES J. MARINE SCI. 2442, 2443 (2016) (“Post-evaluation in 2015 recently indicated that hardly any improvement in the status of the stocks has been achieved, and that—on average—mortality has not been reduced any further since 2012.”). The generation length of the European eel is roughly 15 years, however. David M.P. Jacoby et al., *Synergistic Patterns of Threat and the Challenges Facing Global Anguillid Eel Conservation*, 4 GLOBAL ECOLOGY AND CONSERVATION 321, at 325, fig.1 (2015), [https://ac.els-cdn.com/S2351989415000827/1-s2.0-S2351989415000827-main.pdf?\\_tid=fbb0938a-0b52-430b-8879-5b432b51cb3f&acdnat=1548454100\\_5701a036829b37472ec720d1c68b8820](https://ac.els-cdn.com/S2351989415000827/1-s2.0-S2351989415000827-main.pdf?_tid=fbb0938a-0b52-430b-8879-5b432b51cb3f&acdnat=1548454100_5701a036829b37472ec720d1c68b8820). As a consequence, it may be too early to determine whether existing measures are having a positive impact on the eel’s conservation status.

<sup>10</sup> Int’l Council for the Expl. of the Sea, European eel (*Anguilla anguilla*) throughout its natural range, at 1 (Nov. 2018), <http://ices.dk/sites/pub/Publication%20Reports/Advice/2018/2018/ele.2737.nea.pdf>.

<sup>11</sup> For more information on the Sargasso Sea Commission, see SARGASSO SEA COMM’N, <https://perma.cc/55RX-CJX5>.

<sup>12</sup> Documents for the meeting can found at *The First Range State Workshop on the European Eel*, CMS, <https://perma.cc/YR9Z-ARH9>.

<sup>13</sup> CMS, Rep. of the First Range States Workshop on the European Eel, Doc. UNEP/CMS/Eels WS1/Report, ¶ 145 (Oct. 13–14, 2016), <https://perma.cc/4DX2-DGNF>.

<sup>14</sup> *Id.* at ¶ 145-58.

<sup>15</sup> CMS, *Implementation of Articles IV and V of the Convention*, UNEP/CMS/Resolution 12.8. preamble (2017).

<sup>16</sup> *Id.* at ¶ 145-58.

Before the second workshop could be organized, the CMS Parties, at the Twelfth Meeting of the Conference of the Parties,<sup>17</sup> adopted a “concerted action”<sup>18</sup> for the European eel<sup>19</sup> that calls on CMS Parties to convene a second workshop of Range States “to explore all options that might help to strengthen conservation efforts for the European eel.”<sup>20</sup> In particular, the meeting “should focus on exploring synergies between existing Agreements, to solidify the role of CMS, and associated mechanism[s] of implementation, in on-going conservation efforts.”<sup>21</sup>

## II. Results of the Second Workshop

Based on the conclusions of the first workshop and the concerted action, the CMS Secretariat, the Sargasso Sea Commission, and the World Maritime University organized a second workshop in Malmö, Sweden in May 2018. After a brief overview of the current conservation status of the European eel and ongoing international and regional efforts to manage the eel, the second workshop turned its focus to assessing the nature and content of a CMS Agreement and the role it could play in strengthening conservation measures for the European eel.<sup>22</sup> Participants reviewed existing legal efforts to protect and manage eels outside of CMS and examined the relative advantages and disadvantages of legally binding and non-legally binding CMS Agreements for the conservation and management of the European eel. They also explored the possible content of an Agreement, including measures to protect the eel’s migration and spawning grounds, trade restrictions, the provision of technical advice and secretariat services, and possible staffing needs, among other things.<sup>23</sup>

<sup>17</sup> For information about and documents from this meeting, see *Twelfth Meeting of the Conference of the Parties to CMS*, CMS, <https://perma.cc/RQ93-GVBR>.

<sup>18</sup> “Concerted actions” are defined as:

[P]riority conservation measures, projects, or institutional arrangements undertaken to improve the conservation status of selected Appendix I and Appendix II species or selected groups of Appendix I and Appendix II species that

- a) involve measures that are the collective responsibility of Parties acting in concert; or
- b) are designed to support the conclusion of an Agreement under Article IV of the Convention and enable conservation measures to be progressed in the meantime or represent an alternative to such an Agreement[.]

CMS Res. 12.28, *Concerted Actions*, Doc. UNEP/CMS/Res. 12.28, ¶ 1 (Oct. 2017), <https://perma.cc/L6C4-GHT4>.

<sup>19</sup> CMS, *Concerted Action on the European Eel (Anguilla anguilla)*, Doc. UNEP/CMS/Concerted Action 12.1 (Oct. 2017), <https://perma.cc/B3D5-HD2M> [hereinafter **CMS Concerted Action on the European Eel**].

<sup>20</sup> *Id.* at 1.

<sup>21</sup> *Id.*

<sup>22</sup> The agenda and all other document from the meeting are available at CMS, 2nd Meeting of Range States for the European Eel, <https://www.cms.int/en/meeting/2nd-meeting-range-states-european-eel>. The meeting was graciously hosted by the government of Sweden and the World Maritime University with funding provided by the Principality of Monaco and the Sargasso Sea Commission. CMS, Rep. of the Second Meeting of Rep. of the Second Range States Workshop on the European Eel, Doc. UNEP/CMS/Eels2/Report, ¶ 6 (2018), [https://www.cms.int/sites/default/files/document/cms\\_eels2\\_report-complete\\_e.pdf](https://www.cms.int/sites/default/files/document/cms_eels2_report-complete_e.pdf).

<sup>23</sup> As background for this discussion, see Chris Wold, *Options for Developing an Agreement under the Convention on Migratory Species for European Eels*, UNEP/CMS/Eels2/Doc.7.1 (2018), [https://www.cms.int/sites/default/files/document/cms\\_eels2\\_doc.7.1\\_options-for-developing-an-agreement-under-cms-for-european-eels\\_e\\_0.pdf](https://www.cms.int/sites/default/files/document/cms_eels2_doc.7.1_options-for-developing-an-agreement-under-cms-for-european-eels_e_0.pdf). The paper has been revised and published as Chris Wold, *Bringing the European Eel Back from the Brink: The Need for a New Agreement under the Convention on Migratory Species*, 35 PACE ENVTL. L. REV. 1 (2018), <https://digitalcommons.pace.edu/pelr/vol35/iss2/1/>.

The meeting participants emphasized the “necessity of taking into account all threats affecting eels throughout their life cycle and throughout their range including the High Seas.”<sup>24</sup> They also agreed to “[e]xplore options for a coordination, monitoring and feedback mechanism for all actors to assess the efficiency of implementation of measures for the conservation and recovery of European Eels.”<sup>25</sup> The mechanism should include the following elements:

- Discuss what is being done and what needs to be done better;
- Help to raise awareness among all stakeholders;
- Consider and evaluate advice on the conservation status of the species;
- Address gaps in knowledge; and
- Address gaps in international cooperation to conserve and manage the species.<sup>26</sup>

With that as a mandate, this paper starts the discussion of the specific elements of a CMS Agreement for the conservation and management of the European eel. It is not intended to be prescriptive. With that in mind, the paper describes reasons for choosing specific provisions, while recognizing that negotiators might have different ideas for progressing eel conservation. Moreover, in some cases, options are provided for addressing a specific issue, with commentary that describes the relative strengths and weaknesses of the options.

### III. Summary of Major Elements

The draft Agreement includes detailed annotations that explain why particular provisions were chosen and when more than one option should be considered. In summary, however, the draft agreement includes the following elements:

- **Binding or non-binding.** It does not pre-judge whether the Agreement will be binding or non-binding. It provides clear options for negotiators to choose either approach.
- **Species Scope.** It applies to the European eel. Nonetheless, it includes an annex so that additional anguillid species can be covered by the Agreement, if that is considered desirable.
- **A “habitat approach.”** It doesn’t define a specific “convention area” but instead applies to all eel habitat. In that way, it applies anywhere an eel is found, including during migration. This approach is essential for species like the anguillids that inhabit multiple types of habitats and in order to accommodate the possible inclusion of additional anguillids in the future.
- **Management plans.** To maximize synergies with the EU approach, this draft Agreement includes provisions for the establishment of eel management plans with appropriate geographic scope.
- **Areas Essential for Spawning and other important habitat.** Given the vast area encompassed within the Sargasso Sea, this draft Agreement does not call for the establishment of a marine reserve or protected area. However, it does create provisions designed to conserve and manage areas important for migration as well as spawning and early development.

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<sup>24</sup> CMS, Outcome of the Second Range States Workshop on the European Eel, UNEP/CMS/Eels2/Outcome, [https://www.cms.int/sites/default/files/document/cms\\_eels2\\_outcome\\_e.pdf](https://www.cms.int/sites/default/files/document/cms_eels2_outcome_e.pdf).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

- **Taking.** The draft Agreement proposes the regulation of taking with a specific focus on eels in their glass eel and elver stages because these are the primary driver of international trade, including illegal trade. It also suggests that taking for restocking be regulated, taking into account scientific advice. In addition, it proposes more rigorous regulation of any fishing of silver eels unless a management plan indicates that such regulation is not necessary.
- **Trade.** European eel Range States have taken different approaches to trade. This draft Agreement does not pre-judge which of those approaches Parties/Signatories might take. Instead, it provides three different options for consideration.
- **Cooperation.** Because eel stocks frequently inhabit the waters or territory of more than one State, it includes provisions for those States to cooperate. In addition, given the work on eel conservation in other international and regional bodies, it includes provisions for any new eel organization established by an Eel Agreement to cooperate with existing institutions and treaties working on eel conservation and management.
- **Final Provisions.** It includes many provisions relating to amendments, entry into force, resolution of disputes, signature, withdrawal, and reservations that have become commonplace in multilateral environmental agreements. Because these types of provisions frequently differ as between legally binding and legally non-binding Agreements, it includes provisions applicable to both.

## DRAFT ANNOTATED LEGAL AGREEMENT FOR THE CONSERVATION AND MANAGEMENT OF ANGUILLIDAE SPECIES

**Note:** Three aspects relating to terminology should be noted at the outset in relation to the mandate of this paper not to prejudice the legal effect of this Agreement:

1. This draft Agreement refers to both “Parties” (for legally binding agreements) and “Signatories” (for legally non-binding agreements). In the text of a draft legal provision, the two options are bracketed, as above. In comments concerning a provision, the two options are referenced as “Parties/Signatories.”
2. Consistent with this mandate, the draft Agreement includes a choice of “shall” for legally binding agreements and “should” for legally non-binding agreements.
3. This draft Agreement adopts the terminology of the Convention on Migratory Species (CMS), which identifies legally binding agreements as “AGREEMENTS” adopted pursuant to Article IV(3), legal non-binding agreements as “agreements” adopted pursuant to Article IV(4), and legally binding and legally non-binding agreements collectively as “Agreements,” with a capital “A”.<sup>27</sup>

**More generally, the use of brackets indicates choices that need to be made by negotiators, e.g., [shall] [should].**

The [Parties] [Signatories],

### Preamble

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

*Recalling further* that the CMS Parties at the Eleventh Meeting of the Conference of the Parties included the European Eel (*Anguilla anguilla*) in Appendix II due to the species’ unfavourable conservation status and because the species would significantly benefit from strengthened international cooperation that could be achieved by an agreement;

*Recalling further* that the CMS Parties at the Twelfth Meeting of the Conference of the Parties in 2017 adopted the Concerted Action on the European Eel (*Anguilla anguilla*) (UNEP/CMS/Concerted Action 12.1) to encourage international cooperation to conserve the species;

*Acknowledging* that *Anguilla anguilla* has been classified as Critically Endangered in 2008, 2010 and 2014 on the International Union for Conservation of Nature Red List of Threatened Species;

*Acknowledging further* that other international and regional organizations, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Convention for the Protection of the Marine Environment of the North-east Atlantic (OSPAR) and the European Union have adopted conservation and management measures for *Anguilla anguilla* due to concerns over the species’ conservation status;

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<sup>27</sup> Resolution 12.8, *supra* note 15, at preambular paragraphs 2–3.

*Cognizant* that the United Nations Convention on the Law of the Sea prohibits the harvesting of catadromous species, such as anguillids, in areas beyond national jurisdiction, and that when such species migrate through more than one exclusive economic zone, as in the case of *Anguilla anguilla*, the relevant States should agree on management measures for the species;

**Note: These first five paragraphs of the preamble are intended to quickly summarize the status of eels in international agreements and organizations.**

*Recognizing* that anguillids are adversely affected by utilization, barriers to migration, pollution, habitat degradation and other impacts;

*Acknowledging*, however, the significant gaps in our understanding of the contribution of those impacts to declines in eel stocks;

*Being mindful* of the need to ensure that provisions of this [Agreement] [Memorandum of Understanding] complement the conservation and management measures of these bodies and regional economic integration organizations;

**Note: This paragraph takes note of the mandate from the second workshop to address gaps in knowledge and international cooperation.**

*Recognizing further* that measures to protect and conserve *Anguilla anguilla* have led to increased exploitation and corresponding declines in stocks of other anguillid species;

Note: This paragraph signals that conservation, management, and use of the European eel may have consequences for other anguillids and that consequently this Agreement may need to take those impacts into account.

*Have agreed* to adopt

*Option 1:* this Memorandum of Understanding is a legally non-binding Agreement under Article IV, paragraph 4, of the Convention, as interpreted by Resolution 12.8 adopted at the Twelfth Meeting of the Conference of the Parties to the Convention (Manila, 2017).

*Option 2:* this legally binding Agreement.

**Note: These two options recognize that this paper is not intended to pre-judge the legal effect of any Eel Agreement.**

## Article I — Interpretation

1. For the purpose of this Agreement:

- (a) “Advisory Committee” means the body established under Article VIII of this Agreement.
- (b) “Convention” means the Convention on the Conservation of Migratory Species of Wild Animals, 1979;
- (c) “Eels” means the European eel (*Anguilla anguilla*) and any other species in the family Anguillidae included in Annex 1;

**Note: This definition recognizes the Agreement’s focus on the European eel. However, by including an annex, it allows for the possible addition of species if the Parties/Signatories determine that such action is warranted. As noted in both the first and second workshops, exploitation/trade pressure on other anguillid species has increased since the EU banned exports of European eels; other anguillid species face other pressures. Thus, while this Agreement focuses on the European eel, it may be useful to have other eels covered by the same Agreement at a later time.**

- (d) “Habitat” means any area that contains suitable living conditions for eels during any part of the species’ life history;

**Note: By defining “habitat” without reference to any geographic boundaries, this Agreement ensures that it applies to high seas, near shore, inland waters, and any other habitat, without restriction. This is the approach taken by many of the CMS Memoranda of Understanding (MOUs), including the Memorandum of Understanding on the Conservation of Migratory Sharks (Sharks MOU)<sup>28</sup> and Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Island Region (Pacific Cetacean MOU),<sup>29</sup> as well as legally binding Agreements, including the Agreement on the Conservation of Albatrosses and Petrels (ACAP).<sup>30</sup>**

- (e) [“Party”] [“Signatory”] means a State or any regional economic integration organization constituted by sovereign States which has competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Agreement for which this Agreement is in force;

**Note: This definition is taken from CMS. This definition specifically contemplates participation by the EU. An Agreement for eel management should include the European Union for several reasons: 1) many Range States are Member States of the European Union, 2) the EU has competence for marine issues, and 3) the EU has adopted the EU Regulation for Eels.**

**In addition, it contemplates participation by non-Range States; consumer States, in particular, may be valuable participants in this Agreement.**

<sup>28</sup> Sharks MOU, ¶ 1(i),

[https://www.cms.int/sharks/sites/default/files/instrument/Sharks\\_MOU\\_Text\\_annexes\\_2018\\_e.pdf](https://www.cms.int/sharks/sites/default/files/instrument/Sharks_MOU_Text_annexes_2018_e.pdf).

<sup>29</sup> Pacific Cetacean MOU <https://www.cms.int/pacific-cetaceans/en/documents/agreement-text>.

<sup>30</sup> ACAP, art. I(2)(j), <https://acap.aq/en/acap-agreement>.

- (f) “Range” means all areas of water that an eel inhabits, stays in temporarily, or crosses at any time;

**Note: By defining “range” in relation to areas inhabited by eels, this Agreement can be applied to any marine or inland habitat. This is the approach taken by many of the CMS MOUs, including the Sharks MOU and Pacific Cetacean MOU, as well as legally binding Agreements, including ACAP.**

- (g) “Range State” means any State that exercises sovereignty and/or jurisdiction over any part of the range of an eel stock covered by this Agreement, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking eels or activities which may affect eel conservation and management or have the potential to engage in such taking or activities;

**Note: This definition combines aspects of the CMS definition of “Range State” with the definitions found in the Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS), ACAP, and Sharks MOU. CMS defines “Range State” in relation to vessels “taking” migratory species in areas beyond national jurisdiction.<sup>31</sup> ACCOBAMS defines “Range State” in relation to vessels engaged in activities that may affect cetacean conservation.<sup>32</sup> The definition in ACAP extends to vessels that have the “potential” to take albatrosses and petrels.<sup>33</sup> This definition includes all of these elements. Taking is clearly affecting eels, although the extent to which that is true in marine waters is not known. Future research might indicate that other activities adversely affect eels. Thus, the definition brings within its scope all vessels flagged by a Party/Signatory that take eels or affect eel conservation.**

- (h) “Regional economic integration organization” means an organization constituted by sovereign States which has competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Agreement;

- (i) “Secretariat” means the body [established] [designated] under Article IX, of this Agreement;

**Note: A key question is whether this Agreement will designate the CMS secretariat as the body to administer this Agreement or whether a new secretariat will be established. See Article IX, below.**

- (j) “Taking” means taking, hunting, fishing capturing, harassing, deliberate killing, or attempting to engage in any such conduct; and

**Note: This definition is taken *verbatim* from CMS, Article I(1)(i).**

- (k) “Trade” means import, export, and re-export, as well as “introduction from the sea” as defined by the Convention on International Trade in Endangered Species of Fauna and Flora.

2. The annex to this Agreement forms an integral part of this Agreement, and any reference to the Agreement includes a reference to its annex.

<sup>31</sup> CMS, *supra* note 7, at art. I(1)(h).

<sup>32</sup> ACCOBAMS, art. I(3)(g), <http://www.accobams.org/documents-resolutions/agreement-text/>.

<sup>33</sup> ACAP, *supra* note 30, at art. I(2)(p); Sharks MOU, *supra* note 27, at ¶ 3(l)..

3. In matters within their competence, the regional economic integration organizations which are Parties to this Agreement shall in their own name exercise the rights and fulfil the responsibilities which this Agreement attributes to their member States. In such cases the member States of these organizations shall not be entitled to exercise such rights individually.

**Note: This provision is taken *verbatim* from CMS, Article I(2).**

## **Article II — Scope**

1. This Agreement applies to the European eel (*Anguilla anguilla*) and any other eel species included in Annex 1.

**Note: As noted in the commentary for the definition of “eels,” this Agreement focuses on the European eel given its Critically Endangered status. Nonetheless, other anguillids may warrant protection under this Agreement at a later date; they can be included in the annex. The inclusion of species in an Annex is a typical strategy for defining the scope of the Agreement. The strategy provides Parties/Signatories with flexibility to adopt conservation and management measures to additional species as needed. This is the approach adopted by CMS itself, the Sharks MOU, ACAP, the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA), and the MOU on the Conservation of Migratory Birds of Prey in Africa and Eurasia (Raptors MOU), as well as other international agreements, including CITES, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and the Stockholm Convention on Persistent Organic Pollutants.**

## **Article III — Fundamental Principles**

1. [Parties] [Signatories] [shall] [should] take coordinated measures to
  - (a) achieve and maintain a favourable conservation status for eels;
  - (b) conserve and, where feasible and appropriate, restore those habitats of eels that are of importance to the species;
  - (c) prevent, remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of eels; and
  - (d) to the extent feasible and appropriate, prevent, reduce or control factors that are endangering or are likely to further endanger the species, including strictly controlling the introduction of, or controlling or eliminating, already introduced exotic species.

**Note: Paragraph 1 mirrors the conservation objectives of CMS Articles III(4) and V, as well as the specific goal of Article V(1) to develop Agreements that restore Appendix II species to a favorable conservation status.**

2. An important measure of success in determining whether the objectives included in paragraph 1 have been met is whether, based on the best available science and relevant metrics decided upon by the [Parties] [Signatories], the conservation status of eels is measurably improving.

**Note: Ideally, this Agreement will establish a measurable conservation target to be achieved within a specified timeframe. ICES recommended an escapement goal for silver eels of 50%, but the EU has adopted a goal of 40% for political reasons.<sup>34</sup> However, the EU Eel Regulation does not specify a timeframe for meeting that goal. Instead, it calls for achieving that goal “in the long term.” Given the life history of the European eel, with individuals reaching sexual maturity in variable time periods, the failure to designate a specific timeframe for achieving the 40% escapement goal is understandable. Nonetheless, without a more specific timeframe for achieving a goal, it is difficult to determine progress towards the escapement target.**

**In addition, at least two scientists at the first workshop noted a need to move from a biomass target to a mortality target. The reports do not indicate what those mortality rates might be or whether they would be basin-specific or national. More recently, a study conducted for the European Union concluded that “it would be highly recommended to move from the current 40% regional level escapement targets to a mortality-based target in a revised version of an EU Regulation.”<sup>35</sup> Consequently, this draft Agreement does not propose any specific target but instead proposes that Parties/Signatories establish one based on the best available scientific.**

3. In implementing the measures prescribed in paragraph 1 above, the [Parties] [Signatories] [shall] [should] take into account the precautionary principle. Lack of scientific certainty should not be used as a reason for postponing cost-effective measures to enhance the conservation status of eels.

**Note: Given the significant gaps in our knowledge and understanding of eel biology and the relative contributions of various threats to the conservation status of eels, a specific reference to the precautionary principle would appear warranted. AEWA, the Sharks MOU and the Raptors MOU, and many other MEAs, reference the precautionary principle.**

<sup>34</sup> First Workshop, *supra* note 13, at ¶ 57.

<sup>35</sup> REINHOLD HANEL, ET AL., RESEARCH FOR PECH COMMITTEE – ENVIRONMENTAL, SOCIAL AND ECONOMIC SUSTAINABILITY OF EUROPEAN EEL MANAGEMENT, at 11 (2019), [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/629189/IPOL\\_STU\(2019\)629189\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/629189/IPOL_STU(2019)629189_EN.pdf).

## Article IV — Conservation Measures

1. The [Parties] [Signatories] [shall] [should] adopt, implement, and enforce measures to conserve eels.
2. To this end, the [Parties] [Signatories] [shall] [should]:
  - (a) ensure that management plans are prepared consistent with Article V;
  - (b) regulate the taking of eels
    - (i) in their glass eel and elver stages;

**Note: Eels during these life stages are the ones mostly likely to be smuggled. It is also noted that the European Council decided to extend the mandatory closures agreed for 2018 to recreational fisheries and glass eel fisheries. These measures cover brackish waters, such as estuaries, coastal lagoons and transitional waters, and will ensure consistency with the measures on eel in the Mediterranean Sea.<sup>36</sup>**

- (ii) for restocking based on [scientific advice] [the advice of the Advisory Committee], that restocking benefits the conservation status of the species; and

**Note: This provision recognizes the lack of scientific consensus on the benefits of restocking. Because restocking can have adverse impacts on the conservation status of eels in both the origin basin and the restocked basin, it begins from the premise that such taking should be prohibited.**

- (iii) in recreational fisheries, unless a management plan, developed and approved consistently with Article V, determines that harvest limits in a specific eel basin, is consistent with the principle of Article III(2);

**Note: The WGEEL reports that “most” EU Member States already prohibit retention of eels by recreational anglers but that catch and release is allowed.<sup>37</sup> It also reports that recreational fisheries in six EU Member States constitute at least 7% to 32% of total landings in these countries, but that “these values are an underestimate of the true recreational landings in nearly all of the [Member States].”<sup>38</sup> A 2018 study suggests that mortality rates from catch and release are between 8.4% and 64.4%, depending on hook size, hooking location and unhooking treatment.<sup>39</sup> Mortality from recreational fisheries may thus constitute a significant amount in light of the Critically Endangered status of the European eel. Consequently, it may be useful to begin with a presumption of a ban on recreational fisheries, including catch and release, while also allowing Range States to justify in a management plan a recreational fishery as consistent with the goal of this Agreement.**

<sup>36</sup> European Council, Atlantic and North Sea: Council Agrees 2019 Fishing Quotas, <https://www.consilium.europa.eu/en/press/press-releases/2018/12/19/atlantic-and-north-sea-council-agrees-2019-fishing-quotas/>.

<sup>37</sup> International Council for the Exploration of the Sea, 2015 Report of the Joint EIFAAC/ICES/GFCM Working Group on Eel (WGEEL), ICES CM 2015/ACOM:18, at 33 (2016), available at [http://ices.dk/sites/pub/Publication%20Reports/Expert%20Group%20Report/acom/2015/WGEEL/wgeel\\_2015\\_final.pdf](http://ices.dk/sites/pub/Publication%20Reports/Expert%20Group%20Report/acom/2015/WGEEL/wgeel_2015_final.pdf).

<sup>38</sup> *Id.*

<sup>39</sup> Marc Simon Weltersbach et al., *Estimating and Mitigating Post-release Mortality of European Eel by Combining Citizen Science with a Catch-and-release Angling Experiment*, 201 FISHERIES RES. 98, 102 (2018), [https://ac.els-cdn.com/S0165783618300171/1-s2.0-S0165783618300171-main.pdf?\\_tid=985ee4b1-2032-4214-864e-4ea82029458c&download=true&acdnat=1548456465\\_9633a11dafcb8d4446ba514d21996708](https://ac.els-cdn.com/S0165783618300171/1-s2.0-S0165783618300171-main.pdf?_tid=985ee4b1-2032-4214-864e-4ea82029458c&download=true&acdnat=1548456465_9633a11dafcb8d4446ba514d21996708).

- (c) cooperate to conserve eel stocks, including through the preparation of a transboundary management plans, where an eel stock inhabits the territory or jurisdictional waters of more than one [Party] [Signatory];

**Note: This provision is modelled on Article 6 of the EU Eel Regulation, which requires the relevant Member States to prepare jointly an Eel Management Plan for shared eel stocks. The need for cooperation to conserve a shared stock is self-evident.**

- (d) identify and cooperate to protect the migration routes of eels from their freshwater and near-shore habitats to their spawning grounds;
- (e) endeavor to exchange without undue delay the scientific, technical, legal and other information needed to coordinate measures for the conservation and management of eels;
- (f) restore, to the maximum extent practicable, eel habitat that has been lost to land conversion and obstacles to migration;
- (g) identify, to the maximum extent practicable, areas used for spawning and other important habitat and protect these areas by
- (i) prohibiting the commercial collection of *Sargassum*;

**Note: Collection of *Sargassum* in commercial quantities in the Sargasso Sea is known to occur.<sup>40</sup>**

- (ii) prohibiting deep seabed mining that might adversely affect eel habitat and/or the broader ecosystem on which they depend;

**Note: The seabed of the Sargasso Sea is known to include seamounts with endemic species as well as potentially valuable minerals such as “polymetallic sulphides, manganese nodules and cobalt-rich crust, hydrocarbons and gas hydrates.”<sup>41</sup> These minerals are not currently being exploited, but this provision is intended to be forward looking.**

<sup>40</sup> Arlo H. Hemphill, *Conservation on the High Seas—Drift Algae Habitat as an Open Ocean Cornerstone*, PARKS 15, vol. 3, at 48, 52 (2005), <https://www.oceanfdn.org/sites/default/files/Hemphill%20-%20Sargasso%20Sea.pdf>.

<sup>41</sup> Dan Laffoley et al., *The Protection and Management of the Sargasso Sea: The golden floating rainforest of the Atlantic Ocean* 26 (2011), <http://www.sargassoseacommission.org/storage/documents/Sargasso.Report.9.12.pdf>.

(iii) limiting fishing activities;

**Note:** Only a small amount of fishing occurs in the Sargasso Sea under the International Convention for the Conservation of Atlantic Tuna (ICCAT)—less than 3% for the six principal target species based on a 20-year average<sup>42</sup>—although a modest amount of fishing for albacore occurs there.<sup>43</sup> ICCAT recognizes that the Sargasso Sea “is a major component of the ICCAT convention area and provides a variety of ecosystem services to ICCAT and other Regional Fisheries Management Organisations (RFMOs) in the Atlantic region. Ecosystem services include a variety of products such as fish for food, but also processes that regulate and maintain our environment and cultural experiences.”<sup>44</sup> However, it does not limit fishing in the Sargasso Sea. Certainly, cooperation with ICCAT and any Eel Agreement will be important.

(iv) restricting shipping to areas outside spawning habitat, to the extent that shipping adversely affects spawning habitat;

**Note:** Available information does not now indicate that shipping adversely affects spawning habitat of either the European or American eel. Nonetheless, because the Sargasso Sea appears to be the only spawning habitat for both species, a provision that allows Parties/Signatories to restrict shipping would be an appropriate safeguard if information later determines that shipping is, in fact, adversely affecting spawning habitat.

In addition, this provision on spawning habitat does not identify the Sargasso Sea by name in order to allow this provision to apply to other anguillids that might be added to Annex 1. It recognizes that the spawning areas of anguillids—the Sargasso Sea for the European and American eels—are particularly important to these species. The Sargasso Sea is also important habitat for sea turtles, whales, billfish, tuna, and other species. For these and other reasons, the Sargasso Sea is already recognized as an Ecologically or Biologically Significant Area under the Convention on Biological Diversity (CBD). That designation, however, does not impose any management obligations on CBD Parties.

<sup>42</sup> Anonymous, *An Assessment of the Ecological Importance of the Sargasso Sea to Tuna and Tuna-like Species and Ecologically Associated Species*, SCRS/2015/201, Collect. Vol. Sci. Pap. ICCAT, 72(8): 2007-2015 (2016), [https://www.iccat.int/Documents/CVSP/CV072\\_2016/n\\_8/CV072082007.pdf](https://www.iccat.int/Documents/CVSP/CV072_2016/n_8/CV072082007.pdf). It is not clear whether the 3% figure relates to fishing effort, catch in the Sargasso Sea relative to total landings in the ICCAT convention area, or landings in the Sargasso Sea relative to historic biomass. See also Brian E. Luckhurst, *Analysis of ICCAT reported catches of tunas and swordfish in the Sargasso Sea (1992-2011)*, SCRS/2014/119, Col. Vol. Sci. Pap. 71(6): 2900-2912 (2015), (concluding that the Sargasso Sea “is not a significant fishing area” for any of the six principal commercial tuna and tuna-like species covered by the study), [http://www.sargassoseacommission.org/storage/SCRS\\_2014\\_119\\_ICCAT\\_catch\\_analysis\\_in\\_the\\_Sargasso\\_Sea.pdf](http://www.sargassoseacommission.org/storage/SCRS_2014_119_ICCAT_catch_analysis_in_the_Sargasso_Sea.pdf).

<sup>43</sup> ICCAT, Report of the Standing Committee on Research and Statistics, 28–33 (yellowfin), 55 (bigeye), 69–70 (skipjack), 94 (albacore), 112 (bluefin), 178 (swordfish) (2018), [https://www.iccat.int/Documents/Meetings/Docs/2018/REPORTS/2018\\_SCRS\\_REP\\_ENG.pdf](https://www.iccat.int/Documents/Meetings/Docs/2018/REPORTS/2018_SCRS_REP_ENG.pdf).

<sup>44</sup> *Id.* at 412 (summarizing Laurence T. Kell & Brian E. Luckhurst, *Extending the Indicator-based Ecosystem Report Card to the Whole Ecosystem: A Preliminary Example Based on the Sargasso Sea*, SCRS/2018/067, [http://www.sargassoseacommission.org/storage/SCRS\\_2018\\_067\\_Kell\\_Luckhurst.pdf](http://www.sargassoseacommission.org/storage/SCRS_2018_067_Kell_Luckhurst.pdf)).

In 2016, a study confirmed that 30 percent of the world's oceans needs protection through Marine Protected Areas or reserves and specifically noted that the CBD goal to conserve  $\geq 10\%$  of marine environments by 2020 through "ecologically representative" protected area networks is inadequate.<sup>45</sup> Consequently, the provisions proposed in this draft Agreement start the discussion of a management regime for eel spawning habitat; i.e., the Sargasso Sea.

The Parties/Signatories to this Agreement have the legal capacity to establish a marine protected area or other special management area for the Sargasso Sea and other high seas areas; there is no need to defer to the International Maritime Organization or the UN's effort to negotiate a treaty on global protections for critical marine biodiversity on the high seas. A number of international bodies have already adopted marine protected areas or no-fishing zones in the high seas pursuant to their mandates. These include the International Whaling Commission,<sup>46</sup> Northwest Atlantic Fisheries Organization,<sup>47</sup> South East Atlantic Fisheries Organisation,<sup>48</sup> Commission for the Conservation of Antarctic Marine Living Resources,<sup>49</sup> and the General Fisheries Commission of the Mediterranean.<sup>50</sup> In other words, if an Eel Agreement established a fishing ban or other restrictions in the high seas portions of the Sargasso Sea, it would not be unusual in international law.

(h) Taking other action identified by the [Parties] [Signatories].

3. Each [Party] [Signatory] [shall] [should] provide to the Secretariat, [150] days prior to a Meeting of the [Parties] [Signatories], a report on its implementation of this Agreement.

**Note: The deadline of 150 days was chosen to be consistent with other documents to be submitted to a Meeting of the [Parties] [Signatories]. See Article XI.**

4. Each [Party] [Signatory] [shall] [should] designate a focal point for all matters relating to the implementation of this Agreement and communicate the name and address of that person to the Secretariat.

**Note: Because of the catadromous nature of anguillid eels, and thus the potential for multiple agencies to be involved in eel conservation and management at the national level, it will be vital to have a single person identified as responsible for communications. The establishment of a focal or contact point has become a standard practice in MEAs.**

<sup>45</sup> Bethan O'Leary et al., *Effective Coverage Targets for Ocean Protection*, CONSERVATION LETTERS, <https://onlinelibrary.wiley.com/doi/full/10.1111/conl.12247>.

<sup>46</sup> The International Whaling Commission maintains a Southern Ocean Sanctuary in which all commercial whaling is prohibited. Schedule to the International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, at ¶ 7 (entered into force Nov. 10, 1948).

<sup>47</sup> NAFO prohibits bottom trawling on specified seamounts, corals, and areas with high densities of sponges. NAFO Conservation and Enforcement Measures, FC Doc. 17-01, at art. 17 (2017), <https://perma.cc/PL4F-JKHG>. See Daniela Diz, *Current Legal Developments: The Sargasso Sea*, 31 INT'L J. MARINE & COASTAL L. 359 (2016) (describing the efforts to ban bottom trawling in these areas).

<sup>48</sup> SEAFO bans bottom trawling on specified seamounts on the high seas. SEAFO, Conservation Measure 30/15 on Bottom Fishing Activities and Vulnerable Marine Ecosystems in the SEAFO Convention Area art. 5(1), Dec. 3, 2015, <https://perma.cc/2GYK-6X3G>.

<sup>49</sup> CCAMLR bans bottom trawling in areas of the high seas, subject to few exceptions. CCAMLR, Conservation Measure 22-05: Restrictions on the Use of Bottom Trawling Gear in High-Seas Areas of the Convention Area, Oct. 27–Nov. 7, 2008, <https://perma.cc/YHX4-KTP6>.

<sup>50</sup> GFCM bans fishing on certain coral reefs. GFCM, Recommendation GFCM/35/2011/2 on the Exploitation of Red Coral in the GFCM Area of Application, 2011, <https://perma.cc/J4XZ-WZSQ>.

## Article V —Management Plans

**Note:** These provisions for management plans are designed to allow flexibility in order to account for unique factors within a river basin or other appropriate geographical area. Consistent with the call of the outcomes of the second workshop, it also recognizes what is being done already while calling on other Range States to adopt similar measures to fill in the gaps in international cooperation.

In addition, while many CMS Agreements call for the development of a Conservation Plan, this Agreement does not; the management plans are a substitute for a Conservation Plan. Many Eel Management Plans of the EU Member States include restocking provisions; the negotiators of this Agreement will, thus, need to determine the appropriateness of the proposed provision.

### *Establishment of Management Plans*

1. Each Range State [Party] [Signatory] [shall] [should] identify and define appropriate eel management units lying within their national territory, including their territorial seas and exclusive economic zones. If appropriate justification is provided, a [Party] [Signatory] may designate the whole of its national territory or an existing regional administrative unit as one eel management unit.
2. For each eel management unit defined under paragraph 1, Range States [shall] [should] ensure that a management plan is prepared.
3. The objective of each management plan [shall] [should] be to reduce anthropogenic mortality of eels consistent with Article III(2).
4. The appropriate metric [shall] [should] be determined, taking into account the data available for each eel management unit in one or more of the following three ways, which will, where possible, be based on harmonized methods:
  - (a) use of data collected in the most appropriate period prior to 1980, provided these are available in sufficient quantity and quality;
  - (b) habitat-based assessment of potential eel production, in the absence of anthropogenic mortality factors;
  - (c) with reference to the ecology and hydrography of similar river systems.
5. Each management plan shall contain a description and an analysis of the present situation of the eel population in the eel management unit and relate it to the target level of escapement laid down in Article III, paragraph 2.
6. Each management plan shall include measures to attain, monitor and verify the objective set out in paragraph 3. Range States may define the means depending on local and regional conditions.

7. A management plan may contain, but is not limited to, the following measures:
  - (a) reducing commercial fishing activity;
  - (b) restricting recreational fishing;
  - (c) restocking, consistent with the advice referred to in Article IV(2)(b);
  - (d) structural measures to make rivers passable and improve river habitats, together with other environmental measures;
  - (e) transportation of silver eel from inland waters to waters from which they can escape freely to spawning areas;
  - (f) combating predators;
  - (g) temporary switching-off of hydro-electric power turbines;
  - (h) measures related to aquaculture.

**Note: This list includes restocking, but differs from the EU Eel Regulation in that it adds the condition that the Parties/Signatories first determine that restocking benefits the conservation status of the species.**

8. Each management plan shall contain a time schedule for the attainment of the target level of escapement laid down in paragraph 3, following a gradual approach and depending on an expected recruitment level; it shall include measures that will be applied as of the first year of application of the management plan.
9. In each management plan, each Range State shall implement appropriate measures as soon as possible to reduce the eel mortality caused by factors outside the fishery, including hydroelectric turbines, pumps or predators, unless this is not necessary to attain the objective of the plan.
10. Each management plan shall include a description of the control and enforcement measures applicable within inland and marine waters.
11. For eel management units extending to the territory of more than one Range State [Party] [Signatory], the relevant [Parties] [Signatories] [shall] [should] jointly prepare a management plan.

#### *Communication and Approval of Management Plans*

12. Range States [shall] [should] submit their management plans to the Secretariat 60 days prior to any meeting of the Advisory Committee. The Secretariat [shall] [should] promptly transmit any management plans submitted by Range States to all [Parties] [Signatories] and members of the Advisory Committee.
13. If a [Party] [Signatory] does not submit a management plan for an eel management unit, it [shall] [should] reduce fishing effort by at least 50% relative to the average effort deployed from [2015 to 2017] or, if fishing does not occur in that eel management unit, take other measures to promote the conservation of eels.

14. On the basis of a technical and scientific evaluation by the Advisory Committee or other appropriate scientific bodies, the [Parties] [Signatories] [shall] [should] provide comments on the management plans, as appropriate.

**This provision is intended to incorporate review by the Scientific Technical and Economic Committee for Fisheries, which is charged with evaluating EU Eel Management Plans. Other appropriate bodies may also exist.**

## Article VI — Trade Measures

**Note: One of the more significant issues facing negotiators is whether to allow trade in eels. Overutilization due to trade is adversely affecting eel stocks. The European Union currently prohibits all imports into and exports out of the EU of the European eel, although it allows intra-EU trade. Other eel Range States prohibit trade in eels. Nonetheless, trade in European eels from some Range States is significant.<sup>51</sup> Given the diversity of approaches, this Agreement provides three options for addressing trade.**

**Also note that these provisions will need to be aligned with those provisions relating to “take,” found in Article IV(2)(b). For example, if the taking of eels is broadly prohibited, then it may be unnecessary to adopt a catch document scheme included as Option 3.**

### *Option 1*

The [Parties] [Signatories] [shall] [should] prohibit all trade in eels.

### *Option 2*

1. The [Parties] [Signatories] agree to implement the provisions relating to trade that have been established by other international agreements, including the Convention on International Trade in Endangered Species of Fauna and Flora.
2. Notwithstanding paragraph 1 or any other provision of the Agreement, the [Parties] [Signatories] have the right to adopt stricter domestic measures regarding the conditions for trade, taking, possession or transport of eels, including the complete prohibition thereof.

**Note: International agreements, unless otherwise specified, establish minimum standards. Thus, Parties have the right to adopt legislation that is stricter than those of international agreements. Nonetheless, it is useful to include a provision that reminds States of their rights to legislate.**

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<sup>51</sup> Willow Outhwaite & Lauren Brown, *Eastward Bound: Analysis of CITES-listed Flora and Fauna Exports from Africa to East and Southeast Asia 2006 to 2015* (2018), <http://static1.1.sqspcdn.com/static/f/157301/27848324/1520244219633/TRAFFIC-Africa-Asia-report.pdf?token=OiScvAmNL32inFopATvvgTOXmnI%3D>.

### Option 3

**Note: A third approach may be to allow trade but only subject to a catch document. A 2017 HELCOM workshop on eels has recommended such an approach.<sup>52</sup> A catch document system (CDS) is “a system that tracks and traces fish from the point of capture through unloading and throughout the supply chain.”<sup>53</sup> It records and certifies information, such as the origin of fish caught and consistency with national and international law, with the objective ensuring the sustainability and legality of the catch.**

3. The [Parties] [Signatories] [shall] [should] establish a catch document scheme for the trade in eels.
4. The Eel Catch Document (ECD) is a document containing information relating to the harvest, transshipment and landing of eels.
5. Each [Party] [Signatory] [shall] [should] require that each export or re-export of eels from its ports, each landing of eels at its ports and each transshipment of eels from, or to, its vessels be accompanied by a completed ECD. The export, landing or transshipment of eels without an ECD is prohibited.

**Note: Most catch document schemes relate only to landing and transshipment because they relate to catches of high seas fish, such as tuna and toothfish. As many eels are caught in nearshore and inland waters, an eel catch document scheme must extend these provisions to include export and re-export.**

6. Each [Party] [Signatory] [shall] [should] ensure that its customs authorities or other appropriate government officials request and examine the documentation of each shipment of eels imported into, or exported or re-exported from its territory. The examination will confirm that documentation for each shipment includes ECD(s) that account for all eels contained in the shipment. Where necessary, such officials [shall] [should] also examine the content of any shipment to verify the information contained in the ECD(s).
7. If, as a result of an examination referred to in paragraph 5 above or any other inspection or investigation conducted in accordance with relevant domestic law, a question arises regarding the information contained in the ECD, the exporting State whose government authority validated the document(s) and, as appropriate, the Flag State whose vessel completed the document are called on to cooperate with the importing State with a view to resolving such question.

<sup>52</sup> A workshop report noted the following:

Elaborating a catch documentation and traceability scheme for both inland and marine waters of the Baltic Sea, inspired by examples from certain Member States (c.f. document 2, submitted by LIFE) and based on modern IT technologies, has the potential to improve the eel data availability and help solve the IUU fishing problem.

Baltic Marine Environment Protection Commission, Outcome of Regional Workshop on Eel and the Baltic Sea (HELCOM FISH-M 5-2017) ¶ 5(1)(e) (2017), [https://www.cms.int/sites/default/files/document/outcome-of-regional-baltic-sea-eel-ws-fish-m-5-2017\\_e.pdf](https://www.cms.int/sites/default/files/document/outcome-of-regional-baltic-sea-eel-ws-fish-m-5-2017_e.pdf).

<sup>53</sup> FAO Expert Consultation on Catch Documentation Schemes, FAO Fisheries and Aquaculture Rep., Doc. FIPM/R1120, app. D, § 4.1 (July 21–24, 2015), <https://perma.cc/8YAA-2FTP>.

8. If, following an examination under paragraph 5 or any other inspection or investigation conducted in accordance with relevant domestic law, questions under paragraph 6, and it is determined, after consultation with the States concerned, that any information contained within an ECD is invalid or the eels were not harvested in a manner consistent with this Agreement's conservation measures, the import, export or re-export of the eels that are the subject of the document(s) is prohibited.
9. The [Parties] [Signatories] [shall] [should] develop an ECD for use by all [Parties] [Signatories].
10. Each [Party] [Signatory] [shall] [should] develop national legislation to implement these provisions.

### **Article VII — Meeting of the [Parties] [Signatories]**

**Note: The provisions included in this Article are standard; there is nothing unique about them.**

1. The Meeting of the [Parties] [Signatories] is the decision-making organ of this Agreement.
2. The Secretariat [shall] [should] call a meeting of the Meeting of the [Parties] [Signatories] not later than two years after the entry into force of this Agreement.
3. Thereafter the Secretariat [shall] [should] convene ordinary meetings of the Meeting of the [Parties] [Signatories] at intervals of not more than three years, unless the Meeting decides otherwise, and extraordinary meetings at any time on the written request of at least one-third of the [Parties] [Signatories].
4. The Meeting of the [Parties] [Signatories] [shall] [should] establish and keep under review the financial regulations of this Agreement. The Meeting of the Parties [shall] [should], at each of its ordinary meetings, adopt the budget for the next financial period. Each [Party] [Signatory] [shall] [should] contribute to this budget according to a scale to be agreed upon by the Meeting. Financial regulations, including the provisions on the budget and the scale of contributions as well as their modifications, [shall] [should] be adopted by unanimous vote of the [Parties] [Signatories] present and voting.
5. At each of its meetings, the Meeting of the [Parties] [Signatories] [shall] [should] review the implementation of this Agreement and may in particular:
  - (a) review and assess the conservation status of eels;
  - (b) review the progress made towards achieving the objectives of this Agreement;
  - (c) make such provision and provide such guidance as may be necessary to enable the Advisory Committee and the Secretariat to carry out their duties;
  - (d) receive and consider any reports presented by the Advisory Committee, the Secretariat, any [Party] [Signatory] or any other subsidiary body established by the [Parties] [Signatories];
  - (e) make recommendations to the Parties for improving the conservation status of eels whether or not they are included in Annex 1;

- (f) make recommendations to the [Parties] [Signatories] for improving the effectiveness of this Agreement; and
  - (g) decide on any additional measure that should be taken to implement the objectives of this Agreement.
6. Each meeting of the Meeting of the [Parties] [Signatories] should determine the time and venue of the next meeting.
  7. The Meeting of the [Parties] [Signatories] at its first meeting [shall] [should] determine and adopt rules of procedure for that meeting. The Rules of Procedure remain in force unless and until they are amended.
  8. Decisions at a meeting of the Meeting of the [Parties] [Signatories] [shall] [should] require a two-thirds majority of the [Parties] [Signatories] present and voting, except where otherwise provided for by this Agreement.
  9. The United Nations, its Specialized Agencies, and any Secretariat of relevant international conventions and other instruments, particularly those concerned with the conservation and management of marine living resources, as well as any State not a [Party] [Signatory] to the present Agreement, may be represented at meetings of the [Parties] [Signatories] by observers, who have the right to participate but not to vote.
  10. Any national or international agency or body, whether governmental or non-governmental, technically qualified in protection, conservation and management of eels, which has informed the Secretariat of its desire to be represented at meetings of the Meeting of the [Parties] [Signatories] by observers, shall be admitted unless at least one-third of the Parties present object. Once admitted, these observers have the right to participate but not to vote.

### **Article VIII — Advisory Committee**

**All multilateral environmental agreements, including most CMS MOUs, have a subsidiary body designed to provide advice to the Agreement’s decision-making body. The general functions of subsidiary bodies are straightforward and described in paragraph 4 below. The more challenging questions relate to the composition of the body to ensure that all geographic regions are represented and that appropriate expertise is provided.**

**The first question to decide is whether the Agreement should specify the composition of the body, as in AEWA, or direct the Parties/Signatories to do so at their meetings. In the case of eels, the latter approach might be more effective for a couple of reasons. First, the habitat of *Anguilla anguilla* resides primarily within northern and western Europe. Thus, elaborating on the geographic composition of representatives does not carry the same importance as more global agreements in which it is critical to obtain views from developed and developing countries as well as views from different geographic regions. Second, if additional eel species are included in Annex 1, the composition of the advisory body may need to change to reflect the new Range States participating in the Agreement. If the composition of the advisory body is included in a resolution, the Parties/Signatories can amend the resolution to reflect current circumstances. This would appear to be the preferred approach and is described in Option 1; it is modeled on the provisions of the Sharks MOU. Advice from the CMS Secretariat indicates that this approach is preferred**

because it allows the Parties/Signatories to adapt the composition of the advisory committee in light of the needs of the species. However, an option that provides more specific guidance is provided in Option 2; it is modeled on the AEW Technical Committee.

*Option 1*

1. At its first meeting, the Meeting of the [Parties] [Signatories] [shall] [should] establish an Advisory Committee comprising persons qualified in scientific, management, or legal aspects of anguillid conservation and representing different regions of eels. The [Parties] [Signatories] [shall] [should] keep the composition of the Advisory Committee under review, taking into account the inclusion of additional eel species in Annex 1.

*Option 2*

1. The Advisory Committee shall comprise:
  - (a) [nine] experts representing the different regions inhabited by eels, in accordance with a balanced geographical distribution;
  - (b) one representative from the Anguillid Eel Specialist Group (AESG) of the International Union for Conservation of Nature and Natural Resources (IUCN);
  - (c) one representative from the Joint EIFAAC/ICES/GFCM Working Group on Eels (WGEEL); and
  - (d) one expert from each of the following fields: eel management and environmental law.

**Note: The AESG and the WGEEL are continually assessing the status of the European eel and, in the case of the AESG, other eel species. For this reason, it seems critical to include them in the Advisory Body. The two organizations could also be identified by name in Option 1. Regardless of the number of individuals chosen for the Advisory Committee, the composition should include individuals with scientific, management, and legal expertise.**

2. At its first meeting, the Meeting of the [Parties] [Signatories] [shall] [should] establish the procedure for the appointment of the experts, the term of their appointment and the procedure for designation of the Chair of the Advisory Committee.
3. Meetings of the Advisory Committee shall be convened by the Secretariat at least [120] days prior to each ordinary session of the Meeting of the [Parties] [Signatories]. The Meeting of the [Parties] [Signatories] may decide to convene additional meetings of the Advisory Committee.

**Note: This paper proposes that the Advisory Committee meet 120 days prior to a Meeting of the Parties/Signatories so that the Advisory Committee may review any proposals submitted for the meeting. Paragraph 4(c) below then requires the Advisory Committee to submit its comments and recommendations to the Meeting 90 days before the meeting. Article X requires submission of proposals 150 days prior to the Meeting of the Parties/Signatories. In this way, deadlines are established to ensure the orderly function of advice and so that the Parties/Signatories get the most value from the Advisory Committee. If a different timeframe for the Advisory Committee to meet is desired, this paper recommends also revising deadlines for the**

submission of proposals to ensure that the Advisory Committee can provide advice on those proposals.

**Meeting 120 before a Meeting of the Parties/Signatories will cost more than if the Advisory Committee meets just before the Meeting. However, CMS itself has recently altered its meeting schedule for the Scientific Council to be consistent with this proposal in order to provide a more orderly process for providing and considering scientific advice. To lower costs, paragraph 7 below recommends organizing Advisory Committee meetings to coincide with other eel-related meetings which, presumably, some individuals of the Advisory Committee are likely to attend.**

4. The Advisory Committee [shall] [should]:
  - (a) provide scientific and technical advice and information to the Meeting of the [Parties] [Signatories] including with respect to management plans and proposals to amend Annex 1, through the Agreement Secretariat;
  - (b) analyse, as necessary, scientific, technical and other assessments and make recommendations to the Meeting of the [Parties] [Signatories] concerning the conservation status of eels included in Annex 1 and other eel species that may be contemplated for inclusion;
  - (c) report to each ordinary session of the Meeting of the [Parties] [Signatories] on its activities, which shall be submitted to the Agreement Secretariat not less than [90] days before the session of the Meeting of the [Parties] [Signatories], and copies shall be circulated forthwith by the secretariat to the Parties;
  - (d) recommend to the Secretariat the convening of an urgent session of the Meetings of the [Parties] [Signatories] in view of emergencies that may arise; and
  - (e) carry out any other tasks referred to it by the Meeting of the [Parties] [Signatories].
5. The Advisory Committee may establish such working groups as may be necessary to deal with specific tasks.
6. Members of the Advisory Committee [shall] [should] serve in their individual capacities.
7. To the extent practicable, the Advisory Committee [shall] [should] conduct its work through collaboration by electronic means whenever possible. In exceptional circumstances, meetings of the Advisory Committee should be convened by the Chair of the Committee in consultation with the Secretariat and, where possible, such meetings should be held in conjunction with other eel-related meetings.

**Note: Paragraph 7 is modeled on a similar provision from the Sharks MOU and is designed to reduce costs. In addition, the call to organize any physical meeting with another eel-related meetings is recommended so as to leverage additional expertise from those attending the other meeting and, potentially, to reduce costs of Advisory Committee members who might also be attending that other meeting.**

## Article IX — Secretariat

### *Establishment of a Secretariat*

#### *Option 1*

1. A Secretariat [shall] [should] be established within the Secretariat of the Convention.

**Note: Under this option, the Eels Secretariat is co-located with the CMS Secretariat and would be subject to UN Rules. This Draft Agreement presumes that this option is the preferred option due to synergies with the CMS Secretariat and likely cost savings relative to other options. The advantages of this option include the sharing of administrative and other staff and services with CMS. The Eels Secretariat would be subject to the rules of the United Nations relating to, among other things, salary and travel. Nevertheless, because CMS professional staff are currently working at full capacity, the Parties/Signatories would need to fund additional staff.**

#### *Option 2*

1. If the Secretariat of the Convention is unable, at any time, to provide this function, the Meeting of the [Parties] [Signatories] [shall] [should] make alternative arrangements.

**Note: Under this option, the Parties/Signatories would decide to locate the Secretariat someplace other than with the CMS Secretariat. The Parties/Signatories would need to decide whether they want the Secretariat to be independent of the United Nations, as is the ACCOBAMS and ACAP Secretariats. Organizations such as the Anguillid Eel Specialist Group, which is hosted by the Zoological Society of London, and the Sargasso Sea Commission, provide other options. The Parties/Signatories would want to identify the costs, such as administrative fees and rent, that are associated with these options.**

### *Functions of the Secretariat*

**It is now standard practice for the Secretariat of multilateral environmental agreements (MEAs) to collect and review reports from the Parties/Signatories, organize meetings, and prepare documents for meetings of the Parties/Signatories, and liaise with Parties/Signatories when questions arise. The provisions that follow have been modified from the provisions of CMS and AEWA, but they are similar to the provisions of many MEAs.**

2. The functions of the Secretariat [shall] [should] be:
  - (a) to arrange and service the sessions of the Meeting of the [Parties] [Signatories] and subsidiary bodies;
  - (b) to liaise with and facilitate co-operation between [Parties] [Signatories] and non-[Party] [Signatory] Range States, and international and national bodies whose activities are directly or indirectly relevant to the conservation of eels;
  - (c) to assist the [Parties] [Signatories] in the implementation of this Agreement, ensuring coherence between measures adopted pursuant to other international and regional Agreements in force;
  - (d) to execute decisions addressed to it by the Meeting of the [Parties] [Signatories];
  - (e) to make recommendations to the [Parties] [Signatories] for the implementation of the aims and provisions of the Agreement;
  - (f) to provide to each ordinary session of the Meeting of the [Parties] [Signatories] a report on the work of the Secretariat, the Advisory Committee and any other subsidiary body established by the Meeting of the [Parties] [Signatories], and on the implementation of the Agreement based on information provided by the [Parties] [Signatories] and other sources;
  - (g) to administer the budget for this Agreement;
  - (h) to provide information to the general public concerning this Agreement and its objectives; and
  - (i) to perform any other function entrusted to it under this Agreement by the Meeting of the [Parties] [Signatories].

### **Article X — Cooperation**

1. The [Parties] [Signatories] [shall] [should] cooperate for the purpose of conserving eels by becoming members of relevant organizations or arrangements, such as the General Fisheries Commission for the Mediterranean (GFCM) and the Baltic Marine Environment Protection Commission (HELCOM), with the purpose of achieving compatible measures in respect of eels.
2. The Secretariat shall consult and cooperate with other relevant organizations, [including those identified in paragraph 1, the Anguillid Eel Specialist Group and WGEEL,] as appropriate, to exchange information and ensure the complementarity of conservation and management measures across different international and regional bodies.

**Note: Given the substantial work performed by the AESG and WGEEL that is of relevance to an Eel Agreement, the Agreement may want to specifically identify them. In addition, both GFCM and HELCOM have undertaken actions to conserve eels. Thus, any Eel Agreement should identify those two organizations for purposes of cooperation.**

## Article XI – Amendments of the Annexes

**Note: These provisions are modeled on those of CMS, AEWA, CITES, and the Rules of Procedure for the Sharks MOU and other CMS MOUs.**

1. Any [Party] [Signatory] may propose an amendment to Annex 1 for consideration at any ordinary or extraordinary session of the Meeting of the [Parties] [Signatories].
2. The text of any proposed amendment and the reasons for it, based on the best scientific evidence available, [shall] [should] be communicated to the Secretariat at least 150 days before the session and shall promptly be communicated by the Secretariat to all [Parties] [Signatories] and to members of the Advisory Committee. Any comments on the text by the [Parties] [Signatories] shall be communicated to the Secretariat not less than 60 days before the meeting begins. The Secretariat shall, immediately after the last day for submission of comments, communicate to the Parties all comments submitted by that day.

**Note: By submitting the proposal 150 days prior to the meeting, the Advisory Body, which meets 120 days prior to a session, will have time to review the proposal. See Article VIII.**

3. Amendments shall be adopted by [consensus] [a two-thirds majority of [Parties] [Signatories] present and voting]. [For these purposes “Parties present and voting” means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two-thirds required for adopting an amendment.]

**Note: In CMS legal instruments and other MEAs, the Parties/Signatories adopt decisions by a two-thirds majority (CMS, EUROBATS, AEWA, and CITES). However, the Sharks MOU requires consensus.**

4. Amendments adopted at a meeting shall enter into force 90 days after that meeting for all [Parties] [Signatories] except those which make a reservation in accordance with paragraph 5 of this Article.
5. During the period of 90 days provided for by paragraph 4 of this Article, any [Party] [Signatory] may by notification in writing to the [Depositary Government] [Secretariat] make a reservation with respect to the amendment. Until such reservation is withdrawn the Party shall be treated as a State not a Party to the present Agreement with respect to trade in the species concerned.

## Article XII – Amendment of the Agreement

1. Any [Party] [Signatory] may propose an amendment of this Agreement for consideration at any ordinary or extraordinary session of the Meeting of the [Parties] [Signatories].
2. The text of any proposed amendment and the reasons for it shall be communicated to the Executive Secretary at least 150 days before the meeting at which it is to be considered and shall promptly be communicated by the Executive Secretary to all [Parties] [Signatories]. Any comments on the text by the [Parties] [Signatories] shall be communicated to the Secretariat not less than sixty days before the meeting begins. The Secretariat shall, immediately after the last day for submission of comments, communicate to the [Parties] [Signatories] all comments submitted by that day.

3. Amendments shall be adopted by a two-thirds majority of [Parties] [Signatories] present and voting.

*Option 1*

4. An amendment adopted shall enter into force for all Parties which have accepted it on the first day of the third month following the date on which two-thirds of the Parties have deposited an instrument of acceptance with the Depository. For each Party which deposits an instrument of acceptance after the date on which two-thirds of the Parties have deposited an instrument of acceptance, the amendment shall enter into force for that Party on the first day of the third month following the deposit of its instrument of acceptance.

**Note: This option should be chosen if the Agreement is legally binding.**

*Option 2*

4. An amendment adopted becomes effective immediately.

**Note: This option should be chosen if the Agreement is legally non-binding. It is modeled on a similar provision found in the Raptors MOU. It recognizes that amendments to an MOU do not require ratification at the national level.**

### **Article XIII – Resolution of Disputes**

1. Any dispute which may arise between two or more [Parties] [Signatories] with respect to the interpretation or application of the provisions of the present Agreement shall be subject to negotiation between the [Parties] [Signatories] involved in the dispute.
2. If the dispute cannot be resolved in accordance with paragraph 1 of this Article, the [Parties] [Signatories] may, 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.

### **Article XIV – Signature**

The present Agreement shall be open for signature at \_\_\_\_\_ until [date] [month] [year] and thereafter at \_\_\_\_\_ until [[date] [month] [year]] [indefinitely].

**Note: MOUs remain open indefinitely. Legally binding agreements typically establish a date by which signature closes. However, signature is not required; States may accept an agreement without first signing it.**

**Also, some MOUs limit membership to Range States. However, this agreement acknowledges that other States, including consumer States, may influence the conservation status of eels. Thus, this provision is written in an open-ended manner in order to allow the participation of any State, regardless of whether the Agreement is legally binding or legally non-binding.**

### **Article XV – Ratification, Acceptance, Approval**

**Note: This Article is needed only if the Agreement is legally binding.**

This Agreement shall be subject to ratification, acceptance or approval. Agreements of ratification, acceptance or approval shall be deposited with the Government of \_\_\_\_\_, which shall be the Depository.

### **Article XVI – Accession**

**Note: This Article is needed only if the Agreement is legally binding.**

1. The present Agreement shall be open indefinitely for accession. Agreements of accession shall be deposited with the Depository.
2. This Agreement shall be open for accession by regional economic integration organizations constituted by sovereign States that have competence in respect of the negotiation, conclusion and implementation of international agreements in matters transferred to them by their Member States and covered by this Agreement.
3. In its Agreements of accession, a regional economic integration organization shall declare the extent of its competence with respect to the matters governed by the Agreement. These organizations shall also inform the Depository of any substantial modification in the extent of their competence. Notifications by regional economic integration organizations concerning their competence with respect to matters governed by this Agreement and modifications thereto shall be distributed to the Parties by the Depository.
4. In matters within their competence, such regional economic integration organizations shall exercise the rights and fulfil the obligations which this Agreement attributes to their Member States, which are Parties to the Agreement. In such cases the Member States of the organizations shall not be entitled to exercise such rights individually.
5. In the fields of their competence, regional economic integration organizations shall exercise their right to vote with a number of votes equal to the number of their Member States which are Parties to the Agreement. Such organizations shall not exercise their right to vote if their Member States exercise theirs, and vice versa.

### **Article XVII – Entry into Force**

1. This Agreement [shall enter into force] [becomes effective] 90 days after the date of deposit of the tenth Agreement of [ratification, acceptance, approval or accession] [signature], with the [Depository Government] [Secretariat].

**Note: The references to “entry into force,” “ratification, acceptance approval or accession,” and “depository government” apply to a legally binding agreement.**

**The references to “becomes effective,” “signature” and the “secretariat” apply to a legally non-binding agreement.**

2. For each State or each regional economic integration organization that [ratifies, accepts, accedes to, or approves] [signs] the present Agreement after the deposit of the [tenth] instrument of ratification, acceptance, approval or accession, the present Agreement shall enter into force 90 days after the deposit by such State or each regional economic integration organization of its [Agreement of ratification, acceptance, approval or accession] [signature].

### **Article XVIII – Reservations**

The provisions of the present Agreement shall not be subject to general reservations. Specific reservations may be entered in accordance with the provisions of this Article XI, paragraph 5.

### **Article XIX – Withdrawal**

Any [Party] [Signatory] may withdraw from the present Agreement by written notification to the [Depositary] [Secretariat] at any time. The withdrawal takes effect [twelve] months after the [Depositary] [Secretariat] has received the notification.

### **Article XX – Depositary**

1. The original of the present Agreement, in the English [and Arabic] languages, each version being equally authentic, [shall] [should] be deposited with the [Depositary] [Convention Secretariat], which shall transmit certified copies of each of these versions to all States and all regional economic integration organizations that have signed it or deposited Agreements of accession to it.
2. The [Depositary] [Convention Secretariat] [shall] [should] inform all signatory and acceding States and the Secretariat of signatures, deposit of Agreements of ratification, acceptance, approval or accession, entry into force of the present Convention, amendments thereto, entry and withdrawal of reservations and notifications of denunciation.

In witness whereof the undersigned Plenipotentiaries, being duly authorized to that effect, have signed the present Agreement.

Done at [city] on [date] [month] [year].

**Annex 1 — Species Covered by This [Agreement] [MOU]**

*Anguilla anguilla*