

## Legislative Guidance Document

### *Exceptions to the Prohibition on Taking of Appendix I-listed Species under CMS Article III.5*

#### **Summary:**

Article III.5 of the Convention on the Conservation of Migratory Species of Wild Animals (CMS) prohibits the taking of migratory species listed in Appendix I, while providing for circumstances under which a Party may make an exception to this prohibition. This Legislative Guidance document, *Exceptions to the Prohibition on Taking of Appendix I-listed Species under CMS Article III.5*, prepared by the Secretariat under the CMS National Legislation Programme, provides a legal analysis of the exceptions allowed under Article III.5. It aims to provide clarity and support for Parties to aid in decisions regarding the use of exceptions in implementing the Convention.



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### ***Exceptions to the Prohibition on Taking of Appendix I-listed Species under CMS Article III.5***

#### **I. Introduction and Background**

1. Article III.5 of the Convention on the Conservation of Migratory Species of Wild Animals provides that “Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species.” Article I.1(i) defines “taking” to mean “taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct.” This is known as the “take prohibition”.
2. While the take prohibition provides for strong protections of Appendix I species, the Convention text, in Article III.5, also provides for a limited number of circumstances under which exceptions to this prohibition may be made by Parties:

*Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species. Exceptions may be made to this prohibition only if:*

- a) the taking is for scientific purposes;*
- b) the taking is for the purpose of enhancing the propagation or survival of the affected species;*
- c) the taking is to accommodate the needs of traditional subsistence users of such species; or*
- d) extraordinary circumstances so require;*

*provided that such exceptions are precise as to content and limited in space and time. Such taking should not operate to the disadvantage of the species.*

3. If a Party makes use of an exception to the take prohibition, Article III.7 requires it to inform the Secretariat “as soon as possible.”
4. Taking the clauses of the exceptions text together, the Convention imposes three elements on the use of exceptions, clearly showing an intent that exceptions be used sparingly:
  - Exceptions are limited to four enumerated situations;
  - The implementation of any exception must be precise as to content, limited in space and time, and not operate to the disadvantage of the species; and
  - The use of an exception must be reported to the Secretariat.
5. Importantly, these requirements are cumulative. A Party must meet each of these requirements for an exception to be consistent with the Convention.
6. This guidance document looks at each exception in turn, as well as some related legal issues that may arise in the implementation of the exceptions. The document attempts to identify what might be considered “best practices,” drawing on examples from national legislation reviewed as part of the National Legislation Programme.
7. The guidance document is structured as follows:

- Section II examines the conditions, such as limitations with respect to space and time, which apply to all exceptions;
- Section III explores the Convention’s four enumerated exceptions; and
- Section IV describes important administrative measures that could help ensure that exceptions are granted consistent with the Convention’s intent that exceptions be used sparingly.

## II. Overarching Conditions Pertaining to All Exceptions

8. As noted in Section I, the Convention includes three overarching conditions with respect to any exception to the taking prohibition:
  - to be precise as to content;
  - to be limited in space and time; and
  - not to operate to the disadvantage of the species.

### A. Ensuring the Exception Is Precise as to Content

9. The requirement that any take authorized under an exception be “precise as to content” ensures that the competent agency or ministry does not grant an overly broad authority to take Appendix I species. At its most basic, precision as to content means that the competent agency or ministry allows only activities that are necessary and warranted under the circumstances, communicating the limitations of the exception in clear, unambiguous language.
10. If the exception allowing take is codified in a regulation or decree, it should be clear as to exactly what is and is not permitted. By way of example, one Party’s legislation contemplates lifting the otherwise applicable take and trade prohibitions in certain, exceptional circumstances. In particular, this Party’s legislation authorizes the possibility to waive the default take prohibitions (i.e., to grant an exception) under the following circumstances, assuming “no other satisfactory solution” is available:
  - “(a) — in the interests of public health and safety,  
— in the interests of air safety,  
— to prevent serious damage to crops, livestock, forests, fisheries and water,  
— for the protection of flora and fauna;
  - (b) — for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;  
[...]
11. Note, however, that the mere existence of a qualifying circumstance is not generally sufficient to authorize an individual to engage in take. Thus, for instance, this Party’s legislation requires issuance of a permit by the competent authority.
12. Clear information as to what needs to be included in a permit can be set forth in legislation. For example, in one CMS Party, any permit issued must be justified, made publicly available, and specify the following:
  - the objective and justification of the action;
  - the species;
  - the means, facilities, systems, or methods to be used and their limits, as well as the reasons and qualified personnel authorized; and

- the nature and conditions of risk, the circumstances of time and place, and, if applicable, the alternative solutions not adopted and the scientific data used.”

13. The license or permit is an opportunity to operationalize the CMS’ requirement that any exception be precise as to content. Generally, national law or procedures would normally require that the permit or license enumerate with specificity important details such as the species, the number of specimens, and authorized means.<sup>1</sup> Precision as to content might also be achieved through restrictions related to the age, size, and sex of individuals to be taken. Finally, depending upon the purpose of the take, additional opportunities to gain precision may arise. For example, in the context of a proposed take for scientific purposes, national legislation might include a requirement that the permit applicant provide a detailed research proposal explaining the research objective, why and to what extent take is necessary to meet the objective, and planned use of the research results.
14. In general, Parties may address content precision by (1) limiting exceptions to certain species, and (2) imposing conditions related to number of specimens, age, and sex. These approaches are discussed in turn.

#### 1. *Limiting Exceptions to Certain Species*

15. A significant challenge to implementation of the exceptions in line with the treaty text (i.e., in a manner as narrow, or precise, as the treaty text envisions) is that few Parties, if any, have legislation that is specific to migratory species or domestic implementation of CMS. Instead, broader hunting, wildlife, or biodiversity legislation often serves the role of domestic implementation for CMS purposes. When this is true, exceptions that might be used with respect to CMS Appendix I species need to comport with the treaty text even if they apply to other species. Alternatively, CMS Appendix I species need to be treated separately, so as to avoid compliance issues.

*Tip: If legislation used to implement CMS is not CMS-specific, ensure that CMS Appendix I species can only be subject to exceptions enumerated in CMS Article III.5.*

#### 2. *Imposing Conditions Related to Number of Specimens, Age, and Sex*

16. Another fairly simple way for Parties to advance precision as to content is by limiting exceptions to the take prohibition to a certain number of specimens, of a certain age or point in their life cycle, or of a certain sex. Such limitations can be contemplated in national legislation and, to achieve finer precision, given effect at the permit level. For example, national legislation authorizing exceptions to the take prohibition may direct the competent authorities to specify, in any permit issued, the precise number of individuals, age, and sex that may be taken. If a Party seeks to further limit the discretion of the permitting authority, the legislation may introduce a cap on the number of individuals allowed under any permit (e.g., no more than five), as well as similar fixed delimiters relating to age and sex (e.g., an absolute prohibition on take of juvenile specimens and/or female specimens).
17. These types of limitations also help ensure that a taking under an exception ‘does not operate to the disadvantage of the species,’ as required by Article III.5.

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<sup>1</sup> See also UNEP/CMS/COP13/Doc.22, Review Mechanism and National Legislation Programme, *Legislative Guidance Materials Relating to Implementation of Article III.5*, at Recommendation 9 (“Clearly describe the means by which exceptions will be ‘precise as to content and limited in space and time.’”).

18. Note also, as relates to numerical limitations, that Parties may impose such limitations at two levels. As explained above, Parties may limit the number of individuals that a given permit-holder is allowed to take. Parties may also set overall numerical caps that restrict take in total, as explained below.

*Tip: Take permits can include restrictions as to number of specimens, age, and sex as a means to advance precision as to content.*

## **B. Ensuring Exceptions Are Limited in Space and Time**

19. Complementing the “precise as to content” requirement is the mandate that exceptions be “limited in space and time.”

### *1. Limited in Space*

20. To ensure that any exception to the take prohibition is limited in space, the competent authority could specify the area in which take may occur. The area should be limited to the narrowest confines possible. Factors in determining the geographic area from which take may occur could be linked to numerous criteria, such as avoiding important habitat for the species.
21. In the event of an exception due to “extraordinary circumstances,” such circumstances may be inherently tied to a specific location. If the take of a bird species is necessary to prevent aviation accidents, for instance, the competent authority may limit the take to around a particular airport.
22. Authorities might also enumerate excluded areas (i.e., areas where the exception to the take prohibition is not permitted). Of course, the approaches can be combined, with the governing instrument defining both permitted and excluded zones.
23. As a practical matter, limitations like these may be either set forth generally in legislation, implemented through a permit regime, or both.

### *2. Limited in Time*

24. To give effect to the requirement that exceptions be limited in time, any permits for take should be limited in duration to no longer than necessary to satisfy the circumstances justifying the exception—and that time period should be included within the permit or license. If the exception allows take for scientific purposes, for example, the permit or license should remain valid for no longer than necessary to collect the specimens required for the study.
25. One CMS Party, for example, has a decree that encapsulates both the “precise as to content” and “limited in time” requirements, providing as follows:

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

- a. The species covered;
- b. The duration of the license;
- c. The area covered;
- d. The number of individuals of each species that will be allowed to be collected under the Authorization granted where such indication is possible;

- e. The method and equipment which can be used for catching and collecting; and
- f. Other indications or limits deemed necessary.”

*Tip: National legislation should require that all permits or licenses for an exception to the take prohibition include clear time limits and geographical parameters.*

### **C. Ensuring that Exceptions Do Not Operate to the Disadvantage of the Species**

26. As a further condition, Article III.5 requires that any exception to the take prohibition does not operate to the disadvantage of the species. Although implementation of this requirement can take on many forms, including limiting the use of any exceptions to certain species, at least two approaches stand out as particularly helpful: numerical caps that establish a cap on the maximum possible take of a given species, and categorical prohibitions for take of individuals during a sensitive life-cycle period. These approaches can be used in combination; they are not mutually exclusive.

#### *1. Numerical Caps*

27. One way to ensure that exceptions to the Appendix I take prohibition do not operate to the disadvantage of the species is through strict numerical caps that establish a number beyond which no further takes can be authorized in a given year, on a national or population basis. Under such a system, issuance of a permit for take of an Appendix I species could only occur to the extent that (a) one of the circumstances contemplated in the CMS prevails (e.g., the taking is for scientific purposes) and (b) a cap establishing maximum annual take has not already been exhausted. Numerical caps should not eliminate scrutiny for the issuance of each permit within the cap; instead, they should set limits on the total number of permits that may be issued for take of an Appendix I species. Without evaluation of the sustainability of takes from specific populations, *ad hoc* issuance of permits without a numerical cap could disadvantage a species. A numerical cap of this variety operates best in conjunction with an individualized numerical limit included in a permit.

*Tip: Occasionally, establish a maximum level of annual take based on scientific evidence as a way of limiting the use of the exceptions to thresholds that should not disadvantage the relevant species. Couple with individualized numerical caps included in permits.*

#### *2. Prohibition of Take During a Critical Life-Cycle Moment*

28. Parties may also avoid disadvantaging a species by categorically prohibiting exceptions for breeding, pregnant, nesting, or nursing individuals. By ensuring that take can never be used to disturb or curtail these activities, all of which relate to reproduction, national authorities help to prevent take from operating to the disadvantage of a species. Age and sex restrictions on taking (e.g., for juveniles, or reproductively active females) can also be tools to ensure that exceptions are not to the disadvantage of a species.

*Tip: Limit exceptions to prohibit take of an individual while nesting, breeding, nursing, or pregnant, or based on age or sex.*

## **III. Defining the Scope of the Exceptions**

### **A. Scientific Purposes**

29. The scientific purpose exception is, on its face, potentially broad: the taking must be for “scientific purposes” and the treaty does not further define what constitutes a “scientific purpose.” Nonetheless, as an exception, treaty interpretation mandates a narrow, rather than broad, interpretation. To define the reach of the exception, several factors might be relevant, including but not limited to the following:
- the qualifications of the individual or entity requesting use of the exception;
  - affiliation with an accredited scientific body or institute;
  - the likely contribution to scientific inquiry;
  - whether the activity in question also has a commercial or revenue-generating aspect; and
  - the necessity and inevitability of the proposed take in light of the objectives of the contemplated scientific endeavour.
30. While none of these factors are mandated by the treaty explicitly, they can aid a decision-maker in deciding what constitutes a legitimate scientific endeavor.
31. Consider, for example, how one non-Party approaches extraordinary take of otherwise protected species for scientific purposes. The regulations set forth detailed criteria for the issuance of a take permit for scientific purposes, including the following:
- (1) Whether the permit was applied for in good faith;
  - (2) Whether the permit, if granted and exercised, will not operate to the disadvantage of the endangered species;
  - (3) Whether the permit would be consistent with the purposes and policy set forth in section 2 of the Act [i.e., to conserve endangered and threatened species and their habitat];
  - (4) Whether the permit would further a bona fide and necessary or desirable scientific purpose or enhance the propagation or survival of the endangered species, taking into account the benefits anticipated to be derived on behalf of the endangered species;
  - (5) The status of the population of the requested species and the effect of the proposed action on the population, both direct and indirect;
  - (6) If a live animal is to be taken, transported, or held in captivity, the applicant’s qualifications for the proper care and maintenance of the species and the adequacy of the applicant’s facilities;
  - (7) Whether alternative non-endangered species or population stocks can and should be used;
  - (8) Whether the animal was born in captivity or was (or will be) taken from the wild;
  - (9) Provision for disposition of the species if and when the applicant’s project or program terminates;
  - (10) How the applicant’s needs, program, and facilities compare and relate to proposed and ongoing projects and programs;
  - (11) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application; and
  - (12) Opinions or views of scientists or other persons or organizations knowledgeable about the species which is the subject of the application or of other matters germane to the application.
32. This non-Party’s approach assigns considerable weight to whether the scientific endeavor is truly “necessary”; the availability of alternative approaches that do not

require take of endangered species; the professional competence and wherewithal of the permit applicant; and the informed views of other scientists and third parties.

33. The commercial versus non-commercial nature of the scientific purpose may be an additional factor to consider. On the one hand, for example, research may be for academic study, or a government-sponsored programme designed to promote conservation through science. On the other hand, scientific research may include uses related to the biomedical industry, with the development of revenue-producing pharmaceuticals as the ultimate goal. Interestingly, while many Parties provide a general exception for scientific purposes, few qualify the use of the exception with commercial versus non-commercial delimiters. However, one CMS Party's legislation is an example of drawing this distinction; it provides an exception for "scientific, non-commercial purposes." Although the treaty itself does not state that "scientific purposes" must be devoid of any commercial character, Parties may find this distinction helpful.
34. Similarly, captive wild animals in a zoo or aquarium may or may not be used for scientific purposes, depending on whether a particular animal is necessary for the scientific studies being conducted. If a wild animal is used in a captive breeding program to boost numbers in the wild, this might be considered a scientific purpose but, more accurately, any take for this purpose should be addressed under the exception "for the purpose of enhancing the propagation or survival of the affected species."
35. Certain types of legislative provisions may be helpful in that they set some objective parameters and/or provide discretion to a regulating agency to make a determination as to whether the scientific purpose is legitimate and the use of the exception appropriate. Again, reference to that non-Party's approach, set forth above, is instructive. The legislation of one CMS Party provides another example: scientific research permits may only be granted to persons belonging to *recognized scientific organizations*. The determination as to whether a scientific organization is recognized may be made either on an *ad hoc* basis or through a registration system with clear, objective criteria.
36. Other cases exist, where the exception, as articulated in national legislation, likely covers some takes that are legitimate uses of the exception but also other takes that compromise or stretch the meaning of the exception. In these cases, caveats that further define the circumstances in which the use of the exception is reasonable and appropriate may be necessary. As one example of a legitimate use of the exception, one CMS Party limits the use of the scientific exception to situations in which the animal will be released back to the wild unharmed.

*Tip: The exception for "scientific purposes" could include a definition of "scientific purposes." National legislation could further require that the take and subsequent science be carried out only by recognized or registered scientific institutions, that there be necessity and inevitability of the proposed take in light of the objectives of the contemplated scientific endeavour, and could inquire whether the activity in question also has a commercial or revenue-generating aspect.*

## **B. Enhancing the Propagation or Survival of the Affected Species**

37. The Convention also authorizes take of Appendix I species "for the purpose of enhancing the propagation or survival of the affected species." In the biological context, "propagation" can be linked both to the breeding success of a migratory species, increasing the recruitment of individuals, and to the increase of the species spatial range, either as a consequence of a population increase or to a reduction of the threats limiting their expansion. "Survival" relates to the probability of an individual to live from one phase of its annual cycle to the next (breeding, non-breeding, migratory period). In

either case, take to “enhanc[e] the propagation or survival of the affected species” is limited to take that benefits the species.

38. Still, although the basic objective of the exception may be clear enough, implementation is complicated as different Parties approach wildlife conservation and management in very different ways. For example, some Parties may use sport hunting, culling, captive breeding, wildlife farming (sometimes also known as ranching), and translocation and relocation as part of a policy to enhance propagation or the survival of the species. On the other hand, such use of the exception would still need to be limited in space and time, be precise as to content, and not operate to the disadvantage of the species.
39. Some of the most difficult questions regarding the scope of this section arise with respect to sport hunting programs and culling. Unlike capture for a captive-breeding program designed to boost wild populations, sport hunting and culling involve lethal take. Some governments support such lethal take with the view that such take will enhance overall survival by combatting overpopulation, or that revenue from license sales and hunting services can be directed toward conservation programs and/or incentivize conservation of the quarry species by local communities.
40. Some uses of lethal take may be aimed at ensuring that the population of the species does not exceed the carrying capacity of the habitat where the species are found. Some laws favor sport hunting as a means of managing and controlling animal populations because the cost of the hunting license is directed toward conservation. In other countries, the law might generally provide that the relevant agency or management body may lawfully take an animal or animals when it has been determined necessary for the overall benefit of the population and the survival of the species.
41. Turning to captive-breeding, if the captive-breeding operation is designed to boost propagation with offspring ultimately released into the wild, this would seem to be a paradigmatic use of the exception for “enhancing the propagation or survival of the affected species.” On the other hand, if animals are captured and bred for commercial purposes, such as for meat production, leather, fur, and so forth, this would likely run afoul of the exception.
42. In some Parties, captive breeding exceptions exist in national law, with the relevant terms defined and used in a variety of ways. Sometimes Parties may lump activities related to captive breeding for commercial purposes alongside non-commercial captive breeding for the purpose of propagation or reintroduction for conservation’s sake. For example, one Party’s legislation provides for wildlife use rights for the purpose of “wildlife captive breeding and ranching.” The inclusion of ranching suggests that these activities may be authorized, even when a commercial purpose is involved. In a similar vein, another CMS Party provides for the take of animals when they will be used for wildlife farming practices.
43. If the exceptions are approached with a presumption of strict interpretation and narrow construction, then these examples may be read as falling outside the scope of the exception and thus unacceptable from the perspective of conserving CMS Appendix I species.
44. In contrast, other captive-breeding programs, including those supported by or operated in conjunction with accredited zoos, more clearly fall within a narrower interpretation of the exception. These operations tend to have the production of more animals for the purpose of reintroduction and/or other conservation projects as their central objective. Many CMS Parties contain such provisions in their national legislation, such as one CMS

Party, which allows take for the purpose of “restocking and reintroduction [...] and for operations necessary for that purpose.”

45. A further example of a captive-breeding program that seems to hew closer to the terms and meaning of the CMS exception comes from another CMS Party. Specifically, their legislation established that “collection of threatened wildlife” for “breeding or propagating purposes” is permissible by “accredited individuals, business, research, educational or scientific entities[.]” The legislation then goes on to clarify that “[c]onservation breeding or propagation of threatened species shall be encouraged in order to enhance its population in its natural habitat. It shall be done simultaneously with the rehabilitation and/or protection of the habitat where the captive-bred or propagated species shall be released, reintroduced or stocked.” Note, however, that this legislation also contemplates the possibility of “commercial breeding or propagation of threatened species” when, among other conditions, such breeding is undertaken “simultaneous with conservation breeding.” It is not clear that this latter provision, if applied to Appendix I species, falls within the treaty exception for “enhancing the propagation or survival of the affected species.” The question is whether the authorized take is done to “enhanc[e] the propagation or survival of the affected species.” If Appendix I species are taken for dual purposes—to propagate specimens for sale, for example, *and* to bolster wild populations—the take may be only partially consistent with the treaty exception.
46. As for translocation and relocation, taking for such purposes may often meet the terms of the exception. These are efforts made to move animals into safer situations or into situations where future generations might thrive. While these situations are not often intended to result in lethal take, they might. Otherwise, they are more likely to result in a non-lethal take that involves capturing and/or harassing. For example, legislation of one CMS Party authorizes the capture and transfer of wild animals “to repopulate a protected area.”
47. Similarly, although the exception does not by explicit terms preclude take of Appendix I species for breeding operations designed to produce specimens for commercial uses or other non-conservation purposes, Parties might consider prohibiting such scenarios in national legislation. The objective of the exception is to aid species conservation; if a captive-breeding operation does not do this, then it falls outside the animating logic of the exception.

*Tip: To ensure that the use of the exception aligns with treaty intent, Parties could consider defining with precision in national legislation the take and use of specimens that qualify as “enhancing the propagation or survival of the affected species.”*

### **C. Traditional Subsistence Users**

48. Use of the exception for take “to accommodate the needs of traditional subsistence users of such species” requires consideration of the main variables that constitute the phrase, as well as the requirements that the exception does “not operate to the disadvantage of the species” and is “precise as to content and limited in space and time.”
49. Ideally, national legislation should speak directly to each of these parameters—“needs,” “traditional,” “subsistence” and “users”—leaving no doubt as to the breadth of this exception and its operation in practice. In defining these terms, specific scenarios could be taken into account.
50. The treaty’s use of the word “traditional” prior to “subsistence” is clearly meant to describe the users that qualify for the exception. While some users may engage in take consistent with “subsistence” use, these users and their uses may not be so rooted in

history as to qualify as “traditional.” Although it appears that few Parties specifically define “traditional”, several Parties highlight or focus on the traditional, historical, indigenous, or customary nature of the take or use, and the communities engaged in such take or use, in order to give scope to a take prohibition or licensing requirement. For example:

- One CMS Party’s definition of “subsistence hunting” includes hunting “practiced by the Indigenous Peoples in accordance with their traditions and customs.”
  - Another CMS Party allows for the issuance of permits for take that “is of particular significance to indigenous tradition.”
  - In one CMS Party, a legislation adopted shortly after the emergence of the Covid-19 pandemic significantly limited hunting, excepting only subsistence hunting defined as follows: “Subsistence hunting is only allowed for members of Indigenous and native Peoples, whose practice is: prior to the [...] colonial invasion, within their territory and for non-commercial purposes.”
  - Several CMS Parties allow take consistent with customary use or hunting rights.
51. By emphasizing customary use, tradition, and specific communities, these iterations of the traditional subsistence user exception provide guardrails that help to meet the “traditional” element of the CMS exception. Some of the qualifications also give effect to the global conditions of “precise as to content” and “limited in space and time.”
52. Other examples from national legislation appear to emphasize the scope of what “subsistence” means. This ranges from the idea that subsistence primarily pertains to meeting the nutritional and health needs of an individual, family, or community to cultural, religious, and medicinal practices. In doing so, the examples also often, but not necessarily, address the limitations related to “precise as to content” and “limited in space and time.”
53. In many cases, exceptions in national legislation take into account that the needs of traditional subsistence users are often met through very short supply chains, or through personal or family use, without engaging any sort of supply chain or network at all. Many Parties limit “subsistence” hunting to hunting that satisfies the needs of the hunter, their family, or those of a local traditional subsistence community. Examples include the following:
- One CMS Party allows for “the use of the resources of the flora and wild fauna necessary for the individual or family survival of the members of a native community.” The Party’s law further clarifies that “subsistence hunting” is “destined for local consumption” and “includes exchange or barter,” in contrast to sale for money.
  - Another CMS Party allows for hunting “by national individuals and local communities [...] with the aim of satisfying [their] own consumption needs.”
  - Other CMS Party’s law provides that “[n]o indigenous hunter may kill any animal except for the purpose of providing food for himself and his family.”
  - Exception in the legislation of one Party applies where the capture is “to meet the needs of those who use the said species within the framework of a traditional subsistence economy.”

- Subsistence hunting is in one CMS Party described as hunting to “satisfy the food needs of the family and the family nucleus.”
  - Another CMS Party authorizes the establishment of a “Wildlife Use Right” for subsistence wildlife use “to ensure sustainable wildlife harvesting for protein source for forest-dependent people.”
54. Other types of uses, though, may also constitute a use to “accommodate the needs of traditional subsistence users,” depending on the situation and the context. Some laws have identified traditional medicine, cultural, religious, clothing, and transportation uses as fitting within a “traditional subsistence user” rubric, whether implicitly or explicitly. For example, one Party’s legislation provides that species can be taken “to accommodate the needs of traditional subsistence users of the species.” On the other hand, some legislation specifically contemplates non-nutritional subsistence uses. For example, one CMS Party allows for an exception for take “carried out to meet nutritional or medicinal needs of people with limited economic resources.”
55. In another example, one non-Party’s regulations addressing harvesting rights in [a region] provide that “[s]ubsistence uses means the customary and traditional uses by rural [region’s] residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.”
56. Laws or regulations that set forth the scope of the exception in a precise way are helpful for ensuring that the exception comports with CMS. For example, it would be improper to frame the exception to allow for bushmeat hunting for sale for non-subsistence users in peri-urban and urban areas, and longer supply chains, sometimes deriving from local or indigenous hunters that may supply these markets.
57. Some framings of the exception may be too broad and exceed the plain language of the CMS. For example:
- One CMS Party allows hunting “for commercial or other purposes.”
  - Another CMS Party’s laws do not expressly provide exception for traditional subsistence users, but stated that take by traditional subsistence users falls within the exception “to permit, under strictly controlled conditions, in a selective manner and to a limited extent, the taking or holding of a limited and specified number of certain specimens.”
58. Broad language allowing for the use of specimens for “other purposes,” without further definition, is not sufficiently narrow to match only take “to accommodate the needs of traditional subsistence users.”

*Tip: National legislation can define the terms “traditional” and “subsistence” for purposes of implementing the exception to “accommodate the needs of traditional subsistence users.”*

#### **D. Extraordinary Circumstances**

59. Because it is difficult to foresee every situation wherein an exception to the take prohibition may be necessary, the CMS authorizes take of Appendix I species when “extraordinary circumstances so require”. In context, the fairest reading of this language suggests that this was meant to provide only a narrow space for situations difficult to

foresee or enumerate, as opposed to a broad “catch-all”. After all, common definitions of the word “extraordinary” define the word as meaning “very unusual and special” and “very unusual, special, or unexpected”. The relatively narrow categories preceding the “extraordinary circumstances” exception further counsel in favor of a narrow reading.

60. A review of national legislation reveals a handful of categories that may or may not fit within the “extraordinary circumstances” rubric. These include take out of self-defense or to avoid harm to human life; take to prevent significant damage to crops, livestock, forests, fisheries, waters, and other forms of property; take to control an invasive species; take for the protection of other flora or fauna; take to control pathogens; and take to mitigate aviation risks.
61. Taking these categories in turn, several Parties allow an exception to the take prohibition when necessary for self-defense and/or to protect other humans from physical harm. For example, in one CMS Party, legislation establishes a number of exceptions for “extraordinary circumstances,” including killing or attempting to kill a wild animal in self-defense or defense of another person. Similarly, another Party allows a person to kill or injure any animal in self-defense or in defense of any other person if immediately and absolutely necessary. These provisions fit well within the CMS language on “extraordinary circumstances” if coupled with qualifiers that ensure that the situation is a rare circumstance that necessitated urgent action, such as “immediately” and “absolutely.”
62. The analysis seems significantly different with respect to exceptions for take to prevent damage to crops, livestock, forests, fisheries, waters, and other forms of property. First, it is not clear that damage to crops, livestock, and other property constitutes an “extraordinary” event. Not only is such damage relatively foreseeable in many cases (e.g., elephants entering planted fields, birds eating crops, large carnivores taking livestock), but this sort of damage is different in kind, not just in degree, when compared to harm to human life. Although many Parties contemplate extra-ordinary take in these circumstances, the practice seems highly questionable as applied to CMS Appendix I species. Other mechanisms, such as monetary compensation to the affected farmer or landowner or assistance to build a fence or other protective infrastructure, as examples, seem both suitable and preferable to the take of an Appendix I species.
63. In contrast, invasive species may present a scenario that lends itself to extension of the “extraordinary circumstances” exception. In these cases, biodiversity is at risk, and this might include forests and fisheries, for example, as well as both private and public property. If an Appendix I species establishes itself as an invasive species in a country beyond its historical range—and if that establishment displaces native wild flora and fauna—this could fairly be seen as the sort of “extraordinary circumstance” contemplated by the treaty. Accordingly, laws that authorize an exception to the take prohibition for the protection of other flora, fauna, and habitats appear legitimate when viewed through the lens of Article III.5. For example, one CMS Party authorizes the adoption of legislation allowing derogations from the take prohibition “for the protection of flora and fauna,” where “there is no other satisfactory solution.” Other Party’s legislation offers another compelling permutation, providing that the competent authority may grant an exception to the take prohibition concerning listed migratory species if the action “contributes to the conservation of the listed migratory species concerned or other listed migratory species[.]”
64. In the wake of the COVID-19 pandemic, zoonotic disease and other pathogen risk have begun to command significant attention. Although perhaps uncommon, one could certainly imagine an Appendix I species harboring a zoonotic disease or a disease capable of leaping from one animal to another. In the absence of other solutions, take

of the host animal may constitute the kind of “extraordinary circumstances” contemplated by the treaty. One Party’s legislation provides an example of how such an exception might be codified, authorizing take when “necessary in order to control pathogens.” Another CMS Party similarly provides an exception for the purpose of fighting infectious disease.

65. Finally, an exception to the take prohibition, particularly of birds, may be necessary to prevent aviation accidents. One CMS Party authorizes the possibility to include an exception to the take prohibition where the take is “in the interests of air safety” and “there is no other satisfactory solution.” Ideally, Parties will design airports and aviation routes to avoid collisions with birds. In some cases, however, it will be impossible to eliminate this risk in the absence of preemptive take. Given the stakes – human lives and safety – rare instances of take to ensure aviation safety may be justified under the “extraordinary circumstances” exception. Accordingly, even for Appendix I species, this Party’s authorization of an exception to take prohibition in the interests of air safety appears consistent with the CMS.
66. In contrast, Parties should avoid exceptions that are ambiguous because they are likely to be overly broad relative to the standard set by CMS. For example, one CMS Party’s legislation allows the Minister to exempt a person from seeking a permit in circumstances of “national interest.” While “national interest” may in some cases rise to the level of “extraordinary circumstances” in compliance with CMS Article III.5, the term may be overly broad, creating the possibility of take in situations that do not qualify as truly “extraordinary circumstances.”
67. Similarly, some Parties appear to authorize take when required by “the public interest.” This term is somewhat nebulous; as such, it risks authorizing takes that are arguably in “the public interest” but not compelled by “extraordinary circumstances.” If legislation uses the term “public interest,” it should at least modify the scope of the term through additional language. For instance, one Party’s legislation allows exceptions to the take prohibition in, *inter alia*, “the interests of public health and public safety, or for other *imperative* reasons of *overriding* public interest[.]” Here, the adjectives “imperative” and “overriding” help to narrow the term “public interest,” bringing the term much closer to the limited meaning of “extraordinary circumstances.”
68. In many cases involving extraordinary circumstances, such as defense of human life or takes related to aviation, procuring a permit in advance of the take is most likely impossible. An important means of avoiding abuse is to require *post hoc* reporting and justification. This is further discussed in Section IV.B.

*Tip: Legislation could include qualifying language that defines what would constitute “extraordinary circumstances,” e.g., the urgency, immediacy, necessity, and/or rarity of the situations that should result in such a take.*

*Tip: Defense of human life in a situation where human life is at immediate risk is more likely to meet the “extraordinary circumstances” exception allowed under CMS than circumstances involving property.*

#### **E. Other Exceptions Found in National Legislation that May Not Meet the CMS Criteria**

69. In addition to the examples above that appear to be outside the scope of the CMS exceptions, additional examples found in national legislation may not meet the standards of CMS Article III.5. Here, it is important to note that the analysis is limited by the information available to the authors of the present document. In many cases, additional

information—particularly concerning how legislation is applied in practice, as well as supplemental legal instruments that may have a narrowing effect—could dispel some of the concerns.

70. The legislation of many Parties includes exceptions for education, academic, and/or teaching purposes. CMS Article III.5 does not allow exceptions for exclusively educational purposes. However, where country’s laws and regulations expressly limit the education exception to only instances where the education is for a scientific purpose, then the exception may fall within the CMS’s “scientific purpose” exception. As noted above, some legislation limits the use of the scientific exception to educational or academic institutions and/or registered or recognized scientific research institutions. This is one means of reconciling the potential for overlap without interpreting the exception in an overly broad manner.
71. Another broad category of exceptions that may fall outside the scope of the CMS exceptions are exceptions for zoos, museums, or other institutions for public display. For example, two CMS Parties provide an exception for museums, zoological gardens, or similar institutions; Law in one CMS Party contains an exception for public education purposes or for display in a rescue center; and another CMS Party’s legislation contains an exception for traveling zoos or circuses. A country could potentially harmonize such exceptions with the CMS exceptions for “scientific purposes” or “enhancement of the survival of the species” if the country’s legal or regulatory language made clear that the zoological exception could only apply in instances where the displayed animal/specimen was also to be used for a scientific or (for example) a captive breeding program for reintroduction to the wild. However, to the extent that the purpose of a country’s public display exception is for revenue generation or education, that exception would fall outside the scope of the CMS exceptions, as discussed above.
72. Further, the laws and/or regulations of many CMS Parties contain an exception allowing for take “under strictly controlled conditions, in a selective manner and to a limited extent, the taking of a limited number of specimens.” In the absence of additional limiting criteria—and assuming application to Appendix I species—this exception falls outside the scope of the allowable CMS exceptions since no restriction on the use of the species exists.
73. Other concerning examples of exceptions found in national legislation include, *inter alia*, exceptions for commercial purposes and cultural purposes. Below are several such examples that appear to fall outside the scope of the CMS Article III.5, assuming that examples below apply to Appendix I species:

<b>CMS Party 1</b>
“The authority of application will be able to grant <b>hunting authorizations for the capture of wild specimens, destined to educational or cultural scientific purposes or for zoological exhibition</b> , in the places, times and quantities that in each case are considered convenient ....”
<b>CMS Party 2</b>
“The Authority may establish through regulation, a permitting regime to define and implement Wildlife Use Rights application procedures (including criteria for eligible applicants), and prohibitions, with respect to the following activities: (a) <b>hunting</b> (b) <b>agricultural activities in multiple sustainable use reserves, buffer zones and community-owned forest areas;</b>

- (c) **education** and scientific activities;
- (d) **non-timber forest product**;
- (e) **wildlife captive breeding and ranching**;
- (f) **ecotourism**.

“The Authority may establish two different categories of Wildlife Use Rights permitting and fees for **commercial** and subsistence wildlife use to ensure sustainable wildlife harvesting for protein source for forest dependant people while **allowing for regulated trade in bushmeat**.”

\*Note: Depending upon how this regime is applied to Appendix I species, it may be consistent with the treaty. For example, if the authority to engage in commercial bushmeat trade is *not* applied to Appendix I species (but only to other species), then the Article III.5 exception rubric would not be triggered, let alone violated.

**CMS Party 3**

“Special permit is required pursuant to the Regulation for captivity in special condition, **use of species parts for cultural purposes and for education** and research.”

**CMS Party 4**

“Article 36 - The hunting referred to in this Law is classified as follows:  
 a) **Scientific hunting**, that which is carried out for research or **educational purposes**, sanitation or **repopulation in hatcheries and zoos**;  
 b) **Sport hunting, which is carried out occasionally for competitive or recreational purposes**; ...  
 d) **Commercial hunting, which is carried out for profit; ....**”

**CMS Party 5**

“The prohibitions established in this chapter may be exempted, with the prior administrative authorization of the autonomous community or the General State Administration, within the scope of its powers, if there is no satisfactory solution, and without prejudice to the maintenance in a state of favorable conservation of the populations in question, in their natural distribution area, when any of the following circumstances occur: ...  
 d) When necessary for reasons of research, **education**, repopulation or reintroduction, or when it is necessary for captive breeding aimed at these purposes ...  
 f) **To allow, under strictly controlled conditions and by selective methods, the capture, retention or any other prudent exploitation of certain species not included in the List of Wild Species in Regime of Special Protection, in small quantities and with the precise limitations to guarantee its conservation ....**”

**CMS Party 6**

“[I]t is permissible to allow **hunting for commercial or other purposes** through a resolution by the prime minister based upon a proposal by the council or any other competent body to determine and specify locations, times kinds and genera of fauna and birds.”

**CMS Party 7**

“Subject to this Act, the Authority, with the concurrence of the Minister, may issue a permit to any person—  
 F. (a) **to hunt any specially protected animal on any land other than in a national park**; or ...

Provided that the Authority shall not issue a permit in terms of paragraph (a) unless it is satisfied that the hunting is necessary for— ...

(b) **educational purpose** or

(c) **providing specimens for a museum, zoological garden or similar institution; or**

(d) **the taking of animals live for the purpose of falconry . . . [or] export....”**

#### **IV. Establishing Administrative Measures to Ensure that Exceptions Remain Narrowly Tailored, and that Permit-Seekers Bear the Burden of Providing Information Justifying the Exception**

##### **A. Using a Permit System to Regulate Exceptions**

74. Parties will normally operationalize the use of an exception through a permit system. To ensure that any take of Appendix I species in fact fits within the parameters of the treaty, competent national authorities will ordinarily need to make a finding to this effect prior to the proposed take.
75. Permits are a common and helpful way to regulate exceptions. Using such a system enhances the effectiveness of the treaty and can ensure that the use of exceptions remains “precise as to content” and “limited in space and time,” while “not operat[ing] to the disadvantage of the species.” First, a permit system ensures that a disinterested competent government agency—and not the interested exception user—decides whether a specific take qualifies as an exception. Second, and relatedly, a permit system forces careful analysis of whether the proposed take fits within one of the exceptions. Third, a permit system can shift the burden of establishing eligibility to the applicant (e.g., in the case of taking for scientific purposes, presenting a plan and delineating scientific need and institutional wherewithal). By imposing the burden on the applicant, the agency avoids much of the work of obtaining relevant information to approve or deny the permit. The competent authority can merely look at the applicant’s materials and decide whether the applicant has included sufficient information and made the case for an exception. Fourth, a permit system allows authorities to tailor the permit on a case-by-case basis by adding conditions to the permit, ensuring that the authorized take is “precise as to content,” “limited in space and time,” and does “not operate to the disadvantage of the species.” Fifth, monitoring the scale and impact of extraordinary take is significantly easier when a permit system is used. Finally, identifying illegal take is much simpler under such a system— i.e., illegal take would be that which occurs in the absence of a permit or beyond the permit’s parameters.
76. It should be noted that some countries do not use a permitting system for wildlife conservation and management but rely on legislation or other means of restrictions. In such cases, those relevant measures would need to include the same kinds of specificity as would be utilized in a permit.

*Tip: In general, use of a permit system to implement the exceptions increases the likelihood of objective decision-making, precision, appropriate limitations, adequate protections for species, and monitoring and reporting.*

##### **B. Permit Systems Versus *Post Hoc* Authorizations**

77. While on balance a permit system stands as a best practice for the implementation and regulation of the Article III.5 exceptions, in some circumstances *post hoc* authorizations (authorizations after the “take” occurs) may be necessary.

78. For example, with respect to the “extraordinary circumstances” exception, certain cases might necessitate operation outside of a permit system, especially where self-defense and other random, unpredictable, or extreme situations occur (e.g., emergency translocation in the event of a catastrophic flood, drought, or wildfire). In these cases, a robust *post hoc* authorization system is necessary. One CMS Party offers a good example of such a mechanism: When a specially protected animal is killed or injured, the person shall “as soon as possible and in any event within seven days” report the event in person to the relevant authority.
79. Except in such cases, the use of *post hoc* authorizations is not recommended.

*Tip: In some cases of “extraordinary circumstances”, a permit system may not be workable. In these cases, post hoc reporting and explanation are critical.*

### **C. Permit Specifications**

80. The permit in and of itself is an important regulatory and management tool, but an additional benefit of a permit system is that the use of permits may be subject to specific conditions that allow management authorities to make decisions limiting authorized takes. The use of permit conditions is an important tool for ensuring that takes are precise as to content and limited in space and time.
81. Legislation could provide that permits for take pursuant to any of the exceptions contain specifications, including the following:
- the identity of the individual or entity authorized to use the permit;
  - the species covered;
  - the number of individuals of each species under the authorization granted where such indication is possible;
  - the duration of the permit;
  - the area covered (i.e., the area in which hunting, collection, or capture is allowed);
  - authorized methods and equipment for hunting, collection, or capture;
  - the intended use of the specimen or specimens; and
  - other indications or limits deemed necessary.
82. Consistent with an approach that strictly regulates exceptions to the take prohibition, Parties may also wish to prohibit the transfer of any permit to take an Appendix I species that has been granted. For example, one CMS Party specifically prohibits such transfers:

“No person shall transfer any licence to any other person and no person except the person to whom it is issued shall make use of any licence.”

83. Similarly, any permit issued pursuant to an exception could be revocable if the permittee fails to comply with the conditions of the permit or if subsequently obtained information indicates that the taking will disadvantage the species.

*Tip: Permit conditions could specify the type, number, and age of the species; the duration of the permit; the seasons and areas in which take is authorized; the gear, equipment, and/or methods of the take; and the uses of the animal that are authorized, as well as any other necessary conditions.*

*Tip: Permits that authorize takes could be revocable and transfers could be prohibited to prevent misuse and abuse.*

## D. Monitoring and Reporting

84. Parties can decrease the likelihood of disadvantaging species through monitoring-and-reporting mechanisms. This can be as simple as requiring the competent national authority to conduct an annual review of the effect of an exception to the take prohibition during the prior year (or other time period, as appropriate)—or to undertake a general review of conservation status. Although the limited scope of the exceptions contemplated under the CMS may typically translate to only a minimal impact on the species in question, this is not guaranteed. Requiring the authority to periodically measure, through the best available science, the current conservation status of the species may reveal that even rare instances of take are incompatible with current population trends.
85. Therefore, legislation could establish a system to ensure compliance, monitoring, and reporting for each exception. This helps to ensure that the competent authority has the necessary information to report to the CMS Secretariat, pursuant to Article III.7, on the use of the exceptions as concerns Appendix I species.
86. To further transparency and accountability, national legislation could also establish a system to compile and make publicly available key information related to each exception granted, including “information on affected species, number of specimens, justification, the responsible authorities, permitting and licensing procedures, [and] compliance monitoring and supervision.”<sup>2</sup> This is an approach identified as helpful under the Intergovernmental Task Force on Illegal Killing, Taking, and Trade of Migratory Birds in the Mediterranean (MIKT). Specifically, the *Legislative Guidance Materials Relating to the Illegal Killing, Taking, and Trade of Wild Birds* provides as follows:

“[I]nformation regarding the authorization of exceptional hunting should be made publicly available (absent exceptional circumstances), both as a way to increase transparency and, more specifically, to reduce the risk of excessive use of exceptions. One way to accomplish this legislatively is to require the competent authority to publish an annual report describing all exceptions authorized over the previous year. [...] Legislation might also direct the authority to analyze the ecological impacts of exceptions over the past year and to take such analysis into account when granting exceptions in the future.”<sup>3</sup>

*Tip: Reporting systems are important for monitoring the extent of the use of exceptions, ensuring compliance with the terms and limitations of use, and for providing transparency.*

*Tip: Reporting to the Secretariat on the use of any exceptions is mandatory under the terms of the treaty; establishing mechanisms to ensure that such information is collected and shared with the Secretariat is critical.*

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<sup>2</sup> *Scoreboard to Assess the Progress in Combatting Illegal Killing, Taking and Trade of Wild Birds (IKB)*, at 28.

<sup>3</sup> *Legislative Guidance Materials Relating to the Illegal Killing, Taking, and Trade of Wild Birds*, UNEP/CMS/MIKT5/Outcome 1 T-PVS/Inf (2022) 18\_rev2, Joint Meeting of the Bern Convention Network of Special Focal Points on Eradication of Illegal Killing, Trapping and Trade in Wild Birds and the CMS Intergovernmental Task Force on Illegal Killing, Taking and Trade of Migratory Birds in the Mediterranean (June 2022), [cms\\_mikt5\\_outcome1\\_legislative-guidance-ikb\\_e.pdf](#), at 14.