



The Bonn Convention
A study of approaches and decision-
making within the field of biodiversity
Conservation



Bonn, 2011

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PREFACE AND ACKNOWLEDGEMENTS

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ABBREVIATIONS

CBD	Convention on Biological Diversity
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on the Conservation of Migratory Species of Wild Animals
COP	Conference of the Parties
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
EQS	Environmental Quality Standard
HQS	Habitat Quality Standard
I.C.J.	International Court of Justice
ILA	International Law Association
IWRM	International Water Resource Management
LMO	Living Modified Organism
MEA	Multilateral Environmental Agreements
MOC	Meeting of the Commission
MoU	Memorandum of Understanding
PTAC	Precautionary Total Allowable Catch
RMA	New Zealand Resource Management Act
SICJ	Statute of the International Court of Justice
TAC	Total Allowable Catch
UN	United Nations
UNCHE	United Nations Conference on the Human Environment

UNCLOS	United Nations Law of the Sea
UNEP	United Nations Environmental Program
UNFCCC	United Nations Framework Convention on Climate Change
U.N.T.S.	United Nations Treaty Series
WCED	World commission in Environment and Development
WHC	Convention Concerning the Protection of the World Cultural and Natural Heritage

EXECUTIVE SUMMARY

The last decades the number of international Multilateral Environmental Agreements (MEA) has increased dramatically. At the same time the loss of biodiversity has accelerated. The effectiveness of these agreements has therefore been questioned. On the other side, they have been recognised to play an important part in the process of bringing together and facilitating cooperation between states, and influence government policy and practice in fields related to conservation of biodiversity.

Cooperation, along with coordination, is one of the key aspects to halt the loss of biodiversity. This is especially true in the field of transboundary resources, such as migratory species, where no state single handed effectively can manage these resources. However, as shown in this thesis, even though cooperation would be a great success, there is no guarantee that such cooperation would have a positive impact on the conservation of biological diversity.

This thesis is a review and analysis of the effectiveness of biodiversity-related treaties. It gives a deeper insight in various treaties and the different approaches they use to contribute to the conservation of biodiversity. The purpose of this review was to compare these approaches with the approach used by the Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS), in order to provide proposals to UNEP/CMS Secretariat to consider to increase their contribution to the preservation of the earth's biodiversity, while fulfilling the objectives of the convention.

A challenge this thesis encountered was the difficulty of comparing CMS with other biodiversity-related treaties. This was due largely to difference in structure and approach to the object. While most biodiversity-related treaties contribute to the conservation of biodiversity through its own text, the primary purpose of CMS is to serve as a breeding ground where other agreements may be entered into and spun off.

In recent years, CMS has not been focused on the legally binding agreements, but on non-legally binding agreements, Memorandum of Understanding. As a result, these agreements are included in this thesis.

This thesis and its conclusion is that if the legal text itself can not effectively contribute to the conservation of biodiversity, then the actions taken as a result of this text can neither make an effective contribution.

PART 1 - INTRODUCTION

1 BACKGROUND

‘We must spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs.’¹

The concern over the status of the environment, and the affect its deterioration ultimately will have on humanity, are increasingly present in the contemporary international discourse regarding natural resources. As a result of decades with unlimited unsustainable development mankind as a whole are now faced with the side effect of this development,² and in order for humanity to continually be able to rely on the ecosystem services, they have come to take for granted, there is a need to change this unsustainable development to sustainable development.

To address the problems that humanity was facing entering a new millennium, such as development and other acute problems,³ the United Nations held a high-level meeting in September 2000, *Millennium Summit*.⁴ The summit gathered the majority of the world leaders and resulted in the *Millennium Declaration*⁵ containing the *Millennium Goals*.⁶ These targets were converted into eight specific targets, most with a sunset of 2015.⁷ In relation to biodiversity the millennium declaration calls on states to show prudence in the management of biodiversity in accordance with the precepts of sustainable development.⁸ The declaration also urged that sustainable development should be implemented at all levels of government and reflected in programs and policies, to stop the loss of environmental resources.⁹

To meet the challenge of an accelerating loss of biodiversity, the parties to the Convention of Biological Diversity (CBD)¹⁰ adopted in 2002 a strategic plan.¹¹ The strategic plan set a target to

1 UN doc. A/RES/55/2, *United Nations Millennium Declaration*, GA Res. 55/2, 55th Session, 8th Plenary meeting, 8 September 2000, para. 21.

2 See e.g. UN doc. A/56/326, *Road map towards the implementation of the United Nations Millennium Declaration*, particularly paras. 164-193.

3 See UN doc. A/53/948/Add.1, Report of the Secretary-General, *The Millennium assemble of the United Nations: thematic framework for the Millennium Summit*.

4 See UN doc. A/RES/53/202, A/RES/53/239, A/RES/54/254, A/RES/54/261, A/RES/54/281.

5 UN doc. A/RES/55/2, *United Nations Millennium Declaration*. GA Res. 55/2, 55th Session, 8th Plenary meeting, 8 September 2000.

6 See UN doc. A/56/326, Report of the Secretary-General - *Road map towards the implementation of the United Nations Millennium Declaration*.

7 Ibid.

8 *Op. cit.*, *supra* footnote 1.

9 *Op. cit.*, *supra* footnote 2, Annex: *Millennium Development Goals*.

10 Convention on Biological Diversity (CBD) (Rio de Janeiro, 5 June 1992) EIF 29 December 1993, U.N.T.S. vol. 1760, p. 70 [hereinafter CBD].

halt the rate of which biological resources were being depleted, i.e. not to halt the loss of biodiversity.¹² To achieve this target the parties committed themselves to implement CBD in such a manner so a 'significant reduction of the current rate of biological loss at the global, regional and national level' would take place. The sunset for the goal was set to 2010.

In 2010 it was only confirmed what was known years before,¹³ the goal was far from achieved. The loss of biodiversity was and still is declining,¹⁴ arguable as a result of inadequate management.¹⁵ The decline also arguable takes the world's ecosystems closer to its potential tipping point, where the service of the eco-system, as provided so far, will no longer be provided to humanity.¹⁶

Despite consensus in the international community over the unsustainability of current development,¹⁷ which still exceeding the carrying capacity¹⁸ of the Earth's ecosystem, seemingly simple goal as the CBD 2010 biodiversity goal is still hard to reach. The failure to reach such goals can not be seen as anything but a collective failure of the international community.¹⁹

The fragmented international concern over the human environment, were brought together in 1972 in Stockholm, Sweden,²⁰ where United Nations in response to the invitation of the Swedish government held an international *Conference on the Human Environment* (UNCHE), also known as the Stockholm Conference. This conference was the first international conference of its kind. It represents the big step towards full recognition over the side effects of human development, as well as the recognition over the need to take these side effects into account in future

11 See Decision VI/26, Annex 1, para. 11, CBD/COP-6. In October 2011 a new plan was adopted for the year 2011-2020. See decision X/2, CBD-COP 10.

12 *Id.*, Decision VI/26.

13 See *inter alia* *Global Diversity Outlook 2* (Secretariat of the Convention on Biological Diversity, 2006) (GBO-2); and *Millennium Ecosystem Assessment, 2005: Ecosystem and Human Well-Being: Wetlands and Water. Synthesis* (Washington, DC. 2005).

14 See, *inter alia*, *Global Diversity Outlook 3* (Secretariat of the Convention on Biological Diversity, 2010) (GBO-3); and *The Millennium Development Goals Report 2011* (New York: 2011).

15 See, *inter alia*, GBO-3; *Millennium Ecosystem Assessment, 2005: Ecosystem and Human Well-Being: Wetlands and Water. Synthesis* (Washington: 2005); and *The Millennium Development Goals Report 2011* (New York: 2010).

16 *Ibid.*

17 Decleris, M., *The Law of Sustainable Development: General Principles*, A report for the European Commission (Brussels: 2000), p. 45.

18 See, e.g., Rockström, *et al.*, 'Planetary boundaries: exploring the safe operating space for humanity' *Ecology and Society* (2009) No.14 (2):32; Available at <www.ecologyandsociety.org/vol14/iss2/art32/>.

19 1 October 2011 CBS had 193 parties, covering all members of the United Nations and almost all the world's independent countries.

20 See, *inter alia*, Lowenfeld, A.F., *International Economical Law* (2nd ed.) (Oxford: 2008), pp. 377-381.; and Lausche, B.J., *Weaving a Web of Environmental Law* (Bonn: 2008), pp. 161-167.

development.²¹ As a result, the principle of *responsibility to protect* and *responsibility to improve* where recognised.²²

The Stockholm Conference resulted in the *Declaration of the United Nations Conference on the Human Environment*.²³ This declaration contains 26 principles to be considered in future development. To facilitate the implementation of the declaration the *Action Plan for the Human Environment*²⁴ was adopted²⁵ (hereinafter Action Plan). The Action Plan contains actions as well as recommendations divided into three main areas; (1) *Environmental Assessment*, highlighting the importance of research, monitoring and evaluating the status of the environment; (2) *Environmental Management*, to address the need of cooperation between states; and (3) *Supporting Measures*, which includes measures to support activities taken in the other two areas.²⁶

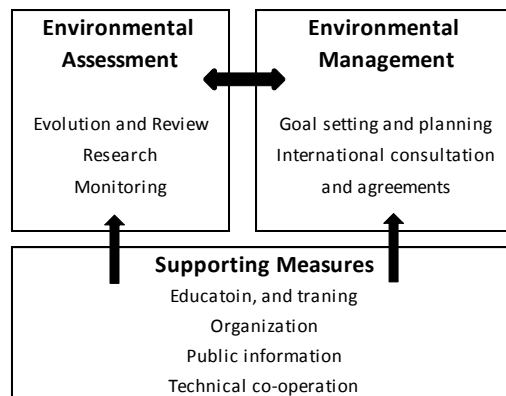


Figure 1.1. The framework of the Action Plan for the Human Environment

All these areas are to some extent incorporated in contemporary biodiversity-related conventions, often by setting goals, methods of monitoring and cooperation.

Recommendation 32 of the action plan addresses natural resources living in international waters as well as species migrating between areas of jurisdiction. The purpose of this recommendation is to facilitate a comprehensive planning that includes conservation and improvement of the human environment, where the human side-effects are taken into account, for the benefit of present and

21 UN doc. A/CONF.48/14/REV.1 *Declaration of the United Nations Conference on the Human Environment, Report of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972 (Stockholm Conference), adopted 16 June 1972. See Part I, Section I (6).

22 Ibid., Principle 1, part 1, chapter 1, section II.

23 See, *supra* footnote 21.

24 Ibid., chapter II.

25 Ibid., part 1, chapter XI-Xii, paras. 339-341.

26 Ibid., Part 1, Chapter II (A).

future generations.²⁷ As a result agreements that cover these areas were proposed, where the focus of such agreements should be on conservation.²⁸ As a result, the United Nations Environmental Programme (UNEP) was established in 1972,²⁹ with a function to facilitate international cooperation by bringing states together to conclude agreements addressing environmental issues.³⁰

In contrast to the exponential growth of international multilateral environmental agreements (MEAs), as a result of the increasing concern over the human environment,³¹ the deterioration of the Earth's biological resources will continue through this century, unless it is obstructed.³²

The failure to effectively address this degradation can not be attributed a specific MEA. It rather confirms the growing concern about the effectiveness of *all* environmental agreements to live up to their purpose and promise.³³ This is alarming because the current rate of biodiversity loss is already beyond the planetary boundaries.³⁴

Despite more than 40 years of international concern over the human environment, and an ever-expanding portfolio of analysis of their effectiveness, there still exists a need for further analysis of existing conventions, particularly with regard to the method used by them to address the preservation of the earth's biological diversity. Thus, this outlines the context of this thesis.

2 PURPOSE AND QUESTIONS

If MEAs are recognised as the principal structure that is supposed to govern and control states conduct relating to the conservation of biodiversity, there is clearly some doubt on their effectiveness.³⁵ On the other hand, they have been shown to play an important role in influencing

27 *Id.*, *supra* footnote 24.

28 *Id.*

29 UN doc. A/RES/2997(XXVII), *Institutional and financial arrangements for international environmental co-operation* GA Res 2997, 27th Session, 2112th Plenary meeting, 15 December 1972.

30 *Ibid.*

31 See Meyer, *et al.*, J.W., Frank, D.J., Hironaka, A., Schofer, E., Brandon Tuna, N., 'The structuring of a World Environmental Regime, 1870-1990', *International Organization* (1997) Autumn, vol. 51, no. 4, pp. 623-651.

32 See *The Millennium Development Goals Report 2010* (UN DESA) (New York: 2010), particularly 2:55.; Available at <www.unfpa.org/public/home/publications>

33 See, e.g., *inter alia*, Jóhannsdóttir, A., Cresswell, I. and Bridgewater, P., 'The current Framework for International Governance of Biodiversity: Is it doing More Harm Than Good?' (2010) *Review of European Community & International Law*, (RECIEL) 19 (2); Mangel, M., *et al.*, 'Principles for the Conservation of Wild Living Resources' *Ecological Society of America* (ESA) Ecological Applications, (1996) May, vol.6, no. 2.; and Meyer, *supra* footnote 20.

34 See Rockström, *supra* footnote 18.

35 See, e.g., *inter alia*, Jóhannsdóttir, *et al.*; Mangle; and Meyer *et al.*, *supra* footnote 33.

policy and practices in these states.³⁶ In addition, their contribution to international conservation cooperation can not be underestimated.³⁷

The effectiveness of MEA can also be questioned in relation to the principle of Sustainable Development. So far, development can not be seen as sustainable, because development so far has taken place at a level where the resources used exceeds the rate at which they are replaced.³⁸ As a result, the question may be if the MEAs effectively contribute to the change in direction, from unsustainable development to sustainable development.³⁹

The aim of this study is at first to analyse *the effectiveness* of existing biodiversity-related MEAs by asking:

- How does the design of a convention text affect;
 - What conservation measures that are taken; and
 - What impact it can have on the Earth's biological diversity?
- What is the role of the Conference of the Parties (COP);
 - As regards to interpretation of the meaning of the text of the convention: and
 - Does this interpretation affect the existence of obligation?

The questions above will help to get a deeper understanding in three areas. The first question gives us a deeper insight of the role of the convention text play in the decision-making process regarding what measures should be taken in order to get adequate conservation. It also shows how these decisions in turn can affect the conservation status of the Earth's biodiversity. The second question will give an insight into the interconnection between the text of the convention and COP-decisions. To understand this interconnection is important as the text of the convention seldom gives all the answers.

36 See, e.g., Meyer, J.W., *et al.*, pp. 646-647 *et passim, supra* footnote 31.

37 See, e.g., Barrett, S., 'Self-Enforcing International Environmental Agreements' (1994) Oxford Economic Paper, New Series, Vol. 46, Special Issue on Environmental Economics. October, at pp. 891-892 *et passim*

38 See Decleris *supra* footnote 17.

39 This thesis adopts the definition of sustainable development as it is definition through Brundtland report, *infra* note 68.

Secondly this thesis compares the covered MEAs with the Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS),⁴⁰ by asking:

- What approach does CMS take when addressing conservation in comparison with other MEAs?

The difficulty in comparing CMS with different MEAs is based on difference in scope, and approach to conservation. CMS for example is concluded for conservation of migratory species, whereas the Ramsar convention is concluded for the conservation of wetlands. The delimitation of this study, described below, will facilitate this process of comparison. This comparison was made possible by analysing *special features* in each MEA. In the context of this thesis *special feature* is characteristics of each MEA which is unique in comparison with other MEAs.

Based on the above analyses this thesis will give proposals to UNEP/CMS Secretariat by asking:

- What steps can CMS take to:
 - Improve their contribution to the preservation of the Earth's biodiversity;
 - Contribute to the conservation of the Earth's biodiversity while meeting their goals and objectives of the Convention; and
 - Contribute to a sustainable development.

The questions above are based on the analysis done by this thesis. In these proposals the often limited financial situations that most MEA secretariats are dealing with have been considered. Thus most of the proposals would be possible to implement without major financial investment.

3 DELIMITATION

To achieve the aim of this thesis delimitation was necessary. The first delimitation follows the above context, which delimits the scope of this thesis to include only biodiversity-related agreements. To mark a convention as biodiversity-related this thesis uses the same label that is used by UNEP.⁴¹ Along with these agreements, other conventions of particular importance for the conservation of biodiversity where included. The concept of *biodiversity-related* is used as a reference to all of the covered agreements. Along with these agreements this thesis covers decision from decision-making authorities of these conventions.

40 Convention on the Conservation of Migratory Species of Wild Animals (Bonn, June 23 1979) EIF 1 November 1983. U.N.T.S. vol. 1651, p. 333 (also known as the Bonn Convention) [hereinafter CMS].

41 See <www.unep.org/dec/links/index.html>.

The conventions covered in this thesis are: (1) CMS;⁴² (2) CBD;⁴³ (3) the Cartagena protocol on Biosafety to the Convention on Biological Diversity⁴⁴ (the Cartagena protocol); (4) the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena protocol on Biosafety⁴⁵ (the Supplementary Nagoya protocol); (5) The Convention Concerning the Protection of the World Cultural and Natural Heritage⁴⁶ (WHC); (6) The Convention on the Conservation of Antarctic Marine Living Resources⁴⁷ (CCAMLR); and (7) the Convention of Wetlands of International Importance Especially as Waterfowl Habitat⁴⁸ (Ramsar).

Further delimitations was made by disregarding the following conventions: (a) The United Nations Convention of the Law of the Sea,⁴⁹ (UNCLOS); (b) The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks;⁵⁰ (c) The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);⁵¹ and (d) The Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Flora and Fauna⁵² (Lusaka Agreement).

All these conventions have special ways to approach conservation management, which makes them stand out from other biodiversity-related agreements. The first two are specialized in dealing with issues relating to the sea. They govern rights and obligations closely connected to the sovereignty of the state. Their strategy and structure are not common in the field of biodiversity

42 See CMS, *supra* footnote 40.

43 See CBD, *supra* footnote 10.

44 Cartagena protocol on Biosafety to the Convention on Biological Diversity (the Cartagena protocol) (Montreal, 29 January 2000). EIF 11 September 2003. U.N.T.S vol. 2226, p.208 [hereinafter Cartagena protocol].

45 Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena protocol on Biosafety (the Supplementary Nagoya protocol) (Nagoya, 15 October 2010). Not yet in force, as of 20 July there are 24 out of 40 signatories [hereinafter supplementary Nagoya protocol].

46 The Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (Paris, 16 November 1972) EIF 17 December 1975. U.N.T.S. vol. 1037 [hereinafter WHC].

47 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) (Canberra, 20 May 1980) EIF 7 April 1982. U.N.T.S. vol. 1329 [hereinafter CCAMLR].

48 Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) (Ramsar, 2 February 1971) EIF 21 December 1975. U.N.T.S. No. 996. As amended by the Paris Protocol (Paris, 3 December 1982) U.N.T.S No.1473, and Regina amendments (Regina 28 May 1987) U.N.T.S No. 1824 [hereinafter Ramsar].

49 United Nations Law of the Sea (UNCLOS) (Montego Bay, 10 December 1982) EIF 16 November 1994. U.N.T.S vol. 1833 [hereinafter UNCLOS].

50 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995) EIF 11 December 2001. U.N.T.S. vol. 2167.

51 Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) (Washington, 3 March 1973) EIF 1 July 1975. U.N.T.S. vol. 993.

52 Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Flora and Fauna (Lusaka Agreement) (Lusaka, 8 September 1994). EIF 10 December 1996. U.N.T.S. vol. 1950.

conservation and this makes them unique in the flora of conventions dealing with biodiversity. The two latter conventions do not address the conservation of biodiversity *per se*. Their scope is more connected to the negative effect that international trade can have on the survival of wild animals and plants. Thus, they are more focused on trade than conservation. As a result of the above, disregarding these instrument do not have a negative effect on the final outcome of this thesis.

Further more, as mentioned above, the covered MEAs vary greatly. As a result, there was a need for further delimitations to facilitate the process of comparison. For this reason limitation on which aspects of each MEA covered where needed. This thesis focus on *special features*, which as described above are characteristics of each MEA which makes it unique compared to other. The different aspects covered by this thesis are: (I) *Obligations*, (II); *Feedback systems*, (III) *Enforcement*, (IV) *Decision-making*; (V) *Dispute Settlement*; and (VI) *Liability*.

Implementation, Obligation and Feedback-system are essential aspects of conservation management. *Implementation* relates to actions parties shall to take in order to fulfil obligations under the signed convention. *Obligations* relate to actions the parties have committed themselves to take as a result of the signing. Submission of reports could be such an obligation, unless it is voluntary. If parties only should submit reports, reporting is not in the eyes of this study considered as an obligation.

As a result of the cooperative and self-enforcement structure of international conventions,⁵³ the submission of reports plays an important role in the *Feedback-system*. The function of a *Feedback-system* is primarily a mean to monitor the implementation of obligations under the convention, in order to evaluate whether the convention is effective or not.⁵⁴

To return to the obligations, this study analyzed whether there are any obligations for parties as a result of signing. To evaluate the existence of obligation this thesis read the text of the convention in conjunction with COP decisions and applicable sources of international law.⁵⁵ Taking special regards to core principles of sustainable development, such as *equity*.⁵⁶

Enforcement refers to the existents of formal enforcement and non-compliance *procedure*. These procedures shall not be confused with non-compliance *mechanisms*, such as technical and

53 Louka, E., *International Environmental Law - Fairness, Effectiveness, and World Order* (Cambridge: 2006), p. 73.

54 Carlman, I., 'The Resource Management Act 1991 Through External Eyes' (2007) *New Zealand Journal of Environmental Law*, vol. 11, pp. 181-186.

55 See Article 38 of the Statute of International Court of Justice, 26 June 1945, EIF 24 October 1945, U.N.T.S. XVI. [hereinafter S.I.C.J.].

56 Harris, D.J., *Cases and Materials on International Law* (6th ed.) (London: 2004), pp.48-50.

financial assistance. The term *enforcement*, as used in this thesis, includes any instruments of pressure to increase compliance. The reason for including enforcement is based on the following assumption; if there is no enforcement the implementation cost will always exceed the benefit, and therefore result in a lower level of compliance.⁵⁷ This will be further clarified below when dealing with the theory of implementation deficit;

Decision Making The absence of a supranational structure within the international community makes it important to understand the role that the decision-making authority of each convention. As a result, decision-making process will be described in close relation to these decisions.

Dispute Settlement refers to how disputes occurring as a result of different interpretation of the convention, should be resolved. Dispute settlement procedures are enforcement procedures; however, they are seldom used in conflicts over biodiversity-related treaties. Nevertheless, this aspect was included in this study as dispute settlement procedures play an important role in clarifying responsibilities.

Liability concerns the extent to which the signer may be liable under the convention. Responsibility for non-compliance or breaches is difficult to negotiate. A good example of a biodiversity-related convention containing such a liability would be the UNCLOS. Liability may, however, arise as a result of international principles, such as the polluter pays principle.⁵⁸

Further delimitation of this thesis will take place as a result of the definition of the term efficiency.

3.1 EFFICIENCY

The efficiency of an object is measured by analysing the object in relation to the purpose for which the analyses takes place. Therefore, the purpose of the analyses must be clarified, whether the purpose is to analyse the effectiveness of the measures taken or to analyse the effectiveness of the method used in the convention and their impact of the measures taken. This section will therefore define the purpose of the analyses by defining the concept of efficiency used in this thesis.

A distinction must be made between *regime effectiveness* and *regime rules effectiveness*. *Analysing the efficiency* is usually applied as a concept for analysing the effectiveness of the regime itself, *the regime effectiveness*. This thesis does not analyse effectiveness of the regime and its contribution to the conservation status of Earth's biodiversity. This thesis narrows the analyses

⁵⁷ See; e.g., Louka, E. p. 73 *supra* footnote 53.

⁵⁸ UN doc. A/CONF.151/26 (VOL.I), Report of the United Nations Conference on Environment and Development, Rio de Janeiro (UNCED), 3-14 June 1992, Annex 1: Rio-declaration on Environment and Development, principle 16.

of effectiveness to the approach used in the texts of a convention to address the conservation of biodiversity. Therefore, this dissertation will analyse the effectiveness of the approach used, i.e. *regime rules efficiency*. As a result, this thesis does not analyse the measured taken by individual signatories, in order to fulfil treaty obligations.

The narrow approach is used as an effective fulfilment of the obligations under a treaty is no guarantee of effectiveness in meeting the goals and objectives of a treaty.⁵⁹ Meanwhile, if the treaty itself is not built for durability, there is a risk of further deviation from the overall objective of the treaty when it is implemented by the signatory States. The successful implementation of such obligations would thus only give the appearance of Phantom of motion in the right direction.⁶⁰

To return to the distinction between *regime effectiveness* (RE) and *regime rules efficiency* (RRE), it may at first glance seem as a trivial matter. This is not the case. A RE approach would require to set a *lower-* and an *upperbound* in order to get an axis, where the effectiveness of the regime can be placed.⁶¹ As a result, more emphasis must be placed on important variables. This is particularly the case when setting the lowerbound, as a mistake here will automatically reflect the results of the analyses of the effectiveness of the regime.⁶² This is especially true in the field of environmental where there is seldom a time lag between actions and results to be expected.⁶³ As a result, there are a higher requirement in an RE approach for reliable scientific data, to get an accurate result.⁶⁴

This is not the case in an RRE approach. In this approach there is no requirement to set a *lowerbound*. Thus, the need for scientific data is not as high. As follows, an RRE approach would

59 See, e.g., Helm, C. and Sprintz, D., 'Measuring the Effectiveness of International Environmental Regimes' *The Journal of Conflict Resolution*, (2000) October, vol. 44, no. 5, pp. 633-635.

60 *Id.*

61 The lower bound would be the state of the matter before the regime was adopted, i.e. the state of nature before a treaty was implemented. It follows, in order to set this bound there is a need to take into account actions which have already taken place, i.e. before the actions as a result of the signed convention was taken, but whose effect will be visible years or decades later. See Helm, C. and Sprintz, D., *Ibid.*, particularly pp.630-652.

62 The demand for scientific data become apparent when setting the lowerbound as there is a need to take into account multiple variables, which can be already implemented environmental policies, or even war and political changes, whose effects has not been apparent because of the response delay. Their effect on the environment have to be included in order to get an accurate lowerbound in order be able to attribute the right contribution of the MEA. . See Helm, C. and Sprintz, D., *supra* footnote 59, particularly pp.630-637.

63 See Helm, C. and Sprintz, D., *supra* footnote 59, particularly pp.630-652.

64 *Ibid.*

be more suitable for a theoretical analysis. However, there is still a prerequisite for an *upperbound*, either of which can be a 'broader institutional goal.'⁶⁵

As mentioned above, such a goal can be an overarching goal. These types of goals are not concern with specific goals, such as the conservation objective in the Agreement on the Conservation of Gorillas and their Habitats (Gorilla Agreement),⁶⁶ but focuses on a primary target to be achieved in a perfect regime. However, it is important that this primary goal is reflected in the instruments concluded for its purpose.⁶⁷

As a result of the above, this thesis analyse the efficiency of the approach used in the design of the conventions, rather than the effectiveness of conventions themselves. Therefore, this thesis will not be required to set a lowerbound. As an upperbound this thesis applies the principle of sustainable development.⁶⁸

4 METHODOLOGY AND APPROACH

To achieve the aim of this thesis it analyzed the approach used in the covered instruments to address the conservation of biodiversity, by focusing on specific aspects of each MEA. In order to analyze the meaning of the text of the conventions, decisions from decision-making bodies have been considered, as well as international documents, legal texts and other relevant literature.

This thesis has been carried out in four phases, (1) Outline of the theoretical framework, (2) Collect information on the subject, (3) Analysis the collected information, (4) Make concrete proposals for UNEP/CMS Secretariat to take into consideration to enhance their contribution to the preservation of the Earth's biodiversity, awhile meeting the purpose and objectives of the Convention. As a result, this thesis is divided into the following parts.

65 The use of a 'broader institutional goal' could in many cases be better than a specific target. Take for example a reduction of percentage (of biodiversity losses). Due to the existence of endogenous problems, such a target could give misleading results of regime effectiveness. On the other hand, vague broad institutional goals, such as sustainable development, are more difficult to use as an upperbound. For this purpose the use of threshold targets is required. A good example of such a threshold target would be a *Flim* reference level; which is a level where 'stock are threatened by substantial decline of collapse.' See, *inter alia*, Helm, C. and Sprintz, D., *supra* footnote 59; and European Fisheries Law - From Promotion to Management till Markus (Groningen:2009) pp. 72-75.

66 Agreement on the Conservation of Gorillas and Their Habitats (Gorilla Agreement). Paris, 26 October 2007, in force 1 June 2008. U.N.T.S No. 2544 [hereinafter Gorilla Agreement], article II.

67 Helm, C. and Sprintz, D., *supra* footnote 59, pp.632-633.

68. See UN doc. A/42/427 World Commission on Environment and Development, *Our Common Future*, 4 August 1987, (Brundtland Report), Annex 1: Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law, chapter 2, paras. 55-64. Where the report outlines the need to conserve the earths natural resources as a part of the concept of sustainable development.

The first part of this thesis, (Part 1 Introduction) contains, (I) *Background* to the topic. In this section, the history and context of biodiversity-related MEAs is introduced, which in turn establishes the framework. (II) *Purpose and questions*. The aim of the work in this thesis is described with specific questions to answer, (III) *Delimitation*. In order to clarify the scope of the thesis, and to facilitate the analysis process this section describes the boundaries, (VI) *Efficiency* is defined here as used in this thesis; (V) *Methodology and Approach*. This section describes the methods and approach in this thesis: and (IV) *Theoretical Approach* which defined the theoretical framework of this thesis, and consists of the following parts, (a) the *environmental perspective*, (b) *Three-Filter Theory*, (c) *Operationalisation*, and (d) the *implementation deficit*.

The Second part, (Part 2, Multilateral Biodiversity-Related Treaties) contains an analysis of the covered conventions. The approach used when analyzing the conventions is an *integrated approach*⁶⁹ outlined in the *Vienna Convention on the Law of the Treaties*.⁷⁰ According to this view, a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose.’⁷¹

Part three, (Part 3, Analysis, Summary and Recommendations) provides an analysis of the approach CMS uses for the conservation of migratory species. This part also contains proposals for UNEP/CMS Secretariat to consider for the benefit of their contribution to the preservation of the Earth’s biodiversity, while meeting the purpose and objective of the convention.

5 THEORETICAL APPROACH

The deteriorating ecosystem is debatable a combination of the none-adoptive rules of human and non-linear structure⁷² of nature.⁷³ Until the 1970s, the prevailing approach in management of resource was to see the ecosystem as a deterministic and homeostatic structure. As a result, only a few components of scientific information were regarded when calculating the maximum

69 There are arguably three ways in international law to interpreting a treaty. The *objective approach*, where a treaty is interpretation solely based on the wording. The *Subjective approach*, where the parties intention is giving precedence. The *teleological approach*, frequently used by the European court of Justice, where the aim of the treaty and the treaty objectives are the main objects. See Wallace, R.M.M. and Martin-Ortega, O., *International Law* (6 ed.) (London: 2009), pp. 275-277.

70 Article 31, *Convention on the Law of Treaties* (Vienna, 23 May 1969) EIF 27 January 1980. U.N.T.S Vol. 1155, p.331 [hereinafter *Vienna Convention*].

71 Article 31, *Vienna Convention*.

72 Westerlund defines a nonlinear effect as something not inline with consents emissions but appears suddenly when a threshold is exceeded. Westerlund, S., *En Hållbar Rättsordning - rättsvetenskapliga Paradigm och tankevändor* (Uppsala, 1997) p. 50.

73 Mangel. M., *et al.*, *Supra* footnote 33.

sustainable yield.⁷⁴ These few components were mainly biological data on the species to be harvested, as well as information of *their* ecosystem.⁷⁵ Consequently, the larger picture was unrecognized.

5.1.1 ENVIRONMENTAL PERSPECTIVE

This thesis adopts an *environmental perspective*⁷⁶ when analyzing the covered documents. The environmental perspective allows the analyses to take a larger picture into account when analyzing legislations and legal texts. Thus, this perspective differs from a traditional legal perspective. At the same time it allows the object to be analyzed from a starting point outside the law. To allow the analyzer to take into account other aspects that are not clearly fit within the boundaries of the traditional justice system, such as the loss of biodiversity.⁷⁷ An analyze according to a traditional legal method would be restricted to only consider only traditional sources of international law⁷⁸ and required to stay within the limits of the judicial system when analyzing. In other words, a traditional method in analyze the biodiversity-related agreements would not be sufficient if the goal is to analyse the legal text and its importance for biodiversity.⁷⁹ This is the result of the requirement of this analysis to take into account aspects that exist outside the law itself,⁸⁰ such as probabilistic and multi-casual nature of the ecosystem.⁸¹

As mentioned above, the deterioration of the ecosystem is the result of the two legal systems operating in the same area, the human justice and the law of nature. Although decomposition occurs as a result of human actions, guided by human laws, the results are largely only visible outside the legal system. The matter is further complicated by the traditional legal system which, debatably, can not handling this.⁸² Human rules can never change the behaviour of the Earth's ecosystems⁸³ and people still do not have the power to manage it. As a logical conclusion, the human rules must adopt to fit within the elasticity of the law of nature, as human laws with nature as an addressee would be a vacuous paper product.⁸⁴

74 Ibid., pp. 355-357.

75 *Id.*

76 Westerlund 1997, *supra* footnote 72, pp. 23-41.

77 Ibid., pp. 25-27.

78 *Op. cit.*, *supra* footnote 55.

79 See Decleris, *supra* note 17, pp. 38-48.

80 Westerlund 1997, *supra* footnote 72, pp. 25-27.

81 See, *inter alia*, Westerlund 1997, Ibid., pp. 142-144; and Mangel. M., *et al.*, *supra* footnote 33, pp. 355-357.

82 See Decleris, *supra* footnote 17, pp. 38-48.

83 Westerlund 1997, *supra* footnote 72, pp. 53.

84 Mangel. M., *et al.*, *supra* footnote 33, pp. 346-347.

As mentioned above, this thesis adopts the principle of sustainable development as an overarching goal for all biodiversity-related instruments.⁸⁵ Sustainable development is largely defined from an anthropocentric point of view,⁸⁶ and is arguable situated outside the law.⁸⁷ While a traditional legal method would allow such an overarching goal, this approach would be more focus on the definition of the term, and whether it has any legally binding status, and contains obligations and rights. The argument against any legal obligations would be amongst other, the non-existent consensus on the definition of the principle. According to Decleris the definition of sustainable development is too general to be able to fulfil the demands for a legal concept, it rather contains ethical obligations than higher moral ones.⁸⁸ This would also be consistent with by Bosselman.⁸⁹ On the other hand, according to I.C.J. Vice-president Weeramantry sustainable development is more a principle of normative values than just a concept, and is part of contemporary international law. In his separate opinion in the case concerning the Gabčíkovo-Nagymaros project, is the principle of sustainable development ‘part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.’⁹⁰

The original definition of sustainable development in the Brundtland report,⁹¹ confirmed in the Rio declaration,⁹² and the report of the World Summit on sustainable Development,⁹³ reads as follows:

‘Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’⁹⁴

Two important aspects in this definition will be addressed.

The first aspect contains the idea of limitations imposed by states through technology and its social structure, including the structure of the judicial system, which may prevent future generations to

⁸⁵In spite of regarding sustainable development as an overall target Westerlunds believes that in order to define sustainable development as a principle this would only be possible as long as the word itself does not have an impact on the ability for the future generations to fulfil their goals. See Westerlund, *supra* footnote 72, pp. 36-42.

⁸⁶ See UNCED, principle 1, *supra* footnote 58.

⁸⁷ See, e.g., Westerlund 1997, *supra* footnote 72, p.167.

⁸⁸ Decleris, *supra* footnote 17, pp. 44-49.

⁸⁹ See Bosselmann, K., ‘Losing the Forest for the Trees: Environmental Reductionism in the Law’ (2010) *Sustainability*, 2, pp. 2424-2448; available at <<http://www.mdpi.com/2071-1050/2/8/2424/>>.

⁹⁰ See, Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgement, 25 September 1997, I.C.J. report 1997, particularly the separate opinion of Vice-president Weeramantry.

⁹¹ See the Brundtland report, *supra* footnote 68.

⁹² See the Rio-declaration, *supra* footnote 58.

⁹³ UN doc. A/CONF.199/20. Report of the World Summit on sustainable development, Johannesburg, South Africa 26 August-4 September 2002.

⁹⁴ See the Brundtland Report, *supra* footnote 68, Annex 1: *Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development*, Adopted by the WCED Experts Group on Environmental Law, chapter 2 (1).

meet their needs.⁹⁵ As a result, these systems must change for development to shift from an unsustainable development to sustainable development.⁹⁶

The second aspect of the definition include the principle of equity, both inter-generation equity and intra-generation equity.⁹⁷ Equity is a fundamental principle of the principle of sustainable development. As a result sustainable development can not be considered sustainable if future generation do not have access to resources to satisfy *their* needs, as they choose to define them.⁹⁸ This would also be relevant for the present generation. Thus, every living generation has the obligations to take this into account. The obligation of each generation is to take into account the long-lasting effect when they exercising their *right to use* resource available, so there will be a base of resources for future generation. As a result, the *sustainability* part of the concept of sustainable development are not met, if not the principle of equity is taken into account.

The definition in the Brundtland report has been seen as incomplete, containing a *weak sustainability*.⁹⁹ This is the case, this definition is made from an anthropocentric point of view and for development to be sustainable development through its definition, then development must take place within the boundaries of the Earth's ecosystem, and such a development would be labelled a *strong sustainability*.¹⁰⁰ As a result, the text of the law dealing with environmental issues must not only be able to handle the probabilistic and multi-casual structure of nature, but also inter- and intra-generation equity to be regarded as a legislation inline with sustainable development.¹⁰¹ It follows from this approach that legal texts can not be renegotiating-proof.¹⁰² Legal text must be in a constant state of reassessment based on feedback, which means that the legal texts can adopt and develop. This re-evaluation and the emergence of legal text must be done even though it is difficult to agree when renegotiating them.¹⁰³

95 *Id.*

96 See, *inter alia*, Westerlund, *supra* footnote 72, pp. 148-149; and Jóhannsdóttir, A, 'Considerations on the development of environmental law in the light of the concept of sustainable development' (2005) *Ympäristöjuridiika* 2, particularly pp. 30-33.

97 See; e.g., *inter alia*, the Brundtland Report, *supra* footnote 68; and Rio declaration, *supra* footnote 58, Annex 1, principle 3.

98 See; e.g., *inter alia*, Cordonire S., M-C., Ashfaq, K., Sustainable development Law – Principles, practice and prospects, (2 ed.) (Oxford: 2005), pp. 99-100; and Chapter 1.1, Swedish Environment Act (1998:808), which clearly outlines the obligation connected to the right to use the natures resources.

99 See Bosselmann, *supra* footnote 89, particularly section 5.2.

100 *Id.*

101 Westerlund 1997, *supra* footnote 72, pp. 37-39.

102 Other however, argues that self-enforcing international environmental agreements must be renegotiation-proof; however this is connected to the theory of infinitely credible punishment. See Barrett *supra* footnote 37, pp. 878-880 *et passim*.

103 This is the most common response you will get when suggesting changes to an international instrument. This stance appears to be based on the "floodwater theory," where it is preferred to patch a disfunctioning

The need for re-evaluation is not based on each generation's obligations towards future once, but based on the need for a progressive transform of the judiciary, as well as these that control structure of society at large.¹⁰⁴ Development in the nineteen century is debatable a result of such changes.¹⁰⁵ For these changes to take place once more there is now a need for change in approach at the international level. This is the logical consequence of a contemporary world where national legislations to a higher degree reflects international law and signed treaties.¹⁰⁶

It is not impossible to make changes within the current legal system to include the responsibility to preserve nature and simultaneously transfer it unspoiled to the future, for the benefit of future generation.¹⁰⁷ The Icelandic *Act on Nature Conservation*¹⁰⁸ is an example where man's relation to nature has been regulated. According to the purpose of the legislation actions should 'harm neither the biosphere nor the geosphere,' it should also 'ensure, to the extent possible, that Icelandic nature can develop according to its own laws and ensuring conservation of its exceptional historical aspects.'¹⁰⁹ The problem is not to put these kinds of legislation in place, but how the laws are implemented and enforced.¹¹⁰

As a result, applying a traditional legal perspective when analyzing the subject will not sufficient, it would have more of a narrative effect on the analysis. Thus an environmental perspective would be more appropriate for this thesis.

5.1.2 THREE-FILTER THEORY

The three-filter theory is a theory about three barriers in place between the target and the end result, with a function to filter out unwanted behaviour.¹¹¹ If the filters are successive to fulfil its function the end-result will be inline with the target.¹¹² According to the theory, the first filter

agreement then open up an old one for renegotiation, This is probably a result of the fear of being over flooded with suggestions and argument which makes it hard for the treaty leave the ground. Bearing in mind the time consuming negotiation of UNCLOS this fear may be true, at least in case of highly politicised agreements. This is arguable the case why we see the patchwork in the area of environmental agreements. Arguable this approach will increase implementation deficit.

104 See the Brundtland Report, *supra* footnote 68, Annex 1, chapter 2 (3).

105 According to Westerlunds the development we saw in the past was the result of re-evaluation and changes in the legal system and law at its time. See Westerlund 1997, *supra* footnote 72, pp.125-140.

106 Decleris, *supra* footnote 17, pp. 38-49 *et passim*.

107 Se., e.g., Westerlund 1997, *supra* note 78, p.38.

108 Lög um náttúruvernd, 44/1999; English version available at <http://english.ust.is/media/log/Act_on_nature_conservation.pdf>, accessed 09.04, 11 July 2011.

109 *Ibid.*, Article 1.

110 See, e.g., Westerlund who recognizes the possibility to have substantive rules, such as rules prohibits actions which would have a deteriorating effect on the biodiversity. He sees, however, this not as a problem, the problem appear within the legal system when these rules are to be implemented into reality and how to enforce them. See Westerlund 1997, *supra* footnote 78, pp. 37-39.

111 Westerlund 1997, *Supra* footnote 78, pp. 13-22.

112 Disregarding the theory of implementation deficits.

consists of ethic and moral considerations. These two concepts are to prevent us from acting in contrary of a goal. A good example would be shoplifting. The reason that most people refrain from doing this is not because it's illegal but because it would be morally wrong. The second filter¹¹³ is of economical nature. This filter would consist of various fines, like parking tickets.¹¹⁴ The third filter contains legal actions to correct these actions the previous two former filters do not filter out. In this case a good example would be smuggling drugs. This filter is closely related to the risk of getting caught. If the risk of getting caught is minimal then the effect of the filter will be reduced. Examples from the international context of the third filter would be to hold a state liable,¹¹⁵ or withdrawal of voting rights.¹¹⁶ The risk of getting caught is also applicable in this context, severely complicated by the need for causality,¹¹⁷ as well as the requirement of the act to be wrongful under international law.

Of the above mentioned filters the last filter can be regarded as the most important, because changes that occur in this filter can lead to changes in the other two filters.¹¹⁸ A good example would be an obligation on the parties to submit reports. If they only *should* submit reports, there are no obligations, as *should* clearly do not impose any obligation on the parties. It could, however, have a normative effect by which some parties choose to follow. If *should* is changes to *shall* combined with a fee for non complying parties and an exclusion if a state fails to hand in report two consecutive years, it will probably be a better alignment. As we shall see below, plays the third filter also an important part in reducing implementation deficits.¹¹⁹

5.1.3 OPERATIONALISATION

Goals need to be transformed into actions to be reached. The process by which a target is converted is called operationalisation. This process is particularly important in cases where targets are not very well defined, or too large to handle at once.¹²⁰ A good example of such a target would be the overarching goal of sustainable development. The method of operationalisation can be done

113 According to Carlman is this theory normally only applicable to the rule of law countries. Carlman 2007, *supra* footnote 54, p. 184.

114 Westerlund calls this filter an economical filter. However, this filter only affects these who think the cost for the deviation is too high, and therefore will not deviate. If the price of deviation is acceptable then deviation will arguably take place to a higher degree. This would for example would be the case if you rent a car. In such a case the rental companies seldom transfer the speeding ticket to the renter. There is therefore not necessary to abide by the rule of not speeding.

115 See; e.g., article 3, CBD; and Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (Basel, 22 March 1989) EIF 5 May 1992. U.N.T.S. vol. 1673.

116 See; e.g., Article XXVI, section 2 (b), (a) Articles of Agreement of the International Monetary Fund (Washington, 27 December 1945) EIF 27 December 1945. U.N.T.S. vol. 2.

117 For a discussion, see Pulp Mills case, *infra*, note 271.

118 Westerlund 1997, *supra* note 78, pp. 155-163.

119 Westerlund 1997 *supra* footnote 78, p. 162.

120 *Ibid.*, pp. 43-51.

in several steps, where a target is divided in another targets, milestone goals. This procedure to break down goals into smaller manageable goals is often crucial to achieving these goals. To exemplify the process of operationalisation, an example based on the Gorilla Agreement¹²¹ will be used.

The Gorilla Agreement can be viewed as a milestone target of sustainable development. Under the agreement, the goal is to preserve the gorillas.¹²² But as a result of the goal being not very specific there is a need to divide this objective in to measurable and manageable pieces. The process of doing so is the process of operationalisation.

A sub-level target could be to maintain a viable population.¹²³ This goal would not be measurable because it is not a very specific goal and as a result further sub-levels are needed.

The next sub-level would be a planned population, such as a population of 120 gorillas. This level could be used as a reference level and if the current population falls below the reference level there is a measurable gap in the system.¹²⁴ This approach is not a preferred one as the numbers of gorillas do not say anything about if the number equals a viable population. Therefore, the fulfilment of that goal gives no assurances that the target level above would automatically be met. As a result, a different approach and further sub-levels are needed.

For this purpose, the law assumes a sufficient habitat reference.¹²⁵ This could be viewed as an elastic law, which can take into account the non-linear structure of nature. However, the similar problem of measurability appears, unless this requirement is clarified and further divided. In this example, the variable of resources will be considered as a classification and clarification of adequate habitat legislation.¹²⁶

To meet the objectives of preserving the gorillas the sub-target covering resources must be met. As a result of a larger population, the demand for resources will increase.¹²⁷ This will in turn have a negative effect on the resources available. As a result of this increasing demand, there will be fewer resources to share in the group. This will eventually result in increasing social pressure amongst the group members and counteract the target.

121 See *Supra* Footnote 66.

122 See Article I (3), Gorilla Agreement.

123 Article I (3), Gorilla Agreement: Article 1 (c) (1), CMS.

124 It will also work if the target is to keep the current population.

125 Article I (3), Gorilla Agreement: Article 1 (c) (1), CMS.

126 This variable can then further be divided, such as into water, food, area size.

127 This would ultimately lead to the gorillas seeking food outside the designated areas and thus increase the conflicts over resources between gorillas and humans.

Returning to the adequate habitat regulation, it is clear from the above example that in order to control any negative effect on the gorilla population occurred as a result of the lack of resources, the legislation would benefit from adopting a Habitat Quality Standards (HQS) approach.¹²⁸ This approach will focus on the quality of the habitat in relation to the existing population of gorillas, at any given time. This would benefit the gorillas, as a sufficient habitat not necessary mean a good quality of the habitat. Thus, HQS will undoubtedly have a positive impact on their conservation status. But these types of systems require extensive monitoring. As a result of the basic rule of law, in order to enforce HQS there needs to be some form of legislation in place that allows for enforcement.

The HQS will eventually affect people's activities.¹²⁹ A good example would be a farmer who wants to expand his farm. Part of this expansion will be done by encroaching on a protected habitat. If the outcome of this will have a negative effect of the HQS of this habitat, such expansion is not possible.

There is a high probability the farmer will expand anyway if the site is located far away from the legislators. As a result, the risk for getting caught is very small. Thus the benefits outweigh the risks. Furthermore, he never sees any gorillas anyway so he does not feel obligated to *not* expand.¹³⁰

As this example shows, the filters mentioned above do not stop the farmer. The last filter did not stop him because the risk of getting caught was minimal. Thus, the discrepancy resulted in a deficit that takes place between the goal and the end-result. In this example, the goal was adequate conservation of gorillas; the end result was insufficient protection.

5.1.4 IMPLEMENTATION DEFICIT

Deficits are losses between a goal and the end-result. In short, the implementation process is what happens between the goal and the end-result. This process is what shall be explained in this section.

A goal is rarely to be met 100%, unless changes are made along the line. Especially in the environmental field the end-result never be 100% of the target. The reasons for this are the expectation of losses that occurs at each stage of the implementation process.

¹²⁸ HQS need to take into account variables that can affect it.

¹²⁹ See Westerlund 1997, *supra* footnote 78, *et passim*.

¹³⁰ There is a difference between the moral obligation not to expand and the moral obligation to restrain from expanding.

Losses can be of various kinds, it can appear in the development process between the objective and legal document, or between legal text and the actual compliance of states, people or companies. The only way to assure full compliance is to overload the material rule of the established legal document. By overloading the material rules the outcome will always sum up to 100 % of the target, although the total losses.¹³¹ Overloading the material rules is not seen as compatible with the development part of the principle of sustainable development.¹³² As a result, it should be avoided. Instead, a feedback-system should be in place for the system to adapt and compensate for the losses without overloading the system.¹³³ The process of implementation can be illustrated as follows:

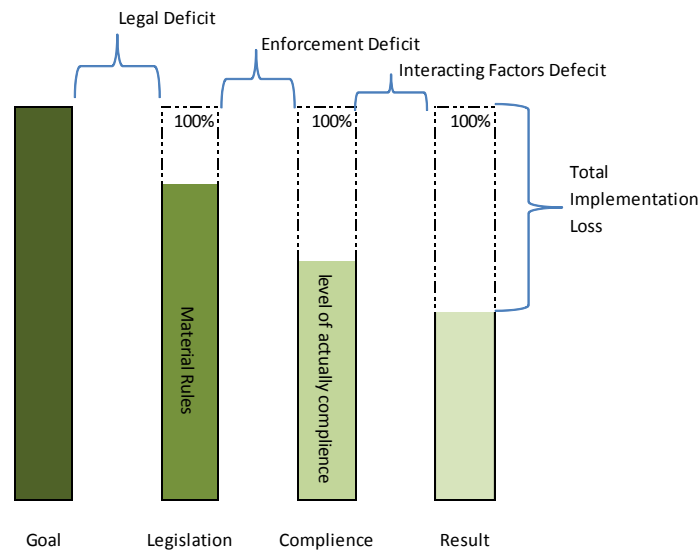


Figure 2.3 Implementation Loss, from Westerlund 1997.

As the figure shows, the loss occurs in three steps. The *Total Implementation Loss* in the *result* column represents the difference between the outcome-and the goal, representing what has been lost along the way.

The illustration contains four columns. They represent different stages of the process and it is between these steps losses occur. The first column represents the goal of the parties. An example of such a goal is the goal of sustainable development. Other examples would be, for example, the conservation of gorillas, or to keep the HQS. Thus, the process may be applied at all levels

131 Overloading material rules means writing an overcapacity into the material rules to counteract the inefficiencies of the system. See Westerlund 1997, *supra* footnote 78, pp. 54-59.
 132 Westerlund 1997, *supra* footnote 78, p. 66.
 133 See Carlman, *supra* footnote 54, pp. 181-192.

requiring implementation. The second column represents the legal documents. This is the act governing the behaviour of the recipient. The highlighted in this column represents the final outcome of the process between the first and the second column. Here the first implementation deficit occurs. A good example why there are losses in this process would be political negotiation, which always takes place between a political incentive and the conclusion of a legal document. Another example is the lack of legal knowledge among these who negotiate or draft text.¹³⁴ As will be described below, the reason the Ramsar convention did not come into force until nearly five years after conclusion was largely a result of this lack of legal knowledge in the negotiation and drafting process. Thus, this deficit is labelled a legal deficit, as it represents a deficits built into the legal document. As will be shown, this deficit can play an important role throughout the process of implementation, and impact on whether the loss reduces or increases.

The second deficit is between the material rules and levels of actual compliance. As discussed above, it is never full compliance. Although some addressee just lacks the interests in complying,¹³⁵ this loss also takes place as a result of misunderstandings and problems that occur at administrative level. It appears from the discussion above, that the three filters placed to correct unwanted actions, are placed between these columns. Thus the legal document and the process behind it play an important role in the process taking place between the second and the third column. As a result of how the different filters, a higher level of losses, i.e. a lower level of compliance can be expected if the price of non-compliance is less than the cost of compliance.¹³⁶

The third step of deficit is between the third and the last column. As described above, the last column represents what is actually achieved. The loss taking place between the third and the last column is the result of various external sources. Example of such sources can be an emission from a source that affect the final result, but at the time of the preparation of the legal document could not have been expected.¹³⁷

134 Westerlund 1997, *supra* footnote 78, pp. 43-51.

135 The lack of interest not to comply does not have to depend on low ethics or moral standards. It can simply be because the subject loses interest in the object and then ethical and moral obligations have no value regarding the object. Not meaning a reduction of the ethical or moral standards of the subject at large. Akhtarkhavari outlines the importance of soft law in environmental governance, however, as soft law are not legally binding losing interest will often result in a lack of motivation to obey by them. See Akhtarkhavari, A., *Global Governance of the Environment - Environmental Principle and change in International Law and Politics* (Cheltenham: 2010), pp. 67-83.

136 See Westerlund 1997, *supra* footnote 78, p.162.

137 The loss between the compliance and end-result could in this case depend on factors such as a legislation not adopted to take into account interacting factors. For example in order to control so a legal emission limits for a specific area is not exceeded, this for the benefit of the people living in the area. The legislation contains provision to regulate the emission of major factories in the area, however, if the

To illustrate the importance of the legislative process, an example will be given. Since the formulation is one of the most important aspects in interpretation of the obligation under a treaty,¹³⁸ this example illustrates how the use of formulation affects the existence of obligation. The paragraphs in this example have been formulated to include the principle of sustainable development in the legal text. Whether this principle gives rise to any obligations depends on the wording. Thus, knowledge of the legal significance of wording is important because a lack of knowledge may result in additional implementation losses.

‘THE CONTRACTING PARTIES,
RECOGNISES that wild animals in their
 innumerable form are an
 irreplaceable part of the earth’s
 natural system which must be
 conserved for the good of mankind;

RECOGNISES that each generation of
 man holds the resources of the earth
 for future generations and has an
 obligation to ensure that this legacy
 is conserved and, where utilised, is
 used wisely.

 HAVE AGREED as follow:

‘THE CONTRACTING PARTIES,
ACKNOWLEDGE that wild animals in
 their innumerable form are an
 irreplaceable part of the earth’s
 natural system which must be
 conserved for the good of mankind;

AWARE that each generation of man
 holds the resources of the earth for
 future generations and has an
 obligation to ensure that this legacy
 is conserved and, where utilised, is
 used wisely.

 HAVE AGREED as follow:

The difference in the first paragraph, between the words *RECOGNISES* and *ACKNOWLEDGE* may be seen as of secondary importance. However, these differences have an effect of the existence of obligation. *RECOGNISES* introduce a (higher moral) obligation to actually take action *in order to conserve* the wild animals, which are an irreplaceable part of nature. *ACKNOWLEDGE*, however, only implies a (higher moral) obligation to *take into account* the *truth* that wild animals are an irreplaceable part of nature, and as such they must be preserved.

legislation as such does not include a major highway located along the area, then the emission limit in the area could never be effectively regulated. As well as the burden of cost would only born by the factories, who has to reduce their omissions in order not to exceed the emission limits, and not shared by all polluters.
 138 See Article 31, Vienna Convention.

The changes in the second paragraph have a more serious effect on the existence of obligations. It follows from the changing of words, from *RECOGNISES* to *AWARE*, that all higher moral obligations to future generations are wipe out.¹³⁹ As a result the needs of the future generations are put below the need of the present.¹⁴⁰ Thus, the legal document is not be inline with principle of sustainable development.

The above example illustrated the effect seemingly small changes can have when interpreting obligations under the treaty.

As shown by the discussion taken place in this part, the legislative procedure plays an important role in all the above areas. But as discussed, it will always be legal deficits. This is the result of not overloading the legal texts, as overloading will not be in line with the principle of sustainable development. At the same time there is a need to consider the principle of equity within the same legal text. The result of not doing so would result in a legal text, not inline with the principle of sustainable development.

As result, the legal text must be able to adapt and compensate for loses occurring without major procedure for its renegotiation.¹⁴¹ This requires not only a flexible piece of legislation but also require a responsible body in charge. The mandate and duties of such authority should be to strengthen the legal rules in order to correct the unwanted behaviour,¹⁴² which counteracts the goal.¹⁴³ However, this requires a comprehensive feedback system in place.¹⁴⁴

Last but not least, it is important to recognize the principle of state sovereignty as a fundamental part of international relations. The importance of this principle will be discussed further below.

139 When outlying the essence of sustainable law Decleris lists sustainability and justice as a second feature of it. Traditionally sustainability and justice was correlated with Ethics, however, the traditional concept of Ethics was too narrow to incorporate the greater moral purposes needed to have a sustainable law. Decleris therefore suggest a broader concept of Ethics need to be created in order to be able to incorporate moral obligations for future generations as well as nature. See Decleris *supra* footnote 17, p. 42.

140 By placing the future generation below the present, there will automatically be a reduction in the possibility for the future generation to meet their needs as the present generation decides that it is okay to set the needs of the future generation below their own.

141 See Decleris *supra* footnote 17, pp. 57-59.

142 IMF, for example, have such a power.

143 Carlman *supra* footnote 54, pp. 181-187.

144 Such a system is for example in place in New Zealand for monitoring the implementation of the Resource Management Act 1991 No 69 (hereinafter RMA); available at <<http://www.mfe.govt.nz/publications/rma/annual-survey/index.html>>.

For now, according to the fundamental nature of this principle, states can not be held responsible their behaviour unless it clearly violates international law or treaties are bound to.¹⁴⁵

The above describes the theory part of this thesis.

145 Louka, *supra* footnote 53, pp. 468-475.

PART 2 - MULTILATERAL BIODIVERSITY-RELATED TREATIES

Multilateral biodiversity-related treaties have been seen as the overall structure of governance and management of global biodiversity. This is probably an accurate description; since no country is able independently solve the problem of the deteriorating biodiversity. As will be shown, the approach taken by various MEAs to address conservation differs widely. You could have thought it would be a more streamlined process after almost 40 years of international concern. This part will highlight some of the more interesting approaches.

6 CONVENTION ON THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCE

The reason for including the Convention on the Conservation of Antarctic Marine Living Resources was because it is regarded both as a pioneer in the development of the 'ecosystem approach',¹⁴⁶ and recognized as a unique system for the conservation of living resources.¹⁴⁷ The Convention is also the first international treaty with an objective containing a wide-range of conservation principles based on an ecosystem approach.¹⁴⁸ As a result, the Convention provides a good example of how to adopt a flexible piece of legislation which is can take the complexity of nature into account, and at the same time be possible to measure by scientific data.¹⁴⁹ For the possibility to take the uncertainty of nature into account the Convention adopts an approach that includes the precautionary principle, which corresponds with principle 15 of the Rio-declaration,¹⁵⁰ and this is the foundation which governs the decisions over which conservation measures are needed.

The Convention was initially adopted to deal with the uncontrolled harvesting of the krill in the Antarctic southern Ocean. The concern was economical in nature and more related to the potential adverse effects of over-fishing of krill may have on other potential economic resources in the area.

146 See <http://www.antarctica.ac.uk/about_antarctica/geopolitical/treaty/convention.php>

147 See Annex B, CCAMLR-I, 1982.

148 Constable, A.J., de la Mare, W.K., Agnew, D.J., Everson, I. and Miller, D., 'Managing fisheries to conserve the Antarctic marine ecosystem: practical implementation of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)' (2000) ICES Journal of Marine Science, vol. 57, pp. 778-791.

149 Ibid., pp. 783-784.

150 See Rio-declaration, *supra* footnote 58, Annex 1, principle 15 which reads as follows: 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

Thus, the noble burden of the task to preserving the ecosystem of the region was of secondary concern.¹⁵¹

6.1 SPECIAL FEATURES AND OBLIGATIONS

Apparently, CCAMLR is unique in many respects. This section will highlight some of the more interesting features of the Convention.

The Convention makes a distinction between different types of parties, Members of the Conventions (MOC) parties and non-MOC parties. The Commission for the Conservation of the Antarctic Marine Living Resources (hereinafter Commission) is the Conventions decision-making body. To become a MOC parties signatories must either have been one of the founding parties, or be engaged in *research* or *harvesting activities* related to the Convention and in the covered area.¹⁵² As shown below, the Commission is important. It is mostly related to the extensive mandate of the Commission when it comes to planning and managing the resources in the area, through the formulation, adoption and review of *Conservation Measures*.

It is the *Conservation Measures* that are the centrepiece of the Convention.¹⁵³ However, it is not possible to understand the full meaning of the provisions governing these actions by simply looking into the Convention text. This applies in all international agreements, in which the texts rarely give all the answers. As a result, a text must always be read in relation to decisions from the authority body of these conventions, in the present case decision taken by the Commission.¹⁵⁴ Under the Convention text, the *Conservation Measures* shall be taken to give 'effect to the objectives and principles set out in article II,'¹⁵⁵ where the *objective* is to conserve the marine living resources in Antarctica.¹⁵⁶

If the *Conservation Measures* is the centrepiece of the convention, the principles set out in article II (3) are the crown jewels, giving the Convention its unique character and enables the *Conservation Measures* to be decided on the basis of an ecosystem and precautionary approach.

151 See Article II, paras. 1-2, Annex B, CCAMLR-I, 1982.

152 Article VII, para. 2, CCAMLR.

153 Article IX, CCAMLR.

154 Constable *et al.*, *supra* footnote 148, pp. 778-791.

155 Article IX, para. 1, CCAMLR.

156 Article II, para. 1, CCAMLR. The treaty specifically excludes the conservation of marine mammals, such as seals and whales, see para. 2, CCAMLR. They are instead covered respectively by; The convention for the Conservation of Antarctic Seals (London, 11 February, 1972) EIF 11 March, 1978. U.N.T.S. vol. 1080, p. 175; and the International Convention for the Regulation of Whaling (Washington, 2 December 1946) EIF 10 November 1948. U.N.T.S vol. 161.

The latter approach, that sets the behaviour for harvesting occurring within the area covered, reads as follows;

‘Prevention of decrease in the size of any harvested population to levels below these which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest net annual increment;

maintenance of the ecological relationship between harvested, dependent and related population of Antarctic marine living resources and the restoration of depleted population to the level defined in sub-paragraph (a) above; and

prevention of changes of minimisation of the risk of changes in the marine ecosystem which are not potentially reversible over the or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species and of the effects of associated activities on the marine ecosystem and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources.’¹⁵⁷

The above provisions constitute the basis on upon which management and harvesting of covered resources in the area must be based. As a result of these provisions and the obligation they contain to be considered in adopting ecosystem management and harvesting strategies, these provisions are the ecosystem-approach.¹⁵⁸ Other obligations to take into account in this decisions are: scientific information on a species (a: recruitment criterion), the obligation to incorporate the effect of harvesting a species has on other, such as predators (b: predator criterion), and the obligation to take into account the long-time impact harvesting has on the ecosystem at large (c: duration criterion). The duration criterion makes the system more capable and adoptive to the probabilistic and multi-casual nature of the ecosystem, and allows the system to account for non-linear fluctuations that occur over a longer period of time.¹⁵⁹

The above-mentioned provision does not define *when* there is a need to take the content into account. As a result, the early year of the Convention adopted a more reactive approach and took the provisions into account only when data signalled that something *went* wrong.¹⁶⁰ This reactive approach was validated by the lack of scientific data, showing that the measure *would* have a

157 Article III, CCAMLR.

158 Mangel. M., *et al.*, *supra* footnote 33, pp. 341-342 *et passim*

159 Constable *et al.*, *supra* footnote 148, pp. 783-787.

160 See, *inter alia*, Mangel. M., *et al.*, *supra* footnote 33, pp. 355-357.; and Constable *et al.*, *supra* footnote 148, pp. 778-791.

negative impact on conservation. If something went wrong the lack of scientific data could be blamed.¹⁶¹ The precautionary approach is to prevent such excuses.

The problem with the reactive management was emphasized in the report of the 10th meeting of the Commission.¹⁶² In this report the Commission recognised the unsustainability of approach taken so far. A request for a more long-term management strategy was emphasized.¹⁶³ This new approach must also constantly adapt to a feedback system of information. The Commission recognized the negative consequences that would follow if they should wait for such a system. A new strategy was urgently required. As a result, the precautionary approach was recognised as an important part of the setting the annual catch limits.¹⁶⁴ This new approach resulted in a new form of total allowable catch (TAC), *precautionary total allowable catch limit* (PTAC). Thus, PTAC was first adopted when setting catch limits for krill 1993.¹⁶⁵

The significance of this decision should not be underestimated. At first, long-term management strategy allows it to take into account the various uncertainties in the assessment. Secondly, by adopting the precautionary principle it is possible to move away from the annual setting of catch limits.¹⁶⁶ Thirdly, the PTAC have come to play an important role in decision on catch limits for new types of biological resources in the area, previously not harvested for economical reasons. As a result of PTAC, the Commission can set catch limits for new species, although there is a small amount, if any, scientific data on such species.¹⁶⁷

The setting of PTAC at the Commission level also plays an important role in reducing the implementation deficit of the combined national level. Given that most of the area covered are beyond national jurisdiction. This is the result of the different interpretations, which would take place if each national states engaged in harvesting activities would determine where the catch limit should be. This would not be enough. This becomes particularly in large complex system or shared resources, where multiple factors intervene and which do not respect state borders. For such system and such resources to be managed effectively, there need to be a responsible authority who

161 See, *inter alia*, Louka, *supra* footnote 53, pp. 50-51.; and Carlman, *supra* footnote 54, pp. 185-189.

162 See paras. 6.1-6.23, CCAMLR-X, 1991.

163 See paras. 6.13, CCAMLR-X, 1991.

164 This consideration was put to the MOC in 1989, See para. 46 and 120; Annex E, para. 5; and Appendix 2 (WG-DAC 89/5) (Working Group for the Development of Approaches to Conservation), CCAMLR-VIII, 1989.

165 See paras. 6.17, 10.4, CCAMLR-X, 1991. Such a precautionary TAC was also introduced in 1993 for the Electrona carlsbergi, See article XII, 8.39 - CONSERVATION MEASURE 67/XII, CCAMLR, 1993.

166 Constable *et al.*, *supra* footnote 148, p. 785.

167 Constable *et al.*, *supra* footnote 148, pp. 785-786.

can take into account the bigger picture and a longer period of time.¹⁶⁸ CCAMLR Commission meets these criteria.

6.2 ENFORCEMENT, LIABILITY AND DISPUTE SETTLEMENT

CCAMLR is like most international convention, self-enforcing and based on cooperation.¹⁶⁹ However, there are two cases where the Convention contains enforcement procedures.

The first case is linked to an obligation of the MOC parties to pay subscription.¹⁷⁰ The failure to do so for two consecutive years in a row will result in withdrawal of rights to participate in the decision-making procedure of the Commission.¹⁷¹ The second one is connected to non-MOC parties and the amendment procedure. At first glance this procedure seems to be like any other amendment procedure. However, the convention takes an approach that if non-MOC parties fail to submit notification of approval within one year after entry into force of the amendment,¹⁷² they are regarded as have withdrawn from the convention.¹⁷³

For the self-enforcing obligations, the first is the obligation not to engage in activities counteracting the purpose and objective of the convention.¹⁷⁴ This provision is merely a codification of the *principle of Good Faith*. As a result of being a customary rule this principle applies to all conventions.¹⁷⁵

Other obligations are the need to take appropriate measures to ensure compliance with the Convention and the *Conservation measures*. Compliance in this case is not the compliance of signatories but of an object subject to its jurisdiction.¹⁷⁶ Connected to this is the obligation to provide feedback information, i.e. reporting. Reports shall cover, the extent of the measures taken,¹⁷⁷ and information of sanction¹⁷⁸ and persecution as a result of failure to comply.¹⁷⁹

168 See, Decleris *supra* footnote 17, pp. 57- 59.

169 See, *inter alia*, the Rio-declaration *supra* footnote 58, principle 7 and 17, which emphasizes the need for co-operation for the protection of the environment and the Earth eco-system; and Wallace, R.M.M. and Martin-Ortega, O., *supra* footnote 69, p. 226

170 Article XIX, para. 3, CCAMLR.

171 Article XIX, para. 6, CCAMLR.

172 Article XXX, para. 2, CCAMLR.

173 Article XXX, para. 2, CCAMLR.

174 Article III, CCAMLR.

175 The codification in CCAMLR, however, expands the principle to cover also the area covered by the Antarctic Treaty. The Antarctic Treaty (Washington, 1 December 1959) EIF 23 June 1961. U.N.T.S. vol. 402.

176 See Article XXIV, CCAMLR.

177 Article XXI, CCAMLR.

178 Article XXI, CCAMLR.

179 See Article XXIV, CCAMLR.

Liability is not regulated within the Convention. This does not mean that a state can not be held liable under it; it just means that this will be governed by applicable sources of international law.¹⁸⁰ This will be discussed more below in relation to other MEAs.

The dispute settlement procedure is a standard one. This applies only to the interpretation or application of the Convention.¹⁸¹ The International Court of Justice (I.C.J.) is the judicial choice, if the dispute can not be resolved by peaceful means.¹⁸²

7 CONVENTION ON WETLANDS OF INTERNATIONAL IMPORTANCE ESPECIALLY AS WATERFOWL HABITAT

The Convention on Wetlands of International Importance especially as Waterfowl Habitat is another ‘pioneering innovation;’ which was adopted in the city of Ramsar, Iran, February 1971, in force December 1975. The pioneer part of the Convention was its scope. Most other biodiversity-related conventions at that time were connected to species. Thus the Ramsar was an exception by being the first global conventions concluded for in order to preserve a special type of ecosystem.¹⁸³ Despite its pre-Rio status the convention has played an important role in clarifying the meaning of important concepts, such as the concept of *wise use*, which is the precursor to *sustainable use*. Thus, the use of *wise use* and *sustainable use* have the same meaning. As will be seen the *wise use* concept, also plays an important role in defining treaty obligations.

As stated above, the treaty took almost five years before entering into force.¹⁸⁴ This was the result of not involving lawyers in the drafting process.¹⁸⁵ As a result of this has the convention been amendment twice.¹⁸⁶

7.1 SPECIAL FEATURES AND OBLIGATIONS

The preamble of the Convention includes an interesting approach of how wetlands should be valued. The values of wetlands are not only an economical nature, but also for non-economical values, such as cultural value and *recreational* value.¹⁸⁷ As a result, the loss of any of these values

180 See article 38 S.I.C.J.

181 Article XXV, CCAML.R.

182 See Article 33, UN-Charter.

183 Lausche, *supra* footnote 20, pp. 179-187.

184 *Id.*

185 Germany did initially not sign the convention as they saw no reason to do so due to the lack of obligations. *Id.*

186 The Paris protocol 1982, EIF 1986, and the Regina amendments 1987, EIF 1994 .

187 The recreational value is seldom seen in contemporary international environmental treaties. It can, however, be seen in another ‘old’ conventions such as CMS.

is seen as an irreplaceable loss. It is therefore possible to weight the recreational value of wetlands to the economical value deriving from exploitation of it. As a result, a high recreational value outweighing an economical value would make an exploitation of that wetland not possible.¹⁸⁸ The difficulty is how to calculate these types of values.¹⁸⁹

A brief comment will be made regarding the status of preambles from an international perspective. The preamble is in most cases not seen as a source intended to contain obligations, but more a political declaration.¹⁹⁰ But as part of the context of the treaty, a preamble may play a key role in treaty interpretation.¹⁹¹ This is also the approach applied in international courts.¹⁹² The preamble is of particular importance as a source for interpretation if the provision of the text is difficult to interpret or do not give a precise meaning of the words it contains.¹⁹³ The ways courts have used the preamble are highlighted below. First the structure of Ramsar will be explained.

The structure of Ramsar contains three main pillars, which of the former and the latter will be highlighted: (1) the special attention to international important wetlands (article 2); (2) the *wise use* of all wetlands (article 3); and (3) international co-operation (see article 5).¹⁹⁴

First Pillar

The first pillar ‘the special attention to international important wetlands’ is related to the obligation to designate at least one wetland. This may be as a prerequisite to become a party to the convention.¹⁹⁵ The choice of wetlands within its territory to be appointed rests with the state and therefore the listed wetland is not necessarily the most important one from an international view, or even of international importance.¹⁹⁶

Closely linked to the listing of wetlands is the exception clause. Here Ramsar are inline with other international treaties. Within the field of environmental agreements these possibilities for escapes

188 Recreation value vs economical value is often a sensitive area. See, www.savingiceland.org.

189 One approach could be to use the contingent valuation method (CVM), “Applications for the Contingent Valuation Method in developing Countries” 2000 *FAO Economic and Social Development Paper*, version 146; available at <www.fao.org/documents>

190 See Dispute between Argentina and Chile concerning the Beagle Channel, Award, 18 February 1977, United Nations Report of International Arbitral Awards, volume XXI, pp. 53-264.; available at <http://untreaty.un.org/cod/riaa/cases/vol_XXI/53-264.pdf>.

191 Article 31, para. 2, Vienna Convention.

192 One early example would be the Beagle case, *supra* footnote 190.

193 Dixon, M., Textbook on international Law, (6th ed.) (Oxford: 2007), pp. 72-75.

194 See, *inter alia*, Millennium Ecosystem Assessment, 2005: Ecosystem and Human Well-Being: Wetlands and Water. Synthesis, *supra* footnote 13, p. 17; the Stockholm declaration, *supra* footnote 21, principle 24; and Wallace, R.M.M. and Martin-Ortega, O., *supra* footnote 69, pp. 223-226.

195 Article 2, para. 4, Ramsar.

196 Article 2, para 2, Ramsar.

can, however, have a significant negative impact on the environment. For example, when states accede to Ramsar they need to meet the prerequisite of designating a wetland. This condition is not a prerequisite to *be* a party, but to become a party. This becomes clear by looking at the text of the Convention, which clearly stipulates that the convention does not prejudiced state sovereignty.¹⁹⁷ As a result, is the designation of a wetland not absolute. In this case the exceptions allow the parties to remove, restrict or alter the boundaries of a listed wetland, *if* there are *urgent national interests* to do so.¹⁹⁸ The term *urgent national interest's* is not defined within the Convention. So it is within the discretion of the state to classify these interests, in line with the principle of sovereignty. But to guide the parties in the interpretation and use of the exception of *urgent national interests*, as well as the provision of compensation associated with it, was a guideline was adopted at the 8th RAMSAR/COP.¹⁹⁹ This guideline obviously does not entail obligations upon the parties.²⁰⁰ The guideline, however, mentions the importance of making an EIA *prior* to invoking the urgent national exception clause. As a result, a precautionary approach are be used to determine if there is an alternative planning and development of the particular wetland. This approach is to minimize or avoid any adverse effects may occur as a result of the right to use the exception.²⁰¹

Returning to state sovereignty, this is not absolute, despite the appearance to be so. This will be described more detailed below when dealing with the CBD. For now, the limitations of state sovereignty are linked to presence of shared wetlands. In these cases, international principles, such as the principle of *prior consultation*, restrict the discretion of the states. The old theory where states could 'pursue its course in silence' is no longer so rigid. This is the result of a logical necessity for states in the contemporary international arena to be more connected to other states, especially those nearby.²⁰²

As briefly mentioned, there is an obligation to compensate for change made to a listed wetland. This is not compensation in monetary terms. It is compensation for loss taking places as a result of changes in a wetland, where it is compensated with gains resulting from designation of another

197 See Article 2, para. 3, Ramsar, which mentions sovereign rights, however, sovereign right over natural resources are an accepted international principle, see *infra* note 261.

198 Article 2, para. 5, Ramsar.

199 Resolution VIII.20, Annex General guidance for interpreting 'urgent national interests' under Article 2.5 of the Convention and considering compensation under Article 4.2, RAMSAR/COP-8.

200 See Jóhannsdóttir who discusses whether or not COP decisions finds their way into national legislation's put in place to protect listed sites. Jóhannsdóttir, A., 'Breytingar á mörkum friðlýstra svæða með áherslu á Ramsarsvæði' Náttúrufræðingurinn (2010) 79 (1–4), pp. 68–74.

201 See, e.g., The Stockholm declaration, *supra* footnote 21, Rec. 51 and 61; and UN doc. A/Conf/48/4, draft of the declaration on the human environment, both document reflects the EIA procedure.

202 Chayes, A. and Handler Chayes, A., *The New Sovereignty - Compliance With International Regulatory Agreements* (Cambridge: 1995), pp. 118-127.

equivalent area. In line with the text of the Convention parties *should* compensate for changes taking place as a result of urgent national interests.²⁰³ As a result, they are not *obligated* to do so.²⁰⁴ This is an example of a typical legal system where substantive rules first set obligations of the parties, but where the formal rules determine how and when these obligations can be avoided.²⁰⁵ Here the legal rules facilitate the implementation deficit rather than preventing it. On the other hand, the legal rules do not *undermine* the aim and the objective of the Convention. But they do give a considerable amount of leeway for the parties to take other considerations into account when deciding whether to appoint a new wetland, or a minor one.²⁰⁶

Another requirement in the text of the convention is the obligation of international cooperation. It refers to the obligation to consult with other parties in the implementing of commitment under the convention.²⁰⁷ The *obligation* to do so, however, occurs only if there is a transboundary wetland. As a result, in *other cases* applicable international law,²⁰⁸ such as article 55 and 56 of the UN-Charter, will govern cooperation; which will be explained further below. The result of this is also a limitation in the management of these non-transboundary wetlands. A limitation of this management would be the principle of not to cause damage.²⁰⁹ A good example of such limitation of management is the judgement of the case concerning the Gabčíkovo-Nagymaros Project. The above limitation in management is described as follows:

‘The existence of the general obligation of States to ensure the activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now a part of the corpus of international law relating to the environment.’²¹⁰

203 Article 4, para. 2, Ramsar.

204 Article 4, para. 2, Ramsar.

205 See Guzman, A.T., *How International Law Works – A Rational Choice Theory* (Oxford 2008), pp. 130-132.

206 See, Westerlund 1997, *supra* footnote 72, pp. 73-80, 157-163 *et passim*.

207 Article 5, Ramsar.

208 *Op. cit. supra* footnote 55.

209 See Stockholm declaration, *supra* footnote 21, principle 21, which is obligates states ensure that ‘activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.’ This is a codification of the Trail smelter Case (United States v. Canada), award 16 April 1938 and 11 March 1941, United Nations Report of International Arbitral Awards, volume III, pp. 1905-1982.: available at <http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf>; and Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgement, 9 April 1949, I.C.J. 1949.

210 Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgement, 25 September 1997, I.C.J. report 1997, para. 53. However, the outcome of the judgement in the Case Pulp Mills on the River Uruguay, (Argentina v. Uruguay) Judgement, 20 April 2010, I.C.J. report 2010, shows a relative high burden of proof when it comes to prove an clear and visible casual effect between the measures taken and the actually claimed damage. See particularly dissenting opinion.

The judgement puts clear obligations of states to manage their resources in such a way so as not cause harm to other states interests.

Second Pillar

The Second pillar including the *wise use* concept has become the most important aspect in the management and wetlands. In order to manage their wetlands, parties are to:

‘[F]ormulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory.’²¹¹

In order to promote the conservation of wetlands, the implementation of measures is done by creating nature reserves.²¹² These types of enclosed areas are a typical way to preserve natural resources, whether they are called parks, reserves or closed areas.²¹³ When the parties to Ramsar have created such reserves, the management of it should as far as possible be made within the limits of *wise use*. In this case the term *far as possible* gives the state a great deal of manoeuvre.

Then what is *wise use*? The Convention provides not definition. Thus, a definition of it has gradually evolved through RAMSAR/COP recommendations and resolutions.

The question of the definition of the term *wise use* was raised at the first RAMSAR/COP. From this meeting two recommendations will be highlighted. The first²¹⁴ emphasized that *wise use* includes the maintenance of the ecological character.²¹⁵ This is not only relating to conservation but also to the principle of sustainable development.²¹⁶ The second recommendation all about decisions taken in relations to large-scale projects of wetland transformation and stresses the importance of these decisions not to be taken ‘until an assessment of all the values involved has been made.’²¹⁷ These two recommendations were to play an important part in the definition and interpretation of *wise use*.

211 Article 3, Ramsar.

212 See Article 4, para. 1, Ramsar.

213 See *Inter alia*, Glowka, L., *et al.*, A Guide to the Convention on Biological Diversity (IUCN) (Cambridge: 1994), pp. 22-23; and Louka, *supra* footnote 53, pp. 78-83. Closed areas are also frequently used as conservation measures for marine resources; this is for example used by CCAMLR.

214 Rec., 1.5., RAMSAR/COP-1 1980.

215 As outlined in article 3, para. 2, Ramsar.

216 The Rec. specifically refers to the World Conservation Strategy. This strategy is a comprehensive work addressing conservation of nature. The primary concern is with the ecological sustainability. This is opposite to the approach in the Brundtland report, which is more concentrated to satisfy human needs: available at <<http://data.iucn.org/dbtw-wpd/edocs/WCS-004.pdf>>; Accessed 15.41, 18 July 2011.

217 Rec. 1.6, RAMSAR/COP-1.

Seven years later, was the emphasis on the need to develop a definition of *wise use*, this in order to guide the parties in their implementation of the convention.²¹⁸ As a result a working group was established.²¹⁹ However attached to this recommendation, a working definition of the concept of *wise use* was attached. This Annex also contained definitions of *sustainable utilisation* and *natural properties of the ecosystem*. The definitions of latter two were later accepted by a following resolution.²²⁰ The definitions are as follows,²²¹

‘The wise use of wetlands is their sustainable utilization for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem.

Sustainable utilization is defined as ‘human use of a wetland so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations.

Natural properties of the ecosystem are defined as ‘these physical, biological or chemical components, such as soil, water, plants, animals and nutrients, and the interactions between them.’

In the following COP the parties were first recommended to adopt and implement ‘*Guidelines for implementation of the wise use concept of the Convention*.’²²² The attached ‘*Framework for the implementation of the Ramsar convention*’ in another resolution from the same meeting was seen as the basis ‘for determining conventions activities.’²²³ This framework contained different types of commitments, which parties should apply in the implementation process. With reference to all previously RAMSAR/COP recommendations and resolutions, a commitment was ‘to make environmental impact assessments (EIA) before transformations of wetlands.’²²⁴

In RAMSAR/COP-5 further guidelines were added. This meeting also clearly identified both the precautionary principle as well as EIA as vital parts of the concept of *wise use*.²²⁵ This led to a recommendation in the following meeting reminding of all the previously recommendations, and again urged the parties to integrate environmental concern into their management of wetlands.²²⁶ This was repeated in resolutions of RAMSAR/COP-7. These resolutions also stress the importance of making an EIA of projects that may affect the listed sites.²²⁷ The COP also adopted the

218 Rec. 3.3, RAMSAR/COP-3.

219 Rec. 3.1, RAMSAR/COP-3.

220 Res. VI.1, RAMSAR/COP-6.

221 See Annex *Definition of Wise Use*, RAMSAR/COP-3.

222 Rec. 4.10, RAMSAR/COP-4

223 See Annex to DOC. C.4.12 (Rev.), RAMSAR/COP-4.

224 See DOC. C.4.12 (Rev.) Attachment 1, para. 2 (a) (II), RAMSAR/COP-4.

225 Res. 5.6, RAMSAR/COP-5.

226 Rec. 6.2, RAMSAR/COP-6.

227 Res. VII.16, RAMSAR/COP-7.

‘*Wetland Risk Assessment Framework*.’²²⁸ RAMSAR/COP-8 followed the previously meeting; now urging the parties to use the CBD guideline ‘*Incorporating biodiversity-related issues into environmental impact assessment legislation and/or processes and in strategic environmental assessment*.’²²⁹ The guideline was later replaced, and the new one was adopted thought RAMSAR/COP-9.²³⁰

Now the question boils down to what the above means? There is apparently no amendment to the treaty and the definition of the *wise use* had developed by COP recommendations and resolutions. A normal approach to these types of documents is to consider them as a non-source of legal obligations. The question is whether this view is correct.

The Lagoon of Lac Bay is located on the island of Bonaire of the Netherlands Antilles. The area is a listed under the Ramsar convention.²³¹ To develop tourism, a company applied and was granted permissions to build a resort village near the lagoon.²³² The resort was largely outside the 500-meter buffer zone, but a part of the resort extended into the zone. Although the permission was granted by the right authority, the Governor decided to annul them. As a basis for revocation of the permissions the Governor claimed them to be inconsistent with obligations existing under Ramsar. In this case the Governor did not only refer to the text of the Convention, but also to the obligation to carry out an EIA before such permissions could be granted, and in this case no such EIA had been performed. As Ramsar does not contain any obligation to perform an EIA the revocation was appealed to the Netherlands Crown (Crown).

Having the case on its table, the Crown experience difficulties as the relevant provision did not itself ‘offer much to hold on to.’²³³ As a result, they had to resort to other means on interpretation. This other way was to interpret the convention in accordance with the provision of the Vienna Convention; specially article 31, which read as follows;

‘1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

228 Res. VII. 10, RAMSAR/COP-7.

229 Res. VIII.9, RAMSAR/COP-8.

230 Res. X.17, RAMSAR/COP-9.

231 See Ramsar website.

232 The example is taken from Jonathan M. Vershuuren, Ramsar Soft Law is Not Soft at All. Discussion of the 2007 Decision by the Netherlands Crown on the Lac Ramsar Site on the Island of Bonaire, *Milieu en Recht*, Vol. 35, No. 1, pp. 28-34, 2008; English version available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1306982>.

233 Ibid.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.'

By adopting the above rule, the Crown came to the conclusion that the resolutions and recommendations may in fact add obligations to the treaty text. This was particularly the case when the recommendations and resolutions had been adopted unanimously.²³⁴ The unanimous part was important because it was seen as a 'shared subsequent practice' according to the above-cited rule.²³⁵ This interpretation has also been adopted several times by the I.C.J.²³⁶

The way the court interpreted the obligations that existed under Ramsar is important. It illustrates how the recommendations and resolutions may affect the existence of treaty obligations, particularly if the treaty text itself is not clear and interpretative. This interpretation is probably not shared by the signatory states, and the question is whether states even are aware of these resolutions and recommendations when implementing the signed convention.²³⁷ Although a national court, this case demonstrates the importance of COP recommendation and resolutions and the impact they may have. As a result, they should not be considered as completely worthless documents.

FEEDBACK-SYSTEM

The feedback of information is not well regulated in the Convention, this despite the importance feedback play in the decision-making process of the COP.²³⁸ The only obligation to report is linked to *changes* that *has* happened, *are* happening, or *is likely* to happen, in the *ecological*

234 Ibid.

235 Dixon, *supra* footnote 193, pp. 72-75.

236 *Id.*

237 See Jóhannsdóttir, *et al.*, *supra* footnote 199, at not 84.

238 See Article 6, para. 2, Ramsar.

character of the wetlands,²³⁹ or in connection to threatened wetlands listed in the Monteux Record, which will be addressed below. Thus, the approach of the Convention to the probabilistic, multi-causal nature of the ecosystem is a reactive one. Such an approach is not consistent with the preamble of the Convention, which describes the need for the parties to adopt a long-term perspective in the implementing of national policies, as well as a need for international coordination of measures to halt the loss of wetlands. The grounds for labelling of the approach as a reactive one are twofold.

The first reason is the still existing uncertainty about the precise meaning of the concepts *changes likely to* and *ecological character*, although there are working definitions found in the case of the first and the latter.²⁴⁰ The definitions do not clearly give obligations to anticipatory reporting. As a result, there is no obligation to monitor the wetlands on a regularly basis, i.e. on a yearly basis. Thus, there would arguably be a lack of a sustainable long-term strategy, despite the preamble describing the term as an important part in adopted of national policies for the conservation of wetlands. The term *likely* would also be a reactive approach because it is more to be interpreted as an obligation to report when some action already took place and there will be an *imminent* risk of an adverse effect of a wetland.

The second reason is directly connected to the first. It is based on the lack of a mandatory feedback system, where parties are required to provide continuous information on a year-to-year basis. Such a response would be crucial to measure if the national management plans are inline with the provision of being far-sighted. Presumably, if there is no such feedback system in place, there can be no international coordinated measures taken in combination with a far-sighted national plan. International coordinating of actions will therefore always be a reactive approach to wetlands conservation, and usually plays an important role only when the wetlands already have been seriously affected, or even worse lost and must be replaced. These international coordinated actions will therefore be a non cost-effective way for the international community to contribute to the conservation of wetlands.

239 See, *inter alia*, article 3, para. 2, Ramsar; Bowman, M.J., 'The Ramsar Convention in International Law' (1995) *Netherlands International Law Review*, vol. 41, issue 2, pp: 1-52; and Res. VIII.8, para. 20, RAMSAR/COP-8, highlight the importance of reporting when the matter reported according to article 3 para. 2, have been resolved, however not legally binding parties as it only calls upon the parties to report.

240 See, *inter alia*, Bowman, *Id.*; and Res. VI.1, Annex 1, RAMSAR/COP-6, which contains a working definition of the *Ecological Character* and *Change in Ecological Character* defined as follows: 'The 'ecological character' is the structure and inter-relationships between the biological, chemical, and physical components of the wetland. These derive from the interactions of individual processes, functions, attributes and values of the ecosystem(s);' 'Change in ecological character' of a wetland is the impairment or imbalance in any of these processes and functions which maintain the wetland and its products, attributes and values.'

Returning to the Monteux Record mentioned above.²⁴¹ This record can be said to be a result of the non-proactive coordination of international actions for the benefit of wetlands. The record was adopted to keep a separate list for threatened sites, and to give the secretariat²⁴² a mandate to take further actions on these sites. The expanded mandate of the secretariat is to; (a) *consult* with a contracting party when it comes to their attention that a site located under the jurisdiction of a party ‘may have changed, may be changing, or may be likely to change as a result of technological development, pollution, or other human interference;’²⁴³ and (b) to *request additional information* on the present status of the wetland.²⁴⁴ The Monteux Record adopts a more proactive approach as the listing of site also expands reporting requirement for the parties. The obligation is to submit report on an annual basis.²⁴⁵ Thus, a closer monitoring of the status of the wetland is required. This could argued to have a positive effect on the conservation status of the wetland, as changes in the wetlands ecosystem can more easily be detected at an earlier stage, leading to a reduction on the cost of tackling the problem.

7.2 ENFORCEMENT, LIABILITY AND DISPUTE SETTLEMENT PROCEDURES

Regarding the procedures for enforcement, liability and disputes, the convention text is silence. This is probably the result of the non-involvement of judicial knowledge in the drafting process, and the first MOP recognized the need to include at least a dispute settlement procedure.²⁴⁶ As mentioned above, these areas will therefore be governed by applicable sources of international law. Liability for example might occur if management on one side of a transboundary wetland has a significant influence on the part of the wetland located at the other side of the border. Relevant source of international law in this case can be the principle of *not to cause damage*. The source of dispute settlement will be first and foremost the Charter of the United Nations.²⁴⁷

8 CONVENTION ON BIOLOGICAL DIVERSITY & PROTOCOLS

241 See, Rec. IV.8, RAMSAR/COP-4; and Res. V.4, RAMSAR/COP-5.

242 Previously known as the Bureau.

243 See para. 2, Annex, Res. V.5, RAMSAR/COP-5.

244 See para. 3, Annex, Res. V.5, RAMSAR/COP-5.

245 See, para. 5, Annex, Res. V.5, RAMSAR/COP-5. Bering in mind the possibility of a party to disagree to placing the site on the list. See para. 2, Annex, Res. V.4, RAMSAR/COP-5.

246 See, *inter alia*, COP-1 (1980), this procedure have, however, not been finalised; and Compliance Mechanisms Under Selected Multilateral Environmental Agreements (UNEP) (Nairobi: 2007), pp. 34-36.

247 See Article 2 (3); 33, UN-Charter.

The Convention on Biological Diversity, also known as the Convention of Biodiversity, is one of the two conventions opened for signing at the Rio-conference.²⁴⁸ CBD is a comprehensive framework addressing the conservation of biodiversity on a global scale.²⁴⁹ The closest parable would be UNCLOS. Like UNCLOS CBD covers almost the total scope of one area, and as an all-embracing convention it overlaps the contemporary patchwork of international environmental agreements.

The Convention has a three-tiered objective,²⁵⁰ which of only the first and the second will be addressed. The third part is connected to genetic resources and thereby falls outside the scope of this thesis. The three parts of the objectives are:

1. [T]he conservation of biological diversity.
2. [T]he sustainable use of its components.
3. [T]he fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.

The all-embracing feature of the Convention includes forests. This is not clearly spelled out but it follows from the definitions in article 2, CBD. This is important, as the obligations discussed below also shall be interpreted as covering these areas, in spite of the reluctance of states to sign legally binding agreement covering the management of forests.²⁵¹

Despite of being of an all-embracing feature, the Convention does not regulate all relevant areas. As a result, three agreements dealing with specific topics have been adopted. The three agreements are: The Cartagena protocol;²⁵² and its Supplementary Protocol on Liability and Redress to the Cartagena protocol on Biosafety (hereinafter supplementary Nagoya protocol),²⁵³ and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits

248 The other being the United Nations Framework Convention on Climate Change. (UNFCCC) (New York, 9 May 1992) EIF 21 March 1994. U.N.T.S vol. 1771.

249 Louka, *supra* footnote 53, p. 299.

250 See article 1, CBD.

251 The reluctance of state to sign legally binding agreement can be seen in the discussion taken place at UNCED where a declaration about forest ended up with the title *Non-Legally binding Authoritative Statement of Principles for Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*. See UNCED, *supra* footnote 58, Annex III. Further, more there are up to date no international legal instruments regulating the management of forests. There are, however an ambitious UN program to address the issue of deforestation, See The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD programme), especially REDD+; <www.un-red.org>.

252 See, *Supra* footnote 44.

253 See *Supra* footnote 45.

Arising from the Utilisation to the Convention on Biological Diversity.²⁵⁴ For reasons given above only the two former will be addressed.

The Cartagena protocol is a result of the combination of article 8 (g), 17, and 19 paras 3 and 4, of CBD. The Cartagena protocol covers both the first and the second column of CBDs objective,²⁵⁵ and follows CBDs anthropocentric approach, in addressing the modern biotechnology of living modified organism (LMOs). The scope of the protocol is to address the potential adverse effects LMOs might have on the *conservation* and the *sustainable use* of biodiversity, including *human health*.²⁵⁶ The protocol covers LMOs in a transboundary context; focusing especially on the handling, transport and use of these.²⁵⁷ The approach used for this purpose is a *precautionary approach* in order to reach an *adequate level of protection*.²⁵⁸

The supplementary Cartagena protocol, not yet in force, is an outcome of article 27 of the Cartagena protocol, where the COP are given the mandate to adopt processes and procedures to address the issues of liability and redress relating to damage resulting from the transboundary movement of LMOs.

This protocol together with the Cartagena protocol and CBD will be examined further to highlighting the special features relevant for this thesis.

8.1 SPECIAL FEATURES AND OBLIGATIONS

8.1.1 CONVENTION ON BIOLOGICAL DIVERSITY

The Convention of Biological Diversity contains a large amount of obligations. Therefore is it more comparable with UNCLOS than with biodiversity-related MEAs. Nevertheless, the major part of obligations under it shall, however, take place only *as far as possible* and *as appropriate*. Giving quite a leeway for parties to evaluate what is appropriate for *them* and how far they are willing to go to conserve the biodiversity within their jurisdiction. This is not all bad as it allows parties to take measures suitable to their situations.

254 The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from the Utilization to the Convention on Biological Diversity (the Nagoya Protocol) (Nagoya, adopted 29 October 2010), not yet in force, as of July 2010 the protocol has 39 signatories of 50.

255 See Preamble, Cartagena protocol.

256 Article 1, Cartagena protocol.

257 *Id.*

258 *Id.*

Article 3 of the Convention expressly mentions state sovereignty over resources. The provision is a direct replica of principle 2 of the Rio-declaration,²⁵⁹ which is based on principles principle 21 of the Stockholm declaration.²⁶⁰ To reaffirm state sovereignty is a normal approach in international treaties, especially these covering any type of resources. It also confirms a long process over right to resources situated within the jurisdiction of a state.²⁶¹ Thus this principle is now seen as a customary rule, as outlines in principle 1 of the International Law Associations (ILA) *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*.²⁶²

If article 1, CBD, defines the objective of the Convention, then article 2 narrows the scope, by defining key term. The Convention covers *biological resources* having some actual or potential use and value for humanity.²⁶³ The covered area is first and foremost conservation in *In-situ*.²⁶⁴ *In-situ* is defined as ‘conservation of ecosystems and natural habitats and the maintenance and recovery of a viable population of species in their natural surrounding.’ *Ecosystem* and *Habitat* are, respectively, defined as; ‘a dynamic complex of plants, animal and micro-organism communities and their non-living environment interacting as a functional unit;’ and ‘the place or type of site where a ... population naturally occurs.’ This definition clearly excludes domesticated animals, as well as animals bred for consumption.

One important feature of CBD is the obligations connected to perform EIA. According to the Convention shall an EIA be performed in order to avoid or minimise significant adverse effect on biological diversity.²⁶⁵ The obligation to perform an EIA is first and foremost related to projects,²⁶⁶ programmes and policies.²⁶⁷ According to the Convention, if the national legislation does not contain any provisions requiring the performance of EIA, they need to be introduced.²⁶⁸ If they

259 The Rio-declaration, *supra* footnote 58, Annex 1, principle 2.

260 The Stockholm-declaration, *supra* footnote 21, part 1, chapter 1, section II, principle 21.

261 See, *inter alia*, UN doc. A/RES/1803(XVII) *Permanent sovereignty over natural resources*, GA Res. 1803 (XVII), 1194th plenary meeting, 14 December 1962; UN doc. A/RES/2158 (XXI) *Permanent sovereignty over natural resources*, GA Res. 2158 (XXI), 1478th plenary meeting, 25 November 1966; and UN doc. A/RES/3171 (XXVIII) *Permanent sovereignty over natural resources*, GA Res 3171, 2203rd plenary meeting, 17 December 1973.

262 New Delhi ILA Declaration of Principles of International Law Relating to Sustainable Development (Delhi, 6 April 2002). The principles were adopted by International Law Association (ILA) at their 70th conference. See, *inter alia*, ILA Newsletter No. 16 2002, and No.17 2003; available at <<http://www.ila-hq.org/>>, Principles available at <www.cisd.org/pdf/new_delhi_declaration.pdf>; and Report of the World Summit on sustainable development, *supra* note 93.

263 Glowka *et al.*, *supra* footnote 213, pp.16-17.

264 Conservation itself is not defined or used by its own in the convention due to concerns over the meaning of the term would shift to give more emphasis on the preservation aspects. See Glowka, *Ibid.*, p. 25.

265 Article 14, para. 1 (a), CBD; which reflects principle 17 in the Rio-declaration, *supra* note 58.

266 Article 14, para. 1 (a), CBD.

267 Article 14, para. 1 (b), CBD.

268 Article 14, para. 1 (a), CBD.

already exist, the Convention require signatories to review them, so they take into account the negative impact projects, programmes and policies can have on biodiversity.²⁶⁹ In spite of the Convention being silence of what type of projects²⁷⁰ should be covered by this obligation, these obligations normally cover larger projects. Nevertheless, in the absence of any guidance, it is up to the state to define what projects should be covered and which should not. This seemingly lack of restrictions of state power to decide over these matter is, however, some what balanced when it comes to project potentially having transboundary effects. In these cases there is strong evidence of a customary rule obligating state to perform an EIA.²⁷¹ This would limit the discretion to exclude some projects.

Further delimitations of state discretion, connected to project potentially having transboundary effects, are the customary rule of the *obligation of consultation*. The obligation of consultation is an important customary rule and contains two aspects. The first aspect is the duty of a state to inform other potentially affected states about actions which might have a negative impact on their territory. The second aspect is the duty of the state taking the measures to enter into *prior negotiation* with potentially affected states. Both the duty to inform,²⁷² as well as the duty to enter into prior consultation²⁷³ are seen as *prior conditions* when undertaking projects, which might have a negative transboundary effects.

As mentioned above, the Convention contains a number of *as far as possible*, which is a kind of escape clause. However, there are restrains within the Convention from using these exceptions, or rather obligation to consider before using them. On important provision in this aspect is article 3,

269 Glowka *et al.*, *supra* footnote 213, p. 71.

270 For programmes and policies see below.

271 See Pulp Mills case, *supra* footnote 210, para. 204. Where the court outlines ‘the obligation to protect and preserve...has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that...activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.’

272 See, *inter alia*, Louka, *supra* footnote 53, pp. 120-125; The Rio-declaration, *supra* footnote 58, principle 19; The UN-Charter, especially article 1 (3); UN Doc. A/RES/2625(XXV) *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, GA Res 2625, 25th Session, 1883rd plenary meeting, 24 October 1970, reaffirmed in UN doc. A/RES/65/222, *Promotion of peace as a vital requirement for full enjoyment of all human rights by all*, GA Res 65/222, 65th session, 71st plenary meeting, 21 December 2011.

273 The principle of prior consultation where established through the Lac Lanoux Arbitration (France v. Spain), Award 16 November 1945, United Nations Report of International Arbitral Awards, 281, 1975, See Louka, *supra* footnote 53, pp. 39-47; English version available at

<<http://www.ecolex.org/ecolex/ledge/view/RecordDetails?id=COU-143747&index=courtdecisions>>.

CBD. This article contains a reference to the UN-Charter,²⁷⁴ which makes it clear a state no longer can pursue its course in silence when managing their biodiversity resources.

The reference to the UN-Charter has this effect as in management and exploiting biological resources states need to take into account their obligations under Charter. The foundation for this obligation is based on states commitment to jointly and/or separately take actions for the purpose of achieving the goals set out in article 55 of the Charter.²⁷⁵ According to article 55 are states, amongst other, obligated to work for a solution of an international known problem, which eventually might have an impact on the economy, the society at large, and he human health.²⁷⁶ The loss of biodiversity will without doubt eventually have such an impact.

Further more the Charter contains the obligation to take into account both intra- and intergeneration equity. This follows from reading article 55 of the UN-charter together with its preamble. Whiles article 55 is set out to create ‘conditions of stability,’ the preamble outlines that one purpose of this stability is to save ‘future generations from the scourge of war.’ This could arguably be seen as a far-fetched interpretation, as well as the loss of biodiversity cannot lead to war. This might be true, the loss it self might not, but the effect of that loss, resulting in a reduction of the eco-system services as we know it, might. A good comparison would be the area of water resources. This area is commonly known as a being an area of conflict, where different riparian’s dispute over the right to water. Also it is commonly known that unless the problem with the wasteful management, the shrinking layer of ground water, and quality of the surface water is addressed, it is not unlikely to expect further armed conflict in the future. Thus, the interpretation is not so far-fetch after all.²⁷⁷

As a result, the conservation and management of biodiversity within the sovereignty of a state needs to be handled in accordance with the obligation arising under the UN-Charter, especially when this resource moved over state jurisdictional boundary. This means, if a state uses the resources available within their jurisdiction in such a way so the international problem of loss of biodiversity is not addressed, then they would have failed to fulfil their obligation towards the future generations, not only based on the UN-Charter, but also based on the principle of sustainable development as inter-generation equity is an inseparable part of this principle. As a logic result, the right of a state to use its resources is only a *right to use*. As an effect, states are

274 Article 3, CBD.

275 Article 55, UN-Charter.

276 See, *inter alia*, Glowka, *et al.*, *supra* footnote 213, p. 26; and International Law Commissions Report from The Hague (2010), part one (collective Responsibility); available at <www.ila-hq.org>.

277 See, *inter alia*, GBO-2, *supra* footnote 13; and GBO-3, *supra* footnote 14.

obligated, when exercising their *right to use*, to take into account the long-time impact of that use.²⁷⁸ This obligation does not only follow from the UN-Charter and principle of sustainable development, it is clearly spelled out within the text of CBD, where sustainable use is defined as;

‘[T]he use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.’²⁷⁹

This definition of sustainable use is ecosystem-oriented, this because it does not only refer to the sustainable use of one specific biological resource, but to biological diversity at large. As a result, in order to reach sustainable use, one components of one biological resource cannot be used in such a way so other biological resources are harmed. Neither can the use of one component result in the long-term decline of others.²⁸⁰ This is inline with the consideration taken into account by the Commission of CCAMLR.

The conservation of the biodiversity is further strengthening by the ecosystem approach incorporated in article 10 (b), CBD. This article obligates parties to ‘adopt measures relating to the use of biological resources to avoid or minimise adverse impact on biological diversity.’²⁸¹ This implies an obligation for the parties to adopt a precautionary approach in their decision-making process when deciding over matters potentially having an adverse impact on the conversation of biological resources.²⁸²

More interestingly, the above would also apply to programs and policies, and here the convention reaches deep into the decision-making process of the state. This is so because the provision does not give possibilities for exceptions. Thus, it covers *all* programs and policies, from taxation and agriculture to energy and transport. It is said that to implement the full scope of this provision would require considerate changes in the way parties develop, and implement, programs and policies.²⁸³ This will, however, not be analysed further in this thesis as it requires a more comprehensive examination.

Finally an important feature at which it differs from other biodiversity-related MEAs is connected to CBD’s relationship towards other international agreements.²⁸⁴ The approach to start with a

278 Cordonire Segger, *et al.*, *supra* footnote 98, pp. 99-100.

279 Article 2, CBD.

280 Glowka, *et al.*, *supra* footnote 213, p.24.

281 Glowka, *et al.*, *supra* footnote 213, pp. 59-60.

282 See, inter. alia, Article 10 (c) CBD; and Glowka, *et al.*, *supra* footnote 213, pp. 59-60.

283 Glowka, *et al.*, *supra* footnote 213, pp. 72-73.

284 See Article 22, CBD.

typical one describing that the obligations under the Convention does not affect the rights and obligations deriving from other existing treaties. To this is there one interesting exception. Accordingly, any obligation arising under other treaties which would cause a serious damage or threat to the biodiversity shall be disregarded.²⁸⁵ Thus in conflict with another treaty containing obligations that have the above effect the CBD will prevail.²⁸⁶ More important, this also applies to the Cartagena protocol²⁸⁷ and the Supplementary Nagoya protocol.²⁸⁸

8.1.2 THE CARTAGENA PROTOCOL ON BIODIVERSITY

As described above, the scope of the Cartagena protocol is *Biosafety* connected to the transfer, handling and use of LMOs, which ‘may have adverse effect on the conservation and sustainable use of biological diversity.’²⁸⁹ *May have* reflects the precautionary approach adopted by the protocol. Despite containing the precautionary approach, the protocol does not define its meaning. The definition of this approach can be found in the Rio-declaration and principle 15, which defines it in a negative sense: ‘Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’²⁹⁰ A good example would be a state that requires a factory to adopt a new cleaning-technology as a condition for granting a new license, despite the lack of scientific data on the full extent of the negative impact of the emissions emanating from the factory.

To ensure that the precautionary approach will contribute to and ensure an adequate level of protection, there is a need to incorporate this approach at all level of decision-making which relates to matters covered by the protocol. The protocol is only one way to assure an adequate level of protection. This is the result of the word *contribute*. As a consequence, for the measures taken to contribute to and ensure this adequate level of protection the measures *needed* in each specific situation must be taken, whether these are measures according to the Cartagena protocol or not. The evaluation of the types of measures needed, the uniqueness and needs of every situation has to be taken into account, to ensure an the measures taken in that specific situation will contribute and ensuring an adequate level of protection.²⁹¹

285 See, *inter alia*, Glowka, *et al.*, *supra* footnote 213, p.109; and Lausche, *supra* footnote 20, pp. 309-327.

286 Leading to interesting questions over the relationship with CBD and economical treaties.

287 Article 32, Cartagena protocol.

288 Article 16, Supplementary Nagoya protocol.

289 Article 1, Cartagena protocol.

290 See Rio-declaration, *supra* footnote 58, Annex 1, principle 15.

291 Mackenzie, R., *et al.*, An Explanatory Guide to the Cartagena protocol on Biosafety (IUCN) (Cambridge:2003), pp.45-49.

The Cartagena protocol is in contrast to the supplementary Nagoya protocol not *per se* only applicable on *transfer, handling* or *use* deriving from transboundary movement. This is the result of the wording *of specifically focusing on* in article 1, Cartagena protocol,²⁹² although some provisions apply only in those three areas. This makes the Cartagena protocol difficult to interpret, and as such an example of an undesirable way to write a legal document if the idea is to adopt a uniform approach to a common problem.²⁹³

An example of a provision not only applicable in the context of transboundary movement is article 23. This article codifies the principle of public participation and access to information and justice. It reflect principle 10 of the Rio-declaration, as codified in the three pillars of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters²⁹⁴ (Aarhus convention). The three pillars of the Aarhus convention is; (i) public participation; (ii) access to information; and (iii) access to justice.²⁹⁵ Although article 23 of the Cartagena protocol is wider than its article 14 (1) (a), where public participation only applies to projects likely to have a *significant adverse effect*, it does not contain the third pillar on access to justice. Article 23 does not contain a clear obligation to give people access to information. This follows from the paragraph of the article covering this topic, according to which states are only *endeavours* to ensure access to information.²⁹⁶ The *obligation* to do so is limited to *promote* and *facilitate* public awareness and participation, in order to create ‘appropriate of necessary mechanisms.’²⁹⁷ Finally, addresses article 23 an obligation to consult with the public in their decision-making process.²⁹⁸ This obligation, however, is weakened by the exception for the protection of confidential information, as well as the discretion of the state to decide who shall have these rights. This is strange because public participation is seen as playing a central role in environmental protection.

8.1.3 THE SUPPLEMENTARY NAGOYA PROTOCOL

292 Ibid., pp.45-49.

293 Recognising the difficulties of political negotiations taking place before a treaty can be adopted..

294 The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, entered into force 30 October 2001. U.N.T.S. vol. 2161, p. 447 (Aarhus Convention).

295 See Rio-declaration, *supra* footnote 58, Annex 1, principle 10 of the Rio-declaration, which reads as follows: ‘Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.’

296 Article 23 (1) (b), Cartagena protocol.

297 Mackenzie *et al.*, *supra* footnote 291, pp. 45-49.

298 Article 23 (2), Cartagena protocol.

The supplementary Nagoya protocol was drafted in order to adopt rules and procedures to address any damage resulting from transboundary movements of LMOs.²⁹⁹ *Nota Bene* the supplementary Nagoya protocol is not a protocol governing liability and compensation between states. Instead, it contains rules and procedures to be implemented by member states in their national legislation, in order to harmonize rules on liability and compensation between subjects under their jurisdiction. The purpose of harmonizing measures, rules and procedures, is to ‘contribute to the conservation and sustainable use of biological diversity’³⁰⁰ by reducing the opportunities for companies to take advantage of differences in national legislation. The civil liability in the treaty is, however, debatably not legally binding.³⁰¹ The supplementary protocol is a good example in how to augmented framework legislation by providing detailed information on the rules to be implemented in national legislations.³⁰² This type of amendments to the mother treaty will also help to reduce the legal deficits because it gives detailed instructions of what should be regulated and how. This would also minimize the risk for idiosyncratic approaches at administrative levels.³⁰³ The states, however, receive a *carte blanche* in terms of exemptions where they can provide for obligations other than those listed ‘as they may deem fit.’³⁰⁴ *Nota Bene*, when deciding whether an exception should be granted states must apply the precautionary principle, and do an EIA, of this decision.³⁰⁵ This is the result of the rules regulating this in CBD as they also apply for the supplementary Nagoya protocol.³⁰⁶

FEEDBACK-SYSTEM

The feedback-system is based upon information submitted by the parties. Of interests are reporting under the CBD. Reports shall initially include information about the measures taken to implement the Convention. Secondly, it shall include an evaluation of the *effectiveness* of these measures, in terms of their contribution to meet objective of the Convention.³⁰⁷ This is important because states have to evaluate their actions, not just take them. An evaluation of activities at national level

299 Inline with Rio-declaration, *supra* footnote 58, principle 13, see the preamble of the Supplementary Nagoya protocol.

300 Article 1, Supplementary Nagoya protocol.

301 See, *inter alia*, Supplementary Nagoya protocol article 5 and 12 which only obligates parties to provide ‘response measures’ and ‘for rules and procedures that address damage;’ and Tladi, D., ‘Civil Liability in the context of the Cartagena protocol: to be or not to be (binding)?’ *International Environmental Agreements: Politic, Law and Economics* (2009) vol. 10, no. 1, pp. 15-27.

302 See Article 1, Supplementary Nagoya protocol.

303 See, e.g., Hollo, *et al.*, ‘Legal aspects of climate change: Instrument choice and the Kyoto mechanisms.’ *Understanding the Global system: The Finnish Perspective*. Ed. Jukka Kayhkö and Linda Talve (Figure: 2002); available at <<http://www.sci.utu.fi/projects/maantiede/figare/UGS/index.html>>.

304 Article 6 (2), Supplementary Nagoya protocol.

305 See Preamble, Supplementary Nagoya protocol.

306 Article 16 (3), Supplementary Nagoya protocol.

307 Article 26, CBD.

would arguable be better than an assessment made by an institution at an international level, based on submitted reports. It is arguable so for two reason. At first, it is at the national level actions must be taken to conserve biodiversity resources, and a measure taken in one state may not be suitable in another. Secondly, it becomes easier to assess whether the measures taken are appropriate to their conditions, while being efficient enough to meet the objectives of an international treaty.

Reporting under the Cartagena protocol is not as developed, and reports only need to include implementation measures taken.³⁰⁸

Reporting in the supplementary Nagoya protocol serves a different purpose. The report aims to provide information in make assessment of the effectiveness of the rules of the supplementary protocol. One must remember that the rules in the supplementary Nagoya protocol are more of a procedural nature, to be implemented within the states, rather than rules to be follow by the signatory states.³⁰⁹

8.2 ENFORCEMENT, LIABILITY AND DISPUTE SETTLEMENT PROCEDURES

None of the agreements contains provisions on liability in the event parties are in breach with treaty obligations. Thus, this will be governed by the applicable sources of international law.

Dispute settlement procedure in CBD applies both to the Cartagena protocol,³¹⁰ and the supplementary Nagoya protocol.³¹¹ The provision is of a traditional approach and only applies to disputes concerning the interpretation and application of the Convention. Disputes shall be resolved by either; (i) negotiation; (ii) though good office or mediation; or (iii) judicial settlement or conciliation. The conciliation procedure is the default procedure.³¹²

None of the agreement provides a formal non-compliance procedure.³¹³ However, the Cartagena protocol has adopted procedures and mechanisms to address non-compliance.³¹⁴ Under these

308 Article 33, Cartagena protocol.

309 Article 13, Supplementary Nagoya protocol.

310 Article 34, Cartagena protocol.

311 Article 16, Supplementary Nagoya Protocol.

312 Article 27, CBD.

313 There are, however, a working group established to review the implementation of CBD. See Compliance Mechanisms Under Selected Multilateral Environmental Agreements, *supra* footnote 246, pp.47-48.

314 Decision Bs-I/7, Annex, para. 2 (d) of section VI, UNEP/CBD/BS/COP-MOP/1/15.

procedures may the decision-making body of the convention take actions in the event of repeated non-compliance. However, what type of actions they can take has never been defined.³¹⁵

9 CONVENTION CONCERNING THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE

The Convention Concerning the Protection of the World Cultural and Natural Heritage³¹⁶ entered into force in December 1975. The background to the Convention was the construction of the Aswan High Dam in Egypt. The project, which threatened to flood the monument of Nubia, especially the temple of Abu Simbel, made it clear for the international community that there was a need for cooperation to save the heritage of humanity, especially for future generation. WHC was drafted for this purpose.³¹⁷ The Convention covers two types of heritage, Cultural and Natural. *Cultural Heritages*³¹⁸ includes monuments such as the Taj Mahal in India, civil engineering construction, as the Canal du Midi in France, but also cultural landscapes in which man and nature influences are combined such as Mount Athos in Greece. *Natural Heritages*,³¹⁹ on the other hand, are not only places of outstanding universal value, such as the Great Barrier Reef, it also covers ‘habitats of threaten species of animals and plants.’ The prerequisite to be within the scope of the convention is universal significance from a scientific or conservational viewpoint.

The heritages are listed either in the *World Heritage List*,³²⁰ or the list of *World Heritage in Danger*.³²¹ The difference in listing are that sites listed in the latter are places under increasingly pressure; not only from natural occurring events, anthropocentric pollution or tourism, but also from other sources, such as conflicts over the site itself, or political conflict within a state.

9.1 SPECIAL FEATURES AND OBLIGATIONS

Obligations can take place as a result of the convention text or in connection to actions taking place as a result of the Convention. The latter type of obligations is connected to such as agreements concluded for the benefit of getting assistance from the World Heritage Fund, or to the nomination process in order to get a site listed. These processes will be addressed further below.

In order to facilitate the implementation process, as well as the nominating process, the World Heritage Committee has produces guidelines. One of these guidelines, the *Operational Guideline*

315 See, e.g., UNEP/CBD/BS/COP-MOP/3/2/Add; and UNEP/CBD/BS/COP-MOP/5/2/add.1.

316 See *supra* footnote 46.

317 See, *inter alia*, Lausche *supra* footnote 20, pp. 89-93: and WHC web-site.

318 Article 1, WHC.

319 Article 2, WHC.

320 Article 11 (3), WHC.

321 Article 11 (4), WHC.

for the Implementation of the World Heritage Convention,³²² contains, amongst other, guidelines for the management systems each party shall implement in order to reach the aim and the objective of the Convention. Paragraph 109 in the guideline reads as follows:

‘The purpose of the management system is to ensure the *effective protection* of the nominated property for present *and future* generations [emphasis added].’

This paragraph is closely connected to article 4 of the Convention text, which outlines the obligations to ensure the transmission of listed sites to the future, for the benefit of future generations. Thus, this article corresponds with the principles of inter-generation equity, which is, as mentioned above, a core principle within the principle sustainable development.³²³ The guideline further defines effective management as management taken into account the ‘cycle of long-term.’³²⁴ However, the guideline does not define the term. A guiding example to what the ‘cycle of long-term’ could mean is the approach used within CCAMLR, the eco-system approach. In this approach CCAMLR take into account the long-term effect of the non-linear nature of the ecosystem over a longer period of time, such as 20/30 years. Thus, it becomes clear an equivalent time-aspect would be appropriate.

The guideline also addresses *sustainable use*, in an interesting way. The approach taken is that in some cases ‘human use would not be appropriate.’ To *be* appropriate, the use must be both ecologically and culturally sustainable *and* at the same time the use cannot have an adverse impact on the *integrity* of that site.³²⁵

As mentioned above, there are obligations connected to the nominating procedures as well as the procedures to seek assistance from the World Heritage Fund. For the purpose of facilitating these processes the guideline contains templates.³²⁶ *Note Bene*, being templates in a guide they cannot be considered to be the foundation for any obligation. Nevertheless, as they are used by WHC, they are more to be considered as prerequisites in order to be eligible to seek assistance from the World Heritage Fund. As a result, it is an obligation to fulfil the entire prerequisite to be eligible to seek for assistance. The Fund will be discussed further below. For now, the obligations regarding the nomination of new sites nominating states are at first required to implement measures for the protection of the site. Secondly, they need to have a management plan that ensures the protection of the site. Thirdly, they are required to present ‘a detailed analysis of the way in which this

322 Operational Guideline for the Implementation of the World Heritage Convention (UNESCO) (Paris 2008): Available at <www.unesco.org>.

323 See WHC-11/35.COM/5E, 35th Session of the Committee.

324 Para. 112, Operational Guidelines, *supra* footnote 322.

325 Para. 119, Operational Guidelines, *supra* footnote 322.

326 See chapter III, Operational Guidelines, *supra* footnote 322.

protection *actually* operates [emphasis added].³²⁷ This is vital as this gives a lower boundary, which later can be used in the evaluation process whether these measures in fact was sufficient for the protection of the site or if further measures are needed. Thus, these are obligations nominating states has to fulfil in order get a site considered for listing.

As for obligations deriving directly from the Convention text the centrepiece for obligations reads as follows;

‘Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Article 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.’³²⁸

The obligations deriving from this piece are, amongst other, the duty to ensure the protection of ‘areas which constitutes the habitat of threatened species of animals and plants of outstanding universal values from the point of view of science or conservation.’³²⁹ For the purpose of protecting and conserving these sites, the management of these sites *has to* incorporate a long-term view as discussed above. This long-term view can be seen as a prerequisite in order to ensure the transmission of these species and habitats to future generations. *Nota Bene*, the species does not have to be endangered but *merely* threatened. The difference is fundamental, as a species can be threatened without being endangered. This differs from most other MEA covering species, where a difference is made between endangered and non-endangered species, where the former almost always enjoys a better protection. As we will see this is the approach adopted by CMS.

The adoption of an ecosystem approach seems to be a key role in effective conservation management. This has been seen both in CCAMLR, as well as CBD. At the same, time if such management shall ensure the transition of a base of resources to future generations, as well as be seen as an effective management, there is also a need to adopt a precautionary approach. In spite of this, the precautionary approach is neither mention in the WHC text, in the mentioned guideline, or clearly visible in meeting documents. Arguable, this does not mean there is no obligation to adopt a precautionary approach when adopting implementation measures as a result of the signing of the Convention.

327 Para. 132 (5), Operational Guidelines, *supra* footnote 322.

328 Article 4, WHC.

329 See Article 2, WHC.

On the other hand, the existence of such an obligation could be contested on the foundation that the relevant provision does not contain any obligation that could be interpreted in this way. The relevant provision would in this case be article 5, WHC. This provision, outlining measures to be taken to ensure effective management of a site, does not put any *obligations* upon parties as the provision only contains the wording *shall endeavour*.³³⁰ This is, however, not a *Carte Blanche*, as parties are restricted from taking measures that ‘might damage directly or indirectly’ a natural heritage.³³¹ As a consequence, parties are obligated to evaluate whether the intended measure might damage a site, i.e. an assessment of the effect of these measure has to take place. Further more, it clearly follows from the text that this obligation to make an assessment also covers actions or projects outside the site, which might have even an indirect damage of the site. As is apparent, the threshold for obligation of assessment is low as the text only refers to *might damage*. This is considerable lower approach comparing to other MEAs, where the damage usually has to be *significant*. As a conclusion, there is an obligation to assess whether a site would be affected, this does not, however, give enough to argue for obligation to adopt a precautionary approach. This follows from article 5, HWC, not contain any obligatory measures.

On the other hand, article 6, WHC, obligates parties to adopt an approach, which guarantee that the measures taken do not have a potential harmful effect on the protected sites. This clearly incorporates the obligation to adopt a precautionary approach, as this approach is the only approach that even closely can be regarded as fulfilling the *guarantee requirement*.

Further obligations under the Convention are the general obligation to pay subscription, at least every two years. There are two kinds of subscription; (1) an amount based on a percentage deciding of the main authority body, and (2) a yearly voluntary contribution.³³² The ‘at least two years’ has similar meaning as within CCAMLR. If a party is arrears with its payment for two consecutive years this party are not eligible to be elected as a member for the decision-making organ of the Convention.³³³

At last, the Convention contains the commonly existing provisions of the obligation to co-operate.³³⁴ What differs in this case is the existence of the *obligation to assist*. This, however,

330 Article 5, WHC.

331 Article 6 (3), WHC.

332 Article 16, WHC.

333 A seated person can, however, end his term, see article 16 (5), WHC.

334 Article 6 (1), WHC.

mainly refers to the occurrence of events requiring major cooperation in order to protect further degradation of, or the risk of loosing, a world heritage site.³³⁵

The above-mentioned World Heritage Fund³³⁶ was established under WCH to assist parties in their management of protected sites. From this fund parties are eligible to seek assistance for a number of reasons,³³⁷ such as for protection, conservation, presentation and rehabilitation of listed sites.³³⁸ To receive assistance parties need to comply with the rules laid down in a specific agreement.³³⁹ The Convention does not itself outline what such an agreement should contain. As a result, and for the purpose of streamlining this process, a standardised agreement has been adopted.³⁴⁰ The Convention text does, however, contain obligations connected to such an agreement. One of these obligations are to inform the public of the importance of the site for which assistance is received.³⁴¹ Closely connected to this obligation are the general obligations to inform the public about activities carried out and connected to protected sites, as well as dangers threatening that site as a result of human or natural interferences.³⁴²

FEEDBACK-SYSTEM

The Feedback system is a classic, based on self-reporting, which parties are to provide relevant information about the implementation measures taken, and the status of listed sites within their jurisdiction.³⁴³ Reporting on the implementation measures taken shall include legislative measures, administrative measures, as well as other actions taken to meet the objectives of the Convention. Another interesting part of the reporting is the *gained experience* issue, where the parties are to exchange experiences gained during the implementation,³⁴⁴ and resemble the evaluation approach in CBD. As a result of a reporting period of at least every sixth year,³⁴⁵ is the approach clearly a reactive approach.³⁴⁶

9.2 ENFORCEMENT, LIABILITY AND DISPUTE SETTLEMENT PROCEDURES

335 Article 6 (2), WHC.

336 Article 15, WHC.

337 Article 16, WHC.

338 See Articles 13, 20, and 22, WHC.

339 Article 26, WHC.

340 This agreement will, however, not be addressed further. See e.g. Decision – 01COM VI.B (d).46.

341 Article 28, WHC.

342 Article 27 (2), WHC.

343 Article 29, WHC.

344 Article 29, WHC.

345 See the Operational Guideline, which, however, only invites states to do so. Operational Guidelines, *supra* note 322, para 203.

346 Louka, *supra* footnote 53, pp. 316-318.

As one of the older conventions WHC does not contain any provisions governing liability, dispute settlement, or non-compliance. This will therefore be governed by the applicable sources of international law. Disputes do occur, although not a dispute about the application or interpretation of the Convention, there is currently a pending case at I.C.J. regarding the listed temple of Preah Vihear.³⁴⁷

10 CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS

The Convention on the conservation of Migratory Species of wild animals is the result of recommendation 32 of the *Action Plan for the human Environment*, adopted at the United Nations Conference on the Human Environment in Stockholm 1972. The recommendation specifically mentions the need to protect species migrating between jurisdictions.³⁴⁸ The scope of the Convention is not primarily to provide protection, but to contribute to better conservation of migratory species. Second, this contribution does not arise directly from the Convention text. Instead, CMS is to provide a framework and umbrella where agreements shall be concluded spun. With these agreements are CMS to establish a system with an ‘ultimate goal to bring all migratory species under the same policy with regard to conversation, management and exploitation.’³⁴⁹

10.1 GENERAL STRUCTURE AND OBLIGATIONS

For species to come within the range of CMS, it must be considered a *Migratory Species* by meeting the conditions of the following definition:

‘[T]he entire population or any geographically separated part of the population of any species of lower taxon of wild animals, as significant proportion of whose member cyclonically and predictably cross one or more national jurisdiction.’³⁵⁰

The definition includes a number of prerequisite. There must be a *population* (a) of *wild* (b) *animal* (c) of which a *significant part* (d) *migrates* (e) *cyclically* (f) and *predictably* (g) over a boundary between two or more *national jurisdictions* (h).

347 See Case regarding *Request for interpretation of the judgement of 15 June 1962 in the case concerning the temple of Preah Vihear (Cambodia v Thailand)* (Cambodia v Thailand, Pending, 28 April 2011. As a result of the ongoing dispute over the listed site, located on the boarder between Thailand and Cambodia, Thailand announced its withdrawal from WHC on 26 June 2011, based on a decision from WHC to review Cambodia’s management plan over the site.

348 See *supra* footnote 21.

349 See *Preparatory work; Explanatory Memorandum to the Draft (June 1974) of International Convention on the Conservation of Migratory Species*. Note 10, Part II. The draft was obtained at UNEP/CMS Secretariat (hereinafter referred to as Exp. Note, CMS – 74; the year are the year of the draft to which the explanatory notes was attached).

350 Article 1 (1) (a), CMS.

This study will highlight four of them; (c) the presence of an animal, (e-f) the cyclonical and predictably movement; and (h) the presence of a judicial border.

The first condition does not clearly define what a species of wild animal are, and therefore it is not clear whether this definition includes insects or not.³⁵¹ The question is relevant as to expand the scope of the Convention beyond the intended initial boundary may have a negative effect on the overall efforts to conserve migratory species for which the convention was drafted.³⁵² One of the reasons is the redistribution of resources from other areas. Arguable insects would better be recognized as part of biodiversity than animals and their conservation should therefore be covered by CBD. The basis for this view is triple. First, the early draft of the convention exempted them.³⁵³ Secondly, there is no evidence that the change of the text in the drafting negotiations meant a difference in that aspect. The text was rather altered to include species such as whales and exploitable fishes, over which there was great controversy in the drafting process.³⁵⁴ Thirdly, highly qualified writers never mention insects in connection to the convention.³⁵⁵ A reasonable conclusion is therefore a scope limited to animals, excluding insects.

The conditions of *cyclically and predictable movement* have been defined broadly by CMS/COP decisions.³⁵⁶ *Cyclically* is to be construed as any *cycle of nature*, whether it is, for example, annual, life and climate. The reference to climate suggests that the cyclically changes that occurs as a result of any changes in climate, whether these changes are due to anthropocentric influences, would fall within the definition. *Predictability* should be interpreted as a movement that can be anticipated depending on the circumstances, and more important, it need not be regular in time. Since these two prerequisites are closely linked to each other they must be interpreted in close relationship.

The fourth condition is the existence of *jurisdictional boundaries*, over which movement take place. Neither here does the Convention contains any definition. According to the early records of the Convention was the term was initially chosen instead of the term 'national boundary,' in order

351 Bearing in mind the listed Monarch Butterfly (*Danaus plexippus*).

352 This is important if the connection is made to the often constrained economical situations of most MEA secretariat, to widen the scope to much will diverge vital resources from the core area of the convention. This will arguable have a negative affect on the overall conservation work.

353 Para 2, Exp. Note, CMS – 75.

354 Lausche, *supra* footnote 53, pp. 169-177.

355 See, e.g., Cyrille de Klemm, 'The Problem of Migratory Species in International Law,' in Bergesen, H. O. and Parmann, G. (eds.), *Green Global Yearbook of International Co-operation on Environmental and Development 1994* (Oxford: Oxford University Press), pp. 67-77; Louka, E., *supra* note, pp. 335-342.

356 See, *inter alia*, at II, Exp. Note, CMS – 74; and Resolution 2.2, CMS/COP-2.

meet future regulatory regimes in the sea.³⁵⁷ Only when it comes to land does ‘jurisdictional boundaries’ *de facto* mean ‘national boundary.’ Thus, the definition is only relevant where there are maritime zones involved. As can be seen by reading the early document, the term *jurisdictional boundaries* shall be deemed to include limits of national fisheries zones, in which coastal states exercise exclusive fishing rights. The inclusion of these limits was seen as a logical conclusion, not because of the exclusive right to fish in these areas, but due to the coastal states sovereign right to adopt conservation measure for living resources in the area.³⁵⁸ The result of this is that coastal states have sovereign right to implement conservation measures in the Exclusive Economic Zone (EEZ), it also means that a species moving between the territorial sea and the EEZ, which belong to the same coastal state, are not covered by CMS. The consequence of this approach is, despite the fact that coastal states have sovereign right to exploit natural resources on the continental shelf,³⁵⁹ the species moving on the seabed between the territorial sea and the seabed located under the EEZ crossing a jurisdictional boundary as the coastal state does not have the sovereign right in exercise conservation measures over the seabed beyond the territorial sea. Species moving across these boundaries therefore falls under the convention.³⁶⁰

The jurisdictional boundary condition symbolizes the major obstacles for CMS in contributions to the preservation of species migrating, because they rarely move across only one boundary. The obstacle is not the border itself, but rather the principle of sovereignty attached to it.³⁶¹ The Convention does not like other conventions, explicitly mention sovereignty of a state to exploit its own resources. However, this can not be interpreted as meaning a prejudice of that right, as the sovereign right can be viewed as a customary rule.

As a consequence of the principle of sovereignty, a state has the right to exploit *their* resources, and *their* resources are resources under *their* jurisdiction any given time. As a result, there is no special right for the state of origin to a resource once it left their jurisdiction.³⁶² This correlates with the view adopted by the UNCLOS where anadromous species originating in one state does not give the origin state any special right once these species left their jurisdiction.³⁶³ The question may be whether migratory species can be seen as an international resource, bringing an

357 Note 3, Exp. Note, CMS – 76.

358 See, *inter alia*, at VI, Exp. Note, CMS – 74; and Article 56, UNCLOS.

359 Article 77, UNCLOS.

360 Another interesting question increased in the 1976 Exp. Note, CMS – 76 is the relationship to the special regime of areas covered by treaties in the Antarctic Treaty series, where there are no national jurisdictional boundary.

361 Another principle would be the principle of freedom of the high seas; which will not be covered in this study.

362 See Klemm C. *supra* footnote 355, pp. 67-69

363 See Article 66, UNCLOS.

international obligation to preserve it? The answer to this question can not be positive. The reason for this is that migratory species can not be regarded as a common resource, such as resources of the High Seas.³⁶⁴ This is especially true for those species constantly within the jurisdiction of one state. Consequently, there can be no universal obligations to conserve these species in accordance with the obligations to conserve under UNCLOS.³⁶⁵ Moreover, there is no recognition in international law for either rights, which would follow the idea of shared resources or obligations to conserve these resources as a result of other states entitled to it. To acknowledge this would be a departure from the principle of sovereignty over resources within state jurisdiction.³⁶⁶ For this reason, any obligation to conserve migratory species must be written in formal instruments, to bind the state to act or not to act in a certain way.

In contrary to the above, the first drafts of the CMS did include a duty to take into account of other government interests in management of migratory species. In these documents, migratory species was considered a common resource. Thus, the first versions of the fundamental principle of the Convention were as follows:

‘[T]he contracting states recognises that migratory species represents a resource common to all states whose territory lie within their range. They agree to manage these common resources taking fully into account the interests of each of the migratory species for which they are responsible.’³⁶⁷

The approach used was a *joint sovereignty approach*. The idea behind this was based on the non-recognition of international law over any special rights to the states of origin over migratory species. This was considered surprising as migratory species are an international phenomenon and no can alone provide effective management for conservation.³⁶⁸ The sovereign approach was a new approach that gave states or origin rights to have their interests considered in other states when they managed migrating species. Despite lack of evidence for a changing of the status of migratory species to be regarded as anything but a natural resource belonging to the state under whose jurisdiction it resides for the moment, migratory species have been labelled as a ‘common natural heritage’ by CMS/COP resolutions.³⁶⁹ The ‘common natural heritage’ derives from the text

364 The exception would be if the species fall within the scope of UNCLOS.

365 See, e.g., Article 192, UNCLOS.

366 Klemm C. *supra* footnote 255, p.69.

367 Draft International Convention on the Conservation on Migratory Species, CMS – 74.

368 Exp. Note, CMS – 74.

369 Resolution 7.10, CMS/COP-7.

of WHC,³⁷⁰ and insinuates that states have a greater obligation and right regarding these species. This is obviously not inline with the principle of state sovereignty.

For some reason was the text of the fundamental principle changed, and the present version reads as follows:³⁷¹

[T] The Parties acknowledge the importance of migratory species being conserved and of Range States agreeing to take action to this end whenever possible and appropriate, paying special attention to migratory species the conservation status of which is unfavourable, and taking individually or in co-operation appropriate and necessary steps to conserve such species and their habitat.³⁷²

The current version is based on principle 4 of the Stockholm declaration.³⁷³ In accordance with the current version the parties agree to take appropriate and necessary actions. The approach for these actions must be a *wise wildlife management* approach in which states individually and in cooperation with other units shall work for the preservation of not only migratory species but also their habits.³⁷⁴

The concept of *wise wildlife management* is not defined the Convention text, in COP decisions, and there are no clues in the preparatory work on the exact meaning of it. Nor are there any clues in the document arising from the Stockholm Conference. The concept has appeared recently in one of the most ambiguously national legislations enacted to protection of the environment. The concept was introduced in New Zealand 'Resource Management Act'³⁷⁵ (RMA) in 1990, and was considered revolutionary.³⁷⁶ RMA defines the term as follows:

[S]ustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while;

sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

370 See Article 2, CWH.

371 The changes took place after 5 of august 1977 and before the Plenary meeting. CMS records, however, do not contain any documents to clarify why the changes took place.

372 Article II (1), CMS.

373 The present version was adopted at the plenary meeting in Bonn, June 1979, See. SumPl 14, 22 June 1979; and PL 44, 21 June 1979, which specially referred to principle 4 of the Stockholm Declaration; available through the UNEP/CMS Secretariat.

374 See Article 1 (c) (4), CMS.

375 See RMA, *supra* note?.

376 See, Bosselmann, *supra* footnote 89, *et passim*.

avoiding, remedying, or mitigating any adverse effects of activities on the environment.’

As the term is used in this definition *wise wildlife management* includes much more than just management of the migratory species or their habitats. This definition also covers important aspects such as the inter-generation equity, making it more inline with the principle of sustainable development.

Although not defining the term itself, as well as the above definition of RMA can not be directly applicable, it is clear that the term *wise wildlife management* in CMS has a much broader scope than the term *wise use*, referred to in the preamble. Thus, the term *wise wildlife management* impose more obligations of the signatories in the performance of their obligation under CMS. This is a logical conclusion as the status of species will automatically be unfavourable if the criteria of *wise wildlife management* are not met.³⁷⁷ This approach would also be more inline with the principle of state sovereignty, as opposed to the ‘common natural heritage’ approach, since this approach does not give anyone the rights to require a state to recognize their right when managing its resources.

Furthermore, the above fundamental principle is applicable to all migratory species, whether they are listed in the appendices to the Conventions or not. This is the result of reading article II (1), CMS, in combination with above described definition of *Migratory Species*,³⁷⁸ none of them refers to the appendices. Furthermore, there is an obligation under the fundamental principles despite status. This is the result of article II (1), CMS, since it only describes that the parties shall pay *special attention* to those species having an unfavourable conservation status. This is not a specific reference to species in Appendix II, but only refers to the special needs of migratory species having an unfavourable conservation status.³⁷⁹ As a result, the full extent of the fundamental principles is applicable to *all* migratory species within the jurisdiction of a signatory state.

In contrast to the obligation to take necessary measures to conserve migratory species, are signatories *not obligated* to avoid that a species becomes endangered. This despite the acknowledgement of the need take measures to avoid this.³⁸⁰ Neither does the Convention *obligate* signatories to take immediate measures with respect to species listed as endangered.³⁸¹ This seems odd; since there is an immanent risk of extinction when species are listed as endangered. This type

377 See Article I (c) (4), CMS.

378 See Article I (a), CMS.

379 See Article I (d), CMS.

380 Article II (2), CMS.

381 Article II (2) (b), CMS.

of *substantial rule gaps* clearly could have a devastating impact on the survival of a species, this as because there is always a delay between the action and the effect. This is obviously not a precautionary approach to conservation. Another not clearly regulated matter is whether there is any obligation to take steps to avoid a species listed in appendix II from becoming endangered. As argued above the obligation would be the one found in the fundamental principle. This, however, only outlines that special attention should be given to appendix II species, and does not obligate parties to take steps to keep these species of appendix I.

As shown above, is the focus of the Convention not to contribute to the conservation through its own text, but the main purpose is to conclude other agreements to cover this. Some of these agreements will be discussed further below.

FEEDBACK-SYSTEM

The Convention text does not contain any formal obligation to submit reports on measures taken, as it only outlines that the parties *should* submit reports.³⁸² However, the term *should* have been interpreted to containing an obligation to provide such reports.³⁸³

10.2 SPECIAL FEATURE

As mentioned above, the main purpose for the Convention is not to create an overall conservation of migratory species through its own text. Instead, it is determined to facilitate the conclusion of agreements in favour of conservation and management of these species.³⁸⁴ As a result, to conclude agreements under article IV, CMS, can be seen as the cornerstone of the Convention.

Before discussing these procedures to concluding agreement, differences between the Conventions two appendices will be highlighted as the conventions is appendix driven. This means that the scope of the convention, to some extent is determined by the migratory species listed in the appendices. Appendix I contain species classified as *endangered*. Appendix II contains species being classified as having an *unfavourable conservation status*.³⁸⁵ Both terms are defined within the Convention,³⁸⁶ this will not be address further. As a guideline, only appendix II species can be subject to conclusion of agreement under articles IV (3), CMS.

10.2.1 APPENDIX I

382 See Article VI (3), CMS.

383 Resolution 8.24, CMS/COP-8.

384 Note 9, Exp. Note, CMS – 77, 8 June.

385 Article IV, CMS.

386 See Article I, CMS.

As mentioned above, there are specific obligations related to the species listed in appendix I, article III, CMS. An obligation is to prohibit the taking of such species.³⁸⁷ Taking is defined as ‘hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct.’³⁸⁸ As discussed above, there is no obligation on the parties to provide for immediate protections,³⁸⁹ with the possible adverse effect this may have. Another requirement is to inform the secretariat of any exceptions granted.³⁹⁰ The rest of article III, CMS, does not contain obligations, but rather measure states should strive to take to conserve listed species. One of them will be highlighted as it contains a threshold criterion. This is the provision regarding the actions the parties must take to make up for ‘activities or obstacles that seriously impede or prevent the migration of the species.’ In comparison to WHCs *merely* criteria, the serious impeding threshold of the CMS seems unnecessary high for a non-mandatory provision.

10.2.2 APPENDIX II

CMS is like a goose that can lay golden eggs; in itself it is of little value for the conservation of migratory species, but treated well the end result can be a valued contribution to the preservation of the Earth’s biodiversity.

For species listed in Appendix II, there is a need to conclude agreements in order to oblige member states to take measure, as the listing itself does not. This need for agreements has already been recognized as of uppermost importance.³⁹¹

To be listed in appendix II, a migratory species must either have an unfavourable conservation status,³⁹² or a status that would significantly benefit from an international agreement.³⁹³ For obviously reasons, there is no obligation on the parties to conclude agreements on species listed in Appendix II.³⁹⁴ As mentioned above, the agreements must include substantive provisions regarding cooperation and coordination of conservation measures to make them binding.

In order to facilitate the conclusion of agreements the Convention text provides a guideline,³⁹⁵ which contains provisions and areas that should be covered.³⁹⁶ As mentioned, this guideline only

387 Article III (5), CMS, subject to exceptions according to treaty provision.

388 Article I (i), CMS.

389 Article II (3) (b), CMS.

390 Article III (7), CMS.

391 Resolution 2.6, CMS/COP-2.

392 See Article I (1) (c) (d), CMS.

393 See Article IV (1), CMS.

394 Article IV (2), CMS.

395 Article V, CMS.

396 See Appendix I to this thesis.

applies to AGREEMENTS concluded under article IV (3), CMS. As a result, agreement concluded under article IV (4), CMS, does not have to include the obligatory objectives to restore or maintain the species concerned at a favourable conservation status.³⁹⁷ However, there is nothing to prevent these provisions to find its way into an article IV (4) agreement.

10.3 ENFORCEMENT, LIABILITY AND DISPUTE SETTLEMENT PROCEDURES

CMS does not contain provisions on liability, which will therefore be governed by the applicable sources of international law. Neither does the Convention contain any formal procedures for handle non-compliance. Yet by the Rules of Procedures used at COP meetings, there is a procedure regarding the payment of subscription.³⁹⁸ Under this procedure, a party loses his right to vote at the meeting if they have failed to pay their subscription for at least three consecutive years. Exceptions are often given. As for the dispute settlement procedures, disputes shall settle amicably.³⁹⁹ If amicable settlement fails, the Convention is not very useful, because it requires mutual consent to submit the dispute to arbitration.⁴⁰⁰ This is clearly a stricter approach than these in the above MEAs, also the high politically CBD does not have this restraint. Mutual consent is always difficult to get, so to get mutual consent both parties need to find it less costly to go to court than to continue the action upon which the conflict arose.

397 Article V (1), CMS

398 See, UN Doc. UNEP/CMS/Conf. 5.4.

399 Article XIII (1), CMS.

400 Article XIII (2), CMS.

PART 3 – ANALYSIS, SUMMARY AND RECOMMENDATIONS

As the author experienced, there is an underlying difficulty of comparing CMS with other biodiversity-related MEAs. The difficulty lies mainly in the structural difference. As a main difference the CMS does not aim to contribute to the conservation of biodiversity through the comprehensive provisions of its text in the same way as other MEAs. CMS has arguable little to offer in this context. The cornerstone of CMS is instead the agreements section, where other agreements should be concluded and the conservation of biodiversity is dependent on these agreements. As a result, CMS seems in comparison with other MEAs as an empty shell contributing little to preserve the Earth's biodiversity. The picture is deceptive. The section that make it possible for the Convention to conclude other agreement under its aegis are unique and super important to CMS contribution to the conservation of biodiversity.

11 CMS AS A BIODIVERSITY RELATED TREATY

11.1 THE GOLDEN EGG TO BE

For an agreement concluded under the aegis of CMS to be successful in the conservation of migratory species, they must meet three conditions;⁴⁰¹

- 1) A judicial authority in all states within the range of the species need to be included;
- 2) At a minimum there must be a joint system established for the management of the species throughout the whole range; and
- 3) An appropriate body must be established to lead the management.

The first condition includes two aspects: The need to cover the entire range, and the need for a responsible nation institute. The former of these is the goal of all agreement concluded under CMS. However, this is for obvious reason not a prerequisite for the conclusion of agreements.⁴⁰² The latter aspect is always met by the system of appointing national focal points.

The second condition sets the premise for a minimum level of interaction between the parties, repeating the need for a minimum level of interaction thorough the range of the species. The cooperation is visible in all agreements complying with the minimum level of interaction. In some cases, this cooperation has been extended to coordination. These two concepts will be discussed further below.

401 See Exp. Note, CMS – 74.

402 See Article V (2), CM, which only contains *should*.

The third condition describes the need to establish an appropriate body for managing the specific species. According to the Convention text, the function of such a body should be to assist and monitor the signatories in their implementation, in order to keep the management in line with the purpose of the signed agreement.⁴⁰³ Since the text of CMS does not provide any further guidance to the type of body is the most appropriate, this provision is quite flexible. This flexibility is good as every situation and every migratory species are unique, and a type of body established for one species may not be appropriate to use in regards to other species. There are some additional guidelines for such a body, originating from COP decisions. Under these decisions, the body has to be considered the most effective one, at least in terms of economical efficiency, administrative efficiency and coordination efficiency.⁴⁰⁴

Before giving example of existing bodies in a nearby area of cross-border resource, the difference between cooperation and coordination must be solved.

The difference between cooperation and coordination can be defined by looking at the expected results. While cooperation focuses on activities performed by a small number of parties, and would ideally lead to a certain result; coordination often involves several parties engaged in similar or same type of activities. A key element of coordination is that if any part of the concerned action is not performed or performed in a non-effective manner, the parties of the coordinating group try to correct this so the purpose for the coordination is achieved. Thus, coordination functions with multiple parties.

Cooperation on the other hand, loses its efficiency with an increasing number of cooperating partners, often a loss in economic efficiency.⁴⁰⁵ An example of why it becomes less effective in the economical side, the risk of double implementation. This often occurs when multiple parties undertake the same action. As a result, the overall implementing cost for the combined group of cooperating parties is higher than if the actions were coordinated. This is connected to the synergies, which are mentioned below. So in order to be regarded as cost-effective some form of coordination of activities is required.⁴⁰⁶ As mentioned, effective coordination requires that the

403 Article V (4) (d), CMS.

404 Resolution 2.7, CMS/COP-2.

405 This section is based on a working document on coordination and cooperation in the field of viral diseases, this however does not result the usefulness of the coordination and cooperation part, Troby. T., *HIV Coordination in National AIDS Programmes*, See <www.troby.eu>.

406 See Guzman, *supra* footnote 205, pp. 25-29.

parties have an interest in coordinate their actions for the benefit of the target otherwise coordination will fail.⁴⁰⁷

One prerequisite for successful participation, as well as the subsequent evaluation, is an understandable goal. The parties need to know specific reasons why coordination takes place. To coordinate actions to preserve a species is not a particularly clear goal, and effectiveness of coordination, i.e. its contribution to achieving the goal can not be measured.⁴⁰⁸ Furthermore, if the goal is not clearly specified *coordination* could be regarded as mere cooperation efforts to reach a desirable non-specific target. But as described above, it is possible to measure the effectiveness of the coordination of actions to a non-clear target, and this is through the process of operationalisation. The coordination must take place within the sub-goals.

What becomes apparent when dealing with transboundary resources is that coordination must be of the same nature, cross-border. This follows the nature of the covered object, which in fact makes coordination measures by one state not an effective method. A good example would be a lake where a farmer each year implants loach to maintain a viable population in the lake for the purpose of selling fishing licenses. What complicates the issue is a factory located nearby, contaminating the lake. As a result, the work of the farmer is not effective way to maintain a viable population of loach in the lake. In this example, cooperation would probably be the best result as there are only two parties. For more complex situations where multiple states are involved, coordination may be preferable. For the benefit of effective coordination, it is arguable need for a responsible authority that supports the management of complex matter. But such a body must also be invested with the mandate to take actions as well as have the resources to do so.⁴⁰⁹ We have already encountered such a body when dealing with CCAMLR. Here the Commission is invested with the mandate to regulate the conservation of the biodiversity in the Antarctic Southern Ocean. Given the status of the Antarctic Southern Ocean, this study will highlight another area dealing with transboundary resources.

A related area dealing with a cross-border resource is water resources, with reference to Integrated Water Resource Management (IWRM) and Integrated River Basin Management.⁴¹⁰ *Nota Bene* this

407 *Id.*

408 If the goal is measurable there is as mentioned above a need to initially set a lower boundary.

409 Chayes *et al.*, *supra* footnote 202, pp. 271-285.

410 See Louka, *supra* footnote 53, pp. 169-243, especially at pp. 182-192.

type of body only works if the parties are willing to coordinate their actions. Coordination is therefore dependent on political will rather than the need for effective conservation.⁴¹¹

Three types of IWRM will be highlighted. The first is a committee or council performing only secretariat duties. The second is a commission tasked with planning and resource management. The third body is empowered with supervisory authority over the use and management of resources.⁴¹² CCAMLR Commission would fall into the third category. The third category will not be considered further as it currently does not seem a viable strategy for CMS.

To meet the third condition of the above criteria for an agreement to be viewed as a successful agreement, an appropriate body must for a minimum provide for secretariat functions. This may not be inline with the goal of an agreement to contribute effectively to the conservation status of the Earth's biodiversity, since this approach allows for idiosyncratically approaches at the national administrative level. As a result, an appropriate body must have the power to counteract these idiosyncratically approach. Thus, as a minimum, this body must have at least a mandate that includes planning (structure) *and* management (activities) of conservation measures. The significance is that the planning and structuring are completed on *one* level. This will automatically reduce the idiosyncratic approaches at the administrative levels. Moreover, such a body has a better basis for adopting a long-term perspective and taken into account the non-linear structure of nature, such as the Commission of CCAMLR does.

The basic functions of such a body may be different (see table 1). An important feature could be a duty to consider all the biodiversity-related MEAs signed by the parties. Obligations under various MEAs can then be coordinated to a single management plan. This is not possible if the body is simply an administrative body, in which there is no coordination between the various MEAs, but only cooperation. In fact, it seems as one of the biggest problems with MEA secretariats is the lack of *coordination* between MEAs,⁴¹³ and coordination between measures taken at national levels.⁴¹⁴ Furthermore, an approach in which a responsibly body will take into account various MEAs are also in favour of a synergistic effect.⁴¹⁵ One of the trade-off will be a reduction of costs, as opposed to the non-coordinative structures of MEAs.⁴¹⁶ For such a trade-off to be possible there must be more coordination between existing biodiversity MEAs, and not just only cooperation.

411 Troby, T, *supra* footnote 405 *et passim*

412 See Louka, *supra* footnote 53, p. 183.

413 Klemm, *supra* footnote 355, p. 73.

414 Behrens, V., Rauchmayer, F., Wittmer., H. 'Managing international problem species: why pan-European cormorant management is so difficult' (2008) *Environmental Conservation* 35 (1) pp. 55-63.

415 See, Jóhannsdóttir *et al.*, *supra* footnote 33, p. 145.

416 Jóhannsdóttir *et al.*, *supra* footnote 33, pp. 147-148.

Furthermore; there will be a synergistic effect on the reduction of the total implementation deficits, which is claimed to automatically higher in cooperation in which several administrative levels separately interpreting what measures are needed.

Last but not least, a body of the above type would also be better equipped to take a more holistic approach. Into account the more complex issues related to conservation of species, such as population growth, poverty and needs of area development, and other millennium goals would arguable have a positive effect on the conservation of species. A good example in this area would be the Tennessee Valley Authority.⁴¹⁷ The reason why such a body would be better equipped is the possibility for it to adopt a holistic approach. Where as contemporary MEAs seems to have a problem of adopting such an approach, as ‘the primarily interest of parties to MEAs is compliance with environmental control measures rather than a holistic approach to environmental governance.’⁴¹⁸

TABLE 1 **ESSENTIAL FUNCTION FOR A WILD LIFE AREA MANAGEMENT COMISSION**

Plan	Formulation of long-term plans for management of wild life and their habitats by incorporating principles, such as the precautionary approach but also the need for EIA in any project that <i>might</i> have an adverse effect. Prioritise measures needed taken covering a proactive mode.
Coordinate	Coordinate obligations and actions deriving from other sources, to minimize duplication of actions and costs.
Monitoring	Monitor implementation activities and correct these activities base on continuously feedback of information, scientific data by adopting a precautionary approach.
Resolve conflicts	Provide for mechanism for negotiation and litigation in conflicts regarding resources. Not only conflict over the right to resources but also such conflict as the losses of livestock to predators, where the gain of the predator has to be valued to the lost livestock, not only in economical value but also in other values.
Participation	Motivate stakeholders by educate them in the reason of the management needed as well as competing reasons, such as economics and sustainable utilization. Involve all stakeholders in the planning, managing process. Increase public participation and awareness

To give an example of loss taking place in cooperation:⁴¹⁹ A working program was adopted with a long-term vision to restore the pink elephant. The goal of the restoration was a point where

417 See Louka, *supra* footnote 53, pp. 182-192.

418 Management Review of Environmental Governance within the United Nations System, Joint Inspection Unit 2008, Doc. JIU/REP/2008/3, especially paras. 22-30.

419 This example is based on a existing MoU.

sustainable use can again be envisioned. The overall target was a pink elephant population showing an increasing trend, or a halt in their decline over the next five years. To implement the goal and the vision, each party were to develop national action plans, after which they were to coordinate conservation efforts and promote cooperation between all stakeholders in ranger states.

In the example above, there are clear visible steps contributing to the implementation deficits. The first step is the vision that provides a non-defined point at which the parties can imagine that they can start utilising the pink elephant again. The restoration of the pink elephants will aim at this point, i.e. it shall not aim to a point where the utilization of the species actually can take place, but to a point where the people can start to thinking about it. This vision is clearly vague and therefore can never be reached and never evaluated on a scientific basis.⁴²⁰ In order to have some guidelines the vision must be materialized into measurable milestones. As described above, this would be done through the process of operationalisation. The overall objective can be measured if the current population is known. Since there is no reference to a historic level of population the starting point must be the current level. The deadline is five years, which means that it is difficult to take into account the non-linear behaviour of nature. This makes this approach a reactive rather than a proactive approach.

To meet the objective of the example sub goals are introduced. One of the sub goals is to develop a national action plan. This goal is measurable, i.e. it is possible to measure whether the parties have developed national plans. But the fulfilment of such a goal says nothing about, if they are effective in contributing to the objective of the agreement. In addition, this goal say noting about what the action plans shall include, without doubt contributing to the implementation deficit as every states administration will have its own agenda. In addition, in this example there is no requirement to involve stakeholders in the development of the national action plan, neither in the coordination process. The stakeholders are involved in the cooperation process. As a result, if cooperation is done at a regional level, and a stakeholder fails to fulfil his task, no one else would do it for him, because there is a lack of coordination. This approach will thus ultimately lead to a higher degree of implementation deficit.

The implementation deficit taken place in the example could be counteracted by a responsible body with the right mandate, such as the mandate to adopt a comprehensive management where coordination is a key aspect, and where monitoring and feedback plays a vital role.

⁴²⁰ Disregarding the science of psychoanalysis.

11.2 MAKING OF GOLDEN EGGS

As mentioned, the provisions allowing CMS to conclude agreement is the cornerstone of the convention. The realization of the importance of agreements was early recognized, as well as the realization of a need to develop exemplary agreements.⁴²¹ Thus, to facilitate the process of conclusion of agreement, an *agreement guideline* was regarded as an important step, as well as an important instrument to clarify different aspects in that process.⁴²² Both the exemplary agreement as well as the guide is based on a report⁴²³ by the International Union for Conservation of Nature (IUCN).⁴²⁴ As a result, a framework guideline was produced, *Guidelines on the Harmonisation of Agreements* (hereinafter Guideline).⁴²⁵ This Guideline was meant to be a living document that would be updated on a regular bases based on the experiences gained from drafting procedures of agreements.

The reason for harmonizing of the agreements is to avoid too many differences in both form and effect, which can lead to uncertainty about their scope. Furthermore, too much divergence may lead to difficulties to comparing agreements and to obtain an overview over what is regulated and what is not, thus increasing the uncertainty over their scope.⁴²⁶ But as a result of a lack of progress, the work on the Guideline was eventually stopped,⁴²⁷ and it was never finalized. As a result, it has never used to lead the development of MoUs.

Returning to the various agreements concluded under CMS. These agreements can be based either on article IV, paragraphs 3, or paragraph 4. Paragraph 3 is used to conclude AGREEMENT, which would be self-standing agreement, such as the Africa-Eurasia Water bird Agreement (AEWA), and paragraph 4 is used for *other* agreements.

One of the most important differences between these agreements is that AGREEMENTS concluded under paragraph 3 usually would have its own secretariat and be self-financing, while agreement under paragraph 4 normally would be placed under the chapeaux of UNEP/CMS Secretariat.

421 Resolution 1.6, CMS/COP-1.

422 See, CMS/StC.15/Doc.9.2.

423 Elements for the formulation of guides for the harmonization of future agreements, produced by Cyrille de Klemm.

424 Resolution 4.3, CMS/COP-4.

425 Doc. CMS/StC.15/Doc.9.2; and Annex, produced by Cyrille de Klemm, International Union for Conservation of Nature (IUCN).

426 Resolution 5.2, CMS/COP-5.

427 See, *Report of the seventh meeting of the Conference of the Parties to the convention on the conservation of migratory species of wild Animal*, CMS/COP-7, paras. 174-175.

There is also a difference in the obligation to take into account article V, CMS. As discussed above, article V is only obligatory for AGREEMENTS. Thus, agreements concluded under article IV, paragraph 4 are not required to include an objective in accordance with article V (1); ‘to restore the migratory species concerned to a favourable conservation status or to maintain it in such a status.’

Whit regards to article IV, paragraph 4, agreements; CMS divides these agreements into two groups, legal binding agreements, and non-legal binding once. What is of outmost importance in this aspect is that *CMS* regards all MoUs concluded as non-legally binding cooperation instruments between states.⁴²⁸ As non-legally binding instruments MoU do not contain legally binding obligations between the signatories. They do, however, contain official undertaking by the signing institution.⁴²⁹

This thesis will only take a closer look on MoUs. The reason for this is based on what appears to be a preference from the CMS of using this type of agreement. Since 2004 there have only been two AGREEMENTS,⁴³⁰ while during the same period eleven MoUs have been concluded.⁴³¹

11.3 MEMORANDUM OF UNDERSTANDING

As they are used by CMS, MoUs are to be regarded as more of administrative instruments to facilitate cooperation. Although non-legal instruments between the signatories, it does not mean they can not contain measures for implementation of legal commitments.⁴³² It means that they can not contain any provisions that require the exercise of political power, but merely undertakings that can be implemented through administrative decisions.⁴³³ As a result the MoUs may not contain provisions like financial provisions to give an annual subscription, as in most cases this

⁴²⁸ *Memorandum of Understanding* are not by definition non-legally binding, the interpretation of if they are so has to be in accordance with the Vienna Convention.

⁴²⁹ See, Introduction at 3 (c), Guidelines on the Harmonization of Agreements, CMS/Stc.15/Doc.9.2 Annex.

⁴³⁰ The Agreement on the Conservation of Albatrosses and Petrels, EIF 1 February 2004; and the Gorilla Agreement, *supra* note 66.

⁴³¹ Memorandum of Understanding concerning Conservation Measures for the West African Population of the African Elephant (*Loxodonta africana*), EIF 2005; Memorandum of Understanding for the Conservation of Ceaceans and their Habitats in the Pacific Islands Region, EIF 2006; See Saiga MoU, *supra* note?, EIF 2006; Memorandum of Understanding concerning Conservation Measures for the Eastern Atlantic population of the Mediterranean Monk Seal (*Monachus monachus*), EIF 2007; Memorandum of Understanding concerning Conservation Measures for the Ruddy-headed Goose (*Chloephaga rubidiceps*), EIF 2006; Memorandum of Understanding on the Conservation and Management of Dugongs (*Dugong dugon*) and their Habitats throughout their Range, EIF 2007; See the Grassland MoU, *supra* note?, EIF 2007; See the MSC MoU, *supra* note?, EIF 2008; See the Bird of Prey MoU, *supra* note?, EIF 2008; Memorandum of Understanding on the Conservation of High Andean Flamingo and Their Habitats, EIF 2008; and Memorandum of Understanding on the conservation of Migratory Sharks, EIF 2010.

⁴³² See, Introduction at 3 (c), Guidelines on the Harmonization of Agreements, CMS/Stc.15/Doc.9.2 Annex.

⁴³³ *Id.*

would require ratification. A simpler reason why MoUs should not contain these kinds of provisions are that MoUs rarely are signed by a person exercising full power of the state, and therefore its provisions will not bind the state.⁴³⁴ In contrast to earlier, there is nothing that says MoUs can not contain provisions allowing voluntary contributions of the signatory institution.⁴³⁵

As discussed above, the conclusion of MoU is first and foremost a way to regulate actions in regard to a specific species. For this purpose these agreements must be flexible in nature. While they must have a clear structure in order to provide a comprehensive picture of what is covered. The formulation of an agreement is an art and requires the right knowledge.

When analysing MoUs concluded under CMS, the following MoUs was covered; The Memorandum of Understanding Concerning Conservation Measures for the Siberian Crane (*Grus leucogeranus*) (hereinafter the Siberian Crane MoU);⁴³⁶ The Memorandum of Understanding Concerning Conservation, Restoration and Sustainable Use of the Saiga Antelope (*Saiga tatarica tatarica*) (Hereinafter the Saiga MoU);⁴³⁷ The Memorandum of Understanding concerning the Conservation of the Manatee and Small Cetaceans of West Africa and Micronesia (hereinafter the MSC MoU);⁴³⁸ The Memorandum of Understanding on the Conservation of Migratory Birds of Prey in Africa and Eurasia (hereinafter Bird of Prey MoU);⁴³⁹ and The Memorandum of understanding on the Conservation of Southern South America Migratory Grassland Bird Species and Their Habitats (hereinafter the Grassland Birds MoU).⁴⁴⁰

By looking into the MoUs, they more or less contain elements contained that are in the above-mentioned Guideline.⁴⁴¹ An important difference is the *definition of terms*, which only the Bird of Prey MoU contains. But more interesting are the differences in design, placement of provisions and their scope, i.e. the scope of the provisions. The number of provision and their volume of them differ from eight to 31. The numbers of paragraphs used are five to 22. *Nota Bene*, this does not

434 See particularly article 7 and 8 Vienna Convention.

435 See at, Guidelines for Memorandum of Understanding, Guidelines on the Harmonization of Agreements, CMS/Stc.15/Doc.9.2 Annex.

436 Memorandum of Understanding Concerning Conservation Measures for the Siberian Crane (*Grus leucogeranus*), EIF 1 January 1999.

437 Memorandum of Understanding Concerning Conservation, Restoration and Sustainable Use of the Saiga Antelope (*Saiga tatarica tatarica*), EIF 24 September 2006.

438 Memorandum of Understanding concerning the Conservation of the Manatee and Small Cetaceans of West Africa and Micronesia, EIF 3 October 2008.

439 Memorandum of Understanding on the Conservation of Migratory Birds of Prey in Africa and Eurasia, EIF 1 November 2008.

440 Memorandum of understanding on the Conservation of Southern South America Migratory Grassland Bird Species and Their Habitats (hereinafter the Grassland Birds MoU), EIF 26 August 2007.

441 The content are; Preamble; Definition; Focal Points; National Report; Exchange of information; Cooperation mechanism; Monitoring; Conservation/Action Plan; Duration; Amendment; EIF, Denunciations; Depositary.

say so anything about the content. As each MoU requires specific content they would always be different, containing different amount of provisions, of different size. Yet it is here the difficulties arise. As a result of the difference in the overall structures of the texts, it is difficult to see if they follow the same pattern. It also makes it difficult to get an overview of what is actually regulated. What are the basic provisions and what is unique in relation to the specific MoU. This may eventually become an obstacle in the progressive development of effective MoUs. Recognising this is important as it is by developing agreements CMS contribution to the conservation of biodiversity can be increased.

11.4 MOU IMPLEMENTATION DEFICITS

The importance or impact MoUs can play and have on the conservation status of biodiversity can be illustrated through the process of implementation deficit. The illustration of the process must be expanded to understand how MoUs can affect the implementation deficit. This is due to the fact that there are two legislative processes in play. The first one was the process of concluding CMS; the other is when CMS concludes agreements under its aegis. Both these processes need to be accounted for. This can be illustrated as follows:

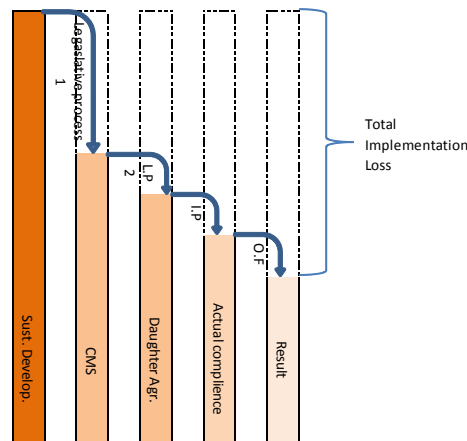


Figure 4.1 CMS Implementation Loss, from Westerlund 1997.

The large gap between the goal of sustainable development and CMS depends on the changes made in the negotiation process, in which the joint sovereignty was removed. This is not such a big problem because it is first and foremost, not CMS, which is to conserve migratory species, but the agreements concluded under it. As mentioned, this is the uniqueness that gives CMS advantage over other MEAS, where the party obligation depends on the text and there must be an amended procedure in order to change these obligations. So, if handled correctly the MoUs concluded under

CMS does not suffer from the amendment problem of ratification. However, this requires more efforts in the process of concluding effective agreements by putting the obligations of the official undertaking above the obligations deriving from the text of CMS. This would in line with the *theory of overloading*⁴⁴² reduce the implementation deficit,⁴⁴³ which would lead to a higher end-result. This process is illustrated below.

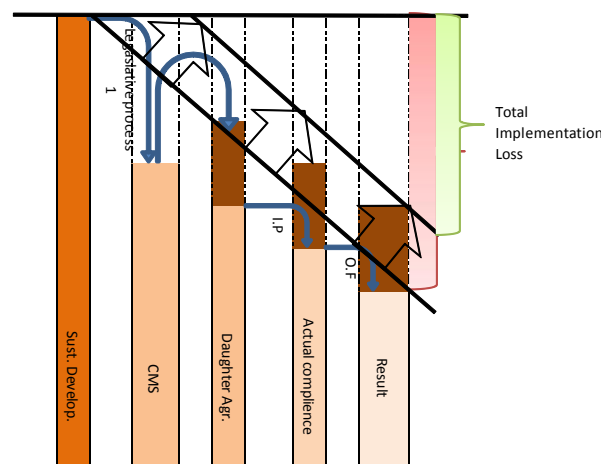


Figure 4.2 Counteracting Implementation Loss, from Westerlund 1997.

The reduction of the implementation deficit comes from the fact that the daughter agreements contain stringent substantive rules than CMS. Such rules could be an obligation to undertake an EIA according to the CBD, if the party are bound by that convention. This would not be an unreasonable requirement as parties to CBD already are required to do so. If the daughter agreement does not contain stringent substantive rules then the deficit would be inline with the previous figures. However, there is not only a need to put more stringent substantive rules in a daughter agreement, both the goals and the type of actions and measures are required to achieve the goal must be clarified. A good example would be the Saiga MoU. The Saiga MoU is also the only MoU taken into account, which takes into account the inter-generation equity as well as the responsibility present generation have for future once. Another example would be the MSC MoU, who mentioned the cultural value of the manatees and the small cetaceans, but only in the relation to the living communities. As a result, other MoUs is not considered agreements inline with the

442 See Above section 2.4.

443 However the reduction of the implementation deficit would not be linear with the improvement placed in the substantive rules.

principle of sustainable development because they do not take into account inter-generation equity.⁴⁴⁴

11.5 SUMMARY

This completes the analysis of the covered biodiversity-related agreements. The analysis shows a wide range of strategies for dealing with conservation of various types of biodiversity. While it shows that there is an underlying structure in which the approach to biodiversity conservation must be based on the precautionary principle where the lack of scientific data should not prevent states from taking actions. This is important because there seems to be recognised that scientific information is only one type of information to take into account, the other being unknown and therefore the precautionary principle.

More important, it demonstrates the need for a coordinated approach, rather than a cooperative approach. This is apparent throughout the documents, which includes systems that are not limited to a national jurisdiction. On the other hand, WCH shows the need to cooperate when dealing with issues enclosed within the jurisdiction of a state.

All the covered instruments are unique in some sense. CCAMLR is unique in the sense that it covers areas beyond national jurisdiction. This makes it possible to have a commission with a strong mandate to deal with the conservation of the resources in the area. Ramsar is unique covering one of the most important ecosystems, which have a variety of functions, not only as a waterfowl habitat but also to the economy of local communities. Despite the importance wetlands play in the global ecosystems, it is up to states to manage them. The contribution of Ramsar is first and foremost through the development of the concept of *wise use*.

CBD is probably the UNCLOS of the land, covering all areas not covered by a specific agreement. It's probably the future for the protection of biodiversity at the global level. The number of parties to the convention shows that it is a politically important convention to sign. The future extent of it will be to take further steps to embrace the contemporary patchwork of the biodiversity-related agreements.

CMS on the other hand, has an important role in the conservation of biodiversity not contained within one jurisdiction. CMS also stands out as its main purpose is to conclude agreements in order to effectively contribute to the conservation of the Earth's

⁴⁴⁴ See Above section 2.1.

biodiversity. For this purpose, the last section will give concrete proposals to CMS based on the above analysis.

12 RECOMMENDATIONS

Every legal documents need to be reassessed once and a while. The context in which they work is changing, and the ways in how to deal with the objects they cover. This analysis has showed that this becomes especially clear in the filed of nature conservation. CMS does, as one of the older biodiversity-related convention, suffer from its pre-Rio status. Principles that now more or less are takes for granted when approaching biodiversity conservation is lacking. Principles as the precautionary principle, the inter-generation equity, and the requirement to conduct an EIA, are not clearly present in the text. As principles and methods play an increasingly important part in the contemporary management of biodiversity this section will give propose to CMS how they can increase their contribution to the preservation of the Earth's biodiversity. The proposals in this section are based on the analysis in the previous parts, and take into consideration the often difficult financial situation most MEA secretariat faces.

12.1.1 RECOMMENDATION 1

As mentioned, the main aims of CMS are to serve as a framework convention allowing stand-alone *Agreements* to be concluded under its aegis, and as an umbrella convention for the conclusion of *Memorandum of Understanding*. Both types of agreements aim to conserve migratory species, there are, however, vast differences between them. One of the major differences is their legal status. Agreements are legally binding and contain obligations, MoUs on the other hand, are regarded as non-legally binding instruments and without legal obligations, but as discusses above, they do contain official commitments by the signed institution. Despite this CMS seems to prefer to work with MoUs. However there seems to be no *structural approach* in the preparation of these. This is opposite to the approach taken by WCH, which has adopted a standard agreement to facilitate the process of concluding agreements. These documents adopted by WCH is not static, they are adoptive to the particular situation and circumstances, but brings a basic structure.

With regards to MoU produced under the aegis of CMS, it is at first not easy to get a comprehensive overview, referring both to specific texts, but also to the content. Secondly, it is unclear whether there is a coordination system in place *between* the MoUs, with reference to coordination at secretariat level. Implementation deficits may thus take place at least as follows:

- (a) Although a MoU will be evaluated as effective, when it come to conservation of migratory species, there will be difficulty to compare that MoU with others, in order to improving other and future MoUs. One reason is the difference in structure and content. Obviously the content of a text cannot be the same in every situation as each context is unique. The structure, however, could be similar in order to make it easier to get an overview of how each MoU addresses conservation in their special case. A clearer distinction between general and specific provisions, relating to specific animals, would have this clarifying effect. A clear structure would also contribute to a reduction in the overall implementation deficit, which takes place in all MoUs, because it would help to correct these instruments at party meetings, according to feedback. The response data referred to here is not only the feedback information received in relation to specific MoUs but also feedback gained from other MoU. For this to be possible coordination must take place at the secretariat level.

- (b) The second implementation losses occur as a result of the lack of coordination between the personal responsible for each specific MoU. The losses come from an error in the feedback system, resulting in the losses of feedback. This loss leads to decreased ability to take care of the information available, which may play an important part in strengthening the preservation contribution of the MoU.

- (c) As a result of the losses of information, there will not be an effective improvement enhancement in future MoUs. In this case there is a risk for new MoUs to be based upon the MoU, which is considered to be the best working MoU, though this MoU may contain bad parts. As a result, good parts in otherwise poorly functional MoUs are disregarded.

Recommendation 1

For the purpose of streamline the process of concluding MoU the secretariat should continue the work on the Guideline for Agreement. The main focus of this work has to be MoUs, rather than Agreements, as MoUs seems to be the focus area.

The process of formulating a guideline has to be an ongoing process, where feedback information as mentioned has to result in the improvement of the guideline.

Recommendation 1.1

Enhance the cooperation and coordination at secretariat level between personal responsible for the different MoUs. This in order to better exchange feedback information, and discuss the future shapes of MoUs, whether or not these should cover specific animals or specific hinders.

12.1.2 RECOMMENDATION 2

CMS is, as described above, special in comparison with other biodiversity-related MEA. First of all, there is a difference in the approach CMS takes to contribute to the conservation of the Earth's biodiversity. While CMS is to contribute by concluding other agreement, other MEAs are to contribute through the substantial rules of their *own* treaty text; this has two impacts on the conclusion process of MoUs. First, MoUs must provide better substantive rules, and not just procedural rules, than the text of CMS. Secondly, when CMS focus on concluding MoUs focus must be to make each new MoU better than the previous once. To do this process every time, however, is time consuming, thus the above recommendation to conclude the Guideline for Agreement, in order to streamline the process of MoU conclusion. The process of improving the agreement seems to work in the event of legally binding agreements, such as AEWA and EUROBATS. Regardless of why it does not work on the MoU is due to the lack of legal knowledge, of a non-effective dissemination of information from other MoUs or administrative reasons are difficult to say and require further analysis.

With particular regards to the MoUs there also seems to be a lack of reassessment if it is necessary to continue along the path. For example, there are no sunset clauses, and few of the MoU includes an assessment of whether the cooperation is to be terminated. The purpose of this reassessment is to see if the MoU has the desirable effect for which it was introduced, or if the cooperation shall be suspended so as not to draw vital resources away from other more potential viable projects of cooperation and coordination. In this aspect, the way CMS uses MoU has potential side effect for parties to CMS. This is due to the following. As the MoUs does not require ratification, they can not contain subscription rules. Thereby, the signatories of a MoU do not contribute to the operational cost of the MoU. As a result, resources invested in MoUs by the secretariat of CMS draws resources away from measures that should have been in favour of CMS parties.⁴⁴⁵ That is also why a MoU should be possible to terminate if it is not regarded to be affective in contributing to the preservation of migratory species. In this case, there must be a function where the secretariat is able to stop providing the secretariat function.

Furthermore, as a result of MoUs being signed also by non-CMS members, and the often lack of connections to the text of CMS, there is a risk in losing important aspects of CMS. One aspect would be the inter-generation equity, which is in the preamble of CMS. This principle is as mentioned above, important as agreement that does not take into account the principle of inter-generation equity is not in line with the principle of sustainable development, as the inter-

⁴⁴⁵ See, for example, Saiga MoU, which contains two CMS parties and two non-CMS parties.

generation equity is a core principle within that principle. As a result, most MoUs concluded under the aegis of CMS can not be seen as an instrument that contributes to sustainable development. It must be remembered that although the non-legally binding nature MoUs stand alone as binding agreements of formal commitments. It is therefore important to connect these commitments to important international principles, such as sustainable development and inter-generation equity.

While it can be argued that a MoU concluded under the aegis of CMS which does not take into consideration the total scope of the convention, where the total scope will be the text, the aim and objectives, *as well* as the preamble, can not be seen as a MoU under the convention. It can rather be regarded as a MoU concluded under the aegis of the UNEP/CMS Secretariat, where the secretariat is only a contractual part assuming the obligation to provide secretarial services. This follows from the obligation of a treaty organ to work according to the vision, aim and objective of its convention. This obligation to work within the frames of its convention is based on the fact that the *Raison d'être* for the UNEP/CMS Secretariats is the text of the convention.⁴⁴⁶ As a result, for the UNEP/CMS Secretariat not to take into account the full scope of the convention would therefore not be inline with their obligations as an organ of that convention. A side effect of not doing so is that the secretariat is contributing to the implementation losses. It follows from the above, as self-standing agreements, not connection to the text of CMS, the CMS/COP resolutions and decisions do not have an impact on the MoUs.

446 Chayes *et al.*, *supra* footnote 202, pp. 274-275.

Recommendation 2

The MoU must contain stricter substantive provisions than CMS. These provisions also should be more detailed, for example as in the Supplementary Nagoya Protocol.

Recommendation 2.1

The secretariat should consult legal knowledge in the field of international environmental law with knowledge of sustainable development when concluding MoUs.

Recommendation 2.2

The secretariat should establish an internal review mechanism to ensure so each MoU are in line with the overall goal of the convention.

Recommendation 2.3

The Inter-generation equity should be incorporated into the MoU to enable them to be truly agreement for sustainable development.

Recommendation 2.4

The Secretariat should consider including some kind of termination clause in MoUs.

12.1.3 RECOMMENDATION 3

Formal non-compliance procedures are not common in international treaties and this thesis has shown that they are even more scarce within biodiversity-related MEAs. A good example where they exist would be the Aarhus Convention, the Kyoto Protocol to the United Nations Framework Convention on Climate Change,⁴⁴⁷ CITES, and the Bern Convention for the Conservation of European Wildlife and Natural Habitats (Bern convention).⁴⁴⁸

According to the Bern convention the secretariat has the possibilities to initiate an investigation into allegations of non-compliance and inform the COP.⁴⁴⁹ This procedure has a shame and blame function, where the non-complying state has to answer for their disobedience at party meetings. Also as mentioned, there are steps taken in the Cartagena protocol to establish a formal non-compliance procedure, by adopting a procedure for the decision-making body of the protocol to take measures to address non-compliance. Given the nature and extent of the Cartagena protocol there are limits to the possibilities of drawing conclusions in order to evaluate whether such a procedure would be appropriate for CMS. In the case of CITES, their enforcement is largely

447 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, EIF 16 February 2005, U.N.T.S. Vol. 2303, p. 148 (Kyoto Protocol).

448 Bern Convention for the Conservation of European Wildlife and Natural Habitats, Bern, September 1979, EIF 1 June 1982, (Bern Convention); available at <http://www.coe.int/t/dg4/default_en.asp>.

449 Louka, *supra* footnote 53, pp. 126-129.

linked to the presence of state borders, where actions can be taken, this would therefore not be a good example for CMS.

As shown in the above analysis, enforcement within the field of biodiversity has to take place at the national level, and by the national legal system, to be effective. This is the result of how MEA works, where implementation to preserve species must take place at national level. Therefore, enforcement should be on the same level. In addition, following the principle of sovereignty, a state can not be forced to comply by means other than peacefully means. Thus, if the available means are not sufficient incentive to change the behaviour of the non-complying state, and the cost of non-compliance is less than the cost of compliance, compliance will take place to a lesser degree.⁴⁵⁰

The case is further complicated by the way CMS works. By using non-legally binding agreement there obligation to follow then, in relation to other signatories, is nil. Therefore, there is nothing to enforce. As a result of the difference between CMS and other MEAs, a comparison of compliance and enforcement regimes between these instruments, is not be worth the effort. This is due to a proposal for enforcement procedure for CMS would only have an effect in term of CMS, and the few obligations it contain. Therefore, the question is if enforcement procedures are an adequate way to address the problem with non-compliance of CMS and associated instruments. It would be better to focus on improving these instruments and to find ways to facilitate their implementation. One way would be to make it more clear what to do. To *improve the conservation status* will only be clear if the text defines what this means.

Another way to improve them would be to make the undertakings a part of the corpus of national law, such as the approach taken by the supplementary Nagoya protocol. This is possible because, according to the signing of the responsible institution, the official undertakings will eventually results in duties of national stakeholders. This obligation is the result of actions taken as a result of the signed MoU. An example of such obligation can be the obligation not to hunt a specific animal. On the other hand, as a consequence of the existence of obligation follows that there is a right, and these rights must be enforceable within the national state. This was the case in the Lagoon of Lac Bay case, where non-legally binding documents resulted in obligations and rights. In this case the right for the state to require an EIA, and the requirement for a stakeholder to perform one. The need to include these undertakings within the corpus of obligations of the signing institution opens an opportunity for an entity, with the correct legal position to enforce this

450 See Guzman, *supra* footnote 205, *et passim*, particularly pp. 119-126 and 150-153.

undertaking at the national level, which would undoubtedly have a significant positive effect on the reduction of implementation deficit, and the conservation of migratory species. This is the idea behind the Aarhus convention. As a result, would the incorporation of these undertaking within the corpus of national law as a viable step in the contribution to preserve the Earth's biodiversity. This could not take place if the undertakings are without meaning at the national level.

Recommendation 3

CMS should change and streamline the way they approach their purpose, this as a result of the major differences between CMS and other MEAs. This difference must be reflected in the way CMS works.

Recommendation 3.1

Focus of CMS work should be on the agreement concluded under its aegis.

Recommendation 3.2

Incorporate provisions so the official undertakings in the signed MoU are applicable to national law and legislation, such as has been done in the Supplementary Nagoya Protocol. The Aarhus convention would be a good place to start.

Recommendation 3.3

For the above purposes a Review Body should be established to evaluate CMS.

Recommendation 3.4

More clearly incorporate public participation, as the public play, especially in the field of biodiversity protection, a key role. A reference to the Aarhus Convention would make a significant contribution to this.

12.1.4 RECOMMENDATION 4

As the nature of migratory species is transboundary, it follows from the above that states have a responsibilities when managing them, both when it comes to *utilization* and *management*. Obligations under the CMS are primarily linked to the text of the convention, as discussed above the preamble is more of a source of interpretation of treaty obligation. Thus giving the absence of the wise use of the term in the treaty text gives some what an illusory picture over the scope of the Convention. Despite the absence of the wise use, the purpose of the convention is primarily not to completely ban the utilization of these species, but to preserve them for the benefit of present and future generations. The same can be said of the MoUs. On the other hand, as a species never has been delisted from one of the appendices the scope of the conventions seems to be of a more protective convention. Meanwhile, the non-delisting of species can be an answer to the initial

question concerning the MEAs in general, and especially CMS, effectively contribute to preserving Earth's biodiversity.

As shown in the Ramsar convention, the concept of *wise use* plays an important role in the preservation of wetlands, this by imposing more stringent obligations on the parties, such as the obligation to conduct an EIA. As mentioned, the concept of *wise use* as it is incorporated into CMS is more of a political statement reminding the parties to utilize these resources in a sustainable way, not obligating parties to do so. This is not a strong base on which CMS could put further obligation on the parties by COP decisions. Sustainable use may be interpreted as the set of customary international customary law, based upon the many instruments containing this provision, and the fact that a large number of states take this into consider in their utilization.

CMS is not without foundation for additional obligations. A strong foundation for obligations to introduce stronger measures to conserve migratory species is the concept of *sustainable wildlife management*. This concept is as discussed above a broader concept than *sustainable uses*, and includes both the principles of inter- and intra-generation equity, *as well as sustainable use*. Connecting this to the fundamental principle of CMS there is a case. In the fundamental principle parties agree to take action individually or jointly, in order to conserve migratory species with an unfavourable status and their habitats.⁴⁵¹ As a result, unless the parties apply a sustainable wildlife management to migratory species, and their habitat, the status of these will automatically be unfavourable, and the parties are obligated to take actions.⁴⁵² What complicates the matter is the definition of the term *wise wildlife management*, which is neither defined in the convention text or COP document. This opens up for idiosyncratic approaches at administrative level when this term will be defined, if at all regarded.⁴⁵³ To reduce the idiosyncratic approach to this concept the term must be defined. Whether it contains, or should be considered including the basis for the obligations to carry out an EIA, or to adopt a precautionary approach when it developed areas and habitats important for migratory species, is not within the scope of this study to say. This is within the mandate of Scientific Council.⁴⁵⁴ Despite this, by analysing the MEAS in this study, it becomes clear that the precautionary principle and the ecosystem approach is an intergraded part of a *sustainable wildlife management*, as sustainable wildlife management may not take place if there is no precautionary approach, and no consideration of the eco-system.

451 Article II (1), CMS.

452 See Article I (c) (4) and (d), CMS.

453 Strangely the term seems to be disregarded at any level, national or other.

454 See Resolution 1.4, para. 6 (b) CMS/COP-1, where the Scientific Council is given the mandate to “for formulate guidelines for the application of such terms of the Convention as ‘endangered’ and ‘migratory species’”. The word *such* does not confine the mandate of the Scientific Council to formulate guidelines of the two mentioned terms.

Recommendation 4

The Scientific Council should define the term and formulate guidelines for the application of *wise wildlife management*. In any definition and guideline of this term the total scope of the convention should be taken into account, incorporating both vital parts of the preamble as well as international principles. The obligation to take these into account follows from the theory of *Raison d'être*, as mentioned above.

Recommendation 4.1

More clearly incorporate into MoU international principles used in other MEAs, such as the precautionary approach, and the eco-system approach, since they play vital parts in conservation as well as they are a prerequisite to lead to sustainable development.

Recommendation 4.2

As a result of migratory species being of a transboundary nature CMS needs to be the connecting hub when concluding agreements. Therefore MoU should contain reference to other MEAs signed by are parties.

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The Convention Concerning the Protection of the World Cultural and Natural Heritage	www.whc.unesco.org
Convention on the Conservation of Antarctic Marine Living Resources	www.ccamlr.org
Convention on the Conservation of Migratory Species of Wild Animals	www.cms.int
Convention on Biological Diversity	www.cbd.int

APPENDIX 1

Article V

Guidelines for AGREEMENTS

1. The object of each AGREEMENT shall be to restore the migratory species concerned to a favourable conservation status or to maintain it in such a status. Each Agreement should deal with these aspects of the conservation and management of the migratory species concerned which serve to achieve that object.
2. Each AGREEMENT should cover the whole of the range of the migratory species concerned and should be open to accession by all Range States of that species, whether they are Parties to this Convention.
3. An AGREEMENT should, wherever possible, deal with more than one migratory species.
4. Each AGREEMENT should:
 - a) identify the migratory species covered;
 - b) describe the range and migration route of the migratory species;
 - c) provide for each Party to designate its national authority concerned with the implementation of the AGREEMENT.
 - d) establish, if necessary, appropriate machinery to assist in carrying out the aims of the AGREEMENT, to monitor its effectiveness, and to prepare reports for the Conference of the Parties;
 - e) provide for procedures for the settlement of disputes between Parties to the AGREEMENT; and
 - f) at a minimum, prohibit, in relation to a migratory species of the Order Cetacea, any taking that is not permitted for that migratory species under any other multilateral Agreement and provide for accession to the AGREEMENT by States that are not Range States of that migratory species.
5. Where appropriate and feasible, each AGREEMENT should provide for but not be limited to:
 - a) periodic review of the conservation status of the migratory species concerned and the identification of the factors which may be harmful to that status;
 - b) co-ordinated conservation and management plans;
 - c) research into the ecology and population dynamics of the migratory species concerned, with special regard to migration;
 - d) the exchange of information on the migratory species concerned, special regard being paid to the exchange of the results of research and of relevant statistics;
 - e) conservation and, where required and feasible, restoration of the habitats of importance in maintaining a favourable conservation status, and protection of such habitats from disturbances, including strict control of the introduction of, or control of already introduced, exotic species detrimental to the migratory species;
 - f) maintenance of a network of suitable habitats appropriately disposed in relation to the migration routes;
 - g) where it appears desirable, the provision of new habitats favourable to the migratory species or reintroduction of the migratory species into favourable habitats;
 - h) elimination of, to the maximum extent possible, or compensation for activities and obstacles which hinder or impede migration;
 - i) prevention, reduction or control of the release into the habitat of the migratory species of substances harmful to that migratory species;
 - j) measures based on sound ecological principles to control and manage the taking of the migratory species;
 - k) procedures for co-ordinating action to suppress illegal taking;
 - l) exchange of information on substantial threats to the migratory species;
 - m) emergency procedures whereby conservation action would be considerably and rapidly strengthened when the conservation status of the migratory species is seriously affected; and
 - n) making the general public aware of the contents and aims of the AGREEMENT.

Appendix 1