



**CONVENTION ON
MIGRATORY
SPECIES**

Distribution: General

UNEP/CMS/COP12/Doc.20/Rev.1
26 July 2017

Original: English

12th MEETING OF THE CONFERENCE OF THE PARTIES
Manila, Philippines, 23 - 28 October 2017
Agenda Item 20

NATIONAL LEGISLATION TO IMPLEMENT CMS PROVISIONS

(Prepared by the Secretariat)

Summary:

This document proposes to establish a National Legislation Project to assist Parties in implementing legally binding Convention obligations. Subject to approval by Parties to daughter Agreements of CMS, identified obligations of those Agreements would also be covered by the project.

Close cooperation in the development and implementation of the project is proposed with the CITES Secretariat, which has been running a National Legislation Project since 1992 providing the model for the proposed project.

The implementation of the attached draft Resolution and Decisions will contribute towards the implementation of targets 3, 4, 6 – 11 and 13 of the Strategic Plan for Migratory Species 2015 – 2023.

Rev.1 corrects typos relating to the reference to Convention obligations quoted in the document.

NATIONAL LEGISLATION TO IMPLEMENT CMS PROVISIONS

Background

1. International agreements are generally not self-executing. This means that they cannot be fully implemented until domestic measures have been adopted for that purpose. Domestic measures can include legislation, orders, policies, etc. and carry different weight in terms of their enforceability at the national level. Legislation, being enacted by a legislature or governing body of a country, is considered to provide the highest degree of certainty and enforceability, given the procedure of its adoption and the possible judicial consequences of non-compliance.
2. International agreements may include obligations that require Parties to achieve, in each and every case, a particular result prescribed by the obligation. Each Party, however, has the discretion to choose the means by which it achieves that result, such as the CMS prohibition against taking Appendix I-listed species. [These are known as obligations of result]. International agreements may also include obligations that require Parties to behave in a certain manner. A particular outcome is not required but a particular action is required, such as the CMS obligation on Parties to endeavour conserving and restoring habitat or preventing, removing or minimizing barriers to migration. [These are known as obligations of conduct.] In either case, these obligations must be implemented through legislation or other domestic legal instruments.
3. It is therefore crucial that CMS Parties (and the Parties of its daughter Agreements) have national legislation and domestic measures in place allowing them to implement and enforce the Convention.

CITES National Legislation Project

4. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) National Legislation Project was established in 1992 to provide legislative analyses and assistance to Parties in complying with CITES obligations ([Resolution Conf. 8.4 \(Rev. CoP15\)](#)). The project is successfully assisting Parties in implementing CITES by meeting the four minimum requirements to national legislation established by the Convention and identified in the Resolution. This has allowed for a concerted effort by the CITES Parties and Secretariat to ensure that the Convention's obligations are implemented and enforced under national laws, and that international trade in CITES-listed species is legal, sustainable and traceable.
5. The CITES National Legislation Project is ongoing (see report to the 17th meeting of the Conference of the Parties to CITES in document CoP17 Doc. 22). It involves *inter alia*:
 - a) The analysis and mapping of national legislation implemented by Parties in fulfilling CITES obligations.
 - b) The creation of guidance materials to assist Parties in drafting national legislation.
 - c) The publication of a draft model law in several languages upon which Parties can base their own legislation.
 - d) Targeted support to Parties including through:
 - i. responses to any queries made regarding aspects of the implementation process;
 - ii. national legislation workshops;
 - iii. providing observations and recommendations on draft legislation submitted to the Secretariat for comments;

- iv. providing small scale financing to Parties requesting such assistance to carry out legal analysis and to prepare draft legislation;
 - e) Reports to the CITES Conference of Parties and Standing Committee outlining progress made by the CITES National Legislation Project in analyzing the legislation of Parties and assisting the implementation of national laws that fulfill Convention obligations.
 - f) Compliance measures recommended by the CITES Standing Committee for Parties that fail to adopt national legislation to effectively implement Convention obligations.
6. Based on the four minimum requirements to national legislation established by CITES Resolution 8.4 (Rev. COP15), CITES places the legislation of its Parties into three categories. Currently, 53.6% of Parties' legislation fall within Category 1 (legislation that is believed generally to meet the requirements for implementation of CITES); 23 per cent fall within Category 2 (legislation that is believed generally not to meet all of the requirements for the implementation of CITES); and 19.1 per cent fall within Category 3 (legislation that is believed generally not to meet the requirements for the implementation of CITES). Since its inception, the CITES National Legislation Project has helped increase the number of Parties that have implemented CITES obligations through national legislation from 12 per cent to 53.6 per cent. Many other Parties have been assisted in making significant strides towards legislative compliance. (Detailed information about the CITES National Legislation Project can be found under: <https://cites.org/legislation>.)

A National Legislation Project for CMS

Justification

7. The Analysis and Synthesis of National Reports prepared by 59 CMS Parties for the Conference of Parties at its 11th meeting (COP11) ([UNEP/CMS/COP11/Doc.19.3](https://www.unep.org/cms/cop11/doc193)) shows that the taking of Appendix I-listed species was prohibited for the following groups of species: birds (92 per cent), aquatic mammals (64 per cent), reptiles (51 per cent), terrestrial mammals (including bats; 32 per cent), and fish (41 per cent). However, the analysis was based on the reports of only those Parties that had submitted National Reports, i.e. 59 of 120 Parties. Given that the majority of those 59 Parties do not currently have legislation in place prohibiting the taking of Appendix I-listed species, particularly for taxa other than birds, it is recommended that a national legislation project be established for CMS Parties similar to that of CITES.

Scope

8. The Convention sets one obligation of result, which each Party has to implement through national legislation. This is contained in Article III, paragraph 5, which provides that *Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species*. "Taking" is defined by the Convention as *taking, hunting, fishing, capturing, harassing, deliberately killing, or attempting to engage in any such conduct* (Article I, paragraph 1 (i)). This constitutes a strict obligation for which national legislation must prohibit 'taking', unless a Party decides to apply one of the four exceptions laid out in subparagraphs 5 (a)-(d) of Article III. The exceptions are allowed provided that they *are precise as to the content and limited in space and time*. Given that CMS-listed species occur in the terrestrial as well as marine environment, the required laws are likely to extend over multiple fields of laws. These might include biodiversity and forestry laws, fisheries and hunting laws, and laws applicable to extractive resources, energy, land-use and infrastructure. This obligation to prohibit taking of Appendix I-listed species is considered to form the 'minimum core obligation' of the CMS National Legislation Project, because national legislation is required to implement

the prohibition.

9. The Convention sets two further obligations, which are obligations of conduct as they could be implemented through a number of domestic measures, including legislation and policies. These obligations are contained in Article III, paragraph 4 (a) and (b). Paragraph 4 (a) provides that *Parties that are Range States of a migratory species listed in Appendix I shall endeavour to conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction.* Paragraph 4 (b) provides that *Parties that are Range States of a migratory species listed in Appendix I shall endeavour to prevent, remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species.* While the former obligation entails actions relating to land-use regulations, ranging from the establishment of permanent protected areas to seasonal use restrictions of a particular habitat, the latter obligation requires actions to be taken where activities or obstacles prevent the migration of a listed species, or impede migration to the detriment of the species, in cases such as road and rail constructions, border fencing, powerlines and renewable energy infrastructure. Since both obligations binding on conduct, there might be a variety of domestic measures including legislation and polices Parties can take to implement these obligations. However, since they are not required to be implemented through national legislation, they are not considered to form part of the 'minimum core obligation'.

Enforcement of legislation implementing relevant provisions of Article III, paragraph 5.

10. Although it is not an obligation under the Convention, in order to ensure the effectiveness of legislation pertaining to the taking of species, relevant authorities, such as forestry, fisheries and port authorities, police or customs should be authorized to search and seize. Likewise, penalties with reasonable punitive measures, including fines, suspensions, etc. ('appropriate enforcement measures') should be stipulated in the event of a breach. Here synergies could be gained if Parties aligned their domestic measures with those stipulated for a breach in relevant CITES obligations.

Link to proposed CMS Review Process

11. There is a close link between this proposed project and the proposed review mechanism for CMS set out in document [UNEP/CMS/COP12/Doc.22](#). The Working Group on the Establishment of a Review Process for CMS suggests that the scope of the proposed review mechanism should mainly be the implementation of obligations relating to Appendix I-listed species. A Party that has adequate legislation in place prohibiting the taking of Appendix I-listed species, including adequate enforcement mechanisms and penalties, is less likely to be found in non-implementation of its obligations relating to Appendix I-listed species.

Proposed execution of the CMS National Legislation Project

12. It is proposed that the National Legislation Project be executed in the following manner:

<p>➤ Secretariat provides questionnaire to Parties.</p>	<p>The Secretariat provides a questionnaire to the Parties to enable Parties to identify whether they have in place adequate legislation related to Article III, paragraph 5 ('minimum core obligation') and domestic measures related to Article III paragraphs 4 (a) and 4 (b).</p>
<p>➤ Parties complete and submit the questionnaire to Secretariat.</p>	<p>Parties should submit their questionnaires to the Secretariat within one year of the date on which the Secretariat circulated the questionnaire to the Parties.</p>
<p>➤ Secretariat analyses information received and categorizes legislation and domestic measures in place.</p>	<p>Upon receipt of a questionnaire, the Secretariat will categorize the legislation and domestic measures in place for each Party as follows:</p> <p>a) Category A: Legislation is in place that implements the 'minimum core obligation' contained in Article III, paragraph 5 (a)-(d) in relation to species occurring within the range of a Party.</p> <p>b) Category A+: Legislation and domestic measures are in place as defined under Category A, including 'appropriate enforcement measures'.</p> <p>c) Category A++: Legislation and domestic measures are in place as defined under Categories A and A+, as well as domestic measures implementing either Article III, paragraph 4 (a) or Article III, paragraph 4 (b).</p> <p>d) Category A+++ : Legislation and domestic measures are in place as defined under Category A, A+ and A++, as well as domestic measures implementing both Article III, paragraph 4 (a) and Article III, paragraph 4 (b).</p> <p>e) Category B: No legislation is in place that implements the 'minimum core obligation' contained in Article III, paragraph 5 (a)-(d) in relation to species occurring within the range of a Party.</p>
<p>➤ Secretariat liaises with National Focal Points regarding the categorization and further actions to be taken.</p>	<p>The Secretariat informs Parties on the categorization of their legislation and domestic measures as well as recommended further actions.</p>
<p>➤ Parties inform the Secretariat how they intend to implement the 'minimum core obligation'.</p>	<p>Parties indicate within six months of having received the categorization and recommended actions from the Secretariat the procedures, action and time-frames that are envisaged to adopt the measures necessary for effective implementation of the 'minimum core obligation'. Parties may also wish to indicate other domestic measures they are intending to take to implement the measures which would place their legislation and domestic measures into categories A+ to A+++.</p>
<p>➤ Parties take appropriate measures to implement the 'minimum core obligation' and other measures, as relevant.</p>	<p>Parties take appropriate measures to implement the 'minimum core obligation' in accordance with their indicated procedures and time-frames. The Secretariat, in cooperation with relevant partners, will support Parties, as necessary, through the provision of, <i>inter alia</i>, guidance materials, model laws, technical assistance and capacity building workshops.</p>
<p>➤ Secretariat reports to the Standing Committee and the Conference of the Parties on the implementation progress of this project.</p>	<p>The Secretariat will report progress of individual Parties with the implementation of this project to the Standing Committee and the Conference of Parties at each of its regular meetings.</p>

Technical support and funding requirements of the National Legislation Project

13. The Secretariat will work in close cooperation with relevant partner organizations and experts to develop guidance materials, model laws and organize capacity-building workshops for Parties.
14. The CITES National Legislation Project has shown that funding is required both to analyse legislation submitted by Parties as well as support Parties with the development of national legislation. Funding for the CITES National Legislation Project is currently received for consultancy services, small-scale funding agreements with Parties, regional workshops and travel of Secretariat staff. The total amount budgeted to implement the National Legislation Project in the intersessional period between the 17th and 18th meeting of the CITES Conference of the Parties amounts to approximately US\$350,000 as well as contributions from UN Environment.

Cooperation with CITES on the National Legislation Project

15. The [CMS-CITES Joint Work Programme 2015-2020](#) encourages the Secretariats of CMS and CITES to jointly carry out activities of mutual interest. As a species listed on Appendix I of CMS is in most instances also listed on Appendix I or II of CITES, it is in the mutual interest of both Conventions that Parties have national laws in place that reinforce the objectives of both Conventions. Furthermore, the Joint Work Programme encourages the Secretariats to pursue capacity building and fundraising activities together. Joint fundraising and joint workshops for enhancement of Parties' capacities with regard to developing national legislation thus fall squarely within the remits of the Joint Work Programme. Consultations between the Secretariats are ongoing as to the specific activities that could be undertaken jointly on the National Legislation Projects, subject to the availability of external funding.

Discussion and analysis

16. The establishment of a National Legislation Project by the 12th Conference of the Parties, through the adoption of the draft Resolution contained in Annex 1 and the decisions contained in Annex 2 of this document, would further Convention goals in that:
 - a) Parties would be assisted in understanding and implementing the obligations under the Convention;
 - b) Parties would be further assisted in drafting specific legislation that implements Convention obligations;
 - c) The CMS Secretariat would be better informed as to where legislation can be implemented to improve the conservation status of migratory species, comply with Convention obligations, and achieve Convention goals;
 - d) There would be greater transparency regarding substantive progress towards achieving Convention goals at a national level; and
 - e) There would be greater accountability by Parties, the CMS Secretariat, and the collaborating Agreement Secretariats in making substantive progress towards achieving Convention goals.

Recommended Actions

The Conference of the Parties is recommended to:

- a. Adopt the draft resolution contained in Annex 1 of this document;
- b. Adopt the draft decisions contained in Annex 2 of this document.

ANNEX 1

PROPOSED RESOLUTION

NATIONAL LEGISLATION TO IMPLEMENT CMS PROVISIONS

Recalling Article III, paragraph 5, which states that *Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species, with possible exceptions laid out in subparagraph 5 (a)-(d),*

Also recalling Article III, paragraph 4 (a), which states that *Parties that are Range States of a migratory species listed in Appendix I shall endeavour to conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction,*

Further recalling Article III, paragraph 4 (b), which states that *Parties that are Range States of a migratory species listed in Appendix I shall endeavour to prevent, remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species,*

Confirming Resolution 11.16, which *urges Parties and encourages non-Parties to ensure adequate national legislation to protect migratory species is in place and properly implemented and enforced, in line with CMS and its relevant associated instruments, especially the African-Eurasian Waterbird Agreement and the Raptors Memorandum of Understanding, and other international instruments, especially the Bern Convention as well as Resolution 11.22, which invites Parties that have not already done so to develop and implement national legislation, as appropriate, prohibiting the live capture of cetaceans from the wild for commercial purposes,*

Convinced that the implementation of the Convention must be a constant concern to the Parties and CMS-related bodies if the objectives of the Convention are to be achieved,

Highlighting the substantial progress made by Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in ensuring compliance with CITES obligations and the fulfilment of CITES objectives, through its National Legislation Project,

*The Conference of the Parties to the
Convention on the Conservation of Migratory Species of Wild Animals*

1. *Agrees* to establish the CMS National Legislation Project to support strengthening the implementation of the Convention through national legislation and support Parties, if needed, in developing or improving relevant national legislation;
2. *Directs* the CMS Secretariat, subject to the availability of external resources, to:
 - a) Identify those Parties whose national legislation does not provide them with the clear authority to prohibit the taking of Appendix I-listed species (the 'minimum core obligation'), including exceptions, if applied, as laid out in Article III, paragraph 5 of the Convention;
 - b) Further identify those Parties whose domestic measures do not provide them with the clear authority to:

- i. Penalize action in contravention of Article III, paragraph 5 through punitive measures such as fines or suspension, etc. ('appropriate enforcement measures');
 - ii. Endeavour to conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction as stipulated in Article III, paragraph 4 (a);
 - iii. Endeavour to remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species as stipulated in Article III, paragraph 4 (b);
 - c) Place the legislation and domestic measures of each Party identified in one of the following categories:
 - i. Category A: Legislation is in place that implements the 'minimum core obligation' contained in Article III, paragraph 5 (a)-(d) in relation to species occurring within the range of a Party.
 - ii. Category A+: Legislation and domestic measures are in place as defined under Category A, including 'appropriate enforcement measures'.
 - iii. Category A++: Legislation and domestic measures are in place as defined under Categories A and A+, as well as domestic measures implementing either Article III, paragraph 4 (a) or Article III, paragraph 4 (b).
 - iv. Category A+++ : Legislation and domestic measures are in place as defined under Category A, A+ and A++, as well as domestic measures implementing both Article III, paragraph 4 (a) and Article III, paragraph 4 (b).
 - v. Category B: No legislation is in place that implements the 'minimum core obligation' contained in Article III, paragraph 5 (a)-(d) in relation to species occurring within the range of a Party.
 - d) Seek from each Party so identified information indicating the procedures, action and time-frames that are envisaged in order to adopt the measures necessary for effective implementation of the 'minimum core obligation';
 - e) Assist Parties in implementing the 'minimum core obligation' through national legislation;
3. *Urges* all Parties that have not adopted adequate legislation for effective implementation of the 'minimum core obligation' set out in paragraph 2 (a) above to do so;
 4. *Encourages* all Parties that have not adopted domestic measures for the implementation of the provisions set out in paragraph 2 (b) above to do so;
 5. *Directs* the Secretariat to seek external funding to enable it to implement the provisions in this Resolution directed to it;
 6. *Encourages* the Secretariat of CITES and the CMS Secretariat to closely collaborate in the execution of the National Legislation Projects;
 7. *Invites* all Parties, governmental, intergovernmental and non-governmental organizations and other sources to provide financial and/or technical assistance for the development and effective implementation of the CMS National Legislation Project;
 8. *Encourages* the Parties and Secretariats or relevant administrative bodies of other CMS Agreements to participate in this National Legislation Project; and
 9. *Directs* the Secretariat to report on progress in implementing this Resolution to the Standing Committee and the Conference of the Parties at each of their regular meetings.

ANNEX TO THE RESOLUTION

**PROPOSED SCHEDULE OF IMPLEMENTATION OF
THE NATIONAL LEGISLATION PROJECT**

<p>➤ Secretariat provides questionnaire to Parties.</p>	<p>The Secretariat provides a questionnaire to the Parties to enable Parties to identify whether they have in place adequate legislation related to Article III, paragraph 5 ('minimum core obligation') and domestic measures related to Article III paragraphs 4 (a) and 4 (b).</p>
<p>➤ Parties complete and submit the questionnaire to Secretariat.</p>	<p>Parties should submit their questionnaires to the Secretariat within one year of the date on which the Secretariat circulated the questionnaire to the Parties.</p>
<p>➤ Secretariat analyses information received and categorizes legislation and domestic measures in place.</p>	<p>Upon receipt of a questionnaire, the Secretariat will categorize the legislation and domestic measures in place for each Party as set out in paragraph 2 (d) of the Resolution.</p>
<p>➤ Secretariat liaises with National Focal Points regarding the categorization and further actions to be taken.</p>	<p>The Secretariat informs Parties on the categorization of their legislation and domestic measures as well as recommended further actions.</p>
<p>➤ Parties inform the Secretariat how they intend to implement the 'minimum core obligation'.</p>	<p>Parties indicate within six months of having received the categorization and recommended actions from the Secretariat the procedures, action and time-frames that are envisaged to adopt the measures necessary for effective implementation of the 'minimum core obligation'. Parties may also wish to indicate other domestic measures they are intending to take to implement the measures which would place their legislation and domestic measures into categories A+ to A+++.</p>
<p>➤ Parties take appropriate measures to implement the 'minimum core obligation' and other measures, as relevant.</p>	<p>Parties take appropriate measures to implement the 'minimum core obligation' in accordance with their indicated procedures and time-frames. The Secretariat, in cooperation with relevant partners, will support Parties, as necessary, through the provision of, <i>inter alia</i>, guidance materials, model laws, technical assistance and capacity building workshops.</p>
<p>➤ Secretariat reports to the Standing Committee and the Conference of the Parties on the implementation progress of this project.</p>	<p>The Secretariat reports progress of individual Parties with the implementation of this project to the Standing Committee and the Conference of Parties at each of its regular meetings.</p>

DRAFT DECISIONS

NATIONAL LEGISLATION TO IMPLEMENT CMS PROVISIONS

Directed to the Secretariat

12.AA The Secretariat shall, subject to the availability of funding:

- a) Develop a questionnaire for Parties to indicate the legislative measures they have put in place to implement the 'minimum core obligation' set out in paragraph 2 (a) as well as other domestic measures set out in paragraph 2 (b) of Resolution 12.X;
- b) Prepare legislative guidance materials and model laws, as well as conduct capacity building workshops and provide technical support to assist Parties in drafting adequate national legislation;
- c) Cooperate in the provision of legislative assistance with the legal programmes of relevant United Nations bodies and intergovernmental organizations, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Global Environment Facility (GEF), the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP), the United Nations Office on Drugs and Crime (UNODC), the United Nations Environment Programme (UN Environment), the World Bank and regional development banks, as well as regional organizations, such as the African, Caribbean and Pacific Group of States (ACP), the Amazon Cooperation Treaty Organization (ACTO), the Association of South-East Asian Nations (ASEAN), the League of Arab States (LAS), the Organization of American States (OAS) and the South Pacific Regional Environment Programme (SPREP);
- d) Report to the Standing Committee at its 48th and 49th meetings on the progress in implementing this decision.