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OPTIONS FOR ENHANCING THE EFFECTIVENESS OF THE CONVENTION ON MIGRATORY SPECIES THROUGH A PROCESS TO REVIEW IMPLEMENTATION

(prepared by an external consultant)

Options for Enhancing the Effectiveness of the Convention on Migratory Species through a Process to Review Implementation

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Scope and purpose of this paper

1. At the Eleventh Meeting of the Conference of the Parties to the Convention on Migratory Species (the “Convention” or “CMS”), the Parties adopted Resolution 11.7, *Enhancing the Effectiveness of the Convention through a Process to Review Implementation*. Resolution 11.7 launches an intersessional process “to explore possibilities for strengthening implementation of the Convention through the development of a review process.” The Executive Secretary submitted to the Standing Committee at its 44th meeting document UNEP/CMS/StC44/16.1, which sets out proposed terms of reference for a working group to explore such possibilities, as required by Resolution 11.7. After discussion, the Standing Committee adopted the Executive Secretary’s proposal with the additional option of maintaining the status quo, also called a “zero option.”¹

2. To support the work outlined in the Terms of Reference, this paper

- provides a short background on review mechanisms: how they work, why they are important, and why the parties are discussing a review process and not a compliance mechanism;
- describes the potential benefits of a review process based on a comparison of relevant processes in selected agreements and MEAs;
- provides an understanding and brief analysis of the articles in the CMS instrument that support the review of Parties’ implementation, identifies which obligations could be considered for review, and describes options for how reviews could be carried out;
- examines ways in which a review incidence could be triggered, and what could be the outcome;
- provides an overview of possible financial implications and provides an understanding of what scientific review and reporting systems that already exist under the CMS could be linked to enhance the review; and
- develops the following three summary scenarios of what a CMS review mechanism could entail: (1) use of internal and existing CMS structures and processes, (2) a customized/institutionalized system of review, and (3) status quo (“zero option”).

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¹ CMS, Draft Report of the 44th Meeting of the CMS Standing Committee, *14 – 15 October 2015*, para. 161 (2016).

Background on review processes

3. In the 2000 Malmö Declaration, environment ministers and heads of delegation recognized the “alarming discrepancy between commitments and action” and “the central importance of environmental compliance, enforcement and liability” for reversing negative global environmental trends.² Compliance with international environmental obligations remains a central concern. The United Nations Environment Programme has identified “[s]trengthening of compliance with multilateral environmental agreements . . . as a key issue.”³ Scholars recently stated that concerns regarding the compliance of States with their international environmental obligations has increased and will continue to grow as the complexity of global environmental commitments and challenges grows.⁴

4. Many multilateral environmental agreements (MEAs) have sought to improve compliance by establishing processes to review compliance and implementation. These MEAs include the Montreal Protocol on Substances that Deplete the Ozone Layer (“Montreal Protocol”),⁵ the Kyoto Protocol,⁶ the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”),⁷ the Convention on the Conservation of European Wildlife and Natural Habitats (“Bern Convention”),⁸ the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (“Basel Convention”),⁹ the Convention on the Prevention of Marine Pollution by Dumping

² The Global Ministerial Environment Forum, Sixth Special Session of the Governing Council of the United Nations Environment Programme, Fifth Plenary Meeting, paras. 2, 3 (31 May 2000), available at http://www.unep.org/malmo/malmo_ministerial.htm.

³ UNEP, *The UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements*, in UNEP, MANUAL ON COMPLIANCE WITH AND ENFORCEMENT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS, at p. 661, Annex I, para. 5 (eds., Carl Bruch & Elizabeth Mrema, 2006).

⁴ Michael G. Faure & Jürgen Lefevre, *Compliance with Global environmental Policy: Climate Change and Ozone Layer Cases*, in THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW & POLICY 110, 110 (Regina S. Axelrod & Stacy D. VanDeveer, 4th ed. 2015).

⁵ Ozone Secretariat, Implementation-Committee-under-Non-Compliance-Procedure-Montreal-Protocol (IMP COM), available at <http://ozone.unep.org/en/implementation-committee-under-non-compliance-procedure-montreal-protocol-impcom>; Ozone Secretariat, Annex II : Non-compliance Procedure (1998), available at <http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/728>.

⁶ For more information on the Kyoto Protocol’s review process, see UNFCCC, An Introduction to the Kyoto Protocol Compliance Mechanism, available at http://unfccc.int/kyoto_protocol/compliance/items/3024.php.

⁷ CITES, *Resolution Conf. 14.3, CITES Compliance Procedures*, available at <https://cites.org/eng/res/14/14-03C15.php>.

⁸ Council of Europe, *Monitoring Set Up under the Bern Convention*, available at <http://www.coe.int/en/web/bern-convention/monitoring>; *Standing Committee, Opening and Closing of Files and Follow-up to Recommendations*, in Secretariat, Summary of Case Files and Complaints—Reminder on the Processing of Complaints and New On-line Form, T-PVS (2008) 7, Annex II (Aug. 25, 2008), available at <http://www.coe.int/en/web/bern-convention/monitoring> [hereinafter *Opening and Closing of Files*].

⁹ Basel Convention, Mechanism for Promoting Implementation and Compliance with the Obligations under the Basel Convention: Terms of Reference, para. 2 (as adopted by the sixth meeting of the Conference of the Parties (decision VI/12), and amended by the tenth meeting of the Conference of the Parties (decision BC-10/11). Basel Convention, *Decision BC-10/11, Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention*, available at <http://www.basel.int/portals/4/download.aspx?d=UNEP-CHW-COP.10-BC-10-11.English.pdf>. More information on the Basel Convention’s process can be found at Basel Convention, Implementation & Compliance Committee, <http://www.basel.int/TheConvention/ImplementationComplianceCommittee/Overview/tabid/2868/Default.aspx>.

of Wastes and Other Matter and its 1996 Protocol (“London Dumping Convention”),¹⁰ the Convention on the Protection of the Mediterranean Sea (“Barcelona Convention”),¹¹ the Long-Range Transboundary Air Pollution Convention (“LRTAP”),¹² and the Convention on Environmental Impact Assessment in a Transboundary Context (“Espoo Convention”),¹³ among others.¹⁴

5. In addition, two CMS daughter agreements have review processes: the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA)¹⁵ and the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS).¹⁶

6. Generally, these processes are referred to as compliance mechanisms, although they are also called review processes and implementation processes, among other things. Whether a review process allows for the imposition of penalties for non-compliance does not have any bearing on the name used. In fact, MEAs use different names to identify their procedures and institutions for reviewing compliance. Some, like the Montreal Protocol and Espoo Convention, emphasize implementation by calling their committees the “Implementation Committee.” Others, like the Barcelona Convention, use the term “Compliance Committee.” Some, like AEWA, focus on the process: AEWA calls its process the “Implementation Review Process.”

7. For consistency with Resolution 11.7, this paper uses the phrase “review process” to describe the procedures for reviewing compliance. It also refers generically to the committees established to review compliance as “review committees.”

¹⁰ *Compliance Procedures and Mechanisms pursuant to Article 11 of the 1996 Protocol to the London Convention 1972*, in REPORT OF THE TWENTY-NINTH CONSULTATIVE MEETING AND THE SECOND MEETING OF THE CONTRACTING PARTIES, DOC. LC 29/17, Annex 7 (2007), available at

<https://docs.google.com/a/lclark.edu/file/d/0BxLMteFpPQ08SGpJeJluQ0xOaUE/edit?pref=2&pli=1>.

¹¹ *Decision IG 17/2 on Procedures and Mechanisms on Compliance under the Barcelona Convention and its Protocol*, Doc. UNEP(DEC)MED IG. 17/10, Annex V (2008), as modified by modified by Decision IG. 21/1, available at:

http://195.97.36.231/dbases/webdocs/content/compliancecommittee/ComplianceProceduresAndMechanisms_Consolidated_Eng.doc.

¹² *Decision 1997/1 on the Implementation Committee, its Structure and Functions and Procedures for Review of Compliance*, Doc. ECE/EB.AIR/53, at Annex III (1997), as amended by ECE/EB.AIR/75, Annex 5, available at

http://www.unece.org/env/lrtap/executivebody/eb_decision.html.

¹³ The complete rules of the Espoo Convention’s Implementation Committee can be found in Economic Commission for Europe, *Structure and Functions of the Implementation Committee and Procedures for Review of Compliance & Operating Rules of the Implementation Committee*, available at http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/2014_Structure_and_functions/Implementation_Committee_structure_functions_procedures_rules.e_2014.pdf.

¹⁴ For a non-exhaustive list of MEAs that include review processes, including the Biosafety Protocol and the Aarhus Convention, see NON-COMPLIANCE PROCEDURES AND MECHANISMS AND THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS (Tullio Treves et al. eds., 2007).

¹⁵ AEWA, *Resolution 4.6, Establishment of an Implementation Review Process*. For more information on AEWA’s Implementation Review Process, see AEWA, *Implementation Review Process (IRP)*, available at <http://www.unep-aewa.org/en/activities/irp>.

¹⁶ ACCOBAMS Resolution 5.4, ACCOBAMS Follow-up Procedure, available at http://accobams.org/index.php?option=com_content&view=article&id=1174%3Amop5-final-report-and-resolutions&catid=34&Itemid=65.

8. Regardless of the name used, review processes are designed to facilitate the fulfilment by the Contracting Parties of their obligations by constructively engaging the Party alleged to be in non-compliance.¹⁷ Nonetheless, MEAs take very different approaches to their review processes. The Montreal Protocol and CITES review processes first attempt to facilitate compliance by providing the non-complying Party with technical or other assistance. This assistance may include technical training, enforcement training, and help with legislative drafting, among other things. If the non-compliance persists, the compliance body may issue a formal warning, recommend trade suspensions or, in the case of the Montreal Protocol, deny access to funding through the Multilateral Fund. Other MEAs, such as the Basel Convention, ACCOBAMS, AEWA, and many others, rely solely on a facilitation approach to non-compliance. Instead of imposing sanctions for non-compliance, these review processes depend on collaborative assistance through the provision of technical and other support to assist the non-complying Party come into compliance.

9. If the CMS Parties decide to adopt a review process, they will need to determine whether they want a sanction-based or facilitation-based approach. A facilitation-based approach seems most feasible. Unlike the Montreal Protocol and CITES, CMS does not have a trade component that would allow a suspension of trade benefits to encourage compliance. Unlike the Montreal Protocol, CMS does not have significant funding that can be withdrawn to encourage compliance.

10. Regardless of whether the process is entirely facilitative or has the possibility to impose sanctions, parties to an MEA must consider several design features of their review process: (1) What triggers the review process?, (2) Who may trigger the review process?, (3) What is the institutional structure of the review process?, and (4) What actions are available to facilitate compliance? The remainder of this section summarizes the basic approaches adopted in other review processes.

Triggers

11. Review processes are triggered in several different ways. Most review processes are triggered based on concerns relating to non-compliance by a Party with its obligations under the relevant MEA. The primary question is whether a Party is complying with a specific obligation under the relevant MEA.

12. AEWA takes a different approach by focusing on adverse impacts rather than non-compliance with obligations. AEWA's Implementation Review Process (IRP) is triggered when the Secretariat becomes aware of an issue or a concerned Party submits a Possible Case Information Sheet to the AEWA Secretariat describing "adverse effects or potential adverse effects" to migratory waterbirds or their habitats as a result of human activities.¹⁸

13. A third option is to review the compliance of all Parties according to a schedule. Such an approach avoids adoption of a trigger that initiates a compliance matter. Instead, each Party has its compliance reviewed periodically (for example, every five years) regardless of whether any

¹⁷ UNEP, Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements, para. 9 (2002), available at <http://www.unep.org/delc/Portals/119/UNEP.Guidelines.on.Compliance.MEA.pdf>.

UNEP, *Compliance Mechanisms under Selected Multilateral Environmental Agreements*, p. 19 (2006), available at <http://www.unep.org/delc/portals/119/Compliance%20mechanisms%20under%20selected%20MEAs.pdf>.

¹⁸ See AEWA Resolution 4.6, *supra* note 15, at para. 3.

specific compliance concerns have been raised. While no MEA has adopted this approach, the UN Human Rights Council has done so with its Universal Periodic Review (UPR).¹⁹ Commentators note that the UPR has become an important tool for identifying areas where technical assistance and capacity building are needed and for incentivizing States to ratify human rights treaties.²⁰

14. Adoption of one approach does not preclude adoption of a second approach. For example, Parties could adopt an approach that includes both a compliance trigger and an adverse impact trigger. Similarly, Parties could review each Party's compliance periodically while also allowing specific compliance concerns to trigger the review process.

Who May Trigger the Process?

15. In many MEAs, including the Montreal Protocol, Kyoto Protocol, CITES, and others, a Party may trigger the review process by raising concerns regarding another Party's lack of compliance. A Party is likely to become aware of a problem, for example, if it receives permits or other documentation that raise compliance issues.

16. In some MEAs, such as the Montreal Protocol, Basel Convention, ACCOBAMS, and CITES, the MEA's secretariat may initiate the review of a Party's implementation. As the repository of national reports and other documentation, as well as a key point of contact for many Parties, the secretariat is well-placed to identify issues of non-compliance (and help Parties resolve issues before they become much bigger concerns). In most MEAs, the majority of compliance matters are initiated by the secretariat. In the Basel Convention, for example, the secretariat has initiated 11 of 13 compliance matters.²¹ The Kyoto Protocol, however, takes a different approach. To maintain the secretariat's administrative role, the secretariat may not initiate the review of a Party's compliance with the Protocol.²²

17. Pursuant to the review processes of many MEAs, including the Montreal Protocol, the Kyoto Protocol, ACCOBAMS, and AEWA, a Party may self-report an issue of non-compliance. Even when a Party self-reports a compliance issue, the full range of facilitation options is available to that Party. Self-reporting has become an important feature of review processes because it encourages Parties "to provide information cooperatively, without fears that they will be subject to intrusive scrutiny or verification."²³ Self-reporting also helps an MEA achieve its global environmental goals; rather than allowing non-compliance to persist or for another Party to raise

¹⁹ See UN General Assembly Resolution 60/251 (3 April 2006).

²⁰ See Edward R. McMahon, *The Universal Periodic Review: A Work in Progress: An Evaluation of the First Cycle of the New UPR Mechanism of the United Nations Human Rights Council* (Sept. 2012); Elvira Dominguez-Redondo, *The Universal Periodic Review: Is There Life Beyond Naming and Shaming in Human Rights Implementation?*, 2012 NEW ZEALAND LAW REVIEW 673 (2012).

²¹ Basel Convention, Specific Submissions Activities, available at <http://www.basel.int/Implementation/LegalMatters/Compliance/SpecificSubmissionsActivities/tabid/2310/Default.aspx>.

²² Geir Ulfstein & Jacob Werksman, *The Kyoto Compliance System: Towards Hard Enforcement*, in IMPLEMENTING THE CLIMATE REGIME: INTERNATIONAL COMPLIANCE 39, 59 (Olav Schram Stokke et al., eds. 2005), available at <http://ulfstein.net/wp-content/uploads/2012/08/TheKyotoComplianceSystem.pdf>.

²³ Glenn M. Wisner, *Compliance Systems under Multilateral Agreements: A Survey for the Benefit of Kyoto Protocol Policy Makers*, 3 (1999).

an issue of non-compliance, a Party can raise its own compliance concerns with the assurance that it will quickly receive technical or other assistance to resolve the issue.

18. The review processes of a few MEAs also provide that non-State actors, such as non-governmental organizations, may initiate a compliance matter. The AEWA resolution does not specify who may trigger the process, stating only that the AEWA Standing Committee's role in the process is triggered "upon receiving information" concerning adverse impacts to waterbirds or their habitats.²⁴ Subsequent practice has clarified that NGOs may initiate a compliance matter; BirdLife International and the Bulgarian Society for the Protection of Birds have each triggered the AEWA review process.²⁵ The review process of the Bern Convention may also be initiated by non-State actors, including NGOs.²⁶

Institutional Structure

19. MEAs have adopted different institutional structures for their review processes. CITES, AEWA, and the Bern Convention rely on their own existing institutional structures—specifically, their secretariat, Standing Committee, and meeting of the Conference of the Parties—to fulfil various roles of their respective review processes. In contrast, ACCOBAMS, the Montreal Protocol, Kyoto Protocol, Espoo Convention, and Basel Convention have established separate review committees to undertake the necessary tasks.

20. Within these two approaches, variations exist. For example, the Basel Convention allows non-Parties to be members of the review committee; the Montreal Protocol does not. The Montreal Protocol's review committee includes ten Parties; the Basel Convention's review committee includes 15 members. The Montreal Protocol requires recommendations of its review committee to be adopted by the Meeting of the Parties; AEWA does not. The Basel Convention's review committee may recommend actions that a non-complying Party should take to come into compliance; further action by the Conference of the Parties is needed only after the review committee has failed to bring the non-complying Party into compliance.

21. The CITES Standing Committee and AEWA Standing Committee have authority to make final recommendations to the Party under review. Because the CITES and AEWA Parties meet as Conference/Meeting of the Parties roughly every three years, delegating this responsibility to these Standing Committees ensures that non-compliance issues get addressed as quickly as possible.

²⁴ AEWA, Resolution 4.6, *supra* note 15, at para. 3(a).

²⁵ See, e.g., *AEWA Implementation Review Process (IRP): On-the-spot Assessment Mission: Sociable Lapwing Conservation in Syria*, 1 (2010), available at <http://www.unep-awea.org/en/activities/irp> (BirdLife); UNEP/AEWA Secretariat, *Implementation Review Process: Report to MOP5*, Doc. AEWA/MOP 5.16, at 6 (Apr. 26, 2012) (Bulgarian Society for the Protection of Birds), available at http://www.unep-awea.org/sites/default/files/basic_page_documents/final_awea_syria_irp_report.pdf.

²⁶ Council of Europe, *Monitoring Set Up under the Bern Convention*, available at <http://www.coe.int/en/web/bern-convention/monitoring> (stating that "[t]he case-file system, dating back to 1984, is a unique monitoring tool based on complaints for possible breaches of the Convention that can be submitted by NGOs or even private citizens.").

Actions to Facilitate Compliance

22. Even when the Parties to an MEA authorize trade suspensions or the loss of other benefits as a consequence of non-compliance, as with CITES, the Kyoto Protocol, and the Montreal Protocol, these MEAs and their review processes put significant effort into facilitating compliance and using trade suspensions only as a last resort. The Montreal Protocol specifically notes that its review process “focuses on amicable solutions and assistance rather than to punish.”²⁷ The CITES procedures are designed to ensure that a “supportive and non-adversarial approach is taken towards compliance matters, with the aim of ensuring long-term compliance.”²⁸

23. The range of possible actions to facilitate compliance is broad. The Montreal Protocol procedures state simply that the review committee may recommend “appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training.”²⁹

24. The CITES procedures include the following detailed but non-exhaustive list of possible actions:

- a) provide advice, information and appropriate facilitation of assistance and other capacity-building support to the Party concerned;
- b) request special reporting from the Party concerned;
- c) issue a written caution, requesting a response and offering assistance;
- d) recommend specific capacity-building actions to be undertaken by the Party concerned;
- e) provide in-country assistance, technical assessment and a verification mission, upon the invitation of the Party concerned;
- f) send a public notification of a compliance matter through the Secretariat to all Parties advising that compliance matters have been brought to the attention of a Party and that, up to that time, there has been no satisfactory response or action;
- g) issue a warning to the Party concerned that it is in non-compliance, e.g. in relation to national reporting and/or the National Legislation Project; and
- h) request a compliance action plan to be submitted to the Standing Committee by the Party concerned identifying appropriate steps, a timetable for when those steps should be completed and means to assess satisfactory completion.³⁰

²⁷ Ozone Secretariat, *supra* note 5. See also Ozone Secretariat, Non-compliance Procedure, *supra* note 5, at para. 8 (stating that “The Implementation Committee shall consider the submissions, information and observations referred to in paragraph 7 with a view to securing an amicable solution of the matter on the basis of respect for the provisions of the Protocol.”).

²⁸ CITES, Resolution Conf. 14.3, *supra* note 7, at Annex, para. 4.

²⁹ See Montreal Protocol, *Non-Compliance Procedure: Indicative List of Measures that Might Be Taken by a Meeting of the Parties in respect of Non-compliance with the Protocol*, in HANDBOOK FOR THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete THE OZONE LAYER, 631, 633 (10th ed. 2016), available at <http://ozone.unep.org/sites/ozone/files/Publications/Handbooks/MP-Handbook-2016-English.pdf>.

³⁰ CITES, Resolution Conf. 14.3, *supra* note 7, at Annex, paras. 29, 31.

Transparency

25. Transparency is a critical aspect of review processes. Transparency confers legitimacy to the process and helps ensure that similar compliance matters are treated similarly.

26. Most review processes specifically state that transparency is a fundamental aspect of the process, although some treat the process and documents submitted as part of the process as confidential. The CITES review process, for example, specifies that compliance measures will be applied “in a fair, consistent and transparent manner”; findings, reports and communications in compliance matters are not treated as confidential, although communications between the Secretariat and individual Parties on specific compliance matters are generally confidential.”³¹ Similarly, the Basel Convention review process must be transparent.³² Unlike CITES, where compliance matters are typically discussed in open debates, the Basel Convention process specifies that meetings dealing with specific compliance submissions shall not be open to other Parties or the public unless the review committee agrees.³³ The ACCOBAMS process mirrors that of the Basel Convention: the process is designed to be transparent, at least as it relates to discussions with the review committee, but the committee must treat documents it examines as confidential, unless the Party concerned agrees to their disclosure.³⁴ The members of the Montreal Protocol’s review committee are instructed to “protect the confidentiality of information they receive in confidence.”³⁵

Information Required to Trigger the Review Process

27. The review processes are not specific about the type of information that is required to trigger the review process. Some level of discretion is left to the relevant treaty entity to determine whether sufficient information exists to move forward with a compliance matter.

28. The CITES process, for example, refers simply to information on compliance matters. It is left to the secretariat or the Standing Committee, depending on the circumstances, to determine whether sufficient information warrants further action.³⁶ ACCOBAMS requires concerns about a compliance matter to be “supported by corroborating information” and the review committee determines whether sufficient information has been provided to move forward.³⁷

29. The Basel Convention review process is more specific. It requires that any submission made by a Party set out the matter of concern, the relevant provisions of the Convention, and, if the submission is made by one Party about another Party’s non-compliance, information substantiating the submission.³⁸

³¹ *Id.* at paras. 5, 6.

³² Basel Convention, Mechanism for Promoting Implementation and Compliance, *supra* note 9, at para. 2.

³³ *Id.* at para. 16.

³⁴ ACCOBAMS Resolution 5.4, *supra* note 16, at paras. 2(2), 11.

³⁵ Montreal Protocol, Non-compliance Procedure, *supra* note 5, at para. 15.

³⁶ CITES, Resolution Conf. 14.3, *supra* note 7, at Annex, paras. 16–28.

³⁷ ACCOBAMS, Resolution 5.4, *supra* note 16, at paras. 7(2), 10.

³⁸ Basel Convention, Mechanism for Promoting Implementation and Compliance, *supra* note 9, at para. 10;

30. Requests to initiate the review process typically must be in writing.³⁹

Benefits of review processes

31. UNEP has stated that the “fulfilment by the parties of their obligations under multilateral agreements is key to ensuring the effectiveness of international environmental law in general and the common interest of all the contracting states to a specific agreement in particular.”⁴⁰ For example, a comprehensive examination of the Montreal Protocol shows that implementation and enforcement of the Protocol’s requirements to phase out various ozone depleting substances, as well as the Protocol’s requirements for licensing systems to combat smuggling and storage and recycling of ODS, among other obligations, have been critical to the success of the Protocol to achieve its goal of setting the ozone layer on the path to recovery.⁴¹

32. Nonetheless, Parties to MEAs do not always implement or comply with their international obligations. Compliance with international treaties generally “is one of the main problems”⁴² for international law, resulting from a lack of human, technical, or financial resources and capabilities or sometimes a lack of political will.⁴³

33. Consequently, the parties to many MEAs have adopted review processes to foster the effectiveness of MEAs by improving implementation of the MEA’s obligations. A review process that helps facilitate compliance can benefit Parties, a convention, and the environment in many ways.

34. *Protect the Environment and Natural Resources.* Most MEAs, like CMS, are designed to resolve or prevent global environmental problems. The global or regional nature of environmental problems presents an inherent need for cooperation among parties. If Parties do not implement or comply with their obligations, then the goals of the MEA are unlikely to be met. Under the Montreal Protocol, for example, the provision of baseline data on the production and consumption of ozone depleting substances is critical to determining whether Party-specific and global goals for reducing ODS production and consumption are being met. The failure to meet those goals could have serious human health consequences, including increased rates of cancer and cataracts. The Montreal Protocol’s review process has been used very successfully to bring non-complying Parties into compliance with their reporting obligations and their targets for reducing ODS production and

³⁹ CITES, Resolution Conf. 14.3, *supra* note 7, at Annex, para. 23, Basel Convention, Mechanism for Promoting Implementation and Compliance, *supra* note 9, at para. 10; Montreal Protocol, Non-compliance Procedure, *supra* note 5, at para. 1; ACCOBAMS, Resolution 5.4, *supra* note 16, at para. 9(2).

⁴⁰ UNEP, *Issues of Compliance: Considerations for the International Regime on Access and Benefit Sharing*, 4 (2010), available at <http://www.unep.org/delc/portals/119/COMPLIANCEandABS.pdf>.

⁴¹ International Network for Environmental Compliance and Enforcement & UNEP, ENFORCEMENT STRATEGIES FOR COMBATING THE ILLEGAL TRADE IN HCFCs AND METHYL BROMIDE (UNEP 2013), available at http://inece.org/wp-content/uploads/2013/06/Illegal_Trade_HCFCs_Methyl-Bromide.pdf.

⁴² Alexandre Kiss, *Reporting Obligations and Assessment of Reports*, in ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS. A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA 229, 229 (Ulrich Beyerlin et al eds. 2006).

⁴³ UNEP, *Issues of Compliance*, *supra* note 40, at 4.

consumption.⁴⁴ The Ozone Secretariat reports that “the unique non-compliance procedure has worked well to encourage and assist Parties in non-compliance to return to compliance.”⁴⁵

35. *Ensure Fairness.* Moreover, when some Parties do not implement or comply with their obligations, they take advantage of the efforts of those Parties that do. This is known as the “free rider problem,” in which an individual enjoys the benefits of a resource, good, or service without contributing to the cost of providing those benefits. In the case of MEAs, a non-complying Party benefits from the actions of complying Parties to protect and conserve a resource without paying the costs of implementing the MEA’s obligations that generate those benefits. A review process helps avoid this situation by ensuring that all Parties play by the same rules.

36. *Promote Credibility.* A review process also helps ensure that an MEA does not face international criticism. The failure of the International Whaling Commission and some regional fisheries management organizations to ensure, among other things, compliance with their rules and obligations has led scholars, governmental delegates, and conservation groups to call these institutions “dysfunctional.”⁴⁶

37. *Direct Technical Assistance Efficiently.* A review process helps direct financial and technical assistance to specific problems. A review process, which seeks to facilitate compliance by a specific Party with a specific obligation, helps ensure that scarce resources are used wisely. For example, many Basel Convention Parties do not need additional assistance to comply with the convention’s reporting obligations. A small minority does, and the Basel Convention’s review committee has been able to direct capacity-building support to these Parties. For example, after Oman self-reported its problems with national reporting, the Basel Convention Regional Centre conducted two workshops on national reporting organized for the Arab States; Oman was able to participate in both workshops.⁴⁷ Similarly, when CITES Parties encounter problems implementing the convention, the CITES secretariat can provide technical and other assistance to help the Party overcome its compliance problems. For example, the CITES secretariat was able to travel to the Democratic Republic of the Congo to provide assistance regarding five different issues that had raised compliance concerns.⁴⁸

38. *Identify and Resolve Systemic Compliance Problems.* A review process can also identify compliance issues involving a much larger number of Parties. For example, the Basel Convention’s

⁴⁴ For a discussion of the success of the Montreal Protocol’s compliance committee, see David G. Victor, *The Operation and Effectiveness of the Montreal Protocol’s Non-Compliance Procedure*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS* 137 (David G. Victor et al. eds., 1998).

⁴⁵ Ozone Secretariat, *Montreal Protocol—Achievements to Date and Challenges Ahead*, available at <http://ozone.unep.org/en/focus/montreal-protocol-achievements-date-and-challenges-ahead>.

⁴⁶ See, e.g., Joji Morishita & Dan Goodman, *Role and Problems of the Scientific Committee of the International Whaling Commission in terms of Conservation and Sustainable Utilization of Whale Stocks*, 9 *GLOBAL ENVIRONMENTAL RESEARCH* 157 (2005), available at <http://www.icrwhale.org/eng/RoleandProb.pdf>; William Aron, William Burke, and Milton Freeman, *Flouting the Convention*, *THE ATLANTIC ONLINE* (May 1999), available at <http://www.theatlantic.com/past/issues/99may/9905whaling.htm>.

⁴⁷ Basel Convention, *CC-11/9: Submission by Oman*, available at <http://www.basel.int/Portals/4/download.aspx?d=UNEP-CHW-CC.11-CC-11-9.English.pdf>.

⁴⁸ CITES, *Application of Article XIII*, SC66 Doc. 28, available at <https://cites.org/sites/default/files/eng/com/sc/66/E-SC66-28.pdf>.

review committee identified implementation of and compliance with the obligation to import hazardous wastes shipped illegally as requiring further study.⁴⁹ It then produced guidance on the implementation of the convention’s obligation to re-import hazardous waste that has been illegally traded.⁵⁰ That guidance also led the Parties to establish the Environmental Network for Optimizing Regulatory Compliance on Illegal Traffic (ENFORCE), a system of cooperation and information exchange.⁵¹

39. *Promote the Rule of Law and Good Governance.* When individuals, corporations, or Parties to an MEA fail to comply with a requirement of law, not only do they harm the environment, but they also damage the rule of law.⁵² A review process, by finding solutions to non-compliance, helps promote the rule of law and good governance.

Table: Benefits of a Review Process
<i>Protects the environment and natural resources</i> by ensuring that the goals of the MEA, for example, protection of migratory species, are met.
<i>Ensures fairness</i> by helping to make all Parties pay the costs associated with providing conservation and other benefits resulting from compliance with treaty obligations.
<i>Promotes credibility</i> by ensuring that the MEA is seen as effective, not ineffective or dysfunctional.
<i>Directs technical assistance efficiently</i> by identifies compliance issues of specific Parties so that technical and other assistance can be directed efficiently.
<i>Identifies and resolves systemic compliance problems</i> affecting more than one Party.
<i>Promotes the Rule of law and good governance</i> by ensuring respect for international treaty obligations.

Brief Analysis of the Convention’s Provisions Allowing for a Review Process

40. While the Convention does not direct the Parties to establish a review process, as some MEAs do,⁵³ several provisions support the establishment of such a process. Article III(6), for

⁴⁹ Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention, Work Programme (2012-2013), available at <http://www.basel.int/Implementation/LegalMatters/Compliance/WorkProgramme/20122013/tabid/2875/Default.aspx>. The Parties approved the work program in *Decision BC-10/11: Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention*, available at <http://www.basel.int/portals/4/download.aspx?d=UNEP-CHW-COP.10-BC-10-11.English.pdf>.

⁵⁰ Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention, *Guidance on the Implementation of the Basel Convention Illegal Traffic Take-back Provision (paragraph 2 of Article 9)*, available at <http://www.basel.int/Portals/4/download.aspx?d=UNEP-CHW.12-9-Add.2.English.pdf>.

⁵¹ Basel Convention, *Decision BC-11/8: Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention*, available at <http://www.basel.int/Portals/4/download.aspx?d=UNEP-CHW-COP.11-BC-11-8.English.pdf>.

⁵² International Network for Environmental Compliance and Enforcement, *Principles of Environmental Compliance and Enforcement Handbook*, at 6, Box 2–1 (2009), available at http://inece.org/principles/PrinciplesHandbook_23sept09.pdf.

⁵³ See, e.g., Montreal Protocol on Substances that Deplete the Ozone Layer, art. 19, Sept. 16, 1987, 1522 U.N.T.S. 3, S. TREATY DOC. NO. 10, 100th Cong. 1st Sess. (1987), 26 I.L.M. 1541 (entered into force Jan. 1, 1989), available at <http://ozone.unep.org/en/treaties-and-decisions>; Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 18, Dec. 11, 1997 (entered into force Feb. 16, 2005).

example, authorizes the Conference of the Parties to “recommend to the Parties that are Range States of a migratory species listed in Appendix I that they take further measures considered appropriate to benefit the species.” Providing specific recommendations to a Party that is Range State is not possible without either an assessment of the Party’s implementation of the Convention or the status of the species.

41. Article VII(5) includes additional provisions supporting the review of a Party’s implementation for the purpose of providing recommendations. Article VII(5) provides that

“At each of its meetings the Conference of the Parties shall review the implementation of this Convention and may in particular

- (e) make recommendations to the Parties for improving the conservation status of migratory species and review the progress being made under Agreements;
- (g) make recommendations to the Parties for improving the effectiveness of this Convention; and
- (h) decide on any additional measure that should be taken to implement the objectives of this Convention.”

42. Article VII(5) makes clear that the Parties must review implementation of the Convention. It does not expressly state that the Parties must review the implementation of the Convention by specific Parties. Nonetheless, the requirement to review implementation of the Convention in order to make recommendations to improve the conservation status of species, improve the effectiveness of the Convention, and take additional measures to implement the objectives of the Convention supports a process to review implementation by specific Parties.

43. In the same way that the Conference of the Parties to CMS established the Standing Committee, which is not expressly provided for in the Convention, the Conference of the Parties could adopt review processes or a review committee using its general powers to “decide on any additional measure that should be taken to implement the objectives of this Convention.” It could also rely on Article III(6) and VII(5) to make recommendations to improve the status of CMS-listed species” or improve the effectiveness of the Convention.

44. If the CMS Parties decide to establish a review process based on provisions such as those described above, it would join other MEAs that have created review processes and committees even when the relevant convention does not expressly call for one. The Conference of the Parties of the Basel Convention, for example, established a review committee under its general authority to create subsidiary bodies.⁵⁴ LRTAP and the Espoo Conventions similarly used general powers to establish their review processes and committees. The CITES Standing Committee developed

⁵⁴ Basel Convention, Implementation & Compliance Committee, available at <http://www.basel.int/TheConvention/ImplementationComplianceCommittee/Overview/tabid/2868/Default.aspx> (stating that “the Committee administering the Mechanism for Promoting Implementation and Compliance with the Basel Convention is a subsidiary body of the Conference of the Parties to the Basel Convention that was established in 2002 under Article 15, paragraph 5 (e) of the Convention.”).

review procedures, and the Conference of the Parties adopted them, without any reference to provisions of the convention.

Possible Triggers for a CMS Review Process

45. The variety of different MEA review processes suggests that one type of review process is not appropriate for all MEAs. Parties need to tailor their review process to the specific needs of the Convention based on a few fundamental factors. To that end, this section begins the discussion of what a CMS review process could potentially look like by discussing possible triggers for initiating the process. The following section looks at a variety of possible institutional structures for the Parties to consider and discuss.

46. *Failure to prohibit the take of Appendix I species.* Article III(5) prohibits the taking of animals of species included in Appendix I. As noted in the *Analysis and Synthesis of National Reports* submitted to COP11, this key provision of the Convention is not being implemented by all Parties.⁵⁵ The failure to do so could trigger a CMS review process.

47. If, after review (and presumably after informal consultations with the Secretariat), it is determined that a Party does not have legislation to prohibit the take of specimens of Appendix I species, then the following outcomes are possible:

- (a) The Party could be offered legal assistance to help draft necessary legislation or other assistance that the Party has identified.
- (b) The Party could be asked to prepare a compliance action plan that includes a timetable for drafting and adopting necessary legislation. The Party would need to report to the relevant body (for example, the Standing Committee) on its progress.
- (c) The Party could be issued a written caution or warning if the problem persists.

48. *Improper implementation of the exceptions to the prohibition against taking animals of species included in Appendix I.* Article III(5) allows exceptions to the prohibition against taking but only for scientific purposes, for enhancing the propagation or survival of the affected species, to accommodate the needs of traditional subsistence users of such species, or in extraordinary circumstances so require. Moreover, those exceptions must be “precise as to content and limited in space and time” and the taking “should not operate to the disadvantage of the species.” The language of the exceptions is very specific and failure to implement the exceptions consistent with this language could be used to trigger a CMS review process. The potential outcomes of a review process are the same as for above: an offer of legal assistance, preparation of a timetable, and a written caution or warning.

49. *Failure to submit national reports.* Article 6(3) provides that Parties that are Range States of species in Appendix I or Appendix II “should inform the Conference of the Parties through the Secretariat, at least six months prior to each ordinary meeting of the Conference, on measures that they are taking to implement the provisions of this Convention for these species.” However, as noted

⁵⁵ See, e.g., CMS, *Analysis and Synthesis of National Reports*, UNEP/CMS/COP11/Doc. 19.3, para. 5 (2014), available at <http://www.cms.int/en/meeting/eleventh-meeting-conference-parties-cms>.

in paragraph 70, a significant number of Parties do not submit national reports.⁵⁶ The failure to submit national reports deprives the Parties of information needed to assess the effectiveness and implementation of CMS. As Resolution 9.4 states, national reports are “vital indicators of the implementation of the Convention.” Given the importance of national reports for understanding the extent to which the Convention is implemented, the failure to submit a national report could be used to trigger a CMS review process. Several MEAs, including the Basel Convention⁵⁷ and CITES,⁵⁸ make failure to submit annual or national reports subject to review pursuant to their respective review processes.

50. The potential outcomes of a review process for failure to submit national reports might include the preparation of a report by the relevant Party identifying the root causes of the failure to submit national reports. Based on that report, the Secretariat could organize a workshop on national reporting. This workshop could also assist other Parties. The relevant Party could also be asked to develop a compliance action plan that includes a timetable for undertaking relevant activities associated with submitting a national report.

51. *Adverse impact.* The convention could also adopt the approach of AEWA, which focuses on the effectiveness of implementation rather than a failure to comply. This approach may make sense for CMS. For example, the Secretariat noted at the 10th Meeting of the Conference of the Parties that 92 per cent of Parties responding to a questionnaire reported habitat destruction as an obstacle to migration for Appendix I birds, with 55 per cent reporting pollution as an obstacle to migration. Bycatch and electrocution were each cited by 45 per cent of responding Parties.⁵⁹

52. Under an adverse impact trigger, the outcomes of a review process would be different from the outcomes of other triggers, and the possible outcomes would vary greatly depending on the activity causing the adverse outcome. In the AEWA case concerning adverse impacts to sociable lapwing (*Vanellus gregarius*) in Bulgaria, the technical mission made 22 recommendations relating to (1) species and site protection, (2) legislation, (3) data and information, (4) monitoring, and (5) additional follow-up.⁶⁰ These recommendations included, among others, enforcing the ban on hunting of sociable lapwing during specified periods, drafting and enacting legislation to implement AEWA, developing public awareness materials, and preparing a monitoring methodology with an annual review of the methodology’s effectiveness.⁶¹

53. Given these common challenges, the Parties may wish to consider an approach based on adverse impacts. Such an approach could look at common challenges collectively, as the Basel Convention’s review committee does.⁶² It could also address adverse impacts caused by the

⁵⁶ See *infra* notes 70–72 and accompanying text.

⁵⁷ See *Submission of Bhutan*, CHW/CC/9c/2010/2 (2010) (self-reporting its failure to submit national reports).

⁵⁸ CITES, Resolution 11.17 (Rev. CoP16), *National Reports* (stating that the failure to submit an annual report “constitutes a major problem with the implementation of the Convention” and recommending that Parties suspend trade with a Party that has failed to submit an annual report for three consecutive years without adequate justification).

⁵⁹ CMS, UNEP/CMS/Conf.10.11 Annex 1, Analysis and Synthesis of National Reports, 4 (2011), available at http://www.cms.int/sites/default/files/document/doc_11annex_natreps_summary_e_0.pdf.

⁶⁰ AEWA Implementation Review Process (IRP): *On-the-spot Assessment Mission: Sociable Lapwing Conservation in Syria*, *supra* note 25, at 3–10.

⁶¹ *Id.*

⁶² See *supra* notes 49–51, and accompanying text.

implementation challenges facing a specific Party. In either case, the “adverse impact” approach would help the Parties identify measures to benefit an Appendix I species, consistent with Article III(6).

54. If an “adverse impact” approach is adopted, the Scientific Council or individual Councillors would likely need to be involved. In the alternative, the Secretariat or the Standing Committee would need to hire relevant expert consultants to assess whether a Party’s actions are adversely affecting a CMS-listed species.

Summary Scenarios for a CMS Review Process

55. As noted earlier, the nature of the Convention does not lend itself well to a review process that can suspend trade or financial benefits of the Convention, as with CITES and the Montreal Protocol. Unlike those two agreements, CMS does not have the type of trade benefits or financial resources needed to make such an approach effective. As a consequence, this paper assumes that a process adopted by the Parties will be facilitative.

56. With a facilitative approach as the starting point, this paper reviews the following three scenarios to stimulate discussion of a possible CMS review process: (1) a review process using internal and existing CMS structures and processes, (2) a customized approach, and (3) the status quo (i.e., the “zero option” or “no action” alternative).

(1) A Review Process Using Internal and Existing CMS Structures and Processes

57. As noted above, a number of MEAs, including CITES and AEWAs, use existing institutional structures to review compliance. CMS could use a similar approach.

58. This approach has some distinct advantages. The 14 Parties of the Standing Committee are based on an equitable geographic distribution. This represents a balanced and reasonable number of Parties to consider implementation issues. If the Standing Committee is given the authority to make recommendations without subsequent approval of the Conference of the Parties, solutions to implementation concerns can be addressed in a timely manner because the Standing Committee meets annually.

59. This report now outlines three options for using existing CMS structures and processes to review compliance.

Option 1

60. A review process modelled on the CITES process could have the following elements:

- (a) Step 1. A Party or the Secretariat initiates a review if concerns are raised based on information included in national reports, national laws, or other sources.
- (b) Step 2. The Secretariat communicates with the relevant Party to resolve the issue.
- (c) Step 3. If the Secretariat is unable to resolve the matter with the relevant Party, the Secretariat puts the matter on the agenda of the next Standing Committee meeting and submits to the Standing Committee any relevant information for discussion.

- (d) Step 4. The Standing Committee determines what actions, if any, should be taken.
- (e) Step 5. The non-complying Party undertakes the actions specified by the Standing Committee.
- (f) Step 6. The non-complying Party reports to the Standing Committee, either in person or in writing, on its progress in implementing those actions.
- (g) Step 7. The non-complying Party continues to report to the Standing Committee until the Standing Committee is satisfied that the issue has been resolved.

Option 2

61. A review process modelled on those of AEWA would be slightly different:
- (a) Step 1. A Party or the Secretariat initiates a review if concerns are raised based on information included in national reports, national laws, or other sources.
 - (b) Step 2. The Secretariat submits the concerns, along with any relevant information, to the Standing Committee for consideration at the Standing Committee's next meeting.
 - (c) Step 3. The Standing Committee determines what action, if any, should be taken.
 - (d) Step 4. The non-complying Party undertakes the actions specified by the Standing Committee.
 - (e) Step 5. The non-complying Party reports to the Standing Committee, either in person or in writing, on its progress in implementing those actions.
 - (f) Step 6. The non-complying Party continues to report to the Standing Committee until the Standing Committee is satisfied that the issue has been resolved.

Option 3

62. A review process could be based on an analysis of national reports. Presently, Parties are asked to submit national reports. They are analysed, with major themes presented to the Parties (for example, the total number of Parties that prohibit the taking of Appendix I species).⁶³ However, the report to the Parties does not typically generate Party-specific information, and the report is not discussed in much detail at meetings of the Conference of the Parties. At meetings of the Conference of the Parties, the Parties could evaluate the synthesis report either to review 1) general issues of compliance and implementation under the Convention or 2) Party-specific issues (provided that the report includes such information).

- (a) Step 1. The Secretariat reviews national reports and synthesizes the major themes relating to compliance or Party-specific compliance issues (or both). This review would be submitted to the Parties at a meeting of the Conference of the Parties.
- (b) Step 2. At a meeting of the Conference of the Parties, the Parties meeting as the Committee of the Whole or a sub-set of Parties meeting as a working group would review the issues identified by the Secretariat and present recommendations to the Parties meeting either as the Committee of the Whole or in plenary. The recommendations would direct the Secretariat or perhaps a working group to undertake specific activities relating to a relevant compliance issue. The recommendations could

⁶³ See, e.g., CMS, *Analysis and Synthesis of National Reports*, *supra* note 55.

direct the Secretariat to investigate the compliance issue further, provide specific services to the non-complying Party, or other action deemed appropriate.

- (c) Step 3. The Secretariat, working group, or non-complying Party would report on its progress toward implementing the recommendations to the Standing Committee at its next meeting.
- (d) Step 4. The Standing Committee would provide further guidance to the Secretariat or working group, if appropriate. The process could end at this step if the Standing committee believes the issue has been addressed. If not, then the process would continue to the next meeting of the Standing Committee or the meeting of the Conference of the Parties—until the Standing Committee or Conference of the Parties is satisfied that the issue has been addressed.

63. This process is less responsive than Options 1 or 2 to issues that may arise between meetings of the Conference of the Parties. However, it does give greater importance to national reports.

(2) A Customized Approach

64. The Parties to the Convention could also establish a customized review process, as some MEAs have done. If they did so, they would need to determine

- (a) the size of the committee;
- (b) who could be on the committee;
- (c) how frequently it would meet;
- (d) when it would meet; and
- (e) whether it, the Standing Committee, or Conference of the Parties has authority to direct non-complying Parties to implement recommendations of the committee.

65. As noted above, there is no “typical” size of composition of a review committee and the frequency with which review committees meet also varies; the Montreal Protocol’s review committee meets twice annually and is composed of ten Parties.⁶⁴ The ACCOBAMS review committee meets annually and is composed of five members (three elected by the Parties and two by bodies having the status of ACCOBAMS partners). The Basel Convention’s review committee meets once every two years⁶⁵ and includes 15 individuals nominated by the Parties.⁶⁶ Meetings of the Montreal Protocol’s review committee tend to be conducted in conjunction with other meetings of the Protocol and last for one day,⁶⁷ whereas meetings of the Basel Convention’s review committee are held at times different from other convention meetings and last for three days.⁶⁸

⁶⁴ Montreal Protocol, Non-compliance Procedure, *supra* note 5, at paras. 5, 6.

⁶⁵ See Twelfth Meeting of the Basel Convention Implementation and Compliance Committee (showing meeting schedule), available at <http://www.basel.int/TheConvention/ImplementationComplianceCommittee/Meetings/ICC12/Overview/tabid/4727/Default.aspx>.

⁶⁶ Basel Convention, Mechanism for Promoting Implementation and Compliance, *supra* note 9, at paras. 3–5.

⁶⁷ See Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol, *Report of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol on the Work of its Fifty-fifth Meeting*, UNEP/OzL.Pro/ImpCom/55/4 (2015).

⁶⁸ See Committee for Administering the Mechanism for Promoting the Implementation and Compliance of the Basel Convention, *Tentative Schedule for the Meeting*, UNEP/CHW/CC.12/INF/1 (2016).

66. To initiate the discussion among CMS Parties about what a potential customized review process might look like, this paper provides the following suggestions that address the issues raised in paragraph 64:

- (a) Size of the committee: 10 members.
- (b) Committee membership: Parties only.
- (c) Frequency of meetings: only when an issue of concern arises but no more than once each year. If more than one issue of non-compliance arises in a year, review committee could convene by teleconference or meet in the margins of the Standing Committee meeting to complete its tasks.
- (d) Meeting schedule: one day before a Standing Committee meeting.
- (e) Authority to make recommendations: the review committee would have authority to make recommendations. In the alternative, the review committee could submit its proposals to the Standing Committee, which is meeting immediately after the meeting of the review committee. This would allow a quicker response to any issue.

67. Under this approach, the review committee is kept small but still large enough to have geographic representation. The approach also encourages synergies by having the meeting of the committee immediately preceding a Standing Committee meeting. In this way, committee members may also attend the Standing Committee meeting. In addition, costs are kept lower by reducing travel costs because individuals do not need to travel to two different meetings. Additional costs could be saved if the committee is composed only of members of the Standing Committee.

(3) *Maintaining the Status Quo—The “Zero Option”*

68. Under the status quo or “zero option”—that is, taking no action to establish a review process—the Parties will have no systematic means to resolve failures to prohibit the taking of animals of Appendix I species, improper implementation of the exceptions to the prohibition against taking, failures to conserve or restore habitat, failures to remove obstacles to migration, and failures to submit national reports.

69. The *Analysis and Synthesis of National Reports* submitted to COP11 indicates that substantial improvement can be made on a number of implementation issues. For example, that document reported that

“The **taking of Appendix I species** is prohibited by Range States for the following major groups: birds (92 per cent of the 59 reporting Parties), aquatic mammals (64 per cent), reptiles (51 per cent), terrestrial mammals (including bats; 32 per cent), and fish (41 per cent). For all groups, exceptions to the prohibition on take are granted by some Parties, principally for scientific or safety reasons or for customary take by indigenous communities.”⁶⁹

70. In addition, a large number of Parties are not submitting national reports. Only 59 of 118 eligible Parties (50%) submitted national reports prior to CoP11,⁷⁰ 68 out of 113 Parties (60%) prior

⁶⁹ CMS, *Analysis and Synthesis of National Reports*, *supra* note 55, at para. 5 (emphasis in original).

⁷⁰ *Id.* at para. 3.

to CoP10,⁷¹ and 50% prior to CoP9.⁷² Without reports from the non-reporting Parties, it is not known whether the problems are larger than the *Analysis and Synthesis of National Reports* indicates.

Financial Implications

71. The financial implications of establishing and operationalizing a review process are difficult to assess until a specific process is chosen because of the numerous variables involved. Nonetheless, a few general conclusions may be made.

72. First, the status quo option entails no financial costs.

73. Second, a review of costs associated with the review processes of other MEAs provides some indication of the financial implications for CMS.

74. The ACCOBAMS Follow-up Committee has met only once so far. The meeting was held in Monaco, the location of the Secretariat, so costs were kept low. The ACCOBAMS' budget includes 5,000€ (USD 5,570) for work associated with the Follow-up Committee.⁷³

75. The Basel Convention has committed a larger amount of money to its Implementation and Compliance Committee. For the current biennium, the Basel Convention Parties have budgeted as follows:

- (a) Funds for travel and daily subsistence allowance (DSA) for 11 eligible compliance committee members for the meeting (USD 42,680 from the core budget);
- (b) Funds for travel and DSA of 10 eligible Parties concerned by a submission (USD 30,280 from voluntary contributions that need to be raised);
- (c) Funds for conference services (editing and report writing), pre-meeting, and translation of COP documents prepared by the compliance committee for meetings of the COP for consideration and adoption are not budgeted separately; they are absorbed within the resources available to the Secretariat);⁷⁴
- (d) Staff costs to support the work of the Basel Convention Implementation and Compliance Committee are roughly estimated as follows: 30% of a P4, 20% of a P3, 20% of a G5, paid from assessed contributions. Bear in mind, however, that these staff costs cover both party-specific submissions and general issues of implementation and compliance.⁷⁵

76. The financial costs for AEWA's Implementation Review Process fall between those of the ACCOBAMS and Basel Convention processes. In the four years since AEWA adopted its review process, four claims have been made. Based on these four claims, the AEWA Secretariat estimates that each claim costs about 20,000 Euros (roughly USD 22,000).⁷⁶

⁷¹ CMS, *Analysis and Synthesis of National Reports*, UNEP/CMS/Conf.10.11, para. 2 (2011).

⁷² CMS, *Analysis and Synthesis of National Reports*, UNEP/CMS/Conf.9.10, para. 2 (2008), available at <http://www.cms.int/en/document/analysis-and-synthesis-national-reports>.

⁷³ E-mail from Florence Descroix-Comanducci, ACCOBAMS Executive Secretary, to Chris Wold (July 5, 2016).

⁷⁴ E-mail from Bruce Noronha, Administrative Officer, BRS Secretariat, to Chris Wold (July 4, 2016).

⁷⁵ E-mail from Juliette Kohler, Policy and Legal Advisor, BRS Secretariat, to Chris Wold (July 6, 2016).

⁷⁶ E-mail from Sergey Dereliev, Technical Officer, AEWA Secretariat, to Chris Wold (July 21, 2016).

77. The technical mission, including travel costs and costs associated with hiring relevant expert consultants and a mission rapporteur, accounts for the vast majority of those costs. Secretariat time was judged difficult to assess because of the periodic nature of the work. However, once a case is triggered, Secretariat staff may spend “a few days a month” following up and communicating with the relevant government and the Standing Committee. If the Standing Committee agrees that an on-the-ground mission is warranted, then the Secretariat must raise funds for the mission (the IRP is funded through voluntary contributions), establish the mission’s terms of reference, and run the mission; this may take “a few weeks in the entire year.”⁷⁷

78. The AEWA Standing Committee spends relatively small amounts of time on each claim. It reviews correspondence sent by the Secretariat that requests a decision concerning the claim. The Standing Committee addresses any other remaining issues at its regular meetings.

79. If CMS adopted a customized approach, its costs would very likely be significantly less than those of the Basel Convention, particularly if the committee members are also members of the Standing Committee. The addition of an extra day of DSA for eligible members, potential travel to meet representatives of the non-complying Party, and costs of bringing the non-complying Party to the meeting of the review committee might cost roughly USD 30,000 to USD 40,000.

80. Assuming CMS chooses a review process that uses the Secretariat and the Standing Committee as its primary fact-gathering and decision making institutions, then the additional day of DSA is not needed. Consequently, the costs are likely to be more similar to AEWA’s costs than the Basel Convention’s costs. However, the costs could be less. As noted, the AEWA technical missions, which include relevant experts and a rapporteur, are the major expense of the IRP. A process focused on compliance with the Convention’s obligations may not require missions as extensive as AEWA missions, which must assess the adverse impact of specific actions on protected species. As such, the Secretariat’s staff may be able to do the necessary fact-finding. In addition, if a CMS review process focuses on compliance with the Convention’s obligations, then another Party may have relevant expertise to assist the non-complying Party by, for example, assisting with legislative drafting.

⁷⁷ *Id.*