

## 14<sup>th</sup> Meeting of the Advisory Committee

Tochni / Larnaca, Cyprus, 11 – 13 May 2009

Evaluation and internal consultation on the suitability  
of an expansion of the EUROBATS Agreement area



The Advisory Committee is kindly invited to take note of the attached document of the 9<sup>th</sup> Meeting of the Conference of Parties to CMS. It is a thorough analysis of the particular features as well as strengths and weaknesses of all Instruments (Agreements, MoUs etc.) so far concluded under the Convention. Concerning EUROBATS it not only confirms the significant impact and success of the Agreement, but also points out important aspects of its future development and potential.

The document has received broad support at the CMS CoP 9 and in the opinion of the Secretariat represents an important contribution to the discussion on the future definition of the EUROBATS Agreement area.



# CONVENTION ON MIGRATORY SPECIES

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## OPERATIONAL INSTRUMENTS OF THE CONVENTION ON MIGRATORY SPECIES

1. The CMS Secretariat is circulating herewith, for the information of participants of the 9<sup>th</sup> Conference of Parties to the Convention, an independent commentary on the paper prepared and submitted by the CMS Scientific Council Vice-chairman Dr. Pierre Devillers on the evolution of CMS instruments. This contribution is envisaged to stimulate debate on CMS policy development and does not necessarily reflect the views of CMS Parties, the Scientific Council or the CMS Secretariat.

2. The legal basis of CMS provided by the Convention text (UNEP/CMS Inf Doc 9.1) and the numerous resolutions, recommendations and agreements supplies the foundation for this document. The paper assesses the CMS mandate provided by these sources and discusses the feasibility of individual instruments acting within one coherent framework. It highlights some of the potential shortcomings and areas for necessary development or clarification, which could be addressed by participants of the 9<sup>th</sup> CMS Conference of Parties. Preliminary guidelines for revisions and other aspects such as the financing of agreements and the trend towards multi-species instruments are provided in the second half of the document.

### **Action requested:**

The Conference of the Parties may wish to consider:

- a. Arranging for the paper to be discussed by a Working Group during the CoP9 and perhaps also in a subsequent inter-sessional working group.
- b. Commenting in particular on the suggestion that CMS would be best served by utilising agreements flexibly and especially in their non-binding form, as one of the key tools within a global multi-species approach in which agreements, concerted and/or co-operative actions and other CMS initiatives are linked synergistically within the CMS umbrella.

### **Submission of comments:**

The CMS Secretariat welcomes comments from Parties on the paper presented. These should be submitted to the CMS Secretariat (secretariat@cms.int) prior to the 25<sup>th</sup> November 2008. Comments will be noted, but not incorporated into the paper prior to the COP9. A revised post-COP report is envisaged, which will be distributed to all Party focal points.

## OPERATIONAL INSTRUMENTS OF THE CONVENTION ON MIGRATORY SPECIES

### 1. OPERATIONAL INSTRUMENTS IN THE TEXT OF THE CONVENTION AND SUBSEQUENT RESOLUTIONS AND RECOMMENDATIONS.

An operational instrument is needed wherever the Convention calls for concerted action by the Parties as per paragraph 6 of the Preamble of the Convention.

Such calls for action occur:

1 In **Article II, paragraph 3, alinea a**, for which “*Parties should promote, co-operate in and support research relating to migratory species*”.

2 In **Article II, paragraph 3, alinea b** and in **Article III, paragraphs 4 and 5**, which stipulate that “*Parties shall endeavour to provide immediate protection for migratory species included in Appendix I*”, 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; 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; and, to the extent feasible and appropriate, to prevent, reduce or control factors that are endangering or are likely to further endanger the species, including strictly controlling the introduction of, or controlling or eliminating, already introduced exotic species*” and 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 specified exceptions.

3 In **Article II, paragraph 3, alinea c** and **Article IV, paragraph 3**, which stipulate, respectively, that “*Parties shall endeavour to conclude AGREEMENTS covering the conservation and management of migratory species included in Appendix II*” and that “*Parties that are Range States of migratory species listed in Appendix II shall endeavour to conclude AGREEMENTS where these would benefit the species and should give priority to those species in an unfavourable conservation status*”.

4 In **Article IV, paragraph 4**, where “*Parties are encouraged to take action with a view to concluding agreements for any population or any geographically separate part of the population of any species or lower taxon of wild animals, members of which periodically cross one or more national jurisdiction boundaries*”.

Requirement 1 above (Article II, paragraph 3, alinea a) can be regarded as the foundation for research, awareness-raising and capacity building **projects** and **programmes** of the Convention, such as the Avian Influenza Task Force, the Wildlife Watching Overview or the Year of the Dolphin. Specific instruments established by the Convention or designed in the course of its implementation to meet Requirements 2, 3 and 4 are summarised below.

#### 1.1. Article IV, paragraph 3, AGREEMENTS

The operational instrument envisaged by **Article IV, paragraph 3, called AGREEMENT, with capital letters**, is the instrument about which the text of the Convention is the most detailed. It is the main instrument through which the conservation and management needs of Appendix II species can be addressed. Guidelines for the content and form of AGREEMENTS

are explicitly provided by the Convention, but they are incomplete, and no Resolution of the successive Conferences of the Parties has addressed this.

The Convention is most explicit on what the conservation and management content of such agreements should be. This is detailed in Article V, paragraph 1, Article V, paragraph 4, alinea f, and Article V, paragraph 5.

The Convention is also highly explicit on the reporting obligations of all bodies that would be constituted under an AGREEMENT to the Conference of the Parties (Article VII, paragraph 5, alineas d and e -- the latter giving monitoring powers to the Conference of the Parties), to the Scientific Council (Article VIII, paragraph 5, alineas a and d, again conferring monitoring powers to the Scientific Council), and to the Secretariat (Article IV, paragraph 5, Article IX, paragraph 4, alineas b and h).

The scope of AGREEMENTs is covered by Article V, paragraphs 2 and 3. An agreement should:

- cover the whole of the range of the migrating species concerned,
- be open to accession by all Range States of that species, Parties or not,
- whenever possible, be multi-species.

These guidelines were relaxed in Resolution 3.5 for Article IV, paragraph 4, agreements but never for Article IV, paragraph 3, AGREEMENTs. Taken literally, they could make geographically-based agreements under Article IV, paragraph 3 difficult, unless the populations concerned are explicitly identified (as in the Action Plan of CAF) and equated to "species".

On the form taken by Article IV, paragraph 3, AGREEMENTs, the Convention guidelines are much more limited, entirely included in Article V, paragraph 4:

- the AGREEMENT should include a list of species with indication of ranges and migration routes (alineas a and b)
- a focal point for the implementation of the AGREEMENT should be designated in each party (alinea c)
- **if necessary**, "*appropriate machinery*" should be established to assist in carrying out the aims of the AGREEMENT, to monitor its effectiveness, and to prepare reports for the Conference of the Parties [of the Convention] (alinea d)
- procedures should be provided for the settlement of disputes (alinea e).

On the precise type of legal document that should be adopted to record the AGREEMENT and provide for its implementation, the Convention is mute and no Resolution has ever added any indication. Indeed, Article I, paragraph 1, alinea j "defines" an AGREEMENT as an "*international agreement*" "*as provided for in Articles IV and V of this Convention*", articles which do not include any further definition.

The Convention and its Resolutions do not explicitly state whether an Article IV, paragraph 3, AGREEMENT should be legally binding or not, but it can be inferred, from the negotiation intents and a number of indices, that it should. Indeed, an AGREEMENT is described in Article I, paragraph 1, alinea j as an "*international agreement*", which the United Kingdom's Foreign and Commonwealth Office defines as "*An agreement between two or more States which creates rights and obligations binding in international law*". Furthermore a clear

distinction between Article IV, paragraph 3, AGREEMENTs and Article IV, paragraph 4, agreements is reiterated in Resolutions 2.6 and 3.5. It is clear that the use of capitals for Article IV, paragraph 3, AGREEMENTs, a peculiarity of CMS apparently otherwise unknown in international treaty law, was meant to indicate that it corresponded to option (1) in the definition of agreements provided by UNEP, Division of Environmental Law and Conventions, "*Generic term for an international legally binding instrument. In this sense, encompasses several instruments, such as treaties, conventions, protocols, oral agreements*", not to option (2) "*Specific term used to designate international instruments that are usually less formal and deal with a narrower range of subject-matter than treaties*".

## **1.2. Article IV, paragraph 4, agreements**

Article IV, paragraph 4 embodies a possible extension of Article IV, paragraph 3, however encouraged rather than required. This extension proceeds in two directions:

1. Article IV, paragraph 4 authorises extension of the provisions of Article IV, paragraph 3, which are limited to species on Appendix II, to "*any population or any geographically separate part of the population of any species or lower taxon of wild animals, members of which periodically cross one or more national jurisdiction boundaries*", thus to species on Appendix I or to species not on appendices at all, provided they include individuals that cross borders. In the original text of the Convention, this was the only extension envisaged since AGREEMENT had been written in the same way, with capitals, in both paragraphs (cf. Resolution 2.6).

2. Resolutions 2.6 and 3.5 recommended for Article IV, paragraph 4, agreements a less formal character than for Article IV, paragraph 3. They do, however, note that such an instrument "*may*" constitute a first step towards the conclusion of an "AGREEMENT" "*in accordance with Article V*" (Resolution 2.6) but that in some cases this "*may not be appropriate*" (Resolution 3.5).

Taking both extensions together, an Article IV, paragraph 4, agreement may concern any species concerned by trans-border movements, Appendix I, Appendix II or not listed in the Appendices. It will normally be implemented by a less formal (presumably non-legally binding) tool than an Article IV, paragraph 3, AGREEMENT, but it can evolve into such an agreement.

The content of an Article IV, paragraph 4, agreement is not elaborated in the Convention or in subsequent resolutions, except in the very general terms of Article IV, paragraph 4 itself, as no reference is ever made in paragraph 4 to Article V, paragraph 4 and Article V, paragraph 5 which cover content for Article IV, paragraph 3, AGREEMENTs.

The reporting obligations of bodies that would be constituted under an Article IV, paragraph 4, agreement are the same as for an Article IV, paragraph 3, AGREEMENT. This is explicitly prescribed by Resolution 3.5.

The scope of Article IV, paragraph 4, agreements was also explicitly envisaged to be the same as that of Article IV, paragraph 3, AGREEMENTs, including, in Resolution 2.6, the obligation of covering the whole range of species and of possible accession by all Range States, but these obligations were suppressed by Resolution 3.5, paragraph 3.

On the form taken by Article IV, paragraph 4, agreements, the Convention and subsequent Resolutions give no guidelines, as they do not list Article V, paragraph 4 among the dispositions that apply. Thus there is no need to include a list of species or to have a focal point for the implementation in each party, two conditions that seem, however, hard to dispense with, but also and more relevantly, there is in principle no need to establish "*appropriate machinery*" for implementation and monitoring, or procedures for the settlement of disputes.

On the precise type of legal instrument that should be adopted to record and implement an Article IV, paragraph 4, agreement, Resolution 2.6 is much more explicit than the Convention or any of its Resolutions are for Article IV, paragraph 3, AGREEMENTS. Resolution 2.6 lists (in this order) Resolutions of the Conference of the Parties, administrative agreements and memoranda of understanding. The list is preceded by "for example", so that other similar tools, such as Type II Partnerships would obviously fit (they can in any case be regarded as administrative agreements). The list provided by Resolution 2.6 intends to propose non-legally binding instruments, although Resolutions could be legally binding if the Parties so decide, and MOUs may be, unless stated otherwise.

### **1.3. Concerted Actions**

Concerted Actions in favour of particular species or groups of species are established by Resolutions taken at each Conference of the Parties (Resolutions 3.2, 4.2, 5.1, 6.1, 7.1, 8.29) to implement, with regard to Appendix I species, the provisions of Article II, Article III and Article VII. These resolutions primarily establish the list of species that will "*be the subject of concerted actions*" in the next triennium. Whether they also initiate the Action is not evident from the wording of Resolution 3.2 ("*Instructs the Secretariat and the Scientific Council to encourage and assist Parties to take concerted actions to implement the provisions of the Convention*") but is clear from that of Resolution 4.2 ("*Recommends that the concerted actions and preparation of review reports envisaged within the framework of Resolution 3.2 be carried out for the above-mentioned species during the 1995-1997 triennium*") and of Resolutions 5.1, 6.1, 7.1, 8.29 ("*Resolves that the concerted actions and preparation of review reports envisaged within the framework of Resolution 3.2 be carried out -- Endorses the recommendation ... that activities ... be continued*"). Thus, Concerted Actions exist as soon as the Resolution is passed. However, the Resolutions that establish them are collective and need renewal at each Conference of the Parties.

The content of Concerted Actions, which embody conservation measures that are obligatory for all Parties under the Convention itself, is clearly spelled out by Article III of the Convention. It is implied that an Action Plan is indispensable.

The reporting obligations of bodies administering Concerted Actions are detailed in Resolution 3.2.

The scope of Concerted Actions is not imposed, beyond the fact that they should be primarily concerned with Appendix I species, and extend to the whole range of these species.

The form taken by Concerted Actions is not indicated in Resolution 3.2, except that by their very nature ("concerted"), they constitute some form of agreement.

The precise type of legal documents that should ensure the adoption, revision, implementation

and monitoring of the Action Plan is not indicated either, except by the request to use, if possible, existing bilateral and multilateral instruments.

#### **1.4. Co-operative Actions**

Co-operative Actions were created by Recommendation 5.2. The Recommendation was trying to remedy an ambiguity created by Resolution 2.6, paragraph 2 and Resolution 3.5, paragraph 4. In encouraging Parties to conclude Article IV, paragraph 4, agreements, in general (Resolution 2.6) or in some cases (Resolution 3.5) as a first step towards an Article IV, paragraph 3, AGREEMENT, and then adding that in some cases this "*may not be appropriate*" the Conference of the Parties intimated either that it was appropriate, in some cases, to conclude paragraph 3 AGREEMENTS for non-Appendix II species (and indeed paragraph 3, if it makes it necessary for Appendix II species, does not, of course, preclude it for other species) or that Parties could derogate from the obligation to "*endeavour to conclude AGREEMENTS*" for Appendix II species. Recommendation 5.2 confirms this derogation and apparently expands it by removing the need to conclude a paragraph 4 agreement, although it can be argued that a Co-operative Action is a form of paragraph 4 agreement.

However, Recommendation 5.2 has created a new contradiction. Although it intends to permit a lesser instrument than would normally be recommended by the Convention for Appendix II species, it suggests in its first two preambulatory clauses that it is intended for species in a particularly unfavourable conservation status, justifying by this the urgency of action. This contradiction has been a source of confusion as to what addition or subtraction from the list of Co-operative Actions meant.

#### **1.5. Accession to agreements by non-Parties or non-Range States**

Accession to agreements by states that are not at the same time Range States and Parties to the Convention is not fully envisaged by the Convention or its resolutions. The case of Range States that are not Parties is covered by Article V, paragraph 2 for Article IV, paragraph 3, AGREEMENTS, and by Resolutions 2.6 and 3.5 for Article IV, paragraph 4, agreements. It is clear that accession should be open to all Range States, always in the first case, usually in the second. For Concerted Actions, the question has not been explicitly raised or settled, but as they can be regarded as a particular case of Article IV, paragraph 4, agreement, the same rules should apply. The reverse case, that of Parties that are not Range States is less evident. For Concerted Actions, the situation is clear. As they primarily proceed from Article II, paragraphs 2 and 3b, addressed to all parties, whether Range States or not, and embody conservation measures that are obligatory for all Parties under the Convention itself, they must involve any Party that might bear a responsibility for, or have leverage on, a relevant threat (taking, resource exploitation, airborne or waterborne pollution, upstream damming of rivers), as well as any Party that is in a position, via multilateral or bilateral instruments (Resolution 3.2), to contribute to the conservation or the restoration of the species concerned or their habitats. For AGREEMENTS, Article IV, paragraph 3 spells out the obligation for Parties that are Range States to endeavour to conclude agreements, but does not prevent any other Party from joining them. For Article IV, paragraph 4, agreements, Article IV, paragraph 4 encourages "Parties", with no further qualification, to take action with a view to concluding agreements. In no case does the Convention preclude any Party, or anyone else relevant to the conservation issue and permitted to sign international instruments, from joining an agreement. Moreover, the wording of Article IV, paragraph 4 is such that the Convention can acknowledge as Article IV, paragraph 4, agreement any agreement that Parties would

conclude between them or with other actors for the conservation or restoration of “any population or any geographically separate part of the population of any species or lower taxon of wild animals, members of which periodically cross one or more national jurisdiction boundaries” whether or not originally negotiated under the Convention. However, to be fully recognised by the Convention, such an agreement would have to fulfil the reporting obligations (to the Conference of the Parties, the Scientific Council and the Secretariat) described in Article VII, paragraph 5, alineas d and e, Article VIII, paragraph 5, alineas a and d, Article IV, paragraph 5 and Article IX, paragraph 4, alineas b and h.

## **2. SURVEY OF EXISTING POLICY**

### **2.1. Article IV, paragraph 3, AGREEMENTS**

Four Article IV, paragraph 3, AGREEMENTS have so far been concluded under the Convention:

The *Agreement on the Conservation of Populations of European Bats* (EUROBATS), requested by COP 1 in October 1985, was concluded on 10 September 1991 in London, and entered into force on 16 January 1994. Its geographical area covers 48 Range States in Europe. It applies to all European populations of 45 bat species - whether migratory or not - occurring in Europe and non-European Range States.

The *Agreement on the Conservation of African-Eurasian Migratory Waterbirds* (AEWA), also requested by COP 1 in October 1985, was concluded on 16 June 1995 in The Hague, and entered into force on 1 November 1999. Its geographical area covers 117 Range States in Africa and Eurasia, including the Middle-East, Greenland and parts of Canada, stretching from the northern reaches of Canada and the Russian Federation to the southernmost tip of Africa. It applies to “migratory waterbirds”, “migratory” being defined by reference to the definition established by the Convention, “water-birds” being defined as “those species of birds that are ecologically dependent on wetlands for at least part of their annual cycle, have a range which lies entirely or partly within the Agreement Area and are listed in Annex 2 to [the] Agreement”. Ultimately it is thus a positive listing agreement, with the parties to the agreement deciding, through amendments to Annex 2 of the agreement, to which species it applies. No formal criteria appear to have been adopted for inclusion in Annex 2 and the treatment of birds traditionally regarded as seabirds has not been fully clarified. At the moment 255 species are covered (172 initially), including species of pelicans, cormorants, frigatebirds, tropicbirds, gannets, storks, flamingos, anatids, waders, gulls, terns and alcids.

The *Agreement on the Conservation of Albatrosses and Petrels* (ACAP), requested by COP 6 in November 1999, was concluded on 2 February 2001 in Cape Town, and entered into force on 1 February 2004. It is not geographically restricted. It applies to any species, subspecies or population of albatross and petrel listed in its Annex 1. It is thus also a positive listing agreement, with the parties to the agreement deciding, through amendments to Annex 1 of the agreement, to which species it applies. It currently covers 19 species of albatrosses and 7 species of petrels, all on Appendix II of CMS (which lists only 12 albatross and 6 petrel taxa, due to divergent taxonomic treatment) except for 1 albatross listed in Appendix I. One other Appendix I albatross, 3 Appendix II albatrosses, and 7 Appendix I petrels are not covered, mostly because their range is restricted to the Northern Hemisphere.

The *Agreement on the Conservation of Gorillas and their Habitats* (GORILLA

AGREEMENT) requested by COP 8 in November 2005, was concluded on 24 October 2007 in Paris, and entered into force on 1 June 2008. Its geographical area covers the entire distribution range of gorillas, over 10 Range States, Angola, Cameroon, Central African Republic, Republic of Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Nigeria, Rwanda and Uganda. It applies to all gorilla taxa (*Gorilla beringei beringei*, *Gorilla beringei graueri*, *Gorilla gorilla gorilla*, *Gorilla gorilla diehli*, in terms of Wilson & Reeder 2005 nomenclature) and their habitats. All are on Appendix I of CMS.

All four agreements explicitly state, through a clause inserted in the body of the agreement, that they constitute Article IV, paragraph 3, AGREEMENTS:

EUROBATS: "This Agreement is an AGREEMENT within the meaning of paragraph 3 of Article IV of the Convention".

AEWA & GORILLA: "This Agreement is an AGREEMENT within the meaning of Article IV, paragraph 3, of the Convention.

ACAP: This Agreement is an AGREEMENT within the meaning of Article IV (3) of the Convention.

EUROBATS only targets Appendix II species (in total conformity with the requirements of Article IV, paragraph 3), AEWA and ACAP predominantly target Appendix II species, but include Appendix I species, as well as, in the case of AEWA, species not listed in the appendices, GORILLA only targets Appendix I species (approaches that Article IV, paragraph 3 does not require but of course does not preclude, as clearly indicated by Resolutions on possible evolution of Article IV, paragraph 4, agreements). EUROBATS and ACAP do not include Concerted Action species. AEWA includes 5 Concerted Action species (2 partially). GORILLA includes only Concerted Action species (totally).

All four AGREEMENTS clearly, and in detail, indicate, within the preambulatory clauses, their foundation in the Convention and its implementation. In addition, GORILLA acknowledges its status as a support to the Concerted Action.

ACAP and GORILLA fully meet the requirements of Article V, paragraphs 2 and 3, in particular in that they cover the whole of the range of the migrating species concerned; EUROBATS and AEWA only do so by identifying -- sometimes quite artificially -- "populations" and equating them to "species". EUROBATS could have avoided that difficulty -- and still could avoid it -- by adopting in its implementation a more realistic definition of "Europe" as the boundaries of the Council of Europe Member States, thus including the whole of the Russian Federation and CIS countries.

The main operational tool of the four AGREEMENTS is an Action Plan, indispensable to meet the requirements of the Convention in terms of content. Drafting the Action Plan and negotiating its adoption by the Range States can be the most difficult and time-consuming part of the preparation of AGREEMENTS. AEWA and ACAP include action plans prepared prior to conclusion of the agreement, appended to it and included in its adoption. EUROBATS and GORILLA include the outline of an Action Plan, but leave to the Meeting of the Parties the preparation of the detailed Plan, after entry into force.

The text that embodies the principles underlying the Action Plan, expresses ways to revise this Action Plan, constitutes the "appropriate machinery" by which the AGREEMENT can be implemented and monitored, establishes the manner in which disputes will be resolved, is, for all four AGREEMENTS, a legally binding document; this it is not explicitly stated, but is

made evident by reference to Article IV, paragraph 3, and by the description of the Signature, Ratification, Acceptance, Approval and Accession procedures. The text is standard, essentially identical in the various Article IV, paragraph 3, AGREEMENTs that have been concluded, and obviously derived from that of EUROBATS, except as noted in the next paragraph.

An "*appropriate machinery*" has been deemed necessary in all four AGREEMENTs. In the first three concluded this "*appropriate machinery*" is highly formal, heavy and rather independent of the Convention. The text of GORILLA and its negotiation intents open the door to a lighter machinery, better integrated with the Convention, in particular through the clause that "*Where it is possible to do so, ... sessions [of the Meeting of the Parties] should be held in conjunction with the ordinary meetings of the Conference of the Parties to the Convention*".

In CMS terminology and communication, all Article IV, paragraph 3, AGREEMENTs have been called "Agreements" but this term has not been reserved to them, as some Article IV, paragraph 4, agreements are designated by an identical label.

The time which elapsed between decision by the COP to proceed with the preparation of an Article IV, paragraph 3, AGREEMENT and its conclusion was 6 years for EUROBATS, 10 years for AEWA, 2 years for both ACAP and GORILLA. The time taken by EUROBATS is easily understood, as it was the first such instrument and the only one that had to create an adequate legal, technical and scientific text. The anomalously long time necessitated by AEWA probably originated in the decision to include a detailed action plan, and the complexity of the collateral context. The preparation and negotiation times of ACAP and GORILLA are typical of what should now be expected for Article IV, paragraph 3, AGREEMENTs.

A reliable evaluation of the operational conservation results of the four AGREEMENTS is beyond the scope of this review. A summary assessment based in part on known species population trend inflections, protected area surface evolution and policy changes can nevertheless be attempted.

Positive trend inflections -- to which it is highly likely that EUROBATS has contributed -- are noted for bats. They are generally not recorded for Eurasian-African waterfowl and for tubenoses, but it is too soon to expect an impact of ACAP.

For protected areas, EUROBATS has operated in a context where few traditions existed, especially for key foraging areas, and it can be demonstrated, through several decisions, that it has contributed, alongside the Bern Convention and the EU Habitat Directive, to a substantial increase in the surface of areas dedicated to integrated bat conservation. This is perhaps less clear so far in the case of AEWA which has had difficulties in extending to Africa, the Natura 2000 and Emerald networks, one of its main original objectives. New instruments recently established in connection with its implementation may however improve the situation. It is premature to evaluate the potential of ACAP in this respect especially in view of the difficulty of establishing protected areas on the open seas.

All three of the first AGREEMENTS have contributed to policy changes. EUROBATS has contributed to making CMS one of the instruments that have propelled bats to the forefront of European conservation. Particularly noteworthy is its wide-ranging Conservation and Management Plan, and its European Bat Night, an awareness raising tool that has had

enormous success with the public, media, scientific institutions, NGOs and governmental authorities. The Action Plans of AEWA have also highlighted key issues in species and habitat conservation, and even more prominently, in management of human activities of all kinds. ACAP has been a motor in research and awareness raising on several serious threats to seabirds, such as by-catch and invasive species. Particularly and most importantly it has contributed to focusing research and has facilitated the adoption of seabird by-catch mitigation measures by a number of regional fisheries management organisations.

It is of course too soon to evaluate any results of GORILLA with respect to these three parameters, but the adequacy of the outlined action plan to the threats bearing on ape populations, and the enthusiasm with which the negotiation of the AGREEMENT was conducted by the Range States, in itself a strong policy signal, raise high expectations.

## **2.2. Article IV, paragraph 4, agreements**

Eighteen Article IV, paragraph 4, agreements have so far been concluded under the Convention:

The *Agreement on the Conservation of Seals in the Wadden Sea* was concluded on 16 October 1990 and came into effect on 1 October 1991. Its geographical area is that indicated in the title as are the targeted species.

The *Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas* (ASCOBANS) was concluded on 13 September 1991 and came into effect on 29 March 1994. Its geographical area included at the start the Baltic and North Seas (the instrument was originally known as “Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas”); the Fourth Meeting of the Parties, held in Esbjerg, Denmark, in August 2003, agreed to extend the original area further west to cover parts of the North Atlantic and to incorporate waters adjacent to Ireland, Portugal and Spain (and adopted the new name “Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas”); the amendment entered into force on 3 February 2008. ASCOBANS covers all species of toothed whales (Odontoceti) in the Agreement area, with the exception of the Sperm Whale (*Physeter macrocephalus*).

The *Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area* (ACCOBAMS) was concluded on 24 November 1996 and entered into effect on 1 June 2001. Its geographical area includes all the maritime waters of the Black Sea and the Mediterranean and their gulfs and seas, and the internal waters connected to or interconnecting these maritime waters, and of the Atlantic area contiguous to the Mediterranean Sea, west to the line joining the lighthouses of Cape St. Vicente (Portugal) and Casablanca (Morocco). It applies to all cetaceans that have a range that lies entirely or partly within the Agreement area or that accidentally or occasionally frequent the Agreement area. “Range States”, to which signature and accession are apparently restricted, are defined as any State that exercises sovereignty and/or jurisdiction over any part of the range of a cetacean population covered by the Agreement, or a State, flag vessels of which are engaged in activities in the Agreement area which may affect the conservation of cetaceans.

The *Memorandum of Understanding concerning Conservation Measures for the Slender-billed Curlew* (*Numenius tenuirostris*) was concluded on 10 September 1994 and came into effect immediately. Its geographical area is the range of the species.

The revised *Memorandum of Understanding concerning Conservation Measures for the Siberian Crane (Grus leucogeranus)* was concluded on 13 December 1998 and came into effect on 1 January 1999. Its geographical area is the range of the species. The original MOU came into effect in 1993.

The *Memorandum of Understanding concerning Conservation Measures for Marine Turtles of the Atlantic Coast of Africa* was concluded on 29 May 1999 and came into effect on 1 July 1999. Its geographical area is that indicated in the title, as well as some European islands and waters; the targeted species are those indicated in the title.

The *Memorandum of Understanding on the Conservation and Management of the Middle-European Population of the Great Bustard (Otis tarda)* was concluded on 27 June 2000 and came into effect on 1 June 2001. Its geographical area is the range of the population.

The *Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia (IOSEA)* was concluded on 23 June 2001 and came into effect on 1 September 2001. Its geographical area is that indicated in the title, as are the targeted species.

The *Memorandum of Understanding concerning Conservation and Restoration of the Bukhara Deer (Cervus elaphus bactrianus)* was concluded on 16 May 2002 and came into effect immediately. Its geographical area is the range of the subspecies (species by current taxonomic evaluations).

The *Memorandum of Understanding concerning Conservation Measures for the Aquatic Warbler (Acrocephalus paludicola)* was concluded on 30 April 2003 and came into effect immediately. Its geographical area is the range of the species.

The *Memorandum of Understanding concerning Conservation, Restoration and Sustainable Use of the Saiga Antelope (Saiga tatarica tatarica)* was concluded on 3 November 2005 and came into effect on 24 September 2006. Its geographical area is the range of the subspecies.

The *Memorandum of Understanding concerning Conservation Measures for the West African Populations of the African Elephant (Loxodonta africana)* was concluded on 22 November 2005 and came into effect immediately. Its geographical area is the range of the populations.

The *Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region* was concluded on 15 September 2006 and came into effect immediately. Its geographical area is that indicated in the title, as are the targeted species.

The *Memorandum of Understanding concerning Conservation Measures for the Ruddy-headed Goose (Chloephaga rubidiceps)* was concluded on 21 November 2006 and came into effect immediately. Its geographical area is the range of the continental populations of the species.

The *Memorandum of Understanding on the Conservation of Southern South American Migratory Grassland Bird Species and Their Habitats* was concluded on 26 August 2007 and came into effect immediately. Its geographical area is that indicated in the title. It applies to one Appendix I open-country wader, *Numenius borealis*, and to 10 open-country passerines, 7 of which are on Appendix I and 3 on Appendix II of CMS.

The *Memorandum of Understanding concerning Conservation Measures for the Eastern Atlantic Populations of the Mediterranean Monk Seal (Monachus monachus)* was concluded on 18 October 2007 and came into effect immediately. Its geographical area is the range of the populations.

The *Memorandum of Understanding on the Conservation and Management of Dugongs (Dugong dugon) and Their Habitats throughout their Range* was concluded on 31 October 2007 and came into effect immediately. Its geographical area is the range of the species.

The *Memorandum of Understanding Concerning the Conservation of the Manatee and Small Cetaceans of Western Africa and Macaronesia* was concluded on 3 October 2008 and came into effect immediately. Its geographical area is that indicated in the title, as are the targeted species.

Of these eighteen Article IV, paragraph 4, agreements, concluded prior to 15 October 2008, fifteen explicitly state, through a clause inserted in the body of the agreement, that they constitute Article IV, paragraph 4, agreements (e.g. Wadden Sea Seals: “*This Agreement shall be deemed to be an agreement as defined in Article IV paragraph 4 of the Convention on the Conservation of Migratory Species of Wild Animals signed at Bonn on 23 June 1979*” or Grassland Birds “*This Memorandum of Understanding is an agreement under Article IV, paragraph 4, of CMS*”). Two agreements indicate it only through the preambulatory clauses (Great Bustard: “*RECALLING that Article IV.4 of [CMS] encourages Parties to conclude Agreements - including non-binding administrative agreements such as this one...*”; Ruddy-headed Goose: “*Taking account similarly of Article IV paragraph 4 of the Convention which invites Parties to enter agreements*” ). One (Slender-billed Curlew) does not mention it.

Nine Article IV, paragraph 4, agreements target Appendix I species, five target Appendix II species, four include both Appendix I and Appendix II species; some indicate they can extend to species not listed in the appendices. The nine agreements that target exclusively Appendix I species are all single-species or species-group agreements that concern Concerted Action species, the four agreements that include both Appendix I and Appendix II species are geographically-based agreements; one of them (ACCOBAMS) includes Concerted Action species.

Most Article IV, paragraph 4, agreements clearly indicate, within the preambulatory clauses, their foundation in the Convention and its implementation. For a few (e.g. Saiga Antelope, West African Elephant), the link is somewhat obscure, with references to CBD or CITES sometimes rather more prominent. Some of the agreements (e.g. Aquatic Warbler, Mediterranean Monk Seal, Ruddy-headed Goose) clearly indicate they are taken in support of a Concerted Action, and, more generally, are particularly good, among the less formal instruments, in detailing the link with CMS implementation.

Although ASCOBANS and ACCOBAMS have structures that are as formal and complex as those of Article IV, paragraph 3, AGREEMENTs, they correctly identified themselves as Article IV, paragraph 4, agreements as in most cases they cannot be regarded as meeting the requirements of Article V, paragraph 2, since they do not cover the whole of the range of the migrating species concerned, and the expedient of identifying “populations” and equating them to “species” would in their case have been difficult to use.

The main operational tool of the eighteen Article IV, paragraph 4, agreements is an Action

Plan, completely equivalent to that of Article IV, paragraph 3, AGREEMENTs, an indispensable tool if the instrument is to have a conservation impact. Most of the instruments include the outline of an Action Plan, but leave to the signatories the preparation of the detailed Plan, after conclusion or entry into force.

The text that embodies the principles underlying the Action Plan, expresses ways to revise this Action Plan, constitutes the "*appropriate machinery*" by which the agreement can be implemented and monitored, establishes the manner in which disputes will be resolved, is, for three of the eighteen Article IV, paragraph 4, agreements an inferably – though not explicitly – legally binding document, for the other fifteen an explicitly or presumably non-binding document. Wadden Sea Seals, ASCOBANS and ACCOBAMS, although they explicitly state they are Article IV, paragraph 4, agreements, and do not state they are legally binding, have a structure and Signature, Ratification, Acceptance, Approval and Accession procedures essentially identical to those of Article IV, paragraph 3, AGREEMENTs, and were, like them, intended as “international treaties” with the status of a legally binding instrument. Of the other fifteen agreements, ten explicitly state they are non-binding instruments, either through an operational clause (Monk Seal, Dugong, Grassland Birds), or through a preambulatory clause (Bukhara Deer, Saiga) or through both (Great Bustard, Aquatic Warbler, West African Elephant, Pacific Islands Cetaceans, West African and Macaronesian Cetaceans and Manatee). One agreement (IOSEA) by including the clause “*When appropriate, the signatory States will consider amending this Memorandum of Understanding to make it legally binding*” implicitly clarifies that it is not at present. The last four agreements contain no such statement but their structure suggests they mean to be non-legally binding. However they are Memoranda of Understanding and some legal sources claim that Memoranda of Understanding are legally binding if they contain no clause to the contrary. All four concern Concerted Action species, for which actions are required under the Convention itself, and one (Ruddy-Headed Goose) refers, in the preambulatory clauses, only to legally-binding commitments, articles of the Convention or regional Protocol.

An "*appropriate machinery*" has been deemed necessary in all Article IV, paragraph 4, agreements, and constructed on the model of Article IV, paragraph 3, AGREEMENTs. This machinery has, however, usually been kept less cumbersome and less independent from the Convention, though ASCOBANS and ACCOBAMS (but not Wadden Sea Seals), have very similar mechanisms to those of Article IV, paragraph 3, AGREEMENTs and some of the other agreements approach them.

In CMS terminology and communication, three of the Article IV, paragraph 4, agreements are called “Agreements”, and not clearly differentiated from Article IV, paragraph 3, AGREEMENTs. The other fifteen Article IV, paragraph 4, agreements are called Memoranda of Understanding.

The time which elapsed between decision by the COP to proceed with the preparation of an Article IV, paragraph 4, agreement and its conclusion, has been on average shorter than for Article IV, paragraph 3, AGREEMENTs. Exceptions do, however, exist.

### **2.3. Concerted Actions**

The Resolutions establishing the list of species to “*be the subject of concerted actions*” in the next triennium have listed a total of 43 species or groups of species. Of these 10 have been included in two administratively structured, complex, geographically-based, whole-range,

multi-species Concerted Actions:

The *Sahelo-Saharan Antelopes Concerted Action* was established by the Conference of the Parties at its Fourth Meeting (Nairobi, 7-11 June 1994) through RECOMMENDATION 4.5 -- CONCERTED ACTION FOR SIX APPENDIX I SPECIES OF SAHELO-SAHARAN UNGULATES: *Addax nasomaculatus*, *Oryx dammah*, *Gazella dama*, *Gazella leptoceros*, *Gazella cuvieri*, *Gazella dorcas*. Its geographical scope is the arid and subarid zones of the Sahara and Sahel and their enclaved mountain ranges and coastal habitats. It targets 6 Concerted Action species, Scimitar-horned Oryx (*Oryx dammah*), Addax (*Addax nasomaculatus*), Dama Gazelle (*Gazella dama*), Slender-horned Gazelle, (*Gazella leptoceros*), Cuvier's Gazelle (*Gazella cuvieri*) and Dorcas Gazelle, (*Gazella dorcas*). It can easily be extended to cover other components of the regional fauna, listed on Appendix II or not listed in appendices.

The *Central Eurasian Aridland Concerted Action* was established by the Conference of the Parties at its Eighth Meeting (Nairobi, 20-25 November 2005) through RECOMMENDATION 8.23 -- CENTRAL EURASIAN ARIDLAND MAMMALS. Its geographical scope is the arid and sub-arid zones of Eurasia and their enclaved mountain ranges and coastal habitats. It targets 4 Concerted Action species, Snow Leopard (*Uncia uncia*), Bactrian Camel (*Camelus bactrianus*), Wild Yak (*Bos grunniens*), Bukhara Deer (*Cervus elaphus bactrianus*), but also, explicitly, several Appendix II species (*Equus hemionus* (s.l.), *Gazella gazella*, *Gazella subgutturosa*, *Procapra gutturosa*, *Saiga tatarica*) and, beyond, the entire megafauna, listed or not listed, migratory or not.

Another 20 Concerted Action species have been the object of administratively structured *single-species* (or species-group) *Concerted Actions*. They are Gorillas (*Gorilla spp.*), South Andean Deer (*Hippocamelus bisulcus*), Mediterranean Monk Seal (*Monachus monachus*), Southern Marine Otter (*Lontra felina*), La Plata Dolphin (*Pontoporia blainvillei*), Black-faced Spoonbill (*Platalea minor*), Andean Flamingo (*Phoenicopterus andinus*), Puna Flamingo (*Phoenicopterus jamesi*), Lesser White-fronted Goose (*Anser erythropus*), Ruddy-headed Goose (*Chloephaga rubidiceps*), Ferruginous Duck (*Aythya nyroca*), White-headed Duck (*Oxyura leucocephala*), Siberian Crane (*Grus leucogeranus*), Great Bustard (*Otis tarda*), Houbara Bustard (*Chlamydotis undulata*), Slender-billed Curlew (*Numenius tenuirostris*), Spoon-billed Sandpiper (*Eurynorhynchus pygmeus*), Chinese Crested Tern (*Sterna bernsteini*), Aquatic Warbler (*Acrocephalus paludicola*) and Marine Turtles (Dermochelyidae: *Dermochelys coriacea*; Cheloniidae: *Chelonia mydas*, *Eretmochelys imbricata*, *Natator depressus*, *Caretta caretta*, *Lepidochelys olivacea*, *Lepidochelys kempii*). Several of these have been totally or partially covered by explicit single-species Article IV, paragraph 4, agreements or in the case of *Gorilla spp.* by an Article IV, paragraph 3, AGREEMENT.

Two species, the Lesser Kestrel (*Falco naumanni*) and the Whitewinged Flufftail (*Sarothrura ayresi*), have not been the subject of administratively structured Concerted Actions but they are incorporated in multi-species agreements, in existence or in negotiation, in the framework of which the Concerted Action requirements can presumably be met.

Eleven species do not yet appear to be the object of administratively structured Concerted Actions reporting to CMS. They are the Southern River Otter (*Lontra provocax*), Humboldt Penguin (*Spheniscus humboldti*) and Blue Swallow (*Hirundo atrocaerulea*), placed on the list in 1999, the Fin Whale (*Balaenoptera physalus*), Sei Whale (*Balaenoptera borealis*), Sperm

Whale (*Physeter macrocephalus*), Southern Right Whale (*Eubalaena australis*), Blue Whale (*Balaenoptera musculus*) and Humpback Whale (*Megaptera novaeangliae*), placed on the list in 2002, the Balearic Shearwater (*Puffinus mauretanicus*) and Western Atlantic Red Knot (*Calidris canutus rufa*), placed on the list in 2005; for the latter two it is too early for reporting to be initiated and an Action Plan exists for *Puffinus mauretanicus*.

The main operational tool of the twenty-two administratively structured Concerted Actions reporting to CMS is an Action Plan, equivalent to that of Article IV, paragraph 3, AGREEMENTs, discussed with the Range States and other interested parties, formally adopted by the Range States and endorsed by the Conference of the Parties.

The text that embodies the principles underlying the Action Plan and establishes the means of its implementation and monitoring has either entirely been left to Resolutions, Recommendations and Endorsements of the Conference of the Parties, issued on the basis of recommendations and endorsements of the Scientific Council (the two geographically-based, whole-range, multi-species Concerted Actions and twelve single-species or species-group Concerted Actions), or has included an Article IV, paragraph 4, agreement (seven single-species or species-group Concerted Actions, Mediterranean Monk Seal, Ruddy-headed Goose, Siberian Crane, Great Bustard, Slender-billed Curlew, Aquatic Warbler and Marine Turtles), rarely an Article IV, paragraph 3, AGREEMENT (one species-group Concerted Action, on Gorillas). Since Concerted Actions primarily target Appendix I species, many of the commitments contained in the Action Plan derive from legally-binding obligations imposed by the Convention itself; other commitments reflect “the will of the governing body of an international agreement” (UNEP, Division of Environmental Law and Conventions, 2008) as expressed, in particular, through Resolutions and Recommendations of the Conference of the Parties.

The "*appropriate machinery*" to pilot administratively structured Concerted Actions reporting to CMS has been provided by the Scientific Council of CMS, in the form of a Focal Point Councillor and an ad hoc Working Group, composed of Councillors appointed by the Range States, other interested Councillors and invited external experts, with support from the Secretariat. In most cases the "*appropriate machinery*" has been in part provided by contracted NGOs or institutions. This machinery has never been cumbersome and always fully integrated in the Convention.

In CMS terminology and communication, Concerted Actions have a confusing coverage. In Scientific Council and Conference of the Parties documents they are called Concerted Actions until a legal tool for the implementation or monitoring of the Action Plan is established. They are then mostly known by the name of that tool, in general an MOU. In external communication (e.g. listings of species activities), they are often not mentioned, or called “action plan” (e.g. “antelopes”), again until a legal tool for the implementation or monitoring of the Action Plan is established. They have then always been known by the name of that tool, in general an MOU.

There is no time lag between decision by the COP to proceed with a Concerted Action and its initiation. Indeed, Concerted Actions exist as soon as the collective Resolution listing the target species is passed. However, administratively structured Concerted Actions have in some cases taken a certain time to get established. This delay is, presently, usually very short.

## **2.4. Cooperative Actions**

Recommendations 5.2, 6.2, 7.1 and 8.28 establishing the list of species to “*be the subject of cooperative actions*” in the next triennium have listed a total of 56 species or groups of species (18 sturgeons, 1 shark, 4 land birds, 2 waterbirds, 9 seabirds or seabird groups, 14 small cetaceans, the Dugong, the African Elephant, 3 Eurasian aridland large mammals, 3 bats). Of these, 3 (the 3 aridland large mammals) were placed on the list only to facilitate their inclusion in the Aridland Concerted Action, and they have indeed been incorporated. Of the remaining 53 species or species-groups, 15 (9 seabirds or seabird groups, the Whale Shark, the Dugong, one small cetacean and 3 South-American land birds) were removed from the list because they had become the object of, or had been incorporated into, an existing or planned Article IV, paragraph 3 (9 species and species-groups) or Article IV, paragraph 4 (6 species) agreement. For the remaining 38 species, no administratively structured action appears to be in progress, except the consideration of agreements. Thus it appears that the Cooperative Action list has been used as a waiting list for the establishment of agreements, in contradiction to the original intent of Recommendation 5.2.

### **3. GUIDELINES FOR REVISED POLICY**

#### **3. 1. Nomenclature of instruments**

The sole objective and the *raison d'être* of the Convention are the conservation, restoration and promotion of the natural heritage. To succeed the Convention and its instruments need public support, for which visibility, clarity and emotional appeal are essential. The vocabulary the Convention uses to identify its instruments is thus not a trivial matter. As practice stands at the moment, there is probably too much emphasis on the legal or administrative tools that underpin the endeavours of the Convention rather than on the endeavours themselves.

For Article IV, paragraph 3, AGREEMENTS, it is not desirable to abandon the denomination of “AGREEMENT”, in spite of its very generic nature when written without capitals, because it is prescribed by the Convention itself.

Calling Article IV, paragraph 4, agreements MOUs is probably unfortunate. Indeed:

- it is confusing the operational instrument, Article IV, paragraph 4, agreement, with the legal tool or one of the legal tools chosen to implement it.
- Memorandum of Understanding is a very general term that does not denote or connote CMS, species conservation, or Article IV, paragraph 4, agreements.
- CMS itself concludes numerous MOUs (for instance with other Conventions, NGOs etc) that are not Article IV, paragraph 4, agreements.
- Conversely, as indicated by Resolution 2.6 and subsequent developments there are many other tools that could be used to implement an Article IV, paragraph 4, agreement, and for complex ones, several tools might be envisaged.

To dispel the impression, still lingering in some quarters, that CMS is a convention that mostly produces other legal documents (AGREEMENTS, MOUs), names are needed for Article IV, paragraph 4, agreements (less administrative than that phrase itself) that better describe what should be the most frequent tool of the Convention. When Article IV, paragraph 4, agreements are concluded in the framework of a Concerted Action primarily targeting Appendix I species, there is no need to abandon the label “Concerted Action” which strongly connotes concrete conservation action. When Article IV, paragraph 4, agreements

primarily target Appendix 2 species, they could perhaps be called “Initiatives”, a widely used expression that has a high level of recognition in the species conservation field (cf. Large Carnivore Initiative, Large Herbivore Initiative, etc.).

Finally, it is essential that the link between the Convention and its operational tools remains evident. At the moment, this link is not always very visible for the conservation community, the public or the decision-makers, which is damaging for the image of the Convention, and undermines the coherence of both the Convention and its instruments. The acronym “CMS” should remain present in the title of all instruments (as “*CMS Agreement on ...*” or “*... CMS Agreement*”).

Permanent operational instruments could thus be streamlined to three:

CMS AGREEMENTS, primarily oriented towards Appendix II species, fully meeting the holistic requirements of Article V, implemented through an Action Plan and a legally binding international agreement as described by Article IV, paragraph 3 and Article V.

CMS CONCERTED ACTIONS, primarily oriented towards the conservation of Appendix I species, implemented through an Action Plan and a legally binding (a Protocol or a legally-binding MOU might be appropriate tools) or non-legally binding (a non-legally binding MOU, an administrative agreement, a Resolution or a Recommendation may be adequate) agreement.

CMS INITIATIVES, primarily oriented towards Appendix II, non-Concerted Action Appendix I or non-appendix migratory species, implemented through an Action Plan and a non-legally binding agreement (Resolution, MOU or Administrative Agreement such as Type II Partnership).

Although Concerted Actions exist as soon as the collective Resolution listing the target species is passed, better substance and visibility would be given to administratively structured Concerted Actions by basing them on specific Recommendations, or better, Resolutions, with a content similar to that of Recommendations 4.5 on Sahelo-Saharan Ungulates and 8.23 on Aridland Mammals, rather than merely on collective Resolutions that need renewal at each Conference of the Parties. The collective Resolutions would then only need to list species for which no administratively structured Concerted Action yet exists.

In this scheme, Co-operative Actions would probably be best redefined as a transient instrument, applicable to species on Appendix II with a particularly unfavourable status, encouraging Parties to take action while an Article IV, paragraph 3 or 4, agreement is being prepared. This would essentially bring the definition in line with what has become the practice, and lift the ambiguity on the symbolic significance of Co-operative Action listing.

### **3.2 Appendix I, Appendix II and non-appendix species in multi-species agreements**

#### ***Multi-species CMS INITIATIVES*** (Article IV, paragraph 4, agreements)

For these the Convention explicitly encourages the inclusion of species from all three categories. However, if Appendix I species are included, conservation commitments in their favour may be imposed by the Convention and thus be legally binding. As the agreement is a generally non-legally binding instrument, this should be noted in its text. For these Appendix

I species Single Species Action Plans should be appended to the agreement, or drafted as part of its implementation. In addition, if Concerted Action Appendix I species are included, the particular reporting obligations to the Conference of the Parties, the Scientific Council and the Secretariat of the Convention which are attached to them should be taken over by the agreement.

### ***Multi-species CMS AGREEMENTS*** (Article IV, paragraph 3, AGREEMENTS)

Although the Convention only requires that Parties "endeavour to conclude AGREEMENTS" for Appendix II species, it does not preclude establishing them for other species. It has been the practice of the Convention, since its first AGREEMENTS were drafted, to include all taxonomically and geographically associated Appendix I species, non-Appendix migratory species, and even non-migratory species (the latter explicitly included in EUROBATS<sup>1</sup>). This is sound conservation practice and should be continued. The additional obligations generated when Appendix I species are included are the same as for Article IV, paragraph 4, agreements, including the need for Single Species Action Plans, and, for Concerted Action Appendix I species, the particular reporting obligations to the Conference of the Parties, the Scientific Council and the Secretariat of the Convention which are attached to them.

### ***Multi-species CMS CONCERTED ACTIONS***

Although primarily intended for Appendix I species, multi-species Concerted Actions must be encouraged to include within their scope Appendix II and non-appendix migratory species, as well as, if relevant, non-migratory species, by noting that they constitute a special case of Article IV, paragraph 4, agreement. This will avoid the cumbersome and confusing need of creating an "associated Co-operative Action" for Appendix II species (cf Recommendation 8.23) and the rather artificial and complicated operation of adding species to the appendices so that they can be covered by a Concerted Action or an "associated Co-operative Action". In due course, nevertheless, the species included should, if they meet the criteria, be added to either Appendix I or Appendix II, but this should not be a prerequisite for dealing with them in the Action Plan, no more than it is for Article IV, paragraph 4, and Article IV, paragraph 3, agreements.

### ***Stand-alone SINGLE-SPECIES INITIATIVES and CONCERTED ACTIONS.***

If the entire range of a stand-alone Single Species Initiative or Concerted Action (or one that covers a small number of species) is within the scope of a broad-based Article IV agreement or Concerted Action (such as a Flyway Agreement or Initiative, or a Megafauna Restoration Concerted Action or Initiative) it contributes to the clarity of the Convention's instruments to merge the single species instrument into the multi-species one. The Action Plan included in the single-species instrument would automatically become a Single Species Action Plan under the Article IV agreement or the Concerted Action. The additional obligations bearing on an Article IV agreement in case of inclusion of Appendix I species would of course apply. Stand-alone Single-species Initiatives or Concerted Actions that cut across more than one geographically based agreement (such as the CMS Siberian Crane CONCERTED ACTION) should of course not be merged with any of them, but all concerned regional agreements should note its implications as a priority obligation in their implementation.

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<sup>1</sup> EUROBATS applies to all European populations of 45 bat species - whether migratory or not - occurring in Europe and non-European Range States. The third preambulatory clause of the agreement justifies the decision by noting that "the threats facing bats in Europe and non-European Range States are common to both migratory and non-migratory species and that roosts are often shared by migratory and non-migratory species".

### 3.3. "Appropriate machinery" to implement and monitor agreements

As indicated above, the Convention and its Resolutions do not prescribe any particular form for this "machinery" and even suggest, in Article V, paragraph 4, alinea d, that one may not always be necessary. However, a culture was established in the early stages of implementation of the Convention, that, at least for Article IV, paragraph 3, AGREEMENTs, a "machinery" was necessary, should be administratively heavy and financially very costly, with an MOP (Meeting of the Parties) convening at regular intervals, some sort of Scientific Advisory Committee, and a full-fledged Secretariat. This culture also saw the structures created as very independent from the Convention, to the point where, today, some of the documents produced by existing Article IV, paragraph 3, AGREEMENTs do not even mention the Convention at all, and one reads, repeatedly, the aberrant UNEP/AEWA instead of the obvious UNEP/CMS/AEWA. To some extent the same principles have pervaded Article IV, paragraph 4, agreements, although their level of integration in the Convention has deteriorated less. None of these trends are founded in the Convention and they are detrimental to the Convention in three ways:

- the high cost of the administration of agreements deters Parties from joining them, and even more, from creating other, biologically and operationally desirable ones; this is aggravated by the impression that this high cost is entirely generated by overhead and "soft" conservation and that very little goes to *in-situ* "hard" conservation.
- the independence of Article IV, paragraph 3, AGREEMENTs, combined with the habit of designating Article IV, paragraph 4, agreements as MOUs, a generic term for a legal treaty or treaty-like instrument, entertains the view, firmly entrenched in some quarters, that CMS is just an umbrella convention, operating strictly by generating new legal instruments and with no conservation action content of its own.
- the same factors, and the habit of changing the name of Concerted Action, which has a strong conservation action connotation, to that of MOU, which has none, once a rather mundane legal document has been signed, and to let that MOU lead its life away from the Convention, do not contribute to creating and preserving, in the interested public, the image of the Convention as a conservation-effective instrument.

These perverse trends should be reversed. There are simple ways to do it. They include small matters of semantics on the one hand, fairly straightforward reforms of the administrative process on the other.

The viability and conservation content of instruments will be considerably improved by ceasing to confuse these instruments with the legal tools chosen to implement them. It is proposed above to limit instruments to CONCERTED ACTIONS, AGREEMENTS and INITIATIVES and to precede all these terms by CMS, and not to change the denominations for the vagaries of legal documents. As an example the Sahelo-Saharan Antelope Concerted Action will, at some point, need a legal document to organise adoption, revision and monitoring of the Action Plan. If it then becomes known as a Sahelo-Saharan Antelope MOU its whole visibility will be lost. It should instead become a CMS Concerted Action for the Conservation and Restoration of the Sahelo-Saharan Megafauna, formalised by a N'Djamena (or Agadez, Luxor or Tripoli or whatever) Protocol, a document that could be signed at the next meeting of the Range States, like the declarations that were issued at the two previous meetings, Djerba and Agadir.

Much better integration of agreements in the Convention and a considerable reduction in administrative costs could be achieved by adapting, for new agreements, the "machinery" developed for the first Article IV, paragraph 3, AGREEMENTs, in three key areas:

1. Systematically making the MOP of the Agreement be a subset of the COP of the Convention, formed by the delegates of the Range States to the COP. The delegates of Parties that attend these meetings are administrators of conservation and there is no reason why they should not be competent for both COP and MOP. Some time for the meeting of the various MOPs would have to be worked into the COP, but that should not be difficult (and some might wish to meet together). Even if it were to entail an extra day, it would still be immensely less costly than having independent MOPs, and it would ensure much better integration of agreements into the Convention. It would also facilitate the implementation of the reporting obligations of agreements, their monitoring by the COP (Article VII, paragraph 5, poorly implemented at present), and the exchange of information and development of synergies between agreements. Delegates from non-party signatories of Agreements would have to be invited to part of the COP, but even for big agreements that would in practice entail very few people. In addition, it might encourage accession to CMS. If it is deemed strategically important occasionally to have a high-profile MOP within the geographical range of the agreement, this could be organised through the "special meeting" clause that most agreements have.

2. Systematically making the Scientific Council of CMS the advisory scientific body of agreements, as it already is for Concerted Actions. The Scientific Council would, as it does for Concerted Actions, create a Working Group, composed of a Focal Point Councillor, the Taxonomic Councillor concerned, Councillors appointed by the Range States, and any other interested Scientific Councillors. It would have in many cases to supplement this group by chosen experts, but the costs would nevertheless be much more modest, as there would be no need to cover a venue, etc. Advantages in terms of integration of agreements into the Convention, implementation of the reporting obligations of agreements, their monitoring by the Scientific Council (Article VIII, paragraph 5, also poorly implemented at present), exchange of information and development of synergies between agreements, would be the same as for the COP.

3. Systematically attaching secretariats of agreements and Concerted Actions to an existing structure, as was **required** for paragraph 3 and paragraph 4 agreements by **Resolution 2.7**, such as:

- the conservation administration of one of the Range States
- a relevant conservation NGO or Institution (as was done for the Siberian Crane Concerted Action with ICF, or with the Slender-billed Curlew Concerted Action with Birdlife International), provided the NGO or institution considers its involvement as a contribution to conservation, and agrees to work at cost (staff, running costs, travel expenses) without regarding it as a subsidy to be invested in other activities.
- the CMS Secretariat.
- the Secretariat of an existing agreement.

In all cases this should reduce the Secretariat cost to staff costs (in general one senior staff and clerical support), running expenses and travel, and eliminate infrastructure costs. Some of the choices could be transitional, modified as capacity building progresses in other options. These options and the flexibility to move between them were all required by Resolution 2.7.

### 3.4. Legally-Binding Tools or Not

There is a lingering feeling, probably dating from the first years of the implementation of the Convention, that agreements would be more effective if their implementation tools were legally-binding documents. However, with the hindsight now available, it is difficult to substantiate that article of faith. If one examines in detail the achievements of, for instance, EUROBATS and AEWA, the two Article 3, paragraph 3, AGREEMENTs with the longest history, one fails to detect a single case in which their legally-binding character has been used. EUROBATS has been very useful as a reference in preambulatory statements of various policies, but through its moral and scientific stature, not as a legal obligation. It has contributed greatly to awareness-raising and encouraged research, but no legal powers were needed for that. European Bat Night is an immense success but it has not been inscribed in the legislation of any European state. It would be different if EUROBATS or AEWA had imposed networks of protected areas, with compulsory minimum requirements, as the European Habitat Directive does, but this has not happened. This is not to say that legally-binding tools may not prove useful in some cases, sometimes even indispensable, but that expected results should be carefully defined before the added complication is engaged into. These expected results may sometimes be operational, sometimes more symbolic. Thus, in some cases the need for a legally-binding instrument may simply arise from the greater political significance of such an instrument. In the case of complex Concerted Actions, as they are primarily targeting Appendix I species, so that the conservation measures contained in the Action Plan derive from legally-binding obligations imposed by the Convention itself, not generated by the signature of the agreement, a legally-binding document, clearly referred to the Convention might be preferable. A **Protocol**<sup>2</sup> would then seem most suitable.

### 3.5. Financing of Agreements

**Resolution 2.7 required** that "*all Range States that are parties to an [Article IV, paragraph 3 or Article IV, paragraph 4] agreement should be prepared to contribute a share of such costs of administering that agreement as may arise and as shall be agreed by the parties to the agreement*". This should be enforced for both types of agreements, otherwise the agreements will become an impossible burden for the Convention. In addition, the Parties to the agreements who, if the procedure outlined above is adopted, will see their administrative costs considerably reduced, should be requested to contribute to pilot projects of "hard" conservation, with, if necessary, help from the core budget of the Convention, and to seek external funds to extend these pilot projects.

For Concerted Actions, because the obligations are directly generated by the Convention itself, the responsibility for financing seed projects and seeking external funds should remain with the Convention and should be considered a priority of the Convention. This should be true as long as the Concerted Action is not merged with a multi-species agreement, in which case this responsibility would be transferred to the agreement. The administrative costs related to Concerted Actions should also be borne by the Convention, but once a legal document has been generated to formalise the adoption, revision, implementation and monitoring of the Action Plan, whether MOU or Protocol, a provision for the signatories to share these administrative costs could be included.

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<sup>2</sup> International legal instrument appended or closely related to another agreement (UNEP); usually denotes a treaty amending or supplementing an existing treaty, but can stand alone (UK Foreign and Commonwealth Office).

If the Convention orients towards the establishment of broad geographically-based, complementary instruments offering a worldwide perspective and coverage for selected species assemblies, incentives should be considered for Range States with a territory overlapping several instruments when they join more than one of them. This would preclude sterile competition for membership between instruments. It would be extremely easy to conceive and organize if all the agreements were fully integrated within the Convention<sup>3</sup>.

#### **4. GLOBAL AGREEMENT POLICY FOR THE FUTURE**

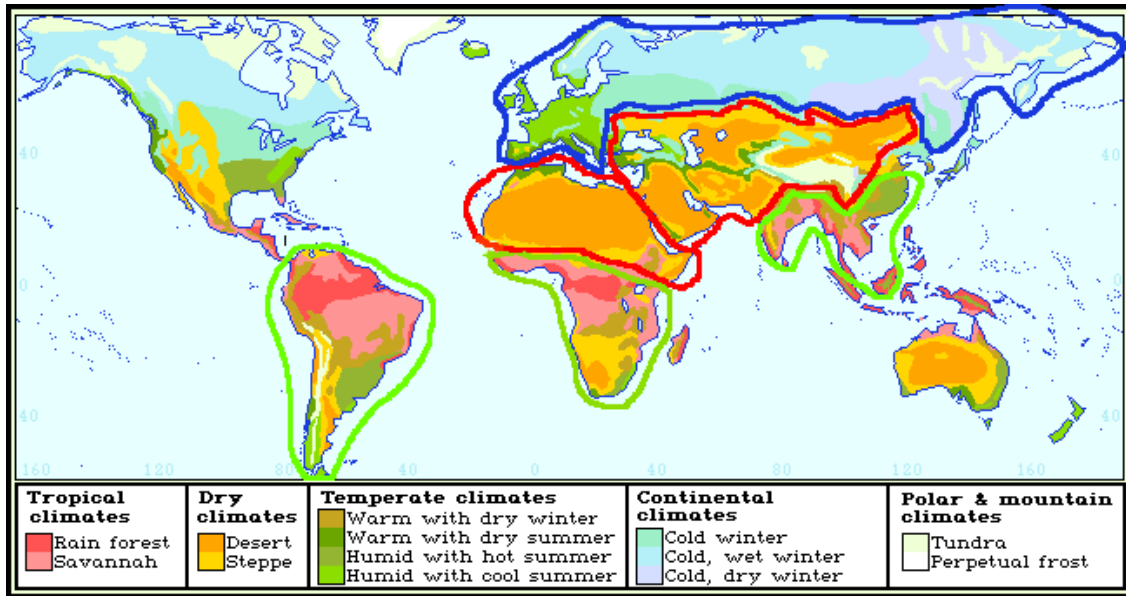
It seems that the perception of the Convention as a conservation-effective tool, and, indeed, its real role in conservation, would be best served by expanding to a coherent network of agreements, achieving world-coverage or near-world coverage, the instruments it has already established in fields in which it has achieved or could achieve a position of leadership. These include **megafaunas, waterfowl, seabirds, marine mammals and sea-turtles, and bats**. To these could be added multi-species instruments oriented towards specific groups for which research and evaluation has already been conducted within the Convention, such as raptors, open-country birds, megafish, sharks as well as a few single-species instruments. Such a major expansion has, rightly, appeared unrealistic to many parties, given the form presently taken by many agreements, and the burden that their implementation constitutes for the Convention. This difficulty would largely disappear if the guidelines proposed above were followed, so that agreements would simply become a way to structure in a coherent and visible way the main activities of the Convention, without generating constantly rising costs.

##### **4.1. Megafaunas**

The strategic importance of large mammals in natural heritage promotion and the reasons for regarding preserving and restoring the global megafaunal heritage as an essential component of a nature conservation policy that is more proactive, more attractive, more optimistic, more capable of generating enthusiasm, feeding dreams and enlisting support, one that “offers an alternative vision for twenty-first century conservation biology” are developed in a companion note (UNEP/CMS/Conf 9.14) Two instruments already exist, the Sahelo-Saharan Antelope Concerted Action and the Central Eurasian Aridland Concerted Action. These instruments could, as already discussed in the Scientific Council, be somewhat extended to cover the entire arid and sub-arid zone of Eurasia and North Africa. For the Sahelo-Saharan Concerted Action, this would entail the inclusion of the horn of Africa. For the Eurasian Aridland CA, it would require including the Arabian Peninsula, an area for which a large mammal agreement was envisaged by earlier COPs. To these two Concerted Actions (in red on map) could be added an Atlantic and Northern European Megafaunal Initiative (in blue on map), which has been suggested to CMS by the Large Herbivore Initiative group; and would complete the coverage of temperate and subtropical Afro-Eurasia. Beyond this, three Initiatives could be considered (in green on map). A South American Megafauna Initiative would give a framework to our Huemul activities, and may be very appropriate, in spite of few species, because it would take place mainly on the territory of our parties and would involve several threatened species, one of which, the Pampa Deer, is a keystone species that may be essential to the management of South American grasslands. A Subsaharan African

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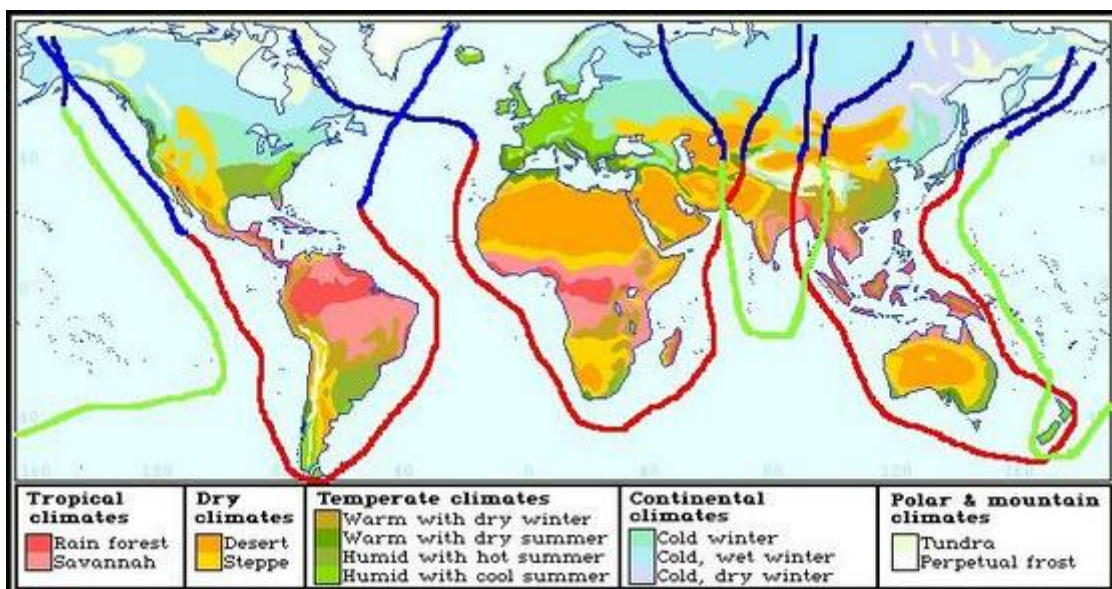
<sup>3</sup> For instance such Range States could be required to provide a single contribution, amounting to the highest contribution they would have to provide to a single agreement among the agreements they join, contribution that would be distributed among the agreements in proportion to their total budget.



Initiative is an obvious option, which would follow up on the proposals already made at the 4th meeting of the Scientific Council, in May 1993, to consider agreements in favour of Derby Eland, Cheetah, African Elephants, Gorillas and African Hunting Dog (for two of those, instruments now exist). But we would perhaps be joining a crowded field. Finally a South and South-east Asian Initiative could be an answer to widespread concern about, in particular, Asian Elephants (Borneo included because it is crossed by international boundaries). At the moment, however, we have too few parties. Opening a discussion with the ASEAN countries around such a project might be an interesting approach.

#### 4.2. Waterfowl

For waterfowl an arrangement in five flyways, emphasizing the five main wintering areas and migration phenomena (in red or green on the map), while of course overlapping in the catchment area (in blue on the map), as proposed by the secretariat in the document presented to the 32<sup>nd</sup> Standing Committee in November 2007 and submitted in revised form to COP 9 (UNEP/CMS/Conf 9.27), would provide a coherent, clearly legible, high-profile world coverage. It would best accommodate and integrate the traditions of waterfowl management agencies and the habits of researchers and conservationists in various fields of avian migration studies while taking fully into account the existence of established or proposed regional agreements.

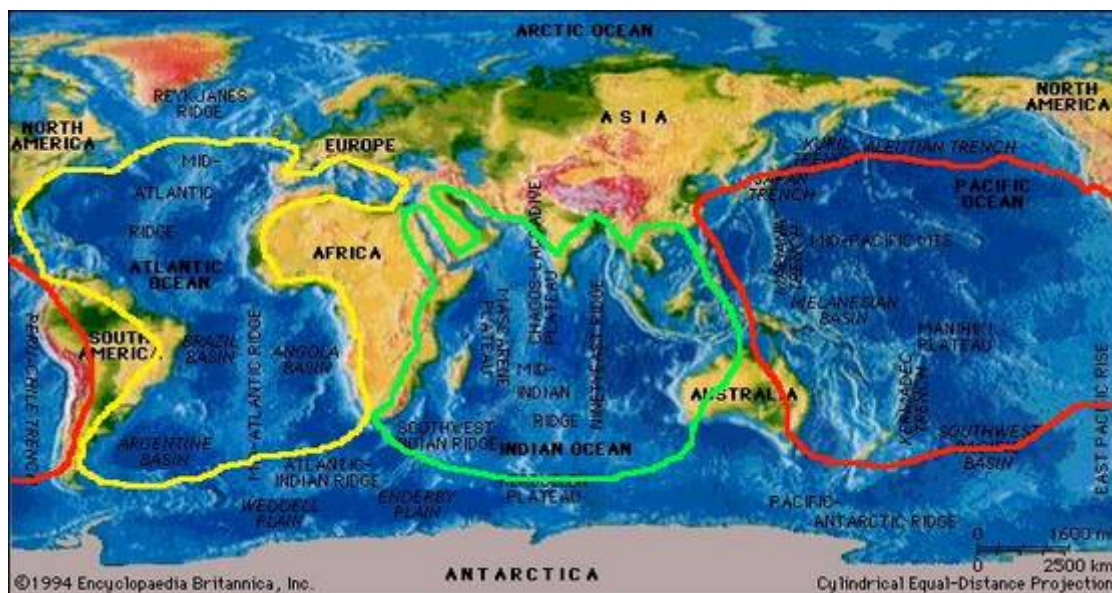


### 4.3. Seabirds

True seabirds undertake circum-global and trans-hemispheric movements, and spend most of their life outside the breeding season out at sea. Many are seriously threatened, the percentage of species in an unfavourable conservation status being much higher for them than for birds in general. For them, CMS is certainly the best possible conservation instrument, and a single global agreement is the obvious choice to federate far-flung conservation efforts. It is the option pioneered by CMS ACAP, for which “the Agreement area includes all the areas of land or water that any albatross or petrel inhabits, resides in temporarily, crosses, or over-flies at any time on its normal migration routes”. The obvious way forward is to expand the coverage list of ACAP to include, at least, all threatened Procellariidae and Spheniscidae, and perhaps other seabird families.

### 4.4. Sea Turtles, Marine Mammals

For **Marine Turtles**, on the excellent model of the CMS IOSEA Marine Turtle Initiative or Concerted Action (outlined in green on the map), instruments could be rapidly established for the Atlantic Basin (outlined in yellow) and the Pacific Basin (outlined in red). For these marine organisms, an ocean-based division, as adopted by CMS IOSEA, makes far more sense than a continent-based one. The Atlantic initiative could be achieved by extending the “Memorandum of Understanding concerning Conservation Measures for Marine Turtles of the Atlantic Coast of Africa”, which covers the Atlantic Coast of Africa, some oceanic Atlantic islands and part of Macaronesia to Atlantic South America, the Caribbean and the rest of southern Europe – where CMS parties are numerous. For the Pacific, two possibilities should be considered. One is a new instrument, the other is an extension of IOSEA into an Indo-Pacific instrument.



For **Cetaceans and Sirenians** a similar basin-oriented scheme could be envisaged, building of course on existing instruments, and possibly tied to the turtle-scheme. Conversely, local or regional coastline-oriented agreements, or regional sub-basin schemes, with the Pacific and Atlantic Ocean basins divided north-south and the Indian Ocean basin divided east-west (possibly with additional areas in the Arctic, the Antarctic and internal waters of South East Asia and the Caribbean), combined with improved inter-agreement liaison, ensured by COP

and Scientific Council integration, may be better suited to the distribution of these groups. Marine opportunities are further considered in UNEP/CMS/Conf 9.26.

#### 4.5. Bats

With CMS EUROBATS the Convention has a well-established, effective, successful instrument to deal with the conservation of temperate bat communities on a broad geographical basis, an instrument which situates the Convention as an important actor in bat conservation and promotion. This field is thus one that is worth emphasizing and the instrument could easily be expanded to the entire Palaearctic zone. This would be a desirable rationalisation, as several populations of bats have a continuous distribution across the boundaries presently adopted, and as the ecology of temperate bat communities is quite uniform. Tropical bat communities raise entirely different problems and the most threatened migratory species among them are probably best approached through single-species initiatives, as already contemplated.

#### 4.6. Other bird-oriented multi-species instruments

An agreement is being developed at the moment for **Afro-Eurasian Raptors**, a continental-scale instrument that is well-suited to the distribution pattern and ecology of the group. Indeed the intrinsically continuous distribution of raptors, linked to zonal habitats, makes the separation of populations within species difficult and most species use at least two of the major southern wintering areas, western ones Africa and the Indian subcontinent, eastern ones the Indian subcontinent and southeast Asia. A similar instrument could be envisaged for **Eurasian Aridland Birds** for which we already have some instruments (CMS CONCERTED ACTIONS on *Chlamydotis undulata* and *Otis tarda*) and proposals, and for South American Grassland Birds for which the existing Concerted Action would be a very good starting point.

#### 4.7. Fish-oriented multi-species instruments

Fish have been a major concern of utilitarian-justified environmentalist efforts, but largely underrepresented in natural heritage conservation endeavours in spite of the potential cultural, sociological and emotional appeal some of them may command. CMS has increasingly been active in correcting that imbalance, and has expressed preoccupation, as well as encouraged and promoted conservation-oriented research on a number of emblematic species and groups, in particular sharks, large diadromous fish and migratory freshwater megafish. Time is ripe for operational instruments. For **Sharks**, a single global agreement is the obvious choice, as the distribution and movement parameters are as universal as those of seabirds. For diadromous and fresh-water **Megafish** optimal structuring requires careful evaluation. A single worldwide umbrella agreement may dilute the responsibilities that have to be taken river basin by river basin. A river-by-river arrangement would lead to an unworkable number of small agreements. Perhaps a structure by ocean basin or some subdivision of ocean basins, which would be logical for diadromous fish, would also suit large fresh-water fish.

#### 4.8. Single-species instruments

Finally, stand-alone Single-Species AGREEMENTS, CONCERTED ACTIONS and

INITIATIVES must continue to be considered for particularly emblematic and seriously threatened species or species-clusters when it appears that including them into multi-species agreements is not practical, because of the geometry of the range, or would result in a loss of visibility, and therefore of concern. Examples, among the CMS instruments presently supported by formal legal tools include the CMS AGREEMENT on Gorillas *Gorilla spp.*, the CMS CONCERTED ACTIONS on **Siberian Crane**, *Grus leucogeranus*, **Monk Seal**, *Monachus monachus*, and **Aquatic Warbler**, *Acrocephalus paludicola*, and the CMS INITIATIVE on the **West African Populations of African Elephants**, *Loxodonta spp.*, *partim* which should be extended to include the entire range of *Loxodonta africana* and *Loxodonta cyclotis*. Several other Single-Species INITIATIVES, targeting some of the most threatened species in the world, and, in particular, large mammals with ranges that transcend that of geographically-based Concerted Actions or Initiatives, such as the Tiger, *Panthera tigris*, and Asian Elephant, *Elephas maximus*, should be envisaged, contributing to the development of CMS as the leading agency for species conservation at global level.