

WATERBIRDS, THE 2010 BIODIVERSITY TARGET, AND BEYOND: AEWA'S CONTRIBUTION TO GLOBAL BIODIVERSITY GOVERNANCE

BY
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Our planet's biodiversity is governed by a system of multilateral biodiversity agreements (MBDAs), created to stop the ongoing degradation of the biological infrastructure of our planet, upon which all life is dependent. However, despite their existence, biodiversity is still on the losing side. Why haven't these MBDAs succeeded in stopping biodiversity loss? Are the individual agreements at fault or is there an inherent problem with the system as a method for global biodiversity governance?

In the context of synergetic relationships amongst MBDAs, this Article addresses the contribution of a small, relatively unknown MBDA, the Agreement on the Conservation of African-Eurasian Migratory Waterbirds, or AEWA, to both the 2010 target of reducing biodiversity loss, and to a common strategy for their implementation.

It is argued that inadequate implementation of MBDAs derives from them being either framework agreements, meant to be implemented by "daughter" agreements or protocols, or "soft law" policy instruments, containing a minimum of binding commitments. Thus a species-specific multilateral environmental agreement (MEA) like AEWA could perhaps be used as an implementer of their policies by means of its detailed and hard law obligations, creating a win-win situation. AEWA would profit since it would receive backing and assistance in its own implementation. Other MBDAs would profit since implementation of AEWA's provisions could also be regarded as implementation of that particular MBDA.

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I. INTRODUCTION

Tales of migratory waterbirds as depicted in the 2001 documentary film *Winged Migration*¹ transports the viewer into the little-known drama of the lives of migratory waterbirds as global migrants. Various species of waterbirds, including the white stork, the Eurasian crane, the red-crowned crane, the bar-headed goose, and the snowgoose, are accompanied on their migratory route by humans flying along besides them. The documentary depicts scenes of these strangely beautiful creatures both in flight and at their breeding and resting sites, hauntingly similar to us humans in so many ways—their devotion to their young and their anguish and desolation at their loss, at play and at war with each other, courting and family relationships, the intricate social structure of their lives as migrants. The film reveals the awe-inspiring migrations that millions of waterbirds undertake twice a year, over distances of thousands of miles from their breeding sites in northern lands to their wintering sites in the warmer southern lands, and then back again.

The waterbirds' migratory path takes them over breathtaking, exquisite natural scenery in landscapes as diverse as the Arctic and the Amazon, as well as densely developed urban centers and heavily polluted industrialized areas. They are ignorant of the fact that the territories over which they fly and in which they rest throughout their long journeys are divided into separate political entities and their chances of safe passage have much to do with the nature of that particular political entity below. In addition to the long, exhausting migrations that can extend for thousands of miles, leaving the birds vulnerable to frigid arctic temperatures, storms, blizzards, and avalanches—all as unforgettably depicted in the documentary—the birds are also at the mercy of human created risks. They have to contend with life threatening situations: huge combines plowing agricultural fields on their

¹ WINGED MIGRATION (Sony Pictures Classics 2003).

What if, for the space of a year, we no longer waited for the seasons, what if we embarked on the most fabulous of journeys, what if, abandoning our towns and our countryside, we went on a tour of the planet? What if we understood that our borders did not exist, that the earth is a one and only space and what if we learned to be free as birds?

Director Jacques Perrin, *Winged Migration* Official Website: The Director, <http://www.sonyclassics.com/wingedmigration/home.html> (last visited Jan. 27, 2008). Some of the footage of the birds in flight was of birds raised in captivity specifically for the documentary. David Loftus, *Winged Migration* Review, <http://www.documentaryfilms.net/Reviews/WingedMigration> (follow "The Director" hyperlink) (last visited Jan. 27, 2008). Some birds were exposed to human voices and camera sounds while still in the egg and many were trained to fly with ultralights. *Id.*

breeding or resting sites, flying overhead only to be brought down with no prior warning by a hunter's bullet, flying through total exhaustion in search of resting sites that are no longer there, and, perhaps because exhaustion leaves no choice, coming to rest in a polluted industrial quagmire and stumbling into inescapable sludge.²

Winged Migration contributes considerably to raising the public's awareness of the unique beauty of waterbirds, the wonder of their migrations, and their plight at the hands of man. Migratory waterbirds epitomize the concept of "global biodiversity": by virtue of their long, transboundary migrations they cannot be defined as national property or as a resource of any one nation, rather they are global citizens.³ Exposed and endangered throughout their migrations to the vagaries of human behavior and to the changes that man has caused to the physical world, whether it be by hunting, agriculture, development, aviation, and more, we are accountable for the harm caused to them and thus the responsibility is ours to ensure their welfare and their continued existence.

Approximately a decade ago the Agreement on the Conservation of African-Eurasian Migratory Waterbirds, or AEWA,⁴—a multilateral environmental agreement created specifically to conserve and protect

² For reasons of transparency it should be pointed out that the scene of the red-breasted goose who became embroiled in industrial sludge was staged, as were several other shots. Loftus, *supra* note 1. However, for Loftus, such criticisms do not decrease the overall impact of the film:

Does all of this make "Winged Migration" something other than a documentary? I say not. All the things that happen on screen really do happen, somewhere, every day. There are deaths in the film that are clearly not staged: the birds shot by hunters, obviously, but also raptors knocking smaller prey out of the sky and into the sea, and a butt-ugly scavenger bird luring a king penguin chick away from its parents and gobbling it. Like most of the occasional violence in this film, the worst occurs offscreen; we get only a closeup of the scavenger's face glistening with juices afterward.

Id.

³ Forty five years earlier, Rachel Carson had depicted in her incomparable prose the wonder of bird migrations:

The night is a time, too, to listen for other voices, the calls of bird migrants hurrying northward in spring and southward in autumn. Take your child out on a still October night when there is little wind and find a quiet place away from traffic noises. Then stand very still and listen, projecting your consciousness up into the dark arch of the sky above you. Presently your ears will detect tiny wisps of sound—sharp chirps, sibilant lisps and call notes. They are the voices of bird migrants, apparently keeping in touch by their calls with others of their kind scattered through the sky. I never hear these calls without a wave of feeling that is compounded of many emotions—a sense of lonely distances, a compassionate awareness of small lives controlled and directed by forces beyond volition or denial, a surging wonder at the sure instinct for route and direction that so far has baffled human efforts to explain it. If the moon is full and the night skies are alive with the call of bird migrants . . . sooner or later you should begin to see the birds, lonely travellers in space glimpsed as they pass from darkness into darkness.

RACHEL CARSON, *THE SENSE OF WONDER* 81 (1956).

⁴ Agreement on the Conservation of African-Eurasian Migratory Waterbirds, June 16, 1995, available at http://www.unep-aewa.org/documents/agreement_text/eng/agree/agree_full.htm (entered into force Nov. 1, 1999) [hereinafter AEWA].

migratory waterbirds—was adopted by the international community. However, despite its varied activities and its potential as a tool for global environmental governance in general and protection of migratory waterbirds in particular, AEWa is still a relatively unknown multi-lateral environmental agreement (MEA).⁵ In light of multitudinous MEAs and the ensuing criticism of the existing fragmented structure, is AEWa yet another example of the phenomenon that could be called “treaty fatigue,” created as a result of what appears in hindsight as the over-enthusiasm of the world community in the last three decades of the twentieth century in drafting, negotiating, and adopting a vast number of ineffective MEAs?⁶ Or does AEWa’s intentionally

⁵ Notwithstanding the extensive number of books and articles on global environmental governance in general and MEAs in particular, a survey of the existing literature came up with few references to AEWa, and the only more detailed analysis found was: ROBERT BOARDMAN, *THE INTERNATIONAL POLITICS OF BIRD CONSERVATION: BIODIVERSITY, REGIONALISM AND GLOBAL GOVERNANCE* 136–45 (2006).

⁶ The phenomenon of “treaty fatigue” is commonly discussed and criticized in many context:

[I]n spite of the high-powered gatherings, agreements and commitments, little progress has been achieved in improving the environment and pursuing sustainable development. Global environmental trends continue to be negative [as] . . . greenhouse gases are steadily increasing [and] ecosystems that are critical for human survival continue to be undermined

There are many reasons for such lack of progress, key among them is a weak and fragmented international environmental governance. . . . The international system is complex, fraught with duplication, and lacks coordination.

Mohamed El-Ashry, *Recommendations from the Hi-Level Panel on System-Wide Coherence on Strengthening International Environmental Governance*, in *GLOBAL ENVIRONMENTAL GOVERNANCE: PERSPECTIVES ON THE CURRENT DEBATE* 7, 7 (Lydia Swart & Estelle Perry eds., 2007), available at <http://www.centerforunreform.org/node/251> [hereinafter PERSPECTIVES].

We have seen that over the past few decades huge international efforts have been expended in an effort to cope with the major threats to the global environment. In many respects this exercise of planetary stewardship has been impressive. But the underlying reality is that these efforts have been inadequate, and the disturbing trends that drove action in the first place by and large continue. The question then is how best to improve global environmental governance.

JAMES GUSTAVE SPETH & PETER M. HAAS, *GLOBAL ENVIRONMENTAL GOVERNANCE* 125 (2006). See also Elizabeth Maruma Mrema, *Cross-Cutting Issues Related to Ensuring Compliance with MEAs*, in *ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS: A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA* 201, 201 (Ulrich Beyerlin et al. eds., 2006) (“[T]he international community has in the past few decades focused its attention on the development of international environmental law through the development of bilateral, regional and global environmental agreements. . . . Unfortunately, despite such rapid development of international and regional agreements, the environment continues to be degraded and polluted.”); Norichika Kanie, *Governance with Multilateral Environmental Agreements: A Healthy or Ill-Equipped Fragmentation*, in PERSPECTIVES, *supra*, at 67, 68, 74 (explaining that more than 500 MEAs are registered with the UN, but noting that analysts point out that the large numbers lead to such system-wide weaknesses as unnecessary duplication and inconsistencies in rules and objectives); Maria Ivanova & Jennifer Roy, *The Architecture of Global Environmental Governance: Pros and Cons of Multiplicity*, in PERSPECTIVES, *supra*, at 48–49 (“[T]he institutional architecture for the environment lacks clarity and coherence. No one organization has been able to emerge as a leader to actively champion environmental issues ensuring their integration

narrow and focused scope on protecting one component of biodiversity—migratory waterbirds—fill a gap in the existing governance system, and if so, how?

The background against which this Article is being written is the issue of non-implementation of MEAs as linked to the September 2002 World Summit on Sustainable Development (WSSD)⁷ and its plan of implementation to achieve a significant reduction in the current rate of loss of biological diversity by 2010.⁸ The WSSD declaration was preceded in June 2001 by a statement of the heads of states of the European Union, which called for a “halt” to biodiversity loss by 2010 as part of a strategy for sustainable development,⁹ and by the Conference of the Parties of the Convention on Biodiversity in April 2002, which called for a “reduction in the current rate of loss of biodiversity.”¹⁰ The 2010 target has become a globally accepted objective and in order to achieve it, biodiversity related MEAs together with forty-one governments and organizations have formed the “Biodiversity Indicator Partnership” to determine indicators to measure progress towards that goal.¹¹

within economic and social policies.”).

⁷ “In the run-up to what became the World Summit for Sustainable Development (WSSD) in September 2002, almost everyone accepted the proposition that the Rio agreements had not been effectively implemented.... For many, therefore, WSSD was to be about implementation.” SPETH & HAAS, *supra* note 6, at 76. *See also* U.N. DEP’T OF ECON. & SOC. AFFAIRS, JOHANNESBURG PLAN OF IMPLEMENTATION OF THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, paras. 83–136, available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf [hereinafter JOHANNESBURG PLAN] (describing the means of implementation of Agenda 21, the global program designed to achieve sustainable development); *infra* note 142.

⁸ JOHANNESBURG PLAN, *supra* note 7, para. 44.

⁹ *See* Countdown 2010, What is the 2010 Biodiversity Target?, <http://www.countdown2010.net/?id=35> (last visited Jan. 26, 2008).

¹⁰ Sixth Conference of the Parties to the Convention on Biodiversity (CBD), The Hague, Neth., Apr. 7–19, 2002, *Decision VI/26: Strategic Plan for the Convention on Biological Diversity*, ¶ 11, UNEP/CBD/COP/6/20, available at <http://www.cbd.int/doc/decisions/COP-06-dec-en.pdf> [hereinafter *Decision VI/26*] (“Parties commit themselves to a more effective and coherent implementation of the three objectives of the Convention, to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on earth.”). *See also* Seventh Conference of the Parties to the CBD, Kuala Lumpur, Feb. 9–20, 2004, *Decision VII/30: Strategic Plan: Future Evaluation of Progress*, UNEP/CBD/COP/7/21, available at <http://www.cbd.int/doc/decisions/COP-07-dec-en.pdf> [hereinafter *Decision VII/30*] (adopting a decision to develop a framework to enhance progress in the implementation of the Strategic Plan). *See generally* Countdown 2010, *supra* note 9.

¹¹ 2010 Biodiversity Indicators Partnership, *What is the 2010 BIP?*, <http://www.twentyten.net/partnership.htm> (last visited Jan. 27, 2008):

The 2010 Biodiversity Indicators Partnership (BIP) is a new initiative that brings together the numerous organisations and agencies working on 2010 biodiversity indicators in support of the 2010 target.

The BIP will support the regular delivery of the 2010 indicators at the global level in a way that is useful for policy intervention and communicating degree of success in achieving the 2010 target. In addition, it will establish links between global and regional biodiversity indicator development, and relate this work to other targets and indicators

The fact that we are not going to meet that target¹² does not detract from its significance; more than a target, the 2010 goal is a vision, shared by the global community and extending beyond 2010, that the biological and physical infrastructure for all life on our planet must be saved from the ongoing degradation that threatens it. And our vision will not disappear if we find in 2010 that biodiversity loss has not been halted; on the contrary, it simply means that we will fight harder.

The purpose in writing this Article is twofold: both to raise awareness of AEWA and to examine its role in the existing network of biodiversity-related MEAs. This Article will address AEWA's contribution to the 2010 target of reducing biodiversity loss in the context of synergetic relationships among biodiversity-related MEAs and AEWA's contribution to a common strategy for biodiversity-related MEA implementation.¹³

used in the various multilateral environmental agreements, and other international initiatives such as the Millennium Development Goals.

¹² For an account of the general state of biodiversity, see WORLD WILDLIFE FUND, LIVING PLANET REPORT 2006, at 1 (Chris Hails ed., 2006), available at http://assets.panda.org/downloads/living_planet_report.pdf:

WWF began its Living Planet Reports in 1998 to show the state of the natural world and the impact of human activity upon it. Since then we have continuously refined and developed our measures of the state of the Earth.

And it is not good news. The *Living Planet Report 2006* confirms that we are using the planet's resources faster than they can be renewed – the latest data available (for 2003) indicate that humanity's Ecological Footprint, our impact upon the planet, has more than tripled since 1961. Our footprint now exceeds the world's ability to regenerate by about 25 per cent [sic].

The consequences of our accelerating pressure on Earth's natural systems are both predictable and dire. The other index in this report, the Living Planet Index, shows a rapid and continuing loss of biodiversity

The message of these two indices is clear and urgent: we have been exceeding the Earth's ability to support our lifestyles for the past 20 years, and we need to stop.

See also SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, GLOBAL BIODIVERSITY OUTLOOK 2, at 10 (2006), available at <http://www.cbd.int/doc/gbo2/cbd-gbo2.pdf>; *Decision VI/26*, *supra* note 10 ("The rate of biodiversity loss is increasing at an unprecedented rate, threatening the very existence of life as it is currently understood."); SPETH & HAAS, *supra* note 6, at 40 ("[S]pecies loss today is estimated to be perhaps 1,000 times the natural or normal rate species go extinct. Many scientists believe we are on the brink of the sixth great wave of species loss on Earth, and the only one caused by the human species."). As to the status of waterbird populations:

Overall the trend status of waterbirds in the Agreement area worsened between 1999 and 2006. . . . A total of 91 populations that showed a decreasing trend in both 1999 and 2006 are still considered to be decreasing. By comparison, only 48 populations that were increasing in 1999 were still considered to be increasing in 2006.

WETLANDS INT'L, REPORT ON THE CONSERVATION STATUS OF MIGRATORY WATERBIRDS IN THE AGREEMENT AREA 4 (3d ed. 2007), available at http://www.unep-aewa.org/publications/technical_series/ts13_conservation_status_report_final.pdf [hereinafter AEWA REPORT]. See generally NICK DAVIDSON & DAVID STROUD, AFRICAN-EURASIAN FLYWAYS: CURRENT KNOWLEDGE, STATUS, AND FUTURE CHALLENGES (2004), available at http://www.ramsar.org/mtg/mtg_flyways_edinburgh2.htm.

¹³ See generally NIENKE BEINTEMA, SAVING OUR WATERBIRDS BY 2010—AN AMBITIOUS TARGET

Biodiversity-related MEAs should be viewed as pieces of the puzzle of global biodiversity governance which fit together to disclose an intricate but entire picture of synergetic agreements, the harmonized implementation of which could perhaps contribute to reducing biodiversity loss. The issue is not a new one; extensive, elaborate, and intensive work on implementation harmonization has been done over the past decade and particularly today as part of the efforts to achieve the 2010 target, by the United Nations Environmental Programme (UNEP) and the biodiversity-related MEAs under its auspices.¹⁴ A substantial number of bi-lateral agreements—Memoranda of Understanding (MOUs)—have been signed between MEAs as a means to achieve joint implementation.¹⁵ Despite recognition of the importance of joint implementation, action has mostly concentrated on specific projects at an international or regional level while harmonized implementation on a national level has remained theoretical.¹⁶

(2005), available at http://www.unep-aewa.org/publications/saving_waterbirds_by2010.htm; AEWa, 1995 2005: TEN YEARS TAKING CARE OF TRAVELLING WATERBIRDS (2005), available at http://www.unep-aewa.org/publications/10th_anniversary_borchure_english.pdf [hereinafter AEWa BROCHURE].

¹⁴ See Forty-Second Meeting of the Standing Committee to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Lisbon, Port., Sept. 28–Oct. 1, 1999, *Synergy Between the Biodiversity-Related Conventions and Relations with other Organizations*, Doc. SC.42.17, available at <http://www.cites.org/eng/com/SC/42/42-17.pdf>; Governing Council of the UNEP, *Linkages Among and Support to Environmental and Environment-Related Conventions*, U.N. Doc. UNEP/GC.22/INF/14 (Nov. 12, 2002), available at <http://www.unep.org/gc/gc22/Document/K0263224.doc> [hereinafter *Linkages*] (containing “information on the activities of the United Nations Environment Programme in enhancing interlinkages and synergies between multilateral environmental agreements”); Seventh Conference of the Parties to CBD, Kuala Lumpur, Feb. 9–20, 2004, *Decision VII/26: Cooperation with Other Conventions and International Organizations and Initiatives*, U.N. Doc. UNEP/CBD/COP/7/21, available at <http://www.cbd.int/doc/decisions/COP-07-dec-en.pdf>; UNEP World Conservation Monitoring Ctr., Hassrode, Belg., Sept. 22–23, 2004, *Report: Towards the Harmonization of National Reporting to Biodiversity-Related Treaties*, available at http://www.unep-wcmc.org/conventions/harmonization/workshop04/Workshop_report.pdf [hereinafter *Workshop Report*] (“Since October 2000, the importance of working on harmonization and synergies between the different Multilateral Environmental Agreements (MEAs) has been repeatedly recognized by the various governing bodies”); Eighth Conference of the Parties to the Convention on Migratory Species, Nairobi, Kenya, Nov. 20–25, 2005, *Options for Enhancing Cooperation Among the Biodiversity-Related Conventions*, U.N. Doc. UNEP/CMS/Conf.8.15, available at http://www.cms.int/bodies/COP/cop8/documents/meeting_docs/en/Doc_15_Cooperation_Biodiversity_related_Conv.pdf [hereinafter *Options for Enhancing Cooperation*]. “International environmental governance should be strengthened and more coherent in order to improve effectiveness and targeted action of environmental activities in the United Nations system.” El-Ashry, *supra* note 6, at 12. “Efficiencies and substantive coordination should be pursued by diverse treaty bodies to support effective implementation of major multilateral environmental agreements.” *Id.* at 14.

¹⁵ See, e.g., *Options for Enhancing Cooperation*, *supra* note 14, paras. 14–23 (providing examples of existing MOUs established between bio-diversity related conventions). See also Richard Caddell, *International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention*, 16 COLO. J. INT’L ENVTL L. & POL’Y 113 (2005).

¹⁶ Tobias Salathé, *Coherent Implementation of Different Biodiversity-Related Conventions*, http://www.ramsar.org/mtg/mtg_unep_meas2006.htm (last visited Jan. 26, 2007) (“Although much has been said regarding the coherence between and coordination of conventions, few concrete projects exist to assist the national implementation of MEAs in a coherent way.”). See also *Decision VI/26*, *supra* note 10, app. para. 5(a) (listing “lack of synergies at the national and

In light of the importance attached to implementation by the network of biodiversity-related MEAs and the challenges encountered in achieving it,¹⁷ this Article proposes a “bottom-up” approach to biodiversity conservation. Some argue that the much-discussed problem of inadequate implementation of biodiversity-related MEAs derives from the nature of these MEAs as framework agreements meant to be implemented by “daughter” agreements or protocols,¹⁸ or as “soft-law” policy instruments, containing a minimum of binding commitments and lacking compliance mechanisms.¹⁹ Thus, a species-specific MEA like AEWA could be used as an implementer of policies by means of its detailed and binding obligations. This approach should be explored in the context of the present reality of inadequate implementation portrayed by the mind-boggling amount of literature that reflects the challenges and frustrations resulting from these inadequacies.²⁰ However, a caveat must be issued. The complexity of the issue of biodiversity and the consequences of its ongoing loss automatically rule out any one solution. Thus, this Article should not be viewed as a concrete proposal for harmonizing the workings of various biodiversity-related MEAs

international levels” as an obstacle to the implementation of the CBD); Mrema, *supra* note 6, at 201 (“Recently . . . the international community realized that the development of treaties without accompanying or subsequent implementation or enforcement means the agreements developed will remain useless papers or documents with no effect on the environment or society.”); JOHANNESBURG PLAN, *supra* note 7, para. 81 (noting that “[i]nternationally agreed development goals . . . will require significant increases in the flow of financial resources . . . to support the implementation of national policies and programmes developed by” developing countries). In the context of harmonized implementation, mention must be made of a new project for promoting implementation of MEAs on a national level that calls for developing four modules on issues of common concern to MBDA— inland waters, biodiversity and climate change, invasive alien species, and sustainable use. See generally UNEP, Tematea, <http://www.svs-unepibmdb.net> (last visited Jan. 27, 2007) (providing information about UNEP’s Issues Based Module Project). Since the above issues are within AEWA’s mandate, AEWA could also contribute to this project.

¹⁷ See Mrema, *supra* note 6, at 203 (“The international community, and the developing countries in particular, are becoming more and more concerned with the huge burden and responsibility for implementing and enforcing all the MEAs to which they are Parties.”).

¹⁸ See Désirée M. McGraw, *The Story of the Biodiversity Convention: From Negotiation to Implementation*, in GOVERNING GLOBAL BIODIVERSITY 7, 20–21 (Philippe G. Le Prestre ed., 2002) (describing framework conventions as documents that do not establish substantive rules, but rather institutional frameworks for producing substantive rules and noting as examples that “the Vienna Convention led to the Montreal Protocol on Ozone Depleting Substances, and the UN Framework Convention on Climate Change prompted the Kyoto Protocol”). See also *infra* note 294.

¹⁹ See Philippe G. Le Prestre, *Studying the Effectiveness of the CBD*, in GOVERNING GLOBAL BIODIVERSITY, *supra* note 18, at 63–64 (“[T]he objectives of most environmental conventions are couched in highly general and abstract terms. By definition—since they are framework conventions—this is the case with the global conventions, but it characterizes many other agreements that have no measurable objectives, such as qualitative targets or technical criteria for compliance.”); SPETH & HAAS, *supra* note 6, at 102 (“In general, the issue with these treaties is not weak enforcement or non-compliance; the issue is weak treaties.”).

²⁰ See, e.g., Mrema, *supra* note 6, at 202 (describing how duplicative and overlapping MEAs have “resulted in a lack of coherence, inadequate implementation, duplication, inefficiency, ineffectiveness in implementation, synergy and interlinkages both at the national and regional level”). See also *supra* notes 14–17 and accompanying text.

but rather as a “stone thrower” that will hopefully allow the reader to view the issue from different perspectives.

Part II of this Article will describe AEWA, its institutional structure, the text of the agreement, as well as measures for implementation, effectiveness, monitoring, and national reports. Part III will address AEWA as a harmonizing factor in the context of other biodiversity-related MEAs, the challenges in their implementation, and AEWA’s potential contribution as an implementer. Part IV, in the interest of contributing to the ongoing debate of reducing biodiversity loss by 2010, will discuss several recommendations for harmonization based on the AEWA paradigm. Part V will conclude with hope for the future despite today’s grim reality.

II. THE AGREEMENT ON THE CONSERVATION OF AFRICAN-EURASIAN MIGRATORY WATERBIRDS

A. Background

The Agreement on the Conservation of African-Eurasian Migratory Waterbirds, commonly known as AEWA (or the Agreement), is a Multilateral Biodiversity Agreement (MBDA)²¹ for the protection of migratory waterbirds along their flyways. The Agreement covers the “geographical area . . . stretch[ing] from the northern reaches of Canada and the Russian Federation to the southernmost tip of Africa.”²² The migratory systems cover the geographical area of 119 range states in Europe, Asia, the Middle East, and Africa.²³ The Agreement defines waterbirds 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 this Agreement.”²⁴ In all, “AEWA covers 235 species of birds ecologically dependent on wetlands for at least part of their annual cycle, including many species of divers, grebes, pelicans, cormorants, herons, storks, rails, ibises, spoonbills, flamingos, ducks, swans, geese, cranes, waders, gulls, terns and even the south African penguin.”²⁵

²¹ In order to differentiate biodiversity-related multilateral environmental agreements from those that focus on other environmental issues, this Article will refer to them as MBDA (Multilateral Biodiversity Agreements).

²² AEWA - Introduction, <http://www.unep-aewa.org/about/introduction.htm> (last visited Jan. 27, 2008). “The geographic scope of this Agreement is the area of the migration systems of African-Eurasian waterbirds, as defined in Annex 1 to this Agreement . . .” AEWA, *supra* note 4, art. I(1).

²³ AEWA - Introduction, *supra* note 22.

²⁴ AEWA, *supra* note 4, art. I(2)(c).

²⁵ AEWA - Introduction, *supra* note 22. See also Agreement on the Conservation of African-Eurasian Migratory Waterbirds, annex 2, June 16, 1995 (as updated at the Second Meeting of the Parties, Sept. 25–27, 2002, Bonn, F.R.G.), available at http://www.unep-aewa.org/documents/agreement_text/eng/pdf/aewa_agreement_text_annex2.pdf. Out of the 235 species, the Agreement covers 512 migratory waterbird populations. Agreement on the Conservation of African-Eurasian Migratory Waterbirds, tbl.1, June 16, 1995, (as updated at the Second Meeting of the Parties, Sept. 25–27, 2002, Bonn, F.R.G.), available at http://www.unep-aewa.org/documents/agreement_text/eng/pdf/aewa_agreement_text_table1.pdf [hereinafter AEWA Table

AEWA is for the most part *hard law*, imposing binding obligations on the Parties in order to protect the waterbird species listed in Annex 2, by means of both coordinated action by range states throughout the geographical scope of the agreement, and by individual nation-states on a national level. As of January 1, 2007, fifty-nine range states and the European Community have become Parties to AEWa.²⁶ Since the issue at stake is the protection of waterbirds as they travel along their flyways, it is of ultimate importance that all range states become Parties in an attempt to achieve collaborated and coordinated action over the maximum geographical coverage.

AEWA is a member of “the family of CMS agreements”²⁷; it was negotiated and adopted under Article IV(3) of the Convention for Migratory Species (CMS)²⁸ and in accordance with the Guidelines laid out under Article V of the CMS.²⁹ The CMS established a structure under which endangered migratory species are listed in Appendix I,³⁰ while Appendix II lists “migratory species which have an unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international co-operation that could be achieved by an international agreement.”³¹ Regarding these species, “[p]arties 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.”³² As an agreement under the CMS, AEWa and the CMS

1]. It should also be noted that in the last meeting of the Technical Committee, it was decided to recommend at the Fourth Meeting of the Parties to add 21 species of seabirds to Annex 2. Seventh Meeting of the Technical Committee to AEWa, Bern, Switz., Oct. 29–Nov. 1, 2006, *Potential Role of the Agreement in the Conservation of Seabirds*, U.N. Doc. TC 7.12 at 2, available at http://www.unep-aewa.org/meetings/en/tc_meetings/tc7docs/pdf/tc7_12_role_of_agreement_in_seabird_conservation.pdf.

²⁶ AEWa, 59 Contracting Parties, <http://www.unep-aewa.org/map/parties.htm> (last visited Jan. 27, 2008). The European Community joined the Agreement as a “regional economic integration organization.” AEWa, *supra* note 4, art. XIII(3).

²⁷ Article IV of the Convention on Migratory Species provides a framework for the adoption of agreements and memorandums of understanding on migratory species. *See* Convention on the Conservation of Migratory Species of Wild Animals art. IV, June 23, 1979, 19 I.L.M. 15 [hereinafter CMS]. Specifically, agreements have been reached with regards to: African-Eurasian Waterbirds, Albatrosses and Petrels, European Bats, Small Cetaceans of the Mediterranean and Black Seas, Small Cetaceans of the Baltic and North Seas, and Wadden Sea Seals. Convention on Migratory Species, Agreement Summary Sheets, http://www.cms.int/publications/agr_sum_sheets.htm (last visited Jan. 27, 2008). Additionally MOUs have been formed with regards to: the Siberian Crane, the Slender-billed Curlew, Marine Turtles of the Atlantic Coast of Africa, Marine Turtles of the Indian Ocean and South-East Asia, Middle-European Population of the Great Bustard, the Bukhara Deer, the Aquatic Warbler, West-African Populations of the African Elephant, and the Saiga Antelope. *Id.*

²⁸ AEWa, *supra* note 4, art. IV(3).

²⁹ *Id.* art. V.

³⁰ *Id.* art. III(1).

³¹ *Id.* art. IV(1).

³² *Id.* art. IV(3). Additionally, the CMS provides for agreements for additional species that are not listed in Appendix II but would still benefit from international coordinated action.

are linked by common objectives, coordinated lists of species, and action plans for shared species. The MBDAs' Secretariats coordinate their work to a large extent and AEWA's implementation and strategy plans are harmonized with those of the CMS.³³ However, AEWA is an independent MBDA with its own institutional structure and a range state can join AEWA without being a member of the CMS.³⁴

B. Institutions

The institutional structure of AEWA, in line with other MEAs, consists of a governing and decision-making body, an administrative unit, a technical-scientific advisory committee, and an administrative-budget oversight committee. Articles VI, VII, and VIII establish the Meeting of the Parties (MOP), the Technical Committee, and the Agreement Secretariat, respectively. The MOP's Resolution 2.6 established the Standing Committee, pursuant to Article VI(9)(e) of the Agreement.³⁵

1. The Meeting of the Parties

In addition to responsibilities and functions similar to decision-making bodies in other MEAs,³⁶ the Meeting of the Parties has AEWA-specific duties³⁷ such as the establishment of the Technical Committee

"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." *Id.* art. IV(4).

³³ See Third Meeting of the Parties to AEWA, Dakar, Sen., Oct. 23–27, 2005, *Res. 3.9: Development of Strategic Plan for the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA)*, para. 1, available at http://www.unep-awea.org/meetings/en/mop/mop3_docs/final_resolutions_pdf/res3_9_strategic_plan.pdf [hereinafter MOP Res. 3.9]. See also AEWA BROCHURE, *supra* note 13, at 13. Another factor that contributes to the harmonized work of the two MBDAs is their geographical location: they share the same office building in Bonn.

³⁴ See CMS, *supra* note 27, art. V(2) (according range states that are not parties to the CMS the right to join AEWA).

³⁵ Second Meeting of the Parties to AEWA, Bonn, F.R.G., Sept. 25–27, 2002, *Res. 2.6: Institutional Arrangements: Standing Committee*, available at http://www.unep-awea.org/meetings/en/mop/mop2_docs/resolutions-word/pdf/resolution2_6.pdf [hereinafter MOP Res. 2.6].

³⁶ For examples of Conferences of the Parties (COPs) and their duties and functions under other MBDAs, see CMS, *supra* note 27, art. VII; Convention on Biological Diversity (CBD) art. 23, June 5, 1992, 1760 U.N.T.S. 142, available at <http://www.cbd.int/doc/legal/cbd-un-en.pdf> [hereinafter CBD]; Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. XI, Mar. 3, 1973, 993 U.N.T.S. 243 available at <http://www.cites.org/eng/disc/text/shtml#XI> [hereinafter CITES]; Convention on Wetlands of International Importance Especially as Waterfowl Habitat, art. 6, Feb. 2, 1971, 996 U.N.T.S. 245 available at http://www.ramsar.org/key_conv_e.htm [hereinafter Ramsar Convention].

³⁷ See, e.g., AEWA, *supra* note 4, art. VI(7)(c) (mandating the MOP to establish the Technical Committee); *id.* art. VI(7)(e) (mandating the MOP to adopt criteria for emergency situations); *id.* art. VI(8)(a) (mandating that the MOP, at each of its ordinary meetings, "consider actual and potential changes in the conservation status of migratory waterbirds and the habitats important

determining criteria and modalities for dealing with emergency situations, and review of the conservation status of waterbirds and their habitats, as well as the right to establish subsidiary bodies to promote the agreement's implementation, in coordination with similar bodies under other MBDAs.³⁸

2. The Technical Committee

Article VII establishes the Technical Committee,³⁹ which is mandated to:

- (a) provide scientific and technical advice and information to the Meeting of the Parties and, through the Agreement secretariat, to Parties;
- (b) make recommendations to the Meeting of the Parties concerning the Action Plan, implementation of the Agreement and further research to be carried out;
- (c) prepare for each ordinary session of the Meeting of the Parties a report on its activities, which shall be submitted to the Agreement secretariat not less than one hundred and twenty days before the session of the Meeting of the Parties, and copies shall be circulated forthwith by the Agreement secretariat to the Parties; and
- (d) carry out any other tasks referred to it by the Meeting of the Parties.⁴⁰

The Technical Committee, comprised of "nine experts representing different regions of the Agreement Area, in accordance with a balanced geographical distribution,"⁴¹ reflects the principle of regionalism common to all MEAs. However, the Technical Committee is comprised not only of the representatives of Contracting Parties but also of representatives of non-governmental organizations (NGOs),⁴² specifically the International Union for Conservation of Nature and Natural Resources (IUCN), Wetlands International,⁴³ and the International Council for Game and Wildlife Conservation (CIC).⁴⁴ Other members of the Technical Committee include one expert from each of the following fields: rural economics, game management, and environmental law.⁴⁵

In addition to the formal representation of NGOs, representatives from BirdLife International, UNEP/WCMC, Oiseaux Migrateurs du

for their survival, as well as the factors which may affect them").

³⁸ *Id.* art. VI(9)(e).

³⁹ *Id.* art. VII.

⁴⁰ *Id.* art. VII(2).

⁴¹ *Id.* art. VII(1).

⁴² "NGO" is defined as "an organization centred around a cause or causes that works outside the sphere of governments. NGOs often lobby governments in an attempt to influence policy." UNEP, Glossary of Environmental Terms, <http://www.nyo.unep.org/action/ap1.htm> (last visited Jan. 27, 2008).

⁴³ AEWA, *supra* note 4, art. VII(1)(b). Wetlands International was formerly known as the International Waterfowl and Wetlands Research Bureau.

⁴⁴ *Id.*

⁴⁵ *Id.* art. VII(1)(c).

Paléarctique Occidental, and the Federation of Association for Hunting and Conservation of the EU participate in the Technical Committee as observers.⁴⁶

3. *The Agreement Secretariat*

The Agreement Secretariat, besides the “standard duties” of administration imposed on it by Article VIII—organization of meetings, executing decisions of the MOP, and administering the budget⁴⁷—is required to consult with the secretariats of other MBDAAs,⁴⁸ “the secretariats of other pertinent conventions and international instruments in respect of matters of common interest,”⁴⁹ and other relevant organizations.⁵⁰ In addition to the duties imposed upon it by the Agreement, the Action Plan requires the Secretariat together with the Technical Committee to prepare “conservation guidelines”⁵¹ and “international reviews necessary for the implementation of this Action Plan.”⁵²

4. *The Standing Committee*

The Standing Committee oversees the administration of the Agreement, including its budget and fundraising for specific projects.⁵³ The MOP decided to establish a standing committee after “[n]oting that no provisions have been made to provide guidance and advice to the Secretariat on policy, financial and administrative matters, which the Secretariat may need to raise between sessions of the Meeting of the Parties.”⁵⁴

C. *Obligations of the Parties Under the Agreement*

Weaving its way throughout the agreement is the clear intention of the countries to create a “hard law,” legally-binding document with a minimum of qualified commitments. Articles II, III, and IV, together with the Action Plan, contain the Agreement’s operative provisions. Article II, “Fundamental Principles,” unambiguously states that:

Parties shall take co-ordinated measures to maintain migratory waterbird species in a favourable conservation status or to restore them to such a status.

⁴⁶ *Id.* art. VII(1)(b). See also BOARDMAN, *supra* note 5, at 142 (discussing the importance of the Technical Committee as an important link between AEWA and NGOs).

⁴⁷ AEWA, *supra* note 4, art. VIII(a), (b), (i). See also AEWA BROCHURE, *supra* note 13, at 30.

⁴⁸ AEWA, *supra* note 4, art. IX(a).

⁴⁹ *Id.* art. IX(b).

⁵⁰ *Id.* art. IX(c).

⁵¹ Agreement on the Conservation of African-Eurasian Migratory Waterbirds, annex 3, para. 7.3, June 16, 1995, (as updated at the Second Meeting of the Parties, Sept. 25–27, 2002, Bonn, F.R.G.), available at http://www.unep-aewa.org/documents/agreement_text/eng/pdf/aewa_agreement_text_annex3.pdf [hereinafter AEWA Action Plan].

⁵² *Id.* para. 7.4.

⁵³ MOP Res. 2.6, *supra* note 35.

⁵⁴ *Id.*

To this end, they shall apply within the limits of their national jurisdiction the measures prescribed in Article III, together with the specific actions determined in the Action Plan provided for in Article IV, of this Agreement.⁵⁵

Article II can be considered the *grundnorm* of the Agreement. Parties to the AEWA are obligated to act collectively in conserving waterbirds or restoring them to a favourable conservation status, by implementing, through national legislation, their commitments as set out in Article III and the Agreement's Action Plan.

Article III, "General Conservation Measures," articulates the measures that Parties are obligated to undertake under the Agreement. Because of the significance of paragraph 2 in Article III, to the nature of the obligations imposed on the Parties, the text is brought in full:

2. To this end, the Parties shall:

- (a) accord the same strict protection for endangered migratory waterbird species in the Agreement Area as is provided for under Article III, paragraphs 4 and 5, of the Convention;
- (b) ensure that any use of migratory waterbirds is based on an assessment of the best available knowledge of their ecology and is sustainable for the species as well as for the ecological systems that support them;
- (c) identify sites and habitats for migratory waterbirds occurring within their territory and encourage the protection, management, rehabilitation and restoration of these sites, in liaison with those bodies listed in Article IX, paragraphs (a) and (b) of this Agreement, concerned with habitat conservation;
- (d) coordinate their efforts to ensure that a network of suitable habitats is maintained or, where appropriate, re-established throughout the entire range of each migratory waterbird species concerned, in particular where wetlands extend over the area of more than one Party to this Agreement;
- (e) investigate problems that are posed or are likely to be posed by human activities and endeavour to implement remedial measures, including habitat rehabilitation and restoration, and compensatory measures for loss of habitat;
- (f) cooperate in emergency situations requiring international concerted action and in identifying the species of migratory waterbirds which are the most vulnerable to these situations as well as cooperate in developing appropriate emergency procedures to provide increased protection to these species in such situations and in the preparation of guidelines to assist individual Parties in tackling these situations;
- (g) prohibit the deliberate introduction of non-native waterbird species into the environment and take all appropriate measures to prevent the unintentional release of such species if this introduction or release would prejudice the conservation status of wild flora and fauna; when non-native waterbird species have already been introduced, the Parties shall take all

⁵⁵ AEWA, *supra* note 4, art. II.

appropriate measures to prevent these species from becoming a potential threat to indigenous species;

(h) initiate or support research into the biology and ecology of migratory waterbirds including the harmonization of research and monitoring methods and, where appropriate, the establishment of joint or cooperative research and monitoring programmes;

(i) analyze their training requirements for, inter alia, migratory waterbird surveys, monitoring, ringing and wetland management to identify priority topics and areas for training and cooperate in the development and provision of appropriate training programmes;

(j) develop and maintain programmes to raise awareness and understanding of migratory waterbird conservation issues in general and of the particular objectives and provisions of this Agreement;

(k) exchange information and results from research, monitoring, conservation and education programmes; and

(l) cooperate with a view to assisting each other to implement this Agreement, particularly in the areas of research and monitoring.⁵⁶

AEWA's obligations, as articulated in Article III(2), are for the most part binding and unqualified commitments.⁵⁷ An unfortunate exception—considering that habitat destruction is the major cause of loss of waterbird populations⁵⁸—is subparagraph (c) which obligates Parties to identify sites and habitats in their territories which are used by migratory waterbirds, but only “encourages” them to protect, manage, rehabilitate, and restore these sites. On the other hand, subparagraph (d) does require the Parties to “coordinate their efforts to ensure that a network of

⁵⁶ *Id.* art. III(2).

⁵⁷ If an agreement's provisions are binding, the question to be asked is: how are they enforced? In stark contrast to its binding commitments, AEWA has no compliance procedure. In contrast to other environmental MEAs (but in common with most MBDA's), the Agreement contains no provision regarding compliance and makes no reference to it. Based on the Agreement's language as well as that of the CMS, the emphasis is on encouraging and supporting contracting parties in meeting their obligations under the Agreement. However, lack of compliance procedures is an obstacle in the successful implementation of AEWA as well as other MBDA's (an exception is CITES, *supra* note 36, art. XIII (providing that the Secretariat shall communicate with a Party when the Secretariat receives information that the Party is not effectively implementing CITES)). As this Article addresses harmonized implementation between AEWA and other MBDA's solely, the author plans future research on the lack of non-compliance mechanisms in MBDA's.

⁵⁸ The effect of climate change on migratory waterbird populations is apparently a close runner-up and also responsible for changes to habitats. See Gerard C. Boere & Douglas Taylor, *Global and Regional Governmental Policy and Treaties as Tools Towards the Mitigation of the Effect of Climate Change on Waterbirds*, 146 IBIS (Supp.1) 111, 111–19 (2004) (noting that most treaties currently focus on the human destruction of the waterbirds' natural habitat, which does not provide the necessary flexibility to account for changes to the habitat resulting from climate change). See also African Penguins First Victims of Climate Change?, http://www.unep-aewa.org/news/news_elements/2007/african_penguins.htm (last visited Jan. 27, 2008) (“Populations of African Penguins are facing extreme declines over the last years. Scientists presume that climate change might be one of the reasons for those changes.”).

suitable habitats is maintained”⁵⁹ (although regarding re-establishment, the obligation is qualified by the term “where appropriate”).

In addition, Article III obligates the Parties to accord strict protection for endangered migratory waterbird species in accordance with Article III(4)–(5) of the CMS, to investigate problems due to human activities—but only “endeavour” to implement remedial measures, cooperate in emergency situations, prohibit the deliberate introduction of non-native waterbird species, and take all appropriate measures to prevent their unintentional release.⁶⁰ As detailed above, the Parties are also required to engage in relevant research, to analyze their training requirements, to promote programmes for awareness and understanding of migratory waterbirds, exchange information, and cooperate in implementation.⁶¹

Article IV(1) attaches the Action Plan to the Agreement which “specifies actions which the Parties shall undertake in relation to priority species and issues” which constitute AEWA’s major concerns and objectives as stated in Article III.⁶² species conservation, habitat conservation, management of human activities, research and monitoring, education, and information and implementation. As detailed below, the intention of the nation-states that drafted and negotiated AEWA was to create a focused, pragmatic agreement that would give guidance for conserving migratory waterbirds.

D. Obligations of the Parties Under the Action Plan

The uniqueness of AEWA is that it comes with directions for implementation in the form of the Action Plan,⁶³ which can be considered both as a handbook on protecting waterbirds and as an interpretative guide to the Agreement’s provisions. And in line with these functions, the Action Plan was designed to be flexible and adaptable to necessary changes. Amendments to the Action Plan, after adoption by a two-thirds majority, go into force automatically for all parties unless a Party notifies the Secretariat of its

⁵⁹ AEWA, *supra* note 4, art. III(2)(d).

⁶⁰ *Id.* art. III(2)(a), (e), (f) & (g).

⁶¹ *Id.* art. III(2)(h)–(l).

⁶² *Id.* art. IV(1).

Parties shall take co-ordinated measures to maintain migratory waterbird species in a favourable conservation status or to restore them to such a status. To this end, they shall apply within the limits of their national jurisdiction the measures prescribed in Art. III, together with the specific actions determined in the Action Plan provided for in Art. IV, of this Agreement.

Id. art. II.

⁶³ Attaching action plans is the common format for agreements in the framework of the CMS. See Hugo Nijkamp & Andre Nollkaemper, *The Protection of Small Cetaceans in the Face of Uncertainty: An Analysis of the ASCOBANS Agreement*, 9 GEO. INT’L ENVTL. L. REV. 281 (1997) (discussing how legal instruments related to species conservation have responded to scientific uncertainty in the face of the precautionary principle); Caddell, *supra* note 15 (discussing the CMS machinery and its practical application to wildlife management).

reservation with respect to the amendment within ninety days after its date of adoption.⁶⁴

The Action Plan is divided into sections according to the Agreement's six priority issues as described below.

1. Species Conservation

With the objective of conserving waterbird species, Parties are obligated to take legal measures to protect populations listed in column A of Table 1 to the Agreement.⁶⁵ Column A lists three categories of populations: Category 1 includes those species included in Appendix I to the CMS, species listed as threatened in Threatened Birds of the World,⁶⁶ or populations that number less than 10,000 individuals.⁶⁷ Category 2 includes "Populations numbering between around 10,000 and around 25,000 individuals," while Category 3 includes those populations between around 25,000 and 100,000 individuals, which are considered at risk because:

- they are concentrated onto a small number of sites at any stage of their annual cycle;
- they are dependent on a specific habitat which is under severe threat;
- they show long-term decline;
- they show extreme fluctuations in population size.⁶⁸

All the above populations listed in Column A are strictly protected under AEWA. In order to meet their commitments under the Agreement, Parties are obligated to take legal measures to prohibit the taking of birds and eggs of those populations, to prohibit any "deliberate disturbance" that is liable to harm their conservation, and to prohibit the use or trade in those birds or eggs that have been taken in violation of the taking prohibition.⁶⁹ An exception for those populations listed in Categories 2 and 3 and marked by an asterisk, is for hunting on a sustainable basis.⁷⁰

Column B is divided into two categories. Category 1 includes populations between 25,000 and 100,000 individuals, but which do not meet the at-risk criteria listed under Column A's Category 3.⁷¹ Category 2 includes populations numbering more than around 100,000 individuals and which do meet the above at-risk criteria.⁷² Parties to the agreement are obligated to regulate the taking of birds and eggs of these populations in Column B, and must take legal measures to prohibit the taking of individuals of these

⁶⁴ AEWA, *supra* note 4, art. X(6).

⁶⁵ AEWA Action Plan, *supra* note 51, para. 1.1.

⁶⁶ BIRDLIFE INT'L, THREATENED BIRDS OF THE WORLD (2000).

⁶⁷ AEWA Table 1, *supra* note 25, at 1.

⁶⁸ *Id.*

⁶⁹ AEWA Action Plan, *supra* note 51, para. 2.1.1.

⁷⁰ *Id.* para. 2.1.1(c).

⁷¹ AEWA Table 1, *supra* note 25, at 1.

⁷² *Id.*

populations during stages of reproduction, rearing, and during their return to their breeding grounds, if the taking will have an unfavorable effect on their conservation status.⁷³ Furthermore, the Parties must take legal measures to regulate the modes of taking, limits on numbers of individuals, and, similarly to those populations in Column A, to prohibit use or trade in individuals taken in violation of those legal measures.⁷⁴

Despite the strict protection that the Action Plan accords waterbirds in paragraphs 2.1.1 and 2.1.2, paragraph 2.1.3 does allow the Parties to grant exemptions. For instance, Parties may grant exemptions to prevent “serious damage to crops, water and fisheries,” to promote air safety, to allow for research, education, and re-establishment, or to allow the taking, keeping, “or other judicious use” of certain birds, but only under strictly supervised conditions and to a limited extent.⁷⁵ Further, Parties may grant exemptions to enhance the propagation or the survival of the populations concerned.⁷⁶

These exemptions are qualified: they have to be precise as to contents, limited in time and space, and cannot be detrimental concerning those relevant populations.⁷⁷ Furthermore, the Parties have to inform the Agreement Secretariat of any exemptions granted.⁷⁸

Additional paragraphs in section 2 of the Action Plan obligate the Parties to cooperate in developing and implementing single species action plans,⁷⁹ to cooperate in case of emergencies that threaten populations,⁸⁰ to “exercise the greatest care when re-establishing populations,”⁸¹ and to prohibit the introductions of non-native species of animals and plants that may harm populations, or if already introduced, to take measures to ensure that they do not pose a threat to the populations.⁸²

2. Habitat Conservation

Paragraph 3 to the Action Plan addresses the conservation of habitats for bird migration and obligates the Parties to undertake and publish inventories of those habitats in their territory which are important to the populations. In addition, Parties to the Agreement “shall endeavour” to identify sites of national or international importance for the populations,⁸³ establish protected areas for habitat conservation,⁸⁴ protect wetlands of international importance, such as those listed on the Ramsar Convention's

⁷³ AEWA Action Plan, *supra* note 51, para. 2.1.2.

⁷⁴ *Id.*

⁷⁵ *Id.* para. 2.1.3.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* para. 2.2.1.

⁸⁰ *Id.* para. 2.3.

⁸¹ *Id.* para. 2.4.

⁸² *Id.* para. 2.5.

⁸³ Compare *id.* para. 3.1.2 (exhorting Parties “to endeavour” to identify all sites which are used by populations in Table 1) with AEWA, *supra* note 4, art. III(2)(c) (stating that “Parties shall” identify sites and habitats used by waterbirds).

⁸⁴ AEWA Action Plan, *supra* note 51, para. 3.2.1.

List of Wetlands of International Importance,⁸⁵ “make wise and sustainable use” of wetlands, take statutory measures regarding the use of agricultural chemicals, pest control, and wastewater treatment,⁸⁶ develop ecosystem based strategies for the conservation of population habitats,⁸⁷ and rehabilitate or restore important habitats.⁸⁸

3. *Management of Human Activities*

One of the major human activities directly affecting waterbirds is hunting. The Action Plan addresses the issue by requiring Parties to undertake specific actions, such as ensuring “that their hunting legislation implements the principle of sustainable use as envisaged in this Action Plan.”⁸⁹ Additionally, Parties are to develop a “reliable and harmonized system for the collection of harvest data in order to assess the annual harvest of populations listed in Table 1,”⁹⁰ to “phase out the use of lead shot for hunting . . . by the year 2000,”⁹¹ and to “develop and implement measures to reduce, and as far as possible, eliminate the use of poisoned baits” and illegal taking.⁹² Further supporting sustainable harvest, Parties are to encourage hunters to coordinate their activities to help ensure sustainable hunting⁹³ and “promote the requirement of a proficiency test for hunters.”⁹⁴

Other areas of human activities addressed by the Action Plan are ecotourism,⁹⁵ assessment of proposed projects on waterbird populations,⁹⁶ damage to agricultural crops from waterbird populations,⁹⁷ impact on populations from existing and proposed structures,⁹⁸ and threats of human disturbance to populations, such as establishing “disturbance-free zones in protected areas where public access is not permitted.”⁹⁹

4. *Research and Monitoring*

Paragraphs 5.1 to 5.8 of the Action Plan list actions required of Parties regarding research on waterbird populations and monitoring of populations. Both of these areas are critical in implementing AEWA and

⁸⁵ See *id.* para. 3.2.2; SECRETARIAT OF THE CONVENTION ON WETLANDS, THE LIST OF WETLANDS OF INTERNATIONAL IMPORTANCE (2007), available at <http://www.ramsar.org/sitelist.pdf>.

⁸⁶ AEWA Action Plan, *supra* note 51, para. 3.2.3.

⁸⁷ *Id.* para. 3.2.4. See CBD, *supra* note 36, art. 8 (listing responsibilities for selection, protection, and restoration of ecosystems necessary for conservation of biological diversity).

⁸⁸ AEWA Action Plan, *supra* note 51, para. 3.3.

⁸⁹ *Id.* para. 4.1.1.

⁹⁰ *Id.* para. 4.1.3.

⁹¹ *Id.* para. 4.1.4.

⁹² *Id.* paras. 4.1.5–6.

⁹³ *Id.* para. 4.1.7.

⁹⁴ *Id.* para. 4.1.8.

⁹⁵ *Id.* para. 4.2.

⁹⁶ *Id.* para. 4.3.1.

⁹⁷ *Id.* paras. 4.3.2–4.

⁹⁸ *Id.* para. 4.3.5.

⁹⁹ *Id.* para. 4.3.6.

measuring its effectiveness, and are intertwined with developing indicators for both AEWA and the 2010 target as well. As apparent from the "International Implementation Priorities,"¹⁰⁰ AEWA emphasizes the importance of research and monitoring and has just issued its third edition of the "Report on the Conservation Status of Migratory Waterbirds in the Agreement Area."¹⁰¹

Parties are directed to carry out "survey[ing] work in poorly known areas, which may hold important concentrations of the populations listed in Table 1."¹⁰² Additionally, Parties must endeavour to monitor waterbird populations of species listed in Table 1.¹⁰³ Further, these monitoring results "shall be published or sent to appropriate international organizations, to enable reviews of population status and trends."¹⁰⁴ Additionally, Parties undertake to cooperate in order "to improve the measurement of bird population trends as a criterion for describing the status of such populations"¹⁰⁵ and to "determin[e] the migration routes of all populations listed in Table 1."¹⁰⁶ Parties must also research "the effects of wetland loss and degradation and disturbance on the carrying capacity of wetlands used by the populations listed in Table 1 and on the migration patterns of such populations,"¹⁰⁷ research "the impact of hunting and trade on the populations listed in Table 1 and the importance of these forms of utilization to the local and national economy."¹⁰⁸

5. Education and Information

Qualified and trained personnel capable of implementing the Agreement are essential to successful implementation, as is public awareness that will encourage participation of civil society.¹⁰⁹ Thus parties are encouraged to give training courses for implementation of the Agreement and to develop educational materials and programs to raise public awareness of AEWA.¹¹⁰ As a means of implementing this section of

¹⁰⁰ Third Meeting of the Parties to AEWA, Dakar, Sen., Oct. 23–27, 2005, *Res. 3.11: AEWA International Implementation Priorities for 2006–2008*, at 11, available at http://www.unep-aewa.org/meetings/en/mop/mop3_docs/final_resolutions_pdf/res3_11_iip_2006-2008.pdf.

¹⁰¹ AEWA REPORT, *supra* note 12.

¹⁰² AEWA Action Plan, *supra* note 51, para. 5.1.

¹⁰³ *Id.* para. 5.2.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* para. 5.3.

¹⁰⁶ *Id.* para. 5.4.

¹⁰⁷ *Id.* para. 5.6.

¹⁰⁸ *Id.* para. 5.7.

¹⁰⁹ *Id.* para. 6.3. This paragraph provides that:

Parties shall endeavour to develop programmes, information materials and mechanisms to improve the level of awareness of the general public with regard to the objectives, provisions and contents of this Action Plan. In this regard, particular attention shall be given to those people living in and around important wetlands, to users of these wetlands (hunters, fishermen, tourists, etc.) and to local authorities and other decision makers.

Id.

¹¹⁰ *Id.*

the Action Plan, AEWA has also prepared a "Communication Strategy" for general awareness-raising and exchange of information.¹¹¹

6. Implementation of the Action Plan

The Action Plan provides instructions to the Parties for its implementation. Specifically, priority should be given to those populations listed in Column A of Table 1.¹¹² In the case of more than one population of the same species occurring in the territory of a Party, conservation measures should be geared for that population with the poorest conservation status.¹¹³ To further aid implementation, "Conservation Guidelines" shall be developed by the Secretariat together with the Technical Committee and experts from Range States on the following topics: single species action plans, emergency measures, preparation of site inventories and habitat management methods, hunting practices, trade in waterbirds, tourism, reducing crop damage, and a waterbird monitoring protocol.¹¹⁴ In addition, the Secretariat together with the Technical Committee and the Parties shall prepare international reviews necessary for successful implementation and report on the status and trends of populations, gaps in information from surveys, networks of population sites, hunting and trade legislation, single species action plans, re-establishment projects and introduced non-native waterbird species.¹¹⁵

E. Implementation of AEWA

As discussed above, lack of implementation is the major challenge facing MEAs.¹¹⁶ An unimplemented treaty is not just an embarrassment to the nations that drafted, negotiated, and adopted it; it is an announcement of the failure of the MEA system as a means of global environmental governance in the face of growing environmental threats.¹¹⁷ Going further, implementation is not a goal in itself: the fact that the contracting parties have fulfilled their obligations under a particular MEA does not necessarily indicate that the MEA is *effective*, i.e., that its implementation has led to attaining those particular objectives for which the MEA was created, as discussed below.¹¹⁸

¹¹¹ AEWA BROCHURE, *supra* note 13, at 17.

¹¹² AEWA Action Plan, *supra* note 51, para. 7.1.

¹¹³ *Id.* para. 7.2.

¹¹⁴ *Id.* para. 7.3. For the text of the Conservation Guidelines, see AEWA, AEWA Conservation Guidelines, http://www.unep-aewa.org/publications/conservation_guidelines.htm (last visited Jan. 27, 2008).

¹¹⁵ AEWA Action Plan, *supra* note 51, para. 7.4.

¹¹⁶ See *supra* note 16 and accompanying text.

¹¹⁷ See Le Prestre, *supra* note 19, at 64–65 (stating that "[i]mplementation has long been recognized as crucial to the success of public policy and to the determination of the actual actions that will be taken on its behalf" and discussing the causes and effects of a failure to implement). See also *supra* note 12 (discussing environmental impacts and threats).

¹¹⁸ Seventh Meeting of the Technical Committee to AEWA, Bern, Switz., Oct. 29–Nov. 1, 2006, *National Reports as Indicators of Implementation and Effectiveness of AEWA*, Doc. TC 7.14, available at http://www.unep-aewa.org/meetings/en/tc_meetings/tc7docs/pdf/tc7_14_

The implementation of the Agreement itself (in addition to the Action Plan) is addressed in Article V, entitled "Implementation and Financing."¹¹⁹ Each Party is obligated to:

[P]repare for each ordinary session of the Meeting of the Parties, beginning with the second session, a report on its implementation of the Agreement with particular reference to the conservation measures that it has undertaken. The format of such reports shall be determined by the first session of the Meeting of the Parties and reviewed as may be necessary at any subsequent session of the Meeting of the Parties.¹²⁰

The Meeting of the Parties, as the decision-making organ of AEWA, carries the main responsibility for ensuring the Agreement's implementation. In accordance with Article VI(8)(b), at each of its ordinary sessions, the MOP shall "review the progress made and any difficulty encountered in the implementation of this Agreement."¹²¹ Thus the MOP is obligated to evaluate, at each of its regular meetings, the implementation of the Agreement.

It should be noted that Article VI(9)(e) also authorizes the MOP to "establish such subsidiary bodies as it deems necessary to assist in the implementation of this Agreement,"¹²² while subparagraph (f) authorizes the MOP to "decide on any other matter relating to the implementation of this Agreement."¹²³

As to the authorities of the Technical Committee, Article VII(3)(b) authorizes the Technical Committee to "make recommendations to the Meeting of the Parties concerning the Action Plan, implementation of the Agreement, and further research to be carried out,"¹²⁴ and "carry out any other tasks referred to it by the Meeting of the Parties."¹²⁵

Two of the Secretariat's functions, as defined in Article VIII, are "to gather and evaluate information which will further the objectives and implementation of the Agreement"¹²⁶ and "to prepare, on an annual basis and for each ordinary session of the Meetings of the Parties, reports on the work of the secretariat on the implementation of the Agreement."¹²⁷

national_reports_indicators_of_implementation.pdf [hereinafter *National Reports as Indicators*] (the author was the Chairman of the working group that prepared the document); see *infra* notes 129–30 and accompanying text. But see Le Prestre, *supra* note 19, at 65 (stating that "[c]learly, implementation has to occur for the regime to be effective, however effectiveness is defined").

¹¹⁹ AEWA, *supra* note 4, art. V.

¹²⁰ *Id.* art. V(1)(c).

¹²¹ *Id.* art. VI(8)(b).

¹²² *Id.* art. VI(9)(e).

¹²³ *Id.* art. VI(9)(f).

¹²⁴ *Id.* art. VII(3)(b).

¹²⁵ *Id.* art. VII(3)(d).

¹²⁶ *Id.* art. VIII(e).

¹²⁷ *Id.* art. VIII(h).

F. Effectiveness of AEWa

The Agreement does not stop at implementation. Measuring implementation and effectiveness are two separate issues: one must ascertain first whether the Agreement is being implemented, and second, whether it is effective. Implementation is the easier of the two to assess because the Parties are obligated to report on their compliance with the provisions of the Agreement.¹²⁸ Measuring effectiveness is more complicated since its significance is assessing attainment of the objectives for which the MEA was adopted.¹²⁹

Article VI(9) authorizes the MOP, "at any of its sessions, to adopt specific actions to improve the *effectiveness* of this Agreement."¹³⁰ From that language we see that the Agreement differentiates between implementation of the Agreement and its effectiveness:

These two terms are not synonymous: while the Agreement might be strictly implemented, i.e., each Party implements its obligations under it, this does not mean that the Agreement is effective, i.e., that it is successful in achieving the Agreement's objectives as set out in Article II of the Convention on Migratory Species and Article II of the Agreement.¹³¹

G. National Reports

As noted above,¹³² Article V(1)(c) obligates Parties to the Agreement to submit reports on their implementation of AEWa. Disturbed by the low number submitted by Parties, the Third Meeting of the Parties adopted a resolution urging parties to submit their national reports.¹³³ This resolution

¹²⁸ *Id.* art. V(1)(c).

¹²⁹ See generally *National Reports as Indicators*, *supra* note 118 (stating that the AEWa is effective if it successfully achieves its objectives).

¹³⁰ AEWa, *supra* note 4, art. VI(9) (mandating that the MOP address the effectiveness of the Agreement). See generally DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 443–79 (1998) (defining effectiveness and identifying criteria of effectiveness, and discussing the differences between compliance and effectiveness).

¹³¹ *National Reports as Indicators*, *supra* note 118, at 3. "With the coming of age of environmental—and in particular biodiversity [MEAs]—effectiveness is a cutting edge issue and will be one of the determining factors as to the relevance and influence of AEWa The question . . . is, what is AEWa's *effect* on the global [biodiversity loss]" *Id.* at 6. (emphasis in original).

¹³² AEWa, *supra* note 4, art. V(1)(c); *supra* note 120 and accompanying text.

¹³³ Third Meeting of the Parties to AEWa, Dakar, Sen., Oct. 23–27, 2005, *Res. 3.4: Submission of National Reports to MOP3 and MOP4 and Reports on the Phase Out of Lead Shot in Wetlands*, available at http://www.unep-aewa.org/meetings/en/mop/mop3_docs/final_resolutions_pdf/res3_4_national_reports.pdf [hereinafter MOP Res. 3.4]. Resolution 3.4 States in the Preamble:

Further noting that national reports are essential sources of information for the preparation of international reviews by the Secretariat pursuant to paragraph 7.4 of the Action Plan, and that the non-submission of national reports has impeded the Secretariat from fulfilling this obligation,

Emphasizing the role of national reports as vital indicators in implementation of the

expresses the Parties' concern and the importance that they attribute to the reports as indicators of implementation. Accordingly, the resolution also requests the Secretariat to analyze the reports in regard to their usefulness as a basis for decision making.¹³⁴

In line with the importance attributed to national reports, the 2005 MOP adopted a resolution for an online national report format. The resolution states that "the format should seek to advance harmonization of reporting with other international biodiversity agreements through the development of common reporting modules."¹³⁵ A working group was established in the framework of the Technical Committee to redraft the format of the national report.¹³⁶ The goal was to encourage more countries to submit national reports by making the format shorter and more concise.¹³⁷ Furthermore, the working group adopted an indicator approach, the goal being to turn the national report into an effective tool for measuring implementation and effectiveness.¹³⁸ As to harmonized reporting with other MBDA's, UNEP-WCMC has developed a reporting format between the CMS and its agreements, including AEWA.¹³⁹ In addition, UNEP-WCMC is carrying out pilot projects on harmonized reporting

Agreement,

....

The Meeting of the Parties:

1. *Urges* all Contracting Parties that have not yet done so to submit at the earliest date, but no later than 31 December 2005, national reports for the triennium 2003–2005;
2. *Instructs* the Secretariat to perform analysis of the reports received by 31 December 2005 and make the results available to the Parties and the Technical Committee by the end of February 2006, so that the findings can help inform their activities and decision-making;
3. *Further instructs* the Secretariat to analyze the difficulties encountered by certain Contracting Parties in delivering their national reports and make the results of this analysis available to the Standing Committee before MOP4;
4. *Urges* all Contracting Parties, in accordance with the provisions of Article V of the Agreement to submit national reports for the triennium 2006–2008 to the Secretariat one hundred and twenty days before MOP4;
5. *Asks* the Secretariat to advise Contracting Parties of the date of submission of their national reports for MOP4 and to issue reminders if reports for MOP4 are not received by the said date;

....

¹³⁴ *Id.* Consequently, no final recommendations regarding national reports can be made until the Secretariat completes its task.

¹³⁵ Third Meeting of the Parties to AEWA, Dakar, Sen., Oct. 23–27, 2005, *Res. 3.5: Development of an Online National Report Format*, available at http://www.unep-aewa.org/meetings/en/mop/mop3_docs/final_resolutions_pdf/res3_5_online_reporting.pdf [hereinafter MOP Res. 3.5].

¹³⁶ See AEWA Technical Committee Work Plan 2006–2008, Doc TC 7.16, 12 September 2006 para. 5, available at http://www.unep-aewa.org/meetings/en/tc_meetings/tc7docs/doc/tc7_16_work_plan_2006-2008.doc (detailing the work plan of the Technical Committee for the years 2006–2008, one of its tasks being the redrafting of the national report format).

¹³⁷ The author was a member of the working group on redrafting the format for national reports.

¹³⁸ *Id.*

¹³⁹ See UNEP World Conservation Monitoring Ctr., *Species Programme: Support to the CMS Secretariat*, <http://www.unep-wcmc.org/species/sca/cms.htm> (last visited Jan. 27, 2008).

formats between the five major MBDA's in which AEWA is also participating.¹⁴⁰

After describing and discussing AEWA's major provisions, its institutions, and its mechanisms for assessing implementations and effectiveness, Part III explores AEWA in the context of joint implementation of MBDA's.

III. TOWARDS THE 2010 BIODIVERSITY TARGET: THE ROLE OF AEWA IN THE JOINT IMPLEMENTATION OF MBDA

AEWA was designed as a tool for harmonization and joint implementation with other MBDA's. The 2010 biodiversity loss reduction target has sharpened the awareness of UNEP, the MBDA COPs and their Secretariats to the lack of implementation on the national level.¹⁴¹ Although the multiple number of MBDA's and the consequent heavy burden on the Parties in implementing them, is most often blamed as the culprit for inadequate implementation, as will be shown in Section B there are other underlying factors. Addressing the obstacles to implementation posed by these factors, Section C discusses AEWA's unique features that can serve as a paradigm for harmonized implementation.

A. AEWA as a Harmonizing Factor in Joint Implementation

The concept of harmonization with other MBDA's weaves throughout AEWA, as attested to by the Agreement's provisions. Adopted in 1995, AEWA is a "post-Rio" agreement and thus its drafters took into consideration Agenda 21¹⁴² along with the MBDA's that preceded it, and specifically referred to them in the introduction:

CONSIDERING that migratory waterbirds constitute an important part of the global biological diversity which, in keeping with the spirit of the Convention on Biological Diversity, 1992, and Agenda 21 should be conserved for the benefit of present and future generations;

....

CONVINCED that any taking of migratory waterbirds must be conducted on a sustainable basis, taking into account the conservation status of the species concerned over their entire range as well as their biological characteristics;

CONSCIOUS that migratory waterbirds are particularly vulnerable because they migrate over long distances and are dependent on networks of wetlands that are decreasing in extent and becoming degraded through non-sustainable human

¹⁴⁰ See WORKSHOP REPORT, *supra* note 14; see also *Linkages*, *supra* note 14, at 3.

¹⁴¹ See *supra* note 7 and accompanying text.

¹⁴² Adopted by the U.N. Conference on Environment and Development (UNCED), Agenda 21 is considered the global master plan for action in achieving sustainable development in the 21st century. U.N. Conference on Env't & Dev., Rio de Janeiro, Braz., June 3-14, 1992, *Agenda 21*, available at <http://www.un.org/esa/sustdev/documents/agenda21/>.

activities, as is expressed in the Convention on Wetlands of International Importance, especially as Waterfowl Habitat, 1971;

....

CONVINCED that the conclusion of a multilateral Agreement and its implementation through coordinated or concerted action will contribute significantly to the conservation of migratory waterbirds and their habitats in the most efficient manner, and will have ancillary benefits for many other species of animals and plants¹⁴³

AEWA was not created in a vacuum. The concept of harmonization does not wane and fade out after the introduction but rather garners strength and appears again in the operative provisions of the Agreement. The drafters took into consideration existing MBDA's and intended that AEWA be complementary to them and implemented through coordination with them. Article VIII, which establishes the Secretariat, assigns it the duty "to liaise with non-Party Range States and to facilitate coordination between the Parties and with international and national organizations, the activities of which are directly or indirectly relevant to the conservation, including protection and management, of migratory waterbirds."¹⁴⁴ Article IX, entitled "Relations with International Bodies dealing with Migratory Waterbirds and their Habitats," goes even further:

The Agreement secretariat shall consult:

- (a) on a regular basis, the Convention Secretariat¹⁴⁵ and, where appropriate, the bodies responsible for the secretariat functions under Agreements concluded pursuant to Article IV, paragraphs 3 and 4, of the Convention which are relevant to migratory waterbirds,¹⁴⁶ the Convention on Wetlands of International Importance, especially as Waterfowl Habitat, 1971, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973, the African Convention on the Conservation of Nature and Natural Resources, 1968, the Convention on the Conservation of European Wildlife and Natural Habitats, 1979, and the Convention on Biological Diversity, 1992, with a view to the Meeting of the Parties cooperating with the Parties to these conventions on all matters of common interest and, in particular, in the development and implementation of the Action Plan;
 - (b) the secretariats of other pertinent conventions and international instruments in respect of matters of common interest;
- and
- (c) other organisations competent in the field of conservation, including protection and management, of migratory waterbirds and their habitats, as well as in the fields of research, education and awareness raising.¹⁴⁷

¹⁴³ AEWA, *supra* note 4, at introduction.

¹⁴⁴ *Id.* art. VIII(d).

¹⁴⁵ The Secretariat of the Convention on Migratory Species, AEWA's "mother" convention, *see supra* note 27.

¹⁴⁶ For a list of the CMS agreements *see supra* note 27.

¹⁴⁷ AEWA, *supra* note 4, art. IX. *See also* Caddell, *supra* note 15, at 133 (discussing AEWA's

Thus AEWA, drafted and negotiated in the aftermath of the Rio Earth Summit Conference of the United Nations Conference on Environment and Development in 1992,¹⁴⁸ was intended to be implemented in coordination with other MBDAs, particularly in the “development and implementation of the Action Plan.”¹⁴⁹ Additionally, AEWA’s MOP Resolutions continue to emphasize harmonization. As discussed above, harmonization in national reports was addressed in Resolution 3.5 of the Third MOP, which instructed the Secretariat to “seek to advance harmonization of reporting with other international biodiversity agreements through the development of common reporting modules.”¹⁵⁰ In Resolution 3.6, the MOP first emphasizes the need for international harmonized action in monitoring waterbird populations and then requests support from the Ramsar Convention, the CMS, the CBD, and other regional and international organizations in funding the International Waterbird Census and *Waterbird Population Estimates*.¹⁵¹ In Resolution 3.7, the MOP urges the international community to adopt the conclusions of the *Edinburgh Declaration*, which was based on the need for partnerships among MEAs in achieving the 2010 goal of reduction of biodiversity loss in general and waterbird populations in particular.¹⁵²

AEWA’s policy of coordinated implementation is further evidenced by Resolution 3.9, in which the MOP called for the preparation of a strategy

“proactive Secretariat” and its duties under art. IX “to prevent duplication of conservatory initiatives or, conversely, the creation of conflicting obligations, the AEWA Secretariat is to consult ‘on a regular basis’ with such organizations”). Other MBDAs also mandate their COPs to cooperate with other conventions, but the relevant provisions are drafted in more general form. See, e.g., CBD, *supra* note 36, art. 23.4(h) (stating that the COP shall “[c]ontact, through the Secretariat, the executive bodies of conventions dealing with matters covered by this Convention with a view to establishing appropriate forms of cooperation with them”).

¹⁴⁸ See *supra* note 142. For more information on the Rio Earth Summit, see Earth Summit, UN Conference on Environment and Development (1992), <http://www.un.org/geninfo/bp/enviro.html> (last visited Jan. 27, 2008).

¹⁴⁹ AEWA, *supra* note 4, art. IX(a).

¹⁵⁰ MOP Res. 3.5, *supra* note 135, para. 1.

¹⁵¹ Third Meeting of the Parties to AEWA, Dakar, Sen., Oct. 23–27, 2005, *Res. 3.6: Developing an International Partnership for Support of Waterbird Population Assessments*, para. 3, available at http://www.unep-aewa.org/meetings/en/mop/mop3_docs/final_resolutions_pdf/res3_6_partnership_wpa.pdf [hereinafter MOP Res. 3.6].

¹⁵² Third Meeting of the Parties to AEWA, Dakar, Sen., Oct. 23–27, 2005, *Res. 3.7: Implementing the Conclusions of the Waterbirds Around the World Conference*, para. 2, available at http://www.unep-aewa.org/meetings/en/mop/mop3_docs/final_resolutions_pdf/res3_7_waw_conference.pdf [hereinafter MOP Res. 3.7]. See in particular this paragraph from the findings of the *Waterbirds Around the World* Conference:

Consider that, with the long history of co-operative international assessments, waterbirds provide excellent indicators by which to evaluate progress towards achievement of the 2010 target established by world leaders in 2002 and to this end Call on the Conventions on Migratory Species, Biological Diversity and Wetlands, and other international agreements to work together and with other partners on such assessments

Id. at 4. See also *Options for Enhancing Cooperation*, *supra* note 14, at pt. III (discussing joint implementation of bilateral agreements via MOUs).

plan that would take into account the draft CMS strategy plan.¹⁵³ Additionally, in Resolution 3.11, the MOP instructed the Secretariat to coordinate with other MBDA's and international organizations for the implementation of the projects listed in the "AEWA International Implementation Priorities for 2006–2008."¹⁵⁴

In conformity with AEWA's policy of harmonization with other MBDA's, in 2003 AEWA signed a Joint Work Plan with the Ramsar Convention and the CMS that was intended to implement the 1997 Memorandum of Understanding between the Ramsar Convention and the CMS.¹⁵⁵ The Joint Work Plan is based on recognition of the benefit of coordinated action by MBDA's for protecting migratory species¹⁵⁶ and specifies actions for joint implementation, including promoting ratification of MBDA's, joint meetings and activities, and dissemination of information to parties.¹⁵⁷

B. Challenges to MBDA Implementation

While AEWA promotes joint implementation of multiple MBDA's,¹⁵⁸ this section explores the challenges which have hampered MBDA implementation generally.

MBDA's deal with various aspects of biodiversity loss caused by identical or similar factors and the reduction of that loss can be achieved by the same or similar solutions.¹⁵⁹ MBDA's are so interrelated that isolated

¹⁵³ MOP Res. 3.9, *supra* note 33 (noting that the MOP is "Further aware that the draft CMS Strategic Plan *inter alia* stresses the important role of the CMS Agreements regarding implementation of the CMS aims and objectives").

¹⁵⁴ Third Meeting of the Parties to AEWA, Dakar, Sen., Oct. 23–27, 2005, *Res. 3.11: AEWA International Implementation Priorities for 2006–2008*, para. 5, available at http://www.unep-aewa.org/meetings/en/mop/mop3_docs/final_resolutions_pdf/res3_11_iip_2006-2008.pdf.

¹⁵⁵ The Ramsar Convention on Wetlands, Joint Work Plan 2004 – CMS, AEWA, and the Ramsar Convention, para. 2, http://www.ramsar.org/key_cms_aewa_jwp.htm (last visited Jan. 26, 2008) [hereinafter Joint Work Plan].

¹⁵⁶ *Id.* para. 4.

The Joint Work Plan also recognises the relevance of joint action on migratory species through other environment-related global and regional conventions and the development of other bilateral joint plans and programmes, notably the Convention on Biological Diversity (CBD)-Ramsar 3rd Joint Work Plan (2002–2006), which includes joint actions in cooperation with the CMS, and the CBD-CMS Joint Work Programme (2002–2005), both of which have been approved by Decision VI.20 of CBD's COP6 (The Hague, Netherlands, Apr. 2002).

Id.

¹⁵⁷ *Id.* paras. A(5)–(6), B(17), C(11).

¹⁵⁸ See generally CBD, *supra* note 36, art. 23.4(h) (calling for contact and cooperation with other MBDA's). But cf. CBD McGraw, *supra* note 18, at 20 ("In conceptualizing a global biodiversity convention, several key states and non-state actors originally envisioned the creation of an umbrella convention that would harmonize existing biodiversity agreements. However this proposal was rejected in the first round of CBD negotiations because of the 'numerous practical, political and legal obstacles' it posed.").

¹⁵⁹ E.g., *Options for Enhancing Cooperation*, *supra* note 14, para. 4 ("All five biodiversity-related conventions address to varying degrees issues of biodiversity conservation and sustainable use. In meeting their objectives, the conventions have developed a number of

implementation results in duplicate work—a waste of resources, consumed time performing tasks on administrative and procedural issues, and the danger of being sidetracked by details instead of seeing the whole picture, both on the international and national level. Reducing biodiversity loss is prone to implementing redundant strategies.¹⁶⁰ Thus the relation between MBDA is a synergetic one—that is, their combined efforts in achieving reduction of biodiversity loss will be greater than their individual efforts.¹⁶¹

The crucial problem for MEAs is inadequate implementation on the national level, brought into sharp relief by data indicating the environmental problems the MEAs were created to solve have become more severe.¹⁶² As detailed below, lack of implementation is an acute problem for MBDA in particular, emphasized by the publicity and myriad of activities and meetings towards the 2010 target, and thus the collective decision to harmonize implementation as a possible solution to the existing impasse. However, despite the extensive work done on promoting harmonization and joint implementation, it is not clear that it will result in the sought-after implementation of each MBDA.

This discussion will specifically address the CMS,¹⁶³ the CBD,¹⁶⁴ and the Ramsar Convention.¹⁶⁵ Each of these MBDA features a global geographical scope, a formal role in AEWA's implementation pursuant to Article IX(a) of the Agreement,¹⁶⁶ and an overlap with AEWA in the area of species conservation, that is, protection of migratory waterbirds,¹⁶⁷ as well

complementary approaches (site, species and/or ecosystem-based).”).

¹⁶⁰ *Id.* para. 35 (“Certain areas of overlap among the conventions are clear (e.g., wetlands and migratory species, protection of endangered migratory species from international exploitation”); *id.* para. 25(a) (“The framework of goals and targets to evaluate progress towards the 2010 target . . . can be applied—the necessary changes having been made—to all five conventions.”).

¹⁶¹ “Five international conventions [CBD, CMS, CITIES, the Ramsar Convention, and the World Heritage Convention] . . . have biodiversity or some of its particular components as their primary concern. . . . With the target of achieving by 2010 a significant reduction of the current rate of biodiversity loss . . . the need to promote synergy among these conventions while reducing duplication of effort has become increasingly relevant.” *Id.* paras. 1, 2.

¹⁶² See Mrema, *supra* note 6, at 201. See also SPETH & HAAS, *supra* note 6, at 56 (“The principal feature of the international community’s first attempt at global environmental governance has been the rapid development of international environmental law. Much less attention has been given to creating the conditions for success of international environmental law and even less to addressing [the causes] of global environmental challenges.”).

¹⁶³ CMS, *supra* note 27.

¹⁶⁴ CBD, *supra* note 36.

¹⁶⁵ Ramsar Convention, *supra* note 36.

¹⁶⁶ AEWA, *supra* note 4, art. IX(a).

¹⁶⁷ Although CITES also meets the above criteria, the decision not to include it in this survey was based on its being a hard law, self-implementing, regulatory MBDA, limited in scope to one issue—international trade in species of plants and animals—with its own non-compliance mechanism administered by a NGO (TRAFFIC). This is not to say CITES is out of the loop of the present discussions and projects on harmonization. Actually, the opposite is true: CITES is a leading MBDA in all these initiatives. See *supra* note 14 (exhibiting that the Parties to CITES are considering the need to synergize CITES with other MBDA). However, bringing CITES into the present discussion would require digressing from the limited scope of this Article.

as their inclusion in the Agreement's preamble.¹⁶⁸ Furthermore, the CMS, the CBD, and the Ramsar Convention are members in the "2010 Biodiversity Indicators Partnership," whose objective is devising indicators in support of the 2010 goal for reduction of biodiversity.¹⁶⁹

C. Specific Obstacles to Implementation

1. Framework Agreements, Flexible Commitments, and Broad Scopes

MBDAs are characterized by their "soft law" provisions, regardless of whether they are framework agreements. Under the CMS,¹⁷⁰ the term "endeavour" qualifies the following obligations: to "provide immediate protection for migratory species included in Appendix I,"¹⁷¹ to "conclude [agreements] covering the conservation and management of migratory species included in Appendix II,"¹⁷² and to conserve species' habitats, remove obstacles to their migrations and reduce the factors that endanger them.¹⁷³ "Endeavour" is further qualified by the term "feasible and appropriate" regarding habitat restoration and preventing and reducing or controlling factors that endanger the species.¹⁷⁴ However, in contrast to the CBD which has only one protocol,¹⁷⁵ it has to be taken into consideration that the CMS, as a framework agreement, is implemented by a substantial number of species-specific agreements.¹⁷⁶

The Ramsar Convention deals with the protection and conservation of wetlands. It emphasizes their importance as vital ecosystems that supply goods and services for human beings as well as their role in biodiversity conservation. Although not a formal framework agreement like the CBD and the CMS, the Ramsar Convention constitutes a framework for coordinated international and national action in the protection of wetlands.¹⁷⁷ Thus while in contrast to the above agreements as most of its obligations are unqualified,

¹⁶⁸ AWEA, *supra* note 4, intro.

¹⁶⁹ See 2010 Biodiversity Indicators Partnership, *supra* note 11 (listing partners and explaining that the 2010 Biodiversity Indicators Partnership is "a new initiative that brings together numerous organisations and agencies working on 2010 biodiversity indicators in support of the 2010 target").

¹⁷⁰ CMS, *supra* note 27. On the CMS as a "soft" law as described below, see Caddell, *supra* note 15, at 144–45 (discussing regional agreements adopted under the CMS, and explaining that "[t]he Bonn Convention generally produces 'soft' law in the form of resolutions and recommendations . . . these initiatives . . . lack the formal and binding character of a regional treaty on the matter").

¹⁷¹ *Id.* art. II(3)(b).

¹⁷² *Id.* art. II(3)(c).

¹⁷³ *Id.* art. III(4).

¹⁷⁴ *Id.* art. III(4)(a), (c).

¹⁷⁵ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027.

¹⁷⁶ For the names of the species, see *supra* text accompanying note 25.

¹⁷⁷ See Ramsar Convention, *supra* note 36, pmb. (noting "the conservation of wetlands and their flora and fauna can be ensured by combining far-sighted national policies with co-ordinated international action").

the Ramsar Convention exemplifies the problem of broadly drafted obligations that are problematic to implement without interpretation and guidance.¹⁷⁸ Under the Ramsar Convention, parties shall “designate suitable wetlands . . . for inclusion in a List of Wetlands,”¹⁷⁹ “formulate and implement planning” for the conservation of wetlands,¹⁸⁰ arrange to be informed of ecological changes in the wetlands,¹⁸¹ establish nature reserves on wetlands,¹⁸² and promote training of relevant personnel.¹⁸³ Regarding protection of “waterfowl,” parties “shall endeavour through management to increase waterfowl populations on appropriate wetlands.”¹⁸⁴ To solve the problem of the broad scope of its obligations—which makes implementation difficult—the Ramsar Convention has issued a series of guidelines on a variety of wetland-related issues.¹⁸⁵

The CBD is the framework agreement on biodiversity. It imposes only one strict obligation on its Parties—the submission of national reports¹⁸⁶—and abounds in the term “as far as possible and as appropriate” in qualifying that obligation.¹⁸⁷ Technically, all MBDAAs could be bundled into its extensive and expansive scope and cross-cutting issues. In addition to its problematic conditional and qualified commitments, the CBD suffers from too wide a breadth as defined by its three objectives: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.¹⁸⁸ In order to implement these broad objectives, a strategy plan was adopted addressing a multiple number of goals and objectives,¹⁸⁹ which in turn was followed by “a framework to enhance the evaluation of achievements and

¹⁷⁸ See Le Prestre, *supra* note 19, at 63–64 (noting “the objectives of most environmental conventions are couched in highly general and abstract terms”).

¹⁷⁹ Ramsar Convention, *supra* note 36, art. 2(1).

¹⁸⁰ *Id.* art. 3(1).

¹⁸¹ *Id.* art. 3(2).

¹⁸² *Id.* art. 4(1).

¹⁸³ *Id.* art. 4(5).

¹⁸⁴ *Id.* art. 4(4).

¹⁸⁵ See generally The Ramsar Convention on Wetlands, The Guidelines Adopted by the Conference of the Contracting Parties to the Ramsar Convention on Wetlands, http://www.ramsar.org/key_guidelines_index.htm (last visited Jan. 27, 2008) (providing a table of contents for the series of guidelines).

¹⁸⁶ See Ad Hoc Open-Ended Working Group on Review of Implementation of the Convention, Sept. 5–9, 2005, *Reporting Mechanisms Under the Convention and other Conventions*, at 1, UNEP/CBD/WG-RI/1/10 (July 27, 2005), available at <http://www.cbd.int/doc/meetings/wgri/wgri-01/official/wgri-01-10-en.pdf> [hereinafter *Reporting Mechanisms Under the CBD*] (“The submission of national reports on measures taken to implement the provisions of the Convention and their effectiveness is the only unqualified obligation of Parties to the Convention.”).

¹⁸⁷ CBD, *supra* note 36, arts. 5, 7–11.

¹⁸⁸ *Id.* art. 1. See also McGraw, *supra* note 18, at 24 (explaining how the CBD encompasses “such issues as the sustainable use of biological resources, access to genetic resources, sharing of benefits from the use of genetic material, and access to technology, including biotechnology”).

¹⁸⁹ *Decision VI/26*, *supra* note 10, para. 11(C).

progress in the implementation of the Strategic Plan,"¹⁹⁰ which includes seven focal areas as well as goals and targets for each focal area.¹⁹¹ The complexity of the strategy plan and its evaluation framework, designed to be implemented by national action plans and strategies,¹⁹² imposes a heavy burden on the Parties and accounts for the difficulties they experience in implementing the CBD.¹⁹³

2. *Lack of Compliance Mechanisms*

Linked to the above, in contrast to other MEAs which include specific provisions on this issue, MBDA's do not provide for compliance mechanisms, but rather, as attested to by their conditional and qualified commitments and soft law features, prefer to encourage their Parties to comply rather than use more coercive measures.¹⁹⁴ The lack of compliance procedures affects implementation by weakening incentives for compliance with legally binding obligations.

3. *The Complexity of the Issue*

Unlike other environmental issues such as climate change, the ozone layer, or hazardous substances, where scientists and policy makers have presented to the public specific, concrete solutions, reducing biodiversity loss cannot be solved by isolated actions but rather by implementations of national strategies addressing cross-cutting areas.¹⁹⁵ The public can participate in reducing emissions of ozone depleting substances into the atmosphere by buying products that use alternative chemicals, or cut back on CO₂ emissions by driving hybrid vehicles.¹⁹⁶ However, similar to issues like climate change, protecting biodiversity and preventing its loss requires major changes in human behavior. Issues that until now have been

¹⁹⁰ *Decision VII/30*, *supra* note 10, para. 1.

¹⁹¹ *Id.* para. 11.

¹⁹² *Decision VI/26*, *supra* note 10, para. 12.

¹⁹³ McGraw, *supra* note 18, at 24.

The sheer proliferation of programmes and processes established under the CBD to date reflects both its breadth and its depth. However, the very comprehensiveness that makes the CBD unique among global biodiversity agreements also makes it vulnerable to overextension. The COP's overcrowded agenda . . . and the proliferation of subsidiary bodies and processes have resulted in a diffusion of limited energy, attention, and resources among state and non-state actors alike.

Id.

¹⁹⁴ *E.g.*, Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 17, Dec. 10, 1997, 37 I.L.M. 32 (entered into force Feb. 16, 2005); Montreal Protocol on Substances that Deplete the Ozone Layer, art. 8 Sept. 16, 1987, 1522 U.N.T.S. 28; *see also* Mrema, *supra* note 6, at 208 (discussing compliance mechanisms within the Kyoto and Montreal Protocols). *See also infra* notes 286–92 and accompanying text.

¹⁹⁵ *See Decision VI/26*, *supra* note 10 (establishing the need for a wide-scale coordination of efforts to preserve biodiversity); *Decision VII/30*, *supra* note 10 (same).

¹⁹⁶ For information about the grassroots movement on climate change, *see* Step It Up 2007, <http://stepitup2007.org/index.php> (last visited Jan. 26, 2008).

assumed to be inalienable rights of citizens of democratic societies, such as where and how we live, the location and size of our homes, modes of transport for ourselves and our goods, our consumer choices, the size of our families—all these affect biodiversity. The enormity of these issues and the challenges in adapting our behaviour so as to mitigate its effect on biodiversity rules out any “miracle” or fast solutions to biodiversity loss.¹⁹⁷

In addition, the *effects* of lost biodiversity, particularly its effects on ecosystem functions, are still relatively unknown even by scientists, thus making the preparation of national strategy plans more challenging.¹⁹⁸ In a wide-scoped MBDA like the CBD, the problem is compounded by the agreement’s comprehensive coverage of all areas of biodiversity, adding to the complexity of the issue and to confusion on the part of the would-be implementing Party.¹⁹⁹

4. Proliferation of MBDAs

The existing global environmental governance system is replete with international agreements on a wide array of environmental issues, numbering in the hundreds.²⁰⁰ The result is a significant amount of duplication and overlap among them in both substance and

¹⁹⁷ See Rachelle Adam, *The Legal Framework for the Protection of Israel’s Biodiversity*, in ISRAEL’S NATIONAL BIODIVERSITY STRATEGY PLAN (NBSAP), Ministry of the Environment, Jerusalem, Isr., (forthcoming 2008) (Hebrew).

¹⁹⁸ See McGraw, *supra* note 18, at 26. McGraw observes:

Whereas the impacts of atmospheric change, such as ozone depletion and global warming, are beginning to be understood by the average person, the ‘web of life’—from microscopic organisms to entire ecosystems—is an extremely elusive matter and indeed forms a topic of continuing research and discussion among ecologists. Even within the scientific community, the reality and potential repercussions of biodiversity loss have really only been recognized by ecologists, taxonomists, and biologists.

Id.

¹⁹⁹ *Id.*

²⁰⁰

Varying methodologies used for counting MEAs have resulted in different numbers, but many researchers and analysts agree that there is a proliferation of MEAs, constituting a key characteristic of the existing environmental governance system. In the IEA database, 405 agreements and 152 protocols have been identified, modified by 236 amendments bringing the total to 794 MEAs that came into existence between 1875 and 2005; although many of these are now defunct. The Ecolex project sponsored by UNEP, FAO and IUCN recognize in total 519 environmental treaties. Other research identifies more than 500 MEAs registered with the UN, including 61 on atmosphere, 155 on biodiversity, 179 on chemicals, hazardous substances and waste, 46 land conventions, and 197 on water issues.

Kanie, *supra* note 6, at 68. See also Mrema, *supra* note 6, at 202 (discussing the proliferation of MEAs); Satoko Mori, *Institutionalization of NGO Involvement In Policy Functions for Global Environmental Governance*, in EMERGING FORCES IN ENVIRONMENTAL GOVERNANCE 157, 157 (Norichika Kanie & Peter M. Haas eds., 2004) [hereinafter EMERGING FORCES] (discussing the proliferation of MEAs).

administration.²⁰¹ On a national level, the implementation of multiple MEAs places a heavy burden on many countries, developing countries in particular, including multiple annual membership payments, the need for capacity building, expenditures for repeated overseas trips for MEA meetings and conferences, and corresponding absences from work when officials attend meetings abroad.²⁰² Because virtually all MEAs require Parties to submit national reports and participate in meetings, these obligations are replete with duplication and draining overlaps.²⁰³

Biodiversity in particular is governed by a proliferation of agreements.²⁰⁴ While it is reasonable to expect implementation of a MEA that is the only one in its area, such as the Montreal Protocol on the ozone layer or the Kyoto protocol on climate change, it is less reasonable to implement a large number of MBDAAs that address the same issue and contain substantial duplication and overlap. More importantly, faced with such a large number of difficult implementation challenges, it is not possible to see the forest for the trees—that each MBDA was created not as an end in itself but as a means for conserving biodiversity and reducing loss.

Thus the resources needed to be a party to multiple MBDAAs, together with the time consuming task of designing, drafting, and implementing separate strategies for each one, obscures the real issue—their effectiveness in reducing biodiversity loss. Harmonized and joint implementation was the solution that UNEP and the MBDAAs furthered for the problem of MBDA proliferation.²⁰⁵

²⁰¹ Mrema, *supra* note 6, at 202 (observing that “[t]he situation has resulted in a lack of coherence, inadequate implementation, duplication, inefficiency, ineffectiveness in implementation, synergy and interlinkages both at the national and regional level”). See also *id.* at 204 (discussing the difficulties of complying with overlapping and sometimes conflicting MEAs).

²⁰² From the personal experience of the author as counsel for the Ministry of the Environment for Israel, the burden placed on the ministry as a result of contending with the implementation of a heavy load of MEAs works as a disincentive in ratifying additional ones. See also Kanie, *supra* note 6, at 75 (noting that the “proliferation of MEAs increases administrative and institutional costs for member states”); Ivanova & Roy, *supra* note 6, at 49, 52, 54 (discussing the inefficiencies created by redundant regimes); *Linkages*, *supra* note 14, at 3 (discussing the burdens created by overlapping MEAs).

²⁰³ See, e.g., El-Ashry, *supra* note 6, at 11.

Developing countries are unable to cope with the extensive reporting and participation requirements of the current multilateral environmental structure, which has depleted expertise and resources for implementation. A survey by the Panel revealed that the three Rio conventions (biodiversity, climate and desertification) have up to 230 meeting days annually. Add the figures for seven other major global environmental agreements (not including regional agreements) and that number rises to almost 400 days.

Id.

²⁰⁴ See, e.g., McGraw, *supra* note 18, at 23 (noting that “the CBD entered a legal field crowded with global agreements”); see also Mrema, *supra* note 6, at 205 (noting the “proliferation of MEAs” and the “increasing burden” imposed on Parties); Caddell, *supra* note 15, at 147–48 (discussing “treaty congestion” as “[o]ne of the most pressing issues faced by the Bonn Convention” creating “considerable potential for duplication and conflict between measures established under the CMS umbrella and other international environmental regimes”).

²⁰⁵ See *supra* note 14 (discussing harmonization and integration concerns and describing the

The above factors constitute obstacles to implementation of MBDA's. While harmonized implementation might address the problem of MBDA proliferation, these other factors will probably continue to impede implementation. However, the features of AEWA which allow it to actively promote conservation of waterbird species—species-focused, hard law, and a truly global approach—could perhaps contribute to a harmonized implementation strategy as a joint “implementer.”

D. AEWA's Contribution to Joint Implementation of MBDA's

In a hypothetical meeting of MBDA Secretariats on how best to harmonize implementation, what would AEWA contribute? The following offers a list of features that are unique to AEWA which could aid in improving harmonized implementation.

1. Conservation of Global Biodiversity is the Essence of AEWA

A requirement for the protection of migratory waterbirds is the coordinated action of all the range states along flyways.²⁰⁶ This requirement is inherent in any scheme for the protection of migratory species and gives expression to the phrase “global biodiversity,” as waterbirds, because they are migratory, are truly global in nature and thus not a national resource of any single country.²⁰⁷ To emphasize this point, compare the sentence in the preamble to the CBD, “Reaffirming that States have sovereign rights over their own biological resources,”²⁰⁸ to the sentence in AEWA's introduction, “Considering that migratory waterbirds constitute an important part of the global biological diversity”²⁰⁹ While the CBD emphasizes the sovereignty of individual countries over their biodiversity,²¹⁰ AEWA is based on the premise

use of MOUs by MEAs to facilitate joint implementation).

²⁰⁶ See J. Gregory Mensik & Fred L. Paveglio, *Biological Integrity, Diversity, and Environmental Health Policy and the Attainment of Refuge Purposes: A Sacramento National Wildlife Refuge Case Study*, 44 NAT. RESOURCES J. 1161, 1168–69 (2004) (discussing refuges along the four major flyways of North America and migratory birds that utilize flyways spanning the Northern and Southern hemispheres).

²⁰⁷ See, e.g., Ramsar Convention, *supra* note 36, pmbl. (“Recognizing that waterfowl in their seasonal migrations may transcend frontiers and so should be regarded as an international resource”).

²⁰⁸ CBD, *supra* note 36, pmbl. See also U.N. Conference on Env't & Dev., June 3–14, 1992, *Report of the United Nations Conference on Environment and Development, annex I*, princ. 2, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies”); Rosie Cooney, *CITES and the CBD: Tensions and Synergies*, 10 REV. EUR. COMMUNITY & INT'L ENVTL. L. 259, 264 (2001) (noting that “an emphasis on asserting sovereign rights over natural resources is apparent throughout the text of the CBD, which represents, in fact, the first statement of the principle of state sovereignty over natural resources in a binding international agreement”).

²⁰⁹ AEWA, *supra* note 4, introduction.

²¹⁰ GOVERNING GLOBAL BIODIVERSITY, *supra* note 18, at 321 (“The CBD strengthens and expands the sovereign rights of states over their biological resources; but it contains no binding

that migratory waterbirds are part of global biodiversity and nation-states are obligated to protect them, thus subjugating the sovereignty of nation-states in favour of biodiversity. And a *sine qua non* for protecting migratory species is ensuring that all range states commit to protecting those segments of the transboundary migratory routes that pass over their jurisdiction, together with the sites and habitats used by the different populations.²¹¹

More so than any other species, birds epitomize the concept of global biodiversity by spinning a web of interconnected and overlapping flyways that enfold the planet, evincing its role as a global habitat. Thus, AEWA, with its transboundary approach that prefers the rights of waterbirds to pass in safety throughout their migratory systems over the national sovereignty of its Parties, could be the link that connects other MBDA's in implementing a biodiversity strategy for national implementation.²¹²

2. AEWA as a "Modular" MBDA

Linked to the above is AEWA's flexibility that allows it to extend geographically and expand to include additional species. Although AEWA has a regional geographical scope as defined in Annex 1, the interconnectedness of flyways gives AEWA global significance. For in contrast to terrestrial species whose migratory borders can be delimited to a certain extent, this is not so easily accomplished with regard to avian species. The African-Eurasian flyway consists of many small flyways that link AEWA's geographical area to neighboring regions.²¹³ In light of the overlapping flyways, AEWA was created as a modular MBDA. AEWA's geographical coverage can be extended by an amendment to Annex 1, which defines the Agreement area.²¹⁴ Additional waterbird species can also be added as amendments to Annex 2.²¹⁵ If the geographical extension or the addition of species necessitates new rules and norms, the Action Plan in Annex 3 can also be amended.²¹⁶ Thus, AEWA's structure as a modular, "stretchable" MBDA allows the extension of international protection over species and habitats without having to adopt new

obligations." See also Ivanova & Roy, *supra* note 6, at 63 ("National sovereignty in the face of global environmental problems has also proven a difficult obstacle to effective solutions as governments have been driven to act on the basis of narrowly defined self-interest rather than the common good.").

²¹¹ AEWA, *supra* note 4, art. II.

²¹² See SPETH & HAAS, *supra* note 6, at 102 ("International law gives countries sovereign legal authority within their borders, but environmental progress requires that they relinquish the freedom of action that sovereignty holds out.").

²¹³ Press Release, AEWA Secretariat, Wings Over Wetlands from the Arctic to the Cape—UN Launches Project on Bird Migration Routes in Africa and Eurasia (Nov. 20, 2006), available at http://www.unep-aewa.org/activities/flywaysproject/docs/press/wow_press_release/press_release_wow_english.pdf.

²¹⁴ Agreement on the Conservation of African-Eurasian Migratory Waterbirds, Annex 1, June 16, 1995 (as updated at the Second Meeting of the Parties, Sept. 25–27, 2002, Bonn, F.R.G.), available at http://www.unep-aewa.org/documents/agreement_text/eng/pdf/aewa_agreement_text_annex1.pdf.

²¹⁵ AEWA, *supra* note 4, art. X.

²¹⁶ *Id.*

agreements. In light of the discussion above on the heavy burden placed on Parties by the large number of MBDA's, it is undoubtedly more efficient to amend annexes to an existing MBDA than to negotiate and adopt a new agreement.²¹⁷

3. AEWA's Species-Focused Approach

AEWA deals with one component of biodiversity: protection of waterbird populations. Its issue-specific scope inherently reduces the burden on Parties as to its implementation, an example being reporting obligations. Furthermore, because its sole focus is on protecting species of migratory waterbirds which serve as good indicators for biodiversity, assessing its effectiveness is easier than assessing, for example, the effectiveness of the CBD whose wide scope and three extensive objectives makes implementation a major challenge.²¹⁸ Thus, AEWA's "species specificity" is a significant advantage in achieving successful national implementation.²¹⁹

4. AEWA's Binding Commitments

As discussed above, AEWA imposes a substantial number of "hard law" commitments on its Parties.²²⁰ Compare this to the "soft law" style of the CBD, which as a framework MBDA, imposes only one strict obligation on its Parties: the submission of national reports.²²¹ Other CBD provisions are qualified, thus weakening them as tools in assessing implementation.²²² AEWA, an

²¹⁷ See *supra* notes 200–04 and accompanying text.

²¹⁸ *Decision VI/26*, *supra* note 10, Annex, para. 8 (noting that "[t]he implementation of the Convention on Biological Diversity has been impeded by a variety of obstacles, as outlined in the appendix hereto. A fundamental challenge for the Convention lies in the broad scope of its three objectives").

²¹⁹ ROBERT C. PAEHLKE, *DEMOCRACY'S DILEMMA: ENVIRONMENT, SOCIAL EQUITY, AND THE GLOBAL ECONOMY* 208 (2003) (stating that "specific problems—especially those with technical solutions of modest economic costs—have relatively good prospects of success through the treaty route" but "the broader the problem and the more important the economic implications, the more thorough the failure of treaty-based environmental initiatives so far").

²²⁰ See *supra* notes 55–57 and accompanying text. See generally SPETH & HAAS, *supra* note 6, at 82 (distinguishing between hard and soft law).

²²¹ See Reporting Mechanisms Under CBD, *supra* note 186, at 1.

²²² A question that arises concerning the lack of binding obligations in the CBD is its need for adopting protocols in order to transform it into a more effective MBDA. Today the CBD has one protocol, the Cartagena Protocol on Biosafety, which deals solely with the issue of biosafety. The Cartagena Protocol, *supra* note 175.

The Cartagena Protocol on Biosafety represents the first effort to operationalize a key and contentious part of the CBD. However, the decision to address biosafety as the first protocol under the CBD has been cited as powerful proof of the treaty's lack of science-based prioritizing. Indeed, the Convention's detractors dismiss it as being a prisoner of its own politics rather than based on sound science.

McGraw, *supra* note 18, at 21. As a framework MBDA, it could be argued that just as the Vienna Convention on the Protection of the Ozone layer is implemented through its Montreal Protocol, or as the United Nations Convention on Climate Change (UNCCD) is implemented through its Kyoto Protocol, successful implementation of the CBD is dependent on adoption of issue-

Agreement under the framework of the CMS, was created to help implement the CMS in attaining its objective of protecting migratory species. As detailed above in Part II, Article III to the Agreement lists unqualified binding obligations with which Parties must comply. Other MBDA's as a rule qualify the commitments imposed on the Parties, thus rendering them "soft law."²²³ The binding nature of AEWA's provisions, together with its species-specific focus, facilitates the assessment of implementation, effectiveness, and compliance.

5. *Emphasis on Changing Human Behavior*

AEWA has the potential to bring about changes in human behavior, which is the underlying factor for biodiversity loss. The general goal of MEAs is to change the behavior of nation-states, and through them, the behavior of individuals.²²⁴ By means of ratification, nation-states express their agreement to the international obligations imposed upon them, in turn imposing the obligations on their citizenry by transforming them into binding national law. AEWA's Action Plan is a major contribution to global biodiversity governance. Its roadmap to implementation commits Parties to behavioral norms designed to mitigate the effects of humans on migratory waterbirds. Thus, one way to measure the effectiveness of MBDA's is by measuring behavioral changes. AEWA works to protect one component of biodiversity—migratory waterbirds—by promoting changes in practices in, among other areas, hunting,²²⁵ farming,²²⁶ ecotourism,²²⁷ and planning and building.²²⁸ Its Action Plan, a flexible, readily amendable document, can be regarded as a manual for achieving sustainable development.

6. *Monitoring Under AEWA*

Article VI mandates AEWA's MOP to "consider actual and potential changes in the conservation status of migratory waterbirds and the habitats important for their survival, as well as the factors which may affect them."²²⁹ As a complementary provision, Paragraph 7.4(a) of the Action Plan requires the Secretariat to prepare an international review every three years on the status and trends of waterbird populations.²³⁰ AEWA's reports on status and

specific, binding protocols, similar in format to AEWA. *Id.*

²²³ Perhaps one of the reasons for the success of AEWA's negotiators in creating a MBDA with a substantial number of binding obligations was due to its limited scope, and thus the smaller number of stakeholders involved in the negotiations. See SPETH & HAAS, *supra* note 6, at 128.

²²⁴ Le Prestre, *supra* note 19, at 63.

²²⁵ AEWA Action Plan, *supra* note 51, paras. 4.1.1–8.

²²⁶ *Id.* para 2.1.3(a). The exemption for agriculture is not unqualified but has to be precise in content and limited, and the Party is obligated to inform the secretariat of the exemption. *Id.* paras. 4.3.2–4.4.

²²⁷ *Id.* para 4.2.

²²⁸ *Id.* paras. 4.3.1, 4.3.5–6.

²²⁹ AEWA, *supra* note 4, art. VI(8)(a).

²³⁰ AEWA Action Plan, *supra* note 51, para. 7.4(a).

trends are based on available and updated data including the International Waterbird Census,²³¹ Wetlands International's Waterbird Population Estimates,²³² and the IUCN's Red List of Threatened Species.²³³ The importance of ongoing monitoring of waterbird populations cannot be overestimated: it constitutes the basis of the work of AEWA's institutions, allows verification concerning achievement of AEWA's objective (protecting waterbirds), is critical to implementation on the national level, and is a valuable indicator.²³⁴

7. NGO Involvement

Global biodiversity governance is not the monopoly of governments.²³⁵ AEWA is unique in its approach of formally including representatives of NGOs as members of an institutional body of a MBDA. As mentioned above in Part II, the Technical Committee includes three representatives of NGOs whose professional expertise is in the area of waterbird populations. Furthermore, an additional three NGOs are represented as observers. Their involvement has supplied AEWA with strong professional expertise that has contributed to its reputation as a

²³¹ Wetlands International, *International Waterbird Census*, <http://www.wetlands.org/listmenu.aspx?id=e661dd2b-3a70-4147-844e-a16ed86468ec> (last visited Jan. 27, 2008) [hereinafter *International Waterbird Census*].

²³² Wetlands International, *Waterbirds Population Estimates—Fourth Edition*, <http://www.wetlands.org/publication.aspx?ID=19fd14bc-f24e-4266-8abe-a155891b8790> (last visited Jan. 27, 2008) [hereinafter *Waterbirds Population Estimates*].

²³³ International Union of Conservation of Nature and Natural Resources, IUCN Red List of Threatened Species, <http://www.iucn.org/themes/ssc/redlist.htm> (last visited Jan. 27, 2008) [hereinafter IUCN Red List of Threatened Species].

²³⁴ *Infra* notes 238–48 and accompanying text. See also SPETH & HAAS, *supra* note 6, at 130. Speth and Hass explain that environmental monitoring has been identified as critical for assessing effectiveness of international regimes:

Environmental monitoring is also important for providing an accurate picture of conditions and trends in the environment. Robust monitoring programs encourage stronger treaties, because nations can ascertain if their efforts are having an impact, and can develop new policies if new threats are identified or if earlier concerns are shown to be exaggerated.

Id.

²³⁵ See SPETH & HAAS, *supra* note 6, at 85, arguing:

Although nations are the principal legal actors in making international environmental policy, they respond to pressure from a number of additional actors, including other nations, the United Nations and other international organizations, scientists, NGOs, and, notably, their own business sectors. The years of multilateral environmental governance have contributed to the legitimation and inclusion of such new nonstate actors.

See also EMERGING FORCES, *supra* note 200, at 157 (providing that “[n]o matter what new framework for global environmental governance is designed, it should not be another organization mandated solely by states”); Jonathan R. Strand, *The Case for Regional Environmental Organizations*, in EMERGING FORCES, *supra* note 200, 71, 79–81 (suggesting a framework for regional environmental organizations to work with governance systems); *supra* note 41 and accompanying text.

proactive, professional MBDA.²³⁶ Based on the work of NGOs in its Technical Committee, AEWA is a good example for the involvement of civil society in the implementation of a MBDA.²³⁷

8. Migratory Species are Good Indicators

The “Edinburgh Declaration,” the concluding statement of the international conference *Waterbirds Around the World* held in Edinburgh, Scotland in April 2004, confirms the role of migratory waterbirds as indicators for biodiversity.

[C]onsider that, with the long history of cooperative international assessments, waterbirds provide excellent indicators by which to evaluate progress towards achievement of the 2010 target established by world leaders in 2002, and to this end Call on the conventions on Migratory Species, Biological Diversity and Wetlands, and other international agreements to work together and with other partners on such assessments.²³⁸

As a result of their position in the food supply web, their habitation of wetlands and coastal areas, the ecosystem services they supply, and ongoing monitoring by thousands of enthusiastic professionals and volunteers alike, waterbirds serve as invaluable indicators for biodiversity, especially of aquatic and marine ecosystems. Analysis of declining populations can indicate underlying factors for biodiversity loss and habitat degradation, wetlands in particular.²³⁹ Their reactions to pollutants and pesticides can be monitored.²⁴⁰ Furthermore, bird populations are relatively easy to monitor since large numbers tend to flock together, different bird species are fairly well recognized and are still found in relatively large numbers, and because of their high visibility.²⁴¹ Thus carrying out surveys does not require expensive or complicated technology and they have historically been performed by a network of devoted volunteers guided by professionals.²⁴² As a result, the status and trends of

²³⁶ See AEWA BROCHURE, *supra* note 13, at 30.

²³⁷ See BOARDMAN, *supra* note 5, at 139 (discussing the involvement of Wetlands International and BirdLife International in AEWA's third MOP).

²³⁸ MOP Res. 3.7, *supra* note 152, at 4.

²³⁹ BOARDMAN, *supra* note 5, at 4. See also Heinz Hafner & Mauro Fasola, *Workshop on Colonial Waterbirds in the Mediterranean: A Summary*, 15 COLONIAL WATERBIRDS 159, 159 (1992); AUDUBON SOCIETY, WATERBIRDS AND WORKING LANDS, available at <http://www.audubon.org/bird/pdf/WaterbirdsOnWorkinglands.pdf>. See generally ESTUARINE INDICATORS (Stephen A. Bortone ed. 2005) (containing several works that use waterbirds as ecological indicators).

²⁴⁰ BOARDMAN, *supra* note 5, at 27. See also James A. Kushlan, *Colonial Waterbirds as Bioindicators of Environmental Change*, 16 COLONIAL WATERBIRDS 223, 229–30 (1993); DAVIDSON & STROUD, *supra* note 12. See generally RACHEL CARSON, SILENT SPRING (1962) (documenting the effects of pesticides on birds).

²⁴¹ E.g., compare to the problems in monitoring dolphins, see Rachele Adam, *The Japanese Dolphin Hunts: In Quest of International Legal Protection for Small Cetaceans*, 14 ANIMAL L. (forthcoming 2008).

²⁴² International Waterbird Census, *supra* note 231.

waterbird populations have been well documented for over forty years.²⁴³ The International Waterbird Census, for example, is an annual census covering millions of birds in over 100 countries.²⁴⁴ Additional information and data sources are BirdLife's Important Bird Areas (IBA)²⁴⁵ and the IUCN's "Red List of Threatened Species," which was last updated in 2007.²⁴⁶ Further, the fourth edition of Wetlands International's "Waterbird Population Estimates" was published in 2006²⁴⁷ and constituted the base for AEWA's third edition of the "Report on the Conservation Status of Migratory Waterbirds in the Agreement Area" published in 2007.²⁴⁸

Thus, if we are looking at what AEWA would bring to the table in a discussion on joint implementation of MBDAs, it could offer its mandated objective of protecting *global* biodiversity which prefers the rights of waterbirds over nation-state sovereignty, its modular structure that allows for expansion to additional species and geographical areas, its species-focused approach which allows for easier implementation and

²⁴³ DAVIDSON & STROUD, *supra* note 12.

With over 40 years of geographically extensive monitoring of waterbirds in parts of the region, the waterbird community has a dataset which is of unparalleled quality for large-scale biodiversity monitoring. This monitoring information has now become of even more relevance in relations to the global biodiversity target established by the WSSD in 2002, of "significantly reducing the rate of loss of biological diversity" by 2010.

Id.

²⁴⁴ See MOP Res. 3.6, *supra* note 151, pmb. ("Further aware that the wide geographic scale of the International Waterbird Census, its long history in some parts of the world, and its annual basis, all provide a highly responsive means of assessing fulfilment of the World Summit on Sustainable Development's 2010 biodiversity target.").

²⁴⁵ See BirdLife International, *Important Bird Areas*, <http://www.birdlife.org/action/science/sites/index.html> (last visited Jan. 26, 2008) (explaining that "IBAs are key sites for conservation—small enough to be conserved in their entirety" and support wide ranges of threatened bird species).

²⁴⁶ See generally IUCN Red List of Threatened Species, *supra* note 233. IUCN's "Red List of Threatened Species" is a comprehensive inventory of the global conservation status of plant and animal species that includes evaluations of risk of extinction for thousands of species. *Id.*

²⁴⁷ See Waterbirds Population Estimates, *supra* note 232 (presenting estimates on numbers, trends, and population data for 878 waterbird species). Regarding the relevance of these documents as available data on monitoring biodiversity trends, see Subsidiary Body on Scientific, Technical and Technological Advice, Nov. 10–14, 2003, *Proposed Biodiversity Indicators Relevant to the 2010 Target*, at 3, UNEP/CBD/SBSTTA/9/INF/26, available at <http://www.cbd.int/doc/meetings/sbstta/sbstta-09/information/sbstta-09-inf-26-en.pdf> [hereinafter *Proposed Biodiversity Indicators Relevant to the 2010 Target*] (listing "important information sources and reporting mechanisms" for data on creating and using indicators including reports such as the IUCN Red Data Books and organizations such as BirdLife International and Wetlands International).

²⁴⁸ The AEWA Report is in accordance with art. VI(8)(a) to the Agreement, which requires the MOP at each of its meetings to "consider actual and potential changes in the conservation status of migratory waterbirds and the habitats important for their survival, as well as the factors which may affect them." AEWA, *supra* note 4, art. VI(8)(a). Furthermore, paragraph 7.4 of annex 3, the Action Plan, requires the Secretariat to prepare a series of international reviews including "reports on the status and trends of populations." AEWA Action Plan, *supra* note 51, para. 7.4. See also AEWA REPORT, *supra* note 12, at 10–11 (listing additional sources that indicate the amount of literature concerning status and trends of migratory waterbirds).

effectiveness assessment, its hard law obligations versus soft law, its emphasis on changing human behavior, and its experience of formal NGO involvement in the implementation of the Agreement. Yet its major and most pragmatic contribution would be extensive and updated data on the status and trends of waterbirds that can be used as indicators for measuring biodiversity loss in general.

IV. RECOMMENDATIONS

In order that this Article might contribute to the ongoing and immensely relevant discussion on global environmental governance, the following are recommendations to put into motion synergized implementation between MBDAs based on AEWA as a paradigm and as an implementer.

A. Involvement of Civil Society

Without extending the scope of this Article, an obstacle in the present system of global environmental governance by MBDAs is that they are monopolized by nation-states. As described above, the formal participation of civil society²⁴⁹ in the implementation of MBDAs is minimal, AEWA being one of the few exceptions.²⁵⁰ Although the majority of nation-states formally demonstrate their support of the existing international regime by ratifying MBDAs, the political reality both domestically and internationally tends to negatively effect implementation and compliance.²⁵¹ Governments inherently make decisions from the perspective of national sovereignty based on political considerations and their own self interest, while global biodiversity requires that nation-states cede some of their national sovereignty. Today, it is recognized that not only governments govern the environment, but that civil society governs as well.²⁵² This contributes to the decision-making process in a watch-dog capacity, and can also promote transparency, a prerequisite for successful global governance.²⁵³ Thus, AEWA could be used a paradigm for

²⁴⁹ The term "civil society" is used by the Organisation for Economic Co-operation and Development "to describe a range of organisations, in addition to government and public administrations, which contribute to society. . . . [i]nclud[ing] business, NGOs, faith institutions and community organisations." Improvement and Development Agency for local government (IDeA), Definitions of Sustainable Development Governance, <http://www.idea.gov.uk/idk/core/page.do?pageId=80939> (last visited Jan. 27, 2008).

²⁵⁰ See *supra* notes 41–45, 235–37.

²⁵¹ As attested to by the non-implementation of MBDAs. See, e.g., *supra* notes 6, 15–16, 116–17. See generally 158–205 and accompanying text.

²⁵² "The new order is the product not only of civil servants, lawyers, and political scientists but also of scientists, indigenous and local communities, NGOs, industry, economists, and philosophers." Le Prestre, *supra* note 19, at 5; Joint Work Plan, *supra* note 155, paras. 11–12. See also SPETH & HAAS, *supra* note 6, at 85 (noting that while nations are the principle actors in international environmental policy, they are also responsive to pressures from additional actors).

²⁵³ Le Prestre, *supra* note 19, at 5; Joint Work Plan, *supra* note 155. See also SPETH & HAAS, *supra* note 6, at 121–24, 133, 136 (discussing the ways civil society organizations can engage in self-policing initiatives, such as eco-labelling and product certification).

other MBDAs in this area, demonstrating the benefits of NGO involvement in running a MBDA.

Going further, civil society should be involved in compliance issues, an area today jealously guarded by nation-states.²⁵⁴ Since MBDAs lack compliance procedures and mechanisms,²⁵⁵ perhaps the solution could be the establishment of a working group on implementation as proposed in section G below.²⁵⁶ It would be comprised of representatives of both government and civil society and could be mandated by the Conferences or Meetings of the Parties to the various MBDAs, to review the national reports of MBDAs and to present its findings as recommendations to a joint meeting of the COPs.

B. Synergetic National Reports

Despite its obvious importance as a tool for conveying information, the obligation to report on implementation of a MEA can be an onerous burden for many governments. It can lead to “reporting fatigue” due to multiple reporting obligations under multiple MEAs. AEWA’s difficulties in persuading Parties to prepare and submit national reports is not unique to AEWA but is a problem shared by other MBDAs.²⁵⁷

AEWA’s national report format, focused on one component of biodiversity and limited in scope, can be used as an instrument for harmonization with other MBDAs by cross-reference with their reporting formats. This would reduce the reporting burden as well as allow for answers that give a more accurate picture of governments’ implementation of MBDAs in general. For example, in chapter 1 of the CBD’s Guidelines for the Fourth National Report, “Parties are requested to provide an analysis or synthesis of the status and trends of, and major threats to, various components of biodiversity in their country, based on the results of

²⁵⁴ See SPETH & HAAS, *supra* note 6, at 136.

Until citizens can have their say in international fora, get the information they need, submit petitions for action and complaints for non-compliance, participate in hearings and initiate judicial proceedings to enforce environmental law—all the things that are available in many countries at the national level—international environmental law and policy will never have the dynamism it so badly needs.

Id.

²⁵⁵ See *supra* note 57 (“[T]he author plans future research on the lack of non-compliance mechanisms in MBDAs.”).

²⁵⁶ See *infra* note 291 and accompanying text.

²⁵⁷ As for the CBD: “The submission of national reports . . . is the only unqualified obligation of Parties to the Convention. Yet, to date, compliance with this obligation has generally been incomplete and late.” Reporting Mechanisms Under CBD, *supra* note 186, at 1. “From the above review, it is clear that the number of both national and thematic reports received around the deadline was very small, and that most national reports were received only two or three years after the deadline.” *Id.* at 9. See also *supra* note 203. In addition to the above, any discussion on reporting should consider the need for an indicator-based approach to evaluate the effectiveness of Parties’ policies in implementing the agreement. See *supra* notes 118 and 129 and accompanying text.

monitoring.”²⁵⁸ This chapter in the CBD national report format could be cross-referenced to the draft national report format for AEWA, which requests Parties to report on status and trends of waterbird populations. Further, this paradigm could be extended to the Ramsar Convention on the interface between wetlands and waterbird habitats. Thus, Parties to these MBDAs as well as the CMS, whose reporting format is already harmonized with that of AEWA, would be able to synergize their reporting duties by using one format that addresses the major concerns of each.

C. Use of Shared Indicators

The detailed provisions of the Action Plan could be turned into indicators that could serve other MBDAs by measuring progress in reaching goals for biodiversity loss.²⁵⁹ The use of such indicators could contribute both to harmonization of reporting formats in biodiversity MEAs²⁶⁰ and to the global initiative in identifying indicators to evaluate the 2010 biodiversity target.²⁶¹

For example, paragraph 4.1.4. of AEWA's Action Plan states that “Parties shall endeavour to phase out the use of lead shot for hunting in wetlands by the year 2000.”²⁶² Since implementation of this obligation has been very slow, at the second meeting of the MOP, it issued resolution 2.2 “Phasing out Lead Shot for Hunting in Wetlands,” which called upon the Parties to comply with paragraph 4.1.4.²⁶³ At its Third Meeting, taking into consideration paragraph 4.1.4 and Resolution 2.2, the MOP issued an additional resolution urging all Parties to submit reports on their progress in phasing out lead shot in hunting.²⁶⁴ Despite these reminders,

²⁵⁸ CONVENTION ON BIOLOGICAL DIVERSITY, GUIDELINES FOR THE FOURTH NATIONAL REPORT 8 (2006), available at <http://www.cbd.int/doc/guidelines/nr-04-gd-lns-en.pdf>.

²⁵⁹ See generally Proposed Biodiversity Indicators Relevant to the 2010 Target, *supra* note 247 (exploring possible indicators of biodiversity loss).

²⁶⁰ See Ninth Meeting of the Conference of the Parties to the Ramsar Convention, Kampala, Uganda, Nov. 8–15, 2005, *Res. IX.1 Annex D: Ecological “Outcome-Oriented” Indicators for Assessing the Implementation Effectiveness of the Ramsar Convention*, at 4, 8, available at http://www.ramsar.org/res/key_res_ix_01_annexd_e.pdf (suggesting that indicators A(i), F(i), and G(i) could be used for global and regional assessments).

²⁶¹ See *Decision VII/30*, *supra* note 10, para. 3 (stating that the Conference of the Parties, “[i]n order to assess progress at the global level towards the 2010 target . . . agrees that a limited number of trial indicators, for which data are available from existing sources, be developed and used in reporting”). See also *id.* annex I (listing “Provisional Indicators for Assessing Progress towards the 2010 biodiversity Target,” including a proposed indicator in the focal area of “status and trends of the components of biological diversity” for “trends in abundance and distribution of selected species”); *id.* annex II (laying out a “Provisional framework for goals and targets,” including “Goal 2 [to promote the conservation of species diversity]”). See generally Proposed Biodiversity Indicators Relevant to the 2010 Target, *supra* note 247 (listing biodiversity indicators). See also *supra* note 11.

²⁶² AEWA, *supra* note 4, para. 4.1.4.

²⁶³ See Second Meeting of the Parties to AEWA, Bonn, F.R.G., Sept. 25–27, 2002, *Res. 2.2: Phasing out Lead Shot for Hunting in Wetlands*, available at http://www.unep-aewa.org/meetings/en/mop2_docs/resolutions-word/pdf/resolution2_2.pdf.

²⁶⁴ See MOP Res. 3.4, *supra* note 133.

the number of Parties who have complied with this obligation remains low.²⁶⁵

Because of its devastating effect on biodiversity,²⁶⁶ the issue of lead shot concerns all MBDAs, not just AEWA. It is estimated that thousands of tons of lead are deposited annually in waterbird habitat, a result of hunting with lead cartridges.²⁶⁷ Further, it is estimated that millions of waterbirds die from lead poisoning each year as a result of lead shot ingestion.²⁶⁸ The lead also enters the food chain and endangers the health and biodiversity and ecosystems, and poses considerable risks to human beings.²⁶⁹

The number of AEWA Parties that have phased out lead shot in response to the Agreement signals significant changes in human behavior, the underlying factor for biodiversity loss. Such changes in human behavior demonstrate not only that human activities specifically regulated by AEWA have become more sustainable, but that humans are also becoming more aware of biodiversity issues in general and specifically in regard to the conservation of species and habitats. This is important news for AEWA and other MBDAs, in particular the CMS, the CBD, and the Ramsar Convention.²⁷⁰

The Action Plan also provides other obligations which could be useful “across the board” indicators. One such indicator could be the number of sites in each Party’s territory that serve as habitat for waterbirds and the status of each site.²⁷¹ Likewise, the number of parties who have hunting legislation that implements the principle of sustainable use,²⁷² have eliminated the use of poison baits,²⁷³ or have taken measures to prevent detrimental effects from alien species²⁷⁴ could be used as an indicator. Statistics on exemptions to the prohibition on takings of waterbirds that Parties have granted in order to prevent damage to crops,

²⁶⁵ See AEWA BROCHURE, *supra* note 13, at 30.

²⁶⁶ See UNEP/AEWA SECRETARIAT, NON-TOXIC SHOT: A PATH TOWARDS SUSTAINABLE USE OF THE WATERBIRD RESOURCE 5, *available at* http://www.unep-aewa.org/publications/technical_series/ts3_non-toxic_shot_english.pdf [hereinafter NON-TOXIC SHOT] (describing death rates in bird populations attributable to lead poisoning, particularly for threatened species such as bald eagles in North America and white tailed eagles in Europe).

²⁶⁷ *Id.* at 4.

²⁶⁸ *Id.* at 2.

²⁶⁹ *Id.* at 5.

²⁷⁰ For an example of AEWA’s pragmatic approach to biodiversity conservation, see BRITISH ASS’N FOR SHOOTING & CONSERVATION, PROTECTING WATERFOWL FROM LEAD IN WETLANDS: A PRACTICAL GUIDE TO THE LEAD SHOT REGULATIONS IN SCOTLAND, *available at* http://www.unep-aewa.org/surveys/hunting_and_trade/brochure_on_lead_shot_scotland.pdf (providing an overview of the environmental impact of lead shot, and the current laws regulating the use of lead shot in Scotland). See also NON-TOXIC SHOT, *supra* note 266 (describing the health and environmental impacts of lead shot, identifying alternatives to lead shot, and providing an overview of legislative tactics in various countries as well as multilateral agreements which address the problem of lead poisoning of waterbirds).

²⁷¹ AEWA Action Plan, *supra* note 51, paras. 3.1–2.4.

²⁷² *Id.* para. 4.1.1.

²⁷³ *Id.* para. 4.1.5.

²⁷⁴ *Id.* paras. 2.5.1–3.

water, or fisheries,²⁷⁵ or for air safety,²⁷⁶ could also serve as such indicators.

In 2004, the CBD incorporated substantive “outcome-oriented” indicators²⁷⁷ into a framework for assessing implementation of its Strategic Plan to achieve the 2010 target. This framework included “[r]educing the rate of loss of the components of biodiversity, including . . . species and populations.”²⁷⁸ Thus, information on waterbird populations can be used as an indicator of the biodiversity loss component of the assessment framework, based on AEWA’s Report on the Conservation Status of Migratory Waterbirds in the Agreement Area.

D. Joint Meetings

As proposed by the Joint Working Plan signed between the Ramsar Convention, the CMS, and AEWA,²⁷⁹ meetings in the framework of these MBDAs on the regional level could be jointly held. This would not only contribute to harmonized implementation, but would also encourage more countries to participate.²⁸⁰ Because in many cases the same officials represent their governments at the COPs of the MBDAs,²⁸¹ consideration should at least be given to joint scheduling of the COPs.²⁸²

E. Work of the Secretariats

Harmonized implementation is dependent on harmonized work of the MBDA Secretariats. This principle has been recognized by UNEP and turned into a UNEP MEA guideline calling for “[e]nhanc[ed] cooperation among multilateral environmental agreement secretariats, if so requested by the parties to the respective multilateral environmental agreements.”²⁸³ Returning to the use of lead shot in hunting as a possible example of harmonized implementation of the relevant MBDAs, the Secretariats of these MBDAs could issue joint letters to all Parties explaining the importance of discontinuing the use of lead shot to protect biodiversity and urging them to comply with the above obligation. Since

²⁷⁵ *Id.* para. 2.1.3(a).

²⁷⁶ *Id.* para. 2.1.3(b).

²⁷⁷ See DAVIDSON & STROUD, *supra* note 12 (explaining that “outcome oriented” indicators regarding the present status and trends of regional waterbird populations are an effective means of measuring the success of conservation efforts).

²⁷⁸ *Decision VII/30*, *supra* note 10, para. 1.

²⁷⁹ Joint Work Plan, *supra* note 155, at 5.

²⁸⁰ See *id.* at 5 (agreeing to hold joint meetings of the CMS and the Ramsar Convention to encourage accession of non-parties).

²⁸¹ As an example, the author of this Article represented Israel at meetings of the Ramsar Convention and the CBD.

²⁸² See also *Linkages*, *supra* note 14, at 2 (noting the U.N.’s Secretary-General’s proposal for increased coordination between biodiversity related Conventions).

²⁸³ UNEP, MANUAL ON COMPLIANCE WITH AND ENFORCEMENT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS 223 (2006), available at http://www.unep.org/dec/docs/UNEP_Manual.pdf (promoting international cooperation and coordination of multilateral environmental agreements).

the concern is joint implementation of obligations pertinent to all MBDA^s,²⁸⁴ Parties to the CBD or the Ramsar Convention, for example, that are not Parties to AEWA, could comply with the AEWA-specific obligation and be considered as implementing these other two MBDA^s. Furthermore, even if they are not legally obligated to comply, it could be recommended behavior in implementation of MBDA^s.²⁸⁵ A working group could be set up to identify additional obligations in AEWA's Action Plan that are relevant for other MBDA^s, such as specific provisions for species and habitat protection. Success in implementing AEWA means success in the implementation of other MBDA^s and should be shared by all.

F. Alternatives to Compliance Mechanisms

In light of the lack of compliance mechanisms in MBDA^s—a factor which impedes their effective implementation²⁸⁶—AEWA can give guidance in establishing a joint implementation body. As provided by Article VI(9)(e) to the Agreement, the MOP can “establish such subsidiary bodies as it deems necessary to assist in the implementation of this Agreement, in particular for coordination with bodies established under other international treaties, conventions and agreements with overlapping geographic and taxonomic coverage.”²⁸⁷ General authorities of other MBDA^s concerning implementation can be added to this specific authority of the MOP under AEWA to establish subsidiary bodies for coordination with other MEAs. The COP of the CBD is also authorized to “[e]stablish such subsidiary bodies, particularly to provide scientific and technical advice, as are deemed necessary for the implementation of this Convention.”²⁸⁸ Just as the COP of the Ramsar Convention is authorized “to discuss the implementation of this Convention,”²⁸⁹ the COP of the CMS is authorized to discuss implementation and effectiveness of the CMS.²⁹⁰ Thus, a joint implementing body created by combining the mandates of the MBDA^s and by a joint decision of the COPs might go a long way in making up for the lack of compliance mechanisms. One example of such compliance mechanisms would be to mandate the body to review national

²⁸⁴ Except for CITES, *supra* note 36.

²⁸⁵ Promotion of harmonized state practice could benefit in the creation of customary law through the consent of states. *See generally* HUNTER ET AL., *supra* note 130, at 225–28 (explaining that the international law-making process benefits from the work of multilateral forums).

²⁸⁶ *See supra* text accompanying note 194; *see also* SPETH & HAAS, *supra* note 6, at 129–30.

²⁸⁷ AEWA, *supra* note 4, art. VI(9)(e). *See also* Decision VII/30, *supra* note 10 (“Recognizing . . . the need for a mechanism to review implementation of the Convention.”).

²⁸⁸ CBD, *supra* note 36, art. 23(4)(g).

²⁸⁹ Ramsar Convention, *supra* note 36, art. 6(2)(a).

²⁹⁰ CMS, *supra* note 27, art. VII(5)(g)–(h) (providing that the COP may “make recommendations to the Parties for improving the effectiveness of this Convention” and may “decide on any additional measure that should be taken to implement the objectives of this Convention”).

reports.²⁹¹ As discussed in Part IV.A of this Article, it is vital to ensure NGO participation in any such body.²⁹²

G. Use of Annexes Under the CBD

A logical recommendation might be to negotiate protocols to the CBD on specific issues—similar to AEWA and its “sister agreements” in the framework of the CMS—which would serve to implement the policies and strategies of these and other MBDAs. However, considering the current proliferation of MBDAs, it can be assumed that such an initiative would lack political will and thus would not advance beyond the discussion stage. Even if the impossible happened and a protocol was drafted, negotiated, and adopted, the present “treaty fatigue” would most likely impede the ratification of the necessary number of Parties for the protocol to come into force. As an alternative, consideration could be given to the use of the annex mechanism in the CBD.²⁹³ Listing the species in the appendixes to the CMS and to Annex 2 in AEWA, together with species listed in additional CMS agreements and MOUs, could assist in implementing, for example, Article 8 to the CBD on *in-situ* conservation and would be a concrete step in promoting synergetic implementation.²⁹⁴

V. CONCLUSION

This Article was motivated by the question of AEWA's contribution to the global target of 2010 biodiversity loss reduction. Setting such a goal raises a number of questions: how do you measure reduction of biodiversity loss? How will we know if and when we reach this goal? Are there benchmarks that tell us what the situation is today so we will know in 2010 if there is a reduction or an increase?

Based on both the most recent general reports as well as reports using migratory waterbirds as indicators, biodiversity is still on the losing side. The gnawing thought is that we, the global community, are continuing to lose biodiversity despite the existence of a large number of MBDA's which we created precisely to address this problem.²⁹⁵ Again, questions arise: why

²⁹¹ This would tie in with the recommendation for a harmonized reporting format. Also compare this approach to the CBD, *supra* note 36, art. 23(4)(h), which requires its COP to “[c]ontact, through the Secretariat, the executive bodies of conventions dealing with matters covered by this Convention with a view to establishing appropriate forms of cooperation with them.”

²⁹² See *supra* notes 249–53 and accompanying text.

²⁹³ See CBD, *supra* note 36, art. 30 (addressing the adoption and amendment of annexes).

²⁹⁴ See McGraw, *supra* note 18, at 21 (“[T]he CBD allows for its own further development through the negotiation of annexes and protocols. The contemporary ‘framework-protocol’ approach to multilateral environmental treaty-making has proven effective in transforming the often ambiguous and ‘soft’ legal content of environment and/or sustainable development conventions into more precise and binding provisions.”).

²⁹⁵ See, e.g., Ivanova & Roy, *supra* note 6, at 54 (noting that the lack of a coherent system to address environmental issues has detracted from the work of the bodies involved in

has this multi-system of MBDAs, some of which have been in existence for over thirty years, not managed to stop biodiversity loss? Are the individual conventions at fault, and if so could they be amended?²⁹⁶ Or is there an inherent problem with the system as a method for global biodiversity governance? Or, perhaps changing human behavior is such a huge challenge that it has to be viewed not in terms of years but in terms of generations (and that might make it too late)? What could be alternatives to managing global biodiversity?²⁹⁷

Promoting joint implementation between MBDAs and AEWA as an implementer would create a win-win situation. AEWA would profit since it would receive backing and assistance in implementing the Agreement; other MBDAs would profit since implementation of AEWA's provisions could also be regarded as implementation of that particular MBDA. However, joint implementation would require a different "mindset" on the part of the COPs and the Secretariats of the MBDAs concerned.²⁹⁸ Conceptually, implementation would address the MBDAs as a whole. Thus, the obligation under the CBD for *in situ* conservation would intertwine with the provisions of the CMS to protect migratory species together with the mandatory duty under AEWA to protect listed populations of waterbirds and the Ramsar Convention's provisions concerning the conservation of "waterfowl."²⁹⁹ Likewise, meeting the obligations under the Ramsar Convention to protect and conserve wetlands, together with the CBD's ecosystem approach, the provisions under the CMS for protecting habitat for migratory species, and obligations under AEWA to protect waterbird habitat, could be considered implementation of all these MBDAs.

The stakes are high. The future of our planet's biodiversity is dependent on a system of multilateral agreements drafted, negotiated, and signed by nation-states who are responsible for their implementation. AEWA and other MBDAs express our shared concern for global biodiversity and are a valiant

environmental work).

²⁹⁶ Perhaps the individual conventions could be amended using the successful paradigm of the Montreal Protocol, which is a trade-based agreement. Of all the MBDAs, only CITES is trade-based. The use of trade in MBDAs as a mechanism in conserving and protecting biodiversity is an area in need of further research that the author plans to tackle.

²⁹⁷ See, e.g., SPETH & HAAS, *supra* note 6, at 138–50 (discussing several ways to change the system of environmental governance).

²⁹⁸ In the list of "[t]he challenges before the international community vis-à-vis the MEAs," after listing efficient use of collective resources, reduction of duplication and overlaps, emphasizing coherence, and avoiding fragmentation, the next challenge is "[r]especting the independent mandate of the MEAs." *Linkages*, *supra* note 14, at 3. This appears contradictory to the discussion on coordination and harmonization since in order to improve implementation on the national level, the concept of "individual mandates" regarding MBDAs will have to change. See, e.g., Kanie, *supra* note 6, at 74 (noting that "inconsistencies in rules and objectives among a large number of MEAs lead to unnecessary duplication," and discussing shortcomings of MEAs).

²⁹⁹ CMS, *supra* note 27, arts. II–V; AEWA, *supra* note 4, art. II(1); Ramsar Convention, *supra* note 36, art. 4. See also Cyril De Klemm, *Migratory Species in International Law*, 29 NAT. RESOURCES J. 935, 955 (1989) (discussing the need to consider MBDAs as a whole in order to assess "the full range of conservation measures").

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attempt by the world community to stop what has been recognized as the ongoing denigration of the biological infrastructures of our planet, upon which all life is dependent. Are there other ways of managing our global biodiversity? Perhaps, and perhaps we should be thinking up new alternatives to the existing system. But time is running out and so, in addition to designing alternatives, we need to use and improve the existing system. The 2010 goal is a wake up call, for our chance to stop biodiversity loss is limited in time.