

## AEWA at Twenty: An Appraisal of the African-Eurasian Waterbird Agreement and Its Unique Place in International Environmental Law

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# AEWA at Twenty: An Appraisal of the African-Eurasian Waterbird Agreement and Its Unique Place in International Environmental Law

Melissa Lewis

## 1. Introduction

Through their annual movements in search of favorable locations to feed, breed, and raise their young, migratory birds connect ecosystems and countries that are sometimes thousands of kilometers apart. In the course of these journeys, populations of migratory birds encounter a myriad of threats, including habitat loss and degradation; unsustainable taking; human disturbance; mortality caused by physical barriers such as wind turbines and power lines; non-native species; poisoning; marine pollution; incidental take (in particular, the bycatch of seabirds in long-line and trawl fisheries); depletion of food resources (especially through overfishing); and diseases.<sup>1</sup> They also traverse multiple jurisdictions, the laws, policies, and conservation priorities of which may differ considerably. Although a spectacular natural phenomenon, bird migration thus presents challenges from a conservation perspective, and international cooperation is needed to maintain populations of migratory birds at or to restore them to a favorable conservation status. Because weak protection in even one segment of a population's migration route ("flyway")<sup>2</sup> has the potential to counteract conservation efforts in other parts of its range, international frameworks for coordinating the conservation and management of migratory waterbirds should ideally encompass entire flyways. However, the majority of the international legal

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<sup>1</sup> See Convention on the Conservation of Migratory Species of Wild Animals [CMS], CMS Scientific Council Flyways Working Group Reviews, *Review 2: Review of Current Knowledge of Bird Flyways, Principal Knowledge Gaps and Conservation Priorities*, at 35–61, UNEP/CMS/ScC17/Inf.4.2b (September 2010) (many of these threats will be exacerbated by climate change, which is already stimulating changes to migration patterns, making it more challenging to protect migratory birds and their habitats); WETLANDS INT'L, STATE OF THE WORLD'S WATERBIRDS 2010, at 8–13 (2010); GERARD BOERE & TIM DODMAN, THE FLYWAY APPROACH TO THE CONSERVATION AND WISE USE OF WATERBIRDS AND WETLANDS: A TRAINING KIT – MODULE 1: UNDERSTANDING THE FLYWAY APPROACH TO CONSERVATION 81–88, 99–103, available at [http://www.wetlands.org/Portals/1/documents/tot\\_resources/2-Module1.pdf](http://www.wetlands.org/Portals/1/documents/tot_resources/2-Module1.pdf).

<sup>2</sup> A flyway can be defined as

the entire range of a migratory bird species (or groups of related species or distinct populations of a single species) through which it moves on an annual basis from the breeding grounds to non-breeding areas, including intermediate resting and feeding places as well as the area within which birds migrate.

Gerard C. Boere & David A. Stroud, *The Flyway Concept: What It Is and What It Isn't*, in WATERBIRDS AROUND THE WORLD 40, 40 (Gerard C. Boere et al. eds., 2006).

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instruments that aim to achieve bird conservation have failed to take this approach.<sup>3</sup> In the Americas, eastern Asia, and Australasia, for instance, bird conservation is pursued primarily through bilateral treaties and non-binding flyway initiatives.<sup>4</sup> While several multilateral bird conservation treaties have been concluded between European countries,<sup>5</sup> and the Directive on the Conservation of Wild Birds (Birds Directive) applies to all European Union (EU) Member States,<sup>6</sup> these instruments have omitted large portions of flyways that extend beyond Europe into Africa and Asia. In contrast, the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) seeks to coordinate the conservation and management of waterbirds across their entire flyways in Africa and western Eurasia.<sup>7</sup> Adopted as an Agreement under the Convention on the Conservation of Migratory Species of Wild Animals (the CMS or Bonn Convention),<sup>8</sup> AEWA was the first multilateral environmental agreement (MEA) to be explicitly dedicated to flyway conservation and remains the world's largest legally binding flyway instrument.<sup>9</sup> In theory, the Agreement thus provides an important tool for the conservation of African-Eurasian waterbirds,<sup>10</sup> as well as a possible model for conservation efforts in respect of other regions and taxa.<sup>11</sup> Despite this potential, the Agreement has thus far attracted relatively little attention from legal researchers.<sup>12</sup>

<sup>3</sup> Convention on the Conservation of Migratory Species of Wild Animals [CMS], CMS Scientific Council Flyways Working Group Reviews, *A Review of CMS and Non-CMS Existing Administrative/Management Instruments for Migratory Birds Globally*, UNEP/CMS/ScC16/Doc.10/Annex 1b (2010) (discussing current instruments).

<sup>4</sup> For an overview of the various bilateral migratory bird treaties, see, e.g., MICHAEL BOWMAN ET AL., *LYSTER'S INTERNATIONAL WILDLIFE LAW 212–225* (2nd ed. 2010). For examples of non-binding flyway initiatives, see generally WESTERN HEMISPHERE SHOREBIRD RESERVE NETWORK, <http://www.whsrn.org/> (last visited 11 November 2015); EAST ASIAN-AUSTRALASIAN FLYWAY PARTNERSHIP, <http://www.eaaflyway.net/> (last visited 11 November 2015).

<sup>5</sup> E.g., International Convention for the Protection of Birds, 18 October 1950, 638 UNTS 186; Benelux Convention on the Hunting and Protection of Birds, 10 June 1970, 847 UNTS 255.

<sup>6</sup> Directive 2009/147/EC, of the European Parliament and of the Council of 30 November 2009 on the Conservation of Wild Birds, 2010 O.J. (L 20) 7.

<sup>7</sup> Agreement on the Conservation of African-Eurasian Migratory Waterbirds art. 3, 16 June 1995, 2365 UNTS 251 [hereinafter AEWA].

<sup>8</sup> Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 UNTS 356 [hereinafter CMS].

<sup>9</sup> Bert Lenten, *The Agreement on the Conservation of African-Eurasian Migratory Waterbirds*, in *WATERBIRDS AROUND THE WORLD* 350, 350, 353 (Gerard C. Boere et al. eds., 2006).

<sup>10</sup> Indeed, Bowman et al. have commented that "AEWA should ultimately prove an extremely important mechanism for avian conservation." BOWMAN ET AL., *supra* note 4, at 231.

<sup>11</sup> Lenten, for instance, notes that AEWA is seen as "a model that could be replicated within the CMS framework in other regions of the world." Lenten, *supra* note 9, at 353.

<sup>12</sup> The most comprehensive legal analysis of AEWA thus far is Rachele Adam, *Waterbirds, the 2010 Biodiversity Target, and Beyond: AEWA's Contribution to Global Biodiversity Governance*, 38 ENVTL. L. 87 (2008). However, several other texts touch on AEWA in broader discussions of the CMS or bird conservation, or in assessments of international responses to specific threats, such as avian influenza or climate change. See, e.g., ROBERT BOARDMAN, *THE INTERNATIONAL POLITICS OF BIRD CONSERVATION: BIODIVERSITY, REGIONALISM AND GLOBAL GOVERNANCE* 138–145 (2006); BOWMAN ET AL., *supra* note 4, at 228–231; Elizabeth A. Baldwin, *Twenty-five Years Under the Convention on Migratory Species: Migration Conservation Lessons from Europe*, 41 ENVTL. L. 535 (2011); M.J. Bowman, *International Treaties and the Global Protection of Birds: Part II*, 11 J. ENVTL. L. 281, 286–288 (1999) [hereinafter *Protection of Birds: Part II*]; 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, 132–134 (2005); Ruth Cromie et al., *Responding to Emerging Challenges: Multilateral Environmental Agreements and Highly Pathogenic Avian Influenza H5N1*, 14 J. INT'L WILDLIFE L. & POL'Y 206 (2011); Arie Trouwborst, *Transboundary Wildlife Conservation in a Changing Climate: Adaptation of the Bonn Convention on Migratory Species and Its Daughter Instruments to Climate Change*, 4 DIVERSITY 258 (2012); Arie Trouwborst, *A Bird's-eye View of Arctic Governance: Reflecting on the Role of International Law in Arctic Cooperation from a Bird Conservation Perspective*, 1 Y.B. OF POLAR L. 401 (2009); Arie Trouwborst, *Bird Conservation and Climate Change in the Marine Arctic and Antarctic: Classic and Novel International Law Challenges Converging in the Polar Regions*, 16 J. INT'L WILDLIFE L. & POL'Y 1, 28–34 (2013).

The date of 16 June 2015 marked the 20-year anniversary of AEWA's adoption, and the Agreement has been in force for over one and a half decades.<sup>13</sup> Against the backdrop of AEWA's birthday celebrations, this article reflects on both the past and future of the Agreement, and its role in relation to other MEAs. The article aims to identify the strengths that distinguish AEWA from other prominent global and regional conservation treaties and to examine the Agreement's progress to date and the challenges that need to be addressed if its implementation is to be improved in the future. Part 2 provides a brief background for this discussion by outlining the limitations of using other conservation treaties as tools for conserving and managing migratory waterbirds. Parts 3, 4, and 5 then examine AEWA's scope and substantive provisions, the manner in which the Agreement has evolved since its entry into force, and the mechanisms used to guide, monitor, and facilitate parties' implementation efforts. Throughout this discussion, factors are highlighted that distinguish AEWA from other relevant MEAs, as are examples of the synergies that AEWA has established with other instruments. Finally, Part 6 analyzes the challenges facing the Agreement, before conclusions are presented in Part 7.

## 2. International treaties relevant to the protection of African-Eurasian migratory waterbirds

A myriad of environmental treaties—some global in scope, others regional or even bilateral—currently contribute to the conservation of African-Eurasian migratory waterbirds. These include instruments focusing on the conservation of wildlife, natural resources, or biodiversity in general;<sup>14</sup> on the protection of particular groups of species to which some or all migratory waterbirds<sup>15</sup> or the species on which they depend belong;<sup>16</sup> or on the conservation and/or management of specific ecosystems or areas that provide waterbird habitat.<sup>17</sup> Also relevant are instruments that contribute to waterbird conservation in a more indirect manner by addressing broad environmental threats, such as hazardous chemicals, marine pollution, and climate

<sup>13</sup> AEWA entered into force on 1 November 1999. UNEP/AEWA Secretariat, *A Brief History of AEWA*, <http://www.unep-aewa.org/en/page/brief-history-aewa>.

<sup>14</sup> See, e.g., Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79 [hereinafter CBD]; Convention on the Conservation of European Wildlife and Natural Habitats, 19 September 1979, ETS 104 [hereinafter Bern Convention]; African Convention on the Conservation of Nature and Natural Resources, 15 September 1968, 1001 UNTS 3 [hereinafter 1968 African Convention].

<sup>15</sup> For instance, see BOWMAN ET AL., *supra* note 4 (the migratory birds shared between two countries); CMS, *supra* note 8 (migratory species in general); Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 993 UNTS 243 [hereinafter CITES] (species threatened by international trade).

<sup>16</sup> See, e.g., United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS] (fish stocks).

<sup>17</sup> See *id.* (marine areas); Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 2 February 1971, 996 UNTS 245 [hereinafter Ramsar Convention] (wetlands); Convention on the Law of the Non-navigational Uses of International Watercourses, 21 May 1997, 36 I.L.M. 700 [hereinafter UN Watercourses Convention] (transboundary watercourses); Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151 [hereinafter World Heritage Convention] (areas of outstanding universal value from a natural heritage perspective).

change.<sup>18</sup> A comprehensive analysis of such treaties' contribution to waterbird conservation falls outside the scope of this article.<sup>19</sup> It is, however, worth briefly considering the limitations of the most prominent conservation treaties that operate within the same geographic area as AEWA, so as to provide a backdrop against which to consider the role and strengths of the agreement.

The “big five” global conservation treaties—the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat,<sup>20</sup> the World Heritage Convention,<sup>21</sup> the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),<sup>22</sup> the CMS,<sup>23</sup> and the Convention on Biological Diversity (CBD)<sup>24</sup>—all play a role in protecting waterbirds and/or waterbird habitat, and they have sufficiently broad geographic coverage to encompass entire flyways. However, the first four of these instruments are limited by either the threats they address or in the species or areas in which they require conservation action. Further, with the exception of CITES, all these conventions are characterized by broadly worded provisions, some of which are also heavily qualified.<sup>25</sup> For instance, the Ramsar Convention, despite its explicit emphasis on waterfowl, applies only to wetland habitat (upon which not all waterbirds rely for their entire annual cycles), has limited application to species-level threats (such as unsustainable harvest), and is made up of vaguely drafted provisions, most of which are qualified by such terms as “should,” “as far as possible,” and “endeavour.”<sup>26</sup> In comparison, regional conservation treaties tend to address a broad variety of both habitat- and species-level threats and contain more detailed and legally rigorous provisions.<sup>27</sup> This is understandable, given that it is easier to reach consensus among a limited number of states (especially where there is little sociocultural and economic divergence within this group) than at the global level. There is, however, regional variation in both the level of protection these instruments provide for migratory birds and the institutional mechanisms and resources available for monitoring and supporting their implementation. For instance, the Bern Convention on the Conservation of European Wildlife and Natural Habitats defines the vast majority of European birds as either protected or strictly

<sup>18</sup> See, e.g., Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 2256 UNTS 119 [hereinafter Stockholm Convention]; United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107; International Convention for the Prevention of Pollution from Ships, 2 November 1973, 1340 UNTS 184, *amended by* Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 17 February 1978, 1340 UNTS 61 [hereinafter MARPOL 73/78].

<sup>19</sup> For a more detailed assessment of the role of various international treaties in bird conservation, see, e.g., Suzette Biber-Klemm, *International Legal Instruments for the Protection of Migratory Birds: An Overview for the West Palearctic-African Flyways*, 12 CONSERVING MIGRATORY BIRDS 315 (T. Salathe ed., 1991); BOWMAN ET AL., *supra* note 4, at 199–238; M.J. Bowman, *International Treaties and the Global Protection of Birds: Part I*, 11 J. ENVTL. L. 87 (1999) [hereinafter *Protection of Birds: Part I*]; *Protection of Birds: Part II*, *supra* note 12.

<sup>20</sup> Ramsar Convention, *supra* note 17.

<sup>21</sup> World Heritage Convention, *supra* note 17.

<sup>22</sup> CITES, *supra* note 15.

<sup>23</sup> CMS, *supra* note 8.

<sup>24</sup> CBD, *supra* note 14.

<sup>25</sup> See Adam, *supra* note 12, at 117–119.

<sup>26</sup> See Michael J. Bowman, *The Ramsar Convention on Wetlands: Has It Made a Difference?* YEARBOOK OF INTL. CO-OP. ON ENVTL. & DEVT. 2002/03, 61, 62–63 (discussing the Ramsar convention and assessing its vague provisions), available at [http://archive.ramsar.org/pdf/key\\_law\\_bowman2.pdf](http://archive.ramsar.org/pdf/key_law_bowman2.pdf).

<sup>27</sup> See, e.g., Bern Convention, *supra* note 14.

protected,<sup>28</sup> contains special provisions regarding migratory species,<sup>29</sup> and has a fairly advanced system for monitoring and reviewing implementation.<sup>30</sup> In contrast, the 1968 African Convention on the Conservation of Nature and Natural Resources prescribes special protections for relatively few avian species,<sup>31</sup> places no emphasis on migratory species specifically, and fails to establish an institutional framework for monitoring and reviewing implementation, with the result of being described as a “sleeping treaty.”<sup>32</sup> More stringent conservation requirements and an improved institutional structure are provided by a 2003 revised version of the African Convention.<sup>33</sup> However, this version has yet to enter into force,<sup>34</sup> and its implementation is likely to be problematic, given the socioeconomic challenges faced by African states.<sup>35</sup>

Another feature that often limits regional treaties’ contributions to the conservation of migratory waterbirds is their geographic scope. For instance, only African states may become parties to the African Convention,<sup>36</sup> with the result that the Convention does not cover the entire flyways of inter-African migrants. The same problem faces bilateral migratory bird treaties, such as those to which both Canada and the Russian Federation are parties.<sup>37</sup> In recognition of the fact that the ranges of some species extend beyond Europe and that conservation problems may thus call for cooperation with non-European states,<sup>38</sup> membership of the Bern Convention is open to states that are not members of the Council of Europe.<sup>39</sup> It is thus possible for this Convention to be used as a framework for coordinating conservation efforts along the entire flyways of even long-distance migrants. The Convention also arguably obliges its parties to assist in conservation initiatives occurring outside Europe for the benefit of European migratory species.<sup>40</sup> Its applicability to migratory species that are *not* native to Europe (such as intra-African migrants) is, however, questionable. While the Bern Convention’s operative provisions do not

<sup>28</sup>*Id.* at apps. II–III.

<sup>29</sup>*Id.* at art. 10.

<sup>30</sup>See Council of Europe, *Monitoring set up under the Bern Convention*, <http://www.coe.int/en/web/bern-convention/monitoring>.

<sup>31</sup>Though note that the birds included in the Convention’s list of protected species are predominantly waterbirds. 1968 African Convention, *supra* note 14, at Annex, Class A.

<sup>32</sup>SIMON LYSTER, *INTERNATIONAL WILDLIFE LAW* 123–124 (1st ed. 1985).

<sup>33</sup>See African Convention on the Conservation of Nature and Natural Resources, *revised* 11 July 2003 [hereinafter Revised African Convention] (not in force), available at <http://faolex.fao.org/docs/pdf/mul45449.pdf> (last visited 30 November 2015).

<sup>34</sup>*Id.* at art. XXXVIII. See African Union, *List of Countries Which Have Signed, Ratified/Acceded to the African Convention on the Conservation of Nature and Natural Resources (Revised Version)*, available at [http://www.au.int/en/sites/default/files/treaties/7782-sl-revised\\_-\\_nature\\_and\\_natural\\_resources\\_1.pdf](http://www.au.int/en/sites/default/files/treaties/7782-sl-revised_-_nature_and_natural_resources_1.pdf).

<sup>35</sup>Bowman et al. observe that the success of the Revised African Convention will depend largely on the extent to which non-African countries and development agencies contribute financially to its implementation, BOWMAN ET AL. *supra* note 4, at 295. Of course, the fact that the Convention’s application will be restricted to Africa means that it will not *oblige* non-African countries to provide such assistance.

<sup>36</sup>Revised African Convention, *supra* note 33, at arts. XXXVI–II; 1968 African Convention, *supra* note 14, at arts. XIX, XXII.

<sup>37</sup>BOWMAN ET AL., *supra* note 4.

<sup>38</sup>Council of Europe, *Explanatory Report to the Convention on the Conservation of European Wildlife and Natural Habitats*, at para. 11, European Treaty Series 4, available at <http://conventions.coe.int/Treaty/en/Reports/Html/104.htm>.

<sup>39</sup>Bern Convention, *supra* note 14, at arts. 19–20.

<sup>40</sup>*Protection of Birds: Part I*, *supra* note 19, at 107.

explicitly restrict its application to European species, its title indicates that the Convention was introduced with the objective of conserving European wildlife,<sup>41</sup> and its Standing Committee has recommended that species that are non-native to Europe be excluded from the Convention's list of strictly protected fauna.<sup>42</sup> That said, the Standing Committee has also occasionally adopted recommendations regarding the conservation of species with no connection to Europe (such as the lion, *Panthera leo*).<sup>43</sup> The Convention thus arguably has the potential to play a role in the conservation of non-European migratory species.<sup>44</sup> Unfortunately, however, this potential is limited by the fact that the Convention has thus far attracted little interest from countries outside Europe, only four of which are currently contracting parties.<sup>45</sup>

### 3. AEWA's scope and substantive obligations

#### 3.1 Geographic and taxonomic scope: Conserving migratory waterbirds at the flyway level

One of AEWA's most important features is that it is designed to coordinate the conservation and management of waterbirds ("birds that are ecologically dependent on wetlands for at least part of their annual cycle")<sup>46</sup> across their *entire migration routes*.<sup>47</sup> Unlike many other regional conservation treaties, AEWA's geographic range is thus defined on the basis of ecological, rather than political, boundaries, and the Agreement provides a framework for true flyway-scale conservation. AEWA currently applies to 254 species (listed in Annex 2 to the Agreement), and its geographic range encompasses the whole of Africa and Europe, parts of Asia, and the Canadian archipelago (this "Agreement Area" is defined in Annex 1). Seventy-four of AEWA's 119 range states are currently parties to the Agreement, as is the European Union (EU).<sup>48</sup>

Of course, it is not unusual for instruments in the CMS Family to cover species' entire ranges.<sup>49</sup> However, the vast majority of the CMS's bird-related instruments are non-binding. These include, *inter alia*, the Memorandum of Understanding (MoU) on African-Eurasian raptors<sup>50</sup> and the Action Plan for African-Eurasian

<sup>41</sup> Lyster, *supra* note 32, at 148–149.

<sup>42</sup> See Bern Convention, *Recommendation No. 56 of the Standing Committee Concerning Guidelines to Be Taken into Account while Making Proposals for Amendment of Appendices I and II of the Convention and while Adopting Amendments* (5 December 1997), available at <https://wcd.coe.int/ViewDoc.jsp?id=1487227&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679> [hereinafter *Recommendation No. 56*].

<sup>43</sup> See Bern Convention, *Recommendation No. 115 of the Standing Committee on the Conservation and Management of Transboundary Populations of Large Carnivores* (1 December 2005), available at <https://wcd.coe.int/ViewDoc.jsp?id=1487553&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>.

<sup>44</sup> See BOWMAN ET AL., *supra* note 4, at 325.

<sup>45</sup> Bern Convention, *Chart of Signatures and Ratifications of Treaty 104*, available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104/signatures>. (last updated 29 October 2015).

<sup>46</sup> AEWA, *supra* note 7, at art. I(2)(c).

<sup>47</sup> *Id.* at art. I(1).

<sup>48</sup> AEWA, *Parties and Range States*, <http://www.unep-awea.org/en/parties-range-states> (last visited 31 August 2015).

<sup>49</sup> The Convention explicitly encourages this for Article IV.3 Agreements. CMS, *supra* note 8, at art. V(2).

<sup>50</sup> CMS, *Memorandum of Understanding on the Conservation of Migratory Birds of Prey in Africa and Eurasia* (1 November 2008), available at <http://www.cms.int/en/legalinstrument/birds-prey-raptors> [hereinafter *Raptors MoU*].

landbirds<sup>51</sup> (both of which have significant geographic, but not taxonomic, overlap with AEWA); the Action Plan for waterbirds in the Central Asian Flyway (CAF)<sup>52</sup> (which overlaps considerably with AEWA in terms of both country and species coverage);<sup>53</sup> and the CMS's single species MoUs (several of which overlap with AEWA geographically, though only one covers an AEWA-listed species).<sup>54</sup> Initially, it was envisaged that binding agreements similar to AEWA would be adopted for both Asia-Australasia and the Americas.<sup>55</sup> However, these instruments have never materialized.<sup>56</sup> At present, the only other bird-related *treaty* to have been adopted under the CMS framework is the Agreement on the Conservation of Albatrosses and Petrels (ACAP),<sup>57</sup> which is much less ambitious than AEWA in terms of species coverage, applying to only 31 species of pelagic seabirds.<sup>58</sup> Although none of these is also an AEWA species, AEWA does apply to several species of coastal seabirds.<sup>59</sup> There is consequently some overlap in the threats addressed by the two agreements, which also have partial geographic overlap.<sup>60</sup>

### 3.2 Fundamental principles

Article II of AEWA, titled “Fundamental Principles,” provides that “[p]arties shall take co-ordinated measures to maintain migratory waterbird species in a favourable conservation status<sup>61</sup> or restore them to such a status.” This mandatory provision sets a standard at which species must be maintained (the implication being that AEWA does not only apply to species which already have an unfavorable conservation status),<sup>62</sup> or to which depleted species must be restored, and appears to require that parties take all measures necessary to achieve this result.<sup>63</sup> A series of more detailed requirements is, however, enumerated in Article III, which describes a collection of “General Conservation Measures” for the protection of Annex 2 species, as well as Annex 3, which includes a legally binding Action Plan. As explained below,

<sup>51</sup> CMS, *Action Plan for Migratory Landbirds in the African-Eurasian Region*, UNEP/CMS/COP11/Doc.23.1.4 (4–9 November 2014) [hereinafter Landbirds Action Plan].

<sup>52</sup> CMS, *Central Asian Flyway Action Plan for the Conservation of Migratory Waterbirds and Their Habitats*, CMS/CAFReport, Annex 4 (10–12 June 2005) [hereinafter CAF Action Plan].

<sup>53</sup> AEWA, *Assessment of the Implications for AEWA of Expanding Its Scope to Include the CAF Region*, at apps. I–II (November 2013), available at [http://flermoneca.org/assets/files/AEWA-CAF\\_report\\_appendices\\_v6.pdf](http://flermoneca.org/assets/files/AEWA-CAF_report_appendices_v6.pdf).

<sup>54</sup> CMS, *Memorandum of Understanding Concerning Conservation Measures for the Slender-billed Curlew*, *Numenius tenuirostris* (10 September 1994), available at <http://www.cms.int/en/legalinstrument/slender-billed-curlew>.

<sup>55</sup> CMS, *Report of the Second Meeting of the CMS Working Group for the Draft Asian/Australasian Waterfowl Agreement*, at para. 8.4 (14–17 October 1992) (copy on file with author).

<sup>56</sup> Bonn Convention, *The Asian/Australian Waterfowl Agreement and Action Plans with Explanatory Note and Management Plan* (10 March 1993) (draft prepared for negotiation, but never finalized) (copy on file with author).

<sup>57</sup> Agreement on the Conservation of Albatrosses and Petrels, 19 June 2001, 58 UNTS 257 [hereinafter ACAP].

<sup>58</sup> *Id.* at 5, art. I(1), read with Annex 1.

<sup>59</sup> See *infra* pt. 4.2.

<sup>60</sup> ACAP's geographic scope is restricted to the migration routes of species covered by the Agreement. ACAP, *supra* note 57, at art. I(1), read with art. I(2)(i). Most of these flyways only overlap with the Southern African portion of AEWA's Agreement Area, although the range of the Balearic shearwater, *Puffinus mauretanicus*, also encompasses parts of Northern Africa and Western Europe. *Id.*

<sup>61</sup> For the definition of favorable conservation status, see CMS, *supra* note 8, at art. 1(c); AEWA, *supra* note 7, at art. I(2).

<sup>62</sup> See *infra* pt. 4.2.

<sup>63</sup> Trouwborst (2012), *supra* note 12, at 274. This standard is clearly drawn from Article V(1) of the CMS, stating that “[t]he object of each [Article IV(3) Agreement] shall be to restore the migratory species concerned to a favourable conservation status or to maintain it in such status.” CMS, *supra* note 8.



the detail and legal rigor of AEWA's requirements and the Agreement's ability to evolve over time have been facilitated by this tiered arrangement of conservation commitments.

In implementing the requisite measures, parties "should take into account the precautionary principle."<sup>64</sup> The wording originally proposed for this provision was more strictly formulated ("Parties *shall* apply the precautionary principle")<sup>65</sup> than that which was finally adopted, but it was watered down during the text's development.<sup>66</sup> While it may be considered unfortunate that this provision is not expressed in stronger language,<sup>67</sup> it is, nevertheless, significant that AEWA's reference to precaution appears in the Agreement's operative text, as a fundamental principle to inform the Agreement's implementation, rather than merely a preambular paragraph or resolution (as is common amongst the global biodiversity-related MEAs<sup>68</sup>).<sup>69</sup>

### 3.3 Article III's general conservation measures

Although AEWA's application is not restricted to species with an unfavorable conservation status, Article III requires parties, when taking conservation measures, to pay particular attention to such species.<sup>70</sup> In order to align AEWA's requirements with those of the CMS, Article III requires that parties to AEWA provide the "same strict protection for endangered migratory waterbird species in the Agreement Area" as the CMS requires<sup>71</sup> in respect of the endangered migratory species listed in Appendix I to the Convention.<sup>72</sup> Such alignment is especially important given that parties to AEWA need not also be parties to the Agreement's parent Convention.<sup>73</sup> This provision has, however, resulted in complexities in interpreting permissible exemptions to the AEWA Action Plan's taking prohibitions, since the Action Plan's exemptions are not modeled on those of the CMS (which prohibits

<sup>64</sup> AEWA, *supra* note 7, at art. II(2).

<sup>65</sup> Minutes of the Fourth Meeting of the First Intergovernmental Session to Discuss the Proposal for an Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) (14 June 1994), at para. 2 (copy on file with author). Emphasis added.

<sup>66</sup> *Id.* at paras. 2–4.

<sup>67</sup> In contrast, two of AEWA's sister agreements provide that, in implementing conservation measures, parties *shall* apply the precautionary approach/principle. ACAP, *supra* note 57, at art. II(3); Agreement on the Conservation of Small Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area art. II(4), 24 November 1996, 2183 UNTS 303 [hereinafter ACCOBAMS].

<sup>68</sup> See, e.g., CBD, *supra* note 14, at preamble; CITES Res. 9.24 (Rev. CoP16): *Criteria for amendment of Appendices I and II* (7–18 November 1994), available at <https://www.cites.org/eng/res/09/09-24R16.php>; CITES, Res. 10.7 (Rev. CoP15): *Disposal of confiscated live specimens of species included in the Appendices* (2–20 June 1997), available at <https://www.cites.org/eng/res/10/10-07R15.php>. References to the precautionary principle more commonly appear in the operative texts of regional instruments. See, e.g., Treaty Establishing the European Community, 15 March 1957, 298 UNTS 11 art. 174(2); Revised African Convention, *supra* note 33, at art. IV.

<sup>69</sup> See *infra* pt. 6.1 (concerning the relevance of AEWA's provision on the precautionary principle in light of gaps in knowledge regarding waterbirds and their habitats).

<sup>70</sup> AEWA, *supra* note 7, at art. III(1).

<sup>71</sup> CMS, *supra* note 8, at art. III(4)–(5).

<sup>72</sup> AEWA, *supra* note 7, at art. III(2)(a), read with art. III(1).

<sup>73</sup> CMS, *supra* note 8, at art. V(2).

the taking of Appendix I species) but rather on those of the Bern Convention and EU Birds Directive.<sup>74</sup>

The remaining conservation measures prescribed by Article III address sustainable use; the identification, protection, management, rehabilitation, and restoration of important habitat; the maintenance or re-establishment of suitable networks of habitat; the investigation and remediation of problems caused by human activities; cooperation in respect of emergency situations; the management of non-native waterbird species; research; training; awareness-raising; and information exchange.<sup>75</sup> Most of these requirements, though broadly worded, are expressed in obligatory, unqualified language<sup>76</sup> and are thus legally stronger than many of the provisions that appear in the major global biodiversity-related treaties.<sup>77</sup> As discussed below,<sup>78</sup> the requirements are further strengthened by parties' inability to enter general reservations in respect of the Agreement text.<sup>79</sup>

### 3.4 The AEWA action plan

#### 3.4.1 Tailoring conservation measures to the population level

Article III's general conservation measures are elaborated on by AEWA's Action Plan, which applies to populations listed in Table 1 of Annex 3.<sup>80</sup> Table 1 classifies waterbird populations into a complex regime of columns (A, B, and C) and categories according to their conservation status. The Action Plan provides a key to classification,<sup>81</sup> with some categorizations<sup>82</sup> being based directly on biological criteria and others<sup>83</sup> instead being linked to listing on CMS Appendix I and the IUCN Red List of Threatened Species.<sup>84</sup>

A population's classification determines the level of protection to which it is entitled under the Action Plan—especially as regards restrictions on taking, disturbance and trade, and the development of national and international species action plans.<sup>85</sup> Because Table 1's listing system operates at the taxonomic level of populations, different conservation measures may be required in respect to different populations of the same species. This approach is not unusual *per se*. In the context of both CITES and the CMS, for instance, geographically separate populations can be considered independently for listing purposes.<sup>86</sup> It does, however, differ from

<sup>74</sup> See *Protection of Birds: Part II*, *supra* note 12, at 288; BOWMAN ET AL., *supra* note 4, at 580–581.

<sup>75</sup> AEWA, *supra* note 7, at art. III(2)(b)–(l).

<sup>76</sup> But see *id.* at art. III(2)(c), (e).

<sup>77</sup> See Adam, *supra* note 12, at 102–103, 117–119.

<sup>78</sup> See *infra* pt. 4.4.

<sup>79</sup> AEWA, *supra* note 7, at art. XV.

<sup>80</sup> *Id.* at Annex 3, para. 1.

<sup>81</sup> *Id.* at Annex 3, tbl.1.

<sup>82</sup> *Id.* at col. A, categories 1(c), 2, 3, col. B, col. C.

<sup>83</sup> *Id.* at col. A, categories 1(a)–(b), 4.

<sup>84</sup> International Union for Conservation of Nature and Natural Resources [IUCN], *Red List of Threatened Species* (25 October 2015), <http://www.iucnredlist.org/>.

<sup>85</sup> AEWA, *supra* note 7, at Annex 3, paras. 2.1, 2.2.

<sup>86</sup> CITES, *supra* note 15, at art. I(a) (definition of “species”); CMS, *supra* note 8, at art. I(1)(a) (definition of “migratory species”).

the approach taken by both the 1968 African Convention, which lists only families of waterbirds,<sup>87</sup> and the Bern Convention, which avoids listing populations<sup>88</sup> and lists only species and families of waterbirds.<sup>89</sup> AEWA's approach has the advantage of allowing conservation requirements to be tailored to the needs of individual populations, even where these differ from the measures needed to achieve conservation at the species level. For instance, the bean goose, *Anser fabalis*, is globally categorized as a species of "Least Concern."<sup>90</sup> However, this categorization fails to reflect that there are two subspecies of bean goose occurring in the AEWA Agreement Area, one of which (the tundra bean goose, *Anser fabalis rossicus*) is far more abundant than the other (the taiga bean goose, *Anser fabalis fabalis*).<sup>91</sup> The tundra bean goose is listed in Column C, Category 1 of AEWA's Table 1, which attracts the lowest level of protection provided by the Action Plan.<sup>92</sup> For instance, the Action Plan does not require that parties regulate the taking of birds from this population (although a broad sustainable use requirement does apply). In contrast, the west and central Siberia/Turkmenistan to western China population of taiga bean goose is listed in Column A, Category 1(c), with the result that parties must, *inter alia*, prohibit the taking of birds from this population.<sup>93</sup> Yet another approach is required for the northeast Europe/northwest Europe population of taiga bean goose, which is listed in Column A, Category 3(c) and marked with an asterisk, with the result that its hunting must be regulated and may occur only within the framework of an international species action plan.<sup>94</sup> The Bern Convention, on the other hand, includes the entire bean goose species on Appendix III, thus requiring that contracting parties regulate, but not prohibit, exploitation.<sup>95</sup> This comparison illustrates, first, the nuanced approach of AEWA's listing system and accompanying obligations, which, although complex, are arguably more advanced than the species- and family-based lists of other instruments. Second, it shows that one of the implications of AEWA's population approach is that the Agreement's requirements in respect of specific populations do not always align with the requirements of other treaties, with AEWA's protections being stronger than those of other instruments for some populations, and weaker for others.<sup>96</sup>

<sup>87</sup>1968 African Convention, *supra* note 14, at Annex, Class A.

<sup>88</sup>See *Recommendation No. 56*, *supra* note 42.

<sup>89</sup>Bern Convention, *supra* note 14, at apps. II, III.

<sup>90</sup>IUCN, *supra* note 84.

<sup>91</sup>AEWA, *Draft International Single Species Action Plan for the Conservation of the Taiga Bean Goose*, at 12, UNEP/AEWA/MOP6.26 (14 August 2015) [hereinafter *Taiga Bean Goose Action Plan*].

<sup>92</sup>AEWA, *supra* note 7, at Annex 3, tbl.1.

<sup>93</sup>*Id.* at Annex 3, para. 2.1.1. Parties must further develop both international and national species action plans with a view to improving the conservation status of this population. *Id.* at Annex 3, para. 2.2. Note that AEWA's Table 1 was recently amended to reclassify this population as a separate subspecies: *Anser fabalis johanseni*. *Id.* at Annex 3, tbl.1.

<sup>94</sup>*Id.* at Annex 3, para. 2.1.1; *Taiga Bean Goose Action Plan*, *supra* note 91.

<sup>95</sup>Bern Convention, *supra* note 14, at app. III, read with art. 7.

<sup>96</sup>AEWA, *Review on Hunting and Trade Legislation in Countries Relating to the Species Listed in Annex 2 to the African-Eurasian Migratory Waterbird Agreement*, at pt. II, UNEP/AEWA/MOP4.9 (September 2008).

### 3.4.2 Detail and stringency of the Action Plan's provisions

The AEWA Action Plan itself is divided into sections on species conservation, habitat conservation, management of human activities, research and monitoring, education and information, and implementation. Its provisions are extremely detailed when compared to instruments with a broader geographic and/or thematic focus, and thus provide for targeted interventions to address the threats faced by migratory waterbirds. This can, for instance, be seen in the Action Plan's various levels of protections regarding hunting, several of which are described above with reference to the bean goose. Another example is the Action Plan's provisions on non-native species. Provisions on controlling the introduction of alien species (either generally<sup>97</sup> or within certain environments)<sup>98</sup> are found in a wide range of treaties, some of which additionally urge the control or eradication of species which have already been introduced.<sup>99</sup> It is thus unsurprising that AEWA's Action Plan contains general requirements regarding the introduction, accidental escape, and control of non-native species that may be detrimental to waterbirds.<sup>100</sup> However, the Action Plan additionally includes provisions that explicitly link the control of non-native species to the rehabilitation of degraded ecosystems, outline measures for eliminating/mitigating the threat posed by non-native predators to breeding migratory waterbirds on islands and islets, and address the issue of non-native species introduced through aquaculture.<sup>101</sup> While it is common to find this level of detail in the non-binding resolutions adopted by treaties' governing bodies,<sup>102</sup> the approach is unusual for a legally binding text. On the other hand, several of the Action Plan's provisions are (perhaps unsurprisingly given their detailed nature) expressed in weak or qualified language.<sup>103</sup> The Action Plan's provisions thus vary in stringency. The most legally rigorous provisions are concentrated primarily in the sections on "Species Conservation" and "Management of Human Activities," which include unqualified requirements regarding, *inter alia*, taking restrictions<sup>104</sup> (the emphasis on this issue being understandable, given that AEWA's negotiation was initially motivated by concerns over unsustainable waterbird harvest).<sup>105</sup> In contrast, the majority of the provisions appearing in the Action Plan's section on "Habitat Conservation" are qualified by the term "endeavour."<sup>106</sup>

<sup>97</sup> E.g., CBD, *supra* note 14, at art. 8(h); Bern Convention, *supra* note 14, at art. 11(2)(b).

<sup>98</sup> E.g., UN Watercourses Convention, *supra* note 17, at art. 22; UNCLoS, *supra* note 16, at art. 196(1).

<sup>99</sup> E.g., CMS, *supra* note 8, at art. III(4)(c); CBD, *supra* note 14, at art. 8(h).

<sup>100</sup> AEWA, *supra* note 7, at Annex 3, para. 2.5.

<sup>101</sup> *Id.* at Annex 3, paras. 3.3, 4.3.10, 4.3.11.

<sup>102</sup> See, e.g., CBD *Invasive Alien Species*, <http://www.cbd.int/invasive/cop-decisions.shtml> (last visited 9 October 2015) (listing numerous decisions of the CBD's Conference of the Parties (CoP) concerning alien invasive species).

<sup>103</sup> See generally AEWA, *supra* note 7, at Annex 3. For instance, although the Action Plan's general provisions on the introduction of non-native species are expressed in obligatory language, most of its more detailed provisions on these species are qualified by such phrases as "to the extent feasible and appropriate," "shall endeavor," and "parties are urged." *Id.* at paras. 2.5.3, 3.3, 4.3.11.

<sup>104</sup> See *id.* at Annex 3, paras. 2.1, 4.1.1, 4.1.2, 4.1.6.

<sup>105</sup> GERARD C. BOERE, THE HISTORY OF THE AGREEMENT ON THE CONSERVATION OF AFRICAN-EURASIAN MIGRATORY WATERBIRDS: ITS DEVELOPMENT AND IMPLEMENTATION IN THE PERIOD 1985–2000, WITHIN THE BROADER CONTEXT OF WATERBIRD AND WETLAND CONSERVATION 25 (2010).

<sup>106</sup> See AEWA, *supra* note 7, at Annex 3, part 3 (the exception is paragraph 3.1.2, which is unqualified).

### 3.4.3 *Overlap with other treaties*

AEWA is designed to address the full range of threats facing migratory waterbirds. Overlap thus inevitably exists between parties' various commitments under the Agreement and their commitments under the myriad of other environmental treaties that operate within the AEWA Agreement Area. Overlap between treaties' provisions can, of course, be problematic where provisions intended to regulate the same issue conflict with one another or result in the duplication of efforts under separate treaty regimes. It is therefore significant that several of the AEWA Action Plan's provisions are clearly designed to support those of other instruments, rather than to introduce *additional* international requirements. For example, parties to AEWA must endeavor to "give special protection to those wetlands which meet internationally accepted criteria of international importance"<sup>107</sup> (this being an obvious reference to the criteria developed for designating sites under the Ramsar Convention<sup>108</sup>) and to make "wise and sustainable use" of all wetlands in their territory<sup>109</sup> (also a core requirement under the Ramsar Convention).<sup>110</sup> Parties must also endeavor to "ensure, where practicable, that adequate statutory controls are in place, relating to the use of agricultural chemicals, pest control procedures and the disposal of waste water, which are *in accordance with international norms*" (as are provided by, for instance, the Stockholm Convention on Persistent Organic Pollutants)<sup>111</sup> "for the purpose of minimising their adverse impacts on the populations listed in Table 1."<sup>112</sup> Further, parties must "establish and effectively enforce adequate statutory pollution controls *in accordance with international norms and legal agreements*, particularly as related to oil spills, discharge and dumping of solid wastes, for the purpose of minimising their impacts on the populations listed in Table 1"<sup>113</sup> (the "legal agreements" referred to here would include a wide range of global and regional treaties aimed at addressing marine pollution).<sup>114</sup> Finally, the Action Plan urges parties to work through the framework of Regional Fisheries Management Organizations (RFMOs, several of which prescribe management measures for fisheries within the AEWA Agreement Area)<sup>115</sup> and other relevant organizations to

<sup>107</sup> See *id.* at Annex 3, para. 3.2.2.

<sup>108</sup> See Ramsar Convention, *supra* note 18 (citing specifically arts. 2.1 and 3.1).

<sup>109</sup> AEWA, *supra* note 7, at Annex 3, at para. 3.2.3.

<sup>110</sup> Ramsar Convention, *supra* note 17 (citing specifically art. 3.1).

<sup>111</sup> Stockholm Convention, *supra* note 18. Indeed, the AEWA MoP has invited, *inter alia*, the Secretariat of the Stockholm Convention and the UN Food and Agriculture Organisation (UNFAO) to cooperate with the Agreement's Secretariat "in efforts to strengthen the capacity of African countries to control/manage the use of agrochemicals." AEWA, Res. 5.12: *Adverse Effects of Agrochemicals on Migratory Waterbirds in Africa* (14-18 May 2012), available at [http://www.unep-aeewa.org/sites/default/files/document/res\\_5\\_12\\_agrochemicals\\_0.pdf](http://www.unep-aeewa.org/sites/default/files/document/res_5_12_agrochemicals_0.pdf).

<sup>112</sup> AEWA, *supra* note 7, at Annex 3, para. 3.2.3(a) (emphasis added).

<sup>113</sup> *Id.* at Annex 3, para. 4.3.9 (emphasis added).

<sup>114</sup> See generally UNCLOS, *supra* note 16, at 105–107 (citing specifically arts. 210–211); MARPOL 73/78, *supra* note 18; 1996 Protocol to the Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 7 November 1996, 1046 UNTS 120. For information concerning various regional seas conventions and their protocols, see UNEP, "About" Regional Seas Programme, <http://www.unep.org/regionalseas/about/default.asp> (last visited 11 November 2015).

<sup>115</sup> See generally Regional Fisheries Management Organizations and Deep-Sea Fisheries, UNFAO, <http://www.fao.org/fishery/topic/166304/en> (last visited 26 October 2015).

minimize the impact of fisheries on migratory waterbirds—especially as regards bycatch in fishing gear and the food depletion from unsustainable fishing.<sup>116</sup>

These provisions suggest that, although the AEWA Action Plan contains provisions on a wide range of threats to migratory waterbirds, it is not intended that the Agreement will necessarily *take the lead* in addressing all of them. Especially where broader environmental problems are already the focus of other treaty regimes, it is rather envisaged that AEWA's parties and institutions will cooperate with these in a manner that ensures that migratory waterbirds are afforded adequate consideration, while avoiding duplication of efforts. There is also, of course, a need to coordinate AEWA's activities with those of the global and regional conservation treaties with which the Agreement overlaps. AEWA's Agreement text highlights the need for such coordination, directing the AEWA Secretariat to consult with the secretariats of relevant international instruments, as well as other organizations competent in the field of conservation.<sup>117</sup> The Agreement text places particular emphasis on consultation with the bodies responsible for the secretariat functions of the CMS, Ramsar Convention, CITES, 1968 African Convention, Bern Convention, and CBD, with a view to AEWA's Meeting of the Parties (MoP) "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."<sup>118</sup> On the basis of, *inter alia*, AEWA's strong emphasis on cooperation, Adam has argued that the Agreement provides a paradigm for harmonization and joint implementation amongst the biodiversity-related MEAs.<sup>119</sup> However, the existing literature fails to consider the extent to which AEWA has actually established cooperative arrangements with other instruments. This issue is explored throughout the discussion below.

### 3.5 International single species Action Plans and management plans

While AEWA's focus on one group of shared species has enabled parties to agree on remarkably detailed legal obligations, the fact that a large number of waterbird species are covered (254 in total, with differing migration strategies, ranges, and conservation requirements) inevitably dilutes the Action Plan's ability to address the specific needs of individual species or populations.<sup>120</sup> For this reason, the Action Plan envisages what Bowman describes as "yet a further tier of conservation norms"<sup>121</sup> in the form of international single species action plans and management plans (ISSAPs and ISMPs).

ISSAPs aim to restore or maintain a particular species' or population's conservation status. Paragraph 2.2.1 of the AEWA Action Plan requires parties to cooperate

<sup>116</sup>AEWA, *supra* note 7, at Annex 3, paras. 4.3.7-4.3.8.

<sup>117</sup>*Id.* at art. IX; see also *id.* at Annex 3, paras. 3.1.1, 4.2.2, 5.8 (concerning cooperation with international organizations).

<sup>118</sup>*Id.* at art. IX(a); see also *id.* at art. III(2)(c), VI(9)(e).

<sup>119</sup>Adam, *supra* note 12, at 112-129.

<sup>120</sup>See Cyrille de Klemm, *The Problem of Migratory Species in International Law*, in GREEN GLOBE Y.B. OF INT'L CO-OPERATION ON ENV'T AND DEV. 67, 73 (Helge Ole Bergesen & Georg Parmann eds., 1994) (highlighting that the greater the number of species and countries covered by an instrument, the more general its provisions need to be).

<sup>121</sup>*Protection of Birds: Part II*, *supra* note 12, at 288.

with a view to developing and implementing such plans for waterbird populations listed in Column A, Category 1 (these being populations with the least favorable conservation status and thus in need of recovery), as well as populations that are listed in Column A, Category 2 or 3 and marked with an asterisk (since the hunting of these populations is permitted, despite their unfavorable conservation status). In addition, paragraph 2.1.1 specifies that the hunting of both asterisk-marked populations and populations listed in Column A, Category 4 (these being Near Threatened species) may occur only within the framework of an ISSAP. In contrast to ISSAPs, ISMPs are intended to manage waterbird populations that cause damage to economic interests, and in respect of which there is thus a need to reduce the damage in question while maintaining the conservation status of the species/populations concerned.<sup>122</sup> Paragraph 4.3.4 requires parties to cooperate with a view to developing such plans “for populations which cause significant damage, in particular to crops and fisheries.”

Thus far, the AEWA MoP has adopted 24 ISSAPs and one ISMP.<sup>123</sup> In 2015, the MoP further adopted AEWA’s first international *multi-species* action plan (for the Benguela upwelling system coastal seabirds).<sup>124</sup> A question, however, arises concerning the legal status of these plans. It is clear that ISSAPs, even once approved by the MoP, are not intended to be directly binding. Indeed, these plans do not only identify activities for governments, but for a range of additional stakeholders in respect of which AEWA creates no direct obligations. However, paragraph 2.2.1 of the AEWA Action Plan does require parties to “cooperate with a view to” the implementation of such plans. Should a party to which an ISSAP applies make *no* efforts towards implementing such plan, the party will thus be in breach of its AEWA commitments, as will a party that permits hunting to occur outside the framework of an action plan, in contravention of paragraph 2.1.1. Curiously, paragraph 4.3.4 does not call on parties to *implement*, but only to develop, ISMPs. It is unclear whether this omission was intentional or simply an oversight by the provision’s drafters. In

<sup>122</sup>Initially, the text of paragraph 4.3.4 also described these types of plans as “single species action plans.” However, at its fifth session, the MoP decided that the term “single species *management* plans” should be introduced so as to avoid confusion between those plans designed for the recovery of species with a poor conservation status and those designed for the management of healthy populations that cause significant damage to crops, fisheries etc. AEWA, *Proposals to the 5th Session of the Meeting of the Parties for Amendments to Annex 3 of AEWA*, at 48-49, UNEP/AEWA/MOP5.20 (14 November 2011); AEWA, Res. 5.6: *Adoption of Amendments to the AEWA Action Plan* (14-18 May 2012), available at [http://www.unep-aewa.org/sites/default/files/document/res\\_5\\_6\\_amendments\\_aewa\\_ap\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res_5_6_amendments_aewa_ap_0.pdf).

<sup>123</sup>See AEWA, Res. 2.13: *International Action Plans on the Sociable Plover, the Black-winged Pratincole and the Great Snipe* (25-27 September 2002), available at [http://www.unep-aewa.org/sites/default/files/document/resolution2\\_13\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/resolution2_13_0.pdf), AEWA, Res. 3.12: *Adoption and Implementation of International Single Species Action Plans* (23-27 October 2005), available at [http://www.unep-aewa.org/sites/default/files/document/res3\\_12\\_ssap\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res3_12_ssap_0.pdf), AEWA, Res. 4.16: *Adoption and Implementation of International Single Species Action Plans* (15-19 September 2008), available at [http://www.unep-aewa.org/sites/default/files/document/res4\\_16\\_adoption\\_implementation\\_ssap\\_final\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res4_16_adoption_implementation_ssap_final_0.pdf), AEWA, Res. 5.8: *Adoption and Implementation of International Single Species Action Plans and Species Management Plans* (14-18 May 2012), available at [http://www.unep-aewa.org/sites/default/files/document/res\\_5\\_8\\_ssap\\_and\\_mp\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res_5_8_ssap_and_mp_0.pdf), AEWA, Res. 6.8: *Adoption and Implementation of International Single Species and Multi-Species Action and Management Plans* (6-14 November 2015), available at [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res8\\_speciesplans\\_en.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res8_speciesplans_en.pdf); and the meeting documents referred to therein.

<sup>124</sup>AEWA, Res. 6.8, *supra* note 123. Although multi-species action plans are not referred to in AEWA itself, see AEWA, Res. 2.1: *Amendments to the Annexes to the Agreement* (25-27 September 2002), available at [http://www.unep-aewa.org/sites/default/files/document/resolution2\\_1\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/resolution2_1_0.pdf) (encouraging the development and implementation of multi-species plans “for populations of two or more species listed in column A of Table 1 when those populations share the same habitat (ecosystem), are exposed to similar threats, and require similar measures for their conservation.”)

the case of the latter, the provision should ideally be amended so as to explicitly require that parties cooperate with a view to implementing management plans. In any event, it should not be forgotten that parties to AEWA are under a broad obligation to “take co-ordinated measures to maintain migratory waterbird species in a favourable conservation status or to restore them to such status.”<sup>125</sup> Given that both ISSAPs and ISMPs identify measures necessary to maintain or restore the conservation status of specific species/populations, such plans arguably provide benchmarks against which to assess whether parties are meeting this commitment in respect of particular species.

A range of fora other than AEWA support the development of species action and management plans as tools to conserve and manage birds. For instance, the European Commission regularly provides funding for the development of such plans for the EU;<sup>126</sup> both single species and multi-species action plans have been developed under the Conservation of Arctic Flora and Fauna (CAFF), a working group of the Arctic Council,<sup>127</sup> the Barcelona Convention<sup>128</sup> and its protocols, specifically, the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, require that parties formulate and implement action plans for the conservation or recovery of certain species;<sup>129</sup> and various single species action plans have been called for and/or endorsed by the Bern Convention’s Standing Committee<sup>130</sup> and the CMS CoP.<sup>131</sup> Therefore, species action and management planning are not unique to AEWA. Nevertheless, the Agreement provides a particularly valuable framework for the development of such plans because, unlike some other instruments and initiatives, it is designed to operate at the flyway level. By coordinating AEWA’s planning efforts with those of other fora, plans that cover only part of a species’ range (for instance, the area falling within the EU) can thus be expanded to cover entire migration routes. Of course, the fact that the Agreement covers such a large number of populations means that there are populations whose ranges extend beyond AEWA’s clearly defined Agreement Area. In such instances, collaboration between AEWA and the CMS can allow for the development of flyway-scale plans. Indeed, efforts have been made to coordinate AEWA’s species action planning process with similar processes under other instruments. For instance, the EU’s 2007

<sup>125</sup> AEWA, *supra* note 7, at art. II(1).

<sup>126</sup> European Commission, *European Bird Species Action Plans*, EC.EUROPA.EU, [http://ec.europa.eu/environment/nature/conservation/wildbirds/action\\_plans/index\\_en.htm](http://ec.europa.eu/environment/nature/conservation/wildbirds/action_plans/index_en.htm) (last visited 1 November 2015); European Commission, *EU Management Plans for Huntability Species Considered to Be in Unfavourable Conservation Status*, EC.EUROPA.EU, <http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/> (last visited 24 November 2015).

<sup>127</sup> See generally *CAFF Strategies*, CONSERVATION OF ARCTIC FLORA AND FAUNA [CAFF], <http://www.caff.is/caff-strategies> (last visited 26 October 2015).

<sup>128</sup> See generally *Convention for the Protection of the Mediterranean Sea against Pollution*, at 46, 16 February 1976, 1102 UNTS 27 [hereinafter *Barcelona Convention*].

<sup>129</sup> Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean art. 12.3, 10 June 1995, 2102 UNTS 203.

<sup>130</sup> See, e.g., Bern Convention, *Recommendation No. 48 Concerning the Conservation of European Globally Threatened Birds* (22 January 1996), available at <https://wcd.coe.int/ViewDoc.jsp?id=1486957&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>.

<sup>131</sup> CMS, *Recommendation No. 5.1 Endorsement of Action Plans for Selected Appendix I and II Migratory Birds* (16 April 1997) available at [http://www.cms.int/sites/default/files/document/Rec5.1\\_E\\_0\\_0.pdf](http://www.cms.int/sites/default/files/document/Rec5.1_E_0_0.pdf).



management plan for the black-tailed godwit, *Limosa limosa*,<sup>132</sup> was upgraded to the flyway level through an AEWA ISSAP, which was partially based on the EU plan.<sup>133</sup> There have also been instances in which AEWA, the European Commission, and the CMS have jointly initiated and provided financial support for the development of common action plans.<sup>134</sup> An advantage of these plans being adopted under AEWA is that parties to the Agreement are obliged to cooperate with a view to implementation. Such a requirement is absent from the text of both the EU Birds Directive and the CMS.

A final point regarding the relationship between AEWA's action and management planning processes and other international instruments is that the Bern Convention's Standing Committee (which has long encouraged inter-treaty collaboration in the promotion, review, and implementation of action plans)<sup>135</sup> has endorsed most of the AEWA ISSAPs that target European species and has recommended that contracting parties take note of AEWA's first ISMP.<sup>136</sup> Under the latter, rigorous population modeling has been used to determine international hunting quotas for the Svalbard population of the pink-footed goose, *Anser brachyrhynchus*.<sup>137</sup> This is an exciting and innovative project insofar as it represents the first time that

<sup>132</sup> See Council Directive 79/409/EEC, *Management Plan for Black-tailed Godwit* (*Limosa limosa*) 2007–2009 (2006).

<sup>133</sup> Flemming Pagh Jensen et al. (compilers), *International Single Species Action Plan for the Conservation of the Black-tailed Godwit Limosa l. limosa and L.l. islandica*, AEWA Technical Series No. 37, at 4 (September 2008) available at [http://www.unep-aewa.org/sites/default/files/publication/blacktailed\\_godwit\\_internet\\_0.pdf](http://www.unep-aewa.org/sites/default/files/publication/blacktailed_godwit_internet_0.pdf).

<sup>134</sup> For instance, the ISSAPs for the white-headed duck, *Oxyura leucocephala*, and the corncrake, *Crex crex*, were cooperative efforts between AEWA, CMS, and the European Commission; the ISSAP for the red-breasted goose, *Branta ruficollis*, was a collaboration between the European Commission and AEWA; and the ISSAPs for the ferruginous duck, *Aythya nyroca*, lesser flamingo, *Phoeniconaias minor*, white-winged flufftail, *Sarothrura ayresi*, Madagascar pond-heron, *Ardeola idea*, and sociable lapwing, *Vanellus gregarius*, were prepared under the auspices of both AEWA and CMS. AEWA, *International Single Species Action Plan for the Conservation of the White-headed Duck Oxyura leucocephala*, CMS Technical Series No. 13/AEWA Technical Series No. 8 (June 2006); AEWA, *International Single Species Action Plan for the Conservation of the Corncrake Crex crex*, AEWA Technical Series No. 9 (June 2006); AEWA, *International Single Species Action Plan for the Conservation of the Red-breasted Goose Branta ruficollis*, AEWA Technical Series No. 46 (May 2012); AEWA, *International Single Species Action Plan for the Conservation of the Ferruginous Duck Aythya nyroca*, AEWA Technical Series No. 7 (June 2006); AEWA, *International Single Species Action Plan for the Conservation of the Lesser Flamingo Phoeniconaias minor*, AEWA Technical Series No. 34 (December 2008); AEWA, *International Single Species Action Plan for the Conservation of the White-winged Flufftail Sarothrura ayresi*, AEWA Technical Series No. 38 (December 2008); AEWA, *International Single Species Action Plan for the Conservation of the Madagascar Pond-heron Ardeola idea*, AEWA Technical Series No. 39 (December 2008); AEWA, *International Single Species Action Plan for the Conservation of the Sociable Lapwing Vanellus gregarius*, AEWA Technical Series No. 47 (May 2012) (respectively). Further collaboration is envisaged in the future under Project LIFE EuroSAP (co-funded by AEWA), which aims to update several of the EU's species action plans, develop a multi-species action plan for grassland-breeding waders, and establish a system for coordinating the activities of those involved in developing and implementing species action plans in Europe. Author's correspondence with AEWA Secretariat and BirdLife International.

<sup>135</sup> See, e.g., Bern Convention, *Recommendation No. 60 on the Implementation of the Action Plans for Globally Threatened Birds in Europe* (5 December 1997), available at <https://wcd.coe.int/ViewDoc.jsp?id=1487317&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>.

<sup>136</sup> Bern Convention, *Recommendation No. 103 on Five New Action Plans for Most Threatened Birds in the Convention's Area* (4 December 2003), available at <https://wcd.coe.int/ViewDoc.jsp?id=1488615&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>; Bern Convention, *Recommendation No. 121 of the Standing Committee on the Implementation of Six New Action Plans for Most Threatened Birds in the Convention's Area* (30 November 2006), available at <https://wcd.coe.int/ViewDoc.jsp?id=1486141&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>; Bern Convention, *Recommendation No. 165 on the Implementation of Twenty-one New or Revised Action Plans for Most Threatened Birds in the Convention's Area* (6 December 2013), available at <https://wcd.coe.int/ViewDoc.jsp?id=2139005&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>.

<sup>137</sup> AEWA, *International Species Management Plan for the Svalbard Population of Pink-footed Goose Anser brachyrhynchus*, AEWA Technical Series No. 48 (May 2012); see also AEWA, *AEWA International Working Group for the Pink-footed Goose*, AEWA.INFO, <http://pinkfootedgoose.aewa.info/> (last visited 28 October 2015).

European countries have attempted to achieve adaptive harvest management<sup>138</sup> at the flyway level. It thus provides a test case for the feasibility of this approach for other species.

## 4. The evolution of AEWA's coverage and requirements

### 4.1 AEWA's flexibility to evolve over time

Human understanding of environmental problems and appropriate response measures is continuously changing, as are the nature and extent of environmental problems themselves. It is thus necessary for environmental treaties to include mechanisms that enable them to evolve over time.<sup>139</sup> Most contemporary MEAs include a provision that specifies that amendments to the treaty text may be adopted by a qualified majority of the parties present and voting; that amendments, once adopted, will enter into force after the deposit of a set number of instruments of acceptance; and that, once they have entered into force, amendments will bind only those parties that have deposited such instruments.<sup>140</sup> Such amendment processes are cumbersome and lengthy, and they are thus generally inappropriate for regular use or for achieving rapid responses to emerging threats. However, it is possible for flexibility to be achieved through other means. AEWA's flexibility is one of the most impressive features of the Agreement and distinguishes it from many MEAs outside the CMS Family. This flexibility is facilitated by AEWA's use of annexes, which form an integral part of the Agreement,<sup>141</sup> defining its geographic scope (Annex 1), defining its species coverage (Annex 2), and specifying actions that parties are required to take in relation to priority species and issues (Annex 3). Amendments to AEWA's annexes are adopted by a two-thirds majority of the parties present and voting, and they enter into force for *all parties* 90 days after adoption, except for parties that have entered a reservation with respect to the amendment.<sup>142</sup> This procedure is significantly less onerous than the procedure for amending the Agreement text itself.<sup>143</sup>

Thus far, the AEWA MoP has made several amendments to Annexes 2 and 3. The significance of these amendments and the reservations entered by parties in respect thereof are discussed below. By amending Annex 1, the MoP could redefine the Agreement Area to encompass additional multi-species flyways, thereby expanding AEWA's geographic influence. Indeed, range states of the CAF Action

<sup>138</sup>As defined in AEWA, *supra* note 7, para. 2.1.1, n.4.

<sup>139</sup>See further M.J. Bowman, *The Multilateral Treaty Amendment Process—A Case Study*, 44 INT'L & COMP. L.Q. 540, 544 (1995).

<sup>140</sup>*E.g.*, Ramsar Convention, *supra* note 17, at art. 10 bis; CMS, *supra* note 8, at art. X; CITES, *supra* note 15, at art. XVII; CBD, *supra* note 14, at art. 29; see also Vienna Convention on the Law of Treaties art. 40, 22 May 1969, 1155 UNTS 331.

<sup>141</sup>AEWA, *supra* note 7, at art. I(4).

<sup>142</sup>*Id.* at art. X(5) (this procedure also applies to the adoption of any additional annexes).

<sup>143</sup>See *id.* at art. X(4).

Plan<sup>144</sup> have expressed their desire for the Plan to be incorporated into AEWA.<sup>145</sup> However, no formal proposal to this effect has yet been presented to the AEWA MoP.

#### 4.2 Evolving taxonomic coverage

As explained above, AEWA applies only to the species of waterbirds listed in Annex 2 to the Agreement, and the provisions of the AEWA Action Plan apply only to populations listed in Table 1 of Annex 3. When AEWA was first adopted, Annex 2 included 170 species, only 59 of which were initially covered by Table 1 (these being mostly *Anatidae*).<sup>146</sup> In recognition of the fact that most of the conservation measures required by the Action Plan are relevant to a broad range of species, the first session of the AEWA MoP (MoP1) expanded the Action Plan's application by amending Table 1 to cover all species listed in Annex 2.<sup>147</sup> Revised versions of Table 1, which keep the Table aligned with Annex 2 and update the conservation statuses of listed populations, have been adopted at subsequent MoPs.<sup>148</sup>

At MoP2, 65 species were added to Annex 2,<sup>149</sup> with the intention being for AEWA to cover *all* species of migratory waterbirds occurring within the Agreement Area, regardless of their conservation status.<sup>150</sup> This approach, while similar to that of the Bern Convention, differs from the approach taken by the CMS and CITES, which (while using lists of species that are amended at each CoP) only provide direct protections for species that are endangered or at risk of becoming endangered.<sup>151</sup> While AEWA's definition of "waterbirds" is based on the Ramsar Convention's definition of "waterfowl,"<sup>152</sup> the AEWA MoP's interpretation of which species qualify as waterbirds has thus far been more conservative than that of the Ramsar CoP, which includes even wetland-related raptors and owls.<sup>153</sup> The Agreement has, however,

<sup>144</sup> See generally CAF, *Meeting to Conclude and Endorse the Proposed Central Asian Flyway Action Plan to Conserve Migratory Waterbirds and Their Habitats*, CMS/CAF/Inf.11 (15 April 2005).

<sup>145</sup> CMS, *Final Declaration of the Meeting to Negotiate the Legal and Institutional Framework for the Central Asian Flyway for Migratory Waterbirds*, at Annex 2, UNEP/CMS/CAF3/REPORT (12 December 2012); see also Trouwborst (2013), *supra* note 12, at 34 (on the possibility of expanding AEWA's geographic scope in the polar regions).

<sup>146</sup> Derek A. Scott, *Proposed Amendments to the Action Plan (draft)*, at annex 5, UNEP/AEWA/MOP2.9 (14 August 2002).

<sup>147</sup> AEWA, Res. 1.9: *Amendments to the Action Plan*, at preambular para. 4 (23-27 October 1999), available at [http://www.unep-aewa.org/sites/default/files/document/r9\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/r9_0.pdf).

<sup>148</sup> AEWA, Res. 2.1, *supra* note 124, at 2; AEWA, Res. 4.11: *Amendments to the Annexes to the Agreement*, at 2 (15-19 September 2008), available at [http://www.unep-aewa.org/sites/default/files/document/res4\\_11\\_amendments\\_aewa\\_annexes\\_final\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res4_11_amendments_aewa_annexes_final_0.pdf); AEWA, Res. 5.6, *supra* note 122, at app. II; AEWA, Res. 6.1: *Adoption of Amendments to the AEWA Annexes*, at app. II (9-14 November 2015), available at [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res1\\_adoption\\_amend\\_en\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res1_adoption_amend_en_0.pdf). The scientific names of several Annex 2 species were also amended at MoP5. AEWA, Res. 5.6, *supra* note 148. Further amendments were necessary at MoP6 as a result of the MoP's adoption of a new standard reference for waterbird species taxonomy and nomenclature. AEWA, Res. 6.1, *supra* note 148.

<sup>149</sup> AEWA, Res. 2.1, *supra* note 124.

<sup>150</sup> Scott, *supra* note 146, at 8.

<sup>151</sup> Admittedly, CITES' application can (by listing on Appendix III) also be unilaterally extended to species that are the subject of national protections, though the Convention's protections in respect of such species are significantly less stringent than its protections in respect of Appendix I and II species, and fail even to require that trade occur at a sustainable level. Compare CITES, *supra* note 15, at arts. III-IV with *id.* at art. V.

<sup>152</sup> Ramsar Convention, *supra* note 17, at art. 1(2) (defining "waterfowl" as "birds ecologically dependent on wetlands").

<sup>153</sup> Ramsar Convention, *Strategic Framework and Guidelines for the Future Development of the List of Wetlands of International Importance of the Convention on Wetlands*, at 91 (2009), available at [http://archive.ramsar.org/pdf/key\\_guide\\_list2009\\_e.pdf](http://archive.ramsar.org/pdf/key_guide_list2009_e.pdf).

always applied to several species traditionally considered to be seabirds,<sup>154</sup> and, at MoP4, Annex 2 was amended to include an additional 20 seabird species.<sup>155</sup> There has also been some discussion about whether to develop the Agreement to cover additional taxonomic groups that rely on wetlands, such as birds of prey and passerines.<sup>156</sup> Indeed, it has even been suggested that AEWA's scope might, in the future, be expanded so that the Agreement encompasses *all* CMS MoUs and Action Plans relating to African-Eurasian birds, thus becoming a framework birds Agreement for this region.<sup>157</sup>

### 4.3 Evolving conservation commitments

It is fairly common for MEAs to stipulate a less cumbersome procedure for amending annexes than for amending their core provisions.<sup>158</sup> However, in the case of wildlife treaties outside the CMS Family, annexes tend to be used primarily to list species in respect of which parties are required to take conservation measures.<sup>159</sup> AEWA and several of the Bonn Convention's other ancillary agreements are thus distinctive insofar as their annexes also include an elaborate collection of conservation commitments.<sup>160</sup>

That AEWA's Action Plan was designed to be a living document, which evolves over time, is clear from Article IV(2), which requires that the Action Plan be reviewed at each MoP. Since AEWA's entry into force, the MoP has added detail to several Action Plan provisions so as to provide parties with more concrete guidance regarding the content of their obligations.<sup>161</sup> Provisions have further been

<sup>154</sup> See generally AEWA, *Final Act of the Negotiation Meeting to Adopt the Agreement on the Conservation of African-Eurasian Migratory Waterbirds* (June 1995).

<sup>155</sup> AEWA, Res. 4.11, *supra* note 148, at 2.

<sup>156</sup> See, e.g., AEWA, Res. 2.1, *supra* note 124, at 2 (calling on the Technical Committee to consider, *inter alia*, "the extent to which the existing Action Plan is adequate in its scope to address differing conservation problems faced by birds of prey, passerines and other taxonomic groups using wetlands").

<sup>157</sup> CMS, Res. 10.10: *Guidance on Global Flyway Conservation and Options for Policy Arrangements*, at 5, (20–25 November 2011), available at [http://www.cms.int/sites/default/files/document/10\\_10\\_flyways\\_e\\_0\\_0.pdf](http://www.cms.int/sites/default/files/document/10_10_flyways_e_0_0.pdf); CMS, Res. 11.14: *Programme of Work on Migratory Birds and Flyways*, at Annex 1, action 19, (4–9 November 2014), available at [http://www.cms.int/sites/default/files/document/Res\\_11\\_14\\_PoW\\_on\\_Migratory\\_Birds\\_\\_Flyways\\_En.pdf](http://www.cms.int/sites/default/files/document/Res_11_14_PoW_on_Migratory_Birds__Flyways_En.pdf). CMS, *Policy Options for Migratory Bird Flyways*, at 10–11, UNEP/CMS/ScC17/Inf.4.3b (11 April 2011).

<sup>158</sup> E.g., CITES, *supra* note 14, at arts. XV–XVII; CMS, *supra* note 8, at arts. X–XI; Bern Convention, *supra* note 14, at arts. 16–17.

<sup>159</sup> See CITES, *supra* note 15, at apps. I–III; CMS, *supra* note 8, at app. I; Bern Convention, at *supra* note 15, at Annexes I–III (Annex IV is more substantive, listing prohibited means and methods of exploitation).

<sup>160</sup> Legally binding Action Plans, or "Conservation Plans," are also annexed to ACAP, *supra* note 57, at Annex 2; ACCOBAMS, *supra* note 67, at Annex 2; Agreement on the Conservation of Gorillas and Their Habitats, 26 October 2007, 2545 UNTS I-45400. A Conservation and Management Plan is additionally attached to the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas, at Annex, 17 March 1992, 1772 UNTS 217. However, unlike the plans annexed to other CMS Agreements, this plan is subject to the same amendment procedure as the Agreement text. *Id.* at art. 6(5)(3).

<sup>161</sup> At MoP5, paragraph 2.1.2(b) (which requires parties to regulate modes of taking in respect of column B populations) was amended to include a (non-exhaustive) list of indiscriminate or otherwise problematic modes of take which parties must prohibit; paragraph 2.1.3(b) (which allows parties to grant exemptions to various prohibitions for reasons of "overriding public interest") was amended to define the meaning of "overriding public interest" in this context; and paragraph 3.3 (on habitat rehabilitation and restoration) was amended to include a list of causes of habitat degradation, which may necessitate rehabilitation/restoration. AEWA, Res. 5.6, *supra* note 122, at app. I; *Proposals to the 5th Session of the Meeting of the Parties*, *supra* note 122, at 41–44, 47.

amended or introduced to address threats faced by groups of species that previously had not been covered by AEWA,<sup>162</sup> as well as new/emerging threats to waterbirds in the Agreement Area.<sup>163</sup> Interestingly, the MoP has also shown a willingness to remove discretionary language from the Action Plan and to add text that strengthens parties' obligations. Thus far, this has been done in respect of provisions on the introduction of non-native species,<sup>164</sup> the regulation of problematic modes of take,<sup>165</sup> and the hunting of Column A populations.<sup>166</sup> The significance of this is that, although several of the Action Plan's provisions are phrased in qualified wording, the Action Plan has the potential to evolve into a *stronger* legal document. The same cannot be said of the detailed, yet non-binding, recommendations and resolutions adopted by the decision-making bodies of MEAs with qualified provisions.

Of course, while the Action Plan has the potential to develop into a stronger legal instrument, the opposite is also true, as it is possible for the MoP to weaken the Action Plan's provisions or to delete them altogether.<sup>167</sup> Thus far, amendments that might be considered to have weakened parties' obligations have included the removal of a specified timeframe within which parties are to endeavor to phase out

<sup>162</sup>Following the addition, at MoP1, of new species to Table 1, paragraphs 4.3.2, 4.3.3, and 4.3.4 of the Action Plan required amendment (to address the potential for conflicts between human activities and the various fish-eating birds now covered by AEWA), as did paragraph 4.3.6 (to address the needs of the colonially nesting birds now covered by the Agreement). When additional species of seabirds were added to Annex 2 and Table 1 at MoP4, paragraphs 4.3.7, 4.3.8, 4.3.9, and 4.3.10 were added to the Action Plan to address threats resulting from human activities in the marine environment. AEWA, Res. 1.9, *supra* note 147, at 1; AEWA, Res. 4.11, *supra* note 148, at 1–3; AEWA, *Proposed Amendments to the Action Plan*, at 2–3, UNEP Doc. AEWA/MOP1.7 (April 1999); AEWA, *Proposals for Amendment to the Annexes to the Agreement*, at 17–19, UNEP Doc. AEWA/MOP4.24 (18 August 2008).

<sup>163</sup>At MoP4, paragraph 4.3.11 was added to the Action Plan to address the threats posed by marine and freshwater aquaculture. AEWA Res. 4.11, *supra* note 148, at 2–3; *Proposals for Amendment to the Annexes of the Agreement*, *supra* note 162, at 18–19. At MoP5, paragraph 4.3.12 was added, addressing lead fishing weights. AEWA Res. 5.6, *supra* note 122, at app. I para. 4.3.12. In Resolution 3.17, the MoP highlighted the “need to include relevant actions related to climate change impacts and adaptation in the Agreement’s Action Plan.” AEWA, Res. 3.17: *Climate Change and Migratory Waterbirds*, (23–27 October 2005), available at [http://www.unep-aewa.org/sites/default/files/document/res3\\_17\\_climate\\_change\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res3_17_climate_change_0.pdf). Thus far, the only Action Plan provision to make explicit reference to climate change is paragraph 3.3 (on the rehabilitation and restoration of degraded habitat). Given the significance of climate change for migratory species and the increasing attention that this threat is attracting from the AEWA MoP, one might expect the Action Plan text to include a greater emphasis on climate change in the future. See AEWA, Res. 4.14: *The Effects of Climate Change on Migratory Waterbirds* (15–19 September 2008), available at [http://www.unep-aewa.org/sites/default/files/document/res4\\_14\\_climate\\_change\\_final\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res4_14_climate_change_final_0.pdf); AEWA, Res. 5.13: *Climate Change and Adaptation Measures for Waterbirds* (14–18 May 2012), available at [http://www.unep-aewa.org/sites/default/files/document/res\\_5\\_13\\_climate\\_change\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res_5_13_climate_change_0.pdf); AEWA, Res. 6.6: *Updated Advice on Climate Change Adaptation Measures for Waterbirds* (9–14 November 2015), available at [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res6\\_climatechange\\_en.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res6_climatechange_en.pdf).

<sup>164</sup>At MoP5, the words “if they consider it necessary” were removed from paragraphs 2.5.1 and 2.5.2 (on the introduction of non-native species), thus changing the nature of these provisions from discretionary to mandatory. AEWA, Res. 5.6, *supra* note 122, at app. I, paras. 2.5.1–2.5.2. See also *Proposals to the 5th Session of the Meeting of the Parties*, *supra* note 122, at 44–46.

<sup>165</sup>The amendment of paragraph 2.1.2(b) strengthened the Action Plan insofar as the amended provision obligates parties to actually *prohibit* certain modes of take, rather than simply regulating them. “Regulation” can obviously include a range of measures (for instance, permitting requirements) that fall short of complete prohibition. See *supra* discussion in note 161.

<sup>166</sup>MoP5 created a new Column A category for Near Threatened species that are pertinent for international action but are not already covered by a higher categorization and amended paragraph 2.1.1 of the Action Plan to require that their hunting occur only within the framework of ISSAPs. See AEWA, Res. 5.6, *supra* note 122, at app. I; *Proposals to the 5th Session of the Meeting of the Parties*, *supra* note 122, at 35–41.

<sup>167</sup>The only provision to be deleted thus far was paragraph 4.1.5, on the use of poisoned baits. AEWA, Res. 5.6, *supra* note 122, at app. I para. 4.1.5. However, the use of poisoned baits is now prohibited under paragraph 2.1.2(b), so this amendment did not weaken the Action Plan. *Id.* at para. 2.1.2(b)

the use of lead shot for hunting in wetlands<sup>168</sup> and the removal of the requirement that hunting of asterisk-marked Column A populations occur only where such hunting is a “long-established cultural practice.”<sup>169</sup> However, both of these amendments were well justified,<sup>170</sup> and neither appears to have far-reaching practical implications, since the lead shot provision has, in any event, always been qualified by the word “endeavour;” the “long-established cultural practice” terminology was broad enough to cover a wide range of hunting activities, and only three Column A populations are currently marked with an asterisk.<sup>171</sup>

#### 4.4 Reservations

Of perhaps greater concern than the MoP’s ability to weaken the Action Plan is the ability of individual parties to enter reservations at the time of ratification in respect of “any species covered by the Agreement or any specified provision of the Action Plan.”<sup>172</sup> Reservations may further be entered in respect of amendments to the Agreement’s annexes.<sup>173</sup> Although it is fairly common for conservation treaties to permit reservations in respect of their annexes,<sup>174</sup> allowing reservations obviously has the potential to frustrate the achievement of an instrument’s objectives. Thus far, parties to AEWA have used their ability to enter reservations somewhat sparingly. While Finland and Iceland have declared that the *hunting restrictions* required by the Action Plan will not apply to certain species,<sup>175</sup> these reservations have not gone so far as to completely exclude species from the Agreement’s application. Thus, while the countries in question may not be required to implement the specific taking restrictions prescribed by the Action Plan, they remain under a broad obligation (per Article III.2(b) of the Agreement text) to ensure that use is sustainable. Denmark, the EU, Finland, and Sweden have also entered reservations against the

<sup>168</sup> Paragraph 4.1.4 of the Action Plan originally required that parties “endeavour to phase out the use of lead shot for hunting in wetlands by the year 2000.” Once the year 2000 had passed, this deadline became redundant, making it desirable to amend the provision. AEWA, Res. 4.11, *supra* note 148, at 2; *Proposals for Amendment to the Annexes of the Agreement*, *supra* note 162, at 17. The amended paragraph 4.1.4 requires parties to “endeavour to phase out the use of lead shot for hunting in wetlands as soon as possible in accordance with self-imposed and published timetables.” The replacement of a fixed time period with wording that allows parties to set their own deadlines diluted the obligation in this provision. Note, however, that at the same MoP that adopted this amendment, a Strategic Plan was adopted that identifies the phase out of lead shot by all parties as a target to be achieved by 2017. AEWA, *AEWA Strategic Plan 2009–2017*, at 7 (September 2008), available at <http://www.unep-aewa.org/en/documents/strategic-plan>. This was extended to 2018 through AEWA, Res. 6.14: *Extension and Revision of the AEWA Strategic Plan and the AEWA Plan of Action for Africa* (9–14 November 2015), available at [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res14\\_ext\\_rev\\_sp\\_poa\\_en\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res14_ext_rev_sp_poa_en_0.pdf).

<sup>169</sup> Originally, paragraph 2.1.1 of the Action Plan required parties to prohibit the taking of birds and eggs of Column A populations but provided an exception for asterisk-marked populations in Categories 2 and 3, which could be hunted on a sustainable use basis where such hunting was a “long-established cultural practice.” At MoP5, the term “long-established cultural practice” was deleted from paragraph 2.1.1 because it was considered to be too vague for practical application. The amendment thus broadened the hunting activities that are permissible under this provision. AEWA, Res. 5.6, *supra* note 122, at app. I; *Proposals to the 5th Session of the Meeting of the Parties*, *supra* note 122, at 35–41.

<sup>170</sup> See *supra* discussion in notes 168–169.

<sup>171</sup> AEWA, *supra* note 7, at Annex 3, tbl. 1.

<sup>172</sup> *Id.* at art. XV.

<sup>173</sup> *Id.* at art. X(6).

<sup>174</sup> See, e.g., CMS, *supra* note 8, at arts. XI(6), XIV(2); CITES, *supra* note 15, at arts. XV(3), XVI(2), XXIII(2).

<sup>175</sup> AEWA, *Report of the AEWA Depositary*, at 4–5, UNEP Doc. AEWA/StC 9.6 (9 September 2013) (more recently included in UNEP/AEWA/MOP6.8 (2015)).

up-listing of certain populations from Column B of Table 1 to Column A.<sup>176</sup> Again, this does not mean that these populations are not covered by AEWA, but rather that the stricter obligations attached to a Column A listing will not apply to the parties that have entered reservations.

Several parties have entered reservations in respect of the Action Plan's provision on the phasing out of lead shot for hunting in wetlands.<sup>177</sup> However, all but one of these reservations are for a limited period or in respect of a limited area.<sup>178</sup> In addition, parties remain under a broad obligation to "maintain migratory waterbird species in a favourable conservation status or to restore them to such a status"<sup>179</sup> and, to this end, to ensure that the use of both waterbirds and their habitats is sustainable. For countries in which the use of lead shot is having a significant impact on waterbird populations, AEWA thus arguably requires that measures be taken to address this impact, regardless of whether a reservation is in place in respect of paragraph 4.1.4 of the Action Plan. This example illustrates just how important it is that AEWA, while permitting reservations in respect of the Action Plan, does not allow general reservations in respect of the Agreement text.<sup>180</sup> Of course, the reservation process does allow the requirements of AEWA's Agreement text to be avoided in respect of *specific species*. However, no party has yet used reservations in this manner.

One advantage of allowing reservations in respect of the Action Plan is that this provides flexibility for parties whose domestic laws require an internal approval process for new international obligations that takes longer than the 90 days after which Action Plan amendments enter into force. Indeed, it is for this reason that the Czech Republic has entered reservations in respect of amendments.<sup>181</sup> The reservation process can also be used to quell the concerns of prospective parties about specific commitments that are not feasible to implement within their jurisdictions. One of the most significant gaps in AEWA's membership is currently the Russian Federation, which provides breeding grounds for numerous waterbird species.<sup>182</sup> At a 2013 high-profile meeting to discuss Russia's potential accession to the Agreement, it was noted that AEWA's process for reservations allows for "the concerns raised about the possible negative consequences of the accession of the Russian Federation to AEWA" to be taken into consideration in the accession process,<sup>183</sup> and a list of possible reservations was developed.<sup>184</sup>

<sup>176</sup>*Id.* at 9–10.

<sup>177</sup>AEWA, *supra* note 7, at Annex 3, para. 4.1.4.

<sup>178</sup>See *Report of the AEWA Depositary*, *supra* note 175, at 9–10.

<sup>179</sup>AEWA, *supra* note 7, at art. II(1).

<sup>180</sup>*Id.* at art. XV.

<sup>181</sup>*Report of the AEWA Depositary*, *supra* note 175.

<sup>182</sup>See BOERE, *supra* note 105, at 67–69 (discussing the history of Russia's relationship with AEWA).

<sup>183</sup>Resolution adopted at the International Seminar on the issue of accession to AEWA in the framework of the CMS (21 August 2013), paras. 4–6 (copy on file with author).

<sup>184</sup>*List of possible special reservations concerning Annex III (AEWA Action Plan) and Table 1 (the status of the populations of migratory waterbirds) in accordance with AEWA paragraph XV*, emerging from the International Seminar on the issue of accession to AEWA in the framework of the CMS (2013) (copy on file with author).

## 5. Mechanisms to guide, monitor, and facilitate implementation

### 5.1 Overview of AEWA's institutional framework

Although a treaty's success is obviously influenced by its substantive provisions, concrete legal obligations alone are likely to be ineffective if not supported by a satisfactory institutional framework. Having examined the nature and flexibility of AEWA's substantive provisions, the Agreement's institutions and the progress that these have made in terms of guiding, monitoring, and facilitating implementation must thus be considered.

AEWA's Agreement text provides for a MoP (sessions of which are convened triennially), Secretariat, and Technical Committee,<sup>185</sup> and a Standing Committee was established by resolution in 2002.<sup>186</sup> While this institutional structure is similar to that of most contemporary MEAs, the Agreement is more inclusive of NGOs than many other treaties insofar as it formally includes representatives of three NGOs as members of its Technical Committee.<sup>187</sup> Insofar as prioritized ISSAPs and ISMPs are concerned, implementation is coordinated and monitored by International Species Working Groups (ISWGs), the establishment of which is overseen by the AEWA Secretariat.<sup>188</sup> However, such groups can be established only where organizations or governments are willing to coordinate, or at least fund, their activities.<sup>189</sup> The most advanced group thus far established is the ISWG for the lesser white-fronted goose, *Anser erythropus*, the coordinator of which is based in the AEWA Secretariat and funded by the Norwegian Environment Agency.<sup>190</sup> For species in respect of which ISWGs are not considered necessary, less formal species expert groups have been developed, based on existing cooperation networks.<sup>191</sup>

<sup>185</sup> AEWA, *supra* note 7, arts. VI–VIII.

<sup>186</sup> AEWA, Res. 2.6: *Institutional Arrangements: Standing Committee*, at 1 (25–27 September 2002), available at [http://www.unep-aewa.org/sites/default/files/document/resolution2\\_6\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/resolution2_6_0.pdf).

<sup>187</sup> AEWA, *supra* note 7, at art. VII.1(b) (“One representative from the [IUCN], one from the International Waterfowl and Wetlands Research Bureau (IWRB) [(now Wetlands International)][.] and one from the International Council for Game and Wildlife Conservation (CIC)”). Representatives from a broader range of NGOs are permitted to participate as observers at meetings of the AEWA Technical Committee, Standing Committee, and MoP. AEWA, *supra* note 7, at art. VI(4); AEWA, *Modus Operandi of the AEWA Technical Committee*, at 2 (14–18 May 2012), available at [http://www.unep-aewa.org/sites/default/files/basic\\_page\\_documents/tc\\_modus\\_operandi\\_approved\\_by\\_mop5\\_en\\_rev\\_012015.pdf](http://www.unep-aewa.org/sites/default/files/basic_page_documents/tc_modus_operandi_approved_by_mop5_en_rev_012015.pdf) (rule 6); AEWA, *Rules of Procedure of the AEWA Standing Committee*, at 3–4 (18–19 September 2013), available at [http://www.unep-aewa.org/sites/default/files/basic\\_page\\_documents/stc\\_rules\\_of\\_procedure\\_adopted%20by%20stc9.pdf](http://www.unep-aewa.org/sites/default/files/basic_page_documents/stc_rules_of_procedure_adopted%20by%20stc9.pdf) (rule 19); see also Margi Prideaux, *Wildlife NGOs and the CMS Family: Untapped Potential for Collaborative Governance*, 17 J. INT'L WILDLIFE L. & POL'Y 254, 264 (2014) (noting that, despite AEWA being one of the CMS's oldest agreements, “it has one of the strongest records of sustained NGO involvement”).

<sup>188</sup> AEWA, *AEWA International Species Working Groups*, <http://www.unep-aewa.org/en/workinggroup/aewa-international-species-working-groups-iswg> (last visited 12 November 2015).

<sup>189</sup> AEWA, *AEWA International Species Working Group Coordinators: Fact Sheet*, in OVERVIEW ON THE STATUS OF PREPARATION AND IMPLEMENTATION OF AEWA ISSAPS AND ISSMPS AS WELL AS MULTI-SPECIES ACTION PLANS 2015, at 100, UNEP/AEWA/MoP6.16 (10 September 2015).

<sup>190</sup> See AEWA, *About – The Lesser White-fronted Goose*, AEWA INTERNATIONAL WORKING GROUP FOR THE LESSER WHITE-FRONTED GOOSE, <http://lesserwhitefrontedgoose.aewa.info/> (last visited 12 November 2015).

<sup>191</sup> AEWA, *AEWA International Species Expert Groups (ISEG)*, <http://www.unep-aewa.org/en/workinggroup/aewa-international-species-expert-groups-iseg> (last visited 12 November 2015).



## 5.2 Guiding implementation

While it is possible for the AEWA MoP to clarify the content of parties' obligations through additions to the Action Plan, more detailed guidance documents take the form of non-binding resolutions and "Conservation Guidelines."<sup>192</sup> The resolutions adopted by the first two MoPs focused primarily on administrative and institutional issues, with the only substantive conservation issue addressed via resolution at these meetings being the use of lead shot for hunting in wetlands<sup>193</sup> (a long-standing concern of European countries, though not a pressing issue for all parts of the Agreement Area).<sup>194</sup> The resolutions adopted at subsequent MoPs have focused increasingly on substantive issues and have also had a less Eurocentric focus, with the issues addressed including climate change, avian influenza, power lines, agrochemicals, extractive industries, non-native species, renewable energy, sustainable use, and threats in the marine environment.<sup>195</sup> In addition, 15 conservation guidelines, covering a broad range of issues, have thus far been adopted to assist parties to implement AEWA.<sup>196</sup> Despite being a relatively young instrument, AEWA has thus facilitated the development of a substantial body of guidance on the conservation and management of waterbirds and their habitat. Some of this guidance has been praised for taking a more progressive approach than other instruments. For instance, Trouwborst has concluded that "AEWA currently represents 'best practice' among the twenty-six CMS daughter instruments in respect of the adaptation of species to climate change."<sup>197</sup>

Potential, of course, exists for overlap between AEWA's guidance materials and the guidance developed under other MEAs or international organizations. Indeed,

<sup>192</sup> See AEWA, *supra* note 7, at art. IV.4, Annex 3, para. 7.3.

<sup>193</sup> AEWA, Res. 1.14: *Phasing Out of Lead Shot in Wetlands* (23-27 October 1999), available at [http://www.unep-aewa.org/sites/default/files/document/r14\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/r14_0.pdf); AEWA, Res. 2.2: *Phasing out Lead Shot for Hunting in Wetlands* (25-27 September 2002), available at [http://www.unep-aewa.org/sites/default/files/document/resolution2\\_2\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/resolution2_2_0.pdf). See also AEWA, Res. 4.1: *Phasing Out Lead Shot for Hunting in Wetlands* (15-19 September 2008), available at [http://www.unep-aewa.org/sites/default/files/document/res4\\_1\\_phasing\\_out\\_lead\\_shot\\_final\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res4_1_phasing_out_lead_shot_final_0.pdf).

<sup>194</sup> BOARDMAN, *supra* note 12, at 141.

<sup>195</sup> AEWA, Res. 3.17, *supra* note 163; AEWA, Res. 3.18: *Avian Influenza* (23-27 October 2005), available at [http://www.unep-aewa.org/sites/default/files/document/res3\\_18\\_avian\\_influenza\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res3_18_avian_influenza_0.pdf); AEWA, Res. 4.14, *supra* note 163; AEWA, Res. 4.15: *Responding to the Threat of Highly Pathogenic Avian Influenza H5N1* (15-18 September 2008), available at [http://www.unep-aewa.org/sites/default/files/document/res4\\_15\\_responding\\_threat\\_ai\\_final\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res4_15_responding_threat_ai_final_0.pdf); AEWA, Res. 5.12, *supra* note 111; AEWA, Res. 5.13, *supra* note 163; AEWA, Res. 5.14: *Waterbirds, Wetlands and the Impacts of Extractive Industries* (14-18 May 2012), available at [http://www.unep-aewa.org/sites/default/files/document/res\\_5\\_14\\_wb\\_and\\_extractives\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res_5_14_wb_and_extractives_0.pdf); AEWA, Res. 5.15: *Impact of Invasive Alien Aquatic Weeds on Waterbird Habitats in Africa* (14-18 May 2012), available at [http://www.unep-aewa.org/sites/default/files/document/res\\_5\\_15\\_inv\\_weeds\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res_5_15_inv_weeds_0.pdf); AEWA, Res. 5.16: *Renewable Energy and Migratory Waterbirds* (14-18 May 2012), available at [http://www.unep-aewa.org/sites/default/files/document/res\\_5\\_16\\_renewable\\_energy\\_and\\_mwb\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res_5_16_renewable_energy_and_mwb_0.pdf); AEWA, Res. 6.4: *Conservation and Sustainable Use of Migratory Waterbirds* (9-14 November 2015), available at [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res4\\_cons\\_sust\\_use\\_mwb\\_en.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res4_cons_sust_use_mwb_en.pdf); AEWA, Res. 6.6, *supra* note 163; AEWA, Res. 6.9: *Improving the Conservation Status of African-Eurasian Seabirds* (9-14 November 2015), available at [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res9\\_seabirds\\_en.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res9_seabirds_en.pdf); AEWA, Res. 6.11: *Addressing Impacts of Renewable Energy Deployment on Migratory Waterbirds* (9-14 November 2015), available at [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res11\\_energy\\_en.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res11_energy_en.pdf); AEWA, Res. 6.12: *Avoiding Additional and Unnecessary Mortality for Migratory Waterbirds* (9-14 November 2015), available at [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res12\\_mortality\\_en.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res12_mortality_en.pdf).

<sup>196</sup> See generally AEWA, *Technical Publications*, [www.unep-aewa.org/en/publications/technical-publications](http://www.unep-aewa.org/en/publications/technical-publications) (last visited 24 November 2015) (providing links to AEWA's technical publications, including Conservation Guidelines).

<sup>197</sup> Trouwborst (2012), *supra* note 12, at 271.

several parties have raised the “considerable overlap” in guidance as a justification for failure to make use of AEWA’s Conservation Guidelines.<sup>198</sup> Overlap is obviously problematic if guidelines on the same topic conflict with one another or where efforts have been duplicated and scarce resources thus arguably wasted. The AEWA Action Plan recognizes the importance of “ensur[ing], where possible, coherence with guidelines approved under other international instruments,” but it is silent on avoiding duplications.<sup>199</sup> Nevertheless, a perusal of AEWA’s Conservation Guidelines reveals that these generally attempt not to duplicate but rather to complement and build on existing guidance documents (to which readers are frequently referred in the AEWA guidelines) by providing detail on how to address particular issues from a waterbird conservation perspective specifically.<sup>200</sup> A similar approach is seen in MoP resolutions, which refer to relevant resolutions of other MEAs<sup>201</sup> and, in some instances, urge parties to apply guidance adopted under such MEAs rather than providing additional guidance.<sup>202</sup> Recently, efforts have also been made to develop *common* guidance to serve the purposes of several MEAs.<sup>203</sup> Where feasible, it would certainly seem desirable to pursue this route, thereby avoiding a profusion of guidance documents on similar issues, while additionally ensuring that the needs of waterbirds are taken into consideration in guidance endorsed by other MEAs.

A final point regarding AEWA’s guidance documents is that the MoP has adopted a Strategic Plan, which is intended to guide the Agreement’s implementation for the period 2009–2018<sup>204</sup> and, to this end, identifies a series of objectives and targets, as well as quantifiable indicators for measuring progress towards each

<sup>198</sup>See AEWA (prepared by UNEP/WCMC), *Analysis of AEWA National Reports for the Triennium 2009–2011*, at 5, UNEP/AEWA/MOP5.12 (17 April 2012), available at <http://www.unep-wcmc.org> (more recently discussed in the 2012–2014 version, in Doc. UNEP/AEWA/MOP6.13 (2015)).

<sup>199</sup>AEWA, *supra* note 7, at Annex 3, para. 7.3.

<sup>200</sup>For instance, the fact that AEWA’s guidelines on translocation are intended to complement the IUCN Guidelines on this topic is explicitly recognized in the document’s title. See AEWA, *AEWA Conservation Guidelines No. 13: Guidelines for the Translocation of Waterbirds for Conservation Purposes: Complementing the IUCN Guidelines*, AEWA Technical Series No. 49 (May 2012).

<sup>201</sup>See, e.g., AEWA, Res. 5.11-5.16 (14-18 May 2012), available at <http://www.unep-aewa.org/en/meeting/5th-session-meeting-parties-aewa> (referring parties to various resolutions of the Bonn, Ramsar, and Bern Conventions).

<sup>202</sup>See *id.* at Res. 5.13, 5.14, 5.16 (urging parties to apply various guidance developed under the Ramsar Convention); see also AEWA, Res. 6.12, *supra* note 195 (urging the utilization of various CMS guidance); AEWA, Res. 6.9, *supra* note 195 (calling for compliance with recommendations of RFMOs).

<sup>203</sup>See, e.g., AEWA/CMS/Memorandum of Understanding on the Conservation of Migratory Birds of Prey in Africa and Eurasia (Raptors MoU), *AEWA Conservation Guidelines No. 14: Guidelines on How to Avoid or Mitigate Impact of Electricity Power Grids on Migratory Birds in the African-Eurasian Region* (2012) (AEWA Technical Series No. 50, CMS Technical Series No. 29, and CMS Raptors MOU Technical Series No. 3); illustrating a collaboration between AEWA, CMS, and the Raptors MoU); see also CMS/AEWA, *Renewably Energy Technologies and Migratory Species: Guidelines for Sustainable Deployment*, at 11, UNEP/CMS/COP11/Doc.23.4.3.2 (2 October 2014); CMS, Res. 11.27: *Renewable Energy and Migratory Species*, at 2–3, (4–9 November 2014), available at [http://www.cms.int/sites/default/files/document/Res\\_11\\_27\\_Renewable\\_Energy\\_E.pdf](http://www.cms.int/sites/default/files/document/Res_11_27_Renewable_Energy_E.pdf); AEWA, Res. 6.5: *Revision and Adoption of Conservation Guidelines* (9–14 November 2015) available at [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res5\\_cons\\_guidelines\\_en.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res5_cons_guidelines_en.pdf) (illustrating collaboration between the CMS and AEWA, with the International Renewable Energy Agency and BirdLife International also contributing). The scientific bodies of AEWA and the Ramsar Convention have collaborated in producing a “guide to guidance” on issues surrounding extractive industries. AEWA, Res. 5.14, *supra* note 195, at 2. Also, they have been encouraged to work with one another and the CMS Scientific Council to develop common guidance relating to climate change. AEWA, Res. 5.13, *supra* note 163, at 2–3.

<sup>204</sup>AEWA, Res. 4.7: *Adoption of Strategic Plan for 2009–2017 and Online National Report Format*, at 1–2 (15–19 September 2008), available at [http://www.unep-aewa.org/sites/default/files/document/res4\\_7\\_adoption\\_strategic\\_plan\\_online\\_format\\_final\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res4_7_adoption_strategic_plan_online_format_final_0.pdf) (read with AEWA, Res. 6.14, *supra* note 168).

target's achievement. The linkage of these targets and indicators to a specified time-frame is important, given that neither AEWA's Agreement text nor its Action Plan prescribes deadlines by which the Agreement's objectives are to be met.

### 5.3 Monitoring implementation

#### 5.3.1 National reports

Like other MEAs, AEWA relies heavily on self-reporting as a means of gathering the information necessary to review national implementation.<sup>205</sup> The non-submission of national reports has been a challenge for the Agreement,<sup>206</sup> as has the late submission of reports<sup>207</sup> and the submission of incomplete reports.<sup>208</sup> In 2008, a new Online Reporting System (ORS) was introduced,<sup>209</sup> which it is hoped will reduce parties' reporting burden over time by allowing the retrieval of responses for future reporting cycles and potentially facilitating the sharing of questions across treaties.<sup>210</sup> While AEWA subsequently experienced an increase in overall submission rates for MoP5, submissions decreased during the MoP6 reporting cycle, in which only 55 percent of the reports due were received,<sup>211</sup> severely constraining the MoP's ability to assess AEWA's implementation and effectiveness.

#### 5.3.2 International reviews

AEWA's implementation is also monitored via a series of international reviews that the Agreement's Secretariat is required to prepare in coordination with the Technical Committee and parties. The Action Plan prescribes a list of issues that must be covered by international reviews as well as the intervals at which each review must be updated.<sup>212</sup> Thus far, international reviews have been prepared on all but two of

<sup>205</sup> See AEWA, *supra* note 7, at art. V(c), Annex 3, paras. 2.1.3, 2.4, 4.1.2, 4.1.3, 4.2.2, 4.3.2.

<sup>206</sup> While submissions have improved over time, there remain some parties that have never submitted a national report. *Analysis of AEWA National Reports for the Triennium 2009–2011*, *supra* note 198, at 3.

<sup>207</sup> Noted in AEWA, Res. 5.1: *National Reporting and Online Reporting System*, at 2 (14–18 May 2012) available at [http://www.unep-aewa.org/sites/default/files/document/res\\_5\\_1\\_nr\\_ors\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res_5_1_nr_ors_0.pdf).

<sup>208</sup> A perusal of the national reports submitted for each MoP reveals numerous gaps. For the MoP5 reporting cycle, Jordan, for instance, submitted a report of only 13 pages (in comparison, the longest report was 613 pages), which included virtually no information on the status of AEWA species within its territory. See generally AEWA, *Meetings of Parties*, UNEP-AEWA.ORG, [www.unep-aewa.org/en/meetings/meetings-of-parties](http://www.unep-aewa.org/en/meetings/meetings-of-parties) (last visited 12 November 2015) (providing links to national reports for each MoP) [hereinafter *AEWA Meetings of Parties*].

<sup>209</sup> AEWA, Res. 4.7, *supra* note 204, at 1; see also AEWA, Res. 3.5: *Development of an Online National Report Format*, at 1 (23–27 October 2005), available at [http://www.unep-aewa.org/sites/default/files/document/res3\\_5\\_online\\_reporting\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res3_5_online_reporting_0.pdf).

<sup>210</sup> Although AEWA was the first MEA to use the ORS and was closely involved in this tool's development, the system has subsequently been customized for use by several other treaties (see UNEP, *Sourcebook of opportunities for enhancing cooperation among the biodiversity-related conventions at national and regional levels* 58 (2015), available at <http://www.unep.org/ecosystemmanagement/Portals/7/Documents/cooperation-sourcebook-biodiversity-conventions.pdf>).

<sup>211</sup> AEWA (prepared by UNEP/WCMC), *Analysis of AEWA National Reports for the Triennium 2012–2015*, at 2, UNEP/AEWA/MOP6.13 (Sept. 10, 2015), available at [http://www.unep-aewa.org/sites/default/files/document/mop6\\_13\\_analysis\\_nr\\_2012-2014.pdf](http://www.unep-aewa.org/sites/default/files/document/mop6_13_analysis_nr_2012-2014.pdf).

<sup>212</sup> AEWA, *supra* note 7, at Annex 3, paras. 7.4, 7.5. Initially, paragraph 7.5 called for all reviews to be updated at intervals of no more than three years. However, MoP4 adjusted the requisite frequency of updates to a less onerous and more cost-effective level. AEWA, Res. 4.11, *supra* note 148; *Proposals for Amendment to the Annexes of the Agreement*, *supra* note 162. The only review that needs to be updated for every MoP is thus the review of the status and trends of waterbird populations.

the prescribed issues.<sup>213</sup> the networks of sites used by AEWA populations (although a draft review has been prepared on this issue,<sup>214</sup> funding constraints have delayed its finalization)<sup>215</sup> and gaps in information from surveys.

Rather than being limited to parties' responses in their national reports, the sources of information for AEWA's international reviews are varied, and they include, *inter alia*, stakeholder responses to questionnaires, scientific and popular literature, and national legislation. The fact that the reviews are not based purely on self-reporting (which may be incomplete or inaccurate) makes them a valuable basis for assessing progress towards the Agreement's implementation. They also provide a basis for identifying gaps in the AEWA Action Plan and can result in amendments thereto.<sup>216</sup>

### 5.4 Facilitating implementation

AEWA's monitoring mechanisms have thus far revealed significant shortfalls in the Agreement's implementation at the national level. For instance, responses in parties' national reports<sup>217</sup> indicate that, although progress has been made towards some of the Strategic Plan's targets (for instance, the establishment of national monitoring systems to assess waterbird status),<sup>218</sup> others still required considerable work (including, *inter alia*, the provision of legal protection for Column A species, the implementation of ISSAPs, and the control/eradication of non-native species).<sup>219</sup> Similarly, AEWA's various international reviews have identified gaps in the Agreement's implementation, with several reviews highlighting that implementation appears to be more advanced in Europe—particularly in the EU, where the Birds Directive applies—than in other parts of the Agreement Area.<sup>220</sup> Lack of resources and expertise are frequently raised by parties as justifications for failing to implement their commitments,<sup>221</sup> although other factors (such as national insecurity and a lack of recognition of the importance of waterbirds and wetlands)<sup>222</sup> also impede implementation in some countries. In light of these challenges, this section briefly discusses the various mechanisms that have been developed under AEWA to facilitate its improved implementation.

<sup>213</sup>All reviews can be found in the Meeting Documents of the various MoPs. See generally AEWA, *Meetings of Parties*, *supra* note 208.

<sup>214</sup>Szabolcs Nagy et al., *Preliminary Report on the Site Network for Waterbirds in the Agreement Area*, at 2, report prepared by Wetlands International & BirdLife International, UNEP/AEWA/MOP5.15 (2012).

<sup>215</sup>AEWA, *Report of the Secretariat*, at 4, UNEP/AEWA/StC10.6/Rev.3 (8–10 July 2015) (updated version presented to the 6th Meeting of the Parties as UNEP/AEWA/MOP6.9) [hereinafter *Report of the Secretariat (2015)*].

<sup>216</sup>See, e.g., AEWA, Res. 4.3: *Hunting and Trade Legislation*, at Annex 1 (15–19 September 2008), available at [http://www.unep-aewa.org/sites/default/files/document/res4\\_3\\_hunting\\_trade\\_legislation\\_final\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res4_3_hunting_trade_legislation_final_0.pdf).

<sup>217</sup>*Analysis of AEWA National Reports for the Triennium 2009–2011*, *supra* note 198.

<sup>218</sup>*Id.* at 44.

<sup>219</sup>See further UNEP/AEWA Secretariat, *Progress of Implementation of the AEWA Strategic Plan 2009–2017*, UNEP/AEWA/MOP6.12 (2015).

<sup>220</sup>See, for instance, *Review on Hunting and Trade Legislation in Countries Relating to the Species Listed in Annex 2 to the African-Eurasian Migratory Waterbird Agreement pt. II*, *supra* note 96, at 74; Nagy et al., *supra* note 214, at 49.

<sup>221</sup>See generally *Analysis of AEWA National Reports for the Triennium 2009–2011*, *supra* note 198, at 50.

<sup>222</sup>AEWA, REPORT: SUB-REGIONAL NATIONAL FOCAL POINT MEETING FOR CENTRAL AND WEST AFRICA 4–5 (11–14 December 2013) (copy on file with author); AEWA, REPORT: SUB-REGIONAL NATIONAL FOCAL POINT MEETING FOR EASTERN AND SOUTHERN AFRICA 3–4 (27–28 October 2013) (copy on file with author).

#### 5.4.1 Prioritizing implementation tasks and supporting implementation in Africa

Given the broad range of species and issues covered by AEWA and the fact that many of the Agreement's parties have limited capacity to implement its requirements, the prioritization of activities is obviously desirable. Since its first session, the AEWA MoP has maintained a list of "international implementation tasks" (IITs) to assist parties in prioritizing their implementation measures and to guide prospective donors in their allocation of funds.<sup>223</sup> The AEWA Secretariat seeks to facilitate listed activities and, to this end, engages in fundraising and coordinates closely with related conventions and organizations. The best example of such coordination to date has been the Wings Over Wetlands (WOW) project: a large-scale Global Environmental Facility project that contributed to the implementation of both AEWA and the Ramsar Convention.<sup>224</sup>

Since 2008, particular emphasis has been placed on enhancing AEWA's implementation in Africa. MoP4 initiated an "African Initiative for the Conservation of Migratory Waterbirds and their Habitats in Africa,"<sup>225</sup> under which a Plan of Action for the Implementation of AEWA in Africa<sup>226</sup> has been developed. This Plan of Action was developed to identify and prioritize actions necessary for implementing AEWA's Strategic Plan in this region. Progress has been made in implementing the Plan of Action for Africa.<sup>227</sup> For instance, the AEWA Small Grants Fund (which, although established in 1999,<sup>228</sup> became operational only in 2010 due to a lack of funding) has supported several small-scale projects in Africa.<sup>229</sup> However, the Plan is extremely ambitious, identifying 83 activities in total, with an estimated implementation cost exceeding nine and a half million euros.<sup>230</sup> Indeed, it could be argued that, as a first step towards enhancing implementation in Africa, the Plan

<sup>223</sup> AEWA, Res. 1.4: *International Implementation Priorities for 2000-2004* (23-27 October 1999) available at [http://www.unep-aewa.org/sites/default/files/document/r4\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/r4_0.pdf); AEWA, Res. 2.4: *International Implementation Priorities for 2003-2007* (25-27 September 2002) available at [http://www.unep-aewa.org/sites/default/files/document/resolution2\\_4\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/resolution2_4_0.pdf); AEWA, Res. 3.11: *AEWA International Implementation Priorities for 2006-2008* (23-27 October 2005) available at [http://www.unep-aewa.org/sites/default/files/document/res3\\_11\\_iip\\_2006-2008\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res3_11_iip_2006-2008_0.pdf); AEWA, Res. 4.10: *AEWA International Implementation Tasks for 2009-2016* (15-19 September 2008) [http://www.unep-aewa.org/sites/default/files/document/res4\\_10\\_iit\\_2009\\_2016\\_final\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res4_10_iit_2009_2016_final_0.pdf); AEWA, Res. 5.3: *AEWA International Implementation Tasks for 2012-2015* (14-18 May 2012) available at [http://www.unep-aewa.org/sites/default/files/document/res\\_5\\_3\\_iit\\_12-15.pdf](http://www.unep-aewa.org/sites/default/files/document/res_5_3_iit_12-15.pdf); AEWA, Res. 6.13: *AEWA International Implementation Tasks for 2016-2018* (9-14 November 2015) available at [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res13\\_iits\\_en.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res13_iits_en.pdf).

<sup>224</sup> See WINGS OVER WETLANDS (WOW), FLYWAY CONSERVATION AT WORK: ACROSS AFRICA AND EURASIA 7 (2010), available at <http://www.wingsoverwetlands.org/>.

<sup>225</sup> AEWA, Res. 4.9: *African Initiative for the Conservation of Migratory Waterbirds and Their Habitats in Africa* (15-19 September 2008), available at [http://www.unep-aewa.org/sites/default/files/document/res4\\_9\\_conservation\\_in\\_africa\\_final\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res4_9_conservation_in_africa_final_0.pdf).

<sup>226</sup> AEWA, *AEWA Plan of Action for Africa 2012-2017*, at 5 (14-18 May 2012), available at [http://www.unep-aewa.org/sites/default/files/basic\\_page\\_documents/aewa\\_poa\\_for\\_africa\\_final.pdf](http://www.unep-aewa.org/sites/default/files/basic_page_documents/aewa_poa_for_africa_final.pdf) (extended to 2018 through Res. 6.14, *supra* note 168).

<sup>227</sup> *The AEWA Plan of Action for Africa*, AEWA, <http://www.unep-aewa.org/en/node/1984> (last visited 25 March 2015).

<sup>228</sup> AEWA, Res.17: *Establishment of a Small Conservation Grants Fund*, at 1, (23-27 October 1999), available at [http://www.unep-aewa.org/sites/default/files/basic\\_page\\_documents/r7\\_0.pdf](http://www.unep-aewa.org/sites/default/files/basic_page_documents/r7_0.pdf).

<sup>229</sup> *The AEWA Small Grants Fund*, AEWA, <http://www.unep-aewa.org/en/projects/small-grants> (last visited 25 March 2015).

<sup>230</sup> *AEWA Plan of Action for Africa 2012-2017*, *supra* note 226, at 20-45. This estimate reflects only the amount that needs to be allocated at the international level and fails to take into account the resources that parties are expected to dedicate towards implementing their AEWA commitments at the national level. *Id.* at 18.

is *too* detailed and lacks sufficient prioritization. This appears to have been recognized to some extent, as further prioritization of the Plan's activities has already been attempted through a series of subregional meetings.<sup>231</sup>

#### 5.4.2 Implementation Review Process

The establishment of multilateral procedures to examine cases of apparent noncompliance and to facilitate and, in some instances, enforce improved compliance has become increasingly popular amongst MEAs.<sup>232</sup> AEWA's Agreement text makes no provision for the development of such procedures. However, in 2008, the MoP established an Implementation Review Process (IRP), in terms of which the Agreement's Standing Committee may, upon receiving information concerning human activities with adverse effects/potential adverse effects on migratory waterbirds or the habitat thereof, notify the party in whose territory these activities occur, request a response from this party, and offer to arrange an on-site assessment as a basis for recommendations.<sup>233</sup> Information on possible IRP cases may be submitted by, *inter alia*, NGOs<sup>234</sup>—this being an important feature of the process, given that parties to MEAs are often reluctant to initiate compliance proceedings in respect of themselves or against other parties. Indeed, none of the complaints thus far submitted as possible AEWA IRP cases have been received from parties.<sup>235</sup>

Although it is too early to assess the effectiveness of the IRP in promoting compliance with AEWA, this process was the first of its kind to be established within the CMS Family<sup>236</sup> and thus potentially provides a model for the development of similar mechanisms by other agreements and the CMS itself.<sup>237</sup> The process is similar to the Ramsar Convention's Advisory Missions, which are intended to assist parties with the management of Ramsar sites whose ecological character is threatened by human activities,<sup>238</sup> and the Bern Convention's case-file system, through which

<sup>231</sup>REPORT: SUB-REGIONAL NATIONAL FOCAL POINT MEETING FOR EASTERN AND SOUTHERN AFRICA, *supra* note 222, at 3–4; REPORT: SUB-REGIONAL NATIONAL FOCAL POINT MEETING FOR CENTRAL AND WEST AFRICA, *supra* note 222, at 4–5; AEWA, *Report of the Second Workshop on International Waterbird Census in North Africa and of the Sub-Regional Meeting of the Launch of the AEWA Plan of Action for Africa in North African*, 2–6 June 2013, available at <http://medwaterbirds.net/doc/Report%20of%20the%202nd%20IWC%20workshop%20in%20North%20Africa.pdf> (last visited 25 October 2015).

<sup>232</sup>See UNEP, Compliance Mechanisms under Selected Multilateral Environmental Agreements 11 (2007), available at [http://www.unep.org/pdf/delc/Compliance\\_Mechanism\\_final.pdf](http://www.unep.org/pdf/delc/Compliance_Mechanism_final.pdf) (last visited Oct. 14, 2015) (stating that "[m]ost MEAs have established or are in the process of developing a formal non-compliance procedure).

<sup>233</sup>AEWA, Res. 4.6: *Establishment of an Implementation Review Process*, at 2 (15–19 September 2008), available at [http://WWW.unep-aewa.org/sites/default/files/document/res4\\_6\\_establishment\\_irp\\_final\\_0.pdf](http://WWW.unep-aewa.org/sites/default/files/document/res4_6_establishment_irp_final_0.pdf).

<sup>234</sup>AEWA, *The Role of the AEWA Technical Committee in the Implementation Review Process (IRP)* (2009).

<sup>235</sup>Author's correspondence with AEWA Secretariat.

<sup>236</sup>See, however, ACCOBAMS, Res. 5.4: *ACCOBAMS Follow-up Procedure*, at 1–2 (5–8 November 2013), available at [http://www.accobams.org/images/stories/MOP/MOP5/Documents/Resolutions/mop5.res5.4\\_accobams\\_follow\\_up\\_procedure.pdf](http://www.accobams.org/images/stories/MOP/MOP5/Documents/Resolutions/mop5.res5.4_accobams_follow_up_procedure.pdf) (establishing a non-compliance procedure for ACCOBAMS).

<sup>237</sup>CMS, *Enhancing the Effectiveness of the Convention through a Process to Review Implementation*, UNEP/CMSRes. 11.7 (2014), available at [http://www.cms.int/sites/default/files/document/Res\\_11\\_07\\_Process\\_to\\_Review\\_Implementation\\_E.pdf](http://www.cms.int/sites/default/files/document/Res_11_07_Process_to_Review_Implementation_E.pdf) (stating it launched "an intersessional process to explore possibilities for strengthening implementation of the Convention through the development of a review process").

<sup>238</sup>Ramsar, *Recommendation No. 4.7 on the Mechanisms for Improved Application of the Ramsar Convention*, at 1, REC. C.4.7 (Rev.) (1990), available at [http://www.ramsar.org/sites/default/files/documents/library/key\\_rec\\_4.07e.pdf](http://www.ramsar.org/sites/default/files/documents/library/key_rec_4.07e.pdf).

complaints regarding possible breaches of the Convention are considered and on-the-spot appraisals arranged where necessary.<sup>239</sup> However, AEWA IRP cases are not restricted to habitat-related threats (unlike Ramsar Advisory Missions) and can be used in more countries than the Bern Convention's case-file system as a result of AEWA's wider geographic coverage. Indeed, the first IRP case to be opened demonstrated the unique role of the AEWA IRP, by addressing a species-level issue (the illegal hunting of the critically endangered sociable lapwing, *Vanellus gregarius*) in a country that is not covered by the Bern Convention—Syria.<sup>240</sup>

The other three IRP cases that have thus far been opened all relate to issues<sup>241</sup> that can be addressed by the compliance processes of—and that have, to some extent, already drawn attention from—the Bern and Ramsar Conventions. While AEWA's IRP should arguably place a stronger focus on issues for which this is *not* the case,<sup>242</sup> an overlap with the processes of other treaties is not in itself problematic. Indeed, the initiation of compliance procedures under more than one treaty has the benefit of exerting increased pressure on a country that is in serious breach of its international commitments; furthermore, duplication of efforts can be avoided through cooperation between relevant instruments. Even before AEWA's IRP was created, the Agreement's Secretariat established a collaborative relationship with other treaties in respect of on-site assessments, participating in joint missions under both the Ramsar and Bern Conventions.<sup>243</sup> Such collaboration has continued following the IRP's establishment. For instance, a joint AEWA and Bern Convention mission to Iceland is tentatively planned for 2016 to address lowland afforestation plans that threaten the breeding grounds of several AEWA species.<sup>244</sup>

A possible criticism of AEWA's IRP is that this process is voluntary in the sense that a party in respect of which an IRP case has been opened has the discretion whether to (i) agree to an IRP mission (indeed, Bulgaria has already declined such a mission), and (ii) implement the recommendations arising from such mission. The

<sup>239</sup>Council of Europe, *Monitoring Set Up under the Bern Convention*, COE.INT, <http://www.coe.int/en/web/bern-convention/monitoring> (last visited 23 October 2015).

<sup>240</sup>AEWA, *AEWA Implementation Review Process: Conservation of the Sociable Lapwing in Syria*, at 1–2, UNEP/AEWA/StC 6.12 (2010), available at [http://www.unep-aewa.org/sites/default/files/document/stc6\\_12\\_irp\\_syria\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/stc6_12_irp_syria_0.pdf). Unfortunately, although unofficial communications have testified that efforts are being made to implement the recommendations that resulted from this IRP case, no formal progress reports have been received by the AEWA Secretariat. AEWA, *Implementation Review Process: Update since MOP5*, UNEP/AEWA/StC 9.12 (2013), available at [http://www.unep-aewa.org/sites/default/files/document/stc9\\_12\\_irp\\_update\\_1.pdf](http://www.unep-aewa.org/sites/default/files/document/stc9_12_irp_update_1.pdf) (more recently addressed in the *Report to MOP6*, UNEP/AEWA/MOP6.17, at 4 (2015)). This is perhaps unsurprising, given Syria's current political situation.

<sup>241</sup>Proposed windfarm developments in Bulgaria; drainage of important waterbird habitat for tourism development in Montenegro; and large-scale afforestation of wader breeding areas in Iceland.

<sup>242</sup>See *infra* pt. 6.3.

<sup>243</sup>See AEWA, *Report of the Secretariat*, AEWA/MOP 4.16, at 10–11 (2008), available at [http://www.unep-aewa.org/sites/default/files/document/mop4\\_16\\_report\\_%20secretariat\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/mop4_16_report_%20secretariat_0.pdf); AEWA, *Report of the Secretariat*, AEWA/MOP 5.9, at 12–13 (2012), available at [http://www.unep-aewa.org/sites/default/files/document/mop5\\_9\\_report\\_secretariat\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/mop5_9_report_secretariat_0.pdf).

<sup>244</sup>*Implementation Review Process – Report to MOP6*, *supra* note 240, at 11; see also Bern Convention, *Afforestation of Low Land in Iceland: Report of an On-the-Spot Appraisal Undertaken for the Council of Europe* (29 May–2 June 2002), SC-22T-PVS/Files, at 3 (2002), available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1326334&SecMode=1&DocId=1450498&Usage=2> (discussing the history of this issue under the Bern Convention); Bern Convention, *Recommendation No. 96 (2002) on Conservation of Natural Habitats and Wildlife, Specially Birds, in Afforestation of Lowland in Iceland*, adopted by the Standing Committee on 5 December 2002 (2002), available at <https://wcd.coe.int/ViewDoc.jsp?id=1492395&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>.

IRP is, in other words, entirely facilitative and cannot be used as a tool for *coercing* compliance. A question that consequently arises is whether this procedure could (and, if so, *should*) be developed to provide for punitive noncompliance response measures. Given the detailed and obligatory nature of many of AEWA's provisions, there is arguably greater potential for developing rigorous compliance procedures under the Agreement than there is for developing such procedures under instruments that are drafted in broadly worded, qualified language, such as the Ramsar Convention, the CBD, and (to a lesser extent) the CMS.<sup>245</sup> One type of coercive response measure that might, for instance, be well suited to the AEWA system is the suspension of certain rights and privileges (such as the right to sit on the Agreement's Standing Committee or to apply to the AEWA Small Grants Fund) in cases of persistent noncompliance.<sup>246</sup> The AEWA MoP could also consider adopting declarations of noncompliance, such as those used by the Bern Convention's Standing Committee.<sup>247</sup>

Of course, before developing the IRP into a more coercive tool, the AEWA MoP should consider whether this might have any negative impacts on the Agreement's operation. One possible problem with coercive measures is that they may impact the willingness of range states to accede to the Agreement. This is something that should be avoided, given the current gaps in AEWA's membership.<sup>248</sup> Another possible drawback of coercive measures is that, in the face of potential penalties for noncompliance, parties may be more hesitant to add to or strengthen the conservation measures required by the AEWA Action Plan—or, alternatively, more likely to enter reservations in respect thereof.

### 5.4.3 Other mechanisms

In addition to having established its own procedure for implementation review, AEWA is involved in a number of multi-stakeholder initiatives that aim to establish implementation mechanisms dedicated to addressing specific threats. Notably, the Agreement's Secretariat has spearheaded the development of a Plan of Action and International Task Force to address bird trapping along the Mediterranean coasts of Egypt and Libya.<sup>249</sup> It is further envisaged that AEWA will cooperate with several

<sup>245</sup>Indeed, Koester has commented that compliance mechanisms “would hardly serve any reasonable purpose as far as Ramsar and the CBD are concerned because of the very general nature of their obligations, which, additionally, are largely qualified.” Veit Koester, *Book Review: Testing Times: The Effectiveness of Five International Biodiversity-related Conventions*, by Karin Baakman, 21 RECIEL 67, 69 (2012). Caddell has expressed doubt as to whether a stringent compliance mechanism would be useful in the CMS context, with one of his concerns being that most of the Convention's obligations are of questionable legal strength. Caddell, *supra* note 12, at 145–146.

<sup>246</sup>For an example of an MEA compliance mechanism that makes use of the suspension of rights and privileges, see Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 6, 1987, 1522 U.N.T.S. 3; Decision IV/5: *Non-compliance Procedure* (1992), available at <http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/1555>, read with *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer*, Annex V, UNEP/OzL.Pro.4/15 (Nov. 25, 1992), available at [http://ozone.unep.org/Meeting\\_Documents/mop/04mop/4mop-15.e.pdf](http://ozone.unep.org/Meeting_Documents/mop/04mop/4mop-15.e.pdf).

<sup>247</sup>See, e.g., Bern Convention, *Secretariat Memorandum established by the Directorate of Environment and Local Authorities*, T-PVS(93)48, at pt. 6.1 (1993) (discussing a declaration of non-compliance with the Bern Convention).

<sup>248</sup>See *infra* pt. 6.2.

<sup>249</sup>AEWA, *Plan of Action to Address Bird Trapping along the Mediterranean Coasts of Egypt and Libya*, at 5, Doc. TC Inf. 12.4 (2015), available at [http://www.unep-aewa.org/sites/default/files/document/tc\\_inf\\_12\\_4\\_poa\\_bird\\_trapping\\_egypt\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/tc_inf_12_4_poa_bird_trapping_egypt_0.pdf); AEWA, *International Task Force: Addressing Bird Trapping in Egypt and Libya*, <http://www.illegalbirdkilling.aewa.info/> (last visited 5 February 2015).



MEAs (such as the CMS and Bern Convention) and other stakeholders in the establishment of an Intergovernmental Task Force to Address Illegal Killing, Taking and Trade of Migratory Birds in the Mediterranean,<sup>250</sup> and a Task Force on Reconciling Selected Energy Sector Developments with Migratory Species Conservation.<sup>251</sup>

It is interesting that AEWA took the lead on the Plan of Action for Egypt and Libya, as the trapping practices at issue do not present a significant threat to waterbirds specifically—these not being target species.<sup>252</sup> On the one hand, AEWA's role in the initiative suggests that the Agreement holds a particularly prominent position within the broader CMS Family and perhaps has the potential to become a leader on all bird-related issues. On the other, AEWA's limited resources should arguably be dedicated to addressing issues of more direct relevance to waterbirds.

## 6. Challenges to improved implementation

Despite AEWA's detailed and stringent provisions, flexibility to evolve over time, and active supporting institutions, 36 percent of the 376 AEWA populations for which trend data is available are currently declining, 39 percent are stable or fluctuating, and only 25 percent are increasing.<sup>253</sup> The Agreement, therefore, has not yet been effective in ensuring that all populations of African-Eurasian migratory waterbirds are maintained at, or restored to, a favorable conservation status. While a variety of factors hinder parties' abilities to implement the Agreement at the *national* level, the Agreement itself also faces various challenges (several of which are common hurdles to MEA effectiveness) that must be addressed if AEWA's contribution to the conservation and management of migratory waterbirds is to be enhanced in the future.

### 6.1 Gaps in data

The effective conservation and management of migratory waterbirds depends heavily on the existence of reliable data. AEWA therefore requires parties to engage in research and monitoring,<sup>254</sup> and both the Agreement's international reviews<sup>255</sup> and various projects that it has supported<sup>256</sup> have resulted in improved knowledge regarding migratory waterbirds and their habitats. Nevertheless, significant knowledge gaps remain. For instance, there are still populations for which size and/or trend estimates either do not exist or are not supported by robust data,<sup>257</sup> gaps

<sup>250</sup> AEWA, Res. 6.12, *supra* note 195.

<sup>251</sup> AEWA, Res. 6.11, *supra* note 195.

<sup>252</sup> See *Plan of Action to Address Bird Trapping along the Mediterranean Coasts of Egypt and Libya*, *supra* note 248, at 4.

<sup>253</sup> AEWA, *Report on the Conservation Status of Migratory Waterbirds in the Agreement Area*, at 20, AEWA/MOP 6.14 (March 2015).

<sup>254</sup> AEWA, *supra* note 7, at art. III(2)(h).

<sup>255</sup> *Id.* at Annex 3, para. 7.4.

<sup>256</sup> For instance, the WOW project and several of the projects supported by the AEWA Small Grants Fund.

<sup>257</sup> *Report on the Conservation Status of Migratory Waterbirds in the Agreement Area*, *supra* note 253, at 20.

remain in the identification of internationally important sites for AEWA populations,<sup>258</sup> and little is known about some of the threats facing migratory waterbirds.<sup>259</sup> A lack of scientific information concerning AEWA populations and their habitats limits the ability both to develop adequate policy responses<sup>260</sup> and to accurately gauge AEWA's effectiveness. Insofar as policy responses are concerned, the Agreement's implementation should, per Article II(2), be informed by the precautionary principle.<sup>261</sup> Lack of scientific knowledge therefore should not prevent parties from taking prudent measures to prevent damage. For instance, where information does not exist regarding a population's status or trend, the most prudent response may be to list it on one of the higher Table 1 categorizations so as to protect it from activities that may negatively impact its conservation status.

## 6.2 Gaps in membership

While the number of AEWA parties is gradually increasing—especially in Africa, where the African Initiative promotes accession<sup>262</sup>—45 range states still are not parties to the Agreement, with gaps in membership being concentrated predominantly in Central and Southern Africa, Eastern Europe, and the Middle East.<sup>263</sup> This is obviously problematic, since true flyway-level conservation requires participation by *all* range states. Interestingly, there are ways in which AEWA provides a platform for cooperation between parties and non-parties, and even assists non-parties in their conservation efforts. Most notably, ISSAPs and ISMPs are designed in consultation with stakeholders from all relevant range states, regardless of whether they are parties to the Agreement,<sup>264</sup> and non-party range states are encouraged to participate in AEWA's ISWGs<sup>265</sup> and may be assisted by ISWG coordinators in the national implementation of ISSAPs and ISMPs.<sup>266</sup> That said, there is clearly no *legal obligation* for non-parties to cooperate in the development and implementation of such plans or to comply with any of AEWA's other provisions (including provisions on

<sup>258</sup> See generally Nagy et al., *supra* note 214.

<sup>259</sup> For instance, the scale or impacts of waterbird harvesting in parts of the Agreement Area (AEWA, Res. 5.3, *supra* note 223), or the impacts of climate change on AEWA populations (*Report on the Conservation Status of Migratory Waterbirds in the Agreement Area*, *supra* note 253, at 25).

<sup>260</sup> See generally BALDWIN, *supra* note 12, at 563–565 (discussing knowledge gaps and their impacts on migratory species conservation); BOARDMAN, *supra* note 12, at 140 (discussing knowledge gaps in the AEWA context specifically); CMS, *Review of the Current Organization and Activities of CMS and the CMS Family: First Step of the Inter-sessional Future Shape Process*, para. 196, UNEP/CMS/Inf.1014.8 (1 January 2010) (discussing knowledge gaps in the AEWA context specifically).

<sup>261</sup> AEWA, *supra* note 7, at art. II(2).

<sup>262</sup> In the period between MoP5 and MoP6, ten states acceded to AEWA, nine of which are African. *Parties and Range States*, *supra* note 48.

<sup>263</sup> *Parties and Range States*, *supra* note 48. In addition, Greenland is excluded from AEWA's application through a reservation by Denmark. *Report of the AEWA Depositary*, *supra* note 175, at 6.

<sup>264</sup> For instance, the ISSAP for the slaty egret, *Egretta vinaceigula*, was prepared by BirdLife Botswana with contributions from stakeholders in Namibia, Zambia, South Africa, Zimbabwe, and Angola. AEWA (prepared by BirdLife Botswana), *International Single Species Action Plan for the Conservation of the Slaty Egret (Egretta Vinaceigula)*, at 2, AEWA Technical Series No. 43 (2012). Botswana, Namibia, Zambia, and Angola are not yet parties to AEWA. *Parties and Range States*, *supra* note 48.

<sup>265</sup> For instance, representatives of several non-party range states are members of the AEWA ISWG for the lesser white-fronted goose. *About – The Lesser White-fronted Goose*, *supra* note 190.

<sup>266</sup> *AEWA International Species Working Group Coordinators: Fact Sheet*, *supra* note 189, at 101.

the national reports necessary for monitoring implementation).<sup>267</sup> Implementation support should also arguably be concentrated on countries that have firmly committed to implementing AEWA and that contribute to the Agreement's budget. There thus remains a need to fill the gaps in AEWA's membership.

### 6.3 Resource constraints and the need for improved prioritization of activities

AEWA faces challenges in respect of both human and financial resources. Regarding the former, the Agreement's Secretariat is small when considered against the volume of work that it is expected to perform, and Technical Committee members contribute their time on a *pro bono* basis and have limited capacity to address the numerous tasks requested by the MoP.<sup>268</sup> As regards financial resources, the various international measures required for AEWA's implementation (for instance, the production of ISSAPs and ISMPs, Conservation Guidelines and international reviews, and the provision of assistance to parties through the Agreement's Small Grants Fund and IRP missions) are obviously funding-dependent. Each party is required to contribute to AEWA's budget in accordance with the United Nations scale of assessment.<sup>269</sup> However, not all parties diligently comply with this obligation.<sup>270</sup> Further, the budgets approved at each MoP are dedicated primarily to the Agreement's administration rather than its implementation, with the result that implementation activities rely largely on voluntary contributions and external support.<sup>271</sup> To date, the resources available have fallen far short of what is necessary for the Agreement to be fully implemented. As noted above, resource constraints have, for instance, impacted both the operation of the AEWA Small Grants Fund and the production of international reviews. Such constraints have further limited progress in respect of AEWA's IITs. For instance, between 2009 and 2012, the Agreement received approximately 1,440,000 euros in voluntary contributions.<sup>272</sup> In comparison, the amount required for full implementation of the IITs for this period was approximately 11,670,000 euros.<sup>273</sup> As of 2012, no progress had thus been made towards 18 of the 31 IITs identified for 2009–2016.<sup>274</sup> Several of these

<sup>267</sup>Vienna Convention on the Law of Treaties, *supra* note 140, at art. 34 ("A treaty does not create either obligations or rights for a third State without its consent").

<sup>268</sup>See *Review of the Current Organization and Activities of CMS and the CMS Family: First Step of the Inter-sessional Future Shape Process*, *supra* note 260, paras. 120, 125. Furthermore, following the Technical Committee's failure to implement several of the tasks in its 2012–2015 work plan, the MoP has adopted a prioritized and costed Technical Committee work plan for the period 2016–2018. AEWA, Res. 6.17: *Institutional Arrangements: Technical Committee* (9-14 November 2015) [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res17\\_inst\\_arr\\_tc\\_en.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res17_inst_arr_tc_en.pdf).

<sup>269</sup>AEWA, *supra* note 7, at art. V(2)(a).

<sup>270</sup>See generally AEWA, *Report of the Secretariat on Finance and Administrative Issues*, at Annex I, UNEP/AEWA/StC 9.20 (6 September 2013) (more recently addressed in the 2013–2015 version in UNEP/AEWA/MOP6.12, at 2 (2015)).

<sup>271</sup>See *Review of the Current Organization and Activities of CMS and the CMS Family: First Step of the Inter-sessional Future Shape Process*, *supra* note 260, paras. 93–98.

<sup>272</sup>AEWA, *Report on the Implementation of the AEWA International Implementation Tasks 2009–2016*, at 1, AEWA/MOP 5.17 Corr. 1 (3 May 2012).

<sup>273</sup>*Id.*

<sup>274</sup>*Id.*

activities have remained on the list since its creation in 1999, without attracting funding.<sup>275</sup>

Given the wide range of issues touched on by AEWA and the resource constraints faced by the Agreement, it is important to prevent its efforts from being spread too thinly. To this end, there is a strong need to identify areas in which AEWA is able to make a *unique* contribution and to prioritize these issues in the Agreement's future activities. For instance, when determining appropriate AEWA IRP missions, priority should be given to issues that cannot be addressed by the compliance mechanisms of other treaties, and the Agreement should avoid taking the lead on initiatives that are not a priority for waterbirds specifically and can be spearheaded by other instruments in the CMS Family (a prime example being bird trapping in Egypt and Libya). AEWA's list of IITs could benefit from more rigid prioritization—indeed, this was recently recognized by the AEWA MoP, which agreed that future lists of IITs be “more limited in extent” and adopted a shorter list of IITs than it had at previous sessions.<sup>276</sup> Similarly, both the current Strategic Plan and the Plan of Action for Africa are broad in nature and should ideally be developed into more focused documents. An opportunity for this will arise in the 2016–2018 triennium, during which revised versions of both the Strategic Plan and the Plan of Action for Africa will need to be prepared for adoption at MoP7.

#### 6.4 Synergies with other instruments

For issues in respect of which there is overlap between AEWA and other MEAs, cooperative relationships need to be established and maintained. Such cooperation avoids inconstancies between regimes and potentially saves resources, while allowing AEWA to influence initiatives to address threats for which the Agreement is not in a position to take a leading role. The need to cooperate with other instruments and organizations is emphasized in both AEWA's Agreement text and Action Plan,<sup>277</sup> and in the course of this article, a number of examples have been provided of the cooperative arrangements established thus far. Unsurprisingly, the most extensive of AEWA's cooperative efforts occur with its parent Convention. The AEWA and CMS Secretariats coordinate their activities to avoid duplications and conflicts and, where appropriate, make use of common representation<sup>278</sup> and cooperate in the provision of training<sup>279</sup> and in joint initiatives.<sup>280</sup> Such cooperation is facilitated by the

<sup>275</sup> Compare *id.*, with Wetlands International, *International Implementation Priorities for 2000–2004*, UNEP/AEWA/MOP 1.9 (1999), and with AEWA, Res. 1.4., *supra* note 223.

<sup>276</sup> AEWA, Res. 6.13, *supra* note 223.

<sup>277</sup> See generally AEWA, *supra* note 7.

<sup>278</sup> For instance, in their participation in joint advisory missions.

<sup>279</sup> See generally UNEP/CMS SECRETARIAT AND UNEP/AEWA SECRETARIAT, *MANUAL FOR THE NATIONAL FOCAL POINTS FOR CMS AND ITS INSTRUMENTS* (Robert Vaag, 2013).

<sup>280</sup> *E.g.* the Migratory Species Champion Programme (author's correspondence with AEWA Secretariat).

co-location of Secretariats.<sup>281</sup> The desirability of establishing more formalized synergies with the CMS has been a point of controversy. A pilot joint communication and outreach unit was established in 2014<sup>282</sup> but, as recognized by AEWA MoP6,<sup>283</sup> is in need of more refined implementation arrangements. MoP6 further decided to take a “stepwise approach” (under the control of the AEWA and CMS Standing Committees) to strengthening synergies in common service areas but took note that this is not aimed at a merger of Secretariats and confirmed that the appointment of a Joint Executive Secretary for AEWA and the CMS is not a desired option.<sup>284</sup>

As regards cooperation between AEWA and her siblings in the CMS Family, collaboration already occurs between the Agreement and the Raptors MoU and Landbirds Action Plan.<sup>285</sup> Despite overlap in the threats covered by AEWA and ACAP, links have not yet been established between these Agreements.<sup>286</sup> Options for such cooperation have, however, been considered by the AEWA Technical Committee.<sup>287</sup> Cooperation between AEWA and the RFMOs that operate within the Agreement Area (and that the AEWA Action Plan recognizes as the appropriate organizations for addressing the impacts of fisheries on waterbirds) would also be valuable, but it has not yet been established.<sup>288</sup> While the AEWA Secretariat lacks the capacity to send representation to the meetings of all relevant RFMOs,<sup>289</sup> it might be possible to establish links with such organizations through collaboration with ACAP (which already works closely with RFMOs)<sup>290</sup> or through AEWA’s NGO partners, such as BirdLife International.<sup>291</sup>

Given AEWA’s overlap with the Ramsar Convention, one would expect a high degree of collaboration between these two instruments. However, no formal arrangements for their cooperation currently exist other than a post-WOW Memorandum of Cooperation, which is intended to provide a basis for continued collaboration in flyway conservation.<sup>292</sup> A trilateral Joint Work Plan (JWP) that was in place between the AEWA, CMS, and Ramsar Secretariats for the period 2003–2005<sup>293</sup> has

<sup>281</sup> See AEWA, Res. 1.1: *Establishment of the Permanent Secretariat for the Agreement on the Conservation of African-Eurasian Migratory Waterbirds*, at ¶ 1 (23–27 October 1999), available at [http://www.unep-aewa.org/sites/default/files/document/r1\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/r1_0.pdf).

<sup>283</sup> See AEWA, *Report on the CMS/AEWA Common Information Management, Communication and Awareness-raising Team*, UNEP/AEWA/MOP6.10Rev.1 (2015).

<sup>283</sup> AEWA, Res. 6.22: *Synergies between the UNEP/AEWA and UNEP/CMS* (9–14 November 2015), available at [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res22\\_synergies\\_en.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res22_synergies_en.pdf).

<sup>284</sup> *Id.*

<sup>285</sup> See, e.g., UNEP/AEWA Secretariat, *Report of the Secretariat UNEP/AEWA/MOP6.9* (10 September 2015) at 11 (discussing the collaboration between AEWA and the Raptors MoU in preventing the poisoning of migratory birds) and 13 (discussing the AEWA Secretariat’s participation in the Working Group on Migratory Landbirds in the African-Eurasian Region).

<sup>286</sup> Author’s correspondence with AEWA Secretariat.

<sup>287</sup> AEWA, *Exploring Possible Areas of Cooperation Between AEWA and the Agreement on the Conservation of Albatrosses and Petrels (ACAP)*, UNEP/AEWA Doc TC 12.37 (2015).

<sup>288</sup> Author’s correspondence with AEWA Secretariat.

<sup>289</sup> *Id.* (however, see AEWA, Res. 6.9, *supra* note 195).

<sup>290</sup> *Exploring Possible Areas of Cooperation between AEWA and the Agreement on the Conservation of Albatrosses and Petrels (ACAP)*, *supra* note 287.

<sup>291</sup> See, e.g., BirdLife International, *Marine Policy*, BIRDLIFE.ORG, <http://www.birdlife.org/worldwide/policy/marine-policy> (last visited 17 November 2015).

<sup>292</sup> *Report of the Secretariat* (2012), *supra* note 243, at 3, 9.

<sup>293</sup> *Joint Work Plan 2003–2005 between the Bureau of the Convention on Wetlands (Ramsar, Iran, 1971) and the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals (CMS) and between the Bureau of the Convention*

never been renewed, though the development of an updated JWP was called for by MoP5.<sup>294</sup>

Another global instrument with which it might be advisable for AEWA to explore a cooperative relationship is the World Heritage Convention. While the purpose of this Convention is not the protection of habitat *per se* but rather the protection of sites of outstanding universal value, these may include sites that constitute the world's most important areas for migratory birds,<sup>295</sup> as well as serial properties along species' migration routes.<sup>296</sup> Indeed, the World Heritage Committee has recognized "the role of the global biological phenomenon of migratory species, including birds" and adopted "the principle that the sites associated with these global phenomena be inscribed on the World Heritage List taking into account that the inscription of these sites have to be based on their sustainability to the continuance of these phenomena, their integrity and relevant criteria."<sup>297</sup> Interestingly, it was discussions regarding the potential serial nomination of the Great Rift Valley as a World Heritage Site (in which the AEWA Secretariat participated)<sup>298</sup> that ultimately lead to the introduction of AEWA's African Initiative.<sup>299</sup> The Agreement's Secretariat has also collaborated in the Wadden Sea Flyway Initiative,<sup>300</sup> which is a response to the World Heritage Committee's request to Germany and the Netherlands (upon the inscription of the German and Dutch parts of the Wadden Sea onto the World Heritage List) to "strengthen cooperation on management and research activities with States Parties on the African Eurasian Flyways, which play a significant role in conserving

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on *Wetlands (Ramsar, Iran, 1971) and the Secretariat of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA)*, 7 J. INT'L WILDLIFE L. & POL'Y at 73 (2004).

<sup>294</sup>AEWA, Res. 5.19: *Encouragement of Further Joint Implementation of AEWA and the Ramsar Convention*, at 2, (14–18 May 2012), available at [http://www.unep-aewa.org/sites/default/files/document/res\\_5\\_19\\_joint\\_impl\\_aewa\\_ramsar\\_0.pdf](http://www.unep-aewa.org/sites/default/files/document/res_5_19_joint_impl_aewa_ramsar_0.pdf).

<sup>295</sup>These sites may qualify for inscription on the World Heritage List because they have outstanding universal value in their own right. For instance, the Wadden Sea provides an essential stopover for several million migratory birds and thus "enables the functioning of the East Atlantic and African Eurasian migratory flyways." Convention Concerning the Protection of the World Cultural and Natural Heritage, *Report of Decisions*, Decision 33 COM 8B.4, WHC-9/33.COM/20 (20 July 2009).

<sup>296</sup>These sites may be viewed as having outstanding universal value when considered as a whole, regardless of whether each individual property has outstanding universal value. Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *The Operational Guidelines for the Implementation of the World Heritage Convention*, at ¶¶ 137–139, WHC.15/01 (18 July 2015). The Kenya Lake System in the Great Rift Valley, for instance, comprises three lakes and their surrounding territories and forms an "integral part of the most important route of the African-Eurasian flyway system where billions of birds are found to travel from northern breeding grounds to African wintering places." Convention Concerning the Protection of the World Cultural and Natural Heritage, *Decisions Adopted by the World Heritage Committee at its 35th Session*, Decision 35 COM 8B.6, at ¶ 3, WHC-11/35.COM/20 (7 July 2011). When inscribing these sites on the World Heritage List, the World Heritage Committee encouraged Kenya, Tanzania, and other relevant state parties to, *inter alia*, "consider further potential serial extensions as part of a potential transnational serial World Heritage property, taking account of relevant recent thematic studies by Birdlife and IUCN." *Id.* at ¶ 7; see also Convention Concerning the Protection of the World Cultural and Natural Heritage, *IUCN Evaluation of Nominations of Natural and Mixed Properties to the World Heritage List*, at 51, WHC-06/30.COM/INF.8B2 (May 2006).

<sup>297</sup>Convention Concerning the Protection of the World Cultural and Natural Heritage, *Decisions Adopted at the 30th Session of the World Heritage Committee*, Decision 30 COM 8B.25, at ¶ 2, WHC-06/30.COM/19 (23 August 2006).

<sup>298</sup>See *Report of the Secretariat* (2008), *supra* note 243, at 12–13; AEWA Draft Res. 4.21: *Conservation of the Great Rift Valley*, at Annex 1 (2008) see also *supra* discussion in note 296.

<sup>299</sup>Author's correspondence with AEWA Secretariat. The proposal that was initially presented to MoP4 was not to establish an "African Initiative" but rather a "Great Rift Valley Initiative." AEWA, Draft Res. 4.21, *supra* note 298. The draft resolution highlighted the outstanding universal value of the Great Rift Valley and instructed the AEWA Secretariat to cooperate with, *inter alia*, the World Heritage Centre to develop plans for the further protection of this area. During the meeting, it was decided to expand the Initiative's scope so as to encompass the whole of Africa.

<sup>300</sup>Common Wadden Sea Secretariat, *Wadden Sea Flyway Initiative (WSFI)*, <http://www.waddensea-secretariat.org/management/projects/wadden-sea-flyway-initiative-wsfi> (last visited 17 November 2015).

migratory species along these flyways.”<sup>301</sup> However, AEWA has yet to establish any formal ties with the World Heritage Convention itself, and even its participation in the Wadden Sea Flyway Initiative has been constrained by lack of resources.<sup>302</sup>

As regards AEWA’s cooperation with regional conservation treaties, the Agreement’s Secretariat has established a good cooperative relationship with the Bern Convention, including with regard to species action plans, advisory missions, and efforts to combat illegal killing.<sup>303</sup> However, cooperative arrangements have not yet been established between AEWA and Africa’s regional and subregional nature conservation treaties.<sup>304</sup> The Plan of Action for Africa highlights the need for cooperation with both the African Union and Africa’s various regional economic communities,<sup>305</sup> and it is hoped that progress on this issue will thus be made under the Agreement’s African Initiative.

This part of the article has suggested the establishment of several new cooperative relationships, and AEWA’s broad issue coverage means that there are opportunities for synergies with various additional MEAs not discussed here (for instance, those addressing chemicals and marine pollution). Although such synergies are desirable insofar as they may ultimately, *inter alia*, save resources and ensure that AEWA species are considered in initiatives led by other MEAs, their establishment is itself hindered by resource constraints. This has been highlighted above in respect to cooperation with both RFMOs and the Wadden Sea Flyway Initiative. It thus stands to reason that the Agreement needs to conduct prioritizations in respect to not only the issues for which it takes a leading role but also the areas in which it collaborates. Clear guidance on this should ideally be provided in AEWA’s next Strategic Plan.

## 7. Conclusions

Although there are numerous international instruments that contribute to the conservation of migratory birds in Africa and western Eurasia, AEWA stands out in various respects. On the one hand, the Agreement’s focus on a particular geographic region and group of species has allowed it to avoid various shortcomings of the global biodiversity-related conventions—especially as regards the level of detail and legal rigor of its operative provisions. On the other, the fact that AEWA’s geographic scope is defined on the basis of ecological boundaries rather than political boundaries enables the Agreement to provide a framework for the conservation and management of even intercontinental migrants—including those which are non-native to Europe. Also important is the manner in which the Agreement provides for various “tiers” of norms: starting with a central obligation to maintain Annex 2 species

<sup>301</sup> *Report of Decisions*, *supra* note 295, at Decision 33 COM 8B.4.

<sup>302</sup> Author’s correspondence with AEWA Secretariat.

<sup>303</sup> See *supra* pts. 3.5, 5.4.2, and 5.4.3. Note also that the terms of reference for the Bern Convention’s Group of Experts on the Conservation of Birds direct this Group to work in close cooperation with AEWA. See, e.g., Bern Convention, *Report of the 31st Meeting of the Standing Committee*, Doc. T-PVS (2011) 26, Appendix 11, at 106.

<sup>304</sup> Author’s correspondence with coordinator of AEWA African Initiative.

<sup>305</sup> *AEWA Plan of Action for Africa 2012–2017*, *supra* note 226, at 17.

at, or restore them to, a favorable conservation status, and then proceeding to several broad, though mostly unqualified, general conservation measures for Annex 2 species; a significantly more detailed, though still legally binding, collection of conservation measures for Table 1 populations; and an obligation to develop still more detailed international action and management plans for specific populations. Although complex, this structure allows AEWA's responses to be tailored to the population level. It also gives the treaty flexibility (as seen by the expansion and strengthening of the AEWA Action Plan), while at the same time ensuring that all parties remain bound by a handful of central conservation commitments in respect of which they are unable to enter reservations. Similarly, the fact that several of the Action Plan's provisions are expressed in weak or qualified language does not detract from parties' more stringently worded obligations under Articles II and III of the Agreement. Although a similar structure is used by other CMS Agreements, none of these is as ambitious as AEWA in terms of scope. Indeed, AEWA's taxonomic coverage has, over a relatively short period, evolved from 170 species belonging to 18 families to 254 species belonging to 27 families,<sup>306</sup> and it is possible that both the Agreement's taxonomic and geographic scope will be further expanded in the future.

To support AEWA's provisions, a substantial body of guidance has been produced under the Agreement, and new tools have been developed to monitor and facilitate implementation. These are especially important for parts of the Agreement Area in which countries lack the resources and capacity necessary for implementation, and in which other regional MEAs fail to provide adequate institutional mechanisms for monitoring and supporting conservation efforts. AEWA's current emphasis on improving implementation in Africa is especially encouraging, given the socio-economic challenges faced by African countries and the fact that institutional structures for supporting treaty compliance are not as advanced in Africa as they are in Europe. Cooperation with other MEAs is obviously essential in the implementation of AEWA's African Initiative, as well as various other activities under the Agreement. Over the past two decades, AEWA has established a variety of synergies with other instruments, although there do remain areas in which strengthened cooperation or new cooperative relationships are arguably necessary.

Given the nature of AEWA's substantive provisions and the manner in which its provisions, scope, and support structure have evolved since the Agreement's entry into force, it is clear that the Agreement has enormous potential. That said, the AEWA Action Plan is extremely ambitious, many of its provisions are not being adequately implemented, and the trend status of many AEWA-protected populations continues to decline. The Agreement's performance is especially hindered by gaps in membership and inadequate resources to support implementation. Its future success will thus hinge largely on the Agreement's ability to attract a higher level

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<sup>306</sup> Compare *Final Act of the Negotiation Meeting*, *supra* note 154, at Annex II, to the current version of AEWA's Annex II (adopted through AEWA, Res. 6.1, *supra* note 148).



of accessions and funding<sup>307</sup> and to direct its resources towards those issues in respect of which it can make the most meaningful contribution in relation to other MEAs. Although daunting, the challenges faced by AEWA should not overshadow the progress that the Agreement has achieved in its relatively short lifespan. In the period since AEWA's first MoP, its membership has increased more than fourfold, and support has been provided for a wide variety of research, education, and conservation activities. Despite its resource constraints, there are also examples of AEWA playing a pioneering role in respect of both substantive conservation issues (such as flyway-scale adaptive harvest management) and institutional matters (such as online reporting and implementation review). By the age of 20, AEWA thus occupies a special place within both the CMS Family and the broader cluster of biodiversity-related MEAs. The Agreement's role in bird conservation may become even more dominant in the future, should AEWA spread its wings even further to encompass additional taxa and flyways.

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<sup>307</sup>See BOWMAN ET AL., *supra* note 4, at 231; BOARDMAN, *supra* note 12, at 143–145; (i) AEWA, Res 6.21: *Resource Mobilisation for the Implementation of the African Eurasian Waterbird Agreement (AEWA)* (9–14 November 2015), available at [http://www.unep-aewa.org/sites/default/files/document/aewa\\_mop6\\_res21\\_resource\\_mobilization\\_en.pdf](http://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res21_resource_mobilization_en.pdf) (on resource mobilization for AEWA's implementation).