

Agenda Item 8.4

Administrative and Budgetary Issues
Financial, Budgetary and Administrative
Matters 2013-2015/16

Document 8-06

**Legal Implications of Reviewing the
MOP Intervals**

Action Requested

- Take note of the analysis
- Decide on the implications for the Agreement

Submitted by

Secretariat



NOTE:
IN THE INTERESTS OF ECONOMY, DELEGATES ARE KINDLY REMINDED TO BRING THEIR
OWN COPIES OF DOCUMENTS TO THE MEETING

Secretariat's Note

This document has been prepared upon request of the 19th Meeting of the ASCOBANS Advisory Committee, 20-22 March 2012, Galway, Ireland. It is analysing the legal implications of a possible move to a four-year Meeting interval, as proposed in budget Option B (MOP7/Doc.8-05), and indicates how such a change could be effected.

Legal Implications of Reviewing the MOP Intervals

Background:

1. ASCOBANS Advisory Committee (AC) at its 19th Meeting held in Galway, Ireland from 20 to 22 March 2012 considered a proposal submitted by the ASCOBANS Secretariat in Document 14-02 calling upon the Committee to consider and advise the MOP on the possibility of changing the interval between Meetings of the Parties (MOP) from three to four years in harmony with other CMS Agreements, namely, EUROBATS and AEWA. EUROBATS moved from a three- to a four-year cycle in 2006 while AEWA did so for the period 2009-2012.

2. The reason behind the Secretariat's proposal is to give adequate time for the effective implementation of the resolutions and programme of work adopted as well as more time to prepare the next MOP. Although the AC reviewed the proposal at its session, it could not make a firm decision on whether or not to advise the MOP to adopt the proposed change. The Committee wished to be advised on the legal implication for such a change before it could advise the MOP at its next session. This document thus explores such implications, if any, based on the interpretation of the relevant provision of the Agreement (ASCOBANS) as well as lessons learned, if any, from similar or related provisions of other multilateral agreements and their practice in such matters.

Approaches taken by CMS Family of Agreements on MOP Intervals:

3. A review of the provisions of a number of CMS Family of Agreements reveals principally four types of approaches for the intervals between different sessions of their MOPs. These approaches are mainly (i) *malleable or flexible approach* or (ii) *silent thus flexible approach* or (iii) *complete silent approach* or (iv) *authoritarian or strict approach*.

4. With regards to the *malleable or flexible approach*, the text of the agreement would provide the generic period as a benchmark upon which the MOPs will be held while also leaving room to the Parties at the MOPs to decide on a different period other than the one specified in the agreement text. For this approach, a number of the agreements clearly state that "The Agreement secretariat shall convene (or shall hold) ordinary sessions of the Meetings of the Parties **at intervals of not more than three years, unless the Meeting of the Parties decides otherwise**". This is the case for AEWA (Article VI(2)), Gorilla Agreement (Article V(2)), ACAP (Article VIII(2)) and ACCOBAMS Article III(2).

5. EUROBATS, on the other hand, adopted a *silent but a more flexible approach* whereby its Parties can decide at its MOP on when its Parties wish to meet to review implementation of its Agreement. The Agreement has not set a benchmark, as the above malleable/flexible approach, to guide the Parties to change the MOP timings whether with authority or not. In this respect, the Agreement simply provides that "there shall be **periodic meetings of the Parties**" (Article V(1)) which means Parties have full authority to decide at its MOPs when to meet to hold their next meeting. The only benchmark EUROBATS had set was for the first MOP to be held "not later than three years" after its entry into force while the rest of the other above mentioned Agreements were "not later than one year after the date of entry into force".

6. The Tripartite Wadden Sea Seals Agreement took a *completely silent approach* since the text of the Agreement does not provide for either MOPs or the anticipated MOPs intervals as is the precedent set by most multilateral agreements. The number of Parties to the Agreement being only three and thus making it easy to decide and meet at any time may have been the reason or incentive for the trilateral Parties' decision to take such a completely

silent but most flexible approach. The Parties have since their first governmental conference in 1978 met regularly starting in the initial years with interval of two years, then changed to three years, followed by four years and most recent being after five years (<http://www.waddensea-secretariat.org/tgc/TGC.html>).

7. Of all the seven legally binding Agreements negotiated and adopted under the auspices of Article IV(4) of the Convention on the Conservation of Migratory Species of Wild Animals (CMS), the ASCOBANS is the only one which took a completely different and the *most stringent, inflexible and authoritarian approach* to its MOPs intervals. Its negotiators then decided to ensure that the Parties meet at least once in three years and this assurance is inscribed in the text of the Agreement in that Parties shall meet “**not less than once every three years**” (Article 6(1)) to review progress of the agreement. In other words, it was not the intention of the negotiators that Parties meet at intervals of more than three years.

8. It is important to note that of the seven Agreements, adopted between 1990 to 2007, the ASCOBANS is the second oldest of them all but the first with meeting of the parties provisions including MOP intervals included into the text of the agreement. ASCOBANS was adopted in September 1991 while Wadden Sea Seals as in 1990, but EUROBATS in December 1991, AEWA in 1995, ACCOBAMS in 1996, ACAP in 2001 and Gorilla Agreement in 2007. With the first Tripartite Agreement taking an open-ended flexible approach by being silent in its text on MOP or MOP intervals, ASCOBANS had no lesson to emulate from that agreement considering it had more countries with the possibility to become members. Unfortunately, the negotiators or drafters then may have never anticipated the implications such a stringent approach would have in the future management and implementation of the Agreement. It seems all other agreements which were adopted thereafter realized that ramification and thus revised and improved it by taking the flexible/malleable approach in their texts on MOP intervals.

9. Unfortunately, the framework parent Convention (CMS) did not influence the ASCOBANS negotiators on this subject matter of MOP intervals. For Conferences of the Parties (COP) intervals, CMS took a flexible approach in that the ordinary meetings of COP are convened “**at intervals of not more than three years, unless the Conference decides otherwise**” - Article VII(3). In the event the Parties consider changing the periodicity of their COPs, the article empowers them to do so and can effect such a change through a COP decision or resolution without necessarily undertaking the strenuous process of amending the text of the Convention followed by yet another arduous procedure of ratification or accession.

10. For the ASCOBANS on the other hand, negotiators closed that possibility of simplified amendment or variation of MOP intervals by not empowering its MOP to effect such a change as and when the Parties consider it necessary and thus being able to do so through a MOP decision. Taking into account the strict legal interpretation of the ASCOBANS text itself together with the *authoritarian or stringent approach* its provisions took with regards to its MOP intervals, any change to more than three years, in this case, consideration of changing it to four years cycle would require formal amendment of Article 6(1) of the Agreement. In this case, the process or procedure stipulated under Article 6.5 of the Agreement will have to be adhered to.

Approaches taken by other MEAs on COP Intervals:

11. A review of a number or sample of other multilateral environmental agreements (MEAs) also reveals different approaches have been taken by different MEAs on the COPs cycles.

12. The major biodiversity, atmospheric as well as chemical MEAs have taken the *malleable and flexible approach* whereby their COPs meet “**at regular intervals as determined or decided by the COPs**” at their first or initial meeting(s) (namely, CITES

Article XI(2), CBD Article 23(1), UNCCD Article 22(4) Carpathian Convention Article 14(3), Ozone Convention Article 6(1), UNFCCC Article 7(4), Rotterdam Convention Article 18(2) and Stockholm Convention Article 19(2)). While some MEAs are more specific on the COPs' duration, such as, CITES with meetings convened "at least every two years" currently held every three years, UNCCD the first three held yearly and thereafter to current "be held every two years", UNFCCC which states "be held every year" and is still the case, while CBD and Ozone Convention have "determined at its first meeting" and held meetings every two years as is still currently the case, while the Carpathian Convention text has "be held every three years". All these Conventions have nonetheless added a flexible caveat empowering the COPs to "decide" or "determine otherwise" the meeting intervals or cycles. With all these MEAs, a COP decision or resolution at any COP can amend and change the COP interval or cycle without a formal amendment process or procedure in accordance with the provisions of their texts.

13. On the other hand, a number of regional seas conventions (namely, Cartagena Convention Article 16(1), Nairobi Convention Article 17(1) and its amended Convention Article 18(1), Barcelona Convention Article 14(1), Abidjan Convention Article 17(21) and Northeast Pacific Convention Article 15(3)) have, like ASCOBANS, adopted a *stringent and authoritarian approach* to COP intervals. These Conventions have influenced each other in that they all stipulate that "the Contracting Parties shall hold ordinary meetings **once every two years**". For these MEAs, like the ASCOBANS, the room for flexible review of their COP intervals is closed as texts have not authorized their COPs to take decision to amend or change the COP intervals. In this regard and by strict legal interpretation, a formal amendment of the relevant provisions of the texts of the Conventions would be required to effect any such change.

14. In addition, with a number of MEAs that have adopted a flexible approach to their COPs, the same is also complemented and reflected in their COPs' rules of procedures (RoP) which include provisions on the periodicity of their COPs. Such rules specify the COP intervals for, in particular, those that have opted either to hold their ordinary meetings at regular intervals (such as, CBD RoP Rule 4, Ozone Convention RoP Rule 4(1) or where specific COPs periodicity has been specified (such as Abidjan Convention RoP Rule 4). Those rules include authority permitting the Parties to review such periods or intervals for their COPs. That is parties hold their ordinary meetings every, for instance, two years unless parties decide otherwise (Ozone Convention Rule 4(1) or parties review the meeting periodicity from time to time (CBD Rule 4).

15. It would be preferable to review the travaux préparatoires (records) of the ASCOBANS intergovernmental negotiation meetings on the Article 6(1) to assess what was the intention of the negotiators at the time of negotiating this provision. However, regrettably these records are not available to the Secretariat. A revision of this document outlining any relevant points will be issued if efforts to obtain them are successful.

Option(s) open to ASCOBANS to change/amend its MOP intervals:

16. The strict legal interpretation of the above review on the relevant text of ASCOBANS in relation to similar or related provisions of CMS Family of Agreements as well as other relevant MEAs clearly reveals that if the ASCOBANS Parties wish to change or amend permanently the periodicity of their MOPs they may have to amend the Agreement's Article 6(1) through the amendment procedure stipulated in Article 6.5.

17. Formal amendment option would require Parties to ASCOBANS to go through the ratification process all over again. The re-negotiation of its provision on the MOP intervals may reopen debates on other provisions as well and it can be long and protracted, and often some parties to the original agreement may not become parties to the amended agreement. Once the amendment is agreed, adopted and signed, Parties will have to undertake national

constitutional process to ratify or accede to the amendment made before it can effectively enter into force, a process which is normally long, strenuous and arduous.

18. Especially if Parties wish to change the periodicity of MOPs on a trial basis for one or even a few times, such an amendment may not be practical or necessary.

19. Another possible option which the Parties or MOP may wish to consider is the reasoning provided under the interpretation of treaties under the 1969 Vienna Convention on the Law of Treaties. Under this Convention, ASCOBANS as a treaty needs to always be interpreted in “good faith” and in the “light of its object and purpose” (Article 31(1)). With regards to the issue at hand, namely, change of MOP intervals, the Parties need to assess whether or not such a change will affect the aim, object and purpose of ASCOBANS. It is doubtful that changing the periodicity of MOPs to allow it to ally with other sister Agreements (AEWA and EUROBATS) and to permit the Secretariat and the Parties more time to implement the decisions of the previous meeting will affect the object and purpose of the Agreement cautioned under the Vienna Convention.

20. If meetings of the parties are generally considered to be a procedural mechanism for the Parties to, *inter alia*, meet and review progress on the implementation of the Agreement, then such a treaty can be amended informally by the treaty executive council, namely, MOP, but only if such a change is considered to be *only procedural* without affecting the object and purpose of the convention (Anthony Aust, *Modern Treaty Law and Practice*, 2007, pages 239-241). However, it will be crucial in such a situation to ensure that the purpose is clear and Parties to the ASCOBANS consent to this particular authoritative interpretation of the proposed change in that its object or purpose is not affected. In this respect, the interpretation will have the legal effect of adding an additional clause to the treaty as an “authentic interpretation” that can be effected by a decision or resolution of the MOP which can further be added into the MOP rules of procedure. The latter, namely, RoP can be easily amended and updated by the Parties in future thus allowing the Parties to revert to the three-year intervals, if deemed appropriate to do so.

21. Wording to that effect for inclusion in the existing draft resolutions on the work plan (Doc.7-02) and budgetary provisions (Doc.8-04) could be as follows:

Agree that a change in the periodicity of the Meeting of the Parties does not affect the object and purpose of the Agreement, and therefore decide that the interval between each meeting may be set on a case-by-case basis by means of relevant resolutions and be indicated in the Rules of Procedure for the Meeting of the Parties;

22. The Rules of Procedure for the Meeting of the Parties could be amended with the following additional provision:

Part [...]

Place and Date of Next Meeting

Rule [...]: Place of the Meeting

Unless all additional expenses incurred are borne by the Host Government, meetings shall take place at the seat of the Secretariat.

Rule [...]: Date of the Meeting

As a general rule, meetings shall be held at least once in three years as stipulated in Article 6(1) of the Agreement. The Meeting of the Parties shall at each meeting decide on the date of the next meeting, for which a longer interval may be considered, deviating from the general rule.