



Interim Secretariat provided by the Australian Government

First Meeting of the Parties

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Agenda Item No. 4.1
ACAP/MOP1/Doc.8 Rev 2
Interim Secretariat

Establishment of the Agreement Secretariat

Purpose of paper

The Agreement on the Conservation of Albatrosses and Petrels (ACAP) requires the first session of the Meetings of Parties (MOP) to establish a Secretariat (Article VIII (11) (c)).

The following matters are identified as requiring consideration by the MOP when establishing the ACAP Secretariat:

- status of the Secretariat;
- location regimes;
- legal personality;
- privileges and immunities; and
- establishment procedures for the Secretariat.

Action Required

The Meeting of Parties is asked to:

1. Discuss the options available for the establishment of a Secretariat for the Agreement on the Conservation of Albatrosses and Petrels.

The issues to be discussed include:

- the activities to be undertaken by the Secretariat (Attachment A);
 - whether the Secretariat is subordinate to the Meeting of the Parties and whether this should be reflected in the drafting of documents relating to the Secretariat (Issue 1 below);
 - whether the Agreement Secretariat is established under a host Government arrangement (Issue 2) or has a legal personality provided for in a Headquarters Agreement (Issue 3).
3. Note that intersessional work may be required to resolve some of the issues.

Methodology

Besides a detailed examination of ACAP and related documents, the approaches of a number of entities concerned with international environmental matters and having international secretariat-type functions were examined as a basis of comparison of approaches.

The following acronyms are used throughout this paper:

ACAP - Agreement on the Conservation of Albatrosses and Petrels;
ATCM – Antarctic Treaty Consultative Meeting;
ATS - Secretariat of the Antarctic Treaty System;
CCSBT - Commission for the Conservation of Southern Bluefin Tuna;
ACCOBAMS - Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area;
CEP - Committee for Environmental Protection (established by the Protocol on Environmental Protection to the Antarctic Treaty);
COMNAP - Council of Managers of National Antarctic Programs;
MOP – Meeting of the Parties to ACAP (see ACAP, Article VIII)

The ACAP Secretariat

The Secretariat is one of several bodies and meetings established by ACAP to support the implementation of ACAP. The others include: the MOP, the decision-making body of the Agreement (Article VIII); and an Advisory Committee to provide expert advice and information (Article IX). The MOP also oversees the Secretariat. The Secretariat's relationship with the Advisory Committee is more symbiotic. Whilst the Secretariat provides services to the Advisory Committee (notably the arranging and servicing of its meetings), it is also entitled to be provided with advice and information by the Advisory Committee (Article IX (1)).

Once established, the Secretariat's effectiveness is to be reviewed at every third session of the MOP (Article VIII (14)).

A proper appreciation of the functions and duties required of the Secretariat by ACAP is necessary to establish a suitable Secretariat structure. The Secretariat's functions and duties are chiefly listed in Article X. However, other parts of ACAP also contain relevant provisions (such as arts VII, VIII, IX and XI and the Action Plan).

The Secretariat has a potentially very wide range of functions. A comprehensive list of the Secretariat's functions is given in Attachment A. The Secretariat's functions can be potentially categorised into seven types:

- i. meeting organisation and support both in relation to the MOP and the Advisory Committee (Articles Xa), Xb), Xj) with VII(1)c); IX(6)e); Xj) with VIII(10), XI(4));

- ii. self-administration (Articles Xi); Xc); Xf));
- iii. financial (Articles Xg));
- iv. policy (Articles Xe));
- v. information/promotion (Articles Xc), Xh), Action Plan 7.5);
- vi. liaison and coordination (Articles Xc), Xd), XI(2), XI(4), XI(4) and XI(3)); and
- vii. implementation (Article Xb), Action Plan (paragraphs 7.4 and 7.5).

These functions encompass both mandatory and discretionary functions and vary in their immediacy with some being immediately essential to the ACAP regime and others only arising in consequence to circumstances (such as, for example, direction by the MOP).

Immediately required of the Secretariat are particular functions concerned with meeting support and organisation, the Secretariat's self-administration and ACAP's financial structuring. Specific functions that will definitely arise before the second ordinary MOP comprise:

- developing a system of performance indicators of its own effectiveness and efficiency for reporting at the next MOP (Article X i));
- administering the Agreement budget (Article X g));
- arranging and being able to service the next meeting (Article X a));
- arranging and being able to service the next Advisory Committee meeting (and all following Committee meetings) (Article X a));
- preparing a report on its work to the MOP (Article X f));
- in the lead-up to the next and following MOPs, receiving and providing to the Advisory Committee each Parties' information on their implementation of ACAP, in particular their conservation measures (Articles X j) with VII(1)c)); and
- receiving and circulating to the Parties the Advisory Committee's report before each MOP (Article IX(6)e).

ACAP contemplates that ordinary sessions of the MOP will be held at intervals not more than three years (Article VIII(2)).

Issues

Issue 1: Status of Secretariat

To clarify the status of the Secretariat within the ACAP regime.

Examination of status of ACAP Secretariat

ACAP expressly designates the MOP as its decision-making body. ACAP also establishes two other entities to support the agreement – the Secretariat as well as the Advisory Committee. As regards the Secretariat, it is to be established by the MOP (Article VIII, (11)c), must report to the MOP (Article X i), f)) and can be required to execute MOP decisions (Article X b)). A number of the Secretariat's major tasks also involve providing support to and taking direction from the MOP. Some actions require MOP approval (eg Article XI (3)).

Issue to be considered

It is concluded that under the terms of ACAP the ACAP Secretariat is to be subordinate to the MOP and an organ of the MOP. In light of this, any host country arrangement described in a Headquarters Agreement may need to reflect this position.

Issue 2: Location

Issue

Consider options for the location of the Secretariat.

Concept

Whilst ACAP requires the establishment of a secretariat, it leaves open the question of the location of the Secretariat for settling by the MOP. Two options are presented for the consideration of the MOP:

- permanently located secretariat
- rotating secretariat

Examples

The following table describes the location regimes of the entities involved in international secretariat-type functions sampled for this paper.

Table: Location regimes of sample secretariats

	Permanent location	Rotating secretariat functions
ATS	√ - As provided in its headquarters agreement, the ATS will be permanently located in Buenos Aires, Argentina.	
ATCM		√ - Before the formation of the interim ATS Secretariat, the secretariat functions relating to ATCMs were handled by the host country for each meeting. ATCMs are held every 1-2 years with every Antarctic Treaty Consultative Party taking its turn to host an ATCM.
CCSBT	√ - As provided in its headquarters agreement, the CCSBT is permanently located in Canberra, Australia.	
ACCOBAMS Secretariat	√ - The first ACCOBAM Meeting of Parties accepted the offer of the Monaco Government to host the ACCOBAMS Secretariat. It is noted that no Headquarters agreement is currently in place. The arrangement can be subject to review at the request of either party.	
CEP (Chair)		√ - The CEP does not have a formal secretariat. The CEP's secretariat-type functions, both intersessionally and

	Permanent location	Rotating secretariat functions
		during meetings, are administered by the Chair through pre-existing organs of the Chair's home government (ie Australia 2003-2005; Norway 1998-2002). CEP Chairs are appointed for terms totalling a maximum of 4 years. The Chair's secretariat-type functions therefore invariably shifts between member states.
COMNAP Secretariat		√ - The Secretariat is located in the country of residence of the Executive Secretary appointee. The Secretariat has been located in Hobart, Australia since 1997 and, prior to that, Washington DC. ¹

Option 1 – permanently located secretariat

The permanent location of a secretariat in an appropriate city of a member state is logistically the simplest model.

Justifications for this approach include:

1. Logistical simplicity – Having permanently decided one location for its Secretariat, the matter is settled once and for all and, subject to changes in circumstances of the host country, need not be addressed again by the MOP.
2. Continuity – The knowledge that the Secretariat will be permanently located in the one place allows for greater continuity in the Secretariat's functions including continuity of staff, archiving and information management systems.
3. Demanding intersessional workload – Where a Secretariat has a demanding intersessional workload, it will not have to deal with the additional burden of regular changes of location.

Issues to be considered include:

1. Burden on one Party to the Agreement - Irrespective of funding arrangements, the hosting of a secretariat usually places particular obligations on the hosting country. These include: provision of premises, etc; tending to the necessary domestic legal arrangements; honouring of host country obligations under the relevant headquarters agreement including in relation to privileges and immunities; and the capacity to deal with operational issues arising from the functioning of the Secretariat on a day to day basis.
2. Long-term suitability and capacity of host country - As the intention is that the Secretariat be permanently located in its host country, it is important that the host

¹ COMNAP brochure,
[http://www.comnap.aq/comnap/comnap.nsf/P/PDF/10/\\$FILE/ComnapBrochure2004_EN.pdf?Open&ext=.pdf](http://www.comnap.aq/comnap/comnap.nsf/P/PDF/10/$FILE/ComnapBrochure2004_EN.pdf?Open&ext=.pdf)

country be a suitable candidate in the long-term. Obviously, if no Party State is willing to assume this role, other arrangements would have to be used (such as a rotating secretariat).

3. Termination arrangements - To provide for the possibility that the Secretariat may be re-located, it is important that sufficient time is allowed. Where there is a Headquarters Agreement, this will usually state the termination arrangements.

Types of arrangement vary, for example:

- ATS Secretariat – The Headquarters Agreement provides for a period of two years from notification of termination of the host country's obligations.
- CCSBT – The Headquarters Agreement can be terminated by a joint decision of the Government and the Commission. The date on which the agreement will terminate is to be confirmed by an exchange of notes between the Australian Government and the Commission.
- ACCOBAMS Secretariat – Monaco's hosting can be reviewed at each ordinary Meeting of the Parties at the request of the Host Country or any Party.

Option 2- rotating secretariat

This option involves the Secretariat moving amongst different host countries after a particular period or term. No Party undertakes to permanently host the Secretariat.

As set out in the above table, examples of rotational arrangements include: ATCM (prior to the ATS); the CEP; and COMNAP.

Rotational arrangements are not generally associated with a situation where the meeting of the higher authority is permanently hosted in the one location.

Justifications for this approach include:

1. Absence of host country candidate – This approach is a solution to the situation where no Party wishes to permanently undertake to host the Secretariat.
2. Sharing of host country costs – Because the host country alternates, one member state is not permanently burdened with the hosting costs.
3. Simplified funding arrangements - Given that hosting is for a finite period, each host country may be prepared to assume the bulk of funding costs thus reducing the funding arrangements to be shared, and thus formalized, between Parties.
4. Less bureaucracy – A rotating secretariat may be less likely to accumulate bureaucratic practices and characteristics.

Issues to be considered include:

1. Representation – A common characteristic of rotational arrangements is that the host country of the moment provides the secretariat staff. In this situation, the secretariat will not be geographically representative of states parties. Further, secretariat staff will necessarily be drawn only from states parties who are in a position to host a secretariat. Obviously, this may not be a major issue in relation to small secretariats.
2. Staffing – If certain staff are not to be provided by the host country, relocation may be an issue for staff retention and availability.
3. Changeover arrangements – It is desirable that clear procedures be in place for determining the succeeding location with sufficient time to ensure a smooth relocation and continuation of secretariat functions. It is noted that the examples of rotational arrangements listed in the above table link location to an external factor such as the home country of the Chair (CEP, COMNAP) or the location of meetings (ATCM).

Issue to be considered

Parties will need to consider the following factors in determining a preference for a permanent or a rotational location regime:

- Availability of a suitable permanent host country candidate (ACAP/MOP1/Doc.9);
- Intersessional workload; and
- Regime for location of meetings.

It is noted that a Headquarters Agreement can be executed with host governments, whether permanent or for a finite period.

Issue 3: Legal Personality

Should the ACAP Secretariat possess domestic legal personality?

The nature of legal personality

Legal personality refers to the possession and exercise of rights and duties enforceable at law. Typical legal capacities are: 1. the ability to make claims in order to vindicate legal rights; 2. being subject to at least some obligations imposed by law; and 3. the power to make binding legal arrangements.²

Examples

The following table samples the legal personality of the following entities involved in international secretariat-type functions:

1. Secretariat of the Antarctic Treaty System (ATS);
2. Commission for the Conservation of Southern Bluefin Tuna (CCSBT);
3. Secretariat for the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS Secretariat)
4. Chair, Committee for Environmental Protection (established by the Protocol on Environmental Protection to the Antarctic Treaty) (CEP Chair)
5. Secretariat to the Council of Managers of National Antarctic Programs (COMNAP Secretariat)

Table: Sample of Legal Personality of Entities involved in International Secretariat-Type Functions

Entity	Legal personality	Details
ATS	Express legal personality	Expressed in Headquarters Agreement, art 2 - "The Secretariat as an organ of the ATCM has legal personality and capacity to perform its functions in the territory of the Argentine Republic. It has, in particular, the capacity to contract, to acquire and dispose of movable and immovable property, and to institute and be a party to legal proceedings. The Secretariat may exercise its legal capacity only to the extent authorized by the ATCM."
CCSBT	Express legal personality	Expressed in Headquarters Agreement, art 3 - "The Commission has legal personality. It has, in particular, the capacity to contract, to acquire and dispose of movable and immovable property, and to institute and be a party to legal proceedings." NB Also expressed in Convention establishing Commission, art 6(9).
ACCOBAMS Secretariat	No express statement of legal personality at this stage.	The documents constituting the Secretariat are largely silent. There is a reference to the Secretariat having "recourse to suitable local banking services to conduct day-to-day transactions". (First Meeting of Parties,

² Shaw, *International Law*, p 137; M. Dixon, *Textbook on International Law*, 4th ed, p 104.

Entity	Legal personality	Details
		Res 1.2, Annex 1, para 6). It is noted that the Secretariat intends entering a headquarters agreement to address its legal personality (and other matters).
Chair, CEP	No legal personality	Note that the operations of the CEP Chair do not have a formal secretariat. Instead the operations are administered through pre-existing organs of the Chair's government (currently Australia). These organs possess their own legal personality.
COMNAP Secretariat	No legal personality.	When operational needs require the exercise of legal rights or the undertaking of legal obligations, these would have to be exercised or undertaken by a legal person (eg the Executive Secretary contracting in their own name on behalf of COMNAP). These cannot be exercised or undertaken by COMNAP in its own name.

Factors to be considered

Justifications for an entity such as the ACAP Secretariat possessing legal personality include:

1. Functionality

An entity is charged with particular functions and, in order to fulfil those functions, may need to act within its local legal system. For example, the entity may need to transact day-to-day business to operate (eg bank accounts, purchase of equipment, hiring of staff or contractors, renting of premises).

If the entity itself does not have legal personality and needs to enter into any legal relations, these will have to be done by another entity possessing legal personality (eg the host government or an individual employee of the entity on behalf of the entity).

2. Independence

The entity can attend to certain matters relevant to its operation without reliance upon, and thus subject to the influence of, the host government or any other States party.

Issues raised by the possession of legal personality include:

1. Legal documentation

It is common for the nature of secretariat-type entities' legal personality to be expressly described, for example, in a headquarters agreement between the entity and the host government. Appropriate attention should therefore be given to the drafting of such clauses.

2. Control

If the entity being granted legal personality is a subordinate organ of a higher authority (such as is likely to be the case between the ACAP Secretariat and the

MOP), the possession of legal personality by that entity should accurately reflect, and not inadvertently alter, the subordinate status of the entity. For example, the MOP is likely to want (and is probably required by ACAP) to maintain its position as the substantive decision-making body of the ACAP regime.

Issue to be considered

The Parties may like to consider whether it is desirable for the Agreement Secretariat to have domestic legal personality as appropriate to its functional needs.

Should that be the case, the Parties may also like to consider how legal personality will be described. For example, a Headquarters Agreement would be a suitable site for a clause to state that the Secretariat:

- has legal personality and capacity to perform its functions in the territory of the Host Country;
- has the capacity to contract, to acquire and dispose of movable and immovable property, and to institute and be a party to legal proceedings; and
- may exercise its legal capacity only to the extent authorized by the ACAP Meeting of Parties.

Issue 4: Privileges and immunities

Should the ACAP Secretariat seek privileges and immunities from the Host Government?

The nature of privileges and immunities³

International organisations can be entitled to certain privileges and immunities as a matter of international law. Privileges and immunities give immunity from legal and administrative proceedings within the host country within which an entity is operating. They can be given to both the entity and its personnel. At the same time as giving privileges to the entity and certain individuals, the granting of privileges and immunities concurrently places obligations on the host country.

The purpose of privileges and immunities is functional. Their intention is not to benefit the recipient but to enable the recipient to effectively carry out its designated functions without fear of interference from the host country.

Features

In the context of a secretariat, privileges and immunities usually apply to:

- the Secretariat itself, including its property, premises and assets;
- the Executive Secretary and other staff as well as some family members;
- meeting delegates; and
- experts.

Immunity is usually granted from matters such as legal process, taxation, and criminal and civil liability.

Privileges and immunities do not usually apply to nationals or permanent residents of the host country.

The grant of privileges and immunities is usually accompanied by a capacity to waive.

Examples

Of the sampled entities, both the ATS Secretariat and the CCSBT have clarified their privileges and immunities. These are set out in their respective Headquarters Agreements.

It is noted that ACCOBAMS has not yet clarified its privileges and immunities in detail but anticipates this matter will be expressly addressed in a future Headquarters Agreement. In the meantime, the first meeting of the parties in Resolution 1.2 placed obligations on the host country to provide for the secretariat.

³ Dixon, *International Law*, 4th ed, pp 189 – 190, 195.

The provisions relating to the privileges and immunities of the ATS and CCSBT both deal with the same, standard aspects, namely:

- inviolability - of Secretariat premises and of records or archives;
- immunity of the Secretariat and its property, premises and assets;
- exemptions from host country taxation – namely direct taxes, taxes such as customs and excise duties; no-less-favourable treatment than the host government in relation to taxes on mail and telecommunications;
- exemptions from other governmental regulatory controls – ie restrictions or prohibitions imposed on imported or exported goods (subject to the resale of such goods being limited); currency or exchange restrictions; restriction of the import and export of publications; entry and visa restrictions (in relation to delegates);
- privileges and immunities - of the Executive Secretary, other staff, their family members and delegates; and
- an obligation to cooperate regarding abuses of privileges and immunities.

Issue to be considered

The Parties may like to consider privileges and immunities relevant to the ACAP Secretariat, which the Secretariat will use in negotiations with the Host Government.

Issue 5: Establishment procedures

To identify the procedures by which the MOP shall establish the Secretariat.

Procedures and documents

ACAP requires the Secretariat to be established by the first MOP (Article VIII (11)c)).

Issues to be considered

The Meeting of the Parties will need to consider drawing up and agreeing the following:

- a written decision establishing the Secretariat including its status as permanent or rotating and the host country (ACAP/MOP1/Doc.9);
- recruitment procedures for the Secretariat (ACAP/MOP1/Doc.10);
- staff regulations; and
- financial regulations (ACAP/MOP1/Doc.14).

Alternatively, MOP1 could determine an intersessional process for furthering the establishment of the Agreement Secretariat.

Functions/duties of the Secretariat

- Arrange and service MOPs (Article X (a))
- Arrange and service Advisory Committee meetings (Article X (a))
- Execute decisions addressed to it by MOPs (Article X (b))

- Promote and coordinate “activities under the agreement” incl. the Action Plan (in accordance with MOP decisions) (Article X c))
- (regularly) review and report to MOP on potential means of resourcing implementation of the Action plan (Action Plan, 7.4)

- Liaise with
 - non-Party Range States
 - regional economic integration organisations(Article X d))

- arrange coordination between Parties and:
 - non-Party Range States
 - international and national organisations whose activities are relevant to the conservation of A&Ps(Article X d))

- consult and cooperate, where appropriate, with relevant international bodies, namely:
 - the CMS secretariat and secretariats under CMS Articles IV (3) and (4) agreements⁴ relevant to albatrosses and petrels
 - Secretariats of other relevant conventions and international instruments in respect of matters of common interests
 - the Antarctic Treaty CEP and other organisations/institutions with competence in the field of –
 - conservation of albatrosses and petrels and their habitats,
 - research, education and awareness raising.(Article XI(2))

- consult and cooperate in the exchange of information and data with relevant international organisations under Article XI(4)) (Article XI(4))
- may invite relevant international organisations to send observers to relevant meetings (Article XI(4))
- develop a system of performance indicators of its own effectiveness and efficiency (Article X i))

- report to ordinary MOPs on performance indicators (Article Xi))
- report on its work to each ordinary MOPs (Article X f))
- in the lead-up to the next and following MOPs, receive and provide to the Advisory Committee each Parties’ information on their implementation of ACAP and particularly their conservation measures (Articles Xj) with VII(1)c))
- receive and circulate to the Parties the Advisory Committee’s report before each MOP

⁴ CMS, Article IV “Migratory Species to be the Subject of Agreements: Appendix II”

3. Parties that are Range States of migratory species listed in Appendix II shall endeavour to conclude Agreements where these should benefit the species and should give priority to those species in an unfavourable conservation status.

4. Parties are encouraged to take action with a view to concluding agreements for any population or any geographically separate part of the population of any species or lower taxonomy of wild animals, members of which periodically cross one or more national jurisdiction boundaries.

- (Article IX(6)e)

• collect and supply to Parties any additional information required by the MOP relevant to the effective functioning of the Agreement

(Articles VIII(10), X j))
- invite MOP attention to matters pertaining to the objectives of the Agreement (Article X e))

.... *Discretion*
- subject to MOP approval, may enter into arrangements with other (relevant international) organisations and institutions (Article XI(3))
- administer

 - Agreement budget
 - Article VII(3) fund, if established

(Article X g))
- Provide information to the general public on the Agreement and its objectives

(Article X h))
- promote the objectives of the Agreement (Article X h))
- may be used by the Parties to draw non-Party attention to its activities which affect the implementation of the Action Plan

(Action Plan, 4.5)