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The Convention on the Conservation of Migratory Species of Wild Animals (The "Bonn Convention")

ABSTRACT

The Bonn Convention aims to protect migratory species. It is intended to work by providing strict protection for certain endangered migratory species and by seeking to persuade states which are host to certain other migratory species (which may not always be endangered) to conclude agreements for their conservation and management. The Convention has considerable potential as a mechanism for the protection of endangered species, but its progress so far has been disappointing. There are still only thirty parties (not nearly enough for the Convention to become effective) and as yet no agreements have been concluded between range states.

"Migration is one of the most fascinating natural phenomena, and it is still a highly mysterious one."

Dr. Klaus Schmidt-Koenig¹

INTRODUCTION

The United Nations Conference on the Human Environment, held in Stockholm in 1972, made a number of recommendations regarding international treaties. One of these, Recommendation 32 of the Action Plan, was that governments should consider the need to enact international conventions and treaties in order to protect species which inhabit international waters or migrate from one territory to another. Recommendation 32 arose out of the realization that migratory species need protection at all stages of their migratory routes in order to maintain or restore their populations. The endangered Siberian crane (*Grus leucogeranus*), for example, is relatively secure in its Russian breeding sites and Indian wintering grounds, but its numbers have steadily declined in recent years primarily because it is hunted on its migratory route through Pakistan and Afghanistan. Many species of North American breeding birds are also thought to be declining, in this case because of deforestation and

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1. K. Schmidt-Koenig, Avian Orientation and Navigation (1979).

the continuing use of DDT and other pesticides in their Central and South American wintering habitats. Furthermore, passerines breeding in Northern Europe run a biannual gauntlet through the Mediterranean region where they are shot and trapped in the thousands as they make their way to and from their African wintering areas. Loss of wetlands in Europe is a serious threat to migratory waterfowl and other water-dependent birds.

As a direct result of Recommendation 32,² the Federal Republic of Germany agreed in 1974 to take the initiative in preparing a draft convention for the conservation of migratory animals and, after several years of negotiation, the Convention on the Conservation of Migratory Species of Wild Animals (the "Bonn Convention")³ was finally concluded on June 23, 1979. Twenty-eight States signed, but the convention did not enter into force until November 1, 1983, being the first day of the third month after the Depositary (the government of the Federal Republic of Germany) had received the fifteenth instrument of ratification, approval, acceptance, or accession.⁴ There are now 30 parties to the convention.⁵ The convention imposes strict obligations for the protection of species in appendix I and requires Range States to conclude further AGREEMENTS, for the conservation of species in appendix II.

The first meeting of the parties, subsequent to the convention coming into force, was held in Bonn in October 1985 (hereinafter called the "Bonn Conference"). The second was held in Geneva in October 1988 (hereinafter called the "Geneva Conference"). A third meeting of the parties will take place in 1991. The Bonn Conference went some way towards making the convention operational. A budget was approved, office facilities for the Secretariat in Bonn were agreed, four groups of species were identified as priority candidates for AGREEMENTS under the convention, and a number of species were added to the convention's

2. It was also felt that the provisions of existing agreements for the conservation and management of migratory animals lacked uniformity and covered only a portion of migratory species which could benefit from international treaties. The Bonn Convention is intended to provide such uniformity and covers the whole spectrum of migratory animals. See, Federal Ministry of Food, Agriculture and Forestry of the Federal Republic of Germany, *Convention on the Conservation of Migratory Species of Wild Animals 95 (1979)* (hereinafter FRG Publication). This publication prints the text of the Convention on the Conservation of Migratory Species of Wild Animals, the names of species included in appendices I and II, the Final Act of the Conference held in 1979 to conclude the Convention, the Summary Record of the Conference, the Second Revised Draft Convention which had been submitted by the Federal Republic of Germany in December 1978, the Rules of Procedure of the Conference, and a number of letters and declarations made by various individuals and organizations.

3. 19 I.L.M. 15 (hereinafter Bonn Convention).

4. As required by art. XVIII(1) of the convention.

5. Benin, Burkina Faso, Cameroon, Chile, Denmark, Egypt, the European Economic Community, Federal Republic of Germany, Finland, Ghana, Hungary, India, Ireland, Italy, Luxembourg, Mali, Netherlands, Niger, Nigeria, Norway, Pakistan, Panama, Portugal, Senegal, Somalia, Spain, Sweden, Tunisia, and the United Kingdom are full Parties. Central African Republic, Chad, France, Greece, Ivory Coast, Jamaica, Madagascar, Malawi, Morocco, Paraguay, Philippines, Sri Lanka, Togo, and Uganda have signed but not yet ratified.

appendices. The Geneva Conference added a few more species to the appendices and directed the Scientific Council to give priority to a global review of the conservation of small cetaceans. Frustrated by the lack of adoption of any AGREEMENTS, the Geneva Conference also agreed that non-legally binding agreements could be concluded as a first step towards more formal AGREEMENTS.

Progress so far has been very slow. Although drafts have been prepared, no AGREEMENTS or even less formal arrangements have been adopted under the auspices of the convention, and the convention cannot yet claim to have been of significant practical value to migratory species conservation. The main problem is that the convention needs to attract many more than 30 parties if it is to have a hope of helping more than a fraction of the world's migratory species which, between them, have migratory routes covering most corners of the earth. Another problem is that a number of countries already have bilateral agreements to protect migratory species and feel they do not need the Bonn Convention in order to take any further cooperative measures with their neighbors which may be required.⁶ It will be difficult for the convention to attract many more parties unless it can prove it can work, yet it will be difficult for the convention to work well without many more parties—a true chicken and egg dilemma. A further difficulty is the poor financial situation of the convention caused by the failure of parties to pay their dues. The Secretariat has been reduced to a staff of one professional and a secretary, and its effectiveness has been seriously hindered by a shortage of funds.

This paper examines the objectives of the Bonn Convention, the definitions of its most important terms, the criteria for including species in the appendices of the convention, the nature of the obligations imposed on parties to protect species in the appendices, the system of administration established by the convention, the decisions made by the first two meetings of the parties, and progress made so far.

OBJECTIVES

The fundamental objective of the Bonn Convention is to protect migratory species. In order to achieve its goal, the convention has two quite distinct sub-objectives.

The first of these is to provide strict protection for species listed in appendix I, which consists of migratory species in danger of extinction throughout all or a significant portion of their range. The convention seeks to protect appendix I species by imposing strict conservation ob-

6. For example, the United States has bilateral migratory bird treaties with Canada, Mexico, Japan, and the USSR. The USSR has bilateral migratory bird treaties with Japan and India, and Japan has one with Australia.

ligations on parties that are "Range States." "Range States" and other important words and phrases used by the convention are defined in the following section.

The second sub-objective is to persuade Range States to conclude "AGREEMENTS" for the conservation and management of appendix II species. Migratory species are eligible for appendix II either if they have an unfavorable conservation status and require international agreements for their conservation or if they have a conservation status which would significantly benefit from international cooperation. Two elements of this sub-objective are noteworthy. Firstly, the convention does not impose direct obligations on Range States to protect appendix II species—it merely requires Range States to conclude further AGREEMENTS for their protection and establishes guidelines as to what these AGREEMENTS should contain. Secondly, a species does not need to be, although it may be, threatened or even potentially threatened with extinction in order to qualify for appendix II. The important criterion is whether or not the species would benefit from the international cooperation that an AGREEMENT would bring.

DEFINITIONS

Range States

Article I(1)(h) of the convention defines a Range State of a migratory species as "any State . . . that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species."

Migratory Species

Article I(1)(a) defines a migratory species as:

the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries.

Four points about this definition are noteworthy:

- i) By allowing geographically separate populations of a species to be considered independently, the Bonn Convention is following a precedent set by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). In the context of CITES the concept has proved extremely useful in enabling a State with a non-endangered, well managed population of a species which is endangered in other States to allow limited exploitation of its population and, conversely, in enabling

States to single out endangered populations of a species for special protection when populations elsewhere are not endangered. Early indications are that the concept will continue to prove useful in the context of the Bonn Convention. Four of the forty original listings in appendix I consist of geographically separate populations of species rather than the species as a whole. They are the North-west African populations of dorcas gazelle (*Gazella dorcas*) and houbara bustard (*Chlamydotis undulata*, Upper Amazon populations of giant river turtles (*Podocnemis expansa*) and non-Peruvian populations of vicuna (*Vicugna vicugna*). The Geneva Conference added the North and Baltic Sea populations of seven small cetaceans to appendix II of the convention.

- ii) Defining a species as migratory if a "significant portion" of its members migrate allows the inclusion of relatively sedentary species in the appendices. For example, adults of the Mediterranean monk seal (*Monachus monachus*) are not migratory, but the species is in appendix I because it is in danger of extinction and "post breeding dispersal of young must regularly involve crossing of national frontiers."⁷
- iii) The Second Revised Draft Convention, which was prepared by the Federal Republic of Germany in December 1978 and was the last formal draft to be considered prior to Final Conference in June 1979 at which the convention was signed, defined migratory species as those whose members "periodically" cross national jurisdictional boundaries.⁸ The intention behind the word "periodically" was to include species living in border areas which might be relatively sedentary but which nevertheless wandered back and forth across national frontiers on a regular basis.⁹ "Periodically" was replaced by the words "cyclically and predictably" in the final version of the convention, and the report of the United States delegation to the Final Conference suggests that species living in border areas should not be considered migratory for the purposes of the convention unless their transboundary movement is in response to seasonal or longer term environmental influences.¹⁰ Initially the parties did not take a very restrictive interpretation. Indeed, at the Final Conference in 1979 it was agreed to include the mountain gorilla (*Gorilla gorilla beringei*) in appendix I. Mountain gorillas live in the border areas of Rwanda, Uganda, and Zaire and regularly cross

7. See FRG Publication, *supra* note 2, at 99 (para. 16) ("Explanatory Notes on Second Revised Draft Convention on the Conservation of Migratory Species of Wild Animals" [hereinafter Explanatory Notes]).

8. FRG Publication, *supra* note 2, at 87 (Second Revised Draft Convention, art. I(1)(a)).

9. See FRG Publication, *supra* note 2, at 95 (para. 2) (Explanatory Notes).

10. See FRG Publication, *supra* note 2, at 95 (para. 2), Report of the U.S. Delegation to the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals 2-4 (Oct. 17, 1979) (available from the Department of State, Washington, D.C.).

national boundaries, but it is not certain whether their crossings are cyclical and predictable.¹¹ The Geneva Conference in 1988 considered the matter further. It recommended that the word "cyclically" should relate "to a cycle of any nature, such as astronomical (circadian, annual . . .), life or climatic, and of any frequency." It also recommended that the word "predictably" implies "that a phenomenon can be anticipated to recur in a given set of circumstances, though not necessarily regularly in time."¹²

- iv) The definition adopted by the Final Conference includes *all* species of migratory animals notwithstanding attempts during the course of negotiations by several countries, including Australia, Canada, Japan, New Zealand, the United States, and the U.S.S.R., to exclude certain marine species, particularly finfish and shellfish, on the grounds that their inclusion could undermine existing and pending international agreements and negotiations.¹³

"Unfavorable" Conservation Status

Article I(1)(d) states that the conservation status of a migratory species will be considered "unfavourable" if any of the following conditions are *not* met:

1. population dynamics data must indicate that the migratory species is maintaining itself on a long-term basis as a viable component of its ecosystems;
2. the range of the migratory species must not be currently reduced, nor likely to be reduced, on a long-term basis;
3. there must be, both now and in the foreseeable future, sufficient habitat to maintain the population of the migratory species on a long-term basis; and
4. the distribution and abundance of the migratory species must approach historic coverage and levels to the extent that potentially suitable ecosystems exist and to the extent consistent with wise wildlife management.

AGREEMENTS

Article I(1)(j) defines an AGREEMENT as "an international agreement relating to the conservation of one or more migratory species as provided for in Articles IV and V of this Convention." Articles IV and V, which are discussed in more detail later in this paper,¹⁴ set out the circumstances

11. *Id.* at 10.

12. Geneva Conference, Res. 2.2.

13. *Id.* at 3, 8, 9. The alliance of Pacific powers on this question provides an interesting illustration of how issues of protection and utilization of natural resources can transcend normal political allegiances. On one working group, the U.S.A. specifically represented the views of the U.S.S.R.!

14. See pp. 990-92 below.

in which AGREEMENTS should be concluded, and establish guidelines as to what each AGREEMENT should contain.

APPENDIX I SPECIES

Listing Criteria

Article III(1) of the Bonn Convention requires that a species be "migratory" and "endangered" as defined by the convention in order to merit inclusion in appendix I. The convention stipulates that a species shall be considered endangered if "reliable evidence, including the best scientific evidence available,"¹⁵ indicates that it is "in danger of extinction throughout all or a significant portion of its range."¹⁶ The fact that a species is still relatively abundant in some areas will not therefore preclude it from being considered "endangered" if it is in danger of extinction elsewhere, provided that the areas where it is endangered are large enough to form a "significant portion of its range." The latter qualification is important because even a very common species may be in danger of extinction on the fringes of its range, and the parties clearly did not intend that such a species should be eligible for appendix I.

There was considerable debate at the Final Conference as to whether or not any species should be included in appendix I at that stage since there had been no opportunity to evaluate "the best scientific evidence available."¹⁷ It was eventually agreed to list a representative sample of forty species consisting of fifteen mammals, twenty birds, four reptiles, and one freshwater fish in order to ensure that the convention had some practical impact as soon as it entered into force. The Bonn Conference in 1985 added a further eleven species to appendix I including three mammals, four birds, and four species of marine turtles.

A species may be removed from appendix I if the Conference of the Parties decides that:

reliable evidence, including the best scientific evidence available, indicates that the species is no longer endangered, and the species is not likely to become endangered again because of loss of protection due to its removal from Appendix I.¹⁸

Conservation Obligations

Regulation of Threats, other than "Taking," to Appendix I Species

Article III(4) states that parties which are Range States of appendix I species "shall endeavour":

15. Bonn Convention, *supra* note 3, at art. III(2).

16. *Id.* at art. I(1)(e).

17. See *supra* note 10, at 3, 10.

18. Bonn Convention, *supra* note 3, at art. III(3).

- a) to conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction;
- b) to prevent, remove, compensate for or minimise, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species; and
- c) to the extent feasible and appropriate, to prevent, reduce or control factors that are endangering or are likely to further endanger the species, including strictly controlling the introduction of, or controlling or eliminating, already introduced species.

The scope of article III(4) is extraordinarily broad. Although it emphasizes loss of habitat, impediments to migration, and the introduction of exotic species as threats to appendix I species which parties should make special efforts to counteract, article III(4)(c) extends to "factors" that are dangerous or potentially dangerous to appendix I species. These articles effectively cover every possible threat.

In order to illustrate what article III(4) actually requires of the parties, the following describes how some appendix I species might be affected by article III(4): The status of the kouprey (*Bos sauveli*), a species of wild cow, is unknown because of years of warfare in the areas of Kampuchea, Laos, and Thailand where it occurs, but it is believed to be critically endangered by loss of its forest habitat and to be likely to survive only if effective sanctuaries are maintained in all three States.¹⁹ If any of the three accede to the convention, article III(4) will oblige them to endeavor to take appropriate measures to set up effective protected areas for this mammal. The survival of two appendix I birds, the cahow (*Pterodroma cahow*) and bald ibis (*Geraniticus eremita*), is threatened primarily by use of pesticides,²⁰ and article III(4) obliges parties that are Range States to endeavor to control this threat. The dark-rumped petrel (*Pterodroma phaeopygia*) is also in appendix I, but it is threatened by the introduction of predators on its breeding grounds in the Galapagos Islands. Consequently, if Ecuador joins the Bonn Convention, it will be under a legal duty to endeavor to eradicate these predators.²¹

The threats to these species would be difficult enough to overcome even if all the Range States were parties to the Bonn Convention and therefore under a legal obligation to try to overcome them. But not one of the Range States of the kouprey, cahow, bald ibis, and dark-rumped petrel is yet a party to the convention! As a result, their inclusion in appendix I is, at the moment, entirely irrelevant.

19. See FRG Publication, *supra* note 2, at 99 (para. 16) (Explanatory Notes).

20. *Id.* at 100.

21. *Id.* at 100. Ecuador has in fact already taken steps to eradicate introduced predators from many of the Galapagos Islands.

It should also be noted that the obligations imposed on parties by article III(4) are not absolute, but are qualified by the word "endeavour." The legal implications of "each Party shall *endeavour* to . . ." as opposed to "each Party *shall* . . ." are not totally clear. J.E.S. Fawcett, a distinguished legal commentator, stated in an article entitled "The Legal Character of International Agreements"²² that:

it is doubtful whether undertakings "to use best endeavours" or "to take all possible measures" can in most cases amount to more than declarations of policy, or of goodwill towards the objects of the agreement.

However, in a case concerning the World Heritage Convention brought before the High Court of Australia, *The Commonwealth of Australia v. The State of Tasmania*,²³ similar issues were argued, and the Court held by a majority of 4-3 that Australia was under a legal obligation to comply with the conservation provisions of the convention notwithstanding that they are prefaced by qualifying words such as "endeavour." Nevertheless, some of the negotiators of the Bonn Convention clearly felt that the word "endeavour" gave them a discretion as to whether or not they complied with article III(4). The Second Revised Draft Convention stated that parties that are Range States of appendix I species *shall* protect habitats etc., and the United States and others fought hard and successfully at the Final Conference to change the text so that it obliged them only to "endeavour" to do these things.²⁴

Regulation of "Taking" of Appendix I Species

In contrast to article III(4), article III(5), which regulates the "taking" of appendix I species, does not preface its provisions with the word "endeavour" or any other such qualifying term. It imposes an unequivocal obligation on parties that are Range States to prohibit "taking" except in a few limited circumstances. Article III(5) states that:

Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species. Exceptions may be made to this prohibition only if:

- a) the taking is for scientific purposes;
- b) the taking is for the purpose of enhancing the propagation or survival of the affected species;
- c) the taking is to accommodate the needs of traditional subsistence users of such species; or
- d) extraordinary circumstances so require.

22. 1953 Brit. Y. B. Int'l L. 391.

23. See *supra* note 10, at 2, 5.

24. 46 A.L.R. 625; 68 I.L.R. 266.

Article III(5) goes on to state that exceptions can be made only if they are "precise as to content and limited in space and time" and that taking pursuant to one of the exceptions "should not operate to the disadvantage of the species." Parties must inform the Secretariat "as soon as possible" of every exception that they allow.²⁵

That the negotiators of the convention were more willing to undertake clear and unequivocal obligations with respect to taking than with respect to habitat protection might be expected since the former do not have such far-reaching implications for agricultural and industrial development as the latter. In addition, many States already have national legislation prohibiting the taking of endangered species (and may therefore feel that article III(5) will not require them to revise their existing legislation), while national legislation providing strict protection for the habitat of endangered species is still relatively rare. Nevertheless, the fact that the convention imposes such a strict duty on parties to prohibit taking is surprising in view of the convention's definition of "taking" which is deemed to include "hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct."²⁶ This very broad definition could have far-reaching implications for parties.

The circumstances surrounding the decline of the Atlantic ridley turtle (*Lepidochelys kempii*), an appendix I species, provide a good example of just how far-reaching article III(5) might be. The Atlantic ridley, like other species of sea turtle, has a propensity to become entangled in fishermen's nets, and the IUCN Amphibia-Reptilia Red Data Book states that the accidental catch of Atlantic ridleys in shrimp trawls "now appears to be the major direct threat to the species with probably several hundred individuals being accidentally caught annually, and drowned or killed aboard trawlers."²⁷ Since the entanglement of turtles in the trawls clearly constitutes "capturing" or "harassing," even if the killing of turtles is deemed not to be "deliberate," it is probably fair to conclude that article III(5) imposes a legal duty on parties that are Range States of the Atlantic ridley to prohibit the use of shrimp trawls in areas where the turtle occurs unless the trawls are fitted with "Turtle Excluder Devices."²⁸ These devices, which are now being used in the United States and elsewhere, release inadvertently captured sea turtles and other large animals through a trap door, while shrimps pass into the end of the trawl.

Further Measures to Benefit Appendix I Species

Article III(6) of the convention expressly authorizes the Conference of the parties to recommend to Range States of an appendix I species "that

25. Bonn Convention, *supra* note 3, at art. III(7).

26. *Id.* at art. I(1)(i).

27. International Union for the Conservation of Nature, The IUCN Amphibia-Reptilia Red Data Book, Part I 201, 204 (1982).

28. *Id.*

they take further measures considered appropriate to benefit the species." Although it is commonplace for a Conference of the Parties to make recommendations which are applicable to all parties to a treaty, it is unusual for such a body to point a finger in public at an individual party or a group of parties and recommend that it, or they, should take certain specific actions. The provision illustrates, at least theoretically, an interesting willingness by the parties to accept an unusual degree of outside interference in their domestic activities in order to promote the conservation of an endangered species. However, article III(6) has not yet been used in practice.

APPENDIX II SPECIES

Listing Criteria

To merit inclusion in appendix II, a species must either have an "unfavourable conservation status" and require "an international agreement for its conservation and management" or have "a conservation status which would significantly benefit from the international cooperation that could be achieved by an international agreement."²⁹ Therefore, the most important criterion for listing a species in appendix II is whether or not it will benefit from international cooperation rather than whether or not it is currently or potentially in danger of extinction. All phalaropes (*Phalaropodidae spp.*), for example, are in appendix II because they have exceptionally long migratory routes and would obviously benefit from international cooperation in their conservation—notwithstanding that the survival of most species of phalarope is neither currently nor even potentially in danger.

Since appendix II is so different in outlook to appendix I, the same species may be listed in both appendices for entirely different reasons. The Atlantic ridley turtle, for example, is in appendix I because it is migratory and in danger of extinction. It is also in appendix II because its conservation status would benefit from international cooperation. However, not all appendix I species will qualify for inclusion in appendix II. The dark-rumped petrel is in appendix I because it is an endangered migratory species, but it will not qualify for appendix II because its threatened status is due to introduced predators and loss of suitable breeding habitat in the Galapagos Islands.³⁰ This is purely a local problem, and an international agreement to protect the petrel along all stages of its migratory route would do nothing to enhance its prospects of survival.

The Final Conference agreed to include a representative sample of species in appendix II. Only seven mammals, one freshwater fish, and one insect were chosen, but all sea turtles, falcons, accipiters, and cranes, together with numerous other reptiles and birds, were listed. The Bonn

29. *Id.* at art. IV(1).

30. See FRG Publication, *supra* note 2, at 100 (para. 16) (Explanatory Notes).

Conference in 1985 added a number of other species including European populations of bats in the genera *Rhinolophidae* and *Vespertilionidae*. It also added Baltic populations of grey seal (*Halichoerus grypus*), Baltic and Wadden Sea populations of harbour seal (*Phoca vitulina*), and seven species of birds. In 1988, the Geneva Conference added North and Baltic Sea populations of seven small cetaceans to appendix II.

The convention provides no criteria for removing species from appendix II, presumably because the capacity of a species to benefit from international cooperation is unlikely to change even if its conservation status improves.

Obligations to Conclude AGREEMENTS

The convention's approach to the protection of species in the two appendices varies enormously. In contrast to the direct conservation obligations imposed on parties which are Range States of appendix I species, the convention requires parties which are Range States of appendix II species to endeavor to conclude "AGREEMENTS" amongst themselves where this would benefit the species, and to give priority to appendix II species in an unfavorable conservation status.³¹

There are a number of mandatory conditions which each AGREEMENT must fulfill. The object of each AGREEMENT "shall be to restore the migratory species concerned to a favourable conservation status or to maintain it in such a status," and each AGREEMENT "should deal with those aspects of the conservation and management of the migratory species concerned which serve to achieve that object."³² Each AGREEMENT should cover the whole range of the species concerned, be open to accession by all Range States whether or not they are parties to the convention,³³ and deal wherever possible with more than one migratory species.³⁴ Each AGREEMENT should also identify the species covered,³⁵ describe the range and migratory route of the species,³⁶ require each party to designate a national authority with responsibility for implementing the AGREEMENT,³⁷ set up an administrative organization to monitor the effectiveness of the AGREEMENT,³⁸ and establish procedures for the settlement of disputes.³⁹ AGREEMENTS concerning the Order Cetacea should prohibit any taking that is not permitted under other multilateral agreements,

31. Bonn Convention, *supra* note 3, at art. IV(3).

32. *Id.* at art. V(1).

33. *Id.* at art. V(2).

34. *Id.* at art. V(3).

35. *Id.* at art. V(4)(a).

36. *Id.* at art. V(4)(b).

37. *Id.* at art. V(4)(c).

38. *Id.* at art. V(4)(d).

39. *Id.* at art. V(4)(e).

notably the International Convention for the Regulation of Whaling, and should be open to accession by States other than Range States.⁴⁰ The latter are not normally permitted to accede to AGREEMENTS, and the reason for the exception in the case of whales was probably to bring the Bonn Convention into line with the International Convention for the Regulation of Whaling which is open to landlocked non-whaling States. Also, the Secretariat must be provided with a copy of each AGREEMENT.⁴¹

In addition to the above requirements, article V(5) of the Bonn Convention suggests 14 different aspects of conservation and management which should be covered by each AGREEMENT "where appropriate and feasible." These include a periodic review of the conservation status of the species concerned, the identification of factors which might be harmful to that status, the taking of appropriate action against harmful factors, the maintenance of a network of suitable habitats along migration routes, the exchange of information, and the education of the public on the contents and objectives of the AGREEMENT.

The system of AGREEMENTS established by the convention is an interesting one, but it faces two potentially serious problems. The first of these problems is time. Parties were obliged to protect appendix I species as soon as the convention entered into force, but appendix II species will receive no protection under the convention until further AGREEMENTS are concluded and themselves come into force—a process which has already taken several years for species identified as priority subjects for AGREEMENTS. However, to date none have yet been concluded. The process could take several decades for the rest. The second problem is to persuade the Range States of an appendix II species to accede to an AGREEMENT which is tough enough to ensure that they take the measures needed to counteract the threats to that species. If an AGREEMENT is negotiated so as to be acceptable to all Range States, its provisions will inevitably be diluted to a level which the least conservation-oriented Range State is willing to accept. Yet if the most conservation-oriented Range States conclude an AGREEMENT with strongly protectionist provisions, other Range States may decide not to accede and portions of the relevant migratory route will therefore remain outside the scope of the AGREEMENT.

Obligations to Conclude AGREEMENTS

In addition to the provisions of the convention concerning AGREEMENTS, article IV(4) encourages parties to conclude "agreements" (spelled

40. *Id.* at art. V(4)(f).

41. *Id.* at art. IV(5).

in ordinary letters to differentiate them from AGREEMENTS)⁴² “for any population or any geographically separate part of the population of any species or lower taxon of wild animals, members of which periodically cross one or more national jurisdictional boundaries.” At first sight, article IV(4) is rather confusing because its provisions appear so similar to those relating to AGREEMENTS, but there are some differences. “Agreements” under article IV(4) cover a wider variety of species than AGREEMENTS since they encompass any population of any species whose members periodically cross one or more national boundaries. This might include species not listed in appendix II or even species that are not considered “migratory” as defined by the convention.⁴³ The purpose of article IV(4) is to encourage parties to conclude agreements to protect species which would benefit from international cooperation in situations where for some reason the species has not yet been listed in appendix II or does not technically qualify for appendix II.

AGREEMENTS to Date

The first meeting of the Conference of the Parties to the Bonn Convention, in Bonn in October 1985, identified four species and groups of species for which AGREEMENTS should be developed. They were European species of bats, the white stork (*Ciconia ciconia*), Western Palearctic ducks and geese, North and Baltic Sea populations of harbour porpoise (*Phocaena phocaena*), and bottlenose dolphin (*Tursiops truncatus*).⁴⁴

Progress on the AGREEMENTS has been very slow. Draft AGREEMENTS on European bats, white stork, and North and Baltic Sea populations of small cetaceans have been prepared. An international conference was even held in London in 1987 to discuss the draft European bat AGREEMENT. However, so far no agreements have been concluded.

One obstacle has been the apparent need for AGREEMENTS to go through a formal ratification process, and a number of countries have expressed reservations about the prospect of asking their Parliaments to go through the full treaty ratification exercise for an AGREEMENT on European bats or white storks. The Geneva Conference agreed that parties should consider less formal administrative arrangements or memoranda

42. The published text of the Bonn Convention contains an important misprint because it prints “agreements” in article IV(4) as “AGREEMENTS.” This misprint was acknowledged in a Note Verbale from the Ministry of Foreign Affairs of the Federal Republic of Germany to signatory governments dated Jan. 28, 1982. The Geneva Conference formally acknowledged that the word “agreement” in article IV(4) should be written in lower case letters (Res. 2.2).

43. The wider application of the word “periodically” compared to the words “cyclically and predictably” is discussed on pp. 983–84.

44. See Proceedings of the First Meeting of the Conference of the Parties 50 (UNEP, 1985) (Bonn Conference, Res. 1.6).

of understanding as a first step prior to the conclusion of an AGREEMENT.⁴⁵ This should facilitate progress, but still no AGREEMENTS or even informal memoranda of understanding have yet been adopted.

RANGE STATES

The convention requires the parties to inform the Secretariat as to which species in the appendices they consider themselves to be the Range States of, and they must also provide the Secretariat with information on any of their flag vessels which are taking or planning to take specimens of species in the appendices outside national jurisdictional limits.⁴⁶ At least six months prior to each ordinary meeting of the Conference of the Parties, parties should inform the Secretariat of measures that they are taking to implement the convention in relation to species of which they are Range States,⁴⁷ and the Secretariat is required to maintain an up-to-date list of Range States.⁴⁸

ADMINISTRATION

The Conference of the Parties

Article VII establishes the Conference of the Parties as the decision-making body of the convention and sets out its powers and functions. It is modeled closely on the corresponding provisions in CITES.

The Conference of the Parties was required to meet not later than two years after the convention came into force, and it must meet at least every three years from now on.⁴⁹ The responsibilities of the Conference of the Parties include the establishment and review of the financial regulations of the convention and the adoption of a budget for the following financial period at each of its ordinary meetings.⁵⁰ Its decisions are normally arrived at by a two-thirds majority of parties present and voting,⁵¹ but in relation to financial regulations, including the scale of each party's contribution to the budget, they must be unanimous.⁵² The Conference of the Parties is also responsible for reviewing implementation of the convention at each of its meetings. The exact nature of the review is flexible, but article VII recommends that matters under review should include the status of listed and unlisted migratory species, the progress made towards their

45. Geneva Conference, Res. 2.6.

46. Bonn Convention, *supra* note 3, at art. VI(2).

47. *Id.* at art. VI(3).

48. *Id.* at art. VI(1).

49. *Id.* at art. VII(2), (3). Art. VII(3) authorizes extraordinary meetings to be held at any time on the written request of at least one-third of the parties.

50. Bonn Convention, *supra* note 3, at art. VII(4).

51. *Id.* at art. VII(7).

52. *Id.* at art. VII(4).

conservation particularly under any AGREEMENTS, and reports submitted by the parties, the Scientific Council, the Secretariat or any other such body. Article VII also suggests that the Conference of the Parties should make recommendations on ways of improving the conservation status of listed and unlisted migratory species and the effectiveness of the convention in any other respect.⁵³ Each meeting of the Conference of the Parties is responsible for determining its own rules of procedure.⁵⁴

Like CITES, the Bonn Convention allows representatives of a wide variety of organizations to attend meetings of the Conference of the Parties as observers who may participate in the proceedings but may not vote. The United Nations, its Specialized Agencies, the International Atomic Energy Authority, and non-Party States are automatically entitled to be represented in this capacity.⁵⁵ International agencies or bodies, national governmental agencies or bodies, and "national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located" may also be represented by observers provided that they have informed the Secretariat of their desire to be so represented and that they are "technically qualified in protection, conservation and management of migratory species," unless at least one-third of the parties present at the meeting object.⁵⁶ Five intergovernmental organizations, eleven international non-governmental organizations, and fifteen national non-governmental organizations were represented at the Bonn Conference in 1985. Fifteen intergovernmental and non-governmental organizations were present at the Geneva Conference in 1988.

The Scientific Council

Article VIII(1) required the first meeting of the Conference of the Parties to establish a Scientific Council in order to provide advice on scientific matters. Each party may appoint a qualified expert to be a member of the Council, and the Conference of the Parties may itself add others. The number of experts, the criteria for their selection, and their terms of appointment are matters for decision by the Conference of the Parties.⁵⁷

The Second Revised Draft Convention envisaged the Scientific Council as a largely autonomous body.⁵⁸ However, the final version of the convention places the Council firmly under the control of the Conference of the Parties, which has absolute power to determine when the Council

53. *Id.* at art. VII(5).

54. *Id.* at art. VII(7).

55. *Id.* at art. VII(8).

56. *Id.* at art. VII(9).

57. *Id.* at art. VIII(2). See further p. 996 below.

58. See FRG Publication, *supra* note 2 (Second Revised Draft Convention, art. VIII(7)).

meets⁵⁹ and precisely what its functions will be,⁶⁰ although the convention does make some suggestions as to what these functions might be. The suggested functions include: providing scientific advice to the Conference of the Parties; recommending, coordinating, and evaluating research into the conservation status of migratory species and reporting the results to the Conference of the Parties; recommending additions to appendices I and II; recommending specific conservation and management measures to be included in AGREEMENTS; and recommending "solutions to problems relating to the scientific aspects of the implementation of this Convention, in particular with regard to the habitats of migratory species."⁶¹ The advisory nature of the Scientific Council is not unusual, but the decision to prevent the Council from taking any initiative with respect to its own activities indicates that some States were concerned lest it might become involved in issues which were scientifically interesting but politically undesirable.⁶²

The Secretariat

Article IX established a Secretariat whose funding arrangements and functions are very similar to those of the CITES Secretariat.

The United Nations Environment Programme (UNEP) originally financed the CITES Secretariat and agreed to do the same for the Secretariat of the Bonn Convention⁶³ on the understanding that the parties would take over this responsibility four years after the convention entered into force.⁶⁴ The Federal Republic of Germany carried out interim Secretariat functions until the convention came into force, and now provides office space for the Secretariat in Bonn as an additional contribution over and above its required share of the budget. The Secretariat is now administered by UNEP but funded by the parties.

Article IX(4) of the convention sets out twelve specific duties for the Secretariat which include arranging and servicing meetings of the Conference of the Parties and of the Scientific Council, acting as a liaison between the parties, disseminating relevant information received from the Council and other such bodies, publishing lists of Range States of species in appendices I and II, promoting the conclusion of AGREEMENTS and maintaining a list of those in force, preparing reports for meetings of the Conference of the Parties and publishing their recom-

59. Bonn Convention, *supra* note 3, at art. VIII(3).

60. *Id.* at art. VIII(5).

61. *Id.*

62. The U.S.A. was one such country. See *supra* note 10, at 6.

63. Bonn Convention, *supra* note 3, at art. IX(2).

64. See FRG Publication, *supra* note 2, at 158-59 ("Address by the Executive Director of UNEP to the Final Conference").

mendations, providing the public with information on the convention, and performing "any other function" entrusted to it by the Conference of the Parties.

FIRST MEETING OF THE CONFERENCE OF THE PARTIES: THE BONN CONFERENCE

The Bonn Conference was the first meeting of the Conference of the Parties and was held in Bonn in October 1985, just less than two years after the convention entered into force.

The Bonn Conference established a Standing Committee to act on behalf of the Conference of the Parties between meetings, to monitor execution of the Secretariat's budget, and to carry out a number of other functions.⁶⁵ Most importantly, the Committee agreed to a budget for the 1986-88 period and to a scale of contributions which closely reflects the UN scale. It was agreed to set up a Trust Fund, administered by UNEP, into which parties would pay their contributions.⁶⁶ However, less than 50 percent of the \$480,000 due from parties in the 1986-88 triennium has been received.⁶⁷ The situation has improved slightly since then. Over \$200,000 out of a budget of \$308,000 for the year 1989 has so far been received. However, Italy has never paid a penny, a serious blow since Italy is supposed to contribute some 16 percent of the budget. The Secretariat has had to reduce its staff to one professional and one secretary, and financial constraints have seriously hampered its ability to promote the convention.⁶⁸

As required by article VIII(1) of the convention,⁶⁹ the Bonn Conference established a Scientific Council, determined principles for its composition and procedure, made guidelines for its functioning and directed it to undertake a number of tasks. These tasks included assisting in the development of AGREEMENTS, reviewing the existing lists of species in the appendices of the convention, and making recommendations for the addition of further species to the appendices.⁷⁰ The Bonn Conference also directed the Secretariat, in consultation with the Scientific Council, to set up a working group on small cetaceans.⁷¹ Finally, the Bonn Conference made a number of additions to appendices I and II.⁷²

65. See *supra* note 44, at 33-35 (Bonn Conference, Res. 1.1).

66. See *supra* note 44, at 36-43 (Bonn Conference, Res. 1.2).

67. Judith Johnson, Secretary General, Bonn Convention Secretariat, *pers comm.*

68. *Id.*

69. See p. 15 above.

70. See *supra* note 44, at 45-46 (Bonn Conference, Res. 1.4).

71. See *supra* note 44, at 51 (Bonn Conference, Res. 1.7).

72. See *supra* note 44, at 28-29.

SECOND MEETING OF THE CONFERENCE OF THE PARTIES: THE GENEVA CONFERENCE

The Geneva Conference was held in Geneva in October 1988. A number of the Conference's decisions have already been referred to: the addition of seven small cetaceans to appendix II, the encouragement of less formal agreements under article IV(4) of the convention as a first step towards more formal AGREEMENTS, and guidance on the interpretation of the phrase "cyclically and predictably."

The Conference produced several other decisions as well. It directed the Scientific Council to give priority to a global review of the conservation status of small cetaceans, including freshwater species. The objective was to enable parties to prepare proposals for additions to appendix II in time for consideration at the next Conference of the Parties in 1991. It also instructed the Secretariat and Standing Committee to do what they can to facilitate AGREEMENTS for small cetaceans.⁷³ The global review is now under way and, as already mentioned, a draft small cetaceans AGREEMENT has been prepared for Baltic and North Sea populations. However, it still remains some way from adoption.

The Conference agreed on administrative arrangements for any AGREEMENTS under article IV(3), and agreements under article IV(4) of the convention (assuming some are eventually concluded).⁷⁴ It also re-established the Standing Committee with detailed instructions on its terms of reference, composition, voting procedures, budgetary arrangements, among other things.⁷⁵

Finally, the Conference adopted a more ambitious budget of \$308,000 for 1989, \$367,000 for 1990, and \$607,000 for 1991.⁷⁶ However, the failure of some parties to pay their dues has meant that the increased Secretariat staff envisaged in the budget has been unable to materialize, and the Secretariat has been unable to promote the convention as vigorously as the Geneva Conference clearly hoped it would.

FINAL CLAUSES

Most of the final clauses of the Bonn Convention are standard, and many are similar to their counterparts under the CITES Convention. Procedures for amending the appendices, for example, are almost identical to the amendment procedures under CITES. Proposals for amendment may be made by any party,⁷⁷ must be submitted to the Secretariat for

73. Geneva Conference, Res. 2.3.

74. *Id.* at Res. 2.7.

75. *Id.* at Res. 2.5.

76. *Id.* at Res. 2.4.

77. Bonn Convention, *supra* note 3, at art. XI(2).

circulation to the parties at least 150 days before the meeting of the Conference of the Parties at which they will be considered,⁷⁸ require a two-thirds majority of parties present and voting to be adopted,⁷⁹ and will enter into force 90 days after the meeting for all parties except those that notify the Depository in writing that they are making a reservation.⁸⁰ Proposed amendments to other parts of the convention must undergo similar procedures except that they will only enter into force for those parties who specifically accept them.⁸¹ The Bonn Convention does not allow parties to make general reservations to its provisions,⁸² but they may make a specific reservation with respect to the inclusion of a species in appendix I or II, provided that the reservation is made at the time of the party's ratification, acceptance, approval or accession, or within 90 days of the species being added to or deleted from either appendix.⁸³ Reservations may be withdrawn by written notice to the Depository at any time.⁸⁴

The procedures of the convention for the settlement of disputes are identical to those under CITES, requiring that disputes be settled by negotiation or, if negotiation fails and the disputing parties consent, by arbitration.⁸⁵ The Second Revised Draft Convention would have allowed a party to a dispute to force all parties to the dispute to accept arbitration,⁸⁶ but this was changed at the Final Conference. The convention is subject to ratification, acceptance, or approval by the 22 states who signed before June 22, 1980, and to accession by those who did not.⁸⁷ It is also subject to accession by "any regional economic integration organisation" such as the European Economic Community.⁸⁸

Article XII deals with a number of points concerning other treaties and national legislation. Article XII(1) provides that nothing in the Bonn Convention shall prejudice the development of the law of the sea or the nature and extent of coastal and flag State jurisdiction. This disclaimer was particularly important to maritime powers which were anxious that nothing should prejudice their positions in the long and complex negotiations being held at that time for an international agreement on exploitation of the living and non-living resources of the sea.⁸⁹ Article XII(2)

78. *Id.* at art. XI(3).

79. *Id.* at art. XI(4).

80. *Id.* at art. XI(5).

81. *Id.* at art. X(5).

82. *Id.* at art. XIV(1).

83. *Id.* at art. XIV(2).

84. *Id.* at art. XI(6).

85. *Id.* at art. XIII(3).

86. FRG Publication, *supra* note 2 (Second Revised Draft Convention, art. XII(2)).

87. Bonn Convention, *supra* note 3, at art. XVI and XVII.

88. *Id.* at art. XVII. The EEC has already acceded to the convention.

89. The Law of the Sea Convention (1982) was finally signed by 119 States in December 1982, although a number of the wealthier maritime States were not among the signatories.

provides that the convention "shall in no way affect the rights or obligations of any Party deriving from any existing treaty, convention or agreement." This kind of clause is not uncommon in conservation conventions, but it represents a considerable change from the Second Revised Draft Convention which would have encouraged the Conference of the Parties to review existing agreements relevant to migratory species to see if their provisions conformed with the standards required for an AGREEMENT under the Bonn Convention, and to indicate the appropriate action to be taken if they did not so conform.⁹⁰ Article XII(2) is significant because it should allay any fears that a non-Party may have that its accession to the Bonn Convention will require it to re-open existing agreements for further negotiation. Under the text of the convention that was finally adopted, such fears are no longer valid.

Finally, article XII(3) permits the parties to adopt stricter domestic measures for the conservation of migratory species than are required by the convention, a provision which is also found in several other treaties concerned with the conservation of wildlife.

CONCLUSION

The Bonn Convention is particularly interesting for three reasons: it covers an unusually broad range of threats to the survival of appendix I species; its provisions are unusually rigorous in their restrictions on the taking of appendix I species; and there is no precedent in international wildlife law for the system of AGREEMENTS set up to help migratory species which would benefit from international cooperation in their conservation and management.

There is no doubt that with enough parties and enough political will, the convention has the potential to be of considerable value to a large number of species which are not adequately protected by existing international agreements. Marine turtles are just one example of migratory species which are gravely threatened by overexploitation and disturbance of their nesting sites, which receive only limited protection from other wildlife treaties, and which could benefit significantly from the international cooperation with respect to their conservation and management that an AGREEMENT might stimulate. Migratory birds in South America, Africa, and Southern Asia also badly need this kind of international cooperation in order to close the gap in the existing network of migratory bird treaties.⁹¹

However, as was pointed out in the introduction, before the Bonn Convention has any significant practical effect, it is essential that many more countries become parties to it. Appendix I species will gain nothing

90. FRG Publication, *supra* note 2 (Second Revised Draft Convention, art. XI(2)).

91. See *supra* note 6.

from being listed under the convention unless their Range States become parties, and although AGREEMENTS are open to Range States that are non-Parties, there is little likelihood of effective AGREEMENTS being concluded for the benefit of appendix II species unless a significant portion of their Range States are parties.

Disappointment must also be expressed that not one single AGREEMENT has yet been concluded in the six years that the convention has now been in force. In addition, implementation of the provisions of the convention requires money and technical expertise, and developing countries may be unwilling to take on the obligations of the convention unless there is the prospect of external financial assistance to help them carry out those obligations. Recognizing this, a resolution on assistance to developing countries was appended to the Final Act of the Conference at which the convention was signed in 1979.⁹² It urges appropriate organizations to give priority to the conservation and management of migratory species and their habitats in developing countries, and urges party governments to "promote" such assistance.

The Bonn Convention is still in its early days, and it would be wrong to dismiss it at this stage. It has to be said, however, that the convention has been of little value so far to migratory species conservation, and there is not much prospect of it becoming of significant value in the near future. If I were a migratory species and I were depending on the Bonn Convention for my future survival, I would quickly move to a nice protected area and stay there. Migration is a dangerous game, and the Bonn Convention has not yet made it any safer.

92. See FRG Publication, *supra* note 2, at 36.