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Tuula Honkonen and Ed Couzens (editors)

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Foreword

The papers in the present *Review* are based on lectures given during the eighth University of Eastern Finland[1] – UNEP Course on International Environmental Agreements. It was held from 4 to 16 September 2011 at the Asian Institute of Technology, Bangkok, Thailand.

Previous courses have been held in Joensuu (2004, 2005, 2007, 2010), in South Africa (2006, 2008), and at the UNEP headquarters in Kenya (2009). The proceedings of those courses have been published in the previous Course *Reviews*.[2]

The aim of the Course is to equip present and future negotiators of multilateral environmental agreements with the information and experiences of others in the area of international environmental law-making in order to improve the impact and implementation of these key treaties.

In addition, others such as representatives of non-governmental organizations and the private sector may apply and be selected to attend the Course. Researchers and academics in the field are also eligible. Altogether 33 participants from 29 developed and developing countries and with due respect to gender participated in the eighth Course.

The Course also serves as a forum for fostering cooperation between developed and developing country negotiators; and for taking stock of recent developments in the negotiation and implementation of multilateral environmental agreements and diplomatic practices in this field. The ultimate aim of the Course is to improve environmental negotiation capacity and governance worldwide.

We would like to express our thanks to all of those who contributed to the successful outcome of the eighth Course including the lecturers and authors who converted their presentation into paper form in order to compile the *Review*. In addition, we would like to thank Tuula Honkonen and Ed Couzens for the skilful and dedicated editing of the *Review*, and the members of the Editorial Board for providing guidance throughout this process.

Professor Perttu Vartiainen
Rector of the University of
Eastern Finland

Achim Steiner
UN Under Secretary General and
UNEP Executive Director

[1] Please note that the University of Joensuu is now the University of Eastern Finland.

[2] For electronic versions of the 2004, 2005, 2006, 2007, 2008, 2009 and 2010 *Reviews* please see the University of Eastern Finland – UNEP Course on International Law-making and Diplomacy website, <http://www.uef.fi/unep>.

Editorial preface

The lectures given on the eighth annual University of Eastern Finland[3] – United Nations Environment Programme (UNEP) Course on Multilateral Environmental Agreements, from which most of the papers in the present *Review* originate, were delivered by experienced diplomats, government officials and members of academia.[4] One of the main purposes of the Course is to take advantage of the practical experiences of experts working in international environmental law-making and diplomacy – both to educate the participants on each Course and to contribute to knowledge and research through publication in the present *Review*. As such, the papers in this *Review* and the different approaches taken by the authors reflect the diverse professional backgrounds of the lecturers, resource persons and participants (some of whom are experienced diplomats in their own right). Overall, the papers in the *Review*, while generally focused on a particular theme, represent various aspects of the broad and complex field of international environmental law-making and diplomacy.

The current *Review* is intended to provide practical guidance, professional perspective and historical background to decision-makers, diplomats, negotiators, practitioners, researchers and stakeholders working in the area of international environmental law-making and diplomacy specifically related to environmental governance. The *Review* aims to elucidate different approaches, doctrines and techniques in the field, including international environmental compliance and enforcement, international environmental governance, international environmental law-making, environmental empowerment, and the enhancement of sustainable development generally.

The first, second, fourth and seventh Courses were hosted by the University of Eastern Finland, in Joensuu, Finland – an area in which forests and water provide abiding and dominant images, and in which dramatic seasonal changes provide an ever-present reminder of how dominant an aspect of life climate can be. The special themes of the first two Courses were 'Water' and 'Forests'. The third Course was hosted by the University of KwaZulu-Natal, on its Pietermaritzburg campus in KwaZulu-Natal, South Africa. KwaZulu-Natal is an extremely biodiversity-rich area, both in natural and cultural terms, and the chosen special theme was therefore 'Biodiversity'. The fourth Course, which returned to Finland, had 'Chemicals' as its special theme. The chosen focus was appropriate considering the important role Finland has played in international chemicals management. The fifth course focused on 'Oceans' as its special theme, and was again held in the coastal province of Kwa-

[3] It is to be noted that the University of Joensuu merged with the University of Kuopio on 1 January 2010 to constitute the University of Eastern Finland. Consequently, the University of Joensuu – UNEP Course has been renamed the University of Eastern Finland – UNEP Course. The Course activities concentrate on the Joensuu campus of the new university.

[4] General information on the University of Eastern Finland – UNEP Course on International Environmental Law-making and Diplomacy is available at <http://www.uef.fi/unep>.

Zulu-Natal in South Africa, on the Pietermaritzburg campus of the University of KwaZulu-Natal. The sixth Course was held in Nairobi and at Lake Naivasha in Kenya – with UNEP as the host, it was fitting to have 'Environmental Governance' as the special theme. The seventh Course returned to Finland with 'Climate Change' as its special focus, or theme. The eighth Course was held in Bangkok, Thailand,[5] and its focused theme – which is therefore the subject of the present *Review* – was 'Synergies Among the Biodiversity-Related Conventions'.

The organizers of the Course, and the editorial board and editors of this *Review*, believe that the ultimate value of the *Review* lies in its making a contribution to knowledge and learning in the field of international environmental negotiation and diplomacy. The papers contained in the *Review* are in most cases based on lectures or presentations given during the Course, but take their subject matters further as the authors explore their ideas. In particular, the *Review* has been proud to receive ongoing contributions through the various editions – meaning that the same writer has contributed several papers and, in many cases, thereby been able to focus and develop their own ideas – of persons who have been involved in some of the most important environmental negotiations in the past several decades. Publication of these contributions means that the experiences, insights and reflections of these environmental leaders and insightful analysts are now recorded and disseminated, where they might not otherwise have been committed to print. The value of these contributions cannot be overstated. In addition, an ongoing feature of the *Review* has been the publication of papers by Course participants – these papers undergo the same editorial process as do the papers by lecturers (which process includes careful scrutiny and research by the editors, numerous rewrites, and approval for publication only after consideration by the Board).

How many environmental agreements there are is uncertain. The International Environmental Agreements Database Project run by the University of Oregon[6] suggests that, as at February 2012, there are over 1 100 multilateral environmental agreements (MEAs); over 1 500 bilateral environmental agreements (BEAs); and over 250 'other' environmental agreements (OEAs). Broken down further, the Database Project suggests that there are 1 154 MEAs, 1 573 BEAs and 247 OEAs; and also 209 multilateral environmental non-binding agreements, 204 bilateral environmental non-binding agreements and 98 other (non-multi, non-bi) environmental non-binding agreements.[7]

The potential difficulties caused by this profusion are multiple – and perhaps even exponential – in nature; and are significantly exacerbated by certain of the ways in

[5] The Course was held on the Bangkok campus of the Asian Institute of Technology (AIT).

[6] See IEA Database Project, available at <http://iea.uoregon.edu/page.php?file=home.htm&query=static> (visited 6 October 2012).

[7] See IEA Database Project, 'Environmental instruments currently in the database', 1 February 2012, available at <http://iea.uoregon.edu/page.php?query=home-contents.php> (visited 6 October 2012).

which the nature of international environmental agreements have changed in recent decades. In respect of this change, Bodansky has written that the 'most recent phase in international environmental law … involves much more complex environmental problems such as dealing with the impacts of climate change and protecting biological diversity, whose solutions may require fundamental economic and social changes rather than relatively simple pollution-prevention fixes'.[8]

Strongly arguably, there has also been a concomitant change in states' collective understanding of how the fundamental principle of state sovereignty operates in international law. In this regard, while states continue to iterate the position reflected in Principle 21[9] of the Stockholm Declaration[10] it has become apparent that the position of insisting on autonomy and complete rights of sovereignty is simply unworkable in an increasingly interconnected world. This shift is reflected in the difference between older MEAs, such as the 1971 Ramsar Convention,[11] which leaves implementation entirely to state Parties, requires very little by way of monitoring and reporting, and has only the most rudimentary compliance measures to offer,[12] and more recent MEAs with sophisticated monitoring and compliance mechanisms.[13]

For further contrast, vide the International Convention for the Regulation of Whaling (ICRW)[14] of 1946, which elderly agreement contains no dispute-breaching mechanism whatsoever. Possibly this is because the Parties to the original agreement simply did not foresee any possibility of their being in major disagreement in the future; more likely the state of development of international agreements at the time[15] was not conducive to anything but exaggerated respect for state sovereignty.

Party practice certainly seems to be changing in this regard, consider for example the actions of the Chair of the 16th Conference of the Parties to the United Nations

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8 Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2010) 31.

9 Principle 21 reads:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

10 Declaration of the United Nations Conference on the Human Environment (UNCHE), Stockholm, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1973), 11 *International Legal Materials* (1972) 1416.

11 Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <http://www.ramsar.org>.

12 Such as listing on the Montreaux Record of Wetlands in Danger, as a means of embarrassing Parties into compliance.

13 Such as those under the Climate Change regime: the United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <http://unfccc.int>; and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22.

14 International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946, in force 10 November 1948, 161 *United Nations Treaty Series* 72.

15 The Convention was in fact based on earlier regulatory efforts from 1931 and 1937.

Framework Convention on Climate Change[16] who in December 2010 refused to allow the clear objection of a single state Party, Bolivia, to prevent her from declaring that there was consensus on a decision.[17] This would have been unimaginable in 1946.

It seems that states Parties are now realizing that there must be more control by the whole over the process, and that individual states consequently should have less individual powers. That this still requires individual states to choose to give these powers over to the whole is probably less and less true, as states become ever more bound to each other and their affairs become ever more interconnected.

Not only are the issues more complex, there are also many more parties now than ever before. States are still the primary actors, but there are many more actors than there ever used to be. Significant actors include, in no particular order, intergovernmental organizations, civil society, multinational corporations/big business, academics and social commentators, nongovernmental organizations in multiple guises, indigenous peoples, and so forth. Even within states themselves, there is even now a quite bewildering array of negotiating alliances and voting blocks with regional or economic or common interest ties – many of these have overlapping mandates and many states belong to more than one.[18]

One significant response, from the drafters of MEAs, to these changes has been to move away from single-issue treaties and from the expectation that the mere fact of the creation of an agreement will have the desired impact on the problem concerned. Rather, such negotiating parties are now building into agreement texts requirements for ongoing monitoring and regular, and detailed, reporting commitments. Together with these come necessary and varied commitments for states, ranging from duties regularly to collect and collate often highly technical information on multifarious aspects of their environmental performances for report-backs to ever more numerous MEA Secretariats; to duties to appoint trained and skilled officials to perform various technical duties required by MEA texts; to obligations to attend ever more and more international meetings, with corollary expenses and the need for more and more trained representatives.

Along with these issues would seem to be increasing understanding that attempting to protect biological diversity through stand-alone, single-issue conventions is

[16] And the 6th COP/MOP to the Kyoto Protocol.

[17] See, for instance, Earth Negotiations Bulletin, 'Summary of the Cancun Climate Change Conference: 29 November to 11 December 2010', 13 December 2010, available at <http://www.iisd.ca/vol12/enb12498e.html> (visited 6 October 2012). Bolivia objected, but has not since taken the matter further and participated in the next COP, in November–December 2011.

[18] On the proliferation of actors, see, for instance, Elizabeth Mrema and Kilaparti Ramakrishna, 'The Importance of Alliances, Groups and Partnerships in International Environmental Negotiations' in Tuula Honkonen and Ed Couzens (eds), *International Environmental Law-making and Diplomacy Review 2009* (University of Eastern Finland – UNEP Course Series 9, 2010) 183–193.

doomed to failure – the Convention on Trade in Endangered Species of Wild Fauna and Flora (CITES),[19] for example, deals only with a single aspect of management of biological diversity (ie: trade in endangered species) and it cannot be hoped that on its own it can offer complete protection.[20] The treaty needs to have the support of other treaties, particularly those designed to be protective of habitats and ecosystems within national borders, if it is to be effective.

Putting these imperatives together, it appears that current thinking in international environmental circles is that a process of 'synergizing' through both formal and informal linkages between MEAs will go at least some of the way toward solving these – and other – problems. To date, the most advanced 'formal synergy regime' is undoubtedly that created within the chemicals and wastes cluster of MEAs – particularly through the linkages[21] amongst the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,[22] the Rotterdam Convention on Prior Informed Consent[23] and the Stockholm Convention on Persistent Organic Pollutants.[24]

It may be hoped that bringing different MEAs together, even if not formally merging them, will cut down on the expense entailed in attending stand-alone meetings – and ideally also cut down on the expenses incurred by onerous data-gathering and reporting commitments. The reduction of costs is an important factor in the current parlous condition of most economies – many states find it difficult, due to financial constraints, to participate as fully in international law-making and enforcement as they would like to.

Within the field of 'biodiversity-related' MEAs, it appears that there is now general acceptance that synergies provide more advantages than they do disadvantages, and

[19] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>.

[20] See, for instance, Ed Couzens, 'The Problem that Categorization of Species in MEAs Poses for the Protection of Biodiversity' in Ed Couzens and Tuula Kolari (eds), *International Environmental Law-making and Diplomacy Review 2006* (University of Joensuu (Eastern Finland) – UNEP Course Series 4, 2007) 185–216.

[21] See, generally, Kerstin Stendahl, 'Enhancing Cooperation and Coordiantion Among the Basel, Rotterdam and Stockholm Conventions' in Tuula Kolari and Ed Couzens (eds), *International Environmental Law-making and Diplomacy Review 2007* (University of Joensuu (Eastern Finland) – UNEP Course Series 7, 2007) 127–141; and Cam Carruthers and Kerstin Stendahl, 'The Naivasha Ex-COP: A Multilateral Simulation Exercise of a Joint Extraordinary Conference of the Parties to the Basel, Rotterdam and Stockholm Conventions' in Tuula Honkonen and Ed Couzens (eds), *International Environmental Law-making and Diplomacy Review 2009* (University of Eastern Finland – UNEP Course Series 9, 2010) 195–217.

[22] Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <http://www.basel.int>.

[23] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <http://www.pic.int>.

[24] Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <http://www.pops.int>.

that the creation of significant linkages is underway – at least in respect of the MEAs which are known as the 'Big Six'. These are CITES,[25] Ramsar,[26] the World Heritage Convention (WHC),[27] the Convention on the Conservation of Migratory Species of Wild Animals (CMS),[28] the Convention on Biological Diversity[29] and the International Treaty on Plant Genetic Resources for Food and Agriculture.[30]

Although the momentum is now with the forging of greater synergies and it appears that there are many more advantages to this than there are disadvantages, with the main focus appearing to be on *how best* to foster synergies rather than *whether* to create them at all, it must not be forgotten that there will be disadvantages too. Amongst these, for instance, might be included the argument that where an MEA was originally tailored specifically to cater for a particular environmental problem, clustering with other MEAs might see a loss of useful emphasis.

In the papers collected in the present *Review* there is considerable evaluation of, and recommendation for, different considerations which the various writers suggest might enhance synergies in the biodiversity-related cluster. It is the hope of the editors, the editorial board, and all involved with this *Review* that its publication will contribute to the body of research in the area of synergies amongst biodiversity-related conventions; and, indeed, to the development of international environmental law and diplomacy generally.

The present *Review* is divided into four Parts. Part I contains papers which address general issues related to synergies in international environmental law. The first paper in the 2011 *Review*, by Sylvia Bankobeza, lays the foundation for the papers on law-making and diplomacy by presenting the nature of multilateral environmental negotiation and diplomacy, which derives from international action taken by three or more parties. The writer explains that many of the issues currently being negotiated by states at various international environmental meetings are both complex and technical in nature. The number of institutions, the numbers of meetings being convened, and the amount of documentation involved in multilateral environmental negotiation and diplomacy have also grown over the years, creating a maze of issues and processes which governments need to be aware of, and need to be prepared to deliberate on. This paper gives consideration to how processes and mechanisms have

[25] See *supra* note 19.
[26] See *supra* note 11.
[27] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <http://whc.unesco.org>.
[28] Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>.
[29] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.
[30] International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, into force 29 June 2004, <http://www.planttreaty.org/>.

evolved over the years and how lessons learned from these can be used to enhance synergies.

The second of the two papers in Part I, by Tuomas Kuokkanen, assists with establishing the theoretical basis for the *Review* theme, by considering relationships between multilateral environmental agreements and other agreements. Through discussion of areas such as trade and the environment, the law of the sea and the environment, and relationships and conflict in general, the importance is shown of understanding the close relationship between a framework agreement and protocols and other instruments relating thereto. It is important also to recognize the cooperative relationship that usually persists between environmental regimes; to acknowledge both boundaries and relationships between environmental and other relationships; and to remember that the general principles and methods of international law remain available when conflicts between international agreements arise.

Part II considers the state of biological diversity governance and synergies. The first paper in Part II, by Marko Berglund and Wanhua Yang, considers compliance with and potential for synergies within biodiversity-related multilateral environmental agreements. It is argued that in addition to translating treaty provisions into national actions, in order to be successful MEAs also require collective action by their Parties to implement the treaty obligations at the international level. These joint actions include mandating Conferences of the Parties (COPs) to establish or improve compliance procedures/processes; to establishing financial mechanisms; and to require the treaty Secretariats to undertake certain administrative functions for facilitating compliance.

The second paper in Part II, by Kerstin Stendahl, focuses on enhancing cooperation and coordination of multilateral environmental agreements as a means of strengthening international environmental governance (IEG). This is a topical issue and recently featured as part of the Rio+20 negotiations on the institutional framework for sustainable development (IFSD). This paper canvasses the main messages to come out of IEG debates over recent decades, relating hopes and prospects to practical experience by considering how synergies have been achieved in the chemicals and waste cluster. It is suggested that past successful endeavours could assist in setting the stage for other MEA clusters, such as amongst the biodiversity-related agreements.

The third and final paper in Part II, by Erie Tamale, considers global trends – including both current pressures and future scenarios. Biological diversity continues to decline globally at unprecedented rates with the decline being more rapid in the past 50 years than at any other time in human history; and being expected to continue at the same pace or even to accelerate as the drivers of biodiversity loss increase in intensity. The paper then offers some possible synergistic strategic policy responses to these.

Part III of the *Review* concerns specific issues related to synergies in international environmental law. The first paper in this Part, by Peter Herkenrath, concerns how biodiversity-related synergies can be used to support and facilitate the implementation within national legal systems of multilateral environmental agreements aimed at halting loss of biodiversity. It is pointed out that there is a plethora of multilateral environmental agreements, with many of these being of global nature and a specific subset of these addressing biological diversity. It is argued that the extent to which these MEAs have been effective in curbing the loss of biodiversity is uncertain; and that improved cooperation, coordination and synergies are required for improving the overall performance of MEAs. The paper considers new opportunities for synergies and makes recommendations as to how the most appropriate of these might be selected.

The second paper in Part III, by Melissa Lewis, deals with synergies within the international regime on access and benefit-sharing with a specific focus on cooperation between the Nagoya Protocol[31] and the International Treaty on Plant Genetic Resources for Forestry and Agriculture. The paper highlights that modern technology enables plant genetic resources to be used in the development of a wide spectrum of commercial products, the combined markets for which are worth hundreds of billions of dollars annually. The 1992 Convention on Biological Diversity (CBD), which includes the fair and equitable sharing of benefits from the utilization of genetic resources as one of its three core objectives, and contains a number of broadly-phrased provisions on access and benefit-sharing (ABS), has seen only limited progress made toward achieving this objective. However, it is argued that recent steps have made considerably more progress and that there is much potential to be found in possible synergies between the Protocol and the International Treaty.

The third paper in Part III, by Marina von Weissenberg, concerns opportunities and challenges that exist for establishing synergies, and generally enhancing cooperation, within the biodiversity-related cluster of MEAs. The latest international reports confirm that the loss of biological diversity continues generally all over the world, and this means that additional work and efforts need to be taken to enable the biodiversity-related multilateral environmental agreements fully to deliver their intended objectives and our common goal of halting biodiversity loss by 2020. The paper considers the importance of both national and international action, and concludes with recommendations on synergistic planning.

The fourth and final paper in Part III, by Marceil Yeater, deals with the CITES Secretariat and synergies based on species-level conservation with trade implications. The paper considers existing synergies and cooperative relationships which CITES

[31] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, <http://www.cbd.int/abs/>.

has with other agreements; and then various possible elements of such relationships in general. In conclusion, challenges are identified and recommendations made.

Part IV of the *Review* reflects the interactive nature of the Course. During the Course negotiation simulation exercises were organized to introduce the participants to the real-life challenges facing negotiators of international environmental agreements. In the two main simulation exercises, participants were given individual instructions and a hypothetical, sometimes country-specific, negotiating mandate and were guided by international environmental negotiators. Excerpts from, and explanations of, the exercises are included in Part IV.

The first paper in Part IV explains a drafting exercise conducted by Sylvia Bankobeza. The exercise provided an introduction to a negotiation session where participants could gain a general understanding of issues relating to multilateral negotiations and the related processes. This was regarded as an important way to improve the participants' general understanding of the processes before entering into the close detail required of the two main negotiation simulation exercises which focused on the theme of the Course. In the drafting exercise, each of three drafting groups was given a sample decision and general guidance information to assist in its work. The decisions were retrieved, modified or crafted (either with brackets, blanks or optional words) from previous decisions of the Conferences of the Parties relating to MEA synergies: two were posited as being from the Convention on Biological Diversity (CBD) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) decisions respectively, and the third was crafted as a UNEP Governing Council decision.

Similarly, the second paper in Part IV, by Haruko Okusu, explains a group work exercise which was based on the Strategic Plan for Biodiversity 2011–2020 and the Aichi Targets[32] and synergies. The exercise was developed as a skills development aspect within the Course's special theme, and focused on considering how synergies might be operationalized by collaboration around the Aichi Biodiversity Targets, and the possible roles that different biodiversity-related conventions could play.

In 2011 there were two main negotiation exercises, each involving issues of both procedure and substance. The third paper in Part IV explains the first simulation exercise, which was devised and run by Cam Carruthers and Niko Urho, with support on both aspects from Marko Berglund and Simone Schiele.

The scenario for the negotiation simulation focused on synergies among biodiversity-related MEAs, and involved both substantive and structural/procedural issues. The exercise included negotiations in an Ad Hoc Joint Working Group (AHJWG) on the

[32] The Strategic Plan for Biodiversity 2011–202 and the Aichi Biodiversity Targets', CBD decision X/2 (2010).

following four issues: joint programmatic activities; a joint work plan for national implementation; a joint review mechanism; and the establishment of a group on Rules of Procedure. While hypothetical, the negotiation simulation scenario was based on recent real-life discussions on enhancing synergies amongst key biodiversity-related conventions. The scenario was chosen because clustering of MEAs to improve coordination and efficiency is of current interest and is an area where much progress is being made and many countries have voiced interest in pursuing further. A supplementary objective of this exercise was that it would produce discussion and results, including this paper, which could be of interest particularly for participants in the related meetings of the governing bodies of the biodiversity-related conventions. The theme also provided an opportunity for participants to gain perspective on the complexity of international environmental law-making in the current international environmental governance (IEG) system.

While describing the course of the exercise, the paper goes further and makes substantive comment on the nature of international environmental law, the desirability of enhancing synergies, and the importance of streamlining rules of procedure and increasing understanding thereof.

The fourth paper in Part IV, the thirteenth and final paper in the 2011 *Review*, by Ed Couzens, explains the second major negotiation exercise run on the 2011 Course. Based on the International Whaling Commission (IWC) in the context of synergies between biodiversity-related MEAs, the paper presents a description of a multilateral simulation exercise designed to foster negotiation skills by simulating the experience of debating and drafting legal text, in an unusually hostile atmosphere. The setting chosen was the International Whaling Commission (IWC); a body which is often depicted as struggling to fulfil its mandate, given the bitter disputes which have characterized it for decades and which have concerned both substantive and procedural issues.

The paper presents a substantive argument as much as it reflects an exercise, and identifies a particular problem relating to species that are only partly regulated in international law, suggests reasons for this, and locates the IWC as a multilateral agreement which has particularly problematic aspects in respect of synergies with biodiversity-related MEAs. Interestingly, although the exercise was based on a fictitious scenario, the problem which it considers was subsequently taken up as an issue in 2012 at the 64th annual meeting of the International Whaling Commission – and is expected to be on the agenda again at future meetings.

While the majority of the papers in the present *Review* deal with specific environmental issues, or aspects of specific multilateral environmental agreements, and thereby provide a written memorial for the future; the negotiation exercises provide, in a sense, the core of each Course. This is because each Course is structured around the practical negotiation exercises which the participants undertake; and it is sug-

gested that the papers explaining the exercises provide insights into the international law-making process. The inclusion of the simulation exercises has been a feature of every *Review* published to date, and the editorial board, editors and course organizers believe that the collection of these exercises (which now spans eight years, and is moving into its ninth) has significant potential value as a teaching tool for the reader or student seeking to understand international environmental negotiation. It does need to be understood, of course, that not all of the material used in each negotiation exercise is distributed in the *Review*. This is indeed a downside, but the material is often so large in volume that it cannot be reproduced in the Course publication.

Generally, it is the hope of the editors that the various papers in the present *Review* will not be considered in isolation. Rather, it is suggested that the reader should make use of all of the *Reviews* (spanning the years 2004 to 2011 to date), all of which are easily accessible on the internet through a website provided by the University of Eastern Finland,[33] to gain a broad understanding of international environmental law-making and diplomacy.

To give an example of this, in the 2006 *Review*, which had the theme 'Biodiversity', there are 18 papers – many of which will provide a reader of the present *Review* with important complementary material. Inclusive of the present volume, in the first eight volumes of the *Review* (spanning the years 2004 to 2011 of the Course from which the papers in each *Review* emanate) 106 authors have contributed to 130 papers. Work is already underway on the 2012 *Review*, to be published in 2013, which it is anticipated will add approximately 12 papers to this total – under the theme of 'Oceans Governance'.

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[33] See <http://www.uef.fi/unep>; link to 'Publications and Materials'.

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Part I

General Issues related to Synergies in International Environmental Law

Multilateral Environmental Diplomacy and Negotiations

Sylvia Bankobeza[1]

1 Introduction

Multilateral environmental negotiation and diplomacy derives from international action taken by three or more states to develop standards for, or to address and/or deliberate on, environmental issues through international negotiations. Many of the current issues that are being negotiated by states at various international environmental meetings, including in multilateral environmental agreements (MEAs) processes, are complex and technical in nature. The number of institutions, the number of meetings being convened, and the amount of documentation involved in multilateral environmental negotiation and diplomacy have also grown over the years, creating a maze of issues and processes which governments need to be apprised of, and need to be prepared to deliberate on.

This paper provides a general introduction to multilateral environmental negotiation and diplomacy. The paper does not include bilateral negotiations that take place between two countries; nor, because they are organized in a different way, does it address processes of negotiations under the framework of individual country processes, or sub-regional and regional organizations processes and meeting formats.

2 Overview of the system of multilateral environmental negotiation and diplomacy

Multilateral environmental diplomacy and negotiation takes place through a variety of frameworks and meetings. These include meetings and conferences convened under the framework of the United Nations, including the United Nations Environ-

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ment Programme (UNEP)[2] Governing Council[3] Sessions, Conferences and Meetings of the Parties (COPs/MOPs) of various multilateral environmental agreements, and other meetings and conferences relating to the environment. Opportunities for multilateral environmental negotiations and diplomacy are also available when three or more countries meet to deliberate on environmental issues of concern among them; or when they meet under sub-regional or regional institutions to address environmental issues. Negotiation processes for developing new environmental legal instruments at the global, regional and sub-regional levels, or between three or more countries also provide an opportunity for multilateral environmental negotiations and diplomacy.

Major environmental conferences organized under the framework of the United Nations have over the years played an important role in directing the environmental agenda. These have included the United Nations Conference on the Human Environment (UNCHE), also referred to as the Stockholm Conference, which was held in 1972;[4] the United Nations Conference on Environment and Development (UNCED), known as the Rio Conference or the Earth Summit, held in 1992;[5] the World Summit on Sustainable Development (WSSD) held in Johannesburg in 2002;[6] and the United Nations Conference on Sustainable Development (the 'Rio+20' Conference), held in 2012 in Brazil.[7]

In particular, multilateral environmental negotiations take place in the following four instances. Firstly, when issues of a transboundary nature arise and need to be resolved through notification, consultations and negotiations between more than two countries, at the sub-regional level, or the regional level, or between countries with transboundary issues, or those sharing a natural resource, or having like-minded environmental interests. Secondly, when agreements, treaties, or specific MEAs are being negotiated; thirdly, when conferences and meetings of the parties for various MEAs and their technical and working groups negotiate the further development or the implementation of MEAs; and, finally, when the United Nations or its organs – such as the United Nations General Assembly,[8] the UNEP Governing Council, the International Labour Organization (ILO),[9] the International Maritime Organization (IMO),[10] and other UN fora such as the Commission on Sustainable Development[11] – meet or organize environment-related summits or conferences.

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2 See, generally, <http://www.unep.org>.
3 See <http://www.unep.org/resources/gov/overview.asp>.
4 See, generally, <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97> (visited 1 January 2013).
5 See, generally, <http://www.un.org/geninfo/bp/enviro.html> (visited 1 January 2013).
6 See, generally, <http://www.un.org/jsummit/html/basic_info/basicinfo.html> (visited 1 January 2013).
7 See, generally, <http://www.uncsd2012.org/rio20/index.html>.
8 See, generally, <http://www.un.org/en/ga/>.
9 See, generally, <http://www.ilo.org>.
10 See, generally, <http://www.imo.org>.
11 See, generally, <http://www.un.org/esa/sustdev/>.

Over the years, many environment-related meetings have been convened to deliberate on environmental issues and to develop and further implement MEAs; and a good number of legal instruments have been negotiated and subsequently adopted.[12] Although the actions required to implement any MEA will depend on the provisions of the MEA and on the specific issue or issues which they intend to regulate, some MEAs have established formal mechanisms to monitor their implementation. Furthermore, institutions in the form of convention secretariats convene Conferences and Meetings of the Parties and organize related meetings of scientific bodies, standing committees, or working groups to deliberate on MEAs. The Conferences and Meetings of the parties of MEAs are institutions that also provide an opportunity for parties to negotiate and decide on issues under the MEA on a regular basis in the course of the implementation of the MEA. These have, under some MEAs, included processes for the development of additional legal instruments, such as protocols to an original MEA.

Multilateral environmental agreements are negotiated and adopted with a global, regional or sub-regional coverage depending on the purpose of the negotiations, the scope envisaged by negotiators and on the intentions of the parties at the time of negotiation. In preparing for any negotiations for a new MEA, it is important for negotiators to understand the issues necessitating the negotiation of this new agreement. To enable the negotiators to understand the technical and legal issues, for example, studies are usually undertaken and the required legal analysis provided as background materials to assist negotiators.

It is also important to understand any actions taken before negotiating the MEA, possible synergies with related MEAs, and the mandate for negotiating the particular MEA. If the negotiations have started, then a negotiator is expected to familiarize himself with the ongoing work of the intergovernmental negotiating committee (INC) for that particular MEA's negotiating text.

When the negotiations are completed and a text is adopted and opened for signature, one can look out for the final act of negotiations. The terms agreed upon to bring into effect the MEA can either be by signature followed by ratification or accession depending on the terms agreed to in the MEA. Bilateral agreements of countries that share a resource jointly for example come into effect upon signature. Non-binding agreements mainly come into effect by adoption as an outcome of a meeting or by signature, i.e. soft law instruments, in the form of codes of conduct, decisions,

[12] The numbers involved are high. It has been estimated, in a database project run by the University of Oregon, that there are more than 1 500 bilateral, more than 1 000 multilateral, and more than 250 'other', international environmental agreements. See University of Oregon, International Environmental Agreements (IEA) Database Project, <http://iea.uoregon.edu/page.php?file=home.htm&query=static> (visited 20 February 2012).

declarations, environmental action plans, guidelines, outcomes, principles, recommendations, resolutions, and so forth.[13]

3 Evolution of the system, institutions and instruments

The evolution of multilateral environmental negotiations and diplomacy can be traced from the early 1900s, when the first MEAs to manage natural resources and wildlife conservation were adopted by colonial powers in 1900 and 1933 respectively.[14] At that time the issues addressed in the international conventions mainly concerned the establishing of national parks and nature conservation areas and issues of overexploitation of natural resources.

In the 1940s and 1950s, several conventions were negotiated and adopted on issues relating to the law of the sea[15] and the regulation of whaling which was adopted as a convention in 1946.[16] In 1971, the Convention of Wetlands of International Importance (the Ramsar Convention)[17] was adopted. In 1972, the United Nations Conference on the Human Environment, also referred to as the Stockholm Conference, was convened. The main outcome of the Conference was a set of recommendations including for establishing the United Nations Environment Programme, which was established in the same year. In 1973, the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)[18] was adopted. The Convention on Migratory Species[19] was adopted in 1979. In 1982, the United Nations Convention on the Law of the Sea[20] was created, regulating marine and coastal pollution. A number of Regional Seas Conventions were subsequently added to the list of those already negotiated and adopted.

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[13] On 'soft law' and the weight which can be given to these various instruments, see '2.2 Soft law and hard law' in Cam Carruthers (ed.), *Multilateral Environmental Agreement Negotiator's Handbook,* University of Joensuu – UNEP Course Series 5 (2nd ed., University of Joensuu, 2007) 2.2–2.3.

[14] These being the Convention on the Preservation of Wild Animals, Birds and Fish in Africa, London, 19 May 1900, which never came into force; and the Convention Relative to the Preservation of Fauna and Flora in their Natural State, 8 November 1933, in force 14 January 1936.

[15] For instance, the Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, into force 10 September 1964, 516 *United Nations Treaty Series* 205 ; Convention on the High Seas, Geneva, 29 April 1958, into force 30 September 1962, 450 *United Nations Treaty Series* 11, 169; Convention on Fishing and Conservation of Living Resources of the High Seas, Geneva, 29 April 1958, into force 20 March 1966, 559 *United Nations Treaty Series* 285; Convention on the Continental Shelf Geneva, Geneva, 29 April 1958, into force 10 June 1964, 499 *United Nations Treaty Series* 311.

[16] International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946, in force 10 November 1948, 161 *United Nations Treaty Series* 72.

[17] Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <http://www.ramsar.org>.

[18] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>.

[19] Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>.

[20] United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261.

In 1985, the Vienna Convention on the Protection of the Ozone Layer,[21] which has an active 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,[22] was negotiated and adopted. In 1989, the Basel Convention on the Control of Transboundary Movement of Hazardous Waste[23] was negotiated and adopted. In 1992, the United Nations Conference on Environment and Development took place and adopted the Rio Declaration[24] and the Agenda 21[25] Action Plan. At the same Conference, the Convention on Biological Diversity (CBD),[26] which now has three protocols, was adopted; along with the United Nations Framework Convention on Climate Change (UNFCCC),[27] which later adopted the Kyoto Protocol.[28] Two years later, the United Nations Convention to Combat Desertification (UNCCD)[29] was adopted in 1994.

In 1998, the Rotterdam Convention on the Prior Informed Consent Procedures for Certain Hazardous Chemicals and Pesticides in International Trade[30] was adopted. The Stockholm Convention on Persistent Organic Pollutants[31] was adopted in 2001, just before the World Summit on Sustainable Development which was held in Johannesburg in 2002. A specific declaration[32] and action plan[33] resulted from that Summit.

The Rio +20 adopted an outcome document called 'The Future We Want' in June 2012. The negotiation processes that were currently underway at the time this *review*

[21] Convention on the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1985) 1529.

[22] Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, <http://www.unep.org/ozone/>.

[23] Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <http://www.basel.int>.

[24] UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876.

[25] Agenda 21, UN Conference on Environment and Development, Rio de Janeiro, 13 June 1992, UN Doc. A/CONF.151/26/Rev.1 (1992), available at <http://www.un.org/esa/dsd/agenda21/>.

[26] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

[27] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <http://unfccc.int>.

[28] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22.

[29] UN Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <http://www.unccd.int>.

[30] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <http://www.pic.int>.

[31] Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <http://www.pops.int>.

[32] Johannesburg Declaration on Sustainable Development 'From our origins to the future', Johannesburg, South Africa, 4 September 2011, available at <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm>.

[33] Plan of Implementation of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002).

was being printed include a legally binding instrument on mercury[34] and the negotiations of the renewal of the Kyoto protocol of the UNFCCC which was mandated by COP17.

4 Processes and mechanisms

4.1 Introduction

Multilateral environmental negotiations can take place in one setting or be convened in various segments or phases. The differences of a multilateral environmental negotiation are determined by the size and type of the meeting. Also important are certain characteristics commonly found where progress is made, including evaluation of the strengths and weaknesses of holding particular negotiation issues in one setting or in different segments and settings. These settings may be, for example, that the first part consists of a meeting of technical officials who deliberate on all the issues in the agenda items, and, secondly, there is a high level/ministerial segment where decisions are taken. In meetings addressing scientific issues, meetings of scientists and technical experts in the field could be organized before the main session to feed into the upcoming meetings. In some meetings, however, differentiation of the sessions is not made.

The mechanics of multilateral environmental conferences and meetings under the framework of MEAs have other features that contribute to the deliberations of the main meeting. For example, they can have both plenaries and break out meetings, such as working group meetings on various issues; contact groups; preparatory regional meetings for consultations and agreeing on common positions; meetings for scientific and technical bodies; and meetings of implementation committees.

4.2 Managing synergies among instruments and processes

Although MEAs have generally been adopted separately, they still fall within different clusters or categories depending on their relationships with each other. Consideration of synergies amongst MEAs related to biological diversity, for example, requires governments to have a clear understanding of MEAs which fall within the biodiversity cluster and of how they relate to each other, of their inter-linkages, coordination and areas of cooperation. Biodiversity-related MEAs include, inter alia, CITES, CMS, CBD, the Ramsar Convention, and the UNCCD. One can also add the UNFCCC to the list because among its activities the regime has programs for miti-

[34] On the process, see UNEP, 'Mercury; the Negotiation Process', available at <http://www.unep.org/hazardoussubstances/Mercury/Negotiations/tabid/3320/Default.aspx> (visited 30 January 2012). See also Sheila Logan, Brenda Koekkoek, Desiree Narvaez and Maged Younes: 'Mercury – Searching for Solutions to a Global Problem', in Tuula Kolari and Ed Couzens (eds), *International Environmental Lawmaking and Diplomacy Review 2007*, University of Joensuu – UNEP Course Series 7 (University of Joensuu, 2008) 205–212.

gating climate change by reducing emissions from deforestation and forest degradation (REDD) which fall under the biodiversity cluster. The understanding necessary for taking synergies into account can also add value to a negotiator in various processes of negotiations when issues addressed in other MEAs in the cluster are raised or referred to.

In developing a new instrument or deliberating on MEAs, it is important for a negotiator to have a clear understanding of the agreements that relate to each other, in terms of understanding the similarities, links in their mandates and the cross-cutting areas. This is important when considering issues relating to the need to cooperate and coordinate some of their work and if a negotiator is to be able to manage the complexity, inter-linkages and synergies among the instruments and processes. To obtain a clear perspective, one can do an analysis of MEAs in a cluster to understand the current similarities, links, and cross-cutting areas in a particular cluster and seek to know the areas of cooperation, joint working arrangements, if any, and/or coordination among MEAs in a cluster. This information can also be important when determining a suitable instrument to be developed to address a particular issue, as the best way to proceed might not always be by developing a new legal instrument.

In this regard, there are chemicals and waste-related MEAs in one cluster; these include the POPs, PIC and the Basel Convention.[35] Those who are presently negotiating for a legally binding instrument on mercury, for example, are expected – if the negotiations are to be effective – to have a clear idea of how the instrument relates to the other chemical and waste related MEAs for them to have mutual cooperation and coordination of their activities. Other clusters include the biodiversity cluster and the freshwater and oceans clusters, for example. In negotiating toward MEAs, it is important to understand how to manage synergies among instruments and processes.

4.3 MEA negotiating formats

There are various negotiations formats depending on the type, size and the organizers of a meeting. For example, in large intergovernmental meetings organized by the United Nations, there will normally be plenary sessions where general debates take place and decisions are taken. In the same meetings, opportunities are often given – through bloc negotiations – for countries in a particular bloc to converge with like-minded countries to deliberate on their positions which are then fed to the plenary. In this regard, the role of the Chair of the plenary is very important in conducting such meetings, in identifying the areas of convergence and diversion within these meetings, as well as in calling for the establishment of different working groups

[35] On synergies in this cluster, see Kerstin Stendahl, 'Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions', in Tuula Kolari and Ed Couzens (eds), *International Environmental Law-making and Diplomacy Review 2007*, University of Joensuu-UNEP Course Series 7 (University of Joensuu, 2008) 127–141.

(of open/selected countries). Such break-away groups may include, inter alia, contact groups, Friends of the Chair consultations, formal and informal consultations, regional group consultations; like-minded group consultations; Small Island Developing States (SIDS) and Least Developing Countries (LDCs). A legal group and various drafting groups can be set up to draft clauses and harmonize agreed texts and decisions. These and other types of groups not mentioned here are established with defined mandates and limited working time, especially when the plenary cannot address all issues in detail in view of time, or needs to address unresolved issues in different sections of the agenda items/revised text, or when there is a need to address divergent views of some delegates. The results are normally presented back to the plenary for consideration.

4.4 Understanding terms referring to common UN documents

In multilateral environmental negotiations convened under the framework of the United Nations, a negotiator will come across terms which refer to common UN documents. These include, inter alia, documents such as in-session documents that are distributed during a meeting. This is a category of documents containing new proposals or outcomes of in-session work and is for use only during the sessions concerned. Examples include conference room papers (CRPs) and limited/draft distribution documents (L docs), which may include draft decisions (documents prepared at the pre-session or in-session stage of the meeting to be considered by delegates as to whether they will become decisions of the meeting).

Informal documents include a working paper and a non-paper. A working paper is more substantive and less ephemeral than a CRP and less specific to a particular delegation than a non-paper. The distribution of this paper is normally limited to participants in the conference. On the other hand, a non-paper is an informal text that is distributed on an informal basis to facilitate the process of negotiating an agreement; it is not a formal proposal nor does it engage its author in multilateral environmental negotiations.

Other types of documents which a negotiator might come across during multilateral environmental negotiations meetings include a draft negotiation text which is the main document which is being negotiated. A chair's summary is a draft text introduced by the presiding officer in an attempt to help the conference towards agreement. It can include some words or text in square brackets, indicating that the issues to which they relate are for later resolution. A chairman's draft is often an attempt at a final text that might secure consensus; it is a proposal prepared by the presiding officer of a meeting to assist in reaching consensus. A compilation text is a chairman's compilation which puts together a number of competing proposals submitted by delegates; it is a text that lays out proposals made by delegations. An outcome document includes decisions, a set of recommendations or a plan of action adopted at major United Nations conferences and international agreements meetings. A Decla-

ration, which is not normally binding, is a formal statement of aspirations issued by a meeting.[36]

4.5 Framework for effective MEA negotiations

The framework conditions needed for effective MEA negotiations to take place include clear rules of procedures which are agreed upon early on by negotiators; and negotiators/parties who are willing to participate, ready to negotiate, and who have the necessary resources to negotiate. Desirable framework conditions also include experienced chairs who are skilled in the art of conducting negotiations; and negotiation blocs that can produce articulated, coherent and effective group positions. In addition, it is important that there be a sense of urgency in the process; and that deadlines are taken note of as the negotiations proceed. All negotiators also ought to have the ability and willingness to consult, bargain and compromise; and to also have a means of influence and leverage. The latter is most likely to be present when there is a level playing field between the negotiators in interacting and consulting continuously and when the parties accept the moral authority of the chair.

5 Effective participation and negotiation in environmental conferences

5.1 Introduction

Effective participation in, and negotiations at, environmental conferences require that one understands the issues being addressed and the nature of the phases of negotiation. In addition, it is important to understand the role and effect of language in negotiation; and the nature of the processes in negotiations such as adversarial and problem-solving orientations, including strategies, tactics and techniques. In assessing the performance of a negotiation process, one can review the characteristics of the processes and outcomes and seek to understand the power of negotiation and the lessons learned for the perceived weak negotiators, and those responding to competitive negotiators. Managing competing interests in a give and take manner is important as one gets involved in exchanging views with other delegates in both formal and informal consultations, as well as resolving arguments and listening actively so that the negotiator is ready when there is a need to intervene and possibly change the course of a negotiation.

[36] For further information on these documents, visit the treaty reference guide available at <http://untreaty.un.org/ola-internet/Assistance/Guide.htm> (visited 26 March 2012). Other useful information sources include UNITAR: A Glossary of Terms for UN delegates (2009), available at <http://www.unitar.org/mdp/training-tools/terms-for-un-delegates> and UNEP, A Glossary of Terms for Negotiators of Multilateral Environmental Agreements (2007), available at <http://www.unep.org/pdf/delc/Glossary_final.pdf> (both visited 26 March 2012).

5.2 Preparing and planning for negotiations

Preparation and planning for multilateral environmental negotiations requires one to know his or her role in the negotiations; and the roles that might be played by other negotiators. Furthermore, it includes having objectives and setting goals; creating, accessing, analysing and sharing information, engaging in consultation; and choosing a negotiation strategy and defining options. In addition, good preparation also includes itemizing and prioritizing issues, formulating positions based on priorities, and choosing the appropriate composition of the delegation. In planning and organizing effectively for negotiation, one can prepare a checklist and delegate brief articulating the issues to be deliberated on and a possible position.

In current multilateral environmental negotiations processes, regional group meetings are normally convened before the session to articulate their positions as soon as the documents of the meeting are posted on the website. These pre-consultation processes provide a forum for preparation of a common position on areas of interest for a regional group, but also for preparation of the negotiators to understand and consult with national stakeholders on the issues before the meeting is convened.

In preparing and planning for negotiations, it is important for government delegates to have inter-ministerial coordination or a national stakeholder consultation where approaches and mechanisms can be determined and managed. The need for and benefits of inter-ministerial coordination is in having a clear perspective of the government position, taking into account the role of other ministries and other relevant stakeholders such as non-governmental organizations, industry, etc in the area that is being negotiated.

There may be coordination challenges, either vertical or horizontal, that need to be managed when handling issues which cut across the work and mandate of different government departments. Institutional, legislative and administrative conflicts may also need to be addressed where they arise. Issues relating to MEA focal points consultations, the role of the environment ministry versus other ministries in managing aspects of the environment may arise when dealing with environmental issues. For example, with regard to an issue such as biosafety, the MEA focal point of the CBD at the national level, who follows up on MEA meetings, is normally based in the ministry responsible for the environment, while biosafety experts may be based in the ministry of agriculture. Consequently, the issue may arise as to who will take the lead in biosafety related meetings. In the same way, there may be issues raised regarding policy-making versus implementing agencies: which department/ministry should be assigned the lead agency role with regard to a particular environmental issue. Furthermore, questions regarding defining the negotiation mandate and identification of the relevant tasks and deadlines may also need to be addressed. Consultation and coordination with ministries and embassies abroad, and with other interested parties such as national regulatory authorities and related national institution in the field, are important.

5.3 General challenges and hindrances to negotiations

5.3.1 Delegation-specific challenges

Insufficient or deficient expertise regarding the substance, process, and institutional dimensions of the issue under negotiation is the main challenge for effective MEA negotiations. Other delegation-specific challenges can include last-minute decisions on the composition of delegations resulting to inadequate time for preparation and national consultation; unclear negotiating instructions from national capitals; and lack of political support therein. Undue influence by other government delegations and specific national interest groups sometimes introduces additional challenges for negotiators.

Most developing countries receive support to attend major multilateral environmental negotiation meetings and can only afford to send one representative who cannot divide himself/herself during complex negotiations which are organized in parallel sessions and various breakaway groups. When these small delegations are given an opportunity to preside over a session or to stir a group or serve as a chair of a meeting, for example, they end up losing the opportunity of participating as representatives of their countries.

5.3.2 Procedure-specific challenges

Inability to reach agreement on important rules of procedure, or having long debates regarding procedure which overwhelm the substantive negotiations, are the main challenges relating to procedures in multilateral environmental negotiations. A negotiator can also be challenged by his/her inability or lack of understanding on how to use the rules of procedure in tactical ways in the course of representing his/her country in a meeting.

Most negotiators are technical experts in the field who may understand the substantive issues being discussed and articulate their interventions skilfully, but some do not take interest in understanding the rules of procedure. The lack of understanding of the rules of procedure can hinder even an experienced negotiator in the process of negotiations when whatever point he/she wants to put across can be rejected because it was not presented properly according to the rules of procedure. It is, therefore, important for negotiators to take time to read the rules of procedure, if they are not aware of them, and to contact the secretariat or visit the website to access the rules of procedure online. An example is when a negotiator attempts to make an intervention on an agenda item which has already been decided according to the rules of procedure, he/she may not be permitted to go on and re-open the discussion of the agenda item in that case.

5.3.3 Challenges specific to the negotiations bloc

There are various types of negotiation blocs: some are large while others are small. A good example of a large negotiations bloc is the G77 and China with more than one

hundred countries being represented during consultations in multilateral environmental negotiations.

Negotiation blocs that are too large to ensure meaningful and coherent group positions are the main challenge in this category. These large groups have sub-groups within them who in some issues have differing interests and are in various levels of development that can pose a challenge when trying to filter in the positions/views of each country and group in the position that is to be presented for the negotiation bloc. Other challenges include a polarized negotiating climate within a bloc and between blocs, which can hinder progress in building consensus at the plenary. Undue influence of certain actors who dominate the discussion at the expense of other negotiators is another challenge. A bloc decision-making machinery that is inefficient also poses challenges specific to a negotiations bloc.

5.3.4 Problems inherent in the plenary/contact process

In the plenary or contact group process, when options are not well articulated to assist in brokering compromise and facilitating bargaining in the tough phases, they become the main challenge. Other problems include excessively exercising political influence or leverage by certain parties in the course of negotiations instead of focusing on the resolving of pending issues. Other challenges are lack of a sense of urgency and deadlines as well as a lack of political will to settle the tough issues in the eleventh hour; and psychological barriers to final settlement which can all be an hindrance to progress in multilateral environmental negotiations.

Subject to the mandate of the intergovernmental body within the United Nations and its rules of procedure, the support to the president/chairperson in plenary or in a contact group could entail providing continuous guidance and advice to the chairperson and the bureau concerning:

- the organization of work;
- the status of negotiations;
- the conducting of business, including interpretation of the rules of procedure; and
- taking note of all aspects in sessions and being able to provide guidance when/where necessary.

Where the Secretariat does not provide adequate guidance and support, the work of the plenary or contact group may not be accomplished on time.

5.5.5 Problems with the Secretariat

Secretariats are expected to service the meeting and support the negotiations, ensuring that the necessary and relevant documentation is prepared for the meetings/sessions in line with the decisions of the inter-governmental body for discussion and decisions by the body. The Secretariat is also expected to provide guidance on the

format, content and political sensitivities of the documents as well as to monitor their timeliness and ensure their availability and accessibility. The main challenge relating to the Secretariat in multilateral environmental negotiations is their lacking support.

The main role of the Secretariat is to prepare and provide proper guidance without having inappropriate political influence of imposing their views on the deliberations or outcome of the meeting. Other relevant problems include inadequate guidance for member states regarding the rules of procedure and practices that govern intergovernmental negotiations. The key role of the Secretariat in supporting multilateral environmental negotiations processes is making adequate preparation and providing proper guidance in meetings. This includes the preparation of proper briefing notes and speaking notes (scripts) for the chair/president; and, where possible, providing an opportunity in advance of the meeting for full consultations in which the Secretariat can warn the chair or president of matters to watch out for, which may not be reflected in any formal document, and provide a background to any particular negotiation. The briefing notes or the script for the chair/presiding officer may summarize some background information, main issues, potential areas of concern, key players and desired outcomes (from the Secretariat's perspective). When the Secretariat does not play its role appropriately in preparing the ground work for negotiations and monitoring the process, this becomes a significant reason why some conferences fail.

6 General guidance for negotiators

Before becoming involved in any negotiation, a negotiator is expected to have a clear brief outlining what deliverables his/her government expects. In this regard, one is expected to know his/her government's interest and bottom-line, and to prepare both his/her aspirations and reserve positions accordingly. Having reviewed the documents of the meeting one can prepare scenarios and options to guide his/her interventions.

In preparing for a position or intervention, it is important for a negotiator to understand and influence his/her own group's position, especially in respect of the countries within his/her bloc which are not in line with his/her position. This contributes to the knowledge of a negotiator of the strengths and weaknesses of his/her position, and to maximizing his/her options during the negotiation process. The negotiator's bloc must consider the possible targets and goals of other negotiating groups and consider bloc-specific aspiration and reserve positions.

It may be important to find out where a negotiator can agree or make concessions with others. Once a negotiator understands others' positions, he or she can ask himself or herself: What can I do all by myself to pursue my interests? What can I do directly to influence the other side to make them respect my interests? How can I bring a third party into the situation in order to further my interests? In this regard,

the negotiator may need to inform other blocs of his/her interest as he/she justifies the importance of his/her position.

When other negotiating blocs present their own positions, the negotiator can translate them in terms of concrete interests. To avoid unnecessary conflicts, however, there may be a need to depersonalize interventions where possible to prevent escalation of tensions and creation of an adversarial negotiating environment.

If the negotiator wants to object that the text proposed by other parties is unacceptable, he/she is expected to justify his/her position with solid reasons, to defend it with the key points contained in his proposal, and to seek support from others. In this regard, a negotiator will have to listen carefully to the objections of others and to identify his/her potential issue-related allies. As a negotiator tracks the convergence of views, not all negotiators from the other side may differ with his/her position; and he/she might be able to identify potential like-minded governments with whom issue-specific alliances or coalitions could be forged.

Once negotiations devolve into smaller groups, such as contact groups, a negotiator can advance his/her position there aggressively, considering his/her position as the negotiations progress. One can then prepare the strategy and possible concessions, be prepared for tactical retreats, and change course toward his/her goal. If the negotiations do not go as planned and desired, the negotiator is not expected to overdefend his/her position, or to corner himself/herself. There is always an option of asking the meeting to reflect his/her view in the report of the meeting, which may not change the outcome of the meeting but could be a source of explanation in the future when the same issue arises. In a contact group, one can frame a problem into a 'win–win' solution by addressing all interests of the parties, and by identifying the general criteria that must be respected in an acceptable result. Working towards a 'win–win' solution means that all sides must present multiple proposals. This will require developing more than one proposal in an effort to reach common ground as the group works towards consensus.

7 Conclusion

Although multilateral environmental negotiations differ from one MEA or UN meeting to another, depending on the size and objective of the meeting, there are clear features that one can identify that cut across MEA processes and meetings. This paper was an attempt to elaborate processes in major multilateral environmental negotiations which are not necessarily followed to the letter in smaller meetings of MEAs but can guide those who attend such meetings on understanding the processes and the role of the actors. The information provided in this paper can also assist those who wish to organize major UN conferences to understand the role of the various phases in meetings and players and what they seek to accomplish.

To be effective, a negotiator is expected to understand MEAs, the principles of environmental law, and the synergies and inter-linkages of various MEAs because these issues regularly surface and can be of added value to a negotiator when deliberating on MEAs. When negotiators understand the various formats of the sessions and strategies and actively participate, it levels the playing field in multilateral environmental negotiation by actively involving negotiators in the whole process of negotiation.

The current multilateral environmental negotiation processes are increasingly being negotiated through blocs. Information and materials for meetings are currently being provided online through websites. The era of paperless meetings and preference for bloc negotiations is here and will be the way to go in the future. A true victory in multilateral environmental negotiations is one where all blocs regard the outcome as fair and equitable with all interests having been addressed in some way.

Relationships between Multilateral Environmental Agreements and Other Agreements

Tuomas Kuokkanen[1]

1 Introduction

In his book on the law of treaties, Reuter notes that a treaty 'does not produce its effects in a legal vacuum', but that surrounding each treaty 'there is an intricate web made up of all the treaties in force, of customary rules, and acts of international organizations'.[2] He underlines that 'a number of treaties may be linked among themselves, as well as with other acts and sources of international law, with differing degrees of closeness and varying effects'.[3]

Reuter's point applies to recent developments in respect of multilateral environmental agreements (MEAs). Indeed, agreements have various relationships between other agreements and decisions made by international bodies. For example, one of the most difficult negotiating issues in the recently concluded Nagoya Protocol[4] was the determination of the relationship the Protocol would have with other international instruments.[5]

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[2] Paul Reuter, *Introduction to the Law of Treaties,* translated by José Mico and Peter Haggenmacher (2nd ed., Kegan Paul International, 1995) 129.

[3] *Ibid*. at 130–131.

[4] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, <http://www.cbd.int/abs/>.

[5] See Matthias Buck and Clare Hamilton, 'The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity', 20 *Review of European Community & International Environmental Law* (2011) 47–61 at 58.

Moreover, the proliferation of treaties may lead to fragmentation which in turn can produce inefficient and even conflicting results.[6] For this reason, the identification and proper management of the relationships between MEAs has recently become an important theme both in MEA negotiations and writings on international environmental law.[7]

Relationships between international agreements may be dealt with in a number of ways. As most international agreements operate as parts of specific regimes, this paper will focus both on treaty relationships and on interactions between treaty regimes. The paper will examine the following relationships: relationships within environmental regimes; relationships between environmental regimes; and relationships between environmental regimes and other regimes. The paper considers particularly issues in respect of biodiversity-related agreements.

2 Multilateral environmental agreements and relationships

2.1 Relationships within environmental regimes

Since the 1970s, a number of international environmental agreements have been concluded whereby several frameworks and environmental bodies have been established. These arrangements[8] are usually characterized by referring to them as 'regimes'.[9] They operate as frameworks under which specific regulations can be elaborated through cooperation between policy and science.

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[6] For a comprehensive discussion, see 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, The Erik Castrén Institute Reports 21/2007. The report discusses four types of relationships in normative conflicts: a) relations between special and general law; b) relations between prior and subsequent law; c) relations between laws at different hierarchical levels; and d) relations of law to its 'normative environment' more generally. This publication contains the final report of the International Law Commission's Study Group on Fragmentation.

[7] For instance, this aspect was highlighted in the UNEP Governing Council decision, giving a mandate to prepare a global legally binding instrument on mercury, in the following way: 'Need to achieve cooperation and coordination and to avoid the unnecessary duplication of proposed actions with relevant provisions contained in other international agreements and processes'. See 'Chemicals management, including mercury', UNEP Governing Council Decision 25/5 (2008), para. 28(d).

[8] Institutional arrangements for these agreements comprise usually a meeting of the parties, a secretariat, and one or more specialist subsidiary bodies. See Robin R. Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', 94 *American Journal of International Law* (2000) 623–659 at 623. See also Martin List and Volker Rittberger, 'Regime Theory and International Environmental Management' in Andrew Hurrel and Benedict Kingsbury (eds), *The International Politics of the Environment. Actors, Interests, and Institutions* (Clarendon Press, 1992) 85–109.

[9] See Peter M. Haas, 'Introduction: Epistemic Communities and Mediterranean Pollution Control', 43 *International Organization* (1992) 1–35; Thomas Gehring, 'International Environmental Regimes: Dynamic Sectoral Legal Regimes', 1 *Yearbook of International Environmental Law* (1990) 35–56. For discussion, see also Tuomas Kuokkanen, *International Law and the Environment: Variations on a Theme* (Kluwer Law International, 2002) 269–278.

Beyerlin and Marauhn describe the framework convention and protocol approach by noting that the purpose of an international framework convention is to establish 'a rudimentary treaty relationship' which will enable parties to take a subsequent course of action in due course, usually through a protocol or protocols.[10] Haas describes regimes as being learning processes instead of being 'simply static summaries of rules and norms'.[11] In the same vein, Sjöstedt, Spector and Zartman note that a post-agreement negotiation process involves 'a continual process of management, monitoring, adjustment, and continued negotiation as the effects of the negotiated provisions are fed back to enhance policy learning'.[12]

Environmental regimes began to develop in connection with pollution control and nature conservation as a flexible framework approach enabled further regulatory and policy developments to advance in a dynamic way. In pursuit of their ultimate goals, negotiators began to design environmental regimes with built-in, step-by-step interim objectives, often through the use of separate protocols or annexes and their regular amendments. The control of transboundary air pollution under the auspices of the 1979 Convention on Long-range Transboundary Air Pollution and its specific protocols,[13] the 1985 Vienna Convention and the 1987 Montreal Protocol,[14] and the 1992 United Nations Framework Convention on Climate Change[15] and the 1997 Kyoto Protocol relating thereto provide examples of regime-building.

Turning to the 1992 Convention on Biological Diversity (CBD),[16] it can be noted that its drafters already envisaged that one or more subsequent protocols would be added to the Convention. According to Article 28, the contracting parties are required to cooperate in the formulation and adoption of protocols to the Convention.

[10] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, 2011) 271.

[11] Peter M. Haas, 'Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control', 43 *International Organization* (1989) 377–403 at 377, where he states that '[r]egimes are not simply static summaries of rules and norms; they may also serve as important vehicles for international learning that produce convergent state policies'.

[12] Gunnar Sjöstedt, Bertram I. Spector and I. William Zartman, 'Looking Ahead' in Bertram I. Spector, Gunnar Sjöstedt and I. William Zartman (eds), *Negotiating International Regimes. Lessons Learned from the United Nations Conference on Environment and Development (UNCED)* (Graham & Trotman/Martinus Nijhoff, 1994) 233–249 at 241.

[13] Convention on Long-Range Transboundary Air Pollution, Geneva, November 13 1979, in force 16 March 1983, 18 *International Legal Materials* (1979) 1442, <http://www.unece.org/env/lrtap/>. The Convention was established as a framework within which parties can identify concerns posed by transboundary air pollution, and under which they can then elaborate more specific protocols. So far, eight protocols have been adopted under the Convention.

[14] Convention on the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1985) 1529; Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, <http://www.unep.org/ozone/>.

[15] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22, <http://unfccc.int/2860.php> (visited 26 July 2012).

[16] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.cbd.int> (visited 26 July 2012).

The final provisions (Articles 29–31, 34 and 35) are drafted in such a way that they take into account subsequent protocols as well. Moreover, Article 32 deals with the relationship between the Convention and its protocols.[17]

As a first step, in January 2000 the parties to the CBD adopted the Cartagena Protocol on Biosafety.[18] The Protocol supplements the Convention by seeking to protect biological diversity from the potential risks posed by living modified organisms (LMOs)[19] resulting from modern biotechnology, with the protections offered focusing on transboundary movements. In 2010, the meeting of the Conference of the Parties serving as the Meeting of the Parties to the Protocol (COP/MOP) adopted the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress.[20] The Supplementary Protocol provides for international rules and a procedure on liability and redress for damage to biodiversity resulting from LMOs. In the same year, the Nagoya Protocol on access and benefit-sharing was adopted under the CBD.[21]

2.2 MEA – MEA relationships

In recent years, regime interaction has gained more and more both in practice and in theory.[22] It is common, for instance, that multilateral environmental agreements interact with agreements that are operating in the same field. Usually, this is done through cooperation between such agreements or regimes.

The CBD has a wide range of cooperative activities with other conventions and bodies.[23] With regard to environmental agreements, such activities include cooperation with the two other Rio Conventions, these being the United Nations Frame-

[17] According to Art. 32, a state or a regional economic integration organization may not become a party to a protocol unless it is, or becomes at the same time, a contracting party to the convention. In addition, the Article states that decisions under any protocol shall be taken only by the parties to the protocol concerned.

[18] Cartagena Protocol on Biosafety, Montreal, 29 January 2000, in force 11 September 2003, 39 *International Legal Materials* (2000) 1027.

[19] According to the CBD's website, a 'Living Modified Organism (LMO)' is defined in the Cartagena Protocol on Biosafety as 'any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology. … In everyday usage LMOs are usually considered to be the same as GMOs (Genetically Modified Organisms), but definitions and interpretations of the term GMO vary widely. Common LMOs include agricultural crops that have been genetically modified for greater productivity or for resistance to pests or diseases.' See cbd.int, 'Frequently Asked Questions: 3. What is a Living Modified Organism (LMO)?', available at <http://bch.cbd.int/protocol/cpb_faq.shtml#faq3> (visited 31 March 2012).

[20] Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, Nagoya, 15 October 2010, <http://bch.cbd.int/protocol/supplementary/>. The Supplementary Protocol will enter into force 90 days after its 40th ratification by a Party to the Cartagena Protocol. As at the beginning of April 2012, that Supplementary Protocol had 51 signatories – but only two ratifications. See CBD, 'Parties to the Protocol and Signature and Ratification of the Supplementaty Protocol', available at <http://bch.cbd.int/protocol/parties/#tab=1> (visited 2 April 2012).

[21] See *supra* note 4.

[22] For a comprehensive discussion, see Margaret A. Young (ed.), *Regime Interaction in International Law. Facing Fragmentation* (Cambridge University Press, 2012).

[23] For a comprehensive discussion, see 'Cooperation with other conventions and international organizations and initiatives', Note by the Executive Director, UN Doc. UNEP/CBD/COP/10/17 (2010).

work Convention on Climate Change and the United Nations Convention to Combat Desertification.[24] In addition, the CBD cooperates with the five other biodiversity-related conventions[25] through the Liaison Group of Biodiversity-related Conventions.[26] The object of the Liaison Group is to explore options for enhancing synergies, avoid duplication of efforts and improve the coherent implementation of the biodiversity-related conventions. Moreover, the CBD has cooperation with other relevant conventions and agreements. Such cooperation includes, for example, cooperation with the UNEP Regional Seas Conventions[27] in connection with the work on marine and coastal biodiversity.

As to the regulatory links between MEAs, it might be rational that in certain instances an MEA refers to specific provisions in another MEA. Some regional marine protection conventions may, for instance, refer to provisions of a global MEA. For example, the Baltic Marine Protection Convention refers to the provisions of the MARPOL 73/78 Convention in connection with the prevention of pollution from ships.[28]

The Kyoto Protocol to the United Nations Convention on Climate Change does not regulate greenhouse gases controlled by the Montreal Protocol on Substances that Deplete the Ozone Layer, but refers to the latter in this regard. In fact, the Montreal Protocol has been effective not only in phasing-out ozone depleting substances but also in reducing greenhouse gases. The Montreal Protocol has even been called as 'world's most effective climate treaty' as it has managed to 'reduce greenhouse gas emissions by the equivalent of approximately 11 gigatons of carbon dioxide a year between 1990 and 2010'.[29]

[24] UN Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <http://www.unccd.int>.

[25] The CMS (Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>); the CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>); the Ramsar Convention (Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <http://www.ramsar.org>); the World Heritage Convention (Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <http://whc.unesco.org>); and the ITPGRFA (International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, in force 29 June 2004, <http://www.planttreaty.org/>).

[26] See <http://www.cbd.int/blg/>.

[27] For more information on the UNEP Regional Seas Programme, see <http://www.unep.org/regionalseas> (visited 21 July 2012).

[28] See, for instance, annex IV of the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 March 1974, in force 3 May 1980, 13 *International Legal Materials* (1974) 546, <http://www.helcom.fi>).

[29] Our Planet Magazine. Celebrating 20 years of the Montreal Protocol, available at <http://new.unep.org/PDF/OurPlanet/2007/sept/EN/ARTICLE7.pdf> (visited 24 July 2012).

One topical problem, however, in relation to the ozone and climate regime is how to regulate hydrofluorocarbons (HFCs) in a synergic manner.[30] While the HFCs are produced as substitutes for ozone-depleting substances they are, nevertheless, greenhouse gases. Thus, the problem solving under one MEA appears to have led to a problem under another MEA. Currently, the HFCs are regulated by the Kyoto Protocol[31] but not by the Montreal Protocol. So far, parties have not been able to agree how to regulate the HFCs in coherent and consistent manner.[32]

2.3 Relationships between environmental and other agreements

2.3.1 Introduction

The Study Group of the International Law Commission noted in its report the emergence of new and special types of law or regimes, such as 'environmental law', 'trade law' and 'human rights law'. The group points out that '[e]ach rule-complex and "regime" comes with its own principles, its own form of expertise and its own "ethos", not necessarily identical to the ethos of neighbouring specialization'.[33]

Along these lines, various relationships between an environmental regime and its neighboring regimes can be identified. By way of an example, the relationship between the environment and trade as well as the environment and the law of the sea are discussed in the present section. Other examples could include, for instance, relationships to intellectual property rights, investment law, finance, and armed conflicts.

2.3.2 Trade and the environment

Loibl characterizes the interaction between trade and environment as a 'difficult relationship'.[34] Indeed, the relationship between multilateral environmental agreements and trade agreements has been under intensive discussion for years.

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[30] For discussion, see Tadanori Inomata, 'Building Institutional and Managerial Foundations for Environmental Governance with the United Nations System – Towards a New Governance Structure for Environment Protection and Sustainable Development' in Ed Couzens and Tuula Honkonen (eds), *International Environmental Lawmaking and Diplomacy Review* 2009, University of Eastern Finland – UNEP Course Series 9 (University of Eastern Finland, 2010) 45–64, at 59.

[31] See Annex A of the Kyoto Protocol.

[32] The issue was discussed in the ninth meeting of the Montreal Protocol on the basis of the proposals to amend the Montreal Protocol. While there was an 'agreement that in phasing out ozone-depleting substances it was preferable to adopt alternatives with low or zero global-warming potential rather than high global-warming potential', parties were not able to agree whether the Montreal Protocol should be amended. See Report of the combined ninth meeting of the Conference of the Parties to the Vienna Convention on the Protection of the Ozone Layer and the Twenty-Third Meeting of the Parties to the Montreal Protocol on Substance that Deplete the Ozone Layer, UN Doc. UNEP/OzL.Conv.9/7-UNEP/OzL.Pro.23/11 (2011) paras 103–119, at 111.

[33] Report of the Study Group of the International Law Commission, *supra* note 6.

[34] Gerhard Loibl, 'Trade and Environment – A difficult relationship?' in Tuula Kolari and Ed Couzens (eds), *International Environmental Lawmaking and Diplomacy Review 2007*, University of Joensuu – UNEP Course Series 7 (University of Joensuu, 2008) 277–283.

A need to regulate economic activities was already recognized, albeit in limited form, in connection with early conservation agreements concluded at the beginning of the 19th century. It was deemed necessary to control trade because, in many instances, foreign demand motivated the overexploitation of wildlife[35] and endangered species.[36] After the Second World War, trade related measures were first extended to regulate international movements of plants in order to control pests and diseases.[37] The process of regulating the trade in wildlife led eventually to the conclusion of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[38]

Trade restrictions in environmental agreements raised new issues concerning the relationship between trade and environmental agreements.[39] The collision between the trade and environment sectors resulted mainly from the fact that the two regimes were based on different starting points.[40] As environmental law aimed to protect the

[35] For agreements including trade restrictions, see Migratory Birds Convention between the United States and Great Britain (for Canada), Washington D.C., 16 August 1916 (amended in 1979 and 1995), 221 *Consolidated Treaty Series*, 408, Art. VI; Convention Relative to the Preservation of Fauna and Flora in Their Natural State, London, 8 November 1933, in force 14 January 1936, available at <http://www.ecolex.org/server2.php/libcat/docs/TRE/Multilateral/En/TRE000069.txt> (visited 22 March 2012), Art. 9.

[36] See the 1940 Western Hemisphere Convention (Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Washington D.C., 12 October 1940, in force 1 May 1942, available at <http://www.oas.org/juridico/english/treaties/c-8.html> (visited 22 March 2012)), Art. IX; the 1950 International Convention for the Protection of Birds (Paris, 18 October 1950, in force 17 January 1963, 638 *United Nations Treaty Series* 185), Arts 3, 4, 6, 7 and 9(2); the 1968 African Convention (African Convention on the Conservation of Nature and Natural Resources, Algiers, 15 September 1968, in force 16 June 1969, available at <http://www.ecolex.org/server2.php/libcat/docs/TRE/Multilateral/En/TRE000492.txt> (visited 22 March 2012), Art. IX; the European Convention for the Protection of Animals during International Transport (Paris, 13 December 1968, into force 20 February 1971, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/065.htm> (visited 22 March 2012), Art. 1(2); the 1970 Benelux Convention Concerning Hunting and the Protection of Birds, Brussels, 10 June 1970, into force 1 July 1972, 847 *United Nations Treaty Series* 255, Arts 6 and 9; and the 1973 Agreement on Conservation of Polar Bears, Oslo, 15 November 1973, into force 26 May 1976, 13 *International Legal Materials* (1974) 13, Art. V.

[37] International Plant Protection Convention, Rome, 6 December 1951, into force 3 April 1952, 150 *United Nations Treaty Series* 67, Art. VI; Plant Protection Agreement for the South East Asia and Pacific Region, Rome, 27 February 1956, into force 2 July 1956, 247 *United Nations Treaty Series* 400, Art. III; Agreement Concerning Co-Operation in the Quarantine of Plants and Their Protection Against Pests and Diseases, Sofia, 14 December 1959, into force 19 October 1960, available at <http://www.whatconvention.org/en/convention/1095> (visited 22 March 2012).

[38] See the 1973 CITES Convention. Aiming to protect endangered species against over-exploitation through international trade, the Convention classifies species into three categories and regulates their trade accordingly. Using trade as a sanction, such parties began to ban trade with non-parties unless they complied de facto with protection measures imposed by those agreements. See CITES Convention, Art. X:

> Where export or re-export is to, or import is from, a State not a Party to the present Convention, comparable documentation issued by the competent authorities in that State which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party.

[39] See Patricia Birnie, Alan Boyle and Catherine Regdwell, *International Law & the Environment* (3rd ed., Oxford University Press, 2009) 766–769.

[40] For example, the GATT is based on three main principles. First, according to the most-favoured-nation treatment, parties are required to ensure that products imported from the territory of one member receive treatment no less favourable than like products imported from any other member. Second, pursuant to

environment though a regulatory approach, trade law purported to free trade through a deregulatory approach.

Sampson notes that despite hesitation on the part of WTO governments to extend their agenda to environment related issues, they have nevertheless gravitated towards it. According to him, '[o]ne reason is that with its creation, the reach of trade policy has greatly expanded, sometimes on a de facto basis with resort to its dispute settlement process'.[41] So far, there has nevertheless been no major GATT/WTO dispute specifically on the relationship between trade rules and an MEA. This does not, however, mean that this could not occur in the near future.[42]

The relationship between trade and environment was one of the most difficult issues in elaborating the 1992 Rio Declaration.[43] According to Principle 12 of the declaration, 'trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'. Moreover, '[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided'.[44]

Parties to a trade agreement or an MEA might agree upfront on how to resolve a potential conflict between trade rules and an MEA. For instance, the relationship between international environmental agreements and free trade agreements is determined in the North American Free Trade Agreement (NAFTA) by giving an explicit supremacy to certain environmental agreements, provided that where a party has a choice among equally effective and reasonably available means of complying with such obligations, the party chooses the alternative that is least inconsistent with the other provisions of the NAFTA.[45]

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the national treatment rule, parties shall treat imported goods like nationally produced goods. Third, the non-discrimination rule requires parties to apply such restrictions to all like goods and not just to goods from a specific member country. See the GATT (The General Agreement on Tariffs and Trade, Marrakech, 15 April 1994, available at <http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm>), Arts I, III and XIII.

41 Gary P. Sampson, 'The Green Economy and International Governance', Paper prepared for the First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability, 12–13 October 2011, Kuala Lumpur, Malaysia, available at <http://www.unep.org/delc/Portals/24151/GreenEconomyInternationalEG.pdf> (visited 21 July 2012).

42 See Loibl, 'Trade and Environment' *supra* note 34, at 282.

43 UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876.

44 For example, in the 'Shrimp' case the GATT panel rejected an import ban on shrimp and shrimp products that had been applied by the United States, where this ban had been imposed in order to conserve sea turtles. The panel found that the United States had adopted measures that were clearly a threat to the multilateral trade system and were applied without any serious attempt to reach, beforehand, a negotiated solution. Without excluding a possibility to have recourse to unilateral measures, the panel noted that environmental matters of mutual interest should nevertheless be primarily addressed through international cooperation. See World Trade Organization: Report of the Panel on United States – Import Prohibition of Certain Shrimp and Shrimp Products, 37 *International Legal Materials* (1998) 832.

45 See Art. 104 of the NAFTA (North American Free Trade Agreement, Ottawa, 11 and 17 December 1992; Mexico D.F., 14 and 17 December 1992; Washington D.C., 8 and 17 December 1992, in force 1 January 1994, available at <http://www.nafta-sec-alena.org/en/view.aspx?conID=590> (visited 22 March

Alternatively, the issue could be left in the open to be solved at a later stage through general interpretation methods.[46] For example, in the Cartagena Protocol negotiations, a compromise formula laying down neutral language was placed in the preamble of the Protocol in the following three paragraphs:

> *Recognizing* that trade and environment agreements should be mutually supportive with a view to achieve sustainable development,
> *Emphasizing* that this Protocol shall not be interpreted as implying any change in the rights and obligations of a party under any existing international agreements,
> *Understanding* that the above recital is not intended to subordinate this Protocol to other international agreements.

Despite the attempts for a mutually supportive approach, the cooperation between the trade and the environment sectors has not amounted to a harmony of interests. It appears rather, as Schoenbaum notes, that 'there will be no grand synthesis of the trade and environment conflict', and that 'the process of accommodation will be ongoing, demanding continual attention and work'.[47]

2.3.3 The Law of the Sea and the environment

The United Nations Convention on the Law of the Sea (UNCLOS)[48] was concluded in December 1982 and entered into force in 1994. So far, the Convention has been complemented by two implementing agreements: the 1994 Agreement on the Implementation of Part XI[49] and the 1995 Fish Stocks Agreement.[50] To underline the importance of the UNCLOS, Koh, the President of the Third United Nations Conference on the Law of the Sea, has called the Convention 'a constitution for the oceans which will stand the test of time'.[51]

2012)). In paragraph 1, the CITES, the 1987 Montreal Protocol and the 1989 Basel Convention (Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, http://www.basel.int) are listed. Furthermore, the paragraph provides a mechanism to add other conventions by listing them in Annex 104(1). For discussion, see Paul Demaret, 'TREMs, Multilateralism, Unilateralism and the GATT" in James Cameron, Paul Demarat and Damien Geradin (eds), *Trade & the Environment: The Search for Balance* (Cameron May, 1994) 52–68.

46 See *infra* part 2.4.; Loibl, 'Trade and Environment', *supra* note 34, at 280.

47 Thomas J. Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation', 91 *American Journal of International Law* (1997) 268–313 at 312–313.

48 United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261.

49 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, New York, 28 July 1994, in force 28 July 1996, 33 *International Legal Materials* (1994) 1309.

50 Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995, in force 11 December 2001, 34 *International Legal Materials* (1995) 1542, <http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm> (visited 22 March 2012).

51 Remarks by T. B. Koh, reproduced in UN, *The Law of the Sea: Official Text of the UNCLOS with Annexes and Index* (United Nations, 1983) xxxiii.

> The UNCLOS is not, however, a similar regime or framework to the environmental regimes discussed above in section 2.2 of this paper. The Convention is not structured, as Boyle notes, 'for the adoption of further protocols and annexes as a means of developing the legal regime to meet new priorities and problems'.[52] Rather, its framework nature means that the UNCLOS includes general principles and requires further elaboration of substantive provisions. For instance, Part XII dealing with the protection and preservation of the marine environment requires parties to establish further rules, regulations and procedures on the protection of the marine environment.[53] De La Fayette characterizes this aspect as the 'dynamism of the convention'.[54] A large number of complementary agreements contain more specific substantive provisions on marine issues.[55]

The relationship between the UNCLOS and other international agreements is, as Redgwell puts it, 'a symbiotic one'.[56] On the other hand, the UNCLOS regulates the relationship between special agreements and their future development. This is done through Article 237[57] which regulates obligations under other conventions on the protection and preservation of the marine environment; and through Article 311, which includes general provisions on the relation to other conventions and international agreements. On the other hand, special agreements contain provisions on their relationship to the UNCLOS. While special conventions concluded before the conclusion of the UNCLOS include a savings clause to prevent any prejudice to the codification of the law of the sea, special conventions concluded after the conclusion of the UNCLOS provide language to take into account the UNCLOS.[58]
The relationship between the CBD and the UNCLOS is a good example of the need

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[52] Alan Boyle, 'Further Development of the 1982 Convention on the Law of the Sea: Mechanism for Change' in David Freestone, Richard Barnes and David M Ong, *The Law of the Sea. Progress and Prospects* (Oxford University Press, 2009) 40–62 at 41.

[53] See Part XII (Arts 192–237).

[54] See also Louise de La Fayette, 'The Role of the United Nations in International Oceans Governance' in *The Law of the Sea*, *supra* note 52, 63–74 at 65–66.

[55] See UN Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *Obligations of States Parties under the United Nations Convention on the Law of the Sea and Complementary Instruments*, United Nations, 2004), available at <http://www.un.org/depts/los/doalos_publications/publicationstexts/E.04.V.5.pdf> (visited 22 March 2012).

[56] Catherine Redgwell, 'From Permission to Prohibition: The 1982 Convention on the Law of the Sea and Protection of the Marine Environment' in *The Law of the Sea*, *supra* note 52, 180–191, at 191.

[57] Art. 237 reads as follows:

> 1. The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention. 2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention.

[58] Redgwell, *supra* note 56, at 184. See also Nele Matz, 'The Interaction between the Convention on Biological Diversity and the UN Convention on the Law of the Sea' in Peter Ehlers, Elisabeth Mann-Borgese and Rûdiger Wolfrum (eds), *Marine Issues from a Scientific, Political and Legal Perspectives* (Kluwer Law International, 2002) 203–220 at 216–219.

for a coherent approach. According to Article 22(2) of the CBD, parties shall implement the CBD 'with respect to the marine environment consistently with the rights and obligations of States under the law of the sea'. While this could suggest that the UNCLOS would prevail, it is important to note that Article 237(2) of the UNCLOS provides some flexibility as it only requires that special conventions 'should be carried out in a manner consistent with the general principles and objectives' of the Convention. Discussing this relatively complex relationship, Boyle comes to the conclusion that the relationship between the two treaties 'is not the exclusive preserve of either treaty', and that '[a] coherent and comprehensive understanding of the present law of the sea requires consideration of both treaties'.[59]

2.4 Relationships and conflicts in general

International law has various methods and techniques for dealing with the relationships amongst international agreements. To begin with, there is a general assumption that states are acting in good faith and aiming for a consistent and rational approach rather than for an approach that is inconsistent and irrational.[60] However, as Jenks put it, 'the presumption against conflict may eliminate certain potential conflicts; it cannot eliminate the problem of conflict'.[61] For this reason, there is a need either to include express provisions on treaty relationships, or to interpret, according to international law, various relationships and possible conflicts between international agreements.

[59] Boyle, 'Further Development', *supra* note 52, at 58.

[60] See Lassa Oppenheim, *International Law, vol. I* (7th ed. by Lauterpachts, 1948) at 858–859:

> It is taken for granted that the contracting parties intend something reasonable, something adequate to the purpose of the treaty; and something not inconsistent with generally recognized principles of International Law, nor with generally recognized principles of International Law, nor with previous treaty obligations towards third States. If, therefore, the meaning of a stipulation is ambiguous, the reasonable meaning is to preferred to the unreasonable, the more reasonable to the less reasonable, …the consistent meaning to the meaning inconsistent with generally recognized principles of International Law and with previous treaty obligations towards third States.

Quoted in Wilfred Jenks, 'The Conflict of Law-Making Treaties', 13 *The British Year Book of International Law* (1953) 401–453 at 428.

[61] *Ibid*. at 429. See also at 402:

> The international legislative process has many imperfections, some of which can be eliminated by forethought and prudence, whereas others, being inherent in the nature of the process, give rise to problems for which appropriate solutions must be found on the assumption that the imperfection itself cannot be whole eliminated. …It is taken for granted that the contracting parties intend something reasonable, something adequate to the purpose of the treaty; and something not inconsistent with generally recognized principles of International Law, nor with generally recognized principles of International Law, nor with previous treaty obligations towards third States. If, therefore, the meaning of a stipulation is ambiguous, the reasonable meaning is to preferred to the unreasonable, the more reasonable to the less reasonable,…the consistent meaning to the meaning inconsistent with generally recognized principles of International Law and with previous treaty obligations towards third States.

Aust underlines that, when drafting the final clauses of a multilateral treaty, it is important 'to consider whether anything might be said about the relationship between it and existing or future treaties dealing with the same subject matter'.[62] He lists recent examples of such express provisions: the treaty prevails over all other past and future treaties; the treaty is subordinate to an earlier one; the parties shall not enter into later inconsistent treaties; an existing treaty shall not be affected; for parties to the treaty it prevails over earlier treaties; compatible supplementary treaties are permitted; and inclusion of comprehensive provisions, the best of both worlds and neutral provisions.[63]

Even though an international agreement would not include any express provisions on treaty relationships, a professional toolbox for international law is available. The study group of the International Law Group reminded us that international law is not a random collection of norms but that there are 'meaningful relationships between them'. The group noted norms may exist at 'higher and lower hierarchical levels, their formulations may involve greater or lesser generality and specificity and their validity may date back to earlier or later in time'.[64]

With regard to hierarchy in international law, one can first refer to peremptory norms of general international law (*jus cogens*) from which 'no derogation is permitted',[65] and to Article 103 of the United Nations Charter[66] according to which the Charter will prevail in the event of a conflict between obligations under the Charter and under any other obligations.[67] As to conflicts between successive norms, the residual norm of international law is provided in Article 30 of the Vienna Convention on the Law of Treaties,[68] according to which a later treaty supersedes an earlier treaty (*lex posterior derogat legi priori*).

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[62] Anthony Aust, *Modern Treaty Law and Practice* (2nd ed., Cambridge University Press, 2007) at 216. He reminds us that, essentially, the issue is about 'which obligations have priority'.

[63] *Ibid.* at 219–227. See also Jenks, 'The Conflict of Law-Making Treaties', *supra* note 60, at 436–450.

[64] Aust, *Modern Treaty Law*, *supra* note 62, at 263.

[65] See Art. 53 of the Vienna Convention on the Law of Treaties (Vienna, 22 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331):

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[66] Charter of the United Nations (26 June 1945, available at <http://www.un.org/en/documents/charter/index.shtml>.

[67] See Art. 103 of the Charter: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under present Charter shall prevail'.

[68] The Vienna Convention on the Law of Treaties has been in force since 27 January 1980 and has 111 parties (as of 25 July 2012). Its provisions arguably reflect customary international law. See, for instance, the *Gabčíkovo-Nagymaros Project* case in which the Court stated: '[The Court] needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law' (*I.C.J. Reports 1997*, 38, para. 46).

In conflicts between special and general law, the generally accepted method is that priority should be given to the treaty that is more specific (*lex specialis derogate legi generali*). Moreover, Article 31(3)(c) of the Vienna Convention provides that 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account, together with the context. Yet, it should be recalled that the applicability of the above principles will depend on context; and that none of them have absolute meanings.[69]

3 Conclusions

The relationships between multilateral environmental agreements and other agreements provide important managerial tasks within contemporary international environmental law-making. Indeed, it is important for lawyers and environmental policy-makers to understand how specialized environmental, and other, regimes operate and could interact.[70]

The present paper has examined the relationships between international agreements with a special focus on treaty regimes. First, with regard to environmental regimes as such, there is a close relationship between a framework agreement and protocols and other instruments relating thereto. This is understandable as the dynamic development of the secondary instruments under the framework agreement is the crucial purpose of the environmental regimes. Second, there is usually a cooperative relationship between environmental regimes. In certain instances, however, there could be inconsistent or even conflicting approaches. Third, it is important to acknowledge boundaries and relationships[71] between environmental and other regimes. In practice, however, conflicts between such regimes have been rare.[72] Fourth, the general principles and methods of international law are available in case of possible conflicts between international agreements.

Overall, the issue appears to boil down to striking a balance between specialization and coherence.[73] Indeed, specific environmental issues require contextual problem-

[69] See Jenks, 'The Conflict of Law-Making Treaties', *supra* note 60, at 453.

[70] In his seminal article on the conflict of law-making treaties, Wilfred Jenks noted in 1953 that the 'world community still has no legislature and it seems improbable that anything comparable to a national legislature can be developed on a world scale in the foreseeable future'. See *supra* note 60, at 402.

[71] See Margaret A. Young, 'Introduction: the Productive Friction between Regimes' in Young (ed.), *Regime Interaction in International Law*, *supra* note 22, 1–19, at 1.

[72] See the Report of the Study Group of the International Law Commission, *supra* note 6, at 248–249: 'One principal conclusion of this report has been that the emergence of special treaty-regimes (which should not be called "self-contained") has not seriously undermined legal security, predictability or the equality of legal subjects'.

[73] See Nele Matz-Lück, 'Norm Interpretation across International Regimes: Competences and Legitimacy', in Young (ed.), *Regime Interaction in International Law*, *supra* note 22, 201–234, at 205–209.

-solving through environmental regulations and regimes. At the same time, it is important to seek to preserve coherence[74] of the legal system by enhancing synergies and by avoiding ineffective fragmentation.

[74] See United Nations Secretary-General's High-level Panel on Global Sustainability, *Resilient People, Resilient Planet: A Future worth Choosing* (United Nations, 2012), available at <http://www.un.org/gsp/report> (visited 11 March 2012), para 220: 'Accountability and coherence at the international level are also indispensible for advancing sustainable development'.

PART II

THE STATE OF BIOLOGICAL DIVERSITY GOVERNANCE AND SYNERGIES

Compliance with Biodiversity-related Multilateral Environmental Agreements and Potential for Synergies

Marko Berglund[1] *and Wanhua Yang*[2]

1 Introduction

Multilateral environmental agreements (MEAs) are agreements among states committing to achieve specific environmental goals. MEAs are often agreed at the global or regional levels, but sub-regional MEAs also exist. MEAs are complemented by bilateral agreements related to the environment. MEAs are usually agreed in the form of an international treaty or protocol[3] which is legally binding on the participating states.

MEAs are the result of international action by governments which often, over time, develop into so called regimes, with both 'hard-law' and 'soft-law' elements.[4] 'Hard-law' specifies legally-binding action to be taken at the national level to achieve the environmental objective prescribed in the treaty, while 'soft-law' usually sets out non-legally binding principles, guidelines, programmes, activities, etc. for Parties to respect when taking actions that involve particular environmental issues.[5] MEAs cover

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[3] A protocol is a treaty, but is not free-standing – being concluded under an existing treaty.

[4] UNEP, *Training Manual on International Environmental Law* (UNEP, 2006), Chapter 4 'Compliance and Enforcement of Multilateral Environmental Agreements' at 39.

[5] *Ibid*.

a wide range of global environmental issues, including, for example biodiversity, chemical substances, climate change, land degradation, sea and marine resources, and waste.

MEAs contain obligations for governments to undertake, either individually or as joint actions at the international level, to implement these legal instruments. Once a state ratifies, accedes to or adheres to a treaty, that state is usually[6] required to implement the treaty at the national level by adopting appropriate national measures to meet its obligations under the treaty. These measures might include the strengthening of state policies, legislation, institutional arrangements, monitoring and reporting, committing financial resources, engaging in awareness-raising, training, public education, and other activities.

In addition to translating treaty provisions into national actions, as outlined above, MEAs may also require collective action by their Parties to implement the treaty obligations at the international level. These joint actions include mandating the Conference of the Parties (COP) further to establish or improve compliance procedures/processes; to establish financial mechanisms; and to require the treaty Secretariats to undertake certain administrative functions for facilitating compliance.

This paper focuses on biodiversity-related MEAs and their compliance mechanisms at the international level. An overview of MEA compliance mechanisms is provided as well as some examples mechanisms under selected biodiversity-related MEAs. The paper concludes by suggesting possible areas for synergies and coherence among the compliance regimes of those biodiversity-related MEAs.

2 Overview of compliance mechanisms of MEAs

2.1 Introduction

MEAs have emerged as one of the favoured means, in the environmental arena, for promoting international cooperation requiring both international and national action to protect both human health and the environment.[7] MEAs establish standards, policies and guidelines for the stewardship of the global environment. With the proliferation of MEAs, however, there has been a growing 'implementation gap' where institutional, legislative and policy measures, and the capacity to implement a large number of MEAs, as well as compliance processes, substantially lag behind the development and ratification of MEAs. Recently, the focus on MEAs has shifted

[6] A treaty might, unusually, contain self-executing provisions; or a state with a monist approach to the inclusion of international law might not require separate national measures to implement it.

[7] UNEP Division of Environmental Law and Conventions, 'The Environmental Dimension of IFSD: Fragmentation of Environmental Pillar and its Impact of Efficiency and Effectiveness' Issues Brief #2 (2011), available at <http://www.unep.org/environmentalgovernance/Portals/8/InstitutionalFrameworkforSustainabledevPAPER2.pdf>_(visited 12 June 2012) at 3.

from negotiating new treaties to promoting compliance with existing environmental conventions.[8] Insufficient and weak implementation of internationally agreed environmental goals, including those set out in MEAs, was one of the major concerns in the preparation process for the United Nations Conference on Sustainable Development (Rio+20) held on 20–22 June 2012 in Rio de Janeiro.[9]

To begin the discussion, it is important to distinguish a few key terms. 'Compliance' is taken to mean 'the fulfilment by the contracting parties of their obligations under a MEA and any amendments to the MEA';[10] and 'implementation' to refer to 'all relevant laws, regulations, policies and other measures and initiatives that contracting Parties take or adopt to meet their obligation under a MEA and its amendments'.[11] Thus, compliance and implementation are related, but distinct. Compliance measures are essential to implementation processes.[12]

The common mechanisms for compliance with MEAs can be grouped into four categories: (a) reporting and performance review; (b) multilateral non-compliance procedures; (c) non-compliance response measures; and (d) dispute resolution.[13]

2.2 Reporting and performance review

Most MEAs require their Parties to report on the measures they have taken to implement a particular MEA, usually by submitting annual reports on their relevant laws or policies. Some MEAs provide for the Secretariat, or a third party, to monitor or verify the performance and require the Parties to cooperate with such monitoring or

[8] UNEP, *Training Manual*, supra note 4; and UNEP and IUCN, *Course on Compliance with and Enforcement of MEAs*: *Lecturer's Manual*, Unit 1, available at <http://www.iucnael.org/en/home/latest-news/176/153-compliance-and-enforcement-of-multilateral-environmental-agreements.html> (visited 12 June 2012) at 15. It should be noted, however, that new MEAs are still being negotiated. For example, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya, 29 October 2010, <http://www.cbd.int/abs/>) was adopted in 2011. In 2009 UNEP's Governing Council requested UNEP's Executive Director to convene an intergovernmental negotiating committee with the mandate to prepare a global legally binding instrument on mercury by 2013. In Durban in December 2011 a process under the UNFCCC was launched to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties to be completed no later than 2015, in order for it to come into effect and be implemented from 2020.

[9] Chapter I, para. 12 of *The Future We Want*, Rio+20 outcome document (available at <http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf> (visited 2 November 2012)), stresses the need for assessing the gaps in the implementation of internationally agreed commitments. Also see UNEP DELC IFSD Issues Brief #3 – Country Responsiveness: Implementation of Capacity Support for the Environmental Pillar of IFSD, stating that the implementation of MEAs has been less successful than their acceptance and ratification, at 1, para. 2, available at: <http://www.unep.org/environmentalgovernance/Portals/8/InstitutionalFrameworkforSustainabledevPAPER3.pdf> (visited 1 October 2012).

[10] 'Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements', UNEP Governing Council Decision SS.VII/4. (2002), at 2, para. 9(a).

[11] *Ibid*. at 2, para. 9(b).

[12] UNEP and IUCN, *Course on Compliance*, *supra* note 8, at Unit 4, Slide 3.

[13] UNEP, *Comparative Analysis of Compliance Mechanisms under Selected Multilateral Environmental Agreements* (UNEP, 2005), 24.

verification of their performance. Thus, reporting and performance review is necessary to determine a Party's compliance situation.[14]

2.3 Non-compliance procedures

Most MEAs establish a formal, multilateral procedure to deal with non-compliance (non-compliance procedures) in the form of an elected committee, often called the 'Implementation Committee' or the 'Compliance Committee'. Non-compliance procedures differ from traditional dispute resolution and aim to identify Parties' compliance difficulties and to facilitate better compliance in a non-adversarial manner. A Party's alleged non-compliance may be referred for consideration to the Committee, which can make a recommendation on the matter to the Conference of the Parties of the MEA in question, as the COP is the supreme decision-making body of a specific MEA. Usually the final output is a decision by the COP.[15]

2.4 Non-compliance response measures

Once a case of non-compliance is identified under an MEA's non-compliance procedure, response measures tailored to the particular circumstances are needed to address the alleged non-compliance at the multilateral level. Given that cases of non-compliance are usually due to lack of human, material and financial resources and/or, in some cases, lack of political will, both incentives and disincentives have been developed as response measures to address the issues.

Incentives are most often used as response measures, and include enhanced international cooperation with the non-compliant Party in support of its implementation. These measures can include the provision of financial and/or technical assistance. Financial assistance often comes in the form of a Trust Fund or a financial mechanism from which the Parties provide funding for relevant projects. Technical assistance may include: (a) capacity-building in the form of training and workshops to address issues of lack of human resources and know-how; and (b) technology transfers and exchange of information to address issues of lack of materials. However, this non-compliance assistance may be conditional so that, for instance, a requirement for the Party to adopt a national program of implementation actions which aim to address the situation of non-compliance must be put into place.[16]

Disincentives are measures that may be imposed on non-compliant Parties. These can include a COP decision to impose additional stringent and specific performance review information obligations (additional to the regular performance review information) subject to verification; to recommend conditional assistance measures; as well as to impose liabilities and/or the suspension of a Party's rights under the con-

[14] *Ibid*.
[15] *Ibid*. at 26.
[16] *Ibid*. at 26–27.

vention.[17] In MEAs which regulate trade, for example, the suspension of rights, viz. the right to trade, can have far-reaching economic impacts.

Table 1 below lists an overview of the compliance mechanisms of nine biodiversity-related MEAs.

Table 1: Overview of MEA Compliance Frameworks[18]

Convention	National performance information	Multilateral non- compliance procedures	Non-compliance response measures
Ramsar[19]	√	√	√
World Heritage[20]	√	√	√
CITES[21]	√	√	√
CMS[22]	√	√	
CBD[23]	√		
UNCCD[24]	√	Pending	
Biosafety[25]	√	√	√
ITPGRFA[26]	√ [27]	√	√
Nagoya	√ [28]	Pending	Pending

[17] *Ibid*. at 27–28.

[18] Modified from UNEP, *Comparative Analysis*, *supra* note 13, at, 104.

[19] Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <http://www.ramsar.org>.

[20] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <http://whc.unesco.org>.

[21] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>.

[22] Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>.

[23] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

[24] UN Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <http://www.unccd.int>.

[25] Cartagena Protocol on Biosafety, Montreal, 29 January 2000, in force 11 September 2003, 39 *International Legal Materials* (2000) 1027.

[26] International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, into force 29 June 2004, <http://www.planttreaty.org/>.

[27] Section V of the ITPGRFA Procedures and Operational Mechanisms to Promote Compliance and Address Issues of Non-compliance provides that the Committee shall develop a reporting format.

[28] Under Art. 29 of the Nagoya Protocol Parties shall report to the COP/MOP on measures taken to implement the Protocol. The reporting format and timetable will be decided by the COP/MOP.

3 Compliance mechanisms of selected biodiversity-related MEAs

This section examines the compliance mechanisms of six major biodiversity-related MEAs: Ramsar, CITES, CBD, the Cartagena Protocol on Biosafety, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the Nagoya Protocol on Access and Benefit-sharing.

3.1 Ramsar Convention on Wetlands of International Importance

3.1.1 Introduction

The Ramsar Convention, which entered into force on 21 December 1975, provides a framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. It requires that Parties designate at least one wetland to be included in the 'List of Wetlands of International Importance': wetlands are chosen according to their international significance in terms of botany, ecology, hydrology, limnology or zoology.[29] Parties are obliged to promote the conservation of the listed wetland by formulating and implementing appropriate policies, legislation and planning;[30] as well as promoting the conservation of wetlands and waterfowl by establishing nature reserves on wetlands regardless of whether they are listed or not.[31]

3.1.2 Performance review information

The Ramsar Convention requires Parties to report as soon as possible a change in the ecological character of any wetland in its territory included in the Ramsar List.[32] Such reports are often referred to as Article 3(2) reports. COP-2 (1984) urged Parties to submit National Reports (NRs) on implementation of the Convention to the Secretariat at least six months before each ordinary meeting of the Conference.[33] National Reports provide a valuable overview of national experiences; continuous monitoring of the implementation of the Convention; and a means of sharing information relating to wetland conservation measures that have been taken, any problems that may have arisen, and appropriate solutions to such problems.[34] National Reports are structured according to the current Strategic Plan[35] and seek information on each Party's success in progress towards the Operational Objectives and their respective Actions called for in that Plan. Each triennium, the Standing Committee of the

[29] Art. 2.
[30] Art. 3.
[31] Art. 4.
[32] Art. 3(2).
[33] 'Submission of national reports', Recommendation 2.1 (1984).
[34] See Ramsar Convention, 'National Reports submitted to the Conference of the Contracting Parties', available at <http://www.ramsar.org/cda/en/ramsar-documents-natl-rpts/main/ramsar/1-31-121_4000_0__> (visited 12 June 2012).
[35] The Ramsar Strategic Plan 2009–2015 adopted by COP10 in Resolution X.1 in 2008.

Ramsar Convention[36] adopts a 'National Report Format' to guide the Parties on reporting on past achievements as well as to assist the Parties in structuring their activities within the framework of the Strategic Plan.

The Ramsar Convention's performance review information is supplemented by a national inventory of wetlands.[37] COP-1 (1980) recognized the importance of national inventories as the basis for developing comprehensive national policies on the wise use of wetlands.[38] COP-7 (1999) adopted Resolution VII.20 which urges the Parties to develop a comprehensive wetland inventory.[39] In response, the 'Framework for Wetland Inventory' was developed to guide Parties on developing their wetland inventory programs and conducting the associated identification, monitoring and implementation activities.[40]

3.1.3 Non-compliance procedure

A non-compliance procedure, the Montreux Record, was established at COP-4 (1990) and formalized at COP-5 (1993).[41] The Record focuses on threatened Ramsar sites listed on the 'Record of Ramsar sites where changes in ecological character have occurred, are occurring or are likely to occur'. When it comes to the attention of the Bureau of the Convention,[42] after a Monitoring Procedure finding that a Ramsar-listed site within a Party's jurisdiction is likely to be degraded due to anthropogenic interference, the Bureau can consult with the Party concerned and invite it to submit additional reports, monitor the site or negotiate a solution. The Bureau may bring the matter to the attention of the Standing Committee, which can bring the issue to the COP.[43] A site can only be included in the Record with the approval of the Contracting Party concerned.[44]

[36] The Standing Committee of the Ramsar Convention consists of representatives of 6 regional groups (Africa, Asia, Neotropics, Europe, North America and Oceania). The criteria for regional nominations are: (1) one representative for regional groups with 1 to 12 Contracting Parties; (2) two representatives for regional groups with 13 to 24 Contracting Parties; (3) three representatives for regional groups with 25 to 36 Contracting Parties; (4) four representatives for regional groups with 37 to 48 Contracting Parties; and (5) five representatives for regional groups with 49 to 60 Contracting Parties. See Resolution XI.19 (2012).

[37] UNEP, *Comparative Analysis of Compliance Mechanisms*, *supra* note 13, at 34.

[38] 'National wetlands inventories', Recommendation 1.5 (1980).

[39] 'Priorities for wetland inventory', Resolution 7.20 (1999), para. 11.

[40] 'Partnerships and synergies with Multilateral Environmental Agreements and other institutions', Resolution 8.6 (2002).

[41] 'The record of Ramsar sites where changes in ecological character have occurred, are occurring, or are likely to occur ("Montreux Record")', Resolution 5.4 (1993); and 'Change in ecological character of Ramsar sites [and establishment of the Montreux Record]', Recommendation 4.8 (1990).

[42] The Bureau of the Ramsar Convention, or the Secretariat, handles day-to-day work of the Convention and reports to the Standing Committee. Its responsibilities are set forth in Article 8 of the Convention (1971).

[43] 'Mechanisms for improved application of the Ramsar Convention', Recommendation 4.7 (1990).

[44] See Guidelines for operation of the Montreux Record adopted by COP-6 in Resolution VI.1 in 1996.

3.1.4 Non-compliance response mechanisms

Recommendation 2.3 (1984)[45] outlines the framework for implementing the Ramsar Convention. It calls for the provision of special assistance to developing countries in the elaboration of their national wetlands policies, in conservation and management of listed wetlands and other aspects of wetland conservation including data collection, education and training, monitoring, public awareness, and research. The framework also requires ensuring that conservation measures are included in development projects of bilateral or multilateral aid programmes that affect wetlands in developing countries. Resolution 8.8 (2002) also recognizes several response options and mechanisms for the Parties concerned to consider when addressing and resolving identified negative changes or likely changes in the ecological character of the sites on the List. These mechanisms include technical assistance and financial assistance.

With regard to technical assistance, the Parties concerned can seek the advice of the Scientific and Technical Review Panel (STRP)[46] on appropriate issues to take into account in addressing the matter. This can be done through requesting the Bureau to circulate their Article 3(2) reports to the STRP for comments; and/or through requesting a Ramsar Advisory Mission (RAM)[47] in order to bring international expertise providing advice on appropriate actions.[48] The Ramsar Advisory Mission mechanism was formerly known as the Monitoring Procedure and the Management Guidance Procedure to provide technical assistance to the Parties.[49]

Financial assistance can be realized by developing country Parties and Parties with economies in transition requesting resources to implement management action. This can be done through the emergency assistance category of the Ramsar Small Grants Fund[50] or by seeking resources from other relevant sources.[51]

[45] 'Action points for priority attention', Resolution 2.3 (1984).

[46] The Scientific and Technical Review Panel of the Ramsar Convention is a subsidiary body of the Convention to provide scientific and technical guidance to the Conference of the Parties, the Standing Committee, and the Ramsar Secretariat. It was established by Resolution 5.5 by COP-5 (1993).

[47] Ramsar Advisory Mission is a technical assistance mechanism formally adopted by Recommendation 4.7 at COP4 in 1990. The main objective of this mechanism is to provide assistance to developed and developing countries alike in solving the problems or threats that make inclusion in the Montreux Record necessary.

[48] 'Assessing and reporting the status and trends of wetlands, and the implementation of Article 3.2 of the Convention', Resolution 8.8 (2002), paras 19b and 19d.

[49] See Ramsar website at <http://www.ramsar.org/cda/en/ramsar-documents-rams/main/ramsar/1-31-112_4000_0> (visited 2 November 2012).

[50] The application for the Small Grants Fund will be reviewed and approved by the Standing Committee. See Resolution 4.3 (1990), Resolution 5.8 (1993) and Resolution 6.6 (1996).

[51] Resolution 8.8, para. 19c.

3.2 Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)

3.2.1 Introduction

The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) entered into force on 1 July 1975. It aims to ensure that international trade in wild animals and plants does not threaten their survival. The Convention has established a permit system to control imports and exports of wild fauna and flora.

The species covered by CITES are listed in three Appendices depending on the degree of protection they are perceived by the COP to need. Appendix I includes species threatened with extinction, in which trade is permitted only in exceptional circumstances. Appendix II lists species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival. Appendix III contains species that any Party has identified as being subject to national regulation for the purpose of preventing or restricting exploitation that require the cooperation with other Parties to control trade. CITES requires Parties to establish national Scientific Authorities to advise on the effects of trade on the status of the species, and Management Authorities to administer the licencing system.[52]

3.2.2 Performance review information

CITES Parties are required to maintain records of trade in species listed in Appendices I, II and III.[53] They must also prepare periodic reports on their implementation of the Convention, including:

> (a) an annual report containing a summary of the information specified in Article 6(b); and
> (b) a biennial report on legislative, regulatory and administrative measures taken to enforce the provisions of the Convention.[54]

Guidelines on reporting were introduced in 1982 following Resolution 3.10, which was revised and updated in 2002.[55] Resolution 11.17[56] consolidates all reporting resolutions and decisions.

[52] See CITES, 'How CITES works', available at <http://www.cites.org/eng/disc/how.php> (visited 13 June 2012).
[53] Art. VIII.6.
[54] Art. VIII.7.
[55] See 'Guidelines for the preparation of annual reports', Doc 13.2, 45th Meeting of the Standing Committee (2001).
[56] 'National reports', Resolution 11.17 (Rev. COP14) (2000).

3.2.3 Non-compliance procedure

Pursuant to Article XIII, if the Secretariat is satisfied that any species in Appendices I or II is being adversely affected, or that the Convention is not being effectively implemented, it will communicate this issue to the relevant Party's Management Authority. The Party must propose remedial action.[57]

A formal non-compliance procedure was adopted at COP-11 (2000);[58] the Guidelines on Compliance with the Convention were discussed, but not agreed, at the 50th meeting of the Standing Committee (2004);[59] and the 'Guide to CITES Compliance Procedures' was taken note of at COP-14 (2007).[60] According to the Guide, there are several ways to identify potential cases of non-compliance:

- annual and biennial reports, legislative texts as well as other special reports and responses to information requests, or review reports, etc. provide the primary, but not exclusive, means of monitoring compliance with the obligations under the Convention;
- any Party concerned over matters related to trade in CITES-listed species by another Party may bring the matter up directly with that Party and/or call upon the Secretariat for assistance; and
- Parties themselves are encouraged to give the Secretariat early warning of any potential non-compliance of their own.[61]

If a case of non-compliance is identified, the Party concerned needs to provide to the Secretariat as soon as possible any relevant facts and propose remedial action. The Secretariat is tasked to provide technical assistance related advice. If the Party fails to take sufficient remedial action within a reasonable time limit, the compliance matter is brought to the attention of the Standing Committee by the Secretariat, in direct contact with the Party concerned.[62]

3.2.4 Non-compliance response mechanisms

The Guide to CITES Compliance, taken note of in Resolution 14.3 (2007),[63] provides several alternative non-compliance response measures, if a case of non-compliance is not resolved through the above procedures. The Standing Committee (SC)[64] can decide to take one or more of the following measures:

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[57] Art. XIII.1.
[58] 'Compliance and enforcement', Resolution 11.3 (Rev. COP15) (2000).
[59] 'Guidelines on compliance with the Convention', Doc. 27, 50th Meeting of the Standing Committee (2004). The Guidelines were presented at the meeting of the Standing Committee but not agreed. The Committee decided to establish an open-ended working group to further discuss the non-compliance procedure (NPC) and responses mechanisms.
[60] Resolution 14.3 (2007). Annex. The Guide was taken note of by the Parties, and is legally non-binding in nature.
[61] *Ibid*. Annex A.
[62] *Ibid*. Annex, B.
[63] Resolution 14.2.
[64] The Standing Committee provides policy guidance to the Secretariat concerning the implementation of

a) provide advice, information and appropriate facilitation of assistance and other capacity-building support to the Party concerned;
b) request special reporting from the Party concerned;
c) issue a written caution, requesting a response and offering assistance;
d) recommend specific capacity-building actions to be undertaken by the Party concerned;
e) provide in-country assistance, technical assessment and a verification mission, upon the invitation of the Party concerned;
f) send a public notification of a compliance matter through the Secretariat to all Parties advising that compliance matters have been brought to the attention of a Party and that, up to that time, there has been no satisfactory response or action;
g) issue a warning to the Party concerned that it is in non-compliance, e.g. in relation to national reporting and/or the National Legislation Project; and
h) request a compliance action plan to be submitted to the Standing Committee by the Party concerned identifying appropriate steps, a timetable for when those steps should be completed and means to assess satisfactory completion.[65]

In certain cases, the SC can decide to recommend the suspension of commercial or all trade in specimens of one or more CITES-listed species consistent with the Convention.[66] The Standing Committee, with the assistance of the Secretariat, monitors the actions taken by the Party concerned to implement measures taken.[67]

Although Resolution 14.3 was only taken note of, the SC has exercised these powers. In a recent case concerning Guinea, where significant problems with the implementation of CITES were found, the Secretariat notified the Parties[68] that it could not confirm the validity of any permit or other document issued by the authorities in Guinea. The Secretariat further advised that no commercial breeding of specimens of CITES-listed species had ever occurred in Guinea, despite apparent 'significant exports' of specimens declared to have been bred in captivity. This illegal trade concern had been reported by the Secretariat to the 61st SC Meeting, whereafter in September 2011 the SC sent a verification mission to Guinea. The SC sent a comprehensive list of recommendations to the Guinean authorities; and further requested that Guinea report on the progress of the implementation of the recommendations and indicate areas in which it required assistance.[69] The Guinean CITES

the Convention and oversees the management of the Secretariat's budget. The composition of the Committee includes the Party representatives from each of the six major geographical regions (Africa, Asia, Europe, North America, Central and South America and the Caribbean, and Oceania), with the number of representatives weighted according to the number of Parties within the region. See Resolution Conf. 11.1 (Rev. CoP15) Annex 1 (1997).

65 *Ibid*. Annex A, para 29.
66 *Ibid*. Annex A, para. 30.
67 *Ibid*. Annex A, para. 33.
68 Notification 2011/040, 26 September 2011.
69 These being guidance to enhance proposed amendments to legislation; assistance with training management and enforcement authority staff; and assistance to implement awareness campaigns.

Management Authority replied, in May 2012, and provided some supporting information on the implementation of the recommendations along with a request for assistance. After reviewing the information provided by Guinea and a Secretariat analysis of feedback received from Guinea on the limited implementation of recommendations, the Committee, in compliance with Resolution 14.3, paragraph 29 g), instructed the Secretariat to issue a warning to Guinea to take urgent measures to implement the recommendations made during the 2011 mission to Guinea. The Committee also instructed the Secretariat to provide Guinea with a clear set of minimum actions that should be undertaken. It requested Guinea to implement these actions and to provide a report to the Secretariat on progress by 31 December 2012. Finally, it asked the Secretariat to evaluate that report and to make a recommendation at the 63rd meeting of the Standing Committee.[70]

3.3 Convention on Biological Diversity (CBD)

3.3.1 Introduction

The Convention on Biodiversity (CBD) was signed in 1992 and entered into force the following year. The CBD has three main objectives: the 'conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources'.[71] The Convention translates its objectives into substantive provisions contained in Articles 6 to 20. These include identifying and monitoring of the components of biological diversity and of the process and activities that threaten those components;[72] measures for the conservation of biological diversity, both *in situ* and *ex situ*;[73] incentives for the conservation and sustainable use of biological diversity; and integrating the conservation and sustainable use of biological resources into national decision-making.[74] Other measures include research and training; public awareness and education; assessing the impacts of projects upon biological diversity; regulating access to genetic resources; access to and transfer of technology; and the provision of financial resources.

The principal instruments for implementing the Convention at the national level are the National Biodiversity Strategies and Action Plans (NBSAPs) under Article 6. The Convention requires countries to prepare a NBSAP (or an equivalent instrument) to ensure the Convention's objectives are mainstreamed into the planning and activities of all sectors whose activities can have an impact (positive or negative) on biodiversity. To date, 175 Parties have developed NBSAPs pursuant to Article 6.[75]

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[70] SC, Interpretation and Implementation of the Convention, Compliance and Enforcement: Enforcement Matters, SC62 Doc. 29 (2012), and 62 Sum. 5 (2012). See <www.cites.org/eng/com/SC/62/E62-29.pdf> (visited 10 November 2012).

[71] Art. 1

[72] Art. 7.

[73] Arts 9 and 18.

[74] Art. 10.

[75] See CBD, 'National Biodiversity Strategies and Action Plans (NBSAPs)', available at <http://www.cbd.int/nbsap/> (visited 13 June 2012).

3.3.2 Performance review information

Article 26 calls upon Parties to report upon their measures to implement the CBD and the effectiveness of those objectives. COP-2 (1995) decided that the first national reports should be submitted to COP-4 in 1998 and adopted guidelines for the preparation of the reports.[76]

The objective of national reporting is to provide information on measures taken for the implementation of the Convention and the effectiveness of those measures developed in light of specific national circumstances in NBSAPs required by Article 6. Public availability of national reports also assists relevant actors (for instance, intergovernmental agencies, specialist non-governmental organizations and scientific bodies) to formulate focused strategies and programmes to assist Parties, individually or collectively, with implementation. This also assists individual Parties or groups of Parties to identify common issues to be addressed, thus facilitating the development of cost-effective and mutually-supportive regional initiatives for implementation.

The fourth national reports were submitted in 2009.[77] They provided essential information to assess progress towards the 2010 Biodiversity Target[78] at the national level, as well to assess progress at the global level. COP-10 (2011) decided that the fifth national reports are due in March 2014 and that the reports should focus on the implementation of the 2011–2020 Strategic Plan for Biodiversity and progress towards the Aichi Biodiversity Targets.[79]

3.3.3 Non-compliance procedure

There is no non-compliance procedure under the CBD. However, given that the effective implementation of the CBD is clearly an important issue, CBD Decision VII/30 established the Ad Hoc Open-ended Working Group on Review of Implementation (WGRI) of the Convention, which was mandated to consider progress in the implementation of the Convention, to review the impacts and effectiveness of the existing processes under the Convention, and to consider ways and means of identifying and overcoming obstacles to the effective implementation of the Convention.[80] To date, WGRI has met four times and submitted its review reports and recommendations for effective implementation of the Convention. However, its recommendations focus on the overall implementation of the Convention, in par-

[76] 'Form and intervals of national reports by Parties', Decision II/17 (1995).

[77] 'National reporting and the next Global Biodiversity Outlook', Decision VIII/14 (2006).

[78] The Parties to the Convention committed themselves to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth. The target was subsequently endorsed by the World Summit on Sustainable Development and the United Nations General Assembly and was incorporated as a new target under the Millennium Development Goals. See CBC website at <https://www.cbd.int/2010-target/> (visited 2 October 2012).

[79] See 'The Strategic Plan for Biodiversity 2011–202 and the Aichi Biodiversity Targets', a revised and updated Strategic Plan and a revised biodiversity target in relation to the 2010 Biodiversity Target in post 2010, adopted in Decision X/2 at COP-10 in 2010.

[80] 'Strategic Plan: future evaluation of progress', Decision VII/30 (2004), para 23.

ticular on a revised and updated Strategic Plan including a revised biodiversity target at the request of COP-9 through Decision IX/9. The WGRI, at its third meeting, submitted the Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets, along with the measures for implementation, monitoring, review and evaluation as well as support mechanisms.[81]

The Strategic Plan aims to 'take effective and urgent action' to halt the loss of and to ensure sustainable use of biodiversity, and includes 20 targets for 2015 or 2020 (the 'Aichi Biodiversity Targets' under five strategic goals: (1) to address the underlying causes of biodiversity loss; (2) to reduce the direct pressures on biodiversity and promote sustainable use; (3) to improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity; (4) to enhance the benefits to all from biodiversity and ecosystem services; and (5) to enhance implementation through participatory planning knowledge management and capacity building.[82]

The implementation will be primarily through activities at the national or sub-national level, with supporting action at the regional and global levels. Parties are invited to set their own targets within the flexible framework of the Strategic Plan for 2011–2020 and the Aichi Biodiversity Targets, taking into account of national needs and priorities, while bearing in mind national contributions to the global targets. The means of the implementation include the provisional technical rationale, possible indicators and suggested milestones for the Aichi Biodiversity Targets, with the support mechanisms of capacity-building, clearing-house mechanism and technology transfer, financial resources and partnerships and initiatives to enhance cooperation.[83]

3.4 Cartagena Protocol on Biosafety

3.4.1 Introduction

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity was signed in 2000 and entered into force in 2003. It 'creates an enabling environment for the environmentally sound application of biotechnology, making it possible to derive maximum benefit from the potential that biotechnology has to offer, while minimizing the possible risks to the environment and to human health'.[84] The objective of the Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.[85] Under the Protocol, Parties

[81] Decision X/2 (2010).
[82] *Ibid*. III and IV.
[83] *Ibid*. at IV, V and VI.
[84] *Cartagena Protocol on Biosafety to the Convention on Biological Diversity: text and annexes* (Secretariat of the Convention on Biological Diversity, 2000), 1.
[85] Art. 1.

shall ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity.[86]

The Protocol establishes a notification and decision-making procedure with regard to the transboundary movement of living modified organisms[87] and contains provisions with regard to risk assessment and management[88] as well as unintentional movements[89] and handling transport packaging and identification.[90] The Protocol also sets up a biosafety 'clearing house'[91] and has provisions, inter alia, on capacity-building[92] and public awareness and participation.[93]

3.4.2 Performance review information

Under the Protocol, each Party shall monitor the implementation of its obligations and shall report to the Conference of the Parties serving as the Meeting of the Parties on measures that it has taken to implement the Protocol.[94] In 2004 the COP/MOP decided on a four-year reporting cycle, with interim reports due two years after the entry into force of the Protocol.[95] In 2006, the COP/MOP adopted the reporting format, which includes a section on obligations for the provision of information to the Biosafety Clearing-House, as well as on all other major provisions of the Protocol.[96] The reporting format for the second national reports was adopted in 2010.[97]

3.4.3 Non-compliance procedure

The Protocol called for the Conference of the Parties, at its first meeting, to consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of the Protocol and to address cases of non-compliance. The Protocol further stipulated that these procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate.[98] The procedures and mechanisms on compliance were adopted in 2004 and a Compliance Committee was established.[99] The procedures and mechanisms contain sections on the objective, nature and underlying principles; institutional mechanisms; functions of the

[86] Art. 2.2.
[87] Arts 7 to 13.
[88] Arts 15 and 16.
[89] Art. 17.
[90] Art. 18.
[91] Art. 20.
[92] Art. 22.
[93] Art. 23.
[94] Art 33.
[95] 'Monitoring and reporting under the Protocol (Article 33): format and timing for reporting', Decision BS-I/9 (2004).
[96] 'Monitoring and reporting', Decision BS-III/14 (2006), Annex: 'Format for the First Regular National Report on the Implementation of the Cartagena Protocol on Biosafety'.
[97] 'Monitoring and reporting (Article 33)', Decision BS-V/14 (2010).
[98] Art. 34.
[99] 'Establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety', Decision BS-I/7 (2004).

Committee; procedures; information and consultation; measures to promote compliance and address cases of non-compliance; and review of the procedures and mechanisms.

The compliance procedures and mechanisms were envisaged to be simple, facilitative, non-adversarial and cooperative in nature, and their operation is guided by the principles of transparency, fairness, expedition and predictability. The mechanism pays particular attention to the special needs of developing country Parties, in particular the least developed and small island developing states among them, and Parties with economies in transition, acknowledging the difficulties they face in the implementation of the Protocol.[100]

The Compliance Committee meets twice a year and it consists of 15 members, three from each UN region, with recognized competence in the field of biosafety or other relevant fields, including legal or technical expertise, serving objectively and in a personal capacity.[101] The Committee identifies the specific circumstances and possible causes of individual cases of non-compliance referred to it; considers information submitted to it regarding matters relating to compliance and cases of non-compliance; provides advice and/or assistance, as appropriate, to the concerned Party, on matters relating to compliance with a view to assisting it to comply with its obligations under the Protocol; reviews general issues of compliance by Parties with their obligations under the Protocol, taking into account the information provided in the national reports communicated in accordance with Article 33 of the Protocol and also through the Biosafety Clearing-House; takes measures, as appropriate, or makes recommendations, to the COP/MOP of the Protocol; and carries out any other functions as may be assigned to it by the COP/MOP.[102] The Committee is to receive, through the Secretariat, any submissions relating to compliance from any Party with respect to itself; and from any Party, where this Party is affected or likely to be affected, with respect to another Party. The Committee may reject considering such latter submissions where these are, 'bearing in mind the objectives of the Protocol', either de minimis or ill-founded.[103]

3.4.4 Non-compliance response measures

The Committee may take one or more measures with a view to promoting compliance and addressing cases of non-compliance, taking into account the capacity to comply of the Party concerned, especially developing country Parties, in particular the least developed and small island developing states amongst them, and Parties with economies in transition.. In addition, such factors as the cause, degree, frequency and type of non-compliance have to be taken into account in the considerations.

[100] Decision BS-I/7, Annex 'Procedures and Mechanisms on Compliance under the Cartagena Protocol on Biosafety', Section I.
[101] *Ibid*. Section II.
[102] *Ibid*. Section III.
[103] *Ibid*. Section IV.

The Committee may provide advice or assistance to the Party concerned, as appropriate; make recommendations to the COP/MOP regarding the provision of financial and technical assistance, technology transfer, training and other capacity-building measures; request or assist, as appropriate, the Party concerned to develop a compliance action plan regarding the achievement of compliance with the Protocol within a timeframe to be agreed upon between the Committee and the Party concerned; invite the Party concerned to submit progress reports to the Committee on the efforts it is making to comply with its obligations under the Protocol; and report to the COP/MOP on efforts made by Parties in non-compliance to return to compliance and maintain this as an agenda item of the Committee until adequately resolved.[104]

The COP/MOP may take further measures relating to a Party's non-compliance. On the facilitative range of the spectrum the COP/MOP may provide financial and technical assistance, technology transfer and training and other capacity-building measures. Information can be shared among Parties through publishing cases of non-compliance in the Biosafety Clearing-House.[105] On the more punitive side the COP/MOP may issue a caution to the concerned Party. To build Parties' confidence in the process, however, the COP/MOP decided that if a Party itself triggers a case of non-compliance only facilitative and supportive measures should be recommended by the Committee and adopted by the COP/MOP.

The Compliance Committee has met nine times since it was established. The first meetings focused mostly on procedural matters, such as agreeing on rules of procedure, including conflicts of interest, and identifying the role of the Committee vis-à-vis other processes under the Convention. The Committee also reviewed lessons learned from other MEAs regarding repeated cases of non-compliance.

Reporting is a time-consuming and challenging issue for many parties: the Committee raised the importance of the matter in 2007 after only 50 parties had submitted their first national reports on time.[106] Much progress had been made by 2012, though, when the Committee noted that only 17 Parties had not submitted their second national reports.[107] The Committee has also addressed the need for Parties to comply with their substantive provisions under the Protocol. Through decisions adopted by the COP/MOP, the Committee has called on Parties to ensure that they have the legal and administrative frameworks in place to meet their obligations. The Committee has also played a facilitative role in requesting Parties to submit information on any challenges they face with regard to operationalizing their biosafety frameworks. With this information the Committee and the COP/MOP would be in a stronger position to assist Parties to comply.

[104] *Ibid*. Section VI.
[105] *Ibid*.
[106] Report of the Compliance Committee under the Cartagena Protocol on Biosafety, UN Doc. UNEP/CBD/BS/COP-MOP/4/2 (2008), 2.
[107] Report of the Compliance Committee under the Cartagena Protocol on Biosafety on the Work of its eighth and ninth meetings, UN Doc. UNEP/CBD/BS/COP-MOP/6/2 (2012), 4.

3.5 ITPGRFA

3.5.1 Introduction

The International Treaty on Plant Genetic Resources for Food and Agriculture was concluded in 2001 and entered into force in 2004. The objectives of the Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use for sustainable agriculture and food security.[108] Contracting Parties should promote an integrated approach to the exploration, conservation and sustainable use of plant genetic resources for food and agriculture, and the Treaty sets out further specific obligations to this end,[109] including a non-exhaustive range of appropriate policy and legal measures to meet the objectives of the Treaty.[110] The Treaty also has provisions on international cooperation and technical assistance and separate parts on farmer's rights and access and benefit-sharing.

3.5.2 Performance review information

The Treaty itself does not contain monitoring and reporting obligations. Rather, these were adopted in 2011 as part of the Procedures and Operational Mechanisms to Promote Compliance and Address Issues of Non-compliance.[111] Parties submit reports on measures taken to implement the International Treaty through the Secretariat to the Compliance Committee. The first reports will be submitted three years after the approval of a standard reporting format, which will be developed by the Compliance Committee and approved by the Governing Body. Subsequent reports are to be submitted every five years thereafter or unless otherwise agreed. The Compliance Committee considers these reports and receives further guidance from the Governing Body regarding, for example, priorities for the Committee's work related to monitoring and reporting.

3.5.3 Non-compliance procedure

According to the Treaty the Governing Body, at its first meeting, should have approved cooperative and effective procedures and operational mechanisms to promote compliance and to address issues of non-compliance, through monitoring, and offering advice or assistance, in particular to developing countries and countries with economies in transition.[112] The Compliance Committee was established at the first session of the Governing Body in 2006, but an agreement was reached only on provisional procedures and operational mechanisms on compliance.[113] Eventually, at the

[108] Art. 1.
[109] Art. 5.
[110] Art. 6.
[111] 'Procedures and operational mechanisms to promote compliance and address issues of non-compliance', Resolution 2/2011.
[112] Art. 21.
[113] 'Draft procedures and operational mechanisms to promote compliance and address issues of non-compliance', Resolution 3/2006.

fourth session of the Governing Body in 2011, full procedures and operational mechanisms on compliance were adopted.[114] The first meeting of the Compliance Committee is scheduled for February 2013 and due to budgetary prudence meetings shall be held as necessary, rather than at preordained intervals.[115]

The procedures and mechanisms should promote compliance with the Treaty's provisions and address issues of non-compliance. They include monitoring and facilitative measures such as offering advice or assistance when needed and requested.[116] The procedures and mechanisms are intended to be simple, cost-effective, facilitative, non-adversarial, non-judicial, legally non-binding and cooperative in nature. Their operation is guided by the principles of transparency, accountability, fairness, expeditiousness, predictability, good faith, and reasonableness, with particular attention to the special needs of Parties that are developing countries and Parties with economies in transition being paid.[117] As can be seen, the focus is very much facilitative and could be considered a 'soft compliance mechanism', rather than a 'hard' punitive one. This is not to say that the mechanism would be ineffective. Rather, it recognizes that Parties sometimes require assistance to meet the obligations and could do so more effectively through support rather than hard sanctions.

The Compliance Committee consists of a maximum of 14 members, up to two from each of the UN Food and Agriculture Organization (FAO) regions, elected by the Governing Body. Members of the Committee shall have recognized competence in the field of genetic resources or other fields relevant for the International Treaty, including legal or technical expertise, and they shall serve objectively and in their individual capacities.

The Compliance Committee considers compliance and non-compliance related information submitted to it. It can offer advice and/or facilitate assistance with a view to assisting a Party to comply with its obligations; it can assist the Governing Body in its monitoring implementation of Parties' obligations; and it can promote compliance by addressing statements and questions concerning the implementation of the Treaty. When addressing issues of non-compliance it must identify and consider the specific circumstances of the matter.[118] The mechanism can be triggered by a submission from a Party with respect to itself; by a Party with respect to another Party; or by the Governing Body.[119]

[114] Resolution 2/2011.
[115] *Ibid*. Section III.
[116] *Ibid*. Section I.
[117] *Ibid*. Section II.
[118] *Ibid*. Section IV.
[119] *Ibid*. Section VI.

3.5.4 Non-compliance response measures

The Procedures and Operational Mechanisms provide for a range of measures. The Committee, with a view to promoting compliance and addressing issues of non-compliance, taking into account such factors as the cause, degree, frequency of, and type of non-compliance, may: provide advice or facilitate assistance, including legal advice or legal assistance, to the Party concerned, as appropriate; request or assist, as appropriate, the Party concerned to develop an action plan, which addresses the issue of non-compliance within a timeframe to be agreed upon between the Committee and the Party concerned, taking into account its existing capacity to address the issue; and invite the Party concerned to submit progress reports to the Committee on the efforts it is making to comply with its obligations under the International Treaty. In addition, the Governing Body may, upon the recommendations of the Committee, decide to provide assistance, including, as appropriate, legal, financial and technical assistance, to the Party concerned; and take any other actions it deems appropriate, including for capacity-building, in accordance with the International Treaty and for the fulfillment of its objectives.[120]

3.6 Nagoya Protocol on Access and Benefit Sharing

3.6.1 Introduction

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity was adopted in 2010. To date the Protocol has been signed by 92 countries but ratified, adhered to or acceded to by only eight countries.[121] It has not yet entered into force.

The objective of the Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies. This objective contributes the objective of the Convention on Biological Diversity of conservation of biological diversity and the sustainable use of its components.[122] Benefits arising from the utilization of genetic resources and their application and commercialization shall be shared in a fair and equitable way. Such sharing shall be upon mutually agreed terms.[123] The Protocol regulates access to genetic resources[124] as well as to traditional knowledge related to genetic resources[125] and established an access and benefit-sharing clearing house.

[120] *Ibid*. Section VII.
[121] See 'Status of Signature, and ratification, acceptance, approval or accession', available at <http://www.cbd.int/abs/nagoya-protocol/signatories/> (visited 2 November 2012).
[122] Art. 1.
[123] Art. 5.
[124] Art. 6.
[125] Art. 7.

3.6.2 Performance review information

Each Party shall monitor the implementation of its obligations under the Protocol and shall report to the COP/MOP on measures that it has taken to implement the Protocol.[126] More detailed reporting provisions including a reporting format and time frame will be adopted by the COP/MOP when the Protocol comes into force and the COP/MOP convenes.

3.6.3 Non-compliance procedure

The first meeting of the COP/MOP will consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of the Protocol and to address cases of non-compliance. These procedures and mechanisms shall include provisions to offer advice or assistance.[127] As the Protocol is not in force this Article has not yet been operationalized nor have procedures and institutional mechanisms been adopted. They have, however, been and continue to be discussed under the Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on Access and Benefit-sharing, which is preparing for the entry into force of the Protocol. The second meeting of this Committee in July 2012 discussed elements of a non-compliance procedure. These elements include objectives, nature and underlying principles; institutional mechanism; functions; procedures; information for and consultation by the Compliance Committee after the triggering of the procedures; measures to promote compliance and address cases of non-compliance; and review of procedures and mechanisms.[128] It remains to be seen whether international negotiations will have concluded on this matter by the time the Protocol enters into force.

4 Potential for compliance synergies and coherence

Synergies among the biodiversity related conventions can be approached from several perspectives. As questions related to compliance surface at the end of an implementation cycle, it at first glance would not seem to be the most effective place to start to identify synergies. Indeed, synergies should be sought as much as possible upstream, beginning with a Party's rights and obligations under the various treaties in a given cluster, or across clusters. If synergies are considered at the early stages of implementation, they could continue to be considered and maintained at the downstream compliance end of an implementation cycle. Conversely, if synergistic actions are not promoted upstream it will be challenging to construct these synergies downstream, at the compliance end.

[126] Art. 29.

[127] Art. 30.

[128] 'Report of the expert meeting on cooperative procedures and institutional mechanisms to promote compliance with the Nagoya Protocol on Access and Benefit-Sharing and to Address Cases of Non-Compliance', UN Doc. UNEP/CBD/ICNP/2/12 (2012).

Upstream synergies can, for example, be created through joint and common reporting formats. These joint reports could then be reviewed by a compliance committee that would have a mandate to assess and address compliance issues across all the selected conventions, as identified in the joint reports. Any measures recommended by the Committee could then speak to implementation of all of the conventions concerned. Moreover, should synergies be identified with regard to joint action plans and work programmes of the biodiversity conventions, a compliance committee could be mandated to review Parties' progress in implementing these plans and work programmes, as well as recommending measures to improve or implement them.

Several institutional arrangements could be envisaged to deal with compliance in a synergistic manner at the downstream end. Most ambitiously, a compliance super-committee could be conceived to assess cases of compliance related to all of the conventions. The committee would have a similar mandate to the existing committees but would not limit its review to one convention. The advantage of this approach would be the ability to recommend measures that would assist the Party to comply with all of the conventions. These measures could include technical assistance and capacity-building support, for example. It should be remembered that compliance committees rarely adopt measures themselves, however, and often only recommend measures for adoption by the governing bodies of the Convention. A super-committee would therefore only really be effective, and realistic, if the institutional structures of the conventions were also otherwise streamlined.

Should these institutional structures be streamlined, a supra-committee could also be considered. This variant would be formed of a main committee that addresses systemic and repeated cases of non-compliance, and be assisted by one or several ad hoc sub-committees dealing with a specific thematic issue. For example, compliance with ITPGRFA and the ABS Protocol could be addressed by one such sub-committee, as both conventions deal with questions of access and benefit sharing. Another sub-committee could be formed to deal with protected areas, and address all related obligations stemming from the CBD, Ramsar and CMS Conventions, for example. The ad hoc nature of the sub-committees would provide flexibility to deal with specific cases of non-compliance, as they arise, and only the supra-committee would be a permanent body. The sub-committees would also give an opportunity to call on individuals with specific expertise in a given field, which would speak to concerns about the supra-committee not having enough in-depth knowledge or experience of a specific convention.

If streamlining institutional structures between conventions proves too ambitious, joint meetings of compliance committees might be an interim step. It would provide an opportunity for the committees to share information and learn from each others' procedures and substantive handling of submissions and cases. This would especially be the case when addressing systemic and repeated cases of non-compliance, while large meetings would be less desirable when addressing a specific case. The

existing committees do of course already share information with each other both formally and informally, and build on each other's experiences.

Promoting compliance will only ever be as effective as the provisions that Parties must comply with. It would therefore seem to be more effective to address the question of synergies at the upstream level first. Once joint provisions are agreed compliance could be reviewed at the downstream end. When such downstream structures are created, however, it would be important to maintain focus on facilitative compliance measures that do not punish a Party that is making its best efforts for not complying. Often parties do not lack the will but the means and technical capability to comply. These Parties should be supported as much as possible to return to compliance.

Clustering of MEAs – Lessons Learned, Rio+20 and Beyond

Kerstin Stendahl[1]

1 Introduction

This paper discusses enhancing cooperation and coordination among multilateral environmental agreements (MEAs) as a means of strengthening international environmental governance (IEG). It is a topical debate, which featured as part of the Rio+20[2] negotiations on the Institutional Framework for Sustainable Development (IFSD).[3] This paper considers the main messages to come out of IEG debates over the last decades; then moves to discuss a practical example of how synergies have been achieved within the chemicals and waste cluster. It is suggested that past successful endeavours could set the stage in other MEA clusters, such as among the biodiversity-related agreements.

2 MEA synergies, international environmental governance and sustainable development

2.1 Introduction

At the international level, in multilateral environmental negotiations, there is much support, almost uncontested, for synergies among the MEAs at all levels. The request

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[2] United Nations Conference on Sustainable Development, Rio de Janeiro, 20–22 June 2012. The Conference marked the 20th anniversary of the 1992 UN Conference on Environment and Development.

[3] The Institutional Framework for Sustainable Development aims to enhance the integration of sustainable development in the activities of all relevant United Nations agencies, programmes and funds, and the international financial institutions, within their mandates. For more information, see <http://www.uncsd2012.org/isfd.html>.

for MEA synergies is a consistent core message from various international environmental governance processes.[4] The strengthening of IEG has featured prominently as part of the negotiations on the institutional framework for sustainable development. The challenge is to place IEG within the IFSD so that system-wide action within the United Nations (UN) is achieved in a supportive fashion across the three pillars of sustainable development (the economic, social and environmental dimensions). Within this context, the most favorable outcome on IEG in general from the Rio+20 Conference, and other such initiatives, would be a firm foundation from which to deliver on IEG reform.

2.2 International environmental governance

International environmental governance encompasses all international environmental instruments, processes, organizations and arrangements within the UN system, including at the regional level. It is not restricted to pursuing reform of the United Nations Environment Programme (UNEP),[5] but takes a wider approach. The strengthening of IEG should be evolutionary (step-by-step) in nature. A prudent approach (meaning that form follows function, leading to incremental reform) to institutional change is required. There is a general preference among governments for making better use of existing structures.

2.3 IEG within the context of sustainable development

In 2002, at UNEP's Governing Council in Cartagena[6] in preparation for the World Summit on Sustainable Development in Johannesburg 2002,[7] a number of core messages were formulated on IEG[8] which, to a large extent, remain valid in respect of the outcomes of the 2012 Rio Conference. It was suggested, for instance, that:

> reform of international environmental governance is a process that should lead to the mainstreaming of environmental concerns into development policy, ensure the balanced integration of the pillars of economic growth, social development

[4] See, for instance, the paper by Marceil Yeater in the present *Review*, which discusses the support for synergies amongst the major biodiversity-related MEAs. A number of papers on extant and potential synergistic relationships can be found at UNEP/WCMC, 'Synergies among MEAs - Key Papers', available at <http://www.unep-wcmc.org/synergies-among-meas---key-papers_580.html> (visited 25 November 2012).

[5] See <http://www.unep.org/>.

[6] UNEP, 'The UNEP Governing Council International Environmental Governance Initiative', Seventh Special Session of the Governing Council/Global Ministerial Environment Forum, Cartagena, Colombia, 13–15 February 2002, <http://www.unep.org/GC/GCSS-VII/Documents/K0260448.doc> (visited 25 November and 9 December 2012).

[7] World Summit on Sustainable Development, <http://www.johannesburgsummit.org/>.

[8] UNEP, Reports of the Seventh Special Sessio006E of the Governing Council, para. 76, 'B. Contribution of the United Nations Environment Programme to the World Summit on Sustainable Development'. available at <http://www.unep.org/GC/GCSS-VII/Reports.htm> (visited 25 November 2012).

> and environmental protection and increase the flow of resources, including technical expertise, technology transfers and capacity building.[9]

It was suggested also that some IEG issues go beyond the mandates of environmental ministries alone; and that other branches of government should therefore be involved so as to enhance national level coordination and bring environmental considerations into the mainstream of economic and social decision-making at all levels.[10] Further, that the design and implementation of environmental policy at all levels requires a clear link to the sustainable development context as well as greater involvement and engagement of non-governmental organizations (NGOs), civil society and the private sector. This allows such groups or sectors to play a meaningful role in intergovernmental policy-making; and also requires strengthened national frameworks of governance.[11]

2.4 The science – policy interface

The increasing complexity of environmental degradation requires an enhanced capacity for scientific assessment and monitoring and for the provision of early warnings to governments. This requires IEG to be responsive to country needs. An essential complement of international cooperative arrangements is the requirement to strengthen the capacity of developing countries actively to participate in international environmental policy formulation and implementation. There is a need to emphasize and support capacity-building and technology transfer, and arguably to enhance the role of UNEP in this regard. The international environmental governance process should take into account the needs and constraints of developing countries on the basis of common but differentiated responsibility.[12]

2.5 The role of UNEP

Few would dispute that the effectiveness of IEG generally should be increased by strengthening the main UN environmental body – UNEP.[13] Strengthening UNEP would thus encompass provisions for a means and measures that would enable it to

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[9] *Ibid*.

[10] UNEP, 'GC IEG Initiative', *supra* note 6, 'Appendix: Report of Open-ended Intergovernmental Group of Minister on IEG' at II.8(d), at 25.

[11] *Ibid*. at II.8(f), at 26.

[12] *Ibid*. at II.8(g), at 26. On common but differentiated responsibility generally, see Tuula Kolari, 'The Principle of Common but Differentiated Responsibility in Multilateral Environmental Agreements', in Tuula Kolari and Ed Couzens (eds), *International Environmental Lawmaking and Diplomacy Review 2007*, University of Joensuu – UNEP Course Series 7 (University of Joensuu, 2008) 21–54.

[13] As recorded by the UNEP Governing Council, Agenda 21 (the global blueprint for sustainable development, which was agreed at the United Nations Conference on Environment and Development in Rio de Janeiro, 1992) 'reaffirmed the role of the United Nations Environment Programme (UNEP) as the principal body within the United Nations system in the field of the environment but also added that it should take into account the development aspects of environmental questions'. UNEP, 'GC IEG Initiative', *supra* note 6, 'Appendix: Report of OIG on IEG' at I.2, at 23.

carry out its mandate, give it a stronger role and authority as well as adequate, stable and predictable financing.[14] UNEP's strategies and programmes of work should be guided by clear goals and be based on the principles of policy integration, broad-based participation, transparency and accountability and its responsibilities being expanded to include multilateral environmental agreements.[15] In this regard a variety of proposals have been considered, including the proposal to upgrade UNEP to a United Nations specialized agency.[16] Also the Global Ministerial Environment Forum[17] – the GMEF – would be placed as the cornerstone of the international institutional structure of international environmental governance.[18] In addition, UNEP's headquarters in Nairobi should be strengthened as a centre for international expertise and meetings on the environment.[19]

2.6 Synergies

The proliferation of international instruments and institutional arrangements in international environmental law and governance is a good sign. It shows that the international community is engaged and committed to solve environmental problems and that governments also look for tailor-made answers to specific problems. However, governments also recognize that the current approach to IEG, while having the benefit of specialization, may weaken policy coherence due to lack of resources, thus lessening the implementation of existing agreements. Through the 'clustering approach' to multilateral environmental agreements, governments are trying to reverse the trend by attempting to adopt a more coordinated and holistic approach to the implementation of MEAs that in one way or another are similar to each other and thus benefit from joint action.

3 IEG on the road to RIO+20

Much effort has been put into the reform of international environmental governance over the last decades. Some milestones along the way are:

- the 2002 Cartagena outcome;
- the Bali Strategic Plan for Technology Support and Capacity-building (2004/2005);[20]

[14] UNEP, 'GC IEG Initiative', *supra* note 6, 'Appendix: Report of OIG on IEG' at II.8(i), at 26.
[15] *Ibid*. at II.8, at 25; and Ch. II,' Report on international environmental governance', para. 39, at 11.
[16] *Ibid*. at II.8(j), at 26.
[17] See <http://www.unep.org/resources/gov/overview.asp> (visited 20 June 2012).
[18] UNEP, 'GC IEG Initiative', *supra* note 6, 'Appendix: Report of OIG on IEG' at II.8(k), at 26.
[19] *Ibid*. at II.8(l), at 26.
[20] 'International environmental governance Bali Strategic Plan for Technology Support and Capacity-building, Note by the Executive Director', UN Doc. UNEP/GC.23/6/Add.1 (2004). For more information, see <http://www.unep.org/dec/onlinemanual/Compliance/NationalImplementation/CapacityBuilding/Resource/tabid/679/Default.aspx> (visited 20 June 2012). According to UNEP, the Bali Strategic Plan

- the System-wide Coherence Report (2006);[21]
- Switzerland-Mexico IEG consultations (2007);[22]
- Options paper. UN Joint Inspection Unit Report (2008);[23]
- the synergies process among the Basel, Rotterdam and Stockholm Conventions 2007 – 2010;
- two rounds of UNEP-facilitated high level/ministerial consultations: Rome – Belgrade (June–October 2009) and Nairobi – Helsinki (July–November 2010);[24]
- the Intergovernmental Science – Policy Platform on Biodiversity and Ecosystem Services (IPBES);[25] and
- incremental reform of UNEP.

The Nairobi–Helsinki outcome concluded that there is a need to strengthen the global authoritative voice(s) on the environment, including through: enhancing UNEP; or establishing a new umbrella organization for sustainable development; or through establishing a specialized agency such as a World Environment Organization (WEO); or through reforming the UN Economic and Social Council (ECOSOC)[26] and the Commission on Sustainable Development (CSD);[27] or/and through enhancing institutional reforms and streamlining existing structures.[28]

provides a framework for UNEP to strengthen the capacity of governments in developing and transitional economy countries to achieve environmentally sustainable outcomes consistent with the programmatic goals of the Council' and 'mandates UNEP to "develop and keep updated a database giving access to information on major existing technology support and capacity-building activities, such as those undertaken by UNEP, with links to the programmes of relevant partners; [which] activity should perform a clearing house function.

UNEP, 'BSP Mandate', available at <http://62.160.8.20/bsp/staticpages/mandate.aspx> (visited 9 December 2012).

21 For more information on the proposals to strengthen the UN, see <http://www.centerforunreform.org/node/33>. In February 2006, the UN Secretary-General created a High Level Panel on UN System-wide Coherence in the areas of development, the environmental and humanitarian assistance. The panel carried out a study of the UN's operational activities in which it assessed how to strengthen UN system works, comparative advantages, and possible areas in which overlap between UN agencies might be reduced. The report, released in November 2006, included extensive recommendations on how to consolidate and improve the effectiveness of United Nations operations. UN, 'System Wide Coherence', available at <http://www.un.org/ga/president/63/issues/swc.shtml> (visited 9 December 2012).

22 During 2007, H.E. Mr. Enrique Berruga (Mexico) and H.E. Mr. Peter Maurer (Switzerland), Co-Chairs of the Informal Consultations on environmental activities taking place at the GA, engaged in a consideration process which culminated, in October 2007, in an 'Options Paper' by the two Co-Chairs which was presented as a 'flexible "framework for decision-making" in regard to the UN's environmental activities'. The paper presented seven 'building blocks constituting "ambitious incrementalism" to strengthen international environmental governance (IEG)'. The Co-Chairs proposed that 'informal consultations be continued and that a decision should be taken no later than by the end of the 62nd session of the General Assembly on the terms of reference for formal negotiations on a broader transformation of the IEG system'. Available at Center for UN Reform Education, 'Informal Consultative Process for the Institutional Framework for the United Nations' Environmental Activities: Co-Chairs' Options Paper', <http://www.centerforunreform.org/node/265> (visited 20 June and 9 December 2012).

23 See UN, 'Report of the Joint Inspection Unit for 2008 and programme of work for 2009', available at <https://www.unjiu.org/en/corporate-information/AR%20%20PoW/enAR2008_WP2009.pdf> (visited 9 December 2012).

24 For more information on the Helsinki meeting, see <http://www.biodivcluster.fi/>.

25 See <http://www.ipbes.net> (visited 20 June 2012).

26 See <http://www.un.org/en/ecosoc/>.

27 See <http://www.un.org/esa/dsd/csd/csd_index.shtml>.

28 See, for instance, UNEP, 'First meeting of the Consultative Group of Ministers or High-level Repre-

The core messages of the processes and documents mentioned above were largely repeated in the preparations in the run-up to Rio+20; showing, perhaps, how difficult, and how lengthy a process, international reform is. Some progress had been achieved, however – for instance in the form of the establishment of the IPBES, through the conduct of UNEP's incremental reform, and the synergies process among the Basel, Rotterdam and Stockholm conventions. However, by and large the same messages that had been voiced over the last decade were being communicated to the next round of sustainable development negotiations in Rio 2012. Countries prepared through the UNEP's Governing Council 2011, one of the outcomes of which was the adoption of eight paragraphs on strengthening international environmental governance,[29] to Rio+20 PREPCOM II[30] where IEG forms part of Rio's second theme 'Institutional Framework on Sustainable Development'.[31]

4 Lessons learned

The experiences from the process on enhancing synergies among the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,[32] Rotterdam Convention on Prior Informed Consent[33] and Stockholm Convention on Persistent Organic Pollutants[34] are useful when devising further strategies on the reform of IEG and when deciding on how to proceed in the clustering of MEAs. The synergies process among the Basel, Rotterdam and Stockholm conventions is also one of the few IEG to have produced results and concrete outcomes.[35]

sentatives on International Environmental Governance, Nairobi, Kenya, 7–9 July 2010', 20 July 2010, available at <http://www.rona.unep.org/documents/partnerships/IEG/Co-Chairs_Summary.pdf> (visited 9 December 2012).

29 UNEP GC, Twenty-sixth session of the Governing Council/Global Ministerial Environment Forum, Nairobi, 21–24 February 2011, 'International Environmental Governance', available at <http://www.environmentalgovernance.org/wp-content/uploads/2011/02/UNEPGC.26CWL.4Add.1.pdf> (visited 9 December 2012).

30 Three preparatory meetings were held. Prepcom II was held in March 2012. See Rio+20, '2nd Preparatory Committee Meeting UN Conference on Sustainable Development, 7 Mar 2011 – 8 Mar 2011, New York, USA', available at <http://www.uncsd2012.org/index.php?page=view&type=13&nr=28&menu=24> (visited 9 December 2012).

31 The Conference had two focal themes, these being a green economy in the context of sustainable development poverty eradication; and the institutional framework for sustainable development. See Rio+20, 'Themes of the Conference', available at <http://www.uncsd2012.org/about.html> (visited 9 December 2012).

32 Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <http://www.basel.int>.

33 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <http://www.pic.int>.

34 Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <http://www.pops.int>.

35 For an earlier consideration of this cluster, see Kerstin Stendahl, 'Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions' in Tuula Kolari and Ed Couzens (eds), *International Environmental Law-making and Diplomacy Review 2007* University of Joensuu – UNEP Course Series 7 (University of Joensuu, 2008) 127–141.

The process was launched in 2006 at the fourth meeting of the Conference of the Parties of the Stockholm convention where a decision was taken to launch a process on synergies among the three conventions if the other conventions, Basel and Rotterdam, were to agree to such a process.[36] The wording of the decision was key and much effort went into balancing it in such a way that it would not impinge on the autonomous decision-making of the conferences of the parties of the conventions. The decision reads:

> … [the Conference of the Parties of the Stockholm Conventions] suggests the establishment of an ad hoc joint working group as a possible way forward and invites the Conferences of the Parties to the Basel and Rotterdam Conventions to consider that option and, in the event of their endorsement, agrees to its establishment. It is suggested that the working group consider the supplementary report referred to in paragraph 2 of the present decision and prepare joint recommendations on enhanced cooperation and coordination among the three conventions at the administrative and programmatic levels to be forwarded to the next meeting of the Conference of the Parties to each convention.[37]

The Basel and Rotterdam COPs then passed decisions to the same effect and an ad hoc joint working group among the three Conventions was set up to propose options for enhancing synergies among the three Conventions.[38] The AHJWG met three times: in March and December 2007 and in March 2008. The AHJWG recommendations were adopted by the COPs and the extraordinary simultaneous meetings of the COPs of the Rotterdam, Basel and Stockholm Conventions in 2009 and 2010.[39]

An innovation emanating from the AHJWG was the organizing of the ExCOPs, extraordinary simultaneous meetings of the COPs of the three Conventions. This meant simultaneous plenary sessions; an open-ended joint working group (OEJWG) of the three COPs prepared draft decisions on the substantive issues. Contact groups on joint activities were set up to deliver on issues such as joint management and the review mechanism.

The result was an omnibus decision adopted simultaneously by the COPs of the Basel, Rotterdam and Stockholm Conventions in plenary, which addressed joint activities (national, on the ground), joint services in the secretariats, joint manage-

[36] Report of the Conference of the Parties of the Stockholm Convention on Persistent Organic Pollutants on the work of its second meeting, UN Doc. UNEP/POPS/COP.2/30 (2006), Annex I, Decision SC-2/15 'Synergies'.

[37] *Ibid*. para. 6.

[38] Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal on its eighth meeting, Annex I, Decision VIII/8 (2007); Report of the Conference of the Parties to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade on the work of its third meeting, Decision RC-3/8 (2006).

[39] On the work of the AHJWG, see, for example, Stendahl, 'Enhancing Cooperation', *supra* note 35.

ment of the secretariats, synchronization of budget cycles, joint audits and review of the synergies arrangements.

The way the omnibus decision was taken – through the convening of three COPs simultaneously – and the issues it addressed makes it unique in the history of international environmental negotiations. There are many factors contributing to this success story. Firstly, the process was very much a country-driven process, driven by needs identified by countries and with countries in the driver's seat. The ad hoc joint working group had a regionally balanced, convention-specific representation, with three government officials per region per convention: 3 x 5 x 3 = 45 members. Also the AHJWG Co-Chairs each represented a convention and region – Chile (Stockholm), China (Basel), and Finland (Rotterdam). The Co-Chairs were engaged, committed and took it upon themselves to allocate the time needed for the process to succeed. The Convention Secretariats facilitated and serviced the meetings and work of the group, but were not members of the group. Neither UNEP nor other UN entities were part of the group but served the discussions as experts (resource persons).

It was a trust- and confidence-building process. It showed that any such process should be undertaken over a period long enough to establish trust as synergies negotiations are heavily laden with 'turf-battles' at all levels, and must deal with inherent fears that there will always be 'someone on the losing side' when synergies are sought. Looking at the process from the level of facilitating national implementation helps. The informal (even 'chatty') nature of the AHJWG also helped to create a constructive atmosphere. In order to secure trust in the group, there were no negotiations before the AHJWG's third and last meeting. In addition, at the last stretch, the COPs trusted the group's recommendations so that the package was not opened during the three specific COPs' deliberations. Simple logistical facts were also beneficial: all three Convention Secretariats were located in the same building in Geneva, except for the FAO part of the Rotterdam secretariat which is in Rome. Consequently, it was easier for a joint Executive Secretary to start working with (almost all) staff in the same place. An additional beneficial factor was that there were only two host institutions involved: UNEP and the Food and Agriculture Organization (FAO).[40]

Admittedly, the reforms made up to date have been mainly administrative in nature. The most concrete outcomes of the process are a joint head, a joint secretariat based on a matrix structure servicing the three conventions, joint formats for budgets, and joint parts of the budgets henceforth. The next step in the synergies work will need to focus on national and regional joint life-cycle implementation; and there already are budding thoughts about the issue to be realized through joint parts of work-programmes and budgets.

[40] See <http://www.fao.org/>.

A very important part of making this process a success has been the attention paid to selling the idea, through outreach and leg-work, talking with the Parties and assessing their needs. Regional workshops and briefings were held on a regular basis in Geneva, Nairobi, New York as well as hosted in other places.[41]

5 IEG in the Rio+20 outcome

The Rio+20 outcome 'The Future We Want'[42] contains a number of paragraphs relating to the strengthening of IEG in general and the furthering of synergies among MEAs specifically. In paragraph 88, the Parties 'committed' themselves 'to strengthening the role of the United Nations Environment Programme as the leading global environmental authority that sets the global environmental agenda, that promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system and that serves as an authoritative advocate for the global environment'; and 'reaffirm[ed] resolution 2997 (XXVII) of 15 December 1972 which established UNEP and other relevant resolutions that reinforce its mandate, as well as the 1997 Nairobi and 2000 Malmö Ministerial Declarations' and 'in this regard, [] invite[d] the United Nations General Assembly, in its 67th Session, to adopt a Resolution strengthening and upgrading UNEP'.[43]

Such 'strengthening and upgrading' is to be achieved by 'establish[ing] universal membership in the Governing Council of UNEP, as well as other measures to strengthen its governance as well its responsiveness and accountability to Member States';[44] 'hav[ing] secure, stable, adequate and increased financial resources from the regular budget of the UN and voluntary contributions to fulfill its mandate';[45] 'enhanc[ing] UNEP's voice and ability to fulfill its coordination mandate within the UN system by strengthening UNEP engagement in key UN coordination bodies and empowering UNEP to lead efforts to formulate UN system-wide strategies on the environment';[46] and by 'promot[ing] a strong science-policy interface, building on existing international instruments, assessments, panels and information networks,

[41] As an example of the numerous outreach efforts, which were both formal and semi-formal, there even was the 2009 UNEP – University of Eastern Finland Course on Multilateral Environmental Agreements, during which a mock simultaneous extraordinary ExCOP of the Basel, Rotterdam and Stockholm conventions was held! On the negotiation exercise, and for an explanation of some of the complexities involved in the process, see Cam Carruthers and Kerstin Stendahl, 'The Naivasha Ex-COP: A Multilateral Simulation Exercise of a Joint Extraordinary Conference of the Parties to the Basel, Rotterdam and Stockholm Conventions' in Tuula Honkonen and Ed Couzens (eds), *International Environmental Lawmaking and Diplomacy Review 2009*, University of Eastern Finland – UNEP Course Series 9 (University of Eastern Finland, 2010) 195–217.

[42] Rio+20, 'Report of the United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil, 20–22 June 2012', available at <http://www.uncsd2012.org/content/documents/814UNCSD%20REPORT%20final%20revs.pdf> (visited 9 December 2012).

[43] *Ibid*. para. 88.

[44] *Ibid*. para. 88(a).

[45] *Ibid*. para. 88(b).

[46] *Ibid*. para. 88(c).

including the Global Environmental Outlook, as one of the processes aimed at bringing together information and assessment to support informed decision-making'.[47] Such 'strengthening and upgrading' is further to be achieved by 'disseminat[ing] and shar[ing] evidence-based environmental information and raise public awareness on critical as well as emerging environmental issues';[48] by 'provid[ing] capacity building to countries as well as support[ing] and facilitat[ing] access to technology';[49] by 'progressively consolidat[ing] headquarters functions in Nairobi, as well as strengthen[ing] its regional presence, in order to assist countries, upon request, in the implementation of their national environmental policies, collaborating closely with other relevant entities of the UN system';[50] and by 'ensur[ing] the active participation of all relevant stakeholders' through 'drawing on best practices and models from relevant multilateral institutions and exploring new mechanisms to promote transparency and the effective engagement of civil society'.[51]

Paragraph 89 deals with synergies among MEAs. Governments agreed that they 'recognize the significant contributions to sustainable development made by the multilateral environmental agreements []', and 'acknowledge the work already undertaken to enhance synergies among the three Conventions in the chemicals and waste cluster (the Basel, Rotterdam and Stockholm Conventions); and in that light 'encourage parties to MEAs to consider further measures, in these and other clusters, as appropriate, to promote policy coherence at all relevant levels, improve efficiency, reduce unnecessary overlap and duplication, and enhance coordination and cooperation among MEAs, including the three Rio Conventions as well as with the UN system in the field'.[52]

Obviously, at the time of concluding this paper, it is not possible to know how significant the 'Future We Want' document will eventually turn out to be, For the moment, what can be said is that based on a reading of the above paragraphs, the document at the very least gives firm encouragement to clusters of multilateral environmental agreements to continue with efforts to create and to foster synergies. This might even prove to be one of the most positive outcomes.

At the general SD level, the outcome document reaffirms governments' commitment to 'strengthening international cooperation to address the persistent challenges related to sustainable development for all, in particular in developing countries';[53] calls for a 'holistic and integrated approaches to sustainable development which will guide humanity to live in harmony with nature and lead to efforts to restore the health and

[47] *Ibid*. para. 88(d).
[48] *Ibid*. para. 88(e).
[49] *Ibid*. para. 88(f).
[50] *Ibid*. para. 88(g).
[51] *Ibid*. para. 88(h).
[52] *Ibid*. para. 89.
[53] *Ibid*. para. 11.

integrity of the Earth's ecosystem';[54] and 'underscores the importance of a strengthened institutional framework for sustainable development which responds coherently and effectively to current and future challenges and efficiently bridges gaps in the implementation of the sustainable development agenda'.[55]

The Parties then noted that the 'strengthening and reform of the institutional framework should not be an end in itself, but a means to achieve sustainable development' and 'resolve[d] to strengthen the institutional framework for sustainable development, which will, *inter alia:* […] (c) underscore the importance of interlinkages among key issues and challenges and the need for a systematic approach to them at all relevant levels; … (d) enhance coherence, reduce fragmentation and overlap and increase effectiveness, efficiency and transparency, while reinforcing coordination and cooperation'.[56] The Parties then 'acknowledge[d] the vital importance of an inclusive, transparent, reformed and strengthened, and effective multilateral system in order to better address the urgent global challenges of sustainable development today, recognizing the universality and central role of the United Nations', and 'reaffirming [their] commitment to promote and strengthen the effectiveness and efficiency of the United Nations system';[57] 'underscore[d] the need to strengthen UN system-wide coherence and coordination, while ensuring appropriate accountability to Member States, by, inter alia, enhancing coherence in reporting and reinforcing cooperative efforts under existing inter-agency mechanisms and strategies to advance the integration of the three dimensions of sustainable development within the United Nations system', with this to occur through means 'including [] exchange of information among its agencies, funds and programmes, and also with the international financial institutions and other relevant organizations such as the World Trade Organization (WTO), within their respective mandates'.[58] The Parties then 'emphasize[d] the need for an improved and more effective institutional framework for sustainable development that should: be guided by the specific functions required and mandates involved; address the shortcomings of the current system; take into account all relevant implications; promote synergies and coherence; seek to avoid duplication and eliminate unnecessary overlaps within the UN system; and, reduce administrative burdens, and build on existing arrangements'.[59]

6 Concluding remarks

The jury is still out as to whether the successful synergies process among the Basel, Rotterdam and Stockholm Conventions will provide a model for synergies among MEAs in other clusters, most notably the biodiversity related ones. What can be said,

[54] *Ibid*. para. 40.
[55] *Ibid*. para. 75.
[56] *Ibid*. para. 76.
[57] *Ibid*. para. 77.
[58] *Ibid*. para. 78.
[59] *Ibid*. para. 79.

however, is that synergising is a mode of working within the chemicals and waste cluster and, as such, is constantly under development and refinement. A second round of simultaneous COPs as well as extraordinary meetings of the COPs of the three conventions will be held in May 2013. Also, the interim joint administrative arrangements of the convention secretariats will be reviewed and decisions on their future will be made.

Steady progress is also being made with respect to international environmental governance at large. In December 2012, the UN General Assembly adopted a resolution to strengthen and upgrade UNEP and establish universal membership of its governing body.[60] The landmark resolution, aimed at increasing the role of UNEP as the leading environmental authority that sets the global environmental agenda, was adopted 40 years after UNEP was established by the General Assembly, following the 1972 Stockholm Conference on the Human Environment.[61]

The General Assembly resolution also provides for UNEP to receive secure, stable and increased financial resources from the regular budget of the UN, and calls for other UNEP donors to increase their voluntary funding. The decision allows full participation of all 193 UN member states at the UNEP Governing Council in February 2013, and follows commitments by world leaders at the UN Conference on Sustainable Development (Rio+20) in June 2012 to improve the institutional framework for sustainable development. The provisions contained in the resolution are among the first practical steps by the UN General Assembly to implement the outcomes of Rio+20.[62]

In light of the above, synergies among MEAs can most probably be pursued effectively using either route, through negotiations among the MEA governing bodies themselves or by addressing the issue in a UNEP setting with universal membership.

[60] See 67th sess. of the UNGA, 'Sustainable development: report of the Governing Council of the United Nations Environment Programme on its twelfth special session. Report of the Second Committee', UN Doc. A/67/437/Add.7 (2012).

[61] For more information, see, for instance, UNEP, 'United Nations Environment Programme Upgraded to Universal Membership Following Rio+20. UN General Assembly Strengthens UNEP Role in Addressing Global Environmental Challenges. Renewed Focus on Improving Access to Technology and Capacity Building (2012)', available at <http://www.rona.unep.org/documents/news/United%20Nations%20Environment%20Programme%20Upgraded%20to%20Universal%20Membership%20Following%20Rio.pdf> (visited 2 January 2013).

[62] *Ibid.*

Global Biodiversity Trends and Synergistic Strategic Policy Responses

Erie Tamale[1]

1 Introduction

Biological diversity, the variability among living organisms,[2] is under threat. Recent reports – including the third Global Biodiversity Outlook,[3] the Living Planet Report,[4] the Global Forest Resources Assessment,[5] the State of the World's Plant and Animal Genetic Resources for Food and Agriculture,[6] the fourth Global Environment Outlook,[7] and the Millennium Ecosystem Assessment[8] – have come to similar conclusions. They all indicate that biological diversity continues to decline globally at

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[2] Biological diversity, or 'biodiversity', is defined in the Convention on Biological Diversity as meaning 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'. Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

[3] Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook 3* (CBD, 2010), available at <http://www.cbd.int/gbo3/> (visited 14 March 2012).

[4] WWF, *Living Planet Report 2010: Biodiversity, Biocapacity & Development* (Global Footprint Network, 2010), available at <http://awsassets.panda.org/downloads/lpr2010.pdf> (visited 14 March 2012).

[5] FAO, *Global Forest Resources Assessment 2010: Main Report*, FAO Forestry Paper No. 163 (FAO, 2010), available at <http://www.fao.org/forestry/fra/fra2010/en/> (visited 14 March 2012).

[6] FAO. *The Second Report on the State of the World's Plant Genetic Resources for Food and Agriculture* (FAO, 2010), available at <http://www.fao.org/agriculture/crops/core-themes/theme/seeds-pgr/sow/sow2/en/> (visited 14 March 2012).

[7] UNEP, *Global Environment Outlook (GEO-4): Environment for Development* (EarthScan, 2010), available at <http://www.maweb.org/documents/document.354.aspx.pdf> (visited 14 March 2012).

[8] *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Biodiversity Synthesis* (World Resources Institute, 2005), available at <http://www.maweb.org/documents/document.354.aspx.pdf> (visited 14 March 2012).

unprecedented rates. The decline has been more rapid in the past 50 years than at any time in human history, and is expected to continue at the same pace or even accelerate as the drivers of biodiversity loss increase in intensity.[9] The main direct pressures driving the decline include climate change, habitat degradation, habitat loss, invasive alien species, over-exploitation and unsustainable use and pollution.[10] These, in turn, are driven by a myriad of underlying causes or indirect drivers, including: demographic change, economic activities, inequitable resource distribution, international trade, policy failures including perverse incentives, scientific and technological change, socio-cultural change, socio-political factors, and unsustainable consumption patterns.[11]

This paper discusses the general status and trends of global biodiversity, and the current pressures on biodiversity, highlighting some of the strategic policy responses taken or proposed under various biodiversity-related multilateral environmental agreements. The paper draws mostly from the findings of the third edition of the Global Biodiversity Outlook (GBO 3), which was released by the Secretariat of the Convention on Biological Diversity (CBD) in May 2010; and the outcomes of the tenth meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 10), which took place in October 2010 in Nagoya, Japan.

2 Current biodiversity status and trends

2.1 Introduction

All recent reports indicate that biodiversity at all its levels – ecosystem, species and genetic diversity – continues to decline or disappear at alarming rates.[12] For example, almost all of the indicators which were used during the preparation of the third Global Biodiversity Outlook to assess the status and trends of various components of biodiversity (genes, populations, species, ecosystems and habitats) and their integrity, as well as the pressures being imposed upon them, all showed a negative trend (see Figure 1).[13]

[9] *Ibid*.
[10] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.
[11] Alexander Wood, Pamela Stedman-Edwards and Johanna Mang, *The Root Causes of Biodiversity Loss* (Earthscan, 2000).
[12] Brian Groombridge and Martin D. Jenkins, *World Atlas of Biodiversity. Earth's Living Resources in the 21st Century* (University of California Press, 2002); and *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Current State and Trends, Volume 1* (World Resources Institute, 2005), available at <http://www.maweb.org/en/Condition.aspx> (visited 14 March 2012).
[13] Source: CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.

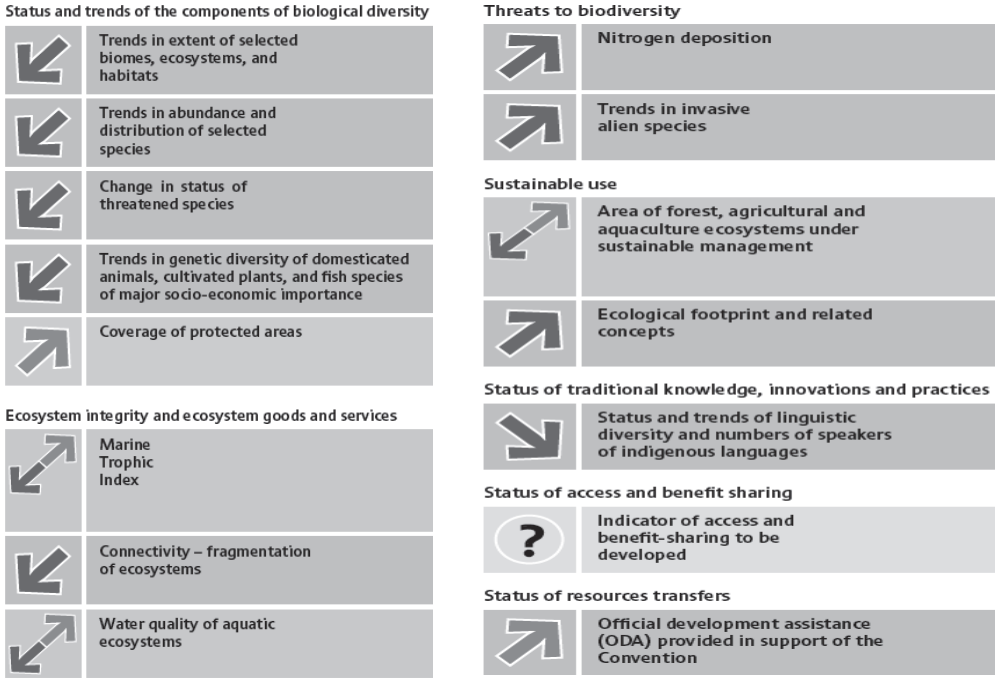

Figure 1: Trends as shown by agreed indicators.

2.2 Ecosystem status and trends

The trends in ecosystem status are quite varied across the world, but reports show that virtually all ecosystems around the world have been dramatically transformed through human actions.[14] According to the GBO 3, many terrestrial ecosystems and habitats, including tropical forests, in most parts of the world have become severely fragmented and degraded resulting in alarming biodiversity loss.[15] Savannas, grasslands and tropical dry forests, in particular, are being degraded faster than any other biome.[16] For example, the *cerrado* woodland savannah biome of Central Brazil and the Miombo woodlands of Southern Africa, which have exceptionally high diversity of endemic plant species, are being lost at a rate of 0.7 per cent per year through clearing for agriculture (cropland and pasture), extraction of wood for charcoal, and uncontrolled bush fires.[17]

Inland water ecosystems and habitats have also been dramatically altered and degraded in recent decades. For example, according to the GBO 3, two-thirds out of the 292 large river systems have become moderately or highly fragmented by dams and reservoirs. Wetlands (including marshes and swamps) in many parts of the world

[14] *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Current State and Trends, Volume 1*, *supra* note 12.
[15] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.
[16] See *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Biodiversity Synthesis*, *supra* note 8.
[17] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.

have also been drained and degraded significantly. For example, up to 65 per cent of wetlands in Europe and North America and 27 per cent in Asia have been drained for use in intensive agriculture. In many freshwater ecosystems, water quality, an important biodiversity indicator, also continues to deteriorate due to pollution originating from non-point sources, including excess fertilizers, herbicides, and insecticides from agricultural lands.[18]

Marine and coastal ecosystems and habitats also continue to be lost at alarming rates as a result of human activities.[19] The Millennium Ecosystem Assessment, published in 2005, revealed that some 35 per cent of mangroves have been lost in the last two decades, and that roughly 20 per cent of the world's coral reefs have been destroyed with an additional 20 per cent having been degraded. Mangroves and coral reefs in South America and Southeast Asia in particular have had the highest rate of habitat loss.[20] However, in other regions, although the loss is still disturbingly high the annual rate of mangrove loss has slowed down.[21]

Tropical coral reefs have also suffered a significant decline since the 1970s due to multiple threats including from 'bleaching' from warmer sea temperatures resulting from climate change, disease outbreaks, dynamiting of reefs, ocean acidification, overfishing, pollution from land-based sources. As well, some 29 per cent of seagrass habitats fringing coastlines throughout the world have also disappeared in recent decades. Furthermore, it is estimated that 85 per cent of oyster reefs have been lost globally and are functionally extinct in 37 per cent of estuaries and in 28 per cent of ecoregions.[22] The status and trends of biodiversity in deepwater habitats, such as sea mounts and cold-water corals, are also a growing concern mainly due to the increase in ocean acidification and modern fishing technology, especially bottom-trawling.[23]

In general, the condition of most ecosystems and habitats around the world is deteriorating, thus threatening the long-term viability of many species and the ecosystem goods and services.[24] However, as indicated above, a few positive trends have been noted in some recent reports. As further examples, there has been a significant increase in the coverage of protected areas, both terrestrial and marine, over the past decade. More than 12 per cent of the global land surface has been designated as

[18] *Ibid*.

[19] Enric Sala and Nancy Knowlton, 'Global Marine Biodiversity Trends', 31 *Annual Review of Environment and Resources* (2006) 93–122.

[20] Rashid Hassan, Robert Scholes and Neville Ash (eds), Ecosystems and Human Well-being: Current State and Trends, vol 1. Findings of the Condition and Trends Working Group of the Millennium Ecosystem Assessment (Island Press, 2005).

[21] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.

[22] *Ibid*.

[23] Enric Sala and Nancy Knowlton, 'Global Marine Biodiversity Trends', *supra* note 19.

[24] Ecosystem services are the benefits that people obtain from ecosystems. These include direct or material benefits from products such as food, fuel, and fiber; and indirect benefits from processes such as pollination, climate regulation, flood control, water purification, pollution control, nutrient recycling, soil formation, as well as aesthetic, recreational, cultural and spiritual benefits. See *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Biodiversity Synthesis*, *supra* note 8.

protected areas to date.[25] Inland water ecosystems, although still poorly served by the terrestrial protected areas network, are also increasingly being protected. Parties to the Ramsar Convention[26] have to date committed themselves to conserving more than 1 880 wetlands of international importance, covering over 1.8 million square kilometres. In addition, steps are also being taken in many countries to restore wetlands.[27] The coverage of marine and coastal protected areas is also growing rapidly, though it still lags far behind the terrestrial protected area network and does not adequately include the open ocean as yet.

The management effectiveness of the existing protected areas is quite varied.[28] A recent global assessment of management effectiveness has found that of the 3 080 protected areas surveyed, only 22 per cent were judged 'sound', 13 per cent 'clearly inadequate', and 65 per cent demonstrated 'basic' management.[29] In general, however, the trend in respect of both the coverage and the effectiveness of protected areas is quite positive.

2.3 Trends in species diversity

The last few decades have witnessed significant changes in the status, abundance and distribution of species. Recent studies show that many species continue to decline in abundance and distribution and several are at increasing risk of extinction. On average, the global Living Planet Index (LPI)[30] has declined by more than 30 per cent globally since 1970. The tropical LPI has declined by almost 60 per cent while the temperate LPI showed an increase of 15 per cent, reflecting the recovery of some species populations in temperate regions.[31]

Significant declines have been observed in population trends of vertebrates, habitat specialist birds and shorebird populations worldwide.[32] On average, the population of wild vertebrate species fell by nearly one-third (31 per cent) globally between 1970 and 2006, with the decline being especially severe in the tropics and in freshwater

[25] *Ibid*.

[26] Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <http://www.ramsar.org>.

[27] *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Wetlands and Water Synthesis* (World Resources Institute, 2005), available at <http://www.maweb.org/documents/document.358.aspx.pdf> (visited 14 March 2012).

[28] Fiona Leverington, Marc Hockings, Helena Pavese, Katia Lemos Costa and José Courrau, *Management Effectiveness in Protected Areas – a Global Study. Overview of Approaches and Methodologies* (University of Queensland, Gatton, IUCN-WCPA, TNC and WWF, 2008), available at <http://www.wdpa.org/me/PDF/global_study_methodologies.pdf> (visited 14 March 2012).

[29] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.

[30] The Living Planet Index (LPI) is an indicator of change in global biodiversity based on change in population abundance of vertebrate species from all around the world. L. McRae et al., *The Living Planet Index – Guidance for National and Regional Use* (UNEP-WCMC, 2008), available at <http://www.unep-wcmc.org/the-living-planet-index-guidance-for-national-and-regional-use_544.html> (visited 12 June 2012).

[31] *Ibid*.

[32] Stuart H. M. Butchart et al., 'Global Biodiversity: Indicators of Recent Declines', 328 *Science* (2010) 1164–1168.

ecosystems. Amphibians are on average the group most threatened with extinction, with more than 42 per cent of all amphibian species declining in population due to a combination of habitat modification, changes in climate and the fungal disease chytridiomycosis.[33] More than 40 per cent of bird species are also declining in population.[34] In particular, farmland bird populations in Europe have declined by on average 50 per cent since 1980, bird populations in North American grasslands have declined by nearly 40 per cent, and waterbird populations worldwide have declined by 44 per cent.[35]

The 2010 edition of the Worldwide Fund for Nature's (WWF)[36] Living Planet Report[37] also showed that populations of tropical species are plummeting as humanity's demands on natural resources increase. It noted that the biodiversity loss is being driven by the consumption of natural resources, which is occurring faster than the resources are being regenerated; putting greater stress on important habitats and the species they support.[38]

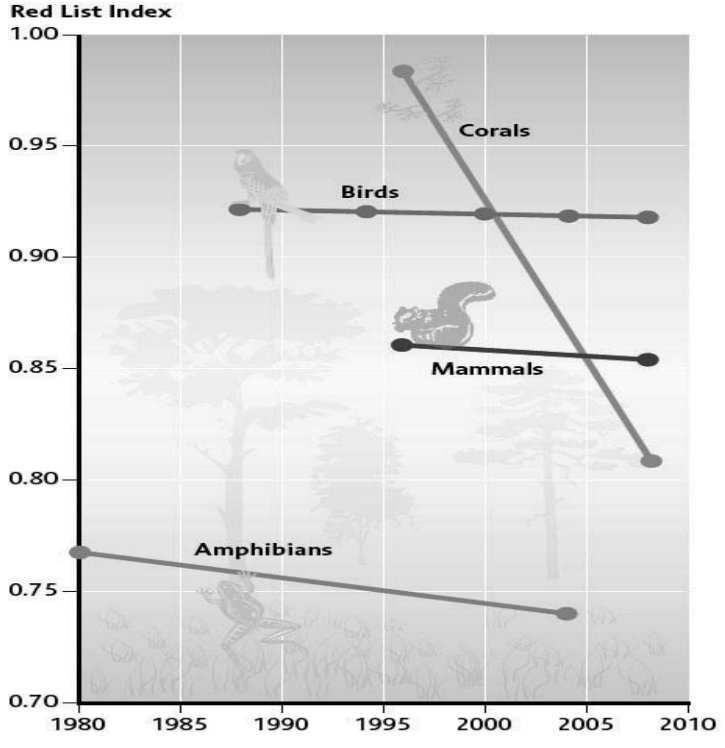

Figure 2[39]

[33] *Ibid*.
[34] Stuart H. M. Butchart, Alison J. Stattersfield, Leon A. Bennun, Sue M. Shutes, H. Resit Akçakaya et al., 'Measuring Global Trends in the Status of Biodiversity: Red List Indices for Birds', 2 *PLoS Biology* (2004) 2294–2304.
[35] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.
[36] See, generally, <http://www.worldwildlife.org/home-full.html> or <http://wwf.panda.org>.
[37] WWF, *Living Planet Report 2010*, *supra* note 4.
[38] *Ibid*.
[39] Source: CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.

The aggregated species' extinction risk (i.e., biodiversity loss at the species level) has accelerated according to, for example, the International Union for Conservation of Nature (IUCN)[40] Red List Index.[41] The IUCN Red List specifically shows that despite the ongoing conservation efforts, between 12 and 52 per cent of well-studied species are threatened with extinction, including approximately 25 per cent of mammals. For example, recent reassessments show that the subspecies of the Black Rhinoceros in western Africa, the Western Black Rhinoceros (*Diceros bicornis longipes*) has officially been declared extinct; and the subspecies of the White Rhinoceros in central Africa, the Northern White Rhinoceros (*Ceratotherium simum cottoni*) is currently teetering on the brink of extinction.[42]

The 2005 Millennium Ecosystem Assessment also noted that some 10–30 per cent of the mammal, bird and amphibian species were threatened with extinction, due to human actions.[43] Species of birds and mammals used for food and medicine are on average facing a greater extinction risk than species not so used. Mammals have suffered the steepest increase in the risk of extinction in South and South-East Asia, due to the combined impact of hunting and loss of habitat. Preliminary assessments also suggest that 23 per cent of plant species are threatened, and coral species are also moving rapidly towards a greater extinction risk.[44]

Humans have also directly caused the global declines in marine populations. The single most important global indicator of population depletion is the global wild fisheries catch, which has been declining since the 1990s. In the United States alone, 81 out of 304 exploited stocks for which the status is known are considered to be overfished; 93 are either overfished or experiencing overfishing; and 65 are experiencing overfishing.[45] Disturbances due to non-extractive activities (such as global warming, ocean acidification, and pollution) have also affected a large number of marine species. Furthermore, human activities have led to the extinction of more than 20 described marine species, including algae, fishes, invertebrates, marine mammals, and seabirds. Dramatic examples of human-driven extinction of marine species include the Steller's sea cow (*Hydrodamalis gigas*), a huge herbivore of the nearshore northeast Pacific, and the Caribbean monk seal (*Monachus tropicalis*) which were hunted to extinction. It is believed that many small species with localized dispersal and limited geographic ranges have also probably gone extinct.[46]

[40] See, generally, <http://www.iucn.org>.
[41] See, generally, <http://www.iucnredlist.org/>. The IUCN Red List of Threatened Species is an authoritative global classification of species' conservation status.
[42] IUCN, *IUCN Red List of Threatened Species,* Version 2011.2 (2011), available at <http://www.iucnredlist.org/apps/redlist/details/6557/0> (Western black rhinoceros) and <http://www.iucnredlist.org/apps/redlist/details/4185/0> (Northern white rhinoceros) (visited 27 March 2012).
[43] *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Biodiversity Synthesis*, *supra* note 8.
[44] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.
[45] Sala and Knowlton, 'Global Marine Biodiversity Trends', *supra* note 23.
[46] *Ibid*.

On a more positive note, the latest IUCN Red List highlights some conservation successes achieved in recent years. For example, the Southern White Rhino subspecies (*Ceratotherium simum simum*), which probably had a population of less than 100 at the end of the 19th century has now increased to an estimated wild population of over 20 000.[47] Another success story is the Przewalski's Horse (*Equus ferus*), which was originally listed as extinct, has improved its status from critically endangered to endangered.[48] Some temperate species populations have also increased on average since 1970. For example, there has been an increase in wild animal populations in temperate regions which may be linked to widespread afforestation of former cropland and pasture, though this may not necessarily reflect increase in species diversity richness.[49]

2.4 Trends in genetic diversity

While fewer detailed studies and assessments have been conducted at the genetic diversity level, as compared to species and ecosystem diversity, the available data shows that genetic diversity too is being lost at very alarming rates globally, particularly among domesticated species.[50] Trends in genetic diversity of domesticated animals, cultivated plants, and fish species of major socio-economic importance in particular all show a major decline. For example, in China the number of local rice varieties being cultivated has declined from 46 000 in the 1950s to about 1 000 in 2006.[51] Globally, the FAO estimates that since the early 1900s, about 75 per cent of plant genetic diversity has been lost.[52] The main causes of this genetic erosion, as reported by almost all countries, are the intensification of agricultural systems coupled with the replacement of local varieties and landraces by improved or exotic high-yielding varieties, which have resulted in increasing homogeneity of crops worldwide. Currently, only 30 crops provide an estimated 90 per cent of the world population's calorific requirements, with maize, rice and wheat alone providing about half of the calories consumed globally.[53] Other causes include changing agricultural systems, environmental degradation, inappropriate legislation and policies, overexploitation, overgrazing, population pressures, as well as weeds, pests and diseases.[54]

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47 See <http://www.iucnredlist.org/apps/redlist/details/4185/0> (visited 28 March 2012).

48 See <http://www.iucnredlist.org/apps/redlist/details/41763/0> (visited 28 March 2012).

49 CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.

50 *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Biodiversity Synthesis*, *supra* note 8; Barbara Rischkowsky and Dafydd Pilling (eds), *The State of the World's Animal Genetic Resources for Food and Agriculture* (FAO, 2007), available at <ftp://ftp.fao.org/docrep/fao/010/a1260e/a1260e01.pdf> (visited 15 March 2012); and FAO, *The Second Report on the State of the World's Plant Genetic Resources*, *supra* note 6.

51 CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.

52 FAO, *The State of the World's Plant Genetic Resources for Food and Agriculture* (FAO, 1997).

53 FAO, *The State of Food and Agriculture* (FAO, 2004), available at <http://www.fao.org/docrep/006/Y5160e/Y5160e00.HTM> (visited 15 March 2012); and *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Biodiversity Synthesis*, *supra* note 8.

54 FAO. *The Second Report on the State of the World's Plant Genetic Resources*, *supra* note 6.

Standardized and high-output systems of animal husbandry have also led to an erosion of the genetic diversity of livestock, especially in developed countries. It is estimated that 21 per cent of the world's 7 000 domesticated animal species (including birds and mammals) are at risk of extinction due to small population size.[55] The FAO estimates that a total of 1 491 breeds (or 20 per cent), including 881 breeds of mammalian species and 610 breeds of avian species are classified as being 'at risk', with Europe and the Caucasus having the largest number of extinct mammalian and avian breeds (16 per cent) and North America with the highest proportion of extinct breeds (25 per cent among its recorded breeds).[56] Regarding the status of the local breeds, a comparison of the data collected in 1999 and 2006 showed a negative trend; 1.8 per cent had become extinct by 2006.[57]

The current trends of genetic diversity loss, largely due to the homogenization of landscapes and agricultural varieties, raise major concerns especially for rural communities that face greater challenges in adapting to changes and shocks. In particular, it is feared that the extinction of plant varieties and animal breeds would limit options for such communities' future survival and ability to adapt to the effects of climate change.[58]

3 Current pressures on biodiversity

The above-described changes in ecosystem, species and genetic diversity have been, and continue to be, driven by several interlinked pressures. The biggest direct pressures are climate change, habitat loss and degradation, invasive alien species, overexploitation and unsustainable use of biological resources, pollution through excessive nutrient loads and other forms of pollution.[59]

Habitat loss is the biggest single pressure on biodiversity worldwide. For terrestrial ecosystems, habitat loss is largely due to conversion of wild lands to agriculture, which accounts for over 30 per cent of all the land globally. For inland water ecosystems, habitat loss and degradation are largely caused by conversion to other land uses, construction of dams and flood levees, and unsustainable water use for irrigated agriculture, for example. In coastal ecosystems, habitat loss is largely driven by mariculture, coastal developments, dredging and land filling.[60]

[55] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3; and *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Biodiversity Synthesis*, *supra* note 8.
[56] *Ibid*.
[57] Rischkowsky and Pilling, *The State of the World's Animal Genetic Resources*, *supra* note 50.
[58] *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Biodiversity Synthesis*, *supra* note 8.
[59] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3; and *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Current State and Trends*, *supra* note 12.
[60] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.

Climate change is another major threat to biodiversity and is projected to become the most significant threat in the coming decades. The loss of Arctic sea ice is already threatening biodiversity across an entire biome and beyond. Arctic and alpine ecosystems, cloud forests, coral reefs, dry and sub-humid lands, freshwater habitats and wetlands, and mangroves are also particularly vulnerable to the impacts of climate change. Climate change is linked to other related pressures such as ocean acidification resulting from higher concentrations of carbon dioxide in the atmosphere.[61]

Pollution from nutrients (in particular nitrogen and phosphorous) and other sources is also a continuing and growing threat to biodiversity in coastal, inland water and terrestrial ecosystems. The build-up of phosphorous and nitrogen, mainly through run-off from cropland and sewage pollution, stimulates the growth of algae and some forms of bacteria, threatening valuable ecosystem services in systems such as lakes and coral reefs, and affecting water quality. Nitrogen deposition is already observed to be the major driver of species change in a range of temperate ecosystems, especially grasslands across Europe and North America, southern China and parts of South and Southeast Asia. Large parts of Latin America and Africa, as well as Asia, are projected to experience elevated levels of nitrogen deposition in the next two decades.[62]

Overexploitation, destructive harvesting practices and unsustainable use of biological resources have emerged in recent years as the biggest threats to the world's biodiversity and ecosystems. For example, changes to fisheries management in some areas are leading to the depletion of fish stocks. Bush meat hunting, which provides a significant proportion of protein for many rural households, also appears to be taking place at unsustainable levels.[63]

Invasive alien species continue to be a major threat to all types of ecosystems and species. There are no signs of a significant reduction of this pressure on biodiversity; instead, there are some indications that it is increasing. Intervention to control alien invasive species has been successful in some particular cases, but it is outweighed by the threat to biodiversity from new invasions. While other groups have not been fully assessed, it is known that invasive species are the second leading cause for extinction for freshwater mussels and more generally among endemic species. Overall, birds, mammals and amphibian species have on average become more threatened due to invasive alien species.[64]

The above-mentioned direct drivers of biodiversity loss are often influenced by deep-rooted underlying causes, or indirect drivers, that determine the demand for natural resources. Examples of major underlying causes include cultural and religious factors,

[61] *Ibid.*
[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.*

demographic change, economic activity, international trade, scientific and technological change, and unsustainable consumption patterns.[65] Other root causes include inequitable resource distribution, policy failures including perverse incentives, political factors and social change.[66]

4 Biodiversity scenarios for the 21st century

Models and extrapolations of global biodiversity change recently drawn by scientists present scenarios which differ, but which commonly predict continuing, and in many cases accelerating, levels of species extinctions, natural habitat loss and widespread shifts in the distribution and abundance of species and biomes throughout the 21st century.[67] Many scenarios also predict a very high risk of large abrupt shifts in the state of species and ecosystems which may result in dramatic and potentially irreversible changes if the Earth system is pushed beyond certain thresholds, or what are referred to as 'tipping points'.[68]

Based on the work undertaken by a group of scientists from a wide range of disciplines, the GBO 3 predicts that under different scenarios, most ecosystems will continue to decline due to various pressures. Inland water ecosystems are predicted to be the most affected due to a combination of increasing water demands exacerbated by climate change, eutrophication caused by pollution, habitat loss due to infrastructure development, and introduction of alien invasive species. Tropical forests will also continue to be cleared to make way for crops and biofuels resulting in historic species extinctions. Some tropical forests may also undergo widespread dieback as deforestation heightens, fires become more frequent and drought more intense. Island ecosystems are also predicted to face species extinctions and instabilities due to invasive alien species. Marine and coastal ecosystems will also be under in-

[65] *Ibid*.

[66] Wood et al., *The Root Causes of Biodiversity Loss*, *supra* note 11.

[67] *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Current State and Trends*, *supra* note 12; UNEP, *Global Environment Outlook*, *supra* note 6; Paul Leadley et al., *Biodiversity Scenarios: Projections of 21st Century Change in Biodiversity and Associated Ecosystem Services*, Secretariat of the Convention on Biological Diversity Technical Series no. 50 (CBD Secretariat, 2010), available at <http://www.cbd.int/doc/publications/cbd-ts-50-en.pdf> (visited 15 March 2012); and CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.

[68] Leadley et al., *Biodiversity Scenarios*, *ibid*. A tipping point has been defined as

> a situation in which an ecosystem experiences a shift to a new state, with significant changes to biodiversity and the ecosystem services it provides to people at a regional or global scale. Tipping points are a major concern for scientists, managers and policy–makers because of their potentially large, long-lasting and sometimes irreversible impacts on biodiversity, ecosystem services and human well-being. It may be extremely difficult for societies to adapt to such rapid and potentially irreversible shifts in the character and functioning of ecosystems on which they depend. While it is almost certain that tipping points will occur in the future, the dynamics in most cases cannot yet be predicted with precision to provide advance warning that would allow for specific and targeted actions to avoid them, or to mitigate their impacts. Responsible risk management may therefore require a precautionary approach to human activities known to drive biodiversity loss.

CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.

creased pressure as demand for seafood grows resulting in loss of fish species exacerbated by climate change, ocean acidification, increased nutrient loads and pollution, invasive alien species and more sophisticated deep sea fishing gear.

The GBO 3 warns that the mounting pressure on biodiversity risks pushing some ecosystems beyond the 'tipping points' which could have severe ramifications for human well-being. It further warns that once an ecosystem moves into such new state it may be very difficult, if not impossible, to return it to its former state.[69]

Ecosystems approaching tipping points

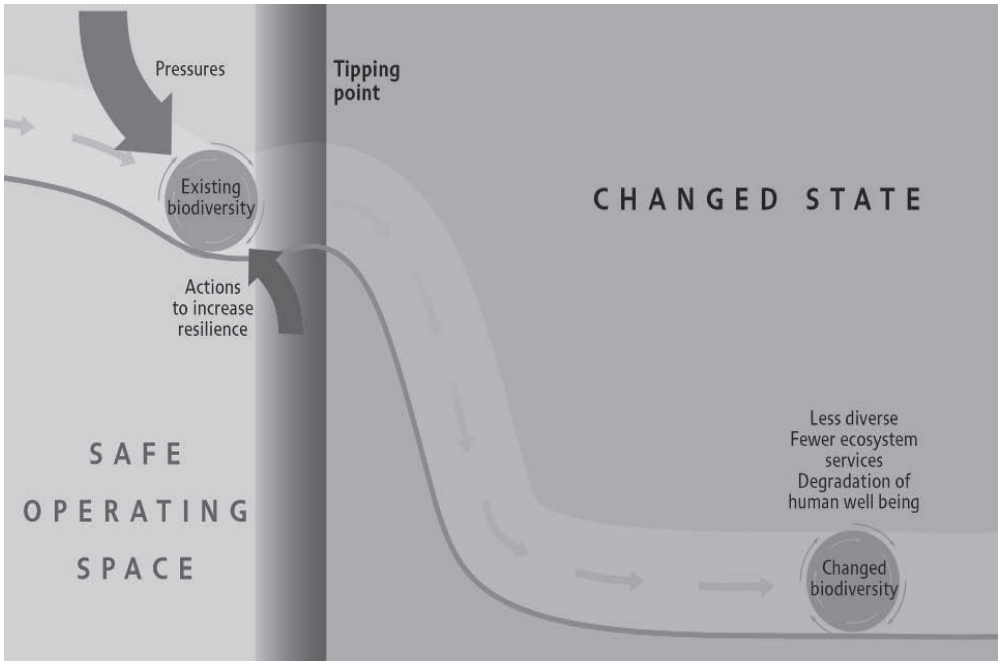

Figure 3.[70]

The Millennium Ecosystem Assessment scenarios also showed that the conditions of many ecosystems and ecosystem services and the pressures on them could be significantly worse in the future than they are at present. It predicted that rapid conversion of ecosystems will continue in the first half of the 21st century.[71] For example, all of the four assessed scenarios projected that habitat loss in terrestrial environments would increase and lead to a decline in the diversity of native species by 2050. The biomes that were projected to have the fastest rate of habitat and local species loss in the next 50 years are savannas, scrub, tropical forests, and tropical woodlands. Land use change was projected to remain the dominant driver of biodiversity change in

[69] *Ibid*.
[70] Source: CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.
[71] *Millennium Ecosystem Assessment. Ecosystems and Human Well-Being: Scenarios, Volume 2* (World Resources Institute, 2005), available at <http://www.maweb.org/en/Scenarios.aspx> (visited 16 March 2012).

terrestrial ecosystems. Wetland drainage and conversion was also projected to increase, and roughly 10–20 per cent of the current grasslands and forests would be converted to other land uses (mainly agriculture, cities and infrastructure) by 2050. Other direct drivers may be more important than land-use change in particular biomes; for example, climate change is likely to be the dominant driver of biodiversity change in tundra, deserts and dry land regions while invasive alien species and water extraction will be major threats to freshwater ecosystems.

5 Strategic policy responses and synergistic approaches

The current trends and projected scenarios of global biodiversity change call for concerted synergistic actions by various stakeholders at different levels. A number of reports and documents, including Global Biodiversity Outlook 3,[72] the Millennium Ecosystem Assessment,[73] the World Conservation Strategy[74] and a few others, have proposed some concrete actions that could be taken at both the policy and field levels.

The GBO 3 noted that global biodiversity loss could be prevented, significantly reduced or even reversed if strong and adaptive action, focused on addressing both the direct and indirect factors driving biodiversity loss, were applied urgently, comprehensively and appropriately, at international, national and local levels. It called for well-targeted policies focusing on critical areas, species and ecosystem services that are essential to preventing further human-induced biodiversity loss and to avoiding pushing ecosystems beyond the 'tipping points'.[75]

Addressing biodiversity loss will also require major shifts in perceptions and priorities on the part of decision-makers, and the engagement of all sections of society, including the private sector.[76] The GBO 3 advocates for a future strategy that, among other things, urges relevant stakeholders to:

- address both the direct and indirect drivers of biodiversity loss, for example through mainstreaming biodiversity across various sectors;
- use pricing, fiscal policies and other mechanisms to reflect the real value of ecosystems in order to create incentives to reverse the current patterns of destruction;
- foster more efficient use of biological resources to meet existing and future demand and with a view to preventing underlying pressures such as population

[72] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.
[73] *Millennium Ecosystem Assessment. Ecosystems and Human Well-Being: Policy Responses, Volume 3* (World Resources Institute, 2005), available at <http://www.maweb.org/en/Responses.aspx> (visited 16 March 2012).
[74] IUCN, UNEP and WWF. *Caring for the Earth: A Strategy for Sustainable Living* (1991).
[75] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 3.
[76] *Ibid*.

increase and increased consumption from inevitably leading to pressures such as loss of habitat, pollution or over-exploitation;
- find an appropriate level of intensity in the use of resources, for example increasing productivity of agricultural land while maintaining a diverse landscape, and reducing fishing intensity below the maximum sustainable yield;
- avoid unnecessary tradeoffs resulting from maximizing one ecosystem service at the expense of another;
- continue direct action to conserve biodiversity, targeting vulnerable and culturally-valued species and habitats, and critical sites for biodiversity;
- increase restoration of terrestrial, inland water and marine ecosystems to re-establish their ecological functioning and their ability to provide ecosystem services;
- create a favourable environment to support effective 'bottom-up' initiatives led by communities, local authorities, or businesses; and
- strengthen efforts to communicate better the links between biodiversity, ecosystem services, poverty alleviation and climate change adaptation and mitigation through education and more effective dissemination of scientific knowledge.

The Millennium Ecosystem Assessment report identified and evaluated the potential use and effectiveness of various response options and strategic interventions to addressing the current and projected global biodiversity loss. It noted that response options and strategic interventions can be implemented through a number of mechanisms, including international conventions, multilateral and bilateral treaties, national laws and regulations, institutional change and changes in governance structures; governmental and industrial policies and contractual agreements, partnerships and collaboration; and joint private and public action. It further noted that a major challenge now is for decision-making to make effective use of the available information and tools in order to improve the decisions intended to provide for a sustainable flow of ecosystem services and enhance human well-being.[77]

The Millennium Ecosystem Assessment also identified a number of elements that could improve decision-making processes related to ecosystems and their services. These include using the best available information; ensuring transparency through greater participation of relevant stakeholders; ensuring accountability; striving for both efficiency and effectiveness in the decision-making process; considering stakeholder equity and vulnerabilities; providing for monitoring and evaluation; and considering cross-scale effects. It also outlines a range of analytical tools that may be useful in choosing responses and the contexts that could help determine the appropriate tools to use. It also urged government decision-makers to consider:

- developing institutions that would enable effective coordination of decision-making at multiple scales and across multiple sectors, and strengthening institu-

[77] *Millennium Ecosystem Assessment. Ecosystems and Human Well-Being: Policy Responses*, *supra* note 73.

tions at lower levels of governance. It noted that problems of ecosystem management are often exacerbated both by overly centralized and overly decentralized decision-making;

- increasing transparency and accountability of government decision-making, encouraging and supporting independent monitoring and assessment of government performance, and securing access to information and justice for all stakeholders;
- promoting 'win-win' solutions by creating an economic framework that supports proper management of ecosystem services. This would include eliminating subsidies (for instance, subsidies in agriculture, forestry and fisheries) that lead to overproduction and promote overuse of specific ecosystem services that may harm other services, correcting market failures exacerbated by harmful subsidies, and internalizing negative environmental externalities;
- putting emphasis on actions designed to reduce demand for harmful trade-offs rather than actions aimed at further increases in production – for instance, in agriculture a focus on reducing post-harvest losses, water pollution associated with fertilizer use or increase water use efficiency rather than clearing more land for agriculture;
- building human and institutional capacity properly to manage ecosystems and to assess the consequences of ecosystem change for human well-being;
- requiring companies publicly to report on their environmental performance; and
- putting more emphasis on adaptive management interventions, which would allow greater learning about the consequences of the interventions and improved management with time.

In response to the findings and recommendations of the GBO 3, the Millennium Ecosystem Assessment and other assessment reports, parties to various biodiversity-related multilateral environmental agreements (MEAs), including the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[78] the Convention on the Conservation of Migratory Species of Wild Animals (CMS),[79] the Convention on Wetlands (Ramsar Convention),[80] the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)[81] and the World Heritage Convention (WHC)[82] have taken a number of strategic and synergetic policy measures in the last few years.

[78] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>.

[79] Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>.

[80] Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <http://www.ramsar.org>.

[81] International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, into force 29 June 2004, <http://www.planttreaty.org/>.

[82] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <http://whc.unesco.org>.

For example, taking into account the findings of the Millennium Ecosystem Assessment, the Parties to the CBD agreed in 2002 on the target 'to achieve by 2010 a significant reduction of the current rate of biodiversity loss at global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth'.[83] The 2010 biodiversity target was subsequently endorsed by the World Summit on Sustainable Development (WSSD)[84] and in 2006 the target was incorporated in the Millennium Development Goals (MDGs),[85] under Goal 7 on environmental sustainability.[86]

In 2006, Parties to the CBD initiated a process to assess the progress made towards achieving the 2010 Biodiversity Target and develop a post-2010 strategic plan, taking into account the findings of the assessment.[87] A 2010 Biodiversity Indicators Partnership[88] was established, with major support from the Global Environment Facility (GEF),[89] to develop and promote indicators to assess the progress made towards achieving the 2010 Biodiversity Target and, in the long run, to ensure consistent monitoring and assessment of biodiversity. This process dovetailed with the development of the GBO 3 and helped to inform the development of the post-2010 strategic plan.

Subsequently, in October 2010, the Parties to the CBD, at their tenth meeting held in Nagoya, Japan, adopted an ambitious Strategic Plan for Biodiversity (2011–2020)[90] to inspire broad-based action by all countries and stakeholders in support of biodiversity, with a view to promoting coherent and effective implementation of the objectives of the Convention. It provides an overarching framework not only for the biodiversity-related conventions, but for the entire United Nations system.

The Strategic Plan for Biodiversity comprises a Vision for 2050, a Mission for 2020, five Strategic Goals and 20 specific targets, referred to as 'the Aichi Biodiversity Targets' (see Annex 1 of this paper).[91] Its vision is a world '[l]iving in harmony with nature' where '[b]y 2050, biodiversity is valued, conserved, restored and wisely used,

[83] 'Strategic Plan for the Convention on Biological Diversity', Decision IV/26 (2002).

[84] *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, 26 August – 4 September 2002, available at <http://www.johannesburgsummit.org/html/documents/summit_docs/131302_wssd_report_reissued.pdf> (visited 12 June 2012), 33.

[85] See <http://www.un.org/millenniumgoals/>.

[86] The 2010 biodiversity target was incorporated in the Millennium Development Goal 7 following the request contained in the 2006 Report of the Secretary General on the Work of the Organization, UN Doc. A/61/1 (2006), available at <http://www.un.org/ga/search/view_doc.asp?symbol=A/61/1(SUPP)> (visited 12 June 2012), 6.

[87] The processes that contributed to the review and updating the CBD Strategic Plan 2002–2010 are outlined at <http://www.cbd.int/sp/inputs/> (visited 12 June 2012).

[88] See <http://www.bipindicators.net/>.

[89] See <http://www.thegef.org/gef/>.

[90] 'The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets', Decision X/2, in Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Nagoya, Japan, 18–29 October 2010, UN Doc. UNEP/CBD/COP/10/27* (2011).

[91] *Ibid.*

maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people'.[92]

The mission of the Strategic Plan is to 'take effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human well-being, and poverty eradication'.[93]

In the decision that adopted the Strategic Plan, the Parties agreed to translate the Strategic Plan into national biodiversity strategy and action plans (NBSAPs),[94] and develop national targets within two years, taking into account the Aichi targets and the status and trends of biodiversity in their respective countries.[95] In the same decision, other biodiversity-related conventions and relevant agreements were invited to consider and take appropriate steps to facilitate coherent and synergistic implementation of the Strategic Plan and its Aichi Targets at all level, including through collaboration in the update and implementation of the NBSAPs.[96]

In response, two MEAs – the CMS and CITES – have already developed guidelines on integration of relevant issues, policy measures and practical actions from their respective processes into NBSAPs.[97] In addition, the six main biodiversity-related conventions, i.e. the CBD, CITES, CMS, ITPGRFA, Ramsar and the WHC, are collaborating through the Biodiversity Liaison Group (BCL) comprising the respective executive heads. Through the BLC, the six MEAs aim to enhance synergies and national implementation towards achieving the Aichi Biodiversity Targets, harmonize national reporting processes, develop common approaches to addressing the major threats to biodiversity, coordinate requests for scientific assessments, share scientific data and expertise, and exchange relevant implementation tools and guidelines.[98]

[92] *Ibid*. para. 11.
[93] *Ibid*. para. 12.
[94] NBSAPs are instruments or frameworks developed by countries to guide the implementation of the Convention at the national and sub-national levels. An NBSAP can take the form of a single biodiversity-planning document or a pool of instruments and processes (including laws, policies, projects and programmes) established to facilitate national implementation of the Convention. See CBD, *NBSAP Training Module 1: An Introduction to National Biodiversity Strategies and Action Plans*, available at <http://www.cbd.int/doc/training/nbsap/b1-train-intro-nbsap-revised-en.pdf> (visited 26 July 2012), 5.
[95] *Ibid*. para. 13, Target 17.
[96] 'Implementation of the Convention and the Strategic Plan', Decision X/5, in Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Nagoya, Japan, 18–29 October 2010, UN Doc. UNEP/CBD/COP/10/27* (2011).
[97] The CMS Guidelines on the Integration of Migratory Species into National Biodiversity Strategies and Action Plans (NBSAPs) are available at <http://www.cms.int/bodies/COP/cop10/resolutions_adopted/10_18_nsbaps_e.pdf>. The Draft NBSAP Guide for CITES Parties (April 2011) is available at <http://www.cites.org/eng/notif/2011/E026A.pdf> (both visited 26 July 2012).
[98] See <http://www.cbd.int/blg/>.

6 Conclusion

Many recent assessments have revealed that biodiversity is declining at a rate faster than any previous time in human history and the decline is expected to continue at the same pace, or even accelerate, as the drivers of biodiversity loss increase in intensity. However, the responses to date have not been adequate to stem the scale of biodiversity loss or to reduce the pressures driving that loss. As stated in the GBO 3, the actions taken over the next decade will determine whether the relatively stable environmental conditions on which humankind has depended in past years will continue beyond the present century.

The synergistic policy responses made by the major biodiversity-related MEAs in the last few years, including the recent adoption of the Aichi biodiversity targets and the joint efforts underway to achieve those targets, are important steps in the right direction. All stakeholders need to work together in a concerted, strategic and synergetic manner in order to prevent, significantly reduce or reverse the current trend of biodiversity loss and to maintain the capacity of ecosystems to provide goods and services to meet the needs of present and future generations.

Annex 1: The Aichi Biodiversity Targets

Strategic Goal A - Address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society

Public awareness increased
Target 1: By 2020, at the latest, people are aware of the values of biodiversity and the steps they can take to conserve and use it sustainably.

Values of biodiversity recognized
Target 2: By 2020, at the latest, biodiversity values have been integrated into national and local development and poverty reduction strategies and planning processes and are being incorporated into national accounting, as appropriate, and reporting systems.

Incentives reformed
Target 3: By 2020, at the latest, incentives, including subsidies, harmful to biodiversity are eliminated, phased out or reformed in order to minimize or avoid negative impacts, and positive incentives for the conservation and sustainable use of biodiversity are developed and applied, consistent and in harmony with the Convention and other relevant international obligations, taking into account national socio-economic conditions.

Sustainable production and consumption promoted
Target 4: By 2020, at the latest, Governments, business and stakeholders at all levels have taken steps to achieve or have implemented plans for sustainable production and consumption and have kept the impacts of use of natural resources well within safe ecological limits.

Strategic Goal B. Reduce the direct pressures on biodiversity and promote sustainable use.

Habitat loss reduced
Target 5: By 2020, the rate of loss of all natural habitats, including forests, is at least halved and where feasible brought close to zero, and degradation and fragmentation is significantly reduced.

Marine stocks sustainably harvested
Target 6: By 2020 all fish and invertebrate stocks and aquatic plants are managed and harvested sustainably, legally and applying ecosystem based approaches, so that overfishing is avoided, recovery plans and measures are in place for all depleted species, fisheries have no significant adverse impacts on threatened species and vulnerable ecosystems and the impacts of fisheries on stocks, species and ecosystems are within safe ecological limits.

Sustainable management increased
Target 7: By 2020 areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity.

Pollution reduced
Target 8: By 2020, pollution, including from excess nutrients, has been brought to levels that are not detrimental to ecosystem function and biodiversity.

Invasive alien species combated
Target 9: By 2020, invasive alien species and pathways are identified and prioritized, priority species are controlled or eradicated, and measures are in place to manage pathways to prevent their introduction and establishment.

Pressures on vulnerable ecosystems minimized
Target 10: By 2015, the multiple anthropogenic pressures on coral reefs, and other vulnerable ecosystems impacted by climate change or ocean acidification are minimized, so as to maintain their integrity and functioning.

Strategic goal C: To improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity

Protected areas increased
Target 11: By 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscape and seascapes.

Extinction prevented
Target 12: By 2020 the extinction of known threatened species has been prevented and their conservation status, particularly of those most in decline, has been improved and sustained.

Genetic diversity maintained
Target 13: By 2020, the genetic diversity of cultivated plants and farmed and domesticated animals and of wild relatives, including other socio-economically as well as culturally valuable species, is maintained, and strategies have been developed and implemented for minimizing genetic erosion and safeguarding their genetic diversity.

Strategic goal D: Enhance the benefits to all from biodiversity and ecosystem services.

Ecosystems restored and safeguarded
Target 14: By 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being, are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable.

Ecosystem resilience and carbon stocks enhanced
Target 15: By 2020, ecosystem resilience and the contribution of biodiversity to carbon stocks has been enhanced, through conservation and restoration, including restoration of at least 15 per cent of degraded ecosystems, thereby contributing to climate change mitigation and adaptation and to combating desertification.

Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization is in force.
Target 16: By 2015, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization is in force and operational, consistent with national legislation.

Strategic goal E. Enhance implementation through participatory planning, knowledge management and capacity-building

National biodiversity strategies and action plans developed
Target 17: By 2015 each Party has developed, adopted as a policy instrument, and has commenced implementing an effective, participatory and updated national biodiversity strategy and action plan.

Traditional knowledge respected and reflected in the implementation of the Convention

Target 18: By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels.

Knowledge and technologies improved and shared

Target 19: By 2020, knowledge, the science base and technologies relating to biodiversity, its values, functioning, status and trends, and the consequences of its loss, are improved, widely shared and transferred, and applied.

Financial resources increased

Target 20: By 2020, at the latest, the mobilization of financial resources for effectively implementing the Strategic Plan 2011-2020 from all sources and in accordance with the consolidated and agreed process in the Strategy for Resource Mobilization should increase substantially from the current levels; subject to changes contingent to resources needs assessments to be developed and reported by Parties.

Part III

Specific Issues Related to Synergies in International Environmental Law

How Biodiversity Synergies Support and Facilitate National Implementation of Multilateral Environmental Agreements to Halt Biodiversity Loss

Peter Herkenrath[1]

1 Introduction

There is a plethora of multilateral environmental agreements (MEAs),[2] many of them of global nature.[3] A specific subset of these MEAs addresses biological diversity.[4] It has often been asked[5] to what extent these MEAs are effective in curbing the loss of

[1] UNEP World Conservation Monitoring Centre, UK; e-mail: peter.herkenrath@unep-wcmc.org. This paper draws on a study (in preparation) on synergies between MEAs that the UNEP World Conservation Monitoring Centre (UNEP-WCMC) is undertaking under contract with the Ministry of Environment, Finland, in following-up on the Nordic Symposium: Synergies in the Biodiversity Cluster, *infra* note 8. The author thanks the Finnish Ministry of Environment for financial support; Niko Urho, Marina von Weissenberg, Kerstin Stendahl, Jerry Harrison and Melissa Jaques for discussions and feedback on the current paper; and Melissa Jaques for comments on an earlier draft of this paper.

[2] For an introduction into the plethora of MEAs, see Alexandre Kiss and Dinah Shelton, *International Environmental Law* (3rd ed., Transnational Publishers, 2004) at 25–40. See also the introduction to Ecolex – the Gateway to Environmental Law, <http://www.ecolex.org/ecolex/ledge/view/About_en_US;DIDPFDSIjsessionid=555FF3F1BF155B287C58299991E3D52E> (visited 30 March 2012) and the University of Oregon database project, which considers there to be more than 1 500 bilateral, more than 1 100 multilateral, and more than 250 'other' international environmental agreements, 'International Environmental Agreements (IEA) Database Project, <http://iea.uoregon.edu/page.php?file=home.htm&query=static> (visited 4 March 2012).

[3] For definitions of the term 'multilateral environmental agreement', see Kiss and Shelton, *International Environmental Law*, *supra* note 2, at 1–4; and United Nations Environment Programme (UNEP), *Glossary of Terms for Negotiators of Multilateral Environmental Agreements* (UNEP, 2007) at 63.

[4] See Kiss and Shelton, *International Environmental Law*, *supra* note 2, at 191–241, who demonstrate the difficulties in estimating the number of biodiversity-relevant MEAs.

[5] For example Karin Baakman, *Testing Times: The Effectiveness of Five International Biodiversity-Related Conventions* (Wolf Legal Publishers, 2011); Aðalheiður Jóhannsdóttir, Ian Cresswell and Peter Bridgewa-

biodiversity[6] and whether improved cooperation, coordination and synergies are required for improving the overall performance of MEAs.[7]

In April 2010, the Government of Finland and the Nordic Council of Ministers for the Environment conducted a Nordic Symposium 'Synergies in the Biodiversity Cluster',[8] which discussed the issue of synergies with representatives of governments, MEA secretariats, and intergovernmental and non-governmental organizations. The symposium addressed possible advantages and disadvantages of a synergies process for the biodiversity-related MEAs, the composition of a possible biodiversity cluster, relevant areas for enhancing cooperation and coordination between biodiversity-related MEAs, and the structure, timing and form which such a synergies process might take.

This paper reviews the existing cooperation and the potential for synergies in four key areas for national implementation of biodiversity-related conventions and suggests practical options for moving the synergy agenda forward through these key areas. The areas include the science-policy interface; the Strategic Plan for Biodiversity 2011–2020 and National Biodiversity Strategies and Action Plans (NBSAPs); capacity-building for biodiversity conservation and sustainable use; and national reporting. The areas are among the programmatic areas that the Nordic Symposium identified as possible areas for joint action among biodiversity-related MEAs.[9]

The set of biodiversity-related conventions and treaties considered in this paper relates to the members of the Biodiversity Liaison Group (BLG)[10] and includes the following six agreements: Convention on Biological Diversity (CBD),[11] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[12] Convention on Migratory Species (CMS),[13] International Treaty on Plant Genetic

ter, 'The Current Framework for International Governance of Biodiversity: Is It Doing More Harm Than Good?', 19 *Review of European Community and International Environmental Law* (2010) 139–149.

6 For an overview of the extent of the loss of biological diversity at a global scale, see Secretariat of the Convention on Biological Diversity (CBD), *Global Biodiversity Outlook 3* (Secretariat of the CBD, 2010).

7 United Nations University (UNU), *Inter-Linkages. Synergies and Coordination between Multilateral Environmental Agreements* (UNU and Global Environment Information Centre, 1999); UNEP World Conservation Monitoring Centre, *Synergies and Cooperation. A Status Report on Activities Promoting Synergies and Multilateral Environmental Agreements* (2004), available at <http://www.unep-wcmc.org/medialibrary/2010/11/05/9339a622/8BackgroundSynergies.pdf> (visited 10 January 2012); Niko Urho, *Possibilities of Enhancing Cooperation and Co-ordination Among MEAs in the Biodiversity Cluster* (Nordic Council of Ministers, 2009).

8 See, generally, <http://www.biodivcluster.fi> (visited 4 March 2012) for information and material on the symposium.

9 Report from a Nordic Symposium: 'Synergies in the biodiversity cluster', <www.biodivcluster.fi/pdf/Synergies%20report%20final.pdf> (visited 10 January 2012) at 6.

10 For more information on this Group operating under the Biodiversity Convention, see <http://www.cbd.int/blg>.

11 Convention on Biological Diversity (CBD), Nairobi, 5 June 1992, in force 29 December 1993, *International Legal Materials* (1992) 822, <www.cbd.int>.

12 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington DC, 3 March 1973, in force 1 July 1975, *United Nations Treaty Series* (1976) 993, <www.cites.org>.

13 Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, *International Legal Materials* (1980) 15, <www.cms.int>.

Resources for Food and Agriculture (ITPGRFA),[14] Ramsar Convention on Wetlands[15] and World Heritage Convention (WHC).[16] These conventions already practice a wide range of collaborative activities, based on decisions and resolutions of their governing bodies, Memoranda of Understanding/ Cooperation and joint work plans and programmes.

2 New opportunities for synergies within the biodiversity cluster

The discussion on synergies between MEAs in general and the biodiversity-related conventions in particular, although having been ongoing for a long time, has recently found more urgency for a number of reasons:

- In 2010, the biodiversity community recognized that the 2010 biodiversity target of achieving 'by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth'[17] was not achieved.[18] This finding questions the efficiency of conventions in addressing the biodiversity crisis.
- The lack of capacity and resources to implement the range of MEAs in developing countries is widely recognized[19] – strengthened synergies should facilitate implementation and streamline the resources required for implementation.
- The discussion on international environmental governance[20] is expected to be

[14] International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, in force 29 June 2004, *United Nations Treaty Series* (2006) 2400, <www.planttreaty.org>.

[15] Convention on Wetlands of International Importance, Ramsar, Iran, 2 February 1971, in force 21 December 1975, *United Nations Treaty Series* (1976) 996, <http://www.ramsar.org>.

[16] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, *International Legal Materials* (1972) 1358, <http://whc.unesco.org>.

[17] The 2010 biodiversity target was adopted through decision VI/26 as the mission of the CBD Strategic Plan by the sixth Conference of the Parties in 2002. See Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/6/20 (2002), decision VI/26 'Strategic Plan for the Convention on Biological Diversity'.

[18] See Convention on Biological Diversity, *Global Biodiversity Outlook 3, supra* note 6.

[19] For example, the Bali Strategic Plan for Technology Support and Capacity-Building, adopted at the twenty-third session of the Governing Council/Global Ministerial Environment Forum, Nairobi, 21–25 February 2005, UN Doc. UNEP/GC.23/6/Add.1 (2004), acknowledges in paragraph 1 'the need for environment-related technology support and capacity-building in developing countries'. See also the frequent calls for provision of financial resources and capacity-building for developing countries in the Plan of Implementation of the World Summit on Sustainable Development (2002), e.g. paragraph 32 (b): 'Implement the work programme arising from the Jakarta Mandate on the Conservation and Sustainable Use of Marine and Coastal Biological Diversity of the Convention on Biological Diversity, including through the urgent mobilization of financial resources and technological assistance and the development of human and institutional capacity, particularly in developing countries'.

[20] See UNEP, *The Environmental Dimension of IFSD: Importance of Environmental Pillar to IFSD*, Issues Brief 1 (2011), available at <http://www.unep.org/environmentalgovernance/Portals/8/InstitutionalFrameworkforSustainabledevPAPER1.pdf> (visited 10 January 2012); and UNEP, *The Environmental Dimension of IFSD: Fragmentation of Environmental Pillar and its Impact on Efficiency and Effectiveness.* Issues Brief 2 (2011), available at <http://www.unep.org/environmentalgovernance/Portals/8/InstitutionalFrameworkforSustainabledevPAPER2.pdf> (visited 10 January 2012).

strengthened by the fact that the United Nations Conference on Sustainable Development ('Rio+20'),[21] to be held in June 2012, will consider the institutional framework for sustainable development as one of its two major themes.

- The governing bodies of the six biodiversity-related MEAs as considered in this paper have consistently adopted decisions and resolutions asking for strengthening of synergies.
- The Strategic Plan for Biodiversity 2011–2020,[22] adopted by the tenth meeting of the Conference of the Parties to the CBD, calls for partnerships, among others with the other biodiversity-related conventions, for its effective implementation.[23]
- The Intergovernmental Science – Policy Platform on Biodiversity and Ecosystem Services (IPBES),[24] which was established at the second IPBES plenary meeting in April 2012,[25] is expected to address jointly the concerns and roles of the biodiversity-related conventions.

For these reasons the present presents an opportune time to address the issue of synergies and, if possible, to find ways of enhancing them, with the ultimate goal being the creation of a system of international environmental governance that is better equipped to curb the loss of biodiversity and ecosystem services.

3 The science – policy interface

The first key area to be addressed in this paper is the science – policy interface for biodiversity. Scientific advice is central to the biodiversity-related conventions, which is demonstrated by the existing scientific advisory bodies: the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) of the CBD,[26] the Animals and Plant Committees of CITES,[27] the Scientific Council of CMS[28] and the Scientific and Technical Review Panel (STRP) of the Ramsar Convention.[29] The World Heritage Convention draws on external scientific advice provided by the Interna-

[21] See, generally, <http://www.uncsd2012.org/rio20/index.html>.

[22] See Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/10/27 (2010), decision X/2 'The Strategic Plan for Biodiversity 2011–202 and the Aichi Biodiversity Targets'.

[23] *Ibid*., Annex, paragraph 17: 'Partnerships at all levels are required for effective implementation of the Strategic Plan… to find synergies with national implementation of multilateral environmental agreements… At the international level, this requires partnerships between the Convention and other conventions…'

[24] See <http://www.ipbes.net> (visited 28 November 2011).

[25] The second session of the plenary meeting on IPBES, in April 2012 in Panama City, Panama, took a decision to establish the IPBES, while a number of institutional and legal issues will be decided at the first session of IPBES, which is likely to take place in 2013. See the summary report of the second plenary session of IPBES by the Earth Negotiations Bulletin, available at <http://www.iisd.ca/download/pdf/enb16104e.pdf> (visited 6 May 2012).

[26] See <http://www.cbd.int/sbstta/>.

[27] See <http://www.cites.org/eng/disc/ac_pc.php>.

[28] See <http://www.cms.int/bodies/ScC_mainpage.htm>.

[29] See <http://www.ramsar.org/cda/en/ramsar-about-bodies-strp/main/ramsar/1-36-71-74_4000_0__>.

tional Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM),[30] the International Council of Monuments and Sites (ICOMOS)[31] and the International Union for Conservation of Nature (IUCN).[32] The ITPGRFA collaborates on scientific issues with the Food and Agriculture Organization of the United Nations (FAO)[33] and the Commission on Genetic Resources for Food and Agriculture.[34]

The recognition of the need of biodiversity policy for scientific advice is expressed, for example, in CBD decision X/11, which in the first preambular paragraph reaffirmed 'that a regular assessment is needed to provide decision-makers with the necessary information base for adaptive management and to promote the necessary political will for action in addressing biodiversity loss'.

Mandated by the Biodiversity Liaison Group,[35] the Chairs of the Scientific Advisory Bodies of Biodiversity-related Conventions (CSAB) have, since 2007, discussed areas of coordination and collaboration on the scientific issues of the various convention processes and their translation into policy.[36]

With the establishment of the IPBES,[37] several years of discussion on improving the science – policy interface for biodiversity have come to fruition. All of CBD, CITES, CMS and the Ramsar Convention have passed decisions or resolutions positioning themselves toward the emerging IPBES.[38]

Assessments and indicators are two areas of particular significance at the science – policy interface for the biodiversity-related conventions. The conventions have drawn on a number of assessments, which include the Millennium Ecosystem Assessment[39] and a range of thematic assessments. Biodiversity indicators have become particularly important for the CBD, in measuring progress toward the 2010 Biodiversity Target, and are currently being developed for the goals and targets of the Strategic

30 See <http://www.iccrom.org/>.
31 See <http://www.icomos.org/en/>.
32 See <http://www.iucn.org/>.
33 See <http://www.fao.org>.
34 See <http://www.fao.org/nr/cgrfa/en/>.
35 The Liaison Group of Biodiversity-related Conventions (Biodiversity Liaison Group) comprises the executive heads of the secretariats of the six biodiversity-related conventions; see <http://www.cbd.int/blg> (visited 30 March 2012).
36 See the report of the third meeting of CSAB, UN Doc. UNEP/CBD/CSAB/3/3 (2009).
37 *Supra* note 25.
38 See CBD decisions IX/15 'Follow-up to the Millennium Ecosystem Assessment' (2008) and X/11 'Science-policy interface on biodiversity, ecosystem services and human well-being and consideration of the outcome of the intergovernmental meetings' (2010); CITES decision 15.12 'Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES)' (2010); CMS resolution 10.8 'Cooperation between Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) and CMS' (2011); and Ramsar Scientific and Technical Review Panel (STRP) decision 16-15 (2011).
39 Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: Biodiversity Synthesis,* (World Resources Institute, 2005).

Plan for Biodiversity 2011–2020. CITES, CMS, Ramsar and World Heritage Convention also make use of indicators or envisage doing so; while several of the conventions cooperate on indicators through the Biodiversity Indicators Partnership.[40] In addition, traditional knowledge, as recognized by the CBD in Article 8(j)[41] and held by indigenous peoples and local communities, is an important area offering options for collaboration and coordination between the conventions.

The following are some options for further synergies between the biodiversity-related conventions in the area of the science – policy interface:

- While the working arrangements of the IPBES (at the time of writing) are only evolving, this body is expected to present an opportunity for MEAs to speak with one voice and to develop an integrated, coherent approach to the science – policy interface. CSAB could support this approach.
- Through IPBES, the conventions could devise a coordinated mandate for future global and regional as well as thematic assessments that could be used to provide coherent and coordinated scientific advice to the convention-related decision-making processes.
- The relevant conventions could also cooperate in taking a joint approach to the Regular Process for the Global Reporting and Assessment of the State of the Marine Environment.[42]
- An integrated approach to scientific advice at the regional and national level, in particular through sub-global assessments, would supplement the global process.
- With the Strategic Plan for Biodiversity 2011–2020, an opportunity is provided better to align indicator development between conventions at the global, but also regional and national, level. IPBES could play a supportive role in this regard.
- Another area for collaboration between the conventions lies in recognition and involvement of traditional knowledge and the holders of such knowledge, facilitated and supported by the work of IPBES.

[40] 2010 Biodiversity Indicators Partnership, *Biodiversity Indicators and the 2010 Biodiversity Target: Experiences and Lessons Learned from the 2010 Biodiversity Indicators Partnership,* (Secretariat of the Convention on Biological Diversity, 2010).

[41] Article 8(j) provides that: Each contracting Party shall, as far as possible and as appropriate:

> Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.

[42] This process, mandated by the United Nations General Assembly is coordinated by the Division for Ocean Affairs and the Law of the Sea; see <http://www.un.org/depts/los/global_reporting/global_reporting.htm> (visited 10 January 2012).

4 The Strategic Plan for Biodiversity 2011–2020 and National Biodiversity Strategies and Action Plans

With the adoption of the Strategic Plan for Biodiversity 2011–2020, the Conference of the Parties to the CBD reached out to other conventions, inviting them to contribute to the collaborative implementation of the Plan, stressing synergies with national implementation of MEAs.[43] Other conventions have acknowledged the opportunities the Strategic Plan for Biodiversity 2011–2020 offers for enhancing cooperation and synergies.[44] The Strategic Plan has also been acknowledged by the United Nations' Environment Management Group (EMG)[45] and the UN General Assembly, which have both called for support for the implementation of the Plan.[46]

Both CITES and CMS have drawn the attention of their Parties to the adoption of the Strategic Plan for Biodiversity 2011–2020 and have encouraged their national focal points to engage with the process of updating and revision of NBSAPs,[47] the main mechanisms for national implementation of the Strategic Plan for Biodiversity 2011–2020.[48] The ITPGRFA has engaged with the updating and revision of NBSAPs through a Memorandum of Cooperation with the CBD,[49] signed in 2010.

A range of options for further synergies between the biodiversity-related conventions in the area of the Strategic Plan for Biodiversity 2011–2020 and NBSAPs arise:

- The Strategic Plan for Biodiversity 2011–2020 offers the chance for all biodiversity-related conventions (and the wider UN system) to collaborate on the Plan's implementation – and even to 'take ownership' of the Plan.
- Conventions can cooperate in the synergistic implementation of NBSAPs, with

[43] *Supra* note 22. In paragraph 16 (a) of decision X/2, the CBD Conference of the Parties invited 'Parties and other Governments at the forthcoming meetings of the decision-making bodies of the other biodiversity-related conventions and other relevant agreements to consider appropriate contributions to the collaborative implementation of the Strategic Plan for Biodiversity 2011-2020 and its Aichi targets'.

[44] See CITES decision 15.10 'Post-2010 biodiversity targets' (2010); CMS resolutions 10.5 'CMS Strategic Plan 2015–2023' and 10.18 'Guidelines on the integration of migratory species into national biodiversity strategies and action plans (NBSAPs) and other outcomes from CBD COP10' (2011); and ITPGRFA resolution 8/2011 entitled, 'Cooperation with other bodies and international organizations, including with the International Agricultural Research Centres of the Consultative Group on International Agricultural Research and other international institutions that signed Agreements under Article 15 of the Treaty'.

[45] The EMG is a UN system-wide coordination body, established in 2001 and chaired by the Executive Director of UNEP.

[46] Report of the 17th Senior Officials Meetings of the EMG (2011), available at at <http://www.unemg.org/MeetingsDocuments/EMGSeniorOfficialsMeetings/2011/tabid/56217/Default.aspx> (visited 30 March 2012) and United Nations General Assembly resolution 65/161 (11 March 2011).

[47] CITES decision 15.10; and CMS resolutions 10.5 and 10.18.

[48] CBD article 6(a) requests parties to 'develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or to adapt for this purpose existing strategies, plans or programmes'. As of January 2012, 173 out of 193 parties to the CBD have developed NBSAPs. CBD Parties are in the process of updating and revising their NBSAPs to align them with the Strategic Plan.

[49] Available at <http://www.planttreaty.org/sites/default/files/Signed_MoU_CBD_ITPGRFA_2010.pdf> (visited 8 February 2011).

the options ranging from collaboration of national focal points on NBSAPs through, for example, national biodiversity committees. Other options for collaboration with NBSAP national focal points might include integration of convention-specific targets, objectives and commitments into the NBSAPs; national and local capacity-building for convention implementation through NBSAPs; support from non-governmental stakeholders to the conventions via the NBSAPs; as well as collaboration of focal points to the biodiversity-related conventions for mainstreaming biodiversity.

- Synergistic implementation of NBSAPs by the focal points of the biodiversity-related conventions and relevant agencies would also assist individual Parties in taking consistent positions across the governing bodies of the conventions.
- Cooperation at the national level through the NBSAPs is likely to open up more funding opportunities for the implementation of the non-CBD conventions. For example, of the six biodiversity-related conventions, only implementation of the CBD is eligible for funding from the Global Environment Facility (GEF)[50] so non-CBD convention activities could benefit from such a funding source if undertaken under the umbrella of NBSAP implementation.
- At the global level, the Strategic Plan for Biodiversity 2011–2020 has the potential to allow for a better alignment of the strategic documents of various MEAs; with CITES, for example, already having established a process for reviewing the need for doing so through CITES decision 15.10.[51]

5 Capacity-building for biodiversity conservation and sustainable use

The Bali Strategic Plan for Technology Support and Capacity-Building,[52] adopted by the UNEP Governing Council in 2005, stressed the need for capacity to implement MEAs, in particular for developing countries. Decision X/2 of the CBD Conference of the Parties,[53] which adopted the Strategic Plan for Biodiversity 2011–2020, placed the need for capacity-building in the context of synergies with other conventions. Capacity-building for implementation plays a major role in the texts, strategic documents and work plans of the biodiversity-related conventions, several of which have established specific capacity-building programmes or strategies.[54] The conventions have also developed a range of joint work plans and initiatives in support of collabo-

[50] See <http://www.thegef.org>.
[51] See *supra* note 44.
[52] *Supra* note 19.
[53] See *supra* note 22.
[54] See the CBD Action Plan on Capacity-building for Access to Genetic Resources and Benefit-sharing, adopted through decision VII/19 'Access and benefit-sharing as related to genetic resources (Article 15)' (2004), section F; the ITPGRFA Joint Capacity-building Programme for Developing Countries with the Food and Agriculture Organization of the United Nations (FAO) and Biodiversity International, available at <http://www.planttreaty.org/content/capacity-building-programme-developing-countries-implementation-treaty-and-its-multilateral-> (visited 30 March 2012); and the World Heritage Capacity Building Strategy, adopted through decision 35 COM 9B (2011).

rative implementation of the conventions by Parties, such as cooperation on the 2010 biodiversity target (now superseded by cooperation on the Strategic Plan for Biodiversity 2011–2020), the Global Strategy for Plant Conservation,[55] the Green Customs Initiative,[56] and on access and benefit-sharing regarding genetic resources.[57] Capacity-building has accordingly been high on the agenda of the Biodiversity Liaison Group. Capacity-building has also been recognized as a key element for ensuring the credibility and legitimacy of the future IPBES process and its products.

A range of options for further synergies between the biodiversity-related conventions in the area of capacity-building can be identified as follows:

- The Strategic Plan for Biodiversity 2011–2020 offers new opportunities for collaboration between the conventions for building Parties' capacity to implement the obligations from the conventions, not least through NBSAPs.
- Building on the existing cooperation between several of the conventions, joint initiatives on capacity-building could be further developed by the biodiversity-related conventions.
- Within the framework of the Strategic Plan for Biodiversity 2011–2020, a joint capacity-building initiative of all the biodiversity-related conventions could be developed, making use of funding opportunities for the implementation of the Strategic Plan for Biodiversity.
- The conventions could also cooperate on capacity-building in the area of the science – policy interface, working jointly through IPBES.

6 National reporting

National reporting is a key obligation for Parties to the biodiversity-related conventions and treaties, with all of the CBD, CITES, CMS, Ramsar Convention and the World Heritage Convention having well-established national reporting systems.[58] Since 1998, a number of pilot projects in developing countries and small island developing states have tested approaches to more integrated or harmonized reporting to the biodiversity-related conventions as well as to the three Rio Conventions,[59] and a number of reports have been produced and workshops have taken place.[60] Challenges for, obstacles to, and preconditions for, streamlining and harmonizing of

[55] See <http://www.cbd.int/gspc/>.
[56] See <http://www.greencustoms.org/>.
[57] See <http://www.cbd.int/abs/>.
[58] As of May 2012, the ITPGRFA is in the process of establishing a national reporting procedure.
[59] CBD; United Nations Convention to Combat Desertification (UNCCD; Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <http://www.unccd.int>); and the United Nations Framework Convention on Climate Change (UNFCCC; New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <http://unfccc.int>).
[60] See workshop documents and key papers available at <http://www.unep-wcmc.org/harmonization-of-reporting_491.html> (visited 10 January 2012).

national reporting have been identified both at the level of parties nationally as well as at the global convention level.[61]

A range of options for further synergies between the biodiversity-related conventions in the area of national reporting can be identified as follows:

- At the national level, immediate gains can be made through improved communication, coordination and collaboration between national focal points to the biodiversity-related conventions on national reporting and through streamlining and integrating the national management of biodiversity information that underlies the reporting processes.
- Experience on approaches to streamlining and harmonizing national reporting could be shared between the sets of the biodiversity-related conventions and the Rio Conventions.
- Country experience could not only be further tested but also better made available to the global convention meetings and documentation, supported by regional processes and institutions.
- National efforts in streamlining biodiversity data and information could be supported through the development and testing of guidelines for strengthening and integrating national management of biodiversity information.
- The options for improved collaboration of the biodiversity-related conventions at the national level within the framework of the Strategic Plan for Biodiversity 2011–2020 and the NBSAPs would also support the promotion of streamlining and harmonizing national reporting.
- National experience could result in new insights into what should and what can be done at the global level, for example regarding improved reporting formats.
- Key aspects for global-level efforts for streamlining and/or harmonizing national reporting between the biodiversity-related conventions range from the identification of the conventions' information needs and an agreement on terms and definitions, to the development of joint reporting formats for overlapping and/or theme-specific information, joint information management systems and online reporting.
- The current efforts for the development of indicators for the Strategic Plan for Biodiversity 2011–2020 and its goals and targets could inform efforts for harmonization of national reporting to the range of the biodiversity-related conventions.
- A technical working group at the global level, consisting of technical staff from the different secretariats and experts from governments and relevant organizations, could take the issue of harmonization of national reporting forward.

[61] See UNEP-WCMC, *Preconditions for Harmonization of Reporting to Biodiversity-related Multilateral Environmental Agreements* (2009), available at <http://www.unep-wcmc.org/medialibrary/2010/11/05/836847ac/2Preconditions_for_harmonization.pdf> (visited 10 January 2012).

7 The synergies process: benefits and lessons from other processes

Key benefits from synergies between the biodiversity-related conventions at the national level include enhanced cooperation across sectors (e.g. water, agriculture, forests); reduced burdens in respect of national reporting; more efficient use of financial resources; more efficient drawing on existing national expertise; and increased consistency between national positions in different fora, for example governing bodies of different MEAs. At the global level, benefits from synergies include consistency in international commitments; common targets allowing for better identification of gaps in addressing global issues; and better targeting of development and environment funding.[62]

Synergies processes have taken place in other sets of agreements, including the chemicals and waste conventions,[63] the Human Rights Treaty System[64] and the UN Women process.[65] Some lessons from the experience of those processes include the need for synergies to be party-driven and government-owned; follow a step-by-step rather than a 'big jump' approach; be transparent, allowing for confidence-building for the stakeholders involved; and allow for consistent decision-taking by individual parties across the conventions involved.

8 Conclusions: options for synergies within the biodiversity cluster

Synergies could be implemented through a number of approaches. These approaches are not mutually exclusive. The following five options represent a growing level of

[62] The list of benefits is adapted from Jaime Webbe, 'Synergies within the biodiversity-related MEAs', presentation at the Nordic Symposium: Synergies in the Biodiversity Cluster, Helsinki, Finland, April 2010, available at <http://www.biodivcluster.fi/pdf/friday/7Webbe_9April2010.pdf> (visited 16 January 2012).

[63] These include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <http://www.basel.int>); the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <http://www.pic.int>); and the Stockholm Convention on Persistent Organic Pollutants (POPs) (, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <http://www.pops.int>). On the synergies process, see Osvaldo Álvarez-Pérez and Kerstin Stendahl, 'Synergies between the Basel, Rotterdam and Stockholm Conventions, from AHJWG to ExCOPs', presentation at the Nordic Symposium: Synergies in the biodiversity cluster, Helsinki, April 2010, available at <http://www.biodivcluster.fi/pdf/thursday/1Stendahl_8April2010.pdf> (visited 10 January 2012); and Kerstin Stendahl, 'Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions', in Tuula Kolari and Ed Couzens (eds), *International Environmental Law-making and Diplomacy Review 2007*, University of Joensuu – UNEP Course Series 7 (University of Joensuu, 2008), 127–141.

[64] See Eléonore Dziurzynski, Meghna Abraham, Alison Graham Gareth and Gareth Sweeney (eds), *Human Rights Monitor*, International Service for Human Rights no. 64 (Médecine & Hygiène, 2006); Eléonore Dziurzynski, Katrine Thomasen, and Gareth Sweeney (eds), *Human Rights Monitor*, International Service for Human Rights no. 65 (Médecine & Hygiène, 2007).

[65] See <http://www.unwomen.org/about-us/about-un-women> (visited 10 January 2012).

ambition: (1) maintaining the existing secretariat level cooperation (business as usual); (2) enhancing secretariat initiatives as well as synergies at the national level, building on existing collaboration and making use of lessons learned through projects and initiatives; (3) increasing clustering of the biodiversity-related conventions, which could involve joint administrative functions, secretariats, budgets and communication functions, following the example of the chemicals and waste conventions; (4) merging conventions as protocols under the CBD; and (5) conducting fundamental reorganization of MEAs in the framework of the discussions on the proposed World Environment Organization (WEO) or United Nations Environment Organization (UNEO).[66]

A step-by-step approach to building synergies, following option (2) above (while not excluding following options (3) to (5) at a later stage), would make the biodiversity-related conventions more efficient in contributing to the overarching goal of conserving biodiversity and using natural resources sustainably. It should be stressed that the process would need to be party-driven whilst simultaneously respecting the autonomy of individual conventions, with form following function and synergies serving the purpose of enhancing convention implementation.

The synergies process for the biodiversity-related conventions can build on the wide range of existing initiatives for cooperation; as well as make use of the options for collaboration and coordination at the global, regional and national levels provided by the Strategic Plan for Biodiversity 2011–2020.

Key elements for such an approach to synergies at the national level, in particular for the four key areas considered above, would include the following:

- collaboration of national focal points on NBSAP implementation, aided by appropriate mechanisms such as national biodiversity committees;
- the inclusion of the objectives of other conventions in NBSAPs;
- alignment of national policies and strategies for the non-CBD conventions with the NBSAP;
- joint development of national indicators for convention implementation;
- joint use of funding, in particular for national capacity-building for convention implementation;
- collaboration of national focal points and relevant agencies on national reporting to the biodiversity-related conventions and integrated management of national

[66] For the discussion of the potential advantages and disadvantages of a World Environment or United Nations Environment Organization and the complexities of its establishment, see, for example, Alejo Etchart, *Lessons from GATT/WTO for enhancing UNEP* (Stakeholder Forum, London), available at <http://www.stakeholderforum.org/fileadmin/files/Lessons%20from%20GATT-WTO%20for%20enhancing%20UNEP.pdf> (visited 30 March 2012); UNEP, *The Environmental Dimension of IFSD: Importance of Environmental Pillar to IFSD*, *supra* note 20; and UNEP, *The Environmental Dimension of IFSD: Fragmentation of Environmental Pillar and its Impact on Efficiency and Effectiveness, supra* note 20.

biodiversity data and information in support of reporting to, and implementation of, all the biodiversity-related conventions;
- making available to the global convention processes the experience on synergies at the national level; and
- providing support to national synergy efforts by the UNEP Regional Offices and other regional and national UN offices and other institutions (e.g. the Food and Agricultural Organisation (FAO),[67] the International Union for Conservation of Nature (IUCN),[68] the United Nations Development Programme (UNDP),[69] and the United Nations Educational, Scientific and Cultural Organization (UNESCO).[70]

Regional and subregional cooperation mechanisms and processes, assisted by the UNEP Regional Offices and other regional and national institutions, could provide support to the integrated implementation of NBSAPs across the conventions at the national level, could establish or host regional hubs for IPBES, and could assist parties in testing national approaches to streamlining and better integrating reporting to the biodiversity-related conventions.

The global synergies process could further evolve through the following elements:

- alignment of the strategic planning documents of the biodiversity-related conventions in the light of the Strategic Plan for Biodiversity 2011–2020;
- joint interaction of the conventions with IPBES, facilitated by the BLG and advised by CSAB;
- joint approval and use by the conventions of global and sub-global biodiversity assessments as well as of biodiversity indicators;
- joint addressing of key thematic areas, such as water, forests, agriculture, marine biodiversity, invasive alien species, bushmeat[71] or protected areas, among others;
- further harmonization of national reporting;
- a joint capacity-building initiative of the biodiversity-related conventions for convention implementation;
- joint provision of guidance to national-level implementation of conventions in a synergistic manner, supported by the UNEP Regional Offices and other regional and national UN offices;
- extension of synergy efforts to other MEAs such as the other Rio Conventions, supported by UN-wide efforts facilitated by the EMG; and
- consistent decision-taking across the biodiversity-related conventions in support of synergies.

[67] See <http://www.fao.org>.
[68] See <http://www.iucn.org>.
[69] See <http://www.undp.org>.
[70] See <http://www.unesco.org>.
[71] Wild, often endangered, animals caught for food (both subsistence and to satisfy a growing urban restaurant market for exotic foods), particularly in Central, East and West Africa.

9 Recommended next steps for synergies between the biodiversity-related conventions

The activities described in the previous chapter would all support enhanced cooperation and coordination between the biodiversity-related conventions at the global and national level. For taking a wider and coordinated approach to taking the synergy process forward, it is suggested that the UNEP Governing Council[72] establishes a party-driven Intergovernmental Working Group on Synergies between the biodiversity-related conventions and invites the bureaus of the governing bodies of the conventions to nominate party and secretariat representatives. The group would review the synergies process, develop recommendations and prepare for consistent decisions for the conventions' governing bodies. Strong party representation should assist in increasing the acceptance of the work and recommendations of the group by the governing bodies of the MEAs.

The work of the group, which would report to the UNEP Governing Council and the governing bodies of the conventions, could be supported by the BLG, which, backed by the governing bodies of the conventions, could help with getting some of the options at the global level outlined above underway. Global bodies such as the Environment Management Group (EMG)[73] and, in terms of funding, the Global Environment Facility (GEF), could support the synergies process, and the emerging process should be considered at the follow-up process to the 2012 United Nations Conference on Sustainable Development (Rio+20).

The party-driven character of the synergies process would ensure that synergies are not pursued as goals in and of themselves, but rather that the capacity of parties is built more efficiently and effectively to implement the objectives of the participating conventions.

[72] See <http://www.unep.org/resources/gov/overview.asp>.
[73] *Supra* note 44.

Synergies within the International Regime on Access and Benefit-sharing: Cooperation between the Nagoya Protocol and the ITPGRFA

Melissa Lewis[1]

1 Introduction

Modern technology enables plant genetic resources to be used in the development of a wide spectrum of commercial products,[2] the combined markets for which are worth hundreds of billions of US dollars annually.[3] Historically, the international community subscribed to the principle that plant genetic resources should be freely available to all countries for all purposes.[4] This is well illustrated by the 1983 International Undertaking on Plant Genetic Resources, which was based on the principle that such resources were 'a heritage of mankind and consequently should be available without restriction'.[5]

Unrestricted access, while favoured by developed countries, was increasingly resisted

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[2] See generally Kerry ten Kate and Sarah A. Laird, *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-sharing* (Earthscan, 1999); Carmen Richerzhagen, *Protecting Biodiversity: The Effectiveness of Access and Benefit-sharing Regimes* (Routledge, 2010) at 26–36.

[3] Even as far back as 1999, ten Kate and Laird estimated that the value of the combined annual global markets for products derived from genetic resources was between USD 500 billion and USD 800 billion. ten Kate and Laird, *supra* note 2, at 1.

[4] Lyle Glowka, Françoise Burhenne-Guilmin and Hugh Synge, *A Guide to the Convention on Biological Diversity*, IUCN Environmental Law and Policy Paper No. 30 (1998) at 5 and 76–78.

[5] International Undertaking on Plant Genetic Resources, Article 1. This Undertaking (although not legally binding) was the first international instrument to deal with the conservation and sustainable use of plant genetic resources for food and agriculture (Gerald Moore and Witold Tymowski, *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture,* IUCN Environmental Policy and Law Paper No. 57 (2005) at 6). It was adopted through FAO Resolution 8/83.

by developing nations which, during the negotiations toward the Convention on Biological Diversity (CBD),[6] insisted that new international principles be designed to enable biologically wealthy countries to control access to their genetic resources and to share in any benefits arising from the commercialization of such resources.[7] The CBD consequently attempts to strike a balance between the interests of developed and developing nations by requiring provider countries (whose sovereignty over genetic resources is now recognized[8]) to facilitate access to genetic resources[9] in return for a share in any benefits that may result from the utilization thereof.[10] While the Convention contains provisions on both access and benefit-sharing (ABS), particular emphasis is placed on the latter by including the fair and equitable sharing of benefits from the utilization of genetic resources as one of the Convention's three central objectives.[11]

Unfortunately, the decade following the CBD's adoption saw limited progress made towards achieving the Convention's benefit-sharing objective.[12] Developing countries thus began calling for the development and adoption of a comprehensive international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the use of genetic resources[13] and, in 2002, participants at the World Summit on Sustainable Development (WSSD)[14] committed themselves to negotiat-

[6] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 1760 UNTS 79, <http://www.biodiv.org>. See Art. 15(1).

[7] ten Kate and Laird, *supra* note 2, at 4; Glowka, *supra* note 4, at 5.

[8] See Art. 15(1). The Convention additionally requires that access occur on mutually agreed terms and be subject to the prior informed consent of the Party providing the resources, unless otherwise determined by that Party (Art. 15(4)–(5)).

[9] Parties are directed to 'endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of [the CBD]' (Art. 15(2)).

[10] See Arts 15(6)–(7), 16(3) and 19(1)–(2). See also Art. 8(j) (requiring Parties to encourage benefit-sharing with indigenous and local communities whose traditional knowledge has been utilized).

[11] Art. 1. The CBD's approach, while certainly a significant improvement upon that taken by the International Undertaking on Plant Genetic Resources, does not completely resolve the tension between achieving continued access, on the one hand, and ensuring benefit-sharing, on the other. In the context of plant genetic resources for food and agriculture, for example, requiring (as the CBD does) that prior informed consent be obtained and mutually agreed terms negotiated on a case-by-case basis would be unduly onerous and potentially frustrate the exchange of the plant genetic resources on which modern agriculture relies (see Moore and Tymowski *supra* note 5, at 10). It is for this reason that the Contracting Parties to the International Treaty on Plant Genetic Resources for Food and Agriculture (Rome, 3 November 2001, in force 29 June 2004, 2400 UNTS 303, <http://www.planttreaty.org/>) agreed, in exercise of their sovereign rights, to establish a multilateral system to facilitate access and benefit-sharing in this context (see Art. 10(2); W. Bradnee Chambers, *Interlinkages and Effectiveness of Multilateral Environmental Agreements* (United Nations University Press, 2008) at 183–184).

[12] It has been estimated that ten years after the adoption of the CBD, fewer than ten per cent of Parties had adopted ABS legislation. Morten Walløe Tvedt and Tomme Young, *Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD*, IUCN Environmental Policy and Law Paper No. 67/2 (2007) at 1.

[13] The creation of such a regime was, in particular, advocated by the group of Like-Minded Megadiverse Countries. See, for instance, Cancun Declaration of Like-Minded Megadiverse Countries (18 February 2002) available at <http://chmguatemala.gob.gt/Members/esolorzano/documentos/paises-megadiversos-lmmc/Declaration%20Cancun%20del%20LMMC.pdf> (visited 17 October 2012).

[14] World Summit on Sustainable Development, Johannesburg, 26 August – 4 September 2002, <http://www.un.org/events/wssd/>.

ing such a regime within the framework of the CBD.[15] This commitment was eventually to lead, in 2010, to the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the CBD (Nagoya Protocol).[16]

Utilization of genetic resources raises issues concerning not only benefit-sharing but also food security, public health, and intellectual property. The use of these resources is thus addressed by a variety of international instruments[17] and organizations[18] outside of the CBD framework, and the need for harmony with these fora was repeatedly emphasized in the negotiations toward the Nagoya Protocol.[19] Negotiators were divided as to whether the Protocol should constitute the overarching ABS instrument in international law, or should instead simply be one component of a broader international regime on ABS, 'with it being the default instrument, augmented by other specialized regimes'.[20] Ultimately, the latter view prevailed, with the decision through which the Nagoya Protocol was adopted recognizing that the international regime is constituted of a suite of complementary instruments.[21] The Protocol itself preserves the ongoing work and practices under other international fora and contains an ex-

[15] Plan of Implementation of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002), para. 44(o).

[16] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, <http://www.cbd.int/abs/>. Following the WSSD, the United Nations General Assembly invited the CBD's Conference of the Parties (COP) to take steps towards meeting the commitment to negotiate an international regime on ABS (UN General Assembly Resolution 57/260 (2003), para 8). The COP responded (in Decision VII/19, section D, para 1) by mandating the negotiation of the regime to the (already established) Ad Hoc Open-ended Working Group on Access and Benefit-sharing, which was subsequently instructed (in Decision VIII/4, para 6) to have completed work on this issue at the earliest possible time before the tenth COP to the CBD (COP10). The final outcome of the work of this Working Group was a draft of the Nagoya Protocol (Report of the Third Part of the Ninth Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, UNEP/CBD/COP/10/5/Add.5), which was presented to COP10 where the Protocol for further negotiation and eventual adoption.

[17] For instance the Agreement on Trade-Related Aspects of Intellectual Property Rights (found in Annex 1C of the Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994, in force 1 January 1995, see <http://www.wto.org/english/tratop_e/t_agm0_e.htm>) and the International Treaty on Plant Genetic Resources for Food and Agriculture. Indeed, Raustiala and Victor observe that '[r]ather than a single, discreet regime governing [plant genetic resources], the relevant rules are found in at least five clusters of international agreements' which, while overlapping, are 'created and maintained in distinct fora with participation of different sets of actors'. Kal Raustiala and David G. Victor, 'The Regime Complex for Plant Genetic Resources' 58 *International Organization* (2004) 277–309 at 279.

[18] Such as the World Trade Organization, see <http://www.wto.org>; World Health Organization, see <http://www.who.int/>; World Intellectual Property Organization, see <http://www.wipo.int/>; and the United Nations Food and Agriculture Organization, see <http://www.fao.org/>.

[19] See, for instance, Report of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing on the Work of its Third Meeting, UN Doc. UNEP/CBD/WG-ABS/3/7 (2005), para. 28; and Report of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing on the Work of its Ninth Meeting, UN Doc. UNEP/CBD/WG-ABS/9/3 (2010), paras 39, 52, 57 and 62.

[20] Matthias Buck and Clare Hamilton, 'The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity' 20 *Review of European and International Environmental Law* (2011) 47–61 at 58.

[21] 'Access to genetic resources and the fair and equitable sharing of benefits arising from their utilization', CBD Decision X/1 (2010)

emption for specialized ABS agreements.[22] One such agreement with which the CBD already has a history of cooperation is the International Treaty on Plant Genetic Resources for Food and Agriculture (the ITPGRFA or 'Plant Treaty'),[23] which provides an international framework for the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits arising out of the use of such resources.[24]

This paper provides a brief examination of the relationship between the ITPGRFA and the Nagoya Protocol; considers opportunities for future linkages between these two instruments; and canvasses the collaboration that is already occurring between the Plant Treaty and the CBD in preparation for the Protocol's entry into force. The paper concludes with comment on the significance of the relationship and collaboration, and of the proposed linkages.

2 Overview of the ITPGRFA and its cooperation with the CBD

It has long been recognized that plant genetic resources for food and agriculture (PGRFA) have special importance for human well-being due to the role that they play in improving crops, thereby helping to achieve food security.[25] The adoption of the ITPGRFA in 2001 was the result of a process to revise the International Undertaking on Plant Genetic Resources so as to harmonize this instrument with the CBD.[26] Indeed, the Plant Treaty articulates its central objective as being:

> the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.[27]

One of the ITPGRFA's core features is the creation of a Multilateral System, which is designed to (i) facilitate access[28] to the crops most essential to food security (these crops are listed in Annex I of the Treaty[29] and are transferred under a Standard Mate-

[22] Art. 4(3)–(4).
[23] See *supra* note 11.
[24] Art. 1(1).
[25] See, for example, Agenda 21 (UN Conference on Environment and Development, Rio de Janeiro, 13 June 1992, UN Doc. A/CONF.151/26/Rev.1 (1992), available at <http://www.un.org/esa/dsd/agenda21/>), paras 14.54–14.56. See also discussion in Moore and Tymowski, *supra* note 5, at 2–3 and 5.
[26] FAO Resolution 7/93. See also Nairobi Final Act of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, Resolution 3 'The Interrelationship Between the Convention on Biological Diversity and the Promotion of Sustainable Agriculture' (1992).
[27] Art. 1(1).
[28] Art. 10(2). Through the Multilateral System access is provided to Contracting Parties, as well as legal and natural persons under the jurisdiction of Contracting Parties, in accordance with conditions prescribed by the Plant Treaty. See Art. 12(2)–(3).
[29] Art. 11. The Multilateral System includes those Annex I resources that are 'under the management and

rial Transfer Agreement[30]); and (ii) share benefits arising from the utilization of such resources[31] (not only through the sharing of monetary benefits from commercialization, but also the exchange of information, access to and transfer of technology, and capacity-building[32]). Other issues addressed by the Plant Treaty include ABS relating to certain *ex situ* collections of PGRFA;[33] farmers' rights (including the protection of traditional knowledge and participation in the sharing of benefits from the utilization of PGRFA);[34] the development of a global information system to facilitate the exchange of information on matters related to PGRFA;[35] and compliance.[36]

The ITPGRFA has a lengthy history of cooperation with the CBD. Not only does the Plant Treaty provide that its objectives are to be achieved in harmony with, and by closely linking to, the Convention;[37] but Articles 19(3)(g) and 20(5) call upon the ITPGRFA's Governing Body and Secretary to cooperate with the Convention's Conference of the Parties (COP) and Secretariat.[38] Since the Plant Treaty's entry into force, its Governing Body has repeatedly emphasized the need to continue to enhance collaboration with the CBD.[39] Commitments to cooperate have likewise been made by the CBD's COP.[40] Indeed, there has been close cooperation between the Plant Treaty and the Convention with regard to such issues as exchange of informa-

control of Contracting Parties and in the public domain', as well as those that are held in the *ex situ* collections of the International Agricultural Research Centres of the Consultative Group on International Agricultural Research and other international institutions (Arts 11(2) and 11(5)). Parties further agree to take measures to encourage natural and legal persons within their jurisdictions who hold Annex I PGRFA to include these in the Multilateral System (Art. 11(3)).

30 Art. 12(4); Resolution 2/2006.

31 Art. 10(2). See also Art. 13. Benefits are to be directed primarily towards farmers in developing countries and countries with economies in transition (Art. 13(3)).

32 Art. 13(2). Obligations concerning technical assistance, information exchange, and financial resources are also included in Arts 8, 17 and 18.

33 Those held by the International Agricultural Research Centres of the Consultative Group on International Agricultural Research and other international institutions. See Art. 15.

34 Art. 9.

35 Art. 17. The Treaty also includes provisions on the conservation and sustainable use of PGRFA. Arts 5–6.

36 Art. 21.

37 Art. 1.

38 The functions of the ITPGRFA's Governing Body further include taking note of relevant decisions of the CBD COP and other relevant international organizations and treaty bodies (Art. 19(3)(l)), and informing such organizations and treaty bodies of matters regarding the implementation of the ITPGRFA (Art. 19(3)(m)).

39 Report of the First Session of the Governing Body of the ITPGRFA, Doc. IT/GB-1/06/Report (2006) at para. 49; Report of the Second Session of the Governing Body of the ITPGRFA, Doc. IT/GB-2/07/Report (2007) at para. 85; 'Cooperation With Other International Organizations, Including Agreements Between The Governing Body And The International Agricultural Research Centres Of The Consultative Group on International Agricultural Research And Other Relevant International Institutions', Resolution 8/2009 at para 1; 'Cooperation with other bodies and international organizations, including with the International Agricultural Research Centres of the Consultative Group on International Agricultural Research and other international institutions that signed agreements under Article 15 of the Treaty', Resolution 8/2011.

40 In Decision VI/6 ('The International Treaty on Plant Genetic Resources for Food and Agriculture', 2002) (at para. 4), the CBD's COP decided to establish and maintain close cooperation with the Plant Treaty's Governing Body, and requested the CBD's Executive Secretary to develop cooperation with the Plant Treaty's Secretariat. See also Decision VIII/16 ('Cooperation with other conventions and international organizations and initiatives', 2006) at paras 9 and 15.

tion, participation in the Liaison Group of Biodiversity-related Conventions,[41] and participation in relevant meetings and processes,[42] including the negotiation of the Nagoya Protocol.[43]

3 Overview of the Nagoya Protocol and its application to PGRFA

The Nagoya Protocol was adopted in 2010, at the CBD's tenth COP,[44] and will enter into force 90 days after being ratified by 50 Parties to the Convention.[45] The Protocol's objective is:

> [t]he fair and equitable sharing of benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.[46]

Building upon the CBD's ABS provisions, the Protocol requires that access to genetic resources for their utilization shall be subject to the prior informed consent of the Party providing the resources (unless that Party determines otherwise).[47] Any benefits arising from the utilization of genetic resources are to be shared with the Party that has provided the resources in a fair and equitable manner and in accordance with mutually agreed terms.[48] The Protocol thus envisages ABS being negoti-

41 Liaison Group of Biodiversity-related Conventions, <http://www.cbd.int/blg/>.

42 See generally Progress Report on Partnerships, Synergies and Cooperation with Other Organizations, Doc. IT/GB-3/09/18 (2009); and Relationship with the Convention on Biological Diversity, Doc. IT/GB-4/11/22 (2011), paras 15, 17 and 32.

43 Report of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing on the Work of its Fifth Meeting, UN Doc. UNEP/CBD/WG-ABS/5/8 (2007), para. 3; Report of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing on the Work of its Sixth Meeting, UN Doc. UNEP/CBD/COP/9/6 (2008), para. 3; Report of the Seventh Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, UN Doc. UNEP/CBD/WG-ABS/7/8 (2009), para. 3; Report of the Eighth Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, UN Doc. UNEP/CBD/WG-ABS/8/8 (2009), para. 3; Report of the First Part of the Ninth Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, UN Doc. UNEP/CBD/WG-ABS/9/3 (2010), para. 3; Report of the Second Part of the Ninth Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, UN Doc. UNEP/CBD/COP/10/5/Add.4 (2010), para. 3. For a discussion of interlinkages between the CBD and the ITPGRFA, and how these have improved the effectiveness of both instruments, see Chambers, *supra* note 11, at chapter 6.

44 Decision X/1, *supra* note 21.

45 Art. 33. As at mid-January 2013, the Protocol had 92 signatories but had been ratified by only twelve states (these being Ethiopia, Fiji, Gabon, India, Jordan, Lao People's Democratic Republic, Mauritius, Mexico, Panama, Rwanda, the Seychelles and South Africa). See 'Nagoya Protocol: Status' at <http://www.cbd.int/abs/nagoya-protocol/signatories/> (visited 18 January 2013).

46 Art. 1.

47 Art. 6(1).

48 Art. 5(1).

ated between users and providers on a case-by-case basis. Parties requiring prior informed consent are obliged to take various measures to provide for fairness, legal certainty, clarity and transparency in their laws and procedures for accessing genetic resources and establishing mutually agreed terms to access,[49] and the Protocol contains several provisions aimed at ensuring compliance with the ABS laws of provider countries[50] (though it does also envisage the possible development of a global multilateral benefit-sharing mechanism to facilitate the sharing of benefits in certain instances[51]). The Protocol further contains ABS requirements for those instances in which genetic resources or traditional knowledge have been provided by indigenous and local communities,[52] as well as provisions on such issues as information-sharing,[53] capacity-building,[54] technology transfer,[55] and awareness-raising.[56]

While there is certainly overlap between the objectives of, and issues dealt with by the Nagoya Protocol and the ITPGRFA, it is also clear that the two instruments, employ very different mechanisms to achieve ABS: the Plant Treaty (insofar as Annex I resources are concerned) facilitates access and shares benefits through a multilateral tool, while the Protocol requires that ABS arrangements generally be made bilaterally. During the negotiation of the Nagoya Protocol, concerns were raised that the introduction of a new legal instrument that covered all genetic resources (including those of relevance for food and agriculture) would be problematic if it called for ABS arrangements that were inconsistent with those under the ITPGRFA (in particular, the Treaty's Multilateral System for Annex I resources).[57] Negotiators thus carefully considered the relationship between the Plant Treaty and the international regime on ABS, and debated various options for restricting the Nagoya Protocol's scope with regard to those resources to which the Plant Treaty applies.[58]

The decision through which the Nagoya Protocol was eventually adopted describes the ITPGRFA as a component of the international regime on ABS.[59] Even with the

[49] Art. 6(3).
[50] Arts 15, 17 and 18.
[51] Article 10 of the Protocol requires Parties to 'consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant prior informed consent'.
[52] Arts 5(5), 6(2) and 7. See also Art. 12.
[53] Art. 14.
[54] Art. 22.
[55] Art. 23.
[56] Art. 21.
[57] Jane Bulmer, 'Study on the relationship between an international regime on access and benefit-sharing and other international instruments and forums that govern the use of genetic resources', UN Doc. UNEP/CBD/WG-ABS/7/INF/3/Part.1 (2009) 14–15.
[58] See Report of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing on the Work of its Fourth Meeting, UN Doc. UNEP/CBD/COP/8/6 (2006) 23; UN Doc. UNEP/CBD/COP/9/6, *supra* note 43, at 15–16; UN Doc. UNEP/CBD/WG-ABS/7/8, *supra* note 43, at 22–23; UN Doc. UNEP/CBD/WG-ABS/8/8, *supra* note 43, at 22–23; UNEP/CBD/COP/10/5/Add.4, *supra* note 43, at 19–20; UNEP/CBD/COP/10/5/Add.5, *supra* note 16, at 10.
[59] Decision X/1, *supra* note 21.

Protocol's adoption, the CBD's COP thus continues to view the ITPGRFA as having a significant role to play in achieving the Convention's benefit-sharing objective.[60] Indeed, the preamble to the Protocol recognizes the special nature and importance of PGRFA, acknowledges the fundamental role played by the ITPGRFA in this regard, and recalls the Plant Treaty's Multilateral System of ABS. In terms of Article 4, the Protocol's provisions shall not affect Parties' rights and obligations arising from existing international agreements, (except where this would cause serious damage or threat to biodiversity),[61] and the Protocol is to be implemented in a mutually supportive manner with other relevant international instruments, with due regard being paid to the ongoing work or practices under these instruments and relevant international organizations.[62] Article 4(4) is particularly significant, as it provides that

> [w]here a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the [CBD] and this Protocol, this Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resources covered by and for the purpose of the specialized instrument.

The result is that, (at least insofar as countries that have ratified both the Nagoya Protocol and the ITPGRFA are concerned[63]) the Protocol's provisions will not apply to PGRFA that are covered by the Plant Treaty unless these are used for purposes unrelated to the Treaty[64] (for instance, if an Annex I-listed crop were used in the development of a cosmetic or pharmaceutical product, its use for this purpose would be governed by the Nagoya Protocol rather than the ITPGRFA[65]). In this way, the

[60] Since COP10, the CBD's Executive Secretary has also highlighted that, as part of the international regime on ABS, the Plant Treaty plays a central role in regulating access to PGRFA. Report of the Second High-level Roundtable on the International Treaty on Plant Genetic Resources for Food and Agriculture on the Occasion of the United Nations Conference of Sustainable Development (2012), available at <http://www.planttreaty.org/sites/default/files/HLRT2_Final_Report_1.pdf> (visited 1 August 2012) at 2.

[61] This provision is not, however, intended to create a hierarchy between the Protocol and other international instruments (Art. 4(1)). The Protocol's provisions also shall not prevent the development and implementation of further international agreements, provided that these do not run counter the objectives of the CBD and the Protocol (Art. 4(2)).

[62] Provided that such work or practices are supportive of, and do not run counter to, the objectives of the CBD and the Protocol (Art. 4(3)).

[63] 72 of the 92 countries that have thus far signed the Nagoya Protocol, and five out of the six that have ratified or accepted the Protocol (Mexico being the exception), are Contracting Parties to the ITPGRFA (Nagoya Protocol website, 'Status of signature, and ratification, acceptance, approval or accession', available at <http://www.cbd.int/abs/nagoya-protocol/signatories/>, read with ITPGRFA website, 'List of countries', available at <http://www.planttreaty.org/list_of_countries> (both visited 30 September 2012)).

[64] Insofar as the Nagoya Protocol does apply to PGRFA, the Protocol recognizes that such resources should be subject to special considerations: Art. 8(c) requires that Parties, in the development of their ABS legislation or regulatory requirements, '[c]onsider the importance of genetic resources for food and agriculture and their special role for food security'.

[65] Buck and Hamilton, *supra* note 20, at 58. See also Art. 12(3)(a) of the Plant Treaty, which provides that access via the Multilateral System of ABS 'shall be provided solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture, *provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed related industrial uses*' (emphasis added).

two instruments' divergent approaches to ABS have been harmonized, and the autonomy of the ITPGRFA respected.[66]

Although the Nagoya Protocol was drafted in such a way that its provisions do not directly conflict with the ITPGRFA, there remains significant overlap in the issues covered by these two instruments (both, for instance, seek to protect traditional knowledge and both apply to ABS relating to Annex I crops, depending on the purpose for which such crops are being accessed). It is thus desirable that the Protocol and the Plant Treaty, rather than following entirely independent (and potentially inconsistent) paths in addressing such issues, coordinate their approaches and activities where possible. Such coordination could reduce the burden on Parties to both instruments (by avoiding the development of fragmented approaches in respect of the same or similar issues), and would have the added advantage of allowing the instruments to pool resources and avoid duplication of efforts in measures aimed at supporting the implementation of their respective ABS provisions.

4 Future cooperation between the Nagoya Protocol and ITPGRFA

Following COP10, the Executive Secretary of the CBD stated that 'with the adoption of the Nagoya Protocol a new era of cooperation between the Convention and the ITPGRFA was born'.[67] The ITPGRFA's Governing Body has likewise recognized the potential of the Protocol to enhance synergies between the Plant Treaty and the CBD, and has appealed to Contracting Parties and other States to consider signing and ratifying the Protocol. It has further decided to cooperate with the Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol (which was established to undertake the preparations necessary for the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP-MOP)[68]) and, upon the Protocol's entry into force, the COP-MOP itself.[69] Indeed, representatives from the ITPGRFA have thus far participated in all meetings of the Intergovernmental Committee for the Nagoya Protocol,[70] as well as other meetings aimed

[66] See also Chambers (*supra* note 11, at 189), who (in commenting on an early draft of this provision) explains that '[t]his type of explicit cross-referencing gives more predictability and certainty to the regime as has proven to be the case in other instances where this technique has been employed, such as between the UNFCCC and Ozone Convention concerning the coverage of common greenhouse gases and ozone-depleting substances'.

[67] Report of the Fourth Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, Doc. IT/GB-4/11/Report (2011), Appendix F.3. The same sentiments have been expressed by the Secretary of the ITPGRFA (Outcomes of the Capacity-building Workshop on Access and Benefit-sharing, UN Doc. UNEP/CBD/ICNP/1/INF/6 (2011) at 3).

[68] See CBD COP Decision X/1, *supra* note 21.

[69] ITPGRFA Governing Body Resolution 8/2011, *supra* note 39.

[70] Report of the First Meeting of the Open-Ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, UN Doc. UNEP/CBD/ICNP/8 (2011), para. 3; Report of the Second Meeting of the Open-Ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on Access to Genetic Resources

at the expedited ratification of the Protocol.[71] In considering elements of the Nagoya Protocol which have yet to be finalized (such as the Protocol's compliance mechanism and potential global multilateral benefit-sharing mechanism) these meetings have considered lessons learned from the Plant Treaty's approach to such issues.[72]

Commitments to future cooperation with the Nagoya Protocol have not only come from the ITPGRFA's Governing Body. In June 2012, at the Second High-level Round Table on the ITPGRFA (which was held at the Rio +20 Summit), the Plant Treaty's Secretariat signed and launched a Joint Initiative on Sustainable Development, Technology Transfer and Capacity-building with the Secretariat of the CBD[73] (which will also serve as the Secretariat to the Nagoya Protocol[74]). As part of this Initiative, the Secretariats agree to cooperate in further activities to support the ratification of the Nagoya Protocol and its harmonious implementation with the ITPGRFA (including the Treaty's Multilateral System of ABS).[75]

Even prior to this agreement the Secretariats had, pursuant to a 2010 Memorandum of Cooperation,[76] begun to organize jointly a series of capacity-building workshops to assist the early ratification of the Nagoya Protocol and its implementation.[77] The capacity-building needs identified by the workshops include measures related to mutual supportiveness of the Nagoya Protocol and the ITPGRFA, such as sensitizing policy-makers to the distinct approaches that each instrument takes to ABS, and building understanding of the relationship between the Protocol's provisions on traditional knowledge and the Treaty's provisions on farmers' rights.[78] Capacity-

and the Fair and Equitable Sharing of Benefits Arising from their Utilization, UNEP/CBD/COP/11/6 (2012), para 3.

71 Such as meetings concerning the Nagoya Protocol's ABS Clearing House (Report of the Expert Meeting on the Modalities of Operation of the Access and Benefit-sharing Clearing-house, UN Doc. UNEP/CBD/ICNP/1/2 (2011), para. 8) and compliance mechanism (Report of the Expert Meeting on Cooperative Procedures and Institutional Mechanisms to Promote Compliance with the Nagoya Protocol on Access and Benefit-sharing and to Address Cases of Non-compliance, UN Doc. UNEP/CBD/ICNP/2/12 (2012), para. 9).

72 See, for instance, Overview of Compliance Procedures and Mechanisms Established under Other Multilateral Environmental Agreements, UN Doc. UNEP/CBD/ICNP/1/INF/1 (2011), paras 108–123; UN Doc. UNEP/CBD/ICNP/2/12, *supra* note 71, at para. 20; Morten Walløe Tvedt, *A Report from the First Reflection Meeting on the Global Multilateral Benefit-sharing Mechanism* (2011), available at <http://www.fni.no/publ/biodiversity.html#abs_meeting_report> (visited 27 July 2012) at 13–15.

73 Joint Initiative of the Secretariats of the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food and Agriculture Under the Memorandum of Cooperation Between Them (Report of the Second High-level Roundtable on the ITPGRFA, *supra* note 60, Annex 2).

74 Art. 28(1) of the Nagoya Protocol.

75 Joint Initiative, *supra* note 73, at para. 1.

76 Memorandum of Cooperation between the Secretariat of the Convention on Biological Diversity and the Secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture (2010), available at <http://www.cbd.int/doc/agreements/agmt-itpgrfa-2010-10-28-moc-en.pdf> (visited 27 July 2012).

77 See UN Doc. UNEP/CBD/ICNP/1/INF/6, *supra* note 67; Outcomes of the Second Capacity-building Workshop on Access and Benefit-sharing, UN Doc. UNEP/CBD/ICNP/2/INF/1 (2011); Outcomes of the Third Capacity-building Workshop on Access and Benefit-sharing, UN Doc. UNEP/CBD/INCP/2/INF/9 (2012).

78 UN Doc. UNEP/CBD/ICNP/1/INF/6, *supra* note 67, at 6.

building is thus an area in which future collaboration between the Treaty and the Protocol will be particularly appropriate. It is also an area in which the Nagoya Protocol has an opportunity to learn from the experiences of the ITPGRFA, as has already been demonstrated during the various joint capacity-building workshops.[79]

Another area of future collaboration that is already being considered is that of information sharing. Under the Nagoya Protocol, information is to be shared through an ABS Clearing House, established under the CBD's existing clearing house mechanism.[80] In preparation for the Nagoya Protocol's first COP-MOP,[81] the Intergovernmental Committee on the Nagoya Protocol has discussed the Clearing House and recommended that it be implemented in a phased manner, beginning with a pilot phase. The Committee has suggested that the development of the pilot phase could include an investigation of partnership opportunities with other data providers, including the ITPGRFA.[82] Indeed, the Treaty's Secretariat is already active in the development of information systems and tools,[83] and is establishing strategic partnerships in this regard – including with the CBD's clearing house mechanism.[84]

As part of their Joint Initiative, the Secretariats of the CBD and the ITPGRFA have agreed to continue their coordination and sharing of expertise on information management for ABS 'as far as useful for implementation of [the Nagoya Protocol's]

[79] This point has additionally been recognized by the Intergovernmental Committee on the Nagoya Protocol, which, in recommending the development of a strategic framework on capacity-building under the Protocol, has highlighted the importance of lessons learned from previous and ongoing capacity-building initiatives, such as those under the Plant Treaty. See Recommendations 1/2 and 2/5 on 'Measures to assist in capacity-building, capacity development and strengthening of human resources and institutional capacities in developing countries and Parties with economies in transition'.

[80] Art. 14(1). Within this context, the term 'clearing house' can be broadly defined as an information-sharing mechanism. The CBD's current clearing house mechanism (under which the Nagoya Protocol's Clearing House is to be established) is made up of the CBD website, a network of national clearing house mechanisms (websites that provide information on the CBD in a particular country) and a variety of partner institutions (see generally <http://www.cbd.int/chm>). It is intended that the Clearing House to be established in terms of the Nagoya Protocol will serve as a means for sharing information relating to ABS, particularly information that is made available by Parties concerning their implementation of the Protocol (Art. 14(1)). To this end, the Nagoya Protocol requires Parties to make certain information available to the ABS Clearing House, including for instance any legislative, administrative or policy measures on ABS and any permits authorizing access to genetic resources (see generally Art. 15(2)–(3)).

[81] Art. 14(4) of the Protocol directs the first COP-MOP to consider and decide upon the modalities of the operation of the ABS Clearing House.

[82] 'Modalities of operation of the Access and Benefit-sharing Clearing house', Recommendation 1/1 of the Intergovernmental Committee on the Nagoya Protocol. See also Report on Progress and Next Steps in the Implementation of the Pilot Phase of the Access and Benefit-sharing Clearing-house, UN Doc. UNEP/CBD/ICNP/2/8 (2012).

[83] The Secretariat has, for example, developed an information technology system to support users of the Multilateral System of ABS (<http://mls.planttreaty.org/itt/>) and participated in the development of a global portal to information about PGRFA (GENESYS: Gateway to Genetic Resources <http://www.genesys-pgr.org>).

[84] See ITPGRFA website, 'Global Information System on PGRFA', available at <http://www.planttreaty.org/content/gis> (visited 27 July 2012). Many of these activities are aimed at furthering development of a global information system on PGRFA, as required by Art. 17 of the Plant Treaty. The ITPGRFA itself requires that cooperation be sought with the CBD's clearing house mechanism in the development of this system.

Clearing House'.[85] Specific areas of cooperation that have already been suggested in this regard include the hyperlinking of portals of the ABS systems developed under the two instruments, the synchronization of data formats, controlled vocabularies and metadata, and the development of data exchange formats and protocols.[86]

Other areas in which the Secretariats of the CBD and ITPGRFA are either already cooperating or planning to cooperate include the coordination of technical assistance,[87] activities on traditional knowledge, joint awareness-raising, joint promotional material, and joint communication work.[88] It can thus be expected that, once the Nagoya Protocol enters into force, the cooperative relationship in these areas that has developed between the Convention and the Plant Treaty will expand so as to include activities under the Protocol.

Coherent implementation of the ITPGRFA and the Nagoya Protocol will, of course, also require coordination at the national level – national laws and policies developed to implement the two instruments will need to be harmonized, and their national focal points will need to collaborate so as to optimize synergies and efficiency. This too is a point that has already been recognized by the Governing Body of the ITPGRFA.[89]

5 Conclusion

As the number of multilateral environmental agreements has increased, so the need for coordination between such instruments (as a means of improving the coherence and efficiency of international environmental law) has gradually been recognized.[90] Given the diverse range of issues that stem from the utilization of genetic resources (and the fact that such utilization is consequently addressed by a variety of international instruments and organizations), the recent negotiation of the Nagoya Protocol provides a good example of how treaty text can be crafted in a manner that avoids

[85] Joint Initiative, *supra* note 73, at para. 1.

[86] Letter from Shakeel Batti (Secretary of ITPGRFA) to Ahmed Djoughlaf (CBD Executive Secretary), 7 June 2011 (available in Excerpt from Resolution 8/2011 of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, UN Doc. UNEP/CBD/INCP/1/INF/8 (2011)).

[87] Memorandum of Cooperation, *supra* note 76, at Art. 2(b).

[88] Joint Initiative, *supra* note 73, at paras 2–3.

[89] The ITPGRFA's Governing Body has called upon Contracting Parties to 'ensure that any legislative, administrative or policy measures taken for the implementation of both the Treaty and the Convention on Biological Diversity (or its Nagoya Protocol), are consistent and mutually supportive', and has requested national focal points of the Plant Treaty to enhance collaboration and coordination with CBD focal points 'on all relevant processes, in particular on the Nagoya Protocol' (Resolution 8/2011, paras 7–8). The CBD COP has also encouraged such coordination in the national implementation of biodiversity-related MEAs generally (see, for instance, 'Cooperation with other organizations, initiatives and conventions', Decision VI/20 (2002), para. 8; 'Cooperation among multilateral environmental agreements and other organizations', Decision IX/27 (2008), para. 12).

[90] Chambers, *supra* note 11, at 6–9.

conflict with other fora. As merely one component of the international regime on ABS, the Protocol is also an instrument for which future synergies are likely to be particularly relevant.

The ITPGRFA and the Nagoya Protocol are the only two global international agreements that provide detailed ABS arrangements concerning genetic resources.[91] The two instruments do, of course, differ in scope: while the Plant Treaty's application is restricted to genetic resources for food and agriculture,[92] the scope of the Nagoya Protocol is far broader, essentially extending to all genetic resources (including plant genetic resources for food and agriculture) to the extent that such resources (and the uses thereof) are not covered by specialized ABS instruments.[93] They also employ different methods to facilitate access and ensure benefit-sharing: the Plant Treaty (insofar as Appendix I crops are concerned) provides for a multilateral approach, while the Nagoya Protocol follows the bilateral approach of its parent Convention, and thus includes detailed provisions on prior informed consent, mutually agreed terms and the legal measures required to support implementation at national level.

Despite their differences, however, both the ITPGRFA and the Nagoya Protocol ultimately seek to achieve a common objective: the fair and equitable sharing of benefits arising from the utilization of genetic resources. There is also significant overlap between their provisions on the protection of traditional knowledge and indigenous and local communities, as well as many of their supporting provisions, such as those on information-sharing, technology transfer, capacity-building and awareness-raising. These overlaps present opportunities for the Nagoya Protocol to learn from the experiences of the Plant Treaty and for the two instruments to collaborate in areas of mutual interest, thereby avoiding duplication of efforts, improving efficiency and, promoting the coherent implementation of the international regime on ABS.[94] The Plant Treaty's lengthy history of cooperation with the CBD provides a firm foundation on which to build such synergies.

[91] The only other global instrument to contain provisions on ABS is the CBD, though these are very broadly-phrased. Both the Nagoya Protocol and the ITPGRFA can be viewed as instruments for implementing the CBD's benefit-sharing objective.

[92] Art. 3. The Plant Treaty also does not focus solely on benefit-sharing, but additionally aims to achieve the conservation and sustainable use of plant genetic resources for food and agriculture (Art. 1(1)). In contrast, the Nagoya Protocol focuses purely on ABS (although it does recognize that the fair and equitable sharing of benefits from the utilization of genetic resources is meant to contribute to conservation and sustainable use; see Art. 1).

[93] Art. 3, read with Art. 4(1).

[94] There is also some potential for the implementation of the Nagoya Protocol's supporting provisions to be aligned with (or to learn from) activities under other biodiversity-related treaties. For instance, a number of capacity-building activities have been conducted under the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena, 29 January 2000, in force 11 September 2003, 2226 UNTS 208, <http://bch.cbd.int/protocol>) concerning the implementation of the Protocol's Biosafety Clearing House. It might be appropriate for similar, or joint, initiatives to build capacity for the implementation of the Nagoya Protocol's ABS Clearing House (UNEP/CBD/ICNP/1/2, *supra* note 71, at para. 52). Indeed, this may be particularly appropriate in light of the fact that the pilot phase of the ABS Clearing House is being largely modeled on the Biosafety example (see UNEP/CBD/ICNP/2/8 , *supra* note 82; UN Doc. UNEP/CBD/ICNP/1/2, *supra* note 71, at paras 3, 12, 16–17, 32 and 69).

What is perhaps more interesting, however, than the potential for future synergies in the implementation of the ITPGRFA and the Nagoya Protocol is the role that the Plant Treaty has played in the lead-up to the Protocol's entry into force. The ITPGRFA's Secretariat was actively involved in the negotiation of the Nagoya Protocol, and its Governing Body has, since the Protocol's adoption, assisted in building support for the Protocol by encouraging countries to consider signature and ratification. The Plant Treaty's Secretariat has further cooperated in capacity-building initiatives which (particularly in light of the Nagoya Protocol's bilateral approach to ABS) are essential in supporting the Protocol's early ratification and future implementation.[95] Finally, various procedures and mechanisms that have been developed under the Plant Treaty (as well as those developed under a number of other multilateral environmental agreements[96]) have provided the Intergovernmental Committee on the Nagoya Protocol with guidance in formulating its recommendations on certain unresolved aspects of the Protocol which need to be decided on at the first COP-MOP if the Protocol is to function effectively.[97] These contributions by the ITPGRFA demonstrate that synergies have an important role to play not only in improving the efficiency of existing international instruments, but also in the development of new instruments and the preparation for their entry into force.

[95] Indeed, the CBD COP has directed the Intergovernmental Committee on the Nagoya Protocol to consider measures to assist capacity-building (as well as measures to raise awareness of the importance of genetic resources, traditional knowledge, and related ABS measures) in preparation for the Protocol's first COP-MOP (see Annex II of Decision X/1, *supra* note 21).

[96] The clearing house developed under the Cartagena Protocol on Biosafety has, for example, been heavily relied upon in developing a pilot phase for the ABS Clearing House, (see note 94 above), while the compliance procedures and mechanisms developed under the Biosafety Protocol and various other MEAs have been considered in discussions of the development of such procedures and mechanisms under the Nagoya Protocol (see generally UN Doc. UNEP/CBD/ICNP/2/12, *supra* note 71). It has further been suggested that the work that has been conducted under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington DC, 3 March 1973, in force 1 July 1975, 993 UNTS 243, <http://www.cites.org/>) on the issuing of electronic permits might benefit the development of the internationally recognized certificate of compliance provided for in Article 17(2) of the Nagoya Protocol (UNEP/CBD/ICNP/2/8, *supra* note 82, at para's 52–53).

[97] The Nagoya Protocol directs the COP-MOP to, at its first meeting, consider and decide upon the modalities of operation of the ABS Clearing House (Art. 14(4)), as well as cooperative procedures and institutional mechanisms to promote compliance with the Protocol and address cases of non-compliance (Art. 30). The COP-MOP is further directed to consider the need for and modalities of a global multilateral benefit sharing mechanism to facilitate the sharing of benefits in certain instances (see note 51 above).

Opportunities and Challenges for Establishing Synergies and Areas for Enhanced Cooperation in the Biodiversity Cluster

Marina von Weissenberg[1]

1 Introduction

Recent international reports confirm that the loss of biological diversity continues generally all over the world.[2] This means that additional work and efforts must be taken to enable the biodiversity-related multilateral environmental agreements (MEAs) fully to deliver their intended objectives and achieve our common goal of halting biodiversity loss by 2020.[3]

The loss of biodiversity probably costs the world over USD 750-billion annually in lost ecosystem services.[4] These services are vital to our economies and our well-being and include climate regulation, rainfall provision, watershed protection and livelihoods for local and indigenous peoples. Whilst the science is unclear about how

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[2] See, for instance, the third Global Biodiversity Outlook, the Living Planet Report, the Global Forest Resources Assessment, the State of the World's Plant and Animal Genetic Resources for Food and Agriculture, the fourth Global Environment Outlook, and the Millennium Ecosystem Assessment – cited in full in footnotes 3–8 (inclusive) in the paper by Erie Tamale, 'Global Biodiversity Trends and Synergistic Strategic Policy Responses', in Part II of the present *Review*.

[3] See, for instance, the 'Strategic Plan for Biodiversity 2011–2020' discussed in footnotes 49 and 50 of the paper by Marceil Yeater in Part III of the present *Review*.

[4] See, for instance, Charlie Parker and Matthew Cranford, *Little Biodiversity Finance Book* (3rd ed., Global Canopy Programme, 2012), available at <http://www.globalcanopy.org/sites/default/files/LittleBiodiversityFinanceBook_3rd%20edition.pdf> (visited 13 December 2012). The term 'ecosystem services' might be defined as a way to accord commercial value to natural resources for the 'service' these give to the support of life. For a description of the concept within the present *Review* series, see Leila Suvantola, 'Ecosystem Services and Climate Change' in Ed Couzens and Tuula Honkonen (eds), *International Environmental Law-making and Diplomacy Review 2010*, University of Eastern Finland – UNEP Course Series 10 (University of Eastern Finland, 2011) 245–254.

much is required to protect biodiversity and ecosystems, it is probable that the cost of doing nothing will be far higher. Ecosystems provide goods and services that sustain all life on Earth, including human life. If extensively damaged, we can probably never fully restore these no matter how much money we spend trying to do so.

Ecosystems and ecosystem services are constantly changing, which in the end influences the demand for goods and services and the ways in which we manage our natural resources. The benefits that we derive from the natural world and its constituent ecosystems are important to human wellbeing and economic prosperity, yet are consistently undervalued in economic analyses and in the decision-making of today. Growing populations and the increasing impacts of human beings on environments mean that the future is likely to bring more challenges to ecosystem functions.

Synergies and strengthened cooperation on different levels are required to conserve and maintain ecosystem services. Many global environmental agreements and conventions have integrated relevant targets into their strategies and planning. Among these, the most important from the biodiversity perspective is the 2020 Aichi Biodiversity Targets.[5]

2 National governance systems for the management of biodiversity

2.1 Introduction

Sound policies and legislative frameworks are essential for good governance at national level and thereby for mainstreaming biodiversity into different sectors of societies. From the late 1940s onwards, emphasis has been placed on maximizing the production of goods to meet human needs for food, timber, energy and water – without there being commensurate protection accorded to the environment. However, relatively recent changes in national policy and legislation, along with technological developments and changing attitudes and behavior, have led to some improvements in this respect.

The preparation of National Biodiversity Strategies and Action Plans (NBSAPs) has recently been seen as useful in successfully managing biodiversity. These Plans are in line with Article 6 of the Convention on Biological Diversity.[6] To give effect to Article 6, needs assessments should be conducted and gaps should be identified together with positive achievements at the national level.[7] In addition, the nomination

[5] 'The Strategic Plan for Biodiversity 2011–202 and the Aichi Biodiversity Targets', CBD decision X/2 (2010). See Yeater, *supra* note 3.

[6] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

[7] The obligations contained in Art. 6 include that each Contracting Party 'shall, in accordance with its particular conditions and capabilities … Develop national strategies, plans or programmes for the con-

of National Focal Points (NFP) is important for identifying who is in charge of information-sharing and the submissions of the notifications received by convention Secretariats, for instance.

Regarding National Biodiversity Strategies and Action Plans, a recent study[8] *concluded that few countries had time-bound and measurable targets or a mechanism in place for monitoring and review of biodiversity loss. There is also a general lack of strategies for communication and financing.* Additionally, the poor design and content of many NBSAPs act as impediments to their effective implementation. However, 'second generation' NBSAPs have been better prepared and have focused more on mainstreaming and on self-reliance.[9]

The negative effects of the main drivers of biodiversity loss have not, unfortunately, been significantly ameliorated by NBSAPs.[10] The main factor currently driving biodiversity loss is habitat destruction – mostly on land but also in streams, rivers, lakes and the oceans. Human activities such as deforestation; bottom trawling in the oceans; the damming and the draining and degradation of wetlands; and removal of mangroves are responsible for the development. On the other hand, much biodiversity remains and humankind has probably identified not more than one in ten of all species on Earth.[11]

As states engage with global-scale initiatives such as the Rio+20 Conference[12] held in Brazil in 2012, it is important to signal emerging challenges that could undermine sustainable development and biodiversity efforts. This should be done alongside the ongoing promising efforts which countries, communities and the private sector are undertaking for our common good.

2.2 Governance: needs and challenges

Lack of integration of biodiversity concerns into different policy areas is arguably the main challenge that we are faced with. Ironically, our knowledge and understanding

servation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; …'. *Ibid*. Art. 6(a).

8 Christian Prip and Tony Gross with Sam Johnston and Marjo Vierros, *Biodiversity Planning: an Assessment of National Biodiversity Strategies and Action Plans* (UNU, 2010), available at <http://www.ias.unu.edu/resource_centre/UNU-IAS_Biodiversity_Planning_NBSAPs_Assessment_final_web_Oct_2010.pdf> (visited 18 June 2012).

9 The study suggests that 'second-generation NBSAPs are generally very different from first-generation ones in terms of more inclusive stakeholder involvement in their preparation, approval at a higher political level, focus on mainstreaming, alignment with other relevant plans and policies, inclusion of monitoring tools, and inclusion of strategies for communication and financing'. *Ibid*. at 97.

10 A general conclusion of the study is that the position as at 2010 was similar to that of earlier NBSAP reviews, being that 'NBSAPs have not seriously affected the main drivers of biodiversity loss'. *Ibid*. at 96.

11 Eric Chivian and Aaron Bernstein (eds), *How Our Health Depends on Biodiversity* (UNEP, 2010), available at <http://chge.med.harvard.edu/sites/default/files/resources/182945%20HMS%20Biodiversity%20booklet.pdf> (visited 18 June 2012), at 5.

12 See, generally, <http://www.uncsd2012.org/>.

of biodiversity have never been greater than they are today;[13] while, at the same time, neither have the pressures on biodiversity ever been greater. Loss of forest biodiversity can reduce the resilience of forests and leave them increasingly vulnerable. Conservation of the biodiversity of forests, for instance, is fundamental to sustaining forests and people in a world that is adapting to climate change. Ecosystem-based approaches recognize the importance of biodiversity to different stakeholders; and also the need for broad stakeholder participation in decision-making in order to arrive at more effective outcomes.

New approaches to biodiversity conservation are promising, but they need to be matched by more effective governance and greater financial investments.[14] Drawing from the information of the 2009 report *Conservation for a New Era*,[15] plus the information from the Millennium Ecosystem Assessment (MA),[16] the Global Biodiversity Outlook 3 (GBO-3) report concludes that biodiversity loss 'is likely to continue for the foreseeable future, and certainly beyond 2010'.[17] Nevertheless, GBO-3 recognizes potential success in biodiversity conservation, including that:

1) at national, regional and global levels, with appropriate responses, it is possible to achieve, by 2020, a positive outcome for halting the loss of biodiversity;[18]
2) the majority of the targets that the CBD has established as part of its framework for assessing progress towards the 2010 target are achievable, provided that the necessary actions are taken;[19] and
3) for the most part, the tools needed to achieve the 2010 target, including programmes of work, principles and guidelines, have already been developed.[20]

However, action to implement the Convention on Biological Diversity has not been taken on a sufficient scale to address the pressures on biodiversity in most places. There has been insufficient integration of biodiversity issues into broader policies,

[13] UNEP year BOOK 2011, 'Emerging Issues in our Global Environment' (UNEP, 2011), available at <http://www.unep.org/yearbook/2011/pdfs/UNEP_YEARBOOK_Fullreport.pdf> (visited 18 June 2012), at vi.

[14] *Ibid*. at vii.

[15] Jeffrey A. McNeely and Susan A. Mainka, *Conservation for a New Era* (IUCN, 2009).

[16] Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: Biodiversity Synthesis,* (World Resources Institute, 2005).

[17] Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook 3* (2010), available at <http://www.unep.org/pdf/GBO3-en.pdf> (visited 18 June 2012).

[18] Although the previous target was not achieved, it can be argued that it was not useless. In this respect, the 'existence of the 2010 biodiversity target helped to stimulate important action to safeguard biodiversity' and many actions taken 'in support of biodiversity loss had significant and measurable results in particular areas and amongst targeted species and ecosystems'. It can therefore be concluded that '[t]his suggests that with adequate resources and political will, the tools exist for loss of biodiversity to be reduced at wider scales'. *Ibid*. at 9.

[19] See, generally, McNeely and Mainka, *supra* note 15.

[20] *Ibid*.

strategies and programmes, and the underlying drivers of biodiversity loss have not been addressed significantly.[21]

3 Enhancing cooperation and synergies

It is important, in planning measures for increasing cooperation and adopting synergies, to cover the objectives of the CBD. This means that we need different measures to ensure coherence and coordination between conservation and sustainable use activities; as well as to take into consideration the broad definition of 'biodiversity'[22] which can be challenging but is nevertheless important.

It should be remembered that there is an inherent internal tension within plans to implement the CBD, which tension lies in the balance between central coordination, steering of activities and a more decentralized approach (bottom-up).

Here the institutional framework of the biodiversity-related conventions and the lack of enforcement are important to note. We need to look at the reporting requirements as well as the monitoring and evaluation of data/baseline information at national and local levels, and ensure that the key actors and stakeholders, whoever these might be in particular circumstances, are involved.

Experience from Finland in this respect, for instance, shows that the reporting format has changed substantially over the years. Furthermore, to help with the challenge of disseminating information about biodiversity so as to facilitate regional and local decision-making, Finland has prepared biodiversity assessment reports for national purposes,[23] which has contributed to improving the relationship between science and policy. In this process, public participation has been encouraged, but it is still difficult to receive contributions because most people appear to consider reporting to be a burden. Another feature has been the general feeling that the reports are not fully utilized by MEA secretariats or by international organizations. The feedback loop should be carefully looked at: it is important to give feedback to those involved in the reporting exercise.

A useful way forward could be that proposed in a recent UNEP summary report: that the reporting framework should be based more and more on thematic elements;

[21] CBD Secretariat, *Global Biodiversity Outlook 3*, *supra* note 17, at 9.

[22] In the CBD, biological diversity is defined as meaning 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'. CBD, Art. 2.

[23] Ilkka Heikkinen (ed), and Interministerial Group of Editors, *Saving Nature for People. National Strategy and Action Plan for Conservation and Sustainable Use of Biodiversity in Finland 2006–2016* (Ministry of the Environment, 2007), available at <http://www.ymparisto.fi/download.asp?contentid=75624&lan=en> (visited 19 June 2012) or <http://www.environment.fi/default.asp?contentid=258249&lan=en&clan=en> (visited 10 December 2012).

and that synergies between the biodiversity-related multilateral agreements should be strengthened when countries are revising their national biodiversity strategies and actions plans.[24] Here also the streamlining and integrating of the national management of biodiversity-related information is crucial. Information that underlies national reporting should be made better available and accessible through, for example, the existing clearing house mechanism and a centralized biodiversity database. This would overcome the challenge that scattered information sources provide for national focal points and those that compile national reports. This would make it possible to use the same information modules available for reports to different conventions, thus avoiding non-consistency between information presented in different national reports.[25]

Taken altogether, this issue needs to be solved at all of the local, national and global levels. It is important to take national experiences into consideration when reporting formats and information-sharing, including databases, are designed. The time used for reporting should be part of implementation, and should not detract from it. It would be practical if the reporting could be undertaken on-line, where countries would have an opportunity to update an existing format – for instance, a clearing-house mechanism (CHM) – whenever considerable changes are made at a national level.

4 Reporting frameworks

National reporting is a key obligation for the success of any multilateral environmental agreement. In some cases, it is the only obligation that Parties are obliged to adhere to. Article 26 of the CBD requires the Parties to present reports to the Conferences of the Parties (COPs) on measures taken to implement the Convention. To date, Parties have been asked to report four times, while the fifth national reports are due in 2014. The important issue here is the follow-up of the 2010 target to halt the biodiversity loss, and the use and development of indicators for national purposes linked to the monitoring of global trends.

Other biodiversity-related MEAs – the CITES,[26] CMS[27] and ITPGRFA[28] – also request reports that may be considered at each Conference of the Parties. The Ramsar

[24] *Promoting Synergies within the Cluster of Biodiversity-related Multilateral Environmental Agreements* (UNEP World Conservation Monitoring Centre, 2012), available at <http://www.unep-wcmc.org/medialibrary/2012/04/27/ff1a00f0/MEA_synergies_summary_for_web_cover_27April2012.pdf> (visited 19 June and 10 December 2012).

[25] See *ibid*.

[26] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>.

[27] Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>.

[28] International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, into force 29 June 2004, <http://www.planttreaty.org/>.

Convention[29] COP decided in 1984 that the Parties should prepare national reports for each COP, following a defined reporting format. The World Heritage Convention (WHC)[30] reports to the General Conference of UNESCO. Additionally, the World Heritage Committee examines reports from regional and sub-regional levels; the practice being based on a six-year cycle.[31]

The development of outcome-oriented indicators[32] has been a challenge due to a lack of baseline data in many countries. The importance of identifying the information needs of individual conventions needs to be taken into consideration when aligning conventions' strategic plans and in developing joint biodiversity indicators. The management of information collection and joint information systems, for instance the InforMEA (UN information portal on MEAs),[33] can also, if well-designed, provide new opportunities for easing up the procedures. A proposal could be made to harmonize definitions and terminology employed by different biodiversity-related MEAs; and to consider both online submission of reports and testing of national approaches. At the global level, cooperation in key areas – for instance, agriculture, forests, protected areas and water – has been encouraging.

Reporting rates vary between MEAs. In particular, the national reports to the Ramsar Convention, the WHC and CITES achieve very high rates; and rates for the other conventions are increasing. It has been found that regional workshops on reporting have helped to improve reporting rates within the CBD and WHC.

5 The Aichi Biodiversity Targets and opportunities for synergies

5.1 The CBD Strategic Plan and the Aichi targets

The vision behind the strategic plan for biodiversity 2011–2020, and the corresponding Aichi biodiversity targets, states that 'by 2050 biodiversity [ought to be] valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people'.[34] Parties agreed also to

[29] Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <http://www.ramsar.org>.

[30] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <http://whc.unesco.org>.

[31] For more information, see *Promoting Synergies*, *supra* note 24.

[32] According to the UNEP-WCMC, biodiversity indicators 'use quantitative data to measure aspects of biodiversity, ecosystem condition, services, and drivers of change, to help understand how biodiversity is changing over time and space, why it is changing, and what the consequences of the changes are for ecosystems, their services, and human well-being'. UNEP-WCMC, 'Biodiversity Indicators', available at <http://www.unep-wcmc.org/biodiversity-indicators_77.html> (visited 10 December 2012).

[33] See <http://informea.org/>.

[34] See CBD decision X/2, Annex.

a shorter-term ambition of 'tak[ing] effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human wellbeing, and poverty eradication'.[35] To deliver on this ambition, parties agreed on a set of strategic goals and targets to drive action on biodiversity.

With the adoption of the Strategic Plan for Biodiversity, the Conference of the Parties to the CBD has reached out to other conventions, inviting them to contribute to the collaborative implementation of the Plan, stressing synergies with the national implementation of MEAs. The other biodiversity-related conventions have quickly begun to acknowledge the opportunities the Strategic Plan offers for enhancing collaboration and synergies. The Strategic Plan has also been taken up by the Environment Management Group[36] and the UN General Assembly, giving support to the implementation of the Plan.[37]

Establishment of a joint capacity-building initiative under the Strategic Plan for Biodiversity has been emphasized and recognized as a key requirement for effective implementation of biodiversity-related MEAs. This issue and the preparation of a joint initiative will in the future be an important field of cooperation between the different entities. In addition, joint guidance for national communication and awareness-raising would be of great value and provide an opportunity for realizing synergies.

What we are faced with is that there is a continued failure to address biodiversity loss and the consequences of such loss, combined with related problems such as the lack of political support. The fact that the Global Environment Facility (GEF)[38] functions as a financing mechanism for the CBD, but not for the other biodiversity-related multilateral environmental agreements, is a significant factor that will need to be tackled. Some useful progress in this regard was made during discussion of financial mechanisms ('review of GEF-5 and needs for GEF-6') at the Fourth Meeting of the Working Group on the Review of Implementation (CBD WGRI-4) in Montreal in May 2012.[39]

Research has suggested that the current level of funding for biodiversity and ecosystem services is around USD 36–38-billion per annum – far more than had previously been estimated. However, around half of this money is currently being delivered domestically in China, the European Union and the United States. As the scale of ecosystem finance increases, however, a greater proportion of it needs to be delivered to developing countries where the majority of the world's biodiversity exists –

[35] *Ibid*.
[36] See <http://www.unemg.org/>.
[37] *Promoting Synergies*, *supra* note 24, at 13.
[38] See <http://www.thegef.org>.
[39] WGRI 4, Montreal, 7–11 May 2012, <http://www.cbd.int/wgri4/> (visited 10 December 2012).

and where the impacts of biodiversity loss are most strongly felt. It has been suggested that, with a multitude of policy options for biodiversity and ecosystem services, significant policy action finance could reach USD 70–160 billion annually by the year 2020.[40] If coordination between agendas were able to implement or scale up new mechanisms and policy options, then conservative estimates indicate that they could generate between USD 5 and 26 billion per annum in biodiversity finance.[41]

5.2 Relevant areas for enhancing cooperation within a biodiversity cluster

There are a number of areas in which it might be possible to enhance cooperation within a biodiversity-related MEA cluster. Some of these include, firstly, the identification and addressing of national needs with a view to enhancing the implementation of MEAs by parties. This should be at the core of any process which aims to enhance cooperation, coordination and synergies.[42] Secondly, it can be argued that synergies should 'start at home' – meaning that national governments should coordinate their own activities in order to develop coherent positions for negotiations and decision-making which take place under MEAs.[43]

Thirdly, without a coordinated approach to enhancing synergies, there is a risk of initiatives competing and inefficient duplicative solutions resulting. An initiative for synergies could bring together and improve current initiatives; and could identify many unexplored areas for synergies in a step-by-step manner.[44] Fourthly, efforts should focus, at least initially, on synergies and cooperation on issues of substance rather than on administrative matters. This is mainly because the conventions grouped in the biodiversity cluster are hosted by different organizations, are geographically dispersed and have different reporting lines. This contrasts markedly with the approach that has been taken in the synergies process for the chemicals and wastes conventions.[45]

[40] Parker and Cranford, *The Little Biodiversity Finance Book*, *supra* note 4, at 111.
[41] *Ibid*. at 107.
[42] Ministry of the Environment of Finland/Nordic Council of Ministers, 'Report from a Nordic Symposium: "Synergies in the biodiversity cluster" held in Helsinki, Finland, 8 to 9 April 2010', available at <http://www.biodivcluster.fi/pdf/Synergies%20report%20final.pdf> (visited 10 December 2012), 'Relevant areas for enhancing cooperation and coordination within a biodiversity cluster', at 6, para. 13.
[43] *Ibid*. at 6, para. 14.
[44] *Ibid*. at 6, para. 16.
[45] *Ibid*. at 6, para. 17. On the chemicals and wastes cluster, see Kerstin Stendahl, 'Clustering of MEAs – Lessons Learned, Rio+20, and Beyond', in Part II of the present *Review*; and Kerstin Stendahl, 'Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions' in Tuula Kolari and Ed Couzens (eds), *International Environmental Law-making and Diplomacy Review 2007* University of Joensuu – UNEP Course Series 7 (University of Joensuu, 2008) 127–141.

Fifthly, a number of programmatic areas provide possible areas for joint action. These include the science-policy interface (for instance, the Intergovernmental Science – Policy Platform on Biodiversity and Ecosystem Services (IPBES)[46]); the harmonization of reporting; the streamlining of meeting agendas; joint information management and awareness-raising, which integrates TEMATEA[47] with newer knowledge management initiatives; and capacity-building, compliance, funding and review mechanisms.[48]

In addition, national needs and assessment procedures require strengthening. Needs-driven approaches for monitoring trends must be tailored for the biodiversity family as well as communicated more effectively to relevant decision-makers, both now and in the future.

6 Conclusions

Responses to the challenges of biodiversity loss and weakened ecosystem services at the international level need to be made through the biodiversity-related conventions. The real benefits of biodiversity, and the costs of its loss, need to become better reflected within the world's economic systems and markets.

It would appear that success in this regard has to date been limited, and it needs to be asked what the challenges are and where opportunities might be. There is ongoing work from which lessons can be learned. Synergies are being, and some already have been, created amongst biodiversity-related multilateral environmental agreements, mostly in the areas of national reporting and information management. Current initiatives are, however, limited primarily to bilateral approaches and are steered through ad hoc processes. Significant challenges include coordinating the structure, timing and forms of decision-making within different MEAs. Also, there is the 'human dimension' which must be taken into consideration – this including factors such as lack of leadership, limited capacity, and weak administration at the national level.

A thematic approach to synergies could also be undertaken. Under such an approach, a multilateral environmental agreement would be selected to act in cooperation with other instruments and agencies. The development of joint work programmes between MEAs could be an effective way of building strong links, promoting synergies and simplifying national obligations.

[46] See <http://www.ipbes.net>.

[47] See <http://www.tematea.org> ; and see Ines Verleye and Jorge Ventocilla, 'Biodiversity Conventions and the IEG Agenda – The Need for an Integrated Approach Both Bottom-up and Top-down: A Case Study of TEMATEA' in Tuula Honkonen and Ed Couzens, *International Environmental Law-making and Diplomacy Review 2009* University of Eastern Finland – UNEP Course Series 9 (University of Eastern Finland, 2010) 89–99.

[48] Ministry of the Environment of Finland/Nordic Council of Ministers, *supra* note 42, at 6, para. 18.

It must be recognized that achieving effective cooperation is not easy, particularly because any process to enhance synergies amongst MEAs needs to be party-driven and can, therefore, only be pursued by parties to the MEAs, but acting with the support of MEA secretariats. Applying a step-by-step approach, whereby national needs are addressed in an efficient and coordinated manner, would therefore seem to be a useful way forward.

More efficient synergies can certainly be achieved amongst the biodiversity-related MEAs. Ultimately, achieving this will require a multitude of factors – including improved education; significant political will; the willingness to learn from experience; and the finding of innovative diplomatic solutions.

CITES Secretariat: Synergies Based on Species-level Conservation with Trade Implications

Marceil Yeater[1]

1 Introduction: the origin of CITES

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[2] could be considered as a 'Stockholm'[3] rather than a 'Rio'[4] convention because it stems from Recommendation 99.3 adopted by States at the 1972 United Nations Conference on the Human Environment (UNCHE) held in Stockholm. CITES can be said to have arisen directly from Recommendation 99.3 of the UNCHE 'Action Plan for the Human Environment', which reads as follows:

> [i]t is recommended that a plenipotentiary conference be convened as soon as possible, under appropriate governmental or intergovernmental auspices, to prepare and adopt a convention on export, import and transit of certain species of wild animals and plants.[5]

Even before this, the International Union for the Conservation of Nature (IUCN)[6] had, at its General Assembly in Nairobi in 1963, called for the formation of an 'international convention on regulation of export, transit and import of rare or threat-

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[2] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>.

[3] Referring to the United Nations Conference on the Human Environment (UNCHE), held in Stockholm in 1972.

[4] Referring to the United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit, held in Rio de Janeiro in 1992.

[5] United Nations Conference on the Human Environment, 1972, 'Action Plan for the Human Environment', <http://fds.oup.com/www.oup.co.uk/pdf/bt/cassese/cases/part3/ch17/1204.pdf>.

[6] See <http://www.iucn.org>.

ened wildlife species or their skins and trophies'.[7] The final text of CITES was concluded on 3 March 1973 at the end of a plenipotentiary conference held in Washington, DC – which is why it is also known as the 'Washington Convention'.

That CITES is a 'Stockholm' rather than a 'Rio' convention is significant as it means that the convention was adopted in the 'cluster' of biodiversity-related conventions of the early 1970s. Twenty years later a second 'cluster' was adopted in the early 1990s. CITES is therefore an older convention which places more concrete, and arguably more demanding, obligations on States Parties than a number of more recent conventions which are much better funded. Its provisions and compliance procedures[8] seem to reflect a greater surrender of sovereignty to achieve international cooperation and effective implementation than is found in a number of more recent conventions. On the other hand, it can be said to lack some of the features of more recent conventions, such as provision of financial support for developing state Parties - a gap which is scheduled to be discussed at the next meeting of the Conference of the Parties to be held in Bangkok in March 2013.[9]

CITES is an international convention that combines wildlife and trade themes with a legally binding instrument for achieving conservation and sustainable use objectives. It has been suggested that what CITES will always be expected to do is more than merely reconcile the inherent difficulties in its two purposes.[10] It is a convention that is generally viewed as effective, although not all of its 'successes' have been sufficiently documented. There are also continuing challenges being faced by the Convention, such as a recent spike in poaching and related illegal trade in elephant ivory and rhinoceros horn. What CITES will always need to do is reinvent itself continually to keep up with developments and changing mores.[11] The Convention has a variety of mechanisms which provide it with the flexibility to adapt to new realities and remain relevant (for example, interpretive Resolutions of the Conference of the Parties, amendments to the Appendices and annotations, longstanding assistance and compliance programmes on national legislation and the review of significant trade in Appendix II species, decision-making by qualified majority voting and a compliance scheme with 'teeth').

CITES entered into force on 1 July 1975 and is now one of six biodiversity-related multilateral environmental agreements (MEAs) which are generally considered to be the most important operating at the global level; and whose executive heads comprise

[7] On the evolution and history of CITES generally, see Willem Wijnstekers, *The Evolution of CITES* (CIC – International Council for Game and Wildlife Conservation', 9th ed., 2011), available at <http://www.cites.org/common/resources/Evolution_of_CITES_9.pdf> (visited 11 January 2013).

[8] See CITES, 'CITES compliance procedures', Resolution Conf. 14.3 (2007).

[9] See, for instance, CITES, 'Access to Global Environment Facility Funding', COP 16, available at<http://www.cites.org/eng/cop/16/doc/E-CoP16-08-04>; and CITES, 'Access to Other Sources of Funding', COP 16, <http://www.cites.org/eng/cop/16/doc/E-CoP16-08-05> (both visited 26 December 2012).

[10] See, generally, Wijnstekers, *Evolution supra* note 7.

[11] See *supra* note 7.

the Liaison Group of Biodiversity-related Conventions (BLG).[12] The five other agreements are the Ramsar Convention on Wetlands,[13] the World Heritage Convention (WHC),[14] the Convention on the Conservation of Migratory Species of Wild Animals (CMS),[15] the Convention on Biological Diversity[16] and the International Treaty on Plant Genetic Resources for Food and Agriculture[17] CITES currently has 177 member Parties – the most recent to join being Bahrain, whose accession entered into force on 17 November 2012; and the Maldives, whose accession will enter into force on 12 March 2013.[18]

2 Framework for tracing trade

CITES uses a system of permits and certificates to regulate international trade in those animal and plant species which have been listed in one of three Appendices.[19] An appropriate permit or certificate accompanies CITES products, which makes their trade traceable. Such documents are similar in their format, languages and issuance or acceptance procedures.[20] Import and export permits and re-export and introduction from the sea certificates (as well as other CITES documents) are issued by national Management Authorities.

Approximately 34 000 animal and plant species are covered by the Convention, roughly 5 000 animal species and 29 000 plant species. 'Specimens' in trade include

[12] The Biodiversity Liaison Group (BLG) has been established between the heads of the secretariats of the six biodiversity-related conventions; and meets regularly to 'explore opportunities for synergistic activities and increased coordination, and to exchange information' – the mandate 'for establishing the [BLG] was set out by the Parties to the CBD'. For more information on this Group see <http://www.cbd.int/blg>.

[13] Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <http://www.ramsar.org>.

[14] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <http://whc.unesco.org>.

[15] Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>.

[16] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

[17] International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, into force 29 June 2004, <http://www.planttreaty.org/>,

[18] CITES, 'List of Contracting Parties', available at <http://www.cites.org/eng/disc/parties/chronolo.php> (visited 21 January 2013).

[19] Appendix I lists species considered to be 'threatened with extinction' and the trade in specimens of which is permitted only in exceptional circumstances. Appendix II lists species 'not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival'. Appendix III lists species that 'are protected in at least one country, which [country] has asked other CITES Parties for assistance in controlling the trade'. Appendix I and II species must be listed by approval of the Conference of the Parties; whereas Appendix III species may be listed unilaterally by the country concerned. See <http://www.cites.org/eng/disc/how.php> (visited 18 June 2012), at which site the relevant listing procedures are given.

[20] See, for instance, the CITES 'Standard permit/certificate form', available at <http://www.cites.org/eng/res/12/E12-03R15A2.pdf>.

live or dead animals and plants, as well as parts and derivatives of both.[21] Such specimens may either be taken from the wild or produced in some way (for instance, in a nursery or captive breeding operation). CITES 'trade' consists of export, import, re-export and introduction from the sea (meaning transportation into a state of specimens of any species which were taken in the marine environment not under the jurisdiction of any state).[22] The purpose of such trade may be either commercial or non-commercial.

The aim of regulation under the Convention is to ensure that trade is legal and sustainable (as well as traceable). The term 'legal' in this sense means that the specimen was obtained in accordance with relevant national legislation. The term 'sustainable' means that trade in the specimen will not be detrimental to the survival of the species in the wild.

Approximately 97% of CITES-listed species (those listed in Appendices II and III) are not necessarily now threatened with extinction and may be commercially traded if their trade is legal, sustainable and traceable. Approximately 3% of CITES-listed species (Appendix I) are 'threatened with extinction' (i.e. are 'endangered') and wild-taken specimens are generally prohibited from commercial trade.

3 Scope of CITES cooperation

The range of cooperative arrangements between CITES and other bodies is reflected, inter alia, by different memoranda of understanding (MOUs) published on the CITES website.[23] These include various forms of agreement or MOUs entered into with multilateral environmental agreements; international governmental organizations, governments, non-governmental organizations, and universities, research centres and other entities. Some partnerships or resolutions date back to the early 1990s.

Cooperation between CITES and a number of conventions and organizations was specifically addressed at the 61st meeting of the Standing Committee of the Conference of the Parties to CITES (SC61, Geneva, August 2011), the interim policy body for the Convention. In its reports to SC61, the Convention Secretariat pointed out that increased coherence with other multilateral instruments and processes (Goal 3 of the CITES Strategic Vision: 2008–2013[24]) should help to achieve better financing

[21] Art. 1(b) of the Convention.
[22] Art. 1(c) and (e).
[23] See, for instance, 'CITES, 'Cooperation and partnerships', available at <http://www.cites.org/eng/disc/coop.php> (visited 20 November 2012).
[24] Adopted at the 14th Conference of the Parties, The Hague, 3–15 June 2007, CoP14 Doc. 11, available at <http://www.cites.org/eng/cop/14/doc/E14-11.pdf> (visited 20 May 2012). According to the Strategic Vision, its two-fold purpose is to 'improve the working of the Convention, so that international trade in wild fauna and flora is consistently conducted at sustainable levels'; and to 'ensure that CITES policy developments are aligned with changes in international environmental priorities and take into account new international initiatives'. In order to achieve this purpose, 'three broad goals, of equal priority, have

of CITES activities at the national and international levels (Goal 2) and accordingly more effective implementation of the Convention (Goal 1).[25] According to the document 'Cooperation with organizations and multilateral environmental agreements', prepared by the CITES Secretariat for COP 16 in March 2013,[26] cooperation 'clusters' for CITES include the following:[27]

- biodiversity: biodiversity-related and other conventions;
- enforcement: international organizations and agreements dealing with law enforcement (for instance, the Green Customs Initiative,[28] the International Consortium to Combat Wildlife Crime (ICCWC),[29] whose members include the International Criminal Police Organization (INTERPOL),[30] CITES, the United Nations Office on Drugs and Crime,[31] the World Customs Organization[32] and the World Bank[33], and regional law enforcement networks[34]);
- finance: international financial mechanisms and other related institutions;
- natural resources: international organizations and agreements dealing with natural resources (for instance, the United Nations Division on Ocean Affairs and the Law of the Sea,[35] the Food and Agriculture Organization of the United Nations (FAO),[36] regional fishery management organizations,[37] the International Tropical Timber Organization[38]);
- science: international environment and science organizations (for instance,

been identified as the key components of the Strategic Vision', these goals being: Goal 1: '[e]nsure compliance with and implementation and enforcement of the Convention'; Goal 2: '[s]ecure the financial basis for the Convention'; and Goal 3: '[e]nsure that CITES and other multilateral instruments and processes are coherent and mutually supportive'. See *ibid*. (visited 18 June 2012).

25 It was acknowledged, for instance, in a discussion item dealing with CITES' relationship with the CBD, that 'CITES could not operate in a vacuum and that cooperation at the national and international levels was not only crucial for the Convention's successful implementation but could also help Parties access additional sources of funding'. CITES, '61st Meeting of the Standing Committee, 15–19 August 2011', available at <http://www.cites.org/eng/com/sc/61/sum/E61-SumRec.pdf> (visited 20 November 2012).

26 CITES, 'Cooperation with organizations and multilateral environmental agreements', available at <http://www.cites.org/eng/cop/16/doc/E-CoP16-13.pdf> (visited 21 January 2013).

27 It should be noted that the list has been revised from the clusters suggested by SC61 (which clusters were 'biodiversity', 'enforcement', 'environment', 'natural resources', 'trade').

28 See <http://www.greencustoms.org/>.

29 See <http://www.cites.org/eng/prog/iccwc.php>.

30 See <http://www.interpol.int>.

31 See <http://www.unodc.org/>.

32 See <http://www.wcoomd.org/home.htm>.

33 See <http://www.worldbank.org/>.

34 See, for examples, the Association of Southeast Asian Nations Wildlife Enforcement Network (ASEAN-WEN), <http://www.asean-wen.org>; the EU Enforcement Group, established by Council Regulation (EC) No. 338/97, <http://wwwec.europa.eu/environment/cites/eg_en.htm>; the Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora', <http://www.lusakaagreement.org/>; and the South Asia Wildlife Enforcement Network (SA-WEN), <http://www.traffic.org/home/2011/1/30/south-asia-wildlife-enforcement-network> (all visited 11 January 2013).

35 See <http://www.un.org/Depts/los/index.htm>.

36 See <http://www.fao.org>.

37 According to the Food and Agricultures Organisation, there are currently 44 regional fishery bodies worldwide, and of these 20 are regional fisheries management organizations. See FAO, 'Regional Fishery Bodies', available at <http://www.fao.org/fishery/topic/16800/en> (visited 20 November 2012).

38 See <http://www.itto.int>.

United Nations Environment Programme (UNEP),[39] International Union for the Conservation of Nature (IUCN)[40] and various non-governmental organizations (NGOs)); and

- trade and transport: international transport, trade and development organizations (for instance, the United Nations Conference on Trade and Development,[41] the World Trade Organization,[42] the International Trade Centre,[43] and the private sector).

4 Synergies and CITES

4.1 Introduction

It may be more appropriate to speak of 'cooperation' at the international level and 'synergy' at the national level as the latter depends on the MEAs to which a State is party. CITES has placed emphasis on fostering country-driven, practical synergies. In this connection, CITES Parties are interested in learning more precisely what is working at the national level and what more could be done to build upon or to replicate such activities and outcomes.

Effective synergy creation takes time and effort as well as a commitment to work collaboratively across 'silos', to make the best use of different mandates or expertise, and to share human and/or financial resources. Much cooperation and synergy creation takes place via informal rather than formal networks. For example, legal officers within various MEAs have long cooperated in an informal way and recently have expressed interest in having regular interaction on issues of common concern.

4.2 Administrative vis-à-vis substantive synergy

The cluster of chemical/waste conventions (i.e. the Basel,[44] Rotterdam[45] and Stockholm Conventions[46])[47] benefits from the co-location of several secretariats in Geneva. States Parties to these conventions have initially focused on achieving administrative

[39] See <http://www.unep.org>.
[40] See <http://www.iucn.org>.
[41] See <http://unctad.org>.
[42] See <http://www.wto.org>.
[43] See <http://www.intracen.org/>.
[44] Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <http://www.basel.int>.
[45] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <http://www.pic.int>.
[46] Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <http://www.pops.int>.
[47] On the chemicals/waste cluster generally, Kerstin Stendahl, 'Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions', in Tuula Kolari and Ed Couzens (eds), *Inter-*

synergy across the secretariats (for instance, common services for administration/finance, meeting organization and general legal advice, followed by a merger of the secretariats). More recently, the cluster has been working on ways to enhance substantive synergy as well.

The biodiversity cluster – which has secretariats in six different cities, five different countries and four different host organizations[48] – has initially focused on enhancing substantive synergies. These efforts were given a major boost with the adoption in 2010 of a Strategic Plan for Biodiversity 2011–2020 and a set of outcome-oriented Aichi targets,[49] the development of indicators for those targets and joint work on National Biodiversity Strategies and Action Plans (NBSAPs).[50] The CITES Secretariat recently advised Parties that more guidance from them was needed, if they wanted the Secretariat to work on administrative synergy as well.[51]

4.3 Strategic plans, targets and indicators

The Strategic Plan for Biodiversity (including the Aichi targets) is a useful flexible framework that is relevant to all biodiversity-related conventions.[52] It derives from a recommendation of the September 2010 retreat, held in Switzerland, of executive

national Environmental Lawmaking and Diplomacy Review 2007, University of Joensuu – UNEP Course Series 7 (University of Joensuu, 2008) 127–141; and Stendahl's paper in Part II of the present *Review*.

48 These being, for the CBD: Montreal, Canada and UNEP; for CITES: Geneva, Switzerland and UNEP; for the CMS: Bonn, Germany and UNEP; for the ITPGRFA: Rome, Italy and the FAO; for Ramsar: Gland, Switzerland and the IUCN; and for the WHC: Paris, France and UNESCO.

49 'The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets', CBD Decision X/2 (2011). See, generally, CBD, 'Strategic Plan for Biodiversity 2011–2020, Including Aichi Biodiversity Targets', available at <https://www.cbd.int/sp/>. The Strategic Plan for Biodiversity is intended to run for the decade from 2011 to 2020, and to be the 'overarching framework on biodiversity, not only for the biodiversity-related conventions, but for the entire United Nations system'; and to include the Aichi Biodiversity Targets. *Ibid*. The Aichi Biodiversity Targets comprise 20 'targets', grouped under five 'Strategic Goal' headings:

- Strategic Goal A: Address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society;
- Strategic Goal B: Reduce the direct pressures on biodiversity and promote sustainable use;
- Strategic Goal C: To improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity;
- Strategic Goal D: Enhance the benefits to all from biodiversity and ecosystem services; and
- Strategic Goal E: Enhance implementation through participatory planning, knowledge management and capacity building.

Ibid.

50 According to the CBD webpage, NBSAPs are the 'principal instruments for implementing the Convention [on Biological Diversity] at the national level (Art. 6)', with the Convention 'requir[ing] countries to prepare a national biodiversity strategy (or equivalent instrument) and to ensure that this strategy is mainstreamed into the planning and activities of all those sectors whose activities can have an impact (positive and negative) on biodiversity'. See <http://www.cbd.int/nbsap/> (visited 18 June 2012).

51 See CITES, 'Sixty-first meeting of the Standing Committee, Geneva, 15–19 August 2011 – Strategic matters: Cooperation with other organizations', available at <http://www.cites.org/eng/com/sc/61/E61-15-01.pdf> (visited 11 January 2013), para. 7.

52 See *supra* note 49.

heads of biodiversity conventions; and was actively supported by CITES, CMS, Ramsar and WHC at CBD-COP10.[53]

Decision 15.10 of the CITES COP directs the Standing Committee[54] to 'review the adopted post-2010 biodiversity targets and, if necessary, to make adjustments to the CITES Strategic Vision: 2008–2013,[55] as appropriate'.[56] The CITES Standing Committee established a working group[57] to assist it with the implementation of this decision.[58] In addition, the Standing Committee Working Group on Special Reporting Requirements[59] was mandated to develop draft guidance to Parties for reporting on the related targets and indicators.

Effective implementation of CITES will be indispensable for meeting a variety of the Aichi targets, including those which address the causes of biodiversity loss/mainstreaming (Aichi targets 1, 2, 3 and 4);[60] direct pressures upon and sustainable use

[53] A weblink to, and description of, the retreat can be found at CITES, 'First High Level Retreat Among Secretariats of Biodiversity-Related Conventions', 1 September 2010, available at <http://www.cites.org/eng/news/SG/2010/sum_retreat100901.pdf>. The conclusions and recommendations emanating from the retreat included, in broad outline, that (a) a strategic plan 2011 to 2020 could serve as a useful framework for the biodiversity-related conventions; that (c) revised and updated NBSAPs should cover the full range of activities needed to implement all of the biodiversity-related conventions; that (d) capacity-building in support of the implementation of the Strategic Plan for Biodiversity should be coordinated among the biodiversity-related conventions; and that (g) the participants agreed to work together in support of the UN Decade for Biodiversity. *Ibid*. (visited 20 September 2012).

[54] According to the CITES homepage, the Standing Committee 'provides policy guidance to the Secretariat concerning the implementation of the Convention and oversees the management of the Secretariat's budget. Beyond these key roles, it coordinates and oversees, where required, the work of other committees and working groups; carries out tasks given to it by the Conference of the Parties; and drafts resolutions for consideration by the Conference of the Parties'. Its membership is reviewed at each COP, and represents each of the six major CITES geographical regions. CITES, 'Standing Committee', available at <http://www.cites.org/eng/disc/sc.php> (visited 20 November 2012).

[55] See *supra* note 24.

[56] CITES decision 15.10 'Post-2010 biodiversity targets' (2010).

[57] See CITES, 'Fifteenth meeting of the Conference of the Parties, Doha (Qatar), 13–25 March 2010 – Strategic matters: Implementation of the Strategic Vision: 2008–2013', available at <http://www.cites.org/eng/cop/15/doc/E15-08.pdf> (visited 14 January 2013).

[58] See CITES, 'Sixteenth meeting of the CoP, Bangkok, 3–14 March 2013 – Strategic matters: CITES Strategic Vision', available at <http://www.cites.org/eng/cop/16/doc/E-CoP16-12.pdf> (visited 26 December 2012).

[59] See CITES, 'Sixty-second meeting of the Standing Committee Geneva (Switzerland), 23–27 July 2012 – Interpretation and implementation of the Convention, Compliance and enforcement, National reports, Special reporting requirements, available at <http://www.cites.org/eng/com/SC/62/E62-24-02.pdf> (visited 14 January 2013).

[60] Target 1 is that people will be 'aware of the values of biodiversity and the steps they can take to conserve and use it sustainably'; target 2 is that 'biodiversity values [will] have been integrated into national and local development and poverty reduction strategies and planning processes and [will be] being incorporated into national accounting, as appropriate, and reporting systems'; target 3 is that '[i]ncentives, including subsidies, harmful to biodiversity [will be] eliminated, phased out or reformed in order to minimize or avoid negative impacts, and positive incentives for the conservation and sustainable use of biodiversity [will be] developed and applied, consistent and in harmony with the Convention and other relevant international obligations, taking into account national socio economic conditions'; and target 4 is that '[g]overnments, business and stakeholders at all levels [will] have taken steps to achieve or have implemented plans for sustainable production and consumption and [will] have kept the impacts of use of natural resources well within safe ecological limits'. All of these targets, under Strategic Goal A, are to have been

of biodiversity (Aichi targets 6, 7 and 9);[61] status of biodiversity through species (Aichi target 12);[62] and enhanced implementation via participatory planning, knowledge management and capacity-building (Aichi targets 17, 18, 19 and 20).[63] Furthermore, national Biodiversity Strategies and Action Plans are effective instruments to promote the implementation of the Strategic Plan for Biodiversity and the Aichi targets, taking into account synergies among the biodiversity-related conventions in a manner consistent with their respective mandates.

In 2011, the CITES Secretariat prepared a Draft Guide for Parties on contributing to the development, review, updating and revision of NBSAPs.[64] In addition, the CITES Secretariat has participated in regional NBSAP workshops for Southern Africa, West Asia and Pan-Europe.

Within the Convention on Biological Diversity, its COP-10 and COP-11 decisions related to NBSAPs, coupled with actions taken by other conventions and the funding available through the Global Environment Facility and bilateral or multilateral do-

achieved 'by 2020, at the latest'. See CBD, 'Aichi Biodiversity Targets', available at <http://http://www.cbd.int/sp/targets/>.

61 Target 6 is that 'all fish and invertebrate stocks and aquatic plants [will be] managed and harvested sustainably, legally and applying ecosystem based approaches, so that overfishing is avoided, recovery plans and measures are in place for all depleted species, fisheries have no significant adverse impacts on threatened species and vulnerable ecosystems and the impacts of fisheries on stocks, species and ecosystems are within safe ecological limits'; target 7 is that 'areas under agriculture, aquaculture and forestry [will be] managed sustainably, ensuring conservation of biodiversity'; target 8 is that 'pollution, including from excess nutrients, has been brought to levels that are not detrimental to ecosystem function and biodiversity'; and 'target 9 is that **'**invasive alien species and pathways [will be] identified and prioritized, priority species [will be] controlled or eradicated, and measures [will be] in place to manage pathways to prevent their introduction and establishment'. The intention is that these targets, under Strategic Goal B, will have been 'achieved by 2020'. *Ibid*.

62 Target 12, under Strategic Goal C, is that 'by 2020 the extinction of known threatened species [will have] been prevented and their conservation status, particularly of those most in decline, [will have] been improved and sustained'. *Ibid*.

63 Target 17 is that by 2015 'each Party [will have] developed, [will have] adopted as a policy instrument, and [will have] commenced implementing an effective, participatory and updated national biodiversity strategy and action plan'; Target 18 is that by 2020 the 'traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, [will be] respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels'; Target 19 is that, 'by 2020, knowledge, the science base and technologies relating to biodiversity, its values, functioning, status and trends, and the consequences of its loss, [will be] improved, widely shared and transferred, and applied'; Target 20 is that, 'by 2020, at the latest, the mobilization of financial resources for effectively implementing the Strategic Plan for Biodiversity 2011–2020 from all sources, and in accordance with the consolidated and agreed process in the Strategy for Resource Mobilization, should [have] increase[d] substantially from the current levels[; with this target being] subject to changes contingent to resource needs assessments to be developed and reported by Parties'. Targets 17, 18, 19 and 20 are under Strategic Goal E. *Ibid*. See also CITES, 'Sixty-Second meeting of the Standing Committee, Geneva, 23–27 July 2012 – Strategic matters: Implementation of the *CITES Strategic Vision: 2008-2013*', available at <http://www.cites.org/eng/com/SC/62/E62-13.pdf> (visited 26 December 2012).

64 CITES Notification to the Parties No. 2011/026 (2011) 'CITES Parties and National Biodiversity Strategies and Action Plans under the Convention on Biological Diversity – A Draft Guide'.

nors, provide an unprecedented opportunity for more coherent and effective implementation of each country's biodiversity commitments 'on-the-ground'.

4.4 Cooperation mechanisms

The effectiveness of the Biodiversity Liaison Group, mentioned above,[65] has been strengthened through the development and agreement by BLG members of *modus operandi*.[66] Better links with national governments are also anticipated within the process.

The Environment Management Group (EMG),[67] a coordination group for the UN system, and its Issue Management Group on Biodiversity[68] produced and are now following up the 2010 EMG report 'Advancing the Biodiversity Agenda: A UN System-wide Contribution'.[69] This report describes the contributions to biodiversity that are being made by various biodiversity-related conventions and policy sectors.[70]

Examples of practical cooperation within the biodiversity-related MEA cluster include the cooperation taking place among the Chairs of the Scientific Advisory Bodies of the biodiversity-related conventions. There have been five meetings to date in this regard.[71] Here mention could also be made of an arrangement whereby the CITES Secretariat gave its documentation officer for 'loan' to the CMS Secretariat to provide direct assistance with a COP meeting. There are plans for CMS to loan one of its staff to the CITES Secretariat for CoP16. Furthermore, Switzerland has funded the post of a Liaison Officer, reporting to both UNEP and the CBD, under the UNEP's EMG secretariat in Geneva with a view to promoting the coordination of the secretariats of the biodiversity conventions for the implementation of the Aichi targets.

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65 See *supra* note 12.

66 See CITES, 'Modus Operandi for the Liaison Group of the Biodiversity-related Conventions', available at <http://www.cites.org/eng/news/sundry/2011/201109-blg-modus-operandi-en.pdf> (visited 21 January 2013).

67 See <http://www.unemg.org/Home/tabid/1120/Default.aspx> (visited 7 June 2012).

68 See <http://www.unemg.org/MeetingsDocuments/IssueManagementGroups/Biodiversity/tabid/1225/Default.aspx> (visited 7 June 2012).

69 UNEP, Advancing the Biodiversity Agenda: A UN System-wide Contribution (UNEP, 2010), available at <http://www.unemg.org/Portals/27/Documents/IMG/Biodiversity/BIODIVERSITY_Agenda_Corrections_finales_.pdf> (visited 7 June 2012).

70 A useful 'mapping exercise' which identifies the contribution that each United Nations agency and convention can make to the different specific Targets is available at EMG, 'Mapping: Contributions of the UN Agencies and Conventions to the Aichi Targets', available at <http://www.unemg.org/>; link to CBD, 'Progress Report on the Contribution of the United Nations System to the Strategic Plan for Biodiversity (2011–2020) prepared by the UN Environment Management Group (EMG)', available at <http://www.cbd.int/doc/meetings/cop/cop-11/information/cop-11-inf-05-en.pdf> (visited 21 January 2013).

71 See CITES, 'Fifth Meeting of the Chairs of the Scientific Advisory Bodies of the Biodiversity-related Conventions (CSAB), Dublin, Ireland, 25 March 2012, hosted by CITES', available at <http://www.cites.org/eng/news/calendar/2012/CSAB5_agenda.pdf> (visited 20 November 2012).

MEA focal points[72] in UNEP regional offices, such as the Regional Office for Asia and the Pacific, and regional bodies like the Secretariat of the Pacific Regional Environment Programme[73] offer other means for biodiversity-related conventions to cooperate. For example, CITES, Ramsar and CMS have organized back-to-back training for the UNEP regional focal points for biodiversity-related MEAs.

Perhaps most importantly, states need to be actively supported in bringing together different convention focal points in the revision and implementation of their NBSAPs and in linking these plans to other processes such as the United Nations Development Assistance Framework.[74]

4.5 Information and knowledge management

The MEA Information and Knowledge Management Initiative[75] was established in 2006 and currently includes 35 MEA secretariats (for global and regional conventions), UNEP and other host organizations as partners. The Initiative can provide the foundation for coherent decision-making as well as other practical synergy. It may also be able to help governments or secretariats better deal with staff turnover. The initiative is increasing technical capacity at the secretariat level to develop interoperable systems; the first output is InforMEA,[76] which is a service collating and making available MEA-related information (for instance, COP decisions, news, membership and reports). Other aspects of the Initiative concern online and streamlined reporting, and the possibility of direct data entries being made in order to obviate the need for classical reporting.

Within CITES, its work on and tools for electronic permitting will enhance the management of trade information. This could also assist the implementation of the Nagoya Protocol on Access and Benefit-sharing.[77] These efforts have been country-driven and have ensured coherence with United Nations and World Customs Organization (WCO)[78] data models. In addition, it could be mentioned that CITES has launched a Virtual College[79] on its website. The initiative could even lead to a broader 'university' amongst biodiversity-related conventions in the future.

The recently established Intergovernmental Science – Policy Platform on Biodiversity and Ecosystem Services (IPBES)[80] is expected to assist scientists and policy-

[72] Meaning 'Focal points for biodiversity-related MEAs'.
[73] See <http://www.sprep.org/>.
[74] See <http://www.undg.org/?P=232> (visited 7 June 2012).
[75] See <http://www.cbd.int/mea/ikm/>.
[76] See <http://informea.org/>.
[77] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, <http://www.cbd.int/abs/>.
[78] See <http://www.wcoomd.org/home.htm>.
[79] See <https://eva.unia.es/cites/>.
[80] See <http://www.ipbes.net>.

makers in the biodiversity field. The CITES Secretariat and chairs of its scientific bodies, together with other convention secretariats and chairs of scientific bodies, have actively participated in the discussions on and establishment of the Platform. Early in the process CITES formulated the following objectives for the work of the IPBES:

- support and establish a regular process for seeking the views and understanding the needs of biodiversity-related conventions;
- support access to reliable existing knowledge and generate knowledge on and facilitate regular assessments of the conservation and sustainable use of key species in ecosystems, including their economic valuation;
- [avoid] duplication of the work of existing MEAs; and
- improve access to knowledge, document best practice in the use of science, provide capacity-building support to carry out applied science, and ensure that decision-makers and policy-makers benefit from capacity-building on how to obtain, interpret and use scientific advice.[81]

The CITES Standing Committee also agreed that the national Management Authorities should be encouraged to coordinate and enhance information exchange with their competent national authority for IPBES.[82]

The Chairs of Scientific Advisory Bodies of the biodiversity-related conventions provided joint input to the April 2012 IPBES meeting. A joint statement was also prepared by the convention secretariats and chairs. Additional efforts of this kind will be made in the future. For example, the CITES Secretariat, along with other biodiversity-related convention secretariats, is planning to attend the first meeting of the Plenary for IPBES.

4.6 Outreach and education

The Strategic Plan for Biodiversity and its Aichi targets serve as a basis for the development of communication tools capable of attracting the attention of and engaging stakeholders. In addition, the Biodiversity Liaison Group[83] members have agreed on an outreach strategy for the UN Decade on Biodiversity 2011–2020.[84]

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[81] UNEP Plenary meeting to determine modalities and institutional arrangements for an intergovernmental science-policy platform on biodiversity and ecosystem services, First session, Recommendations of the 61st Standing Committee of the Convention on International Trade in Endangered Species of Wild Fauna and Flora on an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, Note by the secretariat, UN Doc. UNEP/IPBES.MI/1/INF/16 (2011), 2. See also CITES, 'CoP16 – Strategic matters: Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services', available at <http://www.cites.org/eng/cop/16/doc/E-CoP16-17.pdf> (visited 26 December 2012).

[82] See 'Note by the secretariat', *ibid*.

[83] See, generally, CBD, 'Liaison Group of Biodiversity-related Conventions', available at <http://www.cbd.int/blg/> (visited 20 November 2012).

[84] See <http://www.cbd.int/2011-2020/>.

In conjunction with the 61st CITES Standing Committee meeting, held in Geneva in August 2011, the Government of Switzerland, in partnership with the Japanese presidency of CBD COP-10, hosted the official launch of the UN Decade on Biodiversity for Europe with the participation of the secretariats of CBD, CITES and Ramsar.[85]

The Baeza Masters and Doctoral courses (in the Management of, Access to and Conservation of Species in Trade) offered by the International University of Andalucia in Spain cover both CITES and CBD, as well as the economics of ecosystems and biodiversity.[86] CITES supports these courses, for instance through scholarships funded by several CITES donor Parties and through the Secretariat providing resource persons.[87]

4.7 Conservation and sustainable use of species

CITES and the Convention on Migratory Species have developed a revised joint work plan which includes activities on: harmonized taxonomy; coherence in CITES and CMS Appendices (there are apparent inconsistencies in the listing of 17 shared species); and coherent/mutually supportive implementation in respect of shared animal species such as elephants, gorillas, saiga antelope, and sharks.[88]

CITES cooperates with the CBD under the Global Strategy for Plant Conservation[89] and will, through ongoing fulfillment of its mandate, contribute to Aichi target 12 (which is that '[b]y 2020 the extinction of known threatened species [will have] been prevented and their conservation status, particularly of those most in decline, [will have] been improved and sustained'), amongst others. A draft resolution on cooperation between CITES and the GSPC has been proposed by the CITES Plants Committee for consideration at COP16.[90]

Another example of practical cooperation in species conservation is the FAO/CITES workshop on the conservation and sustainable use of sharks, which was held in 2010.[91] Participants included the CMS Secretariat and experts from various governments, academia, the private sector and non-governmental organizations.

[85] See, generally, on the UN Decade on Biodiversity, <http://www.cbd.int/2011-2020/>.

[86] For a description of these degree courses, see <http://www.unep.org/dec/onlinemanual/Enforcement/InstitutionalFrameworks/TrainingActivities/Resource/tabid/1096/Default.aspx> (visited 19 June 2012).

[87] See, for instance, CITES, 'Notification to the Parties: Master's course on Management, Access and Conservation of Species in Trade: the International Framework', 21 March 2012, available at <http://www.cites.org/eng/notif/2012/E028.pdf> (visited 20 November 2012).

[88] See CITES, 'Report of the Sixty-second meeting of the Standing Committee, 23–27 July 2012, Strategic matters: Cooperation with other organizations: Convention on the Conservation of Migratory Species, available at <http://www.cites.org/eng/com/SC/62/E62-14-03.pdf> (visited 20 November 2012).

[89] See CBD, 'Updated Global Strategy for Plant Conservation 2011-2020', <http://www.cbd.int/gspc/>.

[90] See CITES, 'Twentieth meeting of the Plants Committee, Dublin, 22–30 March 2012 – Global Strategy for Plant Conservation of the Convention on Biological Diversity (Decision 15.19): Report of the Working Group', available at <http://www.cites.org/eng/com/pc/20/E20-13.pdf> (visited 26 December 2012).

[91] See the Report of the FAO/CITES Workshop to Review the application and Effectiveness of Interna-

Work is ongoing to strengthen links between listed species and protected areas (for instance, Ramsar sites, natural heritage sites, biosphere reserves, and migration corridors).[92]

4.8 Economics and trade

A number of activities have been identified that could be jointly undertaken in the area of trade.[93] These include, for instance, requests for observer status in World Trade Organization (WTO)[94] bodies, and preparation and distribution of capacity-building materials on biodiversity and trade.

CITES and CBD have collaborated for some time on the issue of economic incentives. Moreover, CITES and other biodiversity-related conventions have contributed to important publications such as the Economics of Ecosystems and Biodiversity report[95] and the Green Economy Report.[96]

CITES (together with the International Plant Protection Convention,[97] the World Organization for Animal Health (OIE),[98] WTO, FAO, the International Maritime Organization (IMO)[99] and others) is a member of the Inter-Agency Liaison Group on Invasive Alien Species (LG/IAS)[100] established under the CBD. In 2012, the World Trade Organisation organized a seminar on International Trade and IAS, at which it was reported that 'work on trade rules for protecting plants is starting to take biodiversity and the invasion of alien species into account more specifically'; and various recommendations were made, including that there ought to be 'improved coordination between ministries and other agencies within countries, between coun-

tional Regulatory Measures for the Conservation and Sustainable Use of Elasmobranchs, FAO Fisheries and Agriculture Report No. 984 (2012), available at <http://www.cites.org/common/com/AC/26/E26-06i.pdf> (visited 8 June 2012).

92 See, for instance, CBD, 'Programme of Work', <http://www.cbd.int/protected/pow/learnmore/intro/>. At CBD COP 11, a side-event on strengthening such links was hosted by CITES, the CBD, the CMS and UNEP. See, for instance, CITES, CMS, UNEP & SCBD, 'Reconnecting Species with Ecosystems: Why Species Matter', 18 October 2012, available at CBD, 'COP 11- Side Events and Parallel Meetings', <http://webcast.cbdcop11india.in/?page_id=767> (visited 21 January 2013); and ENB/IISD, 'COP 11 Side Events Highlight Financing, Reporting, Ecological Networks and Flagship Species', 19 October 2012, available at <http://biodiversity-l.iisd.org/news/cop-11-side-events-highlight-financing-reporting-ecological-networks-and-flagship-species/> (visited 21 January 2013).

93 See, for instance, CITES, 'Workshop on economic incentives and trade policy', Geneva 1–3 December 2003, available at <http://www.cites.org/eng/prog/economics.php> (visited 21 January 2013). See, also, Wijnstekers *Evolution supra* note 7, 'Ch. 23: Economic Incentives and Trade Policy', 379–382.

94 See <http://www.wto.org>.

95 See TEEB, 'The Economics of Ecosystems and Biodiversity: Making Nature's Values Visible', available at <http://www.teebweb.org/>.

96 UNEP, *Green Economy Report. Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (UNEP, 2011), available at <http://www.unep.org/greeneconomy/greeneconomyreport/tabid/29846/default.aspx> (visited 8 June 2012).

97 International Plant Protection Convention, Rome, 6 December 1951, into force 3 April 1952, 150 *United Nations Treaty Series* 67.

98 See <http://www.oie.int/>.

99 See <http://www.imo.org>.

100 See <http://www.cbd.int/invasive/lg/>.

tries and within regions – the agencies' concerned have diverse responsibilities, from law enforcement, customs and trade to agriculture, fisheries, forestry and environmental protection'.[101]

4.9 Millennium Development Goals, livelihoods and local communities

Some years ago, BLG members agreed on a joint statement about their contribution to the Millennium Development Goals[102] specifically Goal 1 (poverty reduction) and Goal 7 (environmental sustainability).[103]

CITES, together with CBD, CMS, FAO and the UNEP-World Conservation Monitoring Centre (WCMC),[104] provided important technical support when the Government of Austria and the European Commission organized a symposium on '[t]he relevance of community-based natural resource management (CBNRM) to the conservation and sustainable use of CITES-listed species in exporting countries' in Vienna in 2011. A publication has now been produced from the symposium.[105] The publication contains 22 chapters under the headings, 'introduction', 'global context', 'community-based conservation case studies', 'working group reports' and 'conclusion' - according to the concluding chapter, a problem is that there is a lack of understanding of what CBNRM means, but 'CBNRM is making an important contribution to conservation efforts in many of the poorer parts of the world'.[106]

Another innovative and useful meeting was that of the CBD Liaison Group on Bushmeat[107] and the CITES Bushmeat Working Group (Central Africa) (CBWG),[108] which was jointly organized by the CBD and CITES Secretariats in Nairobi during June 2011 and which involved FAO and other relevant organizations. The CBWG was established in April 2000 and comprises Central African Range States with their Wildlife Directors as Members. It has as its goals policy and legislation review, public awareness, bushmeat monitoring and information management, wildlife authority structure review, and wildlife management in logging concessions. According to its Report, the meeting allowed the members of the Working Group to 'harmonize

[101] See WTO, Defending biodiversity from 'alien species' — role of trade rules examined', 12–13 July 2012, available at <http://www.wto.org/english/news_e/news12_e/sps_18jul12_e.htm> (visited 20 November 2012).

[102] See <http://www.un.org/millenniumgoals/>.

[103] See CITES, 'Liaison Group of the Biodiversity-Related Conventions, Fourth Meeting of the Liaison Group of the Biodiversity-related Conventions, Bonn, Germany, 4 October 2005 – Report', available at <http://www.cites.org/common/disc/coop/BLG-4-rep-en.pdf> (visited 20 November 2012).

[104] See <http://www.unep-wcmc.org/>.

[105] Max Abensperg-Traun, Dilys Roe and Colman O'Criodain (eds), *CITES and CBNRM: Proceedings of an international symposium on "The relevance of CBNRM to the conservation and sustainable use of CITES-listed species in exporting countries"* (IUCN Species Survival Commission No. 46, 2011), available at <http://data.iucn.org/dbtw-wpd/edocs/SSC-OP-046.pdf> (visited 20 November 2012).

[106] Colman O'Criodain, 'CITES and community-based conservation: Where we go from here?', *ibid*, 135–141 at 141.

[107] See <http://www.cbd.int/doc/?meeting=LGBUSHMEAT-02> (visited 19 June 2012).

[108] See <http://www.bushmeat.org/about_bctf/engaging_with.../cites_summary> (visited 19 June 2012).

their approach to the CITES bushmeat issue'; enabled 'development partners to understand the need to support Parties in the search for sustainable solutions'; and resulted in the indigenous communities agreeing 'to help CITES Management Authorities identify the species most consumed as bushmeat by using their traditional knowledge'.[109] There will be a report of the Central Africa Bushmeat Working Group at CITES COP 16 in March 2013.[110]

4.10 Compliance

The *Guide to CITES compliance procedures* is contained in the Annex to Resolution Conf. 14.3 of the Conference of the Parties. The content of and experience gained with these procedures has been shared with other convention secretariats and participants in compliance-related meetings. CITES and other conventions have also contributed to UNEP guidelines, manual and workshops on compliance with and enforcement of MEAs.[111]

In general, governments and secretariats have consulted each other in the development of MEA compliance regimes, and they could use similar consultations to address potential compliance problems that are identified. There is scope for the biodiversity-related conventions to increase their cooperation and synergy in this area. An important aspect in this regard is that the sharing of detailed information and experience makes the identification and resolution of specific compliance matters more precise and effective. For instance, recent CITES regional capacity-building workshops are aimed at doing what is needed to withdraw existing trade suspensions under the Convention or by the European Union. Importantly, UNEP regional focal points for biodiversity MEAs have participated in such workshops. According to UNEP, countries and national focal points 'struggle to implement MEAs in a coordinated manner' and often, 'instead of implementing MEAs through a thematic, clustered approach', implement them 'on an *ad hoc* MEA-by-MEA basis'. UNEP's project aims, through its regional focal points for biodiversity MEAs, to 'assist countries to fill the implementation gap by providing technical and advisory services for synergistic implementation of MEAs'.[112]

[109] CITES, 'Report of the Meeting of the Central Africa Bushmeat Working Group held on 10 June 2011 in Nairobi, Kenya', available at <http://www.cites.org/eng/com/sc/61/E61-42-A.pdf> (visited 23 November 2012).

[110] See CITES, 'COP 16: Provisional agenda and working documents', agenda item 70: 'Report of the Central Africa Bushmeat Working Group', and link to 'Rapport du Groupe de Travail D'Afrique Centrale sur la Viande de Brousse a la 16ème Conference des Parties de la CITES (Thailande)', not yet in translation, available at <http://www.cites.org/common/cop/16/doc/E-CoP16-70.pdf> (visited 21 January 2013).

[111] For more information about the work and publications of UNEP in this field, see <http://www.unep.org/DEC/support/Cross_Cutting/Compliance_Enforcement.asp> (visited 8 June 2012).

[112] UNEP DELC, 'Implementation of Specific MEA Clusters', http://www.unep.org/delc/ImplementationofspecificMEAclusters/tabid/101087/Default.aspx> (visited 24 November 2012).

4.11 Legislation and law enforcement

There has been some, but not much, cooperation among biodiversity-related conventions on national legislation.[113]

CITES has been developing a strengthened Regulatory Services team within the Secretariat. This has included the addition of a new Chief of Enforcement Support who has a background in policing, and experience with INTERPOL and wildlife; a new enforcement support officer who has a national police, intelligence analysis and environmental enforcement background; and an environmental prosecutor seconded by the Attorney General of Sao Paolo, Brazil.

The International Consortium on Combating Wildlife Crime (ICCWC)[114] is a 'collaborative effort by five inter-governmental organizations working to bring coordinated support to the national wildlife law enforcement agencies and to the sub-regional and regional networks'. The CITES Secretariat, INTERPOL,[115] the United Nations Office on Drugs and Crime (UNODC),[116] the World Bank[117] and the World Customs Organisation (WCO)[118] are the five organizations involved.[119] The initiative continues to develop and there is growing interest by other organizations to work with ICCWC.

The Green Customs Initiative has been described as an 'unprecedented partnership of international organizations cooperating to prevent the illegal trade in environmentally-sensitive commodities and facilitation of the legal trade in these'; with its objective being to 'enhance the capacity of customs and other relevant enforcement personnel to monitor and facilitate the legal trade and to detect and prevent illegal trade in environmentally-sensitive commodities covered by the relevant conventions and [MEAs]'.[120] Its partners include the secretariats of certain MEAs (Basel, Cartagena, CITES, Montreal,[121] Rotterdam, Stockholm), Interpol, the Organisation for the

[113] See, for instance, *ibid.*, where it has been suggested that '[a]t the national level UNEP would assist countries to develop national approaches to synergistic implementation of MEAs, providing policy advice and technical assistance and training to national focal points'. Also, see Ramsar, 'Options for enhanced cooperation among the biodiversity-related conventions', available at <http://www.ramsar.org/cda/en/ramsar-pubs-cop9-9th-meeting-of-the-17288/main/ramsar/1-30-169%5E17288_4000_0__> (visited 24 November 2012); and, generally, UNEP/WCMS/Ministry of Environment of Finland, 'Promoting Synergies within the Cluster of Biodiversity-related Multilateral Environmental Agreements', April 2012, <http://www.unep-wcmc.org/medialibrary/2012/04/27/8b832e8c/Final_MEA_synergies_27April2012_cover.pdf> (visited 24 November 2012).

[114] CITES, 'Information Note: What is ICCWC?', April 2011, available at <http://www.cites.org/eng/prog/iccwc.php> (visited 24 November 2012).

[115] See <http://www.interpol.int>.

[116] See <http://www.unodc.org/>.

[117] See <http://www.worldbank.org/>.

[118] See <http://www.wcoomd.org/home.htm>.

[119] See UNEP/WCMS/Ministry of Environment of Finland, 'Promoting Synergies', *supra* note 113.

[120] Green Customs, 'About Green Customs', <http://www.greencustoms.org/background/> (visited 24 November 2012).

[121] Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, <http://www.unep.org/ozone/>.

Prohibition of Chemical Weapons,[122] UNEP, the United Nations Office on Drugs and Crime (UNODC) and the World Customs Organization.[123] CITES has actively contributed to the Green Customs Initiative through written and electronic capacity-building materials and participation in training workshops. In the latter, it has emphasized the enhancement of practical skills like species and product identification as distinguished from general awareness-raising.

5 Conclusion and future actions

As has been suggested by the CITES Secretary-General,[124] Global Biodiversity Outlook 3 provided a stark reminder of the challenges that lie ahead in achieving the conservation and sustainable use of biodiversity The Secretary-General further suggested that the 'reality is that there is no one convention or organization that can alone address the challenges that lie ahead in achieving the conservation and sustainable use of biodiversity' and that we therefore need 'all hands on deck'.[125]

Within its very specific mandate, CITES intends to continue to play its part both jointly with other conventions and individually. For example, progress on the alignment of the CITES Strategic Vision: 2008–2013 with the Strategic Plan for Biodiversity 2011–2020 and its Aichi targets was reported to the 62nd meeting of the CITES Standing Committee in July 2012.[126] The Report of the Committee will be put forward for consideration at the 16th meeting of the CITES COP (Bangkok, March 2013).[127]

The outcomes of the 2010 High-level Retreat mentioned above,[128] the joint statement of CITES, CMS, Ramsar and WHC at CBD COP-10[129] and the outcomes of

[122] The Organization for the Prohibition of Chemical Weapons (OPCW) – Chemical Weapons Convention, <http://www.opcw.org>.

[123] Green Customs, 'Green Customs Partners', *supra* note 120.

[124] John E. Scanlon, 'CITES' Contribution to the New Strategic Biodiversity Plan 2011-2020 and Aichi Biodiversity Targets', September 2011, <http://biodiversity-l.iisd.org/guest-articles/cites%e2%80%99-contribution-to-the-new-strategic-biodiversity-plan-2011-2020-and-aichi-biodiversity-targets/> (visited 24 November 2012).

[125] *Ibid*.

[126] See CITES, 'Sixty-second meeting of the Standing Committee, Geneva (Switzerland), 23–27 July 2012: Analysis of how EMG Member Goals, Objectives, Targets and/or Strategies Contribute to Achieving the Aichi Biodiversity Targets Established in the CBD Strategic Plan for Biodiversity 2011–2020 (COP Decision X/2)', available at <http://www.cites.org/eng/com/SC/62/Inf/E62i-04.pdf> (visited 24 November 2012). (Note: 'EMG' refers to the Environment Management Group, a United Nations system-wide coordination body.)

[127] See, for instance, CITES, 'COP 16: Bangkok (Thailand), 3–14 March 2013: Provisional Agenda and Working Documents', available at <http://www.cites.org/eng/cop/16/doc/index.php> (visited 24 November 2012).

[128] See *supra* note 53.

[129] 'Statement to the High-Level Segment of CBD-COP 10 in Nagoya', 28 October 2010, available at <http://www.ramsar.org/pdf/CBD-COP10-joint-statement-281010.pdf> (visited 24 November 2012).

the Nagoya meeting[130] reflect a new era of cooperation among the biodiversity-related convention secretariats – one that fully respects the autonomy of each governing body and has its sights firmly fixed on more effective on-the-ground implementation of the conventions. The joint statement, which was delivered by the Secretary-General of CITES, was an intervention by the Executive Heads of the Secretariats of the: Convention on Wetlands of International Importance; Convention Concerning the Protection of the World Cultural and Natural Heritage; Convention on International Trade in Endangered Species of Wild Fauna and Flora; and the Convention on Migratory Species. The four conventions were described as each having 'a very specific mandate', but, 'while [being] more targeted in scope than the CBD, [] contribut[ing] towards achieving the same objectives of supporting the conservation and sustainable use of biodiversity'.[131] The conventions were further described in the joint statement as being 'joined by a common objective of supporting the conservation and sustainable use of biodiversity, and by a collective desire to see more effective implementation of conventions at the country level'.[132]

With these and further synergies, the effectiveness of and coherence among the different conventions can be enhanced, and – with the different conventions playing different but cooperative roles within a network – the conservation and sustainable use of biological diversity worldwide will be more achievable.

[130] See *supra* notes 49 and 50.
[131] See *supra* note 124.
[132] See *supra* note 124.

Part IV

Interactive Negotiation Skills

A Drafting Exercise on Biodiversity and Synergies

Sylvia Bankobeza[1]

1 Introduction

In previous years, a number of participants on the UNEP – University of Eastern Finland (UEF) Course on Multilateral Environmental Agreements requested, through evaluation submissions, an 'introduction to negotiation' session from which they could gain a general understanding of issues relating to multilateral negotiations and the related processes. This was regarded as an important way to improve the participants' general understanding of the processes before getting into the details of the major negotiation simulation exercises, which are focused on the theme of each particular year's Course. To address this need, the 2011 MEA Course programme envisaged a session on a 'Negotiation Primer' which included a presentation entitled 'Introduction to negotiations' and a presentation on 'MEA techniques'. These focused on the processes of MEA negotiations and the technicalities of negotiations. The issues covered by the two presentations included general introductory issues of negotiations and issues relating to the conduct of business in MEA meetings; drafting issues; strategic issues; and process issues and violations.[2] After the presentations the participants broke into three groups for the drafting exercise which is described below.

2 The exercise

The purpose of the drafting exercise was to enable the participants to use the skills they had acquired during the introductory presentations to make interventions, sug-

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[2] See Sylvia Bankobeza, 'Multilateral Environmental Diplomacy and Negotiations' in Part I of the present *Review*.

gest text, review and amend text, add new language, delete and 'clean up' brackets. In this context, each of the three drafting groups was given a sample decision and general 'guidance information' to guide its work. The decisions were retrieved, modified or crafted (either with brackets/blanks/optional words) from previous decisions of the Conferences of the Parties relating to MEA synergies: two were posited as being from the Convention on Biological Diversity (CBD)[3] and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[4] decisions respectively, and the third was crafted as a UNEP Governing Council decision. The decisions are fictitious and made only for the purpose of conducting the drafting exercise.

The drafting groups were constituted randomly by having participants call out numbers. The approach taken by each group was to give time to each participant within the group to review the sample decision. The next step was for each group to elect a Chair from amongst the group members who would invite parties initially to make their opening statements expressing opposition or support around square brackets; and/or expressing their intention to revise or delete text. The participants were expected to follow the rules of procedure when seeking permission to speak through the Chair. The Chair of each group was under instruction to assert him or herself as he or she exercised his or her authority according to the rules of procedure, in order to give an opportunity to various speakers within the group to express their views and proposals.

The second round of interventions was particularly related to making amendments on the decisions of each group. As a result, parties in several groups made interventions ultimately intended to clean up the texts. Every group was called upon to add two or more new paragraphs or texts. In this regard, participants had the liberty to suggest new text as long as they could justify this later when reporting back to the participants as a whole.

Each group was given an opportunity to report back on their comments and/or amendments to the draft decision before all of the participants. In particular, they reported on how the group was organized in making interventions according to the rules of procedure; and how they used their skills in drafting to clean up the text. There was feedback given from the group, other groups, and overall feedback from the organizers for each of the group presentations. Since the decisions were fictitious, there were no right or wrong particular answers – all that was required was for a group to justify why it chose a particular formulation or text.

[3] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

[4] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>.

3 Sample decisions used in the groups

3.1 Sample decision 1

CONFERENCE OF THE PARTIES TO A MULTILATERAL ENVIRONMENTAL AGREEMENT (MEA)

Fifth meeting
18-29 October 2000
Agenda item 4.3 (b)
DECISION ADOPTED BY THE CONFERENCE OF THE PARTIES OF AN MEA AT ITS FIFTH MEETING
X/5. National reporting: review of experience and proposals for the fifth national report
The Conference of the Parties,
Re-emphasizing [recognising] that national reporting is the obligation for all Parties under Article 26 of the Convention, and that timely submission of national reports by all Parties is essential for reviewing the implementation of the Convention as required in Article 23,

1. *Adopts* the guidelines for the fifth national report as contained in the annex to this decision, *noting* that these may be supplemented by additional guidance from its eleventh meeting;
2. *Decides [urge]* that all Parties should [must] [shall] submit their fifth national report by 31 March 2014;
3. *Encourages* [recognizes that] all Parties to prioritize the preparation of their fifth national report to enable its submission by the deadline established in paragraph 2 above, irrespective of the status of submission of reports requested at previous meetings of the Conference of the Parties;
4. *Requests* [urges] those Parties that expect difficulty in meeting the deadline set in paragraph 2 above to initiate the preparation of the report as early as possible to ensure that the report will be submitted by the deadline;
5. *Requests[decides]* the Global Environment Facility to provide adequate and timely financial support for the preparation of the fifth and future national reports, and further *requests* the Global Environment Facility and its implementing agencies to ensure that procedures are in place to ensure an early and expeditious disbursement of funds;
6. *Invites [calls on]* other donors, Governments and multilateral and bilateral agencies to provide financial and technical support to developing countries, in particular the least developed countries and small island developing States, as well as countries with economies in transition, for preparing their national reports;
7. *Decides* [requests] that the fifth national report should:

(a) Focus on the implementation of the Strategic Plan for Biodiversity 2011-2020, and progress toward the Aichi Biodiversity Targets, using indicators where possible and feasible, including application, as appropriate, of global headline indi-

cators contained in decision VIII/15 and additional indicators that may be adopted at its eleventh meeting for measuring progress towards the Aichi Biodiversity Targets;

(b) Quantitative analysis and synthesis on the status of implementation of the Convention in particular the Strategic Plan for Biodiversity 2011-2020 and national biodiversity strategies and action plans;

10. *Decides* that the fifth national report will use a narrative format where appropriate, combined with use of suggested tools, including tables, charts and questionnaires for statistical analysis, and that the format for the fifth and sixth national reports should be consistent to allow for long-term tracking of progress towards the Aichi Biodiversity Targets;
11. *Encourages* [urges] Parties to continue to involve all relevant stakeholders, including indigenous and local communities, in the process of national reporting, and to use the report as a tool for further planning and communication to the public to mobilize additional support for and participation in activities related to implementation of the Convention;
12. *Encourages* [calls upon] Parties to increase synergies in national reporting under biodiversity-related conventions to ensure that national reports comprehensively reflect the national situation and status of implementation, and to avoid unnecessary reporting burdens;
13. *Requests* [urges] the Executive Secretary to prepare a resource manual providing further suggestions for the preparation of the fifth national reports, drawing upon, *inter alia,* experience and examples from the fourth national reports, other relevant international work including the outcome of the ad hoc technical expert group on indicators. The resource manual should include suggestions for common formats, tables and charts to aid reporting. A first edition should be available before the end of 2011, and the manual should be maintained up to date in the light of new information that may become available. The manual should be made available in the six official United Nations languages.

3.2 Sample decision 2

CONFERENCE OF THE PARTIES OF AN MEA
Fifth meeting
London 18–29 October 2000
Agenda Item 4

DECISION ADOPTED BY THE CONFERENCE OF THE PARTIES TO AN MEA at ITS FIFTH MEETING
X/8. United Nations Decade on Biodiversity 2011-2020
The Conference of the Parties,
Highlighting [recognizing] the importance of biodiversity for the achievement of the Millennium Development Goals,

Emphasizing [calling for] the need to achieve the full implementation of the objectives of this Convention and other biodiversity-related conventions, organizations and processes,
Reaffirming the importance of raising public awareness on biodiversity related issues,
Stressing the need to build on the momentum achieved by the celebration of the International Year of Biodiversity,

1. *Invites [calls upon][encourages]* the United Nations General Assembly to consider declaring 2011-2020 the United Nations Decade on Biodiversity;
2. *Requests* [*calls upon*] [*decides*] the Executive Secretary, in cooperation with relevant partners, in particular the secretariats of biodiversity-related conventions:

(a) To encourage full participation of Parties, and all relevant organizations and stakeholders in the United Nations Decade on Biodiversity and their support for implementation of the Convention and the Strategic Plan for Biodiversity 2011-2020;
(b) To take stock of progress in the implementation of the Strategic Plan, and related activities of Parties and stakeholders, with a view to including this information in the regular reports of the Secretary-General to the United Nations General Assembly on the implementation of the Convention;

3. *Invites [urges]* the Environment Management Group to facilitate cooperation and information exchange among its members in support of the Convention and its Strategic Plan for Biodiversity 2011-2020.

3.3 Sample decision 3

Resolution Conf. 10.4 (Rev. CoP14)*
Cooperation and synergy with the Convention on Biological Diversity
WELCOMING decision III/21 of the Conference of the Parties to the Convention on Biological Diversity, which endorsed the Memorandum of Understanding between the CITES Secretariat and the Secretariat of the Convention on Biological Diversity;
EXPRESSING appreciation for the cooperation and cordial relationship that has been developed between the two Secretariats;
AWARE that decision III/21 of the Conference of the Parties to the Convention on Biological Diverisity invites (calls upon) "the governing bodies of biological-diversity-related conventions to consider the possible contributions of those conventions to the implementation of the objectives of the Convention on Biological Diversity, and to share experience with the Conference of the Parties on, inter alia, successful management practices";
RECALLING that the Conference of the Parties to the Convention on Biological Diversity has invited "contracting Parties to relevant biological-diversity-related conventions to explore opportunities for accessing funding through the Global Environment Facility for relevant projects involving a number of countries, which fulfil the eligibility criteria and guidance provided by the Conference of the Parties to the Convention on Biological Diversity to the Global Environment Facility";

RECALLING also Chapter 38 of Agenda 21 and welcoming decision 19/9c of the Governing Council of UNEP which "recognizes the importance of the Programme's role in promoting and supporting cooperation and coordination with and amongst environmental agreements and their secretariats" and "requests the Conference of the Parties of the relevant conventions to encourage their respective convention secretariats to engage and continue to participate actively in the coordination process";
NOTING the proposal to explore the revival of the Ecosystem Conservation Group, which would meet within the context of UNEP's meetings on coordination of Secretariats of environmental conventions;
RECOGNIZING that UNEP should undertake such tasks in full cooperation with the Conference of the Parties;

THE CONFERENCE OF THE PARTIES TO THE CONVENTION
CALLS upon [*requests*][*urges*] the CITES Secretariat and the Secretariat of the Convention on Biological Diversity to coordinate their programme activities particularly through the UNEP coordination meetings;
SUGGESTS [*calls upon*] that Parties, as appropriate to their national circumstances and to encourage synergy, take measures to achieve coordination and reduce duplication of activities between their national authorities for each Convention;
CALLS upon [*urges*] Parties to explore opportunities for obtaining funding through the Global Environment Facility for relevant projects, including multilateral projects, which fulfill the eligibility criteria and guidance provided by the Conference of the Parties to the Convention on Biological Diversity to the Global Environment Facility;
RECOMMENDS [*Requests*] that the Secretariat investigate opportunities whereby CITES can become a partner in the implementation of appropriate provisions of the Convention on Biological Diversity; and
DIRECTS [*Decides*] the Chairman of the Standing Committee to transmit to the Conference of the Parties to the Convention on Biological Diversity this and other relevant Resolutions and Decisions adopted at the 10th and all future meetings of the Conference of the Parties.

3.4 Sample decision 4

UNEP Special Session of the Governing Council,
Item 4b
Decision adopted at the Special Session of the Governing Council, Global Ministerial Forum of the Environment;
The Governing Council,
Acknowledging that Biodiversity is at the core of human existence;
Recognizing that biodiversity is threatened by rapid global change and pressure from ecosystem degradation and change.
Also recognizing that the Biodiversity decade presents an opportunity to address biodiversity loss and to raise public awareness for achieving the 2020 biodiversity target;

Reinforcing [*stressing]* the importance of promoting actions at national, regional and international levels for achieving biodiversity targets.
Welcoming [*takes note of*] the adoption of an international regime on Access and Benefit Sharing in 2010;
Encourage, [*calls upon]* UNEP to continue to play a leadership role in advancing programme activities for developing countries relating to biodiversity and enhancing the understanding of the economics of biodiversity and ecosystems services and its policy implications, through the initiative on The Economics of Ecosystems and Biodiversity.
Decides to support the efforts of the Executive Director to encourage synergies among multilateral environmental agreements in order to improve on environmental governance;
Requests [*directs]* [*instructs*] the Executive Director to report to the next Governing Council on the progress made in the coordination of programme activities of all partners in achieving environmental goals and objectives in the field of bio-diversity.

3.5 Sample decision 5

UNEP Governing Council, Twenty Second Session;
Agenda item 4h
Decision adopted at the twenty second session of the Governing Council, Global Ministerial Forum of the Environment.
The Governing Council,

Recalling the Nusa Dua declaration adopted during the UNEP Special Session of the Governing Council in February 2010;
Recognizing [*stressing*] the importance of enhancing synergies among biodiversity related conventions without prejudice to their specific objectives;
Urges [calls upon][encourages] the Conferences of the Parties of biodiversity related Conventions to increase efforts towards co-operation taking into account relevant experiences from other MEAs;
Welcoming [*taking note of*] [*endorsing]* the efforts being made by various conventions to cooperate with one another during the International Year of Biodiversity,
Encourages [*requests]* [*urges*] Governments to provide the necessary support to the reforms of the international environmental governance system in relation to MEAs;
Requests [*calls upon] [directs]* [*instructs]* the Executive Director to continue exploring ways and means of streamlining the work of multilateral environmental agreements for the purpose of maximizing the use of resources provided.
Decides to mandate UNEP to undertake a study on the ongoing activities coordinated by regional offices that enhance synergies of biodiversity related conventions, and to report on the results at the next session of the Governing Council.

4 Evaluation

Towards the end of the MEA course the overall evaluation sought to obtain the views of the participants on whether the drafting exercise component had enhanced their expertise. The feedback was to a large extent positive, with most participants finding the drafting exercise useful; while others called for more time, emphasis and detail to be given to developing drafting skills. There were differences in the experiences of the participants in the drafting groups which was a concern for some experienced participants who, at times, found it difficult to learn from one another. A useful example of this is that at times many questions were raised in a group by less experienced participants trying to understand processes, such as the UNEP Governing Council and how it works, instead of focusing more on the content in drafting the decision.

The drafting exercise was deliberately separated from the major negotiation simulation exercises on the 2011 Course so that the two would not end up duplicating each other. In this regard, the aim of the drafting exercise was to prepare the participants to negotiate actively during the negotiation simulation exercise session; and to assist participants to think carefully about when to propose particular terms/texts or drafting decisions in MEA meetings, knowing that there might well be implications to such words, phrases and texts. This was the objective rather than addressing thematic issues in detail during the drafting exercise. The issue of redundancy of the drafting exercise session because of its not being merged by the negotiation simulation exercise session, which was raised by one participant as a possible concern, therefore does not arise.

To conclude, two of the 21 feedback comments received from the participants in the drafting exercise component during the Course evaluation could be highlighted:

> I have learnt a lot on the process…..a lot in terms of language and the process of bringing together compromise text.

> …While the exercise focused most on drafting in negotiations, the exercise has only been useful in terms of drafting documents for meetings. It has also helped in providing practical pointers to prepare on to negotiate well and make drafting as a strategic tool to advance positions.

These comments, and others not repeated here, clearly articulated the result of the drafting exercise component of the 2011 UNEP – UEF MEA Course and provide useful feedback toward improving this component of the MEA Course in the future. It is hoped also that this brief description of a relatively small exercise might have pedagogical value for teaching or working groups – or even individuals – trying to improve their understanding of international environmental law-making and diplomacy techniques.

Workshop on the Strategic Plan for Biodiversity 2011–2020 and the Aichi Targets and Synergies

Haruko Okusu[1]

1 Introduction

This paper describes a group work exercise undertaken at the Eighth Annual Course on Multilateral Environmental Agreements, co-organized by the University of Eastern Finland (UEF) and the United Nations Environment Programme (UNEP). The exercise was developed as an interactive skills development aspect within the Course's special theme ('synergies among biodiversity-related conventions'); and focused on considering how synergies might be operationalized by collaboration around the Aichi Biodiversity Targets, and the possible roles that different biodiversity-related conventions could play.

The Aichi Biodiversity Targets constitute the core element of the Strategic Plan for Biodiversity 2011–2020,[2] established and adopted at the Tenth Meeting of the Conference of the Parties of the Convention on Biological Diversity (CBD)[3] held in October 2010, in Nagoya, Aichi Prefecture, Japan. Subsequently, the United Nations General Assembly declared 2011–2020 as the International Decade on Biodiversity.[4]

[1] Biodiversity MEA Focal Point for Asia/Pacific, United Nations Environment Programme; e-mail: haruko.okusu@unep.org.

[2] 'The Strategic Plan for Biodiversity 2011–202 and the Aichi Biodiversity Targets', decision X/2 (2010). See, in general, CBD, 'Strategic Plan for Biodiversity 2011–2020, Including Aichi Biodiversity Targets', available at <https://www.cbd.int/sp/>. It is intended that the Strategic Plan for Biodiversity will run for the decade from 2011 to 2020, and will be the 'overarching framework on biodiversity, not only for the biodiversity-related conventions, but for the entire United Nations system' – and will include the Aichi Biodiversity Targets. *Ibid*.

[3] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

[4] 'Convention on Biological Diversity', UNGA Res. 61/161 (2011). See also, for instance, UN News Centre, 'UN launches Decade on Biodiversity to stem loss of ecosystems', available at <http://www.un.org/apps/news/story.asp?NewsID=40766> (visited 15 June 2012).

The twenty Aichi Biodiversity Targets and the five Strategic Goals under which the targets are grouped[5] are thus considered as an overarching framework on biodiversity, not only for the biodiversity-related conventions but for the entire United Nations System. The CBD describes the Aichi Targets as 'an ambitious plan developed with the purpose of inspiring broad-based action in support of biodiversity over the next decade by all countries and stakeholders'.[6] It calls on Parties to implement them by developing national targets using the Aichi Targets as a flexible framework, and integrate them into the development/revision of National Biodiversity Strategy and Action Plans (NBSAPs).

Other biodiversity-related conventions, particularly the three other multilateral environmental agreements (MEAs) of focus during the Eighth UNEP – UEF Course (i.e. the Convention on Migratory Species (CMS),[7] the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[8] and the Ramsar Convention on Wetlands[9]) have acknowledged the need for increased collaboration. At the time of the UNEP – UEF Course, they had embarked on various efforts to facilitate countries in better integrating the issues under each Convention into their NBSAP work. For example, CITES and CMS had separately prepared a guiding document on the integration of their respective issues into National Biodiversity Strategies and Action Plans.

It is in this context that the group work exercise was undertaken, to move the discussion forward on tools and methodologies that might help countries get a better idea of ways and means to create synergies among biodiversity-related MEAs through the use of the Biodiversity Strategic Plan 2011–20 and the Aichi Targets.

2 Objectives

This group work exercise, which was the first group work in the agenda during the two-week course, was intended to act as an opportunity to review the biodiversity-related MEAs under the focus of this course, recalling and consolidating the presentations given on the subject area for the few preceding days. In particular, the session aimed to:

5 For more on this, see the paper by Marceil Yeater in Part III of the present volume of the *Review*; especially at section 4.3 and footnotes 24, 49 and 60–63.

6 'Review of Progress in Implementation of the Strategic Plan For Biodiversity 2011–2020, Including the Establishment of National Targets and the Updating of National Biodiversity Strategies and Action Plans', UN Doc. UNEP/CBD/WG-RI/4/2 (2012), 1.

7 Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>.

8 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>.

9 Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <http://www.ramsar.org>.

1. review the key mandates and functions the biodiversity-related MEAs play in dealing with biodiversity;
2. consider what synergies might look like in practice by assigning possible role(s) that the MEAs might play in operationalizing each of the Aichi Targets;
3. discuss activities that countries might undertake in putting synergies into practice; and
4. allow participants to interact, encouraging them to become comfortable discussing openly with each other in a cordial and collaborative atmosphere.

The exercise aimed also to 'test-run' a possible real-world study to map out potential detailed roles of biodiversity-related MEAs for each of the 20 Aichi Targets. Such a resource-mapping exercise could produce useful guiding material for countries when they consider the information, tools, and expertise available for use in translating them into national targets, strategy and action plans.

3 Background documents

Three background documents were provided to the participants:

(1) Summary of priority linkages between biodiversity-related conventions and the Aichi Targets (Annex I to this paper). This document had been originally prepared by the author for the purpose of a regional workshop. It was a result of a survey conducted amongst biodiversity-related convention secretariats, who were asked to select those Aichi Targets with most relevance to their conventions, whether this relevance was philosophical, technical, or other. This document aimed to indicate which Aichi Targets have the greatest potential for synergies with each MEA, from the perspective of the convention secretariats.

(2) CITES Draft Guide Contributing to the Development, Review, Updating and Revision of NBSAPs.[10] This Guide was commissioned by the CITES Secretariat to 'gather pertinent information that may be required by the abovementioned target audience in making decisions on how to integrate CITES targets into the NBSAPs'. The target audience includes CITES Management, Scientific, and Enforcement Authorities; competent authorities and scientific institutions of non-Parties; CBD Focal Points;[11] and Global Environment Facility (GEF)[12] Operational Focal Points.[13]

[10] CITES, Contributing to the development, review, updating and revision of National Biodiversity Strategies and Action Plans (NBSAPs): A Draft Guide for CITES Parties (2011), available at <http://www.cites.org/eng/notif/2011/E026A.pdf> (visited 15 June 2012).

[11] For more information, see <http://www.cbd.int/information/nfp.shtml> (visited 17 October 2012).

[12] See <http://www.thegef.org/gef/>.

[13] For more information, see http://www.thegef.org/gef/focal_points (visited 17 october 2012).

(3) CMS Guidelines on the Integration of Migratory Species into National Biodiversity Strategies and Action Plans.[14] This document was commissioned by the CMS Secretariat, with an aim to help CMS Parties to become better 'involved and influence the coming processes of revising and updating NBSAPs', as well as to raise awareness about 'migratory species and their importance for biodiversity and ecosystem functioning' among non-Parties and other non-CMS stakeholders involved in the NBSAP processes. This is achieved by providing an overview of the linkages between the CBD and CMS in terms of legal obligations, measures and tools, as well as a case study of existing NBSAPs and their relevance with migratory species concerns.

The two latter guides were provided as background reading for participants to learn in further detail about the two MEAs, and how the conventions see as their roles in the Aichi Targets and NBSAP revision process.

4 Introduction to the exercise

The participants were introduced to the group work exercise by first revisiting the Strategic Plan for Biodiversity 2011–20 and the Aichi Targets; hopefully appreciating the central role these can play as part of the synergy process amongst biodiversity-related MEAs. They were then asked to vote for one Target per Strategic Goal that they felt would be important for their respective countries. At this point, the participants were not given explanations as to what the group exercise would entail.

The voting process was open for a few hours for participants to revisit the Aichi Targets if necessary and consider their options. The voting results (see Figure 1 below) were then presented to the participants to show the five Aichi Targets selected for the group exercise. They were:

> Strategic goal A. Address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society.
> Target 1: By 2020, at the latest, people are aware of the values of biodiversity and the steps they can take to conserve and use it sustainably.
>
> Strategic goal B. Reduce the direct pressures on biodiversity and promote sustainable use.
> Target 7: By 2020 areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity.

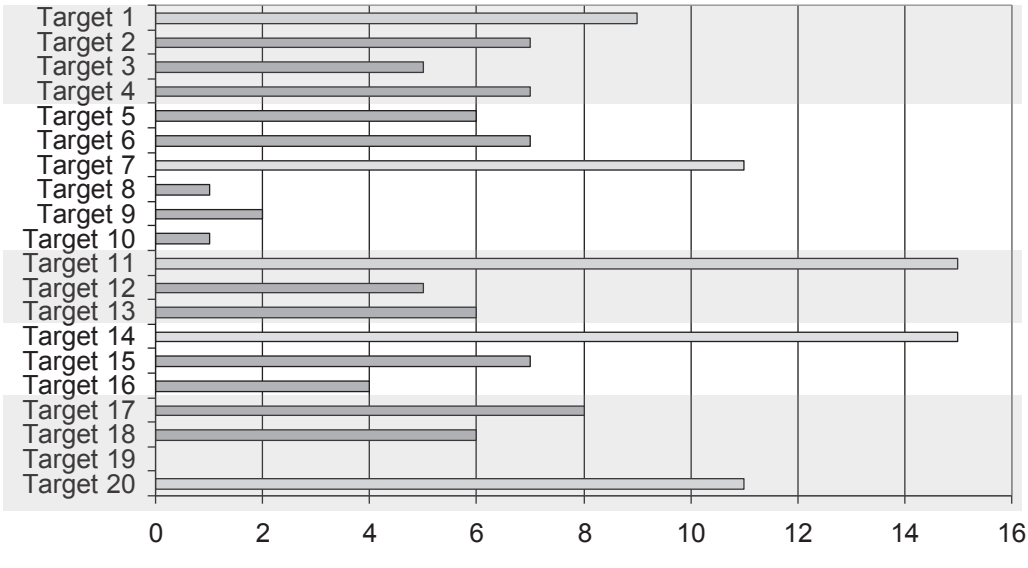
[14] CMS Secretariat in collaboration with Christian Prip, Migratory Species & National Biodiversity Strategies and Action Plans. Guidelines on National strategies and actions for conservation of Migratory Species (2011), available at <http://www.cms.int/about/nbsap/integration_guidelines.pdf> (visited 15 June 2012).

Strategic goal C: Improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity.
Target 11: By 2020, at least 17 per cent of terrestrial and inland water areas, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes & seascapes.

Strategic goal D: Enhance the benefits to all from biodiversity and ecosystem services.
Target 14: By 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being, are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable.

Strategic goal E. Enhance implementation through participatory planning, knowledge management and capacity building.
Target 20: By 2020, at the latest, the mobilization of financial resources for effectively implementing the Strategic Plan for Biodiversity 2011–2020 from all sources, and in accordance with the consolidated and agreed process in the Strategy for Resource Mobilization, should increase substantially from the current levels. This target will be subject to changes contingent to resource needs assessments to be developed and reported by Parties.

Figure 1. Results of the voting.



5 Group work

After the five Aichi Targets were voted for, the participants, who had been carefully selected to ensure equal distribution of technical backgrounds and knowledge of MEAs, were split into five groups.[15] Each group was given an Aichi Target and was asked to discuss and consider the items listed below to implement activities in line with the given Target.

In terms of discussions at the global/regional levels:

1. Which would be the MEA leading the discussions at the global level (CBD, CITES, CMS, or Ramsar)?
2. What other MEAs might participate in the global discussion, and what might the nature of their contribution be?
3. What other non-MEA partner(s) might there be; and what might be the nature of their contributions (for instance, non-governmental organizations (NGOs), private sector, Indigenous and Local Communities, academia, etc)?

At national level implementation:

1. List 1–5 specific actions to be undertaken at the national level; and
2. Indicate key steps and milestones for measuring those actions.

Participants were given two hours in which to discuss the above issues within their groups.

6 Outcome

The outcome of the five groups is summarized and attached as Annex II to this paper.

The first group considered Target 1, and identified that the CBD would be a suitable leading MEA, considering the intended all-encompassing nature of the 'mainstreaming biodiversity' Target. Partners would include all biodiversity-related conventions, taking on various sectoral roles according to their mandates and comparative strengths; as well as a wider community of stakeholders spanning all areas of government and society. Five specific actions were identified at the national level, these being outreach; resource mobilization/consolidation; enhanced stakeholder engagement; incorporation of biodiversity in different government programmes; and development of innovative economic tools (for instance, green taxation, eco-labeling, national accounting, and corporate social responsibility).

[15] The grouping of participants was considered particularly important, as the course participants included a number of technical officers from line Ministries dealing with biodiversity-related MEAs who were conversant with these; as well as, on the other hand, postgraduate researchers who were relatively new to the MEAs and their workings. It was vital that each group had a few 'experts' amongst themselves so that the discussion would proceed smoothly, but without turning into 'mini-negotiations'.

The second group considered Target 7, which mainly deals with the sustainable management of agriculture, aquaculture and forestry. Because of the wider nature of this Target, the group suggested identifying the Food and Agriculture Organization (FAO)[16] as a leading agency, rather than a biodiversity-related MEA. Four out of the six biodiversity-related conventions were identified as partners – it was not certain why the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)[17] was missing from this list, but it might be because it is not considered an MEA and was also not a principal discussion subject on the 2011 Course. The Desertification Convention (UNCCD)[18] was identified as a sole partner agency to the Target. Four actions were identified at the national level, these being: development of legislation; creation of an enabling environment; provision of extension and capacity-building for sustainable management practices, and livelihood support.

The third group discussed Target 11, which concerns conservation through protected areas (and other effective measures). The group identified the CBD as the leading MEA, because of the target's direct link to the three 'pillars' of the CBD, as well as the active work of the CBD in its Programme of Work on Protected Areas (POWPA).[19] Many MEAs, both international and regional, were mentioned as potential participating MEAs under this Target. Of the suggested partners, notable are the references to private landowners, indigenous and local communities, and biodiversity corridors initiatives – reflecting the fact that the success of this target is closely linked to ownership of the area(s) concerned. Five main potential actions were identified at the national level, these being: identification of terrestrial and aquatic areas; prioritization of key areas; development of political measures; implementation of management plans; and mainstreaming of biodiversity and ecosystem services into wider landscape and seascapes.

The fourth group considered Target 14, which addresses ecosystem services and human well-being/livelihoods. The CBD was identified as the leading MEA, while the Ramsar Convention, the World Heritage Convention (WHC),[20] and the ITPGRFA were identified as potential partner MEAs due to their direct links to natural and cultural values of ecosystems, ecotourism, and Access and Benefit-Sharing. Other partners included agencies with mandates that are more oriented towards poverty alleviation and livelihood improvement, such as the United Nations Development

[16] See <http://www.fao.org>.

[17] International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, into force 29 June 2004, <http://www.planttreaty.org/>.

[18] UN Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <http://www.unccd.int>.

[19] For more information, see <http://www.cbd.int/protected/pow/learnmore/intro/> (visited 16 June 2012).

[20] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <http://whc.unesco.org>.

Programme (UNDP),[21] the World Bank,[22] the United Nations Educational, Scientific and Cultural Organization (UNESCO)[23] and the United Nations Industrial Development Organization (UNIDO),[24] as well as bodies that concern women and Indigenous and Local Communities. Five potential actions were identified at the national level, these being: nomination of a national focal point; education and public awareness; establishment of a funding mechanism; community-based conservation efforts; and establishment of a national biodiversity database. The actions seemed more general and process-oriented than the other targets, perhaps because the target was more difficult to tackle than the others.

The fifth group considered Target 20 – the 'NBSAP resource mobilization' Target. The group identified UNEP and the World Bank as the leading bodies, rather than choosing an MEA; perhaps because these agencies are considered to have more mechanisms for resource mobilization than do individual conventions, particular considering that they are both implementing agencies of the Global Environment Facility (GEF). The group decided not to name specific agencies or bodies as partners, but rather noted the conditions for which partners would be selected. It should be noted that 'high level world leaders' were identified as important partners that would bring the necessary public awareness and political will to mobilize resources. Five potential actions were suggested at the national level, these being: 'scientific approach in taking action'; outreach to enhance public-private partnerships; development of clear national mandates and targets; public awareness; and the establishment of an independent national biodiversity fund.

7 Conclusion

This group work exercise entailed the participants undertaking the challenging task of tackling individual Aichi Targets in detail, considering how they could be used as tools to enhance synergies amongst biodiversity-related conventions and the wider sustainable development landscape. The participants were faced with the task of gathering their freshly-acquired knowledge on biodiversity-related MEAs, as well as their general knowledge on existing UN agencies, NGOs, regional/sub-regional bodies, sectoral bodies and interest groups, to come up with a suggested 'roadmap' for each Aichi Target at international ('top-down') and national ('bottom-up') levels. On the whole, considering that this was a rather novel attempt to duplicate an issue with which MEAs, agencies and countries are themselves wrestling with, the course participants did an excellent job in identifying various linkages with partners, and national implications on policy, legal, administrative, financial, technical and scientific dimensions. Their collective efforts were commendable.

[21] See <http://www.undp.org/content/undp/en/home.html>.
[22] See <http://www.worldbank.org/>.
[23] See <http://www.unesco.org/new/en/>.
[24] See <http://www.unido.org/>.

The exercise seemed to show that some Aichi Targets can be tackled in a more straight-forward fashion than others. For example, in respect of Targets 7 and 11 it seemed clear to the participants as to which partners and actions would be needed to achieve them, perhaps because they deal with more traditional values (conservation and food production) or familiar subject areas (protected areas management, agriculture/aquaculture/forestry) where the role of biodiversity is clear-cut. On the other hand, Target 14 located biodiversity within the much greater context of human well-being and livelihoods, which makes it harder to tackle in a technical manner.

The group exercise also highlighted the level of complexity that would involve operationalizing these targets from the 'synergies' point of view. This group session might be considered as a rough, mock exercise of what country parties may themselves need to consider when they attempt to incorporate the Strategic Plan for Biodiversity 2011–2020 into their national biodiversity strategy and action plans, taking into consideration other national and international stakeholders that might need to be consulted in the process. The groups found that there are many stakeholders, outside of the immediate biodiversity-related conventions, potentially involved in realizing each of the Aichi Targets – in the actual process, even more possible stakeholders with indirect connections to the Aichi Targets probably exist.

In reality, the CBD Secretariat has developed a series of capacity-building modules intended to guide 'CBD focal points, biodiversity managers and other national stakeholders… to the process of preparing National Reports and a National Biodiversity Strategy and Action Plan (NBSAP) and to making best use of the NBSAP once it has been prepared',[25] where it has been described as a 'cyclical and adaptive process' (see Figure 2 below). In the same module, the general steps required for the updating of NBSAPs are described (see Fig. 3). In Module 4, which describes how national biodiversity targets could be set in line with the Aichi Targets, the CBD stresses that the 'establishment of national biodiversity targets will require the gathering and/or consultation of stakeholders and experts (presumably already identified in previous NBSAP processes) in order to draw on their expertise and experience, and importantly to ensure their buy-in to the targets set'.[26]

[25] CBD Capacity Building Modules, available at <http://www.cbd.int/nbsap/training/> (visited 15 June 2012).

[26] CBD Capacity Building Module 4: Setting National Biodiversity Targets in line with the Framework of the Strategic Plan for Biodiversity 2011-2020, including Aichi Biodiversity Targets, version 2.1 (2011), available at <http://www.cbd.int/doc/training/nbsap/b4-train-national-targets-revised-en.pdf> (visited 17 June 2012), 12.

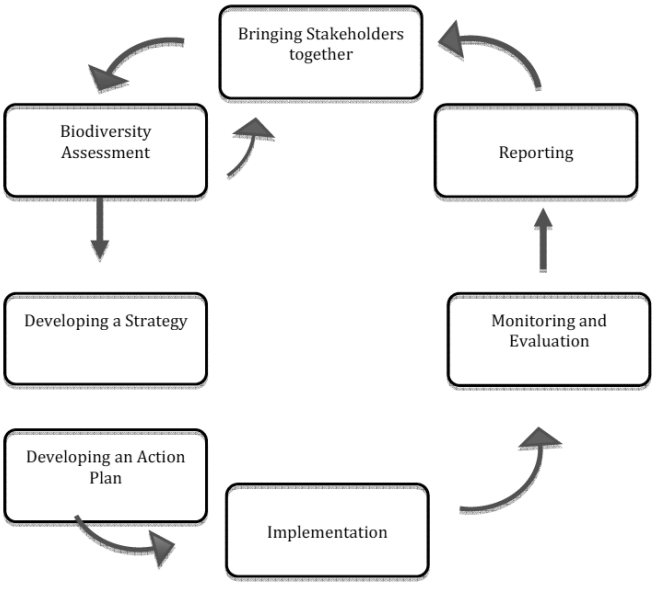


Figure 2. Basic Steps for Biodiversity Planning: recommended process for revising an NBSAP.[27]

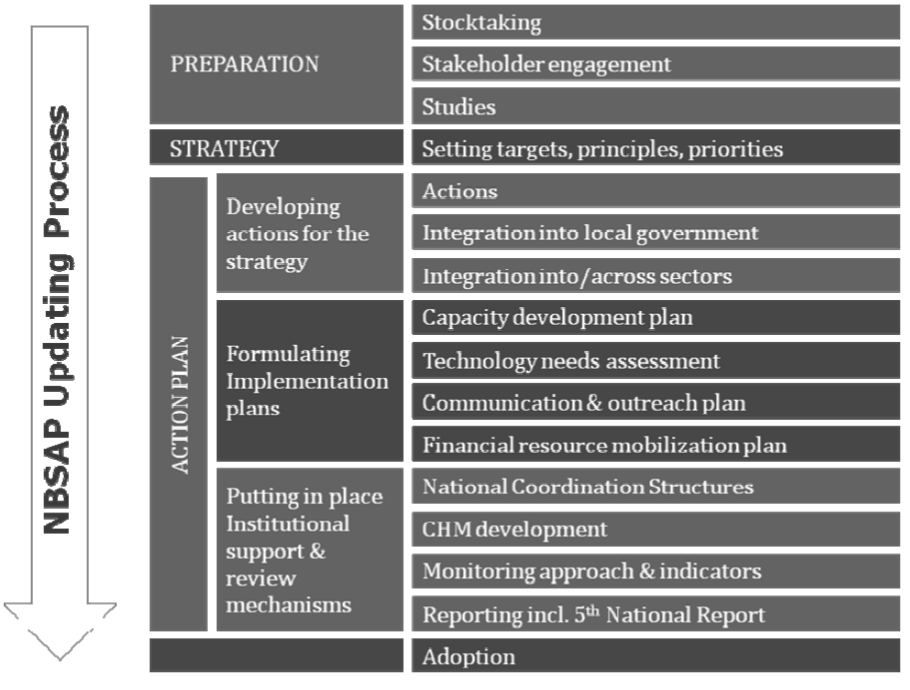


Figure 3. Basic Outline of the typical steps for updating an NBSAP.[28]

[27] *Ibid*. at 11.

[28] CBD Capacity building module 2: The Biodiversity Planning Process: How to Prepare or Update a National Biodiversity Strategy and Action Plan, version 2.1 (2011), available at <http://www.cbd.int/doc/training/nbsap/b2-train-prepare-update-nbsap-revised-en.pdf> (visited 18 June 2012), 13.

Another example of a real-life national biodiversity target and NBSAP development process has been formulated by UNEP World Conservation Monitoring Centre (UNEP-WCMC)[29] as part of their contribution to the Biodiversity Indicators Partnership.[30] Figure 4 provides the suggested steps, which show in even more detail the levels of consultation, information gathering and partnerships that would be required to develop national goals that would meet the needs and priorities of the stakeholders.

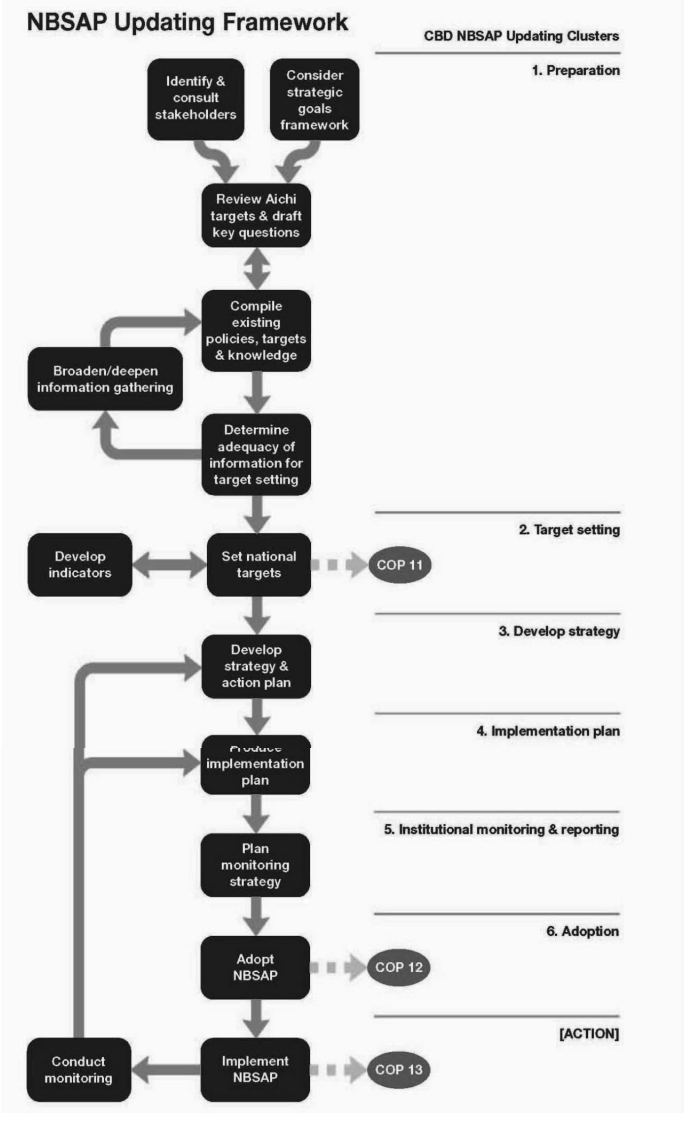


Figure 4. NBSAP Updating Framework suggested by Biodiversity Indicators Partnership (UNEP-WCMC).[31]

[29] See <http://www.unep-wcmc.org/>.
[30] See <http://www.bipindicators.net/>.
[31] Figure used at the latest BIP/UNEP-WCMC regional training workshops on indicators use in NBSAPs. See <http://www.bipnational.net/> for more information on their work.

Lastly, at the time of writing there is an ongoing exercise by the International Union for Conservation of Nature (IUCN)[32] in cross-mapping the planning documents of CITES, CMS, Ramsar, ITPGRFA and WHC against each of the Aichi Targets. This was commissioned by the Chairs of the Scientific Advisory Bodies of the Biodiversity-related Conventions (CSAB)[33] to map the biodiversity-related conventions to the Aichi Targets, and a draft version will be sent back to the governing bodies of each of the Conventions for their consideration. This exercise is considered to provide a 'useful analytical tool for existing issues' within each of the Conventions in their attempt to achieve greater synergy.[34] The work of CSAB and its member Conventions in this regard should be followed with great interest.

[32] See <http://www.iucn.org>.
[33] Report of the Fourth Meeting of the Chairs of the Scientific Advisory Bodies of the Biodiversity-related Conventions (CSAB), UN Doc. UNEP/CBD/CSAB/4/2 (2011).
[34] *Ibid*. at 9.

Annex I
Aichi Targets and relevant biodiversity-related Multilateral Agreements: Compilation of views from MEA Secretariats (11 May 2011)

Target	CMS	CITES	Ramsar	ITPGRFA
Strategic goal A. Address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society				
Target 1**:** By 2020, at the latest, people are aware of the values of biodiversity and the steps they can take to conserve and use it sustainably.		X	X	X
Target 2**:** By 2020, at the latest, biodiversity values have been integrated into national and local development and poverty reduction strategies and planning processes and are being incorporated into national accounting, as appropriate, and reporting systems.	X	X	X	X
Target 3**:** By 2020, at the latest, incentives, including subsidies, harmful to biodiversity are eliminated, phased out or reformed in order to minimize or avoid negative impacts, and positive incentives for the conservation and sustainable use of biodiversity are developed and applied, consistent and in harmony with the Convention and other relevant international obligations, taking into account national socio-economic conditions.	X	X	X	X
Target 4**:** By 2020, at the latest, Governments, business and stakeholders at all levels have taken steps to achieve or have implemented plans for sustainable production and consumption and have kept the impacts of use of natural resources well within safe ecological limits.		X	X	X
Strategic goal B. Reduce the direct pressures on biodiversity and promote sustainable use				
Target 5**:** By 2020, the rate of loss of all natural habitats, including forests, is at least halved and where feasible brought close to zero, and degradation and fragmentation is significantly reduced.	X		X	

Target	CMS	CITES	Ramsar	ITPGRFA
***Target 6*: By 2020 all fish and invertebrate stocks and aquatic plants are managed and harvested sustainably, legally and applying ecosystem based approaches, so that overfishing is avoided, recovery plans and measures are in place for all depleted species, fisheries have no significant adverse impacts on threatened species and vulnerable ecosystems and the impacts of fisheries on stocks, species and ecosystems are within safe ecological limits.**	X	X	X	
***Target 7*: By 2020 areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity.**	X	X	X	X
***Target 8*: By 2020, pollution, including from excess nutrients, has been brought to levels that are not detrimental to ecosystem function and biodiversity.**	X		X	
***Target 9*: By 2020, invasive alien species and pathways are identified and prioritized, priority species are controlled or eradicated, and measures are in place to manage pathways to prevent their introduction and establishment.**	X	X	X	
***Target 10*: By 2015, the multiple anthropogenic pressures on coral reefs, and other vulnerable ecosystems impacted by climate change or ocean acidification are minimized, so as to maintain their integrity and functioning.**	X		X	
Strategic goal C: Improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity				
***Target 11*: By 2020, at least 17 per cent of terrestrial and inland water areas, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes.**	X		XXX	

Target	CMS	CITES	Ramsar	ITPGRFA
***Target 12*: By 2020 the extinction of known threatened species has been prevented and their conservation status, particularly of those most in decline, has been improved and sustained.**	X	X	X	X
***Target 13*: By 2020, the genetic diversity of cultivated plants and farmed and domesticated animals and of wild relatives, including other socio-economically as well as culturally valuable species, is maintained, and strategies have been developed and implemented for minimizing genetic erosion and safeguarding their genetic diversity.**				X
Strategic goal D: Enhance the benefits to all from biodiversity and ecosystem services				
***Target 14*: By 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being, are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable.**			XXX	
***Target 15*: By 2020, ecosystem resilience and the contribution of biodiversity to carbon stocks has been enhanced, through conservation and restoration, including restoration of at least 15 per cent of degraded ecosystems, thereby contributing to climate change mitigation and adaptation and to combating desertification.**			X	
***Target 16*: By 2015, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization is in force and operational, consistent with national legislation.**				X
Strategic goal E. Enhance implementation through participatory planning, knowledge management and capacity building				
***Target 17*: By 2015 each Party has developed, adopted as a policy instrument, and has commenced implementing an effective, participatory and updated national biodiversity strategy and action plan.**		X		X

Target	CMS	CITES	Ramsar	ITPGRFA
***Target 18*:** By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels.		X	X	X
***Target 19*:** By 2020, knowledge, the science base and technologies relating to biodiversity, its values, functioning, status and trends, and the consequences of its loss, are improved, widely shared and transferred, and applied.	X	X	X	X
***Target 20*:** By 2020, at the latest, the mobilization of financial resources for effectively implementing the Strategic Plan for Biodiversity 2011-2020 from all sources, and in accordance with the consolidated and agreed process in the Strategy for Resource Mobilization, should increase substantially from the current levels. This target will be subject to changes contingent to resource needs assessments to be developed and reported by Parties.	X	X	X	X

Annex II
Outcome of the Group Work Exercise on Synergies among Biodiversity-Related Conventions through Aichi Targets

Strategic goal A. Address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society ***Target 1*:** By 2020, at the latest, people are aware of the values of biodiversity and the steps they can take to conserve and use it sustainably.				
Leading MEA	**Identify other participating MEA(s) and nature of their contribution**	**Other Partner(s) and nature of their contribution**	**1–5 Specific actions to be undertaken at the national level**	**Identify key steps and milestones**
CBD	• CITES – species focused – sustainable trade • CMS – migratory species, similar CITES • RAMSAR – ecosystem focused – site designation, 'wise use' practices • WHC – ecosystem focused + valuation system • ITPGRFA – plant genetic resources – food security, sustainable use + reinforces Traditional Knowledge	• Other Rio Conventions (UNFCCC,[1] UNCCD) • UNCLOS[2] • UNESCO • UNCSD[3] • GEF (and implementing agencies) • IUCN • Regional and subregional bodies • Public sector • Private sector • Media	Implement effective and innovative outreach	• # of media, press releases, publications, platforms, facebook-hits, biodiversity videos • # of initiatives, awards (agents of change) • Polls/surveys (trends, patterns)
			Pool resources (resource mobilization)	• # of donors/contributors • Amount amassed under joint work plans • Amount spent (cost and returns analysis)
			Increase effective engagement processes	• # of stakeholders • # of joint workplans/agreements • # of meetings
			Enhance food and water security, extension programmes	• # of programmes with biodiversity components • # of representations (people, locations, species)
			Develop economic instruments (green tax, eco-labelling, national accounting, corporate social responsibility (CSR))	• Consumer trends • # of green legislation • # of private company programs incorporating biodiversity CSR

[1] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <http://unfccc.int>.

[2] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261.

[3] United Nations Commission on Sustainable Development, <http://www.un.org/esa/dsd/csd/csd_index.shtml>.

Strategic goal B. Reduce the direct pressures on biodiversity and promote sustainable use ***Target 7*:** By 2020 areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity				
Leading MEA	**Identify other participating MEA(s) and nature of their contribution**	**Other Partner(s) and nature of their contribution**	**1-5 Specific actions to be undertaken at the national level**	**Identify key steps and milestones**
FAO	• CBD • CITES • CMS • Ramsar	• UNCCD	Legislation in place to implement target (for instance, sustainability requirements)	'Yes/No'; Extent to which legislation's sustainability requirements are met
			Provide enabling conditions for self-regulation, i.e. market-based systems and voluntary stewardship arrangements	Subset of biodiversity indicators which can be derived from international processes
			Provide extension and capacity-building for sustainability management practices – through a participatory approach	Subset of (technical) indicators; for instance, nutrient balance, heavy metals/ pesticides, red list species
			Ibid., for realizing alternate and diversified livelihoods	# of people with (additional) income derived from alternate livelihoods % share of that income

Strategic goal C: Improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity ***Target 11*:** By 2020, at least 17 per cent of terrestrial and inland water areas, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes & seascapes.				
Leading MEA	**Identify other participating MEA(s) and nature of their contribution**	**Other Partner(s) and nature of their contribution**	**1-5 Specific actions to be undertaken at the national level**	**Identify key steps and milestones**
CBD (Links to three objectives of the Convention and POW-PA)	• WHC • Ramsar • UNCLOS • CITES: listing relevant species, establishing special regulation preventing further threats, avoiding utilization incompatible with survival • CMS: listing migratory species • Coral Triangle Initiative (CTI)[4] • Nauru Agreement[5] • Nagoya Protocol on ABS[6] • Espoo Convention[7] and Protocol on SEA[8]	• GEF • Academia • ILC • Private land owners • UNEP-WCMC • IUCN • Project MCPFE-Forest Europe • Corridor initiative (for instance, GMSBCI)	Identify in all the national area (land and sea) and/or update the key biodiversity areas and ecosystem services	Updated list ready by 2012
			Prioritize the key areas and services in consultation with other fora (for instance, IUCN, NGOs).	Result of the assessment of the consequences of the options, through indicator species ready by 2013
			Explore the adequate political measures, in order to ensure the conservation of the areas of particular importance for biodiversity.	Increase in areas that are ecologically representative by 2016
			Approve an effective and equitable management plan, using participatory and science-based site planning processes that incorporate clear biodiversity objectives, targets, management strategies and monitoring and evaluation protocols, considering the potential of the area.	# and effectiveness of management plans being implemented by 2017
			Integrate the areas of particular interest to biodiversity and ecosystem services into the wider landscapes and seascapes.	# and effectiveness of the integrated actions adopted, by 2018

[4] See <http://www.coraltriangleinitiative.org/>.

[5] Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest, Nauru, 11 February 1982, in force 4 December 1982, <http://www.ffa.int/nauru_agreement>.

[6] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, <http://www.cbd.int/abs/>.

[7] Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, in force 10 September 1997, 30 *International Legal Materials* (1991) 802.

[8] Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, Kyiv, 21 May 2003, in force 11 July 2010, <http://www.unece.org/env/eia/sea_protocol.html>.

Strategic goal D: Enhance the benefits to all from biodiversity and ecosystem services ***Target 14*:** By 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being, are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable.				
Leading MEA	**Identify other participating MEA(s) and nature of their contribution**	**Other Partner(s) and nature of their contribution**	**1-5 Specific actions to be undertaken at the national level**	**Identify key steps and milestones**
CBD	• **Ramsar** and **WHC:** Safeguarding natural and cultural values of ecosystems; ecotourism through the creation of livelihoods for women, indigenous and local communities, the poor and vulnerable • **ITPGRFA:** Access and Benefit-sharing	• UNDP, World Bank, NGOs (for instance, WWF[9]): funding • UNEP, UNESCO, UNIDO, FAO, IUCN, academia (UNU[10] and UNITAR[11] etc.): technical and scientific support • UNPFII,[12] UN Women,[13] NGOs, academia: networks and direct collaboration	Nominating a national governmental focal point to follow up the progress of the implementation of the agreed Target	Design a consolidated reporting system for all relevant ministries and governmental agencies who work in collaboration with the national governmental focal point
			Enhance implementing education raising public awareness	50% of all communities participate in awareness and education campaign
			Funding mechanism is established	Make funding available to communities living in the relevant ecosystems
			Community-based conservation efforts	
			Establishing a National Bio-diversity database	

Strategic goal E. Enhance implementation through participatory planning, knowledge management and capacity building ***Target 20*: By 2020, at the latest, the mobilization of financial resources for effectively implementing the Strategic Plan for Biodiversity 2011-2020 from all sources, and in accordance with the consolidated and agreed process in the Strategy for Resource Mobilization, should increase substantially from the current levels. This target will be subject to changes contingent to resource needs assessments to be developed and reported by Parties.**				
Leading MEA	**Identify other participating MEA(s) and nature of their contribution**	**Other Partner(s) and nature of their contribution**	**1-5 Specific actions to be undertaken at the national level**	**Identify key steps and milestones**
• UNEP: leading body to facilitate the mobilization of financial resources World Bank: management of mechanisms for funding; for instance, GEF and other innovative funding sources	• Other relevant/ participating biodiversity-related multilateral agreements • Incorporation of biodiversity conditions (funding on biodiversity) in regional and bilateral agreements	• Contributions from other inter-governmental organizations (IGOs), NGOs, private sector, academia, etc. • High-level world leaders to bring attention and commitment to biodiversity	• Scientific Approach in taking action at the national level (for instance, panel and use of funds) • Marketing/public outreach to involve relevant sectors and strengthen public-private partnerships • National Strategy with clear mandate and targets • Public awareness • Independent Biodiversity Fund at the national level	• General indicators – following the system of the World Bank on replenishment, and amount of resources raised

[9] See <http://wwf.panda.org/>.
[10] United Nations University, <http://unu.edu/>.
[11] United Nations Institute for Training and Research, <http://www.unitar.org/>.
[12] United Nations Permanent Forum on Indigenous Issues, <http://www.un.org/esa/socdev/unpfii/>.
[13] See http://www.unwomen.org/>.

The Bangkok Ad Hoc Joint Working Group: A Multilateral Simulation Exercise of an Ad Hoc Joint Working Group Meeting of the Biodiversity-related Conventions[1]

Cam Carruthers and Niko Urho[2]

1 Overview

1.1 Introduction

This paper sets out the elements and structure of a negotiation simulation exercise which took place during the University of Eastern Finland – UNEP Course on Multilateral Environmental Agreements, held from 8–13 September 2011.

The scenario for the negotiation simulation focused on synergies among biodiversity-related MEAs, and involved both substantive and structural/procedural issues. The exercise included negotiations in an Ad Hoc Joint Working Group (AHJWG) on the following four issues:

[1] The materials for this simulation exercise are for professional development purposes only. With the exception of the text of official documents of UNEP and UN bodies, these materials may not be used, reproduced, revised or translated in whole or in part, by any means, without written permission of the authors. They are not intended to represent any official policy, positions or views of any state, organization, legal entity or individual. Any views expressed in these materials are solely those of the authors.

[2] Cam Carruthers is a former senior legal officer with the UN Climate Change Secretariat and a former Canadian delegate in various MEA fora; e-mail: cam.carruthers@sympatico.ca. Niko Urho is a senior officer in the Ministry of the Environment of Finland; e-mail: Niko.Urho@ymparisto.fi. Marko Berglund and Simone Schiele also contributed to these materials and, along with the authors, led the exercise. The former is a Chief Administrator, International Environmental Policy, Ministry of Foreign Affairs, Finland; and the latter was at the time a Fellow with the Ecologic Institute, Berlin.

1. Joint programmatic activities.
2. Joint work plan for national implementation.
3. Joint review mechanism.
4. Establishment of a group on Rules of Procedure.

The first two issues have a substantive focus, whereas the last two issues have a structural/procedural emphasis. The issues cover a wide range of possible negotiation topics but represent only a fraction of areas where there are potential synergies among multilateral environmental agreements (MEAs). The issues include some elements that derive from recent actual work on enhancing synergies among three conventions (PIC,[3] POPs,[4] Basel[5]) in the chemicals and wastes cluster,[6] but which are considered applicable to the biodiversity conventions. The focus of this exercise, however, was on issues that had been identified by some Parties as having the greatest potential benefits among the biodiversity conventions.[7] While the materials for the exercise were based largely on the assumption that there was a need to engage on issues related to synergies, the authors do not mean to suggest that the individual biodiversity-related MEAs have not produced many positive results, nor to suggest that the solutions and way forward are clear: far from it!

The negotiation simulation scenario is hypothetical but is based on recent real-life discussions on enhancing synergies among key biodiversity-related conventions. The scenario was chosen because clustering MEAs to improve coordination and efficiency is of current interest and is an area where progress has been made toward this goal. Many countries have voiced interest in pursuing further efforts in this area. A supplementary objective of this exercise was that it would produce discussion and results, including this paper, which could be of interest particularly for participants in the related meetings of the governing bodies of the biodiversity-related conventions. The theme also provided an opportunity for participants to gain perspective on the complexity of international environmental law-making in the current international environmental governance (IEG) -system.

[3] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <http://www.pic.int>.

[4] Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <http://www.pops.int>.

[5] Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <http://www.basel.int>.

[6] See Tuula Kolari and Ed Couzens (eds), *International Environmental Lawmaking and Diplomacy Review 2007*, University of Joensuu – UNEP Course Series 7 (University of Joensuu, 2008), which has chemicals and waste, including synergies issues, as its special theme.

[7] A Nordic Symposium 'Synergies in the Biodiversity cluster' held from 8–9 April 2010 concluded that focus should be primarily on enhancing synergies on issues of substance, rather than on administrative issues, because the secretariats are dispersed and administered by different organizations.

This paper contains the general instructions and supporting material provided to participants. Individual instructions were also provided separately to each negotiation simulation participant.

1.2 Importance of synergies in the MEA context

Environmental policy-making at the international, regional, and national levels has traditionally approached problems on a case-by-case basis, addressing individual environmental problems as they arise. This has led to there being a substantial number of MEAs: altogether there exist almost 500 MEAs, plus nearly 400 amendments and close to 200 protocols, bringing the total number above 1000.[8] While each agreement may, taken by itself, represent progress in addressing international environmental challenges, the larger number of agreements results in challenges related to coordination and efficiency – if not overlap and duplication.

As a result of ad hoc proliferation of MEAs, there is no overarching structure coordinating their work.[9] Instead, in line with the principles of international treaty law,[10] each MEA represents an independent regime to address a specific set of environmental issues. They all have different, albeit similar, objectives, scopes, subject matters, governing mechanisms, types of norms and methodological approaches, with all having been developed to meet particular needs. Consequently, the current system is characterized by inconsistencies in rules and norms, duplication of effort and conflicting agendas, a cluttered and overwhelmed meeting schedule, and solutions that lack coherence and efficiency.

In 2008 the UN Joint Inspection Unit (JIU)[11] concluded in a major review of the UN's environmental governance system that 'the current framework of international environmental governance is weakened by institutional fragmentation and specialization and lack of a holistic approach to environmental issues and sustainable development'.[12] Indeed, the high degree of fragmentation and lack of coordination

[8] See Ronald B. Mitchell and the International Environmental Agreements (IEA) Database Project (2002–2011), available at <http://iea.uoregon.edu/page.php?query=summarize_by_year&yearstart=1950&yearend=2010&inclusion=MEA> (visited 20 March 2012). As at August 2012 the total number suggested was over 1100. See <http://iea.uoregon.edu/page.php?file=home.htm&query=static> (visited 8 August 2012).

[9] Except for general international law which provides rules for handling conflicting norms, e.g. the *lex specialis* rule.

[10] See the Vienna Convention on the Law of Treaties (Vienna, 22 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331), which reflects the commonly agreed legal principles of international treaty law.

[11] See, generally, <http://www.unjiu.org/>.

[12] Tadanori Inomata, Management review of environmental governance within the United Nations System. Joint Inspection Unit, Doc. JIU/REP/2008/3 (2008), available at <http://www.unjiu.org/data/reports/2008/en2008_3.pdf> (visited 20 March 2012). See also Tadanori Inomata, 'Building Institutional and Managerial Foundations for Environmental Governance with the United Nations System – Towards a New Governance Structure for Environment Protection and Sustainable Development', Tuula Honkonen and Ed Couzens (eds), *International Environmental Law-making and Diplomacy 2009*, University of Eastern Finland – UNEP Course Series 9 (University of Eastern Finland, 2010) 45–64.

has led to reduced institutional performance to deal with environmental problems. The JIU has calculated that the administrative cost for the IEG-system is up to four times higher compared to other international governance areas.[13]

Negotiations related to synergies may take place at the international, regional or national levels. At the international level, MEA secretariats play an important role in enhancing cooperation and coordination among MEAs. However, the legal authority required for significant progress rests with the Parties to the conventions. This implies that a Party-driven synergies-process could achieve more profound results than limiting efforts to the secretariat level. A Party-driven process also allows for the addressing of structures and organizations to be based on national needs; and, thereby, enables more focused identification of solutions for facilitating national implementation. The advantage of such an approach was clearly demonstrated by the recent and on-going successful work on enhancing synergies among three conventions in the chemicals and waste cluster (PIC, POPs and Basel) (see further section 3.1.2). The biodiversity-related conventions could represent the next developmental step for clustering.

1.3 Importance of procedures and rules of procedure in MEA negotiations

In MEAs, decision-making practices and rules of procedure are set up to govern activities in decision-making bodies, based on a provision in the MEA itself which usually stipulates that Parties are to agree on such rules. A conference or meeting of the Parties (COP, MOP) serving as the supreme decision-making body of the agreement takes decisions to implement the agreement; and reviews and evaluates implementation of the agreement, including related decisions.

Rules of procedure generally regulate the activities of decision-making bodies including subjects such as agendas, conduct of business, decision-making, languages, membership, officers, rule amendments, and secretariat functions. Among other things, the rules reflect fundamental principles of transparency and procedural fairness, the latter of which is based largely on the principle of equality of sovereign states. Another principle reflected in the rules is that in international law, authority is ultimately derived from states. While the fundamental principles are common, each set of rules is adapted to its specific context. A good knowledge of the rules of procedure of the forum a negotiator works in is invaluable. Knowing the rules means knowing what one can do to advance or protect one's position, and how to do it.[14]

However, all too often negotiators in multilateral environmental fora have only a limited awareness of the rules that define the arena in which they operate. The rules

[13] *Ibid*. at 11.

[14] For an analysis of the importance of the rules of procedure in a particular MEA, see Joanna Depledge, *The Organization of Global Negotiations: Constructing the Climate Change Regime* (Earthscan, 2005), particularly at 80–102.

and related issues may seem either mundane or arcane, and only incidental to the more compelling questions of substance. Negotiators are often more concerned with strategy or technical priorities. Some may not even be aware of the influence of the rules on the process, which can be subtle. Even when no reference is made to the rules they have a profound influence on outcomes. A key example is decision-making: votes are generally avoided, but whether and how consensus is obtained on a given issue may depend to some degree on the understanding of how Parties would vote if they did vote. Negotiators who fail to understand the underlying dynamics on such issues can make serious strategic errors.

Indeed, ignorance of the rules can lead to major failures and frustrations with the process arising, especially since problems may be discovered only after key decisions have been taken. It is difficult, if not practically impossible, to undo multilateral process decisions once these have been taken. So, it is important to consider strategic issues about decision-making processes and relevant rules early on in any multilateral endeavour. Once a process is underway, it may result in a proliferation of subprocesses based on a set of interrelated decisions. While these processes are susceptible to congestion and inertia, it is also possible that they can move toward an unexpected direction or conclusion very quickly, with major outcomes in the balance.

The simulation exercise was designed, in part, to open up certain procedural issues so that participants could strengthen their knowledge and understanding of the procedures and rules as tools for more effective and efficient negotiation of individual and common objectives. The idea was for participants to negotiate conceptual ownership of procedures while they negotiate practical textual solutions. The premise was that the procedures and rules constitute a code which reflects the values and interests of Parties and informs the way negotiators work together to take decisions. The rules frame what happens; who can make it happen; and when, where and how it might happen. The higher the level of common understanding and agreement of the rules in any given body, the more efficiently and effectively that body can operate and reach agreement to attain common objectives.

1.4 Simulation objectives

This negotiation simulation exercise was focused on the negotiation of issues related to synergies and procedures in a MEA context, in this case a hypothetical meeting of an Ad Hoc Joint Working Group (AHJWG) of six biodiversity related MEAs. The general objectives were to promote among participants, through simulation experience:

1) understanding of the challenges and opportunities related to synergies among MEAs, both in general and in a specific MEA context;

2) understanding of the principles and practices of multilateral negotiation and appreciation of the value and role of the rules of procedure;
3) familiarity with specific substantive and drafting issues; and
4) discussion and appreciation of different perspectives on both MEA synergies and multilateral procedures.

Within the exercise, the specific objective of the AHJWG meeting was to produce agreement on four issues: i) joint programmatic activities, ii) a joint work plan for national implementation, iii) a joint review mechanism and iv) rules of procedure for the AHJWG.

1.5 Scenario

The scenario was set as the first meeting of the Ad hoc Joint Working Group (AHJWG) on enhancing cooperation and coordination among the six biodiversity-related conventions. The negotiation simulation scenario and the issues therein are hypothetical, but based on actual and recent discussions on enhancing synergies among the following six biodiversity-related conventions[15]:

1) Convention on Biological Diversity (CBD);[16]
2) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);[17]
3) Convention on the Conservation of Migratory Species of Wild Animals (CMS);[18]
4) Ramsar Convention on Wetlands of International Importance (Ramsar);[19]
5) Convention Concerning the Conservation of the World Cultural and Natural Heritage (WHC);[20] and
6) International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).[21]

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[15] These six listed conventions are generally referred as 'the biodiversity-related conventions', and have been proposed to be included in the biodiversity cluster. For further information, see Niko Urho: *Possibilities of Enhancing Cooperation and Coordination among MEAs in the Biodiversity Cluster*, TemaNord 2009:537, (Nordic Council of Ministers, 2009), available at <http://www.biodivcluster.fi/pdf/Possibilities%20on%20enhaning%20cooperation.pdf> (visited 20 March 2012).

[16] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

[17] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>.

[18] Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>.

[19] Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <http://www.ramsar.org>.

[20] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <http://whc.unesco.org>.

[21] International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, into force 29 June 2004, <http://www.planttreaty.org/>.

The premise of the scenario was that there was an agreement by the Parties of the six conventions to meet jointly three times to consider joint programmatic and procedural issues. The exercise was to begin with the first meeting of the AHJWG and proceed to four drafting groups. It was assumed that, informally, the AHJWG Co-Chairs had already identified four priorities that were different in kind, but susceptible to be negotiated together as part of a 'Strong-start package' on synergies.

The AHJWG had two Co-Chairs, four Vice-Chairs (representing the six MEAs) and one rapporteur. The two Co-Chairs were elected by Parties at the opening plenary: one representing a developing country and one a developed country. In addition, the drafting groups each had one facilitator and one rapporteur. The four Vice-Chairs served as facilitators. The elections took place in the initial plenary meeting (participants were encouraged to consult ahead of time).

Draft decisions and conclusions (see below) were provided, purportedly prepared by the Co-Chairs for the consideration of the Parties. The draft texts address issues of synergies in implementation, as well as procedural issues related to the joint operation of the Parties in the AHJWG.

Each drafting group was asked to address at least the issue of the substance of the draft text before it, and possibly also the form (decision or conclusion). Four drafting groups were envisaged for issue clusters, as follows:

A) Joint activities (subsection 3.2.1).
B) Joint work plan for national implementation (subsection 3.2.2).
C) Joint review mechanism / joint advisory board (subsection 3.2.3).
D) Establishment of a group on rules and procedure (subsection 3.2.4).

The main features of the terms of reference for the Ad Hoc Joint Working Group are listed below:

1. The Ad Hoc Joint Working Group shall agree upon joint recommendations on enhanced cooperation and coordination among the six conventions at the administrative and programmatic levels to be forwarded to the next meeting of the Conference of the Parties to each convention for adoption by the Parties.
2. Rules for participation in the Ad Hoc Joint Working Group are listed below:
   a) The Ad Hoc Joint Working Group shall consist of 30 representatives. Each convention shall nominate 5 representatives selected from amongst the Parties to that convention to participate in meetings of the Ad Hoc Joint Working Group, giving due consideration to the five United Nations regions.
   b) Each convention shall be responsible for meeting the costs of participation of its representatives who are from developing countries and from countries with economies in transition.
3. The Ad Hoc Joint Working Group shall determine its own rules of procedure.

1.6 Introduction to the exercise

Each participant was asked to play a specific role, representing either a Party or, depending on the number of participants, a Secretariat official. Participants representing Parties were given a background focused on one particular Convention, but had to represent their national interests on all six agreements. Participants were encouraged to play their part in the overall scenario for the simulation, following both their general and individual instructions. Where possible, it was suggested that they make alliances and develop coordinated strategies to intervene in support of others, or to take the lead in other cases. Some roles, including the Co-Chairs, Vice-Chairs and the Secretariat officials, played a resource function and were to make themselves useful to the process – while maintaining their neutrality. Those playing such roles were to serve all participants and work for a positive outcome in addition to their individual instructions (Chairs and facilitators were encouraged to signal to the other Parties when they took up their partisan roles, e.g. by prefacing an intervention with the words: 'I'm taking off my Chair's hat . . . ').

Participants were asked to keep in mind their interests and positions with respect to all four issues, but to focus on the issue assigned to their drafting group. The groups were asked to narrow their focus as quickly as possible to identify issues to be addressed, and to dispose of issues expeditiously where possible. Participants were also asked to work hard to achieve their objectives.

Participants were strongly urged to follow their instructions, and to elaborate interventions with a compelling rationale to advance their positions, for example by drawing on context provided by their twin (see below for an explanation of 'twinning'). Participants were also encouraged to take the initiative and to be inventive, to intervene in drafting groups and in plenary even where they had no specific instructions on a particular issue. Participants representing Parties were strongly encouraged to seek support from other participants for, and identify opposition to, their positions, including positions discussed in drafting groups in which they did not participate. To this end, participants were asked to consider developing joint drafting proposals and making interventions on behalf of more than one Party, and it was suggested that they might wish to consider using regional and negotiation groups as a point of departure. Participants were also asked to think about issues for discussion in the post-mortem following the exercise, including issues of both process and substance within the exercise, as well as issues relating to the structure and management of the exercise itself.

The simulation was designed to focus on both the negotiation process and relevant substantive issues, and it was designed to be difficult, with failure to reach agreement a real possibility. It was noted that, unavoidably, a random distribution of positions was likely to result in making some country Parties appear more or less constructive, and indeed for simulation purposes some positions were designed to cause difficulties. It was highlighted that the positions in individual instructions were developed and as-

signed randomly, and that they were entirely hypothetical and not intended to reflect the specific positions of particular Parties, or the views of organizations or individuals.

It was explained that individual delegates often face situations similar to this exercise, where they have little opportunity to prepare, but still need to define objectives and develop a strategy. It was suggested that informal diplomacy is where most progress toward agreement on concepts is made, while drafting group and plenary discussion is often required for agreement on specific texts. It was also noted that drafting often involves a fine balance between accommodation and clarity; that decision-making on final text in plenary may be pro forma, but that there can be surprises. It was particularly highlighted that decisions in the plenary are critical and can sometimes move very quickly, at times moving back and forth on an agenda, so that being prepared with an effective intervention at any moment is essential.

The importance of the roles of the two Co-Chairs, four Co-Chairs/drafting group facilitators and the Secretariat were also put forward for consideration, particularly with respect to setting up and managing the process – and managing time – to produce agreement. Those in these roles were encouraged to consult broadly, including among themselves but also with Party representatives (also noting that the simulation organizers might be able to provide advice acting as senior Secretariat officials). Finally, it was suggested that a key factor in success would be the thoughtful organization of the work of the groups, including strategic management of how the smaller drafting groups and the plenary sessions function and were linked.

2 Instructions

2.1 Individual instructions

The dynamic core of the simulation was provided in **confidential** individual instructions of 1–2 pages in length for each participant. They provided very brief positions and fall-back positions on each of the issues being negotiated, but in most cases with no rationale or strategy or at most a vague strategy. This forced each participant to deepen their understanding of the subject area and to develop an own strategy to support their argumentation. It was explained that in some cases the instructions might seem contradictory, which happens in real life. For the exercise, instructions were provided in a simplified form rather than that of official delegation instructions. In some cases, instructions stipulated that a position could not be abandoned for a fall-back without consulting a designated senior official in the state's capital. For the purposes of the simulation the simulation coordinators served in that capacity. For further guidance in dealing with procedural and strategic issues, participants were referred to the *MEA Negotiators' Handbook*.[22]

[22] Cam Carruthers (ed.), *Multilateral Environmental Agreement Negotiator's Handbook,* University of Joensuu

2.2 General instructions

Participants were also given a list of roles and group memberships, as well as the following general instructions:

1) At a minimum, please review the general and individual instructions and the key simulation documents (subsection 3.1) as well as the rules of procedure for the MEA associated with your role. The remaining material is for reference/use as needed, but should not be overlooked.[23]
2) Each participant will be assigned a role as a representative of a Party, or as a Secretariat official.[24] Additional **confidential** individual instructions will be provided to each participant.
3) *Participants representing Parties* have been sent with full credentials from their governments to participate in the meeting of the AHJWG, using their confidential individual instructions as a guide.[25] Parties *should do their best to achieve the objectives laid out in their instructions.* They should develop a strategy and an integrated rationale to support their positions. Do not share your confidential individual instructions with other participants. Do not concede to a fall-back position without a serious effort to achieve your primary objective (and not on the first day!). If possible, consult with others before the session, to identify and coordinate with those who have similar instructions, and even prepare joint interventions. *You should build alliances and try to support anyone with a similar position who is out-numbered. You should try to identify participants with opposing views, and influence them both in formal negotiations, as well as in informal settings. At any time, you may receive supplementary instructions.* Participants should, of course, always be respectful of each other's views and backgrounds.
4) Participants playing the roles of Secretariat officials will support the Co-Chairs, Vice-Chairs and rapporteurs, and join specific drafting groups, in an advisory role only. Secretariat officials support the process and the Parties in any appropriate manner. Secretariat officials support the drafting groups and work directly with the Co-Chairs, Vice-Chairs/facilitators and rapporteurs, and respond to requests from Parties.
5) The Simulation Coordinators may, as needed, play the role of a Senior UNEP official and/or one of the designated senior government officials in a state's capital authorized to provide supplementary instructions to their delegations. The Simulation Coordinators will remain – as far as possible – outside of the simula-

– UNEP Course Series 5 (2nd ed., University of Joensuu, 2007). The Handbook is available in both English and French at <http://www.unep.org/dec/docs/MEAs_Negotiators_Handbook.pdf> and <http://www.unep.org/dec/PDF/MEA_Negotiators_Handbook_French.pdf>.

[23] See also *ibid.*, in particular, sections 3.1, 3.2, 3.3, 3.6, 2.4, 4.3 and 5.

[24] There were no IGO or NGO roles in this exercise, their exclusion based largely on feed-back from participants in other simulations who had indicated that they found such roles very limited.

[25] Confidential individual instructions have been developed without reference to actual country positions, and it is not necessary for this simulation that participants attempt to follow positions in the real negotiations.

tion and should not be consulted unless necessary. Questions on procedure, etc. should a priori be addressed to the Co-Chairs, drafting group facilitators or Secretariat officials.

6) In the AHJWG plenary, the Co-Chairs sit at the head of the room, with the Secretariat officials beside them. Participants were provided with the opportunity to select the appropriate Party 'flag', based either on the nationality of their twin, or if that is taken, then to choose another flag, after discussion with their twin. The term 'flag' refers to the nameplate provided for each Party (fold it twice, so the name is in the mid-panel). To speak, please raise your 'flag' and signal the Secretariat official keeping the speakers' list. Secretariat Officials will have their own name plates.
7) The AHJWG will begin work in plenary. As explained in subsection 1.5, the AHJWG will establish four drafting groups (Groups A–D).
8) The first task for Parties is to elect two Co-chairs for the AHJWG and four Vice-Chairs, one from each of the Conventions. The usual practice is that developing county Parties and developed country Parties are equally represented as Co-Chairs. For this exercise, given the fact that no voting rules have been adopted under the AHJWG (see subsection 3.2), selection should be based on informal consultations, and decided by consensus.
9) When the AHJWG breaks into the four drafting groups, please join the group identified in your individual instructions. The groups will operate much like an informal drafting group (see the *MEA Negotiator's Handbook*).
10) The four drafting groups must reach agreement on what to report back to the plenary. Each Vice-Chair will act as a facilitator in one of the drafting groups to manage the meeting. Each group will select a rapporteur to compile a report of the discussions (see the *MEA Negotiator's Handbook* on drafting, especially on use of brackets).
11) Once elected, Co-Chairs and Vice-Chairs/facilitators must play their roles throughout the negotiation simulation exercise, and generally refrain from openly taking positions, and only do so when explicitly indicating that they are 'taking their Chair's hat off' or similar sentiment.
12) Please use only the materials provided, as well as advice and information from other participants, and do not be distracted by internet resources or use any precedent found there or elsewhere (even though this is often a good idea in real life!).
13) The exercise will take place over a two-day period. Participants are encouraged to consult informally before the exercise for nominations to the Co-Chair/Vice-Chair positions and in the evening of the first day to form alliances and broker solutions (as often happens in real life).

2.3 Twinning

Each participant was assigned a role as a representative of a Party or Secretariat participant; and the former were eligible be chosen to play the role of Co-Chair, Vice-Chair/facilitator or rapporteur (see above subsection 2.2). All participants also played

a role based on the personal background and experience of one or more co-participants with whom they had been 'twinned'. Participants were encouraged to consult their 'twin' or twins, in order to draw on their actual perspectives, in order to develop a rationale of their interventions and put their negotiation instructions in the context of the country they represented.

As noted above, the positions of Parties in this exercise were not intended to reflect the actual positions of any State. Accordingly, participants were asked not to seek information or advice on actual positions or political views of governments, but rather to seek advice on and support for their hypothetical positions by drawing on any relevant environmental, social, cultural or economic information their twin could provide. Twinning was also intended to promote general understanding of how different perspectives might affect approaches to substantive and process issues – and to add some dramatic interest to the scenario.

In addition, participants were encouraged to draw on a cultural reference, local saying or an anecdote from their twin to illustrate a point related to the substance or process of the negotiations, as negotiators often do. Participants were asked always to be respectful of each other's views and backgrounds. All participants were also provided with 'flags' or nameplates for use in the formal meeting. Participants in the role of government representatives were asked to select the flag of their 'twin' or if that flag had already been selected, the flag of a country from the same region or negotiating group. Individual instructions were developed without reference to actual country positions, and so it was not necessary for participants to attempt to follow such positions. It was suggested, however, that participants develop their positions and interventions with the interests of the regional group of their twin in mind.

Each participant was twinned with another participant whose background or experience was different from their own. Thus, as many developing country participants as possible were twinned with participants from a developed country, and vice versa. Each was then asked to take on the role of representing their twin's Party, with their positions informed by the knowledge and perspective of their twin. As there were more developing country participants than developed country participants, some of the latter were twinned with each other. In such cases, each participant was from a different region, so that they had the opportunity to learn about another regional perspective. The instruction sets and roles were otherwise assigned randomly, except for minimal adjustments designed to promote regional, gender and sectoral balance in the exercise. Individual instructions were also provided to each participant in a numbered set of individual instructions. The positions reflected in these instructions were entirely random. No attempt was made to have instructions align with actual positions of Parties on the issues, and any linkages to actual positions were entirely by chance. So, when providing advice and perspective to their twin, each participant was essentially asked to take the positions provided in the materials as given, and then

provide country specific information that could be used to support that position. In this way, participants might also gain an alternative (and random) perspective on their own national positions.

3 Key simulation and official documents

Participants were provided with a number of documents for the simulation, including the following backgrounder, Co-Chairs' texts; as well as actual official texts, including selected and abridged rules of procedure for each of the six participating conventions (in particular, those which relate to participation, conduct of business, voting and language).[26,27, 28, 29, 30, 31.]

3.1 Backgrounder

The emergence of the six main biodiversity-related conventions is summarized below, after which clustering of biodiversity-related MEAs in discussed in the context of the IEG-process. Annex 1 provides more detailed information about the main characteristics of the biodiversity-related MEAs. In addition, annex 2 provides further information about the governing bodies of the biodiversity-related MEAs.

[26] Selected Rules of Procedure for the Convention on Biological Diversity, (Rules 6,7, 22, 29, 31, 33, 37, 39, 40, 52), Annex to Decision I/1 'Rules of procedure for the Conference of the Parties' (1994) and Decision V/20 'Operations of the Convention' (2000), abridged for the exercise.

[27] Selected Rules of Procedure for the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Rules 1, 2, 5, 6, 8, 9, 12, 16, 17, 20, 21, 24, 26, 30), *CITES Rules of Procedure of the Conference of the Parties*, as amended at the 14th meeting, The Hague, 2007; and as abridged for the exercise.

[28] Selected Provisional Rules of Procedure for the Convention on Migratory Species, (Rules 1, 2, 9, 14–17, 19, 20, 23, 25); Provisional Rules of Procedure, 10th Meeting of the Conference of the Parties, Doc. UNEP/CMS/Conf.10.5 (2011), as abridged for this exercise.

[29] Selected Provisional Rules of Procedure (6, 7, 26, 29–33, 37, 38, 40, 52, 53) for the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar) Adopted by the 10th Meeting of the Conference of the Contracting Parties, Changwon, Republic of Korea, 29 October 2008, abridged for this exercise. See <http://www.ramsar.org/cda/en/ramsar-documents-cops-cop10-10th-meeting-of-the-19392/main/ramsar/1-31-58-127%5E19392_4000_0__> (visited 26 October 2012).

[30] Selected Rules of Procedure for the Convention Concerning the Conservation of the World Cultural and Natural Heritage (1, 2, 4, 5, 7, 8, 12), adopted by the Second General Assembly of States Parties (Paris, 24 November 1978) and amended at the Tenth General Assembly of States Parties (Paris, 2–3 November 1995), Thirteenth General Assembly of States Parties (Paris, 30–31 October 2001), Fourteenth General Assembly of States Parties (Paris, 14–15 October 2003), Sixteenth General Assembly of States Parties (UNESCO, 24–25 October 2007) and Seventeenth General Assembly of States Parties (UNESCO, 23–28 October 2009). Articles 13(6) and 13(7) concerning the voting papers have been aligned with Art. 13(4), amended by the Tenth General Assembly of States Parties (2–3 November 1995), in accordance with the decision of the Bureau of the World Heritage Committee at its 23rd session (5–10 July 1999); abridged for this exercise. See <http://whc.unesco.org/en/80/error=forgotlogin> (visited 26 October 2012).

[31] Selected Rules of Procedure for the International Treaty on Plant Genetic Resources for Food and Agriculture (4, 5, 7, 9, 11, 12), Doc. IT/GB-1/06/Report (2006), Appendix D, abridged for this exercise.

3.1.1 The emergence of biodiversity regimes

The current global governance system for biodiversity has emerged during the past half century. Solutions to address biodiversity loss have been identified and developed in an ad hoc and incremental fashion as different aspects of the problem have come to light and opportunities for action have been identified. It has also been necessary to concentrate on specific issues (for instance, access and benefit-sharing of genetic resources) to keep the complexity of the negotiations manageable. As a result, there are today more than 150 global or regional multilateral environmental agreements that concern biodiversity at some level.[32] The scope and coverage of related substantive issues appears piecemeal and fragmented from a broader ecological or global perspective.

In the early 1960s, the degradation of wetlands became a matter of international concern, particularly where their roles as waterfowl habitat were concerned, and a series of negotiations were quickly initiated for the protection of these ecosystems. This process culminated in 1971 in Ramsar, Iran, with the adoption of the Ramsar Convention on Wetlands that provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. Over the years, the Convention has broadened its scope[33] to cover all aspects of wetland and water resource conservation and wise use, including freshwater and saline inland waters and marine waters up to a depth of six metres.

Also in the 1960s global concern over international trade in wild species grew and governments embarked in long negotiations which resulted, in 1973, in Washington D.C., in the adoption of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The Convention aims to ensure that international trade in specimens of wild animals and plants does not threaten their survival. The Convention regulates international trade and lists species in three appendices that are subject to different degrees of regulation, largely depending on the perceived conservation status of the listed species in question. CITES is considered to be one of the most effective global environmental regimes, since non-compliance may be addressed by trade suspensions.[34]

At the end of the 1960s, proposals were made for addressing the conservation of nature and the preservation of cultural sites under a single convention. These proposals were presented to the 1972 Stockholm Conference[35] and, eventually, a single text was agreed. In November 1972, the General Conference of the United Nations

[32] Markus Knigge, Johannes Herweg and David Huberman, *Geographical Aspects of International Environmental Governance, Illustrating Decentralisation* (Ecologic, Institute for International and Environmental Policy, 2005), available at <http://ecologic.eu/download/verschiedenes/2005/knigge_fragmentation.pdf> (visited 21 March 2012).

[33] The words 'especially as waterfowl habitat' have been dropped from the Convention's name.

[34] Pamela S. Chasek, David L. Downie and Janet Welsh Brown, *Global Environmental Politics, Dilemmas in World Politics* (4th ed., Westview Press, 2006).

[35] United Nations Conference on Human Environment.

Educational, Scientific and Cultural Organization (UNESCO) adopted the World Heritage Convention (WHC) that aims to identify and conserve the world's cultural and natural heritage, by drawing up a list of sites whose outstanding values should be preserved for all humanity.

In 1972, the particular need for the conservation of migratory species was acknowledged in the Stockholm Conference. This resulted in several years of negotiations and, in 1979, the Convention on Migratory Species (CMS) was adopted in Bonn, Germany, with the aim being to conserve terrestrial, marine and avian migratory species throughout their ranges. The Convention is considered unique in the sense that it operates like an umbrella convention, under which seven independent regional agreements have been adopted.[36]

In the 1980s, it became apparent that a more integrated approach to addressing biodiversity loss needed to be developed. A decision from UNEP's Governing Council in 1987 started the negotiations for a new international biodiversity convention. Many hoped that that existing biodiversity-related MEAs would be merged as protocols under the new convention. However, it became quickly apparent that this would not be politically feasible. In May 1992, the Convention on Biological Diversity (CBD) was adopted in Nairobi and opened for signature a month later in Rio de Janeiro. The objective of the Convention is the conservation and sustainable use of biodiversity, and the fair and equitable sharing of the benefits arising from genetic resources. The agreement covers all ecosystems, species, and genetic resources.

During the 1990s and the beginning of the 21st century, the emphasis of biodiversity regime setting has shifted from ecosystems and species to genetic resources. In 2000, the Conference of Parties (COP) to the CBD adopted the Cartagena Protocol on Biosafety[37] that seeks to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology.

Access and benefit sharing of genetic resources is supported by two conventions that have been adopted in different political fora. In 2001, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) was adopted under the Food and Agriculture Organization of the United Nations (FAO).[38] The convention aims to ensure the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the CBD. In 2010, the CBD COP-10 adopted the Nagoya Protocol on Access and Benefit Sharing (ABS)[39] that aims at sharing the

[36] Aðalheiður Jóhannsdóttir, Ian Cresswell and Peter Bridgewater, 'The Current Framework for International Governance of Biodiversity: Is It Doing More Harm Than Good?' 19 *Review of European Community and International Environmental Law* (2010) 139–149.

[37] Cartagena Protocol on Biosafety, Montreal, 29 January 2000, in force 11 September 2003, 39 *International Legal Materials* (2000) 1027.

[38] See <http://www.fao.org>.

[39] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising

benefits arising from the utilization of genetic resources in a fair and equitable way, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies. These conventions are compatible in the sense that the ABS Protocol aims to cover all genetic resources of living organisms, except those crops and plants already covered by the ITPGRFA.

3.1.2 International environmental governance and clustering of biodiversity-related MEAs

The wide range of biodiversity-related MEAs has, undoubtedly, induced action that has resulted in positive outcomes. However, the latest international status reports confirm that the loss of biodiversity continues all over the globe.[40] In 2005, the Millennium Ecosystem Assessment (MA) estimated that the current species extinction rate is more than 1 000 times higher than background rates.[41] The MA also showed that 60 per cent (16 out of 24) of the ecosystem services it assessed are either degraded or used unsustainably as a result of human activity. In 2010, the CBD Secretariat's Global Biodiversity Outlook 3 reiterated many of the findings of the MA and concluded that without urgent action ecosystems are approaching tipping points beyond which irreversible degradation will take place.[42]

Consequently, it would seem that global biodiversity-related MEAs have failed to deliver their intended objectives. As noted above, some critics suggest that the lack of coordination and integration in MEAs has been an important factor that has hampered the development of international biodiversity law and its attendant governance apparatus. However, due to the gravity of the biodiversity crisis, it is evident that biodiversity policies need to be further developed globally and implemented more efficiently at all levels. To this end, it will be important to tackle the current IEG-system which many commentators suggest has been characterized by fragmentation and a lack of coherent and efficient solutions for dealing with environmental problems in general, and biodiversity loss and ecosystem degradation, in particular.

The most recent discussions on enhancing international environmental governance have been underway for over a decade. Clustering of thematically or otherwise interlinked MEAs and promotion of synergies among them is one part of those discussions. Broadly speaking, clustering refers to the combination, grouping, consolidation, integration or merger of MEAs or parts thereof in order to improve IEG. Clustering provides opportunities for synergies, particularly within each cluster, where agreements have much in common in terms of issues to be addressed.

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from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, <http://www.cbd.int/abs/>.

40 For further discussion on this issue, see the paper by Erie Tamale in this *Review*.

41 *Millennium Ecosystem Assessment. Ecosystems and Human Well-being: Biodiversity Synthesis* (World Resources Institute, 2005), available at <http://www.maweb.org/documents/document.354.aspx.pdf> (visited 14 March 2012).

42 Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook 3* (CBD, 2010), available at <http://www.cbd.int/gbo3/> (visited 14 March 2012).

In 2002, the UNEP Governing Council/Global Ministerial Environment Forum (GC/GMEF)[43] adopted the 'Cartagena Package on International Environmental Governance' that recommends, inter alia, improving coordination and coherence among MEAs with comparable areas of focus.[44] The process of international environmental governance was highlighted at the 2005 World Summit,[45] where Heads of State adopted the World Summit Outcome Document,[46] in which they agreed to explore the possibility of creating a more coherent institutional framework, including a more integrated structure, for environmental activities in the United Nations system.[47]

Subsequently, the UN Secretariat initiated the 'Informal Consultative Process on the Institutional Framework for the United Nations' Environmental Activities', co-chaired by Mexico and Switzerland.[48] In 2007, the Co-chairs presented an 'Options Paper' that, inter alia, presents an option for the clustering of MEAs.[49] The final stage involved drafting a resolution that was scheduled to be submitted for approval at the 63rd session of the General Assembly in Autumn 2008. However, the views among governments were too divergent and the Co-Chairs decided not to file a resolution. In December 2008, the IEG process in New York came to a standstill and the Co-Chairs of that process called for other processes to provide fresh ideas to the UN General Assembly (UNGA). In February 2009, the 25th meeting of the UNEP GC/GMEF responded to the call and set up a Consultative Group of Ministers, or their High-level Representatives, on IEG.[50]

As discussions on enhancing the IEG system have revolved between UNEP and UNGA during the past decade, there have also been some attempts actually to implement the decisions. In fact, significant progress on enhancing MEA synergies has been achieved among three conventions (Basel, Rotterdam and Stockholm) in the chemicals and wastes cluster. The process started in 2006 with the establishment of an Ad Hoc Joint Working Group (AHJWG) among the three conventions. The group consisted of 45 members: 15 signatories from each of the three conventions. The AHJWG convened three times and agreed on recommendations that include concrete proposals for joint programmatic and administrative activities. These include, inter alia, harmonization of national reporting, developing joint capacity building activities, joint outreach and public awareness activities and establishing

[43] See <http://www.unep.org/gc/gcss-xii/>.

[44] See UNEP/GCSS.VII/1, (para. 133), known as the 'Cartagena package (<http://www.unep.org/GC/GCSS-VII/default.asp> (visited 26 October 2012)).

[45] The High-level Plenary Meeting of the 60th Session of the General Assembly, see <http://www.un.org/summit2005/>.

[46] 'World Summit Outcome', UNGA Res. 60/1 (2005).

[47] *Ibid*. para. 169.

[48] See <http://www.un.org/ga/president/60/summitfollowup/enviro.html> and <http://www.un.org/ga/president/61/follow-up/environmentalgovernance.shtml> (both visited 26 October 2012).

[49] International Consultative Process on the Institutional Framework for the United Nations' Environmental Activities, Co-chairs' Options Paper, 14 June 2007, available at <http://www.un.org/ga/president/61/follow-up/environment/EG-OptionsPaper.PDF> (visited 20 March 2012).

[50] See <http://www.unep.org/environmentalgovernance/Portals/8/documents/IEGEDBackgroundPaper-1.pdf> (visited 26 October 2012).

joint services and functions. The recommendations from the AHJWG were adopted in decisions by the Basel, Rotterdam and Stockholm COPs in 2008 and 2009.[51] Pursuant to those decisions and to seal the process at a high level, simultaneous extraordinary meetings of the three COPs were held in February 2010 in Bali in conjunction with the 11th special session of the UNEP GC/GEMF.[52]

Also in February 2010, in discussions by ministers and heads of delegations at the 11th special session of the UNEP GC/GMEF under the rubric of 'International environmental governance and sustainable development' (Theme I of the session), the synergies process among the chemical and wastes conventions was said to provide an important example of incremental reform. Lessons learned could be applied to processes under other conventions, in particular for those related to biodiversity. In the Nusa Dua Declaration,[53] governments recognized 'the importance of enhancing synergies between the biodiversity-related conventions, without prejudice to their specific objectives, and encourage the conferences of the parties to the biodiversity-related multilateral environmental agreements to consider strengthening efforts in this regard, taking into account relevant experiences'.[54] The COPs of the biodiversity-related conventions were invited to launch a synergies process, taking into account lessons learned from the chemicals and wastes synergies process.

In April 2010, a Nordic symposium on synergies among biodiversity-related MEAs was organized in Helsinki, Finland.[55] The symposium brought together 50 experts in biodiversity issues and international environmental governance. The six conventions discussed above (CBD, CITES, CMS, Ramsar, WHC and ITPGRFA) were considered to form a manageable and coherent cluster. These six conventions are generally referred to as biodiversity-related conventions and they already cooperate at the secretariat level through the Biodiversity Liaison Group (BLG),[56] established by the CBD in 2004. The group's function is to 'enhance coherence and cooperation in implementation' and 'to explore opportunities for synergistic activities and increased coordination, and to exchange information' among the heads of the same six biodiversity conventions. It was broadly understood that the Parties to these MEAs must address the lack of coherence among them, to which end a country-driven synergies process could be launched to consider joint issues. One of the main conclusions of the symposium was that the focus should be primarily on enhancing synergies on issues of substance, rather than on administrative issues, because the secre-

[51] See reports on the meetings for the Stockholm Convention COP-2 (UN Doc. UNEP/POPS/COP.2/30 (2006); SC-2/15: Synergies), Rotterdam Convention COP-2 (UN Doc. UNEP/FAO/RC/COP.2/19 (2005); RC-2/6) and Basel Convention COP-8 (UNEP/CHW.8/16 (2006); VIII/8).

[52] More information on synergies among the three conventions in the chemicals and waste cluster is available at <http://ahjwg.chem.unep.ch/> and <http://excops.unep.ch/>.

[53] UN Doc. UNEP/GCSS.XI/L.6 (2010), available at <http://unep.org/gc/gcss-xi/Documents/Nusa_Dua_Declaration_Bali_Feb2010.pdf> (visited 21 March 2012).

[54] *Ibid*. para. 12.

[55] For further information, visit the symposium website at <http://www.biodivcluster.fi>.

[56] See <http://www.cbd.int/blg/>.

tariats are dispersed and administered by different organizations. The following programmatic areas were identified as possible areas for joint action:[57]

- the science-policy interface, for instance an Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES);
- harmonization of reporting;
- streamlining of meeting agendas;
- joint information management and awareness raising; and
- capacity-building, compliance, funding and review mechanisms.

The tenth meeting of the Conference of Parties of the CBD, in Nagoya, Japan, in October 2010, made significant decisions on enhancing cooperation with the other conventions and institutions. The new Strategic Plan 2011–2020 was adopted as the overarching framework of the biodiversity-related MEAs.[58] To this end, the meetings of the governing bodies of the other biodiversity-related MEAs were invited to consider appropriate contributions to the collaborative implementation of the Strategic Plan. In order to increase the involvement of Parties in the synergies work, the forthcoming meeting of the Working Group on the Review of Implementation of the Convention (WGRI-4) was requested to determine the form and content of a process to enhance synergies among the biodiversity-related conventions and Rio conventions.[59]

In December 2010, the UNGA noted 'with appreciation the adoption … of the updated and revised Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets' (paragraph 4); took note 'of the ongoing work of… the Liaison Group of Biodiversity-related Conventions': recognized 'the importance of enhancing synergies among the biodiversity-related conventions, without prejudice to their specific objectives'; and encouraged 'the COPs to the biodiversity-related MEAs to consider strengthening efforts in this regard, taking into account relevant experiences and bearing in mind the respective independent legal status and mandates of these instruments' (paragraph 11).[60]

In February 2010, the UNEP's GC/GMEF set up another Consultative Group of Ministers or High-level Representatives on International Environmental Governance to consider the broader reform of the IEG system, building on the set of options identified by the previous ministerial group, but remaining open to new ideas.[61] The

[57] See para. 18 of the report of the symposium, available at <http://www.biodivcluster.fi/pdf/Synergies%20report%20final.pdf> (visited 26 October 2012).

[58] 'The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets', Decision X/2, in Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Nagoya, Japan, 18–29 October 2010, UN Doc. UNEP/CBD/COP/10/27* (2011).

[59] Thematic Programmes of Work – Progress Report and Consideration of Proposals for Future Action, Note by the Executive Secretary, UN Doc. UNEP/CBD/COP/10/20 (2010).

[60] 'Convention on Biological Diversity', UNGA Res. 65/161 (2011).

[61] See UNEP Governing Council decision 25/4 ('the GC decision', Annex 1).

Group held its second meeting in Helsinki in November 2010 and the meeting resulted in the Nairobi-Helsinki Outcome that includes six system-wide responses to the current challenges of the IEG-system, including one on clustering of MEAs, as follows:[62]

> [t]o encourage synergies between compatible multilateral environmental agreements and to identify guiding elements for realizing such synergies while respecting the autonomy of the conferences of the parties. Such synergies should promote the joint delivery of common multilateral environmental agreement services with the aim of making them more efficient and cost-effective. They should be based on lessons learned and remain flexible and adaptive to the specific needs of multilateral environmental agreements. They should aim at reducing the administrative costs of secretariats to free up resources for the implementation of multilateral environmental agreements at the national level, including through capacity-building.

The Consultative Group considered institutional forms that would best serve to implement the system-wide responses and came up with the following five options: (1) enhancing UNEP; (2) establishing a new umbrella organization for sustainable development; (3) establishing a specialized agency, such as a world environment organization; (4) reforming the United Nations Economic and Social Council and the United Nations Commission on Sustainable Development; and (5) enhancing institutional reforms and streamlining present structures.[63]

In February 2011, the 26th meeting of UNEP's GC/GMEF discussed the results of the final report and transmitted it to the 2nd meeting of the Preparatory Committee of the United Nations Conference on Sustainable Development (Rio+20-meeting)[64] and the 65th session of the UNGA to consider the options for broader reform of the IEG as part of strengthening the institutional framework for sustainable development.

At the time of the conducting of the exercise, it was anticipated that the forthcoming United Nations Conference on Sustainable Development,[65] which was held on 20–22 June 2012 in Rio de Janeiro, Brazil, would provide an important venue with appropriate authority and vision to deal with the issue. As part of the discussions on enhancing sustainable development governance, it was envisaged that the meeting could provide a strong political signal to the governing bodies of the biodiversity-related MEAs to initiate a clustering process. Hopefully then within five years, a more efficient and coherent system could be put in place so that halting biodiversity loss

[62] Available at <http://www.uncsd2012.org/rio20/content/documents/NairobiHelsinkifinaloutcome.pdf> (visited 21 March 2012).

[63] *Ibid*. para. 7.

[64] See <http://www.uncsd2012.org/rio20/index.php?page=view&type=13&nr=28&menu=24> (visited 21 March 2012).

[65] See <http://www.uncsd2012.org/rio20/index.html>.

and ecosystem degradation can become reality, not only on paper but also within nature.

3.2 Draft texts prepared by the Co-Chairs

The Ad Hoc Joint Working Group recommends the following for adoption by the Governing bodies of the participating conventions.

3.2.1 Draft text on joint programmatic action (Group A)

The Conference of the Parties,

1. *Calls upon* the United Nations Environment Programme and the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization; working together with other bodies of the United Nations, in particular the United Nations Development Programme, secretariats of multilateral environmental agreements and other international bodies, in particular the International Union for Conservation of Nature, to include programmatic cooperation of the participating conventions in their work programmes.

2. *Decides* to strengthen capacity building and technical support to developing countries and countries with economies in transition for coherent national implementation of the decision taken by the Governing bodies of the participating conventions.

3. *Decides* to promote joint programmatic action on cross-cutting issues, including in the area of reporting, information management, public awareness and outreach, and technology transfer and capacity-building, by building on existing initiatives, with a view to developing a coherent approach on these matters for facilitating coordinated implementation at the national, regional and international levels.

4. *Requests* Parties to reflect the full range of measures to implement the six participating conventions in a coherent and synergistic manner in the context of the revision of national biodiversity strategies and action plans.

5. *Requests* the scientific advisory bodies of the participating conventions to enhance cooperation and coordination, inter alia, with regard to work on cross-cutting issues, such as climate change, development of biodiversity indicators, scientific criteria for the identification of ecologically or biologically significant areas in need of protection, as well as identify common scientific needs to be conveyed to the Intergovernmental science-policy Platform on Biodiversity and Ecosystem Services, in a manner consistent with their respective mandates, gov-

ernance arrangements and agreed programmes of work and with a view to developing a coherent approach on these matters.

6. *Invites* the Global Environment Facility to realign and adjust financing for the biodiversity related conventions in order to support synergistic implementation of the participating conventions, inter alia, by promoting cooperation at national and regional levels between focal points of the participating conventions.

7. *Decides* to establish regional centres of expertise to support Parties in the national implementation of their commitments through regional delivery of technical assistance under the six conventions.

8. *Decides* that the work carried out by the regional centres should promote coherent and mutually supportive implementation of the participating conventions by applying a holistic and integrated approach to conservation and sustainable use of biodiversity, fair and equitable sharing of benefits arising from their use and prevention of illegal trade of species, with the ultimate aim for achieving sustainable development and securing human well-being, in a manner consistent with their respective mandates, governance arrangements and agreed programmes of work.

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3.2.2 Draft text on joint work plan for national implementation (Group B)

The Conference of the Parties,

1. *Adopts a* joint work plan with the objectives to promote coherence and synergy in national planning for biodiversity, *taking into account* the updated Strategic Plan for Biodiversity 2011–2020 that represents a useful flexible framework that is relevant to all biodiversity-related conventions.

2. *Invites* Parties to consider the following elements of the joint work plan, in the context of the revision of national biodiversity strategies and action plans, based on national circumstances and priorities.

Element 1: Improve national level coordination
Strengthen national level coordination between convention Focal Points, including representatives of local and indigenous communities, and among relevant national agencies through the establishment of national committees for the implementation of the participating conventions in all phases of planning. This national coordination can be extended to the regional level.

Element 2: Application of the ecosystem approach
Apply the ecosystem approach and other relevant tools[66], taking into account traditional knowledge, and making use of the UNEP Issue-Based Modules, when planning mutually supportive activities among the participating MEAs.

Element 3: *Develop joint guidelines*
Develop and apply joint guidance/guidelines based on good practices.

Element 4: Enhance communication, education and public awareness
Increase public awareness through coordinated information sharing, exchange of experience, analysis of case studies.

Element 5: Strengthen capacity building
Strengthen capacity building and technical support to developing countries and countries with economies in transition for coordinated national implementation.

Element 6: Enhance integration of biodiversity to other sector´s polices
Strengthen the integration of biodiversity through a coordinated effort into other sector´s policies; in particular, those relating to energy, agriculture, transport, urban construction, tourism and climate change.
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3.2.3 Draft text on a joint review mechanism/advisory board (Group C)

The Conference of the Parties,

1. *Decides* that a joint advisory body of the participating conventions, to be known as the Joint Advisory Board, is hereby established.

2. *Decides* that the Joint Advisory Board shall consist of 5 members from each of the participating conventions chosen by the governing body of each with due regard for regional and gender balance.

3. *Decides* that the functions of the advisory board shall be:
   (a) to review the implementation of the synergies decision;
   (b) further to elaborate joint services and functions;
   (c) to advise on joint activities in the field and their implementation in accordance with the One UN initiative.

[66] For example, the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, UN Doc. UNEP/CBD/COP/VII/12 (2004) is relevant to all the biodiversity-related MEAs.

4. *Decides* that the meetings of the Joint Advisory Board shall be serviced jointly by the secretariats of the participating conventions.

5. *Decides* that one Chairperson and one Co-Chairperson be elected from its members by the expert group to preside over its work, and selected on a rotating basis from each of the participating Conventions.

6. *Decides* that the Joint Advisory Board shall meet annually.

7. *Decides* that the rules of procedure of the participating conventions shall apply to the expert group concurrently as far as possible, *mutatis mutandis*.

8. *Invites* Parties and others to make contributions through the special trust fund to ensure the participation of representatives of developing country Parties and Parties with economies in transition in to ensure their effective joint expert group.

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3.2.4 Draft text on the establishment of group on rules of procedure (Group D)

The Conference of the Parties,

1. *Calls for* continued improvement in cooperation and coordination between the participating Conventions.

2. *Decides* to establish a joint open-ended expert group on procedural matters for the participating Conventions.

3. *Decides* that the functions of the advisory body shall be to develop joint decision–making procedures and practices, and to provide advice on procedural matters for consideration by the governing body of each of the participating Conventions.

3. *Decides* that the joint open-ended group shall consist of members elected by the governing body of each of the participating Conventions, with due regard for regional and gender balance, and be comprised of 10 members to represent the perspective of each participating convention.

4. *Decides* that the rules of procedure of the participating conventions shall apply to the expert group concurrently as far as possible, *mutatis mutandis*.

5. *Decides* that one Chairperson and one Co-Chairperson be elected from its members by the expert group to preside over its work, and selected on a rotating basis from each of the participating Conventions.

6. *Invites* Parties and others to make contributions through the special trust fund to ensure the participation of representatives of developing country Parties and Parties with economies in transition in to ensure their effective joint expert group.

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3.3 Recent decisions on synergies among the biodiversity-related MEAs

A summary of recent relevant decisions was also provided to participants, noting that the concept of synergies between MEAs had been discussed over several years by the biodiversity-related MEAs. It was also highlighted that the relevant governing bodies had, to various extents, called for synergies between these conventions. The most recent and key decisions and resolutions calling for synergies and collaboration with one or more of the conventions were listed for participants in table 1.

Table 1. Most recent key decisions and resolutions of the biodiversity-related conventions calling for synergies with other such conventions (focusing on provisions that address synergy with more than a single convention).[67]

CBD Decision X/20	Paragraph 5: 'Urges Parties to establish close collaboration at the national level between the focal points for the Convention on Biological Diversity and focal points for other relevant conventions, with a view to developing coherent and synergetic approaches across the conventions at national and (sub-)regional levels'. Paragraph 10: 'Requests the Ad Hoc Open-ended Working Group on Review of Implementation at its fourth meeting, in order to increase the involvement of Parties in the work of the Liaison Group of the Biodiversity-related Conventions and the Joint Liaison Group of the Rio Conventions, to determine the form and content of a process to enhance coordination, coherence and national level synergies among the biodiversity conventions'. Paragraph 11: 'Recognizing the importance of the coherent and synergistic implementation of the biodiversity-related conventions, requests the Executive Secretary to: (a) review and, where necessary, update working arrangements, such as the joint work plans, with the other biodiversity-related conventions; (b) consider ways to assist Parties to reflect the full range of activities of all biodiversity-related conventions in the context of the revision of national biodiversity strategies and action plans, as well as in relevant capacity-building activities'.
CITES Decision 14.38 (Rev. CoP15)	'The Secretariat shall: … continue to collaborate with the secretariats of other conventions, UNEP and other bodies in order to facilitate the harmonization of knowledge management and reporting'.
CITES Resolution Conf. 10.4 (Rev. CoP14)	'CALLS upon the CITES Secretariat and the Secretariat of the Convention on Biological Diversity to coordinate their programme activities particularly through the UNEP coordination meetings; SUGGESTS that Parties, as appropriate to their national circumstances and to encourage synergy, take measures to achieve coordination and reduce duplication of activities between their national authorities for each Convention; CALLS upon Parties to explore opportunities for obtaining funding through the Global Environment Facility for relevant projects, including multilateral projects, which fulfil the eligibility criteria and guidance provided by the Conference of the Parties to the Convention on Biological Diversity to the Global Environment Facility'.
CMS Resolution 9.6	Paragraph 2: 'Reaffirms the interest and importance for CMS of continuing to develop effective and practical cooperation with other biodiversity instruments and international organisations'.

[67] Table of decisions and resolutions is derived from a draft report: Peter Herkenrath, *Promoting Synergies within the Cluster of Biodiversity-related Multilateral Environmental Agreements* (UNEP-WCMC, 4 August 2011).

ITPGRFA Resolution 8/2009	Paragraph 1: 'Requests the Secretary to continue enhancing the collaboration with other international organizations, especially the Convention on Biological Diversity in regard to the conservation and sustainable use of agricultural biological diversity, access to plant genetic resources and benefit-sharing'. Paragraph 6: 'Requests the Secretariat to foster cooperation with other organizations and strengthen existing cooperative arrangements with a view to developing synergies and reducing inefficiencies in a manner consistent with their respective mandates, governance arrangements and agreed programs, based on available resources'.
ITPGRFA Resolution 8/2011	Paragraph 4: 'Takes note of the Memorandum of Cooperation signed between the Secretary and the Executive Secretary of the Convention on Biological Diversity and commends the Secretary for the initiative, and requests the Secretary to explore with the Secretariat of the Convention on Biological Diversity, practical means and activities to give effect to this cooperation, in particular through capacity building for access and benefit-sharing, as related to plant genetic resources for food and agriculture, including through the organization of workshops, seminars and other events, coordination of technical assistance as well as the exchange of information'; Paragraph 6: 'Requests the Secretary to strengthen collaboration with the Secretariat of the Convention on Biological Diversity in the implementation of the Convention's programme of work on agricultural biodiversity, sustainable use of biodiversity, biodiversity and climate change, as well as on the United Nations Decade on Biodiversity and the integration of biodiversity into poverty eradication and development, in harmony with the work of the Treaty'; Paragraph 7: 'Calls on Contracting Parties to ensure that any legislative, administrative or policy measures taken for the implementation of both the Treaty and the Convention on Biological Diversity (or its Nagoya Protocol), are consistent and mutually supportive'; Paragraph 8: 'Requests the national focal points of the Treaty to enhance their collaboration and coordination with their counterpart national focal points for the Convention on Biological Diversity on all relevant processes, in particular on the Nagoya Protocol and the Strategic Plan'; Paragraph 10: 'Requests the Secretary to continue to foster collaboration with other treaty bodies, especially with the Convention on Biological Diversity in regard to the conservation and sustainable use of agricultural biological diversity, access to plant genetic resources for food and agriculture and benefit-sharing in the light of the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, according to the respective mandates, governance structures and agreed programs'.

Ramsar Resolution X.11	Paragraph 12: 'Requests the Secretariat to continue to be fully involved in the work of the Biodiversity Liaison Group (BLG) established under the aegis of the CBD and to report regularly to Standing Committee on progress achieved by this group'.
WHC Decision 34 COM 5D	Paragraph 5: 'The World Heritage Committee… welcomes the proposed Action Plan for 2012 … and encourages to reflect and to pursue the efforts to strengthen linkages between the World Heritage Convention and other relevant multilateral environmental agreements (MEAs)'. Paragraph 8: 'The World Heritage Convention… requests the World Heritage Centre to identify opportunities, of potential collaboration with the UNESCO Man and Biosphere Programme (MAB), United Nations Environment Programme (UNEP), the Convention on Biological Diversity (CBD) and other MEAs, and taking into account the needs of Small Island Developing States (SIDS), in the form of pilot projects to address the relation between conservation and sustainable development at regional/ ecosystem scales '.

Annex 1. Main characteristics of the biodiversity-related MEAs.

	CBD	CITES	CMS	Ramsar	WHC	ITPGRFA
Mandate	The conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising from commercial and other utilization of genetic resources.	Ensure that international trade in specimens of wild animals and plants does not threaten their survival.	Conserve terrestrial, marine and avian migratory species throughout their range.	The conservation and wise use of all wetlands through local, regional and national actions and international co-operation, as a contribution towards achieving sustainable development throughout the world.	Identify and conserve the world's cultural and natural heritage, by drawing up a list of sites whose outstanding values should be preserved for all humanity and to ensure their protection through a closer co-operation among nations.	The conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the CBD, for sustainable agriculture and food security.
Scope	All ecosystems, species, and genetic resources.	Plant and animal species threatened by trade.	Migratory species.	Wetland ecosystems.	Natural and cultural (as well as "mixed") sites.	All plant genetic resources for food and agriculture.
No. of Parties	193	175	115	160	151	127
Entry into force	1993	1975	1983	1971	1972	2004
Main implementation tool	National Biodiversity Strategies and Acton Plans (NBSAPs) that countries are required develop, implement and periodically revise.	Through its appendices I, II & III, the convention accords protection to more than 30 000 species.	Appendices and agreements	Allows Parties to designate Wetlands of International Importance in the Ramsar list. There are currently 1926 Ramsar sites (1 879 846 km^2).	Allows Parties to designate World Heritage Sites in the World Heritage list. There are currently 201 natural World Heritage Sites (1 770 000 km^2).	The Multilateral System of Access and Benefit-sharing covers a specific list of 64 crops and forages.
Particular strengths	Near universal Membership, Covers all aspects of biodiversity, Role in policy development	Regulatory (powerful and specific trade controls), High-profile	International cooperation, Tailored to specific regions and species	Wise Use, Site-based, Close relations with NGOs (incl. for implementation)	Site-based, Support to national management (capacity-building, financial) The world heritage "brand" brings income	
Particular weakness	Soft and open-ended character of the CBD's provisions, Weak extraterritorial dimension, Lack of an explicit commitment to protect biodiversity	Species, not ecosystem-based approach Challenging to ensure continued financial support	Species, not ecosystem-based approach Low level of ratification, particularly among G-20 countries Proliferation of regional agreements may lead to lack of coherence	Challenging to ensure a continued financial support through the payment of regular contributions to the core budget and to obtain voluntary funding	Limited geographic/spatial application	General awareness of the convention is weak

Annex 2. Governing mechanisms of the biodiversity-related MEAs

	CBD	CITES	CMS	Ramsar	WHC	ITPGRFA
Governing body Freq. of meetings Duration	Conference of Parties (COP) Every 2 years 2 weeks	Conference of Parties (COP) Every 2-3 years 2 weeks	Conference of Parties (COP) Every 2-3 years 1 week	Conference of Parties (COP) Every 3 years 1 week	Session of the World Heritage Committee Annually 1 week	Governing body (GB) Every two years 1 week
Secretariat Location staff	UNEP Montréal 87	UNEP Geneva 29	UNEP Bonn 23	IUCN Gland 22	UNESCO Paris 112	FAO Rome 12
Scientific body Freq. of meetings Duration	Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) Twice before COPs 1 week	Animals Committee & Plants Committee Annually 1 week + 1 week	Scientific Council (SC) Every 1-2 years 3 days	The Scientific and Technical Review Panel (STRP) Annually 1 week	Three external advisory bodies: International Union for the Conservation of Nature, International Council on Monu-ments and Sites and Internatio-nal Centre for the Study of the Preservation and Restoration of Cultural Property	Does not have a scientific body, but has access to the assessment on The State of the World´s Genetic Resources for Food and Agriculture
Other bodies	1) Meeting of Parties to the Cartagena Protocol 2) The Working Group on Article 8(j), 3) The Working Group on Protected Areas, 4) The Working Group on the Review of Implementation of the Convention (WGRI)	1) Standing Committee	1) Standing Committee 2) Intersessional Working Group on the Future Shape of CMS	1) Standing Committee	1) The General Assembly of States Parties to the Convention	
Cooperation mechanisms[1]	BLG Bilateral MoUs with : - Ramsar - CMS - CITES - WHC - ITPGRFA	BLG Bilateral MoUs with: - CBD - CMS - Ramsar	BLG Bilateral MoUs: - CBD - CITES - Ramsar - WHC	BLG Bilateral MoUs: - CBD - CMS - WHC - CITES	BLG Bilateral MoUs: - CDB - CMS - Ramsar	BLG Bilateral MoUs: - ITPGRFA

[1] The bilateral MoUs are listed twice in this table; under both of the conventions involved. In total, there are 11 MoUs among the biodiversity-related MEAs.

4 Review of the exercise

The following is a brief summary of the proceedings and analysis based on observations made by the facilitators during the simulation as well as the 'post-mortem' conducted immediately following the simulation, written evaluations from participants, and notes from additional verbal feedback.

There were 32 official participants in all, not including the four facilitators and the other resource people who supported or played various roles in respect of the simulation.[68] The participants were mainly from Ministries of Foreign Affairs or from ministries responsible for environmental matters of their respective countries. Academia and governmental and non-governmental organizations active in environmental matters were also represented.

This was the fifth time that a simulation exercise based on the same organizational model has been run in a UEF/UNEP course and published in this *Review*. In each exercise, there has been a different substantive focus, while at the same time each has included key issues related to the rules of procedure. This is the second time that the exercise was set to run over two full days. The positive results achieved were largely the product of the creativity of the participants; while the facilitators, who controlled final instructions 'from capitals', only incrementally allowed increased room for agreement.

The results were considered to be a success by the facilitators and by all of the participants who provided feedback.[69] In particular, one participant wrote '[. . .] the simulation exercise helped us to learn firsthand what is expected in reality'. Another noted that it was '[v]ery helpful,' but that it '[. . .] would be good to receive personal feedback and also a little more support and advices during the exercise'. Another said that '[t]he simulation game let participants having a better understanding of their role with the opportunity to put into practice tactics and techniques discussed during the lectures and lessons'.

One comment suggested that '[i]f the Course contains several workshops or interactive sessions, the "synergies" between the different workshops should be carefully balanced. For example, the negotiation workshop could be combined with the drafting workshop'.

In the debriefing session, one of the key areas of focus was *the first objective of the simulation: the understanding of the challenges and opportunities related to synergies*

[68] There were 17 women and 15 men, from the following 26 countries: Cambodia, Colombia, Egypt, Fiji, Finland, Grenada, Indonesia, Iran, Italy, Japan, Kiribati, Kosovo, Malaysia, Micronesia, Namibia, Netherlands, Philippines, Portugal, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand and the USA.

[69] The introduction to the exercise was rated at 4.6/5 by the participants in terms of relevance; and 4.3 in terms of quality. Participation in the exercise was rated at 4.8/5.

among MEAs, both in general and in a specific MEA context. There was considerable positive feedback about the substantive support and information provided by facilitators.

It was noted with some concern, however, and by some participants in particular, that the simulation had a bias towards support for a synergies agenda. It was noted that there was a divergence of views among Parties on the issues under discussion, and some suggested that more effort should have been given to a more appropriate balance of positions and draft outcomes. The simulation managers acknowledged the issue, while emphasizing that the simulation was intended to be a hypothetical situation, and by making the premise of the exercise suggest that new developments with respect to biodiversity were possible, the stakes of the negotiation simulation were higher, and the issues more compelling.

With respect to *the second objective: understanding of the principles and practices of multilateral negotiation and appreciation of the value and role of the rules of procedure,* it was emphasized by the simulation organizers that the goal of the exercise had not been that all groups would successfully achieve consensus on results. Rather, it was revealed that the objective had been to present participants with irresolvable or nearly irresolvable issues, so that there would be more than usual pressure on the rules and procedures of MEA negotiation, and, in turn, more pressure on participants to use – or even misuse – the rules.

It was noted that a number of participants had specific instructions to be obstructionist, and to use the rules of procedure aggressively. However, participants were congratulated on their perseverance and creativity, as the outcome produced a higher than expected amount of agreed text, with only a few outstanding issues reflected in bracketed text. There was considerable discussion among participants, including several with considerable negotiation experience, about how best to negotiate with Parties who appear to be intransigent or unreasonable.

It should be emphasized that the simulation was designed to produce a situation where agreement was very difficult, if not even impossible; where participants would be confronted with results that would be untenable within the terms of their instructions; and where they would be forced to grapple with the constraints of the rules of procedure, as well as the frustrations of being unable to reach agreement. The underlying objective was to highlight the importance of knowing the rules of procedure in the very rare instances where participants could be involved in actual negotiations with such difficulties. It should be noted that this kind of situation does not reflect the reality for most negotiators in most MEA fora, most of the time. And in the end, participants overcame many of the numerous challenges in the scenario and were able to reach agreement on most of the necessary texts, with only a few issues remaining for the final plenary.

However, it needs to be understood that although such instances might be rare and therefore not reflect typical negotiations, the techniques conveyed through the exercise remain both useful and valid. It is relatively common for a few Parties to have serious difficulties at some point in any MEA meeting, often having to consider the possibility of blocking consensus. In these situations, the importance of the rules of procedure increases, as Parties may seek procedural solutions. The assumption behind this objective is that many negotiators are ill-prepared to deal with such challenges. It should be noted that some instructions, and the roles of some groups, were somewhat exaggerated in order to give these participants stronger roles, and to contribute to the inter-locking sets of challenges confronting participants.

Most of the challenges facing participants were based on actual experience, all were based on real issues, and only a few of the instructions were somewhat unrealistic. One of the main concerns raised by participants was the lack of detailed explanations for positions, some of which contained internal contradictions. Apparent internal contradictions appear to be relatively common in MEA fora, and so were purposefully included in the simulation. There may be room in the future to improve the way in which these contradictions are organized and presented.

With respect to procedural and strategic issues, both participants and facilitators offered their views and perspectives based on their experiences. Most of the questions involved subjective assessments of different kinds of negotiation tactics and strategies.

With respect to *the third objective: familiarity with specific substantive and drafting issues,* participants noted in particular that the divergence of positions and views forced them to consider the balance between clarity and 'constructive ambiguity' required to reach agreement, as well as a number of comments about the utility of the course sessions on negotiation and drafting techniques which preceded the simulation, as well as the *MEA Negotiators Handbook.*

On *the fourth and final objective: discussion and appreciation of different perspectives on both MEA synergies and multilateral procedures*, there were a wide range of views expressed about general synergies and MEA process issues, including prospects for future MEA negotiations in general, and biodiversity-related and synergies-related negotiations in particular. One participant noted a concern that '[t]he course did not address all aspects of diplomacy, only language used in the drafting and technical matters'.

On synergies in particular, written comments received from participants included that '[t]he course provided a lot of examples and experiences at programme activities level, but not much in institutional framework matters'; and 'I got an insight in synergies which are available in biodiversity-related MEAs and on how I should work into synergy in national level'.

The resource people noted with appreciation that all participants took the exercise seriously and the simulation, indeed, reflected real-life negotiations. Interestingly, a cultural negotiation difference among participants was noted, as some followed their positions assiduously, while others were more flexible to turn to their capitals for further instructions to overcome difficult situations. The resource people also noted with interest that the assigned convention affiliations of the different Party representatives did not generate conflict along convention lines.

It was noted by the organizers that, in response to feedback from previous simulation exercises, participants were introduced to the exercise several days before it took place; they were not given detailed substantive background to their instructions; and nor were they provided with detailed rationales for the linkage – or lack of linkages – between their positions. Instead, participants were encouraged to develop their own rationales. Similarly, again in response to feedback from a previous simulation exercise, there were no NGO or IGO roles. Some participants noted this absence, and it was discussed how the simulation might be adapted to bring in these perspectives.

Specific comments were received which highlighted the importance of being confronted with a demanding and frustrating situation, in that this helped the participants to recognize the importance of abstract-sounding rules. It was also apparent that the participants appreciated being 'pushed'. While the objective of the simulation was not to explore any MEA rules per se, some participants also indicated an interest in being provided with more background information. One particular concern was that '[s]pecial instructions for junior participants with less experience would be desirable for the negotiation exercise (if possible)'.

Most participants indicated that the twinning of roles and the mutual mentoring between roles was a particularly useful way of exploring and learning about different perspectives; as well as of initiating further discussion on the issues, on regional and country-specific views. Twinning was also conducive to improving social interaction by enabling participants to get to know their fellow participants. In particular some noted that 'role reversal' was 'a great opportunity' to 'wear another country's shoes'.

However, several participants expressed some disappointment that they had not been able better to engage with their twins and draw out more relevant views and perspectives, largely owing to the limited time frame of the exercise. Others suggested that the concepts could have been better explained, or that twinning could have been set up earlier in the course, or even before the course began.

It was noted and recognized that advance reading of the simulation materials would be useful in this regard, and that the extended two-day format also helped to strengthen the twinning aspect of the simulation. In general, there was strong support for the extended two-day format.

In this simulation, it was clear that those in Chairing roles were kept working hard on substantive and procedural issues, so that keeping track of the real and simulation names of all participants became a concern. Based on comments from previous simulations, the Chairs in this simulation were given greater flexibility to design the process and to respond to developments in the simulation. This was particularly challenging, and increased the intensity of the simulation. However, the Chairs were closely supported by participants in Secretariat roles, and effectively used their time between and during sessions to consult with each other.

Participants agreed strongly that the simulation exercise achieved its objectives with respect to promoting engagement and familiarity with the principles of multilateral negotiation and related issues within the context of negotiation on rules of procedure; and putting the rules and principles into practice, in a simulation context. Furthermore, the participants strongly agreed, above all, that the exercise met its objectives with respect to promoting discussion of the issues from different perspectives. Many participants suggested that the exercise was one of the most useful components on the agenda of the course programme.

A Strange Beast Swimming Upstream: The International Whaling Commission in the Context of Synergies between Biodiversity-related MEAs (Including a Multilateral Simulation Exercise)

Ed Couzens[1]

1 Introduction

Presented in this paper is a description of a multilateral simulation exercise which was designed to foster negotiation skills by simulating the experience of debating and drafting legal text, in an unusually hostile atmosphere. The setting chosen was the International Whaling Commission (IWC);[2] a body which is often depicted as struggling to fulfill its mandate, given the bitter disputes[3] which have characterized it for decades and which have concerned both substantive and procedural issues.

It is the hope of the organizers of the University of Eastern Finland/UNEP Course on Multilateral Environmental Agreements that papers such as those presented in the present volume (and previous volumes) of the *Review* will have significant educational value. Much discussion, planning and research is required in the devising of, and preparing toward, the running of the Courses' negotiation exercises. The papers

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[2] See <http://iwcoffice.org/>.

[3] These disputes reach even to the very nature of the Convention itself, with some of its contracting governments denying that it is a multilateral agreement which is environmental in its nature; and others arguing that it is.

which explain the exercises then provide, hopefully, not merely records of what happened; but also pedagogical tools which teachers and lecturers can make use of in years to come in the training of diplomats, negotiators and students in the field of international environmental law-making and diplomacy.

The intention was that the participants would, from the beginning of the actual negotiating, run the exercise themselves – under the direction of their Chair. Although fictitious, the exercise was intended to have a realistic atmosphere – the positions which the participants adopted were intended generally to reflect positions which might be adopted by the country which they were representing. While pointers as to negotiating positions were given, participants were expected also to conduct their own research.

Each participant was assigned a state (a 'contracting government' to the International Convention for the Regulation of Whaling (ICRW)[4]) to represent. Where possible, each participant was assigned to a state with a view unlike that of the state which the participant normally represents or resides in.[5]

The scenario presented concerned a resolution put forward by a contracting government (Australia in the exercise). Each participant was given a copy of the proposed resolution – a document which was designed to be contentious and to contain numerous provocative claims or proposals.[6] The essential possibilities of the exercise were that the proposed resolution could be taken off the agenda; could be agreed upon by consensus; or could be voted on. If voted upon, as a resolution a simple majority would be required for adoption.

There were 29 participants, where there are 89 Contracting Governments to the ICRW. For the exercise, the 29 were allocated to pro- or anti-whaling positions in rough proportion to reality (in other words, a small majority of anti-whaling parties, with a number of possible swing states). It was intended that it would not be certain going into a vote that a majority would be obtained.

While a successful vote would not have the effect either of creating formal synergistic relationships with other Conventions, or amending the Schedule[7] to bring new

[4] International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946, in force 10 November 1948, 161 *United Nations Treaty Series* 72.

[5] There were 32 participants on the 2011 Course, from 26 countries: Cambodia; Colombia; Egypt; Fiji; Finland; Indonesia; Iran; Italy; Grenada; Japan; Kiribati; Kosovo; Malaysia; Micronesia; Namibia; The Netherlands; Philippines; Portugal; Russia; Singapore; South Africa; Spain; Sweden; Switzerland; Thailand; United States. Three participants did not take part in the exercise.

[6] For instance, the preambular object and the word 'environmental'.

[7] See <http://www.iwcoffice.org/cache/downloads/6awoj71tmhkw8gwows440k8kc/schedule.pdf> (visited 27 December 2012). The Schedule has been amended regularly and provides the means by which the contracting governments make changes to species listing, catch methods, catch quotas and other matters.

species under the IWC's control, a resolution carries significant momentum with it and is thus of importance.[8]

The IWC is a forum in which there is often conflict in unexpected places, and argument is not always on substance. This negotiating exercise was intended to educate the Course participants on, firstly, issues of substance (increasing understanding of synergies between biodiversity-related multilateral environmental agreements (MEAs) by considering a situation in which certain parties are highly resistant to synergies); on, secondly, issues of negotiation and strategy (coalition building and winning support); on, thirdly, textual interpretation (increasing understanding of working with the language of MEAs); and, finally, on procedural understanding (simulating a meeting with Rules of Procedure and of Debate and, possibly, the conducting of a ballot).

2 The IWC and synergies with biodiversity-related conventions

At a time when the world's states seem to be moving toward synergies and clusterings of international instruments,[9] almost to a 'biodiversity of conventions', the ICRW is one which is generally left out of such thinking.[10] It sometimes appears, even, that other MEAs simply defer to the International Whaling Commission and treat issues of whale conservation as 'untouchable'.

The Convention on Migratory Species, 1979,[11] provides that: '[e]ach AGREEMENT should … f) at a minimum, prohibit, in relation to a migratory species of the Order Cetacea, any taking that is not permitted for that migratory species under any other multilateral Agreement and provide for accession to the AGREEMENT by States that are not Range States of that migratory species'.[12] The effect of this Article is that the Convention on Migratory Species (CMS) provides that its state parties should not depart from the line taken by the IWC in respect of species for which a zero quota is in place; and that, as with the ICRW, any state should be permitted to join (in the case of the CMS, any AGREEMENT).

[8] Consider, for instance, the St Kitts and Nevis Declaration, adopted by the International Whaling Commission in 2006 (Resolution 2006:1). This is the only Resolution in recent years to have been 'won' by the pro-whaling contracting governments to the IWC. It was successful by a majority of one vote; but in subsequent years the anti-whaling contracting governments have not, despite regaining the majority, sought to overturn the Resolution.

[9] For examples, see other papers in this volume of the *Review*.

[10] Ed Couzens, 'How the Whale got its Impasse' in Ed Couzens and Tuula Honkonen (eds),, *International Environmental Law-making and Diplomacy Review 2008* (University of Joensuu-UNEP, 2009) 81–88.

[11] Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>.

[12] Art. V, 'Guidelines for Agreements', 4.

According to the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), 1980,[13] '[n]othing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling'.[14] This could be seen as a rather astonishing abrogation of authority, from a convention which purports to take a holistic, ecosystem-based approach to the management of the Antarctic's living resources. This wording is repeated in the Protocol on Environmental Protection to the Antarctic Treaty, 1991,[15] which provides that '[n]othing in this Annex shall derogate from the rights and obligations of Parties under the International Convention for the Regulation of Whaling'.[16]

According to the United Nations Convention on the Law of the Sea, 1982:[17]

> [n]othing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.[18]

While there have been suggestions made over the years that the reference to 'organizations' in the plural leaves scope for more than one management body, the IWC is generally considered to be the only such management body of any significance.[19]

While there is no formal reference to the IWC in the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973,[20] it has been recommended by the Parties that 'the Parties agree not to issue any import or export permit, or certificate for introduction from the sea, under this Convention for primarily commercial purposes for any specimen of a species or stock protected from commercial whaling by the International Convention for the Regulation of Whaling'.[21]

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[13] Convention on Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980, in force 7 April 1982, 19 *International Legal Materials* (1980) 841.

[14] Art. VI.

[15] Protocol on Environmental Protection to the Antarctic Treaty, Madrid, 4 October 1991, in force 14 January 1998, 30 *International Legal Materials* (1991) 1461.

[16] Annex II: 'Conservation of Antarctic Fauna and Flora'; Art. 7, 'Relationship with other Agreements outside the Antarctic Treaty System', 1.

[17] United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261.

[18] Art. 65, 'Marine mammals'.

[19] The North Atlantic Marine Mammal Commission (NAMMCO) agreement, signed in Nuuk, Greenland, on 9 April 1992, is a regional agreement (Faroe Islands, Greenland, Iceland and Norway) which has been touted as a possible alternative in respect of the area for which it has geographical scope. See, generally, <http://www.nammco.no>.

[20] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243.

[21] Resolution Conf. 11.4 (Rev. CoP12) (2002), 'Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission'.

The deferral to the authority of the IWC has not met with universal agreement, and was probably put forward in response to proposals put forward to CITES by Japan and Norway to downlist[22] certain species of cetacean to allow international trade therein.[23]

There is also no formal reference to the IWC in the text of the 1992 Convention on Biological Diversity;[24] but it is provided that '[e]ach Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity'.[25] Further, it is provided that '[t]he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity'.[26] These Articles, especially the latter, imply again a deferral of authority.

It seems, therefore, that there is at least a degree of careful avoidance of the whaling issue-area in recent multilateral environmental agreements. One possible reason for this is that states attach so much importance to whaling that they can only get agreement elsewhere by excluding the issue-area. Another possible reason is that states are so worried by the possibility of contaminating newer treaties with the conflict that has marked the ICRW for decades that they prefer to exclude the issue-area.[27] It is hard to see why, otherwise, it should be felt necessary that ICRW issues be expressly excluded from the ambits of newer conventions.

This does lead to a number of problematic issues arising. One noteworthy problem is that of certain cetacean species not being regulated. The Schedule to the ICRW contains a list of the cetacean species which fall under the management of the IWC.[28] The IWC has tended to view cetaceans as either 'large' or 'small' species, a distinction that frequently owes rather more to political considerations than biological credentials[29] and has a significant impact upon the application of relevant instruments to individual animals. Whereas 'small cetaceans' have also been the subject of recom-

[22] From Appendix I, which prohibits all commercial trade, to Appendix II which allows for regulated commercial trade.

[23] See note 37 below

[24] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822.

[25] Art. 5, 'Cooperation'.

[26] Art. 22, 'Relationship with Other International Conventions'.

[27] See *supra* note 10.

[28] Available at <http://www.iwcoffice.org/commission/schedule.htm>.

[29] On this, see Kieran Mulvaney and Bruce McKay, 'Small Cetaceans: Status, Threats, and Management' in William C. G. Burns and Alexander Gillespie, *The Future of Cetaceans in a Changing World* (Transnational Publishers, 2003), at 189–216; and Alexander Gillespie, 'Small Cetaceans, International Law and the International Whaling Commission' in William C. G. Burns and Alexander Gillespie, *The Future of Cetaceans in a Changing World* (Transnational Publishers, 2003), at 219. Mulvaney and McKay suggest

mendations included in Resolutions[30] of the International Whaling Commission, only the larger species of cetacean are dealt with in the text of the Schedule to the treaty. The list can be amended, and has been from time to time. Initially, for instance, the killer whale was not included in the species list. Since 1977, however, it expressly belongs to the list of cetaceans over which the IWC exercises jurisdiction, and the species is within the scope of the current moratorium ('zero quota') on commercial whaling.[31] At present, however, only 15 species are listed.[32] Approximately 70 species of cetacean[33] are not regulated by the IWC, and this leaves something of a 'regulatory vacuum' – there is no legal instrument of global scope which covers these species.

On the issue of synergies, originally, strong consideration was apparently given to a close relationship with the United Nations Food and Agricultural Organization (FAO)[34] – with the ICRW even to be administered by the FAO.[35] This did not happen and has since faded from the parties' thinking.

In 1976, the IWC offered to act as the official advisor to CITES on cetaceans; and, in 1978, requested that CITES 'take all possible measures' to support IWC restrictions.[36] The two organizations have had, however, a somewhat fractious relationship. Parties to CITES have (1994, 1997, 2000, 2002, 2004) proposed the downlisting of certain species of minke whale from Appendix I to Appendix II so as to allow for regulated international trade in those species.[37] None of these proposals achieved the two-thirds majority vote necessary for success, however.

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that the species listed originally were 'simply [] the species that were most likely to be targeted by the whaling industry of that time'; *ibid.* at 189–190.

30 See, for example, IWC Resolution 1994-2 (1994).

31 At the 29th meeting of the Commission in 1977, a definition of the species was included in the Schedule, which is an integral part of the Convention. Schedule, para. 1(B): '"killer whale" (*Orcinus orca*) means any whale known as killer whale or orca'.

32 Under the heading 'baleen whales': blue whale; bowhead whale; Bryde's whale; fin whale; gray whale; humpback whale; minke whale; pygmy right whale; right whale; sei whale. Under the heading 'toothed whales': beaked whale; bottlenose whale; killer whale; pilot whale; sperm whale. See '1. Interpretation' in the Schedule to the ICRW.

33 The Scientific Committee of the IWC currently recognizes 86 species of cetacean – see <http://www.iwcoffice.org/conservation/cetacea.htm> (visited 27 December 2012). However, while listed, the baiji (or Yangtze River dolphin) is probably extinct.

34 See, generally, <http://www.fao.org>.

35 See, for instance, R. Michael M'Gonigle, 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die', 9 *Ecology Law Quarterly* (1980) 119–237 at 133; and Patricia Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (Oceana, 1985) 182.

36 'Resolution to the CITES', IWC Special Meeting (1978), available at <http://iwcoffice.org/meetings/resolutions/IWCRES_1978_SM.pdf> (visited 27 December 2012).

37 For further comment on this see, for instance, Alexander Gillespie, 'Forum Shopping in International Law: The IWC, CITES and the Management of Cetaceans', 33 *Ocean Development and International Law* (2002) 17–56. See also Ed Couzens, *Large and Grey: Whales, Elephants and International Law and Politics* (Doctoral Thesis, University of KwaZulu-Natal, 2008) Chapter 6; available at <researchspace.ukzn.ac.za/xmlui/handle/10413/584> (visited 27 December 2012).

The IWC took a similar approach in 1980 to the (then proposed) CCAMLR, adopting a resolution on cooperation and coordination between the two conventions.[38] At the IWC Meeting in 1982, Australia stated that it believed that 'liaison and cooperation between the IWC and other organisations concerned either directly or indirectly with whales is necessary for the long term conservation of whales'; and argued that this was particularly true of the IWC's relationship with CCAMLR.[39]

The CMS has deferred to the IWC, but has also assisted to some extent in filling the 'regulatory vacuum' in respect of certain species of 'small cetacean'. The CMS and the IWC have a Memorandum of Understanding from 2000, designed to:

> [e]stablish a framework of information and consultation between UNEP/CMS and the IWC in the field of conserving migratory species and the world's natural heritage, with a view to identifying synergies and ensuring effective cooperation in joint activities by the relevant international bodies established under both conventions and national institutions of their Contracting Parties.[40]

Further, two AGREEMENTS under the CMS deal with 'small cetaceans'. These are the Agreement on the Conservation of Small Cetaceans of the Baltic, North-East Atlantic, Irish and North Seas (1991), also known as ASCOBANS;[41] and the Agreement on the Conservation of Cetaceans in the Black Sea Mediterranean Sea and Contiguous Atlantic Area (1996, 2001), also known as ACCOBAMS.[42]

Finally as an example, the IWC has considered the CBD to be 'relevant to whale conservation' in terms of a 'Proposed Consensus Decision to Improve the Conservation of Whales from the Chair and Vice-Chair of the Commission'.[43] This was not adopted as a formal decision of the IWC, but support was given toward further cooperation.

While these moves are obviously to be welcomed, as examples of links being forged between the ICRW/IWC and other conventions, it is probably far too early to describe them as 'synergies'. Rather, they can probably be said to represent initial cooperative efforts. The confrontational nature of the IWC, and the level of contention

[38] IWC Resolution on 'Cooperation and Coordination between the [IWC] and the Proposed Commission for the Conservation of Antarctic Marine Living Resources' (1980).

[39] Australia Commissioner, 'IWC Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting', (*IWC Verbatim Record*, 1982) 181.

[40] See <http://iwcoffice.org/_documents/commission/IWC61docs/OS-IGO.pdf> (visited 27 December 2012).

[41] Concluded in 1991; in force 1994; extended 2008. It has been ratified by Belgium; Denmark; Finland; France; Germany; Lithuania; The Netherlands; Poland; Sweden; and the United Kingdom. See, generally, <http://www.ascobans.org/the_agreement.html> (visited 27 December 2012).

[42] Concluded in 1996; in force 2001. It has been ratified by Albania; Algeria; Bulgaria; Croatia; Cyprus; Egypt; France; Georgia; Greece; Italy; Lebanon; Libya; Malta; Monaco; Montenegro; Morocco; Portugal; Romania; Slovenia; Spain; Syria; Tunisia; and the Ukraine. See, generally, <http://www.accobams.org/about> (visited 27 December 2012).

[43] Doc. IWC/62/7rev (2010).

within the organization,[44] must make it difficult at the present time to conceive of formal synergistic arrangements.

As such, this was selected as a useful issue-area on which to base a negotiation exercise for the 2011 Course on Multilateral Environmental Agreements – the special theme of which was 'Synergies Amongst the Biodiversity-related Conventions'.[45]

Nevertheless, it would be extremely unfair to the IWC not to note that it does have many 'cooperative arrangements' in place with other conventions and international organizations – with many of these links being forged through the IWC's Secretariat and its Scientific Committee. In the 'Chair's Report' for 2011, for instance, it is noted that such cooperative arrangements 'have continued and been strengthened with a number of other Intergovernmental Organisations'.[46] Examples given in the Chair's Report are the Convention on Migratory Species (CMS); the International Council for the Exploration of the Seas (ICES);[47] the Inter-American Tropical Tuna Commission (IATC);[48] the Agreement on the International Dolphin Conservation Programme (AIDCP);[49] the International Commission for the Conservation of Atlantic Tunas (ICCAT);[50] the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR); the North Atlantic Marine Mammal Commission (NAMMCO);[51] the International Union for the Conservation of Nature (IUCN);[52] the North Pacific Marine Science Organisation (PICES);[53] the Protocol on Specially Protected Areas and Wildlife (SPAW) of the Cartagena Convention for the Wider Caribbean;[54] and the International Maritime Organisation (IMO).[55]

3 Instructions and materials

3.1 Role assignation

Each participant was assigned to represent a state (a contracting government to the International Convention for the Regulation of Whaling). Where possible, each

[44] On the fact of such levels of hostility, and on the ICRW contracting governments' efforts to broker compromise, see the 'Future of the IWC' process, available at <http://www.iwcoffice.org/future> (visited 27 December 2012); and see below under section 9.5 of this paper.

[45] See <http://www.uef/unep/courses/2011>.

[46] See 'Chair's Report of the 63rd Annual Meeting, St Helier, Jersey, 2011', available at <http://www.iwcoffice.org/_documents/meetings/jersey/Chairs%20report%20IWC63.pdf> (visited 27 December 2012), 35.

[47] See http://www.ices.dk/indexfla.asp (visited 27 December 2012).

[48] See http://www.iattc.org/HomeENG.htm (visited 27 December 2012).

[49] See <http://www.iattc.org/PDFFiles2/AIDCP-amended-Oct-2009.pdf> (visited 27 December 2012).

[50] See <http://www.iccat.int/en/>.

[51] See <http://www.nammco.no/>.

[52] See <http://www.iucn.org/>.

[53] See <http://www.pices.int/>.

[54] Protocol Concerning Specially Protected Areas and Wildlife (SPAW) in the Wider Caribbean Region, Kingston, 18 January 1990, in force 18 June 2000, <http://www.cep.unep.org/cartagena-convention/spaw-protocol/overview-of-the-spaw-protocol>.

[55] See <http://www.imo.org>.

participant was assigned to a state with an official view different to that of the state from which the participant came.

Each participant was then given a brief indication of the 'philosophy' which would be expected to drive the position of the state which he or she was to represent.[56] The states chosen were divided into three essential groups – 'sustainable use group' states;[57] 'like-minded group' states;[58] and 'middle of the road' states. The numbers of states which fell into each group were intended basically to reflect the comparative positions within the real IWC negotiations.[59] The grouped states, with their instructions, were as follow:

3.1.1 'Sustainable use group' states

Antigua and Barbuda

> 'Sustainable Use Group' member. Would be expected to align itself with Grenada and St Kitts & Nevis; and might be inclined to take a pro-active position on Caribbean unity and the promotion of developing country interests. Would be expected to align itself with Japan's position.

Cambodia

> 'Sustainable Use Group' member. Would be expected to align itself with Japan's position.

Congo, Rep of the

> 'Sustainable Use Group' member. Would be expected to align itself with Guinea-Bissau and Senegal; and might be inclined to take a pro-active position on African unity and the promotion of developing country interests. Would be expected to align itself with Japan's position.

Grenada

> 'Sustainable Use Group' member. Would be expected to align itself with Antigua & Barbuda and St Kitts & Nevis; and might be inclined to take a pro-active position on Caribbean unity and the promotion of developing country interests. Would be expected to align itself with Japan's position.

[56] These instructions could have been more extensive, so as to afford the participants more assistance; but their handing out was brought forward by several days and they had to be prepared quickly. It is likely that in any such participatory exercise there will always be similar adaptations that need to be handled.

[57] With Iceland, Japan and Norway as its most prominent members, this is the group of contracting governments which consistently argues and votes in favour of a resumption of commercial whaling.

[58] Although states such as Australia, Germany, New Zealand, and the UK are often described – on their own – as being the 'Like-minded Group', in fact it is a fairly large group of states basically including all of the EU states and others which consistently argue and vote against moves to resume commercial whaling.

[59] This intention went somewhat awry just before the exercise began, as a number of Course participants unexpectedly did not, for various reasons, take part in the exercise.

Guinea-Bissau

'Sustainable Use Group' member. Would be expected to align itself with Rep. of Congo and Senegal; and might be inclined to take a pro-active position on African unity and the promotion of developing country interests. Would be expected to align itself with Japan's position.

Iceland

'Sustainable Use Group' member. European country, but not a European Union member. An active whaling country with commercial whaling conducted legally under a reservation held to the International Whaling Commission's 1982 'moratorium' (zero quota) on commercial whaling. Recognized as a leader in the Sustainable Use Group. Would be expected to align itself more closely with Japan on trade issues and with Norway on conservation issues.

Japan

'Sustainable Use Group' member. An active whaling country, but not on a commercial basis as country does not hold a reservation held to the International Whaling Commission's 1982 'moratorium' (zero quota) on commercial whaling. Whaling is, instead, conducted for research purposes under scientific permits issued through the national government. Generally regarded as the foremost proponent for resuming commercial whaling. Perceived by many to control, or at least to influence, the positions of many of the countries in the Sustainable Use Group.

Kiribati

'Sustainable Use Group' member. Would be expected to align itself with Palau and Tuvalu. Would be expected to align itself with Japan's position. Might take opportunity to promote developing country interests.

Norway

'Sustainable Use Group' member. European country, but not a European Union member. An active whaling country with commercial whaling conducted legally under a reservation held to the International Whaling Commission's 1982 'moratorium' (zero quota) on commercial whaling. Recognized as a leader in the Sustainable Use Group. Regards itself as an enlightened environmental country. Currently taking a slightly less active role in the IWC and downplaying the importance of the whaling issue.

Palau

'Sustainable Use Group' member. Would be expected to align itself with Kiribati and Tuvalu. Would be expected to align itself with Japan's position. Might take opportunity to promote developing country interests.

St. Kitts and Nevis

'Sustainable Use Group' member. Would be expected to align itself with Antigua & Barbuda and Grenada; and might be inclined to take a pro-active position on African unity and the promotion of developing country interests. Would be expected to align itself with Japan's position. Very proud of the St Kitts Declaration.

Senegal

'Sustainable Use Group' member. Would be expected to align itself with Rep. of Congo and Guinea-Bissau; and might be inclined to take a pro-active position on African unity and the promotion of developing country interests. Would be expected to align itself with Japan's position.

Tuvalu

'Sustainable Use Group' member. Would be expected to align itself with Palau and Kiribati. Would be expected to align itself with Japan's position. Might take opportunity to promote developing country interests.

3.1.2 'Like-minded group' states

Argentina

'Like-minded Group member'. 'GRULAC member'. Currently taking a hard line in entrenching the GRULAC; and in favour of increased protection of whales. Would be expected to support the proposed Resolution.

Australia

'Like-minded Group member'. The proposer of the Resolution and expected therefore to push hard for its adoption, either by consensus or through a vote.

Brazil

'Like-minded Group member'. 'GRULAC member'. Currently taking a hard line in entrenching the GRULAC; and in favour of increased protection of whales. Would be expected to support the proposed Resolution.

Chile

'Like-minded Group member'. 'GRULAC member'. Currently taking a hard line in entrenching the GRULAC; and in favour of increased protection of whales. Would be expected to support the proposed Resolution.

Colombia

'Like-minded Group member'. 'GRULAC member'. Currently taking a hard line in entrenching the GRULAC; and in favour of increased protection of whales. Would be expected to support the proposed Resolution.

The Netherlands
: 'Like-minded Group member'. European Union member. Firmly anti-whaling. Would be expected to hold a position common to the other EU countries.

South Africa
: 'Like-minded Group member'. Would be expected to align itself with the anti-whaling countries, but could decide to abstain in appropriate circumstances. Has a slightly difficult position, given that it is a 'sustainable use-oriented' country in areas other than whaling. The current CHAIR of the International Whaling Commission.

Spain
: 'Like-minded Group member'. European Union member. Would be expected to hold a position common to the other EU countries.

Sweden
: 'Like-minded Group member'. European Union member. Would be expected to hold a position common to the other EU countries, but to be understanding of other positions.

United Kingdom
: 'Like-minded Group member'. European Union member. Would be expected to hold a position common to the other EU countries.

United States
: 'Like-minded Group member'. The country is in a very difficult position as its status as an active whaling country (Aboriginal Subsistence Whaling, not commercial whaling), with quotas which need renewing every five years, leaves it vulnerable to charges of hypocrisy. Would generally be expected to vote with the anti-whaling countries, but to take every opportunity to broker compromise and to encourage other countries to reach consensus.

3.1.3 'Middle of the road' states

China, People's Rep of
: Generally very quiet on the whaling issue, trying to maintain neutrality. Expected either to support the anti-whaling position or to abstain, but might be persuaded to switch in exceptional circumstances. Does have a possible potential interest in resuming whaling, as a 'fisheries-oriented' country.

Denmark
: European Union member. Generally an anti-whaling country, but in international fora represents two self-governing 'countries' (the Faroes and Greenland) which are active whaling countries. On the whaling issue, has occasionally de-

parted from the EU position and might be persuaded to do so again on an appropriate issue. Departed from the EU position in 2006 to vote in favour of Resolution 2006-1, which Resolution was accepted by 33 votes to 32 with one abstention.

Korea, Rep of

Would generally be expected to align itself with the anti-whaling countries, but tries to stay neutral.

Does have a possible potential interest in resuming whaling, as a 'fisheries-oriented' country.

Russian Federation

Holds a reservation to the commercial whaling moratorium, but has advised that it does not intend to resume commercial whaling. Would generally be expected to vote with the anti-whaling countries, but is unpredictable. Seems particularly concerned about the influence exerted by the European Union and

Switzerland

European country, but not a European Union member. Would generally be expected to vote with the anti-whaling countries, and/or the EU, but might be persuaded to abstain in appropriate circumstances.

3.2 Preparatory documents

In preparation, each participant was given – several weeks before the 2011 Course began – the texts of a number of instruments. These were the International Convention for the Regulation of Whaling, of 1946;[60] the Protocol thereto, of 1956;[61] the Schedule thereto;[62] the Rules of Procedure thereto;[63] and the Rules of Debate thereto.[64] Each participant was instructed to be conversant with these texts by the time of the exercise. This was important,[65] as the exercise was designed essentially to concern the creation of, and interpretation of, legal text.

[60] Available at <http://www.iwcoffice.org/commission/convention.htm> (visited 27 December 2012).

[61] Available at *ibid*.

[62] The Schedule to the ICRW contains amendments which the Contracting Governments have made to the operation of the Convention. The ability so to amend operating procedures arguably gives the Convention an inherent degree of flexibility; however, a 75 per cent majority is required to carry an amendment, if consensus is not reached.

[63] Available at <http://www.iwcoffice.org/commission/procedure.htm> (visited 27 December 2012).

[64] Available at *ibid*.

[65] Although probably observed more in the breach! A constant topic of debate amongst the resource persons involved with the UEF/UNEP Course on Multilateral Environmental Agreements is how best to persuade participants to prepare adequately, given that most participants have busy careers. Probably the best that can be done is to encourage as much preparation as possible, but then to present a negotiation exercise which does not rely on this preparation and so will be enhanced by preparation but which will not run the risk of failing if the preparation is not adequate.

As noted earlier, initial instructions were then given to the participants several days before the exercise took place.[66]

Participants had the opportunity, using internet resources, to inform themselves as to their allocated country's position in order to supplement their brief instructions. In addition, it was suggested to the participants that they could make the effort to inform themselves as to other countries' positions; in order potentially to strengthen their negotiating positions. Participants were warned that if they did not fully inform themselves as to their own (allocated) countries' positions, then they might find themselves embarrassed by other participants knowing more about the first participant's (allocated) country.[67]

A Chair was appointed. This office corresponded to the current (at the time of the exercise) Chair of the IWC – i.e. South Africa.[68] It was thought advisable to select a fairly experienced participant for this role, as it a difficult position – being both office-bearer and simultaneously representing a state. The choice of Chair needed also, however, to take account of which participants had taken leadership roles in the first exercise held in the previous week of the Course.[69]

Participants were encouraged to form alliances – some of which suggested themselves naturally.[70] Others arose which might not have been realistic had this been the real IWC. Participants ought to have recognized that they could get better results if united. Each participant was also given a mock Resolution, put forward by Australia.

It is important to note that within the IWC there is a significant difference between a proposed Schedule amendment and a Resolution, in that a Schedule amendment can be passed only with a three-quarters majority while a Resolution can be passed by a simple majority. This meant that there was a good chance, with appropriate alliance-building, that the Resolution would be passed.

The actual exercise, then, was for the participants to deal with the mock Resolution – and for them to choose to take it off the table; to drive it to a vote; to adopt it by

[66] The exercise took place on a single day, 15 September 2011.

[67] Although these descriptions are in the main accurate for each state's current stances in respect of IWC negotiations, and participants had the opportunity to bolster these instructions with internet-based research on their allotted states, it does not ultimately matter – for purposes of the exercise – that the participants had all of the details correct. The exercise was designed to teach negotiation skills, not knowledge. It is worth noting here that many of the participants in the 2011 exercise were from states which are not members of the IWC, and of which it would not be expected that there would be a high degree of knowledge about the whaling debate.

[68] The South African Commissioner to the IWC, Mr Herman Oosthuizen, acted as Interim Chair for IWC63 (2011) and until IWC64 (2012).

[69] See Cam Carruthers and Niko Urho, 'The Bangkok Ad Hoc Joint Working Group: A Multilateral Simulation Exercise', in Part IV of the present *Review*.

[70] According to the brief position statements furnished to the participants.

consensus; or to amend it and to choose one of the above options in respect of the amended version.

4 Exercise documentation

4.1 The proposed resolution

IWC64/PROP1
RESOLUTION PROPOSAL
PROPOSED BY AUSTRALIA; SUPPORTED BY ARGENTINA, BRAZIL, CHILE AND COLOMBIA

The Parties to the International Convention for the Regulation of Whaling, 1946:

RECALLING that the objective of the Convention is to provide for the proper conservation of whale stocks;
NOTING that the Convention on Biological Diversity, 1992, defines 'biological diversity' as meaning 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems';
ACKNOWLEDGING that the Convention on Migratory Species, 1979, provides in Article V, Guidelines for Agreements, that 4. [e]ach AGREEMENT should … f) at a minimum, prohibit, in relation to a migratory species of the Order Cetacea, any taking that is not permitted for that migratory species under any other multilateral Agreement and provide for accession to the AGREEMENT by States that are not Range States of that migratory species;
ACKNOWLEDGING FURTHER that the Convention on the Conservation of Antarctic Marine Living Resources, 1980, provides in Article VI that [n]othing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling;
ACKNOWLEDGING FURTHER that the United Nations Convention on the Law of the Sea, 1982, provides in Article 65, *Marine mammals*, that [n]othing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study;
ACKNOWLEDGING FURTHER that the Protocol on Environmental Protection to the Antarctic Treaty, 1991, Annex II: C**onservation of Antarctic Fauna and Flora, provides in** Article 7, *Relationship with other Agreements outside the Antarctic Treaty System, that 1.* [n]othing in this Annex shall derogate from the rights and obligations of Parties under the International Convention for the Regulation of Whaling;
ACKNOWLEDGING FURTHER that the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973, has RECOMMENDED in Resolution

Conf. 11.4 (Rev. CoP12), Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission, that the Parties agree not to issue any import or export permit, or certificate for introduction from the sea, under this Convention for primarily commercial purposes for any specimen of a species or stock protected from commercial whaling by the International Convention for the Regulation of Whaling;
ACKNOWLEDGING FURTHER that the Convention on Biological Diversity, 1992, provides in Article V, Cooperation, that [e]ach Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity;
NOTING that per the Schedule to the International Convention for the Regulation of Whaling, 1946, as amended, sixteen species of cetacea, sub-divided into ten species of baleen whales and six species of toothed whales, are subjects of regulation by the International Whaling Commission;
NOTING FURTHER that the Scientific Committee of the International Whaling Commission currently recognises 86 species or sub-species of cetacea, and that a significant number of species or sub-species of cetacea are therefore not the subjects of regulation;
RECOGNISING that it is undesirable for proper conservation of biological diversity for species of cetacea to be unregulated, or for certain species to be regulated while others are not;
RECOGNISING FURTHER that it is undesirable for proper conservation of biological diversity for different species of cetacea to be, or potentially to be, regulated under different conventions;
CONSIDERING that the present state of affairs is undesirable;
CONSIDERING FURTHER that greater cooperation with other Multilateral Environmental Agreements is desirable;

hereby ***INSTRUCT*** the Secretary of the International Whaling Commission to initiate formal contact with the Secretariats of the Convention on Migratory Species, the Convention on the Conservation of Antarctic Marine Living Resources, the Convention on the Law of the Sea, the Antarctic Treaty, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the Convention on Biological Diversity, with a view to establishing formal, mutually supportive working relationships between the International Whaling Commission and those Conventions, with the Secretary to report back at the 65th Meeting of the International Whaling Commission on steps taken;

and hereby ***RESOLVE*** that the Commission will work expeditiously to bring all species of cetacea under the management control of the International Whaling Commission by way of inclusion in the Schedule to the International Convention for the Regulation of Whaling, 1946, with a view to achieving this goal at the 65th Meeting of the International Whaling Commission.

4.2 The St Kitts and Nevis Declaration, 2006

In order to assist the participants, particularly those from states not normally represented in the IWC, the St Kitts and Nevis Declaration of 2006 was supplied. It was intended that this would provide 'ammunition' for debate. The resolution is essentially the only resolution 'won' by the pro-whaling ('sustainable use') contracting governments in the IWC in approximately thirty years; and it provides both a useful summary of the sustainable use approach to whaling and a critique of the majority position within the IWC.

Resolution 2006-1
ST. KITTS AND NEVIS DECLARATION

EMPHASISING that the use of cetaceans in many parts of the world including the Caribbean, contributes to sustainable coastal communities, sustainable livelihoods, food security and poverty reduction and that placing the use of whales outside the context of the globally accepted norm of science-based management and rule-making for emotional reasons would set a bad precedent that risks our use of fisheries and other renewable resources;
FURTHER EMPHASING that the use of marine resources as an integral part of development options is critically important at this time for a number of countries experiencing the need to diversify their agriculture;
UNDERSTANDING that the purpose of the 1946 International Convention for the Regulation of Whaling (ICRW) is to 'provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry' (quoted from the Preamble to the Convention) and that the International Whaling Commission (IWC) is therefore about managing whaling to ensure whale stocks are not over-harvested rather than protecting all whales irrespective of their abundance;
NOTING that in 1982, the IWC adopted a moratorium on commercial whaling (paragraph 10 e of the Schedule to the ICRW) without advice from the Commission's Scientific Committee that such measure was required for conservation purposes;
FURTHER NOTING that the moratorium which was clearly intended as a temporary measure is no longer necessary, that the Commission adopted a robust and risk-averse procedure (RMP) for calculating quotas for abundant stocks of baleen whales in 1994 and that the IWC's own Scientific Committee has agreed that many species and stocks of whales are abundant and sustainable whaling is possible;
CONCERNED that after 14 years of discussion and negotiation, the IWC has failed to complete and implement a management regime to regulate commercial whaling.
ACCEPTING that scientific research has shown that whales consume huge quantities of fish making the issue a matter of food security for coastal nations and requiring that the issue of management of whale stocks must be considered in a broader context of ecosystem management since eco-system management has now become an international standard.
REJECTING as unacceptable that a number of international NGOs with self-interest campaigns should use threats in an attempt to direct government policy on matters of sovereign rights related to the use of resources for food security and national development;

NOTING that the position of some members that are opposed to the resumption of commercial whaling on a sustainable basis irrespective of the status of whale stocks is contrary to the object and purpose of the International Convention for the Regulation of Whaling;
UNDERSTANDING that the IWC can be saved from collapse only by implementing conservation and management measures which will allow controlled and sustainable whaling which would not mean a return to historic over-harvesting and that continuing failure to do so serves neither the interests of whale conservation nor management;
NOW THEREFORE:
COMMISSIONERS express their concern that the IWC has failed to meet its obligations under the terms of the ICRW and,
DECLARE our commitment to normalising the functions of the IWC based on the terms of the ICRW and other relevant international law, respect for cultural diversity and traditions of coastal peoples and the fundamental principles of sustainable use of resources, and the need for science-based policy and rulemaking that are accepted as the world standard for the management of marine resources.[71]

6 Expectations from the exercise

The intention was that the participants would, from the beginning of the actual negotiating, run the exercise themselves – under the direction of their Chair. The originator of this negotiation exercise played the role of the Secretary of the IWC – not involved in the negotiations, but sitting alongside the Chair and assisting with procedural issues. In addition, another senior resource person from the Course sat alongside, playing the role of the IWC Head of Science, to assist where necessary.

The exercise would then be followed by a lecture from the originator, including an assessment of the exercise, explanation of how the results of the exercise differed from or were similar to what would probably have happened in reality – given the history of the IWC. In this respect, issues of form and substance from the 63rd Meeting of the IWC, held in 2011, would be highlighted in order to put into context the experience which the participants would just have gained.

7 Debate in plenary

7.1 The opening session

The Chair welcomed the plenary. Australia congratulated the Chair and then introduced its proposal, briefly summarizing this by explaining that it had two objects – these being to synergize; and to bring all whale species under management. Australia noted that whales are important 'keystone' species. Asked by the Chair

[71] Available at <http://www.iwcoffice.org/meetings/resolutions/resolution2006.htm> (visited 27 December 2012).

whether it was proposing the adoption of its resolution by consensus, Australia said that it saw no reason why this should not happen as the proposal was 'pretty straightforward'. Argentina congratulated the Chair, and then identified its position as being the same as Australia's and argued that it is important to bring all species under protection and that it is necessary to synergize. The Chair then asked whether consensus could be achieved.

Russia congratulated and thanked the Chair, then advised that it had interest in the proposal but also concerns over its scope; and argued that the world is still working on getting to a situation where there will be safety of whale stocks and sustainable use thereof. Russia advised that it was hesitant to accept the draft resolution.

Japan then greeted the plenary [in Japanese] and reminded it that Japan had organized the Nagoya meeting and that there can be no doubt as to the support which Japan gives to good governance of biodiversity. Japan then referred to the rights indigenous peoples held to have their cultural preferences recognized in management; stated that the importance ascribed to certain food stocks should not be forgotten; and explained that Japan has been transforming itself since the Fifteenth Century, as a sustainable society with a dense population. Japan argued that sustainable use is important and that we cannot just conserve; and explained that all it was asking for was respect for the way it used food. The draft resolution, said Japan, focuses solely on conservation; and, while Japan has nothing against synergies, the focus should not be on just one side. Japan concluded that the object of the Convention was neglected here.

Norway congratulated Australia for trying to get the motion through as quickly as possible; but advised that before consensus was achieved it would like to bring to the Secretariat's attention the Schedule, which makes it clear whaling is to be conducted sustainably. Norway explained that he, the Commissioner, could not see why at this late stage 'we should turn around and say that this is wrong'; and concluded that the Australian motion to adopt the proposal without debate was premature and probably irregular. Antigua and Barbuda then pointed out that it supports sustainable use; that the vast majority of food available to it to use is marine; and that there must be respect for cultural tradition. Iceland congratulated the Chair; then explained that it believes in the principle of sustainable use as key to sustainable development, that it had serious reservations over the Australian proposal to bring all cetaceans under management, and that it saw no reason to give support.

Australia then thanked the various speakers; and responded that while one of the core objectives of the Convention text is sustainable whaling, we cannot, however, forget conservation. The United States then congratulated the Acting Chair, gave the Chair its full support, and thanked Australia for its submission. The US explained that it recognizes that there is a clear relationship between conservation and orderly development; and that while the US has a strong position in respect of conservation, it

also has a strong position on sustainable use in respect of Aboriginal Subsistence Whaling. On synergies, the US pointed out that not all IWC members are members of the conventions referred to by Australia and that this might be a barrier to conserving both the 15 species managed and also the other 70 species – to which the US wished to draw attention. The US pointed out that there is a shade of difference between 'monitoring' and 'regulating'. The US stated that it wished to encourage debate; and that while it felt that taking over responsibility for the other species would encourage wise use of resources, it could still see problematic aspects – including data and that there are other countries which are not members of the IWC.

The United Kingdom then gave its full support to the proposal, explaining that the UK is strongly against whaling. 'Sustainability', said the UK, implies long-term viability and extraction damages the whale watching industry – the only truly sustainable use. Norway then advised, on terminology, that 'conservation' now includes the element of sustainable use; whereas 50 years ago it had meant 'preservation'. Norway argued that this must be included, and that if the motion is for preservation then it must say so and that 'if Australia thinks it includes sustainable use then it must say so and bring it in'. Norway explained that it cannot see the link between viewing whales and sustainable use – since, if sustainable, the viewing of whales will continue. 'Let us not', said Norway, 'hide behind words to get motions through'. In response, the US argued that 'conservation' used to mean 'preservation' and now means 'sustainable use'; and sought clarification on what Australia meant by 'management control'. The ICRW, said the US, refers to 'regulating' – as opposed to 'monitoring'. The US then asked about financial considerations and enforcement; pointing out that the CBD in part agrees with the IWC and calls for cooperation and that the Antarctic Protocol agrees with the IWC in synergizing and CITES supports – so that it may be possible to make progress if the proposition is modified. The US also referred to the role of the Scientific Committee and said that it is important to get updates. The Chair asked for text on the exact ideas the US proposed needed changing.

Brazil then stated that it had been watching with concern – and that it strongly supported Australia's proposal. Kiribati then explained that, as a small country, it relies on marine resources, and that it supports the sustainable use of whales; and that it was glad that the US had raised the issue of members of other organizations. Kiribati explained that it had not adopt either the CMS or CITES. Guineau-Bissau thanked Australia, but advised that it concurred fully with Iceland, Japan and Norway – then advised that it was more than willing to work on improving the text. Senegal congratulated the Chair and thanked Thailand as host. Senegal then indicated that it concurred with views that amendments to the Schedule should be held in abeyance pending advice from the Scientific Committee. Antigua and Barbuda highlighted the importance of sustainable use, especially for small countries in which it provided their major source of food. The Chair then quoted a proverb which holds that 'a chattering bird builds no nest'.

Norway suggested that a chattering bird has a nicely built nest; then gave support to the US and suggested that the revision should follow Resolution 2006-1 of the IWC (the St Kitts and Nevis Declaration). Australia then suggested, on the food issue, that whales are at the top of the food chain; and that a crash would mean the crash of ecosystems. South Korea then advised that it does not strongly support whaling, but that it recognizes the importance of whaling; and suggested that the ICRW is not about conservation as such, but is more about regulating whaling – regulating maximum sustainable yield (MSY). St Kitts and Nevis congratulated the Chair; then argued that many of its people depend heavily on whaling, and that a total ban would affect them. St Kitts and Nevis then gave its support to Japan, Iceland and Norway – and to what Korea had just said. Switzerland then stated that, as a great lake power, it was very interested in whaling; and that it felt that to take the right decision scientific information should be taken into account. Switzerland supported the US proposal on scientific data.

Spain congratulated the Chair; then suggested going back to the object of the 1946 Convention – and stated that it believed that Australia had provided a means whereby the objective can effectively be met, and that Spain believed that Japan would be willing to look at that. Spain argued that there are 'lots of grey areas in the data', especially for the Pacific Ocean; and suggested that an informed decision was needed, with Spain being 'scared that we might get into a stock collapse situation'. Australia then stated that although it, Australia, had contributed to the reduction of whale stocks, there were now other threats to be recognized – including climate change, entanglement, and habitat destruction. Australia then warned that although members might not be party to all other conventions, this should not be used as an excuse to avoid synergies.

Japan then quoted a saying which it said applied to Australia: 'you can hear the ringing of the bells, but you cannot see the bell tower'; and suggested that the IWC should be true to the 1946 Convention, the Preamble to which is 'still true today'. Japan then suggested changing the word 'conservation' in the text to 'sustainable use'. The Chair then reminded the parties to keep in mind that they were still awaiting the US proposal; and reminded the parties that the Scientific Committee does report extensively every year before the meeting.

Palau then indicated strong support for the Australian proposal, despite indicating that it supports Japan; and noted that whales are not the only source of food. Norway then proposed that new text be agreed to before going to any of the other multilateral environmental agreements; and pointed out that the issue is sustainable use of whales. South Korea then suggested that the term 'management control' was unclear and that the term 'regulation' should be used instead.

The Chair then suggested that an informal group be established to work on the proposal, comprising Australia, Japan, South Korea and the US – the states which had proposed changes to the text.

Senegal reiterated that the proposal should focus on the synergies aspect and the Schedule amendment should be held in abeyance. 'All birds', said Senegal, 'will flock to a fruitful tree'. The Chair invited Senegal to be part of the informal group; and Senegal indicated that it would be 'most willing'. The UK endorsed the Chair's proposal.

7.2 The second session and the proposed revisions to the text of the resolution

After a break, the Chair asked members to consider the revised text for five minutes before raising flags. The shaded text indicates the proposed additions which the parties themselves had added, or which they indicated were in dispute.

IWC64/PROP1 (Revised)
RESOLUTION PROPOSAL
PROPOSED BY AUSTRALIA; SUPPORTED BY ARGENTINA, BRAZIL, CHILE AND COLOMBIA

The Parties to the International Convention for the Regulation of Whaling, 1946:

RECALLING that the objective of the Convention is to provide for the proper conservation of whale stocks [and thus make possible the orderly development of the whaling industry-Japan];
NOTING that the Convention on Biological Diversity, 1992, defines 'biological diversity' as meaning 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems';
ACKNOWLEDGING that the Convention on Migratory Species, 1979, provides in Article V, Guidelines for Agreements, that 4. [e]ach AGREEMENT should … f) at a minimum, prohibit, in relation to a migratory species of the Order Cetacea, any taking that is not permitted for that migratory species under any other multilateral Agreement and provide for accession to the AGREEMENT by States that are not Range States of that migratory species;
ACKNOWLEDGING FURTHER that the Convention on the Conservation of Antarctic Marine Living Resources, 1980, provides in Article VI that [n]othing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling;
ACKNOWLEDGING FURTHER that the United Nations Convention on the Law of the Sea, 1982, provides in Article 65, *Marine mammals*, that [n]othing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study;

ACKNOWLEDGING FURTHER that the Protocol on Environmental Protection to the Antarctic Treaty, 1991, Annex II: C**onservation of Antarctic Fauna and Flora, provides in** Article 7, *Relationship with other Agreements outside the Antarctic Treaty System, that 1.* [n]othing in this Annex shall derogate from the rights and obligations of Parties under the International Convention for the Regulation of Whaling;

ACKNOWLEDGING FURTHER that the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973, has RECOMMENDED in Resolution Conf. 11.4 (Rev. CoP12), Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission, that the Parties agree not to issue any import or export permit, or certificate for introduction from the sea, under this Convention for primarily commercial purposes for any specimen of a species or stock protected from commercial whaling by the International Convention for the Regulation of Whaling;

ACKNOWLEDGING FURTHER that the Convention on Biological Diversity, 1992, provides in Article V, Cooperation, that [e]ach Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity;

NOTING that per the Schedule to the International Convention for the Regulation of Whaling, 1946, as amended, sixteen species of cetacea, sub-divided into ten species of baleen whales and six species of toothed whales, are subjects of regulation by the International Whaling Commission;

NOTING FURTHER that the Scientific Committee of the International Whaling Commission currently recognises 86 species or sub-species of cetacea, and that a significant number of species or sub-species of cetacea are therefore not the subjects of regulation;

RECOGNISING that it is undesirable for proper [conservation – Australia][sustainable use-Japan] of biological diversity for species of cetacea to be unregulated, or for certain species to be regulated while others are not;

RECOGNISING FURTHER that it is undesirable for proper conservation of biological diversity for different species of cetacea to be, or potentially to be, regulated under different conventions;

[CONSIDERING that the present state of affairs is [undesirable – Australia][of great concern – USA];]

CONSIDERING FURTHER that greater cooperation with other Multilateral Environmental Agreements is desirable;

hereby ***INSTRUCT*** the Secretary of the International Whaling Commission to initiate formal contact with the Secretariats of the Convention on Migratory Species, the Convention on the Conservation of Antarctic Marine Living Resources, the Convention on the Law of the Sea, the Antarctic Treaty, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the Convention on Biological Diversity, with a view to establishing formal, mutually supportive working relationships between the International Whal-

ing Commission and those Conventions, with the Secretary to report back at the 65th Meeting of the International Whaling Commission on steps taken;

Option 1
[and hereby ***RESOLVE*** that the Commission will work expeditiously [towards the possibility of bringing – USA] [to bring – Australia] all species of cetacea under the ~~[management control - Australia]~~[regulation - USA] of the International Whaling Commission by way of inclusion in the Schedule to the International Convention for the Regulation of Whaling, 1946, with a view to achieving this goal at the 65th Meeting of the International Whaling Commission. And the provisions of Resolution 1/2006.]

Option 2
[and hereby INSTRUCT the Scientific Committee to provide, as soon as possible, a comprehensive summary of all scientific findings on the current status of all species (including sub-species) of cetacean and provide informed guidance with respect to the inclusion of all species of cetecea in the Schedule with a view to promote cooperation with the above mentioned MEAs. – USA, Senegal, St Kitts, Antigua and Barbuda, Tuvalu and Kiribati]

Norway indicated that it was firmly of the belief that compromise could be achieved. The Chair then reminded the plenary of Rule E of the Rules of Procedure, which indicates that '[t]he Commission shall make every effort to reach its decisions by consensus' before other proceeding further into the Rules if 'all efforts to reach consensus have been exhausted and no agreement reached'. Russia supported the US's proposals, but proposed recalling the object of the Convention without specifying this. Asked by the Chair for clarification, Russia suggested that the preamble of the proposed resolution should include the words 'Recalling the objects of the Convention'. Russia indicated that it could not accept Japan's proposed amendment as there was no need to specify; and Russia indicated that from this point it was content to follow the US text.

Australia stated that the states in the informal working group had looked at the first paragraph, and that it was a direct copy and paste from the text. Japan was next in line to speak, but indicated that it would wait for Russia to respond. Russia suggested that the preambular paragraph of the Convention was more comprehensive, and that there was therefore no reason to repeat it. Japan asked what convention Russia was describing. Russia responded that the preamble outlines well why we have the Convention. The Chair suggested using square brackets for the time being. Japan, however, suggested that, since logical explanations did not seem to satisfy Russia, the whole preamble could be included. Guinea-Bissau concurred with Japan.

Australia still maintained that the amended text reflected the two objectives of the Convention; which were, Australia felt, succinctly captured. Russia stated that there was no need to repeat, and asked 'why should we repeat part of it?'. However, Russia

indicated that it could live with Australia's proposal. The Chair thanked Russia, and the others, for their spirit of collaboration and compromise.

The US indicated that it had some concerns over the strength of the statement and that how the statement would affect the US had not yet been discussed. There are, said the US, positive and negative aspects; and that at this time the US was concerned about effects. The Chair asked if alternative text had been provided; but the US indicated that although it had tried to bring this up in the working group, this had failed and so the US was bringing the issue up on the floor.

Australia referred to an Aboriginal proverb which holds that 'a crab does not teach its son to walk forwards'. Australia argued, on synergies, that the best first step would be to make the list more inclusive and that the last paragraph should therefore be more forceful. Australia then described a scenario of two whales of different species swimming alongside each other, with one being protected and the other not – and argued that conservation imperatives should be kept in mind. Australia then indicated that in a spirit of compromise it would go ahead with the US's last paragraph amendment.

St Kitts and Nevis stated that it was proud of the 2006 St Kitts and Nevis Declaration, and that it supported the US on the last paragraph – pointing out that, per the fifth paragraph of the Declaration, the Scientific Committee had noted abundance. Sweden indicated that it supported Australia's proposed resolution strongly as a measure to ensure the continued existence of cetaceans; and argued that regulating all species will ensure conservation. Senegal argued that comments as to abundance were not supported by the Scientific Committee; and reiterated that any amendment of the Schedule would require scientific evidence. Senegal then suggested deletion of the final paragraph and concentration on synergies. The Chair asked whether a draft could be provided, and Senegal suggested the inclusion of a paragraph instructing the Scientific Committee to report on whether including all species would be good. The US said that it firmly supported Senegal; and then asked how it would be possible to regulate 86 species, when 15 are causing 'so much excitement'. The Chair then adjourned the session.

7.3 The third session

On resumption, the US stated that it considered the present state of affairs to be undesirable; and asked whether primary or secondary data was to be relied upon, indicating that the point is management. If secondary data can be relied upon, said the US, the current situation might not be undesirable; and if data was received through other bodies it might still help to achieve goals.

St Kitts and Nevis then referred to a proverb that 'one whale can feed 20 families'; and pointed out that the debate was also truly about livelihoods. Denmark then quoted a proverb that 'a good plan today is better than a perfect plan tomorrow'; and, pointing out that it represented Greenland also, argued that bringing all species

of cetacean under management might not reflect cultures. Denmark iterated, however, that it was just making a comment. The Chair asked whether Denmark wished to join the working group; but Denmark said that the European Union had a spokesman – the UK. Guinea-Bissau asked whether it was possible for others to sit in on the working group; and the Chair confirmed that it was an open group. The US then asked for an adjournment for the working group to continue drafting.

7.4 The fourth session

After the break the distributed proposed replacement text for the ultimate paragraph of the proposed resolution read as follows:

> … and hereby **INSTRUCT** the Scientific Committee to provide, as soon as possible, a comprehensive summary of all scientific findings on the current status of all species (including sub-species) of cetacean and provide informed guidance with respect to the inclusion of all species of cetacean in the Schedule with a view to promote cooperation with the above mentioned MEAs.

On resumption, Australia indicated that it would be open to adding the word 'possibly' to the phrase '… to bring in all …'; but that at the moment it could not agree to the US's definitive text. The US stated that it was concerned about finances; and stated that it was important that the IWC be recognized, and that the move to the ultimate goal of including all species should be made cautiously and without presupposing the willingness of other organizations. The US then pointed out that there is information about the 15 species in the Schedule, and suggested that before bringing in others the Commission should look to see what kind of data and partnerships can be explored. Sweden agreed with Australia; but suggested that the word 'possibly' was a bit loose, and suggesting discussing with Australia and deciding on a text. Norway then suggested adding to Option 1, at the end, the words '– and the provisions of Resolution 1 of 2006'.

Switzerland then said that it had concerns, and suggested reconfiguring the group. St Kitts and Nevis stated, however, that 'in the spirit of compromise' it was happy with the revised text. The Chair summarized by stating that there were two versions and that they were trying to reach a conversion text, as suggested by Switzerland, to choose between options. The US suggested that all parties with vested interests in change should be present.

Russia then suggested a postponement; with support from Switzerland, which said that it did not favour any voting but would prefer to postpone and await scientific results. Australia, however, implored that Switzerland not ask for a postponement; arguing that 'as we speak, every minute we are losing more whales', and asking whether we should 'postpone until no more whales are left?'. Australia indicated that in the spirit of compromise it had decided to allow categorization of species; but then proposed, as there was no consensus, to go to a vote.

Japan commented on a 'remarkable alliance' between Russia and Switzerland, describing it as 'a first'! Japan described the proposed resolution as being extremely important; and said that in the end it might come to a vote. Japan then said that it could accept either Options 1 or 2, if a final paragraph were added:

> '**RESOLVES**, upon receiving the requested information from the Scientific Committee, to pay due regard to its conclusions and lift the 1982 moratorium for any cetacean classified as meeting a sustained management stock level'.

Iceland then indicated that it would support Option 2, with Japan's addition. Norway argued that there is no evidence to suggest that species are going extinct and need to be saved – characterizing this claim as an 'attempt to hoodwink by the Secretariat'.

The Chair then pointed out that the Options were those of the parties, not of the Secretariat. A point of order was raised, and the Chair ruled that the Secretariat had 'no part in this'.

Sweden said that it agreed with Australia on continuing the discussion with no more delay. Grenada, however, argued that a proposal to adjourn the session takes precedence; and indicated also its support for Japan.

The Chair, however, pointed out that Russia and Switzerland's proposal was 'not to adopt', rather than 'to adjourn'.

The US endorsed 'all that Norway has said'; and argued that the 'text was not yet ripe'. The US explained that it would like to support synergies, but would also like to take time; so asked again, as Senegal 'had asked' according to the US, whether the Commission could either consider only the synergies or defer the whole issue. Senegal, Antigua and Barbuda and Guinea-Bissau indicated that they joined Japan, Iceland and Grenada in supporting Option 2 with the addition. The Netherlands, speaking for the EU, indicated that this could not be supported.

Japan then raised a point of order on the basis that the EU is not a member of the Commission. The Chair queried whether what was meant was the EU, or the members of the EU which were present. The Netherlands confirmed that what was meant were the members of the EU who were present.

Japan then raised a point of order on the basis that the Netherlands had spoken out of turn, but the Chair ruled that it was not in the Rules that a member could not speak twice. Norway then raised a point of order, which the Chair overruled.

The UK then reiterated what the Netherlands had said; and referred to the pillar of sustainable development, before averring that 'none of Japan's research has been

published in official IWC Scientific Committee publications'. Colombia stated that there should be no delay and that it would support holding a vote. Argentina supported Australia and the UK. The US, however, expressed concern over 'the direction taken', pointing out that despite different versions there had not been forward movement. Australia, said the US, needed to spend a little time speaking with other states, and suggested a workshop. The US iterated that it was interested in synergies; but that it felt it was not appropriate to move forward without knowing the answers to important questions such as financing. The US suggested decoupling issues.

The Commissioner for Japan then said that, while as a Buddhist he believed that one should let personal derision go, it should be noted that on the question of peer-reviewed articles he had counted 86 such articles. Kiribati then said that it wished to raise its voice against what European countries have said about small island developing states, and that the issue was about traditional usage. Switzerland then argued that consensus, which is so important, was far away; and asked the Chair to put the proposal aside. The Chair adjourned for a break.

7.5 The fifth session

On resumption, Australia indicated that consensus had been impossible to find. The Chair enquired as to whether Australia therefore wished to withdraw the proposal or to put it to a vote. Japan queried whether there was a rule allowing for a vote. The Chair indicated that discussions were only to be held to attempt to reach consensus. Japan then alleged that the Chair was 'being prejudiced'. The Chair responded that before the adjournment it had been indicated that Australia would be seeking a vote. Switzerland reminded the Chair that amendments needed to be dealt with in sequence. The Chair referred to Rule E.2 of the Rules of Debate, which provides the procedure in respect of voting on motions and amendments. Japan alleged that the Chair was biased. The Chair ruled that the proceedings would continue. Japan then referred to Rule C2, which concerns the order of motions; but the Chair ruled that the matter was closed and that the vote should go ahead. Senegal then raised Rule E3(b) of the Rules of Procedure, which concerns the text of regulations proposed to amend the Schedule; and stated that it could not commit itself to changing the Schedule. The Chair, however, ruled that the words 'with a view to' did not constitute a commitment and overruled Senegal. The Chair then instructed the Secretariat to proceed to a vote.

Australia's proposal was then put to the vote. Per normal IWC procedure, this was an open ballot with votes cast verbally, proceeding through the countries in alphabetical order. Votes in favour were received from Argentina, Australia, Brazil, Chile, China, Colombia, Denmark, South Korea, The Netherlands, Palau, South Africa, Spain, Sweden and the United Kingdom – 14.[72] Votes opposed were received from

[72] It was unexpected that Palau voted in favour.

Antigua and Barbuda, Cambodia, Congo, Grenada, Guinea-Bissau, Iceland, Japan, Kiribati, Norway, Russia, St Kitts and Nevis, Senegal, Switzerland, Tuvalu and the United States – 15.[73] Australia's proposed resolution was therefore not adopted.

The exercise concluded at this point, to cheers from the Commissioners from the contracting governments which had voted against the proposed resolution.

8 Conclusion

In the end, the exercise yielded a result not out of kilter with what might have happened in real life;[74] with arguments being raised over both procedure and substance, and much acrimony, confusion and frustration being evident.

It appeared, from informal reactions afterward, that the exercise achieved its purpose. Participants considered international legal issues with which only a few were familiar; many successfully argued from positions which would not have reflected their countries' usual positions;[75] debate became vigorous; and the participants were required to engage with difficult questions, both of procedure and of substance, in the course of the exercise. Even more importantly, perhaps, the exercise gave many of the participants a taste of international negotiation.

Informal feedback after the exercise indicated further that participants had found the exercise valuable both as to substance and as to procedure. It was apparent, during the exercise, that many of the participants had made the effort to research their designated countries' positions; and also those of other Contracting Governments. Most participants appeared to take the exercise seriously; which may reflect the fact that they were all selected for the Course initially as being persons either already involved in international environmental negotiation, or with the potential to become so involved.

Informal feedback also from resource persons on the Course, many of whom were experienced international negotiators, demonstrated also that the exercise had been successful.

[73] It was unexpected that the United States and Switzerland voted against.

[74] Although it needs to be conceded that the proposed resolution on which the exercise was based was not realistic, in the sense that it raised issues in an unsophisticated way, and was deliberately provocative.

[75] See *supra* section 1 ('Introduction'); and section 3.1 ('Role assignation').

9 Procedural disputes in the IWC

Following the exercise, a lecture was presented on the ICRW and synergies with various biodiversity-related conventions;[76] and also on how procedure and substance can overlap in international negotiations, through a discussion of the 63rd Annual Meeting of the IWC, which was held in Jersey in July 2011.

9.1 IWC 63, 2011

This meeting provided fascinating insight into how issues of substance and issues of procedure might overlap. In the view of the present writer, the meeting involved a 'battle' for control of the IWC – with this battle being fought out not overtly on substantive issues, but through issues of procedure.

At IWC 63, the following four issues dominated debate:

1. The non-attendance of certain delegates due to their failure to obtain visas timeously from the UK to visit the States of Jersey.[77]
2. Whether a proposal properly submitted by a contracting government could at the meeting itself be submitted by a different party.
3. Whether to allow contracting governments to pay their compulsory annual subscriptions by any means other than electronic bank transfer from a bank account held in the name of the contracting government.
4. How a quorum is constituted in the IWC.

9.2 Non-attendance of delegates due to failure to obtain visas to visit the States of Jersey

A number of contracting governments were affected by this, including the Russian and Senegalese delegates. There was no evidence that this was a deliberate ploy by the UK government to exclude certain delegations, despite this being at least insinuated in plenary by some Commissioners. Ultimately, the issue was resolved through an investigation and report by the Secretariat; general discussion; an undertaking from the UK to work with the Secretariat to ensure that the situation did not again occur; and agreement by the Commission that the IWC Secretariat and the host country of annual meetings should take a number of steps, including provision of detailed information to members well in advance of the meeting to help visa acquisition.[78]

[76] See *supra*, section 2 ('Synergies amongst biodiversity-related conventions') of the present paper.

[77] Jersey is a crown territory, although not a member of the European Union. Visa applications are handled by the United Kingdom.

[78] See 'Chair's Report of the 63rd Annual Meeting, St Helier, Jersey, 2011', available at <http://www.iwcoffice.org/_documents/meetings/jersey/Chairs%20report%20IWC63.pdf> (visited 27 December 2012), at 7, 9, 59–60.

Although, obviously, the issue was potentially a serious one; it was arguably used more as a delaying/distracting tactic. If a vote had been held and delegates from contracting governments who would have wished to be there had been unable to be present because of a visa delay, the issue would have been serious. In the end, however, it petered out.

9.3 Whether a proposal properly submitted by a contracting government can at the meeting itself be submitted by a different party

According to the Rules of Procedure of the IWC,

> [n]o item of business which involves amendment of the Schedule to the Convention, or recommendations under Article VI of the Convention, or Resolutions of the Commission, shall be the subject of decisive action by the Commission unless the full draft text has been circulated to the Commissioners at least 60 days in advance of the meeting at which the matter is to be discussed.[79]

A proposal had been so put forward ('circulated') by the United Kingdom more than 60 days before the 63rd Meeting. However, at the Meeting itself, the United Kingdom indicated that it would prefer not to put the proposal forward under its name. Instead, the proposal was to be put forward under the name of the European Union.[80]

Various other contracting governments objected, however; in particular Russia and St Kitts and Nevis. Objections included that a party which had not put forward the proposal originally could not at the Meeting itself become the proposer; and that the European Union was not a contracting government of the ICRW. After much debate, a compromise was reached and the proposed resolution[81] was recorded as having been put forward under the heading '[s]ubmitted by the United Kingdom and Poland, Belgium, Czech Republic, Denmark, Germany, Estonia, Spain, France, Italy, Luxembourg, Hungary, the Netherlands, Austria, Portugal, Finland and Sweden'.[82]

9.4 Whether to allow contracting governments to pay their compulsory annual subscriptions by any means other than electronic bank transfer from a bank account held in the name of the contracting government

This proved to be the most contentious of all of the clauses in Resolution 2011-1, despite having been presented by the United Kingdom described as a 'modest proposal'. The United Kingdom expressed its surprise that the matter was controversial.

[79] 'J. Schedule amendments and recommendations under Article VI and Resolutions'.
[80] See 'Chair's Report of the 63rd Annual Meeting', *supra* note 78, at 47.
[81] Resolution 2011-1 'On Improving the Effectiveness of Operations within the International Whaling Commission'.
[82] See *supra* note 78.

The United Kingdom argued that all it was trying to do was to modernize the IWC,[83] and obviate the need for the Secretariat to handle large sums of money in different countries.

At the same time as the United Kingdom delegation inside the Meeting precinct was arguing this, however, media reports outside of the Meeting suggested that the object of the proposed resolution was nothing less than significant reform of the IWC – in particular, by preventing corrupt practices. Environmental journalist Richard Black, for instance, wrote that 'reforms to prevent "votes for cash" allegations are set to top the agenda at this year's international whaling commission (IWC) meeting in Jersey' and that 'the most eye-catching of the UK reform proposals is that governments should have to pay their membership subscriptions by bank transfer, creating an auditable trail'.[84] The United Kingdom's Environment Minister, Richard Benyon, was quoted as saying that '[the IWC] has been going since 1946, and it needs to modernise its procedures so it doesn't leave itself open to the kinds of allegationsmade a year ago'.[85]

Ultimately, the United Kingdom knew that it had a majority of contracting governments present which would support it, and that for the adoption of a proposal a simple majority was required.[86] Their representatives indicated in plenary that adoption of this particular clause of the proposed resolution was, for them, not negotiable.[87]

In the end, however, a compromise was reached after a small working group had negotiated. The final text read:

> E.2 Payment shall be in pounds sterling, drafts being made payable to the International Whaling Commission and shall be payable within 90 days of the said request from the Secretary or by the following 28 February, the "due date" whichever is the later. It shall be open to any Contracting Government to postpone the payment of any increased portion of the amount which shall be payable in full by the following 31 August, which then becomes the "due date". Payment shall be by bank transfer from an account belonging to the Contracting Government or to a state institution of that Government.

[83] The Preamble to the proposed resolution included the following words: 'NOW THEREFORE THE COMMISSION: RESOLVES that Commission procedures should be brought into line with current international good practice so as to improve the effectiveness of the operations of the organisation; …'.

[84] Richard Black '"Clean-up bid" tops agenda for whaling meeting' *BBC News* of 10 July 2011, available at <http://www.bbc.co.uk/news/science-environment-14079749> (visited 25 July 2012).

[85] *Ibid.* The allegations were as to the alleged 'purchasing' of votes, which allegations have persisted for years in respect of the mainly developing country contracting governments which support Japan at the IWC. For a sober statistical analysis of the issue, see Jonathan R. Strand and John P. Tuman, 'Foreign Aid and Voting Behaviour in an International Organization: The case of Japan and the International Whaling Commission', *Foreign Policy Analysis* (2012) 1–22.

[86] As opposed to a Schedule amendment, which requires a three-quarters majority.

[87] See *supra* note 78, at 49.

This was the text as the United Kingdom had proposed it and insisted it should be. The compromise came in in the adoption of a different, but related, clause:

> E.5 For the purpose of application of Rule of Procedure E.2, payments of membership dues shall only count as having been received by the Commission when the funds have been credited to the Commission's account unless the payment has been made and the Commission is satisfied that the delay in receipt is due to circumstances beyond the control of the Contracting Government.[88]

9.5 How a quorum is constituted in the IWC

In order to understand how this issue arose, a few words of explanation of the IWC's recent history are needed. Briefly, although the IWC has for many years been a by-word for conflict, 2006 was the last year in which there was open conflict – and 2007 was the last year in which any issue was voted upon.[89]

Between 2008 and 2010, the parties engaged in a process termed the 'Future of the IWC',[90] in which compromise was sought through the acceptance of a 'package deal' which would include compromise on issues such as Aboriginal Subsistence Whaling (ASW);[91] Japanese Small Type Coastal Whaling (JSTCW);[92] the lifting of the 1982 'moratorium' on commercial whaling; the management of small cetaceans; and the creation of whale sanctuaries; amongst others. It was originally envisaged that the 'package deal' would be adopted or rejected at IWC 62 in 2010; but at that meeting parties agreed that a further 'period of reflection' was required.

For approximately a decade (2001–2008), a regular proposal was put forward annually, by Argentina, Brazil and South Africa (range states), for the establishment of a whale sanctuary in the South Atlantic. In most of the years the proposal was put forward it was successfully voted for by a simple majority[93] – the last year of voting being in 2007. The proposal was not, however, put forward in the years 2009–2010, as it was part of the proposed 'package deal'. In 2011, Argentina and Brazil put a similar proposal forward once again (South Africa declining to support in the circumstances).[94] Putting the proposal forward was controversial as it required sepa-

[88] See *supra* note 78, at 49–57.

[89] See, generally, 'Meetings', available at <http://www.iwcoffice.org/meetings/meetingsmain.htm> (visited 27 December 2012), for documentation and records of all meetings since the year 2000.

[90] See, generally, 'Future of the IWC', available at <http://iwcoffice.org/commission/future.htm> (visited 25 July 2012), for the history of this process. See also, *supra* note 78, at 8–9.

[91] A small number of communities in the state of Alaska, US; the Chukotka region of Russia; Greenland; and on the island of Bequi, St Vincent and the Grenadines, have traditionally been allocated by the IWC annual quotas of whales, for which there is no commercial whaling quota, for subsistence purposes. Authority for this is derived from the Schedule to the ICRW.

[92] Japan has four coastal communities (Abashiri, Ayukawa, Taiji and Wada,) which have traditionally engaged in whaling – their whaling is not recognized by the IWC as being 'aboriginal' in nature and they are not allocated quotas of whales by the IWC.

[93] A three-quarters majority being required to establish the sanctuary by way of a Schedule amendment.

[94] See *supra* note 78, at 3 and 30.

rating the proposal from the 'package deal' which was part of the 'Future of the IWC' process.

Since the late 1980s, Japan has regularly called for the IWC to consider the socio-economic implications of Japanese small-type coastal whaling. Japan noted in 2011 that, in previous years, it had requested a vote on its proposal for an interim relief catch allocation to relieve hardship; but advised that 'in a spirit of co-operation' it had not requested a vote during the discussions on the 'Future of the IWC' process. Japan advised that, although disappointed at the outcome of those discussions in 2010, it 'recognised the improved atmosphere of discussions that process had engendered'. Finally, Japan advised that, 'appreciative of the efforts for consensus that had already occurred in discussions, it again would refrain from asking for a vote this year'.[95]

Various parties expressed great reluctance to have the South Atlantic sanctuary proposal voted upon, and requested that it be withdrawn. Argentina and Brazil, supported by other members of the Buenos Aires Group (Chile, Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Peru and Uruguay) insisted, however, upon their right to put a proposal forward and to insist upon a vote – several European Union countries gave strong support. Various parties characterized the insistence on putting the proposal to a vote as leading potentially to the 'destruction' of the IWC. The argument made in this regard was that putting the proposal to a vote might lead to other issues being put back on the agenda singly in future years (such as JSTCW) and to issues being linked politically (such as ASW and JSTCW).[96]

The sustainable use group parties did not initially join the meeting; and, when they did, made no secret of their intention to leave the room en masse and break the quorum if a vote was insisted upon. After debate, Argentina and Brazil continued to insist upon a vote. The (Interim) Chair then instructed the Secretary to prepare for a vote. The sustainable use group parties then exited the room, leaving less than half of the Commission's contracting governments represented. Various Buenos Aires group and European Union countries insisted, however, that the meeting remained quorate on the basis that it had been quorate at the beginning of the meeting. The (Interim) Chair then adjourned to a series of Private Commissioners' Meetings where debate continued on the meaning of 'quorate'.[97]

According to the IWC's Rules of Procedure, '[a]ttendance by a majority of the members of the Commission shall constitute a quorum'.[98] The rule is stark – unfortunately, it is this very simplicity which leaves it open to different interpretations.

[95] *Ibid.* at 3 and 33.
[96] *Ibid.* at 30–32.
[97] *Ibid.*
[98] IWC 'Rules of Procedure', *supra*, note 63, at B.1(c).

After nine hours of Private Commissioners' Meetings on the final day of the Meeting, including numerous meetings of sub-groups, a compromise was reached. No resolution was taken, but certain wording was agreed to which would be included in the Chair's Report of the Meeting.[99]

The following wording was agreed to:

> At IWC 63, the delegations of Argentina and Brazil presented a proposal for the establishment of a South Atlantic Whale Sanctuary. The establishment of a sanctuary has been on the Commission's agenda for many years. It would require a consensus decision or a three-quarters majority. The sponsors asked for consensus on the proposal. The debate showed that there was a majority of Commissioners in support of the proposal. Five countries spoke in opposition to the proposal and three said they were not in a position to join a consensus. Russia requested the sponsors to withdraw the proposal.
>
> The delegation of Japan, on behalf of Cambodia, Cameroon, Cote d'Ivoire, the Gambia, Iceland, Norway, Nauru, Mongolia, Mauritania, Guinea-Bissau, Grenada, Kiribati, Morocco, Korea, Ghana, Palau, Togo, Russian Federation, Tuvalu, St Kitts and Nevis and St Lucia, said they were not willing to participate in a vote on the proposal because they considered that reverting to voting could be harmful to the constructive dialogue and atmosphere in the Commission that have been achieved in recent years. The sponsors of the proposal made it clear that they wished the proposal to be put to the vote if consensus was not possible. Many other speakers supported the right of sponsors of a proposal to have that proposal put to a vote if consensus could not be achieved.
>
> The Chair ruled that consensus could not be achieved and asked the Secretary to prepare for a vote. At that point, Japan, Cambodia, Cameroon, Cote d'Ivoire, the Gambia, Iceland, Norway, Nauru, Mongolia, Mauritania, Guinea-Bissau, Grenada, Kiribati, Morocco, Korea, Ghana, Palau, Togo, Tuvalu, St Kitts and Nevis and St Lucia left the meeting room. There were extensive informal consultations on the procedural situation facing the Commission. There was no agreement on how the quorum rule in the Commission's Rules of Procedure applied to this situation or on how to resolve the procedural impasse facing the Commission.
>
> The Commission decided to establish an intersessional Group to consider the interpretation of the Commission's Rules of Procedure regarding the quorum necessary for a decision to be taken and, if appropriate, to present for the consideration of the Commission at IWC 64 a proposal to amend the Rules so as to clarify the matter. While recognizing the diversity of views in the Commission on the issue, the Commission recognizes the importance of a South Atlantic Whale Sanctuary to many member Governments. The Commission resolved:

[99] See *supra* note 78, at 30–32.

a) to continue to discuss the establishment of a South Atlantic Whale Sanctuary as the first substantive agenda item at IWC 64;
b) that, if consensus cannot be reached on the item, a decision will be taken in accordance with the Commission's Rules of Procedure.[100]

9.6 Conclusion

To the casual onlooker, it might seems as though the 63rd Annual Meeting of the IWC became bogged down in procedural matters; and that the various parties involved lost sight of the main goals of the Convention. This would be, it is submitted, too simplistic an explanation. While the bulk of the meeting did involve procedural matters or discussions as to form, and actual whale conservation or management issues were little discussed, the procedural issues were not unimportant. Strongly arguably, what was at stake was control of the international management body – the IWC.

The 63rd Annual Meeting was important in this regard, but not the final word. A number of the issues were held over to be raised and debated again at the 64th Annual Meeting in 2012, and perhaps will be raised again even at future meetings. At the 64th Annual Meeting in Panama in 2012 the quorum issue was indeed raised and discussed; however, no resolution was reached, several votes were taken without quorum being in issue (including a vote on the South Atlantic Whale Sanctuary, which proposal was unsuccessful) and the matter was therefore left unresolved. What was important for purposes of the negotiation exercise discussed in this paper was to demonstrate to the Course participants that the exercise in which they had just engaged had not been unrealistic, but was in fact reflective of real negotiations; and to persuade the Course participants of the importance of their understanding diplomatic techniques, and practices of procedure and debate.

10 Postscript: A proposed resolution in 2012

10.1 Introduction

Although the negotiation exercise described above was entirely fictional, in a strange case of 'life imitating art' a resolution was proposed at the real 64th annual meeting of the International Whaling Commission[101] – which was held in June and July 2012, hosted in Panama City – which was remarkably similar to that in the exercise. The draft resolution was put forward by contracting government Monaco, and was titled 'Highly migratory cetaceans in the high seas'.[102]

[100] *Ibid.*
[101] See, generally, <http://www.iwcoffice.org/meeting2012> (visited 27 December 2012).
[102] See Doc. 64/11rev2 (2012), available at <http://www.iwcoffice.org/index.php?cID=3022&cType=document> (visited 25 July 2012).

The approach taken by Monaco in reality in 2012 was slightly different from that taken by Australia in the fictional world of the 2011 negotiating exercise in that, instead of directing the request for cooperation and discussion by another organization to specific such organizations, the request was to have been made to the United Nations General Assembly itself. Beyond that, however, the thrust of the draft resolution was essentially the same – to move the debate on so-called 'small cetaceans' beyond the confines of the IWC itself. The draft resolution was as contentious in the real context of the IWC as it was in the negotiating exercise – many contracting governments, particularly those regarded as being 'pro-whaling', apparently not wishing to see such a move.[103]

10.2 The draft resolution

What follows here is the final text of the draft resolution which was put forward by Monaco, after having been amended in consultation with various other persons, and which was then considered in plenary by the contracting governments to the IWC.

Draft Resolution for IWC 64: Highly migratory cetaceans in the high seas
Submitted by Monaco
IWC/64/11 Rev2 Agenda item 20

1. *Noting that the overwhelming majority of marine cetacean species currently recognized by the IWC are highly* migratory species and thus critically dependent on international cooperation for their conservation and management;
2. *Noting* that Articles 65 and 120 of the United Nations Convention on the Law of the Sea (UNCLOS) require States to cooperate with a view to the conservation of marine mammals and, in the case of cetaceans, to work through the appropriate international organizations for their conservation, management and study both within and beyond the exclusive economic zone;
3. *Concerned* that efforts by coastal and island States to protect these migratory species depend upon effective conservation efforts on the high seas;
4. *Recalling* that, due to a divergence of views among IWC Parties over the taxonomic coverage of the ICRW, only 38 highly migratory species of cetacean are included in the ICRW Schedule, without addition of any further species in the last 35 years;
5. *Regretting* that most countries engaged in whaling have a policy of not providing data to the IWC Scientific Committee on cetacean species which in their view are not covered by the ICRW;
6. Expressing deep concern that current catches of cetaceans in the world's oceans – with the single exception of those meeting aboriginal subsistence whaling quota – are taken without agreed limits;

[103] The contracting governments which objected most strongly in plenary to the adoption of the draft resolution being pro-whaling parties, such as Japan and St Kitts and Nevis.

NOW therefore the Commission:

7. *Calls the attention* of the international community to the circumstance that significant unregulated catches of highly migratory species of cetaceans continue to take place;
8. *Invites* Contracting Parties to consider this issue in collaboration with the United Nations General Assembly, with a view to contributing to the conservation efforts of the IWC.

10.3 Discussion of the document in plenary

Day 5, the final day of the 64th annual meeting, began with discussion of Monaco's draft resolution. According to the IWC official press release for Day 5, 'after an exchange of views, consensus could not be reached' and Monaco indicated that it would continue to work on the issue 'intersessionally'.[104] The proposed resolution was therefore withdrawn before being put to a vote.

What in fact appears to have happened was that, while Monaco was determined to see the document adopted, or at least voted upon, after fairly extensive discussion on both the penultimate and the final days of IWC 64, Monaco realized that there was not sufficient support from the floor for the resolution to be adopted and withdrew it.[105] That the draft resolution was put forward in the first place, and was then discussed in plenary before being withdrawn late, indicates that it was taken seriously – at least by its proponent. It seems likely that the issue will appear on the agenda again in 2014 when the IWC next meets.[106]

[104] IWC 64, 'Press release: Day 5', available at <http://www.iwcoffice.org/iwc64press> (visited 25 July 2012).
[105] The present author attended IWC 64 as a member of the South African delegation.
[106] The Commission decided at IWC 64 that meetings would in future be held bi-annually rather than annually – as such, there will be no meeting of the Commission in 2013.