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AND NATURAL HABITATS

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**THE BERN CONVENTION AND EU REGULATION 1143/2014 ON
THE PREVENTION AND MANAGEMENT OF THE INTRODUCTION
AND SPREAD OF INVASIVE ALIEN SPECIES**

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ABBREVIATIONS

ASCI	Area of Special Conservation Interest
CBD	Convention on Biological Diversity
COP	Conference of the Parties
EASIN	European Alien Species Information Network
EU	European Union
IAS	Invasive alien species
IAS Committee	Committee on Invasive Alien Species
IAS Regulation	Regulation 1143/2014 on the Prevention and Management of the Introduction and Spread of Invasive Alien Species
SPS Agreement	WTO Agreement on the Application of Sanitary and Phytosanitary Measures
TFEU	Treaty on the Functioning of the European Union
Union IAS List	List of invasive alien species of Union concern
WGIAS	Working Group on Invasive Alien Species
WTO	World Trade Organization

1. INTRODUCTION

The focus of this report is on the European Union (EU)'s Regulation 1143/2014 on the Prevention and Management of the Introduction and Spread of Invasive Alien Species (IAS Regulation),¹ and in particular on the role that the Bern Convention could play in extending the actions provided for in the Regulation beyond the EU, and in facilitating the Regulation's effective implementation generally.

The IAS Regulation entered into force in the 28 EU member states on 1 January 2015. It lays down a range of rules to prevent, minimize and mitigate the adverse effects of invasive alien species (IAS) on European biodiversity, and on related ecosystem services and human health and safety, and also to reduce the socio-economic impacts of IAS.²

This report explores options for extending the scope of (some of) the measures laid down in the IAS Regulation to Europe at large, beyond the EU, using the framework of the Bern Convention. It also explores options for synergies between the Regulation and Bern Convention work on IAS more generally. Accordingly, the IAS Regulation is analysed in this report paying special attention to:

- ways in which the Bern Convention could extend and adapt the measures contained in the Regulation to non-EU member states;
- fields of work flowing forth from the Regulation which could be addressed at the international level;
- possible technical work to be conducted within the framework the Bern Convention in order to broaden the scope of measures contained in the IAS Regulation beyond the EU; and
- the possible role of the Standing Committee of the Bern Convention regarding the above.

It is advisable to read this report in conjunction with the text of the IAS Regulation itself.³

In the Annex to this report a text is included that might serve as the basis for a Standing Committee Recommendation.

2. GENERAL CONSIDERATIONS

2.1 The overall mandate for further Bern Convention action regarding IAS

The mandate of the Bern Convention Standing Committee to agree on further action to address the introduction and spread of IAS is evidently present. Article 14 of the Bern Convention establishes the responsibility of the Committee for supervising the Convention's application and, in particular, making "recommendations to the Contracting Parties concerning measures to be taken for the purposes of this Convention".⁴ Action to reduce the threats posed by IAS is clearly in line with the aims set out in Article 1 of the Convention, and also with the specific obligations of parties under Articles 2, 3(1), 4 and 11. According to the latter provision, contracting parties undertake "to strictly control the introduction of non-native species".⁵ It should also be noted in the present context that Bern Convention parties are to "co-operate whenever appropriate and in particular when this would enhance the effectiveness of measures taken under other articles of this Convention".⁶

Measures under the Bern Convention to further the implementation of the IAS Regulation and to complement the Regulation in non-EU member states would, furthermore, build on a substantial body of guidance and actions already adopted under the Convention. Reference is made here, in particular, to the

¹ Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the Prevention and Management of the Introduction and Spread of Invasive Alien Species.

² IAS Regulation, Preamble, paragraph 6.

³ For lack of space, the analysis below does not cover every detail of the Regulation, which covers over 20 pages of text, containing 38 preambular paragraphs and 33 substantive provisions – many of which are, moreover, quite elaborate.

⁴ Article 14(1).

⁵ Article 11(2)(b).

⁶ Article 11(1)(a).

many Standing Committee Recommendations on IAS, both general and specific,⁷ several Bern Convention Codes of Conduct,⁸ guidelines⁹ and technical reports¹⁰ on IAS, and generally to the work of the Group of Experts on Invasive Alien Species that was established under the Convention in 1992. Special mention should be made of the European Strategy on Invasive Alien Species, setting out a detailed road map for Bern Convention parties regarding the IAS challenge.¹¹ In 2003, the Standing Committee called on contracting parties to devise and implement national IAS strategies, taking into account this European Strategy.¹² Simultaneously, the Standing Committee specifically requested Bern Convention parties to:

*“co-operate, as appropriate, with other Contracting Parties and Observer states in the prevention of introduction of invasive alien species, the mitigation of their impacts on native flora and fauna and natural habitats, and their eradication or containment where feasible and practical, inter alia by exchanging information, collaborating in European projects and paying particular attention to invasive alien species in trade and transboundary areas.”*¹³

This strong history of the Bern Convention regarding IAS issues has unfolded against a background of commitments undertaken under other international legal instruments.¹⁴ A prominent example is Article 8(h) of the Convention on Biological Diversity (CBD),¹⁵ and the associated Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species, adopted by the CBD Conference of the Parties (COP) in 2002.¹⁶

2.2 The incentive for Bern Convention action aligned with the IAS Regulation

The recent entry into force of the IAS Regulation constitutes a milestone in the history of EU law-making for biodiversity conservation.¹⁷ The Regulation introduces an elaborate set of obligations under EU law regarding measures that are specially tailored to dealing with the various challenges posed by IAS (see below Sections 3, 4, 5 and 6). These provisions concern 29 contracting parties of the Bern Convention, namely the 28 EU member states and the EU itself. The faithful implementation of the IAS Regulation in these 28 countries would evidently contribute to achieving the aims of the Bern Convention.

Those aims would be even better served, however, if comparable measures were also taken, preferably in a coordinated fashion, in the various European states that are not covered by the IAS Regulation. This point can be illustrated with reference to the Explanatory Memorandum submitted in

⁷ Recommendations Nos. 57 and 61 (1997), 77 and 78 (1999), 91 (2002), 99 (2003), 114 (2005), 123, 124, 125 and 126 (2007), 134 (2008), 141 and 142 (2009), 149 (2010), 154 (2011), 158, 160 and 161 (2012), 166 and 167 (2013), and 170 (2014).

⁸ Code of Conduct on Horticulture and Invasive Alien Plants, T-PVS/Inf(2008)2; Code of Conduct on Pets and Invasive Alien Species (including Ornamental Fish) in Europe, T-PVS/Inf(2011)01revE; European Code of Conduct on Zoological Gardens and Aquaria and Invasive Alien Species, T-PVS/Inf(2011)26E; European Code of Conduct for Botanic Gardens on Invasive Alien Species, T-PVS/Inf(2012)01E; European Code of Conduct on Hunting and Invasive Alien Species, T-PVS/Inf(2013)20E; European Code of Conduct on Recreational Fishing and Invasive Alien Species, T-PVS/Inf(2014)18E.

⁹ European Guidelines on Protected Areas and Invasive Alien Species, T-PVS/Inf(2013)22E.

¹⁰ E.g., Elvira (2001); Shine (2006).

¹¹ Genovesi and Shine (2004).

¹² Recommendation No. 99 (2003) on the European Strategy on Invasive Alien Species, paragraph 1.

¹³ Ibid., paragraph 2.

¹⁴ See Genovesi and Shine (2004); Shine et al. (2005); Convention on Biological Diversity (2005); Shine (2006).

¹⁵ Convention on Biological Diversity (1992), www.biodiv.org. Article 8(h): ‘Each Contracting Party shall, as far as possible and as appropriate: ... prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species.’

¹⁶ CBD COP Decision VI/23; see also CBD COP Decision IX/4.

¹⁷ Beninde et al. (2014); Shine et al. (2009).

2013 by the European Commission together with its proposal for an IAS Regulation.¹⁸ The Memorandum reports that measures taken by EU member states to address IAS remain predominantly reactive, with insufficient attention being paid to prevention and the detection of new threats.¹⁹ Efforts are furthermore described as fragmented, with substantial gaps in species coverage, and as often poorly coordinated.²⁰ It seems fair to assume that similar considerations apply to non-EU member states as well. In the same vein, it is instructive to consider some of the European Commission's considerations regarding the subsidiarity of its (then) proposed Regulation:

“Union-level action is necessary as IAS problems are increasing and are cross-border by nature. In view of the lack of Union-level action, Member States are putting measures in place to cope with the problem at national level. They are investing resources and efforts in eradicating harmful IAS but such efforts can be undermined by a lack of action in a neighbouring Member State where the species is also present. ... Current efforts are highly fragmented and inconsistent, leaving considerable policy gaps. These lead to ineffectiveness and do not solve the IAS problem. A mixture of Union and national, regional and local measures will be needed, in line with the principle of subsidiarity. However, a coherent approach at Union level will increase the effectiveness of the measures.”²¹

Evidently, what is stated here in respect of action at the EU level applies all the stronger in respect of action at the pan-European level. In other words, to a significant extent, the reasons that lie at the basis of the IAS Regulation also apply beyond the EU. It is thus not surprising that the IAS Regulation itself calls for coordination and cooperation between EU member states and non-member states. A general provision to that end is laid down in Article 22:

“Member States shall, when complying with their obligations under this Regulation, endeavour to cooperate with third countries, as appropriate, including by using existing structures arising from regional or international agreements, for the purpose of meeting the objectives of this Regulation.”²²

Incidentally, Article 22 also calls on EU member states to ensure close coordination amongst each other, again using, where practical and appropriate, “existing structures arising from regional or international agreements.”²³

The preceding considerations indicate the desirability of action extending beyond EU member states to supplement the measures incorporated in the IAS Regulation. The next step, for the purposes of this report, is to explore the merits for taking such action within the framework of the Bern Convention. To be sure, other options exist in order to shape and facilitate such action. These include bilateral coordination and the use of (sub)regional intergovernmental fora, for instance the Nordic Council. Furthermore, some consultations regarding the IAS Regulation and its implementation have already taken place between the European Commission and several non-EU countries that share borders with EU member states.

Having said that, various features of the Bern Convention appear to indicate that the Convention has a distinct role to play to complement the aforementioned efforts. First among these is the unique pan-European scope of the Convention, not only on paper but also in terms of actual Contracting Parties. Besides all EU member states, the latter include virtually all European countries that are not EU member states. Such non-EU Bern Convention parties in Europe are Albania, Andorra, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, “the former Yugoslav Republic of

¹⁸ Proposal for a Regulation of the European Parliament and of the Council on the Prevention and Management of the Introduction and Spread of Invasive Alien Species (9 September 2013), COM(2013) 620 final.

¹⁹ Ibid., p. 2; for the underlying analysis of member state practice, see Sonigo et al. (2011).

²⁰ Ibid.

²¹ Ibid., p. 5.

²² IAS Regulation, Article 22(2).

²³ Article 22(1).

Macedonia”, Republic of Moldova, Monaco, Montenegro, Norway, San Marino, Serbia, Switzerland, Turkey, and Ukraine.²⁴

A second feature is the strong track record of the Bern Convention concerning action to deal with IAS, alluded to above (see Section 2.1). This would seem to provide a solid foundation for any additional measures aligned with the IAS Regulation. It makes apparent sense to envisage the Bern Convention Standing Committee and IAS Group of Experts as covered by the reference in the IAS Regulation to

*“existing structures arising from regional or international agreements which may facilitate international coordination and cooperation, both amongst EU member states and between EU and non-EU countries.”*²⁵

Third, Bern Convention action adopted to complement the IAS Regulation would not constitute the first time that the Standing Committee acts to complement EU legislation. A particularly evocative parallel can be drawn with the Emerald Network of Areas of Special Conservation Interest (ASCI), set up on the basis of Article 4 of the Convention through a series of Resolutions and Recommendations adopted by the Standing Committee.²⁶ The regime concerning the Emerald Network was specially shaped in order to mirror, in non-EU Bern Convention Contracting Parties, the Natura 2000 network set up under the EU Wild Birds²⁷ and Habitats²⁸ Directives.²⁹ “In a sense,” to use the words of a Bern Convention guidance document, “the Emerald Network extends the EU nature conservation standards outside its borders.”³⁰

Finally, and importantly, at the 34th Meeting of the Standing Committee in 2014, the EU and its member states expressly welcomed “the exploration of the possible future role of the Convention in relation to Regulation (EU) No 1143/2014.”³¹

2.3 Some general issues to take into account when considering Bern Convention action aligned with the IAS Regulation

Overall, the case for developing measures within the framework of the Bern Convention to supplement the IAS Regulation thus appears a strong one. At the same time, when designing any such action, due account should be taken of certain issues, including the various significant differences between the instruments, or mechanisms, involved.

The IAS Regulation is a legally binding instrument. Moreover, as it concerns a Regulation as opposed to a Directive, the instrument is directly applicable in all the EU member states. EU Regulations, besides setting out provisions targeting member states or institutions like the European Commission, can by themselves provide for rights and even obligations of citizens. A good example is Article 7 of the IAS

²⁴ The Russian Federation is not a party but has observer status at the meetings of the Standing Committee. African contracting parties are Burkina Faso, Morocco, Senegal and Tunisia.

²⁵ IAS Regulation, Article 22(1)-(2).

²⁶ Resolution No. 1 (1989), Recommendations Nos. 14, 15 and 16 (1989), Resolutions Nos. 3 and 4 (1996), Resolutions Nos. 5 and 6 (1998), Recommendation No. 157 (2011), Resolution No. 8 (2012), Recommendation No. 172 (2014).

²⁷ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the Conservation of Wild Birds (codified version of Council Directive 79/409/EEC of 2 April 1979 as subsequently modified).

²⁸ Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora.

²⁹ Generally, see Directorate of Democratic Governance, Culture and Diversity (2012); see also Epstein (2014), p. 17-20.

³⁰ Directorate of Democratic Governance, Culture and Diversity (2012), p. 11.

³¹ General Secretariat of the Council, Compilation of EU and Member State statements/speaking points at 34th Meeting of the Standing Committee of the Bern Convention, 16916/14, ENV 996, Brussels, 15 December 2014; see Agenda Item 5.1.a.

regulation, laying down a generic prohibition of the intentional importation, transport, release, et cetera, of certain IAS³² (see Section 5.1 below).

Recommendations and Resolutions adopted by the Bern Convention Standing Committee are evidently of a different legal calibre. They are not themselves legally binding. Furthermore, if prohibitions similar to the one featured in Article 7 of the IAS Regulation were to be called for in a Standing Committee Recommendation or Resolution, these would first have to be implemented through changes in national legislation in order to take effect. Nevertheless, it would be a mistake to think that Standing Committee Recommendations and Resolutions are entirely without legal relevance. Depending on their content and the wording employed, such instruments can exert a distinct influence on the interpretation and application of the associated legally binding provisions contained in the Bern Convention itself³³ – such as, in the present context, Article 11(2)(b) on IAS. One may draw another parallel here with the extensive guidance adopted by the Standing Committee concerning the Emerald Network, which evidently influences the interpretation and application of Article 4 of the Convention on habitat conservation.

At any rate, the differences between the EU's IAS Regulation and the mechanism of Bern Convention Recommendations and Resolutions as just highlighted should evidently inform any exercise aimed at complementing the IAS Regulation through Bern Convention action. In addition, compared to the IAS Regulation, the financial resources and capacity available to facilitate the implementation of associated Bern Convention action is probably more limited. Both points may be illustrated again with reference to the Emerald Network. On the one hand, “the Emerald constitution process and methodology got inspired and followed the Natura 2000 examples and best practices,”³⁴ and the aim has been to ensure as much “complementarity and consistency” between Natura 2000 and the Emerald Network as possible.³⁵ On the other hand, the differences in legal and institutional settings and available resources have led, in respect of the Emerald Network, to what has been described as a “simplified approach without losing the essence.”³⁶

In sum, also in the present context it will not be feasible nor indeed desirable to fully mirror the approach taken in the IAS Regulation within the framework of the Bern Convention. Rather, measures to complement the Regulation beyond the EU should be tailored to the extent and in the form appropriate to the framework of the Bern Convention. It is important to bear this in mind throughout the remainder of the present analysis.

Another consideration to take due account of when contemplating the taking of specific measures under the Bern Convention to match the IAS Regulation is the desirability of avoiding friction with obligations of Bern Convention contracting parties within the framework of the World Trade Organization (WTO), such as the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).³⁷ In particular, measures ought to be avoided which could be challenged as constituting arbitrary or unjustified discrimination or disguised restrictions on trade as understood within the WTO regime.³⁸

³² Article 7(1).

³³ Apt examples are Resolution No. 2 (1993) on the Scope of Articles 8 and 9 of the Bern Convention (revised in 2011); Recommendation No. 142 (2009) Interpreting the CBD Definition of Invasive Alien Species to Take into Account Climate Change; and Recommendation No. 173 (2014) on Hybridisation between Wild Grey Wolves (*Canis lupus*) and Domestic Dogs (*Canis lupus familiaris*). See further Shine (2010); Trouwborst (2011), p. 7-8, 12-13; Trouwborst (2013), p. 305-311; and Trouwborst (2014).

³⁴ Directorate of Democratic Governance, Culture and Diversity (2012), p. 11.

³⁵ Directorate of Democratic Governance et al. (2013), p. 2.

³⁶ Ibid.

³⁷ WTO Agreement on the Application of Sanitary and Phytosanitary Measures (1995).

³⁸ See further Shine (2006).

3. OVERALL INTRODUCTION TO THE IAS REGULATION

The IAS Regulation was designed using a number of guiding principles. These are: (i) prioritisation of action regarding particular IAS; (ii) a shift of attention towards preventive measures; (iii) building upon existing systems and efforts at national and international levels; and (iv) a gradual and phased-in approach.³⁹ Below, a bird's-eye view of the Regulation is provided, concisely introducing its structure and key elements. Several of these key elements are discussed in more detail in subsequent Sections of this report.

Preamble

The elaborate Preamble (38 paragraphs) explains, *inter alia*, the background to, reasons for, and content of the IAS Regulation, and links the Regulation to commitments under other international instruments. The Preamble draws express attention to the fact that the EU is a party to the Bern Convention, stressing in particular that the Union has thus “undertaken to take all appropriate measures to ensure the conservation of the habitats of the wild flora and fauna species.”⁴⁰ Curiously, however, no reference is made to the obligation in Article 11(1)(a) of the Convention to “strictly control the introduction of non-native species.”

Chapter I – General provisions

According to its first substantive provision, the Regulation sets out “rules to prevent, minimise and mitigate the adverse impact on biodiversity of the introduction and spread within the Union, both intentional and unintentional, of invasive alien species.”⁴¹ Chapter I contains definitions of 17 terms used in the Regulation. Some of the most significant are reproduced here:

- *alien species* – “any live specimen of a species, subspecies or lower taxon of animals, plants, fungi or micro-organisms introduced outside its natural range; it includes any part, gametes, seeds, eggs or propagules of such species, as well as any hybrids, varieties or breeds that might survive and subsequently reproduce”⁴²
- *introduction* – “the movement, as a consequence of human intervention, of a species outside its natural range”⁴³
- *invasive alien species* – “an alien species whose introduction or spread has been found to threaten or adversely impact upon biodiversity and related ecosystem services”⁴⁴
- *pathways* – “the routes and mechanisms of the introduction and spread of invasive alien species”⁴⁵

The Regulation applies to all IAS,⁴⁶ but not to pathogens causing animal diseases and certain other organisms covered under particular EU Regulations and Directives, regulating genetically modified organisms, organisms harmful to plants, species used in aquaculture, and micro-organisms used for plant protection and biocidal products.⁴⁷ It is also made clear that the Regulation does *not* apply to “species changing their natural range without human intervention, in response to changing ecological conditions and climate change.”⁴⁸ This is in line with relevant guidance adopted under the Bern Convention.⁴⁹ (An

³⁹ Proposal for a Regulation of the European Parliament and of the Council on the Prevention and Management of the Introduction and Spread of Invasive Alien Species (9 September 2013), COM(2013) 620 final.

⁴⁰ Preamble, paragraph 5.

⁴¹ Article 1.

⁴² Article 3(1).

⁴³ Article 3(7).

⁴⁴ Article 3(2).

⁴⁵ Article 3(11).

⁴⁶ Article 2(1).

⁴⁷ Article 2(2)(b)-(g).

⁴⁸ Article 2(2)(a); see also Preamble, paragraph 7.

⁴⁹ Standing Committee Recommendation No. 142 (2009) Interpreting the CBD Definition of Invasive Alien Species

apt example of a species moving by itself into areas where it did not previously occur is provided by the remarkable recent range expansions of the golden jackal (*Canis aureus*) in Europe.⁵⁰ Most importantly, Chapter I sets out crucial provisions concerning the “List of invasive alien species of Union concern” (Union IAS List), which constitutes a central element of the Regulation, and the associated risk assessments (see further Section 4.1 below).

Chapter II – Prevention

This Chapter contains the measures deemed necessary to prevent the introduction into the EU, and the introduction or release into the environment, of IAS, both intentional and unintentional. These include a number of directly applicable prohibitions, and action plans addressing IAS pathways. The various measures are discussed in more detail below (see Sections 5.1 and 5.2).

Chapter III – Early detection and rapid eradication

The Regulation’s third Chapter provides for various means to ensure that IAS of Union concern can be detected at EU borders and in the environment at an early stage, as well as the measures to be taken when such detection takes place. These include surveillance systems, border controls, mandatory notification of detected IAS of Union concern to the European Commission and other member states, and the mandatory application of eradication measures (see further Section 6.1 below.)

Chapter IV – Management of IAS that are widely spread

This Chapter addresses IAS of Union concern that are already established within the EU and new ones that elude preventive and early detection measures and manage to spread widely. It sets out an obligation for member states to apply effective management measures in defined circumstances. Another provision addresses the restoration of ecosystems damaged by IAS. (See further Section 6.2 below.)

Chapter V – Horizontal provisions

The aforementioned Article 22 on international cooperation within and beyond the EU is one of the provisions of Chapter V. It is accompanied by a provision stating that member states may adopt more stringent national rules regarding IAS, as long as these are compatible with overarching EU law, in particular the Treaty on the Functioning of the EU⁵¹ (TFEU), and are notified to the European Commission.⁵²

Chapter VI – Final provisions

This Chapter contains reporting obligations and various mechanisms to facilitate and ensure implementation, enforcement and review of the measures set forth in the Regulation. The following are particularly noteworthy:

- *information support system* – An “information support system” is to be progressively established by the European Commission, in order to aid the Regulation’s implementation.⁵³ Already by 2 January 2016, this system “shall include a data support mechanism interconnecting existing data systems” on IAS, principally to help the Commission and the member states in handling early detection notifications.⁵⁴ By 2 January 2019, this data support mechanism must be ready for exchanging other aspects of the Regulation’s application.⁵⁵ According to the Regulation it may also include information

to Take into Account Climate Change.

⁵⁰ See Trouwborst, Krofel and Linnell (2015).

⁵¹ Treaty on the Functioning of the European Union (1958).

⁵² IAS Regulation, Article 23.

⁵³ Article 25(1).

⁵⁴ Article 25(2).

⁵⁵ Article 25(3).

on pathways, risk assessment, and management and eradication measures.⁵⁶ The information support system, denominated the European Alien Species Information Network (EASIN), is currently running and being developed further.⁵⁷ It is coordinated by the Joint Research Centre of the European Commission.

- *committee* – A “committee” is established, consisting of representatives of all member states, to assist the European Commission in its tasks within the framework of the Regulation.⁵⁸ This “Committee on Invasive Alien Species” (IAS Committee) adopted its Rules of Procedure in February 2015.⁵⁹
- *scientific forum* – A “scientific forum”, consisting of representatives of the scientific community appointed by the member states, is to provide advice on scientific matters concerning the application of the IAS Regulation, and to aid the IAS Committee as appropriate.⁶⁰ The advice of this “Scientific Forum on Invasive Alien Species” will be sought in particular regarding the establishment and updating of the Union IAS List, risk assessment, emergency measures, and derogations from the eradication obligation (on the latter two, see Sections 5.1 and 6.1 below).⁶¹

Not expressly mentioned in the IAS Regulation but nevertheless noteworthy in the present context is the Working Group on Invasive Alien Species (WGIAS) which the European Commission has decided to reconvene with renewed membership.⁶² The WGIAS is conceived as an operational group intended to provide concrete input regarding the Regulation’s implementation.

4. LISTING OF IAS

Under the IAS Regulation, invasive alien species may be listed at various levels, according to the circumstances and the measures deemed appropriate. In this regard, the Regulation distinguishes IAS of “Union concern”, IAS of “regional concern”, and IAS of “Member State concern”. As discussed below, it may be warranted to add another layer under the Bern Convention.

4.1 IAS of Union concern

Article 4 of the IAS Regulation instructs the European Commission to adopt a “List of invasive alien species of Union concern”.⁶³ This Union IAS List is reserved for the potentially most harmful species, posing threats “so significant that it justifies the adoption of dedicated measures applicable across the Union, including in the Member States that are not yet affected or are even unlikely to be affected.”⁶⁴ The criteria for the selection of species for the Union IAS List are designed to ensure that (only) these most harmful species are included. These criteria, which are deemed the “core instrument of application of this Regulation,”⁶⁵ are as follows:

“Invasive alien species shall only be included on the Union list if they meet all of the following criteria:

- (a) they are found, based on available scientific evidence, to be alien to the territory of the Union excluding the outermost regions;*
- (b) they are found, based on available scientific evidence, to be capable of establishing a viable population and spreading in the environment under current conditions and in*

⁵⁶ Ibid.

⁵⁷ See www.easin.jrc.ec.europa.eu.

⁵⁸ Article 27.

⁵⁹ Rules of Procedure of the ‘Committee on Invasive Alien Species’, Code C47600, 25 February 2015.

⁶⁰ Article 28.

⁶¹ Ibid. The Forum’s first meeting took place on 21 April 2015.

⁶² This is a working group within the Informal Commission Expert Group ‘Co-ordination Group for Biodiversity and Nature’; its first meeting is scheduled on 12 June 2015.

⁶³ Article 4(1).

⁶⁴ Preamble, paragraph 10.

⁶⁵ Preamble, paragraph 11.

- foreseeable climate change conditions in one biogeographical region shared by more than two Member States or one marine subregion excluding their outermost regions;*
- (c) *they are, based on available scientific evidence, likely to have a significant adverse impact on biodiversity or the related ecosystem services, and may also have an adverse impact on human health or the economy;*
 - (d) *it is demonstrated by a risk assessment carried out pursuant to Article 5(1) that concerted action at Union level is required to prevent their introduction, establishment or spread;*
 - (e) *it is likely that the inclusion on the Union list will effectively prevent, minimise or mitigate their adverse impact.*”⁶⁶

This cumulative set of restrictive criteria makes clear that species will not lightly be included in the Union IAS List. The criteria are to be applied, furthermore, “with due consideration to the implementation cost for Member States, the cost of inaction, the cost-effectiveness and the socio-economic aspects.”⁶⁷ In addition, the Regulation determines that the List “shall include as a priority” those IAS that are “not yet present in the Union or are at an early stage of invasion and are most likely to have a significant adverse impact” and those that are “already established in the Union and have the most significant adverse impact.”⁶⁸ Whereas the European Commission bears the primary responsibility for the listing of IAS of Union concern, member states may also propose species. In either case, a crucial requirement is the performance of a risk assessment for each species, covering a range of elements specified in Article 5 of the Regulation:

“For the purposes of Article 4, a risk assessment shall be carried out in relation to the current and potential range of invasive alien species, having regard to the following elements:

- (a) *a description of the species with its taxonomic identity, its history, and its natural and potential range;*
- (b) *a description of its reproduction and spread patterns and dynamics including an assessment of whether the environmental conditions necessary for its reproduction and spread exist;*
- (c) *a description of the potential pathways of introduction and spread of the species, both intentional and unintentional, including where relevant the commodities with which the species is generally associated;*
- (d) *a thorough assessment of the risk of introduction, establishment and spread in relevant biogeographical regions in current conditions and in foreseeable climate change conditions;*
- (e) *a description of the current distribution of the species, including whether the species is already present in the Union or in neighbouring countries, and a projection of its likely future distribution;*
- (f) *a description of the adverse impact on biodiversity and related ecosystem services, including on native species, protected sites, endangered habitats, as well as on human health, safety, and the economy including an assessment of the potential future impact having regard to available scientific knowledge;*
- (g) *an assessment of the potential costs of damage;*
- (h) *a description of the known uses for the species and social and economic benefits deriving from those uses.*”⁶⁹

The requirement of conducting a risk assessment, and the establishment of common criteria for its performance, are grounded in the desirability of achieving the Regulation’s coherent application as well as

⁶⁶ Article 4(3), emphasis added.

⁶⁷ Article 4(6).

⁶⁸ Ibid.

⁶⁹ Article 5(1).

ensuring “compliance with the rules under the relevant Agreements of the WTO” regarding trade restrictions on species.⁷⁰

The Union IAS List is to be adopted by the European Commission through “implementing acts”, following a denominated “examination procedure”.⁷¹ A draft of the List is to be submitted by the Commission to the aforementioned IAS Committee no later than 2 January 2016.⁷² Technical work has already been set in motion to operationalize the approach set out in Articles 4 and 5 of the Regulation, so as to work towards an initial version of the Union IAS List.⁷³ A comprehensive review of the List is to be undertaken every six years at a minimum, and the List must in the meantime be updated by adding or removing species, as appropriate.⁷⁴

EU member states are required to undertake a range of actions in respect of the species included in the Union IAS List, as discussed below (see Sections 5 and 6). Action by member states in respect of the other two species categories recognized in the Regulation – IAS of member state concern and IAS of regional concern – is optional rather than mandatory.

4.2 IAS of member state concern and IAS of regional concern

Article 12 of the Regulation provides that each member state may establish a “national list of invasive alien species of Member State concern”. For the species involved, member states “may apply, in their territory, measures such as those provided for in Articles 7, 8, 13 to 17, 19 and 20, as appropriate”.⁷⁵ The latter provisions concern restrictions to prevent IAS introductions, action plans on pathways, surveillance systems, official controls, early detection notifications, rapid eradication measures, management measures, and ecosystem restoration. Such national measures must be compatible with the TFEU.⁷⁶ When established, the list of IAS of member state concern and the corresponding measures must be communicated to the European Commission and the other member states.⁷⁷ It should be recalled that also generally, i.e., apart from Article 12, member states are allowed to adopt stricter IAS measures than provided for in the IAS Regulation.⁷⁸

Article 11 of the Regulation addresses IAS “of regional concern” and “species native to the Union”. From their national lists of IAS “of Member State concern”, member states may identify “species native or non-native to the Union that require enhanced regional cooperation.”⁷⁹ When the member states involved so request, the Commission is bound to facilitate international cooperation between them, in accordance with the aforementioned Article 22.⁸⁰ Moreover, Article 11 introduces a notable construction whereby concerned member states may request the Commission to impose a legally binding regime on all member states involved in order to deal with the IAS of regional concern, by declaring applicable some of the Regulation’s core provisions on pathways, early detection, rapid eradication and management:

“Where necessary, based on the impact of certain invasive alien species on biodiversity and related ecosystem services as well as on human health and the economy and provided that it is thoroughly substantiated by a comprehensive analysis of the justification for an enhanced

⁷⁰ Preamble, paragraph 13; see also paragraph 11.

⁷¹ Article 4(1); for the procedure itself, see Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 Laying Down the Rules and General Principles concerning Mechanisms for Control by Member States of the Commission’s Exercise of Implementing Powers.

⁷² IAS Regulation, Article 4(1).

⁷³ Roy et al. (2014); Roy et al. (2015).

⁷⁴ IAS Regulation, Article 4(2).

⁷⁵ Article 12(1).

⁷⁶ Ibid.

⁷⁷ Article 12(2).

⁷⁸ Article 23.

⁷⁹ Article 11(1).

⁸⁰ Articles 11(2) and 22(1).

regional cooperation carried out by the requesting Member States, the Commission may require, by means of implementing acts, that the Member States concerned apply, mutatis mutandis, in their territory or part of it, Articles 13, 14 and 16, Article 17 notwithstanding Article 18, as well as apply Articles 19 and 20, as appropriate.”⁸¹

Given the size and biogeographic diversity of the EU, it may occur that species which constitute IAS of regional concern in one part of the EU are in fact native species in another part. With a view to these situations, Article 11 of the IAS Regulation stipulates that duties to eradicate or manage such species and various other obligations (Articles 13, 14, 16, 17, 19, 20 and 24) will not apply to such species in the member states where they are native.⁸² Instead, the latter “native” member states are required to cooperate with the member states where the species pose a problem, in particular regarding the assessment of pathways, and may, in consultation with those other states involved, adopt relevant measures to avoid the species’ further spread.⁸³

4.3 The listing approaches of the IAS Regulation and the Bern Convention

Having outlined the approach taken to the listing of IAS under the EU Regulation, the next step is to consider the approach(es) that might be taken in this regard under the Bern Convention to supplement the Regulation in non-EU contracting parties. First and foremost, the question arises as to the utility and suitability of the Union IAS List, and the overall concept of IAS “of Union concern”, in any efforts undertaken within the framework of the Bern Convention to supplement the IAS Regulation in non-EU member states. This is a complicated question with no straightforward answer.

Due note should be taken in this connection of the various efforts that have already been undertaken within the framework of the Bern Convention to identify IAS and suitable measures to deal with them. Indeed, one of the key actions proposed in the European Strategy on IAS is to “work towards a regional or subregional species listing system” that is “consistent with European and international law.”⁸⁴ Of special interest in this regard is the “Metalist of known invasive alien species for Europe” (IAS Metalist) appended to Standing Committee Recommendation No. 125 (2007).⁸⁵ This IAS Metalist is intended as an “indicative alert list”.⁸⁶ The Recommendation calls on Bern Convention parties to “regulate as appropriate the intentional introduction, possession and trade in their territory” of the species in the Metalist, “where necessary, prohibiting the introduction, possession of and/or trade in those species that present an unacceptable risk,”⁸⁷ while accompanying trade regulations where feasible and appropriate with eradication and/or other management measures.⁸⁸

Whereas substantial overlap might be expected, it is difficult to predict at the present stage to what degree the Union IAS List will ultimately come to coincide with this Bern Convention Metalist. In any event, clear benefits of relying on the Union IAS List are the achievement of a uniform approach across the board, and that advantage would be taken of the robust, “WTO-proof” character of the Union IAS List in respect of trade restrictions regarding the species concerned, due to the rigorous risk assessments on which the List is founded.

At first sight, one eligible option would thus be for the Standing Committee to declare the Union IAS List, together with some of the associated measures (discussed below in Sections 5 and 6), applicable to the various European contracting parties of the Bern Convention that are not EU member states.

⁸¹ Article 11(2).

⁸² Article 11(3).

⁸³ Ibid.

⁸⁴ Genovesi and Shine (2004), paragraph 5.2.3.

⁸⁵ Recommendation No. 125 (2007) on Trade in Invasive and Potentially Invasive Alien Species in Europe, Appendix I.

⁸⁶ Ibid., paragraph 5.

⁸⁷ Ibid.

⁸⁸ Ibid., paragraph 6.

Unfortunately, however, such a blanket declaration extending the Union IAS List without more to non-EU countries is subject to certain drawbacks. As will be recalled, the Union IAS List and the various associated mandatory measures are reserved for species that are alien to the entire European territory of the EU.⁸⁹ Whereas applying the Union IAS List to countries like Switzerland and Norway will probably be unproblematic, the further east on the European map one goes, the less appropriate the application of the Union List might become. There might be species on the Union IAS List that are actually native to Bern Convention parties like Ukraine, Turkey or Azerbaijan. Conversely, there might be species that pose a significant threat with regard to Convention Parties like the aforementioned ones, but are not included in the Union IAS List. Hence, it would *not* seem advisable for the Standing Committee to declare the Union IAS List applicable without more to non-EU Bern Convention parties. Rather, it seems that the suitability of the Union List, and every update of it, would need to be verified before linking it to particular actions by Bern Convention contracting parties.

An alternative approach would be to adopt an equivalent list that is based on, but not necessarily identical to, the Union IAS List, together with a regime of associated actions to be taken by (primarily non-EU) Bern Convention parties. This list, which for present purposes is referred to as the Bern Convention IAS List, could be reviewed, and as appropriate revised, by the Standing Committee on an annual basis. Union IAS List species that are inappropriate for inclusion in the Bern Convention IAS List could simply be left out. The issue of including species on this Bern Convention IAS List that are *not* included in the Union IAS List is slightly more complex. There are at least two basic options to go about this. Option (A) would be to make the addition of each candidate species that is not on the Union IAS List conditional upon the outcome of a risk assessment meeting, *mutatis mutandis*, the criteria set out in Article 5 of the IAS Regulation. The main advantage of this option is the achievement of a uniform and straightforward approach. A potential disadvantage of this option is that the demanding risk assessment requirements involved might in practice pose an obstacle to the inclusion of species that do in fact raise legitimate concerns. Option (B) would be to adopt a differentiated regime, with the strictest measures affecting international trade reserved for species that are also included in the Union IAS List as well as any further species backed by a risk assessment conforming to Article 5 of the IAS Regulation, and a “lighter” regime applicable to other species included in the Bern Convention IAS List. In brief, option (A) would thus result in a more uniform and straightforward but less tailor-made approach. *Vice versa*, option (B) would result in a less uniform and straightforward but more tailor-made approach, as it enables the addition of a broader array of (potential) IAS. In either scenario, the Union IAS List would serve as the point of departure, but not be declared directly and automatically applicable.

On a different note, it is in any scenario conceivable for the Bern Convention to contribute, as appropriate, to the performance of risk assessments in connection with the Union IAS List – and by extension any Bern Convention version thereof. This could be done through the Group of Experts on IAS and/or through the commissioning of technical work.

Lastly, in contrast with the concept of IAS “of Union concern”, it would seem that the IAS Regulation’s concepts of IAS “of Member State concern” and IAS “of regional concern” as described above can conceptually be emulated more easily in any Bern Convention regime building on the EU Regulation. Indeed, given the vast geographic scope of the Convention, the development of regional approaches incorporating both non-EU member states and EU member states, as appropriate, might add significant value, as for certain species this would be more suitable than a generic pan-European approach.

⁸⁹ See the criterion in Article 4(3)(a) of the IAS Regulation, reproduced above.

5. PREVENTION OF IAS INTRODUCTIONS

5.1 Prohibitions and exceptions under the IAS Regulation

Article 7 of the IAS Regulation sets out a comprehensive set of restrictions in respect of the species in the Union IAS List:

“Invasive alien species of Union concern shall not be intentionally:

- (a) brought into the territory of the Union, including transit under customs supervision;*
- (b) kept, including in contained holding;*
- (c) bred, including in contained holding;*
- (d) transported to, from or within the Union, except for the transportation of species to facilities in the context of eradication;*
- (e) placed on the market;*
- (f) used or exchanged;*
- (g) permitted to reproduce, grown or cultivated [sic], including in contained holding; or*
- (h) released into the environment.”⁹⁰*

These prohibitions are directly applicable within the legal orders of the member states (see Section 2.3 above). Furthermore, regarding *unintentional* introductions, Article 7 states a general obligation for member states to “take all necessary steps to prevent the unintentional introduction or spread, including, where applicable, by gross negligence, of invasive alien species of Union concern.”⁹¹

Articles 8 and 9 enable member states, in certain circumstances, to issue permits authorizing exceptions to the restrictions set out in Article 7. Under no condition, however, may permits be issued for the placing on the market or the release into the environment of IAS of Union concern.⁹² Regarding the other restrictions – those mentioned in Article 7(1)(a), (b), (c), (d), (f) and (g) – member states must set up a permit system, allowing establishments to carry out research on, or *ex situ* conservation of, IAS of Union concern. Scientific production and subsequent medicinal use of such species may also be included within said permit systems, when this is “unavoidable to advance human health.”⁹³ Permits for other than the aforementioned purposes may only be issued in “exceptional cases, for reasons of compelling public interest, including those of a social or economic nature,” and are, moreover, subject to prior authorisation by the European Commission.⁹⁴ Several substantive and procedural safeguards apply in respect of the establishment and operation of the member states’ permit systems, which are too numerous and detailed to reproduce here.⁹⁵

Article 10 provides member states with the possibility to take “emergency measures” regarding species that are not on the Union List. This possibility arises when the member state concerned has “evidence concerning the presence in, or imminent risk of introduction into its territory” of a species the authorities have found, “on the basis of preliminary scientific evidence, to be likely to meet the criteria set out in Article 4(3)” – which are the aforementioned criteria to be met for a species to qualify for inclusion in the Union IAS List.⁹⁶ Such emergency measures may consist of any of the restrictions set out in Article 7(1).⁹⁷ When the emergency measures involve prohibiting the species’ import, transport and/or placing on the market, the member state in question must immediately notify the European Commission and the other

⁹⁰ Article 7(1).

⁹¹ Article 7(2).

⁹² Article 8(1).

⁹³ *Ibid.*

⁹⁴ Article 9(1); the procedure for such authorizations is laid down in Article 9(2)-(8).

⁹⁵ See Article 8(2)-(8).

⁹⁶ Article 10(1).

⁹⁷ *Ibid.*

member states.⁹⁸ In addition, the member state taking emergency measures is expected to carry out without delay a risk assessment in line with Article 5 of the Regulation.⁹⁹ The Commission, in turn, may decide to establish emergency measures at the EU level, and when this is warranted may indeed proceed to include the species on the Union IAS List.¹⁰⁰

5.2 Addressing priority pathways under the IAS Regulation

A crucial provision regarding the prevention of unintentional introductions is Article 13 of the Regulation, on action plans addressing IAS pathways. Within one-and-a-half years following the adoption of the Union IAS List, each member state must conduct a “comprehensive analysis of the pathways of unintentional introduction and spread” of IAS of Union concern in its territory and marine waters, and identify “priority pathways”, i.e., those pathways requiring urgent action “because of the volume of species or of the potential damage caused by the species entering the Union through those pathways.”¹⁰¹

Within three years after adoption of the Union IAS List, each member state is expected to “establish and implement one single action plan or a set of action plans to address the priority pathways” it has identified. These action plans must include timetables for action, and describe the measures to be adopted as well as any pertinent voluntary actions and “codes of good practice” to address those priority pathways.¹⁰² The action plans shall include “measures based on an analysis of costs and benefits, in order to: (a) raise awareness; (b) minimize contamination of goods, commodities, vehicles and equipment by specimens of invasive alien species, including measures to tackle transportation ... from third countries; (c) ensure appropriate checks at the Union borders.”¹⁰³ Pathway action plans are to be transmitted to the European Commission and reviewed at least every six years.¹⁰⁴ Notably, as regards action at the regional level, member states “shall ensure coordination with the aim of establishing one single action plan or a set of action plans at the appropriate regional level in accordance with Article 22(1).”¹⁰⁵

5.3 Corresponding preventive action under the Bern Convention

Clearly, the extensive guidance on IAS adopted over the years within the framework of the Bern Convention already calls for many preventive measures that are broadly comparable to those contained in the IAS Regulation, as just reviewed. A case in point is the European Strategy on IAS, which Contracting Parties to the Convention are in the process of implementing. The various Bern Convention IAS Codes of Conduct also come to mind, as well as several Standing Committee Recommendations. Notwithstanding this substantive overlap, generally speaking the EU Regulation’s provisions are phrased in a stricter and more defined manner, leaving less leeway to national authorities. At any rate, a significant advantage of adapting the Bern Convention’s approach in non-EU member states to the IAS Regulation is the achievement of a degree of uniformity in the way IAS are addressed across Europe. As the European Strategy on IAS stresses, “Europe particularly needs common approaches to prevention because of the number of contiguous states, the high volume of inter- and intra-continental trade and transport and its extensive free trade arrangements which can facilitate transboundary movements of IAS.”¹⁰⁶ Below, the various IAS Regulation provisions that were just discussed are concisely related to existing and potential future action under the Bern Convention.

⁹⁸ Article 10(2)

⁹⁹ Article 10(3).

¹⁰⁰ Article 10(4)-(7).

¹⁰¹ Article 13(1).

¹⁰² Article 13(2).

¹⁰³ Article 13(4).

¹⁰⁴ Article 13(5).

¹⁰⁵ Article 13(3).

¹⁰⁶ Genovesi & Shine (2004), p. 30.

Articles 7, 8 and 9 of the IAS Regulation may be viewed as operationalizing the commitment of the EU and its member states under Article 11 of the Bern Convention to “strictly control the introduction of non-native species,”¹⁰⁷ as well as various recommended actions contained in the European Strategy on IAS and in Standing Committee Recommendation No. 125 (2007). The European Strategy, for instance, calls for the taking of “appropriate measures to prohibit first-time introductions of alien species, or subsequent introductions of an alien species already invasive or potentially invasive within a country, without prior authorisation from the competent authority of the recipient state.”¹⁰⁸ Furthermore, the Strategy calls for “an evaluation process, including an appropriate risk analysis,” to be carried out before a decision is made on whether to authorise a proposed introduction.¹⁰⁹ All efforts should be made to “permit only those species that are unlikely to threaten biodiversity.”¹¹⁰ Recommendation No. 125 calls on contracting parties to “regulate as appropriate the intentional introduction, possession and trade in their territory of the invasive or potentially invasive alien species listed” in the aforementioned IAS Metalist, “applying the precautionary principle and where necessary, prohibiting the introduction, possession of and/or trade in those species that present an unacceptable risk.”¹¹¹ Such an unacceptable risk is taken to exist when there is “sufficient evidence of their negative impact on ecosystems, habitats or species from a risk analysis or other objective sources.”¹¹² Generally, Parties are requested to “strengthen and extend risk analysis prior to decision-making on the import of alien species that are invasive or potentially invasive, using risk analysis methodology and procedures based on objective and scientific criteria.”¹¹³

Whereas the IAS Regulation’s requirements are mandatory, and some even directly applicable, this does not stand in the way of Bern Convention guidance calling for similar requirements to be implemented in the domestic laws of non-EU Contracting Parties. In particular, it is conceivable for the Standing Committee to recommend such parties to prohibit the acts mentioned in Article 7(1)(a)-(h) of the IAS Regulation, while replacing references to the “Union” with references to the parties’ territories. Likewise, the same Contracting Parties could be requested to set up a permit system in wording resembling Articles 8 and 9 of the IAS Regulation as closely as possible. In combination with a Bern Convention IAS List as coined above (see Section 4.3), such recommendations would establish an unambiguous blueprint for preventive measures, and promote the creation of a regime across Europe with a high degree of uniformity and consistency. Regarding Article 9 of the IAS Regulation, it remains to be seen to what extent the requirement of prior authorization by the European Commission can be emulated within the context of the Bern Convention, given the significant differences between the Commission and the Convention’s institutions. This concerns the granting of permits for uses other than research, *ex situ* conservation or medicinal applications. Calling on the contracting parties involved to seek the advice of the Standing Committee before issuing any such permits appears unworkable with a view to the Committee’s meeting frequency. (Under the IAS Regulation, the European Commission is to decide on authorization requests within 60 days.¹¹⁴) Theoretically, some sort of advisory panel could be set up under the Bern Convention for this purpose. Careful consideration appears warranted to determine to what extent such an approach might be feasible and appropriate.

Incidentally, the IAS Regulation does, strictly speaking, *not* conform to the recommendation in the European Strategy on IAS to “permit only those species that are unlikely to threaten biodiversity.”¹¹⁵ After all, the latter recommendation in the Strategy tends towards a “white list” approach whereby potential IAS are kept at bay unless proven safe. The IAS Regulation employs a “black list” instead, the Union IAS List,

¹⁰⁷ Convention, Article 11(2)(b).

¹⁰⁸ Genovesi & Shine (2004), paragraph 5.2.1.

¹⁰⁹ *Ibid.*, paragraph 5.2.2.

¹¹⁰ *Ibid.*

¹¹¹ Recommendation No. 125 (2007), paragraph 5.

¹¹² *Ibid.*

¹¹³ *Ibid.*, paragraph 4.

¹¹⁴ IAS Regulation, Article 9(2).

¹¹⁵ Genovesi & Shine (2004), paragraph 5.2.2.

whereby significant hurdles must moreover be taken for a suspicious species to be added to the list. It should be noted in this regard, however, that any request to Bern Convention parties to implement the aforementioned restrictions and permit system in respect of species on a Bern Convention IAS List should be viewed as minimum requirements. As far as the Bern Convention is concerned, contracting parties would still be allowed to go beyond what is requested and adopt restrictions for other species as well, in line with the European Strategy on IAS and Recommendation No. 125, and in accordance with the Convention itself.¹¹⁶

In this connection, a specific provision on emergency measures, corresponding to Article 10 in conjunction with Article 23 of the IAS Regulation, could also be included in any Resolution or Recommendation setting out a Bern Convention regime equivalent to the IAS Regulation.

Article 13 of the IAS Regulation on assessing and addressing priority pathways is also well grounded in Bern Convention guidance. The European Strategy on IAS calls for “risk analysis of pathways and vectors for unintentional introductions to support, in particular, an integrated approach to pathway management at the sub-regional or regional level.”¹¹⁷ Furthermore, Recommendation No. 125 recommends Bern Convention Parties to “carry out an in-depth analysis of and research into trade-related pathways, examining imports and international movements of species and commodities,” *inter alia* to “assess the extent of unintentional introduction of potentially invasive alien species through trade-related pathways and take integrated measures based on the precautionary principle to minimise such introductions.”¹¹⁸ There seems to be, at any rate, apparent scope for complementing Article 13 of the IAS Regulation in non-EU Bern Convention Parties by requesting the latter to perform similar analyses and adopt and implement similar priority pathway action plans. Comparable considerations apply to the creation of regional action plans, in cooperation with each other and/or with EU member states, as appropriate.¹¹⁹

Besides, there is clear potential for Bern Convention work to contribute to the effective and uniform implementation of the actions involved across the board – also in EU member states – in several ways. For instance, an apparent role is reserved for the incorporation of the various Codes of Conduct on IAS in priority pathway action plans, in accordance with Article 13(2) of the IAS Regulation. The same purpose would be served by furthering the development of concrete guidance to help national authorities identify priority pathways and draw up associated action plans. A Bern Convention contribution along these lines would also accord with the position expressed by the European Commission and the EU member states at the 2014 meeting of the Standing Committee. In this EU position, “the development of guidelines on the identification of priority pathways and on the ways to address priority pathways” was highlighted as one of the areas where the Bern Convention might play a role in connection with the IAS Regulation.¹²⁰ The deadlines incorporated in Article 13 of the Regulation suggest that the development of any such guidance, for it to be practically relevant, should be undertaken as a matter of priority.

¹¹⁶ Article 12 of the Convention allows contracting parties to take stricter conservation measures than those provided under the Convention.

¹¹⁷ Genovesi & Shine (2004), paragraph 5.3.1.

¹¹⁸ Recommendation No. 125 (2007), paragraph 1.

¹¹⁹ See IAS Regulation, Article 13(3).

¹²⁰ General Secretariat of the Council, Compilation of EU and Member State statements/speaking points at 34th Meeting of the Standing Committee of the Bern Convention, 16916/14, ENV 996, Brussels, 15 December 2014; see Agenda Item 5.1.a.

6. DETECTION, ERADICATION, MANAGEMENT AND RESTORATION

6.1 Early detection and rapid eradication under the IAS Regulation

Article 14 of the IAS Regulation sets out an obligation for member states to establish, or incorporate within their existing system, a “surveillance system of invasive alien species of Union concern” which “collects and records data on the occurrence in the environment” of IAS “by survey, monitoring or other procedures” to prevent the spread of IAS into or within the EU.¹²¹

“The surveillance system ... shall:

- (a) cover the territory, including marine territorial waters, of the Member States to determine the presence and distribution of new as well as already established invasive alien species of Union concern;*
- (b) be sufficiently dynamic to detect rapidly the appearance in the environment of the territory or part of the territory of a Member State of any invasive alien species of Union concern, whose presence was previously unknown;*
- (c) build upon, be compatible with, and avoid duplication of relevant provisions for assessment and monitoring laid down by Union law or under international agreements and make use of the information provided by the existing systems of surveillance and monitoring set out in Article 11 of [Habitats] Directive 92/43/EEC, Article 8 of [Water Framework] Directive 2000/60/EC and Article 11 of [Marine Strategy Framework] Directive 2008/56/EC;*
- (d) take into account the relevant transboundary impact and transboundary features, to the extent possible.”*

The surveillance system shall also be used to monitor the effectiveness of eradication measures, and of management measures applied to IAS that are widely spread.¹²² Each member state is expected to have its surveillance system up and running within one-and-a-half year after the adoption of the Union IAS List.¹²³ Quite a bit sooner, by 2 January 2016, member states are required to “have in place fully functioning structures to carry out the official controls necessary to prevent the intentional introduction into the Union of invasive alien species of Union concern.”¹²⁴ Article 15 lays down a set of detailed requirements to be met by member states in this regard.¹²⁵ Using the surveillance system established under Article 14 and the information collected at official controls provided for under Article 15, member states should be able to achieve the early detection of the introduction or presence of species from the Union IAS List.¹²⁶ Once they do detect such an IAS of Union concern, they shall “without delay” notify the European Commission and inform the other member states, particularly where this concerns a species previously unrecorded in the territory concerned or the reappearance of a previously eradicated species.¹²⁷

Following early detection, Article 17 of the IAS Regulation makes it mandatory for EU member states to apply eradication measures:

“1. After early detection and within three months after the transmission of the early detection notification referred to in Article 16, Member States shall apply eradication measures and notify those measures to the Commission and inform the other member states.

¹²¹ Article 14(1).

¹²² Articles 17(3) and 19(4).

¹²³ Article 14(1).

¹²⁴ Article 15(1).

¹²⁵ Article 15(2)-(9).

¹²⁶ Article 16(1).

¹²⁷ Article 16(2).

2. *When applying eradication measures, Member States shall ensure that the methods used are effective in achieving the complete and permanent removal of the population of the invasive alien species concerned, with due regard to human health and the environment, especially non-target species and their habitats, and ensuring that animals are spared any avoidable pain, distress or suffering.*

3. *Member States shall monitor the effectiveness of the eradication. Member States may use the surveillance system provided for in Article 14 to this effect. The monitoring shall also assess the impact on non-targeted species, as appropriate.*

4. *Member States shall inform the Commission of the effectiveness of the measures taken and notify the Commission when a population of an invasive alien species of Union concern has been eradicated. They shall also provide that information to other Member States.*¹²⁸

Exceptions to the obligation of taking eradication action may be made only under the terms of Article 18 of the Regulation:

“A Member State may, based on robust scientific evidence, decide, within two months of the detection of an invasive alien species referred to in Article 16, not to apply eradication measures if at least one of the following conditions is met:

- (a) eradication is demonstrated to be technically unfeasible because the eradication methods available cannot be applied in the environment where the invasive alien species is established;*
- (b) a cost-benefit analysis demonstrates on the basis of the available data with reasonable certainty that the costs will, in the long term, be exceptionally high and disproportionate to the benefits of eradication;*
- (c) eradication methods are not available or are available but have very serious adverse impacts on human health, the environment or other species.*¹²⁹

When availing itself of this possibility, the member state in question must immediately notify the European Commission, and submit all relevant evidence supporting its decision.¹³⁰ It must also ensure that “containment measures are in place to avoid further spread of the invasive alien species to other Member States.”¹³¹ The Commission has two months to decide whether to reject the member state’s decision or not.¹³² If the decision is upheld by the Commission, then the IAS concerned “shall be subject to the management measures referred to in Article 19,”¹³³ discussed below (see Section 6.2). If the decision is rejected by the Commission, then the member state involved “shall apply the eradication measures referred to in Article 17 without delay.”¹³⁴

6.2 Management of widely spread IAS and ecosystem restoration under the IAS Regulation

Article 19 of the IAS Regulation makes provision for various management measures regarding IAS that are widely spread. Within one-and-a-half year after a species is included on the Union IAS List, member states where the species is widely distributed within the territory “shall have in place effective management measures,” in order to minimise the species’ impact on biodiversity, ecosystem services, human health and/or the economy.¹³⁵ These measures “shall consist of lethal or non-lethal physical,

¹²⁸ Article 17(1)-(4).

¹²⁹ Article 18(1).

¹³⁰ Ibid.

¹³¹ Article 18(4).

¹³² Article 18(2)-(3).

¹³³ Article 18(6).

¹³⁴ Article 18(5).

¹³⁵ Article 19(1).

chemical or biological actions aimed at the eradication, population control or containment’ of the IAS” population.¹³⁶ Where appropriate, management measures “shall include actions applied to the receiving ecosystem aimed at increasing its resilience to current and future invasions.”¹³⁷ Where a significant risk arises that an IAS of Union concern may spread to another member state, then the member state on whose territory the species occurs “shall immediately notify the other Member States and the Commission.”¹³⁸ Where appropriate, the member states involved “shall establish jointly agreed management measures.” Where third countries, i.e. non-EU member states, may also be affected by the spread of the IAS, the member state concerned “shall endeavour to inform the third countries concerned.”¹³⁹

When an ecosystem has been “degraded, damaged, or destroyed” by IAS of Union concern, Article 20 of the IAS Regulation requires the member state(s) in question to “carry out appropriate restoration measures” to assist the ecosystem’s recovery.¹⁴⁰ These measures shall at a minimum include “measures to increase the ability of an ecosystem exposed to disturbance caused by the presence of invasive alien species of Union concern to resist, absorb, accommodate to and recover from the effects of disturbance,” and “measures to support the prevention of reinvasion following an eradication campaign.”¹⁴¹ The obligation to take restoration measures does not apply, however, when “a cost-benefit analysis demonstrates, on the basis of the available data and with reasonable certainty, that the costs of those measures will be high and disproportionate to the benefits of restoration.”¹⁴²

6.3 Detection, eradication, management and restoration under the Bern Convention

As regards the national surveillance systems to be established in accordance with Article 14 of the IAS Regulation, it is conceivable under the Bern Convention to call for the setting up of similar systems in non-EU countries. In addition, the Convention might initiate or facilitate the development of guidance for the design and implementation of such systems, to promote a uniform approach in this regard. Indeed, the potential role of the Bern Convention regarding the “development of guidelines on the establishment of adequate surveillance systems, building upon existing surveillance systems and involving citizens” was suggested by the EU and its member states during the 2014 Standing Committee meeting.¹⁴³ Broadly similar considerations apply, with due adaptations to a non-EU context as appropriate, to the official controls, early detection notifications and eradication measures required under Articles 15 through 18 of the IAS Regulation. All such actions would be consistent with relevant recommendations contained in the European Strategy on IAS.¹⁴⁴

The same is true, in turn, of the IAS management and ecosystem restoration measures prescribed under Articles 19 and 20 of the Regulation.¹⁴⁵ Both provisions could be applied in adapted form to non-EU Bern Convention parties, and in respect of both the development of guidance under auspices of the Convention can in principle be envisaged. In fact, the “development of guidelines for the restoration of ecosystems damaged by invasions in order to avoid re-invasions after eradication” has been proposed by the EU and its member states as a potential area of work for the Bern Convention.¹⁴⁶

¹³⁶ Article 19(2).

¹³⁷ Ibid.

¹³⁸ Article 19(5).

¹³⁹ Ibid.

¹⁴⁰ Article 20(1).

¹⁴¹ Article 20(2).

¹⁴² Article 20(1).

¹⁴³ General Secretariat of the Council, Compilation of EU and Member State statements/speaking points at 34th Meeting of the Standing Committee of the Bern Convention, 16916/14, ENV 996, Brussels, 15 December 2014; see Agenda Item 5.1.a.

¹⁴⁴ Genovesi & Shine (2004), p. 38-43.

¹⁴⁵ Ibid., p. 43-46.

¹⁴⁶ General Secretariat of the Council, Compilation of EU and Member State statements/speaking points at 34th Meeting of the Standing Committee of the Bern Convention, 16916/14, ENV 996, Brussels, 15 December 2014; see

7. SYNTHESIS: POTENTIAL BERN CONVENTION COURSES OF ACTION

In the preceding analysis, several courses of action have been identified which may be pursued under the Bern Convention to (i) promote the implementation of the IAS Regulation generally, and to (ii) supplement the IAS Regulation in non-EU countries. Some of this action is to be taken as soon as possible in order to be effective, particularly the development of guidance concerning the implementation of certain elements of the IAS Regulation. Other courses of action are to materialize at a somewhat later stage, in particular the adoption and implementation of a parallel regime supplementing the IAS Regulation in non-EU states, although basic decision-making and preparatory work in this regard should occur in a timely manner. Some key options with respect to these two main fields of work are outlined below, in a concise manner so as to avoid undue repetition. In addition to the courses of action indicated below, it should be noted that the sharing of relevant information on IAS between EU member states and non-EU member states is to be recommended. Incidentally, it would probably be conducive to any efforts in the present context if the Bern Convention would somehow be represented in the EU Working Group on IAS (see Section 3 above).

7.1 Development of generic guidance regarding the implementation of the IAS Regulation

Subject to the availability of adequate capacity and resources, there is apparent scope for assistance through technical work and the development of guidance under the Bern Convention, in coordination with the European Commission and other relevant bodies as appropriate, regarding several aspects of the implementation of the IAS Regulation. There seems to be particular potential for such Bern Convention work regarding:

- (a) assistance with the performance of risk assessments in accordance with Article 5 of the IAS Regulation (see Sections 4.1 and 4.3 above);
- (b) guidance on the identification of priority IAS pathways and on the design of priority pathway action plans, as required under Article 13 of the Regulation (see Sections 5.2 and 5.3 above).
- (c) guidance on the design and operation of the IAS surveillance systems required under Article 14 of the Regulation (see Sections 6.1 and 6.3 above).
- (d) guidance concerning the restoration of ecosystems impaired by IAS in accordance with Article 20 of the Regulation (see Sections 6.2 and 6.3 above).

The first three of these are the most urgent, given the associated implementation deadlines incorporated in the IAS Regulation. Indeed, at the time of writing this report technical work regarding actions (a) and (b) had already been commissioned. To mention one further option suggested by the European Commission itself, work may also be undertaken under the Bern Convention to contribute to the enhancement of the information support system EASIN operating under Article 25 of the IAS Regulation (see Section 3 above).¹⁴⁷

7.2 Development of a parallel regime for non-EU Bern Convention contracting parties

The other major potential area of work for the Bern Convention in relation to the IAS Regulation concerns the possible design and implementation of an equivalent regime on IAS for those contracting parties that are not EU member states, resembling the regime laid down in the EU Regulation as closely as appropriate and feasible (see Sections 4.3, 5.3 and 6.3 above).

Such a parallel Bern Convention regime could be established on the basis of Resolutions and Recommendations adopted by the Standing Committee, following the precedent set by the development of the Emerald Network (see Section 2.2 above). As regards its substance, the regime could operate on the basis of a Bern Convention IAS List closely associated with, but not necessarily identical to, the Union IAS List (see Sections 4.1 and 4.3 above). With regard to listed species, the regime could set out preventive, detection, eradication, management and restoration measures emulating, in duly adapted form,

Agenda Item 5.1.a.

¹⁴⁷ Ibid.

those set out in the IAS Regulation, along the lines sketched in the analysis above (see Sections 5 and 6). Such a parallel regime cannot be formally set in motion until after the adoption of the Union IAS List, which is foreseen in 2016 (see Sections 4.1 and 4.3 above). Yet, the decision whether or not to develop such a regime should be taken sooner rather than later, given the time needed to design the regime itself and to prepare for its adoption and implementation.

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ANNEX – PROPOSAL FOR A STANDING COMMITTEE RECOMMENDATION



Convention on the Conservation
of European Wildlife and Natural Habitats

Standing Committee

Draft Recommendation No. ... (2015) of the Standing Committee, adopted on, on action to promote and complement the implementation of EU Regulation 1143/2014 on invasive alien species

The Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats, acting under the terms of Article 14 of the Convention;

Having regard to the aims of the Convention to conserve wild flora and fauna and its natural habitats;

Recalling that under Article 11, paragraph 2.b of the Convention, each Contracting Party undertakes to strictly control the introduction of non-native species;

Recalling also Articles 2, 3, 4 and 11, paragraph 1 of the Convention;

Recalling its previous Recommendations addressing invasive alien species, including Recommendation No. 99 (2003) on the European Strategy on Invasive Alien Species and Recommendation No. 125 (2007) on trade in invasive and potentially invasive alien species in Europe.

Welcoming the entry into force and application by the EU and its member states of Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species;

Determined to promote the effective application of Regulation 1143/2014 and to promote the taking of corresponding action by Contracting Parties that are not EU Member States, in order to achieve an approach that is as uniform and effective as possible across Europe;

Taking note of document T-PVS/Inf (2015) 14, which identifies various courses of action that may be taken under the Convention in this regard;

Noting that important contributions could be made through technical work, including the development of guidance, in coordination with the European Commission and other relevant bodies as appropriate, regarding several aspects of the implementation of Regulation 1143/2014, including:

- assistance with the performance of risk assessments in accordance with Article 5 of the Regulation,
- guidance on the identification of priority pathways and the design of priority pathway action plans, as required under Article 13 of the Regulation,
- guidance on the design and operation of the surveillance systems required under Article 14 of the Regulation,

- guidance concerning the restoration of ecosystems impaired by invasive alien species in accordance with Article 20 of the Regulation, and
- the enhancement of the information support system operating under Article 25 of the Regulation;

Welcoming document T-PVS/Inf (2015) ... on risk assessment and document T-PVS/Inf (2015) ... on priority pathways as useful first contributions in this regard, while recognising the desirability of further technical work and cooperation regarding the aforementioned issues;

Noting that, in addition, it is desirable to design and implement an equivalent regime on invasive alien species tailored to those Contracting Parties which are not EU Member States, and resembling the regime laid down in Regulation 1143/2014 as closely as appropriate and feasible;

Furthermore noting that such a regime should operate on the basis of a List of invasive alien species of European concern, based on the List of invasive alien species of Union concern drawn up under Regulation 1143/2014, and should set out preventive, detection, eradication, management and restoration measures emulating, in duly adapted form, those set out in Regulation 1143/2014,

Recommends that:

Contracting Parties which are EU Member States:

1. Cooperate with each other, and with non-EU Member States, where this would enhance the effective implementation of Regulation 1143/2014;

Contracting Parties which are not EU Member States:

2. Cooperate with EU Member States where this would enhance the effective implementation of Regulation 1143/2014, and consider adopting similar measures as those set out in the Regulation to the extent feasible and appropriate;

Invites the European Commission, where appropriate, to liaise with Contracting Parties and Observer States which are not EU Member States in the implementation of Regulation 1143/2014;

Invites Observer States to cooperate, as appropriate, with the EU and its Member States regarding the implementation of Regulation 1143/2014;

Instructs the Secretariat to cooperate, as appropriate, with the European Commission, Contracting Parties and other partners in technical issues such as risk assessment, identification of priority pathways for invasive alien species, design and implement of priority pathways action plans, identification of invasive alien species of European concern, guidance on management of IAS on the field, surveillance systems, restoration of ecosystems impaired by invasive alien species, information systems and other matters that may prevent the entry and spread of invasive alien species and limit their impact on native species and natural habitats protected under the Convention.