

Strasbourg, 25 January 2022

T-PVS/Inf(2022)05

CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

42nd meeting

Strasbourg, 28 November - 2 December 2022

**Establishing a financial mechanism within the
Bern Convention**

-EXPLICATIVE NOTE-

*Document prepared by
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I. Introduction

1. During the past years, possible solutions for ensuring sustainable financing of the *Convention on the Conservation of European Wildlife and Natural Habitats* (ETS No. 104, hereafter the Bern Convention or the Convention) have been discussed. Alongside the idea of setting up an enlarged partial agreement in view of the follow-up of the Bern Convention, the different possibilities of introducing a system of obligatory financial contributions within the Bern Convention by amending or supplementing the Convention have been brought up. In this respect, it should be noted that a Protocol establishing a financial mechanism under the Bern Convention has no precedent and would present a departure from the traditional financing system of the Council of Europe with regard to treaties, based on the ordinary budget and funds stemming from voluntary contributions as well as possible financial contributions by non-member States to the follow-up of certain Conventions.¹

2. The purpose of this note is to explain to the Inter-Sessional Working Group on Finances the different legal avenues that exist for the inclusion of a financial mechanism within the Bern Convention.

II. Amendment pursuant to Article 16 of the Bern Convention

3. Article 16 of the Bern Convention introduces a simplified procedure for amending the Convention which does not require the formal expression of consent through the traditional procedures of signature and ratification normally required for the entry into force of an amending protocol. Amendments proposed under Article 16.2 b (for amendments to Articles 13 to 24 of the Convention) are adopted by the Standing Committee by a three-quarters majority and then formally approved by the Committee of Ministers. Their entry into force requires that all Parties to the Convention inform the Secretary General of their acceptance. In line with the mandate of the Standing Committee, a new Article 14*bis* to the Bern Convention is currently being elaborated by the Inter-Sessional Working Group on Finances in collaboration with the Secretariat of the Bern Convention.²

4. Notwithstanding the impression of a simplified procedure, it is not said that the amendment will enter into force promptly. This depends heavily on the internal procedures States may have to follow before they can accept such an amendment. For example, on 15 June 1999, the Committee of Ministers adopted amendments under Article 21 of the Convention for the protection of individuals with regard to automatic processing of personal data (ETS No. 108, Data Protection Convention) aimed at allowing the European Communities to accede to the Convention. Yet these amendments never entered into force and, instead, they were incorporated into the draft amending protocol to the Data Protection Convention negotiated some 15 years later.

¹ However, Article 46, paragraph 4 of the Convention on Cybercrime (ETS No 185) states that “[...] except where assumed by the Council of Europe, expenses incurred in carrying out the provisions of paragraph 1 shall be borne by the Parties in the manner to be determined by them.”

² According to Article 16 paragraph 2.a an approval of the Committee of Ministers is not needed for amendments to Article 1 to 12 of the Bern Convention.

5. Moreover, it would not be possible to apply an amendment introduced under the procedure of Article 16 of the Bern Convention provisionally pending the acceptance of the amendment by all Contracting Parties. According to Article 25 of the Vienna Convention on the Law of Treaties (VCLT) a treaty or a part of a treaty can be applied provisionally pending its entry into force if the treaty itself so provides or the negotiating States have in some other manner so agreed. Given that the Bern Convention is already in force, it is not possible to apply its provisions provisionally even if such a provision would be newly introduced through an amendment in the meaning of Article 16 of the Convention. Instead, the new provision could only be applied as of the moment that all Contracting Parties, currently 51, have accepted it. This may take considerable time, not to say that the amendment might never enter into force as was the case for the amendments to the Data Protection Convention.

III. Protocol to the Bern Convention

6. Despite Article 16 of the Bern Convention, the Contracting Parties are in principle free to depart from this simplified amending procedure and to decide to negotiate a protocol to the Convention.³ Yet a decision to negotiate a new legal instrument to the Bern Convention could not be taken by the Standing Committee alone. Instead, there should be a mandate by the Committee of Ministers to embark on such negotiations. Such a mandate can further not be seen in a respective endorsement by a Committee of Ministers Rapporteur Group, which does not dispose of decision-making powers in this regard but simply prepares the decisions of the meetings of the Ministers' Deputies.

7. Depending on the substance of the protocol, it could either be drafted as an additional or as an amending protocol.

Amending Protocol

8. According to the usual practice within the Council of Europe, an amending protocol enters into force only after the ratification by all the Parties to the Convention. Exceptions to this practice are, however, possible and the amending protocol may also enter into force after the ratification by a limited number of Parties. After its entry into force, the protocol would only be binding for the Parties that have ratified it. The remaining Parties would still be bound by the original version of the treaty. An example of possible enter into force with a limited number of Parties is the *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No. 223).⁴ However, this procedure would be more suitable for an additional protocol.

³ In this regard precedents exist within the Council of Europe (cf., for instance, protocols to the European Social Charter [ETS Nos 128, 142 and 158] despite Article 36 of the Charter [ETS No. 35], and, the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [CETS No. 223] despite Article 21 of the Convention).

⁴ For instance, Article 37 paragraph 2 of the *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No. 223) foresees that the Protocol shall enter into force after five years after the date on which it was opened for signature provided that it has, until then, at least thirty-eight Parties.

9. An amending protocol could contain a clause on provisional application to be included in it. Such a clause would enable a Party to the Convention to declare, at the time of signature or at any later moment, that it will apply the provisions of the protocol on a provisional basis. Such a provisional application would allow the accumulation of funds via the new financing mechanism to commence on a medium-term basis, i.e., as of the moment the protocol would be open for signature.

Additional Protocol

10. An additional protocol is in principle devised to supplement the body of the mother convention with additional provisions, which build on the existing provisions without altering them. As such, additional protocols are often used as a means to extend the scope of a treaty to areas which were left out from the original remit of the instrument. They usually leave the obligations of the Contracting Parties resulting from the original terms of the treaty unaffected. The introduction of financial clauses to the Bern Convention to the extent that these would pertain to the whole regime of the Convention would probably, at the same time, alter the current functions of the Standing Committee and hence not leave the obligations of the Contracting Parties unaffected.

11. If, however, the new financing mechanism to be introduced can be seen as an additional tool separate from the other tasks of the Standing Committee, one could argue for an additional protocol to suffice. The entry into force of an additional protocol could be achieved after a limited number of States party to the convention have expressed their consent to be bound by it.⁵ The number of ratifying Contracting Parties needed for an additional protocol to enter into force can, at least theoretically, be set quite low.⁶ However, in practice, not much would be won in financial terms if not most of the Contracting Parties would join the protocol in the end. These States should, in addition, include those with significant contributions to the budget of the Bern Convention in order for the total volume to suffice for the targeted aims.

12. As in the case of the amending protocol, the additional protocol could be applied on a provisional basis through the inclusion of the relevant clause on provisional application (see, paragraph 9 above).

13. In the likely scenario that not all Contracting Parties to the mother convention would ratify the additional protocol, two treaty regimes would coexist with possible follow-up problems concerning, e.g., whether the Standing Committee can decide on the use of funds generated by the additional financing mechanism even though not all delegations represented in the Standing Committee are parties to the additional protocol or should the rules of procedure of the Standing Committee foresee, for instance, that decisions regarding financial resources provided by Parties to the additional protocol would be taken with the votes of those parties only. It would further remain possible for new States to accede to the Bern Convention without

⁵ For instance, it took 8 years for the *Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms* (CETS No. 213) to enter into force after its opening for signature.

⁶ In the case of the *Fourth Additional Protocol to the European Convention on Extradition* (CETS No. 212), opened for signature on 20 September 2012, only 3 ratifications were required for the entry into force of the instrument a condition that was achieved on 24 February 2014 with an entry into force of the Additional Protocol on 1 June 2014.

accepting the changes introduced by the additional protocol. By the same token, it would stand open to States to denounce the additional protocol separately while remaining party to the mother convention. In contrast, in the case of a revised convention amended by an amending protocol, a State can only accede to and denounce the revised convention as a whole.

IV. Conclusions

14. The introduction of a financial mechanism to the Bern Convention would, by its very nature and in order for it to fulfil its purpose, require that a large majority of Contracting Parties, if not all, be bound by such a mechanism. Therefore, whether by way of an amending or an additional Protocol, the minimum number of States for the entry into force of such a Protocol must be quite high.

15. This being the case, and due to the lengthy ratification procedures in most countries, the different possibilities proposed for amending/supplementing the Bern Convention are likely to take a long time and would, at best, constitute only medium- or long-term alternatives.

16. When comparing the different options for amending the Bern Convention with each other, time is surely of essential importance. While an amendment introduced by the so-called simplified procedure pursuant to Article 16 of the Bern Convention is, in theory, meant to accelerate the amendment procedure as such, it is difficult to make any assumptions as to when such an amendment will have been accepted by all Contracting Parties and, thus, enters into force. In contrast, an additional protocol to the Bern Convention could be designed to have a threshold of ratifications for its entering into force that would allow for a sufficient amount of contributions to be accumulated while remaining far from the necessity of requiring all Contracting Parties to accept or ratify a revised convention – like is the case for amendments under Article 16 of the Bern Convention, and, although to a lesser extent, for an amending protocol.

17. Both an amending and an additional protocol to the Bern Convention could include a clause on the possibility to apply the instrument provisionally. Whether enough Contracting Parties would be willing to use such an option to resolve the precarious financing situation of the Bern Convention remains a question of political will.

Appendix: Table on the different options for amending/supplementing the Bern Convention

	Amendment pursuant to Art. 16 BC	Amending Protocol	Additional Protocol
Procedure of adoption	Simplified procedure; 1. Amendment proposal by a CP or by the CM communi-cated to the SG who forwards it to all MS, signatories, CP etc. 2. Proposal exami-ned and adopted by the SC by ³ / ₄ -majority 3. Amendments to Articles 13-24 approved by the CM	1. CM mandate to SC for negotiating a protocol; 2. Drafting of the Protocol by SC; 3. Draft presented to CM; 4. Draft put to PACE for opinion; 5. Adoption of the Protocol by CM	1. CM mandate to SC for negotiating a protocol; 2. Drafting of the Protocol by SC; 3. Draft presented to CM; 4. Draft put to PACE for opinion; 5. Adoption of the Protocol by CM
Time to enter into force	All CP need to accept	All CP need to ratify; exceptions possible (cf. Art. 37.2 of Convention 223)	The number of ratifications necessary can be determined in the AddProt itself
Provisional application	Not possible	Possible	Possible
Number of treaty regimes	One	One or two if entered into force with a limited number of CP	Two – as long as not all CP have ratified the AddPro
New States	Automatic accession to the BC in its amended form	Automatic accession to the BC in its amended form	Possibility to accede to the BC without acceding to the AddProt
Denunciation	Only possible for CP to denounce the BC as a whole	Only possible for CP to denounce the BC as a whole	CP could denounce the AddProt only and still remain Party to the BC

CP – Contracting Parties

CM – Committee of Ministers

BC – Bern Convention

MS – member State

SC – Standing Committee