

Strasbourg, 1 September 2022

T-PVS/Inf(2022)50

CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

42nd meeting

Strasbourg, 28 November - 2 December 2022

**Advantages and disadvantages and consequences
of possible options**

*Document prepared by
the Directorate of Legal Advice and Public International Law and examined by the GR-C on 4 October 2022*

1. At the meeting of the GR-C of 2 June 2022 of the Rapporteur Group on Education, Culture, Sport, Youth and Environment (GR-C), certain delegations asked for a document presenting the advantages and disadvantages, as well as the potential consequences, of the different options available to establish a financial mechanism under the *Convention on the Conservation of European Wildlife and Natural Habitats* (ETS No. 104, hereafter the Bern Convention or the Convention).

2. The purpose of this note and the appended table is to present the mentioned information.

3. From the outset, it should be noted that once a treaty is in force, the legal framework set by it is not usually open to dynamic development unless the treaty contains **express regulations regarding amendments** and allowing its continuous evolution. If the treaty in question does not contain such regulations, its amendment for example, to meet changed circumstances or to facilitate its implementation by the parties, is governed by general international treaty law, which is to a large extent embodied in the 1969 Vienna Convention on the Law of Treaties (VCLT). Article 39 of the VCLT provides that “a treaty may be amended by agreement between the parties”.

4. Within the Council of Europe it is a common practice to amend conventions through the adoption of **amending protocols**. Such protocols usually¹ enter into force after ratification by all the parties to the convention. The requirement of a ratification by all parties has the advantage that only one version of the treaty is in force at any given time, the initial text prior to the entry into force of the amending protocol and the amended text thereafter. All parties are bound by the same international obligations. A plurality of treaty regimes can thus be avoided. However, modifications of an existing treaty may also enter into force after ratification by a limited number of parties. After its entry into force, the protocol would then only be binding for the parties which have ratified it. The remaining parties would still be bound by the original version of the treaty. This procedure is suitable for **additional protocols**, which add provisions to the original treaty without necessarily affecting the scope of existing obligations. A more radical solution is to replace the original treaty in its entirety by a new one through the elaboration of **revised conventions**.

5. The Bern Convention contains a clause (Article 16), providing the procedure for amendment of the Articles of the Convention. In view of the above, the possible legal avenues to amend/supplement the Bern Convention with a financial mechanism are the following:

- Amendment through the procedure for amendments provided for by Article 16 of the Convention;
- Amendment through the adoption of an amending protocol;
- Supplementing the convention through the adoption of an additional protocol.

6. The mentioned avenues are not too different from each other, nor are the substantive provisions of the amendments/protocols. However, the additional and amending protocols offer some flexibility regarding an essential aspect which is the number of ratifications needed for their entry into force as well as the possibility of a provisional application. This will be mainly reflected in the final clauses of the protocols.

7. In all cases, 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.

¹ However, 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, at this date, at least thirty-eight Parties.

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

	Amendment pursuant to Art. 16 of the Bern Convention	Amending Protocol	Additional Protocol
Applicable Procedure	<p><i>Simplified procedure:</i></p> <ol style="list-style-type: none"> 1. An amendment proposed by a Party or by the Committee of Ministers (CM) is communicated to the Secretary General who forwards it to all member States, signatories, Parties etc. 2. The proposal is examined and adopted by the Standing Committee by $\frac{3}{4}$-majority. 3. Amendments to Articles 13-24 have to be approved by the CM. 4. An amendment enters into force once all parties have accepted it (see entry into force below). 	<ol style="list-style-type: none"> 1. Mandate by the Committee of Ministers to the Standing Committee for negotiating a protocol. 2. Drafting of the Protocol by the Standing Committee. 3. Draft presented to the Committee of Ministers. 4. Draft put to the Parliamentary Assembly of the Council of Europe (PACE) for opinion. 5. Adoption of the Protocol by the Committee of Ministers. 6. Entry into force (see below). 	<ol style="list-style-type: none"> 1. Mandate by the Committee of Ministers to the Standing Committee for negotiating a protocol. 2. Drafting of the Protocol by the Standing Committee. 3. Draft presented to the Committee of Ministers. 4. Draft put to PACE for opinion. 5. Adoption of the Protocol by the Committee of Ministers. 6. Entry into force (see below).
Expression of the consent to be bound	<p>By acceptance, instead of the traditional form of signature followed by ratification.</p> <p>Although the acceptance can be understood as a formal and official approval of the treaty by a State representative and not necessarily through the deposit of the instrument of ratification, this depends heavily on the internal procedures. In practice, certain States may have to follow the procedure for ratification before they can accept such amendments.</p>	<p>By signature followed by ratification, acceptance or approval.</p> <p>Signature of a treaty is an act by which the State expresses its interest to the treaty and its intention to become a Party. Ratification is an act by which the State expresses its definitive consent to be bound by the treaty. When a State wishes to ratify, accept, approve or accede to a treaty, it must execute an instrument of ratification, acceptance, approval or accession, signed by one of three specified authorities, namely the Head of State, Head of Government or Minister for Foreign Affairs.</p>	<p>By signature followed by ratification, acceptance or approval.</p> <p>Signature of a treaty is an act by which the State expresses its interest to the treaty and its intention to become a Party. Ratification is an act by which the State expresses its definitive consent to be bound by the treaty. When a State wishes to ratify, accept, approve or accede to a treaty, it must execute an instrument of ratification, acceptance, approval or accession, signed by one of three specified authorities, namely the Head of State, Head of Government or Minister for Foreign Affairs.</p>

<p>Entry into force</p>	<p>The amendments will enter into force following their acceptance by all Parties to the Convention (currently 51 Parties).</p>	<p>The usual practice within the Council of Europe, is that an amending protocol enters into force only after the ratification by all the Parties to the Convention. An exception to this practice is contained in Article 37.2 of the Amending Protocol CETS 223 to the Convention for the protection of individuals with regard to automatic processing of personal data (ETS. 108, Data Protection Convention) which allows for an enter into force by 38 Parties five years after the date on which the Protocol was opened for signature. This figure represents more than 2/3. of the Parties to Convention 108 which were 53 at the time of the opening of the Protocol. Certain old amending protocols as well as the protocol amending the joint Convention CoE/OECD on mutual assistance in tax matters (CETS 208, 2010) provide for an entry into force with a limited number of ratifications but those protocols provide essentially for bilateral cooperation.</p>	<p>Within the Council of Europe practice, an additional protocol enters into force after a limited number of ratifications (e.g.3, 5, 10). This number can be determined in the protocol itself. However, given the nature of the financial protocol, the number of ratifications should be much higher. This number is to be determined according to the needs for financial sustainability and could be for example 2/3, 3/4 or 4/5 of the Parties to the Bern Convention (currently 51 Parties).</p>
<p>Length of time for the entry into force/ acceptance or ratification process</p> <p>Apart from the decisive question of whether all parties should ratify, this depends heavily on the political will of states parties to the Convention and on the internal procedures</p>	<p>It is not possible to foresee at present within what period of time the amendments according under Art. 16 will be accepted by the 51 Parties to the Convention.</p> <p>For information purposes even if the nature of the amendments is completely different, on 15 June 1999, the Committee of Ministers adopted amendments under Article 21 of the Data Protection Convention (ETS. 108). Even though more than 30 states accepted or ratified the amendments,</p>	<p>It is not possible to foresee at present within what period of time the amending protocol will enter into force.</p> <p>For information purposes, the Protocol CETS 223 amending the Data Protection Convention and opened for signature in October 2018 has not yet entered into force. It can enter into force in October 2023 if 38 States have ratified it. At this date, this Protocol counts 19 ratifications and 25 signatures not yet followed by a ratification.</p> <p>Another Protocol amending the Additional Protocol to the Convention on the Transfer of</p>	<p>It is not possible to foresee at present within what period of time the additional protocol will enter into force.</p> <p>Since traditional additional protocols can enter into force after a few ratifications, the timeframe for entry into force is generally two to three years.</p>

	<p>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.</p>	<p>Sentenced Persons (CETS 222, November 2017) which requires the ratification by all Parties to the Treaty ETS 167 still needs the ratification of 30 parties to enter into force.</p> <p>Protocols amending the European Convention of Human Rights have taken between 5 and 7 years to be ratified by all Parties to the Convention and thus enter into force.</p>	
<p>Provisional application 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 (Article 25 of the VCLT)</p>	<p>Not possible since not foreseen in Art. 16 of the Convention.</p>	<p>Possible. The Protocol could include a clause on the possibility to apply it provisionally.</p> <p>Example of a provisional application clause: “Pending the entry into force of this Protocol, a Party to the Convention may, at the time of signature of this Protocol or at any later moment, declare that it will apply the provisions of this Protocol on a provisional basis”.</p> <p>Amending protocols 223 and 222 contain a clause on provisional application and although such protocols are not yet in force a certain States have made declarations according to which they will apply the Protocol on a provisional basis.</p>	<p>Possible. The Protocol could include a clause on the possibility to apply it provisionally.</p> <p>Example of a provisional application clause: “Pending the entry into force of this Protocol, a Party to the Convention may, at the time of signature of this Protocol or at any later moment, declare that it will apply the provisions of this Protocol on a provisional basis”.</p> <p>In the case of traditional additional protocols, since they enter into force after few ratifications, the provisional application clause is less relevant.</p>
<p>Number of treaty regimes</p>	<p>One. Once the amendments enter into force, they are integrated into the text of the original convention. All Parties will be bound by the financial obligation.</p>	<p>One or two if the amending protocol entered into force with a limited number of Parties. Only the Parties having ratified the protocol will be bound by the financial obligation.</p> <p>Protocol CETS 208 is an example of a situation where some States are Parties to the original Convention (ETS 127) and most to the Convention as amended by the 208 Protocol.</p>	<p>Two – as long as not all Parties have ratified the additional protocol. Only the Parties having ratified the protocol will be bound by the financial obligation. Should all Parties ratify the additional protocol both the convention and the protocol would exist, but the same treaty regime will apply to all Parties.</p> <p>Within the Bern Convention , if two treaty regimes coexist the question may raise whether the</p>

		<p>Within the Bern Convention if two treaty regimes coexist the question may raise 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. Nevertheless, this scenario exists already de facto, given the existence of the Special Account/ Fund.</p>	<p>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. Nevertheless, this scenario exists already de facto, given the existence of the Special Account/ Fund.</p>
New States	<p>Any new State that accedes to the Bern Convention will accede to the Convention in its amended form and will be bound also by the financial obligation.</p>	<p>Any new State that accedes to the Bern Convention will accede to the Convention in its amended form and will be bound also by the financial obligation. This should be foreseen in the amending protocol.</p>	<p>In principle, it would be possible for any new State to accede to the Bern Convention without acceding to the additional protocol. This is at least the case of traditional additional protocols.</p>
Denunciation	<p>Parties can only denounce the Bern Convention as a whole since once the amendments enter into force they become part of the Convention.</p>	<p>Once the Protocol is in force, Parties having ratified it can only denounce the Bern Convention as a whole since the amendments of the Protocol become part of the Convention.</p>	<p>Since the two treaties continue to exist, Parties could denounce the additional protocol only and still remain Party to the Bern Convention.</p>