ENCAPD Project

Review of Multilateral Environmental Agreements and Documents

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Introduction

Numerous environmental problems are beyond the capacity of any one State to resolve. Many environmental issues span multiple countries, and action in one country to address such an issue cannot be successful without concomitant actions in other countries. In recognition of this circumstance, the international community has developed "multilateral environmental agreements" (MEAs) as a mechanism for establishing common frameworks and actions among countries to address shared environmental problems. Scores of multilateral environmental agreements have been negotiated over the past three decades.[1] Treaties, open to multiple States, have been forged to address such challenges as climate change, ozone layer depletion, hazardous wastes, marine pollution and biodiversity protection.

In addition to MEAs, a number of other multilateral environmental documents have been developed over time. These documents differ from MEAs in that they are not formal agreements that reach the status of international law through ratification.[2] Instead, these documents either reflect existing international law or are efforts to develop international law or domestic law by encouraging countries to implement the principles and actions contained in the documents. There are three such documents included in this report, the FAO Code of Conduct for Responsible Fisheries, the Castries Declaration on Driftnet and Harmful Fishing Methods, and the Jakarta Mandate on Marine and Coastal Biodiversity.

The importance of Multilateral Environmental Agreements and Documents (MEADs) and regional cooperation in addressing common environmental problems are well recognized by Members of the Organization of Eastern Caribbean States. This commitment was confirmed in the St. George's Declaration of Principles for Environmental Sustainability in the OECS, which was signed by seven of the nine OECS Associate and Member States on 10 April 2001, and now constitutes OECS regional environmental policy. Principle 17, in particular, commits Member States to become parties to MEAs, and to co-operate in the negotiation and implementation of MEAs.

MEAs are negotiated between countries sharing environmental problems that require joint action to address. Because they are negotiated, and because they address widely diverging topics within the environmental sector, the types of framework, action and implication on cost to implement varies widely among MEAs and may imply or require widely differing actions among countries that are party to an MEA. Further, and for a variety of political, technical, financial or other reasons, not all countries that share an environmental problem are necessarily party to an MEA designed to address the problem. Among countries that are party to an MEA, the extent to which countries implement their obligations under the MEA often varies. In addition, unless specifically prohibited in a particular MEA, a country can sign onto the MEA without being bound to it in its entirety. This may be achieved by negotiating a "reservation" or other type of "opt out" arrangement with respect to specific clauses. This may have significant implications for the obligations of a country under the MEA.

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[1] A recent United Nations Environment Programme (UNEP) report estimates that over 300 agreements related to the environment have been negotiated since 1972, the year of the Stockholm Conference on the Human Environment. UNEP, Meeting of the Open-Ended Intergovernmental Group of Ministers or Their Representatives on International Governance, *International Environmental Governance: Multilateral Environmental Agreements* (MEAs), UNEP/IGM/1/INF/3 (6 April 2001).

[2] This Review maintains the distinction between legally binding agreements and documents that are not legally binding although the recent UNEP report on MEAs includes both binding and non-binding instruments under the terminology of multilateral environmental agreements. Ibid.

One consequence of the lack of universal implementation is that the ability of MEAs to act as catalysts and frameworks for environmental improvement may be compromised. This can have the effect that the environmental improvements that are intended as a function of the MEA either fail to materialise or do at much slower rates than intended.

National acceptance and implementation of MEAs have varied widely with at least two main reasons for limited impact in some countries, including Member States of the Organisation of Eastern Caribbean States (OECS). These limitations include: (i) a lack of awareness by countries that have signed MEAs regarding obligations undertaken and implementation steps needed; and (ii) an insufficient legal capacity to advise government on MEA ratification and compliance requirements.

This report seeks to address the former of these limitations as a prelude to future and separate work to address the problem of limited legal capacity. Building on the previous OECS review of international environmental agreements,[3] this document summarises the practical implication and status of acceptance in OECS Member and Associate Member[4] States of 15 MEAs and three multilateral documents (the FAO Code of Conduct for Responsible Fisheries, the Castries Declaration on Driftnet and Harmful Fishing Methods and the Jakarta Mandate on Marine and Coastal Biodiversity), considered to be especially important to Caribbean States. In addition, the Waigani Convention, seeking to ban the import of hazardous wastes into Pacific Island States from outside the region, is reviewed since it represents a potential model to be followed by OECS Member States with or without participation of other small island developing States in the Wider Caribbean. The review of these MEADs is based on the state of international law as it applies to these MEADs as of July 1, 2001.

These agreements and documents are described under three main headings. Those headings are: Marine Environmental and Fisheries Agreements/Documents, Environmental Agreements/ Documents, and Trade and Environmental Agreements.

A common format is followed for summarising each of the 19 multilateral agreements/ documents. They are reviewed according to the following methodology:

- Entry into Force
- Status among OECS Member and Associate Member States[5]
- Executive Summary (including background history where relevant)
- Structure of the Agreement/Document

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[3] W. Anderson, E. Rankin and D. VanderZwaag (eds.), *Strengthening Acceptance and Implementation of Maritime Treaties and International Environmental law Obligations in OECS Member States: Treaty Guide, Case Studies and Workshop Proceedings* (Halifax: Oceans Institute of Canada, 1999).

[4] The status of acceptances of these MEAs by two Associate Members of the OECS, Anguilla and the British Virgin Islands (BVI), is included in this review. Anguilla, BVI and Montserrat are Overseas Territories of the United Kingdom. As such, the United Kingdom ratifies or accedes to an MEA on their behalf. In the past, MEAs to which the UK acceded were often extended without consultation to cover Overseas Territories. The process is now one of consent and partnership. When an Overseas Territory views an agreement positively and when the UK believes the territory is in a position to be covered by an MEA and to make a positive contribution to the environment as a result of participation in the MEA, the UK's ratification is extended to cover the territory in question. This means the process of extending MEAs to cover Overseas Territories is slower but more meaningful than in the past (Personal communication, Chris Allan, Environmental Policy Department, Foreign and Commonwealth Office, 4 July 2001).

[5] Dates of entry into force, signature and ratification or accession are provided for each Member State where available. Ratification refers to a State's formal expression of consent to be bound by a treaty that it has signed. Accession refers to a State's becoming a Party to a treaty to which it is not a signatory.

- Obligations (including subsidiary guidelines and decisions, if any)
- Costs of Implementation[6]
- Strengths and Weaknesses of the Agreement/Document

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[6] Where relevant, provisions for technical and financial assistance to developing States are also highlighted.

A. Marine Environmental and Fisheries Agreements/Documents

1. Marine Environmental Agreements

Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region[7] (adopted under the Cartagena Convention)[8]

Entry into Force: Not yet in force. The LBS Protocol was opened for signature on 6 October 1999 in Oranjestad, Aruba. The LBS Protocol was open for signature in Bogotá, Colombia until 5 October 2000. Parties to the Cartagena Convention that have not yet signed the Protocol may accede to it by depositing their instruments of accession with the Government of Colombia as Depository.

Status of Protocol Among OECS Member States as of 1 July 2001:

Country	Date into Force	Date of Signature	Date of Ratification	Date of Accession
Anguilla				**
Antigua and Barbuda				*
British Virgin Islands				**
Dominica				*
Grenada				*
Montserrat				**
St. Kitts and Nevis				***
St. Lucia				*
St. Vincent and the Grenadines				*

* None of the OECS Members signed the LBS Protocol during the period it was open for signature, see <http://www.cep.unep.org/law/ cartstatus.html> (accessed 23 March 2001).

** The United Kingdom ratified the Cartagena Convention on 28 February 1986 and extended its ratification to cover BVI on 21 October 1987 (effective 21 November 1987) but has not done so for Anguilla or Montserrat. Nonetheless, the CEP Secretariat website includes the following "note": "The Other Territories of the United Kingdom participating in the Caribbean Environment Programme are Anguilla and Montserrat".[9] The United Kingdom has not signed the LBS Protocol.

*** St. Kitts and Nevis is not a party to the Cartagena Convention. Therefore, it must first become a Contracting Party to the Cartagena Convention before it can accede to the LBS Protocol.

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[7] Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 6 October 1999, open for signature until 5 October 2000, online at Caribbean Environment Programme website: <http://www.cep.unep.org> (accessed: 23 March 2001) [hereinafter LBS Protocol].

[8] Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 24 March 1983, reprinted in (1982) 21 *International Legal Materials* 227 [hereinafter Cartagena Convention].

[9] At <http://www.cep.unep.org/law/cartstatus.htm#cartagena> (accessed: 16 April 2001).

Executive Summary

The Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (LBS Protocol) was drafted in response to principles of the Rio Declaration, Chapter 17 of Agenda 21 (both adopted by the United Nations Conference on the Environment and Development, Rio de Janeiro, 1992), the Programme of Action for the Small Islands Developing States (Barbados, 1994), and the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (Washington, 1995).

The LBS Protocol is the latest of three protocols to be adopted under the Convention for Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention). Adopted in 1983 and coming into force in 1986, the Cartagena Convention is a framework agreement setting out the legal foundations for actions to be developed.[10] The United Nations Environment Programme (UNEP) is designated as the administrator of the Convention and its Protocols.[11]

The preamble to the LBS Protocol states that the Contracting Parties are conscious of the serious threat to the marine and coastal resources and to human health posed by pollution from land-based sources and activities as well as the ecological, economic, aesthetic, scientific, recreational and cultural value of the marine and coastal ecosystems of the Wider Caribbean Region (the "Convention area"). The Parties also recognise the inequalities in economic and social development among the countries of the Region and the need to co-operate closely in taking appropriate measures to protect the marine environment against pollution from land-based sources and activities at national, sub-regional, regional and international levels.

Structure

The Protocol consists of 19 articles and 4 annexes. The adoption and entry into force of new annexes and amendments to the four existing annexes shall take place in accordance with paragraphs 2 and 3 of Article 19 of the Cartagena Convention.

The Secretariat of the Protocol is provided by the United Nations Environment Programme (UNEP).[12]

Obligations

- General
- Addressing Source Categories, Activities and Associated Pollutants
- Regulation of Domestic Wastewater Discharges
- Prevention and Control of Pollution from Agricultural Non-Point Sources of Pollution
- Bilateral, Sub-regional, Regional or Global Co-operation

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[10] Details on the Cartagena Convention as well as the two earlier Protocols: Protocol Concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region 1983 and Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region 1990 are found in: W. Anderson, E. Rankin & D. VanderZwaag, *Strengthening Acceptance and Implementation of Maritime Treaties and International Environmental Law Obligations in OECS Member States Treaty Guide, Case Studies and Workshop Proceedings* (Halifax: Oceans Institute of Canada, 1999) at 87–98.

[11] Article 15, Cartagena Convention.

[12] Article 13(2a-k) outlines the functions of the Secretariat.

- Monitoring Programmes
- Guidelines Concerning Environmental Impact Assessments
- Public Access to Relevant Information, Education and Awareness
- Scientific, Technical and Advisory Committee
- Reports to UNEP and Regular Meetings

General

Parties must take appropriate measures to prevent, reduce and control pollution of the Convention area from "land-based sources and activities" (Art. 3(1)). Article 1(4) defines pollution from "land-based sources and activities" as:

> those sources and activities causing pollution of the Convention area from coastal disposal or from discharges that emanate from rivers, estuaries, coastal establishments, outfall structures, or other sources on the territory of a Contracting Party, including atmospheric deposition originating from sources located on its territory.

Article 3(1) also requires Parties to use the best practicable means at their disposal and in accordance with their capabilities. The Protocol does not define the term "best practicable means".

Parties shall develop and implement appropriate plans, programmes and measures. In such plans, programmes and measures, each Party shall adopt effective means of preventing, reducing or controlling pollution of the Convention area from land-based sources and activities on its territory, including the use of "most appropriate technology" and management approaches such as integrated coastal area management (Art. 3(2)).

Article 1(5) defines "most appropriate technology" as:

> … the best of currently available techniques, practices, or methods of operation to prevent, reduce or control pollution of the Convention area that are appropriate to the social, economic, technological, institutional, financial, cultural and environmental conditions of a Contracting Party or Parties.

Source Categories, Activities and Associated Pollutants

Parties are required to address the source categories, activities and associated pollutants of concern listed in Annex I to the LBS Protocol through the progressive development and implementation of additional annexes for those source categories, activities, and associated pollutants of concern that are determined by the Parties as appropriate for regional or sub-regional action (Art. 4(1)).

Annex I includes a list of source categories, activities and associated pollutants of concern. Part B of the Annex lists priority source categories and activities, including domestic sewage, agricultural non-point sources, chemical industries, extractive industries and mining, food processing operations, manufacture of liquor and soft drinks, oil refineries, pulp and paper factories, sugar factories and distilleries, and intensive animal rearing operations.

Associated pollutants of concern include those identified by the Parties on the basis of their hazardous or otherwise harmful characteristics when formulating effluent and emission limitations and management practices for the sources and activities in Annex I. They include, *inter alia*,

organohalogen, organophosphorus, organotin compounds and substances, and heavy metals and their compounds.[13]

Added to the list of associated pollutants of concern are any other substance or group of substances with one or more of a number of characteristics, including, *inter alia*, persistency; **t**oxicity or other harmful properties; and bio-accumulation.[14]

Annex II sets out the factors to be used in determining future effluent and emission source controls and management practices. When developing sub-regional and regional source-specific effluent and emission limitations, Parties are to evaluate and consider factors such as the characteristics and composition of the waste (such as type, size and form of waste source) (Part A). When determining if more stringent limitations are appropriate, a Party should also take into account characteristics of the discharge site and receiving marine environment, including hydrographic, meteorological, geographical and topographical characteristics of the coastal areas (Part B). Parties are required to keep the source controls and management practices set out in subsequent annexes under review. In particular, they are to consider whether or not the reduction of inputs resulting from the use of the effluent and emission limitations and management practices established in accordance with Annex II do not lead to environmentally acceptable results (Part C).

Regulation of Domestic Wastewater Discharges

Annex III addresses the regulation of domestic wastewater in the Convention area. Regulation of domestic wastewater varies depending on the "class of water". "Class I waters" means waters in the Convention area that, due to inherent or unique environmental characteristics or fragile biological or ecological characteristics or human use, are particularly sensitive to the impacts of domestic wastewater (Part A, Paragraph 2). Class I waters include, but are not limited to:

- waters containing coral reefs, seagrass beds, or mangroves
- critical breeding, nursery or forage areas for aquatic and terrestrial life
- protected areas and habitat areas for species protected under the Protocol Concerning Specially Protected Areas and Wildlife to the Convention (the SPAW Protocol)
- waters used for recreation

"Class II waters" means waters in the Convention area, other than Class I waters, that due to oceanographic, hydrologic, climatic or other factors are less sensitive to the impacts of domestic wastewater and where humans or living resources that are likely to be adversely affected by the discharges of domestic wastewater (Part A, Paragraph 3).

Part B of Annex III requires Parties to:

- provide for the regulation of domestic wastewater;
- locate, design and construct domestic wastewater treatment facilities and outfalls such that any adverse effects on, or discharges into, Class I waters, are minimised;
- encourage and promote domestic wastewater reuse that minimises or eliminates discharges;
- promote the use of cleaner technologies to reduce discharges to a minimum; and
- develop plans to implement the Annex obligations.

[13] Part C, Paragraph 1, Annex I.
[14] Part C, Paragraph 2, Annex I.

Annex III also sets out an effluent limitations timetable for domestic wastewater discharges, requiring Parties to achieve effluent limitations by a certain date in various communities. For example, communities with more than 50,000 inhabitants not possessing wastewater collection systems are allowed 20 years to implement the provisions of the Protocol. Communities with more than 50,000 inhabitants already possessing wastewater collection systems would have 15 years. Parties are allowed to seek further timetable extensions of five years due to financial and capacity limitations.[15]

Different effluent limitations are set for discharges into Class I and Class II waters. For example, the monthly average for total suspended solids is 30 mg/1 for Class I waters but increases to 150 mg/l for Class II waters. Other measures recommended in Parts D, E and F of Annex III include:

- development of industrial pre-treatment programmes
- upgrading of household systems
- proper management of new and existing domestic wastewater systems including adequate training programmes of system operators

Prevention and Control of Pollution from Agricultural Non-point Sources

Annex IV sets out a number of measures to be undertaken by Parties with respect to agricultural non-point sources of pollution. "Agricultural non-point sources of pollution" means non-point sources of pollution originating from the cultivation of crops and rearing of domesticated animals, excluding intensive animal rearing operations that would otherwise be defined as point sources (Part A, Paragraph 1).

Part B requires each Party, no later than five years after Annex IV enters into force, to formulate policies, plans and legal mechanisms for the prevention, reduction and control of pollution of the Convention area from agricultural non-point sources of pollution. Programmes shall be identified in such policies, plans and legal mechanisms to mitigate pollution of the Convention area from agricultural non-point sources of pollution, in particular, if these sources contain nutrients (nitrogen and phosphorus), pesticides, sediments, pathogens, solid waste or other such pollutants that may adversely affect the Convention area. Plans are to include, *inter alia*, the following elements:

- an evaluation and assessment of agricultural non-point sources of pollution that may adversely affect the Convention area
- education, training and awareness programmes
- development and promotion of economic and non-economic incentive programmes to increase the use of best management practices
- assessment and evaluation of legislative and policy measures

Part C of Annex IV and Article 12 of the Protocol require each Party to report on their plans for prevention, reduction and control of pollution of the Convention area from agricultural non-point sources.

Bilateral, Sub-regional, Regional or Global Co-operation

Pursuant to Article 5, Parties are required to co-operate, bilaterally or on a sub-regional, regional or global basis, in the prevention, reduction and control of pollution of the Convention area from land-

[15] Pursuant to Part G of Annex III, a maximum of two five-year extensions is possible but all newly constructed domestic wastewater systems are <u>not</u> subject to timetable extensions.

based sources and activities. In carrying out these co-operation obligations, Parties are to promote co-operation in several areas, including:

- monitoring activities
- research on the chemistry, fate, transport and effects of pollutants
- exchange of scientific and technical information

Also, Parties are required to co-operate directly or through relevant sub-regional, regional and global organisations to develop information systems and networks for the exchange of information to facilitate the implementation of the Protocol (Art. 8).

Monitoring Programmes

Each Party is required to formulate and implement monitoring programmes, accordance with the provisions of the Protocol (Art. 6(1)). Monitoring is defined as "the periodic measurement of environmental quality indicators (Art. 1(6)). Pursuant to Article 6, monitoring programmes may, *inter alia*:

- systematically identify and assess patterns and trends in the environmental quality of the Convention area
- assess the effectiveness of measures taken to implement the Protocol

Monitoring information is to be made available to the Scientific, Technical and Advisory Committee to facilitate the work of the Committee (Art. 6(2)).

Guidelines Concerning Environmental Impact Assessments

Parties are to develop and adopt guidelines concerning environmental impact assessments, and review and update those guidelines as appropriate (Art. 7(1)). When a Party has reasonable grounds to believe that a planned land-based activity on its territory, or a planned modification to such an activity, which is subject to its regulatory control in accordance with its laws, is likely to cause substantial pollution of, or significant and harmful changes to, the Convention area, that Party is required to review the potential effects of such activity on the Convention area, through means such as an environmental impact assessment (Art. 7(2)). Information obtained in the environmental impact assessment is to be made public (Art. 7(4)).

Public Access to Relevant Information, Education and Awareness

Each Party is required to promote public access to relevant information and documentation concerning pollution of the Convention area from land-based sources and activities and the opportunity for public participation in decision-making processes concerning the implementation of the Protocol (Art. 10).

Parties are to develop and implement individually and collectively programmes on environmental education and awareness for the public related to the need to prevent, reduce and control pollution of the Convention area from land-based sources and activities, and promote the training of individuals involved in such prevention, reduction and control (Art. 11).

Scientific, Technical and Advisory Committee

The Protocol establishes a Scientific, Technical and Advisory Committee. Each Party is required to designate a representative to the Committee who has an expertise in the fields covered by this Protocol. The representative may be accompanied at its meetings by other experts and advisors also designated by the Party. Also, the Committee may request scientific and technical advice from competent experts and organisations (Art. 14(2)).

The Committee is responsible for reporting to and advising the Parties regarding the implementation of this Protocol in the Convention area. In doing so, Article 14(2) requires the Committee to perform the several functions, including:

- review the state of pollution and recommend amendments or additional annexes
- examine, assess and analyse information submitted by the Parties and other relevant information to determine the effectiveness of the measures adopted, and submit regional reports to the Parties

Reports to UNEP and Regular Meetings

Each Party is required to designate a focal point to serve as liaison with UNEP on the technical aspects of the implementation of this Protocol (Art. 13). Parties are required to submit reports to UNEP on measures adopted, results obtained and any difficulties experienced in the implementation of the Protocol. The Meeting of the Parties shall determine the nature of the information to be included, and the collection, presentation and timing of these reports, which will be made available to the public (Art. 12(1)). The Scientific, Technical and Advisory Committee shall use the data and information contained in these national reports to prepare regional reports on the implementation of the Protocol, including the state of the Convention area (Art. 12(2)).

The ordinary meetings of the Parties are generally to be held in conjunction with the ordinary meetings of the Parties to the Convention. The Parties may also hold extraordinary meetings as deemed necessary, upon the request of UNEP or at the request of any Party, provided that such requests are supported by the majority of the Parties (Art. 14(1)).

Costs of Implementation

The Contracting Parties are to unanimously adopt financial rules, prepared in consultation with UNEP, to determine, in particular, their financial participation under the Cartagena Convention and the LBS Protocol.[16]

UNEP may, in response to requests from Parties, seek additional funds for activities related to the LBS Protocol. These funds may include voluntary contributions by the Contracting Parties, other governments and government agencies, international organisations, non-governmental organisations, the private sector and individuals (Art. 16(1)). Contracting Parties have the responsibility of endeavouring, as far as possible, to ensure that adequate financial resources are available to implement the Protocol. In particular, they are to:

- promote the mobilisation of substantial financial resources, including grants and concessional loans, from national, bilateral and multilateral funding sources and mechanisms; and

[16] Article 20, paragraph 2, Cartagena Convention.

- explore innovative methods and incentives mobilising and channeling resources, including those of foundations, non-governmental organisations and other private sector entities (Art. 16(2).

Strengths and Weaknesses

Strengths

- Forms an integral part of the Cartagena Convention and thus benefits from institutional and administrative arrangements governing the parent agreement
- Encourages the development of national plans for managing land-based pollution and recognises the importance of bilateral, sub-regional, regional and global arrangements
- Provides a mechanism for adopting new annexes or amendments to existing annexes to respond to new threats of land-based pollution
- Encourages Parties to build on existing annexes and specifically to develop an annex to address water quality criteria for selected priority pollutants identified in Annex I
- Scientific, Technical and Advisory Committee is to play an active role in reviewing implementation and state of the environment information submitted by Parties

Weaknesses

- Vagueness in wording of general obligations and lack of definition of "best practicable means"
- Allows considerable time periods for countries to meet effluent limitations for domestic wastewaters (10–20 years) with further time extensions possible
- "Best management practices" for agricultural pollution are encouraged but defined only in general terms
- Does not establish specific standards, including prohibitions, for hazardous chemicals
- Does not explicitly adopt the precautionary approach

B. Fisheries Agreements/Documents

United Nations Agreement on Straddling and Highly Migratory Fish Stocks (1995)[17]

Entry into Force: Opened for signature on 4 December 1995, it requires ratification by 30 countries to come into force. To date, 27 countries have ratified the Agreement.

Status of Agreement Among OECS Member States as of 1 July 2001:

Country	Date into Force	Date of Signature	Date of Ratification	Date of Accession
Anguilla*				
Antigua and Barbuda				
British Virgin Islands*				
Dominica				
Grenada				
Montserrat*				
St. Kitts and Nevis				
St. Lucia		12 December 1995	9 August 1996	
St. Vincent and the Grenadines				

* Although the United Kingdom ratified the Agreement on 3 December 1999, it did not specifically include these Overseas Territories in its ratification.

Executive Summary[18]

The UN Agreement on Straddling and Highly Migratory Fish Stocks (Fish Stocks Agreement) officially implements the provisions of the UN Convention on the Law of the Sea (1982) relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. The Agreement is intended to establish the basis for sustainable management and conservation of many high seas fisheries, address gaps in fish stock data, and provide for the establishment of quotas. It also addresses the problem of unauthorised fishing. The Agreement calls for the establishment of regional

[17] United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Agreement for the Implementation of the United Nation Convention on the Law of the Sea of December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted August 4, 1995; UNGA Doc. A/Conf.164/37, 4 Aug 1995, reprinted in (1995) 34 *International Legal Materials* 1542; 161 UNTS 74; 99 RGDIP 736.

[18] The Fish Stocks Agreement, the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (see below, p. 17), and the FAO International Code of Conduct for Responsible Fisheries (see below, p. 21) are intended to work together to provide a comprehensive international response to fisheries conservation and management. The Fish Stocks Agreement and the Compliance Agreement focus on the high seas fisheries and include binding obligations. The Code is more comprehensive in scope, addressing issues ranging from aquaculture and coastal management to high seas fishing. Although it is more comprehensive, it is not a legally binding document.

fishing organisations where they do not exist.[19] Compliance procedures, including inspection powers, and dispute settlement provisions are also part of the Agreement.

Structure

The Agreement consists of a preamble, 13 parts and two annexes. The preamble connects this Agreement and other international instruments, including Chapter 17 of Agenda 21, and the UN Law of the Sea Convention.

Part I consists of general provisions, definitions and objectives. Part II includes many of the core principles of the Agreement, such as the duty to co-operate in the conservation and management of straddling and highly migratory fish stocks, and the application of the precautionary approach in managing these fish stocks. Part II also deals with the relationship of conservation and management measures within areas of national jurisdiction and those on the high seas.

Part III establishes mechanisms for international co-operation in the high seas, including regional or sub-regional fisheries management organisations. An alternative to such a structure would be a less formal arrangement between interested States at the regional or sub-regional level. The nature of the arrangements or organisations, their function, membership and relationships to existing organisations are addressed in Part III. Part IV deals with rights and obligations of Party States that do not participate in the management process set up in Part III. Non-parties are addressed under Part IX. Part V sets out specific duties of Party Flag States that fish on the high seas.

Part VI deals with compliance with and enforcement of the Agreement. It calls for international and regional co-operation, establishes basic rights and obligations relating to inspections, and identifies the role of Port States in the enforcement process. Dispute settlement provisions are included under Part VIII.

Part VII recognises the special requirements of developing countries. It calls for Member States to co-operate on this issue and proposes that work proceed in co-ordination with other international institutions. Parts X to XIII address administrative and miscellaneous issues.

Annex I sets out standard requirements for the collection and sharing of data as provided for under Articles 5 and 14. Guidelines for the application of precautionary reference points are included as Annex II of the Agreement.

Obligations

- General
- Precaution
- Consistency and Co-operation
- Establishment of Regional or Sub-regional Management Organisations
- Non-member Parties
- Flag States
- Developing States

[19] In the Caribbean region, there is a regional organisation in place, the Western Central Atlantic Fishery Commission, see <http://www.fao.org/fi/body/rfb/WECAFC/wecafc_home.htm> (accessed: 23 March 2001).

General

The general obligation imposed under the Agreement is for coastal States and States fishing on the high seas to co-operate for the purpose of conserving and managing straddling and highly migratory fish stocks (Art. 5). To this end, States are expected to adopt measures to ensure the long-term sustainability of these fish stocks, minimise pollution, protect biodiversity, prevent over-fishing, base decisions on best scientific information available, and promote and conduct research.

OECS countries would be expected to implement domestic legislation to regulate high seas fishing. At a minimum this would include a licensing regime for vessels engaged in the high seas fishery, effective enforcement against vessels who violate those provisions, and mechanisms to implement conservation and management measures developed by regional bodies or agreements under Article 9.

Precaution

Article 6 requires States to apply the precautionary approach widely for the purpose of protecting marine resources and the marine environment. States are obliged to exercise more caution the higher the degree of uncertainty is about the information available. The Agreement sets out specific ways Parties are to apply this general principle in Annex II, including the establishment of target reference points (desirable level of fishing) and limit reference points (below which stocks should not be exploited). Maximum sustainable yield is to be regarded the minimum standard for limit reference points.

Consistency and Co-operation

States are obliged to seek agreement on measures for the conservation of stocks to ensure they are compatible with each other, do not have a harmful impact on living marine resources as a whole, and achieve the objectives of the Agreement (Arts. 7 and 8). Coastal States and States fishing on the high seas have a duty to co-operate with the objective of achieving compatible conservation and management measures. States are encouraged to actively participate in the development of appropriate measures. Participation in a region's high seas fishery is conditional, at a minimum, on the acceptance of the measures developed in accordance with this Agreement.

Establishment of Regional or Sub-regional Management Organisations

The preferred mechanism for the development and implementation of appropriate conservation and management measures is through existing or newly established regional or sub-regional fisheries management organisations or arrangements.[20] All coastal States and States involved in the high seas fishery in a region are encouraged to work within these fisheries management organisations. The organisations are then authorised to determine appropriate conservation and management measures, and all Members of the regional organisation or all participants in the fisheries management arrangement are bound to comply with the measures adopted.

[20] Articles 8 to 16. In the Caribbean, the Western Central Atlantic Fishery Commission facilitates the co-ordination of research, encourages education and training, and assists its members in establishing rational policies to promote the rational management of resources that are of interest for two or more countries. The Commission has an advisory management function but has no regulatory powers. Issues such as the implementation of policy and proposed management measures, as well as compliance and enforcement, are left to Member States. See <http://www.fao.org/fi/body/rfb/WECAFC/wecafc_home.htm> (accessed: 23 March 2001).

Non-member Parties

States who are party to the Fish Stock Agreement, but who are not members of the regional organisation or arrangement that applies to an area in question, are nevertheless obliged to co-operate in the conservation and management of the relevant straddling and highly migratory fish stocks (Art. 17). These States either have to abide by the measures adopted for the region, or they are prohibited from authorising vessels flying their flag to engage in fishing for straddling and highly migratory species in the region in question (Arts. 17.1 and 17.2).

Flag States

Flag States have to take measures to ensure that vessels flying their flag comply with regional conservation and management measures, and that these vessels do not undermine the effectiveness of those measures (Art. 18). If a Flag State cannot effectively ensure compliance, it shall not authorise vessels flying its flag to fish on the high seas. Article 18 lists specific measures a Flag State is expected to take to ensure compliance by vessels flying its flag, including measures to control vessels fishing on the high seas, establishment of regulations to ensure vessels comply with measures adopted under this Agreement, applying terms and conditions to licences to fulfil obligations under this Agreement, and measures to prevent unlicensed vessels from fishing on the high seas.

Developing States

The Agreement takes note of special requirements of developing states (Arts. 24 and 25). In recognition of this, States are obliged to provide assistance to developing States, either directly, or through recognised international institutions. States must also consider the needs of developing States in the design and implementation of conservation and management measures. Considerations include the dependence of developing States on the exploitation of living marine resources and the need to ensure that measures do not impose a disproportionate burden onto developing States. Article 25 lists specific areas of co-operation with and assistance to developing States, including assistance in their efforts to participate in regional management efforts and facilitating their participation in high seas fisheries.

Costs of Implementation

The main costs of implementing this Agreement are associated with participation in the regional management organisation. Participation will involve the development of appropriate conservation and management measures. A potential short-term cost could be reduction in or changes to fishing activity. However, such costs should be offset by the long-term sustainability of the fishery. The Agreement recognises the special needs of developing countries. This should provide opportunities for funding to offset implementation costs.[21]

Strengths and Weaknesses

Strengths

- Promises to strengthen inspections and investigations of vessels fishing on the high seas in accord with procedures to be established by sub-regional or regional fisheries organisations/arrangements

[21] For more information on costs and benefits to OECS countries, see the FAO website on small island States at <http://www.fao.org/SIDS/docs-e.htm> (accessed: 23 March 2001).

- Dispute settlement in combination with provisional arrangement provisions (Part 8) allows for quick response to problems identified
- Orienting high seas fishing toward conservation rather than protection and promotion of individual State rights and interests

Weaknesses

- Does not address need to reduce fleet capacity
- Conservation must be balanced against the promotion of optimum utilisation
- Does not address issue of State subsidies
- Does not address use of non-selective gear issue
- Maintains the distinction between straddling and highly migratory fish stocks and other marine resources which is not consistent with an ecosystem approach
- Leaves enforcement of fisheries violations on the high seas to the Flag State

FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas[22]

Entry into Force: Adopted 24 November 1993. Twenty-five acceptances are required for the Agreement to come into force; to date there are 20.

Status of Agreement Among OECS Member States as of 1 July 2001:

Country	Date into Force	Date of Signature	Date of Ratification	Date of Accession
Anguilla*				
Antigua and Barbuda				
British Virgin Islands*				
Dominica				
Grenada				
Montserrat*				
St. Kitts and Nevis**		24 June 1994		
St. Lucia				
St. Vincent and the Grenadines				

* The United Kingdom accepted the Agreement through its European Community membership. This acceptance would not apply to its Overseas Territories.
** Deposited instrument of "acceptance" in accordance with Article 10.2 of the Agreement.

Executive Summary[23]

The FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement) seeks to ensure international co-operation and exchange of information to enable Parties to take effective measures to ensure compliance with "international conservation and management measures". Such measures are defined in Article I (b) to mean measures taken in accordance with rules of international law, as reflected in the UN Law of the Sea Convention (1982). The measures can be adopted in a variety of ways, including by global or regional fisheries organisations.

The Agreement applies to all fishing vessels that fish or are entitled to fish on the high seas, although vessels under 24 metres in length may be exempt under appropriate circumstances.[24] The

[22] US Treaty Doc. 103-24; (1994) 33 *International Legal Materials* 968, 969 (text); BPP Misc. 11 (1995).
[23] The Fish Stocks Agreement (see above, p. 12), the Compliance Agreement, and the FAO International Code of Conduct for Responsible Fisheries (see below, p. 21) are intended to work together to provide a comprehensive international response to fisheries conservation and management. The Fish Stocks Agreement and the Compliance Agreement focus on the high seas fisheries and include binding obligations. The Code is more comprehensive in scope, addressing issues ranging from aquaculture and coastal management to high seas fishing. Although it is more comprehensive, it is not a legally binding document.
[24] The exemption applies unless the Flag State determines that applying the exemption would undermine the object and purpose of the Compliance Agreement. The exemption also does not apply in coastal areas of

Agreement's objective is to provide mechanisms to allow Parties to track vessels that have violated international law, and prevent them from engaging in forum shopping by switching flags whenever States take measures to enforce international conservation and management rules.

Structure

The Agreement consists of the preamble and 16 articles. The preamble places the Agreement in the context of the UN Law of the Sea Convention and the basic right of all States to engage in fishing on the high seas, subject to applicable rules of international law. In addition to the Law of the Sea Convention, the preamble makes specific reference to Agenda 21 and the Declaration of Cancun, adopted by the International Conference on Responsible Fishing.

Articles 1 and 2 include definitions and limit the scope of application of the Agreement to high seas fishing vessels. Articles 3 to 6 deal with Flag State responsibilities, including record keeping, exchange of information and international co-operation. Article 7 requires parties to co-operate to help developing countries meet their obligations under the Agreement. Finally, under Article 8, Parties agree to encourage non-Parties to accept this Agreement and to adopt laws and regulations consistent with its provisions.

Obligations

- General
- Record Keeping
- Co-operation with Developing Countries

General

The key obligation of Parties is to take measures to ensure that fishing vessels entitled to fly their flag do not engage in any activity that undermines the effectiveness of international conservation and management measures (Art. 2). More specifically, Flag States are required to implement an authorisation process for vessels fishing on the high seas and to implement a monitoring and enforcement process to ensure vessels comply with conditions of approval (Art. 3). The Agreement requires Flag States to co-operate in preventing vessels from avoiding having to comply with international conservation measures by preventing vessels from switching flags to escape enforcement. Article 5 requires Parties to co-operate in the enforcement of the provisions of this Agreement against any vessel fishing on the high seas.

Record Keeping

Article 6 requires Parties to keep records on all fishing vessels entitled to fly their flag and authorised to fish on the high seas, and to make the following information available to FAO:

- name of vessel, registration number, previous names, and port of registry
- previous flags
- international radio call sign
- name and address of owner

Member States that have not yet declared exclusive economic zones. In such circumstance, the coastal State may establish a minimum length of fishing vessel flying the flag of the coastal State below which the Compliance Agreement will not apply.

- where and when built
- type of vessel
- length

In addition, the following information is required to the extent practicable:

- name and address of operator
- type of fishing method
- moulded depth
- beam
- gross registered tonnage
- power of engines

Any changes to the information provided must be provided to FAO promptly. Infractions by vessels entitled to fly a country's flag must also be reported to FAO. Any decision to exempt a vessel from the requirements of the Agreement[25] must also be documented with FAO.

Co-operation with Developing Countries

Article 7 obliges parties to provide assistance to developing country Parties to assist them in fulfilling their obligations under the Agreement. Such assistance can be provided individually, or through co-operation among Parties or with regional or international organisations such as the FAO. This article has been the subject of further elaboration by the FAO to include provision of assistance for:

i. the implementation of the Compliance Agreement,
ii. the upgrading of capabilities for reporting on fishery statistics,
iii. upgrading of capabilities in monitoring, control and surveillance,
iv. the promotion of responsible fishing operations,
v. upgrading marine resource survey capabilities,
vi. improving the provision of scientific advice for fisheries management,
vii. fisheries policy, planning and management,
viii. developing and implementing fleet restructuring policies, and
ix. implementation of post-harvest practices and trade[26]

Costs of Implementation

The main cost involved is related to the obligations for record keeping as outlined above. In addition, States are expected to put in place an effective compliance system to ensure vessels that fly their flag comply with management and conservation measures. Article 7 provides for assistance to developing countries that may offset some or all of the costs involved.[27]

[25] Subject to the "24 metres in length" exemption in Article 2.2 of the Agreement.
[26] See David J. Doulman, "Implementation of the Code of Conduct for Responsible Fisheries and Related Instruments: Implications for Members of the OECS," July 1997, at 5, at: <http://www.fao.org/fi/agreem/codecond/oecs.asp> (accessed: 23 March 2001.
[27] For more information on costs and benefits to OECS countries, see the FAO website on small island States at <http://www.fao.org/SIDS/docs-e.htm> (accessed: 23 March 2001).

Strengths and Weaknesses

Strengths

- Includes measures to prevent vessels from changing Flag State to evade enforcement measures of international fishing regulations by Flag States
- Provides new opportunities for sharing of information on fishing practices internationally
- Recognises the needs of developing countries and provides for co-operation with developed countries in addressing these challenges

Weaknesses

- Dependent upon the acceptance and implementation of the Fish Stocks Agreement and the FAO Code of Conduct by Member States to give its provisions meaning
- Essentially an information sharing agreement; enforcement still depends on effective implementation at the domestic level; there is no provision for actual enforcement at the international level
- Scope of the Agreement is limited to fishing on the high seas

FAO International Code of Conduct for Responsible Fisheries (1995)[28]

Entry into Force: Adopted at the 28th Session of the FAO Conference in October 1995. The Code is voluntary. There is no formal ratification process; implementation is through adoption into national laws or regional agreements. The Code is open to all OECS countries to implement at their discretion.

Executive Summary[29]

The FAO International Code of Conduct for Responsible Fisheries (the Code) is not a legally binding document. At the same time, it is based on international law, including the UN Convention on the Law of the Sea (1982). Its overall objective is to establish principles for responsible fishing and fisheries activities. It strives to do this by helping to improve national, regional and international legal frameworks, research, and by promoting general co-operation in the conservation of fisheries resources and fisheries management and development.

The Code recognises the special circumstances of developing countries, particularly the least developed countries and small island States. States are encouraged to take measures to meet the needs of these countries through financial assistance, technology transfer, training, and scientific co-operation.

The objectives of the Code are built around the concepts of maximum sustainable yield, regional and international co-operation in management and co-operation, and consistency and fairness in the impact of fishing management and conservation measures. There are also specific references to biodiversity, endangered species, and the precautionary approach, suggesting a balance between human needs and protection of non-commercial components of ecosystems.

Structure

The Code consists of 12 articles and two annexes. Articles 1 to 4 are introductory and set out the general objectives of the Code. Article 5 deals with special needs of developing countries. The remainder of the Code details specific objectives and proposes actions and policies to achieve those objectives.

General principles of responsible fisheries are set out in Article 6. Article 7 deals with several specific fisheries management issues. Fishing operations are addressed in Article 8.[30] Article 9 deals with aquaculture development.[31] This is followed by a section on coastal zone management,[32] post-harvest practices and trade, and fisheries research issues. Annex I provides an overview of the background to

[28] At <http://www.fao.org/WAICENT/FAOINFO/FISHERY/agreem/codecond/ficonde.asp> (accessed: 5 May 2001).

[29] The Fish Stocks Agreement (see above, p. 12), the Compliance Agreement (see above, p. 17), and the Code are intended to work together to provide a comprehensive international response to fisheries conservation and management. The Fish Stocks Agreement and the Compliance Agreement focus on the high seas fisheries and include binding obligations. The Code is more comprehensive in scope, addressing issues ranging from aquaculture and coastal management to high seas fishing. Although it is more comprehensive, it is not a legally binding document.

[30] See also technical guidelines on fishing operations below, p. 23.

[31] See also technical guidelines on aquaculture development below, p. 24.

[32] See also technical guidelines on Integration of fisheries into coastal area management below, p. 23.

the Code and its development. Annex II includes the resolution by which the Code was formally adopted.

Obligations

Strictly speaking, the Code does not impose any obligations, as it is a voluntary instrument that imposes obligations only to the extent that the Code is otherwise incorporated into international or national laws. To operate in a manner consistent with the Code, States will have to abide by applicable international agreements, including the UN Law of the Sea Convention and the Compliance Agreement (see above, p. 17). The Code specifically incorporates several relevant obligations from these international instruments. As a result, the Code is directed at all States, whether or not they have ratified the relevant international agreements or are members of the FAO. At the same time, the Code is to be interpreted to be consistent with existing international agreements. Article 6 of the Code proposes the following general obligations on States:

- conserve aquatic ecosystems, fish in a responsible manner
- fisheries management aimed at maintaining the quality, diversity and availability of fishery resources
- prevent overfishing and exceeding fishing capacity
- rehabilitate depleted populations
- base conservation and management on best scientific evidence and traditional knowledge
- collect, and keep data, records, and other information on fishing activity
- take a precautionary approach[33]
- use selective and environmentally safe fishing gear
- protect and rehabilitate fisheries habitats
- ensure trade is consistent with WTO rules
- participate in regional fisheries management organisations to ensure responsible fishing and effective conservation

Articles 6.11 and 8.2 identify the following proposed obligations for Flag States:

- take measures to ensure effective control over vessels that fly their flags
- co-operate with (or participate in) regional fisheries management organisations to ensure responsible fishing and effective conservation
- take measures to ensure that only vessels so authorised engage in fishing activity
- maintain records on vessels entitled to fly their flag

Article 8l.3 proposes the following duties for Port States:

- assist other States in achieving the objectives of the Code
- assist, on request, with enforcement and other responses to non-compliance

Protocols, Guidelines, or other Attachments or Agreements

There are several guidelines that have been issued under the Code to offer specific direction on how to conduct fisheries management and conservation in a sustainable manner. The following technical guidelines on the following topics were in existence as of July 2001[34]:

[33] Articles 6.5 and 7.5.

Fishing Operations (with Suppl.1, Vessel Monitoring System[35])

These technical guidelines ensure fishing operations operate in compliance with international law. They identify specific activities for implementation of the general principles set out in several international agreements and in the Code.

These guidelines, for example, list the powers to be given to fisheries protection officers and the conditions to be included in the fisheries authorisation issued by a Flag State. They list the components of an effective monitoring, compliance and enforcement system for Member States, deal with the role of education and training, and address vessel safety issues. The guidelines also list records of vessels to be kept by Flag States and propose links between the vessel registry and the fishing authorisation records. Vessel maintenance, navigational logs and position reporting provisions are also included.

Precautionary Approach to Capture Fisheries and Species Introductions

These guidelines propose a definition of the precautionary approach in the context of the fisheries. They contain detailed guidance on how to conduct fishery management, research and how to select fishery technology in a manner consistent with this approach, consider precaution in the context of species introductions.

With respect to fisheries management generally, the guidelines propose the establishment of a legal or social management framework for all fisheries. This includes controlled access to the fisheries, reporting requirements, the establishment of management objectives and targets, and adjustment procedures to ensure objectives are met. The Guidelines also include evaluation, monitoring, and enforcement procedures consistent with a precautionary approach to fisheries management.

The Guidelines consider precaution in the specific context of new fisheries, over-utilised fisheries, traditional fisheries, and fully-utilised fisheries. A precautionary approach to the introduction of new species is also proposed, involving prevention of unintentional introductions and the avoidance of harmful impacts of intentional introductions.

Integration of Fisheries into Coastal Area Management

This set of Guidelines explores the connection between coastal area management and fisheries, including aquaculture, near shore fisheries, and other fisheries with links to the coastal zone. The Guidelines identify possible impacts of the fisheries on the coastal zone and other activities in the coastal area that may have an impact on fisheries. The guidelines call for involving representatives of the fishing industry in integrated coastal area management planning.

The Guidelines propose several indicators to be monitored to ensure that fisheries management is integrated into coastal zone management, including physical, biological, chemical, economic and social parameters.

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[34] See <http://www.fao.org/fi/agreem/codecond/codecon.asp> (accessed: 23 March 2001).
[35] The text of the supplement was not available at the time of publication of this document.

Fisheries Management

The technical guidelines on fisheries management relate to Articles 7 and 12 of the Code. They introduce the concept of fisheries management and outline activities that are considered to be consistent with that concept. Specific measures discussed range from gear restrictions to catch limitation and regulation of access to fisheries.[36]

These guidelines consider the following elements of fisheries management:

- setting policies and objectives for each fishery
- determining and implementing actions required to meet the objectives, including development of a management plan for each managed stock
- including users and other interested groups in the process
- reviewing and revising management objectives regularly
- reporting regularly on the state of the resource and management objectives

Implementation is left to management authorities, which could be national or international bodies, government or non-governmental, as long as they are given the authority by the Member State to implement the Code. The fisheries management process is considered from a resource, technological, social and economic, and, finally, an institutional perspective.

The collection and validation of data is central to fisheries management. A significant part of these guidelines is devoted to suggestions on what data should be collected, how it may be gathered, and what steps might be taken to validate the information gathered so that management measures are based on the best available information.

Aquaculture Development

This set of guidelines provides an annotation to Article 9 of the Code dealing with aquaculture development. The guidelines are intended to offer assistance to Member States and entities involved in the industry on how to ensure that aquaculture development is ecologically sustainable, respects existing access and uses by local communities, and is generally carried out in harmony with potentially competing uses.

Recommendations for addressing aquaculture development responsibly include the following:

- It is considered essential for States to develop a legal framework for the regulation and management of the aquaculture development within their jurisdiction
- The development of a code of aquaculture practice as a complement to the legal framework is proposed to serve a regulatory and educational function
- Predetermined standards based on the precautionary approach are recommended to determine what level of impact from aquaculture development is acceptable
- States are encouraged to conduct an aquaculture sector study to form the basis for the development of a legal, regulatory and management framework
- Regional co-operation is encouraged while recognising the diversity of the industry
- Special consideration should be given to issues related to genetically modified organisms and invasive species

[36] A new supplement has been issued under this guideline dealing with the conservation and management of sharks. The text of the supplement was not available at the time of publication of this document.

Inland Fisheries

This set of guidelines explores the unique challenges associated with inland fisheries, particularly in the context of rivers and lakes. In the case of international river or lake systems, States are encouraged to co-operate in the development of international management authorities. Management of inland fisheries should include all groups that have a legitimate interest in the fishery or representatives from other activities that could impact on the fisheries. Management authorities should establish management objectives for each fishery and address monitoring, surveillance, control, and enforcement. The importance of data collection and validation is also highlighted.

Responsible Fish Utilisation

The text of these guidelines was not available at the time of publication. The document should be available shortly on the FAO website.

Indicators for Sustainable Development of Marine Capture Fisheries

This set of guidelines advocates a holistic approach to fisheries management. They advocate the use of indicators and reference points to monitor and manage fisheries. The guidelines further outline the process to be followed to establish a Sustainable Development Reference System (SDRS) as a way to measure whether and how the implementation of the various recommendations in the Code and the technical guidelines are leading to sustainable development.

Costs of Implementation[37]

The Code is voluntary and, as such, does not include binding obligations. As such, there are no direct costs associated with formal implementation. States are free to identify measures and policies that are cost effective or otherwise in the best interest of the State or the region. The Code also recognises the special needs of developing countries. It provides opportunities for developing countries to seek the assistance of other States and international organisations to ensure resource limitations do not hinder the implementation by developing countries. Reference should also be made to provision for assistance in the Fish Stocks Agreement and the Compliance Agreement.[38]

Strengths and Weaknesses

Strengths

- Promotes sustainable fisheries practices on a global level and in a comprehensive manner
- Provides an opportunity to reach States that have not ratified specific international instruments
- Adopts strong general principles, including the precautionary approach
- Focuses on conservation rather than protection and promotion of individual State rights and interests

[37] For more information on costs and benefits to OECS countries, see the FAO website on small island States at <http://www.fao.org/SIDS/docs-e.htm> (accessed: 23 March 2001).
[38] Supra note 17 and Articles 6.11 and 8.2 of the Code.

Weaknesses

- Voluntary, non-binding
- No direct enforcement opportunity[39]
- Not very specific, detail left to technical guidelines[40]
- Does not resolve tensions between principles, such as the principles of precaution and consistency with WTO trade rules.

[39] Enforcement can only take place through binding international agreements such as the UN Law of the Sea Convention (1982) and the Compliance Agreement.
[40] Several technical guidelines have since been developed, see "Protocols, Guidelines, or other Attachments or Agreements", above.

Castries Declaration On Driftnet and Harmful Fishing Methods[41]

Entry into Force: The Declaration was issued by the Prime Ministers and Deputy Prime Ministers of the Organisation of the Eastern Caribbean States (OECS) in November 1989 at Castries, St. Lucia. There is no formal adoption process provided for in the Declaration.

Executive Summary

The Declaration commits Member States to establish a sub-regional regime for pelagic fisheries that specifically outlaws the use of drift nets and other disruptive fishing methods by commercial vessels. Member States agree to take all possible measures to prevent the use of indiscriminate fishing methods within their exclusive economic zone and to seek the co-operation of other States to restrict drift net fishing.

Structure

The Declaration consists of a preamble and four paragraphs of substantive text. The preamble outlines the background leading to the Declaration, including the importance of marine fisheries to OECS Member States, and the threat from foreign fishing generally, and from the use of indiscriminate fishing gear more specifically. The preamble sets the legal context by making reference to the UN Law of the Sea Convention (1982).

Obligations

- Seeks to outlaw use of drift nets and "other disruptive fishing methods" within the sub-region by commercial vessels
- Calls on other States to restrict drift net fishing
- Calls on Member States to take all possible measures to prevent the use of indiscriminate fishing methods
- Calls on Member States to take all action possible to contribute to the global restriction of harmful fishing methods

Costs of Implementation

The main obligations under the Declaration with possible cost implications are the restriction on drift net fishing and other indiscriminate fishing practices. This is mainly a cost of education and compliance. Together the Fish Stock Agreement, the Code and the Compliance Agreement have taken on the essence of this Declaration. As a result, there should not be any additional costs to implementing this Declaration.

Strengths and Weaknesses

Strengths

- Regional commitment to restrict harmful fishing methods

[41] The Castries Declaration on the Use of Drift Nets and Other Unselective Fishing Gear, Castries, November 24, 1989. Reprinted in Winston Anderson, *Caribbean Instruments on International Law* (Barbados: Winston Stone Publications, 1994), pp. 506–7.

- Commitment to establish regime for sub-regional co-operation

Weaknesses

- No specific binding commitments
- Does not define "indiscriminate fishing methods" or "disruptive fishing methods"
- Superseded by developments at the international level, e.g., the Code of Conduct for Responsible Fisheries[42]
- Does not address how general commitments are to be implemented

[42] See above, p. 21.

2. Environmental Agreements/Documents

A. Nature Conservation and Biodiversity

Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (1940)[43]

Entry into Force: 30 April 1942. The Convention was open for signature at the Pan American Union in October 1940. The Convention has 22 Parties.

Status of Convention Among OECS Member States: No OECS Member State is Party to this Convention. Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines are Members of the Organisation of American States (which assumed responsibilities of the Pan American Union) and are eligible for membership to the Convention. Since membership is restricted to "the American Governments" (Art. 11), Anguilla, the British Virgin Islands and Montserrat, as overseas territories of the United Kingdom, are ineligible for membership.

Executive Summary

The Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (Western Hemisphere Convention) is one of the earliest multilateral agreements concerning wildlife preservation. Drafted by the Governments of the American Republics, it is the primary convention for protection of wildlife in the Western Hemisphere. It also deals with habitat and flora protection. The Convention is the first nature protection convention to be based on the principle of protection of all species and to explicitly name other than economic values alone as the foundation for that protection.

The objective of the Convention is to preserve all species and genera of native American fauna and flora from extinction, and to preserve areas of extraordinary beauty, striking geological formations or aesthetic, historic or scientific value. Article 8 calls for the development of an "Annex" which identifies species whose protection is "of special urgency and importance" and obliges the Parties to protect these species "as completely as possible". The Convention also includes provisions regarding the establishment of four categories of protected areas and more general provisions related to habitat protection.

The Secretariat of the Organisation of American States (OAS) in Washington, D.C. serves as depositary and Convention secretariat. The OAS has convened several regional meetings on environmental protection. Although an OAS Working Group report recommended the establishment of a comprehensive environmental programme of action for the region, including further measures to implement the Western Hemisphere Convention, very little has been achieved to this end.

Structure

The Convention is comprised of 12 articles; the "Annex" of protected species was generated after the Convention was negotiated.

[43] T.S. 981, Bevans 630, 161UNTS 193. Online at: <http://sedac.ciesin.org/pidb/texts/wildlife.western.hemisphere.1940.htm> (accessed: 16 March 2001).

Obligations

- Protected Areas
- Species Protection
- Controls on Trade of Protected Species
- Scientific Research Co-operation

Protected Areas

Article 1 of the Western Hemisphere Convention describes four categories of protected areas:

1. National parks – areas established for the protection and protection of superlative scenery and flora and fauna of national significance which are open to the general public
2. National reserves – regions established for conservation and utilisation of natural resources under government control
3. Nature monuments – regions, objects or living species of flora and fauna of aesthetic, historic or scientific interest to which strict protection is given (may be closed to the general public)
4. Strict wilderness reserves – regions under public control characterised by primitive conditions of fauna and flora, transportation and habitation wherein there is no provision for the passage of motorised transportation and all commercial development is excluded

Various limits are placed on each of these categories. For example, Article 3 forbids hunting, killing and capturing fauna and the destruction or collection of flora in national parks except by or under the direction or control of park authorities or for authorised scientific purposes. The article also obliges Parties to provide facilities for public recreation and education in national parks. National reserves can include an element of economic utilisation.[44] Article 4 establishes the terms under which strict wilderness reserves remain inviolate.

Article 2(1) obliges Parties to explore "at once" the possibility of establishing each of these categories of protected areas. Where such establishment is feasible, the protected area should be created as soon as possible (Art. 2(2)). If creation of the protected area is "impractical", suitable areas, objects or living species of flora and fauna should be selected to be transformed into the appropriate protected area when circumstances permit (Art. 2(3)).

The Convention also provides a general provision for habitat protection of flora and fauna outside of protected areas (Art. 5(1)). However, this provision is not further elaborated in the Convention.

Article 5(2) obliges Parties to adopt or to recommend that their respective legislatures adopt, laws which will assure the protection and preservation of the natural scenery, striking geological formations and regions and natural objects of aesthetic interest, historic or scientific value.

Species Protection

As a matter of principle, the Western Hemisphere Convention protects all species within the area covered by the Convention. Article 8 provides that species included in the Annex shall be protected "as completely as possible" and that the hunting, killing, capturing or taking thereof shall only be

[44] P. van Heijnsbergen, *International Legal Protection of Wild Fauna and Flora* (Amsterdam: IOS Press, 1997) at 175–76.

allowed with the permission of the appropriate government authorities. Such permission would only be granted "under special circumstances" in order to further scientific purposes or if essential for the administration of the area in which the animal or plant is found.

There are, however, problems with the listing of species in the Annex. The Annex is *not* a single comprehensive list of species agreed to the Parties; rather it is a compilation of lists. In 1944, the Parties were asked to draw up a list of species they considered in need of protection in their own territories; no common criteria were established for choosing species to put on the list nor is there any requirement for specific data on the conservation status of those species. Article 8 merely provides that protection of species in the Annex be of "special urgency and importance". States are only bound to protect the species on their national lists, which can be altered unilaterally. The 1980 report of the Technical Meeting on Legal Aspects of the Convention recommended updating the list of protected species.[45]

The Western Hemisphere Convention is the first multilateral agreement that obliges Parties to adopt appropriate measures for the protection of migratory birds.[46] Article 7 restricts its applicability to "migratory birds of economic and aesthetic value" or to those species (i.e., any migratory species) threatened with extinction.[47] This Article also obliges Parties to adopt adequate measures that will permit a rational utilisation of migratory birds for the purpose of sport, food, commerce and industry, and for scientific study and investigation.

Controls on Trade of Protected Species

Parties are obliged to take measures to control and regulate the import, export and transit of protected fauna and flora by issuing export or transit certificates and by prohibiting the import or transit of any protected species not accompanied by such a certificate (Art. 9).

Scientific Research Co-operation

Parties have a general obligation to collaborate on scientific research and to make such scientific knowledge available to all Parties through publication (Art. 6).

Costs of Implementation

The Convention does not include specific references to financial obligations or costs of implementation. It predates and does not reflect the current distinctions drawn between countries on the basis of their development and financial resources. Rather, their special circumstances are taken into account within the framework of the OAS and informally between Parties engaged in co-operation on particular matters (e.g., the U.S. Fish and Wildlife Service has secured matching funds from the World Wildlife Fund to carry out specific projects in Latin America).

[45] Cited in van Heijnsbergen, supra note 44, at note 594, p. 104.
[46] The Convention is also the first to define the concept of 'migratory birds'. Article 1 contains a description of terms and defines 'migratory birds' as "Birds of those species, all or some of whose individual members, may at any season cross any of the boundaries between the American Countries."
[47] See van Heijnsbergen, supra note 44 at 130–31, for an interpretation of this Article and its applicability to migratory species (birds and other species).

Strengths and Weaknesses

Strengths

- In its time, its objectives, e.g., conserving habitats to protect species, were visionary
- Cited by officials as a factor inspiring and providing uniform criteria for the establishment of national parks, wilderness reserves and environmental laws

Weaknesses

- Does not specify criteria, nor have the Parties agreed to criteria, for listing species in the Annex
- Does not incorporate the concepts of biodiversity and sustainable development
- No obligations for concerted, co-ordinated action to protect species
- No specific commitments relating to monitoring or reporting
- No mechanisms for ensuring compliance with the Convention's provisions; however, since most Parties are also members of CITES (see below, p. 33), the lack of enforcement is less critical than it otherwise might be
- No mechanism for resolving disputes
- Effectiveness hampered by the lack of an intergovernmental mechanism, technical commission or supporting administrative unit, and lack of periodic specialised conferences; the OAS has been slow to proceed with scientific or administrative mechanisms that support the implementation of the Convention's principles[48]
- Information on the Convention is limited; there is a general lack of awareness about the Convention

[48] Between 1977 and 1979, technical meetings of the OAS compiled a series of reports on implementation of the Convention in the areas of marine mammals, terrestrial ecosystems, migratory animals, the administration of protected areas, and legal aspects. The last report recommended that the OAS should function as a secretarial bureau to the Convention and that a conference of the parties be convened every two years to recommend improvements to the Convention. (The Convention itself does not provide for a Conference of Parties.) The Inter-American Programme of Action for Environmental Protection (AG/RES. 1357 XXV-0/95), adopted on 9 June 1995 by the OAS General Assembly, makes two references to the Western Hemisphere Convention. Resolution 3 notes that the Permanent Council concluded that it would be neither necessary nor expedient to update the Convention, or to adopt a new convention, because existing agreements, notably the Convention on Biological Diversity, would "suffice to ensure progress toward the common goal of conserving and making rational use of our Hemisphere's biological resources." Nonetheless, Resolution 4 recommends that the Permanent Council "consider the usefulness of the Convention as an instrument for inter-American co-operation within the broadest possible context of efforts to evaluate and update the Inter-American Programme of Action for Environmental Protection." At <http://www.oas.org/juridico/English/ga-res95/res-1357.htm> (accessed 23 March 2001).

Convention on International Trade in Endangered Species of Wild Flora and Fauna (1975)[49]

Entry into Force: 1 July 1975, Article 11 amended in Bonn 22 June 1979 and entered into force: 13 April 1987;[50] and Article 21 amended and accepted in Gaborone: 30 April 1983.[51] There are presently 152 Parties.

Status of Convention Among OECS Member States as of 1 July 2001:

Country	Date into Force	Date of Signature	Date of Ratification	Date of Accession
Anguilla				
Antigua and Barbuda	6 October 1997			8 July 1997
British Virgin Islands*	31 October 1976		2 August 1976	
Dominica	2 November 1995			4 August 1995
Grenada	28 November 1999			30 August 1999
Montserrat*	31 October 1976		2 August 1976	
St. Kitts and Nevis	15 May 1994			14 February 1994
St. Lucia	15 March 1983			15 December 1982
St. Vincent and the Grenadines	28 February 1989			30 November 1988

* The United Kingdom specifically included BVI and Montserrat when it ratified the Convention. The dates provided here are for the United Kingdom.

Executive Summary

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a binding international instrument, bans commercial international trade in an agreed list of endangered species and regulates and monitors trade in others that might become endangered.

The preamble of the Convention states that the Contracting States recognise that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come. Parties are conscious of the ever-growing aesthetic, scientific, cultural, recreational and economic value of wild fauna and flora. Parties further recognise that peoples and States are the best protectors of their own wild fauna and flora and

[49] Convention on International Trade in Endangered Species of Wild Flora and Fauna [hereinafter CITES] 993 UNTS 243, 244(E), 272 (F); (1973) 12 *International Legal Materials* 1085, 1088 (text); BTS 101 (1976); 91 RGDIP 713, at <http://www.cites.org/CITES/eng/index.shtml> (accessed 9 March 2001).

[50] Entry into force on varying dates: Antigua and Barbuda: 6 October 1997; Dominica: 2 November 1995; Grenada: 28 November 1999; Montserrat: no information available; St. Kitts and Nevis 15 May 1994; St. Lucia 10 April 1999; and St. Vincent and the Grenadines: 28 February 1989.

[51] Entry into force on varying dates: Antigua and Barbuda: 8 July 1997; Dominica: no information available; Grenada: 30 August 1999; Montserrat: no information available; St. Kitts and Nevis: 30 May 1994; St. Lucia 10 April 1999; St. Vincent and the Grenadines: no information available.

that international co-operation and action is essential for the protection of certain species against over-exploitation through international trade.

The Parties shall not allow trade[52] in specimens[53] of species[54] of wild flora and fauna listed in Appendices I, II and III, including mammals, birds, reptiles, amphibians, fish invertebrates, and plants, except when authorised in accordance with the provisions of the Convention. Trade in specimens of species threatened with extinction found in Appendix I is only permitted in exceptional circumstances and then both an import and export permit from the Parties concerned is required. Trade in less critically endangered species found in Appendices II and III requires only the issuance of an export permit. Appendix IV sets out a model of an export permit to be used by Parties. Where export or re-export is to, or import is from, a State not a Party to CITES, comparable documentation issued by the competent authorities may be accepted by any Party (Art. 10).

CITES creates a structure allowing for continuous negotiations between the Parties to decide a number of issues, including which species should receive protection, what level of protection is necessary, and whether protection of a species can be maintained with some level of economic exploitation.[55] It allows Parties to decide to what extent controlled trade is allowed to encourage sustainability. It further allows Parties the opportunity to create criteria or guidelines for the listing of species. In 1994, the Parties established several criteria based on the precautionary approach.[56]

Initially, the Executive Director of the United Nations Environment Programme (UNEP) provided the Secretariat of CITES.[57] Subsequently, it became independent, and its budget is contributed by the Member Parties. Assisting the Secretariat is Traffic, the Wildlife Trade Monitoring Programme of the World Wildlife Fund for Nature and the World Conservation Union. Traffic co-operates with the Secretariat to ensure that trade in wild plants and animals is not a threat to the conservation of nature.[58]

Structure

The Convention consists of 25 articles and four appendices.

The provisions of the Convention shall not be subject to general reservations (Art. 23(1)). Any Party may enter a specific reservation with regard to:

- any species included in Appendix I, II or III (Arts. 15 and 16); or
- any parts or derivatives specified in relation to a species included in Appendix III (Art. 23(2)).

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[52] Article 1(c) defines "trade" as export, re-export, import and introduction from the sea.
[53] Article 1(b) defines "specimen" as any animal or plant, whether alive or dead, or any recognisable part or derivative of an animal or plant species.
[54] Article 1(a) defines "species" as any species, subspecies, or geographically separate population thereof.
[55] D.S. Favre, "Tension Points Within the Language of the CITES Treaty" (1987) 5 *Boston University International Law Journal* 247 at 248.
[56] See Annex 4, Conf. 9.24, 9th Meeting of the Conference of the Parties, 7-18 November 1994, at <http://www.cites.org/CITES/eng/index.shtml> (accessed: 13 April 2001).
[57] Article 12, paragraph 1, CITES. The functions of the Secretariat are found in Article 12, paragraph 2, subparagraphs (a)-(i), CITES.
[58] See <http://www.traffic.org> (accessed: 18 April 2001).

Until a Party withdraws its specific reservation, it shall be treated as a State not a Party to the Convention with respect to trade in the particular species or parts or derivatives specified in such reservation (Art. 23(3)). For example, Japan has relied on extensive reservations to participate in CITES, entering more reservations for Appendix I species such as sea turtles than any other Party.[59] Other examples include France, West Germany and Italy who have entered reservations with regard to saltwater crocodiles.[60]

Parties may amend Appendices I and II either at or between meetings of the Conference of the Parties (Art. 15(1a-b)). Parties may amend Appendix III at any time by submitting to the Secretariat a list of species identified as being subject to regulation within their jurisdiction, as well as a copy of all domestic laws and regulations applicable to the protection of such species (Art. 16(1 & 4)).

Obligations

- Management and Scientific Authorities
- Regulation of Trade in Specimens of Species in Appendix I
- Regulation of Trade in Specimens of Species in Appendix II
- Regulation of Trade in Specimens of Species in Appendix III
- Penalising Trade in and/or Possession
- Confiscation or Return of Specimens
- Records and Reporting
- Meetings
- Information Sharing

Management and Scientific Authorities

Each Party is required to designate one or more Management Authority competent to grant permits or certificates on behalf of that Party and one or more Scientific Authority to provide scientific assistance (Art. 9(1a-b)). Such authorities are to communicate with other Parties and with the Secretariat to the Depositary (the Government of the Swiss Confederation) (Art. 9(2)).

Regulation of Trade in Specimens of Species in Appendix I

Parties are not allowed to trade in specimens of species included in Appendix I except in accordance with the provisions of Article 2(4) of the Convention. Totalling over 800 species,[61] Appendix I includes all species threatened with extinction which are or may be affected by trade (Art. 2(1)). Such species include various whales (humpback, fin and sperm), some parrots (including the St. Vincent and St. Lucia), all sea turtles, and the West Indian manatee. Trade in specimens of these species is subject to particularly strict regulation in order not to endanger further their survival and must only be authorised in exceptional circumstances (Art. 2(1)). In particular, the trade in any specimen of a species included in Appendix I requires the prior grant of both an export and an import permit.[62] The re-export and/or introduction from the sea of any specimen of a species included in Appendix I requires the prior grant of a certificate from the appropriate Management Authority.[63]

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[59] P. Matthews, "Problems related to the Convention on the International Trade in Endangered Species" (1996) 45 *International and Comparative Law Quarterly* 421 at 429.
[60] *Ibid*. at 429.
[61] See CITES website at <http://www.cites.org/CITES/eng/append/species.shtml> (accessed: 13 April 2001).
[62] Article 3(2 & 3). See Article 6 for permitting process.
[63] Article 3, paragraphs 4 and 5, CITES. See Article 6 for certificate issuance process.

Pursuant to Article 3(2a-d), an export permit shall only be granted when the following conditions have been met:

- a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;
- a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora;
- a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimise the risk of injury, damage to health or cruel treatment; and
- a Management Authority of the State of export is satisfied that an import permit has been granted for the specimen.

Pursuant to Article 3(3a-c), an import permit shall only be granted when the following conditions have been met:

- a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;
- a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
- a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.

Articles 3(4) and 3(5) set out the conditions for issuing certificates for re-export and introduction from the sea of any specimen of a species, respectively. The re-export of any specimen of a species requires the prior grant and presentation of a re-export certificate. The introduction from the sea of any specimen of a species requires the prior grant of a certificate from a Management Authority of the State of introduction.

Regulation of Trade in Specimens of Species in Appendix II

Parties are not allowed to trade in specimens of species included in Appendix II except in accordance with the provisions of Article 2(4) the Convention. Totalling close to 30 000 species,[64] Article 2(2) provides that Appendix II include species that may become threatened with extinction unless trade in specimens is subject to strict regulation as well as other species that must be regulated in order to protect those species that may become threatened with extinction (e.g., look-alike species that are difficult to differentiate such as the bobcat). [65]

Examples of Appendix II flora include all species in the order of black corals and various other corals as well as almost all parakeets and orchids.[66]

Pursuant to Article 4(2), the export of any specimen of a species included in Appendix II requires the prior grant and presentation of only an export permit, provided the first three conditions as outlined above for species included in Appendix I are met.

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[64] Supra note 61.
[65] W.C. Burns, "CITES and the Regulation of International Trade in Endangered Species of Flora: A Critical Appraisal" (1990) 8 *Dickinson Journal of International Law* 203 at 209.
[66] Supra note 61.

The import of any specimen of a species included in Appendix II requires the prior presentation of either an export permit or a re-export certificate (Art. 4(4)). Articles 4(5 & 6) set out the specific conditions, based on those established for Appendix I species, for granting re-export certificates and introduction from the sea certificates respectively.

Regulation of Trade in Specimens of Species in Appendix III

Parties are not allowed to trade in specimens of species included in Appendix III except in accordance with the provisions of Article 2(4) of the Convention. Totalling over 200 species,[67] Appendix III includes all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other Parties in the control of trade, such as the walrus.[68]

As with trade in species listed in Appendices I and II, the export of any specimen of a species included in Appendix III from a State which has included that species in Appendix III requires the prior grant and presentation of an export permit (Art. 5(2a-b)). The import of any Appendix III specimen requires the prior presentation of a certificate of origin and, where the import is from a State which has included that species in Appendix III, an export permit (Art 5(3)). In the case of re-export, a certificate granted by the Management Authority of the State of re-export that the specimen was processed in that State or is being re-exported shall be accepted by the State of import as evidence that the provisions of the Convention have been complied with in respect of the specimen concerned (Art. 5(4)).

Penalising Trade In and/or Possession of Specimens

Parties are required to take appropriate measures to enforce the provisions of the Convention by enacting measures to penalise trade in, and/or possession of, Convention specimens (Art. 8(1a)).

Confiscation or Return of Specimens

Parties are required to enforce the provisions of the Convention by enacting measures to provide for the confiscation or return to the State of export of Convention specimens (Art. 8 1b)). In addition, a Party may provide for any method of internal reimbursement for expenses incurred as a result of the confiscation of a specimen traded in violation of the measures taken pursuant to the Convention (Art. 8(2)).

Records and Reporting Incidences

Each Party is to maintain records of trade in specimens of Convention species containing:

- the names and addresses of exporters and importers
- the number and type of permits and certificates granted; the States with which such trade occurred; the numbers or quantities and types of specimens, names of species traded; and the size and sex of the specimens (Art. 8(6))

Parties must prepare an annual report on its implementation of the Convention as well as a biennial report on legislative, regulatory and administrative measures taken to enforce the provisions of the

[67] Supra note 61.
[68] Article 2(3). See also, D.S. Favre, *International Trade in Endangered Species* (Dordrecht: Martinus Nijhoff, 1989) at 377.

Convention (Art 8(7)). The information provided in the periodic reports is to be available to the public where this is not inconsistent with the law of the Party concerned (Art. 8(8)).

Meetings

Normally, the Secretariat will call a meeting of the Conference of the Parties at least every two years. Pursuant to Article 11(2), regular or extraordinary meetings of the Parties will review implementation of the Convention and may, *inter alia*, consider and adopt amendments to Appendices I and II, and review the progress made towards the restoration and conservation of the species included in Appendices I-III.

Information Sharing

When the Secretariat receives information that any species included in Appendix I or II is being affected adversely by trade in specimens of that species or that the provisions of the Convention are not being effectively implemented, it shall communicate such information to the authorised Management Authority of the Party or Parties concerned (Art. 13(1)). When any Party receives such information, it must inform the Secretariat of any relevant facts and, where appropriate, propose remedial action (Art. 13(2)). Where the Party considers that an inquiry is desirable, such an inquiry may be carried out by one or more persons expressly authorised by the Party, and is reviewed by the next Conference of the Parties (Arts. 13(2 &3)).

Costs of Implementation

Initially, the Secretariat of the Convention was provided by the Executive Director of UNEP; subsequently, it became independent and its budget is contributed by member Parties.[69] The Secretariat helps the Parties by:

- interpretating the provisions of the Convention
- providing advice on its practical implementation
- conducting projects to help to improve the implementation, such as training seminars
- providing assistance in preparing national legislation[70]

Parties must assume the costs of implementation, including those associated with administering the export/import permitting and re-introduction certificate issuing processes.

Strengths and Weaknesses

Strengths

- Requires the designation of a national management authority to grant permits or certificates and a national scientific authority to facilitate information sharing
- Includes dispute resolution provisions for problems regarding interpretation or application of the Convention, including negotiation and/or arbitration by the Permanent Court of Arbitration at The Hague
- Creates a flexible structure allowing for continuous negotiations between the Parties[71]

[69] A. Kiss and D. Shelton, *International Environmental Law (*Ardsley-on- Hudson, NY: Transnational Publishers Inc., 1991) at 261.
[70] At <http://www.cites.org/CITES/eng/index.shtml> (accessed: 13 April 2001).

- Although not allowed to vote, NGOs are welcome to attend, participate and provide much-valued scientific information at the meetings of the Parties[72]
- Fairly effective in protecting wildlife and is often touted as the best wildlife protection treaty to be enacted[73]

Weaknesses

- Lacks an effective enforcement mechanism[74]
- Focuses on controlling trade in endangered species not in addressing other threats to flora and fauna, such as habitat destruction
- Leaves key phrases undefined, including "threatened with extinction", "detrimental to the survival of the species", and "affected by trade"[75]
- Does not encourage the conclusion of regional agreements, for areas or regions where risk of trade of endangered species is high
- Establishes no uniform penalties for violations of trade restrictions
- Does not address problems with internal wildlife trade within countries
- Establishes an exceedingly complex listing approach which is difficult to comprehend and implement

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[71] Supra note 55 at 248.
[72] *Ibid*. at 248.
[73] M.L. Ditkof, "International Trade in Endangered Species Under CITES: Direct Listing vs. Reverse Listing" (1982) 15 *Cornell International Law Journal* 107 at 118–19; Burns, supra note 65 at 223; K. Eldridge, "Whale for Sale? New Developments in the Convention on International Trade in Endangered Species of Wild Fauna and Flora" (1995) 24 *Georgia Journal of International and Comparative Law* 549 at 556–57.
[74] Ditkof, *ibid* at 118.
[75] Matthews, supra note 59 at 421.

Convention on the Conservation of Migratory Species of Wild Animals (1979)

Entry into Force: 1 November 1983. As of 1March 2001, the Convention had 74 Parties and 4 Signatories from Africa, America and the Caribbean, Asia, Europe, and Oceania.

Status Among OECS Member States as of 1 July 2001:

Country	Date into Force	Date of Signature	Date of Ratification	Date of Accession
Anguilla				
Antigua and Barbuda				
British Virgin Islands*	1 October 1985			23 July 1985
Dominica				
Grenada				
Montserrat*	1 October 1985			23 July 1985
St. Kitts and Nevis				
St. Lucia				
St. Vincent and the Grenadines				

* The United Kingdom specifically included BVI and Montserrat in its ratification of the Convention.

Executive Summary

The Convention on the Conservation of Migratory Species of Wild Animals (CMS or Bonn Convention) is the first global conservation convention to be entirely devoted to migratory species, including birds, mammals, reptiles, fish, and insects. CMS aims to conserve migratory[77] species over the whole of their range. The Convention provides a framework within which Parties, focusing on the concept of "Range State", may act to conserve migratory species and their habitats. The Convention lists two categories of threatened species in its Appendices: "endangered" species are listed in Appendix 1 while Appendix II includes species with an "unfavourable conservation status" or those that would "significantly benefit from the international co-operation that could be achieved by an international agreement". The criteria for determining the listing of species are set out in various articles of the Convention. With regard to species included in Appendix I, Parties are obliged to endeavour to conserve that species' habitat. The Convention provides for several measures to implement its provisions.

[76] (1980) 19 *International Legal Materials* 15. See also the CMS website at <http://www.wcmc.org.uk/cms> (accessed: 13 March 2001).

[77] Migratory species are defined in the Convention as "the entire population or any separate part of the population of any species or lower taxion of wild animals, a significant proportion of whose members cyclically or predictably cross one or more national jurisdictional boundaries" (Article 1 (1a); the world "cyclically" relates to a cycle of nature, such as astronomical (annual etc.), life or climatic, and of any frequency; the word "predictably" implies that a phenomenon can be anticipated to recur in a given set of circumstances, though not necessarily in time (see Resolution 2.2 of the Conference of Parties, Geneva, 1988).

CMS is the only global and United Nations based intergovernmental convention established exclusively for the conservation and management of migratory species and includes specially tailored instruments for the sustainable management of migratory species. The Convention on Biodiversity[78] (CBD) includes migratory species in general and the UN Convention on the Law of the Sea[79] covers migratory fish species. However, neither provides for special instruments to carry out conservation work. Article 5 of the CBD and Articles 65 and 120 of Convention on the Law of the Sea call on their Parties to implement co-ordinated, international conservation measures, including sustainable use, for migratory species through existing international legal instruments; appropriate instruments are found in the CMS and regional Agreements concluded under its auspices.

Various decisions of the CBD highlight the role of partnership and stress the importance of partnership between the biodiversity-related global conventions. The Secretariats of CMS and CBD signed a Memorandum of Co-operation in 1996, and both have subsequently passed resolutions to further co-operative efforts and utilise the synergies between the CMS instruments and the CBD.[80] Discussions were scheduled for the CBD March 2001 meetings in Montreal on the possible contents, structure and modalities of implementing a proposed joint work programme which would foster collaboration and propose concrete lines of action for the conservation of migratory species while at the same time avoiding unnecessary duplication of effort and resources. The proposed joint work programme will include matters such as protected areas, monitoring and assessment, indicators, sustainable use, and public education and awareness. To date, CMS and CBD have collaborated on Global Environment Facility-funded ecosystem-oriented projects focusing on migratory species as indicators.[81]

Other global wildlife conventions such as Ramsar,[82] CITES (see above, p. 33) and the World Heritage Convention,[83] have limited overlap with CMS. However, some regional agreements concluded under the auspices of CMS (see below, p. 42) may overlap with such conventions. The CMS Secretariat has signed a memorandum of understanding (MOU) with other convention secretariats (e.g., Ramsar) and has looked for other opportunities to adopt an "integrated approach" in implementing biodiversity-related conventions.

Structure

The Convention is comprised of 20 articles and two appendices. The CMS identifies two categories of threatened species which are set out in Appendix I and II[84] respectively.

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[78] For an analysis of the Convention on Biodiversity in relation to the OECS Member States, see Anderson et al., supra note 3 at 74-79.

[79] For an analysis of the Law of the Sea Convention in relation to the OECS Member States, see *ibid*. at 40-48.

[80] See, for example, L. Glowka, *A Guide to the Complementarities between the Convention on Migratory Species and the Convention on Biological Diversity*, prepared for the UNEP/CMS Secretariat and distributed at the 5th meeting of the Conference of the Parties to the Convention on Biological Diversity, Nairobi, 15-26 May 2000 (UNEP/CBD/COP/5/INF/28, 10 May 2000), at <http://www.wcmc.org.uk/cms/CBD_INF_intro.htm#UNEP/CBD/COP/5/INF/28> (accessed: 28 March 2001).

[81] "CMS and the Convention on Biological Diversity: Forging Synergies and a Joint Work Programme", *CMS Bulletin* No. 12, December 2000, at <http://www.wcmc.org.uk/cms> (accessed: 28 March 2001).

[82] See Anderson et al., supra note 3 at 49–52.

[83] See *ibid*. at 62–7.

[84] Most of the species included in Appendix I are also included in Appendix I of CITES and classed as endangered or vulnerable in the Red List. Some species listed in Appendix I of the CMS are listed under Appendix III of CITES, which contains the less protected species. Some of the species listed in Appendix II of the CMS appear in Appendix I of CITES even though one might assume the CMS Appendix II would *not* contain any threatened species.

Appendix I lists migratory species which, according to the best scientific evidence available, are endangered.[85] Currently the Appendix includes 80 species, *inter alia*, Hawksbill turtle, manatees along the Atlantic coast of Honduras and Panama, Monk seals, and various dolphins and seabirds. Additional migratory species can be listed under Appendix I if a Party considers that they are endangered, and submits a proposal that meets the requirements of Resolution 1.5 (Bonn, 1985). The Conference of Parties (COP) would then decide whether to adopt the listing in accordance with Article 11.

Migratory species can be removed from Appendix I when the COP determines the best scientific evidence available indicates the species is no longer endangered and the species is not likely to become endangered again because of loss of protection due to its removal from the Appendix (Art. 3(3)).

Appendix II lists migratory species that (1) have an unfavourable conservation status[86] that require international Agreements for their conservation and management, and (2) have a conservation status that would significantly benefit from the international co-operation that could be achieved by an international Agreement (Art. 4(1)). Several Agreements have already been concluded regarding species listed in Appendix II: seals in the Wadden Sea (in force 1991), bats in Europe (in force 1994), small cetaceans in the Baltic and North Seas (in force 1994), African-Eurasian migratory waterfowl (in force 1999), small cetaceans in the Black Sea, Mediterranean Sea and adjacent Atlantic (open for signature in 1996) and albatrosses and petrels (not yet in force, draft concluded February 2001). Memorandums of Understanding (MOUs) have been concluded on the conservation of marine turtles (Atlantic coast of Africa, 1999 and Indian Ocean and Southeast Asia, 2000), the Siberian Crane (in force 1993), the Slender-billed Curlew (in force 1994), and the Great Bustard (not yet in force).

Obligations

- Adoption of Protection Measures
- Agreements for Conservation and Management of Migratory Species
- Joint Research and Monitoring

Adoption of Protection Measures

Species listed in Appendix I are subject to specific protection measures. Article 4 obliges Range States[87] to prohibit the taking (i.e. hunting, fishing, capturing, harassing and deliberate killing, Article 1, paragraph 1 of animals of Appendix I species, with few exceptions (Art. 3(5)), including a specific reference to traditional subsistence users of such species.

[85] Article 3(2). Article 1 defines "endangered" in relation to a particular migratory species to mean that the species is in danger of extinction throughout all or a significant portion of its range.
[86] Conservation status refers to all the influences upon a migratory species affecting its long-term distribution (Article 1(1b)). Article 1 determines that conservation status is "unfavourable" if one or more of the conditions outlined in paragraph 1c are not met. Unfavourable conservation status may cover a whole range of situations which are unfavourable for the species but which fall outside of the meaning of the terms endangered, vulnerable or rare in the sense of the CITES Red List. See van Heijnsbergen, supra note 44 at 113.
[87] "Range State" in relation to a particular migratory species means any State or any regional economic integration organisation that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species (Article 1(k)).

Parties are obliged to protect Appendix I species in accordance with Article 3. Range States are obliged to "endeavour" to conserve and restore habitats of Appendix I species (Art. 3(4a)), to counteract factors impeding their migration species (Art. 3 (4b)) and to control other factors that might endanger those species (Art. 3 (4c)). Parties are obliged to adapt national legislation and enforcement measures for those Appendix I species to which the Party is a Range State and to adopt CMS requirements in national programmes and projects.

Agreements for Conservation and Management of Migratory Species

CMS provides for the development of specialised regional Agreements for individual species or, more often, for a group of species listed under Appendix II. Until such Agreements are concluded, species listed in this Appendix (and their habitats) are not provided with any direct protection under this Convention.

Agreements are readily adaptable to regional needs, as they can be tailored to suit different taxonomic groups and regional variations. They are intended to cover the entire range of the species for which conservation action is needed. In this respect, CMS is a framework Convention since it provides for separate internationally legally binding instruments between Range States of certain migratory species or groups of species. Pursuant to Article 5(5), Parties to such Agreements do not have to be Parties to the parent Convention.

The Convention requires Parties within whose territories such migratory species occur to conclude "Agreements" pursuant to Article 4(3) or "agreements" pursuant to Article 4(4).[88] Agreements can range from legally binding multilateral treaties to less binding international instruments such as memoranda of understanding. The object of each Agreement is to restore the migratory species to a favourable conservation status or to maintain it in such a status (Art. 5(1)). If the circumstances are warranted, a migratory species can be listed in both Appendix I and II (Art. 4(2)). To the extent that a Party is a Range State for the species concerned, active participation in the development, conclusion and implementation of regional Agreements will require that the Party adopt appropriate legal and enforcement measures to protect the concerned species.

Article 5 sets out the guidelines for Agreements. Article 5(5) suggests measures an Agreement might include, *inter alia*,

- periodic review of the conservation status of the migratory species concerned and identification of factors that might be harmful to that status
- co-ordinated conservation and management plans
- research and exchange of information
- conservation and, where necessary and feasible, restoration of habitat
- maintenance of a network of suitable habitats in relation to the migration routes

[88] Article 5 defines the more formal and comprehensive "Agreement" as, *inter alia*, dealing preferably with more than one species (paragraph 2), covering the whole range of the species concerned (paragraph 2), and including all instruments necessary to operationalise and make effective the Agreement (paragraphs 4 and 5) (e.g., co-ordinated species conservation and management plans, conservation and restoration of habitats, control factors impeding migration, co-operative research and monitoring, and exchange of information and public education). Article 4(4) provides for more flexible "agreements" for the development and conclusion of targeted treaties where geographic coverage does not have to extend to the whole of the migration range of the species concerned, nor does the species have to be listed in Appendix II of the Convention; or for that matter even fall within the narrow definition of "migratory". See Resolutions 2.6 and 3.5 of the COP (Geneva, 1988 and 1991) for more information about the interpretation of "agreements" and "Agreements".

- provision of new habitats favourable to the migratory species, or reintroduction of migratory species into favourable habitats
- elimination of or compensation for activities or obstacles which hinder or impede migration
- prevention, reduction or control of the release into the migratory species' habitat of substances harmful to that habitat
- procedures to co-ordinate action to suppress illegal taking of migratory species

A MOU may be converted into a more formal Agreement if the members agree, or incorporated as an Action (or Conservation) Plan in a broader and more comprehensive Agreement. The aim of a MOU is to co-ordinate short-term measures to be taken by the Range States at the administrative and scientific levels, in some cases on the basis of already existing commitments. The conclusion of a MOU (avoiding a lengthy ratification process) permits the initiation of immediate concerted protection measures for seriously endangered species until a more elaborate conservation strategy can be prepared and adopted. Such an MOU would describe the actions to be taken collectively and more specific measures to be implemented in each country.[89] Resolution 2.6 (Geneva, 1988), paragraph 3, specifically provides for MOUs and, for the time being, these are directed towards immediate protection measures for endangered species.

Joint Research and Monitoring

Article 2 declares "The Parties acknowledge the importance of migratory species being conserved and of Range States agreeing to take action to this end whenever possible and appropriate … In particular, the Parties should promote co-operation and support research relating to migratory species."

In order to report on implementation of the Convention, Parties are obliged to keep the Secretariat informed with regard to which migratory species listed in Appendices I and II they consider themselves to be Range States (Art. 6(2)). Parties that are Range States for Appendices I and II species should inform the Conference of Parties through the Secretariat of measures taken to implement the provisions of the Convention for these species (Art. 6(3)).

Any Party to the Convention may appoint a qualified expert as a member of the Scientific Council (Art. 8(2)). In 1985, the COP established the composition and functions of the Council as meant by Article 8. It was decided that the number of members of the Scientific Council would not exceed eight. The Council works mainly in small groups, dealing with particular problems. The full Council normally meets only in connection with a COP.[90]

Where appropriate, the CMS Secretariat co-operates with specialised non-governmental organisations (NGOs) to assist in the implementation of the Convention and related Agreements, to conduct research and to undertake projects. The CMS has signed MOUs with specialised NGOs to establish a framework for further co-operation.

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[89] For example, the African States bordering coast of the Atlantic have concluded a MOU concerning conservation measures for marine turtles (1999). The MOU provides, *inter alia*, for States to put in place conservation and protection measures for marine turtles at all stages of their life, to enhance the legal protection given to the species (i.e., review and revise where necessary national legislation and ratify or accede to relevant international conventions), implement the Conservation Plan which aims to improve basic knowledge of species and migration routes, reduce mortality, enhance co-operation among Range States, and secure funding for the initiation or continuation of conservation programmes. Protection measures include beaches and key habitats. The Plan also calls for the eventual preparation of national marine turtle action plans that take into account the needs of local human populations.

[90] CMS/Res.1.4, cited in note 1042, van Heijnsbergen, supra note 44 at 223.

Costs of Implementation

Implementation of the Convention and Agreements a country is Party to will incur costs in relation to:

- protection of endangered species (as listed in Appendix I) through legislation and enforcement
- appropriate conservation measures for species with unfavourable conservation status (Agreements for Appendix II species)
- governmental, scientific and enforcement personnel capacity

Parties will also incur costs related to representation in meetings of the COP and Scientific Council and co-operation with other Parties and organisations to enhance the conservation of the species concerned.

Although the Convention does not distinguish between developed and developing countries, the COP adopted a separate resolution that asked Parties to promote financial, technical and training assistance in support of the conservation efforts made by developing countries.[91] Parties contribute to the cost of the whole Convention on the basis of the United Nations scale of assessment.[92] A 'trust fund' under the auspices of the United Nations Environment Programme has been established for implementation of this Convention. Trust funds are expected to cover the international costs of administering and implementing specific treaty regimes, including secretariat and meeting costs. In addition to using the existing trust fund to cover the costs of participation of developing countries in expert meetings, the 1991 COP agreed to earmark a sum equivalent to ten percent of the regular budget for technical assistance.[93]

Strengths and Weaknesses

Strengths

- The only global and United Nations based intergovernmental convention established exclusively for the conservation and management of migratory species
- Encourages activities for the sustainable management of migratory species *within* a country
- Does not prohibit the sustainable use of non-endangered species; nonetheless its provisions will help ensure the sustainable use of migratory species shared with other countries in the region
- Listing of a particular population of a species in Appendix I creates obligations in Range States where the need is greatest without necessarily requiring the same stringent measures to be enacted in other Range States where the species population is healthy
- Implementation of the Convention and Agreements already in force show encouraging results; its membership continues to grow
- Conclusion of an Agreement or MOU can be a quick and effective method of protecting a species
- Financial assistance available for projects and participation by developing countries
- Progress has been made in linking the implementation of CMS and Agreements with other biodiversity-related conventions in an "integrated approach"

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[91] Supra note 44 at 223.
[92] ST/ADM/SER.B/275, as cited *ibid* at 224.
[93] Peter H. Sand, *Transnational Environmental Law: Lessons in Global Change* (The Hague: Kluwer Law International, 1999) at 273.

- Co-operative research, monitoring and conservation actions increase efficiency and are more cost effective than individual measures in Range States

Weaknesses

- Not a politically high-ranked convention
- The limited number of State parties hinders global effectiveness yet mutual co-operation and as large a geographic coverage as possible are vital to protection of migratory species
- To date, agreements concluded under the CMS reflect the strong record of accession by European and African States to the Convention and the weak record of accession by States in the Caribbean and Americas
- Migratory species not included in the Appendices are given little attention under the Convention
- On a global scale, migratory species are only benefiting from isolated conservation measures in various countries

UN Convention to Combat Desertification in those Countries Experiencing Drought and/or Desertification, Particularly in Africa (1995)[94]

Entry into Force: 26 December 1996. Adopted in June 1994, the Convention received 115 signatures between October 1994 – October 1995. As of 1 April 2001, 174 States have signed or ratified the Convention.

Status Among OECS Member States as of 1 July 2001:

Country	Date into Force	Date of Signature	Date of Ratification	Date of Accession
Anguilla				
Antigua and Barbuda		4 April 1995	6 June 1997	
British Virgin Islands	16 January 1997			18 October 1996
Dominica				8 December 1997
Grenada				28 May 1997
Montserrat	16 January 1997			24 December 1996
St. Kitts and Nevis				30 June 1997
St. Lucia				2 July 1997
St. Vincent and the Grenadines		15 October 1994	16 March 1998	

Executive Summary

Following identification of desertification as a top priority by developing countries at UNCED, the United Nations adopted a resolution calling for the establishment of the Intergovernmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification in those countries experiencing serious drought and/or desertification, particularly in Africa. Over the course of five sessions, representatives of 90 countries drafted the Desertification Convention which was opened for signature on 15 October 1994.

The Convention defines desertification as "land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variations and human activities" (Art. 1(a)). "Desertification" encompasses several forms of biological degradation occurring in "drylands", areas that are marked by low annual precipitation and, consequently, are ecologically fragile.[95] The most frequently cited causes of desertification are: overgrazing, overcultivation, deforestation and poor irrigation practices.[96] Desertification is largely a socio-economic phenomenon through which a range

[94] UN Doc. A/AC.241/27 (1994); (1994) 33 *International Legal Materials* 1328.
[95] Article 1(g) defines these arid, semi-arid and dry sub-humid areas as "areas, other than polar and sub-polar regions, in which the ratio of annual precipitation to potential evapotranspiration falls within the range from 0.05 to 0.65."
[96] W.C. Burns, "The International Convention to Combat Desertification: Drawing a Line in the Sand?" (1995) 16 *Michigan Journal of International Law* at 831.

of local, national and international conditions marginalise people and induce them to overexploit relatively fragile resources.[97]

The Convention seeks to combat desertification through long-term oriented strategies which utilise a holistic approach to dryland management, focusing on both the productivity of the land and adoption of conservation and sustainable management programmes for land and water resources. It calls on Parties to adopt an integrated approach, addressing the physical, biological and socio-economic aspects of the processes of desertification and drought. The Convention establishes obligations for both affected countries and developed countries. It takes a "bottom-up" approach to the reversal and prevention of desertification, seeking to involve local populations in both identifying and undertaking efforts to mitigate the occurrence and impacts of drought and desertification. The Convention also contains provisions on research, technology transfer and financial mechanisms.

The Convention contains regional implementation annexes for Africa, Asia, Latin America and the Caribbean, and the Northern Mediterranean.

Structure

The Desertification Convention is comprised of 40 articles divided into six parts (Introduction; General Provisions; Action Programs, Scientific and Technical Co-operation and Supporting Measures; Institutions; Procedures; and Final Provisions) as well as four specific regional implementation Annexes. Annex III is the Regional Implementation Annex for Latin America and the Caribbean (hereinafter referred to as the Caribbean Annex). The Annexes provide general guidelines for the implementation of the Convention in light of the particular conditions in each region. The Caribbean Annex emphasises the links between desertification and biodiversity loss (Art. 4(j)) as well as the importance of promoting the use of traditional technologies and know-how (Art. 5(c)).

Article 3 sets out the four "principles" of the Convention:

- local participation in planning and implementation of desertification programmes
- improved co-ordination and utilisation of financial and other resources
- enhancement of co-operation among governments, NGOs, and land users to improve understanding of the problem
- recognition of the special needs and vulnerability of affected developing countries

Article 4 sets out several general obligations that all the Parties undertake, including adoption of an integrated approach to combating desertification. The Parties also identify eradication of poverty and improvement of international economic conditions as part of the effort to combat desertification.

Article 5 sets out obligations for affected country Parties. Article 6 summarisation obligations for developed country Parties.

Obligations

The Convention sets out general principals and obligations for Parties as well as specific obligations for affected country Parties related to:

[97] K.W. Danish, "International Environmental Law and the "Bottom-Up" Approach: A Review of the Desertification Convention" (1995) 3 *Global Legal Studies Journal* at 142.

- creation of an enabling environment
- action programmes to combat desertification
- participatory development
- partnership arrangements
- institutional framework

Creation of an Enabling Environment

In pursuing their general obligations under the Convention (Art. 4), Parties are obliged to give priority to combating desertification and mitigating the effects of drought, allocating sufficient resources in accordance with their circumstances and capabilities (Art. 5(a)).

Parties are obliged to create an "enabling environment" to facilitate action to implement the Convention at national and local levels (Art. 5(e)). This requires Parties to strengthen, as appropriate, relevant existing legislation, and where it does not exist, enact new laws and establish long-term policies and action programmes.

Parties must communicate details of their efforts to implement the Convention (Art. 26). To date, for the Caribbean, Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines have submitted their first national implementation reports.[98]

Action Programmes to Combat Desertification

The Convention will be implemented through national action programmes.[99] Development of these programmes will be characterised by:

- the full participation of local communities, particularly women and youth
- co-operation and co-ordination between donors and the affected country
- addressing the underlying causes of desertification, in particular socio-economic factors
- integration of the programme within the national programme for sustainable development and other development programmes
- emphasis on adopting preventive measures
- identification of specific measures to be taken
- identification of the resources available and those still needed
- adaptation of the programme to particular regional circumstances

The Caribbean Annex emphasises the need for link between desertification and sustainable development (Art. 3(1)). Although none of the OESC countries have drafted a national action programme to date, several countries have taken steps towards developing such programmes.[100]

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[98] Available at <http://www.unccd.int> (accessed: 5 March 2001) with the exception of Antigua and Barbuda. The report on *Implementation of the Convention* presented to the 4th Session of the Conference of Parties, Bonn, December 2000 (ICCD/COP(4)/3/Add.2 16 October 2000), reports that Antigua and Barbuda submitted their national report on 8 May 2000, however, it is not available on the UNCCD website. See this report generally for a synthesis of the information contained in the national reports for countries for this region.

[99] See Article 3 of Annex III, Regional Implementation Annex for Latin America and the Caribbean, and Articles 9–11 of the Convention for details on action programmes.

[100] See the individual national implementation reports, at <http://www.unccd.int> (accessed: 5 March 2001). Annex II, *Implementation of the Convention*, supra note 98, also lists the national forums/workshops held to date in the region.

National awareness seminars and other activities have encouraged widespread participation by communities, NGOs and other stakeholders in the development of these programmes.

Participatory Development

Action programmes to combat desertification are to originate at the local level and be based on genuine local participation.[101] Active participants would include those most directly involved in the management, use and benefiting from a particular resource. In addition, technical experts, researchers, NGOs, and voluntary associations will bring expertise and skills to the development of such programmes. The Caribbean Annex makes specific reference to the participation of NGOS and local populations in preparing, implementing and evaluating national action programmes (Art. 3(2)).

In addition, Parties recognise the significance of capacity building and the Convention makes specific recommendations for the contents of capacity building programmes including,

- strengthening training and research capacity at the national level
- establishing or strengthening support and extension services
- fostering the use and dissemination of the knowledge of local people in technical co-operation programmes
- providing training and technology in the use of alternative energy sources
- promoting alternative livelihoods
- enhancing public awareness and undertaking public education activities
- undertaking an interdisciplinary review of available capacity and facilities at the local and national levels and the potential for strengthening them (Art. 19)

Partnership Arrangements

Article 14 of the Convention obliges Parties to collaborate with relevant intergovernmental and non-governmental organisation s with a view to maximising the channelling and investment of official development assistance and minimising overlaps and gaps in policy and negotiation and implementation of national action programmes. The Convention recognises the strengths of NGOs, particularly at the community level, and makes specific provisions for them to become active partners in these partnership arrangements (Art. 13(b)).

The Convention and Caribbean Annex make specific provisions with regard to co-operation in information dissemination, use of traditional knowledge and technologies, dissemination and use of available technologies, transfer of technology, and the development of new environmentally sound technologies (Art. 19). The Information Network to Combat Desertification in Latin America and the Caribbean (DESELAC) provides a system of information, co-ordination and communication for actors and observers in the fight against desertification in the region. It is comprised of databases on human, physical, institutional, technical and financial resources; general information and basic official documents for dissemination and information to help in decision making; and infrastructure to carry out co-ordination activities and distance conferencing, primarily through electronic means. It is hoped that DESELAC will soon include national nodules that will facilitate the exchange of information and development of national networks with local nodules. Ninety percent of the countries in the region participate in DESLAC.[102]

[101] Article 3, Article 5(d) and Article 10(2f).
[102] *Implementation of the Convention*, supra note 98, pp. 28-9.

Institutional Arrangements

The Caribbean Annex lists several obligations of Parties in the region, including establishing or strengthening national focal points to co-ordinate action (Art. 7). In addition, Parties are to set up a mechanism to co-ordinate national focal points for the following purposes:

- exchange of information and experience
- co-ordination of activities at the regional and sub-regional levels
- promotion of technical, scientific, technological and financial co-operation
- identification of external co-operation requirements
- follow-up and evaluation of the implementation of action programmes

In March 1998, a Regional Action Programme was established to co-ordinate national efforts. A Regional Co-ordinating Unit for Latin America and the Caribbean was established in the regional headquarters of the United Nations Environment Programme in Mexico City in 1999. In addition to the tasks listed above, the Unit has provided training, managed projects for strengthening co-operation, developed methodologies for monitoring and evaluating land degradation, and promoted the use of Geographic Information Systems at the national level in countries throughout the region.

In addition to the Regional Action Program, several subregions have been identified including one for the small island States of the Caribbean. The States concerned have identified and prioritised transboundary projects. At the Fourth Regional Meeting (Antigua and Barbuda, April 1998), the State Parties requested the preparation of a specific programme for this subregion to cover the following priorities: training, public awareness, a general subregional course on desertification, and an analysis of the desertification process in the islands of the Eastern Caribbean. The Secretariat has submitted the project "Protection of Biodiversity and Prevention of Land Degradation in the Small Insular States of the Caribbean" to the Global Environment Facility (GEF) for funding.[103] At the same time, negotiations are ongoing with the European Union for the formulation and implementation of a specific project on land degradation in the eastern Caribbean.[104]

Costs of Implementation

The Convention emphasises the need to mobilise funding from existing sources (Art. 4(h)) and to rationalise and strengthen the management of resources already allocated to combating desertification (Art. 20(5a)). Developed country Parties have no obligations to provide new and additional funds. The Convention does not establish a new desertification fund, rather it compromises by referring to "financial mechanisms", leaving it to the Conference of Parties to give definition to the favoured mechanisms (Art. 21).

Affected developing countries are to allocate adequate resources in accordance with their circumstances and capabilities.[105] Developed countries are to provide "substantial financial resources and other forms of support", including grants and concessional loans through both bilateral and multilateral channels.[106] They also pledge to seek new and additional funding through the GEF for

[103] *Implementation of the Convention*, supra note 98, p. 25.
[104] Ibid.
[105] Article 5a and Article 20(3). Article 6 of Annex III, Regional Implementation Annex for Latin America and the Caribbean, makes similar general provisions regarding financial resources and mechanisms. Article 7 of the Convention provides that in implementing the Convention, priority shall be given to affected African country Parties.
[106] Article 6(b) and Article 20(2b).

activities to combat desertification which are also relevant to the GEF's four focal areas (biological diversity, stratospheric ozone depletion, climate change, and pollution of international waters) in the context of addressing the issue of land degradation.[107] In addition, developed countries will encourage funding from private sector and non-governmental entities, particularly debt for nature swaps and other innovative means to reduce external debt burdens (Art. 20(2d)). Any Party can voluntarily provide financial resources to affected developing countries over and above these commitments (Art. 20(7)).

The Global Mechanism of the Convention will help promote funding for Convention-related activities and projects.[108] The Mechanism will not raise or administer funds. Instead, it will encourage and assist donors, recipients, development banks, NGOs and others to mobilise funds and to channel them to where they are most needed. It will seek to promote greater co-ordination among existing sources of funding, greater efficiency and effectiveness in the use of funds, and promote access to new and innovative financial resources. The Global Mechanism operates under the authority of the COP, but the International Fund for Agricultural Development (IFAD)[109] hosts it. IFAD has undertaken several project investment programmes in arid and semi-arid zones in the Caribbean region, including projects in Dominica, St. Lucia and St. Vincent and the Grenadines.[110] In addition, IFAD's regional assistance programme includes technical assistance grants to knowledge management and thematic networking initiatives in the region, including a rural credit and micro-enterprise development initiative (*Regional Technical Assistance and Training Programme for Rural Credit Unions in the Windward Islands*, East Caribbean). Other enabling activities in support of implementation of the Convention include training courses, national action programme support, and financial support for regional forums on combating desertification.

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[107] Article 20(2b). In December 1999, GEF has adopted an action plan for enhancing its support for project proposals linking land degradation with the GEF focal areas. The GEF Secretariat has established a new programme management team on land and water that will, among other things, oversee the development of activities related to land degradation. New operational programmes on Integrated Ecosystem Management and the proposed operational programme on the Conservation of Biodiversity Important to Agriculture will address issues related to land degradation. UNEP has initiated several project-related activities and preparatory actions in support of the GEF action plan on land degradation. See GEF Council, *Implementing the Action Plan on Land Degradation*, GEF/C.15/Inf.9, 12 April 2000, for a report on activities to combat land degradation by GEF, UNEP, the World Bank and the UNDP.

[108] Article 21(4–7).

[109] The International Fund for Agricultural Development (IFAD) seeks to contribute effectively to rural poverty alleviation in borrowing countries through agricultural/rural development and natural resources management projects and programmes financed by loans and grants. Its mandate is to combat deforestation, soil degradation and desertification. IFAD mobilises resources and knowledge through strategic alliances with potential beneficiaries governments and other international development agencies as well as with NGOs, civil society and the private sector. IFAD's intervention in Latin America and the Caribbean is focused on natural disaster management/ reconstruction and environmental/natural resources management, with a particular focus on arid and semi-arid zones and fragile ecosystems, and poor and middle-income countries where intrinsic poverty and food insecurity prevail and coexist with environmental degradation. See, *IFAD's Strategy and Intervention Programmes to Combat Desertification and Rural Poverty in Latin America and the Caribbean, Regional Contribution to the Report of the IFAD on Implementation of the Convention*, presented to the Fourth Session of the Desertification Convention COP, Bonn, December 2000, at <http://www.unccd.int/cop/reports/lac/un/2000/ifad-eng.pdf> (accessed 13 April 2001).

[110] *Ibid*. at 4.

Strengths and Weaknesses

Strengths

- The Convention offers an innovative, holistic and participatory approach to combating desertification, confronting the socio-economic factors that underlie the issue[111]
- The regional annexes provide Parties with the opportunity to make specific commitments that address regional priorities in combating desertification
- The national action programmes provide Parties with the opportunity to make specific commitments that address national priorities and interests in combating desertification
- References to local participation are specific throughout the Convention and annexes and identify the land users and land user groups of central importance in combating desertification[112]
- The emphasis on efficiency, popular participation and locally-oriented, small-scale solutions should ensure that available resources are put to good use in addressing immediate problem areas
- The Convention emphasises the role of women in day-to-day land management; the obligation of parties to increase educational opportunities for women could, given the link between level of education and birth rates, help ease population pressures in degraded regions[113]
- Obligations regarding capacity building, public awareness and education, and technology transfer provide rural populations with both information about the causes and cures for desertification and the tools to combat it
- The Convention recognises the dual role of NGOs in combating desertification: as an effective conduit through which the international community can channel resources, information and power to local populations and the NGOs' role as an expert body in both research and implementation[114]

Weaknesses

- Although the Convention recognises the contribution of poverty, international trade and other macroeconomic factors to desertification, none of the Parties are obliged to address them under the terms of the Convention
- As a framework convention, it does not contain any binding commitments for Parties at the national level
- To date, only the African Annex imposes significant substantive obligations[115]
- Donors are not obliged to channel their financial aid to local groups nor is there a financial mechanism put in place to achieve this aim[116]

- There is no clear mechanism established for accessing private and non-governmental financial resources
- The success of the Convention's bottom-up process depends on the compliance of the State Parties with obligations to co-operate with and empower non-State actors; at any given time, the current political atmosphere will affect the level of compliance[117]
- Access to dispute settlement procedures is limited to State Parties[118]

[111] For a discussion of the background to the problem and initial international response (namely the United Nations Conference on Desertification (UNCOD) and the Plan of Action to Combat Desertification (PACD)), see Danish, supra note 97 at 135–148 and Burns, supra note 96 at 849–854. UNCOD and PACD are generally regarded as generating some awareness but little action on addressing of the problem of desertification.
[112] Supra note 97 at 159.
[113] Susan C. Snyder and Wm. Carroll Muffet, "International Protection of the Soil" in Fred L. Morrison and Rüdiger Wolfrum (eds), *International, Regional and National Environmental Law* (The Hague: Kluwer Law International, 2000) at 407.
[114] *Ibid*. at 163.
[115] This might be explained by the fact that no other region has experienced such widespread desertification for as long as Africa, or much experience with failed anti-desertification efforts resulting in the need and opportunity to develop regional concensus solutions. Supra note 113, note 223 at 400.
[116] *Ibid*. at 166.
[117] *Ibid*.
[118] *Ibid*. at 167.

Jakarta Mandate on Marine and Coastal Biological Diversity[119]

Entry into Force: Adopted by the Conference of the Parties to the Convention on Biological Diversity (CBD) 1992 on 14-15 November 1995. The CBD Convention has 180 Parties.

Status of Mandate Among OECS Member States as of 1 July 2001:

Country	Date into Force	Date of Signature	Date of Ratification	Date of Accession
Anguilla				
Antigua and Barbuda	14-15 November 1995	*		
British Virgin Islands	14-15 November 1995	**		
Dominica	14-15 November 1995	*		
Grenada	14-15 November 1995	*		
Montserrat				
St. Kitts and Nevis	14-15 November 1995	*		
St. Lucia	14-15 November 1995	*		
St. Vincent and the Grenadines	14-15 November 1995	*		

*Each of the countries listed above are Contracting Parties to the Convention on Biological Diversity, the framework convention to the Jakarta Mandate. By extension, these countries are also signatories to the Jakarta Mandate.

** The United Kingdom signed the CBD on 12 June 1992 and ratified it on 3 June 1994. It specifically included BVI in its ratification of the CBD. By extension, BVI is also a signatory to the Jakarta Mandate.

Executive Summary

The Jakarta Mandate on Marine and Coastal Biological Diversity (Jakarta Mandate) was developed as a result of the meetings of the Conference of the Parties of the 1992 Convention on Biological Diversity.[120]

In December 1994, at its first meeting, the Conference of the Parties (COP) to the CBD requested its Subsidiary Body on Scientific Technical and Technological Advice (SBSTTA) to advise on scientific, technical and technological aspects of the conservation and sustainable use of marine and coastal biological diversity. The SBSTTA considered this item at its first meeting in September 1995, and produced Recommendation I/8 Scientific, Technical and Technological Aspects of the Conservation and Sustainable Use of Marine and Coastal Biological Diversity.[121] In Recommendation I/8, the SBSTTA recommended that the COP prioritise several issues, including, *inter alia*,

[119] At <http://www.biodiv.org/areas/marine/background.asp> (accessed: 3 April 2001).
[120] Details on the 1992 Convention on Biological Diversity are found in Anderson et al., supra note 3 at 74–9.
[121] At<http://www.biodiv.org/recommendations/default.asp?m=sbstta-01&r=08> (accessed: 3 April 2001).

- integrated marine and coastal area management (including marine and coastal protected areas)
- sustainable use of coastal and marine living resources
- mariculture
- alien species

At its second meeting,14–15 November 1995, COP adopted Decision II/10 Conservation and Sustainable Use of Marine and Coastal Biological Diversity, supporting selected recommendations from the earlier draft and requesting the Executive Secretary of the Convention to provide the SBSTTA with advice and options for recommendations to COP.

At the same meeting, the Ministers participating in the ministerial segment issued the Jakarta Ministerial Statement on the Implementation of the Convention on Biological Diversity. The Statement reaffirmed the critical need for the COP to address the conservation and sustainable use of marine and coastal biological diversity, and urged Parties to initiate immediate action to implement the decisions adopted on this issue.[122] In particular, the Ministers welcomed the declaration of the new global consensus on the importance of marine and coastal biological diversity as the "Jakarta Mandate on Marine and Coastal Biological Diversity".

In May 1998, the fourth meeting of the COP adopted Decision IV/5 on the conservation and sustainable use of marine and coastal biological diversity, including a multi-year programme of work arising from Decision II/10.[123] The decision contains two sections specifically addressing the issue of coral reefs and the special needs and considerations of small island developing States in the implementation of the programme of work.

Drafters of the Jakarta Mandate remarked that current sectoral approaches to the management of marine and coastal resources have generally not proven capable of conserving marine and coastal biological diversity. New models are needed to move planners toward multiple-use, systems-oriented modes of management, based on precautionary approaches and ecosystem management principles. Wide adoption and implementation of integrated marine and coastal area management are necessary for effective conservation and sustainable use of marine and coastal biological diversity.[124]

Structure and Obligations

The Jakarta Mandate identifies and sets out over 50 recommendations for five thematic issues:

- marine and coastal biodiversity - resource management
- sustainable use
- protected areas
- mariculture
- alien species

A sixth thematic area, coral bleaching, has been recently incorporated.

[122] Jakarta Ministerial Statement on the Implementation of the Convention on Biological Diversity Paragraph 14. At <http://www.biodiv.org/areas/ marine/minister.asp> (accessed: 3 April 2001).
[123] At <http://www.biodiv.org/doc/meetings/cop/cop-04/official/cop-04-27-en.pdf> (accessed: 3 April 2001).
[124] See <http://www.biodiv.org/areas/marine/management.asp> (accessed: 4 April 2001).

The recommendations are to be implemented by the Parties at national, sub-regional, regional and global levels.

Marine and Coastal Biodiversity - Resource Management

Parties are encouraged to undertake measures to implement integrated marine and coastal area management (IMCAM). IMCAM is a participatory process for decision-making to prevent, control, or mitigate adverse impacts from human activities in the marine and coastal environment, and to contribute to the restoration of degraded coastal areas. Emphasising community-based management approaches, it involves all stakeholders, including decision-makers in the public and private sectors; resource owners, managers and users; non-governmental organisations; and the general public.[125]

Decision II/10 encourages Parties to promote IMCAM in several ways, including:

- as the framework for addressing impacts of land-based activities on marine and coastal biological diversity
- by carrying out environmental impact assessments of all major coastal and marine development activities
- by addressing socio-economic needs of coastal communities in the planning and implementation of IMCAM[126]

Decision IV/5 sets out the IMCAM programme of work with three operational objectives, to be implemented on national, sub-regional, regional and global levels:

1. To review the existing instruments relevant to IMCAM and their implication for the implementation of the Convention.
2. To promote the development and implementation of IMCAM at the local, national and regional level.
3. To develop guidelines for ecosystem evaluation and assessment, paying attention to the need to identify and select indicators, including social and abiotic indicators, that distinguish between natural and human-induced effects.[127]

Sustainable Use

Pursuant to Decision II/10, Parties are to augment the present mono-species approach to modelling and assessment by an ecosystem process-oriented approach, based on research of ecosystem processes and functions, with an emphasis on identifying ecologically critical processes that consider the spatial dimension of these processes.[128] Parties are encouraged to practice sustainable use management by, *inter alia*,

- basing management decisions on the precautionary approach and the best available and sound scientific knowledge, research and information
- ensuring waste is reduced

[125] At <http://www.biodiv.org/areas/marine/management.asp> (accessed: 4 April 2001).
[126] Paragraph 10(a-h), Recommendation I/8.
[127] Annex to Decision IV/5. At <http://www.biodiv.org/areas/marine/management.asp> and <http://www.biodiv.org/decisions/default.asp?lg=0&m=cop-04&d=05> (accessed: 4 April 2001).
[128] At <http://www.biodiv.org/areas/marine/sustainable.asp> (accessed: 4 April 2001).

- involving local communities, users and indigenous people in the conservation and management of resources[129]

Protected Areas

According to Decision II/10, critical habitats for marine living resources should be an important criterion for the selection of marine and coastal protected areas, within the framework of IMCAM. Conservation measures should emphasise the protection of ecosystem functioning, in addition to protecting specific stocks.[130] Parties are encouraged to, *inter alia*,

- establish or consolidate representative systems of marine and coastal protected areas, based on consideration of biogeography, scale and the objectives of the CBD
- promote research and monitoring of marine and coastal protected areas to assess their value for the conservation and sustainable management of biological diversity[131]

In Decision IV/5, the Parties set out a programme of work on the establishment of protected areas of marine and coastal biological diversity. In particular, the programme of work encourages Parties to:

- facilitate research and monitoring activities related to the value and the effects of marine and coastal protected areas or similarly restricted management areas on sustainable use of marine and coastal living resources
- develop criteria for the establishment of, and for management aspects of, marine and coastal protected areas[132]

Mariculture

Pursuant to the Jakarta Mandate, mariculture on an industrial scale may threaten marine and coastal biological diversity through, for example, wide-scale destruction and degradation of natural habitats, nutrients and antibiotics in mariculture wastes, accidental releases of alien or living modified organisms resulting from modern biotechnology, transmission of diseases to wild stocks, and displacement of local and indigenous communities.[133] In particular, Parties are to, *inter alia*,

- incorporate mariculture into integrated marine and coastal zone management plans
- subject mariculture to prior environmental and social impact assessments and regulations
- minimise the use of chemicals, high nutrient release and freshwater diversion[134]

Decision IV/5 sets out the operational objective of the programme of work on mariculture as being the assessment of the consequences of mariculture for marine and coastal biological diversity and promotion of techniques which minimise adverse impact.[135]

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[129] Paragraph 12(a-g), Recommendation I/8.
[130] At <http://www.biodiv.org/areas/marine/ protected.asp> (accessed: 4 April 2001).
[131] Paragraph 11(a-e), Recommendation I/8.
[132] Annex to Decision IV/5, at <http://www.biodiv.org/decisions/default.asp?lg=0&m=cop-04&d=05 > (accessed: 4 April 2001).
[133] At <http://www.biodiv.org/areas/marine/mariculture.asp> (accessed: 4 April 2001).
[134] Paragraph 15(Ia-g), Recommendation I/8.
[135] Supra note 132.

Alien Species

Alien invasive species represent a serious problem internationally, negatively affecting biological diversity as well as human and animal health and production in agriculture and fisheries.[136] Decision II/10 recognises that the introduction of alien species, products of selective breeding, and living modified organisms resulting from modern biotechnology are a threat to the conservation and sustainable use of marine and coastal biodiversity. Therefore, Parties engaging in any of these activities should use the precautionary approach.[137] Parties are to, *inter alia*,

- prevent, control, or eradicate, where possible, those alien species which threaten ecosystems, habitats or species by implementing international protocols and guidelines
- conduct environmental impact assessments, including risk assessment, prior to the intentional introduction of alien species and consult with neighbouring states before introducing alien species in shared waters[138]

Decision IV/5 establishes three operational objectives for the programme of work on alien species and genotypes:

1. To achieve better understanding of the causes of the introduction of alien species and genotypes and the impact of such introductions on biological diversity.
2. To identify gaps in existing or proposed legal instruments, guidelines and procedures to counteract the introduction of and the adverse effects exerted by alien species and genotypes.
3. To establish an "incident list" on introduction of alien species and genotypes through the national reporting process or any other appropriate means.[139]

Consider Future Recommendations regarding Coral Bleaching

In section 2 of Decision IV/5, the Conference of the Parties recognised the potentially severe loss of biological diversity and the consequent socio-economic impacts of coral bleaching and noted this occurrence as a possible consequence of global warming. In June 1999, the Executive Secretary of the CBD identified an expert consultation on coral bleaching as the appropriate means to compile an analysis of the coral bleaching phenomenon, its potential severe loss of biological diversity, and its consequent socio-economic impacts. The envisaged outcomes of the Consultation are a report that will provide a basis for an analysis of scientific, technical and technological aspects of coral bleaching by SBSTTA and for subsequent policy debate by the COP, and recommendations for a future programme on coral reefs in general and coral bleaching in particular.[140]

Costs of Implementation

As an initiative deriving from the CBD, the Jakarta Mandate benefits from the same funding source as the Convention. In particular, the GEF provides funds for reaching the objectives of the Convention.[141] To assist recipient countries in preparing enabling activity projects, the GEF has prepared detailed "Operational Criteria" outlining the scope of activities that might typically be

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[136] At <http://www.biodiv.org/areas/marine/alien.asp> (accessed: 4 April 2001).
[137] Paragraph (xi) to the Annex I to Decision II/10, at <http://www.biodiv.org/decisions/default.asp?lg=0&m=cop-02&d=10> (accessed: 13 April 2001).
[138] Paragraph 16 (Ia-c) and Paragraph 16(II), Recommendation I/8.
[139] Annex I, Decision IV/5, at supra note 132.
[140] At <http://www.biodiv.org/doc/notifications/ntf-1999-09-04-cor-bleach.asp> (accessed: 4 April 2001).
[141] See <http://www.biodiv.org/financial/fm.asp> (accessed: 4 April 2001).

undertaken and indicative cost norms. Proposals conforming to these criteria are eligible for quick approval through expedited procedures. Such enabling activity projects provide assistance for a broad stocktaking of biodiversity, analysis of options to meet Convention obligations, formulation of plans and strategies, and preparation of national reports to the COP.[142]

Strengths and Weaknesses

Strengths

- As a derivative of the Convention on Biological Diversity, the Mandate's strength lies in its broad coverage of issues and challenges to the marine and coastal environment
- Benefits from the institutional framework established by the CBD, notably, the COP, the SBSTTA, and the Secretariat[143]
- Recommends that Parties adopt the precautionary approach in decision-making with respect to marine and coastal biodiversity

Weaknesses

- Lacks concrete goals and timetables for the implementation of its recommended objectives
- Despite the recommendations, some years have passed where little substantial action has been taken on marine and coastal biodiversity[144]
- There has been no practical application of the precautionary approach under the Mandate[145]

[142] See <http://www.biodiv.org/chm/chm-gef.asp> (accessed: 13 April 2001).
[143] M.M. Goote, "The Jakarta Mandate on Marine and Coastal Biological Diversity" (1997) 12 *International Journal of Marine and Coastal Law* 377 at 378.
[144] *Ibid*. at 386.
[145] *Ibid*. at 388.

Cartagena Protocol on Biosafety[146]

Entry into Force: Adopted 29 January 2000. Open for signature at the United Nations office at Nairobi from 15 to 26 May 2000 and at United Nations Headquarters in New York from 5 June 2000 to 4 June 2001. The Protocol will enter into force 90 days after the deposit of the fiftieth instrument of ratification/acceptance.

Status of Protocol Among OECS Member States as of 1 July 2001:

Country	Date into Force	Date of Signature	Date of Ratification	Date of Accession
Anguilla*				
Antigua and Barbuda		24 May 2000		
British Virgin Islands*				
Dominica				
Grenada		24 May 2000		
Montserrat*				
St. Kitts and Nevis				
St. Lucia				
St. Vincent and the Grenadines				

* Although the United Kingdom signed the Biosafety Protocol on 24 May 2000, ratification depends on action by the European Commission. The UK's signature does not cover its Overseas Territories.

Executive Summary

Adopted on 29 January 2000, the Cartagena Protocol on Biosafety seeks to protect biodiversity from potential threats posed by living modified organisms created through modern biotechnology. Article 19(3) of the Convention on Biological Diversity (CBD) called for negotiation of the subsidiary protocol. An Open-ended Ad Hoc Working Group on biosafety held six meetings between July 1996 and February 1999 and developed a draft text. The first extraordinary meeting of the Conference of the Parties to the Biodiversity Convention opened on 22 February 1999 in Cartagena, Columbia to work on finalising text but contentious issues, such as the role of the precautionary approach and the power of States to impose import bans on biotechnology and labelling requirements, required suspension of negotiations with the resumed session taking place in Montreal from 24 to 29 January 2000.

The Protocol, adopting the precautionary approach as a main objective, focuses on ensuring safe transboundary movements of living modified organisms. An advance informed agreement (AIA) procedure is established for proposed transboundary movement of living modified organisms for intentional introduction into the environment whereby the State of export is to ensure notification and information to the State of import about proposed shipments and not allow export until after written consent by the importing State. For living modified organisms intended for direct use as food, feed or

[146] Text and Annexes at <http://www.biodiv.org> (accessed 31 March 2001).

for processing, the AIA procedure does not apply, but States of potential import may prohibit imports to protect biodiversity and human health. A Biosafety Clearing-House is established to facilitate the exchange of scientific, environmental and legal information about living modified organisms and to assist Parties in Protocol implementation.

Structure

The Protocol consists of a preamble, 40 articles and three annexes. The preamble reaffirms the precautionary approach contained in principle 15 of the Rio Declaration on Environment and Development and highlights the unresolved tensions between environmental protection and risks from expanding biotechnology. The preamble recognises the potential human benefits of biotechnology but also the growing public concerns and potential adverse effects. The relationship between the Protocol and international trade agreements, such as the Agreement on Sanitary and Phytosanitary Measures (see below, p. 98), is left vague with the preambular wording "this Protocol shall not be interpreted as implying a change in rights and obligations of a Party under any existing international agreements."

Annex I sets out the information requirements for notifications under the advance informed agreement procedure. Information given to the competent national authority of the State of import must include, among other things:

- contact details of the exporter and importer
- intended date or dates of transboundary movement (if known)
- a description of the nucleic acid or the modification introduced
- intended use of the living modified organism (LMO)
- quantity and volume of the LMO to be transferred
- a risk assessment report consistent with Annex III
- suggested methods for safe handling storage, transport and use
- the regulatory status of the LMO within the State of export (for example, whether it is prohibited, restricted or approved for general release)

Annex II lists informational details that parties are to provide other Parties through the Biosafety Clearing-House when making a final decision to allow or restrict marketing of a living modified organism that may be subject to transboundary movement for direct use as food, feed or for processing. Information includes, among other things:

- the name and contact details of the authority responsible for the decision
- name and identity of the LMO
- description of the gene modification, the technique used and the resulting LMO characteristics
- approved uses of the living modified organism
- suggested methods for the safe handling, storage, transport and use
- a risk assessment report consistent with Annex III

Annex III sets out risk assessment requirements that must be followed as part of the advance informed agreement procedure (for proposed international introductions of LMOs into the environment) and for decisions relating to living modified organisms intended for direct use as food, feed or for processing. Risk assessments must be carried out in a scientifically sound manner and should follow certain steps including among others: the identification of any novel genotypic or phenotypic characteristics associated with the LMO that may have adverse effects on biological diversity; an evaluation of the likelihood of adverse effects being realised; an evaluation of

consequences should adverse effects be realised; and a recommendation as to whether risks are acceptable or manageable. Where there is uncertainty regarding the level of risk, the uncertainty may be addressed through requiring further information, by implementing appropriate risk management strategies and/or monitoring the LMO in the receiving environment.

Obligations

- General
- Application of the Advance Informed Agreement Procedure
- Procedure for Living Modified Organisms Intended for Direct Use as a Food, Feed or for Processing
- Unintentional Transboundary Movements and Emergency Measures
- Handling, Transport and Packaging
- Designation of National Authorities and Focal Points
- Information Sharing and the Biosafety Clearing-house
- Capacity-building
- Public Awareness and Participation
- Steps to Deal with Illegal Transboundary Movements
- Monitoring and Reporting

General

While Article 4 of the Protocol seeks to limit the scope of application to transboundary movements of living modified organisms, Article 2, entitled "General Provisions", requires Parties to take legal, administrative and other measures to ensure biotechnology developments and uses in general are strictly controlled. Article 2(2) states:

> The Parties shall ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account the risks to human health.

Application of the Advance Informed Agreement (AIA) Procedure

The AIA procedure might be described as the "heart" of the Protocol. The Protocol does not prohibit transboundary movements of living modified organisms intended for environmental introductions, for example, genetically modified fish. However, it subjects proposed transboundary movements to a form of prior informed consent procedure where the State of import must be notified and must consent before shipments are allowed. Article 7 sets out the general AIA obligation and clarifies that the procedure "shall apply prior to the first intentional transboundary movement of living modified organisms for intentional introduction into the environment of the Party of import".

Article 8 establishes notification requirements. The State responsible for export must notify or require the exporter to notify in writing, the competent national authority of the Party of import prior to transboundary movement of the LMO. The notification must contain, at a minimum, the information specified in Annex I of the Protocol. The Party of export must also ensure there is a legal requirement under national law for the accuracy of the information provided by the exporter.

Articles 9 and 10 set out the obligations of the potential importing State upon receiving a notification. Article 9 requires the Party of import to acknowledge receipt of the notification, in writing, within ninety days of its receipt. Article 10 grants the Party of import 270 days from the date of receipt of

notification to communicate, in writing, to the notifier and to the Biosafety Clearing-House, the Party's decision: approval with or without conditions including how the decision will apply to subsequent imports of the same LMO; prohibition on import; request for additional relevant information; or an extension of the time for a decision. The Party of import must base its decision on a risk assessment carried out in accordance with Article 15. In making decisions, States of import are allowed to "err on the side of caution" in light of the precautionary approach (Art. 10(6)).

Article 15 requires risk assessments to be undertaken in a scientifically sound manner in accord with the requirements of Annex III but does allow the State of import to delegate risk assessment responsibilities. The Party of import may require the exporter to carry out the risk assessment and the cost of risk assessment must be borne by the notifier if the Party of import so requires.

The Protocol provides for a number of exemptions to the AIA procedure. Article 6 states that the AIA procedure shall not apply to living modified organisms simply in transit through the territory of a Party nor to LMOs destined for "contained use". Article 3 defines contained use as "any operation, undertaken within a facility, installation or other physical structure, which involves living modified organisms that are controlled by specific measures that effectively limit their contact with, and their impact on, the external environment". Future meetings of the Parties to the Protocol are authorised to decide on what further intentional transboundary movements of living modified organisms should be exempt from the AIA procedure (Art. 7(4)).

Procedure for Living Modified Organisms Intended for Direct Use as a Food, Feed or for Processing

A major controversy in Protocol negotiations was whether food and feeds should be subject to the Protocol and, if so, the procedures that should apply to transboundary movements. In the end a compromise was reached with rather uncertain parameters set out in Article 11. Article 11 makes clear that the formal AIA procedure will not apply to proposed transboundary shipments of food, feeds or LMOs for processing but that a less onerous procedure will apply. A Party that makes a final decision regarding domestic use, including placing on the market, of a living modified organism having potential to be subject to transboundary movement, must inform other Parties of the decision through the Biosafety Clearing-House. If a Party does not have access to the Clearing-House, a Party may inform the Secretariat and decision information would then have to be given directly to the national focal point of that Party. Parties of potential import are allowed under domestic regulatory frameworks to prohibit imports of living modified organisms intended for direct uses as food, feed or for processing (Art. 11(4)) in accord with the precautionary approach (Art. 11(8)). Parties in reaching import decisions may take into account socio-economic considerations including the value of biological diversity to indigenous and local communities (Art. 26).

A possible future point of contention between countries promoting trade in genetically modified foods or feeds and countries opposed is the extent to which States of import will have to justify their prohibitions through a scientific risk assessment. Article 11(6) only clearly requires a risk assessment when a developing country or a Party with an economy in transition does not have a domestic regulatory framework in place. Countries promoting exports may argue that the Agreement on

Sanitary and Phytosanitary Measures, also applicable to food safety, does impose a general risk assessment requirement and that the Biosafety Protocol does not vary such an obligation.[147]

Unintentional Transboundary Movements and Emergency Measures

Article 16 of the Protocol obliges each Party to take appropriate measures, including requiring a risk assessment to be carried out, prior to the first release of a living modified organism, in order to prevent unintentional transboundary movements of LMOs. Where a release leads to or may lead to an unintentional transboundary movement of a living modified organism likely to have significant adverse effects on biological diversity, a Party having jurisdiction over the release must notify potentially affected States and consult over appropriate responses including emergency measures.

Handling, Transport and Packaging

Pursuant to Article 18, Parties are to ensure that living modified organisms subject to international transboundary movement are handled, packaged and transported under conditions of safety. Each Party is to require certain documentation accompanying LMOs and the documentation details vary according to category of LMO. For living modified organisms intended for direct use as food, feed or for processing, documentation must clearly identify that the shipment "may contain" LMOs and are not intended for intentional introduction into the environment. A contact point for further information must be provided. A Conference of the Parties serving as a meeting of the Parties to the Protocol is to decide on additional detailed requirements, including any unique identification, no later than two years after entry into force of the Protocol. LMOs destined for contained use are to be clearly identified as living modified organisms, and documentation must specify any requirements for safe handling, storage, transport and use along with the contact point for further information and the name and address of the individual/institution to whom the LMOs are consigned.

LMOs intended for intentional introduction into the environment of the Party of import have the broadest documentation requirements. Documentation must include:

- identification as LMOs
- identify and relevant traits and/or characteristics
- any requirements for safe handling, storage, transport and use
- contact point for further information
- the name and address of the importer and exporter
- declaration that the movement is in conformity with Protocol requirements applicable to the exporter

Designation of National Authorities and National Focal Points

Each Party is obliged to designate one national focal point responsible for liaison with the Secretariat for the Protocol and to designate one or more competent national authorities responsible for performing administrative functions required by the Protocol. A Party may designate a single entity to fulfill the functions of both focal point and competent national authority. Each Party must notify the

[147] For reviews of the rather vague and inconclusive situation, see Peter-Tobias Stoll, "Controlling the Risks of Genetically Modified Organisms: The Cartagena Protocol on Biosafety and the SPS Agreement" (1999) 10 *Yearbook of International Environmental Law* 82–119; and Jonathan H. Adler, "More Sorry Than Safe: Assessing the Precautionary Principle and the Proposed International Biosafety Protocol" (2000) 35 *Texas International Law Journal* 173–205.

Secretariat, no later than the date of entry into force of the Protocol, of the names and addresses of its focal point and the competent national authority or authorities.

Information Sharing and the Biosafety Clearing-house

Article 20 encourages sharing of scientific, technical, environmental and legal information relevant to biotechnology and requires Parties to make available to the Biosafety Clearing-House specific types of information to ensure access. Information to be supplied to the Clearing-House include: existing laws, regulations and guidelines relating to biosafety; any bilateral, regional and multilateral agreements/arrangements on biosafety; summaries of risk assessments of living modified organisms; and final decisions regarding the importation or release of LMOs.

Capacity-building

Article 22 calls for strengthening human resource and institutional capacities in developing country Parties, in particular least developed and small island developing States. Co-operation in capacity-building is to include scientific and technical training in the safe management of biotechnology and in the use of risk assessment and risk management of biosafety.

Public Awareness and Participation

Pursuant to Article 23, Parties are required to promote public education and involvement concerning the transfer and use of living modified organisms. Public access to information on LMOs that may be imported is encouraged. Parties are required to consult the public in the decision-making process regarding LMOs.

Illegal Transboundary Movements

Article 25 requires each Party to adopt domestic measures penalising illegal transboundary movements of LMOs. In the case of an illegal transboundary movement, the affected Party may request the Party of origin to dispose, at its own expense, of the living modified organism by repatriation or destruction.

Monitoring and Reporting

Each Party is to report to the Conference of the Parties serving as the meeting of the Parties of the Protocol on measures taken to implement the Protocol. The reporting intervals are to be determined by the meeting of the Parties.

Costs of Implementation

While costs may be incurred in establishing the legal and administrative frameworks for assessing and managing the risks of modern biotechnology and in reporting on Protocol implementation measures, the Protocol promises to provide financial resources to assist developing country Parties in implementation. The special need for financial resources by least developed and small island developing States is recognised in Article 28. The GEF is designated as the financial mechanism for the Protocol (Art. 28(2)), and developed country Parties may also provide financial and technological resources through bilateral, regional and multilateral channels (Art. 28(6)).

Strengths and Weaknesses

Strengths

- Ensures prior notification and information to States of LMO import for proposed intentional introductions into the environment
- Allows States of import to regulate or prohibit transboundary movements of LMOs
- Encourages capacity-building for developing States to address biosafety

Weaknesses

- Does not establish a comprehensive governance regime for managing modern biotechnology but focuses on controlling transboundary movements
- Leaves uncertainty regarding ability of States to prohibit imports of LMOs based upon ethical or public fear grounds rather than scientific risk assessment
- Focuses on capacity-building for managing biosafety, not on building biotechnology development expertise
- Leaves considerable national discretion to develop appropriate mechanisms, measures and strategies to manage LMO risks

B. Toxic Chemicals

Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)[148]

Entry into Force: Opened for signature on 11 September 1998 and subsequently at United Nations Headquarters in New York from 12 September 1998 to 10 September 1999, the Convention requires 50 ratifications/acceptances before entry into force. As of 8 March 2001 only 14 States had ratified the Convention.

Status Among OECS Member States as of 1 July 2001:

Country	Date into Force	Date of Signature	Date of Ratification	Date of Accession
Anguilla*				
Antigua and Barbuda				
British Virgin Islands*				
Dominica				
Grenada				
Montserrat*				
St. Kitts and Nevis				
St. Lucia		25 January 1999		
St. Vincent and the Grenadines				

* The United Kingdom signed for "the Kingdom in Europe".

Executive Summary

Following concerns over increasing trade in chemicals banned or severely restricted by developed countries to developing States lacking in regulatory capabilities, in 1989 a voluntary prior informed consent (PIC) procedure was adopted through amendments to the International Code of Conduct for the Distribution and Use of Pesticides and the London Guidelines for the Exchange of Information on Chemicals in International Trade. The voluntary PIC procedure was designed to ensure potential States of impact were given notification and information about listed banned or severely restricted chemicals and the opportunity to reject proposed imports. The Food and Agriculture Organisation (FAO) and the United Nations Environment Programme (UNEP) jointly managed the voluntary procedure.

Various steps occurred in the 1990s to move towards making the PIC procedure legally binding. Agenda 21, adopted at the Earth Summit in 1992 in Rio de Janeiro, through chapter 19 on the Sound Management of Chemicals called for strengthened participation in and implementation of the PIC procedure and raised the need to consider possible mandatory application. In November 1994, the FAO Council agreed the FAO Secretariat should proceed with preparation of a draft PIC Convention.

[148] Reprinted in (1999) 38 *International Legal Materials* 1. See at <http://www.pic.int/finale.htm> (accessed: 17 April 2001).

In May 1995, the Governing Council of UNEP authorised the Executive Director to convene, with the FAO, an Intergovernmental Negotiating Committee (INC) to prepare an international legally binding instrument on the PIC procedure. The INC held five negotiating sessions culminating in March 1998 when a draft text of the PIC Convention was agreed upon. A diplomatic conference, held 10-11 September 1998 in Rotterdam, formally adopted the Convention which is often commonly referred to as the "Rotterdam Convention".

The new Convention will require States of export to ensure States of import receive notice and consent before shipment of listed banned or severely restricted chemicals commence. A resolution on interim arrangements, adopted at the Rotterdam diplomatic conference, called for continued implementation of the voluntary PIC procedure, during the interim period until the Convention enters into force, in accord with the new procedures adopted in the Convention. The resolution also invited UNEP and FAO to commence further meetings of the Intergovernmental Negotiating Committee during this period to oversee implementation of the interim PIC procedure.

The PIC Convention presently covers 31 chemicals. The chemicals include 21 pesticides, five severely hazardous pesticide formulations and five industrial chemicals. The Convention allows for additional chemicals to be added to the PIC procedure through listing in Annex III.

Structure

The Convention consists of a preamble, 30 articles and 5 annexes. Annex I lists information requirements to be notified to the Secretariat of the Convention after a Party has banned or severely restricted a chemical. Annex II establishes criteria to the considered by the Chemical Review Committee in deciding whether to add a chemical to Annex III which lists chemicals subject to the prior informed consent procedure. Annex IV sets out criteria for listing severely hazardous pesticide formulations, that is, chemicals formulated for pesticidal use that produce severe health or environmental effects observable within a short period of time under conditions of use. Annex V lists information requirements for export notification such as the expected date of export and the name and address of the importer.

Obligations

- General
- Designation of National Authorities
- Notification of Chemical Bans or Severe Restrictions
- Prior Informed Consent Procedure
- Export Notification
- Information to Accompany Chemical Exports
- Information Exchange

General

The Convention does not ban trade in hazardous chemicals but seeks to ensure international trade of listed chemicals is subject to the prior informed consent procedure and labelling requirements. The Convention applies to banned or severely restricted chemicals and severely hazardous pesticide formulations. The Convention does not apply to narcotic drugs, radioactive material, wastes, chemical weapons, pharmaceuticals including veterinary drugs, food additives or small quantities of chemicals imported for research.

Designation of National Authorities

Each Party is required to designate one or more national authority to carry out administrative functions under the Convention and to ensure such authority, or authorities have sufficient resources to perform task effectively. The name and address of the national authority or authorities must be provided to the Secretariat no later than the entry into force of the Convention for a Party.

Notification of Chemical Bans or Severe Restrictions

Article 5 requires each Party to notify the Secretariat of final regulatory actions to ban or severely restrict a chemical. Such notification must be made as soon as possible but no later than 90 days after the final regulatory action has taken effect. When the Secretariat has received at least one notification from each of two Prior Informed Consent regions[149] regarding a particular chemical, the Secretariat is required to forward the information to the Chemical Review Committee[150] which must then decide whether to recommend listing for the PIC procedure.

Any developing country Party that is experiencing problems caused by severely hazardous pesticide formulations in its territory may propose to the Secretariat listing under Annex III for the PIC procedure. A review by the Chemical Review Committee and a decision of the Conference of the Parties would be needed for actual listing.

Prior Informed Consent Procedure

Article 10 gives potential importing States of listed chemicals the option to prohibit imports, to consent to imports without conditions or to consent to imports subject to specified conditions. Each Party is required to ensure timely decisions on imports and is supposed to transmit its response to the Secretariat no later than nine months after receiving a final decision guidance document[151] for a listed chemical. A Party deciding to prohibit import of a chemical must also prohibit domestic production of the chemical for domestic use.

Article 11 sets out obligations for States allowing the export of Annex III listed chemicals. Each exporting Party is to take appropriate legislative and administrative measures to ensure exporters within its jurisdiction comply with Party of import decisions including import prohibitions. In case a potential importing State has not yet transmitted a decision to the Secretariat regarding a listed chemical, each Party is to ensure exports do not occur unless explicit consent has been sought and received by the exporter through a designated national authority of the importing Party.[152]

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[149] While final determination of PIC regions is to be made by the Conference of the Parties, the Intergovernmental Negotiating Committee at its sixth session in July 1999 decided to adopt on an interim basis the seven FAO regions (Africa, Europe, Asia, Latin America and the Caribbean, Near East, Southwest Pacific and North America).

[150] The Intergovernmental Negotiating Committee, also at its sixth session, agreed to establish an Interim Chemical Review Committee tasked with reviewing chemicals for inclusion in the PIC procedure.

[151] Article 7 provides that when a decision to list a chemical in Annex III for the PIC procedure is taken, the Conference of the Parties will also approve the related decision guidance document and the Secretariat must forthwith communicate the information to all Parties.

[152] A Party of export can also allow export to a Party of import not responding or deciding on an import ban for a listed chemical if a chemical at the time of import is already restricted by the importing Party or if evidence exists that the chemical has been previously used or imported by the importing Party (Art. 11(2)).

Export Notification

Pursuant to Article 12, where a Party has banned or severely restricted a chemical, that Party is to ensure an export notification is provided to any importing Party before such a chemical is exported from its territory. The export notification must be provided prior to the first export and thereafter before the first export in any calendar year. The notification requirement may be waived by the designated national authority of the importing Party. The notification obligation ceases after a chemical is listed in Annex III and the importing Party has provided its regulatory response to the Secretariat.

Information to Accompany Chemical Exports

Information requirements are also set out for chemical exports. Each Party must require that both chemicals listed in Annex III and chemicals banned or severely restricted in its territory, when exported, are subject to adequate labelling with information on risks to human health or the environment. Where such exported chemicals are to used for occupational purposes, each exporting Party must also ensure a safety data sheet is sent to each importer (Art. 15).

Information Exchange

According to Article 14, each Party is required to facilitate the exchange of scientific, technical, economic, and legal information regarding chemicals within the scope of the Convention. The results of toxicological and ecotoxicological tests are not to be considered confidential information. Any Party requiring information for proposed transits through its territory of chemicals listed in Annex III may report its need to the Secretariat which must then inform all Parties.

Costs of Implementation

While costs may be incurred by States in strengthening national laws and institutions for managing hazardous chemicals, especially the import and export of banned or severely restricted chemicals, developing States are promised technical assistance. Article 16 pledges Parties to co-operate in assisting developing countries in strengthening capacity to manage chemicals throughout their life-cycle.

Details of financial assistance are not spelled out in the Convention. No financial mechanism is established, and new and additional financial assistance to developing countries is not promised. The European Union at the seventh session of the INC, held 30 October to 3 November 2000, announced its recent contribution of 100,000 euros to the Trust Fund to assist implementation activities.[153]

Strengths and Weaknesses

Strengths

- Makes legally-binding the prior informed consent procedure for hazardous chemicals and pesticides listed in Annex III
- Gives developing States the option of prohibiting imports of Annex III listed chemicals
- Allows developing States to propose the listing of especially poisonous pesticide formulations for the PIC procedure

[153] "PIC: Satisfaction at Progress Achieved" (2000) 30:6 *Environmental Policy and Law* 269.

Weaknesses

- Does not prohibit trade in banned or severely restricted chemicals but subjects trade of listed chemicals to the PIC procedure
- Provides a rather tedious process for adding chemicals to the PIC procedure, for example, requiring notifications from two different regions, a finding by the Chemical Review Committee that final regulating actions were based on scientific risk evaluations and a decision by the Conference of the Parties
- Leaves development of procedures and institutional mechanisms for developing non-compliance to the Conference of the Parties (Art. 17)
- Does not address treatment of non-Parties to the Convention
- Provides only a general commitment to technical assistance

Stockholm Convention on Persistent Organic Pollutants (2001)[154]

Entry into Force: Draft text agreed to on 10 December 2000 with a diplomatic conference for formal adoption of the Convention held in Stockholm, Sweden from 22-23 May 2001. The Convention was open for signature at Stockholm on 23 May 2001 and shall be open for signature at UN Headquarters in New York from 24 May 2001 to 22 May 2002. The Convention will enter into force on the ninetieth day after the deposit of the fiftieth instrument of ratification/acceptance.

Status Among OECS Member States: Only Antigua and Barbuda signed the Convention on 23 May 2001 in Stockholm. Antigua and Barbuda and St. Lucia signed the Final Act of the Conference.

Executive Summary

Persistent organic pollutants, (POPs), falling into three main categories, pesticides (e.g., DDT), industrial compounds (e.g. PCBs) and combustion byproducts like dioxins and furans, have become a growing international concern. POPs are found in all the world's oceans, and the ability of the toxic chemicals to persist, bioaccumulate in the environment and travel long distances via air and ocean currents has spurred global action. The Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, adopted by over 100 states in 1995, called for negotiation of a global POPs Convention. An Intergovernmental Negotiating Committee for an International Legally Binding Instrument on POPs held five sessions beginning in June 1998 and concluded in December 2000 with a draft text.

The global POPs Convention initially targets 12 chemicals (the "dirty dozen"[155]) for elimination or restriction. Additional chemicals can be added, based on persistence, bioaccumulation potential and long-range transport threat, following review by a Persistent Organic Pollutants Review Committee and listing approval by the Conference of the Parties. Parties will be required to develop national implementation plans within two years of the Convention's entry into force. Parties will be required to identify stockpiles of POPs and to manage stockpiles in a safe and environmentally sound manner.

The close interlinkages among chemical and hazardous waste agreements means collaboration among MEA secretariats is critical. For example, prohibited chemicals under the POPs Convention may become hazardous wastes subject to transboundary movement by the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989). Article 6(2) of the POPs agreement calls upon the future Conference of Parties to co-operate with the appropriate bodies of the Basel Convention, for example, in determining what constitutes environmentally sound disposal methods where imports and exports of chemical wastes may be allowed. At present, the interim secretariats of the Rotterdam and Stockholm Conventions and the secretariat of the Basel Convention are housed in the same building in Geneva, the International Environment House, and close co-operation is occurring on an informal basis.

[154] Final Act of the Conference of Plenipotentiaries on the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention included at Appendix II) at <http://www.chem.unep.org/pops> (accessed 8 July 2001).

[155] The "dirty dozen" chemicals are aldrin, chlordane, dieldrin, DDT, endrin, heptachlor, hexachlorobenzene, mirex, toxaphene, polychlorinated biphenyls (PCBs), dioxins and furans.

Structure

The Convention consists of a preamble, 30 articles and six annexes. Annex A lists chemicals for elimination. Annex B lists chemicals for restricted production and use (initially limited to DDT for disease control purposes). Annex C lists POPs released unintentionally from human sources through combustion or chemical processes where minimisation measures will be required (dioxins, furans, HCB, PCBs). Annex D sets out information requirements for Parties wishing to add chemicals to the Annex A, B and/or C lists. Annex E lists information requirements for a risk profile, an additional risk evaluation to be prepared by the POPs Review Committee before recommending new chemicals for listing. Annex F sets out socio-economic factors, e.g., technical feasibility and costs, which the Review Committee should consider in preparing a risk management evaluation for new chemicals.

Obligations

- General
- Measures to Reduce or Eliminate Releases
- Information Exchange
- Public Information, Awareness and Education
- Research and Monitoring
- Reporting

General

A number of general obligations are suggested in the preamble to the Convention. Parties are to ensure that use of POPs within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Parties not having regulatory and assessment schemes for pesticides and industrial chemicals are encouraged to develop such schemes.

Measures to Reduce or Eliminate Releases

Article 3, the core provision of the Convention, sets out a complex agenda for eliminating chemicals listed in Annex A, restricting chemicals listed in Annex B and reducing/minimising releases of chemicals listed in Annex C. Annex A, while calling for the eventual elimination of nine chemicals listed,[156] in fact only calls for the immediate elimination of production and use of two chemicals, endrin and toxaphene. The Annex allows countries to register in writing with the Secretariat various specific exemptions that are allowed under the Annex. For example, Parties may register for continued use of chlordane as a termiticide, dieldrin in agricultural operations, heptachlor for wood treatment, and hexachlorobenzene (HCB) as a solvent in pesticides. While the Annex requires the elimination of production of polychlorinated biphenyls (PCBs), Parties are to "make determined efforts" to eliminate the use of PCBs in equipment, such as electrical transformers, by 2025.

Annex B provides for restricted production and use of chemicals and initially includes a single chemical, DDT. Parties are allowed to produce and use DDT for disease vector control but must notify the Secretariat of their intention to produce and/or use it. The Annex provides for an ongoing review of whether DDT production/use should be continued commencing at the first meeting of the Conference of the Parties and at least every three years thereafter in consultation with the World Health Organisation.

[156] The chemicals are aldrin, chlordane, dieldrin, endrin, heptachlor, hexachlorobenzene, mirex, toxaphene, and polychlorinated biphenyls.

Annex C, applying to POPs formed and released unintentionally as a result of incomplete combustion or chemical reactions, initially includes dioxins, furans, hexachlorobenzene and PCBs. Parties are required to take measures to reduce total releases from human sources with the goal of continuing minimisation and where feasible, ultimate elimination. A key national measure is developing a national action plan (or where appropriate a regional or sub-regional action plan) within two years of the entry into force of the Convention for a country. The action plan must include an evaluation of current and projected releases, an evaluation of the efficacy of laws and policies relating to management of releases, and strategies to reduce releases. Parties are to promote the use of best available techniques and best environmental practices with Part V of Annex C providing general guidance, for example, suggesting promotion of low-waste technology, use of less hazardous substances, resource reuse and recycling, and avoidance of elemental chlorine for bleaching. Parties are called upon to require best available techniques for new source categories, especially those industrial sources having the highest emission potentials, such as waste incinerators, cement kilns burning hazardous waste, pulp mills using chlorine for bleaching and secondary aluminium production, no later than four years after entry into force of the Convention for a Party.

The Convention also imposes import and export restrictions for Annex A and B chemicals. Imports and exports are to be allowed only for environmentally sound disposal or for uses permitted under the Annexes. Export to non-Parties is to be limited through a certification requirement whereby the importing State would have to provide an annual certification to the exporting Party verifying various commitments including a commitment to protect human health and the environment.

Parties are also required to address stockpiles of chemicals, including products and articles upon becoming wastes. Parties are required to develop strategies for identifying stockpiles and to manage stockpiles in a safe, efficient and environmentally sound manner. Waste chemicals are to be disposed of in a way that the POPs content is destroyed (or irreversibly transformed) or otherwise disposed of in an environmentally sound manner when destruction or irreversible transformation is not an environmentally preferable option.

Information Exchange

Each Party is required to designate a focal point for the exchange of information. Parties are required to exchange information directly or through the Secretariat relating to ways to reduce or eliminate POPs and alternatives to POPs.

Public Information, Awareness and Education

Each Party is required, within its capabilities, to promote public and decision-maker awareness of the risks of POPs and on their alternatives. Educational and public awareness programmes are to be developed, especially for women, children and the least educated. Public participation is to be enhanced, and each Party is to consider developing mechanisms such as pollutant release and transfer registers to collect and disseminate information on annual releases and disposals of POPs.

Research and Monitoring

Parties are encouraged to support research and monitoring relevant to POPs including: sources of POPs; environmental transport and fate; effects on human health and the environment; and socio-economic and cultural impacts. Parties are also encouraged to co-operate in finding alternatives to POPs and in identifying additional candidate POPs.

Reporting

Each Party must report to the Conference of the Parties on implementation measures including the effectiveness of such measures. Each Party must provide the Secretariat statistical data on its total quantities of production, import and export of each of the chemicals listed in Annex A or B. As well, a list of States from which imports have been received and to which exports were sent is to be provided. The first meeting of the Conference of the Parties will determine report timing and format.

Each Party is required to develop an implementation plan for meeting obligations under the Convention. The national implementation plan must be transmitted to the Conference of the Parties within two years of the date on which the Convention enters into force for a Party.

Costs of Implementation

While various costs are associated with joining the Convention, such as administrative expenses in developing a national implementation plan and future reporting, the Convention promises substantial financial and technical assistance to developing States. Developed country Parties pledge to provide new and additional financial resources to enable developing country Parties to meet the costs of implementing the Convention (Art. 13(2)). A mechanism for the provision of adequate and sustainable financial resources to developing country Parties on a grant or concessional basis is to be established with the GEF acting as the financial mechanism on an interim basis. The extent to which developing country Parties will effectively implement their commitments is made conditional upon effective implementation by developed country Parties relating to financial and technical assistance.

The Intergovernmental Negotiating Committee at its fifth and final session accepted a Resolution on Interim Financial Arrangements that was adopted by the diplomatic conference in Stockholm in May 2001. The Resolution requests the GEF to consider establishing a new focal area to support implementation of the Convention and to establish an operational programme for POPs assistance.

The World Bank is also becoming active in supporting countries to reduce POPs in the environment. For example, the Bank has signed a POPs Trust Fund agreement with the Government of Canada whereby approximately US$14 million would be allocated to support capacity-building projects in developing countries and countries with economies in transition.

Strengths and Weaknesses

Strengths

- Addresses the serious global environmental threat of long-range transport of persistent organic pollutants
- Provides for addition of further chemicals having POPs characteristics
- Calls for new and additional financial assistance to developing States

Weaknesses

- Only tackles an initial 12 chemicals
- Listing of additional chemicals likely to be slow given a rather tedious procedure including proposal submission by a Party, review by the Persistent Organic Pollutants Committee, a risk profile, a risk management evaluation and a decision by the Conference of the Parties

- Is not a comprehensive chemicals convention ensuring only "safe" chemicals are used and marketed[157]
- Allows various exceptions to elimination, such as use of chlordane in plywood adhesives or as a termiticide, and DDT for disease vector control.
- Provides only general obligations relating to unintentional byproducts through the flexible concepts of best available techniques and best environmental practices

[157] The Governing Council of UNEP, at its twenty-first session held in February 2001, has merely requested the Executive Director to prepare a report on the need for a strategic approach to international chemicals management for consideration by the Governing Council/Global Ministerial Environment Forum in 2002.

C. Hazardous Wastes

Basel Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal (1999)[158]

Entry into Force: Concluded 10 December 1999. Open to signature by Parties to the Basel Convention at Berne, Switzerland (Federal Department of Foreign Affairs) from 6 to 17 March 2000 and at the United Nations Headquarters in New York from 1 April 2000 to 10 December 2000. The Protocol will enter into force on the ninetieth day following the deposit of the twentieth instrument of ratification/acceptance. Thirteen States have signed the Protocol.[159]

No OECS Member or Associate Member State has signed the Protocol.

Executive Summary

Article 12 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, adopted in 1989,[160] called for further consultations on a protocol governing liability and compensation rules and procedures for damage resulting from transboundary movement and disposal of hazardous wastes and other wastes. Protocol talks began in 1993 in light of developing country concerns over the lack of funds and technologies for responding to illegal dumping or accidental spills of wastes. The Basel Protocol on Liability and Compensation was adopted at the Fifth Conference of the Parties on 10 December 1999.

The Protocol seeks to clarify: the persons who are liable for incidents from the point of waste loading to final disposal, the basis of liability (strict vs. fault), the types of damages recoverable including costs of reasonable measures to restore the environment, appropriate defences to liability, and insurance and financial guarantee requirements. The Protocol's effect will largely depend on national incorporation of the liability and compensation rules into domestic law. Claims for compensation under the Protocol may be brought in the courts of a Contracting Party where either the damage was suffered or the incident occurred or the defendant has habitual residence or principal place of business. A Technical Co-operation Trust Fund may be accessed on an interim basis by developing countries to assist in taking emergency measures to prevent or mitigate damage from a hazardous waste incident.

Structure

The Protocol consists of a preamble, 33 articles and two annexes. Annex A lists member countries of the Alliance of Small Island States (including Antigua and Barbuda, Barbados, St. Lucia, St. Kitts and Nevis and St. Vincent and the Grenadines) who even though not a Contracting Party to the Protocol, may seek compensation for damages suffered in an area under national jurisdiction during transit of a transboundary movement of hazardous waste. Annex B establishes minimal limits of liability for persons subject to strict liability for damage resulting from hazardous waste incidents.

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[158] Text available at <http://www.basel.int> (accessed: 9 April 2001).

[159] According to signature information provided by the Basel Convention Secretariat at <http://www.basel.int/ratif/ratpol.htm> (accessed: 9 April 2001).

[160] For a review of the implications of the Basel Convention for OECS Member States, see Anderson et al., supra note 3, pp. 80–86.

Obligations

- Adoption of Legal and Administrative Measures to Implement the Protocol
- Mutual Recognition and Enforcement of Judgments

Adoption of Legal and Administrative Measures to Implement the Protocol

The Protocol attempts to ensure the polluter pays principle is applied consistently by States in addressing liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes. Article 4 requires State Parties to make the person notifying[161] the State of import of a proposed transboundary movement of hazardous waste strictly liable for damage until the disposer has taken possession of the hazardous waste shipment. Thereafter the disposer shall be made strictly liable for damage. State Parties are allowed to establish limits for strict liability under domestic law with minimal limits of liability spelled out in Annex B of the Protocol.[162] Parties are also required to allow common defenses to strict liability such as acts of armed conflict and intentional conduct of a third party. Article 5 calls upon State Parties to impose fault-based liability on other persons, for example, the carrier of hazardous wastes, who caused or contributed to the damage through intentional, reckless or negligent acts or omissions. Article 6 urges States to require any person in operational control of hazardous wastes at the time of an incident to take all reasonable measures to mitigate damage.

The Protocol also seeks to clarify the types of damages recoverable relating to a transboundary hazardous waste movement incident. Article 2 of the Protocol defines damage to include: loss of life or personal injury, damage to property, loss of income directly deriving from a use of the environment, costs of preventive measures, and reasonable costs of environmental restoration. Domestic law may indicate who will be entitled to take environmental restoration measures.

Article 10 is the provision that actually requires Contracting Parties to adopt the legislative, regulatory and administrative measures necessary to implement the Protocol. Parties are required to inform the Secretariat of implementation measures including any limits of liability established under domestic law.

Article 14 requires Parties to ensure that persons who may be strictly liable have insurance or other financial guarantees for amounts not less than the limits of liability set out in Annex B.

Mutual Recognition and Enforcement of Judgments

Pursuant to Article 21, Parties agree to recognise and enforce the judgment of a court having jurisdiction over a transboundary movement case with limited exceptions. For example, a Party may

[161] The notifier can be the waste generator, the exporter, or the State of export. If the State of export is the notifier, the exporter shall remain strictly liable.

[162] For example, the limit of liability for the notifier must not be less than 1 million units of account (about US$1.25 million) for shipments up to 5 tonnes; 10 million units of account (about US$12.5 million) for shipments exceeding 1,000 tonnes up to 10,000 tonnes; plus an additional 1,000 units of account for each additional tonne up to a maximum of 30 million units of account (about US$37.5 million). The limits of liability of the disposer must not be less than 2 million units of account (about US$2.5 million) for any one incident. The amounts under the Annex are to be reviewed by the Contracting Parties on a regular basis. The Protocol, in Article 2, defines "unit of account" as the Special Drawing Right (SDR) as defined by the International Monetary Fund. The SDR rate will fluctuate daily according to an exchange rate formula. The SDR rate for 22 June 2001 was listed as US$1.24877.

refuse to recognise a judgment obtained by fraud or where a defendant was not given reasonable notice and a fair opportunity to present his/her case.

Costs of Implementation

Costs of implementation will include expenses related to drafting and enacting domestic laws to implement the Protocol and eventually for reporting. Article 24 requires the future meeting of the Parties to provide for reporting and to establish guidelines and procedures for such reporting.

While the Protocol creates no international fund to ensure adequate and prompt compensation is available for transboundary waste movement incidents, Article 15 calls upon future meetings of the Parties to review the need for a new financial mechanism.

At the 5th Conference of the Parties to the Basel Convention, delegates through decision V/32 agreed on an interim basis to enlarge the scope of the Technical Co-operation Fund of the Basel Convention to assist developing countries in various areas relating to the Protocol. Developing State Parties to the Convention may request financial assistance to take emergency measures to prevent or mitigate damages arising from a transboundary waste incident. After the Protocol enters into force, developing States can also apply to the Technical Co-operation Fund for compensation concerning damage to and reinstatement of the environment.[163] Developing State Parties to the Convention can also seek financial support for projects in capacity-building areas such as enhancement of compliance with international rules and standards in the field of packaging, labelling and transport; development of emergency responses and contingency plans; and establishment of national schemes regarding liability and insurance/financial guarantees for incidents occurring during the transboundary movement of hazardous wastes and their disposal.[164]

Strengths and Weaknesses

Strengths

- Substantially clarifies the liability and compensation rules governing transboundary movements of hazardous wastes
- Subjects notifiers and disposers of hazardous waste shipments to strict liability in case of pollution incidents

Weaknesses

- Continues a fragmented approach to liability and compensation, with separate international schemes for oil pollution from ships and carriage of hazardous and noxious substances by sea, and no binding regime for shipment of ultrahazardous nuclear materials[165]
- Leaves determination of limits of liability largely to domestic law thus opening the door to

[163] A State which is not a Contracting Party to the Protocol may apply for compensation if it appears in Annex A to the Protocol (Members of the Alliance of Small Island States) if it was affected as a State of transit and if it has acceded to a multilateral or regional agreement concerning transboundary movements that is in force.
[164] For further details on the broadened financial assistance available under the Technical Cooperation Fund and application procedures see "Interim Guidelines for the Implementation of Decision V/32 'Enlargement of the Scope of the Technical Cooperation Fund'" at <http://www.basel.int/meetings/interguide00.html> (accessed: 9 April 2001).
[165] See Duncan E.J. Currie and Jon M. Van Dyke, "The Shipment of Ultrahazardous Nuclear Materials in International Law" (1999) 8:2 *Review of European Community and International Environmental Law* 113.

uncertainities and inconsistencies in liability levels

- Sets minimum liability limits solely by tonnage without reference to hazard so that small tonnages of high hazard wastes may be underinsured while large tonnages of low hazard wastes may be overinsured
- Only applies to hazardous wastes and other wastes as defined in the Basel Convention which can be difficult to determine
- Does not establish an international compensation fund
- Seeks to channel liability to private persons rather than further developing the law of the State responsibility

Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (Waigani Convention)[166]

Entry into Force: Opened for signature on 16 September 1995, the Convention is to enter into force thirty days after the deposit of the tenth instrument of ratification. Not yet in force.

Status among OECS Member States: Convention generally restricted to members of the South Pacific Forum and other States with territories in the South Pacific region.

Executive Summary

The Convention's title is self-explanatory. The Convention's main thrust is to prohibit the importation of hazardous wastes and radioactive wastes into Pacific Island developing Countries from outside the region. The Convention seeks to control transboundary movements of hazardous wastes that are allowed (e.g., between developing countries in the region or between developing States and developed States) in various ways including a prior informed consent procedure.

The Waigani Convention is one of the regional agreements adopted to tailor the provisions of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal to regional conditions.[167] Article 11 of the Basel Convention authorises Parties to enter into bilateral, regional or multilateral agreements/arrangements regarding transboundary movements of hazardous wastes, provided the agreements/arrangements do not derogate from requirements for environmentally sound management set out in the Convention.[168]

Structure

The Waigani Convention consists of a preamble, 28 articles and 7 annexes. Annex I lists categories of wastes that are to be considered hazardous wastes, unless they do not possess any of the hazardous characteristics set out in Annex II such as being poisonous, infectious, corrosive or ecotoxic. Annex III lists Pacific Island developing State Parties to whom the import ban from outside the region is to apply. Annex IV lists developed State Parties who are members of the South Pacific Forum, Australia and New Zealand.[169] The Convention will allow controlled movements of hazardous wastes to those countries but requires those countries to prohibit the export of hazardous or radioactive wastes to developing countries in the region. Annex V lists various types of disposal operations subject to the Convention such as deposit into landfills and incineration on land or at sea. Annex VI, in Part A, lists information that must be provided in notifications of proposed hazardous waste shipments and, in Part B, lists information that must be included in the "movement document" required to accompany

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[166] Reprinted in 21 *International Environment Reporter* 2201–13.

[167] Other regional agreements have been adopted for Africa, the Mediterranean, and Central America and a key multilateral arrangement has been forged between the European Union and the African, Caribbean and Pacific States through the Lomé IV Convention. For a discussion, see Fred L. Morrison and Wm. Carrol Muffett, "Hazardous Waste" in Fred L. Morrison and R. Wolfrum (eds.), *International, Regional and National Environmental Law* (The Hague: Kluwer Law International, 1999) at 416–27.

[168] For a review of the implications of the Basel Convention for OECS Member States, see Anderson et al., supra note 3, pp. 80–86.

[169] The Convention does allow other Parties to be added but only after a decision by the Conference of the Parties (Annex IV (2)).

shipments. Annex VII establishes arbitration procedures which may be used by Parties involved in a dispute over application of or compliance with the Convention.

Obligations

- General
- Prior Informed Consent Procedure
- Information Transmission
- Duty to Re-import
- Punishment of Illegal Traffic
- International Co-operation

General

Article 4 sets out various general obligations. Each Pacific Island Developing Party agrees to ban the import of all hazardous wastes and radioactive wastes from outside the Convention area and to make such import illegal and criminal under domestic law. Other Parties, specifically Australia and New Zealand, pledge to ban the export of hazardous wastes and radioactive wastes to all Forum Island Countries or to territories in the Convention area and to make such export illegal and criminal under domestic law. Parties affirm commitments to ban dumping of hazardous wastes and radioactive wastes at sea. Parties must ensure hazardous waste generation is reduced at source to a minimum and are encouraged to treat and dispose of hazardous wastes in an environmentally sound manner in the jurisdiction where the wastes are generated. Each Party is also required to develop a national hazardous wastes management strategy compatible with the South Pacific Regional Pollution Prevention, Waste Minimisation and Management Programme.

Prior Informed Consent Procedure

Article 6 establishes a prior informed consent procedure for transboundary shipments of hazardous wastes allowed under the Convention between Parties. The exporting Party must notify, or require the generator or exporter of hazardous wastes to notify, in writing, concerned States, that is, States of proposed import and transit. The exporting Party is not to allow the transboundary movement until it has received: the written consent of the importing Party; written consent from every transit Party; written consent from every non-Party country of transit; written confirmation from the importing Party of the existence of a contract between the exporter and the disposer specifying the environmentally sound management of the wastes in question; and written confirmation from the exporter of the existence of adequate insurance or other guarantee.

Each transboundary movement of hazardous wastes must also be accompanied by a movement document to help track the "chain of custody". Each person who takes charge of a transboundary movement of hazardous wastes must sign the "movement document". The disposer of hazardous wastes must inform both the exporter and the competent authority of the exporting Party regarding receipt and, in due course, the completion of disposal.

Each Party must designate or establish one competent authority responsible for handling notification procedures and one focal point responsible for receiving and transmitting information. A Party is allowed to name one entity as both the competent authority and the focal point (Article 5).

Information Transmission

Various information requirements are also established. In case of an accident during the transboundary movement or disposal of hazardous wastes, Parties must ensure information is immediately provided to those States or Parties at risk and the Secretariat (Article 7 (1)). Parties are required to set up information collection and dissemination mechanisms in order to report to the Secretariat on various matters including amounts of hazardous wastes generated, exported and imported (Article 7 (3)).

Duty to Re-Import

Where an authorised transboundary shipment of hazardous wastes cannot be completed in accord with contractual terms, the exporting Party is required to insure the wastes are re-imported or to ensure alternative arrangements are made for environmentally sound disposal (Article 8).

Punishment of Illegal Traffic

Pursuant to Article 9, each Party is required to adopt national legislation to prevent and punish illegal traffic in hazardous wastes. Illegal traffic is defined to include movements carried out without notification, without consent of a country concerned or where consent is obtained from countries concerned through fraud or misrepresentation. Illegal traffic also includes movements that contravene import and export bans under the Convention.

International Co-operation

Article 10 calls for various forms of co-operation. Parties are required to co-operate with one another, non-Parties, and relevant regional and international organisations, to facilitate the availability of adequate treatment and disposal facilities, preferably in the South Pacific region. Parties are also urged to co-operate in the development and implementation of cleaner production technologies and in transferring technology and management systems for the environmentally sound handling of hazardous wastes.

Costs of Implementation

Quite minimal costs are likely to be associated with becoming a Party to the Convention. Those costs include expenses related to establishing a national hazardous waste management strategy and establishing a prior informed consent procedure under domestic law.

Developed States do not take on substantial financial commitments. Article 10 (3) simply requires the Secretariat to encourage developed countries to facilitate and finance the transfer of environmentally sound technologies and know-how to Pacific Island Developing Parties.

Article 15 requires the Conference of Parties to consider the establishment of a revolving fund to assist countries in case of emergency situations involving transboundary movements or disposal of hazardous wastes.

Strengths and Weaknesses

Strengths

- Imposes a ban on imports of hazardous wastes from outside the South Pacific region in light of limited technical and regulatory capacities of island States
- Allows Pacific Island Developing States to export hazardous wastes when they lack in-country capacity for disposal in an environmentally sound manner
- Requires national hazardous waste minimisation planning

Weaknesses

- Leaves considerable discretion to Parties in determining when they lack the capacity to dispose of hazardous wastes safely and in deciding what constitutes "environmentally sound management"
- Does not clarify the authority of transit States to impose notice and consent requirements for movements of hazardous wastes through offshore zones of jurisdiction, such as the territorial sea[170]
- Contains minimal financial commitments and financial details, for example, the adoption of financial rules, including the scale of contributions of the Parities, is left to the first Conference of the Parties[171]
- No inspection or verification procedures are established to ensure hazardous wastes are moved and disposed of safely[172]

[170] Like the Basel Convention, the Waigani Convention leaves the issue ambiguous. Article 2 (4) provides:

> Nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea, the sovereign rights and jurisdiction that States have in their exclusive economic zones and continental shelves, and the exercise by vessels and aircraft of all States of navigational rights and freedoms, as provided in international law….

[171] Article 13(2).

[172] Article 19 requires the Conference of the Parties to consider adoption of a protocol dealing with verification of alleged breaches of obligations.

D. Atmospheric Pollution

Kyoto Protocol on Climate Change[173]

Entry into Force: Opened for signature at United Nations Headquarters from 16 March 1998 to 15 March 1999. The Protocol has been signed by 85 countries, ratified by 34 countries, and has not entered into force. The Protocol enters into force once at least 55 Parties, representing at least 55% of emissions from Annex I countries, have ratified the Protocol. So far, only one Annex I country, Romania, representing a small fraction of emissions, has ratified.

Status Among OECS Member States as of 1 July 2001:

Country	Date into Force	Date of Signature	Date of Ratification	Date of Accession
Anguilla*				
Antigua and Barbuda		16 March 1998	3 November 1998	
British Virgin Islands*				
Dominica				
Grenada				
Montserrat*				
St. Kitts and Nevis				
St. Lucia		16 March 1998		
St. Vincent and the Grenadines		19 March 1998		

* Although the United Kingdom signed the Kyoto Protocol on 29 April 1998, its signature does not extend to its Overseas Territories.

Executive Summary

The Kyoto Protocol represents the first binding reduction target under the United Nations Framework Convention on Climate Change (UNFCC).[174] Under the Protocol, developed countries (Annex I Parties)[175] agreed to reduce their emissions of greenhouse gases (GHGs)[176] by at least 5 % below 1990 levels (Art. 3.2). Individually, each Annex I Party agreed to a specific reduction target to achieve to overall goal (Annex B).

[173] Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc. No. FCCC/CP/1997/L.7/Add.1, 10 December 1997, reprinted in (1998) 37 *International Legal Materials* 22, 23. At <http://www.unfccc.int/ resource/protintr.html> (accessed: 16 April 2001).
[174] For a discussion of the implications of the UNFCCC for OECS Member States, see Anderson et al., supra note 3 at 68–73.
[175] "Developed countries" are referred to as Annex I countries because they are listed in Annex I of the UNFCCC, 1992.
[176] For a list of gases included in the Protocol, see Annex A, supra note 173.

The Protocol includes a number of flexibility mechanisms that are intended to provide alternatives to domestic emission reductions. These mechanisms include emissions trading (Arts. 4 and 17) (either on a case by case basis or by creating an emission bubble, such as the European Union[177]) and joint implementation of emissions reductions between Annex I Parties and economies in transition (Art. 6). They also include a clean development mechanism (Art. 12), which allows Annex I countries to work with non-Annex I Parties to achieve credits in non-Annex I countries and use the reductions to offset emissions in the participating Annex I country.

Finally, the Protocol provides an opportunity to offset emissions beyond the country specific target by removing GHGs from the atmosphere through sinks (Arts. 3.3 and 3.4). Possible sinks include forests and soils. The details on how these flexibility mechanisms will operate have yet to be worked out.[178]

Structure

The Protocol consists of a short preamble, 28 articles and two annexes.

The preamble simply places the protocol within the context of the UNFCC. Annex A lists the six greenhouse gases that are subject to the Protocol as well as a list of major sectors that contribute to emissions. Annex B lists the country specific emission reduction targets for Annex I countries.

Articles 1 to 3 include definitions and an overview of the overall obligations taken on by Parties. Included in these articles are the emission reduction obligations, obligations to developing countries, and provisions for sinks as a way to offset emissions (Arts. 3.3 and 3.4). Articles 4, 6, 12, and 17 provide for flexibility mechanisms, including the emissions bubble (allowing countries to meet their target as a group rather than individually), joint implementation, the clean development mechanism, and emissions trading.

Articles 5, 7 and 8 provide for determination and reporting of member countries' emissions by source and removals by sinks. Article 18 addresses the issue of compliance. The remaining articles deal with the general administration of the Protocol.

Obligations

Most of the obligations of the Protocol rest with Annex I countries. They include the country specific emission reduction targets in Annex B for the first commitment period of 2008 to 2012. This means countries have to reduce their emissions to the accepted emissions reduction target averaged over the five-year commitment period. If a country cannot meet its target in 2008, it still has four years to make up the difference.[179]

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[177] Under Article 4, the European Union (EU) was given an overall target for all its Members collectively. As long as the overall target is met for the EU, its Member States are considered to be in compliance, even if individual countries do not meet their target. This allows Members of the EU to trade within the context of Article 4. This option is open to other countries that are willing to be bound by a joint target.

[178] Negotiations, which were set out in the Buenos Aires Plan of Action in 1998 to conclude in The Hague in November 2000, failed to result in an agreement. They are scheduled to resume in Bonn, Germany in July 2001.

[179] Article 3.7. The Protocol does this by providing for an assigned amount of emissions for the five-year commitment period. It is up to individual countries to budget the use of this assigned amount, as long as the total amount for the commitment period is not exceeded. Buying credits or removing emissions through sinks can increase a country's assigned amount. Assigned amounts can be lowered by selling credits or if sinks turn into sources.

To ensure proper accounting of emissions and trading, reporting obligations are included under Articles 5, 7 and 8. These provisions are intended to ensure a balance between national sovereignty in allowing countries to determine how they will meet their obligations for emissions reductions and international oversight to ensure that the terms of the protocol will be met. They include an obligation to show demonstrable progress toward the emission reduction target by 2005 (Art. 3.2). Other related obligations include a requirement to estimate emissions in accordance with accepted methodologies, and a requirement to keep and make public an annual inventory of GHG emissions by source and GHG removal by sinks (Art. 7).

Obligations of Annex I Parties to developing countries are set out in articles 2.3, 3.14, 10, and 11. Article 2.3, in combination with Article 3.14[180] requires Annex I countries to strive to minimise adverse effects on other Parties. This includes the issue of adaptation to the adverse effects of climate change such as sea level rise and extreme weather events. It also extends to economic, social and environmental impacts of mitigation actions. Articles 10 and 11 provide for technology transfer and capacity-building in developing countries, including the provision of new and additional financial resources. The specifics in terms of amounts of funding and processes for technology transfer and capacity-building are still under negotiation.

Non-Annex I countries take on very few obligations under the Protocol (Art. 10), and those taken on are essentially restatements of obligations under the UNFCC.[181] They include the development of national inventories of anthropogenic emissions by source and removal by sinks of greenhouse gases not controlled by the Montreal Protocol on Substances that Deplete the Ozone Layer (1987). Article 10 also makes general reference to an obligation to develop national and possibly regional programmes to mitigate and adapt to climate change. Finally, all Member States are obliged to co-operate in research, technology transfer, education, training, and to communicate on action taken under the Protocol.

Costs of Implementation

The main financial commitments of developing countries are included in the UNFCC[182] and relate to national communications on emissions and policies and action to mitigate and adapt to climate change. Under the Protocol, there is not sufficient detail to determine the potential costs, but there is expected to be a net financial benefit to developing countries resulting from their participation, at least for the first commitment period.

There are expectations for funding to developing countries for capacity building, technology transfer, and for projects through the Clean Development Mechanism.[183] In addition, the Protocol provides for an adaptation fund to assist developing countries with their efforts to adapt to sea level rise, droughts, severe weather events and other climate change impacts.

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[180] See also Articles 4.8 and 4.9 of the UNFCC.
[181] UNFCCC, Article 4, supra note 3 at 72.
[182] Supra note 3 at 72.
[183] The World Bank, with several other partners, has developed a National Strategy Studies Programme (NSS) that offers assistance to developing countries to develop national strategies for the Clean Development Mechanism in the Protocol. For more information, see the World Bank at <http://wbln0018.worldbank.org/external/lac/lac.nsf/f5011188e0c14817852567d6006c43ed/aa8f45728c0c8385852567e7007cb99f?OpenDocument> (accessed: 23 March 2001).

It is generally understood that these funds would be in addition to existing funding, such as the $6 million GEF's Caribbean Climate Change Adaptation Fund.[184] This Fund has supported a variety of climate change adaptation projects in the Caribbean region including coral reef monitoring, establishment of a sea level rise monitoring network, and coastal vulnerability and risk assessments. New funding mechanisms could either be set up within the GEF process or through a separate body.

Strengths and Weaknesses

Strengths

- First agreement to establish binding targets to reduce GHG emissions
- Provides an opportunity for a strong compliance system, perhaps the first MEA to include binding consequences
- Establishes ground rules for a carbon constrained world
- Provides opportunities for partnerships between developed and developing countries

Weaknesses

- Targets are generally recognised to be inadequate to address climate change
- Binding consequences can only be implemented by way of amendment to the Protocol
- Targets were negotiated without agreement on what countries can do to meet their targets[185]
- Not enough detail included in the Protocol to encourage ratification and implementation
- Time for ratification and implementation of the Protocol is running out[186]

[184] Caribbean: Planning for Adaptation to Global Climate Change (CPACC). For more information see <http://www.cpacc.org/cpacc.htm> (accessed: 19 March 2001).
[185] For an article-by-article textual history of the Protocol, see Technical Paper FCCC/TP/2000/2 at <http://www.unfccc.int/resource/docs00.html> (last document listed) (accessed: 16 April 2001).
[186] For latest negotiating texts and status of negotiations, see: <http://www.unfccc.int/resource/docs.html> (accessed: 16 April 2001).

3. Trade and Environmental Agreements

International Tropical Timber Agreement (1994)[187]

Entry into Force: 1 January 1997. As of September 2000, there were 55 Member States

No OECS Member or Associate Member State has signed or accepted the Agreement.

Executive Summary

The first International Tropical Timber Agreement (ITTA), adopted in 1983 under the auspices of the United Nations Conference on Trade and Development and coming into force in 1985, established a number of institutions and policy directions which have continued in the successor Agreement negotiated in 1994. Being a commodity agreement, the ITTA 1983 emphasised the strengthening of trade benefits in tropical timber through enhancing forest management and wood processing capabilities in producing countries and improving market access. The Agreement established the International Tropical Timber Organisation (ITTO), headquartered in Yokohama, Japan, to supervise treaty implementation and the International Tropical Timber Council (ITTC) to meet annually and responsible for development of rules and regulations and approving projects.

The revised International Tropical Timber Agreement (the Agreement), adopted in 1994, while still embracing trade promotion, demonstrates a shift towards sustainable development. The Agreement, according to its objectives set out in Article 1, seeks to "contribute to the process of sustainable development" and to "enhance the capacity of members to implement a strategy for achieving exports of tropical timber and timber products from sustainably managed sources by the year 2000". The Agreement also established a new fund, the Bali Partnership Fund, to assist producing countries to meet the sustainable forestry objective.

Since tropical timber harvesting may be closely linked to other environmental issues such as climate change, biodiversity conservation, desertification, and trade in endangered species, the co-ordination of international forestry policy is an ongoing challenge. The world community has established a number of discussion mechanisms including the Intergovernmental Panel on Forests (1995-1997), the Intergovernmental Forum on Forests (1997-2000) and, most recently, the UN Forum on Forests (UNFF). The UNFF, established in October 2000 as a subsidiary body under the Economic and Social Council (ECOSOC) and having a five-year mandate, has been tasked with continuing policy discussions relating to forests including the possible need for a new legally binding instrument on forests.

Structure

The Agreement consists of a preamble, 47 article and two annexes. Annex A lists and allocates votes to member States who are producing countries for tropical timber. Annex B lists and allocates votes to consuming countries. The Annexes were included as part of a complicated formula for the new Agreement to enter into force.[188]

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[187] January 26, 1994, reprinted in (1994) 24:2/3 *Environmental Policy and Law* 124.

[188] The Agreement was to enter into force if 12 Governments of producing countries holding at least 55 percent of the total votes as set out in Annex A and 16 Governments of consuming countries holding at least 70 percent of the total votes as set out in Annex B ratified the Agreement.

Obligations

- General
- Promotion of Sustainably Managed Forests
- Provision of Statistics and Information

General

The International Tropical Timber Agreement of 1994 is quite limited in scope and obligations. The Agreement focuses on enhancing trade and sustainable forest management practices in countries producing tropical timber, that is, countries situated between the Tropic of Cancer and the Tropic of Capricorn (Art. 2(1)). While some countries pushed hard during negotiations for a revised agreement to cover all the world's forests, they were unsuccessful.[189] In the end, consuming States simply issued a formal statement committing themselves to implement appropriate guidelines and criteria for sustainable management of forests comparable to those developed by the International Tropical Timber Organisation.[190]

The Agreement is rather short in specific obligations and is largely devoted to establishing general objectives and institutional mechanisms to promote projects and guidelines. Article 1 of the Agreement sets out 14 objectives including, among others, the need to:

- provide a forum for consultation in order to promote non-discriminatory timber trade practices
- enhance capacity for sustainable forest management; promote research on forest management and efficiency of wood utilisation
- improve market intelligence
- promote processing of tropical timber from sustainable sources in producing countries in order to increase employment and export earnings
- encourage development of national forest policies
- promote access to and transfer of technologies in the forestry sector

The International Tropical Timber Organisation and its operational Council are given limited functions. Article 24 simply calls upon the ITTO to undertake policy work and project activities in the areas of Economic Information and Marketing Intelligence, Reforestation and Forest Management, and Forest Industry. Pursuant to Article 25, the Council is given a project approval function. Members are invited to submit project proposals in areas such as marketing and strengthening forest management to the Council for approval.[191]

Four Committees of the ITTO are established and given general mandates pursuant to Article 26. The Committee on Economic Information and Market Intelligence is to review statistics relating to international timber trade and assist developing member countries in improving their statistical services. The Committee for Reforestation and Forest Management is to promote co-operation and to

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[189] See generally, Canadian Council on International Law, *Global Forests and International Environmental Law* (London: Kluwer Law International, 1996).

[190] The Statement is reproduced at (1994) 24:2/3 *Environmental Policy and Law* 124.

[191] While the Agreement itself sets out various factors that the Council must consider in making project approval decisions, such as project relevance to the objectives of the Agreement and the designability of a geographical balance in funding, the Council in 1999 adopted second editions of an ITTO Manual for Project Formulation and an ITTO Manual for Project Monitoring, Review and Evaluation. The Manuals are available at the ITTO's website at <http:/www.itto.or.jp> (accessed: 10 April 2001).

identify possible management measures in the areas of reforestation, rehabilitation and forest management.[192] The Committee on Forest Industry is tasked with promoting technology transfers, investments, and joint ventures and training. The Committee on Finance and Administration is to address budgetory issues and ensure secure financing for ITTO operations.

Article 32 of the Agreement explicitly recognises the very general nature of obligations undertaken by Parties to the Agreement:

1. Members shall for the duration of this Agreement, use their best endeavours and co-operate to promote the attainment of its objectives and to avoid any action contrary thereto.
2. Members undertake to accept and carry out the decisions of the Council under the provisions of this Agreement and shall refrain from implementing measures which would have the effect of limiting or running counter to them.

The ITTA takes a facilitative rather than a regulatory approach. The ITTO is given no enforcement powers.[193]

Promotion of Sustainably Managed Forests

What is often referred to as the Year 2000 Objective was originally adopted by the ITTO Council in 1991 through Decision 3(X). The goal of having all tropical timber entering international trade come from sustainable managed sources by 2000 was articulated.[194] The objective was subsequently incorporated into the objectives of the Agreement (Art. 1(d)).

The Objective remains largely an unmet goal. According to a recent progress report, only six countries appear to be managing some of their forests sustainably at the level to achieve the Year 2000 Objective.[195] Common constraints in meeting the Objective have been identified as lack of adequate finances and trained human resources.[196]

Provision Statistics and Information

Article 27 requires Parties to provide the International Tropical Timber Council with requested information. States are required to furnish statistics and information on timber trade and activities aimed at achieving sustainable management of timber producing forests.

Costs of Implementation

[192] The ITTO partly, through the work of the Committee, has developed 4 sets of guidelines: Guidelines for Sustainable Management of Natural Tropical Forests (1990); Guidelines for the Establishment and Sustainable Management of Planted Tropical Production Forests (1993); Guidelines for the Conservation of Biological Diversity in Tropical Production Forests (1993); and Guidelines on Fire Management in Tropical Forests (1997). In addition, a set of Criteria and Indicators for Sustainable Management of Natural Tropical Forests was adopted in 1998. Copies of the Guidelines and Criteria/Indicators may be found on the ITTO website, *ibid*.

[193] Article 31 simply allows complaints and disputes to be referred to the Council for decision but no sanction powers are set out.

[194] However, some uncertainty exists over the scope of the objective, whether an obligation exists to manage all tropical forests in a sustainable manner or only those forests from which traded timber originates. See *Review of Progress toward the Year 2000 Objective Executive Summary* at <http://www.itto.or.jp> (accessed: 10 April 2001).

[195] Specifically, Ghana, Guyana, Indonesia, Malaysia, Cameroon and Myanmar. *Ibid*. at para. 71.

[196] *Ibid*. at para. 72.

Besides costs associated with providing statistical and other information to the Council and possible expenses for sending delegations to Council meetings, a Party will be subject to an annual administrative fee. According to Article 19, the contribution of a Party to the administrative budget for each financial year is to be in proportion with the number of votes it holds to the total votes of all the members.[197]

Financial assistance is available to developing country Parties for various capacity-building and economic development activities but the Agreement leaves the level of funding voluntary. A Special Bali Partnership Fund is specifically targeted at assisting producing countries meet the objective of sustainable forest management but depends on donor contributions (Art. 21). As well, a Special Account is established, again dependent on voluntary contributions, in order to support a broader array of projects or project development exercises (pre-projects) (Art. 20). About US$138 million has been invested so far on the Year 2000 Objective[198] and over 400 projects have been funded since 1987.[199]

A number of projects have been funded in the Latin American region. For example, at its 29th session in November 2000, the Council approved financing for a Government of Honduras 3-year project to improve management and conservation of mangrove forests along the Gulf of Fonseca (US$1,291,000) and a Venezuelan project to address loss of mangrove forests in the northeast Orinoco Delta region (US$363,757).[200]

Strengths and Weaknesses

Strengths

- Provides a consultation forum for discussion tropical timber trade and related forest management issues
- Adopts a sustainable forest management objective and promises producing States project funding to help achieve the objective

Weaknesses

- Continues, as a commodity agreement, an inherent bias towards tropical timber trade rather than recognition of other forest values[201]
- Is not a comprehensive forest agreement and excludes temperate and boreal forests
- Is silent on the need to address indigenous rights issues arising in some countries
- Provides no "teeth" for ensuring the sustainable forest management objective is met such as a mandatory certification scheme, inspections and sanctions
- Has generated various guidelines but not binding standards for forestry operations[202]
- Financial assistance to developing States remains voluntary

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[197] Article 10 establishes a rather complicated formula for allocation of votes to the Member Parties. Part of the allocation for producing countries will depend on their share of tropical forest resources and value of tropical timber exported.
[198] Supra note 194 at para. 32.
[199] "About the ITTO" at <http://www.itto.or.jp> (accessed: 10 April 2001).
[200] "Briefing on ITTO's Project Work" (2001) 11:1 *ITTO Newsletter* at <http://www.itto.or.jp> (accessed: 10 April 2001).
[201] Article 1, setting out objectives, only makes a brief reference on the need to enhance forest values other than timber.
[202] Supra note 194 at para. 86.

Agreement on Technical Barriers to Trade (TBT)[203]

Entry into Force: This Agreement entered into force with the establishment of the World Trade Organisation (WTO) on 1 January 1995. All Member States of the WTO are bound by the terms of this Agreement.

Status Among OECS Member States as of 1 July 2001 (Accession to WTO):

Country	Date into Force
Anguilla*	
Antigua and Barbuda	1 January 1995
British Virgin Islands*	
Dominica	1 January 1995
Grenada	22 February 1996
Montserrat*	
St. Kitts and Nevis	21 February 1996
St. Lucia	1 January 1995
St. Vincent and the Grenadines	1 January 1995

* No information was available on the status of the United Kingdom's Overseas Territories in the WTO at the time this report was published.

Executive Summary

This Agreement seeks to remove technical barriers to international trade. It seeks to distinguish legitimate technical regulations and standards for such purposes as human health, environmental protection and national security from those that favour domestic products over those imported from other countries (Art. 2). All products, including industrial and agricultural products, are subject to the Agreement, with two exceptions. Products purchased under government procurement are not subject to this Agreement, but are subject to the Agreement on Government Procurement. Pursuant to Article 1, the Agreement does not apply to sanitary measures and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures (see below, p. 98).

The preamble recognises that no country should be prevented from taking measures to protect human, animal or plant life or heath or from protecting the environment, as long as those measures do not arbitrarily or unjustifiably discriminate between countries. The Agreement therefore seeks to strike a balance between preserving countries' rights to protect their citizens and the environment on the one hand, and preventing such measures from restricting international trade on the other hand.

[203] Reprinted in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, at 138 to 162 (Geneva: GATT Secretariat, 1994).

Generally, the Agreement encourages the country which seeks to implement measures to protect its citizens or its environment to do so in a manner that is consistent with international standards. In the absence of suitable international standards, the State is obliged to ensure that the standard or technical regulation is designed for the purpose of achieving the human health or environmental objective and has the effect of achieving the objective in the least trade restrictive manner.

To this end, the Agreement establishes general obligations designed to ensure standards and technical regulations do not discriminate against international trade. It then develops processes to ensure this objective can be met and a dispute resolution mechanism in case of dispute over the purpose and effect of specific measures. The Agreement recognises special circumstance of developing countries in meeting the obligations of the Agreement. Article 12.7 specifically obligates Members to provide technical assistance to developing countries to ensure that technical regulations, standards and conformity assessments do not create unnecessary obstacles for exports from developing country Members. Article 12 further recognises that developing countries face institutional and infrastructure problems, and obligates Members to assist developing countries to overcome those challenges.

The fundamental approach of the Agreement puts it at odds with the precautionary principle in the sense that it requires countries to justify action to protect the environment, rather than requiring justification of inaction, as contemplated under the precautionary principle.[204]

Structure

The Agreement consists of a preamble, 15 articles and three annexes. The preamble places the Agreement in the context of the Uruguay Round of Multilateral Trade Negotiations and the 1994 GATT.

Articles 1 to 4 set out the scope of the Agreement and the general obligations on Parties. The objective of these obligations is to ensure that technical regulations and standards adopted are not more trade restrictive than necessary and do not accord favourable treatment to domestic products. These provisions apply to central government bodies, and Parties agree to take reasonable steps to ensure compliance by local government and non-governmental bodies as well. Articles 5 to 9 provide for mechanisms to ensure that domestic standards and technical regulations conform to the obligations under this Agreement. To this end, the Agreement establishes procedures for assessment of conformity. Articles 10 to 12 provide for information sharing and assistance among Parties, with a particular emphasis on developing countries in Article 12. Articles 13 to 15 deal with dispute settlement and administrative matters.

The three annexes are considered an integral part of the Agreement. Annex I defines a number of terms for purposes of the Agreement.[205] Annex II sets out procedures for Technical Expert Groups set up under Article 14 to assist with dispute settlement. Annex III provides a code of good practice for the development of standards. It applies to national and regional standardising bodies.

[204] See, for example, Articles 2.5 and 2.9.

[205] Annex I defines "technical regulation", one of the central terms in the Agreement. The definition provides that a document that "lays down product characteristics or their related processes and production methods" is considered a technical regulation under the agreement if compliance is mandatory. Annex I also defines "standard", "conformity assessment procedures", "international body or system", "regional body or system", "central government body", "local government body", and "non-governmental body".

Obligations

- No Less Favourable Treatment
- Remove Technical Regulations
- Use International Standards
- Justify Technical Regulations
- Ensure Compliance
- Provide Enquiry Point
- Assist Other Countries

No Less Favourable Treatment

At the core of the Agreement is the obligation to ensure that products imported are not treated less favourable than domestic products (Art. 2.1). Related to this is the obligation to ensure that technical regulations[206] are not introduced for the purpose of creating unnecessary obstacles to trade (Art. 2.2).

Remove Technical Regulations

Pursuant to Article 2.3, Members agree to remove technical regulations once the circumstances giving rise to them have changed.

Use International Standards

Members will use international standards for technical regulations except where they are ineffective or inappropriate to meet the legitimate objective pursued (Art. 2.4).[207]

Justify Technical Regulations

Countries agree to give notice and justify technical regulations that are not in accordance with international standards and may have a significant impact on trade.[208]

Ensure Compliance

Articles 2 and 3 oblige Members to ensure compliance by central government bodies, local government bodies, and non-governmental bodies. Members are also expected to ensure that standardising bodies comply with the code of good practice in Annex III (Art. 4). In addition, conformity assessment procedures have to conform to requirements in Articles 5, 7 and 8. Countries are expected to accept such conformity procedures in other countries.

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[206] "Technical regulations" under the Agreement include any regulation to protect the environment unless they are covered under the WTO Agreement on Sanitary and Phytosanitary Measures.

[207] There are several international organisations that either have or are currently developing standards that may have relevance to this Agreement. They include the Codex Alimentarius, the World Organisation for Animal Health (OIE), the World Health Organisation, and the International Plant Protection Convention. A current list of Codex Alimentarius standards can be found at <http://www.codexalimentarius.net/STANDARD/standard.htm> (accessed: 23 March 2001). Standards developed to date address food hygiene, food labelling, food import and export inspection and certifications systems, and organically produced food. For current OIE standards, see <http://www.oie.int/eng/en_index.htm> (accessed: 23 March 2001). The OIE has, for example, developed an International Aquatic Animal Health Code.

[208] Justification is required upon request by another Member, see Article 2.5.

Provide Enquiry Point

Each Member State must provide an enquiry point to ensure access to relevant information for other countries and interested parties (Art. 10).

Assist Other Countries

Members shall assist, where requested, other countries in the development of technical regulations (Art. 11). Members are especially expected to provide favourable treatment to developing country members (Art. 12).

Costs of Implementation

The overall cost of implementing the Agreement is difficult to quantify. It includes the cost of limitations in countries' ability to regulate environmental protection, the cost of justifying and defending those regulatory measures from a scientific and legal perspective, and the benefits of freer access to international trade markets.[209]

Strengths and Weaknesses

Strengths

- Encourages international standards and international co-operation
- Provides an international forum for debate on what regulatory responses are appropriate to address specific environmental risks
- Under the WTO umbrella, this Agreement has the benefit of one of the most effective enforcement mechanisms in international law

Weaknesses

- Contrary to the precautionary approach, it requires States to justify action to protect the environment, rather than encourage action in the face of scientific uncertainty; in practice this has already resulted in domestic environmental protection measures being struck down[210]
- May discourage countries from leading by example on protecting the environment
- Does not protect States who implement appropriate environmental standards from unfair competition from States that do not implement equivalent standards, even if those standards are internationally accepted

[209] For more information on efforts by the WTO to accommodate developing country needs and challenges with the implementation of the Agreement, see <http://www.wto.org/English/thewto_e/whatis_e/tif_e/dev0_e.htm> (accessed: 6 April 2001).

[210] See, for example, the following WTO ruling: United States – Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DSR/R (Jan. 29, 1996); (1996) 35 *International Legal Materials* 274. In this case, US Clean Air regulations were found to violate WTO rules. The US Clean Air Act Regulations were aimed at reducing air pollution from gasoline combustion, particularly in regions suffering from air quality problems. The WTO found that similar reductions in emissions could have been achieved in a manner that did not favour domestic fuel refiners over foreign producers. The regulations were struck down by the WTO even though it was clear that any impact on trade was incidental to the objective of reducing air pollution in the United States.

Agreement on Sanitary[211] and Phytosanitary[212] Measures (SPS)[213]

Entry into Force: This Agreement entered into force with the establishment of the World Trade Organisation (WTO) on 1 January 1995. All Member States of the WTO are bound by the terms of this Agreement.

Status Among OECS Member States as of 1 July 2001 (Accession to WTO):

Country	Date into Force
Anguilla*	
Antigua and Barbuda	1 January 1995
British Virgin Islands*	
Dominica	1 January 1995
Grenada	22 February 1996
Montserrat*	
St. Kitts and Nevis	21 February 1996
St. Lucia	1 January 1995
St. Vincent and the Grenadines	1 January 1995

* No information was available on the status of the United Kingdom's Overseas Territories in the WTO at the time this report was published.

Executive Summary

The primary objective of the SPS Agreement is to strike a balance between the rights of Member States to protect human, animal and plant life or health with the Agreement under the WTO umbrella to promote international trade (Art. 2). The Agreement seeks to identify mechanisms to distinguish between appropriate measures and measures that are intended or have the effect of restricting international trade unnecessarily. It does so in part by separating the interests of the exporting and importing countries. The issue in this context is how far the exporting country has to go to justify the adequacy of its measures and how far the importing country can go in imposing conditions on the exporting country before it has to accept the product to be traded.

Most of the provisions in the Agreement deal with how to distinguish between necessary and unnecessary measures. The preferred solution in dealing with this struggle is through internationally negotiated standards. All Members would ideally accept these standards. The process becomes more complicated when countries either have different views on what level of risk is acceptable, when States disagree over the information that forms the basis for risk analysis, or there are national or regional issues that make an international standard difficult or impossible to apply.

[211] Sanitary refers to food safety.
[212] Phytosanitary measures deal with plant and animal protection.
[213] Reprinted in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, at 69–84 (Geneva: GATT Secretariat, 1994).

The Agreement establishes an equivalency process to allow Members to alter international standards (Art. 4). In addition, where no appropriate international standards exist, members can apply a risk assessment process to identify an appropriate response that balances the human health and environmental risks against the trade restrictiveness of the measures proposed (Art. 5). The Agreement does not completely resolve the fundamental question of what level of risk is appropriate and how to value that risk against the restriction of trade associated with proposed measures.

Annex A offers the following definition of appropriate level of sanitary or phytosanitary protection: "The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory". It is left to the dispute settlement process and negotiations on future standards and risk assessment processes to resolve what the limits of a Member's powers to impose measures are under this definition. The extent to which Members will be able to take a precautionary approach to the protection of the health of humans, plants and animals should be clarified in the process.

Structure

The Agreement consists of a preamble, 14 articles and three annexes. The preamble and the first two articles provide the context and general provisions on the relationship between trade and the protection of human health, plants and animals from pests and disease. Articles 3 to 6 deal specifically with the mechanisms to establish acceptable limits on trade through international standards, equivalent national standards,[214] and accepted risk assessment processes.

Articles 9 and 10 deal with developing country issues. The remainder of the Agreement deals with administrative matters, transparency, and dispute settlement. Annex A provides definitions for key terms in the Agreement, Annex B deals in some detail with the issues of transparency raised in Article 7, and Annex C sets out control, inspection and approval procedures.

Obligations

- General
- Base Measures on International Standards
- Accept Standards of Other Members
- Apply Internationally Accepted Risk Assessment
- Adapt Measures to Regional Characteristics
- Transparency
- Take Account of Special Needs of Developing Countries

General

The general obligation in the Agreement is for Parties to ensure that sanitary and phytosanitary measures are taken either in accordance with international standards, or otherwise in such a way as to minimise their impact on international trade (Arts. 1 and 2).

[214] Pursuant to Article 4, the equivalency provisions allow for differences in SPS standards if the exporting country can demonstrate to the importing country that its measures meet the importing country's standards for SPS protection. Members are encouraged to enter into bilateral or multilateral agreements to formalise these equivalency arrangements.

Base Measures on International Standards

Members shall base their sanitary and phytosanitary measures on international standards where possible (Art. 3). Exceptions include circumstances where there is no international standard and where there is scientific justification for a higher standard.[215]

Accept Standards of Other Members

Standards that differ from international standards are to be accepted by importing countries if the exporting country can demonstrate that the standard meets the importing country's appropriate level of protection (Art. 4).

Apply Internationally Accepted Risk Assessment

Members' measures are to be based on risk assessment, taking into account internationally recognised assessment techniques, available scientific evidence, inspection, testing and sampling methods, and balancing the risk to humans, animals and plants against the economic cost associated with the trade restrictive effect of the measures being considered (Art. 5).

Adapt Measures to Regional Characteristics

Members are required to ensure measures that are applied to the export and import of a product are adapted to the area from which the product in question originates and to the area of destination (Art. 6). This means consideration of the level of prevalence of specific pests and diseases, the existence of eradication and control programmes, and appropriate criteria or guidelines.

Transparency

Annex B establishes processes for notification and access to information on sanitary and phytosanitary measures of a Member State (Art. 7). They include the requirement for one entry point to be set up by each Member State to answer all questions from interested Members. The Annex provides for the availability of documentation through these entry points and includes a notification procedure to be followed by Members.

Take Account of Special Needs of Developing Countries

Members are required to take account of the special needs of developing countries, in particular the least developed countries (Art. 10). This requirement includes an allowance for phased introduction or measures and extended time frames for compliance. The Committee on Sanitary and Phytosanitary

[215] There are several international organisations that either have or are currently developing standards that may have relevance to this Agreement. They include the Codex Alimentarius, the World Organisation for Animal Health, and the International Plant Protection Convention (IPPC). These organisations are recognised in Article 3.4 as playing an important role in developing international standards. The role of the IPPC in setting standards under the SPS Agreement has been formally recognised through changes to the IPPC in 1997. A current list of Codex Alimentarius standards can be found at <http://www.codexalimentarius.net/STANDARD/standard.htm> (accessed: 23 March 2001). Standards developed to date address food hygiene, food labelling, food import and export inspection and certifications systems, and organically produced food. For current OIE standards, see <http://www.oie.int/eng/en_index.htm> (accessed: 23 March 2001). The OIE has, for example, developed an International Aquatic Animal Health Code.

Measures[216] is empowered to grant developing countries specific exemptions from the obligations under the Agreement.

Costs of Implementation

The overall cost and benefits of implementation are difficult to quantify.[217] They include the potential costs associated with the risk of invasion by pests and diseases if more stringent domestic protection measures are struck down under the Agreement and, alternatively, the cost of justifying a higher standard than provided for in international standards. Potential financial benefits include savings through international co-operation in developing standards and the benefits of freer access to international trade markets.

Strengths and Weaknesses[218]

Strengths

- Encouraging international co-operation in preventing spread of pests and diseases through international trade
- Under the WTO umbrella, this Agreement has the benefit of one of the most effective enforcement mechanisms in international law
- Encouraging other international organisations to develop international standards on acceptable risk and on measures to reduce risk of contamination to those levels

Weaknesses

- Limits members' ability to take a precautionary approach to protecting their population and their environments from introduction of pests and diseases through international trade
- Does not consider the overall environmental impact of international trade, but rather isolates the issue of sanitary and phytosanitary health, it thereby makes it more difficult for countries to take a holistic approach to reducing the environmental impact of trade

[216] Established under SPS Agreement, Article 12.

[217] For more information on efforts by the WTO to accommodate developing country needs and challenges with the implementation of the Agreement, see <http://www.wto.org/English/thewto_e/whatis_e/tif_e/dev0_e.htm> (accessed: 6 April 2001).

[218] There is a wide range of views on the implications of this agreement on environmental protection initiatives. For a discussion, see for example R. Neugebauer, "Fine-tuning WTO Jurisprudence and the SPS Agreement: Lessons from the Beef Hormone Case", (2000) 31(4) *Law and Policy in International Business* at 1255 and C. Thorn, "The Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade", (2000) 31(3) *Law and Policy in International Business* at 841. The uncertainties surrounding the application of the SPS Agreement will only be resolved through precedents set by cases brought before the WTO.

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