CONVENTION ON WETLANDS (Ramsar, Iran, 1971)

25th Meeting of the Standing Committee
Gland, Switzerland: 23- 27 October 2000

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Agenda item 7

Report and analysis on issues related to Resolution VII.12:

"Sites in the Ramsar List of Wetlands of International Importance: official descriptions, conservation status, and management plans, including the situation of particular sites in the territories of specific Contracting Parties"

Action requested: To consider: a) the evaluation made by the Bureau of the implementation of a number of paragraphs of Resolution VII.12 and to take and/or support action, as appropriate, to ensure effective implementation; and b) possible recommendations to COP8 to discuss mechanisms for the effective implementation of Article 3.2 of the Convention.

1. The Report of the Secretary General contains information received by the Bureau on actions taken by a number of Contracting Parties in relation to the calls and requests by the Conference of the Parties contained in Resolution VII.12.

2. Nevertheless, the Bureau remains concerned by the fact that almost 18 months after the COP not enough action has been reported by a large number of Contracting Parties in relation to this important and very specific Resolution. The Bureau considers that it will be important, for the achievement of conservation and wise use on the ground and for the credibility of the Convention, to arrive at COP8 with a significant record of effective implementation of this Resolution. To this end, the Bureau invites the support of the Standing Committee as a body, and of each individual Regional Representative, the Permanent Observers, and the International Organization Partners. The operative paragraphs in the Resolution that in the view of the Bureau require particular attention are listed below.

3. Paragraph 12. The COP "WELCOMES the statements made in the National Reports or during this Conference concerning the impending, or planned, extensions to existing Ramsar sites, and designations of new Ramsar sites in the near future or during the next triennium, from the following 56 Contracting Parties: Albania (1 site), Algeria (4 sites), Argentina (1 site), Australia (4 sites), Austria (1 site), Bangladesh (1 site), Belgium (1 site), Brazil (2 sites), Canada (3 sites and extension of 2 existing sites), Costa Rica (2 sites), Ecuador (5 new sites and 1 extension), Estonia (10 sites), Finland (50 sites), France (3 sites), Germany (1 site), Guatemala (3 sites and 1 extension), Guinea-Bissau (2 sites), Honduras (7 sites), Hungary (4 sites), India (25 sites), Indonesia (3 sites), Islamic Republic of Iran (2 sites), Israel (4 sites), Ireland (19 sites), Kenya (1 site), Latvia (1 site), Madagascar (1 site), Malawi (2 sites), Mongolia (6 sites), Namibia (2 sites), Nepal (3 sites), Netherlands (27 sites), New Zealand (3 sites), Nicaragua (3 sites), Niger (1 site), Norway (12 sites),

Panama (2 sites), Papua New Guinea (2 sites), Philippines (3 sites), Poland (5 sites), Republic of Korea (1 site), Romania (8 sites), Russian Federation (90 sites), Slovak Republic (2 sites), Slovenia (4 sites), Sweden (21 new sites and 9 extensions), Suriname (2 sites), Switzerland (2 sites), The Gambia (2 sites), Trinidad and Tobago (1 site), Uganda (3 sites), Ukraine (10 sites), United Kingdom (7 sites in Bermuda, 1 site in the British Indian Ocean Territory, 1 site in the British Virgin Islands, and 1 site in Scotland), Vietnam (3 sites), and Zambia (7 sites); and encourages these Contracting Parties, if they have not already done so, to forward completed Ramsar Information Sheets and boundary maps for these 13 site extensions and 398 new sites to the Bureau as soon as possible."

3.1. Status of implementation. The following CPs have already fulfilled their pledges in full or partially: Algeria (2 out of 4 sites); Argentina (2 out of 1 site); Australia (5 out of 4 sites); Austria (1 out of 1 site); Bangladesh (1 out of 1 site); Brazil (2 out of 2 sites); Costa Rica (1 out of 2 sites); Ecuador (2 out of 5 sites and one extension); Guatemala (1 site and one extension out of 3 sites and one extension); Iran (2 out of 2 sites); Philippines (3 out of 3 sites); Honduras (7 out of 7 sites); Papua New Guinea (1 out of 2 sites); and Slovenia (1 out of 4 sites). In summary, out of 398 new sites pledged, some 30 sites have been designated (7.5%), and one extension has been effected, out of 13 extensions pledged.

3.2 If the 398 sites pledged at COP7 were designated by the time of COP8 in November (to be confirmed) 2002, the Ramsar List would have 1404 sites. In order to achieve the approved target of 2000 sites in the List by COP9 in 2005, 596 new sites should be designated between COP8 and COP9. A concerted effort should be started now if these figures are to be realized. Particular attention should be given to assisting the 57 CPs that so far have designated only one or two sites. Some of them are new CPs, and some are small and/or arid countries with few or no additional sites that would qualify as wetlands of international importance, but a good number of these CPs have been Parties for as long as 15 years and are well endowed with wetland resources.

4. Paragraph 14. The COP "EXPRESSES DEEP CONCERN that there remain a number of Ramsar sites for which an official description has not been provided or updated, or has not been provided in one of the three official working languages of the Convention, and/or for which a suitable map has not been submitted."

Paragraph 15. The COP "CALLS UPON the following Contracting Parties, as a matter of the highest priority, to submit site descriptions conforming with the Ramsar Information Sheet format, and in one of the Convention's three official languages, for a total of 54 Ramsar sites within their territories where no such descriptions have yet been provided (as indicated in Annex 1 of document Ramsar COP7 DOC. 13.3): Algeria (1 site), Belize (1 site), Gabon (3 sites), Germany (10 sites), Ireland (23 sites), Islamic Republic of Iran (1 site), Mauritania (1 site), Monaco (1 site), Netherlands (10 sites), Spain (1 site) and Yugoslavia (2 sites)."

4.1. Status of implementation. Algeria and Monaco have submitted the needed documentation.

5. Paragraph 16. The COP "FURTHER CALLS UPON the following Contracting Parties, as matter of the highest priority, to provide suitable maps for a total of 8 Ramsar sites where

no such maps have yet been submitted (as indicated in Annex 2 of document Ramsar COP7 DOC. 13.3): Bahrain (1 site), India (4 sites), Netherlands (2 sites), and The Former Yugoslav Republic of Macedonia (1 site)."

5.1. Status of implementation. None of the required maps have yet been submitted by the CPs.

6. Paragraph 17. The COP "URGES the following Contracting Parties to provide to the Bureau as soon as possible Ramsar Information Sheets, in one of the Convention's official working languages, for a total of 21 sites where only other language versions have so far been submitted (as indicated in Annex 3 of document Ramsar COP7 DOC. 13.3): Germany (18 sites) and The Netherlands (3 sites)."

6.1. Status of implementation. The two CPs have not yet submitted the RISs in one of the official languages.

7. Paragraph 18. The COP "FURTHER URGES the following Contracting Parties that have yet to provide updated Ramsar site descriptions, using the current Ramsar Information Sheet, to do so as a matter of priority for a total of 29 sites (as indicated in Annex 4 of document Ramsar COP7 DOC. 13.3): Bulgaria (2 sites), Denmark (11 sites), Ghana (1 site), Guinea-Bissau (1 site), India (6 sites), Ireland (1 site), Kenya (1 site), Mali (3 sites), Spain (1 site), Uganda (1 site), and the United Kingdom (1 site); and NOTES the statement of Denmark that the Greenland Home Rule Administration, which has competence for implementation of the Convention in Greenland, will complete the process of updating Ramsar Information Sheets for the 11 Ramsar sites in Greenland by the year 2000."

7.1. Status of implementation. Only Ghana has submitted the needed documentation.

7.2. In addition, it should be recalled that Resolution VI.13, paragraph 7, "URGES Contracting Parties to give priority to providing the Bureau by 31 December 1997 with maps and completed Information Sheets on Ramsar Wetlands for all sites designated for the Ramsar List, and to revise the data provided at least every six years (i.e. every second Meeting of the Conference) for monitoring purposes". Wetlands International reports that no updated RISs have been received since 1994 for 560 sites. Priority to this issue is reflected in the Bureau Work Plan for 2001.

8. Paragraph 19. The COP "AGREES to raise the Convention's target for management planning at Ramsar sites, as set by Action 5.2.3 of the Strategic Plan 1997-2002, and URGES Contracting Parties to ensure that, by COP8 (2002), management plans are in preparation, or in place, for at least three quarters of the Ramsar sites in each Contracting Party and to seek to have these plans being implemented in full."

8.1. Status of implementation. The Bureau has not carried out a full survey of progress being made concerning management planning at Ramsar sites. The information received is contained in the Report of the Secretary General (General Objective 5 of the Strategic Plan). The general impression is that progress is slow, and most likely developing countries and countries in transition continue to require external assistance, and in particular financial assistance, to be able to do more.

9. Paragraph 29. The COP "NOTES WITH CONCERN that the Austrian Ramsar site 'Donau-March-Auen', referred to in Recommendation 6.17, cannot be removed from the Montreux Record owing to the plans for construction of a waterway linking the Danube, Oder and Elbe rivers, which could adversely affect the ecological character of this site, as well as additional Ramsar sites in Austria, the Czech Republic and the Slovak Republic."

   Paragraph 32. The COP "ALSO NOTES that construction of a water way to link Germany, Poland, Belarus, and Ukraine may have significant impacts on wetlands and INVITES the States concerned to undertake a full review and assessment of these impacts, in accordance with international transboundary impact assessment procedures."

   9.1. The Bureau has not received information indicating that the situations that raised the concerns of the COP in the two paragraphs above have changed.

10. Paragraph 33. The COP "REQUESTS those Contracting Parties with sites included in the Montreux Record, and which have not provided updates on the conservation status of these sites as part of their National Reports to this Conference or other appropriate means, to do so as soon as possible, and to advise on the likely time frame for the removal of these sites from the Record."

    10.1. No updates have been received by the Bureau. In the Report of the Secretary General it is indicated that Bangladesh and the Democratic Republic of Congo have requested the inclusion of one site each in the Record and that two Ramsar Advisory Missions have been sent to Montreux Record sites, in Senegal and Tunisia.

11. Paragraph 37. The COP "EXPRESSES ITS APPRECIATION to those Contracting Parties which in their National Reports to this Conference provided information, in accordance with Article 3.2 of the Convention, on changes in ecological character that have occurred, are occurring, or may occur at one or more of their Ramsar sites, namely: Albania, Argentina, Australia, Bangladesh, Belgium, Bolivia, Botswana, Brazil, Canada, Chile, Comoros, Czech Republic, Democratic Republic of Congo, Germany, Guinea, Honduras, Hungary, Ireland, Japan, Lithuania, Malta, Mexico, Mongolia, New Zealand, Nicaragua, Pakistan, Poland, Portugal, Peru, Sri Lanka, The Gambia, Togo, United Kingdom, Venezuela and Yugoslavia; COMMENDS in particular Australia, Germany, Ireland, Japan and the United Kingdom for the detailed advice provided on this matter; and URGES all of these Contracting Parties to consider, at the earliest opportunity, the possible inclusion of these sites onto the Montreux Record."

    11.1. Status of implementation. No requests have been received for inclusion in the Montreux Record of any of the sites referred to in the above paragraph. The Bureau has requested most of the Contracting Parties listed in the above paragraph to provide information on the situation regarding the sites where change in ecological character has been reported and will send reminders at appropriate times. A report will be prepared with the responses received.

    11.2. In the section dealing with General Objective 5 of the Strategic Plan, the Report of the Secretary General provides information about the complaints received by the Bureau, mostly through NGOs, concerning changes in the ecological character of Ramsar sites, including the action taken by the Bureau and the responses received from the Ramsar Administrative Authorities.

11.3. Article 3.2 of the Convention provides that Contracting Parties shall "arrange to be informed at the earliest possible time" if the ecological character of a Listed wetland has changed, is changing or is likely to change; and that information on such changes shall be "passed without delay" to the Bureau.

11.4. Some issues that flow from this Article have been examined by the Standing Committee, the STRP, and the Parties in the past. For example, definitions of "ecological character" and "change in ecological character" were adopted in Resolutions VI.1 and VII.10, and a "Wetland Risk Assessment Framework" was adopted in Resolution VII.10. The "Framework for designing a wetland monitoring programme" contained in the annex to Resolution VI.1 is also relevant.

11.5. The creation of the Montreux Record in 1990, and the associated procedure now known as the Ramsar Advisory Mission (RAM), are direct contributions to implementation of Article 3.2, even though they do not constitute a "direct mechanism" for implementation of this Article (if this was the case, all the sites referred to in paragraph 37 of the Resolution should have been automatically placed in the Montreux Record).

11.6. It has to be acknowledged that other tools devised under the Convention, such as the guidelines on management planning, the Small Grants Fund, a section in the national report format or "National Planning Tool" concerning sites facing change, and COP Recommendations on environmental impact assessment, all have a role to play.

11.7. There are, however, currently also some difficulties and gaps. RAMs have not been initiated in as many instances as might be desirable. As evidenced by paragraph 37 of Resolution VII.12, the Montreux Record mechanism is not a representative record of ecological change issues featuring in the Ramsar List, and while in some instances Parties find that it raises the profile of relevant cases and helps in giving political impetus to problem-solving, others have had difficulty with accepting the factual recognition of existing problems that the Record implies.

11.8. Opportunities for synergy with other Conventions which have their own procedures for addressing problems at specific sites, when these are also Ramsar sites, could be developed further. There are also questions of legal interpretation which may need consideration, such as the "likelihood" of change.

11.9. These issues have been examined in two background papers prepared for the Bureau by D E Pritchard of BirdLife International. These include comparisons of Ramsar procedures with those of some analogous regimes in other Conventions and international instruments. These documents are attached for reference in Annexes I and II.

11.10 The requirements in Article 3.2 to "arrange to be informed at the earliest possible time" and to pass information "without delay" are unqualified, yet what happens in practice usually falls short of this – i.e., technically most Parties are in breach of this fundamental part of the Ramsar treaty. The Bureau considers this to be a serious matter which would merit attention at COP8.

11.11 The Standing Committee is invited to consider future needs in this key area. For example, encouragement by the COP (perhaps with guidance) on implementing Article 3.2 more fully, would help to address a shortfall in delivery of a basic provision of the Convention, and would allow some of the existing tools to be used in a more complete (and perhaps more coherent) way. If formal notifications about sites facing change were to operate as envisaged in the Article, the Montreux Record could then be adapted to become an automatic mechanism for fulfillment of this requirement of the treaty, instead of continuing to be a voluntary mechanism at the disposal of Contracting Parties. This change in the role of the Montreux Record may make advisable, or even require, a role played by the Standing Committee and/or the STRP.

ANNEX I

Convention for the Conservation of European Wildlife and Natural Habitats
(Bern Convention)

REVIEW OF THE CASE FILE SYSTEM

Paper by D E Pritchard

September 2000

Introductory note

The issues addressed by this paper were discussed at two meetings of the Select Group for the Strategic Development of the Bern Convention in April and September 2000. Further to the conclusions in the paper itself, the Group considered that:

- The case file system is one of the fundamental top priority activities carried out in the framework of the Bern Convention.

- The on-the-spot appraisal process is a very useful element in acting on case files, and its use should be reinforced, with Secretariat staff taking part in missions (to cover any "political" negotiations), alongside specialist experts.

- There should be more transparency in the system, *inter alia* by The Secretariat submitting to the Bureau and the Standing Committee an annotated listing of complaints received, information on cases and the state of progress with them being made available on request, and criteria for decision-making and reasons for individual decisions being explained.

- It is important to admit cases which merit international attention, and not just those which involve an alleged breach of Convention requirements: to facilitate this a more flexible application of the rules could be envisaged.

- The case file system should be operated in an integrated way with increased use of rapid responses to emergency damage or threat to biological diversity (resulting from eg accidents or conflict situations).

- Positive examples of case files should be promoted.

- A more clear distinction between open/"active" files and information files should be made in their presentation to the Standing Committee.

- Further monitoring of the application of the Convention by Contracting Parties should be carried out (following the example of the Nordic country case studies).

Contents

Purpose of this paper

1. This paper has been written at the invitation of the Chair of the Bern Convention Standing Committee. It is offered for the consideration of the Select Group examining strategy and aspects of the operations of the Convention during 2000, in association with the Committee's Bureau. Its main purpose is to stimulate a review of the "case file" system, rather than to promote any specific prescription for its future.

2. It is suggested that a key feature of such a review should be to draw on the comparative experience from analogous processes in other Conventions. International NGOs such as BirdLife International and Wetlands International also have procedures for formal interventions in significant individual cases, and that experience has also been drawn on here.

The role of the case file system

3. The practice of examining "case files" in the Bern Convention was approved by the Standing Committee at its 3rd meeting in 1984, and a written procedure provisionally* adopted at the 13th meeting in 1993, set out in the Secretariat memorandum "opening and closing of files - and follow up to recommendations", document T-PVS(99) 16. (*Provisionally, because of apparently still unresolved European Commission concerns about the relationship between the procedure and EU infringement procedures).

4. The case file procedure offers a formal and systematic way of engaging the Secretariat and the Standing Committee in the examination, and hopefully resolution, of issues and problems which arise from time to time in implementing the Convention. Often, but not always, these involve threats to specific sites.

5. The procedure serves to draw out facts about the issue concerned, to raise awareness of it beyond the country concerned, to mobilise political support in an international forum for resolving the issue, and to debate, recommend and support potential solutions.

6. The process of presentation of concerns (eg an NGO complaint), debate, profile-raising and a decision about opening a file, should be considered together with two other potential steps. These are the provision for conducting a so-called "on the spot enquiry" or "on the spot appraisal"; and the adoption of formal Standing Committee recommendations, which, as the Secretariat memorandum points out, may in time come to constitute customary law.

7. Cases which reach this arena are usually controversial. Fundamentally the government of the country concerned, or the primary agency within it responsible for implementation of the Convention, is being offered help. However the process is characteristically driven by allegations eg by NGOs of a compliance failure of some sort, and therefore tends to have some flavour of "enforcement" as well as problem-solving. This helps to galvanise action, but obviously means that a sensitive diplomatic balancing-act is at the heart of the process. This experience is common to several Conventions.

The performance of the system

8. The performance of this system is hard to review objectively, but all would agree it has been patchy. At its best it can generate new wisdom and consensus, or remove an issue from an arena of conflict and stalemate to one where solutions are arrived at in face-saving and politically satisfactory ways. It is also potentially good at empowering a country's nature conservation authorities with an international mandate and imperative, to help them prevail against domestic resistance. This may flow from publicity about the case, as well as the results of the procedure itself.

9. On the other hand it is open to many criticisms. Governments are known to obstruct cases which they find uncomfortable, and to procrastinate over actions. The greatest effort does not necessarily go into the most deserving cases. The time-cycles of meetings and the "bottleneck" filters of the Bureau and Standing Committee are not conducive to fast action. The process lacks legal "teeth".

Features of the Bern Convention's process

10. The existence of the 1993 approved written procedure is key, and it is worth regularly checking that the detail of this meets the need.

11. A purpose of the system (solution-oriented) is expressed: this is valuable.

12. The process is triggered by a complaint letter from any quarter to the Secretariat, and there are no stipulations about the form and content of these. The Secretariat conducts a basic screening as to the merits of the case. The Contracting Party or Parties complained against are kept informed at each stage, and have a time-limit for responding to the first (Secretariat) decision that the case warrants examination; though it is not said what happens if they fail to reply.

13. Normally the case must then be considered by the Bureau (which may decide to let it progress or not) and if passed, wait for attention at the next Standing Committee meeting, which could be as much as a year away. (Interim on-site assessments can be arranged in urgent cases).

14. The basis for these Secretariat and Bureau decisions is not specified, and there is no requirement for them to explain their reasons.

15. Apart from the on-site assessment facility mentioned above, there is no provision for deciding priorities among deserving cases, though in practice no doubt there is some limit on how many can be processed by a given meeting. The sequence in which they are listed on agendas can influence the extent of attention they receive.

16. Standing Committee decisions, by convention, are reached by consensus, so a complained-against Contracting Party which does not wish a file to be opened may simply block it. Under the rules the possibility exists for this to be overridden by a majority vote, but such would be resorted to only as a rare "crisis move".

17. Opening a file leads either to a Committee recommendation or an on the spot appraisal or both, and to reports on the implementation of these. Paras 7, 8 and 10 of T-PVS (99) 16

imply that these are the only outcomes envisaged, but the wording is somewhat ambiguous, and if outcomes other than these are envisaged it would be worth specifying what they might be. When all goes well, recommendations can be a useful political tool for action.

18. Once a file is opened, technically the only grounds for closing it are if "the difficulties relating to implementation have been resolved". In practice files have also been closed when the Committee (perhaps under urging from the Party concerned) concludes it is unlikely to achieve resolution. The basis for this is questionable.

19. In respect of "general" recommendations, the Committee can decide "that implementation is satisfactory" where "follow-up proves to be no longer necessary"; but no parameters for such decisions are specified, and there is no requirement for reasons to be given.

20. The issue of follow-up to "specific" recommendations has been reviewed by the Committee in the past (eg in 1993 and 1996), and a procedure for this has also been provisionally adopted. The description of the system implies that these must be preceded by and based on the opening of a file, but it could be worth expressly providing for them to arise in other ways too.

21. Reports on implementation of "specific" recommendations are supposed to be submitted by the Parties concerned, and consequent proposals tabled by the Secretariat. In practice such reporting is often lax, and the Committee (including observer complainants) struggles instead with last-minute and incomplete information, or no information at all, and the issue may then be delayed for another year (or until action becomes impossible eg a habitat is destroyed). Governments can repeatedly evade the will of the international community (and their Convention obligations) in this way.

22. The Committee can decide that measures adopted pursuant to a "specific" recommendation are "sufficient" (which is then grounds for closing the file) or "insufficient" (whereupon they can "consider", ie decide, that there has been a failure to comply with the Convention). In "certain cases of particular gravity" the arbitration procedure contained in the Convention may be activated. All of these decisions however flow from the reports referred to above, and can thus be frustrated by a simple failure to report.

Features of the Ramsar Convention's equivalent process

23. The Convention on Wetlands (Ramsar, Iran, 1971) established in 1990 the "Montreux Record", a list of wetland sites where an adverse change in ecological character has occurred, is occurring or is likely to occur. It does not purport to be a comprehensive list of sites in such condition, but merely those chosen at the discretion of Parties for international attention in this way, according to a written procedure last revised in 1996.

24. One of the consequences of listing can be the convening of an expert mission to the site to suggest or broker solutions, under a procedure initially termed the Monitoring Procedure, then re-named the Management Guidance Procedure, and now referred to as Ramsar Advisory Missions (RAMs).

25. Like the Bern procedure, the Montreux Record/RAM system has been successful in a number of cases, has failed to make progress in others, and admits in the first place only a minority of the cases that objectively would appear to merit its attention.

26. There has been a permanent presentational difficulty, in trying to make what is designed as a problem-solving procedure not appear too much like vilification or "blacklisting" of "guilty" countries.

27. Unlike the Bern case-file procedure, the Montreux Record is not predicated on an alleged breach of Convention requirements. (In fact, under Ramsar, failure to submit information on ecological changes affecting sites is itself a breach of the Convention).

28. The RAM procedure is a way of offering expert advice (eg involving consultants) which is externally funded (including a dedicated line in the Convention budget), and this acts as a significant incentive for action. There is some evidence that governments take pride in reporting successful conclusions in the Ramsar international forum, and this can also be a political incentive.

29. In theory the process is a continuous and open-ended one, and therefore has this advantage when compared with the Bern system's Bureau and Standing Committee "bottleneck"; but in practice Ramsar's (triennial) Conference of Parties tends to be the reference-point which galvanises action. Limited capacity of the Secretariat at the centre to chase progress and organise missions etc is also a constraint (although there are ways that this might be improved).

30. Central to the Montreux Record procedure is the stipulation that a site can only be listed with the approval of the Contracting Party concerned. This is to allay fears of its use as an "enforcement" sanction. There is judged to be a tradeoff - some deserving cases will undoubtedly be blocked by unwilling Parties, but the price of trying to correct that might be to lose support for the procedure as a whole. It is noteworthy that Bern Parties by contrast have accepted a system that in principle could be used against their will, and could produce a finding of non-compliance. Ramsar offers no equivalent outcome.

31. The Ramsar procedure includes a standard (but voluntary) questionnaire for completion by the Contracting Party concerned: this might be something for the Bern system to consider. Cases are passed to the Convention's permanent Scientific & Technical Review Panel (STRP) for advice.

32. Periodic reports on the condition of sites on the Montreux Record are required, and Ramsar Parties have been reasonably diligent in providing these. Ramsar Advisory Missions produce reports which, among other things, constitute valuable "case study" material for wider use. The general Ramsar national report format (or "national planning tool") asks about this too, in its section 5.1.3.

33. Removal of a site from the Record takes place either when requested by the Party concerned (a necessary provision given that inclusion is subject to their approval in the first place), or if "there is no longer a risk of change in the ecological character" of the site. This is slightly curious, in that one way in which listing can arise is where change has taken place in the past and where listing is intended to aid remedial measures - logically in such a case removal should follow successful remediation, rather than the abatement of threat.

34. While there are no criteria as such for removing sites from the Record, the questionnaire nevertheless rather cleverly includes a section entitled "information for assessing possible removal of a listed site from the Montreux Record". This therefore prompts an explicit and broadly standard approach to justifying removal decisions, something which is missing from the Bern system. This has also recently (1999) been enhanced by a decision of the STRP that it will set up a subgroup on each occasion that a removal is proposed, to review the proposal. The Ramsar system does not otherwise provide for the giving of reasons, because decisions about adding or removing a site are for the Contracting Party to make, rather than a delegated supervisory body like a Secretariat. Nevertheless the questionnaire prompts do give useful parameters, and the approach in any case should be in accordance with the Convention's guidelines on maintenance of ecological character.

Features of the European Union's equivalent process

35. In the European Union there is a formal procedure for Member States or NGOs to submit complaints to the European Commission alleging a breach by a Member State of the provisions of a Directive, which may result in activation of the "Article 226 infringement procedure" under the Treaty of Amsterdam. Complaints can cover a range of matters from inadequate transposition of EU laws into national statutes to procedural improprieties in specific decisions, and include cases of actual or threatened damage to nature conservation sites where such damage runs counter to obligations in relevant Directives (principally the Birds Directive, Habitats Directive and Environmental Impact Assessment Directive).

36. There is a standard pro-forma on which to submit complaints, and a sequence of steps, with deadlines, for the Commission to seek information from/urge solutions on the Member State. On the spot appraisals or special missions can take place, though procedures for these are not fixed and they are undertaken in only a minority of cases.

37. The procedure must be based on a well-formulated allegation of a legal infringement. A key reason for this is that, unless it produces a solution by itself, the complaint forms a precursor to possible action by the Commission against the Member State in the European Court of Justice (ECJ).

38. For that reason the Commission is keen for the process to be activated only after first seeking to resolve the issue within the national jurisdiction concerned. "Twin-tracking" complaints together with domestic action is accepted, but ECJ action is unlikely without first exhausting the domestic possibilities.

39. Although certainly more of a technical infringement procedure than the Ramsar one, and to an extent more than the Bern one too, it is known for EC complaints to be used in the same "constructive" or tactical sense as these other two.

40. There is a serious capacity bottleneck at the Commission, which is unable at present to progress more than a minority of the complaints it receives. It is thus forced to prioritise, and for example is tending to favour action on cases which raise broad implementation and interpretation questions affecting a whole network of sites, or all Member States collectively, rather than "one-off" isolated decisions.

41. This system can ultimately produce outcomes which have the effect of constituting caselaw which is binding on all the Members of the Union, which the Convention systems described do not.

Features of the World Heritage Convention's equivalent process

42. The World Heritage Convention has provided for the establishment of a List of World Heritage in Danger since its adoption in 1972, by an article in its substantive text. Sites are entered either where assistance is requested, or where the World Heritage Committee itself decides there is "urgent need". Detailed eligibility guidelines were adopted in 1982.

43. A key implication of listing a site under these provisions is to help in securing financial assistance from the World Heritage Fund (although funding from this source is not limited to sites on the "in Danger" list). The provision in the Convention affording States Parties rights of consultation is couched in terms of a possible decision to refuse addition of a site to the List, rather than to add it. This implies that it may be regarded as an example at the "incentive" end of the spectrum, if for example the EU system is at the "control" end and the other two Conventions more hybrid in nature.

44. However it is also apparent that adding a site to the "in Danger" list can be viewed by some States as an adverse reflection on them, and therefore like the other systems the prospect of doing so can act as a source of pressure to resolve problems.

45. Time has not allowed further consideration of this system in the present paper, but this could be done at a later date.

Features of the Council of Europe Diploma process

46. The Council of Europe Diploma of Protected Areas is an award which recognises and promotes examples of good practice in protection and management of areas of environmental importance. It is thus primarily an incentive device.

47. However a significant feature of the Diploma is that it is awarded for a limited period, and can be renewed subject to a system of review and assessment. It has thus increasingly been able to function as a relevant instrument for responding to threats and other problems at sites, where the high-profile decision as to renewal of the Diploma may be a key spur to securing resolution of the problem.

48. Time has not allowed further consideration of this system in the present paper, but this could be done at a later date.

Generic points

49. A central consideration in all these systems is the delicate political balance between incentive or assistance, and assurance of compliance or enforcement - ie the balance between "carrot" and "stick". Examination of analogous processes in other régimes shows a range of ways in which this balance is struck.

50. In this, a key point is whether the consent of the country concerned is required before the procedure can be progressed, or whether it is progressed by decision of the majority or by

a "watchdog" body to whom this responsibility is entrusted, in the context of a shared international interest in the outcome.

51. For an enforcement procedure to be effective some sort of meaningful sanction must at least in principle be available.

52. For an incentive/assistance procedure to be effective it must be capable of meeting the need of the country concerned, eg by offering the right expertise within a sufficiently short timescale to solve urgent problems. The systems with the most effective incentives are those which can draw on funds dedicated to the purpose.

53. Whichever philosophy predominates, there may always be scope, and every effort should be made, to help governments ultimately present the solutions that are arrived at as examples of pioneering field-leadership, so they can reap political kudos at home and on the international stage.

54. Incentives of funding or kudos however need to be conditional, and ultimately they are part of a process which must serve the objectives of the Convention. Abuse of the system, or defiance of it, or procrastination, all need to be detected and legitimately countered.

55. Several international conservation instruments have evolved problem-solving processes, of which the Bern case file system is just one. In many countries, governments and NGOs potentially have a choice as to which system might be best in a given case. Enhancing awareness about the respective attributes of each should help in making wise choices on this.

56. On the other hand, the systems are of course not mutually exclusive. There is no reason why, in an appropriate case, all of them could not be operated in parallel.

57. More interesting perhaps than either of these thoughts is the prospect of how the different systems might be operated in a complementary manner. For example, it has already been known for a Bern Convention case file to be a decisive influence in bringing about a European Court of Justice action on the case in question, producing an outcome which the Bern Convention could not have produced on its own, but which the EU system may not have been sufficiently motivated to reach otherwise. The way this might play out will vary from country to country, according to cultural, legal and political preferences, familiarities and sensitivities. This might be an interesting area to explore further in future.

58. This paper has not attempted to evaluate the effectiveness or rates of success with these procedures, in solving or averting harm to nature conservation interests. Clearly that is an important question, but it is unlikely to be simple either to agree a method of addressing it, or to marshal the information required.

59. In the meantime this preliminary review suggests some points on which further thoughts might be developed for the Bern Convention.

Points for possible consideration in Bern

60. It may be worth standardising or systematising the collection of information using proformas or questionnaires. Among other things this may aid transparency and

consistency of decision-making, and may reassure Parties that a "level playing-field" is in operation.

61. It could be an option to admit cases which merit international attention through the Convention where this would help solve implementation problems, and not just those which involve an alleged breach of Convention requirements.

62. It may be worth making provision, on an agreed basis, for deciding priorities among deserving cases (especially perhaps in respect of decisions made by the Bureau).

63. It is recommended that ways be explored to specify criteria and parameters for decisions, and to require that reasons be given when decisions are made, by the Bureau, Standing Committee or ad hoc groups of experts involved in on the spot appraisals. Explicit criteria and a broadly standard approach should be agreed for closure of files. Reasons should be given in particular for decisions on screening, closing files, and for not pursuing recommendations.

64. The scope for enhancing continuing or interim action between Standing Committee meetings, and the institutional mechanisms required for this, should be explored.

65. Provision could be made for decisions in relation to specific recommendations to be made on the basis of reports from independent experts or the Secretariat's own analysis, as well as (ie not restricted to) reports from Parties. At present Parties can frustrate the process simply by not reporting.

66. The above suggestions would fit within the structure and philosophy (though not the detailed guidelines) of the current system. More radical possibilities (eg sanctions for infringements, budgets for case issues) should also be discussed.

Conclusion

67. It would be greatly welcomed if the Bern Convention Bureau were to use this opportunity to initiate a review of the future operation of the case file system. There is exciting potential to capitalise on the comparative experience of other Conventions and similar systems, and to explore complementarities and synergies between them.

68. While it may not be regarded by everyone as the foremost aspect of what the Convention represents, it is inevitable that, in the eyes of many, it is by this aspect that its success or failure is primarily likely to be judged. The case file system is something of a litmus test for the effectiveness of the Convention as a whole. There have been significant achievements from its operation to date; but also many weaknesses which should be addressed. This paper is a first contribution to what hopefully will become an active area of progress in the new century.

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ANNEX II

Convention on Wetlands (Ramsar, Iran, 1971)

ACTION IN RESPONSE TO CHANGE IN ECOLOGICAL CHARACTER OF LISTED WETLANDS

A review of procedural aspects under the Convention, and options for the future

D E PRITCHARD

Contents

I. Introduction

1. Article 3.2 of the Convention provides that:

> "Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to [the Convention Bureau]."

2. This requirement is the primary trigger for the attention given by the Convention not only to degradation of wetlands which is occurring or has occurred in the past, but also to possible threats and the responses which can be made to such threats.

3. It is timely to review a number of interpretation and implementation issues which arise from this key provision, and the way in which they relate to procedures operated by the Bureau and Parties. The significance of these issues has been recognised by the Scientific and Technical Review Panel, which established (at STRP9, June 2000) an Expert Working Group on Ecological Character, so as to bring to Standing Committee and COP8 a report

on further technical aspects of addressing ecological character and change in ecological character.

II. Ecological character and change in ecological character (see Ramsar Wise Use Handbook 8, section 5 - Wetland risk assessment framework)

4. These concepts have been considered in depth by the Scientific & Technical Review Panel, resulting in working definitions adopted in COP Resolution VI.1 in 1996, and amended definitions adopted in Resolution VII.10 in 1999.

5. One point of interest here is the reference to "processes" (in VI.1) which became "interactions" (in VII.10). International legal and policy frameworks include an array of instruments which seek to safeguard species populations, features of the physical environment, natural resources, air and water quality and even habitats (e.g., Ramsar itself), but almost none whose focus of attention is ecological processes.

6. COP6 also asked for the development of "early warning systems for detecting, and initiating action in response to, change in ecological character". As a contribution to this question the STRP conducted further work which resulted in a "Wetland Risk Assessment Framework" adopted by COP 7 in Resolution VII.10. The STRP is undertaking further work on early warning and risk assessment especially in relation to climate change and invasive species.

III. "Arranging to be informed" of change in ecological character (see Ramsar Wise Use Handbook 8, section 4 - Designing a wetland monitoring programme)

7. Inherent in this part of Article 3.2 is a mandatory requirement for Parties to equip themselves with the capability for detecting change, or the likelihood of change, and for information about any such change to be passed in the first instance to the national Administrative Authority for the Convention. Again the Convention has generated a tool which is relevant to this, in the form of the "Framework for designing a wetland monitoring programme" annexed to Resolution VI.1. Clearly there are capacity limitations in many places to doing what is required here, but the fact that this is a mandatory obligation has perhaps been under-appreciated, and thus warrants serious attention.

IV. "Likelihood" of change

8. This central element has not really been elaborated, even in the "assessment of the extent of the problem" section of the wetland risk assessment framework, and it admits a broad range of interpretations as to the standard of evidence or suspicion that a change may occur. It would be relevant to any consideration under the Convention of "alert limits" and/or indicators. As well as the scientific field it has potential dimensions in the policy and legal fields, and should, for example, consider political decision-making probabilities as well as biophysical probabilities.

9. In some other regimes, legalistic interpretations of such concepts have been attempted, but it is probably advantageous in Ramsar's system not to do this, and instead to retain flexibility. It could however be desirable to express, in guidance, a presumption in favour of a precautionary approach, i.e., not demanding a high degree of certainty before action is taken.

V. Passing information without delay (Tool-kit cross-ref: - National planning tool/national report format)

10. The monitoring obligation referred to in para. 7. above requires that the Party arrange to be informed "at the earliest possible time". This allows for the speed of what is "possible" to vary according to the circumstances of each Party or each instance; but in legal terms this is still an objective test rather than a margin of discretion.

11. Once information is available to the Administrative Authority there is no leeway in the requirement to pass it on to the Bureau. The stipulation is an unqualified "without delay". What happens in reality appears frequently to fall short of this.

12. In particular, a common tendency is for Parties to be prompted by the occasion of submitting a triennial national report, to include such information there. Recent moves (see, e.g., Bureau Notification 2000/2) to evolve the national report into a more continuously-used "national planning tool" offer the possibility of an improvement in this situation. However, it may be desirable for guidance in future to encourage Parties **not** to view notification of ecological change as primarily a national report-based procedure, but instead (and more in line with Art 3.2) as something for which swift and dedicated communication channels are used.

13. There are of course Parties who do not even use the national report opportunity when they should, and this also needs (and is receiving) attention. What is perhaps not fully appreciated, once again, is the unqualified nature of the Art 3.2 stipulation, such that failure to pass information without delay, by whatever means, constitutes a breach of the Convention.

VI. Some of the responses available (see Ramsar Wise Use Handbook 8, section VII - Applying the Montreux Record 'tool' of the Convention; and (see Ramsar Wise Use Handbook 9, section 2.5 - Ramsar Small Grants Fund)

14. The Convention itself as yet provides no guidance on what should happen once the steps described above have occurred. By implication the Bureau will be in possession of a list and some particulars of sites where ecological change issues have been raised.

15. One action typically taken is to present summary information on this in documents tabled at the Conference of the Parties. This in itself may help to prompt action by raising awareness and building political support for solutions. In general terms the Conference of Parties in 1990 requested that Parties "in whose territory are located sites which have incurred or are being threatened by change in ecological character, take swift and effective action to prevent or remedy such changes" (Recommendation 4.8). More substantively in this vein, a series of COP Recommendations concerning specific sites have now been adopted over the years on the steps which are identified to remedy or prevent the problems at issue. These may offer Parties a powerful expression of backing from the international community for a particular course of action, which can then be a key influence at national level.

16. Urgent remedial actions at sites in developing countries or countries with economies in transition are eligible for support from the Ramsar Small Grants Fund (SGF), which in

turn may be able to catalyse the attraction of other assistance. This offers an incentive to such countries to activate any of the processes mentioned here, since these processes can potentially act to support the case made for financial assistance for solving a problem at a site.

17. One such process is the procedure initially termed the Monitoring Procedure, then re-named the Management Guidance Procedure, and now referred to as Ramsar Advisory Missions (RAMs), under which an expert mission to the site is convened to suggest or broker solutions. The RAM procedure is a way of offering expert advice (e.g., involving consultants) which is externally funded (including a dedicated line in the Convention budget). This, like the SGF, acts as a significant incentive for action. There is some evidence that governments take pride in reporting successful conclusions in the Ramsar international forum, and this can also be a political incentive.

18. There is a close link between the RAM system and a further mechanism, the "Montreux Record", which lists certain sites where ecological change issues have been raised, and which is a primary tool for prioritising cases for RAM attention. The Montreux Record has assumed a high profile in the Convention, and an analysis of some of its experiences and difficulties follows.

VII. More detailed comments on the Montreux Record

19. The Convention established the Montreux Record in 1990 as a list of sites in the Ramsar List where an adverse change in ecological character has occurred, is occurring or is likely to occur. It does not purport to be a comprehensive list of sites in such condition, but merely those chosen at the discretion of Parties for international attention in this way, according to a written procedure last revised in 1996. (It may therefore be considered to sit alongside the unpublished list of instances of change or potential change which the Bureau can be assumed to possess as a result of information passed to it by Parties under Article 3.2. In theory the latter list **should** be comprehensive).

20. The Montreux Record/RAM system has been successful in a number of cases, has failed to make progress in others, and lists in the first place only a minority of the cases that objectively may merit its attention.

21. There has been a continuing presentational difficulty, in trying to prevent what is designed as a problem-solving procedure from appearing too much like vilification or "blacklisting" of "guilty" countries. It is not an "enforcement" procedure, since it is not predicated on an alleged breach of Convention requirements. (As mentioned earlier in this paper, it is in fact the failure to submit information on ecological changes affecting sites which constitutes a breach of the Convention, i.e. without requiring proof of harm. This makes the Ramsar regime more stringent than many have appreciated.)

22. In theory, the Montreux Record process is continuous and open-ended. However, in practice the triennial meeting of the Conference of Parties tends to be the reference-point which galvanises action. Limited capacity of the Bureau at the centre to chase progress and organise missions, etc., is also a constraint.

23. Central to the procedure is the stipulation that a site can only be listed on the Record with the approval of the Contracting Party concerned. This is to allay fears of its use as an

"enforcement" sanction. The Convention has therefore stopped short of adopting a system which can be used against Parties' will and produce a finding of non-compliance. This is judged to be a tradeoff - some deserving cases will undoubtedly be blocked by unwilling Parties, but the price of trying to correct that might be to lose support for the procedure as a whole.

24. The procedure includes a standard (but voluntary) questionnaire for completion by the Contracting Party concerned. Cases are passed, with the Party's agreement, to the Scientific & Technical Review Panel (STRP) for advice.

25. Periodic reports on the condition of sites on the Record are required, and Parties have been reasonably diligent in providing these. Ramsar Advisory Missions produce reports which, among other things, constitute valuable "case study" material for wider use. This has been encouraged by COP Resolution VII.12, and RAM reports are now being made widely available through the Ramsar Web site.

26. Removal of a site from the Record takes place either when requested by the Party concerned (a necessary provision given that inclusion is subject to their approval in the first place), or if "there is no longer a risk of change in the ecological character" of the site. This is slightly curious, in that one way in which listing can arise is where change has taken place in the past and where listing is intended to aid remedial measures - logically in such a case removal should follow successful remediation, rather than the abatement of threat.

27. While there are no criteria as such for removing sites from the Record, the questionnaire nevertheless rather cleverly includes a section entitled "information for assessing possible removal of a listed site from the Montreux Record". This therefore prompts an explicit and broadly standard approach to justifying removal decisions. This has also recently (1999) been enhanced by a decision of the STRP that it will set up a subgroup, on each occasion that a removal is proposed, to review the proposal.

VIII The role of site management plans (see Ramsar Wise Use Handbook 8 - Frameworks for managing Wetlands of International Importance and other wetlands)

28. On more than one occasion, the Conference of Parties has encouraged the preparation of management plans for sites. In 1993 COP5 adopted "Guidelines on management planning for Ramsar sites and other wetlands" as an annex to COP Resolution 5.7. The Guidelines are undergoing further development and review by the STRP. Where a plan is in place, its exposition in particular of the long-term end objectives (in terms of ecological character) for the site should serve as a frame of reference against which to define threat alert factors, and to define target end-states for protection or remediation measures. Monitoring (see above) should also relate to this frame of reference, in respect of both of these ("action trigger" and "solution assurance") aspects.

IX. Positive change and natural change

29. The discussion above has concentrated on change or potential change in ecological character which is deemed to be adverse or potentially adverse; since this is more of a priority for action (i.e., more in need of intervention) than positive change, and it is what the response procedures have been designed to address. However, it should be noted that Art 3.2 and the obligations it creates are not necessarily limited to adverse change (NB

contrary to the footnote on page 112 of the "Ramsar Convention Manual"). For purposes other than "problem solving" as such, it will presumably be of some interest in the context of the Convention for there to be awareness and information-exchange about positive change, too.

30. Art 3.2 is couched in terms of "change as a result of . . . human interference". The question of whether and to what extent there are adverse changes of a "natural" sort, unaffected by human influence, may be cause for some debate (e.g., philosophically how can we characterise natural change as "adverse", if "naturalness" is one of the things that underpins our criteria for assessing conservation value?). Distinguishing anthropogenic causes from other causes of a given effect is also problematic, and particularly so in relation to *ex situ* drivers such as climate change.

X. Analogous processes in other Conventions and international instruments

31. Some other Conventions and international instruments also operate procedures for giving attention to conservation problems which arise from time to time in specific areas identified as important for the objectives of the instruments concerned. Some points of interest in relation to just four of these (the Council of Europe Convention on the Conservation of European Wildlife and Natural Habitats (Berne Convention), the World Heritage Convention, the European Commission's system in respect of European Union nature conservation designations, and the Council of Europe site diploma system) are given in the Appendix to this paper.

32. Further comparative review of these systems and others would be valuable. A few preliminary comments of a generic nature based on these first examinations, including that of Ramsar's system, can be made here.

33. A central consideration in all these systems is the delicate political balance between incentive or assistance on the one hand, and assurance of compliance or enforcement on the other – i.e., the balance between "carrot" and "stick". Examination of processes in different régimes shows a range of ways in which this balance is struck.

34. In this, a key point is whether the consent of the country concerned is required before the relevant procedure can be progressed, or whether it is progressed by decision of the majority or by a "watchdog" body to whom this responsibility is entrusted (e.g., a convention secretariat or committee), in the context of a shared international interest in the outcome.

35. For an enforcement procedure to be effective, some sort of meaningful sanction must at least in principle be available.

36. For an incentive/assistance procedure to be effective, it must be capable of meeting the need of the country concerned, e.g., by offering the right expertise within a sufficiently short timescale to solve urgent problems. The systems with the most effective incentives are those which can draw on funds dedicated to the purpose.

37. Whichever philosophy predominates, there may always be scope, and every effort should be made, to help governments ultimately present the solutions that are arrived at as

examples of pioneering field-leadership, so they can reap political kudos at home and on the international stage.

38. Incentives of funding or kudos, however, need to be conditional, and ultimately they are part of a process which must serve the objectives of the Convention or other instrument concerned. Abuse of the system, or defiance of it, or procrastination, all need to be detected and legitimately countered.

39. Several international conservation instruments have evolved problem-solving processes. In countries covered by more than one of these, governments and NGOs potentially have a choice as to which system might be best in a given case. Enhancing awareness about the respective attributes of each should help in making wise choices on this.

40. On the other hand, the systems are of course not mutually exclusive. There is no reason why, in an appropriate case, all of them could not be operated in parallel.

41. An even more interesting issue is how the different systems might be operated in a complementary manner. For example, it has already been known for a Berne Convention "case file" to be a decisive influence in bringing about a European Court of Justice action on the case in question, producing an outcome which the Berne Convention could not have produced on its own, but which the European Union system may not have been sufficiently motivated to reach otherwise. The way this might play out will vary from country to country, according to cultural, legal and political preferences, familiarities and sensitivities. This would be a productive area to explore further in future.

42. No reviewer appears to have attempted to evaluate the effectiveness or rates of success with these procedures, in solving or averting harm to nature conservation interests. Clearly that is an important question, but it is unlikely to be simple either to agree a method of addressing it, or to marshal the information required. Hence not only broader but deeper analysis of this whole area would be useful.

XI. Conclusions/recommendations/next steps

43. This paper has reviewed the contribution that a number of existing tools can make to addressing issues of ecological change at Ramsar sites. These include technical support from guidance and good practice experience with management planning, the Ramsar Advisory Mission process, and assistance from the Small Grants Fund. The existence of a systematic framework for such activity under the auspices of a Convention would be of key importance to securing support and assistance from sources beyond the Convention itself, such as the donor community.

44. There are some key aspects which the existing tools have not addressed, including the structure of a regime which would be designed for more completely operating Art 3.2, the relationship of it to the Montreux Record, channels other than the Record and national reports for reporting change or threatened change, and legal interpretation issues.

45. If Article 3.2 is fully implemented it would generate a full list of all sites subject to actual or likely ecological change. What has happened in practice has fallen far short of this. The Standing Committee might therefore wish to consider requesting that attention be given to

this, and that steps be taken to construct the list which Article 3.2 of the Convention implies should exist.

46. This then begs a question as to the function of the Montreux Record. It is clearly functioning at present only to represent a subset of the "ecological change" cases which arise. The Committee may wish to consider that a basis for distinguishing the purpose of the Montreux Record subset should be made explicit (provided that the "full list" step described above is also taken). Options could include using it to address the most serious cases; or using it for those where special sources of funding or advisory assistance need to be unlocked; or using it primarily as a generator of "case study" information for wider consumption.

47. Further, the Standing Committee may wish to consider the case for new guidance on the operation of Article 3.2. This would help to address a shortfall in delivery of a basic provision of the Convention, and would allow some of the existing tools to be used in a more complete and systematic way. Such guidance could also address situations where, for example, an ecological change problem raised through another Convention with a designation applying to the same site could feed information across to the Ramsar process (and vice versa).

48. With action on these points, significant advances could be made in relation to one of the most fundamental of the Convention's original objectives.

APPENDIX

FEATURES OF ANALOGOUS PROCESSES IN OTHER CONVENTIONS AND INTERNATIONAL INSTRUMENTS

1. The Council of Europe Convention on the Conservation of European Wildlife and Natural Habitats (Berne Convention)

(A separate paper on the Berne procedures, containing the points below, has been submitted to that Convention's Standing Committee. The paper also made preliminary recommendations, which are not reproduced here, pending consideration by that body).

1.1 The practice of examining "case files" in the Berne Convention was approved by the Standing Committee at its 3rd meeting in 1984, and a written procedure, provisionally* adopted at the 13th meeting in 1993, set out in the Secretariat memorandum "opening and closing of files - and follow up to recommendations", document T-PVS(99) 16. (*Provisionally, because of apparently still unresolved European Commission concerns about the relationship between the procedure and EU infringement procedures).

1.2 The case file procedure offers a formal and systematic way of engaging the Secretariat and the Standing Committee in the examination, and hopefully resolution, of issues and problems which arise from time to time in implementing the Convention. Often, but not always, these involve threats to specific sites.

1.3 The procedure serves to draw out facts about the issue concerned, to raise awareness of it beyond the country concerned, to mobilise political support in an international forum for resolving the issue, and to debate, recommend and support potential solutions.

1.4 The process of presentation of concerns (e.g., an NGO complaint), debate, profile-raising and a decision about opening a file, should be considered together with two other potential steps. These are the provision for conducting a so-called "on the spot enquiry" or "on the spot appraisal"; and the adoption of formal Standing Committee recommendations, which, as the Secretariat memorandum points out, may in time come to constitute customary law.

1.5 Cases which reach this arena are usually controversial. Fundamentally the government of the country concerned, or the primary agency within it responsible for implementation of the Convention, is being offered help. However, the process is characteristically driven by allegations, e.g., by NGOs, of a compliance failure of some sort, and therefore tends to have some flavour of "enforcement" as well as problem-solving. This helps to galvanise action, but obviously means that a sensitive diplomatic balancing-act is at the heart of the process.

1.6 The performance of this system is hard to review objectively, but all concerned with it would agree it has been patchy. At its best it can generate new wisdom and consensus, or remove an issue from an arena of conflict and stalemate to one where solutions are arrived at in face-saving and politically satisfactory ways. It is also potentially good at empowering a country's nature conservation authorities with an international mandate and imperative, to help them prevail against domestic resistance. This may flow from publicity about the case, as well as the results of the procedure itself.

1.7 On the other hand it is open to many criticisms. Governments are known to obstruct cases which they find uncomfortable, and to procrastinate over actions. The greatest effort does not necessarily go into the most deserving cases. The time-cycles of meetings and the "bottleneck" filters of the Convention Bureau and (annual) Standing Committee are not conducive to fast action. The process lacks legal "teeth".

1.8 The existence of the 1993 approved written procedure is key. In this, a purpose of the system (solution-oriented) is expressed: this is valuable.

1.9 The process is triggered by a complaint letter from any quarter to the Convention Secretariat, and there are no stipulations about the form and content of these. The Secretariat conducts a basic screening as to the merits of the case. The Contracting Party or Parties complained against are kept informed at each stage, and have a time-limit for responding to the first (Secretariat) decision that the case warrants examination; though it is not said what happens if they fail to reply.

1.10 Normally the case must then be considered by the Bureau (which may decide to let it progress or not) and if passed, wait for attention at the next Standing Committee meeting, which could be as much as a year away. (Interim on-site assessments can be arranged in urgent cases).

1.11 The basis for these Secretariat and Bureau decisions is not specified, and there is no requirement for them to explain their reasons.

1.12 Apart from the on-site assessment facility mentioned above, there is no provision for deciding priorities among deserving cases, though in practice no doubt there is some limit on how many can be processed by a given meeting. The sequence in which they are listed on agendas can influence the extent of attention they receive.

1.13 Standing Committee decisions, by custom, are reached by consensus, so a complained-against Contracting Party which does not wish a file to be opened may simply block it. Under the rules the possibility exists for this to be overridden by a majority vote, but such would be resorted to only as a rare "crisis move".

1.14 Opening a file leads either to a Committee recommendation or an on the spot appraisal or both, and to reports on the implementation of these. When all goes well, recommendations can be a useful political tool for action.

1.15 Once a file is opened, technically the only grounds for closing it are if "the difficulties relating to implementation have been resolved". In practice files have also been closed when the Committee (perhaps under urging from the Party concerned) concludes it is unlikely to achieve resolution. The basis for this is questionable.

1.16 In respect of "general" recommendations, the Committee can decide "that implementation is satisfactory" where "follow-up proves to be no longer necessary"; but no parameters for such decisions are specified, and there is no requirement for reasons to be given.

1.17 The issue of follow-up to "specific" recommendations has been reviewed by the Committee in the past (e.g., in 1993 and 1996), and a procedure for this has also been provisionally adopted.

1.18 Reports on implementation of "specific" recommendations are supposed to be submitted by the Parties concerned, and consequent proposals tabled by the Secretariat. In practice such reporting is often lax, and the Committee (including observer complainants) struggles instead with last-minute and incomplete information, or no information at all, and the issue may then be delayed for another year (or until action becomes impossible, e.g., a habitat is destroyed). Governments can repeatedly evade the will of the international community (and their Convention obligations) in this way.

1.19 The Committee can decide that measures adopted pursuant to a "specific" recommendation are "sufficient" (which is then grounds for closing the file) or "insufficient" (whereupon they can "consider", i.e. decide, that there has been a failure to comply with the Convention). In "certain cases of particular gravity" the arbitration procedure contained in the Convention may be activated. All of these decisions, however, flow from the reports referred to above, and can thus be frustrated by a simple failure to report.

2. The European Union Directives dealing with site conservation

2.1 In the European Union there is a formal procedure for Member States or NGOs to submit complaints to the European Commission alleging a breach by a Member State of the provisions of a Directive, which may result in activation of the "Article 226 infringement procedure". This can cover a range of matters from inadequate transposition of EU laws into national statutes, to procedural improprieties in specific decisions, and

includes cases of actual or threatened damage to nature conservation sites where such damage runs counter to obligations in relevant Directives (principally the Wild Birds Directive, Habitats Directive, and Environmental Impact Assessment Directive).

2.2 There is a standard pro-forma on which to submit complaints, and a sequence of steps, with deadlines, for the Commission to seek information from/urge solutions on the Member State. On the spot appraisals or special missions can take place, though procedures for these are not fixed and they are undertaken in only a minority of cases.

2.3 The procedure must be based on a well-formulated allegation of a legal infringement. A key reason for this is that, unless it produces a solution by itself, the complaint forms a precursor to possible action by the Commission against the Member State in the European Court of Justice (ECJ).

2.4 For that reason the Commission is keen for the process to be activated only after first seeking to resolve the issue within the national jurisdiction concerned. "Twin-tracking" complaints together with domestic action is accepted, but ECJ action is unlikely without first exhausting the domestic possibilities.

2.5 Although certainly more of a technical infringement procedure than the Ramsar one, and to an extent more than the Berne one too, it is known for EC complaints to be used in the same "constructive" or tactical sense as these other two.

2.6 There is a serious capacity bottleneck at the Commission, which is unable at present to progress more than a minority of the large number of complaints it receives. It is thus forced to prioritise, and for example is tending to favour action on cases which raise broad implementation and interpretation questions affecting a whole network of sites, or all Member States collectively, rather than "one-off" isolated decisions.

2.7 This system can ultimately produce outcomes which have the effect of constituting case law which is binding on all the Members of the Union, which the Convention systems described here do not.

3. The World Heritage Convention

3.1 The World Heritage Convention has provided for the establishment of a List of World Heritage in Danger since its adoption in 1972, by an article in its substantive text. Sites are entered either where assistance is requested, or where the World Heritage Committee itself decides there is "urgent need". Detailed eligibility guidelines were adopted in 1982.

3.2 A key implication of listing a site under these provisions is to help in securing financial assistance from the World Heritage Fund (although funding from this source is not limited to sites on the "in Danger" list). The provision in the Convention affording States Parties rights of consultation is couched in terms of a possible decision to refuse addition of a site to the List, rather than to add it. This implies that it may be regarded as an example at the "incentive" end of the spectrum, if for example the EU system is at the "control" end and the Ramsar and Berne Conventions more hybrid in nature.

3.3 However, it is also apparent that adding a site to the "in Danger" list can be viewed by some States as an adverse reflection on them, and therefore like the other systems the prospect of doing so can act as a source of pressure to resolve problems.

3.4 Time has not allowed further consideration of this system for this paper, but this could be done at a later date.

4. The Council of Europe Diploma

4.1 The Council of Europe Diploma of Protected Areas is an award which recognises and promotes examples of good practice in protection and management of areas of environmental importance. It is thus primarily an incentive device.

4.2 However, a significant feature of the Diploma is that it is awarded for a limited period, and can be renewed or withdrawn subject to a system of review and assessment. It has thus increasingly been able to function as a relevant instrument for responding to threats and other problems at sites, where the high-profile decision as to renewal of the Diploma may be a key spur to securing resolution of the problem.

4.3 Time has not allowed further consideration of this system for this paper, but this could be done at a later date.

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