

## EU Regulation 1143/2014 and the Bern Convention: Allied forces in the war on invasive alien species

|                  |   |
|------------------|---|
| Authors          | Trouwborst,Arie   |
| Published in     | European Energy and Environmental Law Review  |
| Publication Date | 2015-08   |
| Document Version | publishersversion   |
| Link             | <a href="https://research.tilburguniversity.edu/en/publications/381ecb5f-6e94-4201-89e1-bfd7fb737d88">https://research.tilburguniversity.edu/en/publications/381ecb5f-6e94-4201-89e1-bfd7fb737d88</a>   |
| Citation         | Trouwborst, A 2015, 'EU Regulation 1143/2014 and the Bern Convention : Allied forces in the war on invasive alien species', European Energy and Environmental Law Review, vol. 24, no. 4, pp. 83-99.  |
| Download Date    | 2026-05-18 22:10:30   |
| Rights           | <p>General rights</p> <p>Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.</p> <ul style="list-style-type: none"> <li>- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.</li> <li>- You may not further distribute the material or use it for any profit-making activity or commercial gain</li> <li>- You may freely distribute the URL identifying the publication in the public portal"</li> </ul> <p>Take down policy</p> <p>If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.</p> |

*European*

---

*Energy and*

---

*Environmental*

---

*Law Review*

---



Wolters Kluwer  
Law & Business

Published by Kluwer Law International  
P.O. Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands

Sold and distributed in North, Central and South  
America by Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America

Sold and distributed in all other countries  
by Turpin Distribution  
Pegasus Drive  
Stratton Business Park, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom

ISSN 0966-1646  
© 2015, Kluwer Law International

This journal should be cited as:  
(2015) 24 EELR

The European Energy and Environmental Law  
Review is published 6 times per year.  
Subscription prices for 2015 [Volume 24, Numbers 1  
through 6] including postage and handling:  
Print subscription prices: EUR852/USD1,136/  
GBP626  
Online subscription prices: EUR789/USD1,051/  
GBP579 (covers two concurrent users)

This journal is also available online at  
[www.kluwerlawonline.com](http://www.kluwerlawonline.com). Sample copies and  
other information are available at  
[www.kluwerlaw.com](http://www.kluwerlaw.com). For further information at  
please contact our sales department at  
+31 (0) 172 641562 or at [sales@kluwerlaw.com](mailto:sales@kluwerlaw.com).

For Marketing Opportunities, please contact  
[marketing@kluwerlaw.com](mailto:marketing@kluwerlaw.com)

All rights reserved. No part of this publication may  
be reproduced, stored in a retrieval system, or  
transmitted in any form or by any means,  
mechanical, photocopying, recording or otherwise,  
without prior written permission of the publishers.

Permission to use this content must be obtained  
from the copyright owner. Please apply to:  
Permissions Department, Wolters Kluwer Legal,  
76 Ninth Avenue, 7th floor, New York, NY 10011,  
United States of America.  
E-mail: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com).

Printed on acid-free paper

*Managing Editors* **Kurt Deketelaere**  
Katholieke Universiteit Leuven

**Zen Makuch**  
Imperial College London

*Associate Editors* **Bram Delvaux**  
Katholieke Universiteit Leuven

**Marijke Schurmans**  
Katholieke Universiteit, Leuven

*Editorial Advisory Board* **Lucas Bergkamp**  
Hunton & Williams LLF, Brussels  
Erasmus University, Rotterdam

**Michael Faure**  
Maastricht University

**Stephen Stec**  
Regional Environmental Center for Central and Eastern Europe (REC) Country Office,  
Hungary

*Book Reviews Editor* **Karen Makuch**  
Imperial College London

*European Energy and Environmental Law Review* The European Energy and Environmental Law Review invites the submission of unsolicited articles from scholars, practitioners and students of energy and environmental law. The Editors are willing to consider proposals for articles but is unable to make any commitment as to publication prior to submission of the final script. Book reviews are also welcome. Letters in response to articles can only be considered for publication if they do not exceed a maximum of 500 words.

*Aims and Scope* European Energy and Environmental Law Review is a bimonthly journal which presents comprehensive coverage of the latest developments in energy and environmental law throughout Europe. In addition to this, European Energy and Environmental Law Review contains concise, accessible articles which explore and analyse significant issues and developments in energy and environmental law and practice throughout Europe.

European Energy and Environmental Law Review enables the reader to keep abreast of significant and topical aspects of energy and environmental law, including the legal issues relating to renewables, energy security, energy efficiency, energy competition law, energy liberalisation process, electricity and gas markets, climate change; sustainable energy, land, air, fresh water, oceans, noise, waste management, dangerous substances, and nature conservation. Its succinct, practical style makes it ideal for the busy professional, while the authority, scope, and topicality of its coverage make it an invaluable research tool.

# EU Regulation 1143/2014 and the Bern Convention

## EU Regulation 1143/2014 and the Bern Convention: Allied Forces in the War on Invasive Alien Species in Europe

Arie Trouwborst\*

### I Introduction

European species and ecosystems are under siege from invasive alien species (IAS). Over 12,000 alien species have been documented to occur in Europe.<sup>1</sup> Roughly 15% of these are considered invasive, meaning they have adverse impacts on European nature.<sup>2</sup> These non-native plants and animals predate on, compete and/or hybridize with native species, transmit parasites and pathogens to them, alter their habitats, and/or disrupt the functioning of ecosystems.<sup>3</sup> At a global scale, IAS are recognized as the second largest threat to biodiversity, and as a major cause of species extinctions.<sup>4</sup> Europe is no exception in this regard. A recent assessment found that one out of every five threatened species in Europe is specially affected by IAS.<sup>5</sup> Besides these ecological impacts, IAS cause significant economic damage. In the European Union (EU) alone, IAS are estimated to cost society over 12.5 billion euros a year through impacts on human health, agriculture and infrastructure.<sup>6</sup> The damage to nature itself also comes at major financial costs, but these are difficult to quantify with any precision.<sup>7</sup>

Most alien species are introduced accidentally, hitchhiking along on the increasing currents of international trade, transport and tourism. Still, many alien species are introduced intentionally, for use in forestry or agriculture (whether for growing it, or as a biological control agent), as game animals, pet species, or exotic plants for gardening.<sup>8</sup> As IAS are a cross-border phenomenon almost by definition, international cooperation is a distinct element of the toolbox needed to combat them.<sup>9</sup> Two important international legal instruments under whose umbrellas such cooperation targeting IAS has been taking shape are the 1992 Convention on Biological Diversity (CBD)<sup>10</sup> at the global level, and the 1979 Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)<sup>11</sup> at the European level.

On the first day of 2015, the entry into force of EU Regulation 1143/2014<sup>12</sup> (hereinafter “IAS Regulation”) heralded a new phase in the efforts to address the threats posed by IAS in Europe. The Regulation lays down an elaborate set of obligations aimed at preventing, minimizing and mitigating the adverse effects of IAS on European biodiversity, and on related ecosystem services and human health and safety, while also aiming to reduce the socio-economic impacts of IAS.<sup>13</sup>

Whereas the Regulation’s entry into force may be considered a milestone in the history of EU law-making for biodiversity conservation,<sup>14</sup> it remains to be seen what impact it will actually have on the IAS

\* Associate Professor at Tilburg University – a.trouwborst@tilburguniversity.edu

<sup>1</sup> Delivering Alien Invasive Species Inventories for Europe (DAISIE), www.europe-aliens.org.

<sup>2</sup> M. Vilà *et al.*, “How Well Do We Understand the Impacts of Alien Species on Ecosystem Services? A Pan-European Cross-Taxa Assessment” [2010] 8 *Frontiers in Ecology and the Environment* 135.

<sup>3</sup> M. Kettunen *et al.*, *Technical Support to EU Strategy on Invasive Alien Species (IAS) – Assessment of the Impacts of IAS in Europe and the EU* (2009); European Environment Agency, *The Impact of Invasive Alien Species in Europe* (2012).

<sup>4</sup> Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Biodiversity Synthesis* (2005); M. Clavero and E. García-Berthou, “Invasive Species are a Leading Cause of Animal Extinctions” [2005] 20 *Trends in Ecology and Evolution* 110.

<sup>5</sup> P. Genovesi, L. Carnevali and R. Scalera, *The Impact of Invasive Alien Species on Native Threatened Species in Europe* (2015). Of the 1872 European species listed as threatened on the IUCN Red List, 354 (229 animals, 124 plants and 1 fungus) are specially affected by IAS.

<sup>6</sup> M. Kettunen *et al.*

<sup>7</sup> *Ibid.* W. Born, F. Rauschmayer and I. Bräuer, “Economic Valuation of Biological Invasions” [2005] 55 *Ecological Economics* 321.

<sup>8</sup> P.E. Hulme *et al.*, “Grasping at the Routes of Biological Invasions: A Framework for Integrating Pathways into Policy” [2008] 45 *Journal of Applied Ecology* 403.

<sup>9</sup> C. Shine, N. Williams and L. Gündling, *A Guide to Designing Legal and Institutional Frameworks on Alien Invasive Species* (2000); A.M. Perrault and W.C. Muffett, “Turning Off the Tap: A Strategy to Address International Aspects of Alien Invasive Species” [2002] 11 *Review of European, Comparative and International Environmental Law* 211; J.M. Caffrey *et al.*, “Tackling Invasive Alien Species in Europe: The Top 20 Issues” [2014] 5 *Management of Biological Invasions* 1.

<sup>10</sup> Convention on Biological Diversity, 5 June 1992, www.biodiv.org.

<sup>11</sup> Convention on the Conservation of European Wildlife and Natural Habitats, 19 September 1979, ETS 104.

<sup>12</sup> Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the Prevention and Management of the Introduction and Spread of Invasive Alien Species, [2014] OJ L 317/35.

<sup>13</sup> IAS Regulation, Preamble, paragraph 6.

<sup>14</sup> J. Beninde *et al.*, “Ambitious Advances of the European Union in the Legislation of Invasive Alien Species” [2014] *Conservation Letters* (published online 27 December 2014, DOI: 10.1111/conl.12150); C. Shine *et al.*, *Technical Support to EU Strategy on Invasive Species (IAS) – Recommendations on Policy Options to Control the Negative Impacts of IAS on Biodiversity in Europe and the EU (Final Report for the European Commission, 070307/2007/483544/MAR/B2)* (2009).

## EU Regulation 1143/2014 and the Bern Convention

problem.<sup>15</sup> Moreover, the regulatory scope of the IAS Regulation is obviously limited to the 28 EU member states. Thus, a potential role of significance still appears reserved for other legal instruments to curb the impact of IAS, both within the EU and beyond. Chief amongst these is the overarching legal instrument for nature conservation at the pan-European level, the Council of Europe's Bern Convention.<sup>16</sup> The 51 contracting parties to the Bern Convention comprise virtually all European states and the European Union itself. As discussed below, the Convention has a notable track record on IAS issues.

Against this background, the present article aims to identify and analyze current and potential synergies between the IAS Regulation and Bern Convention work on IAS. Besides focussing on the role the Convention could play in facilitating the Regulation's effective implementation generally, the article explores the scope for extending some of the actions provided for in the Regulation beyond the EU to Europe at large, using the framework of the Bern Convention.<sup>17</sup>

The approach taken to pursue the above is as follows. First, a general introduction is provided of the IAS Regulation (Section 2 below).<sup>18</sup> This is followed by a discussion of the mandate and incentives for taking action under the Bern Convention aligned with the Regulation, as well as some issues to take into account when devising such action (Section 3). Next, the bulk of the article is devoted to analyzing the provisions set out in the IAS Regulation, and relating those provisions to existing commitments and potential future action under the Bern Convention. Such exercises are performed, consecutively, regarding the listing of IAS (Section 4), the prevention of intentional and unintentional introductions of IAS (Section 5), and the detection, early eradication and management of IAS, as well as the restoration of ecosystems damaged by IAS (Section 6). A synthesis of these analyses is then provided, setting out possible courses of action to be taken within the framework of the Bern Convention (Section 7), followed by some concluding observations (Section 8).

### II Bird's-Eye View of the IAS Regulation

The IAS Regulation was designed using a number of guiding principles. These are: (i) prioritization of action regarding particular IAS; (ii) a shift of attention towards preventive measures; (iii) building upon existing systems and efforts at national and international levels; and (iv) a gradual and phased-in approach.<sup>19</sup> Below, a bird's-eye view of the Regulation is provided, concisely introducing its structure and key elements. Several of these key elements are discussed in more detail in subsequent Sections of this article.

The Regulation's elaborate Preamble (38 paragraphs) explains, *inter alia*, the background to, reasons

for, and content of the IAS Regulation, and links the Regulation to commitments under other international instruments. The Preamble draws express attention to the fact that the EU is a party to the Bern Convention, stressing in particular that the Union has thus "undertaken to take all appropriate measures to ensure the conservation of the habitats of the wild flora and fauna species."<sup>20</sup> Curiously, however, no reference is made to the obligation in the Convention to "strictly control the introduction of non-native species."<sup>21</sup>

According to its first substantive provision, the Regulation sets out "rules to prevent, minimise and mitigate the adverse impact on biodiversity of the introduction and spread within the Union, both intentional and unintentional, of invasive alien species."<sup>22</sup> Chapter I of the Regulation also contains definitions of 17 terms. Some of the most significant are reproduced here:

<sup>15</sup> J. Beninde *et al.*

<sup>16</sup> Analyses of the Convention include C. Lasén Díaz, "The Bern Convention: 30 Years of Nature Conservation in Europe" [2010] 19 *Review of European Community and International Environmental Law* 185; M. Bowman, P. Davies and C. Redgwell, *Lyster's International Wildlife Law* (2nd edn, 2010), p. 297–345; Y. Epstein, "The Habitats Directive and Bern Convention: Synergy and Dysfunction in Public International and EU Law" [2014] 26 *Georgetown International Environmental Law Review* 139; and F.M. Fleurke and A. Trouwborst, "European Regional Approaches to Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats Directives" in L. Kotze and T. Marauhn, *Transboundary Governance of Biodiversity* (2014) 128.

<sup>17</sup> The present article is based on a report entitled *The Bern Convention and EU Regulation 1143/2014 on the Prevention and Management of the Introduction and Spread of Invasive Alien Species*, Bern Convention Doc. T-PVS/Inf (2015)14, which was written by the present author under contract from the Secretary General of the Council of Europe (Consultancy Contract No. 423/14). The author gratefully acknowledges useful comments and information received from Eladio Fernández-Galiano, Floor Fleurke, Jonathan Verschuuren, and from various participants of the 11th Meeting of the Bern Convention Group of Experts on Invasive Alien Species (Triglav National Park, Slovenia, 4–5 June 2015), where the report was presented and discussed.

<sup>18</sup> It should be noted that the analysis below does not cover every detail of the Regulation, which covers over 20 pages of text, containing 38 preambular paragraphs and 33 substantive provisions – many of which are, moreover, quite elaborate.

<sup>19</sup> Proposal for a Regulation of the European Parliament and of the Council on the Prevention and Management of the Introduction and Spread of Invasive Alien Species, 9 September 2013, COM (2013) 620 final.

<sup>20</sup> Preamble, paragraph 5.

<sup>21</sup> Bern Convention, Art. 11(1) (a).

<sup>22</sup> IAS Regulation, Art. 1.

## EU Regulation 1143/2014 and the Bern Convention

- *alien species* – “any live specimen of a species, subspecies or lower taxon of animals, plants, fungi or micro-organisms introduced outside its natural range; it includes any part, gametes, seeds, eggs or propagules of such species, as well as any hybrids, varieties or breeds that might survive and subsequently reproduce”<sup>23</sup>
- *introduction* – “the movement, as a consequence of human intervention, of a species outside its natural range”<sup>24</sup>
- *invasive alien species* – “an alien species whose introduction or spread has been found to threaten or adversely impact upon biodiversity and related ecosystem services”<sup>25</sup>
- *pathways* – “the routes and mechanisms of the introduction and spread of invasive alien species”<sup>26</sup>

The Regulation applies to all IAS,<sup>27</sup> but not to pathogens causing animal diseases and certain other organisms covered under particular EU Regulations and Directives, regulating genetically modified organisms, organisms harmful to plants, species used in aquaculture, and micro-organisms used for plant protection and biocidal products.<sup>28</sup> It is also made clear that the Regulation does *not* apply to “species changing their natural range without human intervention, in response to changing ecological conditions and climate change.”<sup>29</sup> This is in line with relevant guidance adopted under the Bern Convention.<sup>30</sup> An apt example of a species moving by itself into areas where it did not previously occur is provided by the remarkable recent range expansions of the golden jackal (*Canis aureus*) in Europe.<sup>31</sup> The most important provisions of Chapter I of the IAS Regulation are those concerning the “List of invasive alien species of Union concern” (Union IAS List), which constitutes a central element of the Regulation, and the associated risk assessments (see further Section 4.1 below).

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

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

Chapter IV addresses IAS of Union concern that is already established within the EU and new ones that elude preventive and early detection measures and

manage to spread widely. It sets out an obligation for member states to apply effective management measures in defined circumstances. Another provision addresses the restoration of ecosystems damaged by IAS. (See further Section 6.2 below.)

One of the horizontal provisions set out in Chapter V is Article 22, addressing international cooperation:

Member States shall, when complying with their obligations under this Regulation, endeavour to cooperate with third countries, as appropriate, including by using existing structures arising from regional or international agreements, for the purpose of meeting the objectives of this Regulation.<sup>32</sup>

It is accompanied by a provision stating that member states may adopt more stringent national rules regarding IAS, as long as these are compatible with overarching EU law, in particular the Treaty on the Functioning of the EU<sup>33</sup> (TFEU), and are notified to the European Commission.<sup>34</sup>

The final provisions in Chapter VI contain reporting obligations and various mechanisms to facilitate and ensure implementation, enforcement and review of the measures set forth in the Regulation. Notably, an “information support system” is to be progressively established by the European Commission, in order to aid the Regulation’s implementation.<sup>35</sup> Already by 2 January 2016, this system “shall include a data support mechanism interconnecting existing data systems” on IAS, principally to help the Commission and the member states in handling early detection notifications.<sup>36</sup> By 2 January 2019, this data support mechanism must be ready for exchanging other aspects of the Regulation’s application.<sup>37</sup> According to the Regulation it may also include information on pathways, risk assessment, and management and

<sup>23</sup> Art. 3(1).

<sup>24</sup> Art. 3(7).

<sup>25</sup> Art. 3(2).

<sup>26</sup> Art. 3(11).

<sup>27</sup> Art. 2(1).

<sup>28</sup> Art. 2(2) (b)-(g).

<sup>29</sup> Art. 2(2) (a); see also Preamble, paragraph 7.

<sup>30</sup> Standing Committee Recommendation No. 142 (2009) Interpreting the CBD Definition of Invasive Alien Species to Take into Account Climate Change.

<sup>31</sup> See A. Trouwborst, M. Krofel and J.D.C. Linnell, “Legal Implications of Range Expansions in a Terrestrial Carnivore: The Case of the Golden Jackal (*Canis aureus*) in Europe” [2015] 24 *Biodiversity and Conservation* (forthcoming).

<sup>32</sup> IAS Regulation, Art. 22(2).

<sup>33</sup> Treaty on the Functioning of the European Union, 25 March 1957, [2012] OJ L 326.

<sup>34</sup> IAS Regulation, Art. 23.

<sup>35</sup> Art. 25(1).

<sup>36</sup> Art. 25(2).

<sup>37</sup> Art. 25(3).

## EU Regulation 1143/2014 and the Bern Convention

eradication measures.<sup>38</sup> The information support system, denominated the European Alien Species Information Network (EASIN), is currently running and being developed further.<sup>39</sup> It is coordinated by the Joint Research Centre of the European Commission. Furthermore, a “committee” is established, consisting of representatives of all member states, to assist the European Commission in its tasks within the framework of the Regulation.<sup>40</sup> This “Committee on Invasive Alien Species” (IAS Committee) adopted its Rules of Procedure in February 2015.<sup>41</sup> A “scientific forum”, consisting of representatives of the scientific community appointed by the member states, is to provide advice on scientific matters concerning the application of the IAS Regulation, and to aid the IAS Committee as appropriate.<sup>42</sup> The advice of this “Scientific Forum on Invasive Alien Species” will be sought in particular regarding the establishment and updating of the Union IAS List, risk assessment, emergency measures, and derogations from the eradication obligation (on the latter two, see Sections 5.1 and 6.1 below).<sup>43</sup> Not expressly mentioned in the IAS Regulation but nevertheless noteworthy in the present context is the Working Group on Invasive Alien Species (WGIAS) which the European Commission has decided to reconvene with renewed membership.<sup>44</sup> The WGIAS is conceived as an operational group intended to provide concrete input regarding the Regulation’s implementation.

### III Mandate, Incentives and Specific Concerns regarding Bern Convention Action Aligned with the IAS Regulation

#### 3.1. The legal mandate

Further action by Bern Convention parties to reduce the threats posed by IAS is clearly in line with the aims set out in Article 1 of the Convention, and also with the specific obligations of parties under Articles 2, 3(1), 4 and 11. According to the latter provision, contracting parties undertake “to strictly control the introduction of non-native species”.<sup>45</sup> It should also be noted in the present context that Bern Convention parties are to “co-operate whenever appropriate and in particular when this would enhance the effectiveness of measures taken under other articles of this Convention”.<sup>46</sup> Article 14 of the Bern Convention establishes the responsibility of its Standing Committee – in which all parties are represented – for supervising the Convention’s application and, in particular, making “recommendations to the Contracting Parties concerning measures to be taken for the purposes of this Convention”.<sup>47</sup> A mandate of the Bern Convention Standing Committee to agree on further action to address the introduction and spread of IAS is thus evidently present.

Moreover, measures under the Bern Convention to further the implementation of the IAS Regulation and to complement the Regulation in non-EU member states would build on a substantial body of guidance and actions already adopted under the Convention. Reference is made here, in particular, to the many Standing Committee Recommendations on IAS, both general and specific,<sup>48</sup> several Bern Convention Codes of Conduct,<sup>49</sup> guidelines<sup>50</sup> and technical reports<sup>51</sup> on IAS, and generally to the work of the Group of Experts on Invasive Alien Species that was established under the Convention in 1992. Special mention should be made of the European Strategy on Invasive Alien Species, setting out a detailed road map for Bern Convention parties regarding the IAS challenge.<sup>52</sup> In 2003, the Standing Committee called on contracting parties to devise and implement national IAS strategies,

<sup>38</sup> *Ibid.*

<sup>39</sup> See [www.easin.jrc.ec.europa.eu](http://www.easin.jrc.ec.europa.eu).

<sup>40</sup> Art. 27.

<sup>41</sup> Rules of Procedure of the “Committee on Invasive Alien Species”, Code C47600, 25 February 2015.

<sup>42</sup> Art. 28.

<sup>43</sup> *Ibid.* The Forum’s first meeting took place on 21 April 2015.

<sup>44</sup> This is a working group within the Informal Commission Expert Group “Co-ordination Group for Biodiversity and Nature”; its first meeting took place on 12 June 2015.

<sup>45</sup> Art. 11(2) (b).

<sup>46</sup> Art. 11(1) (a).

<sup>47</sup> Art. 14(1).

<sup>48</sup> Standing Committee Recommendations Nos. 57 and 61 (1997), 77 and 78 (1999), 91 (2002), 99 (2003), 114 (2005), 123, 124, 125 and 126 (2007), 134 (2008), 141 and 142 (2009), 149 (2010), 154 (2011), 158, 160 and 161 (2012), 166 and 167 (2013), and 170 (2014).

<sup>49</sup> Code of Conduct on Horticulture and Invasive Alien Plants, Bern Convention Doc. T-PVS/Inf(2008)2; Code of Conduct on Pets and Invasive Alien Species (including Ornamental Fish) in Europe, Bern Convention Doc. T-PVS/Inf(2011)01revE; European Code of Conduct on Zoological Gardens and Aquaria and Invasive Alien Species, Bern Convention Doc. T-PVS/Inf(2011)26E; European Code of Conduct for Botanic Gardens on Invasive Alien Species, Bern Convention Doc. T-PVS/Inf(2012)01E; European Code of Conduct on Hunting and Invasive Alien Species, Bern Convention Doc. T-PVS/Inf(2013)20E; European Code of Conduct on Recreational Fishing and Invasive Alien Species, Bern Convention Doc. T-PVS/Inf(2014)18E.

<sup>50</sup> European Guidelines on Protected Areas and Invasive Alien Species, Bern Convention Doc. T-PVS/Inf (2013)22E.

<sup>51</sup> E.g., B. Elvira, *Identification of Non-Native Freshwater Fishes established in Europe and Assessment of their Potential Threats to the Biological Diversity*, Bern Convention Doc. T-PVS/Inf(2001)6; C. Shine, *Overview of Existing International/Regional Mechanisms to Ban or Restrict Trade in Potentially Invasive Alien Species* (2006), Bern Convention Doc. T-PVS/Inf(2006)8.

<sup>52</sup> P. Genovesi and C. Shine, *European Strategy on Invasive Alien Species* (2004).

## EU Regulation 1143/2014 and the Bern Convention

taking into account this European Strategy.<sup>53</sup> Simultaneously, the Standing Committee specifically requested Bern Convention parties to:

co-operate, as appropriate, with other Contracting Parties and Observer states in the prevention of introduction of invasive alien species, the mitigation of their impacts on native flora and fauna and natural habitats, and their eradication or containment where feasible and practical, *inter alia* by exchanging information, collaborating in European projects and paying particular attention to invasive alien species in trade and transboundary areas.<sup>54</sup>

In fact, the IAS Regulation was developed by the EU *inter alia* on the basis of this European Strategy on IAS.<sup>55</sup>

The strong history of the Bern Convention regarding IAS issues as just highlighted has unfolded against a background of commitments undertaken under other international legal instruments.<sup>56</sup> A prominent example is Article 8(h) of the CBD,<sup>57</sup> and the associated Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species, adopted by the CBD Conference of the Parties (COP) in 2002.<sup>58</sup>

### 3.2. Incentives

The obligations laid down in the IAS Regulation concern 29 contracting parties of the Bern Convention, namely the 28 EU member states and the EU itself. The faithful implementation of the IAS Regulation in these 28 countries would evidently contribute to achieving the aims of the Bern Convention. Those aims would be even better served, however, if comparable measures were also taken, preferably in a coordinated fashion, in the various European states that are not covered by the IAS Regulation. This point can be illustrated with reference to the Explanatory Memorandum submitted in 2013 by the European Commission together with its proposal for the IAS Regulation.<sup>59</sup> The Memorandum reports that measures taken by EU member states to address IAS remain predominantly reactive, with insufficient attention being paid to prevention and the detection of new threats.<sup>60</sup> Efforts are furthermore described as fragmented, with substantial gaps in species coverage, and as often poorly coordinated.<sup>61</sup> It seems fair to assume that similar considerations apply to non-EU member states as well. In the same vein, it is instructive to consider some of the European Commission's considerations regarding the subsidiarity of its (then) proposed Regulation:

Union-level action is necessary as IAS problems are increasing and are cross-border by nature. In view of the lack of Union-level action, Member States are putting measures in place to cope with the problem at national level. They are investing resources and efforts in eradicating harmful IAS but such efforts can be undermined by a lack of action in a neighbouring Member State where the

species is also present. . . . Current efforts are highly fragmented and inconsistent, leaving considerable policy gaps. These lead to ineffectiveness and do not solve the IAS problem. A mixture of Union and national, regional and local measures will be needed, in line with the principle of subsidiarity. However, a coherent approach at Union level will increase the effectiveness of the measures.<sup>62</sup>

Evidently, what is stated here in respect of action at the EU level applies all the stronger in respect of action at the pan-European level. In other words, to a significant extent, the reasons that lie at the basis of the IAS Regulation also apply beyond the EU. It is thus not surprising that the IAS Regulation itself calls for coordination and cooperation between EU member states and non-member states, in the aforementioned Article 22. Incidentally, the latter provision also calls on EU member states to ensure close coordination amongst each other, again using, where practical and appropriate, "existing structures arising from regional or international agreements."<sup>63</sup>

The preceding considerations indicate the desirability of action extending beyond EU member states to supplement the measures incorporated in the IAS Regulation. The next step, for the purposes of this article, is to explore the merits for taking such action within the framework of the Bern Convention. To be

<sup>53</sup> Standing Committee Recommendation No. 99 (2003) on the European Strategy on Invasive Alien Species, paragraph 1.

<sup>54</sup> *Ibid.*, paragraph 2.

<sup>55</sup> P. Genovesi, L. Carnevali and R. Scalerà, p. 1.

<sup>56</sup> See P. Genovesi and C. Shine; C. Shine, N. Williams and F. Burhenne-Guilmin, "Legal and Institutional Frameworks for Invasive Alien Species" in H.A. Mooney *et al.*, *Invasive Alien Species: A New Synthesis* (2005) 233; Convention On Biological Diversity, *Report of the Ad Hoc Technical Expert Group on Gaps and Inconsistencies in the International Regulatory Framework in Relation to Invasive Alien Species* (2005), Doc. UNEP/CBD/SBSTTA/11/INF/4; C. Shine (2006).

<sup>57</sup> Art. 8(h): "Each Contracting Party shall, as far as possible and as appropriate: ... prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species."

<sup>58</sup> CBD COP Decision VI/23; see also CBD COP Decision IX/4.

<sup>59</sup> Proposal for a Regulation of the European Parliament and of the Council on the Prevention and Management of the Introduction and Spread of Invasive Alien Species, 9 September 2013, COM (2013) 620 final.

<sup>60</sup> *Ibid.*, p. 2; for the underlying analysis of member state practice, see P. Sonigo, S. Berman and A. Turbè, *A Comparative Assessment of Existing Policies on Invasive Alien Species in the EU Member States and in Selected OECD Countries (Report for the European Commission, 070307/2010/577435/ETU/B2)* (2011).

<sup>61</sup> Proposal, *ibid.*

<sup>62</sup> *Ibid.*, p. 5.

<sup>63</sup> IAS Regulation, Art. 22(1).

## EU Regulation 1143/2014 and the Bern Convention

sure, other options exist in order to shape and facilitate such action. These include bilateral coordination and the use of (sub) regional intergovernmental fora, for instance the Nordic Council. Furthermore, some consultations regarding the IAS Regulation and its implementation have already taken place between the European Commission and several non-EU countries that share borders with EU member states.

Having said that, various features of the Bern Convention appear to indicate that the Convention has a distinct role to play to complement the aforementioned efforts. First among these is the unique pan-European scope of the Convention, not only on paper but also in terms of actual contracting parties. Besides all EU member states, the latter include virtually all European countries that are not EU member states. Such non-EU Bern Convention parties in Europe are Albania, Andorra, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, former Yugoslav Republic of Macedonia, Moldova, Monaco, Montenegro, Norway, San Marino, Serbia, Switzerland, Turkey, and Ukraine.<sup>64</sup>

A second feature is the strong track record of the Bern Convention concerning action to deal with IAS, alluded to above (see Section 3.1). This would seem to provide a solid foundation for any additional measures aligned with the IAS Regulation. It makes apparent sense to envisage the Bern Convention Standing Committee and IAS Group of Experts as covered by the reference in the IAS Regulation to “existing structures arising from regional or international agreements” which may facilitate international coordination and cooperation, both amongst EU member states and between EU and non-EU countries.<sup>65</sup>

Third, Bern Convention action adopted to complement the IAS Regulation would not constitute the first time that the Standing Committee acts to complement EU legislation. A particularly evocative parallel can be drawn with the Emerald Network of Areas of Special Conservation Interest (ASCI), set up on the basis of Article 4 of the Convention through a series of Resolutions and Recommendations adopted by the Standing Committee.<sup>66</sup> The regime concerning the Emerald Network was specially shaped in order to mirror, in non-EU Bern Convention contracting parties, the Natura 2000 network set up under the EU Wild Birds<sup>67</sup> and Habitats<sup>68</sup> Directives.<sup>69</sup> “In a sense,” to use the words of a Bern Convention guidance document, “the Emerald Network extends the EU nature conservation standards outside its borders.”<sup>70</sup>

Finally, and importantly, at the 34th Meeting of the Standing Committee in 2014, the EU and its member states expressly welcomed “the exploration of the possible future role of the Convention in relation to Regulation (EU) No 1143/2014.”<sup>71</sup>

### 3.3. Specific concerns

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

The IAS Regulation is a legally binding instrument. Moreover, as it concerns a Regulation as opposed to a Directive, the instrument is directly applicable in all the EU member states. EU Regulations, besides setting out provisions targeting member states or institutions like the European Commission, can by themselves provide for rights and even obligations of citizens. A good example is Article 7 of the IAS Regulation, laying down a generic prohibition of the intentional importation, transport, release, et cetera, of certain IAS<sup>72</sup> (see Section 5.1 below).

Recommendations and Resolutions adopted by the Bern Convention Standing Committee are evidently of a different legal caliber. They are not themselves legally binding. Furthermore, if prohibitions similar to the one featured in Article 7 of the IAS Regulation were to be called for in a Standing Committee Recommendation or Resolution, these would first have to be implemented through changes in national legislation in order to take effect. Nevertheless, it

<sup>64</sup> The Russian Federation is not a party but has observer status at the meetings of the Standing Committee. African contracting parties are Burkina Faso, Morocco, Senegal and Tunisia.

<sup>65</sup> IAS Regulation, Art. 22(1)-(2).

<sup>66</sup> Resolution No. 1 (1989), Recommendations Nos. 14, 15 and 16 (1989), Resolutions Nos. 3 and 4 (1996), Resolutions Nos. 5 and 6 (1998), Recommendation No. 157 (2011), Resolution No. 8 (2012), Recommendation No. 172 (2014).

<sup>67</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the Conservation of Wild Birds, [2010] OJ L 20/7 (codified version of Council Directive 79/409/EEC of 2 April 1979 as subsequently modified).

<sup>68</sup> Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, [1979] OJ L 206/7.

<sup>69</sup> Generally, see Directorate Of Democratic Governance, Culture And Diversity, *The Emerald Network: A Network of Areas of Special Conservation Interest for Europe – Explanatory Document and Compilation of Relevant Texts*, Bern Convention Doc. T-PVS/PA(2012)2; see also Y. Epstein, p. 151–154.

<sup>70</sup> Directorate Of Democratic Governance, Culture And Diversity, *ibid.* p. 11.

<sup>71</sup> General Secretariat of the Council, Compilation of EU and Member State statements/speaking points at 34th Meeting of the Standing Committee of the Bern Convention, 16916/14, ENV 996, Brussels, 15 December 2014; see Agenda Item 5.1.a.

<sup>72</sup> Art. 7(1).

# EU Regulation 1143/2014 and the Bern Convention

would be a mistake to think that Standing Committee Recommendations and Resolutions are entirely without legal relevance. Depending on their content and the wording employed, such instruments can exert a distinct influence on the interpretation and application of the associated legally binding provisions contained in the Bern Convention itself<sup>73</sup> – such as, in the present context, Article 11(2) (b) on IAS. One may draw another parallel here with the extensive guidance adopted by the Standing Committee concerning the Emerald Network, which evidently influences the interpretation and application of Article 4 of the Convention on habitat conservation.

At any rate, the differences between the EU's IAS Regulation and the mechanism of Bern Convention Recommendations and Resolutions as just highlighted should evidently inform any exercise aimed at complementing the IAS Regulation through Bern Convention action. In addition, compared to the IAS Regulation, the financial resources and capacity available to facilitate the implementation of associated Bern Convention action is probably more limited. Both points may be illustrated again with reference to the Emerald Network. On the one hand, “the Emerald constitution process and methodology got inspired and followed the Natura 2000 examples and best practices,”<sup>74</sup> and the aim has been to ensure as much “complementarity and consistency” between Natura 2000 and the Emerald Network as possible.<sup>75</sup> On the other hand, the differences in legal and institutional settings and available resources have led, in respect of the Emerald Network, to what has been described as a “simplified approach without losing the essence.”<sup>76</sup>

In sum, also in the present context it will not be feasible or indeed desirable to fully mirror the approach taken in the IAS Regulation within the framework of the Bern Convention. Rather, measures to complement the Regulation beyond the EU should be tailored to the extent and in the form appropriate to the framework of the Bern Convention. It is important to bear this in mind throughout the remainder of the present analysis.

Another consideration to take due account of when contemplating the taking of specific measures under the Bern Convention to match the IAS Regulation is the desirability of avoiding friction with obligations of Bern Convention contracting parties within the framework of the World Trade Organization (WTO), such as the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).<sup>77</sup> In particular, measures ought to be avoided which could be challenged as constituting arbitrary or unjustified discrimination or disguised restrictions on trade as understood within the WTO regime.<sup>78</sup>

## IV Listing of Invasive Alien Species

Under the IAS Regulation, invasive alien species may be listed at various levels, according to the circumstances

and the measures deemed appropriate. In this regard, the Regulation distinguishes IAS of “Union concern”, IAS of “regional concern”, and IAS of “Member State concern”. As discussed below, it may be warranted to add another layer under the Bern Convention.

### 4.1. IAS of Union concern

Article 4 of the IAS Regulation instructs the European Commission to adopt a “List of invasive alien species of Union concern”.<sup>79</sup> This Union IAS List is reserved for the potentially most harmful species, posing threats “so significant that it justifies the adoption of dedicated measures applicable across the Union, including in the Member States that are not yet affected or are even unlikely to be affected.”<sup>80</sup> The criteria for the selection of species for the Union IAS List are designed to ensure that (only) these most harmful species are included. These criteria, which are deemed the “core instrument of application of this Regulation,”<sup>81</sup> are as follows:

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

<sup>73</sup> Apt examples are Standing Committee Resolution No. 2 (1993) on the Scope of Articles 8 and 9 of the Bern Convention (revised in 2011); Recommendation No. 142 (2009) Interpreting the CBD Definition of Invasive Alien Species to Take into Account Climate Change; and Recommendation No. 173 (2014) on Hybridisation between Wild Grey Wolves (*Canis lupus*) and Domestic Dogs (*Canis lupus familiaris*). See further C. Shine, *Interpretation of Article 9 of the Bern Convention*, Bern Convention Doc. T-PVS/Inf(2010)16; A. Trouwborst, “*Conserving European Biodiversity in a Changing Climate: The Bern Convention, the EU Birds and Habitats Directives and the Adaptation of Nature to Climate Change*” [2011] *Review of European, Comparative and International Environmental Law* 62; A. Trouwborst, “Climate Adaptation and Biodiversity Law” in J. Verschuuren, *Research Handbook on Climate Change Adaptation Law* (2013) 298, p. 305–311; and A. Trouwborst, *Applying the Bern Convention on the Conservation of European Wildlife and Natural Habitats to the Problem of Hybridisation between Wolves (Canis lupus) and Domestic Dogs: An Analysis and a Proposal for a Standing Committee’s Recommendation*. Bern Convention Doc. T-PVS/Inf (2014)15.

<sup>74</sup> Directorate Of Democratic Governance, Culture And Diversity, p. 11.

<sup>75</sup> Directorate Of Democratic Governance, ETC/BD and M. Roekaerts, *Revised Criteria for Assessing the National Lists of Proposed Areas of Special Conservation Interest (ASCIs) at Biogeographical Level and Procedure for Examining and Approving Emerald Candidate Sites*, Bern Convention Doc. T-PVS/PA(2013)13, p. 2.

<sup>76</sup> *Ibid.*

<sup>77</sup> WTO Agreement on the Application of Sanitary and Phytosanitary Measures, 1 January 1995, www.wto.org.

<sup>78</sup> See further C. Shine (2006).

<sup>79</sup> IAS Regulation, Art. 4(1).

<sup>80</sup> Preamble, paragraph 10.

<sup>81</sup> Preamble, paragraph 11.

## EU Regulation 1143/2014 and the Bern Convention

- (a) they are found, based on available scientific evidence, to be alien to the territory of the Union excluding the outermost regions;
- (b) they are found, based on available scientific evidence, to be capable of establishing a viable population and spreading in the environment under current conditions and in foreseeable climate change conditions in one biogeographical region shared by more than two Member States or one marine sub region excluding their outermost regions;
- (c) they are, based on available scientific evidence, likely to have a significant adverse impact on biodiversity or the related ecosystem services, and may also have an adverse impact on human health or the economy;
- (d) it is demonstrated by a risk assessment carried out pursuant to Article 5(1) that concerted action at Union level is required to prevent their introduction, establishment or spread;
- ea) it is likely that the inclusion on the Union list will effectively prevent, minimise or mitigate their adverse impact.<sup>82</sup>

This cumulative set of restrictive criteria makes clear that species will not lightly be included in the Union IAS List. The criteria are to be applied, furthermore, “with due consideration to the implementation cost for Member States, the cost of inaction, the cost-effectiveness and the socio-economic aspects.”<sup>83</sup> In addition, the Regulation determines that the List “shall include as a priority” those IAS that are “not yet present in the Union or are at an early stage of invasion and are most likely to have a significant adverse impact” and those that are “already established in the Union and have the most significant adverse impact.”<sup>84</sup> Whereas the European Commission bears the primary responsibility for the listing of IAS of Union concern, member states may also propose species.

In either case, a crucial requirement is the performance of a risk assessment for each species, covering a range of elements specified in Article 5 of the Regulation:

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

- (a) a description of the species with its taxonomic identity, its history, and its natural and potential range;
- (b) a description of its reproduction and spread patterns and dynamics including an assessment of whether the environmental conditions necessary for its reproduction and spread exist;
- (c) a description of the potential pathways of introduction and spread of the species, both intentional and unintentional, including where relevant the commodities with which the species is generally associated;

- (d) a thorough assessment of the risk of introduction, establishment and spread in relevant biogeographical regions in current conditions and in foreseeable climate change conditions;
- (e) a description of the current distribution of the species, including whether the species is already present in the Union or in neighbouring countries, and a projection of its likely future distribution;
- (f) a description of the adverse impact on biodiversity and related ecosystem services, including on native species, protected sites, endangered habitats, as well as on human health, safety, and the economy including an assessment of the potential future impact having regard to available scientific knowledge;
- (g) an assessment of the potential costs of damage;
- (h) a description of the known uses for the species and social and economic benefits deriving from those uses.”<sup>85</sup>

The requirement of conducting a risk assessment, and the establishment of common criteria for its performance, are grounded in the desirability of achieving the Regulation’s coherent application as well as ensuring “compliance with the rules under the relevant Agreements of the WTO” regarding trade restrictions on species.<sup>86</sup>

The Union IAS List is to be adopted by the European Commission through “implementing acts”, following a denominated “examination procedure”, involving a vote by the member states.<sup>87</sup> A draft of the List is to be submitted by the Commission to the aforementioned IAS Committee no later than 2 January 2016.<sup>88</sup> Technical work has already been set in motion to operationalize the approach set out in Articles 4 and 5 of the Regulation, so as to work towards an initial version of the Union IAS List.<sup>89</sup> A comprehensive review of the List is to be undertaken every six years at a minimum, and the List must in the

<sup>82</sup> Art. 4(3), emphasis added.

<sup>83</sup> Art. 4(6).

<sup>84</sup> *Ibid.*

<sup>85</sup> Art. 5(1).

<sup>86</sup> Preamble, paragraph 13; see also paragraph 11.

<sup>87</sup> Art. 4(1); for the procedure itself, see Art. 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 Laying Down the Rules and General Principles concerning Mechanisms for Control by Member States of the Commission’s Exercise of Implementing Powers, [2011] OJ L 55/13.

<sup>88</sup> IAS Regulation, Art. 4(1).

<sup>89</sup> H. Roy *et al.* *Invasive Alien Species – Framework for the Identification of Invasive Alien Species of EU Concern (Report for European Commission, ENV.B.2/ETU/2013/0026)* (2014); H. Roy *et al.*, *Organisation and Running of a Scientific Workshop to Complete Selected Invasive Alien Species (IAS) Risk Assessments (Report for European Commission, ARES (2014)2425342)* (2015).

# EU Regulation 1143/2014 and the Bern Convention

meantime be updated by adding or removing species, as appropriate.<sup>90</sup>

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

## 4.2. IAS of member state concern and IAS of regional concern

Article 12 of the Regulation provides that each member state may establish a “national list of invasive alien species of Member State concern”. For the species involved, member states “may apply, in their territory, measures such as those provided for in Articles 7, 8, 13 to 17, 19 and 20, as appropriate”.<sup>91</sup> The latter provisions concern restrictions to prevent IAS introductions, action plans on pathways, surveillance systems, official controls, early detection notifications, rapid eradication measures, management measures, and ecosystem restoration. Such national measures must be compatible with the TFEU.<sup>92</sup> When established, the list of IAS of member state concern and the corresponding measures must be communicated to the European Commission and the other member states.<sup>93</sup> It should be recalled that also generally, i.e., apart from Article 12, member states are allowed to adopt stricter IAS measures than provided for in the IAS Regulation.<sup>94</sup>

Article 11 of the Regulation addresses IAS “of regional concern” and “species native to the Union”. From their national lists of IAS “of Member State concern”, member states may identify “species native or non-native to the Union that require enhanced regional cooperation.”<sup>95</sup> When the member states involved so request, the Commission is bound to facilitate international cooperation between them, in accordance with the aforementioned Article 22.<sup>96</sup> Moreover, Article 11 introduces a notable construction whereby concerned member states may request the Commission to impose a legally binding regime on all member states involved in order to deal with the IAS of regional concern, by declaring applicable some of the Regulation’s core provisions on pathways, early detection, rapid eradication and management:

Where necessary, based on the impact of certain invasive alien species on biodiversity and related ecosystem services as well as on human health and the economy and provided that it is thoroughly substantiated by a comprehensive analysis of the justification for an enhanced regional cooperation carried out by the requesting Member States, the Commission may require, by means of implementing acts, that the Member States concerned apply, *mutatis mutandis*, in their territory or part of it, Articles 13, 14 and 16, Article 17 notwithstanding Article 18, as well as apply Articles 19 and 20, as appropriate.<sup>97</sup>

Given the size and biogeographic diversity of the EU, it may occur that species which constitute IAS of regional concern in one part of the EU are in fact native species in another part. With a view to these situations, Article 11 of the IAS Regulation stipulates that duties to eradicate or manage such species and various other obligations (Articles 13, 14, 16, 17, 19, 20 and 24) will not apply to such species in the member states where they are native.<sup>98</sup> Instead, the latter “native” member states are required to cooperate with the member states where the species pose a problem, in particular regarding the assessment of pathways, and may, in consultation with those other states involved, adopt relevant measures to avoid the species’ further spread.<sup>99</sup>

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

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

Due note should be taken in this connection of the various efforts that have already been undertaken within the framework of the Bern Convention to identify IAS and suitable measures to deal with them. Indeed, one of the key actions proposed in the European Strategy on IAS is to “work towards a regional or sub regional species listing system” that is “consistent with European and international law.”<sup>100</sup> Of special interest in this regard is the “Metalist of known invasive alien species for Europe” (IAS Metalist) appended to Standing Committee Recommendation No. 125 (2007).<sup>101</sup> This IAS Metalist is intended as an “indicative alert list”.<sup>102</sup> The Recommendation calls on Bern Convention parties to

<sup>90</sup> IAS Regulation, Art. 4(2).

<sup>91</sup> Art. 12(1).

<sup>92</sup> *Ibid.*

<sup>93</sup> Art. 12(2).

<sup>94</sup> Art. 23.

<sup>95</sup> Art. 11(1).

<sup>96</sup> Art. 11(2) and 22(1).

<sup>97</sup> Art. 11(2).

<sup>98</sup> Art. 11(3).

<sup>99</sup> *Ibid.*

<sup>100</sup> P. Genovesi and C. Shine, paragraph 5.2.3.

<sup>101</sup> Recommendation No. 125 (2007) on Trade in Invasive and Potentially Invasive Alien Species in Europe, Appendix I.

<sup>102</sup> *Ibid.* paragraph 5.

## EU Regulation 1143/2014 and the Bern Convention

“regulate as appropriate the intentional introduction, possession and trade in their territory” of the species in the Metalist, “where necessary, prohibiting the introduction, possession of and/or trade in those species that present an unacceptable risk,”<sup>103</sup> while accompanying trade regulations where feasible and appropriate with eradication and/or other management measures.<sup>104</sup>

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

At first sight, one eligible option would thus be for the Standing Committee to declare the Union IAS List, together with some of the associated measures (discussed below in Sections 5 and 6), applicable to the various European contracting parties of the Bern Convention that are not EU member states. Unfortunately, however, such a blanket declaration extending the Union IAS List without more to non-EU countries is subject to certain drawbacks. As will be recalled, the Union IAS List and the various associated mandatory measures are reserved for species that are alien to the entire European territory of the EU.<sup>105</sup> Whereas applying the Union IAS List to countries like Switzerland and Norway will probably be unproblematic, the further east on the European map one goes, the less appropriate the application of the Union List might become. There might be species on the Union IAS List that are actually native to Bern Convention parties like Ukraine, Turkey or Azerbaijan. Conversely, there might be species that pose a significant threat with regard to Convention parties like the aforementioned ones, but are not included in the Union IAS List. Hence, it would *not* seem advisable for the Standing Committee to declare the Union IAS List applicable without more to non-EU Bern Convention parties. Rather, it seems that the suitability of the Union List, and every update of it, would need to be verified before linking it to particular actions by Bern Convention contracting parties.

An alternative approach would be to adopt an equivalent list that is based on, but not necessarily identical to, the Union IAS List, together with a regime of associated actions to be taken by (primarily non-EU) Bern Convention parties. This list, which for present purposes is referred to as the Bern Convention IAS List, could be reviewed, and as appropriate revised, by the Standing Committee on an annual basis. Union IAS List species that are inappropriate for inclusion in the Bern Convention IAS List could simply be left out. The issue of including species on

this Bern Convention IAS List that are *not* included in the Union IAS List is slightly more complex. There are at least two basic options to go about this. Option (A) would be to make the addition of each candidate species that is not on the Union IAS List conditional upon the outcome of a risk assessment meeting, *mutatis mutandis*, the criteria set out in Article 5 of the IAS Regulation. The main advantage of this option is the achievement of a uniform and straightforward approach. A potential disadvantage of this option is that the demanding risk assessment requirements involved might in practice pose an obstacle to the inclusion of species that do in fact raise legitimate concerns. Option (B) would be to adopt a differentiated regime, with the strictest measures affecting international trade reserved for species that are also included in the Union IAS List as well as any further species backed by a risk assessment conforming to Article 5 of the IAS Regulation, and a “lighter” regime applicable to other species included in the Bern Convention IAS List. In brief, option (A) would thus result in a more uniform and straightforward but less tailor-made approach. *Vice versa*, option (B) would result in a less uniform and straightforward but more tailor-made approach, as it enables the addition of a broader array of (potential) IAS. In either scenario, the Union IAS List would serve as the point of departure, but not be declared directly and automatically applicable.

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

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

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.* paragraph 6.

<sup>105</sup> See the criterion in Art. 4(3) (a) of the IAS Regulation, reproduced above.

# EU Regulation 1143/2014 and the Bern Convention

## V Prevention of IAS Introductions

### 5.1. Prohibitions and exceptions under the IAS Regulation

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

Invasive alien species of Union concern shall not be intentionally:

- (a) brought into the territory of the Union, including transit under customs supervision;
- (b) kept, including in contained holding;
- (c) bred, including in contained holding;
- (d) transported to, from or within the Union, except for the transportation of species to facilities in the context of eradication;
- (e) placed on the market;
- (f) used or exchanged;
- (g) permitted to reproduce, grown or cultivated [*sic*], including in contained holding; or
- (h) released into the environment.<sup>106</sup>

These prohibitions are directly applicable within the legal orders of the member states (see Section 3.3 above). Furthermore, regarding *unintentional* introductions, Article 7 states a general obligation for member states to “take all necessary steps to prevent the unintentional introduction or spread, including, where applicable, by gross negligence, of invasive alien species of Union concern.”<sup>107</sup>

Articles 8 and 9 enable member states, in certain circumstances, to issue permits authorizing exceptions to the restrictions set out in Article 7. Under no condition, however, may permits be issued for the placing on the market or the release into the environment of IAS of Union concern.<sup>108</sup> Regarding the other restrictions – those mentioned in Article 7(1)(a), (b), (c), (d), (f) and (g) – member states must set up a permit system, allowing establishments to carry out research on, or *ex situ* conservation of, IAS of Union concern. Scientific production and subsequent medicinal use of such species may also be included within said permit systems, when this is “unavoidable to advance human health.”<sup>109</sup> Permits for other than the aforementioned purposes may only be issued in “exceptional cases, for reasons of compelling public interest, including those of a social or economic nature,” and are, moreover, subject to prior authorization by the European Commission.<sup>110</sup> Several substantive and procedural safeguards apply in respect of the establishment and operation of the member states’ permit systems, which are too numerous and detailed to reproduce here.<sup>111</sup>

Article 10 provides member states with the possibility to take “emergency measures” regarding species that are not on the Union List. This possibility arises when the member state concerned has “evidence concerning the presence in, or imminent risk of introduction into its territory” of a species the

authorities have found, “on the basis of preliminary scientific evidence, to be likely to meet the criteria set out in Article 4(3)” – which are the aforementioned criteria to be met for a species to qualify for inclusion in the Union IAS List.<sup>112</sup> Such emergency measures may consist of any of the restrictions set out in Article 7(1).<sup>113</sup> When the emergency measures involve prohibiting the species’ import, transport and/or placing on the market, the member state in question must immediately notify the European Commission and the other member states.<sup>114</sup> In addition, the member state taking emergency measures is expected to carry out without delay a risk assessment in line with Article 5 of the Regulation.<sup>115</sup> The Commission, in turn, may decide to establish emergency measures at the EU level, and when this is warranted may indeed proceed to include the species on the Union IAS List.<sup>116</sup>

### 5.2. Addressing priority pathways under the IAS Regulation

A crucial provision regarding the prevention of unintentional introductions is Article 13 of the Regulation, on action plans addressing IAS pathways. Within one-and-a-half years following the adoption of the Union IAS List, each member state must conduct a “comprehensive analysis of the pathways of unintentional introduction and spread” of IAS of Union concern in its territory and marine waters, and identify “priority pathways”, i.e., those pathways requiring urgent action “because of the volume of species or of the potential damage caused by the species entering the Union through those pathways.”<sup>117</sup>

Within three years after adoption of the Union IAS List, each member state is expected to “establish and implement one single action plan or a set of action plans to address the priority pathways” it has identified. These action plans must include timetables for action, and describe the measures to be adopted as well as any pertinent voluntary actions and “codes of good practice” to address those priority pathways.<sup>118</sup> The action plans shall include “measures based on an analysis of costs and benefits, in order to: (a) raise awareness; (b) minimize contamination of goods, commodities, vehicles and equipment by specimens

<sup>106</sup> Art. 7(1).

<sup>107</sup> Art. 7(2).

<sup>108</sup> Art. 8(1).

<sup>109</sup> *Ibid.*

<sup>110</sup> Art. 9(1); the procedure for such authorizations is laid down in Art. 9(2)-(8).

<sup>111</sup> See Art. 8(2)-(8).

<sup>112</sup> Art. 10(1).

<sup>113</sup> *Ibid.*

<sup>114</sup> Art. 10(2).

<sup>115</sup> Art. 10(3).

<sup>116</sup> Art. 10(4)-(7).

<sup>117</sup> Art. 13(1).

<sup>118</sup> Art. 13(2).

## EU Regulation 1143/2014 and the Bern Convention

of invasive alien species, including measures to tackle transportation ... from third countries; (c) ensure appropriate checks at the Union borders.”<sup>119</sup> Pathway action plans are to be transmitted to the European Commission and reviewed at least every six years.<sup>120</sup> Notably, as regards action at the regional level, member states “shall ensure coordination with the aim of establishing one single action plan or a set of action plans at the appropriate regional level in accordance with Article 22(1).”<sup>121</sup>

### 5.3. Corresponding preventive action under the Bern Convention

Clearly, the extensive guidance on IAS adopted over the years within the framework of the Bern Convention already calls for many preventive measures that are broadly comparable to those contained in the IAS Regulation, as just reviewed. A case in point is the European Strategy on IAS, which contracting parties to the Convention are in the process of implementing. The various Bern Convention IAS Codes of Conduct also come to mind, as well as several Standing Committee Recommendations. Notwithstanding this substantive overlap, generally speaking the EU Regulation’s provisions are phrased in a stricter and more defined manner, leaving less leeway to national authorities. At any rate, a significant advantage of adapting the Bern Convention’s approach in non-EU member states to the IAS Regulation is the achievement of a degree of uniformity in the way IAS are addressed across Europe. As the European Strategy on IAS stresses, “Europe particularly needs common approaches to prevention because of the number of contiguous states, the high volume of inter- and intra-continental trade and transport and its extensive free trade arrangements which can facilitate transboundary movements of IAS.”<sup>122</sup> Below, the various IAS Regulation provisions that were just discussed are concisely related to existing and potential future action under the Bern Convention.

Articles 7, 8 and 9 of the IAS Regulation may be viewed as operationalizing the commitment of the EU and its member states under Article 11 of the Bern Convention to “strictly control the introduction of non-native species,”<sup>123</sup> as well as various recommended actions contained in the European Strategy on IAS and in Standing Committee Recommendation No. 125 (2007). The European Strategy, for instance, calls for the taking of “appropriate measures to prohibit first-time introductions of alien species, or subsequent introductions of an alien species already invasive or potentially invasive within a country, without prior authorisation from the competent authority of the recipient state.”<sup>124</sup> Furthermore, the Strategy calls for “an evaluation process, including an appropriate risk analysis,” to be “carried out before a decision is made on whether to authorise a proposed introduction.”<sup>125</sup> All efforts should be made to “permit only those species that are unlikely

to threaten biodiversity.”<sup>126</sup> Recommendation No. 125 calls on contracting parties to “regulate as appropriate the intentional introduction, possession and trade in their territory of the invasive or potentially invasive alien species listed” in the aforementioned IAS Metalist, “applying the precautionary principle and where necessary, prohibiting the introduction, possession of and/or trade in those species that present an unacceptable risk.”<sup>127</sup> Such an unacceptable risk is taken to exist when there is “sufficient evidence of their negative impact on ecosystems, habitats or species from a risk analysis or other objective sources.”<sup>128</sup> Generally, parties are requested to “strengthen and extend risk analysis prior to decision-making on the import of alien species that are invasive or potentially invasive, using risk analysis methodology and procedures based on objective and scientific criteria.”<sup>129</sup>

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

<sup>119</sup> Art. 13(4).

<sup>120</sup> Art. 13(5).

<sup>121</sup> Art. 13(3).

<sup>122</sup> P. Genovesi and C. Shine, p. 30.

<sup>123</sup> Bern Convention, Art. 11(2) (b).

<sup>124</sup> P. Genovesi and C. Shine, paragraph 5.2.1.

<sup>125</sup> *Ibid.* paragraph 5.2.2.

<sup>126</sup> *Ibid.*

<sup>127</sup> Recommendation No. 125 (2007), paragraph 5.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.* paragraph 4.

# EU Regulation 1143/2014 and the Bern Convention

the Standing Committee before issuing any such permits appears unworkable with a view to the Committee's meeting frequency. (Under the IAS Regulation, the European Commission is to decide on authorization requests within 60 days.<sup>130</sup>) Theoretically, some sort of advisory panel could be set up under the Bern Convention for this purpose. Careful consideration appears warranted to determine to what extent such an approach might be feasible and appropriate.

Incidentally, the IAS Regulation does, strictly speaking, *not* conform to the recommendation in the European Strategy on IAS to "permit only those species that are unlikely to threaten biodiversity."<sup>131</sup> After all, the latter recommendation in the Strategy tends towards a "white list" approach whereby potential IAS are kept at bay unless proven safe. The IAS Regulation employs a "black list" instead, the Union IAS List, whereby significant hurdles must moreover be taken for a suspicious species to be added to the list. It should be noted in this regard, however, that any request to Bern Convention parties to implement the aforementioned restrictions and permit system in respect of species on a Bern Convention IAS List should be viewed as minimum requirements. As far as the Bern Convention is concerned, contracting parties would still be allowed to go beyond what is requested and adopt restrictions for other species as well, in line with the European Strategy on IAS and Recommendation No. 125, and in accordance with the Convention itself.<sup>132</sup>

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

Article 13 of the IAS Regulation on assessing and addressing priority pathways is also well grounded in Bern Convention guidance. The European Strategy on IAS calls for "risk analysis of pathways and vectors for unintentional introductions to support, in particular, an integrated approach to pathway management at the sub regional or regional level."<sup>133</sup> Furthermore, Recommendation No. 125 recommends Bern Convention parties to "carry out an in-depth analysis of and research into trade-related pathways, examining imports and international movements of species and commodities," *inter alia* to "assess the extent of unintentional introduction of potentially invasive alien species through trade-related pathways and take integrated measures based on the precautionary principle to minimise such introductions."<sup>134</sup> There seems to be, at any rate, apparent scope for complementing Article 13 of the IAS Regulation in non-EU Bern Convention parties by requesting the latter to perform similar analyses and adopt and implement similar priority pathway action plans. Comparable considerations apply to the creation of

regional action plans, in cooperation with each other and/or with EU member states, as appropriate.<sup>135</sup>

Besides, there is clear potential for Bern Convention work to contribute to the effective and uniform implementation of the actions involved across the board – also in EU member states – in several ways. For instance, an apparent role is reserved for the incorporation of the various Codes of Conduct on IAS in priority pathway action plans, in accordance with Article 13(2) of the IAS Regulation. The same purpose would be served by furthering the development of concrete guidance to help national authorities identify priority pathways and draw up associated action plans. A Bern Convention contribution along these lines would also accord with the position expressed by the European Commission and the EU member states at the 2014 meeting of the Standing Committee. In this EU position, "the development of guidelines on the identification of priority pathways and on the ways to address priority pathways" was highlighted as one of the areas where the Bern Convention might play a role in connection with the IAS Regulation.<sup>136</sup> The deadlines incorporated in Article 13 of the Regulation suggest that the development of any such guidance, for it to be practically relevant, should be undertaken as a matter of priority.

## VI Detection, Eradication, Management and Restoration

### 6.1. Early detection and rapid eradication under the IAS Regulation

Article 14 of the IAS Regulation sets out an obligation for member states to establish, or incorporate within their existing systems, a "surveillance system of invasive alien species of Union concern" which "collects and records data on the occurrence in the environment" of IAS "by survey, monitoring or other procedures" to prevent the spread of IAS into or within the EU.<sup>137</sup>

The surveillance system ... shall:

<sup>130</sup> IAS Regulation, Art. 9(2).

<sup>131</sup> P. Genovesi and C. Shine, paragraph 5.2.2.

<sup>132</sup> Art. 12 of the Convention allow contracting parties to take stricter conservation measures than those provided under the Convention.

<sup>133</sup> P. Genovesi and C. Shine, paragraph 5.3.1.

<sup>134</sup> Standing Committee Recommendation No. 125 (2007), paragraph 1.

<sup>135</sup> See IAS Regulation, Art. 13(3).

<sup>136</sup> General Secretariat of the Council, Compilation of EU and Member State statements/speaking points at 34th Meeting of the Standing Committee of the Bern Convention, 16916/14, ENV 996, Brussels, 15 December 2014; see Agenda Item 5.1.a.

<sup>137</sup> Art. 14(1).

## EU Regulation 1143/2014 and the Bern Convention

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

The surveillance system shall also be used to monitor the effectiveness of eradication measures, and of management measures applied to IAS that are widely spread.<sup>138</sup> Each member state is expected to have its surveillance system up and running within one-and-a-half year after the adoption of the Union IAS List.<sup>139</sup> Quite a bit sooner, by 2 January 2016, member states are required to “have in place fully functioning structures to carry out the official controls necessary to prevent the intentional introduction into the Union of invasive alien species of Union concern.”<sup>140</sup> Article 15 lays down a set of detailed requirements to be met by member states in this regard.<sup>141</sup>

Using the surveillance system established under Article 14 and the information collected at official controls provided for under Article 15, member states should be able to achieve the early detection of the introduction or presence of species from the Union IAS List.<sup>142</sup> Once they do detect such an IAS of Union concern, they shall “without delay” notify the European Commission and inform the other member states, particularly where this concerns a species previously unrecorded in the territory concerned or the reappearance of a previously eradicated species.<sup>143</sup> Moreover, following early detection, Article 17 of the IAS Regulation makes it mandatory for EU member states to apply eradication measures:

1. After early detection and within three months after the transmission of the early detection notification referred to in Article 16, Member States shall apply eradication measures and notify those measures to the Commission and inform the other member states.
2. When applying eradication measures, Member States shall ensure that the methods used are

effective in achieving the complete and permanent removal of the population of the invasive alien species concerned, with due regard to human health and the environment, especially non-target species and their habitats, and ensuring that animals are spared any avoidable pain, distress or suffering.

3. Member States shall monitor the effectiveness of the eradication. Member States may use the surveillance system provided for in Article 14 to this effect. The monitoring shall also assess the impact on non-targeted species, as appropriate.
4. Member States shall inform the Commission of the effectiveness of the measures taken and notify the Commission when a population of an invasive alien species of Union concern has been eradicated. They shall also provide that information to other Member States.<sup>144</sup>

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

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

- (a) eradication is demonstrated to be technically unfeasible because the eradication methods available cannot be applied in the environment where the invasive alien species is established;
- (b) a cost-benefit analysis demonstrates on the basis of the available data with reasonable certainty that the costs will, in the long term, be exceptionally high and disproportionate to the benefits of eradication;
- (c) eradication methods are not available or are available but have very serious adverse impacts on human health, the environment or other species.<sup>145</sup>

When availing itself of this possibility, the member state in question must immediately notify the European Commission, and submit all relevant evidence supporting its decision.<sup>146</sup> It must also ensure that “containment measures are in place to avoid further spread of the invasive alien species to other Member States.”<sup>147</sup> The Commission has two months to decide whether to reject the member state’s decision or not.<sup>148</sup>

<sup>138</sup> Art. 17(3) and 19(4).

<sup>139</sup> Art. 14(1).

<sup>140</sup> Art. 15(1).

<sup>141</sup> Art. 15(2)-(9).

<sup>142</sup> Art. 16(1).

<sup>143</sup> Art. 16(2).

<sup>144</sup> Art. 17(1)-(4).

<sup>145</sup> Art. 18(1).

<sup>146</sup> *Ibid.*

<sup>147</sup> Art. 18(4).

<sup>148</sup> Art. 18(2)-(3).

## EU Regulation 1143/2014 and the Bern Convention

If the decision is upheld by the Commission, then the IAS concerned “shall be subject to the management measures referred to in Article 19,”<sup>149</sup> discussed below (see Section 6.2). If the decision is rejected by the Commission, then the member state involved “shall apply the eradication measures referred to in Article 17 without delay.”<sup>150</sup>

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

Article 19 of the IAS Regulation makes provision for various management measures regarding IAS that are widely spread. Within one-and-a-half year after a species is included on the Union IAS List, member states where the species is widely distributed within the territory “shall have in place effective management measures,” in order to minimize the species’ impact on biodiversity, ecosystem services, human health and/or the economy.<sup>151</sup> These measures “shall consist of lethal or non-lethal physical, chemical or biological actions aimed at the eradication, population control or containment” of the IAS’ population.<sup>152</sup> Where appropriate, management measures “shall include actions applied to the receiving ecosystem aimed at increasing its resilience to current and future invasions.”<sup>153</sup> Where a significant risk arises that an IAS of Union concern may spread to another member state, then the member state on whose territory the species occurs “shall immediately notify the other Member States and the Commission.”<sup>154</sup> Where appropriate, the member states involved “shall establish jointly agreed management measures.” Where third countries, i.e. non-EU member states, may also be affected by the spread of the IAS, the member state concerned “shall endeavour to inform the third countries concerned.”<sup>155</sup>

When an ecosystem has been “degraded, damaged, or destroyed” by IAS of Union concern, Article 20 of the IAS Regulation requires the member state(s) in question to “carry out appropriate restoration measures” to assist the ecosystem’s recovery.<sup>156</sup> These measures shall at a minimum include “measures to increase the ability of an ecosystem exposed to disturbance caused by the presence of invasive alien species of Union concern to resist, absorb, accommodate to and recover from the effects of disturbance,” and “measures to support the prevention of reinvasion following an eradication campaign.”<sup>157</sup> The obligation to take restoration measures does not apply, however, when “a cost-benefit analysis demonstrates, on the basis of the available data and with reasonable certainty, that the costs of those measures will be high and disproportionate to the benefits of restoration.”<sup>158</sup>

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

As regards the national surveillance systems to be established in accordance with Article 14 of the IAS

Regulation, it is conceivable under the Bern Convention to call for the setting up of similar systems in non-EU countries. In addition, the Convention might initiate or facilitate the development of guidance for the design and implementation of such systems, to promote a uniform approach in this regard. Indeed, the potential role of the Bern Convention regarding the “development of guidelines on the establishment of adequate surveillance systems, building upon existing surveillance systems and involving citizens” was suggested by the EU and its member states during the 2014 Standing Committee meeting.<sup>159</sup> Broadly similar considerations apply, with due adaptations to a non-EU context as appropriate, to the official controls, early detection notifications and eradication measures required under Articles 15 through 18 of the IAS Regulation. All such actions would be consistent with relevant recommendations contained in the European Strategy on IAS.<sup>160</sup>

The same is true, in turn, of the IAS management and ecosystem restoration measures prescribed under Articles 19 and 20 of the Regulation.<sup>161</sup> Both provisions could be applied in adapted form to non-EU Bern Convention parties, and in respect of both the development of guidance under auspices of the Convention can in principle be envisaged. In fact, the “development of guidelines for the restoration of ecosystems damaged by invasions in order to avoid re-invasions after eradication” has been proposed by the EU and its member states as a potential area of work for the Bern Convention.<sup>162</sup>

<sup>149</sup> Art. 18(6).

<sup>150</sup> Art. 18(5).

<sup>151</sup> Art. 19(1).

<sup>152</sup> Art. 19(2).

<sup>153</sup> *Ibid.*

<sup>154</sup> Art. 19(5).

<sup>155</sup> *Ibid.*

<sup>156</sup> Art. 20(1).

<sup>157</sup> Art. 20(2).

<sup>158</sup> Art. 20(1).

<sup>159</sup> General Secretariat of the Council, Compilation of EU and Member State statements/speaking points at 34th Meeting of the Standing Committee of the Bern Convention, 16916/14, ENV 996, Brussels, 15 December 2014; see Agenda Item 5.1.a.

<sup>160</sup> P. Genovesi and C. Shine p. 38–43.

<sup>161</sup> *Ibid.* p. 43–46.

<sup>162</sup> General Secretariat of the Council, Compilation of EU and Member State statements/speaking points at 34th Meeting of the Standing Committee of the Bern Convention, 16916/14, ENV 996, Brussels, 15 December 2014; see Agenda Item 5.1.a.

# EU Regulation 1143/2014 and the Bern Convention

## VII Synthesis: Potential Courses of Action

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

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

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

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

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

Article 25 of the IAS Regulation (see Section 2 above).<sup>163</sup>

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

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

Such a parallel Bern Convention regime could be established on the basis of Resolutions and Recommendations adopted by the Standing Committee, following the precedent set by the development of the Emerald Network (see Section 3.2 above). As regards its substance, the regime could operate on the basis of a Bern Convention IAS List closely associated with, but not necessarily identical to, the Union IAS List (see Sections 4.1 and 4.3 above). With regard to listed species, the regime could set out preventive, detection, eradication, management and restoration measures emulating, in duly adapted form, those set out in the IAS Regulation, along the lines sketched in the analysis above (see Sections 5 and 6). Given the complexity of the subject matter, designing the details of such a Bern Convention regime will require careful thinking. Whichever way, any such parallel regime cannot be formally set in motion until after the adoption of the Union IAS List, which is foreseen in 2016 (see Sections 4.1 and 4.3 above). Yet, the decision whether or not to develop such a regime should be taken by the Standing Committee sooner rather than later, given the time needed to design the regime itself and to prepare for its adoption and implementation.

## VIII Concluding Observations

As regards the actual prospects for these courses of action, it is of interest to note the broad agreement in this regard amongst contracting parties' delegates attending the most recent Meeting of the Bern Convention Group of Experts on IAS.<sup>164</sup> In particular, they endorsed a draft Recommendation, to be considered for adoption by the Standing Committee in December 2015, which expresses agreement to "promote the effective application of Regulation 1143/2014 and to promote the taking of corresponding action by Contracting Parties that are not EU Member States, in order to achieve an approach that is as uniform and effective as possible across

<sup>163</sup> *Ibid.*

<sup>164</sup> 11th Meeting of the Bern Convention Group of Experts on Invasive Alien Species (Triglav National Park, Slovenia, 4-5 June 2015).

---

## EU Regulation 1143/2014 and the Bern Convention

---

Europe.”<sup>165</sup> In particular, the draft Recommendation calls for technical work as discussed above, as well as for the design and implementation of “an equivalent regime on invasive alien species tailored to those Contracting Parties which are not EU Member States, and resembling the regime laid down in Regulation 1143/2014 as closely as appropriate and feasible.”<sup>166</sup> According to the draft Recommendation, said regime should be built around a “List of invasive alien species of European concern, based on the List of invasive alien species of Union concern drawn up under Regulation 1143/2014, and should set out preventive, detection, eradication, management and restoration measures emulating, in duly adapted form, those set out in Regulation 1143/2014.”<sup>167</sup> Time will tell whether the Standing Committee will actually adopt this or a similar Recommendation, and how the decision-making on IAS will develop in the future.

On a final note, the present subject matter is evidently of interest from the perspective of the dynamic interplay and cross-fertilization that has characterized the relations between the Bern Conven-

tion and the EU legal framework in the past.<sup>168</sup> The Convention formed the basis for the EU Habitats Directive, and the Habitats Directive subsequently inspired the Bern Convention Emerald Network. Similarly, the European Strategy on IAS developed under the Convention provided a basis for the EU IAS Regulation, and that IAS Regulation may now in turn trigger corresponding action under the Convention. In other words, the developments discussed in this article have the potential to provide an interesting new chapter in this regulatory interplay between the Bern Convention and EU law. From the perspective of European biodiversity conservation, this new chapter will hopefully see the two regimes cooperate constructively as allied forces in the European war on IAS.

<sup>165</sup> Draft Recommendation annexed to Bern Convention Doc. T-PVS/Inf (2015)14, Preamble.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> For a recent analysis of this interplay, see Y. Epstein.