THE RELATIONSHIP BETWEEN THE CONVENTION ON BIOLOGICAL DIVERSITY AND OTHER INTERNATIONAL TREATIES ON THE PROTECTION OF WILDLIFE

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SUMMARY: 1. Introduction. 2. The Biodiversity Convention and its relationship with the other treaties. 3. Subjects regulated only by the Biodiversity Convention. 4. Issues already regulated at an international level: the potential conflicts. 5. Issues already regulated at an international level: the complementary use of different provisions. 6. Conclusions.

1. The Convention on Biological Diversity (hereinafter referred to as the Biodiversity Convention) was adopted in Nairobi on 22 May 1992 and opened to signature in Rio de Janeiro on 5 June 1992, during the United Nations Conference on Environment and Development (UNCED)[1]. It is one of the most recent treaties on species conservation, among other issues. It is certainly the only one with both worldwide scope and a non-sectoral approach. This Convention fills in a few gaps in some respects: it regulates matters which were not tackled in previous treaties concerning wildlife[2], in particular biotechnology. In some other respects however the Convention is not such an

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1. The text of the Biodiversity Convention is reproduced in BURHENNE (ed.), *Beiträge zur Umweltgestaltung, International Environmental Law* (hereinafter *Beiträge* cit.), 992:42 (Loose-leaf).

2. A wide definition of wildlife has been adopted in the present context. It includes not only the native fauna and flora of a particular place but more generally the natural habitats which are indispensable for the survival of wild species.

improvement in conservation compared to other instruments of international law.

The purpose of this article is not to show the functioning of each treaty protecting wildlife in detail[3], to then compare them to the Biodiversity Convention. Its aim is less ambitious. Reference will be made to some of these treaties in order to point out a few of the many possible relationships and reciprocal influences between the Biodiversity Convention and the provisions of the previous instruments. But it is obviously impossible to consider and examine all the existing treaties which deal with the protection of wildlife[4].

The concept "wildlife protection" has evolved over the years[5]. This evolution may also be seen at the international level and characterizes the different treaties on this matter. This is not without consequences with regard to the interrelationship among the treaties themselves and between them and the Biodiversity Convention.

The way to understand the protection of species and wildlife in general has progressed in stages. These stages correspond only roughly to precise periods[6].

3. On wildlife conventions *see* LYSTER, *International Wildlife Law*, Cambridge, 1985; KISS, *Droit international de l'environnement*, Paris, 1989, p. 212 *et seq.*; FORSTER and OSTERWOLDT, *Nature Conservation and Terrestrial Living Resources*, in SAND (ed.), *The Effectiveness of International Environmental Agreements*, Cambridge, 1992, p. 59 *et seq.*; BIRNIE and BOYLE, *International Law and the Environment*, Oxford, 1992, p. 419 *et seq.*; MAFFEI, *La protezione internazionale delle specie animali minacciate*, Padova, 1992.

4. For a "panorama" of the most important treaties protecting wildlife see PRZYBOROWSKA-KLIMCZAK, *Protection of Wildlife in International Law*, in *Polish Yearbook of International Law*, 1991-1992, p. 161 *et seq.*

5. On this evolution see MAFFEI, *Evolving Trends in the Protection of Species*, in *German Yearbook of International Law*, 1993, p. 131 *et seq.*

6. It must be said moreover that the interpretation here proposed is only one of the many possible ways of interpreting the evolution in wildlife protection. On this subject see also DE KLEMM, *Des "Red Data Books" à la diversité biologique*, in KISS and BURHENNE-GUILMIN (eds.), *A Law for the Environment, Essays in Honour of Wolfgang E. Burhenne*, Gland/Cambridge, 1994, p. 173 *et seq.*; DE SADELEER, *De la protection à la sauvegarde de la biodiversité*, in *Ecologie Politique*, 1994, p. 25 *et seq.* Of course, since evolution in wildlife protection has been and still is a dynamic process, the phases that we have identified are not, in practice, so clear cut. While some outstanding examples of protection treaties easily fit into such categories, other treaties cannot be classed in any of them.

The main purpose of the first treaties (18th-19th century) on wildlife was to regulate the exploitation of certain species through the establishment of bare intergovernmental cooperation for the prevention and punishment of offences concerning forestry, hunting and fishing[7]. Later on States concluded some treaties on wildlife protection. The approach which marked these treaties was strictly utilitarian. They pursued the protection of the species useful to man, ignored the inoffensive species, and encouraged the reduction of the specimens belonging to harmful species[8]. Species were considered "good" if they were helpful to human needs. They were considered "bad" if they represented an obstacle to the achievement of human goals. On these grounds States decided which species deserved to be protected or to be limited in their spreading. Obviously this attitude was likely to alter the ecological balance.

During a successive phase the efforts of States on wildlife protection concentrated on the establishment of protected areas. Wild animals and flora, whether useful, harmless or noxious, were confined to these zones where capturing, killing or collecting were prohibited or strictly regulated. Isolation of noxious species in protected areas is a less destructive method for limiting or avoiding the damage caused by them[9]. Of course protected areas are established also with the broader aim of ensuring the survival of wild species which are threatened by various causes.

A more comprehensive approach marks the third stage of the evolution of wildlife protection. After World War II concern for wildlife preservation was reflected in two kinds of treaties. Some treaties were concluded to protect certain natural areas either *per se*

7. A list of these treaties is published in RÜSTER and SIMMA (eds.), *International Protection of the Environment*, vol. IV, Dobbs Ferry, 1975, p. 1542.

8. An outstanding example of this kind of treaty is the Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa, Which Are Useful to Man or Inoffensive (London, 19 May 1900). The French text of the Convention is reproduced in RÜSTER and SIMMA (eds.), *International Protection* cit., p. 1607. The same utilitarian approach marks the Convention for the Protection of Birds Useful to Agriculture (Bruxelles, 19 March 1902). The French and German texts of the Convention are reproduced in *Beiträge* cit., 902:22.

9. One of the most evident examples of this kind of "separative" approach is that of the Convention Relative to the Preservation of Fauna and Flora in their Natural State (London, 8 November 1933). The text of the Convention is reproduced in *Beiträge* cit., 933:83.

(as they constituted endangered ecosystems), or because they represented the habitat of endangered species. Other treaties were concluded to protect directly wild species of flora and fauna but they tackled this matter in more comprehensive terms than previous treaties had done. Indeed they tried to deal with all the different causes that might constitute a threat for the survival of the species: loss of habitats, illegal trade, pollution, indiscriminate hunting and fishing, and so on. The anthropocentric approach of protection was progressively abandoned: man began to consider himself to be a "part" of the Earth's environment and not its master. Even the strictly utilitarian approach was progressively integrated with the idea that *all* species deserve protection[10]. Moreover States began to pay more attention to the connections existing among the different components of nature and to the necessity of a joint management of these components. Scientific studies clearly showed that protection measures which do not take into account all the factors that threaten a given species are doomed to fail.

The change of attitude in protecting wildlife was also influenced by the need to improve living conditions in developing countries. To this end natural resources, including flora and fauna, must be used and managed wisely. Exploitation of nature must be reconciled with its conservation[11].

All these new trends were pointed out during the United Nations Conference on Human Environment (UNCHE) held in Stockholm from June 5 to 16, 1972[12]. They are also reflected,

10. The change of attitude is manifest in the Convention on the Protection of Birds (Paris, 18 October 1950, hereinafter referred to as the 1950 Convention) which amended the 1902 Convention for the Protection of Birds Useful to Agriculture. The French authentic version of the 1950 Convention, together with English and German translations, is reproduced in *Beiträge* cit., 950:77.

11. This new approach is manifest in the African Convention on the Conservation of Nature and Natural Resources (Algiers, 15 September 1968, hereinafter referred to as the African Convention); the text is reproduced in *Beiträge* cit., 968:68.

12. On the UNCHE *see* SOHN, *The Stockholm Declaration on the Human Environment*, in *Harvard International Law Journal*, 1973, p. 423 *et seq.*; KISS and SICAULT, *La Conférence des Nations Unies sur l'Environnement*, in *Annuaire Français de Droit International*, 1972, p. 603 *et seq.* The protection of wildlife is specifically considered in Principles 2 and 4 of the UNCHE Declaration, while many Recommendations of the UNCHE Action Plan regard more or less directly wildlife. Although both the UNCHE Declaration and the Action Plan lack legally

though to different extents, in the treaties concluded by States since the Seventies. In particular these trends characterize three of the four global treaties preceding the Biodiversity Convention, namely the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar, 2 February 1971, hereinafter referred to as the Ramsar Convention)[13]; the Convention for the Protection of the World Cultural and Natural Heritage (Paris, 23 November 1972, hereinafter referred to as the UNESCO Convention)[14]; the Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979, hereinafter referred to as the Bonn Convention)[15]. Instead a strictly sectoral approach characterizes the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 3 March 1973, hereinafter referred to as the CITES)[16]. In fact the CITES regulates only one of the numerous human activities which may threaten wildlife.

Besides these treaties, other conventions were concluded by States in the same period on a regional basis. We can mention for instance the Convention on the Conservation of European Wildlife and Natural Habitats (Berne, 19 September 1979, hereinafter referred to as the Berne Convention)[17] and the Convention for the Conservation of the Antarctic Marine Living Resources (Canberra, 20 May 1980, hereinafter referred to as the CCAMLR)[18].

The most recent phase in the evolution of the treaties on wildlife protection is characterized by the emerging of the principle of the sustainable use of natural resources, including flora and fauna, and by the emphasis given to the link between protection and development. These two goals must not be pursued separately, but they must be considered indissolubly interconnected. These trends are embodied in some acts of soft law,

binding force, they have constituted an important starting point for the conclusion of new treaties.

13. The text is reproduced in *Beiträge* cit., 971:09.
14. The text is reproduced in *Beiträge* cit., 972:86.
15. The text is reproduced in *Beiträge* cit., 979:55.
16. The text is reproduced in *Beiträge* cit., 973:18.
17. The text is reproduced in *Beiträge* cit., 979:70.
18. The text is reproduced in *Beiträge* cit., 980:39. On environmental protection in Antarctica *see* PINESCHI, *La protezione dell'ambiente in Antartide*, Padova, 1993.

namely the World Conservation Strategy (hereinafter WCS)[19], the Report of the World Commission on Environment and Development "Our Common Future" (hereinafter Brundtland Report)[20], and Caring for the Earth (hereinafter CFE)[21]. These instruments, though legally not binding, have influenced the content of the treaties on wildlife protection of this period. For instance the principles of the WCS are embodied in the Agreement on the Conservation of Nature and Natural Resources (Kuala Lumpur, 9 July 1985, hereinafter referred to as the ASEAN Agreement)[22]. This Agreement has in part the same objectives of the Biodiversity Convention.

2. The above outline description of the evolution of wildlife protection at the international level should provide at least a rough idea of the legal scenario behind the 1992 Biodiversity Convention. The latter is not simply another convention protecting wildlife. It has a broader aim, providing for the conservation of biological diversity through a comprehensive approach. This paper does not intend to deal with the whole content of the Biodiversity Convention. It will discuss only those parts of the Convention that concern its relationship with other treaties[23].

19. See *World Conservation Strategy – Living Resource Conservation for Sustainable Development*, Gland, 1980. The WCS is a non-binding instrument launched in 1980 by the International Union for Conservation of Nature and Natural Resources (IUCN), the United Nations Environment Programme (UNEP), and the World Wildlife Fund (WWF). The WCS tackles both the scientific and the economic aspects of conservation, and it tries to solve the related problems.

20. The Report has been adopted by the General Assembly of the United Nations (doc. A/42/427 of 4 August 1987). It is commonly known as the Brundtland Report.

21. CFE was launched by IUCN, UNEP, and WWF in 1991; see IUCN – UNEP – WWF, *Caring for the Earth – A Strategy for Sustainable Living*, Gland, 1991. On CFE see ROBINSON, *Caring For The Earth – A Legal Blueprint for Sustainable Development*, in *22 Environmental Policy and Law*, 1992, p. 22 *et seq.* CFE constitutes an extension and an advancement of the WCS but it has no legal binding force.

22. The Agreement was worked out within the framework of the Association of South East Asian Nations (ASEAN). The text of the Agreement is reproduced in Beiträge cit., 985:51. The agreement is not yet in force.

23. For further details on the negotiating history of the Biodiversity Convention see RACKLEFF, *Preservation of Biological Diversity: Toward a Global Convention*, in *Colorado Journal of International Environmental Law and Policy*, 1992, p. 405 *et seq.* (esp. focused on the Draft Convention worked out by the IUCN); BURHENNE-GUILMIN and CASEY-LEFKOWITZ, *The Convention*

First of all, it would be rather superficial and even incorrect to solve every problem concerning the relationship of the Biodiversity Convention with the other treaties by simply applying Art. 22 of the Biodiversity Convention (*Relationship with Other International Conventions*). As a matter of fact the problem of the relationship between the Biodiversity Convention and other existing treaties arose at the very beginning of the negotiations of the Biodiversity Convention[24]. The existence of other treaties whose provisions could overlap with those of the Biodiversity Convention even raised doubts about the need to conclude a new convention on biological diversity[25]. Instead of concluding a new treaty, the possibility of using the existing instruments of international law to ensure the preservation of

on Biological Diversity: A Hard Won Global Achievement, in Yearbook of International Environmental Law, 1992, p. 43 *et seq.* HERMITTE, *La Convention sur la diversité, biologique,* in *Annuaire Français de Droit International*, 1992, p. 844 et seq. On the Convention see also BURHENNE, *Biodiversity – The Legal Aspects,* in *22 Environmental Policy and Law*, 1992, p. 324 *et seq.*; SHINE and KOHONA, *The Convention on Biological Diversity: Bridging the Gap between Conservation and Development,* in *Review of European Community and International Environmental Law*, 1992, p. 278 *et seq.*; BOYLE, *The Convention on Biological Diversity*, in CAMPIGLIO, PINESCHI, SINISCALCO and TREVES (eds.), *The Environment after Rio. International Law and Economics*, 1994, London/Dordrecht/Boston, p. 111 - *et seq.*; KISS, *Le droit international à Rio de Janeiro et à coté de Rio de Janeiro*, in *Revue Juridique de l'Environnement*, 1993, p. 45 *et seq.*, p. 68 *et seq.*; MARCHISIO, *Gli atti di Rio nel diritto internazionale*, in *Rivista di Diritto Internazionale*, 1992, p. 581 *et seq.*; DE KLEMM, *The Implementation of the Convention on Biological Diversity in National Law, Proceedings of the Conference: "Derecho y política ambiental en América Latina y el Caribe"*, held on 26-28 May 1993 in Santiago; GLOWKA, BURHENNE-GUILMIN and SYNGE, *A Guide to the Convention on Biological Diversity*, IUCN Environmental Law Centre – IUCN Biodiversity Programme, Environmental Policy and Law Paper No. 30, Gland/Cambridge, 1994.

24. *The Relationship between Planned Framework Legal Instrument and Existing Conventions, Agreements, and Action Plans on Biological Diversity* has been the object of a specific study by UNEP's experts; see doc. UNEP/Bio.Div. 3/9. Another study regards the *Relevant Existing Legal Instruments, Programmes and Action Plans on Biological Diversity*; see doc. UNEP/Bio.Div. 3/Inf. 6.

25. On this topic see BILDERBEEK (ed.), *Biodiversity and International Law*, Amsterdam/Oxford/Washington/Tokyo, 1992. On general problems concerning biodiversity conservation see *Conservation of Biological Diversity – Background and Issues, Report of the Secretary-General of the U.N. Conference on Environment and Development*, doc. A/CONF.151/PC/66 of 9 July 1991.

biodiversity was examined. Indeed it is clear that at least the *in situ* conservation of biological resources tends to coincide with the protection of wildlife provided for in previous treaties.

At the beginning of the negotiations, the relationship between the planned Biodiversity Convention and the previous treaties was put in terms of the "rationalization" of the "activities under existing conventions, global and regional international agreements and programmes relating to the conservation and sustainable use of biological diversity"[26]. It was noted "that each convention had its particular purpose and that the Parties to each convention differed"[27]. Therefore it was concluded "*that amendments to existing conventions for purposes of achieving "rationalization" or consolidation of resources would be difficult and time-consuming*"[28]. It was however important to

"(a) Explore ways and means of broadening participation by Governments in existing conventions concerning conservation of biological diversity; (b) Maximize the individual and collective potential of existing international instruments and their effectiveness"[29].

It was also suggested that "the possibility of convening *regular meetings of the secretariats* of international conventions and agreements as a means of achieving better co-ordination and rationalization of resources"[30] should be explored. It was clearly stated that "the existing conservation conventions and the other relevant international programmes, which are necessarily sectoral, *could not adequately meet* the aim of conserving biological diversity at the global level (...) Consequently there was a *need for one or more legally binding mechanisms dealing with the conservation of biological diversity at the international level*"[31].

The purpose of the negotiations was not the elaboration of an umbrella convention absorbing the existing conservation conventions. On the contrary, the "*new convention should build upon the existing conventions, mechanisms and action plans, using their measures and potential to the greatest possible*

26. *Report of* the Ad Hoc *Working Group on the Work of its First Session*, doc. UNEP/Bio.Div. 1/3 of 9 November 1989, p. 3.
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. *Ibid.*; on this point see also *infra*.
31. *Ibid.*, p. 4.

extent"[32]. It was stated that: "the framework instrument should not explicily exclude aspects already covered by existing conventions. Duplication should be avoided by providing, *inter alia*, a co-ordination mechanism"[33].

It is clear that duplication may constitute a drawback when it causes a useless duplication of expenses. For instance, if a Party to the Ramsar Convention, the UNESCO Convention and the Biodiversity Convention organizes the protection of the same wetland in compliance with each convention separately without co-ordinating the protective measures, the result will almost certainly be a waste of money, without a corresponding improvement in the protection. Moreover, the waste is even more harmful when it turns into a reduction of funds assigned to other protection projects. In other words, while a duplication normally does not constitute a serious problem from a legal point of view, it often has negative consequences in economical terms.

The result of the above mentioned discussions is represented by the penultimate sentence of the Preamble of the Biodiversity Convention. According to this sentence the Biodiversity Convention has been concluded *inter alia* in order "to enhance and complement existing international arrangements for the conservation of biological diversity and sustainable use of its components".

3. It goes without saying that questions on the relationship with other treaties do not arise as regards issues which are now regulated by the Biodiversity Convention but which were not dealt with by previous treaties. In this case the Biodiversity Convention simply fills in a gap in international law, without bringing about any problem of contrast or co-ordination.

It may be useful to start with the purpose of the Biodiversity Convention in order to know which "area" is regulated by the Convention.

According to Art. 1 of the Biodiversity Convention the objectives of the Convention are:

32. *Ibid.*, p. 5. This has been reaffirmed in the *Report of The* Ad Hoc *Working Group on the Work of its Second Session in Preparation for a Legal Instrument on Biological Diversity on the Planet*, doc. UNEP/Bio.Div. 2/3 of 23 February 1990 (hereinafter *Second Session Report*), p. 4.

33. *Ibid.*, p. 4-5.

"the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding".

As regards the first objective - the conservation of biological diversity - it is necessary to explain what "biological diversity" means.

According to Art. 2 of the Biodiversity Convention "biological diversity"

"means the variability among living organisms from all sources including, *inter alia* terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems".

Likewise, scientists and accordingly, jurists commonly agree that biodiversity

"includes ecosystem diversity, species diversity, and genetic diversity"[34].

So, speaking in terms of the relationship between the Biodiversity Convention and other treaties, the first thing to do is to ascertain which other conventions deal with these three topics or, better, which other conventions protect these three diversities. Several conventions do exist on the protection of species and ecosystems; it is clear that these conventions also protect species and ecosystem diversities. Instead the problem of genetic diversity appears often to have been neglected by States, at least in terms of the conventions concluded so far. In this field, therefore, conflicts are unlikely to arise between these conventions and the Biodiversity Convention.

Concern about the preservation of genetic resources –as something partially different from the protection of species– actually dates back to the Seventies. Several Recommendations of

34. See the Glossary annexed to CFE. On the definition of biodiversity see SHINE and KOHONA, *The Convention* cit., p. 278; DE KLEMM, *Des "Red Data Books"* cit., p. 173; BURHENNE, *Biodiversity* cit., p. 324; RACKLEFF, *Preservation* cit., p. 405.

the UNCHE Action Plan[35] clearly pointed out some still existing problems in the field. These were the following: the necessity of co-operation among States, and between them and international organizations; the needs of developing countries in terms of technical and financial assistance; the importance of organizing a global network of genetic resources conservation centres, and of exchanging data and information. Later on also the WCS[36] and CFE[37] gave particular emphasis to the problem of the preservation of genetic resources. Also the Brundtland Report deals with this problem as a part of the more complex issue of preserving biological diversity[38].

None of the four above-mentioned global treaties – the Ramsar, the UNESCO, the Bonn Conventions and the CITES – deals specifically with the protection of genetic resources. Genetic diversity is esplicitly dealt with by the ASEAN Agreement (Art. 3), but these provisions do not differ substantially from the "traditional" provisions on species protection[39]. It must be said that the Biodiversity Convention does not contain provisions esclusively devoted to the preservation of genetic diversity either. In fact the majority of the provisions of the Biodiversity Convention dealing with preservation refer comprehensively to "biological diversity" *tout court*.

As regards the second objective of the Biodiversity Convention – that is the sustainable use of the components of biological diversity – it must be said that the problems concerning the relationship between the Biodiversity Convention and other

35. See Recommendations 39, 40, 41, 42, 43, 44, and 45 of the UNCHE Action Plan.

36. The objectives of the WCS are basically three: a) to maintain essential ecological processes and life support systems; b) to preserve genetic diversity; c) to ensure the sustainable utilization of species and ecosystems. This means that the three aspects of biological diversity are already envisaged in the WCS. Section 3 of the WCS is specifically devoted to the preservation of genetic diversity. See also Sections 6 and 17.

37. The conservation of biological diversity is one of the priority actions provided for by CFE: see Actions 4.9; 4.10; 4.11; and 4.12.

38. The Brundtland Report encourages the conclusion of a "Species Convention" that also deals with biodiversity. The characteristics that this Convention should have are illustrated in Chapter 6.58 et seq. of the Brundtland Report.

39. Only Art. 3.3.d of the Agreement provides – in soft terms – that the Parties shall endeavour to "promote and establish gene banks and other documented collections of animal and plant genetic resources".

treaties in this field may be dealt with together with those concerning conservation. In fact, according to the most recent "wildlife law", conservation of the resources includes their sustainable use[40].

Things are quite different with regard to the third objective of the Biodiversity Convention - that is, the sharing of benefits deriving from the use of genetic resources. The provisions of the treaties preceding the Biodiversity Convention are rare, if any, on this issue.

The use of genetic resources, which necessarily precedes the sharing of benefits, is not problem free. First of all genetic resources must be used in a sustainable way in order to supply the biotechnology industries without threatening genetic diversity. Second, the utilization of genetic resources and the transfer of biotechnologies gives rise to problems of "biosafety". We refer in particular to the accidental or deliberate introduction of modified organisms into the environment. This introduction may seriously and adversely affect the ecological balance of natural ecosystems[41]. The subject is regulated by the Biodiversity Convention only marginally (Art. 8.g), and it is entrusted to a further specific protocol (Art. 19.3). As far as "biosafety" is concerned, the relationship of the Biodiversity Convention with other treaties may be brought to bear. Questions concerning the adverse environmental effects of modified organisms may be considered already regulated, though partially and perhaps inadequately, by some previous treaties on wildlife protection. We

40. Some treaties clearly state that conservation includes sustainable use; see e.g. Art. II.2 of the CCAMLR. See also the definition of conservation in the Glossary annexed to CFE. During the negotiations of the Biodiversity Convention, some delegations expressed the opinion that conservation includes "rational and sustainable utilization"; see *e.g.* the remarks of Chile and India in the *Report of The* Ad Hoc *Working Group of Legal and Technical Experts on Biological Diversity on the Work of its First Session (Addendum)*, doc. UNEP/Bio.Div./WG.2/1/4/Add.1 of 5 February 1991 (hereinafter *First Session Legal Technical Report Addendum*), p. 5 and 36. Despite the distinction between conservation and sustainable use, many articles of the Biodiversity Convention deal with these two issues simultaneously.

41. On the environmental risks linked with the use of biotechnologies see McGARITY, *International Regulation of Deliberate Release Biotechnologies*, in FRANCIONI and SCOVAZZI (eds.), *International Responsibility for Environmental Harm*, London/Dordrecht/Boston, 1991, p. 319 *et seq.*; STEWART and MARTINEZ, *International Aspects of Biotechnology: Implications for Environmental Law and Policy*, in *Journal of Environmental Law*, 1989, p. 157 *et seq.*

refer in particular to those provisions which prohibit or regulate the introduction of new species into the wild[42]. Even when the introduction of new (or genetically modified) species into the environment is not mentioned, it may be included in the concept of pollution[43]. As such it is regulated by the conventions concerning wildlife, should the release turn out to be harmful to the habitats of the protected species. In all these cases, at least until a protocol to the Biodiversity Convention is concluded on biosafety, the provisions of other treaties dealing with this subject may, though fragmentarily, supplement the gaps of the Biodiversity Convention in this field.

Other provisions of the Biodiversity Convention are almost unprecedented as regards their international regulation. We refer to two of the core issues of the Convention: access to, and transfer of, technologies, and access to genetic resources.

The problem of access to and transfer of technologies has always been a thorny question in negotiations among States. This is one of the fields in which the contrast between developed and developing countries often becomes dramatic. This happened, for instance, during the negotiations of the 1982 UN Convention on the Law of the Sea (hereinafter referred to as the UNCLOS)

42. For instance, according to Art. 7 of the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region (Nairobi, 21 June 1985, hereinafter referred to as the Nairobi Protocol, in *Beiträge* cit., 985:47), the Parties shall "prohibit the intentional or accidental introduction of alien or new species which may cause significant or harmful changes to the Eastern African Region". Genetically modified organisms could also be included among the substances harmful to migratory species which, according to Art. V.5.i of the Bonn Convention, should not be released into the habitats of such species. Also Art. 196 of the 1982 Law of the Sea Convention deals with the need for measures "necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful change thereto". The problem of the introduction of alien species into the marine environment is particularly important as these species are often introduced for aquaculture purposes.

43. According to the definition contained in the annex to Recommendation C(74)224 (*Principles Concerning Transfrontier Pollution)* adopted in 1974 by the Council of the Organisation for Economic Co-operation and Development, "pollution means the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, and impair or interfere with amenities and other legitimate uses of the environment".

which led to the adoption of Arts. 266-269 (*Development and Transfer of Marine Technology*)[44]. Due to the limited scope of these UNCLOS provisions and to the peculiarity of the relevant provisions of the Biodiversity Convention, it seems that the provisions of both Conventions on this subject can "cohabit" without serious contrasts. As regards more specifically the treaties on wildlife protection, they are usually silent. Consequently the problem of the relationship of the Biodiversity Convention with other treaties does not exist in this case.

Also the question of access to genetic resources has no significant precedent in States' practice. Consequently there is no question of any relationship between the Biodiversity Convention and other treaties protecting wildlife as far as this issue is concerned. The only international instrument dealing with access to genetic resources is the 1983 FAO International Undertaking on Plant Genetic Resources. This Undertaking, which is not legally binding, was adopted in 1983 by the FAO at its 22nd Conference by Resolution 8/83[45]. During the negotiations of the Biodiversity Convention it was suggested that the Undertaking should be adopted as a protocol to the Convention[46], but this transformation is likely to give rise to some difficulties[47].

4. As stated above, problems of relationship with the Biodiversity Convention are likely to arise with regard to the treaties which protect species and ecosystems, at both the global and the regional levels.

The issue of the relationship between the Biodiversity Convention and the other conventions protecting wildlife may be

44. See the negotiating history of these provisions in NORDQUIST, ROSENNE and YANKOV (eds.), *United Nations Convention on the Law of the Sea 1982, A Commentary*, Vol. IV, Dordrecht/Boston/London, 1990, p. 665 *et seq.*

45. The text is reproduced in: HOHMANN (ed.), *Basic Documents of International Environmental Law*, vol. I, p. 114 *et seq.*

46. See the *Second Session Report* cit., para. 14, and the *Report of the Intergovernmental Negotiating Committee for a Convention on Biological Diversity on the Work of its Third Session*, doc. UNEP/Bio.Div./INC.3/11 of 4 July 1991, para. 48; see also the *Report of The* Ad Hoc *Working Group of Legal and Technical Experts on Biological Diversity on the Work of its First Session*, doc. UNEP/Bio.Div./WG.2/1/4 of 28 November 1990, para. 87.

47. It is worth noting for instance that according to Art. 1 of the Undertaking it is a universally accepted principle "that plant genetic resources are a heritage of mankind and consequently should be available without restriction". This is clearly in contrast with several provisions of the Biodiversity Convention.

tackled from different perspectives. The relationship in itself may occur both in terms of conflict among different provisions and in terms of their complementary nature.

Art. 22 of the Biodiversity Convention appears especially to regulate the case of conflict between the provisions of the Convention itself and of other treaties. According to Art. 22.1:

"The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity".

It is of course almost impossible to describe all the cases in which the rights and obligations of previous treaties could be in principle affected by the provisions of the Biodiversity Convention. Even if the analysis of these cases were limited only to those treaties which protect species and ecosystems, the task is still gargantuan and beyond the scope of this article. In any case, Art. 22.1 cuts the Gordian knot by stating the supremacy of the previous treaties over the Biodiversity Convention, at least in principle.

A provision similar to the first part of Art. 22.1 is very often contained in treaties, including those on wildlife protection. But the last sentence of Art. 22.1 is less common, and it is probably because of this sentence that Art. 22 met with a certain amount of opposition from some delegations[48]. This sentence did not appear in the drafts of the Convention preceding the final version[49]. Only

48. Some States expressed their dissatisfaction as regards Art. 22. See e.g. the statement made by Venezuela during the Seventh Plenary Meeting of the Intergovernmental Negotiating Committee for a Convention on Biological Diversity, in *Report of the Intergovernmental Negotiating Committee for a Convention on Biological Diversity on the Work of its Seventh Negotiating Session/Fifth Session of INC*, doc. UNEP/Bio.Div./N7-INC.5/4 of 27 May 1992 (hereinafter *Seventh Session INC Report*), Annex, p. 36. See also the declaration made by Chile at the time of the adoption of the agreed text of the Biodiversity Convention according to which Chile "would have preferred that the Article did not appear in this Convention". See also the disappointment expressed by the United States in a declaration made on the same occasion. See also *infra* (note 61) the declaration of Colombia.

49. See Art. 21 of the *Revised Draft Convention on Biological Diversity*, doc. UNEP/Bio.Div./WG.2/3/3 of 30 April 1991 (hereinafter the *Rev. Draft*); Art. 21 of the *Second Revised Draft Convention on Biological Diversity*, doc. UNEP/Bio.Div./INC.4/2 of 23 July 1991 (hereinafter the *Second Rev. Draft*); Art. 20 of the *Third Revised Draft Convention on Biological Diversity*,

in the Fifth Draft Convention was a version substantially similar to the final text of Art. 22.1 proposed[50].

The last sentence of Art. 22.1 seems to be extremely important and of great interest. It is clear that Art. 22.1 does not refer only to "existing international agreements" protecting wildlife[51]. Indeed it does not make any distinction as regards the scope of the agreements themselves. At first sight it may sound strange that the application of conventions such as the Ramsar Convention, the UNESCO Convention, the CITES, the Bonn Convention may "cause a serious damage or threat to biological diversity". This is not impossible, however. A couple of academic examples may illustrate this. A Party to the Ramsar Convention could decide to delete or restrict the boundaries of a wetland included in the List of Wetlands of International Importance "in its urgent national interest", as provided for by Art. 4 of the Ramsar Convention. If that Party to the Ramsar Convention is also a Party to the Biodiversity Convention, the deletion or the restriction of the wetland could be prohibited by Art. 22.1 of the Biodiversity Convention, should such a deletion or restriction "cause a serious damage or threat to biological diversity". As said above, this example is more academic than real. In fact "the urgent national interest" can easily be included in all the formulas that match and

UNEP/Bio.Div./N5-INC.3/2 of 9 October 1991 (hereinafter the *Third Rev. Draft*); Art. 20 of the *Fourth Revised Draft Convention on Biological Diversity*, doc. UNEP/Bio.Div./N6-INC.4/2 of 16 December 1991 (hereinafter the *Fourth Rev. Draft*).

50. See Art. 23.1 of the *Fifth Revised Draft Convention on Biological Diversity*, doc. UNEP/Bio.Div./N7-INC.5/2 of 20 February 1992 (hereinafter the *Fifth Rev. Draft*): "1. The provisions of the present convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement compatible with the conservation and sustainable use of biological diversity". This means *a contrario* that when such rights and obligations are not "compatible" with conservation and sustainable use, they can be affected by the provisions of the Biodiversity Convention.

51. On this point, during the Seventh Plenary Meeting of the Intergovernmental Negotiating Committee for a Convention on Biological Diversity, Mauritius made a statement according to which "the reference to existing international conventions means reference to all existing international conventions that are compatible with the conservation and sustainable use of biological diversity". At the time of adoption of the agreed text of the Biodiversity Convention, India made an analogous declaration. Also Mexico made a statement according to which "existing international agreements" are "those related to conservation and sustainable use of biological diversity"; see *Seventh Session INC Report* cit., Annex, p. 30.

weaken most obligations provided for in the Biodiversity Convention. We refer to expressions such as "as far as possible and as appropriate", "in accordance with each Party's particular conditions and capabilities", and so on.

Art. 22.1 of the Biodiversity Convention may also be useful to limit the adverse effects of reservations, even when they are legally allowed. For instance, a State Party to the CITES has the right to enter a reservation according to which it will not be bound by the CITES provisions as regards a certain species (Art. XXIII of the CITES). If that State is also a Party to the Biodiversity Convention, and the effect of the reservation consists in a serious damage or threat to biodiversity, the reservation becomes inadmissible according to Art. 22.1 of the Biodiversity Convention.

Similarly the Biodiversity Convention could prevail over a previous treaty when the latter provides for a sort of "objecting procedure" as regards some of its provisions. This is the case, for instance, of the 1946 International Convention for the Regulation of Whaling (hereinafter referred to as the ICRW)[52]. The Parties to the ICRW may object to the decisions of the International Whaling Commission which constitute the Schedule to the Convention. If they do so, they are not bound by the objected provisions which form an integral part of the ICRW. However, a Party to both the ICRW and the Biodiversity Convention should be aware that it will not always be allowed to invoke the provisions of the first convention in order to shirk the application of the latter. This will be possible only when the application of the ICRW - including the provisions which allow objections - does not entail any serious damage to biodiversity.

The possibility that the exercise of rights and obligations deriving from previous agreements causes damage to biodiversity is even more frequent when these agreements do not intend to protect wildlife. This would be the case, for instance, of a bilateral treaty by which the Parties agree to divert the waters of a river or to build a dam on it. It is clear that in some circumstances the enforcement of these kinds of treaties can cause serious damage or a threat to biological diversity. Consequently, also in these cases, the Biodiversity Convention should prevail over the previous treaties.

52. The text of the ICRW is reproduced in *Beiträge* cit., 946:89.

Of course this supremacy may entail problems in terms of responsibility, especially when not all the Parties to the previous treaty are also Parties to the Biodiversity Convention[53]. In fact the Parties to both conventions might be in the condition to violate at least one of them. If they comply with the older treaty, they violate the Biodiversity Convention, as they cause damage to biological diversity; if they comply with the Biodiversity Convention, they violate the previous treaty and they will be responsible towards the Parties to that treaty which are not Parties to the Biodiversity Convention.

A proposal put forward at the beginning of the negotiations of the Biodiversity Convention might have been useful in order to solve, at least partially, the problems of responsibility. According to this proposal the existing instruments relating to the conservation of biological diversity "may be re-negotiated as protocols to the planned legal instrument"[54]. This proposal became a paragraph of the Article dealing with the relationship of the planned Convention on biodiversity in the successive drafts of the Convention[55]. The provision disappeared in the final text of the Biodiversity Convention. This however does not mean that the Parties are prevented from re-negotiating the existing treaties as protocols to the Convention[56].

A last remark regards the criteria for the assessment of the "seriousness" of the damage to biological diversity according to Art. 22.1. The seriousness should be assessed in the light of the principles embodied in the Biodiversity Convention, including the precautionary principle which is contained in the Preamble[57]. This

53. The Vienna Convention on the Law of Treaties in dealing with the application of successive treaties relating to the same subject-matter (Art. 30) deliberately leaves the problem of responsibility untouched.

54. See *Elements for Possible Inclusion in a Global Framework Legal Instrument on Biological Diversity*, doc. UNEP/Bio.Div./WG. 2/1/3 of 24 September 1990 (hereinafter *Elements*), Chapter X.

55. See Art. 21.2 of the *Rev. Draft*: "Any existing treaty, convention or international agreement relating to the conservation and sustainable use of biological diversity may be renegotiated as protocols to the present Convention". See also Art. 21.2 of the *Second Rev. Draft*; Art. 20.2 of the *Third Rev. Draft*; Art. 20.2 of the *Fourth Rev. Draft*.

56. A similar problem was discussed during the negotiations of the Bonn Convention; on the point see MAFFEI, *La protezione* cit., p. 21.

57. On the precautionary principle see SCOVAZZI, *Sul principio precauzionale nel diritto internazionale dell'ambiente*, in *Rivista di Diritto Internazionale*, 1992, p. 699 *et seq.* (and the bibliography quoted in note 1).

means that what is considered as non-serious damage according to a previous treaty may be considered serious according to the Biodiversity Convention[58]. It is interesting to note that Japan expressed the opinion that also the "threat" to biological diversity mentioned in Art. 22.1 should be "serious", "not just a threat"[59].

Art. 22.2 of the Biodiversity Convention provides that:

"Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea".

Quite surprisingly - considering the title of the Article - Art. 22.2 does not refer to any convention but, more generally, to the "law of the sea". It could be inferred from this that Art. 22.2 refers to *customary* law of the sea and not to treaties on this matter, such as the four 1958 Geneva Conventions and the UNCLOS. The "law of the sea" to which Art. 22.2 refers enjoys in any case a privileged position in comparison to the international agreements considered in paragraph 1 of the same Article. The different possible interpretations of these provisions entails different consequences.

If Art. 22.2 only covers *customary* law of the sea, this means that only this law prevails over the Biodiversity Convention. In other words, the Biodiversity Convention must be implemented consistently with the *customary* law of the sea. Accordingly the law of the sea which is not *customary* but *conventional* remains covered by Art. 22.1. This first interpretation of Art. 22.2 clearly grants a privileged position to the application of the Biodiversity Convention. It also ensures that the existing treaties which do not codify the law of the sea but nevertheless do contain rules on the subject - such as the numerous treaties on sea pollution - cannot *always* prevail over the Biodiversity Convention. They prevail only as far as their application does not "cause a serious damage or threat to biological diversity".

Another interpretation of Art. 22.2 is however possible. It could be maintained that Art. 22.2 refers also to the *conventional*

58. This seems also in accordance with the interpretative criterium embodied in Art. 31.3.c of the 1969 Vienna Convention on the Law of Treaties. This criterium allows an evolutionary interpretation; see GIULIANO, SCOVAZZI and TREVES, *Diritto Internazionale*, Milano, 1991, p. 347 *et seq.*

59. See *Seventh Session INC Report* cit., Annex, p. 29. See also the statement of the United States (ibid., p. 36), according to which in the context of Art. 22.1 "threat" means "a threat of serious damage to biological diversity".

law of the sea[60] even though it does not mention it specifically. Should this interpretation be correct it would be difficult to identify which conventional law of the sea must prevail over the Biodiversity Convention. Does it include every rule concerning the sea embodied in any treaty? Or does it mean only the rules embodied in the codification conventions on the law of the sea, even when they do not correspond to customary law but simply constitute the progressive development of international law? It is evident that this second interpretation of Art. 22.2 is hardly supported by its letter[61].

5. The most interesting and fruitful aspect of the relationship between the Biodiversity Convention and other treaties is certainly the possibility of applying the provisions of these instruments in a complementary manner. As said above, the Biodiversity Convention is characterized by its comprehensiveness, as it regulates the conservation of biological diversity and not only a part of such diversity.

Treaties preceding the Biodiversity Convention were undoubtedly sectoral as regards their application - i.e. regional and not global - or as regards their scope. The sectoral approach has both advantages and disadvantages. The main advantage is that of being focused on a single target. This makes it possible to provide for more effective and less dispersive concrete measures of protection; the costs of implementation are usually lower; the public is more easily acquainted with the protection projects and may participate in them, and so on. The disadvantages are represented first of all by the risk of fragmentariness and lack of co-ordination among the measures required by different sectoral treaties. This lack may hamper the synergy of the single protective

60. GLOWKA, BURHENNE-GUILMIN and SYNGE (*A Guide* cit., p. 109) prefer this second interpretation: "...In contrast to paragraph 1, under paragraph 2, the existing conventional and customary law of the sea is privileged... the law of the sea prevails in instances where the Convention's implementation conflicts with it".

61. A declaration made by Colombia at the time of the adoption of the agreed text of the Biodiversity Convention is particularly interesting on this point. According to this declaration "Colombia questions the inclusion in the Convention of an article laying down the relationship with other international treaties, since this matter falls under the Vienna Convention on the Law of Treaties and also because the Article refers to another legal instrument that has still not entered into force". The last part of this declaration is not very clear. Colombia is probably referring to the UNCLOS, although the UNCLOS is not mentioned in Art. 22.2.

measures and cause an anti-economic protection, besides the already mentioned possibility of a duplication of expenses. Besides all these drawbacks, which are common to almost every field of international environmental protection, it must be added that some phenomena, such as the climate change and the loss of biodiversity, are global risks. Precisely for this reason these phenomena require global regulation.

The wise and simultaneous implementation of the sectoral treaties and the Biodiversity Convention could obviate many disadvantages without missing the advantages[62].

As said above, the Ramsar Convention, the UNESCO Convention, the CITES, and the Bonn Convention have a global application. Although they are devoted to specific and limited problems - that is the protection of specific ecosystems or sites, the regulation of a specific human activity, the protection of a group of faunal species - their provisions are not so "sectoral" as they might appear. This means, for instance, that the provisions of the Biodiversity Convention concerning ecosystem protection could affect the provisions of the Bonn Convention, even though the latter is not devoted in principle to the ecosystem protection. As a matter of fact this is not very important from a "scientific" point of view, but it makes the problem of the relationship among the various treaties even more complex. In fact, in order to have a complete framework of the possible relationships, the provisions of each convention should be accurately considered article by article.

Moreover, it must be said that the conventions do not usually contain a detailed regulation but they use generical formulas. These formulas need to be specified at a domestic level through the adoption of national laws and regulations. Thus it may happen that the relationship among the conventions is more manifest at the moment of the national implementation than at the moment of the simple drafting of the international instruments.

62. In this sense see *e.g.* the *Monaco Declaration on the Role of the Bern Convention in the Implementation of Worldwide International Instruments for the Protection of Biodiversity*, adopted by the Participants in the *Intergovernmental Symposium on the United Nations Conference on Environment and Develpment (UNCED), the Convention on Biological Diversity and the Bern Convention: the next steps* (Monaco, 26-28 September 1994). See also the Report of the Standing Committee of the Berne Convention on the *Symposium*, doc. T-PVS (94) 14 of 24 November 1994.

We have singled out some areas for a brief analysis of the possible relationships between the Biodiversity Convention and the previous treaties.

A) Approach.

A first and general remark on the Biodiversity Convention concerns its approach as regards the protection/conservation issues. This approach is certainly utilitarian[63] and anthropocentric[64]. This is confirmed also by the priority given to development needs over conservation necessities[65]. Can this approach prevail over the less anthropocentric approach of previous treaties, such as for instance the Berne Convention?[66] According to Art. 22.1 of the Biodiversity Convention, from a legal point of view the answer should be "No", but in practice things are different. As a matter of fact, as the approach of a convention is something vague and abstract, the question may seem of minor interest. Some consequences are however important. For instance, according to Art. 6 of the Biodiversity Convention each Party shall comply with the provisions of the Convention "in accordance with its particular conditions and capabilities". This is a clear example that in the Biodiversity Convention conservation is not "at all costs" but is proportional (and subordinated) to other "human" necessities such as development, basic needs and so on. Thus a developing country

63. See e.g. the Preamble according to which "conservation and sustainable use of biological diversity is of critical importance for meeting the food, health and other needs of the growing world population (...)".

64. In this case the anthropocentric approach is however essentially different from the strictly utilitarian considerations which characterized the first treaties on the protection of species. The anthropocentric approach of the Biodiversity Convention is partially balanced by the first sentence of its Preamble, where the Parties recognize "the intrinsic value of biological diversity".

65. See the Preamble of the Biodiversity Convention according to which "economic and social development and poverty eradication are the first and overriding priorities of developing countries". This same sentence is repeated in Art. 20.4. On this point see MENSAH, *The Role of the Developing Countries*, in CAMPIGLIO, PINESCHI, SINISCALCO and TREVES (eds.), *The Environment* cit., p. 43 *et seq.* with particular reference to Principle 5 of the Rio Declaration.

66. The Preamble of the Berne Convention recognizes the intrinsic value of wild flora and fauna. The Berne Convention is one of the least anthropocentric conventions on wildlife preservation, at least in spirit.

Party to the Biodiversity Convention could invoke its "incapability" of conserving its biological diversity due to lack of financial or technical resources as a justification for not implementing the Biodiversity Convention. Again this country could carry out activities which damage biodiversity when the prevention of the adverse effects of such activities is beyond its capabilities. All this would be in compliance with the Biodiversity Convention[67]. However it may happen that the obligation that the country cannot comply with binds the same country under another treaty. In this case the country cannot invoke its "incapability" if the treaty does not allow it to do so. Nor could the Biodiversity Convention prevail over the previous treaty because, as stated in Art. 22.1, the Convention does not affect the obligations deriving from any existing international treaty. In practice, it happens very often that a Party to a protection treaty does not manage to comply with all the provisions of this treaty. Sometimes this is due to economic or social reasons. Suffice it to mention the difficulties in training specialized personnel for the implementation of the treaties or in controlling their enforcement, and so on. Despite these clear violations, very seldom, if ever, do the other Parties to the infringed treaty invoke the international responsibility of the infringing State. It seems almost that the clause contained in Art. 6 (and in Art. 20.1) of the Biodiversity Convention is implicitly contained also in the other protection treaties[68].

In conclusion, realistically speaking it appears rather unlikely that a less anthropocentric approach than that of the Biodiversity Convention may prevail, at least when there are developing countries among the Parties to a less anthropocentric treaty. And this happens in the great majority of treaties, even in the Berne Convention which was worked out in the framework of the Council of Europe[69].

Another feature of the Biodiversity Convention - not a real approach but certainly a very peculiar characteristic - is the emphasis given to indigenous cultures and traditional uses of

67. The subordination of conservation to other basic needs of developing countries is strengthened by Art. 20.4.

68. The possibility not to comply with the protection treaties under certain circumstances could be sometimes considered as a state of necessity or *force majeure*.

69. Senegal and Burkina Faso are Parties to the Berne Convention.

biodiversity. References of this kind are many[70]. The attitude towards indigenous cultures is well summarized in Art. 8.j according to which the Parties shall

"...respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".

The change of attitude in comparison with the previous treaties is rather astonishing. In the latter the rights of indigenous or local populations were often taken into account but they were considered as "exceptions" to protection measures. For instance, according to Art. III.5.c of the Bonn Convention, it is possible to derogate from the prohibition of taking protected animals when "the taking is to accommodate the needs of traditional subsistence users"[71]. Even in the more recent Protocol concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Kingston, 18 January 1990, hereinafter referred to as the Kingston Protocol)[72], Art. 14 is entirely devoted to "Exemptions for Traditional Activities".

In the Biodiversity Convention local populations are involved in conservation activities as far as possible. On the other hand traditional practices may serve as an example of the sustainable use of the resources, on the assumption that the activities which have depleted biodiversity are not the traditional ones but the activities peculiar to the industrialized world.

70. See *e.g.* the Preamble (12th sentence) which refers to "traditional knowledge" relevant to the conservation and use of biological diversity; Art. 10.c according to which the Parties shall "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements"; Art. 17.2 which refers to the exchange of information on indigenous and traditional knowledge; Art. 18.4 which refers to indigenous technologies.

71. The clauses which intend to safeguard the rights of indigenous or local populations are particularly frequent in bilateral protection treaties and in exploitation treaties such as the ICRW. On the relation between protection of species and indigenous populations see MAFFEI, *La protezione* cit., p. 179 et seq.

72. The text is reproduced in Beiträge cit., 990:85.

Whether the assumption is justified or not[73], the involvement of local populations in conservation efforts is important for a widespread and generally accepted application of the Convention[74]. The attitude of the Biodiversity Convention in this field should constitute an example also for the improvement of the application of the previous treaties on wildlife protection.

Finally it must be said that the provisions of the Biodiversity Convention are not so innovative as to change the legal status of natural resources. The Convention considers neither biodiversity nor its components as "common heritage of mankind". Thus biodiversity is not internationalised by the Convention, nor is national sovereignty over natural resources affected, in accordance with previous treaties on wildlife protection. Only the conservation of biodiversity is a "common concern of humankind" according to the Preamble of the Convention[75].

B) Territorial and jurisdictional scope.

Art. 4 of the Biodiversity Convention regards jurisdictional scope. According to this Article the Convention applies in relation to each Contracting Party

"(a) In the case of components of biological diversity, in areas within the limits of its national jurisdiction; and (b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction".

At first sight this Article appears to ensure a satisfactory application of the Convention from the point of view of space. In other words biodiversity appears to be protected by the Parties to the Convention everywhere, or at least where it is necessary. This is not true, however. In fact Art. 4 covers the activities carried out

73. It has been observed that the encouragement of traditional use of the resources "est évidemment partiellement contraire aux politiques de développement, d'aider les populations locales à corriger celles de leur pratiques qui épuisent la diversité biologique, comme le surpâturage, auquel on ne réussit guère à trouver de parade" (HERMITTE, *La Convention* cit., p. 863).

74. In order to achieve better results in conservation "...economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity" shall be adopted by the Parties according to Art. 11.

75. On this point see BOYLE, *The Convention* cit., p. 116 et seq.

in the territory of the Parties or in areas which are not under national jurisdiction (*e.g.* on the high seas). But Art. 4 does not cover the activities carried out by nationals of the Parties in the territory of other States (presumably not Parties to the Biodiversity Convention)[76]. In other words, the Biodiversity Convention does not require to be applied on a personal basis. This is not a minor point. If nationals of a Party to the Biodiversity Convention decide to carry out activities which are prohibited by the Convention itself, they could export such activities to a State that is not bound by the Biodiversity Convention. The effects of these activities might even turn out to be harmful to the biodiversity of the State to which the nationals belong, but this would not be a violation of the Biodiversity Convention. Of course the Biodiversity Convention does not prohibit a Party, through its domestic legislation, from applying the Convention to its nationals in the territory of another State.

The provisions of Art. 4 are strengthened by Art. 5 which provides for international cooperation for the conservation and sustainable use of biological diversity "in respect of areas beyond national jurisdiction and on other matters of mutual interest"[77].

The possibility of applying the Biodiversity Convention in areas beyond national jurisdiction is however important. The Biodiversity Convention can therefore complement the treaties that are in principle applicable everywhere but that do not expressly provide for such a wide range of application, such as the 1950 Convention, the Ramsar Convention and the Berne Convention.

The application of the Biodiversity Convention on the high seas is indirectly strengthened by Art. 22.2 which does not make any distinction between national or international marine areas.

76. It would be different if Art. 4 referred to areas "beyond the limits of *its* national jurisdiction".

77. "Art. 5's obligation to cooperate also applies to processes and activities in areas beyond the limits of national jurisdiction and to other matters of mutual interest. As article 4 of the Convention does not explicitly require a Party to regulate the activities of its nationals operating in another Party's jurisdiction (...), this is one area that it is eligible for cooperation under article 5, that is, if considered by the Parties concerned as a "matter of mutual interest""; GLOWKA, BURHENNE-GUILMIN and SYNGE, *A Guide* cit., p. 28.

C) Conservation of species.

Few provisions of the Biodiversity Convention explicitly mention the conservation of species, which is however included in the conservation of biological diversity.

Arts. 8 and 9 of the Biodiversity Convention respectively provide for *in-situ* and *ex-situ* conservation. At the end of the negotiations of the Convention it was decided to give a pre-eminent position to *in-situ* conservation.

As regards the protection of species, the *in-situ* conservation measures provided for in Art. 8 correspond to the "traditional" ones. These provisions are however extremely vague. Art. 8.k provides for instance that the Parties shall "develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations". The Biodiversity Convention does not specify the measures necessary to protect the species, such as the prohibition on taking, the regulation of hunting, the regulation of trade and so on. States are free to choose the most appropriate methods in order to get the required result, that is the conservation of species diversity. This emerges also from the simple reading of the texts of the conventions: the Biodiversity Conventions contains few self-executing provisions, while many of the provisions of other previous conventions on wildlife protection are self-executing. Once again it is clear that regional conventions may provide more stringent and detailed provisions. This may be useful to attain in countries of the same region, sharing similar natural features and similar problems, such uniformity of measures as is necessary for more complete and effective conservation. All the above-mentioned regional conventions - such as the African Convention, the Berne Convention, and the ASEAN Agreement - contain provisions on species conservation that are more detailed than those contained in the Biodiversity Convention. Similarly, a convention - such as the CITES - which regulates only *one* of the human activities threatening the species is more detailed than a convention - such as the Biodiversity Convention - which intends to regulate *all* the activities that adversely affect species diversity. Again, the problems of a specific group of species such as migratory species are dealt with better by a specific convention. This is the case of the Bonn Convention. It is worth noting that during the negotiations of the Biodiversity Convention the protection of migratory species and of shared ecosystems was

given particular emphasis[78]. However, no provision of the Biodiversity Convention contains any explicit mention of migratory species. The Bonn Convention may efficaciously complement the provisions of the Biodiversity Convention in this field.

Also the provisions of the Biodiversity Convention on *ex-situ* conservation are rather vague and generic, and need to be widely integrated and implemented through national legislation.

Another interesting feature of the Biodiversity Convention is the lack of lists of species to be protected. Provisions regarding such lists - the so called Global Lists - were included in the drafts of the Convention[79]. Different opinions were expressed during the negotiations as to whether it was necessary and opportune to establish Global Lists[80]. The decision was much debated. In the end it was decided to delete these provisions[81]. Once again the Biodiversity Convention leaves each Party free to decide which species are to be protected.

78. *See e.g.* Art. 2, Alternative 2 (e) of the *Draft Convention on Biological Diversity*, doc. UNEP/Bio.Div./WG.2/2/2 of 22 January 1991 (hereinafter the *Draft*); Arts. 3.8 and 10.b of the *Rev. Draft* cit.; Arts. 6.a and 10.b of the *Second Rev. Draft* cit.; Arts. 3.4, 5bis.1.a.iv and 10.b of the *Fourth Rev. Draft* cit. *See* also the proposal of Kenya and the United States, *First Session Legal Technical Report Addendum* cit., p. 7 and 9.

79. The idea of a Global List of "biogeographic areas of particular importance for conservation of biological diversity" and of a Global List "of species threatened with extinction at global level" was already envisaged in *Elements* cit., Chapters V.A.b and XII.d. See also Art. 12 of the *Draft* cit.; Arts. 13, 22.2.b, 23 paras. 4, 5, 6 and 11.i, 24.1 subparas. (b) and (c), and 25.2.c of the *Rev. Draft* cit.; Arts. 13, 23 bis, 24.1 subparas. (b) and (c), and 25.5.c of the *Second Rev. Draft* cit.; Art. 13, 22, 23.1 subparas. (b) and (c) of the *Fourth Rev. Draft* cit.; Art. 15, 25, and 26.1 subparas. (b) and (c) of the *Fifth Rev. Draft* cit.

80. "Some delegations were unconvinced that the preparation of Global Lists was the best way of using the limited financial and human resources available", *Report of the Intergovernmental Negotiating Committee for a Convention on Biological Diversity on the Work of its Third Session/Fifth Negotiating Session*, doc. UNEP/Bio.Div./N5-INC.3/4 of 4 December 1991, para. 62. See also the *Report of the Intergovernmental Negotiating Committee for a Convention on Biological Diversity on the Work of its Sixth Negotiating Session/Fourth Session of INC*, doc. UNEP/Bio.Div./N6-INC.4/4 of 18 February 1992, para. 39 ("42"). See also BURHENNE-GUILMIN and CASEY-LEFKOWITZ, *The Convention* cit., p. 52.

81. *Seventh Session INC Report* cit., para. 41. In its declaration made at the time of the adoption of the text of the Convention France expressed regret for the deletion of the provisions regarding the Global Lists.

In this case the lists of species adopted in the framework of other conventions - such as the African Convention, the CITES, the Bonn Convention, the Berne Convention, etc. - are not legally binding under the Biodiversity Convention. Nevertheless they may have at least an indicative function. Also the criteria to be followed by States to include a species in the lists of the relevant conventions might be useful for determining which species deserve protection under the Biodiversity Convention. Indeed it would be rather disappointing if species protected under a regional or sectoral convention were not protected under the global treaty, that is the Biodiversity Convention.

As said above, the Biodiversity Convention deals simultaneously with the conservation and sustainable use of the resources. This means that the Biodiversity Convention could interfere not only with the treaties on wildlife protection but also with the exploitation treaties. Treaties on fisheries and on hunting - such as the ICRW - as well as treaties - such as the CCAMLR - which have a more ecological approach to exploitation issues, are involved. These issues would deserve a more detailed analysis, but they are unfortunately beyond the scope of this article.

D) Conservation of ecosystems.

Similar remarks to the above may be made about the conservation of ecosystems. Art. 8 of the Biodiversity Convention stresses the importance of the *in-situ* conservation of ecosystems and habitats. *In-situ* conservation includes the rehabilitation and restoration of degraded ecosystems. *Ex-situ* conservation of species may be useful to this end. In any case the collection of biological resources from natural habitats for *ex-situ* conservation purposes must not threaten ecosystems. The establishment of protected areas is essential for conservation[82]. The Biodiversity Convention does not specify the names (parks, reserves etc.) and the administrative régime that these areas shall have. Some previous treaties were much more precise from this point of view[83]. Nor does the Biodiversity Convention specify

82. It goes without saying that the protection of habitats is an indirect way to protect species.

83. See for instance the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (Washington, 12 October 1940,

which measures are to be taken in the protected areas. Conventions particularly devoted to the establishment of protected areas - such as the Nairobi Protocol or the Kingston Protocol - usually provide for an indicative list of activities which are prohibited in the protected areas. Also in this case, without binding the States which are not Parties to them, these specific treaties may be useful for providing States with suggestions for the management of protected areas. In particular, interesting indications may arise from the experience - the successes, the failures - gained in applying the previous treaties in this field.

The Biodiversity Convention does not provide for any list of areas to be protected[84]. Thus also in this case the lists provided for by other treaties - such as the Ramsar Convention and the UNESCO Convention - may be useful for indicating some criteria for the selection of areas deserving protection.

E) Research and exchange of information.

In a declaration made at the time of the adoption of the Biodiversity Convention, France regretted that the Convention "under-values the scientific approach". As a matter of fact, the Biodiversity Convention devotes many provisions to scientific issues. First of all Art. 12 regards research and training in measures for the identification, conservation and sustainable use of biological diversity at a *national* level. *International* technical and scientific co-operation is provided for in Art. 18 of the Biodiversity Convention. In both Articles particular emphasis is given to research in developing countries. These provisions are strengthened by the obligation of facilitating the exchange of information (Art. 17)[85]. The position of the Parties providing

hereinafter referred to as the 1940 Convention, in *Beiträge* cit., 940:76), the African Convention and the ASEAN Agreement.

84. During the negotiations of the Biodiversity Convention it was maintained for instance that "there should be caution in the development of Global Lists, because such a list has the potential to undermine areas not on the list", in Annex I to the *Report of The* Ad Hoc *Working Group on the Work of its Third Session in Preparation for a Legal Instrument on Biological Diversity on the Planet*, doc. UNEP/Bio.Div. 3/12 of 13 August 1990 (hereinafter *Third Session Report*), para. 18.

85. Art. 19.1 also provides for the effective participation in biotechnological research activities by the Parties which provide the genetic resources for such research.

genetic resources for research is taken into account by Art. 15.7, which regards the sharing of the results of such research. Finally, at the *institutional* level, Art. 25 establishes a subsidiary body for the provision of scientific, technical and technological advice. This body is entrusted with all the scientific matters relating to the implementation of the Convention. It shall report regularly to the Conference of the Parties on its activities. Also the activities of identification and monitoring regulated by Art. 7 of the Biodiversity Convention may be included in a broad concept of scientific research.

Provisions on scientific research are frequent also in previous treaties. The latter have gone through a progressive evolution in this field. During the first phase scientific interests were sometimes in contrast with protective measures; exceptions to protection for scientific purposes were often allowed. During a later phase scientific research, despite the survival of these exceptions, was also encouraged in order to support protective measures and justify them. To this end scientific bodies - such as the Scientific Council set up by the Bonn Convention or the Scientific Committee of the CCAMLR - were often established in the conventions. Nowadays, as the Biodiversity Convention clearly shows, scientific research has become an indispensable tool for the conservation and management of the resources.

As protective measures must be based on scientific data in order to be effective, the concrete application of every treaty on wildlife protection should be preceded by appropriate scientific studies. The co-ordination of research conducted under different treaties, including the Biodiversity Convention, and the consequent exchange of information appear to be of great importance in order to enhance research itself and save money[86]. Moreover particular emphasis should be given to the provisions of the Biodiversity Convention as far as they intend to improve and facilitate scientific research in developing countries.

86. A provision according to which the Parties to the Biodiversity Convention "shall invite the Parties to any treaty, convention or international agreement relating to the conservation and sustainable use of biological diversity to agree on arrangements for facilitating joint actions, co-ordination, and exchange of information" was contained in the drafts corresponding to Art. 22 of the final version of the Convention.

F) Environmental Impact Assessment.

A specific Article of the Biodiversity Convention (Art. 14) is devoted to impact assessment[87]. Provisions on environmental impact assessment (EIA) have begun to appear in international environmental treaties, starting with the UNCLOS. At present EIA procedures are provided for also in some conventions on wildlife protection - such as the ASEAN Agreement (Arts. 14 and 20.3.a), the Kingston Protocol (Art. 13) and the 1991 Madrid Protocol to the Antarctic Treaty on Environmental Protection (Art. 8)[88].

EIA procedures may be more or less stringent and severe. Sometimes the degree of severity and effectiveness depends on the interpretation of words such as "significant" as referred to the adverse effects of proposed projects. In particular the provisions of the Biodiversity Convention on EIA have been considered unsatisfactory[89], since they are not sufficiently precise as regards the activities to be assessed, and because of the phrase "as far as possible and appropriate" which may cause disparities in assessment[90]. The provisions of the Biodiversity Convention on EIA are completed by provisions on minimizing adverse impacts and, at least indirectly, by the precautionary principle embodied in the Preamble.

In any case it is desirable that EIA procedures are always adopted for the safeguarding of wildlife, even when the relevant treaties do not contain any provision on this subject[91]. The participation of States to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February

87. On origins and development of environmental impact assessment in international law see PINESCHI, *La valutazione d'impatto ambientale e il diritto internazionale del mare*, in *Rivista Giuridica dell'Ambiente*, 1988, p. 505 *et seq.*

88. The text is reproduced in *Beiträge* cit., 991:74.

89. In particular the United States expressed their unsatisfaction in a declaration made at the time of the adoption of the Biodiversity Convention.

90. On this point see BOYLE, *The Convention* cit., p. 118 *et seq.*

91. It seems that some States do not agree on the obligation of EIA procedures in the framework of other treaties. The question was discussed for example during the Fifth Conference of the Parties to the Ramsar Convention. Japan opposed a proposal according to which the development projects in wetlands should be preceded by EIA (see *Wetlands Protection*, in *23 Environmental Policy and Law*, 1993, p. 214).

1991)[92] or the conclusion of a more detailed protocol to the Biodiversity Convention on this topic could be useful in order to provide for more precise indications and ensure uniformity in national EIA procedures.

G) Financial questions.

An analysis of the complex and unsatisfactory financial mechanism provided for by the Biodiversity Convention is beyond the scope of this article. However it is worth mentioning that the importance of the links with previous treaties was stressed during the discussion of financial questions in the negotiations of the Biodiversity Convention. First of all several international bodies - such as the UNEP, the UNDP, the FAO, the UNESCO, and the World Bank - were called upon to provide financial resources for the provisional implementation of the Biodiversity Convention[93]. Moreover, according to Art. 21.4 of the Biodiversity Convention, the Parties

"shall consider strengthening existing financial institutions to provide financial resources for the conservation and sustainable use of biological diversity"[94].

Art. 21.4 does not specify the institutions to which it refers. They may include the financial institutions set up in the framework of the conventions on wildlife protection. In this field however it is likely that the provision of Art. 21.4 will come to nothing. Indeed the whole Biodiversity Convention is, at least in its intentions, characterized by the great concern devoted to the economic problems of developing countries. Should the developed countries decide to properly implement the provisions on the financial mechanism in compliance with the purposes of the Biodiversity

92. The text is reproduced in *Beiträge* cit., 991:15. The Espoo Convention however only refers to "transboundary impact". Therefore it could be insufficient for the regulation of EIA procedures relating to activities which affect biodiversity only at a national level.

93. See Resolution 1 (*Interim Financial Arrangements)* adopted by the Conference which adopted the final text of the Biodiversity Convention.

94. It is worth recalling that during the negotiations of the Biodiversity Convention many proposals concerning the financial mechanism were put forward. Instead of creating a new fund the possibility of "co-operative arrangements with existing multilateral and bilateral sources of funding" was envisaged (see *Elements* cit., Chapter IX.B; Art. 18.1 of the *Draft* cit.; Art. 19.1 of the *Rev. Draft* cit.; Art. 19.1 of the *Second Rev. Draft* cit.).

Convention, this would lead to a satisfactory conservation of biological diversity. And in this case of course the Parties to the Biodiversity Convention may well try to strengthen the other financial institutions. But if the developed countries are unwilling to help developing countries in a concrete way through the financial mechanism of the Biodiversity Convention, they are highly unlikely to wish to strengthen the financial institutions created under treaties that are far less sensitive to Third World needs[95]. Perhaps the only financial institution that is likely to come into consideration in the implementation of Art. 21.4 is the Fund for the Protection of the World Cultural and Natural Heritage of Outstanding Universal Value created by the UNESCO Convention. The UNESCO Convention, whose application has already achieved appreciable results, does not make a distinction between developing and developed States. However, in deciding on the use of the resources of the Fund, the World Heritage Committee cannot neglect the economic situation of the States asking for international assistance (Art. 13 of the UNESCO Convention). Thus it is not unlikely for the same conservation project to be financially supported by the Biodiversity Convention and by the Fund of the UNESCO Convention[96].

95. Occasionally the Parties to previous treaties on wildlife protection have shown a certain concern for the needs of developing countries; see *e.g.* the Resolution on assistance to developing countries which is annexed to the *Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals*. By this Resolution the Conference requests the Parties *inter alia* "to promote financial, technical and training assistance in support of the conservation efforts made by developing countries". Moreover, during the third meeting of the Conference of the Parties of the Bonn Convention (1991) it was decided to include a sum of about 10% of the total budget to assist developing countries (see FORSTER and OSTERWOLDT, *Nature* cit., p. 94). Similarly, in the framework of the Ramsar Convention, during the 1990 Conference on Wetlands the United States proposed the creation of a Wetland Conservation Fund for technical assistance to developing countries. The proposal was "unanimously and enthusiastically" approved (see *Growing International Recognition*, in *20 Environmental Policy and Law*, 1990, p. 137 *et seq.*).

96. Another financial structure is temporarily envolved in biodiversity conservation. In fact during the period between the entry into force of the Biodiversity Convention and the establishment of the institutional structure provided for in Art. 21, the Global Environmental Facility (GEF) "shall be the institutional structure referred to in Article 21 on an interim basis" (Art. 39 of the Biodiversity Convention). GEF has been recently restructured; see

H) Institutional co-operation.

Some old conventions on wildlife protection are lacking in an institutional mechanism which could ensure the good functioning of the conventions themselves[97]. These conventions are often ineffectual. The great majority of treaties on wildlife however provide for the establishment of organs charged with different tasks as regards their implementation: secretariats, conferences of the Parties, scientific committees, and so on. Also the Biodiversity Convention sets up some institutional bodies: the Conference of the Parties (Art. 23), the Secretariat (Art. 24) and the already mentioned subsidiary body on scientific, technical and technological advice (Art. 25). Further subsidiary bodies may be established by the Conference of the Parties (Art. 23.4.g).

The need to strengthen co-operation among these different organs has been stressed on several occasions during the negotiations of the Biodiversity Convention[98]. During the early stages, a provision on this kind of co-operation was contained in the draft of the Article on the relationship with other existing conventions. The relevant provision finally moved to Art. 23. According to Art. 23.4.h the Conference of the Parties, for the purpose of keeping the implementation of the Convention under review, shall "contact, through the Secretariat, the executive bodies of conventions dealing with matters covered" by the Convention "with a view to establishing appropriate forms of cooperation with them"[99].

Restructuring Instrument, in *24 Environmental Policy and Law*, 1994, p. 156 and *ibid.* p. 192.

97. See e.g. the 1940 and 1950 Conventions. On the proposal of improving the 1940 Convention by the establishment of permanent organs see FORSTER and OSTERWOLDT, *Nature* cit., p. 62.

98. See also Resolution 2 (*International Cooperation for the Conservation of Biological Diversity and the Sustainable Use of its Components Pending the Entry into Force of the Convention on Biological Diversity*) adopted by the Conference which adopted the Biodiversity Convention. According to para. 3 of the Resolution the Executive Director of UNEP is requested to seek "full cooperation with the secretariats of relevant conventions and agreements". Moreover in para. 8 the Conference invites "the secretariats of major international and regional environmental conventions, agreements and organizations to provide information" on their activities.

99. On this point see *e.g.* Recommandation III annexed to the *Monaco Declaration* (see*supra* note 62) where the participants in the *Symposium*

The co-operation between the Conference of the Parties to the Biodiversity Convention and the bodies set up under other conventions means first of all the co-ordination of conservation efforts. This should entail a reduction of expenses, as very often the activities required for the implementation of a convention coincide with the activities required under other treaties. The exchange of relevant information should avoid useless duplication.

An indirect improvement of the implementation of treaties on wildlife protection may also come from the application of Art. 26 of the Biodiversity Convention. According to Art. 26 each Party to the Convention shall periodically "present to the Conference of the Parties reports on measures which it has taken for the implementation of the provisions" of the Convention "and their effectiveness in meeting the objectives" of the Convention itself. This obligation of the Parties to report on their conservation efforts in an international forum is certainly an important incentive for the proper implementation of the Convention. As far as the measures requested by the Biodiversity Convention coincide with those requested by other treaties, the implementation of the latter may indirectly benefit from the periodical reports of the Parties to the Biodiversity Convention. This is important especially for those treaties which do not provide for any implementation control.

It is finally worth noting that the co-ordination between the Biodiversity Convention and other treaties is considered one of the costs of conservation. In fact during the negotiations of the Biodiversity Convention it was stated that funds were necessary to cover *inter alia* "strengthening existing international legal instruments and activities on biological diversity when their basic objectives and/or activities are very similar or closely linked"[100].

recommended to the Standing Committee of the Berne Convention and to the Conference of the Parties to the Biodiversity Convention to "establish appropriate coordination mechanisms, in conformity with Art. 23, paragraph 4(h), of the Convention on Biological Diversity, so that both instruments may be applied and elaborated on together in matters relating to the conservation of biological diversity and the sustainable use of its components".

100. See Annex IV (Principal Conclusions of the *Ad Hoc* Working Group at its Second Session in preparation for a Legal Instrument on Biological Diversity of the Planet) to the *Third Session Report* cit., para. 8.

6. A complete outline of the effects of the relationship among different conventions should take into account for each convention the clauses - similar to Art. 22.1 of the Biodiversity Convention - which safeguard the application of previous agreements (which in turn safeguard the application of previous treaties and so on). In comparison with these clauses Art. 22.1 has the merit of stopping this game of Chinese boxes with a provision which should operate to the advantage of conservation. But the great majority of the provisions of previous treaties remain sound and useful.

It is certainly a pity that the Biodiversity Convention has not altogether learnt from experience gained in the application of the previous treaties on wildlife protection. In some aspects - especially those regarding more strictly the conservation of natural resources - there is even regression in comparison with the previous treaties. This is due to different factors, for instance to the fact that at a certain stage of negotiations States' attention was mainly focused on the regulation of the transfer of technologies and access to genetic resources. Sometimes a scarcely hidden fear of affecting sovereignty over natural resources may have prevented States from adopting more stringent and detailed conservation measures, as in the case of the omission of global lists of species and sites to be protected. In the light of precedents this fear appears unjustified.

Art. 22 of the Biodiversity Convention leaves the relationship between the Convention and the successive treaties unregulated. Art. 28 deals with the adoption of protocols to the Biodiversity Convention and Art. 32 regulates the relationship between the Convention and its protocols. The possible content of these protocols is not defined by the Convention (except in the mentioned case of Art. 19.3). As protocols are considered and adopted by the Conference of the Parties (Arts. 23.4.c and 28.2) it is likely that they shall be drafted in a way that is not in contrast with the Biodiversity Convention. Moreover agreements in some way related to the Biodiversity Convention shall be concluded as regards the transfer of technologies and access to genetic resources.

In any case States, including the Parties to the Biodiversity Convention, are free to conclude further treaties on biodiversity conservation or on some aspects of it. For instance, in Managua on 5 June 1992, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama signed the Convention concerning the

Conservation on the Biodiversity and the Protection of Priority Forestry Areas of Central America (hereinafter referred to as the Central-American Convention)[101]. Regional conventions - such as the latter - have the advantage of tackling local problems better than a framework instrument - such as the Biodiversity Convention - can. This is true especially as regards the strategies and the concrete measures to be adopted for conservation. However regional conventions may be inadequate as regards the financial resources necessary for conservation. In fact it is likely that the countries of the same region also share the same financial and technological difficulties. In these cases the resources must be found "outside" the regional convention. This clearly emerges from the text of the Central-American Convention: while the conservation measures are based mainly on co-operation among the signatory States, as regards financial or technological matters other States, alien to the Convention, come into the picture[102]. The provisions of the Biodiversity Convention in this field could supplement the new regional treaties on the conservation of biological diversity. Indeed it is desirable that the Conference of the Parties to the Biodiversity Convention becomes an international forum to discuss the relationship of future treaties with the Biodiversity Convention and the compatibility of the provisions of the former with those of the latter.

It has been rightly observed that the Biodiversity Convention constitutes "the beginning of a process rather than the

101. The Spanish text of the Convention is reproduced in *Yearbook of International Environmental Law*, 1992, doc. 2 on diskette. As a matter of fact the Central-American Convention was signed exactly on the same day as the Biodiversity Convention – adopted in May 1992 – was opened to signature. Up to now none of the above-mentioned Central-American States has ratified either the Biodiversity Convention or the Central-American Convention.

102. See Art. 13.d of the Central-American Convention according to which "se debe proveer individualmente o en cooperación con *otros* Estados y organismos internacionales, fondos nuevos y adicionales, para apoyar la implementación de programas y actividades, nacionales y regionales, relacionadas con la conservación de la biodiversidad" (*emphasis added*). "Otros" may refer both to the signatory States and to other States. Art. 32 is even more explicit in this sense: "solicitar a la comunidad internacional un trato preferencial y concesional para favorecer el acceso y la transferencia de tecnología, entre los países desarrollados y los centroamericanos, así como facilitar estos entre los países de la región".

end"[103]. This is true also as regards the relationship with other existing or future treaties[104]: much is to be done in order to improve, simultaneously, the effectiveness of both the Biodiversity Convention and the other international instruments.

103. See BURHENNE-GUILMIN and CASEY-LEFKOWITZ, *The Convention* cit., p. 57.

104. It is worth noting that the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 14 October 1994, in *International Legal Materials*, 1994, p. 1328) contains some references to the Biodiversity Convention; see the Preamble ("...Bearing in mind the contribution that combatting desertification can make to achieving the objectives of (...) the Convention on Biological Diversity...") and Art. 8 ("... The Parties shall encourage the coordination of activities carried out under this Convention and, if they are Parties to them, under other relevant international agreements, particularly (...) the Convention on Biological Diversity, in order to derive maximum benefit from activities under each agreement while avoiding duplication of effort...").