

MIGRATORY BIRD TREATIES' ISSUES AND POTENTIALS: ARE THEY VALUABLE TOOLS OR JUST CURIOS IN THE BOX?

BY

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This Essay explores the achievements, issues, and potentials of bilateral migratory bird treaties (MBTs). MBTs have been successful in strengthening domestic laws and facilitating international cooperation for avian conservation. However, the merits of MBTs are mostly limited to migratory bird species in a limited number of countries. Multinational treaties, such as the Bonn Convention, are likely to be capable of addressing these weak points. Nevertheless, MBTs are still a beneficial tool since multinational treaties tend to be inflexible, cumbersome, and politically driven. This Essay recommends expanding the network of MBTs geographically (which may become ancillary agreements of the Bonn Convention), as well broadening their scope to include all birds, including nonmigratory species.

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I. INTRODUCTION

Beginning with the 1902 Convention for the Protection of Birds Useful to Agriculture,¹ which was signed by twelve European countries, and the 1916 Convention between the United States and Great Britain for the Protection of Migratory Birds (U.S./Canada Convention),² migratory bird treaties (MBTs) are known to be one of the oldest sources of international environmental law. After briefly looking at the past achievements of MBTs in Part II, Part III of this Essay discusses whether MBTs are becoming less important in light of emerging multinational agreements and initiatives. After discussing the merits of MBTs, Part IV considers ways to maximize utilization and efficacy of the provisions of MBTs, which are often overlooked. Finally, Part V argues for amendments to MBTs to improve the level of avian protection. Discussion in this Essay centers on MBTs signed either by Japan or the United States; however, the arguments should be applicable to MBTs in general.

II. MBT ACHIEVEMENTS

Ratification of the U.S./Canada Convention led to the enactment of the Migratory Bird Treaty Act (MBTA),³ which opened a new era in United States conservation policy. The MBTA initiated the federal government's commitment to wildlife conservation. As in the United States, MBTs have also led to a strengthening of Japan's domestic conservation statutes. The predecessor of the Act on Conservation of Endangered Species of Wild Fauna and Flora⁴ (the Japanese Endangered Species Act) was promulgated in 1972 to implement the Convention between the United States and Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and their Environment (U.S./Japan MBT),⁵ which was signed earlier in that year. Japan's involvement in the U.S./Japan MBT was initiated by a resolution from the International Council for Bird Preservation (ICBP), which is the

¹ Convention for the Protection of Birds Useful to Agriculture, Austria-Belg.-Fr.-Ger.-Greece-Hung.-Liech.-Lux.-Monaco-Port.-Spain-Swed.-Switz., Mar. 19, 1902, 102 B.S.P. 969.

² Convention for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702 [hereinafter U.S./Canada Convention]. Great Britain signed the U.S./Canada Convention on behalf of Canada. *See id.* at 1702.

³ 16 U.S.C. §§ 703–712 (2006 & Supp. IV 2010).

⁴ Tokushu chōrui no jōtotō no kisei ni kansuru hōritsu [Act on the Regulation of Transfer of Specialised Birds], Law No. 49 of 1972 (Japan), *repealed by* Zetsumetsu no osore no aru yasei dōshokubutsu no shu no hozon ni kansuru hōritsu [Act on the Conservation of Endangered Species of Wild Fauna and Flora], Law No. 75 of 1992 (Japan) [hereinafter Japanese Endangered Species Act], *translated at* Japan Integrated Biodiversity Info. Sys., *Laws and Treaties for Nature Conservation*, http://www.biodic.go.jp/english/biolaw/law_f.html (last visited Apr. 7, 2012) (click on “Act on conservation of endangered species of wild fauna and flora”). For details of the current statute see Mitsuhiro A. Takahashi, *Overview of the Structure and the Challenges of Japanese Wildlife Law and Policy*, 142 BIOLOGICAL CONSERVATION 1958, 1958–60 (2009).

⁵ Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, U.S.-Japan, Mar. 4, 1972, 25 U.S.T. 3329 [hereinafter U.S./Japan MBT].

predecessor of BirdLife International.⁶ In 1960, the ICBP met in Tokyo for the first time in Asia and recommended that the governments expand the network of MBTs in the Asian region.⁷ After signing the 1972 U.S./Japan MBT, Japan signed three other MBTs with neighboring countries: Russia,⁸ Australia,⁹ and China.¹⁰ Japan also signed an agreement with South Korea, known as the Agreement on Cooperation in the Field of Environmental Protection.¹¹

Since then, MBTs have been a powerful device to facilitate, encourage, and justify expensive and often low-priority bird conservation and research in Japan. Of recent examples, the recovery projects of the short-tailed albatross (*Phoebastria albatrus*) are particularly illuminating.¹²

The short-tailed albatross is a majestic seabird that nests on isolated oceanic islets in the North Pacific.¹³ This species of albatross, once amazingly abundant, was gravely exploited for the feather trade in the early twentieth century.¹⁴ The population of the birds declined so drastically that an American expedition shortly after World War II once reported the species to be extinct.¹⁵ The short-tailed albatross was then “re-discovered” on Torishima, a remote volcanic island belonging to Japan; however, the birds were few and the recovery of the breeding birds was slow due to the vulnerability of the nesting site.¹⁶ The nesting site sits on a steep outwash

⁶ Founded in 1922, the ICBP sought an “international solution” to the decline in migratory bird numbers by lobbying governmental organizations with the goals of eliminating environmentally harmful subsidies and enacting trade measures to protect birds, such as prohibitions on feather trading. Steven Charnovitz, *Public Participation in International Environmental Decision Making: Learning from Early NGO Activity*, 92 AM. SOC’Y INT’L L. PROC. 338, 338–41 (1998). As early as 1928, the ICBP had also made recommendations to intergovernmental organizations—such as the League of Nations—aimed at negotiating new bird protection conventions. *Id.* at 339.

⁷ Jean Delacour, *Fifty Years of ICBP*, 11 ORYX 416, 416–18 (1972).

⁸ Convention Concerning the Conservation of Migratory and Endangered Species of Birds and Their Habitat, Japan-Russ., Oct. 10, 1973, 1574 U.N.T.S. 73 [hereinafter Japan/Russia MBT].

⁹ Agreement for the Protection of Migratory Birds and Birds in Danger of Extinction and Their Environment, Austl.-Japan, Feb. 6, 1974, 1241 U.N.T.S. 385 [hereinafter Japan/Australia MBT].

¹⁰ Agreement Concerning the Protection of Migratory Birds and Their Habitats, Japan-China, Mar. 3, 1981, 1317 U.N.T.S. 195 [hereinafter Japan/China MBT].

¹¹ Agreement on Cooperation in the Field of Environmental Protection, Japan-S. Kor., June 29, 1993, 1752 U.N.T.S. 131.

¹² See, e.g., U.S. FISH & WILDLIFE SERV., SHORT-TAILED ALBATROSS: RECOVERY PLAN 7, 32 (2008), available at http://alaska.fws.gov/fisheries/endangered/pdf/stal_recovery_plan.pdf (summarizing a recovery plan for the short-tailed albatross that relies on United States and Japan cooperation and outlining the recovery needs and opportunities of this endangered species).

¹³ *Id.* at iii–iv.

¹⁴ See Oliver L. Austin, Jr., *The Status of Steller’s Albatross*, 3 PAC. SCI. 283, 285–88, 292–93 (1949), available at <http://scholarspace.manoa.hawaii.edu/handle/10125/6091> (click on “The Status of Stellar’s Albatross”); see also U.S. FISH & WILDLIFE SERV., *supra* note 12, at 3.

¹⁵ Austin, *supra* note 14, at 294.

¹⁶ U.S. FISH & WILDLIFE SERV., *supra* note 12, at iii–iv, 3–4, 18.

slope, which suffers frequent mudslides aggravated by the loose volcanic soil of the island.¹⁷

Hope of recovery for the short-tailed albatross was dependent on the successful relocation of the nesting sites.¹⁸ Beginning in the late 1970s, Japanese ornithologist Dr. Hiroshi Hasegawa devoted himself to the conservation of the albatross.¹⁹ In 1991, Dr. Hasegawa, with the Yamashina Institute for Ornithology (Yamashina Institute), initiated a project to relocate the nesting site to a safer location on Torishima.²⁰ Although this relocation proved highly successful, the site remained prone to risk of volcanic eruption.²¹ In 2002, Torishima erupted again and it became evident that re-establishing a breeding colony on a safer island was essential.²²

The resources and expertise necessary to relocate the birds to a safe island were not available through Japanese agencies, and it was cooperation with the U.S. Fish and Wildlife Service (FWS) that led to a breakthrough. In 2000, the short-tailed albatross was listed under the U.S. Endangered Species Act (ESA)²³ and the FWS began collaborating with Japanese agencies and scientists.²⁴ From 2000 to 2008, the United States and Japan jointly participated in satellite telemetry monitoring to track subadult short-tailed albatrosses—a project that has produced data critical for conservation.²⁵

Cooperation between the countries continued when FWS formed the Short-Tailed Albatross Recovery Team (START), and involved Japanese scientists and officials as members.²⁶ At START's second meeting, held in May 2004 at the Yamashina Institute, the parties agreed that re-establishment of the nesting site within the Bonin (Ogasawara) Islands was a priority issue.²⁷ The parties also agreed that the proposal should be included in the Short-Tailed Albatross(STA) Recovery Plan under the ESA.²⁸ In February

¹⁷ *Id.* at 18.

¹⁸ *See id.* at 4.

¹⁹ ROBERT HANNON, BIRD MAN FOR THE ALBATROSS (Arctic Sci. Journeys 1997), http://seagrant.uaf.edu/news/97ASJ/10.30.97_Albatross.html (last visited Apr. 7, 2012) (transcript of a 1997 Alaska radio broadcast about Dr. Hasegawa and his conservation work on the albatross).

²⁰ *See* U.S. FISH & WILDLIFE SERV., *supra* note 12, at 32; *see also* Nagahisa Kuroda, *Obituary: Yoshimaro Yamashina*, 132 INT'L J. AVIAN SCI. 483, 486–87 (1990); Satoshi Yamagishi, *Comeback for the Albatross*, Q. NEWSL. BIRDLIFE ASIA, Oct. 2006, at 1–2.

²¹ U.S. FISH & WILDLIFE SERV., *supra* note 12, at iv, 32, 39.

²² *See id.* at iii–iv, 17–18, 45–46.

²³ Final Rule to List the Short-Tailed Albatross as Endangered in the United States, 65 Fed. Reg. 46,643, 46,643–44 (July 31, 2000) (codified at 50 C.F.R. § 17.11); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. IV 2010).

²⁴ U.S. FISH & WILDLIFE SERV., *supra* note 12, at 7, 43, 50.

²⁵ *Id.* at 7–8, 13, 23–24, 33. This knowledge has improved our understanding of the short-tailed albatross, including range and feeding habits. *See, e.g., id.* at 7–8.

²⁶ *Id.* at ii, 70.

²⁷ *See* U.S. FISH & WILDLIFE SERV., SHORT-TAILED ALBATROSS: DRAFT RECOVERY PLAN 28–29, 61 (2005), available at http://www.fws.gov/ecos/ajax/docs/recovery_plan/051027_1.pdf (providing ranking of priority items discussed in May 2004 START meeting in Chiba, Japan); *see also* U.S. FISH & WILDLIFE SERV., *supra* note 12, at 5, 45–46.

²⁸ *See* U.S. FISH & WILDLIFE SERV., *supra* note 12, at 45–48, 70.

2008, following pilot studies in 2006 and in 2007, the Yamashina Institute captured ten albatross chicks and transported them to Mukojima in the Bonin Islands.²⁹ In 2008, all ten chicks fledged successfully after being reared by Yamashina staff members.³⁰ Similar translocations have been conducted every year since, and the birds successfully returned to Mukojima in February 2011.³¹ Despite the fact that this hugely successful project is recognized by the Ministry of the Environment as part of the Japanese government's recovery plan under the Japanese Endangered Species Act,³² most funding comes from the United States—namely the FWS.³³

Although it was the ESA listing that motivated the FWS to commit to the conservation of the short-tailed albatross in Japan, the mutual relationship between agencies and scientists created by the U.S./Japan MBT has been crucial in making the joint effort possible.³⁴ Since establishing this formal cooperative effort, coordination of the joint project continues to be an issue at meetings of the U.S./Japan MBT.³⁵ Therefore, this success could not have been realized without collaboration between the two countries.

MBTs with other nations have also made important projects possible, especially in the field of research. An MBT between Russia and Japan has recently facilitated monitoring of Steller's sea eagles (*Haliaeetus pelagicus*),³⁶ a species suffering from lead poisoning in Japan and from contamination due to oil and gas drilling in Russia.³⁷ Joint research on shorebirds with

²⁹ *Id.* at 33. See generally Satoshi Yamagishi, *Reintroducing the Short-Tailed Albatross on Mukojima Island*, <http://sciencelinks.jp/content/view/715/241/> (last visited Apr. 7, 2012) (describing the albatross reintroduction plan on Mukojima Island, including the collaborative effort between Japan and the United States).

³⁰ U.S. FISH & WILDLIFE SERV., *supra* note 12, at 33.

³¹ U.S. FISH & WILDLIFE SERV., ON THE ROAD TO RECOVERY: SHORT-TAILED ALBATROSS CHICK TRANSLOCATION (2011), *available at* http://www.fakr.noaa.gov/protectedresources/seabirds/usfws_stal_translocation_%20factsheet.pdf; Yamashina Inst. for Ornithology, *Mukojima Chicks Come Back Home*, <http://www.yamashina.or.jp/hp/english/whatsnew/news20110210.html> (last visited Apr. 7, 2012).

³² JAPANESE MINISTRY OF THE ENV'T, PROJECT PLAN FOR THE PROTECTION AND PROPAGATION IN ENDANGERED SPECIES OF FAUNA AND FLORA (2011), *available at* http://www.env.go.jp/nature/yasei/hozonho/list_project.pdf (Japanese source).

³³ See Yamagishi, *supra* note 29; see also BirdLife Int'l, *Short-Tailed Albatross Chicks Moved out of the Shadow of the Volcano*, http://www.birdlife.org/news/news/2008/03/start_translocation.html (last visited Apr. 7, 2012) (describing additional financial contributions from several conservation groups).

³⁴ See Final Rule to List the Short-Tailed Albatross as Endangered in the United States, 65 Fed. Reg. 46,643, 46,649 (July 31, 2000) (codified at 50 C.F.R. § 17.11) (discussing how listing will enhance protections for and United States participation in the short-tailed albatross); *US-Japan Migratory Bird Treaty Consultative Meeting in Tokyo*, JAPAN ENV'T. Q., Dec. 2002, at 6, 6, *available at* <http://www.docstoc.com/docs/38581497/Japan-Environment-Quarterly> (discussing meetings between the countries focused on seabirds).

³⁵ See *US-Japan Migratory Bird Treaty Consultative Meeting in Tokyo*, *supra* note 34, at 6.

³⁶ Press Release, Ministry of the Env't, Gov't of Japan, Announcing the 5th Japanese–American Migratory Bird Protection Treaty Conference, 7th Japanese–Russian Migratory Bird Protection and Research Conference (Feb. 10, 2009), <http://www.env.go.jp/press/press.php?serial=10699> (last visited Apr. 7, 2012) (Japanese source).

³⁷ Laura Williams, *The Secret Lives of Sea Eagles*, NAT'L WILDLIFE, Dec./Jan. 2009, at 30H, 30P.

Australia,³⁸ and on black-faced spoonbills (*Platalea minor*) and Saunders's gulls (*Larus saundersi*) with China and Korea³⁹ is also facilitated by MBTs. Exchange of information on avian influenza is also a new phenomenon in the MBT scheme.⁴⁰

These once isolated achievements are starting to form a network of international conservation efforts. Australia, China, and Japan have held the Meeting of the Parties at the same venue since 1995, and the United States, Russia, and Japan have followed suit since the early 2000s.⁴¹ These meetings allow countries to share information and discuss matters collaboratively in informal joint meetings following a bilateral Meeting of the Parties.⁴²

To strengthen multinational cooperation for migratory bird conservation, Australia and Japan, as well as Wetlands International, proposed a regional partnership initiative at the 2002 World Summit on Sustainable Development.⁴³ This materialized as "The Partnership for the East Asian-Australasian Flyway" in 2006.⁴⁴ Although it is an informal and voluntary initiative, currently twenty-seven partners, including fourteen governments, three intergovernmental agencies, and ten international nongovernment organizations are participating as partners.⁴⁵ Thus, ICBP's 1960 resolution to expand the network of MBTs in the Asian region has finally started to take shape.

³⁸ Press Release, Ministry of the Env't, Gov't of Japan, Announcement and Results of the 13th Japanese-Chinese Migratory Bird Protection Protocol Meeting, the 15th Japanese-Australia Migratory Bird Protection Protocol Meeting and the 10th Japanese-Korean Migratory Bird Protection Co-operative Meeting (Dec. 16, 2010), <http://www.env.go.jp/press/press.php?serial=13270> (last visited Apr. 7, 2012) (Japanese source).

³⁹ *Id.*

⁴⁰ See, e.g., Ministry of the Env't, Gov't of Japan, *supra* note 36; see also Convention on Migratory Species, *CMS & AWEA and Avian Influenza*, <http://www.cms.int/avianflu/index.htm> (last visited Apr. 7, 2012).

⁴¹ See ROBERT BOARDMAN, *THE INTERNATIONAL POLITICS OF BIRD CONSERVATION: BIODIVERSITY, REGIONALISM, AND GLOBAL GOVERNANCE* 159–61 (2006); Press Release, Ministry of the Env't, Gov't of Japan, Eleventh Consultative Meeting of JCMB and the 13th Consultative Meeting of JAMBA Held (May 31, 2006), <http://www.env.go.jp/en/headline/headline.php?serial=80> (last visited Apr. 7, 2012); Press Release, Ministry of the Env't, Gov't of Japan, Fourth Consultative Meeting of the Japan-US Migratory Bird Agreement and the 6th Consultative Meeting of Japan-Russia Migratory Bird Protection Held (Oct. 19, 2006), <http://www.env.go.jp/en/headline/headline.php?serial=185> (last visited Apr. 7, 2006).

⁴² See, e.g., Austl. Gov't Dep't of Sustainability, Env't, Water, Population & Cmty's., *Bilateral Migratory Bird Agreements*, <http://www.environment.gov.au/biodiversity/migratory/waterbirds/bilateral.html> (last visited Apr. 7, 2012).

⁴³ See Austl. Gov't Dep't of Sustainability, Env't, Water, Population & Cmty's., *East Asian-Australasian Flyway Partnership*, <http://www.environment.gov.au/biodiversity/migratory/waterbirds/flyway-partnership/index.html> (last visited Apr. 7, 2012).

⁴⁴ See *id.*; see also P'ship for the E. Asian-Australasian Flyway, *The Partnership for the East Asian-Australasian Flyway*, <http://www.eaaflyway.net/index.php> (last visited Apr. 7, 2012).

⁴⁵ Partners include the United States, Russia, China, Japan, Australia, New Zealand, BirdLife International, International Union for Conservation Nature, and World Wildlife Fund. P'ship for the E. Asian-Australasian Flyway, *Partners*, <http://www.eaaflyway.net/partners.php> (last visited Apr. 7, 2012).

III. ARE MBTs OUTDATED AND LOSING THEIR MERITS?

As shown, MBTs have helped to facilitate domestic wildlife conservation law and policy. MBTs, however, are known to have a lot of gaps and weak points.⁴⁶ Since the 1970s, many multinational environmental treaties have been signed and this process has seemingly become the mainstream of international environmental law.⁴⁷ This begs the question: Are MBTs outdated and losing their significance as an international conservation tool? This Part undertakes a comparative analysis between multinational wildlife treaties and MBTs to answer the question of MBT value.

The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention),⁴⁸ was signed in 1971 and has been successful in facilitating national and local governments to protect important wetlands around the globe.⁴⁹ The Ramsar Convention requires signatories to register internationally significant wetland sites and work to conserve the sites.⁵⁰ Although MBTs generally have provisions such as “[e]ach Contracting Party shall endeavor to establish sanctuaries and other facilities for the protection or management of migratory birds,”⁵¹ the Ramsar Convention’s mechanism is more direct in conserving the wetlands on which many migratory birds depend.⁵²

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁵³ has been the driving force in regulating international trade of endangered wildlife throughout the world.⁵⁴ After entering into force in 1975, CITES has almost taken over the MBTs’ ancillary task of regulating trade of endangered bird species.⁵⁵ Domestic laws, such as the Japanese Endangered Species Act, rely heavily on CITES for international issues since CITES is now the driving force of international endangered species conservation and is far more comprehensive than

⁴⁶ See generally Vicky J. Meretsky et al., *Migration and Conservation: Frameworks, Gaps, and Synergies in Science, Law, and Management*, 41 ENVTL. L. 447, 522–29 (2011) (discussing gaps in law and policy affecting migratory species, including uneven protection across political boundaries).

⁴⁷ Brad L. Bacon, *Enforcement Mechanisms in International Wildlife Agreements and the United States: Wading Through the Murk*, 12 GEO. INT’L ENVTL. L. REV. 331, 337–38 (2000).

⁴⁸ Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 11,084, 996 U.N.T.S. 245, *amended by* Protocol to Amend the Convention, Dec. 3, 1982, 1427 U.N.T.S. 344, *and* Amendments to Articles 6 & 7 of the Convention, May 28, 1987, 1824 U.N.T.S. 345 [hereinafter Ramsar Convention].

⁴⁹ Bacon, *supra* note 47, at 360.

⁵⁰ Ramsar Convention, *supra* note 48, arts. 2(1), 3(1).

⁵¹ *E.g.*, U.S./Japan MBT, *supra* note 5, art. III(3).

⁵² See Ramsar Convention, *supra* note 48, arts. 2–4 (requires designation of wetlands, planning and promotion of conservation, and establishment of nature reserves).

⁵³ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087 [hereinafter CITES].

⁵⁴ See Laura H. Kosloff & Mark C. Trexler, *The Convention on International Trade in Endangered Species: No Carrot, But Where’s the Stick?*, [1987] 17 Env’tl. L. Rep. (Env’tl. Law Inst.) 10,222, 10,227 (1987).

⁵⁵ See MICHAEL BOWMAN ET AL., *LYSTER’S INTERNATIONAL WILDLIFE LAW* 220 (2d ed. 2010).

MBTs.⁵⁶ CITES is one of the most popular international treaties, signed and ratified by many nations around the world.⁵⁷ An endangered species enjoys almost global protection once listed in the CITES Appendices⁵⁸—something impossible in the bilateral scheme of the MBTs.

Although the Ramsar Convention and CITES are effective devices for the conservation of migratory birds, their main purpose is different from MBTs. The scope of CITES is limited to conservation of endangered species through regulation of international trade.⁵⁹ Therefore, it may be able to replace provisions on endangered species found in some MBTs (such as the U.S./Japan MBT); however, it cannot replace the main goal of MBTs—conservation of migratory birds in general. The Ramsar Convention is somewhat more dedicated to the conservation of migratory birds, as its full title shows.⁶⁰ However, not all migratory birds are dependent on wetlands,⁶¹ nor is wetland conservation the only means of conservation.⁶² Therefore, MBTs are more comprehensive and more direct when addressing migratory birds.

Another powerful tool, the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention)⁶³ was signed in 1979. This Convention aims to conserve not only migratory birds, but also

⁵⁶ Compare Kishō yasei dōshokubutsushu hozon hōshin [Basic Policy for the Conservation of Rare Species of Wild Fauna and Flora], Prime Minister's Office Pub. Notice No. 24 of 1993, II 2 (describing listing of international species under the Japanese Endangered Species will consist of species either listed in app., I of the CITES or bird species informed as endangered by counterparties of the MBTs), with Japanese Endangered Species Act, *supra* note 4, art. 6 (making it the Ministry of the Environment's role to draft the basic strategy for conservation of endangered species, including listing criteria, and seek Cabinet approval); see also BOWMAN ET AL., *supra* note 55, at 484.

⁵⁷ CITES, *supra* note 53, 1346–50; Kosloff & Trexler, *supra* note 54, at 10,227.

⁵⁸ See CITES, *supra* note 53, art. II; see also CITES, *How CITES Works*, <http://www.cites.org/eng/disc/how.php> (last visited Apr. 7, 2012) (noting that all countries that sign CITES must follow CITES even when trading with a country that is not a member of the agreement).

⁵⁹ CITES, *supra* note 53, art. II.

⁶⁰ Ramsar Convention, *supra* note 48.

⁶¹ The Ramsar Convention defines waterfowl as “birds ecologically dependent on wetlands.” *Id.* art. 1(2). Most migratory birds depend on wetlands to a certain degree, but many of them depend primarily on other habitats. Robert E. Stewart, Jr., *Technical Aspects of Wetlands: Wetlands as Bird Habitat*, in NATIONAL WATER SUMMARY ON WETLAND RESOURCES (Judy D. Fretwell et al. eds., 1996), <http://water.usgs.gov/nwsum/WSP2425/birdhabitat.htm> (last visited Apr. 7, 2012); see also Hiroyoshi Higuchi, *Bird Migration and the Conservation of the Global Environment*, 153 J. ORNITHOLOGY (forthcoming Apr. 2012), available at <http://www.springerlink.com/content/e38jg35678h23l50/> (satellite-tracking of 20 species of migratory birds in East Asia shows some are dependent on wetlands while some species, at least directly, are not).

⁶² See, e.g., Lynne Trulio, U.S. Env'tl. Prot. Agency, *Basics of Bird Conservation in the U.S.*, <http://www.epa.gov/owow/birds/basics.html> (last visited Apr. 7, 2012).

⁶³ Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333 [hereinafter Bonn Convention].

migratory terrestrial and marine animals.⁶⁴ Despite minor technical issues, it is fair to say that the Bonn Convention has the capacity to replace MBTs because the Bonn Convention provides broader and more comprehensive coverage than MBTs.⁶⁵ The greatest advantage of the Bonn Convention is the range it can cover, both geographically and taxonomically. Geographically, it strives to cover the entire range of protected species, not just two countries.⁶⁶ Taxonomically, it covers not only birds, but also the whole animal kingdom (including fish, reptiles, and even insects).⁶⁷

The Bonn Convention's conservation mechanism comprises two levels. The first level involves endangered migratory species, listed in Appendix I.⁶⁸ Parties that are "range states" of the species listed in Appendix I bear the obligation to protect them.⁶⁹ The second level is Appendix II.⁷⁰ Article IV of the Convention states that "Appendix II shall list migratory species which have an unfavorable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international co-operation that could be achieved by an international agreement."⁷¹ Interestingly, however, the Convention itself does not apply any direct measures, but directs the "range states" to make ancillary agreements,⁷² such as the 1995 African–Eurasian Migratory Waterbirds Agreement (AEWA).⁷³ Consolidating MBTs in the East Asian–Australasian region into an agreement under the Bonn Convention similar to the AEWA would be an ideal goal for the future.

Unfortunately, the merits of the Bonn Convention are still speculative for a number of reasons. First, participation in the Bonn Convention, especially in the East Asian flyway and the Northern Pacific Rim, is limited. Only Australia, New Zealand, and the Philippines are signatories in the East Asian flyway.⁷⁴ Neither Japan, China, South Korea, Russia, Canada, the

⁶⁴ *Id.* art. I(1)(a); see also Richard Caddell, *International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 113, 115–16 (2005).

⁶⁵ Compare Bonn Convention, *supra* note 63, arts. I(1)(a), II(1), V (covering all species and their Range States with no expiration date), with Japan/China MBT, *supra* note 10, arts. 1, 6(2) (limiting the scope of the agreement to migratory birds between the two countries with an optional expiration date).

⁶⁶ See Caddell, *supra* note 64, at 116.

⁶⁷ See Bonn Convention, *supra* note 63, art. I(1)(a).

⁶⁸ *Id.* art. III(1)–(3).

⁶⁹ *Id.* art. III(5).

⁷⁰ *Id.* art. IV.

⁷¹ *Id.* art. IV(1).

⁷² *Id.* art. IV(3).

⁷³ Agreement on the Conservation of African–Eurasian Migratory Waterbirds, Aug. 15, 1996, 2365 U.N.T.S. 203.

⁷⁴ See CONVENTION ON MIGRATORY SPECIES, PARTIES TO THE CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS AND ITS AGREEMENTS (Feb. 1, 2012), available at http://www.cms.int/about/Partylist_eng.pdf [hereinafter CMS, PARTIES TO THE CONVENTION]; see also CONVENTION ON MIGRATORY SPECIES, CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS: MAP OF 116 PARTIES (Oct. 1, 2011), available at http://www.cms.int/about/map/world_english.jpg.

United States, nor Mexico is a signatory.⁷⁵ As a unique issue for Japan, the government's reluctance towards the Bonn Convention is related to its pro-whaling policy.⁷⁶ The Japanese government wants to keep a distance from the Bonn Convention, which promotes measures to conserve cetaceans as migratory species.⁷⁷ It is true that nonparty states can join ancillary agreements or memoranda of understanding (MOUs) (which unlike agreements are not legally binding) as signatories,⁷⁸ which is the case for the United States, Russia, and China.⁷⁹ However, it is also true that party states are encouraged, but are not obligated, to join any agreements or MOUs, even if they are a "range state."⁸⁰ Several party states have not signed a single agreement or MOU.⁸¹ The lack of participation in the Bonn Convention's mechanism suggests that MBTs are still necessary.

The second issue is the complexity of multinational treaties. Although Japan's attitude towards the Bonn Convention may be peculiar, many nations have their own concerns which may not always be logical. Those concerns often render decision making very difficult and cumbersome at the multinational level. CITES meetings have become politically charged.⁸² As a result, listing species under CITES is time-consuming and led by political intentions and national interests rather than by science.⁸³ There is no guarantee that decision making under the Bonn Convention is immune from these problems. As a matter of fact, progress on making ancillary

⁷⁵ See CMS, PARTIES TO THE CONVENTION, *supra* note 74.

⁷⁶ Anne M. Creason, Comment, *Culture Clash: The Influence of Indigenous Cultures on the International Whaling Regime*, 35 CAL. W. INT'L L.J. 83, 105 & nn. 217–18 (2004).

⁷⁷ See, e.g., CONVENTION ON MIGRATORY SPECIES, CMS: AGREEMENT SUMMARY SHEETS 8, 12, 24, 30 (2012), available at http://www.cms.int/pdf/en/summary_sheets/AgmtSumSheet_engl.pdf (summarizing agreements entered into under the Bonn Convention that relate to the conservation of cetaceans).

⁷⁸ Bonn Convention, *supra* note 63, art. V(2), (4)(f).

⁷⁹ See *id.* pmbl. n.1 (listing contracting Parties and demonstrating that neither the United States, Russia, nor China are Parties to the Convention); see, e.g., CONVENTION ON MIGRATORY SPECIES, *supra* note 77, at 16, 20 (detailing several MOUs, including ones to which China, Russia, and the United States are signatories).

⁸⁰ See Bonn Convention, *supra* note 63, art. IV(3), (4).

⁸¹ For example, Panama, a Party to the Convention, does not seem to have signed an ancillary agreement or MOU. See *id.* pmbl. n.1 (listing contracting parties); see also CONVENTION ON MIGRATORY SPECIES, *supra* note 77 (listing agreements and MOUs, none of which lists Panama as a signatory).

⁸² See, e.g., Melissa Geane Lewis, *CITES and Rural Livelihoods: The Role of CITES in Making Wildlife Conservation and Poverty Reduction Mutually Supportive*, 12 J. INT'L WILDLIFE L. & POL'Y 248, 255 (2009) (describing the difficulties of discussing livelihood concerns in "the politically charged atmosphere of CITES meetings").

⁸³ See Thomas Gehring & Eva Ruffing, *When Arguments Prevail Over Power: The CITES Procedure for the Listing of Endangered Species*, GLOBAL ENVTL. POL., May 2008, at 123, 130 (2008) (noting that many species listing decisions under CITES seem to "reflect political expediency rather than scientific data").

agreements has been “disappointing to record.”⁸⁴ By the end of 2011, only seven formal agreements were adopted.⁸⁵

In conclusion, bilateral MBTs have merits as an important international conservation tool and are worth maintaining as a safety net to fill the gap of emerging multinational schemes. After all, multinational conservation treaties and bilateral MBTs are not exclusive and can work harmoniously.

IV. MAKING MORE USE OF THE MBT: FORGOTTEN TOOL IN THE BOX

MBTs are treaties tailored for avian conservation and are aimed to be comprehensive for that task. MBTs not only govern regulation of “take” of migratory birds,⁸⁶ but also urge the establishment of sanctuaries,⁸⁷ the taking of measures to address ocean pollution,⁸⁸ and the control of importation of hazardous animals and plants as well as introduction of animals and plants to ecologically sensitive islands.⁸⁹ The vulnerability of island ecosystems is strongly expressed in the U.S./Japan MBT—in not only Article VI, but also directly within the Preamble.⁹⁰ Other MBTs to which Japan has signed have similar provisions to address invasive species, especially in islands,⁹¹ but in Japan, these provisions are largely overlooked.

However, it was not until 2004, when Japan promulgated the Invasive Alien Species Act (Japanese IAS),⁹² that Japan began to regulate importation of foreign species for purely ecological reasons.⁹³ Even then, the Japanese IAS addresses only a limited number of species and does not address domestic introduction—even to ecologically vulnerable islands such as the Bonin and Ryukyu Islands.⁹⁴ Conservationists and scientists have long urged the ministry to take regulatory measures against domestic introduction, especially in remote islands.⁹⁵ From the plain words of the MBTs, it is clear that the Japanese government has a legal obligation to address this issue.⁹⁶

⁸⁴ BOWMAN ET AL., *supra* note 55, at 554.

⁸⁵ See CONVENTION ON MIGRATORY SPECIES, CMS CONVENTION TEXT, AGREEMENTS AND MOUS: VOLUME II - AGREEMENTS 1 (2011), available at http://www.cms.int/publications/pdf/vol_2_agreements.pdf.

⁸⁶ See, e.g., U.S./Japan MBT, *supra* note 5, art. III.

⁸⁷ See, e.g., *id.* art. III(1), (3).

⁸⁸ See, e.g., *id.* art. VI(a).

⁸⁹ See, e.g., *id.* art. VI(b), (c).

⁹⁰ See *id.* pmbl.

⁹¹ See Japan/Russia MBT, *supra* note 8, art. VI(c); Japan/Australia MBT, *supra* note 9, art. VI(c).

⁹² Tokutei gairai seibutsu niyoru seitaikeitō ni kakaru higai bōshi ni kansuru hōritsu [Invasive Alien Species Act], Law No. 78 of 2004 (Japan).

⁹³ See *id.* art. 1.

⁹⁴ For a discussion of issues surrounding the Japanese IAS, see Mitsuhiro A. Takahashi, *A Comparison of Legal Policy Against Alien Species in New Zealand, the United States and Japan—Can a Better Regulatory System Be Developed?*, in ASSESSMENT AND CONTROL OF BIOLOGICAL RISKS 45, 47, 50 (Fumito Koike et al. eds., 2006), available at <http://vege1.kan.ynu.ac.jp/isp/pdf/Takahashi.pdf>.

⁹⁵ See, e.g., Mitsuhiro A. Takahashi, *Cats v. Birds in Japan: How to Reconcile Wildlife Conservation and Animal Protection*, 17 GEO. INT'L ENVTL. L. REV. 135, 138–40 (2004) (discussing

Another strong weapon of MBTs is the trade restrictions for endangered bird species. Those endangered species listed under MBTs deserve protection similar to species listed in the CITES Appendices. Unlike CITES, which features a lengthy and political listing process, the MBT process is unilateral.⁹⁷ It only requires one party to “inform” the other of its decision.⁹⁸ Also, MBTs do not have the “reservation” mechanism for protection of listed species as seen in CITES⁹⁹—one would hope that there might not be such tension between MBT signatories, but it is an important consideration. Regulation of domestic trade is also an issue with MBTs, and will be discussed in the following Part.

Provisions recognizing hunting and gathering rights of indigenous and aboriginal people are another topic covered by MBTs. Such provisions, varying extensively, are found in MBTs signed by the United States as well as Australia.¹⁰⁰ This topic is ignored in Japan.¹⁰¹ Although Japan is keen to claim indigenous whaling at the International Whaling Commission, there are no statutes recognizing aboriginal hunting, gathering, and fishing rights of the Ainu—indigenous people of northern Japan.¹⁰² A new law was passed in 1997 to finally revise the century-long assimilating policy and to recognize and promote indigenous Ainu culture.¹⁰³ Unfortunately, the 1997 law failed to recognize any indigenous rights—either political or economical—including access to natural resources.¹⁰⁴ Provisions of MBTs only *allow* governments to

“alarm among conservationists and scientists” over the predatory pressure from nonnative mongooses and cats in an undeveloped region of Okinawa Island).

⁹⁶ See, e.g., U.S./Japan MBT, *supra* note 5, art. VI(c) (stating the parties shall take measures to “control the introduction of live animals and plants which could disturb the ecological balance of unique island environments”).

⁹⁷ See, e.g., *id.* art. IV(2) (noting that “either Contracting Party” can determine when a bird species is at risk of extinction).

⁹⁸ *Id.* Similar provisions are found in the Japan/Russia MBT, *supra* note 8, art. III(2), and the Japan/Australia MBT, *supra* note 9, art. III(2).

⁹⁹ Compare CITES, *supra* note 53, art. XXIII (outlining the reservation process), with U.S./Japan MBT, *supra* note 5 (lacking a reservation process).

¹⁰⁰ See, e.g., Japan/Australia MBT, *supra* note 9, art. II(1)(d) (allowing traditional cultural hunts to be exempted from the prohibition against taking of migratory birds); U.S./Japan MBT, *supra* note 5, art. III(1)(e) (allowing taking of migratory birds by “Eskimos, Indians, and indigenous peoples of the Trust Territory of the Pacific Islands for their own food and clothing” to be exempted).

¹⁰¹ See, e.g., Japan/China MBT, *supra* note 10 (including no provision allowing for the consideration of indigenous or aboriginal hunting rights).

¹⁰² See Bruce Wallace, *Japan's Whaling Logic Doesn't Cut Two Ways*, L.A. TIMES, Nov. 24, 2007, <http://articles.latimes.com/2007/nov/24/world/fg-whaling24> (last visited Apr. 7, 2012).

¹⁰³ Ainu bunka no shinkō narabini ainu no dentōtō ni kansuru chisiki no fukyū oyobi keihatsu ni kansuru hōritsu [Act on the Promotion of Ainu Culture, and Dissemination and Enlightenment of Knowledge About Ainu Tradition], Law No. 52 of 1997 (Japan). For the English summary, see Foundation for Research & Promotion of Ainu Culture, *Profile of FRPAC: Law for the Promotion of the Ainu Culture and for the Dissemination and Advocacy for the Traditions of the Ainu and the Ainu Culture*, http://www.frpac.or.jp/eng/e_prf/profile06.html (last visited Apr. 7, 2012).

¹⁰⁴ See Morihiro Ichikawa, *Understanding the Fishing Rights of the Ainu of Japan: Lessons Learned from American Indian Law, the Japanese Constitution, and International Law*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 245, 283 (2001).

recognize indigenous hunting and gathering rights and do not proactively require recognizing them.¹⁰⁵ Another possibility to make better use of MBTs is in harmonizing implementation. One of the major features of the MBTs is the regulation of the “take” of migratory birds.¹⁰⁶ Wildlife laws in Japan, which implement the MBTs, narrowly define “takings” compared to American counterparts—including the MBTA.¹⁰⁷ The Japanese wildlife and game code’s provision on take is defined simply as “capture or kill or injure.”¹⁰⁸ The Ministry of the Environment has in the past issued a memorandum stating that knowingly cutting a tree with a bird nest can constitute a “take.”¹⁰⁹ However, there are no reports of prosecution of such incidental takes, even with knowledge of harm.¹¹⁰ MBTs do not have definitive provisions for what is a “take.” Yet, incidental take of migratory birds, including electrocution by power lines, has been found in violation of the MBTA.¹¹¹

Under current MBTs it is up to the domestic legislators to define what comprises “take.” That said, it contradicts the spirit of the MBTs if one party’s definition of “take” is considerably narrower than the other party’s definition thereby decreasing the scope of protection. To broaden the scope of protection in Japanese law, harmonization under the MBT could be used to effectuate this change. This proposal is particularly important at this time because risks from incidental takings are as prevalent as ever due to wind energy facility impacts on migratory birds.¹¹² MBTs should not be silent on how to handle the risk from wind energy to migratory and nonmigratory birds.

¹⁰⁵ See, e.g., Japan/Australia MBT, *supra* note 9, art. II(1) (stating only that exceptions to the prohibition against taking migratory birds, such as an exception for traditional cultural hunts, *may* be allowed).

¹⁰⁶ See, e.g., U.S./Japan MBT, *supra* note 5, art. III(1); Japan/Russia MBT, *supra* note 8, art. II(1); Japan/Australia MBT, *supra* note 9, art. II(1).

¹⁰⁷ See 16 U.S.C. § 701 (2006) (defining “take” as defined in 50 C.F.R. 10.12); 50 C.F.R. § 10.12 (2005).

¹⁰⁸ Chōjō no hogo oyobi shuryō no tekiseika ni kansuru hōritsu [Wildlife Protection and Proper Hunting Act] [hereinafter Wildlife Act], Act No. 88 of 2002, art. 2 (Japan). For the English summary, see MINISTRY OF THE ENV’T, GOV’T OF JAPAN, SUMMARY OF THE WILDLIFE PROTECTION AND HUNTING MANAGEMENT LAW, *available at* http://www.env.go.jp/en/laws/nature/law_wphm-summary.pdf.

¹⁰⁹ See Mitsuhiro Takahashi, *Is It Illegal to Cut Down a Nesting Tree?*, 7 BINOS 19, 25 (2000).

¹¹⁰ Interview with Mai Yamamoto, Deputy Dir. of the Office of Wildlife Mgmt. at Ministry of the Env’t, in Tokyo, Japan (Mar. 21, 2012).

¹¹¹ See, e.g., United States v. Moon Lake Elec. Ass’n, 45 F. Supp. 2d 1070, 1071, 1073–74 (D. Colo. 1999) (denying respondent’s motion to dismiss, because the MBTA applies to both intentionally and unintentionally harmful takings of migratory birds, and therefore the electrocution of 38 birds of prey by the respondent’s power lines subjected the respondent to prosecution under the Act).

¹¹² See Alex Arensberg, *Are Migratory Birds Extending Environmental Criminal Liability?*, 38 ECOLOGY L.Q. 427, 441 (2011).

V. MAKING MBTs MORE USEFUL: REFURBISHING THE TOOL BOX

As discussed previously, MBTs have advantages and weaknesses. This Part entertains several suggestions to reform and amend MBTs to overcome their weaknesses and improve avian conservation on a broader scale.

MBTs only apply to limited countries. In Japan, MBTs between Japan and China, Russia, and the United States cover most of the breeding range for waterfowl; however, Southeast Asian countries that comprise the major wintering range for migrating songbirds are not covered.¹¹³ A similar situation exists in the United States where there are no MBTs signed with states south of Mexico.¹¹⁴

To fill these gaps, the Partnership for the East Asian Australasian Flyway (Flyway Partnership) was organized in 2006.¹¹⁵ The Flyway Partnership has been successful in encouraging countries to cooperate in conservation efforts and providing a platform for bilateral MBTs in a multinational forum.¹¹⁶ However, the Flyway Partnership is informal, voluntary, and without legal foundation.¹¹⁷ Thus, consolidation of the bilateral treaties to a multinational, legal regime remains lacking.

The subject matter of MBTs should also be amended to strengthen their use and involvement in avian conservation. MBTs are aimed to protect “migratory birds” with several MBTs including “birds [which] are in danger of extinction.”¹¹⁸ Although the definition of “migratory birds” differs between individual MBTs, those drafted after the 1970s tend to be more restrictive.¹¹⁹ In a typical MBT, as in the U.S./Japan MBT, the same subspecies—or species if there are no subspecies—has to be found on both sides to be “migratory.”¹²⁰

This definition excludes nonmigratory birds from the scope of MBTs.¹²¹ For MBTs to have greater impact they should be amended to target not only conservation of migratory and endangered species, but bird species

¹¹³ See *supra* notes 8–10; P’ship for the E. Asian-Australasian Flyway, *supra* note 44 (describing the East Asian–Australasian Flyway as one of the world’s major migratory bird flyways, covering 22 countries, ranging from Russia through East and Southeast Asia to Australia and New Zealand; however, not all of the countries located within the flyway participate in the Partnership, which is not itself an MBT).

¹¹⁴ See U.S. Fish & Wildlife Serv., *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, <http://www.fws.gov/laws/lawsdigest/treaty.html> (last visited Apr. 7, 2012).

¹¹⁵ P’ship for the E. Asian-Australasian Flyway, *supra* note 44.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See, e.g., U.S./Japan MBT, *supra* note 5, pmb.; see also Japan/Australia MBT, *supra* note 9, pmb.

¹¹⁹ Compare U.S./Canada Convention, *supra* note 2, art. I (defining migratory birds with a nonrestrictive list of several generic species), with Agreement for the Protection of Migratory Birds and Their Environment, China-Austl., art. I, Oct. 20, 1986, 1535 U.N.T.S. 273 (defining migratory birds as only those birds “for which there is reliable evidence of migration between the two countries” and providing a restrictive species list). For discussion of the terminology of migratory birds in MBTs, see BOWMAN ET AL., *supra* note 55, at 214–16.

¹²⁰ U.S./Japan MBT, *supra* note 5, art. II(1).

¹²¹ *Id.*

generally. If this can be achieved, importation of song birds, which is one of the major issues in avian conservation in Eastern Asia, can be regulated more promptly.¹²²

Keeping songbird pets has long been a tradition in Eastern Asia.¹²³ In Japan, the Japanese white-eye (“*Mejiro*” in Japanese) (*Zosterops japonicus*) is the favorite because of its eloquent song.¹²⁴ There are contests to compete with white-eyes for their song.¹²⁵ For decades, Japanese conservation agencies have discouraged and limited this hobby.¹²⁶ Although white-eyes are common in Japan, bird fanciers’ preference to certain “breeds” can apply considerable pressure on local populations, especially with the fanciers’ tendency to hoard many birds for these contests.¹²⁷ The policy has been to phase out keeping wild birds as pets. Since 1999, permits limit ownership to one bird—for the Japanese white-eye only—per household and the Ministry of the Environment has announced it will stop issuing permits after 2012.¹²⁸ The author thinks preserving a cultural tradition is a respected way of wildlife utilization; however, current practices lead to abuse and therefore strict regulation is unavoidable.

In reality, white-eyes are still kept as pets in considerable numbers and contests are still being held.¹²⁹ What makes this possible? The answer lies in the importation of a Chinese subspecies of Japanese white-eye (*Z.j. simplex*).¹³⁰ It is not the case that imported white-eyes are kept as pets. Bird

¹²² See BirdLife Int’l, *East Asia-Pacific Flyway*, http://www.birdlife.org/flyways/asia_pacific/index.html (last visited Apr. 7, 2012); see also Rachel Nuwer, *Plumes and Pathogens: Human Fascination with Birds Can Jeopardize Our Health*, SCI. AM., Aug. 29, 2011, <http://blogs.scientificamerican.com/guest-blog/2011/08/29/plumes-and-pathogens-human-fascination-with-birds-can-jeopardize-our-health/> (last visited Apr. 7, 2012); see also Paul Jepson & Richard J. Ladle, *Bird-Keeping in Indonesia: Conservation Impacts and the Potential for Substitution-Based Conservation Responses*, 39 ORYX 442, 442 (2005).

¹²³ See, e.g., Honolulu Zoo, *Japanese White-Eye*, http://www.honolulu zoo.org/japanese_white-eye.htm (last visited Apr. 7, 2012); PRINCE NOBUSUKE TAKATSUKASA, JAPANESE BIRDS 43–44 (1941).

¹²⁴ See Honolulu Zoo, *supra* note 123; TAKATSUKASA, *supra* note 123, at 43–44.

¹²⁵ Honolulu Zoo, *supra* note 123 (noting this bird is often used in bird song competitions).

¹²⁶ See Ministry of the Env’t, Gov’t of Japan, *Aigan shiyō [Keeping Wildlife as Pets]*, <http://www.env.go.jp/nature/choju/effort/effort3/index.html> (last visited Apr. 7, 2012) (Japanese source).

¹²⁷ See *Vox Populi: Song of Caged Bird Not as Sweet as Those in Wild*, ASAHI SHIMBUN ENGLISH WEB ED., July 19, 2011, <http://www.asahi.com/english/TKY201107180309.html> (last visited Apr. 7, 2012).

¹²⁸ Ministry of the Env’t, Gov’t of Japan, *supra* note 126; Chōjō no hogo o hakaru tameno jigiyō no jisshi ni kansuru kihon shishin [Basic Guidelines for the Implementation of Wildlife Management Project], Ministry of the Env’t Pub. Notice No. 59 of 2011, <http://www.env.go.jp/nature/choju/plan/plan1.html> (last visited Apr. 7, 2012) (Japanese source); see also GLOBAL BIODIVERSITY STRATEGY OFFICE, THE THIRD NATIONAL BIODIVERSITY STRATEGY OF JAPAN 203 (2008) (pointing out the abuse of the permitting system and suggesting it “necessary to deliberate on the necessity of the said existing permission system”), *translation available at* <http://www.biodic.go.jp/convention/The%20Third%20NBS.pdf>.

¹²⁹ See, e.g., *Vox Populi: Song of Caged Bird Not as Sweet as Those in Wild*, *supra* note 127.

¹³⁰ See Robert L. Pyle & Peter Pyle, Hawaii Biological Survey, *Japanese White-Eye*, <http://hbs.bishopmuseum.org/birds/rlp-monograph/pdfs/07-ZOST-ESTR/JAWE.pdf> (last visited Apr. 7,

fanciers claim that the Chinese-imported birds cannot sing like the Japanese birds and are therefore of no value.¹³¹ Imported birds are used to disguise poaching of Japanese birds.¹³² Importation papers are fraudulently applied to Japanese birds, and the fates of the imported birds are unknown.¹³³

To address this problem, the Ministry of the Environment developed several initiatives to make it possible to distinguish the domestic White-eye from imported ones. There are identification manuals and regulatory obligations to band imported birds.¹³⁴ However, identification is often tricky and bands can be forged.¹³⁵ The Ministry of the Environment, however, did not move forward to ban the importation from China.¹³⁶ The Ministry of the Environment feared that restricting imports could trigger conflicts with the General Agreement on Tariffs and Trade and World Trade Organization rules.¹³⁷ The Ministry of the Environment would also have to consult with and convince the Ministry of Economy, Trade, and Industry (METI) of the need for such bans.¹³⁸ Because METI is one of the strongest ministries in Japan, the Ministry of the Environment's reluctance to pursue trade restrictions is understandable.¹³⁹

Fortunately, the wild bird trade in Eastern Asian countries has diminished greatly since 2007 due to the avian influenza crises.¹⁴⁰ That, however, is only a coincidence. If MBTs between Japan and China had provisions to address conservation of songbirds such as the white-eyes, it

2012) (stating the natural habitat of *Z.j. simplex* is mainland China and that of *Z.j. japonicas* is mainland Japan).

¹³¹ See *Vox Populi: Song of Caged Bird Not as Sweet as Those in Wild*, *supra* note 127; Kimio Endo, *Chugokusan mejiro [Japanese White-eye of Chinese Origin]*, in HANDBOOK OF ALIEN SPECIES IN JAPAN 88 (Ecological Society of Japan eds., 2002).

¹³² See *id.*

¹³³ See *id.* Likely, they are either destroyed—raising an animal welfare issue—or released in the wild, which raises issues of exotic species and gene pollution.

¹³⁴ Ministry of the Env't, Gov't of Japan, *supra* note 126; GLOBAL BIODIVERSITY STRATEGY OFFICE, *supra* note 128, at 203; see Wildlife Act, *supra* note 108, art. 26 (delegating authority to designate identification scheme on certain species upon importation to the Minister of the Environment.); Chōjō no hogo oyobi shuryō no tekiseika ni kansuru hōritsu shikō kisoku [Ordinance to Enforce the Wildlife Protection and Proper Hunting Act], Ministry of the Env't Ministerial Order No. 28 of 2002, art. 29-2, 29-3 & form 7-3, <http://law.e-gov.go.jp/htmldata/H14/H14F18001000028.html> (last visited Apr. 7, 2012) (Japanese source) (designating species in which bands should be required, including Japanese white-eye).

¹³⁵ See generally YAMASHINA INSTITUTE OF ORNITHOLOGY, MEJIRO SHIKIBETSU MANYUARU [IDENTIFICATION MANUAL FOR JAPANESE WHITE-EYE] (2d ed., 2001) (including numerous photographs of birds indistinguishable to nonexperts), available at <http://www.env.go.jp/nature/choju/effort/effort3/mejiro.pdf> (Japanese source).

¹³⁶ See GLOBAL BIODIVERSITY STRATEGY OFFICE, *supra* note 128, at 203 (mentioning nothing of importation bans despite difficulty of identification).

¹³⁷ See Ministry of the Env't, Gov't of Japan, *Harmonizing Environment and Trade Policies*, <http://www.env.go.jp/en/earth/iec/hetp/ch3.html> (last visited Apr. 7, 2012).

¹³⁸ See Takahashi, *supra* note 4, at 1962.

¹³⁹ See *id.*

¹⁴⁰ See F. Brooks-Moizer et al., *Avian Influenza H5N1 and the Wild Bird Trade in Hanoi, Vietnam*, 14 ECOLOGY & SOC'Y (2008), <http://www.ecologyandsociety.org/vol14/iss1/art28/> (last visited Apr. 7, 2012); Vincent Nijman, *An Overview of International Wildlife Trade from Southeast Asia*, 19 BIODIVERSITY & CONSERVATION 1101, 1110 (2010).

would have been easier for the Ministry of the Environment to persuade METI to halt importation.¹⁴¹ The Japanese White-eye is not covered under the current MBT between Japan and China because they are classified as different subspecies.¹⁴² Therefore, the issues surrounding the white-eye cannot be addressed in the MBT unless the scope of the MBT is broadened to promote conservation of all the bird species in both countries. Unlike the MBT between the United States and Great Britain (Canada), which has broad definitions, later MBTs have narrower definitions of migratory birds. Under later MBTs, protected birds either must show evidence of migration or be found in both countries at the subspecies level.¹⁴³ Even when species are found in both countries, some MBTs, including Japan/China, exclude species that are obviously nonmigratory.¹⁴⁴ Although worth debating, it is not the theme of this Essay to discuss the construction of the term “migratory bird.” Rather the author would like to propose revising and expanding the MBTs to include all bird species, thereby becoming a treaty for avian protection in general. Given the complicated and mobile nature of both the avian and human worlds, it is naïve to expect that international conservation of birds can be achieved by only protecting migratory birds. Hence it is time to learn from the older model utilized in the United States and Great Britain (Canada) MBT which includes a broad variety of avian species.

Provisions relating to regulation of take can also be strengthened by amending the MBT. It would be useful to have definitive provisions to harmonize taking regulations. More importantly, current MBT ambiguity on domestic trade bans should be addressed by amendment of the MBTs. All MBTs have provisions to prohibit sale, purchase, or exchange of migratory birds (including eggs, parts, and products) “taken illegally.”¹⁴⁵ It is not clear, however, whether this includes birds illegally taken in other jurisdictions, including under jurisdiction of the counterparty of the MBT. The Lacey Act¹⁴⁶ of the United States prohibits domestic trade of birds taken in violation of foreign laws,¹⁴⁷ but Japanese laws do not have such prohibitions. Considering

¹⁴¹ See, e.g., James V. Feinerman & Koichiro Fujikura, *Japan: Consensus-Based Compliance*, in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 253, 270-72 (Edith Brown Weiss & Harold K. Jacobson eds., 1998) (discussing the role of the Ministry of International Trade and Industry as the chief agency regulating trade of endangered species and the role of the Ministry of Environment as a consultant “scientific authority”); Takahashi, *supra* note 4, at 1962 (discussing the obstacles the Ministry of Environment faces as a new agency in Japan in its efforts to influence the Ministry of Economy, Trade and Industry). The Ministry of International Trade and Industry was reorganized into the Ministry of Economy, Trade and Industry in 2001. Ministry of Econ., Trade & Indus., *History of METI*, <http://www.meti.go.jp/english/aboutmeti/data/ahistory2009.html> (last visited Apr. 7, 2012).

¹⁴² See Pyle & Pyle, *supra* note 130 (stating the natural habitat of *Z.j. simplex* is mainland China and that of *Z.j. japonicas* is mainland Japan).

¹⁴³ See U.S./Japan MBT, *supra* note 5, art. II(1); Japan/Australia MBT, *supra* note 9, art. I(1).

¹⁴⁴ See Japan/Australia MBT, *supra* note 9, art. I(1)(b); Japan/China MBT, *supra* note 10, art. I(1).

¹⁴⁵ See *supra* notes 106–07 and accompanying text.

¹⁴⁶ Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371–3378 (2006).

¹⁴⁷ *Id.* § 3372(a)(2).

that the language of the MBTA prohibits only the *importation* of birds taken illegally in Canada¹⁴⁸ and the fact that MBT provisions on endangered species only address *importation*,¹⁴⁹ it seems fair to say that MBT prohibition on illegally importing birds does not encompass foreign law violations. Therefore, I would advise amending MBTs to prohibit import and domestic trade of birds in violation of laws of the counterparty state.

VI. CONCLUSION

MBTs are useful tools for international wildlife conservation, even with the emergence of multinational treaties. MBTs are flexible and simple compared with multinational treaties, which are often inflexible, cumbersome, and influenced by international politics. MBTs can fill the gaps left by multinational treaties and the two treaty types can work together to complement and supplement each other. One model to improve the effectiveness of MBTs could be the consolidation of MBTs in regional initiatives like the East Asian–Australasian Flyway and organizing that regional initiative into an ancillary agreement of the Bonn Convention.

MBTs are treaties specifically addressing avian conservation. Achievements of mutual cooperation in the field of research and conservation action highlights the merits of MBTs. MBTs address a wide variety of topics: from regulation of take and trade of migratory birds to taking measures against invasive species, marine pollution, and endangered species preservation. The multitude of MBT targets are not always correctly recognized and implemented in domestic legislations. We should recognize that the MBT provides a mechanism that has not been used as extensively as it should have been used. Making full use of the underutilized merits of MBTs would be beneficial. To extend the advantages and merits of MBTs, however, there is room for amending and revising MBTs to update and broaden their scope geographically and taxonomically. The network of MBTs should be expanded along with refining its contents to strengthen bird conservation.

¹⁴⁸ Migratory Bird Treaty Act, 16 U.S.C. § 705 (2006).

¹⁴⁹ See U.S./Japan MBT, *supra* note 5, art. IV(3).