The Convention on Biological Diversity. Supporting Ecological Sustainability or Prolonging Denial?

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Abstract

Rooted in and carved into the international legal system, the emergence and growth of modern international biodiversity law has brought on the scene important objectives, concepts and principles. Still, recent status reports indicate that regulatory developments have not been successful, and the decline of biodiversity continues all over the world. Against this background the article explores the main features of the Convention on Biological Diversity (CBD). Its objective is to theorise and discuss the CBD, particularly in light of some of the fundamental principles of international law. The principles focused on in this article are: (1) the sovereign right of states to utilise their own natural resources, and (2) their responsibility to prevent environmental damage in other states and in areas beyond their national jurisdiction. It will be argued that the main features of the CBD and its interaction with the above principles are prolonging international denial of what is really needed to support future biodiversity. The method used in the article builds upon some basic features of environmental law methodology (ELM).

1 Introduction

Although somewhat overshadowed by the climate issue, the current continuing decline in biodiversity, really caught the attention of the international community at the turn of the millennium. The international response was to agree to effectively reduce biodiversity losses and to achieve significant reduction of the current extinction rate by 2010.[1] Some venues went further and agreed to the objective of stopping and reversing the current losses at all levels by 2010.[2] Recent assessments and status reports indicate that the 2010 target will be missed.[3] During the 2008 meeting of the Conference of the Parties (COP 9) to the Convention on Biological Diversity[4] (1992) (CBD), new decisions were agreed, including a new multi-year programme for the period 2011-2022.[5] Thus, the forthcoming challenge facing the Conference of the Parties to be held in October 2010 (COP 10) in Nagoya, Japan, is the difficult task of deciding upon a new biodiversity target for the future that will hopefully be realised not only on paper but in nature.[6] To highlight even further the importance of the biodiversity issue, 2010 has been declared an International Year of Biodiversity. Due to this several events have been planned to stress biodiversity's importance and the challenges ahead.[7]

A new biodiversity target by itself, however, will not solve the problem of the current continuing decline in biodiversity. There are several hurdles along the way, some of which relate to law and legal systems. Thus, by applying some aspects of environmental law methodology (ELM), this article argues that particular fundamental principles of international law and the CBD are prolonging international denial of what is needed to support future biodiversity.

In line with the above, the article begins by outlining its methodological approach and basic hypotheses, *cf.* Section 2. Thereafter, Section 3 elaborates the scope and content of two fundamental principles of international law. Due to the importance and overarching character of the CBD, a considerable part of Section 4 will be devoted to the Convention's basic obligations and principles along with some features of the CBD's development. On the basis of Sections 3-4, and in light of the article's principal objective, Section 5 theorises on and discusses the article's objectives. Finally, Section 6 summarises the article's main conclusions.

2 Methodological approach

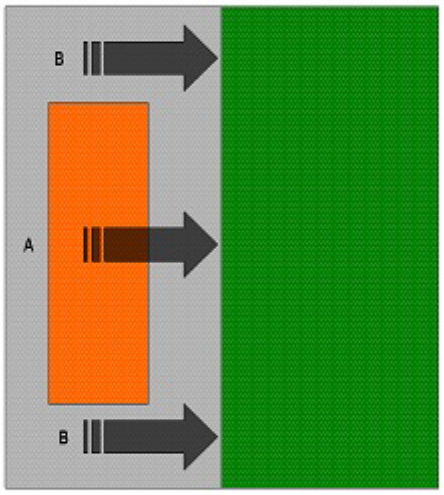
2.1 ELM's main purpose

As stated in Section 1, the article's methodological approach is founded upon some central features of environmental law methodology (ELM).[8] On the basis of the Rule of Law,[9] ELM reflects a proactive methodological approach taking its point of departure from how to reach and maintain ecological sustainability. Based on this foundation, ELM offers arguments, models and theories facilitating the understanding of environmental law, how the law functions in a legal system, and whether it actually works for the environment and

its components.[10] Thus, ELM's reasoning strives to identify and highlight weaknesses and counteractive factors in laws and legal systems as they are or are generally accepted to be. This is mainly done by bringing to the foreground arguments explaining how the establishment of law actually functions (or not).[11] ELM has an anthropocentric point of view towards the concepts of sustainable development and ecological sustainability. Human interests (social, economic and environmental) are all equally important and in the main, impossible to differentiate.[12] However, due to the nature of these interests, the environmental ones are viewed as fundamental perquisites for the successful realisation of both the social and economic ones.[13] This approach is sometimes labelled as strong or ecological sustainability.[14] Since international biodiversity law does not have one absolute or generally accepted definition of *ecological sustainability*, the definition underlying this article is borrowed from ELM. According to it, ecological sustainability is "the situations and conditions in the biosphere that are sufficient for sustaining mankind for innumerable generations to come with reliable and safe resilience, including full biodiversity."[15] To make this article's scope manageable, it focuses primarily on the conservation of biodiversity as being one part of several that are necessary to reach and maintain ecological sustainability.

2.2 The significance of the default

The following section explains one of ELM's models and the basic theory to be used for theorisation and discussion in Section 5. It is based on ELM's fundament and has been developed for international law research. It forms the core of the default theory of law and its significance.[16] The default theory[17] argues that particular international principles (see the following Section), on which international law relating to the environment is based, can, under particular circumstances, become the overriding applicable law. Both the content and the nature of these principles are right- and duty-orientated. Furthermore, they have marginal or even no ties to particular environmental objectives or targets. Consequently, their application is usually founded on the balancing of states´ rights and duties. Viewed from the perspective of ELM, they are thus not particularly supportive of ecological sustainability or biodiversity's future.[18] The circumstances in which the said principles would typically become active and overriding (the default syndrome) are basically the following: (1) when international treaty provisions are rather general (not unusual in the field of international biodiversity law); and (2) when no clear applicable treaty provisions are available on the problem at hand.[19] Moreover, international law does not clearly prohibit states from destroying their own biodiversity.[20] Finally, other states have to tolerate that their biodiversity is diminished to a certain degree by other states´ actions and activities.[21] Turning to the model, *cf.* Figure 1, the light gray area to the left reflects the abstract default where the fundamental principles B are situated. The box A, also on the left side of the model, reflects the available international environmental law (usually treaties) and, in the case of this article, the CBD. The arrows pointing towards the environmental side (right side) of the model reflect the basic fundamentals of the ELM's action-reaction model.[22] As also indicated above, the fundamental principles B are likely to become the active ruling principles under certain circumstances. This is further theorised in Section 6.



3 Fundamental principles

3.1 Generalities

As mentioned in Section 2, two fundamental principles of international law play a decisive role in the international law relating to the environment, including international biodiversity law. The principles relevant to the scope of this article are: (1) the sovereign right of states to utilise and control their natural resources (see further Section 3.2.1) and (2) the duty of states to prevent environmental damage to other states and areas that are beyond their national jurisdiction (see further Section 3.2.2). Although covered separately below, the principles are usually read in conjunction with each other, and the latter principle's scope limits the sovereign right of states stipulated in the former.

3.2 Several issues on scope and application

3.2.1 Sovereign right of states to utilise

Under Principle 2 of the Rio Declaration on Environment and Development (Rio Declaration),[23] states "have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies".[24] This is not an absolute right of states, nor is exercising the right without legal consequences. It is limited by, first, the general principle enshrined in the latter part of Principle 2; second, particular customary rules,[25] and third, existing treaty obligations.[26] International law does not have one definition of the term *natural resource,* and its contents have changed overtime; today it is thought by many to include biodiversity, *inter alia,* due to its intrinsic value.[27] In the principle's application, states would determine what natural resources to utilise and how, but should nevertheless respect relevant international law.[28] Finally, as previously pointed out, international law does not prohibit states from destroying their own natural resources,[29] including their land, soil, forests, fauna and flora and biodiversity, even though such activities may have both regional and global effects to the worse in the long run, as well as challenging to the possible realisation of ecological sustainability.[30] It remains to be seen whether the CBD's affirmation in the preamble that the *conservation* of biodiversity is a *common concern of humankind,* will eventually have the required legal force, *e.g.,* as an accepted customary rule, and in fact limit states in making choices having long-term negative effects on biodiversity. The necessity of taking particular actions in order to conserve biodiversity has been globally accepted. These actions are reflected, *inter alia,* in the CBD although the results have not yet been convincing.[31] Conserving biodiversity as such, presently and in the future, should be an issue that no state should neglect in the name of sovereign rights.[32]

3.2.2 Duty to prevent environmental damage

The latter part of Principle 2 of the Rio Declaration, *i.e.,* the "responsibility [of states] to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction"[33] is as important as the first part of Principle 2.[34] The principle's core includes states´ duty to take anticipatory measures to prevent environmental damage.[35] The standard of care is habitually a *due diligence* standard that includes the duty of states to take *reasonable measures* to protect its neighbouring states. Falling hereunder would, at least, be the duty to introduce the necessary national legislation to control public and private actors in order to protect other state's environmental interests as well as the global environment from environmental damage.[36] As Ebbesson argues, the principle accepts the balancing of environmental interests against economic and social ones.[37] In the absence of a particular treaty obligation, the above standard would be the applicable law.[38] It is a minimum standard and would most likely preclude application of any precautionary approach.[39] To complicate the issue further, international environmental law does not have a useable definition of the term *environmental damage,* nor does it contain any modern quality standards for biodiversity.[40] This lack channels the principle's application onto traditional grounds where the main emphasis is placed on the balancing of states´

rights and duties.[41]

3.2.3 Some concluding remarks

Both of the above principles play a decisive role in the fundaments of international biodiversity law. In the absence of clear treaty obligations to the contrary, they would be the law applicable to biodiversity under the international legal system. The above principles will be further discussed in Section 5.

4 Convention on Biological Diversity

As initially stated this article's objective is to theorise and discuss the CBD by relying on some of the basics of ELM introduced in Section 2. Accordingly much of this Section will be devoted to some of the CBD's basic features. This will provide specific background for the theorisation and discussion in Section 5. Over the years, much has been written about the CBD from many perspectives, and many scholars have analysed and evaluated the treaty and its individual functions.[42] In spite of critical views and several interesting approaches, the CBD has only marginally been viewed from the perspective of ELM.

4.1 CBD's importance

The CBD is widely accepted and at the time of writing, 193 states are parties to it.[43] Some view the CBD as a failure.[44] Moreover, CBD's existence may contribute to false security and prolong the denial of what is really needed to ensure future biodiversity. This is what this article argues. Nevertheless, the CBD's importance should not be underestimated although its existence has not managed to reduce or reverse the current trend of disappearing biodiversity.[45] The Convention should be accepted as a valuable tool in implementing and reaching generally accepted objectives and targets,[46] and, as such, providing a particular global control system. The CBD's parties have transparently recognised the vulnerable state of biodiversity as The Hague Ministerial Declaration (2002) reflects. There the ministers accepted "the commitment to have instruments in place to stop and reverse the current alarming biodiversity loss at the global, regional, sub-regional and national levels by the year 2010."[47] However, as will be argued below, concrete substantive provisions restricting or limiting states in their land use and utilisation of biodiversity are absent from the CBD. Furthermore, such limits are absent from international law relating to the environment. Instead, unfortunately – and in spite of the emergence of sustainable development policies several years before the acceptance of CBD's final text in 1992 – the CBD's principal obligations are carved into an old paradigm that was shaped under very different environmental and social circumstances, long before the political acceptance of sustainable development as an overall and global objective.[48] Moreover, most of the CBD's obligations are open-ended and subject to the discretion of individual parties when implemented at the national level.[49]

4.2 CBD's structure and main obligations

4.2.1 General description

Some scholars view the CBD as a framework convention,[50] and many of its provisions could be categorised as reflecting frameworks. The author of this article views the CBD rather as a mixture of a framework convention and a conventional one, where some of its provisions are frames.[51] On the other hand,[52] the CBD seems to be approached as a framework by its COP, which is best reflected in its active decision-making, as will be further commented on in Section 4.3. The Convention contains 42 substantive articles and two annexes.[53] The substantive provisions of importance to furthering conservation of biodiversity are found in Articles 1-22, and, in particular, in Articles 6-15 (see below in Section 4.2.6). Other provisions tackle international sustainable development policies, including the legal operationalisation of the principle of common but differentiated responsibilities,[54] or are of a formal, procedural or governing nature relating to the operation of the CBD. Some of these provisions are covered in this article.

4.2.2 Governing structure

In line with the development of international treaties in the field of the environment, the CBD creates a hierarchical governing structure. First, at the top is the Conference of the Parties, COP, *cf.* Article 23 of the CBD; second, a permanent subsidiary body (SBSTTA)[55] providing scientific advice,[56] in line with Article 25, and finally, a Secretariat under Article 24 that runs the CBD on a daily basis and provides particular services. This article will not further cover the roles of the SBSTTA, the Secretariat and the various working groups that have been established.[57] Instead the emphasis will be on the COP and its role. In line with Article 23, the COP has a defined role and is competent to take particular decisions to implement and develop the CBD (see further Section 4.3, below).

4.2.3 Objectives

The basic objectives of the CBD are found in Article 1 (1) the conservation of biodiversity; (2) sustainable use of biodiversity's components, and (3) fair and equitable sharing of the benefits arising from the utilisation of genetic resources. For the scope and objectives of this article, the first two objectives are of primary importance and the article views the CBD and its development as fundamental tools to reach and realise these objectives in nature.

4.2.4 Some important terms

As regards terms found in the operative text, tThe conservation of biodiversity relies upon several terms and principles, which the COP has in many instances further developed. However, the CBD's Article 2 provides the basic definitions. The following are the most important ones:[58]

Biodiversity or "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"; Biological resources that "includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity"; Ecosystem that is "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit";Genetic resources or "genetic material of actual or potential value",[59] and Sustainable use is "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations".[60]

Several important terms are not included in Article 2; however, a few of them are present in other articles of the operative text of the treaty. An excellent example is sustainable development. Without any attempt to articulate the contents of sustainable development, direct and indirect references are present in both Article 8(e)[61] and Article 20(4).[62]

As regards further developments – COP decisions, the fact that the operative text of the CBD does not reflect important terms, such as the ecosystem approach, adaptive management, ecological sustainability and the precautionary principle, is perhaps more interesting for this article than the terms that are actually present in the treaty. The reason has to do with their legal status under international law, and whether individual parties actually implement them in their national legal systems and make the necessary changes to ensure their successful legal operationalisation. The CBD's COP has nevertheless elaborated these terms and they are present in the many COP decisions. The most important terms for this article are the following:

Ecosystem approach[63] "is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way."[64] Adaptive management, see below, is a key element in applying the ecosystem approach. The ecosystem approach depends upon accurate scientific information and evaluations, long-time planning and adaption to the current situation. It does not exclude traditional nature conservation approaches, such as establishing nature reserves and national parks or altering traditional natural science definitions.[65]

Twelve complementary principles of the ecosystem approach as well as several focal points for its implementation have been identified.[66] On the basis of global assessments, the CBD COP noted, in its 2008 meeting, that the ecosystem approach had not been applied systematically in the battle against biodiversity loss, and more had to be done to strengthen its usage.[67] Adaptive management[68] constitutes a central element of the ecosystem approach, briefly outlined above. As the adjective indicates, the management method is tailored to "deal with the complex and dynamic nature of ecosystems and the absence of complete knowledge or understanding of their functioning."[69] Thus the fundamental rationale relates to the often non-linear nature of ecosystem processes; they often entail time-lags that may reflect uncertainties and surprises. Finally, particular management measures may be necessary even though certainties and knowledge of causes and effects is lacking.[70] The precautionary principle is not, in so many words, part of the CBD's operative text. The CBD's preamble, however, refers to its core element where the contracting parties note "that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat."[71] Nonetheless, the CBD COP has elaborated several precautionary approaches, including the ecosystem approach, and particularly adaptive management, see above.[72] Several other COP decisions reflect precautionary approaches in particular areas, such as in the field of marine and coastal biodiversity[73] and the battle against alien species.[74]

The above terms will be further discussed in Section 5.

4.2.5 CBD's scope of application

The CBD's geographical scope, which is two-pronged, needs some explanation. In accordance with Article 4(1), and in the case of the components of biodiversity, the CBD's scope of application is confined to each contracting party's national jurisdiction. In practical terms this means that each state has full sovereignty within its national jurisdiction when implementing and applying the CBD. Some of these measures may benefit individual components of marine based biodiversity, such as particular fish stocks and marine mammals. Their utilisation, however, is subject to other conservation measures taken under the law of the sea and also limited by particular international treaties, such as the International Convention for the Regulation of Whaling[75] (1946) and the Convention for the Conservation of Salmon in the North Atlantic Ocean[76] (1982). See also the discussion of the CBD's Article 22. On the other hand, each contracting party, under the CBD or the general principles of international law, is not competent to control components of biodiversity when they are situated within the jurisdiction of other states. Moreover, national management schemes set up for particular fish stocks may control and manage their utilisation in individual cases.[77] In line with Article 4(2), however, the CBD applies to all effects, regardless of where they occur, from processes and activities carried out under the jurisdiction or control of the respective contracting party.[78] This scope of application is in line with the fundamental principles of international law relating to the environment. The effects included are at least the ones from polluting activities carried out or controlled by a contracting party. They probably also include some ecological effects, *inter alia,* the ones originating from the utilisation of shared water resources in border areas.[79] However, it is doubtful whether Article 4(2) adds anything new to international biodiversity law or international law in general. At the same time the CBD, in line with Article 3, stipulates the sovereign right of states to exploit their own resources according to their environmental policies, while bearing the responsibility of ensuring that activities carried out within their jurisdiction or control do not cause environmental damage to states or areas beyond the limits of national jurisdiction.[80]

4.2.6 Main conservation obligations

The CBD's principal conservation measures are found in Articles 6 through 15. Their wording is usually open-ended and no strict limits or bans are found in the CBD.

Several of the articles begin with the following phrase: "Each Contracting Party shall, as far as possible and as appropriate …" This approach weakens the effectiveness of the treaty since the parties have the possibility of balancing their individual economic and social conditions against the treaty obligations when they are being implemented. In light of international sustainable development policies and the principle of common but differentiated responsibilities, such an approach seems reasonable to the developing states. On the other hand, all contracting parties have a general obligation under international law to implement the CBD in good faith, and successful implementation will obviously not be realised without the introduction of new national legislation.[81]

The principal conservation obligations can be divided into two main categories:

Preparatory measures, including the development of strategies, plans and programmes for the conservation and sustainable use of biodiversity;[82] the identification and monitoring of components of biodiversity and the identification of activities that have, or are likely to have, significant adverse impacts on biodiversity.[83] See, furthermore, the provisions on project-related environmental impact assessments (EIA) and strategic environmental assessments (SEA).[84]

General and particular conservation measures, including traditional *in situ* measures, such as the establishment of protected areas, management or control of risk associated with the use of living modified organisms, prevention of the introduction of alien species and the regulation and management of processes and activities that can cause significant adverse effects on biodiversity,[85] and also several *ex situ* measures, including the establishment of *ex situ* conservation facilities;[86] measures to integrate conservation and sustainable use of biodiversity into national decision-making, and, finally, measures relating to the use of biological resources meant to avoid or minimise adverse impacts on biodiversity.[87]

Many of the preparatory measures are expensive, leaving the developing states vulnerable to biodiversity loss. However, although not yet delivering the necessary results, the CBD contains obligations that are particularly aimed at the developed states and tailored to facilitate implementation in the developing states.[88] On the other hand, the developed states have no excuse for not preventing further biodiversity losses subject to their control.

4.3 Role and status of the COP

4.3.1 Conference of the Parties – the COP

The role and status of the Conference of the Parties (COP) is important for furthering the CBD's substantive obligations. Over the years the COP has taken many decisions.[89] At the first meeting of the contracting parties to the CBD, and in line with Article 23 of the CBD, the COP adopted *Rules of Procedure for Meeting of the Conference of the Parties to the Convention on Biological Diversity*.[90] As a general rule, and in line with the CBD's Article 29 and rule 40 of the Rules of Procedure, CBD COP decisions are taken by reaching a consensus on a particular issue. If that is not possible, decisions can be taken by a two-thirds majority vote of the parties present and voting.[91] Neither the CBD nor the Rules of Procedure contain particular procedures to apply when consensus is not possible.[92] In accordance with the general rules of international law, contracting parties not present, abstaining or voting against a proposal would not be bound by the majority's decision.[93]

4.3.2 Role of the COP

As indicated earlier, the CBD COP plays an important role in the implementation of the treaty. Under Article 23, the COP is competent to take several kinds of decisions, many of which further the CBD's material scope. In line with Article 23(4) the COP has a mandate to keep under review the implementation of the CBD, and for that purpose it shall:

in accordance with Article 23(4)(a), the COP shall establish both the form and intervals for transmitting information in the form of reports from each of the Contracting Parties in line with Article 26 of the CBD;[94]

in accordance with Article 23(4)(b), the COP shall review scientific, technical and technological advice on biodiversity provided by the SBSTTA in line with

Article 25;

in accordance with Article 23(4)(c), the COP shall consider and adopt protocols[95] in line with Article 28;

in accordance with Article 23(4)(d), the COP shall consider and adopt amendments to the CBD and its annexes, *cf.* Articles 29-30;[96]

in accordance with Article 23(4)(e), the COP shall consider amendments to any protocol, any annex to them, and if so decided, recommend their adoption to the parties to the protocol concerned;[97]

in accordance with Article 23(4)(f), consider and adopt, in line with Article 30,[98] additional annexes to the CBD;

in accordance with Article 23(4)(g), establish subsidiary bodies deemed necessary for the implementation of the CBD;[99]

in accordance with Article 23(4)(h), contact the executive bodies of other conventions dealing with matters covered by the CBD, with a view to establishing forms of cooperation;[100] in accordance with Article 23(4)(i), consider and undertake any additional action that may be required to achieve of the purposes of the CBD in light of experience gained in its operation.

In line with the above, the COP's mandate is rather diverse. For this article, however, the open-ended discretion given to the COP and reflected in the last item is of prime interest.

4.3.3 CBD's COP decisions

The possibility for the CBD's COP to further and develop the individual objectives of the CBD, is of great importance. At the same time this approach reflects particular legal uncertainties. First, none of the above sources explicitly provides the COP a competence to stretch the CBD's material scope beyond its original objectives. That can only be done by relying on formal procedures and ratification processes, see further Article 23(4)(c)-(f) above. The power to enact COP decisions under Article 23(4)(i) to further and develop individual CBD objectives is herein deemed implicit.[101] Article 23(4)(i) allows the contracting parties to undertake *any* additional action required to achieve the purpose of the CBD in the light of the treaty's operation. This wording must be understood as allowing for any additional action not requiring changes to the treaty's operative text. An interesting problem is whether the CBD's COP has actually stretched the limits of operative the CBD's text beyond what was initially intended. This is likely to have taken place.[102] At the same time, some room for flexibility is necessary in order to ensure the CBD's effectiveness.

Second, the legal status of COP decisions under international law is not clear-cut. As a general rule such decisions are not legally binding under international law. They are not subject to ratification, and their subject matter is in many instances unknown to national legislatures although officials many have contributed to them. However, to deem COP decisions, including the CBD COPs, legally irrelevant under international legal law would be a methodological error, contrary recent developments in the theory and practice of international law.[103] First, such decisions may contribute to the formation of international customs, and second, some states – and international organisations[104] and other venues[105] – clearly take CBD COP decisions into account, and structure their strategies accordingly. These strategies may eventually influence legal developments and the application of law.

Third, scrutiny shows that CBD COP decisions nonetheless differ considerably. Some of them are typical soft law instruments, such as recommendations and other guidelines. Some are reflected in strategies and programmes that the contracting parties are urged to follow.[106] However, some contain general principles that are meant to be followed by both CBD's inner organs and the contracting parties at the national level when implementing the CBD's substantive obligations.[107] Several of the general principles need substantive national law to have the intended effects. Otherwise, they will not legally bind the diverse actors or shape the conditions of the different activities that affect biodiversity's future.[108]

In sum, although being of great importance, the vague legal status of CBD COP decisions causes problems, particularly if their subject matter requires legal operationalisation in national legal systems to have their intended effects. This article views most of the decisions

primarily as guiding the contracting parties in their effort to make the CBD's substantive provisions work for biodiversity; they are thus legally relevant.

4.4 Targets and tools

As previously outlined, since beginning to operate in 1994, the CBD COP has actively taken decisions. Included are decisions setting particular biodiversity targets and establishing strategies to further implement the CBD's objectives addressing the global biodiversity loss. This section will give a brief overview of the principal target and strategies.

4.4.1 Target setting

In 2002 the CBD's COP agreed the 2010 biodiversity target. More accurately, the parties agreed "to a more effective and coherent implementation of the three objectives of the convention, to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on earth."[109] Due to the fact that around 90% of all states are parties to the CBD, the present target has considerable legal weight even though it will not be achieved. However, during the 2008 meeting of the CBD COP, the parties approved several new decisions, including a new multi-year programme for the period 2011-2022.[110] It will be the task of the 2010 meeting next October to take this further and agree a new target. The tools supporting realisation of the 2010 target (and future targets) are reflected in several strategies and approaches agreed by the COP, see below. This includes the ecosystem approach, adaptive management and precautionary approaches, see further Section 4.2.4.2.

4.4.2 Strategies

Particular long-term strategies play an important role in the implementation of the CBD. They are also the basic tool for achieving biodiversity targets. The most important is the *Strategic Plan for the Convention on Biological Diversity*, adopted during COP 6 in 2002. It is now under revision. The Strategic Plan's beginning specifically states that its purpose is to effectively halt biodiversity loss as well as to secure biodiversity's beneficial uses through sustainable use and conservation.[111] Apart from the 2010 target as such, the Strategic Plan builds upon several prerequisites, including: (a) biodiversity provides the living foundation for sustainable development; (b) the rate of biodiversity loss is still accelerating; (c) the threats to biodiversity must be addressed; (d) the CBD is an essential instrument for achieving sustainable development, and (e) the implementation of the CBD has met several obstacles. Moreover, the main thrust of the Strategic Plan is reflected in four strategic goals and the identification of the main obstacles to the implementation of the CBD. The goals are: (1) The CBD is fulfilling its leadership role in international biodiversity issues. (2) CBD parties have improved their financial, human, scientific, technical, and technological capacity for implementation. (3) National biodiversity strategies and action plans, as well as the integration of biodiversity concerns into relevant sectors, serve as an effective framework for CBD's objectives. (4) There is a better understanding of the importance of biodiversity and of the CBD, and this has led to broader engagement across society in its implementation. The main categories of obstacles are identified as: (i) political and societal, including the lack of political will, limited participation by the public and stakeholders and lack of precautionary and proactive measures; (ii) the lack of necessary institutional and technical capacity; (iii) the lack of accessible information and knowledge, including scientific knowledge; (iv) economic policies and lack of financial and human resources; (v) lack of sufficient collaboration and cooperation; (vi) legal and juridical impediments and lack of appropriate policies and laws; (vii) several socio-economic factors, such as poverty and population pressure; and, finally, (viii) natural phenomena and environmental changes, such as climate changes.[112] At COP 9, in 2008, it was emphasised that national biodiversity strategies, action plans, policies and legislative frameworks were the key implementation tools of the CBD, and that they played an important role in achieving the 2010 target. The parties were furthermore urged to develop national biodiversity

strategies and plans as soon as possible and no later than before COP 10.[113] It remains to be seen what will be decided upon for the future.

4.5 Relation to other regimes

Although the CBD was first intended as an umbrella, under which several other biodiversity conventions were to fall, this was not realised.[114] The CBD, at the best, is a semi-framework convention with active decision making on behalf of the COP. Nevertheless, the CBD's Article 22 tackles the relationships with other treaties in this field. Under Article 22(1) the CBD is not to have any effect on the rights and obligations of contracting parties that have been established by existing international agreements. The inter-temporal limit under international law would typically be December 29, 1993, which is when the CBD came into force.[115] This means, as a general principle, that treaties older than the CBD[116] are not affected by it and this would be the legal situation even though this was not stipulated in Article 22(1). This is subject to one exception, where the CBD is to have the status of *lex superior,* and that is when exercising the rights and obligations would cause serious damage or threat to biodiversity. On the other hand, the CBD does not outline how this is to be done or who is competent to evaluate the damage or threat to biodiversity. Most likely, however, this could be argued before international courts, if necessary.

In line with Article 22(2), the CBD is to be implemented with respect to the marine environment in accordance with the rights and obligations of states under the law of the sea. In Ulfstein's view, reference to the "law of the sea" is basically confined to the rights and obligations under the UNCLOS, but in his view it excludes particular fisheries agreements.[117] This conclusion, which is probably correct, does therefore not subject fisheries management to the basic obligation of the CBD.[118] Finally, the exemption mentioned above does not seemingly apply to the law of the sea.[119] On the other hand, it would be a wrong to conclude that the law of the sea allows states to pose a significant threat to biodiversity.[120]

In accordance with the above, and apart from the one possible exemption mentioned, the CBD does not have any legal effect on other international biodiversity treaties that were in effect prior to December 29, 1993. The same also applies to younger treaties even though they implement particular issues relating to biodiversity.[121] In order to strengthen international biodiversity law, extensive international cooperation has been established between the different regimes.[122]

4.6 Compliance mechanism

To no one's surprise, and like many other international treaties in the field of biodiversity, the CBD does not have very effective compliance mechanisms. No particular article contains any substantive compliance requirement or reaction mechanisms that could be used against contracting parties failing to implement the CBD adequately.[123] At the same time, it must be kept in mind that the CBD's substantive obligations are relatively open-ended and far from being precise. Consequently, parties could argue that they are fulfilling CBD's substantive obligations to the best of their capabilities and as they deem necessary.[124] Thus, individual contracting parties have broad discretion when implementing the treaty, making it difficult to argue that its substantive obligations have not been adequately implemented or applied.

In this respect the powers conferred to the COP under Article 23 need further scrutiny, particularly Article 23(3). The general heading of Article 23(3) reads as follows: "The Conference of the Parties shall keep under review the implementation of the Convention, and, for this purpose, shall:" Thereafter, sections (a)-(i) of paragraph 3 outline the several tasks of the COP, as set out in Section 4.3.2. What they have in common is that they dictate particular tasks, and none of them indicates that the COP will directly address a particular contracting party in the case of inadequate implementation of the CBD.[125] Finally, and in line with Article 26,[126] each contracting party is under a duty to submit reports on the measures taken to implement the provisions of the CBD and their effectiveness in meeting CBD's objectives.[127] If, however, a particular contracting party does not hand in reports, or if they are inadequate, the

CBD as such does not have any particular procedure to ensure compliance.[128] For example, the due date for the fourth National Report was March 30, 2009. In the beginning of March 2010, only 96 of 193 contracting parties had handed in their fourth report, including Denmark, Finland, Norway and Sweden. Iceland, on the other hand, has not yet done so or submitted the third one. The national reports are important tools for both evaluating the current status of biodiversity and setting the course for future actions. They also form the foundation for the Biodiversity Outlooks. Finally, the CBD's parties have been slow in developing and submitting their National Biodiversity Strategy and Action Plans (NBSAPS).[129]

4.7 Dispute settlement

On the basis of international law, Article 27 of the CBD provides the principles for dispute settlement. The contracting parties are to seek solution by negotiation in the event of a dispute concerning the interpretation or application of the CBD, as outlined in Article 27(1). If an agreement by negotiation is not possible, then the contracting parties may jointly seek or request mediation by a third party, *cf.* Article 27(2). Otherwise, the dispute will be either brought into arbitration, in line with Article 27(3)(a) and Part 1 of Annex II to the CBD, or submitted to the International Court of Justice (ICJ). It is, however, up to individual states, one or both of them, to decide whether these means of dispute settlement are compulsory pursuant Article 27(3). If states do not accept the same or any procedure, which is a possibility, the dispute is to be submitted to a conciliation procedure provided for in Part 2 of Annex II to the CBD. This does not apply if the parties agree otherwise, as stipulated in Article 27(4). Apparently, no contracting party to the CBD has yet invoked Article 27.

4.8 Overall assessment and concluding remarks

The CBD provides a particular, international control system for the conservation of biodiversity. Although being of high importance for the development of both international and national biodiversity law, the control system is in many respects weak and ineffective. Until now, it has only partially managed to bring about the changes necessary in the battle against biodiversity loss. In the view of the author of this article, there are several reasons for this failure. First, there is the structure of individual substantive provisions of the CBD and its lack of effective control mechanisms. Second, the CBD and the many COP decisions offer a soft approach that has not delivered the results sought after. Furthermore the provisions are not backed up by clear-cut restrictions or limitations. Third, one of the fundamental principles of modern environmental law, the precautionary principle, is not part of the CBD's operative text. Fourth, the CBD builds upon and is carved into a particular international legal environment emphasising above all the sovereign rights of states to do things their way, imposing only minimal duties on states to prevent environmental damage in other states and in areas beyond national jurisdictions. This legal environment does not particularly support environmental objectives or targets or the realisation of ecological sustainability and is likely to prolong the denial of what is needed.

5 Theorisation and short discussion

As introduced in Section 1, the article's main argument is that some fundamental principles of international law and the CBD as such are prolonging international denial of what is needed to support the future of biodiversity. The main thrust of the default theory is that under certain circumstances some international principles can take precedence and become the applicable law. The principles, the theory is particularly focused on, are (1) the sovereign right of states to utilise their own natural resources, and (2) their duty to prevent trans-boundary environmental damage.

As outlined in Section 3, the principle of the sovereign right of states to utilise their natural resources and states´ responsibility to ensure that activities within their borders or under their control do not cause environmental damage make up the foundation of international environmental law, and international biodiversity law is carved into their realm. These principles are in

principle, however, right- and duty-oriented. In applying them, the respective rights and duties are usually balanced against state's social and economic considerations. The respective state does the balancing. The right to utilise, however, is not absolute and can be limited by particular customary rules and international treaty law, *inter alia,* international treaties in the field of biodiversity. To date, slim evidence supports an international custom dictating that states bear a duty to conserve and even protect biodiversity within their borders. International law does not explicitly prohibit states from destroying their own biodiversity, and as long as no trans-boundary effects are apparent from such actions, no other state could argue that the necessary preventive measures had been neglected by a particular state. The duty to take preventive measures is not particularly demanding upon states, and, as a rule, it relies upon a *due diligence* standard, which is a minimum standard probably excluding general application of precautionary approaches. Moreover, all states have to tolerate some biodiversity damage within their jurisdiction, even though the causes could be tied to actions and activities that took place in another state.

From the point of view of ELM, the above principles do not particularly support the realisation of ecological sustainability. They have little environmental orientation and lack orientation to effects. However, under which circumstances do these principles become overriding and the applicable law? Under the default theory, this is thought to happen when: (1) no particular treaties or treaty provisions are available and applicable to the problem at hand, and (2) international treaty provisions are rather generally and openly structured. When this is the legal situation, the above principles could be expected to be the applicable law. As will become more apparent below, this is rather likely to take place in the implementation of the CBD. However, this would also be the case when no particular biodiversity law is available.

Although sustainable development policies have been promoted since the early nineties, and several new environmental regimes have become international law, including the CBD, none of them really limits states when it comes to land use policies. Such policies and the protection of particularly defined areas are likely to be among the most effective measures for the future of land-based biodiversity falling under the scope of the CBD. Thus, under international law states can legally continue to diminish their natural resources, including their land and its biological resources. As touched on earlier, the principle of state responsibility is of limited value unless a state has neglected to take preventive measures when trans-boundary effects can be expected. Whether ecological effects apply here generally is doubtful, but they probably do in the case of shared resources. To conclude, it can at the least be stated that the scope and general acceptance of these two principles are not particularly supportive of the future of biodiversity and they are likely to be the law shaping the permissibility of states´ actions, if no clear treaty obligations dictating otherwise exist.

What about the CBD then? Is the CBD as such likely to prevent the default principles from becoming the applicable law? As outlined in Section 4, the CBD forms a particular international control system. However, it is carved into the legal realm of the two fundamental principles mentioned above. In addition, the CBD's substantive obligations are reflected in a rather soft and open-ended system, where the contracting parties have the possibility of implementing them into their national legal systems by balancing their economic and social interests against environmental ones. As such, the CBD's substantive obligations do not directly restrict or limit the contracting parties in their environmental planning or when planning their economic development. For example, the CBD's parties are expected to undertake EIA if adverse impacts on biodiversity are anticipated from particular activities. However, they are not prevented from carrying out the same activities even if an EIA report demonstrated adverse negative impacts on biodiversity.

On the other hand, the CBD is a forum for active development of further biodiversity measures reflected in the various COP decisions. The CBD operative text offers several new terms relating to the conservation of biodiversity. Quite a few others are available in COP decisions, such as the ecosystem approach, adaptive management and the precautionary approach. In order

the bulk of CBD's substantive obligations (including CBD COP decisions) to steer particular actions and activities, their substance needs to be positively reflected in national law. Otherwise they will not have the necessary legal effect and influence actors at the national level. Due to the unclear status of the CBD COP decisions, it can at the least be argued that national legislatures have little or, in some cases, no information on their content and how important they are for the implementation of the CBD in general. Their substance, however, usually requires express and binding legal frameworks to deliver the necessary results for conserving biodiversity. This is particularly important if the substance of decisions necessitates some kind of restrictions on how land is planned and eventually used; if, in the light of adverse environmental effects, frequent revaluation of the permissibility of particular actions is necessary, or if the implementation requires reversal of the burden of proof where an operator or a land owner would have to limit actions that were previously allowed. Generally speaking, the CBD's contracting parties can legally continue particular land uses and activities even though they impoverish biodiversity in the long run and continue to contribute to the current biodiversity loss. This can be done legally under international law as long as no trans-boundary biodiversity damage is caused.

6 Conclusions

As proposed in Section 1, both the fundamental principles of international law and the CBD as such are prolonging and supporting an international denial of what is needed to support the future of biodiversity. As argued in this article, the core of the denial is reflected in the fact that recent international regulatory efforts have not delivered the results sought. Biodiversity continues to decline. As far as the CBD is concerned, its soft, open-ended approach, even though the CBD's COP is active and taking important decisions and developing international biodiversity law further, it is obviously not the right regulatory method in this respect. Furthermore, if the default theory has any merits, then, in order to minimise the effects of the default principles, the CBD's conservation provisions necessitate a different structure and should, *inter alia*, include some clear restrictions and limits on how far states can go when planning their land uses and in utilising biodiversity under their control. Instead of simply promoting sustainable use, the CBD should promote sustainable use within defined safe ecological limits. The precautionary principle and several precautionary approaches need to become part of the operative text of the CBD. To the extent that international law, including international biodiversity law, has contributed to the current state of biodiversity, the CBD and its implementation at the national level has not yet managed to make a difference, and the 2010 target will be missed.

Notes

[1] Decision VI/26 (2002), items 2 and 11, Annex. UNEP/CBD/COP/6/20, p. 317; Johannesburg Plan of Implementation of the World Summit on Sustainable Development (2002), para. 44. *Report of the World Summit on Sustainable Development*. Johannesburg, South Africa, 26 August - 4 September 2002, (WSSD), A/CONF.199/20 and A/CONF.199/20/Corr.1, and, *e.g.* Articles 2(2) and 6(1) of Decision 1600/2002/EC of the European Parliament and of the Council of 22 July 2001 laying down the Sixth Community Environment Action Programme: *Our future, our choice.* OJ L 242, 10.9.2002, pp. 1-15.

[2] Hague Ministerial Declaration (2002). *Handbook of the Convention on Biological Diversity Including its Cartagena Protocol on Biosafety.* 3rd edition. Secretariat of the Convention on Biological Diversity, Montreal 2005, p. 1452.

[3] Including: The Millennium Ecosystem Assessment series. *Millennium Ecosystem Assessment, 2005. Ecosystems and Human Well-being: Synthesis.* Island Press, Washington DC 2005, pp. 1-131; *Global Biodiversity Outlook 2.* Secretariat of the Convention on Biological Diversity, Montreal 2006, pp. 9-73, and finally Nomander, B., Levin, G., Auvinen, A-P., Bratli, H., Stabbetorp,

O., Hedblom, A., Gudmundsson, G. A.: *State of biodiversity in the Nordic countries. An assessment of progress towards achieving the target of halting biodiversity loss by 2010.* TemaNord 2009:509, pp. 15-121. See furthermore: Communication from the Commission *Halting the Loss of Biodiversity by 2010 – and beyond. Sustaining ecosystem services for human well-being*. COM(2006)216 final, and also Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. *A Mid-term Assessment of Implementing the EC Biodiversity Action Plan*. COM(2008)864 final. See finally the IUCN initiative: *The IUCN Red List of Threatened Species.* www.iucnredlist.org/news/species-of-the-day.

[4] Convention on Biological Diversity (CBD). 31 ILM 818.

[5] Decision IX/8 (2008) and Decision IX/9 (2008). UNEP/CBD/COP/9/29, p. 30 and 36.

[6] Several other venues are contributing to the discussion, see *e.g.* the European Platform for Biodiversity Research Strategy (EPBRS). Further information on EPRBS activities are available on http://www.epbrs.org/

[7] The International Year of Biodiversity was formally launched on January 11, 2010 in Berlin. See further: http://www.cbd.int/2010/welcome/

[8] Originally developed by Dr. Staffan Westerlund, Professor, Faculty of Law, Uppsala University, Sweden. See, *e.g.* titles such as *En hållbar rättsordning. Rättsvetenskapliga paradigm och tankevändor*. Iustus förlag, Uppsala 1997; *Miljörättsliga grundfrågor 2.0*. IMIR Institutet för miljörätt. Åmyra förlag Björklinge 2003, and "Theory for Sustainable Development. Towards or Against?" *Sustainable Development in International and National Law*, eds. Bugge, H. C. and Voigt, C. The Avosetta series 8, Europa Law Publishing, Groningen 2008, pp. 47-66. ELM's original framework was developed by theorising a typical national legal system and environmental law. As the time has gone by, some of its features have been further developed in international environmental law research. See *e.g.* Ebbesson, J.: *Compatibility of International and National Environmental Law,* Iustus förlag AB, Uppsala 1996, and Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* Uppsala University 2009.

[9] ELM, however, does not take any particular stand on which philosophical view on the Rule of Law it favours. It is simply the underlying principle of the *Rule of Law* as a paradigm that ELM places an emphasis on. Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 177-181, *et passim*.

[10] See further Westerlund, S.: *Miljörättsliga grundfrågor 2.0*, p. 1, *et passim.*

[11] Westerlund, S.: *Miljörättsliga grundfrågor 2.0*, as such.

[12] See further Westerlund, S.: "Theory for Sustainable Development. Towards or Against?" in *Sustainable Development in International and National Law*, pp. 47-66, and Westerlund, S.: *Miljörättsliga grundfrågor 2.0*, pp. 23-32, *et passim.*

[13] Problems relating to the implementation of sustainable development and its legal operationalisation, have given rise to different approaches and views. For this article however, some fundamentals need to be clear. First, a different must be made between general policies (strategies, programmes, objectives, goals and targets) on sustainable development and particular legal solutions that are meant to define particular rights and duties of sustainable development and that are reflected in positive law (international treaties, EU Acts and national legislation, depending on the level of governance). Second, to equate all sustainable development's factors on a policy level can generally be accepted. However, when it comes to positive law, substantive rules that are the fundament for decision-making in individual cases, a stand must be taken on whether all factors should be equal or whether the environmental one (ecological) is to function as limitation for the other ones. In this respect, "one size fits all" is unacceptable, and each legislative act may necessitate a particular legal solution. See further Jóhannsdóttir, A.: "Considerations on the Development of Law in the Light of the Concept of

Sustainable Development", *Miljöjuridik* 2/2005, pp. 27-48.

[14] On approaches to sustainability, including weak and strong, see, *inter alia,* Backer, I. L.: "Miljöskydd och ekonomiskt utnyttjande – principen om hållbar utveckling" in *Förhandlingarna vid Det 36 nordiska juristmötet i Helsingfors 15-17 augusti 2002,* Del I, utgivna av lokalstyrelsen för Finland 2002, pp. 113-141, and "Miljöskydd och ekonomiskt utnyttjande – principen om hållbar utveckling" in *Förhandlingarna vid Det 36 nordiska juristmötet i Helsingfors 15-17 augusti 2002,* Del II, utgivna av lokalstyrelsen för Finland 2002, pp. 477-490; Winter, G.: "A Fundament and Two Pillars. The Concept of Sustainable Development 20 Years after the Brundtland Report" in *Sustainable Development in International and National Law,* eds. Bugge, H. C. and Voigt, C. The Avosetta series 8, Europa Law Publishing, Groningen 2008, pp. 23-45; Westerlund, S.: "Theory for Sustainable Development. Towards or Against?" in *Sustainable Development in International and National Law,* pp. 47-66; and Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 153-169.

[15] Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* p. 68.

[16] *Ibid*., pp. 170-198.

[17] The default refers to a preset option. When a system operates and when no particular order is given then the default principles become the ruling principles.

[18] Jóhannsdóttir, A.: *Significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 230-233, *et passim*.

[19] See *inter alia,* the legal status within the Area, United Nation Convention on the Law of the Sea (1982), (UNCLOS), 21 ILM 1261, in particular Articles 1(1), and 133-185. See further: Jóhannsdóttir, A.: *Significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 238-241. For a different view based upon an analogy from particular UNCLOS principles, see, Bonney, S. A.: "Bioprospecting, Scientific Research and Deep Sea Resources in Areas Beyond National Jurisdiction: A Critical Legal Analysis", in *New Zealand Journal of Environmental Law,* Faculty of Law the University of Auckland, Volume 10, 2006, pp. 43-91.

[20] See, further Article 1 and 3 of the CBD.

[21] Jóhannsdóttir, A.: *Significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 208-218.

[22] Westerlund, S.: *Miljörättsliga grundfrågor 2.0,* pp. 33-81 and 122-126.

[23] *Report of the United Nations Conference on Environment and Development* (1992) (UNCED), A/CONF. 151/26 (Vol. I).

[24] The principle is generally accepted to have the status of an international custom. See further, *e.g.* Schrijver, N.: *Sovereignty Over Natural Resources. Balancing Rights and Duties*, Cambridge studies in international and comparative law, Cambridge University Press, Cambridge 1997, pp. 3-12. See also: UNGA Resolution 1803 (1962), *Permanent Sovereignty over Natural Resources,* UN Doc. A/5217 (1962) and also UNGA Res. 1831 (XVII) (1962), and finally, Article 30 of the *Charter of Economic Rights and Duties of States*, UNGA Res. 3181 (XXIX) (1974). International biodiversity law is carved into and reflects the principle, see, *inter alia,* Article 3 of the CBD, Article 2(3) of Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention) (1971), 11 ILM 963, and Article 6(1) of Convention for the Protection of the World Cultural and Natural Heritage (1972), 11 ILM 1358. See furthermore Principle 1.a of the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (1992). *Report of the United Nations Conference on Environment and Development.* A/CONF. 151/26 (Vol. III).

[25] There is slim evidence that many preventative principles have a customary status under international environmental law. It seems that the strongest claim for customs is in the field of the protection of the marine environment. Jóhannsdóttir, A.: *Significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 227-230.

[26] International treaties in the field of biodiversity are usually flexible in the sense that they do not ban particular actions or activities although they may diminish or contribute to the biodiversity loss. For example when States have designated Ramsar sites, in line with Article 2 of the Ramsar Convention, they can all the same, in the name of *urgent national interest*, decide to delete or restrict their boundaries, *cf.* Article 4(2), but have to follow particular criteria in the decision-making. See further: *Resolution VII.20 on Articles 2.5 and 4.2 of the Convention. General guidance for interpreting "urgent national interests" under Article 2.5 of the Convention and considering compensation under Article 4.2.* Conference of the Contracting Parties to the Convention on Wetlands, Valencia, Spain, 18-26 November 2002. See also Jóhannsdóttir, A.: "Þegar dregið er úr verndun náttúruverndarsvæða" in *Afmælisrit Björn Þ. Guðmundsson sjötugur 13. júlí 2009,* eds. Stefánsson, S. M., Jóhannsdóttir, A., and Örlygsson, Þ., Codex, Reykjavík 2009, pp. 1-25.

[27] The term was for long only considered relevant for natural resources with traditional economic value, including fish stocks, minerals and water, see, *e.g.* Schrijver, N.: *Sovereignty Over Natural Resources. Balancing Rights and Duties,* pp. 12-19, and in particular pp. 14-16. See also, *e.g.* CBD Article 2 defining biological resources; Principle 2 of the Stockholm Declaration on the Human Environment, *Report of the United Nations Conference on the Human Environment.* UN Doc. A/CONF. 48/14/Rev.1 (1972) (Stockholm Declaration), and Jans, J. H. and Vedder, H. H. B.: *European Environmental Law*, 3rd edition, Europa Law Publishing, Groningen 2008, pp. 30-31.

[28] For example states have a duty under international law to cooperate. Cooperation is particularly relevant in the case of shared resources and transboundary pollution. See further: UNEP's draft principles: Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (1978), 17 ILM 1097; Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) (1991), 30 ILM 800. See furthermore: *Case Concerning the Gabčíkovo-Nagymaros Project*, (Hungary/Slovakia). Judgement of 25 September 1997, p. 7. ICJ Reports 1997.

[29] Jóhannsdóttir, A.: *Significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 205-207. Kokko is of another opinion and argues that states bear a duty to protect biodiversity regardless of other states and areas beyond states jurisdiction. Kokko, K.: "Biodiversity law" in *Working Papers of the Finnish Forest Research Institute 1,* 2004, pp. 157-168. His conclusion should be viewed in the light of the fact that the Finnish Constitution particularly provides biodiversity protection, *cf.* it's Article 20. The same or similar legal situation could be the reality under Norwegian law due to Article 110b of the Norwegian Constitution.

[30] Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 203-208.

[31] See further note no. 3 above on the status of biodiversity.

[32] See further: Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 24 and 243-244, and also Birnie, P., Boyle, A. and Redgwell, C.: *International Law and the Environment,* Oxford University Press 2009, particularly pp. 128-130 and 657-659, drawing, *inter alia,* attention to the importance of the *common concern* principle and international cooperation in the field of biodiversity conservation, but at the same time outlining the principle's uncertain legal status under international law.

[33] *Report of the United Nations Conference on Environment and Development* (1992) (UNCED), A/CONF. 151/26 (Vol. I).

[34] For the principle's foundation, see note 24.

[35] Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 208-214.

[36] See further, *e.g.* Tinker, C.: "Responsibility for Biological Diversity Conservation Under International Law" in *International Law Classic and Contemporary Readings,* 2. ed. Ku, C. and Diehl, P. F., eds. Lynne Rienner London 1998, pp. 418-419, and Ebbesson, J.: *Internationell miljörätt,* second edition, Iustus förlag AB, Uppsala 2000, p. 53.

[37] See further: Ebbesson, J.: *Compatibility of International and National Environmental Law,* pp. 106-107.

[38] Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 212-214.

[39] *Ibid.,* p. 209.

[40] *Ibid.,* pp. 214-217.

[41] *Ibid.,* pp. 227-233.

[42] See an interesting overages in *Biodiversity and International Law,* ed. Bilderbeek, S., Netherlands National Committee for the IUCN, IOS Press Amsterdam, Oxford, Washington DC, Tokyo 1992; *International Law and the Conservation of Biological Diversity,* International Environmental Law and Policy Series, eds. Bowman, M. and Redgwell, C., Kluwer Law International, London, The Hague, Boston 1996; *Protection of Global Biodiversity. Converging Strategies,* eds. Guruswamy, L. D. and McNeely, J. A., Duke University Press, Durham and London 1998; Louka, E.: *Biodiversity & Human Rights. The International Rules for the Protection of Biodiversity,* Transnational Publishers, Ardsley NY 2002; *Accessing Biological Resources. Complying with the Convention on Biological Diversity,* International Environmental Law and Policy Series, ed. Stoianoff, N. P., Kluwer Law International, The Hague, London, New York 2004, and *Biodiversity, Conservation, Law + Livelihoods. Bridging the North-South Divide,* IUCN Academy of Environmental Law Research Studies, eds. Jeffery, M. I., Firestone, J. and Bubna-Litic, K., Cambridge University Press 2008.

[43] http://www.cbd.int/convention/parties/list/

[44] See, *e.g.* the views of Guruswamy on CBD's shortcomings. Guruswamy, L. D.: "The Convention on Biological Diversity: A Polemic" in *Protection of Global Biodiversity. Converging Strategies,* eds. Guruswamy, L. D., and McNeely, J. A. Duke University Press, Durham, and London 1998, pp. 351-359.

[45] See Section 1.

[46] See further on the implementation of the millennium development goals, *e.g.* Díaz, C. L.: „Biodiversity for Sustainable Development: The CBD's Contribution to the MDGs", *RECIEL* 15 (1) 2006, pp. 30-38.

[47] *Handbook of the Convention on Biological Diversity Including its Cartagena Protocol on Biosafety.* p. 1453. CBD's parties have taken this further with the acceptance of several decisions, see further: Decisions VII/30 (2004) *Strategic Plan: further evaluation of process*, UNEP/CBD/COP/7/21, pp. 379-387, and Decision VII/32 (2004), *The Programme of work of the Convention and the Millennium Developmental Goals*, UNEP/CBD/COP/7/21, pp. 391-392. See furthermore: Decision VIII/15 (2006), *Framework for monitoring implementation of the achievement of the 2010 target and integration of targets into the thematic programmes of work*, UNEP/CBD/COP/8, pp. 153-179; Decision IX/8 (2008), *Review of implementation of goals 2 and 3 of the Strategic Plan*, and Decision IX/9 (2008), *Process for the revision of the Strategic Plan*, UNEP/CBD/COP/9/29, pp. 36-39.

[48] See, CBD's Article 3 stipulating that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction", and *inter alia,* scarce mentioning of the

term sustainable development in the CBD's operative text. See also, *e.g.* Le Prestre, P. G.: "The CBD at ten: the effectiveness. (Comments). (Convention on Biological Diversity)", *Journal of International Wildlife Law & Policy*, Kluwer Law International, September 22, 2002, volume 5, issue 3, pp. 269-288, arguing that the CBD is lacking all binding obligations and being supporting the sovereign right of states over their biological resources.

[49] See further, Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 234-272.

[50] See, *e.g.* Louka, E.: *Biodiversity & Human Rights. The International Rules for the Protection of Biodiversity*. , pp. 129-130.

[51] See, *inter alia,* Articles 6 and 7 are rather frameworks while Article 8 is less so.

[52] On the other hand CBD's Article 23 does not particularly support an active framework function.

[53] Annex I, *Identification and Monitoring*, and Annex II, in two parts the first on *Arbitration* and the second, *Conciliation*.

[54] See further: Article 15, *Access to Genetic Resources,* Article 16, *Access to and Transfer of Technology*, Article 17, *Exchange of Information,* Article 18, *Technical and Scientific Cooperation,* Article 19, *Handling of Biotechnology and Distribution of its Benefits,* Article 20, *Financial Resources,* and Article 21, *Financial Mechanism.*

[55] Subsidiary Body on Scientific, Technical and Technological Advice, for short: SBSTTA.

[56] The COP is competent to create other subsidiary bodies. See further CBD's Article 23.

[57] See furthermore: Working Group on Access and Benefit-Sharing (ABS); Working Group on Article 8(j); Working Group on Protected Areas, and Working Group on the Review of Implementation of the Convention (WGRI).

[58] See further Article 2 of the CBD.

[59] Excluding human genetic resources, however. Decision II/11 (1995), *Access to Genetic Resources*, UNEP/CBD/COP/2/19, p. 22.

[60] See further developments in, *inter alia,* the following COP decisions: Decision VI/13 (2002), *Sustainable use,* UNEP/CBD/COP/6/20, pp. 181-183, and, Decision VII/12 (2004), *Sustainable use,* UNEP/CBD/COP/7/21, pp. 209-226, and providing a more detailed approach with particular emphasis on Article 10 of the CBD on the sustainable use of component of biodiversity. The decision is accompanied with the *Addis Ababa Principles* and *Guidelines for the Sustainable Use of Biodiversity*. Included are fourteen principles that provide an import foundation for planning and decision making.

[61] Article 8(e) stipulates that environmentally sound and sustainable development is to be promoted in areas adjacent to protected areas with a view to furthering protection of the areas.

[62] Financial resources are the subject of CBD's Article 20. Article 20(4) stipulates, *inter alia,* economic and social development and eradication of poverty being the first and overriding priorities of the developing countries that are parties to the CBE. This gives particular information on sustainable development and how the three components are or could be prioritised in particular areas of the world. This, on the other hand, does not change the conclusions on sustainable development that were brought forward in Section 2. The question of interest here is rather if biodiversity will survive this approach and at what ecological cost, presently and in the future.

[63] See, Decision V/6 (2000), UNEP/CBD/COP/5/23, pp. 103-109; Decision VI/12 (2002), UNEP/CBD/COP/6/20, p. 180; Decision VII/11 (2004), UNEP/CBD/COP/7/21, pp. 186-208, and Decision IX/7 (2008), UNEP/CBD/COP/9/29, pp. 28-30.

[64] Decision V/6 (2000), UNEP/CBD/COP/5/23, pp. 103-104.

[65] *Ibid.,* p. 104.

[66] See further, *ibid.,* pp. 104-109.

[67] Decision IX/7 (2008), UNEP/CBD/COP/9/29, p. 28, *et seq.*

[68] Decision V/6 (2000), UNEP/CBD/COP/5/23, p. 104; Decision VI/12 (2002), UNEP/CBD/COP/6/20, pp. 180-182; Decision VII/11 (2004), UNEP/CBD/COP/7/21, pp. 186-208, and Decision IX/7 (2008), UNEP/CBD/COP/9/29, pp. 28-30.

[69] Decision V/6 (2000), UNEP/CBD/COP/5/23, p. 104.

[70] *Ibid.*

[71] See further CBD's preamble.

[72] See, *inter alia,* Decision II/10 (1995), UNEP/CBD/COP/2/19, pp. 16-21; Decision IV/5 (1998), UNEP/CBD/COP/4, pp. 32-43, and Decision V/3 (2000), UNEP/CBD/COP/5/23, pp. 74-80.

[73] Decision II/10 (1995), UNEP/CBD/COP/2/19, p. 20; Decision IV/5 (1998), UNEP/CBD/COP/4, pp. 32-43, and Decision V/3 (2000), UNEP/CBD/COP/5/23, pp. 74-80.

[74] Decision V/8 (2000), UNEP/CBD/COP/5/23, pp. 111-119. See also on the precautionary principle and the necessary means for implementing into national legal systems, Jóhannsdóttir, A.: "Not Business as Usual. A study of the Precautionary Principle", in *Afmælisrit til heiðurs Gunnari G. Schram sjötugum 20. febrúar 2001,* Almenna bókafélagið, Reykjavík 2002, pp. 2-15.

[75] 161 UNTS 72.

[76] OJ L 378, 31.12.1982, p. 25.

[77] See, *e.g.* the Icelandic fisheries management act, Act No. 116/2006.

[78] This is also in line with the latter part of Principle 2 of the Rio Declaration.

[79] See *e.g., Case Concerning the Gabčíkovo-Nagymaros Project,* (Hungary/Slovakia). Judgment of 25 September 1997, p. 7. ICJ Reports 1997.

[80] The core of these principles was tackled in Section 3.

[81] See the legal developments that have taken place in Scandinavia recently, *e.g.* the new Norwegian legislation Relating to the Management of Biological, Geological and Landscape Diversity, the Nature Diversity Act No 100/2009. See also: Backer, I. L.: "Naturmangfoldloven – en milepel i norsk miljølovgivning", *Nordisk Miljörättslig Tidskrift,* 2009, pp. 35-56.

[82] In line with CBD's Article 6.

[83] *Ibid.,* Article 7.

[84] *Ibid.,* Article 14.

[85] *Ibid.,* Article 8.

[86] *Ibid.,* Article 9.

[87] *Ibid.,* Article 10.

[88] See further CBD's Articles 16-21.

[89] All decisions are available on CBD's homepage http://www.cbd.int/decisions/

[90] See further: Decision I/1 (1994), UNEP/CBD/COP/1/17, and amendments, *cf.* Decision V/20 (2000), UNEP/CBD/COP/5/23, p. 153.

[91] The CBD hold particular exceptions and demands consensus on particular decisions which are not of relevance for this article.

[92] Individual contracting parties have submitted formal objections during the decision-making process that have lead to the adoption of particular decisions. See, UNGA/CBD/COP/6/20, paras. 294-324, Decision VI/23 on *Alien species that threaten ecosystems, habitats or species*.

[93] See further CBD's Article 29 and 30, and also the Rules of Procedure.

[94] See further http://www.cbd.int/reports/search/ where submitted reports are available.

[95] One protocol, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000), has been adopted. 39 ILM 1037.

[96] At the time of writing, no amendments have been made to the CBD or its annexes.

[97] At the time of writing, no amendments have been made.

[98] No additional annexes have been accepted.

[99] See *e.g.* the various working groups that have been established, including Working Group on Access and Benefit-Sharing (ABS); Working Group on Article 8(j); Working Group on Protected Areas, and Working Group on the Review of Implementation of the Convention (WGRI)

[100] See further Section 4.5.

[101] See further: Churchill, R. R., and Ulfstein, G.: "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law", *The American Journal of International Law,* Oct. 2000, 94, 4, pp. 623-659, at *e.g.* pp. 631-643.

[102] See *e.g.* decisions on the precautionary approach, note no. 74 above, but the CBD only refers to the approach in its preamble.

[103] See, Churchill, R. R., and Ulfstein, G.: "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law", pp. 623-659; Röben, V.: „Institutional Developments under Modern International Environmental Agreements", in *Max Planck Yearbook of United Nations Law,* eds. Frowein, J. A., and Wolfrum, R., Kluwer Law International, the Hague 2000, pp. 363-443, and *e.g.* Klabbers, J.: "The Redundancy of Soft Law", *Nordic Journal of International Law* 65:1996, pp. 167-182.

[104] See, *e.g.* Articles 2(2) and 6(1) of the Sixth Community Environmental Action Programme: *Our future, our choice.* OJ L 242, 10.9.2002, pp. 1-15.

[105] For example programmes that are carried out under the auspice of the Arctic Council, *inter alia,* the Arctic Biodiversity Assessment (ABA) which purpose is to respond to the CBD's 2010 biodiversity target (Decision VI/26 (2002), UNEP/CBD/COP/6/20).

[106] See, *e.g.* Decision VI/27 (2002), UNEP/CBD/COP/6/20, pp. 232-324.

[107] See further decisions relating to the ecosystem approach and the precautionary principle. Decision II/10 (1995), UNEP/CBD/COP/2/19, pp. 16-21; Decision IV/5 (1998), UNEP/CBD/COP, pp. 32-43; Decision V/3 (2000), UNEP/CBD/COP/5/23, pp. 74-80; Decision V/6 (2000), UNEP/CBD/COP/5/23, pp. 103-109; Decision VI/12 (2002), UNEP/CBD/COP/6/20, p. 180; Decision VII/11 (2004), UNEP/CBD/COP/7/21, pp. 186-208, and Decision IX/7 (2008), UNEP/CBD/COP/9/29, pp. 28-30.

[108] See further: Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 129-132.

[109] Decision VI/26 (2002), UNEP/CBD/COP/6/20, p. 319.

[110] See, Decision IX/8 (2008), UNEP/CBD/COP/8/29, and Decision IX/9 (2008), UNEP/CBD/COP/9/29, pp. 30-38.

[111] Decision VI/26 (2002), UNEP/CBD/COP/6/20, pp. 317-322, see also Decision IX/8 (2008), UNEP/CBD/COP/9/29, and Decision IX/9 (2008), UNEP/CBD/COP/9/29, pp. 30-38.

[112] See further the text of Decision VI/26 (2002), UNEP/CBD/COP/6/20, pp. 317-322.

[113] See, Decision IX/8 (2008), UNEP/CBD/COP/9/29, and Decision IX/9 (2008), UNEP/CBD/COP/9/29, pp. 30-38.

[114] See further Koester on several aspects of the preparations for the CBD final text. Koester, V.: "The Biodiversity Convention Negotiation Process And Some Comments on the Outcome" in *Environmental Law. From International to National Law,* ed. Basse, E. M., GadJura, Copenhagen 1997, pp. 205-258.

[115] Obviously, the legal situation needs to be investigated for each contracting party as the CBD, and other relevant international treaties, did not bind all contracting parties the same day.

[116] In de Klemm's view this is not confined to international environmental agreements. That view is logical also from an ELM's point of view. de Klemm C. in collaboration with Shine, C.: *Biological Diversity Conservation and the Law. Legal Mechanisms for Conserving Species and Ecosystems*. IUCN Environmental Policy and Law Paper No. 29. IUCN Gland 1993, pp. 24-25.

[117] Ulfstein, G.: "Fisheries Management and The 1992 Convention on Biological Diversity" in *Afmælisrit til heiðurs Gunnari G. Schram sjötugum 20. febrúar 2001*. Almenna bókafélagið, Reykjavík 2002, pp. 491-505, at pp. 502-503.

[118] See on the other hand Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995). 34 ILM 1542.

[119] See further de Klemm, C. in collaboration with Shine, C.: *Biological Diversity Conservation and the Law. Legal Mechanisms for Conserving Species and Ecosystems,* pp. 24-25.

[120] See further the UNCLOS; *inter alia,* Articles 61-67, 116-120, and 192-194.

[121] See *e.g.,* International Treaty on Plant Genetic Resources for Food and Agriculture (2001). Text available on ftp://ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf.

[122] See a list of these arrangements on http://www.cbd.int/cooperation/ and, also Joint Web Site of the biodiversity related conventions: www.cbd.int.blg/

[123] When such mechanisms are in place, international regimes in the field of the environment are, in Louka's view, all the same inadequately monitored. See further on this point coverage by Louka, E.: *Biodiversity & Human Rights. The International Rules for the Protection of Biodiversity*, , pp. 109-110.

[124] Most of them would fall under the term *balancing norms.* See further Ebbesson, J.: *Compatibility of International and National Environmental Law*, pp. 86-89 and 103-135.

[125] See for comparison the Ramsar Convention. Under its Article 6(2)(d) its COP has the power "to make general or *specific* [italics added] recommendations to the Contracting Parties regarding the conservation, management and wise use of wetlands and their flora and fauna". In addition the establishment of the Ramsar Montreux Record, Recommendation 4.8: *Change in ecological character of Ramsar sites.* 4th Meeting of the Conference of the Contracting Parties – Report of the Conference 1990, exerts political and moral pressures on the states where an endangered Ramsar site is situated. See also Article 10 and 23 of the Convention for the Protection of the Marine Environment of the North East Atlantic, (1992), (OSPAR Convention), 32 ILM 1069, and the powers of the OSPAR Commission (equalling to a COP) under that Convention's regime.

[126] And also Article 23(4)(a) of the CBD.

[127] A common report format was first introduced in 2000.

[128] See further information on http://www.cbd.int/reports/

[129] *Ibid*.