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## Content

# Introduction

*Gabriel Michanek, editor*

The sixteenth issue of Nordic Environmental Law Journal includes six articles. Four of them have a strong focus on biodiversity aspects. The first – *Nord Stream's Extension to the Kurgalsky Peninsula: Implications for an EIA* – relates to a planned pipeline project in the Baltic Sea, for transportation of natural gas from Russia to the European Union. The Kurgalsky Peninsula is a Ramsar wetland of international importance, protected under both the Ramsar and Helsinki conventions. The author, Alexander Lott, discusses if an EIA is legally requried for the pipeline. In particular, the paper examines inter-connections between the EIA procedure and the relevant international conventions in the fields of marine environmental protection, protection of migratory birds and biological diversity.

The second article, by Froukje Maria Platjouw, focuses on biodiversity and ecosystem services: *Towards the Aichi 2020 biodiversity targets – An assessment of Norway's Nature Diversity Act in Light of Aichi Biodiversity Target 14*. The target requires that "By 2020, ecosystems that provide essential services […] are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable".

The third article – *The Arctic Council and biodiversity – need for a stronger management framework?* – is authored by Christian Prip. As the Arctic constitutes several ecosystems transcending borders, threats to these ecosystems must be dealt with by all the states sharing them, though cross-border responses. Prip examines to what extent the Arctic Council provides the institutional, policy and regulatory means necessary to meet this challenge.

The fourth article is written by Kristjan Laas: *Ekologisk kompensation och biologisk mångfald. Om behovet av rättslig utveckling och försiktighet*. The paper analyses different parts of Swedish environmental law regulating the issue of compensation for loss of biodivesity in connection with exploitations etc. Laas observes a lack of cohesion between different rules and argues for changes in the legislation.

The title of the fifth paper is *Karins och Susannes glädje, Lars-Anders sorg? Om uppdelade tillståndsprövningar på miljöområdet och respekten för samernas renskötselrätt*. The paper is a late dedication to Bertil Bengtsson on his 90th birthday (see issue 2016:1).

Jan Darpö criticises from different aspects the Swedish legal system for licensing of mineral extraction and its consequences for especially the Sami population. The precautionary principle, the need for an integrated and overall assessment of the impacts and access to justice for the public concerned, all important components of environmental decision making, seem to be applied less strictly than normally. The permit procedure is counterproductive and not in the interests of any of the parties involved. A reform is needed, says Darpö.

Finally, in his second paper, Christian Prip asks: *Regulation of mariculture in Denmark: what of the legal and environmental space?* The article reviews the comprehensive and mostly EU-based legal framework regulating Danish mariculture and the decision-making by the Environmental Board of Appeal. It discusses regulatory approaches for reconciling industrial and environmental concerns. It also argues for the possibility to locate mariculture installations in open sea areas (instead of coastal waters), which calls for a maritime spatial planning in accordance with EU Maritime Spatial Planning Directive.

# Nord Stream's Extension to the Kurgalsky Peninsula: Implications for an EIA

*Alexander Lott**

## Abstract

Nord Stream is planning to lay two submarine pipelines in the Baltic Sea in addition to the ones which already enable the export of natural gas from the Russian Arctic to Germany and the European Union (EU). The main difference between the initial Nord Stream project and the extension project is that the Russian landfall is now planned to be located on the southern coast instead of the northern coast of the Gulf of Finland. The location of the Russian landfall is not yet finally determined.

According to Nord Stream the landfall will either be stationed in the Kurgalsky Peninsula or in the Soikinsky Peninsula. Unlike the Soikinsky Peninsula, the Kurgalsky Peninsula is a Ramsar wetland of international importance, a coastal and marine Baltic Sea protected area as well as a candidate Emerald site. Its environment is thus protected currently under both the Ramsar and Helsinki conventions. International environmental organisations deem the project as a danger to the protected area. Nonetheless, due to feasibility reasons Nord Stream has considered the Kurgalsky Peninsula advantageous in comparison with the Soikinsky Peninsula as it would significantly reduce onshore and offshore pipeline route length.

The aim of this paper is to establish whether Nord Stream and Russia are obligated to apply an EIA procedure in respect of the potential construction activities in and near the Kurgalsky Peninsula under international law and, if so, under which legal instruments it should be done. In particular, the paper aims at mapping some of the interconnections between the environmental impact assessment (EIA) procedure and the relevant international conventions in the fields of marine environmental protection, protection of migratory birds and biological diversity.

## 1. Introduction

By April 2012, two 1 224 km-long submarine gas transmission pipelines had been laid on the seabed of the Baltic Sea between Vyborg in Russia and Greifswald in Germany. The pipelines enable the export of 55 bcm of natural gas from the Russian Arctic to satisfy the energy needs of more than 26 million European households per year.[1] Consequently, in 2014 more Russian natural gas was exported to Europe via the offshore Nord Stream than the alternative onshore route through Ukraine and Slovakia.[2]

In May 2012 Nord Stream's shareholders gave their permission for the extension of the pipeline project.[3] The prospective shareholders of the Nord Stream extension project are Gaz-

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[1] Nord Stream AG. Fact Sheet. Zug 2014, p 2. Accessible: https://www.nord-stream.com/the-project/pipeline/ (25.06.2016).

[2] European Parliament. At a glance: The Nord Stream 2 pipeline project. April 2016. Accessible: http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/580875/EPRS_ATA(2016)580875_EN.pdf (25.06.2016).

[3] Nord Stream AG. Nord Stream to Assess Options to Further Increase Gas Import Capacities Through the Baltic Sea, 11.05.2012. Accessible: https://www.nord-stream.com/press-info/press-releases/nord-stream-to-assess-options-to-further-increase-gas-import-capacities-through-the-baltic-sea-410/ (25.06.2016).

prom (Russia) with 50 %, as well as Uniper and BASF/Wintershall Holding (Germany), Shell (the Netherlands/UK), OMV (Austria) and the French Engie (each 10 %).[4] Since Estonia did not permit Nord Stream to conduct marine scientific research in its exclusive economic zone (EEZ) in 2012 (as in 2007),[5] the extension project's transit countries also remain the same: Finland, Sweden and Denmark.[6]

The project concerns the installation of two additional trans-Baltic pipelines which are analogous to the existing ones (incl. capacity-wise). While the landfall on the German coast is planned to remain in Greifswald, the landfall on the Russian coast will either be stationed in the Kurgalsky or Soikinsky Peninsula.[7] The main distinction between the two Russian potential landfall sites is that unlike the latter, the Kurgalsky Peninsula is a Ramsar wetland site of international importance as well as a coastal and marine Baltic Sea protected area[8] (HELCOM MPA). It is also a candidate Emerald site[9] and a state nature reserve.[10]

The Kurgalsky Peninsula is one of 35 Ramsar sites in Russia.[11] The site has been deemed to exhibit "a high species diversity of flora and fauna, supporting numerous species of regionally or globally threatened plants, mammals, birds, amphibians and reptiles."[12] Thus, presumably the potential Soikinsky landfall poses less damage to marine and coastal environment than its alternative option in the sensitive Kurgalsky Peninsula area. In particular, during the implementation of the initial Nord Stream project the domestic competent authority (the Federal Service for Environmental Management Supervision) provided its permit for the laying of the pipelines in the Russian waters on the condition that Nord Stream ensures that this is carried out with minimum impact on the marine environment and its species.[13] Applied to the present context, this would mean *prima facie* that a regular coast should be chosen for stationing a landfall rather than an internationally protected nature reserve.

At the same time, Nord Stream has considered the Kurgalsky landfall financially more feasible in comparison to Kolganpya in the Soikinsky Peninsula (located some 45 km north-east). It has stated that "Among other advantages, the Kurgalsky landfall option significantly reduces onshore and offshore pipeline route length."[14] International environmental organisations have

[4] Nord Stream 2. Our Company – Prospective Shareholders. Accessible: http://www.nord-stream2.com/our-company/prospective-shareholders/ (25.06.2016).

[5] See A. Lott. Marine Environmental Protection and Transboundary Pipeline Projects: A Case Study of the Nord Stream Pipeline. – 27 Utrecht Journal of International and European Law 2011, p 59–61.

[6] See Nord Stream AG. Nord Stream to Further Develop Finnish Route Alternative After Estonia Rejects Survey Application, 06.12.2012. Accessible: http://www.nord-stream.com/press-info/press-releases/nord-stream-to-further-develop-finnish-route-alternative-after-estonia-rejects-survey-application-428/ (25.06.2016). See also Figure 1 (below).

[7] See Figure 1 (below).

[8] HELCOM. 166 – Kurgalsky Peninsula. Accessible: http://mpas.helcom.fi/apex/f?p=103:12:::NO::P12_ID:166 (25.06.2016).

[9] See further *infra* Chapter 3.

[10] See also the domestic regulation on the Kurgalsky nature reserve in ПРАВИТЕЛЬСТВО ЛЕНИНГРАДСКОЙ ОБЛАСТИ ПОСТАНОВЛЕНИЕ от 8 апреля 2010 года N 82. О государственном природном комплексном заказнике "Кургальский" регионального значения (с изменениями на 8 июля 2015 года). Accessible in Russian at: http://docs.cntd.ru/document/891828949 (25.06.2016).

[11] Ramsar. Country Profiles. Accessible: http://www.ramsar.org/country-profiles (25.06.2016).

[12] Ramsar. Country Profiles – Russian Federation. Accessible: http://www.ramsar.org/wetland/russian-federation (25.06.2016).

[13] D. Langlet. Nord Stream, the Environment and the Law: Disentangling a Multijurisdictional Energy Project. – 59 Scandinavian Studies in Law 2014, p 99.

[14] Nord Stream AG. Nord Steam Extension Project Information Document (PID). Zug 2013, p 19. Accessible: https://www.nord-stream.com/media/documents/pdf/en/2013/03/nord-stream-extension.pdf (25.06.2016).

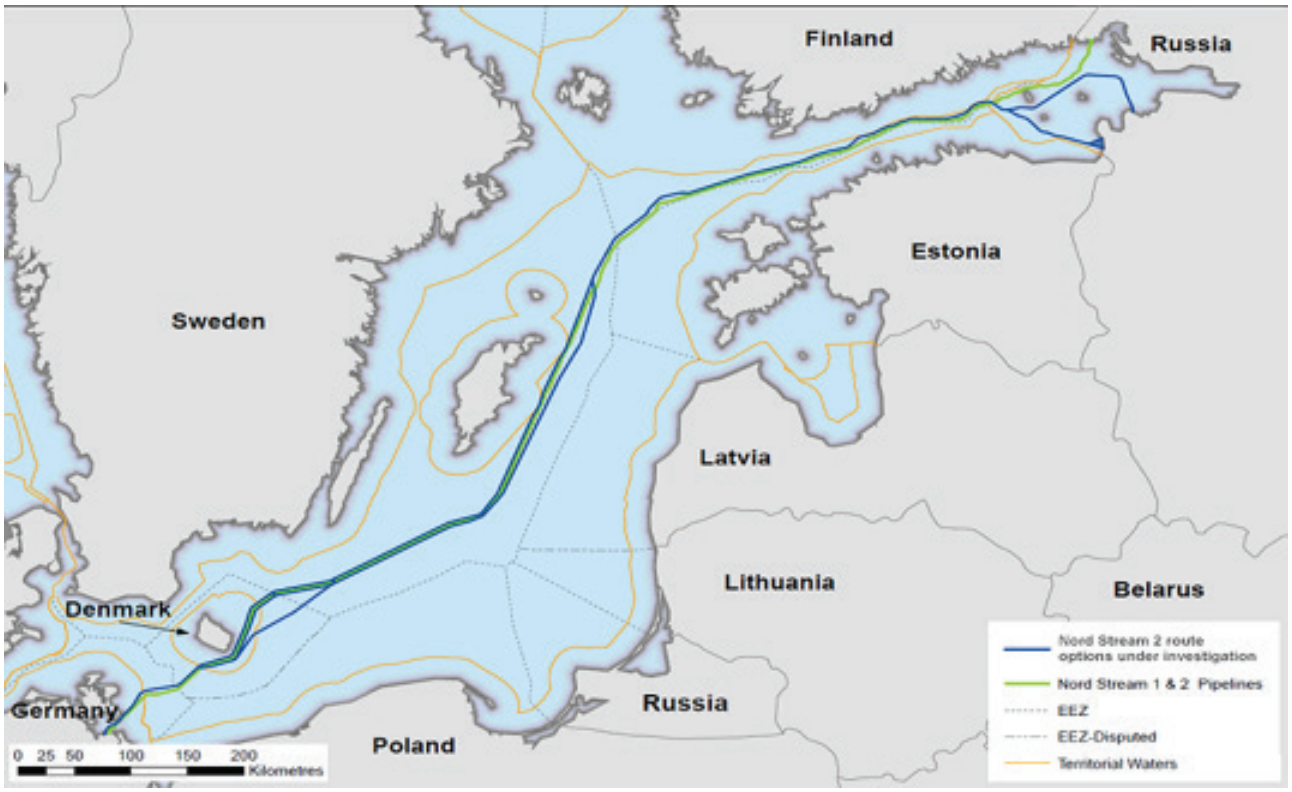


*Figure 1. Possible routes for Nord Stream 2, including the alternative solutions in the eastern part of the Gulf of Finland. Accessible: http://www.nord-stream2.com/our-project/pipeline (25.06.2016).*

raised their concerns regarding this prospect.[15] This paper aims to establish whether Russia and Nord Stream are required to carry out an EIA procedure in respect of the potential construction activities in and near the Kurgalsky Peninsula under international law and, if so, under which treaty.

## 2. Characteristics of the Kurgalsky Nature Reserve

The Kurgalsky Peninsula is located between the Narva Bay and Luga Bay on the southern coast of the Gulf of Finland. The Kurgalsky wetland of international importance (65 000 ha, incl. 38 400 ha of marine area, 1 400 ha of inland water bodies, 25 200 ha of terrestrial habitats)[16] stretches throughout the Kurgalsky Peninsula and also covers the area of HELCOM MPA, candidate Emerald site and a Russian nature reserve. Geographically, the four protection sites generally overlap (hence hereinafter *nature reserve*).

The nature reserve borders Narva River and Estonia in the south-west. The Kurgalsky Peninsula hosts some villages which include members of the endangered indigenous people Izhorians. Until recently, access to the peninsula was restricted as it was part of the Border Security

[15] Greenpeace. "Nord stream" can destroy a wildlife preserve "Kurgalsky", 20.09.2012. Accessible: http://www.greenpeace.org/russia/en/news/20-09-2012-nordstream_kurgalsky_eng/ (25.06.2016). See also Coalition Clean Baltic. Update of information regarding anthropogenic threats to Kurgalskiy Nature Reserve, Leningrad Oblast, Russia. HELCOM 15.02.2016, p 1–3.

[16] Ramsar. Information Sheet on Ramsar Wetlands – Kurgalsky Peninsula, 1997, p 1. Accessible: http://sites.wetlands.org/reports/ris/3RU026en.pdf (25.06.2016).

Zone.[17] Industrial development commenced in the peninsula only recently.

The establishment in 2001 of the Ust-Luga port 8 km east of the nature reserve's border has caused a rapid rise in the number of inhabitants in the surrounding settlements.[18] The Ust-Luga port is due to reach its full capacity in 2018, handling approximately 180 million tons of cargo (incl. radioactive substances and waste) per year.[19] By comparison, the second-largest port in Europe, Antwerp, handled 199 million tons of cargo in 2014.[20] Also, Shell and Gazprom signed in June 2016 a memorandum of understanding for constructing in the Ust-Luga port by 2021 a liquefied natural gas (LNG) terminal with the annual capacity of 10 million tons of LNG.[21] The prospective rise in the already heavy shipping traffic in the Gulf of Finland and Luga Bay in addition to the pollution caused by the development of the Ust-Luga port will likely have an adverse cumulative effect on the state of the environment in the Kurgalsky Peninsula.[22]

The Kurgalsky nature reserve is an important habitat for vulnerable or threatened species, e.g. flying squirrel, European beaver, brown bear, European mink, Eurasian badger, European otter, grey seal and Baltic ringed seal.[23] Notably, it has been estimated that the population of the Baltic ringed seal declined from approximately 200 000 to 5 000 seals in the course of the 20th century and that there are only some 300 Baltic ringed seals left in the Gulf of Finland.[24] The islets around the Kurgalsky Peninsula are used as seal haul-outs of which some hold over 300 seals.[25] The Kurgalsky Peninsula is also a resting area for more than 250 species of migrating water birds.[26] 85 of those species were listed in the so-called Baltic red book and 7 in the Russian red book in the middle of the 1990s.[27]

In the course of the feasibility study, Nord Stream considered that the extension project has a potential offshore and onshore transboundary impact on *inter alia* birds due to noise and visual impact.[28] The construction works may have

[17] Coalition Clean Baltic. Call for action regarding the alarming situation around Kurgalskiy Nature Reserve, Russia. HELCOM 23.10.2015, p 3. Accessible: https://portal.helcom.fi/meetings/STATE-CONSERVATION%203-2015-276/MeetingDocuments/3N-4%20CCB%20letter%20on%20Kurgalskiy.pdf (25.06.2016).

[18] Coalition Clean Baltic. Call for HELCOM action regarding Baltic MPAs within Russian part of the Gulf of Finland. HELCOM 19.11.2015, p 2. Accessible: https://portal.helcom.fi/meetings/HOD%2049-2015-247/MeetingDocuments/4-18%20Call%20for%20HELCOM%20action%20regarding%20Baltic%20MPAs%20within%20Russian%20part%20of%20the%20Gulf%20of%20Finland.pdf (25.06.2016).

[19] Baltic Ports Organization. JSC Ust-Luga. – General Information. Accessible: http://www.bpoports.com/jsc-ust-luga.html (25.06.2016).

[20] Port of Antwerp. 2015: Facts & Figures. Antwerp 2015, p 10. Accessible: http://www.portofantwerp.com/sites/portofantwerp/files/campaigns/Cijferboekje_2015_UK_DEF.pdf (25.06.2016).

[21] See Gazprom. Gazprom and Shell committed to broader cooperation in LNG sector. 16.06.2016. Accessible: http://www.gazprom.com/press/news/2016/june/article276698/ (25.06.2016).

[22] See also N. Trumbull, O. Bodrov. Environmental Degradation of Russian Coastal Regions: The Case of the Gulf of Finland. – 5 Eurasian Geography and Economics 2009, p 4–7.

[23] Information Sheet on Ramsar Wetlands. – Kurgalsky Peninsula (note 16), p 3.

[24] International Union for Conservation of Nature and Natural Resources. The IUCN Red List of Threatened Species – Pusa hispida. Accessible: http://www.iucnredlist.org/details/41672/0 (25.06.2016). See also HELCOM. Species Information Sheet – Phoca hispida botnica. Accessible: http://helcom.fi/Red%20List%20Species%20Information%20Sheet/HELCOM%20Red%20List%20Phoca%20hispida%20botnica.pdf (25.06.2016).

[25] Information Sheet on Ramsar Wetlands – Kurgalsky Peninsula (note 16), p 2–3.

[26] Trumbull, Bodrov (note 22), p 10. Information Sheet on Ramsar Wetlands – Kurgalsky Peninsula (note 16), p 2.

[27] Information Sheet on Ramsar Wetlands – Kurgalsky Peninsula (note 16), p 2.

[28] Nord Stream Extension Project. Public Meeting within the International Consultation. Tallinn 30.05.2013, slide

such an adverse impact also on seals and fish in the affected marine area.[29] Other potential adverse transboundary impacts include sediment spreading and change of water characteristics.[30]

Wetlands have been deemed to be extremely fragile and vulnerable to anthropogenic pollution.[31] In particular, the construction of the landfall (incl. a several kilometres-long trench in the shallow waters as the trench needs to reach up to 15 m water depth) and the compressor station as well as the laying of the pipeline may likely have an impact on the nature reserve's environment. In general, it has been also argued that "Although occasional discharges, which can occur during maintenance, and continuous but comparatively small oil leakages may be relatively insignificant, the risk of losing benthic habitats as a result of large-scale shifting of sediments while pipelines are being laid must not be underestimated."[32] Furthermore, the Nord Stream extension project's potential cumulative effects in combination with the on-going development of the Ust-Luga port should be acknowledged. Such major infrastructure projects also have an indirect effect on the environment as they trigger societal changes in the relevant area, including the formation and expansion of settlements.

## 3. Implications for an EIA

According to the Nord Stream extension's preliminary project timeline, the EIA phase should have been finished by the beginning of 2015.[33] However, the results of an EIA, if carried out, of the project's effects on the Kurgalsky nature reserve have not been published. Greenpeace claimed in the beginning of 2013 that Nord Stream ordered a preliminary EIA from an NGO *Prozrachnyi Mir*, which came to the conclusion that the potential Nord Stream extension project in the Kurgalsky nature reserve will affect its water area and will *inter alia* have a deterring effect on seals.[34] Nord Stream claims that it has not ordered such an EIA.[35]

Unlike the other Baltic Sea coastal States, Russia is not a member State of the EU and does not need to follow its EIA directive.[36] However, since Russia is an Observer State[37] to the Council of Europe's (CoE) Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)[38] it is required to list candidate Emerald sites (based on the same principles as Natura 2000 sites). Russia runs a project in cooperation with the CoE on the identification of potential areas of special conservation interest

22. Accessible: http://www.envir.ee/sites/default/files/nordstream_ettekanne.pdf (25.06.2016).

[29] Ibid.

[30] Ibid.

[31] G. V. T. Matthews. The Ramsar Convention on Wetlands: its History and Development. Gland 2013, p 60.

[32] A. Proelss. Pipelines and protected sea areas, in R. Caddell, D. Rhidian Thomas (eds.). Shipping, Law and the Marine Environment in the 21st Century: Emerging challenges for the Law of the Sea – legal implications and liabilities. Oxford 2013, p 276.

[33] Nord Stream Public Meeting, Tallinn 2013 (note 28), slide 6.

[34] Greenpeace. Construction of Nord Stream pipeline threatens a unique natural site, 14.02.2013. Accessible: http://www.greenpeace.org/russia/en/news/14-02-2013-kurgalsky_nordstream/ (25.06.2016).

[35] Ibid.

[36] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ [2012] L 26/1 as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014, OJ [2014] L 124/1.

[37] Chart of signatures and ratifications of Treaty 104: Convention on the Conservation of European Wildlife and Natural Habitats. Accessible: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104/signatures?p_auth=hj5fqPTV (25.06.2016).

[38] Convention on the Conservation of European Wildlife and Natural Habitats. Bern 19.09.1979, e.i.f. 01.06.1982.

of the Emerald Network in the European part of Russia and its implementation period is due to be finished by 2016.[39] The Kurgalsky Peninsula is among Russia's candidate Emerald sites.[40] However, even if Russia would join the Emerald network soon, it would not necessarily be required under the Bern Convention to conduct an EIA in respect of its planning and development in areas such as the Kurgalsky Peninsula. The 1979 Bern Convention does not explicitly refer to the EIA procedure.

By contrast, some international conventions, *prima facie* the Convention on EIA in a Transboundary Context (Espoo Convention)[41] provide also criteria for conducting an EIA. This is scrutinised next.

### 3.1 The Espoo Convention's Criteria for an EIA

Russia has not (unlike the other Baltic Sea coastal States) ratified the Espoo Convention. However, it is the Espoo Convention's signatory State.[42] Hence it is required to refrain from acts which would defeat the object and purpose of the treaty.[43]

Furthermore, Russia has declared that it will act in respect of the Nord Stream Extension Project as a party of origin under the Espoo Convention (as far as it considers it possible according to its domestic legislation).[44] Russia did the same with the initial Nord Stream project.[45] This decision means that Russia needs to follow the obligations as stipulated for the parties of origin in the Espoo Convention,[46] including the requirement to carry out an EIA. This is due to the potential transboundary effects of the construction activities in the Kurgalsky Peninsula as well as in its adjacent waters.[47]

Russia is required under Article 2(6) of the Espoo Convention to ensure that the opportunity to participate in the EIA procedure as provided to the public of the affected States is equivalent to that provided to its own public. Koivurova and Pölönen have thus concluded in respect of the initial Nord Stream project that the nine affected States (Baltic Sea coastal States) and their publics can participate in any one of the national EIA procedures.[48] This means that e.g. the Estonian public can voice its concerns about the Nord Stream's extension project in the course of the Russian EIA procedure.[49]

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[39] SPb CPO Biologists for Nature Conservation. Report on the implementation of the Joint EU/CoE Programme for the preparation of the Emerald Network of Nature Protection Sites, Phase II in the Russian Federation. St Petersburg 2014, p 3. Accessible: http://pjp-eu.coe.int/documents/1461016/4165450/Emerald_Ru_Report_2013_final.pdf/861e0c43-d07f-4b45-84cd-0a678c93f0de (25.06.2016).

[40] HELCOM. Fact sheet for HELCOM MPA 166 – Kurgalsky Peninsula. General Information of MPA. Accessible: http://mpas.helcom.fi/apex/f?p=103:12:::NO::P12_ID:166 (16.06.2016). See also I. Obretenova. The Emerald Network: legal framework, constitution process and joint EU/CoE action. Council of Europe, slide 10. Accessible: http://eap-csf.eu/assets/images/IO%20EU_Emerald Network_legalframework_JP%20Iva%20Obretenova.pdf (25.06.2016).

[41] Convention on Environmental Impact Assessment in a Transboundary Context. Espoo 25.02.1991, e.i.f. 10.09.1997.

[42] United Nations Treaty Collection. Convention on Environmental Impact Assessment in a Transboundary Context – Status as at: 28.06.2016.

[43] Vienna Convention on the Law of Treaties. Vienna 23.05.1969, e.i.f. 27.01.1980, Art 18.

[44] Nord Stream Public Meeting, Tallinn 2013 (note 28), slide 18.

[45] Nord Stream Espoo Report. Chapter 3: Legal Framework and Public Consultation. 2009, p 62. Accessible: https://www.nord-stream.com/download/document/73/?language=en (25.06.2016).

[46] See e.g. Art 2 of the Espoo Convention.

[47] See for the potential transboundary effects, e.g. Nord Stream Public Meeting, Tallinn 2013 (note 28), slide 22.

[48] T. Koivurova, I. Pölönen. Transboundary Environmental Impact Assessment in the Case of the Baltic Sea Gas Pipeline. – German Yearbook of International Law 2009(52), p 306, 309.

[49] See also e.g. Articles 3(1), 3(2) and 3(8) of the Espoo Convention.

The applicability of the Espoo Convention also implies that Russia would be required under Article 5 of the Espoo Convention to enter into consultations with the nature reserve's bordering country Estonia upon its request concerning, *inter alia*, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact. This is important mainly because such an obligation does not follow from the bilateral treaties concluded between Estonia and Russia in the field of environmental cooperation.[50] The consultations may relate to possible alternatives to the proposed activity, including the no-action alternative and possible measures to mitigate significant adverse transboundary impact and to monitor the effects of such measures at the expense of Russia (Art 5(a) of the Espoo Convention). For example, during the initial Nord Stream project Finland reserved under this provision an opportunity for consultations with Russia.[51]

Therefore, Russia is required to conduct an EIA under the Espoo Convention in respect of the prospective construction works in the Kurgalsky Peninsula as long as this is in accordance with its domestic law. The EIA process in 2008 and 2009 demonstrated the lack of any potential impediments stemming from the Russian domestic law for conducting the EIA under the Espoo procedure. It would thus be reasonable to expect that such an EIA is likewise possible under the Russian domestic law in regard of the on-going extension project. However, as noted by Koivurova and Pölönen, in practice it is still Russia's decision which route-alternatives it will study in its EIA and the other Baltic Sea coastal States do not have many legal means for influencing Russia's choice.[52]

In addition, following the example of the initial project, Nord Stream should also prepare the extension project's general transboundary environmental impact statement (Espoo Report) on the basis of the EIAs conducted by Denmark, Finland, Germany, Russia and Sweden. Unlike the nationally conducted EIAs, this report is not subordinate to the domestic laws of the coastal States and instead needs to directly follow the Espoo Convention and the supervision of the international Espoo contact point meetings. Nord Stream did not have any direct legal obligation to prepare the Espoo Report,[53] but presumably for maintaining good relations with the parties of origin nonetheless decided to present this single document in regards of the initial Nord Stream project.[54] Koivurova and Pölönen have found that in light of this precedent it is very difficult for any future analogous projects not to follow its example on international coordination.[55]

In this regard, it is particularly important that in the upcoming Espoo Report the question of alternatives is scrutinised in depth. This concerns particularly the location of the Russian landfall (either in the Soikinsky Peninsula or in the Kurgalsky Peninsula as elaborated above) but also the prospect of a land-based alternative.

[50] See Agreement between the Government of the Estonian Republic and the Government of the Russian Federation on Cooperation in Protection and Sustainable Use of Transboundary Waters. Moscow 20.08.1997, e.i.f. 20.08.1997. Accessible: http://faolex.fao.org/docs/texts/bi-32669.doc (16.06.2016). This treaty is not concerned with the protection of the marine environment. Instead, pursuant to the treaty's Article 4 its objects are transboundary waters of the Narva River watershed, including Lake Peipus-Pihkva. See also Agreement between the Government of the Estonian Republic and the Government of the Russian Federation on Cooperation in the Field of Environment. Pskov 11.01.1996, e.i.f. 19.06.1996. Accessible in Estonian at: https://www.riigiteataja.ee/akt/13083958 (16.06.2016). Accessible in Russian at: http://faolex.fao.org/docs/texts/bi-32792.doc (16.06.2016). This treaty is worded in abstract manner and is in general an expression of mutual goodwill.

[51] Koivurova, Pölönen (note 48), p 315–316.

[52] Ibid, p 313.

[53] Ibid, p 322.

[54] See ibid, p 305–306.

[55] Ibid, p 323.

Although the additional pipelines would certainly have a cumulative impact on the Baltic Sea's marine environment, most of the issues relevant for the extension project's Espoo Report have been addressed already in the initial project's Espoo Report. This provides the opportunity for the new Espoo Report to address in greater detail some of the shortcomings of the initial project's EIA.

In particular, the initial project's Espoo Report did not elaborate on the land-based alternative since allegedly none of the Baltic Sea coastal States asked Nord Stream to analyse this at the appropriate stage (scoping phase) of the transboundary EIA procedure. Koivurova and Pölönen have found that as a result of this it became subsequently difficult for the affected States to claim that the final Espoo Report was not complete because of failing to address the potentials of a land-based alternative.[56] This time the request to study the land-based alternative should have been made in the appropriate moment, i.e. during the scoping phase.[57]

The international Espoo contact point meetings[58] between the Baltic Sea coastal States (affected States) and Nord Stream will also serve as the forum for influencing Nord Stream to ensure that the potential locations of the Russian landfall and the project's land-based alternative are studied in the final Espoo Report thoroughly. Similarly, albeit Nord Stream was initially rejective towards Finland's concerns about the lack of study on the alternative routing south of Gogland Island in the eastern Gulf of Finland,[59] the alternative route was later still duly analysed by Nord Stream in the Espoo Report.[60] Koivurova and Pölönen found that this illustrates the clear impact that the international Espoo contact point meetings had on the outcome of the final Espoo Report.[61]

Likewise, the affected States would be able to raise their potential concerns in the Espoo contact point meetings about the Russian landfall location in the Kurgalsky Peninsula as well as about the need to elaborate on the land-based alternative route in the Espoo Report. More specifically, the determination of the location of the Russian landfall and submarine pipeline's routing in the Russian territorial sea might deserve a specific routeing document analogously to the one presented during the initial Nord Stream project in respect of routing in the Danish and German waters.[62] This question should require specific attention and an in-depth scrutiny by the Baltic Sea coastal States.

Yet as the Kurgalsky Peninsula is an internationally protected Ramsar site since 1994,[63] it is relevant to establish whether Russia might also be required to follow an EIA procedure under the Convention on Wetlands of International Importance, especially as Waterfowl Habitat[64] (Ramsar Convention). This is analysed subsequently.

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[56] Ibid, p 311–312.

[57] Notably, in 2013 the parties of origin asked Estonia whether it wants to participate in the EIA procedure which they had just commenced and also asked feedback on the extension project's information document (PID). The Estonian Ministry of the Environment asked its public for opinions and recommendations on the PID and the extension project's EIA. During this scoping phase the present author sent to the ministry his observations which centred around the request for Nord Stream to study the land-based alternative in its Espoo Report. Nord Stream and the parties of origin should have received these comments pursuant to Article 3(8) of the Espoo Convention. A. Lott. Seisukoht seoses Nord Streami laienduse projektiga (Position on the Nord Stream Extension Project –A.L.). 31.05.2013, unpublished, p 3–4. On file with the author.

[58] See further on their function and aims in Koivurova, Pölönen (note 48), p 305–306.

[59] Ibid, p 312–313.

[60] Ibid, p 314.

[61] Ibid.

[62] See ibid, p 308.

[63] V. Zimin, Ramsar wetland sites are under threat in the Gulf of Finland. – CCB Newsletter 2003(1), p 14.

[64] Convention on Wetlands of International Importance especially as Waterfowl Habitat. Ramsar 02.02.1971, e.i.f.

### 3.2 The Ramsar Convention's Criteria for an EIA

As the continuator State of the Soviet Union, Russia has acceded to the Ramsar Convention on February 11th, 1977.[65] The Ramsar Convention is deemed to be the first wildlife convention which is focused only on the protection of habitats.[66] It has a near-universal participation (169 States Parties).[67]

The Convention's main aim is pursuant to its Article 3(1) to ensure that Contracting States formulate and implement their planning so as to promote the conservation of the wetlands included in the Ramsar List, and as far as possible the wise use of wetlands in their territory. The aforereferred *wise use* of wetlands is defined by the Contracting States as their sustainable utilisation for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem.[68] The term is commonly considered as synonymous to *sustainable use*.[69] Notably, pursuant to Article 5 of the Ramsar Convention Estonia has also an important role in defining and co-ordinating the wise use of the Russian Kurgalsky wetland as the two States may be considered as sharing the wetland's water system, namely the Narva Bay.[70]

The resolutions of the Conference of the Contracting States of the Ramsar Convention have made common references to the EIA procedures in regard to the wise use of wetlands. However, pursuant to the Convention's Article 6(2)d), such resolutions do not have a binding force. They are of recommendatory value to the Contracting Parties. Therefore, the resolutions adopted unanimously by the Contracting Parties are primarily important sources for interpreting the Ramsar Convention. In practice, domestic courts have also applied them in this manner.[71]

The non-binding legal force of the relevant resolutions is also exemplified by the terms used in a provision of the recommendation X.17 on the scientific and technical guidance for conducting an EIA and a Strategic Environmental Assessment (SEA).[72] It *invites* Contracting Parties to draw these guidelines to the attention of all relevant stakeholders, including *inter alia* government ministries, departments and agencies, water and basin management authorities, non-governmental organizations, and civil society, and to *encourage* those stakeholders to take these guidelines into account in relevant decision-making.

This Ramsar recommendation provides that an EIA should be mandatory when, *inter alia*,

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21.12.1975. As amended by the Paris Protocol, 3 December 1982, and Regina Amendments, 28 May 1987.

[65] Russia's Ramsar Profile (note 11).

[66] P. Birnie, A. Boyle, C. Redgwell. International Law & the Environment. Oxford 2009, p 673.

[67] Ramsar – About Ramsar. Accessible: http://www.ramsar.org/ (25.06.2016).

[68] Ramsar. Recommendation 3.3: Wise use of wetlands. Convention on Wetlands (Ramsar, Iran, 1971) 3rd Meeting of the Conference of the Contracting Parties, 27.05-05.06.1987, p 1. Accessible: http://www.ramsar.org/sites/default/files/documents/library/key_rec_3.03e.pdf (25.06.2016). Ramsar Convention Secretariat. The Ramsar Convention Manual: A Guide to the Convention on Wetlands (Ramsar, Iran, 1971). Gland 2013, p 14.

[69] The Ramsar Convention Manual (note 68), p 14.

[70] Ramsar. Resolution VII.19. 7th Meeting of the Conference of the Contracting Parties, 10.05-18.05.1999, p 5. Accessible: http://www.ramsar.org/sites/default/files/documents/library/key_res_vii.19e.pdf (25.06.2016).

[71] See J. Verschuuren. Ramsar soft law is not so soft at all. Discussion of the 2007 Decision by the Netherlands Crown on the Lac Ramsar Site on the Island of Bonaire. 2008, p 1–2. (Translation of a case law annotation published in 2008 „Milieu en Recht", 35(1), p 28–34.) Accessible: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1306982 (25.06.2016).

[72] Ramsar. Recommendation X.17: Environmental Impact Assessment and Strategic Environmental Assessment: updated scientific and technical guidance. 10th Meeting of the Conference of the Parties to the Convention on Wetlands, 28.10-04.11.2008, p 2. Accessible: http://www.ramsar.org/sites/default/files/documents/pdf/res/key_res_x_17_e.pdf (25.06.2016).

activities take place in protected areas.[73] It also urges Contracting Parties to apply a precautionary approach (to which the Convention itself does not explicitly refer to) in decision-making in cases of scientific uncertainty when there is a risk of significant harm to biodiversity.[74] The Ramsar Handbook on EIA adds that the precondition for a successful EIA is also the effective participation of indigenous people,[75] in this case primarily Izhorians.

In addition, Ramsar Resolution VIII.14 stipulates that "any new factors, including development proposals, on or off the site, that are likely to have a significant impact on the ecological character of the site, should be subject to a full EIA."[76] It follows from the foregoing that the States Parties to the Ramsar Convention have agreed to the principle that an EIA should be conducted if a planned activity in the Ramsar wetland might affect its ecosystem.

Nevertheless, the detailed Ramsar resolutions on the EIA procedure do not, strictly speaking, create any direct legal obligations for the Contracting Parties. They are of soft law value for the potential construction of onshore and offshore pipelines and their supplementary facilities in the Kurgalsky nature reserve.

Thus, Russia's and Nord Stream's obligation to weigh alternatives under the Espoo Convention in respect of Nord Stream's potential extension to the Kurgalsky nature reserve is important mainly because no such requirement for carrying out an EIA applies to them directly under other international conventions. In particular, the United Nations Convention on the Law of the Sea[77] (LOSC), the Convention on Biological Diversity[78] and the Convention on the Protection of the Marine Environment of the Baltic Sea Area[79] (Helsinki Convention) lack strict criteria for an EIA procedure.

### 3.3 Criteria under the LOSC, Convention on Biological Diversity and Helsinki Convention for an EIA

Article 14 of the Convention on Biological Diversity requires conducting an EIA only „as far as possible and as appropriate", thus providing great discretion for the States Parties. Likewise, LOSC Articles 204 and 206 provide that States must „endeavour to" and „as far as practicable" carry out such assessments. Also, LOSC Articles 204 and 206 only provide for a broad assessment of the proposed activity's impacts on the marine environment and do not require *inter alia* any international co-ordination or consultations with the affected States prior to carrying out the project. That said, it still follows from LOSC Article 206 that the extension project's parties of origin (Denmark, Finland, Germany, Russia and Sweden) should make their EIA reports as conducted under the Espoo Convention through an international organisation (e.g. the Helsinki Commission) available to all States (LOSC Art 205).

In addition, although the Kurgalsky Peninsula and its surrounding waters have been designated as a HELCOM MPA, this status as such does not provide any special guarantee of

[73] Ibid, p 25.
[74] Ibid, p 22.
[75] Ramsar Handbook on Impact Assessment. Gland 2010, p 14.
[76] Ramsar. Resolution VIII.14: New Guidelines for management planning for Ramsar sites and other wetlands. 8th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971), 18-26.11.2002, para 141. Accessible: http://ramsar.rgis.ch/cda/en/ramsar-documents-resol-resolution-viii-14-new/main/ramsar/1-31-107%5E21393_4000_0__ (25.06.2016).
[77] United Nations Convention on the Law of the Sea. Montego Bay 10.12.1982, e.i.f. 16.11.1994.
[78] Convention on Biological Diversity. Rio de Janeiro 05.06.1992, e.i.f. 29.12.1993.
[79] Convention on the Protection of the Marine Environment of the Baltic Sea Area. Helsinki 09.02.1992, e.i.f. 17.01.2000.

protection (aside of recommendatory management plans etc)[80] for the area concerned.[81] The Helsinki Convention requires under its Article 7(1) to carry out an EIA only if this is „required by international law or supra-national regulations applicable to the Contracting Party of origin". Hence, as the obligation to carry out a transboundary EIA in respect of Nord Stream's potential extension to the Kurgalsky Peninsula arises only from the Espoo Convention, Article 7(1) of the Helsinki Convention directly brings the EIA procedure under the scope of the Espoo Convention.[82]

Notably, Article 7(3) of the Helsinki Convention requires Russia to cooperate with Estonia to ensure that potential impacts on the marine environment are fully investigated within the EIA as conducted under the Espoo Convention. This is due to the fact that Estonia and Russia share the transboundary waters in the Narva Bay. In particular, they would be required to jointly take appropriate measures in order to prevent and eliminate pollution. In the present context this provision thus somewhat complements Article 5 of the Espoo Convention which also facilitates cooperation between Estonia and Russia on reducing the environmental impact of the potential extension of Nord Stream pipelines to the Kurgalsky Peninsula.

## 4. Conclusion

The extension of the Nord Stream pipelines and their integral parts (e.g. landfall, compressor station) to the Kurgalsky Peninsula would have an adverse impact on the Kurgalsky HELCOM MPA, the Ramsar wetland of international importance, the candidate Emerald site as well as on the Russian nature reserve. The extension project would also in this section likely have a transboundary impact since the onshore and offshore construction works as well as the laying of the pipeline in the Gulf of Finland and Narva Bay would occur mostly within approximately 10 km-radius as measured from the Estonian maritime (concerning offshore works) and land boundary (in regard to onshore works).

Nord Stream and Russia are not strictly obligated under the Espoo Convention, Bern Convention, Ramsar Convention, LOSC, Helsinki Convention, EU law or the Biological Diversity Convention to conduct an EIA in respect of the extension project's potential impact on the ecological character of the Kurgalsky Peninsula. However, as some cases demonstrate, it is possible to interpret Article 3 of the Ramsar Convention in combination with its resolutions on the EIA process in a manner which implies the obligation to conduct an EIA. Yet it is unlikely that the Russian government or courts would apply such an interpretation.

The obligation to conduct an EIA under international law could only follow from the Espoo Convention. However, Russia has not ratified it. Nonetheless, Russia has declared itself bound by the obligations set for the parties of origin under the Espoo Convention as far as it considers it possible according to its legislation. Therefore, as demonstrated by the initial Nord Stream project nearly ten years ago Nord Stream and Russia are able and need to follow the Espoo rules on transboundary EIA due to the extension project's transboundary effects.

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[80] See HELCOM. Recommendation 35/1. System of Coastal and Marine Baltic Sea Protected Areas (HELCOM MPAs). 01.06.2014, p 3–4. Accessible: http://www.helcom.fi/Recommendations/Rec%2035-1.pdf (25.06.2016).

[81] See also HELCOM. Pearls of the Baltic Sea. Networking for life: Special nature in a special area. 2007, p 15. Accessible: http://www.helcom.fi/Lists/Publications/Pearls%20of%20the%20Baltic%20Sea.pdf (25.06.2016).

[82] See Koivurova, Pölönen (note 48), p 302. See also D. M. Dzidzornu. Environmental Impact Procedure through the Conventions. – 10 European Environmental Law Review 2001, p 23.

This implies *inter alia* that following the example of the initial project Nord Stream should present the Espoo Report on the extension project's general transboundary environmental impact. The Espoo Report should provide careful analysis on the potential locations of the Russian landfall. This general study as carried out by Nord Stream is not dependent on its conformity with the Russian legal framework (distinct from the EIA conducted by Russia on its section of the project). Instead, it needs to follow directly the Espoo Convention and the supervision of the international Espoo contact point meetings.

In addition, as the pipelines and their integral components are planned to be stationed in the Kurgalsky Peninsula and in the Narva Bay, Estonia, which shares these transboundary waters and is bordering the Kurgalsky nature reserve, but also other Baltic Sea coastal States have many procedural rights in the course of the transboundary EIA.

# Towards the Aichi 2020 biodiversity targets – An assessment of Norway's Nature Diversity Act in Light of Aichi Biodiversity Target 14

*Froukje Maria Platjouw*[1]

## Abstract

The Nature Diversity Act of 2009 is the most important national legal act for the protection of nature in Norway. It was adopted to allow a better follow-up of the Convention on Biological Diversity and serves to implement the constitutional provision on the right to a natural environment in which productivity and diversity are maintained. This paper reviews the Nature Diversity Act in light of Aichi Biodiversity Target 14, which requires that "By 2020, ecosystems that provide essential services […] are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable". This review is part of a global IDLO initiative to evaluate a number of successful national biodiversity laws. The paper concludes that the Nature Diversity Act has great potential to safeguard ecosystems that provide essential services especially through its focus on ecosystem structures, functioning, productivity; its principle on the ecosystem approach and cumulative effects; and its provisions related to the designation of species, habitat types, and protected areas. Furthermore, the special mention of 'Sami Culture' under the Act may serve as a guideline to take into account the traditional agricultural and ecosystem based practices of indigenous tribes while providing for the safeguard or restoration of ecosystems that provide essential services.

## Introduction

The Convention on Biological Diversity (CBD) – a multilateral agreement that entered into force in 1993 – is presently the main international treaty focusing on biodiversity conservation. In addition to conservation in itself, it includes the sustainable use of biodiversity's components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[2] Yet despite the widespread concern around biodiversity loss, biodiversity loss continues globally, driving major alterations to earth's ecosystems and the services they provide to humans.[3] Global commitments made under the CBD to substantially reduce rates of biodiversity loss by 2010 were not met.[4]

In 2010, the CBD adopted a new Strategic Plan for 2011–2020, which included the Aichi

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[2] The Convention on Biological Diversity (adopted 22 May 1992, entered into force 29 December 1993)1760 UNTS 79.

[3] R. Hill et al, 'A socio-ecological systems analysis of impediments to delivery of the Aichi 2020 targets and potentially more effective pathways to the conservation of biodiversity', 34 *Global Environmental Change* 2015, p. 22.

[4] Ibid.

Biodiversity Targets (ABTs). The Plan marks an important development towards better protection of our ecosystems, as its mission is to:

> ”Take effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human well-being, and poverty eradication. To ensure this, pressures on biodiversity are reduced, ecosystems are restored, biological resources are sustainably used and benefits arising out of utilization of genetic resources are shared in a fair and equitable manner; adequate financial resources are provided, capacities are enhanced, biodiversity issues and values mainstreamed, appropriate policies are effectively implemented, and decision-making is based on sound science and the precautionary approach.”[5]

The Plan presents a set of 20 interacting Aichi Biodiversity targets organized under five Strategic Goals.[6] The 20 Aichi Targets that underpin the Strategic Goals are a step forward from the generic 2010 target of “achieving a significant reduction of the current rate of biodiversity loss”, as they are framed as a set of desired outcomes required to ultimately halt biodiversity loss and ecosystem degradation.[7] Indeed, the goals and targets comprise both aspirations for achievement at the global level, and a flexible framework for the establishment of national or regional targets. The Aichi 2020 Targets thus aim to halt the loss of biodiversity by 2020, in order to ensure that ecosystems continue to provide essential services. They may be considered as a blueprint for reversing biodiversity loss and ensuring the health of ecosystems for generations to come.[8]

In order to assist parties to the CBD in achieving the Aichi Targets, the International Development Law Organization (IDLO) in partnership with the Secretariat of the Convention on Biological Diversity launched an initiative in 2012 entitled ‘Legal Preparedness for Achieving the Aichi Targets”.[9] This initiative provides a central hub for stakeholders and experts to share knowledge and build capacity, contributing to a global effort to raise understanding of “biodiversity laws” and their role in supporting countries to achieve their biodiversity goals related to the Aichi Biodiversity Targets. “Biodiversity laws” have traditionally been used for conservation purposes, focusing on the protection of plant species, wildlife and national parks. Pursuant to

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[5] CBD-COP, Conference of the Parties 10 Decision X/2 ‘Strategic Plan for Biodiversity 2011-2020’ (29 October 2010) UNEP/CBD/COP/10/27.

[6] Ibid.

[7] A. Marques et al, ‘A framework to identify enabling and urgent actions for the 2020 Aichi targets’, 15 *Basic and Applied Ecology* 2014:8, p. 633. The targets are interacting in the sense that actions to achieve one target may influence other targets; in turn a target may be influenced by actions taken towards the attainment of other targets. To determine the potential interactions among the twenty Aichi Targets, a group of 18 experts (composed of GBO-4 Technical Report authors and reviewers) qualitatively assessed how the achievement of any given Aichi Target could influence the achievement of the other targets. See Marques et al figure 1.

[8] IDLO, ‘Aichi: What is legal preparedness about?’, available at http://www.idlo.int/what-we-do/initiatives/aichi-what-legal-preparedness-about.

[9] The IDLO is an intergovernmental organization devoted to promoting the rule of law, with a focus on institution building, access to justice, and sustainable development. In order to realize sustainable development, the rule of law is essential. The IDLO helps to create incentives for sustainable land use, clean energy and low-carbon investment; design solutions to mitigate climate change and preserve biodiversity. The 2012 initiative falls under the ‘sustainable development’ pillar and aims to assist countries to “legally prepare” to achieve the Aichi Biodiversity Targets, a process that includes building up the locally relevant knowledge, legal capacity, and political commitment needed to empower countries to use law to achieve their broad biodiversity goals. For more information see <http://www.idlo.int/sites/default/files/pdfs/IDLO%20Leaflet%20-%20English_2.pdf>

IDLO however, "biodiversity laws" can play a much broader role by addressing the underlying causes of biodiversity loss and mainstreaming biodiversity values across economic sectors. The creation of an enabling legal environment, underpinned by strong institutions and good governance, can be an essential step for countries to effectively achieve their biodiversity goals. [10]

In 2014, the IDLO carried out an assessment of a number of selected national biodiversity laws from different countries (incl. Norway, India, and Costa Rica) that could provide interesting approaches and lessons-to-learn on how national biodiversity laws could contribute to attaining Aichi biodiversity target 14 as part of Strategic Goal D: *Enhance the benefits to all from biodiversity and ecosystem services.* As a contribution to that assessment, this paper reviews Norway's Nature Diversity Act of 2009 in light of Aichi target no. 14. Target 14 requires that:

> "By 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being, are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable".

The analysis of biodiversity laws in light of Target 14 thus consists of three main elements:

1. The extent to which the law places an emphasis on ecosystems that provide essential services;
2. The extent to which the law requires the restoration and safeguarding of these ecosystems that provide essential services; and
3. The extent to which the law meets the needs of women, indigenous and local communities, and the poor and vulnerable.

[10] IDLO (n 8)

This paper describes the state of affairs concerning nature in Norway, assesses Norway's Nature Diversity Act in light of the above-mentioned three elements, and concludes with summing up the lessons learned.

## 1. Nature in Norway

Norwegian nature is very varied, with striking differences between landscapes, habitat types and plant and animal species found in different parts of the country.[11] The large variation over short distances is rare, not only in the Nordic context, but in a global context as well. Mainland habitats range from southern beech forests to the Arctic areas in the north, and from humid coastal areas to dry inland valleys. Norway is also known for its rich marine biodiversity.[12] In fact, the area managed within the Exclusive Economic Zone and the fisheries protection zone around Svalbard and Jan Mayen is, all together, more than five times larger than Norway's land area.[13] This comprises the marine areas of Skagerrak, North Sea, Norwegian Sea, Barents Sea, Greenland Sea and part of the North Pole basin.

Biodiversity in Norway is mainly threatened by five direct drivers of change: land use change, over-harvesting, climate change, invasive alien species and pollution. Changing land use is the most significant factor impacting Norwegian biodiversity and has or will have a nega-

[11] Norwegian Ministry of Climate and Environment, 'Norway's Fifth National Report to the Convention on Biological Diversity' 2014, available at <https://www.regjeringen.no/contentassets/b760c6666be74cc3b8aa1a2ea5351a24/5nr_cbd_norway_final.pdf>

[12] Convention on Biological Diversity, "Norway-Country Profile. Biodiversity Facts. Status and trends of biodiversity, including benefits from biodiversity and ecosystem services", available at: http://www.cbd.int/countries/profile/default.shtml?country=no

[13] The Fisheries Protection Zone is a 200-nautical-mile zone of fisheries jurisdiction zone around the Svalbard archipelago. It was established on 3 June 1977 pursuant to the Act of 17 December 1976 relating to the Economic Zone of Norway.

tive impact on 87 % of the threatened and near-threatened species. Many species will however also be threatened by climate change. A warmer climate will change the living conditions for several species and ecosystems and lead to species dispersing into new areas.[14] According to the Norwegian Black List, a total of 216 terrestrial and marine alien species are associated with a very high or high ecological risk.[15] With regard to the marine environment, the introduction of invasive alien organisms and the spread and accumulation of persistent contaminants in food chains continue to pose significant threats to biodiversity. Climate change is believed to cause the greatest changes to marine biodiversity, as many southern species may migrate northwards due to higher sea temperatures in coastal areas. Furthermore, ocean acidification and less ice cover in the Arctic Ocean may change the living conditions for many species.[16]

Generally, the state of Norwegian ecosystems is relatively good and, if managed wisely, they will be capable of sustaining a flow of important ecosystem services. The administrative, economic and legal framework in Norway has been identified as an important reason for this situation.[17] All Norwegian authorities, industrial sectors and other relevant actors are required to play their part in efforts to ensure the conservation and sustainable use of biodiversity. Norway has developed national environmental targets, a national strategy and action plan which has been implemented and has shaped Norwegian environmental management.[18] Many of the Aichi targets have already been included in Norway's environmental targets related to environmental status. The following national environmental targets correspond to Aichi target 14:

- The structure, functioning, productivity and diversity of marine ecosystems will be maintained or restored and they will provide a basis for value creation through the sustainable use of natural resources and ecosystem services (Target 1.1)
- All coastal waters will have good ecological and chemical status by 2021 (Target 1.2)
- By 2020, the diversity of habitat types in freshwater, forest, wetlands, mountain and in cultural landscapes will be maintained or restored; this will include safeguarding genetic diversity and important ecological functions and services (Targets 2.1., 3.1., 4.1., 5.1 and 6.5.)
- Access rights to uncultivated land will be maintained (Target 8.3)
- Towns and urban areas will be sustainable and attractive, will conform to the principles of functional design, and will promote health and a good quality of life. (Target 8.1)
- Areas of value for outdoor recreation will be safeguarded and managed in a way that maintains the natural environment. (Target 8.2)[19]

Milestones have already been reached towards the achievement of the 2020 Aichi Biodiversity Targets. At the end of 2013, 16.9 % of the land area of the mainland was protected under the Nature Diversity Act. Overall, the extent of protected areas covers the major ecosystems of mainland Norway reasonably well. A large proportion of the total area protected is however in

[14] Convention on Biological Diversity (n 12).

[15] Norway's red lists (*2010 Norwegian Red List for Species* and *Norwegian Red List for Ecosystems and Habitat Types*), the Norwegian Nature Index and the National Forest Inventory are the most important sources of information for assessing status and progress.

[16] Convention on Biological Diversity (n 12). See also Norwegian Environment Agency, 'Nature Index for Norway 2015 (with summary in English), available at <http://www.miljodirektoratet.no/en/News1/2015/Status-report-for-diversity-in-Norwegian-nature/>.

[17] Norwegian Ministry of Climate and Environment (n 11) p. 4.

[18] Ibid p. 43.

[19] Ibid p. 106.

the mountains. Further, Norway has reported 12 marine protected areas to the Convention for the Protection of the Marine Environment in the North-East Atlantic (OSPAR), covering 85 416 km$^2$ (territorial waters and Norwegian Exclusive Economic Zone). Additionally, three new MPAs (74 km$^2$) adopted under the Nature Diversity Act have been designated.[20]

Norway is also active in honouring the Aichi Biodiversity Targets related to the protection of traditional knowledge and the participatory management of natural resources.[21] The Finnmark Act (2005) protects the land rights of the Sami people and establishes a consultation procedure between the Government and the Sami Parliament.[22] This was followed by the "Arbediehtu" Project in 2008, which aims to develop suitable methods to record traditional knowledge and develop capacities and methods for collection of knowledge of experiences, traditions, and cultural practices in consultation with the Sami people.[23]

## 2. The Nature Diversity Act

Norway's Nature Diversity Act was adopted in 2009 to promote the implementation of the objectives of the UN Convention on Biodiversity and to provide an improved legal platform to protect and manage biological diversity in Norway.[24] The official mandate for the drafting of the Nature Diversity Act underscored that the new framework provided by the CBD for integrated natural resource management needed to be reflected in Norwegian law.[25] The Nature Diversity Act also aims to implement the basic right to a natural environment whose productivity and diversity are maintained, which is laid down in the Norwegian Constitution Article 112, subject to further statutory legislation.[26]

The Nature Diversity Act replaces the former Nature Conservation Act 1970 whose dominant function was the designation of protected areas, whilst the Nature Diversity Act provides a wider range of legal instruments to safeguard nature diversity. It contains a range of new instruments to protect species, strict conservation

[20] Ibid p. 6.

[21] An important Norwegian source is the Commission Report 2013:10 entitled "Naturens goder – om verdier av økosystemtjenester [Nature's goods – the values of ecosystem services], which addresses the Aichi target to integrate biodiversity values into national and local development and poverty reduction strategies and planning processes and are being incorporated into national accounting, as appropriate, and reporting systems (target 2). See further: Norwegian Ministry of the Environment, 'The Government's Environmental Policy and the State of the Environment in Norway – Excerpts in English: Report No. 26 (2006-2007) to the Storting. Available at: http://www.cbd.int/doc/world/no/no-nbsap-v3-en.pdf. See also the Norway's National Report on Implementation of the Convention on Biological Diversity, available in English at: http://www.cbd.int/doc/world/no/no-nr-04-en.pdf.

[22] For further reading on the consultation process see E.K. Broderstad,'Consultations as a tool. The Finnmark Act – An example to follow?", available at <http://munin.uit.no/bitstream/handle/10037/3104/article.pdf?sequence=1>

[23] The Árbediehtu project was one of the programmes launched in Report no. 28 (2007-2008) to the Storting on Sami policy. The project was established in 2009 to focus on traditional Sami knowledge in Norway. The guidelines for the project are the instructions in Article 8 (j) of the Convention on Biological Diversity. For a description of the project see: <http://www.arbediehtu.no/index.php?c=7&kat=International>

[24] For the English translation of the Nature Diversity Act, see <https://www.regjeringen.no/en/dokumenter/nature-diversity-act/id570549/>

[25] Commission Report on the Nature Diversity Act: NOU 2004:28 Lov om bevaring av natur, landskap og biologisk mangfold (naturmangfoldloven), p. 57.

[26] Article 112 of the Constitution of Norway states that: "Every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well. In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out. The authorities of the State shall issue specific provisions for the implementation of these principles."

measures and principles on sustainable use of species, habitats and ecosystems. The Act also contains completely new rules on the management of alien organisms[27] and the management of genetic material[28]. This latter element was included as a direct response to the rules on genetic resources in the Biodiversity Convention. The Act also contains new rules on enforcement of the Act and the imposition of sanctions[29], amongst which the possibility to require restoration of a particular area[30].

The Act is based upon an extensive commission report[31] and a similarly extensive Government Bill[32] with references to public consultations and comments to the various provisions of the Act. The responsible ministry for the Act is the Ministry of Climate and the Environment, with its subordinate Norwegian Environment Agency as an executive body.

The Act applies fully to nature on Norwegian land territory, including rivers systems, and in Norwegian territorial waters.[33] The exploitation of marine organisms, however, is dealt with in a separate act, the Marine Resources Act 2008, for which the Ministry of Industry and Fisheries is the responsible ministry.[34] Outside the territorial waters, on the continental shelf and in Norway's 200 miles EEZ, only a few of the provisions apply.[35] These are in particular the provisions setting out the purposes and management objectives of the Act and most of the principles for public decision-making including the precautionary principle and the ecosystem approach and cumulative effects.[36] Except for the provisions on access to genetic material, the Act does not apply to the island group of Svalbard nor to the island of Jan Mayen, which are subject to stricter legal regimes in favour of the natural environment (respectively, the Svalbard Protection of the Environment Act 2001 and nature reserve regulations issued under the Jan Mayen Act 1930).[37]

## 3. The Nature Diversity Act in light of Target 14

As mentioned above, target 14 consists of three elements. This section assesses the various measures and mechanisms of the Nature Diversity Act in light of these elements.

### 3.1 Introduction

The Nature Diversity Act encompasses *all living natural species and geological and landscape diversity* even where affected by human activities. It is by no means limited to the protection of vulnerable landscapes, biotopes and species by designation of specific objects (classical nature conservation) but provides legal remedies to protect biodiversity outside such designated areas and aims at sustaining the interaction between various species and with other elements of nature. Outside designated conservation areas, the Act aims at striking a balance between protection of biodiversity and human activities by promoting

[27] Nature Diversity Act, Article 28–31.
[28] Ibid, Article 57–60.
[29] Ibid, Article 73, 74 (which concerns environmental compensation) and 75.
[30] Ibid, Article 69.
[31] Commission Report on the Nature Diversity Act: NOU 2004:28 Lov om bevaring av natur, landskap og biologisk mangfold (naturmangfoldloven), 839 pp. incl. annexes, with a summary in English at pp. 45–55.
[32] Government Bill on the Nature Diversity Act: Ot.prp. no. 52 (2008-2009) Om lov om forvaltning av naturnes mangfold (naturmangfoldloven), 479 pp.
[33] Nature Diversity Act, Article 2.
[34] The Marine Resources Act states in Article 7 that the management of marine organisms should be based on a precautionary and ecosystem-based approach, without defining this further.
[35] Nature Diversity Act, Article 2.
[36] The articles 1, 3 to 5, 7 to 10, 14 to 16, 57 and 58, apply on the continental shelf and the economic zone of Norway to the extent they are appropriate.
[37] Nature Diversity Act, Article 2.

sustainable use.[38] The Act includes provisions on protected areas, access to genetic material, on alien species and on principles for sustainable use, both in general terms and more specifically as they relate to species and habitat types.[39]

Various aspects of the Nature Diversity Act contribute to Aichi Target 14. Of particular importance is the overall purpose of the Act. The Nature Diversity Act aims:

> "To protect biological, geological and landscape diversity and ecological processes through conservation and sustainable use, and in such a way that the environment provides a basis for human activity, culture, health and well-being, now and in the future, including a basis for Sami culture" [40]

This purpose clearly endorses the understanding that the ecosystem and its services provide the basis for human activity, culture, health and well-being. Equally important is the management objective that provides for the ecologically sustainable use of ecosystems[41], and the principle on the ecosystem approach and cumulative effects[42] that shall serve as guidelines for the exercise of public authority. Furthermore, at several instances, the Act makes important references to the protection of Sami culture.[43]

As will be further shown below, the Nature Diversity Act aims to safeguard and protect ecosystems that provide essential ecosystem services, and aims to ensure the protection of Sami culture. In certain circumstances, restoration can be required. The Nature Diversity Act not only applies to the protection of biological diversity pursuant to the Act itself, but also to the authorisation of human activities and interventions in nature under other legal acts. The Nature Diversity Act has namely a cross-sectoral effect. The general provisions[44] of the Nature Diversity Act complement sector legislation and they will influence the construction of other statutes and affect the exercise of discretionary powers. The environmental law principles, or principles for sustainable use,[45] shall "serve as guidelines for the exercise of public authority regardless of the sector legislation that applies to the case".[46]

Rules in sector legislation which go further in meeting the management aims of the Nature Diversity Act will prevail over or complement the provisions of the Nature Diversity Act. Since the Nature Diversity Act has not been accorded superior status to other statutory acts, clear provisions in sector legislation may also deviate from it by setting lower standards of protection.[47] In such a case, the preparatory works to newer acts adopted after the adoption of the Nature Diversity Act explicitly need to authorize such deviation. With regard to older acts adopted before the adoption of the Nature Diversity Act, the latter will normally prevail as being the newer act (*Lex Posterior*).[48] In general however, when a particular provision from sector legislation contains

[38] Other statutory acts play an important role here. As an illustration, ecosystems are safeguarded against pollution by the Pollution Control Act 1981 which is based on a prohibition against pollution combined with a licensing system. Ecosystems providing water services are safeguarded by the Water Regulations 2006 (issued in pursuance of the Freshwater Resources Act 2000, The Pollution Control Act 1981 and the Planning and Building Act 2008) which transpose the European Water Framework Directive (directive 2000/60(EC) as included in the EEA Treaty).

[39] See for example, article 4 and 5; 15; 28; 33 and 47.

[40] Nature Diversity Act, Article 1.

[41] Ibid, Article 4 and 5.

[42] Ibid, Article 10.

[43] Ibid, Article 1, 8, 14, 41 and 43.

[44] Ibid, Article 1 and 4 to 13.

[45] Ibid, Article 8–12.

[46] Ibid, Article 7. See further H.C. Bugge, *Environmental law in Norway 2011,* Kluwer Law International, p. 179.

[47] I.L. Backer, *Naturmangfoldloven. Kommentarutgave* 2010 (Commentary to the Nature Diversity Act), p. 11

[48] Commission Report on the Nature Diversity Act: NOU 2004:28 Lov om bevaring av natur, landskap og biologisk mangfold (naturmangfoldloven), p. 182.

a margin of discretion,[49] for example discretion provided to pollution control authorities to decide on whether to issue a permit for an activity that may lead to pollution, the Nature Diversity Act will supplement that legislation by its rules embedded in the general provisions.[50]

To illustrate, the protection of ecosystems against pollution is regulated in the Norwegian Pollution Control Act of 1981. Article 11 of the Pollution Control Act states that "The pollution control authority may on application issue a permit for any activity that may lead to pollution", and that "When the pollution control authority decides whether a permit is to be granted and lays down conditions (…), it shall pay particular attention to any pollution-related nuisance arising from the project as compared with any other advantages and disadvantages so arising". In the exercise of this discretion, the principles of the Nature Diversity Act have to be taken into consideration.[51] The authority may issue the pollution permit after an assessment of the advantages and disadvantages of the project.

In practice, the cross-sectoral effect of the Nature Diversity Act entails that public authorities themselves implement the rules of the Nature Diversity Act when they apply the rules of sector legislation. The public authorities shall demonstrate how the principles of the Nature Diversity Act have been taken into consideration.[52] The application of the principles may entail that a certain activity will be refused.

For instance, on October 5th 2009 the Ministry of Climate and the Environment uphold an objection against a zoning plan which was based on the construction of housing in an area where an endangered butterfly species was observed. The zoning plan was therefore refused in pursuance of Article 5, 8 and 9 of the Nature Diversity Act.[53] Even though the application of the precautionary principle and the requirement of a sound knowledge base in this case led to the refusal of the particular zoning plan, this does not necessarily need to be the case. At several instances, the Ministry of Climate and the Environment has also decided that even though there were tensions between the precautionary principle and a particular industrial activity, public authorities were allowed to authorize a particular activity as they deemed the benefits of this activity to be outweighing the negative effects on the environment.[54]

[49] This term should be understood here in a wide sense, so as to cover inaccurate wording of a statute as well as administrative discretion.

[50] I.L. Backer, *Naturmangfoldloven. Kommentarutgave* 2010 (Commentary to the Nature Diversity Act), p. 11.

[51] For an illustration of this cross-sectoral effect of the Nature Diversity Act see, F.M. Platjouw, *Environmental Law and the Ecosystem Approach: Maintaining Ecological Integrity through Consistency in Law*, Routledge 2016, chapter 7.

[52] Nature Diversity Act, Article 7.

[53] I.L. Backer, *Naturmangfoldloven. Kommentarutgave* 2010 (Commentary to the Nature Diversity Act), p. 78.

[54] Det Kongelige Miljøverndepartement [Ministry of the Environment], *Avgjørelse i klagesak – tillatelse etter forurensningsloven i forbindelse med Det norske oljeselskap ASAs boring av letebrønn 3/4-2S Ulvetanna i Nordsjøen*, [Decision by the administrative appeal body concerning a license pursuant to the Pollution Control Act regarding drilling of well 3/4-2S Ulvetanna in the North Sea, Det norske oljeselskap ASA] 28 October 2011 (reference: 201102785-/AE). The case concerned an application for a permit in accordance with the Pollution Control Act for the exploration of oil in a different Sandeel habitat. In 2011 the NCPA had issued a permit that was appealed by the Fisheries Vessel Owners' Association. The Ministry of Climate and the Environment gave its final decision. Interestingly, the Ministry indicated that the scientific uncertainty in combination with the precautionary principle in principle should lead to the refusal of the license. However, taking into account other interests in accordance with Article 11 of the Pollution Act, the permit could nevertheless be upheld.

### 3.2 The emphasis on ecosystems that provide essential services

The essence of the Nature Diversity Act is the protection of natural diversity, which includes biological, landscape and geological diversity. Furthermore, the act aims to protect ecological processes.[55] Ecological processes have been defined as the total interaction between the living organisms in a habitat type and the interaction between the living and non-living nature. This interaction is a result of a number of simple functions which, for example, species or the non-living constituents have. Protecting ecological processes will contribute to maintaining nature's productivity (which is in accordance with the constitutional right to a natural environment whose productivity and diversity are maintained) and the provision of ecosystem services.[56]

Despite its reference to 'ecological processes', the Act does not explicitly mention 'ecosystem services'. The overall purpose however clearly endorses the understanding that the ecosystem and its services provide a basis for human activity, culture, health and well-being. The overall purpose makes a particular reference to the culture of the Sami People and endorses that the environment provides a basis for Sami culture.

The emphasis on ecosystems further appears in the *management objectives* of the Act.[57] What is interesting in the light of Aichi Target 14 is that the Nature Diversity Act contains a general provision that aims to maintain ecosystem structure, functioning and productivity. Importantly, this management objective to maintain ecosystem structure, functioning and productivity is an expression of the ecosystem approach. This differs from an approach that addresses primarily single species and specific elements within an ecosystem.

The management aim does not, however, apply to every single ecosystem. The second sentence contains a reasonableness criterion, which can restrict the extent to which a particular ecosystem should be maintained. It is not necessary to safeguard all ecosystems. Ecosystems are to be safeguarded at an aggregate level. Accordingly, this does not hinder the use of specific areas for other purposes such as the exploitation of petroleum or mineral resources. Using specific areas for other purposes should however not entail derogation from the management objective for ecosystems at an aggregate level. The management objective could however be achieved in a different manner or at a different pace than would have been the case if the aspect of nature conservation had been the only consideration to take.[58]

In addition to the purpose and management aim of the Act that emphasizes the protection of ecosystems and ecological processes, the Nature Diversity Act contains some important environmental principles. These are, in particular, the precautionary principle, the principle on the ecosystem approach and cumulative effects, the user-pays principle, and the principle on the use of environmentally sound techniques and

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[55] Article I of the NDA states that the overall purpose of the Act is to "To protect biological, geological and landscape diversity and ecological processes through conservation and sustainable use, and in such a way that the environment provides a basis for human activity, culture, health and well-being, now and in the future, including a basis for Sami culture."

[56] Government Bill on the Nature Diversity Act: Ot.prp. no. 52 (2008-2009) Om lov om forvaltning av naturnes mangfold (naturmangfoldloven, p. 374–375.

[57] Article 1 of the NDA states that "The objective is to maintain the diversity of habitat types within their natural range and the species diversity and the ecological processes that are characteristic of each habitat type. The objective is also to maintain ecosystem structure, functioning and productivity to the extent this is considered to be reasonable".

[58] Government Bill on the Nature Diversity Act: Ot.prp. no. 52 (2008-2009) Om lov om forvaltning av naturnes mangfold (naturmangfoldloven), p. 375.

methods of operation. Here two of them will be discussed. The principle on the use of the ecosystem approach and cumulative effects is a relatively novel principle in environmental decision-making in Norway and therefore interesting to shed light on. The precautionary principle is and has been widely used in decision-making on the environment. It is deemed useful to shed light on how these two principles relate to the Aichi target 14 components.

*The Precautionary Principle*

The precautionary principle, which may play a role for the safeguarding and restoration of ecosystems, contains two dimensions. Firstly, the principle focuses on measures which are taken to serve other purposes than environmental protection, but which may cause a risk to the environment. The precautionary principle requires that in those situations where the scientific knowledge base of the population status of species, the range and ecological status of habitat types, and the impacts of environmental pressures does not meet the requirements of a sound knowledge base, the aim shall be to avoid possible significant damage to nature diversity.[59] In practice, this requirement can be met through limitations in the permit, requiring mitigating measures, or by refusing a permit. Whether the particular damage can be classified as 'significant' will depend on several factors: to what extent the ecosystem will be changed, how permanent the changes will be, and whether threatened or vulnerable species will be affected.[60]

Secondly, the precautionary principle in the Nature Diversity Act also contains a dimension that is in line with the general understanding of the principle, namely that the principle aims to prevent that scientific uncertainty or a lack of knowledge averts states from taking environmental measures. The principle then aims to ensure that environmental measures are taken when there is a risk of serious or irreversible damage. Uncertainty about the causes or future trends may not be a reason for postponing environmental measures.[61] The principle may, for instance, be of use when introducing new measures under the Nature Diversity Act such as designating new protected areas, priority species or selected habitats.

Considerable scientific uncertainty exists about the functioning and productivity of ecosystems. The precautionary principle may be important for the introduction of measures for the protection of ecosystems in the case of scientific uncertainty.

*Principle on the ecosystem approach and cumulative effects*

Another important principle, especially in light of Aichi Target 14, is the principle on the ecosystem approach and cumulative effects. This principle stipulates that when the effect on an ecosystem is assessed, this is to be assessed based on the cumulative effects on the ecosystem. Based on the emphasis on the ecosystem approach in this principle and the overall purpose and management objectives of the Nature Diversity Act, measures that affect a particular species or habitat will not only be assessed based on the

[59] Article 8 of the NDA requires that "Official decisions that affect biological, geological and landscape diversity shall, as far as is reasonable, be based on scientific knowledge of the population status of species, the range and ecological status of habitat types, and the impacts of environmental pressures. The knowledge required shall be in reasonable proportion to the nature of the case and the risk of damage to biological, geological and landscape diversity".

[60] I.L. Backer, *Naturmangfoldloven. Kommentarutgave* 2010 (Commentary to the Nature Diversity Act), p. 96–97.

[61] Ibid p. 98–99.

effects on this species or habitat but also based on how the surrounding ecosystem, in which the species live or of which the habitat is a part, will be affected. In reality however, knowledge about the effects on the ecosystem may be more limited than knowledge about the effects on particular affected species.[62] In those cases it may be challenging to implement an ecosystem approach.

The requirement to assess cumulative effects has two sides. Cumulative effects firstly comprises the sum of existing effects, and secondly the sum of current and future effects. Single effects may be small and insignificant but considered against the background of already executed measures or interventions the overall load may pass a particular critical limit. Assessing the cumulative effects of measures may also prevent the gradual degradation of the environment because single measures in themselves would probably not have been halted when assessed in isolation. Measures also need to be assessed in the light of future impacts. This helps to make the precautionary principle more effective. These future impacts may stem from official decisions, but also all other impacts could be taken into consideration. Future impacts cannot be merely hypothetical however.[63]

In 2016, the Ministry of Climate and the Environment published a revised and more comprehensive Guidance Document for the application of Chapter II of the Nature Diversity Act.[64] With regard to the assessment of past, current and future impacts, the Guidance Document specifies that past impacts often are reflected in the current status of species and habitats. For example, if a species is endangered, this will normally be a consequence of previous impacts.[65] As a starting point, the authorities can therefore assume that past impacts are reflected in the current status of species and habitats.[66]

With regard to the assessment of future impacts, the authority needs to consider pending applications for certain permits that may affect the same biodiversity. To the extent that the authority has knowledge on any plans under development or authorizations granted but not yet realized in other sectors or agencies, this shall be taken into consideration in the assessment of future impacts.[67]

It is also worth mentioning that the importance of precedence in environmental decision-making might become less relevant in case the carrying capacity of certain ecosystems is reaching critical thresholds. When critical thresholds are being reached, even a small effect from a project might be too much, even though the major effects of similar projects have been accepted earlier. In such cases, precedence is not attributed particular weight.[68]

The Nature Diversity Act thus in various manners requires a focus on ecosystems and ecological processes. The Act also endorses the importance of ecosystem services as a basis for human well-being. The Nature Diversity Act does however not contain a mechanism to identify ecosystems that provide *essential* services. The choice on which ecosystems to safeguard is mainly regarded as a political choice, informed by the scientific knowledge available with regard to the status of the particular ecosystem.[69]

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[62] Ibid p. 100–101.

[63] Ibid.

[64] Miljøverndepartementet [Ministry of the Environment], *Veileder Naturmangfoldloven kapittel II. Alminnelige bestemmelser om bærekraftig bruk* [Guidelines to the Nature Diversity Act. Chapter II General Provisions on Sustainable Use] (March 2016). An earlier version (a practical introduction) was published in 2012.

[65] Ibid p. 60.

[66] There are exceptions however, see the Guidance Document, p. 60.

[67] Ibid p. 60.

[68] Ibid p. 61.

[69] Norway's Fifth National Report to the Convention on Biological Diversity' 2014 mentions the Norwegian Nature Index and the National Forest Inventory are the most

### 3.3 The restoration and safeguarding of ecosystems that provide essential services

The second element of Aichi Target 14 is that the law regulates the restoration and safeguarding of ecosystems that provide essential services. To what extent the Nature Diversity Act meets that criterion will be discussed in this section. As will be shown, the Nature Diversity Act regulates both the safeguarding and restoration of ecosystems.

*Safeguarding*

As outlined above, the aspect of safeguarding ecosystems appears at various instances of the Act. The overall purpose, the management aim, the principle on the ecosystem approach and cumulative effects, and the precautionary principle, all support the safeguarding of ecosystems. Particular measures that could be adopted for the safeguarding of ecosystems are the designation of priority species and the adoption of management measures for the conservation of these species.[70]

Regulations governing priority species made under Article 23 (1) may (a) prohibit any form of removal of, damage to or destruction of a priority species or specific populations of the species, […] (b) make provisions regarding the protection of certain types of areas of limited extent with specific ecological functions for the species […], c) require clarification of the impacts of any works planned in areas with specific ecological functions for the species concerned, including the identification of alternative areas that may be used to ensure the conservation of the species in accordance with Article 5(1).[71]

If provisions are made regarding the protection of certain types of areas with specific ecological functions for priority species under the first paragraph (b) in cases where active management or other types of measures are essential to safeguarding the area, the state shall present an action plan to protect such areas. The public authorities may enter into further agreement with the landowner or the rights holder regarding management of an area with specific ecological functions for priority species.[72]

The competent authority under the Act may grant exemptions from regulations made under Article 23 if this does not result in the deterioration of the species' population status or trend, or if significant public interests make it necessary.[73]

It may also be necessary to protect certain types of areas with specific ecological functions for these priority species.[74] Article 34 concerning protected areas requires that "regulations describe the purpose of protecting the area, including the natural and cultural qualities such protection is intended to safeguard and the state that protection is intended to achieve, the limits of the protected area, affected properties and provisions regarding use of the area."[75] In the context of marine protected areas, in needs to be stated whether the purpose of protection applies to the seabed, the water column, water surface or a combination of these.[76] The geographical extent of the protected area shall be consistent with the purpose of protection. In determining the limits of the protected area, importance shall be attached to safeguarding ecological functions

important sources of information for assessing status and progress. Norwegian Ministry of Climate and Environment, 'Norway's Fifth National Report to the Convention on Biological Diversity' 2014, available at <https://www.regjeringen.no/contentassets/b760c6666be74cc3b8aa1a2ea5351a24/5nr_cbd_norway_final.pdf>

[70] Nature Diversity Act, Article 23 and 24.

[71] Ibid, Article 24.

[72] Ibid.

[73] Ibid.

[74] Ibid, Article 23 and 24.

[75] Ibid, Article 34.

[76] Ibid.

of significance for achieving the purpose of protection and the resilience of the ecosystem to external pressures.[77]

As mentioned above, a considerable percentage of land area has been designated as protected area. In addition, a relatively large proportion of the area of wetlands in Norway, about 18 % of the total, is protected under the Nature Diversity Act. By January 2014, about 2.5 % of all productive forest in Norway was protected under the Nature Diversity Act.[78]

The Act makes it possible to tailor the use of instruments to the status of a particular species, habitat type or ecosystem, to the relevant pressures or threats in a specific case, or to find a balance between environmental considerations and other public interests. The provisions on protected areas and priority species are intended to be used for distinctive or representative areas and for threatened or particularly valuable species or habitats, and in cases where Norway has international responsibilities. Once it has been decided to establish a protected area or designate a priority species, the environmental authorities and local management boards are responsible for their management.[79]

Pursuant to Article 35 and 37, it is also possible to designate 'national parks' and/or 'nature reserves'. According to Article 37 of the Nature Diversity Act, within a nature reserve no activity is allowed that 'reduces the conservation value of the area as described in the purpose of protection'. Nature reserves are generally subject to stricter regulations than national parks. Article 37 states that nature reserves 'may be given absolute protection from all activity, projects and access or passage'. It is also possible to establish interference-free areas in 'wilderness' areas where no major infrastructure exists.[80]

Outside of protected areas, the Nature Diversity Act not only aims at the conservation and safeguarding of nature, but it also aims at sustainable use. 'Sustainable use' refers to ecological sustainable use which meets the general management objectives for habitat types, ecosystems and species.[81] So use of the ecosystem should occur within the boundaries of its productivity and capacity for self-renewal.

It is possible to designate selected habitat types under the Nature Diversity Act pursuant to Article 52. This is a less strict designation than the establishment of protected areas and is intended to safeguard habitat types through sustainable use rather than protection and to ensure that existing instruments are used across sectors to safeguard areas of great value to biodiversity.[82] When a habitat type is selected for which active management or other types of measures are essential to the maintenance of the habitat type, the state shall present an action plan to safeguard the habitat type.[83]

The Nature Diversity Act thus allows the safeguarding of ecosystems to be balanced with other interests or concerns. Of importance with respect to concrete situations is that when decisions have to be made also other considerations than those mentioned in the overall purpose can be taken into account. Therefore, the provision

[77] Ibid.

[78] Norway's Fifth National Report to the Convention on Biological Diversity' 2014, (n 11), p. 101–103.

[79] Ibid p. 53.

[80] For a more comprehensive review on wilderness protection in Norway (and the establishment and management of national parks, nature reserves of interference-free areas) see O.K. Fauchald, Wilderness Protection in Norway, *Wilderness Protection in Europe. The Role of International, European and National Law,* Cambridge 2016, 386–408.

[81] As referred to in Article 4 and 5 of the NDA. See I.L. Backer, *Naturmangfoldloven. Kommentarutgave* 2010 (Commentary to the Nature Diversity Act), p. 21.

[82] Norway's Fifth National Report to the Convention on Biological Diversity' (n 11), p. 53.

[83] Ibid.

on the overall purpose is considered to be non-exhaustive as regards the relevant (permissible) arguments in decision-making. The need for balancing is also underscored in another provision of the Nature Diversity Act, which states that measures under the Act shall be weighed against other important public interests.[84] These public interests may consist of economic, social and cultural needs in addition to the need of effective resource management.[85]

The need to balance the aim of the safeguarding of ecosystems with other interests and concerns also follows from the nature of the management objectives and the environmental principles of the Act. As an illustration, the maintenance of ecosystem structure, functioning and productivity as embedded in the management aim of the NDA applies on an overarching level. It is of importance for the interpretation and the exercise of administrative discretion pursuant to the Nature Diversity Act and other statutory acts.[86] Administrative bodies should in principle prevent the taking of decisions that would complicate the achievement of this overall management aim which is an objective against which to measure the aggregate of the decisions made.[87]

In practice, the interpretation and application of provisions from sector legislation have to be carried out in light of the management objectives for habitat types, ecosystems and species.[88] However, other management objectives that follow from sector legislation itself may be decisive in specific decisions. The preparatory works to the Nature Diversity Act states that in general the management objectives have to be 'kept in mind' so that those decisions would not complicate the achievement of those objectives.[89]

The 2016 Guidance Document on the application of Chapter II of the Nature Diversity Act[90] specifies that the management objectives are of particular relevance when decisions affect endangered species and habitat types. The more these species or habitat types will be affected by a measure, the more likely it will conflict with the overall management objectives. In the case of small hydropower plants for instance, power plants that affect critically endangered or endangered species, are not guaranteed a concession.[91]

It is necessary to assess the cumulative effects of measures. If one has reached or is approaching the limit of what a species or a habitat type can endure and measures will further reduce the population of the species or habitat type, this should be a very weighty factor in the

[84] Nature Diversity Act, Article 12, first subsection, NDA. Article 14.1 only applies to decisions taken in accordance with the Nature Diversity Act and not to decisions which are based on any other legislation. Article 14.1 was inserted to remove a fear that other than environmental considerations could be left completely out of scope in decision-making under the NDA.

[85] Government Bill on the Nature Diversity Act: Ot.prp. no. 52 (2008-2009) Om lov om forvaltning av naturnes mangfold (naturmangfoldloven), p. 383–384.

[86] Ibid p.81 and 373.

[87] I.L. Backer, *Naturmangfoldloven. Kommentarutgave* 2010 (Commentary to the Nature Diversity Act), p. 71. In this respect, an important role is also being played by the Office of the Auditor General of Norway, which undertakes performance auditing resulting in reports to the Norwegian Parliament. A performance audit in this field could highlight to which extent the management objectives of NDA are fulfilled. See, in particular, Document no. 3:12 (2005-2006) (in English) on the investigation of the authorities' efforts to survey and monitor biological diversity and to manage protected areas and Document no. 3:11 (2006-2007) (in English) on the investigation of sustainable land use planning and land use.

[88] Government Bill on the Nature Diversity Act: Ot.prp. no. 52 (2008-2009) Om lov om forvaltning av naturnes mangfold (naturmangfoldloven), p. 373–374 og 375.

[89] I.L. Backer, *Naturmangfoldloven. Kommentarutgave* 2010 (Commentary to the Nature Diversity Act), p. 69

[90] Miljøverndepartementet [Ministry of the Environment], *Veileder Naturmangfoldloven kapittel II. Alminnelige bestemmelser om bærekraftig bruk* [Guidelines to the Nature Diversity Act. Chapter II General Provisions on Sustainable Use] (March 2016). An earlier version (a practical introduction) was published in 2012.

[91] Ibid p. 9.

assessment of whether a measure should be implemented or not.[92]

In administrative practice, the reasons given by the public authority for its decision in accordance with general principles of administrative law, usually make a reference to the relevant principles of sustainable use, amongst which the precautionary principle and the ecosystem approach, indicating how they have been applied, but it varies to what extent this is elaborated on. In many cases, projects are adopted, possibly with certain modifications due to the principles and management objectives of NDA. It has however also occurred that for the sake of preserving biological diversity, a plan for a new road or new housing area has been rejected by virtue of the said principles.[93]

A recent review of the application of the Nature Diversity Act by the municipalities concludes that although the legislation is widely and frequently used, it is uncertain what effect this has had on the decisions that are taken. An evaluation of the effects is therefore in progress.[94]

So, even though the Nature Diversity Act contributes to the safeguarding of ecosystems, the Act also explicitly enables this aim to be balanced against the sustainable use of nature particularly outside of protected areas. The balancing assessment and the decision on the extent to which certain ecosystems are to be safeguarded are ultimately decided by public authorities on a case-by-case base. The management objectives in the Nature Diversity Act have no higher rank than other laws, and the administrative authority responsible may deem to the needs for implementing a measure so strong that the measure should be allowed even if it makes it more difficult to achieve the overall management goals.[95] The overall management goals have to be considered in light of Article 112 of the Norwegian Constitution however.[96]

*Restoration*

The aspect of restoration is also regulated in the Nature Diversity Act. Restoration can be required in the context of protected areas. Active restoration measures may be required when establishing an area as a nature reserve or for the protection of habitat management areas.[97] In addition, administrative authorities have certain powers to carry out measures to maintain or achieve the state of the natural or cultural environment that is the purpose of the protection, including restorative measures after works affecting the natural environment.[98] Restoration orders may also be issued after unlawful activities[99] and even in the case of unforeseen environmental degradation after a lawful activity.[100] The precautionary principle may be invoked to support the restoration of a damaged ecosystem where the damage creates a risk of further deterioration of the ecosystem.[101]

Until now, restoration of ecosystems has been of minor importance in Norway, which has much larger areas of relatively undisturbed nature than more densely populated and heavily

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[92] Ibid p. 10.

[93] Two cases of this kind (concerning the eagle owl and a butterfly species) are reported in I.L. Backer, *Naturmangfoldloven. Kommentarutgave* 2010 (Commentary to the Nature Diversity Act), p. 78.

[94] Andersen, O., Bay-Larsen, I., Øian, H. & Fangel, K. 2013. The Norwegian Biodiversity Act. The municipalities experiences with the implementation of the Biodiversity Act. – NINA Report 964: 63 pp.

[95] Miljøverndepartementet [Ministry of the Environment], *Veileder Naturmangfoldloven kapittel II. Alminnelige bestemmelser om bærekraftig bruk* [Guidelines to the Nature Diversity Act. Chapter II General Provisions on Sustainable Use] (March 2016), p. 8.

[96] See n 26.

[97] Nature Diversity Act, Article 37 and 38.

[98] Ibid, Article 47.

[99] Ibid, Article 69.

[100] Ibid, Article 70.

[101] In particular by issuing an order under NDA, Article 69 or 70.

industrialized countries. However, ecosystem restoration is becoming more important in Norway too, partly in response to Aichi target 15[102]. Norway is currently working on the realization of the 15 % restoration target. Maintenance of healthy and intact ecosystems is considered to be essential for ecosystem resilience. The Norwegian Nature Index, which has been developed to provide an overview of the state of and trends in biodiversity in the major ecosystems in Norway, will help to quantify ecosystem intactness.[103]

In 2013, the Nordic Council of Ministers started a project on ecological restoration designed to help achieve Aichi target 15. Norway, Sweden, Finland, Denmark, Iceland and Estonia are participants in this project. The countries will first map the status of their ecosystems and then use the four-level model of degradation developed by the EU to draw up a restoration plan. The model is to be used as a basis for setting targets and proposing specific restoration projects. The countries are required to set priorities and assess how much realistically can be done given different time limits and cost ceilings.[104]

More specifically in the context of wetlands, Norway has set a national goal to restore at least half of the wetlands that have been damaged by 2020. At the request of the Ministry of Climate and Environment, the Norwegian Environment Agency has drawn up a four-year plan for wetland restoration, giving priority to wetlands within existing protected areas. The plan identifies the 10 highest-priority localities. It covers the period 2014–18, and implementation has begun.[105]

### 3.4 The needs of women, indigenous and local communities, and the poor and vulnerable

The third element of Aichi Target 14 is that the law should ensure the taking into account of the needs of women, indigenous and local communities, and the poor and vulnerable. Frankly, to what extent these groups of people actually need protection might differ widely taking into account social and economic circumstances. Obviously, these may vary for different parts of the world. Though the Nature Diversity Act does not aim at meeting the needs of women and the poor in particular, the Nature Diversity Act places particular emphasis on the protection of the culture of Sami people. The Sami people are an indigenous group of people which is protected by the UN Convention on Civil and Political Rights[106] and the ILO-Convention on Indigenous and Tribal Peoples.[107] The Sami are particularly protected through the 2005 Finnmark Act.[108]

[102] Aichi target 15 stipulates that "By 2020, ecosystem resilience and the contribution of biodiversity to carbon stocks has been enhanced, through conservation and restoration, including restoration of at least 15 per cent of degraded ecosystems, thereby contributing to climate change mitigation and adaptation and to combating desertification".

[103] Norway's Fifth National Report to the Convention on Biological Diversity' 2014, (n 11) p. 108.

[104] Ibid p. 108–109.

[105] Ibid p. 108.

[106] Article 27 UNCCPR.

[107] Convention No. 169 of 1989 on Indigenous and Tribal Peoples.

[108] The background for the Finnmark Act is the Sámi people's fight for their rights to manage their land and culture. In 1978, the Norwegian Water Resources and Energy Directorate published a plan that called for the construction of a dam and hydroelectric power plant that would create an artificial lake and inundate the Sami village of Máze. This plan was met by a strong opposition from the Sámi, and resulted in the Alta controversy. As a result of the controversy, the Norwegian government held meetings in 1980 and 1981 with a Sámi delegation appointed by the Norwegian Sámi Association, the Sámi Reindeer Herders' Association of Norway and the Norwegian Sámi Council. The meetings resulted in the establishment of the Sámi Rights Committee addressing Sámi legal relations, which proposed among other things establishing the Sami Parliament, and finally the adop-

The essence of the Finnmark Act is that the Sámis, through protracted traditional use of the land and water areas, have acquired individual and/or collective ownership and right to use lands and waters in Finnmark County.[109] The Finnmark Act attempts to strengthen the Sámi rights, by giving the entire population of Finnmark greater influence of the property in the county. However, the act does not cover fishing rights in saltwater, mining, or oil rights.[110]

This status of the Sami people has had an important effect on the Committee that drafted the Nature Diversity Act. Already in the overall purpose of the Act it is acknowledged that the environment provides a basis for Sami culture. Moreover, the Act stipulates that when decisions are made that directly affect Sami interests, due importance shall be attached to the natural resource base for Sami culture.[111] Public authorities, when making decisions, have to attach importance to knowledge that is based on many generations of experience acquired through the use of and interaction with the natural environment, including traditional Sami use, and that can promote the conservation and sustainable use of biological, geological, and landscape diversity.[112]

When establishing protected areas, for instance, the Nature Diversity Act also contains specific requirements for the inclusion of Sami cultural and business interests and the Sami Parliament in the context of administrative procedures and consultations regarding proposals for protection regulations.[113] The Finnmark Act, as presented above, regulates in more detail the rights of the Sami people in particular situations such as expropriation cases and compensatory measures.

## 4. To sum up

The Nature Diversity Act of 2009 is the most important national legal act for the protection of nature in Norway. It was adopted to allow a better follow-up of the Biodiversity Convention 1992, and serves to implement the constitutional provision on the right to a natural environment in which productivity and diversity are maintained. The overall purpose of the Act includes the conservation of ecological processes and implicitly underscores the importance of ecosystem services for human well-being. Furthermore, the maintenance of ecosystem structure, functioning or productivity is part of the management objectives of the Act. Another important novelty of the Act is its principle on the ecosystem approach and cumulative effects. The Nature Diversity Act is a cross-sectoral act for which principles for public decision-making – including the precautionary principle, and the principle on the ecosystem approach and cumulative effects – have to be taken into account by all sectoral authorities when they apply their sectoral legislation.

The Nature Diversity Act has great potential to safeguard essential ecosystem services especially through its focus on ecosystem structures, functioning, productivity, and its principle on the ecosystem approach. Also the precautionary principle may play an important role for the safeguarding of ecosystems as it may provide for adopting measures that are helpful in preventing a potential damage to the environment. In addition, the objective of the Act and its role in the protection of 'Sami culture' can be linked to an important aspect of Aichi Target 14, namely the focus on "the needs of women, indigenous and local communities".

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tion of the Finnmark Act in 2005. For further reading, see <http://www.galdu.no/home.347689.en.html>

109 Article 5 of the 2005 Finnmark Act.

110 Ibid.

111 Nature Diversity Act, Article 14, second subsection.

112 Ibid, Article 8.

113 Ibid, Article 41 and 43. See further the Commission Report on the Nature Diversity Act: NOU 2004:28 Lov om bevaring av natur, landskap og biologisk mangfold (naturmangfoldloven), pp. 462– 488.

At present, the principles of the NDA, such as the precautionary principle and the principle on the ecosystem approach and the cumulative effects, are supposed to be applied by all sectors of governance. Through the application of these principles there will be an increased focus on ecosystems. In practice however, due to limits to scientific knowledge, decisions are based more on the assessment of cumulative effects (of human activities) on particular species or habitats, than on assessments of cumulative effects on ecological processes, ecosystems functions, processes or productivity.

Furthermore, even though the Nature Diversity Act has potential to ensure the safeguarding of essential ecosystems, this is not necessarily ensured. The Nature Diversity Act allows for the balancing of interests. The aim of safeguarding ecosystems becomes part of a balancing assessment where other interests and aims also come into play. Sectoral statutory acts play an important role for the protection of ecosystems in Norway. Though the principles and management objectives of the NDA are taken into consideration while public authorities apply their sectoral legislation, administrative discretion in these sectoral statutory acts to weigh and balance divergent interests has an effect on the aim to ensure the safeguarding of ecosystems. The safeguarding of ecosystems that provide essential services therefore depends on the Nature Diversity Act in combination with the application and implementation of other statutory acts.

In short, legal instruments such as the Norwegian Nature Diversity Act could contribute to achieving the three elements of Aichi Biodiversity Target 14. The Act, through its cross-sectoral effect, could effectively ensure that the aim of safeguarding ecosystems would be taken into consideration in all decisions taken by public authorities across sectors. The safeguarding of ecosystems would however be more effectively ensured in a legal system where the margin of discretion in sectoral substantive legislation is more limited and where the aims and objectives of the Nature Diversity Act become less subject to weighing and balancing assessments pursuant to sectoral legislation.

## Key lessons learned

- The Nature Diversity Act underscores the importance of conserving ecosystem structures, functioning and productivity.
- The principle on the ecosystem approach and cumulative effects could be helpful in safeguarding ecosystems that may be under potential threat due to a number of developmental projects.
- The Act does makes important references to the protection of Sami culture, which is an indigenous group of people living in Scandinavia.
- The cross-sectoral effect of the Act ensures that its principles are being taken into account across all sectors in accordance with the principle of environmental policy integration.
- The provisions that refer to ecosystem processes; ecosystem structure, functioning or productivity; or the ecosystem approach, are prescriptive in nature. Sectoral authorities have discretion to give overriding weight to other interests or values.

# The Arctic Council and biodiversity – need for a stronger management framework?

*Christian Prip*[1]

## Abstract

Arctic biodiversity is of global concern, with both the Arctic and the broader international community having a mutual interest in cooperation to ensure its conservation and sustainable use. Biodiversity is one of the focal areas of cooperation under the Arctic Council, addressed mainly under its working group on the Conservation of Arctic Flora and Fauna (CAFF). As the Arctic constitutes several ecosystems transcending borders, threats to these ecosystems must be dealt with by all the states sharing them, through cross-border responses. To what extent does the Arctic Council provide the institutional, policy and regulatory means necessary to meet this challenge? Scientific monitoring and assessments of Arctic biodiversity – the essential feature of Arctic biodiversity cooperation – have shown that action on the ground is needed to reduce Arctic biodiversity loss. However, cooperation mechanisms to translate scientific findings into joint and unified action by the Arctic states are not in place. Decision-making power and instruments are needed, whether in the form of hard or soft law. The recent development of instruments in other thematic areas addressed by the Arctic Council could serve as inspiration.

## 1. Introduction

As reflected in the opening sentence of the Arctic Biodiversity Assessment (ABA) 2013,[2] attention to the unique biodiversity of the Arctic has increased dramatically in recent years. One reason is the growing understanding of the significant contributions to the physical, chemical and biological balance of our planet provided by the vast Arctic wilderness areas where ecosystem processes continue to function in a largely natural state. Growing demands from outside and within the region for large-scale exploitation of Arctic oil and gas and other mineral resources have led to further awareness of the fragility of Arctic ecosystems. Arctic biodiversity is a matter of global concern, with both the Arctic and the broader international community having a mutual interest in cooperation to ensure its conservation and sustainable use. [3]

Biodiversity is one of the focal areas of cooperation under the Arctic Council (AC),[4] dealt with mainly under its working group on Con-

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[2] Arctic Biodiversity Assessment, 2013. (ABA) Conservation of Arctic Flora and Fauna (CAFF), Akureyri, Iceland. http://www.arcticbiodiversity.is/the-report.

[3] There exists no official definition of 'the Arctic' in a geographical sense, and different working groups under the Arctic Council use different boundaries. This article, with its biodiversity focus, assumes the boundaries normally used by CAFF: on land, the natural treeline marks the southern boundary; at sea, the Bering Sea and the North Atlantic down to Iceland and the Faroe Islands are included. See map on CAFF website. http://www.caff.is/about-caff.

[4] Arctic Council website. http://www.arctic-council.org/index.php/en/

servation of Arctic Flora and Fauna (CAFF),[5] but also as a concern to be taken into account by other AC working groups. Beyond doubt, work carried out under CAFF has helped to generate new knowledge and awareness of Arctic biodiversity within and beyond the circumpolar region.

Stewardship of Arctic biodiversity is a particular responsibility of the Arctic states.[6] However, in many aspects the Arctic constitutes a range of border-transcending ecosystems with their own distinct features: threats to these ecosystems must be dealt with by all the states sharing them, through cross-border responses. Focusing on the work of CAFF, this article explores how conservation and sustainable use of biodiversity is being addressed by the AC as a pan-Arctic issue. To what extent does the AC provide institutional and legal means for joint action, in a time of increasing threats and global attention to Arctic biodiversity? That is the focus of this article, not the performance of the individual Arctic states in protecting Arctic biodiversity.

Arctic cooperation and governance in general are well covered in the literature. Arctic environmental cooperation has been dealt with to some extent, but there has been only modest coverage of Arctic cooperation specifically related to biodiversity.[7]

This article begins with an overview of how biodiversity has been institutionally addressed in the Arctic context, including an outline of the development and trends in CAFF over the years. Specific attention is paid to cooperation aimed at the creation of a pan-Arctic network of protected areas, which will require political commitment and decision-making across Arctic states to be successful. Multilateral regimes relevant for Arctic biodiversity and AC/CAFF's alignment with these are examined, and a brief comparative review of parallel processes and events outside the biodiversity context is provided.

## 2. Working group on Conservation of Arctic Flora and Fauna (CAFF)

### 2.1 Background

The CAFF working group was established in 1991 under the Arctic Environmental Protection Strategy, (AEPS), a precursor to the Arctic Council, and was officially inaugurated in April 1992.[8] Recognizing their shared ecosystems with its unique flora and fauna , the eight Arctic States agreed to 'cooperate for the conservation of Arctic flora and fauna, their diversity and their habitats', and established the CAFF programme as a 'distinct forum for scientists, indigenous peoples and conservation managers … to exchange data and information on issues such as shared species and habitats and to collaborate, as appropriate

[5] CAFF website. http://www.caff.is/.

[6] The Arctic states are here defined as Canada, Denmark with the Faroe Islands and Greenland, Iceland, Norway, Finland, Sweden, the Russian Federation and the United States of America.

[7] On Arctic governance in general and Arctic environmental governance, see O.R. Young, 1998, *Creating Regimes: Arctic Accords and International Governance*, Ithaca, NY: Cornell University Press; O.S. Stokke and G. Hønneland, 2007 (eds), *International Cooperation and Arctic Governance: Regime Effectiveness and Northern Region Building*, London: Routledge; O.S. Stokke, 2011, Interplay management, niche selection, and Arctic environmental governance, in: S. Oberthür and O.S. Stokke (eds), *Managing Institutional Complexity: Regime Interplay and Global Environmental Change*, Cambridge, MA: MIT Press; T. Koivurova, 2010, Limits and possibilities of the Arctic Council in a rapidly changing scene of Arctic governance, *Polar Record,46 (2):* 146–156, http://journals.cambridge.org/download.php?file=%2FPOL%2FPOL46_02%2FS0032247409008365a.pdf&code=e60dffbb5f97b1238eb4aa14d4bda045; P. Kankaanpää and O.R. Young, 2012, The effectiveness of the Arctic Council, *Polar Research*, *31*, http://dx.doi.org/10.3402/polar.v31i0.17176. On biodiversity governance, see T. Koivurova 2009, Governance of protected areas in the Arctic, *Utrecht Law Review, 5* (1), Special issue on Protected Areas in Environmental Law.

[8] Programme for the Conservation of Arctic Flora and Fauna Framework Document http://www.caff.is/administrative-series/view_document/137-caff-framework-document.

for more effective research, sustainable utilization and conservation'.[9]

CAFF objectives are:

- to collaborate for more effective research, sustainable utilization and conservation;
- to cooperate to conserve Arctic flora and fauna, their diversity and their habitats;
- to protect the Arctic ecosystem from human-caused threats;
- to seek to develop more effective laws, regulations and practices for flora, fauna and habitat management, utilization and conservation;
- to work in cooperation with the Indigenous Peoples of the Arctic;
- to consult and cooperate with appropriate international organizations and seek to develop other forms of cooperation;
- to regularly compile and disseminate information on Arctic conservation; and
- to contribute to environmental impact assessments of proposed activities.[10]

CAFF predated the UN Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992 and thereby also the adoption of Agenda 21 and the Convention on Biological Diversity (CBD). However, the first CAFF work programme was established in 1993 after the UNCED and reflected this important development in international environmental governance by including as one of its objectives to provide 'a mechanism to develop common responses on issues of importance for the Arctic ecosystem such as development and economic pressures, conservation opportunities and political commitments ( e.g. to international Conventions, the Rio Declaration and Agenda 21, the World Charter for Nature)'. [11]

When the Arctic Council was established in 1996, CAFF became one of its working groups. Soon afterwards, CAFF started to work on a thematic basis supported by expert sub-groups and a lead-country approach – an approach followed throughout CAFF's history. Themes include flora, seabirds, protected areas, stressors of biodiversity and integration of indigenous peoples and their knowledge.

In the ensuing years, various strategic documents were released with an international focus and responding to the CBD, which had recently entered into force.[12]

### 2.2 Arctic Council with CAFF as a forum for scientific cooperation on biodiversity

The *Arctic Climate Impact Assessment* (ACIA) 2005,[13] prepared by CAFF, the Arctic Monitoring and Assessment Programme (AMAP) and the International Arctic Science Committee (IASC), provided important guidance for subsequent biodiversity activities. In addition to focusing on the serious effects of climate change on biodiversity and ecosystems at a time when there was little global attention to this relationship, the ACIA highlighted the lack of knowledge about Arctic ecosystems, and made a range of recommendations. As a result, CAFF changed its focus, from a largely species- and habitat-centred approach to an *ecosystem-based approach* consistent with the

[9] Ibid.
[10] Ibid.
[11] Ibid.

[12] These are: *Cooperative Strategy for the Conservation of Biological Diversity in the Arctic Region*, 1997, (http://www.caff.is/publications/view_document/52-cooperative-strategy-for-the-conservation-of-biological-diversity), *Strategic Plan for the Conservation of Arctic Biological Diversity*, 1998, (http://www.caff.is/strategies-series/view_document/62-strategic-plan-for-the-conservation-of-Arctic-biological-diversity) and *Arctic Flora and Fauna Recommendations for Conservation*, 2002 (http://www.caff.is/assessment-series/view_document/38-Arctic-flora-and-fauna-status-and-trends-recommendations-for-conservation).

[13] http://www.amap.no/Arctic-climate-impact-assessment-acia

launch of the global Millennium Ecosystem Assessment in 2005 and the growing international attention to ecosystems and the services they provide.[14]

ACIA also marked a gradual shift in CAFF's focus from cooperation on administrative and political issues to scientific cooperation through monitoring and assessment activities.[15] ACIA recommendations contributed to the development of CAFF's Circumpolar Biodiversity Monitoring Programme (CBMP), an international network of scientists, government agencies, indigenous organizations and conservation groups working together to improve the detection, understanding and reporting of Arctic biodiversity status and trends.[16] The CBMP focuses on the major ecosystems of the Arctic – freshwater, coastal, marine and terrestrial.

The culmination of CAFF as a forum for scientific cooperation and knowledge generation came with the release of the Arctic Biodiversity Assessment (ABA) at the May 2013 Arctic Council Ministerial Meeting in Kiruna, Sweden.[17] ABA provides a comprehensive description of the status and trends of Arctic biodiversity and describes stressors, knowledge gaps and conservation and research priorities. The presentation is divided into five components: 1) Arctic Biodiversity Trends 2010 – selected indicators of change; 2) scientific assessment; 3) scientific synthesis; 4) report for policy-makers and 5) Life Linked to Ice: a guide to sea-ice associated biodiversity in a time of rapid change. The report for policy-makers offers 17 recommendations for dealing with the key findings, grouped under three cross-cutting themes:

- the significance of climate change as the most serious underlying driver of overall change in biodiversity;
- the necessity of taking an ecosystem-based approach to management;
- the importance of mainstreaming biodiversity by making it integral to other policy fields, for instance by ensuring biodiversity objectives are considered in development standards, plans and operations.

### 2.3 CAFF and protected areas

Another indication of CAFF's shift in focus from policy formulation and application to monitoring and assessment activities was the *de facto* termination of work on a Circumpolar Protected Areas Network (CPAN) around 2004. This had been an early high priority of CAFF with quite ambitious policy objectives.[18] Already in 1991 the Arctic Council forerunner, the Arctic Environmental Protection Strategy (AEPS) had identified the development of a network of Arctic protected areas as an important work area.[19] The aim was set out in greater detail at the inaugural meeting of CAFF in 1992 and was politically endorsed by a ministerial meeting in 1993: '(…) the Ministers requested the CAFF Working Group to Prepare a Plan for developing a network of Arctic protected areas that will ensure necessary protection of Arctic ecosystems, recognize the role of indigenous cultures, and provide a common process by which Arctic countries may advance formation of circumpolar protected areas.'[20]

[14] Millennium Ecosystem Assessment, 2005: http://www.millenniumassessment.org/en/index.html.
[15] Koivurova, 2009.
[16] Circumpolar Biodiversity Monitoring Programme (CBMP): http://www.caff.is/monitoring
[17] Arctic Biodiversity Assessment (ABA). http://www.Arcticbiodiversity.is/.
[18] For an analysis of achievements in Arctic cooperation as regards protected areas, see Koivurova, 2009.
[19] Chapter 2.2. (Principles), viii, p. 11, at http://arcticportal.org/en/arctic-council2.
[20] *The Nuuk Declaration on Environment and Development in the Arctic,* Nuuk, 1993.

A CPAN Strategy and Action Plan was developed which highlighted the Arctic environment as being of global significance and requiring a regional cooperative effort for its conservation.[21] CPAN was also seen as a response to Convention on Biological Diversity (CBD), which had recently entered into force, and its call upon parties to establish a system of protected areas (Art. 8) as well as the CBD recommendations 'that countries examine means of implementing the Convention on a regional level'.[22] Various actions were identified, to be taken at the national and regional levels.

As described by Koivurova 2009, in the first years of CAFF there was clear momentum for promoting CPAN. A standing committee for CPAN was established, which the USA was nominated to lead. However, in 2004 CPAN came to a halt when its co-chairs resigned and no other Arctic state was prepared to take over the leadership.[23] According to the Arctic Council website, CPAN is 'dormant'.[24]

Reports of CAFF meetings do not clearly reveal the underlying causes of CPAN's termination, but CAFF stakeholders have indicated to this author that, due to sovereignty consideration, some Arctic states were not politically prepared to engage in work that would affect the governance of their national protected areas and lead towards a transboundary network.[25] Similarly, Koivurova (2009) argues that the termination of CPAN could be seen as an acknowledgement by CAFF that, with limited resources and government officials represented at expert rather than political level, the working group was better suited for scientific cooperation free of the 'policy' aspects of CPAN.

Koivurova mentions another reason cited by stakeholders: that CPAN 'competed' with and was overtaken by the CBD Programme of Work on Protected Areas adopted in 2004 at COP7,[26] which also aimed at establishing networks of protected areas and reporting requirements for countries. That argument, however, seems to overlook the fact that the CBD Programme of Work generally deals with national *and* regional networks of protected areas. Hence, the CBD as well as other global environmental forums have increasingly called for regional implementation mechanisms, for which AC/CAFF could be well suited. [27]

Protected areas were again addressed by the ABA 2013. It recommends advancing the protection of large areas of ecologically important marine, terrestrial and freshwater habitats, taking into account ecological resilience in a changing climate and building upon existing international and national processes and networks. (Policy recommendation 5)

As regards *marine protected areas*, a 2013 assessment (AMSAIIC) identified 95 areas across each of 16 Arctic large marine ecosystems, cov-

[21] CPAN Strategy and Action Plan, CAFF Habitat Conservation Report no. 6: http://www.caff.is/strategies-series/95-cpan-strategy-and-action-plan.

[22] Ibid. p. 12.

[23] Koivurova, 2009, and CAFF Management Board Meeting Minutes 1–3 February 2005, Helsinki, Chapter 8.3: http://arcticportal.org/uploads/t-/9F/t).9FpbaWsOdX3RSz._UyIFw/CAFF-Board-Meeting-Helsinki-Finland-February-1-3-2005.pdf>.

[24] https://oaarchive.arctic-council.org/handle/11374/148.

[25] This is supported by the following quote from minutes of the CAFF board meeting in February 2008 which discussed a possible resumption of CPAN: 'The challenge which faces CPAN now is how best to continue? CPAN has in the past run into difficulties as each CAFF country has its own protected areas policy and therefore may not need any outside suggestions on how these policies should be structured. Thus in order to proceed CPAN needs to focus more on generalities and the international context.'

[26] *CBD Programme of Work on Protected Areas:* https://www.cbd.int/doc/publications/pa-text-en.pdf.

[27] Goal 1.3. of the above is to 'establish and strengthen regional networks, transboundary protected areas (TBPAs) and collaboration between neighbouring protected areas across national boundaries'.

ering 12 million km$^2$ – more than half the total ice-covered area of the marine Arctic – as marine areas of heightened ecological and cultural significance.[28] AMSAIIC was carried out by CAFF in collaboration with its two sister AC working groups, the Arctic Monitoring and Assessment Programme (AMAP) and the Sustainable Development Working Group (SDWG). While these sea areas were identified as sensitive to shipping activities, they were selected on the basis of their ecological importance to fish, birds and/or mammals. Thus, the assessment could serve as the basis for identifying sea areas in need of protection from impacts beyond shipping as well. The AMSAIIC is also relevant to the CBD-initiated global process for identifying and describing Ecologically or Biologically Sensitive Sea Areas (EBSAs) around the world.[29]

Moreover, in 2015 the Working Group on the Protection of the Marine Environment (PAME) issued a Framework for a Pan-Arctic Network of Marine Protected Areas (MPA).[30] This sets out a common vision for Arctic cooperation in MPA network establishment and management, based on international best practices and previous Arctic Council initiatives. It aims to support Arctic states in developing their MPA networks and charting a course for future collaborative planning, management and actions.

Despite their non-binding nature, these developments, with the ABA recommendation on protected areas, the AMSAII identification of sensitive marine ecosystems and now the MPR framework for a network of marine protected areas, indicate a return to formulating policies on protected areas in the Arctic.

### 2.4 Latest developments in the Arctic Council and CAFF related to biodiversity

The increasing global awareness of Arctic biodiversity was clearly evident at the Arctic Biodiversity Congress in Trondheim, Norway, in December 2014 – the largest gathering in the history of the Arctic Council.[31] The 450 participants comprised a mix of scientists, policy-makers, government officials and representatives of indigenous peoples, industry and civil society. The two main challenges for the Arctic Council, as expressed by presenters at the Congress, were to develop an umbrella strategy for sustainable development that would include, as a core component, conservation and sustainable use of biological resources, while maintaining traditional ways of life for Arctic peoples; and to speed and scale up actions to implement the recommendations of the ABA and international commitments on biodiversity such as the Aichi targets under the CBD.[32]

Among actions suggested at the Congress was the development of 'binding agreements related to the conservation and/or sustainable use of biodiversity' – however, with no further

[28] AMAP/CAFF/SDWG, 2013. Identification of Arctic marine areas of heightened ecological and cultural significance: Arctic Marine Shipping Assessment (AMSA) IIc. Arctic Monitoring and Assessment Programme (AMAP), Oslo. http://www.caff.is/publications/view_document/251-Arctic-marine-areas-of-heightened-ecological-and-cultural-significance-Arctic-marine-shipping-assessment-amsa-iic.

[29] See https://www.cbd.int/ebsa/ . As part of the EBSA process, CAFF provided data, scientific and technical support, and participated in an Arctic regional workshop to facilitate the description of EBSAs in the Arctic in Finland in March 2014 (see Report of the Arctic Regional Workshop to Facilitate the Description of Ecologically or Biologically Significant Marine Areas. http://www.cbd.int/doc/?meeting=EBSAWS-2014-01).

[30] PAME and Arctic Council. 2015 Framework for a Pan-Arctic Network of Marine Protected Areas. https://oaarchive.arctic-council.org/bitstream/handle/11374/417/MPA_final_web.pdf?sequence=1&isAllowed=y.

[31] R. Smith, T. Barry and F. Katerås, 2014. *Arctic Biodiversity Congress, Co-Chairs Report*. Conservation of Arctic Flora and Fauna, Akureyri, Iceland. http://www.caff.is/assessment-series/10-arctic-biodiversity-assessment/284-arctic-biodiversity-congress-co-chairs-report.

[32] Ibid.

specification. Another action suggested was the expansion of both the marine and terrestrial protected areas network and monitoring its effectiveness. Moreover, various actions were suggested for mainstreaming biodiversity concerns across sectoral policies and activities. These include biodiversity as a fundamental component of Environmental Impact Assessments, Strategic Environmental Assessments and risk assessments; mapping biodiversity hot spots and biologically and ecologically sensitive areas on a scale appropriate for industry to use in planning; inclusion of biodiversity in national accounting so that the true value of healthy Arctic ecosystems can be recognized; and expansion of the responsibility for taking care of biodiversity and implementing ecosystem-based management in marine, terrestrial, freshwater and coastal ecosystems.[33]

The report of the co-chairs also noted diverging views on the role of the AC and CAFF. While many Conference participants felt that this should not go beyond assessments, monitoring and data management, there were also many who felt that the AC and CAFF should now move towards policy formulation.[34]

Also in 2015, CAFF published a plan for implementation of the 17 ABA recommendations organized in two-year implementation periods.[35] The plan is presented as a living document to be reviewed and updated every two years. It was developed in cooperation with other AC working groups and external stakeholders and applies to the AC as a whole. CAFF will prepare annual reports on progress towards implementation. Key actions for 2015–2017 include: mainstreaming biodiversity, reducing stressors on migratory birds, ecosystem services evaluation, communications and outreach, adaptation to climate change, invasive species, pollution, safeguarding critical areas, improving knowledge and public awareness, and developing indicators.

Although the implementation plan is meant to concern what are referred to as the ABA *policy* recommendations, the plan only to a very limited extent provides for the development of policies, norm-setting or other outcomes aimed at achieving a direct causal impact on the conservation and sustainable use of Arctic biodiversity. Once again, the vast majority of the actions mentioned concern generating new knowledge, guidance, recommendations, public awareness, data collection and outreach activities by CAFF or other AC bodies, sometimes in collaboration with individual Arctic states. One exception to that pattern is a recommendation for the third phase of the plan (2017–2019) to 'Develop, as needed, binding and/or voluntary agreements/standards that work towards the harmonization of industry-specific and cross-industry standards related to the conservation and/or sustainable use of biodiversity'.[36] Another exception concerns phase two (2015–2017) to 'Execute international exercises under the Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic and maintain and update the Operational Guidelines'.[37] Here the executive character of the action is directly linked to and authorized by one of the two legally binding agreements concluded under AC auspices.

On the whole, however, the limited orientation of the implementation plan towards 'action on the ground' indicates that the Arctic Council is still not ready to move from scientific cooperation and policy shaping to policy-making in the field of biodiversity.

[33] Ibid.
[34] Ibid.
[35] CAFF, 2015. *Actions for Arctic Biodiversity, 2013 – 20121: Implementing the recommendations of the Arctic Biodiversity Assessment*. www.caff.is/actions-for-arctic-biodiversity-2013-2021.
[36] Ibid.
[37] Ibid.

## 3. International agreements related to biodiversity, and Arctic alignment with these

Several multilateral agreements to which Arctic states to varying degrees are parties include explicit and implicit obligations for states to conserve and sustainably use biodiversity. These agreements have increasingly come to focus on Arctic biodiversity. From the beginning, CAFF viewed its activities as an Arctic response to the global biodiversity commitments included in these agreements. Let us now examine the main global agreements as regards framing AC work on biodiversity, with special emphasis on the Convention on Biological Diversity and correlations between the work of AC/CAFF and the international agreements.

### 3.1 The Convention on Biological Diversity (CBD)

The CBD was signed by a large number of states at the Rio Summit (UNCED) in 1992; it entered into force in 1993 and has now almost universal global membership – including all Arctic states except the USA. Unlike earlier nature conservation conventions, which covered either threatened species, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973) or the Convention on Migratory Species (CMS) (1979), or threatened habitats, such as the Ramsar Convention (1971), the CBD covers *all* aspects of biodiversity: the diversity of ecosystems, species and genetic diversity. Its objectives are the conservation and sustainable use of biodiversity and the fair and equitable sharing of benefits from the use of genetic resources. This represents a shift of paradigm from traditional nature conservation to view biodiversity in light of and as an important component of sustainable development. Also as a new concept, the CBD includes provisions to protect the traditional knowledge, innovations and practices of indigenous and local communities in relation to biodiversity. Although the CBD does not itself address regional approaches to implementation, many of its COP decisions do.[38]

In spite of the CBD, with its many work programmes and national biodiversity strategies and action plans developed in most countries, the global decline in genetic, species and ecosystem diversity has continued, and the pressures on biodiversity have remained constant or have increased.[39] In response, the CBD COP 10 in 2010 adopted a Strategic Plan for Biodiversity 2011–2020 with a shared vision, mission, five strategic goals and 20 targets ('the Aichi Biodiversity Targets').[40]

ABA from 2013 refers to itself as a regional contribution to the attainment of these targets.[41] Information from ABA was used in preparing the *Fourth Global Biodiversity Outlook,* launched at the 12th COP meeting in October 2014. Throughout the ABA, reference is made not only to the uniqueness of Arctic biodiversity but also to the increasing threats from human activities, often due to factors outside the Arctic.

The overall approach of the CBD, recognizing both the intrinsic value of biodiversity and the essential ecosystem services it provides to people, is shared with CAFF. *The Ecosystem Approach* was recognized by CAFF as a cornerstone approach for conservation in the Arctic be-

[38] See for example paragraph 5 of decision X/2 (Strategic Plan for Biodiversity 2011–2020) in which the Conference of the Parties 'Urges regional organizations to consider the development or updating of regional biodiversity strategies, as appropriate, including agreeing on regional targets, as a means of complementing and supporting national actions and of contributing to the implementation of the *Strategic Plan for Biodiversity 2011–2020;'.*

[39] See *Global Biodiversity Outlook (GBO 3),* 2010. http://www.cbd.int/gbo3/.

[40] *Strategic Plan for Biodiversity 2011–2020.* CBD decision X/2.

[41] https://www.cbd.int/doc/strategic-plan/2011-2020/Aichi-Targets-EN.pdf.

fore the CBD adopted it, together with 12 principles, in 2000[42] as 'the primary framework for action under the Convention' and described as 'a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way'.[43] The Ecosystem Approach includes the concept of *adaptive management* – particularly relevant in the Arctic, due to the severe impacts on ecosystem functioning caused by climate change.[44] CAFF's Circumpolar Biodiversity Monitoring Programme (CBMP), with its ecosystem-based monitoring plans for freshwater, terrestrial and marine, coastal ecosystems, is an example of application of the approach. Concerning another important topic on the international biodiversity agenda, *The Economics of Ecosystems and Biodiversity (TEEB)*, a scoping study on the Arctic was published in 2015.[45]

Related to the Ecosystem Approach is the *sustainable use of biodiversity components*, the second objective of the CBD. As stated in the ABA, unsustainable use of mammals, birds and fish was historically the most significant pressure on Arctic biodiversity. While much of this pressure has been significantly lessened by improved management and regulation, it has not been eliminated, according to the assessment. CAFF's work on monitoring and assessments has addressed threats to biodiversity, including unsustainable use, and made recommendations on measures to overcome these threats. Nevertheless, attention in CAFF has been unevenly distributed among species groups, with most attention to flora and birds, some attention to terrestrial mammals – and less attention to marine mammals and fish, despite their significance for Arctic community livelihoods. One explanation could be the political sensitivity often associated with the management of marine mammals and fish stocks in the region.[46]

The *mainstreaming* of biodiversity across sectors as a means to address the underlying causes of biodiversity loss is another topic at the core of implementing the CBD and featuring prominently in the Aichi Targets.[47] This is also a top CAFF priority: it is one of the three main themes

[42] Under the CBD, the ecosystem approach is described as a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way, although it is often referred to as 'an ecosystem-based approach' in the CAFF context

[43] CBD Decision V/6

[44] 'Adaptive management' refers to the fact that 'ecosystem processes are often non-linear, and the outcome of such processes often shows time-lags. The result is discontinuities, leading to surprise and uncertainty. Management must be adaptive in order to be able to respond to such uncertainties and contain elements of 'learning-by-doing' or research feedback. Secretariat of the Convention on Biological Diversity (2004), *The Ecosystem Approach (CBD Guidelines)*, Montreal. https://www.cbd.int/doc/publications/ea-text-en.pdf.

[45] The study was prepared by CAFF, with Sweden as the lead country, in cooperation with the UNEP TEEB Office, the UNEP Regional Office for Europe, UNEP GRID Arendal and the WWF Global Arctic Programme. http://www.caff.is/administrative-series/292-the-economics-of-ecosystems-and-biodiversity-teeb-scoping-study-progress-report.

[46] The selective approach to species groups has gradually shifted with CBMP and its ecosystem-based approach. For example, the marine expert monitoring group covers all marine species groups. Also the ABA addresses fish and marine mammals alongside other species and includes specific recommendations (10c and d) on planning and managing commercial fisheries in international waters and on fishing technologies and practices. See *Arctic Species Trend Index (ASTI): Tracking Trends in Arctic Marine Populations*. http://www.caff.is/assessment-series/view_document/28-Arctic-species-trend-index-tracking-trends-in-Arctic-marine-populations.

[47] Under Strategic Goal A, 'Address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society', the first four Aichi targets address general awareness-raising on the value of biodiversity, integration of biodiversity concerns into national and local development plans and strategies, phasing out harmful subsidies and promoting positive incentives for biodiversity, promoting sustainable consumption and production, and keeping the use of natural resources within safe ecological limits. https://www.cbd.int/sp/targets/.

of the ABA, with recommendation 4 requiring 'the incorporation of biodiversity objectives and provisions into all Arctic Council work and encourage the same for on-going and future international standards, agreements, plans, operations and/or other tools specific to development in the Arctic. This should include, but not be restricted to, oil and gas development, shipping, fishing, tourism and mining.' Mainstreaming has also been expressed through the close involvement of CAFF in the work of other Arctic Council working groups, especially AMAP and PAME and their biodiversity considerations.

The CBD was innovative in giving global recognition to *knowledge innovations and customary practices of indigenous and local communities* as important tools for safeguarding biodiversity. Further, the CBD adopted an innovative approach to community participation, by establishing a special open-ended working group where government and indigenous representatives co-chair and participate on an equal footing.[48] To a large extent this is also the approach of the AC including CAFF. The Council recognizes the importance of traditional and local knowledge and therefore seeks to include traditional ecological knowledge where possible. In terms of the participation of indigenous organizations in the working process, six major Arctic indigenous organizations have been granted Permanent Participant status in the Arctic Council, entitling them to participate in the Arctic Council and its working groups with full consultation rights.

The impact of *climate change* on biodiversity ranks high on the international biodiversity agenda, inspired not least by ACIA and its focus on this problem for Arctic biodiversity.

*Monitoring, assessment and developing indicators* have been important for the CBD in evaluating trends and progress towards targets set out in strategic plans. As noted, these are core AC activities and can therefore be regarded as the primary area of AC/CAFF contributions to the CBD and related international regimes most recently being expressed through the CBMP and the ABA. In fact, the CAFF contributions on the various thematic areas of the CBD agenda described above could also be categorized under this heading. CBMP is recognized as one of four regional Biodiversity Observations Networks of the Global Earth Observation System of Systems – Biodiversity Observations Networks (GEO BON).[49] Arctic indicators developed under CBMP have taken into account global biodiversity indicators developed under the CBD, and the CBMP is a partner to the Global Biodiversity Indicators Partnership (BIP). [50] Thereby, CAFF is also an actual and potential contributor to the recently established Intergovernmental Panel for Biodiversity and Ecosystem Services (IPBES), 'as the leading intergovernmental body for assessing the state of the planet's biodiversity, its ecosystems and the essential services they provide to society'.[51]

While the Arctic Council has acknowledged the CBD, the CBD has acknowledged the Council as an important regional forum. In 2010, a Resolution of Cooperation between CAFF and the CBD was signed; and the CBD COP at its 11th meeting in 2012 adopted decision XI/6, with eleven paragraphs on Arctic biodiversity.[52] These paragraphs, *inter alia,* call upon the CBMP to deliver Arctic biodiversity status and trends information as a contribution to tracking progress towards

[48] Ad-Hoc Open-Ended Working Group on Article (8j) and Related Provisions.

[49] http://geobon.org/.

[50] *Global Biodiversity Indicators Partnership (BIP)*. http://www.bipindicators.net/.

[51] IPBES website: http://www.ipbes.net/index.php/about-ipbes.html.

[52] Paragraphs 30 to 40. https://www.cbd.int/doc/decisions/cop-11/cop-11-dec-06-en.pdf.

achievement of the Aichi Biodiversity Targets. Decision XI/6 also expresses appreciation of the Arctic Council's collaboration with indigenous and local communities, and encourages Parties and relevant organizations to ensure their full and effective participation in research projects and programmes on Arctic biodiversity.

### 3.2 The Ramsar Convention on Wetlands

The Ramsar Convention was the first of the biodiversity-related conventions: adopted in 1971, it entered into force in 1975. Its mission is 'the conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world'.[53] Originally, the Ramsar Convention focused on wetlands as habitats for waterfowl, but because of the high economic, scientific, cultural, and recreational value of the world's wetlands, the concept of 'wise use' was introduced – basically an ecosystem approach. The Convention has 168 parties and includes all the Arctic states.

According to the Ramsar Convention Secretariat, 60 % of the terrestrial area of the Arctic is covered by wetlands and 68 Ramsar Sites have been designated in the Arctic.[54] Arctic wetlands provide significant ecosystem services; they are biodiversity hotspots and play a crucial role in permafrost protection and water regulation. However, Arctic wetlands are also undergoing active degradation induced by human impacts and climate change.[55]

CAFF and the Ramsar Convention signed a Resolution of Cooperation in 2012. Cooperation takes place on a regional basis through the Ramsar regional 'NorBalWet' Initiative covering the Nordic countries and the countries around the Baltic Sea, but NorBalWet also acts as Ramsar's operational arm for cooperation with CAFF and for developing a focus on Arctic wetland ecosystems and their crucial role in climate change.[56]

### 3.3 The Convention on Migratory Species (CMS)

The importance of multilateral cooperation for the conservation of migratory species was recognized by the UN Conference on the Human Environment in Stockholm in 1972, which mandated the elaboration of a broad convention. This led to the negotiation of the Convention on Migratory Species of Wild Animals (CMS).[57] The CMS entered into force in 1983 and has since been ratified by 120 countries, including four Arctic States (Finland, Sweden, Norway, and Denmark with the Faroe Islands and Greenland). The CMS includes various types of requirements for conservation, depending on the degree of threat to the species in question. Those considered endangered are listed in Annex I, while Appendix II lists species seen as 'merely' having an unfavourable conservation status and in need of international agreements for their conservation and management. The most comprehensive agreement under CMS is the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA), which entered into force in 1999. It encompasses 554 populations of 255 waterbird species whose ranges include Europe, Africa, the Middle East, parts of West-Central Asia and parts of the Arctic. The geographic area covers 118 states, of which 63 are Parties to the AEWA, including five Arctic states (Iceland, Finland, Sweden, Norway,

[53] Ramsar Convention website. http://www.ramsar.org/news/how-about-arctic-wetlands.
[54] Ibid.
[55] Wetlands International website: http://www.wetlands.org/Whatarewetlands/Arcticwetlands/tabid/2740/Default.aspx.
[56] NorBalWet website: http://www.norbalwet.org/.
[57] Convention on Migratory Species (CMS) website, www.cms.int.

and Denmark with the Faroe Islands and Greenland). [58]

The Arctic is home to several species – especially birds – that migrate both to and from other parts of the world and within the Arctic. Migratory species are an important indicator of ecosystem health, which make the CMS and AEWA highly relevant to the work of CAFF. A recent important contribution to these international commitments is the Arctic Migratory Birds Initiative (AMBI) initiated by CAFF in 2013. This project will require enhanced cooperation among the Arctic states themselves and with non-Arctic states that host Arctic birds during the non-breeding season. [59]

### 3.4 United Nations Convention on Law of the Seas (UNCLOS) and the protection of Arctic marine biodiversity

Recognizing the Arctic as one ecosystem that requires joint, transboundary management is particularly important in relation to the marine ecosystem. For marine areas beyond national jurisdiction this is self-evident, but it is also highly relevant to areas within the jurisdictions of each Arctic coastal state, given the special geographical and ecological conditions of the often ice-covered waters. This makes the United Nations Convention on the Law of the Sea (UNCLOS), which provides for a comprehensive regime of law governing all uses of the oceans and their resources, another important global treaty for the protection of Arctic biodiversity – although the Convention does not explicitly refer to the term.[60] All Arctic states are Parties to UNCLOS, except the USA.[61]

UNCLOS applies to marine areas under and beyond national jurisdiction. Most of the Arctic marine areas are under coastal-state jurisdiction, but there are also areas of high seas beyond national jurisdiction in the Central Arctic Ocean, the Northern Pacific and Northern Atlantic. For these areas UNCLOS is the only legal instrument with provisions on the conservation and sustainable use of marine resources, and thereby biodiversity. To emphasize the importance of this concern and make more specific the rather broad provisions of UNCLOS, the UN General Assembly in 2015 decided to launch a process for the development of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction.[62]

UNCLOS Article 194 sets out the general requirement of due diligence to protect the marine environment from pollution. This includes taking measures 'to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life' (Art. 194.5). The general obligation is specified in more detailed provisions until Article 237. With particular relevance to the Arctic, Art. 234 provides Coastal States with the right to take legal measures to prevent, reduce and control marine pollution from vessels in ice-covered areas.

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[58] Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) website, www.unep-aewa.org.

[59] CAFF, 2013. Arctic Migratory Birds Initiative (AMBI), http://www.caff.is/arctic-migratory-birds-initiative-ambi.

[60] H. Hoel, 2015, Oceans governance, the Arctic Council and ecosystem-based management, in: L.C. Jensen and G. Hønneland(eds.) *Handbook of the Politics of the Arctic*, Cheltenham: Edward Elgar.

[61] The USA, however, considers UNCLOS provisions other than Part XI (which deals with the International Seabed Area) as customary international law and thereby binding (See R. Churchill, 2015. The exploitation and management of marine resources in the Arctic: law, politics and the environmental challenge, in: Jensen and Hønneland (fn 60 above).

[62] UNGA Resolution 69/292, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/292.

Articles 61 to 64 concern obligations for States to conserve and sustainably use marine living resources in the Exclusive Economic Zone, as do Articles 116 to 120 regarding the High Seas. Chapter XIII of the Convention provides for a global regime for marine scientific research.

UNCLOS requires States to collaborate directly or through competent international organizations to protect and preserve the marine environment at the international and regional levels. These requirements include Article 197 concerning pollution, Article 63 on stocks of living resources occurring within more than one Exclusive Economic Zone, and Article 118 regarding management of living resources in the high seas.[63]

Several global and regional agreements build on UNCLOS environmental provisions. These include legally binding agreements regulating shipping negotiated under the auspices of the International Maritime Organization (IMO), where one of particular importance for Arctic marine ecosystem was concluded in 2015: the International Code for Ships Operating in Polar Waters (Polar Code) expected to enter into force in 2017, and with its main goal being ' to provide for safe ship operation and the protection of the polar environment '(Introduction Article 1(n5)).[64]

There are also several regional seas agreements, some developed under the auspices of UNEP, that relate to UNCLOS.[65]

UNCLOS and the related provisions referred to above are dealt with by the Arctic Council mainly through its working group on the Protection of the Arctic Marine Environment (PAME). The mandate of PAME is to address policy and non-emergency pollution prevention and control measures related to the protection of the Arctic marine environment from land- and sea-based activities.[66] These measures are often addressed in cooperation with CAFF when they relate to marine biodiversity. Concerning other biodiversity-related agreements, the Council has contribution mainly through monitoring and assessment activities.

Specifically regarding the Central Arctic Ocean (areas within and beyond national jurisdiction), the five coastal states in 2008 agreed to the Ilulissat Declaration, which acknowledges UNCLOS as a key instrument for, *inter alia*, protection of the marine environment including ice-covered areas. The coastal states also declare that for the moment they see no need to develop a new comprehensive international legal regime for governing the Arctic Ocean.[67] In addition, in July 2015 the five states signed the Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean, [68]

[63] Articles 122 and 123 deal with regional cooperation between states bordering 'Enclosed or Semi-Enclosed Seas'. It has been argued that while the Central Arctic Ocean as an 'ocean' and not a 'sea' may not fully satisfy the definition of a semi-enclosed sea area in Article 122, it nevertheless shares similar properties. Thus an analogous cooperation system could legitimately be applied *mutatis mutandis* for the Central Arctic Ocean. See J. Owens, 2013, 'Enclosed and Semi-Enclosed Seas: Does the Arctic count?', *China Oceans Law Review*, 2. The Ilulissat Declaration and the declaration to prevent unregulated fisheries referred to below exemplify such cooperation.

[64] IMO, International Code for Ships Operating in Polar Waters (Polar Code), (Safety-related provisions) (21 November 2014), IMO Resolution MSC.385 (94), (Environment-related provisions) (15 May 2015), IMO Resolution MEPC. 264(68). IMO documents are available at www.imo.org. The Polar Code applies to Arctic and Antarctic waters.

[65] PAME, *The Arctic Ocean Review, Phase I Report (2009–2011)*, 2nd edn.. http://www.pame.is/images/03_Projects/AOR/Reports/AOR_Phase_I_Report_to_Ministers_2011_2nd_edition_Nov_2013_b-1.pdf.

[66] *PAME Work Plan 2015–2017*. http://www.pame.is/index.php/shortcode/pame-work-plan.

[67] *The Ilulissat Declaration,* Arctic Ocean Conference, Ilulissat, Greenland 27–29 May 2008. http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf. The coastal states are the USA, Russia, Canada, Norway and Denmark (in respect of Greenland).

[68] *Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean of 16*

which acknowledges that commercial fishing in this area is unlikely to occur in the near future. Nevertheless, the dramatic reduction of Arctic sea ice and other environmental changes in the Arctic, combined with the still-limited scientific knowledge about marine resources in this area, necessitate a precautionary approach to prevent unregulated fishing in the area.

Section 4 discusses the recent establishment of a task force to consider future needs for strengthened cooperation on Arctic marine areas as well as mechanisms to meet these needs.

### 3.5 Summary: international biodiversity commitments

To a large extent, commitments related to international biodiversity concerns have guided the work of the Arctic Council as regards generating new knowledge on Arctic biodiversity – knowledge that in return has proven very useful for the various global biodiversity-related regimes and has contributed to greater global awareness on Arctic biodiversity. Lacking executive powers, however, the Arctic Council has not been in a position to take more direct measures in response to international commitments on the conservation and sustainable use of biodiversity.

## 4. Recent developments in the Arctic Council outside the biodiversity context

Many of the deliverables of AC working groups can be classified as technical and/or scientific knowledge generation and dissemination, as is the case with CAFF deliverables. However, some areas outside CAFF have moved beyond this point. Above all this applies to the conclusion of two legally binding agreements: on aeronautical and maritime search and rescue (2011)[69] and oil spill preparedness and response (2013).[70]

A further indication is the establishment of time-delimited task forces with specific action-oriented mandates and expected outputs. One example here is the Task Force for Action on Black Carbon and Methane, established by the Arctic Ministerial in 2013 in Kiruna, Sweden, to develop arrangements on actions for achieving greater reductions of emissions in the Arctic. This is the result of an Arctic Council Framework for Action on Enhanced Black Carbon and Methane Emission Reductions, which includes actions at the national, pan-Arctic and global levels.[71] At the Arctic Ministerial in 2013, a task force was mandated to prepare a legally binding agreement on Arctic scientific cooperation. Its mandate was renewed at the 2015 Arctic Ministerial in Iqaluit, Canada.[72]

Also at the Iqaluit Arctic Ministerial, a task force was established on Arctic marine cooperation.[73] Its mandate is to consider future needs for strengthened cooperation on Arctic marine areas as well as mechanisms for meeting these needs, and to make recommendations on the nature and scope of any such mechanisms. This includes considerations on whether a cooperative mechanism should be formed within or outside

*July 2015*: https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf.

[69] *Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic:* http://library.arcticportal.org/1709/1/Arctic_SAR_Agreement_EN_FINAL_for_signature_21-Apr-2011.pdf. The agreement entered into force in 2013.

[70] *Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic:* http://arctic-council.org/eppr/agreement-on-cooperation-on-marine-oil-pollution-preparedness-and-response-in-the-arctic/. This agreement has not yet entered into force.

[71] Black Carbon and Methane Expert Group website: https://oaarchive.arctic-council.org/handle/11374/1167.

[72] Iqaluit Declaration, para. 44. https://oaarchive.arctic-council.org/bitstream/handle/11374/662/ACMMCA09_Iqaluit_2015_Iqaluit_Declaration_low_resolution_web.pdf?sequence=1&isAllowed=y.

[73] Ibid., para. 43.

the existing structure of the Arctic and whether it should be based on a legally or non-legally binding agreement.[74]

## 5. General discussion and conclusion

Here we may note one key message from the December 2014 Arctic Biodiversity Congress: 'there is a wide gap between what we know and how we act. Although research to fill gaps in knowledge is still needed, there is enough knowledge about what needs to done to act now.' As noted in the report of the co-chairs, 'A companion to that message is the urgent need to shorten the time it takes to for scientific understanding to be translated into policy in the Arctic.' [75] This statement reflects a basic dilemma for the Arctic Council: First-class scientific work has been generated, documenting with ever-greater strength that actions on the ground are needed to reduce the loss of Arctic biodiversity. However, the cooperation mechanisms for translating these scientific findings into coordinated and joint action by the Arctic states are not in place.[76]

During the first years, Arctic Council cooperation under CAFF seemed to include an executive and normative element, as expressed not least through the establishment of a Circumpolar Protected Area Network, which was considered a cornerstone of CAFF activities.[77] However, at that time the AC and CAFF were not able to handle issues of such a political nature affecting the territorial sovereignty of the Arctic states, and CAFF gradually developed into a body for mainly technical and scientific cooperation. [78]

The value of this cooperation cannot be underestimated. Through its monitoring and assessments, CAFF has contributed considerably to improving the knowledge base on Arctic biodiversity. CAFF has also delivered consistent high-quality communication activities and materials on Arctic biodiversity to a variety of audiences. International processes and fora have been provided with new knowledge, which has helped to increase international attention on issues of importance to Arctic biodiversity. This has put Arctic biodiversity in a global context – an achievement comparable to the catalytic achievements of AMAP in informing and influencing global processes on the severe effects on the Arctic environment of climate change and heavy metal and chemicals contamination. The high attendance rate and diversity of participants at the 2014 Arctic Biodiversity Congress attest to this.

A major challenge for the AC and CAFF today is how to best harness the knowledge and capacity to help enable informed, timely and effective decisions in the face of cumulative and accelerating change – as called for by the Arctic Biodiversity Assessment (ABA) and by decisions under the international agreements with which CAFF claims to be closely aligned. In terms of commitments, these agreements cover far more than generating knowledge on and raising awareness on biodiversity. They also require direct measures to tackle the causes of biodiversity loss – both the direct causes and the root causes – measures that the AC and CAFF are currently not authorized to take. In dealing with these

[74] Arctic Council, 2015. Senior Arctic Officials' Report to Ministers. p. 78. https://oaarchive.arctic-council.org/bitstream/handle/11374/494/ACMMCA09_Iqaluit_2015_Iqaluit_SAO_Report_to_Ministers_formatted_v.pdf.pdf?sequence=1&isAllowed=y.

[75] Smith et al. 2014 (see fn 31 above).

[76] Similarly, Koivurova argues: *'the assessments the council has sponsored seem increasingly to challenge the very fundaments of the cooperation'*. (T. Koivurova, 2010, Limits and possibilities of the Arctic Council in a rapidly changing scene of Arctic governance, *Polar Record* 46, 146–156).

[77] O.S. Stokke, G. Hønneland and P.J. Schei, 2007, 'Pollution and conservation', in Stokke and Hønneland (eds) 2007. *International Cooperation and Arctic Governance.*

[78] Koivurova, 2009, Governance of protected areas in the Arctic (fn. 7 above).

causes, the role of the AC and CAFF at the pan-Arctic level has been at best indirect, through generating new knowledge. To what extent has the work of CAFF influenced individual Arctic states and other relevant actors in their actions for Arctic biodiversity? That is an obvious field for further research.

The discourse on strengthening Arctic biodiversity management largely mirrors the general discourse on strengthening the Arctic Council and giving it more decision-making power, as propounded by scholars and NGOs, but also by actors like the European Parliament. Proposals have been made for replacing the AC's 'lightweight' non-regulatory statutes with an overarching Arctic treaty regime, in some cases referring to the Antarctic Treaty System as the inspiration. [79] As much AC cooperation concerns environmental protection, this would be likely to feature prominently in such an overall treaty, including provisions for safeguarding Arctic ecosystems and biodiversity. Time may be working for such a treaty solution: in recent years, the Arctic has been rising higher and higher on the foreign policy agendas of Arctic and non-Arctic states alike.[80] However, such a general transformation of the Arctic Council is not under discussion at the moment, nor are there any no signs that it will be in the near future.

Instead, AC has moved in a more policy-making and normative direction through issue-specific regimes, like the conclusion of legally binding agreements on Search and Rescue in 2011 and Oil Spill Preparedness and Response in 2013.[81] Although these agreements are very general in terms of state obligations, they hold important symbolic value and the potential to set a precedent for binding agreements in other areas. [82] The two agreements seem already to have influenced the Council, through the mandate set by the 2015 Iqaluit Declaration, for task forces to continue to prepare a legally binding agreement on Arctic scientific cooperation and to consider the need for a pan-Arctic cooperation mechanism to protect the Arctic marine environment – an agreement that may be legally binding.

On that basis, would it be feasible to work towards another legally binding agreement to protect Arctic biodiversity? One challenge here is the broad scope of biodiversity and its overlap with several AC thematic areas on which activities of various types may already have been initiated. These include the 2013 oil spill agreement and the current process of considering an Arctic marine environment mechanism – both of which are highly relevant for Arctic marine biodiversity. In that light, it would seem more realistic to continue the current trend whereby binding agreements evolve in piecemeal fashion within more limited and specialized areas,

[79] European Parliament, Resolution of 9 October 2008 on Arctic governance, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-474. L. Nowlan, 2001. Arctic Legal Regime for Environmental Protection, *IUCN Environmental Policy and Law Paper* No. 44. http://www.iucn.org/themes/law/info04.html; also P. Sands, *Principles of International Environmental Law* (second edition). Cambridge University Press 2003: 731. On the discourse in general, see T. Koivurova (2005) 'Environmental Protection in the Arctic and Antarctic: Can the Polar Regimes Learn from Each Other?', *International Journal of Legal Information, 33* (2): 204–218, http://scholarship.law.cornell.edu/ijli/vol33/iss2/5 ; T. Koivurova 2010. 'Limits and possibilities of the Arctic Council in a rapidly changing scene of Arctic governance', *Polar Record, 46* :146–156; Kankaanpää and Young 2012, 'The effectiveness of the Arctic Council' (fn 7 above).

[80] S.V. Rottem, 'A Note on the Arctic Council Agreements'. *Ocean Development and International Law*, Vol 46, No 1, 2015, pp. 50–59.

[81] Although the two agreements have been signed by the eight Arctic states, they do not formally constitute Arctic Council proceedings, as the Council has no formal authority to make decisions legally binding on its members.

[82] Rottem, 2015; Kankaanpää and Young, 2012

while making sure that biodiversity concerns are properly reflected. That would also be in excellent agreement with the CBD and ABA objectives of promoting biodiversity mainstreaming. Such agreements could be directly under AC framework, or outside as regional agreements under international regimes (as with the Polar Code under IMO) but still with AC serving a role as regional mechanism. One such agreement could concern the establishment of an Arctic protected areas network, thereby reviving an early flagship theme of CAFF. The issue of marine protected areas could be dealt with in the AC task force on marine cooperation.

Legally binding agreements are not a prerequisite for strengthening Arctic biodiversity management, as this could also be achieved through the introduction of 'soft-law' instruments, often a first step towards legally binding instruments – and perhaps, in the Arctic context, the most practical, realistic and quickest way to strengthen management and policy-making. There is no official definition of the 'soft law', but a very broad and simple understanding refers to normative provisions in non-binding texts.[83] Soft law is often expressed through codes of conduct, guidelines, standards etc. In the literature, Arctic cooperation has been widely regarded as already building on soft-law instruments,[84] but recent CAFF cooperation on biodiversity – with the notable exception of the 2013 ABA policy recommendations – can hardly be classified as soft law, given the strong focus on assessing, monitoring and collecting data and lack of normative instruments. An example of a more typical soft-law instrument under the AC, and which could inspire biodiversity-related instruments in its design, is the Arctic Council Framework for Action on Enhanced Black Carbon and Methane Emissions Reductions, adopted by Arctic ministers in 2015.

The Arctic Council and its working group on the Conservation of Arctic Flora and Fauna should continue to do what they are best at doing as regards biodiversity: generating scientific knowledge on the state of Arctic biodiversity and acting as a catalyst within and beyond the circumpolar region. However, when this knowledge clearly points to the need for coordinated or joint solutions to protect Arctic biodiversity, instruments – hard or soft – should be developed for action. Indeed, recent developments under the Arctic Council have paved the way for precisely such types of instruments.

[83] D. Shelton, 2000., ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford: Oxford University Press.

[84] Koivurova, 2005.

# Ekologisk kompensation och biologisk mångfald. Om behovet av rättslig utveckling och försiktighet

*Kristjan Laas**

**Abstract**

Loss of biodiversity has been described as one of the big challenges for humanity. Under the Habitats Directive and the Water Framework Directive, Sweden has an obligation to stop degradation of species and water respectively. While avoiding or minimizing impact should be prioritized, the need to cover some impacts by compensation is not negligible. This paper analyses the different parts of Swedish environmental law, which cover the issue of compensation. The aim is to set the regulation in relation to the objectives of stopping degradation of biodiversity. There is a lack of cohesion between different rules on compensation in Sweden. The inconsistency stretches from the question of when to demand compensation to what measures could qualify as compensation and finally how to monitor compensation measures. For compensation to become one, rather than several different, legal instrument it takes changes in the legislation. At present, compensation runs the risk of legitimizing further exploitation but failing to counter the impacts, thus promoting loss of biodiversity rather than preventing it.

## 1. Biologisk mångfald – förluster och behov av skydd[1]

Förlusten av biologisk mångfald har beskrivits som en av de stora utmaningarna för mänskligheten. Att utrymmet för ytterligare påverkan på miljön är begränsat om vi vill ha en för människor god miljö i framtiden, är något som hävdats under många år.[2] 2009 publicerade Rockström m.fl. en artikel i tidskriften Nature[3] som diskuterade de så kallade planetära gränser (*planetary boundaries)* för vilken mänsklig påverkan jorden som ekosystem tål utan att förutsättningarna för det mänskliga samhället förändras radikalt. Även om det i artikeln gjordes en ansats att bedöma de olika gränserna var för sig påpekades också att de i många fall är fundamentalt sammankopplade. För att ta ett konkret exempel tycks övergödningens effekter på ålgräs försvåras av brist på stora rovfiskar såsom torsk.[4] Kritik har också riktats mot att fisket inte inkluderas i tillräcklig utsträckning i förvaltningen av de marina

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[1] Artikeln är en del i ett doktorandprojekt angående rättsliga aspekter på ekologisk kompensation. Forskningen bedrivs tvärvetenskapligt, främst i samarbete med marin ekologi, med ålgräs som gemensam plattform (se vidare: www.gu.se/zorro). Praktiska exempel kommer därför i stor utsträckning att beröra ålgräs och marina miljöer, men avsikten är att diskutera frågor som är relevanta för kompensation generellt. Ett särskilt tack till professor Lena Gipperth, min handledare, för läsning och konstruktiva kommentarer. Tack också till professor emeritus Bertil Bengtsson för granskning och värdefulla synpunkter. Eventuella kvarvarande otydligheter är helt och hållet mina egna.

[2] I en svensk miljörättslig kontext, se exempelvis Lena Gipperth, *Miljökvalitetsnormer: En rättsvetenskaplig studie i regelteknik för operationalisering av miljömål* (Uppsala, 1999). Där också komplexitet i form av icke linjära samband och tröskeleffekter uppmärksammas.

[3] Johan Rockstrom et al., A Safe Operating Space for Humanity, *Nature,* 461/7263 (09/24/print 2009), 472–75.

[4] Örjan Östman et al., 'Top-Down Control as Important as Nutrient Enrichment for Eutrophication Effects in North Atlantic Coastal Ecosystems', *Journal of Applied Ecology,* (2016).

ekosystemen.[5] Just förlust av biologisk mångfald är en av de parametrar som diskuterats, och som mått används den hastighet med vilken arter dör ut. Hastigheten för artförluster har föranlett bl.a. Barnosky m.fl. att fråga sig om vi är mitt uppe i ett sjätte massutdöende av arter på jorden – påskyndat av mänsklig påverkan.[6] Orsakerna till förlusterna beskrivs som förbrukning av naturresurser, fragmentering av livsmiljöer, införande av invasiva arter, spridande av sjukdomar, direkt dödande och klimatförändringar.[7]

Försök att identifiera gränslinjer för förändringar av naturen och studier av rättsliga möjligheter att hantera sådana gränser är inte nytt. En grundlig genomgång av rättens förhållande till ett säkert handlingsutrymme finns i Gipperths avhandling om miljökvalitetsnormer där begreppet navigeringsregler lanserades som en modell för att inom rätten hantera samhällets förhållande till gränserna för långsiktig hållbarhet.[8]

Ebbesson har utifrån beskrivningarna av *planetary boundaries* gjort en analys av vilka internationellrättsliga överenskommelser som motsvarar de olika gränserna.[9] Skydd för biologisk mångfald på internationell nivå hanteras i första hand inom konventionen för biologisk mångfald (CBD) som undertecknades 1992.[10] För att konkretisera åtagandena enligt konventionen har parterna beslutat om de så kallade Aichimålen.[11] En av målsättningarna är att förlusten av biologisk mångfald som beror på mänsklig påverkan ska upphöra helt fram till år 2020. Inom EU finns livsmiljödirektivet som syftar till att skydda biologisk mångfald.[12] Det viktigaste instrumentet inom ramen för livsmiljödirektivet är utpekandet av värdefulla områden som ska skyddas, och som tillsammans bildar det så kallade Natura 2000-nätverket. Som ett led i arbetet med att uppfylla Aichimålen har EU även antagit en strategi för att stoppa förlusten av biologisk mångfald.[13] Inom ramen för strategin ryms en målsättning om ett stopp för förluster (eng. ”no net loss”) av biologisk mångfald till år 2020. År 2013 publicerades en rapport av en arbetsgrupp med rekommendationer för hur målsättningen ska uppnås.[14] Bland annat nämndes ekologisk kompensation (eng. offsetting) som viktigt för att förhindra fortsatta förluster av biologisk mångfald. Det konstaterades i rapporten att kompensation kopplat till art- och habitatdirektivet är relativt välutvecklat men att det dels krävs en bättre tillämpning av dessa regler, dels finns ett behov av att utvidga kompensationskravet till att gälla generellt, inte bara i Natura 2000-områden.[15] Den svenska regeringen initierade i mars 2016 en utredning om effektivare ekologisk kompensation.[16] Utredningen är bara ett av många

[5] Gabriel Michanek & Anna Christiernsson, Adaptive Management of EU Marine Ecosystems – About Time to Include Fishery , in Peter Wahlgren (ed.), *Environmental Law* (Scandinavian Studies in Law; Stockholm: Stockholm Institute for Scandinavian Law, 2014), 201–42.

[6] Anthony D. Barnosky et al., Has the Earth's Sixth Mass Extinction Already Arrived?, Nature, 471/7336 (03/03/print 2011), 51–57.

[7] Ibid.

[8] Gipperth, *Miljökvalitetsnormer : En rättsvetenskaplig studie i regelteknik för operationalisering av miljömål*.

[9] Jonas Ebbesson, Planetary Boundaries and the Matching of International Treaty Regimes, in Peter Wahlgren (ed.), *Environmental Law* (Scandinavian Studies in Law; Stockholm: Stockholm Institute for Scandinavian Law, 2014), 260–84.

[10] Convention on Biological Diversity (CBD), Förenta Nationerna (1992).

[11] Se vidare: https://www.cbd.int/sp/targets/ (senast besökt 2016-04-26).

[12] Rådets Direktiv 92/43/EEG av den 21 Maj 1992 om bevarande av livsmiljöer samt vilda djur och växter, (EGT L 206, 22.7.1992, s. 7).

[13] *Vår livförsäkring, vårt naturkapital – en strategi för biologisk mångfald i EU fram till 2020*, KOM(2011) 244 slutlig.

[14] Graham Tucker et al., *Policy Options for an EU No Net Loss Initiative*. Report to the European Commission, (Institute for European Environmental Policy, London, 2013).

[15] Ibid. s. 17.

[16] Dir 2016:23, En effektivare och mer konsekvent tillämpning av ekologisk kompensation. Utredningen kommer på förslag från SOU 2013:68, Synliggöra värdet av ekosystemtjänster: Åtgärder för välfärd genom biolo-

pågående arbeten med ekologisk kompensation i myndighetssverige, där Naturvårdsverket, Havs- och vattenmyndigheten och länsstyrelserna på olika håll uppmärksammar möjligheten till ekologisk kompensation.[17]

Ett incitament för att initiera ekologisk kompensation är förbudet i EU:s vattendirektiv mot ytterligare försämring av vattenkvaliteten.[18] Kravet innebär att det inte räcker att dämpa och minimera påverkan på vattenmiljön, utan att åtgärder ska vidtas så att sådan påverkan som är oundviklig i samband med aktiviteter kompenseras. Ekologisk kompensation kan användas för att förhindra att direktivens förbud mot försämring medför ett totalt stopp för ytterligare exploatering av områden som påverkar vattenstatusen.[19] Genom att ställa krav på kompensation kan en verksamhet tillåtas utan ytterligare försämring av vattenmiljön och den biologiska mångfalden. Kompensationsinstrumentet kan t o m användas för att åstadkomma en förbättring av miljön om det ställs krav på överkompensation i samband med exploatering. Ett argument mot en överkompensation är att det strider mot principen om att förorenaren ska betala genom att enskilda aktörer då får bära kostnader som orsakats av andra verksamheter. Överkompensation skulle kunna användas för att kompensera framtida intrång. Ett sådant system diskuterades i Genevadsåstudien där det dock bland aktörerna fanns en skepsis grundad i brist på tro på möjlig marknad.[20]

Frågan om ekologisk kompensation kan också initieras av exploatörer som i samband med tillståndsansökningar vill öka möjligheten att få tillstånd till en verksamhet genom att visa insikt om verksamhetens påverkan på miljön och en vilja att minska denna.[21] Denna typ av yrkanden medverkar till behovet av att mer ingående analysera det miljörättsliga instrumentet ekologisk kompensation. Sammantaget finns alltså en utveckling inom miljöförvaltningen på flera nivåer som pekar mot att kompensation kommer att bli ett mer utbrett verktyg framöver.

Som nämndes ovan har förlusten av biologisk mångfald många olika orsaker och ekologisk kompensation ska ses som en del i arbetet med att nå en situation där samhällets utveckling inte medför förluster av arter och livsmiljöer. Skydd av geografiska områden och av arter har varit (och är) viktiga instrument i arbetet med att bevara den biologiska mångfalden, men är till sin natur begränsade till vissa geografiska platser eller specifika arter. Miljön utanför skyddade områden, det så kallade vardagslandskapet, är i betydligt mindre grad skyddad. Att prata om kompensation som generellt instrument rimmar också väl med intentionen i EU:s direktiv rörande vattenkvalitet, där fokus är flyttat från att skydda vissa utpekade värdefulla vattenförekomster

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gisk mångfald och ekosystemtjänster. Här kan nämnas att inför miljöbalkens införande fick Bertil Bengtsson i uppdrag att utreda frågan om kompensation vilket resulterade i Ds 1997:52, Kompensation för förlust av naturvärden.

[17] Se t.ex. Naturvårdsverket, *Ekologisk Kompensation: En vägledning om kompensation vid förlust av naturvärden* (Handbok med allmänna råd, 2016:1; Stockholm: Naturvårdsverket, 2016). En rapport med särskild inriktning på ekologisk kompensation av ålgräs kommer att publiceras under 2016 av Havs- och vattenmyndigheten. Länsstyrelserna har de senaste åren haft flera konferenser på temat ekologisk kompensation.

[18] Främst genom direktiven Europaparlamentets och Rådets Direktiv 2000/60/EG av den 23 Oktober 2000 om upprättande av en ram för gemenskapens åtgärder på vattenpolitikens område. Och Europaparlamentets och Rådets Direktiv 2008/56/EG av den 17 Juni 2008 om upprättande av en ram för gemenskapens åtgärder på havsmiljöpolitikens område (Ramdirektiv om en Marin Strategi), (2008/56/EG; EUT L 164, 25.6.2008, s. 19–40, 2008).

[19] Särskilt efter avgörandet i mål C-461/13 Weser har behovet av kompensation vuxit.

[20] Hans Bertil Wittgren, Staffan Westerlund, och Reinhold Castensson (red.), *Genevadsåstudien: Ett aktörspel om genomförande av miljökvalitetsnormer för kväve i ett avrinningsområde* (Vastra Report, 1404-6652; 1, Linköping, 2000). s. 124.

[21] Per-Olav Moksnes, *Restaurera ålgräsängar*, (2009).

till att ställa krav på god status i samtliga vattenförekomster. En mer omfattande tillämpning av ekologisk kompensation, med de tillhörande förleden att undvika och minimera skador är en möjlighet att inkludera vardagslandskapet på ett tydligare sätt i arbetet för att bevara den biologiska mångfalden.

Denna artikel syftar till att analysera hur dagens svenska reglering av ekologisk kompensation förhåller sig till målsättningen att förhindra ytterligare förluster av biologisk mångfald. För att kunna beskriva kompensationsinstrumentet har samtliga kompensationsregler i miljöbalken undersökts och analyserats utifrån ett antal kriterier som fångar upp väsentliga frågor som bör hanteras i samband med kompensation av miljöpåverkan. Istället för att analysera reglerna var för sig presenteras regleringen i förhållande till faktorer som påverkar funktionen hos kompensation som skydd för biologisk mångfald.

De frågor som berörs i artikeln är:

- I vilken mån är kompensation kopplat till krav på undvikande och minimering av skador?
- Är kompensation ett krav under vissa förutsättningar eller en rent fakultativ möjlighet?
- Vilka är de skyddsvärda intressen som ska/kan kompenseras?
- Vilken omfattning av påverkan krävs för att kompensation ska aktualiseras, och vilka begränsningar finns i kravet på verksamhetsutövare att kompensera?
- Ska kompensation utföras som praktiska åtgärder eller genom ekonomisk ersättning?

Vad de olika perspektiven innebär redogörs för i anslutning till presentationen av resultaten. I blickfånget för denna artikel finns de kriterier som har behandlats i den svenska lagstiftningen rörande kompensation. Någon egentlig detaljreglering av kompensation finns inte i Sverige, utom möjligen vid kompensation för intrång i Natura 2000 områden, varför analysen är av mer övergripande karaktär. I ljuset av målsättningen om ett stopp för förlust av biologisk mångfald diskuteras behov av mer detaljerad reglering i artikelns slutdel. Ytterligare faktorer att ta hänsyn till för att kompensation ska bidra till minskad förlust av biologisk mångfald diskuteras kort i avslutningen och kommer att bli föremål för framtida arbete.

Tillämpningen av de svenska reglerna om ekologisk kompensation kommer inte att vara huvudpoängen i förevarande text, något som Naturvårdsverket presenterat i en rapport.[22] Domar som nämns nedan tjänar istället syftet att illustrera mer övergripande resonemang om kompensation.

## 2. Ekologisk kompensation – möjligt verktyg för att bevara biologisk mångfald

Inför analysen av de svenska reglerna som behandlar kompensation är det på sin plats att kort beskriva kompensation som rättsligt instrument och utmaningar och begränsningar förknippade med detta. Beskrivningen grundar sig mycket på hur kompensation har använts i USA[23] – men också hur det svenska regelverket är utformat. Utmaningarna kan grovt delas in i praktiska och rättsliga. Till de praktiska utmaningarna hör frågan om det alls är möjligt att restaurera eller nyskapa en viss typ av miljö. Med utgångspunkt i studier som har genomförts av plantering av ålgräs utmed västkusten så är svaret att det beror på. I vissa områden med rätt förutsättningar är det fullt möjligt att plantera ålgräs med framgång och därmed kompensera för förluster som

[22] Naturvårdsverket, *Tillämpning av miljöbalkens bestämmelser om ekologisk kompensation*, (Stockholm, 2015).

[23] För granskningar av våtmarkskompensation under amerikanska Clean Water Act, se bl.a. Margaret S. Race and Mark S. Fonseca, Fixing Compensatory Mitigation: What Will It Take?, *Ecological Applications*, 6/1 (1996), 94–101 eller National Research Council, *Compensating for Wetland Losses under the Clean Water Act* (The National Academies Press, 2001).

orsakats. I andra områden är det i dagsläget mycket små möjligheter att lyckas.[24] Praktiskt är också frågan om vilka funktioner som återskapas intressant. För att ta ålgräs som exempel så är det enklast att mäta hur stor areal som har planterats, men det är inte givet att alla funktioner det fyller automatisk återskapas. Det tar olika lång tid att binda kol i sedimenten, för fiskar att hitta den nya livsmiljön och för ålgräset att dämpa vågrörelser för att minska stranderosion. Det är därför väsentligt att ha klart för sig vilka funktioner en viss livsmiljö har och i vilken utsträckning de återskapas vid en kompensation. Hur kompensation bör följas upp återkommer jag till i den avslutande diskussionen.

Kompensation kan ses som ett samlingsbegrepp för flera olika typer av åtgärder för att motverka ekologiska förluster. I amerikansk kompensationsreglering nämns följande alternativ begrepp: restaurering, förbättring (enhancement), skapande och under vissa förutsättningar bevarande av relevanta livsmiljöer.[25] Restaurering nämns som det alternativ som helst bör väljas då förutsättningarna att lyckas är relativt goda samtidigt som de ekologiska vinsterna anses stora.[26] När jag i artikeln använder uttrycket ekologisk kompensation är det restaurering i nu nämnda betydelse som avses. Restaurering kan i sin tur administreras på olika sätt. Antingen genomför exploatören (ofta via en konsult) själv kompensationsåtgärderna eller så kan exploatörens ansvar förvandlas till ett ekonomiskt åtagande och där någon annan genomför den fysiska åtgärden. Två alternativ för ekonomisk kompensation är köp av krediter i en kompensationsbank (eng. mitigation bank) respektive inbetalning till en kompensationsfond.[27]

Bertil Bengtsson skrev för snart 20 år sedan på uppdrag av miljödepartementet en rapport om kompensation inom miljörätten.[28] Bengtsson argumenterar i rapporten för att kompensation ska kunna ske på flera sätt. Som första alternativ bör motsvarande naturmiljö nyskapas – alltså motsvarande det som Naturvårdsverket benämner ekologisk kompensation. Om möjligt bör kompensationen ske på samma plats, utgångspunkten är att ju närmare platsen för förlusten, desto bättre. Av praktiska skäl är denna modell inte alltid genomförbar varför Bengtsson menar att även alternativa typer av kompensation ska tillåtas. Han nämner exempelvis möjligheten att inrätta skydd av ett område med motsvarande naturtyp eller kompensation på annan plats.[29]

### 2.1 Skillnaden mellan försiktighetsåtgärder och ekologisk kompensation

En viktig fråga relaterad till begreppet ekologisk kompensation är om kravet på kompensation ska ses som ett försiktighetsmått eller om det utgör ett krav utöver miljöbalkens krav i framförallt 2 kapitlets allmänna hänsynsregler Det har visat sig vara svårt att utläsa av svensk praxis var gränsen mellan dessa två regeltyper ska dras,[30] något som motiverar en närmare analys av vad som utgör ett försiktighetsmått och vad som är en kompensationsåtgärd. Här görs endast ett kort försök till distinktion.

De allmänna hänsynsreglerna i 2 kapitlet i miljöbalken utgörs i huvudsak av regler som

[24] Eriander L, Infantes E, Olofsson M, Olsen JL, Moksnes P-O 2016. Assessing methods for restoration of eelgrass (Zostera marina L.) in a cold temperate region. *Journal of Experimental Marine Biology Ecology*. 479:76–88.

[25] Amerikanska EPA, Section 404(b)(1) Guidelines (40 CFR 230) § 230.93 https://www.epa.gov/sites/production/files/2015-03/documents/cwa_section404b1_guidelines_40cfr230_july2010.pdf (senast besökt 2016-04-30) Hädanefter (EPA GUIDELINES).

[26] EPA GUIDELINES s. 280.

[27] EPA GUIDELINES s. 281f.

[28] Ds 1997:52 Kompensation för förlust av miljövärden.

[29] Ibid. s. 40–41.

[30] Naturvårdsverket, Tillämpning av miljöbalkens bestämmelser om ekologisk kompensation.

syftar till att hindra eller minimera negativ påverkan på människors hälsa och miljön. Hur omfattande krav som ställs i det enskilda fallet avgörs i huvudsak av en avvägning mellan vad som är tekniskt och ekonomiskt möjligt i relation till vad som är miljömässigt motiverat. Det medför att relativt stor påverkan kan tillåtas om tekniken för att minska intrånget inte är väl utvecklad eller dyrare än vad ett genomsnittligt välskött företag i en viss bransch kan klara av. Hänsynsreglerna är med etablerad miljörättslig terminologi aktörsrelaterade medan kompensationsreglerna snarare har (eller bör åtminstone enligt artikelförfattaren ha) sin utgångspunkt i reaktören – d.v.s. naturen.[31]

Det finns principiella argument för att kompensation ska reserveras för sådan påverkan som är oundviklig, som inte kan undvikas eller minimeras med stöd av miljöbalkens allmänna hänsynregler och övriga försiktighetskrav. Kompensation kan enligt detta synsätt inte vara ett sätt att ”köpa sig” en rätt att exploatera en naturresurs eller ett område. Den ska inte bli en del av förhandlingen om villkor för ett tillstånd. Bengtsson har argumenterat för att denna princip är så viktig att den bör införas i lagstiftningen.[32] Han menar att kompensation bör fungera som en säkerhetsventil för de fall där försiktighetsmåtten inte förmår att i tillräcklig omfattning begränsa den negativa påverkan på omgivningen. Det kan handla om att det saknas befintlig teknik för rening av utsläpp, att själva platsen som ska tas i anspråk är särskilt värdefull, eller att syftet med exploateringen är så angeläget att den godkänns trots allvarliga konsekvenser.

Var ska då gränslinjen mellan försiktighetsmått och kompensationsåtgärder dras? Som oftast när begrepp ska särskiljas finns ett gränsområde där det inte går att tydligt peka på vad som ska tillhöra respektive begrepp. Frågan är vilka kriterier som avgör hur gränsdragningen ska göras; den geografiska kopplingen till den störande verksamheten eller kopplingen till den störande verksamheten? Att anlägga en våtmark för att hantera utsläpp av näringsämnen från en fiskodling har benämnts som kompensation.[33] Däremot ansågs musselodling i vattnet utanför Lysekils avloppsanläggning i syfte att fånga upp motsvarande mängd närsalter som släpptes ut från avloppsreningsverket som ett försiktighetsmått. Likaså har anläggandet av våtmarker i anslutning till en anläggning som en del av reningsprocessen behandlats som ett försiktighetsmått enligt 2 kap. 3 § miljöbalken.[34]

Jag föreslår att begreppet ekologisk kompensation reserveras för de fall då ren fysisk påverkan ska hanteras. Anläggande av våtmark för att fånga upp näringsämnen skulle därmed klassas snarare som ett försiktighetsmått. Exempel på kompensation kan istället vara att plantera ålgräs för att ersätta sådant som förstörs genom att ett vattenområde fylls ut[35] eller om en gruva etableras på en plats med värdefulla livsmiljöer, att det kompenseras genom att skapa nya värdefulla miljöer som kan fylla en motsvarande funktion.[36]

[31] Se bland annat Staffan Westerlund, *Miljörättsliga Grundfrågor 2.0* (Björklinge: Institutet för miljörätt (IMIR), 2003).

[32] Ds 1997:52, Kompensation för förlust av miljövärden, s. 65.

[33] Fallet är MÖD 2005:5 som rörde en fiskodling. Odlingen skulle bedrivas i öppna nätburar – varifrån näringsämnen från foder och fekalier skulle spridas ut i det omgivande vattnet.

[34] Se t.ex. MÖD 2002:80.

[35] Så var fallet i mål nr M 4523-13, 2015-11-24, Vänersborgs tingsrätt där Göteborgs Hamn ska plantera ålgräs motsvarande den areal som försvinner i samband med hamnutbyggnad i Arendal.

[36] Exempel finns i mål nr M 3093-12, 2014-10-03, Umeå tingsrätt angående Aitikgruvan.

### 2.2 Risker och behovet av försiktighet

Som framgår ovan visar myndigheter från regional till internationell nivå intresse för ekologisk kompensation som en möjlig lösning på konflikten mellan exploatering och bevarande av biologisk mångfald. Erfarenheter av kompensation talar för att vara restriktiv i användandet av kompensation, och visar framförallt på problem med genomförandeunderskott. I utvärderingar av kompensation av våtmarker i USA (som regleras i Clean Water Act, CWA section 404) har risker med kompensation uppmärksammats. Ett inflytelserikt bidrag skrevs av Race & Fonseca 1996, där de visade att det fanns stora brister i uppföljning och kontroll av de kompensationsåtgärder som hade beslutats.[37] Bland problemen nämndes att kompensation i många fall helt enkelt inte genomförts, att genomförda projekt inte tog hänsyn till etablerad kunskap, att tillsynen var bristfällig och att kraven var spretiga och därmed undergrävde legitimiteten. Den ”no net loss-policy” som gällde för våtmarker riskerade att motarbetas av tron på kompensationens möjligheter, argumenterade samma författare. Att argumentera för att ”bättre något än inget” var inget annat än ett tyst medgivande till ytterligare förluster av våtmarker.[38] Likaså har det ifrågasatts om kompensation de facto föregås av undvikande och minimering av skador.[39]

## 3. Analys av den svenska regleringen av ekologisk kompensation

Huvudsakligen aktualiseras kompensationskravet i samband med prövning av tillstånd och dispenser, men det förekommer också i samband med behandling av uppkomna miljöskador. Först i detta avsnitt presenteras kort de svenska lagrum som på olika sätt föreskriver kompensation i samband med påverkan på miljön. Därefter analyseras reglerna utifrån de frågor som presenterades i inledningen.

2 kap. 7 § miljöbalken innehåller ett kompensationskrav relaterat till överskridande av miljökvalitetsnormer som utgör så kallade gränsvärdesnormer enligt 5 kap. 2 § 1 p.[40] I situationen att ett naturreservat ska upphävas eller dispens för intrång i reservatet meddelas gäller särskilda skyddsregler. Sådana beslut får bara fattas om det finns synnerliga respektive särskilda skäl och om intrånget kompenseras på naturreservatet eller på ett annat område (7 kap. 7 § 4 stycket miljöbalken). Skyddet för Natura 2000-områden återfinns i 7 kap 27–29b §§ i miljöbalken. Kompensation aktualiseras i de fall då tillstånd ges trots att verksamheten eller åtgärden påverkar bevarandet av utpekade livsmiljöer eller arter. Kompensationskravet i 10 kap. 5 § skiljer sig från övriga genom att frågan om kompensation inte är en del av en förprövning. Kravet uppstår istället i vissa fall då miljön efter allvarliga miljöskador inte kan återställas. Fiske som påverkas genom vattenverksamhet utgör enligt miljöbalken 11 kap. 8 § ett särskilt skyddsvärt intresse och här föreskrivs också kompensationskrav. Bland reglerna om kompensation finns en regel med brett tillämpningsområde, till skillnad från övriga som endast gäller i specifika situationer. Enligt 16 kap. 9 § får tillstånd eller dispens enligt miljöbalken förenas med krav på att *utföra eller bekosta särskilda åtgärder för att kompensera det intrång i allmänna intressen som verksamheten medför.*

[37] Race and Fonseca, *Fixing Compensatory Mitigation: What Will It Take?*

[38] Ibid. s. 98.

[39] Shari Clare et al., Where Is the Avoidance in the Implementation of Wetland Law and Policy?, *Wetlands Ecology and Management*, 19/2 (2011/04/01 2011), 165-82.

[40] Gränsvärdesnormer är sådana som inrättats med stöd i 5 kap 2 § punkten 1 miljöbalken. EU-domstolens dom i mål C-461/13 *Weserdomen* har betydelse för hur kvalitetsnormer för vatten bör hanteras, och påverkar vilka kvalitetsnormer som bör omfattas av kravet. Den diskussionen tas dock inte upp här.

### 3.1 Undvika och minimera

I relation till den skadelindringshierarki som ovan presenterats behandlar det här avsnittet i vilken mån kompensationsreglerna innehåller något mått av krav på att skador på biologisk mångfald förhindras eller minimeras innan kompensation blir aktuellt.

Det tydligaste kravet på att skador i första hand ska undvikas gäller inom Natura 2000-områden. Dels krävs tillstånd för verksamheter och åtgärder som på ett betydande sätt kan påverka naturen inom området.[41] Tillstånd kan i undantagsfall lämnas om det saknas alternativa lösningar och verksamheten måste genomföras av tvingande orsaker som har ett väsentligt allmänintresse, och då krävs också kompensation av intrånget.[42] De allra flesta ingrepp av betydelse hindras alltså innan en diskussion om kompensation blir aktuell. I MÖD 2004:29 avslogs en ansökan om anläggande av småbåtsbrygga för att lokaliseringen innebar stor risk för intrång på naturvärden i form av mjuka bottnar och ålgräsängar inom ett Natura 2000-område. Närmast lika starkt är kravet att undvika skador när miljökvalitetsnormer riskerar att överskridas. Själva funktionen hos dessa normer är att uppnå och upprätthålla en viss miljökvalitet. När miljökvalitetsnormer riskerar att överträdas kan strängare krav än annars ställas på en verksamhet enligt 2 kap.7 §. I sammanhanget är det viktigt att åter påminna om att endast de så kallade gränsvärdesnormerna omfattas av kravet på kompensation i 2 kap. 7 §. Skyddet av naturreservat medför att det krävs synnerliga skäl för att upphäva ett reservat respektive särskilda skäl för att meddela dispens från ett förbud som följer av föreskrifterna för ett reservat. Enligt propositionen till miljöbalken ska inrättande av naturreservat innebära ett definitivt skydd som enligt 7 kap. 7 § bara undantagsvis ska kunna frångås. Normalt ska undantag inte göras för exploateringsföretag. Synnerliga skäl kan vara att området har förändrats väsentligt eller att en detaljplan eller områdesbestämmelse har väsentligt förändrat förutsättningarna för områdets skydd.[43] Avgörande för skyddets omfattning blir därför hur föreskrifterna för reservatet har utformats. I förhållande till vattenverksamhet finns den särskilda hänsynsregeln i 11 kap. 6 § att fördelarna av verksamheten måste värderas högre än nackdelarna för att verksamheten ska vara tillåten. Särskilt i fråga om områden med ekosystem som är känsliga för påverkan, bör det innebära en begränsande faktor för exploatering. För att identifiera känsliga områden måste det finnas kunskap om de ekologiska förhållandena. Någon direkt formulering av behovet att undvika och minimera skador innan kompensation blir aktuellt finns inte kopplad till den allmänna möjligheten till kompensationskrav i 16 kap. 9 § miljöbalken. Dock kan här, liksom i övriga fall, de allmänna hänsynsreglerna i balkens 2 kapitel fylla den funktionen. För fallet med de allvarliga miljöskadorna finns ett krav att omedelbart förebygga ytterligare skada, och därefter ge kompensation för de fall där återställning inte är möjlig, enligt 10 kap. 5 §. Även om skadan redan är skedd finns en tydlig ambition att minimera behovet av kompensation – något som stärker bilden av att det bör vara en grundläggande utgångspunkt för kompensation som rättsligt verktyg att först söka möjligheter att undvika eller minimera skador.

Kompensationsreglerna ovan är i flera fall (om än inte tydligt uttalat) kopplade till synsättet att kompensation ska vara en lösning i sista hand när andra alternativ är uttömda. Mest direkt uttrycks detta krav i förhållande till kompensation inom Natura 2000-områden. För att upprätthålla

[41] 7 kap. 28a § miljöbalken.
[42] 7 kap. 29 § miljöbalken.
[43] Prop. 1997/98:45 Del 2, s. 712f.

– eller kanske snarare upprätta – en ordning där kompensation är ett sätt att hantera oundvikliga skador krävs att exploatörer inte kan köpslå om möjligheten att få tillstånd genom att erbjuda kompensation. Särskilt viktigt blir det med ett tydligt regelverk när exploatörer själva föreslår kompensationsåtgärder – sannolikt för att öka chanserna att få ett tillstånd. Ett exempel på en situation där verksamhetsutövaren själv föreslog ekologisk kompensation för de skador som skulle uppkomma rörde kvittblivning av muddermassor i samband med byggande av en småbåtshamn.[44] Exploatören föreslog att störningen skulle kompenseras genom att muddermassorna skulle dumpas på ett grunt område för att höja bottennivån och därmed öka möjligheterna för ålgräs att etablera sig. Det är möjligt att tolka in att det delvis handlade om att hålla nere kostnaderna för att bli av med muddermassorna. Alternativet hade varit att ta hand om massorna på land eller frakta dem en längre sträcka till en dumpningsplats. Osäkerheterna kring projektets genomförbarhet var många, men tillstånd lämnades.

### 3.2 Krav eller möjlighet

En grundläggande fråga i förhållande till de olika kompensationsreglerna är om behörig myndighet är *skyldig* att kräva kompensation eller om det finns en *möjlighet* att göra detsamma.

Av de undersökta lagrummen är de flesta att hänföra till kategorin krav. Det innebär att om förutsättningarna för kompensation är uppfyllda så *ska* tillståndsmyndigheten begära att exploatören kompenserar för de störningar som verksamheten eller åtgärden medverkar till. Däremot finns det trösklar (en lägsta skadenivå innan kompensation aktualiseras) som gör att kompensationskravet begränsas, vilket jag återkommer till nedan. Den generella regeln i 16 kap. 9 § miljöbalken är den enda kompensationsregel som ger möjlighet att ställa krav på kompensation för intrång i allmänna intressen, och utgör således ett undantag i förhållande till övriga kompensationsregler som ska tillämpas i förhållande till ett specifikt intresse eller särskilda geografiska platser. Dock är regeln i 16 kap. 9 § inte tvingande.

### 3.3 Skyddsvärt intresse

I vilken mån det rättsliga instrumentet ekologisk kompensation bidrar till att bevara biologisk mångfald beror på vilket intresse de olika reglerna syftar till att skydda. Skyddsvärda intressen kan vara specifika så att det anges vad som ska kompenseras eller mer allmänt formulerat. Det skyddsvärda intresset kan också kategoriseras som i första hand materiellt eller formellt. Med formellt intresse avses här att det är formellt utpekade intressen som skyddas, exempelvis genom ett beslut om att inrätta naturreservat, och att kompensationen i det fallet till synes rör sig om att upprätthålla mängden skyddad natur i motsats till att kompensera för förlusten av de värden och funktioner som finns. Ett materiellt intresse utgörs av en art, ett habitat eller en ekologisk funktion oavsett om de befinner sig inom ett skyddat område eller inte.

Undersökningen av kompensationsreglerna visar att de värden som omfattas av skydd och som ska kompenseras för, relaterar till miljöstatus (såsom miljökvalitetsnormer), eller ekologiska funktioner exempelvis förutsättningar för att behålla fiskars vandring och reproduktion.

Gränsvärdesnormer är det direkt utpekade skyddade intresset i 2 kap 7 § 3 stycket. Endast om en viss egenskap i vår miljö har beskrivits i och skyddats genom en särskild typ av miljökvalitetsnorm träder kravet på kompensation in. Det är inte situationen i naturen som är avgö-

[44] Vänersborgs tingsrätt, Mål nr M 417-06 meddelad 2007-03-13.

rande i sig utan hur vi har reglerat vårt förhållande till naturen. Konstruktionen, att relatera till miljökvalitetsnormer är dock flexibel genom att en förändring av sådana normer direkt får ett genomslag också i förhållande till kravet på kompensation. Hittills har normer som beskriver ekologiska funktioner inte uppfattats som gränsvärdesnormer i Sverige, varför kompensationsregeln i 2 kap 7 § 3 stycket p. 2 inte fått särskilt stor tillämpning. Efter den s.k. Weser-domen (C-461/13) krävs dock en förändring av de ekologiska normernas rättsverkan.[45]

Liksom miljökvalitetsnormer kan kompensationen kopplad till områdesskydden ses som ett formellt skydd. Även om naturreservat och Natura 2000-områden syftar till att skydda viktiga miljöer så är det beslutet om skydd som gör att kompensation kan bli aktuellt. Ett område med mycket höga naturvärden men utan att ett särskilt skydd har inrättats, riskerar att exploateras utan att kompensation krävs då tillämpningen av den generella regeln 16 kap. 9 § hittills varit restriktiv. Å andra sidan finns det krav på vilka typer av områden som ska pekas ut som skyddade enligt Natura 2000-reglerna, där funktion och kvalitet är styrande för vilka områden som pekas ut.[46]

För kompensation i samband med vattenverksamhet är ett särskilt intresse utpekat – fisket. Denna kompensationsregel speglar i 11 kap. 8 § miljörättens civilrättsliga härkomst. När exploateringsintressen medför skador för (yrkes)fisket ska skadorna kompenseras. Syftet med kompensationen är att trygga tillgången på kommersiellt intressanta fiskarter men inte sällan har krav på direkta kompensationsåtgärder ersatts av en fiskeavgift. Åtminstone har tidigare nivåer av fiskeavgiften utgått från en schablon för mängden fisk som förloras på grund av exploateringen och en beräkning av det kommersiella värdet av förlusten. Kompensationsinstrumentet i 11 kap. 8 § har en potential att skydda även vardagslandskapet, det vill säga sådana områden som inte omfattas av ett specifikt skydd såsom naturreservat, men i praktiken har krav på kompensationsåtgärder ersatts av fiskeavgifter som används för att täcka miljöförbättrande kostnader generellt och inte nödvändigtvis för de skador som den avgiftsbelagda verksamheten medverkar till. Fokuseringen på fisket har också gjort att värdet av habitat och funktioner som också påverkas av verksamheten exempelvis ålgräsängar, har underskattats när nivån på avgifter har bestämts.

Vad som är ett skyddat intresse enligt 16 kap. 9 § är en relativt öppen fråga. Det som kan utgöra grund för kompensationskrav enligt nämnda regel är om intrång sker i allmänna intressen. Allmänna intressen kan enligt förarbetena röra sig om naturvårdsintressen, men även om en verksamhet tar i anspråk bad-, parkerings- eller tältplats eller en sanitär inrättning. Tillståndsmyndigheten kan då kräva att verksamhetsutövaren ställer i ordning en ny liknande anordning på en annan plats.[47]

Gemensamt för de flesta av kompensationsreglerna är att de omfattar sådana delar av naturen som redan formellt har utpekats som skyddsvärda. Oavsett om det rör skydd genom gränsvärdesnormer, geografiska skydd som naturreservat eller Natura 2000-områden eller det specifika skyddet för fisket så rör det sig om på förhand högt värderade funktioner, naturvärden eller ekosystemtjänster. Den bredare möjligheten i 16 kap. 9 § är ett undantag då den är betydligt vagare angående vad som ska skyddas. Uttrycket ”intrång i allmänna intressen” ger inte mycket ledning till vad som ska skyddas med kompen-

[45] Se t.ex. Christina Olsen Lundh, *Panta Rei: Om miljökvalitetskrav och miljökvalitetsnormer* (Göteborg: Havsmiljöinstitutet, 2016). s. 336.

[46] Se t.ex. fallet Lappel Bank, mål C-44/95 EU-domstolen.

[47] Prop.1997/98:45 Del 2, s. 846.

sationskrav. Det kan tolkas så att vardagslandskapets biodiversitet – d.v.s. inom sådana områden som inte är specifikt skyddade – åtnjuter ett svagt skydd i form av krav på kompensation för förluster av naturvärden. Å andra sidan kan det också ses som en styrka att lagrummet har ett brett tillämpningsområde, som dessutom är flexibelt i förhållande till förändringar i vad som ses som allmänna intressen. I detta sammanhang är det värt att lyfta fram att Bengtsson hade mer långtgående förslag i sin utredning av kompensation från 1997. I utredningen föreslogs att kompensation skulle krävas, utöver i skyddade områden, för ingrepp i områden med ”särskilt värde från miljösynpunkt” om det medförde en ”betydande förlust av miljövärden”.[48] Bengtssons förslag innebär enligt min mening en reglering mer inriktad på funktion och faktiska naturvärden än det system vi har i dagens miljöbalk. Bengtsson förordade också att kompensation för intrång i exempelvis naturreservat skulle genomföras som praktiska åtgärder och inte endast genom att utpeka ett nytt område som ersättning för det som exploaterats.[49] I likhet med Bengtsson är jag av den uppfattningen att kompensation i första hand bör avse de funktioner i naturen som skadas av någon verksamhet eller åtgärd. Att som i fallet naturreservat tillåta att kompensation innebär att ett annat område skyddas är otillräckligt – särskilt i förhållande till den strategi för biologisk mångfald som EU driver. Att inrätta nya skyddade områden kan ses snarast som ett skydd för formella intressen, där effekten blir att mängden skyddade områden inte minskar. Däremot tryggar det inte de ekologiska funktionerna, som i omfattning mycket väl kan minska.

### 3.4 Trösklar och begränsningar

En ytterligare skillnad mellan olika rättsliga konstruktioner som kräver kompensation är den störningsnivå som krävs för att kompensationsregeln ska börja tillämpas, det vill säga hur hög tröskeln av påverkan är innan kompensation blir ett krav. Det finns olika kvalifikationer, såsom *”att miljökvalitetsnormer överskrids”*, *”betydande påverkan på Natura 2000-områden”* eller *”negativ påverkan på fisktillgång”*. Bengtsson nämnde i sin utredning att det bästa ur miljösynpunkt vore att kräva kompensation för varje förlust av miljövärden, men att en sådan ordning dels inte skulle stämma med miljöbalkens generella avvägningstanke, dels att det också skulle kunna innebära stor arbetsbelastning för ansvariga myndigheter.[50] Han föreslog däremot att införa ett krav på att i alla miljökonsekvensbeskrivningar utvärdera behovet av kompensation. Kraven på innehåll i MKB skulle exempelvis kunna utökas med obligatorisk utredning av möjligheterna att kompensera för skador som uppstår till följd av verksamheten. Kompensationskraven har i flera fall också begränsningar som kan hänföras till proportionalitetsprincipen. Det innebär att kompensationen ska utföras i skälig utsträckning eller om det inte är orimligt. Kravet på kompensation kan i de fallen bli mindre än den skada som kan beräknas eller mätas. Tillsammans bildar begreppen tröskel och begränsning det utrymme inom vilket kompensation blir aktuellt, se figur 1. I figuren illustreras också begreppet överkompensation som diskuteras vidare i slutet av artikeln.

För att krav på kompensation ska kunna ställas enligt 2 kap 7 § krävs att den planerade verksamheten eller åtgärden kan antas på ett *inte obetydligt sätt bidra* till att en miljökvalitetsnorm (gränsvärdesnorm) inte följs. Avgörande blir därför hur dessa miljökvalitetsnormer är utfor-

[48] Ds 1997:52, Kompensation för förlust av miljövärden, s. 82f.
[49] Ibid. s. 42.
[50] Ibid. s. 7.

made, och att den planerade verksamheten eller åtgärden bidrar mer än endast obetydligt till att normen inte uppnås. Tydliga gränsvärden används i första hand för koncentrationer av farliga ämnen och regeln får en relativt snäv användning beroende på att gränsvärdesnormerna är få till antalet. För naturreservat gäller att upphävande av reservatet eller dispens från föreskrifter alltid kräver kompensation enligt 7 kap. 7 § miljöbalken. Dock begränsas kravet av att det gäller i *skälig utsträckning*. Utformningen av reservatsföreskrifterna får betydelse då det är skillnad på att ge dispens från ett förbud respektive att bevilja tillstånd till något som kräver tillstånd inom reservatet.[51] Intrång som kan få företas efter beviljat tillstånd, kräver alltså inte kompensation, även om de kan tänkas innebära betydande skador i enskilda fall. Kompensation för intrång i Natura 2000-områden aktualiseras när det handlar om *betydande påverkan* på den skyddade livsmiljön. Kompensationskravet i 10 kap. 5 § skiljer sig från övriga genom att frågan om kompensation inte är en del av en förprövning. För att kompensation ska bli aktuellt krävs att det är fråga om en allvarlig miljöskada. Som i det mesta när det gäller den generella kompensationsmöjligheten i 16 kap. 9 § är tröskeln för när kompensation kan bli aktuellt väldigt diffus. Intrång i allmänna intressen kan ligga till grund för ett kompensationskrav, men det är oklart hur stora intrång det måste handla om.

En viktig begränsning i flera av fallen är rimlighetsbedömningen i kravet på kompensation. Ett problem är att bedömningen av rimlighet inte så ofta kopplas till förståelse för komplexa samband mellan olika delar av ekosystemet. Särskilt tydligt är det i 11 kap. 8 § där kompensation i samband med vattenverksamhet endast utgår från påverkan på fisket och då endast kommersiellt intressanta fiskarter. De vattenverksamheter som drabbar fisket kan också orsaka andra problem, men bristen på helhetssyn gör att kompensationskravet begränsas till att avse fisket. Särskilt om kompensationen sker genom erläggande av en avgift blir nivån mycket lägre än vad som hade varit fallet om även påverkan på andra intressen hade varit en del av bedömningen. För Natura 2000-reglerna där hela grunden för skyddsformen är att skydda, förutom arter, hela livsmiljöer som krävs för en livskraftig biologisk mångfald blir bedömningen en helt annan.

### 3.5 Betala för eller utföra kompensationsåtgärder

Skillnader i regelkonstruktion gäller också i vad för åtgärd som ska utföras för att genomföra kompensationen. I några fall nämns utföra och bekosta som jämbördiga alternativ. Det handlar då om att konkreta åtgärder ska genomföras för att kompensera den skada som orsakas eller ekonomisk ersättning som ska betalas för att kompensera intrången (ersättning som idealt sett ska bekosta kompensation av den specifika skadan). I regleringen av våtmarkskompensation i USA har följande rangordning av kompensationsåtgärder antagits, med utrymme för variation i enskilda fall: 1) betala för redan etablerad kompensation (från s.k. kompensationsbanker, 2) betala in pengar till en fond eller liknande som administrerar kompensation, 3) exploatören ansvarar för kompensation av förlorad funktion inom avrinningsområdet, 4) kompensation utförd av exploatören på samma plats och avseende samma ekologiska värde, 5) kompensation utförd av exploatören men på annan plats och/eller genom annat ekologiskt värde.[52]

Det finns olika argument för att ställa krav på att den som ansvarar för påverkan på miljön också ska utföra kompensationsåtgärden. I sin kommentar till 1918 års vattenlag skrev af Klint-

[51] Se MÖD 2009:38 för betydelseskillnaden.

[52] EPA Guidelines, § 230.93.

berg: ”Det har nämligen ofta befunnits mera ändamålsenligt att skyddsåtgärderna utföras av någon därav direkt intresserad, såsom hushållningssällskap eller fiskevårdsförening än den byggande.”[53] Detta förhållande gäller sannolikt fortfarande även om man kan anta att exploatören själv sällan kommer att vidta åtgärder utan att det utförs av konsulter. Genom att låta någon annan än exploatören själv utföra själva kompensationsåtgärden kan man således medverka till att kunskapen om genomförande av sådana åtgärder samlas på färre aktörer. För kompensation av intrång i fisket har det sedan länge ofta beslutats om en avgift snarare än krav på konkreta kompensationsåtgärder.[54]

Generellt kan sägas att de svenska reglerna om kompensation ger liten eller ingen ledning om hur kompensationen ska genomföras. Precis vad det är som ska ersättas, vilka åtgärder som är godtagbara och hur en utvärdering av kompensation ska göras är något som får hanteras från fall till fall. Som kontrast kan nämnas att i det komplex av regler som rör kompensation av påverkan på vattenmiljöer i USA finns detaljerade beskrivningar av både vad som ska kompenseras och hur kompensationen ska beräknas, genomföras och utvärderas. En grov indelning kan ändå urskiljas då det finns en skillnad mellan kompensation för intrång i skyddade områden å ena sidan och övriga kompensationsregler å andra sidan. För både naturreservat och natura 2000-områden gäller att kompensation ska vidtas eller alternativt skydd etableras. För övriga fall gäller att kompensationen antingen kan utföras eller bekostas. I praktiken kan dock en kompensation för intrång i naturreservat innebära att ett annat område skyddas, vilket främst torde handla om att bekosta eventuell ersättning till markägare vid inrättande av exempelvis reservat.

Skillnaden mellan att kräva direkta kompensationsåtgärder eller att acceptera ekonomisk ersättning får särskilt stor betydelse när det saknas etablerade metoder för att beräkna värdet av den förlorade naturen. En metod för att hantera detta problem är att, istället för att räkna fram ett värde på naturen, använda kostnaden för restaurering som utgångspunkt.

I denna fråga utmärker sig kompensation för påverkan på Natura 2000-områden. Kommissionen har publicerat (icke bindande) rekommendationer om hur kompensation ska genomföras med utgångspunkt i artikel 6 art- och habitatdirektivet.[55] Särskilt relevant att lyfta fram här är att kompensationsåtgärden ska vara funktionell innan det skyddade området slutgiltigt exploateras. Det är en säkerhetsåtgärd för att vara säker på att kompensationen ska lyckas och för att undvika tillfälliga förluster. Kommissionen skiljer också på åtgärder som är en del av medlemsstaternas uppfyllande av kraven i art- och habitatdirektivet och åtgärder för att kompensera påverkan på Natura 2000-områden. Således kan enligt kommissionen aldrig ett utpekande av ett område som Natura 2000-område räknas som kompensation om det i alla fall borde ha skyddats med utgångspunkt i reglerna i art- och habitatdirektivet.[56] I MÖD 2006:44 rörande Botnia-banan för Miljööverdomstolen en diskussion om hur kompensation ska genomföras. I målet var själva tillåtligheten redan meddelad av regeringen, men frågan om kompensation hade enligt domstolen inte behandlats i detalj av regeringen, varför den togs upp till prövning. En viktig fråga är vid vilken tidpunkt kompensationsåtgärden ska vara effektiv, det vill säga

[53] Lennart Af Klintberg, *Om byggande i vatten enligt 2, 3 och 5 kap. Vattenlagen: Lagtext med kommentar och sakregister* (Stockholm: Norstedt, 1955). s. 62.
[54] Ibid. s. 62.

[55] Europeiska Kommissionen, *Skötsel och förvaltning av Natura 2000-områden*, (2000).
[56] Ibid. s. 44–45.

fylla sin funktion. Med hänvisning till EU-kommissionens tolkningsanvisningar till fågel- och habitatdirektiven, angav Miljööverdomstolen att kompensationen ska vara genomförd innan störningen uppkommer. Domstolen argumenterade i målet för att funktionen skulle vara vägledande för kompensationskravet snarare än areal, även det med grund i tolkningsanvisningarna. I målet var det våtmark för fåglar som skulle ersättas och domstolen menade att det var viktigare att fåglarna kunde finna både goda födo- och viloplatser än att i första hand mäta areal.

### 3.6 Övriga kriterier

Flera andra aspekter på utformningen av kompensationsregler än de som beskrivits ovan är av intresse. Flera av dessa aspekter är del av den amerikanska lagstiftningen men (ännu) inte i den svenska regleringen av kompensation. Det rör exempelvis hur framgång respektive motgång av ett projekt ska bedömas och vem som har ansvaret för att kompensationen lyckas. En annan viktig aspekt är, när i tiden kompensationen vara genomförd i förhållande till exploateringen – innan eller efter exploateringen? De flesta av de nu uppräknade frågorna vill jag hänföra till kategorin genomförande. För en framtida, i förhållande till målsättningarna, mer funktionell utformning av kompensationsreglerna finns det behov av att hantera flera av dessa kriterier.

## 4. Diskussion och framåtblick

Sammanfattningsvis är ekologisk kompensation ett sällan utnyttjat instrument i svensk miljörätt. Den del av den svenska lagstiftningen om kompensation som kommit längst i att behandla olika frågor är de krav som är kopplade till skyddet för Natura 2000-områden. Dock är vissa av frågorna som är intressanta inte reglerade av svenska myndigheter utan återfinns i kommissionens tolkningsvägledning till art- och habitatdirektivet. Även i de fall där centrala myndigheter tagit fram närmare vägledning – främst kompensation för fisket och Natura 2000-områden – blir kompensation inte särskilt ofta genomförd. I fallet Natura 2000 beror det dock främst på att förstegen till kompensation – att undvika och minimera skador är väl utvecklade och hindrar nästan all skadlig exploatering av områdena.

Ett antal olikheter mellan de olika kompensationsreglerna gör att det är lätt att se de olika reglerna om kompensation som separata föreskrifter utan någon gemensam ram. Ska kompensation ses som ett relativt enhetligt verktyg så skulle förutsättningarna behöva samordnas i högre grad. Som det är framstår det som delvis slumpmässigt vilka intressen som kan bli föremål för kompensation. Stadganden har följt med in i miljöbalken från tidigare lagstiftning och till stor del behållit form och innehåll. En mer samlad reglering av kompensation föreslogs också av Bengtsson inför miljöbalkens införande, men fick inte genomslag.[57] Olikheterna rör också hur stark påverkan som förutsätts för att kompensation ska bli aktuellt, liksom under vilka förutsättningar ansvaret kan jämkas genom olika skälighetsbedömningar. Från en avvägning mellan nytta och kostnad i 11 kap. 8 § till att kompensera i den utsträckning det inte är orimligt (Natura 2000). Visserligen kan det vara motiverat att ha skillnader i krav beroende på skyddsvärdet av det som regleras, men skillnaderna är inte tydligt motiverade och framstår inte som medvetet valda.

En brist synes vara avsaknaden av tydliga riktlinjer. Gemensamt för de kompensationsregler som analyserats är en osäkerhet om vad kompensationen ska bestå i, hur den ska kvantifieras och hur den ska utvärderas. Ett tydligt exempel är kompensation respektive fiskeavgift enligt 11 kap. 8 §. Att utföra kompensation kan ofta bli

[57] Bengtsson, Ds 1997:52 *Kompensation för förlust av miljövärden.*

mycket mer kostsamt än den avgift som har beslutats istället. Skillnaden beror som nämnts tidigare på att beräkningen har utgått från förluster för fisket – och att värdet av övriga ekosystemtjänster inte har räknats in i bedömningen. Det är för övrigt också generellt en kritik – att kopplingen till ekologi och kunskap om de funktioner i naturen som ska kompenseras inte nämns i regleringen. Om en våtmark ska anläggas för att fånga upp näringsämnen – hur stor bör den vara, var bör den vara placerad, hur ska den anläggas, vilka eventuella negativa effekter finns, hur länge kommer den att vara funktionell, vem har ansvaret om 10 år? Fler frågor skulle kunna radas upp, de angivna avser bara att illustrera behovet av kunskap som idag inte är tydligt kopplad till regleringen av kompensation av miljövärden. Undantaget är skyddet enligt 7 kap. 29 § där det finns vägledning att hämta från kommissionen angående krav på att undvika skador, innehållet i kompensationen, när den ska vara genomförd och hur den ska utvärderas.

Som helhet betraktat finns det ett stort behov av tydligare anvisningar om hur kompensation ska användas. Allt från när kompensation bör krävas till hur åtgärderna ska utformas, vad det är som ska mätas och vem som har långsiktigt ansvar för kompensationen är frågor som behöver tydligare svar för att kompensation ska bli ett instrument att räkna med i den svenska miljörätten. I dagsläget riskerar kompensation att legitimera fortsatt exploatering men misslyckas med att motverka de negativa effekterna. Resultatet blir i sämsta fall att kompensation bidrar till förlust av biologisk mångfald istället för att skydda densamma.

# Karin och Susannes glädje, Lars-Anders sorg? Om uppdelade tillståndsprövningar på miljöområdet och respekten för samernas renskötselrätt

*Jan Darpö**

**Abstract**

This article is a belated contribution to the previous issue of NMT, dedicated to Bertil Bengtsson on his 90th birthday (NMT 2016:1). The article touches upon two subjects which have been close to Bertil's heart throughout the years, namely the environment and the rights of the Sami people. Using the Rönnbäcken case concerning an extraction concession for minerals in a reindeer herding area in Swedish Västerbotten, the author argues that basic principles of environmental decision-making – such as the precautionary principle, an integrated and overall assessment of the impact from planned developments of natural resources and access to justice for the public concerned – seem to be applied less strictly when the authorities and the government strike the balance between mineral extraction and reindeer herding. As a consequence of this approach, the implementation of the international obligations concerning the protection of the Sami people and its culture is weakened. Furthermore, the fragmented decision-making procedure in subsequent phases according to different pieces of legislation and by different authorities creates a system that allows for "tyranny of the small steps". It is also argued that the permit procedure for mineral extraction is counterproductive and not in the interests of any of the parties involved, as legal certainty is lacking. The author concludes that reform is needed to the laws concerning permits for investigation and extraction of minerals in Sweden, and their implementation.

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## Inledning

Denna artikel var tänkt som ett bidrag till festutgåvan av Nordisk Miljörättslig Tidskrift till Bertil Bengtsson (NMT 2016:1), men som synes blev jag inte klar i tid. Artikeln handlar om två frågor som legat Bertil varmt om hjärtat genom åren, nämligen miljöfrågor och samernas rättigheter som ursprungsbefolkning. Den gemensamma länken är som så ofta annars miljöprocessuell. Den här gången handlar det om den rättspraxis som har utvecklats kring s.k. tillåtlighetsförklaringar har någon betydelse vid prövningar av verksamheter som påverkar samernas intressen. Närmare bestämt diskuterar jag vilken inverkan de krav som formulerades av Högsta domstolen och Europadomstolen i målen om Bunge och Botnia – vilka jag kallar för kraven på *helhetsbedömning* och *tillgång till effektiv rättslig prövning* – har på prövningen av mineralutvinning i renskötselmarker. Jag utgår från det kontroversiella målet om gruvan i Rönnbäcken när jag påstår att samernas frågor behandlas mera styvmoderligt än miljöintressena i tillståndsprocessen. Slutsatsen är att minerallagstiftningen bör reformeras för att möta Sveriges internationella förpliktelser.

## Tillåtlighetsförklaring och andra preliminärbeslut

En "tillåtlighetsförklaring" inom miljörätten är ett preliminärbeslut som avgör om en planerad verksamhet kan accepteras med avseende på lokalisering och grundläggande villkor. Beslutet

kan tas av regeringen eller av en domstol (17 kap. resp. 22 kap. 26 § miljöbalken (1998:808, MB), men den rättsliga konstruktionen är i princip densamma. Traditionellt har beslutet ansetts vara bindande i den efterföljande tillståndsprövningen.[1] Motsvarande effekt kan också uppnås genom deldomar och prövotidsförordnanden (22 kap. 27 § MB) och andra slags uppdelningar av bedömningen av större verksamheter. Tillåtlighetsförklaringarna och andra slags preliminärbedömningar har varit föremål för en intensiv diskussion genom åren, på såväl EU-nivå som nationell nivå. Bakgrunden är att dessa konstruktioner medför en uppdelning av miljöprövningen som i många situationer kommer i konflikt med grundläggande krav inom miljörätten. Den svenska diskussionen har under senare år mycket kretsat kring det s.k. *Bunge-målet* om tillstånd att bryta kalk i närheten av Natura 2000-områden på norra Gotland. Den kontroversiella frågan gällde här om den uppdelning av miljöprövningen som tillåtlighetsförklaringen medförde var förenligt med kraven på en samlad bedömning av påverkan på Natura 2000-områdena, vilket Högsta domstolen besvarade nekande för tre år sedan (NJA 2013 s. 613). Man bör emellertid inte glömma bort att tillåtlighetsförklaringen som rättslig konstruktion var kontroversiell redan i samband med utbyggnaden av *Botniabanan* i Umeälvens deltaområde i början av 2000-talet. Då var det dock inte uppdelningen av Natura 2000-reglerna som stod i fokus, utan den berörda allmänhetens möjligheter till domstolsprövning av de administrativa besluten. Den frågan bedömdes i två rättsprövningar i HFD, där de klagande först avvisades, sedan inte tilläts ifrågasätta lokaliseringen av järnvägen. De stämde därför Sverige inför Europadomstolen för brott mot rätten till en rättvis rättegång och avgörandet i *Karin Andersson and others v. Sweden* kom förra sommaren. Domen är en svidande vidräkning med den svenska uppdelningen av tillgången till rättslig prövning, ett faktum som förtjänar att uppmärksammas.

Vi kan alltså konstatera att idén med tillåtlighetsförklaringar inom loppet av ett drygt år fick två grundskott genom avgörandena i *Botnia* och *Bunge.* Jag menar att traditionerna på rättsområdet är en viktig del i förklaringen till att mötet mellan bindande preliminärbedömningar och EU-rätten blivit så dramatisk i Sverige. För många har det varit svårt att acceptera att medlemsstaternas processuella autonomi måste utövas inom ramen för de krav som ställs enligt unionsrätten. Kontroverserna kring *Botnia* och *Bunge* ansluter emellertid till en mera allmän diskussion om hur miljökraven i den gemensamma lagstiftningen kan få genomslag i de nationella systemen. Här finns mycket att lära, exempelvis från den omfattande rättspraxis som bildats av EU-domstolen kring s.k. ”salami-taktik” och liknande, då verksamhetsutövare och myndigheter har försökt undgå MKB och andra slags utredningskrav genom att dela upp projekt eller prövningen av dessa i mindre delar.[2] Även Mark- och miljööverdomstolen har många gånger slagit ned på utredningar i tillståndsärenden som varit för snäva eller på annat sätt inte sett till den samlade effekten av den prövade verksamheten.[3] Till viss del berör diskussionen om uppdelning också skillnaden mellan den fulla överprövning som sker i en reformatorisk process i mark- och miljödomstolarna och HFDs rättsprövning enligt lagen 2006:304 (RPL). Här är det fråga om en begränsad prövning av beslutets formella och materiella rättsenlighet. En begäran om rätts-

[1] Se Darpö: *EU-rätten och den processuella autonomin på miljöområdet.* Nordisk Miljörättslig Tidskrift 2012:2, s. 3. Samtliga mina artiklar som jag hänvisar till i texten återfinns på www.jandarpo.se/Artiklar & Rapporter.

[2] Välkända exempel på detta från EU-domstolen är C-72/95 *Kraaijeveld* (1996), C-392/96 *KOM ./. Irland* (1999) och C-2/07 *Abraham* (2008).

[3] Här kan nämnas MÖD 2007:50 *Citytunneln*, MÖD 2011:51 *Boliden*.

prövning skjuter inte heller upp beslutet – vilket annars är den vanliga ordningen vid överklaganden av miljöbeslut – om inte HFD beslutar om inhibition. Slutligen är processen kassatorisk, dvs. domstolen kan som huvudregel bara acceptera eller upphäva beslutet.

Utgångspunkten för denna artikel är att de slutsatser som kan dras av *Botnia* och *Bunge* – som jag alltså kallar kraven på *helhetsbedömning* och att de berörda har *tillgång till en effektiv rättslig prövning* – är allmängiltiga inom miljöprocessen. Min avsikt är därför att diskutera vilken betydelse som dessa krav får på ett annat område inom miljörätten, nämligen vid tillståndsprövningen av mineralutvinning. Då artikeln är tillägnad Bertil Bengtsson känns det också lämpligt att fokusera på ett av hans många andra intresseområden vid sidan av miljörätten, nämligen samernas renskötselrätt. Jag utgår från ett av de mest uppmärksammade målen de senaste åren, nämligen HFDs prövning av bearbetningskoncessionen för gruvan i *Rönnbäcken* i Storuman. Därefter övergår jag till en allmän diskussion om miljöprövningen av gruvor. Jag inleder emellertid med en kort redogörelse för domarna om *Botnia* och *Bunge* och de slutsatser som kan dras därav.

## Tillbaka till Botnia

Järnvägsutredningen om Botnia-banans dragning i Umeälvens delta presenterades 1998. Därefter gick miljöprocessen i två ”huvudspår”, där det första gällde prövningen av järnvägsplanen. Den blev föremål för två regeringsbeslut och två följande rättsprövningar i HFD (dåvarande Regeringsrätten). Det andra spåret var prövningen enligt MB som slutligen avgjordes i sak av Miljööverdomstolen (MÖD) 2007.[4] Ärendet om järnvägsplanen började i Banverket, som hänsköt det till regeringen för en tillåtlighetsprövning enligt 17 kap. MB. Då järnvägen föreslogs gå igenom två Natura 2000-områden med prioriterade naturtyper rådgjorde regeringen med EU-kommissionen under våren 2004. Regeringen argumenterade för att järnvägen var motiverad av tungt vägande allmänintresse och att det saknades alternativ till den valda dragningen, vilket godtogs av kommissionen. Därefter beslutade regeringen att den föreslagna järnvägsdragningen var tillåtlig och meddelade ett antal villkor för verksamheten.

Ett antal närboende och Sveriges Ornitologiska Förening (SOF) begärde rättsprövning av regeringens beslut hos HFD, men domstolen avvisade samtliga (RÅ 2004 ref. 108). Att föreningen avvisades var inte särskilt förvånande på den tiden, då det inte var fråga om myndighetsutövning mot enskild.[5] HFDs majoritet avvisade emellertid även de enskilda med hänvisning till att planläggningen av järnvägen inte hade kommit så långt att det gick att uttala sig om vilka som skulle beröras eller vilken hänsyn som skulle tas till deras intressen. Då de enskilda ansågs ha möjlighet till domstolsprövning i ett senare skede – genom rättsprövning av regeringens beslut om fastställande av järnvägsplanen – ville domstolens majoritet inte ta upp deras talan till prövning. En ledamot – justitierådet Susanne Billum – var skiljaktig och pekade bl.a. på att regeringens beslut i tillåtlighetsprövningen enligt 17 kap. MB var bindande för den efterkommande järnvägsplaneringen, varför det är särskilt viktigt för den enskilde att kunna påverka i detta tidiga skede.

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[4] MÖD 2006:44 och MÖD 2007-12-06 i mål nr M 5214-04, M 4616-04, M 4494-04, M 3094-03, M 3789-07. För en utförligare bakgrundsbeskrivning, se Darpö: *Botnia-banan; slutpunkten som blev frågetecken.* Nättidningen JP Miljönet 2008-12-22.

[5] Detta framgick av lagtexten i 1 § 2 st. då gällande rättsprövningslagen (1988:205) och av stabil praxis från Regeringsrätten (bl.a. RÅ 1995 ref. 55 och RÅ 1989 not 447).

Efter det att HFD avvisade samtliga som sökte rättsprövning av regeringens tillåtlighetbeslut fortsatte Banverket arbetet med järnvägsplanen. Den beslutades i juni 2005 och fastställdes efter överklagande av regeringen två år senare.[6] Ansökan om rättsprövningen gjordes av 25 närboende, SOF och Svenska Naturskyddsföreningen (SNF), vilka yrkade att regeringens beslut skulle upphävas. Man menade att hela lokaliseringsfrågan måste prövas för att de enskilda skulle få sina rättigheter bedömda i domstol, något som följer av både Europakonventionen om de mänskliga rättigheterna (EKMR) och Århuskonventionen.[7] I sak argumenterade sökandena för att regeringsbeslutet stred mot reglerna i art- och habitatdirektivet (92/43), eftersom en grundläggande förutsättning för att göra undantag från Natura 2000-skyddet är att det saknas alternativ till projektet samt att det kan motiveras av tungt vägande allmänintressen.

HFDs dom i det andra rättsprövningsmålet var inte heller enhällig och majoriteten (fyra ledamöter) resp. minoriteten (en ledamot, återigen Susanne Billum) utvecklade helt olika synsätt av prövningens omfång och förhållandet till EU-rätten (RÅ 2008 ref. 89). Bakgrunden var alltså att någon domstolsprövning inte skett av den grundläggande frågan om järnvägens dragning igenom Natura 2000-områdena var tillåtlig enligt EU-rätten.

Majoriteten ansåg att lokaliseringen redan var avgjord genom regeringens tillåtlighetsbeslut. Man menade att det faktum att samtliga som begärt rättsprövning av det beslutet avvisats inte kunde medföra att prövningen av det nya regeringsbeslutet skulle omfatta även dessa frågor. Det hade nämligen inte ålegat regeringen att vidta någon omprövning av sitt tidigare beslut när man fastställde järnvägsplanen. Majoritetens slutsats var alltså att rättsprövningen av järnvägsplanen inte kunde omfatta lokaliseringsfrågan enbart därför att en domstolsprövning av den frågan tidigare inte varit möjlig. Därmed kunde rättsprövningen inte omfatta Natura 2000-frågan och regeringsbeslutet fasställdes.

Den skiljaktiga ledamoten Billum menade inledningsvis att målet borde ha avgjorts i plenum, då majoritetens ställningstagande stred mot vad som förutsattes när samtliga sökanden avvisades i det första rättsprövningsmålet, nämligen att en allomfattande prövning skulle ske i rättsprövningen av järnvägsplanen. Dessutom delade hon inte majoritetens åsikt om prövningens omfång. En grundprincip i förvaltningsprocessen är nämligen att den som överklagar ett beslut kan åberopa alla slags intressen – inbegripet allmänna – som grund för sin talan. I målet hade flera av dem som överklagade Banverkets beslut påpekat att hinder förelåg enligt Natura 2000-reglerna, vilket regeringen borde ha prövat. Enligt den skiljaktiga ledamoten hade de berörda därför rätt att i denna situation få frågan om lokaliseringen bedömd i domstol. Därefter gick hon över till att pröva regeringens beslut i sak, vilket alltså skedde genom en fullständig bedömning av de omständigheter som klagandena anfört. Hennes slutsats blev att regeringens beslut skulle undanröjas med hänvisning till att projekt som kan medföra skada på ett Natura 2000-område bara får genomföras om det inte finns några alternativ. De skäl som Banverket och regeringen anfört till stöd för den föreslagna dragningen hade dock främst varit ekonomiska, vilket inte dög för att visa att det saknades andra lokaliseringar eller lösningar.

[6] Regeringens (Näringsdepartementet) beslut den 28 juni 2007, dnr N2005/6588/TR, i fråga om Banverkets beslut att fastställa järnvägsplan för Botniabanan, sträckan Stöcke-Centrala Umeå, Umeå kommun.

[7] FN/ECE:s konvention om tillgång till information, allmänhetens deltagande i beslutsprocesser och tillgång till rättslig prövning i miljöfrågor, SÖ 2005:28. Sverige tillträdde konventionen 2005.

## Karin Andersson och hennes grannar i Europadomstolen

Efter HFDs andra rättsprövning stämde de enskilda klagande Sverige inför Europadomstolen.[8] De hävdade att regeringens beslut rörde deras civila rättigheter och att de hade förvägrats en rättvis rättegång enligt artikel 6 EKMR. I sitt svaromål begärde regeringen inledningsvis att några av de klagande, nämligen de som bodde utanför järnvägskorridoren, borde avvisas. Detta godtogs emellertid inte av Europadomstolen som menade att samtliga närboende kunde beröras av olägenheter från den planerade verksamheten i form av buller, vibrationer och värdeminskning på fastigheterna och att verksamheten därmed gällde deras civila rättigheter (domen, pp. 46–47). Domstolen accepterade inte heller regeringens invändning om att de klagande inte hade uttömt de nationella rättsmedlen. Här argumenterade regeringen dels att samtliga inte hade klagat på alla beslut som föregick den andra rättsprövningen, dels att de ändå kan få skadestånd för brott mot EKMR enligt svensk rätt. Europadomstolen konstaterade bara att HFDs avvisning 2004 var generellt tillämplig och hade träffade alla som hade klagat. Till detta kom att miljödomstolarna därefter hade ansett sig bundna av regeringens tillåtlighetsförklaring, vilket ursäktade vissa av de närboendes passivitet. Det avgörande var enligt Europadomstolen istället vilka som hade begärt rättsprövning av det sista regeringsbeslutet, vilket samtliga klagande hade gjort (58–60).

Därefter övergick Europadomstolen till klagomålet i sak. I den delen är domen på enbart två sidor, sex punkter totalt (64–70), varav de två sista utgör domstolens egen bedömning. Karin Andersson och hennes medparter hävdade att de hade blivit förvägrade en fullständig prövning av järnvägsplanen genom att de först blev avvisade (2004) och därefter inte kunde få alla frågor bedömda (2008). Regeringen ansåg däremot att en tillåtlighetsbedömning enligt 17 kap. MB mest handlar om politiska frågor och därför lämpligen ska ligga i regeringen, där det administrativa skönsutrymmet är – och ska vara – större. Det fanns heller ingenting i målet som tydde på att beslutet var godtyckligt eller i strid emot nationella eller internationella rättsregler. De klagande hade haft flera tillfällen att delta i processen, bl.a. genom MKB-förfarandet. Alla frågor som berörde de klagandes egna intressen – jämte de allmänna miljöintressena och järnvägens lokalisering – hade dessutom prövats vid antagandet av järnvägsplanen, liksom vid rättsprövningarna i HFD. De närboende hade även haft möjligheten att få sina klagomål om olägenheter och värdeförlust bedömde av myndigheter och domstolar, varvid de hade fått kompensation och skyddsåtgärder hade vidtagits.

Europadomstolen var inte imponerad av regeringens argumentation. Man erkände visserligen att byggandet av järnvägar är en komplex process och att konventionsparterna har frihet att välja beslutsformerna för sådana projekt. Artikel 6 EKMR medför emellertid ett krav på rättvis rättegång så snart de berörda har skälig anledning att anta att deras civila rättigheter har kränkts (68)). I det här fallet var det enligt Europadomstolen tveklöst så att åtminstone deras egendomsrätt hade berörts på ett sätt som de ville få bedömt av en domstol. Då regeringens beslut 2003 i tillåtlighetsfrågan hade ”bindande effekt” på den efterföljande bedömningen av järnvägsplanen skulle rättsprövningen 2004 av det beslutet varit det naturliga tillfället för att göra denna bedömning. Trots detta avvisades de klagande med hänvisning till att senare kunde begära rättsprövning av järnvägsplanen, vilket inte hindrade HFD från att då begränsa sin bedömning till de

[8] ECtHR (5th Section), judgement 25 September 2014; Case of Karin Andersson and others v. Sweden, Application No. 29878/09.

frågor som inte hade prövats i tillåtlighetsbeslutet (69). Europadomstolen konstaterar att detta utgör ett brott mot artikel 6 EKMR med följande korta motivering (min kursiv):

> 70. It is true that certain details of the railway project could be determined in the subsequent proceedings and that several applicants have received some form of compensation for the effects of the railway construction. *The fact remains, however, that the applicants were not able, at any time of the domestic proceedings, to obtain a full judicial review of the authorities' decisions, including the question whether the location of the railway infringed their rights as property owners. Thus, notwithstanding that the applicants were accepted as parties before the Supreme Administrative Court in 2008, they did not have access to a court for the determination of their civil rights in the case.*

## Bunge och tillåtlighetsbedömningarnas "bindande" effekt

Genom Europadomstolens dom i *Karin Andersson* bekräftades alltså den gamla kritiken mot tillåtlighetsförklaringarna när det gällde den berörda allmänhetens möjligheter att komma till tals och rättsligt ifrågasätta besluten. Kritiken mot tillåtlighetsförklaringen i Botnia avsåg emellertid också frågan om prövningens omfång, närmare bestämt om de lagstadgade miljökraven kan få genomslag i ett system som bygger på en uppdelning av processen. Även i den delen intog domstolarna en sorgfri inställning till EU-rätten då man fann sig bundna av regeringens tillåtlighetsförklaring, ungefär med motiveringen att så var förutsatt i det svenska miljöprövningssystemet. Den inställningen var rådande[9] fram till HDs avgörande i det omtalade Bunge-målet på sommaren 2013.

Bakgrunden var att företaget Nordkalk 2005 och 2006 ansökte om tillstånd till bergtäkt i Bunge på Gotland. Ansökan omfattade flera tillstånd enligt MB, däribland Natura 2000-reglerna. Miljödomstolen avslog ansökan med hänvisning till risken för skada på de skyddsvärda områdena. Bolaget överklagade till MÖD som ansåg att de föreskrivna villkoren *borde leda till* att skadliga effekter inte uppstod på de skyddsvärda intressena. Man gjorde därför en "tillåtlighetsförklaring" enligt 22 kap. 26 § MB och återförvisade målet till miljödomstolen för bestämning av tillstånd och villkor. Där ogillades emellertid ansökan återigen med hänvisning till att det enligt EU-rätten *ska vara klarlagt* att verksamheten inte kan påverka de skyddsvärda intressena i Natura 2000-områdena. Nordkalk överklagade till MÖD, vars avgörande innebar att företaget fick de tillstånd man sökt. MÖD menade att frågan om företagets tillåtlighet redan var avgjord genom tillåtlighetsförklaringen och att prövningsordningen förutsätter att underinstanserna lojalt följer processuella anvisningar från överrätten vid återförvisning. Sedan upprepade man att de planerade skyddsåtgärderna borde leda till att effekterna på arterna och naturtyperna i områdena hölls på en godtagbar nivå.

Tillståndet överklagades till HD som i allt väsentligt bekräftade den kritik som under mer än tio års tid hade riktats mot uppdelning av tillståndsprocessen genom användningen av tillåtlighetsförklaringar i Natura 2000-ärenden (NJA 2013 s 613).[10] HD pekar på att tillståndsprövningen enligt Natura 2000-reglerna utgår från att det någonstans i processen *görs en sam-*

[9] Se t.ex. miljöprövningen av vindparken i Sjisjka, Gällivare (MÖD 2009:38).

[10] Se Darpö, J: *Natura 2000 i Sverige I–II* (Juridisk tidskrift 2007/08 s. 3 resp. s. 295), *EU-rätten och den processuella autonomin på miljöområdet* (Nordisk Miljörättslig Tidskrift 2012:2, s. 3) och *Bunge-täkten i Högsta domstolen* (Miljöaktuellt 2013-06-20).

*lad bedömning av verksamhetens påverkan* på de skyddsvärda intressena. Bedömningen ska vara fullständig, exakt och slutlig så att det är möjligt att skingra varje vetenskapligt tvivel i fråga om dessa effekter. Tillståndsmyndigheten ska med andra ord kunna väga in verksamhetens alla aspekter och samlat pröva återverkningarna på det skyddade områdena. Det är något som svårligen låter sig göras redan vid tillåtlighetsprövningen. Då det heller inte var tydligt att MÖD hade gjort en sådan helhetsbedömning i den överklagade domen, undanröjdes tillståndet och målet återförvisades till miljödomstolen för en fullständig prövning.[11]

## Rättsutvecklingen efter Botnia och Bunge

*Karin Andersson* var alltså ett tydligt underkännande av HFDs resonemang i Botnia när det gällde den berörda allmänhetens möjligheter att försvara sina intressen. Vid en läsning idag av HFDs andra rättsprövningsavgörande från 2008 är det svårt att förstå hur domstolen resonerade, särskilt som en av ledamöterna anmälde avvikande åsikt i en grundläggande fråga. Alldeles oavsett hur majoriteten tänkte så är domen en tydlig illustration av hur formalistisk juridik kan fungera – ”juristerier” som danskarna säger – på så vis att man tillämpar alla regler så strikt så att slutsatserna blir fel. Därefter har rättsläget emellertid förändrats genom tillkomsten av 2006 års RPL. För det första bestäms numera kretsen av enskilda som kan begära rättsprövning genom skrivningen ”beslut av regeringen som innefattar en prövning av den enskildes civila rättigheter eller skyldigheter” enligt EKMR (1 § RPL). Under den skrivningen har HFD utvecklat ett nytt och för de enskilda mera generöst synsätt. I målet om *Förbifart Stockholm* uttalade man att en domstolsprövning av lokaliseringsfrågan bara kan ske genom rättsprövning av regeringens tillåtlighetsbeslut och att processen därför ska anses innefatta en prövning av klagandes civila rättigheter eller skyldigheter.[12] På så vis kan alltså de enskilda klagande ta tillvara på sina intressen genom att begära rättsprövning av regeringens beslut i planeringsfasen av ett projekt. Dessutom medförde 2006 års RPL att miljöorganisationerna fick möjlighet att begära rättsprövning av ”sådana tillståndsbeslut av regeringen som omfattas av artikel 9.2” i Århuskonventionen (2 § RPL). Här är det fråga om listade verksamheter som kräver MKB eller olistade verksamheter som kan medföra ”betydande miljöpåverkan”.[13] Järnvägsplaner är exempel på sådana tillstånd. Det Moment 22 som Botnia innebar för de motstående intressena bör därför nu vara åtgärdat, åtminstone i formellt avseende.

När det gäller den andra invändningen mot bindande preliminärbedömningar – dvs. kravet på helhetsbedömning – är rättsläget däremot mera oklart. HDs resonemang i domen om *Bunge* var allmängiltigt och diskussionen därefter har därför omfattat alla slags tillåtlighetsförklaringar och preliminärbedömningar på ett allmänt plan. Eftersom HD har slagit fast att sådana besluts ”bindande effekt” kan strida emot EU-rätten, är alla frågor uppe till prövning vid ett överklagande av det efterföljande tillståndsbeslutet för en verksamhet, inbegripet lokaliseringen och de grundläggande villkoren om skyddsåtgärder. Det här har inte bara bäring på Natura 2000, utan även andra situationer där det finns ett krav på helhetsbedömning av en verksamhets påverkan på miljön och andra motstående

[11] För en utförligare redogörelse för alla turer i Bungemålet, se Darpö: *Bunge-täkten och EU-rätten.* Nättidningen JP Miljönet 2012-10-15. Idag ligger målet återigen i MÖD, nu vilandeförklarat i avvaktan på Högsta förvaltningsdomstolen (HFD) rättsprövning av regeringens Natura 2000-förklaring av täktområdet från 2015.

[12] HFD 2011 not. 26, se även RÅ 2008 not. 75.

[13] Se Darpö, J: *Rätten att klaga på miljöbeslut i EU-rättslig belysning. Del 2: Klagorätten utanför miljöbalken.* Europarättslig Tidskrift 2013 s. 481.

intressen. Det är emellertid för tidigt att uttala sig om vilket genomslag som HDs avgörande fått i miljöprövningen. Det finns enstaka exempel från miljödomstolarna på hur ”tillåtlighetsförklaringar” använts på ett sätt som verkar strida mot kravet, men också avgöranden där sådana har underkänts just därför att de förhindrat en fullständig bedömning av en verksamhets miljöeffekter.[14] Utöver någon enstaka studentuppsats har användningen av tillåtlighetsförklaringar efter *Bunge* emellertid inte undersökts systematiskt och man kan därför inte dra några slutsatser kring deras fortsatta användning i miljöprocessen. En rimlig utgångspunkt är emellertid att såväl regeringen som miljödomstolarna är försiktiga med att använda dessa preliminärbeslut i situationer där kravet på helhetsbedömning bygger på EU-rätten.

## Den uppdelade prövningen av mineralutvinning i Sverige

Som redan nämnts, menar jag att kraven på helhetsbedömning och allmänhetens tillgång till rättslig prövning är allmängiltiga inom miljöprocessen. Det kan därför vara intressant att lyfta blicken något till andra situationer som bygger på en uppdelad prövning av verksamheter som har konsekvenser i miljön. Miljörätten innehåller som sagt många slags preliminärbedömningar som i större eller mindre grad inverkar på efterföljande beslut om tillstånd till verksamheten. Flera av dessa har också gamla anor på rättsområdet. Så går ju exempelvis regeringens möjligheter att tillåtlighetsförklara större verksamheter tillbaka till den fysiska riksplaneringen 1972 och införandet av 136a § byggnadslagen (1947:385), vilket Bertil Bengtsson skrev om redan i andra upplagan av boken Miljörätt.[15] Skälet för uppdelningen ligger givetvis i föremålet för miljöprövningen, dvs. att det ofta rör sig om stora och investeringstunga verksamheter med långa planeringshorisonter. Verksamhetsutövaren har i dessa situationer intresse av att så tidigt som möjligt får klarhet i om exploateringen får komma till stånd. Även processekonomiska skäl anges ofta till stöd för dessa rättsliga konstruktioner.

En typisk sådan uppdelning av prövningen av verksamheter ges i gruvlagstiftningen. Här meddelas de inledande tillstånden av Bergmästaren och miljöprövningen görs av mark- och miljödomstolarna enligt följande. Eftersökning – malmletning – sker på allemansrättslig grund och kräver inte något myndighetstillstånd eller tillåtelse av ägare eller brukare av det intressanta området. När man kommer så långt som till närmare undersökningar genom fysiska ingrepp i marken krävs en undersökningskoncession av Bergmästaren. Enligt 2 kap. 2 § minerallagen (1991:45, MineralL) ska en sådan ges så snart som det finns ”anledning att anta” att undersökningen kan leda till fynd av mineraler i området. Vid handläggningen av dessa ärenden hos myndigheten kommuniceras inga andra intressenter än dem som har rättigheter till området. Andra som kan beröras av den planerade gruvdriften får alltså ingen information om vad som händer eller del i beslutsprocessen. En undersökningskoncession ger ensamrätt till undersökning och företräde till bearbetning. Det ges sällan villkor för undersökningen, men den omfattas av en allmän försiktighetsregel i 2:3 4 st. MineralL. Dessutom ska undersökningen utföras i enlighet med en av Bergmästaren fastställd arbetsplan. Undersökning brukar delas upp i momenten

[14] Se Lönnroth, OC: Regeringens tillåtlighetsprövning av miljöfarliga verksamheter – en granskning av regeringens tillåtlighetsbeslut och dess rättsverkan. Uppsats vid Göteborgs universitet/Handelshögskolan, ht 2015.

[15] Bengtsson, B: *Miljörätt.* Iustus förlag, andra upplagan 1972, s. 47f. Bestämmelsen i byggnadslagen överfördes 1987 till 4 kap. naturresurslagen (1987:12), se Westerlund, S: Miljöskyddslagen – en analytisk kommentar. Åmyra förlag 1990, s. 82f.

prospektering och provbrytning. För det senare krävs tillstånd enligt 9 kap. MB.

För brytning av mineralerna krävs därefter bearbetningskoncession. Enligt 4:2 MineralL ska Bergmästaren meddela bearbetningskoncession om en mineralfyndighet påträffats och sannolikt kan tillgodogöras samt att ”fyndighetens belägenhet och art inte gör det olämpligt att sökanden” får det begärda tillståndet. Prövningen hos Bergmästaren handlar mest om mineralbevisning och ekonomisk lönsamhet. I ärendet ska emellertid också MKB-reglerna i 6 kap. MB tillämpas, liksom hushållningsreglerna i 3 och 4 kap. MB. Tillståndet gäller alltså att utvinna mineral på en viss plats, däremot sker själva miljöprövningen enligt MB i efterhand. Då finns dock en viktig begränsning. Av 4:2 4 st. MineralL framgår att bearbetningskoncessionen är bindande när det gäller lokaliseringen av verksamheten. Den avvägning som har gjorts av Bergmästaren mellan olika intressen får alltså inte omprövas i den efterföljande miljöprövningen, endast villkor om försiktighetsmått kan meddelas.[16]

Minerallagstiftningen är expropriativ på så vis att exploatören får tillgång till marken genom tillstånden och den efterföljande markanvisningen. Det senare sker genom en markanvisningsförrättning, som också sköts av Bergmästaren. Ersättning för skada och intrång ska betalas till markägare och dem med särskild rätt till fastigheten. Numera utgår också en viss mineralersättning till markägaren. Då mineralutvinning oftast medför en väsentlig miljöpåverkan krävs tillstånd regelmässigt enligt 9 och 11 kap. MB. Om arbetet kan påverka ett Natura 2000-område, kan också tillstånd enligt 7:27–7:29 MB behövas. Sådant tillstånd kan krävas redan vid vägdragningar och provborrningar som utförs i undersökningsskedet. Det finns emellertid inte något regelrätt förbud mot att meddela undersöknings- eller bearbetningskoncession i dessa områden, endast nationalparker är undantagna (3:6 MineralL). Därtill krävs ofta detaljplan enligt plan- och bygglagen (2010:900, PBL) för anläggningsområdet. Regleringen är även processuellt komplicerad; Bergmästarens undersökningskoncession överklagas till förvaltningsdomstolarna, medan bearbetningskoncessionen överklagas till regeringen, vars beslut rättsprövas av HFD. Arbetsplan och beslut i markanvisningsförrättning överklagas däremot i mark- och miljödomstolslinjen, liksom beslut enligt MB och PBL.

Den här uppdelningen har länge kritiserats för att försvåra en helhetsbedömning av miljöeffekterna vid mineralutvinning. Att den också är problematisk i förhållande till andra motstående intressen illustrerades i det uppmärksammade målet om mineralutvinningen i *Rönnbäcken*.

## Rönnbäcksgruvan

Målet om Rönnbäcksgruvan i Västerbotten började 2010 då IGE Nordic AB fick bearbetningskoncession för två delområden. Vapstens sameby överklagade till regeringen som emellertid fastställde tillstånden några månader senare.[17] Regeringen bedömde att det inte förelåg något hinder mot koncessionen enligt 3 och 4 kap. MB. Samebyn begärde rättsprövning hos HFD, som i maj 2012 undanröjde regeringens beslut.[18] Domstolen menade att det förelåg en konflikt i området mellan två oförenliga riksintressen – mineralutvinngen och rennäringen – och att regeringen inte hade tydligt redovisat hur avvägningen hade skett för att bäst främja målet för hushållningen med marken enligt 3:10 MB. Då det dessutom var fråga om en bestämmelse som reglerade särskilt prioriterade intressen,

[16] Michanek & Zetterberg: *Den svenska miljörätten* (Iustus, 3:e uppl. 2012 med supplement 2015), sid. 488ff.

[17] Regeringen/Näringsdepartementet beslut 2010-10-21; dnr N2010/5329/FIN.

[18] HFD 2012 not 27.

ansågs bristen vara så pass allvarlig att beslutet upphävdes.

I oktober 2012 meddelade Bergmästaren bearbetningskoncession för ett tredje område i Rönnbäcken, nu med Nickel Mountain som sökande.[19] Även detta beslut överklagades av Vapstens sameby och ett antal enskilda. Regeringen behandlade de tre ärendena samtidigt och fastställde bearbetningskoncessionerna i augusti 2013.[20] I beslutet pekade man på att nickelfyndigheten vid Rönnbäcken är den i särklass största som kartlagts i Sverige och att en utvinning skulle ge betydande samhällsekonomiska vinster. Även om en fortsatt rennäring i området skulle ha mindre negativ påverkan på områdets ekologiska värden, bedömdes gruvbrytningen kunna ge större fördelar och bättre social välfärd, särskilt som den var tänkt att pågå endast i 27 år. Regeringen menade följaktligen att vid en avvägning mellan de två riksintressena skulle företräde ges åt mineralutvinningen. Man erkände visserligen att rennäringen inom de aktuella områdena temporärt måste upphöra och att det troligen också skulle bli negativa effekter i kringliggande riksintressanta renbetesmarker. Regeringen litade emellertid på Länsstyrelsen i Västerbottens bedömning att renskötseln i området kan fortsätta om kraftfulla skadebegränsande åtgärder vidtas. Därefter uttalade man:

> Regeringen vill understryka att även om rennäring inte är möjlig att bedriva inom de aktuella områdena om företräde ges åt gruvverksamhet, behöver detta inte nödvändigtvis medföra att samebyns möjligheter att i övrigt bedriva rennäring omintetgörs, vilket skulle strida mot renskötselrätten och Sveriges folkrättsliga åtaganden.

Därefter menade regeringen att de miljömässiga konsekvenserna av gruvverksamheten fick bedömas i den efterföljande miljöprövningen. De krav som Bergmästarens föreskrivit ansågs lämpliga, däribland kravet på samråd med samebyn för att minimera störningarna för renskötseln.

Även detta beslut gick till HFD för rättsprövning efter ansökan av Vapstens sameby. Klaganden menade att det låg på koncessionssökanden och beslutsmyndigheten att visa att gruvbrytning inte kommer att medföra otillåten påverkan på rennäringen. Samebyn gick också emot regeringens bedömning i sak och hävdade att de negativa effekterna på renskötseln i området skulle bli mycket stora. De tre dagbrotten med vägnät och tillhörande anläggningar skulle fragmentisera markerna och påverkan kunde bli så stor att man kunde tvingas lägga ned renskötseln.

HFDs dom i rättsprövningsmålet kom i oktober 2014, endast en månad efter *Karin Andersson*.[21] Domstolen började med den sedvanliga uppräkningen av det tillämpliga regelverket. Man pekade bl.a. på det skydd som den samiska befolkningen har för att behålla och utveckla ett eget kultur- och samfundsliv enligt regeringsformen, däribland att bedriva renskötsel. HFD poängterade också att i den avvägning som ska göras mellan olika riksintressen enligt 3:10 MB ska Sveriges internationella åtaganden vägas in. Därefter konstaterar domstolen att regeringen hade tagit ställning mellan två oförenliga riksintressen, mineralutvinning och rennäring. Efter att ha hänvisat till den ovan citerade passusen från regeringens beslut, redogjorde domstolen för olika förarbetesuttalanden kring hushållningsreglerna. Man citerade även den slutsats

[19] Man kan inte annat än att imponeras av rikedomen på fantasifulla namn inom prospekterings- och gruvbranschen; Lappland Goldminers, Zink Mountain, Northland Resources, Dragon Mining, Endomines, Veille Montagne, osv.

[20] Regeringen/Näringsdepartementet beslut 2013-08-22; dnr N2012/1637/FIN, N2012/2776/FIN och N2012/5726/FIN.

[21] HFD 2014-10-29 i målen 7425-7427-13 (ej rapporterat).

som har dragits i lagstiftningsarbetet, nämligen att det skydd som rennäringen har i de svenska reglerna är betydligt starkare än det som får anses följa av Sveriges folkrättsliga förpliktelser. Med den utgångspunkten ställde domstolen sedan frågan om regeringens ställningstagande – d.v.s. att gruvdriften inte nödvändigtvis behöver medföra att samebyns möjligheter att bedriva rennäring omintetgörs – var så bristfällig att beslutet bör upphävas. Efter att ha redogjort för Länsstyrelsens, Bergmästarens och samebyns inställning, konstaterade HFD att det står klart att gruvdriften skulle medföra påtagliga negativa effekter för möjligheterna att bedriva renskötsel även på den mark som omger koncessionsområdena, i synnerhet i nära anslutning till dessa. De områden som skulle påverkas utgjordes dels av flyttningsleder, dels värdefull året-runt-mark. Domstolen menade emellertid att det i nuläget inte går att göra någon säker bedömning av de störningar som gruvdriften kommer att medföra för rennäringen. Vidare var det av avgörande betydelse att det ännu inte hade uppställts några konkreta villkor för gruvverksamheten, samtidigt som det hade förutsatts att kraftfullt skadebegränsande åtgärder måste vidtas. Regeringen hade också utgått från att det skulle vara möjligt att i den efterföljande miljöprövningen uppställa så detaljerade villkor att störningarna för renskötseln skulle bli så små som möjligt, en bedömning som domstolen anslöt sig till. HFD erkände att en sådan ordning medför att en viss osäkerhet präglar koncessionsprövningen och den avvägning som görs av de motstående intressena enligt 3:10 MB. Regeringens bedömning byggde emellertid på att samebyn inte ska tvingas upphöra med sin renskötselverksamhet i området och domstolen menade att den slutsatsen inte kunde anses vara så bristfällig att beslutet bör upphävas på den grunden. Vidare påpekar man att 3:10 MB ger ett stort utrymme för olika bedömningar. Då regeringen hållit sig till de ekologiska, kulturella, sociala och samhällsekonomiska hänsyn som ska tas enligt förarbetena och dessutom ansett att tillståndet inte bryter mot Sveriges folkrättsliga förpliktelser, menade HFD att beslutet inte var lagstridigt. Därmed ansåg domstolen att det inte hade framkommit att regeringen hade felbedömt fakta eller överskridit det handlingsutrymme som ges i lagstiftningen eller att det annars hade förekommit något i handläggningen, varför beslutet om bearbetningskoncession skulle stå fast.

### Lars-Anders m.fl. klagar hos FN

Efter regeringens andra beslut om Rönnbäcken sommaren 2013, anmälde 15 av de renägande samerna i Vapsten med Lars-Anders Ågren i spetsen Sverige till den granskningskommitté (CERD-kommittén) som finns under Konventionen om avskaffande av rasdiskriminering.[22] De klagande menade att Sverige hade brutit mot konventionens krav på likabehandling, rätten till egendom och rättvis rättegång enligt artiklarna 5(a), 5 (d)(v) och 6.[23] Man hävdade att renskötseln kommer att avsevärt försvåras eller omöjliggöras i området genom den sammantagna effekten av de tre dagbrotten, anläggningarna och vägnätet. Vapsten pekade också på att bearbetningskoncessionen är avgörande för lokaliseringen av verksamheten och kan inte ifrågasättas vid den efterföljande miljöprövningen. Man menade också att regeringens beslut är rent politiskt och att HFDs rättsprövning är alltför begränsad, då den inte tar hänsyn till deras civila rättigheter i sammanhanget. Beslutet är också diskriminerade eftersom samerna som en del av en ursprungsbefolkning har en stark brukningsrätt till marken, vilken är fastställd genom HDs avgöranden i *Skattefjällsmålet* (NJA 1981 s. 1)

[22] International Convention on the elimination of all forms of racial discrimination (CERD) under UNHCR, SÖ 1971:40.

[23] CERD Application 54/2013 (2013-09-18) Lars-Anders Ågren et al v. Sweden.

och *Nordmalingsmålet* (NJA 2011 s. 119). Enligt Vapsten får samerna regelmässigt stå tillbaka vid en konkret konflikt med exploateringsintressena, även om lagstiftningen ser ut att försvara deras grundlagsskyddade rättigheter.

I sina inledande svar till CERD hävdade den svenska regeringen att klagomålet i första hand skulle avvisas, då det är för tidigt att avgöra om samebyn är ett offer för diskriminering i konventionens mening. En bearbetningskoncession ger nämligen enbart en begränsad rätt och måste följas av en miljöprövning. Dessutom måste en arbetsplan för utvinningen utarbetas i samråd med Vapsten. Det var därför enligt regeringens uppfattning inte möjligt att i detta skede bedöma i vilken utsträckning som renskötseln skulle påverkas av exploateringen. På så vis är en bearbetningskoncession inte ens en indikation på att tillstånd kommer att ges och därför är talan för tidigt väckt.

Kommunikationen i målet fortsatte efter HFDs avgörande i det andra rättsprövningsmålet i oktober 2014. Här framhärdar Vapsten i att rättsprövning inte är ett effektivt rättsmedel, då HFD i praktiken inte prövar inverkan på rennäringen. Regeringen å sin sida tillstår att det inte har gjorts någon fullständig MKB i ärendet, då detta kommer att ske i tillståndsprövningen enligt MB. Om miljödomstolen då finner att verksamheten kan befaras orsaka skador eller olägenheter av väsentlig betydelse för människor eller miljön kommer den med tillämpning av 2:9 MB inte tillåtas.

I maj 2015 kom ett första preliminärbeslut av CERD-kommittén.[24] Här konstaterar kommittén att enligt artikel 26(2) jämställs samernas renskötselrätt till marken med en egendomsrätt. Vidare uttalar man att en bearbetningskoncession har en mängd konsekvenser för denna brukningsrätt, varför samebyn redan i detta skede kan vara ett offer för diskriminering i den mening som avses i konventionens. Slutligen begär CERD mer information av Sverige om hur miljöprövningen går till och vilka hänsyn som tas där, samt förlänger sin begäran om tillfälligt stopp för den vidare exploateringen.[25] Oavsett hur regeringen ser på denna begäran, står projekteringen av Rönnbäcksgruvan stilla just nu beroende på vikande lönsamhet i nickelbranschen. Bearbetningskoncessionen gäller emellertid fram till 2037 och processen i CERD-kommittén fortsätter.

## Bakgrunden till samernas inställning

Jag ska inte uttala mig om de klagande samernas möjligheter till framgång med sin talan i CERD-kommittén. Skälet är givetvis att jag enbart har en ytlig uppfattning i frågor kring ursprungsbefolkning rättigheter och diskriminering och svensk lags förenlighet med internationella standarder på området. Då parternas argumentation i den frågan kan haft betydelse för hur HFD behandlade bearbetningskoncessionen för *Rönnbäcken*, vill jag ändå redogöra lite noggrannare för samernas synsätt.

Vapsten argumenterar för att deras egendomsrätt har kränkts genom bearbetningskoncessionen och att HFDs rättsprövning inte omfattar denna fråga, vilket är diskriminerande. Delar av den här argumentationen är inte enkel att förstå om man inte tar del av vad samebyns ombud – jur.dr. Mattias Åhrén, første amanuensis vid Norges arktiske universitet i Tromsø – har skrivit i frågan. I en nyligen utgiven antologi om ursprungsbefolkningsrätt har han utvecklat sin syn på samernas traditionella rätt att bruka marken

[24] CERD 18/5-15 Application 54/2013 Lars-Anders Ågren m.fl., Interim decision on 86th meeting of the Committee, 1/5-15.

[25] Om jag förstått det hela rätt, framställdes denna begäran första gången redan 2013 men avvisades av regeringen.

för rennäring.[26] Han menar att det är folkrättsligt klart att samerna som ursprungsbefolkning har en egendomsrätt (”property right”) till renbeteslandet. En sådan rätt innebär per definition att rättighetsinnehavaren kan vägra exploatörer tillgång till dessa marker, dvs. de har friheten att medge eller vägra tillstånd (”informed consent”) till sådan markanvändning. Undantaget från denna regel är expropriation, vilken måste kunna motiveras av tungt vägande allmänintressen samt ekonomisk kompensation. Det är enligt Åhrén tveksamt om en gruvexploatering av privata aktörer över huvud taget kan anses vara ett sådant intresse, åtminstone när det är fråga om projekt som inte ger betydande allmänna fördelar i form av sysselsättning och liknande. Även i sådana fall måste emellertid exploateringsintresset vägas mot rennäringens intressen och ingreppet får inte vara oproportionerligt betungande för det senare. Normalt sett – dvs. när det gäller annat slags egendomsrätt – kan expropriation ske mot ersättning motsvarande marknadsvärdet av marken. Den som är missnöjd med hur ersättningen beräknats, kan väcka talan i domstol, en möjlighet som finns även vid exploatering som rör renbeteslandet. Åhrén menar emellertid att ett sådant system inte håller när det gäller intrång på samernas marker, utan hänsyn måste också tas till den särskilda samiska kulturen, inbegripet traditionella näringar och andra kulturellt betingade markanvändningar och spirituella seder.[27] Att därför ersätta samebyn med marknadsvärde för marken är diskriminerande, då en sådan värdering inte tar hänsyn till den särskilda relation som de har till egendomen. Då HFD dessutom inte kan pröva expropriationsfrågan fullt ut – dvs. om det finns tungt vägande allmänintressen för exploateringen och ingreppet inte är oproportionerligt betungande för samernas markanvändning och kultur – berövas de sina möjligheter till rättvis rättegång. Vid en sådan prövning skulle nämligen domstolen vara skyldig att göra en avvägning mellan det allmänna goda som skulle komma av en exploatering och den negativa inverkan den skulle ha för Vapstens sameby.

### Rättsprövning och samernas intressen

Jag tänker som sagt inte gå in i diskussionen om hur samernas traditionella rätt till renbeteslandet ska betecknas, om denna rätt ska medföra en möjlighet att tillåta eller vägra exploatering av marken eller hur den ska värderas. Till skillnad från Åhrén tror jag emellertid inte att de frågorna var avgörande för utfallet av HFDs rättsprövning av regeringens beslut. Jag menar nämligen att en sådan avvägning mellan olika intressen och rättigheter som han efterlyser mycket väl ryms i rättsprövningen av ett beslut om exploatering av renbetesmarkerna. Givetvis ska HFD i en sådan situation inte bara ta hänsyn till de nationella reglerna, utan göra en självständig värdering av Sveriges internationella förpliktelser i förhållande till samerna. Och på den punkten kan domstolen kritiseras för avgörandet om *Rönnbäcken*. HFD säger ju egentligen bara att regeringens bedömning – dvs. att det inte går att göra en säker uppskattning av påverkan, men att det bör gå att vidta skadebegränsande åtgärder i den efterföljande miljöprövningen – visserligen medför osäkerhet, men inte kan sägas vara felaktig. Inte heller tyckte domstolen att regeringens bedömning att samebyn inte kommer att tvingas upphöra med renskötseln var så bristfällig att beslutet skulle upphävas. Då regeringen dessutom hållit sig till den avvägning som krävs enligt lagstiftning och förarbeten och därtill bedömt att

[26] Åhrén, JM: To what extent can indigenous territories be expropriated? Ur Indigenous Rights in Scandinavia (Red. C. Allard & SF Skogvang), Farnham 2016, s. 173.

[27] Min egen översättning av Åhréns skrivning på s. 181: ”…, it appears relevant to consider the impact that resource extraction would have on the community’s culture, including traditional livelihoods and other culturally based land uses and spiritual practices.”.

tillståndet inte bröt mot våra folkrättsliga förpliktelser mot samerna var allt i sin ordning, enligt HFD.

Domstolens resonemang känns bakvänt och medför att det folkrättsliga skyddet av samernas intressen får svagt genomslag i den svenska tillämpningen. Vem är det egentligen som ska visa vad i förhållande till våra internationella förpliktelser? Bakgrunden var ju att Vapsten hävdade – med stöd av ett sakkunnighetsutlåtande med en utförlig utredning[28] – att gruvverksamheten skulle beröra ett kärnområde för rennäringen och att störningarna från gruvdriften troligen skulle bli så stor att renskötseln måste upphöra. Mot detta hänvisade såväl regeringen som Bergmästaren till Länsstyrelsens bedömning att det är möjligt att bedriva fortsatt bärkraftig rennäring i Rönnbäcken under förutsättning av kraftfulla skadebegränsande åtgärder föreskrivs för gruvverksamheten. Vad dessa åtgärder ska bestå av utvecklas emellertid inte i yttrandet, annat än att man hänvisar till en lista med förslag från sökandens sida.[29] Samtidigt uttalade Länsstyrelsen att MKBn inte var tillräckligt detaljerad för att bedöma vilka åtgärder som behöver vidtas samt att flera frågor – bl.a. den om funktionellt samband mellan de olika renskötselmarkerna – måste utredas vidare. De villkor som sedan föreskrevs i Bergmästarens koncessionsbeslut blev intetsägande och innebar bara att bolaget ska samråda med samebyn och verka för att störningarna för renskötseln minimeras.[30] Alla andra frågor som har betydelse för rennäringen i området – däribland placeringen av sandmagasinet – hänsköts till den efterföljande miljöprövningen. Dessa beslut godtogs utan ändring av regeringen. Vid HFDs rättsprövning accepterades sedan regeringens beslut därför att bedömningen inte kunde sägas vara felaktig. Om man vill hårdra så räcker det alltså för de politiska instanserna att uttala att man *tror* att det inte ska uppstå väsentlig påverkan på rennäringen eller att det *bör* gå att föreskriva så kraftigt skadebegränsande åtgärder att den inte tvingas upphöra för att besluten ska anses vara lagliga. Att så tydligt lägga bevisbördan för skada på dem som riskerar att utsättas för den skulle knappast accepteras vid en rättsprövning av ett beslut som inverkade på andra, mera typiska civila rättigheter. Jag menar att institutet rättsprövning istället kan och ska användas för att skydda samernas intressen, alldeles oavsett hur man betecknar dessa. Min uppfattning är att HFD borde ha gjort detta i fallet om *Rönnbäcken* genom att kräva att regeringen tydligare skulle visa att rennäringen kunde fortsätta att bedrivas på ett rationellt sätt i området. Om så är fallet – exempelvis genom att hela koncessionsområdet inte ianspråktas samtidigt, att driften begränsas under känsliga perioder för rennäringen och att sandmagasinet placeras i ett område som inte berör rennäringen – borde det ha framgått redan av koncessionsbesluten.

Därutöver kan man fundera hur domstolens inställning i frågan om påverkan på samernas intressen är förenlig med den försiktighetsprincip som ju tillämpas vid den efterföljande miljöprövningen. Den principen innebär att man vid prövningen av en miljöfarlig verksamhet även ska ta höjd för osäkerheter och risker, dvs. till sådana skador som *kan* uppstå. En annan utgångspunkt i miljöprövningen är att konsekvenserna på de motstående intressena *ska vara klarlagda* innan tillstånd får meddelas, vilket inte minst HFD har betonat i flera miljömål. Det kanske mest kända gällde rättsprövningen av en detaljplan i Kullavik som undanröjdes då MKBn inte innehöll nå-

[28] Vapstens inlaga i ärende 543-762-2012 till Länsstyrelsen i Västerbotten, ink 2012-05-24, yttrande 2011-08-30 av professor (em.) Öje Danell vid SLU/Uppsala.

[29] Länsstyrelsen i Västerbottens yttrande 2012-09-17 Samråd enligt 8 kap 1 § minerallagen om bearbetningskoncession för Rönnbäcken K nr 3, Storumans kommun.

[30] Bergmästarens beslut 2012-10-01 om bearbetningskoncession för Rönnbäcken K nr 3 i Storumans kommun, dnr BS 22-1714-2011.

gon utredning om påverkan på den EU-rättsligt skyddade arten större vattensalamander (*RÅ 2005 ref. 44*). Här uttalade domstolen att det är en förutsättning för ett effektiv genomförande av art- och habitatdirektivet att artens skyddsbehov är klarlagda och kan beaktas i planprocessen.[31] Det är svårt att förstå varför domstolen inte tillämpat motsvarande synsätt när det gäller påverkan på samernas intressen redan vid rättsprövningen av bearbetningskoncessionen.

## Gruvlagstiftningen och miljöprövningen

Även om man kan kritisera HFD för avgörandet om *Rönnbäcken*, illusterar rättsfallet också ett större och mer systematiskt fel i prövningen av mineralutvinning. Det grundläggande problemet ligger nämligen i den uppdelade processen mellan minerallagstiftningen och MB. Mineralutvinning är i och för sig en verksamhet som till sin natur sker i olika faser, men det motiverar knappast en prövning som är som en av de mest splittrade inom miljörätten. Problemen gäller främst förhållandet att koncessionerna enligt minerallagstiftningen har rättsverkningar i miljöprövningen och att besluten tas av olika myndigheter. Regleringen är till för att ge exploatörerna säkerhet i sina planer, men uppdelningen medför stora problem i mötet med miljöprövningen och EU-rätten. I sin kommunikation med CERD hävdar visserligen regeringen att en bearbetningskoncession inte ens är en indikation på att miljötillstånd kommer att ges och att det senare kan vägras antingen med tillämpning av 2:9 MB, eller av 4:8 MB. Till det kan sägas att den förra paragrafen förutsätter att verksamheten befaras ge upphov till skada eller olägenhet av väsentlig betydelse för människor eller miljön. Bestämmelsen har tillämpats endast ett fåtal gånger i miljörättshistorien och mig veterligt aldrig vid en prövning av tillstånd till mineralbrytning. Dessutom är den försedd med undantaget att regeringen kan ge tillåtelse om det finns särskilda skäl, en lågt satt tröskel som knappast skulle hindra en viktigare gruvexploatering. Hänvisningen till 4:8 MB är i och för sig korrekt formellt sett, men en sådan rättstillämpning är miljöprocessuellt ineffektiv. Det kan inte vara i någons intresse att en gruvexploatering efter flera års processande underkänns därför att en helhetsbedömning på verksamhetens påverkan på Natura 2000-intressena inte gjorts tidigare. Detta problem illustrerades tydligt i ett annat rättsprövningsmål som avgjordes i början av året.

Fallet gällde en bearbetningskoncession i *Norra Kärr* i Jönköping.[32] Här var det ett företag som fått koncession att exploatera sällsynta jordmetaller i ett område som låg i närheten av flera Natura 2000-områden. Ansökan och MKBn avsåg emellertid bara brytningsområdet – inte driftsanläggningarna – vilket också blev styrande för utformningen av koncessionen. Tillståndet överklagades, men regeringen fastställde och de klagande – bl.a. Naturskyddsföreningen – begärde rättsprövning hos HFD. Föreningen menade dels att MKBn var bristfällig, dels att koncessionen bröt mot 4:8 MB, som ju stadgar att tillstånd för en verksamhet som kräver tillstånd enligt de s.k. Natura 2000-reglerna (7:27–7:29 MB) får komma till stånd endast om ett sådant lämnats. I den praxis som utvecklats i miljödomstolarna har 4:8 förståtts som att Natura 2000-tillstånd är en inledande förutsättning för andra slags tillstånd enligt MB.[33] Regeringen menade å sin sida i yttrandet till HFD att ansökan mycket väl kan avslås i miljöprövningen med tillämpning av

[31] Rättsfallet RÅ 2006 ref. 88 *Boberg* om en detaljplan i Falkenberg är ett annat exempel.

[32] HFD 2016 ref. 21, rättsprövning av regeringens (Näringsdepartementets) beslut 2014-01-16; N2013/3396/FIN, bearbetningskoncession för Norra Kärr i Jönköping.

[33] MÖD 2003:105 och MÖD 2006:43, se dock HFDs uttalande i HFD 2011 not. 26 *Förbifart Stockholm*, där dock situationen var lite annorlunda.

4:8 MB och kravet på helhetsbedömning enligt *Bunge* om verksamheten kunde befaras medföra skador på de skyddade intressena i Natura 2000-områdena.

I sitt avgörande uttalade HFD att frågan gällde om en den gjorda begränsningen av bearbetningskoncessionen var förenlig med minerallagstiftningen, EU-rätten och avgörandena i *Bunge* och *Förbifart Stockholm*. Man menade att utformningen av 4:2 MineralL utgår från att den bedömning som ska göras enligt 3–4 kap. MB ska vara så tidig som möjlig, vilket också gäller för bedömningen av påverkan av Natura 2000-områdena enligt 4:8 MB. I det här fallet omfattade Bergmästarens och regeringens prövning enbart själva brytningsområdet, vilket alltså innebar att påverkan på de känsliga områdena från de kringliggande driftsanläggningarna inte hade bedömts. Då störningsområdet från verksamheten enligt länsstyrelsen kunde vara så stort som 1 km från brytningspunkten gick det därför inte att utesluta att det kunde uppstå betydande påverkan på Natura 2000-intressena. Därmed ansåg HFD att någon bedömning enligt 3–4 kap. MB av markanvändningen och av påverkan på Natura 2000 inte hade skett, varför koncessionen upphävdes.[34]

Den uppdelade mineralprövningen medför emellertid inte bara problem i förhållande till Natura 2000, något som visades i en doktorsavhandling som försvarades i början av året vid Luleå Tekniska Universitet. Författare var Lars Bäckström och Bertil Bengtsson var biträdande handledare.[35] I avhandlingen – *Svensk gruvrätt. En rättsvetenskaplig studie rörande förutsättningarna för utvinning av mineraler* – visar Bäckström att den uppdelade prövningen ger upphov till osäkerheter, vilket är negativt för samtliga inblandade; exploatörer, samerna och miljöintresset. Han menar att problemen främst gäller beslutsunderlagen och prövningens ändamålsenlighet. Prövningsordningen förutsätter att kraftigt skadebegränsande åtgärder föreskrivs redan i bearbetningskoncessionen, något som inte sker. Koncessionen är dessutom ofta begränsad till själva ”gruvhålet” och någon samordnad bedömning av de kumulerade effekterna av verksamheten görs bara sällan. Sammantaget menar därför Bäckström att den ”tillåtlighetsbedömning” som möjliggörs genom 4 kap. MineralL ofta sker innan alla kort är på bordet, vilket uppenbarligen strider mot miljörättens integrationstanke, inte minst uttryckt i EU-rätten. Han är vidare tveksam till att lagstiftningen idag fyller någon funktion när det gäller att stimulera och förenkla för exploatörerna, då den har en inbyggd osäkerhet om det slutliga resultatet av en prövning. Bäckström menar därför att Bergmästarens beslut borde begränsas till att omfatta exploatörens företrädesrätt till malmfyndigheten och att hela bedömningen av effekterna på de motstående intressena borde ske inom ramen för tillståndsprövningen enligt MB.

Den här kritiken är inte ny, men den har fått förnyad aktualitet genom avhandlingen. Den bekräftas också i en färsk forskningsrapport som Myndigheten för tillväxtpolitiska utvärderingar och analyser har beställt av Luleå Tekniska Universitet och KTH.[36] Författarna har jämfört regle-

[34] Ärendet gick sedan tillbaka till regeringen, som i sin tur återförvisade det – tillsammans med tre andra (Viscaria i Kiruna, Kallak i Jokkmokk och Eva i Arvidsjaur) – till Bergmästaren för förnyad koncessionsprövning, se http://www.regeringen.se/pressmeddelanden/2016/06/regeringsbeslut-om-bearbetningskoncessioner/

I fallet Norra Kärr kompliceras saken av att Förvaltningsrätten i Falun i somras upphävde Bergmästarens beslut att förlänga undersökningskoncessionen för området (dom 2016-08-29 i mål nr 4291-15).

[35] Handledare var Maria Pettersson, biträdande professor i rättsvetenskap vid LTU.

[36] Pettersson, M & Söderholm, K & Söderholm, P: *Miljöprövning och konkurrens i gruvindistrin.* Luleå Tekniska Universitet och Myndigheten för tillväxtpolitiska utvärderingar och analyser, 2016.

ringen och prövningen av mineralutvinning i Sverige med tre andra, stora gruvnationer; Finland, Kanada (Ontario) och Australien (Western Australia). Lagstiftningarna bygger i huvudsak på samma idéer, dvs. försiktighetsprincipen, bästa teknik (BAT), förorenaren betalar (PPP) och integrerad prövning. Det finns givetvis lärdomar att göra för svensk del, t.ex. att utveckla och tydliggöra reglerna för ekonomisk säkerhet och kraven på efterbehandling. En allmän komparativ slutsats är emellertid också att miljöprövningen i Sverige sker förhållandevis sent, vilket medför svårigheter med att förutse vilka villkor som kommer att ställas i det enskilda fallet. Slutsatserna i rapporten pekar alltså i samma riktning som Bäckström och andra kritiker har gjort de senaste åren, nämligen att det är hög tid med en ingripande lagreform på området.

**Avslutande kommentar**

Vid en jämförelse av domarna i rättsprövningsmålen om *Rönnbäcken* och *Norra Kärr* är skillnaden slående. Det är fråga om samma slags prövning, men i för hållande till EU-rättens miljökrav lägger HFD avgörande vikt vid *kravet på helhetsbedömning*. Så är inte fallet när det gäller bedömningen av påverkan på samernas intressen. Här kan man snarast tala om ”de små stegens tyranni” genom att exploateringar och annat som påverkan rennäringen bedöms isolerat och var för sig.[37] *Rönnbäcken* är också ett tydligt exempel på hur samerna måste kunna motbevisa påståendet om att betydande skador inte kommer att uppstå, vilket givetvis är svårt. Man kan fundera på varför det är så stor skillnad i dessa mål. HFD är ju knappast förhindrad att tillämpa försiktighetsprincipen även med avseende på samernas intressen vid en rättsprövning genom att – med hänvisning till grundlagsskyddet och våra folkrättsliga förpliktelser – slå fast att påverkan på renskötseln måste vara klarlagd innan koncession kan meddelas. Slutsatsen är alltså att även om lagstiftningen för prövningen av mineralutvinning måste moderniseras, är det också av avgörande betydelse att HFD tar sin roll som väktare av grundlagsskyddade intressen på allvar när det gäller andra frågor än de klassiska ”rättigheterna”.

[37] Renskötselrätten och dess förhållande till egendomsrätten m.m. är avhandlingsämnet för doktoranden i rättsvetenskap Malin Brännström, Juridiska institutionen vid Umeå universitet. Avhandlingen beräknas vara klar under 2016.

# Regulation of mariculture in Denmark: what of the legal and environmental space?

*Christian Prip*[1]

## Abstract

In line with EU policies, the Danish government sees great potentials in aquaculture and wishes to create better growth opportunities for the industry. How this objective can be met while also reducing the environmental impacts of aquaculture and meeting the legal requirements has been a highly debated topic in Denmark, particularly in relation to marine aquaculture *(mariculture)*. This industry has not managed to apply cleaner technologies at the same pace as land-based aquaculture has, and installations have typically been located in coastal areas often already in ecologically poor condition. Recently, the quasi-judicial Environmental Board of Appeal refused to grant an environmental permit for a new mariculture installation. This article reviews the comprehensive and mostly EU-based legal framework regulating Danish mariculture and its application through the decision of the Environmental Board of Appeal. It also touches on the discourse this situation has created and discusses regulatory approaches for reconciling industrial and environmental concerns. Further, it finds that there are limited possibilities of achieving the overall goal of a substantial increase in mariculture production under the current practice of siting mariculture installations near the coast. An obvious solution is to locate mariculture in more open sea areas with greater water flow and depth, and thereby less environmental impact. Locations should be decided on the basis of maritime spatial planning in accordance with the recently adopted EU Maritime Spatial Planning Directive.

## 1. Introduction

Denmark has been an international forerunner in developing new and cleaner technologies for the aquaculture industry. While land-based fish farming has the longest history, marine aquaculture or mariculture has existed in Denmark since the 1970s. In the face of growing worldwide demand for seafood that can no longer be met through sustainable catch fishery, Danish governments and the aquaculture industry have recognized the potential in aquaculture, and have been keen to promote and expand sustainable production – also because this industry can create employment opportunities in sparsely populated areas of Denmark.[2]

The environmental impacts of aquaculture against the demand for better growth conditions for the industry, and how to balance these conflicting concerns in the regulatory framework, have been much debated in Denmark.[3] Current-

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[2] Ministry of Environment and Ministry for Food, Agriculture and Fishery, 2014. *Strategi for bæredygtig udvikling af akvakultursektoren i Danmark 2014–2020* (Strategy for Sustainable Development of the Aquaculture Sector in Denmark 2014–2020).

[3] See for example the article by the Danish Society for Nature Conservation of 12 December 2015, 'Havet sletter ikke alle spor' ('The sea does not erase all traces'). The article criticizes the 2015 growth plan for mariculture because it would lead to a tripling of mariculture pollution at sea, 'despite the fact that we have not yet finished cleaning up after past environmental sins' (http://www.dn.dk/Default.aspx?ID=46495). Another illustration of

ly, the focus is mainly on mariculture: in contrast to freshwater aquaculture on land, mariculture is on the increase; moreover, it has not managed to apply cleaner technologies to reduce pollution at the same pace as freshwater aquaculture has.

The framework for regulation of mariculture in Denmark – building mainly on EU legislation – is comprehensive and complex, and is essentially based on environmental and locational considerations. A recent decision of the Danish Environmental Board of Appeal to refuse an environmental permit to a mariculture installation has given rise to serious questions about the growth potential of the industry. Conversely, a recent political proclamation from the Danish government on broadening the environmental space for aquaculture raises questions on conformity with the legal framework.[4]

This article reviews the legal framework regulating Danish mariculture at the international, EU and domestic levels and how it has been applied, as illustrated by the decision of the Danish Environmental Board of Appeal. Further, it reviews the discourse the decision has created, and discusses regulatory approaches for reconciling industry and environmental concerns.

## 2. Status of mariculture in Denmark

The Danish primary production of fish and shellfish amounted close to 44,000 tons in 2014, to a total value of around DKK 1 billion. Mariculture in 2014 had a yearly production of around 11,000 tons with a value of around DKK 0.25 billion. Production in aquaculture has remained fairly constant at that level over the past 10 years: while production in freshwater aquaculture has fallen, production in mariculture has increased commensurately.[5]

Some 90 % of Danish aquaculture production is exported. In freshwater aquaculture, the main product is small-sized fish, while larger (3–4 kg) fish and roe are the main products of mariculture.[6] As with freshwater fish farming, the fish species produced in mariculture is primarily North American rainbow trout *(Oncorhynchus mykiss)*. There are 18 mariculture installations in Denmark, and 13 applications for new installations are currently under consideration by the Danish Environmental Protection Agency (EPA).[7] Most existing installations are located near the coast in Denmark's inner marine areas.

## 3. Environmental impact of mariculture

In Denmark nutrient loading (eutrophication), nitrogen loading in particular, is considered to be the main source of environmental impact from aquaculture.[8] Discharges, primarily from waste feed and faeces, have been reduced significantly in freshwater fish farming due to the use of new and cleaner technology. Although the content of nitrogen and phosphorus in mariculture fish feed has declined, mariculture has not

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the debate is the call by Denmark's Enhedslisten (the Red–Green Alliance) for a moratorium on new mariculture in Danish waters ( https://enhedslisten.dk/artikel/stop-havdambrug-i-danmark-73547).

[4] Danish Government, 2015. Aftale om Fødevare- og landbrugspakke (Agreement on a food and agriculture 'package'), 22 December 2015. (http://mfvm.dk/fileadmin/user_upload/FVM.dk/Dokumenter/Landbrug/Indsatser/Foedevare-_og_landbrugspakke/Aftale_om_foedevare-_og_landbrugspakken.pdf).

[5] Information provided by Dansk Akvakultur (Danish Aquaculture Association).

[6] Ibid.

[7] Danish EPA website: http://eng.mst.dk/topics/industry/aquaculture/

[8] Eutrophication is generally held to represent the most serious problem for the marine environment in Denmark, with agriculture as the main source. It has been a major concern in Danish environmental policy and legislation since the mid-1980s. See N.P. Nørring and E. Jørgensen, 2009. *Eutrophication and agriculture in Denmark: 20 years of experience and prospects for the future* published in Vol. 207 of the series Developments in Hydrobiology pp 65–70. (http://link.springer.com/chapter/10.1007%2F978-90-481-3385-7_7).

experienced the same significant reduction in the nutrient load because technology is not available for curbing the discharge of nutrients from marine fish farms. An indirect way of nutrient neutralization is currently being developed: this involves the breeding of mussels and/or seaweed to absorb the nutrients.[9] However, the effects of such breeding as a compensation measure for mariculture eutrophication are disputed, and are further discussed below.

On a smaller scale than eutrophication, there may be environmental impacts from residues of medicine, as well as disturbance generated by mariculture activities that affect marine mammals and birds. Antifouling of nets with copper may also have an environmental effect, but has been lessened through the use of thinner nets. Escape of farmed fish could have negative effects on wild stocks of trout and salmon. Other environmental effects from mariculture known to be serious problems elsewhere (not least in Norway), such as interbreeding with wild fish stocks and infection of stocks with lice, do not appear problematic in Danish waters.[10]

What happens to any type of waste released into the water column depends on the hydrographic conditions, bottom topography and geography of the area in question. The environmental impact of nutrients depends on the extent to which they are diluted before being assimilated by the pelagic ecosystem.[11]

## 4. Mariculture policies in the EU and Denmark

The aquaculture industry has grown rapidly elsewhere, but has been stagnant in the EU, especially in the countries around the Baltic Sea. Of the total supply of fish and shellfish in the EU, 25 % came from the EU's own fisheries and 10 % from aquaculture in the EU, while the remaining 65 % came from imports from outside the EU.[12] Therefore the EU would like its own aquaculture production to cover more of the demand within its borders. The 2013 EU Regulation on the Common Fisheries Policy has a strong focus on the promotion of an environmentally, socially and economically sustainable aquaculture, and requires member states to draw up national multi-year strategies to that effect.[13] The EU Commission has prepared a set of strategic guidelines for the sustainable development of aquaculture in the EU, with four priority areas: administrative procedures, coordinated planning, competitiveness, and equity.[14]

Both the previous Danish centre–left government and the current liberal/right government have formulated policies aimed at increasing aquaculture production without also increasing the environmental impacts: the former government even had a goal of reducing emissions of

[9] Danish EPA website.

[10] EPA, 2014. Note with EPA comments to the consultation process in the Endelave case. (http://mst.dk/media/mst/9186179/hjarn_-h_ringsnotat_med_bilag.pdf).

[11] P. Read, T. Fernandes, 2003. Management of environmental impacts of marine aquaculture in Europe. *Aquaculture* 226 (2003) 139–163.

[12] Ministry of Environment and Ministry for Food, Agriculture and Fishery, 2014.

[13] European Parliament and the Council of the EU, 2013. Regulation (EU) No 1380/2013 of the European Parliament and the Council of 11 December 2013 on the Common Fisheries Policy. (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:354:0022:0061:EN:PDF).

[14] European Commission, 2013. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Strategic Guidelines for the sustainable development of EU aquaculture. (http://ec.europa.eu/fisheries/cfp/aquaculture/official_documents/com_2013_229_en.pdf).

nitrogen per tonne fish by 20 % by 2020.[15] The current government, which came to power in June 2015, presented a food, agricultural and aquaculture policy 'package' in December that year, aimed mainly at promoting a 'paradigm shift' in environmental regulation to improve economic conditions for the food and agriculture industry. Rather than emplacing general one-size-fits-all requirements on farmers to prevent and reduce eutrophication, the government and its parliamentary majority want to apply a differentiated approach with tailored requirements based on site-specific environmental objectives. The government intends to abolish a range of general environmental requirements to agriculture and replace them with site-specific regulation and voluntary measures.[16]

These proclaimed changes to the regulation of nitrogen run-off from agriculture could have implications for the regulation of aquaculture as an additional contributor of nitrogen to the aquatic environment when assessing total nitrogen emissions against the River Basin Management Plans drawn up under the EU Water Framework Directive. The new policy document also covers the aquaculture industry as such. It reiterates the huge potential of aquaculture for growth and promises a 'growth strategy' for the industry. Identifying requirements on curbing nutrient discharges as the main barrier to growth, the policy document proclaims nitrogen quotas to be set for aquaculture. For mariculture, an environmental space is to be provided in the form of a total load of 800 tonnes of nitrogen for new mariculture production and an additional quota of 43 tonnes for existing production in coastal waters: in total this represents more than a doubling compared to today.

To lessen the administrative burdens for industry, the government has proclaimed not just a service check (as its predecessor), but an upfront general simplification of Danish environmental legislation related to food and agriculture, aimed at reducing the total number of legal acts by one third.[17]

## 5. Regulatory frameworks for mariculture at the international, EU and national levels

The degradation of the marine environment is of global concern, and perhaps the most far-reaching development of international environmental law has occurred in precisely this field. Many legal acts and soft-law instruments have been introduced at various geographical levels, aimed at the conservation and sustainable use of the marine ecosystems. Several of them are relevant to mariculture, as this is a growing industry with actual and potential adverse effects on the marine environment. The following offers an overview of the rather extensive set of legal frameworks relevant for mariculture, from the international to the national levels.[18]

### 5.1 International regulation

At the global level, some general rules and principles for protecting the marine environment are provided by the United Nations Convention on Law of the Sea (UNCLOS)[19] and the Convention

[15] Ministry of Environment and Ministry for Food, Agriculture and Fishery, 2014.

[16] Danish Government, 2015. *Aftale om Fødevare- og landbrugspakke* (Agreement on a food and agriculture 'package').

[17] Ibid.

[18] The overview is not intended to be exhaustive. In certain situations, other legal instruments than those mentioned here may also be of relevance.

[19] The United Nations Convention on Law of the Seas (UNCLOS). Entered into force in 1994 (http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm).

on Biological Diversity (CBD).[20] UNCLOS establishes an overall global framework in defining the rights and responsibilities of states with respect to their use of the world's oceans, including provisions to prevent, reduce and control pollution (Article 192). The CBD has broad provisions on conservation and sustainable use of biodiversity and its components, and has adopted the Ecosystem Approach as the primary framework for action under the Convention.[21] While the CBD contains no provisions specifically related to marine and costal biodiversity,[22] the issue has received extensive attention under the Convention in relation to its Programme of Work on Marine and Coastal Biodiversity, where mariculture is one of its five programme elements.[23]

COP 10 of the CBD in 2010 adopted the Strategic Plan for Biodiversity 2011–2020, including the 20 'Aichi Biodiversity Targets'. Target 7 reads: 'By 2020 areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity.'[24]

Danish marine waters are covered by two regional seas conventions that are partly overlapping in geographical scope:[25] the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR)[26] and the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area (HELCOM)[27]. Both treaties enshrine the precautionary and the polluter pays principles as well as the principle of promoting best environmental practices and technologies. Moreover, HELCOM has adopted recommendations specifically aimed at preventing and mitigating environmental impacts from aquaculture.[28]

### 5.2 EU regulation

Regulation of mariculture in Denmark is based largely on legislation adopted by the EU pertaining to environmental protection, either generally or specifically concerning the protection of the marine environment. This EU legislation is consistent with the global and regional treaties presented above and the soft-law decisions and recommendations adopted by their governing bodies, while also being considerably more detailed as regards obligations for states. The legislation specifies obligations for states to achieve good environmental status and prevent deterioration of bodies of surface water. The following will present the EU legal acts most directly applicable to mariculture and their implementing legal acts in Denmark.

[20] The Convention on Biological Diversity. Entered into force in 1993.(https://www.cbd.int/).

[21] CBD COP 5 Decision V/6. The decision describes the approach as 'a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way'. Such an integrated approach has later been widely applied in legal instruments to protect the marine environment including the instruments described below. Sometimes the approach is formulated in less definite forms, such as 'an ecosystem-based approach'.

[22] Especially relevant provisions for mariculture are Articles 6(b) and 10(c) on mainstreaming of biodiversity concerns into sectoral and cross-sectoral activities and national decision-making.

[23] CBD COP 4 Decision IV/5.

[24] CBD COP 10 Decision X/II. COP 10 took place in Nagoya, Japan, and the Aichi Biodiversity Targets are named after the prefecture of Nagoya. The Plan aims at providing an overarching framework on biodiversity, not only for the CBD and other biodiversity-related conventions, but for the entire UN system and all other partners engaged in biodiversity management and policy development.

[25] Both conventions cover the Kattegat Sea area

[26] The OSPAR Convention, (http://www.ospar.org/). The acronym 'OSPAR' is used because the Convention unified and extended the former Oslo and Paris Conventions, which regulated emissions into waters from dumping and from land-based sources, respectively.

[27] HELCOM website (http://www.helcom.fi/about-us/convention/). HELCOM refers to its governing body, the Helsinki Commission.

[28] HELCOM Recommendations 2004, 25/4 and 37-2016, 4-10-Rev.1.

*5.2.1 The Water Framework Directive (WFD)*

The 2000 EU Water Framework Directive[29] and the implementing Danish legislation may have implications on the regulation of mariculture with regard to installations near the coast – as are most Danish mariculture installations today.

The WFD applies to rivers, lakes, groundwater and coastal waters.[30] It operates with an integrated approach to managing water quality on a river basin basis, with the designation of River Basin Districts (Article 3). For these, the WFD requires River Basin Management Plans; it specifies a structured approach to developing such plans, to be prepared and renewed in six-year cycles (Article 13). In the River Basin Plans, member states shall provide for various measures to be taken with the aim of achieving good surface-water status, which includes preventing and reducing pollution.[31]

Member states are required to prevent deterioration of surface-water bodies and to protect, enhance and restore them with the aim of achieving good status by the year 2015 (WFD Article 4). In a recent ruling (the *Weser* case) the Court of Justice of the European Union (CJEU) applied a strict interpretation of the non-deterioration obligation that may have implications for the establishment or extension of mariculture installations: The Court ruled that this obligation does not amount solely to basic, general obligations, but applies also to the authorization of individual projects. Accordingly, states are required – unless a derogation provided for by the WFD is granted – to refuse authorization for any project that cause a deterioration of the status of the water body in question. [32]

The Water Framework Directive is implemented in Denmark through the 2013 Water Planning Act in relation to future implementation.[33] Denmark has been divided into four River Basin Districts for which River Basin Plans have been developed according to earlier implementing legislation. Denmark issued its first River Basin plans in 2011, four years delayed. The next plans were to have been issued by December 2015. However, also these plans have been postponed by the government, probably with a view to applying its 'paradigm shift' in environmental regulation of the food and agriculture industry when drawing up the plans.

*5.2.2 Marine Strategy Framework Directive (MSFD)*

For mariculture established *beyond* coastal waters, the Marine Strategy Framework Directive may have implications.[34] Its geographical scope is 'all marine waters' (Article 2) covering both territorial waters and Exclusive Economic Zones.[35] For marine waters covered by the Water

[29] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000, establishing a framework for Community action in the field of water policy.

[30] Directive 2000/60/EC Art. 2.7 defines 'coastal waters' as follows: 'surface water on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of territorial waters is measured, extending where appropriate up to the outer limit of transitional waters'.

[31] Article 4. Annex VIII to the Directive includes an indicative list of the main pollutants, of which no. 11 concerns 'Substances which contribute to eutrophication (in particular, nitrates and phosphates)'– the main pollutant from mariculture in the Danish context

[32] CJEU Judgement of 1 July 2015. Case C-461/13 Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland (*Weser Case*) (http://curia.europa.eu/juris/liste.jsf?num=C-461/13).

[33] Lov nr 1606 af 26/12/2013 om vandplanlægning (Danish Water Planning Act).

[34] Directive 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).

[35] Article 3.1 defines 'marine waters' as:

(a) waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where a Member State has and/or exer-

Framework Directive, the MSFD does not apply if specific aspects of the environmental status have already been dealt with under this directive or other Community legislation (Article 3.1.(b)).

The main objective of the MSFD is to achieve or maintain good environmental status in the marine environment by the year 2020. To that end, marine strategies are to be developed and implemented (Article 2). These strategies shall apply an ecosystem-based approach to the management of human activities which have an impact on the marine environment, integrating the concepts of environmental protection and sustainable use (Article 1.3). The MSFD includes rather detailed requirements for the preparation process and content of the marine strategies. (Article 5 and 8–16).

The Marine Strategy Framework Directive establishes European marine regions and subregions on the basis of geographical and environmental criteria within which states shall cooperate to develop coherent strategies (Articles 6 and 5.2). The marine regions are the Baltic Sea, the North-East Atlantic Ocean, the Mediterranean Sea and the Black Sea, all located within the geographical boundaries of existing Regional Sea Conventions under which regional and subregional cooperation is already taking place.[36]

To implement the MSFD, Denmark enacted the Marine Strategy Act in 2010.[37] It aims at establishing a framework for measures to achieve or maintain good environmental status of marine ecosystems, and to provide for the sustainable exploitation of marine resources through the development of marine strategies (Sec. 1).

Denmark issued its first marine strategy in 2010.[38] Although the socio-economic analysis includes a report on mariculture in Denmark explaining its environmental impact (mainly through eutrophication), none of the concrete targets of the strategy for achieving good environmental status refer specifically to aquaculture.

### *5.2.3 The Habitats Directive*

The EU Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (the Habitats Directive)[39] is aimed at protecting species and habitats that are characteristic, endangered, vulnerable or rare in the EU. Together with the Directive on the Conservation of Wild Birds (the Birds Directive),[40] this is the EU's main regulatory contribution to the targeted protection of biodiversity in its member states. These two directives require the designation of core sites on

cises jurisdictional rights, in accordance with the UNCLOS, with the exception of waters adjacent to the countries and territories mentioned in Annex II to the Treaty and the French Overseas Departments and Collectivities; and

(b) coastal waters as defined by Directive 2000/60/EC, their seabed and their subsoil, in so far as particular aspects of the environmental status of the marine environment are not already addressed through that Directive or other Community legislation;

[36] The four European Regional Sea Conventions are:
- The 1992 Convention for the Protection of the Marine Environment in the North-East Atlantic (further to earlier versions of 1972 and 1974) – the OSPAR Convention (OSPAR)
- The 1992 Convention on the Protection of the Marine Environment in the Baltic Sea Area (further to the earlier version of 1974) – the Helsinki Convention (HELCOM) The 1995 Convention for the Protection of Marine Environment and the Coastal Region of the Mediterranean (further to the earlier version of 1976) – the Barcelona Convention (UNEP-MAP)
- The 1992 Convention for the Protection of the Black Sea – the Bucharest Convention.

[37] Lov nr. 522 af 26. maj 2010 om havstrategi (Marine Strategy Act).

[38] Miljøministeriet, Naturstyrelsen, 2010. *Danmarks havstrategi* ( Marine Strategy of Denmark). (http://naturstyrelsen.dk/vandmiljoe/havet/havmiljoe/danmarks-havstrategi/).

[39] Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora.

[40] Directive 2009/147/EC of 30 November 2009 on the Conservation of Wild Birds

land and sea for species and habitat types listed in annexes to ensure that these are maintained, or restored, to a favourable conservation status in their natural range (Article 3 of the Habitats and 4 of the Birds Directive). Together, these designated sites form part of a coherent ecological network of nature areas, known as the European *Natura 2000 Network*. Denmark has designated 252 such Natura 2000 sites in total, with the marine sites covering 17.7 % of the Danish marine area.[41]

Article 6.1 requires states to establish the necessary conservation measures and Article 6.2 to avoid the deterioration of habitats as well as the disturbance of the species for which the areas have been designated. Article 6 .3 stipulates: 'Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.' The competent national authorities are not to agree to a plan or project until they have ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, until obtaining the opinion of the general public. This provision is modified in para. 4, allowing a plan or project to be carried out in spite of a negative assessment of the implications for the site and in the absence of alternative solutions 'for imperative reasons of overriding public interest, including those of a social or economic nature.' In such cases, member states shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected, and shall inform the EU Commission thereon.

Relying on the precautionary principle, the CJEU in several rulings – such as the *Waddenzee* (C-127/02), the *Sweetman v An Bord Pleanála (C-258/11) and the Commission v. Spain (C-404/09)* cases – has operated with a strict interpretation concerning whether an activity has the potential for adversely affecting a Natura 2000 site. This implies that an activity may be allowed only after it has been ascertained that there will be no harmful effects to the site. Hence, the Court has established that an assessment cannot be considered sufficient if there are deficiencies, such as absence of accurate findings and conclusions, to remove any reasonable scientific doubt about possible adverse effects.[42] The implication of this court practice on Danish regulation of mariculture will be further discussed below.

[41] Nature Agency website, http://naturstyrelsen.dk/naturbeskyttelse/natura-2000/natura-2000-omraaderne/.

[42] Case C-127/02, *Waddensee case.*, Para 55–57: 'As regards the conditions under which a particular activity may be authorised, it lies with the competent national authorities, in the light of the conclusions of the assessment of the implications of a plan or project for the site concerned, to approve the plan or project only after having made sure that it will not adversely affect the integrity of that site. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned. Where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation. In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle. See also case (Case C-258/11 Peter Sweetman and Others v An Bord Pleanála, Para 40: 'Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 Commission v Spain, paragraph 99, and Solvay and Others, paragraph 67).'.

The CJEU has also ruled on whether a project that would negatively affect a Natura 2000 site may be allowed if measures are established that could offset the negative effects. As it will be shown below, this question is highly relevant for Danish mariculture. Also here, the Court holds a strict interpretation, rejecting such measures unless the conditions set out in Article 3. 4 are met. The *Briels and others* case (C-521/12) concerned the broadening of a Dutch motorway that would entail increased traffic and thereby a rise in airborne nitrogen depositions on a neighbouring nitrogen-sensitive Natura 2000 meadow where the conservation status was already unfavourable. The Court rejected the argument that the artificial creation of a new meadow in the area that would not be affected by the motorway could qualify as a 'mitigating measures' in the context of an appropriate assessment under the second sentence of Article 6.3 of the Habitats Directive. In the view of the Court, the assessment process must focus on the effects on the actual and existing habitat, and not extend to consideration of some future habitat that might be created by the developer.

The Habitats Directive has been implemented in Denmark through a statutory order on designating and managing international nature protection areas and protection of certain species. [43] For aquaculture projects within or affecting Natura 2000 sites, the order implies that the Natura 2000 appropriate assessment shall be part of and be taken into account in the permit issuance procedure according to the Environmental Protection Act and – when EIA is required – the EIA procedure, as discussed below.

*5.2.4 Maritime Spatial Planning Directive (MSPD)*

Another EU directive of particular relevance in this context is the 2014 Framework Directive for Maritime Planning[44] that 'establishes a framework for maritime spatial planning aimed at promoting the sustainable growth of maritime economies, the sustainable development of marine areas and the sustainable use of marine resources' (Article 1). Member states are required to establish and implement maritime spatial planning (Article. 4.1) to consider economic, social and environmental aspects to support sustainable development and growth in the maritime sector, applying an ecosystem-based approach, and to promote the coexistence of relevant activities and uses (Article. 5.1). Planning for mariculture is specifically referred to in this context, together with other maritime sectors (Articles 5.2 and 8.2).

Obligations under the MSPD are procedural. The Directive specifies that it shall not interfere with member states' competence to design and determine, within their marine waters, the extent and coverage of their maritime spatial plans (Article 2.3). It also establishes that it is without prejudice to the competence of member states to determine how the various objectives are reflected and weighted in their plans (Art 5.3.).

In June 2016, the Danish Parliament adopted a Maritime Spatial Planning Act to implement the EU MSPD.[45] The Ministry of Environment and Food has already started the process of designating areas for new mariculture installations.[46]

[43] Bekendtgørelse nr 408 af 01/05/2007 om udpegning og administration af internationale naturbeskyttelsesområder samt beskyttelse af visse arter, sections 7–10 (Order on designation and administration of Natura 2000 sites).

[44] Directive 2014/89/of 23 July 2014 establishing a framework for maritime spatial planning.

[45] Lov nr. 615 af 08/06/2016 om marin fysisk planlægning (Marine Spatial Planning Act). https://www.retsinformation.dk/Forms/R0710.aspx?id=180281.

[46] Information obtained from the Danish Aquaculture Association and the Danish Nature Agency.

*5.2.5 The Environmental Impact Assessment (EIA) Directive*

The last EU legal instrument of relevance in this context is also procedural: The Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment[47] makes it mandatory to undertake environmental impact assessments (EIA) of projects likely to have significant effects on the environment, prior to their authorization. The aim is to harmonize the principles of environmental assessment by introducing minimum requirements with regard to the type of projects subject to assessment, the main developer's obligations, the content of the assessment and the participation of the competent authorities and the public. This EIA Directive is intended to help policy-makers to reach well-informed decisions based on objective information and the results of consultation with the public/ stakeholders.

All projects listed in Annex I of the EIA Directive are subject to the EIA requirement (Article 4.1). For projects listed in Annex II, the national authorities are to decide whether an EIA is required (Art 4.2.). This includes 'intensive fish farming' (Annex 2, 1. (f)). Annex III specifies selection criteria for determining whether Annex II projects should be subject to EIA.

Thus far, implementation of the EIA Directive in Denmark as regards mariculture has been divided between two sets of legislation depending on the distance from the coast of the mariculture installation. However, a new Danish EIA act adopted in May 2016 has consolidated and made uniform the EIA provisions for aquaculture:[48] As with the EU EIA Directive, 'intensive fish farming' is listed in an annex under which EIA is not mandatory but subject to a prior decision by the competent authority as to whether it is required (Articles 15 and 21). For installations within one nautical mile of the coast the local council is the competent authority; the Ministry for Environment and Food is the authority for installations further out. (In accordance with Danish practice this competence is likely to be delegated to the Danish Environmental Protection Agency (EPA).)

### 5.3 National legislation pertaining to mariculture

Danish legal requirements for mariculture that do not involve implementation of EU legislation are the basic provisions for applying for permits to establish and operate marine fish farms and specifying the terms for this. Such permits are required under two regulatory frameworks, the Fisheries Act [49] and the Environment Protection Act. [50]

Concerning the latter, mariculture is included in an annex listing polluting enterprises which require a permit (Section 33), regardless of whether the installation has been deemed to require an EIA by the competent authority. Installations nearer to the shore than one nautical mile require approval from the local council, while the EPA has the authority to approve those further offshore. In awarding permits and setting terms for polluting enterprises, the competent authorities are to pay particular attention to the applica-

[47] Informal consolidated version of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52/EU.( http://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf).

[48] Lov nr. 425 af 18/05/2016 om miljøvurdering af planer og programmer og af konkrete projekter (VVM) (Act on environmental impact assessment of plans, programmes and projects).

[49] Lovbekendtgørelse nr. 978 af 26/09/2008 om fiskeri og fiskeopdræt (fiskeriloven) (Act on Fisheries and Aquaculture, consolidated version).

[50] Miljøbeskyttelsesloven (Environmental Protection Act) (No. 879 of 2010) (this latest version of the Act is not available in English) and Statutory Order on Authorization of Listed Enterprises (No. 669 of 2014).

tion of the best available technology and the best location in terms of preventing pollution. This permit regime provides a tool for securing compliance with other relevant legislation, not least the EU-based legislation presented above. The competent authority shall oversee whether pollution from mariculture production can be kept within the set limits of the River Basin Management Plans or marine strategies and the designation basis for Natura 2000 sites that may be affected.

### 5.4 Appeal procedure

Decisions on mariculture taken under the Environmental Protection Act on an environmental permit and EIA may be appealed within 30 days after the decision to the Environmental Board of Appeal by the party to whom the decision is addressed, or by any party with an individual, significant interest in the outcome of the case, or by various civil society and trade organizations.[51] The Board is an independent administrative appeal board for rulings relating to planning, nature and the environment.

## 6. Regulation in practice: the Endelave mariculture case

Having provided an overview of the comprehensive regulatory framework regulating mariculture in Denmark, we now turn to the challenges and dilemmas confronting this framework. This will be done through a review of a recent illustrative appeal case brought before the quasi-judicial Environmental Board of Appeal.[52] The decision was keenly awaited by stakeholders, and the refusal to grant a permit sparked extensive debate on the environmental impacts of mariculture, and if the industry had any future in Denmark. The review here focuses on the most-contested aspects of the case.

In January 2013, the aquaculture company Hjarnø Havbrug applied for a permit to establish a mariculture installation in the Kattegat Sea 3.2 km south of the small island of Endelave, to produce up to 2105 tons of rainbow trout per year in 20 circular net cages. It was estimated that production would release 88 tons of nitrogen and 9.6 tons of phosphorus. The company emphasized that the high water flow on the location would lead to dilution and transportation of the nutrients away from coastal waters and to more open sea areas. In addition, the company would establish 'compensation breeding' in the form of mussel and seaweed breeding in coastal waters to 'neutralize' the nutrient loading. According to the company, this would lead to 100 % and 70 % removal of nitrogen and phosphorus, respectively.[53]

As the installation was to be established more than 1nm from the coast, the EPA was the competent authority concerning a permit pursuant to the Environmental Protection Act and an EIA permit, which the EPA had deemed necessary. These were granted in May 2014, on certain conditions.[54]

The installation was planned to be located 1.3 km from a Natura 2000 protected marine site. This designation was based on the presence of

[51] Environmental Protection Act, sections 91–100.

[52] Natur- og miljøklagenævnet (Environmental Board of Appeal) 2014. Afgørelse i sag om miljøgodkendelse af Endelave Havbrug og VVM-tilladelse til etablering af Endelave Havbrug (Decision of the Board, Endelave case). (http://nmkn.dk/media/129490/nmk-10-00807-og-nmk-34-00371.pdf).

[53] Undated note by Orbicon, the consulting firm employed by Hjarnø Havbrug, on Endelave Mariculture. (http://www.havbrug.dk/media/1012/endelave_p__4_sider_23-jan-2014.pdf).

[54] Miljøministeriet, Miljøstyrelsen, 2014. Miljøgodkendelse. Hjarnø Havbrug: Endelave. (http://mst.dk/media/mst/9193293/endelave_havbrug_milj_godkendelse-8_maj.pdf) and Miljøministeriet, Miljøstyrelsen, 2014. VVM tillladelse til etablering af havbrug ved Endelave. (http://mst.dk/media/mst/9193296/vvm_tilladelse_8maj_.pdf).

certain marine mammals, birds and marine habitat types listed in the EU Habitats Directive. This proximity meant that yet another assessment, a Natura 2000 Appropriate Assessment, had to be carried out subject to Article 6.3 of the Directive and its implementing Danish provision. Further, the EPA was obliged to ensure that the mariculture production would not violate the River Basin Management Plan that had been prepared in accordance with the EU Water Framework Directive. In both cases, the level of eutrophication was a critical factor. The EIA and the Natura 2000 assessments were prepared by the environmental consultancy company Orbicon, on behalf of Hjarnø Havbrug. It concluded that, with the planned environmental measures to compensate for the nutrient loading caused by mariculture production, the installation would be able to operate without significantly affecting the aquatic environment.[55]

On the basis of these assessments, the EPA justified granting a permit. The EPA also emphasized that the requirement under the Environmental Protection Act, that a potential polluter must apply the best available technology (BAT) to minimize environmental impact, would be fulfilled through the planned establishment of mussel and seaweed breeding and through not impregnating the cages with anti-fouling material containing copper.

The EPA decisions, however, were appealed to the Environmental Board of Appeal by the coastal local government, some national organizations with nature conservation, outdoor recreation and angling as their focus areas, and by a local interest group. Primarily, they challenged the premise that the installation would be able to operate without significantly affecting the nearby Natura 2000 site. The effect of the mussel and seaweed breeding as a compensation mechanism to absorb nitrogen and phosphorus was also questioned, and it was argued that this activity could not be regarded as BAT. Moreover, it was argued that the installation would pose a serious risk of release of fish that could damage wild populations of trout and salmon.

In its decision to deny a permit, the Environmental Board of Appeal emphasized that the main environmental threat to the nearby Natura 2000 site was nutrient loading, especially nitrogen; further, that, according to the River Basin Management Plan, the marine area in question was already considerably affected in that regard. Referring to the Habitat Directive Article 6.3, and the strict court practice of the CJEU, the Board stressed that the competent authority shall allow a plan or a project that may affect a Natura 2000 site only if the Natura 2000 Appropriate Assessment provides certainty beyond reasonable scientific doubt that this will not be the case. This reflection of the precautionary principle is also laid down in a set of guidelines issued by the Nature Agency on how to administer the Habitats Directive in Denmark.[56] Finding that the Natura 2000 Appropriate Assessment failed to provide such scientific certainty, the Board cited several examples of what it viewed as unclear or insufficient in that assessment.

On the breeding of mussels and seaweed, the Board considered whether this should be regarded a direct mitigation measure integrated in the proposed mariculture project. It had not been claimed that this should be considered a compensation measures pursuant to the Habitat Directive Article 6 (4) and equivalent provisions in Danish law. The distance between the location of the planned mariculture installation and

[55] Undated note, Orbicon.

[56] Vejledning til bekendtgørelse nr 408 af 1. maj 2007 om udpegning og administration af internationale naturbeskyttelsesområder af visse arter af 21. juni 2011 (Guidelines on designation and administration of Natura 2000 sites).

the planned mussel and seaweed breeding sites was 12 to 16 km. Under these circumstances, and since the latter would not even be located in the direction of the water flow from the mariculture installation, the Board found that the planned mussel and seaweed breeding could not have an effect on direct releases from the installation, and thus could not be taken into account in assessing whether the installation would affect the Natura 2000 site. Also for that reason, such mussel and seaweed breeding could not be regarded as a BAT measure. Here the Board also quoted a scientific body (Denmark's Technical University – Aqua) which held that mussel breeding could not be considered BAT as the technology was not yet fully developed (although this technology is in fact recommended in the mariculture guidelines issued by the Ministry of Environment in 2006).[57]

On the risk of escapes of fish from the installation, the Board did not object to the conditions set by the EPA decision to prevent such escapes.

In summary, the location of a marine Natura 2000 site sensitive to nutrient loading in the immediate vicinity of the planned location proved to be the decisive factor. The Appeal Board ruled that, in such cases, issuance of a permit cannot be based solely on an *assumption* that the installation will be able to operate without significantly affecting the site, as was the case for the EPA decision. The Habitat Directive and CJEU practice impose a burden of proof for the producer to document that the activity *will not* cause environmental damage: and the producer was not to do that. This ruling corresponds to earlier rulings of the Board on extension of existing mariculture installations near Natura 2000 sites.[58]

The Board also established that mussel and seaweed breeding facility intended to be established, at a considerable distance from the installation, to absorb nutrients – an important factor in the EPA decision to justify that the installation was 'nutrient-neutral' – could not be regarded as a mitigation measure for the release of nutrients from the installation even if this activity in fact would be able to hold back nitrogen and phosphorus from the marine environment. The ruling thereby leans towards the *Briels* ruling of the CJEU referred to above.

## 7 Discussion and conclusions

In light of the result of the Endelave case, the Danish aquaculture industry today does not see great opportunities for expansion, given current regulatory practices. The industry argues that mariculture is merely one of multiple other sources of loading of nitrogen and other nutrients. The main source is agriculture, which accounts for about 70 % of the total nitrogen discharge. Wastewater treatment installations, storm water outfalls and industry are responsible for approximately 10–12 %, while the contribution from other sources is between 18 % and 20%. Discharges come both from Denmark and from other countries bordering the waters. Areas with less water exchange with adjacent seas and coastal areas close to the sources will be relatively more affected by Danish discharges (up to 100 %) than the more open waters (down to 1 %).[59]

In contrast, proponents of strict environmental safeguards argue that the existing nutri-

[57] Guidance on Mariculture no. 9163 of 31 March 2006

[58] Miljøklagenævnets afgørelse af den 29. marts 2011 vedrørende Kongsnæs Havbrug (decision on Kongsnæs Havbrug), Natur- og miljøklagenævnets afgørelse af 9. januar 2013 vedrørende Langsand Laks (decision on Langsan Laks). Texts of the decisions can be found on the website of the Environmental Board of Appeal, http://nmkn.dk/afgoerelser/.

[59] Danish Aquaculture, 2015. Comments during a consultation process concerning Danish draft River Basin Management Plans, 23 June, 2015. (http://www.danskakvakultur.dk/media/13072/hoeringssvar-fra-Dansk-Akvakultur-til-Vandomraadeplaner_150623.pdf).

ent load of Danish marine areas is an argument for not allowing any increase from additional sources. Given the overall environmental impact and the vulnerability of Danish waters, they hold that the marine environment does not have the capacity to assimilate mariculture as well. In support of their appeal in the Endelave case they pointed out that the local government had invested large sums in waste-water treatment facilities from land sources. For that reason, a new source of 88 tonnes of nitrogen and 9.6 tonnes of phosphorus would, in their view, undermine these public investments.[60] This argument could be applied also in a national context, considering the investments made by various Danish governments over 30 years to reduce nutrient loading of the aquatic environment, not least from the biggest source, agriculture.[61]

Would it in fact be possible to achieve the official goals of a substantial increase in mariculture production, less bureaucracy for industry and less environmental impact? How could this be done in view of the environmental vulnerability of Denmark's coastal marine areas, the current regulatory framework and the legal precedent set by the Environmental Board of Appeal in the Endelave case?

Concerning the bureaucratic obstacles for the mariculture industry, this article has provided an admittedly non-exhaustive survey of the cumbersome administrative and regulatory system for mariculture in Denmark, which involves three separate agencies within the same ministry as well as local councils and numerous legal acts in the form of EU directives, laws and statutory orders, some with overlapping environmental objectives. According to the aquaculture industry, it typically takes one to two years from the applicant's first contact with the authorities to get a decision, sometimes even up to five years. Also the European Commission has identified red tape as a constraint for the aquaculture industry in the EU as a whole.[62] In order not to further discourage the development of mariculture, there are thus good reasons for simplifying and streamlining the unwieldy procedures for granting permits. Lessons may be learned from Norway, where there is a single piece of legislation that regulates mariculture: the Aquaculture Act. One of the aims of this Act, adopted in 2006, was precisely to simplify the application process. [63]

The Danish government intends not only to ease the procedural but also the environmental protection requirements for industry for existing and new mariculture. As yet, however, there have been no indications as to how this promise will be fulfilled in the face of the EU legal requirements and the legal precedent set by the Appeal Board and the CJEU. This applies in particular to expansion of the environmental space for existing installations. These are generally located near the coast, many of them in semi-closed marine areas that are already in an unfavourable ecological condition, according to Danish River Basin Management Plans.[64] Many marine Natura 2000 sites are located in the same coastal waters – a further obstacle to mariculture development, as seen in the Endelave case. The decision in this

[60] Environmental Protection Agency, 2014, note on the consultation process in the Endelave case.

[61] EPA website. Action Plan for the Aquatic Environment III 2005–2009 (http://eng.mst.dk/topics/agriculture/nitrates-directive/action-plan-for-the-aquatic-environment-iii/).

[62] European Commission, 2013.

[63] The Norwegian Ministry of Fisheries and Coastal Affairs, 2006, the Aquaculture Act (https://www.regjeringen.no/globalassets/upload/kilde/fkd/reg/2005/0001/ddd/pdfv/255327-l-0525_akvakulturloveneng.pdf).

[64] B. Riemann, S. Markager and M. Maar, 2015. Posting on the Danish web medium Altinget, 30 October 2015, on mariculture and potentially conflicting spatial interests at sea. The authors are marine environment researchers at Aarhus University. (http://www.altinget.dk/artikel/forskere-havbrug-kolliderer-med-miljoe-turisme-og-fiskeri.

case, together with CJEU court practice, shows that, when natural habitats already have an unfavourable conservation status, any additional impact could be deemed 'significant' in view of Article 6.3 of the Habitats Directive.[65] In addition to the rulings interpreting Article 6.3 of the Habitats Directive, the recent *Weser* case took a strong stance on the non-deterioration principle of the Water Framework Directive. The ruling here can be interpreted as binding the member states to refuse to authorize any project that might cause a deterioration of the status of a body of surface water – and this may include mariculture installations.

'Compensation breeding' of mussels and seaweed to remove nitrogen load from mariculture is part of the government's plan for growth in the aquaculture industry. Again, however, both the Danish Environmental Board of Appeal and the CJEU (through the *Briels* case) have set legal limits on the extent to which such measures can be viewed as integral elements in the mitigation of activities that negatively affect a marine Natura 2000 site.

All in all, there would appear to be limited possibilities for Denmark to achieve the overall political goal of a substantial increase in mariculture under the current practice of locating mariculture near the coast. The obvious solution would therefore be to locate mariculture *further away from the coast,* in open sea areas with greater water flow and depth, and thus with less nutrient load on the marine environment. And indeed, the Danish aquaculture industry appears willing to accept the resultant burden of longer sea transport of fish and of acquiring the technology necessary for dealing with the harsher physical conditions in the open sea.[66]

Such location should be subject to maritime spatial planning – and the recently adopted EU Maritime Spatial Planning Directive and the related implementing legislation in Denmark provide a welcome and timely opportunity for introducing this important tool. Danish marine areas are among the most intensively utilized in the world, and the competition for marine space also includes off-coast open sea areas of the type where mariculture would be best located. Competing uses include fishery, shipping, wind power, and oil and gas extraction. A spatial planning system can facilitate designation of the best suited mariculture locations both in terms of not interfering with other uses of the sea and of impacting the marine ecosystem as little as possible. As mentioned above, the process of designating areas for aquaculture is already underway.

[65] H. Schoukens, 2015. Atmospheric Nitrogen Deposition and the Habitats Directive: Tinkering with the Law in the Face of the Precautionary Principle? *Nordic Environmental Journal*, 2015:2.

[66] Interview with representatives of the aquaculture industry, 30 October 2015.