

Bettina Kleining

# Natura 2000 – A Coherent Nature Conservation Network?

A Proposal for Reforming the Rules  
on Designation under the Habitats  
Directive

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*To Professor Jonathan Fitch*

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# List of Abbreviations

Aarhus Convention	Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
Aarhus Regulation	Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community Institutions and Bodies
AEWA	Agreement on the Conservation of African-Eurasian Migratory Waterbirds
African Commission AG	African Commission on Human and Peoples' Rights Advocate General
Amended Proposal	First Amended Proposal for a Council Directive on the Protection of Natural and Semi-Natural Habitats of Wild Fauna and Flora
Banjul Charter	African Charter on Human and Peoples' Rights
BBNJ	Biodiversity Beyond National Jurisdiction
Bern Convention	Bern Convention on the Conservation of European Wildlife and Natural Habitats
BfN	Bundesamt für Naturschutz (Federal Agency for Nature Conservation)
Birds Directive	Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds
BNatSchG	Bundesnaturschutzgesetz (Federal Nature Conservation Act)
Bonn Convention	Convention on the Conservation of Migratory Species of Wild Animals
CAP	Common Agricultural Policy

CBD	Convention on Biological Diversity
CEPHCP	Committee on the Environment, Public Health and Consumer Protection
CJEU	Court of Justice of the European Union
CMS	Bonn Convention on the Conservation of Migratory Species of Wild Animals
Commission	European Commission
COP	Conference of the Parties
Council	Council of the EU
EAP	Environmental Action Programme
EC	European Community
EC Treaty	Treaty establishing the European Community
ECHR	European Convention on Human Rights
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEC	European Economic Community
EESC	European Economic and Social Committee
EGQ	Evidence Gathering Questionnaire
EIA Directive	Environmental Impact Assessment Directive
ELD	Environmental Liability Directive
ENVI Committee	Committee on the Environment, Public Health and Food Safety
EP	European Parliament
EU	European Union
EUCFR	EU Charter of Fundamental Rights
EURATOM	European Atomic Energy Community
Fitness Check	REFIT Fitness Check of the Nature Directives
Green Deal	European Green Deal
Habitats Directive	Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora
Interpretation Manual	Interpretation Manual of European Habitats
IPBES	Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services
MDG	Millennium Development Goals
MPA	Marine Protected Areas
NGO	Non-Governmental Organisation
OJ	Official Journal of the European Union
pSCI	proposed Sites of Community Importance
REFIT	Regulatory Fitness and Performance Programme
SAC	Special Areas of Conservation
SCI	Site of Community Importance
SDG	Sustainable Development Goals
SEA	Single European Act
SPA	Special Protection Areas



Stockholm Declaration	Stockholm Declaration of the UN Conference on the Human Environment
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
ToR	Treaty of Rome
UDHR	United Nations Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
VCLT	Vienna Convention on the Law of Treaties
WFD	Water Framework Directive
Zero Draft	Zero Draft of the post-2020 biodiversity framework

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# Chapter 1

## Introduction



Ongoing global biodiversity loss is one of the key environmental challenges of the time.<sup>1</sup> Until recently, the natural environment and the services it provides, such as clean air and water, food provision, and an agreeable climate, have been taken for granted by societies worldwide. The natural environment has mostly been perceived as a source available to exploit for human needs.<sup>2</sup> When industrialisation intensified in the late eighteenth century, ecosystems and their services have been used to curb economic growth worldwide.<sup>3</sup> Economic actors have always used ecosystems and the services they provide, such as the provision of water and energy for the production of goods.<sup>4</sup> However, such services can only be provided if ecosystems are healthy and resilient enough not to be depleted. For centuries now, the natural environment has given us signs that our use of it is detrimental to resilience and sustainability.<sup>5</sup>

If we do not protect our biodiversity sufficiently, ecosystems will soon not be able to provide us with the services we need.<sup>6</sup> Already, fossil energy reserves are about to reach their limit, and climate change is happening. The pollution of our air, seas and waters is at worrisome levels, and biodiversity is declining worldwide.<sup>7</sup>

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<sup>1</sup>de Sadeleer (2006), pp. 351–352; Ignar and Grygoruk (2015), p. 2; Verschuuren (2015), p. 287.

<sup>2</sup>Bastmeijer (2019), p. 215.

<sup>3</sup>Hill (2009), p. 361.

<sup>4</sup>Lele et al. (2013), p. 343; Marshman et al. (2019), p. 2.

<sup>5</sup>Brimblecombe (1987), pp. 74–75; Menz and Seip (2004), p. 253.

<sup>6</sup>Wheeler (2017), p. 291.

<sup>7</sup>Marshman et al. (2019), p. 2.

## 1.1 The European Contribution to Mitigating Global Biodiversity Loss

While protecting our environment should be an eco-centric goal for the sake of nature itself, humanity is currently only at the beginning of acknowledging nature's intrinsic value. This book will focus on the European view and legal approach to nature conservation. However, the author acknowledges that this is not the only existing view on the topic of how nature should be treated and that there are other inspiring perceptions throughout the world. For example and most notably, Ecuador, in its constitutional preamble, defines nature as the Andean Inigenous deity *Pachamama*. The intention of this definition is to illustrate that nature's rights are inherent to all ecosystems of the planet, including those beyond the Ecuadorian border.<sup>8</sup> A related concept is *Sumak Kawsay*, the concept of living well, that represents the aspired way of living of several Latin American peoples. It may be defined as a way of living in harmony with nature and with other human beings, supported by the ideas of social equity and environmental sustainability.<sup>9</sup> In the Maori understanding of the environment, the concepts of *kaitiakitanga* and *mana whenua* exist. *Kaitiakitanga* may be understood as mere guardianship or stewardship and *mana whenua* as the ultimate power and authority over a certain territory which is derived from the gods.<sup>10</sup> This are just a few of many worldviews that respect and protect the intrinsic value of the nature all around us on this planet.

In the EU or, rather, the western world however, an anthropocentric worldview still prevails. The very first legal instruments dealing with aspects of environmental protection had an anthropocentric focus, meaning they had the advantages for humankind in mind.<sup>11</sup> Also today, legal instruments that deal with environmental concerns are often linked to economic interests. However, a wind of change is perceivable, and shifting to a more eco-centric approach slowly takes place.<sup>12</sup> On the European level, the European Union's (EU) signature legislation to counteract ongoing biodiversity deterioration are two Directives, often jointly referred to as the Nature Directives.<sup>13</sup> These are Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (Birds Directive) and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive).

The Nature Directives set rules for building a coherent European ecological nature conservation network under the name Natura 2000.<sup>14</sup> Natura 2000 is Europe's

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<sup>8</sup>Kauffman and Martin (2018), p. 48; Takacs (2022), p. 51.

<sup>9</sup>Alcívar Trejo et al. (2023), pp. 106, 110.

<sup>10</sup>Woodhouse et al. (2021), p. 3.

<sup>11</sup>Schoukens and Bastmeijer (2015), p. 126.

<sup>12</sup>Bodansky et al. (2012), p. 3; Birnie et al. (2009), p. 8.

<sup>13</sup>Bunge and Schumacher (2016), p. 313.

<sup>14</sup>Art. 3 (1) Habitats Directive; Art. 3 Birds Directive.

signature biodiversity conservation project.<sup>15</sup> It consists of terrestrial as well as marine conservation sites designated under the Habitats Directive, the Special Areas of Conservation (SAC) and under the Birds Directive, the Special Protection Areas (SPA). It is the largest network of protected areas of its kind in the world.<sup>16</sup> On an international scale, currently, about 15% of the land and only about 3% of the marine areas are legally protected.<sup>17</sup>

Together with other European instruments, the Nature Directives set the playfield for the EU's wider conservation law and policy. The environmental integration principle that is laid down in Art. 11 TFEU and that will be discussed in greater detail in Sect. 2.4.1, requires a holistic approach stating that environmental protection must be integrated into the EU's policies and activities, in particular with a view to promoting sustainable development.<sup>18</sup> To further this goal, for instance, several of the EU's Common Agricultural Policy reforms (CAP) have led to more sustainable agricultural methods leaving field margins and hedgerows as stepping stones for biodiversity that may support the connectivity of Natura 2000.<sup>19</sup> Other European Directives intersect and support the Nature Directives such as, but not limited to, the Environmental Liability Directive (ELD) which aims to hold actors liable and thus furthers the prevention of environmental harm,<sup>20</sup> or the *Marine Strategy Framework Directive* (MSFD), that strives to conserve marine biodiversity, *inter alia*, by taking anthropogenic pressure off marine food webs and reducing pollutants such as marine litter or contaminants.<sup>21</sup>

## 1.2 Shortcomings of the European Biodiversity Conservation Approach

While the setup of Natura 2000 is an impressive achievement, it is a fact that its designation has been slow, and the network is still incomplete.<sup>22</sup> Moreover, the existing parts of the network are often fragmented and incoherently set up, leading to isolated sites.<sup>23</sup> Concerning the Habitats Directive, many Member States did not

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<sup>15</sup> Although during proceedings it was suggested to name it 'Natura Semper', see European Parliament (1989), p. 25, European Parliament (1990), p. 10.

<sup>16</sup> Razzaque and Lester (2021), p. 149.

<sup>17</sup> Sand (2017), p. 6; Bastmeijer (2019), p. 199.

<sup>18</sup> Morgera (2013), p. 196; Arndt et al. (2015), p. 215.

<sup>19</sup> E.g. Arts. 53–57 sec 2 of Council Regulation (EC) No 1728/2003 (2003); Bignal and McCracken (2000), pp. 150, 153; Holder and Lee (2007), pp. 687–690; Doussan and Schoukens (2015), p. 442.

<sup>20</sup> Commission (2013).

<sup>21</sup> [https://environment.ec.europa.eu/topics/marine-environment/descriptors-under-marine-strategy-framework-directive\\_en](https://environment.ec.europa.eu/topics/marine-environment/descriptors-under-marine-strategy-framework-directive_en) (16.11.2023).

<sup>22</sup> Krämer (2012), p. 382.

<sup>23</sup> European Environment Agency (2011), p. 56; Schoukens and Woldendorp (2015), p. 33.

respect its implementation deadline of two years or implemented the Habitats Directive's provisions incorrectly.<sup>24</sup> This is particularly true for those Member States, which joined the EU<sup>25</sup> after the Directives were operative and also for the marine part of Natura 2000, which is of worse designation status than its terrestrial counterpart.<sup>26</sup> Habitat fragmentation and habitat loss are widely recognised as crucial contributors to biodiversity deterioration, particularly species extinction.<sup>27</sup> The densely populated and highly developed EU and the ongoing fragmentation and overexploitation of the land- and seascape are key drivers for ongoing biodiversity loss.<sup>28</sup> Therefore, this book's focus will be on the Habitats Directive's provisions on designating Natura 2000 to examine whether an improvement of the legal framework would be beneficial for the Member States' compliance with their designation duties that might eventually enhance the quality of the European biodiversity conservation network to steer against ongoing fragmentation and habitat loss while also taking into consideration contributing non-legal factors.

### 1.3 State of Research, Focus and Limitations

Much research has already been conducted about the Habitats Directive, its implementation and its shortcomings, e.g., regarding the management of Natura 2000, or the issue of procedural rights and enforcement.<sup>29</sup> Also, the question how to deal with the remaining scientific uncertainties when setting up Natura 2000, as well as transboundary issues and cross-border coherence of Natura 2000 sites have been discussed.<sup>30</sup> Compliance with the law on Member State level and Art. 6 in general have been the subject of numerous academic works. There is also already considerable CJEU case law on many of these issues, as well as academic literature analysing and discussing it.<sup>31</sup>

Regarding the designation of Natura 2000, in particular focusing on species protections, there has been some research, too, for instance, looking at species

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<sup>24</sup> Art. 23 (1) Habitats Directive; Lasén Diaz (2001), p. 288; de Sadeleer (2006), p. 364.

<sup>25</sup> Prior to the entering into force of the Lisbon Treaty on 1 December 2009, the EU did not have legal personality. All European legislation was thus adopted by the European Community (EC). As now all legislation is adopted by the EU and the term EC abandoned, this book will use the term 'EU' throughout, unless a reference to the EC is necessary for reasons of clarity.

<sup>26</sup> Schoukens and Dotinga (2015), p. 375; Schoukens and Woldendorp (2015), p. 33.

<sup>27</sup> Verschuuren (2004), p. 43; Bradshaw (2018), p. 854.

<sup>28</sup> Barnes and Massarella (2016), p. 384; Gunasekara and Karim (2018), p. 6; Caddell (2020), pp. 255–257; Razzaque and Lester (2021), pp. 138–139.

<sup>29</sup> Krämer and Orlando (2018); Epiney (2017); Born et al. (2015); Krämer (2013); Jones (2012); McGillivray (2012); Pavoni (2012).

<sup>30</sup> Cliquet (2014), p. 723; Aragão (2015), pp. 245–250, 257–260.

<sup>31</sup> E.g. Schoukens and Woldendorp (2015); Jones and Westaway (2012), p. 78.



protection via designation.<sup>32</sup> However, there has not yet been so much focus on Art. 4 of the Habitats Directive as well as the Articles and Annexes related thereto. In particular, there has not yet been a systematic approach of analysing all designation rules under the Habitats Directive, considering the legal as well as administrative and policy-related weaknesses, the Member States are facing when setting up Natura 2000 according to the rules of the Habitats Directive. Never has there been a concrete suggestion for reforming the law on designation, providing concrete phrasing suggestions backed up by legal analysis. Therefore, the employed approach is towards answering the following research question: Are the Habitats Directive's provisions on designating Natura 2000 optimally drafted to allow Member States compliance with their designation obligations?

Of course, as this work will focus mainly on Art. 4 and the Articles and Annexes it is referring to, further research would be needed to examine how the remaining Habitats Directive's provisions would benefit from legal reform. In this work, the interrelations between Art. 4 and Art. 6 will be illustrated to some degree. However, future research would benefit from a re-assessment of the Fitness Check outcomes concerning the Member States' Natura 2000 management duties under Art. 6 to learn what particular problems implementing national authorities encounter when following their legal obligations. Subsequently, the respective provisions of the Habitats Directive could be re-assessed, and proposals for sensible law reform be made similar to the approach this work will be taking.

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<sup>32</sup>E.g. Schoukens et al. (2010); Schoukens and Bastmeijer (2015); Schoukens (2015).

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## Chapter 2

# The Habitats Directive and the Natura 2000 Network



European Biodiversity is declining.<sup>1</sup> This trend is due to a variety of reasons such as, for instance, urban sprawl, pollution, and climate change.<sup>2</sup> From a legal stance, an incomplete conservation network Natura 2000 cannot meet the Habitats Directive's objective to protect European biodiversity as incomplete designation is prone to leading to a fragmented network and the creation of mere 'islands of nature' which cannot serve the purpose of providing wild species of flora and fauna sufficient room for 'migration, dispersal and genetic exchange'.<sup>3</sup>

This chapter will put the Habitats Directive's genesis in its relevant historical and international legal context, most notably in the context of the Bern Convention and the CBD. It will also indicate the European legislator's primary motivations for drafting biodiversity conservation legislation, although the EU was initially founded as a customs union. It will retrace the developments that eventually led the EU to assume its current role as one of the leading global contributors to current biodiversity conservation law and policy discussions and developments. After placing the Habitats Directive in its broader historical and legal context, the chapter will ask the sub-question why the Habitats Directive has been cast in the legislative form of a directive and assess the various legal instruments the EU may choose when implementing new environmental legislation. It will discuss why the choice of a directive has been suitable for European biodiversity conservation. Throughout the subsequent chapters, other possible choices of legal instruments will be pointed out and discussed, subject to their appearance, to demonstrate the range of possibilities for the various regulatory objectives in the broader environmental law and policy field. Subsequently, the chapter will discuss the effectiveness of EU environmental law-making, its particular challenges and how environmental enforcement within the EU is not always an efficient means to implement environmental legislation.

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<sup>1</sup>Commission (2011), p. 1; Krämer (2012), p. 192.

<sup>2</sup>Cliquet et al. (2009), p. 158; Krämer (2013), p. 229; Clément (2015), p. 14.

<sup>3</sup>Art. 10 (2) Habitats Directive; Reid (2012), p. 209.

## 2.1 The Habitats Directive's Relevant Historical, European and International Environmental Law Context

In 1958, the European Economic Community (EEC) was founded. It was the precursor of the European Community (EC) established by the 1992 Treaty of Maastricht. The Treaty of Maastricht also founded the EU with its former three-pillars model (EC, Common Foreign and Security Policy, and Police and Judicial Cooperation). These pillars were eventually merged to one legal person, the EU by the 2009 Lisbon Treaty which introduced the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), the latter replacing the former Treaty establishing the European Community (EC Treaty).<sup>4</sup> The EU replaced the EC.

The EEC's founding members had two main ideas in mind.<sup>5</sup> One was to prevent future wars in Europe.<sup>6</sup> This aim had also been a motivating factor behind the earlier establishment of the Treaty on the European Coal and Steel Community (ECSC) in April 1951.<sup>7</sup> Its provisions for supranational cooperation in the coal and steel industries laid the foundation for a united Europe and secured peace.<sup>8</sup> The second major objective was an extended economic collaboration beyond coal and steel.<sup>9</sup> Hence, with the 1957 Treaty establishing the European Economic Community (Treaty of Rome, ToR), the EEC was founded.<sup>10</sup> Together with the European Atomic Energy Community (EURATOM), the ECSC and EEC formed what was known as the EC.<sup>11</sup>

In the following decades, the EEC's principal activity was the approximation and harmonisation of the Member States' laws on economic matters to establish the Common Market and to align competition policies.<sup>12</sup> While economic harmonisation had been the key task, other policy fields had been developed to provide a balance to the overtly economic aspirations, although they often had a linkage with economic considerations, i.e., were to support the establishment of the Common Market.<sup>13</sup> These 'horizontal and flanking' or 'non-economic'<sup>14</sup> policies

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<sup>4</sup>Reinisch (2012), p. 13; Oanta and Sindico (2012), p. 27.

<sup>5</sup>The original founding members are Belgium, France, West-Germany, Italy, Luxembourg and the Netherlands.

<sup>6</sup>Reinisch (2012), p. 1.

<sup>7</sup>Reinisch (2012), p. 4.

<sup>8</sup>Hontelez (2012), p. 664.

<sup>9</sup>Hontelez (2012), p. 664.

<sup>10</sup>Another treaty was signed at the same time. It established the European Atomic Energy Community (EURATOM) and is also referred to as 'Treaty of Rome'. For the purpose of this book, the term 'Treaty of Rome' only refers to the Treaty establishing the EEC.

<sup>11</sup>Reinisch (2012), p. 5.

<sup>12</sup>Witte (2008), pp. 306–307.

<sup>13</sup>Revesz (2000), p. 70; Mortelmans (2008), pp. 1087–1088.

<sup>14</sup>Mortelmans (2008), p. 1087.

included environmental policy.<sup>15</sup> The 1972 United Nations (UN) Conference on the Environment in Stockholm which acknowledged the international character of transboundary environmental problems such as water or air pollution was one of the factors for the EU triggering the consideration of environmental issues on European level for the first time.<sup>16</sup> Accordingly, there have been Community Environmental Action Programmes (EAP) since 1973,<sup>17</sup> the latest of them being currently the 8th EAP to 2030 which supports the environmental and climate change objectives of the Green Deal.<sup>18</sup> The Green Deal is the EU's current policy to tackle climate change, conserve biodiversity and foster sustainable yet competitive economic development.<sup>19</sup> It aspires to do so by, *inter alia*, making the food chain environmentally neutral or even positive and by identifying and implementing measures to mitigate ongoing biodiversity loss.<sup>20</sup> The implementation of the first EAP was visionary for the time.<sup>21</sup> It acknowledged the interdependence of economy and ecology and argued that environmental protection should be essential for the Community.<sup>22</sup> Although EAPs are non-binding soft law, their significance for interpretation of environmental goals has been constantly increasing.<sup>23</sup>

The drafting and application of the Habitats Directive has been informed by international nature conservation instruments, too.<sup>24</sup> Since the 1970s, on international level, the awareness for environmental issues has also grown and international law has produced a wide range of instruments aiming to tackle biodiversity loss.<sup>25</sup> These instruments may be categorise into three groups, according to their objectives.<sup>26</sup> The first group addresses the exploitation of biological resources such as fishery agreements, the second group aims at the protection of biodiversity such as the CBD and the third group has the objective to curb processes which negatively affect the biosphere, in particular, climate change.<sup>27</sup> However, different grouping is possible, for instance, according to their geographical range.<sup>28</sup> The EU is a party to many of them.<sup>29</sup>

<sup>15</sup>Sbragia and Hildebrand (1998), p. 217; Mortelmans (2008), p. 1088; Witte (2008), p. 308.

<sup>16</sup>Brusco Mackenzie (1994), pp. 71, 73; Hontelez (2012), p. 665; see also Brunée (1989), p. 799.

<sup>17</sup>Art. 192 (3) TFEU; Hontelez (2012), p. 666.

<sup>18</sup>Commission (2019); [https://ec.europa.eu/environment/strategy/environment-action-programme-2030\\_de](https://ec.europa.eu/environment/strategy/environment-action-programme-2030_de) (06.11.2023).; Krämer (2012), pp. 363–364.

<sup>19</sup>Commission (2019), p. 2.

<sup>20</sup>Commission (2020b), p. 7, (2019), p. 13.

<sup>21</sup>Hontelez (2012), p. 666.

<sup>22</sup>Hontelez (2012), p. 666.

<sup>23</sup>Arndt et al. (2015), p. 216.

<sup>24</sup>Trouwborst (2015), pp. 306–307.

<sup>25</sup>Richardson (2020), p. 1.

<sup>26</sup>de Sadeleer (2006), p. 352.

<sup>27</sup>de Sadeleer (2006), p. 352.

<sup>28</sup>Trouwborst (2015), pp. 306–307.

<sup>29</sup>Richardson (2020), p. 1.

One of the most significant international instruments that has influenced the rise and drafting of the Habitats as well as the Birds Directive is the Bern Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention).<sup>30</sup> 1 July 1978, the Council of Europe, an international human rights organisation, issued the Bern Convention.<sup>31</sup> The Convention's objective is to set up a pan-European nature conservation network, the 'Emerald Network'.<sup>32</sup> The EEC signed it on 19 September 1979 and ratified it on 07 May 1982. When the Bern Convention entered into force on 1 June 1982, it needed to be implemented into Community law.<sup>33</sup> The EU and its Member States are parties to the Bern Convention and both Nature Directives draw on its provisions, its wording and its approach to list species and habitats.<sup>34</sup>

Another international instrument also accelerated the eventual drafting of the Habitats Directive. The 1992 CBD to which the EU is also a party, promotes sustainable development recognizing that the conservation of biological diversity is needed to make sustainable development possible.<sup>35</sup> Its implementation into Community law took place by, *inter alia*, drafting the Habitats Directive. The CBD does not, however, solely deal with biodiversity conservation topics.<sup>36</sup> Another major area of concern of the CBD is sustainable development. The concept of sustainable development is a core principle of the 1992 Rio Declaration which followed the UN meeting in Rio de Janeiro, Brazil, to work towards international agreements for future cooperation of states. The Rio Declaration produced highly relevant environmental instruments, amongst them the CBD, the UN Framework Convention on Climate Change or the Agenda 21. It reaffirmed the 1972 Stockholm Declaration of the UN Conference on the Human Environment (Stockholm Declaration) and seeks to build upon it.<sup>37</sup>

The CBD is, however, a compromise between participating developing countries and developed states.<sup>38</sup> While developed states were aiming at producing a legally binding document which adequately conserves global biodiversity, developing countries focused on developmental concerns. This is why the CBD describes a development path which focuses on sustainable development.<sup>39</sup> However, doing so

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<sup>30</sup>Krämer (2002), p. 354; de Sadeleer (2006), p. 363; Schoukens and Bastmeijer (2015), p. 133; Trouwborst (2015), pp. 306–307; Bunge and Schumacher (2016), p. 309.

<sup>31</sup>Hacourt (1976), p. 234; Jen (1999), p. 225.

<sup>32</sup>European Environment Agency (2018), p. 5.

<sup>33</sup>Jones (2012), p. 19.

<sup>34</sup>Reid (1997), p. 200; Lasén Diaz (2001), p. 287; Jones (2012), p. 7; Trouwborst (2015), pp. 306–307; Bunge and Schumacher (2016), p. 309.

<sup>35</sup>The EU signed the CBD on 21 March 1994, ratified on 21 December 1993 and became a party on 21 March 1994, see [www.cbd.int/information/parties.shtml](http://www.cbd.int/information/parties.shtml) (06.11.2023), CBD list of parties (2023); Kriwoken et al. (2012), p. 88.

<sup>36</sup>MacKenzie (2012), pp. 28–29.

<sup>37</sup>Jolly (2017), p. 233.

<sup>38</sup>Jolly (2017), p. 234.

<sup>39</sup>CBD Principle 3, Rio Declaration.

it refers expressively to environmental protection.<sup>40</sup> The CBD requests in its Art. 8 (a) that:

each contracting party shall, as far as possible and as appropriate ( . . . ) [e]stablish a system of protected areas or areas where special measures need to be taken to conserve biological diversity.

The COP is the governing body of the CBD and meets regularly. The COP has provided definitions for many terms laid down in the CBD in the past and further developed its objectives.<sup>41</sup> During the regular COP meetings, the COP specifies the need for biodiversity protection in various ecosystems and also widens its application with regard to transboundary issues. In particular, during its 2000 COP-5 meeting in Nairobi, Kenya, the COP picked up the idea for a wholesome ecosystem approach to tackle biodiversity loss which had first been brought up in international environmental law in the 1980s.<sup>42</sup> COP-5 thus added considerably to the upcoming understanding that it is necessary to apply wholesome governance approaches to deal with environmental degradation issues rather than piecemeal or sectoral approaches.<sup>43</sup>

During the next meetings, the parties to the CBD addressed the need to protect the biodiversity of various ecosystems such as, for instance, forest biodiversity (COP-6), marine and coastal biodiversity (COP-7) and island biodiversity (COP-8).<sup>44</sup> During its 2008 COP-9 in Bonn, Germany, the COP specifically addressed the connection between biodiversity conservation needs and climate change and thus raised the awareness of the transboundary nature and the interconnectedness of various fields of environmental law.<sup>45</sup>

The 2010 COP-10 meeting in Nagoya, Japan, marks the birth of the Aichi Targets. The parties to the CBD adopted their Strategic Plan for Biodiversity 2011–2020 during this meeting which provides an overarching framework on policy development and biodiversity management for the entire UN as well as other partners.<sup>46</sup> The Strategic Plan contains the vision that

by 2050, biodiversity is valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people,

as well as the mission 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

<sup>40</sup> Atapattu (2001), p. 270; Jolly (2017), p. 234.

<sup>41</sup> CBD Handbook (2005), p. 90.

<sup>42</sup> Futhazar (2021), p. 113.

<sup>43</sup> Benson et al. (2011), p. 2; Futhazar (2021), pp. 111, 113.

<sup>44</sup> Benson et al. (2011), p. 2.

<sup>45</sup> Benson et al. (2011), p. 2.

<sup>46</sup> Tsioumani (2020), pp. 55–56.



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.

The strategic plan also includes the five Aichi Biodiversity Strategic Goals to protect global biodiversity with their twenty individual targets, most of them to be met by the year 2020, some earlier.<sup>47</sup> These are of particular interest against the background of the Habitats Directive's objective to set up a coherent biodiversity conservation network. The Aichi Targets include, *inter alia*, the objective to halve or bring closer to zero the loss of all natural habitats and the significant reduction of degradation and fragmentation (target 5), the increase of terrestrial and inland water conservation areas to minimum 17 % and of coastal and marine conservation to minimum 10 % with particular focus on areas important for biodiversity and ecosystem services. These shall form well-connected systems of protected areas and shall be integrated into the wider sea- and landscape (target 11). Further, the extinction of threatened species shall be prevented as well as their conservation status improved (target 12).<sup>48</sup>

Most of the Aichi Targets have not yet been fully met, though, including in the EU.<sup>49</sup> The failure to meet the Aichi objectives illustrates the highly complex nature of successful transboundary environmental action. The Green Deal has acknowledged the EU's failure to meet the Aichi Targets, too. One of its key elements, therefore, is the new Biodiversity Strategy for 2030 which aims to halt international biodiversity loss by, *inter alia*, improving transboundary Member States' cooperation regarding the setup and managing of Natura 2000.<sup>50</sup> The Biodiversity Strategy for 2030 acknowledges that although the EU has a legal framework and various action plans as well as strategies to tackle biodiversity loss, these instruments are patchy and not yet fully effective.<sup>51</sup> In particular, it refers to insufficient implementation and enforcement of the existing legal instruments, a topic which will also be discussed in greater detail in Chap. 5.<sup>52</sup> It further stresses that the EU needs to do more to build a coherent network of conservation sites, implying that the current Natura 2000 network is not yet as coherently set up as it should be.<sup>53</sup>

On international level, as well, the parties to the CBD started to switch from policy-making to implementing the Strategic Plan for Biodiversity 2011–2020 by, *inter alia*, adopting decisions on financially supporting developing countries in implementing the Aichi Targets.<sup>54</sup> However, during the mid-term review of the

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<sup>47</sup> Benson et al. (2011), p. 2.

<sup>48</sup> Aichi Targets, [www.cbd.int/sp/targets/](http://www.cbd.int/sp/targets/) (30.10.2023).

<sup>49</sup> Commission (2019), p. 13; Tsioumani (2020), p. 55.

<sup>50</sup> Commission (2020a), pp. 4–5.

<sup>51</sup> Commission (2020a), p. 3.

<sup>52</sup> Commission (2020a), p. 3.

<sup>53</sup> Commission (2020a), pp. 3–4.

<sup>54</sup> CBD COP-11 (2012), p. 109; Tsioumani (2012), pp. 298–299.

parties' progress towards the achievement of the Aichi Targets, the parties to the CBD already acknowledged that the progress is slow and that, in consequence, some of the targets will not be reached.<sup>55</sup>

During the 2016 COP-13 meeting in Cancun, Mexico, the CBD signatory parties then started to prepare the post-2020 global biodiversity framework.<sup>56</sup> The respective proposal was adopted by the 2018 COP-14 meeting in Sharm El-Sheikh, Egypt, for the preparation of the post-2020 global biodiversity framework in cooperation with the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES).<sup>57</sup>

The next meeting, COP-15, happened in Kunming, China, in October 2021, as well as Montreal, Canada.<sup>58</sup> A working group drafted the framework's main contents, the Zero Draft of the post-2020 biodiversity framework (Zero Draft). The Zero Draft built upon on the Strategic Plan for Biodiversity 2011–2020 and envisioned net improvements for the global biodiversity status by 2050.<sup>59</sup> It recognised the need for global, regional and national actions by governments as well as society to transform financial, social and economic models.<sup>60</sup> The draft has in the meantime been replaced by the final text of Kunming-Montreal Global Biodiversity Framework.<sup>61</sup> The post-2020 international biodiversity framework goals stress the need to increase connectivity and integrity of ecosystems and the reduction of threatens species' which are reiterations of Aichi key targets 11 and 12.<sup>62</sup> The post-2020 international biodiversity framework argues for an ecosystem approach to tackle ongoing biodiversity loss instead of focusing on individual environmental issues one by one. For the conservation of biodiversity, it requires action on global, regional and local level, as well as from various stakeholders.<sup>63</sup>

The Habitats Directive is a regional instrument as it is an EU Directive and thus contributes to the aspired ecosystem approach on regional level, as well as the local and national level as the Member States designate Natura 2000 sites nationally. During the second meeting of the Zero Draft Working Group in February 2020, Croatia on behalf of the EU stated that protecting the biodiversity is a challenge that calls for higher ambition and strong links with sustainable development goals-related

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<sup>55</sup> CBD COP-12 (2014), pp. 503, 505, 506.

<sup>56</sup> Tsioumani (2020), p. 56.

<sup>57</sup> CBD COP-14 (2018), Decision 14/36; Tsioumani (2020), p. 56.

<sup>58</sup> Tsioumani (2020), p. 56.

<sup>59</sup> Tsioumani (2020), p. 57.

<sup>60</sup> Tsioumani (2020), p. 57; the need for a whole-of-society-approach is also reflected in Commission (2020a), p. 16.

<sup>61</sup> CBD, COP/15/L25, Final Text of the Kunming-Montreal Global Biodiversity Framework (2022).

<sup>62</sup> Co-Chairs of the Working Group on the Post-2020 Global Biodiversity Framework (2020), Annex II. B. 10 (a) and D. A.1, A.2.

<sup>63</sup> Co-Chairs of the Working Group on the Post-2020 Global Biodiversity Framework (2020), Annex I. B. 3.

processes.<sup>64</sup> Croatia thus made clear that the EU is committed to protect biodiversity better than it currently does and strives to obey with the COP-decisions. Natura 2000 is generally understood to be the European implementation of this obligation.<sup>65</sup>

## 2.2 The Habitats Directive's Drafting Process

Within this historic and international context, the EU drafted and notified the Habitats Directive in the early 1990s. The legislative power for drafting the Habitats Directive was conferred upon the EEC by the 1987 Single European Act (SEA) which introduced a chapter on the environment into the Treaty.<sup>66</sup> Before the SEA, environmental legislation could only be enacted via Art. 100 and Art. 235 TFEU—jointly or separately—as legal basis.<sup>67</sup> Although the act had the primary objective to establish the Common Market by 1992, it also provided legislative powers for regulating environmental matters.<sup>68</sup> Its Art. 25 introduced today's Arts 191–193 TFEU into the ToR (formerly Arts 130r–130k).<sup>69</sup> While Art. 191 (1) TFEU (130r (1) ToR) contains the general objective 'to preserve, protect and improve the quality of the environment',<sup>70</sup> Art. 192 (2) TFEU confers the concrete legislative power to the Council:

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee (EESC) and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph.<sup>71</sup>

The EESC is a committee which is comprised of 'representatives of organisations of employers, of the employed, and of other parties' representative of civil society, notably in socioeconomic, civic, professional and cultural areas'.<sup>72</sup> The idea is to

<sup>64</sup>Tsioumani (2020), p. 58.

<sup>65</sup>Czybulka and Bosecke (2006), p. 34; Schoukens and Woldendorp (2015), p. 32; Bunge and Schumacher (2016), p. 310.

<sup>66</sup>Brusco Mackenzie (1994), p. 75; Sbragia and Hildebrand (1998), p. 217; Hontelez (2012), p. 666.

<sup>67</sup>Brusco Mackenzie (1994), p. 74; Reid (1997), pp. 199–200; Jackson (2020), p. 33.

<sup>68</sup>Mortelmans (2008), p. 1089; Witte (2008), pp. 308, 312; Fontaine (2014), p. 21; Jackson (2020), p. 86.

<sup>69</sup>If not specifically indicated, the former Articles which were in force at that time will be cited in brackets.

<sup>70</sup>Art. 130 (r) contained some principles which were first laid down in the first EAP 1973, see Brusco Mackenzie (1994), p. 73.

<sup>71</sup>The wording of the historic version, Art. 130s (1) ToR was:

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the European Economic and Social Committee, shall decide what action is to be taken by the Community.

<sup>72</sup>Art. 300 (2) TFEU.

have input from these various strands of civil society into the EU law-making process.<sup>73</sup>

On 16 August 1988, the Commission submitted the first proposal of the Habitats Directive, the 'Proposal for a Council Directive on the Protection of Natural and Semi-Natural Habitats and of Wild Fauna and Flora'.<sup>74</sup> Its objective was to establish 'a network of protected wildlife areas throughout the Community' by the year 2000 to ensure more effective implementation of the Bern Convention's provisions.<sup>75</sup> The Habitats Directive's initial proposal was different from today's Habitat Directive. In particular, with regard to the rules on the designation of the conservation network, it had a different setup and terminology.<sup>76</sup> For instance, it used the term SPA, which is the same term the Birds Directive employs, instead of the later introduced terms 'sites of community importance' (SCI) and SAC). It also spoke of 'classification' instead of 'designation' of conservation sites.<sup>77</sup> Still lacking, however, were relevant rules on protecting the habitats of the species to be protected under the new Directive. The EESC strongly criticised this lack in its opinion on the proposal reasoning that the proposal's section on habitats protection was of utmost importance as the lack of relevant rules on protecting the habitats and not only the individual species was a major flaw of the previously drafted Birds Directive as well as several other international instruments.<sup>78</sup> Consequently, the draft proposal of the Habitats Directive underwent refurbishing and eventually, the detailed rules on how to designate the Natura 2000 network found their way into the proposal's text.<sup>79</sup>

As the ToR was concluded primarily to establish an economic community amongst the EEC Member States, it focused on the unification of Member States'

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<sup>73</sup>Reinisch (2012), p. 37.

<sup>74</sup>Proposal for a Council Directive on the Protection of Natural and Semi-Natural Habitats and of Wild Fauna and Flora (OJ No. C 247/3).

<sup>75</sup>Economic and Social Committee, OJ C 31/1 (1991), para. 1.2.; Czybulka and Bosecke (2006), p. 34; Epstein (2013), p. 556; Schoukens and Bastmeijer (2015), p. 133.

<sup>76</sup>The rules on designation or 'classification' were not compiled in one Article but allocated in Art. 4–6 of the proposal. Also, the rules on designation and management of sites were intertwined, see also there.

<sup>77</sup>Art. 5 Proposal for a Council Directive on the Protection of Natural and Semi-Natural Habitats and of Wild Fauna and Flora (OJ No. C 247/3); however, the Habitats Directive is not consistent in its wording. It uses both the terms 'designation' and '(de-) classification', see e.g. Art. 4 (4), Art. 9 and Annex III (Stage 1), C. to the Habitats Directive; the CJEU also accepts and uses both terms in the context of the Habitats Directive see e.g. CJEU, Case C-301/12, mn. 23–29, 35–36; CJEU, Case C-226/08, mn. 31.

<sup>78</sup>The committee's consultation was required under Art. 130s (1) SEA; today it is required under Art. 192 (1) TFEU; Council (1991) Outcomes of Proceedings on 12 December 1991 on the Amended Proposal for a Council Directive on the Conservation of Natural and Semi-Natural Habitats and of Wild Fauna and Flora, pp. 7–9.

<sup>79</sup>Economic and Social Committee, OJ C 31/1 (1991); Council (1991) Outcomes of Proceedings on 12 December 1991 on the Amended Proposal for a Council Directive on the Conservation of Natural and Semi-Natural Habitats and of Wild Fauna and Flora, pp. 7–9.