

Strengthening compliance under the Convention on Biological Diversity: Comparing prospects for follow-up and review with the global climate regime

The Implementation of the 2015 Paris Agreement on Climate Change

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5 Strengthening compliance under the Convention on Biological Diversity

Comparing follow-up and review systems with the global climate regime

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Introduction

The Convention on Biological Diversity (CBD) and the United Nations Framework Convention on Climate Change (UNFCCC) were the two treaty outcomes of the United Nations Conference on Environment and Development (UNCED) – also referred to as the Earth Summit – held in Rio de Janeiro in 1992. Similar to the central role of the UNFCCC in the international community’s response to climate change, the CBD has become a key instrument for addressing biodiversity loss in the international political arena. Twenty-five years later, the CBD remains the most comprehensive international treaty to address biodiversity issues, from conservation to sustainable use, including considerations on fairness and equity. Yet the CBD has been criticized as an ineffective instrument, both for failing to achieve its objectives and for having little impact on states’ practice (i.e., showing a low degree of compliance)¹.

Assessing the effectiveness of the CBD in terms of solving the problem it was created to address (i.e., whether biodiversity is conserved at acceptable levels) is challenging. Biological systems are complex, and data needed to evaluate the (changing) status of biodiversity is often unavailable or out-dated². Moreover, ecological processes occur over time, hence the impact of (stopping) detrimental activities is not necessarily observed as an immediate recovery, increase or further loss of biodiversity³. And finally, establishing cause-effect linkages between

1 See Morgera, E. and Tsionami, E. (2011). “Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity”, *Yearbook of International Environmental Law*, 21, pp. 3–40 for a detailed analysis on the trajectory of the CBD

2 See Collen, B. *et al.* (2013), “Biodiversity Monitoring and Conservation: Bridging the Gap between Global Commitment and Local Action”, in Collen, B., Pettorelli, N., Baillie, J.E.M. and Durant, S.M. (eds.) *Biodiversity Monitoring and Conservation: Bridging the Gap between Global Commitment and Local Action*, John Wiley & Sons, for an overview of the challenges of monitoring and assessing the status of biodiversity

3 Jones, J.P.G. *et al.* (2011), “The why, what and how of global biodiversity indicators beyond the 2010 target”, *Conservation Biology*, 25, pp. 450–457

a policy and impact is difficult and requires a combination of methodological approaches.⁴ Despite these considerations, evidence consistently reveals that biodiversity is not only declining as a consequence of increasing human pressures⁵, but also that biodiversity loss is occurring at unprecedented rates⁶, and is not showing signs of relenting⁷. This clearly indicates the failure of the CBD in solving the biodiversity crisis. However, this poor record in overall outcome effectiveness does not necessarily mean that the CBD does not have any influence on the behaviour of states, such as in eliciting their compliance towards their commitments under the CBD.

Our objective in this chapter is to: analyze the strategies for reviewing compliance and implementation within the CBD, particularly under the Strategic Plan for Biodiversity 2011–2020; and, when appropriate, compare them to the approach followed in the UNFCCC, particularly the Paris Agreement adopted under the UNFCCC in 2015. Such comparison is timely considering that both the CBD and the PA are in a process of elaborating their modalities for follow-up and review.

Principles, obligations and institutional arrangements under the CBD

The CBD opened for signature at UNCED in 1992, and entered into force in 1993. The CBD has gained near worldwide participation, with 196 contracting parties⁸. The CBD is a treaty with three objectives: the conservation of biodiversity; the sustainable use of the components of biodiversity; and the equitable sharing of the benefits derived from the use of genetic resources (Article 1). These three core objectives are framed within the overarching principles of national sovereignty and international co-operation (Articles 3–5), and translated into binding operational commitments (Articles 6–22), as well as into arrangements for further institutional development and follow-up on implementation (Articles 23–42).

As reflected in the core objectives, the Convention has a very broad scope. This wide remit was the result of a troublesome North-South divide at the time

4 Young, O.R. (2011), “Effectiveness of international environmental regimes: Existing knowledge, cutting-edge themes, and research strategies”, *Proceedings of the National Academy of Sciences*, 108 (50), pp. 19853–19860

5 See for example: Butchart, S.H.M. *et al.* (2010), “Global biodiversity: indicators of recent declines”, *Science*, 328 (5982), pp. 1164–1168; and Mace, G.M. & Baillie, J.E.M. (2007) “The 2010 biodiversity indicators: challenges for science and policy”, *Conservation Biology*, 21 (6), pp. 1406–1413

6 See for example: *Global Biodiversity Outlook 3* (2010), Secretariat of the Convention on Biological Diversity, Montréal, 94 pp.; and *Millennium Ecosystem Assessment (2005) Ecosystems and Human Wellbeing: Biodiversity Synthesis*, Washington DC: World Resources Institute

7 See for example: Pereira, H.M. *et al.* (2010), “Scenarios for global biodiversity in the 21st century”, *Science*, 330 (6010), pp. 1496–1501

8 Status as at 12 November 2016

of framing of the CBD⁹. During the negotiation phase of the Convention, whilst developed countries were in favour of a strong conservation approach to halt biodiversity loss, developing countries advocated for their sovereign right to use biodiversity as a means to enhance social and economical development. To make the situation even more conflicting, whilst biodiversity tends to be abundant in developing countries, the technologies to exploit and profit from biodiversity are mostly owned by developed countries. Therefore, developing countries were also concerned about securing mechanisms for the transfer of financial resources and technology and the equitable sharing of benefits. Thus, if an agreement was to be reached for the CBD, a broad remit was needed in order to reunite opposed interests (i.e., exploitation vs. conservation approaches) of varied nature (i.e., environmental, social, economic) and sensitive character (i.e., fairness, transparency, sovereignty)^{10,11}. A notable consequence of these conflicting interests was the reluctance of the United States to ratify the CBD after actively having participated in the negotiations¹². Furthermore, although apparently reconciled in a vague and ambiguous text, the North-South divide has prevailed within the CBD, and has become even more evident during the strategic phase, when concrete action programmes for the implementation of the CBD have been developed¹³. These considerations will be revisited from several perspectives in the paragraphs below.

Obligations and responsibilities: Articles 6–22

The obligations contained in Articles 6 to 22 for the operationalization of the core objectives of the CBD, along with Article 26 on national reporting, define well-differentiated collective and individual-state responsibilities. In some cases collective responsibilities concern only parties from a certain kind of country on the basis of their capability to comply with those specific obligations (i.e., most often developed and developing countries). In doing so, the CBD implicitly recognises the principle of *common but differentiated responsibilities* for the conservation, sustainable use and equitable sharing of benefits arising from

9 For an account of the negotiations that led to adoption of the CBD, see: McConnell, F. (1996), *The Biodiversity Convention: A Negotiating History*, Kluwer Law International; and Koester, V. (1997), “The Biodiversity Convention Negotiation Process and Some Comments on the Outcome”, *Environmental Policy and Law*, 27 (3), pp. 175–192

10 Eser, U. *et al.* (2014), “Prudence, Justice and the Good Life: A typology of ethical reasoning in selected European national biodiversity strategies”, Bundesamt für Naturschutz (BfN) / Federal Agency for Nature Conservation, Bonn, Germany

11 Neßhöver, C. *et al.* (2015), “Biodiversity governance – A global perspective from the Convention on Biological Diversity”, in Gasparatos, A. and Willis, K.J. (eds.) *Biodiversity in the Green Economy*, London: Taylor & Francis

12 See McConnell, F., see note 9

13 See Eser, U. *et al.*, see note 10, for an analysis of the implications of using the term ‘biodiversity’ as a boundary object; and Neßhöver, C. *et al.*, see note 11, for an account of the institutional trajectory of the CBD

biodiversity¹⁴. Accordingly, the various obligations in the treaty call upon: ‘*each Party*’, ‘*the Parties*’, or country parties with distinctive characteristics (e.g., environmentally vulnerable countries, countries rich in biodiversity, country owners of the means to make use and profit out of biodiversity, etc.) and/or capacities or needs (i.e., developed countries, developing countries, least-developed countries).

Obligations targeting parties on an individual-state basis refer to the commitments that each party shall fulfil at the national level in order to effectively comply with the Convention and thus contribute to the global achievement of the core objectives of the CBD¹⁵. Among such obligations for each party are those to: develop national strategies, plans or programmes including mainstreaming biodiversity conservation and sustainable use into relevant sectors (Article 6); monitor the state of biodiversity at the country level (Article 7); conserve biodiversity, including through the adoption of social and economic incentives (Article 8, 9 and 11); take measures for the sustainable use of biodiversity (Article 10); assess impacts of national programmes and policies on biodiversity and, where relevant, minimize those impacts with adverse consequences (Article 14); and report on measures taken towards the implementation of the Convention and their effectiveness (Article 26).

In comparison to individual-state obligations, collective responsibilities derive from the commitments of parties to co-operate with one another in ways that enable the achievement of the overarching objectives of the Convention. They include, but are not limited to, the responsibility that developed countries have towards developing countries to facilitate enabling means to comply with the commitments acquired under the Convention. Thus, obligations calling on ‘the Parties’ are hereby categorised within two different types: those entailing responsibilities that concern all parties alike, or *collective responsibilities*, and those encompassing distinctive responsibilities for a well-defined group of parties, or *common but differentiated responsibilities* (CBDRs). On the one hand, collective responsibilities among parties include obligations to: raise the profile of biodiversity through education and public awareness (Article 13); exchange information (i.e., technical, scientific and socio-economic research; on surveying programmes and techniques; specialised knowledge; indigenous and traditional knowledge) (Article 17); and to strengthen existing financial institutions to provide resources for the conservation and sustainable use of biodiversity (Article 21). On the other hand, examples of CBDRs in the CBD include obligations to: provide and facilitate research and training (Article 12), and provide financial resources (Article 20). Specifically, the CBDR principle is stressed in obligations concerning the third objective of the Convention on the equitable sharing of benefits arising from the use of biodiversity, such as: Article 15, on access to genetic resources;

14 See Rajamani, L. (2006), *Differential Treatment in International Environmental Law*, Oxford, Oxford University Press, for an overview of the use of this principle in different treaties

15 From a perspective of international law, binding obligations are only created from the verb ‘shall’ (ref). We, however, take a broader approach by looking at the variety of actions that

Article 16, on access to and transfer of technology; and Article 19, on handling of biotechnology and distribution of its benefits. In the CBD, CBDRs comprise additional responsibilities for developed countries; hence developed countries are expected to have more obligations than developing countries.

As mentioned above, a vague and ambiguous text was necessary to secure the adoption of the Convention¹⁶. However, besides vague and ambiguous, the text of the CBD has been characterised as being beleaguered by escape clauses¹⁷. According to Harrop and Pritchard¹⁸, ‘most articles of the CBD contain provisions which are expressed in imprecise language or over-qualified terms which enable member states to implement these provisions in virtually any manner they wish, whether challenging or not’¹⁹. For instance, we have identified that most of the CBD’s obligations that individually target states include statements such as ‘as far as possible and as appropriate’, ‘in accordance with its particular conditions and capabilities’, ‘in accordance with its capabilities’, ‘in accordance with national legislation and policies’ and ‘subject to national legislation and international law’. Similarly, Harrop and Pritchard also point out that the obligations specified in the text of the Convention – expressed in terms of ‘shall’ and ‘will’ – are often diluted by the concomitant use of ‘subject to national legislation’, ‘subject to patent law’, ‘as far as possible’ and ‘as appropriate’. In all, these caveats reflect a low degree of obligation imposed on parties by the CBD.

Unlike the UNFCCC, the CBD is not explicitly called a framework convention; however, some scholars do refer to the CBD as such²⁰. As with the UNFCCC, the framework character of the CBD concedes flexibility for country parties to decide, at their discretion, the specific measures they will adopt to translate the obligations of the Convention into the national context. This is reflected, for instance, in Article 6, which stipulates the development of Natural Biodiversity and Actions Plans (NBSAPs) – the key instrument to implement the CBD at the country level – subject to the ‘particular conditions and capabilities’ of each country party and addressing issues they consider ‘relevant’.

Institutional arrangements

For the more than 20 years that the CBD has been in force, it has undergone continuous institutional development guided by the specifications contained in

are given as responsibilities to states in the treaty text and other CBD documents (e.g., COP decisions)

16 See Eser, U. *et al.* and Neßhöver, C. in note 13

17 Rautiala, K. (1997), “Domestic institutions and international regulatory cooperation: comparative responses to the convention on biological diversity”, *World Politics*, 49 (4), pp. 482–509

18 Harrop, S.R. & Pritchard, D.J. (2011), “A hard instrument goes soft: The implications of the Convention on Biological Diversity’s current trajectory”, *Global Environmental Change*, 21, pp. 474–480

19 See Harrop, S.R. & Pritchard, D.J., p. 476, in note 18

20 See for example: Glowka, L. *et al.* (1994), “A guide to the Convention on Biological Diversity”, Global Biodiversity Strategy Environmental Law and Policy paper No 30. IUCN Environmental

Articles 23 to 42. This includes, *inter alia*, the adoption of two supplementary legal agreements to the Convention in accordance with Article 28 on adoption of Protocols, namely: the *Cartagena Protocol on Biosafety* and the *Nagoya Protocol on Access and Benefit Sharing*. The former entered into force in 2003, and has been ratified by 170 parties²¹. Its overarching objective is the protection of biological diversity from the potential risks posed by the development and introduction of living modified organisms. The latter entered into force in 2014, and has been ratified by 89 parties²². It seeks fair and equitable sharing of the benefits arising from the utilisation of genetic resources, including the appropriate access to genetic resources and the appropriate transfer of relevant technologies.

However, it is not through these legal agreements that the CBD has primarily endeavoured to achieve its objectives. On the one hand, the Cartagena Protocol is highly narrow in its objective and, as a result, has been considered by some scholars as a disjointed process in relation to the overarching objectives of the Convention²³. Although the Cartagena Protocol derives from Article 8(h) on the risks posed on biodiversity by alien species, it has been accused of being driven by commercial interests arising from biotechnology markets, rather than by the conservation concerns associated with the management of alien species (including genetically modified organisms). On the other hand, the Nagoya Protocol derives from the third objective of the CBD on the fair and equitable sharing of benefits. Specifically, it deals with the definition of intellectual property rights of biodiversity – a conflict deriving from abusive practices of ‘bio-prospecting’ or ‘bio-piracy’²⁴. Although it is early to assess the impact of the Nagoya Protocol – since it entered into force in 2014, and almost half of the parties are yet to ratify it – the Nagoya Protocol represents an important instrument for the operationalization of the third objective of the Convention²⁵. However, as illustrated above, the Cartagena Protocol and the Nagoya Protocol both fail to comprehensively address the three core objectives of the CBD, particularly concerning the first objective on biodiversity conservation²⁶.

The international community expected that subsidiary protocols would come into being (as stipulated in Article 28) so as to back up the vague commitments scattered in the text of the Convention with more precise obligations for

Law Centre, IUCN Biodiversity Programme; Harrop, S.R. & Pritchard, D.J. in note 18; Sand, P.H. (1993), “International law after Rio”, *European Journal of International Law*, 4, pp. 377–389

21 Status as at 12 November 2016

22 Status as at 12 November 2016

23 See Morgera, E. and Tsiouami, E. in note 1

24 See Harrop, S.R. and Pritchard, D.J. in note 18

25 For a detailed analysis of the implications of the Nagoya Protocol, see Morgera, E. *et al.* (2014), *Unraveling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity*, Legal Studies on Access and Benefit-Sharing, Martinus Nijhoff; available at DOI: 10.1163/9789004217188

26 See Harrop, S.R. and Pritchard, D.J., in note 18

parties²⁷; however, this has not materialised. As a matter of fact, the CBD has been characterised as relying on non-binding goals and targets for the implementation of its core objectives²⁸, even when targets or time-frames were not part of the text of the Convention nor were they envisaged as part of the institutional arrangements of the CBD²⁹.

In 2002, after almost ten years – in which the parties were primarily focused on negotiating and defining the operational rules of the Convention³⁰ – the Conference of the Parties finally moved towards the operationalization path with the adoption of the first Strategic Plan for Biodiversity³¹. Under the overarching (and very unspecific) goal of ‘[achieving] by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on earth’³², the Strategic Plan for Biodiversity 2002–2010 comprised 19 objectives grouped under four operational goals. The Strategic Plan for Biodiversity 2002–2010 was intended to guide an effective and coherent implementation of the three core objectives of the CBD at the national, regional and global levels; yet none of the objectives comprised numerical targets or deadlines. As such, the first strategic plan of the CBD was criticised on several fronts. From a biological standpoint, the scientific community argued that the achievement of the 2010 Biodiversity Target was compromised from the very beginning, owing to the short time span in which a *significant* reduction of biodiversity loss should be not only achieved, but also assessed³³. Furthermore, no reference was made to the parameters against which the reduction of the *current*, yet unspecified, rate of biodiversity loss should be assessed³⁴. From a policy perspective, the Strategic Plan was deemed as vague and unspecific (i.e., the goals and objectives were not measurable or verifiable), and not action-orientated³⁵. The goals and targets largely repeated the already vague commitments of the Convention without contributing to add any strength³⁶, and did not refer to the underlying drivers of biodiversity that needed to be addressed³⁷. Ultimately, the prospect of

27 See for example: Bragdon, S. (1996), “The convention on biological diversity”, *Global Environmental Change*, 6 (2), pp. 177–179; and Sand, P.H. in note 20

28 See Harrop, S.R. and Pritchard, D.J. in note 18; and Morgera, E. and Tsiounami, E. in note 1

29 See Glowka, L. *et al.* in note 20

30 See Neßhöver, C. *et al.* in note 11

31 Convention on Biological Diversity; Decision of the Conference of the Parties VI/26: *Strategic Plan for the Convention on Biological Diversity*. UNEP/CBD/COP/DEC/VI/26 (April 2002); available from: www.cbd.int/doc/decisions/cop-10/cop-10-dec-02-en.pdf (accessed 12 November 2016)

32 See note 31: CBD/COP/DEC/VI/26, Annex, para. 11

33 See Collen, B. *et al.* in note 2

34 Mace, G.M. *et al.* (2010), “Biodiversity targets after 2010. Current Opinion”, in *Environmental Sustainability*, 2, pp. 1–6

35 See Collen, B. *et al.* in note 2; and Harrop, S.R. and Pritchard, D. J. in note 18

36 See Harrop, S.R. and Pritchard, D.J. in note 18

37 See Collen, B. *et al.* in note 2

translating global commitments into national and local actions and measures was very remote³⁸.

Furthermore, with the adoption of the Strategic Plan for Biodiversity 2002–2010, the need to facilitate a mechanism for evaluation of progress in implementing the Convention (i.e., as in assessing and effectively communicating progress towards the 2010 target) was formally recognised for the first time. Accordingly, in decision VII/30³⁹, a framework to enhance the evaluation and effective communication of achievements and progress in implementation of the CBD, as well as trends in biodiversity. It involved the development of a limited number of trial indicators – for which data was available at the time – and the establishment of a process for identifying, developing, reviewing and/or testing indicators and for reporting progress (i.e., through the Global Biodiversity Outlook⁴⁰ – GBO). Parties were called to develop national targets that reflected national circumstances whilst at the same time being in line with the global targets of the framework. Parties were also called to integrate those country targets into their National Biodiversity Strategies and Action Plans (NBSAPs). However, this flexible framework did not achieve its purpose. By 2010 not only was the implementation of NBSAPs low, but also only a minority of countries had established national targets⁴¹. Moreover, many indicators were not developed in time⁴². Information arising from these processes was envisaged as a tool to identify obstacles encountered in the implementation of NBSAPs, and accordingly to provide supporting mechanisms to parties (i.e., capacity-building, and resource and technology transfer).

38 Mace, G.M. and Baillie, J.E.M. in note 5

39 Convention on Biological Diversity, Decision of the Conference of the Parties VII/30: *Strategic Plan: future evaluation of progress*. UNEP/CBD/COP/DEC/VII/30 (13 April 2004); available from: www.cbd.int/doc/decisions/cop-07/cop-07-dec-30-en.pdf (accessed: 12 November 2016). This framework for the monitoring of progress towards the achievement of the 2010 Biodiversity Target was refined in the eighth meeting of the Conference of the Parties held in 2006. For details see: Convention on Biological Diversity, Decision of the Conference of the Parties VIII/15: *Framework for monitoring implementation of the achievement of the 2010 target and integration of targets into the thematic programmes of work*. UNEP/CBD/COP/DEC/VIII/15 (15 June 2006); available from: www.cbd.int/doc/decisions/cop-08/cop-08-dec-15-en.pdf (accessed 12 November 2016)

40 The Global Biodiversity Outlook is the periodic flagship publication of the Secretariat of the Convention on Biological Diversity. It comprises a periodic report *inter alia* providing: a summary of the status and trends of biological diversity at the global and supranational regional level; an analysis of the global and regional trends in implementation of the objectives of the Convention; and a summary of the implementation of the Convention at the national level on the basis of the information contained in national reports and other up-to-date scientific data

41 Convention on Biological Diversity. Note by the Executive General: Implementation of the Convention and the Strategic Plan and Progress towards the 2010 Biodiversity Target UNEP/CBD/COP/10/8 (31 July 2010); available from: www.cbd.int/doc/meetings/cop/cop-10/official/cop-10-08-en.pdf (accessed 12 January 2016)

42 Walpole, M. *et al.* (2009), “Tracking progress toward the 2010”, *Science*, 325 (5947), pp. 1503–1504

Articles 7 and 26 provide specifications for parties to monitor and assess the status of biodiversity and the impact of measures adopted, and subsequently report on progress and challenges, respectively. Despite this, follow-up mechanisms in the CBD are weak, and not systematic. The Conference of the Parties is the body responsible for reviewing the implementation of the Convention (Article 23). Unfortunately, its role has been rather passive: instead of reviewing national reports in plenary sessions, the COP has limited its actions to provide summaries of conclusions drawn from the syntheses of national reports prepared by the Secretariat and from the Global Biodiversity Outlook⁴³. Although these summaries provide general feedback in the form of trends in implementation and indications to define the course of action, they do not entail the review by peers and/or other actors of the (lack of) actions taken by states to comply with the CBD. Thus, the COP has not provided an arena for asking parties about their (lack of) actions, nor have parties had the opportunity to openly explain and justify the reasons of such an outcome. In short, the CBD has not had an arena for enacting accountability among parties⁴⁴. One of the consequences is that the COP is unable to identify countries in need of support, and peer-learning is not enabled.

In 2010, when the Strategic Plan for Biodiversity 2002–2010 was due, the third edition of the GBO⁴⁵ – based on national reports and the latest scientific data on status and trends of biodiversity – concluded that the 2010 Biodiversity Target had not been met at the global level. The publication also assessed the causes for the failure, analyzed future scenarios for biodiversity, and reviewed possible actions that might be undertaken to reduce future loss. It specifically stated that the scale of actions taken until that moment was not sufficient to reduce the underlying drivers of biodiversity loss as a consequence of inappropriate integration of biodiversity issues into broader policies, strategies, programmes and actions. Furthermore, most parties identified a lack of financial, human and technical resources as a factor limiting the appropriate implementation of the Convention. For example, technology transfer was considered to be very limited and scientific information for policy- and decision-making insufficient⁴⁶. The conclusions drawn from the GBO 3 pointed out the underpinning role of biodiversity in ecosystem functioning and the provision of ecosystem services essential for human well-being, which in turn was related to the

43 See Morgera, R. and Tsunami, E. in note 1

44 For an overview on the relational character of accountability dynamics, see: Bovens, M. (2007), “Analysing and Assessing Accountability: A Conceptual Framework”, *European Law Journal*, 13, pp. 447–468; Mashaw, J.L. (2006), “Accountability and Institutional Design: Some Thoughts on the Grammar of Governance”, in: Michael, D. (ed.) *Public Accountability: Designs, Dilemmas and Experiences*, Cambridge University Press; and Steffek, J. (2010), “Public Accountability and the Public Sphere of International Governance”, *Ethics & International Affairs*, 24, pp. 45–68

45 See GBO 3, in note 6

46 See CBD/COP/10/8 in note 41

achievement of the MDGs (millennium developments goals), including poverty reduction. These considerations were crucial elements in shaping the subsequent Strategic Plan for Biodiversity 2011–2020.

After the failure in achieving the Biodiversity Goal 2010, a successive strategic plan was adopted in 2010 for the period 2011–2020⁴⁷. The CBD considers the Strategic Plan for Biodiversity 2011–2020 as a milestone in achieving its long-term vision of ‘Living in harmony with nature’, where ‘By 2050, biodiversity is valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people’⁴⁸. For that purpose, the Strategic Plan for Biodiversity 2011–2020, similar to its predecessor, was envisaged as an instrument to promote effective implementation of the Convention through a strategic approach. In this case, the strategy relied on five strategic goals, 20 targets (the ‘Aichi Biodiversity Targets’) and a set of 168 indicators (those established under decisions VII/30 and VIII/15⁴⁹, until revised indicators were available).

Given the poor outcome of the Strategic Plan 2010, some scholars questioned why the CBD, for the second time, directed its institutional efforts towards adopting an approach based on non-binding goals and targets⁵⁰. Some other scholars focused on the lessons learned from the process and how future approaches could be built upon⁵¹. In this regard, it becomes relevant to review whether the shortcomings identified in the Strategic Plan 2010 were, at least to some extent, addressed in the new Strategic Plan 2020. Referring to the Strategic Plan 2010, Harrop and Pritchard had pointed out, ‘the product of a pre-negotiation agreement rather than the outcome of an established convention’⁵²; however, this does not seem to be the case with the new plan, which appears more robust on paper. It contains a separate section on implementation, monitoring, review and evaluation, as well as a section on supporting mechanisms. Moreover, all the Aichi targets explicitly refer to a desired ‘end point’ by 2020 – although only three of them set numerical standards or refer to measurable rates and comparable baselines to define ‘success’ by 2020. Thus, although most of the Aichi targets struggle to classify as ‘specific’ or ‘measurable’, they at least refer to the achievement of points where ecosystems are functional, constantly emphasizing the link between biodiversity, ecosystem services and human well-being – a welcome approach⁵³. Similarly, the Strategic Plan does not only aim to reduce

47 Convention on Biological Diversity, Decision of the Conference of the Parties X/2: *The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets*. UNEP/CBD/COP/DEC/X/2 (29 October 2010); available from: www.cbd.int/doc/decisions/cop-10/cop-10-dec-02-en.pdf (accessed 12 November 2016)

48 See note 47: CBD/COP/DEC/X/2, Annex, p. 7, para. 11

49 See CBD/COP/DEC/VII/30 and CBD/COP/DEC/VIII/15 in note 39

50 See Harrop, S.R. and Pritchard, D.J. in note 18

51 See Jones, J.P.G. *et al.* in note 3; and Mace, G.M. *et al.* in note 34

52 See Harrop, S.R. and Pritchard, D.J., p. 477, in note 18

53 Mace, G.M. *et al.* (2013), “Science to Policy Linkages for the Post-2010 Biodiversity Targets”, in Collen, B., Pettorelli, N., Baillie, J.E.M. & Durant, S.M. (eds.), *Biodiversity Monitoring and*

pressures on biodiversity but also refers – although in a broad manner – to the drivers of biodiversity loss⁵⁴. This means that the new targets openly addressed sensitive, but critical issues avoided by the CBD until that moment (i.e., sustainable management of commercial fisheries, and the regulation of incentives with impacts on biodiversity)⁵⁵. Moreover, Target 20 refers to increasing the mobilisation of resources for effectively implementing the Strategic Plan for Biodiversity 2011–2020, and specifically refers to the Strategy on Resource Mobilisation⁵⁶.

It must also be noted that while some aspects of the Strategic Plan, other than those mentioned above, were ‘updated’, they still remained very similar to the features of its predecessor. For instance, recognising differential national circumstances and capabilities across parties, the Strategic Plan provided a flexible framework consisting of goals, targets and indicators. Parties were invited to set targets at the national or regional levels, based on national needs and priorities, which were to contribute to the achievement of the global targets. As in the Strategic Plan 2010, the need to continue strengthening the ability to monitor biodiversity at all levels was reinforced⁵⁷. Accordingly, while updating NBSAPs and in national reporting thereafter, parties were encouraged to use indicators that were ready for application at the global level⁵⁸; consequently an updated list of indicators was provided in 2012⁵⁹. Concerning the latter, availability of relevant, credible and solid data-grounded indicators – with specific links to individual targets and clear links to biodiversity status – increased when compared to the Strategic Plan 2010⁶⁰. The flexible framework of targets and indicators reflecting/adapted to national circumstances was proposed to be used by parties not only for monitoring and assessing the status of biodiversity, but also in national reporting. Had ‘tailored’ targets and indicators been explicitly used in national reports, as envisaged by the CBD, the COP would have had a better opportunity to follow up on national progress and identify challenges encountered by parties.

Conservation: Bridging the Gap between Global Commitment and Local Action, John Wiley & Sons, for an overview of the challenges of monitoring and assessing the status of biodiversity

54 See Mace, G.M. *et al.* in note 53

55 See Harrop, S.R. and Pritchard, D.J. in note 18

56 Convention on Biological Diversity, Decision of the Conference of the Parties IX/31: Financial Mechanism. UNEP/CBD/COP/DEC/IX/31 (9 October 2008); available from: www.cbd.int/doc/decisions/cop-10/cop-10-dec-02-en.pdf (accessed 12 November 2016)

57 In accordance with decision X/7. See Convention on Biological Diversity, Decision of the Conference of the Parties X/7: *Examination of the outcome-oriented goals and targets (and associated indicators) and consideration of their possible adjustment for the period beyond 2010*. UNEP/CBD/COP/DEC/X/7 (29 October 2010); available from: www.cbd.int/doc/decisions/cop-10/cop-10-dec-07-en.pdf (accessed 12 November 2016)

58 See note 39: headline indicators as defined in CBD/COP/DEC/VII/30 and CBD/COP/DEC/VIII/15

59 Convention on Biological Diversity, Decision of the Conference of the Parties XI/3: *Monitoring progress in implementation of the Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets*. UNEP/CBD/COP/DEC/XI/3 (5 December 2012); available from: www.cbd.int/doc/decisions/cop-11/cop-11-dec-03-en.pdf (accessed 12 November 2016)

60 Tittensor, D.P. *et al.* (2014), “A mid-term analysis of progress toward international biodiversity targets”, *Science*, 346, pp. 241–244

As national reports are to be written in accordance with agreed guidelines⁶¹, information provided in national reports, although ‘tailored’ to reflect national circumstances, would still provide a common ground for the review of progress at the regional and global levels (i.e., through the GBO, which in turn heavily relies on information provided in national reports to identify global trends). On the basis of the principle of ‘*adaptive management through active learning*’⁶², findings arising from these processes should allow: sharing experiences on implementation, making recommendations on means to address obstacles encountered, and strengthening the mechanisms to support implementation, monitoring and review. However, apart from the resolution to use those indicators in the fifth national reports – due for submission in 2014 for consideration at the twelfth meeting of the Conference of the Parties – as a mid-term review of progress towards the achievement of the Aichi Biodiversity Targets⁶³, the COP did little to strengthen the already weak follow-up process of the Convention. Collective evaluations of progress, through the consideration of the GBO and the synthesis reports of the Secretariat, were to be performed, as usual, on a quadrennial basis at the corresponding meetings of the COP. As such, national reports were to continue being sources of information for the aggregation of data that allow tracking progress at regional and local levels, rather than material for the active peer review of country parties’ performance. In addition to the deficit, in relation to the fact that this condition presupposes that states can be held accountable under the CBD⁶⁴, there is another major challenge: despite the fact that national reporting is mandatory (under Article 26), and constitutes the building block of the follow-up architecture of the CBD, national reporting rates have been consistently low. The percentage of parties that have submitted national reports by the due date for consideration at the corresponding meeting of the COP has been as low as 1.6% and has never been above 15.5%. By November 2016, a percentage of parties, varying between 2.6% and 23.9% across the five national reports that have been agreed by the COP, has never submitted theirs for at least one of the specific deadlines⁶⁵.

Translating global goals and targets into concrete national actions and measures: the challenge ahead

The road up to 2014

NBSAPs are the principal instruments for implementing the Convention at the national level. In accordance with Article 6, the Convention requires parties to

61 Convention on Biological Diversity, Decision of the Conference of the Parties X/10: *National reporting: review of experience and proposals for the fifth national report*. UNEP/CBD/COP/DEC/X/10 (29 October 2010); available from: www.cbd.int/doc/decisions/cop-10/cop-10-dec-10-en.pdf (accessed 12 November 2016)

62 See note 47: CBD/COP/DEC/X/2, p. 11, para. 19

63 See CBD/COP/DEC/XI/3 in note 59

64 See Bovens, M., Mashaw, J.L. and Steffek, J. in note 44 for a review on accountability as a relational concept, based on the giving and demanding of reason of conduct between social actors

65 Data collected from the official website of the CBD (www.cbd.int/reports/search/)

prepare a national biodiversity strategy (or equivalent instrument), and ensure that this strategy is mainstreamed into the planning and activities of all those sectors whose activities can have an impact (positive and negative) on biodiversity. NBSAPs should reflect the measures that need to be taken in light of specific national circumstances. States are generally reluctant to subject themselves to detailed prescriptions in global instruments for what national management and policies of domestic resources, such as biodiversity, should be⁶⁶. Moreover, because the management of biodiversity encompasses the participation of multiple stakeholders on the ground, national planning requires public support and engagement⁶⁷. However, specifically in the case of the CBD, scholars have a critical view on the lack of obligation Article 6 imposes on parties, which leaves NBSAPs devoid of strong commitment to action and transforms them into merely declarations of intention⁶⁸. Indeed, the commitment to develop NBSAPs is subject to national ‘particular conditions and capabilities’ (as specified in Article 6). Similarly, the Strategic Plan 2020 ‘urges’ rather than ‘requires’ parties, for instance, to ‘review, and as appropriate update and revise, their national biodiversity strategies and action plans’.

The development of NBSAPs has been inconsistent, particularly concerning the call to revise and update NBSAPs after adoption of the Strategic Plan 2020. According to a report released by the Executive General in preparation for the thirteenth meeting of the Conference of the Parties held in December 2016: out of the 196 country parties, seven (4%) have not submitted their first NBSAP in 23 years; and out of the 189 NBSAPs submitted, only 121 (62%) have been revised at least once. Concerning Aichi Target 17, which called on parties to revise, update and implement their NBSAPs by December 2015, only 69 parties (35%) had revised/updated their NBSAPs after the adoption of the Strategic Plan 2020. A year later, when the report was issued, a total of 131 (67%) parties had done so, and another six were awaiting final domestic approval. Thus, there are still 48 parties (24%) in the process of revising and/or updating their NBSAPs, and 11 (6%) parties that have not yet started or do not plan to do so in the near future or have provided no information in this regard⁶⁹.

In summary: are there any effective mechanisms that can enhance implementation and compliance of parties with their obligations and responsibilities under the CBD and the Strategic Plan 2020? For its first two decades, the answer is largely ‘no’ for the CBD: national reporting rates are low⁷⁰; revision, update and even development of NBSAPs is inconsistent⁷¹; the 2010 Global Biodiversity

66 See Harrop, S.R. and Pritchard, D.J. in note 18

67 See Glowka, L. *et al.* in note 20

68 See Glowka, L. *et al.* in note 20; and Harrop, S.R. and Pritchard, D.J. in note 18

69 Convention on Biological Diversity, Note by the Executive General: Update on progress in revising/ updating and implementing National Biodiversity and Action Plans, including national targets. UNEP/CBD/COP/13/8/Add.1/Rev.1 (24 November 2016); available from: www.cbd.int/doc/meetings/cop/cop-13/official/cop-13-08-add1-rev1-en.pdf (accessed 12 January 2016)

70 See rate of submission of national reports referred to in note 65

71 See the official report on submission, revision, updating and implementation of NBSAPs referred to in note 69

Target was not achieved⁷²; and in the mid-term evaluation of progress towards the Aichi Targets performed in 2014, it was already acknowledged that the achievement of all the targets will not be met in 2020 without urgent action to scale up implementation⁷³.

Inconsistency of states to comply with multilateral environmental agreements, which involve significant political and economic investments – whether legally binding or not – has been well documented⁷⁴. Because of the absence of global-level enforcement bodies, and taking into account that states commit to international agreements on a voluntary basis, compliance with international (environmental) norms is claimed to be also the result of reciprocity processes, reputational sanctions, learnt-lessons dynamics over time and capacity-building⁷⁵. Therefore, despite the non-legally binding character of the Strategic Plan and the allied Aichi targets, they have the potential to generate compliance if backed up by adequate mechanisms⁷⁶.

Follow-up mechanisms that seek to track progress on implementation of international agreements comprise valuable tools for scrutinising states' behaviour; the object is to hold states to their word, for the commitments that they voluntarily made⁷⁷. In the next sub-section, the most recent developments concerning the follow-up arrangements of the CBD are presented and their implications discussed.

Developments post-2014 at the twelfth and thirteenth meetings of the COP

The CBD has used the formal evaluations of collective progress (i.e., towards the implementation of the SPB-2010 and SPB-2020, through GBO 3 and 4, respectively) to, *inter alia*, identify the challenges faced by parties, feed back on the results, and accordingly adopt measures to meet the shortcomings. For instance, lack of

72 See for example the conclusions of: Butchart, S.H.M. *et al.* in note 5; GBO 3, in note 6; Mace, G.M. *et al.* in note 34

73 See for example: *Global Biodiversity Outlook 4* (2014), Secretariat of the Convention on Biological Diversity, Montréal, 155pp.; and Tittensor D.P. *et al.* in note 60

74 See for example: Mitchell, R.B. (2003), "International Environmental Agreements. A Survey of Their Features, Formation, and Effects", *Annual Review of Environmental Resources*, 28, pp. 429–61; and Oberthur, S. and Lefebvre, R. (2010), "Holding countries to account: The Kyoto Protocol's compliance system revisited after four years of experience", *Climate Law*, 1, pp. 133–158

75 See Abbott, K.W. and Snidal, D. (2000), "Hard and Soft Law in International Governance", *International Organization*, 54, pp. 421–456; and Raustiala, K. (2000), "Compliance and Effectiveness in International Regulatory Cooperation", *Case Western Reserve Journal of International Law*, 32, p. 387

76 For an analysis of the mechanisms through which hard and soft can influence the behaviour of states, see: Guzman, A.T. and Meyer, T.L. (2010), "International Soft Law", *Journal of Legal Analysis*, 2; Karlsson-Vinkhuyzen, S.I. and Vihma, A. (2009), "Comparing the legitimacy and effectiveness of global hard and soft law: An analytical framework", *Regulation & Governance*, 3, pp. 400–420; Raustiala, K. in note 75; Tallberg, J. (2002), "Paths to Compliance: Enforcement, Management, and the European Union", *International Organization*, 56, pp. 609–643

77 See Raustiala, K. in note 75

financial, human and technical capacity were identified as limiting factors for the implementation of the objectives of the Convention and the Global Biodiversity Target 2010⁷⁸. In response, the COP stressed that the fulfilment of biodiversity targets and obligations by developing countries partly depends on the implementation of the provisions of the Convention by developed countries, to facilitate access to and transfer technology, financial resources, and financial mechanisms (in accordance with Articles 16, 20 and 21, respectively). Therefore, previous decisions on capacity-building were recalled, in order to overcome the financial, human and technical limitations that ultimately undermine the efforts of states to fully implement the Convention. An existing strategy on resource mobilisation originally called on developed countries to provide new and additional financial resources to enable developing countries to meet the incremental implementation costs of complying with the SPB-2020⁷⁹. Building upon this resolution, the COP remarkably – in the view of some scholars⁸⁰ – resolved to strengthen the strategy on resource mobilisation by adopting a follow-up mechanism (i.e., global monitoring reports), so as to track the status and trends in the provision of financial resources⁸¹. Similarly, aiming to promote effective implementation of the Convention, the Strategic Plan for Biodiversity 2011–2020 specifically involved the enhancement of support mechanisms to parties⁸², such as: capacity-building (i.e., for the revision and updating of NBSAPs and for the development of indicators at the national level); the Clearing-House Mechanism⁸³ (CHM) and technology transfer; financial resources; and partnerships and initiatives to enhance co-operation at all levels. Furthermore, acknowledging the discouraging conclusions of the formal mid-term review of progress towards the Aichi targets⁸⁴, the Subsidiary Body on Implementation (SBI) was established⁸⁵, and the COP decided that progress on implementation of the Strategic Plan would

78 See GBO 3, in note 6

79 See note 56: CBD/COP/DEC/IX/31

80 See Morgera, E. and Tsiounami, E. in note 1

81 Convention on Biological Diversity, Decision of the Conference of the Parties X/3: *Strategy for resource mobilization in support of the achievement of the Convention's three objectives*. UNEP/CBD/COP/DEC/X/3 (29 October 2010); available from: www.cbd.int/doc/decisions/cop-10/cop-10-dec-05-en.pdf (accessed 12 November 2016)

82 In accordance with decision X/5. See Convention on Biological Diversity, Decision of the Conference of the Parties X/5: *Implementation of the Convention and the Strategic Plan*. UNEP/CBD/COP/DEC/X/5 (29 October 2010); available from: www.cbd.int/doc/decisions/cop-10/cop-10-dec-05-en.pdf (accessed 12 November 2016)

83 The Clearing-House Mechanism was established in response to Article 18.3 on technical and scientific co-operation of the Convention. It has been further developed and refined in several decisions. Currently, its mission is to contribute to the implementation of the Convention (and its Strategic Plan for Biodiversity 2011–2020) at the national and global level, through effective information services in order to promote and facilitate scientific and technical co-operation, knowledge sharing and information exchange, and to establish a fully operational network of parties and partners.

84 See GBO 4 in note 73

85 The Subsidiary Body on Implementation (SBI) was established in order to replace the Ad Hoc Open-ended Working Group on Review of Implementation of the Convention. The SBI has the mandate to support the Conference of the Parties in keeping under review the implementation of

be reviewed at every MCOP; beginning at MCOP 13 in 2016, and continuing until 2020⁸⁶. These reviews, along with the information provided in the national reports, and including information from scientific assessments, were envisaged as a mechanism to guide the COP in defining the actions to be taken in order to support implementation (i.e., enhancement of capacity-building, technical and scientific co-operation), and to provide general advice to all states for policy development (i.e., for reviewing, updating and revising NBSAPs and for adopting indicators at the national level).

However, the institutional approach followed by the CBD presents several shortcomings, namely: first, follow-up mechanisms have not been used to scrutinise states' behaviour, as in assessing individual party compliance; and second, institutional efforts within the CBD have been directed towards strengthening capacity-building, but not towards encouraging unwilling actors to act. Concerning the former consideration, although formal assessments of progress made towards the implementation of the SPB-2010 and SPB-2020 identified lack of capacity as the main reason for failure⁸⁷, informal actors have also pointed out lack of political will as a critical factor. For instance, renowned environmental NGOs consider lack of political will as one of the main challenges to overcome for the successful implementation of the CBD (and also of the UN 2030 Agenda for Sustainable Development adopted in September 2015, which specifically addresses biodiversity in Goal 15)⁸⁸. In this context, mechanisms to enable capacity-building – such as those on which the CBD has focused its institutional efforts – are not by themselves enough to overcome the limitations so far faced to achieve the objectives of the CBD. On the other hand, with reference to the lack of robust and systematic follow-up systems, the CBD has established responsibilities for parties on monitoring and reporting (Articles 7 and 26, respectively). However, the development of indicators has been acknowledged as a slow process⁸⁹ and a challenging task⁹⁰ (particularly for least-developed country parties, those which are economies in transition and those which are particularly environmentally vulnerable⁹¹), whilst national reporting has been inconsistent⁹². Moreover, the review

the Convention. See: Convention on Biological Diversity, Decision of the Conference of the Parties XII/26: *Improving the efficiency of structures and processes of the Convention: Subsidiary Body on Implementation*. UNEP/CBD/COP/DEC/XII/26. (17 October 2014); available from: www.cbd.int/doc/decisions/cop-12/cop-12-dec-26-en.pdf (accessed 12 November 2016)

86 Convention on Biological Diversity, Decision of the Conference of the Parties XII/31: *Multi-year programme of work of the Conference of the Parties up to 2020*. UNEP/CBD/COP/DEC/XII/31 (17 October 2014); available from: www.cbd.int/doc/decisions/cop-12/cop-12-dec-31-en.pdf (accessed 12 November 2016)

87 See GBO 3, in note 6, for an analysis of the causes that prevented the achievement of the Global Biodiversity Target 2010, and the GBO 4, in note 73, for analysis of the factors limiting adequate progress towards the Aichi Biodiversity Targets

88 Interviews by Ulloa, A.M. (2016), "The Role of NGOs in Holding States Accountable: Considerations on Global Biodiversity Governance", a Master thesis at the Technical University of Munich

89 See Walpole, M. *et al.* in note 42

90 See Collen, B. *et al.* in note 2

91 See Harrop, S.R. and Pritchard, D.J. in note 18

92 See data referred to in note 65

process (which is the responsibility of the COP as stipulated under Article 26) has been limited to the collective evaluations of progress through consideration of the GBO and synthesis reports of the Secretariat during plenary sessions⁹³. As such, the CBD is devoid of a mechanism that allows for a true review of the progress, achievements and/or challenges faced by individual parties during the implementation of the objectives of the Convention.

On the bright side, in spite of ‘political reservations’, the need to formally strengthen the review system within the CBD has been increasingly acknowledged. Although not explicitly addressed in the Strategic Plan 2020, the CBD seems to have recognised the shortcoming to effectively follow up progress in achieving the objectives of the Convention. It has taken more comprehensive measures to address both lack of capacity and, more discreetly, the unwillingness of states to implement the Convention. For instance, the strengthening of the strategy on resource mobilisation not only addresses an increase in the provision of financial resources – an enabling precondition for developing countries to comply with the CBD, that is at the core of the principle of common but differentiated responsibilities⁹⁴ – but it also involves the adoption of a follow-up system⁹⁵. This fact shows the disposition of parties to, if not fully engage in stronger accountability dynamics, at least discuss the need for stricter follow-up systems. Furthermore, the *modus operandi* of the SBI was adopted in the thirteenth Conference of the Parties held in December 2016⁹⁶. It involves: reviewing progress in implementation and achievement of targets; contributing towards the definition of strategic actions to enhance implementation; identifying and developing recommendations to overcome obstacles encountered in the implementation process, as well as developing recommendations on how to strengthen the means of implementation; and reviewing the impacts and effectiveness of existing processes under the Convention in order to increase efficiencies (i.e., in areas such as resource mobilisation, guidance to the financial mechanism, capacity-building, national reporting, technical and scientific co-operation and the clearing-house mechanism, and communication, education and public awareness). In comparison to the climate regime, where an analogous body has a well-established role under the UNFCCC, some environmental NGOs consider its follow-up processes and structures stricter and more robust than the ones of the CBD. Therefore, the establishment of the SBI under the CBD has been welcome by the international community, as a favourable step towards strengthening compliance CBD⁹⁷.

Furthermore, since 2008 the CBD has been discussing the establishment of a peer-review process for the development and implementation of NBSAPs.

93 See Morgera, E. and Tsiouami, E. in note 1

94 See Morgera, E. and Tsiouami, E. in note 1

95 In accordance with decision X/3 of the COP referred to note 81

96 Convention on Biological Diversity, Decision of the Conference of the Parties XIII/25: *Modus operandi of the Subsidiary Body on Implementation and mechanisms to support review of implementation*. UNEP/CBD/COP/DEC/XIII/25 (9 December 2016); available from: www.cbd.int/doc/decisions/cop-13/cop-13-dec-25-en.pdf (accessed 12 January 2016)

97 See note 88

The methodology for voluntary peer-review for the exchange of best practices and lessons learned from the preparation, updating and implementation of NBSAPs was put under consideration of the SBI in 2014⁹⁸. In accordance with the methodology under consideration, the main goal of the peer-review system is to help parties to improve their individual and collective capacity so as to more effectively implement the CBD⁹⁹. The peer-review system is intended as a mechanism: to assess the development and implementation of NBSAPs in the context of the Strategic Plan for Biodiversity 2011–2020, and produce specific recommendations for parties under review; provide opportunities for peer-learning for parties directly involved and for other parties; and create greater transparency and accountability for NBSAP development and implementation to the public and other parties¹⁰⁰ (i.e., by aiming for broad participation of relevant governmental institutions and stakeholders in the review process¹⁰¹). Peer reviews are envisaged as mechanisms to stimulate mutual experience-sharing, learning and capacity-building by sharing information (within the CBD but also across other biodiversity-related multilateral environmental agreements and to the broader public) about what measures lead to progress, which ones do not, and/or which ones present a continuous challenge in the management of biodiversity¹⁰². Additionally, the methodology specifies that countries under review are to be allowed to consider how to respond to recommendations, and how to use the review report¹⁰³.

Scholars have argued that review processes are mechanisms through which compliance can be strengthened and promoted because they allow the identification of non-compliance (and non-compliant actors) and its roots (i.e., incapability or unwillingness). Accordingly, transparency is enhanced, and causes of non-compliance can be addressed¹⁰⁴. More importantly, if review processes are open, active and dynamic, they have the potential to put pressure on states to justify their (lack of) actions, also in the absence of legal sanctions¹⁰⁵. If enough criticism is mobilised, active and dynamic review processes have the potential to encourage non-compliant actors to justify their choices or to clarify or defend their positions. By comprising an arena where feedback can be given, open and dynamic reviews offer the opportunity for states to self-reflect on conduct,

98 In accordance with decision XII/26 of the COP, referred to in note 85

99 United Nations Environmental Programme, Convention on Biological Diversity. Note by the Executive General: *Voluntary Peer-Review Process for the National Biodiversity Strategies and Action Plans: Progress Report and Updated Methodology*. UNEP/CBD/COP/13/19 (27 September 2016); available from: www.cbd.int/doc/meetings/cop/cop-13/official/cop-13-19-en.pdf (accessed 12 November 2016)

100 See note 99: CBD/COP/13/19, para. 2(a–c)

101 See note 99: CBD/COP/13/19, para. 6(f)

102 See note 99: CBD/COP/13/19, para. 5

103 See note 99: CBD/COP/13/19, para. 6(e)

104 van Asselt, H. *et al.* (2015), “Assessment and Review under a 2015 Climate Change Agreement”, Denmark, Nordic Council of Ministers

105 See Steffek, J. in note 44

promote catharsis, and subsequently encourage the search for strategies (i.e., triggering a switch in governance arrangements from ‘routine mode’ to ‘crisis mode’¹⁰⁶). Moreover, some authors have further argued that if active and dynamic review processes are aimed towards improving individual and collective performance of country parties, rather than at pointing out wrongful individual behaviour, as is in the case of the CBD, they may have a prophylactic role in deterring con-compliance¹⁰⁷. Specifically, by comprising arenas where mutual learning, trust, co-operation and stewardship are promoted, open and dynamic reviews have the potential to influence the behaviour of states before failure occurs – *ex ante*.

Comparison with the UNFCCC: discussion and conclusion

The UNFCCC has the same starting date as the CBD, which in itself makes for an interesting comparison on how obligations and institutional arrangements have evolved over time. That, in turn, may provide for learning across the regimes. We can here only make a brief journey through the key aspects of the UNFCCC and the agreements that have followed under its ‘shadow’, highlight features linked to the legal nature of the obligations and arrangements for follow-up and review, and put them in perspective with the institutional arrangements of the CBD portrayed in this chapter.

In order to facilitate the analysis of the 23-years-long institutional development process of the CBD, some authors divide it in three blocks: phase I (≈1992–2000), characterised by the definition of operational rules; phase II (≈2000–2005), characterised by the formulation of the first strategic plan (2002–2010); and phase III (2005–present), characterised by the formulation of the strategic plan 2011–2020 and its allied Aichi targets and the mainstreaming of the concept of ecosystem services (which directly links human well-being to biodiversity) into the CBD¹⁰⁸. Despite the recent emphasis on the importance of conserving biodiversity in order to achieve sustainable development, eradicating poverty and improving the well-being of people around the globe, the profile of biodiversity is still low in the global political agenda, as well as in many national agendas. It has been argued that governments are more likely to take action on urgent affairs with implications in the short-term, hence the lack of interest in responding to biodiversity loss¹⁰⁹.

The agenda to tackle climate change and regulate greenhouse gas emissions developed under the UNFCCC faces similar challenges; however, it is interesting to note that despite this, it has received more attention by far¹¹⁰.

106 See Bovens, M. and Steffek, J. in note 44

107 See Mashaw, J. and Steffek, J. in note 44

108 See Nefshöver, C. *et al.* in note 11

109 Balmford, A. *et al.* (2005), “The Convention on Biological Diversity’s 2010 targets”, *Science*, 5707, pp. 212–213

110 Gilbert, N. (2010), “Biodiversity hope faces extinction”, *Nature*, 467, p. 764

Biodiversity continues declining¹¹¹, and as illustrated in this chapter the CBD has so far failed to deliver on its objectives. Despite the multiple institutional arrangements adopted since the Convention entered into force, states have consistently failed with the responsibility to report on national progress; the degree of national implementation remains low as reflected in the inconsistent development, updating and/or implementation of NBSAPs (and above all, the declining status of biodiversity worldwide). Some authors argue that this is because of the softer character that the CBD has acquired over time¹¹². However, we argue the opposite: that the CBD has never been hard, and that over time has put increasing institutional effort into developing more precise commitments, and more effective mechanisms to enhance compliance, making the obligations harder (even if within the soft spectrum of the legalization continuum¹¹³). For instance, having a very vague and ambiguous text as a starting-point, the CBD moved on to developing a set of very imprecise goals and targets contained in the Strategic Plan 2010, which were ultimately revised and refined (i.e., made more specific) in the Strategic Plan 2020. So it is true that the CBD has not given priority to the development of subsidiary legal protocols but rather focused on non-binding goals and targets for the operationalization of its objectives. Whilst goals and targets are considered not very useful tools for resource management (i.e., the development of concrete and implementable policies and legislations¹¹⁴), they are effective in mobilising political efforts and raising the profile of political agendas¹¹⁵. If precise and measurable, targets may assist in keeping implementation in focus¹¹⁶, yet too much emphasis on formal compliance may be counterproductive as it can detract attention for overarching objectives¹¹⁷. In this regard, the Strategic Plan 2020 is noteworthy more ambitious than its predecessor – addressing biodiversity conservation as a cross-cutting issue for human well-being – and its goals and targets more precise – referring to time-bounded objectives, in some cases to measurable rates and comparable baselines, and specifically referring to sensitive (i.e., economical aspects) but urgent issues (i.e., drivers of change) with detrimental impacts on biodiversity.

Both the CBD and the UNFCCC regimes have had similarly highly ambitious, but very vague objectives from the very beginning. In both cases, the objectives became somewhat specified only 18 years after the regime was adopted. For

111 See Butchart, S.H.M. *et al.* and Mace, G.M. & Baillie, J.E.M. in note 5; and Pereira, H.M. in note 7

112 See Harrop, S.R. and Pritchard, D.J. in note 18

113 See Abbott, K.W. *et al.* (2000), “The Concept of Legalization”, *International Organization*, 54, pp. 401–419, for a categorization of hard and soft law

114 See Harrop, S.R. and Pritchard, D.J. in note 18

115 See for example: Mace, G.M. and Baillie, J.E.M. in note 5; and Sachs, J.D. (2012), “From Millennium Development Goals to Sustainable Development Goals”, *The Lancet*, 379, pp. 2206–2211

116 See for example: Maxwell, S. (1999), “International targets for poverty reduction and food security: a mildly skeptical but resolutely pragmatic view with a call for greater subsidiarity”, *IDS Bulletin*, 30 (2), pp. 92–105.; and Sachs, J.D. in note 115

117 See Mace, G.M. *et al.* in note 53

the first time, in 2010, the UNFCCC agreed on a more specific objective – in this case a temperature target (2°C¹¹⁸). This target was adopted in a non-legal COP decision (as the Aichi targets); but in 2015 was even further sharpened through the Paris Agreement by referring to ‘[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels’ (Article 2.1a)¹¹⁹, as well as by formulations on the ‘aim to reach global peaking of greenhouse gas emissions as soon as possible’ and to ‘achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century’ (Article 4.1). The ‘apportioning’ or ‘allocation’ of responsibilities for achieving this objective among countries have also followed a similar pattern to the CBD – indeed that it has been left entirely to countries to decide on what their respective responsibilities are.

The implementation of the objectives of the CBD formally relies on the translation of goals and targets into NBSAPs. However, as a framework convention, the CBD allows flexibility to country parties to decide on the means to do so, and on how ambitious the goals and targets are within NBSAPs. As for the SBP-2020, this specifically involves the review and updates of NBSAPs to integrate the values of biodiversity and ecosystem services into government decision-making. In turn, this depends on the engagement of heads of state, local governments and parliamentarians to gain the political support necessary to translate vague goals and targets into concrete country policy instruments. Since governments are more likely to take action on affairs they deem relevant for their own interests¹²⁰, and conservation measures have proved to have a greater impact when relevant stakeholders are involved on the ground¹²¹, allowing parties to define their own national priorities and accordingly plan relevant measurements for the management of natural resources may encourage action.

As with the NSPABs, the UNFCCC obliges countries to ‘[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change...’ (Article 4b) and to report on their implementation efforts through their national communications which are obligatory for all countries albeit with different frequency. In addition all countries are obliged to periodically send in greenhouse gas inventories (Article 4a). This has in the Paris Agreement been upgraded into the obligation to send in every five years a country’s Nationally Determined Contributions

118 United Nations (2011), Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, Decision 1/CP.16 *The Cancun Agreement: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, Cancun, Mexico, United Nations Framework Convention on Climate Change.

119 UNFCCC (2015), Conference of the Parties, Twenty-first session, Paris, 30 November to 11 December 2015, *Agenda item 4(b) Adoption of the Paris Agreement. Paris, United Nations Framework Convention on Climate Change*

120 See Harrop, S.R. and Pritchard, D.J. in note 18

121 See Glowka, L. *et al.* in note 20

(NDCs). However, the content of the UNFCCC mitigation programmes or the Paris Agreement's NDCs are entirely up to countries to determine. Some observers argue that the Kyoto Protocol adopted in 1997 (entered into force 2004) was significantly different in this regard, as it included specific emission reduction obligations for all developed country parties to it, and have referred to these obligations as being adopted 'top-down'¹²². It is easy to provide strong counter-arguments to this top-down notion. First, the obligations that countries had under the Kyoto Protocol were largely identical to what they themselves had put on the negotiation table. Second, the total emission reductions of countries under the Protocol was far away from the required measures to reach the objective of the UNFCCC. Third, international law is, per definition, not 'top-down', as it is voluntary for countries to sign on to them (and countries can also withdraw, as was done by the United States of America, Canada and Australia vis-à-vis the Kyoto Protocol).

The parties to the Paris Agreement are expected to formulate NDCs that 'reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances' (article 4.3), thus leaving it to countries to determine what such highest possible ambition means. Interestingly, the Agreement includes an obligation for all countries to consider the outcome of the global stocktake every five years when they revise their NDCs: 'The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action' (Article 14.3). It is indeed only a procedural obligation but the transparency framework for the Paris Agreement does prescribe that each party shall regularly provide information that is '...necessary to track progress made in implementing and achieving its nationally determined contribution' (Article 13.7b). The flexibility for countries to adopt their own targets remains in the climate regime – but the procedural obligations to do so on a regular basis – and the explicit obligation that successive NDCs have to be more ambitious than previous ones (Article 4.3) within the context of a legally binding agreement (in comparison to the CBD COP decisions for its Strategic Plan) bodes for at least higher political accountability, if not legal accountability for the climate regime.

In this regard, the CBD has also provided a flexible framework for implementation (i.e., global goals, targets and indicators for monitoring and reporting), so that parties have a stance to define how they will contribute to the achievement of global goals according to their own national priorities and circumstances. Most importantly, the CBD has also put effort into strengthening and establishing mechanisms to enable and promote compliance. Concerning mechanisms to encourage action of states beyond their capabilities, the CBD has: backed up the Strategy on Resource Mobilisation with a follow-up mechanism; established the SBI and given the mandate

122 Bodansky, D. (2016), "The Paris Climate Change Agreement: A New Hope?", *American Journal of International Law*, 110 (2), pp. 288–319

to support the COP in the review of the Convention; increased the frequency of interim evaluations on progress towards meeting the Aichi targets; and emphasised the need to assess compliance at the national level with the consideration of a peer-review process on the development, update and implementation of NBSAPs. From the lens of accountability, the latter is a much-needed process – even if proposed on a voluntary basis – and a very welcome one when it begins to be adopted.

The UNFCCC regime, in contrast with the CBD, set up its Subsidiary Body on Implementation (SBI) from the beginning; this body meets twice every year, since 1997. Its mandate is to assist the COP in the ‘assessment and review of the effective implementation of the Convention’ (UNFCCC article 10.1) and under the guidance of the COP, it shall ‘assess the overall aggregated effect of the steps taken by the Parties in the light of the latest scientific assessments concerning climate change’ (UNFCCC Article 10.2a). The follow-up and review of individual countries’ actions under the regime was limited even if there were reporting requirements for all countries (with differentiated frequencies) to send in national communications on actions taken.

In 2010, the COP of the UNFCCC adopted a more detailed approach, the Monitoring, Reporting and Verification (MRV) system; it included all countries, albeit in a bifurcated manner. This was the result of negotiations launched through the mandate agreed upon in 2007 to set up an MRV system meant also for developing countries. As per the system, all countries are asked to submit reports biannually (in addition to their national communications), which will be subject to technical review. However, the reports have different remits for developed and developing country parties¹²³. Subsequently, developed countries go through an International Assessment and Review (IAR) process, and developing countries a considerably lighter International Consultation and Analysis (ICA)¹²⁴. The IAR and ICA take the form of each country making a public presentation of their reports at the SBI meetings, and a process of submission of written questions by other parties has preceded this¹²⁵. For developing countries important elements of the report, in addition to greenhouse gas inventories and mitigation actions, are constraints and gaps, including support needed and received.

The provisions for follow-up and review of individual country’s actions in the Paris Agreement are described primarily in Articles 13 and 15. On the one hand, Article 13 on the transparency framework outlines that ‘each Party shall participate in a facilitative, multilateral consideration of progress with respect to efforts under Article 9 [for developed country parties, this concerns their financial contributions], and its respective implementation and achievement of its nationally determined contribution’ (Article 13.11). Such a multilateral consideration is based on information provided by parties on mitigation and

123 For details see http://unfccc.int/national_reports/items/1408.php

124 UNFCCC (2011), Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, Cancun, United Nations Framework Convention on Climate Change, paras. 42–63

125 We do not describe the procedures for reporting and accounting of developed country parties under the Kyoto Protocol here

finance (the latter only for developed countries), information that will undergo technical review. The IAR and ICA have only been in place for a few years yet these processes, together with the ‘older’ elements of the follow-up under the UNFCCC ‘shall form part of the experience drawn upon for the development of the modalities, procedures and guidelines’ of the transparency framework for the Paris Agreement (Article 13.4).

In addition to the process under the transparency framework (Article 13), Article 15 outlines the mandate of an expert-based committee as being to ‘enhance implementation and promote compliance’ (Article 15). This committee will operate in a way that is ‘facilitative, non-intrusive, non-punitive and respectful of national sovereignty’ (Article 15). While there is considerable work remaining to provide the operational details of how these processes will be institutionalized, it seems that follow-up and review of individual countries will take place both in a political and an expert-based arena, both of which will be underpinned by the ethos of facilitation (rather than sanctions). In addition, there is a review framework of progress towards the global goals based on stocktaking every five years, assessing ‘collective progress towards achieving the purpose... and its long-term goal’ (Article 14.1).

The existence of an ‘implementation and compliance committee’ under the Paris Agreement was not an obvious outcome of the negotiations, particularly not one where there is no differentiation included in its mandate between different categories of countries. When the last two weeks of negotiations started in Paris in December 2015 there were still a wide range of options on how to deal with compliance on the table¹²⁶. The very name of the committee also reveals the intention that it will deal with not only the explicitly legally binding elements of the Paris Agreement – but also the other elements for which the term implementation is used¹²⁷. Rajamani considers that the Paris Agreement, ‘establishes a rigorous system of oversight to ensure effective implementation of the many requirements it places on Parties’¹²⁸. It is difficult to judge if this system will indeed be so rigorous, and whether it will be able to facilitate implementation and compliance.

In all, despite similarities in the framework character of both Conventions – which as described in this chapter concedes flexibility to parties to decide both on the ‘size’ of their obligations/commitments and on the means to comply with their obligations and/or implement their commitments – the UNFCCC is several steps ahead of the CBD. We ground this conclusion not only on the basis of the ‘harder’ legal approach followed by the UNFCCC – for we have argued that compliance with international norms is also the result of reciprocity processes, reputational sanctions, learnt-lessons dynamics over time and capacity-building¹²⁹ – but because the UNFCCC has evolved more robust mechanisms

126 Voigt, C. (2016), “The Compliance and Implementation Mechanism of the Paris Agreement”, *RECEIL*, 25 (2)

127 Ibid.

128 See Rajamani, L. (2016), “Ambition and Differentiation in the 2015 Paris Agreement: Interpretive Possibilities and Underlying Politics”, *International and Comparative Law Quarterly*, pp. 1–25

129 See note 75

to enhance compliance, and at a faster pace than the CBD. For instance, whilst the CBD is still developing its first review system (i.e., the voluntary peer-review system for the development, update and implementation of NBSAPs under consideration of the recently established SBI), the UNFCCC has through its SBI had a longer emphasis on review of implementation, as well as a review system for both developing and developed countries (until the Paris Agreement with well-differentiated responsibilities and pathways). Yet we emphasise that both the CBD and the UNFCCC have undertaken important institutional measures to strengthen compliance and/or implementation of parties in each regime. As for the CBD, although moving slowly and following more of a soft-law track, it seems to be directing efforts towards: the recognition of its own institutional limitations and needs; learning from its own experience and that of other regimes, such as the UNFCCC¹³⁰; and accordingly shaping further mechanisms to enhance compliance. Despite these significant advances, the new measures are probably still far from sufficient to catalyse a real shift towards states' compliance and/or implementation. Therefore, whether these efforts are adequate to address the increasing pressures on biodiversity – and the threats these pose for the well-being of people worldwide – remains to be seen.

130 For instance, the methodology of the peer-review mechanism was based on, *inter alia*, the United Nations Framework Convention on Climate Change In-Depth Reviews of National Communications and specific national review processes, and the United Nations Human Rights Council universal periodic review as noted in COP/12/25/Add.3 and COP/12/INF/24. For detailed information see: United Nations Environmental Programme, Convention on Biological Diversity, Note by the Executive General: *Voluntary Peer-Review Mechanism for National Biodiversity Strategies and Action Plans*. UNEP/CBD/SBI/1/10/Add.1 (18 March 2016); available from: www.cbd.int/doc/meetings/sbi/sbi-01/official/sbi-01-10-add1-en.pdf (accessed 12 November 2016)