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The evolution of international nature conservation law since the 1972 Stockholm Declaration

by

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Abstract

Although only one of the 26 principles enshrined in the 1972 Stockholm Declaration is devoted specifically to the protection of nature, it has encouraged a large number of states to conclude various international agreements of a sectoral nature, which were supplemented in 1992 by a global agreement on biodiversity. In addition to tracing the influence of the Stockholm Declaration on international nature protection law, this chapter discusses the European Union's role in the development of international law in this field. Conversely, the chapter also looks at how EU internal rules on nature protection have been influenced by the obligations stemming from multilateral environment agreements and illustrates the cross-fertilisation between EU and international law.

1. Introduction

Biodiversity faces a major crisis at both world and European level, the implications of which have still not been fully appreciated. All over the world, most natural or semi-natural,

continental, marine and coastal ecosystems have been subject to significant changes by human activities.

The 1972 Stockholm Declaration has been prompting the adoption of a flurry of multilateral environment agreements (MEAs). This chapter examines and critically assesses the outcome of the Stockholm Conference (ie the Stockholm Declaration and Action Plan) on nature conservation and its influence on International Environmental Law (IEL) as well as on European Union (EU; in 1972 the organisation was named European Economic Community, in 1993 it would change to European Community, and in 2009 to European Union – hereinafter the organisation will be referred to as EU) secondary law. Given that most analyses of international law generally focus exclusively on the sources of international law, it is necessary to go beyond international rules, taking as an example the role played by the EU in the field of nature conservation at international level. In this connection, EU law on nature protection should be seen as a case for examining this cross-fertilization between international environmental law and a regional international organisation.

In a first section, we briefly examine the influence of principles 2 and 4 of the 1972 Declaration on the development of international rules on nature protection and, subsequently, on biodiversity. In a second section, we take stock of the contribution of EU law, in the aftermath to the Stockholm Declaration, to the development of international law regarding nature protection between 1972 and 2022. Conversely, in a third section, we look in reverse at the influence exerted by international nature protection law on EU secondary law.[1] Insofar as the EU is bound by its international obligations regarding nature conservation, one can demonstrate the contribution of international law to the development of EU secondary legislation. Finally, in a fourth section, we use two case studies to highlight the cross-fertilization between international law and EU law.

2. The influence of the 1972 Stockholm Conference on the development of international nature protection law

2.1 A shift from the protection of species and their habitats to broader instruments

As a reaction to the devastation caused by the rise of industrial civilisation, the first efforts at international cooperation in nature protection were inspired in the 19th century mainly by a utilitarian approach. This was reflected in attempts to conserve directly exploited species, such as birds, 'useful to agriculture', whales, seals, and fish.[2]

The 20th century was marked by the shift from a utilitarian conception of nature to a "conservationist" ethic, in other words a shift from an anthropocentric way of perceiving the protection of biological resources to a more eco-centric approach. Aesthetic values were of paramount importance.[3] Perceived as a natural or collective heritage which it is necessary to safeguard, wild species were thus protected for their symbolic or aesthetic value.

[1] N de Sadeleer, 'European Union', in E Morgera and J Razzaque (eds.), *Biodiversity and Nature Protection Law* (Cheltenham: E Elgar, 2017) 413-430.
[2] R Rayfuse, 'Biological resources', in *The Oxford Handbook of International Environment La*w (Oxford UP, 2008) 368
[3] See the preambles of the 1940 Convention on nature protection and wildlife preservation in the Western Hemisphere, and 1968 African Convention on the conservation of nature and natural resources.

Although the conventions adopted during the first half of the 20th Century made it possible to save a certain number of species from extinction, they quickly ran up against their limits. Since the nature "sanctuary" does not fit in well with the dynamic nature of ecosystems which do not conserve themselves like the old masterpieces on display in a museum, neither status as a national park or a natural sanctuary which has been granted to certain enclaves separated from one another by completely de-naturalised environments, nor the status of protected species granted to endangered animal species has made it possible to counteract the erosion of biological diversity. On the other hand, as far as marine biodiversity is concerned, the perception of the risks created by the intensification of fishing is absolutely non-existent, which explains why international conventions on the law of the sea are focused more on cost-effectiveness than the conservation of resources.

2.2 Stockholm: the birth of modern environmental law and a new generation of nature protection international agreements

Of the 26 principles of the 1972 Declaration only two principles (2 and 4) are devoted to the protection of nature. Principle 2 requires the safeguard of 'flora and fauna and especially representative samples of natural natural ecosystems', whereas Principle 4 is more specifici in stating that 'Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development'. These principles call for several comments. The authors of the Declaration thus proclaimed the responsibility that mankind bears for wildlife 'for the benefit of present and future generations' (Principle 2). Without bothering to list the flurry of factors that were already contributing to the disappearance of wildlife at the time, Principle 4 acknowledged that it was already under serious threat. Furthermore, the importance that should be attached to the conservation of nature, including wildlife, should have been addressed in the context of "economic development", which puts more emphasis on a utilitarian approach. Finally, from an institutional point of view, more attention seems to have been paid to combating pollution than to protecting wildlife[4].

Have these two principles been more successful than the other principles of the 1972 Declaration, in influencing the development of international environmental law? To answer this question, we must look chronologically at the main international agreements that have progressively fleshed out principle 4, although they do not expressly refer to it in their preamble.

In the aftermath of the Stockholm Conference of 1972 (or concurrently regarding Ramsar Convention) the adoption of four landmark universal conventions marked a turning point in the history of nature conservation. The 70s saw thus a radical evolution in the legal treatment of nature protection.

Since the survival of species was affected more by the maintenance of the quality of their environment than by the regulation of hunting, the safeguarding of their habitats or ecosystems gradually established itself as the cornerstone for wildlife protection during the 1970s. Two of

[4] The Action Plan for the Human Environment does not address nature protection. Recommendation 43 (5)(a) notes that the International Union for Conservation of Nature 'might, logically, be given responsibility for wild species, in co-operation with FAO, the Man and the Biosphere Programme (UNESCO)'.

these MEAs related specifically to the protection of natural species whilst the two others were aimed more particularly at the protection of vulnerable or endangered species.

Due to the irreparable loss for mankind in economic, scientific and cultural terms caused by the disappearance of wetlands, the 1971 Ramsar Convention on Wetlands of International Importance for its part sought to protect marshlandswhich were particularly threatened by human activity.

An important step in the process of the "heritagisation" of nature – the Convention concerning the Protection of World Cultural and Natural Heritage, adopted at the 1972 UNESCO General Conference, attempted to reconcile the protection of cultural heritage with the protection of natural heritage which, according to the framers of this Convention, formed part of the common heritage of mankind which was to be passed on intact to future generations.

Moreover, the 1973 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora threatened with extinction Flora (CITES), regulated the international trade in certain wild species whose populations had been put under pressure by improvements in techniques relating to their capture and the opening of important markets in the Western world.

Finally, by endorsing a universal approach to conservation covering different classes of animals, the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS) was finally adopted with the intention of guaranteeing protection to species of mammals, birds, fish and even insects a significant portion of the populations of which periodically crossed over the territory of one or more States.

In parallel with the conclusion of these four universal conventions, efforts were made on a regional level in order to conserve both habitats and their species, in particular in Europe where the 1979 Bern Convention on the Conservation of European wildlife and Natural Habitats was drawn up under the aegis of the Council of Europe. This Convention marked a new stage in the development of nature conservation principles in Europe and had a significant impact on Community nature conservation law.

Last, whereas the International Maritime Organisation (IMO) initially privileged a sectoral approach to the fight against marine pollution, which did not make it possible to regulate the conservation of large marine ecosystems, the UNEP programme on regional seas promoted from 1974 the adoption of various agreements on regional seas in the 70s. This quickly led to the establishment of regional legal frameworks to regulate the conservation of suitable marine ecosystems.

2.3 The quest for a new status for biological resources during the 1970s-80s

In the 70s, it quickly became apparent that the concept of absolute sovereignty was ill suited to guaranteeing the conservation of biological resources which do not recognise national boundaries. Within this perspective, several international treaties on the conservation of species and habitats have gradually established the idea that certain elements of natural heritage must be conserved by states for the benefit of all mankind. Similarly, on regional level, the EU law

rules on nature conservation have recognised since 1979 that the habitats of migratory birds form part of a shared heritage of the union.[5]

The management of certain vulnerable resources should be assured by an international authority, as a custodian of the world's heritage, which should ensure that they not be wasted. This control was to have been exercised both on behalf of current generations (i.e. through the right of access to resources) and of future generations (i.e. through the right to development). This dialectical relationship between state responsibility and the common heritage of mankind should have resulted in a reconsideration of the classical concept of state sovereignty over their biological resources as well as enhanced participation by representatives of civil society in the implementation of nature protection policies. This should have translated into the assumption by each state of specific responsibility for all biological resources, including endangered species, located on its territory. According to this argument, the seabed and outer space was classified as the *common heritage of mankind*. These spaces were accordingly regarded as the *common heritage* which *mankind* – which includes not only past and present generations but also future generations – is to administer.

The 1972 Stockholm Declaration falls short of enshrining the *common heritage of mankind*. Principle 4 proclaims the 'responsibility to safeguard and wisely manage the heritage of wildlife' whereas only principles 5 and 18 refer to 'mankind and the 'common good of mankind'. Although the culmination of this evolution, the 2001 International Undertaking on Plant Genetic Resources, is not binding, it is subject to the principle that these resources should remain accessible to all on the grounds that they constitute a common heritage.

2.4 The rise of international protection of biodiversity in the 1980-90s

Since the start of the 1980s, it has become increasingly apparent that due to the breadth of the changes to which ecosystems and the species dependent upon them have been subject, protection measures should no longer be limited to certain species or to certain habitats (such as ancient forests or wetlands), but should apply to all forms of biological diversity. In 1980, the World Conservation Strategy laid the foundation for a global approach to conservation[6] and in 1982 the United Nations General Assembly adopted the World Charter for Nature, which proclaimed that 'every form of life is unique warranting respect regardless of its worth to man' and that nature should be conserved due to its inherent value.

Another major step was taken at the start of the 1990s with the 1992 United Nations Conference on Environment and Development ('the Rio Conference') and the adoption of the Convention on Biological Diversity (CBD). For the first time in the history of international law, a universally legal instrument enshrined the concept of biological diversity. Although the question was debated during negotiations, the CBD did not codify the existing international law on the conservation of species and ecosystems. As a framework convention, it lays the foundations which should underpin all national legislation on the conservation and sustainable use of biodiversity, as well as the bases on which access to generic resources and the fair division of the benefits resulting from that exploitation should be regulated. The enshrinement of the eco-systemic approach by the Conference of the Parties (COP)[7] to the CBD marked a radical turning point in the conceptualisation and management of natural resources, privileging

[5] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.
[6] IUCN–UNEP–WWF, *World Conservation Strategy: Living Resource Conservation for Sustainable Development*, 1980.
[7] Decision V/6 COP.

integrated long-term management grounded on science and with the involvement of local populations, rather than a short-term sectoral approach.

Further developments are worthy of note. Within the law of the sea, various regional seas agreements have placed the emphasis on an integrated approach to the protection of the marine environment and biodiversity. This approach to conservation, which is more eco-systemic and regional, also influenced the adoption of the Alpine Convention, which contained various sectoral protocols, one of which concerns spatial planning, an area rarely included in treaties. Finally, international agreements and other instruments focusing on specific groups of migratory species under Annex II of the Bonn Convention have been adopted, resulting in a scientifically appropriate response through innovative legal techniques (action plans, etc.) to the problems of the conservation of species whose migratory routes may pass through dozens of states.

2.5 Final remarks

Although there has been a shift towards a holistic approach paying heed to the intrinsic value of nature, MEAs addressing biodiversity have never completely departed from a utilitarian conception. In addition, several treaties maintain a mono-specific approach.

Thanks to the impetus given by the 1972 Stockholm Conference, IEL has been enriched by a raft of MEAs intended to put a stop to the *sinking of the Noah's Ark.*[8] However, the existence of these agreements should not lull us into thinking that all natural components are now well protected. The conservation objectives, the material and territorial scope,[9] the level of stringency of these MEAs, vary from one agreement to the next, such that no harmonization, even on a geographical level, is assured. But it is mainly ignorance, lack of political will, lack of financial and human resources, and growing pressures on ecosystems as a result of GDP and demographic growth that explain the failure of international nature protection law.

Against this background, I assess in the second section the extent to which the EU has contributed to the development of international nature conservation law. Most commentators acknowledge that the EU has played a leading role in promoting environment issues and in particular nature protection[10] on the international stage.[11] Several MEAs would not have been possible without the EU's engagement and financial support.

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[8] M Bowman, P Davies, C Redgwell, *Lyster's International Wildlife Law,* 2nd ed. (Cambridge, CUP, 2011).

[9] The emphasis has been placed on regimes relating to the protection of predominantly terrestrial species and habitats.

[10] See, among other strategies, Communication from the Commission– *Stepping up EU Action to Protect and Restore the World's Forests (*COM (2019) 352 final); *EU biodiversity strategy to 2020* (COM(2011) 244); Communication from the Commission, *EU Biodiversity Strategy for 2030* (COM/2020/380 final) 4.2.

[11] The EU has been supporting the conclusion of an ambitious legally binding agreement on marine biological diversity of areas beyond national jurisdiction. It used all f its diplomatic leverage to help broker agreement on the designation of three vast Marine Protected Areas in the Southern Ocean.

3. EU nature conservation law in the context of the 1972 Stockholm Conference

The purpose of this second section is to take stock of the contribution of EU law, in the aftermath to the Stockholm Declaration, to the development of international law regarding nature protection between 1972-2022. After outlining briefly the sources of the EU's legal order in a first sub-section, the second sub-section looks at the role the EU and its member states have played in shaping international nature protection law. This is a difficult exercise insofar as the EU does not exert an exclusive competence in this area. The EU and its member states are involved in the preparatory negotiations and the conclusion of the MEAs whose object is nature conservation. Consequently, the respective roles of the EU and the 27 member states in the course of the negotiations are not easy to assess.[12]

3.1 EU legal sources regarding nature protection

The EU legal order is made up of a set of legal sources, ordered by a principle of hierarchy of norms as precise as in a State legal order. Although autonomous from the legal orders of the member states, the EU order has primacy over the latter. The various amending treaties have strengthened the EU's competence in the field of environmental protection: objectives have been laid down (Article 191(1) TFEU), principles have been set out (Article 191(2) TFEU) and criteria have been established (Article 191(3) TFEU). This legal framework has been enabling the EU to play a major role in nature protection, both internally (adoption of different directives and regulations) and externally. Given that the EU cannot conduct its environmental policy in isolation, environmental issues are today at the core of its external action. In virtue of Article 21(2)(f) TEU, the EU commits itself to cooperate with third states and international organisations in order to 'develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources'.

To sum up, EU law on biodiversity and nature protection derives mainly from three distinct normative sources:
- The provisions of primary law, i.e. those included in the TFEU, particularly those relating to sustainable development and the environment; these provisions are at the top of the normative pyramid.
- The various international agreements to which the EU and its member states are parties in the areas of biodiversity and nature protection. As regards these conventions, they rank below primary law but above secondary legislation.
- The secondary legislation adopted on the basis of the various legal bases assigning specific policies (agriculture, fisheries, environment, etc.) to the EU institutions. These legislative acts do implement the TFEU obligations as well as the various obligations stemming from international nature protection agreements to which the EU and its member states are parties.

In addition, one must take into consideration an array of non-binding sources and the numerous judgments of the Court of Justice of the EU (CJEU). The CJEU is endorsing a teleological interpretation, thereby giving precedence to nature conservation objectives over textual interpretations that would restrict the scope of EU rules. So far, hundreds of judgments have been delivered in nature protection matters. In particular, many questions have been referred to the CJEU by domestic courts in virtue of the preliminary ruling mechanism.[13] Thanks to the

[12] In particular, the agreements do not mention in their preamble the contribution of the EU.
[13] Article 267 TFEU.

doctrines of the *effet utile*, consistent interpretation and direct effect, the CJEU has been playing a key role in interpretating the obligations placed on the member states. In particular, the CJEU regularly affirms in its judgments on nature protection the existence of general principles such as the precautionary principle, the principle of prevention and the principle of a high level of environmental protection. [14] Unlike several international agreements on nature protection,[15] these principles are formulated in a general way without their conditions and modalities of application being really defined in Treaty law.

3.2 The role played by the EU and its member states in shaping nature protection international law

Political commitments made by the EU institutions tend to influence international decisions. This is evidenced by the willingness to curb biodiversity loss. For instance, in 2001 the European Council decided to halt the decline of biodiversity by 2010[16] whereas in 2002 the parties to CBD committed themselves to achieve a significant reduction of the rate of biodiversity loss.[17] The influence exerted by the EU on the international political agenda is therefore far from negligible. However, we will confine our discussion to highlighting the participation of the EU and its member states in the adoption and implementation of several MEAs aiming at nature protection.

Before the entry into force of these Treaty provisions, the EU had concluded in the early years of its environmental policy a significant number of international agreements in the area of nature protection. Given the absence of a specific competence, these agreements were concluded on the basis of the EU's implicit external competences.[18]

With but a few exceptions, most MEAs on nature protection provide for the accession of regional economic integration organisations, such as the EU. The following MEAs have thus been concluded by the EU and its member states:

- the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[19]
- the Bern Convention on the Conservation of European Wildlife and Natural Habitats,[20]
- the Convention on Biological Diversity (CBD),[21]

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[14] See N de Sadeleer, *Environmental Principles. From Political Slogans to Legal Rules*, 2nd ed. (Oxford : OUP, 2020) 181-87.

[15] The Preamble of the Convention on Biological Diversity (CBD) provides that that 'where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat'. Although this statement is not binding, being set out in the preamble to the agreement and not its operative provisions, it is not however devoid of legal effects (interpretative function). See Case C-67/97 *Bluhme* [1998] ECR I-8033, paras 36 and 38.

[16] Presidency conclusions – Gotebörg, 15 and 16 June 2001 European Council, SN 200/01 REV 1, para 31.

[17] D Langlet and S Mahmoudi, *EU Environmental Law and Policy* (Oxford : OUP, 2016) 350.

[18] The Community was able to acquire exclusive competence in the environmental field through internal regulation according to the *ERTA* principle. See Case 22/70 *ERTA* [1971] ECR 263, and Opinion 1/94 [1994] ECR I-5267, para. 77.

[19] Council Decision (EU) 2015/45.

[20] Decision 82/72/CEE [1982] OJL 38/11 ; Décision du Conseil, 21 décembre1998 (JOCE, L 358, 31 décembre1998)

[21] Decision 93/626 [1993] OJL 309/1.

- the UN Convention to Combat Desertification (UNCCD),[22]
- the Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS),[23]
- the Den Hague Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA),[24]
- the Convention on the protection of the Alps (Alpine Convention),[25]
- the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR),[26]
- the Geneva Protocol of 3 April 1982 concerning specially protected areas in the Mediterranean,[27]
- the Barcelona Protocol of 10 June 1995 concerning specially protected areas and biological diversity in the Mediterranean.[28]

Although the EU is bound by these MEAs, itdid not always adopt measures of secondary law to implement these agreements. By way of illustration, there is no framework directive on biodiversity which could flesh out the requirements of the CBD.

The EU is not a contracting party to the 1972 Ramsar Convention, although the Habitats and Birds Directives guarantee the conservation of a very large number of wetlands that have been classified as Ramsar sites. Nor is the EU a party to the 1972 World Heritage Convention and the 2000 European Landscape Convention. Although the EU has adopted measures to protect cetaceans, including cetacean products originating from third countries, it has only an observer status in the International Convention for the Regulation of Whaling (ICRW).[29]

The external competence in the area of nature protection is not exclusive, but rather shared between the EU and the Member States.[30] Accordingly, all nature protection agreements to which the EU is a contracting party, including those concluded both before and after the entry into force of the 1987 SEA, are classified as "mixed agreements" since they were concluded pursuant to Article 191(4) TFEU both by the EU and the member states. The mixity of these agreements made it possible to satisfy both the EU and the member states when each of them assert their own powers. It follows that mixed agreements are negotiated, concluded, implemented and managed jointly by the EU and the member states 'within their respective spheres of competence'. In particular, the mixed representation at the conferences of parties guarantees the participation of both the EU and its member states in the decision-making process. The member states are represented, in their individual capacity, in the intergovernmental institutions in charge for implementing these agreements.[31]

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[22] Decision 98/216 [1998] OJL 83/1.
[23] Decision 82/46/EC [1982] OJL 210/10.
[24] Decision 2006/871/EC [2006] OJL 345.
[25] Decision 96/191 [1996] OJL 61/31.
[26] Decision 81/691 [1981] OJL 252/26.
[27] Decision 84/132/CEE [1984] OJL 68.
[28] Decision 1999/800/CE [1999] OJL 322.
[29] This does not preclude the Council of the EU to adopt decisions establishing the position to be adopted on behalf of the EU at the COPs of the ICRW with regard to proposals for amendments. The Member States may thus present a common position for the EU in the IWC.
[30] Article 4(2)(e) TFEU stipulates that competence over environmental matters shall be shared.
[31] The presence of national representatives in the organs of the convention is justified both by the fact that certain matters covered by the mixed agreement fall within the competence of the Member States and by the fact that the Member States make financial contributions to the operation of the agreement.

The EU and the member states are jointly responsible for fulfilling the obligations owed to third states. It is settled case law that 'in ensuring respect for commitments arising from an agreement concluded by the [EU] institutions the Member States fulfil, within the [EU] system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement'.[32] The implementation of mixed agreements requires a coordinated action by the EU and its Member States.[33] Moreover, the obligations resulting from the mixed agreement are applicable to the member states, despite the absence of EU secondary rules.

Once environmental mixed agreements have been concluded by the EU, they form an integral part of the EU legal order. Their status under EU law is identical to that of agreements concluded exclusively by the EU in so far as their provisions fall within the scope of EU competence.[34] Given that the agreements concluded by the EU have primacy over secondary EU legislation,[35] they bind both the EU and the member states by virtue of Article 216(2) TFEU. In principle, compliance of EU secondary law with these international obligations may be subject to review before the EU courts. The possibility for claimants to invoke directly before their domestic courts mixed international agreements is likely to oblige the courts to discard national law inconsistent with the international obligations. *Etang de Berre* is a case in point. The CJEU held that as long as it is worded in clear, precise and unconditional terms, the requirement laid down in the Protocol of the Protection of the Mediterranean Sea against Pollution from Land-based Sources to subject the discharge of pollutants into surface water to an authorisation procedure has direct effect.[36] Interestingly enough, the Court stressed in its judgment that direct effect 'can only serve the purpose of the Protocol … and reflect the nature of the instrument, which is intended, *inter alia,* to prevent pollution resulting form the failure of public authorities to act'. [37]

However, the logic of other environmental agreements makes it impossible to recognize many of their provisions as having direct effect in the EU. In *Lesoochranárske zoskupenie*, a case on habitat conservation, the CJEU held that Article 9(3) of the Aarhus Convention had no direct effect on the grounds that it does not contain 'any clear and precise obligation capable of directly regulating the legal position of individuals.'[38] Nonetheless, with the view of safeguarding rights which individuals derive from the mixed agreement and EU secondary law implementing it, the Court held that the provision at issue could not be interpreted by national courts in such a way as to make it in practice impossible or excessively difficult to exercise rights (standing) conferred by EU law. Applying the doctrine of consistent interpretation may in such a case lead to similar result as would have direct effect.

Last, the very fact that a treaty, such as that on biological diversity, contains provisions which do not have direct effect does not preclude the ability of the EU courts to review compliance

[32] Case 12/86 *Demirel* [1987] EU:C:1987:400, para 11 ; case C-13/00 *Commission/Irland* [2002] ECR I-2943, para 15.
[33] Joined Cases 3, 4 and 6-76 *Cornelis Kramer* [1976], ECR 1279*,* paras 39 à 45.
[34] Case 12/86, *Demirel* [1987] ECR 3719, para 9 ; case C-13/00, *Commission/Irland,* [2002] ECR I-2943, para 14 ; Case C-213/03 *Etang de Berre* [2004] ECR I-7357, para. 25.
[35] Case C-61/94 *Commission* v. *Germany* [1996] ECR I-3989, para. 52; and Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, para. 25
[36] Case C-213/03 *Etang de Berre* [2004] ECR I-7357.
[37] Ibidem*,* para. 45.
[38] Case C-240/09 *Lesoochranárske zoskupenie* [2011], EU:C:2011:125, para. 45.

with the obligations incumbent upon the EU as a party to that agreement.[39]

4. The influence of international law on EU secondary law

There is a clear link between the Stockholm conference and the start of the Community's environment policy. The Stockholm Conference held in June 5–16, 1972 was quickly followed by the November 1973 EU Declaration an environmental policy that focused on the fight against pollution and ignored nature protection.[40] The first programme of action on the environment, known as the 1973 action program, was set out in this Declaration. Once again, this programme focused primarily on pollution control. Consequently, nature protection agreements rather than political declarations and action programmes have led to the development of the EU nature protection policy.

4.1. The influence of the Council of Europe

Seeking to overcome the divisions of the Second World War, the EU and the Council of Europe share common values of democracy, the rule of law and human rights. All 27 member states are members of the Council of Europe, while the EU has observer status. Various subjects lend themselves to synergies, such as environmental law, criminal law, the protection of cultural property and the protection of personal data in the age of new technologies. As far as nature protection is concerned, the Council of Europe has also played a key role in drafting:

- the 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats,
- the 1998 Convention on the protection of the Environment through Criminal Law,
- the 2000 Florence European Landscape Convention.

The Bern Convention, that was the first international treaty to protect both species and habitats, has been influencing the drafting of the Birds and the Habitats directives. Although the EU is not a party to the 1998 Convention, Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law probably implements the 1998 Convention on the protection of the Environment through Criminal Law, in supplementing existing administrative sanction system with criminal law penalties to strengthen compliance with the laws for the protection of the environment. In 2022, the Committee of Ministers of the Council has been setting up an expert committee that is entrusted with the elaboration of a new Convention on the Protection of the Environment through Criminal Law.

4.2. The dual conservation approach in international and EU law

The various directives and regulations adopted during the 80s aiming at protecting nature were clearly inspired by the Ramsar,[41] Bern and CMS conventions. Moreover, EU secondary law must be interpreted, as far as possible, in the light of international law, in particular where such texts are specifically intended to implement an international agreement concluded by the EU.[42]

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[39] Case C-437/98 *Netherlands v. Parliament and Council* [2001] ECR I-7079, paras. 53-54.

[40] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973, OJ C 112 of 20.12.1973.

[41] Se Article 4(2) of the Birds Directive that requires Member States to 'pay particular attention to the protection of wetlands and particularly to wetlands of international importance'.

[42] Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para. 52; Case C-341/95, *Safety Hi-Tech S.R.L* [1998] ECR I-4355, para. 20. This is not the case where the agreement has not been concluded by

For instance, the 1979 Bern Convention has been fleshed out in two landmark directives: the directive on the conservation of wild birds (the Birds Directive) and the directive on the conservation of natural habitats and wild fauna and flora (the Habitats Directive), which are deemed to be the cornerstones of the EU's nature conservation policy.[43] Conservation measures operate along twin tracks. Like the Bern Convention, the two directives simultaneously pursue an ecosystem approach (protection of vulnerable habitats or habitats of threatened species) and a specific approach (protection of certain wild species). Contemporary to the Bern Convention, the 1979 Birds Directive is in line with this treaty by distinguishing between the protection of the habitats of bird species (Articles 3 and 4), on the one hand, and the protection of bird species as such by regulating their taking (Articles 5 to 9), on the other.[44] Following the example of the Bern Convention, the Habitats Directive ensures the conservation of particular natural habitats as well as species of wild fauna and flora.[45]

4.3. The stringency of habitat protection under EU law

The designation and conservation regimes of protected areas designated under the Birds and Habitats directives are much stricter than under international law. For instance, the Natura 2000 network constituted the first serious attempt in Europe to establish a network of protected sites. The two directives afford specific importance to the conservation of the natural habitats of wild fauna and flora enshrined in two legal instruments: 'special protection areas' (SPAs) intended to protect the habitats of rare bird species as well as migratory species under the Birds Directive and 'special areas for conservation' (SACs) intended to protect non-bird habitats of EU interest under the Habitats directive. In contrast, few international agreements provide for the obligation to protect habitats.[46]

In addition, in international law, the designation of protected areas is in principle a matter for the States. By way of illustration, under the 1972 World Heritage convention the listing of the sites remains under the sovereignty of the State in which they are located.[47] Similarly, under the Ramsar convention, each party must designate suitable wetlands in its territory for inclusion in the List of Wetlands of International Importance.[48] The choice must be made on the basis of their international significance. In contrast, under the Birds Directive, the discretion of states is limited as regards both the number and size of areas, which must be large enough to ensure the conservation of threatened species as well as migratory species.[49] The margin of appreciation of the member states is limited because of the nature protection objectives. Furthermore, the Habitats Directive has introduced a much more sophisticated procedure for

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the Community or ratified by the Member States. See Case C-379/92 *Peralta* [1994] ECR I-3454, para. 56.

[43] N de Sadeleer and C H Born, *Droit international et communautaire de la biodiversité* (Paris: Dalloz, 2002) 436-715.

[44] CH Born and al. (ed.), *The Habitats Directive in its EU Environmental Law Context* (Routledge 2015).

[45] Species which are protected under the Bern Convention are not necessarily protected under the Habitat directive. This is the case of the badger.

[46] The 1979 Bonn convention defines habitat as 'any area in the range of a migratory species which contains suitable living conditions for that species'.

[47] Article 2.

[48] Article 2.

[49] Cases C-355/90 *Marismas de Santona* [1993] ERC I-4221, para 22; case C-44/95 *Lappel Bank* [1996] EU:C:1996:297, para 26 ; C-166/97 *Estuaire de la Seine* [1997] EU:C:1998:596, para 38; C-96/98 *Marais poitevin* [1999] ECR I- - 8548, para 41.

selecting EU-specific sites, further reducing the discretion of member states.[50]

EU nature protection law is far from being toothless. If nature conservation rules are incorrectly applied, the European Commission can bring an action for failure against the defaulting member state. In addition, in national cases where secondary EU law is invoked, the domestic courts regularly refer questions to the CJEU for preliminary rulings on the binding scope of the provisions at hand.

The following table highlights the influence of several MEAs on the development of EU secondary law.

Topics	**International arrangements/agreements**	**EU policy and legal commitments**
Bases of the environment policy	1972 UN Conference on the Human Environment	1972 European Council declaration on a Community environment policy
General framework	1992 CBD	No framework directive
European Wildlife and Natural Habitats	1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats	1979 Birds Directive completed by the 1992 Habitats Directive
Wild birds	1995 AEWA	2010 Birds Directive
Protection of species of wild fauna and flora by regulating trade therein	1973 CITES	1996 CITES Regulation
Invasive alien species	1992 CBD (Art. 8(d))	Regulation (EU) 1143/2014 on invasive alien species
Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization	2010 Nagoya Protocol on Access and Benefit Sharing	Regulation (EU) 511/2014

4.4. The extra-territorial scope of EU nature protection law

Almost 80% of the EU's biodiversity is found in the outermost regions and overseas territories. While the Habitats and Birds directives apply to the Azores, Madeira and the Canary Islands, as these islands are part of the EU territory, the other member states overseas territories are not subject to EU harmonisation measures.

Since Article 355 TFEU makes no reference to the territory of the Member States, this provision cannot be interpreted as limiting the territorial application of the Treaty only to the territories under the sovereignty of the member states. The scope of application of the TFEU as well as of secondary law may thus extend beyond the territory of the member states to the extent that public international law allows member states to exercise limited jurisdiction. This interpretation is of great importance from the point of view of conservation and sustainable use of biodiversity, in particular with regard to the continental shelf, fishing zones and exclusive economic zones. It follows that the EU lawmaker is competent to adopt rules relating to the

[50] N. de Sadeleer & C.-H. Born, *Droit international et communautaire de la biodiversité*, above.

conservation of biodiversity falling within the scope of Article 191 TFEU in any area where member states have competence under public international law to protect the environment outside their own territory.[51] However, the exercise of extra-territorial competences in the environmental field must be in accordance with the rules of international law.[52]

4.5 Final remarks

One might wonder whether the EU nature protection policy might be likely to offer better protection for ecosystems and species than a highly variegated international law. Indeed, EU law today extends to 27 member states and probably more in the years to come. Furthermore, the EU is far from being a toothless legal order. In effect, EU law represents a clear advantage over public international law in terms of efficacy. For instance, the European Commission enjoys specific powers to sue before the CJEU Member States that do not apply nature protection obligations.[53] Enforcement policy has already cut its teeth in this area.[54]

As far as the international scene is concerned, all biodiversity experts acknwoledge that the EU has become the linchpin of international environmental policy. In nature conservation, the EU is a party with its Member States to several key international agreements on nature protection (CDB, CITES, CMS, Bern Convention, etc.). Furthermore, without the active engagement of the EU, agreements such as the 2000 Cartagena Protocol on Biosafety, would not have been concluded.

Yet the picture is not as idyllic as one might be led to think on the account that the EU still lags behind its purported aspirations. Neither biodiversity nor nature conservation are enshrined in the founding EU treaties. With respect to secondary law, in the absence of a framework directive on biological diversity, the EU has found itself forced to fall back upon legislative acts stemming from diverse areas of policymaking, each adopted according to its own specific procedures, pursuing different goals, and elaborated without any general overview.

5. Cross-fertilisation between international law and EU law: the international trade of endangered species

The object of CITES is to protect certain endangered species of wild fauna and flora by regulating international trade. It lays down different rules on protection for different species, which are divided into three categories, corresponding to the three appendices to the convention. CITES covers over 38 700 endangered species – about 5 950 species of animals and 32 800 species of plants – against over-exploitation, by regulating international trade.

In the past, CITES was only open to states and not to international organisations. A 1983 amendment of the Convention, that entered into force in 2013, enabled the EU to become a party to CITES in 2015.[55] The EU is an important region of destination, transit and origin for many of the species protected under CITES.

[51] Case C-405/92 *Armand Mondiet* [1993] ECR I-6176, paras 31 to 36.
[52] Case C-366/10 *Air Transport Association of America* [2011] ECR I-13755.
[53] Articles 258 and 260 TFEU.
[54] Case C-510/20, *Commission/Bulgaria* [2022] EU:C:2022:324.
[55] Decision 98/216 [1998] OJL 83/1.

At the outset, the EU has applied the CITES without however having been able to ratify it. The first regulation implementing CITES dates from 1982. That regulation has been replaced by (EC) regulation N° 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein. In implementing uniformly in all EU member states the provisions of CITES, this regulation considerably broadened the scope of application of the CITES Convention within the European Community legal order.

The regulation classifies wild animal and plant species under four annexes. The three first annexes of the regulation (A to C) roughly correspond to the three appendices of the CITES Agreement (I to III). Regarding these annexes, the regulation applies in compliance with the objectives, principles and provisions of CITES. That being said, the regulation has an additional annex (D) which lists species that are not covered by CITES but which are imported into the EU in such numbers as to warrant monitoring.[56]

Regulation No 338/97 provides for strict rules to ensure that wildlife products only enter the EU market if they are of legal and sustainable origin. It subjects to control procedures species which are not necessarily included in the CITES annexes to control regimes. For instance, Annex A of the EU Regulation includes several species from Annex II of the CITES Convention. Accordingly, the discrepancies between the CITES appendices and the annexes of the EU regulation are related to the willingness of the EU to regulate a number of species more strictly. The CITES regulation is regularly modified to comply with the decisions adopted by the CITES institutions.

The CJEU has ruled on disputes concerning the detention of parrots, taking into account, as the following examples show, the obligations set out in CITES. In *Tridon*, the CJEU had to assess the compatibility of a French regulation prohibiting all commercial use of captive born and bred specimens of species of macaw found in French Guyana with CITES and Regulation No 338/97. The Court concluded that the Appendixes of the Convention do not preclude legislation of a member state which lays down a general prohibition in its territory of all commercial use of captive born and bred specimens.[57] In *Ministerstvo životního prostředí,* the CJEU has been supporting the interpretation that the competent authorities have the power to examine the ancestry of a breeding stock of Hyacinth Macaw (*Anodorhynchus hyacinthinus*) in the context of an application for an exemption certificate for the sale of specimens born and bred in captivity. The CJEU stressed that Regulation No 865/2006 corresponds to resolutions of the COPs. These resolutions were adopted in view of the concern that much trade in specimens declared as born and bred in captivity remains contrary to CITES and to the resolutions of the COPs and may be detrimental to the survival of wild populations of the species concerned.[58]

6. Conclusions

We have seen to what extent the 1972 Stockholm Declaration has enticed Western states, during the 1970s, to negotiate and conclude a swath of MEAs regarding nature protection. In addition, this declaration undoubtedly encouraged the EU to commence harmonising national rules on nature conservation at the end of the 70s.

[56] Article 3.
[57] Case C-510/99 *Xavier Tridon* [2001] ECR I-7777.
[58] Case C-659/20 *Ministerstvo životního prostředí* [2022] EU:C:2022:642, para 55.

However, the authors of the Declaration could not have foreseen in 1972 that more holistic concepts (biodiversity instead of nature, conservation and sustainable use instead of protection[59]) were required given the seriousness of the ecological crisis. These concepts, which are more closely related to sustainable development, emerged in 1992 with the CBD.

The 1972 Declaration did not put an end to the debate between the utilitarian approach, ensuring sustainable level of exploitation of natural resources, and the protection of the natural world as a mankind heritage. The developments of nature protection instruments, at both international and EU level, reflect the underlying tensions between, on the one hand, the utilitarian approach, and on the other, the recognition of the intrinsic value of biodiversity.[60] Last, the EU legal order has neither the equivalent of the CDB nor that of the Montego-Bay Convention on the Law of the Sea, agreements that laid the foundations for land and marine biodiversity conservation regimes.

[59] On these concepts, see Rayfuse, 370-371.
[60] The preamble of the CBD recognizes intrinsic value of biodiversity which is recognized as being the 'common concern of humankind'.