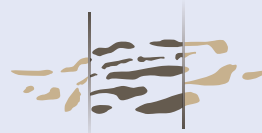


# The Status of the Wadden Sea under European and International Law

Report



waddenacademie

# The Status of the Wadden Sea under European and International Law

Report



waddenacademie

Kees Bastmeijer (ed.)  
Luuk Boerema  
Herman Kasper Gilissen  
Fred Kistenkas  
Linde Miltenburg  
Marleen van Rijswijk  
Arie Trouwborst  
Jonathan Verschuuren  
Wienke Zwier

## Colophon

### Authors

Kees Bastmeijer (ed.), Luuk Boerema, Herman Kasper Gilissen, Fred Kistenkas, Linde Miltenburg, Marleen van Rijswijk, Arie Trouwborst, Jonathan Verschuuren and Wienke Zwier

### Photography

Kees Bastmeijer

### Graphic design

BW H ontwerpers

### ISBN

9789 49 02 89 805

Report 2024-05

Published by the Waddenacademie  
© Waddenacademie November 2024

### Contact Waddenacademie

Secretariat Waddenacademie  
T +31 58 233 90 30  
E [secretariaat@waddenacademie.nl](mailto:secretariaat@waddenacademie.nl)  
[www.waddenacademie.nl](http://www.waddenacademie.nl)

### Reference

Kees Bastmeijer (ed.), Luuk Boerema, Herman Kasper Gilissen, Fred Kistenkas, Linde Miltenburg, Marleen van Rijswijk, Arie Trouwborst, Jonathan Verschuuren and Wienke Zwier, *'The Status of the Wadden Sea under European and International Law'*, Waddenacademie, Leeuwarden – November 2024

The Waddenacademie is funded by the Waddenfonds and is an independent knowledge broker for the Wadden.

# THE STATUS OF THE WADDEN SEA UNDER EUROPEAN AND INTERNATIONAL LAW

## 1 Introduction

On paper, the Wadden Sea is one of the most protected nature reserves in Europe. A large number of international conventions and EU directives on the protection of nature, landscape and water, apply to the Wadden Sea. However, discussions on the protection of the Wadden Sea tend to focus on EU law and many people are less familiar with the applicable international conventions and their legal consequences. This report aims to provide an overview of the international conventions and EU nature and water directives and regulations that are applicable to the Dutch Wadden Sea and Ems-Dollard, and to give an explanation of the objectives, obligations and prohibitions that derive from these legal regimes.

The authors have examined not only the text of EU directives and conventions themselves, but also relevant soft-law instruments that have been adopted within these legal regimes (e.g., Resolutions, Recommendations, handbooks and guidelines).<sup>1</sup> These soft-law instruments are not themselves legally binding but do provide greater clarity on the interpretation of key concepts, the objectives of the regimes and the content of obligations and prohibitions. In addition to the conventions and EU directives, the 'Joint Declaration on the Protection of the Wadden Sea' and the cooperation between the three Wadden Sea countries (the Netherlands, Germany and Denmark) are also discussed. This is not a binding convention, however, an good trilateral cooperation is essential for ensuring proper compliance with conventions and EU directives by the three Wadden Sea countries.

The implementation of, and compliance with, the discussed regimes fall outside the scope of this report and have not been the subject of separate research. However, the authors have made good estimates on these issues, which have been integrated in the discussions in this report. In January 2024, the Waddenacademie has published a separate reflection document with policy recommendations, primarily addressed to the Dutch government.<sup>2</sup>

---

1 This report is based on an English translation of Chapter 15 of the book previously published by the authors: Kees Bastmeijer (red.), Luuk Boerema, Herman Kasper Gillissen, Fred Kistenkas, Linde Miltenburg, Marleen van Rijswijk, Arie Trouwborst, Jonathan Verschuuren, Wienke Zwier, *'De Europees- en internationaalrechtelijke status van de Waddenzee. Een analyse van de relevantie van EU-richtlijnen en internationale verdragen voor de bescherming en het beheer van de Waddenzee'*, Boom Juridische Uitgevers, Den Haag, 2024.

2 Reflectie met beleidsaanbevelingen naar aanleiding van het rapport 'De Europees- en internationaalrechtelijke status van de Waddenzee'. Waddenacademie Rapport 2024-01, available at: [https://www.waddenacademie.nl/fileadmin/inhoud/pdf/04-bibliotheek/2024-01\\_Reflectie\\_met\\_beleidsaanbevelingen\\_nav\\_rapport\\_De\\_Europees-\\_en\\_internationaalrechtelijke\\_status\\_van\\_de\\_Waddenzee.pdf](https://www.waddenacademie.nl/fileadmin/inhoud/pdf/04-bibliotheek/2024-01_Reflectie_met_beleidsaanbevelingen_nav_rapport_De_Europees-_en_internationaalrechtelijke_status_van_de_Waddenzee.pdf).

## 2 Objectives, motives and key concepts of the legal regimes

### 2.1 Different objectives

Conventions and EU directives place different emphases when describing objectives. They can be roughly divided into two categories: conventions and directives that are mainly concerned with safeguarding (preserving and, if necessary, restoring) **healthy ecosystems** and the **natural processes** that characterise these ecosystems (such as the World Heritage Convention, Ramsar Convention, OSPAR Convention and Trilateral Cooperation Agreement) and conventions and directives that place emphasis on bringing **habitat types and species** of animals and plants to a **favourable conservation status** (e.g. the Bern Convention, Bonn Convention and subsidiary conventions such as AEWa, the EU Birds Directive and the EU Habitats Directive). Some conventions fall somewhere in between these two categories by emphasising more precisely described ecological processes and ecological functions of the area for species groups (such as the Ems-Dollard Environmental Protocol).

In terms of species-oriented regimes, some regimes focus more on **specific (listed) species** (such as the Habitats Directive, subsidiary conventions of the Bonn Convention),<sup>3</sup> whereas other regimes apply to **all species** (such as the Bern Convention<sup>4</sup> and for birds the EU Birds Directive) with special attention for endangered species. Other regimes relate primarily or partly to **landscape conservation** (such as the Council of Europe Landscape Convention and the Trilateral Cooperation Agreement) or to addressing a specific threat to biodiversity such as the **prevention and control of invasive alien species** (EU Invasive Alien Species Regulation).

However, there are often no sharp distinctions. For example, a good status of the habitat is a component of a favourable conservation status of a species, and certain species-related conventions also contain provisions on the protection of the species' habitat (see for example Art. 4 of the Bern Convention and Art. VII of the Agreement on the Conservation of Seals in the Wadden Sea). Conversely, species are indicators of the health of an ecosystem. Trouwborst, for example, points to the following passage from the preamble of the Agreement on the Conservation of Seals in the Wadden Sea: "seals are an irreplaceable component of the Wadden Sea ecosystem and [...] they are of great importance as indicators of its condition."<sup>5</sup> Similarly, the OSPAR Convention devotes a great deal of attention to the restoration of OSPAR List species as a key component of a healthy marine environment and a prerequisite for an ecosystem approach.

These main conservation objectives are set out in more detail in the regimes and often in **soft-law documents** (non-binding instruments, such as Resolutions, Recommendations, guidelines and manuals). In terms of area protection, this applies, for example, to concepts such as **integrity** of the Wadden area as a World Heritage site (World Heritage Convention) and the **ecological character** of the area as

3 Agreements within the meaning of Article 4 of the Bonn Convention. See <https://www.cms.int/en/cms-instruments/agreements>.

4 Explanatory Report Concerning the Convention on the Conservation of European Wildlife and Natural Habitats (Council of Europe, 1979), para. 17: "The Convention urges the conservation of all flora and fauna species and their habitats, regardless of their scarcity."

5 Agreement on the Conservation of Seals in the Wadden Sea, preamble. For similar wording, see the ASCOBANS preamble.

international wetland (Ramsar Convention). In terms of habitat and species protection, the concept of ‘favourable conservation status’ has been deployed in several legal regimes. This terminology is explicitly used as conservation objective for species in the Bonn Convention and its subsidiary conventions that have been adopted under Article IV of the Bonn Convention. According to the Bonn Convention, it means, among other things, that the species “is maintaining itself on a long-term basis as a viable component of its ecosystems.”<sup>6</sup> The Habitats Directive contains similar terminology. It is therefore not just a matter of preventing a species from being Red Listed, but ensuring its long-term survival. EU documentation in relation to the Habitats Directive describe the favourable conservation status “as a situation where a habitat type or species is prospering (in both quality and extent/population) and with good prospects to do so in future as well.”<sup>7</sup> What is relevant here is whether a species is in a favourable state in terms of population size, distribution, habitat quality and future prospects.<sup>8</sup> Based on this interpretation, it should be assumed that the Convention on Biological Diversity, the Bern Convention and the EU Birds Directive also pursue the same objective.<sup>9</sup>

These different approaches (e.g. ecosystem-based or species-based) have strengths and weaknesses from the perspective of **adequate protection**. For example, due to broader terminology, a more ecosystem-based approach can sometimes be more difficult to legally assess compared to an approach that centres around specific habitat types and species. However, a specific habitat and species approach risks failing to take sufficient account of the relationship between nature components, the quality of the entire ecosystem or species that, for example, do not feature on the lists used. Landscape conservation makes it possible to protect values such as silence, darkness and vastness, but risks leaving much room for other human influences – and thus weakening protection – when the descriptions of exactly what needs to be protected are imprecise and standards are vague. Interestingly, however, the differences in emphasis are precisely what make conventions and directives complement and reinforce each other, and the sum total of the objectives and obligations is what ensures comprehensive protection (for example at the level of areas such as the Wadden Sea), assuming that all these regimes are actually implemented in practice.

6 Bonn Convention, preamble and Art. I(1)(c)(1).

7 Douglas Evans and Marita Arvela, Assessment and reporting under Article 17 of the Habitats Directive, Explanatory Notes & Guidelines for the period 2007-2012, European Topic Centre on Biological Diversity, July 2011, [http://bd.eionet.europa.eu/article17/reference\\_portal](http://bd.eionet.europa.eu/article17/reference_portal), p.8.

8 See Kees Bastmeijer, ‘Onderzoek naar de betekenis van ‘de gunstige staat van instandhouding’, met name in het kader van de beoordeling van ontheffingsaanvragen onder de Wet natuurbescherming’ (Research into the meaning of ‘favourable conservation status’, particularly in the context of assessing exemption applications under the Nature Conservation Act), a study commissioned by the Provinces of Gelderland and Utrecht, in coordination with the Province of Overijssel, January 2018, available at [https://www.researchgate.net/publication/323446971\\_Onderzoek\\_naar\\_de\\_betekenis\\_van\\_'de\\_gunstige\\_staat\\_van\\_instandhouding'\\_met\\_name\\_in\\_het\\_kader\\_van\\_de\\_beoordeling\\_van\\_ontheffingsaanvragen\\_onder\\_de\\_Wet\\_natuurbescherming](https://www.researchgate.net/publication/323446971_Onderzoek_naar_de_betekenis_van_'de_gunstige_staat_van_instandhouding'_met_name_in_het_kader_van_de_beoordeling_van_ontheffingsaanvragen_onder_de_Wet_natuurbescherming).

9 Ibid. For arguments why the objective of the EU Birds Directive also relate to the favourable conservation status of birds, see also Yaffa Epstein, José Vicente López-Bao and Guillaume Chapron, ‘A Legal-Ecological Understanding of Favorable Conservation Status for Species in Europe’, *Conservation Letters*, March/April 2016, 9(2), 81–88, p. 86.

## 2.2

### Achieving objectives: result obligation or best-efforts obligation?

In several regimes, achieving conservation objectives is a **result obligation** (e.g., the Bern Convention, the Agreement on the Conservation of Seals in the Wadden Sea [Art. VII(2)], AEWa Convention [Art. II(1)], Ramsar Convention, the EU directives). Achieving the objectives is thereby mandatory and cannot be abandoned for reasons such as socio-economic interests, unless legitimate grounds justify an exception in accordance with provisions of the relevant legal regime. Other conventions set out **best-efforts obligations** (e.g., the Ems-Dollard Environmental Protocol), whereby a party is obliged to make efforts to achieve a certain result. However, these best-effort obligations are sometimes far-reaching (World Heritage Convention).

Where there is a best-efforts obligation, this does not mean that contracting states are completely free to decide the extent of the effort. Best-efforts obligations in hard-law conventions therefore differ from soft law. Best-efforts obligations can also be infringed when it is clear that the effort made is substandard. The World Heritage Convention, for instance, imposes a far-reaching best-efforts obligation that leaves no room for decisions that clearly compromise the outstanding universal value of the area to be protected. Discussions with UNESCO on projects such as gas extraction at Ternaard in the Netherlands, salt extraction and cable laying through the Wadden Sea, followed by the inclusion of the Wadden Sea on the agenda for the World Heritage Committee meeting and a Resolution by this committee in September 2023, underline this.<sup>10</sup>

From an effectiveness perspective, it is difficult that many regimes do not set a hard deadline for achieving **improvement targets** (nature restoration). On the other hand, however, many regimes impose **prohibitions of deterioration** that apply continuously and often make ‘doing nothing’ impossible in situations where threats for the relevant natural values exist. This is particularly relevant for large-scale cumulative effects that can lead to deterioration, such as climate change (including drought), accumulation or dispersion of pollutants (such as nitrogen and pesticides) and disruption.

Another weakness is that many convention regimes lack effective **enforcement mechanisms**. One response is to use national instruments to achieve compliance, however in the Netherlands there is a concern (from the point of view of convention objectives) that administrative courts are reluctant to test governmental decisions against convention obligations. This reluctance is open to criticism, because many of the conventions impose fairly specific obligations and prohibitions, particularly if such tests include examining soft-law documents that give further substance to the hard-law obligations.<sup>11</sup>

<sup>10</sup> See Bastmeijer et al., note 1, Chapter 2, section 6.4.

<sup>11</sup> See i.a. Bastmeijer et al., note 1, Chapter 4 by Jonathan Verschuuren and subsection 10.5 below.

## 2.3 Geographical scope

The objectives, obligations and prohibitions in the conventions and directives relate primarily to the territory and maritime zones over which the party/EU member state exercises jurisdiction and the human activities carried out or planned within them, although the OSPAR Convention, for example, also relates to ‘areas beyond national jurisdiction’. A few conventions also explicitly state that the provisions apply to activities and processes outside those areas but over which the state can exercise jurisdiction or control. Reference is made to Article 4(2) of the Convention on Biological Diversity. Examples from the perspective of The Netherlands include the exercise of jurisdiction over activities undertaken by Dutch persons or legal entities or from Dutch vessels abroad or in areas outside The Netherlands’ jurisdiction. This may be relevant for the Wadden Sea, for example when it comes to ‘**Dutch activities**’ in the German or Danish parts of the Wadden Sea or maritime zones of those countries.

In this context, reference should also be made to the generally applicable ‘**no harm principle**’, also known as the ‘**due diligence principle**’. This principle is part of international customary law and is therefore binding on all states. It stipulates that states have an obligation to ensure that activities within their jurisdiction or control do not harm the environment of other states or of areas beyond the limits of national jurisdiction. In short, in taking proper care of the Wadden Sea – including the German and Danish parts of this area – the government must look not only at activities within its own territory and maritime zones but also at ‘Dutch activities’ outside these areas. This applies not only to the Netherlands, but also to Germany and Denmark.

## 2.4 Reasons for protection

In terms of reasons for protection, we see a wide range of **anthropocentric** (‘people as the focus’) and **ecocentric** (‘ecosystem as the focus’, whereby nature has intrinsic value) reasons.

The more anthropocentric reasons for nature conservation are explicitly reflected in certain regimes. For example, the Convention on Biological Diversity also relates to ensuring the sustainable use and fair distribution of the benefits (benefit sharing) of biological resources. The goal of the OSPAR Convention also includes sustainable use based on an ecosystem approach. The Ems-Dollard Environmental Protocol primarily defines ecological objectives but, according to the contracting states, these objectives are pursued “with a view to sustainable development.”<sup>12</sup> Several regimes also address the importance of nature conservation from the perspective of preserving ecosystem services. Some regimes furthermore stress that it is not only about the existing generation of humans but also about fairness to future generations (‘intergenerational equity’; see, for example, the preamble of the Bonn Convention, the preamble of the OSPAR Convention and the Water Framework Directive).<sup>13</sup>

However, most regimes reflect not just one human-nature relationship but multiple perspectives. For example, the regimes do not only protect species that are useful to humans. In regimes such as the Habitats Directive and annexes to conventions, we do see that significantly more attention is devoted to certain species groups (such as birds

<sup>12</sup> Art. 4 of the Ems-Dollard Environmental Protocol.

<sup>13</sup> Bonn Convention, preamble (as an example): “each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilised, is used wisely.”



and mammals) than to others (such as fish and invertebrates), but ‘usefulness to humans’ is not the key element. Even when specific species or species groups are not the subject of specific species protection provisions (for instance prohibitions), these species are often protected by broader obligations. Examples include general obligations to bring all species to a favourable conservation status (the Bern Convention) and obligations to protect the ecological character of the area (e.g. the Ramsar Convention).

The intrinsic value of nature is also explicitly recognised in some regimes, for example in the preambles of the Convention on Biological Diversity, the Bern Convention,<sup>14</sup> the OSPAR Convention and the Water Framework Directive, but can certainly also be read in the wording of objectives and principles of the different regimes (e.g. the Bonn Convention<sup>15</sup>).

## 2.5 Key terms

For a proper understanding of the objectives and obligations, it is important to note that all these regimes have their own key concepts, such as ‘**biodiversity**’ (Convention on Biological Diversity), ‘**ecosystem**’ (Convention on Biological Diversity, OSPAR Convention), ‘**integrity**’ (World Heritage), ‘**outstanding universal value**’ (World Heritage), ‘**wise use**’ (Ramsar), ‘**ecological character**’ (Ramsar), ‘**natural features**’ (Habitats Directive), ‘**migratory species**’ (Bonn Convention and subsidiary agreements) and ‘**favourable conservation status**’ (Bonn Convention and subsidiary agreements, Habitats Directive) and ‘**good status**’ (Water Framework Directive). These concepts largely determine the content of the objectives and the scope of prohibitions and obligations of the relevant legal regimes. It is therefore important to bear in mind that many of these concepts are defined in the relevant convention or directive or elaborated further in soft-law documents (such as resolutions, strategies, handbooks and guidelines), as well as in case law (such as the European Court of Justice). When implementing the regimes in the Netherlands (both in law and in practice), this elaboration and meaning of these concepts must be taken into account in order to properly comply with the prohibitions and obligations of the regimes.

14 Bern Convention, preamble: “Recognising that wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handed on to future generations.”

15 See, for example, Article II (‘Fundamental principles’) of the Bonn Convention.

### 3 Principles

Principles can be seen as legal guidance providing direction for the further development of the relevant legal regime and for the interpretation and implementation of applicable obligations and prohibitions. Principles thus form a link between objectives and specific obligations and prohibitions.<sup>16</sup>

Many of the conventions explicitly mention principles or describe the essence of principles in a preamble or articles. This is especially true of the **precautionary principle** (Convention on Biological Diversity, OSPAR Convention, AEWa, Ems-Dollard Environmental Protocol), the **prevention principle** (Convention on Biological Diversity, Ems-Dollard Environmental Protocol), the **'standstill' principle** (Ems-Dollard Environmental Protocol), the **cooperation principle** (Convention on Biological Diversity, Bonn Convention and subsidiary conventions) the principle of using 'best available technologies' and 'best environmental practice' (OSPAR Convention), the **source principle** (Convention on Biological Diversity), the **'no harm' principle** (Convention on Biological Diversity), the **polluter pays principle** (OSPAR Convention, Ems-Dollard Environmental Protocol and Water Framework Directive) and the **principle of 'intergenerational equity'** (preamble to the Bonn Convention, OSPAR Convention and Water Framework Directive).

Besides the more familiar principles mentioned above, conventions also have more specific principles. One example is the principle under the Convention on Biological Diversity that preference should be given to protecting species in their natural habitat (***in situ* protection**), which can potentially be supplemented by *ex situ* protection (such as zoo breeding programmes). Other examples include the principle of **'applying best existing techniques** and best environmental practice within the framework of currently applicable European Union law' and **'the principle of not transferring negative environmental impact** to other environmental compartments' (both Ems-Dollard Environmental Protocol).

Sometimes a regime also shows a clear **interrelationship between principles and a certain degree of prioritisation**. For example, regulations on invasive alien species are based on the order prevention, rapid control, management (if control is no longer possible) and restoration (Invasive Alien Species Regulation, Convention on Biological Diversity).

In many cases, a principle is not recognisable in the convention itself, but the principle appears to have been embraced in soft law under the regime in question. One example is the emphasis on the importance of the precautionary principle in the system of the Bonn Convention and its subsidiary conventions,<sup>17</sup> which is also implemented in practice, for instance in the COP's call "to take full account of the precautionary principle in the development of wind turbine plants."<sup>18</sup> Another example is a Recommendation of the Standing Committee of the Bern Convention to the effect that a contracting state should suspend two hydropower projects based on the precautionary principle.<sup>19</sup>

16 See Jonathan Verschuuren, 'Sustainable Development and The Nature of Environmental Legal Principles', *Potchefstroom Electronic Law Journal* 9/1 (2006).

17 CMS COP Resolution 13.7 (2020), para. 4; Conservation and Management Plan for the Wadden Sea Seal Population 2018-2022, p. 9 and 15; ASCOBANS MOP Resolutions 3.3 (2000) and 8.9 (2016), para. 6.

18 CMS COP Resolution 7.5 (Rev. COP12) (2002/2017), para. 1(b).

19 Recommendation No. 202 (2018), para. 1.

Moreover, principles can often be identified in more specific prohibitions and obligations in conventions and directives, in which cases a principle is essentially codified (recorded in writing) or translated into a rule of law. For example, the principle of integration (integrating environmental/nature concerns into other policy sectors) can be clearly recognised in the obligation of each contracting party under the Bern Convention “in its planning and development policies and in its measures against pollution, to have regard to the conservation of wild flora and fauna.”<sup>20</sup> The transmission of cultural and natural heritage to future generations is mandated by Article 4 of the World Heritage Convention and although the Ems-Dollard Environmental Protocol does not explicitly mention the principle of cooperation in Article 1(2), the protocol is full of cooperation obligations for the Netherlands and Germany. Another example is the requirement, laid down in the AEWa Convention, that states take into account the precautionary principle when taking certain prescribed measures.<sup>21</sup> An even more explicit translation of the precautionary principle into a rule can be found in Article 6(3) of the Habitats Directive, which stipulates that a plan or project may not be authorised in the event of reasonable scientific doubt regarding adverse effects on the natural features of a Natura 2000 area.<sup>22</sup>

---

20 Bern Convention, Art. 3(2).

21 AEWa, Art. II(1)-(2): “In implementing the measures prescribed in paragraph 1 above, Parties should take into account the precautionary principle.”

22 Art. 6(3) of the Habitats Directive.

## 4 Obligations and prohibitions

To ensure that objectives are met and human co-use remains within the limits referred to above, the regimes include more specific obligations and prohibitions. Two recurring pillars that feature in many regimes are prohibitions and obligations in relation to **areas** and prohibitions and obligations in relation to (individuals and populations of) **species**. In addition, more **general obligations** also apply under many regimes, for example regarding environmental impact assessment (e.g. Convention on Biological Diversity [Art. 14] and Ramsar Convention [as part of ‘wise use’]), the application of specified principles (see, for example, Art. 2 of the OSPAR Convention and discussion above), cross-border cooperation (almost all conventions, Water Framework Directive), monitoring (almost all conventions and EU directives), involving the public in decision-making and securing financial resources for conservation (e.g. Art. 8 of the Convention on Biological Diversity and the Water Framework Directive). Some regimes mainly impose **obligations and prohibitions in respect of a particular component of the environment** (e.g. the Water Framework Directive) or a **specific threat to biodiversity** (e.g. the EU Invasive Alien Species Regulation).

### 4.1 Area protection

#### 4.1.1 Network of protected areas

With regard to areas, several legal systems impose an obligation to establish a **network of protected areas** (Convention on Biological Diversity, Bern Convention, OSPAR Convention, EU Birds Directive and Habitats Directive). The entire Wadden Sea has been designated as a Natura 2000 area and therefore<sup>23</sup> also forms part of the network under other conventions. For instance, the Natura 2000 areas are also part of the Emerald network under the Bern Convention and the Dutch marine Natura 2000 areas have been reported as part of the OSPAR MPA network. However, the importance of a network of protected areas is also emphasised in the more species-oriented conventions on migratory species. For example, Trouwborst points to the obligation of parties to the Agreement on the Conservation of Seals in the Wadden Sea to take into account the need to establish and maintain a network of protected areas in the seals’ migration area.<sup>24</sup>

<sup>23</sup> For example, the Natura 2000 areas are also Emerald Network areas under the Bern Convention. See the reference to the preambles of Standing Committee Resolution No. 5 (1998) and Resolution No. 8 (2012) in Bastmeijer et al., note 1, Chapter 6 by Arie Trouwborst. Marine Natura 2000 areas are also reported by the Netherlands as part of the OSPAR MPA network, although it is not clear whether this includes the Wadden Sea.

<sup>24</sup> Agreement on the Conservation of Seals in the Wadden Sea, Art. VII(1).

## 4.1.2 Subject of protection

The different legal regimes place different emphases as regards the subject of protection. For example, the Convention on Biological Diversity places a strong emphasis on the relationship between all parts of an ecosystem and the Ramsar Convention puts the preservation of the ecological character of the area first, while the EU directives focus primarily on habitat types and species and the natural features that make the area suitable for those types and species. This is relevant to the Wadden Sea because it makes it clear that the protection of the area to be achieved involves more than just a focus on the species and habitats to which Natura 2000 conservation objectives apply.

## 4.1.3 Preservation obligation and prohibition of deterioration

Some of the obligations in relation to protected areas concern the preservation of natural values (**preservation obligation**) that are central to the relevant convention or EU directive. The concept of ‘preservation’ already generally implies the obligation to avoid deterioration, however several regimes impose an even more explicit **prohibition of deterioration**. For example, under Article 3.2 of the Ramsar Convention, the ecological character of the Wadden Sea must not be altered by human influences, whereby this is assumed to be a result obligation.<sup>25</sup>

The prevention of deterioration is also the main feature of the ‘standstill’ principle set out in the Ems–Dollard Environmental Protocol. This is consistent with the aim of ‘preserving and improving’ water quality and nature in the Ems estuary and improving the quality of sediment in the water and on the seabed so as to prevent further harm to the ecosystem.<sup>26</sup>

A prohibition of deterioration also applies to the EU Natura 2000 areas under Article 6(2) of the Habitats Directive. European Court of Justice case law makes it clear that this prohibition must be observed very closely and on the basis of the precautionary principle (mandatory measures in case of reasonable scientific doubt, the same criterion as when assessing new plans and projects under Article 6[3] of the Habitats Directive).

Bodies of water covered by the Water Framework Directive (WFD) are also subject to a prohibition of deterioration. Under the Water Act, water permit applications must be assessed to determine whether the activity in question leads to a deterioration of the status of the Wadden Sea. The WFD stipulates that the status of the Wadden Sea must not deteriorate and the competent authority must assess, under the Weser ruling of the European Court of Justice, for each quality element, whether the activity applied for will lead to a deterioration in classification status. If there is a deterioration in classification status of any of the quality elements, the permit must be refused or stricter rules must be imposed to avoid a violation of the prohibition of deterioration of the status of the Wadden Sea. If a quality element is already in the lowest classification, any deterioration of that element means a deterioration of the status of the Wadden Sea, which means that the competent authority must refuse the permit.<sup>27</sup> It is important to note that even a temporary decline is not permitted unless a ground for exception is successfully invoked.

<sup>25</sup> See also the prohibition of deterioration in the AEWa Action Plan, which is defined as a best-efforts obligation: see AEWa, Annex 3, para. 3.2.3.

<sup>26</sup> Ems-Dollard Environmental Protocol, Art. 4.

<sup>27</sup> Court of Justice of the EU, 1 July 2015, ECLI:EU:C:2015:433, AB 2015/262, with commentary from Van Rijswijk.

These preservation obligations and prohibitions of deterioration call for the assessment not only of new human activities but also of existing human activities and other developments and processes. Much of the deterioration of areas, which has unfortunately continued even after the legal regimes have come into force, is due to **cumulative effects**: the sum of the many influences of human activities and processes such as excessive nitrogen loads, climate change, a bigger ‘human footprint’ due to building, and disturbance caused by increasing human activities. This issue of cumulative effects is discussed in more detail below.

Deterioration not only leads to a breach of the obligations discussed above but also increases the tension between human activities and the legal regimes, not only when assessing new plans and projects but also when determining whether existing activities are still acceptable.

#### 4.1.4 Restoration

However, objectives tend to go beyond preventing deterioration by also describing a status to be achieved. Since a great deal of damage has often already been done prior to the regime coming into force and the prohibition of deterioration is not properly observed in practice, it is important that the **restoration** of ecosystems and/or the conservation status of habitat types and species is also an explicit objective in most systems (e.g. Art. 4[4] of the Ramsar Convention and Resolution VIII.16 [2002] under this convention, Art. 2 and Art. 6[1] of the Habitats Directive, Agreement on the Conservations of Seals in the Wadden Sea, Art. III; ASCOBANS, Art. 2[1]; AEWA, Art. II[1]).

### 4.2 Protection of species

#### 4.2.1 Overarching obligations

Achieving or restoring the **favourable conservation status** of species and habitat types has already been mentioned above as an important goal of several conventions (Bonn Convention and its subsidiary conventions, Bern Convention, Convention on Biological Diversity) and the EU nature directives.

Achieving this goal is not voluntary, but is a **result obligation**. This applies to the species listed in the EU directives (all birds and all species listed in the Habitats Directive) and the migration conventions (Bonn Convention and subsidiary conventions), however under the other conventions (Bern Convention and the Convention on Biological Diversity), the obligation to achieve and maintain favourable status applies to all wild species of plants and animals. In addition, the Bern Convention refers not just to species but populations of species.<sup>28</sup> As explained by Trouwborst, this is not just about preventing species extinction, but also about ensuring that the numbers, densities and distribution of species are such that the species can adequately perform their ecological functions – their roles in relation to other species and the ecosystem as a whole. This is in line with the interpretation of the concept of ‘favourable conservation

---

<sup>28</sup> Bern Convention, Art. 2.

status' within the EU, where it is important whether population size, distribution, habitat and future prospects are 'favourable'.<sup>29</sup>

In most regimes, these obligations are elaborated in specific prohibitions related to the prevention of infringements regarding individual specimens of the species, prohibitions of deterioration and restoration obligations. Under the OSPAR Convention, many OSPAR List species are the subject of specific recommendations (OSPAR Committee Recommendations), often based on detailed background documents for the species in question.

## 4.2.2 Prohibitions

Species protection provisions in the various regimes include fairly specific prohibitions of acts such as killing, capturing or deliberately disturbing specimens of the species in question (Birds Directive, Habitats Directive, Bonn Convention, subsidiary conventions of the Bonn Convention, Bern Convention). The species protection provisions of EU directives have strongly shaped Dutch species protection law. The relevant directive provisions have been the subject of rich case law of both the European Court of Justice and national courts in the Member States.

When shaping the Dutch species protection provisions, the Bern Convention and the Bonn Convention have also been considered in terms of the classification of species into protection regimes, but the focus on conventions is too limited. An example relevant to the Wadden Sea is the protection of seals from deliberate disturbance. Grey seals and harbour seals have been designated as 'nationally protected species' (Art. 3.10 of the Nature Conservation Act). Unlike under the old 1998 Flora and Fauna Act, which has been integrated into the Nature Conservation Act, this act no longer explicitly prohibits the deliberate disturbance of this category of species, although it could of course be successfully argued that such behaviour constitutes a breach of the duty of care. Deliberate disturbance is still prohibited for the protected species under EU and international law listed in Article 3.5 of the Nature Conservation Act, but this therefore does not take into account the Agreement on the Conservation of Seals in the Wadden Sea. As a result, there is no consistency in the transposition of conventions into Dutch law, as the Agreement on the Conservation of Seals in the Wadden Sea very explicitly prohibits the deliberate disturbance of the harbour seal: "The Parties shall preserve habitats and seals present from undue disturbances or changes resulting, directly or indirectly, from human activities."<sup>30</sup>

However, such prohibitions alone will not make it possible to bring or maintain many species in a favourable conservation status. For example, the Agreement on the Conservation of Seals in the Wadden Sea requires the development of a "conservation and management plan" for the harbour seal population, stating how the objective of a favourable conservation status will be achieved.<sup>31</sup> In many cases, active restoration of populations will also be required. We will return to this under the topic of 'restoration obligations'.

29 See Kees Bastmeijer, 'Onderzoek naar de betekenis van 'de gunstige staat van instandhouding'', supra note 8.

30 Agreement on the Conservations of Seals in the Wadden Sea, Art. VII (2).

31 Ibid., Art. IV.

### 4.2.3 Preservation obligation and prohibition of deterioration

As in area protection law, prohibitions of deterioration also occur in the primarily species-oriented regimes. An explicit prohibition of deterioration is included in the EU Birds Directive: “Application of the measures taken pursuant to this Directive may not lead to deterioration in the present situation as regards the conservation of the species of birds referred to in Article 1.”<sup>32</sup> Other obligations or prohibitions do not include the term ‘deterioration’ but effectively amount to the same thing. One example is the recognition of the need “to take action to avoid any migratory species becoming endangered” in the Bonn Convention<sup>33</sup> and similar obligations in its subsidiary conventions.

### 4.2.4 Restoration

In many regimes, species protection – contrary to what some may believe – relates not only to stopping infringements regarding individuals or populations of species but also to restoration. This already follows from the obligation to achieve favourable conservation status for species. Since many species have an unfavourable status, restoration is necessary. In some cases, nature can achieve that restoration itself by removing the stressors, but in other cases, active restoration is needed.

However, restoration is not just an implied or derivative obligation. Many regimes contain explicit restoration obligations. The AEWA Convention links a restoration obligation directly to achieving favourable status: “Parties shall take co-ordinated measures to maintain migratory waterbird species in a favourable conservation status or to restore them to such a status.”<sup>34</sup> Trouwborst explains that the AEWA Convention therefore requires the Netherlands to take the general measures listed in Article III for many Wadden Sea species, as well as the specific measures set out in the Action Plan included in Annex 3 to the Convention.<sup>35</sup> These measures include restoration obligations. Article III of the AEWA Convention obliges contracting states in strict terms (“the Parties shall”) to take the following measures:

- c) “identify sites and habitats for migratory waterbirds occurring within their territory and encourage the protection, management, *rehabilitation and restoration of these sites*, in liaison with those bodies listed in Article IX, paragraphs (a) and (b) of this Agreement, concerned with habitat conservation;
- e) investigate problems that are posed or are likely to be posed by human activities and endeavour to implement remedial measures, including habitat *rehabilitation and restoration*, and compensatory measures for loss of habitat” (emphasis added).<sup>36</sup>

The other migration conventions impose similar obligations, which may also involve species habitat restoration. For example, the Agreement on the Conservation of Seals in the Wadden Sea stipulates: “The Parties shall explore the possibility of restoring degraded habitats and of creating new ones.”<sup>37</sup>

32 EU Birds Directive, Art. 13.

33 Bonn Convention, Art. II(2).

34 AEWA, Art. II(1).

35 Ibid.

36 AEWA, Art. III(2).

37 Agreement on the Conservation of Seals in the Wadden Sea, Art. VII (4).



## 4.3 Combating invasive alien species

Almost all conservation conventions also address the prevention and control of invasive alien species. The EU aims to implement these convention obligations to which the EU itself is also a party (such as the Convention on Biological Diversity) through the EU Invasive Alien Species Regulation.<sup>38</sup> Under this regulation, Member States must prevent the deliberate introduction of alien species that feature on the Union list by means of measures including a system of prohibitions (Art. 7) with the possibility of derogation through permits (subject to strict conditions) (Art. 8 and 9). In addition, a Member State can also draw up a national list of alien species of concern and take similar measures as for species on the Union list (Art. 11 and 12). Member States are in any case permitted to lay down more stringent rules to prevent the introduction, establishment and spread of invasive alien species of concern (Art. 23).

Member States are also required to:

- › Establish a surveillance system of invasive alien species of Union concern which collects and records data “on the occurrence in the environment of invasive alien species by survey, monitoring or other procedures to prevent the spread of invasive alien species into or within the Union” (Art. 14; within 18 months of the adoption of the Union list);
- › Carry out a comprehensive analysis of the potential priority pathways of unintentional introduction and spread of invasive alien species of Union concern in their territory, as well as in their marine waters, and of the priority measures that need to be taken (Art. 13; also within 18 months of the adoption of the Union list);
- › Establish and implement one single action plan or a set of action plans to address priority pathways (Art. 13[2]; within three years of the adoption of the Union list);
- › Have in place fully functioning structures to carry out the official controls necessary to prevent the deliberate introduction into the Union of invasive alien species of Union concern (Art. 15; by 2 January 2016);
- › Apply rapid eradication measures after detection of Union list species (Art. 16 and 17, with exceptions under Art. 18);
- › Have in place effective management measures for those invasive alien species of Union concern which the Member States have found to be widely spread on their territory, so that their impact on biodiversity, the related ecosystem services, and, where applicable, on human health or the economy are minimised (Art. 19[1]; within 18 months of an invasive alien species being included on the Union list);
- › Carry out appropriate restoration measures to assist the recovery of an ecosystem that has been degraded, damaged, or destroyed by invasive alien species of Union concern unless a cost-benefit analysis demonstrates, on the basis of the available data and with reasonable certainty, that the costs of those measures will be high and disproportionate to the benefits of restoration (Art. 20[1]).

A 2021 analysis reveals that more than 110 alien species have now been observed in the trilateral Wadden Sea.<sup>39</sup> Knowledge about their invasive character and its effects is still incomplete, however it is widely recognised that invasive species pose a threat to Wadden Sea biodiversity and many of the objectives of conventions and EU directives. It would be advisable to check whether the Netherlands is properly complying with the conventions and in particular the EU Invasive Alien Species Regulation on this issue in relation to the Wadden Sea. For example, has a surveillance system for species on the

<sup>38</sup> See Bastmeijer et al., note 1, Chapter 12 by Linde Miltenburg and Marleen van Rijswijk.

<sup>39</sup> Wadden Sea Quality Status Report, Annex 1, available at: <https://qsr.waddensea-worldheritage.org/annex-alien-species>.

Union list already been established to collect and record data “on the occurrence in the environment of invasive alien species by survey, monitoring or other procedures” in accordance with the Regulation (Art. 14)? And has it been determined for the Wadden Sea which national alien species require special action?

A joint approach to the subject of invasive alien species has been ongoing in the context of the trilateral cooperation since World Heritage status was obtained in 2009, and a joint Trilateral Wadden Sea Management and Action Plan for Alien Species (MAPAS) was adopted in 2019.<sup>40</sup> It is recommended that the implementation of this plan be reviewed and, in particular, whether the trilateral coordination advocated in the plan has come about. This plan identified the added value of coordination particularly in respect of cooperation in surveying and monitoring alien species in the Wadden Sea region, exchange of knowledge on effectiveness of measures and cooperation on public information.<sup>41</sup> Where this coordination needs strengthening, the possibility of granting the trilateral cooperation the status of regional cooperation within the meaning of Article 11 of the EU Invasive Alien Species Regulation may be considered. This would also open up opportunities to secure support from the European Commission.

## 4.4 Environmental impact assessment

Many of the legal regimes require an assessment of the effects of human activities in advance of making a decision on those activities. A well-known assessment is the ‘**appropriate assessment**’ referred to in Article 6(3) of the Habitats Directive, however reference can also be made to Article 14 of the Convention on Biological Diversity, the **environmental impact assessment** as part of ‘wise use’ under the Ramsar Convention and the impact assessment required for World Heritage sites. These environmental impact assessment obligations are often set out in more detail in soft-law documentation under the convention systems (for example in the Ramsar Secretariat’s Impact Assessment Guidelines (2010) and the Operational Guidelines under the World Heritage Convention).

For the Wadden Sea, these convention obligations are highly relevant because a Natura 2000 appropriate assessment generally focuses on the potential impacts on natural features of the area that are relevant from the point of view of the conservation objectives, while the other assessment obligations are broader. For example, Verschuuren describes that the assessment requirement under the Ramsar Convention should focus on “the true values of wetland ecosystems in terms of the many functions, values and benefits they provide, to allow these environmental, economic and broader social values to be included in decision-making and management processes.”

A similar broad assessment is also necessary for World Heritage sites. For example, section 118bis of the Operational Guidelines under that convention clearly stipulates that projects and human activities must be assessed to determine their impact on the Outstanding Universal Value of the area. This therefore includes impact on the values and processes that qualified the Wadden Sea as a World Heritage site, as well as the integrity of the area. In addition, this convention considers strategic environmental impact assessment as an appropriate tool to assess the cumulative effects of human

40 Trilateral Working Group Alien Species & A. Gittenberger, ‘Trilateral Wadden Sea Management and Action Plan for Alien Species (MAPAS)’, eds: J.A. Busch, G. Lürßen, F. de Jong, Common Wadden Sea Secretariat (CWSS), Wilhelmshaven, 2019, available at: <https://waddensea-secretariat.org/resources/management-and-action-plan-alien-species-mapas>

41 Idem., Bastmeijer et al., note 1, Chapter 12 by Linde Miltenburg and Marleen van Rijswijk.

activities, which may include joint assessment of cumulative impact by multiple countries for transboundary World Heritage sites (for example the Netherlands, Germany and Denmark in the case of the Wadden Sea).

Reference should also be made to broader obligations under EU and international law in relation to environmental impact assessment which, although not examined in the context of this report, are also relevant to the Wadden Sea. These include the EU directives on environmental impact assessment, the Espoo Convention (environmental impact assessment at project and plan level in a transboundary context) and the generally applicable 'no harm' principle. Reference should also be made in this respect to the joint statement of the Netherlands and Germany on mutual involvement and information in EIA: the "Germany-Netherlands joint statement on EIA in a transboundary context 2013". This joint statement agreed on the steps to be taken, including responsibilities and the division of roles in this regard, when there is a project or plan/programme with potentially significant transboundary environmental impact for which an EIA is to be carried out.<sup>42</sup>

## 4.5 Cross-border cooperation

Cross-border cooperation is essential to the proper functioning of protection regimes, since environmental quality, population habitats and ecosystems do not respect legally defined geographical boundaries. This is self-evident when it comes to areas like the Wadden Sea. For the World Heritage Committee, this was also the reason why granting World Heritage status was only acceptable if all three countries wanted to grant the area this status. The Netherlands and Germany were also called upon in the 1980s to designate the entire Wadden Sea as an international wetland, not just parts of it, in the context of the Ramsar Convention.

Several regimes explicitly state that parties must cooperate across borders to fulfil obligations and achieve objectives. This is self-evident in regimes such as the migratory species conventions, the Birds Directive (focus on migratory birds) and the Water Framework Directive (transboundary river basins). The Trilateral Cooperation Agreement and the Ems-Dollard Environmental Protocol are essentially all about cross-border cooperation. In addition, Article 5 of the Convention on Biological Diversity stipulates that the obligation of cross-border cooperation also exists in relation to areas that fall outside the jurisdiction of a single state.

Such collaboration can take different forms. As stated above, it may involve cooperation in the designation or delimitation of areas, but also, for example, in the adoption of objectives or policy documents, in the drafting of management plans, in implementation and monitoring or with regard to specific issues such as the control of invasive alien species. Verschuuren argues that legal coordination and cooperation can be complex due to different national legal systems, but that in practice, even in those cases, international cooperation can be successfully achieved through the joint drafting and implementation of a joint management plan.<sup>43</sup>

42 See <https://www.infomil.nl/onderwerpen/integrale/mer/procedurehandleiding/procedurele/grensoverschrijdend/>.

43 Ramsar Convention Secretariat, 'International cooperation: Guidelines and other support for international cooperation under the Ramsar Convention on Wetlands'. Ramsar handbooks for the wise use of wetlands, 4<sup>th</sup> edition, vol. 20, Gland 2010, 14.

## 4.6 Human co-use within limits

All regimes allow some degree of human co-use and no regime aims to completely exempt certain areas from human presence or influences. ‘**Wilderness protection**’ in the strictest sense of the term is thus not an explicit objective of the conventions and EU directives examined. However, strict protection to the exclusion of human beings may be implied where necessary to protect the objectives set out in conventions and EU directives and to comply with obligations and prohibitions. A few regimes also place a focus on **reference areas**, for instance for the purpose of research. For example, the Trilateral Cooperation agreed in the 1991 Esbjerg Declaration to designate reference areas in which any human use would be barred.

Although all regimes make human co-use possible, all these regimes also set limits on this co-use. These limits can often be directly explained in relation to the objectives: human co-use must be limited to ensure that the objectives can be achieved and maintained. This may mean that certain effects on specific species must be excluded, but also that human co-use must not jeopardise the maintenance or restoration of the overall quality of the ecosystem and its biodiversity. Relatively speaking, landscape conservation can potentially allow the most scope for human co-use, but even that use is restricted by the objectives to be achieved with regard to landscape. In a few regimes, sustainable human co-use is also an independent part of the objectives (for example in the Convention on Biological Diversity, the OSPAR Convention and – embedded in the central concept of ‘wise use’ – Ramsar), but even then it is about sustainable use and thus a matter of **respecting boundaries** that keep the ecosystem healthy and safeguard future ecosystem services.

## 5 Relationships between regimes and the obligation to comply with the sum total of objectives, obligations and prohibitions

### 5.1 Sum total of regimes requires broader protection than a focus on EU directives

It is often thought that convention obligations are adequately met through implementation of the EU directives. For certain topics and situations, this is true, yet conventions have many objectives and obligations that are not fully covered by the implementation of the directives. All the regimes dealt with in this report apply to the Wadden Sea, which means that choosing one angle of approach or regime is likely to leave other regimes neglected. From a legal perspective, the Netherlands must ensure that the objectives, obligations and prohibitions laid down in all applicable regimes are observed not only in law but also in practice.

This **sum total of all regimes** thus effectively leads to far-reaching and comprehensive protection that goes beyond the requirements of the EU directives. Protection should be aimed at preserving (or if necessary restoring) the ecological character of the Wadden Sea as an international wetland (Ramsar Convention), preserving the integrity of the area and important natural processes (World Heritage Convention and Trilateral Cooperation Agreement), ensuring that habitat types and plant and animal populations have a favourable status and can therefore flourish (Convention on Biological Diversity, Bern Convention and EU directives), countering pollution and restoring habitats and species in the Wadden Sea as part of the OSPAR MPA network (OSPAR Convention) and ensuring that valuable landscapes are preserved (Council of Europe Landscape Convention and Trilateral Cooperation Agreement). As noted above, achieving many of these objectives is a result obligation. Simply ‘doing our best’ based on criteria such as ‘feasible and affordable’ and focusing on specific Natura 2000 objectives is therefore not enough.

Differences between conventions and EU directives should also be considered in detail. One example is the scope for allowing **exceptions to protection**. Whereas under Article 6(4) of the Habitats Directive, the Natura 2000 regime allows exceptions to area protection on the basis of ‘imperative reasons of overriding public interest, including those of a social or economic nature’, the Ramsar Convention allows exceptions only on the basis of ‘urgent *national* interest’ (emphasis added).

### 5.2 Mutual tensions

In practice, the concepts and differing objectives can lead to **tensions**, for example when commitment to one goal jeopardises another. Yet, in many cases, it is also possible to reconcile objectives. For example, an ecosystem approach is partly about ensuring the completeness of the system and thus healthy food chains, including associated species and habitat types. Conversely, the Bern Convention also relates to area protection and a healthy habitat is also one of the four components of the concept of ‘favourable conservation status’ within the meaning of the EU directives. The Natura 2000 regime also refers, for example, to ‘natural features’ of a Natura 2000 area. To avoid tensions and allow measures to benefit multiple objectives, an integrated approach that takes into consideration all objectives is essential. We will come back to this later.

## 6 Cumulative effects

Certain regimes explicitly focus on the assessment and/or mitigation of cumulative effects. For example, the assessment of plans and projects within the Natura 2000 framework must explicitly include accumulation with effects from other sources.<sup>44</sup>

Although the texts of many directives and conventions make no explicit reference to cumulative effects, the objectives and obligations set out in those regimes also imply that cumulative effects are assessed and addressed. This applies, for instance, to quality requirements (an impact-oriented approach whereby a certain quality must be achieved), such as the obligation under the Water Framework Directive to achieve good status for water bodies, but also to objectives and obligations (conservation, prohibition of deterioration and restoration obligations). For example, without taking cumulative effects into account, the obligation to preserve the ecological character of the area (Ramsar Convention) and the integrity of the Wadden Sea (World Heritage Convention) cannot be properly met.

This also explains why soft-law documents devote explicit attention to cumulative effects within legal regimes. For example, the Ramsar Convention stipulates that cumulative effects must be assessed as a component of environmental impact assessments (see the Ramsar Convention handbook on the wise use of wetlands), while the World Heritage Committee believes that the risk of cumulative effects may make the application of strategic environmental impact assessment desirable. Reference can also be made to ASCOBANS MOP Resolution 8.9 (2016) on “managing cumulative anthropogenic impacts in the marine environment.”<sup>45</sup> Among other things, the MOP urges parties that:

“in order to improve the conservation outcomes of decisions on human activities in the marine environment and in application of the precautionary principle ... potential impacts of all activities, including chronic, cumulative and synergistic impacts on cetaceans, be taken into account.”<sup>46</sup>

---

44 Art. 6(3) of the EU Habitats Directive.

45 ASCOBANS MOP Resolution 8.9 (2016).

46 Ibid, para. 6(a).

## 7

## Climate change

Climate adaptation is slowly but surely becoming an increasingly important issue in European and international law. For instance, Verschuuren describes the obligation of Member States under the Paris agreement to draft an adaptation report setting out priorities and plans. This report should be submitted by the Member State to the Paris Agreement's Secretariat along with the national mitigation objective and national adaptation plan. Climate adaptation is also slowly but surely becoming more a part of EU law. For example, steps to 'climate proof' the Environmental Impact Assessment Directive mean that the effects of climate change on the project and the project's contribution to climate change must now be taken into account when conducting an environmental impact assessment.

No explicit reference is made to climate change in the text of most nature conservation conventions and EU nature and water directives because many of these instruments were developed before the global focus on climate change. What is clear, however, is that climate change requires serious attention in order to meet the objectives and obligations.<sup>47</sup> It is therefore not surprising that resolutions, strategies, guidelines and handbooks drawn up under the legal regimes have already devoted attention to climate change in the last few decades. Examples include the resolution adopted in 2002 under the Ramsar Convention,<sup>48</sup> a World Heritage Committee decision adopted in 2005,<sup>49</sup> European Commission guidelines<sup>50</sup> and a more recent resolution of the 2017 COP of the Bonn Convention.<sup>51</sup> The latter resolution states: "the best available scientific information indicates that action to help migratory species adapt to climate change is urgently required in order to meet the objectives of the Convention."<sup>52</sup>

The AEWa Convention is one example of a legal regime that does address climate change in the convention itself. Annex 3 to this convention (the Action Plan) states:

"Parties shall endeavour to rehabilitate or restore, where feasible and appropriate, areas which were previously important for the populations listed in Table 1, including areas that suffer degradation as a result of the impacts of factors such as climate change, hydrological change, agriculture, spread of aquatic invasive non-native species, natural succession, uncontrolled fires, unsustainable use, eutrophication and pollution."

---

47 See also extensively A. Trouwborst, 'Transboundary Wildlife Conservation in a Changing Climate: Adaptation of the Bonn Convention on Migratory Species and its Daughter Instruments to Climate Change', *Diversity* 2012/4: 258-300.

48 Ramsar Resolution VIII.3 (2002), 'Climate change and wetlands: impacts, adaptation, and mitigation'.

49 World Heritage Committee, Decision 29 COM 7B.a (2005).

50 European Commission 'Guidelines on Climate Change and Natura 2000 - Dealing with the impact of climate change, on the management of the Natura 2000 Network of areas of high biodiversity value', 2013, available at <https://op.europa.eu/en/publication-detail/-/publication/59c03f44-f672-4f61-bbf7-5422479cf6bb>.

51 Bonn Convention, COP Resolution 12.21 (2017).

52 Idem.

Further attention is also devoted to climate change in this regime in soft law.<sup>53</sup> Among other things, parties are called upon to take the measures set out in a detailed “AEWA Guidance Framework for Climate Change Adaptation”:<sup>54</sup>

- “Maintain and increase ecological resilience to climate change to support the widest range of biodiversity to survive and adapt;
- Conserve the range and ecological variability of habitats and species, to increase the chances that species whose current habitat becomes inhospitable will be able to spread locally into newly favourable habitat;
- Maintain existing ecological networks *and* establish ecological networks through habitat restoration and creation, to promote the success of species dispersal;
- Integrate adaptation and mitigation measures into conservation management to complement existing policies; and
- Undertake vulnerability assessments of biodiversity and associated ecosystem goods and services without delay to prioritise and develop appropriate actions.”<sup>55</sup>

A focus on climate change is not just about countering negative impacts on the areas and species themselves, but also the important role that natural areas play in the global climate mitigation challenge. Examples include the major role of wetlands in carbon sequestration.<sup>56</sup>

The focus on climate change in regimes has increased over the years, not just for land areas but also specifically for marine areas.<sup>57</sup> Measures vary widely and include attention to climate change in management plans. For example, the 2021 version of the Operational Guidelines under the World Heritage Convention talks about building “disaster, climate change and other risk preparedness” into management plans.<sup>58</sup>

Failure to take sufficient account of climate change for an area could result in failure to meet objectives and obligations, which, depending on the nature and content of those obligations, could lead to **violation** of the regime in question. This can also have consequences for the international status of the area. For example, a lack of climate adaptation measures may result in a World Heritage site ending up on the List of Endangered World Heritage Sites.<sup>59</sup>

53 See AEWA MOP Resolutions 6.6 (2015) and 7.9 (2018), which build on already superseded MOP Resolutions 3.17 (2005), 4.14 (2008), 5.13 (2012); see also Trouwborst, *supra* note 47.

54 AEWA MOP Resolution 6.6 (2015), Appendix I.

55 *Ibid.*, preamble.

56 Resolution XIII.14 (2018), ‘Promoting conservation, restoration and sustainable management of coastal blue-carbon ecosystems. See also Ramsar Convention Secretariat, ‘The contribution of blue carbon ecosystems to climate change mitigation’, Ramsar Briefing Note 12, Gland 2021, p. 14.

57 See under the World Heritage Convention for example: <https://whc.unesco.org/en/climate-change-marine>.

58 Operational Guidelines, 2021, §118.

59 World Heritage Committee, Decision 30 COM 7.1, ‘Issues Related to the State of Conservation of World Heritage Properties: the Impacts of Climate Change on World Heritage Properties’, 2006, available at <https://whc.unesco.org/en/decisions/1046>, §14.



## 8 Monitoring and reporting

Monitoring and reporting are essential components of the regimes as it is otherwise impossible to verify whether objectives are being achieved and conservation obligations and prohibitions of deterioration are being met. This includes all the previously mentioned objectives and obligations, such as achieving and maintaining favourable conservation status, not allowing the ecological character of a wetland to deteriorate and so on. Monitoring is sometimes regulated in conventions and directives themselves, but often elaborated further in resolutions and other instruments under conventions and directives.

A significant emphasis is placed on monitoring and reporting under the EU directives, however conventions also call for monitoring and reporting. By way of illustration, some of the key monitoring obligations from various convention regimes are listed below:

- World Heritage sites must be subject to regular monitoring: “A regular review of the general state of conservation of properties, and thus also their Outstanding Universal Value, shall be done within a framework of monitoring processes for World Heritage properties, as specified within the Operational Guidelines.”<sup>60</sup>
- Where World Heritage sites are at risk, a ‘reactive monitoring’ procedure can be initiated in which the World Heritage Committee, based on documents including a report from the relevant contracting state and a ‘state of conservation report’, discusses the threats and possible consequences.<sup>61</sup>
- Continuous monitoring of the status and trends of Ramsar areas is seen as an obligation that follows from conservation and wise use under the Ramsar Convention: “The delivery of the conservation and wise use of wetlands, in line with the commitments embodied in the Ramsar Convention, entails (...) monitoring the status and trends, including the identification of reductions in existing threats and the appearance of new threats (monitoring).”<sup>62</sup> Detailed instructions have therefore been drawn up on how best to carry out monitoring<sup>63</sup> and a monitoring programme should ideally be part of the management plan for the area.<sup>64</sup>
- Obligation to monitor population trends and migratory behaviour of seals, as well as “seal population parameters, such as diseases, survival, age structure, distribution by sex” (Agreement on the Conservation of Seals in the Wadden Sea);<sup>65</sup>
- A general obligation to mutually coordinate monitoring and research (Agreement on the Conservation of Seals in the Wadden Sea);<sup>66</sup>

60 World Heritage Operational Guidelines, 2021, §96 et seq.

61 Ibid., 2021, §169 et seq.

62 Resolution IX.1 (2005), Annex E ‘An Integrated Framework for wetland inventory, assessment and monitoring (IF-WIAM)’, para 9.

63 See in particular Ramsar Convention Secretariat, ‘Inventory, assessment, and monitoring: an Integrated Framework for wetland inventory, assessment, and monitoring’. Ramsar handbooks for the wise use of wetlands, 4<sup>th</sup> edition, vol. 13, Gland 2010.

64 Ramsar Convention Secretariat, ‘Managing wetlands: Frameworks for managing Wetlands of International Importance and other wetland sites’. Ramsar handbooks for the wise use of wetlands, 4<sup>th</sup> edition, vol. 18, Gland 2010, 58.

65 Agreement on the Conservation of Seals in the Wadden Sea, Art. (V)2.

66 Ibid, Art. V(1): “The Parties shall co-ordinate their research programmes and projects and their monitoring of the seal population to increase their knowledge of the biology and the habitats including harmful effects of human activities on the seal population to provide a basis for measures to improve its conservation status.”

- An unconditional obligation to monitor concentrations of pollutants in the tissues of seals and their prey animals (Agreement on the Conservation of Seals in the Wadden Sea);<sup>67</sup>
- An (also unconditional) obligation regarding ‘surveys and research’ in respect of small cetaceans (ASCOBANS);<sup>68</sup>
- Several ASCOBANS-MOP resolutions emphasise and elaborate on the importance of monitoring with regard to specific threats, such as bycatch, chemical pollution and plastics;<sup>69</sup>
- Monitoring obligations under Article III(2) of AEW<sup>70</sup> and the more detailed and comprehensive provision of the AEW<sup>70</sup> Action Plan:
  - “Parties shall endeavour to carry out survey work in poorly known areas, which may hold important concentrations of the populations listed in Table 1. The results of such surveys shall be disseminated widely.
  - Parties shall endeavour to monitor the populations listed in Table 1. The results of such monitoring shall be published or sent to appropriate international organizations, to enable reviews of population status and trends.
  - Parties shall cooperate to improve the measurement of bird population trends as a criterion for describing the status of such populations.
  - Parties shall cooperate with a view to determining the migration routes of all populations listed in Table 1, using available knowledge of breeding and non-breeding season distributions and census results, and by participating in coordinated ringing programmes.
  - Parties shall endeavour to initiate and support joint research projects into the ecology and population dynamics of populations listed in Table 1 and their habitats, in order to determine their specific requirements as well as the techniques which are the most appropriate for their conservation and management.
  - Parties shall endeavour to undertake studies on the effects of wetland loss and degradation and disturbance on the carrying capacity of wetlands used by the populations listed in Table 1 and on the migration patterns of such populations.
  - Parties shall endeavour to undertake studies on the impact of hunting and trade on the populations listed in Table 1 and on the importance of these forms of utilization to the local and national economy.
  - Parties shall endeavour to cooperate with relevant international organisations and to support research and monitoring projects.”<sup>71</sup>
- Under AEW<sup>70</sup>, one or more national authorities should also be designated to implement AEW<sup>70</sup> “which shall, *inter alia*, monitor all activities that may have impact on the conservation status of those migratory waterbird species of which the Party is a Range State.”<sup>72</sup>

67 Ibid, Art. VIII(c): “The Wadden Sea States ... shall ... monitor in the Agreement Area, in particular in seal tissues and in organisms which are preyed upon by seals, the levels of those substances which in the light of the results of research appear to play a major role in the conservation status of the seal population.”

68 ASCOBANS, Annex, para. 2: “Investigations ... shall be conducted in order to (a) assess the status and seasonal movements of the populations and stocks concerned, (b) locate areas of special importance to their survival, and (c) identify present and potential threats to the different species.”

69 See i.a. ASCOBANS MOP Resolutions 3.5 (2000), 7.4 (2012), 8.5 (Rev. MOP9) (2016/2020) and 9.3 (2020).

70 AEW<sup>70</sup>, Art. III(2)(h), (i), (k) and (l).

71 Ibid, Annex 3, para. 5.1-5.8.

72 Ibid, Art. V(1)(a).

## 9 Monitoring non-compliance and sanctions

Attention is devoted to ensuring compliance with EU law when legislating, when implementing that legislation and often when settling disputes about decisions by the Dutch administrative courts. It is generally assumed that EU directives are properly transposed into Dutch law, although an ongoing focus is needed in this area in light of new insights, for example as a result of new case law of the European Court of Justice. In implementation practice, the concerns are greater. However, a powerful feature of EU regulation is that the European Commission performs a ‘watch-dog’ role that can lead to a Member State being summoned to appear before the European Court of Justice through an ‘**infringement procedure**’. If a Member State is then convicted and fails to comply with the ruling, this could lead to a second procedure in which the Court could impose a high **fine** and a penalty payment. The general public and environmental organisations themselves do not have direct access to the European Court of Justice but can alert the European Commission to non-compliance and ask it to start infringement proceedings. Violation of EU law can also be revealed by a national court asking the European Court of Justice to clarify the interpretation of EU law (referred to as a request for a preliminary ruling). An example is responses by the Court to questions from the Administrative Law Division of the Council of State (ABRvS) on the Integrated Approach to Nitrogen, which revealed that this programme did not meet the requirements arising from Article 6 of the Habitats Directive. From the perspective of complying with EU directives and obtaining clarity on the exact meaning of these directives, it is regrettable that the ABRvS is reluctant to put such questions to the Court, despite the fact that there is frequent cause to do so.<sup>73</sup>

In general, convention regimes have fewer ‘teeth’ but most regimes are certainly not ‘toothless’. The discussion of the regimes shows that there are many mechanisms to address **non-compliance**. While it is true that, in many cases, less vigorous action can be taken than within the EU system, relative silence on convention compliance seems to be partly related to the strong focus in the Netherlands on EU law and the limited use of, or recourse to, the mechanisms by civil-society organisations.

Under many of the convention regimes, non-compliance is addressed through a combination of reporting and notification obligations, monitoring obligations and discussion of problems within a committee and/or the Conference of the Parties (COP). Below are some examples of procedures and possible sanctions:

- Concerns regarding a World Heritage site may prompt the introduction of ‘reactive monitoring’, whereby the World Heritage Committee discusses threats based on factors including a ‘state of conservation report’.<sup>74</sup> This type of procedure exerts diplomatic pressure on the contracting state but, depending on the outcome of the discussions, it can also lead to the heritage being placed on the List of Endangered World Heritage Sites;

<sup>73</sup> This could include allowing the use of a cut-off limit of 25 kilometres when assessing effects of nitrogen deposition.

<sup>74</sup> *Ibid.*, 2021, §169 et seq.

- The obligation to report changes in the ecological character of the wetland to the Ramsar Bureau.<sup>75</sup> Such reports will be the subject of discussion of possible improvements and will also be communicated to the Conference of the Parties.<sup>76</sup> Punitive sanctions are ultimately lacking, however non-compliance can lead to diplomatic pressure, making it harder to obtain funding for wetland conservation;
- Under the Bonn Convention, the COP can make recommendations to Contracting Parties based on information provided by a Scientific Council (info on the status of species conservation and measures for improvement)<sup>77</sup> and by the Secretariat (reporting on “the implementation of this Convention”)<sup>78</sup>. In addition, the COP has set up a Review Mechanism (RM)<sup>79</sup> which includes the option for NGOs to submit implementation issues to the Secretariat.<sup>80</sup> The Secretariat may refer the matter (in the absence of an adequate response from the Contracting State) to the Bonn Convention’s Standing Committee.<sup>81</sup> Final outcomes of this procedure can include issuing a warning or requesting an implementation action plan with a time schedule to resolve the problems.<sup>82</sup> Although this will lead to diplomatic pressure or potential loss of face, there are no real sanctions;
- The AEWa has a similar procedure (in fact earlier than the Bonn Convention itself), although the wording is more prescriptive (for example measures must be based on the precautionary principle), however this convention and the other subsidiary agreements of the Bonn Convention also contain no real sanctions;
- Subsection (b) of Article 23 of the OSPAR Convention states that the OSPAR Commission – “when appropriate” – may decide to take (or call for) steps “to bring about full compliance with the Convention, and decisions adopted thereunder, and promote the implementation of recommendations, including measures to assist a Contracting Party to carry out its obligations.”<sup>83</sup>

75 Article 3(2) of the Ramsar Convention.

76 Article 8(2)(d) and (e) of the Ramsar Convention. Recommendation 4.8 (1990). See also Resolution VI.1 (1996), Working definitions of ecological character, guidelines for describing and maintaining the ecological character of listed sites, and guidelines for the operation of the Montreux Record, para 3.

77 Bonn Convention, Art. VIII(5)(b).

78 *Ibid*, Art. IX(e).

79 CMS COP Resolution 12.9 (2017).

80 *Ibid.*, para. I(B)(2).

81 *Ibid*, para. I(C)(5). The Standing Committee is a treaty body, established by resolution (see CMS COP Resolution 9.15, 2008), consisting of representatives of a rotating selection of contracting parties, charged with carrying out interim activities between meetings of the COP itself.

82 *Ibid*, para. I(F)(6).

83 Art. 23(b) of the Convention.

## 10 Implementation in the Netherlands with regard to the Wadden Sea

Implementation and compliance in the Netherlands have not been the subject of specific research, however all authors have made estimates based on available knowledge. These findings show that – in the Netherlands – conventions in particular are neglected at all stages of the policy cycle. Very little attention is paid to convention objectives and relevant obligations and prohibitions in Dutch law, in policy making, in implementation (e.g., permitting), in case law and in monitoring.

The implementation of EU directives also requires serious improvement to ensure that the objectives are met. Particularly cumulative pressures on nature constitute serious hurdles for reaching conservation objectives. Challenges relate to enforcing prohibitions of deterioration in practice, reviewing existing use (in practice often considered to be ‘rights’), actually basing decisions regarding Natura 2000 areas on the precautionary principles as requires, as well as ensuring a sound knowledge of cumulative effects across human influences and climate change.

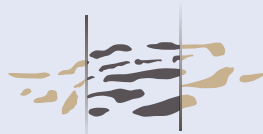
The Waddenacademie has used the descriptions and analyses of the legal regimes to reflect more extensively on the significance of the findings for the Dutch implementation of the conventions and EU directives, with a particular focus on the Wadden Sea. Findings of the authors have been translated into 15 policy recommendations for the Dutch government.<sup>84</sup>

---

84 Bastmeijer, K, L. Boerema, H. Gilissen, F. Kistenkas, L. Miltenburg, M. Van Rijswijk, A. Trouwborst, J.M. Verschuuren & W. Zwier (2024). ‘Reflectie met beleidsaanbevelingen naar aanleiding van het rapport “De Europees- en internationaalrechtelijke status van de Waddenzee”’. Waddenacademie Rapport 2024-01, available at: [https://www.waddenacademie.nl/fileadmin/inhoud/pdf/04-bibliotheek/2024-01\\_Reflectie\\_met\\_beleidsaanbevelingen\\_nav\\_rapport\\_De\\_Europees-en\\_internationaalrechtelijke\\_status\\_van\\_de\\_Waddenzee.pdf](https://www.waddenacademie.nl/fileadmin/inhoud/pdf/04-bibliotheek/2024-01_Reflectie_met_beleidsaanbevelingen_nav_rapport_De_Europees-en_internationaalrechtelijke_status_van_de_Waddenzee.pdf).

© Waddenacademie  
Leeuwarden, November 2024

The Waddenacademie connects and shares knowledge about the Wadden Sea and broader Wadden area from various sciences and makes this knowledge accessible to governments, scientists, economic sectors, NGOs and the general public. The Waddenacademie aims to contribute to the protection and development of the Wadden Sea as a nature reserve and the preservation of the unique open landscape, as well as to the sustainable development of the Wadden area.



waddenacademie