

## **Doomed to failure: The discussed implementation and compliance design of the draft Post-2020 Global Biodiversity Framework**

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### **A. Introduction**

The Aichi targets might have been well drafted to (per se) address relevant biodiversity issues. However, as many assessments have shown, they have largely not been achieved. To me, this allows for the conclusion that – amongst others – at least their implementation mechanism has failed. Being in the process of drafting the follow-up, the implementation mechanism of the new Post-2020 Global Biodiversity Framework will hence be crucial.

This short assessment will reflect on the discussed implementation mechanism (and the overall binding nature) of the draft text. As the discussion on the future biodiversity agreement started with comparing it to the Paris Agreement (also from the political leadership), expressing the expectation to create the “Paris moment” for biodiversity, it is obvious to do a quick comparison of the draft Post-2020 Global Biodiversity Framework with the Paris Agreement. In addition, another possible comparison could be made with mechanisms found in other international treaties. Here, I will also refer to the compliance mechanism of the Aarhus Convention that could serve as a good example.

To cut a long story short: The implementation mechanism of the draft Post-2020 Global Biodiversity Framework and the overall legal approach to the future biodiversity agreement is – in my opinion – doomed to fail. Already the chosen wording of specific commitments, but also the underlying approach of the text, is timidly self-limiting and not built to deliver compliance. The criticism raised in this assessment should not be read as a call against multilateralism, but as an alarm to wake-up and show political will for a global solution to address the biodiversity crisis.

### **B. The approach of the Paris Agreement (and the Aarhus Convention) to achieve implementation and compliance, compared to the draft Post-2020 Global Biodiversity Framework**

Do not worry, I will not bother you with lengthy assessments of the Paris Agreement (for which I am anyhow not the expert). However, looking at it, the text and its implementation approach appear quite straightforward (while still having certain weaknesses, as we all know).

#### **1. The Paris Agreement design, compared to the draft Post-2020 Global Biodiversity Framework**

Not only the chapter on the implementation mechanism, but already the wording of the agreement and the overall approach seem to be designed to deliver on the overall purpose to reduce emissions and hence address the climate crisis.

- **Title of the treaties:** This starts with the title of the treaty, which, in the climate context, names what it is: an “*agreement*”. So why do parties name the future biodiversity agreement a “*framework*”, where no one understands what this means? Of course, the content determines the legal character, not the name. To me, a clear title showing the world that we are ready to address the biodiversity crisis with the means of public international law though would have benefits.

- **Wording and design:** Then, the wording of the Paris Agreement makes it unequivocally clear from the beginning that the treaty comes with obligations. Article 3 Paris Agreement reads: “all parties are to undertake [...] ambitious efforts as defined in [...]”. Article 3 Paris Agreement then, amongst others, refers to the latter to be defined as “nationally determined contributions” that parties intend to achieve. On the contrary, the corresponding article of the draft Post-2020 Global Biodiversity Framework does not even come with the expectation to lay down obligations for the undersigning parties. Instead, it only wants to galvanize (hence, in a way to trigger) action and facilitate implementation. Numbers 2 and 3 in section B of the draft framework reads as follows: “The framework aims to galvanize urgent and transformative action by Governments and all of society. [...] The framework aims to facilitate implementation”. I was not able to find a proper article where parties bind themselves to deliver on the specific actions (such as providing and adequately managing protected areas, reducing pesticides, mobilizing resources, etc.). Instead, the section on the action targets that parties aim to achieve stands somewhat isolated. Therefore, already the framework design lacks a binding approach comparable to the nationally determined contributions of the Paris Agreement.

## 2. The implementation mechanism of different environmental treaties

The above discussed design failures are crucial. Let us now dig a bit more concretely into what lawyers call implementation mechanism of international treaties. Technically, those mechanisms are support mechanisms that are drafted independently from the commitments of the treaties to ensure that those commitments are delivered. In a broader sense, also the tracking of progress towards meeting the commitments can be seen as part of the implementation mechanism.

- **Tracking of success:** We remember: one of the duties parties committed to in the Paris Agreement in order to reduce emissions and address the climate crisis is to prepare, communicate and maintain nationally determined contributions. Article 13 Paris Agreement now lays down a whole framework to monitor and track success to ensure the implementation of this commitment. Its paragraph 7 number 7 lit. b) reads: “Each party shall regularly provide [...] information necessary to track progress made in implementing and achieving its nationally determined contributions”. Of course, also the draft Post-2020 Global Biodiversity Framework foresees a provision for monitoring. Under section J in number 18 on transparency it reads: “The successful implementation of the framework requires responsibility and transparency, which will be supported by effective mechanisms for planning, monitoring and review”. My point of concerns is: why does the framework not get more concrete at global level, but instead explicitly states that parties have a responsibility to implement mechanisms for monitoring, reporting and review. Number 18 lit a) and b) only refer to the reporting of national strategies and national targets. To me, it is not apparent that there is a harmonized way for tracking the success of the framework’s action targets, respectively for tracking that parties delivered their commitments in achieving success (e.g. by providing and adequately managing their protected areas, reducing pesticides on their ground, mobilizing their resources). Neither does it get clear which consequences not being on the right track bears.
- **The proper mechanism:** So, now to the core provisions for implementation: Article 15 Paris Agreement states with very clear wording: “A mechanism to facilitate implementation and promote compliance [...] is hereby established.” Without going into details: This mechanism foresees an expert-based committee that operates under specific terms of procedure. With other international treaties, such committees have (sometimes) proven to be effective. Article 10 and Article 15 Aarhus Convention, together with the corresponding decisions, for instance also foresee the creation of such (Aarhus Convention) Compliance Committee, stating: “At their meetings, the Parties shall keep under continuous review the implementation of this Convention. [...] The Meeting of the Parties shall establish [...] optional

*arrangements for reviewing compliance [...] with the provisions of this Convention*". Having followed several opinions of the Aarhus Convention Compliance Committee (e.g. Decision V/9h against Germany, or case C-32 against the European Union) I can say that those are respectable means to quasi-enforce the agreed provisions. Yet, the draft Post-2020 Global-Biodiversity Framework does not even mention the term "compliance" one single time!

### 3. What "Draft One" of the Post-2020 Global Biodiversity Framework calls "implementation mechanism"

- **The starting point:** The corresponding part of the "Zero Draft" respectively "Discussion Paper" dating 25 January 2019 started in a promising way by summing up the state of discussion on the implementation mechanism. The Summary of Synthesis of Submissions i.a. stresses in section III lit. o): "*The post-2020 global biodiversity framework should have a focus on implementation and have an effective process for monitoring and effective review process to improve [...] accountability. [...] The establishment of a "ratcheting-up" mechanism and a compliance process was suggested*". Furthermore, section K preparing the discussion on implementation reads: "*Many submissions noted that the NBSAP process needs to be strengthened and accountability enhanced*". Those concerns arising from the failure of the governance of the AICHI targets hence were put on the table right from the beginning.
- **The failure:** Yet, the text of the current "Draft One" of the Post-2020 Global Biodiversity Framework only has a very short paragraph in section H number 13, entitled "Implementation support mechanisms". This section reads: "*Implementation of the framework and achievement of its goals and targets will be supported through support mechanisms under the Convention on Biological Diversity, including the financial mechanism, and strategies for resource mobilization, capacity-building and development, technical and scientific cooperation and technology transfer, knowledge management as well as through relevant mechanisms under other conventions and international processes*". To be fair, the text is not finalized, as is also stated by a footnote. Yet, there is no mentioning of compliance, no concrete ideas on ratcheting-up if the tracking of success shows insufficiency and nothing on a subsidiary body such as a compliance committee that could be entitled to address concerns with specific parties. Instead, the text only refers to the CBD and mixes up action targets (such as resource mobilization) with the proper idea of having a technical implementation and compliance mechanism.

### C. Conclusion

I am well aware that my assessment is harsh. It is a short and personal reflection that should primarily serve as a wake-up call. This text is drafted from a lawyer's perspective, purely looking at "good regulation", to serve the overall objective of addressing the biodiversity crisis. What I expect is that all the energy parties and stakeholders are putting into the negotiations is used efficiently and effectively. From the "good regulation" perspective, this means to create provisions that deliver, not such that are doomed to failure. The legal basis to do better is provided by the CBD, which entitles parties at the COP to undertake any additional action required for the achievement of the purposes of the convention. The most sophisticated wording of the text, and respectively its goals, milestones and action targets will not help them being implemented. What is now needed is political will for an agreement that has binding nature, quasi-enforceable targets and a robust compliance mechanism. It is not too late to improve, let's do it!