

## **Editorial**

### *International & European Environmental Law*

Harm Dotinga

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I am very pleased that the editors of *Merkourios* decided to devote this issue to international and European environmental law. International environmental law is the subject that I have taught for more than ten years at the School of Law of Utrecht University. In this context and in my research I have also increasingly addressed European environmental law, *ie* the law of the European Union (EU) dealing with environmental protection.

Both international environmental law and European environmental law are relatively young fields of law that fully emerged in the last forty years. The deteriorating state of the environment and the growing recognition that many environmental problems have an international dimension have been the driving forces behind the steady development of international and European environmental law. It is safe to say that these distinct fields of international law and EU law have left their infancy behind and have come of age. A complex network of environmental treaties and various other international instruments is now in existence to address an equally vast number of environmental problems that are considered of international concern.<sup>1</sup> Many of the treaties involved have developed over the years into complex regulatory regimes. A similar growth has taken place in the EU that has adopted a large number of policies and legal instruments to address environmental problems in Europe and beyond.<sup>2</sup> Issues that are the subject of environmental treaties and/or EU environmental legislation include the protection of the atmosphere (transboundary air pollution, ozone depletion and climate change), the marine environment, international watercourses, nature and biodiversity conservation, toxic and other hazardous substances, the Antarctic environment, and many more.

The fact that there is a massive amount of international and European environmental law does, of course, not mean that all environmental problems are now effectively addressed. Notwithstanding some undeniable successes such as the phasing out of dumping at sea and the global reduction of the production and use of substances that deplete the ozone layer, many environmental problems persist and continue to increase. Notable examples are the ongoing worldwide loss of biodiversity and climate change. There are many reasons why these problems have thus far not been effectively tackled. Certain legal and political factors account for this lack of success, but to a large extent this is also a result of the way human society has developed with unsustainable patterns of population growth, economic development and consumption of resources. Those root causes of environmental problems are notoriously difficult to resolve and require changes to society that cannot be brought about only by international and European environmental law.

This issue of *Merkourios* contains five contributions wherein the actual relevance or potential role of international environmental law and/or European environmental law is discussed. Four of the articles included in this volume deal with the protection of the marine environment of which three address both international and European law aspects. The fourth contribution examines an issue that straddles the fields of international environmental law and the law of the sea. The last contribution deals with an issue that is on the divide between public and private international environmental law.

Arie Trouwborst explores the evolving role of international law in the efforts to manage the persistent environmental problem of marine litter, with a particular focus on recent developments within the framework of the Convention for the Protection of the Marine Environment of the North-East Atlantic and the EU's Marine Strategy Framework Directive. The author explains that these and other international legal instruments could well make a difference in tackling this problem, while at the same time noting that much remains to be done. The author concludes that the situation with regard to marine litter would probably have been worse without international environmental law, but it is still far from living up to its full potential.

Jaap Leijen provides an analysis of the complex relationship between EU nature conservation law (the Birds and Habitats Directives) and the Common Fisheries Policy (CFP). As the author explains, EU Member States are faced with the 'paradox' that they have to meet their obligations under the Birds and Habitats Directives for the marine environment without having sufficient competence under the CFP to regulate fishing activities that have significant harmful effects on the protected species and habitats. He asserts that there are essentially two solutions to the paradox: the Union route or the Member State route, where either of them is responsible for meeting the requirements under the Birds and Habitats Directives when it comes to the regulation of fisheries. The author concludes that the upcoming reform of the CFP is the perfect opportunity to provide a definite solution to the paradox.

1 See generally: P Sands, *Principles of International Environmental Law* (2<sup>nd</sup> edn, Cambridge University Press 2003); D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007); P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (3<sup>rd</sup> edn, Oxford University Press 2009); D Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2009).

2 See generally: P Davies, *European Union Environmental Law: an Introduction to Key Selected Issues* (Ashgate Publishing 2004); M Lee, *EU Environmental Law: Challenges, Change and Decision-making* (Hart Publishing 2005); L Krämer, *EC Environmental Law* (6<sup>th</sup> edn, Sweet & Maxwell 2007); J Jans and H Vedder, *European Environmental Law* (3<sup>rd</sup> edn, Europa Law Publishing 2008).

Marieke van der Kooij examines existing cooperation requirements under international and EU environmental law in relation to the designation and management of the Dogger Bank that is the largest transboundary marine protected area in the North Sea. She identifies the relevant obligations and assesses the extent to which they have been implemented by the coastal states. She concludes that significant cooperation has taken place between the coastal states in relation to this area, which in her opinion should be continued and elaborated in the future. She offers a number of options to optimize cooperation in relation to this area and other (potential) transboundary marine protected areas in the region.

Alexander Lott discusses several legal questions related to the construction of the Nord Stream transboundary submarine pipeline in the Baltic Sea. He addresses the extent of the rights of the coastal states to prevent the laying of the pipeline and related seabed studies, as well as the project's conformity to the applicable requirements contained in the Espoo Convention on Environmental Impact Assessment in a Transboundary Context. One of his main conclusions is that the environmental impact assessment that was conducted for the project did not sufficiently address land-based alternatives.

Martijn van de Kerkhof goes back to the roots of international environmental law by revisiting the procedural obstacles for private party litigation before national courts in the situation of transboundary air pollution that gave rise to the famous *Trail Smelter* arbitration between Canada and the United States. His analysis points out that in the present day resort to a national court in a similar case of transboundary pollution is much more likely to be successful, in particular in the United States.

This issue of *Merkourios* is completed with a case note on a judgment of the Court of Justice of the EU, a review of a book on humanitarian intervention and an interview with Theo Rosier.

I hope you enjoy this issue. ■