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# Protected areas in environmental law
# Introduction

One of the most frequently used methods to protect nature and the environment is the creation of protected areas. Especially during the last few decades the establishment of marine protected areas and protected land areas has increased under the influence of international law, European law and the legislation and policy of national states.

Protected areas are generally seen as essential tools to protect species, habitats and ecosystems and to maintain biodiversity. The number of protected areas has accordingly increased significantly over the last two decades. The World Database on Protected Areas lists more than 100,000 protected sites worldwide covering almost 13% of the Earth's land surface. There are, however, important differences in the coverage of the various biomes and ecosystems. In particular the establishment of protected areas in the marine environment lags noticeably behind with less than 1% of the oceans designated as protected areas.

A large number of global and regional treaties and other instruments promote the establishment of protected areas. Among these is the 1992 Convention on Biological Diversity (CBD) to which virtually all states are Contracting Parties. The CBD generally defines a protected area as 'a geographically defined area, which is designated or regulated and managed to achieve specific conservation objectives'. It calls for the establishment of a system of such protected areas or areas where special measures need to be taken to conserve biodiversity. The overall target that has been agreed upon within the framework of the CBD is to establish a global network of comprehensive, representative and effectively managed national and regionally protected area systems by 2010 for terrestrial areas and by 2012 for marine areas. A wide range of other global and regional treaties equally promote the establishment of (networks of) protected areas.

While the world population is growing steadily by the day and developmental pressures are increasing by the year, there is indeed a serious need for measures to protect special areas. Looking at the different levels on which these measures must be taken, one cannot expect that only one, generally applicable instrument for the protection of areas could be designed. However, a general pattern of legal protection may be observed. This pattern consists of at least three instruments: the designation of the area to be protected, the regulation of human influence in this area and the enforcement of the protecting regime. In some cases additional provisions are made for conflict resolution and liability.

In this special issue of the *Utrecht Law Review* twenty authors from six different universities in the Netherlands, Belgium, the United Kingdom and Finland deal with the legal aspects of protected areas under international, European and national law. This special issue derives from an initiative of the *Centre for Environmental Law and Policy (CELP)* and the *Netherlands Institute for the Law of the Sea (NILOS)* at Utrecht University.

In their article on marine protected areas Erik Molenaar and Alex Oude Elferink pay attention to the OSPAR Convention for the Protection of the Marine Environment of the North East Atlantic. The international community has committed itself to establishing a network of

marine protected areas by 2012. This network has to be coherent and representative, consistent with international law and based on scientific information. In areas beyond national jurisdiction the freedom of the high seas has traditionally existed. Therefore, cooperation is essential to protect the marine environment of the high seas. The establishment of marine protected areas under international law needs to deal with questions of competence, regulation of human activities and governance. This article shows that complementary action at the global and regional levels is required. A coherent global general framework is desirable to ensure consistency between regional practices. The authors draw the conclusion that the efforts under the OSPAR Convention to establish marine protected areas in areas beyond national jurisdiction 'provide a fascinating example of the interaction between the regional and global level in the development of international law.'

Harm Dotinga's and Arie Trouwborst's article addresses the contribution that is made by the Netherlands to the North Sea network of marine protected areas. It focuses on legal questions related to the designation of areas for nature conservation purposes in the territorial sea and the exclusive economic zone of the Netherlands. Their principal conclusion is that significant steps have been taken towards a solid Dutch contribution to the global and regional goals of representative networks. Nevertheless, the network of marine protected areas in the Netherlands' North Sea is subject to a number of shortcomings. The Dutch Government seems to pursue the policy to go no further in the designation of marine protected areas than what is strictly required by the EU Birds and Habitats Directives. It is doubtful whether this minimalist approach is sufficient to meet the obligations of the Netherlands under global and regional treaties. The authors recommend the designation of additional areas and, in some cases, the extension of the list of species and habitats for which areas have been selected.

With the advance of climate change and economic globalization the image of polar areas as deserts of snow and ice, free from human influence, is changing. They are no longer protected by their own natural qualities and circumstances. Timo Koivurova's article analyzes what has been achieved in Arctic cooperation as regards the protected areas. His examination primarily concerns two of the working groups of the present Arctic Council: the Conservation of Arctic Flora and Fauna and the Protection of the Arctic Marine Environment. The Circumpolar Protected Area Network (CPAN) project is designed to coordinate the protected area policies of the Arctic states in their Arctic regions. The main goal of the article is to examine the kinds of functions CPAN is meant to achieve and to discuss whether the project has met its goals.

Kees Bastmeijer and Steven van Hengel discuss the protected status of the entire Antarctic continent and surrounding islands as well as the instrument for designating protected areas within Antarctica. The debates at the Antarctic Treaty Consultative Meetings since the entry into force of a protocol on the protection of the Antarctic environment in 1998 on issues such as tourism and shipping make it clear that the Consultative Parties have difficulties in reaching a consensus on proactive measures to address new challenges. There is a legally binding instrument for designating areas as Antarctic Specially Protected Areas (ASPA). The overall picture of designated areas, however, shows a relatively small percentage of the 70 ASPA in Antarctica. The lack of overall protection for Antarctica could become a strong argument for applying the ASPA instrument in respect of larger areas in order to ensure comprehensive protection. Considering the current increase in human activities in Antarctica, the authors emphasize the importance of Antarctica's protected status. They believe that the arguments for considering Antarctica itself as a protected area are convincing.

Antoinette Hildering, Andrea Keessen and Helena van Rijswick go into the problem of the pollution of the Mediterranean Sea. Most of the pollution of the marine environment comes from

land-based sources, such as municipal, industrial and agricultural wastes and run-off. Several legal regimes – on the international level as well as on the European level – have been developed to regulate this kind of pollution. The authors explain that 'an effective and coherent legal protection regime should provide clear goals and clear responsibilities and take into account the specific characteristics of the protected areas and the relevant impacts and pressures.' Of particular interest are the transboundary elements of most of the protected areas. This shows the need for international cooperation. The authors give arguments for an integrated ecosystem approach that covers all impacts and pressures that could influence the attainment of the goals and targets for the protected areas. The Marine Strategy Framework Directive, for instance, does not have a specific regime for protected areas. The marine ecosystems as a whole should be protected against all human activities that have an impact on the marine environment. This directive is in line with the approach that was already taken in the Water Framework Directive. Furthermore, the integrated approach has its consequences for the dispute settlement system. The international, European and national legal protection regimes should be closely connected in the way they manage the protection of the marine environment. The international courts, arbitral tribunals, the European Court of Justice and national courts should coordinate the ways in which they deal with the obligations following from the different legal regimes. This would be in line with the current development in which the European Court of Justice interprets European law in the light of international convention obligations.

Barbara Beijen focuses on the obligation to designate areas in European environmental directives, using the Wild Birds Directive, the Habitats Directive, the Nitrates Directive and the Bathing Water Directive as examples. She found differences between the interpretation of the Member States, the European Commission and the European Court of Justice concerning the obligation to designate protected areas. Member States often prefer an interpretation which leaves them with a margin of discretion in their decision on the designation of areas. And they tend to lean towards a limitation of the scope of the directive and the application of its protective regime.

The European Union adopted an Environmental Liability Directive (2004/35/EC). Remedial action is required if damage to natural resources meets the threshold criteria mentioned in the directive. It is based on the expectation that liability for environmental damage will be an incentive to show respect for the environment and to act with care. It demonstrates a strong belief in favour of the 'polluter pays' principle. The person who has caused environmental damage is liable for the costs related to preventive and remedial actions. However, a number of aspects of the liability regime in this directive give rise to the question whether it will actually lead to the restoration of affected natural resources. This question is answered by Berthy van den Broek in her contribution to this special issue. Her answer is rather sceptical about the effects that may be expected.

Aletta Blomberg, Toon de Gier and Jan Robbe focus on the protection of designated areas in Dutch environmental law, in particular on the question how area protection affects other parts of Dutch environmental law. Different statutes regulate activities in vulnerable areas. One statute regulates the designation of nature reserves, another regulates various forms of land use and a third statute regulates the exploitation of establishments which have an environmental impact. This sectoral approach will have to be abandoned if the aim is to achieve full integration in the field of environmental law. In the future it may even be possible to use a general reference criterion like 'protection of the physical living surroundings'. After a lengthy, complicated and highly controversial process, the Environmental Licensing (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht*) will come into force in the Netherlands in 2010. Its introduction will collate more than twenty-five permit systems relating to the environment under

a single statute. There will be one new, umbrella permit: the local environment permit for any activity that affects the environment. However, this new procedural system does not imply substantive integration. The individual checks and balances to which individual permits are subject – and which are currently embedded in various laws – will remain intact. Still the procedural change might initiate substantial integration in environmental governance. For the competent authority will be obliged to harmonize the relevant conditions with a view to protecting the interests of the various parties concerned.

An Cliquet, Chris Backes, Jim Harris and Peter Howsam have written an interdisciplinary article on climate change and its effects on regimes for the legal protection of areas. Climate change will put pressure on biodiversity. In order to face this pressure, we need adaptation measures for the conservation of biodiversity. The question in this article is whether existing nature conservation legislation is sufficiently adapted to face the challenges of climate change. The authors conduct a preliminary research into EU nature conservation law on protected areas (the Birds and Habitats Directives) in order to answer this question. They try to find out what possible bottlenecks exist in the legislation itself or in the implementation thereof. When climate change continues, a new way of thinking about nature conservation might be necessary. A new way of thinking is examined in this final contribution to this special issue, where the authors briefly explore the idea of an 'Ecosystem Framework Directive', thus giving an impression of possible solutions for future problems in a changing world.