# 10. TRANSNATIONAL WATER MANAGEMENT

Ellen Hey and Marleen van Rijswick*

## 1. INTRODUCTION

One of the developments in European environmental law that is the focus of a great deal of attention at the moment is the Water Framework Directive (WFD) and its implementation into the laws of the Member States of the European Community.[1] With most rivers in Europe covering the territory of several states, the river basin approach, which is central to the WFD, has turned water law in Europe into transnational law, at least in terms of substance if not institutionally. Implementation of the WFD raises many questions, one of which will be the focus of discussion in this contribution: the relationship between the WFD and international treaties. Questions about the relationship between the WFD and international treaties arise, because the WFD requires that Member States cooperate both among themselves and with non-member states in order to implement the Directive. International treaties are often used as a way of realising such cooperation also among Member States. We suggest that Member States use treaties for this purpose because European law does not provide them with a legal instrument that they can use to implement their mutual cooperation obligations under European law. This topic is particularly important for the Netherlands since all the river basins located on Dutch territory are transboundary.

The underlying reasoning behind the WFD's obligations to cooperate is that in transboundary river basins cooperation is essential for attaining the

* Authors are, respectively, Professor of Public International Law at the Erasmus University Rotterdam and Senior University Professor at the Centre for Environmental Law and Policy/ NILOS at Utrecht University. This contribution is based on a report of the Advisory Committee on Water Management Legislation, titled '*Samenwerking over de grenzen*', The Hague 2004. Both Authors are members of this committee. This contribution and its conclusions, however, reflect the views of its authors and not necessarily those of the Commission or its individual members.

1 Directive 2000/60/EC, OJ L 327, 22–12–2000 and Decision no. 2455/2201/EC, OJ L 331, 15–12–2001.

environmental objectives specified in the WFD. Cooperation is of special significance for downstream areas of a river basin, since downstream Member States are to a significant degree dependent on the measures taken by upstream states for their own compliance with the environmental objectives formulated in the WFD. This is particularly relevant because the WFD holds each Member State individually responsible for fulfilling the environmental objectives and other obligations that it specifies. In other words, a Member State cannot, at least not in legal terms, hide behind the veil of ineffective cooperation if it is brought before the Court of Justice of the European Communities (European Court of Justice) for non-compliance with its obligations under the WFD.

The relationship between the WFD and international treaties has a number of facets. Its characteristics depend both on the nature of the international treaty in question and the role which the WFD allocates to various forms of international cooperation. Clarity about the relationship between the WFD and international treaties is important when negotiations are taking place on the implementation of the WFD, within the context of international treaties or within treaties which the WFD seeks to implement. The principal question in this contribution thus focuses on the nature of the legal relationship between the WFD and international treaties.

In this context, particular attention will be paid not only to treaties which are directed at the management of specific rivers or river basins but also to treaties of a more general nature that relate to, for example, the protection of the marine environment, like the OSPAR Convention, and to the protection of fresh water in general, like the Helsinki Convention.

In the course of our analyses we will consider a number of subsidiary questions since no simple answer can be given to the main question considered. These subsidiary questions are as follows.

- What are the legal consequences of the river basin approach which is the central aspect of the WFD for cooperation between Member States and for the cooperation between Member States and non-member states?
- What forms of international cooperation can be discerned on the basis of the WFD and what role do treaties play in that respect?
- What is the nature of the legal relationship between the WFD and the various types of treaties linked to the Directive?
- What law – international law or European law – applies to the interpretation and application of treaties drawn up in order to implement the WFD, and which court or courts – international or European – have jurisdiction to rule on disputes concerning such treaties?

This contribution will consider each of these questions consecutively and will close with concluding remarks in which we will suggest that consideration should be given to developing an instrument in European law through which Member States can shape their mutual obligations to cooperate under European law. In the context of European water law such an instrument might take the form of a European water board.

## 2. THE WFD AND THE RIVER BASIN APPROACH

### 2.1. THE AIMS AND CONTENT OF THE WFD

The aim of the WFD is to establish an integrated and coherent water policy within the European Community by protecting and improving all waters within the Community, including surface waters, groundwater, transitional waters and coastal waters. This aim is to be attained by managing water systems in their entirety, and individual river basins in particular. Given that river basins often extend over several states, European water management and law will have to have a strong transboundary dimension with transnational cooperation playing an important role. Since the approach chosen is based on river basins, including the protection of surface waters as well as groundwater, the protection of the soil and ground also fall within the scope of the Directive.

A second important feature of the WFD is that it is strongly purpose oriented, in the sense that achieving the environmental objectives set out in Article 4 of the Directive takes priority. The ultimate environmental objective is to achieve a 'good status' for all European waters by 2015. The legally vague concept of 'good status' is defined further in the Annexes to the Directive. A distinction is made between the good status of groundwater and surface waters. Good status consists of a chemical component, i.e. the good chemical status of respectively groundwater and surface waters, and an ecological component that only applies to surface waters. Protected areas are listed separately in the environmental objectives. Protected areas are not areas, which are designated on the basis of the WFD, but they must be designated according to other Community regulations such as, for example the Habitat Directive.[2] The WFD requires that these areas be listed in a register and stipulates that the most stringent protection regime is applicable to them.

The legal standing of this 'good status' is that of an environmental quality standard. The elaboration of the good status must be laid down as quality standards in statutory provisions. These quality standards are not new in water

2 OJ 1992 L206/7.

law: many quality standards have already been determined on the basis of older directives, both for waters with a particular function (drinking water, bathing water, fishing waters and shellfish waters[3]) and for specific substances.[4] It may be deduced from case law of the European Court of Justice that quality standards must be regarded as an *obligation of result* with which Member States have to comply under all circumstances, and, if this is not attainable by means of legal measures such as permits, then additional (actual) measures must be taken.[5] In a recent judgement by the European Court of Justice in which it ruled against Luxembourg because it had not complied with the obligations of the WFD, the Court established, on the one hand, that Member States are free in choosing the type of instruments that they adopt to implement the Directive – integrated water laws not being required – but the Court determined, on the other hand, that the obligations in Article 7(2) and the environmental objectives of Article 4 of the Directive must be viewed as obligations of result.[6] In view of the fact that environmental quality standards have been in existence in European water law and European law in general for a longer period of time, it is astonishing that it is this aspect of the WFD, in particular, which has caused so much commotion in the Netherlands.

The chemical quality standards, as mentioned, have been part of European water law for awhile. The WFD, however, refers only to standards for priority substances, and a Directive on such substances should have been ready by the end of 2006. Work on this Directive, however, is still ongoing. Some of the environmental quality standards are new; to some extent they already exist, for example in the form of the former grey-list of substances (List II) in Directive 76/464/EEC. They are new in so far as they refer to ecological standards. The very fact that the protection level may in no case be lower than that under existing regulations implies that all existing environmental quality standards continue to applicable under the WFD.

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3 Based on the Council Directive of 16 June 1975 concerning the required quality of surface water intended for the production of drinking water in the Member States, OJ 1975 L194/34, amended by Directive 79/869; Council Directive of 8 December 1975 concerning the quality of bathing water, OJ 1976 L31/1, Council Directive of 18 July 1978 concerning the quality of fresh water that requires protection or improvement in order to make it suitable so that fish can live in it, OJ 1978 L222 and Council Directive of 30 October 1979 concerning the required quality of shellfish water, OF 1979 L281/47.

4 Based on Directive 76/464/EEC.

5 ECJ 18 June 2002, C-60/01; ECJ 8 March 2001, Case C-266/99; ECJ 14 July 1993, Case C-56/90; ECJ 12 February 1998, Case C-92/96; ECJ 25 November 1992, Case C-337/89; ECJ 14 November 2002, Case C-316/00. With regard to water directives, the case law often concerns directives that also have the protection of public health as an objective.

6 ECJ 30 November 2006, Case C-32/05, Commission v Luxembourg, consideration 75.

The standard of a 'good status' for all waters in 2015 applies to those waters which Member States have designated as 'natural waters'. Waters may also be designated as 'artificial' or 'heavily modified'. A slightly less stringent protection regime is imposed for these waters; they have to comply with a good chemical status, but need have no more than a 'good ecological potential' as far as their ecological status is concerned. The WFD also contains a number of possibilities for setting less stringent objectives or for postponing the deadline by which the objectives have to be achieved, albeit under strict conditions.

The *instruments* with which the environmental objectives must be realised are integrated river basin management plans (preferably for the entire river basin) on the one hand and programmes of measures setting out the steps which Member States intend to take to achieve these aims, on the other. These measures should also include at least those that need to be taken on the basis of a number of existing directives.[7] Here again there will have to be intensive transnational cooperation because of the existence of transboundary river basins.

The WFD also contains the obligation to recover the costs of 'water services' in accordance with the principle of the polluter pays, and it also devotes a great deal of attention to *public participation*.

While source-oriented policies also figure in the WFD (Art. 10), its focus, as set out above, is on effected-oriented policies, environmental standards in particular. It is this latter element which will be used to determine whether the requirements of the WFD have been met. The crucial question in this context being whether a Member State for its waters has met the 'good status', specified in the WFD.

## 2.2. THE RIVER BASIN APPROACH

Member States are obliged to identify individual river basins lying within their national territory and designate river basin districts in order to realise the objectives of the Directive (Article 3(1)). A river basin district is described as 'the area of land and sea, made up of one or more neighbouring river basins with their associated groundwater and coastal waters…' (Article 2(15)). In this context, coastal waters are the 'surface waters on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of the territorial waters is measured,

7 Article 10 WFD and part A of Annex VI; it concerns in any case the measures in the Bathing Water Directive, the Wild Birds Directive, the Drinking Water Directive (80/778), the Seveso Directive, the EIA Directive, the Sewage Sludge Directive, the Urban Waste Water Directive, the Plant Protection Products Directive, the Nitrate Directive, the Habitats Directive and the IPPC Directive.

extending where appropriate up to the outer limit of transitional waters' (Article 2(7)). Transitional water is 'a body of surface water in the vicinity of a river mouth, which is partly saline in character as a result of its proximity to coastal waters, but which is substantially influenced by freshwater flows' (Article 2(6)).

River basin districts therefore consist of an entirety of associated waters, including surface waters, groundwater and coastal waters, and can extend up to a kilometre from the baseline into the marine area or to where the marine waters are substantially influenced by freshwater flows. Smaller river basins may be combined into one larger river basin district. Groundwater that does not entirely follow a particular river basin will be assigned to the closest or most appropriate river basin district, and coastal waters will also be allocated to the closest or the most appropriate river basin district or districts (Article 3(1)).

For each river basin district, Member States are responsible for making 'appropriate administrative arrangements, including the identification of the proper competent authorities', which are responsible for implementing the WFD (Article 3(2)). Member States may identify existing organisations as competent authorities (Article 3(6)). Such authorities had to be identified by 22 December 2003 and the relevant information communicated to the Commission by 22 June 2004. Member States are to draw up a river basin management plan for each river basin district (Article 13(1)). River basin management plans should be published by 2009 and will be reviewed and updated no later than 2015; six-yearly reviews are required after this date (Article 13(6) and (7)).

The river basin approach also applies to transboundary river basins and it is the origin of the obligations to cooperate which the WFD imposes on the Member State. This is particularly important for the Netherlands since the four river basins located on Dutch territory – the Meuse, Rhine, Schelde and Ems – extend beyond the borders of the Netherlands.

## 3. TYPES OF INTERNATIONAL COOPERATION IN THE WFD AND THE ROLE OF INTERNATIONAL TREATIES

### 3.1. INTRODUCTION

There are several types of references to international cooperation and also to international treaties in the WFD. The first distinction to be made is between the international treaties which the WFD aims to implement (Article 1 and preambule) and treaties that seek to implement the obligations to cooperate

contained in the WFD (Article 3). In the latter case, a second distinction needs to be made, that of cooperation between Member States (Article 3(3) and (4)) and cooperation between one or more Member States and non-member states (Article 3(5)). These two obligations ensue from the river basin approach. This section outlines the roles played by international cooperation and treaties in the implementation of the WFD.

## 3.2. TREATIES WHICH THE WFD AIMS TO IMPLEMENT

One of the aims of the WFD is to achieve 'the objectives of relevant international agreements, including those which aim to prevent and eliminate pollution of the marine environment by Community action' regarding priority hazardous substances (Article 1 in conjunction with Article 16(3)). The aim of this action is to 'ultimately achieve concentrations in the marine environment which are near background values for naturally occurring substances and close to zero for man-made synthetic substances' (Article 1). Relevant international agreements include those treaties referred to in the preamble to the WFD.

The WFD's preamble refers to international treaties which contain obligations to protect the marine environment and to which the Community and a number of Member States are party: specific mention is made of the Convention for the Protection of the Marine Environment of the Baltic Sea Area,[8] the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention)[9] and the Convention for the Protection of the Mediterranean Sea from Pollution (Barcelona Convention)[10] and its Protocol for the Protection of the Mediterranean Sea from Pollution from Land-Based Sources (Athens Protocol).[11] The WFD aims to 'assist' the Community and the Member States in fulfilling their obligations arising from these treaties.

The OSPAR Convention is particularly important for the Netherlands since it covers the protection of the marine environment in the north-eastern part of the Atlantic Ocean, including the North Sea. One of its aims is to reduce and eliminate pollution of the marine environment from land-based sources. As a result, parties to the OSPAR Convention have adopted decisions and recommendations regarding the discharge of polluting substances into surface waters and on priority substances. The OSPAR Convention thus links up with the source oriented aspects of the WSD.

8 9 April 1992, OJ L 73, 16–3–1994, p. 20.
9 22 September 1992, OJ L 104, 3–4–1998, p. 2.
10 16 April 1976, OJ L 240, 19–9–1977, p. 3.
11 17 May 1980, OJ L 76, 12–3–1983, p. 3.

In addition, the preamble of the WFD refers to 'Community obligations within the scope of water protection and management, and more precisely the Convention of the United Nations Economic Commission for Europe on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention),[12] and later agreements on the application of this convention.' The WFD states that it 'will contribute to the implementation of Community obligations' as they arise from such treaties (section 35, preamble).

Both the Community and Member States, including the Netherlands, have become parties to the Helsinki Convention. The Helsinki Convention is a so-called framework convention which sets out the contours for international cooperation in the field of water management and is further elaborated on by way of protocols. The Protocol on Water and Health is an example of one such protocol: parties undertake to take steps to improve water quality with the intention of protecting public health and the environment. This protocol has not been ratified by the Community and has been ratified by some Member States, but not by the Netherlands. The protocol entered into force in August 2005.[13]

## 3.3. COOPERATION OBLIGATIONS IN THE WFD

Article 3 of the WFD makes no reference to specific international treaties, but formulates two different obligations to cooperate. Firstly, the obligation of Member States to cooperate in the management of river basins located within the territory of more than one Member State (Article 3(3) and (4)). Secondly, the obligation of one or more Member States to endeavour to cooperate with non-member states in the management of river basins extending beyond the boundaries of the Community (Article 3(5)).

Article 3(3) establishes that 'Member States shall ensure that a river basin covering the territory of more than one Member State is assigned to an international river basin district'. Each Member State also has the obligation to ensure 'appropriate administrative arrangements, including the identification of the appropriate competent authority, for the application of the rules of this Directive within the portion of any international river basin district lying within its territory' (Article 3(3)). Member States are also obliged to ensure that implementation of the measures to be taken under the WFD is coordinated for the whole of the river basin district (Article 3(4)), and may, for this purpose, 'use existing structures stemming from international agreements' (Article 3(4)).

12 7 March 1992, OJ L 186, 5–8–1992, p. 42.

13 See website of the UN Economic Commission for Europe: www.unece.org/env/water.

Examples of international river treaties to which The Netherlands and other Member States are parties and which serve to implement Article 3(3) and (4) are the Meuse Convention,[14] the Convention on the Protection of the Schelde (Schelde Convention),[15] and the Convention concerning the Protection of the Rhine (Rhine Convention).[16] Bilateral harmonisation with Flanders takes place within the framework of the Netherlands-Flemish Integral Water Consultation (NVIWO) and four transboundary river basin committees set up in 1994. Bilateral cooperation with the Walloon provinces of Belgium takes place within the Netherlands-Walloon water consultation. With Germany there is bilateral agreement within the framework of the German-Dutch Transboundary Water Commission (PGC)[17] and the Steering Group and Coordination Group for the Ems. In addition, the Trilateral Wadden Sea Forum between Denmark, Germany and the Netherlands also is relevant to the implementation of the WFD.[18]

Article 3(5) deals with the cooperation between Member States and non-member states in relation to river basins extending outside the Community. In this case, it is laid down that Member State or States involved must aim for suitable coordination with the non-member states concerned 'with the aim of achieving the objectives of this Directive throughout the river basin district', imposing on Member States the obligation to ensure that the provisions of this Directive are applied within their territories.

The Rhine Convention is an example of an international river treaty to which the Netherlands is a party and which partly serves to implement Article 3(5) WFD. Under this treaty, Belgium, Germany, Luxembourg and the Netherlands (Member States) work together with Switzerland (non-member state). The European Community also is a party to the Rhine Convention.

River basin management plans should preferably also be drawn up for transboundary river basins. For river basins encompassing more than one Member State, the Member States involved need to draw up coordinated

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14 The Meus Convention which was adopted on 3 December 2002 in Ghent (Treaty Series. 2003, 75) has not yet come into effect, so the Convention for the Protection of the Meus of 26 April 1994 is still in effect (Treaty Series 1994, 149). This convention will be replaced by the 2002 Meus Convention when it enters into force.

15 Convention for the Protection of the Scheldt of 26 April 1994 (Treaty Series 1994, 150).

16 Convention for the Protection of the Rhine of 12 April 1999 (Treaty Series 1999, 139).

17 The German-Dutch Transboundary Water Commission (PGC) was established under Article 64 of the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany with regard to the joint border, the transboundary waters, landownership close to the border, transboundary traffic by land and inland waterways and other topics related to the border, 1960 (Treaty Series 1960, 68).

18 See also: J. Verschuuren, Towards a trilateral Convention on the Waddensea, The relations between International Treaties and EC-Directives and the Westerschelde case, in: Lambers et al, Trilateral or European protection of the Waddensea?, The Hague, 2003.

programmes of measures with the aim of achieving a single river basin management plan. If this aim cannot be achieved, individual Member States must as a minimum develop separate plans for that part of the river basin district falling within their territory (Article 13(2)). For river basin districts extending beyond the boundaries of the Community, Member States are to endeavour to develop one single river basin management plan. If this is not possible, then they must produce a plan that at least covers the part of the river basin district lying within their territory (Article 13(3)).

The obligations to cooperate which are imposed on the Member States under Article 3 can be summarised as follows:

- *For transboundary river basins or the part of the transboundary river basin located within the Community:* the obligation to reach coordinated implementation on the basis of the environmental objectives set out in the WFD and the required measures (obligation of result), preferably in a river basin management plan (obligation of conduct).
- *For those river basins extending beyond the Community:* the obligation to endeavour to achieve appropriate cooperation with non-member states in order to fulfil the objectives of the Directive for the entire river basin (obligation of conduct), preferably in a river basin management plan (obligation of conduct).

## 3.4. FURTHER DIFFERENTIATION

The international treaties discussed above can be divided into three types of agreements:

- Treaties, the so called *inter se* agreements, which are concluded by a restricted number of Member States amongst themselves for the implementation of Article 3(3) and (4).
- Treaties, the so called *inter se cum tertis* agreements, which are concluded by one or more Member States with a non-member state for the implementation of Article 3(5). Note that the term *inter se cum tertis* is not completely accurate when only one Member State is involved.[19]
- Treaties concluded by all or a number of Member States and non-member states and to which the Community is a party – the so called mixed agreements.

[19] For more information, see de Witte 2000 and 2002.

These mixed agreements include those treaties referred to in the preamble and Article 1 of the WFD. Treaties that implement Article 3(5), like the Rhine Convention, however, also qualify as mixed agreements, since the Community and several Member States are parties to them.

## 3.5. THE WFD AND TREATIES

The treaties referred to in Article 1 and the preamble to the WFD serve as part of the international legal framework within which the Member States and the Community are to shape their water policy. They contain the minimum obligations which the water policy and law of the Member States and the Community must fulfil under international law. Such treaties do not restrict the competence of the Member States or the Community to adopt more stringent environmental standards for activities in their territories or within their jurisdiction.

For the sake of completeness, it should be remarked here that the latter does not apply to ships flying a foreign flag which are present in the territorial sea, including the coastal waters beyond the baseline to which the WFD applies. The coastal state, and also the Community, in this case may not impose standards as to design, construction, crew and equipment of the ship which are more stringent than the applicable international norms.[20]

In addition, the WFD requires Member States to work together on transboundary river basins within the boundaries of the Community, and it also obliges the Member States to seek cooperation with non-member states for river basins extending beyond the boundaries of the Community. As already mentioned above, the first aspect involves an obligation of result so that there is coordinated implementation of environmental objectives and programmes of measures for each river basin district. Linked to this is an obligation of conduct to devise a single river basin management plan. It aims to attain coordinated implementation of the objectives of the Directive, preferably in a single river basin management plan.

When the question of whether a Member State has fulfilled its obligations under Article 3(3), (4) and (5) of the WFD arises, these obligations as elaborated in the river basin approach contained in the Directive will be the primary touchstone. It should be noted that Article 3 of the WFD does not impose an obligation on Member States to enter into international treaties with regard to river basins

[20] Article 21(3) UN Convention on the Law of the Sea. For further information, see Advisory Committee for Water Management Legislation, *Waarborgen voor een samenhangend beleid voor de Noordzee*, April 2003.

which are partially outside their territories, but it goes without saying that such treaties and the activities undertaken under their auspices play a part when an assessment is made as to whether a Member State has fulfilled its cooperation obligations under Article 3 of the WFD. The fact that a treaty has or has not been entered into in itself, however, does not determine the answer to the question whether a Member State has fulfilled its cooperation obligations under Article 3. The answer to this question will be determined on the basis of the substantive results of any cooperation engaged in (for the obligations of result) and on the basis of the efforts made to achieve cooperation (for the obligations of conduct). In the case of the Netherlands, for example, it is to be expected that the results of the various forms of international of cooperation mentioned above, including treaties, will determine whether the Netherlands has fulfilled its obligations under Article 3(3), (4) and (5) of the WFD.

## 4. THE VARIED NATURE OF THE RELATIONSHIP BETWEEN THE WFD AND TREATIES

### 4.1. INTRODUCTION

The question concerning the relationship between the WFD and international treaties arises for a number of related reasons. Firstly, European law does not offer Member States a legal instrument on the basis of which they can shape cooperation for purposes of implementing European law. This is one of the reasons why Member States have turned to international law, and treaties in particular. Secondly, some treaties play several roles in relation to the WFD, and this can lead to a lack of clarity during negotiations. Thirdly, the division of competences between the Member States and the Community is often unclear, including the competence of Member States to take more stringent environmental measures. These factors result in a complex situation in which many of the water related international treaties contain rules and standards that give rise to obligations under both European and international law. The three complicating factors will be addressed in this section.

### 4.2. COOPERATION BY WAY OF TREATY

Although the WFD obliges the Member States to cooperate with regard to the management of river basins encompassing the territory of several Member States, European law has no general legal instrument to regulate this kind of cooperation. As already mentioned in the introduction, a Member State is not only responsible for fulfilling the cooperation obligations, but also for fulfilling

the underlying key obligations of the Directive, i.e. achieving a good status for its waters as determined by the environmental objectives elaborated in the WFD. These underlying environmental objectives, in fact, often only can be achieved through transnational cooperation, which includes cooperating in the development of international river basin management plans and programmes of measures for the entire river basin. Member States have turned to an international legal instrument – the treaty – as a means of implementing these obligations under Article 3(3) and (4).

This has resulted in the remarkable situation that, on the one hand, European law governs the WFD when it comes to, for example, its adoption and implementation whereas, on the other, instruments intended to implement the WFD, when it comes to their adoption and implementation, are subject to a combination of international law and national law of the individual Member States. This situation seems to suggest that Member States enjoy a greater freedom of action, associated with international law, with regard to these implementing instruments than they do with respect to the WFD itself. The origin of this confusing situation is related to the characteristics of the European legal system on the one hand and the characteristics of the international legal system on the other. Firstly, European law comes into existence through decision-making procedures which do not require the consent of each individual Member State. Secondly, due to the primacy of European law, national legislation which conflicts with European law can and must be declared inoperative by the European courts, including national courts as well as the European Court of Justice and the Court of First Instance. This contrasts with international law which, in principle, only legally binds a state if that state has consented to the rule or treaty in question. Moreover, national courts often are not entitled to directly apply international law. In the Netherlands for example, Dutch courts may only declare Dutch laws inoperative in those cases where the law in question conflicts with a self-executing provision of an international treaty or other written source of international law (art. 94 Dutch Constitution [*Grondwet*]).[21]

The freedom which international law offers states, however, is not compatible with the European legal system and thus not available to Member States when they are implementing the WFD or other European law instruments. This situation entails that if Member States conclude *inter se* agreements to shape their mutual cooperation, European law prevails over those agreements, which

[21] The role of national courts in applying international law depends on the national legal order of states and differs from Member State to Member State of the European Union. In some states, like the United Kingdom, for instance, national courts may not review national legislation against treaties, even if it concerns a self-executing treaty provision. In such cases, international law must first be transposed into national legislation before the international law can have effect in the national legal order.

raises the question to what extent international law still applies to these type of treaties. The WFD gingerly avoids this problem since it does not require Member States to conclude international treaties for purposes of implementing the cooperation obligations in of Article 3(3) and (4). Instead, it focuses on the obligation of result to attain specified environmental quality objectives, by devising coordinated programmes of measures, and the obligation of conduct to seek develop river basin management plans for the whole of the river basin. Member States may choose to attain these ends by a variety of means, including the conclusion of international treaties.

The above implies that, although a treaty could be one of the most immediately apparent instruments to implement these obligations, the Member States will not able to avail themselves of the freedom which the treaty instrument might offer in the implementation of the cooperation obligations under Article 3(3) and (4) of the WFD: at least, insofar as exercising this freedom would conflict with the obligations of the Member States pursuant to the WFD. This means that the Member States are at all times required to implement the obligations as laid down in the WFD, even when they have opted for a treaty as a means of meeting those obligations.

A similar reasoning is applicable, by analogy, to treaties concluded for the implementation of Article 3(5) of the WFD. In this case, the WFD takes as its point of departure the obligation of conduct imposed on the Member States to achieve implementation of the WFD for the entire river basin, preferably through a river basin management plan. In this case a treaty is the instrument *par excellence* to give legal substance to the international cooperation required, international law being applicable to the relationship between non-member states on the one hand and Member States and the Community on the other hand. Certainly, other instruments are available – consider, for instance, Ministerial Declarations – but these types of instruments generally are not legally binding. Also in this case, however, the WFD places the obligation of conduct, instead of the type of instrument used to achieve it, centre stage.

## 4.3. THE MULTIPLE ROLES OF SOME TREATIES

In practice, the relationship between the WFD and the international treaties mentioned above is not unequivocal. The WFD serves, on the one hand, to implement international obligations arising out of treaties by which the Member States and the Community are bound, while – on the other – Member States may use existing treaties to comply with their obligations arising out of the WFD. The particular problem which then crops up is the fact that in some cases the very same treaty fulfils these two roles, a problem that concerns mixed treaties, in particular.

Treaties like the OSPAR Convention provide a relevant example: it regulates pollution of the marine environment from land-based sources, among other things, and serves as a framework within which rules concerning priority substances can be determined. Such rules, which also apply to industries which discharge upstream in rivers, are implemented by the Member States and the Community through the framework of the WFD, including the cooperation between the Member States on the basis of Article 3. The Member States and the Community, however, also can use the OSPAR Convention to support implementation of the WFD in cooperation with non-member states by agreeing on rules or standards on, for example, discharges, with these non-member states. Like the OSPAR Convention, the Helsinki Convention can also fulfil this double role.

Mixed treaties which relate to a specific river, like the Rhine Convention, can also be affected by this problem, a treaty like the Rhine Convention, for example, also can fulfil several roles in relation to the WFD. Firstly, the Member States may use such a treaty to implement their mutual cooperation obligation under Article 3(3) and (4) of the WFD. Secondly, the Member States can use this type of treaty to implement the cooperation obligation with non-member states defined in Article 3(5) of the WFD, in which the Community and the Member States are both involved because of their joint competences. Thirdly, agreements on ecological objectives or priority substances, for example, can be made with non-member states within the framework of a treaty like the Rhine Convention. The Community and the Member States are bound to such agreements by the operation of international law and the WFD forms the framework, in conjunction with the national legislation of the Member States, within which the Community and the Member States implement such agreements.

The multifaceted relationship between treaties and the WFD may result in confusion as to what is being negotiated when such treaties are being developed. Moreover, it raises questions as to the role that international law plays in *inter se* agreements. While the WFD seeks to avoid these questions by focusing on obligations of result and conduct, the lack of a European legal instrument that Member States can use to implement their mutual obligations to cooperate remains problematic. Developing such an instrument in European law would go some way towards addressing the confusing relationship between treaties and the WFD and would structure the development of transnational law within the European Union.

## 4.4. SHARED COMPETENCE AND MORE STRINGENT MEASURES

Another complicating factor related to the fact that the Member States and the Community share competences in the field of water policy is that Article 176 EC gives the Member States the competence to adopt and enforce more stringent environmental protection measures, also within the framework of international treaties. This competence may be exercised subject to a number of conditions. It only concerns environmental measures based on Article 175 EC (and not, for instance, Articles 95, 133 or 37 EC), because a so-called minimum harmonisation is involved. In addition, these more stringent measures may not conflict with other – more general – provisions of European law, such as the free movement of goods and the rules on competition. A number of elements play a role in this context.

Firstly, the European Commission prefers to start negotiations with non-member states on mixed agreements or on measures to be agreed within the framework of such an agreement, only after measures on the topic of negotiation have been agreed within the Community. This approach is prevalent especially where measures are at stake, which in their application, are not restricted to a certain area, such as measures regarding priority substances, and possibly also measures for controlling groundwater pollution.[22] Such Community measures then apply uniformly across the whole of the Community. The adoption of more stringent measures within a mixed agreement conflicts with the desire of the Commission to maintain uniformity within the Community, irrespective of the competence allocates to Member States under Article 176 EC.

Secondly, if more stringent measures are adopted by a Member State, by the Member States amongst themselves, or by one or more Member States together with non-member states, these measures need to conform to European law, insofar as they affect the Member States. In such a case the European Commission must be informed of the measure and will test the compatibility of the measure with European law under article 176 EC as well as other provisions of the EC Treaty. The dispute between the Netherlands and the European Commission concerning a prohibition on the use of chlorinated paraffins adopted by the Netherlands pursuant to a decision adopted within the framework of the OSPAR Convention, of which the European Commission was informed of under Article 95(4) EC, is illustrative of the problems that may arise.[23] In this case the Commission maintains that it is entitled to be informed and must approve also

22 The situation is different in the case of specific ecological objectives, which are agreed on for particular areas and are therefore restricted to an area and cannot, by definition, be equally applicable for all Member States.

23 See Case C-103/04, pending before the European Court of Justice.

national measures related to uses not mentioned in Directive 2002/45/EC,[24] the Netherlands disputes this view. Only the European Court of Justice can provide certainty as to the compatibility of the measure with European law, and in all such cases it is the primacy of European law within the Community that is at stake.

A third complicating factor arises when the European Court of Justices declares that a more stringent measure which has been agreed on within the context of an international treaty is in conflict with European law. In this case, the Member States violate international law if they fail to implement the measure, and they violate European law if they implement it. Where an *inter se* treaty is concerned, this problem is of a more limited nature since all the parties to such a treaty are bound by European law and they would have to either withdraw or amend the measure adopted. The situation is more complex when a mixed treaty is involved because, if the Member States (and the Community for that matter) fail to implement their obligation under the treaty, they would be violating international law with regard to the non-member states. The significance of this problem, however, should not be overestimated. Firstly, the Community is party or can be a party to these mixed treaties which have some connection to the WFD and is represented by the European Commission. It could then be surmised that the Commission will refrain from agreeing to measures which would not be in accordance with European law, since the Community itself would be bound by these measures. Secondly, the principal of loyalty to the Community (Article 10 EC) obliges the Member States to cooperate with the Commission, even if the Community is not a party to the treaty in question.

## 5. APPLICABLE LAW AND COMPETENT COURTS

### 5.1. INTRODUCTION

As was illustrated above, a complicating factor in the relationship between the WFD and the treaties that serve to implement this directive is that these treaties involve obligations under international and under European law. *Inter se* and mixed treaties are both treaties under international law in terms of their legal structure, which implies that they are subject to international law with regard to their entry into force, their interpretation and their application. Secondly, both types of treaties are related to European law, which suggests that European law is also applicable, in so far as Member States and the Community are concerned. Moreover within the Community, European law would take precedence over international law (the principle of the primacy of European law).

24 OJ 2002 L 177/21.

## 5.2. THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE

Established case law of the European Court of Justice illustrates that the court regards treaties that have a link with European law as part of the European legal system and it interprets and applies them accordingly. An analysis of the case law of the European Court of Justice gives rise to the following conclusions concerning the relationship between European law and international treaties.

1. European law takes precedence within the legal order of the Community. This entails that *inter se* agreements and decisions taken within the framework of such treaties should be compatible with European law.[25] In other words, the internationally applicable legal rule that treaties entered into at a later date take precedence over treaties entered into at an earlier date[26] does not apply within the relationship between European law and *inter se* agreements.
2. Treaties concluded by Member States with non-member states must also be compatible with European law.[27] The only exceptions to this rule are the treaties entered into by a Member State with non-member states before the former became a member of the Community.[28]
3. Treaties to which the Community is a party, including mixed treaties, form an integral part of the legal order of the Community.[29]
4. Treaties which form part of the legal order of the Community include those treaties which relate to policy areas where the Community is competent, but to which the Community cannot become a party in view of the provisions of the treaty in question.[30]
5. A treaty to which the Community is not a party and which concerns a policy area in which the Community has not or has not yet exercised its competences is not part of the legal order of the Community.[31]

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25 Case C-3/91, *Exporteur SA v/ Lor SA et Confiserie du Tech* [1992] ECR I-5529, par. 8 (For more information see de Witte 2000 and 2002).

26 Article. 30, Vienna Convention on the Law of Treaties.

27 The so-called Open Skies cases: Case C-467/98, *Commission v. Denmark*, [2002] ECR I-9591; Case-468/98 *Commission v. Sweden*, [2002] ECR I-9597; C-469/98, *Commission v. Finland*, [2002] ECR I-9627; Case C-471/98, *Commission v. Belgium, [2002]* ECR I-9681; Case C-472/98, *Commission v. Luxembourg,* [2002] ECR I-9741; Case C-475/98, *Commission v. Austria, [2002]* ECR I-9797; Case C-476/98, *Commission v. Germany,* [2002] ECR I-9855; Case C-466/98, *Commission v. Great Britain and Northern Ireland* [2002] ECR I-9427 (for a discussion see Holdgaard).

28 Article 307 EC.

29 Case 181/73 *Haegeman v. Belgium*, [1974] ECR 499, par. 4–6 and Case 12/86 *Demirel v. Stadt Schwabisch Gmund*, [1987] ECR 3719, paras. 6–12 (for a discussion of recent case law, see Koutrakos).

30 Opinion 2/91, [1993] ECR I-1061 paras. 5–6.

31 Case C-379/92, *Peralta* [1994] ECR I-3453.

6. Decisions which have come into effect within the context of international treaties which are part of the legal order of the Community are an integral part of the legal order of the Community[32] because of the 'direct link' which they have with the treaty in question; non-legally binding decisions, such as recommendations, adopted within such a treaty will also be considered by the European Court of Justice.[33]
7. The European Court of Justice will also establish whether a provision of a treaty is directly applicable, that is self-executing. The Court applies the following criterion. A provision must be regarded as directly applicable 'when, regard being had to its wording and to the purpose and the nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.'[34] Relevant in this context is the judgement in which the European Court of Justice determined that Article 6(3) of the Athens Protocol to the Barcelona Convention and Article 6(1) of the revised Protocol are self-executing.[35] The relevant provisions stipulate that permits are required for the discharge of certain priority substances into the Mediterranean Sea. The Court regarded itself competent to interpret these provisions and established that the lack of implementation legislation at Community level did not release the Member States from their obligation to implement the relevant provisions of the Protocol.

## 5.3. THE WFD, TREATIES AND DISPUTES

If the European Court of Justice has to adjudicate a dispute concerning a treaty that is somehow linked with the WFD,[36] the Court will include the treaty and the decisions, even if not legally binding, taken on the basis of this treaty in its considerations. Due to the primacy of European law, a situation could develop in which the European Court of Justice deems that an internationally adopted measure is in conflict with European law. That situation, as suggested above,

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32 Case 30/80 *Greece v Commission* [1989] ECR 3711 and Case c 192/89 *Sevince* [1990] ECR I-3461.

33 Case C-188/91, *Shell*, [1993] ECR I-363.

34 Para. 39, Case C-213/03, 15 July 2004 in which previous case law was referred to, particularly the judgments in Demiral, para. 14 and Wählergruppe Gemeinsam, C-171/01, I-4301, para. 54.

35 Case C 123/03, 15 July 2004.

36 Compare with the case of *Peralta* (note 32) when the Court judged that there was insufficient connection between the Marpol Convention of 2 November 1973 (with Protocols and Annexes and Appendices (Treaty Series 1975, 147) and with the Protocol to that Convention of 17 February 1978 with Annex and Appendix (Treaty Series 1978, 188)), and the European legal order, because the Community was neither competent with regard to the pollution from shipping activities nor was it party to this convention.

however is unlikely to materialize with great frequency. Much more likely is the situation where the European Court of Justice will be providing a judicial means of enforcing internationally agreed rules and standards, whether legally binding under international law or not, within the European Union.

Problematic is the situation in which Member States submit their mutual disputes concerning a treaty that is related to European law to an international court or to an arbitral tribunal. The problem that arises concerns the fact that, due to the relationship between the treaty and European law, in interpreting the treaty in question the court or tribunal may have to interpret European law. If this where to be the case, the obligation imposed on Member States by virtue of Article 292 EC is at issue. This provision imposes the obligation on Member States to submit disputes concerning the interpretation and application of European law to the European courts.[37] This situation actually emerged in the dispute between Ireland and the United Kingdom in the so called *MOX Plant* case, which was submitted to an international arbitral tribunal.[38] The arbitral tribunal suspended the case until the European Court of Justice had ruled on the case.[39] Now that the judgement of the European Court of Justice has been delivered, it must be concluded that it has exclusive jurisdiction in relation to disputes between Member States that arise from the a mixed-agreement such as United Nations Convention on the Law of the Sea, to the extent that such an agreement is part of the 'Community Legal Order'.[40]

In view of the course of events during this arbitration, it seems that there must always be a proper examination of whether European law might be at issue in a particular dispute among Member States. Whenever this might the case, such a dispute is not to be submitted to a court or tribunal other than the European courts. Article 10 EC loyalty to the Community requires this approach.

The situation is different when a dispute occurs between one or more Member States and/or the Community and a non-member state. This kind of dispute can only be submitted to an international court or an arbitral tribunal, since non-member states may not appear before the European courts, and international law

37 In the Protocol of Signature agreed on under the Rhine Convention, there is the explicit stipulation that disputes which do not involve non-member states should be resolved in accordance with art. 292 EC [219 old].

38 Permanent Court of Arbitration, press release, 14 November 2003, available at www.pca-cpa.org.

39 These proceedings relate to proceedings of the European Commission against the United Kingdom, concerning the nuclear systems which are a feature of the MOX Plant. The discussion concerned the inadequate access allowed to Community inspectors, as a result of which inspection of certain storage facilities for nuclear waste was not possible.

40 ECJ EC Case C-459/03.

applies to legal relationships between one or more non-member states and one or more Member States and/or the Community.

## 6. FINAL REMARKS

The multi-facetted relationships that exist between international and European legal instruments might be characterized as giving rise to a situation of multi-level governance. We however, suggest that this situation is unduly complex because European law does not provide Member States with a legal instrument that they can use to implement their mutual obligations to cooperate under European law. Member States as a result have recourse to international law, and to treaties in particular, to implement European law. Even though the European Court of Justice has managed to bring a considerable amount of clarity into the matter, this situation remains problematic because the discretion that states have in international is not available to Member States under European law. Establishing a European law instrument for cooperation among Member States of course would only serve to clarify matters with respect to the issues now treated in inter se agreements. We suggest that it is with respect to these agreements where the role of international law within Community law is most problematic. In all other situations treaties, and mixed-agreements in particular, would still be required, as it is the way in which cooperative relationships between Member States and the Community, on the one hand, and non-member states, on the other hand, can be given legal significance.

The cooperation obligations imposed on Member States under Article 3(3) and (4), as those under of Article 3(5), of the WFD owe their immediate origin to the river basin approach which is the central feature of the WFD. Taking that approach one step further one might argue that the WFD should have provided for the establishment of a European transnational authority, for example but not necessarily in the form of transnational water boards, under European law. Such a transnational instrument would have facilitated the implementation of the obligations to cooperate as contained especially in article 3(3) and (4) of the WFD, and would have prevented member states from having recourse to international law to implement these obligations. Logically, it also would be this transnational authority which would appear before the Court of Justice when the obligations set out in the WFD (and in particular those related to the environmental quality objectives) are not met, for example because insufficient measures have been taken within a particular river basin.

We realize that the political climate in Europe might at present not be ready for such a step, with Member States preferring, when possible, to avail themselves of

the discretion that international offers. However, we suggest that thinking along these lines may be required if European water law is to become a stable and sustainable system of law, a system in which the substantive and institutional aspects are in balance. International law, we add, would be an undesirable way of establishing such transnational agencies within the European Community, amongst others, due to the immunities that such institutions are likely to be entitled to under international law.

In developing transnational water law within the European Community, international treaties among Member States should ideally play a very limited, if any, role. However, given the fact that European law does not offer Member States a legal instrument which they can use to implement their obligations to cooperate, which are based on that same European law, including the WFD, Member States will continue to conclude such treaties, at least, in the near future.

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