

法治海南战略研究文库

FAZHI HAINAN ZHANLUE YANJIU WENKU

海南经济特区法治战略研究基地

跨越与传承

中国·芬兰环境与资源保护
法律制度比较研究

冯春萍◎主编



中国科学技术大学出版社

—— 法治海南战略研究文库 ——

FAZHI HAINAN ZHANLUE YANJIU WENKU

海南经济特区法治战略研究基地

跨越与传承

中国·芬兰环境与资源保护 法律制度比较研究

冯春萍◎主编



中国科学技术大学出版社

内 容 简 介

本书为“中国·芬兰环境与资源保护法国际论坛”的会议论文集,汇集了国内外有关环境资源保护的先进研究成果,包含构建绿色发展生态体系的法治路径,绿色发展、循环发展、低碳发展与环境法治建设,生态文明体制机制改革的法治保障,气候变化问题研究,海洋、河流水域生态环境保护的理论与实践,资源有偿使用和生态补偿制度的科学构建,环境治理和生态保护市场体系构建的国际比较与中国选择,生态文明绩效评价考核和责任追究制度研究,环境犯罪问题研究等生态法治领域最新研究成果、热点问题、发展趋势和成功案例等。

本书适合从事环境资源保护法律制度研究的人员阅读,也可供相关政府决策人员参考。

图书在版编目(CIP)数据

跨越与传承:中国·芬兰环境与资源保护法律制度比较研究/冯春萍主编. —合肥:中国科学技术大学出版社,2017.3

ISBN 978-7-312-04119-8

I. 跨… II. 冯… III. ① 环境保护法—对比研究—中国、芬兰 ② 自然资源保护法—对比研究—中国、芬兰 IV. ① D922.604 ② D953.126

中国版本图书馆 CIP 数据核字(2017)第 004092 号

出版 中国科学技术大学出版社

安徽省合肥市金寨路 96 号,230026

<http://press.ustc.edu.cn>

<https://zgkxjsdxcbs.tmall.com>

印刷 安徽省瑞隆印务有限公司

发行 中国科学技术大学出版社

经销 全国新华书店

开本 710 mm×1000 mm 1/16

印张 19.75

字数 409 千

版次 2017 年 3 月第 1 版

印次 2017 年 3 月第 1 次印刷

定价 80.00 元

前言

一、本书出版的背景

随着我国经济与社会的发展,工业化和城市化的提速,环境资源保护与社会发展之间的矛盾日益凸显。2007年,党的十七大报告首次提出“建设生态文明”,报告指出:“建设生态文明,基本形成节约能源资源和保护生态环境的产业结构、增长方式、消费模式。循环经济形成较大规模,可再生能源比重显著上升。主要污染物排放得到控制,生态环境质量明显改善。生态文明观在全社会牢固树立。”2012年,党的十八大报告再提生态文明,并强调:“建设生态文明,是关系人民福祉、关乎民族未来的长远大计。面对资源约束趋紧、环境污染严重、生态系统退化的严重形势,必须树立尊重自然、顺应自然、保护自然的生态文明理念,把生态文明建设放在突出地位,融入经济建设、政治建设、文化建设、社会建设的全过程,努力建设美丽中国,实现中华民族永续发展。”2013年,党的十八届三中全会所作的《中共中央关于全面深化改革若干重大问题的决定》提出明确要求:“建设生态文明,必须建立系统完整的生态文明制度体系,实现最严格的源头保护制度、损害赔偿制度、责任追究制度,完善环境治理和生态修复制度,用制度保护生态环境。”2014年,党的十八届四中全会指出:“用严格的法律制度保护生态环境,加快建立有效约束开发行为和促进绿色发展、循环发展、低碳发展的生态文明法律制度,强化生产者环境保护的法律责任,大幅度提高违法成本。建立健全自然资源产权法律制度,完善国土空间开发保护方面的法律制度,制定完善生态补偿和土壤、水、大气污染防治及海洋生态环境保护等法律法规,促进生态文明建设。”

基于现实的要求,党的十八大从新的历史起点出发,做出了“大力推进生态文明建设”的战略决策。党中央、国务院2015年印发的《生态文明体制改革总

体方案》和之前发布的《中共中央关于全面深化改革若干重大问题的决定》与《中共中央关于全面推进依法治国若干重大问题的决定》，全面深入地阐述了生态文明法治建设对促进生态文明建设的意义和作用。

当代中国的环境资源问题突出。国务院《关于落实科学发展观加强环境保护的决定》(2005年12月3日发布)指出：“主要污染物排放量超过环境承载能力，流经城市的河段普遍受到污染，许多城市空气污染严重，酸雨污染加重，持久性有机污染物的危害开始显现，土壤污染面积扩大，近岸海域污染加剧，核与辐射环境安全存在隐患，生态破坏严重，水土流失量大面广，沙漠化、草原退化加剧，生物多样性减少，生态系统功能退化。环境污染和生态破坏造成了巨大经济损失，危害群众健康，影响社会稳定和环境安全。未来15年我国人口将继续增加，经济总量将再翻两番，资源、能源消耗持续增加，环境保护面临的压力越来越大。”

面对资源约束趋紧、环境污染严重、生态系统退化的严峻形势，我们必须树立尊重自然、顺应自然、保护自然的生态文明理念，把生态文明建设放在突出地位，融入经济建设、政治建设、文化建设、社会建设各方面和全过程，努力建设美丽中国，实现中华民族永续发展。坚持节约资源和保护环境的基本国策，坚持节约优先、保护优先、自然恢复为主的方针，着力推进绿色发展、循环发展、低碳发展，形成节约资源和保护环境的空间格局，从产业结构、生产方式、生活方式，从源头上扭转生态环境恶化趋势，为公众创造良好生产生活环境，为全球生态安全做出贡献。

在此背景下，2015年11月30日，由海南师范大学法学院主办、海南经济特区法治战略研究基地承办的“中国·芬兰环境与资源保护法国际论坛(Sino-Finnish Environmental and Resource Protection Law International Forum)”在海口“海南国际法治大讲坛”举行。本次论坛有来自芬兰奥尔托大学环境经济法、欧洲环境、能源与土地利用法专家以及武汉大学环境法研究所、重庆大学法学院、中国政法大学环境法研究所、北京师范大学法学院、宁波大学法学院、西北政法大学环境法研究所、安徽大学法学院、山东理工大学法学院、天津商业大学法学院、西南政法大学、内蒙古大学、三亚学院法学院、河南省社会科学院、河南警察学院、鲁东大学法学院、云南省人民检察院、海南省高级人民法院、海南省人民检察院、重庆市丰都县法院等单位的学者、司法工作者共同参与。

论坛讨论主题紧紧围绕我国经济社会发展中带有战略性、全局性和前瞻性

的环境与资源保护法律问题,站在国际环境的高度围绕中央提出的“创新、协调、绿色、开放、共享”发展新理念展开讨论,既契合了我国“四个全面”建设战略的布局,又适应了当前世界发展总趋势。本论文集汇集了与会人员的研究成果,具有较高的学术价值和现实意义,值得参考与学习。

二、本书的主要内容

第一部分,生态文明法治建设研究。其内容主要涉及我国生态文明法治建设过程中基本问题的提出、研究意义的探讨、研究方法的梳理以及对研究路径的设想。其研究范围较广,不仅包括了具体实践中的法律制度,如生物安全法律制度,还涵盖了理论研究,如环境人格权证等。

第二部分,环境资源保护的地方视角。其内容主要是以地方视角作为切入点展开研究,其中包括了对陕西省秦岭生态环境保护条例的细致探讨、对南水北调工程生态补偿的思考以及在经济效益与生态效益的博弈中如何从地方立法的层面对当地公众的行为进行引导等内容。环境保护涉及的范围广、综合性强,涉及自然科学和社会科学的诸多领域,有其独特的研究对象。地方视角所反映出的地方问题具有明显的地域性、特异性、两面性,我们既要从生态效益角度进行考虑,也要重视经济效益,需要对二者进行权衡而不能过于偏重某一方面。本部分中的数篇论文从海南省的邮轮产业、生态修复及橡胶产业等作为地方视角的典型事例着手,认真分析其中所包含的环境问题,并尝试给予相应对策解决其中存在的环境资源问题,针对海南经济发展与生态环境保护的冲突进行分析并给予立法上的指导和建议。

第三部分,环境犯罪理论探讨。本部分主要是对环境犯罪理论与实务的研究。环境犯罪又称为危害环境犯罪、公害犯罪、破坏环境资源保护罪。在环境问题已经成为全世界普遍关注的严重社会问题的背景下,各类型的环境犯罪也有着愈演愈烈的趋势。但是作为一种新兴的犯罪类型,理论界在环境犯罪的一些基本问题上还存在分歧。因此,我们有必要从理论及实务两个层面进行研究,从而更加有效地惩罚环境犯罪,以实现法律保障社会公共利益的机能。因各国的社会发展、法律历史背景等实际情况不同,各国的环境犯罪概念的内涵也不同,中国与芬兰环境犯罪的对比研究与探讨有利于我们更深入地分析当下中国与国外的环境犯罪的异同。

第四部分,环境公益诉讼研究。从生态文明建设与环境保护的关系看,生态文明建设的关键在于环境保护。因此,深入推进环境司法改革,是生态文明建设的基本保障。环境司法改革要特别注重环境公益诉讼,用司法保护社会环境公共利益。首先,从环境保护法律体系的角度来看,尽管自2014年起出台了新《环境保护法》等一系列相关的法律法规及最高人民法院、最高人民检察院的司法解释,但我国目前的环境诉讼制度仍有不少立法空白尚需填补;其次,从我国环境公益诉讼角度看,本部分的相关论文从环境公益诉讼主体资格的角度入手,在整理近年公益诉讼情况和案件的基础上对我国环境公益诉讼“无案可审”的困境进行分析,指出目前诉讼制度仍存在的不足,结合最新的环境保护法律实施后的实际情况,总结出目前需要解决的关键问题,解析这些问题形成的原因,并指出导致问题无法解决的症结所在,其研究成果对未来的相关研究具有重要的参考价值。

第五部分,自然资源保护机制研究。其主要内容是以页岩气开发、矿产资源行政特许、雾霾污染防治等具体制度为切入点,对数个具体制度中的典型问题进行研究。

本次国际学术论坛能够成功举办,得益于武汉大学环境法研究所所长秦天宝教授的指导与支持,在此表示衷心的感谢!同时,感谢林必恒、关丹丹、唐欣喻、顾小娟、周兆进、刘敏、张红昌、高昕、李哲漫等一批海南师范大学法学院的青年才俊,正是他们的倾力付出和无私奉献才使论坛得以顺利举办,他们的创新能力、组织能力、执行能力、责任心和团队精神是法学院未来发展的希望所在!

在本书编辑出版的各个环节,中国科学技术大学出版社提供了多方面的帮助,在此表示深深的谢意!

冯春萍

2016年7月16日

目 录

前言	(i)
----------	-------

第一部分 生态文明法治建设研究

Climate Change Policy and Legislation in the EU and Finland (Sara Kymenvaara Ari Ekroos)	(3)
依法治国方略下的环境法治困境与出路 (白 洋)	(20)
我国生态文明与法治文明同步建设论 (王运慧)	(33)
我国生物安全法律制度的反思与重构——以《卡塔赫纳生物安全议定书》 为视角 (刘秋妹 王刚刚)	(43)
论中国农村环境污染法律防治中的二律背反 (张祖庆)	(53)
环境人格权之理论证成 (付淑娥)	(60)

第二部分 环境资源保护的地方视角

《陕西省秦岭生态环境保护条例》存在的问题及其改进思路 (李集合 李军波)	(73)
资源有偿使用与生态补偿制度的构建——以南水北调中线工程生态补偿 为视角 (李永宁)	(80)
略论地方立法对自然资源生态效益与经济效益契合的引导 (祁雪瑞)	(89)
海南邮轮游艇产业发展中的环境保护问题及其对策研究——以芬兰邮轮游艇 产业为借鉴 (肖纪连)	(100)
环境法治视阈下海南生态修复法律制度完善建议 (关丹丹)	(108)
生态保护视角下海南农垦橡胶林地权利制度的完善 (唐欣瑜)	(115)
生态文明视野下海南环境的法治保障 (林必恒)	(122)

第三部分 环境犯罪理论探讨

中芬环境犯罪比较探究 (曾赛刚)	(131)
------------------------	---------

试论环境犯罪因果关系的判定理念——基于环境犯罪因果关系的特殊性

(李 霞).....	(139)
我国环境犯罪适用严格责任的应然分析 (周兆进).....	(150)
环境犯罪原因分析及立法完善 (柳 松).....	(162)

第四部分 环境公益诉讼研究

环境公益诉讼中原告资格选任的优化——以环境管理机关参与环境公益

诉讼为视角 (余德厚).....	(171)
环境公益诉权之权源探析——一种新型诉权的权源追溯 (张祥伟).....	(182)
浅析我国环境公益诉讼的原告资格问题——以中华环保联合会诉海南省 罗牛山股份有限公司案例为视角 (刘 敏).....	(198)
检察环境公益诉讼主体理论与实证分析 (卢义颖).....	(208)
从泰州天价环境公益诉讼案看政府角色定位 (靳 菲).....	(219)
论环境服务组织对环境污染、生态破坏的法律责任——以新《环境保护法》 第65条为中心 (徐春成).....	(227)

第五部分 自然资源保护机制研究

“以自然应对自然”——应对气候变化视野下的生态修复法制问题初探

(吴 鹏 张永荣).....	(239)
我国页岩气开发环境影响评价制度研究 (尹萌萌).....	(251)
大气雾霾污染防治法律研究 (徐思源).....	(258)
论矿产资源行政特许的制度改革——以健全资产产权制度和用途管制 制度为导向 (周晓然 苗元菡).....	(267)
浅析环评制度在禽畜养殖污染中的法律适用 (顾小娟).....	(279)

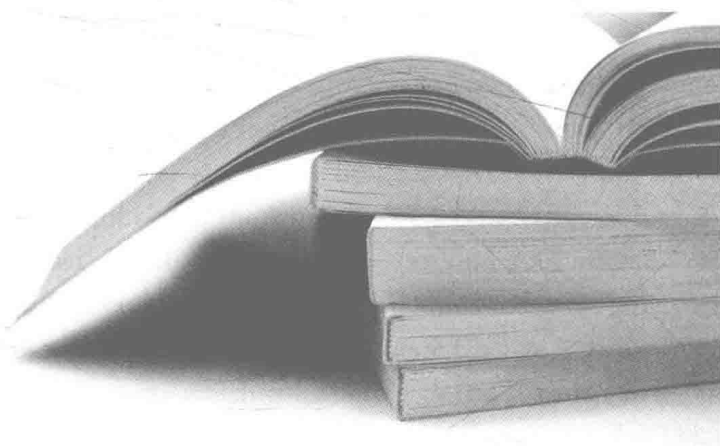
第六部分 其 他

滥觞与控制:城管泛化的逻辑与治理——以城市法原则构建为向度

(余孝安).....	(291)
------------	-------

第一部分

生态文明法治建设研究



Climate Change Policy and Legislation in the EU and Finland

Sara Kymenvaara^① Ari Ekroos^②

(Aalto University Helsinki)

1 Introduction

1.1 Climate Change in EU Environmental Policy

Climate change is a fairly new concept within EU environmental policy. It was long seen as a ‘purely environmental issue’ and therefore politically discussed on an isolated level among environmental ministers and meteorologists. The 4th Environmental Action Programme^③(“EAP”), which covered the period between 1987 and 1992, was among the first EU-level policy documents referring to climate change; it contained the words “greenhouse effect of human activities” and briefly addressed climate change. Later, around 2007 – 2008, certain major changes with an effect on EU and international climate change policy took place. ^④ In 2007, the Intergovernmental Panel on Climate Change (“IPCC”) published its Fourth Assessment Report, which contributed to the latest findings on the scientific developments concerning climate change. The report fuelled an already growing public debate on climate change issues. At political level in the EU, the issue of climate change was increasingly thematically linked to the important issues of energy, energy security, competitiveness and economic growth. In line

① Sara Kymenvaara, Aalto University Professor.

② Ari Ekroos, Aalto University Professor.

③ The Environmental Action Programme is a regularly revised policy document which gives directions to the EU decision making bodies in formulating and implementing EU environmental policy.

④ See e. g. Dernbach and Kakade (2008); Kulovesi et al. (2011); Jordan (2013).

with this, the EU Commission envisioned the path for an EU climate change and energy strategy in early 2007.^① Since then, climate change has been connected to the broader political agenda in which it now is a frequent feature at both EU and international level.

As climate change falls within the scope of environmental policy, the matter is put in further context by elaboration on the historical development of environmental policy in the EU. The Treaty of Rome, the international agreement that led to the founding of the European Economic Community (“EEC”) in 1957, contained no explicit legal basis upon which environmental policy could have been built. Environmental matters were nevertheless gradually placed on the political agenda as of the late 1960s as a consequence of inter alia identification of the transnational nature of environmental pollution and its costs for the industry of the member states. It was not until 1986 that environmental policy was explicitly declared an official task of the European Communities. Before that, environmental legal measures were legally justified mainly on the basis of trade policy objectives. Thus, European environmental policy and law have developed in the EU over the past 40 years. EU climate change policy obtains its legal justification from environmental policy, despite it being a fairly recent addition; as of 1 December 2009, “combating climate change” was formally included in the main objectives of EU environmental policy in Article 191 in the Treaty on the Functioning of the European Union (“TFEU”). Climate change is nowadays one of the fastest growing areas of EU policy and law and has ascended to the highest point of the EU political agenda.

1.2 EU Climate Change Policy in the International Context

Approximately 10% of the emitted worldwide greenhouse gases come from the EU. As an environmental problem, climate change is a global phenomenon, and the situation of the international climate change policy is thus equally important for understanding the development of climate change policy in the EU. The UNFCCC, which was agreed at the conference in Rio in 1992, was the first international agreement on climate change. Its objective is the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.^② In 2010, the said

① COM (2007) 1 final.

② UNFCCC, Article 2.

objective was transformed into the “2-degree temperature target”, i. e. the objective that the increase in global temperature should be below 2 degrees Celsius compared to preindustrial levels.^① The 2-degree temperature target has thereafter been restated as a ‘concentration target’, a maximum amount of carbon dioxide in the atmosphere, set at 450 parts per million (ppm) CO₂-equivalents, as well as reframed as a certain percentage in reduction of greenhouse gas emissions by a certain date, as done in the EU; 20% by 2020.

The Kyoto Protocol of the UNFCCC was adopted in Kyoto, Japan, in December 1997, and entered into force in February 2005. It is considered the “first step towards a truly global emission reduction scheme with an architecture for the future international agreement on climate change”.^② The Protocol contains binding greenhouse gas emission reduction targets for the so-called “Annex I-countries”, i. e. developed countries, and sets up an international emission trading scheme between states. The scheme is executed in commitment periods, the first of which started in 2008 and ended in 2012. During this period, Annex I-countries were thus legally obliged to reduce greenhouse gas emissions by certain country-specific targets, which would result in an overall total of 5 per cent reduction in emissions by 2012.^③ The 15 EU member states were meeting their combined 8 per cent emission reduction target under the Kyoto Protocol jointly. When the European Commission presented its climate strategy for 2020 in early 2007, the UNFCCC and its Kyoto Protocol provided a strong basis for policy motivation. The said strategy proposed a commitment to achieve at least a 20% reduction of greenhouse gas emissions by 2020 and was subsequently endorsed by the member states at the March 2007 European Council.^④ This, in turn, sent a signal to the international arena, and at the UNFCCC’s conference in Bali in December 2007, governments adopted the so-called Bali Road Map. The road map included the Bali Action Plan and its aim was to reach an agreement at the Climate Change Conference in Copenhagen in December 2010. Although the conference in Copenhagen was considered a disappointment in terms of legally binding commitments, it is known to have raised climate change policy to the highest political level. To ensure that the above mentioned 2-degree temperature target is

① Copenhagen Accord (2010), Sections 1 and 2.

② The United Nations, Process, Kyoto Protocol, available at: http://unfccc.int/kyoto_protocol/items/2830.php (7 May 2015).

③ The Kyoto Protocol, Article 3.

④ COM (2007) 2 final; Council of the European Union (2007).

reached, the international community aims to work for an international climate agreement for the period after 2020.

2 The Consequences of a Changing Climate

Climate change is estimated to cause significant damage to both natural and human-made systems on a global scale over time. The various effects of climate change are equally projected to cause substantial costs, particularly if the necessary policy responses are delayed. Thus, rapid and powerful mitigation and adaptation measures are required.

2.1 Scientific Findings

In its 2007 Fourth Assessment Report, the IPCC concludes that it is very likely that the rise in global temperatures during the preceding 50 years is the consequence of the observed increase in human-made greenhouse gas concentrations in the atmosphere.^① The message of the 2013 Fifth Assessment Report is clear and explicit in this respect; based on the latest scientific evidence it is now extremely likely that human influence has been the dominant cause of the change in the climate since the mid-20th century, and the scientific evidence for human influence has thus grown since the Fourth Assessment Report was published. The IPCC highlights the urgency to take both mitigation and adaptation policy actions, in order to keep global warming below 2 degrees Celsius and thereby avoid its most damaging impacts.^② As for the atmospheric concentration of all combined greenhouse gases, a key indicator for international climate negotiations, the value of 435 ppm CO₂ equivalents was reached in 2012. Certain studies have shown that the concentration of all greenhouse gases in the atmosphere would have to be stabilised at about 450 ppm CO₂-equivalents to have a 50% probability of limiting the global mean temperature increase to 2 degrees Celsius. This probability is very low at 550 ppm CO₂ equivalents.^③

According to the IPCC Fifth Assessment Report, the impacts of climate change are visible in natural and human systems all over the world. For example, changing rainfall and melting snow and ice are modifying hydrological systems

① IPCC (2007).

② WGI-III Contributions to the IPCC Fifth Assessment Report (2014).

③ European Environment Agency (2015).

and thus affecting the quantity and quality of water resources. In addition, climate change has a negative impact on crops, such as maize and wheat, in many regions globally. Impacts have also been seen in the form of recent climate-related weather extremes, such as heat waves, droughts, floods, cyclones and wildfires, as a consequence of which ecosystems and human systems are considerably exposed and vulnerable to the climate change ability, which is especially serious for poor people. In addition, armed conflicts increase the vulnerability in the face of climate change. Overall, impacts are very diverse depending on geographical location and whether the exposed system is natural or human managed.

2.2 Economic Impacts

According to the Stern Review on the Economics of Climate Change published in 2006, the costs of taking no action with regard to climate change, i. e. to continue “business as usual”, would be devastating for the world economy, as it would cost around 5%–20% of global GDP.^① Other later estimates have stated a cost of 100 billion euros per year for climate change in the EU by 2020 and that current global costs of climate change would lie at an annual cost of approximately 1.6% of GDP. According to an extensive report by the Global Commission on the Economy and Climate published in 2014, a delayed response to climate change could cut consumption growth by as much as 0.3% per annum between 2030 and 2040. The same report underlines that the overall economy would benefit in various ways from ambitious climate change policy aiming at a broad-based “structural transformation” of the economy. The benefits are stated as health benefits from reduced fossil fuel use and increased fiscal efficiency through recycling of revenues from carbon pricing. What is more, such policies, combined with the said benefits, would reduce certain previously anticipated short and medium term negative effects on the economy caused by emission reduction as such.^②

3 EU Climate Change Policy and Legislation

Taking particular account of the activities at international level within the UNFCCC such as the Kyoto Protocol, the findings of the IPCC’s Fourth Assess-

① Lord Nicholas Stern (2006).

② The Global Commission on the Economy and Climate (2014).

ment Report, the Stern Review mentioned above and the member states' political determination demonstrated by the March 2007 European Council, the EU Commission put forward a proposal on a path ahead for the EU's climate change policy in January 2008.^① The proposal introduced the EU's so-called "20-20-20 targets", consisting of the following goals to be achieved by the year 2020; decreasing greenhouse gas emissions by 20% compared to 1990 levels, improving energy efficiency by 20% and promoting the use of energy produced by renewable sources to 20% of total energy consumption in the EU. The targets were entered into legislation by the EU climate and energy package (the "EU Climate Package", see more below) in 2009. In addition, in an attempt to boost the international climate change negotiations, the EU presented a conditional offer to raise its target for 2020 emissions reduction from 20% to 30% if "a global and comprehensive agreement" would be reached.

3.1 Climate Change Policy Measures and Law-making Competence

The different types of policy instruments of the EU's environmental policy are, for example, regulatory instruments, market-based mechanisms, informational instruments and voluntary agreements. Of these, the most common policy instrument is regulation, which customarily is enforced through some sort of disciplinary action. The choice of instrument is often the result of a political process that includes an assessment of subsidiarity.

Pursuant to the TFEU, the EU has the competence and is responsible to take measures for protecting the environment, while at the same time taking into account *inter alia* the principle of subsidiarity.^② EU-level legal acts based on TFEU Article 192 are aimed at improving the protection of the environment and human health by setting out minimum standards to be attained. Nevertheless, member states are allowed to take more stringent measures as long as they are compatible with primary EU law, such as the free circulation of goods on the EU internal market. Too stringent measures on national level may be deemed a barrier to trade. These are referred to as EU-level 'legal margins', i. e. limitations as to the policy instruments introduced on member state level. For the public inter-

① COM (2008) 30 final.

② As stipulated by Article 5(3) of the TFEU, the EU shall "act only if the objectives of the proposed action cannot be sufficiently achieved by the member state".