



International Foundation for the Law of the Sea

IFLOS Maritime Talks 2012

Conference Report

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Marine Spatial Planning and Offshore Wind Energy

March 24th, 2012

At the International Tribunal for the Law of the Sea, Hamburg

On March 24th, 2012 the International Foundation for the Law of the Sea (IFLOS), in co-operation with the Baltic Sea Forum (BSF), Bucerius Law School (BLS) and the Federal Maritime and Hydrographic Agency (BSH) invited policy makers, industry associations and legal scholars from all over Europe to the **International Tribunal for the Law of the Sea (ITLOS)** in Hamburg. The conference was supported by Edmund Siemers-Stiftung. For the 8th time since its creation in 2003, IFLOS had organized the Maritime Talks. This year, experts came together to discuss “Maritime Spatial Planning and Offshore Wind Energy”. In 2008, the Foundation had already organized Maritime Talks concerning offshore wind energy.¹⁾



H.E. Judge **Shunji Yanai**,
President of ITLOS
Welcome & Introduction

BACKGROUND

The intensity of sea use and the number of sea users has steadily grown over the last years. Not all sea activities are compatible with each other. This has led to a number of sea use conflicts that have to be dealt with. Maritime spatial planning (MSP) is seen as being a suitable tool to harmonize and coordinate these conflicting uses. After the initial implementation in some European member states, among them Belgium and Germany, other European countries and the European Commission jumped on the wagon of taking an ecosystem-based approach to allocating sea uses rather than making decisions on an ad-hoc basis.

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¹ Offshore Wind Energy – Good for our climate, bad for our seas? see <http://www.iflos.org/en/events/maritime-talks/maritime-talks-2008-offshore-wind-energy---good-for-our-climate,-bad-for-our-seas--.aspx>.

WELCOME AND INTRODUCTION

H.E. Judge *Shunji Yanai*, President of ITLOS, welcomed the participants to the venue and expressed his eagerness to discuss various aspects of MSP and offshore wind energy. Due to the tsunami that hit his home country Japan in March 2011 and the following nuclear crisis, the possibilities of renewable energy are of personal concern to him. He does not believe that nuclear energy can be totally replaced by renewable energies any time soon, but the aspect of energy security is growing which gives rise to the question of offshore wind farms.

The President also alluded to the fact that offshore wind is only one of many energy aspects that concern the law of the sea; a large part of fossil fuels is located on the continental shelf, where the use is also regulated by the international law of the sea.



Doris König

After the President's introductory remarks *Prof. Dr. Doris König*, professor for public international law at BLS and chair, IFLOS, gave a warm welcome to the participants. After briefly explaining the work of the foundation with a special emphasis on the Summer Academy, which will take place in Hamburg this summer for the 6th time, she pointed out the ambition of the European energy goals: by 2020 the member states want to cut their emission of greenhouse gases by 20%, reduce the primary energy use by 20%, and – most importantly for the purpose of the conference – generate 20% of the energy from renewable sources ².

Offshore wind energy plays a crucial role in achieving these goals. The progress, however, is rather slow: while the BSH had approved the construction of 28 wind parks with more than 2000 turbines ³, only 52 installations fed electricity into the high-voltage cables towards the shores by the end of 2011 ⁴. But very soon the number of installations will grow and spatial conflicts are foreseeable. Maritime spatial planning, defined by IOC/UNESCO as “a practical way to create and establish a more rational organization of the use of marine space and the interactions between its uses, to balance demands for the development with the need to protect marine ecosystems, and to achieve social and economic objectives in an open and planned way”⁵, will be the tool to harmonize the competing sea uses.

² CARE – Climate and Renewable Energy Package consisting of Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 to improve and extend the greenhouse gas emission allowance trading scheme of the Community, the Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (“Renewable energy Directive”) and the Directive 2009/31/EC on the geological storage of carbon dioxide.

³ See <http://www.bsh.de/de/Meeresnutzung/Wirtschaft/Windparks/index.jsp>.

⁴ Numbers from DEWI (Deutsches Windenergie Institut = German Wind Energy Institute) (<http://www.dewi.de/dewi/index.php?id=47&L=0>).

⁵ Charles Ehler/Fanny Douvère, *Marine Spatial Planning: a step-by-step approach towards ecosystem-based management*. IOC Manual and Guides No. 53, ICAM Dossier No. 6, Paris 2009, page 18.

Then, *Kurt Bodewig*, former Federal Minister of Transport and Infrastructure, addressed the participants as chairman of the board of the BSF. He pointed out the need not only to think regionally, but globally. After stressing the high quality of the speakers and the panel, he emphasized that a secure energy supply is most important for every future energy policy. Managing multiple uses at sea in a planned approach is, therefore, a right step into a good future.

Kurt Bodewig



Staffan Ekwall

MARITIME SPATIAL PLANNING AT EUROPEAN UNION LEVEL

Staffan Ekwall, policy officer for maritime policy in the North Sea and Baltic Sea in the DG Mare at the European Commission in Brussels, started by explaining the background of European Union (EU) maritime policy. In the past, different approaches have been developed independently for each aspect of maritime policy, such as fisheries and environment. Today, the European Commission aims at creating one integrated maritime policy for the EU. MSP is an integral part of this policy. But as a prerequisite, policy makers have to increase their knowledge about the oceans. Therefore, this “data issue” will also have to be addressed. Another aspect is enforcement. The integrated maritime policy intends to cover aspects of maritime surveillance, such as border control and continuous monitoring programmes.



Staffan Ekwall

The commission has already published two communications on MSP ⁶. Currently, the DG Mare is conducting an impact assessment to estimate the potential economic, social and environmental consequences that the new initiative will have. The expected result is that EU legislation is needed to meet the current challenges in maritime affairs. *Mr. Ekwall* emphasized, that with an expected increase in offshore produced energy from currently 3,8 GW to 150 GW in the next 20 years, offshore wind energy is a driving factor for the development of MSP, but not the only one. Today, the European maritime policy is

characterized by a lack of coherency in its approach. The central challenge will be how to make the member states cooperate in a better way. As for the legal aspects, he notes that the United Nations Convention on the Law of the Sea (UNCLOS) is silent on the issue of MSP. It rather encourages the States to cooperate and certainly does not prohibit MSP. In the past the EU has seen MSP as a matter of the member states, although fishing has been an exclusive competence of the EU for a long time. *Mr. Ekwall* finished his speech by pointing out the need to bring stakeholders together at an early stage.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Maritime Spatial Planning in the EU - achievements and future development, COM (2010) 771 final of 17.12.2010 and Communication from the Commission - Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU, COM (2008) 791 final of 25.11.2008.

Frank Maes

OFFSHORE WIND ENERGY AND SHIPPING IN BELGIAN MARITIME SPATIAL PLANNING

Prof. Dr. Frank Maes, professor for public international law at the law faculty of Ghent University, has been an expert in MSP for years, since Belgium was a European front runner in establishing MSP-measures as early as 2002 ⁷. From a Belgian perspective, the reasons for offshore wind energy are manifold: Belgium committed itself to reduce the amount of greenhouse gas emissions by 8% (Kyoto Protocol). Furthermore, the country is a net importer of energy and therefore has a natural interest to become more self-sufficient. Finally, over 50% of the energy used in Belgium comes from nuclear sources. Although it has not yet been decided politically, there is a strong movement towards stepping out of nuclear energy. Since many people are only eager to welcome renewable technologies as long as they are not personally affected (NIMBY [= not in my backyard] -syndrome), the Belgian government looked at the sea for new areas of development. It soon discovered that initial plans to establish offshore wind farms would come into conflict with other uses, such as navigation, sand extraction and environmental protection. Consequently, the plan was altered to accommodate these uses. This initial master plan was concluded without a formal process. However, legislation addressing this deficit is on its way.

Prof. Maes remarked that these conflicts are not necessarily national. He gave the example of the Dogger Bank, where in the Dutch Exclusive Economic Zone (EEZ) Natura 2000-areas are being planned, whereas wind farms are supposed to be established in the neighbouring British EEZ. But the possibilities of trans-boundary cooperation exceed the planning stage. When talking about offshore wind parks, it is also about sharing existing cables to bring the produced energy to the shores. However, questions related to national programmes on subsidizing renewable energy currently hinder a closer cooperation between the Netherlands and Belgium.



Frank Maes

Under the current legislation, a domain concession, an environmental permit and a continuous monitoring programme are required for a permission to erect an offshore wind park. 55 wind mills are already in operation. However, not all legal aspects are sufficiently researched. As *Prof. Maes* pointed out, UNCLOS allows for a safety zone around artificial installations of up to 500 m, Art. 60 para. 5 UNCLOS. What about situations, in which wind mills stand 1,5 km apart from each other? May a state prevent ships from using the theoretically available corridor of 500 m? Art. 60 para. 5 UNCLOS allows an extended safety zone, if it is compliant with generally accepted international standards or recommendations by a competent international organization such as the IMO. Even though the collision risk for all 3 currently planned parks is estimated at only one collision every 4-5 years, the Belgian government wants to keep ships out of the wind parks for multiple reasons: although the possible damage to the ship resulting from a collision with a wind mill would be minor, the potential damage to the installation is of

⁷ For more information see Maes et al., A Flood of Space – Towards a Spatial Structure Plan for Sustainable Management of the North Sea, Belgian Science Policy 2005.

greater concern. On the one hand, the wind mills would cease to produce energy, thus affecting the possibility of offshore wind farms to increase energy security and reliability. Furthermore, insurance issues concerning such incidents remain unresolved. The last legal uncertainty addressed by *Prof. Maes* concerns the freedom of navigation: according to Art. 60 para. 7 UNCLOS which states, that “artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation”. According to *Prof. Maes* the very meaning of “lanes essential to international navigation” is unclear, since the state practice in the North Sea has been ambiguous. Nevertheless, it becomes clear that the freedom of navigation has to be taken into account. But the bigger offshore wind farms are the longer are the routes ships have to take around them. Longer journeys increase fuel consumption and consequently greater harm to the environment due to pollution. In Belgium and the Netherlands shipping and the safety thereof is a top priority. However, offshore wind energy became a top priority as well. Now these activities have to be securely planned and brought into accordance with each other.

Axel Wenblad

MARINE SPATIAL PLANNING IN SWEDEN – PROPOSAL FOR AN INTEGRATED SYSTEM



Axel Wenblad

Axel Wenblad, the former Director General of the Swedish Board of Fisheries and current senior adviser on MSP began his presentation by reminding the audience of the bad environmental state the Baltic Sea is suffering right now. Sweden, the main bordering country to the Baltic Sea, has a natural interest in preserving its marine resources. He considers MSP as a tool to allocate resources and space for the different uses. Furthermore, it is a way to implement the European Marine Framework Directive ⁸⁾. He also introduced a sea use unmentioned in the discussion so far: carbon capture and storage (CCS) technology allows for capturing the harmful carbon dioxide released when burning fossil fuels. This carbon is then stored and thus prevented from being released into the atmosphere. *Mr. Wenblad* regards the Baltic Sea as a

possible place for CCS. This and other economic growth prospects lie at the sea, a fact that calls for a planned approach. As for offshore wind parks, the process takes currently 5-6 years in Sweden which is too long for industry demands.

Today, Sweden has no national comprehensive approach to MSP. Municipalities can plan the territorial sea, but only 4 out of 80 have done so. However, federal legislation is on its way. *Mr. Wenblad* predicted that by autumn 2012 the legislative framework will be in place and that by 2016 Sweden will have an eco-system based maritime spatial plan. The difficulty will be not only to balance the competing private and public interests, but also to include the different stakeholders, especially the public ones. He pointed out that national MSP must be carried out in collaboration with the municipalities to avoid conflicts. But so far knowledge about the seas is still not adequate for a comprehensive plan, a point on which other speakers

⁸ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).

agreed. Also, the coherency with existing legislation, such as the Electricity and Natural Gas Act must be ensured to avoid a conflict between new MSP and already existing licensing frameworks.

Nico Nolte
MARITIME SPATIAL PLANNING IN THE GERMAN EEZ

The last speaker to give a presentation was *Dr. Nico Nolte* from the BSH. After providing an overview over the current sea uses in German waters, he pointed out the challenges faced by increasing offshore wind energy. Germany faced the particular problem, that its EEZ is comparatively small. Today, most of the territorial sea is a Natura 2000 area with another 30% of the EEZ protected as well. If Germany wanted to achieve its ambitious goals of generating 25.000 MW of offshore electricity, another 15% of the EEZ would have to be covered with permanent installations. The space left has to be shared by the “other” uses, amongst them fishing and shipping. The policy of “no turbines in Natura 2000-sites” contributed to the general space problem. UNCLOS provides for a framework of public international law of the sea, thus also for MSP. Whereas it confers upon coastal states full jurisdiction based on sovereignty over the internal waters, it is limited by the right of innocent passage in the territorial sea. In the EEZ, the coastal state’s jurisdiction is functionally limited to artificial structures, scientific research and environmental protection. Accordingly, the possibilities for MSP measures are limited. *Dr. Nolte* called MSP a “voluntary self-constraint”. He also addressed the problem concerning the definition of “sea lanes used for international navigation” in Art. 60 para. 7 UNCLOS, but attributes the competence to define such sea lanes to the IMO. Allocating all uses in German waters was no easy task, especially since the space is limited. The BSH started by analysing ship traffic and was able to identify priority areas that had to be kept free from obstacles according to UNCLOS, and reservation areas where shipping was attributed a special weight in the balancing process. *Dr. Nolte* emphasized that this is not a regulation but a protection of current traffic. The strategic environmental assessment, the first one ever carried out in a sea area distant from the coast, came to the conclusion that no substantial impact on the environment would result from the plan. As for the issues of trans- boundary cooperation, he spoke of a general importance concerning the use of cables and pipelines which are in most cases by its very nature international. More recent challenges to be tackled internationally concern the common use of maritime infrastructure getting electricity produced offshore to the consumers. In Germany, the competence for MSP is divided: whereas the *Länder* (federal states) have the competence of planning in the territorial sea, the *Bund* (federal government) is competent to regulate activities in the EEZ. Procedural steps to establish a legislative framework started in 2005 with questionnaires sent out to all stakeholders. It was only then that the BSH discovered the lack of a comprehensive inventory of all sea uses. After an initial drafting period, public participation and international



Nico Nolte

consultation followed in the summer of 2008. The spatial plan for the North and Baltic Sea became legally binding by the end of 2009⁹.

Panel Discussion
MARITIME SPATIAL PLANNING AND OFFSHORE WIND ENERGY
- HOW TO BALANCE CONFLICTING USES AND INTERESTS -

Dr. Ursula Prall, Managing Director of the Offshore Wind Energy Forum and *Wolfgang Hintzsche*, Marine Director of the German Ship owners' Association (VDR), joined the speakers for the panel discussion led by *Prof. König*.



Ursula Prall



Wolfgang Hintzsche

The discussion began with the screening of the narrated comic “Become a maritime Specialist in 10 minutes” produced by the WWF Germany¹⁰. Asked by *Prof. König* about the problems faced by the offshore wind industry *Dr. Prall* reported that currently the biggest issues are getting the generated power to the shores since the construction of the cables is behind schedule. Concerning MSP she noted as a positive aspect that this legal concept has structured the discussion about coordinating sea uses. *Mr. Hintzsche* mentioned the BSH as a good example when it comes to stakeholder participation. From the beginning the agency had made it clear that shipping remains a priority in MSP. When Belgium would have done the same they could have avoided alterations later in the process as described by *Prof. Maes*. *Mr. Hintzsche*, who is also a licensed ship master, explained that the wind mills itself are easily detectable by on-board radar and per se do not pose a great threat to the security of shipping. *Prof. Maes* defended the Belgian approach with regard to the limited space in the Belgian EEZ. Therefore, not all shipping lanes could be taken into account when setting up the master plan. When assigning space to offshore wind mills one has to consider the suitability of the designated space for the specific use; e. g. not all sea areas are suitable for erecting wind power installations.

Judge Anthony Lucky commented on the concept of MSP and wished for a round of experts to apply this tool to his home state of Trinidad and Tobago, where the sea use is so far uncoordinated. *Judge Stanislaw Pawlak* emphasized the impact MSP and the contribution of

⁹ Ordinance on Spatial Planning in the German Exclusive Economic Zone in the North Sea of September 21st 2009 and Ordinance on Spatial Planning in the German Exclusive Economic Zone in the Baltic Sea of December 10th 2009; see http://www.bsh.de/en/Marine_uses/Spatial_Planning_in_the_German_EEZ/index.jsp for more information.

¹⁰ Available on YouTube: <http://www.youtube.com/watch?v=rZJrHuYkXUY>.

the EU could have on the entire Baltic region with 100-120 Mio. people. *Mr. Wenblad* supported his position by referring to the example of Latvia: although the Baltic country started the planning process rather late, Latvian MSP legislation is already in place. Similar “success stories” can be observed all around the Baltic Sea. *Dr. Nolte* traced this back to a feeling of unity in the Baltic region that has been developed over decades. At this point the former President of BSH, *Prof. Dr. Peter Ehlers*, commented on MSP coming a long way: less than two decades ago people thought that MSP was incompatible with the freedoms of the high seas. Today, MSP is an accepted tool of sustainable sea management.

Concerning the necessity of a truly international stakeholder process due to restrictions of these freedoms that come with each MSP measure, *Dr. Nolte* noted that the BaltSeaPlan ¹¹⁾ project is exploring these possibilities. Especially for regional seas such international cooperation is of great importance. He called for a coordinating body to establish common principles. *Mr. Wenblad* agreed and underlined the fact that having a competent authority in each participating country is already a great leap forward. International cooperation is about building trust in the system of MSP. At this point, *Prof. Maes* gave reference to MASPNOSE ¹²⁾, a sister project of BaltSeaPlan, that is also financed by the EU to explore regional cooperation on MSP in the North Sea Area. He also stressed the importance of having a common understanding of stakeholder participation. According to him, this includes private and public stakeholders. Especially public stakeholders like authorities and regional governments, but also special interest groups, have problems in using this opportunity to their advantage. *Mr. Ekwall* gave the example of a group representing fisheries in the Netherlands: their interests were not included in the early planning phase since they did not participate in stakeholder meetings. Once the group realized this deficit, they contributed eagerly. *Mr. Hintzsche* pointed out that shipping is the international business. Other aspects can be dealt with regionally. But as long as rights of shipping are affected, MSP will have to be dealt with at the international level.



The Panel

¹¹ See www.baltseaplan.eu for more information.

¹² See <https://www.surfgroepen.nl/sites/CMP/maspnose/default.aspx> for more information.