Chapter 2

Marine Protected Areas in the EEZ in light of international and European Community law – Legal basis and aspects of implementation

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Abstract

At the international level, Articles 192, 194, and 56(1)(b)(iii) of the United Nations Convention on the Law of the Sea (UNCLOS) oblige the coastal States to protect the marine environment in their own Exclusive Economic Zones (EEZs). The measures required under international law also include the establishment of Marine Protected Areas (MPAs). Regulations in MPAs must be based on the sovereign rights and jurisdictions given to the coastal States by UNCLOS. Admissible restrictions concern most forms of economic uses such as all kinds of installations, the exploration and exploitation of the living and non-living resources in the water, seabed and subsoil. Marine scientific research is also covered by such restrictions, but not navigation, overflight and military use. Specifications of this rather general obligation derive from regional or global international environmental law.

The habitat protection directives under European Community legislation are legally enforceable and sanctions-implying obligations to carry out site protection. In the framework of the sovereign rights and jurisdictions that UNCLOS assigns to the Member States, the latter are obliged by the directives to establish even in their EEZs the coherent ecological network of protected areas known as NATURA 2000. The selection of the sites follows exclusively technical and scientific criteria. The protection system substantially follows Articles 6(2), 6(3), 6(4) and 7 of the Habitats Directive (HD). In accordance with these provisions, plans and projects which may adversely affect the site shall only be agreed to if, in light of the precautionary principle, no reasonable scientific doubt remains as to the absence of such effects. Possible exceptions must strictly

follow the provisions under Articles 6(3) and 6(4) of the HD. Protection does not only have to be guaranteed at the time when an authorisation or licence is granted, but permanently.

In Germany, site protection in the EEZ is implemented through Article 38 of the Federal Nature Conservation Act (BNatSchG) and in the form of relevant statutory ordinances on protected areas. Although Article 38(1)(3) BNatSchG refers to the EU legislation, Germany is responsible for the regulation of fisheries within the MPAs. This is because Member States are responsible for issuing site-related protection provisions – even if these have side effects on fishery – when fulfilling their protection obligation under Article 6 HD and Article 4 of the Birds Directive (BD). Based on Article 6 EC Treaty, the Community can also take measures under the Common Fisheries Policy to support the Member States in their efforts to protect species and habitats in their NATURA 2000 sites (e.g., protection of the *Darwin Mounds*). Thus, the Council of the EU can adopt measures with nature conservation effects, but it can never supersede the Member State in their own responsibility. The restrictions under Articles 38(1)(4) and 38(1)(5) BNatSchG rule out the possibility of abstract and general prohibitions of projects mentioned in that Article (prospecting and extraction of mineral resources, windmills, etc.) but not the duty to carry out an impact assessment. Statutory ordinances with regard to protected areas in the EEZ are to be implemented by use of management plans under the responsibility of the Federal Agency for Nature Conservation (BfN).

1 The basis and framing conditions of MPAs in international law

1.1 The United Nations Convention on the Law of the Sea

1.1.1 Mission and obligation to protect the marine environment

The protection of the marine environment through international laws has evolved since 1945. In the beginning, environmental treaties regulated individual aspects of the pollution of the marine environment and the protection of living marine resources (Beyerlein 2000, para. 220ff). Today, Part XII of the United Nations Convention on the Law of the Sea (UNCLOS)[1], deemed as the constitution of the seas, provides for the basic

[1] Entered into force 16 November 1984; Federal Law Gazette of 10 December 1982, 21 ILM 1982, p. 1261, [Bundesgesetzblatt] 1994 II p. 1799.

rights and duties of the coastal States and of the international community of States in the ocean, and it includes a comprehensive mission to protect the marine environment. Article 192 UNCLOS expressively provides for the States to protect and preserve the marine environment. This is a genuine legal obligation having even *erga omnes*[2] effect (cf. Proelß 2004, p. 77), however, its scope has been controversial. Based on Article 194 paragraph 5 UNCLOS, this mission includes all measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. Just as with any other constitution, UNCLOS needs to be concretised and implemented through national laws, regional protection systems (cf. Articles 197 to 201 UNCLOS), or by empowering an international organisation.

UNCLOS assigns the coastal States certain sovereign rights and jurisdiction – which are basically of the same kind – in the EEZ. These are either exclusive or primary-interest rights and jurisdiction (e.g., exploiting the living resources) (Jarass 2002, p. 22; Stoll 1999, p. 668). The sovereign rights and jurisdiction (and duties) of the coastal States in the EEZ are listed under Article 56 UNCLOS and are described in more detail for artificial islands, installations and structures under Article 60.[3] Article 61 formulates the rights and duties with regard to the conservation and management of the living resources of the EEZ in a very elaborate manner. The sovereign rights and jurisdictions provided in Article 56(1)(a) and (b) need to be claimed by the coastal State in order to be exercised. In practice, this has been done by the proclamation of an EEZ by Germany and by most other coastal States. The United Kingdom has not done this until today (April 2005). In contrast to that, the sovereign rights under the continental shelf regime (Part VI Art. 77 to 81 UNCLOS) do not depend on occupation, effective or national, or on any expressed proclamation (Art. 77 para. 3). The continental shelf of a coastal State comprises (only) of the seabed and the subsoil of the submarine area, and not the body of water, up to a distance of 200 nautical miles from the baselines, and in some cases even up to 350 nautical miles (Art. 76 para. 10). On the continental margin, coastal States have *inter alia* sovereign rights to explore and exploit the mineral and other non-living resources of the seabed and subsoil, including living organisms belonging to sedentary species (Art. 77 para. 4 UNCLOS). Article 56 paragraph 3 links the EEZ and continental

[2] *Erga omnes*: literally 'between all', in this context: affecting all states and their nationals.

[3] Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf (Art. 80 UNCLOS).

shelf regime by stating that the rights set out in Article 56 UNCLOS shall be exercised in accordance with Part VI. In the following, the continental shelf regime will not be covered in detail, although some relevant aspects on species protection are mentioned.

The tasks of protection mentioned under Part XII of UNCLOS are implemented by Article 56(1)(b)(iii) UNCLOS into the legal order of the EEZ and transferred into the coastal States' competence. The rights and jurisdiction assigned to the coastal States are particularly important for the establishment of MPAs (see 1.1.2 below for further detail). Outside the scope of special rights and jurisdiction the legal order of the EEZ essentially follows the legal regime of the high seas (Article 87ff UNCLOS) in accordance with Article 58 UNCLOS. This applies in particular to the freedoms of navigation and over-flight and (in parts) to the freedom of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to these freedoms.[4]

However, it is not at the discretion of the coastal States to claim the rights and yet not assume the tasks and duties resulting from UNCLOS for the protection of the marine environment. Those who make use of the rights of economic exploration and exploitation are obliged to protect, as a countermove, the marine environment in accordance with UNCLOS.[5] This is also clarified by Article 193 UNCLOS, which obliges the States to link simultaneously the exploitation of their natural resources to their very protection.

Possibly there are some or many strategies and measures for successfully implementing the protection of ecosystems stipulated under Article 194(5) UNCLOS. Czybulka and Kersandt (2000, p. 7) think that the inclusion of three-dimensional area strategies in this context is essential: in some cases, it might be sufficient to protect the seabed and/or deep layers of the body of water. Such strategies also call for the creation of biologically needed disturbance-free No-Take-Zones or other qualified areas for retreat and reproduction. Thus the basic obligation to protect and preserve the marine environment (Art. 192) becomes more concrete and converts to an obligation of habitat protection (Art. 194(5)) by establishing MPAs when rare and fragile ecosystems can only thus be protected in accordance with Article 194(5) UNCLOS (see Wolfrum 2001, p. 430). There are no more disputes in literature as to whether it is basically admissible to assign MPAs in the EEZ based on international law.[6] In

[4] For the continental shelf, compare Article 79.

[5] Czybulka 2001a, p. 369; Long and Grehan 2002; Kersandt 2002, p. 121; Nebelsiek 2002, p. 10; Gellermann 2004, p. 76.

[6] Czybulka 1999, pp. 563f; Jarass 2002, pp. 29ff; Proelß 2004, pp. 91ff.

practice, coastal States have also been doing just this (see Janssen 2002, pp. 76ff for examples).

The older existing literature on international law contested the coastal States' jurisdiction to establish MPAs in the EEZ. One basic misunderstanding was to confuse the establishment of MPAs with the assertion of territorial ('aquitorial') claims. There is no link to territorial claims, even if geographic references are necessary for marking the protected areas. The International Maritime Organisation's (IMO) exclusive regulatory competence with regard to shipping (Wolfrum 2002, p. 7; similar in Lagoni 2002, p. 128), served as another starting point for conflicting opinions. MPAs need not necessarily be legally or technically strict nature reserves (Czybulka 2001a, pp. 373f). In many cases, it would not make sense to exclude navigation in a MPA. Rather, MPAs in the EEZ are restrictions of use within the jurisdiction assigned to the coastal State (similar in Lagoni 2002, pp. 123f). The IMO's exclusive competencies only correspond to navigation-related rules. Such rules will only be necessary in the EEZ in exceptional cases. Although shipping activities cannot be legally regulated by the coastal States, the protection of marine areas can be achieved by regulating human activities using the powers already granted to the coastal States in the EEZ for protecting and conserving the marine environment.

Such restrictions may, of course, also be "bundled" and applied to certain marine areas in the EEZ. Marine protected areas are thus established (Czybulka 2001a, p. 374).

1.1.2 Regulatory power

As mentioned above, it is necessary to regulate the different types of human activities that could be harmful to the designated MPAs. Decisive in this respect is the question of whether it is admissible in terms of international law to create area-related limitations. For the EEZ, rights and jurisdiction for conserving and managing the natural resources are derived from Article 56, Article 60 (concerning installations and structures), for fishing from Article 61ff, in particular from Article 61(2), and for the continental shelf from Articles 77 and 80 UNCLOS. Subject to certain restrictions, the coastal State may autonomously regulate the exercise of these assigned rights and jurisdiction.[7] Coastal States may therefore regulate the different types of use and human activities in the form of a regulation which applies to all states and nationals (*erga omnes*).

[7] Klinski 2001, pp. 9ff; Nebelsieck 2002, pp. 8ff; Wolf and Heugel 2001, pp. 8ff.

They are not limited to controlling the behaviour of their nationals; the flag States have no special rights beyond Article 73(4).

The question is which additional activities the coastal States may regulate in the EEZ. Article 58(1), in conjunction with Article 87 UNCLOS, shows that it is not possible for the coastal State alone to regulate navigation and over-flight in a way admissible in international law. It is possible for the coastal State to submit an application for navigation rules at the IMO in accordance with Article 211(6)(c) UNCLOS concerning the ecological conditions of the area. The IMO may then allow the coastal State to apply (even) stricter rules to its EEZ with regard to the pollution of the area from vessels (for more details and in relation to "Particularly Sensitive Areas", see Proelß 2004, pp. 89ff).

The coastal State may, in accordance with Articles 87 and 79(4) UNCLOS, establish (legal) conditions for the laying of submarine cables or pipelines entering its territory or territorial sea, or it may establish its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or the exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction. The laying of transit *pipelines* requires the consent of the coastal State in accordance with Article 79(2)(3) UNCLOS and thus, it can also be regulated within a MPA. However, it will most probably not be possible to provide for the abstract regulation (prohibition) of the laying of transit *cables* since such cables are not covered by the requirement of consent (subject to the consent) in the text of Article 79(2)(3) UNCLOS (controversial, Lagoni 2002, p. 124; see also Wolf 2004, p. 71). However, it should be possible for the coastal State to influence the type of cable laid, according to Article 79(2) UNCLOS, and the location (the delineation of the course) where the cables will be laid.

According to Article 56, the coastal State has sovereign rights for resource-related marine scientific research (i.e., exploration and exploitation). Coastal States may, in accordance with Article 246(5) UNCLOS, withhold their consent to marine scientific research activities which may adversely affect the sovereign rights for the exploration and exploitation of the natural resources. Such research may thus also be regulated in a MPA. In principle, the coastal State must tolerate marine scientific research unrelated to living resources (pure research) in its EEZ and on the continental shelf with one exception: restrictions are possible if the existing circumstances are not "normal circumstances" within the meaning of Article 246(3) UNCLOS. Normal circumstances may be ruled out for MPAs if it can be proven that they are actually worthy of protection and require special protection, and if the intended research

activities would adversely affect the area (Stoll 2004, p. 50). The result is that resources-unrelated marine scientific research (pure research) may also be regulated significantly in MPAs.

1.2 International environmental law

Modern international environmental law constitutes the second pillar of the mission and obligation to establish MPAs. At the global level, the Convention on Biological Diversity (CBD) of 5 June 1992 (Bundesgesetzblatt 1993, II, p. 1741) is of great importance. According to Article 8(a) CBD the Contracting Parties are called upon to establish, as far as possible and as appropriate, a system of protected areas or areas where special measures need to be taken to conserve biological diversity. Upon ratification of the Convention, the Federal Republic of Germany assumed the obligation to implement the provisions contained therein.[8] The CBD neither modifies nor extends the regulations of UNCLOS.

Specifications of the CBD for the North Sea and the Baltic Sea derive from the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area (HC) (of 9 September 1992, Bundesgesetzblatt 1994 II, p. 1355) and from the Oslo Paris Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) (of 22 September 1992, Bundesgesetzblatt 1994 II, p. 1355). For more details on international conventions, see chapter 1.

2 Standards in European Community legislation

2.1 The coherent ecological network NATURA 2000

Recognising that the decline of biological diversity can only be combated through coordinated Europe-wide protection measures, the Council of the European Community decided to set up a coherent European ecological network of special areas of conservation known as NATURA 2000 (see Art. 3(1) sentence 1 of the Habitats Directive). Through the designation of protected coherent areas composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, the network shall serve the establishment of disturbance-free areas, the genetic exchange of certain wild species of fauna and flora, and thus the conservation of the European natural heritage.[9] The

[8] Czybulka 2001, pp. 24ff; Wolff 2004, p. 177; Jarass 2002, p. 40.
[9] Gellermann 1996, p. 548; Ssymank et al. 1998, pp. 11f.

system of NATURA 2000 areas comprises of two area types: Special Areas of Conservation (SACs) under the Habitats Directive (HD)[10], and Special Protection Areas (SPAs) under the Birds Directive (BD).[11] SACs are selected in detailed procedures from Sites of Community Importance (SCIs) proposed by the Member States (pSCIs). The Habitats Directive implements the Berne Convention (of 19 September 1979, Bundesgesetzblatt II 1984, p. 618) at the European Community level, and with the protection of habitats, it provides an extension to the legal tools of the said Convention (Wagner 1990, p. 396; Bosecke 2005, p. 334). The Birds Directive, on the other hand, is the legal adaptation of the Ramsar Convention at the Community law level (Czybulka 1996, p. 48). The NATURA 2000 Network is generally understood to be the European implementation of the task contained in Article 8(a) CBD (Czybulka 2003, p. 62) which requires a "system" of protected areas to be established.

With respect to the protection aim under Article 2 Habitats Directive for all areas incorporated in the NATURA 2000 Network, the Member States must take both statutory (legal) and administrative measures to maintain or restore the favourable conservation status of the natural habitats and species of wild flora and fauna. Member States have to classify the most suitable territories (in number and size) as SPAs for the conservation of bird species listed in Annex I,[12] and of migratory bird species not listed in Annex I[13] with regard to their geographical distribution on sea and land, and to their breeding, moulting and wintering areas and staging posts. For site selection under the Habitat Directive (SAC), the relevant criteria are the priority and non-priority species listed in Annex II and the natural habitat types listed in Annex I of that Directive. From the expert point of view, the Annexes fail to be complete with regard to the marine area; Annex II, for example, does not include any marine water plants.

2.2 Does European nature conservation and environmental legislation apply to the EEZ?

Recent discussions and jurisprudence have clarified that the Birds Directive and the Habitats Directive are applicable to the EEZ (and the continental shelf) of the Member States.[14]

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[10] Habitats Directive: 92/43/EEC, OJ EC L 206, p. 7.

[11] Birds Directive: 79/709/EEC, OJ EC L103, p. 1.

[12] Under Article 4(1) sentence 4 of the Birds Directive.

[13] Under Article 4(2) Birds Directive.

[14] London High Court, LO 1336/1999 NuR 01, pp. 19ff; European Commission, evidence ibidem; Czybulka 2001, pp. 19ff; Kersandt 2002, p. 124; Jarass 2002, pp. 41ff; Long and Grehan 2002, pp. 248f; Owen 2004, p. 61.

The HD mentions, among others, aquatic areas in Article 1(b) and aquatic species, which range over wide areas, in Article 4. At least the following natural habitat types in need of protection as listed in Annex I of the HD can be found in the German EEZ: sandbanks (Annex I HD, NATURA-2000-Code No. 1110), and reefs (Code No. 1170). In addition, some species listed in Annex II are known to regularly occur in the German EEZ; these include harbour porpoise (*Phocoena phocoena*), grey seal (*Halichoerus grypus*), common seal (*Phoca vitulina*), river lamprey (*Lampetra fluviatilis*), sea lamprey (*Petromyzon marinus*), and twaite shads (*Alosa fallax*). These species and habitats would therefore not be effectively protected if the scope of application were limited to the Member States' Territorial Waters, excluding the EEZ (Nordberg 2004, p. 116; for the Directive on Environmental Impact Assessment: Jarass 2002, p. 49). The same applies to the bird species listed in Annex I and the migratory species according to Article 4(2) that are protected under the BD.

2.3 The obligation to protect habitats

2.3.1 The site selection

The Birds Directive and the Habitats Directive specify the protection obligations more explicitly than the international environmental law. Protection starts with certain natural conditions, which at the EU level, have been assessed as sites in need of protection in accordance with Article 4(1) BD ("most suitable territories") and in accordance with Annex III of the HD (habitat types listed in Annex I and species listed in Annex II). The directives are legally enforceable and imply sanctions (Czybulka and Kersandt 2000, pp. 26f).

When classifying the "most suitable territories" under Article 4(1) BD, Member States have only a limited scope of selection. In those cases where a territory or aquatic area has been classified as the most suitable in purely ornithological terms with regard to the protection purpose of the BD,[15] the classification must take place. Economic or political reasons are not allowed.[16] In principle, the same applies to the designation of sites under the HD, even if the selection procedure and the criteria to be applied are much more complex. Sites are exclusively selected in line with the technical criteria set out in Annex III.[17] In summary: when

[15] For example, in accordance with the IBA lists drawn up by expert associations, cf. ECJ, Case C-374/98- ZUR 01, p. 76; Iven 1998, pp. 529f.

[16] ECJ, Case C-3/96- NuR 98, p. 539; Iven 1998, p. 529; Spannowsky 2000, p. 43.

[17] Rödiger-Vorwerk 1998, p. 36; Ssymank et al. 1998, p. 23; see also chapter 4.

selecting sites, Member States are not allowed to consider issues other than those of nature conservation, for example, those of an economic or structural nature (ECJ, Case C-371/98- DVBl. 00, p. 1842). The same applies to the final act of the official designation of the site according to German national legislation (Louis 2000, §19 para. 11). Such economic or structural considerations may only be undertaken within the exceptions provided under Article 6(4) HD (cf. Article 34(3) and Article 35 of the Federal Nature Conservation Act (BNatSchG) (see section 2.2.3 above).

The material requirements with regard to site selection contained in the HD and BD are essentially of the same kind. The significant differences between these two Directives and the German national legislation for nature conservation areas other than NATURA 2000 sites, concern the selection criteria and the classification or designation duties. Whereas under the HD only scientific criteria apply for site selection and Member States have the duty to establish protected areas for Annex I habitats and Annex II species, conventional German national law allows a wider scope of criteria, including for example economic and political criteria, and does not oblige the establishment of protected areas on a national basis. Additionally, maintenance of the network protection in EC Law is mandatory, although there are still questions to be answered with regard to the marine area.

2.3.2 The protection level to be guaranteed

The protection system in SACs and classified and protected SPAs (for such SPAs see Art. 7 HD) follows the provisions under Article 6(2) to (4) HD. Under this article, the Habitats Directive does not provide protection to sites that should have been classified as SACs but have not yet been so classified. The Birds Directive, however, under Article 4(4) does provide protection for SPAs not yet classified as such.[18] Article 6(2) HD is the central link to the protection level to be guaranteed. Under this provision, the Member States shall take appropriate steps to avoid in the SACs the deterioration of natural habitats and the habitats of species, as well as significant disturbances of the species for which the areas have been designated, independent of the fact whether such effects were caused within the area or were brought in from outside. Thus, there is a general prohibition of deterioration for which surveillance is to be undertaken (Art. 11 HD).

[18] (ECJ, Case C-374/98- ZUR 01, pp. 76f; Federal Administrative Court, Reference 4 VR 13.00, ZUR 02, p. 226).

Article 6(3) and (4) HD provide for special provisions with regard to *plans* and *projects*. The Habitats Directive does not define plans and projects. The European Court of Justice (ECJ) follows the wider concept of "project" given in the Council Directive 85/337/EEC.[19] Accordingly, mechanical cockle fishing in the Netherlands' Wadden Sea for which new licences have to be applied annually has been assessed as a *project* (ECJ ibid., para. 25). In light of this opinion, projects are not only such classical measures like constructions of residential buildings, infrastructure or industrial structures, but they are also parts of agriculture, forestry or fishing use. Impact assessments with regard to the implications for the site's conservation objectives must be carried out if the plan or project, individually or in combination with other plans and projects, is likely to have a significant effect on the site. The plan or project may be authorised only after the national authorities have ascertained that a plan or project will not adversely affect the integrity of the site concerned. This is only the case where, given the precautionary principle, no reasonable scientific doubt remains as to the absence of such effects (ECJ ibid., para. 58f). Otherwise, plans and projects may not be authorised unless the exceptions provided under the first paragraph of Article 6(4) (for sites not hosting priority habits or priority species) and under the second paragraph of Article 6(4) (for sites hosting priority habits or priority species) apply. These exceptions are: "imperative reasons of overriding public interests", the absence of alternative solutions, and the maintenance of the overall coherence of NATURA 2000 even if a plan or project will be carried out (Article 6(4) HD). The Commission shall be informed of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, and where the assessment of the implications for the site is negative, the only considerations which may be taken into account for carrying out the project are those relating to human health, public safety, or to beneficial consequences of primary importance for the environment, or to other imperative reasons of overriding public interest. In this case, the Commission must deliver its opinion prior to a possible authorisation of the plan or project.

The admissibility of all types of exploitation that are neither plans nor projects is exclusively assessed under both Article 6(2) HD and the specific national provisions adopted to this end. Article 6(2) obliges the Member States to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species in the SACs. Human activities

[19] cf. Judgement of 7 September 2004, Case C-127/02, para. 24.

that could bring about deteriorations of natural habitats and the habitats of species as well as significant disturbances are not allowed. This requires continuous surveillance (cf. Art. 11). Article 6(2) HD aims at maintaining (at least) the conservation status at the date of the site's designation and intends to avoid the creation of such adverse implications for the site which add up to the ones already existing at that time.[20] In this respect, the assumption prevails that legally existing activities or exploitations do not negatively modify the conservation status of the site. Such an assumption, however, does not apply to new forms of exploitation and is refuted for existing ones if the protected assets are damaged largely due to intensified exploitation (ECJ, Case C-117/00). The same will have to apply to existing exploitations which have not been intensified or modified but which will permanently lead to deteriorations or considerable disturbances thus aggravating the existing adverse effects in type and quantity at the date of identification.

Recently, it has been argued that Article 6(2) HD provides for the substantive protection level of protected sites with regard to all effects, including those caused by plans and projects, and that it establishes a permanent obligation for its conservation.[21] The consequence of this is that both exploitations (those that are not plans or projects), and plans and projects that have been drawn up and implemented on the basis of valid authorisations, shall be submitted to constant control as to whether they negatively modify the conservation status. Such opinion is to be preferred in the interest of the protection of habitats. Only by way of a permanent obligation, including a control function, will it be possible to permanently maintain the coherence of the NATURA 2000 network and thus to ensure the conservation of biological diversity and the protection of the European natural heritage.

The judgement of the ECJ of 7 September 2004 on Case C-127/02 is not opposed to this opinion: once the assessment has been carried out, a "concomitant application of the rule of general protection laid down in Article 6(2)" becomes "superfluous" (ECJ ibid., para. 35). However, this statement presupposes that the authorisation of the project necessarily means that it is not considered likely to give rise to deteriorations (ECJ ibid., para. 36). Hence, the general level of protection and the conservation of habitats and of species remain untouched. If deteriorations occur, they shall be regulated by retroactively (not concomitantly) applying

[20] European Commission 2000, pp. 26f; Gellermann 2001, pp. 72f.

[21] AG Kokott, Opinion delivered on 29 January 2004 on Case C-127/02; Federal Administrative Court, Reference 4 C 2.03, p. 18 of the document.

the measures ("steps") of Article 6(2) HD (similar: ECJ ibid., para. 37). This involves far-reaching consequences for valid authorisations (permits or licences) that originally allowed projects or plans in protected areas. Thus, the Member States would have the opportunity to make sure that it would be possible to modify and possibly reverse administrative decisions in order to be able to interfere in cases where Article 6(2) HD has been violated. With regard to Germany, it should be taken into consideration by the administration whether more limited or revocable authorisations will be required for corresponding activities than before. This is because German administrative law grants a strong position to the holder of a once-legal or even illegal authorisation (permit or licence) if that authorisation is valid (entered into effect).

3 Site protection in Germany – implementation of NATURA 2000

3.1 Basic principles

In the Federal Republic of Germany, protected areas for the purpose of nature conservation are as a rule designated by means of legal acts (ordinances). Since such designations have legal effects on third persons, they require a legal basis on the grounds of the constitutional principle of the rule of the law (Article 20(3) of the German Constitution (GG)). Due to the federal structure of Germany, the federal States (Länder) are responsible for the creation of the necessary legal basis in their respective Nature Conservation Acts. The German Federal Nature Conservation Act (BNatSchG) is a piece of framework legislation under Article 75(3) of the German Constitution (GG). It contains some principles and standards for instructions to the federal States and specifies how the Länder have to use their *legislative* competence in their territories and in the adjacent Internal Waters and Territorial Sea. Under Article 30 GG, the Länder have as a rule the full *executive* competencies.

In 2002, Article 38 was introduced into the Federal Nature Conservation Act and thus legal authorisation was established with regard to the EEZ. Hence, the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety is responsible for the establishment of protected areas in the EEZ and on the continental shelf in accordance with some provisions of nature conservation legislation as it applies to the German territory. Under Article 38(2) BNatSchG, the Federal Agency for Nature Conservation (BfN) shall perform the tasks resulting from the

establishment and protection of the European Network NATURA 2000 in the EEZ with two relevant exceptions. The exceptions refer firstly, to the implementation of the assessment of plans and projects under the Habitats Directive, and secondly, to the formal designation of areas as "protected parts of nature and landscape". The second exception has to be done by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety by way of an ordinance (*Rechtsverordnung*). At the same time, it can be derived from this provision that the legislator intended the protection of marine areas to be primarily guaranteed through the adoption of official statutory acts and not through other administrative or contractual measures which are also mentioned under Article 6(1) HD (Gellermann 2004a, pp. 11, 15).

Article 38(1) BNatSchG declares Articles 33 and 34 BNatSchG (Protected Areas, and Impact Assessment, Inadmissible Projects and Exemptions, respectively) applicable to the protection of marine areas in the EEZ.

Thus, the prerequisites established for the most important legal standards of the BNatSchG are also to be applied to the EEZ in order to implement the EC directives on habitat protection. The wording of Article 38(1) and (2) BNatSchG exclusively refers to the implementation of the European Directives on habitat protection. Habitat types which are to be protected according to OSPAR/HELCOM, but not by the EC-Habitats Directive do not fall under the wording of Article 38 BNatSchG (cf. Gassner 2003, sect. 38 para. 8). However, it is not likely that the legislator had such intention because the OSPAR and HELCOM Conventions, and the on-going process of establishing a network of MPAs in their respective areas are firmly supported by the European Community and by Germany. It would be unfair to sign international documents in order to establish a network of marine MPAs on the one hand, and hamper their designation by national law on the other. Hence, a different interpretation or even an amendment of the Act is needed.

Article 33 BNatSchG essentially governs the designation of protected areas, thus serving the implementation of Article 4(1) BD and Article 4(1) HD. Article 33(5) BNatSchG treats aspects of preliminary protection. Article 33(5) BNatSchG and the respective special legal acts of conservation (ordinances) shall implement the general prohibition of deterioration resulting from Article 6(2) HD. Article 34 BNatSchG delivers the special protection and assessment schemes for *projects*, mainly in accordance with Article 6(3) and 6(4) HD. Article 38 BNatSchG does not explicitly refer to Article 35 BNatSchG, which delivers the implementation of *plans*, even though both projects and plans are mentioned in Article 6(3) and 6(4) HD.

This gap might however be considered to be covered by the reference in Article 33(3) BNatSchG to Article 6 HD (Gellermann 2004a, p. 80).

3.2 Contents and provisions in the legal act of conservation

Under Article 22(2) BNatSchG it is necessary, with regard to the effective designation as a protected area (in the format of an ordinance), to determine the object to be protected, the protection purpose, the orders and prohibitions to be complied with to achieve the protection purpose, and, where necessary, the respective management, development and restoration measures. The object to be protected is the detailed description of the area to be protected and the area boundary definitions (Schumacher and Fischer-Hüftle 2003, sect. 22 para. 19). The description of the protection purpose is important to justify that protection is needed and that the area is worthy of protection, and for the orders and prohibitions contained in the ordinance (Mannheim Administrative Court, Reference 5 S 251/91, UPR 93, p. 151). Under Article 33(3) BNatSchG the protection purpose of protected sites of habitats of wild fauna and flora and of bird species should also be designated in line with the respective conservation objectives for such sites (see section 3.1 above). Thus, the protection purpose shall include all conservation objectives relevant to the site; these will be the assessment criteria. When describing the protection purpose, it appears to be advisable to refer to the management plan describing in more detail the conservation objectives, thus avoiding the protection purpose and the ordinance as such to be overloaded with details (Gellermann 2004a, p. 29). Thus, the protection purpose described in the ordinance would be the framework for an eventual assessment, whereas the details could be regulated in a management plan.

Article 38(1) numbers (1), (2), (3), (4) and (5) define which orders and prohibitions could be included in the ordinance in accordance with Article 38(3) BNatSchG. Ordinances implementing provisions with regard to nature conservation could restrict, prohibit, or regulate any activity that negatively affects the protected area. Numbers (1) and (2) of Article 38(1) make clear that regulations of air traffic, shipping, internationally allowed military use, and scientific marine research may only be applied in accordance with international law.

The aim of number 3 Article 38(1) is to ensure that possible national restriction to fishing does not collide with the Common Fisheries Policy (CFP) and Council Regulation 2371/2002/EEC which was adopted to implement the CFP. Within the framework of the CFP, the EC has the competence to adopt provisions on the conservation, management, and

exploitation of living aquatic resources. However, a collision with nature conservation legislation can be ruled out for legal reasons.[22] This is because according to Article 33 EC Treaty, the CFP primarily refers to the economic aspects of fisheries (Proelß 2004, p. 311) whereas the Member States are responsible for enforcing the protection of habitats at the European level under Article 174 EC Treaty in conjunction with Article 6 HD and Article 4 BD. Since the authorisation arising from Article 38 BNatSchG is restricted to implementing the protection of habitats at the European level only, the restrictions contained in the legal act to designate protected areas are always restrictions made for the purpose of nature conservation. Such measures are clearly not covered by the objectives enshrined in Article 33 EC Treaty, but by Article 174 EC Treaty (Gellermann 2004a, pp. 53ff; Schwarz 2004, pp. 18f). When competency is defined, the primary objective of the measure is important and not the possible side effects.[23] Measures for biodiversity protection in a specific SAC or SPA within a Member State's waters, which have certain effects on fishing, do not become a CFP measure just because of such effects (see Owen 2004, p. 64). The focus of the provision is of decisive importance. If such focus is on nature conservation, as is the case in this context, the measure is one of nature conservation (ECJ, Case C-164/97 para. 16, OJ 1999, p. 1139). Under Article 175(4) EC Treaty and – if the focus is on the protection of habitats at the European level – on the grounds of the explicit obligation arising from Article 6 HD and Article 4 BD, the Member States are responsible and have the competency for such measures. Member States can regulate human activities in NATURA 2000 sites that are negatively impacting marine species and habitats in order to protect or conserve these, without interference from the EU Fisheries Council even if the regulations have an impact or side effect on fisheries. The authors know very well that this is a highly disputed issue and will take this up in another publication.

Numbers 4 and 5 of Article 38(1) BNatSchG provide for restrictions on power generation from water, current and wind, and on the prospecting and extraction of mineral resources; that they are only admissible in accordance with Article 34 BNatSchG. On the grounds of the preceding, it can be concluded that the explorations and exploitations mentioned cannot be prohibited in advance for all explorations and exploitations, but only in those cases where it has been individually proven that they

[22] Such collision is also explicitly ruled out according to Article 13(1)(d) in conjunction with Article 14(2)(d) of the Draft Treaty Establishing a Constitution for Europe (6 August 2004 version) adopted by the European Council.

[23] ECJ, Case 70/88, para. 17, OJ I 1991, p. 4529; ECJ, Case C-164/97, para. 16, OJ 1999, p. 1139.

have adverse effects in accordance with Article 34 BNatSchG and that no exceptions are possible. The consequence is that the most relevant exploitations and those with a high potential for entailing damage can only be regulated to a very limited extent in the protective legal act (ordinance). However, it is permissible that the ordinance obligates the competent authorities to carry out an impact assessment for privileged exploitations and activities (Article 38(1) nr. 4 and 5) by way of an anticipated risk assessment (Gellermann 2004a, pp. 63ff). In connection with this, it can be necessary that the exploiters also carry out research and provide relevant information to the competent authorities.

The preference given to mining and wind power is rather astonishing. In terms of European legislation there is no reason to complain about the provision (Article 38(1) nr. 4 and 5) since it does not rule out completely the protection system foreseen under Article 6(2), (3) and (4) HD. This, however, is a new way followed by the legislator opposed to the protected areas on land. It is not the way to enhance biodiversity protection. Usually, appropriate orders and prohibitions directly regulate in advance possible activities and exploitations which might adversely affect protected areas. Additionally, the restrictions mentioned under numbers 1 to 5 of Article 38(1) should only serve to comply with the standards of international law and European legislation (justification of the law, BTD Case 14/6378 and 14/6878) and thus not the enhancement of economic issues. So far, the text of Article 38(1) numbers 4 and 5 BNatSchG is not covered by the justification of the law. In summary, it remains to be seen how far it will be possible for the legally required appropriate assessment in a particular case to permanently comply with the protection requirements under European legislation.

3.3 Nature conservation management

According to Article 6(1) HD the Member States shall establish, if need be, appropriate management plans specifically designed for the sites. According to Article 22(2) BNatSchG, protected areas include the respective management, development and restoration measures, or contain the necessary empowerments. At present, Germany is preparing for the protection of marine areas according to Article 38 BNatSchG by a combination of legal instruments (legal act – statutory ordinance) and technical and scientific instruments (management plans). The management plans shall contain detailed descriptions of the site, the environmental assets and the conservation objectives. Additionally,

technical measures of conservation and restoration based on monitoring or scientific data shall also be mentioned.

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