Establishment of a Guidance Framework for Cross-border Maritime Spatial Planning

Maria da Luz Fernandes ^(a), Lisa P. Sousa ^(a), Ana I. Lillebø ^(b), Fátima L. Alves ^(a)

(a) CESAM & Department of Environment and Planning, University of Aveiro, Portugal <u>maria.luz@ua.pt</u>, <u>lisa@ua.pt</u>, <u>malves@ua.pt</u>

(b) CESAM & Department of Biology, University of Aveiro, Portugal lillebo@ua.pt

ABSTRACT

In the last five years European Union has strongly promoted Maritime Spatial Planning among its Member States as expressed in the Maritime Strategy Framework Directive and the Roadmap for Maritime Spatial Planning. Crossborder cooperation in the marine environment is one of the main principles for successful maritime spatial planning approaches. Transboundary Planning in the European Atlantic is a recently started European Union project, which studies the implementation of maritime spatial planning in cross-border areas. Difficulties arise in these areas as different national frameworks and models of marine planning are being implemented according to Member States own traditions of planning in the European Atlantic project, reviewing the main existing legal and administrative frameworks at international, regional and at European Union level. Finally, an overview of the lessons learnt in similar projects, in the context of Transboundary areas, was also embedded in the overall assessment.

KEY WORDS: Transboundary management, Integrated Coastal Zone Management Integrated Maritime Policy, Marine Strategy Directive.

INTRODUCTION

European Union (EU) is taking important steps to promote Maritime Spatial Planning (MSP) among Member States. This has been set within the context of its emerging Integrated Maritime Policy (IMP) and its environmental priorities, as expressed in the Marine Strategy Framework Directive, emphasised in the Commission's IMP Action plan - Roadmap for MSP. One of these key principles is the cross-border cooperation to ensure coherence across political, administrative and natural boundaries, as the dynamics of the marine environment and the mobility of most maritime activities cannot be easily contained within national borders (EC, 2008a). With this purpose the European project entitled "Transboundary Planning in the European Atlantic" (TPEA) was launched in 2012. This project concerns the Atlantic North area, including Celtic Sea and Bay of Biscay, as defined by OSPAR areas III, IV and V. Five states have jurisdiction over these waters: France, Ireland, Portugal, Spain and the United Kingdom; with focus in those areas where coastal and marine Transboundary interactions take place between these Member States (DG Mare, 2012).

This project seeks to embrace the diversity of these realities across the region, where MSP is being implemented at different speeds and adopting various models in line with the Member States own formal and informal traditions of coastal and marine planning and governance. In cross-border cooperation, regard was therefore taken to different national frameworks that are developing and means of finding agreed solutions to crossborder issues. By capturing this range of approaches, the project articulates the potential for Transboundary MSP within European Atlantic as a whole and demonstrates options for cross-border initiatives elsewhere (DG Mare, 2012).

Within the scope of this project, this paper aims to analyse the existing conditions of MSP processes in areas near national or regional borders in order to establish a legal conceptual framework on cross-border MSP processes for a closer integration among MSP and Integrated Coastal Zone Management (ICZM). For this purpose was performed a basic assessment on the existing legal and administrative frameworks at international, regional and at EU level. International knowledge and expertise within similar approaches and case studies on implementation of cross-border MSP was as well gathered.

LEGAL FRAMEWORK

International Framework

The United Nations Convention on the Law of the Sea (UNCLOS) provides the legal basis for international marine law regulating the rights and duties of State Parties. Opened for signature in 10th December, 1982 in Montego Bay, Jamaica, it finally came into force in 16th November 1994, one year after the signature of the 60th country. It establishes a legal order promoting international communication, the equitable and efficient utilization of seas and oceans resources, conservation, protection and preservation of marine environment (UN, 1982; Maes, 2008). UNCLOS is not directly referring to MSP initiatives in the marine areas but it gives the legal basis to be used in joint MSP initiatives. It regulates several maritime uses and activities such as the rights of passage, freedom of navigation, fishing and the laying of submarine cables or pipelines (Maes, 2008; Douvere & Ehler, 2009).

Agenda 21 was the result of United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, in 1992. **Chapter 17 of Agenda 21** concerns the Protection of the oceans and coastal zones, setting out a framework programme for achieving protection and sustainable development of the marine environment and its resources. Integrated management, marine environmental protection, sustainable use and conservation of marine living resources are areas also included in the Programme (UNCED, 1992; Douvere & Ehler, 2009).

In the UNCED was also adopted the **Convention on Biological Diversity** (CBD), whose goals are the conservation of biological diversity and the sustainable use of its components and the fair and equitable sharing of benefits arising from the use of genetic resources (UN, 1992; Douvere & Ehler, 2009). According to Article 5, Parties are required to cooperate directly or through competent international organizations, with respect to areas beyond national jurisdiction (Maes, 2008).

To further advance the implementation of the third objective the World Summit on Sustainable Development in Johannesburg, South Africa (2002), called for the negotiation of an international regime, within the framework of the CBD to promote and safeguard the fair and equitable sharing of benefits arising from the utilization of genetic resources. Finally, at the tenth meeting of the Conference of the Parties on 2010 in Nagoya (Japan), the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their utilization was adopted (CBD, 2011). Article 11 of the Protocol gives clear indication regarding Transboundary cooperation between Parties involving local communities in order to implement the objectives of this Protocol when genetic resources are found in more than one Party territory or when traditional knowledge associated with genetic resources is shared by one or more indigenous and local communities in several Parties (CBD, 2011).

International Maritime Organization (IMO) develops rules and regulations concerning marine safety, efficiency of navigation, prevention and control of marine pollution from ships. It also provides the basis for delineation of spatial planning for particular purposes such as "Special Areas" (SAs) and "Particular Sensitive Sea Areas" (PSSAs) (Maes, 2008; Cole et al., 2012). IMO has produced the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 ("MARPOL 73/78). MARPOL 73/78 regulates vessel design, equipment, and operational discharges from all ships within and beyond national jurisdiction. It also provides the designation of Special Areas where, for technical reasons relating to their oceanographical and ecological condition and to their sea traffic, the adoption of special mandatory methods for the prevention of sea pollution is required (Maes, 2008; Cole et al., 2012).

There are a number of non-binding instruments which do not create legal obligations, but instead reflect agreements between States considering the need to cooperate. The **Code of Conduct on Responsible Fisheries** under the Food and Agriculture Organization of the United Nations (FAO) is an example of such instruments. Although nonbinding it provides standards applicable to the conservation and management and development of all fisheries. (Katsanevakis *et al.*, 2011).

Regional Framework

OSPAR Convention – "Convention for the Protection of the Marine Environment of the North-East Atlantic" (entered into force in 1998) replaces the earlier Oslo and Paris Conventions and focus mainly on the international cooperation among its Parties on the prevention, protection and elimination of marine pollution of the North-East Atlantic. It aims to cover the study of the adverse effects of the human activities on the marine environment and when practicable, to restore marine areas which have been adversely affected. Contracting parties which established the OSPAR Commission pursuant to OSPAR Convention comprise fifteen governments: Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and United Kingdom, together with the European Union divided among five regional areas (OSPAR, 1992). Although the Convention does not explicitly refers the MSP it considers the need for protection of marine areas by means of appropriate programs (OSPAR, 1992; DG Mare, 2008).

Other regional agreements have been settled concerning other regions, such as the Helsinki Commission (HELCOM), which is the Governing Member of the Helsinki Convention (the Convention on the Protection of the Marine Environment of the Baltic Sea Area). Signed in 1992 by all states bordering the Baltic Sea and the European Community (Denmark, Estonia, European Community, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden) it is working to protect the marine environment in the Baltic Sea from all sources of pollution. The Convention entered into force on 17 January 2000 and covers the whole of the Baltic Sea area, including inland waters as well as the water of the sea itself, sea-bed and the whole catchment area of the Baltic Sea (www.helcom.fi). HELCOM's intends to act as an environmental policy maker and supervisory body developing common environmental objectives and actions, implements and promotes co-operation among partner states in order to have a Baltic Sea with diverse biological components functioning in balance, resulting in a good ecological status and supporting a wide range of sustainable economic and social activities. Within the Convention scope was established a system of coastal and marine Baltic Sea Protected Area (BSPA). This management plan considers all possible negative affecting activities and an appropriate zoning system to facilitate the achievement of a satisfactory protection (DG Mare, 2008).

In 2003 MSP process was launched with the adoption of the joint HELCOM-OSPAR statement on ecosystem approach, hence promoting maritime spatial planning in marine areas. Furthermore, HELCOM member parties together with European Commission (BaltSeaPlan Project) committed themselves to adopt, test and apply principles for regional broad-scale maritime spatial planning in the Baltic Sea (Backer, 2011).

Also in the Mediterranean area was adopted in 1976 (by 16 countries and the EU) the Convention for the Protection of the Mediterranean Sea against Pollution, known as the **Barcelona Convention**. One year before these parties adopted the Mediterranean Action Plan (MAP) under United Nations Environment Programme (UNEP). Its initial objective was to address the marine pollution control but over the years its scope was broadened to integrate coastal zone planning and management. Although no concrete MSP initiatives have been set up within this Convention – as a well-established platform of cooperation – is taking steps regarding strengthening the bonds between the different countries in the Region, hence facilitating a joint action on MSP (DG Mare, 2011).

In 1997, with the financial support of Global Environmental Facility (GEF), UNEP-MAP initiated a comprehensive regional effort aimed at identifying and

accelerating the key reforms and investments necessary to reverse negative trends threatening the Mediterranean sea ecosystem, and move towards sustainability. А Transboundary Diagnostic Analysis (TDA) for the Mediterranean Sea was prepared and agreed upon by the Contracting Parties to the Barcelona Convention, followed by the adoption of two Strategic Action Programs (SAPs) to address main Transboundary concerns: land based pollution and loss of biodiversity. As a consequence, the Mediterranean countries agreed on a collective effort for the protection of the environmental resources of the Mediterranean, the Strategic Partnership for the Mediterranean Sea Large Marine Ecosystem (LME), led by UNEP and the World Bank. To achieve these goals the partnership addresses the need for financial resources and investments, the assistance in policy, legislation and institutional reforms, as well as the demonstration and transfer of technical knowledge and best practices. Several key principles of MSP have already been applied within the framework of the LME project, making it a good starting point for the future implementation of MSP in the Mediterranean Sea (UNEP/MAP, 2005).

European Framework

European Union legislation is shaping the terms and guidelines for an Ecosystem Based Marine Spatial Management setting a number of goals and objectives largely defining Maritime Spatial Planning in Europe (Katsanevakis et al., 2011), striving to balance the marine environment and its resources and the need to stimulate economic growth, employment and welfare (Douvere & Ehler, 2009). The main basis for this approach at the Integrated Maritime Policy in Europe was the EU Green Paper - Towards a Future Maritime Policy for the European Oceans and Seas, launched in 2007, replacing compartmentalized resource management with a holistic and integrated ecosystem-based approach to the management of human activities while simultaneously encompassing all elements of maritime activity (Santos et al., 2012).

The Marine Strategy Framework Directive (MSFD) -Directive 2008/56/EC of the European Council establishes the framework within which Member States must take necessary measures to promote sustainable use of the seas and to conserve marine ecosystems by achieving or maintaining good environmental status in their marine environment by the year 2021 (EC, 2008b). MSFD forms the pillar of the European Union's Maritime Policy outlining an action plan in which Member States have to develop and implement marine strategies, targets, monitoring plans and programme measures to be developed for its marine waters. Therefore, to properly fulfil the preparation of the marine strategies is necessary to ensure that methodologies are consistent across marine regions/sub-regions in order to facilitate the comparability of results and thus take into account Transboundary effects (EC, 2008b).

Habitats and Birds Directives are among the most important European legislation regarding nature conservation. Through the history, they have been main drivers for MSP development in Europe providing a framework for identification and classification of Special Protection Areas (SPAs') for rare, vulnerable or regularly occurring migratory species and Special Areas of Conservation (SAC). Together the SACs and the SPAs create a network of protected areas across the EU known as Natura 2000 Network for protection of habitats, animals and plants, either in land as in marine environment (Douvere & Ehler, 2009).

Adopted in 2002 the EU Recommendation on Integrated Coastal Zone Management (ICZM) does not refer to marine spatial planning. Nevertheless the document provides a basis for it as part of the requirement of Member States to develop ICZM strategies, mainly by recommending improved coordination of actions taken by all authorities concerned both at sea and on land, in managing sea–land interaction (Commission of the European Communities, 2007; Douvere & Ehler, 2009).

Other EU legislation of interest in this scope is the EU Water Framework Directive (European Parliament and European Council, 2000) and the European Common Fisheries Policy, CFP (Regulation (EC) No 2371/2002) (Katsanevakis *et al.*, 2011).

Table 1 presents a brief resume of the main legislation discussed in this paper and its relation to several activities and uses in maritime spaces. Some activities due to their Transboundary nature have more legislation in international sphere, such as navigation or fisheries, in comparison with others which are not so regulated, as for example tourism and recreation.

TRANSBOUNDARY EXPERIENCES IN EU

Transboundary cooperation in MSP is still rare, though the international nature of human activities linked to seas raises the issue. European Union MSP process promotes cooperation across borders to ensure the coherence of national maritime spatial plans, standards and processes across ecosystems. This can be understood not only as a bilateral platform for communication, but a truly transnational joint regional processes and plans involving intergovernmental policies (EU, 2008a). Some pioneering initiatives of Transboundary marine planning have been experienced within European context such as the ones in the North Sea (MASPNOSE), Baltic Sea (BaltSea Plan and PlanBothnia) and Mediterranean Sea (UNEP/MAP) (see figure 1). Following are presented some major conclusion withdrawn from these projects, which can be deemed when approaching Transboundary marine planning.

Experience in the Baltic Sea within BaltSeaPlan Project, demonstrated it is essential the existence of a functional geographic information system which broke down the traditional divisions between different thematic approaches (socioeconomic statistics and environmental monitoring, for instance). It served as a regionally compiled geo-referenced data on various topics related to several distinct aspects of human use, e.g. maritime traffic, fisheries, pipelines and cable routes or protected areas.

Another main advantage found in this experience was the similarity in planning systems and approaches and track record of good cooperation across the border, the existence of a regional infrastructure and the informal status given to the activity itself. Even beyond national maritime borders and the rights conferred according with UNCLOS, many types of international agreements control the Baltic Sea region (Backer, 2011).

Plan Bothnia Project tried out the strategic Transboundary spatial planning approach in Bothnian Sea, between Sweden and Finland, also coordinated by HELCOM. The main challenges experienced (despite of the great similarities described above) were the difficulties in combining the planning and permitting granting systems, national datasets, planning traditions and procedures from both countries. At the end, this project provided also the opportunity to ponder on the planning implications of the ecosystem approach and the related definitions of good environmental status. Even countries with good records and progressive views in terms of environmental concerns admitted to have conflicts between public and private interests to exploit common resources and public efforts to conserve them (Backer, 2011).

In the North Sea project (MASPNOSE) after approaching two different case studies (one between Belgian and Dutch borders and other between United Kingdom, Denmark, The Netherlands and Germany) it was possible to establish some main conclusions regarding administrative and legal issues, such as the need to agree on who has the power to decide (coordination body) and to have a good connection among key persons for MSP in the different Member States. Essentially in the initial phases of planning informal contacts were considered more important than formal ones. Also, as a conclusive remark of this project was considered of great importance the clear differentiation among front-stage transparency (to the entire public) from back stage transparency (between a group of stakeholders and again a good and strong databases and geo-spatial analysis (Pastoors *et al.*, 2012).

In the Transboundary Diagnostic Analysis (TDA) for the Mediterranean Sea, developed by UNEP/MAP in 2005, the major problems identified with legal arrangements were focused on the absence of appropriate national and regional Transboundary-related institutional arrangements and the lack of responsibility for Transboundary issues, which is unclear or shared by various authorities. It is interesting to

Table 1 – Specific Activities and uses in maritime areas and its legal framework

Navigation:

UNCLOS | Ships of all States, whether coastal or land-locked enjoy the right of innocent passage through the territorial sea, the Economic Exclusive Zone (EEZ) and the High Seas.

IMO | Traffic Separation schemes are notified to IMO and form the legal basis for ships' routeing measures in EEZ and on high seas. It is considered the competent international body to provide guidance for establishing special protective measures in defined areas where shipping presents a risk – applying both within and beyond areas of national jurisdiction.

Fisheries:

UNCLOS | In territorial sea and in EEZ coastal states are empowered to establish fishery zones and determine zones in which fisheries activities are prohibited or restricted. Nationals or third state fishing in the EEZ of coastal state have to comply with the laws and regulations of the coastal state. States have a general duty to co-operate in the conservation and management of fish stocks, which often entails entering into negotiations to agree any necessary conservation measures.

Code of Conduct on Responsible Fisheries under FAO | non-binding it provides standards applicable to the conservation, management and development of fisheries

EU - Common Fisheries Policy | Main regional agreement binding the EU States. EC competence on fisheries leaves almost no room for Member States to unilaterally introduce zones where fishing activities are prohibited or restricted.

Marine Protected Areas:

UNCLOS, CBD, IMO, OSPAR, EU legislation (Birds and Habitats Directives, ICZM Recommendation, EU Water Framework Directive | General obligation on protection, preservation and reduction of pollution in the marine environment. Ecosystem-based approach for fragile ecosystems and integrated ocean management to regulate activities at sea and definition of protected areas.

Laying Pipelines and Cables:

UNCLOS | A coastal State cannot in general control the laying by other States of cables and pipelines passing EEZ. In territorial sea more strict control is possible and restriction can be imposed.

Exploitation of Natural Marine Resources (living and non-living):

UNCLOS | In accordance with UNCLOS, in the territorial water, the coastal States have sovereignty over natural resources (living and non-living) extended through water column, seabed and subsoil. On the EEZ sovereign rights of the state are limited for the purpose of exploring, exploiting, conserving and managing living and non-living natural resources of the water columns and underlying continental shelf.

Directive 94/22/EC | Regarding the prospection, exploration and production of hydrocarbons EU Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 grants the right to the Member State to authorize and determine the areas within their territory (considering EEZ and Continental Shelf) to be made available for these activities.

CBD/Nagoya Protocol | Nagoya Protocol calls on countries to consider the need of a global multilateral benefit-sharing mechanism for genetic resources. This would facilitate fair and equitable sharing of benefits in Transboundary situations or other cases in which it is not possible to grant or obtain prior informed consent.

Military activities:

UNCLOS | Coastal State may only temporarily suspend innocent passage for its own military exercises.

Whether military exercises by non-coastal States are allowed within the EEZ of the coastal State still remains an open question.

Other activities:

UNCLOS | Other specific uses such as production of energy from renewable sources and economical activities such as marine fish farming or raising of marine animals or plants in the ocean is considered within the legal framework provided in UNCLOS as in the territorial sea and in the EEZ the state has the sovereign rights.

Marine recreational activities and tourism do not have specific regulation in international law. Although, as it implies a variety of activities some of the legal instruments previously described can be applied.

note the sectorial governance arrangements in Mediterranean sometimes place functions important for Transboundary issues in "non-standard" administrative bodies and agencies, establishing a large number of decision making entities which makes difficult to avoid



Figure 1. Transboundary experiences in EU.

overlapping or conflicting decisions. It was also identified an absence of participation of the affected public, NGOs and insufficient Transboundary provisions either on a regional as well as on a national scale. Another main conclusion of this study is the effective need for implementation of ICZM procedures and tools for successfully addressing Transboundary environmental issues in a timely and costefficient manner and arranged through appropriate institutional and legal bodies (UNEP/MAP, 2005).

FINAL REMARKS

This paper intended to contribute to the European Transboundary planning in the European Atlantic, by establishing the main legal conceptual framework in an international, regional and European level and to provide a brief overview of the main issues found in similar projects in the vicinity of the European borders. After this first approach it can be concluded that there is a lack of specific regulations regarding cross-border processes in MSP. During the following months will be developed the study of the aspects detected in similar projects and the legal framework analysis will be studied in order to establish good practice principles and main parameters for cross-border MSP approaches.

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