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THE DESIGNATION OF MARINE PROTECTED AREAS IN BELGIUM: From government to governance?

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ABSTRACT In 1999 a new law on the protection of the marine environment was enacted in Belgium. This law created the possibility for establishing marine protected areas in the Belgian marine waters. Several attempts were made but never succeeded due to serious public and political protest against the designation. In 2005-2006 the minister for the North Sea succeeded in designating several marine protected areas. Preliminary results from a process evaluation learn that the failure of the first attempts were due to a lack of well organised communication and participation. In the later, successful, attempt a thorough informal participation process was set up. The question remains whether the participation will lead to a weakening of the conservation of the marine environment.

Introduction

In a lot of countries the process of designating marine protected areas is still ongoing. Compared to terrestrial protected areas, marine protected areas are for most countries a new subject of policy. In Belgium a new law was enacted in 1999[1] which enabled the Belgian federal government to designate marine protected areas in the Belgian marine environment (Cliquet and Maes 1998). In this law, no formal procedures for participation or consultation were included. Between 1999 and 2006 several attempts were undertaken by the Belgian government to implement this law and designate marine protected areas. In 2005 the first Belgian marine protected areas were legally designated. The Maritime Institute of the Ghent University conducted a process analysis of these different attempts. The analysis focuses on the level of participation, or lack thereof during this process[2]. This contribution will try to answer the question whether there has been a shift from government to governance. A question which remains, is whether the final outcome - six designated marine protected areas - is also an ecological success.

Before we can actually describe and analyze the process, we have to give a short introduction on both the institutional and legal context in Belgium in which this process took place.

Institutional context

Belgium has a marine area of about 3,600 km² and a coastline of about 67 kilometers in length. Even in such a small area, different government levels exercise competences. There are probably only a handful of countries in which, relatively speaking, such a large number of

ministers, administrations and institutions are involved on such a small maritime surface. As such, the Belgian North Sea policy can be called a school example of what recently has been described in scientific literature as 'multi-level government'.

The North Sea policy of Belgium is scattered over several institutional levels, and includes, next to international institutions, the federal government, the Flemish Region, one province (the Province of West-Flanders) and ten coastal municipalities. The federal government has competences over, among others, environmental policy and protection of the marine environment, wind farms at sea, shipping, military activities, aggregate extraction, cables and pipelines. The Flemish Region is competent for policy areas such as nature policy on the beach and the hinterland, recreation, ports, fishing, dredging, piloting and coastal defense. The North Sea policy is likewise scattered over the respective ministries, administrations and institutions.

As an example of how this fragmentation can lead to complex situations on relatively small surfaces, we take the case of the port of Zeebrugge. A nature reserve next to the port of Zeebrugge, situated on the beach up to the baseline, is a Flemish nature reserve and thus under Flemish competence. The nature reserve on the seaward side of the baseline is a federal marine reserve (based on the federal law on the marine environment) and thus a federal competence, whereas certain activities within the marine area are a Flemish competence. It is easy to understand that this complex institutional context can cause substantial problems (overlap, conflicts, gaps) (see Cliquet 2001; Cliquet, Maes and Schrijvers 2004).

Next to the Belgian institutional context, the international context plays an important role for the demarcation of the marine protected areas. Belgium, just as other European countries, is subject to a number of international expectations and obligations. Some of the most important obligations concerning the conservation of marine biodiversity in Belgium are to be found in the Convention on Wetlands of International Importance, especially as Waterfowl Habitat (Ramsar 1971)[3], the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR 1992)[4], the Convention on Biological Diversity of Rio the Janeiro (1992)[5], and at the EU-level the Birds Directive 79/409/CEE (1979)[6] and the Habitats Directive 92/43/CEE (1992)[7]. Belgium has to comply with international commitments on the designation and management of marine protected areas, such as those agreed at the World Summit on Sustainable Development, to establish a representative system of marine protected areas by 2012[8] and the decision from the 7th conference of state parties to the Biodiversity Convention to establish and maintain (by 2012) marine and coastal protected areas that are effectively managed, ecologically based and contribute to a global network of marine and coastal protected areas[9]. Also at the EU level commitments have been made regarding the conservation of marine biodiversity: the EU Biodiversity Action Plan has as objective to complete a network of Special Protection Areas by 2008 for marine areas, adopt lists of Sites of Community Importance by 2008 for marine areas, designate Special Areas of Conservation and establish management priorities and necessary conservation measures for Special Areas of Conservation by 2012, and establish similar management and conservation measures for Special Protection Areas by 2012 for marine areas[10].

Legal context

In order to meet the international obligations concerning the protection of its marine environment, Belgium drafted a marine protection law in 1999. After the necessary parliamentary preparations the 'Law on the protection of the marine environment in marine areas under Belgian jurisdiction on the marine environment'[11] was approved on 20 January

1999. In the preamble of this law the importance of the international legislation in general and some international principles in particular are underlined. The law clearly states that: 'the users of marine spaces and the public authority must hold count of the prevention principle, the precautionary principle, the principle of sustainable development, the polluter-pays principle and the restoration principle.'[12]

Furthermore the law foresees the possibility to delimitate five types of marine protected areas. The marine protected areas can include: integral marine reserves, specific marine reserves, Special Protection Areas or Special Areas of Conservation intended to safeguard certain marine habitats or specific species, closed zones for certain activities all the year round or for a part of the year and buffer zones in which the restrictions on the activities are less strict than in the marine reserves.

The marine reserves are the marine protected areas with the most stringent rules. In the integral and specific marine reserves all activity is prohibited, with the exception of surveillance and control, scientific research and monitoring, shipping, professional fishing and military activities in the integral and specific reserves, and measures of management, conservation, restoration or nature development in the specific marine reserves. The reason for not automatically restricting fishing and shipping activities is the international regulatory character of these activities. However, the law of 1999 provided the possibility to restrict or prohibit professional fishery and shipping activities in the reserves, in accordance with international regulations and the specific conditions laid down in the law on the marine environment.

First attempts for the delimitation of marine protected areas: missed opportunities

Lack of information and participation

Almost immediately after the law was approved, a first proposal was made by the federal environmental secretary of state for the delimitation of several marine reserves (several underwater shallow sand banks and six shipwrecks).

The fact that certain activities could be prohibited or diminished in these areas quickly led to the eruption of protest against the demarcation of these marine reserves. Only three weeks after the law on the marine environment was passed, but before the publication in the Belgian Official Journal, the protest was swelling. One of the protesters was the 'Flemish Association for Water Sport Nieuwpoort', which, among other things, organizes large international sail races. Their protest was sparked by the fact that the government in its draft decree prohibited offshore races between the French border and Nieuwpoort and that they were not involved in the development of the demarcation proposals.

The protesters rapidly got support from individual local politicians and municipal authorities. In a short period a coalition of fishermen, ship-owners, water sports enthusiasts and local politicians raised against the provided delimitation of marine reserves. The protest knew a first peak on 20 March 1999 when 150 professional fishermen, recreational fishermen and water sports enthusiasts held a protest march in Ostend. The protesters used harsh language ('Nature reserves at sea are not open to discussion') and threatened with port blockades. The whole situation threatened to escalate when the protesters made reference to the 'green lobby' of the Walloon scientists of the MUMM (The Management Unit of the North Sea Mathematical Models and the Scheldt estuary), which is the institution that was responsible for drafting the designation proposals.

The discourse of the antagonists illustrated the well-known NIMBY-syndrome. The protest did not start by accident in the coastal municipalities adjacent to the proposed marine reserves. Arguments used by the antagonists were among others: problems with imposed

restrictions and prohibitions on offshore activities; the expected damage to tourism, recreation and water sports; the expected damage for the economy (port, shipping, fisheries); perception of inequality between sectors (military activities were further allowed); perception of inequality between countries (in France and the Netherlands similar restrictions and prohibitions did not apply); the lack to involvement in the policy process; the problem of subsidiarity.

As was mentioned above, the law on the marine environment did not provide for a formal participation procedure, or even an information supply during the process of delimitation. Neither the responsible secretary of state, nor the administration organized an information or participation moment. The lack of participation and even information formed a substrate for disinformation. Opponents of the marine reserves could profit from this lack of information by spreading their 'truth' and opinion about the reserves. The law on the marine environment was depicted by the antagonists in the media as the law that would prohibit everything for everyone. Some of the statements were: 'even swimming will be prohibited', 'they foresee the complete prohibition of fishery in the three most important fishing grounds', et cetera. The law was above all considered as a typical example of government, where all kinds of restrictions are imposed from 'Brussels' (the federal government) without consultation of local (Flemish) actors and municipalities.

A post-process consultation round

In response to the growing protest and the disinformation the environmental secretary of state decided to organize a consultation round with local politicians (the coastal mayors and the governor of West-Flanders) and certain administrations. The consultation round was thus initiated in a late phase of the policy process (after the approval of the law on the marine environment and after the first draft proposals were made for the designation of certain marine reserves). This was a testimony of the scant ambition level concerning participation (information supply). The coastal mayors felt still left out of the policy process or ill informed and insisted to delay the demarcation of the marine reserves. The policy process was eventually adjusted by foreseeing in consultation with all of the actors concerned, organized by the governor of the Province West-Flanders.

On the initiative of the governor a workshop was organized in June 1999 with the objective to make an overview of the activities which overlapped with the ecologically valuable areas and to asses the conflicts with the actors in these areas. In several working groups the government wanted to identify, among others, the possible conflicts in these areas and to document the proposals the actors made for a sustainable conservation of the marine areas. The following working groups were formed: energy distribution and communication, port activities and shipping, water sport enthusiasts, professional fisheries and recreational fisheries. During the group discussions, procedural and substantive objections were formulated. The scientific (ecological) knowledge on which the draft delimitation was based, was questioned. Moreover, the draft delimitation assumed a unilateral (ecological) approach without taking into account other sectors. Procedurally, the lack of consultation and participation in the earlier phases of the policy process was denounced.

After this first round of consultation at the workshop, it became evident that there was a need for a thorough consultation with all interested parties and not in the least with local governments. It was also clear for the federal government that there were objections both from sectors and some public governing boards (mainly the ministry of agriculture competent for fisheries) related to the content of proposals for the delimitation of the marine protected areas.

Discontinuity in the North Sea policy

After the composition of a new federal government in the summer of 1999, a new (and for the first time 'green') minister became competent for the federal department for the environment and, hence, for the development of the North Sea policy. The lack of consensus concerning the delimitation of marine protected areas and a lack of political interest and political courage of the new minister, however, led to a stop in the policy process. In 2002 the minister was forced to resign due to a controversial Belgian weapon supply to Nepal, and she was succeeded by a party member. This was the third minister competent for the marine environment in three years time.

In December 2002, the new environmental minister announced the demarcation of three Special Protection Areas for the Belgian coast in the light of the European obligations for the Birds - and Habitats Directives. A slightly different approach would be followed: consultations would be held in advance with the sectors (fishery, water sports, et cetera) concerning possible restrictions, not concerning the demarcation itself. As an argument the minister referred to the European directives and case law which state that for the demarcation only scientific arguments can be used. The socio-economic concerns would come up for discussion at a later stage when deciding on the management measures (and possible restrictions for users) within the reserves.

In response to this new attempt, the coastal mayors organized a press conference in which they denounced the lack of participation and the obscurity concerning the possible impact of the demarcation. They referred to the draft royal decree as the `box of Pandora' and threatened with legal action. In other words, they wanted a coupling of the discussions concerning the delimitation and the resulting impacts.

Remarkably enough, it seems that no lessons were taken from the previous attempt to delimitate the marine reserves. The demarcation is once again perceived as a product of a top-down policy where higher governing bodies (the federal government and Europe) do not take into account lower governing bodies (coastal municipalities). The reference to the European directives on the one hand, and the exclusive importance of scientific arguments on the other hand reinforced this feeling. Essentially we can state that history repeated itself during this second attempt.

A lack of (ecological) results

Eventually this second initiative stranded, among other reasons, after a recommendation by the Belgian Council of State. Moreover, in the spring of 2003 the green political party (Agalev) was brushed aside during the federal elections and thus the green minister of environment competent for the North Sea disappeared. Four years after the approval of the law on the marine environment the delimitation of marine protected areas was still not realized.

The period 1999-2003 teaches us certain matters regarding the demarcation of the marine reserves. Four years after the law on the marine environment Belgium still lacked marine protected areas. Both the first and second attempts are characterized by a lack of participation opportunities for sectors and local governments. At the same time, these groups did not show any goodwill towards the process. Both the first and second attempts are characterized by a poor (missing, late, unclear) communication. During the second attempt the federal government obviously neglected to learn from the past. In both attempts scientific (ecological) knowledge was paramount. Both attempts started with the demarcation to address the measures and restrictions during a later stage. Both attempts damaged the confidence in the federal (and regional) North Sea policy and in particular the concept of marine protected areas and led to a polarization. The whole period was characterized by a lack of continuity in the North Sea policy.

Successful delimitation of marine protected areas

With the new government, formed in 2003, Belgium got, for the first time in history, a minister with a specific competence for the North Sea. This minister was not only the minister for the North Sea, he was also the vice-premier and the minister of finance within the federal government. This important position within the government proved to be a decisive element in the success of the delimitation of the marine protected areas. It was, however, the fourth minister competent for marine issues in four years time. It is clear that since 1999 the Belgian North Sea policy clearly lacked continuity.

The new minister of the North Sea promised to tackle the North Sea policy in a more incorporated manner and presented the North Sea Master Plan to accomplish this. This Master Plan is a first step towards marine spatial planning in the Belgian marine environment. The first component of the sustainable management of the North Sea included a revision of the demarcation of the sand and gravel extraction and exploration areas. It contained also a demarcation of the area for the marine wind farms. The existing environmental permit for an offshore windmill park, situated close to shore, was withdrawn. This will later on lead to a legal procedure of the energy sector against the designation of a marine protected area (see below). The demarcation of both the sand- and gravel extraction sites and the offshore windmill farms was now based on consultation rounds with stakeholders and on the basis of socio-economic and ecological studies.

In the second phase the Master Plan foresaw in concrete measures for the demarcation of the marine protected areas, after consultation with all actors concerned. During the consultation phase the minister chose to divide the actors according to type of user (fishermen, coastal mayors, et cetera). Confidential consultation moments were organized in the period January - March 2004 with civil servants of several departments (mobility and transport, sea fisheries, environment), with scientists and with the civil society (the environmental movement). For this, draft maps had been prepared by the staff of the minister, delimitating the spawning grounds and fishing areas together with the first proposals for the delimitation of the marine protected areas. At the same time, a list of 21 possible protective measures for these areas were proposed and were based on the knowledge of the interactions and conflicts. Next to these consultation moments, the staff of the minister conversed directly (bilaterally) with remaining actors. As a result, it was decided to visit the fishermen of Nieuwpoort and Zeebrugge. By doing this, the minister hoped to get to know the fleet, and hence, to gain the trust of the fishermen. The aim was to create a basis of support among the fishermen (protecting nursery grounds is an added value for the fishermen) and to regain legitimacy. Similar to the consultation rounds organized with the coastal mayors, there were consultation rounds organized with the water sport enthusiasts (Jet Skiers, surfers, sailors and divers).

It is clear that the approach of the minister of the North Sea strongly differs from the approaches of his predecessors. The delimitation of the marine protected areas was still based on scientific knowledge and criteria but by means of several forms of consultation this demarcation was accepted by the stakeholders. Moreover, and perhaps most importantly, the discussions concerning the measurements were held parallel to the delimitation procedure. The measures to be taken were also tackled according to a certain step-by-step plan. For each bird type/species type they stated clearly where they resided, why they are vulnerable and what does not impede them. In a second step, a list was compiled, containing positive measures which can stimulate the presence of these bird type/species and do not impede the stakeholders. In a next stage, possible conflict measures were identified, that is measures that actively stimulate the presence of the bird types or other species but are in conflict with the

other activities. Based on this list, consultations were organized with the different stakeholder groups.

In 2005, three Special Protection Areas were delimitated for birds (SBZ-V1 Nieuwpoort, SBZ-V2 Oostende and SBZ-V3 Zeebrugge) and two Special Areas of Conservation (SBZ-H1 Trapegeer Stroombank and SBZ-H2 Vlakte van de Raan)[13]. In March 2006, a sixth area was delimited: the first specific marine reserve Bay of Heist[14].

The final demarcation took place after the concrete protection measures were communicated to all sectors and interested parties. Users and lower governing boards were involved in the preparation by means of consultation. The draft texts for the demarcation were discussed by the minister at a meeting with the governor and the coastal mayors one week before the minister presented it to the parliament. The consultation of the stakeholders in the preparatory phase of the policy process marks an important shift in policy style. Another important modification was the fact that the government no longer focused solely on legal prohibitions and commandments. Instead, they opted for a mix of formal and informal rules, including the so called 'voluntary user agreements'.

With these agreements the government departed from a voluntary approach to the conservation of the areas. Several users, such as the water sports enthusiasts, can enter into such an agreement, in which the minister can add conditions after consultation with the users of the protected areas. In practice, the user agreements contain engagements to make a maximum effort to respecting the legislation in relation to the maintenance of the natural habitat and the protection of species. Additionally, the users commit themselves to actively inform their members and customers. If the stakeholders repeatedly, intentionally or unintentionally, violate the agreements the minister can unilaterally cancel the agreement.

The law on the marine environment was altered in order to provide for a legal basis for these user agreements. A Royal Decree of 14 October 2005[15] further works out the conditions and procedure for the user agreements. At the same time the law also includes a legal basis for making policy plans for the marine protected areas.

For each designated marine protected area a policy plan must be drawn up. The policy plans must contain information on the protection measures, the user agreements and the results of the monitoring. Based on this information the user agreements will be evaluated. The procedure for making the policy plans provides for a public inquiry, consultation meetings with users and a public consultation meeting. This shows that the policy makers had a rather high ambition level concerning participation aiming at increasing the stakeholder accountability.

Notwithstanding all the efforts that were made for prior consultation and information, a legal procedure has been started against the designation of one of the marine protected areas. The opponent is Electrabel (an energy firm), which lost its environmental permit for the construction of an offshore windmill park on the Vlakte van de Raan. This area is one of the Special Areas of Conservation, in which offshore windmill parks are now prohibited.

The increase in participation is certainly a positive evolution. However, there is also a possible downside to the alterations made in the legislation. While adding a legal basis for user agreements and policy plans, also some changes were made in the rules that apply to the marine protected areas. These changes reduce the possibilities for the federal government to restrict human activities within the marine protected areas. For instance, fishing can now no longer be restricted within the marine protected areas by the federal government. If such restrictions would be necessary, it is up to the Flemish government to take the appropriate measures. The federal government motivated this legal change on constitutional grounds (change of competences). However, this is certainly questionable. It would lead us too far in this article to discuss this issue which is mostly a matter of legal discussion.

Regardless of the legal correctness, the situation today is that the federal government is limited in taking appropriate conservation measures within the marine protected areas. The question is whether the marine protected areas will not become 'empty shells'. Also, the legal regime on the user agreements contains some weaknesses. If the users do not respect the user agreements, the only sanction the government can take is to cancel the agreement. If more stringent measures are required in order to reach conservation goals, there is no legal basis for binding measures. Also user agreements are made up for a limited period of time, whereas a sustainable management of the marine environment requires a long term perspective. As no policy plans have been made yet, we cannot assess the value of these plans at this stage.

Challenges for the future

An important step in marine nature conservation in Belgium has been taken by designating the first marine protected areas in the Belgian part of the North Sea. The restrictions to existing activities are very limited. According to the minister of the North Sea the main aim was to restrict future activities such as the construction of windmill farms in these areas. From a conservation perspective it remains to be seen whether the actual measures will be sufficient. Especially the lack of restrictions to certain types of fisheries might prove to be inadequate to acquire a favourable conservation status[16]. The policy plans and the monitoring of the marine protected areas will have to analyse the ecological impact of the management of the marine protected areas. If the measures prove to be inadequate, additional measures will be required. However, the institutional complexity will not render this process easy.

Another important step in the recent North Sea policy was the inclusion of informal and formal participation mechanisms (informal consultation and information rounds, the legal possibility for user agreements, participation in policy plans). The time and effort that was given to this participation in the last successful attempt of the designation of marine protected areas certainly helped in gaining trust and legitimacy among the users of the marine environment. The spreading of information in advance has had a positive effect on understanding the need and importance of marine protected areas. However, one might wonder whether the acceptance level is inversely proportional to the limited restrictions to existing activities. Also, not all users accepted the marine protected areas (see the above mentioned legal process by the energy firm against the designation of one of the marine protected areas). If in the future more stringent measures might seem necessary or additional marine protected areas need to be designated, the question is whether the support for the marine protected areas will remain.

The shift that was made in the Belgian North Sea policy from government towards more interactive ways of policy making (governance?) proves to be partly successful. In order to continue on the same path, continuity in the North Sea policy will be required. In June of this year (2007) federal elections were held in Belgium. The political party to which the North Sea minister belonged, will no longer be part of the federal government. At this moment it is uncertain whether the North Sea policy from the past four years will be continued and even if there will still be a minister for the North Sea.

Notes

[1] Law of 20 January 1999 on the protection of the marine environment (Wet ter bescherming van het mariene milieu in de zeegebieden onder de rechtsbevoegdheid van België), published in the Belgian Official Journal 12 March 1999. Amended by Law of 17 September 2005, Belgian Official Journal 13 October 2005.
[2] For a description of the process evaluation and the methodology that has been used, see Bogaert, D. *et al*, *Designation of Marine Protected Areas in Belgium: legal and ecological success?*. Marine Policy (in preparation).
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[4] Convention for the protection of the marine environment of the North-East Atlantic, Paris, 22 September 1992. Available: www.ospar.org.
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[11] For full reference, see endnote 1.
[12] Art. 4. § 1: 'De gebruikers van de zeegebieden en de overheid zullen bij het uitvoeren van hun activiteiten in de zeegebieden rekening houden met het beginsel van het preventief handelen, het voorzorgsbeginsel, het beginsel van het duurzaam beheer, het beginsel dat de vervuiler betaalt en het herstelbeginsel.'
[13] Royal Decree of 14 October 2005 for the establishment of special protected areas and special areas of conservation in the marine areas under Belgian jurisdiction (Koninklijk besluit tot instelling van speciale beschermingszones en speciale zones voor natuurbehoud in de zeegebieden onder de rechtsbevoegdheid van België), Belgian Official Journal 31 October 2005. Amended by Royal Decree of 5 March 2006, Belgian Official Journal 27 March 2006.
[14] Royal Decree of 5 March 2006 for the establishment of a specific marine reserve in the marine areas under Belgian jurisdiction and for the amendment of Royal Decree of 14 October 2005 (KB van 5 maart 2006 tot instelling van een gericht marien reservaat in de zeegebieden onder de rechtsbevoegdheid van België en tot wijziging van het koninklijk besluit van 14 oktober 2005 tot instelling van speciale beschermingszones en speciale zones voor natuurbehoud in de zeegebieden onder de rechtsbevoegdheid van België), Belgian Official Journal 27 March 2006.
[15] Royal Decree of 14 October 2005 on the conditions, conclusion, implementation and termination of user agreements and the drawing up of policy plans for the marine protected areas in marine areas under Belgian jurisdiction (KB van 14 oktober 2005 betreffende de voorwaarden, sluiting, uitvoering en beëindiging van gebruikersovereenkomsten en het opstellen van beleidsplannen voor de beschermde mariene gebieden in de zeegebieden onder de rechtsbevoegdheid van België), Belgian Official Journal 31 October 2005.
[16] See Rabaut, M., A. Cliquet, *Marine protected areas in temperate continental shelf areas: application of a concept in the Belgian part of the North Sea*, in preparation.

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