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The North Sea: Perspectives on Regional Environmental Cooperation

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BOOK REVIEW

*The North Sea:
Perspectives on Regional Environmental Cooperation
(Special Issue of the International Journal
of Estuarine and Coastal Law)*
David Freestone/Ton Ijistra (eds.)
London/Dorecht/Boston: Graham & Trotman/Nijhoff,
1990, 356 pp.

The Northeast Atlantic (with its northern part, the North Sea) is unique, from a legal point of view: The riparian states of the Northeast Atlantic needed five conventions for regulating various environmental impacts¹ while the riparian states of the Baltic Sea succeeded in regulating most questions in one comprehensive convention and each of the regions of the UNEP Regional Seas Programme in one framework convention.² This piecemeal-approach has legal consequences for the eco-management of the Northeast Atlantic/North Sea: since every source of pollution is treated in a different convention, it was nearly impossible to establish one commission with comprehensive functions. Instead, two commissions—the Oslo (OSCOM) and Paris (PARCOM) Commissions—were established which now maintain a joint Secretariat that simultaneously undertakes the Secretariat function of the Bonn Agreement. Thus, in contrast to the Baltic Sea and to the eight convention areas of the UNEP Regional Seas Programme,³ the Northeast Atlantic does not have a regional organization for the comanagement. It also has no rules regarding specially protected areas.⁴

This unique legal situation poses difficult questions discussed in the 26 contributions found in *The North Sea: Perspectives on Regional Envi-*

1. The 1983 Bonn Agreement and the 1991 Lisbon Accord regulate the cooperation concerning the pollution of the sea by oil and other harmful substances; the 1972 Oslo Convention regulates dumping; the 1974 Paris Convention focuses on land-based sources; and the London Offshore Convention (not yet in force) regulates questions of civil liability for offshore activities. These and the following Conventions are reproduced in: Freestone/Ijistra (eds.), *The North Sea: Basic Legal Documents on Regional Environmental Cooperation*, London/Dordrecht: Graham & Trotman/Nijhoff 1991, and in: H. Hohman ed., *Basic Documents of International Environmental Law*, London/Dordrecht/Boston: Graham & Trotman 1992, two volumes.

2. The 1974 Helsinki Convention covers a wide range of pollution issues, with the exception of civil liability (and nearly of land-based pollution). Similarly, the eight conventions of the UNEP Regional Seas Programme are framework conventions providing for specific questions to be regulated by later protocols.

3. The Helsinki Convention established the Helsinki Commission. In the UNEP Regional Seas Programme, four conventions (Kuwait, Jeddah, Lima and Noumea) founded regional organizations or entrusted already existing commissions. The remaining four Conventions entrusted UNEP with the functions of a regional organization.

4. Four regions of the UNEP Regional Seas Programme (Mediterranean Sea (1981), Easter Agrican Region (1985), SouthEast Pacific (1989) and Wider Caribbean Region (1990)) have established Protocol-rules on specially protected areas.

ronmental Cooperation. The first part concentrates on the International North Sea Conferences (INSC): the history of the INSC (by Ehlers), the legal status of INSC declarations (V.D. Mensbrugge), national implementation of these declarations (de Jong; Gibson & Churchill), as well as on features and problems of the North Sea environment (Jones).

A second part considers existing institutional frameworks: the roles and activities of OSCOM and PARCOM (Hayward), of the EEC (PRAT), of the International Rhine Commission (Nollkaemper) and of bodies for exchange of views between policymakers and scientists, like the North Sea Task Force (Reid; Wettestad & Andersen). It also looks at the concept of special areas, especially for the Wadden Sea (Sebek; v.d. Zwiep), and the dispute over environmental quality objectives versus uniform emission standards⁵ (Boehmer-Christiansen). Part 3 of the book analyses the issues still outstanding: maritime boundaries and regional cooperation (Franckx), the EEZ as an instrument for environmental management (Jenisch), marine protected areas (Peet & Gubbay), conservation of wildlife (Birnie), fisheries (Symes), atmospheric depositions (Davidson), radiological discharges (Woodliffe), use management and planning (H.D. Smith).

In spite of the numerous details discussed, it is possible to see five questions which are of main importance for the authors. The review will concentrate on these mainly discussed five points, which are also of primary importance for the assessment of the legal regime for the eco-management of the North Sea.

The main discussion point of the book's first part is the assessment of the work and functions of the INSC. By analyzing that, the authors also try to answer the question whether the whole Northeast Atlantic or only the North Sea can be the object of an effective eco-management. Convincingly, all authors share the view that the whole Northeast Atlantic (the geographical extent of OSPARCOM) is a super regional level. Especially Peter Hayward, former Secretary of OSPARCOM, points out that the Atlantic deeps off the coast of Portugal may require different management decisions than the shallow North Sea ecosystem, which is a clearly identifiable region within the wider Oslo and Paris Conventions area. This argument is now supported by the fact that the Lisbon Accord 1991 (applicable for the southern part of the Northeast Atlantic) has created a separate basis for regional cooperation to the Bonn Agreement to the North Sea.

This consent of the authors is diminishing concerning the assessment of the functions of the INSC. The one position is represented by Patere Hayward. To him, a regional organization seems to be superfluous, and he speaks as if all contributions to the North Sea's eco-management

5. Cf. already Winter, *Der Schutz der Nordsee als Problem Internationaler Übereinkommen und EG-Richtlinien*, *Natur und Recht* 10 (1988), 265-272.

could be coordinated by the INSC in cooperation with its implementing area, OSPARCOM. In his view, a regional organization was not founded since "the political statements coming out of a free-standing Ministerial conference are arguably more powerful than if they were watered down within the framework of an international organization" (p.92). Though he recognizes the danger of duplication of efforts, he cannot see that the North Sea interests would gain significantly from a project of a new North Sea forum, a single administrative body covering all relevant issues of eco-management.

The other authors seem to have a different opinion; some say this implicitly (as e.g. Patricia Birnie) and only a few explicitly. It seems to be more realistic, when Patricia Birnie analyzes that an integrated system of eco-management is mission, and that there is a considerable overlap between bodies and conventions with no body being responsible for taking the lead.⁶ Having analyzed the results of the First and Second INSC 1984/87, Peter Ehlers' critical remarks are more explicit: to him, the relationship of these Conferences to the meetings of OSPARCOM must be clarified on the Third INSC⁷; and he seems to plead for a new regional organization (or at least for more regulated meetings of the INSC, taking place more often), since he is sympathetic to further institution-building and to laying down rules of procedure.

In my view, the question whether a regional organization (at least in addition to a ministerial conference) or only a ministerial conference is preferable has to be seen against the background of the experiences with the comanagement of other international water resources. Nearly all conventions of regional seas and international rivers or lakes have created a regional commission for the shared eco-management of the common resource. The regional organizations for the Baltic Sea, the Red Sea, the Persian Gulf and the South Pacific meet at least once a year; they have the competence to review the implementation of Convention and action plans, to establish subsidiary bodies (especially regional centers which can organize the training of experts), to encourage research, to assess the environment and to report about it, to coordinate the national contributions to the eco-management and to provide technical assistance (including the establishment of a communication network); their decisions require unanimity, two-thirds or three-fourths majority. A ministerial conference is not able to fulfill all these functions, since it is limited to political decisions; it normally meets all two or three years and their decisions regularly need unanimity. This leads to the conclusion that a ministerial con-

6. This position is supported by Eric Franckx who discards the misconception that countries with similar political and economic systems agree more easily on a comprehensive eco-management. Explicitly, he uses this argument only for the agreement on a particular maritime boundary. But the latter may be interpreted as a *pars pro toto* for a comprehensive eco-management.

7. "The more so as the Commissions' Meeting in 1992 will also be held at ministerial level," (Ehlers, p. 14). The book was published a month before the Third INSC, March 1990.

ference alone is hardly able to organize an effective eco-management. A regional organization, being always aware of the local conditions of the comanagement, may be more effective, especially if it has far-reaching competences⁸ and may impose majority decisions on the Contracting Parties. In my view, for the North Sea a combination of a ministerial conference (the INSC, for political decisions) and new regional organization (for the eco-management) is necessary. As Ehlers correctly points out, OSPARCOM cannot replace such a new regional organization, since the member states of these Commissions are not identical with the North Sea coastal states.

Another major organizational point, discussed especially in contributions to the book's second part, is the assessment of the role of the EEC. The EEC has ratified only the Bonn Agreement and the Paris Convention, but it already has a certain influence on OSCOM since it is a member of PARCOM. Jean-Luc Prat and Andre Nollkaemper welcome the europeanization of fragmented attempts at water protection on the one hand. But on the other hand, their resume remains, convincingly, skeptical: in their well-founded opinion, many directives are minimum directives, and they analyze a certain slowdown of PARCOM in cases where Community legislation lags behind PARCOM developments.⁹

A fourth major point, discussed especially in the book's second and third part, is the meaning of specially protected areas. Viktor Sebek and Peet/Gubbay underline the necessity of these areas; their analysis of legal aspects is very satisfying. Peet/Gubbay show that Sebek's recommendation, that a convention on North Sea Protected Areas be adopted under the aegis of the INSC, will be difficult to realize: "There are only a few marine protected areas in the North Sea proper, and only one of these areas has strict statutory protection" (p.251).

The need to establish such areas is exemplified for the Wadden Sea (van der Zwiëp), one of the world's richest but very vulnerable ecosystems governed by conflicting national laws of three states¹⁰ and with no mechanisms for cooperation. And in fact, it is a scandal that the North

8. Especially the competence to establish subsidiary bodies (like regional centers which can organize the training of experts, et cetera) and to impose other decisions and to enact binding guidelines/minutes/action plans without waiting for any prior decision by Ministers. Really far-reaching is this competence, when unanimity is replaced by majority votes.

9. Prat adds three recommendations: the EEC should ratify the Oslo Convention, it should cooperate with nonmembers bordering the North Sea (Norway and Sweden) and it should elaborate a specific North Sea environmental plan. Cf. the similar analysis for the role of the EEC in the International Rhine Commission by Kamminga, in Zacklin/Caflish (eds.) *The Legal Regime of International Rivers and Lakes*, The Hague/Boston: Nijhoff 1981, 371-387.

10. Netherlands, Denmark and Germany and, additionally, of the three German Länder Lower-Saxony, Schleswig-Holstein and Hamburg; cf. C. Backes, K.v.d. Zwiëp (eds.), *Integrated Systems for the Conservation of Marine Environments. The International and National Protection of the Wadden Sea*, Düsseldorf: Werner 1992 (in print). A vague initial step for the protection of the Wadden Sea was done by the Final Declaration of the Third INSC, annex 4, reproduced in *Yearbook 1* (1990), pp.658 §§ 688-690.

Sea states did not yet enact a convention on protected areas of the North Sea, as four regions of the UNEP Regional Seas Programme, thereby declaring the Wadden Sea a protected area.

A last point should be mentioned, the legal status of the declarations of the INSC. After a careful analysis, Yves van der Mensbrugge regards such declarations (and the other authors share this position) to be only political commitments (with a few legal consequences, especially estoppel). If this were the only possible analysis, the logical consequence of the fact that OSPARCOM, and INSC, declarations formally accepted the principle of precautionary action (cf. especially Lothar Gündling) would be to consider this a mere political concept. The above mentioned analysis correspond to the prevailing view that resolutions aren't legally binding. In my view, v. d. Mensbrugge's analysis would have been more interesting as it already is, if he also had responded to a more progressive view, according to which legal commitments may also be created by obligatory unilateral acts or be hot regional customary rules, established by consent or consensus of the states concerned.¹¹

On this theoretical background, it might be possible to regard a part of these declarations, as e.g. the London Declaration's sections devoted to dumping and incineration at sea (quoted on p. 20) and those on the precautionary principle as already legally binding.¹² Only when, as is convincingly clear, that the principle of precautionary action is also a legal concept; this question remains open to Gündling. Open also remains the question whether the precautionary principle is already clearly defined and elaborated in OSPARCOM and INSC-declarations (Folkert de Jong.)

The book is important insofar as it is the only current book which summarizes nearly all problems and prospects of the North Sea. All positions (with a very few exceptions) are well founded. A few articles are a bit too short. Nevertheless, the book is highly recommended to lawyers, politicians, to everyone engaged or interested in the protection of the ecosystem North Sea. The authors of the book, professors, researchers or people working in this field, are nationals of nearly every riparian state of the North Sea.

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11. Cf. the theories of hot and instant custom (Ago and Cheng), cf. Hohmann, *Präventive Rechtspflichten und prinzipien des modernen Umweltvölkerrechts. Zum Stand des Umweltvölkerrechts zwischen Umweltnutzung und Umweltschutz*, Berlin: Duncker & Humbolt 1992, pp. 221-241.

12. If so, there were already e.g. a legal duty to stop incineration at sea even without a formal amendment to the Convention, only because of the firm statement in the declaration.