



An International Instrument on Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction

Exploring Different Elements to Consider

PAPER IV

Governance Principles^{*}

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1. Background

At the 2012 United Nations Conference on Sustainable Development (Rio+20), States committed themselves ‘to address, on an urgent basis, building on the work of the Ad Hoc Open-ended Informal Working Group and before the end of the sixty-ninth session of the General Assembly, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea.’¹ This commitment was recalled and reaffirmed by the United Nations General Assembly (UNGA) in its 67th and 68th session.² In its resolution 68/70, the UNGA also requested the United Nations Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (UN Working Group) to make recommendations to the UNGA ‘on the scope, parameters and feasibility of an international instrument under the Convention’.³ These recommendations shall help to prepare for the decision to be taken at the 69th session of the UNGA in 2015, whether to start the negotiation of an international instrument on the conservation and sustainable use of biodiversity in areas beyond national jurisdiction (ABNJ).

The International Union for Conservation of Nature (IUCN) in collaboration with different partners has prepared a series of policy briefs to provide technical input to the ongoing ABNJ discussions, and thereby support the UNGA decision-making process. As indicated in *Paper I*, one of the issues to be discussed under ‘parameters’ could be governance principles. The following paper aims to provide an overview of the most relevant governance principles in the context of conservation and sustainable use of marine biodiversity in ABNJ, as well as different approaches on how to include such principles in an international instrument for ABNJ under the United Nations Convention on the Law of the Sea (UNCLOS).

2. Importance of Governance Principles

Despite their very general nature, governance principles are fundamental and basic to more specific and concrete regulations under a future international instrument for ABNJ. They express certain underlying legal norms in a declaratory form and constitute the basis for all the obligations and rights contained in the instrument. Furthermore, they guide States’ actions to achieve the objectives of the instrument, and implement its provisions.

Such principles do not need to be developed from scratch. They are already included in the UNCLOS as well as different multilateral environmental agreements and international court decisions, thus reflect international consensus. However, these principles require much more rigorous implementation.⁴

¹ UNGA resolution 66/288. ‘The future we want.’ UN doc. A/RES/66/288, of 11 September 2012. Paragraph 162.

² UNGA resolution 67/78. ‘Oceans and the law of the sea.’ UN doc. A/RES/67/78, of 11 December 2012. Paragraph 181. UNGA resolution 68/70. ‘Oceans and the law of the sea.’ UN doc. A/RES/68/70, of 9 December 2013. Paragraph 197.

³ UNGA resolution 68/70. ‘Oceans and the law of the sea.’ UN doc. A/RES/68/70, of 9 December 2013. Paragraph 198.

⁴ Freestone, D. A. (2009). ‘Modern Principles of High Seas Governance: The Legal Underpinnings.’ 39/1 Environmental Policy and Law. P. 44-49.

The main purpose of formulating a comprehensive set of principles for ABNJ in a future international instrument would be fourfold:

- Compiling all relevant principles from different sources;
- Providing an unequivocal reconfirmation that these principles have to be applied to ABNJ;
- Building a basis for their harmonized interpretation; and
- Representing a code of good practice and a first important step in the development of a more complete system for governance of marine ABNJ.⁵

3. Overview of Relevant Governance Principles

Although generally recognized, the following principles are not yet uniformly applied to marine ABNJ and therefore could be included in a future international instrument.⁶

- **Respect for the law of the sea, in particular the UN Convention on the Law of the Sea and related instruments**

The UNCLOS and related instruments seek to balance the rights and duties of States in their conduct of activities in the oceans. Article 87 of the UNCLOS provides a non-exhaustive list of the freedoms of the seas. Importantly, however, it provides that the freedom of the high seas *'is to be exercised under the conditions laid down by this Convention and the other rules of international law'*. These include conditions already laid down by the UNCLOS (e.g., Articles 87.1 and 2, 88, 116, 117, 192, 194.5), as well as others that might be included in the international instrument for ABNJ, and in other rules of international law. Through the explicit reference in an instrument related to ABNJ, giving equal weight to the responsibilities of States in exercising the freedom of the high seas would provide an important legal basis for future mechanisms related to monitoring and compliance.

- **Protection and preservation of biological diversity in ABNJ**

There can be no doubt that the general obligation of States to protect and preserve the marine environment, which is enshrined in many legal instruments at the global and regional level and contained in Article 192 of the UNCLOS, reflects customary international law.⁷ UNCLOS also contains a specific obligation 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 (Article 194.5). As noted by Freestone, Article 192 extends further than simply the avoidance of deliberate and/or obvious damage, so as to include active measures to maintain or improve the present condition of the marine environment as well as to cooperate to this end.⁸ In order to update this obligation with the objectives of an international instrument for ABNJ, it could be preferable to explicitly focus on the

⁵ Oude Elferink, A. G. (2011). *'Governance principles for areas beyond national jurisdiction – Report for the symposium 'Biological Diversity and Governance of Areas beyond National Jurisdiction', organized by the Netherlands Institute for the Law of the Sea of Utrecht University and the Netherlands ministry of Economic Affairs, Agriculture and Innovation.'* Netherlands Institute for the Law of the Sea Utrecht University. P. 1.

⁶ The following list of principles is partly based on a presentation by D. Freestone (2013). *'Modern Principles of High Seas Governance.'*

⁷ Birnie, P., Boyle, A., and Redgwell, C. (2009). *'International Law and the Environment.'* 3rd (Oxford University Press). P. 387.

⁸ Freestone, D. A. (2009). *'Modern Principles of High Seas Governance: The Legal Underpinnings.'* 39/1 Environmental Policy and Law. P. 44-49.

issue of biodiversity in ABNJ. Listing this principle would reaffirm the general obligations contained in Articles 192 and 194.5 of the UNCLOS, particularly for ABNJ and constitute the basis for creating conservation instruments such as area-based management tools, including marine protected areas, or environmental impact assessments, and more specific State obligations (e.g. addressing new and emerging threats, as well as cumulative and synergistic impacts) under an international instrument.

- **International cooperation**

UNCLOS recognizes the importance of international cooperation in its Preamble and numerous provisions containing the duty to cooperate.⁹ This includes Article 197 which explicitly calls for cooperation on a global basis, and as appropriate, on a regional basis, for the protection and preservation of the marine environment. The duty of States to cooperate is also recognized by the 1970 UNGA Declaration of Principles of International Law¹⁰ and in Principles 7 and 27 of the 1992 Rio Declaration adopted at the UN Conference on Environment and Development.¹¹ Furthermore, the Convention on Biological Diversity (CBD) includes the obligation of States to cooperate in respect of ABNJ for the conservation and sustainable use of biodiversity (Article 5). Listing this principle would first of all stress the importance of international cooperation particularly for the conservation and sustainable use of biodiversity in ABNJ. Furthermore, it could reaffirm that international cooperation concerns obligations resting on all States under whose jurisdiction or control activities in ABNJ take place; recall that such cooperation needs to be carried out at both the global as well as regional levels, in particular through the creation of new and/or the expansion of the mandates of existing institutions; and concretize specific elements of the duty to cooperate as well as their content (e.g. technical assistance, environmental assessment, monitoring and enforcement, etc.).¹²

- **Science-based approach**

The gathering, analysis and application of scientific information is crucial to assess the potential impacts of new activities or the expansion of existing activities, to explore alternative ways to meet management objectives, to predict the outcomes of each alternative, to decide in favor of one or more of these alternatives, and (if necessary) to adjust management actions. This also applies to the prioritization of actions as well as conservation measures in ABNJ, and is directly or indirectly confirmed in the UNCLOS in a number of provisions.¹³ However, the UNCLOS does not concretize the obligations of States in this respect. This could be done in an international instrument by highlighting,

⁹ For example Articles 117, 118, 138, 143, 194(1) and 197 of the UNCLOS.

¹⁰ UNGA resolution 25/2625. '*Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.*' UN doc. A/RES/25/2625, of October 1970. Annex.

¹¹ Principle 7 of the 1992 Rio Declaration obliges states to '*co-operate in a spirit of global partnership to conserve protect and restore the health and integrity of the Earth's ecosystem.*' Rio Principle 27 requires that '*States and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.*' UN doc. A/Conf.151/26 (vols. 1-V), of 12 August, 1992.

¹² Hart, S. (2008). '*Elements of a Possible Implementation Agreement to UNCLOS for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction.*' IUCN Environmental Policy and Law Papers online – Marine Series No. 4. P. 4.

¹³ For example, Articles 119, 194(5), 200 of the UNCLOS. Most important, Article 201 of the UNCLOS states that '*States shall cooperate, directly or through competent international organizations, in establishing appropriate scientific criteria for the formulation and elaboration of rules, standards and recommended practices and procedures for the prevention, reduction and control of pollution of the marine environment.*'

amongst others, the duty of all States to ensure decisions affecting biodiversity in ABNJ are consistent with the best available scientific information and are designed to maintain or restore biodiversity, as well as to contribute actively to the collection and analysis of relevant scientific information, including relevant socio-economic information. It would also be a useful mechanism to make a direct link to ongoing and future processes, such as the World Ocean Assessment, the Intergovernmental Panel on Climate Change and the Intergovernmental Science-policy Platform on Biodiversity and Ecosystem Services (IPBES).

- **Precautionary approach**

The precautionary approach which addresses cases of scientific uncertainty came after the adoption of the UNCLOS but has been recognized in virtually all multilateral environmental agreements and policy declarations, many relating to the marine environment and resources.¹⁴ This approach is especially applicable to marine ABNJ where scientific knowledge about the ecosystems, their functions, the biodiversity that depends on and sustains them, as well as the impacts of human activities is still weaker than for other ecosystems. Therefore, an international instrument could reaffirm that States have the obligation to apply a precautionary approach, i.e. the absence of further detailed scientific information should not be a reason to delay or fail to implement management measures to conserve biodiversity in ABNJ; decisions should be made using conservative estimates; and the introduction of new activities in an area should be done on a progressive and precautionary basis.¹⁵ The content of the specific measures States have to take in applying the precautionary approach in this context is, however, currently not defined and is still largely discretionary.¹⁶ Therefore, an international instrument could further specify its requirements, learning for example from the operational procedures for a precautionary approach set out in Article 6 and Annex II of the 1995 UN Fish Stocks Agreement, or the experiences from the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and its 1996 Protocol.

- **Ecosystem approach**

The ecosystem approach means that the optimal management of a natural system (i.e., its conservation, maintenance and restoration) occurs when it is treated as a single unit.¹⁷ In the context of ABNJ, the recognition of the ecosystem approach would be important in order to promote a more holistic, integrated and cross-sectoral approach in the management of ABNJ ecosystems. This is necessary to overcome the artificial distinction between the high seas and the Area which appears to be unjustified from a natural science perspective and to take into account the full range of

¹⁴ Principle 15 of the 1992 Rio Declaration on Environment and Development was adopted 10 years after the adoption of the UNCLOS in 1982. Principle 15 of the Rio Declaration provides that: *'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'* UN doc. A/Conf.151/26 (vols. 1-V), of 12 August, 1992.

¹⁵ Hart, S. (2007). *'An analysis of the proposed agreement for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.'* IUCN. P. 35

¹⁶ Birnie, P., Boyle, A., and Redgwell, C. (2009). *'International Law and the Environment.'* 3rd. Oxford University Press. P.163

¹⁷ IUCN Environmental Law Programme (2010). *'Draft International Covenant on Environment and Development.'* Fourth edition: Updated text. Prepared in cooperation with the International Council of Environmental Law. Gland, Switzerland: IUCN. P. 85.

cumulative impacts of different human activities taking place in ABNJ.¹⁸ While the UNCLOS (and the legal framework for oceans governance in general) is largely based on a sectoral approach,¹⁹ a basis for the ecosystem approach can be found in different parts of the Convention, such as the Preamble which states that *‘the problems of ocean space are closely interrelated and need to be considered as a whole.’*²⁰ An international instrument could for example endorse the consensual elements relating to ecosystem approaches and the oceans which were agreed by the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea in 2006²¹ and were adopted by the UNGA in December of the same year.²²

- **Sustainable and equitable use**

The concepts of sustainable development and equity find a legal basis in the UNCLOS Preamble which recognizes *‘the desirability of establishing [...] a legal order for the seas and oceans which will facilitate [...] the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.’* Furthermore, the UNCLOS acknowledges *‘that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.’* An international instrument could further specify this by explicitly recognizing the need to reconcile economic development with protection of the environment; as well as the necessity for a balance between the rights and interests of individual users and those of the international community; intra- as well as inter-generational equity; fair and equitable sharing of benefits arising out of the utilization of marine genetic resources from ABNJ; and capacity-building, technology transfer and sharing of scientific knowledge.

- **Accountability**

Accountability can be seen as one element of democratic governance, and as a means to implement State responsibility. The principle of accountability is coupled with monitoring, performance reviews and compliance mechanisms. An international instrument could therefore foresee a duty to report on different ABNJ activities; establish a system for monitoring and reviewing related decision-making processes; and include procedures for legal redress to remedy actions affecting biodiversity in ABNJ, including access to justice.

¹⁸ Oude Elferink, A. G. (2011). *‘Governance principles for areas beyond national jurisdiction – Report for the symposium ‘Biological Diversity and Governance of Areas beyond National Jurisdiction’, organized by the Netherlands Institute for the Law of the Sea of Utrecht University and the Netherlands ministry of Economic Affairs, Agriculture and Innovation.’* Netherlands Institute for the Law of the Sea Utrecht University. P. 22.

¹⁹ The provisions to prevent, reduce and control pollution of the marine environment in Part XII of the UNCLOS generally address different sources of pollution separately and ignore the question of how to coordinate between the different regimes for the various sources of pollution.

²⁰ The importance of the ecosystem approach has also been confirmed in a number of international instruments: For example, the 2002 World Summit on Sustainable Development included the application of the ecosystem approach to the Oceans by 2010 in its plan of implementation; it is also the primary framework for action under the CBD.

²¹ *‘Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its seventh meeting.’* UN doc. A/61/156, of 17 July 2006. Part A.

²² UNGA resolution 61/222. *‘Oceans and the law of the Sea.’* UN doc. A/RES/61/222, of 16 March, 2007. Paragraph 119.

- **Transparency**

The principle of transparency is linked to the principle of accountability, as it is a prerequisite for monitoring, reviewing and supporting compliance. It is not explicitly recognized by the UNCLOS but certain elements, such as public availability of information, are reflected in a number of UNCLOS provisions addressing specific contexts.²³ Furthermore, some of the criteria comprised by the principle of transparency are reflected in other international instruments, such as the 1995 UN Fish Stocks Agreement (Article 12), or the CBD (Article 17). Principle 10 of the Rio Declaration also recognizes that *'[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level'* and that *'States shall facilitate and encourage public awareness and participation by making information widely available.'* As noted by Freestone, *'[t]hese hortatory provisions have been given important legal substance'* by the 1998 UN-ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). An international instrument could therefore promote transparency criteria based on, *inter alia* the Aarhus Convention. For example, in order to ensure transparency in ABNJ decision-making processes, information exchange amongst all States could be facilitated (by compiling, publishing, disseminating and granting access to information related to the conservation and sustainable use of biodiversity in ABNJ, including through a clearing-house mechanism); and openness of meetings, equal access to ABNJ proceedings, as well as participation of relevant stakeholders could be ensured.

- **State responsibility**

The obligation of States to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of ABNJ is widely recognized by the 1972 Stockholm Declaration, the 1992 Rio Declaration as well as in Article 3 of the CBD, the 1995 FAO Code of Conduct for Responsible Fisheries, and is echoed with respect to fisheries in the 1993 Compliance Agreement and the UN Fish Stocks Agreement. These require States to supervise properly the activities of their vessels (and their nationals) when on the high seas. The International Maritime Organization has long had standards for flag State performance audits and the FAO have begun to develop principles for audits of flag State responsibility. These could be aligned to ensure international responsibility for all activities under national control or jurisdiction.²⁴

4. Options

It should be noted that different options exist how to integrate such governance principles in a future international instrument for ABNJ:

- In form of a preambular declaration of conservation, management and governance principles to guide States both individually and operating through competent organizations in the responsible management of activities that may affect marine biodiversity in ABNJ; or

²³ For example, Article 143.3(c) of the UNCLOS contains an obligation to promote international cooperation in marine scientific research in the Area by *'effectively disseminating the results of research and analysis when available.'*

²⁴ Freestone, D. A. (2009). *'Modern Principles of High Seas Governance: The Legal Underpinnings.'* 39/1 Environmental Policy and Law. P. 44-49.

- As specific articles of the main text of the instrument (as for example is the approach taken under the UN Fish Stocks Agreement and other instruments).²⁵

²⁵ Druel, E., Gjerde, K. M. *'Sustaining marine life beyond boundaries: the need for and potential content of an UNCLOS Implementing Agreement for marine biodiversity beyond national jurisdiction.'* To be published in Marine Policy.

List of Papers

Paper I: Introduction on Scope, Parameters and Feasibility

Paper II: Enhancing Cooperation and Coordination

Paper III: Options and Approaches for Access and Benefit-sharing

Paper IV: Governance Principles

Paper V: Understanding Area-based Management Tools and Marine Protected Areas

Paper VI: Options and Approaches for Establishing and Managing MPAs

Paper VII: Relation between Environmental Impact Assessments, Strategic Environmental Assessments and Marine Spatial Planning

Paper VIII: Options for Environmental Impact Assessment Elements

Paper IX: Technology Transfer and Capacity-building

Paper X: Existing Regulatory, Institutional and General Governance Gaps

Paper XI: Basic Ideas for a Possible Institutional Structure

Paper XII: International Procedures to Ensure Science-based Decision-making

Paper XIII: Compliance and Verification Mechanisms