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Governance Principles for Areas beyond National Jurisdiction

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Abstract
There is a widely held view that there is a need to formulate a comprehensive set of general principles for the legal regime of maritime areas beyond national jurisdiction (ABNJ). On the basis of existing suggestions for a list of governance principles, the present report investigates how these principles might be formulated in more detail. The report concludes that most of the principles are already part of international law. The report submits that an advantage of drawing up an instrument on governance principles for ABNJ would be that it brings them together in one single document and would unequivocally recognize their relevance. To be effective, such an instrument should, in addition: contain commitments to apply and operationalize these principles; identify institutions and other actors which have a role in the implementation of these principles; and provide for reporting by these institutions and other actors to a global body allowing the assessment of the stage of implementation of the principles.

Keywords
Area; high seas; law of the sea; governance; areas beyond national jurisdiction (ABNJ)

Introduction

There is a widely held view that there is a need to formulate a comprehensive set of general principles for the legal regime of maritime areas beyond national jurisdiction (ABNJ).[1] There is similar recognition that there is no need to

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[1] See, *e.g.*, B. Cicin-Sain, S. Maqungo, S. Arico and M. Balgos, *Submission of the Global Forum on Oceans, Coasts, and Islands to the UN* 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* (available at: http://www.globaloceans.org/globaloceans/sites/udel.edu.globaloceans/files/GlobalForumSubmission-2ndAdHocWGMeeting-April2008-red.pdf; last accessed 4 April 2011) 4; *Co-chairs' Summary Report, December 2007, Workshop*

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develop these principles from scratch.[2] As will also become apparent from this report, such principles are already included in the United Nations Convention on the Law of the Sea (hereinafter LOSC of the Convention)[3] and other international treaties and instruments. The main purpose of formulating a comprehensive set of principles for ABNJ would be twofold. First, it would provide an unequivocal reconfirmation that these principles have to be applied to ABNJ. Second, a comprehensive set of principles would provide a sound basis for developing a coherent regime for the governance of ABNJ.

The present report has its origin in research question 1 of the Study of Biological Diversity and Governance of the High Seas,[4] which has been commissioned by the Ministry of Economic Affairs, Agriculture and Innovation (EL&I) of the Netherlands. Research question 1 asked to establish what governance principles have been integrated in international management regimes since the adoption of the LOSC. In addition, this question 1 required to determine how these principles were currently being applied.[5]

After an initial assessment of the research question and the current state of the international debate on these governance principles, the present report has adopted the approach set out below in answering it. In the preparation of the 2010 *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 (BBNJ Working Group), the Netherlands suggested a number of governance principles in respect of the conservation and sustainable use of marine biological diversity in ABNJ.[6] An almost identical list of such principles was provided to the 2010 BBNJ Work-

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on High Seas Governance for the 21st Century, New York, October 17–19, 2007 (IUCN, 2008); hereinafter High Seas Workshop (available at: http://cmsdata.iucn.org/downloads/iucn_workshop_co_chairs_summary_new_iucn_format.pdf; last accessed 4 April 2011), 7 and 24–25. For an overview of international initiatives to strengthen the governance regime of ABNJ see R. Warner, *Protecting the Oceans Beyond National Jurisdiction; Strengthening the International Law Framework* (Martinus Nijhoff Publishers, Leiden 2009) 207–234. The idea of drawing up a list of governance principles for ABNJ derived from a presentation of David Freestone at an IUCN Workshop in 2007. See further D. Freestone "International Governance, Responsibility and Management of Areas beyond National Jurisdiction", this issue.

[2] See, *e.g.*, Cicin-Sain *et al., supra* note 1 at 4; High Seas Workshop, *supra* note 1 at 7.

[3] Adopted on 10 December 1982; entry into force 16 November 1994; 1833 UNTS 396.

[4] In accordance with the relevant legal framework provided by the LOSC, the present study will refer to the high seas and the Area as appropriate. Where reference is made to both these areas, the term "ABNJ" will be employed.

[5] National Service for the Implementation of Regulations *Specifications of the Study of Biological Diversity and Governance of the High Seas* (February 2009) 13.

[6] Draft EU position on the outcome of the third meeting of the AOIWG-BBNJ; Written comments by the Netherlands (paper provided to the author of this report by M.W.F. Peijs of the then Ministry of Agriculture, Nature and Food Quality of the Netherlands).

ing Group by Spain in making an intervention on behalf of the European Union (EU) and its Member States.[7]

The Netherlands' paper on a draft EU position indicated that it had selected these principles because they have all been generally accepted by the international community but were not yet uniformly applied to ABNJ. According to the paper "[t]heir public enumeration could represent a form of code of 'good practice' and a commitment to their much more rigorous implementation as the first step in the development of a robust and appropriate system of international governance for [ABNJ]."[8]

As this explanation provided by the Netherlands' paper on a draft EU position indicates, the focus of the current debate is not yet on a detailed assessment as to how the governance principles should be applied in practice. For that reason the current report does not address that matter. On the other hand, the explanation does indicate that it is desirable to provide a list of principles of relevance to the regime of ABNJ. The present report has taken the principles listed in the Netherlands' paper as the point of departure for answering research question 1 of the Study of Biological Diversity and Governance of the High Seas. In addition, an analysis has been carried out to establish if there are any further principles which might be included in a list of governance principles. In this connection the analysis has taken into account the LOSC and other relevant international agreements, documents and studies.

Research question 1 of the Study of Biological Diversity and Governance of the High Seas and the Netherlands' paper on a draft EU position and the Spanish intervention referred to above do not define the term "governance principles". The present report for the moment also refrains from adopting a formal definition of this term, but as a working definition it considers that "governance principles" can be said to provide guidance to States and other actors in adopting and implementing specific rules or approaches in respect of activities in ABNJ.[9]

Uncertainty may exist about the status of certain of the principles under international law. Their status will be discussed: i.e., are they part of international law or do they constitute legally non-binding principles? It is considered important that specific principles are listed correctly as regards their

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[7] J. Urbiola "Agenda item 5(d): Integrated ocean management and ecosystem approaches as well as cross-sectoral cooperation and coordination" (Intervention on behalf of the European Union and its 27 Member States, New York, 2 February 2010).

[8] Written comments by the Netherlands, *supra* note 6, at 2–3.

[9] The report also employs the terms "principles" and "general principles" in referring to these principles.

status under international law. Principles which are part of international law should be clearly recognized as such in a list of governance principles for ABNJ. An incorrect classification might lead to unnecessarily weakening the status of those principles. For these reasons, the report will establish for each specific principle whether it is part of international law or is a legally non-binding principle. In view of the central role of the LOSC in ocean governance, for each principle this report will first seek to establish if and to what extent a specific principle can be said to be reflected in the Convention. Apart from the Convention, other treaty instruments and legally non-binding instruments and legal literature have been examined to establish the status of specific principles.

It is to be expected that in a debate over these principles in international fora, questions will arise as to their content. For that reason, the report for each of the principles will provide a short statement on its core content. In this respect the focus will also be on the LOSC and will also take into account other treaty instruments and legally non-binding instruments and legal literature as appropriate.

The explanation for the selection of a list of principles provided by the Netherlands' paper on a draft EU position indicates that the adoption of such a list may take the form of a code of good practice containing a commitment to their application and rigorous implementation in respect of ABNJ. This explanation points out that it is necessary to consider the type of instrument in which to recognize the relevance of governance principles for ABNJ and how their more rigorous implementation should be realized.

On the basis of the preceding considerations, the following specific questions will be addressed in this report:

- What is the status of governance principles which are (potentially) relevant for the protection and preservation of the marine environment and the conservation and sustainable use of marine biological diversity of ABNJ, under international law?;[10]
- What is the core content of these principles?;
- Are there additional principles which might be included in a list of governance principles?;
- What type of instrument could be used in recognizing the relevance of these principles for ABNJ and setting out their core content?; and

[10] Discussions of these principles refer both to the preservation and protection of the marine environment and the conservation and sustainable use of biological diversity. It is for the moment not considered to be necessary to define and apply these terms rigorously.

- How should an instrument containing these principles seek to achieve their further implementation?

The first two of these questions are addressed in the section on Governance Principles for ABNJ, below. This first of all concerns the principles identified by the Netherlands' paper on a draft EU position and the intervention of Spain on behalf of the EU and its Member States at the 2010 BBNJ Working Group. In addition, at the end, the section discusses a number of additional principles which might be included in a list of governance principles, and a final subsection considers the relationship between areas within national jurisdiction and ABNJ. The fourth and fifth of the above questions will be considered in the section on Content and Format of a Document on Governance Principles for ABNJ of the present report. The final section of the report contains a number of points of discussion in respect of the further development of governance principles for ABNJ.

Governance Principles for ABNJ

Introduction

In preparation for the 2010 BBNJ Working Group, the Netherlands suggested a number of principles for the conservation and sustainable use of marine biological diversity for ABNJ.[11] The paper prepared by the Netherlands lists the following principles:[12]

- Respect for the law of the sea, in particular the LOSC and related instruments;
- Protection and Preservation of the Marine Environment;
- International Cooperation;
- Science-Based Approach to Management;
- Precautionary Approach;
- Ecosystem Approach;
- Sustainable and Equitable Use;
- Public Availability of Information;
- Transparent and Open Decision-Making Processes; and
- Responsibility of States as Stewards of the Global Marine Environment.

[11] Written comments by the Netherlands, *supra* note 6.
[12] *Ibid.*, at 3.

According to the paper, these principles:

> are the least or non-controversial because they have all been generally accepted by the international community in a range of global and regional instruments, and some are included in the decisions of international courts and tribunals. They are widely applied on land and to various marine sectoral activities, but not yet uniformly applied to the high seas. Some represent established international law; others agreed international minimum standards. Their public enumeration could represent a form of code of "good practice" and a commitment to their much more rigorous implementation as the first step in the development of a robust and appropriate system of international governance for the high seas.[13]

At the 2010 BBNJ Working Group, Spain made an intervention on behalf of the EU and its Member States under agenda item 5(d),[14] which listed most of the principles enumerated in the paper presented by the Netherlands.[15] In addition, it also mentioned the principle of an "integrated approach". The intervention also adopted the reasoning included in the paper prepared by the Netherlands as to why the focus could be on these specific principles and how these principles might be endorsed by the international community.

The present section of the report addresses the first two questions identified in the first section:

- What is the status of the principles under international law?; and
- What is the core content of these principles?[16]

These two questions are addressed in individual sections for all of the abovementioned principles. In each case the individual section provides a discussion followed by a proposed formulation of the principle concerned and a short statement as to what can be considered to be its core content. The next section discusses a number of additional principles, which might be included in a list of principles. In this case, a slightly different approach has been followed. After a short discussion of the content of these principles, some

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[13] *Ibid.*, at 2–3.

[14] Urbiola, *supra* note 7.

[15] Similar lists have also been suggested in other fora and by other authors. See, for example, the *10 Principles for High Seas Governance* adopted by the IUCN in 2008 (available at: http://cmsdata.iucn.org/downloads/10_principles_for_high_seas_governance___final.pdf; last accessed 4 April 2011); *e.g.*, Cicin-Sain *et al., supra* note 1 at p. 4.

[16] A good overview in respect of these two questions is also provided by D. Freestone, 'Modern Principles of High Seas Governance; The Legal Underpinnings' (2009) 39(1) *Environmental Law and Policy* 44–49 at 45–49. The analysis and conclusions of this analysis in general coincide with the analysis and conclusions of the present report.

arguments are provided as to why a principle might be included in a list of governance principles for ABNJ. The following section considers the relationship between areas within national jurisdiction and ABNJ and the possible implications for the elaboration of the regime for ABNJ.

Respect for the Law of the Sea, in Particular the LOSC and Related Instruments

Discussion

In the commentary on this principle in the paper prepared by the Netherlands, it is noted, *inter alia*, that the freedoms of the high seas listed in Article 87 of the Convention "are not absolute rights but are subject to a number of limitations and corresponding duties upon which their legal exercise is preconditioned."[17] This principle thus is concerned with the nature of freedom of the high seas and the conditions under which it is to be exercised, which are elaborated in Part VII of the Convention. In a number of other lists of principles for ABNJ this principle is referred to as conditional freedom of the high seas.[18]

The Convention itself explicitly defines a number of conditions which are applicable to the exercise of freedom of the high seas. Article 87 provides that freedom of the high seas "is exercised under the conditions laid down by this Convention and the other rules of international law". The Convention lists numerous specific duties of States related to their exercise of freedom of the high seas, for instance, the duty to effectively exercise jurisdiction and control over ships flying their flag and the duty to protect and preserve the marine environment. The Convention also contains a generally formulated condition which is applicable to the exercise of freedom of the high seas. Article 300 of the Convention requires States Parties to fulfil in good faith the obligations assumed under the Convention. This is a specific restatement of the fundamental principle of public international law of *pacta sunt servanda*, which rule has been defined as: "Every treaty in force is binding upon the parties to it and must be performed in good faith."[19] The International Law Commission, which prepared a draft of Article 26 of the Vienna Convention on the Law of Treaties, observed that this rule "is the fundamental principle of the law of treaties".[20]

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[17] Written comments by the Netherlands, *supra* note 6 at 4.

[18] See, *e.g.*, Cicin-Sain *et al., supra* note 1 at 4; Freestone, *supra* note 16 at 45.

[19] Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entry into force 27 January 1980, 1155 UNTS 331), Article 26.

[20] *Yearbook of the International Law Commission* 1966, Vol. II, 211.

The International Court of Justice in its judgment in *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* observed that "[t]he principle of good faith obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized."[21]

In the case of the LOSC, the States Parties recognize—through its Preamble—the desirability of establishing:

> a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.

The current threats to the marine environment indicate that this legal order can only be realized if States discharge their obligations under the Convention in good faith.

Article 87 of the Convention indicates that freedom of the high seas not only has to be exercised in accordance with the conditions laid down by the Convention, but also with the conditions laid down by other rules of international law. This rule of reference is of fundamental importance as it ensures that the regime for the exercise of freedom of the high seas is continuously updated. Developments in international environmental law since the adoption of the Convention are relevant to the exercise of freedom of the high seas in accordance with the Convention. An argument that the Convention has not kept up with developments in international environmental law as far as the governance of ABNJ is concerned is thus unwarranted.[22] Rules of customary international law, including rules of international environmental law, will have to be applied by a State Party to the Convention to the extent these rules have become binding on the State concerned.[23]

Besides Part VII of the Convention on the high seas, Part XI of the Convention is also relevant to the principle of respect for the LOSC and related instruments as it pertains to ABNJ. Article 300 of the Convention is equally applicable to Parts VII and XI of the Convention, as are the general considerations in respect of good faith and *pacta sunt servanda*. In addition, Part XI

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[21] *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* Judgment, I.C.J. Reports 1997, 7 at 79, para. 142.

[22] See also R. Rayfuse and R. Warner 'Securing a Sustainable Future for the Oceans Beyond National Jurisdiction: The Legal Basis for an Integrated Cross-sectoral Regime for High Seas Governance for the 21st Century' (2008) 23 *International Journal for Marine and Coastal Law* 399–421 at 418.

[23] See Vienna Convention on the Law of Treaties, Article 31(3)(c).

itself contains two provisions which address the linkage between rights and obligations of States under Part XI in general terms. Article 138 provides that:

> The general conduct of States in relation to the Area shall be in accordance with the provisions of this Part, the principles embodied in the Charter of the United Nations and other rules of international law in the interests of maintaining peace and security and promoting international cooperation and mutual understanding.

Article 138, like Article 87, refers to the need for accordance with other rules of international law and thus also includes rules of international environmental law which have developed after the adoption of the Convention. Article 138 does place a restriction on its scope of application. The general conduct of States prescribed by Article 138 shall be "in the interests of maintaining peace and security and promoting international cooperation and mutual understanding".[24] However, in view of the broad formulation of these objectives, it can be considered that they also cover the obligations of States in accordance with international law in respect of the protection and preservation of the marine environment.

Article 139 of Part XI of the Convention is concerned with the general obligations of States Parties in relation to activities of exploration for and exploitation of the mineral resources of the Area.[25] The first sentence of paragraph 1 of Article 139 reads:

> States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part.

The obligation of States Parties to fulfil their obligations under the Convention is specifically stated in Part XII on the protection and preservation on the marine environment. Paragraph 1 of Article 235 provides that "States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment". The reference to "international obligations" covers both the provisions of the Convention and

[24] The English text of Article 138 might suggest that the other rules of international law are those concerning international peace, etc. The Spanish and French text of Article 138 include a comma after the reference to other rules of international law, indicating that the reference is to other rules of international law in general and that those rules have to be applied in the interest of international peace, etc.

[25] The Convention refers to these activities as "activities" (LOSC, Article 1(1)(3)).

other treaty provisions and rules of customary law, which are binding on a specific State.[26]

In conclusion, there can be no doubt that the fundamental precepts of treaty law of *pacta sunt servanda* and good faith, as explicitly reconfirmed in Article 300 of the Convention, are applicable to the exercise of freedom of the high seas by States and the conduct of States in the Area. States Parties are in this respect not only obliged to act in accordance with the obligations contained in the Convention itself, but also in accordance with other rules of international law. This includes rules of international environmental law that have developed after the adoption of the Convention in 1982.

The preceding discussion indicates that the principle under consideration in the present section touches on a fundamental question in relation to the legal regime applicable to ABNJ. The commentary on this principle in the paper prepared by the Netherlands quoted above focuses on the exercise of freedom of the high seas. This focus may in particular be problematic because it implies that freedom of the high seas also applies to all uses of the Area, such as, *e.g.*, the use of living resources of the Area, except for activities in the Area.[27] States which oppose such a broad understanding of freedom of the high seas can be expected to oppose such a formulation of the principle under consideration. In addition, it also would not seem to be desirable to formulate the principle solely by reference to freedom of the high seas because that would imply that it does not apply to activities in the Area.

It is submitted that it would not be desirable that the discussion in the BBNJ Working Group or other fora in respect of the principle under consideration in this section would result in a debate concerning the respective scope of application of Parts VII and XI of the Convention. It is suggested that the principle should be formulated and elaborated in such a way that it does not prejudice the outcome of any future debate on the relationship between Parts VII and XI of the Convention.

Formulation and Core Content of the Principle

The principle is at present formulated as "respect for the law of the sea, in particular the UN Convention on the law of the sea and related instruments". It might be considered to reformulate the principle in a way that would explicitly recognize the linkage between rights and obligations of States in ABNJ. A possibility would, for instance, be to formulate it as "The international law of the sea establishes a comprehensive legal order for areas beyond national

[26] See also M.H. Nordquist (ed.) *United Nations Convention on the Law of the Sea 1982; A Commentary* (Martinus Nijhoff Publishers, Leiden 1990) Vol. IV, 412.

[27] See note 25 *supra* for the meaning of "activities" in this context.

jurisdiction". A short explanation of the principle might contain the following language:[28]

> The United Nations Convention on the Law of the Sea sets out the legal framework within which all activities in the oceans and seas have to be carried out. Article 300 of the Convention recognizes the fundamental principle of public international law of *pacta sunt servanda*. The States Parties to the Convention shall fulfil in good faith the obligations assumed under the Convention. Parts VII and XI of the Convention contain general provisions on the obligations of States Parties in respect of areas beyond national jurisdiction. Article 87 of the Convention provides that States shall exercise freedom of the high seas under the conditions laid down by the Convention and by other rules of international law. Article 138 of the Convention provides that the general conduct of States in relation to the Area shall be in accordance with the provisions of Part XI, the principles embodied in the Charter of the United Nations and other rules of international law. Those other rules of international law include those in respect of the protection and preservation of the marine environment and sustainable development, which have been accepted by the international community after the adoption of the Convention in 1982.

The Protection and Preservation of the Marine Environment

Discussion

In a commentary on this principle in the paper prepared by the Netherlands it is noted that:

> Based on Articles 192 and 194(5) LOSC there is an unequivocal obligation to protect and preserve the marine environment and to protect and preserve rare or fragile species and ecosystems in all parts of the marine environment, as well as the habitat of depleted, threatened or endangered species and other forms of marine life.[29]

The importance of this principle has been repeatedly recognized by the international community. For instance, the General Assembly of the United Nations in its Resolution on Oceans and Law of the Sea of 2009 included the following language:

> *Emphasizes once again* the importance of the implementation of Part XII of the Convention in order to protect and preserve the marine environment and its

[28] This explanation is based on the analysis contained in the preceding section and relevant provisions of international instruments. This same observation applies to the short explanations provided in the following subsections.

[29] Written comments by the Netherlands, *supra* note 6 at 6.

> living marine resources against pollution and physical degradation, and calls upon all States to cooperate and take measures consistent with the Convention, directly or through competent international organizations, for the protection and preservation of the marine environment.[30]

There can be no doubt that the general obligation of States to protect and preserve the marine environment, which is contained in Article 192 of the Convention, reflects general international law.[31] It is not considered necessary to further elaborate on this proposition. On the other hand, some further attention is needed as regards the reasons for listing this principle and what its implications are.

One fundamental reason for listing the principle of protection and preservation of the marine environment is that it constitutes the framework in respect of all more specific obligations of States in this respect. A reference to the general obligation to protect and preserve the marine environment thus sets the stage for introducing the other principles, which might be included in a list of governance principles for ABNJ. Moreover, the listing of this general principle serves to reaffirm that this general obligation is applicable to all oceans and seas, including those parts of the oceans and seas which are ABNJ.

Another point to be made in respect of the principle is that it applies to the marine environment as such and that it is not only intended to protect, for instance, economic interests.[32] This is confirmed by the reference to "rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine line" contained in Article 194(5) of the Convention.

A final point to be noted about the general obligation contained in Article 192 is that it is subject to the specific rights and duties contained in the Convention.[33] This implies that in discharging this obligation, States also have to take into account obligations which are included in the Convention by

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[30] Oceans and the Law of the Sea; Resolution adopted by the General Assembly on 4 December 2009 (A/RES/64/71 of 12 March 2010) para. 112.

[31] See also P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* 3rd ed. (Oxford University Press, Oxford 2009) 387.

[32] See also *ibid.*, at 388.

[33] See Nordquist, *supra* note 26 at 43. The commentary makes the following observation:

> The general obligation of Article 192 is set forth in an extremely lapidary form, and the various formulas used in previous drafts, such as "in accordance with the provisions of these Articles," were not included in the final text. This omission is not to be misconstrued, however. In one sense, such words would be redundant. It is clear from the Convention as a whole (and not merely from Part XII), that the obligation of Article 192 (and with it the right of Article 193) is always subject to the specific rights and duties laid down in the Convention.

rules of reference. This includes the reference to other rules of international law contained in Articles 87 and 138 of the Convention. As was set out in the section on Respect for the Law of the Sea, in particular the LOSC and related instruments, those other rules of international law include the rules of international environmental law which have been developed after the adoption of the Convention in 1982. In other words, in discharging their general obligation to protect and preserve the marine environment, States Parties to the Convention have to take into account these rules of international environmental law.

Formulation and Core Content of the Principle

The principle is at present formulated as "protection and preservation of the marine environment". It might be considered to reformulate the principle to explicitly refer to ABNJ. A possibility would, for instance, be to formulate it as "States have the obligation to protect and preserve the marine environment of areas beyond national jurisdiction". A short explanation of the principle might contain the following language:

> Article 192 of the United Nations Convention on the Law of the Sea provides that States have the obligation to protect and preserve the marine environment. This general obligation is applicable to all oceans and seas, including areas beyond national jurisdiction. The general obligation contained in Article 192 is subject to the specific rights and duties contained in the Convention. In discharging their obligations under Article 192 of the Convention, States also have to take into account obligations which have been included in the Convention by rules of reference. This includes the references to other rules of international law contained in Articles 87 and 138 of the Convention.

International Co-operation

Discussion

In a commentary to this principle in the paper prepared by the Netherlands it is noted that this concerns:

> A basic international law obligation reflected in many instruments and UNGA Res. 25/2625 (October 24, 1970) which declared that: "All states have the duty to cooperate with one another… to maintain international peace and security and to promote international economic stability and progress…".

The LOSC recognizes the fundamental significance of international cooperation in its first preambular consideration and in this connection it also links this purpose to one of the principal purposes of the United Nations, the maintenance of peace. This preambular paragraph reads:

> *Prompted* by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world[.]

Although the Convention does not formulate a general duty of States to cooperate, it contains numerous references to a duty to cooperate. However, in such cases the object of cooperation is always specified. A duty to cooperate is implicit in the requirement of Article 87 of the Convention, which provides that States in exercising the freedoms of the high seas shall have due regard "for the interests of other States in their exercise of the freedom of the high seas, and [...] for the rights under this Convention with respect to activities in the Area.[34] The 'due regard' requirement may require States to cooperate in order to ensure that it will be effectively implemented.

Part XI of the Convention makes a direct reference to international cooperation in setting out the requirements for States in respect of their general conduct in the Area. That conduct shall be:

> in accordance with the provisions of this Part, the principles embodied in the Charter of the United Nations and other rules of international law *in the interests* of maintaining peace and security and *promoting international cooperation* and mutual understanding.[35]

A number of provisions of the Convention are concerned with cooperation between States in respect of specific matters. Article 118 of the Convention, which is concerned with cooperation in respect of fisheries on the high seas, provides:

> States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

Cooperation in respect of mining activities in the Area is institutionalized through the establishment of the International Seabed Authority. States Parties moreover have the obligation to promote international cooperation

[34] LOSC, Article 87(2).
[35] LOSC, Article 138; emphasis provided.

in marine scientific research in the Area. To this end, Article 143 of the Convention sets out a number of specific obligations to give detailed content to this obligation.

Part XII of the Convention, which is concerned with the protection and preservation of the marine environment, sets out a number of obligations in respect of international cooperation. A general obligation to cooperate is set out in Article 194(1) of the Convention, which provides:

> States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

This general obligation to cooperate is further specified in Section 2 of Part XII, which is concerned with global and regional cooperation. Section 2 indicates that this cooperation may be carried out directly or through competent international organizations. Article 197 indicates the criteria to be taken into account in deciding as to whether cooperation is to take place on a global or regional basis. Article 197 reads:

> States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

Although Article 197 might seem to indicate that cooperation on a global basis is the default mechanism, the reference to cooperation on a regional basis as appropriate indicates that regional cooperation may also be used to formulate and elaborate international rules, standards and recommended practices and procedures. Article 197 is applicable to the entire marine environment. The reference to regional cooperation in this context indicates that the protection and preservation of the environment of ABNJ in specific circumstances may also be realized at the regional level. At the same time, it should be pointed out that Article 197 refers to international rules, standards and recommended practices and procedures *consistent with this Convention*. International rules, standards and recommended practices and procedures elaborated at the regional level would not be consistent with the Convention if they were to affect the rights and obligations of third States in relation to such international rules, standards and recommended practices and procedures.

An argument that the reference to "as appropriate" implies that the protection and preservation of the marine environment in ABNJ has to be carried out at the global level, because it affects the interests of all States, is not necessarily convincing. First of all, in the case of fisheries on the high seas, the Convention recognizes that cooperation can be carried out on a (sub)regional basis. Article 118 of the Convention provides that States shall, as appropriate, establish subregional or regional fisheries organizations to this end. The Convention thus explicitly recognizes that the regulation of specific activities in ABNJ need not always be carried out at the global level. Second, the example of the designation of MPAs in ABNJ in the North East Atlantic in the framework of the OSPAR Convention[36] implies a recognition by the States Parties to the Convention that regional cooperation may be used in addressing the protection and preservation of the environment of ABNJ. Consultations between the OSPAR Commission and the International Seabed Authority on ABNJ included in the area of application of the OSPAR Convention imply that the Authority, which has a near universal membership, recognizes the mandate of the OSPAR Convention in respect of ABNJ.

Obligations in respect of international cooperation are also contained in Sections 3, 4 and 5 of Part XII of the Convention, which are concerned with, respectively, technical assistance, monitoring and environmental assessment, and international rules and national legislation in respect of specific sources of pollution. In general, the specific forum for cooperation is not identified. In a number of instances there is general agreement in the international community that the general reference to "the competent international organization" concerns a specific organization. For instance, this reference in Article 211, which addresses pollution from vessels, is recognized to primarily concern the International Maritime Organization.

The above review indicates that the Convention is squarely premised on the assumption that the governance of the seas and oceans can only be effective if States cooperate. The obligations to cooperate apply *a fortiori* to ABNJ. All States in principle have access to these areas on a basis of equality. The impacts of human activities on the environment of ABNJ can only be effectively addressed if all States concerned cooperate.

The Convention on Biological Diversity also contains an obligation for its States Parties to cooperate in respect of ABNJ. Article 5 of the Convention provides that:

[36] Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted on 22 September 1992; entry into force 25 March 1998 (1993) 32 ILM 1068).

> Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.

It has been observed that a problem in respect of the provisions on cooperation of LOSC and the Convention on Biological Diversity is that they do not specify the content of the duty to cooperate.[37] The only case in which the duty to cooperate in ABNJ has been further elaborated—apart from mining activities regulated through Part XI of the Convention—is that of fisheries for straddling and highly migratory fish stocks. The 1995 Fish Stocks Agreement[38] elaborates the general obligation contained in, *inter alia*, Article 118 of the LOSC, in detail for these stocks in Part III of the Agreement on mechanisms for international cooperation. A similar elaboration of the general obligations on cooperation contained in the LOSC and the Convention on Biological Diversity in a legally binding instrument does not exist for other issues.

It is true that the LOSC does not elaborate the content of the duty to cooperate for most issues in much detail. At the same time it has to be realized that the Convention does prescribe a number of obligations in respect of cooperation for its States Parties. First of all, the obligation to cooperate in general is stated in mandatory terms (States shall cooperate) and does not leave States the option to refrain from cooperating. This arguably is different in the case of Article 5 of the Convention on Biological Diversity, which contains the qualification that States shall collaborate "as far as possible and as appropriate".

Second, the obligations to cooperate contained in the Convention are to be interpreted dynamically. If new issues covered by the Convention arise which require cooperation, States are obliged to develop such cooperation in accordance with the Convention. This, for instance, implies that any issue concerning the protection and preservation of the marine environment of ABNJ is covered by the general obligation to cooperate contained in Article 197 of the Convention.

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[37] See S. Hart, *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) 4.

[38] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995; entry into force 11 December 2001; 2167 UNTS 88.

Formulation and Core Content of the Principle

The principle is at present formulated as "international cooperation". It might be reformulated to include a specific reference to ABNJ and would thus read "International cooperation in respect of areas beyond national jurisdiction". A short explanation of the principle might contain the following language:

> The United Nations Convention on the Law of the Sea recognizes the importance of international cooperation in respect of specific activities in the seas and oceans and for the purpose of the protection and preservation of the marine environment. International cooperation is in particular required for areas beyond national jurisdiction, which are open to all States. The provisions of the United Nations Convention on the Law of the Sea on international cooperation indicate that this concerns obligations resting on all States under whose jurisdiction or control activities in area beyond national jurisdiction take place. The Convention recognizes that States are in the best position to establish the exact content of the cooperation which is required of them. The provisions of the Convention on international cooperation have been formulated with the future in mind. States are required to take into account new developments in implementing their duties under the Convention in respect of international cooperation.

A Science-Based Approach to Management

Discussion

In a commentary on this principle in the paper prepared by the Netherlands it is noted that:

> Article 119 LOSC requires states to base their fisheries conservation and management measures on "the best scientific evidence available" as well as environmental and economic factors and "generally recommended international minimum standards." These same obligations are reflected in the 1995 UN Fish Stocks Agreement (UNFSA).[39]

In addition, Part XII of the Convention contains a number of provisions on the role of science in the protection and preservation of the marine environment. Article 200 of the Convention requires States to cooperate "for the purpose of promoting studies, undertaking programmes of scientific research and encouraging the exchange of information and data acquired about pollution of the marine environment." Article 200 moreover provides that States "shall endeavour to participate actively in regional and global programmes to acquire knowledge for the assessment of the nature and extent of pollution, exposure to it, and its pathways, risks and remedies".

[39] Written comments by the Netherlands, *supra* note 6 at 6.

The key provision of Part XII of the Convention, as far as a science-based approach to management is concerned, is Article 201, which reads:

> In light of the information and data acquired pursuant to Article 200, 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.[40]

Article 201 is applicable to the entire marine environment, including ABNJ. Article 201 is applicable to the prevention, reduction and control of marine environment from all sources of pollution. Article 201 contains an explicit recognition that the regulations for the prevention, reduction and control of pollution of the marine environment have to be based on scientific criteria. As the addition of the word "scientific" before "criteria" indicates, the criteria have to be based on scientific knowledge. The addition of the word "appropriate" before "scientific criteria" moreover indicates that these criteria have to meet a certain standard: they have to be appropriate for the formulation and elaboration of regulations for the prevention, reduction and control of pollution of the marine environment.

It should be recognized that Article 201 also might seem to include a limitation. The introductory part of the first sentence of the Article refers to the information and data acquired pursuant to Article 200 of the Convention. Article 200 itself does not contain mandatory rules for the collection of scientific data. Rather, it requires States to cooperate to *promote* research and they are required to *endeavour* to participate in regional and global programs. However, in assessing the implications of the reference to Article 200 in Article 201, the modality of the reference has to be taken into account. Article 201 uses the words "[i]n the light of the information and data acquired pursuant to Article 200". The choice of the words "[i]n light of" indicates that the basis for establishing appropriate scientific criteria is not limited to the data and information acquired pursuant to Article 200. If that were to be the case, different language would have been used, namely, that the appropriate scientific criteria have to be established *on the basis of* the information and data acquired to Article 200. On the contrary, the actual wording of Article 201 indicates that the information and data acquired have to be used to establish for which specific issues scientific criteria for regulations have to be established. In determining the content of these scientific criteria, all relevant scientific data and information have to be taken into account. Only such

[40] Emphasis provided.

an assessment allows establishing what constitute appropriate scientific criteria in accordance with Article 201 of the Convention.

Apart from the direct reference to scientific criteria in Article 201, it is clear from other provisions of Part XII that they can only be effectively implemented if there is a sufficient scientific basis. For instance, Article 194(5) provides that the measures taken in accordance with Part XII "shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life". This obligation presupposes an obligation on States Parties to gather sufficient scientific knowledge to allow determining the occurrence of ecosystems, species and forms of marine life, the threats they are exposed to and the measures which are necessary to protect and preserve them. Without this implicit obligation, the explicit obligations contained in Article 194(5) would be without meaning and cannot be implemented.

The preceding analysis indicates that the LOSC requires that regulations for the protection and preservation of the environment of ABNJ are based on scientific criteria. On the other hand, the Convention does not explicitly spell out the obligations of States in respect of the gathering of scientific data and information. The implications of this latter issue have to be viewed in light of the further development of customary international law.[41] As will be set out below, the precautionary approach has been recognized as being part of customary international law. The precautionary approach has to be applied in the case of scientific uncertainty. Thus the absence of sufficient scientific information and data does not imply that States do not have to apply a science-based approach to management, but instead implies that they have to apply the precautionary approach.

Formulation and Core Content of the Principle

The principle is at present formulated as "science-based approach to management". It might be reformulated to include a specific reference to ABNJ and would thus read "Science-based approach to management of areas beyond national jurisdiction". A short explanation of the principle might contain the following language:

[41] Customary international law is relevant to interpreting the rights and obligations of the States Parties to the Convention. Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which reflects customary international law, provides that the context for interpreting a treaty includes "any relevant rules of international law applicable in the relations between the parties". Moreover, the references to "other rules of international law" contained in the Convention, which are discussed in the subsection Respect for the law of the sea, in particular UNCLOS and related instruments above, lead to the same conclusion as the application of the rule contained in Article 31(3)(c) of the Vienna Convention.

> The United Nations Convention on the Law of the Sea requires states to establish 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, including the environment of areas beyond national jurisdiction, from all sources. This obligation entails a science-based approach to the management of areas beyond national jurisdiction. Appropriate scientific criteria can only be established on the basis of sufficient scientific knowledge. The absence of sufficient scientific knowledge requires States to apply a precautionary approach in determining rules, standards and recommended practices and procedures for the prevention, reduction and control of pollution of the marine environment until sufficient scientific knowledge is available to establish scientific criteria for the formulation and elaboration of such regulations.

The Precautionary Approach

Discussion

In a commentary on this principle in the paper prepared by the Netherlands it is noted that this principle is:

> [m]andated by Agenda 21, Principle 15 of the UN Conference on Environment and Development (UNCED) Rio Declaration as well as the UNFSA. It has also been reflected in the governing instruments and/or practice of most Regional Fisheries Management Organizations (RFMOs).[42]

The first thing to be noted about the commentary by the Netherlands is that reference is made to the precautionary approach and not to the precautionary principle. This is in accordance with the general trend in recent practice.[43] There does not seem to be a significant distinction between the basic characteristics or the legal consequences of the precautionary approach as compared to the precautionary principle.[44]

The precautionary approach is not included in the Law of the Sea Convention. This is explained by the fact that the precautionary approach was developed after the adoption of the Convention in 1982. The fact that the precautionary approach is not contained in the Convention does not, however, mean that the principle is irrelevant in the context of the Convention.

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[42] Written comments by the Netherlands, *supra* note 6 at 6.

[43] See, *e.g.*, Oceans and the Law of the Sea; Resolution adopted by the General Assembly on 4 December 2009 (A/RES/64/71 of 12 March 2010), which refers to the precautionary approach in paragraphs 133 and 150.

[44] See A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (Kluwer Law International, Leiden 2002) 4; A. Trouwborst, *Precautionary Rights and Duties of States* (Martinus Nijhoff Publishers, Leiden 2005) 11–12.

Customary international law is relevant to interpreting the rights and obligations of the States Parties to the Convention.[45] If the precautionary approach is part of customary international law, States Parties to the Convention are required to take it into account in implementing their obligations in respect of the protection and preservation of the marine environment.

The relevance of the precautionary approach for treaty instruments which have been adopted before the approach was developed, has recently been confirmed by the International Court of Justice in the *Pulp Mills case*. In a discussion of an argument by Argentina on the burden of proof, the Court observed:

> Regarding the arguments put forward by Argentina on the reversal of the burden of proof and on the existence, *vis-à-vis* each Party, of an equal onus to prove under the 1975 Statute, the Court considers that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof.[46]

A general statement on the content of the precautionary approach is contained in Principle 15 of the Rio Declaration on Environment and Development adopted in Rio de Janeiro in 1992. Principle 15 reads:

> 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.

This general statement on the content of the precautionary approach reflects customary international law.[47] However, customary international law does not

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[45] See further *supra* note 41.

[46] Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), judgment of 20 April 2010, para. 164 (available at: http://www.icj-cij.org/docket/files/135/15877.pdf; last accessed 10 February 2012).

[47] See Birnie *et al., supra* note 31 at 159–164, especially at 163; Trouwborst, Precautionary Rights, *supra* note 44 at 286–287. The status of the precautionary approach was also considered by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) in *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*; Advisory Opinion of 1 February 2011 (available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf; last accessed 10 February 2012), hereinafter Advisory Opinion. The Chamber first observed that there has been "initiated a trend towards making this approach part of customary international law" and subsequently seems to indicate that there is a legal obligation to apply the precautionary approach (para. 135; see also *ibid*., para. 242, section B(b).

prescribe the specific measures States have to adopt in implementing the precautionary approach. As has been observed by Birnie, Boyle and Redgwell:

> in determining whether and how to apply 'precautionary measures', states have evidently taken account of their own capabilities, their economic and social priorities, the cost-effectiveness of proposed measures, and the nature and degree of the environmental risk when deciding what preventive measures to adopt. They have in other words made value judgements about how to respond to environmental risk, and have been more willing to be more precautionary about ozone depletion, dumping at sea or whaling, than about fishing or industrial activities which cause air, river or marine pollution.[48]

The relevance of the precautionary approach for developing rules in accordance with the LOSC has been recognized by the International Seabed Authority, one of the institutions set up by the Convention. The Authority has incorporated the precautionary approach in the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, which it adopted in, respectively, 2000 and 2010.[49]

Formulation and Core Content of the Principle

The principle is at present formulated as "precautionary approach". It might be considered to reformulate the principle to explicitly refer to ABNJ. A possibility would, for instance, be to formulate it as "States shall apply the precautionary approach in areas beyond national jurisdiction". A short explanation of the principle might contain the following language:

> Principle 15 of the Rio Declaration on the precautionary approach reflects customary international law. As a principle of customary international law it has to

[48] Birnie *et al., supra* note 31 at 163. Trouwborst similarly concludes that customary international law does not prescribe the content of the measures which are to be taken in the implementation of the precautionary approach (Trouwborst, Precautionary Rights, *supra* note 44 at 293–294).

[49] See Regulation 31 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (available at: http://www.isa.org.jm/files/documents/EN/Regs/PN-en.pdf; last accessed 10 February 2012) and Regulations 2, 5 and 33 of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (available at http://www.isa.org.jm/files/documents/EN/Regs/PolymetallicSulphides.pdf; last accessed 10 February 2012). The significance of the precautionary approach for the mining regime of the Areas has been reaffirmed by the Seabed Disputes Chamber of the ITLOS in the Advisory Opinion, at paras. 125–135. The Advisory Opinion expresses the belief that the Authority will repeat or further develop the approach taken in the above Regulations when it regulates exploitation activities and activities concerning other types of minerals (*ibid.*, para. 130).

> be taken into account by States in implementing their obligation to protect and preserve the marine environment of areas beyond national jurisdiction. Customary law does not define the content of the specific measures States have to take in applying the precautionary approach in this context. States are required to assess what specific measures they will have to adopt in discharging their obligation to apply the precautionary approach.

The Ecosystem Approach

Discussion

In a commentary to this principle in the paper prepared by the Netherlands it is noted that it is:

> [m]andated by a range of instruments from the World Charter for Nature (adopted by the UNGA in 1982) to Agenda 21 and the 1992 Convention on Biological Diversity (CBD), but also the UNFSA and the 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem.[50]

The ecosystem approach is not included in the LOSC. At the same time, the Convention can be said to contain a number of elements which indicate that an ecosystem approach may be required to successfully fulfil the purposes of the Convention.[51] The Preamble to the Convention indicates that its States Parties are conscious that the problems of ocean space are closely interrelated and need to be considered as a whole. Article 194(5) provides that measures taken to prevent, reduce and control pollution of the marine environment shall include those necessary to protect and preserve rare or fragile ecosystems. This provision requires that States, in order to comply with it, have to take the ecosystem which needs to be protected and preserved as the starting point of the assessment of which measures have to be taken to protect and preserve it.

The United Nations General Assembly has considered the implications of the ecosystem approach for marine ecosystems in its Resolution on Oceans and the Law of the Sea of 2006.[52] That year's session of the Informal Consultative Process had discussed the issue of ecosystem approaches and oceans, resulting in the determination of agreed consensual elements relating to ecosystem approaches and the oceans.[53] The Resolution of the General Assembly

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[50] Written comments by the Netherlands, *supra* note 6 at p. 6.

[51] See also the discussion on the significance of the Convention for an integrated approach in the section on that approach of the present report.

[52] Oceans and the Law of the Sea; Resolution adopted by the General Assembly on 20 December 2006 (A/RES/61/222 of 16 March 2007).

[53] See 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; Letter dated 14 July 2006 from the

invites States to consider the agreed consensual elements relating to ecosystem approaches and oceans suggested by the Informal Consultative Process.[54] Paragraph 119 of the Resolution also contains the following language:

> (*a*) Notes that continued environmental degradation in many parts of the world and increasing competing demands require an urgent response and the setting of priorities for management interventions aimed at conserving ecosystem integrity;
> (*b*) Notes that ecosystem approaches to ocean management should be focused on managing human activities in order to maintain and, where needed, restore ecosystem health to sustain goods and environmental services, provide social and economic benefits for food security, sustain livelihoods in support of international development goals, including those contained in the Millennium Declaration, and conserve marine biodiversity;
> (*c*) Recalls that States should be guided in the application of ecosystem approaches by a number of existing instruments, in particular the Convention, which sets out the legal framework for all activities in the oceans and seas, and its implementing Agreements, as well as other commitments, such as those contained in the Convention on Biological Diversity and the World Summit on Sustainable Development call for the application of an ecosystem approach by 2010;
> (*d*) Encourages States to cooperate and coordinate their efforts and take, individually or jointly, as appropriate, all measures, in conformity with international law, including the Convention and other applicable instruments, to address impacts on marine ecosystems in areas within and beyond national jurisdiction, taking into account the integrity of the ecosystems concerned[.]

Paragraph 119 of the 2006 General Assembly Resolution has been reaffirmed in the General Assembly Resolutions on Oceans and Law of the Sea of subsequent years.[55]

Formulation and Core Content of the Principle

The principle is at present formulated as the "ecosystem approach". It might be considered to reformulate the principle to explicitly refer to ABNJ. A possibility would for instance be to formulate it as "The conservation of the integrity of marine ecosystems in areas beyond national jurisdiction requires the

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Co-Chairpersons of the Consultative Process addressed to the President of the General Assembly (A/61/156 of 17 July 2006).

[54] Oceans and the Law of the Sea; Resolution adopted by the General Assembly on 20 December 2006 (A/RES/61/222 of 16 March 2007) para. 119.

[55] See, *e.g.*, Oceans and the Law of the Sea; Resolution adopted by the General Assembly on 4 December 2009 (A/RES/64/71 of 12 March 2010) para. 134.

application of an ecosystem approach". A short explanation of the principle might contain the following language:

> The United Nations Convention on the Law of the Sea recognizes that the problems of ocean space are closely interrelated and need to be considered as a whole and sets out the legal framework for all activities in the oceans and seas. In light of the Convention and its implementing Agreements, as well as other obligations and commitments, such as those contained in the Convention on Biological Diversity and the Joint Plan of Implementation adopted by the World Summit on Sustainable Development, which call for the application of an ecosystem approach by 2010, it is recognized that the conservation of the integrity of marine ecosystems in areas beyond national jurisdiction requires the application of an ecosystem approach.

The Integrated Approach

Discussion

This principle is not listed in the paper prepared by the Netherlands, but was mentioned in the intervention by Spain on behalf of the EU and its Member States under agenda item 5(d) at the 2010 BBNJ Working Group.

The LOSC does not explicitly prescribe an integrated approach to oceans management. At the same time, the Convention can be said to contain a number of elements which indicate that an integrated approach may be required to successfully fulfil the purposes of the Convention. The Preamble to the Convention indicates that its States Parties are conscious that the problems of ocean space are closely interrelated and need to be considered as a whole. The Preamble to the Convention moreover indicates that the Convention is intended to establish a legal order for the seas and oceans which will promote the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment. On the other hand, the regime of the Convention is based on a sectoral approach to the regulation of activities in the oceans, which pays scant attention to the coordination between different activities and their cumulative impacts on the marine environment. This not only concerns the regime of specific activities, but in large part also applies to Part XII of the Convention, which is concerned with the protection and preservation of the marine environment. This is particularly evident from Section 5 of Part XII of the Convention on international rules and national legislation to prevent, reduce and control pollution of the marine environment. Section 5 addresses different sources of pollution separately. Section 5 does not address

the question how coordination between the regimes in respect of different sources of pollution is to be achieved.

The purpose of Part XII indicates that an integrated approach may be required to protect and preserve the marine environment. That purpose of Part XII is the protection and preservation of the marine environment as such. This is confirmed by Article 192 of the Convention, which sets out the general obligation of States to protect and preserve the marine environment. Although the purpose of Part XII and Article 192 have to be read in light of the specific obligations which Part XII imposes on States Parties to the Convention, the purpose of Part XII and the general obligation contained in Article 192 are relevant in interpreting those other provisions contained in Part XII.

Two specific interpretations of the provisions of Part XII dealing with specific sources of pollution are possible. One interpretation would be that these provisions take a strictly sectoral approach to dealing with the environmental impacts of specific activities. The result of that interpretation would be that although specific sources of pollution are addressed in accordance with the requirements of the Convention, the cumulative effects of various activities could lead to the pollution of the marine environment. In that case a sectoral approach would fail to protect and preserve the marine environment. This conclusion indicates that these provisions of Part XII cannot be implemented effectively through a strictly sectoral approach. In discharging their obligations under the Convention in respect of specific sources of pollution, States will also have to take into account the cumulative effect of various sources of marine pollution. In other words, the Convention implicitly prescribes an integrated approach in respect of the protection and preservation of the marine environment.

The requirement of such an approach is also implicit in a number of specific provisions of Part XII of the Convention. Article 194 deals in general terms with the measures States have to take to prevent, reduce and control pollution of the marine environment. Paragraph 1 specifies that States shall take all measures that are necessary "to prevent, reduce and control pollution of the marine environment from any source". Paragraph 1 does not indicate that these measures are limited to measures which only deal with specific sources of pollution. As was noted above, Article 194(5) provides that measures taken to prevent, reduce and control pollution of the marine environment shall include those necessary to protect and preserve rare or fragile ecosystems. This provision requires that States take the ecosystem which needs to be protected and preserved as the starting point of the assessment of which measures have to be taken to protect and preserve them. If a sectoral approach does not ensure effective protection, an integrated approach will have to be adopted.

Conversely, it might be pointed out that paragraph 3 of Article 194 confirms that the Convention is premised on a sectoral approach in dealing with sources of pollution. Paragraph 3 provides a list of specific sources of pollution which the measures taken pursuant to Part XII should address. However, paragraph 3 has to be read in the context of the purpose of Part XII, namely the general obligation to protect and preserve the marine environment contained in Article 192 and paragraph 1 of Article 194 discussed above. Read in that context, it is difficult to maintain that Article 194(3) requires a strictly sectoral approach in dealing with pollution of the marine environment. It can moreover be observed that Article 194(3) contains a non-limitative list of the types of measures States are required to take and the paragraph does not exclude that in determining measures for specific sources States have to take into account the cumulative effect of different sources.

The need for an integrated approach can also be said to be implicit in Article 204 of Part XII dealing with monitoring the risks or effects of pollution. Article 204 reads:

> 1. States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.
> 2. In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

Paragraph 1 of Article 204 is concerned with the risks or effects of pollution of the marine environment. This includes those risks and effects which result from the cumulative effects of various sources of marine pollution. On the other hand, paragraph 2 of Article 204 might seem to suggest a focus on the effects of individual activities. However, it can be noted that the reference to activities in paragraph 2 is in the plural. That reference can be taken to also include the need to assess the interactions between different activities. Even if it were to be concluded that paragraph 2 indicates a focus on the effects of individual activities, this is not decisive for the interpretation of paragraph 1 of Article 204. As is indicated by the words "in particular" at the beginning of paragraph 2, it is a non-limitative list.

The report by the 2010 BBNJ Working Group contains a recommendation on an integrated approach, which reads:

> States and competent international organizations should work towards a more integrated and ecosystem-based approach to the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction, in order to

> strengthen cross-sectoral cooperation and effectively address sectoral and cumulative impacts.[56]

Formulation and Core Content of the Principle

The principle is at present formulated as an "integrated approach". It might be considered to reformulate the principle to explicitly refer to ABNJ. A possibility would, for instance, be to formulate it as "The conservation and sustainable use of marine biological diversity in areas beyond of national jurisdiction and the protection and preservation of the marine environment in areas beyond national jurisdiction require the application of an integrated approach". A short explanation of the principle might contain the following language:

> The United Nations Convention on the Law of the Sea recognizes that the problems of ocean space are closely interrelated and need to be considered as a whole. The Convention sets out the legal framework for all activities in the oceans and seas. The purpose of Part XII of the Convention is the protection and preservation of the marine environment. A sectoral approach to address marine pollution may prevent that the purpose of Part XII will be realized, as it may result in ignoring the cumulative effect of various sources of marine pollution. The cumulative effect of various sources of marine pollution can only be addressed by the application of an integrated approach to the protection and preservation of the marine environment in areas beyond national jurisdiction.

It should be noted that the integrated approach and the ecosystem approach discussed in the preceding section at times are also considered jointly.[57] It might be considered to adopt this approach if it is decided to further elaborate the current report.

Sustainable and Equitable Use

Discussion

In a commentary to the principle of sustainable and equitable use in the paper prepared by the Netherlands it is noted that:

> Many international legal instruments now recognize the new paradigm of "sustainable use" or "sustainable development" as outlined by the 1987 Brundtland

[56] Letter dated 16 March 2010 from the Co-Chairpersons of the *Ad Hoc* Open-ended Informal Working Group to the President of the General Assembly (A/65/68 of 17 March 2010).
[57] See, for instance, Letter dated 16 March 2010 from the Co-Chairpersons of the *Ad Hoc* Open-ended Informal Working Group to the President of the General Assembly (contained in the document A/65/68 of 17 March 2010) para. 13.

> Commission. A commitment to sustainable use can be found in the UNFSA, the 1995 FAO Code of Conduct for Responsible Fisheries and the 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem.[58]

The concept of sustainable development and equity are closely related. For instance, Principle 5 of the 1992 Rio Declaration observes that the eradication of poverty, i.e., the realization of intra-generational equity, is "an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world" and Principle 12 provides that:

> States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.

The linkage between sustainable development and intra-generational equity is also apparent from the current discussion on the regime of ABNJ. An important aspect of this debate concerns the development of a regime for marine genetic resources. This debate also concerns the regime on access and benefit sharing, which should be applicable to these resources. Differences of opinion exist on the legal regime which is applicable to these resources. One view is that these resources fall under the freedom of the high seas regime contained in Part VII of the Convention and another view is that they fall under the common heritage regime of Part XI of the Convention. A choice of one of those regimes would have obvious implications for the access and benefit-sharing regime applicable to these resources.

The divergence of views on the regime applicable to marine genetic resources indicates that the formulation of a principle on sustainable and equitable use of (the resources of) ABNJ should accommodate the views of both groups of States.

In order to better assess the options which exist in this respect, it is useful to consider first of all the common ground between the different views. There is a general recognition that the concept of sustainable development is one of the cornerstones of international environmental law. There also is a general recognition that sustainable development and intra-generational equity are intrinsically linked.

A reflection of these basic concepts is also contained in the Preamble of the LOSC, which provides:

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[58] Written comments by the Netherlands, *supra* note 6 at pp. 6–7.

> Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the *equitable and efficient utilization of their resources, the conservation of their living resources*, and the study, protection and preservation of the marine environment,
>
> Bearing in mind 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* [.][59]

At the same time, the legal regime contained in the Convention indicates that these considerations have been given specific content in different ways in respect of individual uses of the ocean. As was already observed, as far as ABNJ are concerned, the regimes of freedom of the high seas and the common heritage of mankind are relevant. Freedom of the high seas implies a regime of equal access, which only to a very limited extent accommodates the special interests and needs of developing countries. Part VII's Article 119(1)(a) on the conservation of the living resources of the high seas contains such a qualification. It provides that in determining measures, States have to take into consideration a number of environmental and economic factors, including the special requirements of developing States. Article 24 of the 1995 Fish Stocks Agreement has further developed this provision in relation to straddling and highly migratory fish stocks. The Fish Stocks Agreement also contains a provision on forms of cooperation with developing States (Article 25) and special assistance to developing States in the implementation of the Agreement (Article 26).

Part XI of the LOSC, in comparison to Article 119, accommodates the special interests and needs of developing States to a larger extent. This, *inter alia*, concerns the participation of developing States in mining activities in the Area (Article 148), benefit sharing derived from mineral activities in the Area (Article 140) and the development of marine science programs for the benefit of developing States (Article 143(3)).[60] The special interests and needs of developing States are also taken into account in Part XIV of the Convention, which is concerned with the development and transfer of marine technology.

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[59] Emphasis provided.

[60] Part XIII of the Convention on marine scientific research contains a provision on the dissemination of information and knowledge, which specifically mentions developing States (Article 244). That provision is also applicable to marine scientific research in the high seas.

The preceding discussion points out that there are three aspects to the concept of intra-generational equity. Equitable considerations can be taken into account in designing regimes on access to resources, on benefit sharing and in capacity building. It should be considered whether the concept of "equitable use" sufficiently captures all these aspects. In the present version of the formulation of the core content of the principle, it has been attempted to capture these aspects by referring to the requirements and interests of developing States. It could be considered to further elaborate this concept in a separate principle on the requirements and interests of developing States.

Formulation and Core Content of the Principle

The principle is at present formulated as "sustainable and equitable use". It might be considered to reformulate the principle to explicitly refer to ABNJ. A possibility would, for instance, be to formulate it as "sustainable and equitable use of areas beyond national jurisdiction". A short explanation of the principle might contain the following language:

> The United Nations Convention on the Law of the Sea creates a legal order for the seas and oceans aimed at equitable and efficient use of marine resources. The management of resources of areas beyond national jurisdiction should result in such resources being used in a sustainable manner to maintain biological diversity to meet the needs of present and future generations. Particular attention should be given to benefits to and the requirements and interests of developing States.[61]

Public Availability of Information

Discussion

In a commentary to this principle in the paper prepared by the Netherlands it is noted that:

> Principle 10 of the Rio Declaration recognizes that "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level… States shall facilitate and encourage public awareness and participation by making information widely available." These provisions are reflected in the 1998 UN-ECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, and its 2005 Almaty Guidelines which declare that "access to information, public participation and access to justice in environmental matters are fundamental

[61] This formulation draws on language included in Principle 9 of the 10 Principles for High Seas Governance, *supra* note 15.

> elements of good governance at all levels and essential for sustainability." The (regional) Aarhus Convention is open for accession by any other UN Member state, with approval of the Meeting of the Parties.[62]

The LOSC contains a number of provisions which are of direct relevance for the public availability of information. This first of all concerns Section 4 of Part XII, which is concerned with monitoring and environmental assessment. Article 204 contains an obligation for States to monitor the risks or effects of pollution of the marine environment. Article 205 provides that:

> States shall publish reports of the results obtained pursuant to Article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.

Article 206, which is concerned with the assessment of potential effects of activities, also contains an obligation to communicate reports of the results of such assessments in the manner provided for in Article 205.

The obligations contained in Section 4 of Part XII do not seem to offer a guarantee that information will become publicly available. First of all, in connection with the obligation to monitor the risks or effects of pollution Article 204(1) stipulates that States "shall [...] endeavour, as far as practicable" to monitor these risks or effects. This wording implies a considerable discretion for individual States. However, these limitations on the obligation to monitor the risks or effects of pollution are not included in the second paragraph of Article 204, which requires States to in particular keep "under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment". It has been noted that the obligation to keep activities "under surveillance" is vague.[63] This surveillance in any case has to be carried out in such a way that it allows a State to establish whether the effects of the activity concerned are likely to pollute the marine environment. Article 204 is applicable to the entire marine environment, including ABNJ, as well as to activities in which a State engages and activities which it permits.

Second, Article 206 on the assessment of potential effects of activities also leaves a considerable discretion for individual States. They shall assess these effects "as far as practicable" if they have reasonable grounds for believing that such activities under their jurisdiction or control "may cause substantial pollution of or significant and harmful changes to the marine environment".

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[62] Written comments by the Netherlands, *supra* note 6 at 7.
[63] Nordquist, *supra* note 26 at 115.

Craik has observed in respect of the qualification of "reasonable grounds" that as a matter of practice:

> The state of origin will likely be given some leeway in determining whether reasonable grounds exist, but this is no different from the deference normally granted to a domestic agency in its determination of whether significant impacts are "likely" to occur.[64]

The reference to "as far as practicable" does not qualify the obligation to carry out an assessment, but is applicable in determining the content of the assessment in a specific case.[65]

The obligation to publish reports contained in Article 205 in the Convention also is not absolute. States shall publish reports *or* provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States. If a State chooses the second option, there is no further obligation to make these reports publicly available.

Article 244 of the Convention is concerned with the publication and dissemination of information and knowledge concerning marine scientific research. The formulation of Article 244 implies an obligation on States to publish and disseminate knowledge resulting from marine scientific research.

Formulation and Core Content of the Principle

The principle is at present formulated as "public availability of information". It is suggested to reformulate the principle to explicitly refer to the obligations of States in this respect. A possibility would, for instance, be to formulate it as "States shall facilitate and encourage public awareness and participation by making information widely available." A short explanation of the principle might contain the following language:

> Principle 10 of the 1992 Rio Declaration recognizes that environmental 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." The United Nations Convention on the Law of the Sea *inter alia* provides for the public availability of information in the context of monitoring and environmental assessment and the

[64] N. Craik, *The International Law of Environmental Impact Assessment* (Cambridge University Press, Cambridge 2008) 98–99.

[65] See also *ibid.*, at 99, concluding that the most likely reason for the inclusion of this provision is to account for the differing capabilities of States. However, in that case a more direct reference to the differing capabilities of States would also have been an option and there may be other reasons explaining the choice of the wording as included.

knowledge resulting from marine scientific research. These obligations also apply to the marine environment of areas beyond national jurisdiction.

Transparent and Open Decision-making Processes

Discussion

In a commentary on this principle in the paper prepared by the Netherlands it is noted that:

> This leads on from Principle [10] of the Rio Declaration. UNFSA Article 12 introduces an obligation on its state parties to provide for "transparency in the decision-making process and other activities of subregional and regional fisheries management organizations and arrangements" and may be regarded as minimum international practice.[66]

The observation that Article 12 of the 1995 Fish Stocks Agreement "may be regarded as minimum international practice" is also subscribed to by Freestone.[67] It should be noted that Article 12 only refers to transparency in decision making and not to openness. This latter point may need some further attention if this principle is further elaborated. It is possible that the concept of transparency as defined in Article 12 also covers the idea of openness.

As indicated by the commentary on the principle of public availability of information contained in the paper prepared by the Netherlands,[68] the 1998 UN-ECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, and its 2005 Almaty Guidelines, are also relevant to considering the present principle of transparent and open decision-making processes.

The LOSC does not explicitly refer to the need for transparent and open decision-making processes. The Convention does envisage certain obligations on States to make information on monitoring and environmental assessments available. However, as was pointed out in the section on Public Availability of Information, there is no guarantee that this information will become publicly available. Other international agreements also do not contain far-reaching

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[66] Written comments by the Netherlands, *supra* note 6 at 7. The quoted text actually refers to Principle 8 of the Rio Declaration, which is concerned with unsustainable patterns of production and consumption and demographic policies. Principle 10 deals with transparency and openness.

[67] See Freestone, *supra* note 16 at 48, who also remarks that "[t]ransparency and openness in the conduct of the work of international and intergovernmental processes is now becoming the norm", *ibid*.

[68] The relevant section is quoted *supra* at note 62.

obligations on transparent and open decision-making processes. For instance, the Convention on Biological Diversity in its Article 14 envisages public participation in environmental assessments, but only "where appropriate".

In light of the above, the 1998 UN-ECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters deserves some further consideration. The Aarhus Convention is a regional Convention—it has been concluded in the framework of the United Nations Economic Commission for Europe (UN-ECE)—but any State that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.[69] At present the Convention only has Member States of the UN-ECE as Parties.

The global significance of the Aarhus Convention has been recognized by the then Secretary-General of the United Nations, Kofi Annan, in 2000:

> Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations. Furthermore, the Convention will be open to accession by non-ECE countries, giving it the potential to serve as a global framework for strengthening citizens' environmental rights.[70]

Another regional example of the elaboration of Principle 10 of the Rio Declaration is provided by the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development, which was adopted by the Organization of American States in 2000.

Formulation and Core Content of the Principle

The principle is at present formulated as "transparent and open decision-making processes". It might be considered to reformulate the principle to explicitly refer to ABNJ. A possibility would, for instance, be to formulate it as "States shall provide for transparent and open decision-making processes in exercising their rights and discharging their obligations in areas beyond

[69] UN-ECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 19(3) (adopted on 25 June 1998; entry into force 30 October 2001; 2161 UNTS 450).

[70] "Foreword by the Secretary-General of the United Nations", in S. Stec and S. Casey-Lefkowitz in collaboration with J. Jendroska, *The Aarhus Convention: An Implementation Guide* (United Nations, New York and Geneva, 2000), v.

national jurisdiction". A short explanation of the principle might contain the following language:

> Principle 10 of the 1992 Rio Declaration observes that "States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." Principle 10 of the Rio Declaration has been elaborated in a number of international instruments, including the UN-ECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development adopted by the Organization of American States. The relevance of Principle 10 of the Rio Declaration has also been recognized in the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, whose Article 12 provides that States shall provide for transparency in the decision-making process and other activities of subregional and regional fisheries management organizations and arrangements. These instruments provide guidance in the further elaboration of Principle 10 of the Rio Declaration in the context of the regime of areas beyond national jurisdiction.

The Responsibility of States as Stewards of the Global Marine Environment

Discussion

In a commentary on this principle in the paper prepared by the Netherlands, it is noted that:

> Principle 21 of the 1972 Stockholm Declaration, and Article 3 of the Convention on Biological Diversity reflect the international customary principle that "States, have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction." A simpler statement of the principle, derived directly from these words and applicable to the high seas and which would be widely regarded as a principle of customary international law, would read as follows: "States… have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment… of areas beyond the limits of national jurisdiction."[71]

[71] Written comments by the Netherlands, *supra* note 6 at 7.

This principle is also contained in the 10 Principles for High Seas Governance adopted by the IUCN in 2008. The commentary on the Principle contained in these Ten Principles has a somewhat different focus than the commentary provided by the paper prepared by the Netherlands. The commentary contained in the 10 Principles for High Seas Governance reads:

> States need to bear responsibility for activities in the high seas by their own governmental agencies, by vessels under their flags, and by their nationals, both individual and corporate. States are responsible for assuring that national activities are carried out in conformity with international law and with the abovementioned principles. The activities of ships and nationals in the high seas should require authorization and continuing supervision and monitoring by the appropriate State. In accordance with the polluter/user pays principle, States should be liable to other States and to the global community in case of damage to the marine environment and resources caused by their vessels and nationals.

Both these commentaries focus on the responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to the environment of ABNJ. In the case of the commentary by the Netherlands, this concerns activities within national jurisdiction and activities beyond national jurisdiction. The commentary by the IUCN focuses on activities in the high seas. The commentary by the IUCN moreover addresses the issue of State responsibility (liability) in case of damage to the marine environment.

The above focus of the commentaries gives rise to a couple of observations. First, it can be questioned whether the concept of stewardship should be considered to primarily concern the obligation of individual States to ensure that activities under their jurisdiction and control do not cause damage to the marine environment of ABNJ. The core significance of stewardship rather is concerned with responsible use of the environment and all types of resources. Stewardship thus has affinity with the principles of sustainable and equitable use and the principle of international cooperation. Second, the narrow definitions of stewardship provided by the commentaries in the paper by the Netherlands and the IUCN High Seas Principles are also covered by, *inter alia*, the principles of respect for the law of the sea, and the protection and preservation of the marine environment, which have been discussed previously.

Formulation and Core Content of the Principle

In light of the above discussion, it should be considered whether it is helpful to include the principle of stewardship in a list of principles for the governance of ABNJ. It might be considered to reformulate the principle to express that it entails the responsible use of resources. The principle might also be

used to express the idea that all States have a shared interest in the governance of ABNJ. However, it remains questionable if the principle thus formulated would add much to the list of principles as formulated above.

In addition, it might be considered to use the concept of "common concern" to express the idea that all States have a shared interest in the governance of ABNJ.[72] The concept of "common concern of humankind" is, for instance, included in the Preamble of the Convention on Biological Diversity. The use of this concept in that context has been explained as follows:

> The "common concern of humankind" is used here in the preamble to emphasize that *all* humanity has an interest [in] ensuring the conservation of biological diversity because biological diversity is essential to sustaining *all* life on earth. Conservation is not an exclusive national affair; it is an issue which has also to be addressed by concerted international action, including the adoption of legal instruments.[73]

Birnie, Boyle and Redgewell have expressed the significance of the concept of common concern as follows:

> If 'common concern' is neither common property nor common heritage, and if it entails a reaffirmation of the existing sovereignty of states over their own resources, what legal content, if any, does this concept have? Its main impact appears to be that it gives the international community of states both a legitimate interest in resources of global significance and a common responsibility to assist in their sustainable development.[74]

Rayfuse and Warner have argued that the common interest of all States in ABNJ could provide the legal basis for a new approach to the governance of the ABNJ.[75] They note that the expansion of the common heritage principle is often posited as a point of departure for a new regime for the high seas, but as they observe, "expanding the application of [this] regime to the high seas in general is a difficult proposition."[76] Instead they propose to devise a regime

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[72] It has also been suggested that the concept of common concern might provide a basis to bridge the gap between the different views of States on the legal regime applicable to marine genetic resources in ABNJ (High Seas Workshop, *supra* note 1 at 6 and 22).

[73] L. Glowka, F. Burhenne-Guilmin and H. Synge, *A Guide to the Convention on Biological Diversity* (Environmental Policy and Law Paper No. 30; IUCN, Gland 1994) 10 (emphasis in the original).

[74] See Birnie *et al., supra* note 31 at 130 (footnote omitted).

[75] Rayfuse and Warner, *supra* note 22, especially at 408–411.

[76] *Ibid.*, 408–409.

that straddles the divide between the common property concept underlying high seas freedoms and the common heritage concept. The objective of this regime would be to protect not only the common interests, but also the common concerns of humanity in the protection and preservation of the marine environment.[77]

A common ground could be found in the concept of public trust. As Rayfuse and Warner observe, this idea was already expressed by the Independent World Commission on the Oceans in 1998, which recommended that "the 'high seas' be treated as a public trust to be used and managed in the interests of present and future generations".[78] Certain aspects of the public trust concept are already present in the current high seas concept. For instance, regional fishery management organizations remain based on an open access regime, but this access is subject to the rules set by the regional organizations.[79] Other examples of global or regional organizations fulfilling the role of trustee are the States Parties to the London Convention and the London Protocol[80] and MARPOL[81] and certain regional arrangements, such as Regional Seas agreements.[82] The trusteeship model proposed by Rayfuse and Warner does not presuppose that all revenues and benefits are shared on the basis of a common heritage principle. Rather, revenues received by the trust should be reinvested back into the trusteeship property.[83]

In the context of ABNJ, the concept of "common concern" might be formulated as follows: "The governance of areas beyond national jurisdiction is a common concern of humankind." It would be advisable that the commentary to this principle explicitly acknowledges that it is not intended to modify the scope of the principles of freedom of the high seas and common heritage of mankind contained in the LOSC, but that it is intended to reinforce the fundamental notion that all States have a shared interest in and responsibility

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[77] *Ibid.*, 410.

[78] *Ibid.*, quoting from Independent World Commission on the Oceans, *The Oceans: Our Future* (Cambridge University Press, Cambridge 1998), 17.

[79] Rayfuse and Warner, *supra* note 22 at 411.

[80] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted on 29 December 1972, entry into force 30 August 1975; 1046 UNTS 120); Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted on 7 November 1996, entry into force 24 March 2006 ((1997) 36 ILM 7).

[81] International Convention for the Prevention of Pollution from Ships (adopted on 2 November 1973, entry into force 2 October 1983, as amended by the 1978 Protocol; 1340 UNTS 61).

[82] Rayfuse and Warner, *supra* note 22 at 412.

[83] *Ibid.*, at 411.

for the governance of ABNJ. The principles of freedom of the high seas and common heritage of mankind would operate in line with this fundamental notion. The concept of public trust seems to have a slightly different connotation from common concern, as it may give the impression that it is concerned with ownership and exclusionary rights. This might make this concept less attractive than that of common concern. On the other hand, the concept of public trust might seem to be more specific in content, implying, *inter alia*, stronger commitment to and basis for joint action.

Other Possible Governance Principles

Introduction

Apart from the governance principles discussed above, a number of other principles[84] may be relevant for the governance of ABNJ. This includes the following:

- responsibility and liability in respect of damage caused by pollution to the marine environment;
- the polluter-pays principle;
- best environmental practices and best available techniques;
- environmental impact assessment; and
- protection and preservation of the marine environment through the establishment of marine protected areas.

The following subsections will briefly consider these principles in order to facilitate a further discussion as to whether it should be considered to include them in a list of governance principles for ABNJ. A general argument for their inclusion is that their exclusion might suggest that they are considered of lesser relevance for the governance of ABNJ than the principles which are currently listed. It is questionable that this actually is the case.

[84] This does not necessarily concern principles in the strict sense of that word. The additional "principles" have been included because it is considered that they have a similar significance for ABNJ as the principles discussed in the preceding sections.

Responsibility and Liability in Respect of Damage Caused by Pollution to the Marine Environment

The issue of responsibility and liability in respect of damage caused by pollution to the marine environment is addressed in Article 235 of LOSC.[85] Article 235 reads:

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

Article 235 consists of a number of elements. Paragraph 1 first of all recognizes that States are responsible for the fulfilment of their obligations concerning the protection and preservation of the marine environment. This provision, which, so to speak, introduces the issue of liability, is concerned with the obligation of States to discharge their obligations in good faith.[86] The second sentence of paragraph 1 of Article 235 establishes the liability of States for damage caused by pollution of the marine environment. The Convention does not further elaborate this general provision on liability. As is indicated by paragraph 1 of Article 235, States "shall be liable in accordance with international law". This reference implies that this matter is regulated by the general

[85] It should be noted that the term "responsibility" is used in two different senses in international law. Article 235 is an example of the employment of the term to refer to the obligation of States to discharge their international obligations. The term "responsibility" is also used in the context of State responsibility. In the latter context the notion of responsibility entails that a State which has breached an international obligation to another State is required to make reparation to the latter. Paragraph 1 of Article 235 in that connection makes reference to the liability of States. Liability in this sense is governed by the law on State responsibility (see also Nordquist, *supra* note 26 at 412). Paragraphs 2 and 3 of Article 235 are also concerned with the liability for damage to the environment caused by private parties.

[86] For a discussion of this obligation see also *supra* text at note 19.

rules of international law applicable to State responsibility.[87] Paragraph 3 of Article 235 requires States to cooperate in the implementation and further elaboration of the law of State responsibility. Paragraph 2 of Article 235 is concerned with the availability of legal remedies against natural or juridical persons under national legal systems.

Apart from the general provisions on responsibility and liability in Article 235 of the Convention, Article 139 of the Convention contains a provision on the liability of States in respect of mining activities in the Area. Article 22 of Annex III to the Convention is concerned with the liability of contractors and the Authority in respect of mining activities in the Area.[88]

Article 235, including the provisions on civil liability, is also applicable to ABNJ. It should be noted that a number of international instruments dealing with civil liability exclude environmental damage beyond the 200-nautical-mile limit.[89] A governance principle dealing with liability of natural and juridical persons will have to take those Conventions into account. In that connection a choice will have to be made whether the regime contained in those Conventions in the future should be extended to also cover ABNJ (and the continental shelf beyond 200 nautical miles) or whether it should remain solely applicable to areas within 200 nautical miles.

The issue of State responsibility is a complex legal matter and it probably is not appropriate to address it further in an elaboration in the specific context of a list of governance principles for ABNJ. At the same time, Article 235 is applicable to the entire marine environment, including ABNJ. Similar considerations apply as regards paragraph 2 of Article 235, which deals with civil liability. In light of the above, it might be considered to include a reference to State responsibility and compensation and relief by referring to Article 235 and Article 139 of the Convention. In that connection, particular reference could also be made to the requirement on States to cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage. It could be recognized that such cooperation should be developed in accordance with the needs in this respect as regards ABNJ.

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[87] See also note 85 *supra*.

[88] The liability of contractors and their sponsoring States and the relationship between the two is discussed in the Advisory Opinion of the Seabed Disputes Chamber of the ITLOS, at paras. 165–211 and 242.

[89] See, *e.g.*, International Convention on Civil Liability for Bunker Oil Pollution Damage, Article 2 (adopted on 23 March 2001; entry into force 21 November 2008 (Doc. LEG/CONF 12/19 of 27 March 2001)).

The Polluter-Pays Principle

The polluter-pays principle requires that the costs of pollution prevention, control and reduction measures must be borne by the polluter. The polluter-pays principle is an elaboration of the principle that the person who has polluted the (marine) environment is liable for the damage caused. The polluter-pays principle is not included in the LOSC, but it has been included in Principle 16 of the Rio Declaration and in a number of international agreements.[90] It could be considered to include the polluter-pays principle in a list of governance principles in view of its relevance to effective environmental policies and the recognition it has received internationally.

Best Environmental Practices and Best Available Techniques

The concepts of best environmental practices (BEP) and best available techniques (BAT) are considered as suitable tools to prevent and eliminate pollution of the environment. The concepts have been included in a number of international instruments. An example is provided by the OSPAR Convention. Appendix 1 to the OSPAR Convention provides that BEP means "the application of the most appropriate combination of environmental control measures and strategies" and that BAT means "the latest stage of development (state of the art) of processes, of facilities or of methods of operation which indicate the practical suitability of a particular measure for limiting discharges, emissions and waste".

The LOSC does not employ the concepts of best environmental practices and best available techniques. However, the Convention does require States Parties to take "all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities".[91] The Convention does not define the term "necessary" in this connection, but it is reasonable to assume that it expresses at least the same level of action as implied in best environmental practices. Article 194(1) contains one important limitation on the obligation of States to take all necessary measures using the best practical means. They can discharge this obligation "in accordance with their capabilities". It has been observed that this wording:

[90] See, *e.g.*, OSPAR Convention, Article 2(2)(b).
[91] LOSC, Article 194(1).

> clearly reflects the concern of developing States that the obligations imposed by this Article regarding the prevention, reduction and control of pollution could impose excessive burdens on them.[92]

The concept of best practicable means, which is employed in the Convention, has been equated with the concept of best available technology.[93] In this connection it can also be observed that the Authority has included the concept of "best technology available" in Regulation 31 of its Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area. Moreover, the concept of best environmental practice has been employed by the Authority in Regulations 5 and 31 of its Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area.

The preceding analysis indicates that it might be considered to propose the inclusion of an explicit reference to the concepts of best environmental practices and best available techniques in a list of principles for the governance of ABNJ. These concepts have been applied in international instruments following the adoption of the LOSC. The Convention itself does not explicitly refer to the concepts, but Article 194(1), which refers to the obligation of States to take all necessary measures using the best practical means, reflects these concepts. The reference to "in accordance with their capabilities" in Article 194(1) implies a limitation on the applicability of the concepts as regards developing States. Moreover, Article 194 should be interpreted in light of the development of the law as regards these concepts. That approach also indicates that these concepts have to be applied in implementing the environmental provisions of the Convention.[94]

Environmental Impact Assessment

The LOSC addresses the requirement of environmental impact assessment in Article 206 and there is general agreement in the international community that this matter should be considered in the further elaboration of the regime for ABNJ. In this light it would seem to be an option to include a specific reference to environmental impact assessment in a list of guiding principles for the governance of ABNJ. If that option were to be pursued, it should also

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[92] Nordquist, *supra* note 26 at 64; see also Birnie *et al., supra* note 31 at 389.

[93] See A. Nollkaemper, *The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint* (Martinus Nijhoff Publishers, The Hague 1993) 137.

[94] See also Seabed Disputes Chamber of the ITLOS, Advisory Opinion, at paras. 136–137.

be considered whether to also include a reference to strategic environmental assessments.[95]

Protection of the Marine Environment through the Establishment of Marine Protected Areas

The international community agrees that the establishment of marine protected areas is an important aspect of the regime for ABNJ. Marine protected areas can be an important tool in furthering the objectives of an integrated and ecosystem approach for the areas concerned. In this light it would seem to be an option to include a specific reference to protection of the marine environment through the establishment of marine protected areas in a list of principles for the governance of ABNJ.[96]

The Relationship Between Areas Within National Jurisdiction and ABNJ

The focus of the analysis of this report is on the regime of ABNJ. This is explained by the fact that this same focus dominates much of the current debate on the further elaboration of the regime for oceans governance. It should, however, be questioned whether the regime of areas within national jurisdiction should be completely ignored. The dilemma in this respect is aptly expressed by Treves:

> This spatial limitation hinges on the fact that the [LOSC] allocates to the coastal state sovereign rights or jurisdiction on most important maritime activities in the exclusive economic zone and on the continental shelf, and that most coastal states consider it unacceptable to enter into discussions that might imply questioning recently obtained and hard-fought rights. Yet, the reasons for discussing and developing ocean governance as regards new activities do not stop at the 200-mile line. Concepts like the ecosystem approach, concerns as those linked to climate change and its effect on the oceans, or the preservation of marine biodiversity, are global in character—as is the rational management of many fisheries—and thus not limited to the high seas. Any approach to these or similar

[95] Environmental impact assessment and strategic environmental assessment in relation to ABNJ are discussed in the report *Environmental Impact Assessment in Areas Beyond National Jurisdiction*, which has also been prepared in the framework of the Study of Biological Diversity and Governance of the High Seas and which is included in this special issue.

[96] Marine protected areas in relation to ABNJ are discussed in the report *Marine Protected Areas*, which has also been prepared in the framework of the Study of Biological Diversity and Governance of the High Seas and which is included in this special issue.

> subjects that leaves aside the huge portion of the oceans under national jurisdiction may be flawed.[97]

The need to take into account interactions with areas within national jurisdiction in shaping a future regime for ABNJ has also been recognized by others.[98] As the remarks by Treves indicate, there might be a risk that the introduction of this topic might lessen the willingness of at least certain coastal States to support initiatives to enhance the governance framework for ABNJ. At the same time, the governance principles which have been formulated in the preceding analysis are equally applicable to areas within and beyond national jurisdiction. This suggests that it would be possible to include appropriate language in a statement of principles to reconfirm that these principles are also applicable to areas within national jurisdiction. In this connection, it would be possible to apply a safeguarding clause similar to that contained in Article 3(1) of the Fish Stocks Agreement. This Article provides that Articles 6 and 7 of the Agreement also apply to areas under national jurisdiction:

> subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention [on the Law of the Sea].

Content and Format of a Document on Governance Principles for ABNJ

Introduction

The present section deals with questions 3 and 4 which have been identified in the introduction of this report. These questions are:

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[97] T. Treves, 'The Development of the Law of the Sea since the Adoption of the UN Convention on the Law of the Sea: Achievements and Challenges for the Future' in D. Vidas (ed.) *Law, Technology and Science for Oceans in Globalisation* (Martinus Nijhoff Publishers, Leiden 2010) 41–58, at 58.

[98] See, *e.g.*, High Seas Workshop, *supra* note 1 at 27; V. Golitsyn, 'Major Challenges of Globalisation for Seas and Oceans: Legal Aspects' in Vidas, *supra* note 97, 59–73 at 68; S. Arico and S. Maqungo, *Co-chairs' Report for the Global Forum on Oceans, Coasts and Islands; Working Group of Marine Ecosystems and Uses in Areas beyond the Lmits* [sic] *of National Jurisdiction at the 4th Global Conference on Oceans, Coasts, and Islands*, 7–11 April 2008, Hanoi, Vietnam (available at: http://www.globaloceans.org/globaloceans/sites/udel.edu.globaloceans/files/GlobalForumSubmission-2ndAdHocWGMeeting-April2008-red.pdf; last accessed 4 April 2011) 13.

- What is the best format to recognize the relevance of governance principles for ABNJ?; and
- How should an instrument listing these principles seek to achieve their further implementation?

The following section sets out a number of considerations which might be taken into account in answering these two questions.

Considerations

Different formats have been suggested for adoption of a list of governance principles applicable to ABNJ. One option would be an implementing agreement to the LOSC. This option has been regularly suggested in the debate on ABNJ in the framework of the General Assembly of the United Nations. Another option would be the adoption of a declaration by the General Assembly. These two options have also been identified by others.[99]

A first question is whether States are willing to enter into negotiations on an implementing agreement or a declaration of principles. Proposals to start negotiations on an implementing agreement have not received unanimous support at past meetings of the BBNJ Working Group. The 2011 BBNJ Working Group reached agreement on a recommendation to the General Assembly that:

> a process be initiated by the General Assembly, with a view to ensuring that the legal framework for the conservation and sustainable use of [marine biodiversity in ABNJ] effectively addresses issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under [the Convention].[100]

The reference to the *possible* development of a multilateral agreement under the Convention was included because a number of States at the 2011 BBNJ Working Group did not accept that further negotiations had to result in the adoption of such an instrument.[101]

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[99] See, for instance, D. Freestone, *Problems of High Seas Governance*, 2009, University of New South Wales, Faculty of Law Research Series 42 (available at: http://www.austlii.edu.au/au/journals/UNSWLRS/2009/42.html; last accessed 4 April 2011); Warner, *supra* note 1 at 221–224.

[100] Reported in the Summary of the Fourth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 31 May–3 June 2011 (*Earth Negotiations Bulletin* Vol. 25, No. 70, Monday, 6 June 2011) 6.

[101] See *ibid*.

It might be easier to secure agreement on the adoption of a declaration as compared to an implementing agreement. In addition, the time and effort which would be required to negotiate an implementing agreement in all likelihood would be much greater than in the case of a declaration. States may be more reluctant to accept commitments which are framed as legal obligations and negotiations to arrive at an acceptable compromise text may take more time than in the case of a declaration of principles. At the same time, the discussions at the 2011 BBNJ Working Group confirm that there is broad agreement that the issues under consideration of the BBNJ Working Group should be considered as a package.[102] This makes it unlikely that it would be possible to secure agreement on an instrument on principles for the governance of ABNJ without also simultaneously addressing the issue of access to and benefit sharing of marine genetic resources in ABNJ.

Another difference between the two options is that an implementing agreement is a treaty instrument. Its entry into force may require a considerable period of time. The LOSC itself entered into force in 1994, 12 years after its adoption in 1982. The 1995 Fish Stocks Agreement, which is an implementing agreement to the Convention, entered into force in December 2001. Once an implementing agreement has entered into force, it is legally binding on the States Parties to it, but this is not the case for non-Parties. A declaration is a legally non-binding instrument. However, its adoption by unanimity or an overwhelming majority of States would give it considerable authority. An advantage of a declaration over an implementing agreement would be that it would be possible to take steps to effectuate the commitments contained in it immediately after its adoption. In the case of an implementing agreement, it would be likely that States would only start to implement the agreement fully after they have become a Party to it and it has entered into force.[103]

Another characteristic of an instrument containing legally binding obligations is that disputes concerning the implementation of those obligations in principle can be the subject of dispute settlement procedures.[104] Such procedures can lead to the conclusion that a State has not discharged its obligations under an instrument and is required to do so. This possibility in any case does not exist in the case of a non-binding instrument. It has been suggested that the availability of compulsory dispute settlement mechanisms constitutes an

[102] See *ibid*.

[103] It should be noted that the experience with the Law of the Sea Convention and the Fish Stocks Agreement shows that States may already take the provisions of a treaty into account before it has formally entered into force.

[104] That is, depending on the type of dispute settlement mechanisms, which will have been agreed during the negotiations of an instrument.

essential element of an effective regime for ABNJ.[105] Whether dispute settlement is really that central in this respect may be open to doubt.[106] Compulsory dispute settlements mechanisms are relatively little used, are slow and costly, and may not always be able to effectively address implementation deficits. The development of reporting and assessment procedures seems a more effective tool to monitor the progress in the implementation of the regime for ABNJ by States. In any case, compulsory dispute settlement mechanisms are available under the LOSC and many other existing treaty instruments applicable to ABNJ.

Apart from these general considerations, it is also relevant to take into account a number of considerations which are specific for the case of governance principles for ABNJ. The preceding analysis points out that a significant number of the principles which have been mentioned for inclusion in a list of governance principles either are already contained in the LOSC or are relevant to implementing obligations contained in the Convention because they are customary international law.[107] The argument that an implementing agreement would be required to make the governance principles for ABNJ legally binding thus only is relevant to a limited extent, if at all.[108] In addition, it would also be possible to recognize the obligatory force of these principles in a declaration. The inclusion of governance principles in an implementing agreement or a declaration would thus serve the same general purpose. It would be the recognition by the international community that these governance principles provide the basis for the regime of ABNJ.

An implementing agreement or a declaration could also serve the purpose of further elaborating the governance principles for ABNJ. One reason to suggest the adoption of an implementing agreement has been that it would allow the addition of specific content to these principles. Such specific content can

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[105] See, *e.g.*, Rayfuse and Warner, *supra* note 22 at 420.

[106] This also seems to be recognized by Rayfuse and Warner, who stress the significance of compliance mechanisms and the need to develop preventive diplomacy techniques to preempt disputes (*ibid.*, at 416 and 421).

[107] See also Freestone, *supra* note 99; High Seas Workshop, *supra* note 1 at 7.

[108] The need for a legally binding instrument has for instance been stressed in the High Seas Workshop, *ibid.*, at 7, 25 and 27. The Summary submits that:

> While much progress could be made at the sectoral and regional levels incorporating both voluntary and binding approaches, ultimately there would be significant advantages in moving towards a binding global agreement as a framework to guide the holistic development and implementation of sectoral and regional efforts (*ibid.*, 25).

This preference for a legally binding global instrument seems to be explained by the fact that it could not only restate a list of governance, but could also add specific detail to the principles (see *ibid.*, at 7).

be expected to contribute to a more effective regime for ABNJ. As is observed by Freestone in respect of these principles:

> All however require much more rigorous implementation as the first steps in the development of a robust and appropriate system of international governance for the high seas.[109]

Two aspects should be distinguished as far as providing specific content to obligations is concerned. First, there is a need to operationalize the generally framed governance principles applicable to ABNJ. This operationalization can also be achieved in a legally non-binding instrument. An example in this respect is provided by the Code of Conduct for Responsible Fisheries and the International Plans of Action to further implement the Code adopted by the Food and Agriculture Organization.

Second, there have to be adequate institutional mechanisms. A number of institutions which deal with specific activities in ABNJ already exist. What is particularly lacking is a mechanism to effectively coordinate the activities of these different mechanisms.[110] It can be questioned whether an implementing agreement would be the best option to establish a global mechanism to coordinate the implementation of and cooperation on a regime for ABNJ. Such a mechanism will also have to deal with the legal regime applicable to the oceans, of which the LOSC is the main component. Attempts to establish such an oceans organization in the framework of the negotiations of the LOSC failed.[111] It is not to be expected that there now is more support for such an organization. Moreover, the definition of functions and the relationship of such an organization to existing institutions can be expected to be extremely complex.

On the other hand, according a role to the General Assembly of the United Nations could be a viable alternative. This option might be more easily acceptable and would not require dealing with the relationship with other institutions through the development of an implementing agreement. The General Assembly already undertakes an annual review and evaluation of the implementation of the LOSC and other developments related to oceans and the law of the sea. New aspects could be easily added to the already existing role of the

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[109] Freestone, *supra* note 99; see also Rayfuse and Warner, *supra* note 22 at 421.

[110] See also, *e.g., ibid.*, 412–415.

[111] See A.G. Oude Elferink 'Reviewing the Implementation of the LOS Convention: The Role of the United Nations General Assembly and the Meeting of States Parties' in A.G. Oude Elferink and D.R. Rothwell (eds.), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff Publishers, Leiden 2004) 295–312 at 302.

General Assembly. The same applies to the role of the Secretary-General as far as reporting to the General Assembly is concerned.

The LOSC does not envisage that its Meeting of States Parties has a general supervisory role in respect of the Convention and the law of the sea.[112] There have been attempts to widen the mandate of the Meeting of States Parties. In view of the considerable opposition to these attempts, however, the Meeting of States Parties does not offer a viable alternative to the General Assembly as a mechanism for the coordination at the global level of the regime for ABNJ.

Other global mechanisms in general have deferred to the General Assembly as far as general questions in relation to the Convention and oceans and the law of the sea are concerned. These other bodies in any case do not have a mandate to deal with these questions in a comprehensive way. The only possibly alternative to using the United Nations General Assembly would be to broaden the mandate of an existing body or to create a new body. In view of the fact that a role for the General Assembly in all likelihood would be sufficient to ensure the coherence of the regime for oceans governance at the global level, it would not seem to be helpful to suggest the broadening of the mandate of an existing body or to create a new body in this connection.[113]

The United Nations General Assembly could act as a focal point for reporting by global and regional institutions and instruments and States in respect of ABNJ. In addition, it could deal with the following specific tasks: the elaboration of generally applicable guidelines as appropriate; the development of benchmarks to assess the implementation of the regime for ABNJ; monitor the progress in implementation of the regime for ABNJ. These tasks should contribute to working towards guaranteeing that there is coherent and effective regime for ABNJ.

The implementation of an effective regime for the governance of ABNJ requires the involvement of a large number of global and regional mechanisms. At the global level this concerns, for instance, apart from the General Assembly, the Convention on Biological Diversity, the International Seabed Authority and the International Maritime Organization. Regional fisheries management organizations and arrangements have the primary responsibility for the management and conservation of high seas fisheries and certain regional

[112] For a discussion of the relationship between the General Assembly and the Meeting of States Parties see Oude Elferink, *supra* note 111; T. Treves 'The Role of the General Assembly of the United Nations and the Meeting of States Parties to the LOS Convention in Reviewing its Implementation' in A.G. Oude Elferink (ed.) *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff Publishers, Leiden 2005) 55–74.

[113] See also High Seas Workshop, *supra* note 1 at 6. The summary suggests that the mandate of the Informal Consultative Process, which operates in the framework of the General Assembly, be broadened to serve as an intergovernmental steering committee (see also *ibid.*, at 17).

seas conventions play an important role in the protection and preservation of the marine environment of ABNJ. The existence of this multiplicity of instruments and institutions suggests that it may be difficult to agree at the global level on detailed rules to operationalize the principles applicable to ABNJ. A specific elaboration of a general principle may be appropriate for the regulation of one specific sector, activity or issue, but not for another or across the board.

At present, a large number of instruments already exists which could be used to give, or which already give, specific content to the governance principles for ABNJ listed in the section on Governance Principles for ABNJ. For instance, the discussion on the principle of transparent and open decision-making processes pointed to the relevance of Principle 10 of the 1992 Rio Declaration, the UN-ECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development and the 1995 Fish Stocks Agreement. Instead of focusing on the detailed elaboration of principles in a new instrument, existing instruments could be used as building blocks to implement the existing governance principles for ABNJ. In that context, these instruments should be further elaborated as appropriate.[114]

Points for Discussion

The preceding analysis points to a number of considerations to be taken into account in deciding on the content and format of an instrument containing governance principles for ABNJ. This concerns the following:

1. It does not seem that there are significant advantages to negotiating an implementing agreement as compared to a legally non-binding declaration of principles;
2. The linkage between the topic of governance principles and the other topics under discussion at the BBNJ Working Group suggests that the adoption of an instrument on governance principles is only feasible if progress on all of the topics under consideration is reached at the same time;
3. Most if not all of the governance principles for ABNJ discussed in the present report are already binding on States Parties to the LOSC and other

[114] See also Warner, *supra* note 1 at 231–233; High Seas Workshop, *supra* note 1 at 6 and 23–24, which identifies a number of governance and regulatory gaps of the existing legal framework.

States[115] and an instrument on governance principles should recognize that most if not all of these principles already are binding on States;

4. It might be considered to include in an instrument on principles a reference to the need to take into account interactions between ABNJ and areas within national jurisdiction;
5. There might be merit to introducing the concept of "common concern" or "public trust" as an overarching principle for the governance of ABNJ. Such a reference would be intended to reinforce the fundamental notion that all States have a shared interest in and responsibility for the governance of ABNJ. The principles of freedom of the high seas and common heritage of mankind would operate in line with such an overarching principle;
6. An advantage of drawing up an instrument containing a list of governance principles for ABNJ would be that it brings these principles together in one single document and would unequivocally recognize their relevance. To be effective, such an instrument should in addition:
   a. contain commitments to apply and operationalize these principles;
   b. identify institutions and other actors which have a role in the implementation of these principles;
   c. provide for reporting by these institutions and other actors to a global body which could be responsible for:
      i. further elaborating generally applicable guidelines as appropriate;
      ii. the development of benchmarks to assess the implementation of the regime for ABNJ;
      iii. monitoring the progress in implementation of the regime;
      iv. guaranteeing that there is a coherent regime;
7. The General Assembly of the United Nations at present seems to be the most appropriate candidate for fulfilling the tasks set out under item 6.c above;
8. The focus in dealing with the implementation of a future regime for ABNJ should be on ensuring compliance. This suggests that there may be limited additional value in a legally binding instrument which would permit disputes over its implementation or application to be submitted to third-party dispute settlement entailing binding decisions. Compulsory dispute settlement mechanisms are in any case available under the Convention and many other existing treaty instruments applicable to ABNJ;

[115] This conclusion also applies to States that are not a Party to the Convention. To the extent that the principles reflect customary law, they are in principle binding on all States. Provisions of the Convention in general are recognized to reflect customary international law.

9. The elaboration of detailed substantive rules and procedures to implement the governance principles in one instrument applicable to all ocean uses is not a viable option; and
10. A large number of specific instruments already exist which can be used to further elaborate the governing principles for ABNJ. One necessary step in this connection would be to identify these existing instruments and to assess if they need to be reinforced or supplemented by additional instruments.