Governance of Marine Areas Beyond National Jurisdiction:
Towards a Principled Approach

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BBNJ Prep Com
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IUCN Governance Initiative

2008 IUCN Marine Programme produced a draft of principles applicable to high seas governance

2008 October Barcelona World Conservation Congress:

“10 Principles of High Seas Governance”
What is a Legal Principle?

- Different from a rule or a methodology
- Abstract formulation of potential general application
- Can be in the Preamble or in a separate provision of a treaty
- Informs the interpretation and implementation of the text
Governance of ABNJ: 10 Principles

- Not new principles
- Derived from existing global and regional instruments
- Accepted by consensus - not controversial
- Have never been collected together before in this form
- BUT
Legal Regime
Plethora of Instruments

- 1982 Law of the Sea Convention
- 1992 Rio Declaration and Agenda 21
- 1993 FAO Compliance Agreement
- 1995 UN Fish Stocks Agreement
- 1995 FAO Code of Conduct
- 2001 Reykjavík Declaration
- 2002 WSSD POI
- 2009 FAO Port State Measures Agreement
- 2012 Rio + 20
Principle 1

Conditional Freedom of Activity on High Seas
Freedoms of the Seas

Recognized by 1982 LOSC (art. 87)

Freedom of Navigation
Freedom of Overflight
Freedom to Lay Submarine Cables/Pipelines
Freedom to Construct Artificial Islands/Installations
Freedom of Fishing
Freedom of Scientific Research

BUT these are not ABSOLUTE Rights
For Example - Freedom of Fishing

Art. 116 LOSC:

- “All states have the right for their nationals to engage in fishing on the high seas, **subject to**
  
  (a) their treaty obligations
  
  (b) the rights and duties, ... [and] interests of coastal states ...

  (b) the provisions of this section.”

- NOT an absolute right. It requires:
  
  - cooperation for management and conservation (art 117)
  
  - conservation measures based on:
    
    - Best scientific evidence available
    
    - Environmental and economic factors
Principle 2
Protection and Preservation of the Marine Environment
Protection and Preservation of the Marine Environment

Article 192 LOSC

- “States have the obligation to protect and preserve the marine environment.”

Article 194.5 LOSC

- “The measures taken ... shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitats of depleted, threatened or endangered species and other forms of marine life.”
Principle 3

International Cooperation
Legal Duty of Cooperation

1970 UNGA Declaration of Principles of International Law

- All states have the duty to cooperate with one another … in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress …

1982 UN Law of the Sea Convention Art 117

- All states have the duty to take or co-operate with other states in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.
Principle 4

Science-Based Approach to Management
Science-based Approach to Management

Science-based approach already recognised by the legal Instruments but needs to be universally applied:

- In assessment of impacts of new activities and expansion of existing activities
- In allocation of catch targets
- E.g. allocation proportions can be political but TACs should be based
Principle 5

Precautionary Approach
Rio Principle 15

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capacities. 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.
Principle 6

Ecosystem Approach
Ecosystem Approach

- Origins – adopted by UNGA, by Agenda 21 and is in the UNFSA and the 2001 Reykjavik Declaration
- Needs to be internalised by ocean decision makers
  - to consider range of impacts of activities
- Networks of marine protected areas as part of large scale spatial planning
- GEF Large Marine Ecosystem Programme is supporting this
- High Seas are an ideal place to implement this – fewer boundaries and stakeholders
Principle 7

Sustainable and Equitable Use
Sustainable Development and Equitable Use

- Rio Declaration and Agenda 21
- In *Gabcikovo-Nagymaros (1997)*
  - International Court pointed out
    - “need to reconcile economic development with protection of the environment … aptly expressed in the concept of sustainable development “
- “Sustainable Use” is in UNFSA, Code of Conduct and Reykjavik Declaration…
Sustainable and Equitable Use

- Part of UNFSA and WSSD commitments
- Sustainability is undermined by over-capacity, overcapitalization and by subsidies:
  - Global annual cost of $50 billion is equivalent to more than half the value of the global trade in fish
    - (The Sunken Billions – World Bank/FAO 2008)
  - Decreases the ability of developing countries (new entrants) to benefit from fisheries (intra-generational equity)
  - Diminishes future options for sustainable fisheries (inter-generational aspects)
Principle 8

Public Availability of Information
Principle 9
Transparent and Open Decision Making Processes
Principle 10

Responsibility of States as Stewards of the Global Marine Environment
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1995 FAO Code of Conduct for Responsible Fisheries

Development of the Responsibility concept
Advisory Opinion of ITLOS Chamber on responsibilities of Sponsoring States
Advisory Opinion of ITLOS on responsibilities of flag States for failure to regulate ships and nationals
Greater responsibility for behaviour of citizens – boats, crews and owners and investors – all in value chain.

Compare state obligations under the Moon Treaty
Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies

Article VI

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.
Thank You