



**Statement of Hiroko Muraki Gottlieb
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**Intergovernmental conference on an international legally binding instrument under
the United Nations Convention on the Law of the Sea on the conservation and
sustainable use of marine biological diversity of areas beyond national jurisdiction
(UNGA Res. 72/249)**

Item 6: Cross-cutting Issues

New York, Monday, 5 April 2019

Check against delivery

Madame Facilitator/President,

Thank you for giving International Council of Environmental Law the floor.

GENERAL PRINCIPLES AND APPROACHES

On general principles and approaches, Section 1 has a mix of principles of international law, environmental protection, good governance, and balance so it would benefit from reorganization. Also, additional principles from UNFSA and UNCLOS could be incorporated. Same reorganization could be done for MGRs, ABMT and EIA sections.

We agree with CARICOM that on objectives, there are specific objectives that are pertinent to specific parts. For example, the CBTT “principles” are actually objectives of CB/TT and could for the most part be in that section. Also, we note that a clear idea of what the Member States desire to get out of the MGR element could be reflected in the objectives. Any obligations and mechanisms for MGRs could then be measured against such objectives.

§ Legend: **Bold** = in ATN, *Italics* = UNFSA, underline= UNCLOS

Suggested new section 1.

o *In order to conserve and sustainably manage* marine biodiversity in areas beyond the limits of national jurisdiction, States shall, *in giving effect to their duty to cooperate in accordance with the Convention:*

Act: Principles to guide the adoption of specific actions and results

- o Adopt measures to proactively protect and preserve the marine environment (UNCLOS)
- o *Adopt measures to ensure the conservation and sustainable use of marine biodiversity and promote the objectives* of “maintaining marine biodiversity and protecting and restoring the health, productivity and resilience of the ocean and marine ecosystems in ABNJ.” (Rio+20)
- o **Adopt measures to build resilience to the effects of climate change**
- o Adopt measures to ensure that any use of natural resources and biodiversity is equitable and ecologically sustainable. (instead of “promote sustainable development”)
- o **Act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another**



- o *Assess the impacts of human activities* on marine biodiversity in ABNJ and adopt the necessary conservation and management measures to avoid significant adverse impacts on the marine environment including biodiversity and dependent and associated ecosystems [combination of SDG 14.2; and UNGA 61/105]
- o Act as stewards on behalf of present and future generations in the management of marine resources and activities affecting biodiversity in ABNJ and ensure that actions support and do not erode the health, productivity and resilience of ocean and marine ecosystems.”

How: principles to guide management and environmental decision-making

- o **Ensure that such measures are based on the best available scientific information and knowledge, including traditional knowledge**
- o Ensure that activities in ABNJ are planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgments about, their possible impacts [from [Antarctic Madrid Protocol](#) article 3 on Environmental Principles (many more could be added)]
- o **Apply an ecosystem approach** in accordance with Article xxx
- o *Apply the precautionary approach widely in order to protect marine biodiversity and preserve the marine environment in accordance with Article xxx;*
- o **Apply an integrated approach** in accordance with Article xxxx;
- o Apply the polluter pays principle [shortened form of ATN).

How: principles of good governance

- o **Ensure transparency and the timely availability of information**
- o **Promote and facilitate public participation in addressing the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, take into account and respond to public comments**
- o *Collect and share in a timely manner complete and accurate data and information concerning activities likely to affect marine biodiversity in ABNJ*
- o *Promote and conduct scientific research and develop appropriate technologies in support of biodiversity conservation and management*
- o *Implement and enforce conservation and management measures through effective monitoring, control and surveillance*

How: principles of balance

- o **In adopting measures to protect and preserve the marine environment and conserve marine biodiversity pursuant to this agreement, States Parties shall:**
 - o **Respect the balance of rights, obligations and interests enshrined in the Convention**
 - o **Have due regard to the rights, duties and interests of other States as reflected in relevant provisions of the Convention**
 - o **Respect the rights and jurisdiction of coastal States over all areas under their national jurisdiction, including the continental shelf within and beyond 200 nautical miles and the exclusive economic zone**
 - o **Respect the sovereignty and territorial integrity of all States**
 - o **Take into account the special requirements of small islands developing States and least developed countries, including by ensuring that measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto developing countries**
 - *Take into account the concerns of potentially affected States and populations by ensuring prior notification, consultation and agreement on measures*



that are *compatible with* and no less effective than/*do not undermine the effectiveness of* national measures [based on adjacency text in ATN]

Promote international cooperation and coordination, at all levels, including north-south, south-south, and triangular cooperation.

TRADITIONAL KNOWLEDGE

On TK, as highlighted by PSIDS, the principles would benefit from a clear indication on the role of TK. For example, on the precautionary principle, we believe that clarification is needed as to the role of TK in the decision-making process.

Part III section 1 includes Precautionary approach under general principles and approaches. The general principles applying to MGRs, ABMTs and EIAs suggest options of the precautionary principle or precautionary approach. We recognise that the precautionary approach as articulated in article 15 of the Rio Declaration is generally a softening of the principle because it is to be applied by States according to their capabilities and calls for a value judgement of 'cost effectiveness' in applying measures to prevent environmental degradation.

The point we would like to make about whether the approach or principle is applied is the need to include inherent bias towards scientific knowledge in the principle to the exclusion of other knowledge systems. While the principle is about making precautionary decisions when faced with a lack of scientific knowledge, it still uses scientific evidence as the trigger. Other knowledge systems, such as traditional knowledge are not given the same weighting for making precautionary decisions. For example, what may appear to be of little threat of damage based on scientific evidence so that precautionary management is not applied may be contrary to traditional knowledge that is intimately connected with the area in question.

Options under section 4.3.1 'proposals for designating area-based management tools option I (3)' attempts to incorporate traditional knowledge into decision making, however, we argue that it does not go far enough in giving the two knowledge systems equal playing field in decision making. The option suggests proponents 'apply the precautionary approach/principle and the ecosystem approach and take into account relevant traditional knowledge of indigenous peoples'. It is unclear in this option whether TK should be taken into account for the ecosystem approach or the precautionary principle. If TK is to be given proper consideration as a knowledge base for precautionary management instead of token reference as one of the considerations to be taken into account, the ILBI may need to rearticulate how traditional knowledge informs precautionary decision making.

RELATIONSHIP TO OTHER CONVENTIONS

We believe that Options I and III in subparagraph (2) could be clarified, as pointed out by CARICOM. Articles 197 and 237 as well as the Preamble of UNCLOS could provide guidance in that regard.

The key here is that it will be important for the text of ILBI to reflect the mandate of this IGC, which is to set environmental requirements and standards as well as recommended practices and procedures as necessary to enhance conservation, protection and preservation of BBNJ, and to elaborate on how such obligations are to be operationalized, consistent with the general principles and objectives of UNCLOS.



o Article 237 confirms that a new agreement may impose additional obligations with respect to the protection and preservation of the marine environment, provided they are carried out in a manner consistent with the general principles and objectives of the Convention.

o UNCLOS Article 237 is important as it allows for evolution of UNCLOS to be interpreted in the light of new international environmental law agreements and commitments.

o Article 197 in UNCLOS specifically envisages and calls for the development of additional international rules, standards, and recommended practices and procedures to protect and preserve the marine environment.

o As is recalled in the Preamble to UNCLOS, such objectives include “the conservation of their living resources, and the study, protection and preservation of the marine environment.” As noted above, UNCLOS principles, including the freedom of the high seas, are not absolute but are to be exercised under the conditions laid down by the Convention and other rules of international law.

o UNCLOS Preamble also envisages a more coherent and integrated approach to ocean management, by recalling that “the problems of ocean space are closely interrelated and need to be considered as a whole.”

INTERNATIONAL COOPERATION

On international cooperation, as with many other delegations, we agree that a specific obligation on international cooperation will be needed. We also believe that this paragraph would benefit from greater detail on ways in which States Parties could collaborate. We will highlight four ways this might be done.

The text of Article 197 of UNCLOS gives prominence to global cooperation, as well as the need to cooperate, as appropriate, on a regional basis, and to take into account “characteristic regional features.”

First—identify the parties who will cooperate (e.g. other States Parties, directly and through competent international organizations). The UN Fish Stocks Agreement as well as CBD’s Article 5 may give inspiration. For example, “States Parties shall cooperate with other States Parties, directly and through competent international organizations.”

Second—define the objectives for cooperation that meets the ambition for ILBI. Rio+20 Outcome Document para 158 may be helpful. Building on Rio + 20, a more ambitious provision could be provided, such as “to protect, and restore, the health, productivity and resilience of marine ecosystems and biodiversity in ABNJ, enabling their conservation and sustainable use for present and future generations (Rio +20 Outcome Document para. 158).

Third—define the objectives relating to the provision of and access to resources required for effective CBTT which will assist developing countries, such as SIDS and LDCs, to effectively participate in, implement, and benefit from this Agreement.

Fourth—define how to cooperate. The UN Fish Stocks Agreement Articles 5, 6, 7, 8 among many others, in fact the entire UNFSA, provide a very useful model to operationalize the duty to cooperate. The new instrument could build on UNCLOS Articles 192, 197 and 237 in a similar way to define how States cooperate to achieve the objectives of ILBI and apply



the general principles. On that point, Rio+20 paragraph 158 could provide further inspiration.

Thank you.

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