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Commentary on 'Governance Principles for Areas beyond National Jurisdiction'

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Abstract
This paper comments upon the list of governance principles for areas beyond national jurisdiction (ABNJ) advanced in the Report by Alex Oude Elferink. It begins by considering the meaning of governance principles, and how they can contribute to the development of the legal regime for ABNJ. It suggests that such principles need to be rooted in more than existing rules, although such rules provide an important means of inducing the existence of general principles. Governance principles need to be properly aligned with the nature of the spaces and resources found in ABNJ, as well as with fundamental values of the international community and contours of legal authority. The paper offers some further comments on the specific principles, emphasising the importance of not just strong procedural approaches, but also principles that facilitate a sound and reliable knowledge basis for decision-making and that advance a strong version of integrated management.

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Introduction

The question of how best to regulate areas and activities located beyond the limits of national jurisdiction is one of paramount concern to international lawyers. Apart from the practical need for rules to ensure that activities are conducted in a conflict-free, safe and environmentally sensitive manner, the issue is also of concern because of the particular political and intellectual challenges it provokes. What rules should be adopted, how, and by whom, and, more fundamentally, what values should such rules advance? Areas beyond the limits of (exclusive) national jurisdiction (ABNJ) are necessarily subject to collective regulation. This means that any regulation ought to be inclusive of the interests of all States and, potentially, the international community as a whole. Here the distinction is between the disaggregated views of States and the aggregate views of the international community. This presents myriad problems, not least in distinguishing between such views, but in finding the means, institutional or otherwise, to capture these values.

The purpose of this paper is to reflect upon some aspects of this complex set of issues in light of Alex Oude Elferink's Report on the Design and Operation of Governance Principles for ABNJ. That Report sets out and comments upon a list of eleven principles and four potential principles that could be used to direct the more specific regulation of ABNJ. Fortunately, there is considerable merit in his review of the issues, so one is afforded the luxury of adding a gloss to his efforts, although it is hoped that some of the comments will also provoke further debate about the content and role of these principles. In the second part of this paper, some reflections are provided concerning the 'legal' nature of oceans governance principles, first in terms of their broader legitimacy, and then second in terms of how they fit within existing structures of international law. In the third part of this paper, I consider the key principles in turn, exploring where there may be room for strengthening the

authority of each principle and noting any potential problems, whether practical or conceptual, with the scope of each principle.

The Meaning and Legitimacy of Governance Principles

For Oude Elferink, there are two reasons for formulating the list. The first is to provide unequivocal reconfirmation that these principles have to be applied to ABNJ. The second is to provide a sound basis for developing a coherent regime for the governance of ABNJ.[1] In adopting this position, Oude Elferink regards the list to be somewhat declaratory, i.e., a restatement of principles that already exist and apply to ABNJ. The process is inductive and so Oude Elferink takes time to provide evidence in support of each principle. Although this may be sufficient, it is useful to dig a little deeper into the question of the role of such principles, since it is useful to have some external measure of the principles' legitimacy other than their purely instrumental function. Also, an inductive approach perhaps constrains future opportunities by focusing on what exists at present and may be regarded as self-limiting.[2] We have the opportunity to design such principles with an eye on developing a better regulatory regime.

In an earlier exploration of the principles and objectives of oceans governance, Treves was keen to point out that governance does not always coincide with the concept used by lawyers; it includes the idea of "good government, government for the general interest of those governed, on the basis of commonly shared values and with the involvement of stakeholders".[3] This rightly alludes to the broader legitimacy that any system or governance regime must possess if it is to succeed. Oude Elferink's principles may well possess legitimacy in narrow legal terms, but they should also possess a deeper sense of legitimacy.[4]

Taking our lead from Treves, one means of evaluating Oude Elferink's principles is to ask whether or not they conform to broader ideas of good governance. Notions of governance abound in the wider academic literature.[5] It is a rather mutable concept, but it is generally understood to be concerned with direction, delivery, facilitation, and information provision in the context of a decision-making process. Thus Krasner talks of "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations".[6] However, it is not simply governance to which we aspire, but a particular quality of good governance. This is much more difficult to articulate and reach agreement on. Accounts of good governance generally include:

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[1] A.G. Oude Elferink, *Governance Principles for Areas Beyond National Jurisdiction*, Report on Research Question 2 of the Study on 'Biological Diversity and Governance of the High Seas' (commissioned by the Netherlands Ministry of Affairs, Agriculture and Innovation) (2011). A revised version of the Report is included as one of the contributions to this Special Issue (see Introduction).

[2] See A. D'Amato, 'International Law as an Autopoietic System' in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making* (Springer, Berlin, 2005), 335.

[3] T. Treves, 'Principles and Objectives of the Legal Regime Governing Areas Beyond National Jurisdiction' in A.G. Oude Elferink and E.J. Molenaar (eds.), *The International Regime of Areas Beyond National Jurisdiction: Current and Future Developments* (Martinus Nijhoff, Leiden, 2010), 7-25, at 7.

[4] On the legitimacy of law generally, see further, J. Brunée and S. Toope, *Legitimacy and Legality in International Law* (Cambridge University Press, Cambridge, 2010).

[5] For a useful perspective see S.J. Toope, 'Emerging Patterns of Governance and International Law' in M. Byers (ed.), *The Role of International Law in Politics. Essays in International Relations and International Law* (Oxford University Press, Oxford, 2001), 91. Also, P. Sands, 'International Law in the Field of Sustainable Development' (1994) 65 *British Yearbook of International Law* 303-81; K. Ginther, E. Denters and P.J.I.M de Waart (eds.), *Sustainable Development and Good Governance* (Martinus Nijhoff, Leiden, 1995).

[6] S. Krasner, 'Structural Causes and Regime Consequences: Regimes As Intervening Variables' in S. Krasner (ed.), *International Regimes* (Cornell University Press, Ithaca, 1983), 2.

participation of stakeholders, accountability of decision-makers, the existence of institutions capable of supporting decision-making, procedural or substantive integration in the regulation of subject matter, and some degree of certainty so as to provide a basis for forming expectations about future behaviour.[7] Good governance also includes adaptability, because social and real world conditions are not fixed in stone, and so decision-making must be capable of accommodating new eventualities. Such attributes permeate Oude Elferink's principles, especially respect for the law of the sea, international cooperation, the integrated approach, public availability of information, and transparent and open decision-making. Indeed, nothing in this list visibly challenges our ideas of good governance. The real challenges will come when trying to put these principles into practice.

It may be noted that governance as outlined above is overtly about how to make decisions. It is a means to an end, rather than the end itself. This suggests an overtly procedural approach. This is not necessarily problematic, as long as sufficient procedures or institutions exist to support decision-making. This may be more problematic, for at present decision-making in respect of ABNJ remains highly decentralised and rather fragmented. Furthermore, it is suggested that the principles should also be concerned with the substantive goals of the international community, such as resource allocation and environmental protection.[8]

Some of Oude Elferink's principles touch upon substantive matters, such as the protection and preservation of the marine environment, sustainable and equitable use, and stewardship. However, these are couched in rather general terms and Oude Elferink takes some care to avoid being drawn into any consideration of resource distribution. For example, he suggests that the principle of sustainable use should accommodate the views of both groups of States, supporting either free access or the application of common heritage to marine genetic resources in ABNJ.[9] Further reliance is placed upon the highly contextual notion of equitable use, thereby avoiding making any generalisations about who gets what and when. That said, even Rawls shied away from an overtly redistributive approach, preferring to leave such uncertain matters to ongoing dialogue and process.[10]

Here is not the place to engage in a sustained critique of procedural fairness in international law. However, one can observe that since the formal equality of States has limited influence on actual decision-making, even formal procedural guarantees may not result in equitable outcomes. Unless the institutions of governance can properly structure and facilitate the interactions of all States, then adopting a limited or minimalist procedural approach exposes one to the criticism that one is simply reinforcing structural inequalities between States.

Another approach is to ask whether or not the application of governance principles is properly aligned with the regulatory subject matter. The value of this approach is that such an alignment can reinforce not only the procedural principles, but also the substantive principles, since they are concerned with a broader range of values. Arguably, there are three measures of 'fit' that can be used to test the suitability of governance principles: physical fit, legal fit and moral fit. In addition, we might consider political fit and intellectual fit.

The first test of fit is to ask whether or not the principles of governance are properly aligned with the physical nature of the subject matter to which they apply. If law is to be meaningful, it must not ignore the natural limits of the subject matter. Thus we do not

[7] See, for example, the principles listed in: European Commission, *White Paper on European Governance* (WPEG), COM(2001) 428 final [2001] OJ C287/1. Also, C. Harlowe, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187.
[8] T.M. Franck, *Fairness in International Law and Institutions* (Clarendon Press, Oxford, 1995), at 7-9.
[9] Oude Elferink, *supra* note 1, Section on Sustainable and Equitable Use, Discussion.
[10] J. Rawls, *A Theory of Justice* (Oxford University Press, Oxford, 1972), at 304.

legislate for bottled sunlight or treat finite resources as renewable. What then are the physical attributes of ABNJ that determine the fit of governance principles? Some of the general attributes of ocean spaces in ABNJ have been known for centuries. Thus the boundless and inexhaustible qualities of the oceans sustained the Grotian principles of freedom of the high seas for centuries.[11] However, there is now better awareness of the complex relations within and between ecosystems which may demand more nuanced regulatory approaches that can account for such interactions. Ocean waters remain physically unbound and fluid, capable of interactions with water bodies within and beyond national jurisdiction. The quality of water bodies is sustained and replenished through complex global processes. This means that water bodies in ABNJ should not be governed in isolation from other marine or natural environments. Thus the principles must embrace cooperative action, and not merely as a matter of process. It may indeed demand a more general application of an approach akin to the compatibility requirement under Article 7 of the Fish Stocks Agreement.[12]

The open seas also defy physical boundaries that can generally exclude persons from access to them. They are a common-pool natural resource, and so are difficult and costly to regulate.[13] The seas sustain multiple uses, ranging from navigation to resource provision. This demands integrated and inclusive decision-making. The physical nature of the oceans places a high degree of inter-relationship between the oceans and the creatures living therein. Such resources, such as, for example, fish, are moveable and difficult to isolate from each other or from their habit unless extracted by capture, meaning that they cannot be readily reduced to exclusive control in their natural state. Marine living resources may be renewable, but we know that there are thresholds for exploitation, which if crossed will cause the degradation, collapse, and potential extinction of a resource.

Marine ABNJ also comprise the sea-bed and its mineral resources, and, arguably, living resources around deep sea hydrothermal vent sites. The mineral resources are finite and exhaustible and so regulatory principles might be designed to direct users towards the most sustainable use patterns.[14] Other resources in ABNJ, such as biodiversity, are inherently indivisible, shared goods. This may demand different kinds of regulatory principles. Here it is important to distinguish biodiversity from the components of biodiversity, such as individual species of fish. The latter are potentially subject to appropriation and may be subject to acquisition or individual control. In contrast, biodiversity is a non-exclusive attribute that transcends the individual components of biodiversity. All persons have an interest in biodiversity, but individuals cannot regulate it in isolation. Thus biodiversity 'goods' in ABNJ demand positive obligations to cooperate, gather and share information, as well as potential constraints, on individual activities that may compromise biodiversity.[15]

It should be apparent that the physical nature of marine ABNJ and the resources therein reinforce the need for cooperative and integrated regulation. Yet they also require principles that can adapt to their physical (including biogeochemical) exigencies. This strongly reinforces the importance of Oude Elferink's principles that encompass the ecosystem approach, the precautionary approach, an integrated approach, and the use of

[11] R. Barnes, *Property Rights and Natural Resources* (Hart, Oxford, 2009), at 171.
[12] 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 (1995) 34 *ILM* 1542.
[13] Barnes, *supra* note 11, at 1-3.
[14] This approach is considered by David Ong in respect of the continental shelf. D. Ong, 'Towards an International Law for the Conservation of Hydrocarbon Resources within the Continental Shelf?' in D. Freestone, R. Barnes and D. Ong (eds.), *Law of the Sea: Progress and Prospects* (Oxford University Press, Oxford, 2005), 93.
[15] See R. Barnes, 'Fisheries and Biodiversity' in M. Fitzmaurice, D. Ong and P. Merkouris (eds.), *Research Handbook on International Environmental Law* (Edward Elgar, Cheltenham, 2010), 542-63.

science-based management. If regulation is to be aligned with the nature of a resource, then it must be based upon sound knowledge and good science.

The second test of governance principles is that of legal fit. Subject to the foregoing remarks about the physical alignment of regulatory principles, governance principles ought to be sensitive to limits inherent in current legal processes, such as the allocations of authority and the limits imposed by law as a concept. For example, principles should not require States to act *ultra vires*. It is notable that Oude Elferink mostly limits his discussion of the principles to ABNJ, treating it as a discrete legal space. But matters are not so simple. Oude Elferink is sensitive to the broader political context within which the regime of ABNJ is developing. As Treves has observed, the 'high seas only' approach is the product of ideology and history, and ensures that the hard-fought extension of State sovereignty over sea areas is not threatened by incursions from institutions operating in ABNJ.[16] However persuasive the arguments for the application of governance mechanisms that transcend such boundaries are, political will and legal boundaries seem to dictate otherwise.

It must be observed that the limits of legal authority are not always well aligned to regulation of marine spaces, hence the difficulties in regulating straddling and highly migratory fish stocks. Indeed, one could argue that any legal authority drawn without any regard to the nature of a thing is doomed to fail. We have all heard of the story of King Canute and his attempt to command the tides. In the present author's opinion, this strong regard for legal boundaries produces a degree of conflict within the logic of the principles. For example, Oude Elferink places much emphasis on the principle of integration, focusing on integration between different sectors, such as fisheries and pollution control, but at the same time limiting this principle spatially to ABNJ.[17] Given the overlapping nature of the subject matter and the potential for transboundary interactions, it seems incongruous to ignore that integration should also operate spatially back into areas *within* national jurisdiction (AWNJ) and this should form an explicit part of this principle.[18] At the very least it should provoke efforts to overcome the potential obstacles presented by capriciously drawn boundaries of legal authority.

Another aspect of legal fit is the requirement that individual legal rules ought to form part of a coherent system of rules. This requires similar factual situations to be addressed by similar rules. For example, unless a rational distinction can be drawn between pollution of coastal waters and pollution in ABNJ, then a similar rule concerning liability for harm should apply to each instance of pollution. The requirement for coherence means that legal principles applicable to ABNJ ought to be consistent with principles for the law of the sea and international law in general.

Next is the question of the alignment of governance principles with fundamental moral values. If governance principles are aligned with fundamentally held values, then they will have a higher degree of legitimacy. All legal institutions are underpinned by a broader set of values, and it is useful to understand what these are and how they influence the institution. For example, it is widely acknowledged that property is justified according to a plurality of social values.[19] Natural rights theory in the Lockean tradition demands that socially productive work is rewarded. In the liberal tradition, a high value is placed on governance mechanisms that protect the material and political agency of individuals. Under utilitarian theory, decisions are designed to maximise general welfare. Transcending these approaches is the idea that property rules should facilitate social order and be consistent and

[16] Treves, *supra* note 3, at 12.
[17] See, however, the qualifying remarks in Oude Elferink, *supra* note 1, Section on The Relationship Between Areas Within National Jurisdiction and ABNJ.
[18] See, for example, Article 142 of the LOSC.
[19] Barnes, *supra* note 11, chapter 2.

certain, so that future action may be planned. It goes beyond the scope of this paper to consider this further, but such values clearly have a role to play in testing the principles of governance for ABNJ. Such values might not be universal values, but they are certainly powerful, especially within Western legal traditions. The point is not to espouse a particular set of values, but rather to indicate that values should play a role in the design of legal institutions, including governance principles for ABNJ.

Two additional measures of the legitimacy of the principles are suggested. First, governance principles should be sensitive to questions of political authority. In its most simple form, this means that the principles must be something that can be realised in practice. This suggests a degree of pragmatism, and this may run counter to the previous call for 'morally fitting' governance principles. However, there is clearly no point in designing a principle for which there is no political will. Thus, there seems little point in calling for the creation of a new supra-national agency that will manage ABNJ, at least for the present.

It is notable that Oude Elferink was quite careful to draft the first principle in terms that guarded against a singular legal characterisation of ABNJ, given the well-known differences of opinion on the status of marine genetic resources. On the other hand, he more than dips his toe in the waters of institutional reform by considering quite seriously the idea of ocean stewardship. Political power is more often manifest in more subtle ways, and it is important to be sensitive to this also. For example, any government agency or department possesses a degree of independent personality and generates a degree of functional self-value. In practice such agencies may jealously guard their existing authority and seek to acquire more. This may make it difficult to secure agreement between different constituencies when there is the risk of a loss of authority. 'Political fit' understood in these senses might not be the best driver of governance, but it does caution against being dangerously idealistic.

Finally, there is the question of intellectual fit. Developments in governance do not occur in an intellectual vacuum. The information, ideas and values that inform public debate and decision-making are readily drawn from various intellectual disciplines, e.g., science, politics, economic, law and so on. In the past there has been a tendency for the debate to stay within the secure realms of discrete epistemic communities. However, such divides are breaking down and there are demands for far greater integration and collaboration between different disciplines.[20] It is suggested that this intellectual climate demands principles that embody integration between natural and social sciences, and that each has an important role to play in defining the scope and content of the principles.[21] This is manifest in part in Oude Elferink's call for principles embodying science-based decision-making, the precautionary approach and the ecosystem approach.

The Legal Status of the Principles of Oceans Governance

It was noted above that principles ought to fit within existing legal structures. A further aspect of this looks at how the enumerated principles fit within or relate to the formal sources of international law. It is not immediately obvious where governance principles might lie. Article 38 of the Statute of the International Court of Justice (ICJ) refers to:

> "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

[20] See, for example, the collection of essays from the International Foundation for Law of the Sea (IFLOS) Symposia reproduced in (2009) 24(2) *IJMCL*.

[21] This interdisciplinarity is a feature of resilience-based approaches. See C. Folke, 'Resilience: The Emergence of a Perspective for Social-Ecological Systems Analyses' (2006) 16(3) *Global Environmental Change* 253-67.

b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;"

If we read further into the exposition of the principles by Oude Elferink, we clearly see a deliberate effort to locate them within existing rules of treaty law and, in particular, the United Nations Convention on the Law of the Sea (LOSC). To this extent, the principles might merely be regarded as a reiteration of various rules of treaty law. I think, however, that this is not enough. If this were the case, then this simply repeats the existence of existing obligations under international law. They are binding on States party to the relevant agreement(s), and may have wider effect if they meet the requirements of Articles 34-38 of the Vienna Convention on the Law of Treaties, and produce legal effects for third States, or form part of customary international law. The principles might constitute rules of customary international law of a rather general nature.

Locating such principles in custom has the immediate advantage of establishing general rules that are binding on all States, and this seems to be of fundamental importance in the development of a legal regime for the regulation of a global commons that all States are entitled to access and utilise. This would require Oude Elferink to demonstrate that each and every principle manifests the requirements of customary international law. This may be the case for many manifestations of each principle, but I do not propose to categorically review that status of each principle in terms of its customary status.[22] This is not to deny that some of the principles discussed are in fact rules of customary international law, or that particular manifestations of the principles are part of customary international law. However, the important point here is that the principles are principles, and not merely rules.

Reading the Report as a whole, it is clear that Oude Elferink wants to do something more, or perhaps less, than list existing rules or treaty law or custom. The principles are not intended to simply reconstitute strictly binding rules of law for application to ABNJ, and so the principles might be viewed as a poor relation of binding laws. But, on the other hand, they would appear to possess a more nuanced directive quality, capable of shaping a range of more precise rules, and so are more than mere rules. There is an important distinction between rules and principles, which needs to be kept in mind when evaluating the function of the principles.

> A rule [...] is essentially practical and, moreover, binding; there are rules of art as there are rules of government, while a principle expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence.[23]

I shall return to this distinction in more detail below, but first it is useful to comment on the third source of international law: the category of general principles.

The precise nature and function of general principles of law is a much debated topic.[24] This is despite the fact that general principles find a place in most legal systems. One view is that such principles are rules accepted in the municipal law of all 'civilised' States. A more nuanced view is that they authorise the ICJ to apply "principles of municipal jurisprudence,

[22] Various principles have been considered in more detail by other writers. See, for example, A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (Kluwer Law International, The Hague, 2002).
[23] *Gentini case* (1903). Cited in B. Cheng, *General Principles of International Law as Applied by International Courts and Tribunals* (Cambridge University Press, Cambridge, 1953), at 24.
[24] See further, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius, 1987).

insofar as they are applicable to the relations of States."[25] Resort to such principles was a more common feature of international adjudication in the nineteenth century. This reflected the fact that international law was a less complete system and recourse to such principles was necessary in order to prevent a *non liquet*. It is notable that in the twentieth century, the ICJ has had little occasion to refer to general principles to resolve the disputes before it. This is because rules of custom and treaty generally provide a sufficient basis for a decision. It may also be because the ICJ is conservative in its application of rules derived from positive law, so as not to threaten its consent-based jurisdiction.[26] Discrete from general principles narrowly construed, Brownlie also lists as a source "general principles of international law".[27] These appear to include rules of custom and logical propositions resulting from judicial reasoning. However, they have a distinct identity:

> "In many cases these principles are to be traced to state practice. However, they are primarily abstractions from the mass of rules and have been so long and so generally accepted as to be no longer *directly* concerned with State practice."[28]

It is notable that the leading text on the law of the sea acknowledges a minor role for the category. The authors take the view that the "rather vague category of 'general principles of international law' is not of great significance for the law of the sea".[29] They go on to note that certain principles are of profound importance to the law of the sea, such as freedom of the high seas. However, they suggest that these are better categorised as principles of custom. These are distinct from commonly accepted general principles, such as estoppel or *audi alteram partem*, which have strongly influenced the procedural administration of international law. The treatment of principles in this way reaffirms Brownlie's view that the sources of international law cannot be rigidly classified.

A useful, threefold classification of legal principles is provided by de Sadeleer.[30] First, he lists the general summaries of the law as presented by academic scholars. Second are general principles of legal logic, such as the *lex specialis derogat legi generali* rule, which are better regarded as interpretative tools. Finally are general principles that have been created by courts to provide greater coherence to the legal system and fill gaps or remove obscurity within the legal system. It is this third category that provides the more useful starting point for our analysis. Principles in this third sense play a crucial role by providing coherence to a legal system. They provide a means of ordering more specific legal rules, and of ensuring a degree of consistency within legal systems. For example, a general principle may be the polluter-pays principle. Within the umbrella of the general principle may be numerous specific rules, dictating, for example, that a ship-owner is strictly liable for damage caused by the release of oil resulting from a collision, or that a fisherman is responsible for using fishing gear that causes damage to habitats. The individual rules share a familiar resemblance and may be subject to shared constraints and modes of operation. New rules, or the application of existing rules to new situations, may be evaluated according to the extent that they fall within the general principle, or share common traits with analogous rules. A

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[25] R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (Oxford University Press, Oxford, 2008), vol. I, at 37.
[26] W. Friedmann, *The Changing Structure of International Law* (Stevens and Sons, London, 1964), at 189.
[27] I. Brownlie, *Principles of Public International Law*, 6 th ed. (Oxford University Press, Oxford, 2003), at 18-9.
[28] *Ibid.*, at 19.
[29] R.R. Churchill and A.V. Lowe, The Law of the Sea, 3rded. (Manchester University Press, Manchester, 1999), at 12.
[30] N. De Sadeleer, *Environmental Principles. From Political Slogans to Legal Rules* (Oxford University Press, Oxford, 2002), at 236.

court faced with the application of a rule may refer to the general principle underlying the rule to help determine its proper meaning.

A general principle is induced from a mass of specific rules. This approach is followed by Oude Elferink. Care must be taken here if we are to accept principles of law induced from State practice; then there is always the risk that the principle is advanced without due attention to the body of law that supports it. It would hardly be permissible to assert a general principle that was derived from a custom that in itself was not clearly supported by evidence of sufficient State practice. A cautionary tale here is the treatment of sustainable development by the ICJ in the *Gabčikovo-Nagymaros* case.[31] The ICJ referred to the 'concept' of sustainable development, not the principle, without further relying upon it as the basis for its judgment. Although Weeramantry strongly advocated the existence of a customary principle in his Dissenting Opinion,[32] Lowe has more convincingly argued that the concept lacks a fundamentally norm-creating character.[33] In this sense it is better regarded as part of a framework within which decisions can be made. This is not critical to the exercise of advancing a list of principles of oceans governance, but it does caution against an unsophisticated view of their normative relevance.

It is interesting to note that Oude Elferink refrains from adopting a formal definition of the term 'governance principle'. He is clearly sensitive to the complexities and complications that follow from any such definition. Instead he settles for a working definition that conceives of governance principles as guiding States and other actors in adopting and implementing specific rules or approaches in respect of activities in ABNJ.[34] The only threshold used to calibrate such principles is the quality of 'bindingness', which in itself is somewhat mutable.

Some Observations on the Governance Principles

As Oude Elferink notes, there is little need to formulate a list of principles of oceans governance from scratch. One or other of the principles and, quite often, most of the principles have been iterated elsewhere.[35] Such principles are not merely the views of academics, but are also being advanced by States, and this is surely the most important test of their normative relevance.

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

At first glance, this call for respect for the law of the sea suggests something analogous to the rule of law, as applied to ABNJ. This would seem a strong first choice for a governance principle. However, Oude Elferink seems to struggle to pin this principle down, and ultimately suggests that it might be phrased thus: "The international law of the sea establishes a comprehensive legal order for areas beyond national jurisdiction". There is nothing wrong with this statement, evincing a general truth about the law of the sea. It does, however, seem to lack the normative force one might expect of a principle, and one wonders whether it might be better restated as: "States shall respect the comprehensive order for the law of the

[31] (1997) ICJ Rep. 7.
[32] Weeramantry, Dissenting Opinion, *ibid.*, at 92 *et seq.*, especially at 104.
[33] A.V. Lowe, 'Sustainable Development and Unsustainable Arguments' in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development. Past Achievements and Future Challenges* (Oxford, University Press, Oxford, 1999), 19 and 25.
[34] Oude Elferink, *supra* note 1.
[35] See, for example, D. Freestone, 'Modern Principles of High Seas Governance - The Legal Underpinnings' (2009) 39 *Environmental Policy and Law* 44-9.

sea that applies to areas beyond national jurisdiction". A further point, which is not raised by Oude Elferink in his principle, is the issue of compliance, particularly through the mechanism of flag State jurisdiction. Most activities in ABNJ are carried out by private persons, who are subject to the control of flag States. Unfortunately, the mechanism of flag State control is imperfect, either because of the practical problems of securing compliance, or the lack of political will by certain flag States to properly control the activities of vessels flying their flag. This is a significant and generally understood governance gap, and one that would usefully be filled by an explicit governance principle.

Closer reading of the commentary suggests a more nuanced content, since Oude Elferink combines a potential number of principles under this first heading. He begins by discussing the conditional freedom of the high seas, as contained in Article 87 of the LOSC. This much seems uncontroversial as it applies to the high seas, especially the strong emphasis on the conditionality of this principle. What is interesting to note is that freedom of the high seas imports substantive values into the governance principles, since it implies a substantive right of access to certain marine spaces and resources. It is not merely about decision-making, unless it is read as a right not to be excluded from participation in a regime in general. This careful handling of the freedom of the high seas is unsurprising, not least because it may generate concerns when juxtaposed with the common heritage principle that applies to the seabed. Given this substantive element to the principle, it is not surprising that much emphasis is placed on its conditionality. There is also force in the argument that the conditional freedom is to be treated as a dynamic principle, facilitated by the general rule of reference in Article 87. The same point is reiterated for Articles 138 and 235.

It may be recalled that the law of the sea is part of international law and is subject to the same systemic requirements that constrain and shape general international law.[36] The freedom of the high seas is subject to general systemic requirements of international law, such as restrictions on the use of force and protection of human rights. There is nothing special about the freedom that excludes such fundamental concerns. At this point one can begin to appreciate the importance of the principle of integration, which makes explicit such complex interactions and the need for coherence and consistency in a legal system.

Oude Elferink goes on to state that the conditional freedom is to be fulfilled in good faith. The principle of good faith is not limited to the application of the freedom of the high seas. It is a distinct principle, of general application but with contextual meaning.[37] The requirement to act in good faith is one of the most fundamental principles of international law.[38] It has a long history, being reiterated in a range of cases, from the *North Coast Atlantic Fisheries* case[39] to the *Shrimp Turtle* case.[40] It also appears in the Article 2(2) of the United Nations Charter and the Declaration of Friendly Principles.[41] The principle is manifest in the doctrine of abuse of rights, *pacta sunt servanda* and, perhaps most germane to environmental

[36] See further A. Boyle, 'Further Development of the 1982 Convention on the Law of the Sea' in Freestone *et al.* (eds.), *supra* note 14, at 40.
[37] See the *Case Concerning the Interpretation of the Agreement of 25 March 1951 Between the WHO und Egypt* (1980) ICJ Rep. 96, at para. 49.
[38] As the ICJ has observed, good faith is "one of the basic principles governing the creation and performance of legal obligations". The *Nuclear Tests cases* (1974) ICJ Rep. 268, para. 46.
[39] *The North Atlantic Coast Fisheries Case* (Great Britain, United States) 7 Sept 1910. Reproduced in RIAA, vol. XXI, 167 at 187-9.
[40] *Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/AB/R, para 158. Reproduced in (1999) 38 *ILM* 118.
[41] Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with International Law, UN GA Res. 2625/XXV, 24 Oct. 1970.

issues, duties of consultation and prior notification,[42] and management of shared or common resources.[43] Finally, it may be noted that the principle is a qualifying requirement, and not a source of obligation itself. States must act in good faith in respect of some existing commitment.[44] So in the context of a specific treaty obligation, it "obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized".[45] This clearly alludes to some quality of process in decision-making – the decision must be reasonable. More generally, reasonableness is used to constrain the factors that can be used to reach a decision. In public law it seeks to delimit the factors that are relevant in reaching a decision.[46] This approach applies equally to international adjudication and decision-making.[47] More might be said about the meaning and content of good faith, but for present purposes it is sufficient to show how it opens up possibilities for calibrating decision-making and could begin to influence the governance of ABNJ. Given this meaning of the principle to act in good faith, one wonders whether it might be restated as a distinct governance principle for ABNJ, rather than finding itself packaged up with this particular principle.

The Protection and Preservation of the Marine Environment

The second principle requires States to "protect and preserve the marine environment of areas beyond national jurisdiction". It is notable that it appears to be a principle of substance rather than process. That it is concerned with the idea of preventing harm to an area of common concern, rather than the distribution of resources, means that it is more readily acceptable. Oude Elferink is unequivocally right to assert that there can be no doubt that the general obligation of States to protect and preserve the marine environment reflects general international law.[48] It extends to all oceans and parts of the sea, both within and beyond national jurisdiction. There is scope to refer to other potential authorities for this principle, including Chapter 17 of Agenda 21[49] and the various Regional Seas agreements.[50]

One also wonders whether the principle could have been couched in terms of due diligence. This would require States to ensure that not only their own conduct was in conformity with the principle, but also that of any actors or agents over which they have effective control.[51] This seems particularly important in the context of activities in the Area,

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[42] See P. Birnie, A. Boyle and C. Redgwell *International Law and the Environment*, 3rd ed. (Oxford University Press, Oxford, 2009), at 177.

[43] In *Gabčikovo-Nagymaros*, the ICJ noted how certain general obligations were to be "transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks." See *supra* note 31, para. 112.

[44] *Border and Transborder Armed Actions* case (1988) ICJ Rep. 69, at 105.

[45] *Gabčikovo-Nagymaros*, *supra* note 31, at para. 142.

[46] See T.R. Hickman, 'The Reasonableness Principle: Reassessing Its Place in the Public Sphere' (2004) 63 *Cambridge Law Journal* 166.

[47] See the *Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entites with Respect to Activities in the Area*., paras. 229-30. ITLOS case No. 17 of 1 Feb. 2011. Available online at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf *(Area Advisory Opinion).*

[48] Oude Elferink, *supra* note 1, Section on The Protection and Preservation of the Marine Environment, Discussion.

[49] A/CONF.151/26 (vol. III), 13 August 1992. Reproduced in A.V. Lowe and S.A.G. Talmon, *The Legal Order of the Oceans* (Hart, Oxford, 2009), 459.

[50] See, for example, the Convention on the Protection of the Marine Environment of the North-East Atlantic 1992, (1993) 23 *LOSB* 32. It is notable that OSPAR has been actively engaged in the protection of ABNJ. See the Bergen Statement of the Ministerial Meeting of the OSPAR Commission, 23-24 September 2010. Available at http://www.ospar.org/html_documents/ospar/news/ospar_2010_bergen_statement.pdf.

[51] See the *Case concerning Pulp Mills on the River Uruguay* (2010) ICJ Rep. 1, para. 197.

which will most likely be conducted by private companies.[52] As noted above, ensuring that non-State actors comply with the international law of the sea is one of the key governance issues for ABNJ.

Some further supporting evidence for the general principle is provided by the rules of reference in Articles 207-212 of the LOSC, which link the general obligation to the creation of generally accepted international rules and standards. Although Article 215 seems to detach the Area from the general requirements of Part XII, the general approach is restated in Article 145, which requires the adoption of rules to protect the marine environment of the Area. In any case the point of a general principle, as outlined above, is to provide a means of directing the regulation of a subject matter. Thus it guides the development of rules of environmental protection of ABNJ in light of rules developed in AWNJ and more generally. In this sense it also serves to reinforce the principle of integration. Thus it forms part of a network of related laws, regulations and measures.

International Cooperation

The duty to cooperate is not limited to the law of the sea. It is a general principle of international law that States cooperate with each other. As such, one can refer to a far greater array of instruments and decisions to reaffirm the existence of this principle.[53] Such authorities aside, it is manifest in the simple fact that States regularly cooperate with each other. As such there is little doubt that such a principle must apply to ABNJ. What is more interesting is to try to ascertain the meaning of the duty.

Oude Elferink takes a rather liberal approach to cooperation. Thus States are "in the best position to establish the exact content of the cooperation that is required of them".[54] This reflects the need for flexibility in the means of cooperation, but also the fact that the duty does not appear to be well developed under international law beyond a simple obligation of process. In this respect, the duty to cooperate is notoriously limited. As the Permanent Court of International Justice (PCIJ) noted in the *Advisory Opinion on Railway Traffic between Lithuania and Poland*, "the obligation to negotiate does not imply an obligation to reach an agreement".[55] That said, there are some indications that cooperation is more than a minimal form of engagement between States. In the *North Sea Continental Shelf* cases, the ICJ stressed that "the parties are under an obligation so to conduct themselves that the negotiations are meaningful."[56] More recently, the International Tribunal for the Law of the Sea (ITLOS) noted in the *Mox Plant* case:

> the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise there from which the Tribunal may consider appropriate to preserve under article 290 of the UNCLOS. [57]

[52] See Article 139(1) of the LOSC. Also, see *Area Advisory Opinion*, para. 108; *supra* note 47.
[53] See, for example, Article 3 of the Charter on the Economic Rights and Duties of States, UN GA Res. 3281 (XXIX) 1974, A/RES/29/3281; UNEP Draft Principles of Conduct on Shared Natural Resources 1978, reproduced in (1978) 17 *ILM* 1097; Convention on the Law of Non-navigational Use of International Watercourses 1997, (1997) 36 *ILM* 719.
[54] Oude Elferink, *supra* note 1, Section on International Cooperation, Formulation and Core Content of the Principle.
[55] (1931) PCIJ Rep. Ser.A/B, No. 42, 108, at 116.
[56] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment* (1969) ICJ Rep. 47, para. 85).
[57] *Mox Plant case* (ITLOS: *UK* v. *Ireland*), Request for Provisional Measures, ITLOS Reports 2001, 82.

The ITLOS then prescribed provisional measures requiring consultation and exchange of information.[58] In the same case, the importance of cooperation was further stressed by Wolfrum in his Separate Opinion: "The obligation to cooperate with other States whose interests may be affected is a *Grundnorm* of Part XII of the Convention, as of customary international law for the protection of the environment."[59] Furthermore:

> [t]he duty to cooperate denotes an important shift in the general orientation of the international legal order. It balances the principle of sovereignty of States and thus ensures that community interests are taken into account *vis-à-vis* individualistic State interests. It is a matter of prudence and caution as well as in keeping with the overriding nature of the obligation to co-operate that the parties should engage therein as prescribed in paragraph 89 of the Order.[60]

In this sense the duty is not just the means by which States advance their interests; it is the means by which community interests emerge and may be protected. This seems particularly important in ABNJ, where actions directly concern the international community and not merely neighbouring States. In the *Land Reclamation* case, the ITLOS did not accede to Malaysia's request to be furnished with a range of information pertaining to certain projects, and to be allowed to comment thereon. However, it did require the parties to establish a group of experts with the authority to study the effects of land reclamation, and to propose measures to deal with any adverse consequences.[61] Such a measure was justified according to the overriding importance of a duty to cooperate in respect of the protection and preservation of the marine environment. In the same case the ITLOS also referred to prompt and effective cooperation, indicating further general constraints on the minimum quality of cooperation.[62]

It might be possible to further specify the modalities of the duty in greater detail, for example, by noting the purpose of cooperation, and not simply leaving it "in respect of ABNJ". This could be done by explicitly linking it to the other principles. One idea would be to make use of the general requirement to inform other States of activities that may have an impact upon ABNJ, whether potentially harmful or not. States should furnish each other with information as far as is reasonable or appropriate, since unless such information is made available, States cannot ascertain whether or not their interests might be engaged and some form of cooperation or involvement in an activity required. Article 142 of the LOSC requires prior notification and consultation with coastal States where deposits straddle national boundaries, but it would be odd if no such general requirement exists where other interests of States might be at stake. In this sense the duty might also extend as far as establishing the grounds for meaningful cooperation.

A final observation is that the obligation is not limited to States, but is one that is systemic. As there are intergovernmental organisations and other actors engaged in activities in ABNJ, the duty to cooperate should extend equally to such agencies. It operates between international organisations, and between States and international organisations.[63] Even if the latter are not directly subject to rules of international law, the requirement of cooperation is

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[58] *Ibid*., at para 89.
[59] Available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/sep.op.Wolfrum.E.orig.pdf.
[60] *Ibid.*
[61] *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore)*, Request for Provisional Measures, 8 October 2003, para. 106. ITLOS case No. 12. Available online at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/Order.08.10.03.E.pdf.
[62] *Ibid*., at para. 98.
[63] See J. Harrison, *Making the Law of the Sea* (Cambridge University Press, Cambridge, 2011), chapter 7.

generally extended to such agencies through other mechanisms. This is the case for private contractors under the Deep Seabed Mining Regulations.[64]

The importance of cooperation for the governance of ABNJ is axiomatic, given the fact that cooperation is really the only means by which activities can be effectively regulated in ABNJ. A failure of States to agree on the means of cooperation would significantly limit the development of any more detailed regime and the proper coordination and control of activities in ABNJ. The willingness of dispute settlement fora to direct particular forms of cooperation, in light of other overarching principles, indicates the value of not just governance principles, but also of governance mechanisms and institutions.

A Science-based Approach to Management

As indicated above, there should be a science-based approach to management of activities in ABNJ. This much follows from the argument that the principles must be responsive to the physical nature of the regulatory subject matter and that science reveals this. Oude Elferink's commentary refers to Article 119 of the LOSC, as well as a general reference to the Fish Stocks Agreement, but mainly draws upon Article 201.[65] Other potential points of reference include Article 6.4 of the FAO Code of Conduct for Responsible Fisheries,[66] Article 2 of OSPAR, Articles 3(5), 20 and 24 of the Helsinki Convention,[67] and Chapter 17.25 of Agenda 21. Indeed, research and the sharing of information is a key feature of regional fisheries management organisations and instruments concerning the protection of the marine environment, as well as institutions such as the Arctic Council and the Antarctic Treaty System. It might be stated as an axiom that regulation is knowledge-dependent. However, this is not to say that a science-based approach is the same in each instance.

It is notable that Oude Elferink's commentary is silent on the threshold of what constitutes an acceptable standard of science for management purposes. This is probably because it is a notoriously difficult standard both to establish and demand of all States. It is also problematic for the ultimate bearers of the duty to provide the evidence basis for decisions - that is to say the individual scientists and research institutes engaged in marine scientific research. In the present writer's opinion there is a strong sense that the legal requirements for the provision of the science that provides the evidence base for management are insufficiently clear. This is notoriously the case in respect of the EU Marine Strategy Framework Directive and the focus on measuring complex environmental conditions, designing mechanisms capable of monitoring human impacts on the environment and the consequences of regulatory responses to such activities.[68]

There is also a wider concern about how such science can be defended against critical scrutiny. This stems directly from the fact that science does not provide absolute truths. It comprises propositions accepted as valid until disputed and proven to be incorrect. The commentary refers to "appropriate science", and indicates that this suggests that the science must meet a certain standard. This is certainly desirable since there is no point on relying upon bad, poor or incomplete science. However, I am not sure this is the only, or the intended

[64] See Regulation 31(4) and (6) of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area. Available online at http://www.isa.org.jm/files/documents/EN/Regs/PN-en.pdf. Also Regulations 5(3), 33(6), and 34(1) of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area. Available online at http://www.isa.org.jm/files/documents/EN/Regs/PolymetallicSulphides.pdf. See also clause 5 of the standard mining contracts annexed to each set of the Regulations.

[65] Oude Elferink, *supra* note 1, Section on A Science-based Approach To Management .

[66] Available online at http://www.fao.org/docrep/005/v9878e/v9878e00.HTM.

[67] Convention on the Protection of the Marine Environment of the Baltic Sea Area 1992, 2099 *UNTS* 197.

[68] See T. Markus, S. Schlacke and N. Maier, 'Legal Implementation of Integrated Ocean Policies: The EU's Marine Strategy Framework Directive' (2011) 26 *IJMCL* 59.

meaning of 'appropriate'. It may also be read as a qualifier, and one wonders whether this might actually allow States more leeway to use a less rigorous quality of science where they deem it appropriate, for example, on the basis of a cost-benefit analysis.

Although science is desirable for, or rather fundamental to oceans governance, a strict reading of the LOSC shows it only to possess a rather facultative role. The LOSC requires standards to be established in light of information gathered under Article 200, but it does not require States to go beyond the requirements of Article 200. It merely allows them to do so. This is a less than stringent demand for recourse to a particular standard of science. As I indicated earlier, the fact that principles should be sensitive to the physical qualities of the regulatory subject matter reinforces the central role of science in the management of ABNJ. Given the contingent nature of science, this principle needs to be dynamically structured. The state of knowledge about the environment or of science generally influences the construction of other principles, such as the responsibility to protect the environment. Thus the ITLOS notes that the content of a due diligence obligation "may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge".[69] States should take a progressive and ongoing approach to the development and improvement of science, and adapt their conduct accordingly.

As a final word on the principle of science-based management, Oude Elferink's explanatory note refers initially to the protection of the environment. It then goes on to provide for a "science-based approach to the management of areas beyond national jurisdiction". It should be reiterated that such management applies to all activities, such as fishing and mining, in ABNJ, and not merely to those that may have an adverse impact on the marine environment *per se*.

The Precautionary Approach

Oude Elferink's fifth principle provides that "States shall apply the precautionary approach in ABNJ".[70] The principle is reaffirmed not merely by the existence of specific rules on the use of precaution under general international law, but is also a product of the limited knowledge we have about the state of the environment and its resources in ABNJ, and that we must accommodate such uncertainties in the management process. As such it is strongly linked to the previous principle.

Oude Elferink induces the principle from a range of obligations and treaty provisions under international law, as well as domestic law, and little can be usefully added to this. In any case, the issue is not so much the existence of the principle/approach, but the way in which it is implemented. International law prescribes a general requirement for its use, but does not specify its particular modalities in any given context. This is because its operation is highly contingent. That said, its operation clearly relates to other defined conditions, such as the use of particular standards of scientific evidence in decision-making.

A contextual approach poses few difficulties when the principle/approach is applied to AWNJ. There is clearly scope for variations in its application, depending upon the capacity of the State and its administrative agencies, availability of resources, and the extent of any knowledge basis in respect of the activity, as well as the scale and potential impact of the activity. However, in ABNJ, the fact that the spaces and resources are common, with multiple actors engaged in similar activities, suggests that highly localised practices might be unsuitable. This suggests that States could adopt a more consistent approach to its

[69] *Area Advisory Opinion*, *supra* note 47, para. 117.
[70] Oude Elferink, *supra* note 1, Section on The Precautionary Approach.

application. It would seem odd that different manifestations of the precautionary principle could arise in respect of similar activities in ABNJ. This would open the door for different standards of conduct. Indeed, the requirement for consistent application of governance principles should apply more generally.[71]

The Ecosystem Approach

As with the precautionary principle, the ecosystem approach is closely related to the requirement for science-based management.[72] There is little doubt that it is a key feature of contemporary marine environmental management regimes, and required by a number of binding and non-binding instruments.[73] My key observation on this principle links to the following points about integration. That is to say that it requires an inclusive approach to regulation and should not be given a narrow application purely to ABNJ.[74] By definition the approach runs counter to a strict respect for formal legal boundaries and requires approaches that address a natural system as a whole. This does not permit States to act beyond their authority, but rather requires cooperation in order to ensure that management fits the nature of the subject matter rather than be limited by formal allocations of competence.

The Integrated Approach

There is little doubt that oceans must be governed in an integrated manner. Habitat protection requires consideration of the impacts of shipping and fishing activities, pollution control requires certain standards to be applied to the construction and operation of ships and offshore mining installations, and so on. Only through such an approach can we assess and address the cumulative impacts of human activities in ABNJ. An integrated approach is particularly evident under recently developed national marine regulatory regimes and is a growing trend in maritime regulation.[75]

Oude Elferink is correct to note that whilst the LOSC aspires to an integrated approach in its Preamble, the fact is that the bulk of its rules and principles retain a highly sectoral focus. At best, the LOSC tends to indirectly or partially accommodate an integrated approach. This tends to arise when multiple activities occur within the same spatial area.[76] In his commentary, Oude Elferink refers mainly to pollution and the idea of integrated pollution control. This has been relatively well developed under environmental law more generally, so the focus is understandable.[77] This might seem to downplay the importance of spatial

[71] K.M. Gjerde, H. Dotinga, S. Harp, E.J. Molenaar, R. Rayfuse and R. Warner, *Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction* (IUCN, Gland, Switzerland, 2008).

[72] See S.M. Garcia, 'Governance, Science and Society: The Ecosystem Approach to Fisheries' in R. Quentin Grafton, R. Hilborm, D. Squires, M. Tait and M. Williams (eds.), *Handbook of Marine Fisheries Conservation and Management* (Oxford University Press, Oxford, 2010), 76.

[73] See for example, Article 6 of the FAO Code of Conduct, *supra* note 66.

[74] See *infra.*

[75] See, for example, the English and Welsh Marine and Coastal Access Act 2009, c. 23. Available at http://www.legislation.gov.uk/ukpga/2009/23/contents. Also see the EU Plan for an Integrated Maritime Policy - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 10 October 2007 on an Integrated Maritime Policy for the European Union, COM (2007) 575. OJ L 321/1, 5/12/2011.

[76] See, for example, the relationship between resource activities and shipping implicit in LOSC Articles 56(2), 59, and 60(7), and the notion of due regard in respect of the exercise of high seas freedoms under LOSC Article 87(2).

[77] The approach is quite well developed under EU law. See B. Lange, *Implementing EU Pollution Control: Law and Integration* (Cambridge University Press, Cambridge, 2008).

integration between ABNJ and AWNJ. In this respect one should note the more explicit reference to spatially integrated approaches in Article 195 of the LOSC, which provides that:

> [in] taking measures to prevent, reduce and control pollution, States shall 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.

One might also refer to Article 7 of the Fish Stocks Agreement, which requires that "[c]onservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible". Furthermore, Article 142 of the LOSC requires that:

> [a]ctivities in the Area, with respect to resource deposits in the Area which lie across limits of national jurisdiction, shall be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits.'

Spaces within and beyond national jurisdiction do not exist in isolation from the wider environment and resource systems. The idea of integrated management across this boundary is not disregarded by Oude Elferink, but neither is it explicitly mentioned at this point. Rather it is left to a general caveat in the section on the relationship between AWNJ and ABNJ. This approach seems to puts a higher degree of weight on political factors rather than on natural factors in the design of governance mechanisms. It might also result in a rather one-directional process, whereby strong interests of coastal States are used to influence the management of ABNJ, but interests emerging in respect of ABNJ are not influencing domestic management regimes.

To ensure that integration is 'full' integration, it is suggested that spatial integration be a key requirement of this principle. At the very least, there seems to be merit in articulating this principle of integration in such a way that it 'opens the door' to a wider potential application. Thus the principle might be restated: "States shall, as appropriate, apply compatible approaches to the protection and preservation of the marine environment and sustainable use of resources within and beyond areas of national jurisdiction".

Sustainable and Equitable Use

This principle advances a substantive goal, rather than a procedural approach. The law of the sea requires something like the sustainable use of living resources, although this is phrased in rather different terms, such as the somewhat contentious concepts of maximum sustainable yield and optimum utilization.[78] The commentary to this principle focuses on intra-generational equity, although it ultimately embraces the needs of future generations.[79] This is in line with the idea of sustainable development. Equity is seen to embrace questions of access, benefit-sharing and capacity-building, which provide starting points in deciding how best to use and distribute resources located in ABNJ. It is not as clear how sustainable use or equitable use might apply to non-living resources of the Area, given their finite nature.

Although I find myself in agreement with this principle, in general terms, I am concerned about the inherently contestable nature of both sustainability and equity as principles. There is a place for the principle, but there is much work to do to flesh out how it can shape specific decisions on resource use. Indeed, as Birnie, Boyle and Redgwell point

[78] See LOSC, Article 119, but also Articles 61-4.
[79] Oude Elferink, *supra* note 1, Section on Sustainable and Equitable Use.

out, since equitable use requires a balancing of interests between interested parties, it is less well suited to the protection of common interests, given the difficult process of ascertaining these interests.[80]

Public Availability of Information

As indicated in the context of the principle on cooperation, good governance requires availability of information. This not only improves the evidence basis for decision-making, it helps to encourage participation in and appreciation of decision-making. This in turn strengthens the legitimacy of the governance mechanisms.

Apart from the general references to the Rio Declaration and the Aarhus Convention, and the specific citing of Articles 204-6 of the LOSC, the Report states that other provisions of the LOSC require information to be made available, and perhaps support the principle, including Articles 119(2) and 143. The former requires sharing scientific information about high seas fishing activities through regional fisheries management organizations and arrangements. This information must be provided regularly, but only as deemed appropriate, indicating that the obligation to disseminate information is not unqualified.

Somewhat detailed information-sharing requirements in the deep seabed mining context are provided for by Article 143. Again this is facilitated institutionally, through the International Seabed Authority. There is a strong emphasis on promotion of research, and specific modalities of supporting research are indicated. This goes beyond mere research to capacity-building.

These provisions in respect of fisheries on the high seas and mineral exploitation in the Area may not go quite as far as Article 205, since there are explicit requirements to ensure that the information becomes publicly available, but they do indicate the pervasive requirement of information availability in good governance regimes.

Transparent and Open Decision-making Processes

As Oude Elferink notes, this principle is less well grounded in the LOSC than it is in the Fish Stocks Agreement. This perhaps reflects the wider changes in perceptions about the requirements of proper decision-making procedures that have developed since the adoption of the LOSC in 1982. There has been a broader change in the perception of how public decision-making should be conducted and this now demands a degree of participation by a wider range of stakeholders. Although this represents a challenge to the traditionally State-centric view of international law, one could argue that the requirement to ensure transparent and open decision-making flows from the basic principle of good faith and so it is well rooted in international law. It could also be regarded as a fundamental attribute of the rule of law.[81] As with the previous principle, it contributes to the broader legitimacy of decisions, and this in turn may help improve compliance.

Openness may also increase the scope for improving management, because a broader category of participants can bring alternative insights into questions of resource use and management.[82] This much is alluded to in the International Law Association (ILA) Resolution on Legal Aspects of Sustainable Development, which notes that "[p]ublic participation is essential to sustainable development and good governance in that it is a

[80] Birnie *et al.*, *supra* note 42, at 201.
[81] See for example, J. Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 *Yearbook of International Environmental Law* 51.
[82] J. Ebbesson, 'The Rule of Law in Governance of Complex Socio-ecological Changes' (2010) 20 *Global Environmental Change* 414.

condition for responsive, transparent and accountable governments as well as a condition for the active engagement of equally responsive, transparent and accountable civil society organizations, including industrial concerns and trade unions."[83]

Transparency is pervasive and applies to all aspects of the regulatory process. Indeed, the ITLOS raised the requirement of transparency in the *Area Advisory Opinion* to buttress its arguments in favour of sponsoring States adopting reasonable and non-arbitrary regulatory measures rather than relying upon contractual measures to ensure their compliance.[84] The ITLOS observed that a purely contractual approach would be insufficient. Since contracts may not be publicly available, so it would be difficult to verify that States had met their obligations to ensure compliance and liability for damage under Article 139.

The Responsibility of States as Stewards of the Global Marine Environment

The starting point for this principle is the proposition that States have a responsibility to ensure that activities within their jurisdiction or control do not cause harm to the environment.[85] This much seems relatively uncontroversial, embodying as it does the well-accepted *sic utere* principle. Oude Elferink's commentary then goes on to develop the notion of due diligence as a matter of State responsibility. This was considered above and it clearly has a role to play in guiding States' responsibilities in ABNJ. The question remains whether a general responsibility of stewardship can be extrapolated from this proposition. Whilst I think that the notion of stewardship should have a role to play, the principle needs to be more widely grounded in a range of practice.[86] Indeed, as Oude Elferink notes, 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. Stewardship is not merely about prevention of harm, it is also about preservation and conservation of resources and, more importantly, it involves questions of ownership and allocation of resources.[87]

The commentary then indicates a range of forms it may take, from the articulation of a common concern, to a stronger form of trusteeship, based on the public trust doctrine, while seeming to prefer the former approach. In this sense it legitimises the 'interests' of a wider range of actors in the governance of matters that might otherwise have been regarded as subject to exclusive sovereignty. This avoids the difficulties that are associated with a more substantive notion of stewardship that encompasses questions of resource use and access, favouring instead a more procedural approach that requires, in some unspecified way, some means of including interests in a decision-making process.

This advances a rather weak form of stewardship and it does not seem to add much to the foregoing principles. The meaning and content of stewardship need to be defined more carefully, as do the precise means by which it operates. If stewardship is a responsibility, then does this entail rights that can be used to secure compliance with stewardship duties? This question of how to hold States to account for stewardship is crucial. Stewardship requires a high degree of institutional support since it entails the existence of complex divisions of responsibility and accountability. Unfortunately, in a strongly decentralised system like

[83] ILA Resolution 3/2002, para 5.1. Available online at http://www.ila-hq.org/en/committees/index.cfm/cid/25
[84] *Area Advisory Opinion*, *supra* note 47, paras. 223-6.
[85] Oude Elferink, *supra* note 1, Section on The Responsibility of States as Stewards of the Global Marine Environment.
[86] See, for example, Articles 87(2), 116 and 193 of the LOSC, and Article 6.1 of the FAO Code of Conduct on Responsible Fisheries, *supra* note 66.
[87] Barnes, *supra* note 11, at 155-63.

international law, the scope for effective monitoring of and control over public responsibilities is quite limited.

It might be argued that certain environmental commitments possess an *erga omnes* character that grants individual States the right to pursue claims for breaches of collective interests.[88] However, although such a right exists in principle, it is not clear how effective it will be in practice, since such a right is contingent on the underlying collective interest being sufficiently well defined and worth pursuing as a legal claim. By way of illustration, we can look at experiences in respect of (not) holding States to account for their failure to properly conserve and manage the living resources of the exclusive economic zone (EEZ). Arguably the EEZ represents a form of stewardship, whereby the claim to enjoy exclusive resource rights was justified and balanced against certain conservation and management duties.

Final Observations

Law as a system requires specific rules and decisions to be made in accordance with pre-existing or higher order principles. This requirement of coherence helps ensure consistency in the application of the law and allows for legal agents to plan and carry out their activities. Principles make the law intelligible and ascertainable. This alone provides good reason for trying to identify governance principles for ABNJ. Such principles must be in accordance with the fundamental values of the community. They must also be aligned with the nature of the regulatory subject matter. Although Oude Elferink adopts a largely inductive approach, drawing his principles from the existing body of rules on the law of the sea, the eventual list of principles largely meets these more fundamental demands. It is important to stress the directive and coordinating function of principles, and to emphasise that this is an inherent quality of principles that is not contingent on their particular manifestation in a binding or non-binding instrument.

Most of the listed principles relate to legal process rather than matters of substance. There is nothing wrong with such a focus, but one should appreciate that this also demands strong institutional mechanisms that support procedural demands.[89] It is not at all clear whether existing mechanisms are fully capable of delivering this at the present time, given the decentralised nature of international law and the absence of cross-sectoral management regimes capable of putting principles into practice. Nor, as Oude Elferink points out, does there appear to be much appetite for a global organisation for governing all of the above. [90] So we are left with what might be termed 'soft' institutional support through the UN General Assembly and Meetings of States Parties.

Although some principles allude to substantive goals, they tend to focus on requirements of general environmental protection rather than difficult issues of resource allocation. This approach is understandable, first given the focus of governance on decision-making, but also the difficulty of reconciling what appear to be fundamental differences between States concerning the legal status of certain resources and the potential distribution of benefits derived from ABNJ. One might consider whether there is any need to try and structure the principles, or identify a hierarchy. However, this would miss the point about their inherent coordinating function. As soon as one looks at the principles in any detail, it becomes immediately clear that they do not and should not operate in isolation. This points to

[88] See Article 48 of the Articles on State Responsibility 2001. The draft Articles are available online at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.
[89] See Oude Elferink, *supra* note 1, Section on Content and Format of a Document on Governance Principles for ABNJ.
[90] *Ibid.*

a fundamental role for integration in decision-making. Integration requires not just the use of principles in combination, it requires a cross-sectoral approach to regulation, capable of accommodating complex interactions between and cumulative impacts of activities. It also means that ABNJ cannot be governed in isolation from other ocean spaces. Finally, governance must not be seen as limited to the domain of law or politics. Although principles encompassing science-based decision-making and precautionary and ecosystem approaches are relatively new, they have quickly become central features of marine management regimes and as such should be recognised in the basic list of governance principles.

Commentary on 'Governance Principles for Areas beyond National Jurisdiction'

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Abstract
This paper comments upon the list of governance principles for areas beyond national jurisdiction (ABNJ) advanced by the report of Alex Oude Elferink. It begins by considering the meaning of governance principles, and how they can contribute to the development of the legal regime for ABNJ. It suggests that such principles need to be rooted in more than existing rules, although such rules provide an important means of inducing the existence of general principles. Governance principles need to be properly aligned with the nature of the spaces and resources found in ABNJ, as well as fundamental values of the international community and contours of legal authority. The paper offers some further comments on the specific principles, emphasising the importance of not just strong procedural approaches but also principles that facilitate a sound and reliable knowledge basis for decision-making and that advance a strong version of integrated management.

Keywords:
high seas; Area; good governance; governance principles; sources of law, integration

Introduction

The question of how best to regulate areas and activities located beyond the limits of national jurisdiction is one of paramount concern to international lawyers. Apart from the practical need for rules to ensure that activities are conducted in a conflict-free, safe and environmentally sensitive manner, the issue is also of concern because of the particular political and intellectual challenges it provokes. What rules should be adopted, how, and by whom, and, more fundamentally, what values should such rules advance? Areas beyond the limits of (exclusive) national jurisdiction (ABNJ) are necessarily subject to collective regulation. This means that any regulation ought to be inclusive of the interests of all States and, potentially, the international community as a whole. Here the distinction is between the disaggregated views of States and the aggregate views of the international community. This presents myriad problems, not least in distinguishing between such views, but in finding the means, institutional or otherwise, to capture these values.

The purpose of this paper is to reflect upon some aspects of this complex set of issues in light of Alex Oude Elferink's report on the design and operation of governance principles for ABNJ. That report sets out and comments upon a list of eleven principles and four potential principles that could be used to direct the more specific regulation of ABNJ. Fortunately, there is considerable merit in his review of the issues, so one is afforded the luxury of adding a gloss to his efforts, although it is hoped that some of the comments will also provoke further debate about the content and role of these principles. In the second part of this paper, some reflections are provided concerning the 'legal' nature of oceans governance principles, first in terms of their broader legitimacy, and then second in terms of how they fit within existing structures of international law. In the third part of this paper, I consider the key principles in turn, exploring where there may be room for strengthening the

authority of each principle and noting any potential problems, whether practical or conceptual, with the scope of each principle.

The Meaning and Legitimacy of Governance Principles

For Oude Elferink, there are two reasons reason for formulating the list. The first is to provide unequivocal reconfirmation that these principles have to be applied to ABNJ. The second is to provide a sound basis for developing a coherent regime for the governance of ABNJ.[1] In adopting this position, Oude Elferink regards the list to be somewhat declaratory, a restatement of principles that already exist and apply to ABNJ. The process is inductive and so Oude Elferink takes time to provide evidence in support of each principle. Although this may be sufficient, it is useful to dig a little deeper into the question of the role of such principles, since it is useful to have some external measure of the principles' legitimacy other than their purely instrumental function. Also, an inductive approach perhaps constrains future opportunities by focusing on what exists at present and may be regarded as self-limiting.[2] We have the opportunity to design such principles with an eye on a developing a better regulatory regime. In an earlier exploration of the principles and objective of oceans governance, Treves was keen to point out that governance does not always coincide with the concept used by lawyers, it includes the idea of 'good government, government for the general interest of those governed, on the basis of commonly shared values and with the involvement of stakeholders'.[3] This rightly alludes to the broader legitimacy that any system or governance regime must possess if it is to succeed. Oude Elferink's principles may well possess legitimacy in narrow legal terms, but they should also possess a deeper sense of legitimacy.[4]

Taking our lead from Treves, one means of evaluating Oude Elferink's principles is to ask whether or not they confirm to broader ideas of good governance. Notions of governance abound in the wider academic literature.[5] It is a rather mutable concept, but it is generally understood to be concerned with direction, delivery, facilitation and information provision in the context of a decision-making process. Thus Krasner talks of 'sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations'.[6] Of course, it is not simply governance to which we aspire, but a particular quality of good governance. This is of course much more difficult to articulate and reach agreement upon. Accounts of good governance generally include: participation of stakeholders, accountability of decision-makers, the existence of

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[1] A.G. Oude Elferink, *Governance Principles for Areas beyond National Jurisdiction*, Report on research question 2 of the Study on 'Biological Diversity and Governance of the High Seas' (commissioned by Netherlands Ministry of Affairs, Agriculture and Innovation) (2011). A revised version of the report is included as one of the contributions to this Special issue. Introduction.

[2] See A. D'Amato, 'International Law as an Autopoietic System' in R. Wolfrum and V. Röben (eds.) *Developments of International Law in Treaty Making* (Springer, Berlin, 2005), 335.

[3] T. Treves, 'Principles and Objectives of the Legal Regime Governing Areas beyond National Jurisdiction' in A.G. Oude Elferink and E.J. Molenaar (eds.), *The International Regime of Areas beyond National Jurisdiction: Current and Future Developments* (Martinus Nijhoff, Leiden, 2010), 7-25, at 7.

[4] On the legitimacy of law generally, see further, J. Brunée and S. Toope, *Legitimacy and Legality in International Law* (Cambridge University Press, Cambridge, 2010).

[5] For a useful perspective see S.J. Toope, Emerging Patterns of Governance and International Law' in M. Byers (ed.), *The Role of International Law in Politics. Essays in International Relations and International Law* (Oxford University Press, Oxford, 2001), 91. Also, P. Sands, 'International Law in the Field of Sustainable Development' (1994) 65 *British Yearbook of International Law* 303-81; K. Ginther, E. Denters and P.J.I.M de Waart (eds.), *Sustainable Development and Good Governance* (Martinus Nijhoff, Leiden, 1995).

[6] S. Krasner, Structural causes and regime consequences: regimes as intervening variables' in S. Krasner (ed.) *International Regimes* (Cornell University Press, Ithaca, 1983), 2.

institutions capable of supporting decision-making, procedural or substantive integration in the regulation of subject matter, and some degree of certainty so as to provide a basis for forming expectations about future behaviour.[7] Good governance also includes adaptability, because social and real world conditions are not fixed in stone, and so decision-making must be capable of accommodating new eventualities. Such attributes permeate Oude Elferink's principles, especially respect for the law of the sea, international cooperation, the integrated approach, public availability of information, and transparent and open decision-making. Indeed, there is nothing in this list that visibly challenges our ideas of good governance. The real challenges will come when trying to put these principles it practice.

It may be noted that governance as outlined above is overtly about how to make decisions. It is a means to an end, rather than the end itself. This suggests an overtly procedural approach. This is not necessarily problematic, as long as sufficient procedures or institutions exist to support decision-making. This may be more problematic, for at present decision-making in respect of ABNJ remains highly decentralised and rather fragmented. Furthermore, it is suggested that the principles should also be concerned with the substantive goals of the international community, such as resource allocation and environmental protection.[8] Some of Oude Elferink's principles touch upon substantive matters, such as the protection and preservation of the marine environment, sustainable and equitable use, and stewardship. However, these are couched rather general terms and Oude Elferink takes some care to avoid being drawn into any consideration of resource distribution. For example, he suggests that the principle of sustainable use should accommodate the views of both groups of States, supporting either free access or the application of common heritage to marine genetic resources in ABNJ.[9] Further reliance is placed upon the highly contextual notion of equitable use, thereby avoiding making any generalisations about who gets what and when. That said, even Rawls shied away from an overtly redistributive approach, preferring to leave such uncertain matters to ongoing dialogue and process.[10] Here is not the place to engage in a sustained critique of procedural fairness in international law. However, one can observe that since the formal equality of States has limited influence on actual decision-making even formal procedural guarantees may not result in equitable outcomes. Unless the institutions of governance can properly structure and facilitate the interactions of all States, then adopting a limited or minimalist procedural approach exposes one to the criticism that one is simply reinforcing structural inequalities between States.

Another approach is to ask whether or not application of governance principles is properly aligned with the regulatory subject matter. The value of this approach is that such an alignment can reinforce not only the procedural principles, but also the substantive principles, since they are concerned with a broader range of values. Arguably, there are three measures of 'fit' that can be used to test the suitability of governance principles: Physical fit, legal fit and moral fit. In addition, we might consider political fit and intellectual fit.

The first test of fit is to ask whether or not the principles of governance are properly aligned with the physical nature of the subject matter to which they apply. If law is to be meaningful it must not ignore the natural limits of the subject matter. Thus we do not legislate for bottled sunlight or treat finite resources as renewable. What then are the physical attributes of ABNJ that determine the fit of governance principles? Some of the general attributes of ocean spaces in ABNJ have been known for centuries. Thus the boundless and

[7] See for example the principles listed in European Commission, *White Paper on European Governance* (WPEG), COM(2001) 428 final [2001] OJ C287/1. Also, C. Harlowe, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187.
[8] T.M. Franck, *Fairness in International Law and Institutions* (Clarendon Press, Oxford, 1995), 7-9.
[9] Oude Elferink, *supra* note 1 section Sustainable and equitable use, Discussion.
[10] J. Rawls, *A Theory of Justice* (Oxford University Press, Oxford, 1972), 304.

inexhaustible qualities of the oceans sustained the Grotian principles of freedom of the high seas for centuries.[11] However, there is now better awareness of the complex relations within and between ecosystems which may demand more nuanced regulatory approaches that can account for such interactions. Ocean waters remains physically unbound and fluid, capable of interactions with water bodies within and beyond national jurisdiction. The quality of water bodies is sustained and replenished through complex global processes. This means that water bodies in ABNJ should not be governed in isolation from other marine or natural environments. Thus the principles must embrace cooperative action and not merely as a matter of process. It may indeed, demand a more general application of an approach akin to the compatibility requirement under Article 7 of the Fish Stocks Agreement.[12] The open seas also defy physical boundaries that can generally exclude persons from access to it. They are a common pool natural resource, and so are difficult and costly to regulate.[13] The seas sustain multiple uses, ranging from navigation to resource provision. This demands integrated and inclusive decision-making. The physical nature of the oceans places a high degree of inter-relationship between the oceans and the creatures living therein. Such resources, for example fish, are fungible, moveable and unascertained, meaning that they cannot readily be reduced to exclusive control. Marine living resources may be renewable, but we know that there are thresholds for exploitation, which if crossed will cause the degradation, collapse, and potential extinction of a resource. Marine ABNJ also comprise the sea-bed and its mineral resources, and, arguably, living resources around deep sea hydrothermal vent sites. The mineral resources are finite and exhaustible and so regulatory principles might be designed to direct users towards the most sustainable use patterns.[14] Other resources in ABNJ, such as biodiversity, are inherently indivisible, shared goods. This may demand different kinds of regulatory principles. Here it is important to distinguish biodiversity from the components of biodiversity, such as individual species of fish. The latter are the potentially subject to appropriation and may be subject to acquisition or individual control. In contrast biodiversity is a non-exclusive attribute that transcends the individual component of biodiversity. All persons have an interest in biodiversity, but individuals cannot regulate it in isolation. Thus biodiversity 'goods' in ABNJ demand positive obligations to cooperate, gather and share information and potential constraints on individual activities that may compromise biodiversity.[15]

It should be apparent that the physical nature of marine ABNJ and the resources therein reinforce the need for cooperative and integrated regulation. Yet they also require principles that can adapt to their physical exigencies. This strongly reinforces the importance of Oude Elferink's principles that encompass the ecosystem approach, the precautionary approach, integrated approach, and the use of science based management. If regulation is aligned with the nature of a resource, then it must be based upon sound knowledge and good science.

The second test of governance principles is that of legal fit. Subject to the foregoing remarks about the physical alignment of regulatory principles, governance principles ought to

[11] R. Barnes, *Property Rights and Natural Resources* (Hart, Oxford, 2009), 171.
[12] 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, (1995) 34 *ILM* 1542.
[13] *Supra* note 11, 1-3.
[14] This approach is considered by David Ong in respect of the continental shelf. D. Ong, 'Towards an International Law for the Conservation of Hydrocarbon Resources within the Continental Shelf?' in D. Freestone, R. Barnes and D. Ong (eds.) *Law of the Sea Progress and Prospects* (Oxford University Press, Oxford, 2005), 93.
[15] See R. Barnes, 'Fisheries and Biodiversity' in M. Fitzmaurice, D. Ong and P. Merkouris (eds.), *Research Handbook on International Environmental Law* (Edward Elgar, Cheltenham, 2010), 542-63.

be sensitive to limits inherent in current legal processes, such as the allocations of authority and the limits imposed by law as a concept. For example, principles should not require States to act *ultra vires*. It is notable that Oude Elferink mostly limits his discussion of the principles to ABNJ, treating it is a discrete legal space. Of course, matters are not so simple. Oude Elferink is, of course, sensitive to the broader political context within which the regime of ABNJ is developing. As Treves has observed, the 'high seas only' approach is the product of ideology and history, and ensures that the hard fought extension of State sovereignty over sea areas is not threatened by recursions from institutions operating in ABNJ.[16] However persuasive arguments for the application of governance mechanisms that transcend such boundaries, political will and legal boundaries seem to dictate otherwise. Of course, it must be observed that the limits of legal authority are not always well aligned to regulation of marine spaces, hence the difficulties in regulating straddling and highly migratory fish stocks. Indeed, one could argue that any legal authority drawn without any regard to the nature of a thing is doomed to fail. We have all heard of the story of King Canute and his attempt to command the tides. In the present author's opinion, this strong regard for legal boundaries produces a degree of conflict within the logic of the principles. For example, Oude Elferink places much emphasis on the principle of integration, focusing on integration between different sectors, such as fisheries and pollution control, but at the same time limits this principle spatially to ABNJ.[17] Given the overlapping nature of the subject matter and the potential for transboundary interactions, it seems incongruous to ignore that integration should also operate spatially back into areas within national jurisdiction (AWNJ) and this should form an explicit part of this principle.[18] At the very least it should provoke efforts to overcome the potential obstacles presented by capriciously drawn boundaries of legal authority.

Another aspect of legal fit is the requirement that individual legal rules ought to form part of a coherent system of rules. This requires similar factual situations to be addressed by similar rules. For example, unless a rational distinction can be drawn between pollution of coastal waters and pollution in ABNJ, then a similar rules concerning liability for harm should apply to each instance of pollution. The requirement for coherence means that legal principles applicable to ABNJ ought to be coherent with principles for the law of the sea or international law in general.

Next is the question of the alignment of governance principles with fundamental moral values. If governance principles are aligned with fundamentally held values then they will have a higher degree of legitimacy. All legal institutions are underpinned by a broader set of values, and it is useful to understand what these are and how they influence the institution. For example, it is widely acknowledged that property is justified accordingly a plurality of social values.[19] Natural rights theory in the Lockean tradition demands that socially productive work is rewarded. In the liberal tradition, a high value is placed on governance mechanisms that protect the material and political agency of individuals. Under utilitarian theory decisions are designed to maximise general welfare. Transcending these approaches there is the idea that property rules should facilitate social order, be consistent and certain so that future action may be planned. It goes beyond the scope of this paper to consider this further, but there is clearly a role to play for such values in testing the principles of governance for ABNJ. Such values might not be universal values, but they are certainly powerful, especially within Western legal traditions. The point is not to espouse a particular

[16] Treves, *supra* note 3, at 12.
[17] See, however, the qualifying remarks in Oude Elferink, *supra* note 1, Section The relationship between areas within national jurisdiction and ABNJ.
[18] See for example Article 142 of the LOSC.
[19] Barnes, *supra* note 11, chapter 2.

set of values, but rather to indicate that values should play a role in the design of legal institutions, including governance principles for ABNJ.

Two additional measures of the legitimacy of the principles are suggested. First, governance principles should be sensitive to questions of political authority. In its most simple form, this means that the principles must be something that can be realised in practice. This suggests a degree of pragmatism, and this may run counter to the previous call for 'morally fitting' governance principles. However, there is clearly no point in designing a principle for which there is no political will. Thus, there seems little point in calling for the creation of a new supra-national agency that will manage ABNJ, at least for present. It is notable that Oude Elferink was quite careful to draft the first principle in terms that guarded against a singular legal characterisation of ABNJ, given the well-known differences of opinion on the status of marine genetic resources. On the other hand, he more than dips his toe in the waters of institutional reform by considering quite seriously the idea of ocean stewardship. Political power is more often manifest in more subtle ways, and it is important to be sensitive to this also. For example, any government agency or department possesses a degree of independent personality and generates a degree of functional self-value. In practice such agencies may jealously guard existing authority and seek to acquire more. This may make it difficult to secure agreement between different constituencies when there is the risk of a loss of authority. 'Political fit' understood in these senses might not be the best driver of governance, but it does caution against being dangerously idealistic.

Finally, there is the question of intellectual fit. Developments in governance do not occur in an intellectual vacuum. The information, ideas and values that inform public debate and decision-making are readily drawn from various intellectual disciplines science, politics, economic, law and so on. In the past there has been a tendency for debate to stay within the secure realms of discrete epistemic communities. However, such divides are breaking down and there are demands for far greater integration and collaboration between different disciplines.[20] It is suggested that this intellectual climate demands principles that embody integration between natural and social sciences, and that each has an important role to play in defining the scope and content of the principles.[21] This is manifest in part in the Oude Elferink's call for principles embodying science-based decision-making, the precautionary approach and the ecosystem approach.

The Legal Status of the Principles of Oceans Governance

It was noted above that principles ought to fit within existing legal structures. A further aspect of this looks at how the enumerated principles fit within or relate to the formal sources of international law. It is not immediately obvious where governance principles might lie. Article 38 of the Statute of the International Court of Justice refers to:

> 'a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;'

If we read further into the exposition of the principles by Oude Elferink, we clearly see a deliberative effort to locate them within existing rules of treaty law, and in particular, the

[20] See for example, the collection of essays from the IFLOS symposia reproduced in (2009) 24(2) *IJMCL*.
[21] This interdisciplinarity is a feature of resilience-based approaches. See C. Folke 'Resilience: The emergence of a perspective for social-ecological systems analyses' 2006) 16(3) *Global Environmental Change* 253-67.

United Nations Convention on the Law of the Sea. To this extent, the principles might merely be regarded as a reiteration of various rules of treaty law. I think, however, that this is not enough. If this was the case, then this simply repeats the existence of existing obligations under international law. They are binding on States party to the relevant agreement, and may have wider effect if they meet the requirements of Article 34-38 of the Vienna Convention on the Law of Treaties, and produce legal effects for third States, or form part of customary international law. The principles might constitute rules of customary international law of a rather general nature. Locating such principles in custom has the immediate advantage of establishing general rules that are binding on all States, and this seems to be of fundamental importance in the development of a legal regime for the regulation of a global commons that all States are entitled to access and utilise. Of course, this would require Oude Elferink to demonstrate that each and every principle manifests the requirements of customary international law. This may be the case for many manifestations of each principle, but I do not propose to categorically review that status of each principle in terms of its customary status.[22] This is not to deny that some of the principles discussed are in fact rules of customary international law, or that particular manifestations of the principles are part of customary international law. However, the important point here is that the principles are principles, and not merely rules. Reading the report as a whole, it is clear that Oude Elferink wants to do something more, or perhaps less, than list existing rules or treaty law or custom. The principles are not intended to simply reconstitute strictly binding rules of law for application to ABNJ, and so the principles might be viewed as poor relation to binding laws. But, on the other hand, they would appear to possess a more nuanced directive quality capable of shaping a range of more precise rules, and so are more than mere rules. There is an important distinction between rules and principles, and this needs to be kept in mind when evaluating the function of the principles.

> A rule [...] is essentially practical and, moreover, binding; there are rules of art as there are rules of government, while a principle expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence.[23]

I shall return to this distinction in more detail below, but first it is useful to comment on the third source of international law: the category of general principles.

The precise nature and function of general principles of law is a much debated topic.[24] This is despite the fact that general principles find a place in most legal systems. One view is that such principles are rules accepted in the municipal law of all 'civilised' States. A more nuanced view is that they authorise the Court to apply 'principles of municipal jurisprudence, insofar as they are applicable to the relations of States.'[25] Resort to such principles was a more common feature of international adjudication in the nineteenth century. This reflected the fact that international law was a less complete system and recourse to such principles was necessary in order to prevent a *non liquet*. It is notable that in the twentieth century, the ICJ has had little occasion to refer to general principles to resolve the disputes before it. This is

[22] Various principles have been considered in more detail by other writers. See for example, A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (Kluwer Law International, The Hague, 2002).

[23] *Gentini case* (1903). Cited in B. Cheng, *General Principles of International Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953), 24.

[24] See further, B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Grotius, 1987).

[25] R. Jennings and A. Watts (eds.) *Oppenheim's International Law* 9th ed. (Oxford University Press, Oxford, 2008), vol. I, 37.

because rules of custom and treaty generally provide a sufficient basis for a decision. It may also be because the ICJ is conservative in its application of rules derived from positive law, so as not to threaten its consent based jurisdiction.[26] Discreet from general principles narrowly construed, Brownlie also lists as a source 'general principles of international law'.[27] Such appears to include rules of custom and logical propositions resulting from judicial reasoning. However, they have a distinct identity:

> 'In many cases these principles are to be traced to state practice. However, they are primarily abstractions from the mass of rules and have been so long and so generally accepted as to be no longer *directly* concerned with State practice.'[28]

It is notable that the leading text on the law of the sea acknowledges a minor role for the category. The authors take the view that the 'rather vague category of 'general principles of international law' is not of great significance for the law of the sea'.[29] They go on to note that certain principles are of profound importance to the law of the sea, such as freedom of the high seas. However, they suggest that these are better categorised as principles of custom. These are distinct from commonly accepted general principles, such as estoppel or *audi alteram partem*, which have strongly influenced the procedural administration of international law. The treatment of principles in this way reaffirms Brownlie's view that the sources of international law cannot be rigidly classified.

A useful, threefold classification of legal principles is provided by de Sadeleer.[30] First, he lists the general summaries of the law as presented by academic scholars. Second, there are general principles of legal logic, such as the *lex specialis derogat legi generali* rule, which are better regarded as interpretative tools. Finally, there are general principles that have been created by courts to provide greater coherence to the legal system and fill gaps or remove obscurity within the legal system. It is this third category that provides the more useful starting point for our analysis. Principles in this third sense provide a crucial role by providing coherence to a legal system. They provide a means of ordering more specific legal rules, and of ensuring a degree of consistency within legal systems. For example, a general principle may be the polluter pays principle. Within the umbrella of the general principle, there may be numerous specific rules, dictating for example that a ship-owner is strictly liable for damages caused by the release of oil resulting from a collision, or a that a fishermen is responsible for using fishing gear that causes damage to habitats. The individual rules share a familiar resemblance and may be subject to shared constraints and modes of operation. New rules, or the application of existing rules to new situations, may be evaluated according to the extent they fall within the general principle, or share common traits with analogous rules. A court faced with the application of a rule may refer to the general principle underlying the rule to help determine its proper meaning.

A general principle is induced from a mass of specific rules. This approach is followed by Oude Elferink. Of course care must be taken here if we are to accept principles of law induced from State practice, then there is always the risk that the principle is advanced without due attention to the body of law that supports it. It would hardly be permissible to assert a general principle that was derived from a custom that in itself was not clearly

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[26] W. Friedmann, *The Changing Structure of International Law* (Stevens and Sons, London, 1964), 189.
[27] I. Brownlie, *Principles of Public International Law* 6 th ed. (Oxford University Press, Oxford, 2003), 18-9.
[28] *Ibid.*, 19.
[29] R.R. Churchill and A.V. Lowe, The Law of the Sea 3rded (Mancherster University Press, Manchester, 1999), 12.
[30] N. De Sadeleer, *Environmental Principles. From Political Slogans to Legal Rules* (Oxford University Press, Oxford, 2002), 236.

evidenced by sufficient State practice. A cautionary tale here is the treatment of sustainable development by the ICJ in the *Gabčikovo-Nagymaros* case.[31] The Court referred to the 'concept' of sustainable development, not the principle, without further relying upon it as the basis for its judgment. Although Weeramantry strongly advocated the existence a customary principle in his Dissenting Opinion,[32] Lowe has more convincingly argued that the concept lacks a fundamentally norm creating character.[33] In this sense it is better regarded as part of a framework within which decisions can be made. Of course this is not critical to the exercise of advancing a list of principles of oceans governance, but it does caution against an unsophisticated view of their normative relevance.

It is interesting to note that Oude Elferink refrains from adopting a formal definition of the term 'governance principle'. He is clearly sensitive to the complexities and complications that follow from any such definition. Instead he settles for a working definition that conceives of governance principles as guiding States and other actors in adopting and implementing specific rules or approaches in respect of activities in ABNJ.[34] The only threshold used to calibrate such principles is the quality of bindingness. Of course, this in itself is somewhat mutable.

Some Observations on the Governance Principles

As Oude Elferink notes, there is little need to formulate a list of principles of oceans governance from scratch. One or other of the principles and, quite often, most of the principles have been iterated elsewhere.[35] Such principles are not merely the views of academics, but are also being advanced by States, and this is surely the most important test of their normative relevance.

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

At first glance, this call for respect for the law of the sea suggests something analogous to the rule of law, as applied to ABNJ. This would seem a strong first choice for a governance principle. However, Oude Elferink seems to struggle to pin this principle down, and ultimately suggests that it might be phrased thus: 'The international law of the sea establishes a comprehensive legal order for areas beyond national jurisdiction'. There is nothing wrong with this statement, evincing a general truth about the law of the sea. It does, however, seem to lack the normative force one might expect of a principle, and one wonders whether it might be better restated 'States shall respect the comprehensive order for the law of the sea that applies to areas beyond national jurisdiction'. A further point, which is not raised by Oude Elferink in his principle, is the issue of compliance, particularly through the mechanism of flag State jurisdiction. Most activities in ABNJ are carried out by private persons, who are subject to the control of flag States. Unfortunately, the mechanism of flag State control is imperfect, either because of the practical problems of securing compliance, or the lack of political will by certain flag States to properly control the activities of vessels flying their

[31] (1997) ICJ Rep. 7.
[32] At 92 and following , especially at 104.
[33] A.V. Lowe, 'Sustainable Development and Unsustainable Arguments' in A. Boyle and D. Freestone (eds.) *International Law and Sustainable Development. Past Achievements and Future Challenges* (Oxford, University Press, Oxford, 1999), 19 and 25.
[34] Oude Elferink, *supra* note 1 at 00.
[35] See for example, D. Freestone, 'Modern Principles of High Seas Governance - The Legal Underpinnings' (2009) 39 *Environmental Policy and Law* 44-9.

flag. This is a significant and generally understood governance gap, and one that would usefully be filled by an explicit governance principle.

Closer reading of the commentary suggests a more nuanced content, since Oude Elferink combines a potential number of principles under this first heading. He begins by discussing the conditional freedom of the high seas, as contained in Article 87 of the LOSC. This much seems uncontroversial as it applies to the high seas, especially the strong emphasis on the conditionality of this principle. What is interesting to note is that freedom of the high seas imports substantive values into the governance principles since it implies a substantive right of access to certain marine spaces and resource. It is not merely about decision-making unless it is read as a right not to be excluded from participation in a regime in general. This careful handling of the freedom of the high seas is unsurprising, not least because it may generate concerns when juxtaposed with the common heritage principle that applies to the seabed. Given this substantive element to the principle, it is not surprising that much emphasis is on its conditionality. There is also force in the argument that the conditional freedom is to be treated as a dynamic principle, facilitated by the general rule of reference in Article 87. The same point is reiterated for Articles 138 and 235. It may be recalled that the law of the sea is part of international law and is subject to the same systemic requirements that constrain and shape general international law.[36] The freedom of the high seas is subject to general systemic requirements of international law, such as restrictions on the use of force and protection of human rights. There is nothing special about the freedom that excludes such fundamental concerns. At this point one can begin to appreciate the importance of the principle of integration which makes explicit such complex interactions and the need for coherence and consistency in a legal system.

Oude Elferink goes on to state that the conditional freedom is to be fulfilled in good faith. The principle of good faith is not limited to the application of the freedom of the high seas. It is a distinct principle, of general application but contextual meaning.[37] The requirement to act in good faith is one of the most fundamental principles of international law.[38] It has a long history, being reiterated in a range of cases from the *North Coast Atlantic Fisheries* case[39] to the *Shrimp Turtle* case.[40] It also appears in the Article 2(2) of the United Nations Charter and the Declaration of Friendly Principles.[41] The principle is manifest in the doctrine of abuse of rights, *pacta sunt servanda*, and, perhaps, most germane to environmental issues, duties of consultation and prior notification,[42] and management of shared or common resources.[43] Finally, it may be noted that the principle is a qualifying requirement, and not a source of obligation itself. States must act in good faith in respect of

[36] See further A. Boyle, 'Further Development of the 1982 Convention on the Law of the Sea' in Freestone et al. (eds), *supra* note 14, at 40.
[37] See the *Case concerning the Interpretation of the Agreement of 25 March 1951 between the WHO und Egypt* (1980) ICJ Rep. 96, para. 49.
[38] As the ICJ has observed, good faith is 'one of the basic principles governing the creation and performance of legal obligations". The *Nuclear Tests cases* (1974) ICJ Reports, 268, para. 46.
[39] The North Atlantic Coast Fisheries Case (Great Britain, United States) 7 Sept 1910. Reproduced in RIAA, vol. XXI, 167 at 187-9.
[40] *Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/AB/R, para 158. Reproduced in (1999) 38 *ILM* 118.
[41] Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with International Law, GA Res 2625/XXV 24 Oct. 1970.
[42] See P. Birnie, A. Boyle and C. Redgwell *International Law and the Environment* 3rd ed. (Oxford University Press, Oxford, 2009), 177.
[43] In *Gabčikovo-Nagymaros*, the ICJ noted how certain general obligations were to be 'transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.' *Supra* note 31, para 112.

some existing commitment.[44] So in the context of a specific treaty obligation, it 'obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized'.[45] This clearly alludes to some quality of process in decision-making – the decision must be reasonable. More generally, reasonableness is used to constrain the factors that can be used to reach a decision. In public law it seeks to delimit the factors that are relevant in reaching a decision.[46] This approach applies equally to international adjudication and decision-making.[47] More might be said about the meaning and content of good faith, but for present purposes it is sufficient to show how it opens up possibilities for calibrating decision-making and could begin to influence the governance of ABNJ. Given this meaning of the principle to act in good faith, one wonders whether it might be restated as a distinct governance principle for ABNJ, rather than find itself packaged up with this particular principle.

The Protection and Preservation of the Marine Environment

The second principle requires States to 'protect and preserve the marine environment of areas beyond national jurisdiction'. It is notable that it appears to be a principle of substance rather than process. That it is concerned with the idea of preventing harm to an area of common concern rather than the distribution of resources means that it is more readily acceptable. Oude Elferink is unequivocally right to assert that there can be no doubt that the general obligation of States to protect and preserve the marine environment reflects general international law.[48] It extends to all oceans and parts of the sea, both within and beyond national jurisdiction. There is scope to refer to other potential authorities for this principle, including Chapter 17 of Agenda 21[49] and the various regional seas agreements.[50] One also wonders whether the principle could have been couched in terms of due diligence. This would require States to ensure that not only their own conduct was in conformity with the principle, but also that of any actors or agents over which they have effective control.[51] This seems particularly important in the context of activities in the Areas, which will most likely be conducted by private companies.[52] As noted above ensuring that non-State actor comply with the international law of the sea is one of the key governance issues for ABNJ.

Some further supporting evidence for the general principle is provided by the rules of reference in Articles 207-212 of the LOSC, which link the general obligation to the creation of generally accepted international rules and standards. Although Article 215 seems to detach the Area from the general requirements of Part XII, the general approach is restated in Article 145 which requires the adoption of rules to protect the marine environment of the Area. In any case the point of a general principle, as outlined above, is to provide a means of directing

[44] *Border and Transborder Armed Actions* case (1988) ICJ Rep. 69, at 105.
[45] *Gabčikovo-Nagymaros*, *supra* note 31, para 142.
[46] See T.R. Hickman, 'The Reasonableness Principle: Reassessing its Place in the Public Sphere' (2004) 63 *Cambridge Law Journal* 166.
[47] See the *Area Advisory Opinion*, paras. 229-30.
[48] Oude Elferink, *supra* note 1, Section The protection and preservation of the marine environment, Discussion.
[49] A/CONF.151/26 (vol. III), 13 August 1992. Reproduced in A.V. Lowe and S.A.G. Talmon, *The Legal Order of the Oceans* (Hart, Oxford, 2009), 459.
[50] See for example, the Convention on the Protection of the Marine Environment of the North-East Atlantic 1992, (1993) 23 *LOSB* 32. It is notable that OSPAR has been actively engaged in the protection of ABNJ. See the Bergen Statement of the Ministerial Meeting of the OSPAR Commission 23-24 September 2010. Available http://www.ospar.org/html_documents/ospar/news/ospar_2010_bergen_statement.pdf
[51] See the *Case concerning Pulp Mills on the River Uruguay* (2010) ICJ Rep. 1, para. 197.
[52] See Article 139(1) of the LOSC. Also, *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* (2010), para 108. Available online at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

the regulation of a subject matter. Thus it guides the development of rules of environmental protection of ABNJ in light of rules developed in AWNJ and more generally. It this sense it also serves to reinforce the principle of integration. Thus it forms part of a network of related laws, regulations and measures.

International Cooperation

The duty to cooperate is not limited to the law of the sea. It is a general principle of international law that States cooperate with each other. As such, one can refer to a far greater array of instruments and decisions to reaffirm the existence of this principle.[53] Such authorities aside, it is manifest in the simple fact that States regularly cooperate with each other. As such there is little doubt that such a principle must apply to ABNJ. What is more interesting is to try to ascertain the meaning of the duty.

Oude Elferink takes a rather liberal approach to cooperation. Thus States are 'in the best position to establish the exact content of the cooperation that is required of them'.[54] This reflects the need for flexibility in the means of cooperation, but also the fact that the duty does not appear to be well-developed under international law beyond a simple obligation of process. In this respect, the duty to cooperate is notoriously limited. As the PCIJ noted in the *Advisory Opinion on Railway Traffic between Lithuania and Poland*, 'the obligation to negotiate does not imply an obligation to reach an agreement'.[55] That said there are some indications that cooperation is more than a minimal form of engagement between States. In the *North Sea Continental Shelf cases*, the ICJ stressed that 'the parties are under an obligation so to conduct themselves that the negotiations are meaningful.'[56] More recently, ITLOS noted in the *Mox Plant* case:

> the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise there from which the Tribunal may consider appropriate to preserve under article 290 of the UNCLOS. [57]

ITLOS then prescribed provisional measures requiring consultation and exchange of information.[58] In the same case, the importance of cooperation was further stressed by Wolfrum in his Separate Opinion: 'The obligation to cooperate with other States whose interests may be affected is a *Grundnorm* of Part XII of the Convention, as of customary international law for the protection of the environment.'[59] Further:

> [t]he duty to cooperate denotes an important shift in the general orientation of the international legal order. It balances the principle of sovereignty of States and thus ensures that community interests are taken into account *vis-à-vis* individualistic State interests. It is a matter of prudence and caution as well as in keeping with the

[53] See for example, Article 3 of the Charter on the Economic Rights and Duties of States, UN GA Res 3281 (XXIX) 1974, A/RES/29/3281; UNEP Draft Principles of Conduct on Shared Natural Resources 1978, reproduced in (1978) 17 *ILM* 1097; Convention on the Law of Non-navigations Use of International Watercourses 1997, (1997) 36 ILM 719.
[54] Oude Elferink, *supra* note 1 section International cooperation, Formulation and core content of the principle
[55] (1931) PCIJ Rep. Ser.A/B, No. 42, 108, at 116.
[56] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment*, (1969) ICJ Rep. 47, para. 85).
[57] *Mox Plant case* (ITLOS -*UK* v. *Ireland*), Request for Provisional Measures, ITLOS reports 2001, 82.
[58] Ibid., para 89.
[59] Available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/sep.op.Wolfrum.E.orig.pdf

> overriding nature of the obligation to co-operate that the parties should engage therein as prescribed in paragraph 89 of the Order.[60]

In this sense the duty is not just the means by which States advance their interests; it is the means by which community interests emerge and may be protected. This seems particularly important in ABNJ, where actions directly concern the international community and not merely neighbouring States. In the *Land Reclamation case*, ITLOS did not accede to Malaysia's request to be furnished with a range of information pertaining to the certain projects, and to be allowed to comment thereon. However, it did require the parties to establish a group of experts with the authority to study the effects of land reclamation, and to propose measures to deal with any adverse consequences.[61] Such a measure was justified according to the overriding importance of a duty to cooperate in respect of the protection and preservation of the marine environment. In the same case the Tribunal also referred to prompt and effective cooperation, indicating further general constraints on the minimum quality of cooperation.[62]

It might be possible to further specify the modalities of the duty in greater detail. For example, by noting the purpose of cooperation, and not simply leaving it 'in respect of ABNJ'. This could be done by explicitly linking it to the other principles. One idea would be to make use of the general requirement to inform other States of activities that may impact upon ABNJ, whether potentially harmful or not. States should furnish each other with information as far as is reasonable, or appropriate since unless such information is made available States cannot ascertain whether or not their interests might be engaged and some form of cooperation or involvement in an activity required. Article 142 of the LOSC requires prior notification and consultation with coastal States, where deposits straddle national boundaries, but it would be odd if no such general requirement exists where other interests of States might be at stake. In this sense the duty might also extend as far as establishing the grounds for meaningful cooperation. A final observation is that the obligation is not limited to States, but is one that is systemic. As there are intergovernmental organisations and other actors engaged in activities in ABNJ, the duty to cooperate should extend equally to such agencies. It operates between international organisations, and between States and international organisations.[63] Even if such are not directly subject to rules of international law, the requirement of cooperation is generally extended to such agencies through other mechanisms. This is the case for private contractors under the Deep Seabed Mining Regulations.[64]

The importance of cooperation for the governance of ABNJ is axiomatic, given the fact that cooperation is really the only means by which activities can be effectively regulated in ABNJ. A failure of States to agree on the means of cooperation would significantly limit the development of any more detailed regime and the proper coordination and control of activities in ABNJ. The willingness of dispute settlement fora to direct particular forms of cooperation, in light of other overarching principles, indicates the value of not just governance principles, but of governance mechanisms and institutions.

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[60] *Ibid.*
[61] *Malaysia* v. *Singapore*, Request for Provisional Measures, 5 September 2003, para. 106.
[62] *Ibid*., para. 98.
[63] See J. Harrison, *Making the Law of the Sea* (Cambridge University Press, Cambridge, 2011), chapter 7.
[64] See Regulation 31(4) and (6) of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area. Available online at http://www.isa.org.jm/files/documents/EN/Regs/PN-en.pdf. Also Regulation 5(3), 33(6), 34(1) of the Regulations on prospecting and exploration for polymetallic sulphides in the Area. Available online at http://www.isa.org.jm/files/documents/EN/Regs/PolymetallicSulphides.pdf. See also clause 5 of the standard mining contracts annexed to each set of regulations.

A Science-based Approach to Management

As indicated above, there should be a science based approach to management of activities in ABNJ. This much follows from the argument that the principles must be responsive to the physical nature of the regulatory subject matter and that science reveals this. Oude Elferink's commentary refers to Articles 119 of the LOSC as well as a general reference to the Fish Stocks Agreement, but mainly draws upon Article 201.[65] Other potential points of reference include Article 6.4 of the FAO Code of Conduct for Responsible Fisheries,[66] Article 2 of OSPAR, Articles 3(5), 20 and 24 of the Helsinki Convention,[67] and Chapter 17.25 of Agenda 21. Indeed, research and the sharing of information is a key feature of regional fisheries management organisations and instruments concerning the protection of the marine environment, as well as institutions such as the Arctic Council and the Antarctic Treaty System. It might be stated as an axiom that regulation is knowledge dependent. However, this is not to say that a science based approach is the same in each instance.

It is notable that Oude Elferink's commentary is silent on the threshold of what constitutes an acceptable standard of science for management purposes. This is probably because it is a notoriously difficult standard both to establish and demand of all States. It is also problematic for the ultimate bearers of the duty to provide the evidence basis for decisions - that is to say the individual scientists and research institutes engaged in marine scientific research. In the present writer's opinion there is a strong sense that legal requirements for the provision of the science that provides the evidence base for management is insufficiently clear. This is notoriously the case in respect of the EU Marine Strategy Framework Directive and the focus in measuring complex environmental conditions, designing mechanisms capable of monitoring human impacts on the environment and the consequences of regulatory responses to such activities.[68] There is also a wider concern about how such science can be defended against critical scrutiny. This stems directly from the fact that science does not provide absolute truths. It comprises propositions accepted as valid until disputed or proven to be incorrect. The commentary refers to appropriate science, and indicates that this suggest that the science must meet a certain standard. This is certainly desirable since there is no point on relying upon bad, poor or incomplete science. However, I am not sure this is the only, or the intended meaning of appropriate. It may also be read as a qualifier, and one wonders whether this might actually allow States more leeway to use less rigorous quality of science where they deem it appropriate, for example, on the basis of a cost benefit analysis.

Although the role of science is desirable, or rather fundamental to oceans governance, a strict reading of the LOSC shows it only to possess a rather facultative role. The LOSC requires standards to be established in light of information gathered under Article 200, but it does not require States to go beyond the requirements of Article 200. It merely allows them to do so. This is a less than stringent demand for recourse to a particular standard of science. As I indicated earlier, the fact that principles should be sensitive to the physical qualities of the regulatory subject matter reinforces the central role of science in the management of ABNJ. Given the contingent nature of science, this principle needs to be dynamically structured. The state of knowledge about the environment or of science generally influences the construction of other principles such as the responsibility to protect the environment. Thus ITLOS notes that the content of a due diligence obligation 'may change over time as

[65] Oude Elferink, *supra* section, A Science-based Approach To Management .
[66] Available online at http://www.fao.org/docrep/005/v9878e/v9878e00.HTM.
[67] Convention on the Protection of the Marine Environment of the Baltic Sea Area 1992, 2099 UNTS 197
[68] See T. Markus, S. Schlacke and N. Maier, 'Legal Implementation of Integrated Ocean Policies: The EU's Marine Strategy Framework Directive' (2011) 26 *IJMCL* 59.

measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge'.[69] States should take a progressive and ongoing approach to the development and improvement of science, and adapt their conduct accordingly.

As a final word on the principle of science based management, Oude Elferink's explanatory note refers initially to the protection of the environment. It then goes on to provide that a 'science-based approach to the management of areas beyond national jurisdiction' It should be reiterated that such management applies to all activities such as fishing and mining activities in ABNJ, and not merely those that may have an adverse impact on the marine environment per se.

The Precautionary Approach

Oude Elferink's fifth principle provides that 'States shall apply the precautionary approach in ABNJ'.[70] The principle is reaffirmed not merely by the existence of specific rules on the use of precaution under general international law, but is also a product of the limited knowledge we have about the state of the environment and its resources in ABNJ, and that we must accommodate such uncertainty into the management process. As such it is strongly linked to the previous principle.

Oude Elferink induces the principle from a range of obligations and treaty provisions under international law, as well as domestic law, and little can be usefully added to this. In any case, the issue is not so much the existence of the principle/approach, but the way in which it is implemented. International law proscribes a general requirement for its use, but does not specify its particular modalities in any given context. This is because its operation is highly contingent. That said, its operation clearly relates to other defined conditions, such as the use of particular standards of scientific evidence in decision-making. A contextual approach poses few difficulties when the principle/approach is applied to AWNJ. There is clearly scope for variations in its application depending upon capacity of the State and its administrative agencies, availability of resources, and the extent of any knowledge basis in respect of the activity, as well as the scale and potential impact of the activity. However, in ABNJ, the fact that the spaces and resources are common, with multiple actors engaged in similar activities, suggests that highly localised practices might be unsuitable. This suggests that States could adopt a more consistent approach to its application. It would seem odd that different manifestations of the precautionary principle could arise in respect of similar activities in ABNJ. This would open the door for differential standards of conduct. Indeed, the requirement for consistent application of governance principles should apply more generally.[71]

The Ecosystem Approach

As with the precautionary principle, the ecosystem approach is closely related to the requirement for science-based management.[72] There is little doubt that it is a key feature of contemporary marine environmental management regimes, and required by a number of

[69] *Area Advisory Opinion*, *supra* note 52, para 117.
[70] Oude Elferink, *supra* section The Precautionary Approach.
[71] K.M. Gjerde et al, *Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction* (IUCN, Gland, Switzerland, 2008).
[72] See S.M. Garcia, 'Governance, Science and Society: The Ecosystem Approach to Fisheries' in R Quentin Grafton et al (eds) (Oxford University Press, Oxford, 2010), 76.

binding and non-binding instruments.[73] My key observation on this principle echoes the above comments on integration, and relates to its apparently narrow application to ABNJ.[74] By definition the approach runs counter to a strict respect for formal legal boundaries and requires approaches that address the system as a whole. This does not permit States to act beyond their authority, but rather requires cooperation in order to ensure that management fits the nature of the issue rather than the formal allocation of competence.

The Integrated Approach

There is little doubt that oceans must be governed in an integrated manner. Habitats protection requires consideration of the impacts of shipping and fishing activities, pollution control requires certain standards to be applied to the construction and operation of ships and offshore mining installations, and so on. Only through such an approach can we assess and address the cumulative impacts of human activities in ABNJ. An integrated approach is particularly evident under recently developed national marine regulatory regimes and is a growing trend in maritime regulation.[75] Oude Elferink is correct to note that whilst the LOSC aspires to an integrated approach in its preamble, the fact is that the bulk of its rules and principles retain a highly sectoral focus. At best, the LOSC tends to indirectly or partially accommodate an integrated approach. This tends to arise when multiple activities occur within the same spatial area.[76] In his commentary, Oude Elferink refers mainly to pollution and the idea of integrated pollution control. This has been relatively well developed under environmental law more generally, so the focus is understandable.[77] This might seem to downplay the importance of spatial integration between ABNJ and AWNJ. In this respect one should note the more explicit reference to spatially integrated approaches in Article 195 of the LOSC, which provides that:

> [in] taking measures to prevent, reduce and control pollution, States shall 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.

One might also refer to Article 7 of the Fish Stock Agreement, which requires that '[c]onservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible'. Further, Article 142 of the LOSC requires that:

> [a]ctivities in the Area, with respect to resource deposits in the Area which lie across limits of national jurisdiction, shall be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits.'

[73] See for example, Article 6 of the FAO Code of Conduct, *supra* note 66.
[74] *Infra* at 00.
[75] See for example, the English and Welsh Marine and Coastal Access Act 2009, c. 23. Available http://www.legislation.gov.uk/ukpga/2009/23/contents. Also the EU plan for an integrated maritime policy - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 10 October 2007 on an Integrated Maritime Policy for the European Union, COM (2007) 575. OJ L 321/1, 5/12/2011.
[76] See for example, the relationship between resource activities and shipping implicit in Article 56(2), 59, and 60(7), and the notion of due regard in respect of the exercise of high seas freedoms under Article 87(2).
[77] The approach is quite well developed well developed under EU law. See B. Lange, *Implementing EU Pollution Control: Law and Integration* (Cambridge University Press, Cambridge, 2008).

Spaces within and beyond national jurisdiction do not exist in isolation from the wider environment and resource systems. The idea of integrated management across this boundary is not disregarded by Oude Elferink, but neither is it explicitly mentioned at this point. Rather it is left to a general caveat in the section on the relationship between areas within national jurisdiction and ABNJ. This approach seems to puts a higher degree of weight on political factors rather than natural factors in the design of governance mechanisms. It might also results in a rather one-directional process whereby strong interests of coastal States are used to influence the management of ABNJ, but interests emerging in respect of ABNJ are not influencing domestic management regimes. To ensure that integration is 'full' integration, it is suggested that spatial integration be a key requirement of this principle. At the very least, there seems to be merit in articulating this principle of integration in such a way that it 'opens the door' to a wider potential application. Thus the principle might be restated: 'States shall, as appropriate, apply compatible approaches to the protection and preservation of the marine environment and sustainable use of resources within and beyond areas of national jurisdiction'.

Sustainable and Equitable Use

This principle advances a substantive goal, rather than a procedural approach. The law of the sea requires something like the sustainable use of living resources, although this is phrased in rather different terms, such as the somewhat contentious concepts of maximum sustainable yield and optimum utilization.[78] The commentary to this principle focuses on intra-generational equity, although it ultimately embraces the needs of future generations.[79] This is in line with idea of sustainable development. Equity is seen to embrace questions of access, benefit sharing and capacity building, which provide starting points in deciding how best to use and distribute resources located in ABNJ. It is not as clear how sustainable use or equitable use might apply to non-living resources of the Area, given their finite nature. Although I find myself in agreement with this principle, in general terms, I am concerned about the inherently contestable nature of both sustainability and equity as principles. There is a place for the principle, but there is much work to do to flesh out how it can shape specific decisions on resource use. Indeed, as Birnie, Boyle and Redgwell point out, since equitable use requires a balancing of interest between interested parties it is less well-suited to the protection of common interests given the difficult process of ascertain such.[80]

Public Availability of Information

As indicated in the context of the principle on cooperation, good governance requires availability of information. This not only improves the evidence basis for decision-making, it helps to encourage participation and appreciation of decision-making. This in turn strengthens the legitimacy of the governance mechanisms. Apart from the general references to the Rio Declaration and Arhus Convention, and the specific citing of Article 204-6 of the LOSC, there are other provisions of the LOSC that require information to be made available, and perhaps support the principle. This includes Articles 119(2) and 143. The former requires sharing scientific information about high seas fishing activities through regional fisheries management organizations and arrangements. This must be provided regularly, but only as deemed appropriate, indicating that the obligation to disseminate information in not unqualified. Somewhat detailed information sharing requirements are provided for by Article

[78] See LOSC, Article 119, but also Article 61-4.
[79] Oude Elferink, *supra* note 1, section Sustainable and Equitable Use.
[80] *Supra* note 42, at 201.

143. Again this is facilitated institutionally, through the International Seabed Authority. There is a strong emphasis on promotion of research, and specific modalities of supporting research are indicated. This goes beyond mere research to capacity building. These provisions in respect of fisheries and mineral exploitation in the Area may not go quite as far as Article 205 since there are explicit requirements to ensure that the information becomes publicly available, but they do indicate the pervasive requirement of information availability in good governance regimes.

Transparent and Open Decision-making Processes

As Oude Elferink notes, this principle is less well grounded in the LOSC than it is in the Fish Stocks Agreement. This perhaps reflects the wider changes in perceptions about the requirements of proper decision-making procedures that have developed since the adoption of the LOSC in 1982. There has been a broader change in the perception of how public decision-making should be conducted and this now demands a degree of participation by a wider range of stakeholders. Although this represents a challenge to the traditionally State-centric view of international law, one could argue that the requirement to ensure transparent and open decision-making flows from the basic principle of good faith and so it is well rooted in international law. It could also be regarded as a fundamental attribute of the rule of law.[81] As with the previous principle, it contributes the broader legitimacy of decisions, and this in turn may help improve compliance. Openness may also increase the scope for improving management because a broader category of participants can bring alternative insights into questions of resource use and management.[82] This much is alluded to in the ILA Resolution of Legal Aspects of Sustainable Development, which notes that [p]ublic participation is essential to sustainable development and good governance in that it is a condition for responsive, transparent and accountable governments as well condition for the active engagement of equally responsive, transparent and accountable civil society organizations, including industrial concerns and trade unions.'[83] Transparency is pervasive and applies not all aspects of the regulatory process. Indeed, ITLOS raised the requirement of transparency in the *Area Advisory Opinion* to buttress its arguments in favour of sponsoring States adopting reasonable and non-arbitrary regulatory measures rather than rely upon contractual measures to ensure the compliance.[84] The tribunal observed that a purely contractual approach would be insufficient. Since contracts may not be publicly available, so it would be difficult to verify that States had met their obligations to ensure compliance and liability for damage under Article 139.

The Responsibility of States as Stewards of the Global Marine Environment

The starting point for this principle is the proposition that States have a responsibility to ensure that activities within their jurisdiction or control do not cause harm to the environment.[85] This much seems relatively uncontroversial, embodying as it does the well accepted *sic utere* principle. Oude Elferink's commentary then goes on to develop the notion

[81] See for example, J. Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 *Yearbook of International Environmental Law* 51

[82] J. Ebbesson, 'The rule of law in governance of complex socio-ecological changes' (2010) 20 *Global Environmental Change* 414.

[83] ILA Resolution 3/2002, para 5.1. Available online at http://www.ila-hq.org/en/committees/index.cfm/cid/25

[84] *Supra* note 52, paras. 223-6.

[85] Oude Elferink, *supra* note 1, section The Responsibility of States as Stewards of the Global Marine Environment.

of due diligence as a matter of State responsibility. This was considered above and it clearly has a role to play in guiding States' responsibilities in ABNJ. The question remains whether a general responsibility of stewardship can be extrapolated from this proposition. Whilst I think that the notion of stewardship should have a role to play, the principle needs to be more widely grounded in a range of practice.[86] Indeed, as Oude Elferink notes, 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. Stewardship is not merely about prevention of harm, it is also about preservation and conservation of resources, and more importantly involves question of ownership, and allocation of resources.[87] The commentary then indicates a range of forms it may take, from the articulation of a common concern, to a stronger form of trusteeship, based on the public trust doctrine, seeming to prefer the former approach. In this sense it legitimates the 'interests' of a wider range of actors in the governance of matters that might otherwise have been regarded as subject to exclusive sovereignty. This avoids the difficulties that are associated with a more substantive notion of stewardship that encompasses question of resource use and access, favouring instead a more procedural approach that requires, in some unspecified way, some means of including interests in a decision-making process.

This advances a rather weak form of stewardship and it does not seem to add much to the foregoing principles. The meaning and content of stewardship needs to be defined more carefully. As do the precise means by which it operates. If stewardship is a responsibility, then does this entail rights that can be used to secure compliance with stewardship duties? This question of how to hold States to account for stewardship is crucial. Stewardship requires a high degree of institutional support since it entails the existence of complex divisions of responsibility and accountability. Unfortunately, in a strongly decentralised system like international law, the scope for effective monitoring and control over public responsibilities is quite limited. It might be argued that certain environmental commitments possess an *erga omnes* character that grants individual States the right to pursue claims for braces of collective interests.[88] However, although such a right exists in principle, it is not clear how effective it will be in practice since such a right is contingent on the underlying collective interest being sufficiently well-defined and worth pursuing as a legal claim. By way of illustration, we can look at experiences in respect of (not) holding States to account for their failure to properly conserve and manage the living resources of the exclusive economic zone (EEZ). Arguably the EEZ represents a form of stewardship, whereby the claim to enjoy exclusive resource rights was justified and balanced against certain conservation and management duties.

Final Observations

Law as a system requires specific rules and decisions to be made in accordance with pre-existing or higher order principles. This requirement of coherence helps ensure consistency in the application of law and allows for legal agents to plan and carry out their activities. Principles make the law intelligible and ascertainable. This alone provides good reason for trying to identify governance principles for ABNJ. Such principles must be in accordance

[86] See for example, Articles 87(2), 116 and 193 of the LOSC, and Article 6.1 of the FAO Code of Conduct on Responsible Fisheries, *supra* note 66.
[87] Barnes, *supra* note 11, at 155-63.
[88] See Article 48 of the Articles on State Responsibility 2001. The draft Article are available online at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

with the fundamental values of the community. They must also be aligned with the nature of the regulatory subject matter. Although Oude Elferink adopts a largely inductive approach, drawing his principles from the existing body of rules on the law of the sea, the eventual list of principles largely meets these more fundamental demands. It is important to stress the directive and coordinating function of principles, and to emphasise that this is an inherent quality of principles that is not contingent on their particular manifestation in a binding or non-binding instrument.

Most of the listed principles relate to legal process rather than matters of substance. There is nothing wrong with such a focus, but one should appreciate that this also demands strong institutional mechanisms that support procedural demands.[89] It is not at all clear whether existing mechanisms are fully capable of delivering this at the present time, given the decentralised nature of international law and the absence of cross sectoral management regimes capable of putting principles into practice. Nor as, Oude Elferink points out, does there appear to be much appetite for a global organisation for governing all of the above. [90] So we are left with what might be termed soft institutional support through the UN General Assembly and Meetings of States Parties. Although some principles allude to substantive goals, they tend to focus on requirements of general environmental protection rather than difficult issues of resource allocation. This approach is understandable, first given the focus of governance on decision-making, but also the difficulty of reconciling what appear to be fundamental differences between States concerning the legal status of certain resources and the potential distribution of benefits derived from ABNJ. One might consider whether there is any need to try and structure the principles, or identify a hierarchy. However, this would miss the point about their inherent coordinating function. As soon as one looks at the principles in any detail, it becomes immediately clear that they do not and should not operate in isolation. This points to a fundamental role for integration in decision-making. Integration requires not just the use of principles in combination, it requires a cross-sectoral approach to regulation, capable of accommodating complex interactions and cumulative impacts of activities. It also means that ABNJ cannot be governed in isolation from other ocean spaces. Finally, governance must not be seen as limited to the domain of law or politics. Although principles encompassing science-based decision-making, precaution and ecosystem approaches are relatively new, they have quickly become central features of marine management regimes and such should be recognised in the basic list of governance principles.

[89] See Oude Elferink, *supra* note 1, section Content and Format of a Document on Governance Principles for ABNJ.
[90] *Ibid.*