

Chapter 2

Good Ocean Governance and International Law

Abstract At the present, the concept of good ocean governance is articulated by literature only. This chapter adopted eight elements of good governance as an analytical framework, namely, the rule of law, participatory, transparency, consensus based decision making, accountability, equity and inclusiveness, responsiveness and coherence. The chapter also provides evidence from international treaty practice to support each element of good ocean governance. In summary, the elements of good ocean governance are partially supported by international treaty practice but are not yet receiving universal acceptance.

Keywords Good ocean governance • UNCLOS • 1998 Aarhus convention • 1972 London convention • MARPOL 73/78 • 1992 OSPAR convention

2.1 Introduction

Although there has been a world-wide effort to develop an effective ocean governance mechanism,¹ to date, there are no specific mechanisms or policy approaches in place, with which to encourage cooperation and coordinated action.

¹ General Assembly, United Nations, *Oceans and the Law of the Sea—Report of the Secretary-General*, A/61/63, 9 March 2006, pp. 76–78.

‘Good governance’, is considered to be a positive and constructive element of sustainable development.² It is an open decision-making process which should involve public participation, the release of environmental information and access to environmental justice.³

Eight elements were acknowledged as being the elements of good governance, namely, the rule of law, participatory, transparency, consensus based decision making, accountability, equity and inclusiveness, responsiveness and coherence.⁴ It is proposed that good ocean governance may be achieved by means of major international law of the sea treaties, through the operation of global and regional

² Konrad Ginther and Paul J. I. M. de Waart, “Sustainable Development as a Matter of Good Governance: An Introductory View”, in Konrad Ginther, Erik Denters and Paul J. I. M. de Waart (ed), *Sustainable Development and Good Governance*, (London: Martinus Nijhoff Publishers, 1995), pp. 9.

³ See Preamble of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus) 25 June 1998, came into force on 30th October 2001, 38 ILM 517 (1999).

⁴ Yen-Chiang Chang, “Good Ocean Governance”, in *Ocean Yearbook*, vol. 23, 2009, pp. 89–118; Francis N. Botchway, “Good Governance: The Old, The New, The Principle, and The Elements”, *Florida Journal of International Law*, no.13, 2001, pp. 180–183; The European Commission, *Communication on Governance and Development*, October 2003, COM (03) 615; The World Bank, *Governance and Development*, Washington, 1992, p. 1; UNDP, *Governance Indicators: A User’s Guide*, p. 3, available from: <http://www.undp.org/oslocentre/docs04/UserGuide.pdf> last visited date: 21/12/2007; Asian Development Bank, *Governance: Sound Development Management*, August 1999, p. 3; Tony Bovaird and Elke Löffler, “Evaluating the Quality of Public Governance: Indicators, Models and Methodologies”, *International Review of Administrative Sciences*, 69 no. 3, 2003, p. 316; Robert I. Rotberg, “Strengthening Governance: Ranking Countries Would Help”, *Washington Quarterly*, 28:1, Winter 2004–5, p. 71; Peter Rogers and Alan W Hall, *Effective Water Governance*, Global Water Partnership Technical Committee, The Background Papers, No. 7, February 2003, p. 4; Andrew Allan and Patricia Wouters, ‘What Role for Water Law in the Emerging “Good Governance” Debate?’, available from www.dundee.ac.uk/water/Documents/Conferences/2004/woutersGovernancearticleforAWRA.pdf last visited date: 18/03/2008; Patrick Molutsi, “Tracking Progress in Democracy and Governance Around the World: Lessons and Methods”, available from: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan005784.pdf> last visited date: 22/12/2007; Carlos Santiso, “Good Governance and Aid Effectiveness: The World Bank and Conditionality”, *The Georgetown Public Policy Review*, vol. 7 no. 1, Fall 2001, p. 2; Daniel Kaufmann, Aart Kraay, Pablo Zoido-Lobaton, *Aggregating Governance Indicators*, The World Bank Policy Research Working Paper 2195, October 1999, pp. 1–2, 5–7; Commission of the European Communities, *White Paper on European Governance—Enhancing Democracy in the European Union*, Brussels, 11th October 2002, SEC (2000) 1547/7 final, pp. 4; see also European Union, *Governance in the European Union: A White Paper—Enhancing Democracy in the European Union*, COM (2001) 428 final; European Commission, *Report from the Commission on European Governance (European Commission, 2003)*; see also European Commission, *Toward a Reinforced Culture of Consultation and Dialogue—General Principles and Minimum Standards for Consultation of Interested Parties*, COM (2002) 704 final.

organisations and through national ocean governance efforts.⁵ Based on the above assumptions, it is therefore necessary to discuss how good ocean governance has been incorporated into international treaty practice.

This chapter aims to provide examples from the existing international law of the sea, to illustrate how good governance has been incorporated into international treaty practice. In order to achieve this objective, the author adopts a two-stage approach. Firstly, this chapter selects a number of international treaties that are relevant to ocean governance and indicates the reasons for the selection. Then, the chapter will focus on the elements of good governance and their relationship with international treaties. The purpose of this exercise is to find examples from international treaty practice of each element of good ocean governance. The overall outcome will provide legal evidence or support to the elements of good ocean governance.

In brief, the outcome of this analysis is that although the concept of good ocean governance is not, as yet, expressly or universally accepted by international law, each element of good ocean governance has, at least to some extent, been addressed by international law treaty practice. A State that is complying with its treaty obligations will, in practice, be applying the elements of good governance, even although this may not be made explicit at international level. It is, therefore, not unreasonable to suggest that there is a legal requirement to introduce the concept of good ocean governance at the domestic level.

2.2 The Legal Governance Framework for the Oceans

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)⁶ aims to establish a legal order for the seas and oceans, which will facilitate international communication and promote the peaceful use of the seas and oceans, as well as providing for the equitable and efficient utilisation of their resources and the conservation of their living resources.⁷ Part XII of UNCLOS specifically sets out obligations for the protection and preservation of the marine environment, the said obligations also providing an implementation framework for ocean governance and therefore, examples in relation to the elements of good governance from this part of treaty will be provided.

There are four types of marine pollution detailed by UNCLOS, namely, pollution from dumping, pollution from land-based sources, including through the atmosphere, pollution from vessels and pollution from seabed activities.⁸ This

⁵ Robert L. Friedeim, "Ocean Governance at the Millennium: Where We Have Been—Where We Should Go", *Ocean & Coastal Management*, vol. 42, 1999, p. 747.

⁶ UNCLOS, 10th December 1982, came into force 16th November 1994, 21 ILM 1261. At the time of writing, there are 155 parties to UNCLOS.

⁷ Preamble of UNCLOS.

⁸ UNCLOS Article 194 (3) (a)–(d).

study will, based on the foregoing, examine the 1972 Convention on the Preservation of Marine Pollution by Dumping of Waste and Other Matter⁹ (1972 London Convention)¹⁰ and its 1996 Protocol,¹¹ the 1992 Convention for the Protection of Marine Environment of the North-East Atlantic¹² (1992 OSPAR Convention),¹³ the International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978,¹⁴ usually referred to as the MARPOL 73/78.¹⁵

The 1992 Convention on Biological Diversity,¹⁶ together with the 1995 United Nations Fish Stocks Agreement,¹⁷ are of central importance as regards the governance of marine living resources. The 1992 Convention on Biological Diversity was the first treaty to provide a legal framework for biodiversity conservation and it established three main goals: the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising from the use of genetic resources.¹⁸ The 1995 United Nations Fish Stocks Agreement aims to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks.¹⁹ In particular, it requires States to co-operate so that there is compatibility between national and high seas

⁹ Convention on the Preservation of Marine Pollution by Dumping of Waste and Other Matter, (London, Mexico City, Moscow, Washington DC) 29th December 1972, came into force on 30th August 1975; 1046 UNTS 120.

¹⁰ At the time of writing, there are 89 parties to the 1972 London Convention.

¹¹ The 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London), 7th November 1996, came into force on 24th March 2006, 36 ILM 1.

¹² The 1992 Convention for the Protection of Marine Environment of the North-East Atlantic (Paris), 22nd September 1992, came into force on 25th March 1998, 23 LOSB 32.

¹³ At the time of writing, there are 16 parties to the 1992 OSPAR Convention.

¹⁴ Protocol Relating to the Convention for the Prevention of Pollution from Ships (London), 17th February 1978, came into force on 2nd October 1983, 17 ILM 546.

¹⁵ Apart from the MARPOL 73/78 there is another convention relating to the pollution from vessels, which is the International Convention on Civil Liability for Oil Pollution Damage 1992 but this convention was adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships and places the liability for such damage on the owner of the ship from which the polluting oil escaped or was discharged. Since the notion of good governance is more focused on the decision-making process of public authorities, civil liability is therefore beyond the scope of this study.

¹⁶ Convention on Biological Diversity (Rio de Janeiro), 5th June 1992, came into force on 29th December 1993, 31 ILM 822 (1992). At time of writing, there are 190 parties to the 1992 Convention on Biological Diversity.

¹⁷ 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 (New York), 4th December 1995, came into force on 11th December 2001, 34 ILM 1542 (1995). At time of writing, there are 66 parties to the 1995 United Nations Fish Stocks Agreement.

¹⁸ Preamble of the 1992 Convention on Biological Diversity.

¹⁹ Article 2 of the 1995 United Nations Fish Stocks Agreement.

measures.²⁰ This chapter will, therefore, examine their views on good governance and where appropriate, examples from other international environmental treaties will be provided.

Academics and others, increasingly aware of the need for a broader form of ocean governance, began calling for more comprehensive, better integrated approaches.²¹ This need began to be echoed at international conferences and in declarations such as the Rio Declaration.²² The author also focuses on the way in which the concept of good governance and its earlier manifestations have been reflected in international agreements, with special attention being devoted to the pronouncements related to the United Nations Conference on the Human Environment held in Stockholm, in June 1972,²³ the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil, in June 1992²⁴ and the United Nations World Summit on Sustainable Development in Johannesburg, South Africa, in September 2002.²⁵ In the thirty-year time span represented by these conferences, there can be seen the gradual maturation of the concept of good governance as a generally accepted concept, which is articulated progressively in the national decision making processes.

As was agreed at the Rio Conference, the protection of the environment and social and economic development are fundamental to sustainable development. To achieve this development, the international community adopted the global programme entitled Agenda 21,²⁶ which deals with marine issues. In particular, in Chapter 17, it states that its objective is: *Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection,*

²⁰ UN Oceans and Law of the Sea website: http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm last visited date: 27/02/2007.

²¹ Mariam Sara Repetto, "Towards an Ocean Governance Framework and National Ocean Policy for Peru", The Nippon Foundation of Japan Fellow, 2005, available from: http://www.un.org/depts/los/nippon/unnnff_programme_home/fellows_pages/fellows_papers/repetto_0506_peru.pdf last visited date: 21/07/2008, p. 8–9; Seoung-Yong Hong and Young-Tae Chang, "Integrated Coastal Management and the Advent of New Ocean Governance in Korea: Strategies for Increasing the Probability of Success", The International Journal of Marine and Coastal Law, no. 2, 1997, p. 142; General Assembly of the United Nations, *Oceans and Law of the Sea—Report of the Secretary-General*, A/60/63, 4 March 2005, p. 80.

²² United Nations, *Report of the United Nations Conference on Environment and Development*, Annex I, Rio Declaration on Environment and Development, UN Doc A/CONF.15/26 (Vol. I) (1992) (Rio Declaration); Gillian D. Triggs, *International Law: Contemporary Principles and Practices* (Australia: LexisNexis Butterworths, 2006), pp. 803–804; Philippe Sands, *Principles of International Environmental Law* 2nd ed. (UK: Cambridge University Press, 2003), pp. 4–5.

²³ Stockholm Declaration of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14 (1972) (XXVII), UNGAOR, 27th sess, 2112th plen mtg, UN Doc A/RES/2994 (XXVII).

²⁴ United Nations publication, Sales No. E.73.II.A.14 and corrigendum, Chap. I.

²⁵ Adopted at the 17th plenary meeting of the World Summit on Sustainable Development, on 4th September 2002, see Chap. VIII of the Summit Report.

²⁶ United Nations, *Report of World Summit on Sustainable Development*, Johannesburg, South Africa, 26th August–4th September 2002, ISBN 92-1-104521-5, 8.

rational use and development of their living resources. The aforementioned ‘soft law’ consists of non-treaty obligations, however, it incorporates the fundamental components of the international legal order. Following on from the aforementioned, the subsequent section will discuss the extent to which the elements of good governance are being incorporated into international treaty practice.

2.3 International Law and Good Ocean Governance

International law and institutions serve as the main framework for international cooperation and collaboration between members of the international community in their efforts to protect the local, regional and global marine environment. The subsequent section will provide examples of what elements of good ocean governance may look like in practice. The aforesaid elements of good governance being: the rule of law, participatory, transparency, consensus based decision making, accountability, equity and inclusiveness, responsiveness and coherence. The aim is to provide an insight into the sorts of provisions one would anticipate States may adopt or respond to, in ensuring that they implement good ocean governance.

2.3.1 *The Rule of Law*

The rule of law emphasises that all laws have to be published via appropriate media, equally and fairly administered and effectively enforced. It is also important to ensure that decision makers and administrators are bound to follow the rule of law when making decisions. The subsequent part will provide examples of the rule of law from international treaty practice.

Under UNCLOS, States are asked to adopt laws, regulations, measures, rules, standards, recommended practices and procedures to prevent, reduce and control pollution of the marine environment from varied ocean use activities.²⁷ The content of these national instruments shall be “no less effective in preventing, reducing and controlling such pollution than the global rules and standards.”²⁸ The evaluation of enforcement with respect to these national instruments to marine pollution control activities is through competent international organisations or diplomatic conference.²⁹ Nevertheless, UNCLOS leaves room for States to decide “the best practicable means at their disposal and in accordance with their

²⁷ Article 207.1 and 207.5; 208.1 and 208.2; 209.2; 210.1, 2 and 3; 211.2; 212.1 and 212.2 of UNCLOS.

²⁸ Article 208.3; 209.2; 210.6 and 211.2 of UNCLOS.

²⁹ Article 213, 214, 216, 217 of UNCLOS.

capabilities”³⁰ to prevent and control marine pollution. In brief, UNCLOS establishes State responsibility not to cause damage to the marine environment and this has commonly been accepted as customary international law.³¹ States are, therefore, required to follow the rule established by UNCLOS and transpose this into national law or laws. The content of the said national law or laws must be as clear as possible and cover all aspects of concern regarding ocean governance.³²

The ethos of following the rule of law is evidenced in the MARPOL 73/78, as the Parties to the MARPOL 73/78 shall “undertake to give effect to the provisions of the present Convention and those Annexes thereto by which they are bound, in order to prevent the pollution of the marine environment by the discharge of harmful substances or effluents containing such substances in contravention of the Convention.”³³ To achieve these objectives, the Parties may promulgate domestic law to provide certificates and special rules on the inspection of ships.³⁴ Any Parties may deny “a foreign ship entry to the ports or off-shore terminals under its jurisdiction or take any action against such a ship for the reason that the ship does not comply with the provisions of the present Convention, the Parties shall immediately inform the consul or diplomatic representative of the Party whose flag the ship is entitled to fly....”³⁵ It is necessary for Parties to ensure that no more favourable treatment is given to the ships of non-Parties to the Convention.³⁶ This reading indicates that the Contracting Parties are obliged to publish law in an appropriate way under the MARPOL 73/78. In addition, these laws should be equally and fairly administered, regardless of whether dealing with Parties or non-Parties to the Convention. The text of laws, orders, decrees and regulations and other instruments which have been promulgated on the various matters within the scope of the MARPOL 73/78 are subject to submission to the Inter-Governmental Maritime Consultative Organisation.³⁷ (IMCO) The aforesaid Organisation is entitled to monitor the implementation of the MARPOL 73/78. The competent authorities of the Parties are, therefore, bound to follow the rule of law when making decisions.

Under the 1992 Convention on Biological Diversity, each Contracting Party shall “Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use.”³⁸ The Contracting Parties shall

³⁰ Article 194.1 of UNCLOS.

³¹ *Nuclear Tests case (Australia v. France)* (1974) ICJ Reports 253 at 389; *United States v. Canada*, 3 RIAA 1907 (1941).

³² Articles 194.3 and 207.5 of UNCLOS.

³³ Article 1.1 of the MARPOL 73/78.

³⁴ Article 5 of the MARPOL 73/78.

³⁵ Article 5.3 of the MARPOL 73/78.

³⁶ Articles 5.3 of the MARPOL 73/78.

³⁷ Article 11.1 (a) of the MARPOL 73/78.

³⁸ Article 8 (c) of the 1992 Convention on Biological Diversity.

also “develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.”³⁹ Legislative, administrative or policy measures shall be taken to ensure that international law is followed⁴⁰ in “a fair and equitable way.”⁴¹ The Contracting Party is, therefore, obliged to publish law consistent with the 1992 Convention on Biological Diversity and the said law should be implemented equitably and fairly.

Finally, the clear and equitable rule of law at national level is essential. As stated by the 1992 Rio Declaration, “States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply.”⁴² They also need to “develop national law regarding liability and compensation for the victims of pollution and other environmental damage.”⁴³ These measures should not “constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction.”⁴⁴ The 1992 Rio Declaration establishes a need to enact environmental law in order to protect the environment and the said environmental law should be implemented in a fair and equitable matter.

From the above, international treaty practice has set out examples to publish laws in an appropriate way. International legal instruments also emphasise the need that the law should be equally and fairly administered and effectively enforced. At the domestic level, decision makers and administrators are bound to follow the rule of law, when making decisions.

2.3.2 *Participatory*

The following part will provide examples from international treaty practice as illustrations of public participation. This research will also consider in what form the participatory activity is organised.

The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters⁴⁵ (1998 Aarhus Convention), describes public participation as: designed to give members of the public “the opportunity to express their concerns and enable[ing] public

³⁹ Article 8 (k) of the 1992 Convention on Biological Diversity.

⁴⁰ Article 16 (3) of the 1992 Convention on Biological Diversity.

⁴¹ Article 15 (7) of the 1992 Convention on Biological Diversity.

⁴² Principle 11 of the 1992 Rio Declaration.

⁴³ Principle 13 of the 1992 Rio Declaration.

⁴⁴ Principle 12 of the 1992 Rio Declaration.

⁴⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus) 25th June 1998, came into force on 30th October 2001, 38 ILM 517 (1999).

authorities to take due account of such concerns.”⁴⁶ The 1998 Aarhus Convention also provides detailed and clear obligations on States to include in their decision-making processes the concept of public participation. These obligations include: public participation in decisions on specific activities⁴⁷; public participation concerning plans, programmes and policies relating to the environment⁴⁸ and public participation during the preparation of executive regulation and/or generally applicable legally binding normative instruments.⁴⁹ The contracting parties should, therefore, fix the time-frames appropriately to “promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.”⁵⁰ It is also the contracting parties’ obligation to “provide for early public participation, when all options are open and effective public participation can take place.”⁵¹

In addition, the 1992 Convention on Biological Diversity imposes obligations to allow public participation when introducing “appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects.”⁵² Public participation in the authorities’ decision-making procedure is, therefore, no longer merely a political theme, it is a legally binding obligation.

Apart from ‘hard law’ sources, the 1992 Rio Declaration also indicates that the participation of the public is necessary. As the 1992 Rio Declaration states, “Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development”⁵³; “the creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership”⁵⁴; “Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation”⁵⁵ and finally, “States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this

⁴⁶ Preamble of the 1998 Aarhus Convention.

⁴⁷ Article 6 of the 1998 Aarhus Convention.

⁴⁸ Article 7 of the 1998 Aarhus Convention.

⁴⁹ Article 8 of the 1998 Aarhus Convention.

⁵⁰ Article 8 (a) of the 1998 Aarhus Convention.

⁵¹ Article 6 (4) of the 1998 Aarhus Convention.

⁵² Article 14 (a) of the 1992 Convention on Biological Diversity.

⁵³ Principle 20 of the 1992 Rio Declaration.

⁵⁴ Principle 21 of the 1992 Rio Declaration.

⁵⁵ Principle 22 of the 1992 Rio Declaration.

Declaration and in the further development of international law in the field of sustainable development.”⁵⁶

Chapter 17 of Agenda 21 provides a joint approach to access, where ever possible, “for concerned individuals, groups and organisations to relevant information and opportunities for consultation and participation in planning and decision-making at appropriate levels is necessary.”⁵⁷ It is also important to consult “on coastal and marine issues with local administrations, the business community, the academic sector, resource user groups and the general public.”⁵⁸ Without an appropriate assessment mechanism, however, the decision-making processes may not be deemed to be complete. As a result, it is imperative “to review the existing institutional arrangements and identify and undertake appropriate institutional reforms essential to the effective implementation of sustainable development plans, including inter-sectoral coordination and community participation in the planning process.”⁵⁹

The 2002 Johannesburg Declaration emphasises the link to equitable public participation within the decision-making processes. It requires a “long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels.”⁶⁰ The continuous striving for stable partnerships involving all major groups is an important part of public participation. “The promotion of dialogue and cooperation among the world’s civilizations and peoples, irrespective of race, disabilities, religion, language, culture or tradition”⁶¹ are, therefore, relevant and necessary requirements.

It can be seen that these international legal instruments provide an obligation to ensure that there is public participation, which should lead to open decision-making processes. Although the precise form of public participation is not yet clear from the reading of treaties, this could be achieved through consultation.⁶² Following the above discussion, the public should be given the opportunity to be involved in decisions, concerns, plans, programmes and policy relating to the environment, as well as in the preparation of executive regulations and other legal instruments.

⁵⁶ Principle 27 of the 1992 Rio Declaration.

⁵⁷ Paragraph 17.5 (f) of the Agenda 21.

⁵⁸ Paragraph 17.17 (b) of the Agenda 21.

⁵⁹ Paragraph 17.128 of the Agenda 21.

⁶⁰ Paragraph 26 of the 2002 Johannesburg Declaration.

⁶¹ Paragraph 17 of the 2002 Johannesburg Declaration.

⁶² Paragraph 17.17 (b) of the Agenda 21.

2.3.3 *Transparency*

The element of transparency emphasises the need for the public authorities to release environmental information, including information on decision making. It is also important to consider in what form the environmental information should be presented. The subsequent part will provide examples to illustrate what the element of transparency may look like, from the viewpoint of international treaty practice.

UNCLOS sets out substantive rules and standards to facilitate transparent decision making including: notifying of imminent or actual damage⁶³; developing contingency plans against pollution⁶⁴; promoting the studies, research programmes and exchange of information and data, as well as providing the scientific criteria for regulations and⁶⁵ monitoring of the risks or effects of pollution, all of which should be included in an environmental assessment report.⁶⁶ This would suggest that UNCLOS imposes obligations on States to pro-actively release or exchange environmental information, which should be presented in the form of an environmental assessment report. States should provide the aforesaid reports to the competent international organisations, which, in turn, should make the reports available to all States.⁶⁷ In this instance, transparency is to other States but not to the public, as there is no reference to releasing the minutes of meetings to the public. It is also a limited form of transparency in relation to States, as only specific information is released but not information on decision making. Nonetheless, it provides an example of what transparency means in practice.

Article 12 of the 1995 United Nations Fish Stocks Agreement emphasises the need to “provide for transparency in the decision-making process and other activities of sub-regional and regional fisheries management organizations and arrangements.”⁶⁸ To facilitate the aforesaid objective, States shall establish, “a national record of fishing vessels authorized to fish on the high seas and provision of access to the information contained in that record on request by directly interested States, taking into account any national laws of the flag State regarding release of such information.”⁶⁹ In this case, transparency is only to other States and there is no clear reference to releasing the minutes of meetings to the public. It also relates to transparency in international decision making, not transparency at the national level. Nonetheless, it still provides an example of what transparency means in practice.

⁶³ Article 198 of UNCLOS.

⁶⁴ Article 199 of UNCLOS.

⁶⁵ Article 200 and 201 of UNCLOS.

⁶⁶ Article 204, 205 and 206 of UNCLOS.

⁶⁷ Article 205 of UNCLOS.

⁶⁸ Article 24.2 (b) of the 1995 United Nations Fish Stocks Agreement.

⁶⁹ Article 18.3 (c) of the 1995 United Nations Fish Stocks Agreement.

Further provisional duties regarding the transparency approach in good governance were illustrated by the 1998 Aarhus Convention. In accordance with Article 3 (1) of the 1998 Aarhus Convention, the contracting parties, “shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.” The contracting parties are also responsible, “to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.”⁷⁰ The authorities must also make requested information available and that in the case of refusing a public application for environmental information, the contracting parties shall take “into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”⁷¹

It is also true that, within the framework of national legislation, it is the public authorities’ duty to possess and update environmental information and establish a mandatory system to provide all information without delay to members of the public who may be affected.⁷² For the purposes of disseminating environmental information, such information is progressively becoming available from electronic databases which are easily accessible to the public through public telecommunications networks. This information should include reports on the state of the environment, texts of legislation, policies and plans and programmes on or relating to, the environment.⁷³ Article 6 (2) of the 1998 Aarhus Convention states that, “the public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner.” Finally, the contracting parties shall set up mechanisms to examine their legislation and policy documents to also ensure that the domestic law matches international treaties, conventions and agreements on environmental issues. An assessment body in respect of this field is therefore necessary.⁷⁴ The most important factor is that transparency is directed to the public, which is different from what is included in previous treaties. It is also important to note that the public authorities should release the minutes of meetings.⁷⁵

The 1992 OSPAR Convention ensures that the Contracting Parties’ competent authorities are required to, “make available the information in written, visual,

⁷⁰ Article 3 (2) of the 1998 Aarhus Convention.

⁷¹ Article 4 (4) of the 1998 Aarhus Convention.

⁷² Article 5 (1) (2) of the 1998 Aarhus Convention.

⁷³ Article 5 (3) (4) (7) of the 1998 Aarhus Convention.

⁷⁴ Article 5 (5) (6) (8)–(10) of the 1998 Aarhus Convention.

⁷⁵ Article 4, 5 of the 1998 Aarhus Convention.

aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention.”⁷⁶ The aforesaid information should be available, “in response to any reasonable request, without that person’s having to prove an interest, without unreasonable charges.”⁷⁷ In addition, the Contracting Parties shall publish, at regular intervals, joint assessments of the quality status of the marine environment and of its development. The aforementioned assessments should include, “both an evaluation of the effectiveness of the measures taken and planned for the protection of the marine environment and the identification of priorities for action.”⁷⁸ Once again, transparency is to other States but not to the public and there is no clear reference referring to the release of the minutes of meetings to the public. More specifically, information released is focused on specific types but is not particularly transparent in relation to the decision making. Once again, however, the international provisions provide an example of the types of activity we might anticipate seeing at the national level.

At national level, as stated by the 1992 Rio Declaration, “each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”⁷⁹

In support of the above, Chapter 17 of Agenda 21 pronounces that States should improve their capacity to collect, analyse, assess and use information for the sustainable use of resources. This environmental information should include; “environmental impacts of activities affecting the coastal and marine areas”⁸⁰; “disposal and with due regard for their technical and scientific capacity and resources, make systematic observations on the state of the marine environment”⁸¹; “with the support of international organizations, whether sub-regional, regional or global, as appropriate”⁸²; “individually or through bilateral and multilateral cooperation and with the support, as appropriate, of international organizations, whether sub-regional, regional or global”⁸³; “use existing sub-regional and regional mechanisms, where applicable, to develop knowledge of the marine environment, exchange information, organize systematic observations and assessments, and make the most effective use of scientists, facilities and

⁷⁶ Article 9.2 of the 1992 OSPAR Convention.

⁷⁷ Article 9.1 of the 1992 OSPAR Convention.

⁷⁸ Article 6 of the 1992 OSPAR Convention.

⁷⁹ Principle 10 of the 1992 Rio Declaration.

⁸⁰ Paragraph 17.8 of the Agenda 21.

⁸¹ Paragraph 17.35 of the Agenda 21.

⁸² Paragraph 17.56 of the Agenda 21.

⁸³ Paragraph 17.86 of the Agenda 21.

equipment”⁸⁴ and there is “an obligation to ensure transparency in the use of trade measures related to the environment and to provide adequate notification of national regulations.”⁸⁵ As before, while this principle refers to the exchange of information between States, it hints at the type of information that ought to be made available to the public at national level. When combined with obligations under the 1998 Aarhus Convention and elsewhere as regards making decision making transparent, the implication is that the public must be able to see what scientific understanding underpins decision making.

From the above it is clear that international treaty practice emphasises the need to release environmental information. It is recommended that environmental information should be made available from electronic databases, which are easily accessible to the public through public telecommunications networks. The aforesaid environmental information should include reports on the state of the environment, texts of legislation, policies and plans and programmes on or relating to, the environment. The 1998 Aarhus Convention does ask States to release information on decision making, whereas, other treaties point only to releasing specific types of information. Apart from the 1998 Aarhus Convention, most of international treaty practice does not require the release of minutes of meetings to the public, which may in turn weaken the performance of transparency. The current climate is moving in the direction of the adoption and implementation of the 1998 Aarhus Convention. Transparency would be further strengthened if States were obliged to release ‘ALL’ the minutes of meetings to the public but one may anticipate that actual practice will sit somewhere between the ideal and the position illustrated by the majority of provisions discussed above.

2.3.4 Consensus Based Decision Making

The core concern of consensus based decision-making is that no individual, official or group should be able to force their individual decisions or views on others, whether through majority voting or otherwise.⁸⁶ What does international treaty practice say about consensus based decision- making? In searching for answers to the aforesaid question, the subsequent section will provide examples to illustrate consensus based decision making from international treaty practice.

⁸⁴ Paragraph 17.114 of the Agenda 21.

⁸⁵ Paragraph 17.118 of the Agenda 21.

⁸⁶ National Marine Sanctuaries, Monterey Bay, ‘Joint Management Plan Review Working Group—Consensus Based Decision Making’, available from: www.sanctuaries.noaa.gov/jointplan/mb_docs/mb_consensus.pdf last visited date: 17/06/08; Dr. John Robert Dew, ‘Consensus Based Decision Making’, available from: <http://bama.ua.edu/~st497/ppt/consensusbaseddecision.ppt> last visited date: 17/06/2008.

The best international example of consensus based decision making is, of course, provided by the international law of trade.⁸⁷ As Article IX of the 1994 Agreement Establishing the World Trade Organisation⁸⁸ explicitly states, “The WTO shall continue the practice of decision making by consensus followed under GATT 1947.” The Agreement further explains ‘consensus’ as having been achieved, “if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”⁸⁹ Where a decision cannot be achieved by consensus, the relevant agreements provide for decisions to be made by majority voting, often with the requirement for a qualified majority to be used.⁹⁰

Evidence also can be found from a WTO’s subsidiary organ, such as the Dispute Settlement Body (DSB). For example, Article 2.4 of the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes⁹¹ states, “Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.” The aim of the DSB is to secure a positive solution to a dispute. The wish is to ensure a solution mutually acceptable to all parties to a dispute.⁹² Since consensus requires the approval of the conflicting parties, these parties, not the DSB, will normally have the effective final word on the dispute topics.⁹³ In addition, it is important to note that for some key decisions, such as the decision on the establishment of panels,⁹⁴ the adoption of panel⁹⁵ and Appellate Body reports⁹⁶ and the authorisation of suspension of concession and

⁸⁷ See also Miquel I Mora, “A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes”, *Columbia Journal of International Law*, Vol. 31 (1993–1994), pp. 142–143; Raymond Vernon, “The World Trade Organization: A new Stage in International Trade and Development”, *Harvard International Law Journal*, vol. 36, No. 2, (1995), pp. 336–337; Steven P. Croley and John H. Jackson, “WTO Dispute Procedures, Standard of Review, and Deference to National Government”, *The American Journal of International Law*, Vol. 90 (1996), pp. 193–213; Robert E. Hudec, *Enforcing International Trade Law—The Evolution of the Modern GATT Legal System* (US: Butterworth Legal Publishers, 1993), pp. 357–366.

⁸⁸ The 1994 Agreement Establishing the World Trade Organisation, (1994) 33 I.L.M. 1144 and available at <http://www.wto.org>.

⁸⁹ See footnote of Article IX of the Agreement Establishing the World Trade Organisation.

⁹⁰ Articles IX (1), IX (3) (a) and X of the Agreement Establishing the World Trade Organisation.

⁹¹ The 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes, (1994) 33 I.L.M. 1226 and <http://www.wto.org>.

⁹² Article 3.7 of the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁹³ N. David Palmeter, Peter C. Mavroidis, *Dispute Settlement in the World Trade Organization—Practice and Procedure* (UK: Cambridge University Press, 2004), p. 15.

⁹⁴ Article 6.1 of the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁹⁵ Article 16.4 of the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁹⁶ Article 17.14 of the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes.

other obligations,⁹⁷ the consensus requirement is in fact a ‘negative’ consensus requirement.⁹⁸ The ‘negative’ consensus requirement means that it is deemed that the DSB will make a decision, unless there is a consensus among WTO Members not to take that decision.⁹⁹ Since there will usually be at least one Member with a controversial objective included in the panel, the adoption of the panel and/or Appellate Body reports or the authorisation on suspend concessions, it is highly unlikely that there will be a consensus not to adopt these decisions. To this end, the process prescribed for the handing of a complaint does not require a vote of the contracting parties.

The ‘unanimous vote’ approach is used within the Commission to the 1992 OSPAR Convention.¹⁰⁰ Although this is not what one generally envisages as consensus based decision making, when combined with the obligation on the Contracting Parties to harmonise their policies and strategies, it also demonstrates a good example of consensus based decision making.

Although consensus based decision making is said to be an important element of good ocean governance, there is no clear direction from international law pertaining to the marine environment as to how this can be achieved. An illustration can, however, be found in international trade law, which emphasises the importance of attempting to achieve consensus before resorting to majority voting. One might anticipate that it would be very difficult to find evidence to support the consensus based decision making at the national level. What is important, however, is that all aspects of relevant opinion should be properly respected.

2.3.5 Accountability

The subsequent part will provide examples to illustrate what international treaty practice say about accountability. Within the rules of the 1972 London Convention, the national authority is authorised to control dumping behaviour in relation to the possible harm to their citizens and marine living resources within their territory.¹⁰¹ This leads to an obligation to ensure marine dumping behaviour will not cause any possible harm and if it does, it is also the States’ responsibility to tackle or control the pollution before it causes further damage.¹⁰² Furthermore,

⁹⁷ Article 22.6 of the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁹⁸ Other decisions of the DSB such as the appointment of the Members of the Appellate Body are taken by ‘normal’ consensus.

⁹⁹ Peter van den Bossche, *The Law and Policy of the World Trade Organization*, (UK: Cambridge University Press, 2005), pp. 229–230; World Trade Organization, *A handbook on the WTO Dispute Settlement System* (UK: Cambridge University Press, 2004), pp. 60–62.

¹⁰⁰ Articles 10 and 11 of the 1992 OSPAR Convention.

¹⁰¹ Article VI (1) (a) (b), (2), (3) and Annex III of the 1972 London Convention.

¹⁰² Article X of the 1972 London Convention and Article 15 of the 1996 Protocol.

Article VI (4) states that it is the Contracting Party's obligation to report the information, criteria, measures and requirements it adopts to the IMO and other parties.¹⁰³ Article 9.4 of the 1996 Protocol echoes the ethos of the 1972 London Convention and states that these national governance instruments need to be submitted to the IMO or where appropriate, to other Contracting Parties on an annual or regular basis, which further strengthens the accountability of the Contracting Party. The reports will be reviewed by consultative meeting of the parties on an annual basis.¹⁰⁴ The content of the 1972 London Convention and its 1996 Protocol suggests that public authorities are responsible for controlling dumping behaviour. The monitoring process is by means of the IMO and other Contracting Parties. Externally, the Contracting Party is responsible to the IMO and other Contracting Parties. If the Contracting Parties fail in their responsibilities, the consultative meeting may develop or adopt procedures for determining exceptional and emergency situations.¹⁰⁵ Consultative meetings may also consider any additional action that may be required, if the aforementioned situation occurs.¹⁰⁶

All Contracting Parties, under the MARPOL 73/78 must prohibit and take action against violations and accept certificates required by the regulations which are prepared by other parties as having the same validity as their own certificates.¹⁰⁷ A ship which is in the port or offshore terminal of a party may be subject to inspection, in order to verify the existence of a valid certificate, unless there are clear grounds for believing that the condition of the ship or its equipment does not substantially correspond with the particulars of that certificate.¹⁰⁸ If a certificate exists, the inspecting party shall, "ensure that the ship does not sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment."¹⁰⁹ This interpretation suggests that the inspecting party should be responsible for taking any action against marine pollution or the threat thereof. If an inspection indicates a violation of the Convention, a report shall be forwarded to the Government of the State under whose authority the ship is operating.¹¹⁰ The authority of the flag State shall promptly inform the inspecting party which has reported the alleged violation of the action taken, in addition to advising the IMCO.¹¹¹ By this means, the inspecting party and flag State are accountable to each other and to the IMCO.¹¹²

¹⁰³ Article VI (4) of the 1972 London Convention.

¹⁰⁴ Article XIV 4 of the 1972 London Convention.

¹⁰⁵ Article XIV 4 (e) of the 1972 London Convention.

¹⁰⁶ Article XIV 5 of the 1972 London Convention.

¹⁰⁷ Article 5.1 and 2 of the MARPOL 73/78.

¹⁰⁸ Article 5.2 of the MARPOL 73/78.

¹⁰⁹ Article 5.2 of the MARPOL 73/78.

¹¹⁰ Article 6.2 of the MARPOL 73/78.

¹¹¹ Article 6.4 of the MARPOL 73/78.

¹¹² Article 4.3 and 6.4 of the MARPOL 73/78.

It is required that parties apply the MARPOL 73/78 to ships of non-parties, so as to ensure that no more favourable treatment is given to such ships.¹¹³ There is also provision for the detection of violations and enforcement, such as in-port inspections, to verify whether ships have discharged harmful substances, reporting requirements on incidents involving harmful substances and the communication of information to the IMCO, plus technical co-operation.¹¹⁴ The aforementioned treaty obligations form the accountabilities of the Contracting Parties.

The Contracting Parties must comply with the 1992 OSPAR Convention and the decisions and recommendations made by the Commission.¹¹⁵ It is also the Contracting Parties' responsibility to report to the Commission at regular intervals on: "(a) the legal, regulatory, or other measures taken by them for the implementation of the provisions of the Convention and of decisions and recommendations adopted thereunder, including in particular, measures taken to prevent and punish conduct in contravention of those provisions; (b) the effectiveness of the measures referred to in subparagraph (a) of this Article; (c) problems encountered in the implementation of the provisions referred to in subparagraph (a) of this Article."¹¹⁶ In return, the Commission shall assess the Contracting Parties' compliance with the Convention and the decisions and recommendations adopted thereunder.¹¹⁷ If appropriate, the Commission may call for steps to bring about full compliance with the Convention and "promote the implementation of recommendations, including measures to assist a Contracting Party to carry out its obligations."¹¹⁸ This conduct suggests that the Contracting Parties are responsible to the Commission, rather than to the general public. In practice, at the domestic level, each Contracting Party is responsible to its citizens, depending on its domestic law. The Convention uses the term "competent authorities",¹¹⁹ to represent those domestic public authorities that are entitled to deal with marine pollution. In this way, the Convention does not distinguish jurisdictional boundaries between the various ocean governance authorities.

The International Court of Justice, in the *Nuclear Weapons* case, affirmed that the primary obligation of States is to ensure that their activities will not cause harm or potential harm to other States.¹²⁰ The substantive legal content of this customary rule is now evolving rapidly through the negotiation of specific treaties, some of which have been discussed in this section. As to the domestic level, some of the treaties do emphasise the importance of the competent authorities being

¹¹³ Article 5.4 of the MARPOL 73/78.

¹¹⁴ Article 6, 8, 11 and 17 of the MARPOL 73/78.

¹¹⁵ Article 23 of the 1992 OSPAR Convention.

¹¹⁶ Article 22 of the 1992 OSPAR Convention.

¹¹⁷ Article 23.a of the 1992 OSPAR Convention.

¹¹⁸ Article 23.b of the 1992 OSPAR Convention.

¹¹⁹ Article 9 of the 1992 OSPAR Convention.

¹²⁰ *Nuclear Weapons* case ICJ Reports 1996, 266. See also *Nuclear Tests Examination Request New Zealand v France* ICJ Reports 1995, 288 at 306.

responsible for marine pollution but do not distinguish jurisdictional boundaries between the various ocean governance authorities. This, therefore, leaves room for States to decide their national ocean policy and to ensure that their legal systems provide for accountability to prevent and control marine pollution, for example, competent Ministers being answerable to the Parliament and the public. Following on from this, institutionally, States commit themselves in accordance with their policies, priorities and resources, to promote the institutional arrangements necessary to support the implementation of the programme areas regarding good ocean governance.¹²¹

2.3.6 *Equity and Inclusiveness*

The element of equity and inclusiveness aims to respect individual rights and interests. How does international treaty practice address the issue of equity and inclusiveness? The 1972 London Convention requires contracting parties to take all practicable steps to prevent the pollution of the sea.¹²² In addition, the Convention and its 1996 Protocol, ask for the acknowledgement of characteristic regional features, when developing harmonising procedures.¹²³ Furthermore, the 1996 Protocol calls for Contracting Parties to take into account the special needs of developing countries and countries in transition to market economies.¹²⁴ This conduct should lead towards equitable and inclusive decision making but only at the international level, nevertheless, it gives an indication of the types of issues States ought also to take account of at the domestic level, when making decisions relating to ocean governance.

The 1992 Convention on Biological Diversity is aimed at “fair and equitable sharing of the benefits arising out of the utilization of genetic resources, [...], taking into account all rights over those resources and to technologies, and by appropriate funding.”¹²⁵ To pursue the aforesaid objective, Contracting Parties should “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”¹²⁶ The 1995 United Nations Fish Stocks Agreement emphasises the need to ensure access

¹²¹ Paragraph 116 of the Agenda 21.

¹²² Article I of the 1972 London Convention.

¹²³ Article VIII of the 1972 London Convention and Article 12 of the 1996 Protocol.

¹²⁴ Article 13.1.5 of the 1996 Protocol.

¹²⁵ Article 1 of the 1992 Convention on Biological Diversity.

¹²⁶ Article 8 (j) of the 1992 Convention on Biological Diversity.

to fisheries by small scale and artisanal fishermen and female fish processors, as well as indigenous people in developing States, particularly in small, island developing States.¹²⁷

The 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter¹²⁸ represents a major change of approach to the question of how to regulate the use of the sea as a depository for waste materials and it is much more restrictive than the Convention. It encourages States to adopt “regional and national instruments which aim to protect the marine environment and which take account of specific circumstances and needs of those regions and States”,¹²⁹ more importantly, “having due regard to the public interest.”¹³⁰ To this end, it is clear that the 1996 Protocol requires taking decisions concerning all the varying circumstances.

The notion of equality is accepted by the States, in the sense of equality of legal personality and capacity. This notion was illustrated by the 1998 Aarhus Convention, as it states that it is necessary to encourage, “the possibility to participate in decision making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.”¹³¹

To sum up, it can be seen that these international legal instruments providing an obligation to respect individual rights and interests. The utilisation of renewable resources¹³² should be based on the principle of fairness and equality. Attention should be given to those people in the minority, such as indigenous people or female fish processors. The equality of legal personality and capacity will ensure the possibility of access to environmental justice, without discrimination. Yet again, these obligations provide an indication of the types of issues one would anticipate being taken into account in domestic decision making.

2.3.7 Responsiveness

Responsiveness emphasises the need for the public authorities to make decisions within a specific time scale. It is also important to provide a legal system/mechanism which can respond to the current needs of the general public/environment.

¹²⁷ Article 24.2 (b) of the 1995 United Nations Fish Stocks Agreement.

¹²⁸ The 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London), 7th November 1996, came into force on 24th March 2006, 36 ILM 1.

¹²⁹ Preamble of the 1996 Protocol.

¹³⁰ Article 3.2 of the 1996 Protocol.

¹³¹ Article 3 (9) of the 1998 Aarhus Convention.

¹³² This part of the research only considers renewable resources as, exhaustible resources would be subject to further research.

The following section will provide examples relative to responsiveness, from international treaty practice.

UNCLOS imposes an obligation on States, from time to time, to re-examine rules, standards and recommended practices and procedures, as regards the control and prevention of marine pollution.¹³³ This mechanism allows States to meet the requirement to be able to adapt to new issues, as they arise.

Under the 1992 Convention on Biological Diversity, Contracting Parties shall, “promote national arrangements for emergency responses to activities or events”¹³⁴ and also, “introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity, are duly taken into account.”¹³⁵

Under the 1995 United Nations Fish Stocks Agreement, States shall ensure that their decision making procedures facilitate the adoption of conservation and management measures, in a timely and effective manner.¹³⁶ There follows, some examples of how States should respond to the changing needs of the environment.

The 1992 OSPAR Convention requires the contracting parties to produce relevant information, “in response to any reasonable request, without that person’s having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months.”¹³⁷ This provision requires the Contracting Parties to treat all applications to dump on an equal basis, without discrimination and also requires States to make decisions within a specific time scale. In addition, the Contracting Parties are required to adopt the best available techniques and best environmental practice,¹³⁸ by which to ensure that their decision making system is responsive to the needs of individuals or the environment. To this end, the Convention not only illustrates a legal duty on public authorities to make decisions within a limited timeframe but also a duty to respond to the current needs of the general public and environment. This illustrates a good example of responsiveness in good ocean governance.

The 1998 Aarhus Convention imposes a further duty on public authorities, in that the latter shall make environmental information, “available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.”¹³⁹ In the event of refusing a request, it is also the public authorities’ duty to ensure that, “A refusal of a request shall be in

¹³³ Article 207.4; 208.5 and 210.4 of UNCLOS.

¹³⁴ Article 14 (e) of the 1992 Convention on Biological Diversity.

¹³⁵ Article 14 (a) of the 1992 Convention on Biological Diversity.

¹³⁶ Article 10 (j) of the 1995 United Nations Fish Stocks Agreement.

¹³⁷ Article 9 (1) of the 1992 OSPAR Convention.

¹³⁸ Article 2.2 of the 1992 OSPAR Convention.

¹³⁹ Article 4 (2) of the 1998 Aarhus Convention.

writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure.” In addition, “the refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.”¹⁴⁰ This offers a good example of responsiveness, in terms of decision making.

A number of treaties have, in different ways, emphasised the importance of the element of responsiveness in good governance. Following on from the above discussion, it is evident that international law requires States to make decisions within a specific time scale, depending on the specific circumstances involved. In addition, international law also requires States to take all practicable measures to ensure that the current needs of the general public and environment can be met. The latter is reflected in Chapter 17 of Agenda 21 which indicates that States should, “design and implement rational response strategies to address the environmental, social and economic impacts of climate change and sea level rise, and prepare appropriate contingency plans.”¹⁴¹ One would anticipate that such provisions should be mirrored in domestic provisions.

2.3.8 *Coherence*

Coherent decision making emphasises the requirement that decisions are consistent and make sense across time and institutions. To achieve this objective may require an institution to coordinate various public authorities, in order to facilitate a comprehensive ocean governance policy. The next section will provide examples addressing the element of coherence from international treaty practice.

Under the 1992 Convention on Biological Diversity, each Contracting Party shall “Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies”¹⁴² and introduce this concept into the national decision making processes.¹⁴³

The Commission to the 1992 OSPAR Convention provides a forum for all the Contracting Parties and for a review of, “the condition of the maritime area, the effectiveness of the measures being adopted, the priorities and the need for any additional or different measures.”¹⁴⁴

¹⁴⁰ Article 4 (7) of the 1998 Aarhus Convention.

¹⁴¹ Paragraph 17.128 (g) and see also 17.100 (c) of the Agenda 21.

¹⁴² Article 6 (b) of the 1992 Convention on Biological Diversity.

¹⁴³ Article 10 (a) of the 1992 Convention on Biological Diversity.

¹⁴⁴ Article 10.2.b of the 1996 OSPAR Convention.

Chapter 17 of Agenda 21 states that States should take effective action consistent with international law, so as to monitor and control the activities to ensure compliance with applicable conservation and management rules, including full, detailed, accurate and timely reporting, in order to facilitate good governance.¹⁴⁵

Although international treaty practice emphasises the need for integration of national ocean policy, they do not indicate how this objective might be achieved, save to suggest the need to monitor activities, in order to ensure compliance with international obligations. One option to ensure coherence might be to establish a cross-sectoral body, in order to oversee ocean governance issues, although, currently, there is no clear example of this to draw from international law.

2.4 Conclusion

The various treaties and soft law instruments referred to above provide an indication of what good ocean governance may look like in practice. It is clear that the implementation of good ocean governance at the national level may vary slightly but the lessons that can be learnt include the fact that law should be published in an appropriate way and should be equally and fairly administered and effectively enforced. The decision makers are, therefore, bound to follow the rule of law when making decisions.

There is a growing awareness as regards the desirability of including public participation in the decision making processes. The need for public participation is not, however, universally acknowledged. Consultation is largely limited to the Contracting Parties, organisations and experts but does not include the general public. It is anticipated that participation in terms of decision making at the national level is likely to be limited to the relevant stakeholders and experts.

Attention is devoted to transparent decision making, which may require a considerable amount of environmental information to be released to the public. To release environmental information to the general public is the central concern of the 1998 Aarhus Convention, whereas, other treaties are more concerned with the making of information available to other Contracting Parties and Organisations. The key lesson from international law seems to be that information must be made available to all those who may have an interest in it, be that the general public or specific stakeholders. It is observed that there is a growing movement toward making environmental information available to the general public. This statement, however, needs to be further scrutinised at national level.

Individual rights and interests are emphasised in the international legal order and the same practice ought to be evident at national level. International treaty practice emphasises the need to make decisions within a specific time scale, depending on specific circumstances. In addition, international law requires States

¹⁴⁵ Paragraph 17.51, 68,108,116, of the Agenda 21.

to take all practicable measures to ensure that the current needs of the general public and environment can be met. It is, therefore, not unreasonable to suggest that decision making at the national level should also be on a time related basis and should reflect the needs of the general public and the environment.

International trade law clearly perceives consensus as meaning no member formally objecting to the proposed decision at a meeting, when a decision is taken. To seek common agreement in the decision making processes is essential and therefore, needs to be further addressed at the domestic decision making level. Under customary international law, States are accountable for their surrounding marine environment and are entitled to adopt all appropriate measures to maintain environmental quality and control marine pollution. International law does not, however, address the issue whereby public authorities should be answerable to Parliament and the general public.

Finally, according to international treaty practice, States should integrate national ocean policy, in order to coordinate different sectors of ocean governance programmes. The result of the aforesaid should be not only more effective governance of the oceans at national level but also a uniform and consistent national position at regional and global levels. The consequence of this would foster better cooperation among States, as well as between international organisations, when addressing oceans issues, potentially leading to more integrated and more effective ocean governance at the global level.



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