

## **The Ecosystem Approach for Areas Beyond National Jurisdiction: Reflections on the Chair’s non-paper ahead of “PREPCOM III”**

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**Matter commented on:** [Chair’s non-paper](#) “On elements of a draft text of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction”, dated 28 February 2017.

In a [JCLOS blog post](#) of 17 August 2015, Anna-Maria Hubert provided an overview of the UN General Assembly (UNGA) resolution ([A/RES/69/292](#)) to begin a process towards an internationally legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (ABNJ). In a [second JCLOS blog post](#) on the topic in October 2016, Christian Prip provided an overview of the progress that had been made in the interim. The preparatory committee (PREPCOM) established by UNGA Resolution 69/292 has held two meetings to date, the latest being in August-September 2016. The Chair of the PREPCOM (HE Mr. Eden Charles of Trinidad and Tobago) has released a non-paper in advance of the PREPCOM III meetings in New York at the UN headquarters, March 27 – 7 April, 2017. In this blog post I briefly discuss the purpose of the non-paper within the context of the work being undertaken by PREPCOM, and reflect in detail on one particular aspect of the non-paper: the ecosystem approach.

The aim of the PREPCOM is to contribute to the development of an international legally binding instrument under the [United Nations Convention on the Law of the Sea](#) (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

As discussed in the Explanatory Note section of the non-paper, the Chair published the non-paper on 28 February 2017 in order to provide a “structured presentation of the issues and ideas reflected in the proposals for elements of a draft text of an international legally-binding instrument invited by the Chair to be submitted by 5 December 2016”. Additionally, the non-paper aims to serve as a “reference document to assist delegations in their consideration of the issues to be discussed by the Preparatory Committee”.

### **The ecosystem approach**

The ecosystem approach is increasingly deployed as the primary management framework in a wide variety of international legal regimes. Moreover, and importantly, the ecosystem approach is the “primary strategy” of management within the context of the [Convention on Biological Diversity](#) (CBD), and is arguably an implicit element of UNCLOS, and more broadly of ocean management (see for example, [FAO Technical Guidelines for Responsible Fisheries from 2003](#)). The PREPCOM process is located at the intersection of law of the sea and of biodiversity law. The ecosystem approach should therefore have a central role in relation to the key agenda items to be addressed “together and as a whole” by the PREPCOM, namely, marine genetic resources, including questions on the sharing of benefits; measures such as area-based management tools, including marine protected areas (MPA); environmental impact assessments; capacity-building and the transfer of marine technology.

Looking back at the previous meetings of the PREPCOM, the ecosystem approach was from the initial stages included as one of the “guiding principles and approaches” ([Chair’s Overview](#), PREPCOM I), both in general and in relation to environmental impact assessment. In the [Chair’s Overview](#) of PREPCOM II, the ecosystem approach is mentioned twice under the heading “possible areas of convergence of views” in relation to area-based management tools and cross-cutting issues (Annex 2 and Annex 5 respectively).

However, reference to the ecosystem approach does not reveal what sort of role it may have in a future international legally binding instrument. The ecosystem approach is stretched between competing narratives, and is the result of a complex set of contingencies and contestations. Additionally, the ecosystem approach has been developed within several different institutional and legal clusters, and as such has been articulated in accordance with the peculiar needs and pre-existing principles and rules of each specific cluster. In some cases this has resulted in the development of “specialized” versions of the ecosystem approach, such as the ecosystem approach to fisheries. Today however, the ecosystem approach is, for the most part, understood as a style of research and a method of management. Such an articulation bypasses systemic questions about the philosophy of conservation, of ethics and of law that were raised in the 1990s by certain academics. Instead, it situates the focus of management within its broader environmental context, on the assumption that at least some of its properties depend on interactions and relations with the environment within which the focus is situated. Yet there still exist significant differences between the ecosystem approach to fisheries management and the ecosystem approach developed within the CBD.

So, what is the role of the ecosystem approach in the political economy of the PREPCOM, as expressed in the Chair’s non-paper? Is the inclusion of the ecosystem approach merely a rhetorical gesture, destined to populate the preambular section of the potential international legally binding instrument, or can we detect any sign of its potential “intrusion” in the operative parts of the agreement, or of its detailed articulation?

## **The Ecosystem Approach in Oceans and Biodiversity Governance**

Any discussion of the ecosystem approach in the context of the PREPCOM must take as a reference point existing rights and obligations, UNGA resolutions and other UN documents related to the law of the sea, as well as existing policy and technical guidance documents that have been adopted, endorsed or otherwise produced within the context of the CBD, UNCLOS and other relevant international regimes. These on the one hand define the key elements of the ecosystem approach in their different contexts, and on the other define also the relationship between the ecosystem approach and other conservation tools (such as marine protected areas) and principles (such as the precautionary principle). It is useful then, before moving on to explore the role of the ecosystem approach in the PREPCOM process as expressed in the Chair’s non-paper, to mention some of these relevant reference points.

In relation to Oceans, ecosystem approaches (in the plural) became a “theme” following the [World Summit on Sustainable of Development](#) (WSSD), which encouraged States to apply the ecosystem approach by 2010. UNGA resolution ([A/RES/60/30](#)) subsequently requested the United Nations Open-ended Informal

Consultative Process (ICP) on Oceans and the Law of the Sea to focus one of its sessions (the seventh) on “ecosystem approaches and oceans” ([ICP-7](#), 17 July 2016). ICP-7’s report, while recognizing that there was no single way to conceptualize and implement the ecosystem approach, arrived at a set of “agreed consensual elements”. These included, inter alia, conservation of ecosystem structures and their functioning and key processes in order to maintain ecosystem goods and services; the balancing of diverse social objectives; the use of best available knowledge; participatory governance; precaution; the appropriate balance between, and integration of, conservation and sustainable use of marine biological diversity. The ICP-7 report also includes a second set of elements “for the improved application of an ecosystem approach”, such as, inter alia: identification of ecologically based management areas; assessment of ecosystem health and indicators; adaptive management; ecosystem monitoring; and addressing the “root causes” of ecosystem degradation.

The [FAO](#) has also carried out important work in relation to the ecosystem approach to fisheries. However, given that the question of whether fisheries will be included within the scope of the international legally binding instrument (despite the fact that fisheries is perhaps the global legal field where most initiatives are taken to address the protection of marine biodiversity) remains unanswered at this point, I will not discuss this cluster in this post.

The CBD early on adopted the ecosystem approach as “the primary framework of action to be taken under the Convention” ([Decision II/8, 1995](#)). The CBD however has made clear that the ecosystem approach does not possess a legally binding character, but is rather intended to offer a framework of “flexibility and experimentation” in the implementation of the substantive obligations under the CBD, with a view to achieve the “integrated management of land, water and living resources” ([Decision V/6, 2000](#)). The CBD has also endorsed a set of 11 principles known as the Malawi Principles (Decision V/6, 2000), that, while subsequently refined and elaborated ([Decision VII/11, 2004](#)), remain an important reference point for any discussion of the ecosystem approach. These Principles also included four operational guidelines.

[OSPAR](#), the mechanism through which 15 Governments and the EU cooperate to protect the marine environment of the North-East Atlantic, also offers an important reference point, particularly [Annex V of its Convention](#), relating to the protection of biodiversity. The ecosystem approach is an important tool within OSPAR, which has also pioneered work on the development of ecological quality objectives which serve as important tools for the actual monitoring of ecosystems and for the implementation of the ecosystem approach.

These elements represent an important reference point in relation to the articulation of the ecosystem approach within an international legally binding agreement.

### **Ecosystem Approach in the Chair’s non-paper**

The inclusion of the ecosystem approach in the current chair’s non-paper is not surprising, given that States have been repeatedly encouraged in the last decade and a half to apply the ecosystem approach in relation to biodiversity, as referenced above. What is perhaps surprising is the *dearth* of submissions that suggest it should be a general principle in the international legally binding instrument (ILBI), or in relation to one of the agenda items (e.g. environment impact assessments (EIA)), especially considering that, in the experience of the present writer, there is a concrete interest in

its effective inclusion in the international legally binding instrument on the part of at least some delegations (it must be noted however that there have only been 20 submissions, including those of NGOs). Of the State parties to the process, Norway is the only one that has indicated its interest in a detailed elaboration of the ecosystem approach in the international legally binding instrument. WWF has presented the only submission offering comprehensive suggestions for inclusion of the ecosystem approach.

Most submissions that mention the ecosystem approach suggest including it as one of the governing principles of the ILBI (see e.g. WWF, Norway, High Sea Alliance, EU and G77/China). While some suggest that it should govern the entire ILBI, others suggest that it should govern only some of the thematic areas, and most especially area based management tools (ABMT), or EIAs.

These are certainly welcome proposals. However, merely mentioning the ecosystem approach will be little more than a rhetorical gesture. Norway's submission, in this respect, is more interesting. Norway suggests that the ecosystem approach "should be *clearly defined*" in the implementing agreement (emphasis added). Norway offers also a definition derived from the WSSD. Yet this alone is probably not sufficient as definitions of the ecosystem approach, given the multiplicity of possible articulations and orientations, remain vague, over-inclusive and generally rather susceptible of contrasting emphases and interpretations, particularly in relation to their operationalization.

In this respect, the most concrete and interesting suggestion for the inclusion of the ecosystem approach comes from WWF. WWF's submission suggests that the ecosystem approach should be one of the general guiding principles/approaches of the future ILBI. However, and importantly, WWF further suggests that the parties should adopt an annex to the ILBI containing the rules necessary to guide the implementation of the ecosystem approach. The idea is to follow the model of the [Fish Stocks Agreement](#) (FSA), where Annex II guides the operationalization of the precautionary approach in the context of fisheries. The Annex, in WWF's view, should form "an integral part of the agreement" ([WWF submission, p. 2](#)) borrowing again from the FSA, where Article 48 establishes the integral nature of the Annexes to the main agreement.

One important element of an annex setting out the operational rules of the ecosystem approach for a future ILBI could also be the inclusion of a clear reference to one of the existing frameworks setting out the key elements of the ecosystem approach. The [Malawi Principles](#) come to mind given their biodiversity focus. However, perhaps more relevant in an ocean governance context are ICP-7's report and the work done within the context of OSPAR and of the FAO. This, however, is not the place to review these elements. It is sufficient to emphasize how such a list of elements would help concretize the particular articulation of the ecosystem approach the ILBI will adopt, and would also frame the discussion on more specific operational rules. For example, a definition of ecological integrity along the lines of the [Convention for the Conservation of Antarctic Marine Living Resources](#) (CCAMLR) could offer an interesting starting point in our context. CCAMLR to be sure, does not define ecological integrity but the content of the concept can be evinced from one of CCAMLR's objectives, namely the "prevention of changes or minimization of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades" (CCAMLR, art. II(3)(b)). But again the mere mention of a term such as

ecological integrity in the definition of the ecosystem approach is not enough, it needs to be defined in ways that can be measured and allow its operationalization.

To come back to a review of the submissions, WWF's submission is very comprehensive, and also considers aspects related to institutional set-up and to the production, gathering and dissemination of scientific knowledge. In this respect, WWF imagines, the institution of two bodies, along the lines of the CBD, a Conference of the Parties (COP) and a Subsidiary Body for Scientific and Technical Advice (SBSTA). WWF suggests that the COP would, inter alia, serve the role of "overseeing/supervising the implementation of the implementing agreement, including the operationalisation of ecosystem-based integrated oceans management in areas beyond national jurisdiction" (WWF submission, p. 9). For the SBSTA, WWF imagines a role of "providing scientific and technical assistance in operationalising ecosystem-based integrated oceans management at appropriate biogeographic scales" (WWF submission, p. 10).

Finally, WWF proposes the creation of a clearing-house mechanism or online repository, with the purpose of "information sharing and dissemination". This would facilitate implementation of the ecosystem approach by providing continuous and updated biological, ecological and oceanographic information, "as well as pressures, stressors, activities and uses of the marine space" (WWF submission, p. 10). This type of information, suggests WWF, and it is difficult to disagree, would be necessary and essential in relation to "the assessment of cumulative impacts" (WWF submission, p. 10), as well as in relation to various forms of impact assessments, and for the informed development of an effective network of MPAs, and more broadly for ecosystem-based ocean management plans.

WWF's suggestion is certainly a good way forward to ensure that the ecosystem approach is included in a future international legally binding instrument in a concrete, detailed and indeed operational manner, rather than simply by way of generic, in principle, references in the preamble or in non-operative parts of the agreement. However, since the devil is in the detail, and considering how the ecosystem approach can and does take many forms, regardless of the level of detail that the relevant operational guidance contains, the key will be the actual rules adopted to ensure its effective implementation.

Another important aspect relates to the question of cross-jurisdictional lines. The ecosystem approach is already in principle operational in domestic marine spaces, and is also operational within the context of many international institutional and legal regimes. It is also an important policy instrument in international fisheries law. It is included in most regional fisheries management organizations (RFMOs), and is arguably also part of UNCLOS, FSA and of the [FAO Code of Conduct for Responsible Fisheries](#). In this respect, an important question will be how all these institutions will coordinate their efforts in order to ensure the actual operation of the ecosystem approach in the particular geo-ecological areas of relevance, rather than within particular jurisdictional boundaries or areas of competence. Some experience of inter-institutional coordination exist, but the ILBI may offer a new opportunity for rethinking in a more ambitious manner the role of the ecosystem approach for the conservation of marine biological diversity in all maritime zones.

## Conclusions

This post has offered some reflections on the role of the ecosystem approach in the current PREPCOM process, based on the Chair's non-paper published ahead of PREPCOM III, and on the submissions of parties and stakeholders participating to the process. While the inclusion of the ecosystem approach will perhaps not be the central focus of the upcoming debates, it is an important element that cuts across the negotiations, and traverses all four agenda items of the PREPCOM, albeit in different ways and with differing degrees of intensity.