

**International Environmental Governance**

**An International Legal Regime for Protected Areas**

**Vth IUCN World Parks Congress**

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**for the**

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# International Environmental Governance An International Legal Regime for Protected Areas

## Section 1: Executive Summary

### Part A: Overview

This body of work on governance in the lead up to the Vth IUCN World Parks Congress was commissioned by Parks Canada and was undertaken by the IUCN Environmental Law Programme as a collaborative effort of the IUCN Environmental Law Centre, Bonn and the IUCN Commission on Environmental Law.

The results of this work are divided into four sections:

Section 1: *Executive Summary*. Editors, Françoise Burhenne-Guilmin and John Scanlon draw upon the contributions from the lead authors, and related publications, to reflect on the international trends affecting governance of protected areas at the international level, including the possible impact of emerging issues such as certification.

Section 2: *An International Legal Regime for Protected Areas*. Lead Author, Professor Michael Jeffery QC carries out a comprehensive review and analysis of the relevant global instruments, and a select few regional instruments, together with key global initiatives, to identify any discernible trends in protected area governance at the international level.

Section 3: *Protected Areas and Certification*. Lead Author, Nigel Dudley provides a substantive examination of the emerging issue of certification, with an analysis of the current range of possible mechanisms and the potential issues of concern relative to the development of such a system for protected areas.

Section 4: *International Funds, 'Partnerships' and other Mechanisms for Protected Areas*. Lead Author, Tomme Young undertakes a critical review of the governance framework for ongoing financing for protected areas and possible options for future mechanisms. Various options for advancing action through partnerships, and related governance implications, are also reviewed.

The views expressed are those of the Editors and Lead Authors alone and do not necessarily represent the views of IUCN. They are presented to stimulate critical thinking and discussion.

The Editors and Lead Authors would like to acknowledge and to express thanks to Parks Canada for supporting this valuable work and the many researchers and peer reviewers who invested significant time and effort in providing feedback, all of whom are listed in the Appendix to this Executive Summary.

### Part B: What is meant by governance

1. Governance of protected areas cannot be considered in isolation from contemporary thinking on governance issues generally or from the international debate on 'good governance' that has been vigorously pursued in other fora - with 'good' governance now being firmly entrenched on the international agenda. This is evident from the outcomes of the World

Summit on Sustainable Development<sup>1</sup>, with the Johannesburg Plan of Implementation stating that “good governance within each country and at the international level is essential for sustainable development”.

2. Governance can be described as the means by which society defines goals and priorities and advances cooperation; be it globally, regionally, nationally or locally. Governance arrangements are expressed through legal and policy frameworks, strategies, and action plans; they include the organizational arrangements for following up on policies and plans and monitoring performance. Governance covers the rules of decision-making, including who gets access to information and participates in the decision making process, as well as the decisions themselves.<sup>2</sup>
3. Governance has also been described as fundamentally about “power, relationships and accountability: who has influence, who decides, and how decision makers are held accountable”.<sup>3</sup>
4. Most fundamentally, governance is the means to an end, not an end in itself.
5. There are certain elements of ‘good’ governance which are universal, such as the need for transparency and accountability. The purpose of this work is not to repeat these general principles.<sup>4</sup>
6. In order to most effectively achieve sustainable development, governance at all levels – local, national, regional, and global – should be mutually reinforcing. International governance does not produce results in the absence of good national governance, and good national governance is essential for meaningful participation and results at the international level.
7. Who is involved and how decisions are made affects the commitment and ability to follow through. Once decisions are taken, steps are needed at all levels to implement them. If the capacity for governance is weak at any level, this will undermine results. The need for structured devolution of authority to the local and community level necessitates good governance at national and local levels - but devolution will fail unless it is accompanied by the capacity to organize, fund and carry out the devolved responsibilities. Building governance capacity is vital for implementing national and international decisions.
8. It is important to remember that governance is not the province of governments alone. It includes informal institutional arrangements like voluntary codes of conduct for private business and partnerships among governments, intergovernmental organizations, business, civil society, and professional associations. These partnerships include numerous varied and innovative arrangements.

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<sup>1</sup> See also the UN Millennium Declaration where States committed “to promote democracy and strengthen the rule of law” and the Report of the International Conference on Financing for Development (‘the Monterrey Consensus’) where States committed themselves to “good governance at all levels and the rule of law”, and the outcomes of the 3<sup>rd</sup> World water Forum, Kyoto, 2003

<sup>2</sup> See IUCN Position Paper: Governance for Sustainable Development, May 2002. Available from the IUCN ELP Website: [www.iucn.org/themes/law](http://www.iucn.org/themes/law)

<sup>3</sup> See ‘Governance Principles for Protected Areas in the 21<sup>st</sup> Century’, Institute on Governance in collaboration with Parks Canada prepared for the Vth IUCN World Parks Congress

<sup>4</sup> For a good review of general principles see the IUCN Position Paper and the paper ‘Governance Principles for Protected Areas in the 21<sup>st</sup> Century’ referred to above



9. Increasingly, new models are being explored to find ways of building civil society and the private sector into international policy making.<sup>5</sup>
10. Part C of this Executive Summary first addresses the sizeable amount of international guidance that is provided by current international hard and soft law in the field of protected areas<sup>6</sup> and then goes on to consider the informal governance arrangements for protected areas that are also starting to emerge at the international level.<sup>7</sup>

### **Part C: International governance and protected areas**

1. International environmental law has been developing at an increasingly rapid pace for over three decades. Its very purpose is to provide international governance for environmental and natural resources conservation. While this is undeniable, the question here, is whether, and to what extent, this body of rules contains elements of international governance specific to protected areas.
2. International law has various sources, which each generate elements of international governance, but whose mandatory nature varies: treaties, as well as customary law and general principles, are binding (hard law); resolutions and declarations issued by international institutions and international conferences are non-binding (soft law), but have a powerful guidance character, especially for those states having participated in their elaboration. Today, international environmental law governance is provided by a complex body and interaction of hard and soft law. This situation also applies to the specific subject of protected areas.
3. There are a number of legal techniques which enable the protection of particular areas. Some are 'site specific' in that they address geographically delimited areas, designated for a particular purpose, and managed according to that purpose. Others are 'non site specific' in that they address areas belonging to a certain ecosystem type (eg wetlands) wherever they are located and without requiring a case by case designation. This technique, while it permits controlling through a permit system on all those areas, does not seek to address targeted management.
4. IUCN defines a protected area as '*An Area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means*'. It is this definition which is followed in this work. Thus, only site-specific protection is taken into account. In addition, only the goal of protecting and maintaining biological diversity is considered. This includes species, genetic and ecosystem diversity.
5. Tracing the evolution of international law instruments pertaining to protected areas leads to the observation that, generally, protected areas are increasingly recognized by treaties as well as soft law, including international programmes, as a critical tool within the array of measures required for the conservation of biological diversity. This is illustrated by the obligations and

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<sup>5</sup> Recent initiatives such as the World Commission on Dams provides a good example of achieving this. See IUCN ELP Newsletter, Issue 1 2003 available from [www.iucn.org/themes/law](http://www.iucn.org/themes/law) (and IUCN is itself a 54 year old experiment in global governance)

<sup>6</sup> In paragraphs 6.1 to 6.5

<sup>7</sup> In paragraph 6.6

guidelines which consistently mandate the maintenance of existing protected areas, and the establishment of new ones. Such guidance was already part and parcel of early regional biological diversity-related conventions, such as the 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, and has continued to be an important feature of all those which followed in the next two decades, eg for Africa (Algiers, 1968 and revised in 2003); South Pacific (Apia, 1976); Europe (Berne, 1979); Asean (Kuala Lumpur, 1985), as well as for the most recent ones (Protocol to the Alpine Convention, 1994; protocols to the Regional Seas Conventions 1989, 1990, 1996...). This general guidance became global in character with the adoption of the Convention on Biological Diversity in 1992, i.e. relatively late, in the wake of the recognition of biological diversity as a global concern, calling for global responses.

6. Beyond this general level, an array of specific guidance is provided on a variety of aspects of protected areas. Important to note is the evolution which takes place in each case, as newer international instruments adapt their requirements to the evolution of the concept and the role of protected areas in the scientific and socio-economic fields.

Among these aspects are:

### ***6.1. Objectives and corresponding level of action***

Concerted international action is usually called for to achieve particular objectives regarding biological diversity, including protected areas, and the level at which it should take place evolves with the changing perception of which level - regional or global - is appropriate for which objective.

In the field of protected areas, historically, regional action was first called for, leading to broadly based requirements for protected areas to be created as needed to conserve species and representative samples of unique ecosystems regionally.

Global requirements started later, first in relation to specific objectives which clearly could not be achieved without commitments of the global community of states, namely:

- one ecosystem type threatened globally (Ramsar);
- globally important sites (Ramsar and World Heritage); and
- sites important for species migrating across borders (Convention on Migratory Species).

These rather specific global instruments did not focus on protected areas but considered them, explicitly or implicitly, as one, if not the most important, tool to achieve their respective objectives.

Global requirements expanded to increasingly broader objectives as a result of the recognition of global environmental interdependence and as a consequence of globalization, culminating in the recognition, by the adoption of the Convention on Biodiversity, that

- biological diversity conservation is a common concern of humankind in spite of or, depending on the view one takes, because of, states sovereign rights over their biological resources; and

- states are responsible for their biological diversity, and for using their biological resources sustainably.

As the standards for biological diversity conservation became global, so did the standards for techniques and tools to conserve it, including protected areas.

### ***6.2. Objectives of protected areas: where, and how?***

Various requirements have evolved significantly over the years, in particular regarding the following:

- originally purely a tool used on land, the requirement to create protected areas in coastal and marine areas has become standard;
- standard also has become the call for applying an ecosystem approach in determining the boundaries of protected areas;
- equally important has become the requirement to avoid ecological isolation, and achieve protected areas connected in networks and parts of coordinated systems; and
- also striking the evolution of objectives, originally focussed on preservation, to now include substantial roles regarding the sustainable use of ecosystems and their resources.

### ***6.3. Relationships of protected areas with the landscape***

Early on, requirements to protect protected areas from negative impacts from outside have played an important role in international instruments, starting with the concept of buffer zones, in which activities having the potential to affect the protected area considered are to be prohibited.

The Biosphere Reserve concept broadened and refined this approach, providing for a transition area, which can be used to operate linkages between core areas in the protected area and the landscape, including ecological corridors.

Another further step has been the requirement, independently of zoning techniques as indicated above, to regulate processes and activities occurring outside a protected area, but likely to affect it.

Requirements for protected areas networks and systems also underline the necessity to move from single isolated areas to a concept of integration of protected areas and protected areas planning into a general physical planning process sensitive to the requirements of biological diversity conservation.

### ***6.4. The socio-economic requirements***

To take into account the social and economic factors surrounding protected areas has become an important component of protected area design and policies. This is also reflected at international level, with requirements aimed at social acceptability, transparency, and support for sustainable development. Standard setting are trends which aim at:

- targeting/limiting regulation of human activities in protected areas to the purpose for which the protected area has been created, thus tuning prohibitions to ecological needs, while allowing human activities which do not run against these needs;
- empowering local stakeholders to play an active role in individual protected area management, and providing incentives i.e. through benefit sharing to their interest in achieving the purpose for which the protected area was created;
- building capacity of stakeholders, in particular local or indigenous communities, in providing, and benefiting from, such management; and
- providing sufficient support, including financial support, in order to achieve both ecological and socio-economic goals.

### ***6.5. The surrounding legal environment***

In addition to standard setting or guidance related to protected areas per se, a number of broader international legal principles, tools and techniques are relevant to them.

These may address the national or international levels. Of relevance to the national level are, in particular:

- the international requirements to subject projects, plans and programmes to an environmental impact assessment, with a view to providing decision makers with all information needed when taking decisions; and
- the requirement to provide for procedural rights (right to information, public participation, access to justice) in the environmental field generally, is no doubt also of great relevance to protected areas.

Of relevance to the international level are, inter alia, the recognition of:

- common but differentiated responsibilities (and related funding mechanisms – see below) which bind states to the same obligations, but differentiate the level of implementation according to evolving national capabilities;
- equity considerations, leading to requirements for equitable sharing of benefits deriving from the use of genetic resources between those husbanding these resources, and those using their potential to manufacture intellectual property rights protected products;
- the precautionary approach, enabling states to take restrictive measures also in the absence of scientific established certainty;
- transfrontier obligations, whenever action, or lack of action, in a particular state may significantly affect the environment of another; or joint management obligation, when resources are shared;
- accountability at international level, through periodic reports by individual Parties to the conference of parties of each international treaty,

and a number of others, constituting the fabric of an evolving international environmental law.

## **6.6. Emerging issues**

The implementation of most of the international governance principles and standards is dependant on action taken at national level. This in turn depends on the political will and capacity of individual states.

Implementation and compliance are, therefore, crucial, and now increasingly receive priority attention, as is reflected in the outcomes of the World Summit on Sustainable Development.

Compliance mechanisms, for instance, have become a welcome feature of international environmental instruments, as they focus on reviewing specific critical situations upon request (by the state concerned, affected state(s) or the secretariat of the international instrument at stake). The advantage of such mechanisms is their emphasis on solving problems of implementation in a non-confrontational manner.

In addition, other techniques are emerging in parallel. This is the case in the protected areas field for management effectiveness/standards and certification. This reflects not only the generally growing interest in implementation, but also an attempt to assist in how to measure compliance. While certification is not a novel concept, its application to protected areas is problematic, and the implications of developing a global scheme may outweigh any potential benefits.

Added to this are moves to explore new financial mechanisms and ways of creating and supporting partnerships. Much of this is not new, but new approaches are being considered as the importance of both gathers renewed momentum. How this is best advanced in the context of protected areas remains open, including whether support for additional financing to address specific threats, such as alien invasive species, and specific instruments, such as the World Heritage Convention, is a preferable option.

### **Part D: Conclusions**

1. A sizeable amount of international guidance is provided by current international hard and soft law, constituting a true body of standards for 'good' governance in the field of protected areas.
2. Informal governance arrangements for protected areas are also starting to emerge at the international level as management effectiveness/standards, certification, new financial mechanisms and ways of creating and supporting partnerships are further explored and/or developed.
3. As is usually the case with international guidance, most of it is directed at the national level, thus leaving the burden of implementation to individual states.
4. Recent moves to look at certification of protected areas reflect a growing interest in looking more closely at the means used for implementation at the national level, and at their results. How far they will, or should, progress, and whether they will be voluntary or mandatory, remains open to debate.

5. Ongoing issues regarding the means of providing on-going financing for protected areas, and its relationship to the principle of common but differentiated responsibilities remain unresolved, with new options for additional global financing mechanisms being considered.
6. Partnerships, the foundation upon which IUCN has been built, have re-emerged to centre stage, with all means of advancing them across all sectors being explored to enhance implementation.
7. The theme of the Vth IUCN World Parks Congress is '*Benefits Beyond Boundaries*'. How emerging issues of certification, new financial mechanisms and partnerships for protected areas serve to progress this theme also remains open to debate.
8. Is all of this sufficient? Should the international community be diving deeper into national governance and/or implementation issues, and if so which ones and how - or is effort better placed elsewhere?

These are the sorts of questions that now need to be discussed.

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## **Executive Summary: Appendix:**

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## **The Editors**

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