

Making Legal Sense of the Ecosystem Approach

A MEDITERRANEAN CASE STUDY

GUILLAUME FUTHAZAR, PH.D

SENIOR RESEARCH FELLOW, MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW

THE ECOSYSTEM APPROACH (EcAp)

A RELATIVELY UNDERSTUDIED NOTION

- **An omnipresent “buzzword” of environmental governance**
 - Wide diffusion since 2000 (CBD, Decision V.6)
 - Already influential in the 80s (CCALMR, UNCLOS...)
 - A semantically unstable notion, but stable components
- **A notion that has drawn little attention from legal scholars**
 - Few articles and books on the EcAp
 - A recent spark in interest : Platjouw 2016 / Langlet, Rayfuse 2018 / DeLucia 2019

The governance of ecosystems should be reflective of their characteristics

—

Ecosystems are “dynamic complexes of plants, animals and micro-organisms and their non-living environment interacting as a functional unit”(Art. 2 CBD)

- **Physical coherence**

- The governance of ecosystems should be conducted by considering the entirety of the target ecosystem

- **Institutional coherence**

- The different instruments and institutions dealing with ecosystems should be coherent between themselves

- **Adaptability**

- The governance framework should allow for change based on the evolution of the ecosystem or on the acquisition of new relevant knowledge

A persistent legal indeterminacy

WHAT IS THE ECAP FROM A LEGAL PERSPECTIVE?

PURPOSE OF THE PRESENTATION

- Demonstrate that the Ecosystem Approach can be understood as a principle of environmental law
- In doing so, giving an account of its implementation in the Mediterranean region.



A SYLLOGISTIC STRUCTURE

MAJOR

The characteristics of legal principles

A SYLLOGISTIC STRUCTURE

MAJOR

The characteristics of legal principles

MINOR

The characteristics of the implementation of EcAp in the
Mediterranean Region

A SYLLOGISTIC STRUCTURE

MAJOR

The characteristics of legal principles

MINOR

The characteristics of the implementation of EcAp in the
Mediterranean Region

CONCLUSION

EcAp as a legal principle

Opening remarks : why does it matter?

LEGAL PRINCIPLES

CONTESTED NOTIONS IN LEGAL THEORY

A solid blue horizontal bar at the bottom of the page.

SEVERAL UNDERSTANDING OF LEGAL PRINCIPLES


- **No clear consensus emerging on a stable definition**
 - From Ronald Dworkin to Josef Raz, legal principles have been extensively discussed
- **Disagreement on the utility of principles of environmental law :**
 - Threats to legal security (Scotford, 2017) or necessary post modern tools for environmental governance (De Sadeleer, 2002).
- This study relies on a **functional understanding of principles** (Martin, 2018)

A FUNCTIONAL
READING OF
LEGAL PRINCIPLES
(Martin, 2018)

- **Legal principles should be identified based on their function in a legal system. Their source matters not.**
- **Principles are not only highly abstract norms, they also:**

A FUNCTIONAL READING OF LEGAL PRINCIPLES (Martin, 2018)


- Legal principles should be identified based on their function in a legal system. Their source matters not.
- Principles are not only highly abstract norms, they also:



Initiate and
legitimize
rules

A FUNCTIONAL READING OF LEGAL PRINCIPLES (Martin, 2018)

- Legal principles should be identified based on their function in a legal system. Their source matters not.
- Principles are not only highly abstract norms, they also:



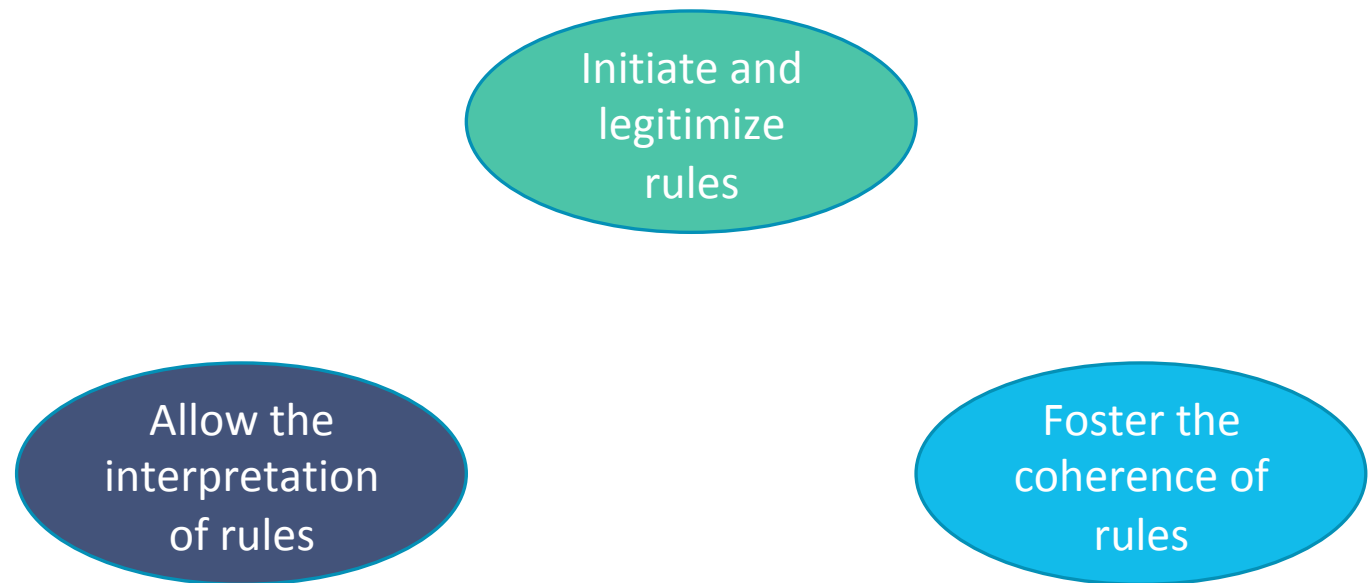
Initiate and
legitimize
rules



Foster the
coherence of
rules

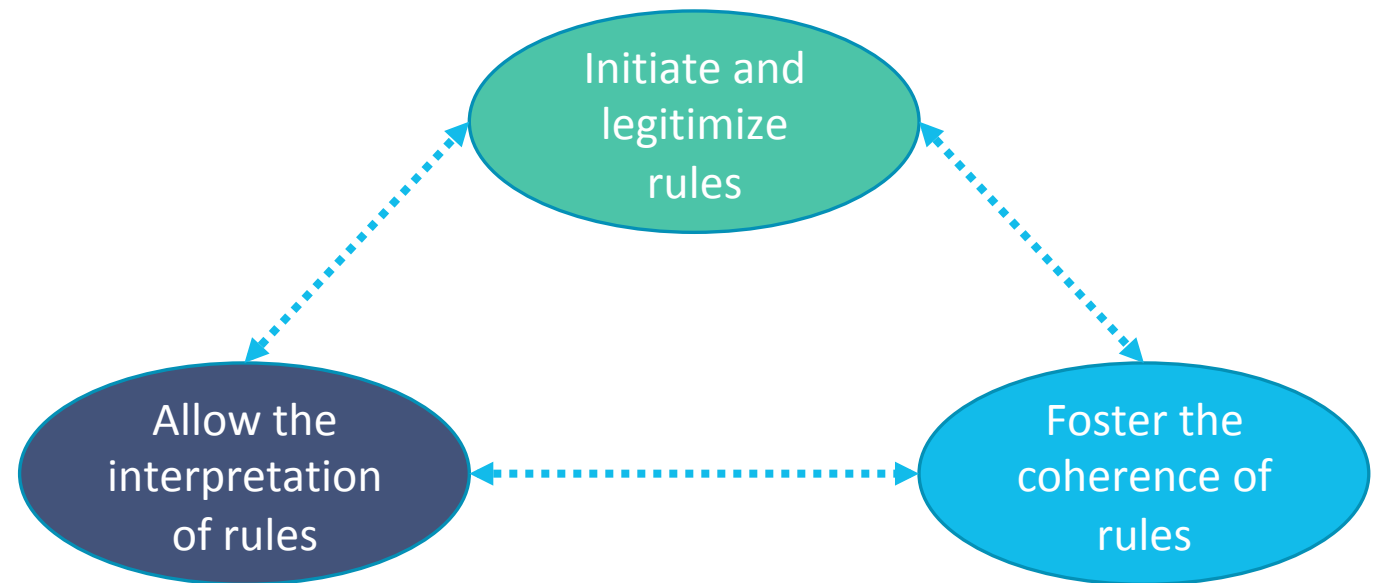
A FUNCTIONAL READING OF LEGAL PRINCIPLES (Martin, 2018)

- Legal principles should be identified based on their function in a legal system. Their source matters not.
- Principles are not only highly abstract norms, they also:



A FUNCTIONAL READING OF LEGAL PRINCIPLES (Martin, 2018)

- Legal principles should be identified based on their function in a legal system. Their source matters not.
- Principles are not only highly abstract norms, they also:



THE ECOSYSTEM APPROACH IN THE MEDITERRANEAN REGION

A REGIONAL EXAMPLE OF GLOBAL RELEVANCE



THE MEDITERRANEAN – GLOBAL AND REGIONAL

- **The Mediterranean region holds within itself all of the issues and characteristics of international environmental law**
 - Biodiversity hot spot faced with high anthropic pressure
 - North/South cooperation characterised by important development differences
 - High legal density
 - Scientific uncertainties remain
- **The Mediterranean Action Plan (MAP) and its Barcelona Convention**
 - A regime connected to the main multilateral environmental agreements and the European Union

The study of the EcAp at the Mediterranean level is relevant for its global understanding

THE ECAP IN THE MEDITERRANEAN ACTION PLAN – A MANAGEMENT PROCESS

- The process for the implementation of the EcAp started in 2008:
 - Decision. 17/8 of the parties to the Barcelona Convention
- The decision 17/8 establishes seven steps for the implementation

THE ECAP IN THE MEDITERRANEAN ACTION PLAN – A MANAGEMENT PROCESS

- The process for the implementation of the EcAp started in 2008
 - Decision. 17/8 of the parties to the Barcelona Convention
- The decision 17/8 establishes seven steps for the implementation

1. Definition on an ecological vision for the Mediterranean
2. Setting of common Mediterranean strategic goals
3. Identification of important ecosystem properties and assessment of ecological status and pressures
4. Development of a set of ecological objectives corresponding to the Vision and strategic goals
5. Derivation of operational objectives with indicators and target levels
6. Revision of existing monitoring programmes for ongoing assessments and regular updating of targets
7. Development and review of relevant actions plans and programmes

THE ECAP IN THE MEDITERRANEAN ACTION PLAN – A MANAGEMENT PROCESS

- The process for the implementation of the EcAp started in 2008
 - Decision. 17/8 of the parties to the Barcelona Convention
- The decision 17/8 establishes seven steps for the implementation

Goals

1. Definition on an ecological vision for the Mediterranean
2. Setting of common Mediterranean strategic goals

3. Identification of important ecosystem properties and assessment of ecological status and pressures

Goals

4. Development of a set of ecological objectives corresponding to the Vision and strategic goals
5. Derivation of operational objectives with indicators and target levels

6. Revision of existing monitoring programmes for ongoing assessments and regular updating of targets

7. Development and review of relevant actions plans and programmes

THE ECAP IN THE MEDITERRANEAN ACTION PLAN – A MANAGEMENT PROCESS

- The process for the implementation of the EcAp started in 2008
 - Decision. 17/8 of the parties to the Barcelona Convention
- The decision 17/8 establishes seven steps for the implementation

Goals

1. Definition on an ecological vision for the Mediterranean
2. Setting of common Mediterranean strategic goals

Monitoring

3. Identification of important ecosystem properties and assessment of ecological status and pressures

Goals

4. Development of a set of ecological objectives corresponding to the Vision and strategic goals
5. Derivation of operational objectives with indicators and target levels

Monitoring

6. Revision of existing monitoring programmes for ongoing assessments and regular updating of targets
7. Development and review of relevant actions plans and programmes

THE ECAP IN THE MEDITERRANEAN ACTION PLAN – A MANAGEMENT PROCESS

- The process for the implementation of the EcAp started in 2008
 - Decision. 17/8 of the parties to the Barcelona Convention
- The decision 17/8 establishes seven steps for the implementation

Goals	1. Definition on an ecological vision for the Mediterranean 2. Setting of common Mediterranean strategic goals
Monitoring	3. Identification of important ecosystem properties and assessment of ecological status and pressures
Goals	4. Development of a set of ecological objectives corresponding to the Vision and strategic goals 5. Derivation of operational objectives with indicators and target levels
Monitoring	6. Revision of existing monitoring programmes for ongoing assessments and regular updating of targets
Development	7. Development and review of relevant actions plans and programmes

A HYBRID LEGAL PROCESS

- **The EcAp does not entail new obligations for the members of the Barcelona Convention (UNEP-MAP, 2007)**
- **The process rather redirects the existing normative framework**

The structures of objective and indicators for the implementation of the EcAp

Ecological Objective 1

Biological diversity is maintained or enhanced. The quality and occurrence of coastal and marine habitats and the distribution and abundance of coastal and marine species are in line with prevailing physiographic, hydrographic and climatic conditions.

The structures of objective and indicators for the implementation of the EcAp

Ecological Objective 1	Operational Objectives
<p>Biological diversity is maintained or enhanced. The quality and occurrence of coastal and marine habitats and the distribution and abundance of coastal and marine species are in line with prevailing physiographic, hydrographic and climatic conditions.</p>	<p>1. Species distribution is maintained</p>

The structures of objective and indicators for the implementation of the EcAp

Ecological Objective 1	Operational Objectives	Indicators
<p>Biological diversity is maintained or enhanced. The quality and occurrence of coastal and marine habitats and the distribution and abundance of coastal and marine species are in line with prevailing physiographic, hydrographic and climatic conditions.</p>	<p>1. Species distribution is maintained</p>	<p>1.1. Distributional range</p>

The structures of objective and indicators for the implementation of the EcAp

Ecological Objective 1	Operational Objectives	Indicators
<p>Biological diversity is maintained or enhanced. The quality and occurrence of coastal and marine habitats and the distribution and abundance of coastal and marine species are in line with prevailing physiographic, hydrographic and climatic conditions.</p>	<p>1. Species distribution is maintained</p>	<p>1.1. Distributional range</p> <p>1.2. Area covered by the species (for sessile / benthic species)</p>

The structures of objective and indicators for the implementation of the EcAp

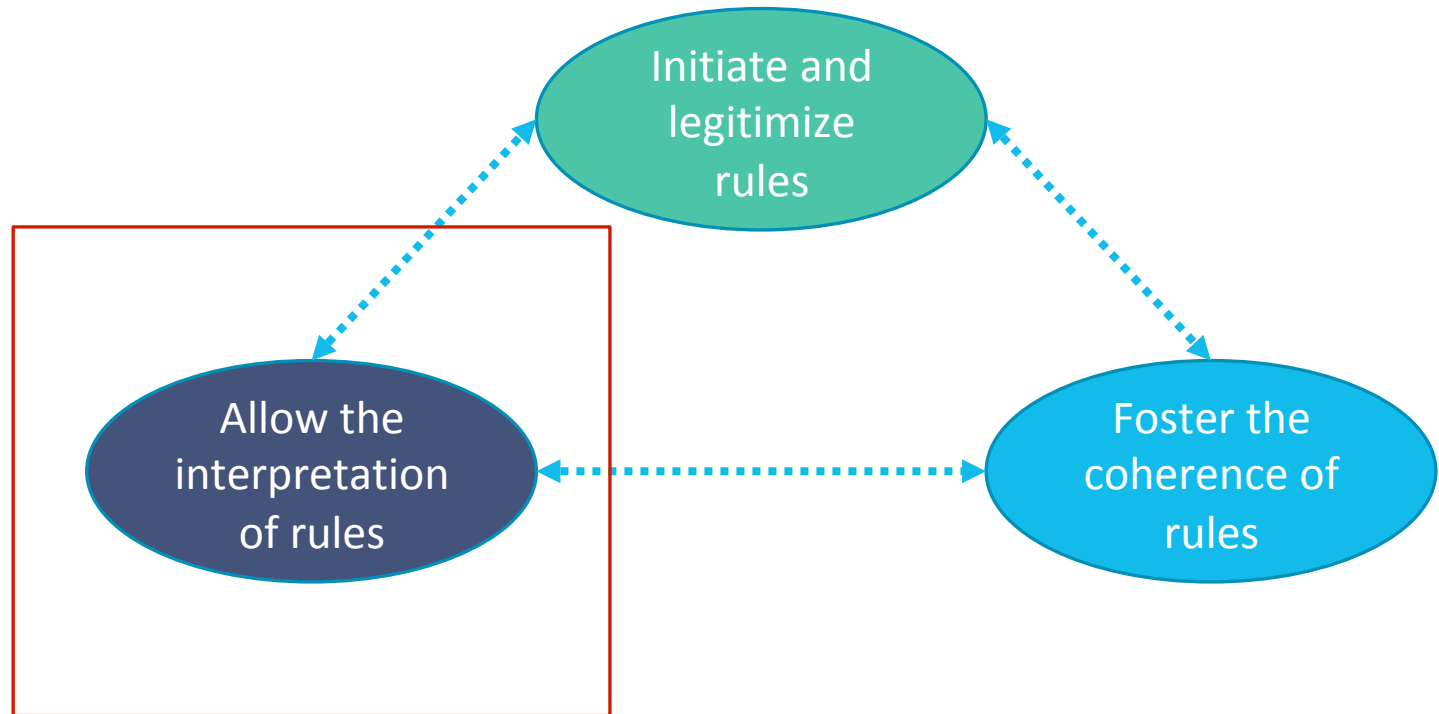
Ecological Objective 1	Operational Objectives	Indicators
<p>Biological diversity is maintained or enhanced. The quality and occurrence of coastal and marine habitats and the distribution and abundance of coastal and marine species are in line with prevailing physiographic, hydrographic and climatic conditions.</p>	<p>1. Species distribution is maintained</p>	<p>1.1. Distributional range</p>
	<p>2. Population size of selected species is maintained</p>	<p>1.2. Area covered by the species (for sessile / benthic species)</p>
	<p>3. Population conditions of selected species is maintained</p>	<p>2.1. Population abundance</p>
	<p>4. Key coastal and marine habitats are not being lost</p>	<p>2.2. Population density</p>
		<p>3.1. Population demographic characteristics</p>
		<p>...</p>
		<p>...</p>
	<p>...</p>	

Giving a meaning to “necessary measures” and other vague obligations

- Several of the obligations contained in the Barcelona Conventions and its Protocol are voluntarily vague
 - Protocol on Specially Protected Areas, article 3: “*The parties shall take **the necessary measures** to [...] protect, preserve and manage threatened or endangered species of flora and fauna*”
- The previously describe structure of objectives and indicators allows flesh out a more precise meaning to the term “necessary measures”.
It allows **interpretation**.

A FUNCTIONAL READING OF LEGAL PRINCIPLES (Martin, 2018)

- Principles are not only highly abstract norms, they also

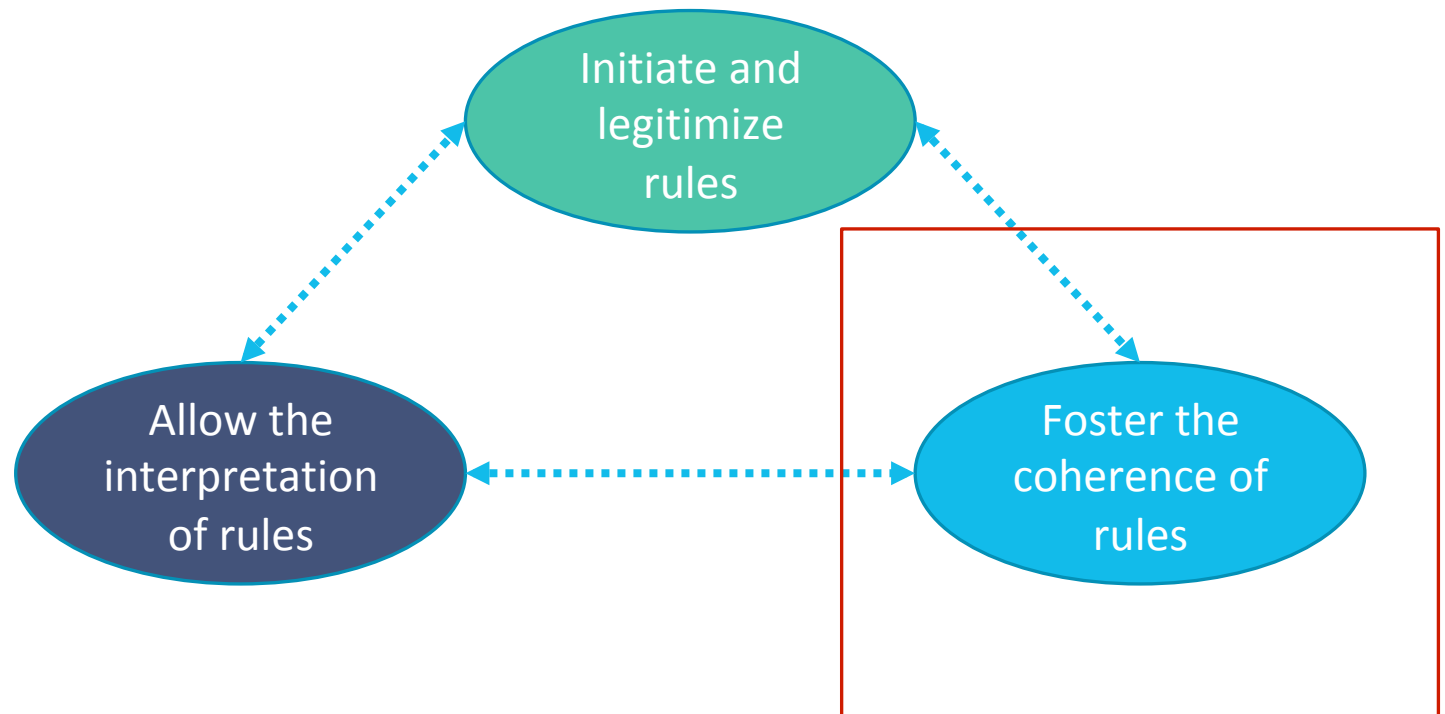


Monitoring programmes and commonly agreed objectives allow for coherence in the implementation of the legal regime

1. Definition on an ecological vision for the Mediterranean
2. Setting of common Mediterranean strategic goals
3. Identification of important ecosystem properties and assessment of ecological status and pressures
4. Development of a set of ecological objectives corresponding to the Vision and strategic goals
5. Derivation of operational objectives with indicators and target levels
- 6. Revision of existing monitoring programmes for ongoing assessments and regular updating of targets**
7. Development and review of relevant actions plans and programmes

A FUNCTIONAL READING OF LEGAL PRINCIPLES (Martin, 2018)

- Principles are not only highly abstract norms, they also

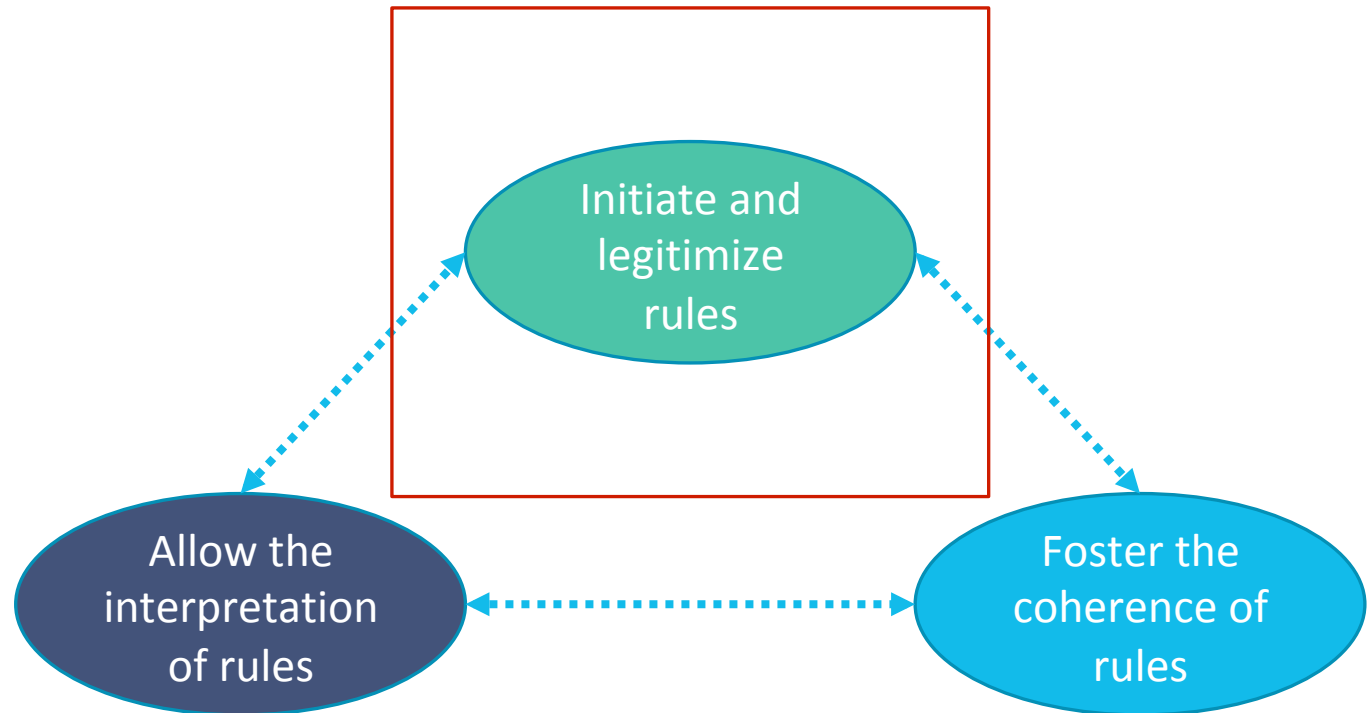


Directing future decisions of the parties to the Barcelona Convention

1. Definition on an ecological vision for the Mediterranean
2. Setting of common Mediterranean strategic goals
3. Identification of important ecosystem properties and assessment of ecological status and pressures
4. Development of a set of ecological objectives corresponding to the Vision and strategic goals
5. Derivation of operational objectives with indicators and target levels
6. Revision of existing monitoring programmes for ongoing assessments and regular updating of targets
- 7. Development and review of relevant actions plans and programmes**

A FUNCTIONAL READING OF LEGAL PRINCIPLES (Martin, 2018)

- Principles are not only highly abstract norms, they also



Why does it matter ?

- Conceptual clarification can help with the diffusion and appropriation of this emergent principle
 - The voice of scholarship could shape the *opinio juris* around the notion
- Understanding it as a principle of environmental law could push for its use by different actors, for instance judges
 - Failure to implement an ecosystem approach could be an important element in the adjudication of environmental cases

THANK YOU FOR YOUR
ATTENTION

FUTHAZAR@MPIL.DE

