



Review Article

The art of “not undermining”: possibilities within existing architecture to improve environmental protections in areas beyond national jurisdiction

Zoe Scanlon^{1*}

¹Centre for International Law, National University of Singapore, Bukit Timah Campus, Tower Block, no. 09-01, 469A Bukit Timah Road, Singapore 259770, Singapore

*Corresponding author: e-mail: cilzs@nus.edu.sg

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United Nations General Assembly resolution 69/292 provides that in developing an internationally legally binding instrument on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction, the process should “not undermine” relevant existing legal instruments and frameworks and relevant global, regional, and sectoral bodies. An analysis of the varied interpretations of this ambiguous expression and its surrounding language raises questions about the role envisaged for such existing architecture. This article considers the practice of regional fisheries management organizations as an illustration of the possibilities and potential for improved practices generated from within existing architecture. It reviews measures taken to protect biodiversity and innovative applications of international law that have improved the ability of RFMOs to take such environmental measures. It seeks to highlight the importance of avoiding too narrow an interpretation of the notion of “not undermining”, and of recognizing the potential in existing architecture when designing an improved regime for the protection of biodiversity beyond national jurisdiction.

Keywords: biodiversity, biodiversity beyond national jurisdiction, fisheries, Law of the Sea, regional fisheries management organizations, United Nations Convention on the Law of the Sea, United Nations Fish Stocks Agreement.

Introduction

United Nations General Assembly (UNGA) resolution 69/292, adopted on 7 July 2015, confirmed the decision to develop an internationally 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 in areas beyond national jurisdiction (ABNJ). Importantly, resolution 69/292 recognizes that this process should ‘not undermine’ relevant existing legal instruments and frameworks and relevant global, regional, and sectoral bodies in ABNJ. However, varied approaches as to this term’s meaning and practical effect exist, and its ambiguity is undeniably significant. On some interpretations, the term appears to suggest only a minimal commitment to maintaining the relevance of existing bodies and instruments in ABNJ. In the context of a new, “comprehensive global regime”

(Preparatory Committee, 2017, 8), a weak commitment to “not undermine” existing architecture in this process raises questions about the role for improvements generated within existing regional and sectoral bodies.

There are today a multitude of legal frameworks and bodies that manage activity in ABNJ, with responsibilities in a variety of different sectors. Many of these have taken measures to protect biodiversity beyond national jurisdiction and have used international law in innovative ways to improve their abilities to adopt and enforce such protections. This article considers some of the practice of one sector—regional fisheries management organizations (RFMOs)—as an illustration of the possibilities and potential for improvements within existing architecture itself. It urges against taking too narrow an interpretation of “not undermining”, suggesting that the potential for improvements from within the regional and

sectoral sphere through innovative uses of international law is significant, and may have the potential to deliver many effective protections for biodiversity that would be unlikely to be unachievable through a heavily globally-focussed approach.

The requirement to “not undermine” existing architecture

In response to concerns that UNCLOS does not adequately address governance of the marine environment in ABNJ, in 2004, the UNGA established the BBNJ Working Group (UNGA, Resolution 59/24, 17 December 2004, UN Doc A/Res/59/24, 4 February 2005). This Group considered various aspects of governance of the marine environment, including the scientific, technical, economic, legal, environmental, and socio-economic aspects. Its work was intended to facilitate government studies and culminate in the generation of recommendations on how to improve international cooperation and coordination. At the Working Group’s 2015 session, the recommendation to develop a legally binding instrument was taken. Resolution 69/292 was adopted shortly thereafter.

Resolution 69/292 governs the procedure for the development of a new instrument for the protection of biodiversity in ABNJ and sets out the procedural process including details of a Preparatory Committee (PrepComm) to make recommendations to the UNGA on elements of a draft text. It also outlines topics to be addressed in a new instrument—the conservation and sustainable use of marine genetic resources, measures such as area-based management tools, including marine protected areas (MPAs), environmental impact assessments, and capacity building and the transfer of marine technology. In outlining these topics, resolution 69/292 also recognizes, in operative paragraph 3 (OP3) that the process of developing a new instrument should “not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies”. The term “not undermine” will play a key role in defining the scope and function of any new instrument and the PrepComm’s negotiations and deliberations. Its importance is therefore clear; however, its precise meaning is highly ambiguous.

The PrepComm met on four occasions from 2016 to 2017. At its final session on 21 July 2017, it adopted, by consensus, a report containing recommendations to the UNGA, including that the text of an international legally binding instrument under UNCLOS be elaborated, and that the UNGA take a decision as soon as possible on the convening of an intergovernmental conference to consider its recommendations (PrepComm, 2017, 8). The report outlines historical context, as well as a (non-exhaustive) list of elements of a new instrument that generated convergence among most delegations. This list includes elements on preamble, scope, objectives, the instrument’s relationship to existing architecture, general principles, elements on each of the elements of the package, institutional arrangements, a clearing-house mechanism, financial issues, compliance, settlement of disputes, responsibility and liability and review. The report also contains a list of issues on which there is a divergence of views between delegations. It underlines that neither the elements largely converged on, nor those in contention, reflect consensus. The report is important as it reflects the PrepComm Members’ most recent thinking on the direction and content of an implementing agreement. In considering the report, however, it must be recalled that it contains recommendations, and that UNGA’s final decision on the report’s recommendations has not yet been taken.

The meaning of the term “not undermine” is elaborated somewhat in the PrepComm’s report. The report indicates that the preambular text of an instrument would set out contextual issues such as the recognition of the “central role” of UNCLOS, the role of existing architecture for the conservation of marine biodiversity in ABNJ and the need for a “comprehensive global regime” (PrepComm, 2017, 8). The text would note that the instrument would “promote greater coherence with and complement existing relevant legal instruments and frameworks and relevant global regional and sectoral bodies”, and should be interpreted and applied in a manner that “would not undermine these instruments, frameworks, and bodies” (PrepComm, 2017, 10). The report notes that a new instrument would outline the relationship between measures under the instrument and those under existing architecture, “for the purpose of coherence and coordination of efforts” (PrepComm, 2017, 12). It suggests a process would be outlined for coordination and consultation with existing bodies on MPA proposals (PrepComm, 2017, 14) and that an instrument would outline institutional arrangements, “taking into account the possibility of using existing bodies, institutions, and mechanisms” (PrepComm, 2017, 17). Included in issues on which diverging views exist, is the most appropriate decision-making and institutional set up for MPAs, “with a view to enhancing cooperation and coordination, while avoiding undermining existing legal instruments and frameworks and the mandates of regional and/or sectoral bodies” (PrepComm, 2017, 20). The report generally reflects the importance of coordination and notes that a new instrument would “affirm the importance of enhanced cooperation and coordination” between elements of existing architecture (PrepComm, 2017, 13).

The ambiguity of the term “not undermine”

The precise meaning of the term “not undermine” in this context is ambiguous. The ordinary meaning of “undermine” is to lessen the “effectiveness, power, or ability of” (Oxford Dictionaries, 2017), yet these three concepts are very different, and the meaning of “undermine” would therefore vary depending on which it is applied to in any particular context. This demonstrates the broad spectrum of meanings the notion of “undermining” embodies.

Resolution 69/292 and the PrepComm report apply the requirement to “not undermine” to various subjects: “relevant legal instruments, relevant legal frameworks and relevant global, regional, and sectoral bodies”. This broad application further complicates the task of defining its settled meaning. Because the term “undermine” has a number of different meanings dependent on context, its meaning will differ when applied to different subjects. For instance, “not undermining” a legal instrument might ordinarily suggest a requirement to not undermine the obligations in that instrument. However, “not undermining” a legal body with a mandate, a body of practice, and which has created its own legal framework may encompass different meanings: respecting its existing decisions, not creating an overlapping mandate or frustrating its ability to operate, for example.

There are accordingly at least two key, but different ways to understand the term “not undermine”, which could have remarkably different effects. In particular, one interpretation has the effect of empowering existing bodies while the other potentially disempowers them. The first approach requires any new instrument to “not undermine” the *authority or mandate* of existing bodies, and to “not undermine” the *measures* in existing

instruments but necessarily leaving their mandates untouched. The effect of this approach would be to allow existing bodies to continue to operate under existing legal frameworks i.e. to continue to make decisions and adopt measures, for example.

The second approach would require a new instrument to not undermine the *effectiveness or objectives* of existing frameworks and bodies, which could include improving the implementation or effectiveness of existing instruments. In effect this could include, for example, the creation of a new global system with the authority to implement existing agreements more effectively, on the basis that this would strengthen—not undermine—the objectives of the existing legal framework.

These different meanings perhaps stem from the complication of the application of “not undermining” to several objects: a focus on the term’s application to a body might be more likely to lead to the former interpretation, on account of the existing mandate and decision-making power of that body and reluctance to compromise those. Conversely, a focus on “not undermining” a legal framework may be more likely to lead to the latter interpretation, as it prioritizes the objectives and principles that underpin that framework. It is thus hardly surprising that different interpretations of this term could emerge.

To support the second interpretation, it has been noted that the term “not undermine” and “not undermine the effectiveness” appear several times in the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 (United Nations Fish Stocks Agreement or UNFSA), and is argued that UNFSA may be instructive in interpreting the term “undermine” (Wright *et al.*, 2016, 10). On this basis it is said that “not undermine” should be understood to mean “not reduce the effectiveness” and thus the ordinary meaning in resolution 69/292 is that the process should not undermine or reduce the effectiveness of relevant existing instruments, frameworks and bodies (Wright *et al.*, 2016, 10). In the context of fisheries in ABNJ, it is argued that it then follows that a new instrument should not undermine the effective implementation of UNFSA, nor RFMO conservation and management measures (CMMs), in the sense of reducing their effectiveness, or weakening them. This would thereby have the effect of strengthening RFMO competences and complementary frameworks (Wright *et al.*, 2016, 10).

However, this analysis raises some doubts. UNFSA’s references to “not undermining the effectiveness”, almost universally refer to an obligation on a flag State to ensure the conduct of its flagged vessels does not undermine the effectiveness of a relevant RFMO CMM in particular in articles 7, 17, 18, 20, and 23. In this context, “not undermining” arguably means ensuring that a vessel does not act inconsistently with the relevant CMM. For example, article 18(3)(h) requires flag States to take measures to regulate their flagged vessels in respect of transshipment, to “ensure that the effectiveness of CMMs is not undermined”. In such examples, relying on UNFSA as an interpretive tool, in particular to incorporate the idea of “not undermining effectiveness” more broadly is not convincing. Its application in this context appears to apply to a vessel’s inconsistent action with a legal measure—a much narrower use of the term, thus not undermining a body with a prescribed mandate and competence is an entirely incomparable concept. Although not undermining an instrument could simply mean not violating its articles, the meaning is significantly obscured where that treaty—like UNFSA, and many treaties in the environmental sphere—provides for the creation of new

bodies and empowers them with competence to make decisions and adopt legal instruments.

An illustration of the stark difference between these two interpretive approaches becomes particularly clear when considered in the context of the creation of a global body for improved implementation of an existing legal framework like UNFSA, for example. If such a new body had overlapping jurisdiction with RFMOs this would be understood as undermining the *authority or mandate* of existing bodies and instruments under the first interpretation, and thus inconsistent with OP3. However, at the same time, a new body with an ability to establish measures that could be imposed on RFMO Members may not undermine the *effectiveness or objectives* of UNFSA and existing bodies, and would thereby be consistent with OP3.

The interpretation of “not undermining”

Treaty interpretation analysis

A starting point for the interpretation of the term ‘not undermining’ ought to be the authoritative test for treaty interpretation found in articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (VCLT) (VCLT, 1980). Although UNGA resolutions such as 69/292 are not treaties, as international legal instruments, the VCLT framework may still prove a useful tool in their interpretation. The test would require, as a starting point, that the terms of the resolution be interpreted in good faith, in accordance with their ordinary meaning, in their context, and in light of the object and purpose of the instrument (VCLT, article 31(1)). Problematically, and as discussed earlier, the key term “undermine” has more than one meaning, and its meaning will differ according to the subject to which it is applied, and according to one’s perspective. In this context, the ordinary meaning aspect of the VCLT analysis is not overly enlightening.

Further, there is no persuasive language in the remainder of the resolution text—which focuses squarely on other aspects of the implementing agreement—to provide context that would aid in the interpretation. The central object of resolution 69/292 was to record the decision to develop a legally binding instrument and to set out the modalities for that process; an object that is so broad that it does not clarify precisely what was meant by the particular language related to the relationship with existing architecture. Since there are numerous different ways to design a new regime, looking to the object to clarify the meaning of ‘undermine’ does not illuminate the true interpretation. There is also a fair likelihood that when agreeing on the language in OP3, that States understood the term to have divergent meanings, which would facilitate different models and functions in an implementing agreement. Since the ultimate objective of any treaty interpretation analysis is generally conceived of as to ascertain the intentions of the parties (Clapham, 2012, 168, 349; Pauwelyn and Elsig, 2012, 451), and it is not clear here that that interpretation was necessarily shared between the parties, this renders finding a “correct” interpretation of the term even more problematic.

In the midst of such debates, the PrepComm’s 2017 report perhaps provides further clarity. The PrepComm report might be considered subsequent practice between the parties in the application of 69/292 under article 31(3)(b) of the VCLT. The term “not undermine” appears in the report, again referring to existing relevant frameworks *and* bodies. Other expressions are also used to describe the potential relationship between an instrument and existing architecture including “avoiding undermining” and

“complement” existing architecture. These terms reinforce the concept established in resolution 69/292; however, given their generality; they do not provide much clarification on the precise meaning of the term. The report also states that “further discussions are required on the most appropriate decision-making and institutional set up with a view to enhancing cooperation and coordination, while avoiding undermining existing legal instruments and frameworks and the *mandates* of regional and/or sectoral bodies”. This indicates an interest in ensuring that, even seeking to enhance the objectives of existing agreements, this should not occur where to do so would compromise the mandate of an existing body. Notably however, the report also underlines that consensus was not reached on these elements and, in particular, on outstanding issues including this one. Nonetheless, the report demonstrates recognition of the importance of a coherent system that operates effectively despite complications of varying competences and acknowledges implicitly the role of regional and sectoral bodies in this space. In light of this, it appears less likely that a scenario like the second interpretation would be feasible i.e. where a focus on enhancing effectiveness of existing legal frameworks may be pursued at the expense of preserving the mandates of existing bodies.

States parties' interpretations

In an effort to reflect consensus, UNGA resolution 69/292 and the PrepComm report contain very broad language and concepts, and to the extent the PrepComm report describes the views of delegations, it does so very generally. This makes it difficult to ascertain the specific positions of States through these documents. Nonetheless, comments have been made by participants during the PrepComm sessions on the appropriate meaning of “not undermining”. That “not undermining” is not synonymous with “not discussing” has been noted (IISD(a), 2016, 5) as well as the need to distinguish between “undermining” and “interfering with” (IISD(a), 2016, 11). Using terms not used in resolution 69/292 such as “non-interference” or “non-duplication” was cautioned against (IISD(b), 2016, 17).

However, despite such discussions over several years, it has been acknowledged that the meaning of “not undermining” existing agreements has not been agreed upon (IISD(b), 2016, 16), and *how* a new agreement will “not undermine” existing instruments and processes has generated “continuing controversial discussions” (IISD(d), 2017 20) and numerous issues on this point have been raised (BBNJ Chair, 2016, 4). It has been acknowledged that the phrase “not undermine” was carefully negotiated by the UNGA (IISD(b), 2016, 19) and different delegations attach different meanings to it (IISD(b), 2016, 19). These range from not interfering with, to not duplicating existing mandates, to not engaging in direct management at the global level, to not impairing the effectiveness of existing measures (IISD(b), 2016, 19).

For this reason, there are also a wide range of views as to the appropriate model for a new agreement, and the relationship between that agreement and existing bodies and instruments, especially in respect of the degree of control a new global mechanism ought to have over existing regional and sectoral bodies (IISD(c), 2017, 15). Some States have called for a comprehensive global mechanism (IISD(b), 2016, 17) or a global institutional mechanism (IISD(a), 2016, 9; IISD(c), 2017, 15) with consensus decision-making (IISD(b), 2016, 6) or global standards binding on States and regional organizations (IISD(a), 2016, 11). Some

call for a global top-down approach mandating changes at regional and sectoral levels (IISD(b), 2016, 19) or a global standard-setting process for regional management (IISD(b), 2016, 19). However, others caution against a global mechanism (IISD(b), 2016, 17), object to specific management approaches in areas already regulated by competent bodies (IISD(b), 2016, 19), prefer an approach which would prioritize capacity building for existing bodies and the creation of new regional seas conventions (IISD(b), 2016, 17) rather than “creating another bureaucratic layer” (IISD(b), 2016, 17), or fear the “slow-down effect” of an extra layer of bureaucracy (IISD(c), 2017, 15). It has been stated that an agreement shouldn’t undermine the mandates of particular existing organizations (IISD(b), 2016, 16; IISD(c), 2017, 6; IISD(c), 2016, 7) and that a new agreement shouldn’t supersede existing instruments (IISD(d), 2017, 11). “Global”, “hybrid”, and “regional” models have frequently been discussed (IISD(c), 2017, 15).

In respect of the most appropriate interpretation of the term “not undermining”, there is much ambiguity and several possible meanings. However, limiting the interpretation to not undermining the *effectiveness* of existing instruments, thereby potentially allowing the undermining of existing mandates would create significant complications given the breadth of existing systems and practice in existing architecture. Realistically, since this process is in the hands of States who will design the model of a new agreement, thereby giving effect to the interpretation of the term “not undermining”, its “correct” interpretation is not overly significant. Given some of the comments made by States thus far that place importance on “not undermining” existing bodies (BBNJ Chair, 2016, 15) it appears unlikely that consensus could be reached on a very narrow interpretation of the term.

Weak surrounding language

Contributing to the uncertainty around meaning, it is unmistakable that the language surrounding the term “not undermine” in OP3 contains a number of weak terms that appear to offer only a partial commitment to the concept of “not undermining” existing architecture.

First, in determining the most appropriate language in which to express this concept, there are various ways this could have been captured in resolution 69/292. For example, it could have been expressed as *building on* existing architecture, or *drawing on*, *looking to*, or *empowering* existing bodies. The phrase, however, is instead expressed in the negative. Presumably, the flexibility of the adopted language, which could conceivably accommodate a diverse range of positions and outcomes was considered an advantage. Notably, the PrepComm’s report states that a new instrument would “complement” existing relevant legal instruments, frameworks and bodies. Although this is a positive term, the idea of “complementing”—which necessarily implies the existence of at least two elements (i.e. to complement each other)—minimizes indications of building on existing tools but rather, appears to focus on the development of a new regime to operate compatibly with existing architecture.

Second, numerous terms within OP3 surrounding the requirement to “not undermine” demonstrate only a limited commitment to “not undermining” existing architecture. For instance, the resolution only “recognizes” that the “process” for developing a new instrument “should not” undermine existing architecture. The term “recognize” stands in contrast to other binding terms in

the resolution, such as “decides” on nine occasions in OP1 and once in OP2, and doesn’t commit to any particular action. The term “should not” similarly appears a limited to commitment to not undermining and finally, OP3 provides only that the *process* should not undermine existing architecture; this requirement is not extended to the final instrument.

The PrepComm’s report states that an institutional set up should carry out its functions, while “avoiding undermining” existing legal architecture. This resembles the language in OP3, with the term “avoid” not reflecting a significant commitment to “not undermine”. The report appears to envisage a global body with decision-making powers, with the scope of those powers, the role of regional and sectoral bodies, and the eventual relationship between the bodies at global and regional levels, to be negotiated. The report envisages a “comprehensive global regime” noting possible institutional frameworks such as a decision-making body, with functions such as making decisions related to implementation of the instrument and promoting cooperation and coordination with existing bodies (Preparatory Committee, 2017, 18). It specifies that when outlining institutional arrangements, the *possibility* of using existing architecture will be taken into account. This too arguably represents only a limited commitment to considering the use of existing architecture in a new regime. The noncommittal language is surely indicative of some reluctance to commit too strongly to maintaining or enhancing the existing abilities of regional and sectoral bodies.

Conclusions on “not undermining”

In summary, there remains much ambiguity around the meaning of the term “not undermine” and the future role of existing architecture in ABNJ. Resolution 69/292 envisages a legally binding instrument and establishes a global process to address the inadequate environmental protections in the current system. The 2017 PrepComm report also envisages a global regime and global decision-making body, whose relationship to existing architecture is yet to be determined. In light of the report’s statement on not undermining the “mandate” of existing bodies, it appears more likely that regional bodies’ mandates will remain uncompromised.

However, the process anticipates a new global regime to address the problems around protections for biodiversity in ABNJ. This global focus, combined with the weak commitment to “not undermine” and the underlying ambiguity of the notion, which could leaves open the possibility of compromising existing mandates, seems to suggest the potential for a strong focus on designing global solutions over generating improvements from within the regional or sectoral level.

Possibilities and potential for improvement within existing architecture—RFMOs as an illustration

There are a multitude of existing bodies and legal frameworks with management functions within ABNJ. Many of these have competence to take measures for the protection of marine biodiversity. This includes bodies such as RFMOs, which cooperatively manage high seas fisheries, the International Maritime Organization (IMO), which manages shipping and the International Seabed Authority (ISA), which manages deep seabed mining, among many others. There are also regional bodies that focus directly on the protection of the environment that operate in ABNJ including OSPAR and the Sargasso Sea Commission. Many of these bodies are governed by treaty frameworks whose competence covers areas

of ABNJ, such as UNFSA on the sustainable management of fish stocks, International Convention for the Prevention of Pollution from Ships and the International Convention for the Safety of Life at Sea, which outlines minimum standards for the construction, equipment and operation of ships, to ensure their safety. This system is comprised of many separate bodies and frameworks and could undoubtedly be improved. However, it should also be acknowledged that significant progress for the protection of marine biodiversity has been made by many of these bodies and treaty frameworks, especially in recent years, and that the potential to achieve further protections through this existing architecture exists.

As an illustration, this article reviews some of the work of RFMOs that contributes to the protection of biodiversity beyond national jurisdiction, and examines innovations taken by RFMOs to confirm or improve their abilities to take such protection measures. RFMOs are illustrative in this context because fishing activity may be the greatest threat to, or have the greatest impact on marine biodiversity in ABNJ (Gjerde in Molenaar, 2007, 90) on account, for example, of overexploitation or its impact on elements of the broader ecosystem such as bycatch or the benthos (Molenaar, 2007, 90). RFMOs are therefore an important sector in adopting and enforcing protections to the marine environment from fishing activity. Further, given they have traditionally been criticized for weak environmental protections, it follows that if RFMOs can make such improvements, other regional and sectoral regimes also hold this potential.

RFMOs as innovative bodies

Depending on precise definition, there are ~17 RFMOs worldwide (Pew Charitable Trusts). RFMOs sit within the broader legal framework of UNCLOS and UNFSA, which guide their operation. However, although UNCLOS governs the rights and duties of States Parties in ABNJ, including with respect to the protection and preservation of the marine environment and the sustainable use of marine living resources, it does so in very little detail. Part XII of UNCLOS places obligations on States for the protection of the marine environment but these obligations are vague and provide little practical guidance.

In response to a recognition that UNCLOS established only in a very general way a requirement that States cooperate in respect of straddling and highly migratory fish stocks, UNFSA was developed. UNFSA is an implementing agreement under UNCLOS that elaborates on the fundamental principles in UNCLOS, providing greater content to the responsibilities of States in this regard, the form such cooperation should take and the core principles for the conservation and management of fish stocks. UNFSA details more clearly the role and functions of RFMOs, underlining the importance of avoiding adverse impacts on the marine environment, and requires States Parties to apply the precautionary approach and adopt management measures for species belonging to the same ecosystem. However, while it addresses the sustainable management of fish stocks in some detail, its guidance on environmental protections remains very vague. RFMOs are therefore situated within a legal framework that provides very few clear obligations with respect to the protection of the marine environment in ABNJ and therefore, very little direction on how to address such challenges.

RFMOs can be seen as generally quite innovative bodies. Some RFMOs have taken innovative measures to address weaknesses in their systems that often hindered the ability to operate effectively.

It has been said that exclusive flag State jurisdiction has failed in high seas fisheries regulation (Rayfuse, 2004, 17) but that the international community has increasingly developed mechanisms of control through which flag State action (or inaction) is scrutinized (Gavouneli, 2007, 162), or innovative mechanisms that also provide third States with jurisdiction. In respect of transparency and accountability around flag State control, RFMOs have developed onerous data reporting requirements. Often, this reported information is circulated to all Member States for scrutiny and examined in Commission meetings. In such meetings, flag States are questioned on their domestic regulation and enforcement action. In some RFMOs, flag States are given compliance ratings. As all States have an interest in the sustainable management of these shared resources, they all have an interest in ensuring others' compliance, and thus, holding them to account.

To enhance their efficacy, RFMOs have also developed measures that extend obligations to third States, such as port States. Many have created regimes permitting boarding and inspection of other Member States' vessels to verify compliance. Many require frequent location data through real-time VMS for uninterrupted vessel tracking. Most RFMOs have established illegal, unreported, or unregulated lists for non-compliant vessels. Vessel listing has several severe consequences that include the withdrawal of fishing authorization and the prohibition of landing or transshipping catch. Further, RFMOs generally have some requirements for independent observers. All these measures have improved efforts to manage fish stocks sustainably and, often, their surrounding marine environments.

Modernizing RFMO mandates and procedures to improve environmental protections

Historically, most RFMOs were mandated only to ensure the long-term conservation and sustainable use of fishery resources, thus clearly marking their focus on sustainable management of fisheries. However, RFMO mandates have increasingly modernized. Contemporary constitutive instruments tend to provide the relevant RFMO with a clear mandate to also take measures to safeguard the marine environment surrounding the fish stocks it manages, thereby expressly allowing those RFMOs to take measures to reduce harmful impacts of fishing on the marine environment. Further, they often expressly refer to the application of the ecosystem and precautionary approaches in RFMO decision-making.

Newer RFMOs

For example, the South Pacific Regional Fisheries Management Organisation (SPRFMO) mandate includes references to the precautionary and ecosystem approaches "to safeguard the marine ecosystems in which [the] resources occur". Similarly, the North Pacific Fisheries Commission (NPFCC)'s mandate includes "protecting the marine ecosystems of the North Pacific Ocean in which [the] resources occur".

On occasion, a consensus-based decision-making system can operate to "provide political cover for a Member that does not want to exercise the necessary restraint recommended by scientists" and effectively provides every member with a veto (Mansfield, 2015). This can thereby prevent the adoption of RFMO measures. A view thus emerged that decision-making procedures that allow for the possibility of a vote increases pressure to reach consensus, and are a more effective way of ensuring

RFMOs take timely and effective management measures (Mansfield, 2015). Accordingly, newer RFMOs, such as SPRFMO, SIOFA, and NPFCC, for example have established decision-making procedures that allow for the possibility of a vote where consensus cannot be reached.

Amended conventions

Some older RFMOs have also actively taken steps to amend their mandates to ensure they can take environmental measures. For example, NAFO's 2007 Amended Convention's mandate includes "to safeguard the marine ecosystems in which [the] resources are found" (NAFO Convention, article 2). NAFO has noted its intention through these amendments to "modernize NAFO, particularly by incorporating an ecosystem approach to fisheries management" ensuring safeguarding the marine environment, conserving marine biodiversity and minimizing the risk of long-term adverse effects of fishing activities on the marine ecosystem (NAFO, 2017). In 2015, ICCAT (ICCAT, 2015) adopted a resolution requiring the application of an ecosystem-based approach in its recommendations (paragraph 1) outlining relevant considerations (paragraph 2). This approach allows the ecosystem-based approach to be applied without the formal, time-consuming process of treaty amendment. Since 2012, ICCAT has been working to bring its Convention into line with contemporary management practices, including adding to its Convention "basic principles of modern international fisheries norms such as the ecosystem and precautionary approaches" (ICCAT working group, 2017, Appendix VI, 24) and appears to be moving closer to finalizing a proposal for adoption. In particular, the current proposed amendments to Convention provide that the Commission and its Members shall act to "protect biodiversity in the marine environment" (ICCAT working group, 2017, Appendix VI, article III bis (c)) and "apply the precautionary approach and an ecosystem approach to fisheries management in accordance with relevant internationally agreed standards" (ICCAT working group, 2017, Appendix VI, article III bis (c)).

In some cases, RFMO Members have approached these amendments flexibly, and despite not having entered into force, they have been applied provisionally. NAFO's Member States took this approach to its amended convention which allowed NAFO to take measures to protect vulnerable marine ecosystems (VMEs) (NAFO, 2017). Similarly, even prior to formally resolving to apply an ecosystem approach, ICCAT had adopted recommendations taking ecosystem considerations into account (for example Recommendation 10-06 and Recommendation 10-09).

Treaty interpretation

Another potential mechanism for modernising RFMOs is through treaty interpretation. Even without an express reference to protecting the marine environment in the objectives article of an RFMO convention, there are mechanisms through which such conventions can be interpreted to provide competence to take measures for the protection of the marine environment. For example, despite no reference to environmental protections in its mandate, WCPFC adopts measures to protect the marine environment, clearly reflecting the view that it has the competence to do so. For example, CMM 2008-04 prohibiting the use of large-scale driftnets notes that these "have serious detrimental effects on these species of concern and the marine environment". Further, while the WCPFC Convention does not expressly

provide that Member States are to apply an ecosystem approach in decision-making, an ecosystem-based approach might be implicit (Barnes, 2016, 602) noting the references to ecosystems in other parts of the Convention. For instance, the preamble acknowledges the need to avoid adverse impacts on the marine environment, to preserve biodiversity and to maintain the integrity of marine ecosystems. It also includes in the role of the Commission and the Scientific Committee assessing the impacts of fishing on species belonging to the same ecosystem as target stocks (articles 5(d) and 13(c)).

These examples illustrate the importance of the context element in the VCLT treaty interpretation test which emphasizes reference to the remainder of the treaty text to assist in the interpretation of a particular treaty term. This can be critical in allowing Member States to look to the preamble or surrounding treaty articles in interpreting a particular treaty term. Furthermore, the possibility exists for reliance on mechanisms such as article 31(3)(a) of the VCLT, which provides that any subsequent agreement between the parties to a treaty regarding the interpretation or application of a treaty to determine the meaning can be taken into account in its interpretation. This could be achieved through a resolution. This provision could be used to develop the meaning and application of an RFMO Convention without the formality of the treaty amendment process which can be complex and time-consuming.

RFMO measures for the protection of biodiversity

RFMOs have also taken measures specifically to protect biodiversity in ABNJ. Many of these measures should be seen as a form of area-based management, to address threats to the marine environment from fishing activity.

Protection of VMEs

Some key examples are the measures various RFMOs have taken for the protection of VMEs in ABNJ. Bottom fishing, especially bottom trawling, can have a significant impact on deep-sea ecosystems as it can damage or destroy long-lived species (Wright *et al.*, 2015, 135). These impacts are often permanent or long-lasting, because deep-sea bottom species are often old and have a slow growth rates (Wright *et al.*, 2015, 135; FAO, 2008, 3).

In 2004, the UNGA adopted a resolution calling for urgent action and to consider the interim prohibition of destructive fishing practices under appropriate CMMs (A/RES/59/25, 2004). In 2006, UNGA adopted a more detailed resolution (A/RES/61/105, 2006) calling on States and RFMOs to take urgent action to protect VMEs from the impacts of bottom fishing (A/RES/61/105, 2006). Specifically, it called for impact assessments, improved scientific research, “move-on” rules and the closure of certain areas to bottom fishing (A/RES/61/105, 2006, [83]). In 2009, after reviewing progress on the implementation of resolution 61/105, UNGA adopted resolution 64/72 which recalled the importance of resolution 61/105, deemed its implementation insufficient and called on States to take immediate action to protect VMEs, prior to allowing or authorizing bottom fishing in the high seas. These measures reflect the important obligations in articles 5 and 6 of UNFSA and Part XII of UNCLOS and express the will and the commitment of the international community to ensure effective management of deep-sea fisheries based on the ecosystem and precautionary approaches (Gianni *et al.*, 2016, 7).

RFMOs have been criticized in this field for being slow to respond, or to follow the advice of their scientific bodies in

considering closures (Wright *et al.*, 2015, 146), for placing an inordinate burden of scientific proof before effecting closures (Wright *et al.*, 2015, 146) and for limiting closures to areas that are not fishable in any case (Clark *et al.*, 2011 in Wright *et al.*, 2015, 146). However, it cannot be denied that significant action has been taken within RFMOs in recent years. In particular, over the past 10 years, there has been significant progress in developing regulatory frameworks for bottom fishing in ABNJ (Urrutia, 2016, 3). In general, it can now be said that within RFMOs far more information on the impact of deep-sea fishing on ABNJ is now available (Gianni *et al.*, 2016, 4) and significantly increased transparency on RFMOs’ work in this area (Gianni *et al.* 2016, 5). A number of RFMOs have now undertaken scientific research, have instituted managed or protected areas, and in some cases, no-fishing zones where VMEs exist or are likely to exist. Historic fishing footprints have been identified and mapped, requirements for impact assessments, VME identification and closures, encounter protocols, stock assessments, compulsory observer coverage and periodic reviews of regulatory measures have also been established (Urrutia, 2016, 7). Most have incorporated key provisions of the FAO Deep Sea Fisheries Guidelines, such as internationally agreed criteria for identifying VMEs, conducting impact assessments and determining significant adverse impacts (Gianni *et al.*, 2016, 5).

Bans and closed areas

The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) is not an RFMO but, among its other functions, manages deep-sea fisheries in the Southern Ocean. CCAMLR has prohibited bottom trawling in the high seas on the Southern Ocean in the CCAMLR Area entirely (CCAMLR, 2008). CCAMLR’s action to protect VMEs, following the advice of its SC, was fairly rapid (Wright *et al.*, 2015, 147). The General Fisheries Commission for the Mediterranean (GFCM) has prohibited towed dredges and trawnet fisheries beyond 1000 m depth (GFCM, 2005).

A number of RFMOs have also established particular areas that are closed to bottom fishing in which VMEs exist. For instance, the North East Atlantic Fisheries Commission (NEAFC) has closed significant fishing areas since 2009 (NEAFC, 2014). NEAFC has also closed “representative” areas, in which it is thought that VMEs are likely to exist (NEAFC, 2014). NAFO, which covers the North-West Atlantic Ocean, has adopted measures closing 20 large areas to bottom fishing (NAFO, 2015, 24–31). These areas will remain closed until the end of 2020; however, NAFO is reviewing its measures and it is anticipated these be made indefinite, that areas will be expanded and new areas will also be closed (Wright *et al.*, 2015, 139). The South East Atlantic Fisheries Organization (SEAFO) has permanently closed 11 seamounts where VMEs have been identified (SEAFO, 2010a, 2016) as well as significant “representative” areas, in which it is thought that VMEs are likely to exist (SEAFO, 2010a, 2016). The GFCM has also instituted areas closed for the protection of a reef system, a cold seep and a seamount (GFCM, 2006, 2013).

Bottom fishing management regimes

Other RFMOs have carefully regulated bottom fishing in their areas of competence. SPRFMO has essentially closed its area to bottom fishing unless a Party has provided evidence of its historic bottom fishing “footprint”. In such cases, that Member State must provide a “bottom fishing impact assessment” to the

SPRFMO Scientific Committee. The Scientific Committee will then make recommendations to the Commission, who takes a decision as to whether and the extent to which bottom fishing in that area can be authorized and under which conditions (SPRFMO, 2017). For a Member State to fish outside its historic footprint, it must be permitted to do so by the Commission on the basis of an application considered by the Scientific Committee (SPRFMO, 2017). This has not yet occurred.

The Southern Indian Ocean Fisheries Agreement (SIOFA), a relatively new RFMO, adopted an interim bottom fishing measure in 2016. The measure outlines scientific research to be undertaken by its scientific committee, provides that Member States may only allow vessels to bottom fish within recently fished areas, under certain conditions, to ensure no significant adverse impact to VMEs. They may not fish within closed areas and must limit catch to that of previous years, vessels may be suspended from bottom fishing if the scientific committee indicates that a Member State's bottom fishing impact assessment does not meet appropriate standards. Once the scientific committee completes the requisite scientific work, Member States will act on the scientific committee's advice, presumably to adopt a final measure to manage the impact of bottom fishing on VMEs.

Alongside its ban on bottom trawling, CCAMLR permits some deep-sea longlining within its area, but only once a proposal has been considered by CCAMLR's scientific committee to determine if significant adverse impacts on VMEs would occur and ensure that those activities are managed to prevent those impacts and approved by the Commission (CCAMLR, 2015). NPFC is a newer RFMO, which has, nonetheless, adopted management measures for bottom fishing in its area. It has established its historic fishing footprint, provided for area closures, requirements for impact assessments and management measures for bottom fishing within the footprint (NPFC, 2016).

Further, in the South-West Atlantic where there is no RFMO governing fishing in ABNJ, the EU and Spain have implemented measures regulating bottom fishing and thereby have largely implemented the UNGA resolutions in the area (Gianni *et al.*, 2016, 41) including by closing most of the area below 400 metres to their flagged vessels (Gianni *et al.*, 2016, 4). This has led, for example, to Spain conducting a comprehensive impact assessment of its bottom fishing on VMEs in the southwest Atlantic. Most of the area below 400 m has been closed to protect VMEs (Gianni *et al.*, 2016, 4).

At the 2016 UN bottom fishing review, it was noted that significant progress had been made in implementing the UNGA resolutions (Urrutia, 2016, 2) and many commentators consider that good practices for identifying and protecting VMEs are now emerging (Ardrón *et al.*, 2014a, 103). Some consider that the UNGA resolutions played a significant role in the great improvements in the management of deep-sea fisheries in ABNJ, as well as the availability of information on deep-sea fishing including known or likely VMEs, the impact of gear types and catch and bycatch data (Gianni *et al.*, 2016, 4).

Exploratory fishing measures

In a related issue, many RFMOs now carefully regulate fishing in areas that have not previously been fished or proposals to fish with a new method, including in SPRFMO, SEAFO, NEAFC, NPFC and NAFO, and CCAMLR (for example, see CCAMLR, 2016; NPFC, 2016; SPRFMO, 2016, SEAFO, 2016). These include

where a Member State seeks to bottom fish outside a designated bottom fishing footprint. These measures essentially close the entire area to new fishing unless appropriate scientific work is undertaken and subject to approval by a Commission (based on a scientific committee's advice) of a detailed proposal for the fishing activity. Such a proposal must generally be for a limited time period, set out all the details of the proposed activity and its anticipated impacts and outline appropriate bycatch measures which will be implemented.

Bycatch measures

Preventing and minimizing bycatch is another area in which RFMOs have taken environmental measures. For example, numerous management measures have also been adopted that ban or regulate the use of particular gear. There are also many bans on the use of gillnets, including in SPRFMO (2013), CCAMLR (2010), SIOFA (2016b), IOTC (2012), and WCPFC, 2008) for example SEAFO (2010b) and NEAFC (for depths >200 m) (NEAFC, 2006) have adopted a recommendation that provide for the banning of deep-water gillnets, in SEAFO's case until more information is available and in NEAFC's case, until the Commission adopts a CMM regulating their use. UNGA resolutions 44/225, 45/197, and 46/215 also appeared to play an important role in encouraging RFMOs to take action in this area and are referred to in the preambles of many RFMO measures.

Another example is found in the many measures that have been taken to reduce the incidental bycatch of seabirds in long line and trawl fisheries. These have been adopted in numerous RFMOs including: IOTC, IATTC, ICCAT, SEAFO, SPRFMO, WCPFC and CCAMLR. These measures generally prohibit the use of certain fishing gear, of discards and lights, mandate certain mitigation measures (such as tori lines, night setting or line weighting, for example) and impose reporting requirements.

A "push" mechanism?

It can be seen that for some of these measures, the principles in UNFSA and UNGA resolutions have played an important role in securing environmental measures in ABNJ by RFMOs (Gianni *et al.*, 2016, 4). There are also increasingly "push" mechanisms within existing architecture. RFMOs learn from one other and are encouraged and inspired by each others' measures. For example, in 2009, WCPFC adopted a measure encouraging action to be taken by its Member States against vessels without nationality. In 2015, CCAMLR adopted a similar measure. In 2016, SPRFMO, IOTC, and SIOFA all adopted similar measures, and NPFC followed in 2017. Similarly, the language of many CMMs is based on the text of similar successful measures in other RFMOs. The similarities in language between the various RFMO measures on vessels without nationality provide an example of this. Such encouragement would only be further improved through increased collaboration.

Further, the inclusion of certain principles and obligations in RFMO Conventions often guides the approach taken in CMMs. For example, in addition to referring to relevant UNGA resolutions, the CCAMLR bottom fishing measure refers to the "precautionary and ecosystem approaches to fisheries management" and the "obligation to use the best scientific evidence available", both referring to the CCAMLR Convention. Many RFMO measures also include provisions that require review of the measure within a particular period of time, particularly where

that measure relies heavily on scientific advice (SIOFA, 2016a, article 38, for example). Similarly, article 27(3) of the SPRFMO Convention includes a mechanism whereby if no high seas boarding and inspection compliance regime had been adopted by the Commission within three years after the Convention’s entry into force, the boarding and inspection regime in articles 21 and 22 of UNFSA would automatically apply in SPRFMO. This provision proved highly effective when, by 2016, SPRFMO had not been able to adopt a boarding and inspection regime. Article 27(3) ensured that a detailed high seas enforcement mechanism is now in place in among SPRFMO Members.

Collaborative measures taken by RFMOs

It has been increasingly acknowledged that an absence of adequate cooperation and coordination between competent bodies—such as RFMOs—can lead to uncoordinated action of conflicting management decisions along sectoral lines (Rochette et al, 2014, 115). It has been argued that the existing management system for biodiversity in ABNJ is highly sectoralised and decentralized (Molenaar, 2007, 95). Although there have traditionally been minimal examples of cooperation or coordination of activities between regional bodies in ABNJ (Rochette et al, 2014, 116), this is rapidly changing—at least in the RFMO space. There is a growing recognition of the importance of RFMOs coordinating in shared ocean space. At the 2016 UN Bottom Fishing Review, the importance of sharing information and collaborating was emphasized both between RFMOs (Urrutia, 2016, 8) and between RFMOs and other regional seas programmes (Urrutia, 2016, 9) and existing examples of such collaborations referred to. Blasiak and Yagi have posited the great potential benefits in increased sharing of information from RFMOs’ diverse experience (Blasiak and Yagi, 2016, 214–215).

Collaborations between RFMOs

There are now several examples of working relationships between RFMOs. Some RFMOs have signed Memoranda of Understanding (MoU) defining and governing their collaborative relationships, particularly where they have adjacent or overlapping areas. For example, the MoU between SPRFMO and CCAMLR outlines all the areas in which the two organizations will coordinate and cooperate, specifies the information to be shared, seeks to harmonize approaches in areas of mutual interest, and makes provision for the establishment of a formal consultation process (SPRFMO, 2016; CCAMLR, 2016). In the absence of such formal arrangements, RFMOs extend observer status to representatives of other RFMOs, particularly where those RFMOs share common interests or concerns. Further, a Regional Fishery Body Secretariats Network has been established, with the objective of ongoing exchange of information among RFMO Secretariats. This body allows RFMOs to exchange information on current challenges and emerging issues experienced by RFMOs. Additionally, the ABNJ Deep Sea Project has been established, which aims to improve the application of policy and legal frameworks in ABNJ, reduce adverse impacts on VMEs, improve planning or management for ABNJ deep sea fisheries and develop a methodology for area-based planning in ABNJ (Martin, 2017, 4). Under the Project, an informal RFMO Secretariats Contacts Group has been established to exchange regular information (ABNJ Deep Seas Project, 2016, 3). Further, information is being shared between RFMOs through the FAO VME database (Urrutia, 2016, 8).

Collaborations between RFMOs and other sectoral bodies

Furthermore, some RFMOs have established arrangements to collaborate, and share information with other bodies in their regions. Some such collaborations are aimed at more holistic and improved environmental protection regimes. A key example is in the North East Atlantic, where NEAFC collaborates closely with the OSPAR Commission.

As an Organization that works to protect the marine environment, OSPAR has the capacity to adopt legally binding decisions to that end (OSPAR Convention, article 13) but its mandate contains explicit exceptions for fishing and shipping (OSPAR Convention, Annex V, Article 4), as those activities are governed in the North-East Atlantic by NEAFC and IMO, respectively. As both NEAFC and OSPAR have limited competence, and as many other organisations also operate in that area, to adopt area-based management measures, these organisations must work together. Accordingly, there is an MoU in place between NEAFC and OSPAR which acknowledges the bodies’ mutual interest in conserving the living resources of the seas and underlines their agreement to “promote mutual cooperation towards the conservation and sustainable use of marine biological diversity including protection of marine ecosystems in the North-east Atlantic” (Memorandum of Understanding, 2008). It outlines their complementary competences and responsibilities and arrangements for data sharing, development of a common understanding of the precautionary approach, reciprocal observer arrangements and cooperation. IMO and OSPAR have also signed a “Cooperative Agreement” guiding their joint activities underlining future cooperation and consultation and mutual assistance. OSPAR also has similar MOUs with the North Atlantic Salmon Conservation Organization, the International Atomic Energy Agency, the European Energy Environment Agency, the UN Economic Commission for Europe, International Council for the Exploration of the Sea, and the ISA.

OSPAR has made swift progress (O’Leary et al, 2012, 603), and is generally seen as an effective organization. It has adopted numerous MPAs covering large areas of ocean World Summit on Sustainable Development, ([31(c)]) which have widely been seen as a significant achievement (O’Leary et al., 2012, 603). Although UNCLOS obligations on protections of marine environment are vague, OSPAR is an example of Parties acting under UNCLOS to collectively adopt environmental measures. The NEAFC/OSPAR MoU has been cited as an example of a potential avenue for furthering conservation through cooperation between regional seas programmes and RFMOs (Wright et al., 2015, 147).

Another example is ICCAT’s collaboration with the Sargasso Sea Alliance in the North Atlantic ocean, over an area that is home to a range of endemic species and is a major migration and feeding route for numerous vulnerable, threatened and endangered species (Freestone in Barnes, 2016, 244) and which is generally seen as a successful development. The Sargasso Sea Alliance works to “exercise a stewardship role for the Sargasso Sea and keep its health, productivity and resilience under continual review” (Hamilton Declaration, 2014) and to use existing regional, sectoral and international organisations to secure a range of protective measures to address key threats in the Sargasso Sea. A key challenge in the Sargasso Sea project had been the lack of coordination between various sectors (Freestone et al., 2014, 147) thus such arrangements facilitate the move from a sectoral to an integrated ecosystem-based approach (O’Leary et al.,

2012, 602). These examples of collaborations with regional environmental bodies demonstrate the possibilities that exist for similar models where other such environmental bodies exist or are to be created of holistic, coordinated protections for marine biodiversity beyond national jurisdiction involving RFMOs.

Conclusions on RFMO practice

In adopting environmental measures and improving their ability to take such measures, RFMO practice providing environmental protections has improved significantly in recent years. Further, positive institutional developments are occurring in the fisheries field (Barnes, 2016, 583). The practice outlined above illustrates that as the international community's concern for environmental protections has grown, although not the traditional focus nor objective of RFMOs, innovations that have increased their abilities to protect biodiversity have been implemented.

Some of these examples of improvements demonstrate the impressive adaptability and flexibility of existing bodies and frameworks in ABNJ. This reinforces the fact that there are numerous mechanisms and devices within international law through which changes could be made to minimize organizational limitations, particularly in respect of existing bodies' competence, mandates and efficacy. It illustrates that creative mechanisms to address organisational limitations would allow more action to be taken through existing architecture in ABNJ. It becomes clear, bearing this in mind, that when designing a new regime, existing bodies and legal frameworks, and their practice and potential should be focussed on, and consideration given to how their work can be facilitated and strengthened within those existing frameworks.

The benefits of a focus on existing architecture

When designing a mechanism to provide for the improved protection of biodiversity beyond national jurisdiction there are a multitude of options. Such options could include such mechanisms like a global political movement, which appears to have been the focus of academic voices (Matz-Luck and Fuchs, 2014, 163) to, at a minimum, a mechanism that would encourage and structure information sharing practices between regional and sectoral bodies (see Barnes, 2016, 615). Countless other structures in between would be possible, comprised of various regional, sectoral and global management elements. UNCLOS clearly permit cooperation both on a regional basis and/or global basis (UNCLOS, article 197), and yet also emphasizes the sectoral regulation of activities (Molenaar and Oude Elferink, 2009, 10). A wide range of different regime designs would therefore be consistent with UNCLOS and there is much flexibility available in designing a new system. The PrepComm's July 2017 report sheds some light on the type of model envisaged. It appears to anticipate a decision-making body to be supported by a scientific body and secretariat whose functions may include making decisions and recommendations related to the implementation of the instrument. Where most substantive management decisions would be made—i.e. at the global, regional or sectoral level—is not yet clear although Freestone argues that it is unlikely to be at the global level (Freestone *et al.*, 2014, 17, 4).

Given the progress already made by some existing bodies, some of the building blocks and important tools for environmental protection will already be in place in existing architecture, including infrastructure, management measures, research and data and compliance tools. In the RFMO sector, for example, there are

management measures for fishing activity to minimize harm the surrounding marine environment, which could be expanded, strengthened, or used as models for other measures. Significant scientific research and reported data have now been generated, which might be helpful for other purposes. Monitoring and enforcement regimes and other compliance tools could potentially also be used for compliance in other contexts. Additionally, the increasing collaborative relationships established by RFMOs have the potential to be beneficial for the protection of biodiversity. As protections will likely only be improved with enhanced institutional cooperation (Matz-Luck and Fuchs, 2014, 165), existing collaborative relationships could be strengthened or expanded and built on.

Irrespective of the approach taken, the reality remains that achieving agreement between States to take conservation measures will be challenging. RFMOs have a difficult task even with limited membership numbers; however, reaching agreement on any binding measures would be even more difficult at the global level when a larger number of parties—potentially including those without a direct interest—are involved. The importance of designing a practical, effective system that will be implemented by State Parties cannot be understated. Some academic voices seem to focus on momentum for a global movement rather than practical implementation (Matz-Luck and Fuchs, 2014, 163) however it appears that effective implementation of measures at the regional level rather than global is more likely, as regional Parties are more likely to have a strong interest in the preservation of the marine environment of that region (Matz-Luck and Fuchs, 2014, 163).

A focus on existing regional and sectoral bodies may also ensure better designed tools to address the specific threats identified in particular regions. At the 2016 UN bottom fishing review, the regional differences which “necessitated tailored approaches” in how RFMOs regulate bottom fishing were acknowledged (Urrutia, 2016, 10). RFMOs' diversity has been seen as an opportunity for tailored approaches to regional conditions (Blasiak and Yagi, 2016, 214) and it appears measures tailored to the specific circumstances of a region are more likely to be effective than generalised measures that are applicable more broadly.

In light of these considerations, and their experience and established roles, regional and sectoral bodies appear best placed to regulate their particular activities or regions to protect biodiversity beyond national jurisdiction. Although such bodies may not be able to address broader global problems outside their sphere, a new regime could accommodate such bodies, through a system that would facilitate and strengthen their work. Taking a broad interpretation of “not undermining” to protect existing mandates and ensure existing bodies' abilities to continue to make improvements within those regimes themselves will be important in facilitating this. There is a risk that an approach that is too globally focussed may not be able to deliver targeted, effective protections. However, in light of the current momentum in this area, an opportunity exists to facilitate the improvement of regional and sectoral systems that regulate biodiversity in ABNJ.

Conclusion

Significant uncertainty surrounds the nature of the relationship of existing architecture in ABNJ to a future global instrument to provide for improved protection for biodiversity beyond national jurisdiction. The eventual design of this instrument, however, will undoubtedly have a strong bearing on its effectiveness.

Drawing on RFMO practice as an example from one sector, this article seeks to highlight the benefits of a focus on the

potential for improvement generated within existing architecture in ABNJ in approaching these considerations. RFMOs have increasingly adopted measures to protect marine biodiversity from the harmful effects of fishing. They have also implemented innovative changes to improve their abilities to take such measures. This illustrates the impressive flexibility and adaptability of international law mechanisms. It highlights the potential for international law to be used to minimise limitations on such regional bodies to achieve improvements in the protection of the marine environment from within the regional and sectoral level. That the RFMO sector—a sector whose governing legal frameworks were not designed for environmental protections—has made such improvements demonstrates the potential that other sectors also hold to make an effective contribution to the protection of marine biodiversity at the regional and sectoral level.

From the outset, the implementing agreement has been envisaged as a global solution to the inadequate protections for biodiversity beyond national jurisdiction. This global focus, combined with the weak commitment to “not undermine” and its underlying ambiguity—which leaves open the possibility to compromise mandates—holds potential for a focus on global solutions over improvements from within the regional or sectoral level. Taking a broad interpretation of “not undermining” to protect existing mandates and ensure existing bodies can continue to improve within those regimes themselves will likely generate more tailored and effective environmental protections. Thus, rather than seeking simply to “not undermine” existing architecture in ABNJ, focussing on and facilitating their efforts and abilities to take action and to adapt to improve environmental protections would be highly beneficial. The current momentum for improved protections for biodiversity beyond national jurisdiction presents an important opportunity to secure an enhanced system for environmental protections in ABNJ. In this regard, carefully designing a regime to ensure the most effective protections possible will be critical going forward.

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