Interpretation of “Not Undermine” concerning the Relationship between Area-Based Management Tools (ABMTs) under a BBNJ Instrument and Measures under Existing Mechanisms

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1. Introduction
2. Potential Conflicts between ABMTs including MPAs under a BBNJ Instrument to UNCLOS and Measures under Relevant Instruments, Frameworks and Bodies
3. The “Not Undermine” Requirement Provided by UN General Assembly Resolutions
4. The Meaning of “Not Undermine”
5. Approaches to Reflecting the “Not Undermine” Requirement in a Future BBNJ Instrument
6. Concluding Remarks
1. Introduction

- Marine areas beyond national jurisdiction (ABNJ) cover approximately 40% of the earth’s surface, 64% of the ocean surface and 95% of its volume.
- **ABMTs including MPAs** are widely recognized as a key mechanism for conserving and restoring biodiversity.
- ABMTs including MPAs are one of the key issues under the discussions and negotiations on an *international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction* (BBNJ instrument).
- Of these relevant issues, the relationship between ABMT-related measures under a BBNJ instrument to UNCLOS and measures under relevant existing instruments, frameworks and bodies has aroused much debate.
2. Potential Conflicts between ABMTs under a BBNJ Instrument and Measures under Relevant Instruments, Frameworks and Bodies

- Possible conflicts with ABMTs/MPAs in ABNJ that have been/would be established by existing regional and/or sectoral bodies.
- Possible conflicts with the mandates and competences of other international and regional bodies.
- Possible conflicts with the 1982 UNCLOS and its two implementation agreements adopted in 1994 and 1995 respectively.
- Possible conflicts with other international and regional agreements.

There are overlapping regimes that need to be harmonized.
3. The “Not Undermine” Requirement Provided by UN General Assembly Resolutions

- **UN General Assembly Resolution 69/292** (adopted on 19 Jun. 2015)
  “3. Recognizes that the process indicated in paragraph 1 above *should not undermine* existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies;”

- **UN General Assembly Resolution 72/249** (adopted on 24 Dec. 2017)
  “6. Reaffirms that the work and results of the conference *should be fully consistent with* the provisions of the United Nations Convention on the Law of the Sea;
  7. Recognizes that this process and its result *should not undermine* existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies;”

A future BBNJ instrument “*should not undermine*” existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.

**Questions:**

What the meaning of “not undermine”? ; How to ensure/reflect the requirement of “not undermine”?
4. The Meaning of “Not Undermine”

- **Meanings in Dictionaries**
  - undermine: “to subvert or weaken insidiously or secretly; to weaken or ruin by degrees.”
    ----Merriam-Webster’s Collegiate Dictionary, 1994
  - undermine: “[to] make [something] less strong or less secure than it was before, often by a gradual process or by repeated efforts.”
    ----Collins (Cobuild) English Dictionary, 1995

- **Not mentioned or defined in 1982 UNCLOS**

- **Uses in the 1995 Fish Stocks Agreement to 1982 UNCLOS**
  - the word “undermine” is mentioned 8 times in the 1995 UN Fish Stocks Agreement, although it is not defined in this agreement.
    - “undermine the effectiveness of [...] measures”: used for 6 times; [Arts 7(2)(a), 17(4), 18(1), 18(3)(h), 20(7), 23(3)].
    - “undermine the [fish] stocks”: used for 1 time; [Art 16(2)]
    - “undermine the effective implementation of this Agreement”: used for 1 time. [Art 33(2)]
Uses in 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAOF Agreement)

- Art 14(4), “...This Agreement shall neither undermine nor conflict with the role and mandate of any existing international mechanism relating to fisheries management.”

- In this agreement, the relationship of the CAOF Agreement with other regional agreements was addressed through three different levels. Namely, concerning the general legal framework [Art 14(1)], concerning the rights and obligations of the parties arising from the general framework [Art 14(2)(3)], and not undermine or conflict with existing international mechanism [Art 14(4)].

  The existing treaties indicate that the term “not undermine” has not been explicitly defined, but instead this requirement has been reflected in relevant agreements. [eg, CAOF Agreement]
5. Approaches to Reflecting the “Not Undermine” Requirement in a Future BBNJ Instrument

5.1 General Requirement: “Not Undermine” Existing Mechanisms

“The regulation of this Part shall not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.”

---President’s aid to negotiations, 2019

• This is consistent with UN GA resolutions 69/292 and 72/249;
• most States supported this reference/expression at BBNJ IGC-2; only differed on where this should be put (general elements section vs. each section?);
• Less likely that there will be a definition of “undermine” in this BBNJ instrument although this has been suggested by some States.
5.2 The 4-Element Approach to Reflecting the “Not Undermine” Requirement at BBNJ IGC-2: Some Preliminary Comments

Element 1: Promotion of *coherence and complementarity* in measures related to ABMTs, including MPAs

Three divergent issues discussed at IGC-2

- **How should States parties promote coherence and complementarity?**

View 1: through global overarching framework [G77+China, EU, African Group, Singapore, India, Australia, New Zealand...]

View 2: through the application of general principles and approaches, guidelines, standards, or the process of ABMTs/MPAs. [Norway, Japan, Korea, USA...]

**Comments:**

- Purpose of this element is to ensure “no undermining”, so any regulation that may lead to hierarchy is inconsistent with UNGA Resolutions, thus not acceptable.
- Global approach has its strength in ensuring coherence and complementarity.
When may the measures related to ABMTs/MPAs be established?

**View 1:** where there is no competent global, regional or sectoral body. [Australia...]

**View 2:** to complement measures designed under exiting mechanisms. [Micronesia, Argentina, Turkey, Philippines...]

**View 3:** merge the above two options [African Group, EU, Singapore, New Zealand...]

**Comments:**
- View 3 is generally reasonable as it is consistent with the “not undermine” requirement.
- “complementarity” may be examined through both the geographical scope and functional mandates of relevant bodies.
The issue of “recognition”

• View 1: oppose/doubt the “recognition”. Reasons: not clear what the “recognition” might entail or imply (Norway); may be interpreted differently (Singapore). **Not acceptable if validity of other ABMTs is somehow dependent on this body.** [Australia, Singapore, Japan, Norway,…]

• View 2: ABMTs/MPAs established under existing mechanism **shall go through a process of “recognition”** by global mechanism, or other arrangement under this instrument, or be recognized automatically. [AG, EU, Argentina,…]

Comments:

• To meet/reflect the “not undermine” requirement, the use of “recognition” **should not create any hierarchy**, thus the “recognition” might be either clearly defined or replaced by another term (eg, consultation?).

• ABMTs/MPAs established under existing mechanisms would not be dependent on a BBNJ instrument to be valid.
Element 2: Enhanced *cooperation and coordination* between relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, with regard to ABMTs, including MPAs, without prejudice to their respective mandates.

- How should this “cooperation and coordination” be enhanced?
  - View 1: could be enhanced *through* a coordination mechanism, cooperation and coordination in the consultation process, a working group, or coordination mechanisms at the regional level. [AG, Argentina, New Zealand, Iceland…]
  - View 2: while supporting the enhancement of cooperation and coordination, *concerned about options provided in View 1;* proposed no-text or COP model. [USA, Norway, Japan, Russia…]

Comments:
- “cooperation and coordination” involves institutional arrangement. Existing regional and sectoral practice and relevant research reveal the strength of a global approach.
- Not undermining/superseding existing mechanisms is a key.
Element 3: *Respect for the rights of coastal States* over all areas under their national jurisdiction, including the continental shelf within and beyond 200 nautical miles and the exclusive economic zone.

- In cases where a ABMT/MPA established under this Part falls under the national jurisdiction of a coastal State at a future point in time, either whole or in part, that area shall be amended or cease to be in force.
- Views: accept; [EU, Russia,...] or suggest redrafting [USA, Japan, Russia, Australia...].

Comments:
- Regarding existing practice (eg, Mediterranean sea), this approach works;
- Regarding a future BBNJ instrument, this scenario could be avoided so not necessary.
  Relevant scenarios: extended CS, EEZ, disputed sovereignty.
Element 4: Relationship between measures under this instrument and those established by adjacent coastal States, including *issues of compatibility*.

- This relationship should apply the “compatibility” requirement or “due regard” obligations?
  - View 1: support the “compatibility” requirement through consultations. [Russia-decisive vote by adjacent coastal States, Argentina, Philippines…]
  - View 2: support the application of “due regard” obligations; meaning of “compatibility” vague. [EU, USA, Japan,…]

Comments:
- The concept of “adjacency” is only employed in the context of fisheries and has been elaborated through the concept of “compatibility” in the context of the 1995 UNFSA [“prioritizing coastal State rights”; “creeping jurisdiction”?].
- Existing practice indicates that “due regard” is fundamental in addressing interactions between coastal States and other States.
- UNCLOS and CBD indicate that “the primary responsibility for dealing with MPAs in ABNJ rests on States [carrying out activities in ABNJ]”. 
6. Concluding Remarks

- “Not Undermine” requirement in the ABMT/MPA of a BBNJ instrument context could be roughly interpreted as “to complement but not overlap in terms of objectives and functional mandates” rather than mere geographical coverage.
- This requirement could be reflected through several elements in a future BBNJ instrument to ensure that a delicate balance reached with the adoption of the UNCLOS between relevant States would not be upset.