

Reflecting on the meaning of “not undermining” ahead of IGC-2

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Matter commented on: Intergovernmental Conference on marine biodiversity in areas beyond national jurisdiction

Introduction

After years of preliminary and preparatory discussions, the United Nations General Assembly (UNGA) ([A/RES/72/249](#)) finally launched an intergovernmental conference (IGC) with the purpose of adopting a new global treaty on marine biodiversity in areas beyond national jurisdiction (BBNJ). The IGC is soon to hold its second substantive session (IGC-2) following an organizational meeting held in April 2018, and a first substantive session (IGC-1) held in September 2018. IGC-1 has arguably shown progress, though not on certain key issues, such as the legal status of marine genetic resources, and a regime to share the benefits arising from their utilization. One of the questions that remains unresolved is the meaning of a key sentence that delimits the mandate of the IGC vis-à-vis existing bodies and institutions. UNGA Resolution 72/249 sets out that the new instrument “should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies”. Given that the IGC is moving towards text-based negotiations, and that one of the crucial negotiating issues is the institutional architecture, and further, that the interaction between a future BBNJ agreement and existing legal instruments and frameworks and other global, regional and sectoral bodies will be inevitable, it is perhaps time to address and resolve this issue. This post offers some inputs with the aim of furthering the debate on the meaning of “not undermining.”

The meaning of “not undermine”

[As Scanlon \(2017 405\) has noted](#), the term “undermine” possesses an “undeniably significant ambiguity” and while there have been several attempts to enunciate a precise meaning for the term, there remains uncertainty as to its scope and implications. This blog post focuses on a limited number of points. The first is that the language used in the resolution is hortatory: the new instrument ‘should’, rather than (the more forceful) ‘shall’, not undermine etc.. This already indicates that what is at stake is not an absolute mandate not to undermine existing instruments and bodies, but a requirement of good faith negotiations that takes into consideration existing instruments and bodies. This view is supported also by a further analysis of the meaning of the verb to undermine. By reference to the Oxford Dictionary, the first meaning of the verb “to undermine” refers to the risks related to rock erosion, and, subsequently, of mining operations. Metaphorically transposed, the meaning of the verb interestingly becomes that of ‘lessen the effectiveness, power, or ability of’ something (an individual, a practice, an institution etc.), as already noted by Scanlon. What is more interesting however, and something that doesn’t seem to have been picked up by commentators, is that the meaning refers ‘especially’ to a manner of undermining that is ‘gradual or insidious’. To undermine, then, at a first approximation and based on the natural meaning of the word extracted from the Oxford Dictionary, indicates a detrimental effect that thwarts the effectiveness of a body or institution, and it does so in a specific manner. This undermining, in other words, is not the result of a direct conflict of competence, but rather is a surreptitious and gradually insidious effect. This has perhaps useful implications. For example, it can be understood to imply that the undermining effects in questions are effects that result from a slow and scattered accumulation of “undermining practices”, rather than of

formal encroachment on legal competence, or a (re-)distribution thereof. This is perhaps the spirit captured by one of the formulations of the [President's aid to negotiations](#). Section 4.2 provides that: “[t]he *implementation* of this Part shall not undermine” (emphasis added) existing instruments, bodies and institutions. This opens up the need to evaluate whether or not the future internationally legally binding instrument (ILBI) undermines existing instruments and bodies - not on the basis of the ILBI provisions, but on the basis of subsequent slow and accumulated scattered practices, including practices of implementation, that may lead to the undermining of existing bodies and institutions only cumulatively. And while this may potentially prove problematic without a general framework of assessment (which however could be another central limitation to the ICG mandate, that it be consistent with UNCLOS), it simultaneously facilitates the complementarity between the ILBI and existing instruments, bodies and institutions.

There are two further considerations that bear on the meaning of undermining. A first consideration is that to ascertain the meaning of the requirement not to undermine, it is helpful to have a look at the history of the BBNJ process, and examine when the idea of not undermining emerged, in what forms, what the different positions have been in that regard, and when the terminology crystallized. It is thus necessary to look back at the documentation available from the [Ad Hoc Open-ended Informal Working Group](#) to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ WG). There, the question of the relationship between a potential new global instruments and existing instrument, bodies and institutions was a key element of the discussion from the very beginning. Indeed, several delegations have been consistently against (“not supportive” of) “proposals involving the creation of new institutions” ([A/RES/65/68](#), para 44). This lack of support eventually turned into a consistent emphasis on how “the existing legal framework was sufficient to address the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction” ([A/RES/66/119](#), para 29), or later on the need to be careful not to infringe “on the regulatory scope of existing agreements or duplicating ongoing efforts” ([A/RES/67/95](#), para 29). It is perhaps not difficult to guess which delegations held such positions.

Interestingly however, the term “undermine” did not make it into the reports of the BBNJ WG until 2014, and its introduction was arguably a maneuver to break a deadlock that had ensued with respect to the relationship between a new global instrument and existing regional and sectoral ones (with fisheries arrangements being a key concern). Even more interestingly perhaps, it surfaced together with other terms that capture a related, yet distinct concern of several delegations. Indeed Section A of the Appendix to the letter from the Co-Chairs of the BBNJ WG to the President of the General Assembly under the heading “relationship to other instruments” had noted that some delegations had proposed language suggesting that a new global instrument “Should not undermine, duplicate or change existing instruments” ([A/RES/69/177](#), p. 24). Other formulations captured similar concerns, for example, . a new global instrument should “Respect and complement the existing mandates of relevant organizations and avoid duplications”; or should not “subordinate existing instruments”. Some delegations also emphasized how “Decision-making for regional and sectoral activities should remain with the relevant regional and sectoral organizations”.

More recently, the PREPCOM process and the ongoing IGC offer further documents that may help decipher the meaning of this contentious notion, including interventions and submissions of delegations as well as the President's documents aimed at facilitating respectively IGC-1 and IGC-2. The PREPCOM process continued to record diverging positions, some of which intended to delineate negatively the scope of the ILBI to areas not adequately addressed by existing international conventions; or that required the ILBI to apply existing rules where relevant activities are already managed or governed by existing instruments or bodies ([Chair's non-paper](#)). The [PREPCOM report](#)

contains formulations that on the one hand suggest that the ILBI should enhance cooperation and coordination, while on the other emphasize the need to not “undermin[e] existing legal instruments and frameworks and the mandates of regional and/or sectoral bodies”. Here the report explicitly refers to the “mandates” (and hence the competence) of bodies and institutions, as opposed to a more generic undermining that can be, by contrast, reasonably interpreted along the lines of the [Fish Stocks Agreement](#) (FSA), which already contains obligations on “not undermining” and may provide useful interpretive resources. All relevant FSA provisions (articles 7(2), 16(2), 18(1), 18(3)(h), 20(4), 20(7), 23(3) and 33(2)) focus on conservation and management measures rather than mandates, and on *effectiveness*, rather than competence, and do so in a way that parallels, and also complements, the principle of compatibility contained in article 7 of the FSA. Given the different circumstances, goals and operational scope, the use of “not undermine” in the FSA can only offer limited help for the interpretation of the meaning of not undermining in the BBNJ context. Views however, vary, and while the recent “[President’s aid to negotiations](#)” circulated by the President (in the section “Relationship to the Convention and other instruments and frameworks and relevant global, regional and sectoral bodies”) reiterates the relevant parts of the PREPCOM Report which framed the idea of not undermining as an element of ensuring a coherent framework that complements existing instrument and bodies (which may easily be reconciled with the idea of not undermining the effectiveness of existing bodies and institutions), the [President’s aid](#) also includes other options and language. Indeed, section 4, which addresses area-based management tools, including marine protected areas, shows that at least one of the options underlines how any measures adopted under the ILBI should not prejudice the “mandates” of existing instruments, bodies and institutions. It must be recalled that earlier in the process, during the work of the BBNJ WG, several delegations specifically linked the notion of undermining with the competence and mandates of existing bodies and instruments ([A/RES/69/780](#), para 29).

There are also terminological variations in relation to the cogence of the consideration of not undermining. While the UNGA resolutions have consistently adopted hortatory language (that is, “should”), both the PREPCOM Report and the aid to negotiations include options that instead use the word “shall”. This again reflects diverging views not only as to the meaning of undermining, but also as to the stringency of its legal implications.

A third set of options, included in both the PREPCOM Report and in the President’s aid to negotiations, perhaps offers the most useful articulation of the meaning of not undermining. These options focus on the idea of mutual support among existing instruments, bodies and institutions and the ILBI, and on the idea of due regard, with the only caveat being that due regard is, as it were, due, but *on condition* that existing instruments and institutions “are supportive of and do not run counter to the objectives of the Convention and this instrument” (President’s aid to negotiations, at 7). This view arguably embodies the spirit of article 237 UNCLOS, which sets out a principle of consistency that shall guide the relations between international agreements whose subject matter is the marine environment and UNCLOS, as well as the broader rule contained in article 311 UNCLOS. A relationship between two instruments both implementing UNCLOS, or related to UNCLOS, may then be interpreted in the sense that is most consistent with UNCLOS’ own provisions and objectives. Complementarity and mutual support thus offer an interpretive approach more apt to foster the integration of exiting instruments, bodies and institutions and the ILBI in a manner that contributes to more effective ocean governance. This would not be the case if the interpretation of not undermining focuses on a bilateral conflict of mandates or on the clear delineation of potentially overlapping mandates.

Conclusions

The meaning of not undermining remains contentious, and as we have seen, there are significantly differing views as to its interpretation that remain on the negotiating table. It is however, perhaps time to bypass the question (and the language) of not undermining altogether, and rather focus on cooperation, collaboration and integration. The [Collective Arrangement](#) adopted in 2014 by OSPAR may offer a useful example in this sense. The primary aim of the Collective Arrangement is to provide a collective and multilateral forum composed of all competent entities addressing the management of human activities in specified areas of ABNJ (in this case the North-East Atlantic), operating on the basis of memoranda of understanding, and of all relevant binding legal instruments and frameworks. In other words, it is a process for integrating the regional, sectoral and global dimensions in a coherent framework for decision making which fosters coordination, complementarity and consistency. Integrating and aligning existing and new bodies and instruments within the same horizon, and under the “constitutional” umbrella of UNCLOS, may prove indeed very productive for moving forward discussions on the institutional arrangements, and the debate about the regional, global or hybrid approach.