



Side Event Announcement

‘High seas fisheries in a new international legally binding instrument’

Date: Wednesday 7 September 2016, 1.15 pm to 2.45 pm

Conference Room: 12

Speakers: Duncan Currie (GlobeLaw), Dr. Carole Durussel (IASS), Sebastian Unger (IASS), Glen Wright (IDDRRI)

Both in the course of the deliberations that led to the decision to develop a new international legally binding instrument (ILBI) on the conservation and sustainable use of marine biological diversity of ABNJ, and at the first meeting of the Preparatory Committee (PrepCom) in March-April 2016, numerous States and stakeholders highlighted that fishing is currently the activity with the largest impact on biodiversity in ABNJ. Despite this widespread recognition, a number of delegations have expressed concern that it is not currently clear whether fisheries should be integrated into a new ILBI and how this could be achieved. This workshop will explore this specific issue, highlighting possible options for the inclusion of fisheries within a new ILBI, and identifying ways for this agreement to complement and enhance existing fisheries management.



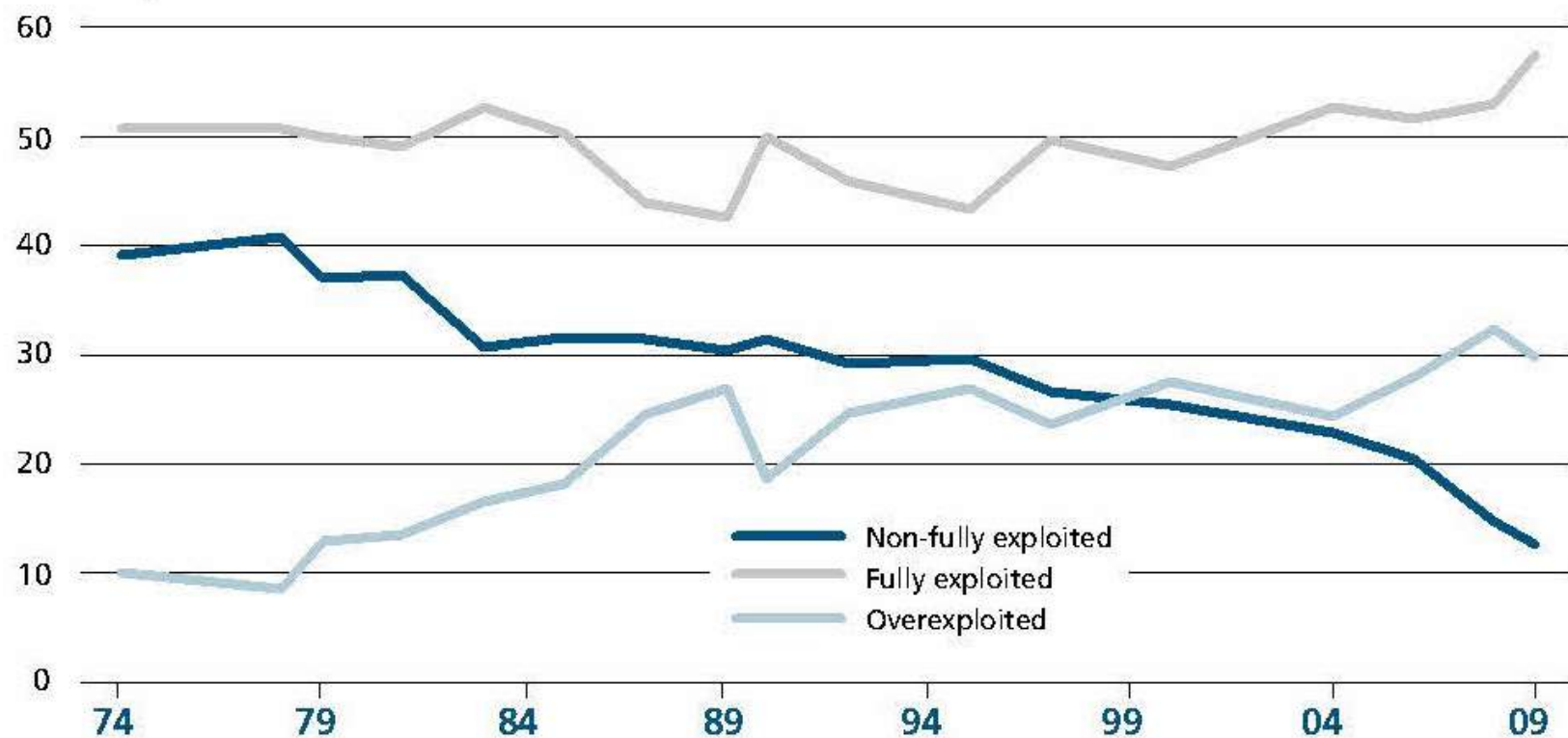
High Seas Fisheries in a New International Legally Binding Instrument ISD / IASS

7 September 2016

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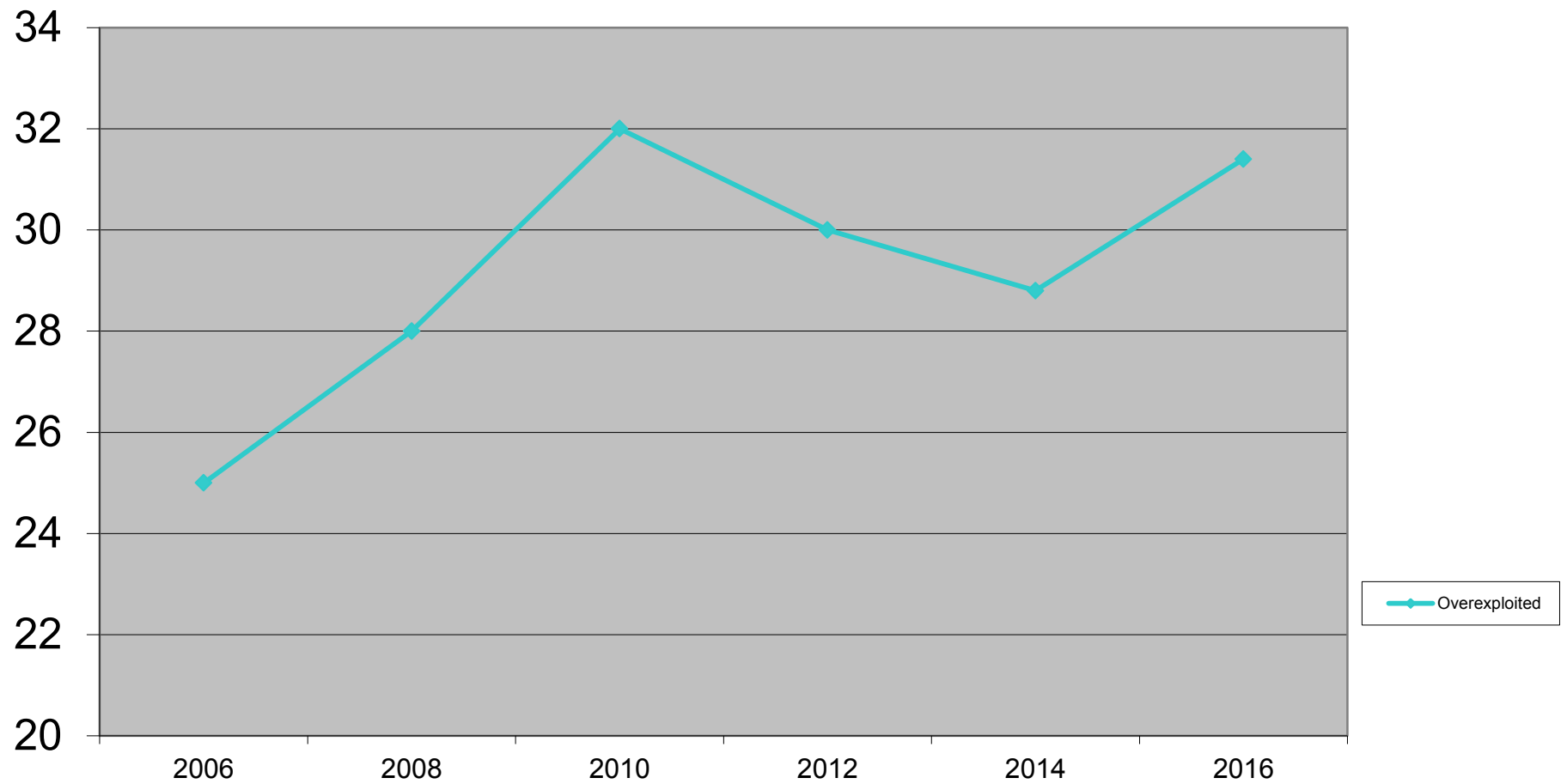
Global trends in the state of world marine fish stocks since 1974

Percentage of stocks assessed



Status of Fisheries 2006-2016

Overexploited



Data:

FAO, The State of World Fisheries and Aquaculture 2006,
2008, 2010, 2012, 2014, 2016

Fish Stocks Review Conference 2016

- 2. Independent reviews; timely implementation; Kobe-like process for non-tuna RFMOs- example of coordinated action that enabled progress
- transparency, publicity and accountability
- Public information about implementation
- exchange information on perf reviews -
104

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- Ensure the consistent application of the precautionary and ecosystem approaches among RFMO/As, 2 a,b
- Precautionary target and limit reference points, provisional reference points when information low -3(i); determine actions to be taken if they are exceeded (ii)

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- Develop appropriate area-based management tools, including closed areas, marine protected areas and marine reserves and criteria for their implementation, -6(a)
- MPAs – connectivity, resilience (48)
- urgently reduce the capacity of the world's fishing fleets to levels commensurate with the sustainability of fish stocks -7(a)

54 overcapacity problem has grown

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- 92 Bycatch –selectivity of fishing gear, reducing catch of juveniles, adopting environmentally friendly material, improving data collection and monitoring, control and surveillance.
- Encourage application of FAO International Guidelines on Bycatch Management and Reduction of Discards.
- 95 ITLOS Case 21 Advisory Opinion – due diligence
- 101 timely implementation of independent RFMO reviews: adaptive, independent, continuous

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- 3 Cooperation:

joint meetings, joint working groups, share lists of IUU vessels, harmonise measures across RFMOs

-esp on data collection, sharing, bycatch, ecosystem approach, mcs, sharing vessel black and white lists

and memoranda of understanding (107)

Cooperation RFMOs, RSOs

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● 5 Governance

- Ensure that **post-opt-out behaviour is constrained** by rules to prevent opting out parties from undermining conservation, by establishing clear processes for dispute resolution and for the adoption of alternative measures with equivalent effect that will be implemented in the interim.
- Improve the **transparency** of RFMO/As, both in terms of decision-making that incorporates the precautionary approach and the best scientific information available and by providing reasonable participation for intergovernmental and nongovernmental organizations through the organizations'/arrangements' rules and procedures.
- Encourage RFMO/As to **review their decision-making procedures**, noting the need for procedures which facilitate the adoption of conservation and management measures in a timely and effective manner, in particular to consider provisions for **voting and objection procedures**.

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- 7. Effective control - Strengthen effective control over vessels flying their flag
- 113 Case 21 AO: due diligence, take all necessary measures to ensure compliance with measures, prevent IUU fishing
- FAO 2014 Voluntary Guidelines for Flag State Performance

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- Deep sea: 13
- Continue to establish and implement long-term CMM for deep-sea fisheries in accordance with GA resolutions and FAO Guidelines
- Improve data collection and cooperation by States and RFMO/As in regards to the CMM for deep-sea fisheries, including the use of the precautionary approach.
- **See DSCC report for comprehensive analysis**

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- MCSCE

- 116 Action against **beneficial owners, operators** of IUU vessels
- 5. control over fishing activities of their **nationals** and to strengthen domestic and other mechanisms to **identify and deter nationals and beneficial owners** from engaging in IUU fishing activities
- proper **penalties** imposed to deprive nationals, including beneficial owners, of the benefits of such activities. (127)

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- MCSCE

- 6 develop a **global record** of fishing vessels and unique vessel identifiers (UVIs), use IMO ship numbers for >100 GT (and 134)
- 12 including info on **beneficial ownership**
- 8 Encourage **transshipment in port** “to maximum extent”
- Clear and stringent **trans-shipment regulation**, reporting, VMS, observers
 - aim for 100% observer coverage. (143)

Challenges

- The deep sea constitutes the largest source of species and ecosystem diversity on earth (UNGAs First Global Marine assessment ([Ch 36F](#)))
- Deepwater trawl fisheries: concern for the conservation of fragile benthic habitats associated with seamounts and other deep-sea environments (GMA [Ch 52](#))
- Lack of information: “The incompleteness of our knowledge of biodiversity and the factors that affect it means that decision-making about potential impacts will be subject to high uncertainty, and the application of precaution is appropriate.” Ch 52

Opportunities

- Expanded focus on sustainability to protecting marine biodiversity in ABNJ:
 - 3 new agreements established – SPRFMO, SIOFA, North Pacific
 - NEAFC, NAFO, SEAFO have closed substantial areas at fishable depths, including where VMEs likely to occur. NEAFC, SEAFO have closed representative areas
 - SPRFMO, SIOFA, NPFC restricted to footprint unless EIA
 - CCAMLR bans bottom trawling
 - CCAMLR, SPRFMO, NEAFC ban gillnets
 - Transparency improved

UN General Assembly and deep-sea fisheries on the High Seas (2004-2014)

- UN debate - biodiversity, equity, governance, international law
- Four+ UNGA resolutions (59/25, 61/105, 64/72, 66/68); UNGA reviews
- Core Resolution: Prevent Significant Adverse Impacts on Vulnerable Marine Ecosystems and ensure sustainability of deep-sea fish stocks:
 - Prior Environmental Impact Assessments of bottom fisheries
 - Precautionary Area Closures of VMEs
 - Sustainable catch/bycatch deep sea species
 - Move on Rule

Adopt and implement by 31 December 2008 or else not authorize to proceed

Progress to Date

- **Three new RFMO agreements: North Pacific, South Pacific and Southern Indian Oceans**
- **Framework regulations and interim measures adopted by most RFMO/As**
- **Impact Assessments (IAs) for all DSF required by CCAMLR, North and South Pacific RFMOs, NAFO (2016)**
- **IAs required in “new” fishing areas or when new scientific information becomes available in NE, NW, and SE Atlantic RFMOs**
- **EU adopted regulation 734/2008 to require IAs and reverse burden of proof to implement UNGA resolution in non-RFMO/A areas (e.g. SW Atlantic). Others?**

Progress to Date cont.

- Freezing footprint & delineating 'existing fishing areas': SPRFMO, NEAFC, NAFO, SEAFO, NPFC; imposing restrictions on fishing in 'new' fishing areas
- A number of known or representative areas of VMEs closed NAFO, NEAFC, CCAMLR, GFCM, NPFC, SPRFMO, SEAFO
- Closing seamounts to bottom fishing (NAFO)
- Prohibition of bottom trawling (CCAMLR; GFCM > 1000m)
- Prohibition of bottom gillnet fishing (SPRFMO, NEAFC (>200m) SEAFO, CCAMLR)
- Gear restrictions/regulations in other area (e.g. set gillnets in North Pacific)
- NON-RFMO areas: EU legislation, Spain closed most areas as VME areas below 300-400m to bottom fishing in SW Atlantic based on extensive impact assessment. Others?

Shortcomings in Implementation

- **Bottom trawling remains dominant method of bottom fishing on high seas (GMA/WO, others)**
- **Move-on rules vary widely from region to region but rarely triggered outside of CCAMLR area (thresholds too high, reporting requirements not rigorous)**
- **Systemic overfishing, no stock assessments for many/most target species; little to no information on impacts on hundreds of bycatch species (e.g. South Pacific/NZ: 22 target species; 115 bycatch species; NE Atlantic/FR: up 100 species); trophic impacts**
- **Most species impacted long lived, slow growing low fecundity: in some cases endangered species (IUCN NE Atlantic Red List - roundnose grenadier, blue ling, deep-sea sharks)**

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General approach to VME protection:

- ⑩ closed areas where concentrations of VMEs identified (though not in all cases);
- ⑩ closure of some 'representative' areas where VMEs likely to occur; establish fisheries footprint;
- ⑩ require move-on rule in areas open to fishing;
- ⑩ require impact assessments for bottom fishing outside of footprint/open areas

Summing up

Aiming at

- Conservation of marine biological diversity in ABNJ
- Sustainable exploitation of fish stocks
- Minimal impact on bycatch species
- Preservation and protection of the marine environment
- Assessments and move-on encounters should result in measures to control identified effects to prevent significant adverse impact on VMEs – e.g. restrict gear types, close areas, act on precautionary basis in the absence of adequate scientific information.
- **No assessment** should mean **no fishing**
- **No measures** should also mean **no fishing**
- Stock assessments and bycatch provisions: core business of RFMOs
- Problems with science, data: precautionary principle



High Seas Fisheries in a New International Legally Binding Instrument

Area-based Management Tools

Dr. Carole Durussel

Institute for Advanced Sustainability Studies (IASS), Potsdam

- **Possible role of a new BBNJ instrument for ABMTs**
- **CBD provision on in-situ conservation**
- **Area-based Management Tools**
 - Complementary measures for sectoral ABMTs
 - Options for the implementation of ABMTs
- **Marine Protected Areas**
 - Options for the establishment of MPAs



Picture: Source: <https://images7.alphacoders.com/410/410838.jpg>

Possible Role of a New BBNJ Instrument

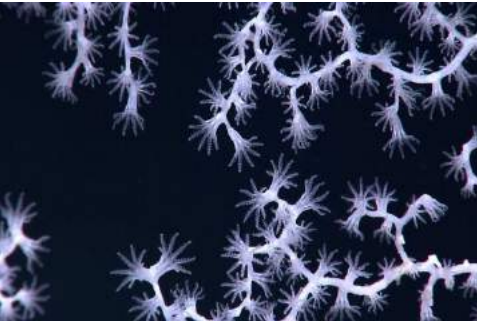


- **No existing global cross-sectoral legal mechanism** for the establishment, implementation, and enforcement of ABMTs in ABNJ



- A new BBNJ instrument could:
 - **Provide a coordination framework** to ensure that
 - Current and future sectoral ABMTs in ABNJ are comprehensively and consistently applied;
 - Systems of MPAs are effectively established, implemented, and enforced.
 - **Outline general principles, criteria, and obligations** with respect to the adoption of sectoral and cross-sectoral ABMTs for achieving conservation and sustainable use of BBNJ

International Law: UNCLOS and UNFSA



- Under international law, States have the duty:
 - To **take conservation measures** to **maintain or restore populations** of both target and non-target species, and to cooperate in the conservation and management of living resources in the high seas (*UNCLOS, arts. 117, 118, 119*)
 - To **adopt conservation and management measures** to ensure the **long-term sustainability** of straddling and highly migratory fish stocks and same ecosystem or associated species, and **to protect marine biodiversity** (*UNFSA, arts. 5 and 10*)



Neither UNCLOS nor UNFSA explicitly specify conservation and management measures to be used to achieve these goals

Pictures: NOAA, Source: <https://www.theguardian.com/environment/gallery/2016/aug/30/world-heritage-in-the-high-seas-oceanic-wonders-explored>

CBD Provision on In-Situ Conservation



- CBD specifies ABMTs as among key measures to be used for the conservation of biodiversity:

CBD, art. 8a:

*'Establish a **system of protected areas or areas where special measures** need to be taken to conserve biological diversity'*



- CBD provision could be considered as a **model** for the new BBNJ instrument



Picture: Norbert Probst/Alamy, Source: <https://www.theguardian.com/environment/gallery/2016/aug/30/world-heritage-in-the-high-seas-oceanic-wonders-explored>
Picture: Norbert Probst/Alamy Stock Photo; Source: <https://www.theguardian.com/environment/gallery/2016/aug/30/world-heritage-in-the-high-seas-oceanic-wonders-explored>
Picture: Source: https://www.helpgoabroad.com/images/easyblog_images/985/1492110.jpg

CBD Provision on In-situ Conservation

CBD, art. 8 on in-situ conservation:

- (c) **Regulate or manage biological resources** important for the conservation of biological diversity whether **within or outside protected areas**, with a view to ensuring their conservation and sustainable use;
- (e) Promote **environmentally sound** and **sustainable development** in **areas adjacent to protected areas** with a view to furthering protection of these areas;
- (f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the **development and implementation of plans or other management strategies**.



Picture: NOAA, Source: <https://www.theguardian.com/environment/gallery/2016/aug/30/world-heritage-in-the-high-seas-oceanic-wonders-explored>

Complementary Measures for Sectoral ABMTs

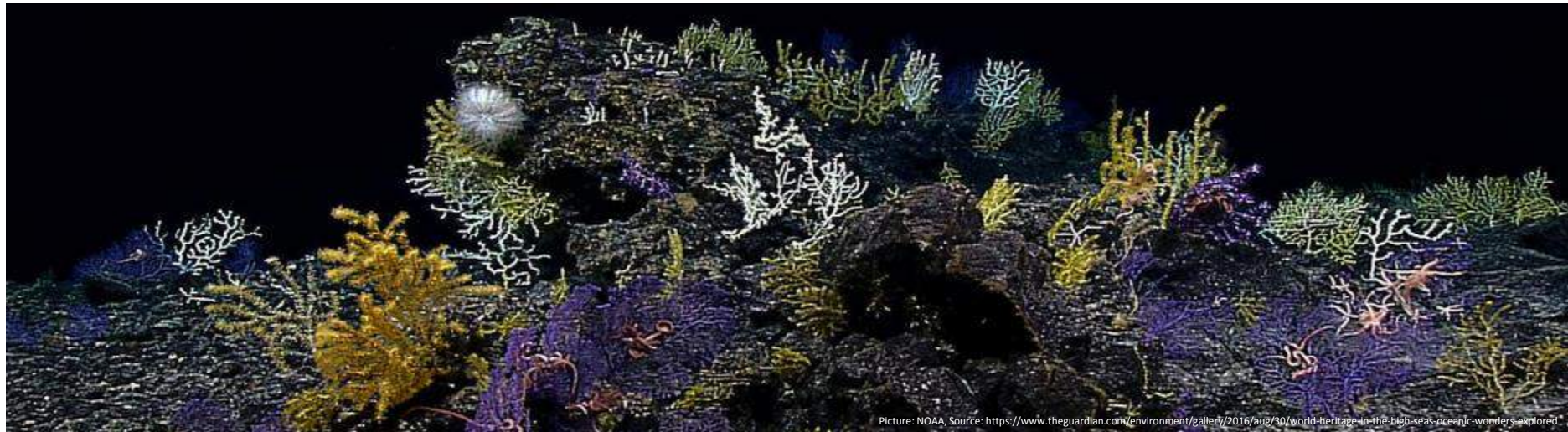
- **Spatial and temporal fisheries closures** or ‚refugia‘ established to limit biodiversity impacts of fisheries activities, protect vulnerable species, habitats and ecosystems, and to enhance resilience;
- Spatial and temporal fisheries closures **outside the boundaries of an MPA** with a view to complementing and enhancing the effectiveness or ecological coherence of MPAs and protecting migratory corridors for vulnerable species;



Picture: NOAA, Source: <https://www.theguardian.com/environment/gallery/2016/aug/30/world-heritage-in-the-high-seas-oceanic-wonders-explored>

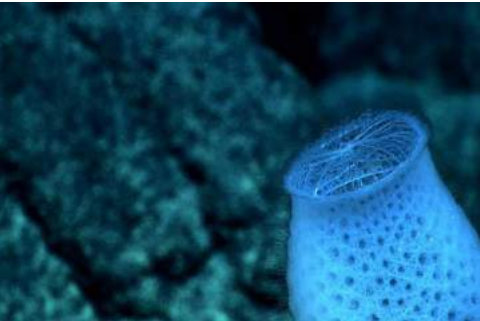
Complementary Measures for Sectoral ABMTs

- **Limiting deep water fishing effort or gear types** in areas in or adjacent to known VMEs or in areas where VMEs are likely to be present in order to reduce the likelihood of further disturbance of VMEs or their broader ecosystems above the seabed;
- Mandated use of **fisheries management measures**, including catch quotas, effort or gear restrictions, and seasonal and temporal closures.



Picture: NOAA, Source: <https://www.theguardian.com/environment/gallery/2016/aug/30/world-heritage-in-the-high-seas-oceanic-wonders-explored>

Complementary Measures for Sectoral ABMTs



- Use of **marine spatial planning**
 - Especially in areas already experiencing higher levels of activity

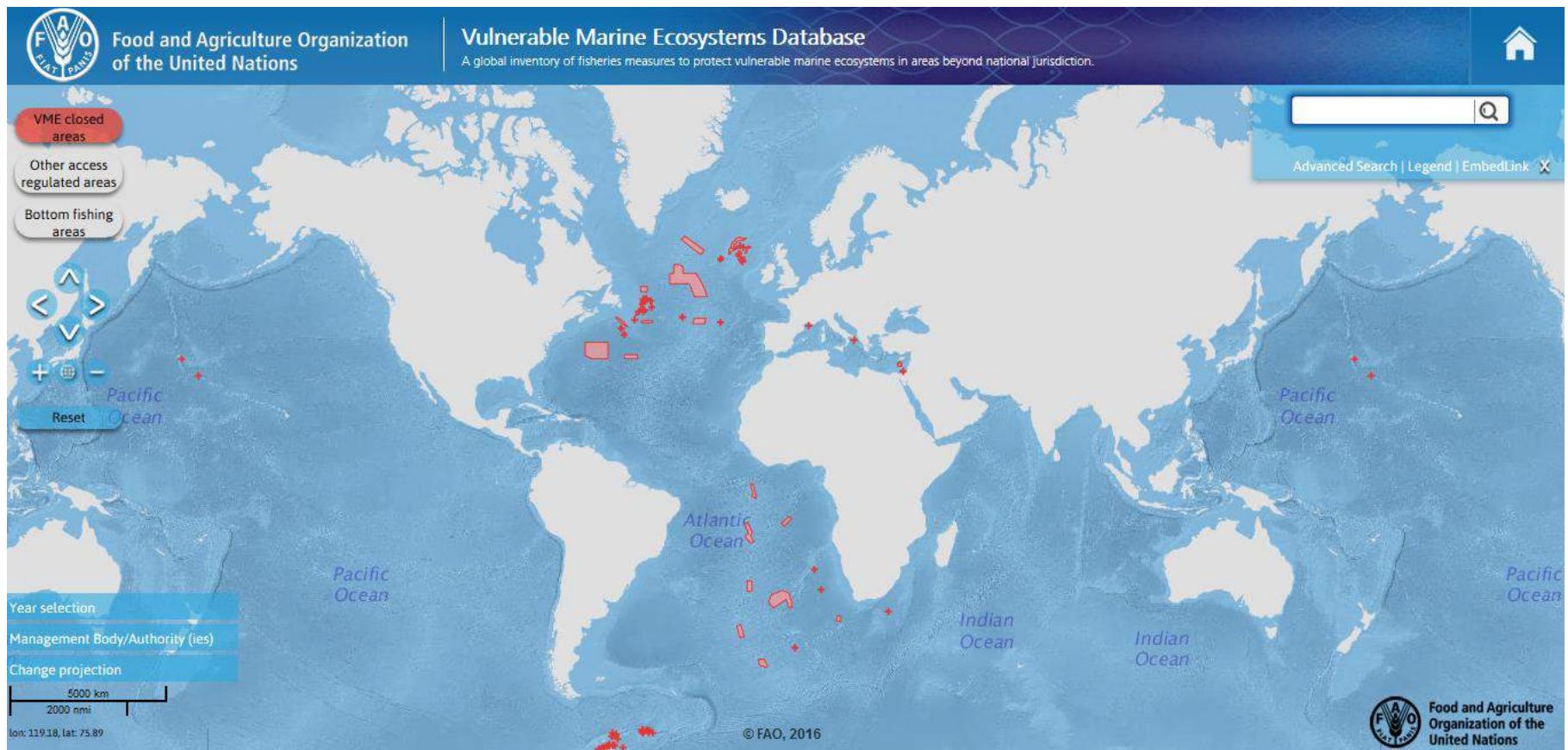


The establishment of spatial plans for areas of the ocean would require the **cooperation of all relevant sectoral bodies**, including RFMOs

Picture: NOAA, Source: <https://www.theguardian.com/environment/gallery/2016/aug/30/world-heritage-in-the-high-seas-oceanic-wonders-explored>

ABMTs implemented by RFMOs

In ABNJ, ABMTs have primarily been implemented by RFMOs in the context of **protecting VMEs** (via closures and other measures) and **in controlling mortality on certain fish stocks or life stages**

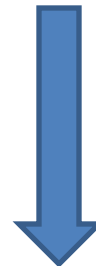


Source: <http://www.fao.org/in-action/vulnerable-marine-ecosystems/vme-database/en/>

Implementation of ABMTs: Options



- 1) Place obligation upon States Parties **to work directly and through relevant sectoral bodies**, including RFMOs, **to adopt ABMTs** for the purpose of conservation and sustainable use of BBNJ, accompanied by **regular reporting and review of progress**



In cases where:

- *Mandate and/or member constraints*
- *Lack of biodiversity expertise*

Alternative or complementary provision:

- 2) State Parties **to take independent action** with respect to activities and processes subject to their jurisdiction or control, and then **seeking the adoption of complementary measures within sectoral bodies**

Picture: NOAA, Source: <https://www.theguardian.com/environment/gallery/2016/aug/30/world-heritage-in-the-high-seas-oceanic-wonders-explored>

Implementation of ABMTs: Options



- 3) Include **overarching provisions** to require States directly and through competent international organisations, such as RFMOs, **to reform current management practices to be more biodiversity-inclusive**, while **specific provisions for ABMTs** may require them to take action for conservation and sustainable use of marine biodiversity in ABNJ

Picture: Sönke Johnsen, Source: <https://www.theguardian.com/environment/gallery/2016/aug/30/world-heritage-in-the-high-seas-oceanic-wonders-explored>
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Marine Protected Areas



- To be effective, marine protected areas must:
 - Be **comprehensively and effectively managed**
 - Be **enforced across all sectors**
 - **Address all human activities** relevant to the goal of the MPA, or, more generally, the goal of conservation and sustainable use of marine biodiversity
- Together with the other sectoral bodies, fisheries management instruments and organisations should be a **crucial part of establishing, implementing, and enforcing** such comprehensive and effective MPAs where fisheries are involved



Source: <http://meche.mit.edu/sites/default/files/styles/hero/public/slides/Research%20Oceans.jpg?tok=okSrE16D>

Establishment of MPAs: Options

The role of RFMOs in the establishment of MPAs depends on the chosen structure of the MPA mechanism in the new BBNJ instrument:

1) A centralised mechanism

- Could involve a **new international body** setting out the management measures for MPAs and **request**, via the inherent power of the UNGA, **sectoral and regional bodies to take conservation measures**

2) A decentralised mechanism:

- Could allow for MPAs to be **agreed by a COP** and the **sectoral and regional bodies could be left to take appropriate measures** to implement, monitor, and enforce the MPA to achieve the agreed conservation objectives

Source: <https://deepseacru.files.wordpress.com/2014/06/hattonbankreef.jpg>

Establishment of MPAs: Options

The role of RFMOs in the establishment of MPAs depends on the chosen structure of the MPA mechanism in the new BBNJ instrument:

- 3) COP, advised by a scientific and technical body:
- They would **review proposals** from States and sectoral/regional organisations, **adopt conservation objectives, agree on specific management measures** that parties can take, and through elaboration of the duty to cooperate by State Parties, reinforce these measures through **the adoption of complementary measures by the competent international organisations**

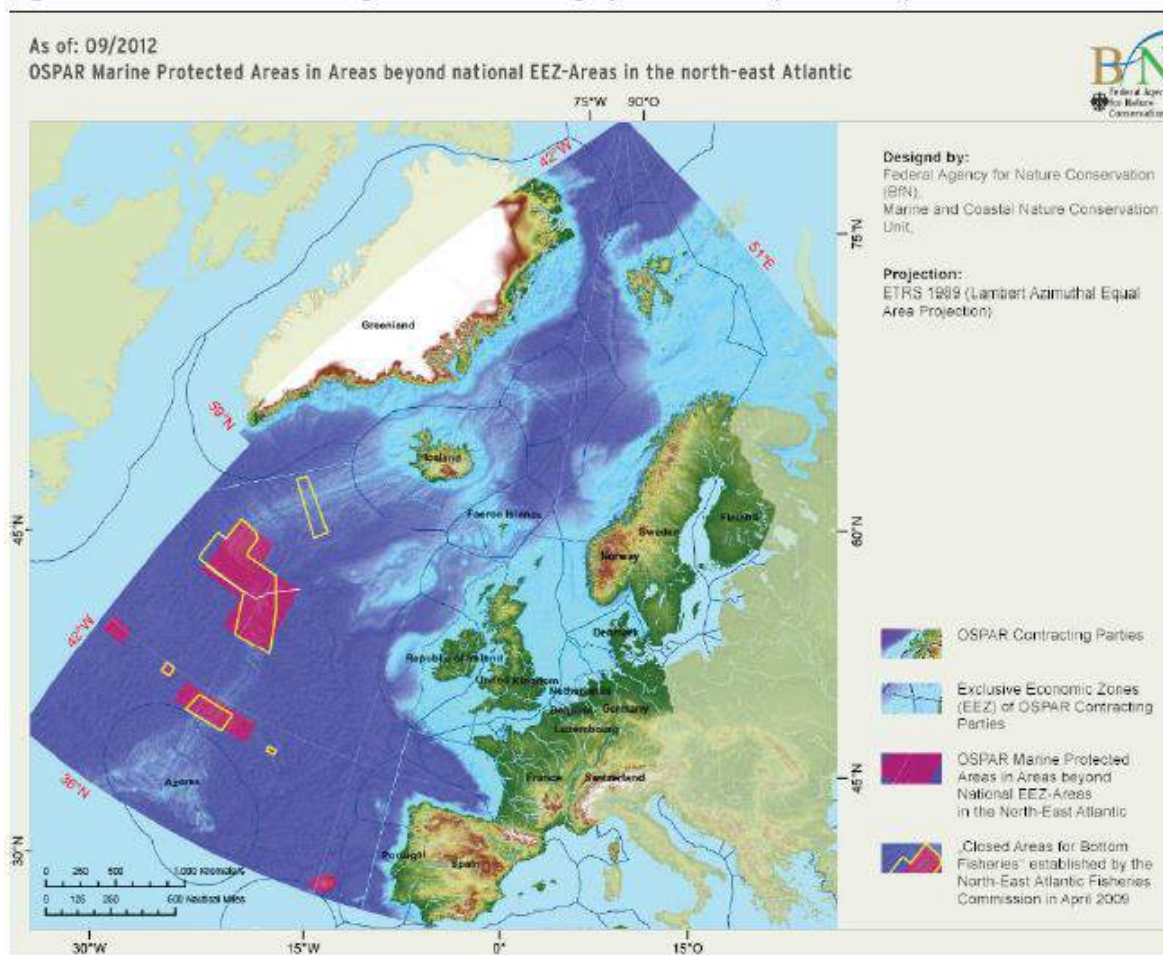


RFMOs will likely be called upon **to take proactive steps or measures** to give effect to an MPA that they may not have otherwise taken in a 'business as usual' scenario

Source: <https://deepseacru.files.wordpress.com/2014/06/hattonbankreef.jpg>

North-East Atlantic

Figure 5. NEAFC VME closures along the Mid-Atlantic Ridge (yellow) and their partial overlap with OSPAR MPAs (red)



Source: German Federal Agency for Nature Conservation. <http://mare.essenberger.de/en/karte-charlie-gibbs-schutzgebiet.php>

Conclusion



- All-inclusive & collaborative cross-sectoral process
- Role of RFMOs
- Importance of coordination and cooperation

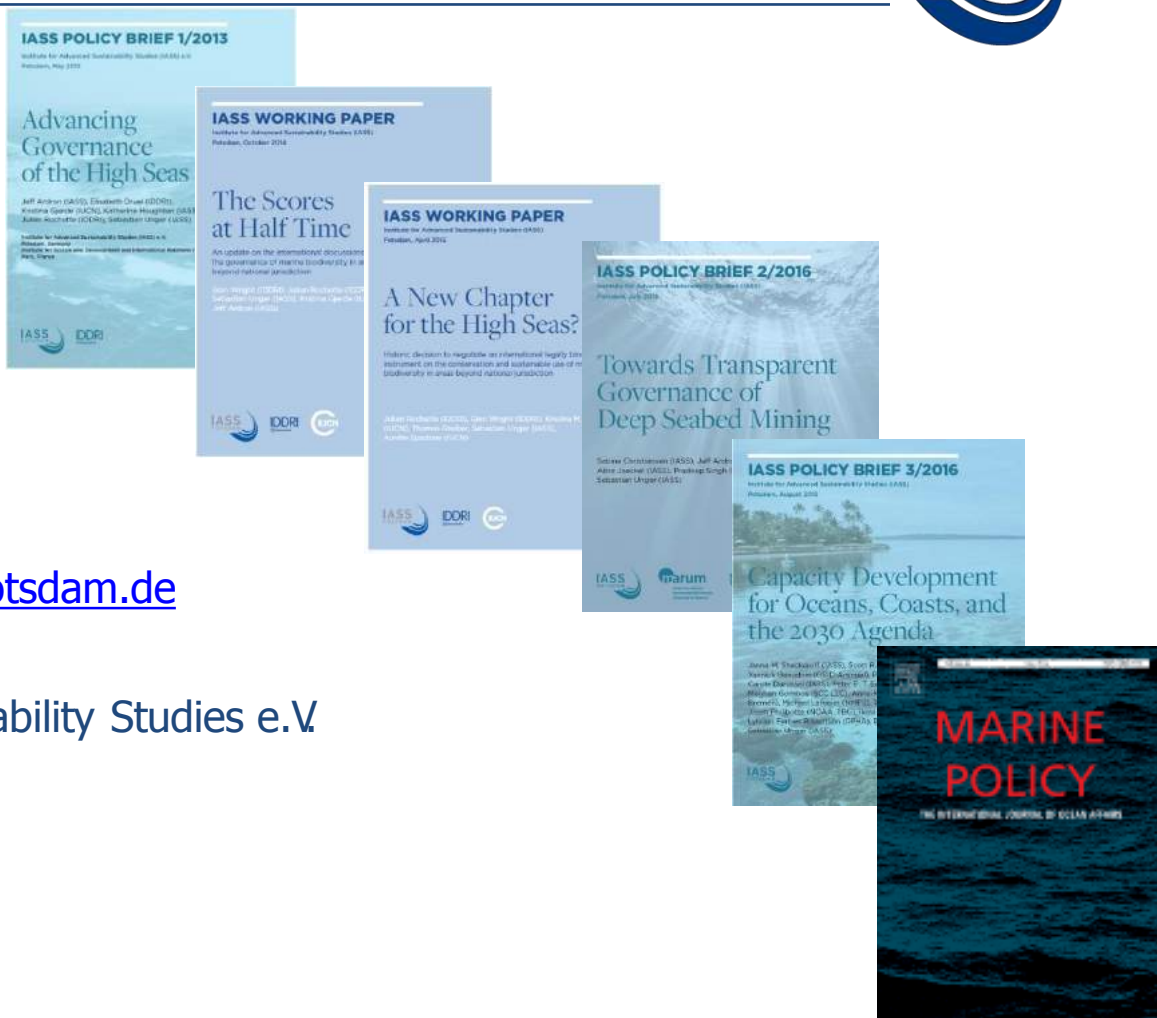
Picture: Dave Fleetham/Getty Images, Source: <https://www.theguardian.com/environment/gallery/2016/aug/30/world-heritage-in-the-high-seas-oceanic-wonders-explored>

Thank you!



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EIA and Overarching Provisions

**Side Event: High seas fisheries in a new international legally binding instrument
PrepCom 2 (26 August-9 September 2016)**

**New York
7 September 2016**

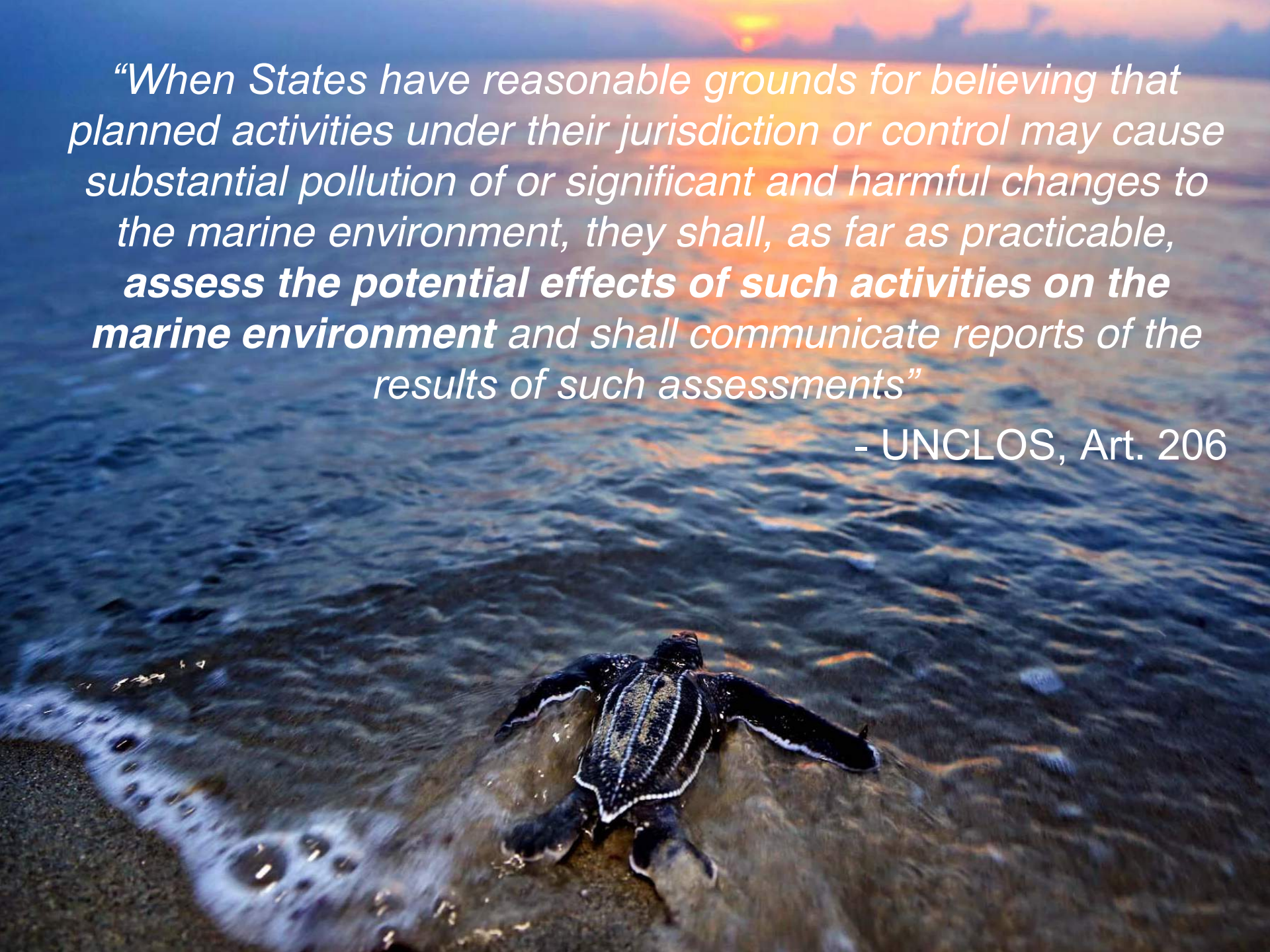
Glen Wright

*“a process of evaluating
the likely environmental impacts,
including cumulative impacts,
of a proposed project or development”*



Existing obligations - General

- **UNCLOS**
 - “States have the obligation to protect and preserve the marine environment” (art. 192)
 - “States shall... endeavour... to observe, measure, evaluate and analyse... the risks or effects of pollution of the marine environment.” (art. 204)
 - “States shall keep under surveillance the effects of any activities which they permit or in which they engage” (art. 204)
 - “States shall publish reports of the results... or provide such reports at appropriate intervals to the competent international organizations...” (art. 205)

A sea turtle with a dark shell and white stripes is resting on a rock in the ocean. The background shows a sunset with a bright orange sun low on the horizon, casting a warm glow over the water and sky. The water is dark blue with some white foam from a wave in the foreground.

*“When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, **assess the potential effects of such activities on the marine environment** and shall communicate reports of the results of such assessments”*

- UNCLOS, Art. 206

Existing obligations – Fisheries (1)

- **UNFSA** (arts. 5c, 5d, 6.6, 10.d)
 - RFMOs must apply precautionary approach in conservation & management of straddling & highly migratory fish stocks
 - Includes assessing the impacts of fishing & other human activities, as well as environmental factors, on target & non-target species.
 - Parties must adopt cautious conservation & management measures for new/exploratory fisheries until long-term impacts can be assessed



Existing obligations – Fisheries (2)

- **UNGA 61/105 (2006)**
 - States and RFMOs must conduct impact assessments to determine whether significant adverse impacts (SAIs) will occur to vulnerable marine ecosystems (VMEs); and
 - Ensure proper management/prohibition where SAIs are likely
- **UNGA 64/72 (2009)**
 - Reaffirmed commitments and requested all flag States to regulate bottom fisheries and to ensure that vessels do not conduct bottom fishing until impact assessments have been carried out
- **FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas (2009)**

Gaps in EIA Obligations

- **UNCLOS** EIA obligations are general in nature and have not been implemented.
- **UNFSA** only directly applies to:
 - Straddling and highly migratory fish stocks; and
 - States who are party to the Agreement.
- **UNGA** resolutions are:
 - Soft law;
 - Specifically designed to limit SAIs to VMEs;
 - Not designed to account for cumulative impacts or the impacts of overfishing and human activities; and
 - Not aimed at the conservation and sustainable use of marine biodiversity in ABNJ in general
- **Implementation gaps**

What can a new instrument do? (1)

- Strengthen existing obligations under international law by:
 1. Requiring EIA when fishing can cause harm to marine biodiversity, taking into account both conservation & sustainable use.
 2. Stipulating that new fishing activities in ABNJ (in both the water column & on the seafloor) only take place following EIA.
 3. Requiring EIA establish that fishing can be managed in a way that:
 - Prevents and minimises future environmental impacts;
 - Ensures long-term sustainability (target & non-target); and
 - Will have minimal incidental impacts on surrounding marine ecosystems/marine biodiversity.

What can a new instrument do? (2)

4. Provide for assessment of current fishing activity (with a timeline).
5. Introduce formal reporting & monitoring mechanism (either at the global or regional level).
6. Provide a detailed follow-up procedure.
7. Require continuous monitoring & regular review.
8. Institute a process to review the assessment where specific new scientific knowledge has become available (and/or require assessment upon introduction of new technologies or gear, or an increase in fishing effort).
9. Develop an information-sharing mechanism to ensure that assessments are based on the best scientific data available.

What can a new instrument do? (3)

10. Establish a legal framework for EIAs and strategic environmental assessments (SEAs) to assess cumulative impacts, and allow for impact assessments across sectors.



Overarching provisions (1) - general

- New instrument could:
 - Enable regular global review & reporting.
 - Provide default regime for precautionary fisheries management in ABNJ where gaps remain in geographical coverage by RFMOs.

Overarching provisions (2) – fostering integration

- Effective cooperation/interplay depends on (Mahon et al., TWAP 2016) :
 - Geographical coherence (spatial overlap and fit);
 - Good governance structure & practice;
 - Functional linkages (interplay) among institutions/arrangements; and
 - A common purpose & set of principles allowing institutions to deal with one another as equals.
- New instrument could, in particular, provide:
 - Obligations/framework/mechanisms for cooperation;
 - Guidance on good practice; sharing of good practice;
 - A common purpose (e.g. “the conservation of marine biodiversity in ABNJ is the common concern of humanity”); and
 - A set of governance and conservation principles to guide decision making to assist in integrating biodiversity considerations.

Overarching provisions (3) – guiding principles

- The “fundamental principles [that] could lead to sustainable fisheries management, are contained in many of the binding and non-binding fisheries agreements, and in the UNFSA in particular. What is needed is effective and uniform application of these principles and obligations in practice”

- Global Ocean Commission, Policy Options Paper #9, 2013
- New instrument could outline the guiding principles of international law for conservation & sustainable use of marine biodiversity in ABNJ.
- E.g. precaution, science-based management, the ecosystem approach, transparency, accountability, public participation, and intra- and inter-generational equity.

Overarching provisions (4) – complementary obligations

- A new instrument could place specific complementary obligations on States.
- E.g.:
 - Requiring flag States to cooperate with other States and/or relevant sectoral and regional organisations to adopt measures;
 - An obligation for States & competent international organisations to promote in-situ conservation, including the protection of ecosystems, natural habitats & maintenance of populations in natural surroundings (as in CBD, Art. 8).



Overarching provisions (5) – development of international law

- A new instrument could:
 - Urge States to engage with international agreements relevant to fisheries (e.g. UNCLOS, UNFSA, Port State Measures Agreement (PSMA), RFMOs, relevant regional agreements).
 - Directly strengthen & formalise certain provisions of existing agreements & guidelines by restating them as concrete obligations, e.g.:
 - Art. 20(3) of the PSMA - encourages parties to develop procedures for identifying States that may not be acting in accordance with the PSMA;
 - Art. 50 of the FAO Guidelines, which states that RFMOs should develop appropriate review mechanisms.



Thank you!



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