CLAIRE BOARDMAN

WHAT MECHANISMS SHOULD BE USED TO PROMOTE COMPLIANCE WITH A PROPOSED INSTRUMENT RELATING TO MARINE BIODIVERSITY IN AREAS BEYOND NATIONAL JURISDICTION?

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FACULTY OF LAW

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

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Abstract

This paper examines the type of compliance and enforcement mechanisms that should be included in proposed instrument to be negotiated under the United Nations Convention on the Law of the Sea in relation to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. The paper also examines the literature as to why states do or do not comply with international law and makes recommendations of compliance and enforcement mechanisms informed by those compliance theories.

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I Introduction

For more than ten years, a working group of the United Nations General Assembly (UNGA) has been considering issues related to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. On the recommendation of this working group, the UNGA passed a resolution earlier this year to:[1]

> develop an international legally binding instrument under the United Nations Convention on the Law of the Sea [UNCLOS][2] on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

The resolution goes on to specify four topics on which states will negotiate,[3] two relating to tools to conserve the marine environment (area-based management tools, including marine-protected areas, and the requirements for and of environmental impact assessments) while the other two raise distributive justice questions (sharing the benefits of marine genetic resources (MGRs) and capacity-building and the transfer of marine technology). In addition to setting the substantive issues for states to negotiate, the resolution provides parameters for the negotiations including that agreement on all of the issues must be negotiated within the context of already existing agreements and institutions; any agreement "should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies".[4] The resolution also specifies that the committee preparing the draft text should "exhaust all efforts" to reach consensus on substantive issues in order that any legally binding instrument secures "the widest possible acceptance."[5]

This paper will examine what mechanisms the proposed instrument should contain to encourage compliance with the legal rules in the first instance ("compliance mechanisms")[6] and to address non-compliance ("enforcement mechanisms"). Part II of this paper will examine the concepts of compliance and enforcement in relation to international law generally, and international environmental law in particular. Part III will examine the existing legal frameworks and institutions relating to conservation of marine biodiversity in areas beyond national jurisdiction ("ABNJ"). Part IV will identify the gaps the proposed instrument is likely to fill while Part V will set out the types of compliance and enforcement mechanisms that could

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[1] *Development of an internationally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction* GA Res 69/292 A/RES/69/292 (2015) at [1].

[2] United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

[3] GA Res 69/292, above n 1, at [2].

[4] At [1(g) – (h)].

[5] At [3].

[6] Teall Crossen "Multilateral environmental agreements and the compliance continuum" (2003) 16 Geo. Int'l Envtl. L. Rev. 473 at 478.

be utilized within it and suggest which mechanisms would be most applicable. Part VI will summarise and conclude the paper.

II Compliance with international law

The international legal system is defined by state sovereignty.[7] Each state is sovereign in its own territory but the international system itself exists in a state of anarchy (in the neorealist sense) as there is no international government requiring states to comply with particular rules.[8] States are therefore only bound by rules or law that they agree to be bound by.[9] Owing to the consensual nature of international law, a state has to agree to a mechanism by which the law can be enforced against it. This places constraints on the types of mechanisms that international agreements can contain: states will not sign up to obligations that they are likely to breach if there are going to be severe sanctions on that breach. Given the value in continual engagement with other states on important issues, international agreements have to strike a balance so that the obligations entered into will encourage desired outcomes but without being so onerous as to discourage general ratification of the agreement.[10] The form of the compliance and enforcement mechanisms within those agreements are very important tools in striking that balance.

A Distinguishing compliance, implementation, effectiveness and enforcement

Compliance can be defined as "a state of conformity or identity between an actor's behavior [sic] and a specified rule."[11] Closely related to the concept of compliance are the concepts of implementation and effectiveness. Implementation is defined as "the process of putting international commitments into practice: the passage of legislation, creation of institutions (both domestic and international) and enforcement of rules."[12] In practice implementation of commitments is "frequently critical" for compliance but it is possible in some situations for an actor to comply without needing to take any steps of implementation. The concept of "effectiveness" can be defined in varying ways including as "the degree to which a rule induces changes in behavior [sic] that further the rule's goals; improves the state of the underlying

[7] Abram Chayes and Antonia Handler Chayes *The New Sovereignty: compliance with international regulatory agreements* (Harvard University Press, Cambridge, Massachusetts, 1995)

[8] Kenneth N. Waltz *Theory of international politics* (Addison-Wesley Publishing Company, California, 1979) at 89.

[9] See for instance Thomas M. Franck *Fairness in international law and institutions* (Oxford University Press, Oxford, 1995) at 28.

[10] George W Downs, David M Rocke and Peter N Barsoom "Is the good news about compliance good news about cooperation?" (1996) 50 International Organization 379 at 399; Andrew T Guzman "A compliance-based theory of international law" (2002) 90 California Law Review 1823 at 1856.

[11] Kal Raustiala and Anne-Marie Slaughter "International law, international relations and compliance" in W. Carlsnaes and others (eds) *Handbook of international relations* (Sage, London, 2002) 538 at 539.

[12] At 539.

problem or achieves its policy objective".[13] In the context of multilateral environmental agreements, effectiveness is often defined in relation to "whether the state of the environment has improved".[14] High levels of compliance and effectiveness will not coincide when the commitments or rules are set at too low a level to solve the problem targeted by that rule.

Enforcement can be defined as compelling an actor to comply with a law or rule.[15] International agreements usually contain dispute resolution clauses that determine whether and how a state can take an action against another state. In addition to dispute resolution mechanisms, agreements may contain "penalties, sanctions, or other coercive measures to induce compliance with obligations."[16] In the context of international environmental agreements, sanctions are rare, with emphasis tending to be placed on incentives and "sunshine" policies, both of which fit into the category of compliance mechanisms.[17] A number of international environmental agreements also have "non-compliance procedures"[18] which are a combination of compliance and enforcement mechanisms. Usually the relevant treaty organisation or the non-complying state will refer the state to a "Compliance Committee" which examines the reasons why a state is not complying and offers assistance. The Committee may also have more coercive powers.[19]

For the purposes of this paper, "compliance mechanisms" are defined as mechanisms to encourage compliance with international law in the first instance (including by encouraging implementation of the relevant rules) and "enforcement mechanisms" are defined as mechanisms to address non-compliance. There is some overlap between the two categories - the mere fact of having the possibility of enforcement in relation to an instrument will encourage compliance even if the mechanisms never have to be utilised.

B Why do states comply with international law?

Given that there is no-one forcing states to comply with international law, it might be expected that states would not enter into many international legal arrangements and that if they did, that they would not comply with those rules unless it is clearly to their benefit. In practice, states

[13] At 539.

[14] Crossen, above n 6, at 478.

[15] See the definition of "enforce" in Catherine Soanes and Angus Stevenson (eds) *Concise Oxford English Dictionary* (11th ed (revised, Oxford University Press, Oxford, 2009) at 472.

[16] Edith Brown Weiss "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" (1998) 32 U. Rich. L. Rev. 1555 at 1564.

[17] At 1588.

[18] Karen N. Scott "Non-compliance procedures and dispute resolution mechanisms under international environmental agreements" in Duncan French, Matthew Saul, and Nigel D. White (eds) *International law and dispute settlement: new problems and techniques* (Hart Publishing, Oxford and Portland, Oregon, 2010) 225.

[19] At 233.

spend a long time negotiating international agreements[20] and on the whole are thought to comply with most of their obligations most of the time.[21] However, there is debate as to why states comply with international law and consequently debate as to what mechanisms will be most effective in encouraging compliance. In particular, scholars differ over the importance of coercive enforcement mechanisms in encouraging compliance with international environmental agreements (IEAs),[22] ranging from the Chayeses' managerial model in which coercive enforcement is seen as ineffectual and costly[23] to the "enforcement" model of Downs et al who maintain that any IEA that requires deep cooperation between states will require strict sanctions to deter non-compliance.[24]

According to Mitchell, compliance theories can also be categorised on the basis of two different behavioural logics – the logic of consequences or the logic of appropriateness.[25] Theories based on the logic of consequences emphasise that states are rational actors with goals who weigh the costs and benefits of potential actions before they take them. On this basis, states comply with international law when it is in their interests to do so. IEAs influence behaviour by changing the costs and benefits of particular actions.[26] In contrast, theories based on the logic of appropriateness emphasise the role of state identity in compliance with international law. Rather than calculating costs and benefits, states ask "what is the 'right' thing to do in this situation for someone like me?"[27] IEAs influence state behaviour by codifying norms, thereby designating behaviour that is appropriate or inappropriate for the type of actor that a state seeks or sees itself as being.[28] The following sections will survey a few of the main compliance theories, in preparation for an analysis in Part IV of this paper as to the types of compliance and enforcement mechanisms that would be appropriate to encourage compliance with the proposed instrument filling the gaps identified in Part III.

1 The managerial model

The Chayeses in their book "*New Sovereignty*"[29] promote a managerial model of compliance, arguing that coercive enforcement mechanisms are of little importance when it comes to encouraging compliance with treaties. After reviewing the use of military, economic and

[20] Guzman, above n 10, at 1837.

[21] Raustiala and Slaughter, above n 11, at 540, quoting Henkin's famous aphorism.

[22] Crossen, above n 6, at 481.

[23] Chayes and Chayes, above n 7.

[24] Downs et al, above n 10.

[25] Ronald B. Mitchell "Compliance theory: compliance, effectiveness, and behaviour change in international environmental law" in Daniel Bodansky, Jutta Brunee, and Ellen Hey (eds) *The Oxford handbook of international environmental law* (Oxford University Press, Oxford, 2007) at 901.

[26] At 902.

[27] At 902.

[28] At 902.

[29] Chayes and Chayes, above n 7.

membership sanctions over the course of the second half of the twentieth century, the Chayeses come to the conclusion that sanctions have been used rarely and to relatively little effect compared to the political and economic cost on the state or states imposing the sanctions.[30] According to the Chayeses, compliance with international law occurs because: it is efficient (in that states do not have to constantly recalculate the costs and benefits of the agreement); it will usually be in the state's self-interest to comply (as states will not negotiate or enter into agreements that are contrary to their interests); and because norms support compliance with international law.[31] Non-compliance is viewed not as a result of willful disobedience but as a result of "ambiguities in the terms of an obligation, lack of capacity to carry out an obligation, and a change in circumstances."[32] These causes of non-compliance are not amenable to coercive enforcement. To maintain compliance at an acceptable level, the fundamental instrument to do so is "an iterative process of discourse among the parties, the treaty organisation, and the wider public."[33] The tools used within a managerial compliance regime include reporting, verification and monitoring, dispute resolution and capacity building.[34] These tools are used to try and persuade a state to change its ways. Underpinning the Chayeses argument that such methods will actually encourage compliance is their view of sovereignty in the contemporary interdependent international system as "status – the vindication of the state's existence as a member of the international system." Without that status, states are unable to realize their potential for economic growth and political influence.[35] The Chayeses also highlight the role of international treaty organisations in furthering the implementation of treaties[36] along with the importance of review and assessment procedures[37] and non-governmental organisations in encouraging compliance.[38] In terms of Mitchell's classification of behavioural logics, the managerial model combines both logics: states are thought to act in their interests but also to respond to normative influences.

2 Franck's fairness model

Writing at a similar time to the Chayeses, Franck's focus is on critiquing international law using the metric of fairness, rather than the promotion of compliance with it. However, in developing his thesis that international law is effective when it is fair, Franck argues that the perceived fairness of laws encourages states to comply voluntarily with those laws.[39] Like the Chayeses, Franck recognises that the notion of sovereignty has been modified by the increasing

[30] See Chapters 2 – 4 of Chayes and Chayes, above n 7.

[31] At 4 – 9.

[32] Crossen, above n 6, at 482.

[33] Chayes and Chayes, above n 7, at 25.

[34] Crossen, above n 6, at 482.

[35] Chayes and Chayes, above n 7, at 27.

[36] At 275.

[37] At 230.

[38] At 251.

[39] Franck, above n 9, at 8.

interdependence of the international community[40] and emphasises that the making of legitimate international laws is a community activity.[41] According to Franck, there are two aspects of fairness, one procedural and one substantive. As to procedural fairness, a law will be seen as legitimate if it is made in accordance with right process. There are four components contributing to legitimacy: the rule must be determinate,[42] have symbolic validation,[43] fits coherently within already existed rules and is applied coherently[44] and finally adheres to the secondary rules of process by which the community gives it validity.[45] As to substantive fairness, a law will be substantively fair if it equitably distributes resources. Franck acknowledges that the two elements can pull in different directions as legitimacy favours order while fairness as distributive justice favours change.[46] However, as Crossen summarises, Franck's argument is that "fairness provides the conceptual tool to manage the tension between change and order."[47] Franck does not specifically address the efficacy of coercive enforcement.[48] In terms of the behavioural logic that it applies, Franck's theory (like the managerial model) applies both logics; it relies on the logic of consequences when it assumes that states will have regard to their interests when it comes to distributive justice but also relies on the logic of appropriateness in arguing that states respond to the norms of fairness.[49]

3 Koh's transnational legal process

According to Koh, both the Chayeses and Franck rely on norm-internalization to encourage voluntary compliance but without explaining how that process occurs.[50] Koh fills this gap through elucidation of the "transnational legal process". Internalization of norms through the transnational legal process involves repetition of interactions, interpretations and internalization.[51] The process starts with an interaction of transnational actors which leads to an interpretation or enunciation of a global norm[52] which ideally will be integrated into the state's internal decision-making system. That internalized norm then governs future interactions which lead to further interpretations and internalizations. The example that Koh gives is President Reagan's decision to "reinterpret" the ABM Treaty to allow the US to build a space-based missile system. Owing to sustained discussion and debate with Congress and

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[40] At 3 – 4.
[41] At 29.
[42] At 30.
[43] At 34.
[44] At 38
[45] At 41.
[46] At 7.
[47] Crossen, above n 6 at 484.
[48] At 485.
[49] Harold Hongju Koh "Why do nations obey international law?" (1997) 106 Yale Law Journal 2599 at 2642.
[50] At 2646.
[51] At 2649.
[52] At 2646.

figures from non-government organisations (NGOs) over the course of the next eight years, Reagan had to back down and interpret the treaty in its original way.[53] This example also shows the role that NGOs can play in the transnational process.[54] Koh argues that not only does transnational legal process explain why states comply with norms, it also suggests ways to encourage non-compliant states to comply.[55] NGOs within a country can play an important role in assisting to internalize norms. For instance, NGOs may be more willing to raise human rights issues with a non-complying state, as compared to other states who are constrained by political or economic concerns.[56] Interaction with NGOs or other domestic actors still lead to the same interpretation and internalization process. This process helps to change a state's interests and identity.[57] In terms of the behavioural logic that this process embodies, it fits best within the logic of appropriateness as states are internalizing norms that affect their identities and hence what they view as appropriate or inappropriate.

4 Guzman's reputation theory

Guzman's reputation theory fits squarely within the behavioural logic of consequences. In contrast to the theories outlined above, Guzman argues that enforcement mechanisms are required to ensure compliance with treaties. States will enter into treaties and comply with their international obligations when the costs of non-compliance outweighed the benefits of non-compliance. The costs of non-compliance can include retaliatory sanctions and any reputational damage which "affects a state's ability to make commitments in the future."[58] If states want to enter into agreements in the future whereby they promise certain actions in return for concessions, they need enough reputational capital that other states trust that they will actually fulfil their commitments. Non-compliance reduces the value of a state's reputational capital. However, the reputational cost of non-compliance will depend on the severity of the breach, the reasons for it, other state's knowledge of the breach, the clarity of the international obligation, any implicit obligations on that state and any subsequent regime change.[59] Guzman also argues that creating internationally binding agreements is not necessary in some coordination situations but in situations when the incentives of the other party are not clear, entering a binding agreement increases reputational cost and hence the likelihood that both parties will comply. Like the Chayeses, Guzman recognises that sanctions can be costly for the state imposing them[60] but Guzman maintains that sanctions can still be efficient in certain

[53] At 2646 – 2647.
[54] At 2646.
[55] At 2655.
[56] At 2655.
[57] At 2655.
[58] Guzman, above n 10, at 1845.
[59] At 1861 – 1865.
[60] At 1867.

situations when there will be repeated interactions and the benefit of increased compliance in the future outweighs the immediate cost of sanctions.[61]

5 The enforcement model

At the other end of the spectrum is Downs et al's model, arising from political economic theory. Downs et al argue that a key reason for high levels of compliance with international agreements is that the obligations that states take on when entering into many agreements are "shallow", in that they do not require much change in behaviour from how the states would have acted in the absence of the agreement.[62] If deeper cooperation is required, then more comprehensive enforcement measures are essential to deter and punish defection from the agreement.[63] Like Guzman's theory, this fits within Mitchell's logic of consequences.

III Existing protection of marine biodiversity in ABNJ

C Distinction between EEZ and the High Seas

Conservation and sustainable use of marine biodiversity present unique challenges to the international legal system; how can the international community protect marine biodiversity in areas over which no state has authority? One solution to this problem is to put greater areas of the ocean under the control of particular states,[64] a solution contained within the UNCLOS[65] which codified the concept of a 200 nautical mile Exclusive Economic Zone (EEZ). Around a one third of the world's oceans[66] come within the EEZs of coastal states and so are under the control of those coastal states for the purposes of:[67]

> exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil

This regime allows states such as New Zealand[68] to set sustainable catch limits for fish stocks within their EEZs[69] and enforce those limits.

However, the EEZ regime still leaves around two thirds of the oceans beyond the jurisdiction of coastal states. The water column in this area is called the high seas and the seabed is called

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[61] At 1868.

[62] Downs, Rocke and Barsoom, above n 10, at 391.

[63] At 387.

[64] Donald R Rothwell and Tim Stephens *The international law of the sea* (Hart Publishing, Oxford and Portland, Oregon, 2010) at 297.

[65] See Part V of UNCLOS.

[66] Rothwell and Stephens, above n 64, at 82.

[67] UNCLOS, art 56(1)(a).

[68] See the Fisheries Act 1996.

[69] UNCLOS, art 61.

the Area – both are ABNJ. It is in these areas that the sovereignty norms of the international legal system clash with the objective of conservation of marine "biodiversity beyond national jurisdiction" (BBNJ). Rather than states exercising sovereignty over particular areas of the high seas, states have the right to have vessels flying its flag sailing the high seas.[70] Flagged vessels are subject to the law of their flag states and it is only rarely that other states can intervene in the activities of vessels flagged to other states.[71] As to the activities that flagged ships can undertake on the high seas, the overarching principle is "freedom of the high seas" which, amongst other freedoms, allows all vessels to engage in fishing on the high seas.[72] However, this right is limited by the succeeding provisions (discussed below).

D Existing conservation duties relating to marine biodiversity in ABNJ

6 UNCLOS

The principal agreement relating to marine biodiversity in ABNJ is the UNCLOS, which imposes a number of conservation duties on states including that:

(a) States have the obligation to protect and preserve the marine environment.[73]
(b) All States have the duty to take, or to cooperate with other States in taking such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.[74] The duty to cooperate extends to seeking to negotiate necessary conservation measures with other states exploiting the same living resources.
(c) Coastal states, taking into account the best scientific evidence available, shall ensure through proper conservation and management measures that the maintenance of the living resources in their respective EEZs are not endangered by over-exploitation.[75]
(d) Where fish stocks straddle an EEZ and the high seas, or two EEZs, coastal states and states fishing in the high seas shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for conserve those stocks.[76]
(e) Coastal states and states fishing for highly migratory species (as listed in Annex I), shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region.[77]

[70] Art 91.
[71] Art 92.
[72] Art 116.
[73] Art 192.
[74] Art 117.
[75] Art 61(2).
[76] Art 63.
[77] Art 64.

(f) 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 to the competent international organizations, to be made available to all states.[78]

7 Convention on Biological Diversity (CBD)

The CBD[79] provides that contracting parties have a duty to cooperate with other contracting parties in respect of ABNJ for the conservation and sustainable use of biological diversity.[80] In ABNJ, the provisions of the CBD only apply to "processes and activities… carried out under its jurisdiction or control"[81] whereas within national jurisdiction, the provisions apply to the "components of biological diversity".[82] The CBD also provides that states are to:[83]

> Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biodiversity with a view to avoiding or minimising such effects.

Under the auspices of the CBD, guidelines for environmental impact assessments (EIAs) on marine biodiversity have been prepared but they are not binding.[84] While all state parties have conservation duties, the fulfilment of those duties by developing country parties expressly depends on developed country parties effectively implementing their commitments under the Convention related to financial resources and transfer of technology.[85] The CBD also contains provisions relating to access to genetic resources and benefit-sharing which are elaborated on in the Nagoya Protocol.[86] However, the Nagoya Protocol does not apply to biodiversity in ABNJ.

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[78] UNCLOS, art 206.

[79] Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993).

[80] Art 5.

[81] Art 4(b).

[82] Art 4(a).

[83] Art 14(1)(a).

[84] See Jeff A. Ardron and others "The sustainable use and conservation of biodiversity in ABNJ: What can be achieved using existing international agreements?" (2014) 49 Marine Policy 98 at 102.

[85] CBD, art 20(4).

[86] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (opened for signature on 2 February 2011, entered into force 12 October 2014).

One of the CBD's streams of work has been the identification of "ecologically or biologically significant areas" (EBSAs) in ABNJ.[87] However, the CBD is subject to UNCLOS[88] and in any event does not have the institutional infrastructure to create marine protected areas. While there are some organisations that have declared marine protected areas, there are coordination problems in using the research prepared under the auspices of the CBD. For instance, in relation to the Sargasso Sea Alliance's proposed marine protected areas, NAFO[89] and ICCAT's scientific committees would not accept the CBD EBSA assessment and undertook their own confirmatory assessment as to whether that particular area should be protected.[90]

8 The Fish Stocks Agreement

UNCLOS did not provide any detail in relation to the operation or obligations of regional fisheries management organisations (RFMOs), and (given that it was opened for signature in 1982) did not take into account developments in thinking about conservation. The Fish Stocks Agreement,[91] an implementing agreement, filled these gaps in relation to straddling stocks and highly migratory stocks. Like the 1992 Convention on Biological Diversity (CBD),[92] the Fish Stocks Agreement recognises the ecosystem approach to conservation and seeks to apply the precautionary approach. The key innovation of the Fish Stocks Agreement is the institutional provisions relating to regional fisheries management organisation (RFMOs) regulating straddling and highly migratory fish stocks. Only states that are members of a RFMO or part of a cooperative arrangement would have access to the fishery resources to which the Treaty applies.[93] Within the territory of the particular RFMO, the RFMO member states are to "agree on and comply with conservation measures to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks" and as appropriate agree on catch or fishing effort allocations, and agree on standards for collecting, reporting, verification and exchange of data on the fish stocks.[94] Importantly, members of the relevant RFMO have the right to board other vessels flagged to other states that are party to the Fish Stocks Agreement to ensure compliance with the relevant conservation measures.[95] Any evidence of a violation is then remitted back to the flag state of the vessel concerned to allow the flag state to take enforcement action. If

[87] Daniel C. Dunn and others "The Convention on Biological Diversity's Ecologically or Biologically Significant Areas: Origins, development, and current status" (2014) 49 Marine Policy 137.

[88] Pursuant to art 22 of the CBD.

[89] Northwest Atlantic Fisheries Organisation.

[90] International Commission for the Conservation of Atlantic Tunas.

[91] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks ("Fish Stocks Agreement") 2167 UNTS 3 (opened for signature 4 December 1995, entered into force 11 December 2001).

[92] CBD, above n 79.

[93] Fish Stocks Agreement, art 8(4).

[94] Art 10.

[95] Art 21(1).

the flag state takes no action, the RFMO member can take enforcement action.[96] However, there is nothing to prevent the flag state from taking inadequate enforcement action, and there are economic incentives to do so.[97] The ability for non-flag states to take enforcement action within the RFMO area was the most controversial provision in the Fish Stocks Agreement as it is a significant exception to the principle of flag state sovereignty.[98] There are now a number of species-specific and general RFMOs managing various parts of the oceans.[99]

9 Other fisheries instruments

In terms of conservation of fisheries, a number of other instruments have been promulgated since UNCLOS, including the 1993 FAO[100] Compliance Agreement[101] and the voluntary 1995 FAO Code of Conduct for Responsible Fisheries. The FAO Compliance Agreement strengthens the responsibilities of flag states by, amongst other provisions, requiring its state parties to take such measures necessary to ensure that fishing vessels flagged to them do not engage in any activity that undermines the effectiveness of international conservation and management measures.[102] It also requires state parties only to authorize fishing vessels if that state party is satisfied that it is able to exercise effectively it responsibility under the Agreement in respect of that fishing vessel.[103] The FAO Compliance Agreement also contains provisions for a register of fishing vessels and provisions preventing the prompt reflagging of delinquent vessels. The FAO Code of Conduct for Responsible Fisheries is voluntary and sets out "principles and international standards of behaviour for responsible practices with a view to ensuring the effective conservation, management and development of living aquatic resources, with due respect for the ecosystem and biodiversity."[104]

10 Port State Measures Agreement

Most recently, the FAO Conference adopted the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing,[105] in addition to the various instruments allowing port states to detain vessels that do not meet a certain standard of

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[96] Art 21.

[97] Jessica K Ferrell "Controlling flags of convenience: one measure to stop overfishing of collapsing fish stocks" (2005) 35 Environmental Law 323.

[98] Giselle Vigneron "Compliance and International Environmental Agreements: a case study of the 1995 United Nations straddling fish stocks agreement" (1997) 10 Geo. Int'l Envtl. L. Rev. 581 at 600.

[99] See for instance the list in Ardron and others, above n 84.

[100] Food and Agriculture Organization of the United Nations.

[101] Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas (opened for acceptance 24 November 1993, entered into force 24 April 2003).

[102] Art III(1)(a).

[103] Art III(3).

[104] FAO Code of Conduct for Responsible Fisheries adopted 31 October 1995.

[105] Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (opened for signature 22 November 2009, not yet in force).

repair.[106] The Port State Measures Agreement has not yet come into force but when it does, state parties may deny vessels from entering its ports when it has sufficient evidence that the vessel has been carrying out illegal, unreported or unregulated (IUU) fishing or fishing-related activities.[107] Port state parties will also be able to inspect fishing vessels that enter the port to determine whether there is evidence of IUU fishing or related activities.[108] The results of inspections will be shared with other state parties with a view to coordinating inspections.[109]

Despite the Fish Stocks Agreement, and the other agreements described above that are aimed at preventing overfishing, in 2012, up to one-third of all commercial fish species were estimated to be overfished,[110] highlighting the need for greater protective measures. Conservation of marine biodiversity is still hampered by the fundamental reliance on flag states to enforce law on vessels flagged to them. Even when there is a regional fisheries management organisation in an area that has set a particular catch limit, ships can avoid the limitation by flagging to a state that is not party to the Fish Stocks Agreement. Alternatively, a ship could be flagged to a state that is party to the Fish Stocks Agreement but does not comply with its obligations to exercise control over its flagged vessels. While UNCLOS requires a vessel to have a "genuine link" with a state in order to be flagged to that state,[111] "genuine link" is not defined and states interpret the phrase in different ways.[112] As outlined above, while states have a general duty to taken measures necessary for the conservation of living resources in the high seas, in practice some states do not take active steps to prevent their nationals from taking actions that jeopardise conservation efforts. By flying "flags of convenience" ("FOC") when the flag state is not a signatory to the relevant agreement, ships can effectively avoid most if not all regulation of their activities on the high seas. Alternatively, ships can fly "flags of non-compliance" (FONCs) which is when the flag state signs up to an international agreement but does not exercise control of its flagged vessels. Despite a number of instruments that seek to require states to only flag vessels over which they will be able to exercise control, the practice of using FOCs continues to cause problems and is associated with IUU fishing.[113]

[106] Erik Jaap Molenaar "Port state jurisdiction: toward comprehensive, mandatory and global coverage" (2007) 38 Ocean Development & International Law 225

[107] Art 9(4).

[108] Art 9(5) and 12.

[109] Art 15.

[110] U. Thara Srinivasan, Reg Watson and U. Rashid Sumaila "Global fisheries losses at the exclusive economic zone level, 1950 to present" (2012) 36(2) Marine Policy 544.

[111] UNCLOS, art 91(1).

[112] Dana D Miller and U Rashid Sumaila "Flag use behavior and IUU activity within the international fishing fleet: Refining definitions and identifying areas of concern" (2014) 44 Marine Policy 204 at 204.

[113] At 208.

11 Marine pollution framework

The UNCLOS sets out a comprehensive framework on states to prevent marine pollution from land-based sources, vessels, dumping, activities in the seabed and from the atmosphere.[114] It also gives powers to port states to inspect vessels to gather evidence in relation to any possible discharge in breach of the relevant international standards.[115] Port states can also detain vessels that are unseaworthy.[116] In addition to the UNCLOS framework, there are several conventions dealing with different aspects of pollution[117] and a number of regional seas bodies that deal with pollution in particular areas.[118] While the mandate of some of the regional seas bodies has expanded to include matters such as environmental impact assessments,[119] there are still coordination problems with setting up marine protected areas given the number of other institutions, such as RFMOs, that may have an interest in a particular area.[120]

IV Gaps in the existing protection of marine biodiversity in ABNJ

The "package" of issues that negotiations are to focus on, all relate to existing gaps within the legal and institutional framework relating to marine biodiversity in ABNJ. In relation to MGRs, there are two diametrically opposed positions as to whether marine genetic resources are subject to the common heritage of humanity approach or are subject to freedom of the high seas.[121] MGRs are not covered by the benefit sharing regime in the Nagoya Protocol to the CBD.

In relation to area-based conservation measures, while there are a number of different institutions that may be able to contribute towards setting up marine protected areas (including RFMOs and regional seas organisations), there is little coordination between them – a matter that is likely to be remedied in any proposed instrument. It is also possible that any proposed instrument will contain provisions relating to the prevention of IUU fishing by eliminating the use of FOCs. In practice, action on this issue will be required if marine protected areas are to

[114] UNCLOS, Part XII, Section 5.

[115] Art 218.

[116] Art 219.

[117] See the table in Ardron and others, above n 84, at 99.

[118] For instance OSPAR, the convention body for the Convention for the Protection of the Marine Environment of the North-East Atlantic 32 ILM 1072 (opened for signature on 22 September 1992, entered into force on 25 March 1998).

[119] Rothwell and Stevens, above n 64, at 345.

[120] Nele Matz-Lück and Johannes Fuchs "The impact of OSPAR on protected area management beyond national jurisdiction: Effective regional cooperation or a network of paper parks?" (2014) 49 Marine Policy 155 at 161.

[121] Elisabeth Druel and Kristina M. Gjerde "Sustaining marine life beyond boundaries: Options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea" (2014) 49 Marine Policy 90 at 91.

work effectively. Controlling FOCs will require widespread acceptance of the instrument (in compliance with the parameters of the resolution) so that few states remain who will flag FOCs.

In relation to environmental impact assessments (EIAs), while there are requirements in UNCLOS and in the CBD to carry out these assessments, there are different thresholds at which EIAs are required and no binding guidelines as to how the EIAs are to be carried out. The proposed instrument could solve those problems.[122]

In relation to capacity building and transfer of marine technology, again UNCLOS contains some general provisions relating to these topics[123] but with no real detail. According to Churchill and Lowe:[124]

> Little improvement in this position [in relation to transfer of marine technology] is likely to result from the provisions of the Law of the Sea Convention, which in Boczek's view 'do not lay down clear legal obligations but only establish certain standards of conduct which to a large extent reflect the already existing practice … and are not likely to have any immediate discernible legal effect upon the transfer of marine technology'.

V Compliance and enforcement mechanisms to be included in the proposed instrument

There are three broad types of compliance and enforcement mechanisms: incentives, disincentives and transparency measures. There is overlap between these categories given that the fact that the regime is transparent will act as an incentive for compliance and a disincentive to non-compliance. Reporting and monitoring mechanisms are the primary transparency mechanisms while sanctions are the classic disincentive and financial assistance the classic incentive. The appropriateness of these mechanisms, along with a number of other mechanisms will be analysed in the following sections.

E Reporting and monitoring mechanisms

At a base level, any new instrument should contain reporting and monitoring obligations so that states have to engage with their substantive obligations and inform the international community what steps they are taking to fulfil them.[125] Reporting and monitoring mechanisms are recognised as being important by theories all along the enforcement continuum. From a managerial perspective, reporting and monitoring obligations require state bureaucracies to at least to engage with the international instrument. The actual reports contribute to the

[122] At 93.

[123] For instance in Part XIV of UNCLOS.

[124] R. R. Churchill and A. V. Lowe *The law of the sea* (3rd ed, Manchester University Press, Manchester, United Kingdom, 1999) at 418 – 419.

[125] Weiss, above n 16, at 1574.

transparency of the regime and give states reassurance that other states are taking action. Reporting and monitoring will also highlight which states are having problems with compliance, and need assistance. From a pure enforcement perspective, states must be able to know the extent of other states non-compliance to be able to take enforcement actions against them. Reporting and monitoring requirements also bring into play reputational costs and benefits; a state who is considering non-compliance will know that there is a high likelihood of the non-compliance being disclosed to the international community at large.

As to the content of the reporting and monitoring obligations, there should be an obligation to report on the steps that a state has taken to comply with the duties set out in the proposed instruments through domestic implementation of those duties. For instance, in relation to EIAs, states should report the steps they have taken to ensure that their nationals undertake proper EIAs in relation to activities in marine ABNJ. In relation to marine-protected areas, states should report on the regional organisations in which they are participants and the steps that are being taken there to implement marine protected areas. Depending on the strength of any substantive provisions in the proposed instrument relating to flag state duties, there could be a requirement to report on the criteria that a vessel must fulfil before it will be flagged to that state. This would allow for "white"[126] or "black" lists[127] to be established – either of states that are responsibly exercising their right to flag vessels or states that are being irresponsible respectively. These lists could be used as the basis for preferential treatment or sanctions when ships flagged to those states arrive in port states.[128] Provision for a global register of all vessels could also be helpful in ensuring that FOCs cannot easily reflag and continue breaching conservation measures.

F Dispute resolution mechanisms

As regards enforcement mechanisms, there should be provision for peaceful resolution of disputes. In terms of formal dispute resolution between two state parties, reference could be made to the UNCLOS dispute resolution procedures, though with provision for states that are not party to UNCLOS but will be to the new agreement. The Fish Stocks Agreement makes reference to UNCLOS' dispute resolution mechanisms in this manner.[129] If parties cannot agree otherwise, the default option in UNCLOS is binding arbitration.

G Non-compliance procedure

In addition to dispute resolution provisions, the proposed instrument should set up a non-compliance procedure (NCP).[130] NCPs have become popular in multilateral environmental

[126] Ferrell, above n 97 at 331.

[127] At 347 and 374.

[128] At 374.

[129] Fish Stocks Agreement, art 30.

[130] As described by Scott, above n 18.

agreements in recent decades. A NCP usually allows a state party, the treaty organisation or the non-complying state to bring the state's non-compliance to the attention of a compliance committee.[131] The non-complying state then has to justify why it has not complied (contributing to the norm-internalization process) and the compliance committee can offer technical or financial assistance if it feels it is necessary. NCPs are well-suited to multilateral agreements as they avoid the necessity for a state to have suffered loss for that state to take a claim against another state for breaching the instrument. In multilateral agreements, as the proposed implementing agreement would be, it can be difficult to prove loss as a result of another state's non-compliance.[132] Some NCPs also provide for the involvement of the public or NGOs who can bring non-compliance to the attention of the compliance committee.[133] Depending on the type of penalties for non-compliance (if any), there could be a separate committee to sanction states whose non-compliance is ongoing and unjustified. A similar split in committees was used in the Kyoto Protocol NCP.[134]

The term "non-compliance procedure" was not in use at the time the Chayeses wrote their book on compliance.[135] However, NCPs are very much in line with the managerial approach to compliance as such a procedure recognises that one of the primary causes of non-compliance is lack of capacity. The NCP also allows for the removal of ambiguity in the interpretation of the treaty if the compliance committee can give an opinion on interpretation.[136] These interpretations may be more helpful to ongoing regime development than a binding decisions from a dispute between two state parties.[137] The compliance committee will have the relevant experience to be able to interpret the treaty in a way that is consistent with the actual implementation of the treaty across all parties. A NCP also brings into play reputational risks, as per Guzman's theory.[138] States know that they may have to go before a committee of representatives from other states to justify their non-compliance. This may in itself disincentivise non-compliance where possible.

H Review of the effectiveness of the instrument

The proposed instrument could include a review mechanism similar to that contained in the Fish Stocks Agreement.[139] The review would be of the effectiveness of the proposed instrument in conserving and promoting the sustainable use of marine biodiversity in ABNJ.

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[131] At 227.

[132] Scott, above n 18, at 227.

[133] At 233.

[134] Scott, above n 18, at 237; Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 162 (opened for signature 11 December 1997, entered into force 16 February 2005).

[135] At 223.

[136] Chayes and Chayes, above n 7, at 203 – 204.

[137] At 206.

[138] Scott, above n 18, at 231.

[139] Art 36.

This review mechanism would encourage party engagement with the instrument and would highlight any systemic issues that had arisen or any improvements that could be made. For instance, one of the recommendations from the first review of the Fish Stocks Agreement was that the financial assistance mechanism under that Agreement needed to be promoted.[140] When the Agreement was re-reviewed, as a result of that recommendation, it was found that use of the fund had increased dramatically.[141]

I Financial assistance

As mentioned above, one of the primary causes of non-compliance according to the managerial model is lack of capacity. Providing financial assistance to states to assist with compliance is likely to increase the effectiveness of the instrument. The provision of financial assistance may also make the instrument more fair in a substantive, distributive justice sense, given that many of the threats to marine biodiversity have arisen from the industrialisation of developed countries. If the instrument is perceived as fair, developing states may be more likely to sign up to and comply with the agreement. Financial assistance is a feature in a number of prominent multilateral environmental agreements including the CBD, the United Nations Framework Convention on Climate Change ("UNFCCC")[142] and its subsidiary instrument the Kyoto Protocol[143] and the Montreal Protocol on Substances that Deplete the Ozone Layer.[144] This suggests that to encourage developing states to enter into an agreement whereby those states take on further responsibilities (for instance in relation to control of vessels flagged to their state), some form of financial assistance will need to be provided. However, developed states are less willing to contribute funds to international regimes in recent times.[145] One possibility would be to require entities who want to use MGRs to pay some sort of license fee or royalties which could be used for fund the financial assistance mechanism under the instrument.

J Enforcement by non-flag states

There are situations when non-flag states can take some sort of enforcement action against a vessel that is suspected of not complying with conservation measures relating to the high seas. As outlined above, the Fish Stocks Agreement allows non-flag states to board a vessel that is flagged to another party to the Fish Stocks Agreement to ensure compliance with the relevant

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[140] *Secretary General's Report submitted to the resumed Review Conference in accordance with paragraph 32 of General Assembly resolution 63/112 to assist it in discharging its mandate under article 36, paragraph 2, of the Agreement* A/CONF.210/2010/1 (2010) at [441].

[141] At [443].

[142] United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 9 May 1992, entered into force 21 March 1994).

[143] Kyoto Protocol, above n 133.

[144] Montreal Protocol on Substances that Deplete the Ozone Layer 1522 UNTS 3 (opened for signature on 16 September 1987, entered into force on 1 January 1989).

[145] Chayes and Chayes, above n 7, at 282 – 283.

conservation measures. The other situation is when a suspected IUU vessel is seeking to enter a port state. Under the Port State Measures Agreement when it comes into force, a port state will be able to inspect to determine whether there is evidence of the vessel fishing in an IUU way. Both methods are controversial as they infringe the principle of flag state sovereignty. The new instrument could incorporate similar provisions or given that the UNGA expressly states that the new instrument is not to undermine existing instruments, the new instrument could encourage states to ratify those two agreements. Allowing states to take enforcement action against vessels not flagged to them is an important mechanism deterring IUU fishing. Many IUU vessels will be flying FOCs or flags of non-compliance (FONCs) which means that it is very unlikely that the flag state is going to take any enforcement action against the vessel.

K Coercive sanctions

Sanctions against states for non-compliance are likely to be unproductive as it may disincentivise participation in the agreement and if enforcement actually took place, may take resources away from states which could be used for enforcement against non-complying vessels. The Chayeses' analysis of the downsides of enforcement is convincing. However, an agreed sanctions regime that any state could apply against infringing *vessels* (whatever the flag) rather than states, could be useful in combating FOCs. This would mean that whichever state was seeking to take enforcement action against a vessel that was not flagged to it for breaches of high seas conservation measures, there would be a set of agreed regulations and fines or penalties for breaching them. If these penalties could be agreed, it might lessen the concerns of flag states about allowing other states to take enforcement action against their nationals, as there would be certainty as to what punishment would be applied.

VI Conclusion

The international community has recognised that there are gaps in the international regime relating to the conservation and sustainable use of marine biodiversity in ABNJ and have agreed to negotiate an instrument under the UNCLOS to ameliorate the current regulatory and governance deficits. The negotiations will focus around conservation tools such as marine protected areas and environmental impact assessments as well as the distribution of benefits from MGRs and capacity building and transfer of marine technology. To be effective in conserving and sustainably using marine biodiversity in ABNJ, the substantive duties that states agree to in the proposed instrument must be capable of actually curbing the current threats to biodiversity including IUU fishing. This paper has focussed on the types of mechanisms that should be included in the proposed instrument (whatever the substantive duties) to promote compliance with those duties. However, if the substantive duties are too shallow, then even perfect compliance with the duties will not result in any improvement in the protection of biodiversity.

To inform this analysis, Part II of the paper surveyed the most prominent theories as to why states do or do not comply with international law. Each theory highlights an important theme: from the managerial model that non-compliance is ofter as a result of lack of capacity and so assistance with meeting obligations is likely to be effective; from Franck that fairness in a procedural and substantive sense in important in encouraging states to comply; from Koh that the norms are internalized through interaction; from Guzman that states will take into account reputational costs; and finally from Downs et al that compliance should not be mistaken for effectiveness and that deep cooperation is usually absent from international agreements. On the enforcement question, the Chayeses do present a convincing argument that coercive sanctions are likely to be costly and ineffectual in relation to enforcing multilateral international environmental agreements.

A number of the theorists emphasised the importance of the international community and international interactions in encouraging compliance with international law. This supports an argument that states should try to involve as many stats as possible in the proposed instrument. Even if some states are non-compliant, it is better to have states involved and potentially internalizing norms or changing interests rather then excluding them from the community. There was also theoretical support for negotiating clear rules to encourage compliance.

Part III described the existing regimes in relation to conservation of marine biodiversity in ABNJ. This highlighted that the duties on states in relation to important conservation tools, including marine protected areas and environmental impact assessments are lacking in detail. It also emphasised how many different intstitutions are involved in various aspects of ocean governance, which presents coordination problems. Part IV identified the gaps that the proposed instrument will fill, while Part V examined the types of compliance and enforcement mechanisms the proposed instrument should have and linked the proposed mechanisms back to the compliance theories discussed in Part II.

In conclusion, the instrument should have reporting and monitoring requirements, dispute resolution mechanisms, a financial assistance mechanism and a non-compliance procedure. These mechanisms will encourage engagement by the state with its obligations (reporting and monitoring), will incentivise that states to take active steps in implementation (financial assistance mechanism), will help states to comply if they are having problems (non-compliance procedures), and will raise reputational concerns that will encourage compliance (reporting and monitoring, and non-compliance procedures). The other two mechanisms mentioned relate to action against FOCs by allowing enforcement by non-flag states and a universal set of regulations and penalties for high seas fisheries violations. It would also be useful to have a review provision in the instrument so that its overall efficacy can be assessed.

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