



An International Instrument on Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction

Exploring Different Elements to Consider

PAPER VIII

Options for Environmental Impact Assessment Elements^{*}

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Commissioned by the German Federal Agency for Nature Conservation with funds from the German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety.



^{*} DISCLAIMER: The views expressed in this paper do not necessarily reflect those of the German Federal Agency for Nature Conservation or the German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety.

1. Background

At the 2012 United Nations Conference on Sustainable Development (Rio+20), States committed themselves ‘to address, on an urgent basis, building on the work of the Ad Hoc Open-ended Informal Working Group and before the end of the sixty-ninth session of the General Assembly, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea.’¹ This commitment was recalled and reaffirmed by the United Nations General Assembly (UNGA) in its 67th and 68th session.² In its resolution 68/70, the UNGA also requested the United Nations 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 (UN Working Group) to make recommendations to the UNGA ‘on the scope, parameters and feasibility of an international instrument under the Convention’.³ These recommendations shall help to prepare for the decision to be taken at the 69th session of the UNGA in 2015, whether to start the negotiation of an international instrument on the conservation and sustainable use of biodiversity in areas beyond national jurisdiction (ABNJ).

The International Union for Conservation of Nature (IUCN) in collaboration with different partners has prepared a series of policy briefs to provide technical input to the ongoing ABNJ discussions, and thereby support the UNGA decision-making process. As indicated in **Paper I**, one of the operational mechanisms to be discussed under ‘parameters’ could be environmental impact assessments (EIAs). The following paper aims to provide an overview of the current challenges with regard to EIA implementation in ABNJ, the rationale for including EIA elements in a future international instrument for ABNJ under the United Nations Convention on the Law of the Sea (UNCLOS), different options and approaches to do so, as well as links between EIA elements and other components of a future instrument.

2. Challenges

Environmental impact assessment is acknowledged as a key element in the suite of tools for biodiversity conservation, and its application to activities affecting the marine environment has been endorsed in many international law instruments and policy statements.⁴ Article 206 of the UNCLOS imposes a general obligation on States Parties to assess the potential effects of activities under their jurisdiction or control that may cause substantial pollution of, or significant and harmful changes to the marine environment. Although the obligation to conduct environmental assessment of activities with the potential for significant and harmful impacts on the marine environment is well established in both customary and conventional international law, implementation of this obligation for marine

¹ UNGA resolution 66/288. ‘The future we want.’ UN doc. A/RES/66/288, of 11 September 2012. Paragraph 162.

² UNGA resolution 67/78. ‘Oceans and the law of the sea.’ UN doc. A/RES/67/78, of 11 December 2012. Paragraph 181. UNGA resolution 68/70. ‘Oceans and the law of the sea.’ UN doc. A/RES/68/70, of 9 December 2013. Paragraph 197.

³ UNGA resolution 68/70. ‘Oceans and the law of the sea.’ UN doc. A/RES/68/70, of 9 December 2013. Paragraph 198.

⁴ These instruments include the regional seas conventions, the 1982 United Nations Convention on the Law of the Sea, the 1991 Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol), the UN Fish Stocks Agreement (UNFSA) and the International Seabed Authority’s Regulations for exploration contractors.

ABNJ⁵ is fragmented between different sectors and regions. There is no overarching international agreement which develops in more specific terms the obligation contained in UNCLOS to assess the potential effects of planned activities under States jurisdiction or control for ABNJ sites. Similarly institutional coverage for ABNJ is far from comprehensive with no global body having overarching responsibility for protection and preservation of the marine environment or conservation of marine biodiversity beyond national jurisdiction, and only a few regional seas programs having specific environmental protection responsibilities for these areas.⁶ The International Seabed Authority has comprehensive environmental protection powers for seabed mining activities affecting the Area, but this advanced environmental governance situation for mining activities in the Area is not matched by a global institution with comparable environmental protection powers for other activities with the potential to affect the seabed or the high seas water column. Nor are there mandatory EIA laws and regulations at the global or regional level to govern new or emerging activities such as bioprospecting (*see Paper X*).

Lack of an integrated system of environmental governance for ABNJ presents considerable problems for implementing comprehensive environmental assessment processes in these vast areas of the ocean. The predominant form of jurisdiction in ABNJ is flag state jurisdiction. For shipping and fishing vessels operating in ABNJ, it falls largely to individual flag States rather than any regional or global body to enforce the activities of their flag vessels including their impacts on the marine environment. This results in variable levels of compliance with environmental standards, no independent auditing of individual flag State performance with respect to fishing vessels or sanctioning of sub-standard performance. Many of the stages in an EIA process require coordinating authorities which are conspicuously lacking in the fragmentary and disjunctive system of governance applicable to most ABNJ activities. These stages include the initial screening process to select which activities are subject to environmental assessment, the scoping process to decide the terms of reference for an EIA, the public notification and consultation process to engage relevant stakeholders, the post EIA decision-making phase and the ongoing monitoring of environmental impacts.

3. Rationale for Including EIA Elements

The UN Working Group has discussed reasons for including EIA as one of the key components in any future international instrument on the conservation and sustainable use of biodiversity in ABNJ.⁷ A key plank of the rationale for including EIA elements is to capture activities occurring in ABNJ that are not already subject to sectoral EIA processes, in effect, to provide a default EIA system for activities such as bioprospecting and marine geo-engineering. Another reason for including EIA elements is to provide best practice standards for EIA in ABNJ where scientific knowledge of marine biodiversity is still nascent. Developing best practice standards for EIA in ABNJ may well entail the incorporation of new elements into the generally accepted components of the EIA process. Rather than perpetuating a situation where EIA is simply a procedural hurdle for the proponents of a particular activity, a best

⁵ Marine areas beyond national jurisdiction include both the high seas water column and the deep seabed beyond national jurisdiction (the Area).

⁶ The scope of application of the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea Convention), the 1992 Convention for the Protection of the Marine Environment of the North-east Atlantic (OSPAR Convention) and the 1995 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention) extend to ABNJ.

⁷ *Recommendations of 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 and Co-Chairs' summary of discussions.* UN doc. A/66/119, of 30 June 2011. Annex, Section I, Paragraphs (a) and (b).

practice standard could require a process that is biodiversity inclusive, transparent and subject to international scrutiny with associated powers to impose conditions in the interest of mitigating adverse impacts on the marine environment or to disallow the activity where there is the potential for substantial harm to the marine environment.

4. Options for Incorporating EIA Elements

Typical components of an EIA process include screening, scoping of the terms of reference for an EIA, public notification and consultation, reporting and post report decisions on whether to impose conditions on the activity or to disallow it.⁸

Screening

The screening component of an EIA process determines whether particular activities or projects will be subject to an EIA. The threshold of significant effects on the environment as the trigger for subjecting activities to EIA has gained wide acceptance in global and regional instruments as well as national legislation.⁹ The Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol) is a notable exception to this generally accepted threshold with the screening process involving three levels – the preliminary assessment level, the initial environmental evaluation level and the comprehensive environmental evaluation level. A preliminary assessment is carried out at the national level for all activities subject to the Protocol with less than a minor or transitory impact.¹⁰ If an activity will have no more than a minor or transitory impact, an initial environmental evaluation must be carried out at the national level.¹¹ If it has more than a minor or transitory impact, a comprehensive environmental evaluation must be carried out and submitted to the Committee on Environmental Protection of the Madrid Protocol.¹² This is a potential option for screening thresholds in ABNJ, at least for activities intended to occur in sensitive ABNJ, such as identified vulnerable marine ecosystems (VMEs) and ecologically and biologically significant areas (EBSAs).

In addition to threshold criteria, many EIA regimes list activities which will automatically be subject to EIAs and criteria to assist in determining which other activities should be subject to EIAs.¹³ An indicative list of such activities for ABNJ could include fishing, aquaculture, dumping of waste, marine geo-engineering, offshore hydrocarbon production, marine scientific research, laying of submarine cables and pipelines, ballast water exchange, deep sea tourism expeditions and ocean energy operations. Criteria to assist States in determining which other activities should be subject to EIAs could be developed based on whether the activity has the potential to adversely affect marine biodiversity alone or in combination with other existing activities or stressors.

⁸ Craik, N. (2008). *The International Law of Environmental Impact Assessment.* Cambridge University Press. P. 132.

⁹ Ibid., 133.

¹⁰ Madrid Protocol, Annex I, Article 1(1).

¹¹ Ibid, Annex I, Articles 2(1) and 3(1).

¹² Ibid, Annex I, Article 3(2).

¹³ Craik, N. (2008). *The International Law of Environmental Impact Assessment.* Cambridge University Press. P. 134-135.

Scoping

Once the need for an EIA has been agreed, a scoping process follows that determines the focus, depth and terms of reference for the EIA. The fundamental objective of the scoping process is to identify those issues arising from the proposed activity which are most likely to have a significant impact on the environment and to describe alternatives that avoid, mitigate, or compensate for adverse impacts on the environment. The content of the EIA report or Environmental Impact Statement (EIS) is derived on the basis of these elements. The scoping stage of EIAs for activities in ABNJ while addressing the same issues could also incorporate examination of impacts and alternatives which take into account the shared interests of the international community, such as the long term sustainability of marine resources, continuing marine scientific research and the stability of global climate.

Reporting

The EIS which is usually prepared by the proponent of the activity forms the basis for subsequent decisions by the relevant authorities on whether an activity should proceed and whether conditions should be imposed on the activity. The potential elements of an EIS for proposed activities in ABNJ could include:

- A description of the proposed activity including its purpose, location, duration and intensity;
- A description of the initial environmental reference state and a prediction of the future environmental reference state in the absence of the proposed activity;
- A description of the programme for oceanographic and environmental baseline studies that would enable an assessment of the potential environmental impact, including but not restricted to the impact on biodiversity of the proposed activity;
- A description of the practical alternatives, including the alternative of not proceeding and the consequences of those alternatives;
- An assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including the direct, indirect, individual and combined, cumulative, short term and long term effects of the proposed activity and alternatives in the light of existing and planned activities;
- A description of the expected biophysical changes resulting from proposed activities, including a description of ecosystems lying within the range of influence of such changes and the spatial and temporal scale of influence of each biophysical change, identifying effects or connectivity between ecosystems, and potential cumulative effects;
- A determination of whether there will be adverse impacts on biodiversity or ecosystems affected by the expected biophysical changes in terms of composition, structure (spatial and temporal) and key processes highlighting any irreversible impacts and irreplaceable loss;
- Identification (in consultation with a potential scientific and technical advisory body under a future international instrument) of the current and potential ecosystem services provided by the affected ecosystems, and determination of the values these represent for the international community highlighting any irreversible impacts and irreplaceable loss;
- As complete a consideration as possible of effects involving impediments to migration, of transboundary effects on migratory species and of impacts on migratory patterns or migratory ranges;

- Definition of possible alternatives, including ‘no net biodiversity loss’ or ‘biodiversity restoration’ alternatives and location, scale, siting, lay out and technology alternatives;
- An assessment in consultation with the Intergovernmental Panel on Climate Change of the likely impacts on global climate of the proposed activity, whether positive or negative;
- A description of the methods, data and underlying assumptions used to forecast the impacts of the proposed activity;
- An identification and description of measures available to prevent or avoid adverse environmental impacts of the proposed activity and alternatives, and an assessment of those measures;
- A description of the effects of the proposed activity on the conduct of scientific research and on other existing uses and values;
- An identification of whether the proposed activity will affect the proponent’s compliance with its obligations under customary or conventional international law;
- An identification of gaps in knowledge and uncertainties encountered in compiling the information required for the EIS; and
- A non-technical summary of the information provided under the previous clauses.

Public notification and consultation

The duty to notify and consult with affected parties is an integral component of environmental impact processes in both the national and transboundary arenas.¹⁴ The general obligation to notify and consult derived from the international law duty to cooperate and found in a variety of hard and soft law instruments can be adapted to activities in ABNJ. When information provided as part of an EIA indicates that the environment of ABNJ is likely to be significantly affected by a proposed activity, the proponent of the planned activity should notify and consult with potentially affected stakeholders and provide them with relevant information. In the ABNJ context, potential stakeholders could include States, members of the public, international and regional organizations, inter-governmental and nongovernmental organizations, industry representatives and corporate entities, as well as research communities. Before a decision is made on whether an activity proceeds and on what conditions, these stakeholders should be provided with an opportunity to comment. To assist in this process, States could be encouraged to notify other States and competent international organizations of planned activities under their jurisdiction or control which may have a significant effect on marine biodiversity in ABNJ. There is also the potential for a more enhanced role for the regional seas organizations as dissemination points and consultation hubs on EIAs and as technical advisers on mitigation measures.

Post EIS decision-making

Under most EIA regimes, the obligation on the final decision-maker is one of due diligence encompassing a full examination of the potential environmental impacts of a particular project and due consideration for the interests of affected parties.¹⁵ The global commons status of biodiversity in ABNJ calls for a more stringent and inclusive standard of decision-making on whether an activity should be allowed to proceed and on what conditions. This could involve developing a further set of

¹⁴ Craik, N. (2008). *The International Law of Environmental Impact Assessment.* Cambridge University Press. P. 141.

¹⁵ *Ibid.*, 150-151.

criteria related to the permissible levels of impact on marine biodiversity in ABNJ and a decision-making structure which involves a level of international scrutiny over EIAs prepared by proponents of particular activities.

5. Links between EIA Elements and other Components of the International Agreement

The EIA components of an international instrument should be consistent with its overarching objectives and general principles. For example, the EIA process prescribed in the instrument should be focused on the conservation and sustainable use of marine biodiversity in ABNJ. The institutional infrastructure required for the EIA process prescribed in the international instrument should utilise as far as possible existing global and regional organisations with the relevant expertise, as well as the institutions of the instrument itself.

For example, a Meeting of the Parties to the international instrument advised by a subsidiary scientific and technical body could function as the decision-making body for EIAs. Its functions could include setting standards for best practice EIA and reviewing EIAs undertaken by sectoral bodies for activities in ABNJ. It could have powers to impose conditions or disallow activities based on criteria developed around thresholds for adverse impacts on marine biodiversity in ABNJ. The subsidiary scientific and technical body and the Meeting of the Parties could also function as default review and decision-making bodies for EIAs of new and emerging activities in ABNJ not covered by existing sectoral EIA regimes. In addition, the EIA screening criteria developed under an international instrument could take into account any network of marine protected areas.

6. Conclusions

The potential negotiation of an international instrument for the conservation and sustainable use of marine biodiversity in ABNJ offers the opportunity to develop best practice standards for biodiversity inclusive EIA for all activities with the potential for adverse impacts on the marine biodiversity of ABNJ. With appropriate elaboration and adaptation from existing EIA regimes, it can provide a process for assessing the impacts of previously unexamined activities in ABNJ and new and emerging activities. An EIA regime for ABNJ also provides an opportunity for the shared interests of the international community in conserving and sustainably using marine biodiversity to be represented in a transparent and inclusive process which takes into account the interests of multiple ocean stakeholders of current and future generations. The development of an EIA regime for ABNJ is a fundamental prerequisite for the conservation and sustainable use of marine biodiversity across the whole spectrum of ABNJ activities.

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