

Environmental Impact Assessment

Developing options for ABNJ

Informal Meeting to Consider the Substantive Aspects of a New International Instrument for the Conservation and Sustainable Use of Marine Biodiversity beyond National Jurisdiction

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What is EIA?

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



Process (simplified!)

- **Screening:** Determines whether particular activities or projects will be subject to an EIA
- **Scoping:** Determines the focus, depth and terms of reference for the EIA
- **Assessment/evaluation** of impacts
- **Notification:** Stakeholders are notified/consulted
- **Reporting:** Statement of effects and supporting documentation (Environmental Impact Statement or EIS)
- **Decision making:** EIS factored into decision on whether activity proceeds

EIA within national jurisdiction

- First formal system established **1970** in US
- Now forms part of environmental law and planning frameworks **worldwide**
- Adopted in **over 100 jurisdictions** and in many bilateral and multilateral aid and funding agencies
- EIA is often one of the main interfaces between **science and policy/regulation**



Trends

- Use of EIA **growing**: different levels, decision-types
- **Poor quality** EIA common; reflects many barriers
- EIA often threatened by “**pro-growth**” policies
- Previously **no marine-specific processes**, but this is emerging

“The profile of EIA can only increase as concerns over issues such as climate change grow and communities and governments recognize the importance of true anticipatory mechanisms in their decision-making processes.”

- Morgan (2012)

Outcomes

Despite widespread acceptance and implementation, outcomes are mixed:

- **Mainstreaming** the environment:
 - Environmental data is put in hands of decision makers
 - Quality improves over time
- **Awareness** and dialogue:
 - Can contribute to longer term goals/shifts
 - Public participation is crucial
- **Changing decisions:** highly variable
 - Decision makers tend to have a wide discretion
 - Final outcomes are rarely directly restricted

Good practice

- Focus on the **environment**, impacts, biodiversity
- Ensure **transparency**
- Include a **review** mechanism
- Involve **stakeholders**/consider their interests
- Include the ability to:
 - Impose conditions to **mitigate** adverse impacts; or
 - **Disallow** the activity where there is the potential for substantial harm.

Challenges for EIA in ABNJ



- Marine EIA is hard!
 - Physical processes harder at sea
 - Highly variable and often poorly understood environment
- Compounded by a number of factors in ABNJ:
 - **Geographical**: depth, pressure, temperatures, productivity
 - **Practical**: less data, remoteness, high cost, dispersed stakeholders
 - **Governance**: unclear and fragmented EIA provisions, no cumulative assessment/SEA

A photograph of a sea turtle resting on a dark, wet rock at the edge of the ocean. The turtle has a dark shell with prominent white stripes running down its back. The water is dark blue with white foam from a small wave washing over the rock. In the background, the sun is setting on the horizon, creating a warm orange and yellow glow that reflects on the water's surface. The sky is a deep blue with some light clouds.

*“States have the **obligation to protect and preserve** the marine environment.”*

- UNCLOS, Art. 192

UNCLOS – EIA (i)

Art. 204

- “States shall... endeavour... to observe, measure, evaluate and analyse... the risks or effects of pollution of the marine environment.”
- “States shall keep under surveillance the effects of any activities which they permit or in which they engage”

Art. 205

- “States shall publish reports of the results... or provide such reports at appropriate intervals to the competent international organizations...”

UNCLOS – EIA (ii)

Art. 206

- “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”

Customary international law

“It may now be considered a requirement under general international law to undertake an environmental assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context”.

- Pulp Mills [2010] ICJ Rep. 14, 83 para. 204

This “may also apply to activities with an impact on the environment **in an area beyond the limits of national jurisdiction**; and the [ICJ]’s references to ‘shared resources’ may also apply to resources that are the common heritage of mankind”

- Seabed Disputes Chamber of ITLOS, Case 17 (2011)



Existing provisions for EIA in ABNJ

Sectoral

International Seabed Authority/Part XI Agreement (1994)

- EIA and broader seabed management plans for seabed mining activities

London Convention/Protocol (1972)

- Dumping, ocean fertilization



Fish Stocks Agreement (1995), UNGA res.61/105, 64/72

- Bottom fisheries (RFMOs)

Also: World Heritage Convention; Convention on Migratory Species, Agreement on the Conservation of Cetaceans of the Black Sea; Mediterranean Sea and Contiguous Atlantic Area...

Sectors not yet covered

Seabed activities other than mining

- cable and pipelines
- seabed installations
- marine scientific research
- bioprospecting



High seas activities other than dumping and some fishing:

- shipping
- marine scientific research
- floating installations
- impacts of high seas fishing on continental shelves of coastal nations
- impacts of continental shelf activities on high seas
- military activities
- new or emerging uses of the seas

Existing provisions for EIA in ABNJ

Regional/International

- **Limited implementation** in some regional seas agreements
- Loosely worded suggestions/elements, **not obligations**/processes
- E.g. Barcelona Convention (1976) – Mediterranean
- Notification/consultation among Parties where activities likely to have significant adverse effect on ABNJ



Existing provisions for EIA in ABNJ Antarctica

Madrid Protocol (1981)

More complex/comprehensive

Three level screening process:

- Preliminary assessment
 - Less than a minor or transitory impact
- Initial environmental evaluation
 - No more than a minor or transitory impact
- **Comprehensive environmental evaluation**
 - More than a minor or transitory impact



Existing provisions for EIA in ABNJ

Espoo Convention (1991)

- Convention on EIA in a Transboundary Context
- **Only specific international instrument** on EIA
- Parties required to implement EIA for activities listed in Appendix I that are likely to cause **significant adverse transboundary impact**
 - This includes large pipelines and offshore hydrocarbon facilities
- Protocol on Strategic Environmental Assessment (Kiev Protocol)

What can an agreement add?

- Reaffirm obligation; renew focus & impetus
- Set out a clear & uniform process
- Cover activities outside sectoral regimes
- Provide for cumulative assessment and/or Strategic Environmental Assessment
- Fill in the gaps in existing EIA coverage
- Act as a safety net/complement to MPAs
- Technical support & capacity building to assist developing States

Strategic Environmental Assessment

“the evaluation of the likely environmental, including health, effects, of plans and programmes, and to the extent appropriate, policies and legislation, which comprises the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.”

- Kiev Protocol (ESPOO Convention)

Who are the *stakeholders*?

Everyone!

- States
- Members of the public
- International bodies
- Regional organizations
- Inter-governmental organisations
- NGOs
- Industry
- Private sector/corporations
- Research institutions...



Discussion

- **Threshold** for EIA:
 - Significant adverse effects?
 - More than a minor or transitory effect?
 - Always in VMEs/EBSAs?
- **Coverage**: All activities? A list?
- **Who** carries out the EIA? States? Proponent?
- How can **stakeholders** be involved?
- **Decision making**: What powers? Who? Criteria? Review
- **Reporting**: To who? Publically available?
- **Review/verification**: How? By who? States?
- **Institutional arrangements**: Role of existing regional & sectoral organisations, new institution(s)

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Thank you!



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