



Towards a global agreement on environmental impact assessments in areas beyond national jurisdiction

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INTRODUCTION

Areas beyond national jurisdiction (ABNJ)¹, or “high seas”, cover around half of the planet’s surface and are home to a fragile and poorly known biodiversity. Over the past decades, threats against these areas have grown, linked to the exponential use of ABNJ and of their resources (overexploitation of fish stocks, illegal fishing, destructive fishing practices, oil and noise pollution, emerging threats linked to deep-sea mining...). Against this background, the international community felt necessary to engage the discussions on the conservation and sustainable use of marine biodiversity in ABNJ. This has been done under the auspices of the United Nations General Assembly (UNGA) and of its *Ad-Hoc* Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ Working Group). Within this framework, States must decide by the end of the 69th session of the UNGA (2014) if they agree to launch the negotiations of an Implementing Agreement to the United Nations Convention on the Law of the Sea (UNCLOS).²

Issues under consideration in this context include marine genetic resources (MGRs), area-based management tools such as marine protected areas (MPAs), environmental impact assessments (EIAs), capacity-building and transfer of technology. The G77 and other developing countries are pushing for the inclusion, in any future multilateral agreement, of rules related to the access to and benefit-sharing arising from the exploitation of MGRs. The European Union and its allies such as Australia or New Zealand have voiced support for the establishment of MPAs in ABNJ. Therefore MGRs and MPAs have been widely debated and are the main topics of numerous publications and events.³ EIAs appear at first glance to be a less controversial issue: all Parties seem to consider them necessary⁴, and they have been less frequently discussed and studied. This is somehow surprising given the strategic importance of this tool which, if adequately implemented, could be instrumental in halting biodiversity loss in ABNJ. Defined as “a process of evaluating the likely environmental impacts of a proposed

1. Areas beyond national jurisdiction encompass the high seas, defined in Article 86 of the United Nations Convention on the Law of the Sea (UNCLOS) as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the archipelagic waters of an archipelagic State” and the Area, defined in Article 1 (1) (1) of UNCLOS as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”.

2. UNGA Resolution 66/288 of 27 July 2012, “The future we want”, § 162.

3. On the MPA issue, see Druel E., Billé R., Treyer S. (2012), “A legal scenario analysis for marine protected areas in areas beyond national jurisdiction”, *IDDRI-IUCN-Agence des Aires Marines Protégées*, Studies n° 06/11, 28p.

4. On the state of play on EIAs discussions within the BBNJ Working Group, see Druel E. (2013), “Environmental Impact Assessments in areas beyond national jurisdiction”, *IDDRI*, Studies n°01/13, 42 p.

project or development taking into account inter-related socio-economic, cultural and human health impacts, both beneficial and adverse”⁵, EIAs are particularly useful for:

- Determining and analysing likely environmental impacts of proposed human activities;
- Developing mitigation measures or, wherever appropriate, recommending that an activity should not be authorised because the impacts would be too severe or because there is too much uncertainty about them; and
- Helping the competent authority to make a final decision about the conduct of an activity.

At the national level and in transboundary contexts (for example, when activities conducted by a State may have an impact on the environment of a neighbouring State), conducting EIAs for activities likely to cause significant adverse impacts to the environment is a well-established practice. This is not the case in ABNJ, where the requirement to carry out EIAs is implemented in a fragmented—and often unsatisfying—way. A general obligation exists under UNCLOS to carry out such assessments “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”.⁶ However, this requirement is poorly implemented. Under the CBD, Voluntary Guidelines for the consideration of biodiversity in EIAs and strategic environmental assessments (SEAs) in marine and coastal areas were adopted recently.⁷ They provide mainly scientific guidance, leaving governance and policy issues unresolved. The development of the obligation to conduct EIAs has also arisen through intergovernmental organisations for some sectoral activities (deep-sea bottom fisheries, seabed mining in the Area, dumping of waste and ocean fertilisation) and in a very small number of regional frameworks (the Antarctic Treaty System, the OSPAR, SPREP and Barcelona regional seas conventions), with notable differences in the extent of requirements and in their implementation.

Against this background, three questions can be raised. First, where exactly to define gaps in the current institutional and legal framework which would justify the development of an international agreement on EIAs in ABNJ? What could be the possible content of such an agreement? And what form could it take?

5. Voluntary Guidelines on biodiversity-inclusive impact assessment, §5, Annex to CBD COP 8 Decision VIII/28 on Impact Assessment.

6. Article 206 of UNCLOS.

7. CBD COP 11, Decision XI/18 on Marine and Coastal Biodiversity.

GAP ANALYSIS

Although a general obligation to carry out EIAs exists under UNCLOS, it appears that it has not been fully implemented, because of its lack of precision and details. UNCLOS does not provide minimum standards and requirements to be applied uniformly in the conduct of EIAs in ABNJ. As a result, when States decided to develop specific requirements, it was done in a disparate way through regional or sectoral organisations, which led to inconsistencies.

Even worse, legally-binding requirements have not been developed for all sectoral activities. Indeed, for a large number of human activities taking place in ABNJ, proponents are not required to carry out EIAs when a proposed project is likely to cause significant impacts to marine biodiversity. In particular, such requirements do not exist for: “seabed activities other than mining, (e.g. cable and pipelines, seabed installations, marine scientific research, bioprospecting, sea-based tourism); high seas activities other than dumping and some fishing (e.g. shipping, marine scientific research, floating installations (e.g. wave, nuclear, CO₂ mixers)); impacts of high seas fishing activities on outer continental shelves of coastal nations (e.g. deep-sea fishing impacts on sedentary species and resources, vulnerable benthic ecosystems); impacts of outer continental shelf activities on high seas (e.g. seismic testing noise); military activities; new or emerging uses of the seas”.⁸ The need to establish a global default mechanism to regulate new and emerging activities along with activities that are not covered by a sectoral mechanism, is the logical conclusion of this gap analysis.

A lack of requirement to assess the cumulative impacts of human activities in ABNJ is another important gap in the current international framework. This is due to the sectoral development of EIAs requirements, as sectoral frameworks mostly take into consideration the separate impacts of the activities they regulate.

Developed after EIAs had been introduced into national legislations, SEAs are defined as “the evaluation of the likely environmental, including health, effects, 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

8. Gjerde K.M. *et al.* (2008), “Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction”, *IUCN*, Gland, Switzerland, p.8.

programme”.⁹ SEAs are not an obligation under UNCLOS and requirements to conduct them are lacking in many existing frameworks.

Beyond the legal gaps highlighted in the previous paragraphs, institutional gaps also exist. For example, there is no global competent authority which would have the potential to monitor the implementation, by States and international organisations, of their duty to carry out EIAs in ABNJ.

POTENTIAL CONTENT OF A GLOBAL INSTRUMENT ON EIAs IN ABNJ

If developed, a global instrument on EIAs in ABNJ will need to provide details on the content of the requirements to carry out EIAs in ABNJ.

First, an international instrument will need to include general objectives or principles against which the outcome of the EIA will be reviewed and the final decision on whether to authorise the proposed activity will be taken. Such approach is retained in the 1991 Protocol on Environmental Protection to the Antarctic Treaty. Its Article 3 on Environmental Principles states that activities in the Antarctic Treaty area should avoid causing significant adverse impacts on a number of characteristics of the Antarctic environment.

With respect to the general principles or objectives that need to be taken into account in the conduct of an EIA and in the final decision on whether or not to proceed with the activity, a 2007 study suggested that “*the effectiveness of EIA would be bolstered if a specific aim was to deliver ‘no net environmental deterioration’ and if this could not be demonstrated, to require the application of the precautionary principle in decision-making*”.¹⁰

Guidance on the steps to follow to conduct an EIA has already been issued in various non-legally-binding instruments. In the most recent one, the 2012 CBD Voluntary Guidelines for the consideration of biodiversity in EIAs and SEAs in marine and coastal areas, the following procedural steps are defined:

- Screening, to determine which activities will be subject to an EIA;
- Scoping, to identify which potential impacts are relevant to assess and to find alternative options;
- Assessing and evaluating of impacts and development of alternatives;
- Reporting of the Environmental Impact Statement (EIS);

- Reviewing of the EIS;
- Decision-making;
- Monitoring, compliance, enforcement and environmental auditing.

The screening process itself would need to be clarified in any international instrument on the subject. First, there would be a need to provide a threshold above which EIAs will be conducted. In existing instruments, this threshold is often found under the notion of “significant adverse impact”. Within the Antarctic Treaty System (ATS), the threshold used is the notion of “minor or transitory impact”. In addition, the procedure implemented within this regional framework could be a useful model for any future international agreement, as it provides for a level of international scrutiny.

In addition to guidance to help to determine what qualifies as a significant adverse impact, an international agreement could also include lists of areas where EIAs will always be needed (for example, in Ecologically or Biologically Significant Marine Areas or in Vulnerable Marine Ecosystems) and lists of activities which would always be subject to such assessments.¹¹

An international agreement would also need to define what would be the minimum components of an EIS. Several examples already exist, as within the ATS where such requirements vary depending on the level of likely impacts concerned and also in the Espoo Convention.¹²

All these requirements would be minimum standards which would establish the default mechanism needed to manage human activities that are not yet subject to EIAs, and would be integrated into sectoral instruments as well.

In addition, an advisory scientific and technical body could be established through an international instrument. It would be tasked with (i) the provision of advice on EIAs subject to international scrutiny, (ii) the management of a public EIA database, (iii) the evaluation of cumulative impacts when needed and (iv) the definition of more specific guidelines for activities managed through the default mechanism. The governing body of the international agreement (either the Conference of the Parties to this agreement, or a newly created global authority, or an International Seabed Authority with an extended mandate) would take decisions on EIAs based on advice provided by the scientific body.

9. Article 2 (6) of the Kiev Protocol on Strategic Environmental Assessments.

10. Jay S., Jones C., Slinn P., Wood C. (2007), “Environmental impact assessment: Retrospect and prospect”, *Environmental Impact Assessment Review* 27, p. 298.

11. With respect to activities, this is already the case in the Espoo Convention on Environmental Impact Assessment in a Transboundary Context and in its Kiev Protocol on Strategic Environmental Assessment.

12. Espoo Convention on Environmental Impact Assessment in a Transboundary Context, Appendix II.

To go further, States could agree to include specific requirements on SEAs and establish a global compliance committee. This committee would review national reports of implementation provided by Contracting Parties. In addition, a provision could allow Contracting Parties with concerns about EIAs conducted by other States as well as civil society representatives to report to the Committee, which would adopt recommendations on the subject.

HOW TO ESTABLISH A GLOBAL FRAMEWORK FOR EIAs IN ABNJ?

Suggestions to enhance the international framework for EIAs in ABNJ were made during previous meetings of the BBNJ Working Group. They ranged from the adoption of voluntary guidelines by the industry to the development of non-legally binding codes of conducts or of legally-binding EIAs requirements within sectoral organisations and to the development of an Implementing Agreement to UNCLOS. Voluntary instruments and legally-binding sectoral approaches would be valid options and would probably be needed at some point as an interim solution, or in complement to a global initiative. But they would not be sufficient to create the global default mechanism needed, to provide for a set of minimum standards and requirements to ensure consistency in the conduct of EIAs in ABNJ or to establish a global obligation to assess cumulative impacts of human activities in the marine environment.

Given the state of play of international negotiations and discussions, an Implementing Agreement to UNCLOS on the conservation and sustainable use of marine biodiversity in ABNJ would be the most logical instrument through which the EIA issue could be addressed. But even if negotiations on the subject are not finally launched, there are other means through which the conclusion of an international instrument on EIAs in ABNJ could succeed, for example:

- The adoption of an additional protocol to the CBD, based on its Article 29;
- The adoption of a protocol to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, akin to the Kiev Protocol on SEAs;
- The adoption of a stand-alone legally-binding instrument.¹³

13. Options presented below are based on the conclusions of a presentation delivered by Prof. R. Warner, available at: <http://ancors.uow.edu.au/content/groups/public/@web/@law/@ancors/documents/docs/uow103164.pdf>.

CONCLUSION

Looking at the negotiations that have taken place within the BBNJ Working Group so far, the EIA issue appears to have been one of the least controversial subjects for debate. Many States agree that there is a need for such assessments in ABNJ although they do not necessarily agree on the practical implementation modalities. If negotiations on an Implementing Agreement to UNCLOS dealing *inter alia* with EIAs are launched, or if States decide to turn to the CBD, the Espoo Convention framework or to adopt a stand-alone instrument, the greatest challenge will be to add substance to this requirement so as to avoid the development of an article that merely states that EIAs are required for all human activities in ABNJ. Only if this substance is adequately defined and applied will States fulfil their duties to implement the precautionary and no-harm principles, amongst others, which are embodied in international environmental law. Needless to say, there is no reason to expect an easy consensus if ambition is high.

Moving away from the procedural requirements which would be defined in the international agreement, it would also be useful to start thinking about the content and quality of these EIAs, so that ultimately, EIAs are truly used as a decision-making tool and not a decision aiding-tool.¹⁴ This means in particular that principles against which the outcome of any EIA will be tested need to be adequately defined. These principles will be instrumental when it comes to the final decision on the conduct of the proposed activity. In this respect, if the international community is to finally fulfil its commitment to halt—or at least reduce—the rate of biodiversity erosion, a “no net biodiversity loss” principle will have to be integrated in any future international agreement on EIAs in ABNJ.

One area of common concern (and therefore of common ground) for all the options discussed in this paper is that they will all, in the end, rely on flag State implementation. However, flag State implementation is not always reliable, especially in the high seas. An essential component of any global instrument on EIAs in ABNJ will therefore be the definition of appropriate international scrutiny or compliance mechanisms to ensure that flag States abide with their international obligations. ■

14. On this subject, see Jay S., Jones C., Slinn P., Wood C. (2007), “Environmental impact assessment: Retrospect and prospect”, *Environmental Impact Assessment Review* 27, pp. 287-300.