



Key Components and Best Practices for Environmental Impact Assessments

Introduction¹

The immense technological advances since the adoption of UN Convention on the Law of the Sea (UNCLOS) have exponentially increased the number and scale of threats to the marine environment and its biodiversity. The cumulative impacts of existing activities, combined with the potential impacts of new and emerging activities, pose risks to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (ABNJ). Environmental impact assessments (EIAs) and strategic environmental assessments (SEAs) are widely accepted as valuable tools for addressing these threats and risks, by incorporating environmental and social concerns into decision-making processes, either with respect to specific projects or activities (EIAs) or policies, plans or programmes (SEAs). Yet the absence of a global mechanism for prior assessments remains a significant gap under UNCLOS.

A new international instrument to address the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (“Instrument”) should incorporate best practices for EIAs and SEAs as reflected in existing multilateral and regional agreements and lessons learned from their application. Importantly, the new Instrument should also provide a mechanism to assess the cumulative impacts of activities and climate change.

Elements of an EIA Framework

Objective and Principles

The Instrument should provide the objective against which EIAs for proposed projects or activities and decisions made on EIAs will be measured. An objective for the Instrument could be, for instance, that “activities in ABNJ shall be planned and conducted so as to avoid significant adverse impacts on marine biological diversity and on the marine environment, as well as avoid impacts on marine protected areas (MPAs), vulnerable marine ecosystems (VMEs) and ecologically or biologically significant marine areas (EBSAs), taking into account the precautionary principle and ecosystem based management.”

General governance principles, including the precautionary principle, ecosystem-based management, transparency, stewardship, and others should be made specifically applicable to EIAs and SEAs. Guiding principles for decision-making processes should also be considered.

¹ A more detailed version of his paper on “*Key Components and Best Practices for EIAs,*” will be made available at <http://highseasalliance.org/resources>.

These could be based on, for example, Article 3 of the Protocol on Environmental Protection to the Antarctic Treaty (**Madrid Protocol**) which requires, for example, that “activities shall be planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgments about their possible impacts;” that judgements take account of “whether technology and procedures are available to provide for environmentally safe operations; whether there exists the capacity to monitor key environmental parameters and ecosystem components so as to identify and provide early warning of any adverse effects...and to provide for modification of operating procedures... and whether there exists the capacity to respond promptly and effectively to accidents.”

Screening Threshold

The screening threshold determines the need for an assessment. The Instrument could draw upon a number of examples of thresholds from existing agreements. Article 206 of **UNCLOS** requires assessment of planned activities which “may cause substantial pollution of or significant and harmful changes to the marine environment.” The **Rio Declaration** Principle 17 calls for assessment of activities likely to have a significant adverse impact on the environment, and **Sustainable Development Goal** 14.2 also requires its parties to identify, monitor, and avoid significant adverse impacts. Similarly, the **Convention on Biological Diversity** provides for a threshold of proposed projects that are likely to have “significant adverse effects” on biological diversity.

One of the international instruments most widely recognized to reflect best practice on EIAs is the **Madrid Protocol**. Its preliminary threshold is a “minor or transitory impact” leading to a multi-layered approach to assessment with increasing requirements based on the level of potential harm (the preliminary threshold could lead to an initial evaluation followed by a more comprehensive evaluation depending upon the findings). Also widely recognized is a European convention on EIAs, the Convention on Environmental Impact Assessment in a Transboundary Context (**Espoo Convention**). It has a threshold of activities “likely to cause a significant adverse transboundary impact” which are listed in its Appendix I. In addition, parties may discuss treating activities as “listed” if a party is concerned that an un-listed activity may cause a significant adverse transboundary impact.

Where information about ecosystems and impacts remains uncertain, as is the case for much of ABNJ, States should apply a precautionary screening threshold, whether it is a standard of potential significance, or a stepwise approach using a preliminary threshold (**Madrid Protocol**). In addition, the new Instrument should include an Annex that details certain activities that will always require EIAs (similar to the **Espoo Convention**). EIAs should also be required to consider cumulative impacts. Review of the screening process should be carried out and compliance should be ensured by the competent authority under the Instrument.

Conduct of the EIA

The Instrument should include a list of matters to be addressed as part of the EIA, thereby providing strong minimum standards and requirements for the conduct of EIAs and clarifying their definition, scope and content. For example, under the **Madrid Protocol**, once a Comprehensive Environmental Evaluation (CEE) (which is comparable to an EIA Report or

Environmental Impact Statement (EIS)) is carried out based on a checklist of matters to be addressed in the assessment, it is then circulated to the Committee for Environmental Protection (CEP) and parties to the Madrid Protocol and published for comment. The final CEE must take those comments into account. The **Espoo Convention** establishes a similar process for the conduct of EIAs, and incorporates transparency through publication and public participation in the commenting process.

The Instrument should follow these practices. The body responsible for reviewing an EIA report will be determined by the architecture of the Instrument. One option noted in the PrepCom Chair's Overview² would make States responsible for conducting EIAs with respect to activities under their jurisdiction or control. States could establish the framework under which the public or private entities under their jurisdiction or control will carry out such assessments, with proponents of an activity bearing the costs. In addition, provision needs to be made for transboundary EIAs, where effects of activities within national jurisdictions may impact ABNJ. Cumulative impacts over time and across sectors should also be considered, as well as impacts caused by other activities outside areas of national jurisdiction, socio-economic impacts, and the risks of impacts.

Decision

Following an EIA, a decision must be made as to whether and under what conditions the activity can proceed, as is done under the **Madrid Protocol** and the **Espoo Convention**, taking into account the comments and the consultations generated while compiling the EIA.

Under the Instrument, the State with jurisdiction or control over the activity could be responsible for taking the decision to permit it, but to ensure that the best available science is incorporated into each decision, a scientific body under the Instrument should review the adequacy of the EIA and potentially even adopt a decision on the permissibility of an activity and/or the conditions under which the activity may proceed. Alternatively, a governing body could be given responsibility for taking such a decision, based on the advice of a scientific body. This international level of decision-making may be especially necessary in cases where cumulative impacts of a number of activities and/or transboundary impacts of activities are assessed. Where a sectoral or regional organization already has the authority to adopt a decision on an EIA and/or an SEA, such decisions should reflect, at minimum, the requirements, principles and standards adopted pursuant to the Instrument.

Monitoring, Review and Compliance

The Instrument should also make provisions for monitoring, review and compliance. This could involve, as in the Madrid Protocol, monitoring of key environmental indicators, reporting provisions, adjustment or termination of an activity or redress, reparation and compensation on the basis of the monitoring results, and bonding provisions.

² Following the first session of the Preparatory Committee (PrepCom), the PrepCom's Chair, H.E. Mr. Eden Charles of Trinidad & Tobago provided his overview of the first session ("Chairs Overview"), http://www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf.

Strategic Environmental Assessments

Strategic environmental assessments (SEAs) relate to plans, programmes and policies, often for a particular region or area, as distinct from specific proposed activities. SEAs can incorporate proposed or ongoing activities taking place within areas of national jurisdiction that could impact marine biodiversity in ABNJ, as well as those taking place in ABNJ. States may wish to make the competent international organization, where one exists, or an expert body designated pursuant to the Instrument, responsible for conducting SEAs.

The **Kiev Protocol** to the Espoo Convention specifically addresses SEAs and is a useful example of an SEA process. An international Instrument would need to establish clear, transparent and effective procedures for SEAs, provide for public participation in SEAs, and integrate concerns into measures designed to further the goals of the Instrument.³ Screening for situations when SEAs are needed can be provided either by (i) specifying a case-by-case examination; (ii) specifying types of policies, plans and programmes, or (iii) a combination of both approaches. Scoping is needed to identify, describe, and evaluate the likely significant environmental effects of implementing the policy, plan or programme and its reasonable alternatives. As with EIAs, there should be opportunity for public participation and consultation. Decisions should account for conclusions of the SEA report, identify measures to prevent, reduce or mitigate identified adverse effects, and address comments received. Monitoring and implementation of the report also needs to be considered.

The role of SEAs in ABNJ is now under consideration by the **International Seabed Authority** (ISA), with a recent workshop noting that SEAs must include a broad assessment of potential impacts as well as synergies (cumulative impacts) with other activities such as fisheries and shipping. An SEA would inform future EIAs, such as by providing information on possible cumulative effects, global warming, ocean acidification and fisheries. As an outcome of an SEA, a strategic environmental management plan (SEMP), which would incorporate and operationalize the outcomes of the SEA, could be developed.

Possible Process for Conducting an EIA under the International Instrument

In applying best practices from existing models of EIA processes, the process for conducting EIAs under an international Instrument could incorporate the following steps:

- Strong minimum requirements and standards for conducting EIA;
- Screening (activity meets threshold for potential harm or a list of activities, taking into account cumulative impacts);
- State is responsible for conducting EIA (or sectoral or regional body as appropriate) according to specified criteria, including cumulative impacts;
- EIA is made publicly available (by State or conducting authority) for comment;
- Comment period (includes all relevant stakeholders, existing organizations);

³ Kiev Protocol, art. 1.

- Scientific committee reviews EIA and makes recommendations on whether the activity may proceed and if so under what limitations or restrictions to prevent harm to the marine environment, taking into account comments;
- Possible appeal / objection / revision;
- Decision by appropriate body;
- Reporting and monitoring;
- Review by decision-making body of actual implementation, compliance, and enforcement.

Annex: Examples of Activities Triggering EIAs

The **Convention on Biological Diversity** “Marine and Coastal Biodiversity: Voluntary Guidelines for the Consideration of Biodiversity in EIAs and SEAs in Marine and Coastal Areas” lists activities for which EIAs should be mandatory or determined, and provides useful guidance for activities where EIAs should be mandatory: (**NOTE: This is not an exclusive list.**)

- Activities in protected areas: This should include sectoral conservation areas (e.g. fisheries closed areas, particularly sensitive sea areas (PSSAs), areas of particular environmental interest (APEI), etc.);
- Activities in threatened ecosystems outside protected areas: This should include ecologically or biologically significant marine areas (EBSAs) and vulnerable marine ecosystems (VMEs);
- Activities in ecological corridors important for ecological or evolutionary processes;
- Activities in areas known to provide important ecosystem services;
- Activities in areas known to be habitat for threatened species. In the marine context there should be reference to communities characteristic of vulnerable marine ecosystems;
- Extractive activities or activities leading to a change of land-use occupying or directly influencing an area of at minimum a certain threshold size (land or water, above or underground - threshold to be defined). In the marine context there should be reference to change of water column or seabed-characteristics;
- Creation of linear infrastructure that leads to fragmentation of habitats over a minimum length (threshold to be defined);
- Activities resulting in emissions, effluents, and/or other means of chemical, radiation, thermal or noise emissions in areas providing key ecosystem services (areas to be defined). In the marine context these should include ecologically or biologically significant marine areas (EBSAs).
- Activities leading to changes in ecosystem composition, ecosystem structure or key processes responsible for the maintenance of ecosystems and ecosystem services in areas providing key ecosystem services (areas to be defined).