

The Obligation to Conduct Environmental Impact
Assessment in Areas Beyond National Jurisdiction:
Proposals for a New Legal Regime.

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CHAPTER 1 INTRODUCTION

Marine areas beyond national jurisdiction (ABNJ) are the high seas together with the deep seabed beyond the continental shelves of coastal States, known as the Area. These vast areas encompass 64 percent of the oceans' surface¹ and pose considerable challenges in regard to their protection, conservation and sustainable uses of their resources. The increasing number of human activities in ABNJ in recent years further complicates these challenges.

It is more difficult to assess and mitigate activities in ABNJ that may cause adverse impacts to the marine environment than activities taking place on land or within national jurisdiction.² One of the management tools used to conserve marine biodiversity is Environmental Impact Assessments (EIAs).³ While EIAs are significantly recognized and implemented by States in areas within national jurisdiction, the use of EIAs in ABNJ is less so.⁴ Although the obligation to conduct EIAs exists within the current legal framework, mostly in international agreements and at sectoral and regional levels, uncertainties regarding the applicability of the EIA obligation in ABNJ contributes to poor implementation, leaving coverage gaps concerning emerging activities which are not subject to any EIA obligation.⁵

The 1982 *United Nations Convention on the Law of the Sea* (UNCLOS) does not explicitly include the EIAs obligation, yet UNCLOS provides the general obligation to assess the potential effects when activities are likely to “cause pollution or significant and harmful changes to the marine environment”.⁶ The general and broad UNCLOS requirement has resulted in uncertainties regarding whether the obligation to perform EIAs should extend to ABNJ and how it could be implemented and required.⁷

Attempting to strengthen the obligation to conduct EIAs in ABNJ and solve the regulatory gaps within the legal regime, the Ad Hoc Open-ended Informal Working Group (BBNJ Working Group) started to study the issues relating to the conservation and sustainable

¹ Food and Agriculture Organization of the United Nations (2015). *Workshop on Management of Marine Areas Beyond National Jurisdiction*. Available at <http://www.fao.org/news/story/en/item/277824/icode/> accessed on 2 July 2018.

² Ma, Fang, & Guan. (2006). Current legal regime for environmental impact assessment in areas beyond national jurisdiction and its future approaches. *Environmental Impact Assessment Review*, 56(c) at 23.

³ Druel, E. (2013). Environmental Impact Assessments in areas beyond national jurisdiction”, 1 IDDRI at 37.

⁴ Ibid.

⁵ Warner, R. (2012). Oceans beyond Boundaries: Environmental Assessment Frameworks. *The International Journal of Marine and Coastal Law*, 27(2), at 482 and 498.

⁶ United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982. Article 206.

⁷ Kong, L. (2011). Environmental Impact Assessment under the United Nations Convention on the Law of the Sea. *Chinese Journal of International Law*, 10(3), 658-661.

use of marine biological diversity in ABNJ. After years of discussion, in June 2015, the United Nations General Assembly (UNGA) decided to convene a preparatory committee (PrepCom) to develop a new international legally binding instrument (ILBI) under UNCLOS to address the conservation and sustainable use of marine biological diversity in ABNJ.⁸ Between 2016 and 2017, the PrepCom met with the task of developing recommendations on the elements of a draft text, on the basis of four elements of negotiation identified by UNGA:

“(i) marine genetic resources, including questions on the sharing of benefits; (ii) measures such as area-based management tools (ABMTs), including marine protected areas (MPAs); (iii) environmental impact assessments (EIAs), which is the focus of this thesis; and (iv) capacity building and the transfer of marine technology”.⁹

At the fourth and last session of the PrepCom in July 2017, despite many divergent views among delegations, the PrepCom fulfilled its mandate by adopting the PrepCom Report, which included a “recommendation to the UN General Assembly to take decision, as soon as possible, on the convening of an Intergovernmental Conference (IGC) to elaborate the text of the agreement”.¹⁰ The PrepCom Report includes “a list of non-exclusive elements of a draft for ILBI”.¹¹

The PrepCom Report reveals that there are still significant divergences on many elements of an ILBI, including issues related to EIA in ABNJ, especially in regard to its obligation, governance, Strategic Environmental Assessment (SEAs), monitoring and review; as well as its definition, scope, and content.¹² It also discussed uncertainties regarding the thresholds and triggers to conduct EIAs and concerns about the “relationship of a new instrument with existing regimes and arrangements”.¹³

⁸ United Nations General Assembly. Resolution 66/292 adopted on 19 June 2015. Development of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity in ABNJ. Accessed on 20 June 2018.

http://www.un.org/ga/search/view_doc.asp?symbol=A/AC.287/2017/PC.4/2

⁹ Ibid. para. 2.

¹⁰ United Nations General Assembly. Resolution 72/249 adopted on 24 December 2017. International legally 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. para 3. Accessed on 20 July, 2018. <http://undocs.org/en/a/res/72/249>

¹¹ Morgera, E., Appleton, A., Kantai, T. and Tsioumanis, A. (2017). Summary of the fourth session of the Preparatory Committee on Marine Biodiversity Beyond Areas of National Jurisdiction: 10-21 July 2017. *Earth Negotiations Bulletin*, 25(141), at 1.

¹² Report of the Preparatory Committee established by General Assembly resolution 69/292. Accessed on 20th July 2018. http://www.un.org/ga/search/view_doc.asp?symbol=A/AC.287/2017/PC.4/2 .

¹³ Goodman, C., & Matley, H. (2018). Law Beyond Boundaries: Innovative mechanisms for the integrated management of biodiversity beyond national jurisdiction. *ICES Journal of Marine Science*, 75(1). At 403.

As a result, on 24 December 2017, the General Assembly on the resolution 72/249, decided to establish the four sessions of the Intergovernmental Conference. The first session starts from the 4 to 17 of September 2018, with the final session to be held in 2020.¹⁴

The objective of the IGC is to consider the recommendations of the PrepCom elements to elaborate the text of an ILBI under UNCLOS. “The objective of the instrument is to ensure the conservation and sustainable use of marine biological diversity of ABNJ through effective implementation of UNCLOS”.¹⁵

In the face of the current situation, this thesis discusses the obligation to conduct EIAs in ABNJ. In achieving its purpose, it first provides a general understanding of the EIA concept and its importance as a management tool to protect marine biodiversity in ABNJ. Followed by a review of the EIA current legal framework applicable in ABNJ, examining its shortcomings and indicating the challenges for EIAs implementation in ABNJ.

However, the core of the thesis aims at examining the proposals and recommendations of the PrepCom regarding such obligation. It analyzes whether such proposals and recommendations on matters, which there were divergences and lack of consensus, could either strengthen or weaken EIA obligation in ABNJ during the coming Intergovernmental Conference. It also provides further proposals for strengthening the obligation to conduct EIA to protect marine biodiversity.

Thus, to successfully achieve the primary objective of this thesis, the following research questions must be addressed:

- Is there an obligation under international law to conduct EIAs in ABNJ?
- What triggers the obligation to conduct EIAs in ABNJ?
- How the shortcomings of the current legal framework interfere with the obligation to conduct EIA in ABNJ?
- What are the proposals for strengthening the obligation to conduct EIAs in ABNJ?

¹⁴ United Nations General Assembly. Resolution 72/249 of 24 December 2017.

¹⁵ Report of the Preparatory Committee established by General Assembly resolution 69/292. Accessed on 20th July 2018. http://www.un.org/ga/search/view_doc.asp?symbol=A/AC.287/2017/PC.4/2 .

1.1 Outline and scope

The thesis comprises six chapters. Chapter 1 introduces the reader to the topic of this paper, explaining the focus and objective of the thesis.

Chapter 2 provides the reader with a general understanding of the EIA concept. Also it provides the legal definition of EIAs under the existing legal framework and its applicability in ABNJ.

Chapter 3 reviews the applicable EIA legal framework in ABNJ, discussing whether existing instruments are sufficient to recognize this obligation.

Chapter 4 examines the shortcomings of the current regime, explaining how they affect the EIA obligation in ABNJ.

Chapter 5 and the main contribution of this thesis presents proposals and recommendations to strengthen the obligation to perform EIAs in ABNJ. In doing so, it is essential first to discuss and includes the proposals of the PrepCom. It also evaluates the PrepCom proposals and recommendations, indicating its strengths, as well as its weaknesses concerning the obligation to conduct EIAs in ABNJ.

The thesis will also consider other possibilities to complement and strengthen the EIAs existing regime applicable to ABNJ.

Chapter 6 contains the conclusion.

The scope of this research does not include the scientific and technical aspects of EIAs, nor the minimum standards or details of its content, since the purpose of this thesis focus solely on the obligation to perform EIAs in ABNJ and not on its procedural requirements. It neither includes EIAs monitoring and reviewing.

1.2 Legal sources and methodology

Given the legal nature of this thesis, the legal sources included are in accordance with Article 38 of the Statute of the International Court of Justice. Primarily international conventions and agreements. It also includes other legal sources, such as UN resolutions, UN preparatory work, general principles of international environmental law, State practice, court decisions and legal theory.

Relevant literature and others secondary source materials were also reviewed and comprised during the research. In relation to the marine environment and its natural resources in ABNJ, policy documents and non-legal sources materials from natural science and the

environment were also included.

The sources have been examined in this work using descriptive, analytical and evaluation methods. The descriptive method was used when presenting the current situation of EIAs in ABNJ and providing with the relevant legal framework and definition of the EIA process.

The analytical method was applied when analyzing the existing legal framework and providing with proposals and recommendations for a new legal regime. The evaluation method was applied when indicating the shortcomings of the current regime and also when evaluating the proposals and recommendations from other sources.

CHAPTER 2 ENVIRONMENTAL IMPACT ASSESSMENT (EIA)

Environmental impact assessment process was first observed at domestic legislation and introduced by the United States in 1969¹⁶ under US federal law as part of the National Environmental Policy Act (NEPA).¹⁷ Domestic EIA's regulations play a significant role in the international EIA's process "by incorporating the international requirements into the existing domestic EIA's framework".¹⁸

2.1 EIA general definition

The term EIA is used to describe the procedure of assessing the adverse effects of a proposed activity on the environment when such is likely to have significant harmful changes.¹⁹

EIAs are essential to protect the marine environment; especially because their objective is to indicate the possible damages, the activity may cause, and help to understand the potential impacts of the proposed activity. Therefore, "the process should supply decision-makers with an indication of the likely consequences of their actions".²⁰

In other words, the information gathered during an EIA should help to better understand the adverse effects and impact of the proposed development before deciding if the project should be allowed to proceed, and if so on what terms.²¹ However, some argue that EIA is not a procedure for preventing activities with significant environmental impacts from happening. Rather, EIA purpose is that actions are authorized in the full knowledge of their environmental consequences.²²

As a result, EIAs are often considered a mere procedural requirement rather than an environmental protection tool that indicates the risks of the proposed activity and ways to address them in order to prevent or reduce the impact on the environment.

¹⁶ Tromans QC, S. (2012). *Environmental Impact Assessment*. 2nd ed. Bloomsbury Professional at 2.

¹⁷ National Environmental Policy Act (2000) 42 USC para.4321-4370(f)

¹⁸ Neil C., (2008) *The International Law of Environmental Impact Assessment* (Cambridge University Press) at 24.

¹⁹ Tromans QC, S. at 1.

²⁰ Wood, C. (1995) *Environmental Impact Assessment: A comparative Review*, Longman at 1.

²¹ Carroll and Turpin (2009) *Environmental Assessment Handbook*, Thomas Telford (2) at 1.

²² Wood, C. at 1.

This situation is due to the political pressure that an EIA is conducted, where economic interests often prevail over environmental protection concerns. Consequently, “decision-making authority considers that the role of the EIA is to identify and mitigate significant adverse impacts and not to prevent the activity from being carried out if such impacts are identified and cannot be adequately prevented”.²³

In contrast, the International Court of Justice (ICJ) in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* clearly stated the function of the EIA process, as quoted:

“The state conducting such an EIA would be under a positive obligation to mitigate that harm or refrain from the activity”.²⁴

EIA is also essential because it provides relevant information for States, which the proposed activity falls under their jurisdiction and control, in regards to the possible adverse effects it may cause to the environment. When the assessment indicates such effects, States are required to take necessary measures to mitigate or prevent them, considering EIA results and making such information accessible to possible affected parties and stakeholders.

In that regard, it is possible to conclude that in general, the international community recognizes EIAs as an important environment management tool. However, the lack of a legally accepted global concept for EIA obligations, interferes with its understanding and its implementation, especially in ABNJ.

2.2 EIA under international environmental law

At the international level, the State responsibility to assess the impact of activities that could cause damage to the environment first appeared at the United Nations Conference on the Human Environment (UNCHE). It was included as a recommendation in the “Action Plan for the Human Environment” in the *1972 Stockholm Conference on the Human Environment*.²⁵ Although the Stockholm Conference left out EIA’s provisions in its final version, the conference contributed to the progress of the EIA concept, which “continued to

²³ Druel, E. at 37.

²⁴ International Court of Justice, *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, 241–242, para. 29

²⁵ Declaration of the United Nations Conference on Human Environment. Stockholm, 16 June 1972.

be incorporated into instruments produced by the United Nations”.²⁶

The term EIA and its first legal definition were only developed in the *1987 Goals and Principles of Environmental Impact Assessment of the United Nations Environment Programme* (UNEP Goals and Principles) as “An examination, analyses and assessment of planned activities with a view to ensure environmentally sound and sustainable development”.²⁷ Although, not legally binding, the contributions of UNEP Goals and Principles for EIAs in ABNJ will be discussed later in chapter 3.

The first specific international convention for EIA²⁸ the *1991 Convention on Environmental Impact Assessment in a Transboundary Context* (Espoo Convention) provides with a legal definition for EIA in its Article 1(vi) "Environmental impact assessment means a national procedure for evaluating the likely impact of a proposed activity on the environment”.²⁹

In the transboundary context the *International Law Commission Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries* further supports EIA obligation according to its Article 7.

“Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment”.³⁰

The Espoo Convention has greatly contributed to the development of others instruments for EIA and has also introduced the legal requirement for Strategic Environmental Assessment (SEA) through the *Kiev Protocol on Strategic Environmental Assessment in a Transboundary Context on 21 May 2003* (Kiev Protocol)³¹ which came into force in 2010. However only applicable in transboundary situations and within national jurisdiction.³²

²⁶ Neil, C. at 91.

²⁷ Goals and Principles of Environmental Impact Assessment of the United Nations Environment Programme. January 16, 1987 – Principle 4.

²⁸ Ma, Fang, & Guan. at 26.

²⁹ 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) adopted on 25 February 1991, entry into force 10 September 1997, 1989 UNTS310. Article 1(vi).

³⁰ Text adopted by the International Law Commission in 2001 session (A/56/10) *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*. Article 7. Available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf Accessed on 24 August 2018.

³¹ Protocol on Strategic Environmental Assessment in a Transboundary Context (Kiev, 21 May 2003, in force 11 July 2010) 2685 UNTS.

³² Espoo Convention. Articles 1(viii) and 2(1).

The Kiev Protocol may play an essential role in the development of SEAs requirements for activities in ABNJ during the negotiations for the new agreement. The inclusion of SEAs in ILBI still controversial among the delegations, yet there still a possibility for the establishment of SEA's requirements for activities in ABNJ. As a result, the next section discusses the relationship between EIAs and SEAs and its possible implementation in ABNJ.

The Convention on Biological Diversity (CBD) in its Voluntary Guidelines on biodiversity also provides with a definition for EIA as “the process of evaluating the likely environmental impacts of a proposed project or development...].”³³ In addition, the CBD “establishes a link between the fundamental obligation of Contracting Parties to conserve marine biodiversity and to conduct environmental assessments”.³⁴

To sum up, the research demonstrates that the definitions given by the current regime are not universally accepted and its implementation diverges among the international community. It is also weak in relation to the obligation to perform EIA without limitations. For instance, some are limited by their geographical scope and are therefore not applicable in ABNJ, or only applicable for a specific scenario, such as ESPOO Convention, which is only applicable for transboundary impact.

In conclusion, there is a necessity for an internationally accepted concept for EIAs in ABNJ, providing not only with its definition but also strengthen the obligation to perform it. It is essential to clearly state its objective, aiming at the protection and conservation of marine biological diversity and not limit the EIA function only for identifying the impacts that the proposed activity may cause.

2.3 The relationship between EIA and Strategic Environmental Assessment (SEA)

The development of Strategic Environmental Assessment as a process started with the formulation of article 2(7) of the Espoo Convention, which requires States parties to “ apply the principles of environmental impact assessment to policies, plans and programmes”.³⁵ The acknowledgment of SEA process encouraged the international community to negotiate a

³³ Convention on Biological Diversity. What is Impact Assessment? Available at <https://www.cbd.int/impact/whatis.shtml> Accessed on 12 July 2018.

³⁴ Rayfuse, R. (Ed.). (2015). Chapter14. Environmental assessment in marine areas beyond national jurisdiction, Warner, R. at 295. *Research handbook on international marine environmental law*. Available at <https://ebookcentral.proquest.com> Accessed on July 2018.

³⁵ Espoo Convention article 2(7).

protocol to the Espoo Convention for SEA requirement.³⁶ As a result, the *2003 Protocol on Strategic Environmental Assessment in a Transboundary Context*, came into force in 2010, establishing procedural requirements for SEAs under national jurisdiction. Even though, only applicable within national jurisdiction, the inclusion of SEA process in this thesis is very relevant since SEA implementation will be discussed during the coming IGC.

Sadler and Verheem in 1996, provided the most accepted and used definition for SEA as the “the formalized, systematic and comprehensive process of identifying and evaluating the environmental consequences of proposed policies, plans or programmes to ensure they are fully included and appropriately addressed [...] with economic and social considerations”.³⁷

Besides the Kiev Protocol, the CBD Voluntary Guidelines on biodiversity requires the use of SEAs to protect the marine environment. The European Union Directive on SEA “is a regional example of its implementation in policy”.³⁸

Although relatively new and very controversial, the adoption of SEA requirements for activities in ABNJ has been greatly discussed during the BBNJ Working Group and PrepCom meetings, especially in relation to its function to assess ‘cumulative adverse impact’ on the marine environment.

The relevance of SEA for activities in ABNJ is that “it focuses on the incorporation of environmental concerns into the decision-making process, often making EIAs a more effective process.”³⁹ In doing so, it considers environmental, economic and sustainability issues and minimizes the biodiversity loss that an emerging activity may cause.⁴⁰ SEAs would “establish important background information for project-based EIAs such as ecologically and biologically sensitive areas...”⁴¹ where further knowledge is necessary. As a result, SEA instrument would contribute as “a remedy for the limited effectiveness of EIA”.⁴²

³⁶ De Mulder, J. (2011). The Protocol on Strategic Environmental Assessment: A Matter of Good Governance. *Review of European Community & International Environmental Law*, 20(3), at 234.

³⁷ Sadler, B. and Verheem, R. (1996) Strategic EIA: Status, Challenges and Future Directions. *World Bank*. Washington.

³⁸ Warner, R. Strategic Environmental Assessment (SEA) and its Application to Marine Areas Beyond National Jurisdiction (ABNJ). *Australian National Centre for Oceans Resources and Security (ANCORS)*. at 1. Available at http://www.un.org/depts/los/biodiversity/prepcom_files/Warner_Strategic_Environmental_Assessment_PrepCom2.pdf Accessed on 3th August 2018.

³⁹ Oude Elferink, A. (2012). Environmental Impact Assessment in Areas beyond National Jurisdiction. *The International Journal of Marine and Coastal Law*, 27(2) at 452.

⁴⁰ Warner, R. Strategic Environmental Assessment (SEA) and its Application to Marine Areas Beyond National Jurisdiction at 4.

⁴¹ Ibid. at 3.

⁴² De Mulder, J. at 234.

The difference between SEA and EIA is that the first “ by its nature, covers a wider range of activities and area, often a longer time span than EIA”.⁴³ Therefore for some activities in ABNJ, conducting SEA prior to conducting an EIA would be a more appropriate approach, since it would firstly focus on “[...environmental and social management rather than only predicting impacts of alternative policy actions”.⁴⁴

Due to its relationship to EIAs and its importance for activities in ABNJ, the inclusion of SEA in the following chapters is necessary since there is some indication that the SEA process could be an essential management tool for the conservation of biological diversity in ABNJ.

⁴³ Oude Elferink, A. at 451.

⁴⁴ Slunge, D., Nootboom, S., Ekbohm, A., Dijkstra, G., & Verheem, R. (2011). Conceptual Analysis and Evaluation Framework for Institution-Centered Strategic Environmental Assessment. at 7. Available at <http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/244351-1222272730742/seaconceptualanalysisandevaluationframework.pdf>. Accessed on 5 of August 2018.

CHAPTER 3 CURRENT LEGAL FRAMEWORK FOR EIAs APPLICABLE IN AREAS BEYOND NATIONAL JURISDICTION (ABNJ)

The first indication of the EIA obligation in ABNJ started with the formulation of the UNEP Goals and Principles in 1974 when the Regional Seas Programmes for the protection of the marine environment from pollution began. Many of these programmes adopted legally binding conventions requiring the obligation to conduct EIAs.⁴⁵

UNEP also issued the Principles of Environmental Impact Assessment in 1987. These principles were essential for the development of EIAs obligation at the regional level, which, in some cases also extends to ABNJ.⁴⁶ Despite its importance, the situation created many issues and uncertainties related to the obligation to perform EIAs in ABNJ. One of them is the variety of the existing legal framework at the sectoral and regional level,⁴⁷ which complicates the implementation of this obligation. This issue is discussed later in this chapter.

3.1 Global instruments for EIA in ABNJ

At the global level, UNCLOS and CBD provide with the general obligation to conduct EIAs. However, the “implementation of this obligation for marine ABNJ is fragmented between different sectors and regions”.⁴⁸

3.1.1 United Nations Convention on the Law of the Sea

There is no definition for EIA under UNCLOS, but the Convention provides with the direct obligation to assess the impact of activities under State’s jurisdiction or control.

“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...”⁴⁹

⁴⁵ Regional Seas Programmes of the United Nations Environment Programme in 1974. Information available at <http://www.biodiversitya-z.org/content/unep-regional-seas-programme.pdf> Accessed on 5th July 2018.

⁴⁶ Ibid. Regional Sea Programmes applicable in ABNJ is included later in the chapter.

⁴⁷ Warner, R. (2012). Tools to Conserve Ocean Biodiversity: Developing the Legal Framework for Environmental Impact Assessment in Marine Areas beyond National Jurisdiction. *Ocean Yearbook Online*, 26(1), at 325.

⁴⁸ Rayfuse, R. at 293.

⁴⁹ UNCLOS article 206.

By analyzing article 206, it is possible to affirm that it provides the threshold, which is when States have ‘reasonable grounds for believing’, that the activity ‘may cause substantial pollution of or significant and harmful changes’. Therefore, requiring States to perform EIA for the activity under their jurisdiction. It is clear that the article applies to areas within and beyond national jurisdiction since ‘State jurisdiction or control’ does not exclude ABNJ, because it refers to jurisdiction over the activity, not over the maritime area.⁵⁰

States or sponsoring States and their nationals, including their registered vessels or other installations, are responsible to carry out EIA for activities in ABNJ.⁵¹ Despite where the activity takes place since the term ‘marine environment’ includes all ocean areas without exception. Therefore, the activity will always be under the control of a State even in ABNJ.

The obligation to perform EIA arises when there is a risk that the proposed activity causes ‘significant harmful changes’ according to article 206 of UNCLOS. However, some argue “by referring to the term ‘assess’, article 206 does not obligate the requirement for an EIA, but rather allows states to make such determination in accordance with their capabilities”.⁵²

In this author’s opinion, the term ‘assess’ should not interfere with the obligation to undertake EIA. The obligation to assess the impact is indicated when analyzing the wording ‘shall assess’. Further, it includes the term ‘assessment of potential effects’, which reflected merely to a different choice of words with the same meaning.

Regarding State’s different capabilities, this statement should not exclude their obligation to undertake EIA even if ‘as far as practicable’.

The problem is that the wording of article 206 of UNCLOS, gives margin for different interpretations, generating uncertainties. Especially when considering if the impact or changes are sufficiently harmful to require an EIA, resulting in different approaches among the international community.

The lack of governance structure, with an overarching responsible institution or authority in international waters, where the freedom of high seas regime is applicable in light of article 86 of UNCLOS⁵³ also contributes to the weakening of the obligation for EIAs in ABNJ. Due to the remoteness of ABNJ, it is very complicated to ensure that contracting

⁵⁰ Craik, N. (2008). *The International Law of Environmental Impact Assessment*. Cambridge University Press. at 98.

⁵¹ Oude Elferink, A. G. (2012) *Environmental Impact Assessment in Areas beyond National Jurisdiction*. *The International Journal of Marine and Coastal Law*, 27 (2) at 475.

⁵² Craik, N. at 98-99.

⁵³ UNCLOS article 86.

parties or sponsoring States are complying with the obligation to carry out EIAs. Moreover, the “significant impact” what triggers an EIA according to UNCLOS is open for discussions and uncertainties since EIA obligation under UNCLOS only requires it, for ‘activities that are likely to cause ‘significant harmful changes’, but not specifically provided with a precise meaning for it.

It is also unclear how and when interested or possibly affected parties may require EIAs for activities in ABNJ, raising the question of who qualifies as stakeholders in ABNJ and whether their participation is limited to contributions during the decision-making process.

In conclusion, because the general obligation under UNCLOS must be “read in conjunction with specific environmental principles and procedural provisions...”⁵⁴ it has led to poor implementation of the EIA obligation in ABNJ.

3.1.2 The Convention on Biological Diversity

In areas of biodiversity preservation, the CBD explicitly requires EIAs to be carried out considering biological factors and “[...requiring EIA of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects...].”⁵⁵ This obligation also applies to ABNJ as provided in article 4(b).⁵⁶

The CBD establishes a link between the fundamental obligation of Contracting Parties to conserve biodiversity including marine biodiversity and the conduct environmental assessments.⁵⁷ Consequently, “The work under CBD seeks to support efforts to adequately reflect biodiversity considerations in impact assessments”.⁵⁸ However, it makes the same mistake as UNCLOS’s provision on EIA, when using the wording ‘as far as possible’ diminishing the obligatory nature to conduct EIAs.

Despite these flaws, the CBD encourages States to conduct SEAs⁵⁹ but also gives great discretion to States parties to perform it. The requirements for EIAs and SEAs in light of the CBD are further elaborated in its Voluntary Guidelines. Since the initiatives and

⁵⁴ Rayfuse, R. at 293.

⁵⁵ Convention on Biological Diversity (CBD) on 05 May 1992. Article 14(a).

⁵⁶ CBD Article 4(b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction.

⁵⁷ Rayfuse, R. at 295.

⁵⁸ Information available at <https://www.cbd.int/impact/>. Accessed 8th June 2018.

⁵⁹ CBD article 14(b).

guidelines from the CBD are not legally binding, they are discussed later in this chapter, in the soft-law section.

3.2 Regional instruments

The obligation to conduct EIA in ABNJ within the existing regional instruments is limited to their geographical scope and legally binding only to the parties. As a result, not all regional legislations extend to ABNJ.⁶⁰ Despite the coverage of most of the regional seas conventions being limited to national jurisdiction, some include ABNJ and recognize the obligation of EIA in ABNJ.

A good example is the very strict Antarctic Treaty System (AT) subject to the Madrid Protocol⁶¹, which is applicable in part, to ABNJ. Article 8(1), clearly imposes the obligation to conduct EIAs for activities in the Antarctica area.⁶² It also includes stricter thresholds to trigger EIAs, such as ‘less than minor or transitory impact’⁶³ and provides procedures in its Annex 1.

The EIA system for the AT “very often received praised for being one of the most developed regional instruments applicable to the marine environment...].”⁶⁴ Therefore, it could be a good model of a stricter threshold to trigger EIAs in ABNJ, to be considered during the ILBI negotiations.

Another example is the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), which covers an area of the high seas. Unlike most regional seas conventions, OSPAR contains no explicit EIA provisions.⁶⁵ Instead, OSPAR requires the parties to assess the status and trends of the marine environment, supported by collaborative monitoring and research.⁶⁶

The 1995 Barcelona Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean stated in Article 4(3)(c) “Parties shall promote cooperation between and among the States in EIA procedures [...] under their jurisdiction and control which are likely to have [...] adverse effect on the marine environment of other States or ABNJ...].” This provision provides for the obligation to conduct EIA in ABNJ, yet it is

⁶⁰ Warner, R. (2012). *Tools to Conserve Ocean Biodiversity*. at 325.

⁶¹ *Ibid* at 326.

⁶² Protocol on Environmental Protection to the Antarctic Treaty on 4th April 1991. Article 8.

⁶³ *Ibid*. Article 8(1)(a).

⁶⁴ Druel, at 22

⁶⁵ Sander at 102.

⁶⁶ *Ibid*.

limited to its contracting parties and by its geographical scope. Similarly to that, the 1986 Convention for the Protection of Natural Resources and Environment of the South Pacific also extends to ABNJ, as prescribed in Article 16 and its paragraphs.⁶⁷

3.3 Sectoral instruments

Many activities in ABNJ are already subject to the obligation to conduct EIA to some extent. Such as bottom fisheries, dumping, ocean fertilization and deep seabed mining. However, emerging activities in ABNJ such as bioprospecting is not covered by any instrument with an EIA obligation.

3.3.1 Fisheries

States enjoy the freedom of fishing on the high seas according to Article 87(1)(e) of UNCLOS but subject to some conditions and with due regards to the interest of other States. Fisheries activities in the marine environment cause significant impacts in its ecosystem, yet there is no obligation for EIA prior to fishing activities on the high seas, under UNCLOS or any other instruments. With the exception for parties to the United Nations Fish Stocks Agreement (FAO) that must assess the impacts of fishing on target stocks and on other associated species.⁶⁸

For the fact that it is challenging to regulate or to request EIA for every fishing boat operating on the high seas.⁶⁹ “Fisheries management focuses on the assessment of the impact of activities on an ongoing basis and does not require the prior assessment of impacts”.⁷⁰

A different scenario is related to EIAs obligation for bottom fisheries activities. Deep-sea fisheries assessment has been further elaborated in the 2009 FAO International Guidelines for the Management of Deep-Sea Fisheries in the High Seas (Deep Sea Fisheries Guidelines).⁷¹ Although, not legally binding, the guidelines encourage further measures to

⁶⁷ Convention for the Protection of Natural Resources and Environment of the South Pacific on 1986. EIA’s obligation stated in article 16(2) “Each Party shall, within its capabilities, assess the potential effects of such projects on the marine environment, so that appropriate measures can be taken to prevent any substantial pollution or significant harmful changes within, the Convention area.

⁶⁸ Warner, R. Tools to Conserve Ocean Biodiversity at 330. United Nations Fishing Stock Agreement, art. 5(d) and 6(3)(d).

⁶⁹ Ibid.

⁷⁰ Oude Elferink, A. (2012). Environmental Impact Assessment in Areas beyond National Jurisdiction. *The International Journal of Marine and Coastal Law*, 27(2) at 469.

⁷¹ United Nations General Assembly on December 2006 on bottom fishing. Document (A/RES/61/105 of 6 March 2007)

protect the vulnerable ecosystem against bottom fishing.⁷² In contrast, offshore aquaculture is also not covered by any EIAs obligation under the current legal regime.

3.3.2 Shipping

The general obligation under UNCLOS also establishes the obligation to assess the impact on the environment from shipping activities. However, the International Maritime Organization (IMO) does not recognize or use the EIA term.⁷³

The use of EIAs for evaluating impacts from shipping is uncommon.⁷⁴ Some Regional Fisheries Management Organizations (RFMOs) require conducting EIAs in specific activities in ABNJ, such as dumping. However, the EIA process in the shipping industry mostly focuses on pollution prevention from vessels according to Annexes 1-4 of the International Convention for the Prevention of Pollution from Ships (MARPOL).⁷⁵

3.3.3 Dumping and Ocean Fertilization

For States Parties to the Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter (London Convention), dumping of non-prohibited substances at sea, including in ABNJ, is only allowed subject to the requirements of a prior EIA.⁷⁶ Its protocol requires States Parties to conduct EIAs for dumping waste. In October 2008, ocean fertilization activities were included in the scope of the London Convention.⁷⁷ As a result, ocean fertilization is considered dumping and is not allowed under the London Convention⁷⁸ since “knowledge on potential environmental impacts of ocean fertilization currently insufficient to justify activities other than legitimate scientific research”.⁷⁹

⁷² Ibid.

⁷³ Andersson, K., Brynolf, S., Lindgren, J., & Wilewska-Bien, M. (2016). *Shipping and the Environment : Improving Environmental Performance in Marine Transportation* (1st ed. 2016. ed.) at 270.

⁷⁴ Ibid.

⁷⁵ International Convention for the Prevention of Pollution from Ships (MARPOL) on 2 November 1973. Rayfuse, R. (Ed.). (2015). Chapter 14. Environmental assessment in marine areas beyond national jurisdiction, Warner, R. at 302. *Research handbook on international marine environmental law*.

⁷⁶ London Convention (LC); adopted on 29 December 1972, entered into force 30 August 1975); (1976) UKTS 43, Art. IV and Annex III.

⁷⁷ Resolution LC-LP.1 (2008) on the Regulation of Ocean Fertilization (adopted on 31 October 2008) (LC 30/16 of 9 December 2008, Annex 6).

⁷⁸ Oude Elferink, A.G at 473

⁷⁹ Annex 1 to the Report of the Extraordinary Session of the scientific groups (LC 32/WP.1 of 11 October 2010).

3.3.4 Geo-engineering

The same situation occurs to geo-engineering activities, due to scientific uncertainties in relation to its impact and also its effectiveness against climate change.⁸⁰ This issue was discussed by COP-10 under CBD, where the Decision X/33 Biodiversity and Climate Change emphasis that geo-engineering activities “are only justified by the need to gather specific scientific data and are subject to a thorough prior assessment of the potential impacts on the environment”.⁸¹

3.3.5 Deep seabed mining

Deep seabed mining activities beyond national jurisdiction are subject to a well-developed framework of EIA obligations⁸² under UNCLOS and its 1994 Implementation Agreement on Part XI of the Convention.⁸³

The International Seabed Authority (ISA) is responsible for the development of mineral resources in ‘the Area’ but it is also responsible for protecting the marine environment but limited to this activity in light of Article 145 of UNCLOS. Therefore, the ISA mandate does not extend to living resources activities in the Area.

The ISA may require EIAs for non-living resources activities in the Area. Good examples are the *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Areas and Regulations* and on *Prospecting and Exploration for Polymetallic Sulphides in the Area*.

For non-living resources activities “contractors must submit an assessment of the potential environmental impacts of proposed activities”⁸⁴ including taking into consideration the impact on biodiversity. The sponsoring State is under due diligence obligation to ensure that contractors perform EIA for seabed mining in ABNJ.⁸⁵ As a result, “ISA has a broad

⁸⁰ Oude Elferink, A.G at. 474.

⁸¹ Decision X/33 Biodiversity and Climate Change, para.8.

⁸² Warner, R. (2012). Oceans beyond Boundaries: Environmental Assessment Frameworks. *The International Journal of Marine and Coastal Law*, 27(2) at 497.

⁸³ Agreement Relating to the Implementation of Part XI of the United Nations Conference on the Law of the Sea, in 28 July 1994.

⁸⁴ UNCLOS Part XI Implementing Agreement. Annex. Para 7.

⁸⁵ International Tribunal Law of the Sea. (ITLOS) *Advisory Opinion, supra note 1, at pp. 43–44, paras. 141–143; Polymetallic Nodules Regulations, Regulation 31(6) and Polymetallic Sulphides Regulations, Regulation 33(6)*.

capacity to enact protective measures as it deems necessary”.⁸⁶

In addition, the Implementation Agreement on Part XI of the Convention, which was adopted in 1994, in its Annex, Section 1.7 reinforce the obligation of EIA for this kind of activity and provides that the proposed activity “shall be accompanied by an assessment of the potential environmental impacts of the proposed activities...].”

3.4 EIA obligation under customary international law

It is arguable whether or not EIA is a general obligation under customary international law since its requirement is not universally binding.⁸⁷ In contrast, in the transboundary context, many support the view that such obligation is strongly established under customary international law,⁸⁸ especially after the International Court of Justice in the 2010 Pulp Mills Case, recognized it:

“ It may now be considered a requirement under general international law to undertake EIA where there is a risk that the proposed industrial activity may have significant adverse impact in a transboundary context, in particular, on shared resources”.⁸⁹

The ICJ indicated that there is an obligation to undertake EIA under customary international law, at least in transboundary situations or shared resources. Essential to stress that the Court explicitly stated EIA obligation under customary international law for the specific context of transboundary impact and shared resources. As a result, it is uncertain whether or not EIAs obligation in ABNJ in others circumstances other than transboundary or shared resources, could also be considered customary international law.

Nonetheless, there is no doubt related to the general obligation for States to carry out EIA under their jurisdiction when activities may cause significant harm to other States or ABNJ. However, the court did not indicate this obligation for activities taking place in ABNJ.

Fortunately, the ICJ included ‘shared resources’. As a result, one may argue that all States shares the high seas’ natural resources since they all have certain freedoms and rights,

⁸⁶ Jaeckel, A. (2015) An Environmental Management Strategy for the International Seabed Authority - The Legal Basis, 30 Int'l J. Marine & Coastal L. 93 at 99.

⁸⁷ Bremer, N. (2016) Transboundary Environmental Impact Assessment of Large Dams in the Euphrates–Tigris Region: An Analysis of International Law Binding Iran, Iraq, Syria and Turkey’, 25: 1 *Review of European, Comparative and International Environmental Law*. at 92.

⁸⁸ Bremer, N. (2017). Post-environmental Impact Assessment Monitoring of Measures or Activities with Significant Transboundary Impact: An Assessment of Customary International Law. *Review of European, Comparative & International Environmental Law*, 26(1), at 81.

⁸⁹ Pulp Mills Case (*Argentina v. Uruguay*) judgement of 20 of April, 2010. Para.204

including the freedoms of navigation, fishing, and scientific research. In ‘the Area’ the resources can also be considered shared since the ‘common heritage of mankind’ principle is applied in light of article 136 of UNCLOS.⁹⁰

The Seabed Chamber of the International Tribunal of the Law of the Sea goes beyond and recognizes EIA’s obligation as customary international law in its *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, 1 February 2011*.

“It should be stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law”.⁹¹

Here, ITLOS did not limit the EIA obligation under customary international like ICJ. Even though, some may argue that this general obligation is only applicable to the content of the ‘advisory opinion’, which means, only for non-living resources activities in the Area, others can argue that clearly, ITLOS refers to a direct obligation to conduct EIA under UNCLOS, which means for all activities that are likely to have significant impact, not only for non-living activities in the Area.⁹²

In light of both international tribunals statements, it is clear that there is an obligation to conduct EIA in ABNJ not only in transboundary and shared resources context but also in other circumstances. In conclusion, ITLOS recognizes the EIA as general obligation under customary international law, therefore applicable to all States even if they are not parties to any EIA’s legal instruments.⁹³

When confirming that the EIA obligation does exist, it is then important to understand when and how EIA obligation could arise in ABNJ. As previously observed, it is possible to affirm that what triggers this obligation are ‘activities that may cause significant harmful changes to the marine environment’.⁹⁴ Therefore, current legal regime provides the threshold for EIA in ABNJ. However, the uncertainties among the impact of activities in ABNJ make it difficult to measure and understand what would be considered ‘significant harmful changes’ for the involved parties. One may have a different understanding of adverse effects than

⁹⁰ UNCLOS article 136 “The Area and its resources are common heritage of mankind.”

⁹¹ ITLOS. *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, 1 February 2011*. p. 44, para. 145.

⁹² Warner, R. *Oceans beyond Boundaries*, at 489.

⁹³ Warner, R. *Oceans beyond Boundaries*, at 489.

⁹⁴ UNCLOS article 206. Look at *Kong, L.* at 658.

others. For this reason, it is essential to identify the possible stakeholders in ABNJ, which is not an easy task.⁹⁵

Stakeholder's participation in the EIA process is essential, especially economic interests may highly influence the discretion of the responsible State. Stakeholders are usually the other interested party, which may be potentially affected by the activity; therefore, they might be stricter regarding the meaning of significant impact and adverse effects.

It is arguable that non-States actors such as international, non-governmental organizations, institutions and environmental groups could act as stakeholders in ABNJ, as well as scientists and the public.⁹⁶ How and when stakeholders could act to strengthen the obligation to perform EIA in ABNJ will be discussed later in Chapter V.

3.5 Soft laws

Soft laws play an important role in the governance of ABNJ, contributing with guidance and more specific recommendations. On the other hand, States are not obliged to follow them. Nonetheless, soft law contributions have enhanced the obligation to perform EIAs in ABNJ.

The UNEP Goals and Principles as previously discussed are very general but have greatly contributed to EIA performance at international levels, as can be observed in its principle 1.

“Where the extent, nature or location of a proposed activity is such that it is likely to significantly affect the environment, a comprehensive environmental impact assessment should be undertaken ...]”.⁹⁷

Further supporting the EIA obligation, *The 1992 Rio Declaration* (Rio Declaration) and the *2002 Joint Plan Implementation* have enhanced EIAs obligation in its Principle 2:

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities

⁹⁵ Warner, R. *Oceans beyond Boundaries*, at 485.

⁹⁶ Grip, K. (2017) International marine environmental governance: A review. *The Royal Swedish Academy of Science*. at 422. Accessed on 13 August 2018. Available at <https://link.springer.com/content/pdf/10.1007%2Fs13280-016-0847-9.pdf>

⁹⁷ The UNEP Goals and Principles principle 1.

within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.⁹⁸

Moreover, Rio Declaration adopted the EIA principle. The Principle 17 of the Rio Declaration provides that “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment”.⁹⁹

The contributions of CBD towards the implementation of EIAs obligation is further developed throughout the elaboration of Guidelines, such as *The Voluntary Guidelines on Biodiversity –Inclusive Impact Assessment*.¹⁰⁰ The CBD secretariat host annual Conferences of the International Association for Impact Assessment “to discuss approaches to improve biodiversity-inclusive impact assessment in the context of the 2030 Agenda and COP13 decisions”.¹⁰¹

The Guidelines for Environmental Impact Assessment in the Arctic (Arctic EIA Guidelines), although not binding, it recommends EIA for activities that may cause significant environmental impacts. Furthermore, it suggests that the sensitivity of the Arctic may justify the application of lower threshold levels for EIA¹⁰² since the Guidelines’ main objective is to raise issues that are unique to Arctic assessments.”¹⁰³

In summary, it is possible to conclude that there is a legal obligation to require EIAs in ABNJ, although it is limited and complicated. The obligation has been implemented by States and at regional or sectoral organizations, but with little consistency.¹⁰⁴ Some activities that are already taking place in ABNJ are still not covered by any current legal framework that prescribes the EIA obligation.

The following chapter will address these issues, including discussion on other shortcomings of the EIA legal obligation in ABNJ.

⁹⁸ Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992).

⁹⁹ Ibid. Principle 17.

¹⁰⁰ CBD decision VIII/28 in 2006 *Voluntary Guidelines on biodiversity –Inclusive Impact Assessment* Available at <https://www.cbd.int/doc/publications/imp-bio-eia-and-sea.pdf> Accessed 13 July 2018

¹⁰¹ Available at <https://www.cbd.int/impact/doc/IAIA17-Draft-Agenda.pdf> Accessed 13 August 2018

¹⁰² Arctic Environment Protection Strategy, *Guidelines for Environmental Impact Assessment in the Arctic*, 1997. Available online: ceq.hss.doe.gov/nepa/eiagui.pdf at 5.

¹⁰³ Sander, G. (2016). International Legal Obligations for Environmental Impact Assessment and Strategic Environmental Assessment in the Arctic Ocean. *The International Journal of Marine and Coastal Law*, 31(1), at 101.

¹⁰⁴ Druel, at 42.

CHAPTER 4 SHORTCOMINGS OF THE CURRENT REGIME FOR EIA OBLIGATIONS

By analyzing and reviewing the existing legal framework for EIA in ABNJ, it is possible to identify many legal issues and practical implications that may compromise the implementation of its obligation. The last PrepCom Report identified that the EIA main issues are related to governance, obligations, SEAs, monitoring and review.¹⁰⁵

This chapter starts discussing the shortcomings identified at the early stages of the BBNJ Working Group and also the shortcomings addressed during the PrepCom meetings, where the discussion on the study of issues relating to the conservation and sustainable use of marine biological diversity in ABNJ were developed. Other implications in regard to the obligation to conduct EIA in ABNJ are indicated.

The shortcomings included in this thesis are particularly related to the obligation to conduct EIAs in ABNJ. Other issues related to EIA process were also identified during the BBNJ Working Group and PrepCom meetings, but they are beyond the scope of this thesis. As a result, shortcomings related to EIA standards, need for guidelines, monitoring and review¹⁰⁶ were not included in this discussion.

4.1 Shortcomings in Governance

There is no disagreement among the delegations when recognizing the EIA as “an effective tool to ensure the sustainability of activities in areas beyond national jurisdiction”.¹⁰⁷ As well as “the importance of EIAs for the conduct of activities in ABNJ”.¹⁰⁸ However, it was also recognized that governance issues and gaps affect the implementation of this obligation in ABNJ.¹⁰⁹

¹⁰⁵ United Nations General Assembly, 10-21 July 2017. Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally 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. at 13-14. Accessed on 16 July 2018. <https://undocs.org/A/AC.287/2017/PC.4/2>.

¹⁰⁶ Ibid.

¹⁰⁷ Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. A/69/177. para 65.

¹⁰⁸ Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. A/66/119. para 30.

¹⁰⁹ Ibid.

4.1.1 Absence of an overarching legal framework

During the PrepCom meetings, not all delegations recognized that the lack of a global framework implicates the obligation to conduct EIA in ABNJ. Some pointed out that the regime for EIA already exists and the no implementation is caused by the lack of political will. However, most recognize the need to address governance issues including the absence of an overarching legal framework and body for governing all activities in ABNJ.¹¹⁰

As previously observed, UNCLOS in general, provides with the fundamental rules for the governance of the world's oceans, providing a binding legal regime to protect and manage its resources, including ABNJ. Therefore, these vast areas of the ocean, where jurisdiction and control lie beyond the capability of any States, are by no means unregulated. In contrast, the review of existing EIA legal framework for activities in ABNJ shows the need to address some governance issues, in particular, its structure and the significant gaps in coverage for activities taking place in ABNJ.

The current “fragmentary and disjunctive framework applicable to most ABNJ activities”¹¹¹ makes the implementation of management and conservation tools such as EIAs legally challenging.

For instance, the Regional Sea Conventions are limited to their geographical scope, therefore have a limited application within ABNJ. The same situations occur to sectoral instruments that are only applicable to their respective activities, leaving out some activities in ABNJ without coverage. There are circumstances that both regional and sectoral regimes overlap, resulting in discrepancy, since the different instruments may have different EIA's criteria.¹¹²

There is no global institution responsible for all activities in ABNJ. The existing institutions/authorities acting in ABNJ have limited institutional capability in accordance with their mandates. At the regional level, there is a Commission responsible for implementing the provisions of the Regional Seas Conventions, therefore covering only specific areas of the Oceans. At the sector level, the IMO, the FAO and the ISA also have limited mandates covering their specific activities. There is also the possibility of overlapping mandates. It is important to note that none of these regulatory institutions/authorities has the mandate to

¹¹⁰ Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. A/69/177. At 22

¹¹¹ Rayfuse, R at 305.

¹¹² Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. A/66/119. para 33

conserve the ecosystem as a whole.

Activities taking place in ABNJ are most likely to be supported by a vessel. Therefore, the predominant jurisdiction in ABNJ is flag state jurisdiction. As a result, EIA obligation mostly falls to individual flag States.¹¹³ They are responsible for regulating the activities of their flag vessels including their impacts on the marine environment.¹¹⁴

The problem is that the lack of a global framework and institution with overarching responsibilities, directly affect the implementation of EIA in ABNJ.¹¹⁵ As a result, the obligations to conduct EIAs in these areas are very difficult to implement when solely relying on flag state jurisdiction and with no assistance from a global institution.

The development of an ILBI with an overarching legal framework and institutional body covering all activities in ABNJ could be the answer to address these issues and fill the regulatory gaps within the current regime.

4.1.2 No coverage for emerging activities in ABNJ

There is no EIA obligation for some “emerging and future uses of the Oceans”.¹¹⁶ The most emerging governance gap is related to living marine resources in ABNJ, since ISA mandate is limited to non-living resources in ‘the Area’ according to Part XI of UNCLOS.

There are also other activities with no obligation for a prior EIA, such as “seabed activities other than mining and on the high seas, the activities not covered are shipping, fishing other than bottom fishing, marine scientific research, cable or other installations, military activities and marine bioprospecting”.¹¹⁷ This list is not exhaustive.

Among activities covered by EIA instruments, there are still some issues that must be addressed.

In fisheries, for example, the non-binding obligation is limited to bottom fishing activities, leaving out aquaculture and high seas fishing in general without coverage.

In the shipping industry, many activities exercised from a vessel are not subject to any

¹¹³ Chair’s non-paper on elements of a draft text of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of ABNJ. 28 February 2017. at 63 . Accessed on 3 August 2018. Available at http://www.un.org/depts/los/biodiversity/prepcom_files/Chair_non_paper.pdf

¹¹⁴ Rayfuse, R at 305.

¹¹⁵ Ibid. at 293.

¹¹⁶ Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. A/69/177 para 66.

¹¹⁷ Gjerde, K. M. (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. at 8.

EIA obligation. On the seabed, only non-living resources activities ‘in the Area’ are subject to EIA obligations.

At the regional levels, many of the conventions are limited to its geographical scope, therefore not applicable to ABNJ.

Besides the activities with limited coverage, there are also emerging activities taking place in ABNJ without any obligation for EIA.

One emerging activity, in particular, that was greatly discussed during the BBNJ Working Group and the PrepCom meetings are marine genetic resources. Although it is clear that there is “the intrinsic link between EIAs and the conservation and sustainable use of marine genetic resources...]”¹¹⁸

The obligation to conduct EIAs for this activity is very controversial since its impact is considered relatively minor.¹¹⁹ However, on a commercial scale, this activity might have a significant impact on coral reefs and hydrothermal vents.¹²⁰ Currently, there is no obligation to assess the possible adverse effects in these ecosystems. It is also uncertain if this kind of disturbance would create ‘significant adverse effects’ to qualify as a trigger to require EIA in light of article 206 of UNCLOS.

This situation raises the question whether fundamental principles of international environmental law, such as the preventive principle and precautionary approach, could be the trigger to require EIA in ABNJ.

Some delegations recommended a inclusion of different criterion to trigger EIAs for vulnerable ecosystems and ecologically or biologically significant marine areas.¹²¹

Nonetheless, uncertainties related to marine genetic resources should be taken into consideration in the coming Intergovernmental Conference despite the resistances of some States, especially since assessing and fully understanding the impact of this activity, is still beyond scientific knowledge.

¹¹⁸ Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. A/66/119. para 30.

¹¹⁹ Broggiato, A., Vanagt, T., Lallier, L., Jaspars, M., Burton, G., & Muyldermans, D. (2018). Mare Geneticum: Balancing Governance of Marine Genetic Resources in International Waters. *The International Journal of Marine and Coastal Law*, 33(1), at 20.

¹²⁰ Ibid.

¹²¹ Chair’s non-paper on elements of a draft text of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of ABNJ. 28 February 2017. at 66.

Accessed on 3 August 2018. Available at http://www.un.org/depts/los/biodiversity/prepcom_files/Chair_non_paper.pdf

4.2 Obligations Issues

Issues related to the obligation to carry out EIA in ABNJ has always been the subject of discussion from the early stages of the BBNJ Working Group and also during the PrepCom meetings. Some delegations called for the need to clarify the EIA obligation under article 206 of UNCLOS as well as its status under customary international law.¹²²

4.2.1 The need to operationalize and strengthen EIA obligation under UNCLOS

The Letter dated 5 May 2014, stated “the need to operationalize EIA obligation in ABNJ”.¹²³ However, issues regarding the general framework of article 206 of UNCLOS were referred earlier on the 2011 recommendations of the BBNJ Working Group and also included in the PrepCom Report later in 2017.¹²⁴

The need to operationalize article 206 of UNCLOS is a result of the broad and ambiguous wording of this provision, where more details and a stronger requirement is needed to prescribe a clear obligation for EIA in ABNJ.

For instance, there is the need to address issues raised by UNCLOS wording that determine the EIA obligation when States ‘have reasonable grounds for believing’. EIA under UNCLOS is also ambiguous with the wording ‘as far as practicable’ and use ‘best practicable means at their disposal and according to their capabilities’. Despite these terms being more related to the merits of the procedure, they also affect the obligation to enforce EIA obligation, since some less developed States may not have the capability to assess impacts of activities, especially in ABNJ.¹²⁵

The problem is that this choice of words is very subjective to ensure an obligation. A provision for an obligation should never rely on an intuitive nature. Therefore, attention to the wording during the negotiations of the ILBI is essential for clarification. The provisions must be clear and direct to solve the uncertainties in regards to article 206 of UNCLOS.

¹²² Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. A/69/177 para 65-70. Report of the Preparatory Committee at 13. Accessed on 16 July 2018. <https://undocs.org/A/AC.287/2017/PC.4/2>.

¹²³ Letter dated 5 May 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. A/69/82 at 22.

¹²⁴ Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. A/66/119. para 30

¹²⁵ Oude Elferink, A.G. at 456.

4.2.2 Issues for EIA obligation under existing agreements

The BBNJ Working Group and the last PrepCom Report raised questions “regarding the effect that a new instrument for EIA in ABNJ would have on the work of existing processes”.¹²⁶ In particular, “whether an ILBI would set out the elements required to be considered in conducting EIAs, as well as who would be required to follow them and whether the assessments would be provided to existing organizations for their consideration.”¹²⁷

The PrepCom Report indicated that issues related to EIA processes under existing instruments should be addressed.¹²⁸

Issues related to the “lack of cooperation and coordination, among these existing global, regional and sectoral bodies...]”¹²⁹ were also indicated.

4.2.3 Uncertainties related to thresholds and criteria to trigger the obligation to conduct EIA in ABNJ.

The need for criteria to identify the activities that might require EIA in ABNJ was indicated by the work of The PrepCom as the main issues related to EIA obligation.¹³⁰

As previously observed UNCLOS and CBD prescribe the obligation for States to carry out EIA in ABNJ, but they fail to provide a precise definition for such, creating ambiguous understanding and different interpretations for what triggers this obligation. As a result, it is possible for States to deny the applicability of article 206 of UNCLOS.

The threshold of significant effects on the marine environment under UNCLOS as the trigger to require EIA “has gained wide acceptance in global and regional instruments...]”.¹³¹ However, at the same time, the content of article 206 weakens the obligation to conduct EIA when given extensive discretion to States¹³² to consider the need or not to assess the adverse effects to the marine environment.

¹²⁶ Ibid.

¹²⁷ Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. A/69/177. para 64

¹²⁸ Report of the Preparatory Committee at 13. Accessed on 16 July 2018. <https://undocs.org/A/AC.287/2017/PC.4/2>.

¹²⁹ Narula, K. (2016). Ocean governance: Strengthening the legal framework for conservation of marine biological diversity beyond areas of national jurisdiction. *Maritime Affairs: Journal of the National Maritime Foundation of India*, 12(1), at 73.

¹³⁰ Report of the Preparatory Committee at 13. Accessed on 16 July 2018. <https://undocs.org/A/AC.287/2017/PC.4/2>

¹³¹ Craik, N (2008). *The International Law of Environmental Impact Assessment*. Cambridge University Press. at 133.

¹³² Oude Elferink, A. (2012). Environmental Impact Assessment in Areas beyond National Jurisdiction. *The International Journal of Marine and Coastal Law*, 27(2) at 455.

The threshold to perform EIA is unclear in respect of the term ‘substantial pollution and significant harmful changes’ in article 206 of UNCLOS. This provision opens possibilities for States to determine whether or not the impact is sufficiently significant or harmful to trigger the obligation of EIA. For instance, one may consider the impact is not significantly harmful and therefore acceptable according to its national regulations, while others may have stricter environmental protection domestic legislation. Moreover, the term ‘reasonable ground to believe’ as mentioned above further contributes to this problem, opening margin for discussion.¹³³

Therefore, it is possible to conclude that obligations for EIAs rely heavily upon the capabilities of the responsible State and their domestic law and practice.¹³⁴ Consequently, it is very difficult to ensure EIA obligation in ABNJ, due to the discretionary implementation of EIA in ABNJ by each flag States or sponsoring States.

For this reason, several delegations noted the need to consider the threshold for the obligation to conduct EIAs, including a possible list of activities that would always require EIAs. It was also discussed that some activities might not meet the threshold in light of UNCLOS and not require EIA.¹³⁵

4.3 No obligation for SEA in ABNJ

Some delegations noted challenges in assessing the cumulative impact of activities in ABNJ. It was suggested, that SEA was suitable to address a broad range of activities.¹³⁶ As a result, the PrepCom included discussions on SEAs in ABNJ.¹³⁷

The problem with SEAs is that there is no binding obligation to carry out SEA in ABNJ. As a result, SEA considerations for ABNJ are at very early stages and continue to be controversial, even during the last PrepCom session.¹³⁸

The 2003 Protocol on Strategic Environmental Assessment in a Transboundary

¹³³ Ibid.

¹³⁴ Craik, N (2008). *The International Law of Environmental Impact Assessment*. Cambridge University Press. at 99

¹³⁵ Report of the Preparatory Committee at 14. Accessed on 16 July 2018. <https://undocs.org/A/AC.287/2017/PC.4/2> and Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. A/69/177 para 69.

¹³⁶ Ibid. para 70

¹³⁷ Report of the Preparatory Committee at 14. Accessed on 16 July 2018.

<https://undocs.org/A/AC.287/2017/PC.4/2>

¹³⁸ Morgera, E., Appleton, A., Kantai, T. and Tsioumanis, A. (2017). Summary of the fourth session of the Preparatory Committee on Marine Biodiversity Beyond Areas of National Jurisdiction: 10-21 July 2017. *Earth Negotiations Bulletin*, 25(141), at 13. Accessed on 7 July 2018, available at <http://enb.iisd.org/download/pdf/enb25141e.pdf>.

Context (Kiev Protocol) is the only international instrument for SEAs. Articles 6 and 12 of Kiev Protocol require “the evaluation of the likely environmental and health effects of a policy, plan or programme through the determination of the scope of an environmental report and its preparation”.¹³⁹ However, this is only applicable within national jurisdiction.

It was acknowledged during the work of the PrepCom the importance of SEA inclusion in the coming negotiations especially because “SEA process may be most appropriately employed where a trigger arises as a result of proposed sectoral developments or plans for a particular region of ABNJ”.¹⁴⁰ In contrast, during the fourth PrepCom meeting, some delegations desired SEA’s section to be completely removed from future discussions and negotiations.¹⁴¹

Nonetheless, SEA process would be more adequate to assess hydrothermal sites and its potential resources because SEA when compared to EIA “deals more with environmental disturbances produced by the activities themselves and with the cumulative impacts of different activities undertaken in the deep sea.”¹⁴² However, at this point, it is uncertain how SEA will be addressed in the Intergovernmental Conference and whether or not to include this in further discussion.

There are still many divergences among the delegations in relation to important issues about how to implement EIAs and SEAs obligation in ABNJ. The need to get consensus from the delegations must not interfere or jeopardize the objective of the coming IGC. Weakening EIA obligation in ABNJ due to political and social-economic pressures will continue to create the same mistakes from past legal attempts and compromise the conservation of marine biological diversity.

¹³⁹ 2003 Protocol on Strategic Environmental Assessment in a Transboundary Context (Kiev Protocol) articles 6 and 12.

¹⁴⁰ Warner, R. Strategic Environment Assessment and its Application to Marine Areas Beyond ABNJ. http://www.un.org/depts/los/biodiversity/prepcom_files/Warner_Strategic_Environmental_Assessment_PrepCom2.pdf. Accessed on 25 July 2018. at 4.

¹⁴¹ Russia federation, USA, China, proposed deleting the SEA section during the fourth PrepCom session, due to lack of consensus and insufficient information. Accessed on 7 July 2018, available at <http://enb.iisd.org/download/pdf/enb25141e.pdf>.

¹⁴² Broggiato, A. (2013). Exploration and Exploitation of Marine Genetic Resources in Areas beyond national Jurisdiction and Environmental Impact Assessment. *European Journal of Risk Regulation*, 4(02) at 250.

CHAPTER 5 PROPOSALS FOR A NEW LEGAL REGIME

This chapter and the main contribution of this thesis, aim at providing proposals to address the shortcomings discussed in the previous chapter and strengthen the obligation to conduct EIA in ABNJ.

In achieving this purpose, it first explains how the PrepCom meetings addressed the identified shortcomings in regard to EIAs obligation. Secondly, it includes a number of contributions from the delegations, in various aspects on this matter. Followed by an analysis of the PrepCom's approach when addressing such issues and evaluating whether the PrepCom proposals and recommendations could solve the gaps in relation to EIAs obligation in ABNJ. The PrepCom recommendations for EIAs in ABNJ are separated into seven categories. However, this thesis focuses on the obligation to perform EIAs in ABNJ. Therefore, this chapter does not include recommendations for EIA's process, reports, monitoring and reviewing in its text content.

The second part of this chapter includes this author's own recommendations and proposals to strengthen the obligation to conduct EIAs in ABNJ.

5.1 Proposals from the Preparatory Committee

In the PrepCom Report dated 31 July 2017, recommendations to the Assembly were made on the elements of a draft text of an ILBI under UNCLOS, considering previous reports of the Co-Chairs and the BBNJ Working Group.

The report acknowledges “the need for the comprehensive global regime to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction”.¹⁴³

The PrepCom report aims to provide points for discussions for the negotiations during the Intergovernmental Conference dated to start on September 2018.

¹⁴³ United Nations General Assembly, 10-21 July 2017. Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally 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. at 8. Accessed on 16 July 2018, at <https://undocs.org/A/AC.287/2017/PC.4/2>

5.1.1 Obligation to conduct EIAs in ABNJ

The first proposal is related to the obligation to conduct EIAs “drawing from article 206 of UNCLOS and customary international law, the text would set out the obligation for States to assess the potential effects of planned activities under their jurisdiction or control in areas beyond national jurisdiction”.¹⁴⁴

As previously observed EIAs obligation is stated in article 206 of UNCLOS, yet the delegations demonstrated concerns in relation to the interpretation and application of this provision. It is clear that the text must be in light of article 206 of UNCLOS. On the contrary, the text of ILBI should not repeat the mistakes of article 206 of UNCLOS. The text must complement this provision and solve its uncertainties. Moreover, it should provide guidance to Parties on how to implement the existing UNCLOS obligations, focusing on improving coordination and implementation of EIAs in ABNJ.¹⁴⁵

In doing so, States should be responsible for ensuring that EIAs are undertaken when required and that such activities are consistent with States' obligation under the UNCLOS, including the responsibility to prevent or mitigate adverse effects in ABNJ.¹⁴⁶

It was pointed out that according to UNCLOS the decisions and responsibilities for EIA is primarily flag State jurisdiction.¹⁴⁷ Other delegations noted that States exercise jurisdiction not only as flag States but also when licensing and sponsoring an activity.¹⁴⁸

The proposals to address issues related to ‘flags of convenience’ were to strengthen the cooperation among States to mitigate this issue.¹⁴⁹ Consequently, the cooperation would arise among the flag State and the sponsoring State. This proposal could extend the EIA obligations beyond flag States, including States that are sponsoring the activity. As previously observed, this direct obligation is confirmed by The Seabed Chamber of the International Tribunal of the Law of the Sea, in its *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 1 February 2011.

Another proposal in relation to EIA obligations in ABNJ, is the need to further

¹⁴⁴ Report of the Preparatory Committee. at 13.

¹⁴⁵ Proposals from New Zealand’s delegation. Chair’s non-paper on elements of a draft text of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of ABNJ. 28 February 2017. at 62 . Accessed on 8 August 2018. Available at http://www.un.org/depts/los/biodiversity/prepcom_files/Chair_non_paper.pdf

¹⁴⁶ Ibid at 63.

¹⁴⁷ Ibid at 63. Considerations from the Norwegian delegation.

¹⁴⁸ Ibid at 63, High Seas Alliance.

¹⁴⁹ Ibid at 63 Considerations from the Canadian and Australian delegations.

elaborate the provisions of UNCLOS in detail.¹⁵⁰ This would include provisions to “operationalize the duty of article 206 of UNCLOS into the text, with a clear statement of the obligation to conduct EIAs for the State whose activity lies under its jurisdiction or control”.¹⁵¹ The wording ‘operationalize’ proved to be controversial during the PrepCom meetings, hence it was not mentioned in the last PrepCom Report.

Furthermore, it was suggested there is a need to establish “guiding principles and approaches for EIAs, which must reflect upon existing international law principles, including transboundary EIAs”.¹⁵²

In conclusion, the ILBI text would assist States to implement their obligations under international law, in particular, article 206 of UNCLOS.

5.1.2 Activities for which EIAs are required

The PrepCom Report provided proposals to identify the activities for which an EIA is required.¹⁵³ During the PrepCom meetings, there was a discussion on the need to clarify the meaning of ‘substantial pollution’ or ‘significant and harmful changes to the marine environment’ stated in article 206 of UNCLOS. Therefore, the proposal to address uncertainties to this matter is that “the text would address the thresholds and criteria for undertaking EIAs in ABNJ”.¹⁵⁴

It was proposed that the implementing agreement could characterize 'significant impacts' of an activity that is likely to have significant adverse effects on biological diversity or may cause substantial pollution of, or significant harmful changes to, the marine environment.¹⁵⁵ In contrast, it was recommended that the implementing agreement should set a defined threshold(s) for environmental impacts that would trigger a requirement to undertake an EIA.¹⁵⁶

The threshold-based approach would be contained in an annex to the agreement. It would be based on the likelihood of significant adverse impacts (individually or combined) in

¹⁵⁰ Ibid at 61 Considerations from Japan’s delegation.

¹⁵¹ Ibid at 64. Considerations from the Norwegian delegation.

¹⁵² Ibid at 64. CARICOM considerations. Some principles considered by the participant delegations were: Precautionary, Ecosystem, Science-based.

¹⁵³ Report of the Preparatory Committee at 13. Accessed on 16 July 2018.

<https://undocs.org/A/AC.287/2017/PC.4/2>

¹⁵⁴ Ibid.

¹⁵⁵ Chair’s non-paper on elements of a draft text of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of ABNJ. 28 February 2017. at 63 . Accessed on 3 August 2018. Available at http://www.un.org/depts/los/biodiversity/prepcom_files/Chair_non_paper.pdf

¹⁵⁶ Ibid at 65.

ABNJ, for activities not already covered by existing obligations and agreements.¹⁵⁷

Other delegations called for a stricter threshold, using the example from the Environmental Protocol of the Antarctic Treaty System (AT) prescribed in Article 8.¹⁵⁸ It was also recommended to consider the experience of the International Seabed Authority (ISA) and the CBD COP 8 Decision VIII/28 Voluntary guidelines on biodiversity-inclusive impact assessment.¹⁵⁹

In contrast, it was suggested to include a list of activities likely to be harmful to the environment and that would always require EIAs.¹⁶⁰ However, the problem of having such a list would open the possibility to establish a list for exempting some activities from this obligation. Therefore, as suggested, activities with little or no expected impact might only be subject to monitoring and reporting obligations and not require EIAs. In addition, activities in which the impact is already known and sufficiently managed would also be included on the exemption list.¹⁶¹

In this author's opinion, having a prior list like the one suggested, would be difficult and not efficient. First, States Parties would have to agree on the activities and elements of the list. Factors such as, location, how the activity will be conducted and by which State, are all reasons that could influence the need or not to conduct EIAs. For instance, it is important to consider Ecologically or Biologically Significant Areas (EBSAs), Vulnerable Marine Ecosystems (VMEs), Particular Sensitive Sea Areas (PSSAs), Important Biodiversity Areas (IBAs), Important Marine Mammal Areas (IMMA) and ecological corridors for determining the threshold for EIAs.¹⁶² A list is not very practical when taking into account emerging and future activities, which would require continuous reviewing and updating.

In contrast, it was recommended that EIAs process must be mandatory for all proposed activities in ABNJ.¹⁶³ Consequently, no minimum threshold of impact would be required. It is very unlikely that States Parties would agree to this obligation. It cannot be

¹⁵⁷ Ibid at 65. Consideration from the New Zealand's delegation and WWF.

¹⁵⁸ Ibid at 66, considerations from CARICOM and High Seas Alliance. Protocol on Environmental Protection to the Antarctic Treaty System (AT), Article 8 a) less than a minor or transitory impact; b) a minor or transitory impact; or more than a minor or transitory impact.

¹⁵⁹ Ibid at 66

¹⁶⁰ Ibid at 63.

¹⁶¹ Ibid at 65. Considerations from G77 and China. Contested by Australian delegation

¹⁶² Considerations from the Australian's delegation. Chair's non-paper on elements of a draft text of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of ABNJ. 28 February 2017. at 66. Accessed on 3 August 2018. Available at http://www.un.org/depts/los/biodiversity/prepcom_files/Chair_non_paper.pdf.

¹⁶³ Ibid at 65. Proposal from the delegation of the Federal State of Micronesia

denied that requiring EIA for all proposed activities would solve all issues related to thresholds and criteria. The very strict provision would not leave gaps and uncertainties in regards to the meaning of ‘significant harmful changes’ or ‘substantial pollution’ since all activities in ABNJ would require EIAs.

5.1.3 Relationship to EIA processes under existing instruments, frameworks and bodies

The PrepCom proposal is that “the text would set out the relationship to EIA processes under relevant legal instruments and frameworks and relevant global, regional and sectoral bodies”.¹⁶⁴ Therefore, the text should ‘not undermine’ such existing legal instruments and frameworks, as stipulated in the UN resolution 69/292.¹⁶⁵ In doing so, it is necessary for enhancing cooperation and coordination between them and the new legal regime for EIA in ABNJ.

Under the implementing agreement, States should be obliged to conduct EIAs either directly or through relevant global, regional or sectoral bodies. It is important to note that overlaps must be avoided and no other EIA should be conducted if it is already conducted under existing frameworks. As a result, existing EIAs processes and guidance applicable in ABNJ should be respected and duplication avoided.¹⁶⁶

Existing activities managed under regional and sectoral organizations should be allowed to continue (e.g. RFMOs, ISA and IMO). Any new agreement could play a useful role in assisting to coordinate these efforts, and facilitating cooperation and information sharing between these bodies.¹⁶⁷ In addition, the implementing agreement could contribute by ensuring the necessary contact and exchange of information among relevant sectorial and regional mechanisms.¹⁶⁸

The recognition of existing instruments was pointed out from the first PrepCom

¹⁶⁴ Report of the Preparatory Committee. at 15. Accessed on 18 July 2018.

<https://undocs.org/A/AC.287/2017/PC.4/2>

¹⁶⁵ United Nations General Assembly. Resolution 72/249 adopted on 24 December 2017. para 7. Accessed on 13 August, 2018. <http://undocs.org/en/a/res/72/249>

¹⁶⁶ Chair’s streamlined non-paper on elements of a draft text of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of ABNJ. 28 February 2017. para 170 at 32 . Accessed on 3 August 2018. Available at

http://www.un.org/depts/los/biodiversity/prepcom_files/Chairs_streamlined_non-paper_to_delegations.pdf

¹⁶⁷ Canada’s views related to PrepCom. Accessed on 18 August 2018, available at

http://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/Canada.pdf.

¹⁶⁸ Chair’s non-paper on elements of a draft text of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of ABNJ. 28 February 2017. at 63 . Accessed on 3 August 2018. Available at

http://www.un.org/depts/los/biodiversity/prepcom_files/Chair_non_paper.pdf

meeting when it was suggested that these instruments could assist in clarifying concepts and provide guidance for the application of EIA in ABNJ.¹⁶⁹

5.1.4 Strategic environmental assessments

The proposal for SEA is that the text would address strategic environmental assessments in ABNJ.¹⁷⁰ Although, it could be considered in a different section of the instrument.¹⁷¹

The need for cooperation between States at the regional level, either *ad hoc* or in the context of existing regional or global institutions was mentioned.¹⁷² A possible role for regional seas conventions in relation to SEAs was discussed.¹⁷³

The proposal to include provisions on SEA is motivated by the need to take into account the cumulative impact of various activities, and SEA would be ideal to effectively assess such cumulative impacts.¹⁷⁴

The obligation to conduct SEA in ABNJ is highly controversial among the participant delegations. For instance, China, USA and the Russian Federation suggested deleting the entire section due to “lack of consensus and insufficient information”.¹⁷⁵

It is a fact that SEA process is relatively new and there are still uncertainties about its process. Despite that, it has also been indicated that SEAs would be an important tool for the conservation and sustainable use of marine biological diversity. It is understandable that the easiest path would be deleting an entire section when facing divergent views. However, if this reasoning would be enough to delete a section, then no positive solution would ever be achieved. Instead, the delegations should be discussing ways to solve the lack of information and consensus aiming at the development of stronger tools and further knowledge.

¹⁶⁹ Available, and Accessed on 13 August 2018

http://www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf

¹⁷⁰ Report of the Preparatory Committee. at 14. Accessed on 19 July 2018.

<https://undocs.org/A/AC.287/2017/PC.4/2>

¹⁷¹ Many delegations, such as Norway and Australia. Chair’s non-paper of 28 February 2018. at 75 . Accessed on 3 August 2018. Available at http://www.un.org/depts/los/biodiversity/prepcom_files/Chair_non_paper.pdf.

¹⁷² Ibid.

¹⁷³ Ibid. Considerations from the Norwegian delegation.

¹⁷⁴ Letter dated 16 March 2010 from the Co-Chairpersons, para. 51, 52, 53, 54 and 55.

¹⁷⁵ Morgera, E., Appleton, A., Kantai, T. and Tsioumanis, A. (2017). Summary of the fourth session of the Preparatory Committee on Marine Biodiversity Beyond Areas of National Jurisdiction: 10-21 July 2017. *Earth Negotiations Bulletin*, 25(141), at 13.

5.2 Thesis proposals and recommendations

The final PrepCom Report provided relevant proposals to address the need of a global regime aim at the conservation and sustainable use of marine biological diversity in ABNJ. In addition to these proposals, this section aims at providing further recommendations for a new legal regime for EIAs in ABNJ.

5.2.1 Explicit application of precautionary, ecosystem, and science-based approaches in ABNJ

As previously observed, some delegations suggested the need to establish guiding principles for EIAs.¹⁷⁶ The proposal is relevant, however, a stronger function of principles and approach for EIA should be clearly stated in the ILBI provisions.

The inclusion and the effective implementation of the ecosystem, precautionary and science-based approaches could be the bases for ensuring and strengthening the obligation to conduct EIA in ABNJ.

Many of international instruments had recognized the application of these approaches in order to protect the environment.¹⁷⁷ In ABNJ, the lack of scientific knowledge, uncertainties related to its ecosystem and insufficient information, should be enough reason to not only use principles as guidance but also to reinforce State's duty to protect and preserve the marine environment when exercising their rights.¹⁷⁸

Moreover, one can argue that the lack of scientific knowledge and information should trigger the obligation to conduct EIA in ABNJ. The EIA would play an essential role by gathering information and contributing for a better understanding of the risks of a proposed activity and how to avoid or mitigate them.

5.2.2 Clearly identify thresholds to trigger EIAs in ABNJ

The PrepCom Report suggested the need to address issues regarding the identification of the threshold to trigger EIAs in ABNJ. This author concluded that a provision requiring EIA for all proposed activities in ABNJ would solve all regulatory gaps and issues related to

¹⁷⁶ Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. para 22. Available at <http://undocs.org/A/69/780> Accessed on 22 August 2018.

¹⁷⁷ Such as Rio Declaration, CBD, London Protocol, FAO and ISA instruments.

¹⁷⁸ UNCLOS article 192.

the meaning of article 206 of UNCLOS and the different interpretations of it among the international community. This approach is very unlikely to be accepted.

For this reason, it is possible to conclude that an alternative solution would be to clarify the existing UNCLOS provisions, explaining without ambiguities what is considered to be ‘significant harmful changes’ and ‘substantial pollution’.

Stricter provisions related to activities in areas of unique ecosystems such as EBSAs, VMEs, PSSAs, IBAs, IMMA and ecological corridors, should also be considered.

5.2.3 Establish an institution with overarching responsibility

Analyzing the issues concerning governance in ABNJ, it is possible to argue that there is the need for an overarching body/institution to govern ABNJ.

The first proposal would be establishing an international governing institution that would facilitate cooperation and coordination among existing instruments at the global, regional and sectoral levels.¹⁷⁹ The body could also conduct EIAs and be formed by scientific experts and enforce the obligation to perform EIAs to the responsible States. In addition, the body would be responsible for defining which activities are subject to EIAs or SEAs case by case.¹⁸⁰

A second proposal would be to extend ISA mandate to living resources in the Area, even though UNCLOS specifically stated that the authority regulates only non-living resources in ‘the Area’. Some delegations expressed the view that ISA mandate could be expanded.¹⁸¹ While others observed that ISA “could serve as a model for any institution developed under a new agreement”.¹⁸²

The reasons for the extension of ISA mandate could be justified when considering the time that UNCLOS was developed. At that time, the commercial potential of marine living resources in ‘the Area’ was unknown. It seems practical to extend its mandate since ISA is already responsible for non-living activities, especially when considering cumulative impacts. Activities in the Area for non-living resources are very likely to cause adverse impacts on the

¹⁷⁹ Oude Elferink, A. G. at 478.

¹⁸⁰ International Union for Conservation of Nature, Environmental Law Centre (2015) An International Instrument on Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction. at 27. Available at https://www.iucn.org/downloads/iucn_bbnj_matrix_december_2015.pdf. Accessed 27 August 2018.

¹⁸¹ Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly. para 23. Available at <http://undocs.org/A/69/780> Accessed on 22 August 2018.

¹⁸² Ibid.

living resources in the Area, respectively. For this reason alone, it seems reasonable to expand ISA mandate and make it responsible for all activities in the Area, without exception.

5.2.4 Strengthen the role of adjacent coastal States and other stakeholders

The PrepCom proposals addressed the question of involvement of adjacent coastal States, but limited to rights of consultation/notification during EIAs processes. As a result, their participation are limited only when transboundary impacts are identified.

A further proposal in relation to adjacent States would give them the right to request the responsible States to conduct EIAs when the proposed activity in ABNJ has a boundary to their maritime areas since these areas are “adjacency of the ocean spaces over which they have rights and responsibilities”.¹⁸³

This proposal could solve issues caused by ‘flag of convenience’ especially when the adjacent State observes that EIA is necessary but the State that is obliged to perform it has decided not to. As a result, adjacent States would have the right to contest the proposed activity that did not have a prior EIA and require it to be conducted in respect of their duty to protect and preserve the marine environment.

It is possible to affirm that this proposal could result in a better implementation of EIAs obligation in ABNJ since adjacent coastal States are the most interested in having a clear EIAs obligation for activities in these areas. It would also enhance a better interaction and cooperation between the adjacent coastal states and flag or sponsoring States of the proposed activity.

Stakeholders could also have a similar role and have the right to require States to conduct EIAs when they believe the proposed activity may cause harmful impacts that could affect them. As a result, non-States actors such as international, non-governmental organizations, institutions, environmental groups and scientists could act as stakeholders in ABNJ and have the right to require States to conduct EIAs in ABNJ when there is a risk of an adverse effect to the biological diversity. Consequently, this proposal could strengthen States obligations to perform EIA in ABNJ.

Overall, this proposal would address issues caused by the full discretion given to States responsible for the proposed activity on whether or not to perform EIA, since other actors could require States to conduct EIAs even when they have decided not to.

¹⁸³ Chircop, A. (2011). Managing Adjacency: Some Legal Aspects of the Relationship Between the Extended Continental Shelf and the International Seabed Area. *Ocean Development & International Law*, 42(4), at 310.

5.2.5 Enforce strict provisions on State responsibility and liability

The ILBI text should prescribe and enforce stringent penalties for States, which fail to perform EIAs for activities that caused adverse effects to the marine environment. Consequently, failing to comply with EIAs obligation in ABNJ would result in a criminal offense against the marine environment. Therefore, the provisions would be stricter than the usual State responsibility and liability sanctions. This proposal would motivate States to perform EIAs to avoid strict charges and penalties upon them.

CHAPTER 6 CONCLUSION

There is no doubt that Environmental Impact Assessments is an important management tool to protect the environment including our Oceans. The process has been greatly applied at the domestic and international level, mostly within national jurisdiction. EIA prior to the start of an activity has demonstrated to be essential to gather information and encourage further studies to better address the possible impacts caused by it. It provides possibilities to acknowledge and mitigate the risks before they actually happen. Despite the fact that there is no globally accepted concept for EIA, the current regime provides definitions, which are accepted and applied among the international community.

The EIA current legal regime also prescribes the legal obligation to conduct EIAs when “the planned activity ...] may cause substantial pollution of or significant harmful changes to the marine environment”.¹⁸⁴ However, the direct obligation provided by UNCLOS proved to be not sufficient to enforce this obligation, especially in ABNJ. It was observed that the ICJ and ITLOS also recognized the obligation as customary international law. However, it is arguable whether their decisions would be only applicable to similar circumstances and not extend to all ABNJ.

The findings show that although there is a clear obligation to perform EIAs in ABNJ under the existing legal framework. In contrast, there are also gaps and uncertainties directly related to its implementation.

First is the ambiguous wording of UNCLOS, especially in regards to different interpretation of what would trigger an EIA in ABNJ. Secondly, it is the fragmented nature of the obligation, which is implemented at global, regional and sector levels, but without cooperation among them. In addition, some activities are not covered by any EIAs obligation.

It was concluded that not having an overarching body/institution contributes to the no implementation of EIAs in ABNJ. The only authority in ABNJ is the ISA, but its mandate is limited to non-living resources activities in the Area, leaving the high seas and other activities without a regulatory body.

¹⁸⁴ UNCLOS article 206

Analyzing the PrepCom materials and proposals, it can be easily noted that economically powerful States, such as the USA, Russia and China generally tend to disagree on the development of stricter provisions to strengthen the obligation to conduct EIAs in ABNJ since conducting EIAs prior to an activity would increase its cost. The same can be observed when discussing the inclusion of SEA provisions. Nonetheless, economic interest should not jeopardize the need for a better conservation and sustainable use policies, for the marine natural resources. The delegations' divergences and lack of consensus may greatly compromise the future negotiations for EIA obligation in the coming IGC.

The PrepCom meetings identified the main issues in relation to EIAs obligation in ABNJ. There are some ambitious recommendations made by some delegations, such as making EIAs mandatory for all activities in ABNJ. Unfortunately, this is very unlikely to go forward.

In contrast, the final PrepCom Report provides proposals to address issues related to EIAs obligation such as the relationship between EIA instruments, frameworks and bodies, the threshold to trigger EIAs in ABNJ and also the possible inclusion of SEAs. The proposals however are limited to identifying the need to address and discuss these issues but do not provide solutions.

Considering the proposals and recommendations during the PrepCom meetings, including its final report, it is possible to conclude that it is necessary to strengthen the obligation to conduct EIAs in ABNJ. It seems controversial that there is a need to strengthen this obligation since there is a certain consensus among the international community that the obligation already exists. The problem is that regulatory gaps also exist and give the possibility for States not to comply with this obligation.

In solving such issues, this author suggests several approaches such as: better implementation of principles and approaches; giving rights to adjacent States and possible stakeholders to be able to require the responsible State to perform EIAs and the establishment of an overarching body responsible to protect marine biodiversity in ABNJ. Moreover, it suggests the very ambitious proposal for considering the failure to conduct EIAs when required, a criminal offense.

Overall, aiming at simplifying all the problems related to EIAs in ABNJ, this author agrees that the best proposal would be to require EIAs for all activities in ABNJ and SEA to all policies, plans and programmes. The legal base for this is UNCLOS article 206, but with a stricter interpretation of it, since in this author's opinion, it is uncertain whether or not all human activities may cause significant impact to the marine environment in ABNJ.

Nonetheless, the international community could gain further knowledge of ABNJ when performing EIAs and SEAs. This would contribute greatly to a better understanding of such ecosystems and also for the conservation and sustainable use of marine natural resources.

The development of a new agreement to conserve biological diversity in ABNJ will contribute and achieve its purpose, only if all the gaps and uncertainties are appropriately addressed and State Parties prioritize the conservation and sustainable use of marine biological diversity over short-term economic interests.

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