



Environmental Assessment in Marine Areas Beyond National Jurisdiction

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ENVIRONMENTAL ASSESSMENT IN MARINE AREAS BEYOND NATIONAL JURISDICTION: PRACTICE AND PROSPECTS

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INTRODUCTION

Knowledge of the threats posed to the oceans by human activity has expanded beyond marine pollution to encompass recognition of the risks posed to vulnerable marine ecosystems (VMEs) by overfishing, destructive fisheries practices, and invasive exploitation of living and nonliving marine resources. However, with the still-developing state of marine scientific research, the majority of activities at sea continue to occur with limited knowledge of their impacts on the marine environment. In this climate of uncertainty, environmental assessment assumes heightened importance. While governance structures will generally exist to facilitate environmental assessment¹ in marine areas within national jurisdiction, these structures are still developing for marine areas beyond national jurisdiction (ABNJ).²

INTERNATIONAL LAW FRAMEWORK FOR ENVIRONMENTAL ASSESSMENT IN ABNJ

UNCLOS

Environmental impact assessment is acknowledged as a key element in the suite of tools for biodiversity conservation, and its application to activities affecting the marine environment has been endorsed in many international law instruments, policy statements by governments and international organizations, and decisions of international tribunals.³ Article 206 of UNCLOS imposes a general obligation on states parties to assess the potential effects of activities under their jurisdiction or control that may cause substantial pollution of, or significant and harmful changes to, the marine environment. There is no overarching international agreement that develops in more specific terms the obligation contained in Article 206 of UNCLOS. The UNCLOS obligation is broad in scope, extending to all parts of the marine environment, but detailed requirements for environmental assessment of activities in marine areas beyond national jurisdiction (ABNJ) are still developing.⁴

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¹ In these remarks, the term “environmental assessment” is used to refer to all facets of measuring the impact of human activities on the environment. This includes the typical process of prior environmental impact assessment (EIA) and extends to and through postactivity monitoring of environmental impacts. Within those processes the term environmental assessment also encompasses the conduct of environmental baseline studies and the measurement of single as well as cumulative impacts on marine environments over time. Cross-jurisdictional application of EIA and strategic environmental assessment (SEA) of plans, programs, and policies likely to impact the marine environment over longer periods and broader geographical areas are also included in the term environmental assessment.

² Marine areas beyond national jurisdiction (ABNJ) include both the high seas water column and the deep seabed beyond national jurisdiction (the Area).

³ These instruments include the regional seas conventions, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1991 Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol), the UN Fish Stocks Agreement (UNFSA), and the International Seabed Authority’s Regulations for exploration contractors.

⁴ Marine areas beyond national jurisdiction (ABNJ) include both the high seas water column and the deep seabed beyond national jurisdiction (the Area).

Sectoral Frameworks for Environmental Assessment in ABNJ

The principal sectors of activity in ABNJ—fishing, shipping, and deep seabed mining—have prescribed environmental assessment measures for some of their activities but there are no mandatory environmental assessment processes for new and emerging activities such as bioprospecting.

Fisheries Sector

Parties to the UN Fish Stocks Agreement must assess the impacts of fishing, other human activities, and environmental factors on target stocks and species belonging to the same ecosystem or associated or dependent ecosystems and develop data collection and research programs to assess the impact of fishing on nontarget and associated or dependent species and their environment.⁵ This obligation has been further elaborated in the 2009 FAO International Guidelines for the Management of Deep Sea Fisheries in the High Seas (Deep Sea Fishing Guidelines), which were developed to help states and RFMOs implement a call from the United Nations General Assembly (UNGA) to prevent significant adverse impacts on VMEs or not to authorize the bottom fishing activity to proceed (UNGA Resolution 61/105 paragraphs 80–91).⁶

Shipping Sector

In the shipping sector, only a limited number of activities that ships may engage in beyond national jurisdiction, such as dumping of wastes and ocean fertilization, are subject to risk and environmental assessment processes. For parties to the London Convention, dumping of nonprohibited substances is only allowed subject to the requirements of prior environmental impact assessment, the issue of a permit, and ongoing monitoring.⁷ For parties to the London Protocol, dumping of all waste and other matter is prohibited, except for five listed categories of substances the dumping of which is subject to stringent assessment, permitting, and ongoing monitoring requirements.⁸ Any application for a permit to dump these listed substances must be accompanied by an assessment of the sea disposal options, including information on waste characteristics, conditions at the proposed dump site, fluxes, and proposed disposal techniques. These assessments can apply to dumping of wastes in ABNJ as well as to areas within national jurisdiction.

In October 2013, the contracting parties to the London Convention and London Protocol adopted an amendment to the London Protocol that makes a risk assessment mandatory for all specified marine geoengineering activities.⁹ The only marine geoengineering activity currently specified is ocean fertilization. The Assessment Framework (AF) is described as a “tool . . . to determine if the proposed activity constitutes legitimate scientific research that is not contrary to the [LC/LP] aims.” It sets out a two-stage process involving an initial assessment and an environmental assessment.

⁵ UN Fish Stocks Agreement, Arts. 5(d) and 6(3)(d), Aug. 4, 1995.

⁶ Food and Agriculture Organization of the United Nations, *International Guidelines for the Management of Deep Sea Fisheries in the High Seas* (2009), available at <http://www.fao.org/docrep/011/0816t/0816t00.htm>.

⁷ London Convention, Art. IV & Annex III, available at http://www5.imo.org/SharePoint/blastDataHelper.asp/data_id%3D16925/LC1972.pdf.

⁸ London Protocol, Art. 4 & Annex 2, available at <http://www.austlii.edu.au/au/other/dfat/treaties/2006/11.html>.

⁹ Report of the Working Group on the Proposed Amendment to the London Protocol to Regulate Placement of Matter for Ocean Fertilization and Other Marine Geo-engineering Activities, LC Doc 35/WP.3 (Oct. 17, 2013); Philomene Verlaan, *Current Legal Developments: London Convention and London Protocol*, 28 INT’L J. MARINE & COASTAL L. 729 (2013).

Deep Seabed Mining Sector

Deep seabed mineral exploration activities in ABNJ are subject to environmental assessment obligations. An exploration contractor must submit a preliminary assessment of the potential environmental impacts of proposed activities with an application for approval of a plan of work together with a description of proposed measures for the prevention, reduction, and control of possible impacts on the marine environment to the International Seabed Authority (ISA).¹⁰ The Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area, issued by the Authority's Legal and Technical Commission in revised form in 2010, specify the particular activities of exploration contractors that are subject to environmental impact assessment (EIA).¹¹ The sponsoring state for an exploration contractor is under a due diligence obligation to ensure that an exploration contractor fulfils all these obligations.¹²

ENVIRONMENTAL ASSESSMENT ISSUES AT PREPARATORY COMMITTEE MEETINGS

Environmental assessment processes and their application to activities in ABNJ have been extensively discussed at all three Preparatory Committee meetings. At both the second and third Preparatory Committee meeting, significant areas of convergence have begun to emerge. These include the following:

- EIAs should contribute to the conservation and sustainable use of marine biodiversity beyond national jurisdiction;
- Existing relevant legal instruments and frameworks, in particular, UNCLOS, as well as relevant global, regional, and sectoral bodies, should not be undermined, as stipulated in UNGA Resolution 69/292, and should guide and inform the development of EIA measures/procedures under the international legally binding instrument (ILBI)
- The EIA process needs to be transparent, including by involving states and relevant stakeholders and disseminating assessment reports
- EIA reports should be made publicly available
- Article 206 of UNCLOS should be the point of departure for EIA provisions under the ILBI
- Coordination and communication with existing regional and sectoral bodies on EIAs should occur
- Cumulative impacts should be taken into account in EIAs

¹⁰ Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1996, 33 ILM 1309, Annex, para. 7; International Seabed Authority, Regulations for Prospecting and Exploration of Polymetallic Nodules (Polymetallic Nodule Regulations), 18(c) and (d), available at <http://www.isa.org.jm/files/documents/EN/Regs/PN-en.pdf>.

¹¹ International Seabed Authority, Legal and Technical Commission, *Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area*, available at http://www.isa.org.jm/files/documents/EN/7Sess/LTC/isba_7ltc_1Rev1.pdf, para. 10.

¹² International Tribunal of the Law of the Sea, Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Feb. 1, 2011), available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf, paras. 141–43; Regulations for Prospecting and Exploration of Polymetallic Nodules in the Area (Polymetallic Nodule Regulations), available at https://www.isa.org.jm/sites/default/files/files/documents/isba-19c-17_0.pdf, Regulation 31(6); Regulations for Prospecting and Exploration of Polymetallic Sulphides in the Area (Polymetallic Sulphides Regulations), available at https://www.isa.org.jm/sites/default/files/files/documents/isba-16a-12rev1_0.pdf, Regulation 33(6).

The facilitator's oral report of Working Group discussions on EIA at the third Preparatory Committee meeting identified the following areas for further discussion:

- Whether transboundary EIA should be included in the new instrument and whether this would require a separate procedure
- Whether there should be a list of activities that would always be subject to an EIA
- Whether there should be special provision for EIA in environmentally sensitive areas
- Whether activities already subject to an EIA process in ABNJ should be covered by the EIA processes in the new instrument
- What the nature and form of the public consultation and notification provisions would be under the new instrument
- If the new instrument contained provisions for transboundary EIA, what the involvement of the coastal state would be
- Who would bear the costs of EIAs
- Whether strategic environmental assessments would be included in the new instrument
- What capacity-building measures for EIA would be included in the new instrument
- What form would the clearinghouse for EIAs take
- Governance issues and interlinkages with other elements of the ILBI