

Internationalization of EIA in a new marine biodiversity agreement under the Law of the Sea Convention: A proposal for a tiered approach to review and decision-making

Kahlil Hassanali

World Maritime University - Sasakawa Global Ocean Institute, P.O. Box 500, SE 201 24 Malmö, Sweden

ARTICLE INFO

Keywords:

United Nations Convention on the Law of the Sea (UNCLOS)
Environmental impact assessment
Areas beyond national jurisdiction (ABNJ)
BBNJ agreement
Tiered approach to EIA

ABSTRACT

Environmental Impact Assessment (EIA) is one of the four main elements of the package being negotiated in the Intergovernmental Conference to develop an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ agreement). “Internationalization” of EIA under the agreement, which partly relates to the international community’s role in oversight and outcome of the process, remains a contentious issue that requires continued consideration. Less controversial aspects of internationalization in the EIA process are internationalization of consultation and dissemination of information. They are shown to be critical to achieving quality outcomes and encouraging transparency and accountability. This paper addresses a third dimension of internationalization, relating to review and decision-making, which is proving to be the most divisive in the negotiations to date. This aspect of internationalization is fundamental to allowing decisions taken on proposed activities to be seen as legitimate but concerns exist about the bureaucracy and costs that the process may entail, as well as potential interference with sovereign rights of States Parties under UNCLOS. This paper advances a proposal for internationalization of review and decision-making under the BBNJ agreement that attempts to bridge the divide evident going into the 4th session of the Inter-governmental Conference in 2021.

1. Introduction

Environmental impact assessment (EIA) is commonly identified as having origins in 1969 when its practice was legislated in the US through the *National Environmental Policy Act* (NEPA) (Ortolano and Shepherd, 1995). In the present day, conduct of EIA is a requirement in the vast majority of countries around the globe (Yang, 2019). Rulings in international courts, most notably the International Court of Justice’s (ICJ) judgment in the *Pulp Mills on the River of Uruguay* (Argentina v. Uruguay) case, have affirmed the conduct of EIA as a general obligation under customary international law (Payne, 2011; Boyle, 2011). EIA is also acknowledged as a process that operationalizes duties and principles of international environmental law including the duty to prevent environmental harm, the precautionary principle and the duty to cooperate (Craig, 2020).

The 1982 *United Nations Convention on the Law of the Sea* (UNCLOS) positively influenced the progressive evolution of the customary status afforded to EIA when the responsibility to undertake these assessments was made incumbent on States for activities proposed in marine areas.

Although never specifically making reference to the term “environmental impact assessment”, Article 206 of the Convention embodied its essence in outlining that:

“When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.” – UNCLOS, Article 206.

Application and understanding of the discipline of EIA was still nascent when UNCLOS was being negotiated during the 1970s and early 1980s. It is therefore not surprising that EIA related provisions in UNCLOS are very general, with their vagueness leaving them open to interpretation. For instance, Article 206 does not specify the scope and content of impact assessment to be undertaken in marine areas. Article 205 speaks about the requirement on States to publish assessment and monitoring reports or provide them to competent international organizations, but does not elaborate on when and how this should be done

E-mail addresses: w1903620@wmu.se, kahlil_hassanali@hotmail.com.

<https://doi.org/10.1016/j.eiar.2021.106554>

Received 22 September 2020; Received in revised form 7 January 2021; Accepted 7 January 2021

Available online 15 January 2021

0195-9255/© 2021 The Author. Published by Elsevier Inc. This is an open access article under the CC BY license (<http://creativecommons.org/licenses/by/4.0/>).

and who the competent organizations are. That being said, Articles 205 and 206 of UNCLOS remain enforceable obligations under international law as exemplified by the ruling of the Permanent Court of Arbitration in the *South China Sea* case (Tanaka, 2018). However, with almost 40 years' experience in the conduct of EIA since the Convention was agreed and extensive jurisprudence from international courts and tribunals on the topic, more detailed procedural and substantive requirements as it relates to EIA under UNCLOS can be developed. The opportunity to do this has presented itself in the context of ongoing intergovernmental negotiations to develop a new biodiversity treaty under UNCLOS known as the BBNJ agreement.

This paper, informed by a review of submissions by negotiating Parties, direct participation in the BBNJ agreement negotiations and consideration of other existing EIA frameworks and procedures, examines the issue of internationalization of the EIA process in the draft BBNJ agreement. It starts by giving a brief insight into the BBNJ process up to this point. A discussion on what is meant by "internationalization" within the context of the negotiations then follows. This discussion also considers if internationalization is important or needed. Based on this analysis, the paper then goes on to suggest a process for internationalization as relates to review and decision-making for proposed activities in areas beyond national jurisdiction (ABNJ). The intention of this article is to contribute to the ongoing debate and advance solutions in the intergovernmental negotiation of the BBNJ agreement.

2. Efforts to improve conduct of EIA in marine areas beyond national jurisdiction (ABNJ)

Due to its broad scope and character of universality and changing circumstances over time, UNCLOS has relied on supplemental agreements to clarify and develop more comprehensive rules on some of its provisions (Treves, 2013). Implementing agreements under UNCLOS, namely, the *1994 Agreement relating to the implementation of Part XI of the UNCLOS* and the *UN Agreement for the implementation of provisions of the UNCLOS relating to the conservation and management of straddling fish stocks and highly migratory fish stocks* (UNFSA), have been used for this purpose. As it relates to the former, it is interesting to note that this implementing agreement significantly amended what was originally contained in the Law of the Sea Convention in a number of respects (Duff, 1995). Currently, the negotiation of a third implementing agreement under UNCLOS is in progress. The agreement being negotiated addresses the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ agreement).

Developing the BBNJ agreement has been a long process of informal and formal efforts (Long and Chaves, 2015). It commenced under the auspices of the UN in 2004 with the setting up of the *Ad hoc informal working group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction* (BBNJ Working Group). The process then progressed through a Preparatory Committee (Prep Com) established through UN Resolution 69/292¹ and eventually to an Inter-governmental Conference (IGC) when UN Resolution 72/249² was adopted in December 2017. The negotiations address, together and as a whole, the topics identified in a package agreed in 2011 by the BBNJ working group:

- marine genetic resources, including questions on the sharing of benefits;
- measures such as area-based management tools, including marine protected areas;
- environmental impact assessments; and
- capacity building and the transfer of marine technology

Although UNCLOS already outlines the general obligation on States to assess impacts of proposed activities, in ABNJ the standards and processes for the conduct of EIA are fragmented, varying considerably between sectors, between regions, sometimes within sectors and in some instances the duty to conduct EIA and the manner in which this is done may not yet even be a consideration (Elferink, 2012a; Warner, 2012). Therefore, a critical objective of the BBNJ agreement is to bring coherence to the conduct of EIA in ABNJ including by establishing processes, thresholds and guidelines for conducting and reporting of assessments by States.

The IGC for the BBNJ agreement has been organized into four substantive meeting sessions. The first session took place in September 2018, the second in March 2019 and the third in August 2019. The fourth session was scheduled to be completed in the first half of 2020 but has been postponed due to the global Covid-19 pandemic. By the end of the fourth session, negotiators are supposed to have elaborated the text of the BBNJ agreement. However, at the closing of the third session, the Chair of the informal working group on EIA highlighted a number of issues on which there is still no convergence and which could benefit from further consideration. At the forefront of these is "the degree to which environmental impact assessment process should be 'internationalized', for example by assigning roles to the scientific and technical body or the conference of parties" (*Statement by the President of the Conference at the closing of the third session*, p. 13³).

3. Internationalization – the what and the why

There is no single interpretation of what is meant by "internationalization" of EIA under the BBNJ agreement. In the *Report of the Preparatory Committee established by General Assembly resolution 69/292*,⁴ which was produced in July 2017 and was the basis on which the UNGA decided to convene the IGC, it was identified that "further discussions are required on the degree to which the (EIA) process should be conducted by States or be 'internationalized'" (p. 17 – emphasis added). On the surface therefore, "internationalization" may have been best understood as one end of a continuum between a State-led EIA process and one that is subject to full global oversight.

As discussions progressed during the IGC, what is meant by internationalization has been clarified. At the broadest level internationalization relates to having common standards for the conduct of EIA in ABNJ, the absence of which, as alluded to earlier, is a problematic feature of the current governance framework (Elferink, 2012a; Warner, 2012; Doelle and Sander, 2020). Whether the standards set out in the BBNJ agreement should constitute global minimum EIA standards for all activities that impact ABNJ and how this is to be co-ordinated and realized given that there are existing entities with already established EIA responsibilities and mandates, are still topics of debate. The International Seabed Authority (ISA) is one such entity. Its regulations, including the *Recommendations for the Guidance of Contractors for Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area*,⁵ already specify, inter alia, the extent of EIAs to be conducted under its purview. At the closing of the third session of the BBNJ IGC, the Chair of the EIA informal working group acknowledged that this aspect of internationalization i.e. interaction

³ Statement by the President of the Conference at the closing of the third session: <https://undocs.org/a/conf.232/2019/10> (accessed on 17th August 2020)

⁴ Report of the Preparatory Committee established by General Assembly resolution 69/292: https://www.un.org/ga/search/view_doc.asp?symbol=A/A.C.287/2017/PC.4/2 (accessed on 4th August 2020)

⁵ Recommendations for the Guidance of Contractors for Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area: https://isa.org.jm/files/files/documents/ISBA_25_LTC_6_Rev.1_Corr.1-2007786E.pdf (accessed on 22nd September 2020)

¹ UN Resolution 69/292: <https://undocs.org/A/RES/69/292>

² UN Resolution 72/249: <https://undocs.org/A/RES/72/249>

with existing arrangements in the development and subsequent operationalization of the BBNJ agreement, needs further attention (*Statement by the President of the Conference at the closing of the third session*, p. 14). This particular discussion is outside the scope of this paper however.

Another dimension of internationalization shall be addressed here. The Chair of the EIA informal working group also highlighted that there is little convergence with respect to “the degree to which the environmental impact assessment process should be ‘internationalized’, for example by assigning roles to the scientific and technical body or the conference of the parties” (*Statement by the President of the Conference at the closing of the third session*, p. 13). This article therefore drills down deeper into the actual substance of what is being negotiated and discusses internationalization through that lens. It examines internationalization within the EIA process that proposed activities would be subject to in the agreement and the decision-making procedure that would follow. Within the context of the IGC, consideration of this process and decision-making dimension of internationalization, reveals that there is nuance to acknowledge and scrutinize. In this regard, generally, delegations see internationalization as entailing one or more of the following:

1. Internationalization of consultation which implies broad, global scale stakeholder notification, engagement and public participation as relates to consultation throughout the EIA process.
2. Internationalization of dissemination of information which refers to open distribution, circulation and public access to information, including to the reports and decision-making documents emanating from the EIA process.
3. Internationalization of review and decision-making where the issue of global oversight is addressed and EIA reports are reviewed by independent experts and forwarded to an identified representative body who determines whether activities proceed or not.

The first category, internationalization of consultation, is addressed under Article 34 (Public Notification and Consultation) of the President’s revised draft text⁶ released after the 3rd session of the IGC. Public participation is a well-established requirement in all EIA procedures (Glucker et al., 2013) for normative e.g. influencing decisions, empowering marginalized groups, enhancing democracy; substantive e.g. harnessing information and knowledge; and instrumental reasons e.g. resolving conflicts (O’Faircheallaigh, 2010). Article 34(1) of the revised draft text sets forth that:

“States Parties shall ensure early notification to stakeholders about planned activities under their jurisdiction or control and effective, time bound opportunities for stakeholder participation throughout the environmental impact process, including through the submission of comments, before a decision is made as to whether to proceed with the activity.”

Paragraph 2 of Article 34 goes on to outline a broad and comprehensive, but indicative and non-exhaustive list of stakeholders to be notified and consulted in the process. However, this paragraph is wholly bracketed along with some of the categories of stakeholders listed including “indigenous people and local communities with relevant traditional knowledge in adjacent coastal States”, who some commentators see as having an integral but traditionally marginalized voice (Mulalap et al., 2020; Vierros et al., 2020), and “interested and relevant stakeholders”, which may include those who may wish to speak on behalf of nature (Harden-Davies et al., 2020). Encouraging internationalization of consultation lies firstly in sending the right signal through what is included in the text of the agreement. The text would

help dictate and guarantee that mechanisms are put in place which ensure States genuinely and transparently enable participation and actively consult with the public and stakeholders who may have something to contribute, not just those who may be perceived as relevant, familiar or accessible. In this regard, in the absence of, or as a complement to listed examples, definitions of what constitutes the “public” and “stakeholders” may be useful inclusions in the agreement text.

Impetus and precedent for the second identified dimension of internationalization, internationalization of dissemination of information, can be found in two multi-lateral treaties that have been crafted for this purpose. The *United Nations Economic Commission for Europe (UNECE) Convention on access to information, public participation in decision-making and access to justice in environmental matters* (Aarhus Convention),⁷ adopted in 1998, provides for the right of everyone to access environmental information that is held by public authorities and obliges public authorities to actively disseminate same (Oliver, 2013). Although originally crafted within a pan-European context it is open to signature by non-UNECE countries. Of more recent vintage, the 2018 *Regional Agreement on access to information, public participation and justice in environmental matters in Latin America and the Caribbean* (Escazú Agreement)⁸ is a sister agreement to the Aarhus Convention crafted with consideration to circumstances existing in that part of the world. Although not without shortcomings and challenges to implementation (Mason, 2010; Stec and Jendroška, 2019), the intent and principles espoused in these two treaties are laudable and aspirational (Barritt, 2019). Indeed, Article 3(7) of the Aarhus Convention⁹ and Article 4(10) of the Escazú Agreement mandate that Parties promote the application of the principles contained therein in other international environmental decision-making processes. This is already being done to some extent in global climate change regime (Duyck, 2015), has been done in regard to the management plan for the Clarion-Clipperton Zone in the deep-seabed mining regime and is certainly therefore also germane to the EIA process under the BBNJ agreement. The *Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums* can be instructive in these efforts.

The revised draft text of the BBNJ agreement contains avenues that can effect internationalization of dissemination of information in EIA processes. Again, article 34 is important where paragraph 5 speaks to States parties establishing procedures allowing for access to information related to the EIA process under the agreement. Exceptions are proposed to be made for “non-public information or information that would undermine intellectual property rights or other interests”. This allowance, while not unusual, may benefit from more clarity in the text as, as phrased, it is open to wide interpretation and therefore potentially disingenuous usage. Nonetheless, internationalization of dissemination of information is bolstered by Articles 36 and 40 which address publication of reports coming out of the EIA process, including monitoring and review reports from approved activities. These articles both contain the bracketed suggestion that the proposed clearing-house mechanism be one outlet utilized in this regard. Bracketed text in Article 40(2) also specifically recognises that a Scientific and Technical body (STB) established under the agreement be one body who must receive monitoring reports and that may exercise additional review of them. Moreover, the draft BBNJ agreement text further potentially improves upon UNCLOS provisions by recognizing that it is necessary for decision-

⁷ Aarhus Convention text: <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> (accessed on 7th August 2020)

⁸ Escazú Agreement text: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf (accessed on 7th August 2020)

⁹ The Almaty Guidelines on “Promoting the Application of Principles of the Aarhus Convention in International Forums” has been adopted to give further guidance on effecting Article 3(7) of the Aarhus Convention: <https://www.unece.org/fileadmin/DAM/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.5.e.pdf> (accessed on 25th August 2020)

⁶ Revised draft text of an agreement 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: <https://undocs.org/en/a/conf.232/2020/3> (accessed on 4th August 2020)

making related documents be made public. This is currently found in bracketed text in Article 38(3).

Taken together, internationalization of consultation and internationalization of dissemination of information can ensure transparency and accountability in the EIA process and subsequent decision-making on and monitoring of activities that have effects in ABNJ. Accountability and transparency are features of good governance and have been identified as qualities inherent to “next generation environmental assessment” (Doelle and Sander, 2020). Overall, through effective operationalization of these aspects of internationalization, the quality of outcomes should be improved, adaptive management could be encouraged (Noble, 2000), opportunities for the process to be secretive and ad hoc would be lessened, balance of interests and equity can more readily be achieved and decision makers and persons in authority could be held to high standards (Morrison-Saunders and Early, 2008). Additionally, especially as it relates to internationalization of consultation, more legitimacy and acceptability in decisions can be generated (Glucker et al., 2013).

That being said, when considering the global commons that are ABNJ, legitimacy in EIA decision-making entails more than just ensuring genuine and inclusive participation and consultation. Some commentators have called for advancing the principle of stewardship as a basis to guide governance of ABNJ with a view to expressing the idea that all States have a shared interest and responsibility in this regard (Elferink, 2012b; Ridings, 2018). Indeed, the preamble of the revised draft text speaks to States Parties to the agreement “desiring to act as stewards of the ocean in areas beyond national jurisdiction on behalf of present and future generations”. The evolving legal doctrine of common concern of humankind (CCH) captures the notion of the responsibility of States as stewards of the global marine environment (Shelton, 2009) and warrants consideration for inclusion in Article 5 on general principles and approaches (Bowling et al., 2016). It must be made clear however, that to say this is not to advocate for CCH replacing the related but more robustly developed and legally distinct principle of common heritage of mankind (currently bracketed in Article 5), which has been suggested in the past in discussions about access and benefit sharing of marine genetic resources in ABNJ (International Institute for Sustainable Development, 2017).

In the global commons, recognition and acknowledgement of shared interest and responsibility has important implications for decision-making. It shapes the understanding that it cannot be considered good governance practice to have a framework where a State is allowed to make a unilateral decision as to whether an activity, with great potential to affect the environment and its constituents in ABNJ, may proceed or not. It could be used to further argue that to make such a decision is not the legitimate right of a singular State in an area under global custodianship. In sum, it provokes the realization that legitimacy would better result from internationalization of review and decision-making as it relates to EIA for activities proposed in ABNJ.

At the negotiations however, this aspect of internationalization remains very contentious. A seemingly intractable cleavage exists between countries wanting review and decision-making to be under the control of individual States and those wanting to see the process have greater global oversight. The European Union (EU), USA, Canada and United Kingdom are some of the countries that have expressed sentiments aligned with the former category while the Caribbean Community (CARICOM), group of Pacific small island developing States (PSIDS) and the Philippines are examples of the latter. Countries not wanting internationalization of review and decision-making cite the interference with State's rights under UNCLOS, the existence of capable and well-functioning EIA machinery already existing within their own territories, exorbitant costs to set up and maintain an internationalized system and possible lengthy delays in the process of review and decision-making as reasons for preferring the EIA procedure remains State controlled. With this in mind, this paper will now go on to present a proposal aimed at bridging the divide that exists as relates to

internationalization of review and decision-making in the negotiations.

4. Proposal for internationalization of review and decision-making

With a view to attaining a resolution which, in the spirit of compromise, would see the interests of States on both sides of the divide being accommodated to some degree in a solution that is practical and implementable, a novel approach must be sought. Given the elicited positions of negotiators, the ongoing, protracted debate on internationalization of review and decision-making for EIA under the BBNJ agreement requires creative adaptation and adoption of features found in assessment frameworks that are currently employed elsewhere around the world. That is the idea behind this proposed novel framework. The main features of this arrangement, which includes tiering and roles for organs set up under the agreement, shall be expanded upon below.

Ceding review and decision-making to international authorities or cooperative bodies is not an untried concept in the governance of ocean affairs. For example, individual countries do not unilaterally establish ship routing; proposals made by countries in this regard are evaluated by the International Maritime Organization's (IMO) sub-committee on Navigation, Communication and Search and Rescue (NCSR) and adopted by the Maritime Safety Committee (MSC). This is so despite activities such as navigation and fishing being qualified as “freedoms” in the high seas under Article 87 of UNCLOS. It therefore reinforces the fact that these and other freedoms are not absolute but subject to certain obligations such as the duty to cooperate in the conservation and management of living resources, as expressed in Article 118 of UNCLOS.

However, one only has to look at the Commission on the Limits of the Continental Shelf (CLCS), a part-time body established under UNCLOS which gives recommendations to coastal States on their extended continental shelves submissions, to see that concerns about lengthy delays in the process of international review and decision-making, can be well founded. Currently, the workload of the CLCS far exceeds its resources and capacity and it is now the norm for States to have wait times of well over a decade for their submissions to be given consideration (Subedi, 2011). Although the workload of an international body which would have responsibility for EIA review and decision-making for proposed activities with impact in ABNJ is as yet uncertain, if not properly resourced there is the possibility that such an arrangement could become non-functional, ineffective and moribund. Tiering of the EIA process would be a feasible way to minimize the likelihood of unmanageable caseloads, allowing in country expertise to be utilized where appropriate, while still ensuring that the most impactful activities are subject to the internationalized process.

The Antarctic Treaty system (ATS) which aims that Antarctica shall be used for peaceful purposes and provides the mechanism for international cooperation and management for the vast continent (Triggs, 2011), has adopted an EIA procedure that employs a tiered approach as a central feature of the mechanism. The 1991 *Protocol on Environmental Protection to the Antarctic Treaty* (Madrid Protocol), which entered into force in 1998, sets out how the tiered EIA system works. The protocol operationalizes the threshold of “minor or transitory” effects in order to give effect to the tiered approach. Under Article 206 of UNCLOS the threshold used for conduct of EIA is “substantial pollution of or significant and harmful changes to the marine environment”. Importantly, for the purposes of the BBNJ agreement, which is meant to at least be consistent with, if not build upon, what is found in the Convention, the Madrid Protocol's threshold can be squared with UNCLOS' threshold. Proposed activities with “more than minor or transitory” effects can be deemed to match the standard found in Article 206 of UNCLOS (Bastmeijer and Roura, 2008). It should be noted that in Article 24 of the revised draft text, in one alternative put forward for the threshold for the conduct of EIA, the “more than minor or transitory effects” threshold is confusingly proposed to operate alongside the UNCLOS threshold even

though they essentially mean the same thing. This paper will attempt to alleviate this confusion in the approach that it presents. At the same time, it will be seen that what is being proposed here will not derogate from or dilute the primary obligations flowing from the Convention.

Under the Madrid Protocol, three levels of potential impacts are established which sets the stage for how the EIA regime proceeds. A preliminary assessment for proposed activities is conducted which determines whether its impacts are likely to be less than minor or transitory; minor or transitory; or more than minor or transitory. If the impacts are determined to be less than minor or transitory the activity can proceed. If impacts are deemed to be minor or transitory an additional initial environmental evaluation (IEE) is required. However, if the preliminary assessment determines that the impacts are likely to be more than minor or transitory, a comprehensive environmental evaluation (CEE) is needed. In the Madrid Protocol, IEE and CEE have different requirements and the latter is subject to international scrutiny (Bastmeijer and Roura, 2008). For the EIA approach under the BBNJ agreement, what is being proposed, and explained in more detail later on, is adoption of preliminary assessment to determine the likely level of impact. The likely level of impact would then be used to tier the process with the functional variable being not the type of EIA to be carried out but rather the level of global oversight any conducted EIA is subject to.

Global oversight would entail, in the first instance, a review of the initial EIA report by the STB established by the BBNJ agreement. There is general support for an STB to be established under the BBNJ agreement, with details regarding it being addressed in Article 49 of the revised draft treaty text. At present, it is uncertain what form the STB would take, with many delegations choosing to defer that discussion to a later stage when there is a clearer picture emerging on how the agreement as a whole would take shape (International Institute for Sustainable Development, 2019). “Form follows function” is often the remark made by delegations in this regard. This proposal would see the STB performing functions related to ensuring adherence of EIAs to procedural requirements of the agreement e.g. mandatory report content and extent of public consultation; and assessing the actual quality of the report, including the alternatives and mitigation measures it will propose. In order to adequately carry out these functions the STB would need to have access to a wide range of expertise contingent upon the subject matter and regional peculiarities of the assessment. Internationalization of review is not only important for transparency purposes but it also allows countries who may want, or need, to review EIA reports (as is their right), but lack the capacity to do so, to find comfort in the fact that an independent body of qualified experts is tasked with this responsibility on their behalf.

After a thorough review of the EIA is done by the STB, it will then forward its recommendation to a body representing the global community to make a decision as to whether the given activity would be given leave to proceed or not, and if so under what conditions. A Conference of Parties (COP) is such a global body and it too seems to be a favoured institutional arrangement to be established under the BBNJ agreement (International Institute for Sustainable Development, 2019). The intention is to have the COP make its decision based on the advice of the STB to reinforce a science-based approach to management (Elferink, 2012b). However, it is acknowledged that other factors, including political ones, may play a part in decision-making under the COP. There may be use in developing transparent criteria for decision-making that can be objectively scrutinized to improve accountability in the procedure. That being said, it is recognized that development of such criteria may also be a long and contentious process which should not delay implementation of this proposal if it is adopted.

With the preceding considerations in mind, the proposal for internationalization of review and decision-making can now be fully outlined (Fig. 1). Under Article 30 on “Screening” in the revised draft treaty text, a preliminary assessment of the proposed activity will be carried out. This screening is with a view to determining the level of effect on the marine environment and associated ecosystems the activity is likely to

have. The level of effect would be classified as either “less than minor or transitory effects”, “minor or transitory effects” or “more than minor or transitory effects”. It is being advanced that this screening process be conducted by the State under whose jurisdiction or control the activity falls, but those States must provide documents to the STB and general public outlining how its decision was arrived at, for information purposes and to allow challenges to that decision should it be clear, on the basis of science or otherwise, that it was improperly taken. The STB would therefore have latitude to make recommendations to the State to address inadequacies in its analysis. It is also being suggested that a body of experts, independent of the STB, be established under the agreement to assist States in conducting the preliminary assessment, should there be need to do so but, at the same time, a lack of capacity. Members of this body of experts can be accredited by the STB. States may then commission them to conduct screening with costs to be borne by the proponents of activities.

Based on the findings of the screening the proposed activity will then enter either a State controlled stream for review and decision-making or an international one. If the screening determines that the proposed activity is likely to have minor or transitory effects, the activity goes into a State-led mandatory EIA process where, after the EIA has been conducted to the standards outlined in the Agreement, decision-making as to whether the activity proceeds or not would be done by the State under whose jurisdiction or control the activity falls. In this stream, all EIA and decision-making documents are still required to be made public through whatever means is decided, including the clearing-house mechanism. On the other hand, if the screening determines that the proposed activity is likely to have more than minor or transitory effects then the internationalization of review and decision-making occurs. This should also occur when the screening determines that the effects of the proposed activity are unknown or poorly understood which is in line with the application of precaution especially in the face of novel activities that may have impacts in ABNJ. As outlined above, internationalization of review and decision-making entails review of the EIA by the STB and decision-making on behalf of the global community by the COP. Lastly, as with the Antarctic Treaty, if the screening determines that the proposed activity is likely to have less than minor or transitory effects, no further evaluation will be required under the Agreement.

This proposal on how the EIA procedure under the BBNJ agreement should function is one of compromise. It seeks to achieve internationalization of review and decision-making where it matters most i.e. with activities that have the potential to cause the most harmful effects. At the same time the tiering of the system provides a means to not overburden the bodies established under the agreement with assigned roles, in particular, the STB. The STB will only have responsibility to review EIA reports for activities forecasted to have more than minor or transitory effects. The experience in Antarctica may be used as a proxy to gauge the future workload of the STB. Perusal of the EIA database of the Secretariat of the Antarctic Treaty¹⁰ reveals that from 1991 (the year the Madrid Protocol was signed) to now, only 26 projects required the conduct of CEE. Thousands of other proposed activities during that time required only IEE or preliminary assessment. These statistics may serve to allay some fears of an unmanageable caseload, especially if the STB were to be properly resourced.

5. Challenges and opportunities in the proposed approach

With this novel proposed approach there will likely be teething issues and challenges to application. However, there are also safeguards and supporting and complementary mechanisms that could be put in place to aid implementation and functionality of the arrangement being suggested. For instance, an effective system hinges on the ability of States

¹⁰ Antarctic Treaty EIA database: <https://www.ats.aq/e/eia.html> (accessed on 13th August 2020)

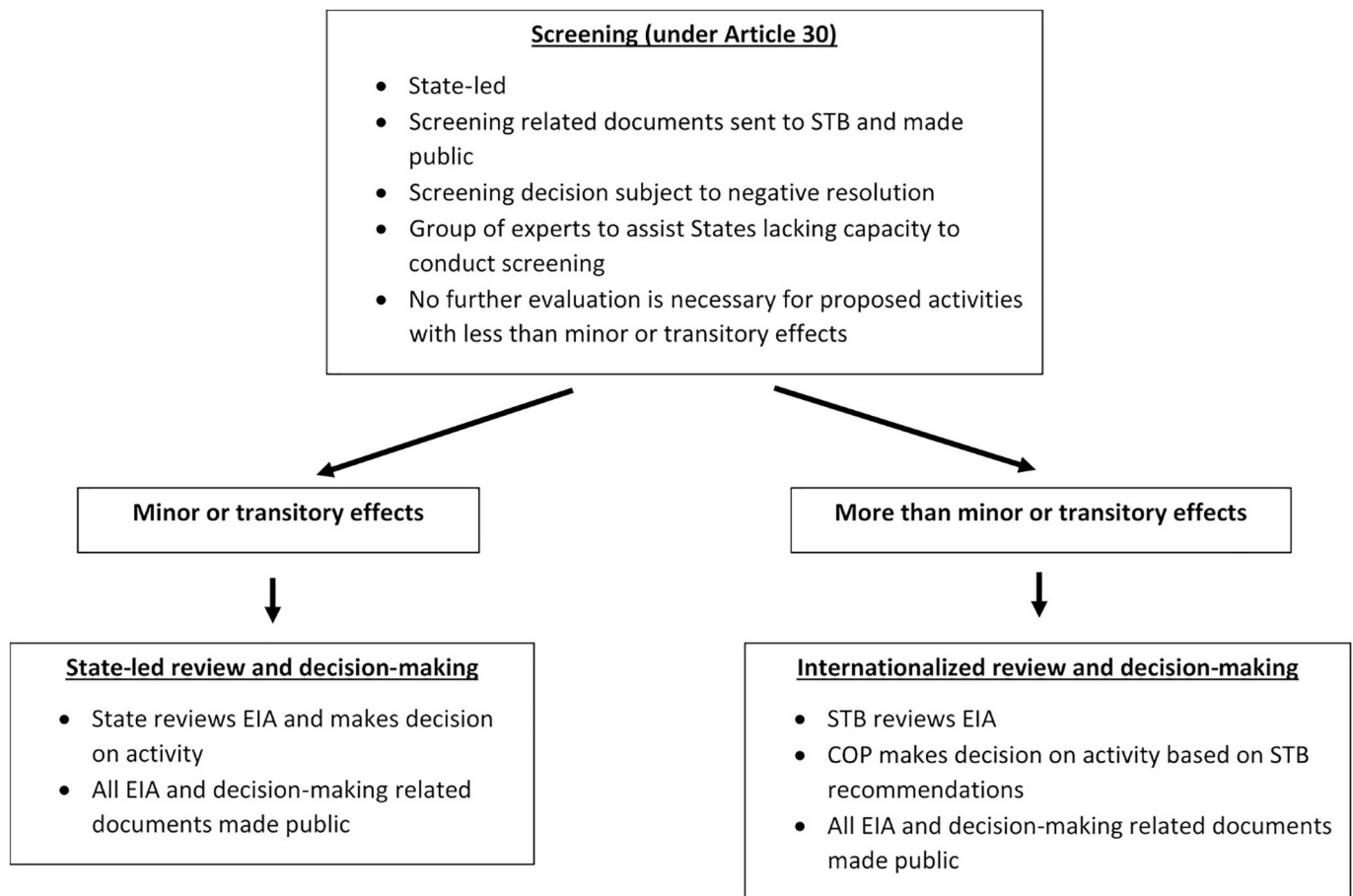


Fig. 1. Proposed approach for EIA review and decision-making under the BBNJ agreement.

parties to accurately and transparently classify activities by the appropriate level of likely effects during the screening stage. The revised *Guidelines for Environmental Impact Assessment in Antarctica*,¹¹ adopted in 2016, notes that, despite attempts, no agreement has so far been reached on how “minor or transitory” effect is defined. It goes on further to suggest that interpretation needs to be made on a case by case, site specific basis due to the dependence of a number of variables associated with each activity and each environmental context. The lack of concrete criteria has led to some tensions in the past within the setting of the Antarctic Treaty Consultative Meeting where scientific, environmental and operational issues are discussed (Hemmings and Kriwoken, 2010).

Under the BBNJ agreement there may be room for the STB to build upon what has already been tabled under the auspices of the Antarctic Treaty and attempt to develop more objective specifications and guidelines, tailored to ABNJ, for the “minor or transitory” threshold. It should be noted that the UNCLOS Article 206 threshold also remains unelaborated and open to interpretation (Kong, 2011). Therefore, absence of specific guidelines for the “minor or transitory” threshold should not be seen as a deterrent to endorsing this proposal. However, development of further guidance as to what this particular threshold means would be a prudent, pragmatic action that could be undertaken to improve implementation of the BBNJ agreement. Guidelines may be gradually developed over time and should also not be seen as a reason to delay implementation of this proposal should it be adopted.

As alluded to earlier, criteria and guidelines may also be important to obtaining an objective decision as to whether an activity proceeds or

not. This is so whether the decision is to be made in the State-led stream or the internationalized stream for decision-making. The development of such transparent criteria and guidelines will also ultimately aid in the BBNJ agreement being effective in implementation. In the draft treaty text there is currently one listed criterion, found in the bracketed Article 38(2), which says that no proposed activity may proceed where the EIA indicates there will be “severe adverse impacts on the environment”. With specific regard to this point, it is important to highlight that “severe” as a standard for classifying adverse impacts is found nowhere in international law as it relates to EIA (High Seas Alliance, 2020). Strong consideration should therefore be given to adopting the more commonly used standard of “significant”, when referring to adverse effects, as the bar for not permitting activities to proceed.

Confidence in this proposed process being effective and fit for purpose can be bolstered by adequate implementation of strategic environmental assessment (SEA). SEA is also a major feature under discussion in this Part of the BBNJ agreement, and can help in determining whether the threshold for internationalized review and decision-making for proposed activities has been crossed and improve the subsequent evaluation that is carried out. There is no single understanding of what SEA entails (Noble and Nwanekezie, 2017) but it may be seen as a proactive evaluation of the vulnerability of a geographic area or ecosystem type to potential human activities so as to establish what kinds of activities may be permitted and how the likely impacts will be assessed by EIA. SEA conducted under the BBNJ agreement can help to inform decision-making including as it relates to screening of proposed activities (Clark et al., 2020).

Finally, as noted by Yotova (2016) in commentary on the judgment delivered by the ICJ in the joined cases of *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of*

¹¹ Guidelines for Environmental Impact Assessment in Antarctica: https://documents.ats.aq/recatt/att605_e.pdf (accessed on 14th August 2020)

a Road in Costa Rica along the San Juan River (*Nicaragua v Costa Rica*), the Court's analysis highlighted that the threshold of risk triggering the obligation to conduct EIA is subject to international judicial scrutiny and not up to the State alone. Although these cases were not connected to ABNJ, they did concern transboundary effects and effects on shared resources. The ruling suggests that under the BBNJ agreement the standard of due diligence should be firmly linked to the decisions and actions taken by States. Furthermore, it is prudent to ensure decisions made at all stages of the EIA process be subject to the established dispute resolution mechanisms under the agreement.

It is also important to note that for the purposes of liability and compensation, in line with Article 235 of UNCLOS, due diligence on the part of the State becomes an important consideration where they have jurisdiction over persons causing damage as a result of approved activities (Svendsen, 2020). State responsibility in relation to screening and subsequent review and decision-making on an EIA is applicable in this regard. For the purposes of activities impacting ABNJ however, it is being advanced here that the liability and compensation regime needs to go further, especially in light of the fact that, under this proposal, the STB and the COP will have roles in the permitting of some activities. Liability and compensation have not received much attention in discussions at the IGC thus far and there are no provisions that address it in the revised draft text (Long, 2019). States under whose jurisdiction proponents of activities in BBNJ fall should be required to implement strict liability on them in order to ensure prompt and adequate compensation in the event of damage to the environment. Consideration should be given to creation of a liability fund under the agreement to which proponents of activities would be required to contribute or a provision ensuring that proponents of activities acquire suitable accident and liability insurance to cover permitted activities throughout the duration of their life-cycle.

6. Conclusion

Provisions in UNCLOS, and Article 206 in particular, do not specify the scope and content of impact assessment to be undertaken in marine areas. The Convention is also largely silent on procedural matters pertaining to the internationalization of EIA, apart from Article 205 which requires the publication of assessment and monitoring reports, either directly or by providing them to competent international organizations which should then make them available to States. The BBNJ agreement is a means to clarify and build upon UNCLOS' EIA provisions, in ABNJ in particular. With a total of twenty-one articles, Part IV on EIA is the longest section of the revised draft text of the BBNJ agreement. During the third session of the IGC, deliberations on this part were lengthy with negotiators convening in two informal working group sessions and ten "informal-informals". Despite many hours dedicated to the various facets relating to internationalization of EIA, the issue remains a divisive and unresolved aspect of the BBNJ agreement negotiations. This is less so as it relates to internationalization of consultation and dissemination of information but is definitely the case with respect to internationalization of review and decision-making.

As a global commons, ABNJ require a framework for EIA that is co-operative, transparent, accountable and robust. At the same time, a framework that is efficient, nimble and cost-effective is also expected. Proposals on internationalization of EIA under the BBNJ agreement need to effectively balance these interests. As negotiations enter the fourth session of the IGC, delegations will need to move away from their entrenched positions if the issue of internationalization is to be settled. The proposal outlined here, it is felt, represents an arrangement of compromise, practicality and progressive ideals which can support the goal of conservation and sustainable use of marine biological diversity of ABNJ. Moreover, it encourages precaution and evidence-based decision-making in the management of the marine environment which are crucial characteristics to inculcate in blue economy development models.

Author statement

All persons who meet authorship criteria are listed as authors. The author certifies that he has participated sufficiently in the work to take public responsibility for the content, including participation in the concept, design, analysis, writing, or revision of the manuscript. Furthermore, the author certifies that this material or similar material has not been and will not be submitted to or published in any other publication before its appearance in Environmental Impact Assessment Review.

Declaration of Competing Interest

The Author is a negotiator for the Caribbean Community (CARICOM) on Environmental Impact Assessment in the intergovernmental process to develop an international legally binding instrument under the United Nations Convention on the Law of Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

Acknowledgements

The ideas explored in this paper partly form the basis of the Caribbean Community's (CARICOM) proposal on EIA in the BBNJ agreement negotiations going into the 4th session of the Inter-governmental Conference. The author would like to thank CARICOM colleagues for their efforts and engagement in formulating these ideas. Colleagues from the Pacific Small Island Developing States (PSIDS) and the High Seas Alliance (HSA) were also integral and valued in this process. This article is part of a PhD research project under the "Land-to-Ocean Leadership Programme" at the World Maritime University (WMU) – Sasakawa Global Ocean Institute, Malmö, Sweden. The author would like to acknowledge the generous funding of the Institute by The Nippon Foundation, as well as the financial support of the Programme provided by the Swedish Agency for Marine and Water Management (SwAM) and the German Federal Ministry of Transport and Digital Infrastructure. Sincere gratitude is also extended to Ronan Long, Meinhard Doelle and the anonymous reviewers for their helpful comments and insights that improved the manuscript.

References

- Barritt, E., 2019. Global values, transnational expression: From Aarhus to Escazú. In: TLI Think! Paper 11. King's College London, Transnational Law Institute.
- Bastmeijer, K., Roura, R., 2008. Environmental impact assessment in Antarctica. In: Theory and Practice of Transboundary Environmental Impact Assessment. Brill Nijhoff, Boston, pp. 175–219.
- Bowling, C., Pierson, E., Ratté, S., 2016. The common concern of humankind: a potential framework for a new international legally binding instrument on the conservation and sustainable use of marine biological diversity in the high seas. In: White Paper, pp. 1–15. https://www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf (Accessed 7th August, 2020).
- Boyle, A., 2011. Developments in the international law of environmental impact assessments and their relation to the Espoo convention. *Rev. Eur. Commun. Int. Environ. Law* 20 (3), 227–231.
- Clark, M.R., Durden, J.M., Christiansen, S., 2020. Environmental impact assessments for deep-sea mining: can we improve their future effectiveness? *Mar. Policy* 114.
- Craig, N., 2020. The duty to cooperate in the customary law of environmental impact assessment. *Int. Comp. Law Quart.* 69 (1), 239–259.
- Doelle, M., Sander, G., 2020. Next generation environmental assessment in the emerging high seas regime? An evaluation of the state of the negotiations. *Int. J. Marine Coast. Law* 35 (3), 498–532.
- Duff, J.A., 1995. UNCLOS and the new deep seabed mining regime: the risks of refuting the treaty. *Suffolk Transnat'l L. Rev.* 19, 1.
- Duyck, S., 2015. Promoting the principles of the a rhus C onvention in international forums: the case of the UN climate change regime. *Rev. Eur. Compar. Int. Environ. Law* 24 (2), 123–138.
- Elferink, A.G.O., 2012a. Environmental impact assessment in areas beyond national jurisdiction. *Int. J. Marine Coast. Law* 27 (2), 449–480.
- Elferink, A.G.O., 2012b. Governance principles for areas beyond national jurisdiction. *Int. J. Marine Coast. Law* 27 (2), 205–259.

- Glucker, A.N., Driessen, P.P., Kolhoff, A., Runhaar, H.A., 2013. Public participation in environmental impact assessment: why, who and how? *Environ. Impact Assess. Rev.* 43, 104–111.
- Harden-Davies, H., Humphries, F., Maloney, M., Wright, G., Gjerde, K., Vierros, M., 2020. Rights of nature: perspectives for Global Ocean stewardship. *Mar. Policy* 104059.
- Hemmings, A.D., Kriwoken, L.K., 2010. High level Antarctic EIA under the Madrid protocol: state practice and the effectiveness of the comprehensive environmental evaluation process. *Int. Environ. Agreements: Politics Law Econ.* 10 (3), 187–208.
- High Seas Alliance, 2020. Decision-making Standards in ABNJ.. Information Brief. January 2020.
- International Institute for Sustainable Development, 2017. Summary of the third session of the preparatory committee on marine biodiversity beyond areas of national jurisdiction: 27 March–7 April 2017. In: *Earth Negotiations Bulletin*, Vol. 25 No. 129. <https://enb.iisd.org/download/pdf/enb25129e.pdf> (Accessed 7th August, 2020).
- International Institute for Sustainable Development, 2019. Summary of the third session of the intergovernmental conference (IGC) on marine biodiversity beyond areas of national jurisdiction: 19–30 August 2019. In: *Earth Negotiations Bulletin*, Vol. 25 No. 218. <https://enb.iisd.org/download/pdf/enb25218e.pdf> (Accessed 13th August, 2020).
- Kong, L., 2011. Environmental impact assessment under the United Nations convention on the law of the sea. *Chic. J. Int. Law* 10 (3), 651–669.
- Long, R., 2019. Restoring marine environmental damage: can the Costa Rica v Nicaragua compensation case influence the BBNJ negotiations? *Rev. Eur. Comp. Int. Environ. Law* 28 (3), 244–257.
- Long, R., Chaves, M.R., 2015. Anatomy of a new international instrument for marine biodiversity beyond national jurisdiction. *Environ. Liabil. Law Policy Pract.* 6, 213–229.
- Mason, M., 2010. Information disclosure and environmental rights: the Aarhus convention. *Glob. Environ. Politics* 10 (3), 10–31.
- Morrison-Saunders, A., Early, G., 2008. What is necessary to ensure natural justice in environmental impact assessment decision-making? *Impact Assess. Proj. Apprais.* 26 (1), 29–42.
- Mulalap, C.Y., Frere, T., Huffer, E., Hviding, E., Paul, K., Smith, A., Vierros, M.K., 2020. Traditional knowledge and the BBNJ instrument. *Mar. Policy* 104103.
- Noble, B.F., 2000. Strengthening EIA through adaptive management: a systems perspective. *Environ. Impact Assess. Rev.* 20 (1), 97–111.
- Noble, B., Nwanekezie, K., 2017. Conceptualizing strategic environmental assessment: principles, approaches and research directions. *Environ. Impact Assess. Rev.* 62, 165–173.
- O’Faircheallaigh, C., 2010. Public participation and environmental impact assessment: purposes, implications, and lessons for public policy making. *Environ. Impact Assess. Rev.* 30 (1), 19–27.
- Oliver, P., 2013. Access to information and to justice in EU environmental law: the Aarhus convention. *Fordham Int’l LJ* 36, 1423.
- Ortolano, L., Shepherd, A., 1995. Environmental impact assessment: challenges and opportunities. *Impact Assess.* 13 (1), 3–30.
- Payne, C.R., 2011. Pulp Mills on the river Uruguay (Argentina v. Uruguay). *Am. J. Int. Law* 105 (1), 94–101.
- Ridings, P., 2018. Redefining environmental stewardship to deliver governance frameworks for marine biodiversity beyond national jurisdiction. *ICES J. Mar. Sci.* 75 (1), 435–443.
- Shelton, D., 2009. Common concern of humanity. *Iustum Aequum Salutare* 5, 33.
- Stec, S., Jendroška, J., 2019. The Escazú agreement and the regional approach to Rio principle 10: process, innovation, and shortcomings. *J. Environ. Law* 31 (3), 533–545.
- Subedi, S.P., 2011. Problems and prospects for the commission on the limits of the continental shelf in dealing with submissions by coastal states in relation to the ocean territory beyond 200 nautical miles. *Int. J. Marine Coast. Law* 26 (3), 413–431.
- Svendsen, K., 2020. Liability and compensation for activities in the area. In: *The Law of the Seabed*. Brill Nijhoff, pp. 593–610.
- Tanaka, Y., 2018. The South China Sea arbitration: environmental obligations under the law of the sea convention. *Rev. Eur. Comp. Int. Environ. Law* 27 (1), 90–96.
- Treves, T., 2013. UNCLOS at thirty: open challenges. *Ocean Yearbook* 27, 49–66.
- Triggs, G., 2011. The Antarctic treaty system: A model of legal creativity and cooperation. In: Berkman, P.A., Lang, M.A., Walton, D.W.H., Young, O.R. (Eds.), *Science Diplomacy: Antarctica, Science, and the Governance of International Spaces*. Washington, DC, Smithsonian Institution Scholarly Press, pp. 39–50.
- Vierros, M.K., Harrison, A.L., Sloat, M.R., Crespo, G.O., Moore, J.W., Dunn, D.C., Govan, H., 2020. Considering indigenous peoples and local communities in governance of the global ocean commons. *Marine Policy* 119, 104039.
- Warner, R., 2012. Oceans beyond boundaries: environmental assessment frameworks. *Int. J. Marine Coast. Law* 27 (2), 481–499.
- Yang, T., 2019. The emergence of the environmental impact assessment duty as a global legal norm and general principle of law. *Hastings Law J.* 70, 525–572.
- Yotova, R., 2016. The principles of due diligence and prevention in international environmental law. *Cambridge Law J.* 75 (3), 445–448.