

Briefing

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Policy pointers

Delegates negotiating a new international instrument to govern areas beyond national jurisdiction should include provisions to ensure projects are subject to rigorous Environmental Impact Assessments (EIAs).

These assessments will need to consider a wide range of environmental, cultural and socio-economic impacts if they are to deliver appropriate ecosystem-level thresholds and equitable sustainability outcomes for vulnerable coastal states.

The new instrument should make EIAs mandatory for any activity taking place under the jurisdiction or control of any of its parties that could harm marine biodiversity in areas beyond national jurisdiction (BBNJ) or within national waters.

By building on a substantial body of existing instruments related to marine biodiversity, the new instrument can make a defining contribution to closing one of the last great gaps in global governance.

Maximising ecosystem benefits through EIAs in areas beyond national jurisdiction

A new instrument to govern the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction can provide significant opportunities for many coastal developing countries in general, and for the Least Developed Countries in particular.¹ This briefing shows how robust requirements for Environmental Impact Assessments (EIAs) could be enshrined in the instrument to protect the interests of vulnerable coastal states. We argue that comprehensive EIAs should be mandatory for any projects or activities taking place under the jurisdiction or control of parties to the instrument — and should consider a full spectrum of environmental, socio-economic and cultural impacts. We also show how negotiators can build on the best aspects of existing marine governance to forge a truly comprehensive instrument that can close the governance gap prevailing across much of the world's oceans.

United Nations member states are negotiating a new instrument to govern the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ). The goal is to produce an International Legally Binding Instrument (ILBI) under the UN Convention on the Law of the Sea. This new instrument will have important implications for any country — including many developing countries and coastal and island Least Developed Countries (LDCs).

The ocean is a highly interconnected ecosystem. Although the vast stretches of water lying in areas beyond national jurisdiction (ABNJ) are geographically distant from coastal areas,² the circulation of currents and the migration of marine species mean that any

disturbance in these regions can have a big impact on ecosystems in national waters, and ultimately change their structure and function. Most coastal LDCs, Small Island Developing States (SIDS) and other developing coastal states depend heavily on marine resources for food security, livelihoods and government revenues. These resources also have important cultural significance for fishing and other coastal communities, many of which are facing climate shocks from extreme weather and sea-level rise. The rules in this ILBI will therefore affect millions of people in developing countries who depend on the sea to survive.

To ensure that due consideration is given to the interests of coastal communities, especially

By building on an existing body of marine governance instruments, negotiators could craft a truly comprehensive ILBI

those in vulnerable states, the new instrument should contain robust provisions requiring comprehensive Environmental Impact Assessments (EIAs). Such provisions represent the surest way to ensure that projects or activities in ABNJ adhere to appropriate ecosystem-level thresholds and deliver an equitable distribution of any conservation benefits.

To support negotiators to incorporate EIA

provisions into the ILBI, we have examined EIAs in terms of their type, scope, thresholds, criteria and standards (see definitions in Box 1). We have also identified standards from other instruments that could be used as a foundation to ensure the ILBI adopts a truly comprehensive approach.

Strong foundations: EIAs as a human rights tool

At the most basic level, EIAs should identify the groups of countries and people that are likely to experience the greatest impacts on biodiversity, and ecosystem functions and services from activities in ABNJ. A thorough EIA can help avoid potential harm by identifying alternative activities or tailoring mitigation measures.³

Various international instruments recognise the importance of EIAs. For example, The Framework Principles on Human Rights and the Environment developed by the former Special Rapporteur Knox explicitly recognises the role of EIAs as ‘procedural human rights tools’.⁴ Framework Principle 8 says: “States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.”⁵ Principle 8 also makes clear that EIAs should assess potential impacts on all rights, including rights to food, life, health and culture.

Knox clarified that the assessment of environmental impacts should include “transboundary effects and cumulative effects that may occur as a result of the interaction of the proposal with other activities”.⁶ Knox also stated the findings of EIAs should be made public and subject to review by an independent body before a final decision is taken on a project. Monitoring procedures should be put in place to ensure compliance with any conditions and check that impacts do not surpass permitted levels.⁶ Delegates negotiating the

ILBI should draw on these principles, which reflect existing EIA obligations under international law.

Include robust provisions on participation

Delegates negotiating the ILBI can also draw on existing frameworks to push for the inclusion of strong requirements for community participation in EIAs. The most important of these is the Convention on Biological Diversity (CBD) *Akwé: Kon Voluntary Guidelines*.⁷ The Guidelines state that indigenous peoples and local communities should be invited to participate in all stages of the planning and implementation of a project that could impact sacred sites, lands and waters they traditionally occupy or use.⁸ These principles should also hold true in transboundary contexts — where a project in ABNJ could affect coastal areas.⁹ The Guidelines also recommend consultation with civil society during EIAs since conserving biodiversity is a common concern of humankind.

Biodiversity-inclusive EIAs

Biodiversity-inclusive EIAs should be mandatory under the ILBI. The CBD guidelines for the consideration of biodiversity in EIAs in marine areas¹⁰ highlight specific marine and ecological features (such as ecologically or biologically significant marine areas, and vulnerable marine ecosystems) that should receive special attention in EIA processes. These guidelines provide a starting point for drafting provisions to ensure important biodiversity components and their respective ecosystem services are not overlooked.

Integrate environmental, social and cultural impacts through SEAs

The EIA regime introduced in the ILBI must be more robust and require Strategic Environmental Impact Assessments (SEAs) — a type of EIA that considers a project’s broader cultural and socio-economic implications (see Box 1). SEAs are gaining prominence in national and international law.¹¹ The CBD, for example, alludes to SEAs by requiring parties to “introduce appropriate arrangements to ensure that the environmental consequences of its activities and policies that are likely to have significant adverse impacts (SAIs) on biological diversity are duly taken into account.”¹²

Furthermore, the CBD marine biodiversity-inclusive guidelines (referred to earlier), which should be read in tandem with the *Akwé: Kon Guidelines*, call for the

integration of cultural, environmental and social impact assessments as a single process. These guidelines should be incorporated, by reference, into the new instrument to ensure an integrated assessment regime.

Create a scientific body to support better EIAs

For the new instrument to achieve its full potential, it should create a scientific body with a mandate to harness the best research to improve the conduct of EIAs and to provide advice in the EIA decision-making process. The instrument could support this goal by requiring EIAs to make use of ecosystem service methods and assessments, including ecosystem mapping. The scientific body could be mandated to produce guidelines for, and to evaluate, the utilisation of such methods in EIAs. Such methodologies can unveil hidden policy and management trade-offs among stakeholders across scales,¹³ and help decision makers weigh the significance of 'extra-local' ecosystem services.¹⁴ Special attention could be given to biodiversity impacts that may affect livelihoods of vulnerable people in developing countries in general, and LDCs and SIDS in particular.

The instrument could require EIAs to capture how various benefits from ecosystem services are spatially distributed — an important safeguard for LDCs and SIDS who may be dependent upon flows across jurisdictions. For example, Drakou et al. (2017) propose a framework to assess interactions between a service-providing area, a service-benefiting area and service-connecting areas.¹⁴ The flow of benefits assessed can include nutritional value and other factors influencing human wellbeing¹⁴ that could be affected by a given activity, even if it takes place in a seemingly distant area of ocean.

Findings from the scientific body could supplement existing EIA processes. The body should also have a mandate to work closely with the Regular Process, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) and the UN's System of Environmental Economic Accounting.

Include robust thresholds, criteria and standards

The ILBI can draw on existing instruments to define robust thresholds, criteria and standards. For example, the concept of SAIs is used as a threshold for EIAs under UNCLOS, the CBD and the FAO's *International Guidelines*

Box 1. Relevant Environmental Impact Assessment types for the new international legally binding instrument under UNCLOS

Environmental Impact Assessment (EIA) is a process of evaluating the likely environmental impacts of, and proposing appropriate mitigation measures for, a proposed development, taking into account interrelated socio-economic, cultural and human health impacts, both beneficial and adverse.

Cultural heritage impact assessment is a process of evaluating the likely impacts, both beneficial and adverse, of a proposed development on the physical manifestations of a community's cultural heritage including sites, structures and remains of archaeological, architectural, historical, religious, spiritual, cultural, ecological or aesthetic value or significance.

Social impact assessment is a process of evaluating the likely impacts, both beneficial and adverse, of a proposed development that may affect the rights (which have an economic, social, cultural, civic and political dimension), as well as the wellbeing, vitality and viability, of an affected community — that is, the quality of life of a community as measured in terms of various socio-economic indicators, such as income distribution, physical and social integrity and protection of individuals and communities, employment levels and opportunities, health and welfare, education, and availability and standards of housing and accommodation, infrastructure and services.

(CBD, *Akwé: Kon Guidelines*)

Strategic environmental assessment (SEA) is one type of EIA. SEA is a process of evaluating the likely environmental impacts of proposed policies, plans or programmes to ensure that they are fully included and addressed at an early stage of decision making, together with economic, social and cultural considerations.

(CBD Decision VI/7 A, Annex)

*for the Management of Deep-sea Fisheries in the High Seas.*¹⁵ UNCLOS and the CBD do not define SAI. However, the FAO Guidelines define SAIs in the context of bottom fishing on vulnerable marine ecosystems, and require the assessment of individual, combined and cumulative impacts. They define an impact as 'temporary' if it is limited in duration and allows an ecosystem to recover within a given timeframe. Longer-lasting impacts occur when the interval between habitat disturbances is shorter than the necessary recovery time — which should be judged according to a precautionary approach.

The *Protocol on Environmental Protection to the Antarctic Treaty*¹⁶ is even more precautionary, requiring an initial environmental evaluation of activities likely to have a minor or transitory impact, and a comprehensive environmental evaluation if the impact is likely to be longer-lasting. The ILBI should be similarly rigorous. Given the scientific uncertainty around the ecosystem

functions of deep-sea habitats, we strongly recommend the use of the precautionary approach with substantially low thresholds.

Several other instruments also provide relevant EIA standards, including the *Convention on the Conservation of Migratory Species of Wild Animals (CMS) Family Guidelines on Environmental Impact Assessments for Marine Noise-generating Activities*¹⁷ as well as the Antarctic Treaty's EIA revised guidelines.

Closing a gap in global governance

By building on an existing body of marine governance instruments, negotiators could craft a truly comprehensive ILBI ensuring that

the full range of potential impacts are weighed carefully before any project or activity in ABNJ or that affects ABNJ is allowed to proceed. These assessments will be vital for protecting marine biodiversity and the ecosystem services that vulnerable coastal states depend upon, and to close one of the most glaring gaps in global governance: the need to assess and mitigate cumulative impacts that pose a threat to the functioning of critical marine ecosystems.

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Notes

¹ For more information, see: www.un.org/bbnj / ² See: Harrison, A-L, Costa, DP, Winship, AJ, Benson, SR, Bograd, SJ, Antolos, M, Carlisle, AB, Dewar, H, Dutton, PH, Jorgensen, SJ, Kohin, S, Mate, BR, Robinson, PW, Schaefer, KM, Shaffer, SA, Shillinger, GL, Simmons, SE, Weng, KC, Gjerde, KM and Block, BA (2018) The political biogeography of migratory marine predators. *Nature Ecology & Evolution* 2, 1571–1578. / ³ See CBD Decision XI/18 (2012), CBD EIA/SEA Guidelines, Section B. / ⁴ UNGA, A/HRC/37/59 (2018) *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*. / ⁵ UNGA, A/HRC/37/59 (2018) *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, at 11. / ⁶ UNGA, A/HRC/37/59 (2018) *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, para. 20. / ⁷ CBD Decision VII/16 F (2004) *Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities*. / ⁸ CBD Decision VII/16, Annex, para 12. / ⁹ N Craik (2017) Biodiversity-inclusive impact assessment. In: Morgera, E and Razzaque, J (eds) *Biodiversity and Nature Protection Law*. Edward Elgar Publishing, at 440. / ¹⁰ CBD Decision XI/18 (2012), Section B, para 1; *Voluntary guidelines for the consideration of biodiversity in environmental impact assessments (EIAs) in marine and coastal areas* (UNEP/CBD/COP/11/23). / ¹¹ N Craik (2017) Biodiversity-inclusive impact assessment. In: Morgera, E and Razzaque, J (eds) *Biodiversity and Nature Protection Law*. Edward Elgar Publishing. / ¹² CBD, Article 14 (1) (b). / ¹³ Diz, D and Morgera, E (2018) Insights for sustainable small-scale fisheries. In: Schreckenber, K, Mace, G and Poudyal, M (eds) *Ecosystem services and poverty alleviation: trade-offs and governance*. Routledge. / ¹⁴ Drakou, EG, Pendleton, L, Efron, M, Ingram, JC and Teneva, L (2017) When ecosystem and their services are not co-located: oceans and coasts. *ICES Journal of Marine Science*, 74(6), 1531–1539. The authors define 'extra-local' ecosystem services as those that generate benefits which are enjoyed far from the providing ecosystem. / ¹⁵ FAO (2008) *The FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas*. / ¹⁶ Protocol on Environmental Protection to the Antarctic Treaty was signed in Madrid on October 4, 1991 and entered into force in 1998. / ¹⁷ See: www.cms.int/guidelines/cms-family-guidelines-EIAs-marine-noise and <https://tinyurl.com/ydh7r9xa>

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