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High Seas Environmental Impact Assessments

The importance of evaluation in areas beyond national jurisdiction

Overview

Worldwide, scientists continue to make important discoveries about the high seas and marine depths in areas beyond national jurisdiction (ABNJ), distant places that support life throughout the global ocean and are home to some of its most fascinating and valuable species. But with new and emerging activities threatening the health of these ecosystems, safeguarding their biodiversity is increasingly important.

To ensure that they do not upset the fragile and interconnected marine environment, high seas activities and any associated impacts must be fully understood and carefully managed, and an environmental impact assessment (EIA) is the most important tool in this effort. EIAs allow policymakers to identify the potential effects of proposed projects, explore alternative solutions and determine ways to prevent, mitigate and control environmental harm.

Through United Nations General Assembly Resolution 69/292, States committed to developing an “international legally binding instrument ... on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.”¹ Its negotiation will address a package of issues, including EIAs. All States have not only an interest but also an obligation to ensure that this new instrument incorporates a robust EIA framework.

What are environmental impact assessments?

Defined as a “procedure for evaluating the likely impact of a proposed activity on the environment,”² EIAs bring together scientists, policymakers and other stakeholders, including civil society, to identify and potentially prevent activities that may cause environmental harm. EIAs are a requirement of international law: “Countries must undertake an assessment where there is a risk that [a] proposed ... activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource” like the high seas.³ This requirement is reinforced in a number of treaties and obligations, including the United Nations Convention on the Law of the Sea (UNCLOS), which obliges States to assess activities under their jurisdiction that may cause “significant and harmful changes to the marine environment and [to] communicate reports of the results of such assessments.”⁴

Guidelines for conducting effective EIAs in areas beyond national jurisdiction

Despite States’ obligation to conduct impact assessments under UNCLOS and international law, no global coordination mechanism requires an EIA for activities in areas beyond national jurisdiction, and no guidance standards, principles by which to evaluate EIAs or opportunities to promote public awareness and engagement over potential threats exist. As a consequence, only fragmented measures to prevent environmental damage in ABNJ remain, and there is little to no accountability for such damage when it occurs.

To improve ocean governance, a new agreement on high seas biodiversity should:

- **Set minimum requirements for an EIA:** Any framework must be flexible enough to cover a wide range of activities while also identifying the core elements necessary to implement a successful EIA, as demonstrated through decades of national and international practice. These could include the components outlined by the United Nations Environment Programme in its Goals and Principles of Environmental Impact Assessment:⁵
 - A description of the proposed activity.
 - A description of the potentially affected environment, including specific information about possible impacts of the proposed activity.
 - An assessment of the probable or potential environmental impacts of the proposed activity as well as possible alternatives to it, including the direct, indirect, cumulative, short-term and long-term effects.
 - An identification, description and assessment of measures available to mitigate any potential adverse impacts identified by the EIA.
- **Designate activities that require an EIA:** States requiring EIAs for activities under their jurisdiction or control must first screen for projects that could adversely affect the marine environment. Because some activities are inherently dangerous or harmful, States can facilitate coherence and reciprocity among themselves and across activities in EIA implementation by requiring EIAs before certain categories of projects can be carried out on the high seas. The designations could be reflected in an appendix to preserve the flexibility of the overarching instrument, as modeled by the Espoo Convention on Environmental Impact Assessment in a Transboundary Context.⁶
- **Require follow-up to ensure environmental protection:** International law requires States to do more than simply prepare and circulate EIAs. They must also provide for ongoing monitoring and enforcement to ensure that activities comply with the terms and conditions of approval; to evaluate impacts and the effectiveness of mitigation measures; and, where required, to strengthen future EIAs and mitigation measures. Such follow-up would be facilitated by the reporting obligations and implementation review process described above.

Key processes for successfully evaluating EIAs in areas beyond national jurisdiction

An EIA regime will be effective only to the extent that it is supported by robust provisions to ensure compliance by all States and that these guidelines provide for:

- **Transparency and public participation:** Governments may have limited resources to carry out and evaluate EIAs, particularly in developing States. One of the best ways to ensure that an EIA addresses all of the risks posed by a potential project is to broaden the audience for the assessment to include the public. Such disclosure will necessarily extend to members of academia and civil society who can, if given sufficient opportunity, provide expert feedback from diverse perspectives that can be incorporated into any decisions made about the proposed activity. In particular, they can ensure that all possible impacts and alternative activities that could be reasonable project substitutes are considered.
- **Communication of EIA results:** Although many States make high seas EIA results publicly available, only a State-by-State analysis can provide a comprehensive picture of all activities in ABNJ and their cumulative environmental impacts. The parties to a new instrument could enhance transparency and improve governance by establishing a centralized clearinghouse or other mechanism for communicating the results of their EIAs.
- **Periodic review of implementation:** Parties should commit to regular evaluations of their EIAs to confirm that they are using a satisfactory process and to ensure that all relevant environmental obligations are fully integrated into assessment outcomes.
- **Dispute resolution:** Responsibility for implementing high seas EIAs is likely to fall upon many States, making recourse between the instrument's parties in cases of noncompliance all the more important. An effective dispute resolution mechanism that is streamlined enough to accommodate challenges to planned activities before they begin will be instrumental in preventing irreversible damage to the marine environment. States should be able to avail themselves of all of the dispute resolution provisions reflected in Part XV of UNCLOS, including binding arbitration if necessary, in cases where another party fails to conduct an appropriate EIA or allows an activity that is inconsistent with its duties to protect the marine environment. Provisional measures, as provided under Article 290 of UNCLOS, should be made available as needed to respond to an imminent threat of serious harm to the marine environment.

Conclusion

Evaluating potentially harmful activities on the high seas is necessary to protect biodiversity, and EIA is a powerful tool for identifying and preventing negative environmental impacts. States should support all of the elements and characteristics above to ensure that an effective framework for carrying out EIAs becomes a lasting legacy of a new instrument.

Endnotes

- 1 U.N. 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," June 19, 2015, <http://www.un.org/en/ga/69/resolutions.shtml>.
- 2 Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, Feb. 25, 1991, 30 ILM 802, entered into force Jan. 14, 1998.
- 3 Argentina v. Uruguay (International Court of Justice 2010).
- 4 U.N. Convention on the Law of the Sea, Dec. 10, 1982, 21 ILM 1261, Art. 206, entered into force Nov. 16, 1984.
- 5 U.N. General Assembly, Resolution 42/184, "International Co-operation in the Field of the Environment," Dec. 11, 1987, <http://www.un.org/documents/ga/res/42/a42r184.htm>.
- 6 Convention on Environmental Impact Assessment.

For further information, please visit:
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