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Implementing the rule of law for nature in the global marine commons: developing environmental assessment frameworks

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Abstract

The anthropocene era has brought with it increased threats to the biodiversity of the world's oceans. Until the latter half of the twentieth century, human use of the oceans beyond a narrow coastal belt was largely confined to navigation, fishing, whaling and from the mid nineteenth century, the laying of submarine cables and pipelines. With the development of the continental shelf and the exclusive economic zone, coastal States have extended their jurisdictional reach to a wider offshore domain for purposes such as resource exploitation, marine scientific research and the generation of energy from wind and waves. Other developments such as the depletion of inshore fish stocks, an increase in global maritime trade and transport and the search for new resources have led to greater human activity in marine areas beyond national jurisdiction (ABNJ). These activities have expanded to include more frequent and invasive marine scientific research expeditions, associated bioprospecting for marine genetic resources, exploration for deep seabed minerals and geo-engineering experiments utilising the capacity of the ocean to absorb excess carbon dioxide from the earth's atmosphere.

The extended spectrum of human activities now taking place in ABNJ has the potential to harm the highly interconnected and sensitive ecosystems of these areas if not carefully managed now and into the future. International law can play a vital role in preventing and mitigating the adverse impacts of human activities on the rich repository of marine biodiversity in ABNJ through the further development of environmental assessment in ABNJ. Environmental 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 and policy statements. Currently there is limited legal and institutional provision for the implementation of environmental assessment in ABNJ. This chapter examines international law obligations for environmental assessment in the world's oceans and the complex challenges involved in implementing these in ABNJ. The fragmentary nature of the legal and institutional framework for environmental governance in ABNJ is discussed as well as some initiatives being taken at the global level to develop a more comprehensive framework for environmental assessment in these extensive areas of the ocean.

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Implementing the rule of law for nature in the global marine commons: developing environmental assessment frameworks

Robin Warner

Introduction

The anthropocene era has brought with it increased threats to the biodiversity of the world's oceans. Until the latter half of the twentieth century, human use of the oceans beyond a narrow coastal belt was largely confined to navigation, fishing, whaling¹ and from the mid nineteenth century, the laying of submarine cables and pipelines.² With the development of the continental shelf and the exclusive economic zone, coastal States have extended their jurisdictional reach to a wider offshore domain for purposes such as resource exploitation, marine scientific research and the generation of energy from wind and waves.³ Other developments such as the depletion of inshore fish stocks, an increase in global maritime trade and transport and the search for new resources have led to greater human activity in marine areas beyond national jurisdiction (ABNJ).⁴ These activities have expanded to include more frequent and invasive marine scientific research expeditions, associated bioprospecting for marine genetic resources, exploration for deep seabed minerals and geo-engineering experiments utilising the capacity of the ocean to absorb excess carbon dioxide from the earth's atmosphere.⁵

The extended spectrum of human activities now taking place in ABNJ has the potential to harm the highly interconnected and sensitive ecosystems of these areas if not carefully managed now and into the future. International law can play a vital role in preventing and mitigating the adverse impacts of human activities on the rich repository of marine biodiversity in ABNJ through the further development of environmental assessment in ABNJ. Environmental 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 and policy statements. Currently there is limited legal and institutional provision for the implementation of environmental assessment in ABNJ. This chapter examines international law obligations for environmental assessment in the world's oceans and the complex challenges involved in implementing these in ABNJ. The fragmentary nature of the legal and institutional framework for

¹ Earle, supra note 3.

² Couper, supra note 4, p.200 notes that the first successful submarine cable was laid between England and France in 1851.

³ 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3 (LOSC), Arts. 56 and 77.

⁴ Kristina Gjerde and Charlotte Breide (eds.), *Towards a Strategy for High Seas Marine Protected Areas: Proceedings of the IUCN, WCPA and WWF Experts Workshop on High Seas Marine Protected Areas, 15-17 January, Malaga, Spain* (IUCN, Gland, Switzerland, 2003), pp.6-7.

⁵ Ibid, p.7.

environmental governance in ABNJ is discussed as well as some initiatives being taken at the global level to develop a more comprehensive framework for environmental assessment in these extensive areas of the ocean.

The International Law Basis for Environmental Assessment in ABNJ

Environmental assessment involves obligations derived from multiple sources of international law. These include conventional international law instruments, customary international law principles and the decisions of international tribunals. These obligations have grown in specificity and now encompass not only prior environmental impact assessment (EIA), but also ongoing monitoring of impacts on the marine environment, strategic environmental assessment (SEA) and transboundary environmental assessment. EIA is now emerging as a customary international law obligation in its own right. Both the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS) have addressed the obligation to conduct EIA of activities with the potential to significantly affect the global environment.

Conventional International Law Sources and Policy Documents

United Nations Convention on the Law of the Sea (LOSC)

The LOSC contains general obligations to conduct assessment and monitoring of activities with the potential for significant effects on the marine environment but no further detail on how these obligations should be implemented in different offshore zones. Article 206 specifies that ‘where 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... assess the potential effects of such activities on the marine environment.’ These obligations are not limited to areas within national jurisdiction. States must also keep under surveillance the effects of any activities they engage in or permit, to determine whether these activities are likely to pollute the marine environment (Article 204(2)). These general obligations are supplemented by the more specific EIA principles and procedural provisions that have been developed in international environmental law instruments and associated guidelines.

United Nations Environment Programme (UNEP) Goals and Principles of EIA

One of the earliest global elaborations of the fundamental components of an EIA process is found in the 1987 UNEP Goals and Principles of EIA .⁶ Principle 1 specifies that an EIA should include, at a minimum:

- A description of the proposed activity;
- A description of the potentially affected environment....;
- A description of the practical alternatives;
- An assessment of the likely or potential environmental impacts of the proposed activity and alternatives;
- An identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and alternatives, and an assessment of those measures;
- An indication of gaps in knowledge and uncertainties that may be encountered in compiling the required information; and
- An indication whether the environment of any other state or of areas beyond national jurisdiction are likely to be affected by the proposed activity or alternatives.’

This statement of minimum requirements is significant for ABNJ as it highlights the need to include in EIAs an indication of whether proposed activities will affect these areas. ABNJ is also mentioned in Principle 11 which specifies that states should endeavour to conclude bilateral, regional or multilateral arrangements to provide reciprocal notification, exchange of information and agreed upon consultation on the potential environmental effects of activities under their control or jurisdiction likely to significantly affect other states or ABNJ.

The general obligation to consult with interested stakeholders on an EIA before a decision is made to proceed with an activity is recognized in Principle 7 which provides that:

“... government agencies, members of the public, experts in relevant disciplines and interested groups should be allowed appropriate opportunity to comment on the EIA.”

For activities affecting ABNJ, this immediately raises the question of who qualifies as an interested stakeholder and which organization is responsible for administering and responding to such consultation.

⁶ UNEP, United Nations Environment Programme Goals and Principles of EIA (UNEP Principles), <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentsID=1008&ArticleID=1658>.

Convention on Biological Diversity (CBD)

The 1992 Convention on Biological Diversity (CBD) links Contracting Parties' obligations to conduct EIAs more directly to the conservation of biodiversity in both marine and terrestrial environments.⁷ Under its provisions, Contracting Parties must introduce appropriate procedures requiring EIA of proposed projects that are likely to have significant adverse effects on biodiversity with a view to avoiding or minimizing such effects (Article 14(1) (a)). This obligation applies to processes and activities, regardless of where their effects occur, carried out under the jurisdiction or control of Contracting Parties in areas under their national jurisdiction or in ABNJ (Article 4(b)). The critical importance of collaboration between states in minimizing adverse impacts to biodiversity in ABNJ is emphasized in Article 14(1) (c). This requires Contracting Parties to promote reciprocal notification, exchange of information and consultation on activities under their jurisdiction or control that are likely to significantly affect adversely the biodiversity of other States or in ABNJ. In the case of imminent or grave danger or damage, originating under their jurisdiction or control, to biodiversity under the jurisdiction of other states or in ABNJ Contracting Parties must notify immediately the potentially affected states as well as initiate action to prevent or minimize such danger or damage.

The obligations in the CBD have been augmented by Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment (CBD Guidelines) that emphasize the importance of including biodiversity-related criteria in the screening process.⁸ The Guidelines reflect a best practice standard for EIAs of activities with the potential to significantly affect all aspects of biodiversity, including those components situated in ABNJ. They depend on a detailed level of knowledge of species, habitats and ecosystems and their interconnections in a particular marine area. A later section of this chapter on global initiatives will refer to the process currently being undertaken in the CBD to define the special considerations to be taken into account in EIAs of activities with the potential to significantly affect biodiversity in marine and coastal areas, including ABNJ.

The Customary International Law Status of the Obligation to Conduct EIA

The customary international law status of EIA including its marine components, has been steadily crystallizing in the recent jurisprudence of the ICJ and ITLOS. In the *Gabcikovo-Nagymaros Case* the ICJ considered assessment, notification and consultation, effectively the elements of an EIA

⁷ *Convention on Biological Diversity*, opened for signature 22 May 1992, 31 ILM 822 (entered into force 29 December 1993) ('*CBD*').

⁸ *Biodiversity in Impact Assessment. Background Document to Decision VIII/28 of the Convention on Biological Diversity. Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment*, <http://www.cbd.int/doc/publications/pubcbd-ts-26-en.pdf>.

process, to be a necessary step in a State's implementation of the duty to prevent transboundary harm and the concept of sustainable development.⁹ In the Pulp Mills Case, the ICJ found that:

'...it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.'¹⁰

In the Mox Plant Case, ITLOS concluded that the United Kingdom had breached its obligations under Article 206 of the LOSC by failing to carry out an adequate assessment of the potential impacts of a nuclear fuel reprocessing plant in Cumbria on the marine environment of the Irish Sea.¹¹ The 2011 advisory opinion of ITLOS on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, also acknowledged the customary international law status of the obligation to conduct EIAs for activities with the potential for significant impacts on the marine environment, including for ABNJ, specifically the Area.¹²

Regional Implementation of Environmental Assessment in ABNJ

Regional Seas Conventions

There are broad obligations on environmental assessment in most of the UNEP and non UNEP regional seas agreements. Parties to these conventions are typically responsible for developing EIA guidelines, legislation and processes that prevent or minimize harmful effects on the Convention Area with the assistance of competent global, regional and sub-regional organizations. In most cases, the Convention Area is limited to marine areas within the national jurisdiction of the parties, although there are some regional seas conventions that include ABNJ in their scope of application.¹³ The

⁹ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (1997) ICJ Rep 7, para 141; Alan Boyle, "The Gabcikovo-Nagymaros Case: New Law in Old Bottles" (1997) 8 *Yearbook of International Environmental Law* 18; Craik, above note 5, 114.

¹⁰ *Pulp Mills on the River Uruguay Case (Argentina/Uruguay)(Provisional Measures)* (2006) ICJ Rep, para 204.

¹¹ *Mox Plant Case (Provisional Measures)* ITLOS No. 10 (2001), para 82; Alan Boyle, "Environmental Jurisprudence of the International Tribunal for the Law of the Sea" (2007) 22(3) *International Journal for Marine and Coastal Law* 377; Marie Cordonnier Segger, Marcus Gehring and Andrew Paul Newcombe, *Sustainable Development in World Investment Law* (Kluwer Law International, 2011) 152.

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*, 1 February 2011, <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf>, p. 44, para. 145.

¹³ The scope of application of the 1986 *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region* (Noumea Convention), the 1992 *Convention for the Protection of the Marine Environment of the North-east Atlantic* (OSPAR Convention) and the 1995 *Convention for the*

conventions do not incorporate screening, scoping and content prescriptions for EIA, leaving this responsibility to the more detailed legislative enactments of their member states. Different versions of the duty to notify and consult on EIAs with other parties and the relevant regional seas organization appear in many of the conventions, but most are relatively loose prescriptions urging rather than obligating states to disseminate results of EIAs and consult with affected parties.¹⁴

The 1995 *Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean* (Barcelona Convention) makes specific mention of notification and consultation among Contracting Parties where activities are likely to have a significant adverse effect on ABNJ. Article 4(3)(c) provides that:

‘the Contracting Parties shall promote cooperation between and among States in environmental impact assessment procedures related to activities under their jurisdiction or control which are likely to have a significant adverse effect on the marine environment of other States or *areas beyond the limits of national jurisdiction* on the basis of notification, exchange of information and consultation.’

This provision recognizes the mandatory responsibility of Contracting States to protect and preserve the marine environment beyond national jurisdiction in their region.

The OSPAR Commission established to implement the 1992 *Convention for the Protection of the Marine Environment of the North-east Atlantic* (OSPAR Convention) is moving towards more collaborative arrangements between competent regional and global authorities for EIA and SEA of activities, plans, programmes and policies affecting ABNJ marine protected areas (MPAs) within the convention’s area of responsibility. The OSPAR Ministerial Meeting in 2010 established six MPAs in ABNJ encompassing four seamounts, an area of the deep seabed beyond national jurisdiction in the southern area of the Charlie Gibbs Fracture Zone and an area to the north of the Azores Islands in the Atlantic.¹⁵ A collective arrangement between OSPAR and global and regional organizations with responsibilities for managing activities such as fisheries, deep seabed mining and ships routing in these MPAs including the North East Atlantic Fisheries Commission, the International Seabed Authority and the International Maritime Organization is in the course of negotiation. Under this

Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention) extend to ABNJ.

¹⁴ Craik, above note 5, 145.

¹⁵ OSPAR Commission, *OSPAR Network of Marine Protected Areas*, <http://www.ospar.org/content/content.asp?menu=00700300100011_000000_000000>.

arrangement, joint management plans will be prepared for each of the six MPAs including provisions for cooperation on EIAs and SEAs.¹⁶

Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol)

The test applied for screening activities for EIA under the Madrid Protocol to the Antarctic Treaty is more complex and multi-layered than many other international instruments and clearly applies to ABNJ, although there are significant exceptions to its application to certain activities. The screening process has three levels – the preliminary assessment, initial environmental evaluation and comprehensive environmental evaluation.¹⁷ A preliminary assessment is carried out at the national level for all activities subject to the Protocol with less than a minor or transitory impact. If an activity has no more than a minor or transitory impact, an initial environmental evaluation must be carried out, and if it has more than a minor or transitory impact, a comprehensive environmental evaluation must be carried out. All activities, both governmental and non-governmental, in the Antarctic treaty area (south of 60° S latitude) are subject to these provisions, except for fishing, sealing, whaling and emergency operations as these are covered by other international instruments.¹⁸

Sectoral Implementation of Environmental Assessment in ABNJ

Some sectors of activity in ABNJ have implemented unilateral environmental assessment measures tailored to particular types of activities.

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 programmes to assess the impact of fishing on non-target and associated or dependent species and their environment.¹⁹ 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

¹⁶ “Designation and Management of OSPAR MPAs Beyond National Jurisdiction in the North-East Atlantic”, Presentation by Dr. Henning von Nordheim and Tim Packeiser, IUCN/German Federal Agency for Nature Conservation Seminar on the Conservation and Sustainable Use of Marine Biodiversity beyond National Jurisdiction, 3-6 December 2011, Bonn, Germany.

¹⁷ Madrid Protocol, Article 8(1); K. Bastmeijer and R. Roura, “Environmental Impact Assessment in Antarctica,” in K. Bastmeijer and T. Koivurova, *Theory and Practice of Transboundary Environmental Impact Assessment* (Martinus Nijhoff Publishers, 2008), 182.

¹⁸ Madrid Protocol, Article 8(2).

¹⁹ UN Fish Stocks Agreement, Articles 5(d) and 6(3)(d).

adverse impacts on vulnerable marine ecosystems or not to authorize the bottom fishing activity to proceed (UNGA Resolution 61/105 paragraphs 80–91).²⁰ Significant adverse impacts are defined as those that compromise ecosystem integrity (i.e. ecosystem structure or function) in a manner that:

‘(i) impairs the ability of affected populations to repair themselves;
(ii) degrades the long-term natural productivity of habitats; and
(iii) causes, on more than a temporary basis, significant loss of species richness, habitat or community types.’²¹

The Guidelines also specify that impacts should be evaluated individually, in combination and cumulatively.²² They call for states to conduct assessments of individual bottom fishing activities and to adopt measures to prevent significant adverse impacts on vulnerable marine ecosystems (VMEs). These procedures include identifying areas or features where VMEs are known or likely to occur, identifying the location of fisheries in relation to these areas and features, and then developing data collection and research programmes to assess the impact of fishing on target and non-target species and their environment.²³ The Guidelines list the characteristics of VMEs that should be subject to assessments and give examples of potentially vulnerable species groups, communities and habitats, as well as features that potentially support them.²⁴

Deep Seabed Mining Sector

Deep seabed mining activities in ABNJ are subject to a well developed framework of environmental assessment obligations. An exploration contractor must submit an 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).²⁵ 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

²⁰ FAO, *International Guidelines for the Management of Deep Sea Fisheries in the High Seas*, 2009, <<http://www.fao.org/docrep/011/0816t/0816t00.htm>>.

²¹ *Ibid.*, 4, para. 17.

²² *Ibid.*

²³ *Ibid.*, 9-11.

²⁴ *Ibid.*, 4, paras.14-16.

²⁵ *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, opened for signature 28 July 1994, 33 ILM 1309 (entered into force 28 July 1996) (*Part XI Implementation Agreement*), Annex, para. 7; Regulations for Prospecting and Exploration of Polymetallic Nodules (Polymetallic Nodule Regulations), <<http://www.isa.org.jm/files/documents/EN/Regs/PN-en.pdf>>, Regulation 18(c) and (d).

of exploration contractors that are subject to EIA.²⁶ The sponsoring state for an exploration contractor is under a due diligence obligation to ensure that an exploration contractor fulfils all these obligations.²⁷

Legal and Institutional Challenges in Implementing Environmental Assessment Obligations in ABNJ

Although the obligation to conduct environmental assessment of activities with the potential for significant impacts on the marine environment is well established in both customary and conventional international law, implementation of this obligation for ABNJ is still at a nascent stage. There is no overarching international agreement which develops in more specific terms the obligation contained in Article 206 of the LOSC to assess the potential effects of planned activities under States jurisdiction or control for ABNJ. Similarly institutional coverage for ABNJ is far from comprehensive with no global body having overarching responsibility for protection and preservation of the marine environment or conservation of marine biodiversity beyond national jurisdiction and only a few regional seas programs having specific environmental protection responsibilities for these areas.²⁸ The ISA has comprehensive environmental protection powers for activities affecting the Area, but this advanced environmental governance situation for the deep seabed beyond national jurisdiction is not matched by a global institution with comparable environmental protection powers for the high seas water column.

Lack of an integrated system of environmental governance for ABNJ presents considerable problems for implementing comprehensive environmental assessment processes in these vast areas of the ocean. The predominant form of jurisdiction in ABNJ is flag state jurisdiction so it falls to individual flag States rather than any regional or global body to regulate and enforce the activities of their flag vessels in ABNJ including their impacts on the marine environment. This results in variable levels of compliance with environmental standards, no auditing of individual flag State performance or sanctioning of sub-standard performance. Many stages in an environmental assessment process require a coordinating authority lacking in the disjunctive system of flag state governance which applies to most ABNJ activities. These include the initial screening process to select which activities are subject to environmental assessment, the scoping process to decide the terms of reference for an environmental assessment, the public notification and consultation process to engage relevant stakeholders and the ongoing monitoring of environmental impacts. A global environmental

²⁶ Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area, http://www.isa.org.jm/files/documents/EN/7Sess/LTC/isba_7ltc_1Rev1.pdf, para 10.

²⁷ ITLOS Advisory Opinion, above note 10, 43–44, paras. 141–143; Polymetallic Nodules Regulation 31(6) and Polymetallic Sulphides Regulation 33(6).

²⁸ See above note 27.

governance body for ABNJ together with a coordinated system of regional environmental governance bodies could perform these tasks and monitor emerging activities with the potential for adverse impacts on marine biodiversity .

With the intensification of activities in ABNJ, the establishment of a global environmental governance instrument and institutional infrastructure to conserve the marine biodiversity of these areas is becoming increasingly urgent. Environmental assessment obligations for deep seabed mining exploration in the Area apply to all exploration contractors but in the fisheries sector, the FAO's Deep Sea Fishing Guidelines apply only to bottom fishing activities rather than all high seas fishing and aquaculture activities and rely on the variable standards inherent in flag state implementation either by individual flag States or through RFMOs. A wide range of current and emerging activities involving ships in ABNJ such as oil and gas exploration on the extended continental shelf, bio-prospecting, marine scientific research, survey activities, marine geo-engineering, deep-sea tourism and military activities are not subject to any EIA process. In most cases the EIA obligations in regional seas conventions do not require member states to assess the impact of their activities on the marine environment beyond national jurisdiction because the geographic scope of the conventions does not extend to these areas.

Environmental governance in ABNJ is further complicated by the array of international instruments applicable in these areas, many with overlapping mandates. Antarctica is a case in point with the Antarctic Treaty system conventions, the LOSC, the CBD, the Convention on Migratory Species and the International Convention on the Regulation of Whaling all applying to ABNJ below 60 degrees south latitude. A more comprehensive and integrated environmental governance framework for ABNJ could develop environmental assessment processes for new and emerging activities in ABNJ and coordinate existing sectoral and regional processes. It could also perform the role of prescribing and monitoring best practice standards for environmental assessment in ABNJ

Global Initiatives to Strengthen the International Law Framework for Environmental Assessment in ABNJ

United Nations General Assembly (UNGA) Initiatives

In the four meetings since its inception in 2005, the United Nations General Assembly (UNGA) Ad Hoc Open-ended Informal Working Group, created to study issues related to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ Working Group), has consistently identified EIA for activities affecting marine areas beyond national jurisdiction as an important component of its work. In 2011, the Co-Chairpersons recommended to the

UNGA that a process be initiated, by the General Assembly to ensure that the legal framework for the conservation and sustainable use of marine biodiversity in ABNJ effectively addresses relevant issues including EIA by identifying gaps and ways forward. These issues would be dealt with through the implementation of existing instruments and the possible development of a multilateral agreement under the LOSC. In particular, it was recommended that the process address measures such as EIA.²⁹ The UNGA in its annual Oceans and Law of the Sea Resolution on 24 December 2011 endorsed the BBNJ Working Group recommendations.³⁰ A recommendation to support the initiation of a process to develop an implementation agreement under the LOSC which would address the conservation and sustainable use of marine biodiversity in ABNJ including EIA was endorsed by the UN Conference on Sustainable development(Rio + 20) in June 2012.

CBD Initiatives

The Conference of the Parties of the CBD has also been proactive in investigating the scientific and technical aspects of EIA for activities in ABNJ. It convened an Expert Workshop on Scientific and Technical Elements of the CBD EIA Guidelines which focused on ABNJ in November 2009.³¹ This highlighted some of the governance and practical challenges related to the implementation of EIA for activities ABNJ.

It emphasised the practical difficulties associated with conducting EIAs including:

- The industry proposing the activity and the national flag state jurisdiction are often far from the marine area affected;
- The conduct of EIA and management, control, monitoring, surveillance and follow-up activity were likely to be more costly and may be less effective for a given budget; and
- Capacity building needs for EIA in ABNJ would be greater as customs of practice are less established, methodologies less mature, and multiple assessment cultures may converge in the same area.³²

²⁹ Letter from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, 30 June 2011, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/397/64/PDF/N1139764.pdf?OpenElement>>, Annex, Section I, paras. (a) and (b).

³⁰ Oceans and the Law of the Sea; Resolution adopted by the UNGA on 24 December 2011 (A/RES/66/231 of 28 November 2011), para. 167; UN Conference on Sustainable Development – Rio + 20, *The Future We Want – Zero Draft of the Outcome Document*, <http://www.uncsd2012.org/rio20/index.php?page=view&type=12&nr=324&menu=23>, para 80.

³¹ Report of the Expert Workshop on Scientific and Technical Aspects relevant to Environmental Impact Assessment in Marine Areas beyond National Jurisdiction, UNEP/CBD/EW-EIAMA/2, 20 November 2009, <<http://www.cbd.int/doc/?meeting=EWEIAMA-01>>.

³² Ibid, Annex II, paras. 10–14.

The complex and fragmentary nature of the law and institutions governing ABNJ were accentuated including:

- The split legal framework for ABNJ – high seas (LOSC Part VII) and deep seabed beyond national jurisdiction – the Area (LOSC Part XI and Part XI Implementation Agreement);
- The diverse institutional framework for ABNJ including States, non State actors and global and regional organizations and the need for cooperation between all these actors to conserve biodiversity ;
- The fact that stakeholders are harder to define for ABNJ because communities do not have immediate proximity to these areas; and
- The variable standards of compliance among states with environmental assessment obligations in international conventions.³³

The Workshop's Report was considered by the tenth Conference of Parties of the CBD in 2010 which endorsed the development of voluntary guidelines for the consideration of biodiversity in EIAs for marine and coastal areas drawing on the guidance from the Workshop.³⁴ The Guidelines are being developed for all marine and coastal areas rather than simply for ABNJ emphasising the interconnections between ocean ecosystems across jurisdictional boundaries. This initiative represents an important step in articulating the peculiar characteristics of EIA for activities in ABNJ and should provide a repository of information on EIA for all sectors operating in ABNJ.

Conclusion

There is an established obligation to conduct EIAs of activities with the potential for significant impacts on the marine environment including ABNJ in both customary international law and conventional international law but its implementation in ABNJ is still at an early stage. This chapter has examined some limited examples of EIA for ABNJ activities in regional and sectoral contexts. The establishment of a more comprehensive and integrated system of environmental assessment in ABNJ faces considerable hurdles including the lack of global and regional institutions with the responsibility to monitor new activities in ABNJ and administer environmental assessment processes. Increasing human impacts on the oceans provide a strong impetus for strengthening the legal and institutional infrastructure for environmental assessment of all human activities affecting ABNJ. A number of options are available to the international community for a legally binding instrument on environmental assessment in ABNJ including a stand-alone instrument or relevant provisions in a potential implementation agreement under the LOSC for the conservation of marine biodiversity in

³³ Ibid, Annex II, paras. 7–9.

³⁴ Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UNEP/CBD/COP/10/27, 20 January 2011, Annex, Decision X/29, para. 50, <<http://www.cbd.int/cop10/doc/>>.

ABNJ. Developing comprehensive obligations and global standards for prior environmental impact assessment and ongoing monitoring of the impacts of activities in ABNJ represents a critical role for law in conserving this pristine element of the earth's environment.