

Practical and Institutional Aspects of Environmental Impact Assessments in Areas beyond National Jurisdiction

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Practical and Institutional Aspects of Environmental Impact Assessments in Areas beyond National Jurisdiction

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I. Introduction

The international community is currently in the process of negotiating an international legally binding instrument (ILBI) to regulate marine biodiversity in areas beyond national jurisdiction (ABNJ) under the United Nations Convention on the Law

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of the Sea (UNCLOS).¹⁾ The purpose of such an instrument is to establish a comprehensive global regime to better address the conservation and sustainable use of marine biodiversity in ABNJ and to investigate the potential need for further cooperation among states.

According to the development of marine bio-technology, marine biodiversity including genetic resources are becoming increasingly important as they may be the source materials that create higher added values.²⁾ Moreover, as the use of marine genetic resources in areas within national jurisdiction is somewhat restricted after the entry of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in 2014, the use of marine biodiversity in ABNJ is considerably attracting international attention.³⁾

The United Nations General Assembly (UNGA) established an Ad Hoc Open-ended 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) in 2004.⁴⁾ The BBNJ Working Group has met consecutively from 2006 to 2015, discussing various issues ranging from the legal status of marine genetic resources, the use of area-based management tools, environmental impact assessments (EIAs), capacity-building and the transfer of marine technology in order to effectively protect marine biodiversity in ABNJ. In 2011, it recommended to the UNGA that it initiates a process "with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in [ABNJ] effectively addresses those issues by identifying gaps and ways forward, including ... the possible development of a multilateral agreement under the [UNCLOS]."⁵⁾ Thereafter, the UNGA decided to

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- 1) United Nations Convention on the Law of the Sea, Montego Bay, December 10, 1982, 21 ILM 1261 (1982), in force November 16, 1994 [hereinafter UNCLOS].
 - 2) A. Gusman Siswandi, "Marine Genetic Resources beyond National Jurisdiction and Sustainable Development Goals: The Perspective of Developing Countries", in *The Marine Environment and United Nations Sustainable Development Goal 14* (Myron H. Nordquist, John Norton Moore & Ronan Long eds, 2019), p. 196.
 - 3) The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, opened for signature Feb. 2, 2011, U.N.T.S. A-30619 (entered into force Oct. 12, 2014), available at <https://www.cbd.int/abs/text/>.
 - 4) G.A. Res. 59/24, U.N. Doc. A/RES/59/24, (Feb. 4, 2005), ¶ 73.
 - 5) G.A., Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working

develop the ILBI in 2015.⁶⁾ Prior to holding an Intergovernmental Conference, it decided to establish a Preparatory Committee, to make substantive recommendations on the elements of a draft text of the ILBI, taking various works of the BBNJ Working Group into consideration. The Preparatory Committee held two sessions each in 2016 and 2017, and adopted its final report on July 31, 2017.⁷⁾ The Intergovernmental Conference is scheduled to meet for four sessions commencing in September 2018, with the last session programmed in the first half of 2020.

Among various issues discussed at the meetings held by the Committee and the Conference, the implementation of EIAs in ABNJ seems less controversial. This may be because state parties have generally recognized it as an obligation under public international law and shown broad support by institutionalizing such use under various international instruments.⁸⁾ Unfortunately, however, state parties do not seem to have reached consensus on how EIAs should be implemented along with their content and procedural elements. Among different views and options suggested during the Intergovernmental Conference so far, in my view, there are some of the fundamental questions that need to be addressed from practical and institutional aspects and they are as follows:

Group to the President of the General Assembly, U.N. Doc. A/66/119 (June 30, 2011), ¶ 1 (1) (a) & (b). See also G.A. Res. 66/288, U.N. Doc. A/RES/66/288 (Jul. 27, 2012), ¶ 162.

6) G.A. Res. 69/292, U.N. Doc. A/RES/69/292 (Jul. 6, 2015).

7) G.A., Report of the Preparatory Committee established by 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, U.N. Doc. A/AC.287/2017/PC.4/2 (Jul. 31, 2017).

8) See footnotes 11 & 12 of this paper. An obligation to conduct EIAs in ABNJ is provided not only under global instruments such as the UNCLOS, but also under various regional and sectoral instruments. An example of regional instruments would be the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region. Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Nov. 25, 1986, 26 ILM 38. In terms of sectoral instruments, they are tailored to deal with specific activities that are or may be performed in ABNJ. Shipping, fishing and deep seabed mining are the three activities that are of particular importance. For example, with respect to the shipping sector, see 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov. 7, 1996, 36 ILM 1 (1997). For a close examination on these instruments, see Elisabeth Druel, "Environmental Impact Assessments in Areas Beyond National Jurisdiction", The Institute for Sustainable Development and International Relations, Study No. 01/03, (2013), available at https://www.iddri.org/sites/default/files/import/publications/study0113_ed_environmental-impact-assessments.pdf.

1. What is the scope of activities that are subject to EIAs under the ILBI?
2. How could the transparency of the EIA process be ensured?
3. What role should be given to the Scientific and Technical Body under the ILBI?
4. What is the relationship between the ILBI and other relevant legal instruments and frameworks?

This article seeks answers to these questions which would be critical in proceeding and, eventually, completing the negotiations on the EIA regime under the ILBI. In the following, I will answer these questions respectively and conclude with some comments.

II. What is the scope of activities that are subject to EIAs under the ILBI?

It is unclear whether an obligation to conduct EIAs applies either to activities ‘conducted’ in ABNJ or to activities having an ‘impact’ in ABNJ. In other words, would the ILBI extend its application not only to the activities located in ABNJ, but also to the activities within national jurisdiction having impacts in ABNJ? At first glance, it seems reasonable for all human activities with the potential for adverse impacts in ABNJ to be assessed, regardless of where they take place, under the ILBI, in the sense that it literally aims to conserve marine biodiversity located in ABNJ.⁹⁾

However, in my view, it seems impractical for the ILBI to extend its application to the activities within national jurisdiction having impacts in ABNJ for two reasons. First,

9) See G.A., 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, Note by the President, art. 22.3, A/CONF.232/2020/3 (Nov. 18, 2019) [hereinafter Revised Draft Text]; Preparatory Committee Established by General Assembly Resolution 69/292, Chair’s Streamlined Non-Paper on Elements of a Draft Text 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, Fourth Session (Jul. 10 - 21, 2017), ¶ 183, available at http://www.un.org/depts/los/biodiversity/prepcom_files/Chairs_streamlined_non-paper_to_delegations.pdf [hereinafter Chair’s Streamlined Non-Paper].

as the ILBI is expected to completely respect jurisdictional boundaries, any perceived threat to sovereignty will likely encounter heavy resistance from states.¹⁰⁾ States would be very reluctant to let activities conducted within national jurisdiction being subject to EIAs under the ILBI. Second, such states would likely argue that the responsibilities of coastal states in respect of the environment beyond their national jurisdiction are already being regulated under the UNCLOS, thereby addressing such responsibilities under the ILBI futile. Article 194.2 of the UNCLOS is understood as providing such responsibilities and they are as below:

“States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.”

By reading the text of Article 194.2, it is clear that the obligation to prevent trans-boundary harm extends its application to ABNJ. This obligation has also been confirmed in a number of international disputes. The International Court of Justice (ICJ) mentioned that states have “to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national jurisdiction.”¹¹⁾ The International Tribunal for the Law of the Sea (ITLOS) in its advisory opinion also confirmed that an obligation to undertake EIAs in a trans-boundary context applies “to activities with an impact on the environment in an area beyond the limits of national jurisdiction.”¹²⁾

In this circumstance, states would most likely believe that the activities within national jurisdiction having impacts in ABNJ are fully governed by the provisions

10) UNEP, International Environmental Governance: Multilateral Environmental Agreements (MEAs), Meeting of the Open-ended Intergovernmental Group of Ministers or Their Representatives on International Environmental Governance, UN Doc. UNEP/IGM/1/INF/3 (Apr. 6, 2001), ¶ 108.

11) Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8), ¶ 29.

12) Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Responsibilities and Obligation of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion, Case No. 17 (1 February 2011), ¶ 148.

under the UNCLOS, including Articles 194.2 and 206, which provides for an obligation to conduct EIAs in ABNJ.¹³⁾ And, again, from a practical standpoint, as states would like to strongly hold their sovereignty and authority over the activities under their jurisdiction, they would prefer EIA processes either under the domestic legal framework or, probably, under the trans-boundary legal instruments rather than the ones under the ILBI. Thus, it seems more plausible for only those activities located in ABNJ, and not all the activities having impacts in ABNJ, to be the subject of EIAs under the ILBI.¹⁴⁾

III. How could the transparency of the EIA process be ensured?

In order for the EIA process under the ILBI to receive wide support from the international community, it has to be transparent. In my view, the credibility and transparency of an EIA process could be obtained by receiving comments from the public and reflecting them in EIA reports. State parties shall ensure public participation by notifying them first about the planned activities under their jurisdiction or control in the EIA process before making a decision as to whether to proceed with the activity.¹⁵⁾ Comments received at the stage of public participation have to be considered and responded to by a state party undertaking an EIA pursuant to the ILBI.

A state party could also consider establishing procedures allowing for public access to information related to the EIA concerned. The most prominent example of such access would be the website operated by the Antarctic Treaty. The Initial Environmental

13) Article 206 of the UNCLOS reads that “[w]hen 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...”

14) For a similar view, see Permanent Mission of the People’s Republic of China to the United Nations, Written Submission of the Chinese Government on Elements of a Draft Text 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, CML/24/2017 (Mar. 7, 2017), ¶ 19 (on file with author).

15) Revised Draft Text art. 34.1. For more on public participation in the EIA process, see Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge, 2008), pp. 146-150.

Evaluation and Comprehensive Environmental Evaluation (CEE), which are EIAs under the Protocol on Environmental Protection to the Antarctic Treaty, are made publicly available by posting them at the official website of the Secretariat of the Antarctic Treaty.¹⁶⁾ Particularly regarding a draft CEE, it is circulated to all state parties, which also make it publicly available for comments. Comments delivered by other parties along with the Committee for Environmental Protection must be addressed in a final CEE, which are considered in making a decision as to whether to proceed with the activity.¹⁷⁾ In addition, along with such public access, if the comments on the EIA report conclude that the activity in question should not take in place, the state with jurisdiction or control over activity should give particular regard to such comments.

Another means of obtaining the credibility and transparency of an EIA process would be the consideration and review of EIA reports by the Science and Technical Body.¹⁸⁾ The primary role for the Body is to determine whether an EIA is scientifically and technically valid. Furthermore, based upon such determination, it could identify the deficiencies in the EIA report and, if so, recommend how these deficiencies are to be remedied so as to render a satisfactory assessment.¹⁹⁾

The transparency of an EIA process would ultimately lead to the improvement of the quality of EIA, which may have more chances of being used as a decision making tool. Mechanisms are, therefore, needed to ensure that an EIA influences on decision-making under the ILBI. First, in terms of the provision on decision-making, it should articulate a general principle that no decision allowing the planned activity under the jurisdiction or control of a state party to proceed 'should' be made where the EIA indicates that the planned activity under the jurisdiction or control of a state party would have severe adverse impacts on the environment. This would assign a

16) See <https://www.ats.aq/devAS/EP/EIAList?lang=e>. On the rules and procedures for an Initial Environmental Evaluation and Comprehensive Environmental Evaluation, see Protocol on Environmental Protection to the Antarctic Treaty Madrid, Oct. 4, 1991, art. 2 & 3, 30 ILM 1455, in force January 14, 1998. [hereinafter Madrid Protocol].

17) Revised Guidelines for Environmental Impact Assessment in Antarctica, Resolution 1(2016) - ATCM XXXIX - CEP XIX, Santiago 22 (Jan. 6, 2016).

18) Revised Draft Text art. 37.

19) For a similar review process, see United Nations Environment Programme, Environmental Impact Assessment Training Resource Manual, Division of Technology, Industry and Economics and Trade Branch 357 (2d ed. 2002).

general duty for states to comply with the result of the EIA. Instead of using the term 'shall,' the term 'should' seems more appropriate in the sense that it is to inform a general understanding of decision-making that the decision should not be made against the EIA.²⁰⁾ Most state parties would be burdensome, if they were strictly abide by such an obligation as international law only requires state parties to conduct EIAs, but not the compliance of EIAs, for activities that are likely to cause adverse impacts to the environment.

Second, the systematization of post-EIA process would improve compliance with EIAs. For secured and sound environmental management, the activities in operation must be subject to continuous monitoring.²¹⁾ The ILBI should primarily impose the sponsoring state to mandatorily monitor compliance with the elements provided in the final approval to proceed with the activities. It is important to regularly review the impacts of activities on the environment as there is limited information on ABNJ.²²⁾ In particular, the monitoring process should be in line with Article 204 of the UNCLOS which clearly imposes on states to monitor the risks or effects of pollution of the marine environment either directly or through competent international organizations.

20) In the context of international trade law, Article III:1 of the General Agreement on Tariffs and Trade also stipulates a general principle on the national treatment obligation that internal measures 'should' not be applied so as to afford protection to domestic production. This is established as a guide for understanding and interpreting the specific obligations provided under the other paragraphs of Article III. Appellate Body Report, Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R (Oct. 4, 1996), ¶ 111.

21) In the Gabčíkovo-Nagymaros Case, Judge Weeramantry, in a separate opinion, stated that "environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation." Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, at 111 (Sept. 25).

22) In the report of the United Nations Secretary-General, 2011, the European Union also addressed that:

"[I]nformation concerning assessments undertaken with respect to planned activities in areas beyond national jurisdiction ... [is] still disperse and scarce. Some European Union States had reported that they did not carry out activities in areas beyond national jurisdiction, while in the case of those who may have carried out some activities in those areas there was no information on any environmental impact assessment undertaken, except where such assessments were compulsory under international agreements ..."

United Nations General Assembly, Oceans and the Law of the Sea - Report of the Secretary General, U.N. Doc. A/66/70 (Mar. 22, 2011), at 38, ¶ 140.

Furthermore, state parties shall ensure that the environmental impacts of the authorized activity are periodically reported to the Conference of the Parties.²³⁾ If either non-compliance with the EIA or an adverse impact not foreseen in the EIA has been found, the Conference of the Parties should make every possible means to find appropriate solutions. Such issues shall be on the agenda until they are resolved. The sponsoring state shall provide the Conference of the Parties with a status report in writing of its implementation progress.²⁴⁾ In sum, such a comprehensive approach to monitoring could be very effective in terms of increasing transparency by generating public awareness of the activities in operation. The sponsoring state may, eventually, feel strong pressure by such awareness and, thus, comply with the result of the EIA report.

IV. What role should be given to the Scientific and Technical Body under the ILBI?

In the context of the discussions so far, the Scientific and Technical Body seems to have certain roles under the ILBI in operating the EIA process, but they are somewhat unclear. Thus, at this point, I would like to suggest a number of functions the Body could have under the ILBI. First, it could primarily function as an advisory organ to the Conference of the Parties in terms of administering the operation of the ILBI. In particular, for example, when the Conference of the Parties needs to elaborate the procedure set out in the ILBI, it could request the Scientific and Technical Body for review on the technical elements including thresholds and criteria for EIAs. Another example would be for the Conference of the Parties to consult with the Scientific and Technical Body in elaborating the guidelines on the conduct of EIAs in areas that are ecologically or biologically significant or vulnerable as well as in updating the list of activities that require or do not require an EIA under the ILBI.²⁵⁾ The Scientific and

23) Revised Draft Text art. 40.

24) For a similar view, see Chair's Streamlined Non-Paper, *supra* note 9, ¶ 202. It may also be useful for states to report on other states' failure to implement EIA reports. *Ibid*

Technical Body could also advice the Conference of the Parties in coordinating with relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.²⁶⁾

Second, the Scientific and Technical Body could assist state parties in conducting EIAs. For instance, during the screening process, state parties could be able to determine on whether EIAs are required or not for planned activities under their jurisdiction or control based upon the review of such determination by the Scientific and Technical Body.²⁷⁾ Furthermore, before adopting EIA reports, they may be considered and reviewed by the Scientific and Technical Body which would be, as mentioned earlier, a means of obtaining the credibility and transparency of an EIA process.²⁸⁾ Last but not the least, the Scientific and Technical Body could also assist those developing states, i.e., the least developed countries and small island developing states, having capacity constraints in conducting EIAs upon request.²⁹⁾ In particular, it would provide for a committee, consisting of experts that are able to review the EIAs submitted by the states, to determine whether such EIAs meet the requirements provided under the ILBI. Or, more directly, such a committee would conduct EIAs on behalf of the states.³⁰⁾

Third, the Scientific and Technical Body could gather all available information on EIAs and on ABNJ. As information on marine ecosystem in ABNJ is disseminated and scarce, it is essential to establish an operational network of states in systematically managing and gathering information on any EIAs undertaken. In doing so, the Scientific and Technical Body could provide a central repository of publicly available information on EIAs and baseline data on ABNJ.³¹⁾ This central repository should make

25) Revised Draft Text art. 27.2 & 29.

26) Revised Draft Text art. 23.2. For more on this issue, see Section 5 of this paper.

27) Revised Draft Text art. 30.3.

28) Revised Draft Text art. 37.

29) Revised Draft Text art. 32. See also Chair's Streamlined Non-Paper, *supra* note 9, ¶ 197.

30) Another option would be an EIA being conducted by a third party, such as a research institution or a private company, under the auspices of the state. See Chair's Streamlined Non-Paper, *supra* note 9, ¶ 156.

31) This would closely resemble a 'clearing-house' mechanism under the Convention on Biodiversity (CBD). The 'clearing-house' mechanism was established by the CBD Secretariat in 1995 in order to promote and facilitate technical and scientific cooperation, develop a global mechanism for exchanging and integrating information on biodiversity, and develop a human and technological

information gathered at all different stages of the EIA process. Consistent with Articles 205 and 206 of the UNCLOS, the reports of the results of EIAs would be published and accessed by means of posting them on a website managed by the United Nations Division for Ocean Affairs and the Law of the Sea.³²⁾

One significant issue remaining with regard to the establishment of the Scientific and Technical Body is, perhaps, the formation of its participants. It could be open to participation by government representatives of all parties like the Subsidiary Body on Scientific, Technical and Technological Advice under the Convention on Bio-diversity.³³⁾ Otherwise, international organizations competent in the relevant field of expertise could supersede the roles that are assigned to the Scientific and Technical Body.³⁴⁾ No matter how it is formed, those participants should perform the functions that are mentioned above.

V. What is the relationship between the ILBI and other relevant legal instruments and frameworks?

There are, at least, two purposes of addressing the relationship between the ILBI and EIA processes under other relevant legal instruments and frameworks. First, due to the diversification of the instruments for EIAs governing ABNJ, there may have the possibility of an overlap in their application on specific activities.³⁵⁾ And, it would be

network. See Convention of Biological Diversity, art. 18.3, Rio de Janeiro, June 5, 1992, 31 ILM 818, in force December 29, 1993 [hereinafter CBD]; Conference of the Parties to the Convention on Biological Diversity, Tenth Meeting, Nagoya, Japan, Oct. 18-29, 2010, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting: X/15. Scientific and Technical Cooperation and the Clearing-House Mechanism, UNEP/CBD/COP/DEC/X/15 (Oct. 29, 2010).

32) See Chair's Streamlined Non-Paper, *supra* note 9, ¶ 196.

33) See CBD art. 25.

34) Similarly, under The World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures, WTO members agree to facilitate the provision of technical assistance to other members either bilaterally or through 'international organizations.' Agreement of the Application of Sanitary and Phytosanitary Measures, art. 9.1, Apr. 15, 1994, 1867 U.N.T.S. 493.

problematic, if they produce contrary outcomes. Thus, in order to avoid such an overlap, a hierarchical order in which these instruments are applied must be set under the ILBI.³⁶⁾ Second, a cooperative arrangement on EIA processes needs to be established between the ILBI and other relevant legal instruments and frameworks in order to fully perform EIA commitments. Internationally accepted practice as well as those rules and procedures reflected in other relevant legal instruments and frameworks could be referenced in developing the provisions of the ILBI.³⁷⁾ The coordination with other legal instruments and frameworks could offer best practice model for EIAs in ABNJ.

The ILBI should play a role as a comprehensive legal instrument developing global minimum standards for the conduct of EIAs in ABNJ. Based upon the reflection of the existing international environmental law principles, the ILBI should specify the EIA process in greater detail to make states certain about the responsibilities they have under EIA commitments.³⁸⁾

Of course, this does not mean that EIAs under other relevant legal instruments and frameworks cannot be conducted. Again, I have suggested above that the ILBI should set an order of application between the ILBI and other relevant instruments by addressing, perhaps, that the former prevails over the latter. From a strict legal sense, however, this does not mean that the ILBI could prevent state parties from using EIA processes under other relevant legal instruments and frameworks that they are parties to. The ILBI could only enforce the rules and procedures that are provided under it. Thus, it is undeniable that the EIA processes under the ILBI and other relevant legal

35) Julien Rochette, Sebastian Unger, Dorothee Herr, David Johnson, Takehiro Nakamura, Tim Packeiser, Alexander Proelss, Martin Visbeck, Andrew Wright & Daniel Cebrian, "The Regional Approaches to the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction", *Marine Policy*, Vol. 49 (2014), p. 115.

36) For a similar view, see E.M. De Santo et al., "Protecting Biodiversity in Areas beyond National Jurisdiction: An Earth System Governance Perspective", *Earth System Governance*, Vol. 2 (2019), p.5 (Arguing that the ILBI could "include innovative treaty provisions that clearly define its relationships with other agreements").

37) See Lingjie Kong, "Environmental Impact Assessment under the United Nations Convention on the Law of the Sea", *Chinese Journal of International Law*, Vol. 10 (2011), p. 657.

38) The existing international instruments on EIAs in ABNJ normally establish the operating principles for conducting them. The precautionary principle, for example, is established in several instruments. See United Nations Conference on Environment and Development, Principle 15, Rio de Janeiro, Brazil, June 3-14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (Vol. 1), 31 ILM 874 (Aug. 12, 1992).

instruments and frameworks co-exist. As long as the threshold for the conduct of EIAs under other relevant legal instruments and frameworks either meets or exceeds the threshold pursuant to the ILBI, the former shall be respected.³⁹⁾ In other words, it may be unnecessary to conduct another EIA under the ILBI, if it has already been conducted under other relevant legal instruments and frameworks which are compatible with those standards provided under the ILBI.⁴⁰⁾ This firmly establishes the nature of the ILBI as setting a minimum level for the conduct of EIAs.⁴¹⁾

The UNGA Resolution and other relevant documents have continuously noted that the ILBI “should not undermine” existing relevant instruments.⁴²⁾ Although the meaning of ‘not undermining’ remains somewhat unclear, it definitely seems to offer a cooperative arrangement between the two, thereby establishing a collective and hybrid forum for addressing the management of EIA processes in ABNJ. Aligning the ILBI with other relevant legal instruments and frameworks and, perhaps, particularly under the umbrella of the UNCLOS would establish an operational network of these instruments and frameworks in systematically managing EIAs in ABNJ.

39) In my view, as long as the ILBI and other relevant instruments do not set exactly the same process and standards for the conduct of EIAs, there seems to have a lesser degree of duplication of the outcomes, both of which may have considerable merit. The only problem, as mentioned above, is that there is a possibility of producing contrary outcomes. Based upon such outcomes, a sponsoring state would be very difficult to decide on whether to proceed with the proposed activity. This is the reason why I suggest addressing clearly a hierarchical order between the ILBI and other relevant instruments under the ILBI.

40) For a similar view, see Canada’s Views Related to Certain Elements under Discussion by the Preparatory Committee Established by United Nations General Assembly Resolution 69/292 (on file with author). In case of the activities that are not governed by other legal instruments or frameworks, needless to say, they should be subject to the EIAs under the ILBI.

41) The establishment of global minimum standards also appears in the international trading system with respect to the protection of intellectual property rights. The members of the WTO are free, but not obliged to, impose more extensive protection than that required under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Thus, the TRIPS Agreement sets a minimum level for protecting intellectual property rights. Agreement on Trade Related Aspects of Intellectual Property Rights, art. 1.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

42) See, for example, G.A. Res. 72/249, U.N. Doc. A/RES/72/249, (Feb. 4, 2005), ¶ 7.

VI. Conclusion

It is a significant achievement for the international community to reach consensus on the development of an international instrument, the ILBI, with an expectation to operate as a comprehensive legal regime for EIAs in ABNJ. I have no doubt that it will significantly transform the paradigm of the existing law of the sea, particularly the concept of the freedom of high seas.

Unfortunately, however, despite the Intergovernmental Conference in its final stage, the text of the ILBI would not seem to be finalized soon in that it deals with highly complicated issues involving different interests of various stakeholders. The answers to the questions addressed in this paper may not be complete but, at least, provide credible elements that would spur the discussions associated with EIAs in ABNJ forward.

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Abstract

Practical and Institutional Aspects of Environmental Impact Assessments in Areas beyond National Jurisdiction

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The international community is currently in the process of negotiating an international legally binding instrument (ILBI) to regulate marine biodiversity in areas beyond national jurisdiction (ABNJ) under the United Nations Convention on the Law of the Sea (UNCLOS). One of the potential elements for inclusion in the ILBI, that is being importantly discussed, is the implementation of environmental impact assessments (EIAs). Although the use of EIAs in ABNJ has gained broad support by state parties, they do not seem to have reached consensus on how EIAs should be implemented along with their content and procedural elements.

Among different views and options suggested during the Intergovernmental Conference so far, in my view, there are some of the fundamental questions that need to be addressed from practical and institutional aspects and they are as follows: (1) What is the scope of activities that are subject to EIAs under the ILBI?; (2) How could the transparency of the EIA process be ensured?; (3) What role should be given to the Scientific and Technical Body under the ILBI?; (4) What is the relationship between the ILBI and other relevant legal instruments and frameworks? This article seeks answers to these questions which would be critical in proceeding and, eventually, completing the negotiations on the EIA regime under the ILBI.

〈Key Words〉

United Nations Convention on the Law of the Sea, environmental impact assessments; biological diversity, areas beyond national jurisdiction, transparency, the Scientific and Technical Body

국문초록

국가관할권 이원지역에서 이행되는 환경영향평가의 실제적·제도적 측면 검토

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오늘날 국제사회는 ‘국가관할권 이원지역의 해양생물다양성(biodiversity beyond national jurisdiction, BBNJ)’ 보존과 지속가능한 이용에 관한 유엔해양법협약상 법적 구속력 있는 국제 법률문서(BBNJ 법률문서)’를 개발하고 있다. BBNJ 법률문서 개발과정에서 ‘환경영향평가제도의 도입’은 ‘이익공유 문제를 포함한 해양유전자원의 법적 지위’, ‘해양보호구역을 포함한 지역기반관리수단의 이용’, ‘역량강화와 해양과학기술 이전’ 등과 함께 주요 협상과제 중 하나로 논의된다.

환경영향평가는 인간의 계획된 활동이 환경에 끼치는 영향을 평가하는 절차다. 환경오염이 발생한 이후의 사후적인 대응보다 사전에 오염을 방지하려는 차원에서 평가를 실시하는 것이다. 환경영향평가는 국내 법률체계 내에서 뿐만 아니라 여러 국제조약 등에서 국가 의무로 받아들여지고 있다. 특히, 관할권 이원지역에서의 환경영향평가도 다른 국제문서 또는 국제제도를 통해 이미 그 실행이 제도화되고 있다는 점에서 국가 간 폭 넓은 지지를 얻고 있는 것으로 이해된다. 다만, BBNJ 법률문서 개발과 관련한 제3차 정부간회의가 마무리된 현 시점에 이르기까지 국제사회는 환경영향평가의 내용 및 그 이행 방법 등 기술적 요소들에 대한 구체적인 합의에 도달하지는 못한 것으로 보인다.

그러한 합의에 도달하기 위해서는 환경영향평가의 실제적이고 제도적인 측면에서 검토할 몇 가지 요소들이 있는데, 이를 다음과 같이 정리해 볼 수 있다. ①BBNJ 법률문서에 따른 환경영향평가에 적용되는 활동의 범위는 무엇인가?, ②환경영향평가의 절차적 투명성을 어떻게 보장할 수 있는가?, ③ BBNJ 법률문서 하, 과학기술기구(Scientific and Technical Body)에 부여되는 역할은 무엇인가?, ④BBNJ 법률문서와 다른 관련 법률문서나

제도 사이의 관계는 무엇인가? 따라서 본 연구는 BBNJ 법률문서 개발과 관련한 제4차 정부간회의 의장문서에 제시된 내용에 기초하여 상기 요소들을 검토하여 해당 협상을 마무리 지을 수 있는 방안을 궁극적으로 모색하고자 한다.

〈주제어〉

위생 및 식품위생조치 적용에 관한 협정, 세계무역기구, 후쿠시마 다이치 원자력발전소, 수입금지 조치, 수산물