

Building an Integrated Scheme for Environmental Impact Assessments in Areas beyond National Jurisdiction

관할권 이원지역의 해양생물다양성 보존과 지속가능한 이용을 위한 포괄적 환경영향평가제도 도입에 관한 연구

저자 (Authors)	Lee, Kil Won
출처 (Source)	법학연구 61(1) , 2020.2, 193-215 (23 pages) LAW REVIEW 61(1) , 2020.2, 193-215 (23 pages)
발행처 (Publisher)	부산대학교 법학연구소 Institute of Law Studies PUSAN NATIONAL UNIVERSITY
URL	http://www.dbpia.co.kr/journal/articleDetail?nodeId=NODE09315083
APA Style	Lee, Kil Won (2020). Building an Integrated Scheme for Environmental Impact Assessments in Areas beyond National Jurisdiction. 법학연구 , 61(1), 193-215.
이용정보 (Accessed)	이화여자대학교 203.255.***.68 2020/05/18 04:08 (KST)

저작권 안내

DBpia에서 제공되는 모든 저작물의 저작권은 원저작자에게 있으며, 누리미디어는 각 저작물의 내용을 보증하거나 책임을 지지 않습니다. 그리고 DBpia에서 제공되는 저작물은 DBpia와 구독계약을 체결한 기관소속 이용자 혹은 해당 저작물의 개별 구매자가 비영리적으로만 이용할 수 있습니다. 그러므로 이에 위반하여 DBpia에서 제공되는 저작물을 복제, 전송 등의 방법으로 무단 이용하는 경우 관련 법령에 따라 민, 형사상의 책임을 질 수 있습니다.

Copyright Information

Copyright of all literary works provided by DBpia belongs to the copyright holder(s) and Nurimedia does not guarantee contents of the literary work or assume responsibility for the same. In addition, the literary works provided by DBpia may only be used by the users affiliated to the institutions which executed a subscription agreement with DBpia or the individual purchasers of the literary work(s) for non-commercial purposes. Therefore, any person who illegally uses the literary works provided by DBpia by means of reproduction or transmission shall assume civil and criminal responsibility according to applicable laws and regulations.

Building an Integrated Scheme for Environmental Impact Assessments in Areas beyond National Jurisdiction*

Lee, Kil Won**

Table of Contents

I. Introduction	III. Potential Elements in Structuring the
II. Problems of the Current EIA Scheme	EIA Scheme under the BBNJ
for ABNJ	Instrument
	IV. Conclusion

I. Introduction

In 2004, 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 biodiversity beyond areas of national jurisdiction (BBNJ).¹⁾ After a long discussion on such

■ 투고일자 : 2020년 2월 2일, 심사일자 : 2020년 2월 18일, 게재확정일자 : 2020년 2월 19일.

* This work was supported by the Ministry of Education of the Republic of Korea and the National Research Foundation of Korea (NRF-2016S1A3A2925230).

** Associate Professor, Chungnam National University Law School

issues, in 2011, the Working Group recommended to the UNGA that it initiates a process that would ensure the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (ABNJ).²⁾ And, finally, in 2015, the UNGA decided to develop an international legally binding instrument (hereinafter, ‘BBNJ instrument’) under the United Nations Convention on the Law of the Sea (UNCLOS).³⁾ Before commencing an Intergovernmental Conference, a Preparatory Committee was established to make substantive recommendations on the elements of a draft text of the BBNJ instrument. The Preparatory Committee held two sessions each in 2016 and 2017, and adopted its final report on July 2017.⁴⁾ And, as of this writing, the Intergovernmental Conference was held three times from September 2018, with the last session expected to be held in between March and April 2020.

Among various issues, an important part of the negotiations concerns the implementation of environmental impact assessments (EIAs) in ABNJ.⁵⁾ An EIA is a tool that is used to identify the environmental, social and economic impacts of a project prior to decision-making. It aims to predict environmental impacts at an early stage in project planning and design, find ways and means to reduce adverse impacts, shape projects to suit the local environment and present the predictions and options to decision-makers.⁶⁾

Currently, almost all state parties seem to agree on the establishment of an EIA scheme under

1) G.A. Res. 59/24, U.N. Doc. A/RES/59/24, (Feb. 4, 2005), ¶ 73.

2) See G.A., Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working 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.

3) See G.A. Res. 69/292, U.N. Doc. A/RES/69/292 (Jul. 6, 2015); United Nations Convention on the Law of the Sea, art. 1.1 (1) & 89, Montego Bay, December 10, 1982, 21 ILM 1261 (1982), in force November 16, 1994 [hereinafter UNCLOS].

4) 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).

5) Other issues concerned are the legal status of marine genetic resources, including the question of benefit-sharing, the use of area-based management tools, including marine protected areas (MPAs), capacity-building and the transfer of marine technology.

6) UNEP Goals and Principles of Environmental Impact Assessment, Preamble, UNEP Res. GC14/25, 14th Sess. (1987), endorsed by GA Res. 42/184, UN GAOR, 42nd Sess., U.N. Doc. A/Res/42/184 (1987) [hereinafter UNEP EIA Principles].

the BBNJ instrument. This is true because states have shown broad support by institutionalizing such use under various international instruments and frameworks. Furthermore, EIAs have been developed as customary practice which has been recognized by international courts. The International Court of Justice (ICJ) stated, in the Pulp Mills case, that “the obligation to protect and preserve, under Article 41(a) of the Statute [of the ICJ] has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance that it may now be considered a requirement under general international law to undertake an [EIA] 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.”⁷⁾ Shortly after, the International Tribunal for the Law of the Sea also acknowledged the customary international law status of the obligation to conduct EIAs in ABNJ. In its advisory opinion, it stated that “the obligation to conduct an environmental impact assessment is a direct obligation under the [UNCLOS] and a general obligation under customary international law” with respect to the activities in the Area, i.e., the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.⁸⁾ Hence, the use of EIAs in ABNJ is considered to be less controversial among state parties. Unfortunately, however, they do not seem to have reached consensus on the technical elements including the contents of EIAs and a means of their implementation.

Therefore, this article examines those technical elements that state parties should pay particular attention to in building an EIA scheme for ABNJ. The article is organized as follows. Chapter II examines the problems associated with the current EIA scheme for ABNJ. Chapter III attempts to provide the potential elements in building the EIA scheme under the BBNJ instrument. The elements provided in Chapter III are specifically tailored to solve, or at least minimize, the problems considered in Chapter II. In Chapter IV, I conclude with some comments.

7) Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 (Apr. 20), ¶ 204.

8) 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), ¶¶ 145 & 148 [hereinafter Seabed Disputes Chamber with Respect to Activities in the Area].

II. Problems of the Current EIA Scheme for ABNJ

The international community has adopted a number of instruments at the global, regional and sectoral levels including not only legally binding instruments, but also policy documents and guidelines regarding EIAs in ABNJ.⁹⁾ Examples of them would be the 1987 United Nations Environment Programme Goals and Principles of Environmental Impact Assessment (UNEP EIA Principles), the UNCLOS and the Convention on Biodiversity (CBD) and the Regional Seas Programmes and the Protocol to the Antarctic Treaty on Environmental Protection (Madrid Protocol).¹⁰⁾

However, they contain some problems which render them largely ineffective. In the following, I will examine and enumerate those problems that the current EIA scheme for ABNJ has. By and large, such problems originate from the provisions of the instruments themselves and from the geographical conditions of ABNJ.

1. Unspecified Nature and Diversification of EIA commitments

The existing international instruments normally furnish general provisions rather than specific standards and requirements for the conduct of EIAs in ABNJ. The lack of such specificity and

9) For more information, see Elisabeth Druel, "Environmental Impact Assessments in Areas Beyond National Jurisdiction", The Institute for Sustainable Development and International Relations, Study No. 01/03 (2013).

10) Convention of Biological Diversity, Rio de Janeiro, June 5, 1992, 31 ILM 818, in force December 29, 1993 [hereinafter CBD]; Protocol on Environmental Protection to the Antarctic Treaty Madrid, Oct. 4, 1991, 30 ILM 1455, in force January 14, 1998 [hereinafter Madrid Protocol]. The Regional Seas Programmes include the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention); the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention), and the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (SPREP Convention). Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 32 I.L.M. 1069, 2354 U.N.T.S. 67; Convention for the Protection of Mediterranean Sea Against Pollution, Feb. 16, 1976, 15 I.L.M. 290. The Convention for the Protection of Mediterranean Sea Against Pollution was amended in 1995, which has entered into force on July 9, 2004, and, renamed as 'Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean'; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Nov. 25, 1986, 26 I.L.M. 38.

details make states uncertain about the responsibilities they have under EIA commitments, thereby bringing the possibility of insufficient implementation. The most prominent example would be the commitments under the UNCLOS. In particular, the general obligation on EIAs is well described under Article 206, but it does not provide any definitions or criteria on the terms used in that Article, i.e., “substantial pollution,” “significant and harmful changes to the marine environment” and “potential effects of activities on the marine environment.”¹¹⁾ The terms “reasonable grounds” and “as far as practicable” rather provide a good excuse for states to avoid conducting EIAs.¹²⁾ One reason that these instruments do not contain detailed obligations may be because the impacts of activities tend not to interfere directly with the sovereign rights of states as the impacts occur outside their jurisdiction. States will probably demand for strong and elaborated commitments when there are potential impacts on the rights of themselves.¹³⁾

Furthermore, because the international instruments for EIAs in ABNJ were also adopted at the regional and sectoral levels, where the processes and requirements for conducting EIAs are tuned to specific regions and sectors, some of these instruments may have the possibility of overlapping application on specific activities.¹⁴⁾ This diversification of the law and institutions governing ABNJ makes state actors difficult in conducting consistent assessments and may undermine the credibility of the existing regime for EIAs in ABNJ.

11) Article 206 of the UNCLOS reads as follows:

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

12) Deqiang Ma, Qinhua Fang & Song Guan, “Current Legal Regime for Environmental Impact Assessment in Areas Beyond National Jurisdiction and Its Future Approaches”, *Environmental Impact Assessment Review*, Vol. 56 (2016), p.27.

13) Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration*, Cambridge, 2008, pp.164-165.

14) 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.

2. Technical Limitations for Assessment

From a technical perspective, there are, at least, three elements that place limitations for conducting EIAs in ABNJ: information, technologies and budgets. First, information on marine ecosystems in ABNJ is very limited. Compared to coastal and terrestrial ecosystems, information and knowledge on ecological elements in ABNJ are normally insufficient and, as a consequence, “knowledge of what ecosystem components may be at risk is poorer, and the ability to assess known risks is weaker.”¹⁵⁾ In the report of the United Nations Secretary-General, 2011, the European Union addressed that:

“information 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”¹⁶⁾

Second, states’ capabilities to conduct EIAs in ABNJ are also very limited. The assessment practices as well as methodologies are less established and various assessment techniques may be required in the same area.¹⁷⁾ This limitation would be even greater for developing countries which have relatively low technical skills in conducting EIAs.¹⁸⁾

15) Expert Workshop on Scientific and Technical Aspects Relevant to Environmental Impact Assessment in Marine Areas Beyond National Jurisdiction, Manila, Nov. 18-20, 2009, 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 (Nov. 20, 2009), p.12, ¶ 10 [hereinafter Manila Workshop Report]. The physical conditions in ABNJ are well described in the report of the Manila Workshop. See id. pp.11-12.

16) 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), p.38, ¶ 140.

17) Manila Workshop Report, op. cit., p.12, ¶ 13.

18) As discussed in the Manila Workshop, the limitations of both information and capabilities have two important implications:

“First, the application of precaution will be even more important in decision-making. Second, there will necessarily be greater dependence on incremental ‘test-bed’ approaches to permitting activities, given the

Lastly, as the industry proposing the activity and the sponsoring state are located far from the site that is being affected, the cost of conducting EIAs in ABNJ would be often higher than EIAs for comparable activities in coastal or terrestrial ecosystems. This makes the necessary follow-up management, control and monitoring costly and less effective for a given budget, thereby leading to poor capabilities for states to conduct EIAs in ABNJ.¹⁹⁾

III. Potential Elements in Structuring the EIA Scheme under the BBNJ Instrument

1. General remarks

To date, various alternatives to the current EIA scheme for ABNJ have been proposed.²⁰⁾ Yet, they must be considered carefully, since each of them has not only advantages but disadvantages, which may make them unacceptable under the EIA scheme of the BBNJ instrument. Again, the elements that are provided in this Chapter are specifically tailored to solve, or at least minimize, the problems explored in Chapter II.

outcome of an EIA. To increase the very limited knowledge, an activity may be allowed at a small scale, and carry strict conditions for monitoring and surveillance, so that the permitted activity becomes the source of better information for more complete assessment of impacts of the activity at the allowed and possibly larger scales.”

Id. p.12, ¶ 14.

19) Id. at 12, ¶ 12.

20) See Robin Warner, “Environmental Assessment in Marine Areas Beyond National Jurisdiction”, in *Research Handbook on International Marine Environmental Law* (Rosemary Rayfuse ed., 2015), p.292 [hereinafter Warner 2015]; Elisabeth Druel & Kristina M. Gjerde, “Sustaining Marine Life Beyond Boundaries: Options for an Implementing Agreement for Marine Biodiversity Beyond National Jurisdiction under the United Nations Convention on the Law of the Sea”, *Marine Policy*, Vol. 49 (2014), p.90; Alex G. Oude Elferink, “Environmental Impact Assessment in Areas beyond National Jurisdiction”, *International Journal of Marine and Coastal Law*, Vol. 27 (2012), p.449; Robin Warner, “Oceans beyond Boundaries: Environmental Assessment Frameworks”, *International Journal of Marine and Coastal Law*, Vol. 27 (2012), p.481.

2. Building an Integrated Regime for EIAs in ABNJ

As discussed in the previous Chapter, due to the diversification of the instruments governing ABNJ, there may have the possibility of an overlap in their application on specific activities. Thus, in order to minimize such an overlap, the BBNJ instrument should play a role as a comprehensive legal instrument establishing standard rules and procedures for EIAs in ABNJ. Internationally accepted practice as well as those rules and procedures reflected in the existing instruments could be referenced in developing the provisions of the BBNJ instrument.²¹⁾ Based upon the reflection of the international environmental law principles, the BBNJ instrument should specify the EIA process in greater detail to make states certain about the responsibilities they have under EIA commitments.²²⁾

It is true that the EIA schemes under both the BBNJ instrument and other existing legal instruments and frameworks co-exist. In this circumstance, 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 BBNJ instrument, the former shall be accepted. This implies that an EIA process under the BBNJ instrument would be unnecessary, if it has been implemented pursuant to the other relevant legal instruments, which are consistent with the standards and thresholds provided under the BBNJ instrument.

Here, the question is what are the activities that are governed by the BBNJ instrument? More specifically, would the BBNJ instrument extend its application not only to the activities located in ABNJ, but also to the activities within national jurisdiction having impacts in ABNJ? In my view, as the activities within national jurisdiction are normally regulated by the legal regime established between coastal states, EIAs under the domestic legal framework should be required rather than the ones under the legal instrument.²³⁾ Article 194.2 of the UNCLOS also imposes

21) 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.

22) 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, for example, United Nations Conference on Environment and Development, Principle 15, Rio de Janeiro, Braz., 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).

coastal states to “take all measures necessary to ensure that activities ... does not spread beyond the areas where they exercise sovereign rights in accordance with [the] Convention.” And, this has been confirmed in a number of international dispute cases.²⁴⁾ As states would likely hold their sovereignty over the activities under their jurisdiction, they would prefer EIA processes under either the domestic legal framework or the trans-boundary legal instruments rather than the ones under the BBNJ instrument.

3. Specifying Requirements and Details of EIA Processes

As mentioned earlier, the obligations to conduct EIAs under the UNCLOS are not further specified so as to concretely assess the potential effects of proposed activities in ABNJ. Although they are binding in nature and broad in scope, reaching all parts of the marine environment, they are in ambiguous and indeterminate terms, thereby leaving states with certain discretion in conducting EIAs. As also seen from the previous cases, the parties to disputes did not disagree with the obligation to conduct an EIA itself, but had controversies over the specific requirements and details of EIA obligations.²⁵⁾ This rudimentary and unelaborated nature of the provisions makes the implementation of EIA obligations very difficult. Thus, it is important for the BBNJ instrument, perhaps, to be designed to supplement those EIA provisions under the UNCLOS in the form of either setting ‘additional or special rules’ or placing ‘minimum standards,’ and specifying a strict time frame for every procedural stage of an EIA so as to render a prompt process for assessment.

The procedural steps for an EIA under the BBNJ instrument would not be all that different from the ones under other existing instruments as the latter have received broad support globally.²⁶⁾

23) 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), p.8.

24) Seabed Disputes Chamber with Respect to Activities in the Area, *op. cit.*, ¶ 148.

25) For example, see Counter-Memorial of the United Kingdom, *MOX Plant (Ir. v. U.K.)*, pp.109-121 (Perm. Ct. Arb. Jan. 9, 2003).

26) For instance, the procedural steps for an EIA is well defined in the revised Voluntary Guidelines for the

They generally include the processes of screening, scoping, assessing and evaluating of impact, reviewing of the environmental impact statement, decision-making and monitoring as suggested in various international instruments and frameworks.

Regarding the screening process, it is the first step of the EIA procedure, determining the activities that is subject to an EIA. Article 206 of the UNCLOS provides two thresholds “substantial pollution of the marine environment” and “significant and harmful changes to the marine environment” for triggering an EIA, these could be literally used under the BBNJ instrument. Otherwise, as the likelihood of a ‘significant’ environmental impact of the proposed activity on the environment has gained wide acceptance, this could only be used as a threshold.²⁷⁾ A more stringent form of threshold such as the likelihood of a “minor or transitory impact,” as provided under the Madrid Protocol, could be considered as a plausible option, too.²⁸⁾ Here, the important point is that it is not about which term should be used under the BBNJ instrument. Rather, it is about whether the term being used provides an objective standard for triggering an EIA. Again, such a standard would make states certain about the responsibilities they have under EIA commitments and, eventually, develop a consistent approach in triggering EIAs in ABNJ.²⁹⁾

consideration of biodiversity in EIAs in marine and coastal areas. See Conference of the Parties to the Convention on Biological Diversity, Eleventh Meeting, Hyderabad, India, Marine and Coastal Biodiversity: Revised Voluntary Guidelines for the Consideration of Biodiversity in Environmental Impact Assessments and Strategic Environmental Assessments in Marine and Coastal Areas, Note by the Executive Secretary, UNEP/CBD/COP/11/23 (Aug. 21, 2012), pp.3-5.

27) The threshold of ‘significance’ can be found in a number of international instruments. See the UNEP EIA Principles, Principles 1 & 2; CBD, art. 14.1(a).

28) Madrid Protocol art. 8.1. Various proposals regarding the threshold for triggering an EIA were put forward during the discussions in the Informal Working Group on EIAs of the Intergovernmental Conference. Informal Working Group on Environmental Impact Assessments, Oral Report of the Facilitator to the Plenary, Intergovernmental Conference on 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 Biodiversity of Areas Beyond National Jurisdiction 4-17 September 2018 (Sept. 14, 2018), p.3.

29) A few attempts have been made to define the term ‘significance’ at the UN. Under the UNEP Principles on Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, it defines “significantly affect” as “any appreciable effects on a shared natural resource and excludes de minimis effects.” UNEP Principles on Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, UN Doc. UNEP/IG.12/2 (1978), reprinted in 17 ILM 1094 (1978). In its commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, the International Law

In terms of the scoping process, along with the identification of the potential impacts of the activity proposed, it establishes terms of reference for assessment and seeks for alternative options. The BBNJ instrument should have similar components that are included in other existing international instruments. The most prominent example would be the UNEP EIA Principles as it is widely recognized in the international community. In particular, the UNEP EIA Principles address that an EIA should include, at a minimum:

(a) A description of the proposed activity; (b) A description of the potentially affected environment, including specific information necessary for identifying and assessing the environmental effects of the proposed activity; (c) A description of practical alternatives, as appropriate; (d) An assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including the direct, indirect, cumulative, short-term and long-term effects; (e) An identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and alternatives, and an assessment of those measures; (f) An indication of gaps in knowledge and uncertainties which may be encountered in compiling the required information; (g) An indication of whether the environment of any other State or areas beyond national jurisdiction is likely to be affected by the proposed activity or alternatives; (h) A brief, non-technical summary of the information provided under the above headings.³⁰⁾

With respect to the assessment of impacts and review of environmental impact statement, not only potential but also short-term, long-term and cumulative impacts of the activity on the environment should be assessed based upon possible scientific methods.³¹⁾ In addition, the Scientific and Technical Body established under the BBNJ instrument could be given the opportunity to review an environmental impact statement.

Commission defines the term 'significant' as 'something more that detectable but need not be at the level of serious or substantial.' International Law Commission, Commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, in Report of the International Law Commission, Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN DOC. A/56/10 (2001), p.377.

30) UNEP EIA Principles, Principle 4.

31) Kong, op. cit., p.665. The importance of cumulative impact assessment has been confirmed in the UNEP EIA Principles and the Madrid Protocol. UNEP EIA Principles, Principle 4(d); Madrid Protocol, art. 3.2(c).

In terms of decision-making, no matter how the process is structured, state parties should make every possible effort to disallow the proposed activities that would have significant adverse impacts and this must be reflected in designing the EIA regime under the BBNJ instrument. And, lastly, with regard to the monitoring process, it is important to regularly review the impacts of activities on the environment as there is limited information on ABNJ.³²⁾ When a harmful impact has been discovered as a result of monitoring, the sponsoring state as well as the Conference of the Parties shall immediately take measures necessary to reduce or eliminate the impact.³³⁾

The establishment of a contingency fund could also be considered as suggested during the negotiations at the fourth session of the Preparatory Committee. In particular, the proponent of the activity could deposit a sum of money which could be returned back to the proponent upon satisfactory implementation of EIA reports.³⁴⁾ It would be posted in an escrow account so that it does not remain under the control of the state or the proponent that posts it. In the sense that the proponent itself, which has a direct obligation to comply with EIA commitments, has to place a deposit rather than shifting it to the state, this would reasonably create an incentive for compliance.

32) For secured and sound environmental management, the activities in operation must be subject to continuous monitoring. In the *Gabcikovo-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.” *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7 (Sept. 25), p.111.

33) It is worth mentioning that the Convention on Environmental Impact Assessment in a Transboundary Context, the so-called ‘Espoo’ Convention, describes the objectives of the post-project analysis in concrete terms. See Convention on Environmental Impact Assessment in a Transboundary Context, art. 2(3), Feb. 25, 1991, 1989 U.N.T.S. 310 (entered into force Sept. 10, 1997), Appendix V.

34) 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, ¶ 204 (hereinafter Chair’s Streamlined Non-Paper).

4. Assigning Roles to a Central Governing Body Established under the BBNJ Instrument

As conducting an EIA as well as following the results of it primarily falls within the responsibility of a state under whose control or jurisdiction the activity in question takes place, it is somewhat skeptical whether such a state is willing to impose a strict assessment on its nationals and vessels. Thus, in order to minimize such skepticism, one option, under the BBNJ instrument, as mentioned earlier, would be to establish a central governing body that could generally review the adequacy of EIAs and make recommendations on whether to proceed with proposed activities. This would be similar to the Subsidiary Body on Science, Technical and Technological Advice (SBSTTA), established under Article 25 of the CBD, that reviews the scientific and technical aspects of EIAs and provides advice with respect to the implementation of the CBD.³⁵⁾

By and large, along with the secretariat support from the United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS), the body may be able to perform the functions of providing a central repository of publicly available data and information on EIAs, technical support to states having capacity constraints, and periodical reviews during the monitoring process.

(1) Providing a Central Repository of Publicly Available Data and Information

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 central governing body could establish a central repository of publicly available data and information on EIAs and baseline data on ABNJ, which would closely resemble a ‘clearing-house’ mechanism under the CBD. The ‘clearing-house’

35) For more on the functions of the SBSTTA, see Conference of the Parties to the Convention on Biological Diversity, Eighth Meeting, Curitiba, Brazil, Mar. 20-31, 2006, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Eighth Meeting: VIII/10. Operations of the Convention, Annex III, UNEP/CBD/COP/DEC/VIII/10 (June 15, 2006).

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 network.³⁶⁾

This central repository should make information gathered at all different stages of the EIA process and the results of EIAs and monitoring measures publicly available. 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 DOALOS.³⁷⁾

(2) Providing Technical Support to States Having Capacity Constraints

Under the BBNJ instrument, the special needs of developing states, i.e., the least developed countries and small island developing states, having capacity constraints in conducting EIAs, would need to be taken into account.³⁸⁾ Accordingly, the central governing body would assist those developing states in conducting EIAs upon request. 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 BBNJ instrument. Or, more directly, such a committee would undertake EIAs on behalf of the states.³⁹⁾

The establishment of a central repository of publicly available data and information on EIAs, as mentioned above, and the assurance of sufficient financial assistance are also the underlying elements for improving developing state capacities.

(3) Enhancing the Monitoring Process by Providing Periodical Reviews

Article 204 of the UNCLOS clearly imposes on states to monitor the risks or effects of pollution of the marine environment either directly or through competent international

36) See CBD, art. 18.3; 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).

37) See Chair's Streamlined Non-Paper, *op. cit.*, ¶ 163.

38) *Id.* ¶ 197.

39) An EIA could also be undertaken by a third party, such as a research institution or a private company, under the auspices of the state. See *id.* ¶ 156.

organizations. Here, the problem is that it is in the hands of the states in overseeing the effects of any activities they have permitted, which may seem to be quite unreliable.⁴⁰⁾ Thus, at the stage of monitoring, it is essential for the central governing body to have the opportunity to periodically review the action taken pursuant to the result of an EIA, and report such a review to the Conference of the Parties. If non-implementation has been found, it should make every possible means to find appropriate solutions. The issues of implementation shall be on the agenda until such issues are resolved. States shall provide the Conference of the Parties with a status report in writing of their implementation progress.

Periodic reviews by the central governing body could be very effective in terms of increasing transparency by generating public awareness of the activities in operation. The state may, eventually, feel strong pressure by such awareness and, thus, comply with the result of the EIA report.

IV. Conclusion

In this paper, I provided some potential elements in building the EIA scheme under the BBNJ instrument. First, in order to minimize an overlap between various instruments in terms of the application of an EIA process, the BBNJ instrument should play a role as a comprehensive legal instrument establishing standard rules and procedures for EIAs in ABNJ. It should specify the EIA process in greater detail to make states certain about the responsibilities they have under EIA commitments. Second, as the rudimentary and unelaborated nature of the provisions makes the implementation of EIA obligations very difficult, it is important for the BBNJ instrument, perhaps, to be designed to supplement those EIA provisions under the UNCLOS in the form of either setting ‘additional or special rules’ or placing ‘minimum standards,’ and specifying a strict time frame for every procedural stage of an EIA so as to render a prompt process for assessment. Third, the BBNJ instrument could establish a central governing body that could generally review the adequacy of EIAs and make recommendations on whether to proceed with proposed activities.

40) Ma, Fang & Guan, op. cit., p.27.

The body may be able to perform the functions of providing a central repository of publicly available data and information on EIAs, technical support to states having capacity constraints, and periodical reviews at the monitoring process.

Undoubtedly, EIAs contribute to the conservation and sustainable use of marine biodiversity in ABNJ. It is for the UNGA to continuously play a pivotal role in offering the opportunity to develop best practice standards for EIAs on all activities with the potential for adverse impacts on the marine biodiversity in ABNJ.

References

- Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration*, Cambridge, 2008.
- Elisabeth Druel, “Environmental Impact Assessments in Areas Beyond National Jurisdiction”, “The Institute for Sustainable Development and International Relations”, Study No. 01/03 (2013).
- Elisabeth Druel & Kristina M. Gjerde, “Sustaining Marine Life Beyond Boundaries: Options for an Implementing Agreement for Marine Biodiversity Beyond National Jurisdiction under the United Nations Convention on the Law of the Sea”, *Marine Policy*, Vol. 49 (2014).
- Alex G. Oude Elferink, “Environmental Impact Assessment in Areas beyond National Jurisdiction”, *International Journal of Marine and Coastal Law*, Vol. 27 (2012).
- Lingjie Kong, “Environmental Impact Assessment under the United Nations Convention on the Law of the Sea”, *Chinese Journal of International Law*, Vol. 10 (2011).
- Deqiang Ma, Qinhua Fang & Song Guan, “Current Legal Regime for Environmental Impact Assessment in Areas Beyond National Jurisdiction and Its Future Approaches”, *Environmental Impact Assessment Review*, Vol. 56 (2016).
- Julien Rochette, Sebastian Unger, Dorothee Herr, David Johnson, Takehiro Nakamura, Tim Packeiser, Alexander Proelss, Martin Visbeck, Andrew Wrighti & Daniel Cebrian, “The Regional Approaches to the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction”, *Marine Policy*, Vol. 49 (2014).
- Robin Warner, “Environmental Assessment in Marine Areas Beyond National Jurisdiction”, in *Research Handbook on International Marine Environmental Law* (Rosemary Rayfuse ed., 2015).
- Robin Warner, “Oceans beyond Boundaries: Environmental Assessment Frameworks”, *International Journal of Marine and Coastal Law*, Vol. 27 (2012).
- Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 (Apr. 20).

Counter-Memorial of the United Kingdom, *MOX Plant (Ir. v. U.K.)*, pp.109-121 (Perm. Ct. Arb. Jan. 9, 2003).

Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25).

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).

Conference of the Parties to the Convention on Biological Diversity, Eighth Meeting, Curitiba, Brazil, Mar. 20-31, 2006, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Eighth Meeting: VIII/10. Operations of the Convention, Annex III, UNEP/CBD/COP/DEC/VIII/10 (June 15, 2006).

Conference of the Parties to the Convention on Biological Diversity, Eleventh Meeting, Hyderabad, India, Marine and Coastal Biodiversity: Revised Voluntary Guidelines for the Consideration of Biodiversity in Environmental Impact Assessments and Strategic Environmental Assessments in Marine and Coastal Areas, Note by the Executive Secretary, UNEP/CBD/COP/11/23 (Aug. 21, 2012).

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).

Expert Workshop on Scientific and Technical Aspects Relevant to Environmental Impact Assessment in Marine Areas Beyond National Jurisdiction, Manila, Nov. 18-20, 2009, 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 (Nov. 20, 2009).

G.A., Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, U.N. Doc. A/66/119 (June 30, 2011).

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).

G.A. Res. 59/24, U.N. Doc. A/RES/59/24, (Feb. 4, 2005).

G.A. Res. 66/288, U.N. Doc. A/RES/66/288 (Jul. 27, 2012).

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

Informal Working Group on Environmental Impact Assessments, Oral Report of the Facilitator to the Plenary, Intergovernmental Conference on 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 Biodiversity of Areas Beyond National Jurisdiction 4-17 September 2018 (Sept. 14, 2018).

International Law Commission, Commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, in Report of the International Law Commission, Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN DOC. A/56/10 (2001).

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).

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.

UNEP Principles on Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, UN Doc. UNEP/IG.12/2 (1978), reprinted in 17 ILM 1094 (1978).

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).

<Abstract>

With respect to the development of an international legally binding instrument (BBNJ instrument) under the United Nations Convention on the Law of the Sea (UNCLOS) to regulate marine biodiversity beyond national jurisdiction, the issue of implementing environmental impact assessments (EIAs) is an important part of the negotiations. An EIA is a tool that is used to identify the environmental, social and economic impacts of a project prior to decision-making. It aims to predict environmental impacts at an early stage in project planning and design, find ways and means to reduce adverse impacts, shape projects to suit the local environment and present the predictions and options to decision-makers.

Currently, almost all state parties seem to agree on the establishment of an EIA scheme under the BBNJ instrument. This is true because states have shown broad support by institutionalizing such use under various international instruments and frameworks. Furthermore, EIAs have been developed as customary practice which has been recognized by international courts. Unfortunately, however, they do not seem to have reached consensus on the technical elements including the contents of EIAs and a means of their implementation.

Therefore, this article examines the potential elements that state parties should pay particular attention to regarding those elements in building the integrated scheme for EIAs in ABNJ.

Key words : United Nations Convention on the Law of the Sea, Environmental Impact Assessment, Marine Biodiversity, Areas beyond National Jurisdiction, Sustainable Use, Screening, Monitoring, Central Governing Body

<국문요약>

관할권 이원지역의 해양생물다양성 보존과 지속가능한 이용을 위한 포괄적 환경영향평가제도 도입에 관한 연구

이 길 원*

국제사회는 국가관할권 이원지역의 해양생물다양성 보존과 지속가능한 이용에 관한 유엔해양법협약상 법적 구속력 있는 국제 법률문서(BBNJ 법률문서)를 개발하기로 결정한 바 있다. 지금까지의 협상 과정을 살펴보면, 환경영향평가제도의 도입에 관한 논의는 ‘이익공유 문제를 포함한 해양유전자원의 법적 지위’, ‘해양보호구역을 포함한 지역기반관리수단의 이용’, ‘역량강화와 해양과학기술 이전’ 등에 관한 논의와 더불어 주요이슈 중 하나로 대두되고 있다.

환경영향평가란 활동의 개시여부를 결정하기에 앞서 해당 활동의 환경적, 사회적 그리고 경제적 영향을 검토하는 절차를 말한다. 활동 계획 및 설계 등 초기 단계에서 환경 영향을 예측하고, 부정적인 영향을 줄이기 위한 방법과 수단을 모색하여 해당지역의 환경에 맞는 활동을 설계하고, 의사 결정자에게 환경영향에 대한 예측과 여러 대안을 제시하는 것을 목표로 한다.

현재 BBNJ 법률문서 개발에 참여하고 있는 당사국들은 BBNJ 법률문서에 따른 환경영향평가 제도의 설립에 대체로 동의하는 것으로 보인다. 이미 현존하고 있는 다양한 국제문서와 제도에서 관할권 이원지역에서 이행되는 환경영향평가 제도를 도입하고 있다는 점이 이를 뒷받침한다. 아울러, 국제사법법원이나 국제해양법재판소 등 국제분쟁 해결절차에서 환경영향평가의 이행을 국제법상의 의무로 받아들이고 있다는 점에서도 그렇다. 다만, 아직까지 당사국들은 환경영향평가의 내용과 그 이행 방법을 포함한 기술적 요소들에 대해 합의에 도달하지 못한 것으로 보인다. 따라서 본 연구는 당사국들이 BBNJ 법률문서의 개발과정에서 상기 언급한 기술적 요소와 관련하여 고려하여야 하

* 충남대학교 법학전문대학원 부교수

는 부분이 무엇인지 검토 및 분석하고자 한다.

주제어 : 유엔해양법협약, 환경영향평가, 해양생물다양성, 관할권 이원지역, 지속가능한
이용, 스크리닝, 감시, 중앙통제기구