When to conduct an EIA

Two main elements need to be addressed to answer the question of when an EIA should be conducted, each of which are discussed below:

(i) The **threshold of impact** that triggers the obligation to prepare an EIA; and

(ii) Does the obligation to conduct EIA apply only to activities **conducted in** ABNJ, or does it include activities conducted within national jurisdiction that could have **effects on** areas beyond national jurisdiction?

Threshold of impact

Two options for an impact threshold are under discussion:

(i) An EIA would be required if an activity “may cause substantial pollution of or significant and harmful changes” (UN Convention on the Law of the Seas (UNCLOS) Art. 206), or

(ii) If the activity “is likely to have more than a minor or transitory effect,” which would then trigger a tiered EIA process.¹

In the nearly 40 years since UNCLOS was adopted, EIA practice in ABNJ has evolved considerably. The “minor and transitory effect” threshold coupled with a “tiered approach” to EIA in Antarctica is one example of this evolution. Under this approach, all activities with the potential for minor or transitory effects are subject to a preliminary assessment (screening) to determine the likely level of impact, which in turn determines how the assessment is conducted and how decisions are made (see EIA Briefing #3).¹ This process is well established under the Madrid Protocol in the Antarctic Treaty System, and many States involved in the BBNJ negotiations have extensive experience with its application. The High Seas Alliance (HSA) and many delegations support this approach.

“Effects on” vs “activities in” ABNJ

Because the ocean is a fluid environment, effects may spread far beyond the site of an activity. Thus, the HSA and many States support requiring EIA for activities that may have **effects** on ABNJ, regardless of whether the activity itself takes place within or beyond national jurisdiction. It is the effects of an activity that matter to the marine environment, not where the activity is located. This is reflected in the objective of the High Seas Treaty, which is the conservation and sustainable use of **biodiversity**
in ABNJ, not activities in ABNJ. An effects-based approach is also consistent with UNCLOS Article 194(2), as well as the general obligation of States to undertake an environmental impact assessment where there is a risk that a proposed activity may have significant adverse impacts in a transboundary context, in particular, on a shared resource such as the High Seas.

REFERENCES
2. UNCLOS Art. 194(2) reads “2. 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.”