



HSA Policy Brief: EIAs in ABNJ: Effects or location-based?¹

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This Memorandum, relating to the 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 diversity of areas beyond national jurisdiction, examines whether at international law States are required to assess activities within national jurisdiction which may have an effect in areas beyond national jurisdiction, particularly with reference to Article 22 of the [draft President's text](#)² of 18 November 2019, A/CONF.232/2020/3.

The IGC President's draft offers alternative texts.

Article 22 Obligation to conduct environmental impact assessments

*3. The requirement in this Part to conduct an environmental impact assessment applies [only to **activities conducted** in areas beyond national jurisdiction] [to all **activities that have an impact** in areas beyond national jurisdiction]. [emphasis added]*

We analyze this text with respect to relevant provisions of the United Nations Convention on the Law of the Sea 1982 (UNCLOS), international jurisprudence, other multilateral agreements, and national laws.

Overview

The obligation to undertake an environmental impact assessment (EIA) with respect to activities which may affect in areas beyond national jurisdiction (ABNJ) is grounded in the "no harm" principle,³ is stated in the *Trail Smelter* case,⁴ is enunciated in Principle 2 of the Rio Declaration,⁵ has evolved into a principle of customary international law; and is codified in Article 194(2) of UNCLOS.⁶

² 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 (18 November 2019) UN Doc A/CONF.232/2020/3. Available at <https://undocs.org/en/a/conf.232/2020/3>.

³ See Gunnar Sander, "International Legal Obligations for Environmental Impact Assessment and Strategic Environmental Assessment in the Arctic Ocean" *International Journal of Marine and Coastal Law* 31/88 (2016); Elisa Ruozi, "The Obligation to Undertake an Environmental Assessment in the Jurisprudence of the ICJ: A Principle in Search of Autonomy" *European Journal of Risk Regulation* 8/158 (2017).

⁴ "No State has the right to use or permit the use of its territory in such a manner as to cause injury by the emission of fumes in or transported to the territory of another or the properties or persons therein, when the case is of serious consequence and injury is established by clear and convincing evidence." *Trail Smelter Arbitration (United States v Canada)* (1938 and 1941) 3 RIAA 1905.

⁵ Rio Declaration, Principle 2 says: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992, Annex I. See also UN Conference on the Human Environment, 'Stockholm Declaration of the United Nations Conference on the Human Environment' (16 June 1972) UN Doc A/CONF.48/14/Rev 1, 3, reprinted in 11 ILM 1416 (1972).

⁶ UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, 21 ILM 1261, Article 194(2). Available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1833-A-31363-English.pdf>.

UNCLOS

Article 194(2) Measures to prevent, reduce and control pollution of the marine environment

Article 194(2) of UNCLOS provides for a specific obligation of due diligence to ensure that States Parties 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.” That clearly includes the high seas, and specifically addresses harmful effects that occur beyond areas where they exercise sovereign rights: in terms of draft Article 22, it embodies the effects, rather than activities, criterion.

Article 204 Monitoring of the risks or effects of pollution

Article 204 of UNCLOS, which requires States “to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment,” applies to “the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.” Article 204 does not distinguish between activities within or beyond national jurisdiction. It addresses *any* activities that might be likely to have effects on the marine environment.

Article 206 Assessment of Potential Effects of Activities

Article 206 of UNCLOS requires an EIA when there are “reasonable grounds for believing that planned activities under [the State’s] jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment.” The State must “assess the potential effects of such activities on the marine environment and ... communicate reports of the assessment.” Article 206, like Article 204, does not distinguish whether the “substantial pollution of or significant and harmful changes to the marine environment” are effects manifesting themselves within or beyond areas of national jurisdiction.

International Jurisprudence

International Court of Justice: *Pulp Mills Case*

In the [Pulp Mills Case](#),⁷ the ICJ explained that it is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”⁸ and “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”.⁹ ABNJ is, in this sense, a shared resource.

International Court of Justice: *Certain Activities Case*

The ICJ elaborated on the EIA obligation in the [Certain Activities](#) case, para 104, explaining that “the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context.” This principle is just as applicable to ABNJ.

International Court of Justice: *Gabčíkovo–Nagymaros Case*

The ICJ, in the *Gabčíkovo–Nagymaros* case,¹⁰ said that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.” This is clear support for the effects approach for areas beyond national jurisdiction.

International Tribunal for the Law of the Sea: *Seabed Advisory Opinion*

In its advisory opinion on deep seabed mining, *Case No. 17*, para 142, the Seabed Disputes Chamber of the International Law of the Sea (ITLOS), applied the *Pulp Mills* principle to ABNJ, stating that “[t]he Court’s reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction.” This again is a clear recognition that activities with an impact on areas beyond the limits of national jurisdiction are to be within the scope of an EIA.

Inter-American Court of Human Rights: *Advisory Opinion*

In its *Environment and Human Rights* Advisory Opinion OC23/17, the Court held that “Under environmental law, the principle of prevention is applicable with regard to activities which take place in a State’s territory, or in any area under its jurisdiction, that cause damage to the environment of another State, or in relation

⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [2010] ICJ Rep 14. Available at <https://www.icj-cij.org/en/case/135/judgments>.

⁸ *Pulp Mills*, para. 101. Citing *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment [1949] ICJ Rep, 22.

⁹ *Pulp Mills*, para. 204.

¹⁰ *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, para. 53. Available at <https://www.icj-cij.org/en/case/92/judgments>. Citing *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 1996 226, 241–242 (“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”).

to the damage that may occur in areas that are not part of the territory of any specific State, such as on the high seas.”¹¹

Other Multilateral Agreements

CBD Convention

The [CBD Convention](#)¹² applies to ABNJ¹³ and requires environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity.¹⁴ Its Expert Workshop¹⁵ on EIA in marine areas beyond national jurisdiction focused on activities and processes under their jurisdiction and control which may have significant adverse impacts on marine biodiversity beyond national jurisdiction.

Espoo Convention

The European [Espoo Convention](#)¹⁶ defines “transboundary impact” to mean an impact within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party.¹⁷ So while it does not apply to ABNJ, it does clearly imply an effects based criterion: an impact caused by a proposed activity situated in the area of another Party.

UNFCCC

Parties to the UNFCCC confirmed that “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹⁸

¹¹ Inter-American Court of Human Rights, Advisory Opinion OC23/17 (2017), para. 131. Available at https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf.

¹² Convention on Biological Diversity (adopted 22 May 1992, entered into force 29 December 1993) 1760 UNTS 79, 31 ILM 818. Available at https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf.

¹³ CBD Article 4(b): Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party: In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction.

¹⁴ CBD Article 14(1).

¹⁵ Report of the Expert Workshop on Scientific and Technical Aspects Relevant to Environmental Impact Assessment in Marine Areas Beyond National Jurisdiction, UN Doc UNEP/CBD/EW-EIAMA/2 (2009) para. 15. Available at <https://www.cbd.int/doc/meetings/mar/eweiama-01/official/eweiama-01-02-en.doc>.

¹⁶ Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 310 (Espoo Convention). Available at https://treaties.un.org/doc/Treaties/1991/02/19910225%2008-29%20PM/Ch_XXVII_04p.pdf.

¹⁷ Espoo Convention, Article 1 (viii)

¹⁸ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107. Available at: https://treaties.un.org/doc/Treaties/1994/03/19940321%2004-56%20AM/Ch_XXVII_07p.pdf.

National and Community Law

United States

U.S. [Executive Order 12114](#), to further the purposes of the U.S. National Environmental Policy Act,¹⁹ requires that “major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica)” are subject to “(i) environmental impact statements (including generic, program and specific statements); (ii) bilateral or multilateral environmental studies, relevant or related to the proposed action, by the United States and one or more foreign nations, or by an international body or organization in which the United States is a member or participant; or (iii) concise reviews of the environmental issues involved, including environmental assessments, summary environmental analyses or other appropriate documents,” subject to some exceptions.

New Zealand

In New Zealand, section 39(1)(d) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, which governs environmental impact assessments, provides that an impact assessment must “identify the effects of the activity on the environment and existing interests (including cumulative effects and effects that may occur in New Zealand or in the sea above or beyond the continental shelf beyond the outer limits of the exclusive economic zone.” This is then an obligation to take measures to ensure that oil pollution from within its EEZ, for instance, does not spread to the high seas, or the waters of other States.

European Union

The European EIA [Directive](#), Article 2,²⁰ requires that “projects likely to have significant effects on the environment” need to be assessed.²¹

The European Union Directive on SEA²² requires a State to undertake transboundary consultations when “the implementation of a plan or program being prepared in relation to its territory is likely to have significant effects on the environment in another Member State.”²³ This is an effects-based criterion. The application of the Directive to ABNJ is unclear.²⁴

¹⁹ [42 U.S.C. 4332](#), et seq.

²⁰ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) (OJ L 26, 28.1.2012, p. 1) As amended by: Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (OJ L 124, 25.4.2014, p. 1).

²¹ Projects are defined in terms of lists in Annexes I and II – see Art 4.

²² Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment. Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001L0042>.

²³ European SEA Directive Art. 7.

²⁴ See SEA Directive, preamble paragraph 4, referring to “significant effects on the environment in the Member States”. See Gunnar Sander, “International Legal Obligations for Environmental Impact Assessment and Strategic Environmental Assessment in the Arctic Ocean,” *International Journal of Marine and Coastal Law* 31/88 (2016); Richard Caddell, “Uncharted Waters: Strategic Environmental Assessment in the UK Offshore Area” in G Jones and E Scotford (eds), *The Strategic Environmental Assessment Directive: A Plan for Success?* (Hart 2016). Available at <https://orca.cf.ac.uk/91903/3/Caddell%20-%20SEA%20in%20the%20Offshore%20Area%20Final%20Version%20060516%20%281%29.pdf>.

Spain

Law 21 of 9 December 2013 establishes the parameters to be followed for environmental studies, taking into account possible transboundary effects. Projects under this directive will be evaluated according to their characteristics (size, resource use, waste generation, etc.), location (paying special attention to environmentally important locations such as coasts, wetlands or forests, and the characteristics of possible impact (extent, magnitude, duration, frequency, and reversibility).

Lithuania

The process of transboundary EIA is regulated by the Law on Environmental Impact Assessment of the Proposed Economic Activity, United Nations Convention on Environmental Impact Assessment in a Transboundary Context (also referred to as “Espoo Convention”) and international treaties concluded by the Republic of Lithuania. Based on these regulatory documents, Lithuania, as Party to the Espoo Convention is obliged to assess the environmental impact of certain activities at an early stage of planning and to notify and consult other countries on all proposed economic activities that are likely to have a significant adverse environmental impact across the state boundaries. Accordingly, other countries, which are Parties to the Espoo Convention are obliged to notify and consult Lithuania about economic activities proposed on their territory that are likely to have significant negative transboundary impacts. When performing a transboundary environmental impact assessment, the Ministry of Environment of the Republic of Lithuania is acting as a coordinating authority, while the Environmental Protection Agency performs the functions of the competent authority.

Central Asia: Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan

There are specific guidelines on EIA in a transboundary context for Central Asia that were developed in 2005. Countries include Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan with the aim to promote and facilitate the implementation of the Espoo Convention in the Central Asian sub-region.²⁵

²⁵ United Nations Economic and Social Council, Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, Sixth session, ECE/MP.EIA.2014/2 (2014). Available at https://www.unecce.org/fileadmin/DAM/env/eia/meetings/2017_02_09_Almaty_Workshop_Espoo/3_Guidance_on_enhancing_consistency_ECE_MP.EIA.2014.2_e.pdf

Conclusion

It is clear that under UNCLOS, international jurisprudence and the national laws examined, it would be both consistent with international law and would assist the implementation of States' obligations if draft Article 22(3) were to read as follows:

3. The requirement in this Part to conduct an environmental impact assessment applies ~~{only to activities conducted in areas beyond national jurisdiction}~~ {to all activities that have an impact in areas beyond national jurisdiction}.