



## How could the EIA provisions of the BBNJ Agreement apply to activities and existing bodies?

July 2021

United Nations (UN) Member States are in the final stages of negotiating a new legally binding instrument under the UN Convention on the Law of the Sea (UNCLOS) for the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (hereafter “BBNJ Agreement”). This paper examines, from a practical perspective, how key EIA provisions proposed by the High Seas Alliance would be applied in the BBNJ Agreement to new activities<sup>1</sup> proposed by Parties to the Agreement.

The EIA provisions of the BBNJ Agreement offer the opportunity to update and modernize the practice of environmental assessment in ocean areas beyond national jurisdiction (ABNJ). While the BBNJ Agreement will not directly impose EIA procedures on existing bodies such as RFMOs, the ISA or the IMO,<sup>2</sup> the requirements will apply to those States that have agreed to by the BBNJ Agreement’s provisions by becoming Parties to the new Agreement. Those States Parties that are also party to regional and sectoral organizations such as RFMOs, the ISA and the IMO, would promote the adoption by those organizations of the EIA standards and procedures in the BBNJ Agreement.

### Initial assumptions

- **Threshold:** For the purpose of these examples, we have used ‘more than minor or transitory,’ a threshold adopted from the Antarctic Treaty’s Madrid Protocol that has enjoyed considerable support in the negotiations to date.<sup>3</sup>
- **Who conducts:** The State with jurisdiction or control over the activity is responsible for conducting the EIA. States with capacity constraints may request that the EIA be prepared by a pool of experts identified by the Scientific and Technical Body (STB).
- **Who reviews:** We have applied the procedure in Article 37 of the draft text, under which EIAs prepared for activities with more than a minor or transitory effect on ABNJ are reviewed by the STB, which may make requests for additional information or recommendations for further consideration by the sponsoring State and the Conference of Parties (COP).
- **Who decides:** HSA supports the view of many that the BBNJ COP, which represents the interests of the international community, should have decision-making authority over whether a proposed activity may proceed. However, if the sponsoring State retains

authority over the conduct of an EIA and resulting decisions, it is **critical** that the BBNJ Agreement include a mechanism under which one or more States Parties can request:

- The STB to review the EIA (or a decision not to prepare an EIA);
- The COP to review the decision to authorize the activity.

The inclusion of this review mechanism is an *essential backstop* to prevent substandard, incomplete or inadequate “flag of convenience” EIAs, and to prevent approval of activities that are not consistent with the purposes of the BBNJ Agreement. Dispute resolution mechanisms, because they are rarely invoked for political reasons, should not be relied upon.

- **Standard for decision-making:** If the project cannot be managed to prevent significant adverse effects, the project may not go forward. This decision standard already applies to one activity in ABNJ --high seas bottom fishing.<sup>4</sup>

## 1. Novel projects

A number of proposals have emerged in recent years to conduct activities in ABNJ that have not previously taken place on a significant scale, and for which there is no established relevant body with the authority to assess and manage those activities. These include [floating cities](#) (“seasteading”), large scale [floating aquaculture](#) operations, floating [renewable energy](#) or nuclear facilities, [plastic collection](#) activities; and [climate change mitigation](#) or geoengineering proposals. At present, there is no relevant body or regulatory structure under which these activities can be appropriately assessed and managed, with the possible exception of ocean iron fertilization (one type of proposed carbon dioxide removal technology).

The following provides practical examples of how HSA recommendations on EIAs would play out in the real world for both existing and novel activities.

### a. “Seasteading”

An individual proposes to develop a floating condominium complex in the high seas that will originate from and fly the flag of State X, a State Party to the BBNJ Agreement. State X concludes that the condominium project is likely to have more than a minor or transitory effect on the marine environment and is thus obligated to ensure the conduct of an EIA that meets the BBNJ agreement requirements for EIA. If State X faces capacity constraints, it could request that the EIA be prepared by a “pool of experts” named by the Scientific and Technical Body (STB) of the BBNJ COP. If capacity is not an issue, State X could either conduct the EIA itself, or require the proponent to prepare the EIA. In either case, State X would be responsible for ensuring that the EIA comports with the EIA requirements in the BBNJ Agreement.

Once completed, the EIA would undergo scientific review by the STB to ensure that it meets the minimum requirements in the new Agreement. This step is crucial to prevent substandard, inadequate or “flag of convenience” EIAs. The STB would make recommendations for any revisions necessary to comport with the EIA requirements in the BBNJ agreement, or if none are

needed, make a recommendation to the Conference of Parties (COP) as to whether the project should proceed, and if so, what management measures are needed to prevent significant adverse effects.

The COP would decide whether the project may proceed, and under what conditions, consistent with the recommendations of the STB. If the project cannot be managed to prevent significant adverse effects, or if the STB determines that management measures proposed by State X are not sufficient to prevent significant adverse effects, the project may not go forward.

Once the project is launched, State X would be required to monitor the operation of the project to ensure that unexpected effects, either in nature or severity, are discovered promptly and reported to the COP and the public via the Clearinghouse Mechanism. In such a case, the COP would have the authority to require State X to modify or halt the activity.

#### **b. Kelp aquaculture for carbon sequestration**

A company proposes to grow kelp on floating platforms and then sink the kelp to the ocean floor with the objective of sequestering carbon.<sup>5</sup> The project will originate from State Y.<sup>6</sup>

Similar to the example above, State Y would be responsible for ensuring the preparation of an EIA consistent with the BBNJ Agreement's EIA provisions. The STB would review the EIA to ensure it comports with the BBNJ requirements. This step provides an important safeguard against unscrupulous companies that might otherwise "forum shop" for States that may not have the capacity or inclination to ensure an EIA is conducted consistent with the BBNJ Agreement's EIA standards.

## **2. New proposed activities in existing industrial sectors**

#### **a. Fishing**

Proposed new fishing activities, which include substantial changes to existing fisheries that may have more than a minor or transitory effect on the marine environment, should be subject to EIA under the BBNJ Agreement. This will help operationalize existing obligations in international fisheries-related instruments, including Articles 5, 6 and 10 of the Fish Stocks Agreement,<sup>7</sup> and Article 206 of UNCLOS.

#### ***Where there is no RFMO with competence over the proposed fishing activity***

In an area where there is no RFMO with competence over the proposed new fishing activity, BBNJ provisions would apply directly. Thus, when a State Party has reasonable grounds for believing the planned fishing activity is likely to have more than a minor or transitory effect on the marine environment in ABNJ, that State would be responsible for ensuring the conduct of an EIA in

accordance with the provisions in the BBNJ Agreement. The process would be similar to that described above for novel activities.

***Where there is an RFMO with competence over the proposed fishing activity***

The Treaty will have an important role in ensuring that RFMOs follow basic modern EIA practices, such as notifying and consulting with potentially affected States and stakeholders, assessing the impact of the activity on different elements of the ecosystem, considering social or economic impacts, evaluating cumulative effects, and ensuring independent scientific review.<sup>8</sup>

While the BBNJ Agreement would not directly impose EIA procedures on RFMOs with competence over a proposed new fishing activity, States Parties to the BBNJ Agreement should promote the adoption of pertinent EIA measures through the competent RFMO. Likewise, States proposing new activities that are Parties to the BBNJ Agreement and members of the RFMO would take steps to ensure the conduct of an EIA in accordance with the BBNJ Agreement's provisions on EIA.

As envisioned in draft Article 23(4) (alt 4), if the proposed fishing activity has already been assessed under the auspices of an existing RFMO, it is not necessary to conduct another EIA, *provided* that the EIA already undertaken is functionally/substantively equivalent to one required under the BBNJ Agreement.<sup>9</sup>

Under any of these scenarios, there needs to be a mechanism through which other States can ask the STB/COP to review and make recommendations to the State concerned regarding the extent to which the obligations under the new Agreement have been implemented with respect to (i) a decision not to prepare an EIA; (ii) the adequacy of the EIA; and/or (iii) the decision to proceed. This again is essential to prevent flag of convenience or substandard EIAs.

**b. Seabed mining**

The International Seabed Authority (ISA) does not require basic modern environmental assessments for proposed exploration activities.<sup>10</sup> The ISA's current EIA requirements for exploration activities are inadequate from both a procedural and substantive standpoint. Of particular note, EIAs are only "reviewed," not formally approved (or rejected), and there is no ability for the ISA or its Member States to reject or require amendments to an EIA or proposed activity, including where activities would cause significant environmental harm. At present, the ISA does not have EIA requirements for exploitation activities, but its draft EIA regulations, standards, and guidelines are similarly deficient and do not adequately equip the ISA to ensure the effective protection of the marine environment as required under UNCLOS.<sup>11</sup>

States Parties to the BBNJ Agreement proposing to conduct seabed mining operations would be obliged to prepare an EIA in accordance with the BBNJ Agreement's provisions. As with fishing, if an assessment has already been prepared under the ISA's regulations and procedures, it is not

necessary to prepare another EIA, *provided* the assessment is functionally/substantively equivalent to one prepared under the new BBNJ Agreement.

As with other types of activities in ABNJ, it is again critically important that the new Agreement provide a mechanism under which States Parties can ask the COP to review and make recommendations to the sponsoring State with respect to (i) a decision not to prepare an EIA; (ii) the adequacy of the EIA; and/or (iii) the decision to proceed.

### **c. Shipping**

The International Maritime Organization (IMO) is the United Nations agency charged with developing and adopting international regulations on the safety of shipping and protection of the environment from international shipping operations. Other than the general obligations under UNCLOS, IMO has no specific EIA requirements, although there are *ad hoc* requirements to assess the impact (on States) of new regulations, with little or no consideration to the environmental impacts.<sup>12</sup> Given the increasing impact of shipping on the marine and atmospheric environments, new shipping activities, including changes in existing operations and regulations that are likely to have more than a minor or transitory impact, should be subject to modern environmental assessment procedures.

While the new Agreement cannot *directly* impose EIA requirements on the IMO, States Parties to the new Agreement that are IMO members would be under the obligation to ensure the proper conduct of an EIA that comports with the requirements of the BBNJ Agreement when proposing substantial changes to existing shipping regulations and/or activities that are likely to have more than a minor or transitory effect on the marine environment.

The 2020 IMO regulations intended to cut sulfur emissions from shipping provides an example of why prior environmental assessment in the shipping sector is important. These regulations required ships to use either low sulfur fuels or to install scrubbers to capture the sulfur. A recent study reported in [Science magazine](#) found that many more ships opted to install the cheaper scrubbers, which is now resulting in ships “cleaning the air but dirtying the waters,” with an estimated *10 gigatons* of wastewater discharged into the marine environment each year.<sup>13</sup> Studies are only now revealing that the wastewater poses serious potential for harm at very low doses to zooplankton such as young copepods, an important part of the food chain.

Had a modern EIA been prepared by either the IMO or one or more Parties to the IMO, this shift of harm from the air to the water might well have been identified and assessed. Alternative options might have been considered. Mitigation measures might have been identified and required. This example highlights the need for parties to the BBNJ Agreement to take steps to ensure that the EIA requirements in the new Agreement are applied consistently across sectors.

#### **d. Cable laying**

The environmental impacts of cable laying are not as well studied as those of some other industrial sectors affecting ABNJ. A recent scientific review<sup>14</sup> found that while overall impacts on ecosystems are considered minor or short term, they are not absent. Installation and repair increases noise, pollution, turbidity and physical disturbance, which are of concern when vulnerable, sensitive or rare habitats are affected. Growth of the marine renewable energy sector and other developments are expected to dramatically increase the deployment of submarine power cables.<sup>15</sup>

As with any other proposed activity, the BBNJ Agreement's provisions would apply directly to States Parties proposing cable laying/operation (either fiber optic or power) activities if the planned activity is likely to have more than a minor or transitory effect on the marine environment in ABNJ. If the flag State assesses that an activity will be likely to have more than a minor or transitory effect, such as may be the case for an entire new cable, the flag State would be responsible for conducting an EIA in accordance with the provisions in the BBNJ Agreement. The BBNJ Agreement should also prescribe EIA requirements for the State from which the activity departs or on which it was organized, in addition to activities within its jurisdiction and control; in cases where there may be more than one such State, the States should consult as to which State carries out the EIA obligations.

#### **CONCLUSION**

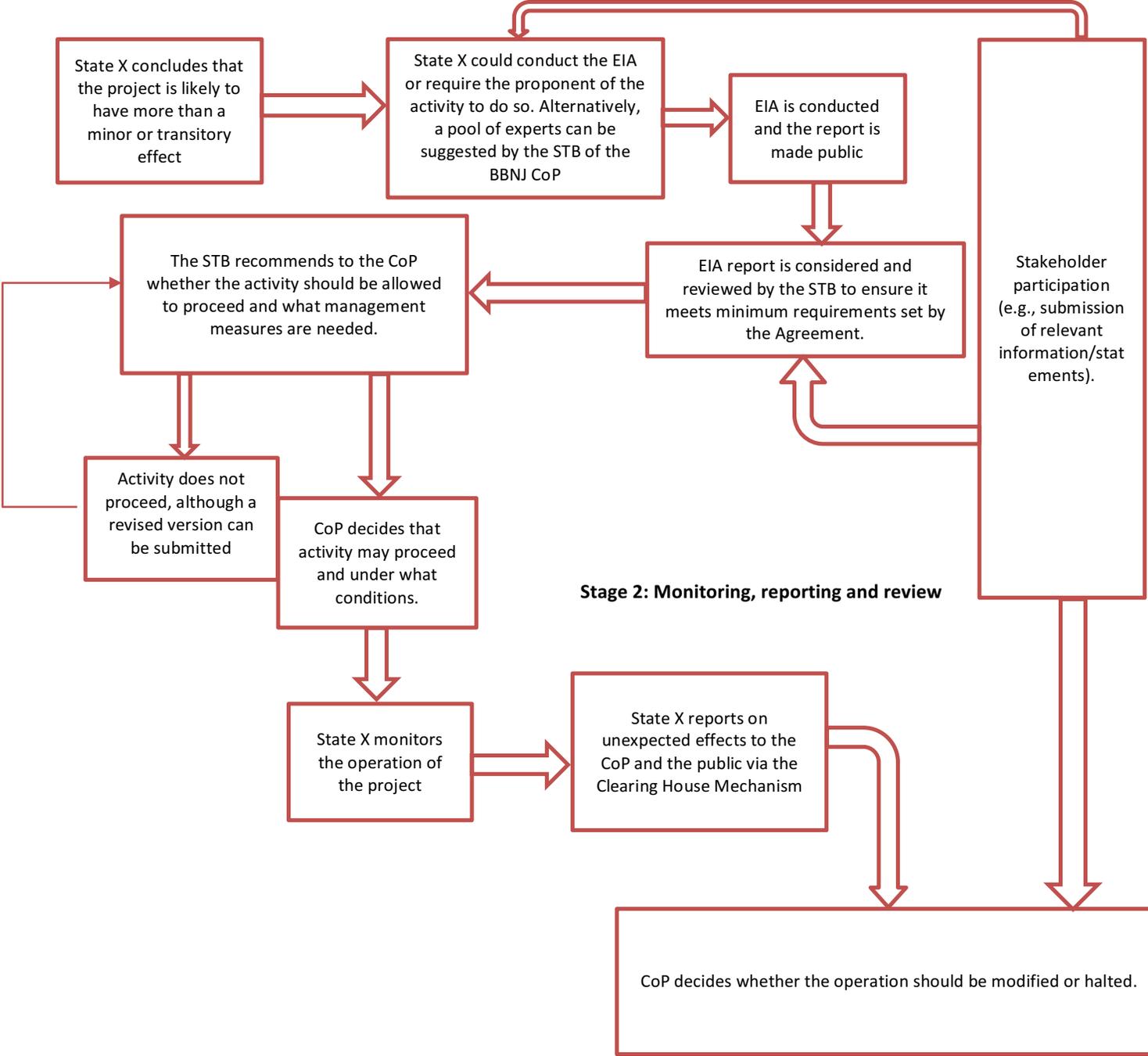
As illustrated above, the EIA practices of many existing regional and sectoral bodies, where they exist, are outdated, inconsistent and not up to modern standards as practiced by most countries. Given the fluid nature of the marine environment, and the fact that industrial activity is increasing rapidly in ABNJ, it is in the interest of not only the ocean as a whole but of all States and stakeholders to ensure that assessment and management of human activity in ABNJ is brought up to modern standards. Failing to do so will have consequences for the broader marine environment, including within EEZs. Thus, HSA recommends that the BBNJ Agreement include provisions that encourage existing bodies such as the IMO, RFMOs and the ISA to upgrade and modernize their practices consistent with the EIA provisions of the new Agreement.

**ANNEX**

**Environmental impact assessment workflow using “seasteading” as an example**

Initial assumption/project description: A company/individual proposes to develop a floating condominium complex in the high seas. The condominium complex originates from State X and will fly the flag of State X.

**Stage 1: Conducting the EIA and the decision-making process**



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<sup>1</sup> “New” activities are defined here to include both novel projects, such as floating aquaculture facilities, as well as significant changes to existing activities that can be expected to have *more than a minor or transitory effect* on the marine environment.

<sup>2</sup> Under the Vienna Convention, a treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization (though nothing precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization if it is recognized as customary international law.) Vienna Convention on the Law of Treaties, Art. 38. At [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_2\\_1986.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf). But States Parties within the BBNJ Agreement will themselves be bound by its provisions, and their actions within other bodies of which they are members will need to be consistent with those (BBNJ) obligations, just in the same way as members of RFMOs are also bound by provisions of the UN Fish Stocks Agreement.

<sup>3</sup> K. Hassanali, *Internationalization of EIA in a new marine biodiversity agreement under the Law of the Sea Convention: A proposal for a tiered approach to review and decision making*,

87 Environmental Impact Assessment Review, 2021. <https://doi.org/10.1016/j.eiar.2021.106554>.

<sup>4</sup> See e.g., UN General Assembly Resolution 61/105 (2006), <https://undocs.org/A/RES/61/105>.

<sup>5</sup> There are significant questions as to whether this approach is effective at sequestering carbon for meaningful timeframes. See Bach, L.T., Tamsitt, V., Gower, J. et al., *Testing the climate intervention potential of ocean afforestation using the Great Atlantic Sargassum Belt*. 12 *Nat Commun* 2556, 2021. and K. Thompson, et. al., [Storage of carbon by marine ecosystems and their contribution to climate change mitigation](https://doi.org/10.1038/s41467-021-22837-2), 2017. <https://doi.org/10.1038/s41467-021-22837-2>.

<sup>6</sup> For purposes of this paper, the proposal is assumed not to fall under the London Convention and London Protocol. If the proposal did fall under the Convention/Protocol, an Assessment of Potential Effects would have to be undertaken in accordance with Annex 2. If that Assessment was functionally and/or substantively equivalent to an EIA required under the BBNJ agreement, it would not be necessary to conduct another EIA.

<sup>7</sup> See FSA, arts. 5(d), 6(3)(d), 6(g), ad 10(d), (g).

<sup>8</sup> A recent study reviewing assessment processes for a hypothetical fishery revealed that “An RFMO may have an assessment procedure in place for exploratory fisheries, but in practice they generally focus on management of the target stocks and consider only a limited part of the ecosystem and potential impacts”. K. Gjerde, K.M., et. al., *Strengthening high seas governance through enhanced environmental assessment processes: A case study of mesopelagic fisheries and options for a future BBNJ treaty*, STRONG High Seas Project, 2021.

<sup>9</sup> “Functionally/substantively equivalent” refers to EIAs that meet the process and content requirements in the BBNJ Agreement.

<sup>10</sup> The ISA only has regulations for exploration. Exploitation regulations are under development.

<sup>11</sup> The draft exploitation regulations as released in March 2019 are at: <https://www.isa.org.jm/document/isba25cwp1>. See the numerous comments on the draft regulations at [https://www.isa.org.jm/files/files/documents/collation\\_of\\_specific\\_drafting\\_suggestions\\_for\\_posting\\_0.pdf](https://www.isa.org.jm/files/files/documents/collation_of_specific_drafting_suggestions_for_posting_0.pdf) and [https://isa.org.jm/files/files/documents/comments-jan2020a\\_final.pdf](https://isa.org.jm/files/files/documents/comments-jan2020a_final.pdf). Draft standards and guidelines at <https://www.isa.org.jm/mining-code/standards-and-guidelines>.

<sup>12</sup> E.g., any State/NGO proposing a short-term GHG measure was asked to include an “assessment of the impact on States.” Similarly, the IMO invited States/observers to provide an impact assessment of a possible ban on the use and carriage of heavy fuel oil in the Arctic, but the focus of those assessments is more on the socio-economic, rather than on the environmental impacts of the ban.

<sup>13</sup> E. Stokstad, *Shipping rule cleans the air but dirties the water*. 14 *Science* Vol. 372, Issue 6543, pp. 672-673, May 2021. DOI: <https://doi.org/10.1126/science.372.6543.672>

<sup>14</sup> B. Taormina, et. al., *A review of potential impacts of submarine power cables on the marine environment: Knowledge gaps, recommendations and future directions*, 96, *Renewable and Sust. Energy Rev.* 380-391, 2018.

<sup>15</sup> The likely substantial growth in subsea power cables means that impacts could be spread over a much wider area and interact with other stressors, such as underwater noise, to contribute to cumulative impacts. Systematic, modern environmental impact assessment, like that proposed for all other activities in ABNJ, will become increasingly important as the area affected by subsea power cables expands in coming decades, in addition to cumulative impacts.