

Key Components and Best Practices for Environmental Impact Assessments and Strategic Environmental Assessments

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Introduction

New and emerging activities pose risks to the conservation and sustainable development of ABNJ in the absence of prior assessment, and remain a significant gap under UNCLOS. Environmental impact assessments and strategic environmental assessments are widely accepted as valuable tools for incorporating environmental and social concerns into decision making processes with respect to specific projects or activities (EIAs) or policies, plans or programmes (SEAs). The development of a new international instrument to address the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (“international Instrument”) is an opportunity to incorporate best practices for EIAs and SEAs already found under a number of multilateral and regional agreements, and apply lessons learned from their application. Importantly, the new Instrument should also provide the mechanism for the assessment of cumulative impacts of activities and climate change.

Following the first session of the Preparatory Committee (PrepCom), the PrepCom’s Chair, H.E. Mr. Eden Charles of Trinidad & Tobago provided his overview of the first session (“Chairs Overview”) which includes Annex II. Annex II contains the Chair’s general observations on issues of general convergence as well as issues that need further discussion and clarification. On environmental impact assessments (EIAs), the Chair noted that:

With regard to environmental impact assessments, the Chair notes that there seems to be a convergence of views on the need for environmental impact assessments and on the need to further elaborate and strengthen the implementation of relevant provisions of UNCLOS, in particular articles 204-206. Delegations also seemed to converge on the need for a clearing-house mechanism to facilitate exchange of information. Differences were detected, however, for example, with regard to the scope and the triggering conditions/thresholds for carrying out impact

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assessments, as well as regarding who would be responsible for taking the decision for an activity to proceed or not, and under what conditions. The Chair encourages further discussion on these issues as well as on transboundary environmental impact assessments and strategic environmental assessments. (Emphasis added).¹

This briefing seeks to provide some clarification on these issues, as well as describe some key components, best practices and existing models for EIAs and SEAs, including thresholds for EIAs and SEAs and activities requiring EIAs.

Elements of an EIA Framework

Objective and Principles

The International Instrument should provide the objective against which EIAs and decisions made on EIAs will be measured.²

An objective for the international instrument could be, for instance, that activities in ABNJ shall be planned and conducted so as to avoid significant adverse impacts on marine biological diversity and on the marine environment, as well as avoid impacts on VMEs and EBSAs, taking into account the precautionary principle and ecosystem-based management.

Screening

The threshold determines the need for an assessment. UNCLOS in article 206 requires assessment of planned activities which “may cause substantial pollution of or significant and harmful changes to the marine environment.” The Rio Declaration Principle 17 threshold is for activities “likely to have a significant adverse impact on the environment”. Sustainable Development Goal 14.2 also speaks in terms of avoiding “significant adverse impacts.”³

One leading instrument which incorporates a well-established EIA process is the Madrid Protocol, which has a threshold of “minor or transitory impact,”⁴ leading to a stepwise

¹ http://www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf, Annex II, para 7.

² The Madrid Protocol, for instance, provides that activities in the Antarctic Treaty area shall be planned and conducted so as to limit adverse impacts on the Antarctic environment and dependent and associated ecosystems and contains a list of outcomes to avoid, such as significant adverse effects on air or water quality. Madrid Protocol. Art. 3 Environmental Principles. 1. The protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment, shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area. 2. (a) activities in the Antarctic Treaty area shall be planned and conducted so as to limit adverse impacts on the Antarctic environment and dependent and associated ecosystems. (b) Activities in the Antarctic Treaty area shall be planned and conducted so as to avoid: (i) adverse effects on climate or weather patterns; (ii) significant adverse effects on air or water quality; (iii) significant changes in the atmospheric, terrestrial (including aquatic) glacial or marine environments; (iv) detrimental changes in the distribution, abundance or productivity of species of fauna and flora; (v) further jeopardy to endangered or threatened species or populations of such species; or (vi) degradation of, or substantial risk to, areas of biological, scientific, historic, aesthetic or wilderness significance.

³ By 2020, sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans <https://sustainabledevelopment.un.org/sdg14>

⁴ Unless it has been determined (by the national authority, in that case) that an activity will have less than a minor or transitory impact, an Initial Environmental Evaluation (IEE) must be prepared. Madrid Protocol art 8; Annex I.

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process.⁵⁶ The CBD article 14 provides for a threshold of proposed projects “that are likely to have significant adverse effects on biological diversity”.

Another well-established EIA Convention is the Espoo Convention, which has a threshold of activities “likely to cause a significant adverse transboundary impact” and activities listed in Appendix I.⁷

The Noumea Convention requires assessment of major projects which might affect the marine environment.⁸ The ISA exploration regulations require assessment of the potential environmental impact of proposed exploration activities, with a short list of low impact exploration-related activities that do not require an EIA.⁹

The UNGA bottom fishing resolutions require EIAs for specified activities, rather than by a threshold: the resolutions require impact assessments for all “individual bottom fishing activities”, and the scope is whether they “would have significant adverse impacts on vulnerable marine ecosystems”. The threshold comes in at the decision-making stage: “if it is assessed that these activities would have significant adverse impacts, they are managed to prevent such impacts, or not authorized to proceed.”¹⁰ In summary, the test of significant adverse impacts is well established, and is consistent with UNCLOS.

It can be seen that most Conventions apply a test of significant effects or similar. A screening threshold for activities in ABNJ could therefore apply a test of significant adverse impact on marine biodiversity in ABNJ (following Rio Principle 17), significant adverse (harmful) changes (following UNCLOS article 206), significant adverse effects (following CBD article 14) or, if a stepwise approach is preferred, greater than minor or transitory impact (Madrid Protocol). Most relevant Conventions apply a test of “significant effects.” Delegates may wish to consider the alternatives of a list approach (Espoo), whether or not it is combined with a test of potential significance (not applied in either bottom fishing or seabed mining), or a preliminary threshold (Madrid Protocol). To this, a test to take into account cumulative impacts may be considered: an effect may be significant when cumulative impacts are considered. In addition, a list should be open-ended: the Espoo Convention provides for Parties to add other activities against specified criteria.¹¹

⁵ Madrid Protocol, Annex I, art. 2. If that IEE concludes that a proposed activity is likely to have more than a minor or transitory impact, a draft Comprehensive Environmental Evaluation (CEE) must be prepared. Madrid Protocol, Annex I, art. 3.

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⁷ Espoo Convention, article 2.2.

⁸ Then appropriate measures can be taken to prevent any substantial pollution of, or significant and harmful changes within, the Convention Area. Noumea Convention article 16.

⁹ ISA Nodules Regulation, Regulation 18(b) and (c)

¹⁰ UNGA resolution 61/105 para. 83(a).

¹¹ Espoo Convention article 2.5: 5. Concerned Parties shall, at the initiative of any such Party, enter into discussions on whether one or more proposed activities not listed in Appendix I is or are likely to cause a significant adverse transboundary impact and thus should be treated as if it or they were so listed. Where those Parties so agree, the activity or activities shall be thus treated. General guidance for identifying criteria to determine significant adverse impact is set forth in Appendix III.

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Such an approach should align with the objectives noted in the Chair's Overview to further elaborate and strengthen the relevant provisions of UNCLOS, in particular arts. 204-206;¹² provide common/minimum standards and clarify the definition, scope and content of EIAs; and align with best practices. The screening process is to be undertaken by the competent authority, rather than the proponent of the activity: in the Espoo Convention it is the Party.¹³

Conduct of the EIA

The Madrid Protocol lists a number of matters that a Comprehensive Environmental Evaluation (CEE) (which is comparable to an EIA Report or Environmental Impact Statement (EIS)) must take into account.¹⁴ The CEE is then circulated to the Committee for Environmental Protection (CEP) and Parties and published for comment, and the final CEE

¹² The Chair's Overview also mentioned other sources of thresholds in UNCLOS in articles 145, 192, 194, 198, 207, and 208. A brief summary of those follows.

Art 145: Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities.

Art 192: States have the obligation to protect and preserve the marine environment.

Art 195:.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.

3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimize to the fullest possible extent:[...]

5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

Art 198: When a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations.

Art 207: 1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.

208: 1. Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80.

2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.

3. Such laws, regulations and measures shall be no less effective than international rules, standards and recommended practices and procedures.

4. States shall endeavour to harmonize their policies in this connection at the appropriate regional level.

5. States, acting especially through competent international organizations or diplomatic conference, shall establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment referred to in paragraph 1.

Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

¹³ Espoo Convention, article 2.3. In the Madrid Protocol, the screening is undertaken in accordance with appropriate national procedures: Annex I, article 1.1.

¹⁴ Madrid Protocol, Annex I, art. 3.

must take those comments into account.¹⁵ The Espoo Convention has a list in Appendix II of matters to be included. Distribution of the EIA to affected Parties and the public of the affected Party¹⁶ is then followed by consultation with the affected Party.¹⁷

For a new international Instrument, a listing of matters to be addressed as part of the EIA would provide strong minimum standards and requirements for the conduct of EIAs and clarify the definition, scope and content of EIAs. Cumulative impacts over time and over sectors would also need to be considered, as well as impacts caused by other activities outside areas of national jurisdiction, socio-economic impacts, and the risks of impacts, all further noted in the Chair's Overview. Other common EIA elements noted in the Chair's Overview include: assessment of the area where the activity or activities take place and the vulnerability of that area to impacts, adverse effects on other activities, alternatives to avoid, mitigate or compensate adverse impacts, in the short term as well as the long term (incorporated in an environmental management plan) and a cross-sectoral assessment of a range of activities. As the Chair's Overview further noted, lists of activities could be reviewed on a regular basis to include new and emerging activities, and there may be a need for a geographical aspect to the list: activities requiring prior EIAs to include those in sensitive areas, such as MPAs, EBSAs, VMEs, and PSSAs. Baseline studies should also be required to determine whether the areas of interest are likely to contain areas that meet the EBSA, VME or other recognized criteria for significant or vulnerable areas and species. In addition, the Summary noted that not all activities can be treated equally, as technologies used may vary and the impacts will vary depending on the ecosystem.

The body responsible for reviewing a report will be determined by the architecture of the Instrument. Article 206 of UNCLOS requires that the State undertaking the EIA communicates reports of the results of such assessments in the manner provided in article 205. That leaves the question of what is the 'competent organization': is it a new organization established by the Instrument, or is it a sectoral or regional organization?

The Chair's Overview notes the option that States with jurisdiction or control over an activity would be responsible for conducting EIAs and SEAs, and that States could establish the framework under which the public or private entities will carry out such assessments, with proponents of an activity bearing the costs.

The public comment phase is another vital component of EIA processes. Consultation, including effective participation of stakeholders and consultation with adjacent coastal States, and coordination with existing sectoral and regional organizations are essential, as is the obligation for the final EIA to actually show how it has taken such comments into account. Independent scientific review of reports also needs to be included.

Decision

Following an EIA, a decision needs to be made as to whether the activity can proceed, and if so, under what conditions. Under the Madrid Protocol, such a decision is based on the CEE¹⁸ following consideration by the CEP, and monitoring procedures must be put into place.¹⁹

¹⁵ Madrid Protocol, Annex I, art. 3.

¹⁶ Espoo Convention art. 4.

¹⁷ Espoo Convention art. 5.

¹⁸ Madrid Protocol, Annex I, art. 4.

¹⁹ Madrid Protocol, Annex I, art. 5.

Under the Espoo Convention, a decision is made taking into account the comments and the consultations.²⁰ A post-project analysis may then be carried out, possibly including surveillance.²¹ The Chair's Overview suggested that decision-making under the Instrument could be by the State responsible for taking the decision, but also that a scientific body with equitable geographical representation could adopt a decision on the admissibility of an activity, or provide advice to a governing body that could adopt such a decision. In addition, it seems possible that a sectoral or regional organization may itself wish to carry out an EIA and/or an SEA, such as where an activity is being proposed by more than one State or where the activities or consequences are particularly significant or far ranging. A test noted in the Chair's Overview was that an activity should be permitted to take place only when it will not have significant adverse effects and, where such effects are possible, measures are in place to prevent such effects, and it was noted that there may be a necessity to refrain from certain activities while the EIA proposal is being reviewed. Decision-making will often need to consider a timeframe within which an approved activity should take place.

Monitoring, Review and Compliance

Provision for monitoring, review and compliance also need to be made. Under the Madrid Protocol, procedures shall be put in place, including appropriate monitoring of key environmental indicators, to assess and verify the impact of any activity that proceeds following the completion of a CEE.²² The Espoo Convention includes monitoring and management programmes and any plans for post-project analysis as matters to be included in EIA documentation,²³ as well as in the post-project analysis.²⁴

The Chair's Overview references follow-up procedures to monitor and review compliance with the agreed rules and procedures for completed EIAs and SEAs, as well as follow-up measures, including adjustment or termination of an activity or redress, reparation and compensation, on the basis of the monitoring results. While UNCLOS provides for the responsibility of States to monitor impacts under UNCLOS,²⁵ the Chair's Overview notes that one option is that States could make the proponents of an activity responsible for reporting and providing information on impacts. Other observations include that previously unexamined activities should be subject to monitoring, new information on the environment and impacts on the environment should be taken into account when monitoring the impacts of an activity, public availability of monitoring results needs to be considered, general rules for reporting need to be established, and mandatory issuance of bond guarantees to ensure compliance need to be considered as does the need to develop a code of conduct.

²⁰ Espoo Convention art. 6.

²¹ Espoo Convention art. 7.

²² Madrid Protocol art. 5. The provisions are put into place in order to enable assessments to be made of the extent to which such impacts are consistent with the Protocol, and provide information useful for minimising or mitigating impacts, and, where appropriate, information on the need for suspension, cancellation or modification of the activity.

²³ Espoo Convention Appendix II and see art. 5(a)

²⁴ Espoo Convention Appendix V

²⁵ UNCLOS art. 204; Chair's Overview.

Strategic Environmental Assessments

Strategic environmental assessments (SEAs) relate to plans, programmes and policies, as distinct from proposed activities.

The Kiev Protocol to the Espoo Convention specifically addresses SEAs. Its objective is to ensure that environmental, including health, considerations are thoroughly taken into account in the development of plans and programmes in the preparation of policies and legislation. SEAs in the Kiev Protocol are to be carried out for listed plans and programmes²⁶ which are likely to have significant environmental, including health, effects.²⁷

Similar to the Kiev Protocol, a new international Instrument would need to establish clear, transparent and effective procedures for SEAs, provide for public participation in SEAs, and integrate concerns into measures designed to further the goals of the Instrument.²⁸ Screening for plans and programs which need SEAs can be undertaken either by specifying a case-by-case examination or specifying types of plans and programmes or by a combination of both approaches.²⁹ Scoping is needed to identify, describe and evaluate the likely significant environmental effects of implementing the plan or programme and its reasonable alternatives.³⁰ Public participation and consultation should also be provided for.³¹ Decisions need to take account of conclusions of the environmental report, identified measures to prevent, reduce or mitigate the adverse effects, and comments received.³² Also required are monitoring of the implementation of environmental effects of plans and programs³³ and implementation through consideration of the identified concerns in formulating legislation.³⁴

The International Seabed Authority is now considering the role of SEAs in ABNJ. SEAs, regional environmental assessments and strategic environmental management plans were discussed in recent workshop co-hosted by Griffiths University and the ISA.³⁵ The Co-Chairs' report noted that SEAs must include assessment of the broader potential impacts and synergies that deep seabed mining raises, and in particular, in carrying out an SEA, the ISA must include activities such as fisheries and shipping. The SEA would inform EIAs to be carried out, such as by providing information on possible cumulative effects of and on global warming, ocean acidification and fisheries, as well as provide the necessary framework within which to evaluate contractor environment impact assessments for individual sites.³⁶

²⁶ Including agriculture, forestry, fisheries, energy, industry including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning or land use.

²⁷ Kiev Protocol, art. 4.

²⁸ Kiev Protocol, art. 1.

²⁹ Kiev Protocol, art. 5.

³⁰ Kiev Protocol, art. 7.

³¹ Kiev Protocol, arts. 8, 9 10.

³² Kiev Protocol, art. 11.

³³ Kiev Protocol, art. 12.

³⁴ Kiev Protocol, art. 12.

³⁵ See Co-Chair's report, Griffith Law School and the International Seabed Authority Workshop on Environmental Assessment and Management for Exploitation of Minerals in the Area, Surfers Paradise. Queensland, Australia. 2016. At <https://www.isa.org.jm/files/documents/EN/Pubs/2016/GLS-ISA-Rep.pdf>. Paragraph 37.

³⁶ ISA/Griffiths Co-Chairs' report, paragraph 38.

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As an outcome of an SEA, a strategic environmental management plan (SEMP) can be developed that includes provisions for periodic public review, address cumulative effects of multiple exploration and exploitation activities in a region, and takes into consideration cumulative impacts from other activities, and changes such as ocean warming and acidification, affecting the region.³⁷

The kind of information included in an SEA and an SEMP include reference to existing relevant regulations, information needs of stakeholders, alternative actions (including no-action), cumulative and synergistic impacts (for example ocean acidification, global warming, fisheries, multiple mining operations), technology evaluation, and gathering of baseline data and protected areas.³⁸ An SEA should have broad scope, taking account of all environment impacts, consider overarching issues, and set up the guidance for EIAs and regional environmental management plans (REMP).³⁹

These observations are helpful in providing an example of SEAs in ABNJ in the context of the Instrument.

³⁷ ISA/Griffiths Co-Chairs' report, paragraph 39.

³⁸ ISA/Griffiths Co-Chairs' report, paragraph 63.

³⁹ ISA/Griffiths Co-Chairs' report, paragraph 69.

Annex 1

Steps of EIAs

The essential steps in conducting an EIA are screening, scoping, assessment and evaluation of impacts and development of alternatives, reporting of the environmental impact statement (EIS) or EIA, review of the EIS, decision-making on whether or not to approve the project, and under what conditions, and monitoring, compliance, enforcement and environmental auditing.

Screening

Screening provides the trigger to start an EIA process, and determines which projects or developments require an EIA. Screening mechanisms typically include lists of activities, lists of geographical areas,⁴⁰ or a determination, such as one based on an initial environmental examination or preliminary environmental assessment. The mechanism typically incorporates criteria, such as significant harmful effects.⁴¹ The Sustainable Development Goal 14 also speaks in terms of “significant adverse impacts”. Thus “significant adverse impacts could be considered to be a more modern threshold that builds on and incorporates the language of UNCLOS.

The screening decision will then often define the appropriate level of assessment. This may be a determination either (a) that the project should not proceed, even without an EIA, for instance because it is legally barred; (b) that an EIA is required; (c) that limited environmental effects are expected so a restricted EIA is required; (d) that a further initial evaluation should be undertaken to decide whether an EIA is required, or (e) that no EIA is required.⁴²

Scoping

During scoping, relevant impacts are identified, resulting in the terms of reference for the actual impact study. Scoping defines the issues to be studied and identifies which potential impacts are relevant to assess, identifies alternative options that avoid, mitigate or compensate adverse impacts on biodiversity (including the option of not proceeding with the activity, finding alternative designs or sites which avoid the impacts, incorporating safeguards in the design of the project, or providing compensation for adverse impacts), and derives terms of reference for the EIA.⁴³

⁴⁰ Areas could reference vulnerable marine ecosystems (VMEs), further to the 2009 International Guidelines for the Management of Deep-Sea Fisheries in the High Seas, ecologically or biologically significant areas (EBSAs), further to CBD decision IX/20, or could be broader.

⁴¹ CBD. CBD UNEP/CBD/COP/11/12. 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. At <https://www.cbd.int/doc/meetings/cop/cop-11/official/cop-11-23-en.pdf>.

CBD UNEP/CBD/COP/11/23 page 7.

⁴² CBD UNEP/CBD/COP/11/23 page 8.

⁴³ CBD UNEP/CBD/COP/11/23 page 4.

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Conduct of the EIA

Once screening has determined an EIA should be undertaken, then the instrument will set out the procedure for conduct of the EIA, including distribution, public comment, scientific review, revision and consultation. The instrument will address who carries out an EIA (such as a State or an international organization), and to which body a report is made.

Decision

Once an EIA has been undertaken, a decision needs to be made on whether a proposed activity should proceed, and if so, under what conditions, and what monitoring and review procedures need to be put into place.

Monitoring and Review and Compliance

Monitoring and review procedures, including compliance and the possibility of suspension, cancellation or modification of the activity, as well as provisions for redress, reparation and compensation, as well as bonding arrangements, need to be addressed.

Strategic Environmental Assessments

Strategic environmental assessments (SEAs) relate to plans, programmes and policies, as distinct from activities. Often objectives for a geographic region and activities within that region will be developed, and a range of courses of action to achieve the stated objectives are developed. Selected courses of action are then implemented in plans programmes and policies for the area. SEAs are anticipatory and can be valuable in avoiding cumulative adverse impacts.

Annex II Existing Models

Existing Models

In the first session of the Prepcom, EIAs were addressed in the Informal Working Group led by Mr. René Lefeber (the Netherlands). In the Chair's Overview,⁴⁴ the Overview notes that existing instruments could assist in clarifying concepts for the application of EIAs, SEAs and Transboundary EIAs (TEIAs) to areas beyond national jurisdiction and provide guidance.

Examples given were:

- UNEP Goals and Principles of Environmental Impact Assessment;⁴⁵
- CBD art.14 and CBD Voluntary Guidelines on Biodiversity, Inclusive Impact Assessment and Voluntary Guidelines for the Consideration of biodiversity in EIAs and SEAs in marine and coastal areas;⁴⁶
- ISA Regulations on prospecting and exploration of mineral resources in the Area,⁴⁷
- FAO International Guidelines for the Management of Deep-sea Fisheries,⁴⁸
- Annexes 1-4 of MARPOL Convention;⁴⁹

⁴⁴ 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. Chair's overview of the first session of the Preparatory Committee. At http://www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf.

⁴⁵ United Nations Environment Programme (UNEP) Goals and Principles of Environmental Impact Assessment. 1987. Adopted by Decision 14/25 of the Governing Council of UNEP on 17 June 1987, and supported by the UN General Assembly Resolution 42/184 (1987) <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=100&ArticleID=1658> At http://www.soas.ac.uk/cedep-demos/000_P514_IEL_K3736-Demo/treaties/media/1987%20UNEP%20Goals%20and%20Principles%20of%20Environmental%20Impact%20Assessment.pdf

⁴⁶ CBD. CBD UNEP/CBD/COP/11/12. 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. At <https://www.cbd.int/doc/meetings/cop/cop-11/official/cop-11-23-en.pdf>. Adopted at CBD COP11 in CBD Decision XI/18. At <https://www.cbd.int/doc/decisions/cop-11/cop-11-dec-18-en.pdf>

See earlier Annex to CBD Decision VIII/28. At <https://www.cbd.int/decision/cop/?id=11042>

⁴⁷ See the ISA Mining Code at <https://www.isa.org.jm/mining-code>. For polymetallic nodules, see Decision of the Assembly of the International Seabed Authority regarding the amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area at <https://www.isa.org.jm/documents/isba19a9>, and <https://www.isa.org.jm/documents/isba19c17>. For sulphides, see Decision of the Assembly of the International Seabed Authority relating to the regulations on prospecting and exploration for polymetallic sulphides in the Area. At <https://www.isa.org.jm/documents/isba16a12-rev-1> and <https://www.isa.org.jm/document/isba16c15>. For crusts, see Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area. At <https://www.isa.org.jm/documents/isba18a11>.

⁴⁸ FAO International Guidelines for the Management of Deep-sea Fisheries. 2009. At <http://www.fao.org/docrep/011/i0816t/i0816t00.htm>.

⁴⁹ International Convention for the Prevention of Pollution from Ship (MARPOL) Annex I prevention of pollution by oil & oily water, Annex II control of pollution by noxious liquid substances in bulk, Annex III prevention of pollution by harmful substances carried by sea in packaged form, Annex IV pollution by sewage from ships. Texts not at IMO site but are listed by Australian government at <https://www.amsa.gov.au/environment/regulations/marpol/current-texts/index.asp>. Annex I at

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- Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter;⁵⁰
- Espoo Convention on Environmental Impact Assessments in a Transboundary Context;⁵¹
- Kyiv Protocol to the Espoo Convention on Strategic Environmental Assessments;⁵²
- Antarctic Treaty on Environmental Protection;⁵³ and
- Environmental assessment guidelines of the Secretariat of the Pacific Regional Environment Programme;⁵⁴ and
- Article 7 of the International Law Commission's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.⁵⁵

To this list can be added Principles 17 and 19 of the Rio Declaration⁵⁶ and article 206 of the Law of the Sea Convention.⁵⁷ In addition, the London Convention Framework on ocean

<https://www.amsa.gov.au/environment/regulations/marpol/documents/117-52.pdf>. Annex II at <https://www.amsa.gov.au/environment/regulations/marpol/documents/118-52.pdf>. Annex III at <https://www.amsa.gov.au/environment/regulations/marpol/documents/193-61.pdf>. Annex IV at <https://www.amsa.gov.au/environment/regulations/marpol/documents/115-51.pdf>. Amendments at same page.

⁵⁰ 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (London Protocol). Text at <https://www.epa.gov/ocean-dumping/1996-protocol-convention-prevention-marine-pollution-dumping-wastes-and-other-matter>.

⁵¹ Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention). At <http://www.unece.org/env/eia/eia.html>.

⁵² UNECE Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context. At http://www.unece.org/env/eia/about/sea_text.html.

⁵³ Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol). At http://www.ats.aq/documents/recatt/att006_e.pdf.

⁵⁴ A guide to Environmental Impact Assessment in the South Pacific (1993). At <https://www.sprep.org/publications/a-guide-to-environmental-impact-assessment-in-the-south-pacific-1993>.

⁵⁵ International Law Commission. Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. 2001. At http://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf. Article 7 states that "Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment."

⁵⁶ Rio Declaration on Environment and Development. 1992. At <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>. Rio Declaration: Principle 17: Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

Principle 19: States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

⁵⁷ United Nations Convention on the Law of the Sea. 1982. At http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Article 206 *Assessment of potential effects of activities*. 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 in the manner provided in article 205.

Key Components and Best Practices for EIAs and SEAs

fertilisation⁵⁸ and the OSPAR⁵⁹ and Barcelona⁶⁰ regional seas conventions can be considered, as well as the Noumea Convention.⁶¹

International jurisprudence was also listed. Leading cases are the ITLOS *Seabed Mining* Advisory Opinion⁶² and decision on *Land Reclamation*⁶³ and the International Court of Justice decisions⁶⁴ on nuclear weapons⁶⁵ and *Pulp Mills*.⁶⁶

⁵⁸ Assessment Framework for Scientific Research Involving Ocean Fertilization, adopted on 14 October 2010. Resolution LC-LP.2 (2010). At <http://www.imo.org/en/OurWork/Environment/LCLP/EmergingIssues/geoengineering/Documents/OFAssessmentResolution.pdf>. See Duncan Currie, A Brief Primer on Ocean Fertilization in the CBD and the London Convention and Protocol, 2012. At <http://www.etcgroup.org/content/brief-primer-ocean-fertilization-cbd-and-london-convention-and-protocol>.

⁵⁹ OSPAR Convention Annex IV. Convention for the Protection of the Marine Environment of the North-East Atlantic. 1992. At http://www.ospar.org/site/assets/files/1290/ospar_convention_e_updated_text_in_2007_no_revs.pdf. Annex IV on the assessment of the quality of the marine environment. See also OSPAR's Joint Assessment & Monitoring Programme (JAMP). At <http://www.ospar.org/work-areas/cross-cutting-issues/jamp>.

⁶⁰ Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention). 1976, as amended. At <http://www.ypeka.gr/LinkClick.aspx?fileticket=30r%2B7BeaSOo%3D&tabid=406&language=el-GR>

⁶¹ Article 16 of the Noumea Convention requires parties to assess major projects which might affect the marine environment in such a way as to prevent or minimise harmful impacts on the Convention Area. Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea Convention) 1986. At <https://www.sprep.org/legal/noumea-convention>.

⁶² Advisory opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area. ITLOS stated that “the obligation to conduct an environmental impact assessment is a direct obligation under the (United Nations Convention on the Law of the Sea) and a general obligation under international customary law. International Tribunal on the Law of the Sea, Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area. 1 February 2011. Para. 145.

⁶³ ITLOS ordered Singapore to conduct an assessment of land reclamation and provide Malaysia with an opportunity to comment. ITLOS Case No. 12, Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, at <https://www.itlos.org/cases/list-of-cases/case-no-12/>.

⁶⁴ The ICJ stated that “The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.” *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia). 1997. Para. 140. At <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=92>.

⁶⁵ The ICJ stated that “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.”

Legality of the Threats or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996. At <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95>. Para. 29.

⁶⁶ The ICJ held that “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. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.”

Pulp Mills on the River Uruguay (Argentina vs. Uruguay) Judgment, I.C.J. Reports 2010. At <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=135&p3=4>, Para. 204.