



Implementation of EIA in Areas Beyond National Jurisdiction Under the UN BBNJ Agreement: Next Steps in EIA Guidelines

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**In honor of Dr. Arvid Pardo,
“Father of the Law of the Sea Conference”**

“The dark oceans were the womb of life: from the protecting oceans life emerged. We still bear in our bodies—in our blood, in the salty bitterness of our tears—the marks of this remote past.”

—Arvid Pardo
UN General Assembly
22d Session, November 1967

“... the high seas are the common heritage of all mankind . . .”

—Resolution 15, World Peace Through Law
Conference, Geneva, July 1967

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Introduction

On April 27, 2021, more than 25 senior officials with expertise in international law and ocean policy, environmental management, and environmental impact assessment (EIA) met at the invitation of the Environmental Law Institute, based in Washington, D.C., to discuss challenges to the successful implementation of an EIA regime as proposed under the United Nation’s draft agreement for the protection of marine biodiversity in areas beyond national jurisdiction (the BBNJ treaty). Participants in this working group (WG) came from a cross-section of sectors, including current and former federal government employees, NGOs, industry, academia, and international foundations. Each participant had decades of experience working in the United States and internationally. Each came to the workshop with a shared goal of bringing a practitioner’s perspective to the UN BBNJ process, thereby helping to move the treaty forward in a substantive way. On June 4, 2021, the working group met again as a follow up to the first meeting and to discuss next steps for our work.

Background

At the time of the workshops, the United Nations had held three preliminary negotiation sessions for the BBNJ treaty language. The fourth and proposed final session had been tentatively set for August 2021, after the postponement of an earlier March 2020 date due to the COVID pandemic. That date was again postponed and is now set for March 2022. In terms of the EIA portion of the proposed BBNJ language,

While the BBNJ language as currently proposed contains a solid outline of many elements for a sound EIA program, additional guidelines are needed to establish clear protocols and interpretation of standards for implementation.

several key issues remained unresolved as of the close of the third negotiation session—many of which were discussed during the workshop (see insert for an outline of those issues). Nonetheless, the proposed language contained at least a solid outline of many undisputed elements of substance and procedure for a sound EIA program, resembling EIA standards applied in the United States, Europe, Canada, and elsewhere. Table 1 below summarizes the main outstanding issues.

TABLE 1. General EIA Elements and Outstanding Issues	
General EIA Elements Under Current BBNJ Text	Outstanding Issues After 3rd UN Prepcom Negotiations re EIA Under BBNJ
Screening	Should Adjacent States' comments receive special consideration?
Scoping	Should there be a basic international standard of EIAs, supervised by an international body?
Description of existing environment (baseline conditions?)	Should the role to develop standards be assigned to the Conference of the Parties (COP) or the Science & Technical Committee (S&T)?
Analysis of potential environmental and social impacts, including direct, indirect, and cumulative impacts.	Is implementation guidance required and/or needed? How should this be developed?
Description of reasonable alternatives, including a No Action alternative.	How to establish thresholds and criteria.
Description of worst-case scenario.	Relationship between EIA process and other existing legal instruments.
Mitigation	Is the EIA "trigger" impact-oriented or activity-oriented?
Monitoring	Do impacts that originate inside an EEZ cause transboundary impacts to trigger an EIA?
	Should a tiered approach with a less extensive EIA be used for lower threshold activities?
	Definitions of cumulative impacts and transboundary effects .
	Screening and scoping responsibility.
	Negative/positive list of activities for EIA trigger?
	Scientific and technical review of EIA and its role in decisionmaking on the activity.

Two points with regard to Table 1: In the left-hand column, under "General EIA Elements," it is evident that the basic outline for the widely accepted practice of how to structure an EIA analysis exists under the current BBNJ language. But important details, such as definitions of terms or clarifications on how to implement an EIA are largely not included. Regarding "outstanding issues," which were acknowledged during the workshop, it is clear that many complex issues with regard to EIA practice remain to be addressed and that full clarity on how they will be addressed will likely wait until a post-agreement phase of the BBNJ treaty. The draft BBNJ language indicates, in fact, that many issues will be addressed in an annex to the treaty as guidelines, though no information on that process is provided.

These outstanding issues are extremely complex and can benefit from senior-level EIA practitioner input as they are further developed through an annex or guidelines. Experienced practitioners have the fieldwork experience to understand at policy, management, administrative, and technical levels how to navigate through the complex EIA process, including stakeholder engagement. Importantly, they are also adept at achieving the environmental goals for EIA practice even in the face of long odds. For that reason, ELI suggests that the establishment of a core group of expert senior-level EIA practitioners would be extremely useful to assist in the post-agreement stages of BBNJ going forward. This will be discussed further below.

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Implementation Challenges

The ELI EIA WG was convened specifically to consider *post-BBNJ-agreement* EIA implementation issues for the high seas; it was not formed as another forum for litigating proposed BBNJ treaty language itself. Our concern surrounded the question, “How can we ensure that EIA is done and done right once the BBNJ language is signed into international law?” As many EIA practitioners would attest, words on the page often do not translate into good practice without experienced practitioners to help see it through correctly. What follows is a composite of the outcome from the two WG meetings and more than six hours of discussion.

#1 Issue. Governance: Harmonization and the Need for an Advisory Body of EIA Experts.

Procedural transparency, accountability, and credibility are fundamental to a successful EIA process; without this, the BBNJ treaty is a hollow instrument. One of the top concerns expressed by the WG was the need for harmonization of EIA practices to ensure that all member states elevate their own EIA procedures to a minimum standard, at least for the purposes of BBNJ. To achieve this objective, the EIA WG believes that, beyond the development of the BBNJ treaty itself, the establishment of a

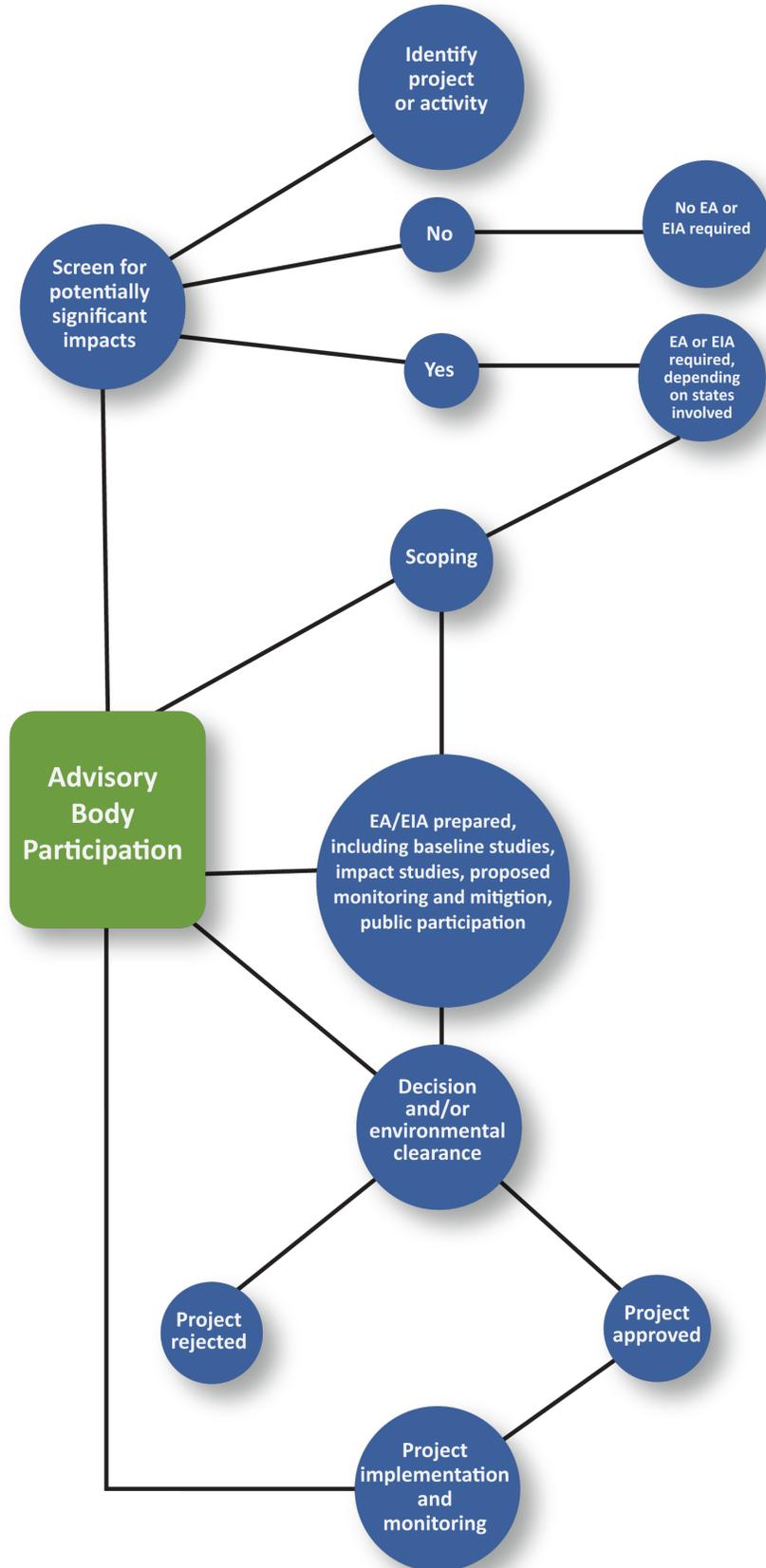
standing advisory body made up of expert senior-level EIA practitioners would be helpful. This advisory body could help achieve the following:

- Establish guidelines that would define standardized procedures and requirements for how to implement EIA (e.g., assessment methods, selection of affected stakeholders, and means to engage, i.e., public participation);
- Establish a review mechanism so that inadequate EIAs are “identified and can be supported to achieve appropriate standards”;
- Assist in stakeholder identification and engagement;
- Carry out and/or advise on stakeholder consultations and serve as advisors;
- Assist in capacity-building in EIA; and
- Advise in the development of Strategic Environmental Assessment (SEA) for the high seas, should SEA be included in the treaty language.

NOTE: At the time of the last Preparatory Committee Meeting, there was still much debate about whether the S&T Committee would take on the role of an independent authoritative body to address implementation issues. Much more clarity on the role of the S&T Committee is needed because the range of issues and resources needed to carry out these implementation responsibilities seem to stretch well beyond what would be assumed for a committee group. Of further note, traditional EIA is not solely a scientific analysis; it is a decisionmaking tool that addresses the entirety of a project and sets forth a decision space that includes not only scientific and technical concerns, but also international law and/or policy-related issues. For example, when setting criteria for what constitutes a “reasonable alternative” to a proposed project, an EIA could state that all alternatives must result in “no net increase in carbon greenhouse gases,” — which is a policy issue.

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**Figure 1:
Advisory Board
Flowchart**



#2 Issue. Issues to Be Addressed Within the Guidelines

Numerous issues of procedure and substance that are key challenges for successful implementation of EIA in the high seas were identified and discussed by the working group.

These issues are clear candidates for treatment within the UN-proposed annex/guidelines and supported by the working group. Some, though not all, of these issues overlap with those identified in Table 1 and are further elaborated upon here from the standpoint of their significance to the EIA practitioner. They are as follows:

Table 2 Issues for Practitioners to Be Addressed Within the Annex/Guidelines		
PROCEDURAL (1-7) & ANALYSIS (8-11) ISSUES	WHAT IS THE CHALLENGE TO EIA?	WHAT DO THESE ISSUES MEAN TO THE EIA PRACTITIONER?
1. Preexisting and over-lapping legal agreements	Many legal instruments already exist that have some authority over high seas activities. Many require some environmental analysis, but not as complete as under traditional EIA. E.g., Regional Seas Agreements and Regional Fishery Management Organizations (RFMOs) that regulate commercial fishing require analysis of the target fishery only and do not include indirect or secondary impacts on non-target fisheries. Relying on these instruments as “functional equivalents” of EIA will result in incomplete analyses and poorly informed decisions under EIA that could harm the environment. (https://www.iass-potsdam.de/en/output/publications/2021/strengthening-high-seas-governance-through-enhanced-environmental)	It needs to be clear what the relationship of these instruments are to the BBNJ EIA requirements. EIA should serve as an umbrella statute. It should not ask to replicate what other statutes require, but incorporate overlapping legal agreements into the EIA analysis.
2. Timing—When to initiate EIA	Appropriate timing of EIA process is critical to success because EIA is fundamentally “pre-decisional,” begun before any irretrievable commitment of resources to the project is made. It does little good to be working on the EIA process when the proponent has already broken ground at its preferred site.	EIA must begin at the planning stage if the process is truly going to avoid impacts where possible and be transparent and informative to the public and decisionmakers.

PROCEDURAL (1-7) & ANALYSIS (8-11) ISSUES	WHAT IS THE CHALLENGE TO EIA?	WHAT DO THESE ISSUES MEAN TO THE EIA PRACTITIONER?
3. What triggers EIA? Who decides?	<p>The question of whether an activity (i.e., a list of project types) or the potential for significant or more than minor or transitory impacts should trigger the requirement for an EIA is still unresolved within the BBNJ framework document. Important to the question of whether to use a “project list” is that the purpose of EIA is to avoid and minimize impacts to environmental resources from project activities, meaning <i>any</i> project with the potential for significance.</p> <p>The question of who decides is relevant because project proponents may ignore what others believe are serious impacts and approve projects regardless. Should some international governing body make those decisions? Should individual states be responsible for decisionmaking?</p>	<p>Establishing what the <i>trigger</i> is for EIA is essential to the issue of making sure that EIA is done under the appropriate circumstances. Relying on a list of which projects are “in” and which are “out” when it comes to EIA puts the focus on the wrong issue. <i>Any</i> project with the potential to cause significance triggers EIA and thus potential impacts on the environment must be a minimum standard for whether an EIA is required.</p> <p>Whomever is the decisionmaker decides on whether an EIA is triggered. The decision is subject to public review, however, and can be challenged in the court of public opinion and perhaps in legal court.</p> <p>EIA does not necessarily prevent bad decisions, just badly informed decisions.</p>
4. How to screen for significance	<p>Credible screening is necessary to ensure the integrity of the decision whether a full EIA is appropriate or, if provided for under BBNJ, a less detailed analysis is sufficient. “Best professional judgment,” applying sound scientific principles, and environmental standards is used to argue for whether the potential for significance exists.</p>	<p>Screening for significance should be a public participatory process, involving all relevant stakeholders. Public notice of proposed projects would initiate a public process to argue for or against the need for an EIA.</p>

PROCEDURAL (1-7) & ANALYSIS (8-11) ISSUES	WHAT IS THE CHALLENGE TO EIA?	WHAT DO THESE ISSUES MEAN TO THE EIA PRACTITIONER?
5. Use of tiering and notion of “scale”	<p>“Tiering,” where the EIA process allows for a less detailed analysis, is also closely tied to the notion of significance. Where less-than significance seems likely or unknown, an initial, shorter analysis can be conducted and made available to the public for review. If, based on this initial analysis, the potential for significance is revealed, the project proponent must proceed to a full EIA analysis.</p> <p>“Scale” refers to the issue of whether a small impact that nonetheless has a significant localized effect should be weighed as heavily as a larger-scale significant impact.</p>	<p>Tiering is an important way to streamline the environmental review process and focus on only those projects with real potential for significant environmental impacts. The opportunity for public review is essential, however, because it is possible that other stakeholders may have information relevant to the project that was previously unknown and will assist in making a sound decision on whether to proceed.</p> <p>Issues of scale and significance will have to be argued in context. It may be that a small, localized impact should be considered significant enough to trigger EIA; that is all part of the public process and the need for transparency and public engagement.</p>
6. If impacts are significant, who decides if project proceeds?	<p>A key purpose of EIA is to avoid significant impacts to the environment. In the event it is determined that significant impacts are likely, it is still up to the decisionmaker whether to proceed and under what conditions, subject to regulations. This decision is fully subject to public review, including by an international authoritative body such as one we suggest above, and potentially judicial review. Again, the challenge is that EIA does not necessarily prevent bad decisions, just badly informed decisions.</p>	<p>Should “significance” be determined under EIA, the advisory body (as suggested above) can both assist in this determination and play an important role in mediating the outstanding environmental concerns and elevating these concerns among decisionmakers.</p>
7. Public involvement	<p>Meaningful public involvement is a cornerstone of EIA practice. Not only does an active public contribute important insights to EIA, they can play a key role in the court of public opinion with regard to the use of public resources.</p>	<p>Without meaningful public participation, the integrity of the EIA process is in doubt, along with the EIA analysis itself. It is also important that decisionmakers be kept informed about public opinion with regard to projects subject to EIA.</p>

PROCEDURAL (1-7) & ANALYSIS (8-11) ISSUES	WHAT IS THE CHALLENGE TO EIA?	WHAT DO THESE ISSUES MEAN TO THE EIA PRACTITIONER?
8. Define the project and its public purpose	Defining the project and its public purpose is the foundation on which the rest of the EIA analysis lies. If these elements are incorrectly defined, then it usually means the rest of the EIA analysis is seriously flawed. For example, a project to mine ocean minerals and create transportation routes to new transnational markets is very different from a project to mine ocean minerals only. A purpose of accessing ocean mineral resources for capital markets is very different from a purpose to mine minerals important for medical and technological development that will assist humanity. They will result in a very different set of alternatives designed to avoid impacts and an improperly scoped analysis that may focus on the wrong issues while ignoring other important ones.	The project's <i>public purpose</i> (vs. whatever private purpose may be held by the project proponents) should be fully defined.
9. Screen for significance	Screening for significance is going to lay the argument for whether an EIA or something less detailed, such as an Environmental Assessment (EA) is needed for a proposed project. Get this wrong and the end result may be a loss of valuable time and resources as decisions get adjudicated in public or the courts, as well as poor environmental outcomes as a result of a flawed EIA process.	Screening should be done at the beginning of the EIA process with a critical eye by all relevant stakeholders so that skilled arguments can be expressed for whether an EIA is required or something less detailed, such as an EA. These arguments are generally based on "best professional judgement," applying sound scientific principles and environmental standards. It should be a public and transparent process, with written comments and written responses to comments provided so that everyone remains informed.

PROCEDURAL (1-7) & ANALYSIS (8-11) ISSUES	WHAT IS THE CHALLENGE TO EIA?	WHAT DO THESE ISSUES MEAN TO THE EIA PRACTITIONER?
10. Scope the project correctly	Projects that are inappropriately scoped for relevant issues under EIA significantly challenge the credibility of the EIA analysis and the EIA process. A project to mine ocean minerals for the capital markets, for example, has a far more narrow scope than a project to mine ocean minerals and create transportation routes for transnational markets.	A project should be scoped so as to embrace its full scale and reach. Relevant issues identified for analysis in an EIA document will be based on “best professional judgment,” applying sound scientific principles and environmental standards.
11. Alternatives analysis	Alternatives should be the heart of the EIA analysis. Through the discovery of reasonable alternatives comes the purest form of avoidance of impacts. It should be thoroughly considered before any rush to mitigate a less-than-ideal option from an environmental standpoint. Not all impacts can be mitigated and neither do we want a world composed of entirely managed (mitigated) natural systems. A rigorous alternatives analysis is essential to avoid that outcome and preserve the environment as much as possible in its natural state. Anything less is irresponsible decisionmaking.	Always defend the need for a full and rigorous evaluation of reasonable alternatives. Since the point of alternatives is to seek options that meet the public purpose of the proposed project while causing less environmental harm, it is important to focus on the potential harm and consider options based on those concerns. There may be many types of alternatives to evaluate, e.g., site options, scale options, timing options, technology options, etc. A robust analysis is <i>not</i> a repurposed look at engineering designs.
12. Baseline evaluations	Baseline evaluations make it possible to evaluate the degree of impact because they give you something to compare against. It is a serious weakness in the analysis if baseline information is absent.	Despite its almost existential role in EIA analysis, baseline information is often lacking or incomplete. It is important, then, to argue for research that will provide some baseline and, where that is not possible, consider whether proxies exist that will provide a reasonable response to the missing data. Any assumptions you make regarding proxies in the analysis must be made very clear in the write-up. Further, the analysis should be upfront about the lack of baseline data and what this means in terms of credibly predicting impacts. EIA requires that the “best available science” be applied and that the technical approach to the analysis be fully transparent.

PROCEDURAL (1-7) & ANALYSIS (8-11) ISSUES	WHAT IS THE CHALLENGE TO EIA?	WHAT DO THESE ISSUES MEAN TO THE EIA PRACTITIONER?
13. Analysis	<p>The analysis itself is inextricably linked to the scoping process, which identified the range of issues that need to be evaluated in the EIA. If scoping was done well, the analysis should be fairly complete. Many decisions are involved in how to best complete an analysis, especially the technical and scientific elements involved. In the end, it is important to have a clear demonstration that a project's potential impacts are either significant or, if not, something less than significant. Once that initial analysis is complete, consideration of mitigation that may be useful is also evaluated.</p>	<p>The analysis should be robust, consistent with the scoping issues identified, and criteria should be specified in a table format about what constitutes a "significant," "moderate," or "minor" impact under each resource category. This avoids making general conclusions re impacts that do not clearly demonstrate the rationale on which those conclusions are made.</p>
14. Information gaps	<p>Typically there are information gaps in EIA and, with regard to deep ocean issues, these gaps are expected to be significant.</p>	<p>Information gaps, nonetheless, are not an invitation to leapfrog over the analysis. Every effort should be made to acquire data where possible and to the extent possible. Where it is not possible, experts should consider whether proxies are available to assist in making reasonable judgments regarding potential impacts. EIA requires the use of "best available science," and that your rationale be clearly and explicitly explained in the EIA. If in the end, the information is completely absent, the EIA should make clear that important information relevant to drawing conclusions regarding impacts is unavailable AND how this affects the overall conclusion regarding impacts from the proposed project. Staying silent on the lack of information and what it means for a fully informed decision is not an appropriate response.</p>

PROCEDURAL (1-7) & ANALYSIS (8-11) ISSUES	WHAT IS THE CHALLENGE TO EIA?	WHAT DO THESE ISSUES MEAN TO THE EIA PRACTITIONER?
15. Cumulative and secondary impacts	Without a cumulative impacts (CI) analysis, it is not possible to fully assess the impacts of a proposed action in combination with other actions affecting the same resource area. The lack of CI or a CI done wrong is a fatal flaw within EIA. The same is true for secondary impacts (SI). Sometimes it is the CI and SI associated with proposed projects that raise the most significant environmental concerns.	CI will typically require its own definition of scope. In other words, the “area of influence”* is typically more expansive than under an evaluation of direct impacts. The same can be true for SI. *”Area of Influence” in this context refers to the area affected by changes in economic, social, and environmental dynamics induced by the implementation of a proposed project.
16. Document public involvement	If the project stakeholder community is not well represented or incorporated into the EIA, stakeholders are unable to benefit from the comments made by other officials and the general public. This is as important as any other piece of the EIA and should not be dealt with lightly.	Where other authorities (e.g., ministries) have made official comments on the project, those comments should be in writing and included in the EIA so all stakeholders have access to these views. The same is true for any written public comments. Further, official responses back from project authorities should also be included in the EIA.

Table 3
Common Problems Seen in the Practice of EIA:
“What goes wrong when things go wrong?”

Project definition and public purpose	The project is defined too narrowly; the public purpose is not provided, which skews the alternatives analysis.
Screening (for significance)	There is a rush to dismiss the possibility of significant impacts and little rationale is provided to explain why.
Scoping	Scoping is rushed; not much background information is provided by the project proponent; potential environmental issues are overlooked.
Alternatives	Alternatives are chronically ignored, viewed too late in the process, or presented as “straw men” that are not meaningful.
No baseline information	The lack of baseline information is a recurring problem that makes a full understanding of potential impacts difficult or impossible to achieve. Ways to address this in the EIA (through the use of proxies or by addressing the issue upfront and incorporating into mitigation and monitoring, for example) are often ignored.
Analysis	Many declarative statements and conclusions regarding impacts are not supported by the analysis.
Data gaps	Data gaps are to be expected, but ways to meaningfully compensate for those gaps in the analysis are often ignored, significantly weakening the analysis.
Cumulative impacts	Poor effort to meaningfully consider CI; sometimes the discussion of direct impacts is repeated as an equivalent of CI, which is wrong.
Secondary impacts	Similar to CI, above.
Public involvement	The extent of public involvement is often very opaque at best; typically there are no copies of public comments included with the EIA or responses from project officials.
Lack of internal and/or political support	An EIA process that lacks political support from the top creates an uphill mountain for practitioners to climb when it comes to defending EIA requirements that are essential to keep the analysis and the process credible and transparent.
Use of engineering or other studies as a stand-in for an EIA	Use of engineering or other studies (perhaps as a way to save time and money) is inadequate from an EIA standpoint. These studies do not meaningfully address many issues that are central to EIA.

Conclusion

ELI greatly appreciates the important efforts made by the United Nations to address the challenging issues brought by the BBNJ negotiations. EIA is just one of several groundbreaking topics dealt with in the proposed treaty language and, for many involved, is perhaps the least fully understood. Further, industrial development of the high seas in many ways presents a textbook case of the challenges in EIA—given the pioneering nature of these activities, large data gaps are to be expected; new technologies will also present novel challenges that must be analyzed; and stakeholder groups will be particularly active in their public participation. It is thus fundamental to uphold adequate, meaningful rule of law in this new context. For the EIA practitioners who will have the daunting task of implementing the EIA portion of the BBNJ treaty, words matter. The language in any follow-up annex or guidance document to the BBNJ treaty must provide important *support* to those who must face all the stakeholders involved in proposed projects, to those on the front lines of EIA practice. If the language is weak or fails to give adequate meaning, not only will a practitioner’s job suffer, but the EIA process, and most importantly, resources of the high seas, will too.

The good news is that there are options for how to proceed with follow-up guidelines. For example, recognizing that even the development of guidelines can be a lengthy and complex process, it may be practical to identify a small number (5 or 6) of key issues to focus on first (e.g., alternatives, screening, and cumulative impacts), presented as interim guidelines that can be finalized over time. In addition, it might be useful to look to existing international agreements to see how similar issues have been codified and put into practice as a place mark until the BBNJ guidelines are completed.

ELI is developing this work as part of a multi-year research and collaboration effort to ensure a meaningful implementation of EIA principles in the high seas. We have embarked in this process in the hopes that the information delivered in this and future documents will be helpful to the United Nations, governments, and other key stakeholders in the BBNJ process. In this sense, establishing a standing advisory body of EIA experts to assist in the international management and protection of high seas resources seems a necessary step to consolidate knowledge and build a global community of practice on this fundamental issue.



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