

# Assessing the role of strategic environmental assessments in the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction

By: Kristine Gu

**Document commented on:** President's aid to negotiations on the 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, [A/Conf.232/2019/1](#).

The year 2020 will be a milestone year for the UN's Sustainable Development Goals (SDGs) and an opportunity to reflect on the progress made, and the hurdles still ahead, in attaining these goals. [SDG 14](#) addresses the conservation and sustainable use of the oceans, seas, and marine resources. It sets out to tackle several issues by 2020 that plague the marine environment, including overfishing and ocean acidification, and to manage marine ecosystems to avoid significant adverse impacts (Targets 14.2–14.4). SDG 14 points to the [UN Convention on the Law of the Sea](#) (LOSC) as the legal framework for the conservation and sustainable use of the ocean and marine resources (Target 14.C).

2020 also coincides with the final substantive session of the intergovernmental conference (IGC) on an international legally binding agreement (ILBI) under LOSC on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). Key elements of the ILBI will not only uphold LOSC mandates but also provide the tools essential to achieving the targets under SDG 14.

The first session of the IGC convened in September of last year. Discussions were centered around the four key elements of the “package deal” agreed upon in 2011, including environmental impact assessments (EIAs). An overview of the history and objectives of the IGC and the ILBI are provided for in the JCLOS blog posts of [17 August 2015](#) by Anna-Maria Hubert and [21 October 2016](#) by Christian Prip.

Delegates will gather again in New York at the end of this month for the second session of the IGC, with a focus on the Zero-Draft contained in the IGC President's Aid to Negotiations ([A/Conf.232/2019/1](#)). Options to treaty text in the Zero-Draft take into consideration discussions from the first session, as well as the Preparatory Committee's (PrepCom) recommendations in its 2017 report ([A/AC.287/2017/PC.4/2](#)), to reflect the general trend in the current dialogue.

This blog post focuses on the treatment of strategic environmental assessments (SEAs) by the IGC within the ambit of the EIA Working Group with a view to demonstrating the role of SEAs in pursuing SDG 14 and in the good governance of marine biodiversity. The post first lays out the nature and purpose of SEAs, and their use in existing environmental agreements. It then reviews delegate positions from the first session and as reflected in the Zero-Draft to uncover the ways in which SEAs may be developed in the ILBI.

## The role of SEAs in upstreaming environmental concerns

SEAs evaluate the potential effects of a strategic-level decisions – often referred to as plans, programmes, and policies (PPPs) – on the environment, and also analyze any mitigation methods and

alternatives to the proposed decision. SEAs were first developed as a tool to address two major gaps in EIA practice. First, to counteract reactionary nature of an EIA, whereby project impacts were often being considered too late in the planning process, thereby foreclosing important options that might have been identified in earlier planning processes. Second, EIAs, because they focus on single projects, face fundamental challenges in addressing cumulative and long-term effects. SEAs have since shifted toward becoming an independent mechanism for upholding the environmental pillar in sustainable development and have been utilised in numerous environmental treaties and domestic laws.

The [Convention on Biological Diversity's \(CBD\) voluntary guidelines](#) on biodiversity-inclusive impact assessments identify three key elements of an SEA: stakeholder engagement, transparency, and good quality information. The voluntary guidelines also note that when an SEA is integrated into a strategic decision-making process, as opposed to running alongside it, the assessment is often more effective and meaningful.

SEAs ensure that sustainable development goals and environmental concerns are contemplated at the earliest stage of decision-making processes. By upstreaming the consideration of these interests, the projects that eventually result from PPPs will already be better aligned with environmental goals. These benefits, however, are hindered by a lack of clear and technical guidelines on SEAs and by the inherent difficulties associated with forecasting environmental effects at such an early stage in the decision-making process for areas beyond national jurisdiction (ABNJ).

### **SEAs in existing legal instruments**

Whilst EIAs are required under customary international law (see the ICJ's [2010 Pulp Mills decision](#)), as well as under Article 206 of LOSC, no similar obligations exist for states to conduct SEAs under customary international law and LOSC. The current application of SEAs is instead found in a collage of international, regional, and domestic instruments.

The [Kiev Protocol](#) to the [Espoo Convention](#) is a key international legal instrument on SEAs. Article 4(1) requires parties to the Protocol to carry out SEAs on plans and programmes related to certain industries or caught during a screening process. Similarly, without using the term "SEA", Article 14(1)(b) of the CBD requires member states to ensure the environmental consequences of their policies and programmes that are likely to have significant adverse impacts on biological diversity are assessed.

Non-binding international documents include the CBD's voluntary guidelines and the OCED's [good practice guidance](#) for applying SEAs to development cooperation. The CBD's voluntary guidelines have been adopted by the Conference of the Parties (COP) to the Ramsar Convention in its non-binding [resolution on EIAs and SEAs](#).

In the EU, SEAs are incorporated in secondary laws via the SEA Directive ([Directive 2001/42/EC](#)). The SEA Directive is supplemental to the EIA Directive ([Directive 85/337/EEC](#) last amended in [2014](#)), which influenced both the SEA Directive and the Kiev Protocol. The SEA Directive adopts the majority of its provisions from the Kiev Protocol, and places an emphasis on the precautionary principle and sustainable development. Both the SEA Directive and the Kiev Protocol are regional arrangements limited to European membership.

As for domestic SEA processes, UNEP's [2018 report](#) on EIAs and SEAs in national legislation and institutional arrangements indicates that over forty countries have implemented a range of approaches to SEAs. These findings show that, while SEAs are growing in popularity, the application of effective systems are hindered by a lack of formal processes, cross-cutting issues of access to information and public participation, and a failure to take into account the specific challenges in understanding strategic decision-making processes. Many are also weakened by the continued treatment of SEAs as a derivative tool to complement EIAs and by a lack of data to measure the outcomes of an SEA process as they trickle down from decision-making levels and into the environment. Likewise, there is a need to address training and capacity-building requirements, especially in developing countries.

### **SEA implementation in the marine environment**

The use of SEAs in the marine environment thus far has been predominantly with regard to coastal zones. After its introduction at the 1992 Rio Earth Summit, integrated coastal zone management (ICZM) has been adopted by several jurisdictions as a method to achieve sustainable development that contemplates the full decision-making process and ensures informed public participation. ICZM is coveted for bringing together the relevant policy makers, sectors, and administrators to balance environmental concerns with economic, social, and cultural goals (borrowing from the [EC's definition of ICZM](#)). The [International Association of Impact Assessment](#) points to SEAs as a tool for ICZM in developing a strategic framework to achieve sustainable development goals.

The COP to the CBD underscores the role of SEAs in the conservation and sustainable use of marine and coastal biodiversity in [Decision XI/18](#) and [Decision XIII/3](#). The former encourages member states to the CBD to adopt biodiversity-inclusive SEAs, and the latter reiterates the importance of SEAs alongside other area-based management tools. These two decisions, along with Article 14(1)(b) and the voluntary guidelines, form the framework under the CBD for states to address biodiversity-specific issues in the marine environment using SEAs.

If adopted into the ILBI, SEAs will play a major role in reaching the goal of sustainably managing and protecting marine and coastal ecosystems, set out in Target 14.2 of SDG 14, through the identification of adverse impacts and environmental vulnerabilities at the earliest stages in decision-making processes.

### **Rationale for a biodiversity-inclusive approach to SEAs**

Current SEA practices offer little basis to endorse a single definitive approach to implementing SEAs. Similar to the UNEP report, the CBD's voluntary guidelines identify a range of practices. On one end of the spectrum lies an approach that focuses on the biophysical environment (e.g., the EU's SEA Directive and the Kiev Protocol), and on the other lies practices that attempt to balance environmental, social, and economic concerns (e.g., ICZM and UNEP's [guideline](#) to integrated environmental assessment).

This blog post endorses the first approach, which prioritizes biodiversity concerns during strategic decision-making processes, and ensures that social and economic concerns are upheld and protected by state governments. This approach treats biodiversity as a paramount issue, in a way that is akin to biodiversity-inclusive SEAs discussed in the CBD's voluntary guidelines. Biodiversity-inclusive SEAs treat biodiversity as the first and foremost concern and requires a biodiversity-oriented perspective at every step of the SEA process. The rationale for this choice is two-fold. Firstly, it places an emphasis

on the environmental pillar of sustainable development, especially where economic and social concerns may already be prioritized by governments. Secondly, such an approach aligns with the ILBI's prospective role in promoting coherence with relevant legal instruments like the CBD.

### **SEA in practice**

While there is certainly no one-size-fits-all approach, the Kiev Protocol provides an excellent starting point to understanding SEAs in practice. The Kiev Protocol begins with the “screening” stage, which identifies what plans and programmes (and not policies) require an SEA. Screening is done through a hybrid system. First, a state uses a list to determine if its proposed plan or programme automatically triggers an SEA. If the plan or programme is not covered in the list, it is then subject to a screening process that determines if an assessment is still required.

If an SEA is required, the next step is to scope out the contents of an environmental report. This includes looking at expert advice on what information must be gathered. The report then informs a decision on the adoption of the plan or programme. This decision ultimately lies with the state. Article 7(3) of the Kiev Protocol requires that an environmental report be of sufficient quality but does not subject states to a review on whether the impacts outlined in the report were actually incorporated into the final decision. The only monitoring requirements are to track the environmental and health effects of a plan or programme, identify any unforeseen effects, and undertake the necessary remedial action.

Since the state that proposes a plan or programme also conducts the SEA, the identification, notification, and consultation of stakeholders and the public are integral. Public participation is required throughout the SEA process, and transboundary consultations are mandatory when a plan or programme is likely to have transboundary environmental effects.

### **Delegate positions and SEAs in the Zero-Draft**

The inclusion of an SEA framework, and what such a framework would look like, was a point of divergence at the first session of the IGC. Many states and organisations backed the inclusion of SEAs for BBNJ. For example, the EU delegate stressed that SEAs are a valuable mechanism for ensuring the incorporation of environmental concerns at the earliest stage in decision-making processes. IUCN touched on the many opportunities that would coincide with the development of SEAs, including the furtherance of important international environmental law principles and increased coordination and cooperation across regions and sectors. Other states that also voiced support for SEAs include CARICOM, Canada, and Iran, but the views among these countries varied on the design of a framework.

In his [oral report](#) after the first session, the Facilitator of the EIA Working Group identified three main points of divergence amongst SEA supporters: (1) scope, (2) level of assessment required, and, (3) who is responsible to undertake SEAs in ABNJ. Questions were also raised as to the type of PPPs that would require an SEA, the involvement of a governing body in reviewing and monitoring SEA practices, and whether PPPs would be better addressed by EIAs.

The Russian Federation and the US opposed the inclusion of SEA provisions, arguing that these assessments are not required under LOSC and do not necessarily align with its mandates. The Facilitator's oral report further notes the drawbacks of SEAs, including that they are complex, costly,

and lengthy processes to undertake. Thorny issues also arise with regard to the design and application of SEAs in marine ABNJ.

The Zero-Draft prepared for the second substantive meeting reflects these concerns in three options to treaty text in paragraph 5.7:

OPTION I: Each party shall ensure that a strategic environmental assessment is carried out for plans and programmes under their jurisdiction or control, affecting areas beyond national jurisdiction, which meet the threshold/criteria established in paragraph [...]

OPTION II: The instrument would set out rules and conditions to carry out strategic environmental assessments as one type of environmental impact assessment.

OPTION III: No text

These options will be discussed in detail below, but it is important to note, as with the Kiev Protocol, policies are left out of Option I – only plans and programmes will be subject to SEAs. This post nevertheless continues to consider policies, and therefore uses the term “PPPs”.

### **Towards an SEA framework for BBNJ**

Support for SEAs in the lead up to the IGC suggests widespread agreement on the value of SEAs in the IBLI. Arguably, concerns raised in the Russian Federation and US interventions can be addressed within the framework. The larger issue is the extent to which SEAs will be developed under Option I or II, as well as the elements of the chosen SEA framework.

Option II is less than desirable substantively, because it stands to perpetuate the development of SEAs in the shadow of EIAs by failing to acknowledge the key differences between strategic-level decisions and project-level decisions. (The first session of the IGC also considered the development of SEAs under other sections of the ILBI, including under area-based management tools; these options will not be discussed in this post.) In comparison, Option I creates a clear obligation to carry out an SEA practice that is related, but conceptually distinct from EIAs.

However, this should not preclude a nexus between SEAs and EIAs (e.g., sharing a governing body or reusing data gathered during an SEA to avoid duplication during an EIA). One method to bridge the two is the tiered method, which involves preparing environmental assessments at different stages of planning and linking these assessments to create a flow of information between the stages (drawing on [Arts et al., 2005](#)). Tiering itself is limited by realities such as the “shelf life” of scientific information and data, but despite these limitations, tiering allows the benefits of SEAs to reach project-level EIAs. Tiering also recognizes that environmental assessments conducted at the strategic-level strengthen the basis and normative background against which project-level impacts can be assessed.

#### *Using existing legal agreements*

Existing legal instruments can act as a starting point to developing an SEA framework under Option I (see JCLOS blog post of [1 February 2018](#) by Anna-Maria Hubert and Neil Craik). The relationship between the ILBI and other existing legal instruments is outlined in paragraph 4 of the Zero-Draft,

which under Option 1 sets out that the ILBI should complement and promote coherence with relevant legal instruments, frameworks, and bodies.

Coherence is especially important given the existing obligations found in the CBD, the Kiev Protocol, and other international and regional documents. These obligations could inform the ILBI on the minimum standards for applying SEAs. The IGC should pursue a harmonized approach that contemplates current SEA frameworks that already govern certain activities and regions and includes input from other sectors and stakeholders. For instance, information from the International Seabed Authority's (ISA) regional environmental management plans can be used by member states to LOSC to assess the impact of activities related to mineral resources and the deep seabed on biodiversity.

Annex I to the [Chair's overview](#) on PrepCom I lists several documents from which SEA procedures can be extracted, including the Kiev Protocol and the CBD's voluntary guidelines. The benefits of looking at existing SEA practices, and adapting them for BBNJ, makes it unlikely that the IGC will need to draft an SEA framework from scratch. Even so, there is little precedent on adapting the Kiev Protocol into a new system – the SEA Directive replicates a majority of the provisions, while the Ramsar Convention's Resolution to adopt the Kiev Protocol did so by adding annotations to incorporate matters specific to wetlands.

#### *Public participation in ABNJ*

Several challenges to creating an SEA framework present themselves immediately, with the first being the cross-cutting issues of stakeholder identification, public participation, and access to information that are especially complex in ABNJ. Who is the “public” in ABNJ, and how can they be notified about, and included in, the SEA process?

For EIAs, paragraph 5.4(1)(f)(i) of the Zero-Draft lists those who make up the “public” during notification and consultation, but the list captures an expansive population. The failure to properly demarcate who comprises the public creates two issues: firstly, it will be difficult for states or institutions to identify when sufficient notification has been provided, and, secondly, it will be equally difficult to challenge a state on the grounds of insufficient notification.

#### *Deciding on an approach to screening*

It is also unclear as to how a need for an SEA will be identified. Will the Kiev Protocol's hybrid approach be employed? If so, should SEAs share a list of triggering activities with EIAs, or should a separate list be drafted?

Sharing a list means the screening process will be activity-based, and states will have to guess as to what activities a proposed PPP will eventually involve. However, developing an independent, flexible, and non-exhaustive list for SEA-specific screening will not be straightforward. Debates at the first session arose as to whether such a list should be activity- or location-based, as well as whether particularly vulnerable or sensitive areas should automatically require an SEA. The issue with activity-based SEAs is that a PPP on the surface may not lead to a specific activity, e.g., if a new tax subsidy unintentionally encourages increased fishing activity. As for location-based SEAs, it is difficult to identify the extent a domestic policy on pesticides will impact the marine ABNJ. In both situations, a certain amount of foresight is required on the part of the state or implementing institution.

### *Authority over the final decision*

Another issue is who should make the final decision to adopt, modify, or reject a PPP after an SEA is completed. Paragraph 5.4(1)(i) of the Zero-Draft lays out three options for EIAs in relation to this issue. The first reflects the current state of EIAs under the Espoo Convention, and gives the state the authority to make the final decision on a project. The second option assigns the decision to a decision-making body convened under the ILBI, and the third option is that the decision should be made by the state in light of recommendations by a technical expert.

For both SEAs and EIAs, will states be willing to relinquish their right to govern issues within their jurisdiction in light of the delays and costs involved? Who will bear the burden of convening and financially supporting a governing body? What qualifications, other than being objective, will such a body have that puts it in a better position to judge the PPP of a sovereign nation?

### *Procedural versus substantive review*

The UNEP report studied national-level procedural versus substantive reviews of EIAs, noting that looking beyond procedural adherence can help meet environmental and sustainability goals. This is similarly the case for SEAs, which on a national-level are more often than not subject only to procedural review.

Paragraph 5.4 of the Zero-Draft suggests the possibility of a substantive review process for projects commenced in spite of the results of an EIA, as well as an option to prohibit any project where an EIA forewarns of significant adverse environmental impacts. If a substantive review process is selected, against what standard will an EIA be measured? Will developing countries be held to the same stringent tests? Who will conduct the review, and what remedies should be at their disposal? The answers to some of these questions may be informed by the ITLOS [Advisory Opinion](#) on deep seabed mining, which looks into EIAs and the interests and needs of developing states.

The risk to choosing a substantive review process is that states may no longer support an SEA framework in the ILBI. States may feel apprehensive about subjecting domestic decisions on PPPs to external review. Such a review process would expose states to a new set of liabilities and, potentially, a higher standard against which their actions will be assessed. There is also a question as to what type of review should be pursued. Should compliance mechanisms merely look at whether an SEA was conducted, or should an SEA be assessed by the quality of its components and the level to which recommendations were incorporated when adopting a PPP?

The flexibility of SEAs will also affect a substantive review process. The meaning of “flexible” in this context reflects the CBD’s voluntary guidelines, which note that SEAs can vary in scope and detail depending on the time and resources available. In some cases, the desired result is a policy-maker’s contemplation of environmental concerns during strategic decision-making processes, while in others, the environmental report itself is imperative. Should the review examine the environmental report or the overall quality of the adopted PPP? Will some states or types of PPPs produce shorter and faster SEAs, and is that necessarily a bad thing?

In spite of these challenges, a review process would greatly benefit SEA practice. A state should be held to some degree of responsibility for pursuing a PPP despite having the knowledge of significant adverse effects on BBNJ. Examining whether a state carried out its duty to conduct an SEA for a PPP

that was likely to have significant adverse impacts, as well as whether alternatives to address and avoid such impacts were given proper consideration before a final decision was made, aligns with Target 14.2. The language of Target 14.2 could also inform the standard to which SEAs are held, possibly through the requirement for PPPs to have no significant adverse effects.

To avoid impeding on state sovereignty, the final decision can still rest with the state; however, the failure to avoid adverse impacts on BBNJ would expose the state's decision to review. As for ensuring transparency and accountability in accordance with paragraph 1(1)(s) of the Zero-Draft, a substantive biodiversity-inclusive review process would be beneficial to pursuing these objectives.

### *Additional issues*

The adoption of the ecosystem approach in paragraph 1(1)(j) of the Zero-Draft, specifically the ecosystem approach described in COP CBD Decision V/6 cited in the [Chair's non-paper](#) on PrepCom III, provides an overarching but vague idea of what SEAs should be aiming to achieve. The murkiness of navigating the ecosystem approach is explained in the JCLOS blog post of [20 March 2017](#) by Vito De Lucia, and the work of the ISA on deep seabed mining is informative on the need for environmental objectives to assess and avoid harms (see [Jaeckel, 2019](#)).

Additional issues that will arise include establishing effective capacity-building and technology transfer approaches and other support to developing countries, overcoming the initial learning curve through flexible and adaptive implementation, and ensuring that sovereignty and sovereign rights are not disregarded. While these issues do not necessarily impede the creation of an SEA framework, a careful assessment of how to resolve them will improve the effectiveness and quality of SEA practice. The art will be in balancing the objectives of SEAs with political, economic, and social realities.

### **Conclusion**

When the second substantive session of the IGC convenes at the end of this month, delegates will need to reach a consensus on the inclusion of an SEA framework in the ILBI. If the delegates choose not to include SEA provisions, or if SEAs are developed under EIAs, an opportunity to create an assessment practice that integrates environmental concerns into strategic decision-making processes, and the benefits that SEAs provide to project-level decisions, will have been missed. The upcoming session of the IGC will be an opportunity to inform delegates on the value and options for an SEA framework in the ILBI.

*I am grateful for the support, guidance, and insightful comments provided by Professor Anna-Maria Hubert (University of Calgary), Kristina M. Gjerde (Senior High Seas Advisor to IUCN Global Marine and Polar Programme), Professor Neil Craik (University of Waterloo), and Professor Nigel Bankes (University of Calgary) on earlier drafts of this post. Any errors or omissions remain my own. My research at the Faculty of Law at the University of Calgary is made possible through the funding provided by the Social Sciences and Humanities Research Council of Canada for Professor Hubert and Professor Craik's project, *The International Law of the Commons: Towards a Global Constitutional Framework*.*

*This blog will be cross-posted on ABlawg, the blog of the Faculty of Law at the University of Calgary.*