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International legal obligations for EIA and SEA in the Arctic Ocean

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Outline

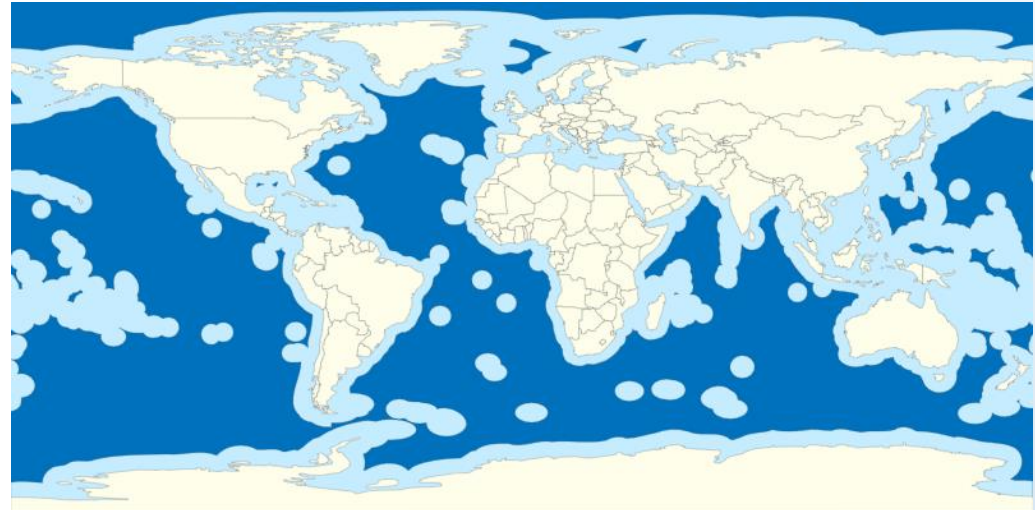
- Research questions
- The context: a global and a regional process
- Impact assessments: terminology, role, effectiveness
- Review of instruments – a brief overview
- Status of EA obligations
- Gaps
- Ways forward

Questions

1. Which obligations exist for states under international law to conduct EIA and SEA for activities in the Arctic Ocean?
Means excluding:
 - * Activities outside affecting the Arctic Ocean (Climate, pollutants etc)
 - * How states have regulated assessments nationally
2. What are the gaps in this legal regime?

UNGA resolution June 2015: A new implementation agreement under LOSC on biodiversity in ABNJ?

- Preparatory committee:
Develop an international legally binding instrument under the LOS Convention
- A package of topics:
 - * Conservation and use of marine biodiversity, incl. marine genetic resources and benefit sharing
 - * Measures such as area-based management tools, incl. MPAs
 - * **Environmental impact assessments**
 - * Capacity-building, transfer of technology
- No clear diagnosis on “EIAs”



Marine areas beyond national jurisdiction (ABNJ) = High Seas (picture) + Deep Seabed («the Area»)

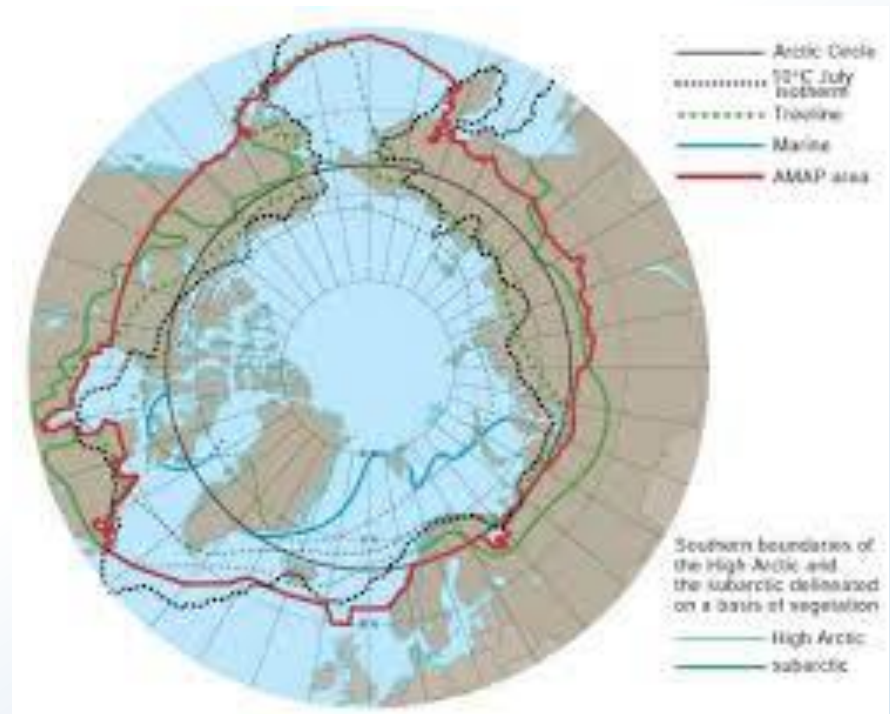
An Arctic Council task force 2015

Mandate:

“...assess future needs for a regional seas programme or other mechanism, as appropriate, for increased collaboration in Arctic marine areas”

Dead-line:

Same as the UN process, 2017. Interplay?



The Arctic marine area – however delineated - is wider than the Arctic Ocean

What is Impact Assessment?

Decision-makers need to know what is likely to happen before they approve, reject or modify proposals

⇒ Anticipation: prior identification of impacts (ex ante prediction).

Evaluation of real effects (ex post monitoring). Environmental management tools.

Mitigate harm – or even optimize benefits – through the whole life cycle

⇒ A tool for decision support:
Shall ensure informed decisions. Unwise decisions can not be avoided (process vs substance)

An arena for interplay between different interests and values. Social learning.

Legal obligation: assessing the final proposal

Planning: integrated into planning process when elaborating the proposal

Types of assessments and terminology

Proposals at different levels

- Projects: Environmental Impact Assessment (EIA)
- Legislation, policies, plans and programmes: Strategic Environmental Assessment (SEA)

Values or types of impacts in focus

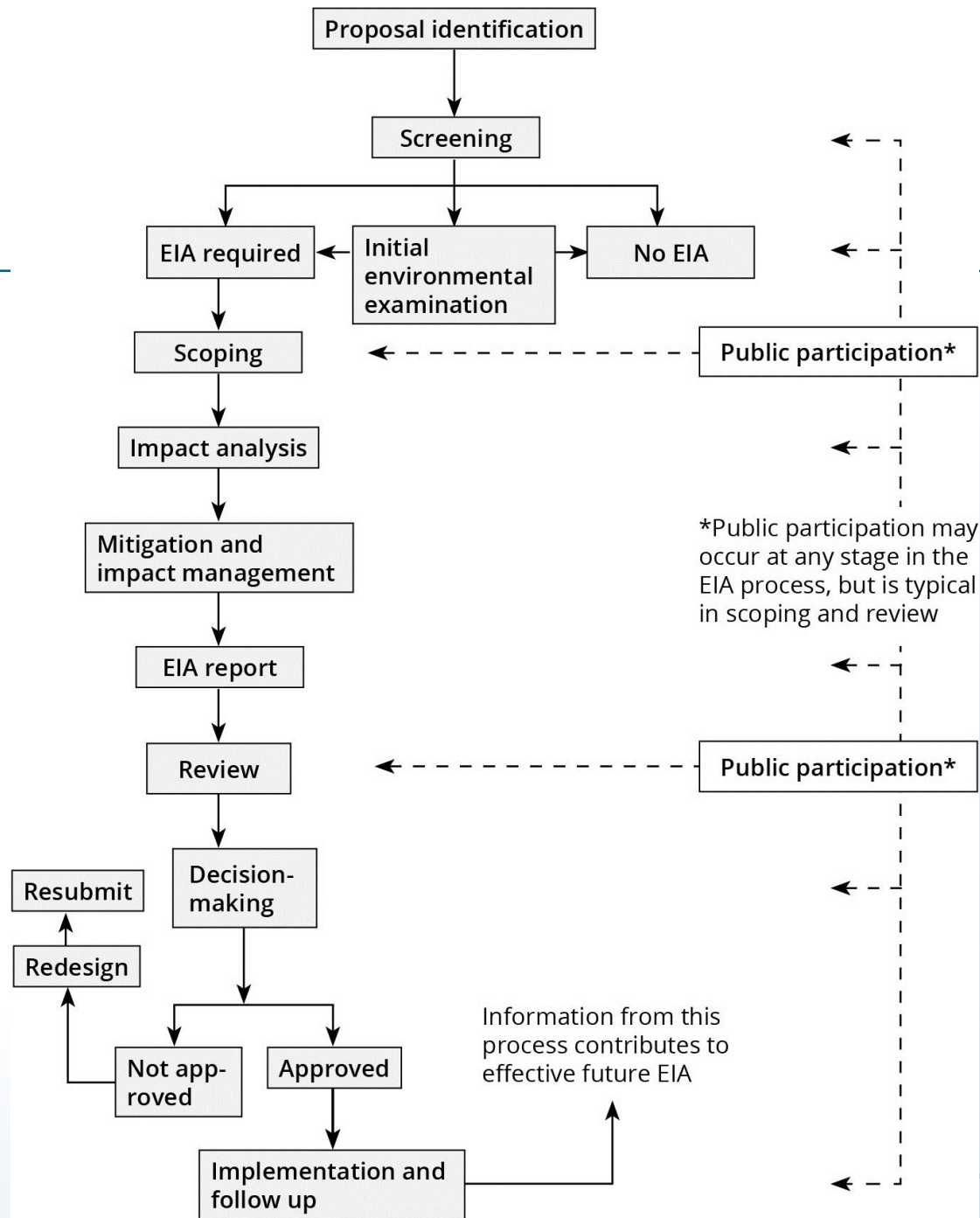
- The environment: EIA and SEA
- Other specified impacts: Social impact assessment, sustainability assessment, health impact assessment, risk assessment, etc
- Impacts in general: Impact Assessment

Jurisdictional area affected

- Domestic impacts?
- Transboundary impacts on other states and ABNJ?

Different legal status and different procedures: Transboundary EIA/SEA

The EIA process (1987 UNEP goals and principles)



SEA:

1. Extended EIA
2. Strategic

Figure:
based on UNEP

Effectiveness: Does EIA/SEA make a difference?

The answer depends on your perspective:

- **To mainstream the environment**
Yes: Environmental data are sampled, assessments are made and brought before decision-makers.
Quality improves over time.
- **To change the content of decisions in a more sustainable direction**
Highly variable results found regarding influence of EIA/SEA on decisions.
Decision makers have wide discretion, seldom restricted by EIA laws
- **To foster environmental learning, awareness and dialogue.**
A contribution to longer term societal changes.
Public participation is crucial to obtain this.

Analysis of the legal status in the Arctic Ocean

Analysis of legal EA instruments by

Hard law – soft law

Non-binding: General principles, guidelines

Binding: Customary law, judicial decisions, treaty law.

Specificity: What is the content and procedure in an assessment obligation?

1. Specific obligations of EIA or SEA
 - a) Highly elaborated in "specialist legislation"
 - b) More unelaborated, but still specific on the tool
2. The tool is open: "Assess" etc,
=> EIA/SEA may be relevant, but also other tools
3. Indirect assessment requirements:
Obligation cannot be met without some sort of prior assessment, though not explicitly required

Has implication for interpretation of treaties

Treaties that specifically require EIA or SEA

Instruments containing requirements for EIA/SEA:

- CBD art 14: Specific on SEA and EIA, Guidelines also for marine biodiversity assessments
- Deep seabed mining: EIA regulations by ISA

Specialized instruments developed only for EIA/SEA:

- Espoo convention on transboundary EIA (1991)
- SEA protocol to Espoo convention (2003)
- (Arctic EIA guidelines (1997))

Transboundary EIA: The Espoo convention

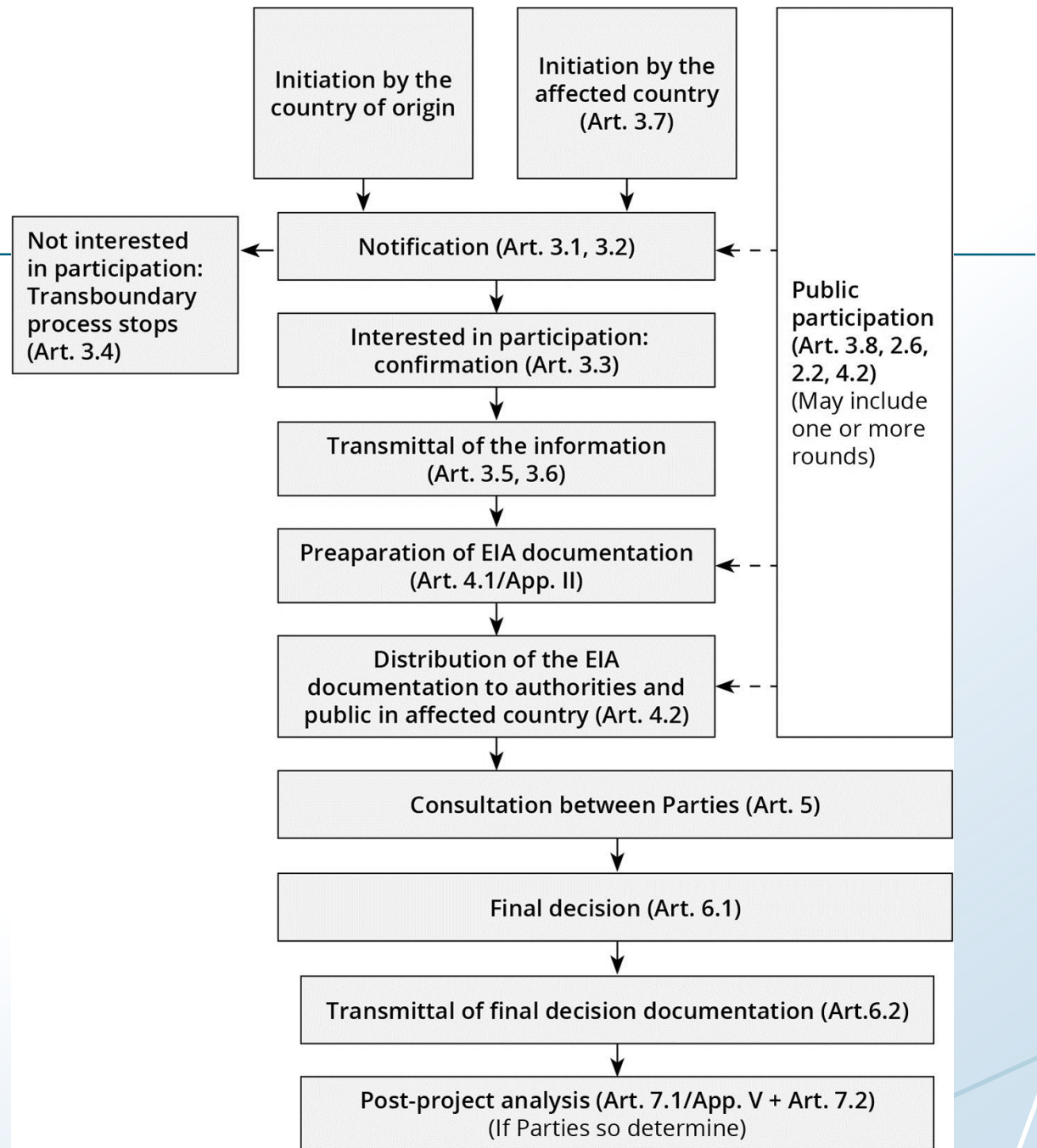


Figure: Based on UN ECE

Treaties that require assessments, not EIA/SEA

- Law of the Sea Convention (1982) art 206 : "assess".
By interpretation (due diligence for the Arctic coastal states):
 - * EIA according to UNEP's principles
 - * SEA
- Ramsar/Wetlands (1971)
Migratory species (1979)
(Only unspecific provisions in conventions, COP resolutions refer to CBD)
- OSPAR (1982): No EIA provisions – some unspecific
- London Convention/Protocol on dumping at sea (1996)
- Fisheries:
Only indirect EA provisions, except in UNFSA (1995): "assess"
FAO guidelines on deep sea fisheries (2009): series of assessments
NEAFC: implements UNGA resolutions and FAO guidelines

When and where are EIA and SEA required?

When?

Obligation activated by a threshold: likelihood of significant harm.

To what? Depends on instrument:

- Pollution and the marine environment (LOSC)
- Biodiversity (CBD)
- Human health (Espoo)
- Socioeconomic conditions – probably not per se
- Others – various

Where?

- CBD (+ customary obligation + LOSC) are transnational: apply to all maritime zones.
- Other instruments only to specific zones (see fig)

Specific obligations apply to certain zones

		Areas affected by the impact	
		Coastal state zones	High Seas and the Area
Location of activity	Coastal state zones	SEA-protocol Espoo convention	SEA-protocol CBD
	High Seas and the Area	ISA deep seabed mining	ISA deep seabed mining

Dotted area: Domestic EA – only state's own territory affected.
 SEA: apply to Norway and Denmark/Greenland (only parties)

How should EIA and SEA be conducted?

- EIA:
Minimum content according to UNEP 1987 principles
(CBD, interpretation of LOSC)
- SEA:
CBD guidelines give some direction,
The SEA protocol applies only between Norway and
Denmark/Greenland

Gaps

- Insufficient acceptance of existing instruments
The US is in a very peculiar position. Stewardship, ref Illulisat declaration?

- Major sectors no or uneven assessment obligations beyond LOSC
 - * Fisheries:
No specific requirements outside NEAFC area: New and exploratory fisheries.
Pelagic fisheries + AWNJ not covered.
 - * Shipping and marine tourism: No requirements.
 - * Oil and gas: PatchyGeneral problem: No specific, default, assessment mechanism for all activities
- Weak obligations for domestic assessments
- Weak coverage of ABNJ
Activities in AWNJ must be included to capture potential harm to ABNJ
- Low marine relevance of the Espoo instruments
- Strategic level not covered well

Some reflections on the way forward

Do states agree that there is a need for more specific regulation of EIA and SEA and a more uniform application of the tools? If yes:

Global minimum standards for EIA and SEA in LOSC.
Additional rules as *lex specialis* (ref existing conventions)

How specific should new rules be towards wider set of impact assessments?
Include EIA and SEA, open towards other values and hence, assessments

Espoo convention: increase marine relevance?

Regionally: an assessment instrument for the Arctic Ocean?

Lessons learned from literature on EIA effectiveness:

- Address quality of assessments beyond formal rules: improve capacities
- Closer linkage of process and substance
- Integration with planning