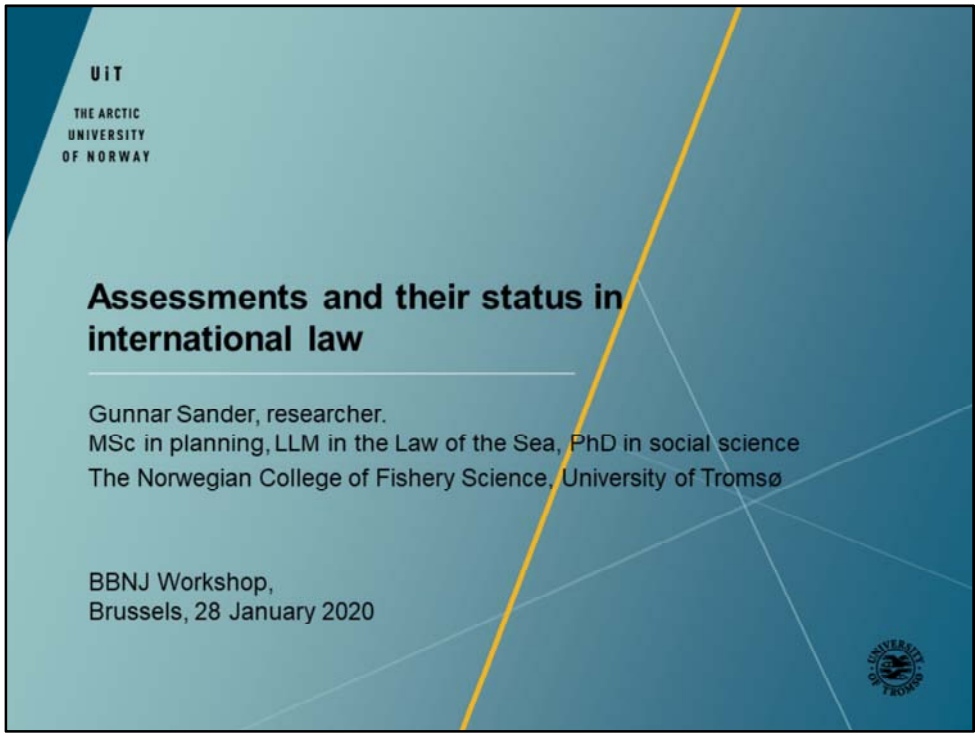
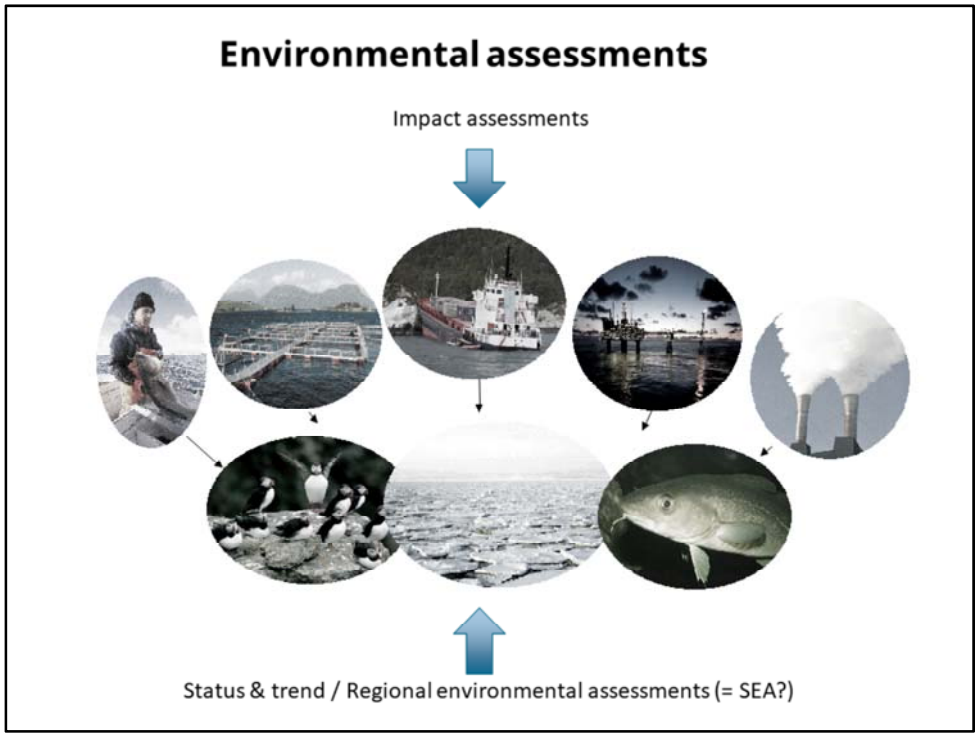


The purpose of this presentation is to give a brief overview of different types of assessments and their status in international law. I will also make some comments to the negotiations. What you get here in the notes panel is updated after the workshop and include issues I would have liked to say with more time ☺.

My background: Quite multi-disciplinary. I have worked with environmental monitoring, reporting and assessments as well as EIA, SEA and socioeconomic assessments. I teach EIA. Academically, I have been interested in combining knowledge of assessments with analyses of the legal regime for assessments.
Personal web site:
https://en.uit.no/om/enhet/ansatte/person?p_document_id=387266&p_dimension_id=88166



Upper panel: The human activities that cause impacts.
Lower panel: The ecosystem that is changed by the impacts – the receiving end. This is the management object for the BBNJ treaty, in particular its biodiversity.

The starting point of assessments can be from the activities, or from the receiving environment. Or, hopefully, combinations, since we need both. Thus, we can distinguish between:

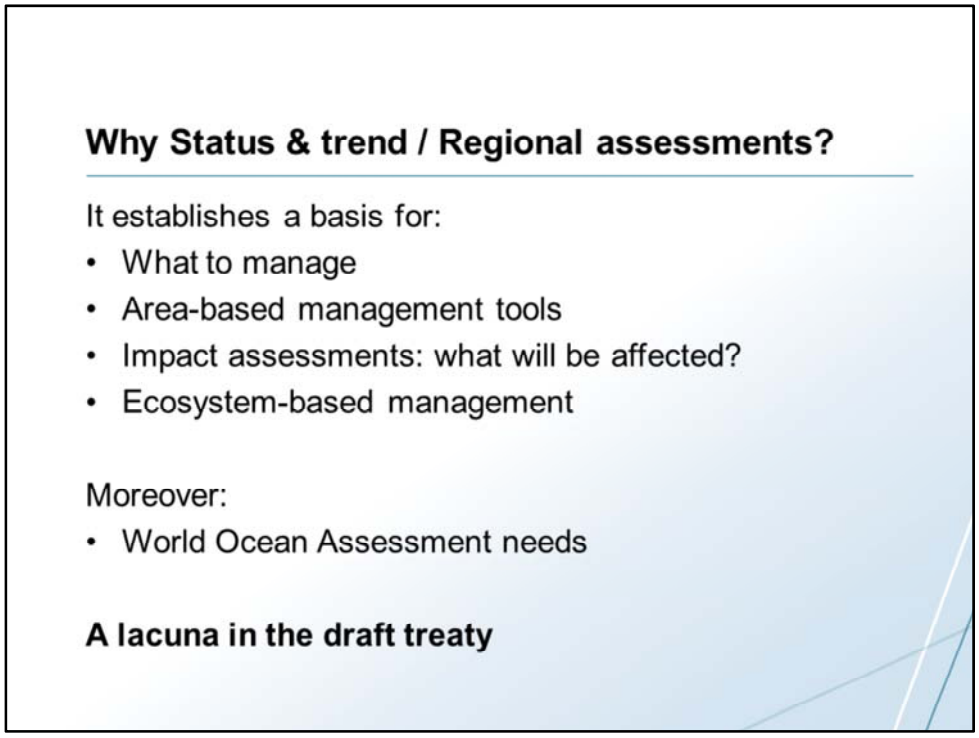
- Impact assessments, which I will come back to
- Status and trend assessments, also referred to as Regional assessments. State of the environment assessments may also apply; names flourish in the world of assessments and may cause great confusion.

Their role is to assess the status of an ecosystem, including over historic time periods and with projections into the future by the use of scenarios, models etc: Is the status satisfactory, for instance as regards ecosystem services and state of habitats and species? A central issue also is to assess the cumulative impacts from all human activities upon the ecosystem. That makes a diagnosis which can serve as the basis for treatment; the elaboration of policy responses aimed at addressing unsatisfying ecosystem conditions. This is a process on its own, and paramount if the assessment shall lead to better management. Proposals for such policy responses may be subject to assessment according to legislation on impact assessments. Despite a common legal

trigger for conducting assessments, we may still distinguish response assessments originating from an analysis of the ecosystem, from those SEAs (and EIAs) that originate from an initiative in a sector because of its interests in creating certain developments.

There are not strong obligations in int. law to make Status and trend assessments; there are mostly indirect requirements following from other obligations. Such indirect requirements can be found for instance in the draft BBNJ treaty art 17(4)d on proposals for area-based management tools, and art 35(2)c on the content of EIA reports.

Status & trend assessment / regional assessment is often considered as one type of SEA, and one surely can do so. The point here is function, not name, which can confuse because people put different meanings to the same term. Status and trend assessments should be described functionally in the BBNJ treaty because of their vital role in a regime for conservation and sustainable use of biodiversity (next).



Status and trends assessments provide the basis for a range of other functions, see the bullet points. The most fundamental question one should ask in the context of the BBNJ treaty is linked to the first: Would it be possible to manage biodiversity without knowledge about what to manage? There is a need to describe a clear mandate for collecting data about the marine environment and its biodiversity through mapping, research, monitoring - and compilation of the information in policy-relevant assessments as described on the previous slide. All this must be done by close collaboration with the relevant coastal and other States, IGOs and scientific institutions. Regional collaboration is probably the best, but with close linkages to the global level, both in the context of a BBNJ treaty and the World Ocean Assessment, which was assumed to be built up from regional assessments. Provisions on capacity-building and financial resources should clearly spell out the needs of particularly developing states to be able to deliver on these issues, and to strengthen their institutional capabilities.

There is a model for this in the UN Fish Stock Agreement from 1995 – the previous implementation treaty to the LOS Convention (LOSC). The scope for that treaty was fish and fisheries. Now it is biodiversity, which is broader by both management object and activities involved. However, *the same mechanisms are needed* and should be included in the BBNJ treaty: why aim for something less ambitious when the international community already has spelled out these commitments as a model in the context of LOSC? One can replace fisheries/fish etc with human activities/biodiversity etc, as

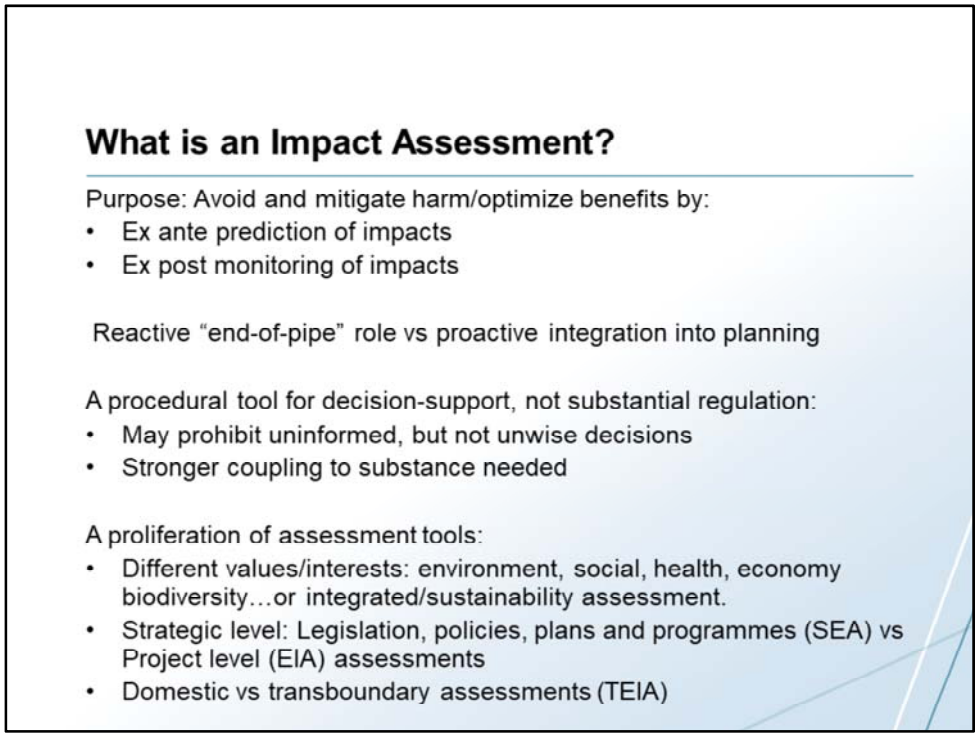
relevant and appropriate, from provisions in the UN Fish Stock Agreement art 5(d, j and k), art 6(3)b and d, art 6(6), art 8, 9, 10 and Annex I + II in particular. LOSC art 200, 201 and 204 are also relevant. See also art 203; I think that is the only place in LOSC where "environmental assessments" is explicitly mentioned.

This can be inspiration for improved provisions in a BBNJ treaty on assessments and their underpinning activities. Thus, the BBNJ treaty should describe a duty to cooperate and describe what this implies for mapping, scientific programmes and monitoring, with exchange of data reposited in appropriate, open-access databases, and joint assessments, also openly accessible. This is not clear in the proposed arts 6, 15 and 51. The institutional aspects of collaboration, also at the regional level, should be included.

Regarding the ecosystem approach/ecosystem-based management (synonymous concepts):
Status and trend assessments including response assessments and an adopted programme of measures put into practice, is what is needed to make EA/EBM operational. I am worried that the initial enthusiasm is over and that many actors only want it to be an abstract principle not meant for implementation. It can be, as Norway and the EU (Marine Strategy Framework Directive) have demonstrated. You may read more about this in Chapter 2 of my PhD thesis:
https://munin.uit.no/handle/10037/15191

A caveat:
The scientific support for managing biodiversity is essential and must be spelled out in the treaty. However, scientists have their own interests and motives – there will always be endless "knowledge gaps" that someone think need to be filed. Uncertainty and surprises are the normal state of affairs. Therefore:

- Put management needs at the heart of what knowledge is needed – not the other way around.
- Assessments, driven by policy-relevant questions, is one of the most appropriate ways of ensuring good science – policy communication
- Start by collating the data and information that is available. It is more than most people think if the different knowledge-holders share what they have. Sharing and open access should be essential for the treaty.
- Use the existing information as a platform for assessments and management measures, and build up gradually more knowledge over time (adaptive management).
- Precautionary approaches will always be needed, but should be essential in ABNJ with their deep oceans. The ISA presentation at the workshop and the regime for new and exploratory fisheries as spelled out for instance in the FAO guidelines for deep-sea fisheries, are examples of how the principle may be put into practice. Thus, one should consider whether precautionary principle/approach (art 5c) should also be spelled out more clearly in the treaty text.



1) Ex post monitoring is often seen as "something else" - Environmental management systems. However, impact assessments cover the whole life-cycle of an initiative: before and after decisions are made.

2) Assessing the final proposal is a reactive "end-of-pipe" approach to avoid harm. Knowledge of impacts throughout the planning process is needed in order to make more beneficial proposals. Such integration has been strongly advocated for SEAs and is incorporated into SEA legislation (see the Kiev Protocol and the SEA directive). However, it is as relevant for project-level assessments (EIA). Professional proponents who want do a good job consider impacts at an early stage, in dialogue with stakeholders, to inform their own planning, instead of just seeing the SEA or EIA as a hurdle that must be passed after they have made up their mind of what they want. Recognition of this proactive role misses in the draft BBNJ treaty and can easily be incorporated.

3) Procedural tool: As long as the procedure is followed, the assessment obligation is met. Decision-makers may be required by law to reason their decisions in the light of an assessment, but enjoys mostly completely freedom to decide whatever they want. US Supreme court: Can legislate against uninformed, but not unwise decisions. A suggested line of reform therefore has been to link EIA stronger to substance. One may prohibit adopting proposals that cause significant harm (draft treaty art 38(2)) – or that significantly affect EBSAs and vulnerable areas (art 27), or protected areas (can be found

in EU legislation). May become a game-changer if such provisions are adopted. It should in order to protect biodiversity from unsustainable uses.

4) A large number of specialized assessment tools for addressing particular concerns have emerged, creating a long and confusing list of names and acronyms. They may operate in parallel, but integration in one process is mostly preferred by the assessment community, as long as trade-offs in assessments as well as decision-making are clear and transparent.

At the national level, parallel requirements for assessments may be caused by different sectoral legislation and permissions. However, joint rules on procedure and core content across the different requirements for what to assess towards, will make it easier for the proponent to prepare one joint assessment, which may be delivered to different authorities (Norway has such cross-sectoral provisions). This may be extended to the international level by requiring global minimum standards (see later).

Similar difficulties arise from the scrutiny of legal assessment obligations; each instrument must be read carefully to understand exactly what are its major concerns which are to be assessed. The scope of impacts is an unresolved issue so far in the draft, though there is no doubt that the main emphasis is on biophysical impacts (ref. i.a. art 1(7), 35(2)d). A feasible compromise probably is to spell out minimum requirements for type of impacts (ecosystem services should be included), and point out other concerns that may be added.

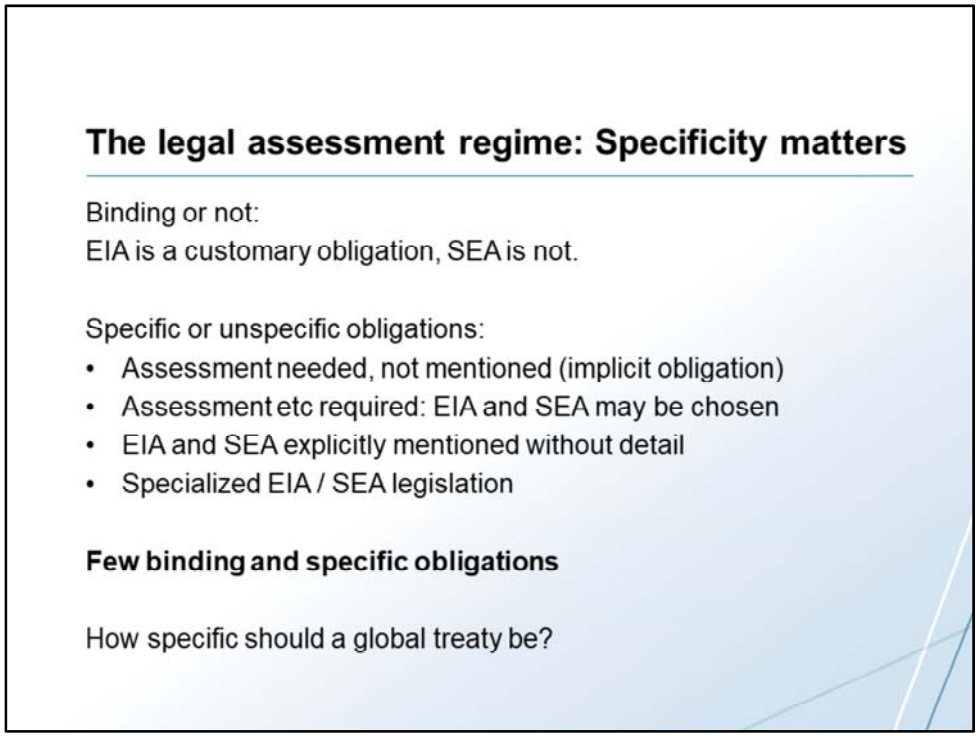
5) Initiatives are developed at different levels, or tiers, from the most overarching, strategic policies to detailed projects. “Tiering” is a central idea in the assessment community, meaning that information on assessments, data, impacts and regulations are transferred effectively between the different levels. Assessments must be conducted at all levels. Status & trend/Regional assessments can be seen as a fundamental level that will support EBM and impact assessments. Moreover, impact assessments are needed to assess the potential effects of proposed policies, plans, program and legislation (SEA), and finally, concrete projects (EIA). Thus, conceptually, we can envisage at least three tiers in interplay (S&T/REA, SEA(-s) and EIA(-s)).

The proposed text is weak on SEA. The only article contained does not take the peculiarities of SEA into consideration. Status & trend/Regional assessments misses.

Referring to the discussion at the workshop on cumulative effects: SEA, and in particular S&T/R assessments as described above, is the only tool that can take cumulative impacts fully into account. That was a major reason for creating SEA. When a regional assessment and SEAs are available, it will be easier and more meaningful to assess for the marginal contribution to cumulative impacts from an individual project in EIA.

6) Domestic – transboundary
The “no-harm-principle” is a fundamental environmental norm, requiring i.a. the avoidance of extra-territorial impacts on other states *and ABNJ* (see Rio principle 2). That requires at least some sort of screening for extra-territorial impacts of all proposals, and assessment and consultations when such impacts are likely to occur. The Espoo

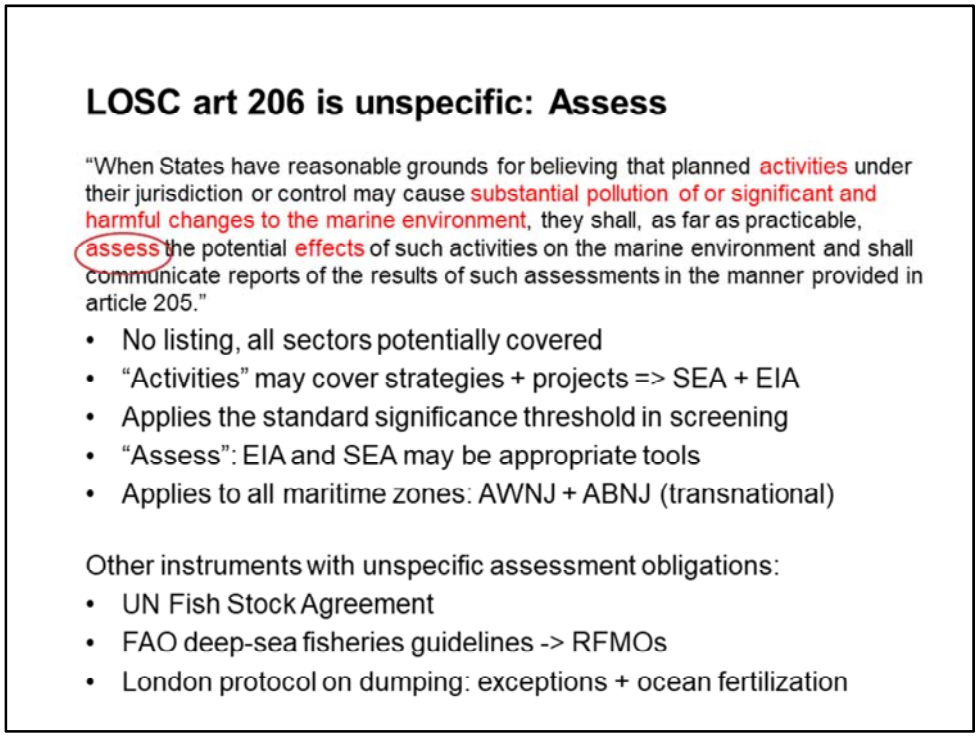
convention offers special procedures for transboundary assessment. It is amended so it can be acceded by all UN member states, see https://www.unece.org/env/eia/about/amendment.html



Rio Principle 17 established EIA as a legal principle on its own. Rulings by international courts have confirmed that EIA is a customary obligation and thus, legally binding. The same is not the case with SEA. However, courts have not clarified the content of the EIA obligation.

Such a binding norm does not help much: "Whether the norm has achieved customary status is of secondary importance where the norm itself lacks the necessary detail to influence behaviour" (Neil Craik). Inspired by Neil, I therefore have found it fruitful to distinguish between four levels of specificity (fig).

The level of specific obligations in a global treaty is a challenge because of the many different capacities of states.
A balance: Ensuring support for the treaty versus sufficiently strict provisions; remember, lack of ratification is a vexing issue in international law.
Related issue: How much in the treaty text, how much in annexes, how much delegated to COP and other bodies?
Part V Capacity-building and VII Financial resources are essential in this respect. They should ensure that also states with low capacities get sufficient help to meet better assessment provisions.



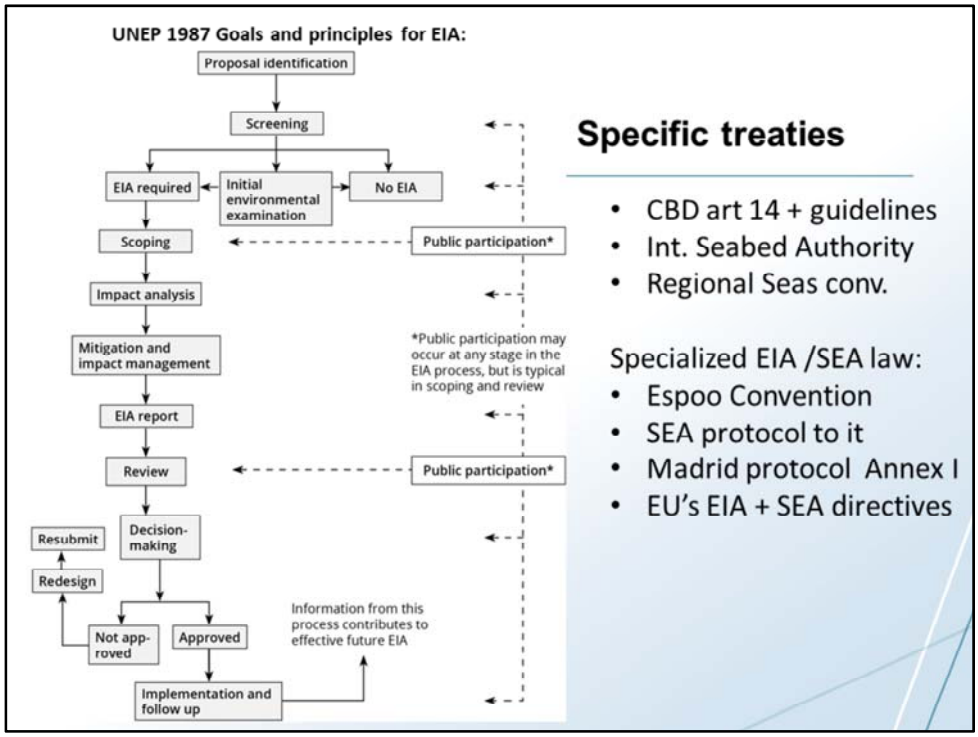
Significance threshold in screening: LOSC is a relatively old treaty. In newer international treaties as well as in national legislation, "significance" is the dominating term. It will only cause confusion to uphold a concept that is not up-to-date (see in references: Sander 2016 p. 110 - 111 + Craik 2008 at p. 133).

Regarding "effects": There are no clear definitions of different meanings of effects vs. impacts vs. consequences. The words therefore could be treated as synonyms, unless one by definition want to assign something else in a treaty. Using "impacts" consistently throughout the text would bring the BBNJ treaty most in line with other legislation and therefore avoid problems with interpretation later.

Other instruments:
The global fisheries regime contains a plethora of indirect assessment obligations: it is not possible to meet the obligation without some sort of assessment. However, words like "assess" etc hardly appeared until UNFSA (1995) art 5(d). In recent years, particularly in the FAO deep-sea fisheries guidelines and certain RFMO's implementation of these, assessment obligations are specified, and even "EIA" do occur. The main impression is that the fisheries sector has developed their own assessment traditions, vital for the functioning of the fisheries regime, but not relating clearly to environmental assessments as found elsewhere.

Other assessment-relevant provisions of LOSC:

- Art 200: States shall cooperate to acquire knowledge about pollution and exchange information and data. Assessment of pollution is mentioned as a purpose
- Art 202 (c.): “Environmental assessments” is mentioned explicitly – but in the context of assistance to developing states
- Art 204: States shall monitor the risks of pollution, particularly the effects of activities that they permit.



Based on national experiences, UNEP's goals and principles for EIA from 1987 was the first international instrument that specified EIA – in non-binding guidelines. However, they have been highly influential upon many international treaties and national states. It would not be a surprise if key issues from them once were to become customary international law. Today, only interpretation based on the national capacities and practices of particular states can maintain that the guidelines is an appropriate standard for their EIA obligations (ref. Sander 2016 about the five Arctic coastal states). This creates uncertainty; treaty-based provisions are needed to come beyond this.

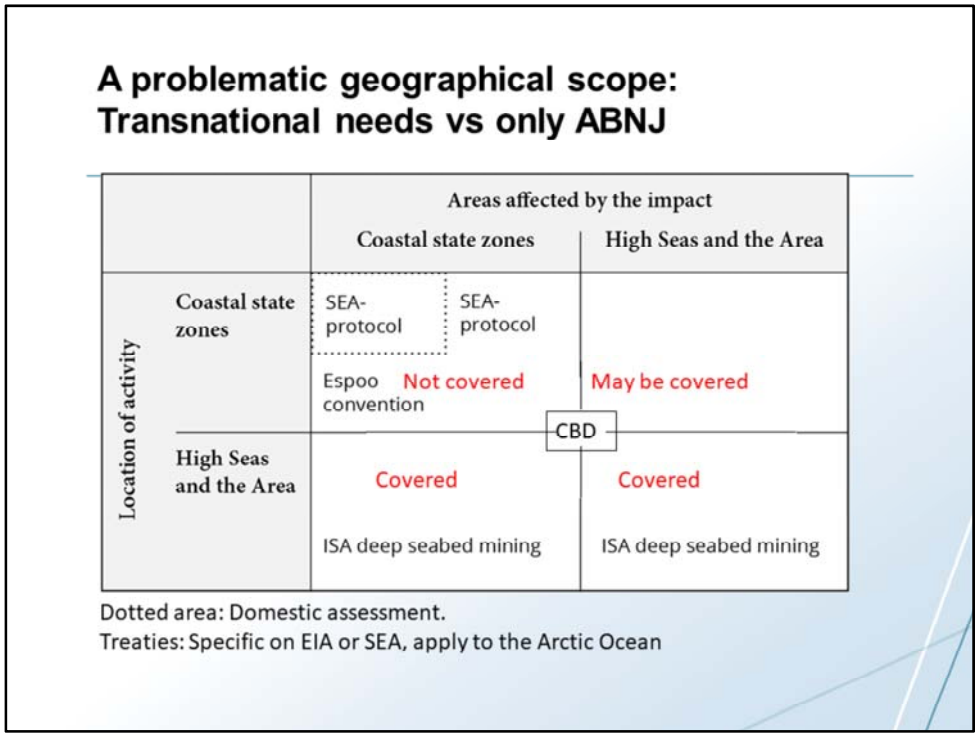
CBD art 14 specifically requires parties to introduce "EIA" and "appropriate arrangements" for assessing "programs and policies" in their national legislation. The CBD parties have adopted voluntary guidelines for biodiversity-inclusive EIA and SEA as guidance for how to conduct this. These build upon UNEP's structure for EIA. They are of high relevance to the BBNJ treaty due to the same thematic scope – biodiversity.

Like LOSC, art 14 applies to all maritime zones and contains similar reservations related to different capacities of states. It is more specific than LOSC, and CBD has more State parties, so it can be viewed as the most prominent global assessment instrument. However, CBD's primary concern is having biodiversity included in assessments, which may be mandated nationally or in other international instruments. The premise is that the national states or other international treaties should elaborate on assessment

obligations as such.

SEA in international treaties: CBD with guidelines, the Kiev (SEA) protocol to the Espoo convention and EU's directive are central pieces of international SEA legislation with specific content.

Madrid protocol: This is interesting in the BBNJ context for its tiered screening criteria (minor or transitory impacts) linked to 3 levels of assessment, and for its operationalization of participation and decision-making in an international common. Note that there is no SEA practice in Antarctica, as opposed to the Arctic, where the Arctic Council has a long track record of conducting collaborative SEAs of for instance contaminants, climate, biodiversity and shipping:
https://www.amap.no/
https://www.caff.is/assessment-series/arctic-biodiversity-assessment
https://www.pame.is/index.php/projects/arctic-marine-shipping/amsa
Thus, information on the bigger picture is available in the Arctic, but misses in the Antarctica.



I did not show this slide, which is more detailed on the geographical scope of existing treaties that are:

1) specific about EIA and
2) apply to the Arctic Ocean

according to where the activity causing potential harm is located, and where the harm may affect. Placing CBD in the middle is meant to indicate that it applies to all maritime zones.

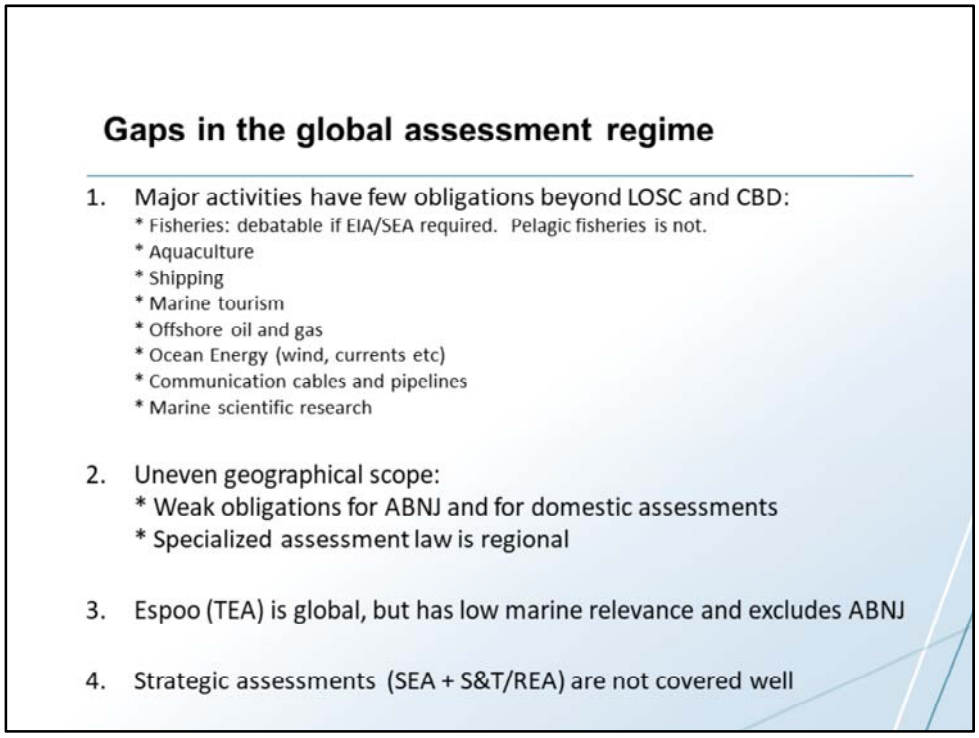
If we should place EIA-specific treaties from other regions in the same figure, the Regional seas conventions would be in the upper left quadrant (three exceptions, where the conventions also cover the high seas), and the Antarctic treaty would be in the lower right quadrant.

Note that all the combinations here, apart from the domestic situation within the dotted lines, require transboundary assessments; that is a frequent and normal situation in the dynamic oceans. It occurs even between the ISA regime for the Area and the high seas (not demonstrated in the figure). This illustrates why specific rules for transboundary assessments are so important.

Advice: Look to the Espoo convention and incorporate procedural elements from that (=> harmonization of international obligations).

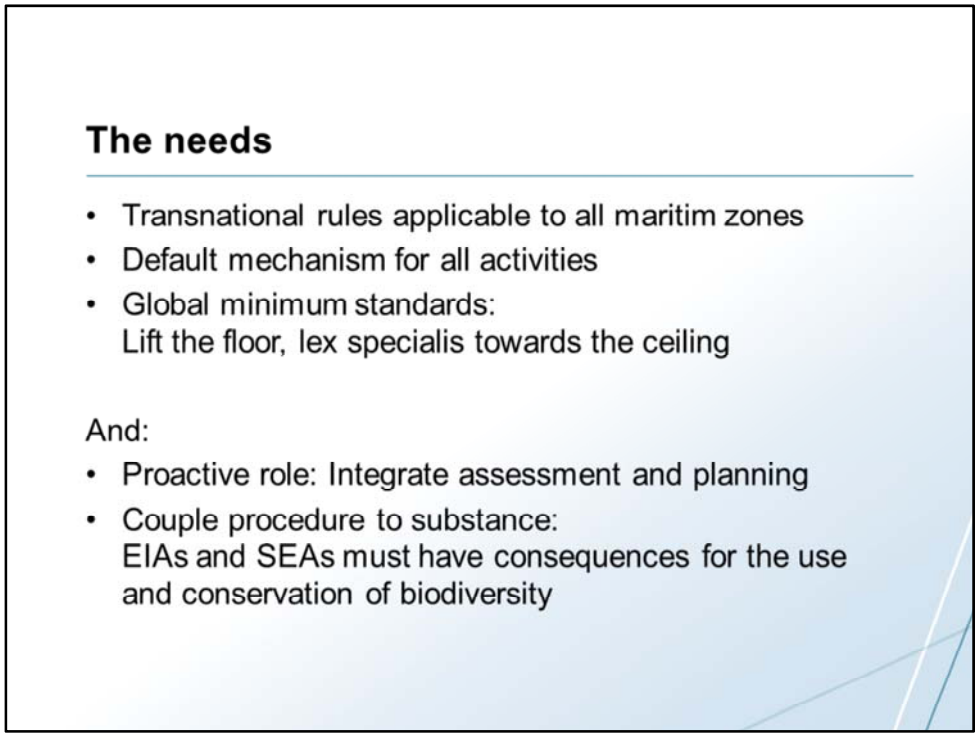
The geographical scope of the new treaty is ABNJ. What does that mean, ref the quadrants in the matrix (red text)?

- Location in ABNJ -> harm in ABNJ will obviously be covered (lower right quadrant).
- Seems to be agreement also to include ABNJ -> Areas within national jurisdiction (AWNJ) (lower left quadrant).
- Still open whether AWNJ -> ABNJ will be included (upper right quadrant)
  This is the same weakness as in the Espoo convention, which excludes ABNJ. However, *assessing for impacts on ABNJ is an obligation of customary international law*, following from the "no-harm-principle" and international courts (ICJ Pulp Mills 2010 and ITLOS Advisory Opinion 2011 - see Sander 2016 pp 96 – 98).
- Upper left quadrant: Domestic EIAs/SEAs and transboundary assessments between coastal states will not be covered by a new instrument. Means that CBD, the Espoo instruments, with low marine relevance, and the Regional Seas conventions will continue as the only specific instruments for these situations.



1) Some of the activities listed in 1 may be regulated at the national as well as the regional level.

2) Domestic assessments: States have sovereign rights to exploit their resources according to their own policies, according to the no-harm principle. Common concerns such as climate and biodiversity create certain commitments. Apart from that, it is only states' acceptance of binding international obligations that restrict their freedom to assess according to their own standards.



Transnational rules:
Remember the preamble of LOSC: problems of ocean space are closely interrelated and need to be considered as a whole. Jurisdictional borders (maritime zones) cuts across natural phenomena and are therefore problematic for managing the oceans and its biodiversity.

There is a need for transnational rules. However, the BBNJ treaty concerns ABNJ. It may still have influence on other maritime zones by:

- creating global minimum standards, ref draft art 23(4); other jurisdictions then should update their rules accordingly
- requiring assessment of activities in AWNJ affecting ABNJ, ref one alternative in draft art 22(3)
- influencing national assessment systems indirectly; states may want to avoid the burden of too many parallell assessment systems
- over time, affecting the interpretation of customary law

UNFSA is a parallel: Strictly speaking, it applies to certain fish stocks that mainly occur in ABNJ. However, the regime that it has created, has been highly influential on the fisheries regime in other maritime zones as well. A major rationale for the agreement was to "repair" for the problems created when LOSC divided the ocean into maritime zones. Examples can be found for instance in its art 7, particularly art 7(2)d and f.

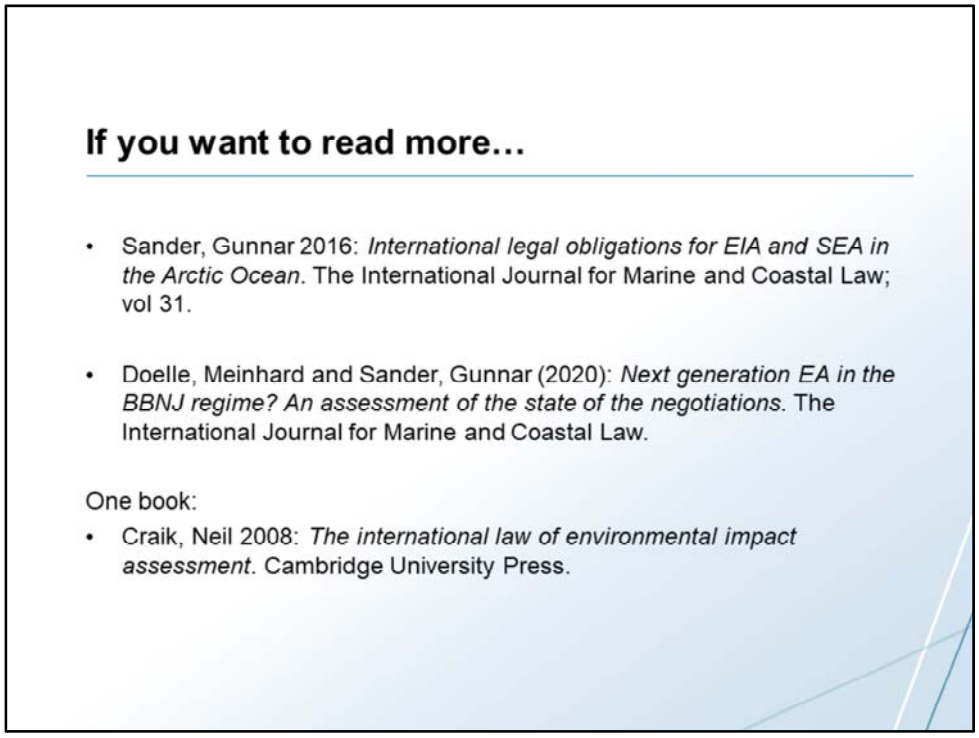
Default mechanism
I am very sceptical to excluding any of the activities listed at the previous slide from a treaty by negative listing, ref also what was said at the workshop about emerging activities. Everything that could cause a significant impact should be assessed. For instance, most communication cables probably have small impacts on biodiversity. However, some, for instance located in EBSAs or vulnerable areas, may have. They may also create conflicts and problems to other sea users, such as fishers. Such conflicts could be solved through marine spatial planning, which strangely enough is not mentioned explicitly in the draft provisions on area-based management tools.

The challenge is to create a legal test in the screening provisions that «capture the big fish, and let the smaller ones go»: It will be unreasonable and ineffective to assess all initiatives thoroughly. Proposals in the negotiations, and the discussions at the workshop, suggest to use a similar approach as in the Antarctic treaty («minor and transitory impacts» combined with different levels/thoroughness of assessments). This may be a solution. However, note what Kees Bastmeijer said about the relation between these concepts and «significance», and the lack of thresholds that define what the terms mean in the Antarctic context. However, there are several attempts to define different levels of «significance», for instance in the FAO deep-seabed guidelines, and there is much more in the assessment literature. So this can be solved, though most likely at a later stage than in the final round of negotiations this spring. Defining "a ladder of significance" for the use in the convention would be a typical task for a scientific and technical body, before COP adoption.

Global minimum standards:
There are several proposals in the negotiations that aim at avoiding or reducing the burden of having to conduct several assessments for several bodies (art 23(4), ref. the discussion at the workshop after the first panel on a suggested new art 23(5)). That problem will be reduced if the BBNJ treaty creates global minimum standards that other treaties/jurisdictions will have to adjust to. Harmonization of procedures as well as substantive requirements will facilitate the preparation of one integrated assessment. This must contain the requirements for different assessment obligations that may differ for instance on which types of impacts that should be taken into account (ref. Sander 206 pp 110 – 111). However, it will facilitate the use of the same assessment report in different situations and contribute to coherence and reduced administrative burdens.

Linked to this is also the language of «not undermining» other instruments and bodies (art 4):
Int. law is dynamic. LOSC has a constitutional character, and several places refer to "general accepted rules and standards" instead of detailed provisions, thereby pointing out that further developments will be needed. In the same manner as for instance RFMOs have been updated to meet developments from the second implementation agreement to LOSC (UNFSA), and several other legal developments in int. fisheries related law (UNGA resolutions etc), one must expect that a BBNJ treaty will lead to updates in other instruments. «Undermine» must mean a substantial breach with other objectives, not evolutionary law affecting the same type of provisions.

Besides: Cooperation and shared responsibilities should be promoted, not «turf wars» and protection of sectoral mandates and silos!



Sander 2016 contains a review of major characteristics of the instruments referred to here. It is also an analysis of the regime that can be found when all relevant treaties in a region are interpreted as a whole. Such analyses can easily be done also for other regions than the Arctic by substituting with the relevant regional treaties. The concluding section contains discussions about a BBNJ treaty.
It is available in IJMCL: https://brill.com/view/journals/estu/31/1/article-p88_4.xml and in an edited book with articles relevant for the BBNJ negotiations: https://brill.com/view/title/54217

Doelle and Sander contains a short and globalized description of the int. regime for assessments in the oceans, as presented here, and a set of standards against which a BBNJ treaty can be evaluated. This is used to analyse the draft treaty after IGC 3. The article is accepted, but will be updated after IGC 4 before finally printed. We would appreciate comments. You may download it from here and distribute it freely: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479657.

Craik (2008):
If you should read one book that explains the origins, characteristics and functions of EIA in legal terms, I will recommend Neil Craik's. It covers land, air and watercourses as well as the ocean, but you can easily select. Note that there have been legal developments since the book was written, e.g. a few rulings in int. courts that address the duties

towards ABNJ (referred above).
See https://www.cambridge.org/core/books/international-law-of-environmental-impact-assessment/366DE9DD9738B01E7629E55DEEFC13A7