

【The 15th Ocean Dialogue, themed “**From Agreement to Action: Implementing BBNJ for Equitable and Effective Ocean Governance**” on 18 September 2026 in Ha Noi, Viet Nam
Session 2, titled “**Operationalizing International Cooperation under the BBNJ Framework.**”】

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【**Title of the Presentation**】

Substantial Basis for International Cooperation for Effective Implementation of the Environmental Impact Assessment under the BBNJ Agreement

【**Abstract**】

The theme of the 15th Ocean Dialogue is “**From Agreement to Action: Implementing BBNJ for Equitable and Effective Ocean Governance.**”

The title of the Session 2 to which my presentation will contribute is “**Operationalizing International Cooperation under the BBNJ Framework.**”

As one of the pillars of the BBNJ Agreement, my presentation will take up its environmental impact assessment (EIA) mechanism. This also relates to exploration and exploitation of marine genetic resources (MGR) on the deep seabed.

The EIA mechanism under the BBNJ Framework requires institutional cooperation by institutions, such as the Conference of the Parties, the Scientific and Technical Body, and the Clearing-House Mechanism.

The substantial basis for such international cooperation is the obligation to conduct EIA under the Agreement. Particularly the critical issue is when the obligation to conduct EIA is triggered. In this regard, understanding of the meaning and interpretation of the abundant provisions of the Agreement are not straightforward. Thus, some analysis of these provisions is essential for precise understanding of the obligation to conduct EIA. My presentation will engage in such an analysis to provide some substantial basis for the international and institutional cooperation for the effective implantation of the EIA

mechanism under the Agreement.

Mainly the following points will be discussed.

First, the BBNJ Agreement is the third implementation agreement for UNCLOS. As such, the BBNJ Agreement cannot impose on its Parties obligations that “go beyond” those under UNCLOS.

Second, Article 27 (a) of Part IV, which provides for EIA, confirms the relationship between the Agreement and UNCLOS:

The objectives of this Part are to: (a) *Operationalize the provisions of the Convention (UNCLOS, by the author) on environmental impact assessment* for areas beyond national jurisdiction by establishing processes, thresholds and other requirements for conducting and reporting assessments by Parties

(emphasis added);

Third, the basic position of the BBNJ Agreement is seeking a fine balance between the conservation and sustainable use of biodiversity. The name of the Agreement clearly demonstrates it: The Agreement on *the Conservation and Sustainable Use* of Marine Biological Diversity (emphasis added.) In addition, Article 2 reads:

The objective of this Agreement is to ensure *the conservation and sustainable use* of marine biological diversity... (emphasis added.)

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【Discussion Paper】

1. Introduction

Under the theme of the 15th Ocean Dialogue is “**From Agreement to Action: Implementing BBNJ for Equitable and Effective Ocean Governance,**” the title of the Session 2 to which my presentation will contribute is “**Operationalizing International Cooperation under the BBNJ Framework.**”

As one of the pillars of the BBNJ Agreement, my presentation will take up its environmental impact assessment (EIA) mechanism. This also relates to exploration and exploitation of marine genetic resources (MGR) on the deep seabed which is, too, among the main pillars of the BBNJ Agreement¹.

The EIA mechanism under the BBNJ Framework requires institutional cooperation by institutions, such as the Conference of the Parties, the Scientific and Technical Body, and the Clearing-House Mechanism.

The most important substantial basis for such international cooperation is the obligation to conduct EIA under the Agreement. Particularly the critical issue is when the obligation to conduct EIA is triggered. In this regard, understanding of the meaning and interpretation of the abundant provisions of the Agreement are not straightforward. Thus, some analysis of these provisions is essential for precise understanding of the obligation to conduct EIA. Without this understanding being shared, the expected institutional cooperation could not be realized properly.

2. Guiding Principles for Interpreting Relevant Provisions to EIA under the BBNJ Agreement

All URLs were last visited on the 12th of September, 2026.

¹ As an analysis of the BBNJ Agreement from the perspective of history of the law of the sea, see, Kanehara, A. “Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea”

https://cigs.canon/en/article/20240510_8077.html.

(1) The BBNJ Agreement as an Implementation Agreement of UNCLOS

The BBNJ Agreement is an implementation agreement of UNCLOS². This is explicitly stated in Article 27(a) of Part IV, the objective clause concerning EIA.

The objectives of this Part are to: (a) *Operationalize the provisions of the Convention on environmental impact assessment* for areas beyond national jurisdiction *by establishing processes, thresholds and other requirements* for conducting and reporting assessments by Parties (emphasis added);

The most important point for an implementation agreement of UNCLOS is that it does not create obligations that “go beyond” those agreed upon under UNCLOS itself; that is, it does not impose obligations stricter than those stipulated by UNCLOS. Needless to say, if a treaty separate from UNCLOS stipulates obligations stricter than those prescribed for by UNCLOS, there is no problem as far as the parties to that treaty have agreed to it. However, it is not the case with the BBNJ Agreement, as it was adopted as an implementing agreement to UNCLOS.

In relation to this point, Article 311 of UNCLOS deserves attention. It governs the relationship between UNCLOS and other treaties³. In a word, it is interpreted to maintain as much as possible the integrity of the rights and obligations under UNCLOS. Considering this UNCLOS’s policy, too, an implementing agreement to UNCLOS should certainly not stipulate obligations that “go beyond” those of UNCLOS.

(2) Balances to be Sought under the BBNJ Agreement

There is a fundamental principle which should be respected in interpreting the obligations under the BBNJ Agreement. That is the two balances to be sought by the Agreement.

The BBNJ Agreement seeks to strike two balances.

Firstly, it seeks a balance between the conservation and sustainable use of biodiversity. This is clearly indicated by the Agreement's very name: The Agreement on *the*

² The BBNJ Agreement is the third implementing agreement under UNCLOS. The first is the 1994 Agreement Relating to the Implementation of Part XI of the Convention, and the second is the 1995 Fish Stock Agreement.

³ Article 311 of UNCLOS governs the relationship between UNCLOS and other treaties and agreements. In summary, it stipulates that when UNCLOS Contracting Parties agree on rights and obligations in other treaties, the impact on UNCLOS rights and obligations is limited.

Conservation and Sustainable Use of Marine Biological Diversity (emphasis added) ⁴. Furthermore, the general objective stipulated under Article 2, the securing of this balance:

The objective of this Agreement is to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction,...

What, then, is the meaning of sustainable use? Article 1(13)⁵ of the BBNJ Agreement defines sustainable use, but it remains a negative definition, stating “that does not lead to a long-term decline of biological diversity.” Its meaning is not necessarily clear. Secondly, the balance is sought by the BBNJ Agreement between developing and developed countries⁶. While it contains numerous provisions concerning developing countries, its preamble, for example, stipulates as follows:

Recognizing the importance of contributing to the realization of a just and equitable international economic order which takes into account the interests and needs of humankind as a whole and, in particular, *the special interests and needs of developing States*, whether coastal or landlocked,

Recognizing also that *support for developing States Parties* through capacity building and the development and transfer of marine technology are essential elements for the attainment of the objectives of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (emphasis added),

The rights, interests, and obligations of States under the BBNJ Agreement are to be interpreted and applied in light of this fundamental stance of balancing these two aspects. Particularly, the institutional cooperation may and should discharge function to support developing countries for implementing EIA in accordance with the BBNJ Agreement.

⁴ During the drafting process of the BBNJ Agreement, the balance between the principle of freedom of the high seas and regulations for the conservation and sustainable use of biodiversity on the high seas, and the deep seabed was also debated.

⁵ The provision reads:

“Sustainable use” means the use of components of biological diversity in a way and at a rate that does not lead to a long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

⁶ This issue keenly relates to the issue of marine genetic resources and the fair and equitable sharing of benefits.

The following part is mainly bearing in mind the first balance to be sought, namely, balance between the conservation and sustainable use of biodiversity in examining the obligations to conduct EIA under the BBNJ Agreement. Simply speaking, unnecessarily heavy burden of conducting EIA would prevent public and private entities from planning and conducting activities properly.

(3) Article 206 of UNCLOS

Regarding EIA, Article 206 of UNCLOS provides for it as follows:

When States have *reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment*, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205 (emphasis added).

The italicized parts constitute the requirement triggering the obligation to conduct EIA⁷. The concepts of “substantial pollution of or significant and harmful changes to the marine environment” forms a core element in the triggering of the obligation to conduct EIA under the BBNJ Agreement. Different from such a simple provision of UNCLOS, the BBNJ Agreement contains many complex provisions for the EIA process.

Based upon some analysis on the guiding principles and the provision under UNCLOS for interpretation of the relevant provisions to EIA under the BBNJ Agreement, next, an examination, in detail, is conducted on the triggering of the obligation to conduct EIA

⁷ “Pollution” is included in the requirements for EIA. Pollution is defined in Article 1(4) of UNCLOS as follows:

"pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities;

There is debate regarding this provision, suggesting some broadening of the concept of pollution; global warming is cited as an example to be included in “pollution.” Considering such arguments, the BBNJ Agreement which also defines pollution necessitates clarification of its meaning.

under the Agreement.

3. Triggering of the Obligation to Conduct EIA under the BBNJ Agreement

(1) Article 28 (2) of the BBNJ Agreement

Article 28(2) of the BBNJ Agreement stipulates the conditions for the triggering of the obligation of EIA.

When a Party with jurisdiction or control over a planned activity that is to be conducted in marine areas within national jurisdiction determines that *the activity may cause substantial pollution of or significant and harmful changes to the marine environment* in areas beyond national jurisdiction, that Party shall ensure that an environmental impact assessment of such activity is conducted in accordance with this Part or that an environmental impact assessment is conducted under the Party's national process (emphasis added):

The italicized parts constitute the triggering conditions for the obligation of EIA, which reflect Article 206 of UNCLOS reproduced above⁸. In this sense, this provision remains to be a general provision for EIA leaving the details to subsequent provisions, which are dealt with next.

(2) Designated Steps of EIA under the BBNJ Agreement

① The BBNJ Agreement divides the EIA process into several steps, with the following provisions containing differing requirements at each step. In a wider sense, all the steps are included in EIA.

② For example, Article 30(1), which establishes the threshold criteria for conducting a “screening” as a prerequisite for EIA, in a narrow sense, reads:

When a planned activity may have more than a minor or transitory effect on the marine environment, or the effects of the activity are unknown or poorly understood, the Party with jurisdiction or control of the activity shall conduct a screening of the activity under article 31, using the factors set out in paragraph 2 below, and (emphasis added)⁹:

⁸ The same provision is found in articles addressing the same context. For example, Article 30(1)(a) and (b).

⁹ The threshold in Article 30(1) is thought to reflect the BBNJ Agreement's principle to apply the precautionary principle and precautionary approach where appropriate (Article

“Screening” is conducted under Article 30 (1) (b) to determine whether there are reasonable grounds to believe that the activity would cause “substantial pollution of or significant and harmful changes to the marine environment.” If the results of “screening” indicate there are reasonable grounds for believing that the activity would cause substantial pollution of or significant and harmful change to the marine environment, EIA must be carried out.

Therefore, the existence of reasonable grounds to believe that “substantial pollution of or significant and harmful change to the marine environment” will occur constitutes the threshold triggering the obligation to conduct EIA, in a narrow sense.

③ Following “screening” and “scoping (Article 31(1)(b)),” the Contracting Party shall carry out EIA, in narrow sense (Article 31(1)(c)), and further take “measures to prevent, mitigate and manage potential adverse effects to avoid significant adverse effects (Article 31(1)(d)(i)).”

④ Article 34(2), which governs the decision-making process for authorising activities reads as follows:

A decision to authorize the planned activity under the jurisdiction or control of a Party shall only be made when, taking into account mitigation or management measures, the Party has determined that it has made all reasonable efforts to ensure that the activity can be conducted in a manner consistent with the *prevention of significant adverse impacts on the marine environment* (emphasis added).

⑤ Article 35, governing post-commencement monitoring, requires Contracting Parties to monitor whether activities “are likely to pollute or have adverse impact on the marine environment.” Article 37 (2), dealing with the review of authorised activities, reads:

Should the Party with jurisdiction or control over the activity identify *significant adverse impacts* that either were not foreseen in the environmental impact assessment, in nature or severity, or that arise from a breach of any of the conditions set out in the approval of the activity, the Party shall review its decision authorizing the activity ...(emphasis added).

7(1)(c)). As to some analysis on precautionary principle, see, Kanehara, A. “Applicability of Precautionary Principle Reconsidered,” https://cigs.canon/en/article/20240807_8266.html.

Thus far, the relevant provisions to the triggering of the EIA process under the BBNJ Agreement are confirmed. Next, focus is placed on the thresholds for conducting EIA at its each step.

4. Thresholds for Conducting EIA at Its Each Step

(1) Key Concepts That Form Thresholds for Conducting EIA

The provisions which are tailored to each step of the EIA process, differ in their stipulations regarding thresholds and other aspects at each step of the EIA process. Understanding the meaning of these provisions is not straightforward. However, the following points need to be seriously recognized.

The concepts employed for thresholds – such as pollution, significant, substantial, and adverse impact – are concepts that have been carefully and seriously debated in the related areas of international law, such as the law of State responsibility and the international environmental law, focusing upon the duty to prevent (environmental) damage and the entailing of State responsibility¹⁰. This is because, these concepts have the important functions of compromising conflicting fundamental rights, such as sovereignties, the right of development and the protection of environment. Considering these important functions and historical background of these concepts, the provisions that include them must be interpreted precisely in light of such functions and background.

(2) Important Functions and Historical Background of Key Concepts That Form Thresholds for Conducting EIA

In this regard, the most frequently cited case in the international environmental law is the Trail Smelter case of the first half of the 20th century¹¹. This was a dispute between

¹⁰ The terms “substantial” and “significant” are the a concepts indicating the degree of (environmental) damage, and there is debate concerning the triggering of the duty to prevent damage and the occurrence of State responsibility. Including an examination of the Trail Smelter case, Kanahara, A. “The Meaning of the Relativity of Territorial Sovereignty in the Principle of *sic utere tuo ut alienum non laedas* (in Japanese),” in Sh. Murase, Sh. and Okuwaki, N. eds., *Jurisdiction of the State: The Relationship between International Law and Domestic Law* (Keiso Shobo, 1998), pp. 179-207.

¹¹ Trail Smelter case, https://legal.un.org/riaa/volumes/riaa_III.pdf, Decision of 16 April 1938, pp. 1911-1937; Decision of 16 April 1938-1982.

Canada and the United States, whose territories border each other.

Fumes from the Trail Smelter, operated with Canadian permission within Canadian territory, caused damage in the territory of the United States. Canada asserted its right to use its territory, while the United States asserted its right to territorial integrity, demanding that damage not occur within its own territory. Both claims are based upon (territorial) sovereignty, the most fundamental right of sovereign States in international law. To reconcile the equal rights of both nations based on their equal territorial sovereignty, a decision was made that:

...[u]nder the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of *serious consequence* and the injury is established by clear and convincing evidence (emphasis added)¹².

The threshold for damage to prevent was thus carefully established, bringing the reconciliation of conflicting rights based on equal territorial sovereignty.

Since then, this threshold has been discussed regarding the extent of the duty to prevent environmental damage and State responsibility. This discussion has been incorporated into the international environmental law, too.

5. Concluding Remarks

The key concepts that from the thresholds have been developed in the law of State responsibility and the international environmental law by taking a long time.

Such development and historical background should be reflected in interpreting and understanding the provision on the EIA process under the BBNJ Agreement.

In the EIA process under the BBNJ Agreement, thresholds regulating activities, particularly activities of individuals, have been devised in accordance with several steps of the EIA process such as, screening, scoping, EIA - in a narrow sense, prevention, mitigation and management of potential adverse impacts.

Under the BBNJ Agreement, Parties should regulate individuals to fulfil their obligations. This is the case with the obligation to conduct EIA¹³.

¹² Ibid., p. 1965. This is the part frequently referred to in the fields of the law of State responsibility and the international environmental law.

¹³ As to a detailed examination on this issue, see, Kanehara, A. "Challenges of the BBNJ Agreement: from the Perspective of Japan's Ratification,"

Regarding the obligation to conduct EIA under the BBNJ Agreement, the crucial points are, firstly, the balance should be sought between the conservation and sustainable use of biodiversity; secondly, as an implementation agreement of UNCLOS, the BBNJ Agreement should not impose stricter obligations than that under Article 206 of UNCLOS; and thirdly, Parties must further clarify the meaning of concepts such as pollution, substantial, significant, and harmful damage to the marine environment, with the knowledge of the historical background and based on the international practice and judicial precedents, and explain to individuals the requirements under which their activities may be regulated and restricted.

Respect for and realization of these crucial points constitute a Party State's accountability. Otherwise, activities could be unnecessarily restricted, and individuals would be unable to predict regulations and restrictions on their activities, and safely plan them. Without recognising and understanding the precise meaning of these thresholds, the Parties could not make decisions to authorise planned activities while considering EIA.

“The balance between sustainable use and conservation of biodiversity” should be sought. It is one of the guiding principles that should be reflected in interpretation and understanding of the provisions of the BBNJ Agreement.

Also, the institutions that are expected to internationally cooperate for the realization of the EIA process under the BBNJ Agreement need to share the precise interpretation and understanding of the provisions on the EIA process under the Agreement.

https://cigs.canon/en/article/20260206_9681.html, pp. 8-19.