

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

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THE BBNJ FRAMEWORK.”**

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[The BBNJ Agreement]

AGREEMENT 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

<https://www.un.org/bbnjagreement/sites/default/files/2024-08/Text%20of%20the%20Agreement%20in%20English.pdf>

Structure of the Presentation

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- 2. Guiding Principles for Interpreting Relevant Provisions to EIA under the BBNJ Agreement**
- 3. Triggering of the Obligation to Conduct EIA under the BBNJ Agreement**
- 4. Thresholds for Conducting EIA at Its Each Step**
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I. Introduction

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1. 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

2. The Most Important “Substantial Basis” for Such International Cooperation

= the obligation to conduct EIA under the Agreement

The critical issue is: **“when the obligation to conduct EIA is triggered?”**



Some analysis of these provisions is essentially required for precise understanding of the obligation to conduct EIA.

Without this understanding being shared, the expected institutional cooperation could not be realized properly.

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

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1. The BBNJ Agreement as an Implementation Agreement of UNCLOS

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 BBNJ Agreement should 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.

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

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

* 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.

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

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2. Balances to be Sought under the BBNJ Agreement

Aa fundamental principle which should be respected in interpreting the obligations under the BBNJ Agreement

The two balances to be sought by the Agreement.

① 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 Conservation and Sustainable Use* of Marine Biological Diversity (emphasis added) .

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,...”

The meaning of sustainable use?

Article 1(13) 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.

“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.”

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

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2. Balances to be Sought under the BBNJ Agreement (continued)

② Secondly, the balance is sought by the BBNJ Agreement between developing and developed countries. Particularly, the institutional cooperation may and should discharge function to support developing countries for implementing EIA in accordance with the BBNJ Agreement.



Mainly this presentation is bearing in mind the first balance to be sought, namely, the balance between the conservation and sustainable use of biodiversity

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

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3. Article 206 of UNCLOS

“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).”

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

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3. Article 206 of UNCLOS (continued)

The concepts of “substantial pollution of or significant and harmful changes to the marine environment” form a core element in the triggering of the obligation to conduct EIA under the BBNJ Agreement.

Next, an examination, in detail, is conducted on the triggering of the obligation to conduct EIA under the Agreement.

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

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1. Article 28 (2) of the BBNJ Agreement

“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):”



Reflecting Article 206 of UNCLOS reproduced above
Detailed contents are to be in the subsequent provisions

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

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2. Designated Steps of EIA under the BBNJ Agreement

(1) The BBNJ Agreement divides the EIA process into several steps with differing requirements at each step.

In a wider sense, **all the steps are included in EIA.**

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

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(2) “Screening”

Article 30(1), which establishes the threshold criteria for conducting a “screening” as a prerequisite for EIA, in a narrow sense.

“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):”

“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.”*

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

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2. Designated Steps of EIA under the BBNJ Agreement (continued)

(3) Following “scoping (Article 31(1)(b)),” the Contracting Party shall carry out EIA, in narrow sense (Article 31(1)(c))

Further take “measures to prevent, mitigate and manage potential adverse effects to avoid significant adverse effects (Article 31(1)(d)(i))”

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

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(4) Decision-making process for authorizing activities
Article 34(2)

“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).”

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

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(5) Post-Commencement, Monitoring and Review

Monitoring: Article 35

(Contracting Parties to monitor whether activities) “**are likely to pollute or have adverse impact on the marine environment.**”

Review of authorized activities

Review: Article 37 (2)

“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).”



Detailed examination of the thresholds for conducting EIA at its each step

IV. Thresholds for Conducting EIA at Its Each Step

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1. Key Concepts That Form Thresholds for Conducting EIA

The concepts employed for thresholds
pollution, significant, substantial, and adverse impact



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 responsibility

IV. Thresholds for Conducting EIA at Its Each Step

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1. Key Concepts That Form Thresholds for Conducting EIA (continued)

The important functions of those key concepts



Compromising conflicting fundamental rights, such as sovereignties, the right of development and the protection of environment



The provisions under the BBNJ Agreement that include them must be interpreted precisely in light of such functions and historical background.

IV. Thresholds for Conducting EIA at Its Each Step

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

The Trail Smelter case (the most frequently cited case in the international environmental law)

https://legal.un.org/riaa/volumes/riaa_III.pdf,

Decision of 16 April 1938, pp. 1911-1937; Decision of 16 April 1938-1982.

IV. Thresholds for Conducting EIA at Its Each Step

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

Trail Smelter case

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.

IV. Thresholds for Conducting EIA at Its Each Step

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

Trail Smelter case (continued)

The decision is made for reconciling the two equal rights:

“...[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).”

IV. Thresholds for Conducting EIA at Its Each Step

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



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.

V. Concluding Remarks

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1. Development and Historical Background of the Key Concepts



They should be reflected in interpreting the provision on EIA under the BBNJ Agreement.

V. Concluding Remarks

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2. Regulation of Activities of Individuals

Under the BBNJ Agreement, Parties should regulate individuals to fulfil their obligations of EIA

The crucial points are;

- ① the balance should be sought between the conservation and sustainable use of biodiversity;
- ② as an implementation agreement of UNCLOS, the BBNJ Agreement should not impose stricter obligations than that under Article 206 of UNCLOS;
- ③ 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.

V. Concluding Remarks

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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.

Balance between sustainable use and conservation should be sought.

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 of the provisions on the EIA process under the Agreement.

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Thank you for your attention!