



**Consistency of Madrid Protocol Thresholds
with UNCLOS EIA Provisions
September 2020**

*Why the BBNJ Agreement Should Adopt
the Madrid Protocol Threshold and Tiering Approach*

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Executive Summary

- The tiered approach to EIAs under the Madrid Protocol to the Antarctic Treaty represents a signature procedural innovation that is complementary to and not inconsistent with UNCLOS.
- Options provided in draft Article 24(1), Article 24(1) Alt. 1 and Alt. 2 of the draft Agreement include the Madrid Protocol's threshold text "more than minor or transitory."
- The "more than minor or transitory text" evolved from the need to clarify the commonly used term "significant"; helpfully, the Madrid test explicitly introduces a temporal component ("transitory").
- The tiered approach under the Madrid Protocol requires an initial environmental evaluation (IEE) to indicate whether there is a likelihood that minor or transitory effects may occur, and a more comprehensive environmental evaluation (CEE) assessment if the results indicate that such effects can reasonably be expected to occur. However, the current alternatives in draft Article 24(1) do not fully reflect this tiered approach. Instead, they simply substitute "more than minor or transitory" for "significant."
- The Madrid Protocol's tiered approach, properly applied, represents a way forward for the BBNJ Treaty as it provides a concrete vehicle to ensure the objective of the Agreement is met by operationalizing the principles and approaches in Article 5, including precaution and the use of the best available scientific information and relevant knowledge.
- How it would operate: Just as in the Madrid Protocol, States would have the first obligation to conduct the Preliminary and Initial Environmental Evaluations (IEE); if the evidence from the IEE indicates that the proposed activity may reach the more than minor or transitory threshold, the equivalent of the Comprehensive Environmental Evaluation would be required, whereby the mechanism of the BBNJ (such as the Scientific and Technical Body and/or Conference of the Parties) can be usefully engaged.
- This tiered approach thus acts both as a filter mechanism – not all activities affecting ABNJ would be addressed by the BBNJ Scientific and Technical body/COP. A 'backstop' will ensure that the BBNJ mechanisms are engaged when required.

I. Introduction

In 2017, United Nations [General Assembly resolution 72/249](#) established a negotiating conference to elaborate text for a new legally binding treaty under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). After three sessions of the negotiating conference in 2018-2019, governments are in the final stages of these negotiations, which are expected to resume in the spring of 2021.

One of the current areas of debate on provisions of the draft text¹ under Part IV on environmental impact assessments pertains to the threshold to be applied for the undertaking

of environmental impact assessments. This brief will examine and compare the standards found under UNCLOS and the Madrid Protocol, and consider whether and how they are consistent, followed by the implications on the current draft text.

It concludes by suggesting that the draft Agreement could adopt a framework whereby States have the first obligation to conduct the Preliminary Stage and IEE investigations, but that if and when a proposal reaches the more than minor or transitory threshold, the mechanism of the BBNJ (such as the Scientific and Technical Body (STB) and/or Conference of the Parties (COP)) can be engaged. This both acts as a filter mechanism – not all activities affecting ABNJ would need to be addressed by the STB or COP – and a ‘backstop’ to ensure that the BBNJ mechanisms are engaged when required.

II. Background

The standard applied under UNCLOS refers to activities that “may cause substantial pollution of or significant and harmful changes to the marine environment.” During the negotiations some delegations have voiced that the new agreement must stay consistent with the language found under UNCLOS.²

Article 206 of UNCLOS provides that:

*“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.”*

Another threshold standard applied by a multilateral agreement is found under Article 8 of the Protocol on Environmental Protection to the Antarctic Treaty (“Madrid Protocol”), which provides that:

- 1. Proposed activities referred to in paragraph 2 below shall be subject to the procedures set out in Annex I for prior assessment of the impacts of those activities on the Antarctic environment or on dependent or associated ecosystems according to whether those activities are identified as having:*
 - (a) less than a minor or transitory impact;*
 - (b) a minor or transitory impact; or*
 - (c) more than a minor or transitory impact.*

The tiered approach found under the Madrid Protocol is provided as one of the threshold options in the BBNJ draft text, with support indicated by some delegations.³ A key question is what is deemed equivalent to language of “significant and harmful changes” and does the Madrid Protocol meet that test?

A fundamental difficulty is that the risk of significant environmental harm must itself be determined through the assessment, meaning that the threshold condition to trigger the obligation to conduct an EIA is the same as the level of risk to be avoided – a quandary which can be avoided if more appropriate criteria is used. ⁴ For example, Article 196 of the Convention requires measures to prevent, reduce and control pollution of the marine environment resulting from the use of technologies, or the intentional or accidental introduction of alien or new species, which may cause significant and harmful changes

thereto, and the UNGA resolutions applicable to bottom fishing call for measures to avoid significant adverse impacts on vulnerable marine ecosystems.⁵

Significance has been evaluated in terms of harm which is not minor (ILC 2001).⁶ The formulation in the Madrid Protocol of “more than a minor or transitory impact” can therefore be seen as a method of assessing significance. Indeed, an analysis of the development of the Madrid Protocol shows that the terminology ‘more than a minor or transitory impact’ evolved from the wording ‘significant impacts’ used in earlier formulations.⁷

III. Tests of Significance under International Criteria

While UNCLOS does not provide criteria for a test of significance, international criteria have been developed in the context of the Espoo Convention, European EIA Directive, the Nagoya/Kuala Lumpur Protocol, and bottom fishing regulations put into place following UN General Assembly resolutions.

Espoo Convention

The Espoo Convention⁸ requires an environmental impact assessment to be undertaken for a listed activity that is “likely to cause a significant adverse transboundary impact”. Appendix III lists general criteria to assist in the determination of significance. They include size, location and effects (e.g. particularly complex and potentially adverse effects). The Economic Commission for Europe (ECE) developed methodologies and criteria to determine significance of adverse transboundary impacts,⁹ including magnitude, reversibility, any impacts on protected areas, and rates of recovery.

EU EIA Directive

The EU EIA Directive¹⁰ applies to the assessment of the environmental effects of those public and private projects which are “likely to have significant effects on the environment”.¹¹

Living Modified Organisms

International criteria have been derived in the context of living modified organisms in the Nagoya-Kuala Lumpur Supplementary Protocol.¹² That Protocol provides in Article 2(3) that

A “significant” adverse effect is to be determined on the basis of factors, such as:

- (a) The long-term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonable period of time;
- (b) The extent of the qualitative or quantitative changes that adversely affect the components of biological diversity;
- (c) The reduction of the ability of components of biological diversity to provide goods and services;
- (d) The extent of any adverse effects on human health in the context of the Protocol.

Seabed Mining

The International Seabed Authority exploration regulations define “serious harm” in terms of a “significant adverse change in the marine environment” determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized standards and practices”.¹³ However, “serious harm” is in effect the intervention standard in UNCLOS: it is the level at which mining may be stopped through emergency

orders¹⁴ or may be disapproved,¹⁵ and the level at which provisional measures (an injunction may be prescribed.¹⁶ So the ISA exploration test appears to assume that a significant adverse change constitutes serious harm. However, the ISA is in the process of developing exploitation regulations.¹⁷ From a scientific viewpoint, it has been suggested that impacts at the level of species, community or ecosystem impacts should be considered when assessing significance.¹⁸

Bottom Fishing

The United Nations General Assembly (UNGA) resolutions for bottom fishing call for States and RFMOs to apply a test to determine whether bottom fishing will have “significant adverse impacts” on vulnerable marine ecosystems for bottom fishing (UNGA Resolution 61/105).¹⁹ The FAO Deep Sea Guidelines²⁰ provide further details,²¹ stating that when determining the scale and significance of an impact, factors to be considered include the intensity or severity of the site being affected, the spatial extent of the impact, the sensitivity/vulnerability of the ecosystem to the impact, the ability of an ecosystem to recover from harm and the rate of recovery, the extent to which ecosystem functions may be altered by the impact and the timing and duration of the impact.

IV. Tests of Significance under National Criteria

Criteria of “significance” in guidelines and publications frequently consider the extent, magnitude, duration, timing, scale, severity, frequency and reversibility of an impact. (CIEEM, 2018; Duinker and Beanlands, 1986; Johnston et al. 2000; Marazza et al. 2009).

The United States in its regulation²² implementing its NEPA²³ legislation measures significance in terms of context²⁴ and intensity.²⁵

Australia in its guidelines has addressed the question of significance in applying the [Environment Protection and Biodiversity Conservation Act](#):

A significant impact is an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have significant impact depends upon the sensitivity, value and quality of environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts.²⁶

Other relevant criteria include the scale of the action and frequency of the action.²⁷

V. The Test Under the Madrid Protocol

Under the Madrid Protocol²⁸ there are three tests: a Preliminary Stage (sometimes referred to as a Preliminary Assessment (PA) or Preliminary Environmental Evaluation (PEE)), an Initial Environmental Evaluation (IEE); and a Comprehensive Environmental Evaluation (CEE). After the Preliminary Stage investigations, (1) an activity can proceed, if the potential impacts of the activity are determined to be less than minor or transitory,²⁹ (2) an IEE can be undertaken, if predicted impacts are likely to be minor or transitory;³⁰ or (3) a CEE can be undertaken, if the impacts may be more than minor or transitory.³¹

Preliminary Stage evaluations are undertaken under appropriate national procedures,³² as are IEEs, though an IEE must contain sufficient detail to assess whether a proposed activity may have more than a minor or transitory impact and shall include a description of the proposed activity, including its purpose, location, duration and intensity; and consideration of

alternatives to the proposed activity and any impacts that the activity may have, including consideration of cumulative impacts in the light of existing and known planned activities.³³ The scope of the CEE is prescribed,³⁴ and the draft CEE shall be made publicly available and shall be circulated to all Parties, which shall also make it publicly available, for comment, as well as to the Committee for Environmental Protection.³⁵ A period of 90 days shall be allowed for the receipt of comments.³⁶ No final decision shall be taken to proceed with the proposed activity unless there has been an opportunity for consideration of the draft CEE by the ATCM on the advice of the Committee.³⁷ A final CEE shall address and shall include or summarise comments received on the draft CEE.³⁸ Any decision on whether a proposed activity should proceed, and, if so, whether in its original or in a modified form, shall be based on the CEE.³⁹ As an indication, as at 2009, 724 IEEs and 19 CEE processes had been recorded,⁴⁰ and of the CEE processes, not one had resulted in a decision not to proceed with the activity.⁴¹

“Minor or Transitory”

While there has been no clear agreement on what constitutes “minor or transitory”, as noted earlier, the terminology ‘more than a minor or transitory impact’ originates from the wording ‘significant impacts’ used in earlier documents.⁴² The term ‘more than a minor or transitory impact’ was reportedly based on concerns about the unclear meaning of the term ‘significant’.⁴³ The 1987 Guidelines⁴⁴ proposed that “first evaluation, termed an “Initial Environmental Evaluation”, should be performed to determine whether the activity might reasonably be expected to have a significant impact.”

VI. Consequences for the BBNJ Agreement

Article 24(1) Alt 1 and Alt 2 of the draft Agreement include the “more than minor or transitory” language. As the history of the Madrid Protocol test shows, it was evolved as a way of addressing a lack of clarity of the term “significant”. This, as well as discussions within the Antarctic Treaty system, show that the tiered approach found under the Madrid Protocol and the significance threshold set forth in UNCLOS Article 206 are not inconsistent but are complementary to each other. As the survey of international applications of the “significance” test shows, application of the test requires in almost all cases a temporal component: helpfully, the Madrid test explicitly introduces a temporal component (“transitory”).

But there is a more fundamental issue. The alternatives in draft Article 24(1) currently do not yet represent the tiered approach: they simply substitute “more than minor or transitory” for “significant”. The tiered approach in Madrid is the signature procedural innovation in the Madrid Protocol, and, properly applied, represents a way forward for the BBNJ Treaty. Further it represents a concrete way to ensure the objective of the Agreement is met by operationalizing the principles and approaches in Article 5 including precaution and the use of the best available scientific information and relevant knowledge. Just as in the Madrid Protocol, States have the first obligation to conduct the Preliminary State and IEE investigations, once a proposal reaches the more than minor or transitory threshold, the equivalent of the CEE can apply, whereby the mechanism of the BBNJ (such as the Scientific and Technical Body and/or Conference of the Parties) can be usefully engaged. This both acts as a filter mechanism – not all activities affecting ABNJ would be addressed by the

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STB/COP – and a ‘backstop’ to ensure that the BBNJ mechanisms are engaged when required.

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Endnotes

- 1 President's Revised Draft Text of 18 November 2019.
- 2 See e.g. United States intervention September 10th 2018. At <http://webtv.un.org/search/12th-meeting-part-2-intergovernmental-conference-on-marine-biodiversity-of-areas-beyond-national-jurisdiction/5833227773001/?term=biodiversity&sort=date#t=1h44m11s>.
- 3 See summary by Rene Lefebvre, facilitator, noting that some recognized the need for tiered threshold approach requiring comprehensive EIAs only for those meeting threshold in art 206 of UNCLOS. Report at http://highseasalliance.org/treatytracker/statements/facilitator-rene-lefeber-september-14th-report-on-environmental-impact-assessment-working-group/?_sf_s=tiered.
See India Statement September 10, 2018. At http://statements.unmeetings.org/media2/19408205/bbnj-eia_india.pdf and Colombia Statement September 10, 2018. At http://highseasalliance.org/treatytracker/statements/colombia-september-10th-environmental-impact-assessments-informal-session/?_sf_s=madrid+protocol/
- 4 Craik, N. The Duty to Cooperate in The Customary Law of Environmental Impact Assessment. 2020. *International and Comparative Law Quarterly*, Volume 69, Issue 1 January 2020, pp. 239-259.
- 5 United Nations General Assembly resolution 61/105. Adopted 8 December 2006. At <https://undocs.org/A/RES/61/105>.
- 6 International Law Commission. Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries. 2001. At https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf. Page 148.
- 7 In particular, the Code of Conduct of 1975 and the EIA Guidelines of 1987. See Kees Bastmeijer and Ricardo Roura. *Environmental Impact in Antarctica*. 2008.
Citing K. Bastmeijer, *The Antarctic Environmental Protocol and its Domestic Legal Implementation*. Doctoral thesis, *International Environmental Law and Policy Series*, Vol. 65 (The Hague/London/New York: Kluwer Law International, 2003, at 190-194.
- 8 Convention on Environmental Impact Assessment in a Transboundary Context. Adopted in Espoo (Finland), on 25 February 1991. As amended on 27 February 2001. Article 2.
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- 9 Specific Methodologies and Criteria to Determine the Significance of Adverse Transboundary Impact. CEP/WG.3/R.6. 20 January 1995. At https://www.unece.org/fileadmin/DAM/env/documents/1995/eia/cep_wg_3_r_6_e.pdf. These have not been widely adopted. <https://ec.europa.eu/environment/eia/pdf/Transboundary%20EIA%20Guide.pdf> page 7.s
- 10 Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. Consolidated version at https://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf.
- 11 EIA Directive Article 1.
- 12 Nagoya-Kuala Lumpur Supplementary Protocol to the Convention on Biological Diversity. Entered into force 5 March 2018. At https://bch.cbd.int/protocol/NKL_text.shtml
- 13 E.g. Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters. (sNodule Regulations) 2013 ISBA/19/C/17. 22 July 2013. At https://isa.org.jm/files/files/documents/isba-19c-17_0.pdf. Regulation 1(3)(f).
- 14 UNCLOS Article 162(2)(w)
- 15 UNCLOS Articles 162(2)(x), 165(2)(l)
- 16 UNCLOS Article 290(1)
- 17 ISBA/24/LTC/WP.1/Rev.1. Draft Regulations on Exploitation of Mineral Resources in the Area. At <https://www.isa.org.jm/document/isba24lctwp1rev1>.
- 18 Lisa Levin et al. Defining "serious harm" to the marine environment in the context of deep-seabed mining. 74 *Marine Policy*, 2016. Pages 245-259. Page 248.
- 19 61/105. Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments At <https://undocs.org/A/RES/61/105>. 8 December 2006. Paragraph 83.
- (a) To assess, on the basis of the best available scientific information, whether individual bottom fishing activities would have significant adverse impacts on vulnerable marine ecosystems, and to ensure that if it is assessed that these activities would have significant adverse impacts, they are managed to prevent such impacts, or not authorized to proceed;

(b) To identify vulnerable marine ecosystems and determine whether bottom fishing activities would cause significant adverse impacts to such ecosystems and the long-term sustainability of deep sea fish stocks, inter alia, by improving scientific research and data collection and sharing, and through new and exploratory fisheries;

(c) In respect of areas where vulnerable marine ecosystems, including seamounts, hydrothermal vents and cold water corals, are known to occur or are likely to occur based on the best available scientific information, to close such areas to bottom fishing and ensure that such activities do not proceed unless conservation and management measures have been established to prevent significant adverse impacts on vulnerable marine ecosystems;

(d) To require members of the regional fisheries management organizations or arrangements to require vessels flying their flag to cease bottom fishing activities in areas where, in the course of fishing operations, vulnerable marine ecosystems are encountered, and to report the encounter so that appropriate measures can be adopted in respect of the relevant site;

²⁰ FAO. International Guidelines for the Management of Deep-sea Fisheries in the High Seas. 2009. At <http://www.fao.org/in-action/vulnerable-marine-ecosystems/background/deep-sea-guidelines/en/>

²¹ FAO Deep Sea Guidelines 17. Significant adverse impacts are those that compromise ecosystem integrity (i.e. ecosystem structure or function) in a manner that: (i) impairs the ability of affected populations to replace themselves; (ii) degrades the long-term natural productivity of habitats; or (iii) causes, on more than a temporary basis, significant loss of species richness, habitat or community types. Impacts should be evaluated individually, in combination and cumulatively.

18. When determining the scale and significance of an impact, the following six factors should be considered:

- i. the intensity or severity of the impact at the specific site being affected;
- ii. the spatial extent of the impact relative to the availability of the habitat type affected;
- iii. the sensitivity/vulnerability of the ecosystem to the impact; iv. the ability of an ecosystem to recover from harm, and the rate of such recovery;
- v. the extent to which ecosystem functions may be altered by the impact; and
- vi. the timing and duration of the impact relative to the period in which a species needs the habitat during one or more of its lifehistory stages.

²² 40 CFR § 1508.27. At <https://www.law.cornell.edu/cfr/text/40/1508.27>.

²³ United States National Environmental Policy Act of 1969. (Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970, as amended by Pub. L. 94-52, July

3, 1975, Pub. L. 94-83, August 9, 1975, and Pub. L. 97-258, § 4(b), Sept. 13, 1982). At https://www.whitehouse.gov/sites/whitehouse.gov/files/ceq/NEPA_full_text.pdf

²⁴ Context means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

²⁵ Intensity refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action.

²⁶ [Significant impact guidelines 1.2. Environment Protection and Biodiversity Conservation Act 1999](#) (Australian Government, 2013) Page 3. At https://www.environment.gov.au/system/files/resources/a0af2153-29dc-453c-8f04-3de35bca5264/files/commonwealth-guidelines_1.pdf/

²⁷ Ibid. page 11.

²⁸ Alan Hemmings and Lorne Kriwoken. High level Antarctic EIA under the Madrid Protocol: state practice and the effectiveness of the Comprehensive Environmental Evaluation process. *International Environmental Agreements: Politics, Law and Economics*, 2010, Vol.10(3), pp.187-208.

²⁹ Madrid Protocol Annex I, Article 1(2)

³⁰ Madrid Protocol Annex I, Article 2(1)

³¹ Madrid Protocol Annex I, Article 3(1).

³² Madrid Protocol Annex I, Article 1(1)

³³ Madrid Protocol Annex I, Article 2(1)

³⁴ Madrid Protocol Annex I, Article 3(2)

³⁵ Madrid Protocol Annex I, Article 3(3)

³⁶ Madrid Protocol Annex I, Article 3(4). It must also be forwarded at least 120 days before the next Antarctic Treaty Consultative Meeting. Article 3(4).

³⁷ Madrid Protocol Annex I, Article 3(5). But no decision to proceed with a proposed activity shall be delayed for longer than 15 months from the date of circulation of the draft CEE.

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³⁸ Madrid Protocol Annex I, Article 3(6). The final CEE, notice of any decisions relating thereto, and any evaluation of the significance of the predicted impacts in relation to the advantages of the proposed activity, shall be circulated to all Parties, which shall also make them publicly available, at least 60 days before the commencement of the proposed activity in the Antarctic Treaty area. Article 3(6).

³⁹ Madrid Protocol Annex I, Article 4.

⁴⁰ Hemmings. Page 189.

⁴¹ Hemmings. Page 193.

⁴² In particular, the Code of Conduct of 1975 and the EIA Guidelines of 1987. See Bastmeijer and Roura 2008, page 6.

Citing K. Bastmeijer, *The Antarctic Environmental Protocol and its Domestic Legal Implementation*. Doctoral thesis, *International Environmental Law and Policy Series*, Vol. 65 (The Hague/London/New York: Kluwer Law International, 2003), at 190-194.

⁴³ Bastmeijer and Roura 2008.

⁴⁴ Environmental impact evaluation. Recommendation XIV-2 (ATCM XIV - Rio de Janeiro, 1987). At <https://ats.aq/devAS/Meetings/Measure/161>.