

Note on *de minimus* thresholds for environmental impact assessments under Article 20 of the draft BBNJ Agreement

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Introduction

The question has been raised as to which activities the BBNJ EIA provisions may apply to: e.g. is there a ‘*de minimus* threshold’?

This brief Note looks at the Madrid (Antarctic) approach and suggests ways this could be adapted to the BBNJ Agreement.¹

Threshold: Minor or Transitory

Article 24 of the draft BBNJ text includes various iterations of the threshold “likely to have more than a minor or transitory effect on the marine environment”.

The High Seas Alliance has published a briefing [Consistency of Madrid Protocol Thresholds with UNCLOS EIA Provisions](#) (September 2020) explaining why the BBNJ agreement should adopt the Madrid Protocol threshold and tiering approach.

The briefing notes that the term ‘more than a minor or transitory impact’ was reportedly based on concerns about the unclear meaning of the term ‘significant’. The significance threshold set forth in UNCLOS Article 206 and the Madrid Protocol threshold are not inconsistent but are complementary to each other.

An important point is that the tiered approach in the Madrid Protocol is the procedural innovation and, properly applied, represents a way forward for the BBNJ Treaty. Just as in the Madrid Protocol, States would have the first obligation to conduct the Preliminary State and Initial Environmental Evaluation (IEE) investigations. An activity can proceed if the potential impacts of the activity are determined to be less than minor or transitory. Only if predicted impacts are likely to be minor or transitory need an IEE be undertaken. Once a proposal reaches the more than minor or transitory threshold, the equivalent of the comprehensive environmental evaluation (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.

Note that this approach to the Article 24 threshold does not establish or alter the threshold in Article 206 of the Convention, but will operationalize the Convention’s EIA provisions by providing a recognized standard for assessment of activities that may fall below the Article 206 standard of “substantial pollution of or significant and harmful changes to the marine environment.”

Moreover, while it the BBNJ agreement will not set legally binding standards for EIAs conducted under other instruments, frameworks, or bodies, the agreement should incorporate the complementary provisions of the Madrid Protocol to develop a consistent approach between the agreement and other instruments, frameworks, or bodies that use the Madrid Protocol.

¹ [Further revised draft text of an 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](#)

Article 8 of the Madrid Protocol applies the Antarctic scheme to “activities undertaken in the Antarctic Treaty area pursuant to scientific research programs, tourism and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required under Article VII (5) of the Antarctic Treaty, including associated logistic support activities.”

In BBNJ, there is broad convergence that an exhaustive list is not necessary except that an option for an indicative non-exhaustive list of activities is offered in the new Article 41bis(2)(a) in the new text. A question is whether a more specific description than “activities under their jurisdiction or control” (“activities under their jurisdiction or control” is the language from UNCLOS Art 206) is needed.

In any case, minor activities such as ship movements would not reach the “minor or transitory” threshold to initiate the BBNJ EIA process. But to make this clear, the following are suggested as a definition or replacement term. e.g. Article 20 could read:

“ 1. Parties shall ensure that activities under their jurisdiction or control which may have at least minor or transitory effects on the conservation or sustainable use of marine biological diversity of areas beyond national jurisdiction, taking into account cumulative impacts, are conducted consistently with the decisions adopted under this Part.”

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