**DEEP DIVES**

**BBNJ and activities within national jurisdiction: How the BBNJ Agreement could help protect the High Seas from activities within national waters**

**Summary**

- For activities within national jurisdiction that may impact areas beyond national jurisdiction (ABNJ), **Parties must conduct an environmental impact assessment (EIA) in line with the BBNJ Agreement** or their national process.
- **EIAs under the BBNJ Agreement have detailed requirements** including baseline assessments, public consultation, consideration of alternatives, monitoring and reporting.
- Even for **EIAs conducted under the national process, there are transparency provisions**, such as undertaking monitoring and making reports available via a Clearing-House Mechanism. The Scientific and Technical Body (STB) can review such EIAs and make comments.
- The EIA provisions under the BBNJ Agreement will **enhance assessment and protection of ABNJ from activities within national jurisdiction** through transparency, consultation, and review.

**The BBNJ Agreement**

On 4 March 2023 the international community concluded the Agreement under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ Agreement, also known as the High Seas Treaty). The Agreement opened for signature on 20 September 2023 and will remain open for signature for two years. It will enter into force 120 days after 60 State ratifications. Until then, signatories are obliged to refrain from acts which would defeat the object and purpose of the Agreement.

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The objective of the BBNJ Agreement is to ensure the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (ABNJ), for the present and in the long term, through effective implementation of the relevant provisions of the Convention. Promptly ratified and appropriately implemented, the BBNJ Agreement can play a key role in halting the degradation of the marine environment and biodiversity loss in ABNJ, increasing knowledge, capacity and access to marine technologies, as well as addressing climate change and its effects on the ocean.

**BBNJ and activities within national jurisdiction**

This objective is implemented for EIAs in Part IV of the BBNJ Agreement. The core obligation is to ensure that activities which would take place in ABNJ are assessed as set out in Part IV of the Agreement before they are authorized (BBNJ Art. 28(1)). In other words, the overall test is whether the activity would take place in ABNJ, not whether the effects may be manifested in ABNJ.

However, the BBNJ Agreement still provides requirements for activities within national jurisdiction which may have an effect in ABNJ: the relevant Party must ensure that an EIA of such activity is conducted in accordance with Part IV of the Agreement, or that an EIA is conducted under the Party’s national process (BBNJ Art. 28(2)). There are numerous activities, including discharges or underwater noise pollution for example, that may originate within national jurisdiction but that have transboundary effects in ABNJ. This briefing examines how these provisions may work in practice.

**Environmental impact assessments under UNCLOS**

The core obligation to conduct an EIA is contained in article 206 of UNCLOS, which requires a State to conduct an EIA when it has reasonable grounds for believing that planned activities may cause substantial pollution of, or significant and harmful changes to, the marine environment. There is no exception for activities carried out in marine areas within national jurisdiction. In fact, this is consistent with UNCLOS: “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights” (UNCLOS Art. 194(2)).

However, prior to the BBNJ Agreement, there was no framework or detail around this obligation: no cumulative impact assessment requirement, no scientific review, and no requirements for consultation with potentially affected States or the public. The EIA requirement in UNCLOS article 206 is operationalized in Part IV of the BBNJ Agreement, by establishing a framework and processes, thresholds, and other requirements for conducting and reporting assessments by Parties, including consultation with both affected States and
stakeholders throughout the EIA process, and by adding provisions which require transparency and means for holding States accountable (BBNJ Art. 32).

**International Cooperation**

The MOX case, which concerned radioactive pollution from a nuclear installation, established that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment. The BBNJ Agreement has elevated this to a specific requirement to cooperate under article 8. Other overarching principles and approaches are provided in article 7, including: the polluter pays principle, the precautionary principle or precautionary approach, as appropriate; an ecosystem approach; an integrated approach to ocean management; an approach that builds ecosystem resilience; and the use of the best available science and scientific information.

**Environmental impacts assessments under the BBNJ Agreement**

In its preamble, the BBNJ Agreement notes that Parties are mindful of the obligation set out in the Convention to take all measures necessary to ensure that pollution arising from incidents or activities does not spread beyond the areas where sovereign rights are exercised, in accordance with the Convention (Art. 194(2) of UNCLOS). This means the BBNJ Agreement must be read and implemented with that obligation in mind.

Where a country determines that an activity to be conducted in marine areas within national jurisdiction may cause substantial pollution of, or significant and harmful changes to, the marine environment in ABNJ, it would need to ensure that an EIA is conducted in accordance with Part IV of the BBNJ Agreement, or under its national process. In the latter case, it would need to:

a. Make relevant information available through the Clearing-House Mechanism in a timely manner during the national process;

b. Ensure that the activity is monitored in a manner consistent with the requirements of its national process; and

c. Ensure that EIA reports and any relevant monitoring reports are made available through the Clearing-House Mechanism as set out in the BBNJ Agreement (BBNJ Art. 28(2)). The STB would be able to provide comments (BBNJ Art. 28(3)).

Under Part IV of the BBNJ Agreement, an EIA requires screening, scoping and assessment, including making information publicly available and allowing other Parties, including affected coastal States, to express their views, taking into account views based on traditional knowledge (BBNJ Art. 31). Measures to prevent, mitigate and manage potential adverse effects, such as a planned discharge or, potentially, an activity creating noise effects in ABNJ, would need to be identified and analyzed to avoid significant adverse

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1 The MOX Plant case (Ireland vs United Kingdom), Request for provisional measures, Case number 10. Order dated December 3, 2001, para. 82.

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impacts, including alternatives, while conducting public notification and consultation throughout (BBNJ Art. 31(1)(e) and Art. 32). Potentially affected States and stakeholders would need to be notified and consulted. Such public notification and consultation should be inclusive and transparent, be conducted in a timely manner and be targeted and proactive when involving small island developing States (BBNJ Art. 32(4)). Comments would need to be considered and responded to (BBNJ Art. 32 (5)).

The EIA report would need to include (inter alia): a baseline assessment\(^2\) of the marine environment likely to be affected; a description of potential impacts, including cumulative impacts\(^3\) and impacts within national jurisdiction, such as in its exclusive economic zone (BBNJ Art. 27(c)); a description of uncertainties and gaps in knowledge; and a description of the consideration of reasonable alternatives, such as to a proposed discharge (BBNJ Art. 33(2)). The Party would need to make the draft EIA report available through the Clearing-House Mechanism for publication (BBNJ Art. 33(5)) during the public consultation process, to provide an opportunity for the STB to consider and evaluate the report (BBNJ Art. 33(3)) and provide comments (BBNJ Art. 33(4)).

A decision to authorize the proposed activity 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 (BBNJ Art. 34(2)). This requirement of preventing significant adverse impacts is important because it adds a specific test that must be applied.

The effects of the activity must be monitored, including its potential economic, social, cultural and human health impacts (BBNJ Art. 35). Periodic reports of impacts, including monitoring reports, must be made available to the Clearing-House Mechanism (BBNJ Art. 36). The Party would need to review impacts and, if it identified significant adverse impacts that either were not foreseen in the EIA or were different in nature or severity, it would need to review its decision to authorize the activity. It would need to notify the Conference of the Parties (CoP), other Parties and the public, including through the Clearing-House Mechanism, and require that measures be proposed and implemented to prevent, mitigate and/or manage those impacts, or take any other necessary action and/or halt the activity, as appropriate (BBNJ Art. 37 (1) and (2)). In addition, the STB may make recommendations (BBNJ Art. 37 (3)) and other Parties may register their concerns, which can trigger an STB consideration (BBNJ Art. 37(4)): While such a recommendation is not binding, it is an important signal towards improving accountability and transparency. All States and

\(^2\) A baseline assessment is an assessment of the current state of the environment so that any later effects, such as from a later activity, can be discerned or ascertained.

\(^3\) The BBNJ Agreement defines cumulative impacts as the combined and incremental impacts resulting from different activities, including known past and present and reasonably foreseeable activities, or from the repetition of similar activities over time, and the consequences of climate change, ocean acidification and related impacts. BBNJ Art. 1(6): “Assessing cumulative effects is critical as it assists policy makers in fully understanding the changes in the environment that result from the combined and incremental effects of past, present, and foreseeable future activities. Failing to consider such effects can lead to underestimation of effects and in some cases to irreversible environmental destruction”.}

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stakeholders shall be kept informed through the Clearing-House Mechanism and may be consulted in the monitoring, reporting, and review processes in respect of the activity (BBNJ Art. 37(5)).

In summary, under the BBNJ Agreement, key issues such as cumulative effects, the environmental baseline, and alternatives to the planned activity would need to be considered. In addition, there are extensive public, as well as stakeholder and State notification and consultation provisions, and there are monitoring, reporting and review requirements. All these are crucial to transparency, effective assessment, decision-making, monitoring, reporting, consultation and review.

**Recommendations to Signatories to the BBNJ Agreement:**

To advance the objectives of the BBNJ Agreement, Parties could:

- Provisionally apply Part IV of the BBNJ Agreement pending the entry into force of the Agreement (see [High Seas Alliance Briefing on provisional application](#)).
- Review and update national laws, policies and/or administrative procedures as necessary to reflect BBNJ Agreement obligations.
- Share the results of reviews to inform similar efforts by other States.
- Provide technical, legal and financial assistance to other States to assist them when conducting similar reviews.
- When EIAs are carried out under national processes, ensure that monitoring and reporting are carried out. Before the Clearing-House Mechanism is established, States can report to the interim secretariat, the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs (DOALOS).

**Authors: Duncan Currie and Johannes Müller**

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