

OceanCare Briefing for IGC 5 Proposed Text on Transboundary Pollution for the New Instrument

Zurich/Switzerland, 8th August 2022

This briefing is intended to support OceanCare's recommended text on provisions of the further revised President's Draft of the BBNJ Agreement dated 1st June 2022 and reflects the numerous intersessional dialogues and deliberations that have taken place in the interim. Please see the respective table on pages 2-7.

The timing for developing and adopting an international legally binding instrument on marine biodiversity in areas beyond national jurisdiction (BBNJ) remains as critical as ever. **Governments need to take bold and ambitious action to close existing regulatory and governance gaps and to pave the way for a holistic and robust conservation-oriented framework for conserving the high seas.**

The Case of Ocean Noise Pollution: A severe transboundary threat to BBNJ

In some regions, the levels of ocean noise have doubled every decade for the past 70 years. Both non-impulsive (e.g., commercial shipping) and impulsive noise (e.g., hydrocarbon exploration) can have detrimental effects on many species beyond the 200-mile Exclusive Economic Zones (EEZ), hence also inflicting significant harm to biodiversity of areas beyond national jurisdiction (BBNJ). This acknowledgement is well-reflected in a number of global and regional multilateral environmental agreements, but more recently also by General Assembly Resolution 74/19, which noted "that ocean noise has potential significant adverse impacts on living marine resources" (UNGA74/19: 2019, para. 279).

Noise pollution is particularly alarming considering that a wide variety of species rely on sound for their vital life functions, including communication, orientation, prey detection and predator avoidance, and for sensing surroundings. In 2017, a study by Australian scientists determined that a single seismic airgun had killed all krill larvae and a large part of the adult zooplankton at a distance of 1.2 kilometres in the entire study area. These findings are worrying as there is now ample evidence that even the smallest organism suffers from the impact of anthropogenic noise, potentially having devastating consequences for the entire marine food web.

Evidence furthermore suggests that noise levels in the ocean present a growing threat to fish stocks and the sustainability of fisheries. In this regard, studies have shown that fish catch rates can drop substantially, with larger fish leaving an area coincident with ocean noise events.

By-catch rates have also been observed to increase in the presence of noise whereas fish abundance decreases. Across the world, unchecked propagation of ocean noise is now undermining efforts to achieve healthy, sustainable oceans and restore fish stocks, with serious implications for human livelihoods and food security.

OceanCare is convinced that Part III and Part IV of the BBNJ Agreement, which address area-based management tools (ABMTs), including marine protected areas (MPAs) and environmental impact assessments (EIAs) and strategic environmental assessments (SEAs), respectively, offer significant potential to future-proof the Agreement and to incorporate provisions for the management of transboundary pollution.

OceanCare has taken the opportunity to provide several thoughts and text-edits on the provisions of the revised President’s Draft (dated 30th March 2022) that we believe are critical for ensuring a meaningful Instrument in conserving biodiversity in areas beyond national jurisdiction. Our recommended text is in **bold** and replaces original text (~~strike through~~).

Text Recommendations:

Part I- General Provisions

2022 President’s Draft Text	Suggested text OceanCare	Comments
<p>Preamble</p> <p>Suggesting new text.</p>	<p>Alt. 1: Stressing the responsibility of States Parties to ensure that activities within their jurisdiction or control do not cause damage to areas beyond the limits of national jurisdiction.</p> <p>Alt. 2: Stressing the need to take all measures necessary to ensure that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with the Convention.</p>	<p>Alt. 1 modulated on basis of Art. 3 CBD. The principle enshrined in Art. 3 reiterates a country’s responsibility to ensure that activities within their jurisdiction or control does not cause damage to the environment of another country and areas beyond national jurisdiction.</p> <p>Alt. 2 modulated on basis of Art. 194 (2) UNCLOS which requires countries to ensure that activities under their jurisdiction or control do not cause pollution to other States and that pollution does not spread beyond the areas where they sovereign rights.</p>
<p>8. Option A: “Cumulative impacts” means the incremental effects of a proposed activity under the jurisdiction and control of a State Party when added to the impacts of past, present and reasonably foreseeable activities, or from the repetition of similar activities over time, including climate change, ocean acidification and possible transboundary impacts, regardless of whether the Party exercises jurisdiction or control over those other activities.</p>	<p>Option A is preferable:</p> <p>“Cumulative effects impacts” means the incremental effects of a proposed activity under the jurisdiction and control of a State Party when added to the effects impacts of past, present and reasonably foreseeable activities, or from the repetition of similar activities over time, including climate change, ocean acidification and possible transboundary impacts, regardless of whether the Party exercises jurisdiction or control over those other activities.</p>	<p>The term ‘effect’ is a term used in UNCLOS whereas ‘impact’ is not. Similarly, transboundary pollution is easily defined and can be readily measured through scientific investigation, whereas transboundary impact is vague and it may be difficult to establish criteria acceptable to all parties. Moreover, transboundary pollution is referred to in an extensive body of existing international law, whereas transboundary impact is not.</p>

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<p>Option B: "Cumulative impacts" means impacts on the same ecosystems resulting from different activities, including past, present or reasonably foreseeable activities, or from the repetition of similar activities over time, including climate change, ocean acidification and related impacts.</p>		
<p>10. Option A: "Environmental impact assessment" means a process to evaluate the potential environmental impacts, including cumulative impacts, of an activity with an effect on areas within or beyond national jurisdiction, taking into account, inter alia, interrelated social and economic, cultural and human health impacts, both beneficial and adverse.</p> <p>Option B: "Environmental impact assessment" means a process to identify, predict and evaluate the potential effects that an activity may cause in the marine environment in the short, medium and long term, in order to take the necessary measures, including mitigation, to address the consequences of such activity, prior to its commencement.</p> <p>Option C: "Environmental impact assessment" means a process for assessing the potential effects of planned activities, carried out in areas beyond national jurisdiction, under the jurisdiction or control of Parties, that may cause substantial pollution of or</p>	<p>10. Option A: "Environmental impact assessment" means a process to evaluate the potential environmental effects, impacts, including cumulative effects, impacts, of an proposed activity with an effect on areas within or beyond national jurisdiction, taking into account, inter alia, interrelated social and economic, cultural and human health impacts, effects, both beneficial and adverse.</p>	<p>No need to limit the definition of EIA to activities carried out in ABNJ. Our proposal takes a more inclusive approach and also helps to streamline the paragraph</p>

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significant and harmful changes to the marine environment.		
<p>Transboundary pollution.</p> <p>Suggesting new text after the definition of cumulative impacts (new Art. 9).</p>	<p>New Art. 9 with possible definition of transboundary pollution: :</p> <p>"Transboundary pollution" for the purposes of this Instrument means the introduction, directly or indirectly, of substances or energy, including acoustic energy, into the marine environment (a) that is generated by human activities in, or adjacent to, areas beyond national jurisdiction, (b) that disperses across more than one jurisdiction, including dispersing into areas beyond national jurisdiction from areas within national jurisdiction, and (c) that results in, or is likely to result in, significant harm to marine biological diversity beyond national jurisdiction.</p>	<p>To properly manage transboundary pollution, it is important for states to define it.</p> <p>Article 1 of UNCLOS defines marine pollution and can easily be used as a starting point to define transboundary pollution that impacts BBNJ.</p> <p>There are a number of observations that support this effort:</p> <ul style="list-style-type: none"> - Transboundary <i>pollution</i> is easily defined and can be readily measured through scientific investigation, whereas transboundary <i>impact</i> is vague, and it may be difficult to establish criteria acceptable to all parties. - Transboundary pollution is referred to in an extensive body of existing international law, whereas transboundary impact is not (e.g., Espoo Convention Art. 1(viii)). - Transboundary <i>pollution</i> can be addressed and mitigated through practical concrete measures mandating the reduction of the polluting emissions. Conversely, there is no practical way to mitigate transboundary impacts without also addressing the causes at its source. - Transboundary <i>pollution</i> stands the test of time as it potentially includes a vast assortment of destructive pollutants—from plastics to chemicals to oil to noise and ones that cannot yet be anticipated.
<p>Article 5 General [principles] [and] [approaches]</p>	<p>Add additional paragraph:</p> <p>(L) Take all appropriate and effective measures to prevent, reduce, mitigate and control transboundary pollution from proposed or existing activities.</p>	<p>Consistent with the obligation expressed in Article 194(2) to ensure activities under States' 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</p>

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		sovereign rights in accordance with the Convention.

Part III Measures Such As Area-Based Management Tools (ABMTs), Including Marine Protected Areas (MPAs)

The future BBNJ Agreement needs to provide the ability for countries to establish marine protected areas (and other area-based management tools), which will in turn enable long-term preservation of biodiversity on the high seas. It is also important to note that anthropogenic underwater noise sources must be considered as a cumulative threat as they only rarely occur in isolation. . As noise travels far and wide, any area-based management tools must be large enough to accommodate this acknowledgment and governments must ensure connectivity between such areas to achieve its purpose.

Part III and Part IV cannot be considered in isolation from one another. The example of seismic hydrocarbon exploration activity, to name a specific noise-generating activity, demonstrates that noise sources have impacts far from its origin. Countries must consider this aspect in the designation and management of ABMTs and marine protected areas and when approving such activities during the environmental impact assessment phase.

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<p>Article 17 Proposals</p> <p>4. Proposals shall include the following key elements:</p> <p>(f) A description of the proposed measures and priority elements for a management plan to be adopted to achieve the specified objectives;</p>	<p>4. Proposals shall include, at a minimum, the following elements:</p> <p>(f) A description of the proposed measures and priority elements for a management plan to be adopted including, when relevant, a description of activities to be managed, restricted or prohibited to achieve the specified objectives;</p> <p><i>ADDITION OF NEW TEXT (this text was included in earlier versions of the Draft President's Text)</i></p> <p>(j) Information on transboundary pollution that is known, likely and has the potential to adversely impact the area.</p>	<p>For the Agreement to be effective the proposal should include a description of the proposed conservation and management measures and the activities to be managed. This is particularly critical for pollutants, such as ocean noise, that are transboundary in nature and which effects reach, in many cases, into ABNJ.</p>

Part IV Environmental Impact Assessments

Evaluating the likely environmental impacts of a proposed activity at sea is a critical step in addressing the risk of pollution on marine biodiversity. Environmental impact assessments (EIAs) are widely recognised as necessary tools for mitigating potential anthropogenic impacts of projects on the environment, ideally considering the socio-economic, cultural and human-health related impacts of a given activity before a project is approved. This process may however vary depending on jurisdiction and the nature of the activity. The current BBNJ negotiations are therefore an important step towards harmonising and standardising EIA processes for activities related to the high seas.

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<p>Article 22 Obligation to conduct environmental impact assessments</p> <p>1. Parties shall [, as far as practicable,] assess the potential effects [on the marine environment] of [planned] [proposed] activities under their jurisdiction or control [on the marine environment] [in accordance with their obligations under articles 204 to 206 of the Convention].</p> <p>2. On the basis of articles 204 to 206 of the Convention, Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to implement [the provisions of] this Part [and any further measures [on the conduct of environmental impact assessments] adopted by the Conference of the Parties].</p> <p>3. The requirement under this Part to conduct an environmental impact assessment applies [only to activities conducted in areas beyond national jurisdiction] [to all activities that have an impact in areas beyond national jurisdiction].</p>	<p>1. Parties shall [as far as practicable,] assess the potential effects of [planned] [proposed] activities under their jurisdiction or control which may have minor or transitory effects or greater on marine biological diversity of areas beyond national jurisdiction [on the marine environment] [in accordance with their obligations under articles 204 to 206 of the Convention].</p> <p>2. On the basis of articles 192-212 204-206 of the Convention, States Parties shall take the necessary legal, administrative or policy measures, as appropriate, to implement the provisions of this Part and any further measures [on the conduct of environmental impact assessments] adopted by the Conference of the Parties].</p> <p>3. The requirement in this Part to conduct an environmental impact assessment applies only to activities conducted in areas beyond national jurisdiction] [to all activities that have an effects impacts in on areas beyond national jurisdiction].</p> <p>New para. 4 (Alternatively, this para. could be a new Art. 22bis):</p>	<p>Effects-based rather than location-based assessment is important to ensure that potentially serious effects stemming from activities within an EEZ on the environment outside that EEZ are assessed, and to ensure consistency with the obligation to prevent transboundary harm contained in numerous international instruments and agreements.</p> <p>An effects-based approach is also consistent with existing international commitments, including UNCLOS Art. 194(2) and the Espoo Convention Art. 2 (1) for example.</p> <p>As transboundary pollutants travel far from their base of origin, it is important that any environmental assessment considers how the proposed activity may impact areas beyond the immediate vicinity of where the activity takes place. This is also a safeguard mechanism as a country may be affected (e.g., a country's fish stocks) by an activity that originates in another country. Such a scenario has been addressed by the Follow-Up Committee of ACCOBAMS (See page 8).</p>

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	<p>4. States Parties shall, on the basis of the Convention, take the necessary legal, administrative or policy measures, as appropriate, to implement provisions on the duty to perform environmental impact assessments for activities in areas within national jurisdiction with possible effects on areas beyond national jurisdiction. Such laws, regulations and measures shall be no less effective than international rules, standards and recommended practices and procedures.</p>	<p>New para. 4 (or Art. 22bis) is basically already contained in Art. 194 in conjunction with Art. 204-206 and Art. 207 ff. UNCLOS but reinforced and made explicit in the context of transboundary pollution originating from activities within national jurisdiction and affecting ABNJ (and would also state clear binding of Non-Members to UNCLOS, apart from the likely legal binding to the respective UNCLOS provisions by customary law)</p> <p>IGC 3 showed strong support to make general reference to the Convention instead of citing specific Articles of the Convention.</p>
<p>Article 25 Cumulative impacts and transboundary impacts</p> <p>1. [Cumulative and transboundary impacts shall, as far as practicable, be taken into account in the conduct of environmental impact assessments.]</p> <p>[2. Where relevant, the environmental impact assessment process shall also take into account possible transboundary impacts in areas within national jurisdiction.]</p> <p>[3. The provisions of this Part shall not prejudice any obligation of Parties under other applicable international law with regard to activities having or likely to have a transboundary impact.]</p>	<p>1. [/del>Cumulative and transboundary effects-impacts shall, as far as practicable, be taken into account in the conduct of environmental impact assessments.]</p> <p>[/del>2. Where relevant, the environmental impact assessment process shall also take into account possible transboundary impacts in areas within national jurisdiction.]</p> <p>[/del>3. The provisions of this Part shall not prejudice any obligation of Parties under other applicable international law with regard to activities having or likely to have a transboundary impact.]</p>	<p>If the phrasing "as far as possible" remains included, a significant loophole in addressing cumulative impacts and transboundary effects will remain.</p> <p>As above - The term 'effect' is a term used in UNCLOS whereas 'impact' is not.</p> <p>Similarly, transboundary pollution is easily defined and can be readily measured through scientific investigation, whereas transboundary impact is vague and it may be difficult to establish criteria acceptable to all parties. Moreover, transboundary pollution is referred to in an extensive body of existing international law, whereas transboundary impact is not</p>
<p>Article 35 Environmental impact assessment reports</p>		<p>Note that UNGA Resolution 74/19:</p>

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<p>1. Parties shall ensure the preparation of an environmental impact assessment report for any such assessment undertaken pursuant to this Part.</p> <p>2. Where an environmental impact assessment is required in accordance with this Part, the environmental impact assessment report shall include, as a minimum, the following components: a description of the [planned] [proposed] activity, a baseline assessment of marine environment likely to be affected, a description of potential impacts, a description of prevention and mitigation measures, uncertainties and gaps in knowledge, information on the public consultation process, consideration of alternative options to the [planned] [proposed] activity, and a description of follow-up actions, including a monitoring and review plan. Additional guidance regarding the content of environmental impact assessments reports to be prepared pursuant to this Part shall be developed by the Scientific and Technical Body for adoption by the Conference of the Parties under article 41 bis.</p>	<p>Support for text proposal on 1.</p> <p>2. Where an environmental impact assessment is required in accordance with this Part, the environmental impact assessment report shall include, as a minimum, the following components: a description of the planned [proposed] project, a baseline assessment of marine environment likely to be affected, a description of potential effects including transboundary pollution and socio-economic and other related impacts, a description of prevention and mitigation measures, uncertainties and gaps in knowledge, information on the public consultation process, consideration of alternative options to the planned [proposed] activity, and a description of follow-up actions, including a monitoring and review plan. Additional guidance regarding the content of environmental impact assessments reports to be prepared pursuant to this Part shall may be developed by the Scientific and Technical Body for adoption by the Conference of the Parties under article 41 bis.</p>	<p>2019, Para. 287. "Calls upon States to consider appropriate cost- effective measures and approaches to assess and address the potential socioeconomic and environmental impacts of anthropogenic underwater noise, taking into account the precautionary approach and ecosystem approaches and the best available scientific information, as appropriate."</p> <p>-</p>
<p>Article 38. Decision-making</p> <p>2. When determining whether the [planned] [proposed] activity may proceed, Parties shall take full account of the results of an environmental impact assessment conducted in accordance with this Part. [No decision allowing the [planned] [proposed] activity under the jurisdiction or control of a Party</p>	<p>2. When determining whether the planned [proposed] activity may proceed, Parties shall take full account of the results of an environmental impact assessment conducted in accordance with this Part. [No decision allowing the planned [proposed] activity under the jurisdiction or control of a Party to</p>	<p>It is important to have a safeguard that prevents proponents for an activity to move forward when the EIA assessment indicates that it will significant adverse impact on the environment.</p>

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to proceed shall be made where the environmental impact assessment indicates that the [planned] [proposed] activity under the jurisdiction or control of a Party would have significant adverse impacts on the environment.]	proceed shall be made where the environmental impact assessment indicates that the planned [proposed] activity under the jurisdiction or control of a Party would have significant adverse impacts on the environment.]	

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About OceanCare:

OceanCare is a Swiss non-profit organisation. It was founded in 1989 and has a strong commitment to realistic and cooperative initiatives. The organisation works at national and international level in the areas of marine pollution, environmental changes, fisheries, whaling, sealing, captivity of marine mammals and public education. OceanCare holds Special Consultative Status with the Economic and Social Council of the United Nations (ECOSOC) and is a partner of the General Fisheries Commission for the Mediterranean (GFCM), the Convention on Migratory Species (CMS), and the UNEP/CMS Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS), as well as UNEP/MAP. OceanCare also became an accredited observer to the Convention on Biological Diversity (CBD) and the International Seabed Authority (ISA) in 2021. The organisation has moreover been accredited as part of the Major Group 'Science & Technology' to the United Nations Environment Assembly (UNEA), which is the governing body of UNEP, and is a part of the UNEP Global Partnership on Marine Litter.

OceanCare started its involvement in the BBNJ process since the beginning in 2007, attending the subsequent Ad-Hoc-Open-Ended Working Group meetings, as well as the four preparatory committee meetings in 2016 and 2017. In 2011, OceanCare became a member of the High Seas Alliance (HSA) – a group of over 50 organisations that work together to strengthen high seas governance. OceanCare's primary objective has been to raise awareness of the threat posed by transboundary pollutants, such as underwater noise, in areas beyond national jurisdiction and advocate for the mitigation of underwater noise through the application of robust, transparent, and stringent EIAs and area-based management tools, including MPAs. www.oceancare.org