

OceanCare Briefing for BBNJ IGC3 Proposed Text for the New Instrument: “Transboundary Pollution”

OceanCare applauds the work of the United Nations intergovernmental conference “to elaborate the text of an international legally binding instrument under the United Nations Convention on the Law of the Sea¹ on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, with a view to developing the instrument as soon as possible” pursuant to UN General Assembly resolution 72/249.²

OceanCare recognizes that UNGA resolution 72/249 authorizes the IGC to develop, through the new instrument, an international legal framework for nations to conserve and sustainably use marine biological diversity beyond national jurisdiction (BBNJ). With reference to the proposed provisions for environmental impact assessments and area based management tools, including marine protected areas, this UNGA directive encompasses all the living resources that comprise BBNJ and all measures for the conservation and sustainable use of BBNJ.

We at OceanCare were gratified to hear so many national delegations during IGC2 express their strong support for incorporating transboundary pollution into the element for environmental impact assessments of the new instrument. OceanCare advocates for the likewise incorporation of transboundary pollution into the element for area-based management tools, including marine protected areas.

OceanCare is cognizant that although the new instrument will have no legal authority in areas within national jurisdiction, we also are aware that **resolution 72/249 indicates a mandate for the inclusive conservation and sustainable use of BBNJ without reference to the jurisdiction where the risks to BBNJ may physically originate**. Activities that take place within the jurisdiction of a coastal state may generate transboundary pollution that crosses into the adjacent area beyond national jurisdiction causing significant adverse impacts to BBNJ. The new instrument can address the current lack of an applicable legal framework by providing for the authority to conserve and sustainably use the BBNJ that is thus affected.

OceanCare’s position is that under UNGA resolution 72/249, the new instrument can and should provide robust authority 1) for assessing all significant adverse impacts to BBNJ due to transboundary pollution and 2) for considering transboundary pollution in the framework for the management and protection of BBNJ, both without regard to the jurisdiction where the transboundary pollution originates or the location of the activity that generates the transboundary pollution.

OceanCare proposes the following text for incorporation into the new instrument to specifically assess and manage transboundary pollution, presented along with the rationale for the text’s inclusion and selected supporting authorities in international law.

¹ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (“UNCLOS”).

² *International Legally Binding Instrument 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*, GA Res 72/249, UN GAOR, 72nd sess, UN Doc A/Res/72/249 (19 January 2018) para 1.

I. Proposed Text: Definition of Transboundary Pollution

“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.

Rationale

Under Article 31 of the Vienna Convention, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.³ A definition of “transboundary pollution” is necessary to give clear meaning to the term and enable State Parties to fulfil their obligations under the new instrument to conduct environmental impact assessments for all activities with the potential to cause significant adverse impact to BBNJ and to implement effective area based management tools, including marine protected areas, to conserve and sustainably use BBNJ.

Legal Authorities

UNCLOS

Article 1(4): “[P]ollution of the marine environment” means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

Espoo Convention⁴

Article 1(viii): “Transboundary impact” means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party.

OSPAR Convention⁵

Article 1(d): “Pollution” means the introduction by man, directly or indirectly, of substances or energy into the maritime area which results, or is likely to result, in hazards to human health, harm to living resources and maritime ecosystems, damage to amenities or interference with other legitimate uses of the sea.

³ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1960, 1155 UNTS 331 (entered into force 27 January 1980) ('*Vienna Convention*') art 31(1).

⁴ *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, 1989 UNTS 309 (entered into force 10 September 1997) ('*Espoo Convention*')

⁵ *Convention for the Protection of the Marine Environment of the North-East Atlantic*, opened for signature 22 September 1992, 2354 UNTS 67 (entered into force 25 March 1998) ('*OSPAR Convention*').

Canada-US Air Quality Agreement⁶

Article I(2): “Transboundary air pollution” means air pollution whose physical origin is situated wholly or in part with[in] the area under the jurisdiction of one Party and which has adverse effects, other than effects of a global nature, in the area under the jurisdiction of the other Party.

II. Proposed Text: State Party Obligations

State Parties shall, to implement the provisions of this instrument, individually and through bilateral and multilateral cooperation,

- (a) take all appropriate and effective measures to prevent, reduce and control transboundary pollution from proposed or existing activities, and
- (b) take the necessary legal, administrative or other actions to establish procedures for conducting environmental impact assessments that include the investigation and analysis of known, likely and possible significant adverse impacts to biological diversity beyond national jurisdiction caused by transboundary pollution, and
- (c) take the necessary legal, administrative or other actions to establish procedures for implementing area based management tools, including marine protected areas, that include the investigation and analysis of known, likely and possible significant adverse impacts to biological diversity beyond national jurisdiction caused by transboundary pollution.

Rationale

Under UNCLOS and other international law, States have an obligation to ensure that activities under their jurisdiction or control are conducted in a manner so as not to cause significant adverse impacts to BBNJ due to transboundary pollution. International action through the new instrument is necessary, as individual national and regional approaches are insufficient to effectively manage transboundary pollution and its impacts.

Legal Authorities: Cooperative Control of Transboundary Marine Pollution

UNCLOS

Article 194(1): States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practical means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

(2): 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

⁶ *Agreement between the Government of Canada and the Government of the United States of America on Air Quality*, opened for signature 13 March 1991, 1852 UNTS 79 (entered into force 13 March 1991) (*Canada-US Agreement on Air Quality*).

does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

(3): The measures taken pursuant to [Part XII] shall deal with all sources of pollution of the marine environment [...].

Article 195: In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.

Article 207(1): States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources [...] taking into account international agreed rules, standards and recommended practices and procedures.

(2): States shall take other measures as may be necessary to prevent, reduce and control such pollution.

Article 208(1): Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction [...].

(2): States shall take other measures as may be necessary to prevent, reduce and control such pollution.

(5): States, acting especially through competent international organizations or diplomatic conference, shall establish global and regional rules and recommended practices and procedures to prevent, reduce and control pollution of the marine environment referred to in paragraph 1. [...].

Barcelona Convention of 1976⁷

Article 3(1): The Contracting Parties may enter into bilateral or multilateral agreements, including regional or sub-regional agreements, for the protection of the marine environment of the Mediterranean Sea against pollution.

Article 4(1): The Contracting Parties shall individually or jointly take all appropriate measures in accordance with the provisions of this Convention and those protocols in force to which they are party, to prevent, abate and combat pollution and enhance the marine environment.

Cartagena Convention⁸

Article 1: The Contracting Parties shall, individually or jointly, take all appropriate measures in conformity with international law and in accordance with this Convention and those of its protocols in force to which they are parties to prevent, reduce and control pollution of the Convention area and to ensure sound environmental management, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.

⁷ *Convention for the Protection of the Mediterranean Sea against Pollution*, opened for signature 16 February 1976, 1102 UNTS 27 (entered into force 2 February 1978) ('*Barcelona Convention of 1976*').

⁸ *Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region*, opened for signature 24 March 1983, 1506 UNTS 157 (entered into force 11 October 1986) ('*Cartagena Convention*').

Article 2: The Contracting Parties shall, in taking the measures referred to in paragraph 1, ensure that the implementation of those measures does not cause pollution of the marine environment outside the Convention area.

OSPAR Convention

Article 2(a): The Contracting Parties shall, in accordance with the provisions of the Convention, take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected.

Article 21: When pollution originating from a Contracting Party is likely to prejudice the interests of one or more of the other Contracting Parties to the Convention, the Contracting Parties concerned shall enter into consultation, at the request of one of them, with a view to negotiating a cooperation agreement.

International Court of Justice Advisory Opinion⁹

Legality of the Threat or Use of Nuclear Weapons, paragraph 29: [...] The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

Rio Declaration¹⁰

Principle 2: States have [...] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Legal Authorities: Environmental Impact Assessment

UNCLOS

Article 200: States shall cooperate, directly or through competent international organizations, for the purpose of promoting studies, undertaking programmes of scientific research and encouraging the exchange of information and data acquired about pollution of the marine environment. They shall endeavour to participate actively in regional and global programmes to acquire knowledge for the assessment of the nature and extent of pollution, exposure to it, and its pathways, risks and remedies.

Article 204(1): States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.

⁹ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] IJ Rep 1996 ('*Nuclear Weapons Advisory Opinion*').

¹⁰ *Report of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development*, GA Rep CONF.151/26 (Vol II), UNCED, UN Doc A/CONF.151/26 (Vol II) (13 August 1992) ('*Agenda 21, Chapter 17*').

(2): In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

Article 206: 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.

Espoo Convention

Article (2)1: The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.

Article 2(2): Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.

Madrid Protocol¹¹

Article 6(3): The Parties shall co-operate with those Parties which may exercise jurisdiction in areas adjacent to the Antarctic Treaty area with a view to ensuring that activities in the Antarctic Treaty area do not have adverse environmental impacts on those areas.

North American Agreement on Environmental Cooperation¹²

Article 10(7): Recognizing the significant bilateral nature of many transboundary environmental issues, the Council shall [...] consider and develop recommendations with respect to: (a) assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects [...].

Legal Authorities: Area Based Management Tools, including Marine Protected Areas

UNCLOS

Article 197: States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

¹¹ *Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, 30 ILM 1455 (1991) (entered into force 14 January 1998) ('*Madrid Protocol*').

¹² *North American Agreement on Environmental Cooperation*, opened for signature 14 September 1993, 32 ILM 1482 (entered into force 1 January 1994) ('*NAAEC*').

Article 235(1): States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

Madrid Protocol

Article 3(1): The Parties commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems and hereby designate Antarctica as a natural reserve, devoted to peace and science.

Bonn Convention¹³

Article V(5)(e): [C]onservation and, where required and feasible, restoration of the habitats of importance in maintaining a favourable conservation status, and protection of such habitats from disturbances [...].

(f): [M]aintenance of a network of suitable habitats appropriately disposed in relation to the migration routes.

(i): [P]revention, reduction or control of the release into the habitat of the migratory species of substances harmful to that species.

Convention on Biological Diversity¹⁴

Each contracting Party shall, as far as possible and as appropriate:

Article 8(c): Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use.

(e): Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas.

UN Fish Stocks Agreement¹⁵

Article 6(1): States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.

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¹³ *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983) ('CMS').

¹⁴ *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('CBD').

¹⁵ *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*, opened for signature 4 December 1995, 2167 UNTS 88 (entered into force 11 December 2001) ('Fish Stocks Agreement').