

OceanCare Briefing for IGC 4 Proposed Text on Transboundary Pollution for the New Instrument

6th February 2020

This Briefing is intended to support OceanCare’s recommended text on Provisions of the President’s Draft of the BBNJ Agreement dated November 27, 2019. Please see the respective table on pages 3-7.

OceanCare’s position is that UNGA resolution 72/249 is a legal **outcome document** that charges the IGC with putting into place processes and measures pursuant to UNCLOS and other international law **to achieve the result** of the conservation and sustainable use of marine biological diversity beyond national jurisdiction (BBNJ). This UNGA mandate encompasses all living resources that comprise BBNJ and all measures for conservation and sustainable use of BBNJ. **OceanCare advocates for incorporating provisions for management of transboundary pollution** into the sections of the BBNJ Agreement for environmental impact assessments and strategic environmental assessments, and for area-based management tools, including marine protected areas.

Although the new Agreement will have no legal authority within national jurisdiction, resolution 72/249 clearly mandates the inclusive conservation and sustainable use of BBNJ without reference to the jurisdiction where the risks to BBNJ, including transboundary pollution, may physically originate. **Human 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 and vice versa.

The BBNJ Agreement should provide robust authority without regard to the jurisdiction where the transboundary pollution originates or the location of the activity that generates the transboundary pollution,

- For assessing all significant adverse impacts to BBNJ due to transboundary pollution, and
- For considering transboundary pollution in any framework for conservation management of BBNJ.

The inclusion of the term ‘transboundary pollution’ is relevant insofar as:

- 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.
- Transboundary pollution is referred to in an extensive body of existing international law, whereas transboundary impact is not.
- Transboundary pollution 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.
- Article 1 of UNCLOS defines marine pollution and can easily be used as a starting point to define transboundary pollution that impacts BBNJ.
- The argument that transboundary pollution is too narrow a category does not stand up to scrutiny; transboundary pollution potentially includes a vast assortment of destructive pollutants—from plastics to chemicals to oil to noise and much more.

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

Levels of ocean noise have doubled every decade for the past 70 years in some regions. Indeed, it is now scientifically well-established that 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)**. The General Assembly also acknowledged as much when it adopted Resolution 74/19, noting “that ocean noise has potential significant adverse impacts on living marine resources” (UNGA 74/19: 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 also a large part of the adult zooplankton at a distance of 1.2 kilometres in the entire study area¹. These findings are particularly worrying as there is now evidence that even the smallest organism suffers from the impact of anthropogenic noise, potentially having devastating consequences for the entire marine food web. So far, around 130 marine species, practically all exposed to related scientific research, are shown to be impacted by underwater noise, including more than 30 species of marine mammals, around 66 species of fish and at least 36 species of invertebrates.

Evidence furthermore suggests, that noise levels in the ocean present a growing threat to fish stocks and the sustainability of fisheries the world over. In this regard, studies have shown that fish catch rates can drop substantially, with larger fish leaving an area coincident with ocean noise events². 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 security³.

As the 4th Intergovernmental Conference is rapidly approaching in March 2020, OceanCare continues to advocate for managing transboundary pollution and its impact through the new BBNJ Instrument. With this mission in mind, we have taken the opportunity to provide a number of text-edits that we believe are essential for ensuring a meaningful Instrument in conserving biodiversity in areas beyond national jurisdiction.

¹ See McCauley et al.’s “Widely used marine seismic survey air gun operations negatively impact zooplankton” for further findings and explanation.

² See for example Weilgart’s “The Impact Of Ocean Noise Pollution On Fish And Invertebrates” for further reading on the impacts of noise on fish.

³ Other impacts include: body malformations and higher egg or immature mortality; internal injuries, causing disorientation and even death; damage to hearing structures which can worsen over time, temporary hearing loss which can last for months, or even permanent hearing loss; stress, with negative consequences on the immune system and reproductive rates; behavioural changes, including aggression, flight reactions, reduced communication and foraging; high mortality in the presence of noise was suffered by zooplankton.

Part I - General Provisions

Our recommended text is in **bold**, and replaces original text (~~strikethrough~~)

Draft Text	Suggested text	Comments
<p>Article 1 Use of terms</p> <p>Article 1.6. [6. “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>{6. “Cumulative effects impacts” means effects impacts on the same ecosystems resulting from different activities and effects, including past, present or reasonably foreseeable activities and effects, or from the repetition of similar activities over time, including climate change, ocean acidification and related effects impacts, and transboundary effects including pollution.}</p>	<p>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>A possible definition of transboundary pollution could read as follows: “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>Article 5 General [principles] [and] [approaches]</p>	<p>Add additional paragraph</p>	<p>Consistent with the obligation expressed in Article 194(2) to ensure activities under States’ jurisdiction or control are so</p>

	(k) Take all appropriate and effective measures to prevent, reduce, mitigate and control transboundary pollution from proposed or existing activities.	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 in accordance with the Convention.
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Part II Measures Such As Area-Based Management Tools, Including Marine Protected Areas

Draft Text	Suggested text	Comments
<p>Article 17 Proposals</p> <p>4. Proposals shall include, at a minimum, the following elements:</p> <p>(f) A description of the proposed [conservation and [management] [sustainable use] measures] [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 conservation and management 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 Agreement)</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 III Environmental Impact Assessments

Draft Text	Suggested text	Comments
<p>Article 25 Cumulative Impacts</p> <p>1. Cumulative impacts shall [as far as possible] be [taken into</p>	<p>1. Cumulative effects impacts shall [as far as possible] be taken into</p>	<p>If the phrasing “as far as possible” remains included, a significant</p>

<p>account] [considered] in the conduct of environmental impact assessments.</p> <p>2. Alt. 1. Guidelines for assessing cumulative impacts in areas beyond national jurisdiction and how those impacts will be taken into account in the environmental impact assessment process for planned activities shall be developed by the Conference of the Parties.</p> <p>[2. Alt. 2. In determining cumulative impacts, the incremental effect of a planned activity under the jurisdiction or control of a State Party when added to the effects of past, present and reasonably foreseeable future activities shall be examined regardless of whether the State Party exercises jurisdiction or control over those other activities.]</p>	<p>account [considered] in the conduct of environmental impact assessments.</p> <p>2. We suggest deletion of 2. Alt. 1 2. Alt. 1. Guidelines for assessing cumulative impacts in areas beyond national jurisdiction and how those impacts will be taken into account in the environmental impact assessment process for planned activities shall be developed by the Conference of the Parties.</p> <p>2. Alt. 2. In determining cumulative effects impacts, the incremental effect of a planned activity under the jurisdiction or control of a State Party when added to the effects of past, present and reasonably foreseeable future activities and effects, including those related to climate change and transboundary pollution, shall be examined regardless of whether the State Party exercises jurisdiction or control over those other activities.</p>	<p>loophole in addressing cumulative impacts will remain.</p> <p>Paragraph 2 Alt. 1 would put off the requirement to consider cumulative effects to the Conference of the Parties (CoP) to the Agreement. This process would take a number of years, leaving a significant loophole in the EIA process potentially over the next decades.</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>
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<p>Article 26 Transboundary impacts</p> <p>1. Possible transboundary impacts shall be taken into account in environmental impact assessments.</p> <p>2. Where relevant, the environmental impact assessment process shall also take into account possible impacts in [adjacent] [coastal States] [areas within national jurisdiction,</p>	<p>1. Possible transboundary effects, impacts including from transboundary pollution, shall be taken into account in environmental impact assessments.</p> <p>2. Where relevant, the environmental impact assessment process shall also take into account possible effects impacts in [adjacent] [coastal States] areas within national jurisdiction,</p>	<p>The Agreement needs to take into account potential effects on all States, not just adjacent coastal States or coastal States. In the case of climate change mitigation for example, some mitigation schemes conducted within ABNJ could have effects that reach far beyond coastal states. Furthermore, the Agreement must provide robust authority without regard to the jurisdiction of where the transboundary pollution originates or the location of the activities that generates the</p>
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<p>including the continental shelf beyond 200 nautical miles].</p>	<p>including the continental shelf beyond 200 nautical miles.</p>	<p>transboundary pollution. Conversely, this Article should thus not be limited to impacts in adjacent coastal States but must be more comprehensive.</p>
<p>Article 35 Preparation and content of environmental impact assessment reports</p> <p>(d) A description of the potential effects of the planned activity under the jurisdiction or control of a State Party on the marine environment, including [social, economic, cultural and other relevant impacts,] and [reasonably foreseeable potential direct, indirect,] cumulative and transboundary impacts, [as well as an estimation of their significance] [, including a description of the likelihood that the assessed activity will cause substantial pollution of or other significant and harmful changes to the marine environment in areas beyond national jurisdiction and its biodiversity];</p> <p>(g) A description of any measures for avoiding, preventing [, minimizing] and mitigating impacts [and, where necessary and possible, redressing any substantial pollution of or significant and harmful changes to the marine environment] [and other adverse social, economic, cultural and relevant impacts];</p>	<p>(d) A description of the potential effects of the planned activity under the jurisdiction or control of a State Party on the marine environment, including social, economic cultural and other relevant effects-impacts, and reasonably foreseeable potential direct, indirect, cumulative and transboundary pollution impacts [as well as an estimation of their significance] including a description of the likelihood that the assessed activity will cause substantial pollution of or other significant adverse effects and harmful changes to the marine environment in areas beyond national jurisdiction and its biodiversity;</p> <p>(g) A description of any measures for avoiding, preventing, minimizing and mitigating impacts [and, where necessary and possible, redressing any substantial pollution of or significant and harmful changes to the marine environment] [and other adverse social, economic, cultural and relevant impacts effects, including those that are transboundary in nature;</p>	<p>As above – “impacts” is vague and it may be difficult to establish criteria acceptable to all parties.</p> <p>Note also UNGA Resolution 74/19: 2019, Para. 281. “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>As above.</p>

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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 has also been accredited as a Major Group 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. The primary objective pursued by OceanCare has been to raise awareness of the threat posed by transboundary pollution, such as underwater noise, in Areas Beyond National Jurisdiction (ABNJ).

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