

**Intergovernmental Conference on an 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**

**Intersessional work**

**Reports on the four thematic issues of the BBNJ Conference and cross-cutting issues**

**Note by the President**

**(September 2020 – March 2021)**

1. In light of the impacts of the COVID-19 pandemic, the General Assembly decided to postpone the fourth session of the Intergovernmental Conference on an 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 (BBNJ Conference, which was originally scheduled to take place from 23 March to 3 April 2020 (decision [74/543](#)).
2. On 14 September 2020, the President of the Conference in consultation with the Bureau, launched the BBNJ informal intersessional work to keep the momentum and continue the dialogue on the four thematic issues in the package set out in General Assembly resolution [72/249](#) as well as cross-cutting issues (<https://www.un.org/bbnj/content/Intersessional-work>).
3. In accordance with the President's proposed [programme of work](#), the intersessional work was carried out from September 2020 to March 2021 in the format of online discussion forums and a webinar, guided by the facilitators of the Conference's informal working groups, namely Janine Elizabeth Coye-Felson (Belize) for marine genetic resources, including questions on the sharing of benefits (MGRs); Alice Revell (New Zealand) for measures such as area-based management tools, including marine protected areas (ABMTs); René Lefeber (Netherlands) for environmental impact assessments (EIAs) and the President of the Conference, for cross cutting issues (CCIs). The President of the Conference also acted as facilitator for capacity-building and the transfer of marine technology (CBTMT), due to the unavailability of the facilitator of that informal working group. As secretariat of the Conference, the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs provided assistance to the BBNJ intersessional work.
4. The intersessional work proceeded on the basis of questions and other background documents prepared by the facilitators based on the Revised draft text of an agreement on an 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 ([A/CONF.232/2020/3](#), annex).
5. At a stock-taking webinar held on 20 August 2021, Ms. Coye-Felson and the President of the Conference, in their capacity as facilitators, presented highlights from the intersessional exchanges on MGRs, ABMTs, EIAs, CBTMT and CCIs. The annex to the present note contains the reports prepared by the facilitators on the intersessional work on the four thematic areas and on cross-cutting issues. The reports do not purport to provide an exhaustive account of the exchanges that took place, but rather, they give an overview of the main issues raised.

## Annex

### **Reports on the four thematic issues of the BBNJ Conference and cross-cutting issues**

#### **I. Report on Marine genetic resources, including questions on the sharing of benefits**

1 The intersessional work on marine genetic resources, including questions on the sharing of benefits, was held in the format of an online discussion forum, convened over two rounds, from 12 to 16 and from 21 to 27 October, respectively.

2 The discussions focused on the following two topics: (i) Access and benefit-sharing with regard to marine genetic resources and the role of the institutional arrangements proposed in Part VI of *the Revised draft text*; and (ii) Access to traditional knowledge of indigenous peoples and local communities associated with marine genetic resources of areas beyond national jurisdiction.

#### **Access and benefit-sharing with regard to marine genetic resources and the role of the institutional arrangements proposed in Part VI of the Revised draft text**

3 The exchanges relating to modalities for access and benefit-sharing addressed general comments, stages at which benefits may be shared, triggers for benefit-sharing, notifications and possible roles for institutional arrangements.

4 Delegations emphasized the need for the fair and equitable sharing of benefits. A group of States, referring to the special circumstances of small island developing States (SIDS), noted that a lack of capacity, technology and resources should not hinder SIDS from benefitting from the agreement with regard to access or benefit-sharing.

5 Several delegations including some groups of States stated that modalities for benefit-sharing should not impede but rather facilitate marine scientific research. A group of States noted that marine scientific research should not be excluded from the scope of Part II of the agreement.

6 Different views were expressed on the extent to which the agreement should set out the modalities for benefit-sharing. One group of States proposed to fully operationalize access and benefit-sharing modalities in the agreement in order to “future proof” it, while a delegation preferred to leave detailed provisions to a future decision by a Conference of the Parties (COP). A group of States suggested that it would be sufficient to include in the agreement a general obligation to ensure that benefits are shared. One delegation suggested that the agreement should contain general principles, such as the fundamental modalities of benefit-sharing.

7 Many delegations, including some groups of States, expressed the view that marine genetic resources of areas beyond national jurisdiction were the common heritage of mankind and that benefit-sharing should be mandatory. Several other delegations, including a group of States, emphasized that access to marine genetic resources of areas beyond national jurisdiction was free under UNCLOS.

8 The importance of taking into account adjacency with regard to marine genetic resources that are found both in areas beyond national jurisdiction and within national jurisdiction was noted by several delegations, including a group of States.

9 With regard to the stages at which benefits may be shared, delegations noted that benefits could be shared at different stages, although views differed on the identification of these stages, with some groups of States suggesting to include access and utilization of marine genetic resources, and some other delegations focussing on collection and access to samples and information. A group of States

suggested that the identification of the stages should depend on the type and nature of the benefits to be shared. A delegation proposed a three-stage approach, consisting of prior notification, deposit of samples in public collections and the uploading of information to the clearing-house mechanism (ChM). Another delegation suggested that the stages could be modelled on the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, keeping in mind that the types of benefits that could be shared were likely to evolve over time.

10 Many delegations, including several groups of States, supported the sharing of both monetary and non-monetary benefits. Some of these groups of States suggested that research and development would generate non-monetary benefits while exploitation/commercialization would generate monetary benefits. A group of States suggested that the grant of intellectual property rights should be exempt from monetary benefit-sharing, but that their licencing, transfer or assignment should not. Several delegations proposed that payments be made into a special fund, a trust fund or a benefit-sharing fund. Several other delegations, including a group of States, expressed a preference for focusing on sharing of knowledge and research findings, with some delegations stating that benefits should be non-monetary only. Several delegations, including a group of States, emphasized that scientific and technical cooperation and coordination, as well as capacity-building and the transfer of marine technology, was a form of non-monetary benefit-sharing.

11 Several delegations, including a group of States, expressed support for including an obligation to promote cooperation on the collection of marine genetic resources of areas beyond national jurisdiction in the agreement. Some delegations noted that access to data should be complemented by capacity development and the transfer of marine technology. It was noted that intellectual property rights should not preclude the transfer of marine technology. Several delegations, including a group of States, stressed the need to ensure that data and samples were deposited in publicly available and open-access databases, taking into account international scientific practices. A delegation emphasized that access to samples should be subject to reasonable conditions, including reasonable costs. With regard to digital sequence data and/or information, many delegations, including some groups of States, stressed that this should be made publicly available, with a delegation suggesting that this could be done against an embargo period of at least three years.

12 Many delegations, including several groups of States, highlighted the importance of traceability to ensure an effective benefit-sharing system. A delegation considered a traceability system to be costly and expressed its preference to focus on benefit-sharing modalities, before considering tracking and tracing.

13 Delegations expressed different views on the triggers for benefit-sharing, including whether collection, utilization (including research and development as well as exploitation), both access and utilization, and data collection should constitute such triggers. A group of States suggested that triggers could be included in domestic legislation, to be shared through the ChM, rather than in the agreement. A delegation noted that the timing of benefit-sharing may be staggered.

14 Different views were expressed regarding notifications related to access or utilization of marine genetic resources. With regard to timing of the notification, many delegations, including some groups of States, maintained that, in case of *in situ* access, both pre- and post-cruise notifications should be made. A delegation expressed preference for post-cruise notification only, within two months of completion of the cruise. With regard to access *ex situ*, a group of States suggested that notifications should be made post-access, another group of States suggested that this be post-research, and another group of States proposed that this be no later than utilization. With regard to notification of utilization, a group of States suggested that this should be made upon publication of results, application of intellectual property rights or commercialization. A delegation stressed that strict time

limits should be avoided and that notification should only be required when information became available.

15 A suggestion was made that notifications should be made by the State Party involved in the collection of the resource. Another delegation noted that further discussion was needed on who would be required to notify with regard to access to *ex situ* collections, i.e., the holder of the collection or the entity accessing the resources.

16 With regard to the content of notifications, delegations made various proposals regarding the information to be provided in case of *in situ* access/collection, *ex situ* access, access to digital sequence data and/or information, as well as in the case of utilization.

17 A delegation stressed that any notification system should be without prejudice to the protection of confidential information and take into account all rights over information.

18 Some delegations noted that samples, data and related information should be deposited in an open-source platform within a specific time period after the completion of the cruise and that this information should be provided to the proposed ChM.

19 Delegations addressed the potential roles of institutional arrangements in relation to marine genetic resources, including questions on the sharing of benefits, including those of the proposed COP; the Scientific and Technical Body (STB); and the ChM.

20 With regard to the proposed COP, some groups of States suggested that it could decide on the mechanisms of payment of monetary benefits at its first session. A group of States added that the COP could adopt rules, guidelines and a code of conduct for utilization of marine genetic resources of areas beyond national jurisdiction and review reports by States in this regard.

21 With regard to the proposed STB, different groups of States suggested that it could: develop guidelines on current practices with regard to marine genetic resources of areas beyond national jurisdiction, for submission to the COP; support a proposed access and benefit-sharing mechanism (ABSM); play a role in the identification of recipients of non-monetary benefits; and monitor the access/collection and utilization of marine genetic resources. A delegation suggested that the STB could play a role in monitoring projects undertaken to access and utilize marine genetic resources.

22 With regard to the proposed ChM, many delegations, including some groups of States, suggested that it could provide a mandatory, open and self-declaratory electronic system for notifications. Some groups of States suggested that the ChM could issue a certification of notification. These groups and some delegations also suggested that the ChM could assign a unique identifier upon notification. A group of States suggested that the ChM could be notified by databases, repositories and gene banks regarding access to marine genetic resources and that it could have functionality to match providers and recipients of capacity-building. Another group of States suggested that it could play a role in the identification of recipients of non-monetary benefits. Several delegations, including a group of States, suggested that the ChM could function as a meta-repository that could link to information available elsewhere. A group of States suggested that the ChM could facilitate international scientific and technical cooperation and coordination. Views were expressed that the ChM could disseminate information on bilateral/multilateral agreements on benefit sharing or regarding training opportunities on-board cruises.

23 A group of States suggested that the ChM could be managed by the Intergovernmental Oceanographic Commission of UNESCO, the International Seabed Authority or a similar body. Some delegations stressed that it would require sustainable funding.

24 Several delegations, including some groups of States, proposed to establish other institutional arrangements, including an ABSM. A delegation suggested the establishment of a compliance mechanism. A group of States also suggested that, in addition to the institutional arrangements under

Part VI, the agreement could designate roles for other appropriate international and regional organizations and bodies, particularly in support of SIDS.

**Access to traditional knowledge of indigenous peoples and local communities associated with marine genetic resources of areas beyond national jurisdiction**

25 The comments around this topic focused on conditions of access to traditional knowledge of indigenous peoples and local communities associated with marine genetic resources of areas beyond national jurisdiction, utilization of such knowledge and benefit-sharing, and institutional arrangements in relation to such knowledge.

26 Several like-minded delegations, including a group of States, drew attention to their joint proposal related to article 10bis of the Revised draft text on access to traditional knowledge of indigenous peoples and local communities associated with marine genetic resources collected/accessed in areas beyond national jurisdiction. A group of States noted that the main role for States Parties in implementing article 10bis would be to take appropriate legislative, administrative, or other policy measure which should include provisions for monitoring and checks on compliance.

27 A group of States stressed that, in accordance with UNCLOS, the collection of marine genetic resources in areas beyond national jurisdiction should remain free and marine scientific research unimpeded. A delegation stressed the importance for the agreement to recognize the diversity of circumstances in which traditional knowledge is held or owned by indigenous peoples and local communities and are associated with marine genetic resources. Another delegation shared its view that access to such traditional knowledge should be regulated by domestic provisions since such knowledge rests with individuals, communities and cultures based within national jurisdiction.

28 Several delegations, including one group of States, noted the importance of fostering coherence between the agreement and UNCLOS as well as relevant international legal instruments, such as the Convention on Biological Diversity (CBD) and the Nagoya Protocol, with a group of States recalling that any solutions with respect to traditional knowledge would have to take account of the specific legal regime of areas beyond national jurisdiction and be consistent with UNCLOS, as well as not undermine existing relevant legal instruments and frameworks.

29 Many delegations, including some groups of States, expressed the view that access to traditional knowledge must comport with the principle of free, prior and informed consent or approval and involvement of the holders of such knowledge. One delegation noted that it was carefully considering the concept of “free consent”, acknowledging that it was increasingly reflected in international instruments. Another delegation noted the need for clarification of the meaning of the word “free”.

30 In response to requests for additional information on how to identify holders of traditional knowledge, a group of States noted the principle of self-identification as stated in the preamble of the Nagoya Protocol, and expressed the view that such self-identification could be supported by culturally appropriate guidelines and inclusive criteria established by a specialized body.

31 A group of States expressed the view that the potential users of traditional knowledge should exercise due diligence in identifying traditional knowledge and holders of such knowledge, further noting that it might be reasonable to proceed with utilization of such knowledge in the absence of the identification or involvement of traditional knowledge holders in certain cases.

32 With regard to cases where information associated with traditional knowledge could also be accessed through scientific knowledge, several delegations, including a group of States, expressed the view that access to knowledge generated through scientific methods should not be subject to consent

of traditional knowledge holders. A delegation suggested that there would also be no requirement for prior and informed consent if the knowledge was in the public domain and could be accessed by all.

33 Several delegations, including one group of States, expressed the view that traditional knowledge should be accessed in accordance with relevant cultural, customary or traditional protocols. It was suggested that the relevant guidelines adopted under the CBD could be useful models.

34 With respect to the joint proposal related to article 10bis, different views were expressed on whether to require mutually agreed terms for utilization of traditional knowledge, in addition to access to such knowledge. Several delegations, including a group of States, noted that requiring mutually agreed terms for utilization of traditional knowledge would enable the holders of such knowledge to benefit from the utilization of that knowledge. A delegation expressed the view that including utilization in article 10bis would clarify that the holders and potential users of traditional knowledge are free to negotiate the terms, including terms for utilization and benefit-sharing. A delegation questioned whether the proposed inclusion was appropriate or necessary, noting that mutually agreed terms for utilization and benefit-sharing could be elaborated when a potential user sought consent to access traditional knowledge held by Indigenous peoples and local communities.

35 With regard to institutional arrangements in relation to traditional knowledge, a group of States noted that they were considering how a ChM may be used as an information platform, including for such traditional knowledge, and how States Parties could use the ChM to make information available on how legislative, administrative and policy measures might incorporate the principle of “free, prior and informed consent”.

36 Several delegations, including a group of States, expressed the view that the ChM may act as an intermediary to facilitate access to traditional knowledge, noting that there could be other ways in which indigenous peoples and local communities and users might interact. A group of States further elaborated on how the ChM could carry out this role, including on how it could assist in identifying holders of such knowledge. A group of States expressed the view that it should be permissible for States Parties to require that entities or persons under their jurisdiction or control only access traditional knowledge through national procedures, assuming that such national procedures comport with the obligations embedded in article 10bis.

37 Addressing how to access and submit information to the ChM as well as the role of States Parties in that regard, a group of States noted that the ChM could provide a space for holders of traditional knowledge to signal that they have such knowledge.

38 Several delegations, including a group of States, suggested that a subsidiary body including representatives of indigenous peoples and local communities could be established under the COP or the STB, to maintain a running brief on traditional knowledge elements of the agreement and to recommend guidelines to facilitate their implementation. In that regard, several delegations, including a group of States, expressed interest in exploring the models of the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions of the CBD or the Facilitative Working Group of the Local Communities and Indigenous Peoples Platform under the United Nations Framework Convention on Climate Change (UNFCCC). That group of States suggested that such a subsidiary body could also facilitate the identification of holders of traditional knowledge and assist States Parties in addressing legal consistency among relevant national legislations and international law.

39 A group of States also suggested that language be added in article 10bis and/or other articles of the Revised draft text to identify ways to conduct oversight or review of interactions between holders and potential users of traditional knowledge, as well as to ensure compliance with proper cultural, customary or traditional protocols, core principles such as free, prior and informed consent, and the overall objectives of the agreement. It further suggested that this could take place through the monitoring process envisioned in article 13 or through the COP or other institutional arrangements

under the agreement, such as the STB or another subsidiary body to be established under the COP or the STB.

## **II. Report on measures such as area-based management tools, including marine protected areas**

1. The intersessional work on measures such as area-based management tools, including marine protected areas (ABMTs and MPAs), was held on 11 to 17 November 2020 and 24 November to 3 December 2020, in the format of an online discussion forum.
2. The discussions focused on the following topics: (i) the relationship with relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies; (ii) international cooperation and coordination in relation to measures such as area-based management tools, including marine protected areas; and (iii) the process relating to the establishment /designation of measures such as area-based management tools, including marine protected areas, under articles 15 and 19.

### **The relationship with relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies**

3. With regard to the relationship with relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies (abbreviated as “IFBs”), some delegations noted that the relationship between the framework related to ABMTs, including MPAs and relevant IFBs was an important element of part III of the agreement, that it underpinned much of the discussion around governance of areas beyond national jurisdiction and that it was critical to the success of the agreement. A group of delegations noted that the agreement presented an opportunity to strengthen global, regional subregional and sectoral efforts to conserve marine biodiversity and to ensure its sustainable use. Several delegations, including one group of States, stressed the importance of enhanced cooperation and the need to promote a collaborative and constructive process with competent IFBs, as well as necessary consultation mechanisms for the establishment of ABMTs, including MPAs, under the agreement that rely upon relevant IFBs that have jurisdiction over activities in relevant areas.
4. Some groups of States recalled that General Assembly resolutions 69/292 and 72/249 recognized that the process and its result should not undermine existing relevant IFBs. Several delegations, including one group of States, stressed that the agreement should not establish any competence that would interfere with the mandate of relevant IFBs, but rather work to build a ‘positive relationship’ with IFBs, while respecting their mandates for the management of activities in ABMTs and MPAs within their competence. These delegations emphasized that the States Parties should rely and build upon the expertise within IFBs and thereby benefit from their important role in the operationalization of the agreement.
5. Several delegations noted that the concept of “not undermining” was not specific to part III but was cross-cutting and applicable throughout the agreement. A group of delegations stressed the need for a clear understanding of the meaning of the term, in particular in the context of part III, since most IFBs were empowered to take some kind of conservation measures within their mandates. Another group of States recognized the importance of having a clearly formulated “not undermine” clause in the text of the agreement. Some delegations noted that the “not undermining” clause should not be interpreted in an overly strict manner.
6. In terms of the specific meaning of “to undermine” in the context of part III of the Agreement, many delegations, including some groups of States, offered different detailed definitions, which will need further discussion.
7. Some delegations noted that “not undermining” should not mean preserving the *status quo* (Australia) and that there was room for improvement across the spectrum of IFBs. In this regard,

several delegations emphasized that the agreement should support enhanced action and would benefit from enhanced coordination and information exchanges, under a transparent and cooperative regime.

8. A group of States expressed the view that the work of States Parties under the agreement should be complementary to the work of relevant IFBs and serve to strengthen efforts to conserve and sustainably use marine biodiversity and not weaken the effectiveness of existing bodies. Another group of States indicated that the agreement should promote coherence and coordination and reduce fragmentation with other relevant IFBs, including those that have a mandate to regulate or adopt conservation and/or sustainable use measures for activities in areas beyond national jurisdiction.

9. Delegations also offered views on what mechanisms or safeguards should be included in the agreement to ensure that relevant IFBs are not undermined.

10. According to one group of States, the “not undermining clause”, including the mechanisms for consultations, offered sufficient safeguards in this regard. Several delegations, including another group of States, recognized the importance in this context of having consultations that were inclusive, transparent, open and effective and where relevant IFBs could provide input on aspects of proposed measures that fell within their competences.

11. Many delegations, including some groups of States, recognized the importance of a coordination and collaboration mechanism as an essential step in the adoption of ABMTs/MPAs and as an important tool to complement measures taken by IFBs, without prejudice to their mandates, in order to develop a more holistic, coordinated multi-sectoral approach to ocean management. To this end, a suggestion was made that memorandums of understandings (MOUs) could be developed between the bodies established by the agreement and other relevant IFBs.

12. Several delegations, including some groups of States, suggested a number of different options that could apply in scenarios where IFBs have the mandate to establish ABMTs, including: that the Conference of the Parties under the agreement (COP) issue recommendations for States Parties to use their best efforts to work through relevant IFBs to which they are party in order to establish ABMTs; that the COP adopt measures complementary to those adopted under such IFBs; that the COP recommend management measures for activities in areas where relevant IFBs have jurisdiction to be considered, adopted and implemented by these IFBs; that the COP recognize MPAs established by relevant IFBs in order to make them universally applicable.

13. A group of States suggested that, where there is no relevant IFB with the mandate to establish an ABMT, the COP could take decisions on: (a) the identification of areas requiring protection; (b) the establishment of ABMTs, including MPAs, with respect to proposals submitted under part III of the agreement, on a case-by-case basis and taking into account the scientific advice or recommendations and the contributions received during a consultation process; and (c) measures to be adopted to achieve the specified objectives. Several delegations, including a group of States, stated that in this scenario, the agreement should provide a mechanism to establish ABMTs through the COP or provide for the establishment of a new IFB to achieve the objective of the agreement.

14. Delegations also addressed the meaning of “relevant” IFBs. Several delegations, including a group of States, suggested that “relevant” should be interpreted broadly to include all actors and organizations whose work could be impacted by a proposed ABMT. Some delegations identified IFBs that were “relevant” for the purpose of consultations processes and suggested that any IFB with an interest in marine biodiversity of areas beyond national jurisdiction (BBNJ) matters should have the opportunity to share information and expertise or engage in consultation processes. These delegations also drew a distinction between IFBs that were “relevant” and “competent” for the purposes of decision-making to regulate an aspect of BBNJ.

15. One delegation suggested including a cross-cutting article in the agreement that elaborated on the concept of “competent” and that could cover aspects such as mandate, including the ability to adopt

measures, and membership. Several delegations, including some groups of States, were of the view that whether an IFB was “relevant” in the context of the agreement would depend on its mandate and competences.

16. A delegation suggested giving consideration not only to the mandates of relevant IFBs, but also to whether such IFBs had adopted certain measures for the conservation of BBNJ. This delegation noted that many IFBs existed and were competent in certain aspects of the law of the sea, but were not universal, nor had a mandate linked to the conservation of marine biodiversity. This delegation further noted that there was no organization with a global and cross-sectoral mandate for the conservation of BBNJ. Another delegation noted that this issue could be addressed in the context of consideration of a specific ABMT and proposed the development of a list of relevant IFBs for any specific proposal, as part of the ABMT development process.

### **International cooperation and coordination in relation to measures such as area-based management tools, including marine protected areas**

17. With regard to international cooperation and coordination in relation to ABMTs, including MPAs, exchanges focused on whether the necessary mechanisms were sufficiently reflected in the Revised draft text. Many delegations, including two groups of States, stressed in this regard the importance of furthering international cooperation and coordination with respect to BBNJ by promoting coherence and complementarity in relation to ABMTs, including MPAs.

18. Regarding institutional aspects, some groups of States expressed the view that the COP would provide the dedicated framework for regular and institutionalized cooperation under the agreement, as an inclusive, transparent, time-bound coordination and collaboration mechanism. One of these groups indicated that, in the longer term, the COP could also have a role in establishing a mechanism for marine spatial planning.

19. Several delegations, including a group of States, highlighted transparency as a fundamental governance principle to integrate in the agreement in order to underpin effective cooperation and coordination and drew attention to their proposal submitted during the third Intergovernmental Conference to that end. Some delegations noted in this regard that enhancing international cooperation and coordination was essential throughout the agreement and was closely linked to the concept of “not undermining”.

20. Several delegations, including a group of States, stressed the need for cooperation and coordination between and within all levels of the governance framework, including the bodies established under the agreement, relevant IFBs, States, other stakeholders and civil society, as well as among States Parties to the agreement. Another group of States emphasized the need for States Parties to have equal involvement in the selection, and establishment of ABMTs regardless of geographical location. Several delegations, including a group of States, stressed the need for cooperation and coordination between States Parties in implementing their obligations to promote the objectives of the agreement within relevant IFBs. These delegations further elaborated the need for cooperation and coordination between the mechanisms under the agreement and relevant IFBs based on the “not undermine” clause, including with a view to filling existing gaps in coordination amongst relevant IFBs.

21. Delegations also addressed a requirement to establish IFBs where none exist, as an element of cooperation. One group of States considered it to be an element of cooperation among the States Parties to establish IFBs where no such entities and/or mechanisms existed, albeit not a mandatory one. Several other delegations, including a group of States, opposed including a requirement to establish new IFBs in the agreement, noting that it would limit cooperation and coordination in the

establishment of ABMTs, including MPAs, under the agreement in favor of the negotiation of new IFBs, which would create more fragmentation.

22. Several delegations, including a group of States, noted that international cooperation and coordination was vitally and integrally related to the special circumstances of small island developing States and strongly supported provisions in the agreement addressing the “no disproportionate burden”, including a standalone provision.

23. New textual proposals were made by several delegations, including two groups of States, in relation to measures for areas of the high seas that were superjacent to a continental shelf beyond 200 nautical miles and for areas surrounded by the exclusive economic zones of adjacent coastal States.

24. In terms of necessary mechanisms, several delegations, including a group of States, highlighted the need for a clear mechanism for cooperation and coordination under the agreement that would avoid any issue of overlapping activities or conflict of competences. This group of States indicated that the COP could deliberate on the details of this mechanism, based on article 15(3) of the Revised draft text. Several other delegations, including some groups of States, elaborated on elements and mechanisms they had proposed for cooperation and coordination.

25. Several delegations, including a group of States, noted that the text provided a good basis for cooperation and coordination under part III of the Revised draft text, but suggested including more rigorous language to promote effective cooperation and coordination among States and relevant IFBs and to address the scenario where States Parties were not parties to relevant IFBs. One delegation supported the introduction of language to reflect the mechanisms through which non-Parties could cooperate in the context of the agreement.

#### **The process relating to the establishment /designation of measures such as area-based management tools, including marine protected areas, under articles 15 and 19**

26. Under this topic, delegations addressed the process under articles 15 and 19 of the Revised draft text. Many delegations, including some groups of States, highlighted the importance of an inclusive consultation process in the establishment or designation of ABMTs, including MPAs, with one of these groups noting that the process should also be clear and transparent and that the duration of consultations with stakeholders should be regulated to prevent possible delays or blockages in the process.

27. Many delegations, including some groups of States, highlighted the need for the best available scientific information in the establishment of ABMTs, including MPAs. Several of these delegations also emphasized the need to take into account relevant traditional knowledge of indigenous peoples and local communities and the precautionary principle or approach in the establishment of ABMTs, including MPAs, as well as consideration of all relevant stakeholder inputs.

28. Several delegations, including a group of States, made or referred to proposals for redrafting or streamlining articles 15 and 19. A proposal was also made to restructure part III of the Revised draft text, including by deleting article 15 and moving relevant parts of the article elsewhere.

29. Several delegations, including a group of States, reiterated under this topic that the agreement should not distinguish between different scenarios regarding the existence of IFBs. It was further noted by several of these delegations, including one group of States, that such a distinction could weaken the strength and scope of the agreement, as in practice there would usually be partial coverage by relevant IFBs.

30. Several delegations, including a group of States, stressed the importance of coordination with relevant IFBs in the proposal process, and the need to ensure the establishment of a mechanism that would allow for coordination and cooperation with and among relevant IFBs with regard to ABMTs,

including MPAs, and also facilitating coordination among associated measures adopted under such IFBs.

31. A delegation suggested that the COP should not act when there was a relevant IFB with a mandate to designate or establish ABMTs, including MPAs, and recommended that States Parties work within those IFBs to deliver the objectives of the agreement. Some delegations noted that the COP could make recommendations on matters under the competence of relevant IFBs, either directly to the IFBs or to the States Parties to both the agreement and the IFBs with respect to measures to be undertaken in the latter, provided that the prior consultation process involved gathering input from these IFBs.

32. Several delegations, including a group of States, suggested that the COP could adopt additional measures to complement the measures adopted by relevant IFBs, without undermining their respective mandates.

33. Several delegations, including a group of States, suggested a mechanism for recognition whereby the existing regional and sectoral measures would be brought to the attention of the States Parties to the agreement to have the measures universally applied, if the COP so decided.

34. Some delegations suggested that where a new IFB was being established, the COP could take action in the interim period by establishing ABMTs, including MPAs as appropriate, even if responsibility was handed over to the new IFB in the longer term.

35. Several delegations, including a group of States, indicated that, where there was no relevant IFB, the COP should establish ABMTs, including MPAs, with the possibility of having States Parties cooperate to establish an IFB. Some delegations expressed the view that where no IFB was in place, States should create one in order to establish ABMTs.

36. Some delegations noted that establishing new IFBs should be encouraged but not be mandatory under the agreement, since it could be time-consuming and complex. Another delegation noted that where there was no relevant IFB, the COP should request relevant States, including geographically proximate States, to consider a proposed decision in the process of establishing an ABMT.

37. Delegations also addressed the steps to be undertaken under these different scenarios by the COP and within IFBs in order for an ABMT or MPA to be established or designated.

38. With regard to the COP, several delegations, including one group of States, suggested that it should establish mechanisms for coordination and cooperation across relevant IFBs as well as with non-Parties and other stakeholders to ensure inclusive and transparent consultations. Several delegations, including a group of States, supported including language in the Revised draft text on decisions of the COP being made publicly available by the secretariat and transmitted to all States Parties in a timely manner, in particular, to adjacent coastal States and relevant IFBs.

39. Many delegations, including a group of States, shared their views on the role of the COP in decision-making and the decision-making process. Different views were expressed on the role of the COP in cases where either IFBs existed or did not exist.

40. With regard to the steps to be undertaken within relevant IFBs, a group of States emphasized that, as part of the consultation process, relevant IFBs should be given an opportunity to include in the proposed management plan for an ABMT or MPA the measures under their respective mandates that would apply in respect of the area under discussion. This group of States also proposed that States Parties work to adopt measures through relevant IFBs.

41. One delegation expressed its view that in operationalizing the establishment of ABMTs under the agreement, States Parties would proactively work within relevant IFBs by: committing to working within their mandates to further BBNJ objectives; establish sectoral or regional ABMTs, including MPAs, consistent with their mandates and preferably consistent with any guidance and standards

agreed by the COP; adopt ABMTs, including MPAs, and/or conservation and sustainable use measures to complement existing ABMTs or MPAs established by the COP or by other IFBs, taking into account any recommendations from the COP; share with the COP information relevant to BBNJ, including on ABMTs and MPAs established; and commit to cooperate and coordinate with the COP and other relevant IFBs, as well as with States and other stakeholders on ABMTs, including MPAs.

42. A view was expressed that IFBs should be responsible for implementation, monitoring, review and enforcement of any management measures established by those bodies in relation to areas identified by the COP as requiring protection.

### **III. Report on environmental impact assessments**

1. The intersessional work on EIAs was held in the format of an online discussion forum, over two rounds, from 16 to 23 September 2020, and from 28 September to 2 October, respectively.
2. The work focused on the following four topics: (i) Internationalization of the EIA process; (ii) Triggering the conduct of EIAs; (iii) Strategic environmental assessments (SEAs); and (iv) Objectives of Part IV on EIAs.

#### **Internationalization of EIAs**

3. Delegations noted the need to further clarify the meaning of internationalization with regard to EIAs.
4. Different views were expressed as to the meaning and forms of internationalization. A group of States noted that the term internationalization could relate not only to the stages of the process, but also the roles of the decision-making bodies under the agreement. Another group of States noted that there were different forms of internationalization, including three aspects relating respectively to consultation; dissemination of information; and review and decision-making. It was suggested by another group of States that internationalization covers a range of options, including institutional questions of whether the State or a body under the agreement would be responsible for particular steps of the EIA process; and the establishment of common criteria and/or a common process to ensure greater uniformity in States' implementation and application of the EIA provisions.
5. Different proposals were made concerning internationalization of the EIA process and the extent to which this should be done. Some delegations considered that the EIA provisions of the agreement should be consistent with and logically flow from article 206 of the United Nations Convention on the Law of the Sea (UNCLOS); and that it was important for the internationalization process to be aligned with the provisions of article 206 of UNCLOS, which provides for the responsibility of States for the assessment of potential effects of activities under their jurisdiction or control.
6. Many delegations, including some groups of States, called for States under whose jurisdiction and control an activity is planned to retain primary responsibility for all or some aspects of the EIA process, including the screening, scoping, monitoring, review, and decision-making. A delegation further stressed that the instrument should elaborate on the EIA process under UNCLOS, and refrain from transferring responsibilities within the process. A delegation suggested that while decision-making following an EIA was not a part of the EIA process, such decision-making was also the responsibility of the State with jurisdiction or control over the activity. A group of States proposed that certain exceptions to the principle that the State is responsible for ensuring that an EIA is conducted could be considered, in particular when a State is unable to conduct the EIA process, for example due to capacity constraints. Another group of States suggested a review of EIA reports by independent experts to be forwarded to an identified representative body which would determine whether activities could proceed or not.
7. Many delegations, including some groups of States, noted that there was scope for internationalizing certain aspects of all stages of the EIA process, to varying degrees. In particular, many of these delegations expressed support for a level of internationalization which enhanced transparency and accountability, including through reporting; public notification; public consultations; and publication of reports. A group of States also called for the creation of mechanisms for international cooperation such as with respect to capacity-building on EIAs.
8. A delegation proposed that article 31 of the Revised draft text on scoping could be internationalized by including a specific provision for consultation with other/adjacent/potentially affected States.

9. Some delegations expressed support, in order to safeguard against ‘forum shopping’, for a ‘call-in’ mechanism for situations where one State disagrees with the determination of another State that an EIA is not required or for when a State is deemed to not be fulfilling its duties. A group of States reserved their views on the specific EIA components that should be “internationalized” until such a time when there is clarity on the notion itself.

10. Roles were proposed in the EIA process for specific bodies under the agreement. Several delegations, including a group of States, suggested that the COP could be mandated to identify best practices and develop standards or guidelines, provide recommendations on the conduct of EIAs, including through the Scientific and Technical Body (STB) and review reports of completed EIAs. Some delegations, including one group of States, proposed mandating the COP to make decisions such as to grant approval or halt an activity in light of the EIA process.

11. Support was also expressed by several delegations, including one group of States, for the STB to be given the mandate to review a sample of EIA reports, rather than every report, and to provide the results to the COP, published through the clearing-house mechanism. Another suggestion was made that the STB could provide general guidance to States in the development of reports, and assist developing States upon request by reviewing EIA reports to help inform their decision-making; or to develop terms of reference for the scope of the EIA. Several delegations, including one group of States, also expressed support for giving the STB the competence to review screening determinations; or the opportunity to review the decision as well as the rationale, data and information supporting such decisions. A delegation further added that the STB could have a role in a ‘call-in’ mechanism through a staged process whereby a notice of particular interest could be issued by States to the responsible State, through the STB, where they have concerns with a planned activity and the State(s) that have issued such a notice could escalate to the call-in mechanism if their concerns were not addressed.

12. However, a group of States questioned how a body under the agreement could be legally responsible for a planned activity under the jurisdiction or control of a State and all possible subsequent consequences of that legal responsibility and opposed automatically making the COP or a subsidiary body under the agreement responsible for particular steps in the EIA process.

### **Triggering the conduct of EIAs**

13. Many delegations, including some groups of States, expressed support for an impact-based approach to triggering EIAs, pursuant to which an activity under the jurisdiction or control of a State Party having the potential to impact an area beyond national jurisdiction would trigger the EIA process. A delegation indicated that while the agreement could not impose obligations for activities that occur within national jurisdiction, activities occurring in ABNJ should take into account any relevant effects within national jurisdiction, such as on the continental shelf beyond 200 nautical miles from the baselines, and with the potential to contribute to cumulative impacts.

14. Addressing the threshold for triggering an EIA, a group of States stated that a State Party shall determine whether an EIA is required for any planned activity under its jurisdiction or control. Another group of States saw merit in exploring the utility for a combination of triggers to conduct EIAs.

15. Several delegations, including a group of States, proposed adopting the threshold contained in article 206 of UNCLOS of “reasonable grounds for believing that planned activities under [a State’s] jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment”. Several other delegations, including a group of States, noted that article 206 of UNCLOS does not mandate nor prohibit any particular approach in determining the “reasonable grounds” for belief as contained therein.

16. Many delegations, including some groups of States, proposed adopting the threshold of “minor or transitory effects” used in the 1991 Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol), including as a starting point. Several delegations, including a group of States, proposed adopting a tiered approach, based on the degree of potential impact on an area beyond national jurisdiction from an activity under the jurisdiction or control of a State Party or on the vulnerability of the marine areas in which the activity is to be undertaken. One delegation stressed that the threshold should only be triggered by the level of potential impact and not the type of activity. Another delegation wondered if the “minor or transitory effects” threshold might lead to highly subjective determinations, creating varied and divergent implementation, or clog the EIA process.

17. Different options were advanced for implementing a tiered approach. Several delegations, including one group of States, proposed to carry out an initial environmental evaluation in the first tier, which would determine whether the potential impacts of the activity were no more than minor or transitory, with a negative determination requiring no further action, with a full assessment as the second tier. Another delegation proposed two triggering pathways by linking article 24 (threshold) to article 30 (screening) requiring States to show how the threshold was assessed to have been met or not met. In this connection, a determination of a minor or transitory effect would lead to the publication of the screening report in the clearing-house mechanism, while a determination of substantial pollution of or significant and harmful changes to the marine environment would require a full EIA.

18. A delegation indicated that, although it favoured the article 206 threshold, it was open to discussions around whether the concept of “minor or transitory” could be used within the EIA process, perhaps at the screening stage; whereas another delegation was unclear on how a tiered approach would proceed, in practical terms, and how effective it might be in achieving the objectives of the Agreement.

19. A group of States indicated that agreement on other issues in the text, such as capacity building, institutional mechanisms, the applicability of the ‘effects’ or ‘impacts’ versus ‘location’ based approaches, and what a full comprehensive EIA entails, would better inform their position on what should trigger the conduct of an EIA.\

20. The need to elaborate a set of criteria that would aid in operationalizing the threshold for triggering the conduct of an EIA was commented upon, with many delegations, including some groups of States, expressing support for a non-exhaustive or an indicative list of criteria. Several delegations, including a group of States, however stressed that this list of criteria would not be an independent trigger for an EIA. Some groups of States proposed that the STB be involved in developing a list of criteria or further developing a list included in the agreement. A group of States saw added value in having some criteria, including in a non-exhaustive list of activities, developed by the STB to guide States when interpreting or applying the threshold. Some delegations proposed that guidelines be developed by the STB or COP to assist in assessing the threshold.

21. With regard to the specific criteria to be adopted, a delegation reiterated its proposal for a new paragraph under Article 24 directing Parties to consider the magnitude, geographic extent, timing, frequency, duration, and reversibility of the potential impacts of a proposed activity.

22. Although many delegations, including some groups of States, expressed a willingness to continue to consider the option of a list of activities requiring an EIA, many other delegations, including some groups of States, did not favour establishing such a list, citing the difficulties posed in, and time required for, negotiating such a list; as well as the difficulties associated with amending the list in the future. In this connection, a group of States stressed that any list could not be a trigger for an EIA. Many other delegations, including some groups of States, noted that the activities listed should always be tied to or be in agreement with the threshold, which should remain the ultimate determinant of whether an EIA is required, with the list playing a complimentary role.

23. On the issue of whether areas identified as ecologically or biologically significant or vulnerable should be treated differently, including by providing stricter EIA requirements for those areas, while, many delegations, including some groups of States, expressed the view that an EIA should be required for all proposed activities in areas identified as ecologically or biologically significant or vulnerable, many other delegations, including some groups of States, opposed special treatment for these areas.

#### **Strategic environmental assessments**

24. Many delegations, including some groups of States, favoured the inclusion of a provision in the agreement addressing SEAs. A group of States expressed the view that further discussions were needed on the issue, in light of the fact that the function, operationalization, scope and conduct of SEAs as an assessment tool remained largely unsettled. Another group of States indicated that it remained open to the inclusion of provisions on SEAs but set out questions regarding the relationship between EIAs and SEAs, including in relation to possible duplication of functions and procedural differences. A delegation indicated that it could not support an SEA requirement in the agreement since SEAs were distinct from EIAs and not required under UNCLOS and did not fall within the scope of the package of elements under discussion by the Conference.

25. Several delegations, including one group of States, expressed the view that SEAs would help futureproof the agreement. The potential benefits of SEAs for activities in areas beyond national jurisdiction were noted by several delegations, including: enhancing understanding of the main environmental issues in a particular region; identifying potential cumulative impacts at an early stage and considering such impacts at a broader scale; informing the establishment of adequate thresholds for EIAs; supporting the assessment of impacts of new types of activities; supporting integrated management of an area; assuring holistic ocean management; providing a means for States to conduct a collective EIA in certain circumstances rather than having to conduct a separate project-specific EIA; and supporting cooperation between States and regional and sectoral bodies. SEAs were also seen by a group of States as a means to help in determining whether the threshold for internationalized review and decision-making for proposed activities has been met, to improve the subsequent evaluation carried out by the internationalized process, and to inform final decision-making. A delegation noted that SEAs could be part of a staged approach where an SEA considers the broader spatial and temporal environmental impacts of plans and programmes and informs project specific EIAs.

26. Several delegations, including one group of States, also noted that a provision on SEAs would provide a link between EIAs and area-based management tools, including marine protected areas and marine spatial planning.

27. Some groups of States noted that there was no common understanding of what was meant by SEA. A delegation proposed adding a provision in the agreement to clarify, inter alia, what SEAs are and how they can facilitate EIAs. A group of States proposed that SEAs could constitute a proactive evaluation of the vulnerability of a geographic area or ecosystem type to potential human activities so as to establish what kinds of activities may be permitted and how the likely impacts will be assessed through EIAs.

28. A group of States suggested that SEAs could be carried out by States individually or in cooperation with other States at an early stage in planning relevant activities, as part of broader plans and programmes conducted in areas beyond national jurisdiction.

29. A delegation suggested that the substantive and procedural modalities of SEAs under the agreement be further developed at a later stage, to allow a thorough consideration of those matters. Many delegations, including some groups of States, proposed the inclusion of an enabling clause which would contain an authorization or an encouragement for the COP to adopt standards and/or

guidance elaborating on the process for SEAs in areas beyond national jurisdiction. Some groups of States considered, however, that postponing the decision on whether or not to include an obligation to conduct SEAs, such as by having the COP take it up at a later stage, would be problematic. Several delegations, including a group of States, preferred having substantive elements on SEAs included in the Agreement rather than an enabling clause. A group of States queried whether States Parties would be allowed to access capacity-building to conduct SEAs from the entry into force of the agreement if an enabling clause were to be included. A delegation suggested that the obligation to carry out SEAs would not enter into force until adoption of the required guidance by the COP. Some groups of States expressed the view that an enabling clause should not preclude an obligation on States Parties to conduct SEAs when the agreement enters into force. A view was expressed that an enabling clause should not enable the COP to create new obligations for Parties, as it was important for Parties to be certain of their obligations under the agreement before signature. Another delegation opposed the inclusion of an enabling clause which would require Parties to implement provisions on SEAs to be determined in the future by any body under the agreement.

30. With respect to the content of an enabling clause, a proposal was made for such a clause to set out: the purpose of an SEA; public consultation; the SEA process; the differences between SEA and EIA procedures; and the relevant expertise to be held by any environmental authority consulted on an SEA.

#### **Objectives of Part IV of the Revised draft text on EIAs**

31. Delegations supported the inclusion of an article on objectives in Part IV of the Revised draft text. A group of States highlighted that several concepts in article 21bis of the Revised draft text remained under discussion.

32. Several delegations, including a group of States, expressed a preference for the article to be succinct. Some delegations considered that it would be more important that the objective of an EIA in itself be clearly stated, rather than the objective of Part IV. Some delegations expressed a wish to avoid duplication with other Parts and to avoid repetition and possible differing interpretations. A delegation considered it preferable to have common objectives to EIAs in an overarching provision or added to article 2 ‘General Objective’.

33. Several delegations, including a group of States, supported the objectives as currently outlined in the Revised draft text of an agreement. Delegations expressed support for an objective to be operationalizing the relevant provisions of UNCLOS.

34. Many delegations, including some groups of States, supported the inclusion of an objective on cumulative impacts. However, a group of States considered cumulative impacts an important part of the text, but not part of the objectives. Another group of States viewed the mandatory consideration of cumulative impacts as critical for the effectiveness of Part IV.

35. Many delegations, including some groups of States, supported the inclusion of an objective enabling SEAs. Another group of States proposed changing the title of Part IV of the Revised draft text to “Environmental Assessments” to better reflect that both EIAs and SEAs were covered under that Part.

36. Delegations expressed support for the objective of achieving a coherent framework for EIAs in areas beyond national jurisdiction. However, differences continued to exist on whether an impact/effects-based, or activity-based approach should be reflected. A group of States proposed the inclusion of an objective to uphold the “not undermining” clause and respect for existing international law in areas beyond national jurisdiction, as well as establishing a coherent legal framework that develops the procedures for conducting an EIA in those areas.

#### **IV. Report on capacity-building and the transfer of marine technology**

1. The intersessional work on capacity-building and the transfer of marine technology was held over two rounds from 13-19 January 2021 and from 26 January-2 February 2021, in the format of an online discussion forum.
2. Two main topics were discussed, namely modalities for, and cooperation in, capacity-building and the transfer of marine technology. Related issues on types of capacity-building and the transfer of marine technology and monitoring and review, were also discussed.

#### **Modalities for capacity-building and the transfer of marine technology**

3. Discussions focused on how capacity-building and the transfer of marine technology could be effectuated in practical terms when carried out on a mandatory and/or voluntary basis, what elements could be considered mandatory, how modalities would interact with any needs-assessment mechanisms, the rationale for including or not additional modalities for the transfer of marine technology, and what factors would strengthen the transfer of marine technology regime under the agreement.
4. Delegations reaffirmed that capacity-building and the transfer of marine technology are essential for the implementation of the agreement and the realization of its objectives. In that regard, a group of States stressed the particular relevance of capacity-building and the transfer of marine technology to guaranteeing the achievement of the agreement's objectives and its efficient implementation, including with respect to access to and utilization of marine genetic resources, area-based management tools and environmental impact assessments. One group of States expressed its support for a strong legal framework that would clearly define obligations in the agreement and provide for their effective implementation, with a clear, predictable and sustainable financing mechanism as its backbone. Some groups of States further noted that modalities for capacity-building and the transfer of marine technology in the agreement should be designed to adapt to multilateral, bilateral and regional levels.
5. With reference to principles such as equity, equitable utilization, participatory approach and transparency, many delegations, including several groups of States, regarded at least certain types of capacity-building and the transfer of marine technology as mandatory. Some delegations, including groups of States, observed that States already have obligations under the Convention to, inter alia, promote international cooperation, disseminate information and knowledge, transfer marine technology, promote capacity-building programs for the protection preservation of the marine environment, and provide assistance concerning the preparation of environmental assessments. One group of States, having highlighted existing obligations under the Convention, considered that mandatory capacity-building and the transfer of marine technology in the agreement would ensure that there are clear obligations and mechanisms for assessing compliance and would foster transparency, accountability, and predictability in funding and evaluation. The same group, while emphasizing that capacity-building and the transfer of marine technology could not be voluntary, given the obligations on all States to ensure the objectives are achieved, acknowledged that the nature, extent and terms and conditions on which capacity-building and the transfer of marine technology is implemented in practice would depend on specific arrangements made or agreements entered into between the relevant involved States and organizations, with terms and conditions to be mutually agreed.
6. Many delegations, including some groups of States, considered it important that capacity-building and the transfer of marine technology be carried out through cooperation on a mandatory and voluntary basis. Some of these groups of States reaffirmed that the framework facilitating voluntary and mandatory capacity-building in the agreement must take into account the unique dependence of small island developing States on the marine environment, and their extreme capacity constraints, and

referred in that regard to the proposal for an Article 43 bis. Some delegations highlighted that a combination of mandatory and voluntary components would secure long-term and sustainable action and financing to meet countries' capacity-building and the transfer of marine technology needs.

7. A group of States identified as mandatory those types of capacity-building and the transfer of marine technology necessary to implement Parties' rights and obligations under the agreement and in this regard, expressed openness to including specific provisions relating to conditions for capacity-building and the transfer of marine technology in different parts of the agreement. One delegation suggested that mandatory capacity-building and the transfer of marine technology should be required for activities with potential impacts on areas within national jurisdiction, while another noted that most capacity-building efforts with respect to conservation and sustainable use of biodiversity in areas beyond national jurisdiction would in practice also be applicable to areas within the national jurisdiction of States.

8. Some delegations indicated further that mandatory elements could include financial mechanisms; obligations with respect to scientific cooperation and dissemination of information; support for core activities under the agreement; needs assessments; and institutional mechanisms. Voluntary elements could refer to the development of additional sources of funding, partnerships, schemes for the sharing of resources, and collaboration to ensure coordinated action. One delegation stressed that where capacity-building and the transfer of marine technology is voluntary, the details and particularities of such activities may be set out and conducted, and information on such undertakings may be divulged as agreed in bilateral or multilateral agreements.

9. Some other delegations, including one group of States, considered capacity-building and the transfer of marine technology to be voluntary in nature. Several delegations, including one group of States, deemed it difficult to see how the term 'mandatory' could promote capacity-building and the transfer of marine technology, which are based on a common willingness to cooperate, and suggested that the focus should rather be on the material scope of cooperation – covering all aspects of the agreement's objectives – and the financial mechanisms to support such cooperation. Recalling that there is a variety of ways in which capacity building can take place, including through providing access to data and information, sharing of knowledge and equipment, training of scientists and interchanges, research cooperation, and the provision of funding, one delegation further noted that in view of the breadth, variety, and specificity of possible actions, capacity-building should be carried out on a voluntary basis.

10. Regarding the discussion on mandatory and/or voluntary capacity-building and the transfer of marine technology, one delegation noted the difficulty of describing in the agreement which elements may or may not be considered mandatory, while another delegation noted the difficulty of a binary approach between mandatory and voluntary, and considered capacity-building and the transfer of marine technology from the perspective of two main challenges – mutual benefit and funding.”

11. Delegations shared the view that capacity-building and the transfer of marine technology should respond to needs of recipients, particularly developing States, and that this could be facilitated through a needs assessments mechanism. One group of States highlighted that needs assessments should be country-driven and tailored to the relevant institutions within a State to ensure effectiveness, while another emphasized the need to strengthen the needs-assessment provisions with respect to the establishment, funding and operationalization of an effective mechanism. Some delegations emphasized the need to understand and strengthen existing mechanisms of bilateral and multilateral cooperation, to assess existing activities and gaps, build on expertise and networks and avoid unnecessary duplication. One delegation highlighted the need to distinguish between needs and priorities, with States best placed to determine these, and between bilateral and multilateral support. Several delegations noted the importance of getting an overview of ocean-related capacity-building and transfer of marine technology efforts currently taking place, while some delegations, including a

group of States, highlighted the need to use existing organizations currently undertaking capacity-building programmes relating to science and technology, and take advantage of existing structures rather than seeking to create new mechanisms or organizations. Several delegations, including one group of States, emphasized the importance of capacity-building and the transfer of marine technology being participatory, cross-cutting and gender-responsive.

12. How the needs assessment process should work in practice garnered a variety of views from many delegations, including several groups of States and different proposals were made as to the role of the Conference of the Parties or other global coordination entity in identifying needs, guiding cooperation and allocating support, possibly in addition to individual or collective action to assess needs, including at the regional level, as well as on the role of the Clearing House Mechanism in facilitating the assessment of needs and the matching of available assistance, thus also minimizing duplication.

13. More particularly, one group of States suggested that a national needs assessment would enable developing States to identify needs and align with marine scientific priorities, leading to the development of tailored programs, while another delegation emphasized the role of regional assessment of capacities.

14. Another group of States endorsed undertaking a needs-assessment survey of Parties, carried out by the Secretariat or Clearing House Mechanism under the direction of the Conference of the Parties, with identified needs translated into recommendations endorsed by the Conference of the Parties, with possible regular reviews. This group of States also suggested that priorities so identified could guide cooperation between Parties and interventions from available sources. One delegation proposed that the Conference of Parties could indicate priority areas to guide the allocation of support from the Global Environment Facility or other financial mechanism which could provide multilateral support to deliver capacity-building and the transfer of marine technology under the agreement. One group of States indicated that needs could also be individually or collectively expressed by Parties through the Clearing House Mechanism, to be met on a voluntary basis by Parties interested and willing to cooperate and supported the possibility of providing for developing States to be assisted in identifying, defining and formulating their needs.

15. Some groups of States considered that the process for needs assessment should be developed based on procedures and guidelines for capacity-building and the transfer of marine technology approved by the Conference of the Parties, but that they should be broad enough to envelop all possibilities (regional, national, bilateral, multilateral) for determining needs and priorities as agreed on a case-by-case basis.

16. One of these groups of States further supported an adequately funded needs-assessment mechanism, supported by the Clearing House Mechanism, consisting of a global coordination entity that would set broad categories/guidelines for identifying needs and providing capacity-building and the transfer of marine technology; facilitate/coordinate supply; review and assess effectiveness; and modify categories in light of technological advancements. Such mechanism would operate together with a regional/subregional mechanism, hosted in an existing regional/subregional organization, or consisting of a coordinating group, that would assist in identifying needs and capabilities, facilitating delivery in close coordination with the global entity, and reporting on effectiveness and provision of capacity-building and the transfer of marine technology. The need for further consideration of the relationship with other instruments and initiatives, including the potential role of a Scientific and Technical Body, was also noted. Another delegation observed that needs assessments would need global coordination and guidance, but that regional and subregional bodies could provide support, including in relation to area-based management tools.

17. One delegation noted that needs and priorities may be self-assessed or facilitated through a mechanism established by the Conference of the Parties, but that capacity-building and the transfer of

marine technology should be ‘informed by’ rather than ‘determined by’ such needs assessment, where available and appropriate. Another delegation highlighted the need to avoid an unnecessarily heavy and burdensome process and underlined those tools and mechanisms already in place should be employed. Other delegations highlighted the role of the Clearing House Mechanism for pursuing coordination and cooperation, in facilitating the visibility of existing and future capacity-building and the transfer of marine technology endeavours, and in identifying needs. One delegation suggested the use of blockchain technology to match the needs of States and their nationals to end-providers of capacity-building and the transfer of marine technology.

18. Views differed on whether additional modalities are needed for the transfer of marine technology. Several delegations, including one group of States, regarded it as sufficient that the transfer of marine technology be carried out on the basis of mutually agreed terms, with other issues adequately regulated by other instruments. Several other delegations, including one group of States, took the view that the additional modalities contained in the current agreement (Article 45) address important and distinct issues, including vis-à-vis intellectual property rights and licensing, terms and conditions, cross-border issues including privacy of data transfer, and environmental soundness. Several delegations, including several groups of States, envisaged some role for the Conference of Parties in the development or further development of the modalities for capacity-building and the transfer of marine technology, if needed. Building on a previous proposal, one delegation suggested that to further technology transfer related to marine technology, the agreement could require States to ensure that intellectual property rights are subject to specific limitations, consistent with the international intellectual property framework.

19. Additional aspects of the modalities for capacity-building and the transfer of marine technology were also discussed. Some delegations, including a group of States, were amenable to the inclusion in the agreement of an indicative list of types of capacity-building and the transfer of marine technology, appropriately balanced in terms of detail. Some groups of States favoured also including additional types in an annex to the agreement, able to be adjusted to respond to evolving needs. Other delegations, including one group of States, expressed a preference for more detailed guidelines, types or modalities for capacity-building and the transfer of marine technology to be rather developed by the Conference of the Parties.

20. Several delegations, including one group of States, stressed the importance of monitoring and review or evaluation of activities related to capacity-building and the transfer of marine technology and of the needs and priorities as established. A group of States suggested that global monitoring and review could be conducted by a Scientific and Technical or other subsidiary body, while individualized monitoring and review could be conducted through a needs-assessment, targeted to the recipient, to identify new or outstanding needs. One delegation envisaged a role for the Conference of Parties in monitoring and review of capacity-building and transfer of marine technology, including in establishing a subsidiary body to follow up, which would include national experts. One delegation called for a robust monitoring and review mechanism, linked to the Clearing House Mechanism, for mandatory elements. Some delegations emphasized the importance of having a robust, comprehensive and transparent mandatory reporting framework to realistically evaluate implementation, making textual suggestions for annual reporting of contributions given and received, and noting potential synergies with reporting obligations pursuant to other processes.

### **Cooperation in capacity-building and the transfer of marine technology**

21. Discussions on cooperation focused on how any obligation for direct cooperation in capacity-building and the transfer of marine technology would be implemented, including the form that such direct cooperation would take to achieve the agreement’s objectives and the aspects of implementation that should be included, and how cooperation in capacity-building and the transfer of marine technology would be effectuated in practical terms through global, regional, subregional and

sectoral bodies. Delegations reiterated the importance of cooperation for the achievement of the objectives of the agreement. Different views persisted regarding whether the agreement should include an obligation to cooperate or an obligation to promote cooperation, with some groups of States preferring the former, and several other delegations, including one group, preferring the latter.

22. Delegations expressed the view that an obligation related to cooperation should be needs-driven and would require an assessment of needs and/or priorities and aspirations. Several delegations, including some groups of States, reiterated that the agreement should consider the special needs and circumstances of small island developing States, and avoid undue burdens with one of these delegations additionally highlighting the needs of least developed countries.

23. A group of States expressed the view that enhanced cooperation in all forms and dimensions should be considered, including North-South, South-South and triangular cooperation. Delegations shared the view that global, regional, subregional and sectoral bodies have a role to play in capacity-building and the transfer of marine technology under the agreement. A group of States envisaged that the needs assessed under the direction of the Conference of Parties, and translated into recommendations and priorities, should guide cooperation between States Parties, as well as the identification of partner organizations and bodies at appropriate levels. Such bodies would then cooperate according to their own cooperation modalities, those jointly defined, or those recommended under guidance of the Conference of Parties. Several delegations, including groups of States, similarly supported general regulations for coordination being developed at the global level, with more particularized focus on addressing case-by-case needs on regional and subregional levels. Several delegations, including a group of States, highlighted that contributions could be made through bilateral and multilateral means, as well as through intergovernmental organizations, while one delegation observed that how detailed the content and practical arrangements for cooperation needed to be described is yet to be determined, endorsing the approach of establishing a working group to develop such details. Two groups of States stressed that the agreement should be immediately operational.

24. Several delegations, including a group of States, noted that various bodies are already carrying out ocean-related capacity-building and transfer of marine technology work, including in areas beyond national jurisdiction. Some of these delegations, including groups of States, stressed the importance of strengthening and reinforcing such existing organizations and mechanisms. However, one delegation noted that it could not support prescriptive text related to cooperation with relevant bodies, as the agreement cannot mandate action by other entities, although it could promote strengthened cooperation between them.

25. Some delegations, including a group of States, noted that enhanced cooperation could be materialized through partnerships between Parties, international organizations, scientific institutions, the private sector, and civil society. Similarly, several delegations, including groups of States, indicated that cooperation in capacity-building and the transfer of marine technology should involve a wide range of stakeholders, including the private sector, industry, civil society, holders of traditional knowledge and capacity holders. Some delegations stressed that the challenge for delivery of capacity-building and the transfer of marine technology lies in going beyond ad hoc approaches to deliver capacity and technology with long-lasting impacts. A group of States indicated that direct cooperation should be grounded on the will of Parties to cooperate.

26. Delegations identified various ways in which cooperation could be implemented, including through collaborative scientific networks, sharing of knowledge, information, data, best practices, training, exchanges of, and/or mentorships for scientists, provision of infrastructure, equipment, tools or technologies, and partnerships. A delegation took the view that the agreement should not detail specific forms that cooperation on capacity-building and transfer of marine technology must take.

27. Several delegations, including one group of States, highlighted specific areas in which direct cooperation in capacity building and the transfer of marine technology would be needed, including monitoring, control and surveillance; training related to marine genetic resources; regional-scale environmental assessments; and environmental impact assessments. Several delegations, including some groups of States, stressed the importance of funding for capacity-building and cooperation in marine science. A delegation noted that the forms for such direct cooperation should reflect the full ambit of the BBNJ Agreement and inspire the ambition needed for its effective implementation.

28. Many delegations, including several groups of States, highlighted the potential role of the Clearing House Mechanism in facilitating cooperation. A delegation noted that the Conference of Parties, to be convened annually, could be complemented by an active Committee on Capacity Building, based on the model of the United Nations Framework Convention on Climate Change, and that work could be carried out by existing organizations, hubs and networks at the regional level. Another delegation noted that lessons could be learned from convention-specific mechanisms for facilitating scientific cooperation and technology transfer, including the Climate Technology Centre and Network under the United Nations Framework Convention on Climate Change and the BioBridge under the Convention on Biological Diversity.

## V. Report on cross-cutting issues

1. The intersessional work on cross-cutting issues was conducted in the form of a webinar held on 19 March 2021.
2. The work focused on the topic “Understanding linkages across work streams”. The webinar focused on institutional arrangements and aimed at increasing delegations’ understanding of the various proposals made with regard to the suggested bodies and mechanisms, in light of the functions to be assigned to those bodies and mechanisms in respect of each of the substantive elements of the package.
3. With a view to assisting discussions at the webinar, two sets of background documents were made available to delegations prior to the webinar. These documents aimed to show: (1) the processes under each element of the package, including the role of various bodies and mechanisms in those processes (“flowcharts”), and (2) the cumulative functions of each of the bodies and mechanisms across the agreement (“functions tables”). Both sets of documents reflected the options regarding the processes and functions as set out in the Revised draft text of an agreement (A/CONF.232/2020/3). These documents were not meant to be negotiated.
4. Delegations acknowledged the usefulness of the background documents. In particular, several delegations, including some groups of States, considered that the flowcharts provided a helpful illustration of the steps of possible processes and responsible actors in respect of the different elements of the package as currently reflected in the revised draft text of an agreement while the functions tables assisted in tracking the interlinkages across substantive provisions and could inform discussions as to how the institutional arrangements might be structured in the agreement. While many delegations noted that the documents did not reflect all proposals, a delegation acknowledged that they reflected a snapshot of a work in progress as at the end of the third session of the Conference.
5. Delegations expressed support for the establishment of a conference of the parties (COP), a scientific and technical body, a clearing-house mechanism and a secretariat. Several delegations supported the establishment of a fully-fledged secretariat. Some groups of States also supported the establishment of other bodies, including an access and benefit-sharing mechanism, mechanisms to facilitate needs-based assessments for capacity-building and the transfer of marine technology, a financial mechanism, a compliance committee and clearing-house mechanisms at the regional or subregional levels.
6. Several delegations emphasized that the provisions on institutional arrangements would depend on how the substantive parts of the agreement would be construed. These delegations considered that reaching agreement on the substantive provisions would then enable the functions to be assigned to the institutions to be identified.
7. Some delegations emphasized that the functions of the institutions should be appropriate and feasible, while also ensuring that the agreement was effective, implementable and not burdensome.
8. Many delegations, including some groups of States, emphasized the need to strike a balance between including sufficient detail in the agreement and retaining flexibility for subsequent decision-making and development of the institutional framework by the COP, in order to futureproof the agreement and ensure that it can be implemented. It was suggested, in particular, that the agreement should not be over-prescriptive regarding the functions of the COP as it would need flexibility to respond to developing challenges. A delegation expressed the view that the agreement should set out the proposed functions of the institutional arrangements at an appropriate level of detail and that these could be further developed in subsidiary documents, as required. Several delegations, including one group of States, emphasized the importance of ensuring consistency across substantive

provisions and those in the Part on institutional arrangements, and also of avoiding duplication within the agreement.

9. One group of States suggested that organizational functions should be included in the Part on institutional arrangements, while the substantive functions to be assigned to the various institutions should be included in the substantive parts of the agreement.

10. Delegations discussed the relationship between the various institutional arrangements in the agreement. In particular, several delegations, including one group of States, considered that the COP should be the main decision-making body under the agreement, and that all other bodies should be subservient to the COP. Some delegations observed that the relationship of the scientific and technical body with the COP and its functions would be shaped by its composition. Some delegations noted that the scientific and technical body would support the COP by providing advice to it. A delegation further noted that, as a subsidiary body of the COP, the scientific and technical body would not be a decision-making body and would not initiate work without the direction of the COP. Delegations noted that the clearing-house mechanism could play a central role in the dissemination or exchange of information, with several delegations, including one group of States, adding that it could increase transparency of the implementation of the agreement. It was suggested by a group of States that the clearing-house mechanism could be managed by the secretariat.

11. Regarding the relationship of institutions in the agreement with other international fora and bodies, many delegations, including some group of States, noted that they should complement relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, and not weaken their effectiveness. A view was expressed that the agreement should clearly articulate the functions of all the institutions in order to avoid duplication and assist the goal of not undermining such instruments, frameworks and bodies. The secretariat was suggested by a group of States as the appropriate body to coordinate with such other instruments, frameworks and bodies in this regard. A delegation queried how the COP would relate to other sectoral and regional bodies and indicated that this was a priority issue.

12. Several delegations addressed decision-making processes and modalities, in particular of the COP and the scientific and technical body. Some delegations were of the view that it was essential for the agreement to set down the rules regarding the decision-making processes of the COP. One delegation considered that the COP should take decisions by consensus, while some others suggested that, in the event that consensus could not be reached, the agreement must provide for the COP to take decisions by voting. It was suggested that the scientific and technical body should similarly seek consensus in making recommendations, but that minority or dissenting views should also be able to be communicated. A group of States emphasized that decisions of the scientific and technical body must be based on scientific information and relevant traditional knowledge of indigenous peoples and local communities. A delegation took the view that decision-making in the scientific and technical body should be reserved for States parties.

13. Different views were expressed as to whether to entrust existing bodies with performing the functions of institutional arrangements under the agreement. Some delegations expressed a preference for using existing structures where possible. Some views were expressed that consideration should be given to designating an existing body as the secretariat, but that such entity should be adequately resourced and be part of the UNCLOS family. Another delegation took the view that the Division for Ocean Affairs and the Law of the Sea should be designated as the secretariat. A group of States suggested that, in addition to a clearing-house mechanism under the agreement, regional or subregional clearing-house mechanisms could be hosted by existing regional organizations.

14. Transparency was highlighted by several delegations, including one group of States, as essential for the effective implementation of the agreement. Views were expressed by some delegations that

there was a need for transparency in the work of the COP and its subsidiary bodies, including by the COP being open to observers. Some delegations drew attention to a proposal made at the third session of the Intergovernmental Conference for a standalone article that would set out transparency obligations. Several delegations, including a group of States, considered the clearing-house mechanism as an important tool to promote transparency in the implementation of the agreement.

15. Some delegations suggested that the roles of non-State actors could be further elaborated with regard to different aspects of the agreement. A view was expressed that it was critical for the agreement to be gender responsive, including by adequately reflecting the rights of women and girls and gender equality and ensuring that women were represented in all bodies established under the agreement.

16. A delegation observed that although some matters could be left for the COP to decide, the Intergovernmental Conference would need to consider interim arrangements in advance of the first COP to ensure that implementation could commence following the conclusion of the agreement.